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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001546-MR

SARAH JANE GROVES AND
GEORGE HIBERT GROVES, JR. APPELLANTS

APPEAL FROM BOYD CIRCUIT COURT
v. HONORABLE GEORGE W. DAVIS, III, JUDGE
ACTION NO. 14-CI-00810

JOHN WOODS, SR., HAZEL J. WOODS,
TERRY HARRIS AND TAMMY L.
HARRIS APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, STUMBO,[1] AND THOMPSON, JUDGES.

CLAYTON, JUDGE: Sarah Jane Groves and George Hibert Groves, Jr. appeal the Boyd Circuit Court's grant of summary judgment in favor of landowners, John

[1] Judge Janet Stumbo concurred in this opinion prior to retiring from the Kentucky Court of Appeals effective December 31, 2017. Release of this opinion was delayed by administrative handling.

Woods, Sr. and Hazel J. Woods, and horse owners, Terry Harris and Tammy L. Harris (hereinafter collectively the "Appellees"). This action arises from an injury incurred by Sarah that was allegedly caused by a horse on the Woods' property. Hank, the horse, is owned by the Harrises who boarded the horse part-time on the Woods' property. The Groves also appeal the trial court's denial of their motion to alter, amend, or vacate the order of summary judgment.

After careful consideration, we affirm.

BACKGROUND

Sarah Groves and her husband, George Groves, entered a verbal lease with John and Hazel Woods to rent a home with an abutting yard in Catlettsburg, Kentucky. However, the parties disagree about whether the Groves rented the house and yard or the whole property. The Appellees maintain that they only rented the house and yard, but the Groves claim to have rented the entire property. It was not until after the Appellees' motion for summary judgment that the Groves insisted that they had rented the entire property.

The Groves and their three children moved into the home on December 30, 2013. Adjacent to the home and yard, the Woods had a fenced pasture with a barn. On this portion of the Woods' property, the Harrises boarded Hank, a Tennessee Walking Horse, part-time. He spent time on the pasture and in the barn.

The Harrises described Hank as a gentle, trained horse that enjoyed being ridden. He was taken to church picnics, fall festivals, and birthday parties to perform tricks and give rides. The Harrises knew of no occasion where he kicked another horse or person. The horse was used to being around other people and exposed to loud noises and multiple stimuli.

According to the Woods, contrary to the Groves' assertions, they specifically discussed the horses, barn, and pasture with the Groves. Hazel Woods claimed to have informed them that they were only renting the house and the yard. Further, because Hazel did not want them going near the horses, she told them to keep the children away from the barn and out of the pasture. John Woods also said that he told George about the horses and not to go into the pasture. George agreed that the family would stay off the pasture. It was a verbal lease and an informal arrangement since the Woods' son was married to Sarah's sister. Sarah, in her deposition, said that they were helping the Woods out by renting the home.

Nonetheless, the Groves disagree that they were told to stay off the pasture and away from the horses. Yet, in their depositions, both Sarah and George admitted knowing horses were on the pasture. They both saw a horse, Hank, on the property the day after they moved into the house.

On January 9, 2014, nine days after moving in, Sarah and the children went for a walk to see an old graveyard. They cut through the pasture to get to the

site. It is disputed whether Sarah and the children crossed a fence into the pasture where the horses spend time. The Appellees believe that Sarah and the children crossed onto the pasture, but Sarah claimed that they never crossed onto the pasture or traversed the fence. Sarah maintained that Hank was running loose, chased her, and stomped her thigh after she fell. Countering her assertion, the Appellees highlight that in her description of the accident, she stated she walked up a hill to get to the graveyard. The hill is on the pasture side of the fence, not the yard. Therefore, they maintain that the injury occurred on the pasture. In fact, Sarah and the children in their depositions talked about the injury occurring on a hill.

On October 10, 2014, Sarah filed the complaint against the Woods and the Harrises alleging negligence on their part. George filed a separate suit seeking damages for a loss of consortium. His suit was consolidated with the negligence action.

At the close of discovery and after the depositions, the Appellees made a motion for summary judgment. Sarah objected to the summary judgment motion. In her written objection, she averred that they had rented the entire property from the Woods, and thus, was in possession of the whole property. This claim, sometime into the litigation, changed the status of Sarah from a trespasser to a tenant. A week later, Sarah also supplemented the summary judgment response

outside the time permitted by the trial court. In the supplement, Sarah argued that the Appellees also violated the cattle-at-large statute (Kentucky Revised Statute (KRS) 259.210).

A hearing was held where the Appellees argued, based on Sarah's new assertion that she was a tenant not trespasser, the previous issues before the trial court were moot since the matter now involved landlord-tenant law. The Appellees asserted that under landlord-tenant law, they owed no duty to Sarah because they had informed her about the horse prior to the alleged injury.

In its order granting summary judgment, the trial court noted that the Groves attempted to argue one theory under the complaint and then pivoted with new facts after the summary judgment motion. The trial court believed that changing the theory of the case and the underlying facts ran afoul of Kentucky jurisprudence. Additionally, the trial court held that Sarah's argument that KRS 259.210 was applicable was incorrect. This statute applies only to cattle running at large on public property and this property was a private leasehold.

Ultimately, the trial court held that no genuine issues of material fact existed, and as a matter of law, the Appellees were entitled to summary judgment. The Groves filed a motion to alter, amend, or vacate the summary judgment, which the trial court denied on October 10, 2016. The Groves now appeal both the order

granting summary judgment and the order denying their motion to alter, amend, or vacate this order.

STANDARD OF REVIEW

The standard of review on appeal of a 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). Summary judgment is appropriate where "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.

A trial court must view 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." *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). And summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id*. Since summary judgment involves only legal questions and whether any disputed material issues of fact exist, an appellate court need not defer to the trial court's decision and reviews the issue *de novo*. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001).

ANALYSIS

The Groves argue negligence as the basis of the complaint. In a negligence action, a plaintiff "must prove the existence of a duty, breach thereof, causation, and damages." *Boland-Maloney Lumber Co., Inc. v. Burnett*, 302 S.W.3d 680, 686 (Ky. App. 2009). Whether a duty of care exists is a question of law for the court. Therefore, it is reviewed *de novo*. *Id*. Here, the question is primarily one of duty.

The Groves contend that the trial court erred in granting summary judgment because disputed issues of material fact exist precluding summary judgment. Further, they maintain that the trial court incorrectly stated the law regarding the responsibility of a landlord to a tenant regarding warning of latent dangers. Bolstering their position, the Groves declare that the Appellees were negligent in providing a fence, specifically referencing KRS 259.210; the horse was an open and obvious danger; and, the Appellees failed to follow the farm animal activities statutes, KRS 247.401 – 247.4029.

The Appellees counter that they owed no duty to Sarah since she was a trespasser; even if she was not a trespasser, they had no duty to warn because Hank was a known and/or obvious condition; summary judgment is permissible in open and obvious cases; Hank's presence in the pasture was an obvious condition of which Sarah had actual knowledge when she entered the pasture; if Sarah was a

tenant that has leased the entire premises, the Appellees had no duty to warn since the horse was not a latent danger since it had not been established that Hank was an "abnormally dangerous" animal; and, the Animal Statutes and KRS 259.210 are inapplicable.

We begin our analysis by observing that the arguments in this matter are convoluted. The Groves' many assertions seem contradictory and non-cohesive. At the minimum, they provide no interconnected theory of negligence but appear to throw out any and all arguments. The Appellees have responded to the many arguments rather than providing a more precise answer. To address the random arguments, our approach is to avoid the ambiguous, inconsistent nature of the presented issues and fashion a decision that establishes the facts and law before us.

Furthermore, it is important to keep in mind that an issue of nonmaterial fact will not preclude the granting of a summary judgment. *Isaacs v. Smith*, 5 S.W.3d 500, 503 (Ky. 1999). The Groves not only proffer numerous legal arguments that are non-cohesive and unrelated but also vary their reporting of the facts to suit the argument proffered. Significantly, a motion for summary judgment may be granted if the Court is fully satisfied that there is an absence of genuine and material factual issues. *Id*. Nor can a litigant provide self-serving statements to defeat a motion for summary judgment. *See First Federal Sav. Bank*

v. McCubbins, 217 S.W.3d 201, 204 (Ky. 2006). Evidence presented must create a genuine issue of material fact.

First, the trial court observed in its order granting summary judgment that the Groves initially premised the case on the rental of the home and the yard. Yet, in response to the motion for summary judgment, they changed the characterization of the rental from the renting of the house and yard to the rental of the entire property. This new characterization somewhat defies logic given the amount of the family's rent and their purpose in seeking a home rather than a farm. Nonetheless, that is the Groves' contention.

As noted by the trial court, a party may not use an affidavit to defeat a motion for summary judgment if it contradicts previous testimony provided by the non-moving party. *Gilliam v. Pikeville United Methodist Hospital of Kentucky, Inc.*, 215 S.W.3d 56, 62-63 (Ky. App. 2006). As the Court explained a post-deposition affidavit may be admitted explaining deposition testimony, but an affidavit which merely contradicts earlier testimony cannot be submitted for purpose of attempting to create genuine issue of material fact to avoid summary judgment. *Id*. In the case at bar, the Groves only clarified that they rented the whole property when they objected to the Appellees' summary judgment motion.

Notwithstanding Appellees' assertion that Sarah was a trespasser, our perusal of her lengthy, contentious deposition provides no concrete or certain

evidence to indicate whether the Groves rented the house and yard or the whole property. It is equivocal. Moreover, the lease is verbal. Hence, without evidence of certitude concerning the rental of the house and yard, we accept their assertion that the family rented the entire property. In truth, the deposition testimony is not clear, which negates the impact of *Gilliam*.

But by giving the Groves the status of tenants rather than trespassers, the analysis of duty is dramatically altered. The Groves' changed status, from trespasser to tenant, changes the nature of the Appellees' legal duty in the calculus of the negligence. The question becomes what is the Appellees' duty to Sarah as a tenant.

Under Sarah's proposed facts, she was injured on property she was renting. "'Negligence,' as used in law, may be defined as the failure to discharge a legal duty, whereby injury occurs." *Franklin v. Tracy*, 117 Ky. 267, 77 S.W. 1113, 1115 (1904). As a general proposition of law in Kentucky, a tenant takes the leased premises as he or she finds them. *Milby v. Mears*, 580 S.W.2d 724 (Ky. App. 1979). And the Woods' only duty as landlords was to warn the tenant of known latent defects at the time of the lease agreement. *Carver v. Howard*, 280 S.W.2d 708 (Ky. 1955). Further, contrary to the Groves' claim, this case is still good law in Kentucky.

In *Carver*, Kentucky's highest court explained the landlord liability rule as follows:

> In determining the liability of a landlord to a tenant and his guests, invitees and others for injuries attributable to defects in the premises, there is in the law a clear distinction existing between a state of facts where the tenant is put in complete and unrestricted possession and control of the premises with no statutory or contractual obligation on the landlord to repair, and a case where the defective condition is located in that portion of the demised premises, or appurtenances, retained by the lessor for the common use and benefit of a number of tenants.

Id. at 711.

Here, the Groves, as tenants, indicated that they were in control of the premises and could use all the property. Kentucky courts have long held "[w]hen a tenant maintains complete control and possession over the premises and the landlord has no contractual or statutory obligation to repair, the landlord is only liable for 'the failure to disclose known latent defects at the time the tenant leases the premises.'" *Jaimes v. Thompson*, 318 S.W.3d 118, 119 (Ky. App. 2010) (quoting *Carver*, 280 S.W.2d at 711).

Moreover, the day after the Woods leased the premises to the Groves, both Sarah and George testified in their depositions that they saw a horse near the house. Their depositions provided no testimony that they acted or did anything about the presence of the horse. Supporting the allegation that they knew about

Hank are statements found in both the complaint and Groves' deposition. Under Count I – Negligence, No. 7 states that "[o]n or about January 9, 2014, Defendants Woods also provided boarding of a horse to Defendants Harris in a barn located on the same property . . . ." Thus, by the actual words in the complaint, they knew that a horse was boarded on the property. In sum, they knew about Hank, the horse, and hence, the Woods cannot be liable for failure to warn them of a known latent defect. The trial court's grant of summary judgment was appropriate as a matter of law.

Next, we consider the Harrises' liability. Kentucky law governs the liability of the Harrises, as the owners of the horse. According to *Baker v. McIntosh*, 132 S.W.3d 230, 232 (Ky. App. 2004), "one who possesses or harbors a domestic animal that he does not know or have reason to know to be abnormally dangerous, is subject to liability for harm done by the animal if, but only if, (a) he intentionally causes the animal to do the harm, or (b) he is negligent in failing to prevent the harm."[2] In the matter at hand, the Groves have provided no proof that the Harrises' horse, Hank, was abnormally dangerous or that the Harrises caused the harm or they were negligent in failing to prevent the harm.

[2] RESTATEMENT OF THE LAW (SECOND) TORTS § 518.

As Sarah admitted, she knew about Hank and still went onto the pasture the day of the incident. While she now claims that she did not know the Woods were allowing the Harrises to board horses on the property, both the deposition testimony and the complaint belie this contention. Further, the Woods testified that they told the Groves about the horses and warned them to stay out of the pasture. Sarah may deny that they told her, but her denial does not explain away the fact that the Groves saw a horse on the property the day after they moved into the home. Additionally, having seen the horse, the Groves did not testify to doing anything about it. Our Court has stated that "[r]easonable care on the part of the possessor of . . . premises does not ordinarily require precaution or even warning against dangers that are known to the visitor or so obvious to him that he may be expected to discover them." *Id*. (quoting *Bonn v. Sears, Roebuck & Co.*, 440 S.W.2d 526, 528 (Ky. 1969)). Moreover, Sarah cannot continually use self-serving statements to modify the facts.

To summarize, if the Harrises did not know or have reason to know Hank was abnormally dangerous, they would be liable for Hank's actions only if they intentionally caused Hank to do harm or were negligent in failing to prevent the harm. *Id.* The trial court concluded that Sarah did not provide proof that the Harrises were negligent under this standard. We concur. Again, the trial court did not err in granting summary judgment.

The next issue implicates premises liability and the interplay between "open and obvious" conditions and summary judgment. Appellees assert that they had no duty to warn the Groves about Hank because he was a known or obvious condition. The Groves counter that whether Hank's presence was open and obvious is not dispositive because based on comparative fault, summary judgment is no longer permitted in such matters. Both parties cite *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288 (Ky. 2015) to support their positions.

The Appellees maintain that under *Carter*, the trial court may still grant summary judgment in certain cases involving "open and obvious" hazards in premises liability matters. They point out the Court's following statement:

> Under the right circumstances, the plaintiffs conduct in the face of an open-and-obvious hazard may be so clearly the only fault of his injury that summary judgment could be warranted against him, for example when a situation cannot be corrected by any means or when it is beyond dispute that the landowner had done all that was reasonable. *Id*. at 918. Applying comparative fault to open-and-obvious cases does not restrict the ability of the court to exercise sound judgment in these cases any more than in any other kind of tort case.

Id. at 297.

The Groves counter that because the horse was an "open and obvious" hazard, based on *Carter*, summary judgment is improper, and the case must be heard by a jury. Citing *Carter*, the Groves explain that when an "open and obvious" hazard exists, summary judgment is inappropriate, and liability must be

considered under the comparative fault doctrine, and accordingly, such a case must be sent to a jury to determine each party's fault. Both parties' interpretations gloss over both the nature of this case and the applicable jurisprudence.

Contrary to the Appellees' assertion, the Kentucky Supreme Court has held that most "open and obvious" hazard cases are subject to the comparative fault doctrine unless "a situation cannot be corrected by any means or when it is beyond dispute that the landowner had done all that was reasonable." *See Carter* at 297. While these qualifiers must be considered in the light most favorable to the nonmoving party, the Groves, they fail to consider, pursuant to their contention of tenancy, the differences in duty in landlord/tenant matters and duty in premises liability cases.

The Groves further muddle this argument by declaring that they did not know about the horse or its boarding on the property, and hence, the horse's presence was not "open and obvious." Clearly, Sarah and George's testimony established that they knew about Hank. This statement is another example of the Groves attempting to have it both ways – they were not trespassers but tenants, and now, Hank was an "open and obvious" hazard but they did not know about his existence.

We distinguish *Carter* for two reasons. First, while the Court modified the rule that there can be no liability for injuries resulting from naturally

or structurally occurring open-and-obvious hazards, the Court's holding did not encompass farm animals, which are neither natural nor structural open-and-obvious hazards. They are animals, which are brought onto property. As discussed below, animals have specific statutory mandates regarding their presence on the land.

Second, the Courts in the Commonwealth have not established that duty on the part of a landowner to an invitee is the same duty owned by a landlord to a tenant. According to *Carver*, which has not been overruled, a landlord's only duty is to warn a tenant of known latent defects at the time of the lease agreement. *Carver*, 280 S.W.2d at 708. Whereas the duty of a landowner to an invitee is as follows: "a possessor of land owes a duty to an invitee to discover unreasonably dangerous conditions on the land and either eliminate or warn of them." *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901, 909 (Ky. 2013). Simply put, *Carter* and its progeny have not abrogated the Commonwealth's jurisprudence regarding landlord-tenant relationships.

Here, the relevant duty is found in *Carver*. As discussed above, the Groves, who insist that they were tenants, were aware of the horse on the pasture, so the Appellees fulfilled their duty as landlords to warn the Groves about Hank. Because the Groves were not invitees, the duty discussed in premises liability cases, which relate to cases involving "open and obvious" conditions, is not

pertinent to this matter. Thus, the trial court did not err in granting summary judgment.

Another argument proffered by the Groves is that the Appellees violated KRS 259.210. Unfortunately, they incorrectly explain the impact of this statute. Under this statute, people may not permit any cattle owned by them, in their custody, or under their control to run at large. Nothing in this statute or applicable case law bears on an injury by an animal on private property. Indeed, an opinion of the attorney general supports this interpretation of KRS 259.210 when it states "[w]hether this statute has been violated or not depends, we believe, on the status of the road. If it is in fact the private property of the cattle's owner, it would appear that there is no violation." Ky. Op. Atty. Gen. 2-89, Ky. OAG 88-59, 1988 WL 409931, *2. For some inexplicable reason, the Groves assert that because neither Sarah nor the Woods owned Hank, KRS 259.210 applies. This reasoning is incorrect. The statute is only applicable if the animal is on a public roadway. Therefore, this argument does not obviate the grant of summary judgment in this case.

The next argument proffered by the Groves maintains that because the requirements of KRS 247.4027 – KRS 247.4029 were not followed; summary judgment was not proper. These statutes regulate certain activities related to farm animals. The Groves maintain that the Woods and the Harrises did not comply

with the requirements under these statutes, and therefore, they are liable for Sarah's injury. Additionally, the Groves suggest that the failure to follow these statutory requirements is negligence per se. They provide no legal support for this statement.

Significantly, however, KRS 247.4025(2) mandates that "KRS 247.401 to 247.4029 shall not apply to questions of liability arising from fencing and enclosure as regulated by KRS 256.010 to 256.990." Here, Hank was not involved in farm animal activities but was merely boarded on the Woods' property. Thus, these statutes are inapposite.

The final argument submitted by the Groves is that the trial court erred by not allowing briefing of the landlord-tenant issue advanced by the Appellees. However, the parties were able to debate the issue at the hearing, and consequently, no due process violation occurred. The trial court, which is tasked with managing the process, allowed oral arguments in which both parties were able to fully explicate their positions.

CONCLUSION

The decision of the Boyd Circuit Court is affirmed. It is well-settled law in Kentucky that a landlord is only required to warn a tenant of a known, latent danger. The Groves admitted to knowing that Hank, the horse, was present on the property leased by them. The grant of summary judgment was proper.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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