SUPREME COURT OF KENTUCKY
CASE NO. 2013-SC-538-DG

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2010-CA-1063-MR

RON CADLE, Individually and as the Administrator for the Estate of Jane Cadle, and SARAH CADLE — APPELLANTS

v.

APPELLANTS' REPLY BRIEF

WILMA CORNETT and ALLSTATE INSURANCE — APPELLEES

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of this brief was served via registered mail upon the Clerk of the Supreme Court, 700 Capitol Avenue, Frankfort, KY 40601 and via first-class mail, postage prepaid, this the 23 day of October, 2014, upon Hon. James B. Dilbeck, 1100 Kentucky Home Life Building, 239 S. Fifth Street, Louisville, KY 40202, Hon. William Clifton Travis, Travis & Herbert, PLLC, Jefferson Marders Building,11507 Main Street, Louisville, KY 40243, Hon. Samuel Givens, Kentucky Court of Appeals, 700 Democrat Drive, Frankfort, KY 40601 and Hon. James M. Shake, Jefferson Circuit Judge, 700 West Jefferson Street, Louisville, KY 40202. It is further certified that the record on appeal was not withdrawn.

TABLE OF POINTS AND AUTHORITIES

INTRODUCTION

"[W]e should not fear jury determinations..." Shelton v. Easter Seals, Inc., 413 S.W.3d 901, 916 (Ky. 2013). The superseding cause doctrine is not abrogated if this case were to be remanded for trial. Appellees' suggestion that this case is logically (or legally) different from the "slip and fall" cases (Dick's and Easter Seals) is erroneous. Kentucky law has consistently favored jury resolution of negligence cases; this trend has become more apparent since the adoption of comparative fault. Accordingly, that principle should apply equally to this case.

I. "Genuine issues of material fact"—the timing of the Cornett negligence vs. the Cadle collision—preclude summary judgment

Appellees urge this Court to confront this case as a pure question of law, rather than the mixed question of law and fact mandated by the case law. The approach advocated by appellees has been consistently rejected by this Court in negligence cases for the last thirty years.

Appellees tacitly concede[1],[2] that there is a genuine factual dispute regarding the timing of the two collisions. Summary judgment properly terminates litigation **only** when the party opposing it, here the appellants, cannot produce at trial which would lead to a verdict in their favor. CR 56.03; Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W. 2d 476, 480 (Ky. 1991). Importantly, and ignored in appellees' briefs, is that summary judgment should be granted only when there is no genuine issue of material fact such that the parties seeking summary judgment, here appellees, are entitled to judgment as a matter of law. Scifres v.

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[1] "It is difficult to believe that traffic could back up safely and without incident for 1.3 miles in 120 seconds...The police accident reports indicate that the two accidents occurred between 14 and 22 minutes apart." (Brief for Cornett at 9).

[2] "As the time interval increases from zero, the shorter the time interval the less relevant time remains..."(Brief for Allstate at 20). Both passages, to be sure, would be the centerpiece of opposing counsel's closing argument. However, "difficult to believe" and "less relevant" indicate a "genuine issue of material fact."

Kraft, 916 S.W.2d 779, 781 (Ky. App. 1986) (emphasis added). There are genuine issues of material fact regarding the timing of the two collisions. Those genuine issues of material fact are memorialized in the EMS run reports for the two collisions and the affidavit of Steve Wortham.

Appellees acknowledge that there are genuine issues of fact regarding the timing of the two collisions at issue. Based upon evidence in the record, the collisions could have occurred within, at most, two minutes of each other (4:22 pm for Cornett; 4:24 pm for Cadle). Appellees simply state that this scenario is not possible because of the distance between the accident scenes. Respectfully, that is a jury argument, not an argument applying law to established facts. The premise assumed by the appellees does not take into account the speed of the vehicles on the highway, the size of the same vehicles and the density of traffic on the main highway between this state's two largest cities on the afternoon of Mothers' Day. The question of whether Cornett's negligence could have been a proximate cause of the Cadle collision is exclusively within the province of a jury. The Court of Appeals erred when it held otherwise. Its judgment should be reversed on this basis alone.

II. There is no difference between the Court's decisions in the slip and fall cases and its logical extension to the superseding cause doctrine

Appellees expended much effort in their respective briefs extolling the role of the court in making threshold determinations of law when confronted by superseding/intervening cause questions. The Court does not have to throw the superseding cause doctrine out with the jurisprudential bathwater. Antiquated tort doctrines like the doctrine of superseding cause are still, as both appellees note, "good" law in Kentucky. However, simply because "superseding cause" has not been explicitly overruled does not mean that the principles of law set forth in that line of cases, particularly Donegan v. Denney, 457 S.W.2d 953 (Ky.

1970), do not have diminished importance in today's pure comparative fault landscape. This is especially true in a motor vehicle liability case, where cars travel faster, people travel greater distances and roads are busier.

This Court addressed a long-standing substantive tort principle in Kentucky premises liability law (the "open and obvious" doctrine) in Kentucky River Medical Center v. McIntosh, 319 S.W.3d 385 (Ky. 2010). This Court then had the opportunity to clarify or amplify its McIntosh decision in Dick's and in Easter Seals. In all three cases, this Court held that the open and obvious doctrine in the premises liability context has diminished importance and effect in the age of pure comparative fault. Importantly, while the court did not wholly overrule open and obvious principles, the court deferred judgment on those issues to the jury in the latter's fault calculus. "The incompatibility between the open and obvious doctrine as an absolute, automatic bar to recovery and comparative fault is great..." McIntosh, 319 S.W.3d at 191. Moreover, modern Kentucky jurisprudence focuses on foreseeability, rather than rigid, pre-comparative fault rules, in the proximate cause calculus. Id.; Pathways, Inc. v. Hammons, 113 S.W.3d 85, 98 (Ky. 2003) (Proximate cause is a mixed question of law and fact). This logic pervades every Kentucky case that has addressed the applicability of common law affirmative defenses to negligence claims since the adoption of comparative fault. Superseding cause is no different, or novel, than "open and obvious," "sudden emergency," "last clear chance," or any other common law doctrine that, like Donegan, was settled law in the pre-comparative fault era.

Confronted with this trend, and this Court's decisions in post-comparative fault superseding cause jurisprudence in **recent** cases like Com. Transportation Cabinet v. Babbitt, 172 S.W.3d 786 (Ky. 2005) and Pile v. City of Brandenburg, 215 S.W.3d 36 (Ky. 2006),

appellants seek refuge in federal cases and in cases from other states. Federal decisions, at least in negligence cases, are fundamentally inapposite because of the marked difference between the federal iteration of Rule 56 and this Court's vast body of law on the Kentucky version of the summary judgment rule.

In both Babbitt and Pile, this Court held that whether the posited superseding cause excused the negligence of the tortfeasor was a question better suited for jury resolution, rather than resolution by the court. In this case, the issue of whether appellee Cornett's falling asleep at the wheel was a substantial factor in causing the injuries sustained by the appellants should be decided by a jury. Many of the cases cited by appellees, particularly those cited by appellee Allstate, are likewise of no avail and indeed support the appellants' position rather than the appellees. For instance, application of the superseding cause doctrine might indeed be appropriate when an intentional or wanton act of the subsequent tortfeasor is at issue (James v. Meow Media is a perfect example—there, the plaintiffs faulted a video game company for the homicidal act of the subsequent tortfeasor). But here, a jury could conclude that appellee Cornett's admitted deviation from the standard of care—she fell asleep at the wheel—set forth in motion a causal chain which culminated in the tragic injuries to Sarah and Ron Cadle and in Jane Cadle's death less than two minutes later.

The adoption of pure comparative fault pervades all cases discussing substantive tort law in Kentucky. The clear trend is toward jury resolution of issues involving the relative fault of parties and other extrinsic factors which contributed to the ultimate results of the parties' course of conduct in a given instance.

Appellees heavily rely upon Donegan v. Denney, for the proposition that the

negligence of Cornett "spent itself" before the Cadle collision took place.[3] Aside from the factual issues described in our principal brief which preclude this determination, Donegan might well be decided differently in 2014 than it was 44 years ago. Nevertheless, the crucial issue is whether the rationale for the principles of law in Donegan has diminished substantially in Kentucky jurisprudence over the course of the past 44 years.

Appellee Allstate notes that the Donegan court decided essentially the same question that this case presents. That notion ignores the vast evolution of tort law in Kentucky since 1970. The Donegan court was required to balance the competing interests because the question required balancing equities because of the harsh result of contributory negligence. Before the adoption of pure comparative fault in Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984) and the General Assembly's enactment of KRS 411.182 a jury and a court had two options: Assign all blame to the tortfeasor or assign none of the blame to the tortfeasor. Pure comparative fault allows juries to use common sense in judgment in deciding where the blame lies for an ultimate result. Summary judgment precluded the jury's ability to consider the facts in the light most favorable to the appellants.

In the light most favorable to the appellants, a jury could conclude that the Cornett collision and the Cadle collision occurred within two minutes of each other. The jury may or may not accept this theory of what transpired on Interstate 64 on Mothers' Day in 2005. However, less than one year ago this Court held in Dick's and Easter Seals that this decision is best left within the province of a jury, not within the province of the court.

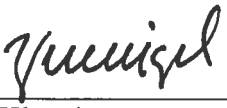
[3] Interestingly, the collision at issue in Donegan occurred in 1966, 48 years ago. Donegan, 457 S.W.2d at 955.

CONCLUSION

The Court of Appeals erred by concluding that appellee Cornett's negligence was excused as a matter of law. Whether Wilma Cornett's admitted negligence was a proximate cause of Jane Cadle's death and Sarah and Ron Cadle's injuries is a question which should be resolved by a jury.

The judgment of the Court of Appeals should be reversed, and this case should therefore necessarily be remanded to the Jefferson Circuit Court for disposition by a jury.

Respectfully submitted,



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