RENDERED: JULY 30, 1999; 10:00 a.m.
NOT TO BE PUBLISHED
MODIFIED: AUGUST 6, 1999; 2:00 P.M.

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001756-MR

DANNY BELL, ADMINISTRATOR OF THE ESTATE
OF BRITT THOMAS BELL, DECEASED — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 1996-CI-836

RUBEN NAZARIO — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GARDNER, KNOPF, AND MCANULTY, JUDGES.

KNOPF, JUDGE: This is an appeal from a summary judgment dismissing a wrongful death action because the victim's death was not a reasonably foreseeable consequence of the defendant's alleged negligence. Finding no error, we affirm.

The underlying facts of this action are not in dispute and were set out by the trial court as follows:

> The circumstances of this case are tragic. While Dr. Ruben Nazario and his wife were out

> of town, their two children, Eduardo, age 18, and Gustavo, age 14, threw a party. It is uncontroverted that the Defendant [Nazario] did not know they planned to do so. There is evidence that he actually told them not to have friends over while they were out of town. Regardless, the boys had a large number of people over. That evening [February 9, 1996], Mark Gosser, a stranger to the boys, came over, walked into the house to find Danny Abbott, persuaded Mr. Abbott to go outside of the Nazario home, and started to fight with him. Gosser and Abbott had been having trouble for some weeks previous to the party. Several people at the party gathered around to watch the fight. Gosser pulled a gun and fired at Abbott. He missed, but struck a spectator, Britt Thomas Bell, fatally wounding him.

Record on Appeal (ROA) at 113.

On October 8, 1996, Danny Bell, as administrator of the estate of Britt Thomas Bell, brought a wrongful death action against Ruben Nazario. In the original complaint, Bell alleged that Nazario was negligent in allowing the party at his home and in failing to provide adult supervision for the party. Nazario answered, denying any negligence, and the action proceeded through discovery.

On January 20, 1998, Nazario moved for summary judgment on the complaint. While the motion was pending, Bell moved the trial court to file an amended complaint. The trial court granted the motion and the first amended complaint was filed on February 20, 1998. In the first amended complaint, Bell alleged that Nazario's sons were acting as his agents, and that Britt Thomas Bell's death was caused by their negligence while acting in the scope of their authority. Subsequently, on June 5, 1998,

Bell filed a second amended complaint, alleging that Nazario negligently entrusted his home to his minor sons while he was out of town, and that Britt Bell's death occurred as a result of this negligent entrustment.

On June 26, 1998, the trial court granted Nazario's motion for summary judgment. In addition to dismissing the original complaint alleging Nazario's primary negligence, the trial court also dismissed the counts alleged in Bell's first and second amended complaints. The trial court found that, regardless of any negligence by Nazario or his sons, the actions of Mark Gosser were an intervening and superseding cause of Britt Thomas Bell's death, and that Gosser's criminal conduct was not a reasonably foreseeable consequence of any negligence by either Nazario or his sons. Bell now appeals from this determination.

Bell primarily argues that the trial court denied him due process of law in dismissing the counts contained in the first and second amended complaints. Nazario filed the motion for summary judgment prior to the filing of the amended complaints, and his motion did not address the new claims raised therein. Bell contends that the trial judge acted improperly in dismissing those claims when the issues had not been submitted to the court for adjudication.

We agree that, as a general rule, a trial court should not rule on issues which have not been presented to the court for adjudication. *See* Gall v. Scroggy, Ky. App., 725 S.W.2d 867 (1987). However, a trial judge is authorized to grant a summary

judgment in favor of a party who has not requested it when all of the pertinent issues are before him at the time the case is submitted. Green v. Bourbon County Joint Planning Commission, Ky., 637 S.W.2d 626, 630 (1982) The rationale for not requiring a formal motion for summary judgment in these limited situations is that there is no prejudice to the party against whom summary judgment is granted. Storer Communications of Jefferson County, Inc. v. Oldham County Board of Education, Ky. App., 850 S.W.2d 340, 342 (1993). In the present case, we conclude that the trial court's ruling regarding the foreseeability issue necessarily precluded any recovery on Bell's additional causes of action.

A motion for summary judgment should only be granted where there is no genuine issue as to any material fact and when the moving party is entitled to judgment as a matter of law. CR 56.03. The record must be viewed in a light most favorable to the party opposing the motion, and all doubts are to be resolved in his favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Summary judgment should only be used to terminate litigation when, as a matter of law, it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor and against the movant. Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255, 256 (1985). We agree with the trial judge that summary judgment was appropriate.

The parties in this case had completed discovery. Although Bell filed two (2) amended complaints after Nazario

filed his motion for summary judgment, all of the additional causes of action sounded in negligence. In the original complaint, Bell alleged that Nazario was negligent in allowing the party to be held in his home and in failing to provide adult supervision for the party. In the first amended complaint, Bell alleged that Eduardo and Gustavo were acting as Nazario's agents, and that he was liable for their negligence. In the second amended complaint, Bell alleged that Nazario negligently entrusted his home to his sons while he was out of town. The threshold issue of foreseeability in each of these claims was a matter of law for the court to decide.

As correctly stated by the trial court, negligence consists of: (1) a duty on the part of the defendant; (2) a breach of that duty; and (3) a consequent injury. The absence of any one (1) of the three (3) elements is fatal to the claim. Illinois Central Railroad v. Vincent, Ky., 412 S.W.2d 874, 876 (1967). Moreover, the chain of causation will be broken by an intervening or a superseding cause. A superseding cause is an act which intervenes between the original negligence and the injury, is of independent origin, is itself capable of bringing about the injury, is not reasonably foreseeable by the original actor, and must involve the unforeseen conduct of a third person. NKC Hospitals, Inc. v. Anthony, Ky., 849 S.W.2d 564, 568-69 (1993). The question of whether an undisputed act or circumstance is a superseding cause is a legal issue for the

court to resolve. Montgomery Elevator Co. v. McCullough, Ky., 676 S.W.2d 776, 780 (1984).

As stated in Waldon v. Housing Authority of Paducah, Ky. App., 854 S.W.2d 777 (1993):

> In Kentucky, "[t]he rule is that every person owes a duty to every other person to exercise ordinary care in his activities to prevent *foreseeable* injury." Grayson v. Fraternal Order of Eagles, Aerie No 3738, Inc. v. Claywell, Ky., 736 S.W.2d 328 (1987). (Emphasis added). In addressing questions of proximate cause, recent cases apply the general principles of foreseeability in those cases involving intervening or superseding cause. *See generally* Montgomery Elevator Co. v. McCullough, Ky., 676 S.W.2d 776 (1984). Even an intervening criminal act does not relieve one for liability for his or her negligent acts or omissions, where the criminal act is a reasonably foreseeable consequence of the defendant's negligent act. *See, e.g.* Wheeler v. Andrew Jergens Company, Ky., 696 S.W.2d 326 (1985).

Id. at 778-79.

In Waldon, a resident of a public housing complex was shot and killed outside of her residence. Her estate brought a wrongful death action against the housing authority, alleging that its negligence was a cause of her death. The evidence showed that the housing authority was told by the decedent and others that the assailant had made threats to kill one of its tenants. The housing authority was also aware that the assailant was residing in the complex without its permission, yet it took no action to evict him or to discourage his presence in the area. Despite its knowledge of the assailant's threats against one of its tenants, as well as the frequent occurrence of crime at the

complex, the housing authority failed to provide any security patrols of the area. Id. at 799.

By contrast, the uncontested evidence in the record in the present case was that Gosser did not go to the Nazario house to attend the party. Rather, he went to the house to find Abbott, with whom he had a number of previous disputes. Gosser then managed to convince Abbott to come outside of the house to start the fight. As explained by the trial court:

> No matter if the Nazario children had held parties at the home previously to this one, ostensibly without the parent's knowledge. A little rowdiness at a party with alcoholic drinks and lots of teenage guests is foreseeable. A murder is not. No matter if alcohol and marijuana were available at the party from various sources, since it is undenied that Gosser did not partake of either while at the Nazario's and that Abbott was 23 years old and did not smoke any marijuana at the party. No matter if the Nazario parents had made the children their agents or that they entrusted the house to their sons. The house did not cause the death of Britt Thomas Bell. The intervening and superseding criminal act of Mark Gosser did. Gosser broke the chain of proximate cause as to Dr. Ruben Nazario.

ROA at 115.

We agree with the trial court's analysis. Nazario could not be held liable on any of Bell's negligence theories unless the shooting and Britt Thomas Bell's death was a reasonably foreseeable consequence of the alleged negligence. Based upon the undisputed facts, Gosser's criminal conduct was a superseding cause of Britt Thomas Bell's death regardless of any of the alleged negligence of either Nazario or his sons.

Therefore, Bell could not prevail on any of his theories of the case and summary judgment was appropriate on all of his claims.

Accordingly, the judgment of the Pulaski Circuit Court is affirmed.

GARDNER, JUDGE, CONCURS.

McANULTY, JUDGE, DISSENTS AND FURNISHES OPINION.

McANULTY, JUDGE, DISSENTING: Respectfully, I dissent. The trial court deprived Appellant of his opportunity to be heard by considering the two amended complaints under Appellee's motion for summary judgment. In addition, I disagree with the majority's position that the injury to the decedent was not a foreseeable consequence of Appellee's negligence. In my humble opinion, the trial court erred by granting by summary judgment.

A party may move for judgment as a matter of law if there are no genuine issues of material fact in dispute. Steelvest, Inc. v. Scansteel Serv. Center, Inc., Ky., 807 S.W.2d 467 (1991). However, the trial court cannot grant summary judgment until the non-moving party receives notice of the motion and is allowed ten days to respond. CR 56.03. This Court has maintained that "it is fundamental that a trial court has no authority to otherwise dismiss claims without a motion, proper notice and a meaningful opportunity to be heard." Storer Communications of Jefferson County, Inc. v. Oldham County Bd. Of Educ., Ky. App., 850 S.W.2d 340, 342 (1993).

In this case, the motion for summary judgment was filed by Appellee after the original complaint. No additional motions

for summary judgment were filed after the first and second amended complaints. Appellant did not receive proper notice from the trial court that the subsequent claims would be considered under the original summary judgment motion. Therefore, Appellant did not receive the requisite ten days to respond.

The majority states that the trial court may consider the motion as to the amended complaints if all the issues are before the court and cites Green v. Bourbon County Joint Planning Commission, Ky., 637 S.W.2d 626, 630 (1982). In Green, the issue was whether summary judgment could be granted in favor of a non-moving party. This is inapplicable to the case at hand. In the case sub judice, the trial court granted summary judgment in favor of the moving party and thereby deprived Appellant of the opportunity to respond to the amended complaints. The trial court cannot grant summary judgment as to the new claims since the issues were never presented to the court by the moving party. CR 56 requires a party, not the court, to move for summary judgment. The trial court erred and thereby violated Appellant's right to due process.

Even without this procedural error, summary judgment was not appropriate. The majority agreed with the trial court's ruling that the misconduct of Gosser is a superseding cause which breaks the chain of proximate cause. However, "once it is determined that the defendant's duty requires him to anticipate the intervening misconduct, and guard against it, it follows that [the misconduct] cannot supersede his liability." William L.

Prosser, Torts § 44 (4th ed. 1978). In other words, if the misconduct is reasonably foreseeable, the action is not a superseding cause and the defendant is still liable.

Appellee informed his children that they were not to have friends over while he was out of town. It was reasonably foreseeable that a teenage party with no adult supervision could lead to injury. Both the trial court and majority conceded that there was a foreseeable likelihood of rowdiness. It is not such a far stretch in logic that rowdiness could lead to serious injury. Appellee had a duty to protect the guests from injury and the combination of teens and drinking created a foreseeable risk of injury.

I would reverse and remand this case to the trial court.

BRIEF FOR APPELLANT:

William C. Boone
Louisville, Kentucky

Phillip K. Wicker
Somerset, Kentucky

BRIEF FOR APPELLEE:

Joe L. Travis
Heidi Schultz Powers
Travis, Pruitt & Lawless
Somerset, Kentucky