

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-001274-MR

SAMUEL B. MCKINNEY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 16-CI-006198

KINGPIN, LLC

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, GOODWINE, AND LAMBERT, JUDGES.

COMBS, JUDGE: Samuel B. McKinney appeals from an opinion and order of the Jefferson Circuit Court granting summary judgment in favor of Appellee, Kingpin, LLC. After our review, we affirm.

On December 17, 2015, McKinney attended the Christmas party of his employer, Marcus Paint, which was held at Kingpin Lanes, a bowling alley

operated by the Appellee, Kingpin, LLC (Kingpin). Kingpin served a buffet lunch, and McKinney ate at the buffet.

On the evening of December 18, 2015, McKinney attended another Christmas party, a potluck at Chuck's Recycling in Meade County. McKinney also ate food at the potluck. At about 9:00 p.m., while still at the potluck, McKinney became quite ill. A friend drove him to Southwest Hospital where he was kept overnight. On December 19, 2015, McKinney was transported to Sts. Mary and Elizabeth's Hospital and was admitted. He was discharged the following day. The hospital's "History and Physical" report reflects a chief complaint of vomiting, diarrhea, and abdominal pain and that

[t]his patient . . . was at a Christmas party where he did not have any alcoholic beverages but is concerned that he might have gotten some bad food. He began having nausea, diarrhea, and abdominal pain and came into the emergency room.

Test results were negative for salmonella, shigella, campylobacter, and E. Coli.

The physician's assessment was likely viral gastroenteritis.

On December 13, 2016, McKinney filed a complaint in the Jefferson Circuit Court against the Appellee, Kingpin, LLC, alleging claims of negligence and breach of warranty in that "his illness was transmitted and caused by the food served by Kingpin."

On October 19, 2018, Kingpin, LLC, filed a motion for summary judgment. In its supporting memorandum, Kingpin argued that it was entitled to summary judgment because there was no evidence that any of the food served by Kingpin at Marcus Paint's Christmas party was contaminated and that although there was a diagnosis of a "likely" viral gastroenteritis, there was no evidence of the actual existence of a virus or of its source. Kingpin noted that McKinney's discovery responses did not disclose the name of any expert witness.

Kingpin also argued that it was entitled to summary judgment on McKinney's breach-of-IMPLIED-warranty claim.

On November 12, 2018, McKinney filed an answer. McKinney argued that Kingpin's motion should be denied as to his tort claim, but he conceded that his breach-of-warranty claim should be dismissed. McKinney alleged that he had been diagnosed with food poisoning and that "many other employees at the Christmas party got sick shortly after eating the buffet." McKinney did not file any affidavits in support of his answer, but he attached selected pages from his February 23, 2018, deposition and answers to interrogatories as exhibits.

At page 59 of his deposition, McKinney was asked if someone actually told him that it was food poisoning. He testified, "I believe one of the doctors had told me, because they had done some different tests to figure out what

was going on.” At pages 32 and 40-41 of his deposition, McKinney testified that after he had gone back to work, he started hearing that other people had gotten sick. He testified that Dennis Goeing told him that he had had some diarrhea after the party. McKinney also testified that:

I think Marjorie [Brien¹] had told me when I had talked with her that I had gotten sick, and then she was kind of finding out – when I was finding out that other people had become ill also.

McKinney named some of the people whom Marjorie had mentioned.

(McKinney’s Answer, Exhibit “A”).

As to his answers to interrogatories, Interrogatory No. 2 asked McKinney to state all facts upon which he relied to support the allegations in his complaint that his illness had been transmitted and caused by food served by Kingpin. McKinney responded that it was “his understanding” that many Marcus Paint employees who ate at the Christmas party also became ill soon thereafter and that his symptoms were consistent with food poisoning. (*Id.*, Exhibit “B”).

On July 25, 2019, the trial court entered an opinion and order granting Kingpin’s motion as follows in relevant part:

In a negligence action, the plaintiff must show there was a legal duty, a breach of that duty, and consequent injury. Mullins v. Commonwealth Life Insurance Company, 839 S.W.2d 245, 247 (Ky. 1992). Consequent injury requires both actual injury to the

¹ Ms. Brien works in human resources at Marcus Paint.

plaintiff, as well as legal causation between the breach and the injury. Pathways Inc. v. Hammons, 113 S.W.3d 85, 88 (Ky. 2003). “The absence of any one of the three elements is fatal to the claim.” Illinois Central Railroad v. Vincent, 412 S.W.2d 874, 876 (Ky. Ct. App. 1967).

McKinney has failed to provide any evidence of causation between the Kingpin buffet and his illness. McKinney has presented insufficient medical cooperation [sic] to support his argument that the illness was caused from food poisoning, let alone that it was related to the Kingpin buffet. See Rutherford v. Modern Bakery, 310 S.W.2d 274, 275 (Ky. Ct. App. 1958). The mere possibility that the food caused the illness is not sufficient, and the likely cause of McKinney’s illness is insufficient proof to survive summary judgment. Id.

Although McKinney relies on his assertion that there are other alleged co-workers [who] were also ill, this allegation is not supported by any facts or testimony. Legal causation may be established from a quantum of circumstantial evidence; however, the evidence must be reasonable and indicate the probable as opposed to the possible cause. Bailey v. North American Refractories Company, 95 S.W.3d 868, 872-73 (Ky. Ct. App. 2001). Assuming the evidence in the light most favorable to McKinney, even if other co-workers became ill, this is insufficient proof to establish that the Kingpin buffet was the probable cause [of] his illness over twenty-four hours later. Therefore, Kingpin’s motion for summary judgment is granted.

The trial court also granted Kingpin’s motion for summary judgment with respect to McKinney’s breach-of-warranty claim.

On August 20, 2019, McKinney filed his notice of appeal. On appeal, he contends that the trial court misapplied legal standards and improperly pre-

judged the merits when it granted summary judgment. In reviewing a summary judgment, our role:

is to determine whether the trial court erred in finding no genuine issue of material fact exists and the moving party was entitled to judgment as a matter of law. A grant of summary judgment is reviewed *de novo* because factual findings are not at issue.

Feltner v. PJ Operations, LLC, 568 S.W.3d 1, 3 (Ky. App. 2018) (citations omitted).

McKinney argues that the trial court “should not have rendered itself the medical expert prior to medical experts testifying in deposition and/or trial.” Further, he contends that the trial court erred in relying on *Rutherford v. Modern Bakery*, 310 S.W.2d 274 (Ky. 1958). In *Rutherford*, appellant became ill after eating some pies that he had purchased the day before from appellee. The trial court entered a directed verdict for the bakery.

No medical testimony was introduced to prove whether the illness described in his complaint was caused by poisoning from the pies, or from something else he ate, or resulted from some physical infirmity suddenly manifesting itself. It was proven that the appellant became ill soon after consuming the pies at lunch, but it was not proven that the pies had any causal connection with the illness. The mere possibility that the pies could have caused the illness was not sufficient to warrant submission of the case to the jury.

Id. at 275.

McKinney argues that he may rely on circumstantial evidence to establish that his food poisoning was caused by Kingpin because other patrons who ate the same food became ill. He relies on *Capps v. Bristol Bar and Grille, Inc.*, No. 3:09-CV-960-CRS, 2012 WL 1067908 (W.D. Ky. Mar. 29, 2012),² and *Snead v. Waite*, 306 Ky. 587, 208 S.W.2d 749 (1948).³ However, both are highly distinguishable and cannot serve as support for McKinney's argument.

It appears that McKinney misperceives the basis of the trial court's decision. The trial court did not hold that causation cannot be established by circumstantial evidence. The trial court granted Kingpin's motion for summary judgment because McKinney's answer was insufficient.

It is well established that a party responding to a properly supported summary judgment motion cannot merely rest on the allegations in his pleadings. *Continental Casualty Co. v. Belknap Hardware & Manufacturing Co.*, 281 S.W.2d 914 (Ky. 1955). “[S]peculation and supposition are insufficient to justify a submission of a case to the jury, and . . . the question should be taken from the jury when the evidence is so unsatisfactory as to . . . resort to surmise and speculation.” *O’Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (citing *Chesapeake & Ohio Ry. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951)). “‘Belief’ is

² In *Capps*, nearly all the guests at a rehearsal dinner became ill after consuming the meal. The defendant conceded that the factual allegations in the amended complaint were true for purposes of its motion for summary judgment.

³ *Snead* involved some bad barbeque. Three doctors testified that the ailments apparently resulted from food poisoning. At issue was whether the verdict was against the evidence. The court held that appellees proved the elements of an implied warranty and damages proximately resulting from its breach and that the verdict was not against the evidence.

not evidence and does not create an issue of material fact.” *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990); *see also Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007) (“A party’s subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment.”) Furthermore, the party opposing summary judgment “cannot rely on the hope that the trier of fact will disbelieve the movant’s denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 481 (Ky. 1991) (internal citations and quotations omitted).

Smith v. Norton Hosps., Inc., 488 S.W.3d 23, 28 (Ky. App. 2016).

As Kingpin observed, “[e]vidence presented in opposition to a motion for summary judgment must be affirmative and it must be admissible.” *Walker v. Commonwealth*, 503 S.W.3d 165, 177 (Ky. App. 2016). In *Walker*, the trial court entered summary judgment in favor of Walker’s employer on his claims of employment discrimination and retaliation. This Court held that the deposition testimony of two individuals (*i.e.*, that they were told that Walker was “blackballed” because he had filed a complaint with the Human Rights Commission) was hearsay and that Walker’s own deposition testimony based upon the same hearsay statement “is of no use to Walker in opposing summary judgment.” *Id.*

In the case before us, McKinney failed to submit affirmative and admissible evidence. Instead, he relied upon his own deposition testimony and

discovery responses which were based upon hearsay and surmise: what he believed a doctor told him, what his “understanding” was, what others told him, or what he heard about people getting sick after the buffet. As Kingpin notes, McKinney did not submit affidavits from any of these individuals, nor did he take any depositions or identify any expert witnesses in the twenty-two months between the filing of the litigation and Kingpin’s motion. The trial court properly determined that Kingpin was entitled to summary judgment.

Accordingly, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joshua T. Rose
Louisville, Kentucky

BRIEF FOR APPELLEE:

Deanna M. Marzian Tucker
Louisville, Kentucky