

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000933-MR

ERIN STEPHENS, A MINOR,
BY AND THROUGH HER
MOTHER AND NEXT FRIEND,
DEBORAH BELLOMY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 07-CI-03158

RICHARD MCCULLOUGH;
DEWAYNE CAUDILL; AND
BONNIE JEAN MCCULLOUGH

APPELLEES

OPINION
REVERSING AND REMANDING

** ** *

BEFORE: LAMBERT, STUMBO, AND WINE, JUDGES.

STUMBO, JUDGE: Erin Stephens appeals from a Fayette Circuit Court summary

judgment in favor of Dewayne “Dank” Caudill and Bonnie Jean McCullouch.¹

Erin contends that Dewayne and Bonnie are liable for the injuries she sustained when Richard McCullouch² shot her. Following a careful review of the record, we find summary judgment was inappropriate and reverse and remand this case to the trial court.

The events surrounding this appeal occurred in 2006, when Richard was fourteen-years old. At that time, he primarily resided with his mother, Bonnie, and her boyfriend, Dewayne. Several nights a week Richard stayed with his grandmother, Mary Doan, because Bonnie and Dewayne both worked third shift. Mary regularly drove Richard to appointments and events. She took him to the doctor and participated in many of his activities. Mary actually maintained a limited guardianship of Richard for medical and school related purposes.

Although Richard lived in Dewayne’s home, Dewayne did not participate in child rearing activities. He did not discipline Richard or make decisions concerning his welfare. Dewayne, however, repeatedly instructed Richard not to touch his weapons.

¹ It is uncommon for our Court to use parties’ first names in cases that do not contain issues related to family law. Nonetheless, in this opinion we use these designations to differentiate between the parties with the same last name.

² The heading of this case has Richard’s last name spelled McCullough. The correct spelling is McCullouch, however, the Notice of Appeal has it spelled McCullough and we are bound by that spelling for the heading.

Dewayne was an avid gun owner. As a way to fit in with him, Richard requested and received his own handgun. Dewayne and Richard hunted together and went to the gun range to practice. Weapon education and practice became a major part of their relationship.

On July 25, 2006, Dewayne and Bonnie were both working. Bonnie called Mary to tell her that Richard was spending the night at a friend's house. Throughout the afternoon and evening, Richard and several friends rode their bikes and played in the neighborhood. When Mary was unable to contact Richard on his mobile phone, she drove by Bonnie and Dewayne's home where she found Richard and several kids. She ordered Richard and his friends to immediately leave.

Although Erin Stephens had been playing with the group earlier in the day, she went home to wash dishes. She was not in the home when Mary ordered the kids to leave. After her chores were complete, Erin once again joined the group and they all went back to the house.

Richard went into Dewayne and Bonnie's room and retrieved Dewayne's loaded .357 magnum handgun from the nightstand. It is uncontested that the gun was hidden from view behind a jar and was in a holster with a hammer guard in place. Richard left Dewayne and Bonnie's room with the handgun. Erin received a call on her cell phone. Richard asked who was on the phone and then shot Erin in the hand.

Erin, through her mother, filed a claim against Richard, Dewayne, Bonnie, and Mary. On February 23, 2009, the trial court entered summary judgment in favor of Mary. On April 23, 2009, the trial court entered summary judgment in favor of Dewayne and Bonnie. Erin appeals from the April 23, 2009 order.

The standard of review on appeal of a 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. Kentucky Rules of Civil Procedure (CR) 56.03 “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476, 480 (1991). Summary “judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances.” *Steelvest*, 807 S.W.2d at 480, citing *Paintsville Hospital Co. v. Rose*, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted “[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor” *Huddleston v. Hughes*, Ky. App., 843 S.W.2d 901, 903 (1992).

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996).

We find that summary judgment was improperly granted. Erin brought suit alleging negligence, negligent supervision, and negligent failure to secure a handgun. There are too many genuine issues of material fact in this case to grant summary judgment.

Whether it was foreseeable that Richard would disobey the rules in regard to being in the home without adult supervision and handling Dewayne's firearms is clearly a question for the jury. The evidence in the record indicates that the jury could find that Dewayne and Bonnie knew that Richard had been in the home when he was not supposed to be, that Richard and Dewayne were avid gun owners and users, that Dewayne knew his own handgun was both loaded and unsecured, that Richard knew where Dewayne's handgun was hidden because Richard had cleaned and stowed the gun for Dewayne in the past, and that Dewayne and Bonnie were negligent in supervising Richard.

Also, that Dewayne is not Richard's biological or step-parent is irrelevant. A jury could find that because Dewayne was instrumental in teaching Richard how to properly use firearms, he assumed the duty to suitably instruct and supervise Richard. There are simply too many questions of fact that should be decided by the jury, not by the trial court.

Based on the above, we reverse and remand this case for a trial on the merits.

ALL CONCUR.

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