

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001125-MR

JUNE MISSINNE

APPELLANT

v. APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHIL PATTON, JUDGE
ACTION NO. 07-CI-00676

CITY OF GLASGOW

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON AND CLAYTON, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

CLAYTON, JUDGE: This is an appeal of a decision of the Barren Circuit Court dismissing appellant June Missinne's claim against the City of Glasgow, Kentucky

¹ Senior Judge David C. Buckingham 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.

(“Glasgow”). Based upon the foregoing, we reverse the decision of the trial court and remand this case for further proceedings.

BACKGROUND INFORMATION

Missinne was visiting a friend and the two were sightseeing in Glasgow on September 21, 2006. At around 3:00 p.m., she fell while walking on the sidewalk. Missinne filed suit against Glasgow alleging that its failure to properly construct and maintain the sidewalk in question was the proximate cause of her fall and subsequent injuries.

Glasgow filed a motion for summary judgment asserting that it was not responsible as it did not own the property in question. Missinne’s accident occurred near the county courthouse. Glasgow contended that the property upon which Missinne fell was owned by Barren County (“County”). Missinne, however, argues that the County was not the one maintaining it, but Glasgow was. As a result, she asserts that once Glasgow assumed the responsibility, they could be liable for any negligence associated with the sidewalk.

The trial court granted summary judgment in favor of Glasgow and Missinne brought this appeal.

STANDARD OF REVIEW

In reviewing the granting of summary judgment by the trial court, an appellate court must determine whether the trial court correctly found “that there [were] no genuine issue as to any material fact and that the moving party [was]

entitled to a judgment as a matter of law.” Kentucky Rules of Civil Procedure (CR) 56.03.

“[A] trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only [when] it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. [While] [t]he moving party bears the initial burden of [proving] that no genuine issue of material fact exists, . . . 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.’” *Community Trust Bancorp, Inc. v. Mussetter*, 242 S.W.3d 690, 692 (Ky. App. 2007).

Since summary judgment deals only with legal questions as there are no genuine issues of material fact, we need not defer to the trial court’s decision and must review the issue *de novo*. *Lewis v. B&R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001). With this standard in mind, we review the issue.

DISCUSSION

Missinne first asserts that once Glasgow assumed responsibility for the construction and maintenance of the sidewalk upon which her alleged injuries occurred, it was subject to tort liability for its failure to do so in a reasonably prudent manner irrespective of the owner of the property.

In *Louisville Cooperage Co. v. Lawrence*, 313 Ky. 75, 230 S.W.2d 103, 105 (Ky. 1950), Kentucky’s highest court held that “[a] duty voluntarily

assumed cannot be carelessly abandoned without incurring liability for injury resulting from the abandonment.” (Citation omitted). Negligence requires proof that:

(1) the defendant owed the plaintiff a duty of care; (2) the defendant breached the standard by which his or her duty is measured; and (3) consequent injury. ‘Duty, the first element, presents a question of law.’ (Citation omitted). ‘If no duty is owed by the defendant to the plaintiff, there can be no breach thereof, and therefore no actionable negligence.’ (Citation omitted).

Jenkins v. Best, 250 S.W.3d 680 (Ky. App. 2007).

Whether a duty has been “assumed” is determined by whether the “tortfeasor has actually and specifically undertaken to render services allegedly performed without reasonable care.” *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840, 847 (Ky. 2005). Missinne argues that this case is similar to *Estep v. B.F. Saul Real Estate Inv. Trust*, 843 S.W.2d 911, 914 (Ky. App. 1992) in which the court held that “a duty voluntarily assumed cannot be carelessly undertaken without incurring liability[.]”

In the *Estep* case, there was a question of who was liable after the undertaking of snow removal at a mall. While there was evidence that the mall contracted the snow removers, the lease provided that it was the responsibility of the store owners. While the trial court granted summary judgment, this court reversed the decision based upon the assumption of duty by the mall.

We believe this case to be similar. While Glasgow did not own the premises upon which the sidewalks were located, evidence set forth in depositions

as well as the newspaper clipping indicate that the county did not maintain the sidewalks, but rather Glasgow did. As set forth above, for a defendant to be granted summary judgment, it must be impossible for the defendant to obtain a judgment in his favor at trial. While Missinne will need to provide evidence of the assumed duty of Glasgow, it would not be impossible for her to do so. Thus, we find the trial court erred in granting summary judgment in Glasgow's favor. We therefore reverse the decision of the Barren Circuit Court and remand this case for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brian Schuette
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Greg Stivers
Andrea Anderson
Bowling Green, Kentucky