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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000614-MR

PATRICK HUNTER CORNETT APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL JR., JUDGE
ACTION NO. 14-CI-03175

MARIA LABREVEUX, DAVID H. MCNEAR, LIBERTY MUTUAL INSURNACE COMPANY, LARRY MOOREHEAD, INDIVIDUALLY, AND LARRY MOOREHEAD, D/B/A TRIANGLE CONSTRUCTION A/K/A TRIANGLE CONSTRUCTION & REMODELING APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, J. LAMBERT, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: The Appellant, Patrick Hunter Cornett, appeals both the Fayette Circuit Court's order of summary judgment and the order denying Cornett's motion to alter, amend, or vacate. Originally, Cornett filed a complaint

against Maria Labreveux and her husband, David H. McNear, upon the theory of negligence in a premises liability matter. Cornet now appeals the decision of the Circuit Court upon two theories of negligence. After careful review, we affirm the decision of the Circuit Court.

BACKGROUND INFORMATION

Patrick Hunter Cornett was an independent contractor working for Larry Moorehead's company, Triangle Construction & Remodeling, at the home of Maria Labreveux and her husband, David H. McNear (collectively "the Homeowners"). While working to remove siding from the side of the house on August 22, 2013, Cornett claims that he was electrocuted after touching metallic flashing around a window. Because of the electrocution, Cornett was knocked from the walk board upon which he was sitting, falling more than fourteen feet. This fall resulted in an injury to Cornett's right ankle that later required surgery.

Cornett then filed a complaint in Fayette Circuit Court asserting negligence by the homeowners. Specifically, Cornett claimed that the homeowners had failed to remove, or warn him about the danger posed by the electrical charge in the window's metal flashing. Cornett also claims that the Homeowners unreasonably allowed him to use the walk board without providing any additional forms of protection. Cornett contends that the Homeowners knew and failed to remedy electrical issues in their home. Specifically, he points to problems present in the window flashing, which resulted in the electrocution and the injury to his ankle.

The Homeowners moved for summary judgment, which was granted by the trial court on January 5, 2016. The trial court judge determined that there was no genuine issue of material fact. Additionally, on March 29, 2016, the trial judge denied Cornett's Kentucky Rules of Civil Procedure (CR) 59.05 Motion to Alter, Amend, or Vacate. Cornett now appeals from these orders.

STANDARD OF REVIEW

An appellate court reviews *de novo* a trial court's grant of summary judgment. It examines "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). The Court reviews the record in a light "most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Id*. (quoting *Steelvest Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

DISCUSSION

Cornett asserts claims of negligence upon two separate, but necessarily related, theories against the Homeowners. As to the first theory of negligence, he asserts that they failed to remove the threat of an electrical charge present on window flashing near where Cornett was working. And, not having removed the aforementioned issue, that they failed to properly warn him that the window flashing was electrically charged. In the second theory of negligence, Cornett claims that the Homeowners were negligent in not providing for, or

directing the procurement of, a harness to better secure Cornett to the walk board that had been constructed by contractors working for Moorehead. However, Cornett does not indicate where this argument was preserved. Cornett did not allege this in his complaint and the trial court does not address this in its orders.

First, we address the theory of negligence stemming from the danger posed by the allegedly electrically charged window flashing. It is well established that every person owes the duty to exercise ordinary care in his or her actions so as to prevent reasonably foreseeable injury. *Grand Aerie Fraternal Order of Eagles v. Carneyham*, 169 S.W.3d 840, 848-49 (Ky. 2005). Yet, it is claimed by Cornett that there may be a special relationship in premises liability situations. Cornett was an invitee upon the premises of the Homeowners by virtue of being an independent contractor working there. *Edwards v. Johnson*, 306 S.W.2d 845, 848 (Ky. 1957). Despite such a status, he was owed no special duty beyond that usually owed in the exercise of ordinary care. *Id.* "Under Kentucky law, the possessor's only duty to the invitee is to use ordinary care in making the premises reasonably safe and free from dangers of which the possessor knows or reasonably should know." *Linn v. United States*, 979 F.Supp. 521, 523 (E.D. Ky. 1997) (citing *Edwards*, 306 S.W.2d at 848). We therefore hold that without knowledge of the electrical charge in the window flashing, the Homeowners owed no specific duty to warn Cornett and it is, at best, questionable if they even owed him a duty of ordinary care in such circumstances as surrounded the incident of August 22, 2013. If they did owe him such a duty of ordinary care, summary judgment would still be

proper as it would be nothing short of irrational but to determine that a breach could not be reasonably found. *Shelton v. Ky. Easter Seals Soc'y, Inc.*, 413 S.W.3d. 901, 916 (Ky. 2013).

The question of whether a duty exists is a matter of law. *Pathways v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003). Again, it is true that there is a universal duty of care to others. Nevertheless, such a duty is to be considered "commensurate with the circumstances." *Sheehan v. United Services Auto. Ass'n*, 913 S.W.2d 4, 6 (Ky. App. 1996) (citing *Grayson Fraternal Order of Eagles v. Claywell*, 736 S.W.2d 328 (Ky. 1987)). And so, from a review of the record: "If no duty is owed by the defendant to the plaintiff, there can be no breach thereof, and therefore no actionable negligence." *Ashcraft v. Peoples Liberty Bank & Trust Co., Inc.*, 724 S.W.2d 228, 229 (Ky. App. 1986).

Cornett argues that the Homeowners breached their duty to him as an invitee because he believes that they knew, or should have known, of electrical problems in their house that could pose a threat to people. He bases this claim upon several factors: the recording of electrical problems in the house on a Property Inspection Report, prepared seven years prior to the August 22, 2013 incident; voltage measured on the window flashing immediately after the incident; possible circumstance in which a singular shock experienced elsewhere in the house would be ground to suggest other electrical problems; that contractors' equipment had been working intermittently prior to the incident; and finally, that testing done two years after the incident still showed the presence of voltage on the

window flashing. Cornett's reasoning does not change the undisputed nature of the facts in the record, it but provides his impression of what those facts mean.

The subjective belief of the appealing party as to the nature of the evidence is not sufficient as affirmative proof to successfully defeat summary judgment. *Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007) (citing *Humana of Kentucky, Inc. v. Seitz* 796 S.W.2d 1, 3 (Ky. 1990). Rather, belief does not amount to evidence at all, and so it will not create a material issue of fact. *Smith v. Norton Hosps., Inc.*, 488 S.W.3d 23, 28 (Ky. App. 2016) (quoting *Seitz*, 796 S.W.2d at 3). Indeed, the Kentucky Supreme Court has stated that "speculation and supposition are insufficient to justify a submission of a case to the jury, and that the question should be taken from the jury when the evidence is so unsatisfactory as to require a resort to surmise and speculation." *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (quoting *Chesapeake & Ohio Ry. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951). Furthermore, although it is usually a question for a jury, "[i]f reasonable minds cannot differ or it would be unreasonable for a jury to find breach . . . summary judgment is still available to a landowner. And when no questions of material fact exist or when only one reasonable conclusion can be reached, the litigation may still be terminated." *Shelton*, 413 S.W.3d. at 916 (footnote omitted). Cornett has not been able to establish any evidence that would approach a plausible suggestion that the Homeowners did or should have known of the electrical danger.

The foreseeability of a danger, and the injury stemming from it, figures prominently in Kentucky regarding the analysis of whether a duty exists. Kentucky law holds that "[the] scope of duty also includes a foreseeability component involving whether the risk of injury was reasonably foreseeable." *Lewis v. B&R Corp*., 56 S.W.3d 432, 437 (Ky. App. 2001). Indeed, it has been said that "[t]he most important factor in determining whether a duty exists is foreseeability." *Pathways*, 113 S.W.3d at 89 (citing David J. Leibson, Kentucky Practice, Tort Law § 10.3 (West Group 1995)). Reasonably foreseeable risks are largely determined by what the "defendant knew at the time of the alleged negligence." *Id*. at 90.

Speaking *specifically* as to the application for the duty of universal care to others, the Kentucky Supreme Court has said that "such a duty applies *only* if the injury is foreseeable." *Issacs v. Smith*, 5 S.W.3d 500, 502 (Ky. 1999) (quoting *Britton v. Wooten*, 817 S.W.2d 443, 447 (Ky. 1991)) (emphasis added). This is not meant to say that the *exact* injury is foreseeable but only that it must be within a plausible vein. *Id*. at 503. It may not be stressed enough that even the exercise of ordinary care is only applicable to situation in which foreseeability can be found. Finally, the determination of foreseeability in inquiries as to the existence of a duty is, according to this state's jurisprudence, one to be left to the court. *Lee v. Farmer's Rural Elec. Coop. Corp.*, 245 S.W.3d 209, 217 (Ky. App. 2007).

Cornett has not presented any affirmative proof that casts doubt on the decision of the lower court. The evidence provided by Cornett fails to demonstrate that a reasonable person would have believed the window to present a dangerous threat from electrocution. Nothing in the record, which remains undisputed as to the factual occurrence surrounding the incident, demonstrates that there was a connection between the past electrical problems of the house and the electrically-charged window flashing. If there were some physical connection to the house's electrical system then, according to the Master Electrician, the charge measured by the Master Electrician after the incident would have been exactly the same as that of current found in the house's wires. This was indisputably not the case. Indeed, the record shows that the Homeowners did not and would not have known of the potential danger found in the window flashing. The Master Electrician who inspected the window flashing after the incident stated that he had never heard of such an "unprecedented" situation. He went so far as to call it a "freak circumstance."

Review of the record prohibits the finding of any issue of material fact. The connection between the ideas is far too attenuated, perhaps even nonexistent, to be given any serious consideration. If no element of reasonable foreseeability exists, then the Homeowners cannot be held responsible for protecting against such dangers. And so, again, without a presentation of affirmative evidence, the summary judgment cannot be defeated. *Brewster v. Colgate-Palmolive Co.*, 279 S.W.3d 142, 147 (Ky. 2009).

Looking beyond foreseeability, it must further be shown that the Homeowners possessed actual knowledge of the danger. It is not enough for evidence to be suggestive of possible danger. The premises owner must possess actual, not only probable, knowledge for there to be a duty to act upon. *Id.* at 148 (citing *Owens v. Clary* 75 S.W.2d 536, 537 (Ky. 1934)). It is clear that for the Homeowners to be required to act, "precedent clearly establishes that actual—rather than constructive—knowledge of a hidden danger is required to establish a duty for a landowner to warn or take steps to protect an independent contractor and its employees." *Id*. The record does not show, nor even does Cornett's brief argue, that the Homeowners possessed actual knowledge of the danger posed by the electricity in the window flashing. A parallel may be made between the case in *Brewster*, where the plaintiff unsuccessfully brought suit against the defendant after exposure to asbestos where the landowner was unaware of the danger present on their premises. *Id*. at 150-51.

After careful review of the record in light most favorable to Cornett, we determine no reasonable proof that the Homeowners were in some way derelict in their upkeep of the property or in exercising normal usage. Throughout their deposition, the Homeowners noted frequently opening and touching the window that was said to have caused Cornett's injury without any injury to themselves. Moreover, "[a] risk is not unreasonable if a reasonable person in the defendant's shoes would not take action to minimize or avoid the risk." *Shelton*, 413 S.W.3d at 914 (citing Dobbs, The Law of Torts § 143, p. 336 (2001)). If the Homeowners

knew of the danger and then chose to, unreasonably, not take action against it, then an unreasonable risk would be created and their duty unequivocally breached. Again, no such evidence was provided by Cornett.

The cases cited in Cornett's brief do not indicate that the owner of a property is liable for a danger that was not known and could not reasonably have been known. One cannot be expected to address a danger that one has no knowledge of. The problems cited by Cornett in the house prior to the electrocution would not have led the Homeowners to foresee the danger posed by the window flashing. Nor does the record show that the Homeowners had, at any time, actual knowledge of the window's danger. Thus, we hold that no duty existed, specifically, for the Homeowners to warn Cornett of the electrical danger when they were themselves not aware of it. We agree with the decision of the lower court that, in this incident, there was not a breach by the Homeowners in their duty to exercise ordinary care. Without the establishment of a requisite duty of care, this court need not consider the other elements from an analysis of negligence. *Ashcraft*, 724 S.W.2d at 229.

Regarding the second claim of negligence brought by Cornett, that the Homeowners failed to protect him from the danger of working on the walk board, this court will not address the arguments made by Cornett in his brief as this issue was not preserved.

Thus, after consideration of the reasoning provided by Cornett as to the record of undisputed facts, there yet remains no issue of material fact that

would result in the order of summary judgment being improper. To summarize, while the Homeowners owed a duty of ordinary care to Cornett, they had no duty to warn him of something for which they had no knowledge. Exercising reasonable practices to keep their home safe, the Homeowners could not have been expected to know that an electrical charge was present in the metal flashing surrounding their window. Without such knowledge, they acted completely within the requirements of their duty to exercise normal care to invitees, such as Cornett. So, Cornett's first theory of negligence by the Homeowners fails. This court will not address Cornett's second theory of negligence surrounding the walk board. Thus, neither theory of negligence argued by Cornett may succeed. The trial court was right to grant summary judgment since it is meant to "expedite disposition of civil cases and to avoid unnecessary trials where no genuine issues of fact are raised." *Cont'l Gas Co. v. Belknap Hardware &Mfg. Co.*, 281 S.W.2d 914, 916 (Ky. 1955).

The Homeowners brought Moorehead into this litigation through a third-party complaint. However, because we have determined that no liability on the part of the Homeowners exists, the Homeowners' claim against Moorehead is moot. If the complaint against the Homeowners is dismissed, then it reasonably follows that the third-party complaint against Moorehead will have no purpose.

CONCLUSION

Review of the record, taken in the light most favorable to Cornett, shows that the Homeowners did not breach their duty to exercise ordinary care.

The record also illustrates that no additional duty was placed upon the Homeowners for which they could be found liable. Because no genuine issue of material fact exists the Homeowners are entitled to judgment as a matter of law.

The order granting summary judgment by the Fayette Circuit Court is affirmed.

ALL CONCUR.

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