No. 111987

IN THE COURT OF APPEALS OF THE
STATE OF KANSAS

JUAN A APODACA,
Plaintiff/Appellant,

v.

MARK WILLMORE,
MATTHEW WILLMORE, and
OAK RIVER INSURANCE COMPANY
Defendant/Appellee

BRIEF OF CROSS APPELLEE

APPEAL FROM THE DISTRICT COURT OF SHAWNEE COUNTY,
HONORABLE LARRY D HENDRICKS, JUDGE,
DISTRICT COURT CASE NO. 11 C 1195

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I. NATURE OF THE CASE

This is a personal injury action stemming from an October 18, 2009 accident wherein Plaintiff/Appellant, Juan Apodaca, suffered injury after his vehicle collided with Defendant/Appellee Mark Willmore's truck, which was sideways blocking both lanes of southbound traffic on K-177. Prior to trial, Defendant moved the District Court to enter summary judgment on its behalf. Plaintiff opposed this request, arguing that as a matter of law, Apodaca was not precluded from recovery. Shawnee County District Court Judge, Larry D Hendricks, granted Defendant's motion on March 13, 2014 as to the fire fighters rule, but denied Defendant's motion as to proximate causation, finding it was a question for the jury. (R.V. 7, p. 692). The instant appeal and cross-appeal followed.

II. STATEMENT OF THE ISSUE TO BE DECIDED ON APPEAL

Did the district court err in finding proximate causation a question of fact for the jury?

III. FACTUAL STATEMENT OF THE CASE

Plaintiff/Appellant incorporates his factual statement from his original brief, with emphasis on the following:

The headlights of a witness's vehicle, which had stopped on the side of the road in the north bound lanes, could be seen from over a mile away by Plaintiff/Appellant as he approached the scene. (R.V. 7, p. 685). Believing this was the scene of the accident in the northbound lanes,

Plaintiff intended to drive past the accident in the southbound lanes, cross the median, and then come up behind the accident in the northbound lanes. (R.V. 7, p. 686). Plaintiff was unaware that Defendant's truck had the headlights and taillights turned off. (R.V. 7, p. 686). At approximately 3:42 am, Plaintiff's vehicle struck Defendant's unlit truck, which was blocking the southbound lanes. (R.V. 7, p. 683).

IV. ARGUMENT AND AUTHORITIES

The district court properly concluded that Defendant/Appellee was not entitled to a finding he was not the proximate cause of Plaintiff/Appellant's injuries as a matter of law. Dispute exists over material facts that could affect the case's outcome. These disputed facts, when considered in light most favorable to the Plaintiff, could allow a reasonable jury to find Defendant as the proximate cause of the accident. Therefore, Defendant is not entitled to judgment as a matter of law.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only where the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. K.S.A. 60-256(c). If there is a genuine dispute over a material fact, than the moving party is not entitled to summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" if it "might affect the outcome of the suit under the governing law." *Id*, at 248. The dispute is "genuine" if a reasonable jury could find in favor

of the non-moving party. *Id.* Courts should use caution when granting summary judgment in negligence actions because, in the majority of cases, negligence claims present factual determinations for the jury, not legal questions for the court. *Hauptman v. WMC, Inc.*, 43 Kan.App.2d 276, 283, 224 P.3d 1175 (2010). The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. *Bacon v. Mercy Hosp. of Ft. Scott*, 243 Kan. 303, 306-07, (1988). On appeal, this court reviews the district court's decisions of law de novo. *See David v. Hett*, 293 Kan. 679, 682, 270 P.3d 1102 (2011).

A. Genuine dispute exists over material facts that could affect the outcome of the case.

Defendant/Appellee's argument for summary judgment depends on the factual findings that are under dispute in this case. Defendant attempts to claim Plaintiff is negligent for the accident to relieve himself of liability.

Defendant relies heavily on facts he claims Plaintiff was aware of prior to the accident. (Appellee Brief, p 29-30). Specifically, Defendant claims Plaintiff was aware the southbound lanes of K177 were blocked due to the accident and Plaintiff could see the site of the accident from over a mile away. *Id.* However, these facts are in dispute.

In their brief, Defendant argues Plaintiff could see the sight of the accident from over a mile away. (Appellee Brief, p. 30). Plaintiff denies this fact. Plaintiff admits a witness's vehicle which had stopped in the median of the *northbound* lanes could be seen from over a mile away. (R.V. 7, p. 685). Believing this was

the scene of the accident in the *northbound* lanes, Plaintiff intended to drive past the accident in the southbound lanes, cross the median, and then come up behind the accident in the northbound lanes. (R.V. 7, p. 686). Unbeknownst to the Plaintiff, Defendant's truck was actually in the southbound lanes with the headlights and taillights turned off. (R.V. 7, p. 686).

Defendant argues Plaintiff knew or should have known of the unlit vehicle blocking both lanes of traffic. Plaintiff disagrees, and argues it appeared to him the accident was in the northbound lanes. Whether Plaintiff should have anticipated the location of Defendant's darkened vehicle was actually in the southbound lanes is a factual dispute for a jury to decide. Further, a jury may determine this fact in favor of the Plaintiff. Because the determination of this fact could affect the outcome of the case, it is a material fact. With a genuine dispute over a material fact regarding proximate causation, Defendant is not entitled to judgment as a matter of law.

B. A reasonable jury could conclude that the Defendant's negligent conduct was the proximate cause of Plaintiff's injuries.

In his brief, Defendant makes a factual argument that he is not the proximate cause of the accident. Defendant points out Plaintiff had 6 minutes to think about the accident before arriving at the scene, was suspended after the accident by the police force and two other civilian vehicles had managed to miss crashing into the Defendant's truck.

This is an argument for the jury. A jury could reasonably decide not to give much weight to the two civilian vehicles who avoided the accident, may

disagree with the reasoning behind the officer's suspension, and may give no weight to the Plaintiff having 6 minutes to think about the fact that he was driving to an accident scene. (Appellee Brief, p. 29). Certainly these facts don't entitle Defendant to judgment as a matter of law.

The facts in light most favorable to the Plaintiff would allow a reasonable jury to conclude the Defendant was the proximate cause of the accident and Plaintiff's injuries.

The district court found the Defendant was under the influence of alcohol at the time of the accident. (R.V. 7, p. 684). At 6:02 am, Defendant was given an evidentiary breath test, which determined his blood alcohol level was .103 at the time of the test, which was administered more than 2 hours after the accident. (R.V. 7, p. 686). Subsequent to the accident, Defendant turned off the truck's headlights and taillights, leaving the truck unlit in the dark and blocking both lanes of southbound traffic. (R.V. 7, p. 684). The headlights of a witness's vehicle, which had stopped on the side of the road in the north bound lanes, could be seen from over a mile away by Plaintiff as he approached the scene. (R.V. 7, p. 685). Believing this was the scene of the accident in the northbound lanes, Plaintiff intended to drive past the accident in the southbound lanes, cross the median, and then come up behind the accident in the northbound lanes. (R.V. 7, p. 686). Plaintiff was unaware that Defendant's truck had the headlights and taillights turned off. (R.V. 7, p. 686). At approximately 3:42 am, Plaintiff's vehicle struck Defendant's

unlit truck, which was unlit and blocking both southbound lanes of K177. (R.V. 7, p. 683).

Looking at these facts in light most favorable to the Plaintiff, a reasonable juror could conclude that the proximate cause of the accident and Plaintiff's injuries was Defendant's negligence.

In support of their argument, Defendant cites *Hale v. Brown*, 287 Kan. 320, 197 P.3d 438 (2008). In *Hale*, a truck driven by the defendant was in a single car accident when it struck a tree. *Id.* at 321. Traffic became congested as a result of the accident. *Id.* at 321. Plaintiff stopped his car in the road due to the accident and was injured when a 3rd party motorist who failed to stop in time struck Plaintiff's vehicle. *Id.* at 321. The court found the 3rd party motorist's negligence interrupted the chain of causality, and found the defendant was not the proximate cause of Hale's injuries. *Id.* at 324.

Hale is dissimilar factually to the present case for one major reason; the accident here was not caused by an intervening 3rd party. The *Hale* decision relied on the intervening negligence of the 3rd driver. Here, Plaintiff did not find himself in an accident because of a 3rd driver, but rather because he directly struck Defendant's vehicle. Unlike *Hale*, here there is no 3rd party negligence to break the chain of causality.

While factually dissimilar, *Hale* is still instructive generally on the issue of proximate causation. In rendering its decision, the *Hale* court reasoned

> "Individuals are not responsible for all possible consequences of their negligence, **only those consequences that are probable according to ordinary and usual experience."**

Id. at 332, (citing *Aguirre v. Adams*, 15 Kan.App.2d 470, 472, 809 P.2d 8 (1991) (emphasis added).

A probable and ordinary consequence of leaving an unlit truck in the middle of the highway at night is that another motorist may not see the vehicle and collide with it at a high rate of speed. *Hale* supports a finding Defendant was the proximate cause of Plaintiff's accident and injuries.

Conclusion

This Court should find the district court properly concluded that in this case, proximate causation is a question of fact, and that the Defendant is not entitled to a finding as a matter of law. There are disputed questions of fact that when looked at in the light most favorable to the Plaintiff, would allow a jury to find in his favor.

WHEREFORE, in keeping with the above and foregoing, Plaintiff/Appellant, Juan A. Apodaca, respectfully requests this Court find that the District Court was correct in denying Defendant/Appellee's Motion for Summary Judgment in regards to proximate causation, and affirm the decision.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify two (2) copies of the above Brief of Cross Appellee was deposited in the U.S. Mail, postage prepaid, on this 10th day of December, 2014, addressed to the following:

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And, that sixteen (16) of the above Brief of Cross Appellee was delivered for filing on this 10th day of December, 2014, to the following:

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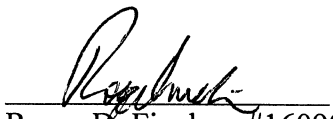

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