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Commonwealth Of Kentucky

Court Of Appeals

NO. 2005-CA-000401-MR
AND
NO. 2005-CA-000493-MR

SHIRL PERRY — APPELLANT

v.

APPEALS FROM MORGAN CIRCUIT COURT
HONORABLE SAMUEL LONG, JUDGE
ACTION NO. 02-CI-00043

GREGORY PARKS,
NANCY B. SMITH, AND
KENTUCKY FARM BUREAU
INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND KNOPF, JUDGES.

KNOPF, JUDGE: On October 13, 2001, a vehicle owned and operated by Gregory Parks collided with a vehicle operated by Nancy Smith. Shirl Perry was a passenger in the Smith vehicle. In February 2002, Perry brought suit for damages against Parks. In October 2002, Parks filed a third-party complaint against Smith in which he sought “indemnity or contribution or apportionment.”

Perry then obtained leave to amend her complaint, ostensibly to add a claim against Smith. By summary judgment entered February 9, 2005, the Morgan Circuit Court dismissed "all claims" against Smith, but explained that the judgment was not intended to preclude an apportionment instruction between the two drivers. Perry's claim against Parks was then tried before a jury on February 22, 2005. At the trial Parks was permitted to present evidence, including testimony by an accident reconstructionist, tending to show that he had not been negligent and that Smith had been. The instructions included one permitting the jury to apportion fault between Parks and Smith. Because the jury exonerated Parks, however, it did not reach the apportionment instruction. Finally, on February 25, 2005, the trial court entered judgment in accord with the jury's verdict. It is from that judgment and the February 9, 2005, summary judgment that Perry has appealed. She contends that the trial court erred by dismissing her claim against Smith, by permitting an apportionment instruction after Smith had been dismissed from the case, and by allowing expert testimony (the reconstructionist) that had not been timely disclosed. Persuaded by none of these contentions, we affirm.

Although they differed in important respects, the parties' pre-summary-judgment accounts of the accident were largely in accord. It occurred about 2:00 p.m. The day was

clear and driving conditions were good. Smith was south-bound on a straight section of old Kentucky Highway 172 not far east of West Liberty. She was driving slowly preparing to make a right-hand turn into her son's driveway. Parks came upon her from the rear, and, thinking that she was turning left, attempted to pass on the right. Instead, Smith turned to the right in front of Parks, whose left headlight and bumper collided with the passenger side of Smith's vehicle just behind the front tire. Parks maintained that Smith made no signal, and that in the course of making what proved to be a wide right-hand turn she had pulled almost entirely into the left or north-bound lane, leading him to believe that she was turning left. Smith and Perry both testified that Smith signaled a right-hand turn and did not cross over into the opposite lane. Parks simply ran into them, they claimed, possibly because he was going too fast.

Perry contends that the trial court should not have summarily dismissed her complaint against Smith. As Smith notes, however, to maintain a cause of action for negligence, one must allege that the defendant was at fault.[1] Although Perry's amended complaint alleged generally that both defendants were negligent, when asked during her deposition to specify how Smith had been at fault, Perry denied that she had been and asserted in particular that Smith had signaled her turn and had

[1] M & T Chemicals, Inc. v. Westrick, 525 S.W.2d 740 (Ky. 1974).

not strayed from her lane. These admissions could properly be deemed binding and conclusive.[2] Absent an allegation of fault, the trial court did not err by ruling that Perry's claim against Smith must fail.

The trial court also dismissed Parks's third-party complaint against Smith, apparently concluding that Parks was not entitled either to indemnity or contribution and that apportionment, the real relief that Parks sought, did not require and would not support a cause of action. This seems to be the thrust of the court's ruling that Parks was entitled to an apportionment trial and an apportionment instruction even though his third-party complaint had been dismissed. Perry contends that the trial court erred. She maintains that the dismissal of all claims against Smith amounts to a matter-of-law determination that Smith was not negligent and thus rendered apportionment moot. Although we do not agree with Perry's interpretation of the error, for clearly the record did not support a summary judgment vis-à-vis Parks absolving Smith of all responsibility, nevertheless we agree that Parks's complaint ought not to have been dismissed.

As the parties note, with KRS 411.182 the General Assembly codified the doctrine of comparative negligence first

[2] Sutherland v. Davis, 286 Ky. 743, 151 S.W.2d 1021 (Ky. 1941).

adopted by our Supreme Court in Hilen v. Hays.[3] Under that statute, "[i]n all tort actions . . . involving fault of more than one party to the action, including third-party defendants," the jury must determine "[t]he percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, [and] third-party defendant." By its express terms, the statute contemplates a third-party action for apportionment against a third-party defendant who allegedly shares fault for the first-party plaintiff's injury. The third-party defendant must be within the trial court's jurisdiction and must not be immune from suit altogether.[4] She need not, however, be subject to a claim for damages for the apportionment claim to lie. She may have settled, she may have a defense, she may, as in this case, simply be a person from whom no one else wishes to recover; nevertheless the apportionment is not moot because it will determine the extent of the third-party plaintiff's responsibility. The third-party defendant ought not to be dismissed from the apportionment action, moreover, because she may wish to contest the imputation of fault even if her own damages are not at stake. The trial court erred, therefore, when it dismissed Parks's third-party apportionment claim

[3] 673 S.W.2d 713 (Ky. 1984).

[4] Lexington-Fayette Urban County Government v. Smolcic, 142 S.W.3d 128 (Ky. 2004); Copass v. Monroe County Medical Foundation, Inc., 900 S.W.2d 617 (Ky.App. 1995).

against Smith. With respect to Parks and Perry, however, the error was harmless because the court allowed them to try the apportionment issue and submit it to the jury. And with respect to Smith the error is moot because she did not object; indeed she is the one who sought to be excluded from the apportionment action. The error, therefore, does not entitle Perry to relief.

Finally, Perry contends that the trial court abused its discretion by permitting an accident reconstructionist to testify who had not been noticed in Parks's initial, 2002, interrogatory responses, and was not noticed in an amended response until a week before the February 2005 trial. This Court has recently held that the admission of undisclosed expert testimony, where there has been a violation of both "the letter [and] the spirit" of CR 26.02(4), may constitute an abuse of the trial court's discretion.[5] Here, however, we are convinced that the spirit, at least, of the Civil Rules was not violated and that the trial court's decision to admit the reconstructionist's testimony was neither arbitrary, unreasonable, unfair, nor unsupported by sound legal principles.

Parks concedes that he did not amend his interrogatory responses until the eve of trial, but asserts without contradiction that in March 2004, nearly a year prior to trial, he fully disclosed during the parties' mediation the

[5] Clephas v. Garlock, 168 S.W.3d 389, 393 (Ky.App. 2004).

reconstructionist's identity, the subject matter of his testimony, and the substance and basis of his opinions. During the pre-trial conference about two weeks before trial, moreover, when Perry objected to admission of the expert's testimony, Parks waived any objection to a continuance so that Perry might have additional time to meet the expert's evidence. Perry declined a continuance. Although timely amendment of Parks's interrogatory responses would have been the better practice, we cannot say in these circumstances that Perry was unfairly surprised or denied the opportunity to prepare for trial contemplated by the Civil Rules. The trial court, therefore, did not abuse its discretion by permitting Parks's reconstructionist to testify.

In sum, although the trial court properly dismissed Perry's negligence claim against Smith when Perry failed to allege that Smith had breached a duty of care, it should not have dismissed Parks's third-party claim against Smith for apportionment. KRS 411.182 contemplates such a claim even divorced from a claim for damages. The court's error was harmless, however, because notwithstanding the dismissal the apportionment claim was fully tried and properly submitted to the jury. The trial court did not abuse its discretion, finally, by admitting expert testimony of which Perry had had adequate notice even if not the precise notice contemplated by

CR 26. Accordingly, we affirm the February 9, 2005, and February 25, 2005, judgments of the Morgan Circuit Court.

ALL CONCUR.

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