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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002467-MR

SANDY G. CHRISTIAN and
GLENN CHRISTIAN — APPELLANTS

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
CIVIL ACTION NO. 98-CI-00027

SUPER QUIK, INC. — APPELLEE

OPINION

REVERSING AND REMANDING

** ** ** ** **

BEFORE: HUDDLESTON, MILLER and TACKETT, Judges.

HUDDLESTON, Judge: Sandy G. Christian and Glenn Christian[1] appeal from a Greenup Circuit Court order that dismissed their complaint against Super Quick, Inc. The issue on appeal is whether the circuit court abused its discretion in dismissing the Christians' lawsuit on the merits for failing to meet the requirements of Kentucky Revised Statutes (KRS) 411.300 et seq., the Kentucky Products Liability Act.

[1] Glenn Christian's claim is based on a loss of consortium.

On January 20, 1998, the Christians filed suit against Super Quik. The complaint alleged that Sandy was injured as a result of burns received after a cup containing the coffee she had just purchased at Super Quik suddenly and without warning collapsed. The coffee spilled and burned Sandy's ankle and foot. In their complaint, the Christians alleged that Super Quik was negligent in providing Sandy with a container that was not fit for its intended purpose and for offering coffee for sale to the public at a temperature that unreasonably created a risk of harm to members of the public.

Super Quik filed an answer to the Christian' complaint on or about February 9, 1998. At about the same time, Super Quik served the Christians with interrogatories and a request for production of documents. A motion to compel discovery was filed by Super Quik on August 3, 1998, after the Christians failed to respond to the discovery requests. On August 13, 1998, the circuit court ordered the Christians to respond to Super Quik's discovery requests within twenty days. On October 29, 1998, Super Quik filed a motion to dismiss pursuant to Kentucky Rule of Civil Procedure (CR) 37.02 resulting from the Christians' failure to comply with the circuit court's August 13, 1998, order.[2] Again, on November 5, the circuit court ordered the Christians to provide responses to Super Quik's discovery requests within fourteen days. On November

[2] According to the circuit court's August 13 order, the Christians had until September 2 to comply with the discovery requests. As of October 28, 1998, Super Quik had received no response to its discovery requests.

19, answers to Super Quik's interrogatories were received, allegedly signed only by counsel.

Super Quik also made several attempts to depose Sandy. Super Quik served notice on April 26, 1999, to take Sandy's deposition on May 24, 1999. The deposition was renoticed for June 25, 1999, because of Sandy's inability to travel to Kentucky.[3] Again, Super Quik was advised Sandy would not be able to appear. Notice was issued a third time to take Sandy's deposition on July 9, 1999, and again Super Quik was advised Sandy would not appear.

In examining the trial judge's order entered September 10, 1999, it becomes apparent that his reasons for dismissing were based solely on KRS 411.300 et seq., the Kentucky Products Liability Act, because of Sandy's failure to retain the allegedly defective cup. Although the trial judge cited to CR 37.02(2)(c) and CR 41.02 in his order, his decision to dismiss was not based on those two procedural rules.

We view the trial judge's dismissal under two possible theories. First, the dismissal could be viewed as a judgment on the pleadings, or alternatively, as the Christians argue, the dismissal could be viewed as a summary judgment.

If the trial judge's order is viewed as a judgment on the pleadings, the dismissal was improper. A judgment on the pleadings is proper only if, on the admitted material facts, the movants are clearly entitled to judgment.[4] A party which moves for judgment

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[3] The Christians moved to Florida when Glenn obtained new employment.

[4] See Archer v. Citizens Fidelity Bank & Trust Co., Ky., 365 (continued...)

on the pleading admits for purposes of the motion the adversary's pleadings.[5] CR 7.01 defines pleadings as "a complaint and an answer; a reply to counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, . . . ; and a third-party answer . . . ." The only pleadings in the record are the Christians' original complaint and Super Quik's answer. The complaint alleges facts sufficient to defeat a motion for a judgment on the pleadings. The Christians' complaint alleges, inter alia, that Sandy bought coffee at Super Quik, the cup which held the coffee suddenly and without warning collapsed, and as a result she received second degree burns. Super Quik's answer denies the Christians' allegations and claims that the Kentucky Products Liability Act is a bar to their allegations. Certainly, based on these pleadings alone, sufficient questions of fact are raised to survive a motion for judgment on the pleadings. No "admitted facts" exist on the pleadings alone that could preclude the Christians' claim.

Alternatively, if the order is viewed as a summary judgment, the record presents sufficient questions as to Super Quik's negligence to withstand a summary judgment motion. The rule governing summary judgment motions is set forth in CR 56.03 wich was interpreted in Steelvest v. Scansteel Service Center.[6] Summary judgment is proper when the record shows that "there is no genuine

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[4] (...continued)
S.W.2d 727, 729 (1963).

[5] See Sheffer v. Chromalloy Mining & Mineral Div., Ky. App., 578 S.W.2d 594, 595 (1979).

[6] Ky., 807 S.W.2d 476 (1991).

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[7] Summary judgment is proper when it would be impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor and against the movant.[8]

The order dismissing the case appears to be based on the fact that the Christians did not retain the cup. However, the record is not conclusive as to this fact. The only evidence in the record of the Christians having not retained the cup is found in an incomplete set of answers to interrogatories that were filed as an exhibit along with Super Quik's September 3, 1999, motion to dismiss. From the record it appears that those interrogatories do not comply with the rules. First, there is no evidence in the record as to whether the Christians signed the answers to the interrogatories propounded.[9] Secondly, it appears that the interrogatories were answered by Christians' counsel, evidenced by the opening sentence of the answers which reads "Come the plaintiffs, Sandy G. Christian and Glenn Christian, by counsel, and for their answers to Interrogatories propounded by the Defendant, ..."[10] The interrogatories were not compliant with CR 33.01; therefore, no legitimate basis exists to support summary judgment.

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[7] Ky. R. Civ. Proc. (CR) 56.03.

[8] Steelvest, supra, n. 6, at 483.

[9] CR 33.01(2) requires that "[t]he answers are to be signed by the person making them . . . ."

[10] Emphasis supplied.

Even assuming that Sandy did not retain the cup, adequate grounds still exist for the Christians to prove their case. The Christians alleged that Super Quik was negligent in providing Sandy a container that was not fit for its intended purpose and in offering coffee for sale to the public at a temperature that unreasonably created a risk of harm to the public. Based upon the fact alone that Sandy was burned by the coffee, adequate evidence in the record exists to defeat a motion for summary judgment.

The decision of Greenup Circuit Court is reversed. Having found no evidence in the record that the circuit judge considered the other grounds in Super Quik's September 3, 1999, motion to dismiss as grounds for dismissal, specifically CR 37.02 and CR 41.02, this matter is also remanded for consideration of these grounds and for further proceedings as necessary.

ALL CONCUR.

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