IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 4, 2020 Session

PAUL AFFAINIE ET AL. V. HEARTLAND EXPRESS MAINTENANCE SERVICES, INC. ET AL.

Appeal from the Circuit Court for Davidson County
No. 16C2386 Amanda McClendon, Judge

No. M2019-01277-COA-R3-CV

This appeal arises from a hit–and–run involving a tractor-trailer and a passenger vehicle. The plaintiffs—the car driver and passenger—alleged in their complaint that the defendant trucking company owned the tractor-trailer that collided with their vehicle on the interstate. The plaintiffs also served a copy of the complaint on the car owner's uninsured motorist carrier as an unnamed defendant. Following discovery, the trucking company moved for and was granted summary judgment on the ground that the plaintiffs were unable to establish liability because they were unable to prove that the trucking company owned the tractor-trailer. The court also dismissed the claims against the uninsured motorist carrier because the plaintiffs failed to establish legal liability against the alleged defendant tortfeasor. Plaintiffs appeal. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT JR., P.J., M.S., delivered the opinion of the Court, in which RICHARD H. DINKINS and W. NEAL MCBRAYER, JJ., joined.

Terry R. Clayton, Nashville, Tennessee, for the appellants, Paul Affainie and Ayikuma Adamafio.

C. Benton Patton and Danica R. Grosko, Nashville, Tennessee, for the appellee, Heartland Express, Inc. of Iowa.

Joseph B. Klockenkemper, II, Nashville, Tennessee, for the appellee, State Farm Mutual Automobile Insurance Company.

OPINION

On September 7, 2016, Paul Affainie and Ayikuma Adamafio (collectively, "Plaintiffs") filed a complaint against Heartland Express Maintenance Services, Inc. ("Heartland Maintenance") and Heartland Express, Inc. of Iowa ("Heartland Express") (collectively, "Defendants") in Davidson County Circuit Court. A copy of the complaint was also served on State Farm Mutual Automobile Insurance Company ("State Farm"), Mr. Affainie's uninsured motorist carrier, as an unnamed defendant.[1]

Plaintiffs alleged that on September 9, 2015, they were traveling eastbound on I-24 in Nashville when Defendants' tractor-trailer negligently crossed into Plaintiffs' lane, collided with their vehicle, and then fled the scene of the accident. Defendants and State Farm filed answers denying the allegations and any liability.

Heartland Maintenance moved for and was granted summary judgment on the basis that it was solely a maintenance company and did not own any tractors or trailers. Plaintiffs do not appeal the dismissal of Heartland Maintenance. The case proceeded thereafter with Heartland Express as the only named defendant.

Following discovery, Heartland Express filed a summary judgment motion contending it was entitled to judgment as a matter of law because Plaintiffs had no competent evidence to establish that it owned the tractor (the power unit of a tractor-trailer) that struck Plaintiffs' car. To support its statement of undisputed facts, Heartland Express submitted the deposition testimony of each plaintiff and the affidavit of Troy Wallis, a Heartland Express employee in the risk management department. Each plaintiff testified that they did not see any identifying information on the tractor. Mr. Affainie testified that he never saw the tractor, while Mr. Adamafio testified that he saw the tractor, but it did not have any information on it. However, Mr. Adamafio testified that he saw "Heartland Express" on the back of the trailer.

In his affidavit, Mr. Wallis stated that multiple carriers transported trailers bearing the name "Heartland Express" because Heartland Express regularly interchanged its trailers with other carriers. Thus, Heartland Express contended that because Plaintiffs presented no evidence upon which to establish the owner of the tractor, and it presented evidence upon which to establish that the Heartland Express trailer was being towed by a tractor owned by another motor carrier, Plaintiffs could not establish it owned the tractor.

[1] Pursuant to Tenn. Code Ann. § 56-7-1206(a), any insured intending to rely on the coverage of his or her uninsured motorist carrier is required to "serve a copy of the process upon the insurance company issuing the policy in the manner prescribed by law, as though the insurance company were a party defendant."

As a consequence, Heartland Express asserted that Plaintiffs could not establish that it was liable for the accident.

In response to Heartland Express's summary judgment motion, Plaintiffs submitted the affidavit of Mr. Adamafio, in which he stated that he saw "Heartland Express" written on the door of the tractor. He also stated that after the truck collided with Plaintiffs, it continued eastbound on I-24 toward Atlanta, Georgia. Although there is no documentation in the record to support it, Mr. Adamafio also stated that Heartland Express "caused Heartland Express trailer #25471 to be taken to [a] facility in Atlanta Georgia on September 11, 2015 at 10:48."[2] Based on these facts, Plaintiffs contended that they established a genuine dispute concerning whether Heartland Express owned the tractor.

Heartland Express filed a reply arguing that Mr. Adamafio's testimony and affidavit concerning what he did and did not see on the tractor were directly contradictory; therefore, pursuant to the cancellation rule, his testimony on this fact should not be considered.

The trial court granted Heartland Express's motion for summary judgment, determining that Plaintiffs could not establish Heartland Express's liability for the accident. More specifically, the court ruled:

> In response to the Motion for Summary Judgment, Plaintiff Adamafio has now specifically and materially changed his [deposition] testimony regarding identifying markings on the tractor-trailer unit allegedly involved in the accident. "It is the rule of law in this state that contradictory statements of a witness in connection with the same fact have the result of 'cancelling each other out.'" *Taylor v. Nashville Banner Pub. Co*., 573 S.W.2d 476, 483 (Tenn. Ct. App. 1978).
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> . . .

[2] Plaintiffs claim that Heartland Express produced a service/inspection document during discovery indicating that a Heartland Express trailer was inspected at a facility in Atlanta, Georgia, two days after the accident. The document was not included in the record on appeal, and Heartland Express insists it did not produce the document. Heartland Express states that it destroyed any such records after six months, and Plaintiffs filed this action eleven months after the accident occurred. Heartland Express explained that its record destruction protocol is a customary practice in the trucking industry because, pursuant to the Federal Motor Safety Regulations, a motor carrier is only required to retain records for each of its drivers for "a period of not less than 6 months from the date of receipt." 49 C.F.R. § 395.8(k)(1).

> Proof of the fact of whether or not there was identifying information obtained from the tractor lies solely with one witness, Plaintiff Adamafio. The Affidavit attached to Plaintiffs' response directly contradicts Plaintiff Adamafio's deposition testimony and discovery responses. Pursuant to the cancellation rule, the testimony of Plaintiff Adamafio contained within his Affidavit supporting the Plaintiffs' response should not be considered.
>
> Plaintiffs' Response and Exhibits do not create any genuine issue of material fact that defeats Defendant's Motion for Summary Judgment. The record of service/inspection of the trailer allegedly involved in the accident does not set forth any proof that the tractor was owned by defendant.

Plaintiffs filed a motion to alter or amend the judgment, and the trial court denied the motion.

With the dismissal of Heartland Express, State Farm moved for dismissal of Plaintiffs' claims against it pursuant to Tenn. R. Civ. P. 12.02(6) for failure to state a claim on which relief could be granted. State Farm contended the claims against it as the uninsured motorist carrier failed as a matter of law because Plaintiffs could not establish legal liability against the alleged defendant tortfeasor, Heartland Express. The trial court granted the motion.

Plaintiffs appealed.

STANDARD OF REVIEW

This court reviews a trial court's decision on a motion for summary judgment de novo without a presumption of correctness. *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015). Accordingly, this court must make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Id.*; *Hunter v. Brown*, 955 S.W.2d 49, 50 (Tenn. 1997). In so doing, we consider the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002).

Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. When the party moving for summary judgment does not bear the burden of proof at trial, it may satisfy its burden of production "either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense." *Rye*, 477 S.W.3d at 264 (emphasis in original).

When a motion for summary judgment is made and supported as provided in Tenn. R. Civ. P. 56, the nonmoving party may not rest on the allegations or denials in its pleadings. *Id.* at 265. Instead, the nonmoving party must respond with specific facts showing that there is a genuine issue for trial. *Id.* A fact is material "if it must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993). A "genuine issue" exists if "a reasonable jury could legitimately resolve that fact in favor of one side or the other." *Id.*

ANALYSIS

The dispositive issue on appeal is whether Plaintiffs demonstrated the existence of specific facts that could lead a rational trier of fact to find that Heartland Express owned the tractor involved in the accident.

I. Heartland Express

In a case similar to the one at bar, *Fuller v. Tennessee-Carolina Transportation Company*, the plaintiff filed a negligence action against Tennessee-Carolina Transportation Company ("TCT"), alleging that a tractor-trailer owned by TCT negligently ran the plaintiff's vehicle off the road. 471 S.W.2d 953, 954 (Tenn. Ct. App. 1970). At the trial, the plaintiff's driver testified that when the TCT truck struck his vehicle, he saw information on the trailer that identified the trailer as belonging to TCT, but he saw no identifying information on the tractor. *Id.* The traffic manager for TCT testified that TCT frequently interchanged its trailers with other carriers. *Id.* at 954–55.

TCT moved for a directed verdict, and the trial court denied the motion. *Id.* at 954. This court reversed the trial court, determining that "with [the] evidence of interchange in the record, the inferred fact that the defendant owned the trailer could not be used as a basis for building a further inference that the defendant also owned the tractor." *Id.* at 957. Therefore, this court concluded that "under the evidence presented here there was only one determinative fact established and that was that the trailer was owned by defendant. But this [was] not enough to present to the jury a question of ownership of the tractor." *Id.*

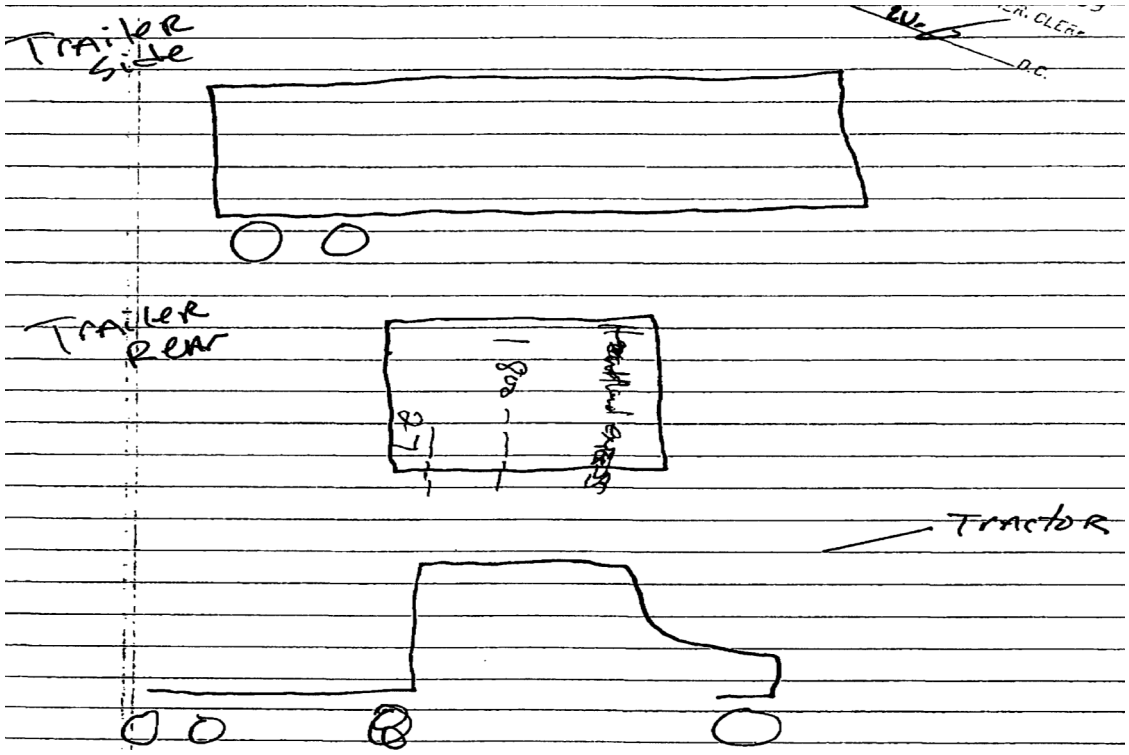
Heartland Express's motion for summary judgment was properly supported by a statement of undisputed facts. Its statement cited testimony from the affidavit of Mr. Wallis, stating that Heartland Express regularly interchanged its trailers bearing the name "Heartland Express" with other carriers. It also cited the deposition testimony of Mr. Affainie and Mr. Adamafio, who testified that they did not see any identifying information on the tractor. Mr. Affainie testified that he saw writing on the back of the trailer. Mr. Adamafio testified as follows:

Q. Did you ever see the tractor long enough, the tractor, the front of the tractor-trailer unit? Did you ever see this part of that vehicle for any period of time?
A. Yeah. I saw he just passed us.
Q. Did you take any of the information—
A. No information here. There was information on the back of the truck.
Q. Was there any information you wrote down or you saw that came from the tractor of the vehicle?
A. It was on the—say that again.
Q. The trailer.
A. Yeah, it was on the trailer, Heartland Express.

Mr. Adamafio was shown a rough sketch of the tractor-trailer truck and asked to identify where he saw "Heartland Express":

Q. I tried to do this with your driver. Maybe we'll get it better. I've drawn, roughly, the side of the trailer.
A. Yeah.
Q. And then a rectangular box that would be the back of the trailer?
A. Uh-huh (affirmative).
Q. You understand that?
A. I understand.
Q. Where did you take the information from?
A. The back right here.

The sketch shown below reveals that Mr. Adamafio saw "Heartland Express" on the trailer but not the tractor:



Relying on the undisputed facts that Plaintiffs did not see "Heartland Express" on the tractor, only the trailer, and that Heartland Express regularly interchanged its trailers with other carriers, Heartland Express sought summary judgment on the basis that Plaintiffs failed to establish that the Heartland Express trailer was being towed by a Heartland Express tractor. Therefore, Heartland Express could not be held responsible for the accident as a matter of law.

To create a genuine issue for trial, it was incumbent upon Plaintiffs to respond to Heartland Express's motion for summary judgment and statement of undisputed facts with specific facts showing that Heartland Express owned the tractor pulling the Heartland Express trailer. In response, Plaintiffs submitted the affidavit of Mr. Adamafio in which he stated:

1. My name is Ayikuma Adamafio, I am over eighteen years of age and have personal knowledge of the facts testified to herein.

2. I was a passenger in the car driven by co-plaintiff, Ayikuma Adamafio on September 9, 2015 **when we were hit by a tractor with the name Heartland Express on the side of the door** pulling a Heartland Express trailer #25471.

3. **I saw the side of the tractor long enough to see the name Heartland Express**.

4. A tractor truck was pulling Defendant Heartland Express trailer #25471 collided with the car I was riding in on September 9, 2015 at 13:25 on I-24 E in Nashville, Tennessee.

5. The Defendant or its agent caused Heartland Express trailer #25471 to be taken to facility in Atlanta Georgia on September 11, 2015 at 10:48.

6. After the collision that is the subject of this lawsuit the Heartland trailer that was pulling the Heartland Express trailer #25471 continued to travel on I-24 E toward Atlanta Georgia.

7. The Heartland tractor that was pulling the Heartland Express trailer #25471 was owned by Defendant, Heartland Express.

(Emphasis added). Significantly, however, Mr. Adamafio's sworn statement that he saw "Heartland Express" on the side door of the tractor directly contradicted his deposition testimony wherein he stated that there was no identifying information on the tractor.

As the trial court correctly noted, "contradictory statements of a witness in connection with the same fact have the result of 'cancelling each other out.'" *Taylor*, 573 S.W.2d at 482 (citations omitted). As further explained in *HCA, Inc. v. American Protection Insurance Company & Industrial Risk Insurers*,

> [t]he question here is not one of the credibility of a witness or of the weight of evidence; but it is whether there is any evidence at all to prove the fact. If two witnesses contradict each other, there is proof on both sides, and it is for the jury to say where the truth lies; **but if the proof of a fact lies wholly with one witness, and he both affirms and denies it, and there is no explanation, it cannot stand otherwise than unproven**. For his testimony to prove it is no stronger than his testimony to disprove it, and it would be mere caprice in a jury upon such evidence to decide it either way.

174 S.W.3d 184, 214 (Tenn. Ct. App. 2005) (quoting *Taylor*, 573 SW2d at 482) (emphasis added). Therefore, Mr. Adamafio's contradictory testimony could not create a genuine dispute as to whether Heartland Express owned the tractor.

Plaintiffs argue, however, that this is not the only evidence they presented. They note that Mr. Adamafio stated in his affidavit that he witnessed the truck responsible for the accident driving in the direction of Atlanta, Georgia, and he referenced a service/inspection document indicating that a Heartland Express trailer was inspected at a facility in Atlanta, Georgia, two days after the accident. Relying on this fact, Plaintiffs argue that a reasonable trier of fact could infer that Heartland Express owned the tractor

involved in the accident and was liable for the accident. We disagree. While a reasonable trier of fact may infer that the trailer being serviced in Atlanta was part of the truck that collided with Plaintiffs, this fact alone does not lead to an inference that Heartland Express owned the tractor pulling the trailer at the time of the accident. Furthermore, the alleged service/inspection document Mr. Adamafio referenced is not in the record on appeal.[3] Thus, his testimony in reliance on a document that was not admitted into evidence and is not in the record constitutes inadmissible hearsay. As such, Plaintiffs cannot rely on it to create a genuine dispute of fact. *See* Tenn. R. App. P. 24(a) ("The record on appeal shall consist of . . . the original of any exhibits filed in the trial court. . . .").

Accordingly, we affirm the trial court's decision to summarily dismiss Plaintiffs' action against Heartland Express.

II. State Farm

As for the trial court's decision to dismiss Plaintiffs' action against State Farm, a plaintiff "who fails to establish legal liability against a defendant tortfeasor cannot impose liability upon her uninsured motorist carrier for the acts of that same tortfeasor." *Winters v. Estate of Jones*, 932 S.W.2d 464, 465–66 (Tenn. Ct. App. 1996) (citing *Hickey v. Insurance Co. of North America,* 239 F. Supp. 109 at 111 (E.D. Tenn. 1965)).

Because Plaintiffs' claims against Heartland Express as the only tortfeasor in this matter have been summarily dismissed, Plaintiffs have failed to state a claim against State Farm on which relief can be granted. Accordingly, we affirm the dismissal of Plaintiffs' action against State Farm pursuant to Tenn. R. Civ. P. 12.02(6).

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Paul Affainie and Ayikuma Adamafio.

FRANK G. CLEMENT JR., P.J., M.S.

[3] As noted in footnote 2, Heartland Express insists all service records concerning the date of the accident were destroyed pursuant to the Federal Motor Safety Regulations before Plaintiffs commenced this action. *See* 49 C.F.R. § 395.8(k)(1).