RENDERED: JULY 10, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001239-MR

RANDY ALLEN — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 13-CI-00369

MANN AUTO SALES OF PRESTONSBURG, LLC — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, D. LAMBERT, AND TAYLOR, JUDGES.

COMBS, JUDGE: Randy Allen appeals the order of the Floyd Circuit Court which granted summary judgment to Mann Auto Sales of Prestonsburg, LLC. After our review, we affirm.

In March 2009, Allen took his Toyota Highlander to Mann to be repaired. It had not been properly shifting in and out of overdrive. Repair records indicate that

Mann replaced a loose wire. Additionally, Mann documented finding fine metal and black fluid in the transmission pan. However, in spite of Mann's recommendations, Allen declined replacing or repairing the transmission and continued driving the vehicle.

On August 27, 2012, Allen took the Highlander to Mann for replacement of rear spark plugs and a valve cover gasket. On September 18, 2012, Allen returned with the Highlander, again complaining of issues with shifting into overdrive. Mann's diagnostics again revealed black transmission fluid and fine metal in the transmission pan. They recommended replacing the transmission, but Allen declined.

On April 22, 2013, Allen filed a complaint alleging that Mann had damaged the transmission when it performed the spark plugs and valve cover gasket repair. Allen filed responses to interrogatories and produced requested documents. Both parties tendered their exhibit and witness lists. On April 28, 2014, Mann filed a motion for summary judgment. Allen inadvertently did not submit responsive pleadings. The trial court granted the summary judgment motion on May 16, 2014. Allen then filed a motion to vacate the judgment, which the trial court overruled on July 11, 2014. This appeal followed.

Summary judgment is a device utilized by the courts to expedite litigation. *Ross v. Powell*, 206 S.W.3d 327, 330 (Ky. 2006). It is a "delicate matter" because it "takes the case away from the trier of fact before the evidence is actually heard." *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 482 (Ky. 1991).

The movant must prove that no genuine issue of material fact exists and "should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy." *Id*.

The trial court must view the evidence in favor of the nonmoving party. *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). In order to overcome a motion for summary judgment, the nonmoving party must present "at least some affirmative evidence showing the existence of a genuine issue of material fact." *Id*. *See also* Kentucky Rule[s] of Civil Procedure (CR) 56.03. On appeal, our standard of review is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Because summary judgments do not involve fact-finding, our review is *de novo*. *Pinkston v. Audubon Area Community Services, Inc*., 210 S.W.2d 188, 189 (Ky. App. 2006).

On appeal, Allen presents an argument of *res ipsa loquitur* – a presumption of negligence based on Mann's possession of the vehicle. However, we are unable to address the merits of this argument.

An appellate court may not rule on issues which were not raised before the trial court. *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011). Parties may not submit new theories of error for the first time on appeal. *Springer v. Commonwealth*, 998 S.W.2d 439, 446 (Ky. 1999). The reasoning behind the rule is that an appeal might be avoided if opposing counsel has the opportunity to

respond and the trial court has the opportunity to consider an issue; *i.e*., the rule promotes judicial economy. *Fischer, supra*. While there might be merit to an appellant's argument, a reviewing court may reverse a finding ***only*** when it "knows and considers . . . the law and facts upon which the court actually relied. . . . [A] reversal must be based on the trial court's failure to properly apply the law that was argued to it, not that which ***might or should have been***." *Id*. at 590. (Emphasis added).

In this case, we thoroughly searched the record,[1] and it did not reveal any mention of the doctrine of *res ipsa loquitur* before the trial court. The only evidence which Allen set forth in his motion to vacate the summary judgment was his own affidavit alleging errors committed by Mann; it is the only evidence which we may consider. However, it is established law that a party's own statements alone are insufficient to overcome summary judgment. *Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007). We also note that during discovery, Allen's tendered witness list did not include experts who would testify about the causality of the damage.

Consequently, we must affirm the Floyd Circuit Court.

ALL CONCUR.

[1] Allen's brief does not comply with Kentucky Rules of Civil Procedure 76.12(4)(c)(v), which requires "ample supportive references to the record."

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