RENDERED: JANUARY 29, 2010; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000301-MR

JEROME HIGGINBOTHAM;
JEROME HIGGINBOTHAM,
ADMINISTRATOR OF THE ESTATE
OF JESSE HIGGINBOTHAM, DECEASED;
JEROME HIGGINBOTHAM, SURVIVING
PARENT OF JESSE HIGGINBOTHAM AND
MERCEDES HOPEWELL; REBECCA WOLOCH,
SURVIVING PARENT OF JESSE HIGGINBOTHAM
AND MERCEDES HOPEWELL — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 08-CI-02301

KEENELAND ASSOCIATION AND
COLLEEN MOUREAUX — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND WINE, JUDGES; HARRIS,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Appellants are the estate of a passenger killed in an automobile accident and a passenger injured in that accident. They appeal from summary judgment entered in favor of Appellee, Keeneland Association, the employer of the operator of the other vehicle involved in the accident. After careful review, we affirm.

This case arises from a motor vehicle accident that occurred on April 18, 2007, on Versailles Road in Fayette County, Kentucky. Jesse Higginbotham, then a high school student at Dunbar High School, was killed in the accident, and Mercedes Hopewell, also a Dunbar student, was injured. The vehicle in which they were riding was driven by Colleen Moureaux. A fourth passenger in the vehicle, Cassandra Hardin, was not injured. The collision occurred when Moureaux improperly reacted to a flat tire, lost control of her vehicle, and struck a vehicle owned by Keeneland's employee, Brad Pinkerton, which was parked on the shoulder of the road. The Lexington Division of Police performed an extensive accident reconstruction report and the material facts of the collision are undisputed.

During the spring race meet of 2007, it was Pinkerton's job to activate three temporary signs, including the subject sign on Versailles Road, in order to direct traffic into Keeneland. Keeneland had applied for, and received, an encroachment permit from the Kentucky Transportation Cabinet to use the

[1] Senior Judge William R. Harris, 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.

temporary signs. These signs were intended to direct traffic into Keeneland and to show people which gate to enter. Keeneland claims that it abided by all the terms of the encroachment permit, but Appellants claim on appeal that Keeneland violated the terms of the permit by having Pinkerton place the signs on the highway during nonwork hours. Nonetheless, on the morning of the accident, Pinkerton had parked his 1991 Jeep Grand Wagoneer partly on the shoulder of westbound Versailles Road, with his two left wheels on the pavement of the shoulder and his two right wheels in the grass.

That morning Moureaux was driving her vehicle in the middle lane of westbound Versailles Road toward Dunbar High School when she felt her vehicle pull to the left. Although Moureaux did not recall hearing a sound, Hopewell testified that she heard a "pop" associated with this pull and then the vehicle began swerving back and forth. Moureaux feared her vehicle might strike a vehicle located in the lane to her left, so she tried to pull the steering wheel to the right. Hopewell testified that the driver of the vehicle on their left side blew his horn and that Moureaux managed not to hit that vehicle. Moureaux testified that there was another vehicle to her right and that she was sandwiched in between the two vehicles in the middle lane. Intending to move into the emergency lane, Moureaux put on her brakes and turned her steering wheel to the right to move to the right lane. Then, her vehicle turned 180 degrees clockwise. She traveled down Versailles Road backwards at a rate of speed estimated between 55 and 65 miles per hour and struck the rear of Pinkterton's parked vehicle.

Significantly, there were no allegations that Pinkerton's vehicle was parked on the shoulder near a blind curve or over the crest of a hill. His vehicle was parked on a relatively flat portion of Versailles Road in plain view of Moureaux, who testified that she saw the vehicle. Pinkerton's vehicle was not intruding into the traveled portion of Versailles Road, and in fact, two wheels were in the grass to the right of the shoulder. Pinkerton testified that he had just parked and exited his vehicle in order to activate the sign when he heard a noise. He then saw the Moureaux vehicle traveling out of control in his direction and ran up the embankment to safety. The impact pushed Pinkerton's vehicle 151 feet, and the Moureaux vehicle came to rest in the approximate location where Pinkerton's vehicle had been. It is not disputed that the shoulder of Versailles Road was vacant except for the portion occupied by Pinkerton's vehicle.

Subsequent investigation by the Lexington Division of Police concluded that the Moureaux vehicle had a "flat tire on the left rear axle" and that the "improper input of braking and steering" caused her to lose control. The report stated:

> Ms. Moureaux was a young driver with limited driving experience. When she experienced the flat tire, she lacked the experience[] or knowledge to properly handle the hazard. Her response to the hazard was to brake and steer in an attempt to stabilize her vehicle's wobbling. . . . As outlined in this report, the improper input of braking and steering by Ms. Moureaux caused her to lose control of her vehicle, in the unstabilized event of the flat tire.

In her deposition, Moureaux, who had only had her license for about a month at the time of the accident, admitted that she did not react properly to the blown tire:

> Instead of stepping on the brake, which I did, you're supposed to tap on it because the sudden stopping is what will make your car overcorrect even more . . . .I actually got the little pamphlet—or the little book that they send you home when you're getting your driving test and looked it up.

After a hearing on January 8, 2009, the Fayette Circuit Court entered summary judgment in favor of Keeneland Association. The Court found that as a matter of law, Keeneland, through its employee, Pinkerton, did not owe a duty to Appellants and that even if a duty was owed, Pinkerton's actions were not the proximate cause of Appellants' injuries. This appeal now 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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); *Palmer v. International Ass'n of Machinists & Aerospace Workers*, 882 S.W.2d 117, 120 (Ky. 1994); Kentucky Rules of Civil Procedure (CR) 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment" and all doubts will be resolved in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is only proper where the "movant shows that the adverse party could not prevail under any circumstances." *Id.* at 480. Consequently, summary

judgment must be granted only when "it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor[.]" *Id.* at 482. (Citations omitted).

Appellants argue on appeal that the trial court erred in holding that Keeneland did not owe a duty of care to Appellants and in finding, as a matter of law, that Pinkerton's actions were not the proximate cause of the accident.

Appellants contend in their first argument that Pinkerton's parking in the emergency lane of Versailles Road constituted negligence *per se*. Keeneland argues, and we agree, that Appellants failed to raise this argument before the trial court, and therefore it cannot be considered by this court on appeal. Appellants' Complaint does not assert a claim against Keeneland based on negligence *per se*. In response to Keeneland's motion for summary judgment, Appellants did not argue that Keeneland should be adjudged negligent *per se* based on the alleged violation of certain administrative regulations. Nor did they raise the argument at the hearing on January 8, 2009. Appellants' negligence *per se* argument on appeal is based on the premise that Keeneland violated certain administrative regulations (which were not cited to the trial court or otherwise part of Appellants' argument) and a provision of the Kentucky Transportation Cabinet Permits Manual (hereinafter "Permits Manual"), which is not part of the record on appeal but is nonetheless attached to Appellants' brief as an Appendix.

Kentucky caselaw is clear that Appellants may not raise new issues for the first time on appeal. *See Regional Jail Authority v. Tackett*, 770 S.W.2d

225, 228 (Ky. 1989) (An appellate court "is without authority to review issues not raised in or decided by the trial court."). In *Florman v. MEBCO Ltd. P'ship*, 207 S.W.3d 593 (Ky. App. 2006), this Court held that claims must be plainly stated in the complaint and new theories may not be raised on appeal:

> CR 8.01 requires that claims to be litigated be plainly stated. "The scope of review is limited to the theories upon which the case was tried." "The Court of Appeals is one of review and is not to be approached as a second opportunity to be heard as a trial court. An issue not timely raised before the circuit court cannot be considered as a new argument before this Court."

Id. at 607 (citations omitted). Furthermore, we are not permitted to consider documents on appeal which were not before the trial court. *See* CR 76.12(4)(c)(vii). Because Appellants' negligence *per se* argument and supporting documentation was not presented to the trial court, we will not address it on appeal.

Citing *Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell*, 736 S.W.2d 328 (Ky. 1987), Appellants also argue that Pinkerton had a duty to refrain from parking on the shoulder of Versailles Road based upon the so-called "universal duty of care." The Kentucky Supreme Court has determined that the universal duty of care is "not boundless" and that "[t]he requirement of 'duty to all' is a beginning point for any duty analysis." *See Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840, 848-849 (Ky. 2005) (internal citations omitted). Moreover, this Court has directly addressed the issue and held that "*Grayson* is cited often by parties advocating a theory of liability or a cause of

action where none previously existed and legal authority is otherwise lacking." *Jenkins v. Best*, 250 S.W.3d 680, 689 (Ky. App. 2007) (internal citations omitted).

In *Grand Aerie*, the Kentucky Supreme Court noted that the "examination must be focused so as to determine whether a duty is owed, and consideration must be given to public policy, statutory, and common law theories in order to determine whether a duty existed in a particular situation." *Grand Aerie*, 169 S.W.3d at 849 (citing *Fryman v. Harrison*, 896 S.W.2d 908, 909 (Ky. 1995). Kentucky law is clear that the "existence of a duty is a matter of law for the court because 'when a court resolves a question of duty it is essentially making a policy determination.'" *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 533 (Ky. 2003) (internal citation omitted). This Court recently held that the trial court acts as a gatekeeper for the otherwise extremely broad concept of negligence and must "consider[] the policy consequences of imposing liability on a certain class of situations." *Lee v. Farmer's Rural Elec. Co-op. Corp.*, 245 S.W.3d 209, 218 (Ky. App. 2007).

Accordingly, in order to impose a duty of care, the Court must consider, among other things, whether the harm was foreseeable based on the facts as viewed by a reasonable person in like or similar circumstances as well as several other factors including public policy, statutory, and common law theories. *See Fryman,* 896 S.W.2d at 909. Here, each of these factors supports the conclusion that no duty existed and summary judgment in favor of Keeneland was appropriate.

Appellants argue that the particular harm in this case was foreseeable. The crux of Appellants' argument is that "any reasonable person in Pinkerton's shoes would have foreseen that occupying the emergency lane on Versailles Road during morning rush hour created a risk of harm to drivers and their passengers who were in vehicles traveling on Versailles Road." As grounds for this argument, Appellants state that it is generally understood that the emergency lane should be kept free of traffic so that it is available to other motorists in the event of an emergency or breakdown.

Kentucky law has long distinguished between events which are possible and events which are reasonably probable. Kentucky's highest Court has held that, "[m]en are not called upon to guard against every risk that they may conceive as possible but only against what they can forecast as probable." *Merchants Ice & Cold Storage Co. v. United Produce Co.*, 279 Ky. 519, 131 S.W.2d 469, 472 (1939). While it was certainly possible that a vehicle could collide with Pinkerton's vehicle that morning, it was not reasonably probable that the temporary parking of Pinkerton's vehicle on the shoulder of the road would cause the injuries to Appellants. Pinkerton had a legal right to be parked on the shoulder, two of his wheels were in the grass, his vehicle was visible to oncoming motorists, he intended to be parked there for no more than three or four minutes, and there were miles of shoulder available in the event another vehicle needed access. Based on these undisputed facts, a reasonable person in Pinkerton's position could not have foreseen the injuries sustained by Appellants or that

Moureaux would lose control to the extent that she could not bring her vehicle to a complete stop utilizing the portions of the shoulder available to her on that morning. A driver is "not required to anticipate such negligent inattention on the part [of another driver]." *Frozen Food Marketers v. Feisstreitzer*, 335 S.W.2d 896, 897 (Ky. 1960). Accordingly, the Fayette Circuit Court appropriately found the accident at issue in this case was not foreseeable to Pinkerton when he stopped to briefly activate the sign.

Appellants also argue that Kentucky statutory law creates a duty on behalf of Keeneland, through its employee, Pinkerton, to refrain from parking on the shoulder of the road, which they call the emergency lane. Appellants cite to KRS 189.450(3), which states, in relevant part:

> No vehicle shall be parked, stopped, or allowed to stand on the shoulders of any toll road, interstate highway, or other fully controlled access highway, including ramps thereto, **nor shall any vehicle registered at a gross weight of over forty-four thousand (44,000) pounds be parked, stopped, or allowed to stand on the shoulders of any state-maintained highway** . . . .

(Emphasis added). Appellants concede that Versailles Road is not a toll road, interstate highway, or other fully controlled access highway and yet still ask this Court to rely upon KRS 189.450(3) to impose a duty of care on Keeneland. This argument is not reasonable. KRS 189.450(3) prohibits parking on the shoulder of certain highways, but given that Versailles Road is not a toll road, interstate, or limited access highway, KRS 189.450(3) does not apply to the facts of this case. Furthermore, Pinkerton's vehicle weighed approximately 6,000 pounds, and thus

the prohibition against vehicles weighing over 44,000 pounds also does not apply or establish a duty on behalf of Keeneland. Stated simply, the Kentucky legislature has specifically considered under what circumstances vehicles should be prohibited from parking on the shoulder of the road, and the Legislature limited those roadways to toll roads, interstate highways, and fully controlled access roads. Given that the legislature could have included the terminology "all roadways" and chose not to, we will not read that language into the statute. Accordingly, Pinkerton did not violate a statutory duty of care by temporarily parking on the shoulder of Versailles Road.

Appellants also suggest that KRS 189.290(1) may create a statutory duty of care. That statute states, in pertinent part: "[t]he operator of any vehicle upon a highway shall operate the vehicle in a careful manner, with regard for the safety and convenience of pedestrians and other vehicles upon the highway." The statute is clear that it applies to an "operator" of a vehicle upon a highway. Given that Pinkerton's vehicle was parked on the shoulder of the road and that he was outside his vehicle at the time of the accident, this statute does not impose a duty of care on behalf of Keeneland, and Appellants' argument to the contrary fails.

Similarly, no common law duty existed for Pinkerton to refrain from parking on the shoulder of Versailles Road. Appellants argue that the "emergency lane" is for emergencies only and that Pinkerton had a duty not to park his vehicle on the shoulder unless it was for emergency purposes. However, there is simply

no authority for the proposition that the shoulder of Versailles road is reserved exclusively for emergency purposes. Drivers may stop on the shoulder for many purposes, including, but not limited to, attending to a sick child or reading a map. In this case, Pinkerton parked his vehicle for three to four minutes to activate a temporary sign, for which Keeneland had an encroachment permit. His use of the shoulder was not prohibited by any statute or law. Nor was the harm that ensued a foreseeable risk of harm to the Appellants. Therefore, the trial court properly held that there was no common law duty for Pinkerton to refrain from using the shoulder of the roadway to activate the signs.

Public policy considerations also support a determination that Pinkerton did not have a duty to refrain from parking on the shoulder of the road. The Kentucky Transportation Cabinet granted Keeneland an encroachment permit for the placement of a temporary directional sign. Common sense supports the notion that Pinkerton should be able to park his vehicle on the shoulder of Versailles Road for three to four minutes in order to activate the sign authorized by the Department of Transportation. Indeed, the encroachment permit states, "all work necessary in shoulder or ditch line areas of a state highway is to be scheduled to be promptly completed so that hazards adjacent to the traveled-way are kept to an absolute minimum." Since Pinkerton testified that he was able to activate the sign in no more than three to four minutes, his work on the shoulder was "promptly completed" as required by the permit.

Further, Appellants argue that the permit required that "the right-of-way shall be left free and clear of equipment, material, and vehicles during non-working hours." Working hours were defined in the permit as being "between the hours of 9:00 a.m. and 3:30 p.m." Appellants argue that Pinkerton's use of the shoulder to place the sign at 7:30 a.m. (the time in which the accident occurred) violated the terms of the encroachment permit. We disagree. A careful review of the attached permit reflects that the above referenced "working hours" only apply when it is necessary to block a traveled-lane of a state highway. As Pinkerton was not blocking any traveled-lanes of highway and was instead placing a message board on the shoulder of Versailles Road, he did not violate the terms of the encroachment permit. There is simply no evidence that Pinkerton or Keeneland violated the terms of the permit granted them by the Department of Transportation, nor that they unreasonably completed the activation of the signs the permit allowed. Thus, public policy considerations also favor a determination that Pinkerton did not have a duty to refrain from parking on the shoulder of the road.

Finally, even assuming that the Appellants could somehow prove that Pinkerton and Keeneland owed a legal duty to refrain from parking on the shoulder of the roadway, Appellants cannot establish that Pinkerton's actions and/or inactions were a substantial factor in bringing about the collision. "[I]t is not enough that the harm would not have occurred had the actor not been negligent," but the negligence must be a substantial factor in bringing about the harm.

Pathways, Inc. v. Hammons, 113 S.W.3d 85, 92 (Ky. 2003) (citing the Restatement (Second) of Torts § 431 comment (a) (1965)).

Thus, it is not sufficient for the Appellants to establish that Moureaux would not have struck Pinkerton's vehicle had it not been located on the shoulder of the road. The Appellants must also establish that the location of Pinkerton's vehicle was a "substantial factor" in bringing about the collision and resulting harm. This they simply cannot do. There is not any evidence to support the notion that the location of Pinkerton's vehicle was a substantial factor in bringing about the collision. It is undisputed that Moureaux lost control of her vehicle because she improperly reacted to a flat tire. The location of Pinkerton's vehicle had absolutely nothing to do with that fact. Appellants suggest that the location of Pinkerton's vehicle may have influenced Moureaux. However, Moureaux's testimony on this subject belies this argument, as she testified that she does not place any blame on Pinkerton and in fact instead stated she improperly reacted to the flat tire, in contravention of her drivers' manual instructions. Thus, as a matter of law, Pinkerton was not a substantial factor in causing the collision. *See Pence v. Sprinkles*, 394 S.W.2d 945, 947 (Ky. 1965) ("Proximate cause becomes a question of law when . . . there is no dispute about the essential facts of causation, and but one conclusion may be reasonably drawn from the evidence.") (Citations omitted).

Appellants argue that they can establish proximate cause because "[b]ut for the location of Pinkerton's vehicle in the emergency lane, the collision would not have occurred and [Moureaux's] vehicle would have come to a stop

safely on the grass berm." This argument is contrary to the facts and Kentucky precedent, as set forth in *Estate of Wheeler v. Veal Realtors & Auctioneers, Inc.*, 997 S.W.2d 497 (Ky. App. 1999). In *Wheeler*, the driver of a truck collided with a tree located near the roadway, resulting in his death. *Id.* at 498. It was undisputed that the tree encroached on the roadway in violation of KRS 177.106 and that the property owner had been ordered by the Department of Highways to remove the tree. *Id.* It was further undisputed that the accident occurred when the driver lost control of his truck and collided with the tree. *Id.* Like the Appellants in the instant case, the Estate in *Wheeler* argued that the tree was physically part of the collision and resulting injury and, further, that the accident would not have occurred but for the location of the tree in violation of the statute. *Id.* at 499. The trial court rejected this theory based on the fact that the accident would have occurred regardless of the location of the tree; i.e., the fact that the driver lost control of his vehicle had nothing to do with the location of the tree. *Id.*

> This Court affirmed, holding:
>
> When the original negligence is remote and only furnishes the occasion of the injury, it is not the proximate cause thereof.
>
> . . . .
>
> [T]he accident[was] directly attributable to other negligent acts and [was] not proximately caused by the statutory violations. In other words, the failure to remove the tree did not cause Wheeler's accident, as it would have occurred absent [the] statutory violation.

Id. at 499 (citations omitted). Similarly, Pinkerton's vehicle parked on the shoulder of the road did not cause the accident; the accident was caused by Moureaux's negligence and her improper reaction to the flat tire and would have occurred absent Pinkerton using the shoulder to activate Keeneland's sign.

Further, the photographs of the scene document that Moureaux's vehicle was headed toward a very steep earth berm at the time it impacted Pinkerton's vehicle. It is undisputed that Moureaux's vehicle was traveling backwards and out of control at a rate of speed estimated to be in the range of 55 m.p.h. to 65 m.p.h. Considering these facts, it simply cannot be argued that the vehicle would have come to a stop safely on the grass berm. To the contrary, the facts indicate that the vehicle was out of control, traveling at a high rate of speed, and would have collided with whatever was in its path had Pinkerton not been there—either the temporary sign, the steep earth berm, or both. Accordingly, the Fayette Circuit Court properly found that Pinkerton's vehicle being parked on the shoulder of the roadway was not the proximate cause of Appellants' injuries.

In conclusion, we do not find the existence of any duty on behalf of Keeneland, or its employee, Pinkerton, to refrain from parking on the shoulder of Versailles Road. Keeneland was not negligent, nor was there any statutory, common law, or universal duty of care to prohibit Pinkerton from briefly parking to activate a sign for which he had a permit to activate. The ensuing accident was not reasonably foreseeable, nor does public policy indicate that Pinkerton had such a duty not to park on the shoulder. Finally, Pinkerton's actions were not the

proximate cause of the Appellants' injuries, as the proximate cause of this accident was Moureaux's failure to properly react to a flat tire. Accordingly, we affirm the January 27, 2009, order of the Fayette Circuit Court granting summary judgment to Keeneland in its entirety.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Stephen M. O'Brien, III
Lexington, Kentucky

BRIEF FOR APPELLEE, KEENELAND ASSOCIATION:

Perry M. Bentley
Lucy A. Pett
Lexington, Kentucky