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# Commonwealth of Kentucky

# Court of Appeals

NO. 2017-CA-000430-MR

WILLIAM MCMAHON APPELLANT

v.

APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE JANET J. CROCKER, JUDGE
ACTION NO. 09-CI-00452

F & C MATERIAL HANDLING, INC.,
d/b/a KENTUCKIANA MATERIAL
HANDLING APPELLEE

## OPINION
## REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON AND LAMBERT, JUDGES; HENRY,[1] SPECIAL JUDGE.

LAMBERT, JUDGE: William McMahon appeals from the Simpson Circuit Court order granting summary judgment to F & C Material Handling, Inc., doing

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[1] Special Judge Michael L. Henry sitting by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

business as Kentuckiana Material Handling (KMH).[2] He argues that summary judgment was improper because privity of contract was not required for him to recover and that there were genuine issues of material fact that should have been decided by a jury. We reverse and remand for trial on the issue of negligence.

On December 1, 2008, McMahon was injured at his place of employment, the Walmart Supercenter in Franklin, Kentucky. We repeat the circuit court's summary of facts relating to McMahon's injury:

> McMahon was 22 years old when he was hired by Store No. 282 [Walmart Supercenter] on August 25, 2008. He was paid minimum wage and was assigned to second shift – 4:00 p.m. to 1:00 [a.]m. – as an "unloader." His general job duties required him to unload trucks, take freight out to the store floor, and put up freight. He was trained to use the unloading equipment, which included an electric floor jack that was used to offload palletized merchandise. He maintains that it was necessary to walk backwards when unloading a truck with the electric pallet in order to monitor the pallet, periodically checking the pathway behind him. There is contrasting testimony that he should have operated the electric jack facing forward.
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> . . . . It is not disputed that the injury occurred on the right-hand interior dock, hereinafter referred to as "dock #2." That dock is denoted externally with what appears to be the words *WAL-MART GM* spray painted on the dock door. According to McMahon, "*GM*" referred to

[2] BID Central, Inc. (d/b/a BCI, Inc., and BCI Management Group, Inc.), was dismissed as a party to this appeal by order of this Court entered December 8, 2017. Claims Management, Inc., as Subrogee and Third-Party Administrator of Wal-Mart Stores, Inc., was dismissed as a party to this appeal by order of this Court entered on March 7, 2018. Thus, KMH is the sole appellee remaining.

> general merchandise. The word "*Grocery*" is denoted on the left-hand exterior dock door.
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> On December 1, 2008, which the Court notes would have been the Monday following "Black Friday" of the 2008 Christmas season, McMahon had previously unloaded a "GM" truck at dock #2, which entailed engaging the dock leveler and then positioning a roller conveyor belt inside the truck to move the boxes into the receiving area. Although the dock leveler should remain in place if the "hold-down" mechanism is functioning properly, the weight of the conveyor belt would have held the dock plate in place even if the hold-down mechanism was not functioning properly. He then removed the conveyor belt, leaving the dock leveler in place, and began unloading a truck of palletized frozen products with the use of the electric floor jack.
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> Walmart video surveillance establishes that during that process the dock plate did not stay in place, but rather gradually lifted or "creeped" up on its own five (5) times while McMahon was moving in and out of the back of the truck. As that occurred, other employees and the truck driver (on one occasion) "walked" the dock plate back down level with the trailer. However, on the fifth occurrence, while moving backwards McMahon pinned his right leg between the electric pallet and the dock plate, crushing his femur which subsequently resulted in amputation above the knee.

McMahon sought redress for his injuries by suit filed on November 30, 2009. His initial complaint was filed against the manufacturer of the dock leveler (4Front) under a product liability theory, and KMH for negligent repair of the dock leveler. Claims Management, Inc. (as subrogee and third-party administrator of Walmart Stores, Inc.) filed as intervening plaintiff. McMahon

amended his complaint to include BCI for improper coordination between Walmart and KMH for the repair. In 2014, a third-party complaint was brought by BCI and KMH against Overhead Door Company and Warehouse Equipment and Supply Company, Inc.; there were also cross-claims for apportionment. The only remaining parties to this appeal are McMahon and KMH. The relationship between these parties is described by the circuit court:

> The defendant, Bid Central, Inc. d/b/a BCI and BCI Management Group ("BCI"), is a construction and maintenance management firm located in Conway, Arkansas. At the time of McMahon's accident, BCI dispatched repair services for Walmart Stores in 30 states across the country under a contractual arrangement with Walmart corporate operations located in Bentonville, Arkansas. BCI in turn contracted with regional service providers, such as the defendant, F&C Material Handling, Inc., d/b/a Kentuckiana Material Handling ("KMH"). KMH specializes in the service and repair of loading docks and doors.

There is no dispute that BCI had dispatched KMH to Walmart Supercenter Store No. 282 within weeks before McMahon's injury (following Walmart's November 3 and November 10 calls for repairs) and that KMH's employee had made repairs to the dock leveler at a different dock (i.e., not the specific site of McMahon's injury) on November 6 and 11, 2008. The controverted testimony and evidence concern whether KMH had attempted to repair the dock leveler that caused McMahon's injury, whether KMH had a duty to investigate and repair the remaining docks at the loading area, and what

information was passed along from Walmart to BCI and in turn from BCI to KMH. McMahon insists, as he did in the circuit court, that the factual discrepancies were genuine issues that made summary judgment inappropriate. He also argues that the dispatch by BCI to KMH to make the repairs conferred a duty owed to him by KMH.

We agree with McMahon that there were genuine issues of material fact and that summary judgment was therefore improperly granted to KMH. We begin by stating the standard of review:

> 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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); Kentucky Rules of Civil Procedure (CR) 56.03. "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." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), citing *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480-82 (Ky. 1991).
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> "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.'" *Lewis*, 56 S.W.3d at 436, citing *Steelvest*, 807 S.W.2d at 482. The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists."

> *Steelvest*, 807 S.W.2d at 480. The Kentucky Supreme Court has held that the word "impossible," as set forth in the standard for summary judgment, is meant to be "used in a practical sense, not in an absolute sense." *Lewis*, 56 S.W.3d at 436. "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* at 436.

*West v. KKI, LLC*, 300 S.W.3d 184, 188 (Ky. App. 2008).

Here the circuit court determined that, although there were facts in dispute, they were not material facts pertaining to the causes of action in McMahon's complaint and amended complaint. We thus focus our attention on the duty owed by KMH to McMahon and the facts relevant to that cause of action.

The circuit court properly listed possible duties owed by KMH to McMahon, namely: (1) the Undertaker's doctrine as set forth in RESTATEMENT (SECOND) OF TORTS, §324A (1965)[3]; (2) a contractual duty; or (3) a common law duty imposed under a negligence standard. The circuit court then described why each theory is inapplicable for recovery under the facts and circumstances presented by McMahon. It explained that its ruling for granting summary

[3] That section states: "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if . . . (b) he has undertaken to perform a duty owed by the other to the third person[.]" *Louisville Gas & Elec. Co. v. Roberson*, 212 S.W.3d 107, 111 (Ky. 2006). "In *Ostendorf v. Clark Equipment Co.*, 122 S.W.3d 530 (Ky. 2003), the Kentucky Supreme Court adopted Restatement (Second) of Torts § 324A, as a basis for imposing a duty." *Jenkins v. Best*, 250 S.W.3d 680, 693 (Ky. App. 2007).

judgment was grounded in the concept of duty of care, holding that KMH owed no such duty to McMahon, only to BCI. We disagree.

As McMahon aptly points out, he and other Walmart employees were the expected users of the equipment. Thus, there was a duty owed by KMH to make the appropriate repairs for the safety of those employees. This type of duty is discussed in *Louisville Gas & Electric*, *supra*:

> As previously discussed, the county appears to have determined that illumination of Preston Highway in the vicinity of Miles Lane was a necessary or desirable safety improvement of the highway. To implement its safety determination, the county contracted with LG & E to install and maintain street lamps. As such, LG & E had a **duty to exercise ordinary care to see that the street lamps it installed were maintained in a working condition**.
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> Provided that public safety was the primary purpose of the street lamp, the duty of LG & E to exercise ordinary care with respect to maintenance of the street lamp has been established. Whether LG & E was negligent and whether its negligence, if any, was a substantial factor in causing the death of Shytone Roberson will be **for the trier of fact to determine on remand**. Accordingly, we affirm the Court of Appeals and remand to the Jefferson Circuit Court for further consistent proceedings.

212 S.W.3d at 111-12 (emphasis added). Whether KMH "was negligent and whether its negligence, if any, was a substantial factor in causing [the injury of McMahon] will be for the trier of fact to determine on remand." *Id.* at 112.

The judgment of the Simpson Circuit Court is reversed, and this matter is remanded for trial.

ALL CONCUR.

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