

RENDERED: JULY 25, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001811-MR

MELISHA WHITE AND
SHARON McDANIELS

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 01-CI-02919

DARRYL JONES AND
AMERICAN RED CROSS

APPELLEES

OPINION

REVERSING AND REMANDING

** **

BEFORE: EMBERTON, CHIEF JUDGE; KNOPF AND SCHRODER, JUDGES.
SCHRODER, JUDGE. Melisha White and Sharon McDaniels,
(appellants), appeal from an order of the Fayette Circuit Court
denying their motion to alter, amend or vacate an order granting
summary judgment in favor of Darryl Jones and American Red Cross
(appellees). Appellants argue that there are genuine issues of
material fact as to whether appellee, Darryl Jones (Jones),

negligently operated his vehicle resulting in a rear-end collision with appellants. Upon reviewing the record in the light most favorable to appellants, we conclude that there are genuine issues of material fact, which preclude summary judgment. Hence, we reverse and remand for further proceedings.

The only undisputed facts in this case are that, on April 19, 2001, appellants were traveling South on Limestone Street in Lexington, Kentucky on their way to the Kentucky Clinic. White was driving the vehicle and McDaniels was a passenger. The morning of the collision, Jones was also driving South on Limestone transporting several persons in a Red Cross bus. Jones was employed as a driver by Red Cross, transporting elderly and disabled persons for medical treatments and appointments. When White made a lane change, her car was rear-ended by the bus driven by Jones.

In a complaint filed on August 3, 2001, appellants claimed that Jones negligently operated his vehicle so as to cause the collision injuring both White and McDaniels and damaging White's vehicle. Appellees asserted that the accident was the result of White's and/or McDaniels' own negligence. They also relied upon the defenses of contributory and comparative negligence.

Depositions were taken from White, McDaniels, and Judy Dunn, an eyewitness to the accident. Affidavits were entered

into the record from Jones, Tonya McMullen, a passenger on the bus at the time of the collision, and Ed Brady, Jones' supervisor who arrived on the scene approximately 15 minutes after the collision occurred. The stories vary as to exactly how the collision occurred. White stated that she signaled to make a lane change, did not observe the bus in the other lane, changed lanes, and then slowed her vehicle in an attempt to merge into the turn lane. She stated that when she looked in her rear-view mirror, the bus was overtaking her and she was forced to accelerate in an attempt to avoid being rear-ended. Jones stated that he was traveling within the posted speed limit and that he was maintaining a proper lookout for traffic when White cut directly in front of his bus and immediately stopped at a green light. He stated that he responded by braking but because of White's sudden lane change and reduction in speed, was unable to avoid the collision. Tonya McMullen stated virtually the same facts as Jones. Judy Dunn stated that she was traveling approximately a half of a block behind the vehicles when the collision occurred. She stated that White was traveling behind the bus in the fast lane of traffic, abruptly changed lanes, accelerated past Jones and then abruptly cut in front of Jones. She admitted that she could not observe the distance between the two vehicles when White changed lanes but that White was very close to the bus.

Appellees filed a motion for summary judgment on July 3, 2002. A hearing on the motion was held on July 12, 2002, after which the circuit court entered summary judgment in favor of appellees. Appellants filed a motion to alter, amend or vacate the judgment on July 25, 2002. The circuit court held a hearing on the motion on July 26, 2002, and on August 21, 2002, denied the motion. It is from these orders that appellants appeal.

Appellants argue that it is a question of fact for the jury as to whether Jones was negligent. They contend that the record contains proof of Jones' negligence or a permissible inference of negligence on the part of Jones. They also argue that summary judgment was improperly granted before they were able to depose Jones. Appellees argue that appellants failed to present any evidence to support a finding that Jones breached any duty to appellants, entitling them to summary judgment.

When a trial court grants a motion for summary judgment, the standard of review on appeal 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, Ky. App., 916 S.W.2d 779, 781 (1996). The trial court must view the evidence in the light most favorable to the nonmoving party and should grant summary judgment only if it appears impossible that the

nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 483 (1991). The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." Id. at 480. The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. "In the analysis, the focus should be on what is of record rather than what might be presented at trial." Welch v. American Publishing Co. Of Kentucky, Ky., 3 S.W.3d 724, 730 (1999). Because summary judgment addresses only legal questions and the existence of disputed material issues of fact, this Court need not defer to the trial court's decision and will review the issue de novo. Scifres, 916 S.W.2d at 781.

"In order to state a cause of action based on negligence, a plaintiff must establish a duty on the defendant, a breach of the duty, and a causal connection between the breach of the duty and an injury suffered by the plaintiff." Lewis v. B & R Corp., Ky. App., 56 S.W.3d 432, 436-437 (2001). Lucas v. Davis, Ky., 409 S.W.2d 297 (1966), lists the common law duties of a driver, as codified in the Kentucky Revised Statutes, as follows:

- 1) Violation of KRS 189.340(6)(a), which directs that the operator of a motor vehicle shall not follow another vehicle more

closely than is reasonable and prudent having regard for traffic and road conditions;

(2) violation of KRS 189.390(1), which directs that the operator of a motor vehicle shall not operate the vehicle at a greater speed than is reasonable and prudent in light of traffic and road conditions;

(3) violation of KRS 189.290(1), which directs all motorists to drive in a careful manner with regard for the safety and convenience of pedestrians and other vehicles on the highway;

(4) violation of KRS 189.080(1), which requires the sounding of a horn or other sound device to warn of the approach of a motor vehicle.

Id. at 299-300.

White testified that she signaled appropriately before changing lanes. She also testified that she looked but did not see the bus when she changed lanes. She further stated that, after changing lanes, she slowed to get into the turn lane but when she looked in her rearview mirror, she saw the bus overtaking her, at which point she accelerated to get out of the way but was rear-ended. McDaniel's story, though not exactly the same, was quite similar to White's. Appellants argue that Jones must have either been speeding or inattentive and therefore, negligent. If we accept appellants' argument, Jones is strictly liable simply because he rear-ended White's vehicle. Clearly, this is not the law in Kentucky. Id. and USAA Cas.

Ins. Co. v. Kramer, Ky., 987 S.W.2d 779, 782 (1999). We disagree that the cases cited by appellants prove that Jones was negligent as a matter of law. However, we are still left with the question as to whether a permissible inference may be drawn as to Jones' negligence.

Appellees make much of the fact that White stated that she did not see the bus until just before impact, and therefore she cannot testify that the bus was speeding, following too closely or that Jones was inattentive. If we accept appellees' argument, the driver of a vehicle involved in a collision with another vehicle would never be able to survive summary judgment unless she personally observed that the other vehicle was speeding or inattentive or there was a third-party eyewitness who could so testify. Neither is this the law.

Kramer and Lucas hold that a driver is not negligent as a matter of law when he strikes another vehicle from the rear. However, they support appellants' argument that the driver's negligence is a question of fact for the jury. Id. and Lucas, 409 S.W.2d at 300. In essence, White's story is that she was traveling the speed limit, appropriately signaled, changed lanes when she observed it was safe to do so, slowed her vehicle, and when she next looked in her rear view mirror, the bus was overtaking her. For purposes of summary judgment, viewing the facts in a light most favorable to appellants, a

permissible inference is that the bus was unable to stop because it was either traveling too fast for the traffic conditions or the driver failed to observe White's lane change and reduce speed in time to stop without colliding with the vehicle. While it is true that the weight of the evidence in this case highly favors Jones, trial courts are to refrain from weighing the evidence at the summary judgment stage. Steelvest, 807 S.W.2d 482-483.

Because we conclude that summary judgment was improper, we need not address the issue of whether summary judgment should have been granted before appellants had an opportunity to depose Jones.

The summary judgment of the Fayette Circuit Court is reversed and the case is remanded for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Lawrence R. Webster
Pikeville, Kentucky

BRIEF FOR APPELLEE:

Julie Muth Goodman
Douglas J. Hallock
Lexington, Kentucky