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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001289-MR

DERRICK WALLACE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 08-CI-06446

THOROUGHbred HOSPITALITY, LLC,
D/B/A CROWNE PLAZA HOTEL AND
DANIEL BILLINGS

APPELLEES

AND

NO. 2010-CA-001290-MR

RANDALL COMBS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 08-CI-06447

THOROUGHbred HOSPITALITY, LLC,
D/B/A CROWNE PLAZA HOTEL AND
DANIEL BILLINGS

APPELLEES

AND

NO. 2010-CA-001458-MR

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 08-CI-06447

THOROUGHbred HOSPITALITY, LLC,
D/B/A CROWNE PLAZA HOTEL

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, STUMBO, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: Derrick Wallace, Randall Combs, and the Lexington-Fayette Urban County Government (hereinafter “LFUCG”) appeal the June 25, 2010, order of the Fayette Circuit Court granting the motion for summary judgment made by Thoroughbred Hospitality, LLC, D/B/A Crowne Plaza Hotel (hereinafter “Thoroughbred Hospitality”). These consolidated appeals involve the right of Wallace, Combs, and LFUCG to recover against Thoroughbred Hospitality for injuries caused to Wallace and Combs by Daniel Billings, a patron of the Crowne Plaza Hotel,¹ incurred while they were subduing and arresting him. We conclude that the trial court properly granted Thoroughbred Hospitality’s motion for summary judgment because the Firefighter’s Rule is a complete defense to Thoroughbred Hospitality’s liability. Hence, we affirm.

¹ The appellant is Thoroughbred Hospitality; the entity is the Crowne Plaza Hotel.

FACTUAL AND PROCEDURAL BACKGROUND

On December 20, 2007, Shepherd Communications, a Lexington company, held its holiday party at the Crowne Plaza Hotel, which is operated by Thoroughbred Hospitality. The party took place in part of the Colonial Ballroom and was the only party in the ballroom that evening. At approximately 8:00 p.m., Crowne Plaza Hotel management called the police because an unidentified person broke a piece of glass with a beer bottle. By the time the police arrived, however, the incident had been handled. Then, Shepherd Communications asked hotel management if they could continue the party and were allowed to move it to Bogart's Bar, a hotel lounge, which is part of the Crowne Plaza hotel and located on the hotel premises.

At around 11:00 p.m., another disorder call was made to the police by Crowne Plaza management and security. They asked the police to respond to another situation. The police, including Wallace and Combs, discovered a party getting out of hand at Bogart's Bar. The police then walked through Bogart's Bar to show a police presence. But problems persisted, and Crowne Plaza Hotel security requested police assistance with Daniel Billings, an attendee at the Shepherd party. The police asked Billings and his wife to leave the premises, but they continued to try to walk back into the bar. At this point, the police escorted the Billingses outside. Later, the police again asked the Billingses to leave when the couple was observed in the parking lot.

Meanwhile, another incident occurred in the front of the hotel.

Crowne Plaza management and security again requested police assistance at that location. As they responded to that request, police noticed that the Billingses were trying, once more, to re-enter the hotel, and the police once more instructed them to leave the hotel premises. At this juncture, Mrs. Billings began to curse the police and waive her middle finger. Based on these actions, the police decided to place her under arrest and charge her with criminal trespass and disorderly conduct. As his wife was being arrested, Billings interfered with the arrest and charged Officer Combs. Additionally, Billings assaulted Officer Wallace as the officer tried to move Billings out of the area.

Wallace and Combs sued Thoroughbred Hospitality, among others, for injuries incurred by them while dealing with Billings. Because Wallace and Combs were engaged in workers' compensation proceedings with LFUCG, it too intervened in the action to protect its workers' compensation subrogation interest. Even though LFUCG was dismissed from *Wallace v. Thoroughbred Hospitality, LLC, et al.*, Civil Action No. 08-CI-06446, following a transfer of its subrogation rights, it still appeals the trial court's order granting summary judgment.

Based on the Firefighter's Rule, Thoroughbred Hospitality moved for summary judgment. After the parties briefed the issues and had oral arguments, the trial court granted the summary judgment motion because it found that the Firefighter's Rule barred the appellants' claims. Wallace, Combs, and LFUCG all

separately appealed the trial court's order. On December 9, 2010, the Kentucky Court of Appeals granted a motion to consolidate the three appeals.

STANDARD OF REVIEW

Summary judgment is appropriate when “it appears . . . impossible for the [non-moving party] to produce evidence at the trial warranting a judgment in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). To review the correctness of the trial court's grant of summary judgment, we are mindful that summary judgment is only appropriate if Thoroughbred Hospitality showed that the appellants “could not prevail under any circumstances.” *Id.* Further, we note that when ruling on a motion for summary judgment, the trial court must examine the evidence in the light most favorable to the non-movant. *Id.* Therefore, an appellate court reviewing a grant of “summary judgment [must determine] whether the trial court correctly found that there were no genuine issues [of] material fact[.]” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Since findings of fact are not at issue, the trial court's decision is entitled to no deference. *Id.* And, as such, an appellate court reviews grants of summary judgment *de novo*. *Baker v. Weinberg*, 266 S.W.3d 827, 831 (Ky. App. 2008).

ISSUE

The issue is whether the trial court correctly granted the summary judgment motion when it determined that the Firefighter's Rule is applicable and acts to protect Thoroughbred Hospitality from liability for the injuries suffered by

the police officers when they arrested an intoxicated patron on the premises of the appellee's hotel, the Crowne Plaza. Furthermore, LFUCG suggests that the personal injury herein derived from an assault on the police officers resulting from Thoroughbred Hospitality's violations of the Dram Shop Act.

In contrast, Thoroughbred Hospitality maintains that the Firefighter's Rule provides a defense to parties who ask the police to respond to a situation that is dangerous to the public. Consequently, Thoroughbred Hospitality states that the distinctive feature of the case is based on the fact that the Crowne Plaza management and security summoned the police to handle disorderly conduct at the hotel. They contend that the summoning of the police was appropriate because it is the role of the police to keep order. And Thoroughbred Hospitality maintains that since the resulting injuries were a direct consequence of the police exercising their police power, the Firefighter's Rule bars any possible liability for them. In sum, the appellee asserts that the Firefighter's Rule is a prohibition against injury claims by police officers, who as a part of their occupation, respond to a situation, which requires them to engage in a specific risk, and they suffer injuries because of that risk.

ANALYSIS

Therefore, this case requires us to discern the applicability of the previously-called "Fireman's Rule" (herein "Firefighter's Rule"). The Firefighter's Rule, as it applies in this state, was enunciated in *Buren v. Midwest Industries, Inc.*, 380 S.W.2d 96, 97-98 (Ky. 1964), as follows:

[As] a general rule the owner or occupant is not liable for having negligently created the condition necessitating the fireman's presence (that is, the fire itself), but may be liable for failure to warn of unusual or hidden hazards, for actively negligent conduct and, in some jurisdictions, for statutory violations "creating undue risks of injury beyond those inevitably involved in fire fighting." (quoting *Krauth v. Geller*, 31 N.J. 270, 157 A.2d 129, 131 (N.J. 1960)).

In *Fletcher v. Illinois Central Gulf Railroad Co.*, 679 S.W.2d 240 (Ky. App. 1984), the Court of Appeals extended the rule to police officers. The appellants do not challenge the merits of the Firefighter's Rule but rather its application to the facts of this case.

In *Sallee v. GTE South, Inc.*, 839 S.W.2d 277, 279 (Ky. 1992), the Kentucky Supreme Court enunciated three necessary conditions for the application of the Firefighter's Rule as adopted in Kentucky:

1) The purpose of the policy is to encourage owners and occupiers, and others similarly situated, in a situation where it is important to themselves and to the general public to call a public protection agency, and to do so free from any concern that by so doing they may encounter legal liability based on their negligence in creating the risk.

2) The policy bars public employees [from asserting a claim for negligence](firefighters, police officers, and the like) who, as an incident of their occupation, come to a given location to engage a specific risk; *and*

3) The policy extends only to that risk. (Footnote omitted).

The appellants concede that the public policy purpose of the rule cited in the first condition above was met, at least with regard to the initial call, made by Crowne Plaza Hotel personnel. Nevertheless, the appellants argue that the second and third prongs were not satisfied because the police officers must be called “to a given location to engage in a specific risk,” and “the policy only extends to that risk.”

Id.

Here, appellants claim that the multiple requests for assistance after the initial request by Crowne Plaza at different locations on hotel premises obviated the applicability of the Firefighter’s Rule. In essence, they assert that once the police dealt with the initial call concerning the broken glass in the ballroom, the remaining requests for help at other hotel locations rendered the Firefighter’s Rule inapplicable.

We cannot agree with this logic, however. As we interpret the rule, the three conditions for the applicability of the Firefighter’s Rule in *Sallee* were met in the instant case. As relates to the first condition of the rule, the situation was one where it is important for the general public to be kept safe and for the land owner to be empowered to call a public protection agency. The second condition was also satisfied. Here, public employees (the police officers), as part of their occupation, came to a given location (the Crowne Plaza Hotel) to engage in a specific risk (handling people who are intoxicated and disorderly). The fact that they were called several times and the incidents occurred at different locations in the hotel does not alter the fact that the police were called to protect the public by

exercising their police powers. Finally, the third condition, that is, the policy extends only to the risk arising from the exercise of their occupation is also met. Although it is unfortunate that Wallace and Combs were injured in the performance of their job as police officers, these injuries are the result of risks intrinsic to the exercise of this police power. Hence, the Firefighter's Rule bars liability on the part of Thoroughbred Hospitality.

To imply that because Crowne Plaza Hotel personnel called them more than once that evening and also asked them to respond to different parts of the facilities' premises would render the Firefighter's Rule inapplicable is problematic. Such reasoning would not only make the rule meaningless but it also directly controverts the rationale behind the rule. Parties should not have to worry about liability when requesting help from public employees to perform their duties. Appellant's interpretation of the rule so narrows the rule that the rule is eliminated.

The applicability of the Firefighter's Rule here becomes obvious when one considers the ramifications of the appellants' argument. The argument that the subsequent incidents were not covered by the Firefighter's Rule leads to the absurd conclusion that an entity that serves the public is allowed only one call to one place at the site for the Firefighter's Rule to apply. Arguments, fights, and public brawls often occur over a significant time period and at different places in a location. But police officers are still mandated to respond to the disorder over this time period and at the various spots it is occurring. In addition, the public must have confidence in their ability to ask for police assistance.

Moreover, the appellants make the argument that an exception, “continuing active negligence,” under *Buren* obviated the application of the Firefighter’s Rule. They assert that allowing the party to continue after the broken glass incident was possibly negligent because the police were dealing with drunkenness not disorderly conduct. “Continuing active negligence” refers to “new negligence that is subsequent conduct after the [police] arrive[] on the premises.” *Hawkins v. Sunmark Industries, Inc.*, 727 S.W.2d 397, 399 n.1 (Ky. 1986). The factual scenario herein is one where Crowne Plaza Hotel management and security asked the police for assistance several times over the evening. One request by Crowne Plaza personnel was to have Billings removed from the premises and prevent his re-entry. The police never allowed Billings to return so the Hotel had no opportunity for continuing negligence on their part. There is no suggestion that Crowne Plaza ever interfered with the actions of the police nor that anyone but the police should have handled the disorderly conduct.

Appellants cite to *Sallee* to support this position but a closer look at that case indicates its lack of relevance. In *Sallee* a paramedic responded to a call to treat and transport an assault victim. After loading the injured party into the ambulance, the paramedic tripped and severely twisted his ankle. He sued the cable company for improperly filling a trench, which was the cause of his injury. So, in that case, the party being sued was not in the class of “owners and occupiers” or persons needing protecting, as required in the first element of the Firefighter’s Rule, but instead the company laying underground cable. In addition,

the paramedic's injury was not a result of a risk associated with the delivery of his services. Therefore, the Firefighter's Rule did not protect against the cable company's liability. Our facts starkly contrast with the *Sallee* facts because the hotel (an owner/occupier) called for the help and the police officers were injured in arresting a person for disorderly conduct (a risk associated with their services). *Sallee*, 839 S.W.2d at 279.

Regarding LFUCG's assertion that this situation implicates "Dram Shop" liability under Kentucky Revised Statutes (KRS) 413.241(2), and therefore, the Firefighter's Rule does not apply, our examination reveals that this issue was not preserved for review. Before an issue may be raised on appeal, "a trial court must first be given the opportunity to rule on a question for which review is sought." *Taxpayer's Action Group of Madison County v. Madison County Bd. of Elections*, 652 S.W.2d 666, 668 (Ky. App. 1983). If the trial court has not been given an opportunity to rule on the question, the argument is unpreserved for appeal. *Hoy v. Kentucky Industrial Revitalization Authority*, 907 S.W.2d 766, 769 (Ky. 1995).

Furthermore, as provided in CR 76.03(8):

A party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion.

LFUCG's prehearing statement states the issue as "[d]id the circuit court err in granting summary judgment to defendant under the Fireman's Rule?" Because the

prehearing statement did not mention the Dram Shop Act and because LFUCG did not move this Court for good cause to consider the claim under Dram Shop liability, the issue is not properly before the Court.

CONCLUSION

Thus, we concur with the trial judge's grant of Thoroughbred Hospitality's summary judgment motion and hold that the three conditions for the applicability of the Firefighter's Rule were satisfied and affirm the order of the Fayette Circuit Court.

ALL CONCUR.

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