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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000084-MR

THOMAS BIESTY — APPELLANT

v.

APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 09-CI-00287

WILTON FLYNN AND
LAMON FLYNN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; COMBS AND NICKELL, JUDGES.

NICKELL, JUDGE: Thomas Biesty has appealed from the Estill Circuit Court's entry of summary judgment in favor of Wilton Flynn and his brother, Lamon Flynn. He contends the trial court erroneously found the Farm Animal Activities

Act[1] ("the Act") insulated the Flynns from liability for Biesty's injuries sustained while training Lamon's horse on Wilton's farm. We affirm.

The facts of this case are relatively simple and predominantly undisputed. Biesty is an experienced horse trainer, having honed his craft over a nearly twenty-year period. During his deposition, Biesty described his immense experience working with all breeds of horses at farms across the country, stating he had a God-given talent for training horses that very few people possessed.

In 2008, Biesty agreed to work with two of Wilton's Palomino horses at Wilton's farm in Estill County. During the course of that training, Biesty undertook the training of Spirit Aces High, a black stud Tennessee Walker stallion belonging to Lamon. Wilton was not present during any of the training sessions, but Lamon observed Biesty's work on several occasions.

Biesty worked with Spirit Aces High for five or six days doing "ground work," a type of training which does not require saddle riding, and another five or six days riding the horse. He stated that each time he rode Spirit Aces High, the horse would attempt to buck him off. However, because he was an experienced rider, Biesty was able to remain in the saddle and regain control of the horse. On October 30, 2008, Biesty rode Spirit Aces High out of the normal training area, down a driveway, and toward the front gate of the property to where Lamon was standing and observing the progress Biesty was making with the horse. As Biesty turned the horse to return to the barn and training area, Lamon pushed

[1] Kentucky Revised Statutes (KRS) 247.401 *et seq*.

the gate open. The twelve-foot long metal gate dragged the gravel driveway and made a loud scraping noise.

Biesty stated he had previously requested that Lamon refrain from making noises or sudden movements while he was training Spirit Aces High. Although he stated Lamon did not comply with his requests, Biesty continued training the horse. Lamon denied such conversations occurred. Nevertheless, Biesty opined that Lamon had not opened the gate intentionally to cause the noise and spook the horse, but rather that Lamon was careless about making loud noises on the farm.

According to Biesty, the loud noise from the dragging gate spooked Spirit Aces High, causing the horse to rear up and throw Biesty to the ground. The fall resulted in Biesty sustaining personal injuries including a herniated disc, a pinched nerve in his left elbow, bruised ribs, hyperextension of his right shoulder, ripped cartilage in his right hand, and numerous broken teeth. These injuries required surgeries to repair his neck and elbow, and Biesty testified he had scheduled an additional surgery to repair his right pinky finger. Biesty filed suit against Lamon and Wilton seeking damages for his injuries. He alleged Wilton failed to ensure that his farm was safe for training horses or to otherwise maintain a safe working environment, more specifically for failing to procure a "round pen" in which to train Spirit Aces High. He contended Lamon acted in a reckless, careless or negligent manner which caused Biesty's injuries. Wilton and Lamon separately

answered the complaint, denying liability and asserting several affirmative defenses.

Following a short period of discovery, Lamon moved for summary judgment. Approximately one month later, Wilton likewise requested summary judgment. Following a hearing, the trial court entered a twelve-page order granting summary judgment to both defendants on March 12, 2010, finding the Act insulated them from liability. Specifically, the trial court found that since KRS 247.4015(8)(b) states a farm animal's unpredictable reaction to sounds is an inherent risk in farm animal activities, then, pursuant to KRS 247.4013, Wilton and Lamon were under no duty to eliminate such inherent risks which are "reasonably obvious, expected, or necessary to participants engaged in farm animal activities." The trial court also found that because Biesty knew the front gate of Wilton's farm caused a loud noise each time it opened, the condition of the gate could not be deemed a latent defect requiring warning signs to be posted.

On April 6, 2010, the trial court granted Biesty's motion to alter, amend or vacate its March 12, 2010, order, finding its earlier order had been partially based on statements of counsel rather than on deposition testimony from either defendant. The trial court allowed the parties to conduct additional discovery. Wilton and Lamon were subsequently deposed and testified consistently with the statements of their counsel upon which the trial court had previously relied in making its March 10, 2010, ruling. Both renewed their

motions for summary judgment which were granted by written order entered on December 21, 2010. This appeal followed.

The standard of review governing appeals from the grant of summary judgment is well settled. We must determine whether the trial court erred in concluding there was no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, 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." CR 56.03.[2] In *Paintsville Hospital Co. v. Rose,* 683 S.W.2d 255 (Ky. 1985), the Supreme Court of Kentucky held that for summary judgment to be proper it must be shown that the adverse party cannot prevail under any circumstances. The Supreme Court has also stated, "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent 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).

Appellate courts are not required to defer to the trial court when factual findings are not at issue. *Goldsmith v. Allied Building Components, Inc.,* 833 S.W.2d 378 (Ky. 1992). "The record must be viewed in a light most favorable to

[2] Kentucky Rules of Civil Procedure.

the party opposing the motion for summary judgment and all doubts are to be resolved in his favor [citation omitted]." *Steelvest,* 807 S.W.2d at 480. However, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* at 482. *See also* Philipps, *Kentucky Practice,* CR 56.03, p. 418 (6th ed. 2005).

KRS 247.4013 defines the scope and policies of the Act as follows:

> KRS 247.401 to 247.4029 are intended to aid courts and juries in defining the duties of persons responsible for farm animals to others who have chosen to participate in farm animal activities. KRS 247.401 to 247.4029 also establish the policy of the Commonwealth of Kentucky that persons do not have a duty to eliminate risks inherent in farm animal activities which are beyond their immediate control if those risks are or should be reasonably obvious, expected, or necessary to participants engaged in farm animal activities. Furthermore, KRS 247.401 to 247.4029 establish the policy that the sponsor, instructor, or other professional engaged in farm animal activities who breaches a duty to a farm animal activity participant and causes foreseeable injury to the participant shall be responsible for the injury in accordance with other applicable law.

KRS 247.402, in relevant part, provides:

> (1) The inherent risks of farm animal activities are deemed to be beyond the reasonable control of farm animal activity sponsors, farm animal professionals, or other persons. Therefore, farm animal activity sponsors, farm animal professionals, or other persons are deemed to have the duty to reasonably warn participants in farm animal activities of the inherent risks of the farm animal activities but not the duty to reduce or eliminate the inherent risks of farm animal activities. Except as provided in subsections (2) and (3) of this section, no

participant or representative of a participant who has been reasonably warned of the inherent risks of farm animal activities shall make any claim against, maintain an action against, or recover from a farm animal activity sponsor, a farm animal professional, or any other person for injury, loss, damage, or death of the participant resulting from any of the inherent risks of farm animal activities.

(2) Nothing in subsection (1) of this section shall prevent or limit the liability of a farm animal activity sponsor, a farm animal professional, or any other person if the farm animal activity sponsor, farm animal professional, or person:

(a) Provided the equipment or tack, and knew or should have known that the equipment or tack was faulty, and the equipment or tack was faulty to the extent that it contributed to the injury;

(b) Provided the farm animal and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the farm animal activity and to safely manage the particular farm animal based on the participant's representations of the participant's ability;

(c) Owns, leases, has authorized use of, rents, or otherwise is in lawful possession and control of the land or facilities upon which the participant sustained injuries because of a dangerous latent condition which was known or should have been known to the farm animal activity sponsor, farm animal professional, or person and for which warning signs have not been conspicuously posted;

(d) Commits an act or omission that constitutes willful or wanton disregard for the safety of the participant, and that act or

> omission caused the injury; or
>
> (e) Negligently or wrongfully injures the participant.
>
> . . . .

The trial court determined that none of the exceptions set forth in KRS 247.402(2) was applicable to the case at bar, specifically finding that utilization of any of them would undermine the Legislative intent of the Act. Conversely, Biesty argues the trial court's ruling effectively defeated the stated purpose of the Act by shielding the Flynns from liability for their negligent or wanton acts. He further contends genuine issues of material fact were presented, thus precluding the entry of summary judgment. We disagree.

It is undisputed that Biesty was a farm animal participant and the Flynns were farm animal activity sponsors as those terms are defined in the Act. Thus, under the express terms of KRS 247.402(1), the Flynns had a duty only to warn Biesty of the inherent risks associated with farm animals, but no such duty to eliminate those risks. Because it is further undisputed that Biesty was well aware of the risks associated with training horses—a fact made more evident upon review of his discovery deposition—it is not argued that the Flynns breached their statutorily imposed duty to warn. Therefore, the Flynns are presumed to be insulated from liability for Biesty's injuries under the Act, and Biesty's claims may stand only if one of the exceptions enumerated in KRS 247.402(2) is applicable. We agree with the trial court that they do not.

Biesty advances no argument on appeal urging application of the exceptions set forth in KRS 247.402(2)(a) or (b), nor did he present such arguments to the trial court. Thus, we need not determine whether either is applicable. Further, although Biesty argued below that the noisy gate constituted a dangerous latent defect and the Flynns failed to warn him of the danger, he has apparently abandoned that argument on appeal. Consequently, we need not pass on the question of the proper application of the exception set forth in KRS 247.402(c) to the facts at bar. Rather, Biesty presents arguments only on the exceptions set forth in KRS 247.402(2)(d) and (e). He contends the Flynns willfully or wantonly disregarded his safety and thereby caused his injuries. He additionally argues Lamon acted negligently in dragging the gate across the ground and causing the loud noise to which Spirit Aces High reacted negatively. He contends genuine issues of material fact existed as to these matters and, thus, summary judgment should not have been granted.

In support of his arguments, Biesty cites the unpublished opinion of this Court, *Swanstrom v. Seadler*, 2010 WL 4294684 (Ky. App. 2010)(2010-CA-000059-MR). In *Swanstrom*, a veterinarian was hired by Seadler to sedate a horse. Soon after administering the sedative, the horse fell against a barn stall door erected by Seadler which collapsed under the weight of the horse, thereby causing injuries to the veterinarian. This Court held that the trial court erred in shielding the Seadlers from liability under the Act since genuine issues of fact existed as to whether the faulty stall door constituted a latent defect requiring adequate

warnings, whether Swanstrom's injuries were caused by the alleged defects, and whether Swanstrom was comparatively negligent. Biesty argues similar factual questions were presented to the trial court herein, thereby precluding entry of summary judgment in favor of the Flynns. We believe Biesty's reliance on *Swanstrom* is misplaced.

The holding in *Swanstrom* turned on the question of whether "defects in the design, construction, installation and maintenance of the barn were latent defects that were known or should have been known to the Seadlers." *Id*. at *2. We noted that latent defects are imperfections which are "not discoverable by a reasonable inspection." *Id*., quoting Black's Law Dictionary 428 (8th ed. 2004). The sole argument advanced on appeal regarding a defect in Wilton's property is the lack of a round pen in which to train Spirit Aces High.[3] In his deposition, Biesty admitted to training Spirit Aces High in the absence of the purportedly requested round pen. Although he stated such a pen was necessary for training every horse, he continued training Spirit Aces High for a substantial period of time without securing the pen. Biesty was clearly aware of the lack of this piece of training equipment and, because the absence of such a relatively large structure is undoubtedly open and obvious, he cannot now reasonably argue that such constituted a latent defect. Thus, the holding in *Swanstrom* is inapposite to the matter at bar.

[3] As we noted earlier, Biesty has seemingly abandoned his argument that the noisy and sagging gate constituted a latent defect.

Biesty's allegation seems to be that the Flynns breached their duty to exercise ordinary care by failing to provide him with a safe working environment, including the round pen with a sandy- or sawdust-covered base to contain the horse and ease any falls. Biesty contends such a breach constituted an act or omission showing a "willful or wanton disregard for his safety" which ultimately resulted in his injury. Thus, he contends the exception in KRS 247.402(d) is applicable and prevents a limitation of liability for the Flynns and that the trial court erred in not so finding. We disagree.

As previously stated, Biesty was aware that no round pen had been provided. He does not state how the Flynns breached their duty to exercise ordinary care beyond their failure to provide this pen. He contends the lack of a round pen created an "extra risk" that he would strike a solid surface if he were bucked or thrown from the horse. However, "surface and subsurface conditions" are specifically delineated in KRS 247.4015(8)(c) as integral parts of farm animal activities and constitute inherent risks of such activities. Biesty's unsupported contention that the Flynns failed to provide a safe working environment by ensuring that the surface conditions on the farm were "free from recognized hazards that are causing or likely to cause death or serious physical harm" is contrary to the statutory guidance and is otherwise without merit. Biesty's own testimony indicates he approached the gate to show Lamon what the horse "looks like in his gait" and that the horse threw him when he was returning to the barn. Although Biesty contends his injuries would have been lessened had the round pen

been set up, he fails to show that the location of the gate or where the injury occurred would have been contained within such a pen. Mere speculation substantially after the fact cannot suffice to sustain his argument. We cannot conclude from the record before us that the failure to erect the round pen constituted a willful or wanton act evidencing a disregard for Biesty's safety, nor that such was a contributing factor to Biesty's injuries.

Next, Biesty alleges that Lamon's action in scraping the gate across the ground—an action known by Lamon to produce a loud noise—was negligent, caused Spirit Aces High to react negatively, and ultimately caused his injuries. He argues that sufficient issues of disputed fact were presented to preclude entry of summary judgment. However, we are unable to conclude a genuine issue of material fact existed.

KRS 247.4015(8)(b) specifically states that the risk a horse will react negatively to a sound is an inherent risk of farm animal activities. Contrary to Biesty's contentions, the sound and its source did not cause his injury. Rather, it was the horse's unpredictable reaction to the sound which resulted in his being bucked and injured. Such a reaction is clearly beyond the control of a horse's owner and is the sort of risk sought to be covered by the Act's limitation on liability. Thus, Biesty's claims against the Flynns falls squarely within the mandate of KRS 247.402(1), and the Flynns are thereby granted immunity from liability for his injuries. The trial court did not err.

Because we have determined the trial court did not err in its grant of summary judgment in favor of the Flynns, we are likewise unable to conclude that the trial court's ruling negated the purpose of the Act. The Act recognizes that working with farm animals carries inherent risks and seeks to limit liability for unforeseeable injuries sustained as a result of the unpredictability of such animals. Biesty's claim was based upon just such an injury. Although we may sympathize with Biesty's suffering from his injuries, the General Assembly has laid the framework upon which this Court must operate in analyzing such claims and the limitations on liability for injuries resulting from farm animal activities. Clearly, Biesty's claim falls within the class of actions intended to be limited by the Act and we are constrained to follow the statutory mandates set forth therein.

For the foregoing reasons, the judgment of the Estill Circuit Court is affirmed.

ALL CONCUR.

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