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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001367-MR

MARGIE ANN FAESY — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 13-CI-00638

JG 1187, INC. d/b/a
McDONALD'S RESTAURANT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON AND KRAMER, JUDGES.

KRAMER, JUDGE: Margie Ann Faesy appeals the decision of the Franklin Circuit Court to summarily dismiss her negligence claim against appellee, JG 1187, Inc. d/b/a McDonald's Restaurant ("JG"). Upon review, we affirm.

FACTUAL AND PROCEDURAL HISTORY

The undisputed facts of this case, along with the parties' respective arguments, were aptly summarized in the circuit court's order of summary judgment as follows:

> [Faesy], a resident of Franklin County, states that on or about August 29, 2012, she visited the McDonald's located at 102 Limestone Drive, Frankfort, KY at approximately 3:00 p.m. and purchased two iced coffees and a medium regular coffee. Defendant, JG 11187, Inc., d/b/a McDonald's Restaurant (hereinafter "JG"), has its principal office at 100 United Dr., Suite 4-C, Versailles, Kentucky. On her way out of the restaurant, [Faesy] got her foot stuck or caught in between the sidewalk and the parking abutment and fell, dropping her drink holder and spilling her coffee onto the right side of her body, soaking through her clothing and leaving her with severe second degree burns to her right breast, side and right upper arm. As a result of her burns, [Faesy] spent $5,337.03 on medical treatment and was in severe pain for several weeks following the incident.
>
> This is an action for personal injury and negligence brought by [Faesy], who claims that at the time of the injury, the temperature of the coffee she spilled was between 195-205 degrees, and that her burns were proximately caused by JG's negligence and disregard for acceptable coffee temperatures. [Faesy] first argues that [JG's] Motion for Summary Judgment is premature, as very limited discovery has been exchanged by the parties, and because there are genuine issues of material fact remaining. [Faesy] cites to *Pathways, Inc. v. Hammons*, 113 S.W.3d 85 (Ky. 2003), arguing that it is premature to determine the "legal causation" component of this case, and also cites to *McCoy v. Carter*, 323 S.W.2d 210 (Ky. App. 1959), to show that there are still disputed facts and that more than one conclusion can be drawn from the evidence. [Faesy] also argues that her injuries were caused by burns from the coffee, not the fall itself, and

> the burn was the result of the negligence and breach of duty by JG by failing to maintain their coffee at a reasonable temperature.
>
> JG denies that it was negligent in this case, and argues that the negligence alleged was not the legal cause of Plaintiff's injuries and that the case should be dismissed with prejudice. JG argues that [Faesy], in her deposition, admitted there was nothing wrong with the sidewalk, the parking abutment, the cup of coffee, or the tray she was carrying, so [Faesy] does not blame JG for her fall, only that the coffee was too hot and that it should not have burned her once she did fall. [JG] also cites to the *Pathways* case as evidence that JG was not the legal cause of [Faesy's] injuries and that the negligence must be a substantial factor in bringing about [Faesy's] harm. "[T]he actor's negligent conduct is a legal cause of the harm to another if his conduct is a substantial factor in bringing about the harm." *Pathways* at 91-92. JG argues that since they did not cause her in any way to spill the coffee (that there was nothing wrong with the cup, the carrier, or the sidewalk), and that [Faesy] admits she was solely responsible for spilling the coffee, that summary judgment should be granted in their favor.

The circuit court's order then proceeded to resolve this matter as follows:

> In order to prove negligence in this case, [Faesy] must prove that (1) JG owed [her] a duty of care, (2) that JG breached the standard by which its duty is measured, and (3) that [Faesy] suffered a "consequent injury." *Pathways* at 88 (citing *Mullins v. Commonwealth Life Insurance Co.*, 839 S.W.2d 245, 247 (Ky. 1992)). "Consequent injury' contains two distinct elements: actual injury or harm to the plaintiff and legal causation between the defendant's breach and the plaintiff's injury." *Id*. at 89. "Duty, the first element, presents a question of law… [while] breach and injury are questions of fact for the jury to decide. However, the last element, legal causation, presents a mixed question of law and fact." *Mullins* at 248 (citing *Lewis v. B & R Corporation*,

> 56 S.W.3d 432, 436 (Ky. 2001), and *Deutsch v. Shein*, 597 S.W.2d 141, 145 (Ky. 1980)). However, if "there is no dispute about the essential facts and [only] one conclusion may be reasonably drawn from the evidence" then the question of legal causation presents a question of law. *McCoy v. Carter*, 323 S.W.2d 210, 215 (Ky. 1959). Since there is no dispute on the essential facts of this case, the question of legal causation is a question of law: whether JG was a substantial factor in bringing about [Faesy's] harm. [Faesy] argues that JG is the clear legal cause because had she been carrying another beverage that was not excessively hot, the injury would not have occurred. On the other hand, JG argues that by [Faesy's] own admission, JG did not cause her to trip and fall and spill her coffee. It was the fall that was the substantial factor in causing the injury, not the coffee.
>
> The Court finds that summary judgment should be granted in favor of JG as there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. The basic facts of the case are undisputed. [Faesy] was the only witness to the fall and her deposition was taken. [Faesy], in her deposition, admits that she was solely responsible for spilling the coffee and falling on it; her only complaint of JG was that the coffee was too hot. Deposition of Margie Ann Faesy, pp. 35-37. The negligence alleged against JG (the hot coffee) was not the legal cause of [Faesy's] injury. But for [Faesy] tripping and spilling the coffee, the injury would not have occurred. JG was not negligent in its warning of the hot coffee, there was no defect in the cup or the tray provided, nor in the sidewalk design or parking abutment. It is irrelevant that if [Faesy] had been carrying a cold drink such as water or a soft drink, the injury would not have occurred. [Faesy] admits she was to blame for tripping and subsequently spilling the coffee; therefore, JG cannot be the legal cause of [Faesy's] injuries.

Thereafter, Faesy moved the circuit court to reconsider the legal conclusions of its judgment and asserted that she had not been given an adequate

amount of time to conduct discovery. The circuit court overruled her motion, stating in relevant part:

> This Court granted summary judgment for the Defendant because [JG] was not the legal cause of [Faesy's] fall and subsequent injuries. [Faesy] admits fault for tripping and spilling the coffee. In light of [Faesy's] testimony, no further discovery is necessary on the crucial issue of causation. Here, [JG] sold a product that everyone understood was hot, and capable of causing injury if it was spilled. There is no allegation that the coffee was improperly served (e.g., with the lid improperly attached), or that [JG's] premises were improperly maintained, causing [Faesy's] fall. [JG] could not reasonably foresee that [Faesy] would slip and fall, causing the coffee to spill on her and inflict burns. The Court simply cannot see how any action of [JG] contributed to the injuries in these circumstances, or how [JG] failed to exercise ordinary care.

This appeal followed.

STANDARD OF REVIEW

Appellate review of a summary judgment involves only legal questions and a determination of whether a disputed material issue of fact exists. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991). Therefore, we operate under a *de novo* standard of review with no need to defer to the trial court's decision. *Davis v. Scott*, 320 S.W.3d 87, 90 (Ky. 2010) (citation omitted). Summary judgment is proper only "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." Kentucky

Rules of Civil Procedure (CR) 56.03. "The 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*, 807 S.W.2d at 480.

ANALYSIS

We briefly pause to address an appellate procedural issue presented by JG. Faesy's primary argument on appeal is that JG had a duty to never serve hot beverages between the temperatures of 195 and 205 degrees Fahrenheit. She reasons that because JG served her coffee at that temperature and the coffee ultimately burned her, JG proximately caused her injuries. However, JG asserts this Court is precluded from reviewing this particular argument because Faesy did not specifically list it among the issues in her prehearing statement.

The Kentucky Rule of Civil Procedure 76.03(8) provides: "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." Upon review, we agree with JG that Faesy did not correctly identify in her prehearing statement the issue she primarily argues on appeal. Nevertheless, the penalties for failure to comply with the provisions of CR 76.03, which run from assessing attorney's fees to dismissal of the appeal, are discretionary. See CR 76.03(14); *see also Jones v. Dougherty*, 412 S.W.3d 188, 192 (Ky. App. 2012). Because the parties are and have been well aware of what the primary issue is in this case, we elect in this instant not to penalize Faesy, as a *pro se* litigant, although it would well be within our discretion to do so.

Turning now to the merits, we begin our analysis of Faesy's argument by stating that we agree with and incorporate the circuit court's analysis and resolution of this matter. We will also supplement the circuit court's analysis with a brief discussion of the following passage from *Sturm, Ruger & Co., Inc. v. Bloyd*, 586 S.W.2d 19, 21-22 (Ky. 1979):

> Although a gun is inherently dangerous, it does not necessarily follow that a manufacturer is liable in damages to each person injured or killed by the use of the weapon. There is nothing in the record to disclose that the subject revolver was any more dangerous than any other single-action revolver. In *Jones v. Hutchinson Manufacturing, Inc.*, Ky., 502 S.W.2d 66 (1973), we were confronted with an alleged defective design, and the question turned on what is reasonable care and what is reasonable safety? The maker is not required to design the best possible product or one as good as others make or a better product than the one he has, so long as it is reasonably safe. A gun, although inherently dangerous, does not come within the category of those substances or chattels which, by their very nature, are not only inherently dangerous but unsafe for general use. Was Ruger required to anticipate that the revolver would be carried under the floor mat of an automobile with all six chambers loaded and the hammer resting on live ammunition? We think not. It is required of Ruger to anticipate reasonable use; that use being in keeping with the written warning. *The dangerous propensity of the revolver was a condition rather than a cause*.

(Emphasis added.)

A hot cup of coffee is also, to a much lesser extent, inherently dangerous; as the circuit court indicated, everyone understands or should understand that hot coffee (what Faesy specifically ordered) is *hot*, and *hot* things cause *burns*. However, it does not necessarily follow that a restaurant that serves

such beverages is liable in damages to each person burned by such beverages. Here, despite Faesy's allegation that 195 to 205 degrees was an excessively hot temperature for her cup of coffee, there is nothing of record illustrating that Faesy's cup of coffee was any hotter than the temperature of coffee she would have received at any other restaurant, or hotter than the industry standard for coffee temperatures in general. There is nothing of record demonstrating that Faesy's injuries would have been any less had she been exposed to coffee served at the industry standard for coffee temperatures, assuming that it is any lower; as Faesy herself explains in the reply brief she has filed in this matter, even a beverage heated to 180 degrees is "known to cause a full thickness burn to human skin within two to seven seconds." Moreover, hot beverages are most certainly not within the category of those substances or chattels which by their very nature are not only inherently dangerous, but unsafe for general use.

JG was merely required to anticipate reasonable use of its product. And, as the circuit court observed, it did so. It maintained its premises in a reasonably safe condition (there were no tripping hazards alleged). It provided Faesy with a reasonably safe cup (Faesy does not allege that the cup malfunctioned in any way). Faesy testified she was aware the cup contained a warning cautioning her that the coffee was hot. Faesy does not argue this warning was inadequate (nor was it), or that it had any bearing upon what caused her to spill her coffee onto herself. Thus, as in *Bloyd*, we are left with the proposition that the dangerous

propensity of the instrumentality at issue here (hot coffee as opposed to a revolver) was a condition rather than a legal cause of Faesy's injuries.

Lastly, Faesy argues that she was denied an adequate period of time for discovery. In light of what she conceded during her deposition (*i.e.*, that the fall was entirely her own fault, there was nothing wrong with the coffee cup, and that she was aware of the warning on the cup that the coffee was hot), additional discovery was, as the circuit court pointed out, unnecessary.

CONCLUSION

For these reasons, we AFFIRM.

ALL CONCUR.

BRIEF FOR APPELLANT, *Pro se*:

Margie Ann Faesy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Philip M. Longmeyer
Ryan A. Morrison
Louisville, Kentucky