RENDERED: DECEMBER 17, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001409-MR

HELEN ABNER — APPELLANT

v.

APPEAL FROM CLAY CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
ACTION NO. 01-CI-00349

TOMMY MATHIS; AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, DYCHE, AND McANULTY, JUDGES.

McANULTY, JUDGE: This is an appeal of summary judgment granted in favor of the defendants, the insurer and the other driver, in a two-car automobile collision case. Finding no error, we affirm.

While driving her truck to work one morning in January of 2000, Helen Abner (Abner) collided with another truck driven by Tommy Mathis (Mathis). Mathis's truck was traveling in the opposite direction that morning. Abner has no memory of how the

accident occurred. Mathis stated that he was stopped to make a left-hand turn when Abner swerved into his lane, clipped his front bumper head-on and dragged his truck with her truck into a ditch. There were no other witnesses to the accident.

Abner sustained severe injuries in the accident. Ultimately, she sued Mathis for his alleged negligence and State Farm Mutual Automobile Insurance Company (State Farm), her insurer, for benefits to which she was entitled under her underinsured motorist coverage. Mathis and State Farm moved for and were granted summary judgment dismissing Abner's complaint. The Clay Circuit Court found that Tommy Mathis was not negligent -- and not liable -- for the accident because there was no evidence to contradict his testimony that he was on his side of the road at the time of the accident.

Ten days after entry of the trial court's order granting summary judgment, Abner filed a motion to alter, amend or vacate summary judgment under CR 59.05 or CR 60.02 due to mistake or newly discovered evidence. The attorney that filed this motion was not the same attorney that filed the lawsuit and represented Abner to the point that the trial court granted summary judgment. The newly discovered evidence was an affidavit by James Sams, chief of the local fire department who was among those responding to Abner's accident. In his affidavit, Sams stated that, based on his view of the accident

scene including the final resting-place of the vehicles, the skid marks, and the location of debris, the initial impact occurred in Abner's lane. But the trial court believed that this evidence could have been discovered by due diligence and presented prior to the summary judgment hearing in May of 2003. And Abner's counsel did not deny that this evidence could have been obtained before the hearing. As Abner made no other showing of a reason of extraordinary nature that would justify CR 60.02 relief, the circuit court denied the motion.

Abner presents two issues for our review. First, Abner argues that summary judgment was inappropriate. Second, Abner argues that the trial court abused its discretion by denying Abner's motion to set aside the summary judgment on the basis of newly discovered evidence.

The standard of review of a trial court's granting of summary judgment 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). We review the record in a light most favorable to Abner and resolve all doubts in her favor. See Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

State Farm and Mathis filed their motions for summary judgment more than three years after the accident occurred and a

year and a half after Abner filed her lawsuit. At the time they filed their motions, the only testimony in the record pertaining to the cause of the accident is that of Mathis. Abner has no memory of the accident. She has nightmares in which Mathis comes into her lane and hits her, but no conscious recollection of what occurred.

Abner argues that genuine issues of material fact precluded summary judgment in spite of her lack of memory as to how the accident occurred. Specifically, there was evidence from both Mathis and Abner that the vehicles came to rest in a ditch on the side of the highway on which Abner was traveling. Abner argues that this fact alone raises questions about the mechanics of the collision and the point of impact that preclude summary judgment.

Once State Farm and Mathis submitted their motions for summary judgment on the issue of liability, Abner had an obligation to do something more than rely upon allegations in her pleadings to show that evidence was available that would justify a trial. See Continental Casualty Co. v. Belknap Hdwe. & Mfg. Co., Ky., 281 S.W.2d 914, 916 (1955). She did not do so. She did not depose the law enforcement officer who prepared the accident report, nor did she obtain a statement from him. She did not subpoena photographs of the accident scene that might

have shown some evidence that she did not cross the center line and cause the collision as Mathis testified that she did.

At the point of summary judgment, the record consisted of Mathis's deposition testimony as to the way in which the accident occurred. His account was neither inherently improbable nor contradicted by any other evidence. When the trial court heard the summary judgment motion, it asked Abner's counsel if there was any evidence that showed that Mathis crossed the center line and hit Abner. Abner's counsel said there was not. Under these circumstances, there was no genuine issue of fact for the jury, and the trial court was correct in granting summary judgment.

We move to the issue of CR 59.05 or 60.02 relief in light of James Sams's affidavit. Abner characterizes this evidence as "newly discovered" because it was not obtained until after the trial court entered its summary judgment. And Abner argues that CR 60.02(b) authorizes a circuit court to relieve a party from its final judgment on the ground of newly discovered evidence. But neither CR 59.05 nor CR 60.02 provides relief to Abner in this case because James Sams's testimony was available throughout the course of the circuit court proceedings. Abner made no assertion to the circuit court or to this Court on appeal that she either (1) could not have presented this evidence during the proceedings before the entry of the

judgment; or (2) was diligent in discovering the new evidence. See Hopkins v. Ratliff, Ky. App., 957 S.W.2d 300, 301 (1997). It is simply not new evidence, and we note that James Sams's name is listed in discovery documents produced by Abner as early as January 11, 2002, more than one year before State Farm and Mathis moved the court for summary judgment.

As to our standard of review of this issue, "CR 60.02 addresses itself to the sound discretion of the trial court." Fortney v. Mahan, Ky., 302 S.W.2d 842, 843 (1957). Accordingly, "[t]he trial court's exercise of discretion will not be disturbed on appeal except for abuse." Id. Considering the facts and procedural history of this case, we find no abuse of discretion in the trial court's denial of CR 60.02 relief.

For the foregoing reasons, we affirm the circuit court's judgment in favor of Mathis and State Farm.

ALL CONCUR.

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