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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000607-MR

KYLE CHANCE;
KYLE CHANCE AS ADMINISTRATOR
OF THE ESTATE OF BROOKE CHANCE;
P.C., A MINOR BY AND THROUGH
HER PARENT AND NEXT FRIEND,
KYLE CHANCE — APPELLANTS

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R SCHRAND, II, JUDGE
ACTION NO. 12-CI-01868

MARY QUEEN OF HEAVEN PARISH;
AND ROMAN CATHOLIC DIOCESE
OF COVINGTON — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MAZE AND MOORE, JUDGES.

MAZE, JUDGE: Appellants Kyle Chance, Kyle Chance as the Administrator of the Estate of Brooke Chance, and P.C., a minor, (hereinafter "the Chances") appeal

from an order of the Boone Circuit Court granting Appellees', Mary Queen of Heaven Parish (hereinafter "MQH"), and the Roman Catholic Diocese of Covington (hereinafter "the Diocese"), motion for summary judgment. On appeal, the Chances argue that summary judgment was inappropriate because disputed issues of material fact remain. The Chances also allege that the trial court incorrectly determined that no duty of care was owed by MQH and the Diocese. Upon review of the record and pertinent law regarding the existence of a duty, we find no error in the trial court's grant of Appellees' motion for summary judgment. Therefore, we affirm.

Background

On June 23, 2012, Kyle and Brooke Chance attended MQH's Fun Fest on Donaldson Highway in Boone County. Prior to attending the festival, Kyle Chance states that he drove around numerous times looking for a parking spot, but was unable to find a spot in the designated parking areas. He ultimately stopped to park on the side of the road. The Chances opted not to use the shuttle service provided by MQH. Instead, they walked to the festival via Donaldson Highway.

After attending the parish festival for approximately one hour, the Chances left MQH's premises and walked back to their vehicle. As they were walking, the Chances were struck from behind by motorist Christy Vance, who was driving in the eastbound lane on Donaldson Highway. The accident occurred at approximately 11:00 pm. While it is unclear whether the Chances were walking on or adjacent to the eastbound lane of Donaldson Highway when the accident

occurred, the record clearly demonstrates that the accident occurred off MQH's property. Both Kyle and Brooke Chance suffered various injuries as a result of the pedestrian/auto accident on Donaldson Highway. However, Brooke Chance died as a result of the injuries she sustained in the collision.

Appellants Kyle Chance, individually, as Administrator of the Estate of Brooke Chance, and on behalf of their daughter, P.C., filed suit on September 21, 2012, against Christy Vance, MQH, and the Diocese of Covington. In their complaint, the Chances alleged that MQH and the Diocese breached their duty to festival invitees to take reasonable precautions to protect them from harm by failing to provide a safe place to park. Additionally, they argue MQH failed to provide safe ways for pedestrians to get to and from the festival safely. The Chances further allege that MQH's failure to provide parking and a safe way for pedestrians to get to from the event was a proximate cause of the accident in question. MQH and the Diocese filed their answer to the complaint on October 12, 2012, denying the allegations against them.

On December 21, 2012, the Chances served their answers to interrogatories and responses to requests for production of documents on MQH and the Diocese. No further discovery took place prior to the motion for summary judgment filed by MQH and the Diocese on January 10, 2013. In their motion, MQH and the Diocese argued that there were no genuine issues of material fact in dispute, and that Kyle and Brooke Chance's negligence claim failed as a matter of Kentucky law because they owed no duty of care. After considering the Chances'

response and arguments from counsel, the trial court granted Appellees' summary judgment motion on March 1, 2013. This appeal followed.

Standard of Review

The proper standard of review for appeals on 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). Additionally, "[t]he 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 Serv. Ctr.*, 807 S.W.2d 476, 480 (Ky. 1991). Even if the trial court believes that the party opposing the motion has little chance of success at trial, summary judgment is inappropriate if there are any issues of material fact that remain. *Id.* Moreover, summary judgment is proper only when "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03.

The movant has the burden of demonstrating that there are no genuine issues of material fact in the record, while the party opposing the motion "cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Steelvest,* 807 S.W.2d at 482. Since no issues of fact are involved, review of summary judgment involves only

questions of law, which we review *de novo*. *Lewis v. B. & R Corp.,* 56 S.W.3d 432, 436 (Ky. App. 2001).

Analysis

On appeal, the Chances assert that summary judgment was inappropriate. The Chances seek to impose liability on MQH and the Diocese under two alternative legal theories of negligence. First, the Chances argue that the trial court was incorrect in finding that MQH and the Diocese did not owe a duty under a premises liability theory. Additionally, the Chances claim summary judgment to be improper because MQH and the Diocese owed a duty of care under a general negligence theory. Duty is one of the three essential elements of a negligence cause of action. Duty is a question of law that must be resolved by the Court. *Pathways, Inc. v. Hammons,* 113 S.W.3d 85, 89 (Ky. 2003). Moreover, "whether a duty is owed is determined *de novo* because duty presents questions of law and policy." *Id.*

Under Kentucky law, there is a "universal duty of care, [whereby] every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury." *James v. Meow Media, Inc.,* 300 F.3d 683 (6th Cir. 2002) (citing *Grayson Fraternal Order of Eagles v. Claywell,* 736 S.W.2d 328 (Ky. 1987)). However, the "universal duty of care is not boundless." *Grand Aerie Fraternal Or. of Eagles v. Carneyhan,* 169 S.W.3d 840, 849 (Ky. 2005). While a "duty to all" is the analytical point of departure, it should be focused, "and consideration must be given to public policy, statutory and common law theories in

order to determine whether a duty existed in a particular situation." *Id., quoting Fryman v. Harrison,* 896 S.W.2d 908, 909 (Ky. 1995).

It appears that the Chances are relying on the universal duty concept without giving the necessary consideration to common law, public policy, and statutory law in order to ascertain whether a duty existed in this particular situation. *Grand Aerie Fraternal Or. of Eagles,* 169 S.W.3d at 849 (Ky. 2005). The determination of whether a duty was owed in this particular case is limited in scope. Moreover, the existence of such a duty must be viewed in light of premises liability and general negligence claims which the Chances have asserted.

With respect to premises liability, a duty is imposed on landowners "for the obvious reason that the person in possession of property ordinarily is in the best position to discover and control its danger." W. Page Keeton, Dan. B. Dobbs, Robert E. Keeton & David G. Owen, *Prosser and Keeton on Torts* § 10, 386 (5th ed. 1984). A special obligation is placed upon the occupier of land to invitees by virtue of an implied representation made by a landowner "when he encourages others to enter to further a purpose of his own, that reasonable care has been exercised to make the place safe for those who come for that purpose." *Id.* § 61 at 422. This is basis of a premises owner's liability to invitees. *Id.* However, the obligation owed exists "only while the visitor is upon the part of the premises which the occupier has thrown open to him for the purpose which makes him an invitee." *Id.*

As a threshold matter, in order for this Court to find that MQH and the Diocese owed a duty to the Chances under premises liability law, the injuries in question must have occurred on their property. As noted, the trial court found that the pedestrian/vehicle accident occurred off MQH's premises. Consequently, under a premises liability analysis, neither MQH nor the Diocese had any control over Kyle and Brooke Chance's decision to park and walk on or adjacent to Donaldson Highway, a public thoroughfare outside its premises.

In their brief on appeal, the Chances argue that it is unsettled whether the injuries occurred of MQH's property. We find no indication in the record that the Chances ever asserted that this fact was in dispute before the trial court. Moreover, the Chances have failed to offer any affirmative evidence to contradict the evidence showing the injuries occurred away from MQH's premises. The only evidence in the record demonstrates that Kyle and Brooke Chance were either on or adjacent to the eastbound lane of Donaldson Highway when the accident occurred. Notwithstanding how this particular factual discrepancy might be resolved, neither would serve to place the accident on MQH's property. Stated otherwise, the issue is neither genuine nor material to the question at hand. CR 56.03. We therefore agree with the trial court's determination that because the pedestrian/vehicle collision occurred off MQH's property, there was no duty owed to the Chances under premises liability law. Thus, summary judgment was appropriate on this issue.

The Chances also seek to impose liability under a general negligence theory. The same question of duty arises with this argument. The Chances argue that MQH and the Diocese owed a duty to provide invitees with adequate parking and a safe way to walk to and from the festival. The Chances further assert that it was reasonably foreseeable to MQH and the Diocese that invitees to the festival would attempt to walk along Donaldson Highway if parking was inadequate. Finally, the Chances contend that MQH and the Diocese had actual notice of this situation in June of 2012. Given this evidence, the Chances argue that the trial court erred in finding that MQH and the Diocese owed no duty to them.

Foreseeability is the most important factor in analyzing the existence of a duty under a general negligence theory. *Pathways, supra*, 113 S.W.3d at 89, *citing* David J. Leibson, 13 *Kentucky Practice, Tort Law* §10.3 (West Group 1995)). Moreover, the "risk reasonably to be perceived defines the duty to be obeyed." *Id.* (quoting *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99, 100 (1928)). Stated otherwise, whether or not a particular risk is foreseeable is determined by "what the defendant knew at the time of the alleged negligence." *Pathways*, 113 S.W.3d at 90. Liability is not imposed "based on hindsight." *Mitchell v. Hadl*, 816 S.W.2d 183, 186 (Ky. 1991). *The Restatement (Second) of Torts* elaborates, stating:

> Foreseeable risks are determined in part on what the defendant knew at the time of the alleged negligence. The actor is required to recognize that this conduct involves a risk of causing an invasion of another's interest if a reasonable man would do so while exercising

> such attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence, and judgment as a reasonable man would have.

*Restatement (Second) of To*rts §289(a).

The imposition of liability under a general negligence theory also requires that the risk foreseen be unreasonable. *Pathways*, 113 S.W.3d at 91. Unreasonable and negligent risks are those "of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done." *Restatement (Second) of Torts* § 291.

The Chances argue that the trial court incorrectly determined that the pedestrian/vehicle accident at issue was not reasonably foreseeable. We first note that when the motion for summary judgment was made, the Chances made no effort to show that additional discovery would lead to the production of evidence establishing a duty under either premises liability or general negligence theory. As the party opposing the motion for summary judgment motion, it was incumbent upon the Chances to point to affirmative evidence that would demonstrate the existence of a genuine issue of material fact on this issue. *Steelvest*, 807 S.W.2d at 480. The record is devoid of any affirmative evidence that would lead this Court to find that MQH and the Diocese were or should have been aware of the alleged parking and shuttle service deficiencies, or that these deficiencies would create a risk of unreasonable harm to the Chances. The Chances merely claimed that the risk was foreseeable due to the lack of adequate parking. Without more, this Court

is compelled to agree with the trial court's finding that the record provides no genuine issues as to any material fact.

Furthermore, in our review of the questions of law regarding the existence of a duty, it is clear that MQH and the Diocese owed no duty of care to the Chances. Based upon the record before this Court, there is no dispute that MQH provided parking options and a shuttle service for festival invitees. Even if MQH was aware that some invitees were parking along Donaldson Highway and walking to the festival, it had no control over the road or the invitees' decisions to park on the road and walk rather than using the shuttle service provided.

The Chances have failed to set out any legal authority to show that MQH had a duty to protect against or warn of *all* foreseeable risks to invitees, including those off its premises and outside of its control. A property owner is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection. *Bartley v. Educational Training Systems, Inc.*, 134 S.W.3d 612, 615 (Ky. 2004), *citing Prosser and Keeton on Torts*, § 61. As such, we agree with trial court's finding that MQH and the Diocese owed no duty of care to the Chances under a general negligence theory. Therefore, summary judgment was appropriate on this issue.

Accordingly, the summary judgment granted by the Boone Circuit Court is affirmed.

ALL CONCUR.

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