

RENDERED: JULY 24, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000729-MR

CHRISTOPHER EARLEY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 18-CI-002993

REBECCA O'TOOLE

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, DIXON, AND MCNEILL, JUDGES.

ACREE, JUDGE: Christopher Earley appeals the Jefferson Circuit Court's April 12, 2019, summary judgment in favor of appellee, Rebecca O'Toole. We find genuine issues of material fact exist precluding summary judgment. Accordingly, we reverse and remand for additional proceedings.

BACKGROUND AND PROCEDURAL HISTORY

This case began as an automobile accident on June 28, 2017, between Earley and O'Toole. However, a third vehicle driven by Sean Strader also appears to have been involved. The police report¹ summarized the accident as follows:

[Sean Strader] was attempting to merge onto Brownsboro Road westbound. [Earley] and [O'Toole] were traveling westbound on Brownsboro road. Earley and O'Toole state Strader pulled out into traffic. Earley was unable to stop in time and the two vehicles collided. Earley bounced off of Strader and struck O'Toole. Strader took off before police arrived but O'Toole was able to write down the license plate.

O'Toole filed a negligence claim against Earley but did not name Strader as a defendant. Earley did not move for leave to file a third-party claim against Strader. After limited discovery, O'Toole moved for summary judgment with a supporting affidavit. In it, she said she was stopped on Brownsboro Road in her car, waiting to make a left turn, when Earley ran into the rear of her vehicle. She stated she heard screeching tires moments before her vehicle was struck. A picture was appended depicting skid marks approximately fifteen feet long. Additionally, O'Toole claimed she did not see a third vehicle.

In his response, Earley attached the police report, interrogatories, and his own sworn affidavit. His affidavit stated he was traveling westbound on

¹ O'Toole asserts she did not speak to the investigating police officer and the entire report is just a recitation of what Earley told the officer.

Brownsboro Road, behind O'Toole, who was in the left lane. He noted Strader attempted to merge onto Brownsboro Road, directly in front of him. According to Earley, he hit his brakes, but was unable to stop. He collided with Strader, which propelled him into O'Toole's vehicle. Additionally, his affidavit stated O'Toole was able to get Strader's license plate number before he drove off.

In her reply, O'Toole filed a supplemental affidavit. She clarified that she did see a third vehicle; however, she did not see the third vehicle hit Earley or cause the accident. Moreover, she stated she recorded Strader's license plate number only after Earley directed her to.

The circuit court granted O'Toole's motion for summary judgment, stating simply that "there is no material issue as to liability."² Earley moved for reconsideration of the order. Following a hearing, the circuit court denied Earley's motion for reconsideration. Earley appealed.

STANDARD OF REVIEW

"The standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012) (citations omitted). "[S]ummary judgments involve

² The summary judgment is strange in form as it is typed by O'Toole's counsel on the same single sheet of paper as O'Toole's motion, which says in its entirety: "Plaintiff, by counsel, moves the Court to enter the following Summary Judgment based on the attached Affidavit."

no fact finding[.]” *Associated Ins. Serv., Inc. v. Garcia*, 307 S.W.3d 58, 61 (Ky. 2010). Consequently, our review is *de novo*. *Id.*

ANALYSIS

“‘Negligence,’ as used in law, may be defined as the failure to discharge a legal duty, whereby injury occurs.” *Franklin v. Tracy*, 117 Ky. 267, 77 S.W. 1113, 1115 (1904). “The elements of a negligence claim are (1) a legally-cognizable duty, (2) a breach of that duty, (3) causation linking the breach to an injury, and (4) damages.” *Patton v. Bickford*, 529 S.W.3d 717, 729 (Ky. 2016) (citation omitted). “Whether the defendant owed a duty to the plaintiff is a question of law for the court, while breach and injury are questions of fact for the jury.” *Howard v. Spradlin*, 562 S.W.3d 281, 286 (Ky. App. 2018) (citation omitted).

The causation element of a negligence claim consists of two components – but-for causation and proximate causation. “But-for causation requires the existence of a direct, distinct, and identifiable nexus between the defendant’s breach of duty (negligence) and the plaintiff’s damages such that the event would not have occurred ‘but for’ the defendant’s negligent or wrongful conduct in breach of a duty.” *Patton*, 529 S.W.3d at 730. Proximate causation, on the other hand, “captures the notion that, although conduct in breach of an established duty may be an actual but-for cause of the plaintiff[’]s damages, it is

nevertheless too attenuated from the damages in time, place, or foreseeability to reasonably impose liability upon the defendant.” *Id.* at 731. But-for causation is a question of fact, to be determined by the factfinder, while proximate causation is a question of law. *Id.* at 730-31.

Earley says genuine issues of material fact exist precluding summary judgment and, therefore, the circuit court erred in granting judgment in O’Toole’s favor. Specifically, he contends “[t]he dispute with regard to Sean Strader’s vehicle at the scene of the accident on June 28, 2017 creates a disputed issue of material fact with regard to actual and proximate causation.” Because causation requires a nexus between a breach of duty and the injury asserted, we must address whether there is a genuine issue of material fact regarding the breach of duty.

O’Toole asserts Earley breached his duty by operating his vehicle in a careless and negligent manner. Her affidavit states she was rear-ended by Earley while she was stopped in her vehicle and attaches photographs of skid marks stretching approximately fifteen feet at the scene of the accident. She attested to hearing Earley’s tires screech on the pavement moments before the collision. This is certainly affirmative evidence supporting her assertion.

However, Earley contends his negligence did not cause his vehicle to collide with O’Toole’s car, but rather that his vehicle was propelled into O’Toole when Strader collided with him. In effect, he claims he acted as a reasonably

prudent person when the accident occurred and breached no duty he owed. In support of his position, Earley introduced written interrogatories, a sworn affidavit, and the police report. This evidence, if believed, would support a conclusion that Earley did not breach a duty at the time of the accident. Notably, O'Toole retracted her statement that there was no third vehicle. She simply claims she did not see a third vehicle collide with Earley. She even says in her supplemental affidavit, "[Earley] asked me to take down the license plate number on [Strader's vehicle]." This corroborates Earley's version of the events. Whether Strader's vehicle struck Earley's vehicle and was the reason Earley's vehicle collided with O'Toole is a material fact about which there is a genuine issue.

Based on the record, this Court concludes that a reasonable juror could find Earley was driving in a manner that breached no duty and that Strader's negligence was the sole cause of the damages to O'Toole's car and the injury to her person. This genuine issue of material fact precludes summary judgment.

Lastly, we address O'Toole's argument that "since Earley did not make [Strader] a party to this action, whether [Strader] caused the accident or not is of no consequence." O'Toole relies on *Baker v. Webb*, 883 S.W.2d 898 (Ky. App. 1994) to support her position. We find O'Toole's reliance misplaced.

The question in *Webb* was whether it was improper to instruct the jury on the apportionment of liability among the plaintiff, the defendant, and a third

person who was never made a party to the action. In *Webb*, the case had progressed past the liability, or fault, issue. As our Supreme Court said, “[F]ault may be apportioned only among those against whom the evidence of liability was sufficient to allow submission of the issue of fault to the jury.” *Morgan v. Scott*, 291 S.W.3d 622, 634 (Ky. 2009). That is, the concept of apportionment presupposes a non-plaintiff’s liability and the jury will not reach the apportionment instruction unless the jury first finds fault with a party other than the plaintiff.

The summary judgment here resolved the predecessor issue to an apportionment instruction – that of Earley’s fault – as though the evidence could not support a jury verdict that Earley’s conduct was not a substantial factor in the accident. Considered in a light favorable to Earley, the evidence shows there is a genuine issue of material fact whether the accident was Earley’s fault.

Nothing in this Opinion should be construed as implying that Earley is not liable. We find merely that there is conflicting evidence in the record as to whether the breach of duty and causation elements of O’Toole’s claim are satisfied. Simply put, genuine issues of material fact remain in O’Toole’s negligence claim. Accordingly, she is not entitled to judgment as a matter of law.

CONCLUSION

We reverse the Jefferson Circuit Court's April 12, 2019 order granting summary judgment in favor of O'Toole and remand for additional proceedings consistent with this Opinion.

ALL CONCUR.

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