

RENDERED: DECEMBER 7, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001944-MR

ESTATE OF ELEANOR M. THOMAS

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 10-CI-00307

JENNIE STUART MEDICAL CENTER, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, KELLER AND MAZE, JUDGES.

MAZE, JUDGE: The Estate of Eleanor M. Thomas (the Estate), appeals from a summary judgment order of the Christian Circuit Court dismissing its negligence claim against Jennie Stuart Medical Center, Inc. (JSMC). The Estate argues that there were genuine issues of material fact which precluded summary judgment and that it was entitled to additional discovery due to JSMC's inaccurate and untimely

responses to interrogatories. We conclude that any disputed issues of fact were not material because the Estate failed to show that JSMC owed a duty to Thomas in the manner alleged. Furthermore, while we have concerns about JSMC's conduct in responding to the Estate's discovery requests, the omitted evidence was not relevant to establish the existence of a duty. Therefore, the trial court properly granted JSMC's motion for summary judgment. Hence, we affirm.

Except where otherwise noted, the following facts are not in dispute. On April 27, 2009, Eleanor Thomas, accompanied by her friend Betty Young, visited JSMC for a routine doctor's appointment. Thomas was ninety-two years of age as of that date. Upon arriving, they were approached at the hospital's entrance by a JSMC employee, Amanda Gilbert. Gilbert is a "greeter" for JSMC, and her responsibilities include offering assistance to any person entering or leaving the hospital. In accordance with those duties, Gilbert obtained a wheelchair, assisted Thomas into the wheelchair and wheeled Thomas to her doctor's appointment.

After the appointment, Gilbert again assisted Thomas into the wheelchair and wheeled Thomas to the edge of the canopy in front of the hospital's entrance. Gilbert then locked the wheels of the wheelchair and helped Ms. Thomas to her feet. At that point, Gilbert left Thomas with Young to assist another individual. According to Gilbert, Thomas stated to Ms. Gilbert that she would take it from there. Young then escorted Thomas to her car, which was a short distance away. Thomas fell while she was attempting to enter the vehicle, fracturing her

ankle and suffering a laceration to her hand. Gilbert returned and assisted Thomas into the hospital's emergency room.

Thomas filed this action on March 1, 2010, alleging negligence on the part of JSMC and Gilbert.¹ While this action was pending, Thomas died testate on November 23, 2010. Her Estate was substituted as a party and discovery continued.

During the course of discovery, the Estate took the deposition of Thomas's grandson, L.G. Davis. Davis, who arrived at the hospital shortly after the accident, testified that hospital personnel had informed him there was a surveillance video of the incident. Based on this testimony, the Estate repeatedly requested that JSMC produce any video recording of the incident. JSMC responded to each of these requests by stating that there was no such video.

On November 19, 2010, JMSC filed a motion for summary judgment, arguing that it could not have breached any duty because Thomas fell after she had entered her vehicle. The trial court denied this motion on January 5, 2011. The case proceeded toward its scheduled trial date in February 2011. However, a snowstorm forced the date to be rescheduled for October 6, 2011. Shortly thereafter, the trial court also issued an order closing further discovery.

On August 22, 2011, JSMC filed a second motion for summary judgment. The Estate responded and also filed a motion for a jury instruction

¹ Thomas also brought a negligence claim against Young. Thereafter, Young filed a cross-claim against JSMC. However, those claims were dismissed by an agreed order entered on July 11, 2011.

regarding spoliation of any video evidence of the incident. On September 8, 2011, JSMC filed a supplemental response stating that it had located a video of the incident. However, the footage was limited to the fall only and the Estate requested additional footage, as well as the extent of JSMC's efforts to locate the video.

On September 15, 2011, the trial court granted JSMC's motion for summary judgment, based upon "the reasoning expressed in [JSMC's] motion filed August 22, 2011." Thereafter, the Estate filed a motion to alter, amend or vacate the summary judgment pursuant to CR 59.05, to re-consider in light of the newly-produced video, and for additional factual findings. On October 5, 2011, the trial court denied all motions and designated its judgment as final and appealable. This appeal followed.

The standard of review governing an appeal of a summary judgment is well-settled. We must determine whether the trial court erred in concluding that there were "no genuine issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment is 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. In *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985), the Supreme Court

of Kentucky held that for summary judgment to be proper, “the movant shows that the adverse party could not prevail under any circumstances.”

The Kentucky Supreme Court also stated that “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 Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). However, the word “‘impossible’ is used in a practical sense, not an absolute sense.” *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992). Furthermore, the party opposing summary judgment “cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment.” *Steelvest*, 807 S.W.2d at 481 (*Internal quotations and citations omitted*). “Because summary judgments involve no fact finding, this Court reviews them *de novo*, in the sense that we owe no deference to the conclusions of the trial court.” *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

The Estate argues that summary judgment was inappropriate because there were genuine issues of material fact regarding the circumstances of Thomas’s fall and whether JMSC and Gilbert breached a duty which it owed to Thomas. The Estate also argues that summary judgment was inappropriate considering JSMC’s untimely production of the video and its motions for additional discovery about the reasons for JSMC’s failure to produce the video earlier.

JSMC responds that any disputed issues of fact were not material because it was entitled to summary judgment on the legal issue of duty. It is well-established that tort liability for negligence requires the plaintiff to establish: (1) a duty; (2) a breach of that duty; (3) proximate causation; and (4) damages. *Illinois Cent. R.R. v. Vincent*, 412 S.W.2d 874, 876 (Ky. 1967); *Helton v. Montgomery*, 595 S.W.2d 257, 258 (Ky. App. 1980).² The failure to prove any requisite element is fatal to a negligence claim. *Illinois Cent. R.R. v. Vincent*, 412 S.W.2d at 876, citing *Warfield Natural Gas Co. v. Allen*, 248 Ky. 646, 59 S.W.2d 534 (Ky. App. 1933).

While both parties acknowledge factual disputes concerning the exact circumstances surrounding Thomas's fall, none of these disputes are material to the questions of whether Gilbert owed a duty to Thomas and whether she breached that duty. Despite the conflicting deposition testimony and the dispute over the missing video recording, the parties agree that Thomas fell after Gilbert left her at the hospital entrance. Thomas got up from the wheelchair and Young assisted her to the car from there. Depending upon the particular deposition testimony, Thomas either fell while attempting to get into the car, or she fell out of the car after getting into it. Although the video recording was taken from a camera some distance away, it clearly shows that Thomas had one foot in the car and one foot still on the ground when she fell.

² In some cases, the element of damages is included in the element requiring proof that the plaintiff suffered an injury which was proximately caused by the breach of a duty. See *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 88 (Ky. 2003).

But in any event, the controlling issue turns on the extent of JSMC's duty to Thomas. The Estate maintains that Gilbert owed a duty to ensure that Thomas was properly secured in the vehicle. JSMC responds that it owed no such duty, and that Gilbert properly discharged any duties which she had assumed after Thomas got up from the wheelchair. The existence of a duty presents a question of law, while breach and injury are questions of fact for the jury to decide. *Pathways, Inc. v. Hammons*, 113 S.W.3d at 89 (Ky. 2003).

JSMC notes that no court has ever imposed a duty on a business to provide assistance to customers in getting in and out of their vehicles. While the Estate does not cite any authority imposing such a specific duty, it notes that Kentucky has recognized a "universal duty" to exercise ordinary care in his activities to prevent foreseeable injury. *Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell*, 736 S.W.2d 328, 331 (Ky. 1987). However, *Claywell's* sweeping language of "universal duty of care" cannot be interpreted as creating a legal duty where none has existed before. *Jenkins v. Best*, 250 S.W.3d 680, 689 (Ky. App. 2007)

Under common-law principles of negligence, a possessor of land is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection. *Bartley v. Educ. Training Systems, Inc.*, 134 S.W.3d 612, 614-15 (Ky. 2004), *citing* William Prosser and W. Page Keeton, *Prosser and Keeton on Torts*, § 61 (5th ed. 1984). There is no allegation in this case that Thomas fell because of a hazardous condition on JSMC's premises. Likewise,

there is no allegation that Thomas was particularly susceptible to injury as a result of her treatment at JSMC. As a result, we have no basis on which to find that JSMC had a pre-existing legal duty to assist patrons to and from their vehicles.

Nevertheless, the Estate argues that JSMC assumed this duty by employing greeters such as Gilbert to exercise these duties. A breach of a voluntarily assumed duty can give rise to tort liability. *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840, 847 (Ky. 2005). The threshold inquiry under this doctrine is whether the putative tortfeasor has actually and specifically undertaken to render the services allegedly performed without reasonable care. *Id.*

To show that JSMC had actually undertaken a duty to escort patrons to their vehicles, the Estate points to several statements which Gilbert made after Thomas fell. In their depositions, both Thomas and Young testified that when Gilbert came to the vehicle and saw that Thomas had fallen, Gilbert exclaimed, “She’s going to fire me! She’s going to fire me!” In addition, Thomas’s grandson, L.G. Davis, testified that Gilbert later apologized to him, saying “that she’d let [his] grandmother fall.” The Estate construes these statements as admissions by Gilbert that she had a duty to see Thomas all the way to the vehicle.

The Estate also focuses heavily on JSMC’s troubling delay in producing the video surveillance recording. After repeatedly denying the existence of any such recording, JSMC produced the recording from one of the security cameras covering the time period immediately before and a short time

after Thomas's fall. The Estate contends that it is entitled to additional discovery of additional recordings, which it alleges will "demonstrate a pattern of hospital greeters transferring individuals from wheelchair all the way to their vehicles."

However, none of these factual disputes are sufficient to impose liability on JSMC. In *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 538 (Ky. 2003), the Kentucky Supreme Court addressed additional elements which are necessary before a party may be held liable for negligent performance of a voluntarily assumed duty. The Court pointed to the *Restatement (Second) of Torts* § 324A (1965), which provides as follows:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

With regard to element (a), the Estate alleges that JSMC's failure to provide Thomas with assistance all the way to the vehicle increased the risk of harm, and cites to an illustration under § 323 of the *Restatement* (Negligent Performance of Undertaking to Render Services), as a basis for imposing liability. However, the commentary preceding that illustration emphasizes that the increased

risk must be measured against the inherent risk if no assistance had been undertaken:

Where, however, the actor's assistance has put the other in a worse position than he was in before, either because the actual danger of harm to the other has been increased by the partial performance, or because the other, in reliance upon the undertaking has been induced to forego other opportunities of obtaining assistance, the actor is not free to discontinue his services where a reasonable man would not do so. He will then be required to exercise reasonable care to terminate his services in such a manner that there is no unreasonable risk of harm to the other, or to continue them until they can be terminated.

Restatement (Second) of Torts, § 323, Comment c, p. 137.

Similarly, the illustration under Comment c of § 324A demonstrates that the risk of harm from negligent performance of a duty must be greater than the risk if no such duty were undertaken:

1.A. operates a grocery store. An electric light hanging over one of the aisles of the store becomes defective, and A calls B Electric Company to repair it. B Company sends a workman, who repairs the light, but leaves the fixture so insecurely attached that it falls upon and injures C, a customer in the store who is walking down the aisle. B Company is subject to liability to C.

Restatement (Second) of Torts, § 324A, Comment c, p. 143.

Unlike the examples in these two sections, the Estate does not allege that JSMC's failure to assist Thomas all the way to her vehicle created a greater risk of harm than if it had offered no assistance. Although Thomas may have been more vulnerable to falling than a younger and healthier individual, Gilbert's assistance did not place Thomas in a worse position than she would have otherwise been, nor did it lead her to forego other opportunities of obtaining assistance.

Gilbert pushed Thomas's wheelchair to and from the appointment. Thomas's friend Young accompanied them the entire time. Gilbert waited with Thomas at the hospital entrance while Young brought the car around, then Gilbert assisted Thomas to her feet. Thereafter, Young helped Thomas to walk the short distance from the hospital entrance to the car. There is no evidence to support a finding that Gilbert's actions increased the risk of harm to Thomas.

Likewise, the Estate has not shown any factual bases for liability under § 324A(b) or (c). Unlike in *Louisville Gas and Elec. Co. v. Roberson*, 212 S.W.3d 107 (Ky. 2006), JSMC did not undertake to perform any duty already owed by a third party. Young accompanied Thomas to the hospital and assisted her the entire time she was there. Gilbert's additional assistance did not supplant the duties which Young had already undertaken. Finally, even if JSMC had provided assistance to other patrons in getting into vehicles, the Estate presents no evidence to show that Thomas relied on JSMC or Gilbert to assist her in getting into the vehicle. Indeed, Young accompanied Thomas to the hospital for that purpose. Furthermore, there is no evidence that either Thomas or Young ever asked for assistance getting out of or into the car.

In the absence of any of these showings, JSMC cannot be liable even if it had assumed a duty to assist patrons to and from their vehicles. The disputed issues of fact would not alter this conclusion. Likewise, any additional discovery of JSMC's video records would not lead to the evidence supporting any of these

elements. Therefore, the trial court properly granted summary judgment for JSMC.

Having said this, we are extremely concerned about JSMC's untimely production of the video recording. Prior to the filing of this action, several employees of JSMC indicated to Thomas's family that a video recording of the incident existed and had been reviewed. On March 9, 2010, the Estate propounded its first set of interrogatories, requesting that JSMC identify "any photographs, films, or videotapes depicting any place, object, or individual concerning the Plaintiff's injuries..." In its April 29, 2010, response, JSMC stated that it had no such photographs or recordings. Record on Appeal (ROA) at 52. JSMC again denied the existence of any recordings in its December 16, 2010, response to the Estate's fourth set of interrogatories. ROA at 248. The trial court closed further discovery on February 23, 2010.

Nevertheless, on September 8, 2011, less than a month before trial and after the Estate had requested a spoliation instruction, JSMC produced the video recording in a supplemental response to the Estate's first set of interrogatories. JSMC did not explain its reasons for the delay in producing the video, stating only, "[a]fter several diligent searches, a copy of video from a security camera in the vicinity of the occurrence was located on 09/07/11."

The circumstances of this case demonstrate a lack of diligence in JSMC's performance of its obligation to respond timely to the Estate's discovery requests. The circumstances and timing of JSMC's eventual response justifies the

Estate's suspicions of bad faith. If the wrongfully withheld video was at all relevant to the legal issues of duty, or if the Estate had made a showing that it had been prejudiced by the untimely production, we would not hesitate to reverse the summary judgment and remand for additional proceedings, including a determination of whether sanctions are appropriate. Since JSMC was entitled to summary judgment as a matter of law, this matter is ultimately moot.

Accordingly, the summary judgment of the Christian Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert L. Fears
Hopkinsville, Kentucky

Sands Chewning
Hopkinsville, Kentucky

BRIEF FOR APPELLEE:

Charles G. Franklin
Madisonville, Kentucky