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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000645-MR

DANETTI MARTIN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 09-CI-05840

ST. JOSEPH HEALTH SYSTEM, INC., AND
CONGLETON-HACKER, CO. — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: KELLER, TAYLOR, AND THOMPSON, JUDGES.

KELLER, JUDGE: Danetti Martin (Martin) appeals from the trial court's summary judgment in favor of Congleton-Hacker, Co.[1] On appeal, Martin argues that a genuine issue of material fact exists, making the court's judgment

[1] Martin initially named St. Joseph Health System, Inc. as a party defendant; however, she voluntarily dismissed her claims against St. Joseph prior to the court's summary judgment. Therefore, St. Joseph was not subject to that judgment and is not a party to this appeal.

inappropriate. Congleton-Hacker argues to the contrary. Having reviewed the record, we reverse and remand.

FACTS

The underlying facts are not in dispute. Congleton-Hacker contracted to build a pedestrian walkway from St. Joseph Hospital to the employee parking lot.[2] Because construction of the walkway was going to impede use of an existing stairway leading to the parking lot, Congleton-Hacker constructed a temporary stairway for employee use during construction. At the top of the stairway, there was a transition step or curb from the stairway to the parking lot.

The perimeter of the parking lot had permanent lighting fixtures, and Congleton-Hacker positioned the top of the stairway under an existing permanent light fixture. Congleton-Hacker also placed a temporary light fixture at the midpoint of the stairway and made an electrical connection between that fixture and the permanent fixture at the top of the stairway. Thus, the midpoint light fixture operated on the same schedule as the parking lot light fixtures.

On November 11, 2008, Martin left the hospital at approximately 6:15 p.m. She noticed that the light at the stairway midpoint was not on and that none of the parking lot perimeter lights were on, including the one at the top of the stairway. Martin walked up the stairway and, when she reached the transition step between the parking lot and the stairway, she fell, suffering a severe shoulder

[2] We note that Congleton-Hacker was also performing other construction work; however, only the work on the pedestrian walkway project gave rise to this litigation.

injury. According to Martin, she fell because it was exceptionally dark and she could not see the transition step.

Following the accident, Martin filed a complaint alleging, in pertinent part, that Congleton-Hacker had been negligent with regard to providing lighting for the temporary stairway. Congleton-Hacker filed an answer and, after conducting limited discovery, filed a motion for summary judgment. In its motion, Congleton-Hacker argued that St. Joseph controlled and was responsible for the parking lot and its lights. Therefore, according to Congleton-Hacker, it could have no liability when those lights failed to operate.

In her response, Martin argued, as she does here, that because Congleton-Hacker knew that employees would be traversing the stairway in the dark, it had a duty to ensure that proper lighting was in place and functioning. According to Martin, Congleton-Hacker could not foist its duty onto St. Joseph, particularly when Congleton-Hacker personnel testified that they did not know when the parking lot lights went on or off or how reliable those lights were.

The trial court, following argument on Congleton-Hacker's motion, stated on the record that the duty to maintain the parking lot lighting was St. Joseph's not Congleton-Hacker's. Therefore, the court stated that it would grant summary judgment, which it did in a subsequent written order. It is from that order that Martin now appeals.

STANDARD OF REVIEW

"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." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky. App. 1996). Negligence requires proof of a duty of care, breach of that duty, and injury. Whether Congleton-Hacker had a duty is a question of law; however, whether it breached that duty and whether any breach caused Martin's injury are questions of fact for a jury. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003).

ANALYSIS

At the outset, we note that there is no issue with regard to the construction of the stairway. Martin agrees that the stairway was constructed in a workmanlike manner and in compliance with the applicable building codes. Furthermore, Martin testified that she did not fall because of any defect in the stairway's construction. Therefore, as we perceive it, Martin has raised two issues: (1) whether Congleton-Hacker had a duty to ensure that the stairway was adequately lit; and, (2) whether Congleton-Hacker could fulfill that duty by relying on the presence of existing lighting.

The parties agree that a land owner, in this case St. Joseph, has the duty to maintain property in a reasonably safe condition. *See Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385, 393 (Ky. 2010). However, the parties do not agree whether, or to what degree, that duty extended to Congleton-Hacker. Martin argues that Congleton-Hacker had a duty to provide adequate

lighting for the stairway and liability for damages related to its failure to fulfill that duty.

On the other hand, Congleton-Hacker argues that its only duty was to construct the stairway in a workmanlike manner. Furthermore, Congleton-Hacker argues that, if it had a duty to provide lighting, it was free to rely on St. Joseph's lighting; and if that lighting failed, the liability was St. Joseph's.

In support of its argument, Congleton-Hacker cites to *Saylor v. Hall,* 497 S.W.2d 218 (Ky. 1973). However, *Saylor* is distinguishable. In *Saylor,* E.H. Hall built a house containing a fireplace and mantel in 1955. Hall sold the house to Thomas and Kathlyn Johnson in 1955 and they resided there until 1969, when they rented the house to the Saylors. One of the Saylors' children was killed and another was seriously injured when the fireplace and mantel collapsed. The Saylors brought suit against the Johnsons and Hall. *Id.* at 220-21. With regard to Hall's liability, the Court adopted Section 385 of the Restatement of the Law of Torts, Second, which addresses contractor liability after work has been accepted by the owner. *Id.* at 224. Neither *Saylor* nor Section 385 of the Restatement of the Law of Torts, Second, applies herein, because there is no evidence that St. Joseph "accepted" the temporary stairway.

Rather, in what appears to be a case of first impression, we hold that Section 384 of the Restatement of the Law of Torts, Second, applies. Pursuant to Section 384,

> One who on behalf of the possessor of land erects a structure or creates any other condition on the land is subject to the same liability, and enjoys the same freedom from liability, as though he were the possessor of the land, for physical harm caused to others upon and outside of the land by the dangerous character of the structure or other condition while the work is in his charge.

Based on the preceding, and because St. Joseph had not accepted the stairway, Congleton-Hacker had the same liability and the same freedom from liability as St. Joseph. Thus, Congleton-Hacker had the same duty to prevent harm as St. Joseph.

Having determined that Congleton-Hacker had the same duty with regard to the stairway as St. Joseph, we must determine if that duty included providing adequate lighting. We have not found, and the parties have not cited, any cases directly on point. However, we note that there are a number of cases in which the courts of the Commonwealth have held that a landowner may have a duty to provide adequate lighting. *See Phelps Roofing Co. v. Johnson*, 368 S.W.2d 320 (Ky. 1963); *Urban v. Walker*, 403 S.W.2d 11 (Ky. 1966). Based on these holdings and Congleton-Hacker's recognition that providing adequate lighting was essential, we hold that Congleton-Hacker had a duty to provide adequate lighting.

Having determined that Congleton-Hacker had a duty to provide adequate lighting, we next look to whether Congleton-Hacker breached that duty. In doing so, we must construe the facts in a light most favorable to Martin and resolve all doubts in her favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991).

Martin agrees that, to fulfill its duty, Congleton-Hacker was free to rely on the parking lot lighting provided by St. Joseph. However, Martin argues that Congleton-Hacker cannot avoid liability if that reliance was misplaced. On the other hand, Congleton-Hacker argues that, because it had no ability to maintain or control the parking lot lighting, it could not, as a matter of law, have any liability when that lighting failed.

We disagree with Congleton-Hacker. Certainly, Congleton-Hacker was free to rely on the parking lot lights to fulfill its duty to provide adequate lighting. However, whether Congleton-Hacker's reliance solely on St. Joseph was a breach of that duty is a question of fact for the jury, not a question of law. *See Pathways*, 113 S.W.3d at 89. Therefore, we must remand this matter so that the parties can proceed to trial.

CONCLUSION

Having reviewed the record, and based on the facts of this case, we reverse the circuit court's summary judgment and remand for trial.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: I respectfully dissent. The majority's holding broadly expands a contractor's potential liability and imposes a duty not contemplated by the parties' contract. Martin conceded that the stairway

was constructed in a workmanlike manner. Further, when operational, there was sufficient lighting provided by the existing lights located in the parking lot. Congleton-Hacker did not control the parking lot lights, and there is no evidence that it was aware that the lights were not operating on the date Martin fell. In the absence of a contractual duty, Congleton-Hacker did not have the means or the ability to control the operation of the parking lot lights.

The majority's reliance on the Restatement (Second) of Torts, § 384, is misplaced. Congleton-Hacker did not create a dangerous condition on the hospital premises. Again, there is no dispute that the stairway was properly constructed and lighting was available. Although it is not clear why the lights were not operating when Martin fell, it is clear that the operation of the lighting was not within Congleton-Hacker's control.

The consequences of the majority's opinion will be far reaching. As in this case where the premises owner has installed adequate lighting to ensure the structure built is not dangerous, the contractor will be required to ensure that the lights are properly maintained and operational. Alternatively, the contractor must provide his own lighting, an alternative that is costly, time-consuming and, in this case, beyond the scope of the work to be completed. Moreover, the majority has expanded the potential liability of every business owner. Under the majority opinion, liability will attach when a hail storm or other natural disaster causes a power loss to a commercial business and the owner does not immediately install

backup lighting. I cannot agree that this Court should impose such an onerous duty on contractors and business owners.

For the reasons stated, I would affirm.

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