

RENDERED: June 10, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000942-MR

JOSHUA JUSTICE

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JR., JUDGE
CIVIL ACTION NO. 02-CI-00362

TOMMY CECIL, BILLY ROWE,
RANDY STILES AND DWAYNE PORTER,
D/B/A TOTAL PHARMACY CARE

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER AND JOHNSON, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

HUDDLESTON, SENIOR JUDGE: Joshua Justice was seriously injured in a single-car accident in 2001. The driver of the car was Scott Justice (no relation to Josh), a former employee of the appellees, a group of pharmacists who own and operate Total

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Pharmacy Care. While employed at Total Pharmacy, Scott had stolen thousands of OxyContin tablets. After the accident, Josh filed suit against the appellees, alleging that their negligence in allowing Scott to take the pills had contributed to the accident. The circuit court granted summary judgment in favor of the appellees on the ground that there was no evidence that Scott's abuse of OxyContin played any role in the accident. We agree and therefore affirm the judgment.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."² The circuit court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."³ On appeal, the 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."⁴

² Kentucky Rules of Civil Procedure (CR) 56.03.

³ Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991) (citations omitted).

⁴ Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996).

Josh's friend, Scott, had worked for two years as a delivery driver and assistant for Total Pharmacy, which has stores in Pikeville and Phelps, Kentucky. One of the pharmacists, Tom Cecil, is Scott's stepfather. Scott stopped working for Total Pharmacy in 1999, but he occasionally ran errands for the pharmacy such as delivering drugs to nursing homes. In his deposition, Scott stated that he did this as a favor to the owners and because he was given gas money. Scott stole thousands of tablets of OxyContin from the pharmacy, both for his own use and for sale; and he became addicted to the drug. Josh also used OxyContin regularly, but he did not obtain it from Scott.

On the day of the accident, March 16, 2001, Scott and Josh (who were college students at that time) had returned to Lexington, Kentucky, from a spring break vacation in Tennessee. They were planning to attend a Sweet Sixteen high school basketball game in Lexington. Scott ran out of OxyContin, however, so he and Josh drove to the Total Pharmacy branch in Pikeville, where Scott took a supply of the drug from the inventory. Scott also made a delivery of some drugs to a local nursing home. The two young men then headed back to Lexington. It is unclear from the record whether the delivery of drugs to the nursing home and the drive back to Lexington took place on the same day. Scott was driving his sport-utility vehicle; Josh

was in the passenger seat. Along the way, Josh realized that his wallet was missing and might have fallen under the car seat. He began searching for the wallet. Scott claims that he told Josh to take the wheel so he could check if the wallet was under his seat. Josh claims that he did not take the wheel, but removed his seatbelt so he could search more easily. The car veered off the road and struck an embankment. Josh was thrown through the roof of the car and was seriously injured. The police who investigated the accident did not test Scott for drugs, nor is there any indication in the record that they suspected he was impaired in any way. The police did find OxyContin tablets in a coat belonging to Scott that was in the car.

The incident led to criminal charges being filed against Scott for trafficking in a controlled substance in the first degree. Scott entered a plea of guilty, admitting that he had removed approximately 4,000 OxyContin pills from Total Pharmacy over a two-year period. The appellees have been disciplined by the Kentucky Board of Pharmacy for violating their duty of security.

About two months after the accident, Josh told the detective investigating Scott's involvement with trafficking in OxyContin that he saw Scott with a bottle of Alprazolam (a drug used to treat anxiety) during their delivery of drugs to the

nursing home. Josh stated that he watched Scott orally take a few of those pills that day. Josh also told the detective that on the day of the accident he did see Scott with a bottle of OxyContin in his jacket pocket but did not see him take any of the pills.

In his deposition, taken on August 8, 2002, Josh testified that on the day of the accident he did see Scott come out of the pharmacy with a bottle, and he did "take something." However, Josh stated that the pills were in an antibiotic bottle, and he did not know if they were OxyContin.

Josh filed a complaint against Scott and the owners of Total Pharmacy in Pike Circuit Court on March 15, 2002. In December 2002, Scott was dismissed as a party.⁵ Subpoenas duces tecum were issued to Scott's medical providers in January and February 2003 ordering them to produce his medical records, but there is no indication that they ever did so, nor was the matter pursued any further. On May 20, 2003, the court granted a motion of Josh's attorney to be dismissed from the case. Josh retained new counsel. On July 28, 2003, the appellees filed a motion for summary judgment. A hearing was held on September 12, 2003, and Josh filed a response to the motion shortly thereafter. The circuit court granted the appellees' motion for

⁵ Josh had entered into a settlement agreement with Scott and Scott's insurance company that contained a release discharging Scott from any claims for personal and physical injuries in connection with the accident.

summary judgment on September 18, 2003, on the following grounds:

The Plaintiff [Josh] has not proven, from the evidence in the record, that Scott Justice was taking any drugs on the day of the accident. First, Scott Justice denied it. . . . Second, the Plaintiff stated that he saw Scott Justice "take something" but could not say what that "something" was. He later admitted during his deposition that he did not see Scott Justice take any pills and that he told Detective Tom Underwood that he did not see Scott Justice consume any drugs on the day of the accident.⁶ . . . The Plaintiff has proven that Scott Justice was an OxyContin abuser and an OxyContin possessor at the time of the accident. However, he has not proven that Scott Justice's OxyContin abuse played any role in the accident in question. Therefore, the Defendants cannot be held liable for the Plaintiff's injuries, because their failure to prevent Scott Justice from abusing OxyContin did not proximately cause the accident in question.

Josh argues that summary judgment was inappropriate because genuine issues of fact existed that should have been put before a jury. These include the fact that Scott was addicted to Oxycontin, that he drove all the way from Lexington to Pikeville to get OxyContin, and that Josh saw him take "something" from a bottle before they headed back to Lexington. Josh argues that there was sufficient circumstantial evidence for the jury to infer that Scott was under the influence of intoxicants at the time of the accident, and that the negligence

⁶ This is not entirely accurate because Josh did tell the detective that he saw Scott taking Alparzolam.

of the appellants in allowing him to steal the drugs was a substantial factor in causing the accident and Josh's injuries.

Even if we view these facts in the light most favorable to Josh, there is simply no evidence whatsoever that Scott's alleged intoxication caused or contributed to, the accident. No blood tests were administered to determine whether Scott was under the influence of any drugs, and we are left to assume the effects of his alleged ingestion of OxyContin or Alparzolam. The record reflects that more than adequate time was provided to produce such evidence if any existed. No attempt was made, for instance, to follow up on the subpoenaed medical records. Even if Scott did take OxyContin or Alparzolam, there is simply no proof in the record that his ingestion of these drugs had any impact on causing the accident.

The judgment is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jeffrey D. Thompson
Louisville, Kentucky

BRIEF FOR APPELLEE:

Richard D. Bissell
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