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

vs.

WILMA CORNETT and
ALLSTATE INSURANCE — APPELLEE

BRIEF FOR APPELLEE, WILMA CORNETT

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that ten copies of the foregoing was served via registered mail upon the Clerk of the Supreme Court, 700 Capitol Avenue, Frankfort, Kentucky 40601; and via first-class mail upon Mr. Joseph C. Klausing/Mr. Benjamin J. Weigel, 1500 Starks Building, 455 South Fourth Avenue, Louisville, Kentucky 40202; and Mr. William Clifton Travis, 11507 Main Street, Middletown, Kentucky 40243; and Honorable James Shake, Judge, Jefferson Circuit Court, 7th Floor, Judicial Center, 700 W. Jefferson Street, Louisville, Kentucky 40202; and Mr. Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; this 30 day of September, 2014. This record on appeal was not withdrawn.

JAMES P. DILBECK

STATEMENT CONCERNING ORAL ARGUMENTS

Appellee, Wilma Cornett, submits that because the material facts have been stipulated and the applicable law is clear, unless desired by the Court, Oral Arguments are not necessary.

COUNTER-STATEMENT OF POINTS AND AUTHORITIES

MAY IT PLEASE THE COURT:

COUNTER-STATEMENT OF THE CASE

The relevant material facts of this case are not in dispute and have been previously stipulated by the parties. On the afternoon of May 8, 2005, Wilma Cornett was traveling home to Louisville with her husband on westbound I-64 in Shelby County, Kentucky, when she lost control of her vehicle. The accident occurred at a point where the westbound and eastbound lanes of I-64 are separated by a wide grassy median. Further, separate bridges for westbound and eastbound interstate traffic cross over and span Guist Creek which is approximately 30 feet below the interstate (see photograph of Cornett accident scene attached hereto as "Exhibit 1"). Ms. Cornett's vehicle left the westbound lane and traveled down the embankment coming to rest at the base of the bridge (see Shelbyville Police Department Collision Report attached hereto as "Exhibit 2"), some 21 to 30 feet below/under the I-64 lanes of travel (see Emergency Responder Incident Report attached hereto as "Exhibit 3"). Ms. Cornett's vehicle never entered or came near the eastbound lanes of 1-64. Ms. Cornett's one-car accident did not in any way block or impede traffic in the eastbound lanes of I-64.

In the Appellant's Statement of the Case, they have asserted that "Traffic in the eastbound lanes naturally stopped and response to Ms. Cornett's loss of control and the approaching, oncoming vehicle in the grassy median." However, there is no evidence to support this claim or that there was any approaching traffic in the eastbound lanes of I-64 at the time of Ms. Cornett's accident.

After arriving on the scene, emergency responders made the decision to close and

stop eastbound traffic in order to transport Ms. Cornett and her husband to the hospital (see Shelby County Sheriff's Department Accident Report attached hereto as "Exhibit 4"). Eastbound I-64 traffic then backed up safely and without incident for over 1.3 miles (see Google Map attached hereto as "Exhibit 5"). At that point, as the appellants' vehicle was coming to a stop at the end of the line of traffic, it was rear-ended by a loaded tractor trailer whose driver stated that he did not notice that the traffic had stopped in front of him (see Shelby County Sheriff Accident Report attached hereto as "Exhibit 4"). It is also uncontroverted that the location of Ms. Cornett's one-car accident on westbound I-64 was not even visible from the location of the second accident involving the appellants (see Police scene photograph attached hereto as "Exhibit 6").

After settling with the owner of the tractor trailer, appellants brought this action against Cornett and the plaintiffs' underinsured motorist carrier, Allstate. Counsel for the appellants suggested that the parties expedite discovery and stipulate the material and relevant facts as they were and are not in dispute.

ARGUMENT

THE TRIAL COURT AND THE COURT OF APPEALS CORRECTLY HELD THAT APPELLEE CORNETT'S ONE-CAR ACCIDENT IN THE WESTBOUND LANE OF I-64 WAS NOT A PROXIMATE CAUSE OF THE APPELLANTS BEING REAR-ENDED 1.3 MILES AWAY IN THE EASTBOUND (OPPOSITE) LANES OF I-64.

Summary judgment is appropriate where there are no genuine issues as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56.03. (*Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky., 1991); *Paintsville Hospital v. Rowe*, 683 S.W.2d 255 (Ky., 1985). Proximate cause is a required element of tort liability without which there can be no claim. *Illinois Central Railroad v. Vincent,* 412 S.W. 2d 874 (Ky., 1967). Where the material facts are not in dispute, proximate cause is a question of law. *Cundiff v. City of Owensboro*, 235 S.W. 15 (Ky., 1921); *Pathways, Inc. v. Hammond,* 113 S.W.3d 85 (Ky., 2003). Similarly, where the material facts are not in dispute, the issue of superseding cause is for the court to resolve. *City of Florence v. Chapman,* 38 S.W. 3d (Ky.S.C., 2001). *Miller v. Marymont Medical Center*, 125 S.W.3d 274 (Ky., 2004).

Kentucky courts have decided numerous cases where the issue was whether the negligence which caused an initial automobile accident or condition was a proximate cause of a subsequent motor vehicle accident. Based on the reasoning and rationale in all of those cases, Ms. Cornett's accident was not a proximate cause of the accident involving the appellants' vehicle.

The Kentucky Court of Appeals previously ruled that an automobile accident is not the legal and proximate cause of a subsequent collision which occurred 800 to 1,000 feet behind the initial accident. *Donegan v. Denney,* 457 S.W.2d 953 (Ky.App., 1970). In *Donegan*, cases of soda fell off the rear of a Pepsi truck, scattering over the Watterson Expressway in Louisville. A long line of cars accumulated behind the Pepsi truck, many of which were completely stopped. As a result of the stopped traffic, rear-end collisions involving five vehicles occurred some 800 to 1,000 feet to the rear of the Pepsi truck. The Kentucky Court of Appeals affirmed the trial court's dismissal of the claims against Pepsi and cited the trial judge's holding:

> "I think the Pepsi Cola negligence had spent itself. A good many vehicles had come to a stop, there were cars lined up. . . it is the Court's opinion that Pepsi's negligence had spent itself and that Pepsi Cola cannot be kept in."

Reaching its conclusion in *Donegan*, the Court of Appeals cited the reasoning contained in *Anderson v. Jones,* 213 N.E.2d 627 (Ill.App., 1966) in which driver Jones lost control of his vehicle, crossed a highway median and struck two oncoming cars; that collision caused one of the vehicles struck by Jones to cross the median and block the westbound lanes of the highway. Several cars stopped because of the obstruction in the westbound lanes. One of the stopped cars was struck from behind by defendant Zehr. That car's owner sued both Zehr and Jones whose original negligence had caused the traffic back-up. In absolving Jones, the Illinois court observed:

> "It is quite clear the immediate cause of plaintiff's injuries and damages was the course set in motion by the negligent act of Zehr. The force set in motion by Jones had spent itself. It was in repose. It was quiescent. The incident was

> at an end. The plaintiffs were home free save for the wrongful act of Zehr."

The *Donegan* court went on to state that Pepsi's negligence was too remote and superseded by too many intervening factors to afford a basis for liability against Pepsi for the collisions 800 to 1,000 feet to the rear of the Pepsi truck. The Court of Appeals went on to note that any negligence of Pepsi was superseded in light of so many instances in which motorists had safely stopped between the site of the Pepsi negligence and the locale of the subsequent five car collision.

On several occasions, Kentucky courts have ruled that merely leaving a disabled vehicle partially in a roadway is not the proximate cause of a subsequent accident. In *Greyhound Corporation, et. al. v. White, et. al.*, 323 S.W.2d 578 (Ky., 1958), the court held that, where a Greyhound bus driver had failed to pull a bus completely off the roadway and shortly thereafter another vehicle struck a school bus that had subsequently stopped adjacent to the Greyhound bus, the negligence of the school bus was the proximate superseding cause of the automobile accident and the Greyhound bus was relieved of any liability. In *Lawhorn v. Holloway*, 346 S.W.2d 302 (Ky., 1961), the Kentucky Court of Appeals held that a vehicle left partially in the roadway was not the proximate cause of an accident where the improperly parked vehicle was struck by another vehicle that had a clear opportunity to see and avoid the improperly parked vehicle.

In *Hines, et. al. v. Westerfield*, 254 S.W.2d 728 (Ky., 1953), the court similarly held that leaving a vehicle so that it was extended into the traveled portion of the roadway

was not the proximate cause of a later accident where an unidentified driver attempted to pass said vehicle, came across the center line, and forced another vehicle into a ditch. In that case, the court noted that a proximate cause is that cause which naturally leads to, and which might have been expected to have produced, the result, and that if a cause is remote and only furnished the condition or occasion of the injury, it is not the proximate cause thereof, *Hines* at p. 729.

Unlike the foregoing cases, Ms. Cornett's accident did not impede the Cadle path of travel i.e. the eastbound lanes of I-64. Rather, it was the decision of the emergency medical personnel (in order to better provide first aid) to close the eastbound lanes. Further, in the *Greyhound, Lawhorn,* and *Hines* cases, traffic had not backed up safely for 1.3 miles. Clearly Ms. Cornett's accident was much more remote and separated by many more intervening factors than in those cases, in all of which Kentucky appellate courts ruled that the first accident was not a proximate cause of the second accident.

Finally, in *Deutsch v. Shein*, 597 S.W.2d 141 (Ky., 1980), the Kentucky Supreme Court in discussing proximate cause, specifically adopted the substantial factor test, i.e. the original negligent act must be a substantial factor in bringing about the plaintiff's subsequent harm. The Supreme Court in *Deutsch* specifically referenced the *Donegan v. Denney* case as limiting the responsibility for negligent acts when there was a superseding cause. The Court also cited *House v. Kellerman*, 519 S.W.2d 380, 383 (Ky., 1974) for the proposition that whether a particular act was a superseding cause was a matter of law that should be determined by the court.

Numerous holdings in other jurisdictions comport with Kentucky law with regard

to the issue of proximate causation and superseding cause. In *Cefalu v. Continental Western Insurance Co., et. al.,* 703 NW 2d 743 (Wisconsin App., 2005), the court held that the first accident, a single vehicle roll over, was not a substantial factor in causing the second later accident involving a first responder's vehicle that occurred near the scene of the first accident. The court found that the initial negligence that caused the first one-car collision was "not actively operating" (a.k.a. had spent itself) by the time of the second accident. The court held:

> "We cannot agree that it was a normal consequence of the intervention of emergency personnel or other drivers to then become involved in an accident at a nearby intersection".

(at p. 7).

The court went on to state that if we accept the appellant's position, "then every tortfeasor who causes an initial accident is liable for damages resulting from a second accident even after emergency personnel respond and secure the area."

In *O'Connor v. Nigg*, 838 P. 2d 422 (Mt., 1991), the defendant while operating his vehicle in the eastward lanes of travel on the interstate lost control of his vehicle causing it to overturn and come to rest in the median between the westbound and eastbound lanes of travel. Shortly thereafter, the plaintiff, who was traveling in the opposite westbound direction on the interstate slowed his vehicle as he approached and passed the scene of the defendant's original accident. At that point, he was rear-ended by another vehicle. The Montana Supreme Court upheld the trial court's summary judgment in favor of the defendant involved in the original accident. The court held that the chain of causation

between the defendant's original act of negligence and the plaintiff's collision and damages had been interrupted by the independent, intervening negligence of the third driver, the one who rear-ended the plaintiff.

In *Lewis v. Esselman*, 539 S.W.2d 581 (MO., 1976), the Missouri Court of Appeals upheld the dismissal of an injury claim brought by a person who was injured when he was struck by an automobile whose driver's attention had been distracted by the scene of an earlier two-car collision. The Missouri Court of Appeals held that the negligence of the driver in the prior collision was not a proximate cause of the plaintiff's injuries. See also 8 Am.Jur. 2d Automobiles and Highway Traffic §432 (2007) (citing a number of other cases in which courts have indicated that negligence causing one accident could not be found to have continued as an effective legal cause of injuries received when a subsequently approaching vehicle collided with a vehicle in or near the road as a result of the first accident).

Applying the law as set out in the aforementioned cases to the undisputed and stipulated facts of this case, it is clear that the actions of Ms. Cornett were not the proximate cause of the rear-end collision between the appellants and settling tortfeasor. Ms. Cornett's actions in driving her vehicle from the westbound lane, into the median, and down under the expressway, did not block eastbound traffic. In fact, she never came near or entered onto the eastbound lanes of I-64. Her negligence had "spent itself" and it was "harmless" until it was acted upon by others out of Ms. Cornett's control.

Those intervening factors include the decision of the emergency medical technicians to close the eastbound traffic in order to render first aid. The emergency

responders did not believe it was reasonably foreseeable that the appellants' subsequent accident would occur. Thereafter, traffic backed up safely 1.3 miles until the Cadle vehicle was rear-ended on a clear open stretch of road by the settling tortfeasor. Clearly, the settling tortfeasor's negligence in rear-ending the appellants' vehicle was the sole and proximate cause of that accident.

Appellants' legal theory is that any action of Ms. Cornett (or anyone) that results directly or indirectly in the stoppage of traffic on an adjacent roadway makes that action a proximate cause of any subsequent accident on the adjacent highway no matter the distance, remoteness, or number of intervening factors. However, it is noteworthy that the appellants cite no cases factually similar to this case that support that position. Neither do appellants cite any cases that contradict or overrule the numerous factually similar cases cited by the appellees and relied on by the trial court and Court of Appeals.

Rather, the appellants first argue an EMT Affidavit that the two accidents happened two minutes apart provide a basis of liability against Ms. Cornett. As pointed out by Judge Moore in his majority opinion, "these reports simply note when Shelby County EMS received the calls regarding the Cadle and Cornett accidents, they do not indicate when the respective accidents occurred." Court of Appeals Opinion at 10). It is difficult to believe 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. However, the time between two accidents has never been considered a factor by any of the deciding courts (including the trial court) as to whether the first accident was a legal proximate cause of the second accident. In fact, in a number

of the cases relied upon and cited by the appellee, including *Donegan*, the time between the two accidents was less than two minutes. Regardless of the time it took, traffic stopped safely and without incident for 1.3 miles up until the time of the Cadles' accident.

Next, the appellants attempt to distinguish *Donegan*. Legally, they argue that *Donegan* was rendered before the adoption of comparative negligence. However, *Donegan* has been cited favorably in numerous appellate decisions since the adoption of comparative fault in Kentucky. The appellants then attempt to factually distinguish *Donegan* from the case at bar, i.e. "the negligence in *Donegan* was discrete from the facts of this case: loading and unloading bottles of cola there, falling asleep at the wheel here." However, there is no mention of this distinction as a basis for the holding by the *Donegan* court. The factors relied on by the court in *Donegan* i.e. the number of intervening and superseding acts including the number of cars that safely stopped between the initial incident and the second accident, all apply to this case, and that is what the court in *Donegan* as well as the trial court clearly relied on. Further, the cases cited by the *Donegan* court including the *Anderson* case, all were cases involving two separate automobile collisions.

Next, the appellees argue to severely restrict, if not abolish the trial court's right and responsibility to rule on issues of proximate cause where (as here) the material facts are not in dispute, no matter how remote one occurrence is from another, and without regard to any intervening and/or superseding events between the first and last event.

Appellee Cornette believes this is a radical and unnecessary departure from an

established legal doctrine that, while not often used, has served the judiciary, litigants and society well. The doctrine already has limited applicability.

Proximate cause is a prerequisite for tort liability for negligence to be established. Without proximate cause there is no fault much less comparative fault. As previously set out herein where the material facts are not in dispute, proximate cause is a question of law. *Cundiff; Pathways, Inc.; supra.* Similarly, where the material facts are not in dispute, the issue of superseding cause is for the court to resolve. *City of Florence; supra, Miller v. Merrymont Medical Center; supra.* These cases were all decided post comparative fault. As Judge Acree pointed out in his concurrence, no one seriously questions that there should be a point where an act of negligence becomes so remote and separated by so many intervening and superseding events, that as a matter of law, it is not the proximate cause of the subsequent event. The question becomes whether Judge Shake, and the majority of the Court of Appeals who affirmed Judge Shake's ruling were in error.

As previously set out herein, the facts in this case are far beyond that limit. At best, Ms. Cornett's actions indirectly (it was the first responders decision to close eastbound I-64) caused traffic to back up safely 1.3 miles in the eastbound lanes upon which Ms. Cornett's vehicle never traveled. Thereafter, the appellants' vehicle was rear-ended by the negligent settling tortfeasor. Again, the appellants have cited no cases even remotely factually similar from any jurisdiction that have held otherwise.

The *Dick's Sporting Goods* and *Shelton* cases cited by the appellants do not support the plaintiffs' argument that the doctrine of intervening superseding cause should

be abolished or severely restricted. *Dick's* and *Shelton* both cite summary judgment language from *Steelvest*. Neither involve the issue of proximate and/or superseding cause. Rather they were both premises liability cases in which the courts held that the open and obvious doctrine as a complete bar to recovery was unduly harsh. That ruling is much more akin to *Hilan v. Hays* than anything having to do with the doctrine of intervening and superseding causes.

CONCLUSION

For the reasons stated herein, the trial court correctly held, and the Court of Appeals properly affirmed, that the appellee Cornett's one-car accident was not a proximate cause of the appellants' accident in the opposite lanes of travel 1.3 miles away. Cornett's accident was at best a prior remote act that merely indirectly created a condition for the second accident. The sole proximate cause of the Cadles' accident was the negligence of the settling tortfeasor. Wherefore, the trial court's granting of Summary Judgment should be affirmed.

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