RENDERED: August 1, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-000936-MR

JERRY SHEPPERD — APPELLANT

v.

APPEAL FROM HARRISON CIRCUIT COURT
HONORABLE ROBERT W. McGINNIS, JUDGE
ACTION NO. 01-CI-00154

JOY HILL SHEPPERD — APPELLEE

OPINION

AFFIRMING

** ** ** ** ** ** ** **

BEFORE: BAKER, GUIDUGLI AND KNOPF, JUDGES.

BAKER, JUDGE. Jerry Shepperd appeals from an order of the Harrison Circuit Court granting Joy Hill Shepperd summary judgment on Jerry's complaint for tort damages involving injuries he received as a passenger in a single vehicle accident. Finding no error, we affirm.

On January 23, 2000, Jerry and Joy Hill Shepperd, his wife, were visiting friends in Harrison County. When they were returning home on Oddville-Sunrise Road, a two-lane road, with Joy driving her 1997 Chevrolet Cavalier and Jerry as the passenger, it was dark and snowing lightly. The roadway had

snow covering a thin layer of ice. As they approached a rise in the road, the vehicle started to fishtail to the right. When Joy attempted to straighten it, the rear of the vehicle slid to the left, back to the right, and eventually left the pavement. The vehicle then careened onto an embankment with the front striking a wire fence. Damage to the vehicle was relatively minor, and the couple was able to continue on their trip home.

Jerry had some soreness that night but experienced increased pain the next day. He went to the hospital complaining of pain in his middle and lower back. Jerry ceased working as a heavy construction equipment operator temporarily, but he did return to work. He has received conservative treatment of physical therapy and medication for his back.

On November 6, 2000, Jerry filed a complaint seeking tort damages for physical injuries he allegedly suffered in the accident. Jerry alleged that Joy "operated her vehicle in such a careless and negligent manner so as to cause physical injury to the Plaintiff, a passenger in her vehicle." On April 26, 2001, Joy took Jerry's deposition. Jerry stated that the couple had replaced the tires and brakes on the Cavalier approximately six months before the accident. He said that just before the incident, he did not notice Joy having any handling problems with the vehicle despite the weather conditions. In response to questions from Joy's attorney, Jerry stated as follows:

Question: Okay. As far as your — anything that you may have noticed before the car went out of control, if that's a fair characterization of what happened, do you have any criticisms about the manner in which your wife was operating the vehicle?

Answer: No, sir.

Question: As far as when the vehicle – again if this is a fair characterization, when the vehicle began to lose control, do you have any criticisms of the manner in which your wife handled the vehicle when the car began to lose control?

Answer: Besides – no, not really. She done everything she could do I guess because I did notice that she did turn into the slide like you're supposed to and went the other way. And she tried to correct it, and went back the other way. By that time we were leaving the road.

Jerry also testified that he was awake and had a good view of the events as a passenger in the front seat.

On August 10, 2001, Joy filed a motion for summary judgment pursuant to Kentucky Rules of Civil Procedure (CR) 56 and an accompanying memorandum in support. In the memorandum, Joy argued she was entitled to summary judgment based on judicial admissions by Jerry in his deposition. The motion included a notice that it would be brought at a hearing on August 17, 2001. On the noticed hearing date, only Joy's

attorney appeared. On August 31, 2001, the circuit court entered an order granting the motion for summary judgment stating judicial admissions made by Jerry in his deposition exonerated Joy of negligence in that he stated unequivocally that Joy's "driving conduct was not to be faulted for the accident in question."

On September 7, 2001, Jerry's attorney filed a motion to set aside the summary judgment based on lack of notice with an accompanying affidavit stating that he had not received a copy of the summary judgment until August 31, 2001. Following a hearing, the circuit court gave Jerry an opportunity to file a memorandum opposing summary judgment. In his memorandum, Jerry claimed his deposition testimony was exhaustive and the principle of res ipsa loquitur created a presumption of negligence by a driver in a single-car accident. On November 16, 2001, Jerry filed a motion for extension of time to file an affidavit in support of his memorandum in opposition of summary judgment. On December 5, 2001, Jerry filed an affidavit stating that prior to operating her vehicle on the night of the accident, Joy was aware that it had been snowing and sleeting. He said it was "my opinion that Joy Hill Shepperd failed to have her automobile under reasonable control and failed to exercise ordinary care to avoid collision [sic]." On April 10, 2002, the circuit court entered an order denying the motion to set aside

the August 31, 2001, order granting summary judgment to Joy. This appeal follows.

Jerry challenges the circuit court's conclusion that his deposition testimony concerning Joy's actions constituted judicial admissions. He further contends that under the doctrine of res ipsa loquitur, he is entitled to an inference or presumption that his wife was negligent in operating her vehicle. Jerry asserts that genuine material factual issues remain in dispute, which precludes summary judgment in Joy's favor.

The standard of review on appeal when a trial court grants a motion for summary judgment is whether the trial court correctly found there are no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. Palmer v. International Ass'n of Machinists, Ky., 882 S.W.2d 117, 120 (1994); Stewart v. University of Louisville, Ky. App., 65 S.W.3d 536, 540 (2001); Ky. R. Civ. P. 56.03. The movant bears the initial burden of convincing the court by evidence of record that no genuine issue of fact is in dispute, and then the burden shifts to the party opposing summary judgment to present at least some affirmative evidence showing that there is a genuine issue of material fact for trial. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 482 (1991). See also City of Florence v. Chipman,

Ky., 38 S.W.3d 387, 390 (2001); Lucchese v. Sparks-Malone, Ky. App., 44 S.W.3d 816, 817 (2001). The court must view the record in a light most favorable to the nonmovant and resolve all doubts in his favor. Commonwealth v. Whitworth, Ky., 74 S.W.3d 695, 698 (2002); Lipsteuer v. CSX Transportation, Inc., Ky., 37 S.W.3d 732, 736 (2000). An appellate court need not defer to the trial court's decision on summary judgment and will review the issue de novo because only legal questions and no factual findings are involved. See Barnette v. Hospital of Louisa, Inc., Ky. App., 64 S.W.3d 828, 829 (2002); Lewis v. B&R Corp., Ky. App., 56 S.W.3d 432, 436 (2001).

Establishing the propriety of the circuit court's grant of summary judgment in favor of Joy requires a multi-step analysis. First, we must determine as a matter of law that Jerry's deposition testimony included judicial admissions. Second, if Jerry made judicial admissions, we look to whether the circuit court properly decided that there were no genuine material issues of fact in dispute and Joy was entitled to judgment as a matter of law.

"A judicial admission is a formal act by a party in the course of a judicial proceeding which has the effect of waiving or dispensing with the necessity of producing evidence by the opponent and bars a party from disputing a proposition in question." Nolin Production Credit Ass'n v. Canner Deposit

Bank, Ky. App., 726 S.W.2d 693, 701 (1986)(citing Center v. Stamper, Ky., 318 S.W.2d 853, 855 (1958)). See also Berrier v. Bizer, Ky., 57 S.W.3d 271, 279 (2001). A judicial admission is a deliberate, clear, unequivocal statement of a party about a fact within that party's peculiar knowledge. See Schoenbaechler v. Louisville Taxicab & Transfer Co., Ky., 328 S.W.2d 514, 515 (1959); Greenwell v. Boatwright, 184 F.3d 490, 498 (6th Cir. 1999). Unlike evidentiary admissions that may be contradicted, a party making detrimental judicial admissions under circumstances where there is no probability of error may not introduce other evidence such as his own testimony or that of other witnesses or experts to rebut the admissions. See, e.g., Moore v. Roberts, Ky., 684 S.W.2d 276, 277-78 (1982); Sutherland v. Davis, 286 Ky. 743, 151 S.W.2d 1021, 1024 (1941); Robert G. Lawson, The Kentucky Evidence Law Handbook § 815 at 385-86 (3d ed. 1993). One policy justification for the conclusive effect of judicial admissions is to eliminate the temptation to commit perjury. See Hansen v. Ruby Const. Co., 155 Ill. App. 3d 475, 108 Ill. Dec. 140, 508 N.E.2d 301 (1987).

It is well established that statements made under oath in a pretrial deposition may constitute judicial admissions sufficient to summary judgment. See Fletcher v. Indianapolis and Southeastern Trailways Inc., Ky., 386 S.W.2d 264 (1965); Bell v. Harmon, 284 S.W.2d 812 (1955); Lawson, supra. A party

may not create a genuine issue of material fact by taking a position contradictory with a judicial admission. Van's Material Co. v. Department of Revenue, 131 Ill.2d 196, 212, 137 Ill. Dec. 42, 545 N.E.2d 695, 703 (1989); Hansen, 155 Ill. App.3d at 480, 508 N.E.2d at 304. Whether a statement is a judicial admission is a question of law. See Strouse v. K-Tek, Inc., 129 Idaho 616, 618, 930 P.2d 1361, 1363 (Idaho App. 1997); Hansen, supra.

Jerry challenges the circuit court's summary judgment in favor of Joy on two grounds. First, he contends the trial court erred in determining that his deposition statements were judicial admissions. Jerry maintains that his statements were not a deliberate, clear, and unambiguous waiver of liability absolving Joy of negligence. Relying on McCallum v. Harris, Ky., 379 S.W.2d 438 (1964), he states that his testimony merely involved the absence of facts supporting negligence by Joy. In McCallum, Virgil Harris and his 18 month-old daughter, Rhonda Fay, died in an automobile accident involving a car driven by Virgil and a semi-trailer truck. The court held that the testimony of Golene Harris, who was Virgil's wife and another passenger in the car, did not constitute a judicial admission absolving Virgil of negligence because it was not "deliberate, unequivocal and unexplained." The court characterized her testimony as of a "negative character; that is, she simply

testified as to an absence of knowledge about the crucial facts of the accident." Id. at 441.

The McCallum case does not compel reversal of the circuit court in this appeal for several reasons. First, any comparison is hampered by the absence of a description of Golene Harris's specific testimony in the opinion. Second, the McCallum court's conclusion is based on Golene Harris's "absence of knowledge about the crucial facts of the accident" with the court specifically noting that she was not in a "favorable position to observe accurately what occurred" because she was blinded by the lights of the oncoming truck. Id.

On the other hand, Jerry was a passenger in the front seat of the vehicle with no obstructions. He explicitly stated that he had no criticism of the manner in which his wife handled the vehicle either before or during the incident and that she did everything she could including turning into the slide. His statements were affirmative representations that Joy acted properly, not equivocations based on lack of knowledge. We believe that Jerry's testimony was sufficiently deliberate, clear, and unequivocal statements about facts within his particular knowledge to qualify as judicial admissions.

In support of his position, Jerry also cites to Arnett v. Thompson, Ky. App., 433 S.W.2d 109 (1968), but that case is clearly distinguishable. In Arnett, a wife sued her husband for

injuries she sustained in an accident while a passenger in a vehicle driven by her husband. The court held that a pretrial written statement by a wife endorsing her husband's pretrial written version of the accident exonerating him and placing sole fault on the other driver was not a judicial admission. The court's decision, however, was based on the fact that the wife's endorsement was not done in the course of judicial proceedings. Jerry's statements were made in a deposition taken as part of the judicial proceedings in this case.

Having concluded that Jerry's deposition statements constituted judicial admissions, we turn to the question of whether Joy was entitled to summary judgment. A judicial admission has a conclusive effect on the party who makes it that prevents that party from introducing further evidence to disprove or contradict the admitted fact. See Bell, supra; Zipperle v. Welsh, Ky., 352 S.W.2d 556 (1961). In order to state a cause of action for negligence, a plaintiff must establish a duty on the part of the defendant, a breach of that duty, and a causal connection between the breach of the duty and injury to the plaintiff. Commonwealth, Transportation Cabinet, Department of Highways v. Shadrick, Ky., 956 S.W.2d 898, 900 (1997); Lewis v. B & R Corp., supra at 436. The absence of any one of these three elements is fatal to a claim. Id.

Jerry's deposition statements that Joy did all she could do and expressing no criticism of her actions effectively negate any claim that Joy breached her duty to handle her vehicle in a reasonable manner. As a result, there is no genuine material factual issue in dispute and Joy was entitled to judgment as a matter of law. Jerry's December 2001 affidavit does not alter this conclusion. It merely consists of vague, general statements that fail to offer sufficient specificity to create a genuine material factual dispute.

Jerry also argues that application of the res ipsa loquitur doctrine creates genuine issues of material fact that preclude summary judgment. He claims the doctrine of res ipsa loquitur should be applied to create an inference that Joy was negligent in operating her vehicle. He cites several cases involving single vehicle accidents where res ipsa loquitur was applied. See, e.g., Wireman v. Salyer, Ky. App., 336 S.W.2d 349 (1960); Vernon v. Gentry, Ky. App., 334 S.W.2d 266 (1960); Beatty v. Root, Ky. App., 415 S.W.2d 384 (1967). In Eaton v. Swinford, Ky., 424 S.W.2d 118 (1967), the court set out the elements of res ipsa loquitur as follows:

> 1. The defendant must have had full management of the instrumentality which caused the injury;
>
> 2. The circumstances must be such that, according to common knowledge and the experience of mankind, the accident could

not have happened if those having control and management had not been negligent;

3. The plaintiff's injury must have resulted from the accident.

Id. at 119.

Jerry's argument lacks merit for several reasons. First, having concluded that his deposition statements constitute judicial admissions, those statements conclusively rebut any presumption of negligence that would exist under the res ipsa loquitur principle. Secondly, the requirements for res ipsa loquitur do not exist in this case. As the court noted in Cox v. Wilson, Ky., 267 S.W.2d 83 (1954), res ipsa loquitur would apply only if the circumstances in a particular case involve an accident which would not in the ordinary course of things occur without negligence. In Thurmond v. Chumbler's Administratrix, Ky., 287 S.W.2d 908, 910 (1956), the court noted that in several cases, the courts "recognize the fact that an automobile may skid on a slippery road without negligence in its operation and the rule that the skidding of an automobile on such a road does not of itself summon the aid of the doctrine of res ipsa loquitur." In our situation, the wet, icy conditions of the roadway militate against applying the res ipsa loquitur doctrine because Joy could have lost control of her vehicle even in the absence of negligence on her part.

Finally, Jerry asserts that summary judgment is unavailable because Joy admitted fault after the accident when she stated, "I wrecked my car." He claims this statement creates a disputed issue of material fact. While we question whether this statement constitutes an admission of negligence, Jerry failed to preserve this issue for review. He has raised it for the first time on appeal. This Court will not review issues not raised in or decided by the trial court. Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225, 228 (1989); Burgess v. Taylor, Ky. App., 44 S.W.3d 806, 814 (2001).

For the foregoing reasons, we affirm the order of the Harrison Circuit Court.

ALL CONCUR.

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