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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001278-MR

LINDA THOMAS APPELLANT

APPEAL FROM JESSAMINE CIRCUIT COURT
v. HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 15-CI-00361

DIXIE BOTTOMS,
JAMES M. BREINER, and
MARY S. BREINER APPELLEES

AND
NO. 2016-CA-001735-MR

LINDA THOMAS APPELLANT

APPEAL FROM JESSAMINE CIRCUIT COURT
v. HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 15-CI-00361

NELSON BOTTOMS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; COMBS AND THOMPSON, JUDGES.

KRAMER, CHIEF JUDGE: Linda Thomas appeals the Jessamine Circuit Court's granting of summary judgment to Dixie Bottoms, Nelson Bottoms, James M. Breiner, and Mary S. Breiner, with respect to claims of negligence she asserted against those parties. After careful consideration, we affirm.

The basic facts in this case are not seriously disputed. On June 21, 2014, Linda attended a party at Nelson Bottoms' farm, which he was leasing from Dixie Bottoms. Dixie was not present at the party. Children were playing with water balloons at the party, including E.B., who was five years old at the time. E.B. is the minor child of the Breiners. Linda sat in one of the chairs that had been placed in the yard for guests. Shortly after sitting, Linda was hit in the back of the head with a water balloon thrown by E.B., who was chasing another child with it. When E.B. threw the water balloon, the other child ducked and the water balloon hit Linda in the back of the head. At first Linda did not realize what had happened. She remained seated for some time to gather herself and then decided to go home because she did not feel well.

Linda drove approximately 30-40 minutes to get home. She claims that the next morning, she woke up with blurred vision and that she has not

recovered her vision. She claims she has trouble completing household chores and has been unable to drive since this injury. She alleges she quit her job due to this injury. Linda filed her complaint on June 12, 2015, alleging negligent supervision of E.B. and negligence on the part of the Bottomses. Following discovery, the appellees respectively moved for summary judgment; their motions were granted.

Our review of summary judgment is as follows:

> The standard of review on appeal when a trial court grants a motion for 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." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists. . . . Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo.*

Lewis v. B & R Corp., 56 S.W.3d 432, 436 (Ky. App. 2001) (internal citations omitted).

The general rule with respect to a parent's duty to supervise a child is as follows:

> A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent
>
> (a) knows or has reason to know that he has the ability to control his child, and
> (b) knows or should know of the necessity and opportunity for exercising such control.
>
> The existence of a parent's duty to control a minor child largely turns on the foreseeability of the child's injurious conduct. For a child's act to be foreseeable, it is not necessary that the child have committed that same act before. A duty to control the child may also arise where the child previously has committed a very similar act and there are circumstances making it foreseeable that the child might later commit the specific act at issue.

Hugenberg v. W. Am. Ins. Co./Ohio Cas. Grp., 249 S.W.3d 174, 181-82 (Ky. App. 2006) (quoting Restatement (Second) of Torts § 316 (1965)).

Linda relies on *Moore v. Lexington Transit Corp.,* 418 S.W.2d 245 (Ky. 1967), to establish that the Breiners were negligent in their supervision of E.B. However, *Moore* is distinguished from the present case. In *Moore*, an eight-year-old boy suddenly opened a car door at an intersection causing a bus to slam on its brakes, which resulted in a passenger getting hurt. The Court reversed summary judgment because there was evidence that on past occasions the child was permitted to leave the car at this intersection, which the Court determined presented a jury question. Although the child had never done it before without the mother's permission, the Court found that the mother negligently failed to

anticipate that the child might perform this act and did not prevent it from happening.

"The essence of a negligent supervision claim is that the parent's 'failure to exercise due care has made it possible and probable that the child would injure another.'" *Hugenberg*, 249 S.W.3d at 181 (citing *Moore*, 418 S.W.2d at 248). In the present case, no evidence in the record supports that E.B. had previously engaged in conduct that had the potential to cause harm. *See generally, James v. Wilson*, 95 S.W.3d 875, 887 (Ky. App. 2002) (The minor child went to his high school and shot and killed three students and injured five more. This Court affirmed the granting of the summary judgment as to the parents regarding negligent supervision because there was no evidence that the child had ever exhibited violent tendencies toward anyone.) Therefore, the Breiners were under no duty to take precautionary measures that would have prevented Linda from getting hit with a water balloon. Accordingly, Linda cannot demonstrate a genuine issue of material fact that the Breiners' failure to supervise E.B. made it probable that he would injure Linda. And, to the degree that Linda makes the same claims against the Bottoms, she cannot prevail because there is no dispute that E.B. displayed any tendency or propensity to engage in conduct similar to that which caused injury in this case.

Regarding Linda's negligence claims against Nelson Bottom, it is well settled in Kentucky that a social guest is considered a licensee. *Shipp v. Johnson*, 452 S.W.2d 828 (Ky. 1969); Restatement (Second) of Torts, § 330 cmt. H.3

(1965). "[A] premises owner or occupant owes a duty to a licensee not to willfully or wantonly injure the licensee and to warn of dangerous conditions known by the owner/occupant." *Klinglesmith v. Estate of Pottinger,* 445 S.W.3d 565, 567 (Ky. App. 2014).[1] It was not foreseeable that a five-year old child playing with a water balloon would injure an adult at the party, and E.B. had not engaged in similar injurious conduct in the past. Accordingly, there was nothing of which to warn Linda. Moreover, the children were playing out in the open. Accordingly, Linda cannot create a genuine issue of material fact sufficient to survive summary judgment against Nelson Bottoms.

Regarding Linda's claims against Dixie Bottoms, the landlord, "[a] long line of cases in this Commonwealth hold that when a third person is injured on rented premises his cause of action, except for certain situations, lies against the tenant rather than the landlord." *Rogers v. Redmond*, 727 S.W.2d 874, 875 (Ky. App. 1987). Consequently, summary judgment was correctly granted for any claims against Dixie.

In light of the above-stated reasons, the circuit court's grant of summary judgment to all appellees in this case was warranted. Therefore, we AFFIRM.

ALL CONCUR.

[1] For the sake of clarity, we note that the parties do not cite to *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901 (Ky. 2013), and rightfully so. *Shelton* only "address[es] the somewhat evolving duty owed by possessors of land to invitees rather than licensees." *Klinglesmith*, 445 S.W.3d at 567. Consequently, *Shelton* has no impact upon this case.

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