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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002125-MR

RYAN LARCADE — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND, II, JUDGE
ACTION NO. 05-CI-01294

LANCE FOSSITT AND MELINDA FOSSITT — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND STUMBO, JUDGES; KNOPF[1], SENIOR JUDGE.

CAPERTON, JUDGE: Ryan Larcade appeals the Boone Circuit Court's grant of summary judgment in favor of Lance and Melinda Fossitt. Finding no error, we affirm.

[1] Senior Judge William Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

The facts of this appeal are not in dispute. Larcade was injured when he was "headbutted" by Tyler Barnett at the Fossitt's home. The Fossitts had left their home and children in the charge of a babysitter, Tiffany Huff. Against the Fossitts explicit instruction, Huff invited Tyler Barnett and others to the Fossitt's residence. Larcade, a minor, had been drinking heavily when he learned that Tiffany Golladay, whom he thought was his girlfriend, was also at the Fossitt's residence. Larcade became upset and called Mike Sharp, Melinda Fossitt's brother, to take him to the Fossitt's residence. Thereafter, Larcade and Barnett were in an altercation on the Fossitt's porch resulting in injury to Larcade. Larcade sued the Fossitts alleging breach of duty to not provide alcohol to minors, to protect invitees, supervise, prevent the assault and call the police, as well as negligence per se. The Fossitts moved for summary judgment.

In granting the motion for summary judgment, the trial court found that the Fossitts owed Larcade no duty of care. The court noted that there was no evidence that the Fossitts' conduct created a risk of harm. The court rejected the argument that a special relationship existed based on the Fossitts' meaningful right or ability to control another's conduct, based on *Grand Aerie Fraternal Order of Eagles v. Carneyhan,* 169 S.W.3d 840 (Ky. 2005). The court noted that, based on the evidence, if the Fossitts had been home and had been able to control the situation, Larcade would not have been permitted into their home. The court found

that there were no genuine issues of material fact and that the Fossitts were entitled to summary judgment as a matter of law. It is from this grant of summary judgment that Larcade appeals.

On appeal, Larcade argues that the Fossitts should be held liable based on a theory of vicarious liability. Larcade specifically argues that the issue before this Court is whether the Fossitts, as homeowners, owe a duty to social guests or invitees who are injured by a third party (another social guest) while the homeowners are away from their home, when their home and children were left in the care of a babysitter. Larcade further argues that the babysitter stands in the shoes of the homeowners and that the Fossitts did not take the necessary action to prevent the type of conduct which occurred in their absence, even though they instructed the babysitter not to have people over. The Fossitts argue that they did not owe a duty to Larcade, and we agree.

At the outset, we note that the applicable 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 "shall be rendered forthwith if 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 judgment as a matter of law." CR 56.03. The 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).

Thus, summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.* However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992), *citing Steelvest, supra*. *See also O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); *Hallahan v. The Courier Journal,* 138 S.W.3d 699, 705 (Ky.App. 2004). Since 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 Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001).

In *Sheehan v. United Services Auto. Ass'n,* 913 S.W.2d 4 (Ky.App. 1996), this Court held that in a negligence action,

> Before a defendant can be held liable on a theory of negligence, there must exist a duty owed to the plaintiff by the defendant. *Mullins v. Commonwealth Life Insurance Co.*, Ky., 839 S.W.2d 245, 247 (1992). *Grayson Fraternal Order of Eagles v. Claywell*, Ky., 736 S.W.2d 328 (1987), indicates that "liability for negligence expresses a universal duty owed by all to all." However, and this is a point frequently overlooked by some, the duty to exercise ordinary care is commensurate with the circumstances. *Id*. at 330. The statement of whether or not a duty exists is but a conclusion of

> whether a plaintiff's interests are entitled to legal protection against the defendant's conduct. *Id*. The existence of a duty is an issue of law, and a court, when making the determination of such existence, engages in what is essentially a policy determination. *Mullins, supra* at 248.

Sheehan at 6.

In the case *sub judice*, Larcade argues that the Fossitts owed him a duty to control the conduct of a third party to prevent the injury. We note that "as a general rule, an actor whose own conduct has not created a risk of harm has no duty to control the conduct of a third person to prevent him from causing harm to another." *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840, 849 (Ky. 2005). However, a duty can arise

> To exercise reasonable care to prevent harm by controlling a third person's conduct where: (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection....
>
> There are two distinct types of claims based upon a defendant's special relationship with the person causing the harm. The first type, which can be labeled "negligent failure to warn," ... [and] the second...[type]: "negligent failure to control." In this type of claim...the alleged tortfeasor's ability to control the person causing the harm assumes primary importance.

Carneyhan at 849-851.

However, the ability to control must be real and not fictional. *Id.* at 851. "A "real" ability to control necessarily includes some sort of leverage, such as the threat of involuntary commitment...parole revocation...or loss of the

livelihood provided by an employment relationship." *Carneyhan* at 853. (internal citations omitted).

In the case *sub judice*, the Fossitts conduct did not create the risk of harm to Larcade. Moreover, the Fossitts did not have a special relationship with Barnett that imposed a duty upon the Fossitts to control the conduct of Barnett, nor did the Fossitts have a special relationship with Larcade from which he could expect a duty to be imposed upon the Fossitts to protect him. Thus, the trial court correctly determined that the Fossitts were entitled to summary judgment. Accordingly we affirm.

In light of the aforementioned reasons, we affirm the Boone Circuit Court's grant of summary judgment in favor of Lance and Melinda Fossitt.

ALL CONCUR.

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