RENDERED: MAY 14, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000225-MR

SAMUEL STEWART — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 06-CI-009460

GEORGE L. TAFEL — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Samuel Stewart appeals from the Jefferson Circuit Court's entry of summary judgment in favor of George L. Tafel. Stewart filed a negligence action against Tafel after falling into an uncovered water utility hole on a public right-of-way adjacent to Tafel's property. The circuit court determined that Tafel did not owe any duty to Stewart since it was not Tafel's responsibility to

[1] Judge William L. Knopf completed this opinion prior to the expiration of his term of Senior Judge service on May 7, 2010. Release of the opinion was delayed by administrative handling.

maintain that right-of-way. After our review, we reverse and remand for further proceedings.

Facts and Procedural History

The incident leading to this litigation took place on March 4, 2006, while Stewart was attempting to access the sidewalk in front of Tafel's property at 603 and 605 Caldwell Street in Louisville, Kentucky. Upon leaving the street and crossing over an area of grass located between the street and the sidewalk, Stewart stepped into an uncovered water meter hole and suffered injuries to his left leg, groin, lower back, and neck.

Stewart subsequently filed a personal injury action against Tafel in the Jefferson Circuit Court on October 24, 2006, claiming that Tafel was negligent for failing to replace the cover on the water meter hole. Although Stewart did not specifically allege in his complaint that Tafel was originally responsible for removing the cover, the remaining record reflects that Stewart believed that this was the case. At the time of the subject incident, Tafel's properties were vacant, but Stewart alleges that it appeared that construction work was being done there and that his injuries resulted from Tafel's negligent failure to maintain his property during this work.

On October 22, 2008, Tafel filed a motion for summary judgment against Stewart. In support of his motion, Tafel asserted that Stewart was a trespasser at the time of the subject incident and was consequently not owed a legal duty by Tafel. Tafel further argued that to his knowledge no construction work

was being done on his property at the time of Stewart's injuries and that even assuming that the water meter hole was uncovered, such was the responsibility of the local water utility and any liability ultimately lay with that entity.

In response to Tafel's motion for summary judgment, Stewart produced photographs taken on the day of the subject incident that purported to show that construction work was being done or had been done on Tafel's property. The photographs provided images of areas of the property that had been excavated and marked with caution tape. Stewart argued that these images, at the very least, demonstrated that a genuine issue of material fact existed as to the question of whether work was being done on Tafel's property. Stewart also asserted that the area on which he was injured was part of a public right-of-way and that he therefore was not trespassing at the time of his injuries. Stewart further cited a number of Louisville Metro ordinances for the proposition that Tafel had a duty to maintain the right-of-way abutting his property, with this duty including an obligation to ensure that the water meter hole thereon was covered.

On January 6, 2009, the circuit court entered an "Opinion and Order" granting Tafel's motion for summary judgment. In so doing, the court first rejected Tafel's contention that Stewart was a trespasser and found that he was injured in a public right-of-way. However, the court then concluded that Stewart had failed to show that it was Tafel's duty to maintain that right-of-way, instead finding that if a duty to Stewart had been breached, it had most likely been done by

the local utility responsible for maintaining water meters, *i.e.*, the Louisville Water Company. This appeal followed.

Standards of Review

The standards for reviewing a circuit court's entry of summary judgment are well-established and were concisely summarized by this Court in *Lewis v. B & R Corp.*, 56 S.W.3d 432 (Ky. App. 2001):

> The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." While the Court in *Steelvest*[2] used the word "impossible" in describing the strict standard for summary judgment, the Supreme Court later stated that that word was "used in a practical sense, not in an absolute sense." Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*.

Id. at 436 (internal footnotes and citations omitted).

Analysis

[2] *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991).

As an initial matter, we note that Stewart's reply brief contains a number of attached exhibits that were not presented to the circuit court and are not contained within the record. Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(vii) clearly sets forth that "[e]xcept for matters of which the appellate court may take judicial notice, materials and documents not included in the record shall not be introduced or used as exhibits in support of briefs." CR 76.12(8)(a) permits, but does not require, a brief to be stricken for failure to comply substantially with this rule. In lieu of this penalty, we elect not to strike Stewart's entire brief but instead to disregard that portion therein that relies on the aforementioned exhibits as well as the exhibits themselves. *See U.S. Bank, NA v. Hasty*, 232 S.W.3d 536, 542 (Ky. App. 2007); *Baker v. Jones*, 199 S.W.3d 749, 753 (Ky. App. 2006); *Pierson v. Coffey*, 706 S.W.2d 409, 413 (Ky. App. 1985).

With this established, we now turn to the question of whether the circuit court erred in granting Tafel's motion for summary judgment. As noted above, the court concluded that Tafel did not owe Stewart any duty with respect to the uncovered water meter hole in the public right-of-way abutting Tafel's property. In order for a plaintiff to prevail in a negligence action, he "must prove the existence of a duty, breach thereof, causation, and damages." *Boland-Maloney Lumber Co., Inc. v. Burnett*, 302 S.W.3d 680, 686 (Ky. App. 2009). Whether a duty exists is a question of law for the court and is therefore reviewed *de novo*. *Id.*

Stewart cited the circuit court to a number of Louisville Metro ordinances in support of his position that a duty was owed to him; however, we

agree with Tafel and the circuit court that those ordinances have questionable application here.[3] We also acknowledge that as a general rule it is the duty of the local water utility to maintain a water meter hole such as the one in question. *See Louisville Water Co. v. Cook*, 430 S.W.2d 322, 324 (Ky. 1968); *Lutz v. Louisville Water Co.*, 291 Ky. 31, 163 S.W.2d 29, 30 (1942).

With this said, our courts have long held that "[t]he owner of property abutting upon a public sidewalk is liable to persons injured in consequence of a dangerous condition of the sidewalk created by some affirmative act of the owner or by some act of negligence on his part constituting a nuisance." *Equitable Life Assur. Soc. of U. S. v. McClellan*, 286 Ky. 17, 149 S.W.2d 730, 732 (1941); *see also Rollins v. Satterfield*, 254 S.W.2d 925, 927 (Ky. 1953); *Reibel v. Woolworth*, 301 Ky. 76, 190 S.W.2d 866, 867 (1945); *Hippodrome Amusement Co. v. Carius*, 175 Ky. 783, 195 S.W. 113, 115-16 (1917); *Stephens' Adm'r v. Deickman*, 158 Ky. 337, 164 S.W. 931, 933 (1914); *Covington Saw Mill & Mfg. Co. v. Drexilius*, 27 Ky.L.Rptr. 903, 87 S.W. 266, 267 (1905). Accordingly, there are occasions in which a property owner may be held liable for injuries occurring on an adjoining public pathway.

In this instance, the "dangerous condition" at issue was not on a sidewalk but, rather, a water meter hole located on a public right-of-way that was allegedly left uncovered by Tafel or an agent acting on his behalf. We believe,

[3] Stewart also cites to a number of ordinances in his brief that were not presented to the circuit court below. Thus, the arguments relating to those ordinances are not preserved for our review. *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976).

however, that the aforementioned rule of law is equally applicable under the circumstances presented here given that each situation involves injuries occurring on a public passageway as the result of allegedly affirmative, negligent action on the part of an abutting landowner. Thus, if Tafel or an agent acting on his behalf removed the water meter cover and left it uncovered, this action created a "dangerous condition" that rendered Tafel liable for any injuries that resulted as a consequence of that action.[4]

Returning to the evidence presented in this case, Tafel asserted that he had undertaken no construction work on his property and that such work did not cause the water meter cover to be removed, but the photographs presented by Stewart suggest that at least some work was being done or had been done thereon on the day of the subject incident or beforehand – including excavation near the water meter hole in question – thereby raising the issue of whether Tafel was responsible for the cover's removal. While this evidence is not overwhelming, we believe that it satisfies the requirement of "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Lewis*, 56 S.W.3d at 436 (internal citation omitted). Thus, we believe that the circuit court acted

[4] We also note that § 52.01 of the Louisville Metro Code of Ordinances provides that "[i]t shall be unlawful for any person to open, close, otherwise operate, or damage any valve or any fire hydrant, water pipe, water service, flushing connections, or other public water facilities located anywhere within Louisville Metro or to otherwise tamper" with any of those things without a signed, written permit from the Louisville Water Company.

prematurely in granting Tafel's motion for summary judgment and reversal of that decision is merited.[5]

Conclusion

For the foregoing reasons, the summary judgment entered by the Jefferson Circuit Court is hereby reversed and this matter remanded for further proceedings.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Joseph M. Longmeyer
Louisville, Kentucky

BRIEF FOR APPELLEE:

Ryan N. Pogue
Louisville, Kentucky

[5] Having said this, this opinion should not be read as foreclosing any future summary judgment motions once additional discovery is conducted.