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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001244-MR

CHERYL ROBINSON AND STEVE ROBINSON — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 14-CI-01354

BLUE VELVET EXCHANGE, LLC — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: D. LAMBERT, STUMBO, AND THOMPSON; JUDGES.

D. LAMBERT, JUDGE: Cheryl and Steve Robinson, a married couple, appeal the adverse summary judgment entered by the Jefferson Circuit Court. After careful review of the record, we find no error and affirm the trial court's judgment.

I. FACTUAL AND PROCEDURAL HISTORY

The Appellee, Blue Velvet Exchange, LLC (hereinafter "Blue Velvet"), is a limited liability company engaged in the business of conducting estate sales on a contract basis. Del Rita Phillips, the owner of a residence in Jefferson County, needed to liquidate personal property so that she could enter an assisted living facility. On March 6, 2013, Blue Velvet entered into a contract with Phillips' attorney-in-fact to conduct an "estate sale" at Phillips' residence.

The contract afforded Blue Velvet "full access" to the home beginning on March 8, 2013, for the purpose of setting up the sale. Derek Manz, the owner of Blue Velvet, signed the Estate Sale Agreement, along with Phillips' attorney-in-fact. Manz testified that while the agreement allowed Blue Velvet to stage the items in the home for the sale, appraise them, and price them, he would allow the owner final approval if they objected to the placement or pricing.[1] Ownership of any personal property to be sold remained with Phillips, and such property was merely consigned to Blue Velvet for the purpose of the sale. In contrast, the Robinsons argued on appeal that Blue Velvet allowed the owner no input in placement of items in the house for sale or the placement of cashiers.

Manz also testified about the process by which Blue Velvet prepared a home to host a sale, specifically in relation to safety. Manz personally walked through the home, noting potential safety issues. Areas where he found safety issues were cordoned off with yellow hazard tape, so that "…no one could walk into that area for safety reasons."

[1] Neither Phillips nor her attorney-in-fact raised objections to any aspect of the sale.

The Robinsons attended the sale on March 23, 2013. They parked in the rear of the residence and proceeded inside through the garage, along the concrete walkway between the garage and the rear deck, ascending two concrete steps in that walkway, then ascended the wooden steps onto the deck, and proceeded into the residence through the back door. Once inside they found the residence was crowded with people and cluttered with items for sale.

Cheryl found an item she wished to purchase, and proceeded along the same route back to the garage where Blue Velvet had stationed the cashier. According to her deposition testimony, after descending the steps from the deck to the walkway, Cheryl tripped "on something hard, something really firm, and it propelled me forward" and she struck her head on the door to the garage. She unequivocally testified that she "had no idea what it was." Cheryl suffered a significant laceration to her head, and complained of pain and numbness in her neck. She required medical care at the scene and went to the hospital in an ambulance.

The Robinsons instituted this civil action on March 10, 2014, asserting causes of action for negligence against Blue Velvet resulting from Cheryl's injuries, and a claim for loss of spousal consortium for Steve. They alleged that Blue Velvet was negligent in failing to warn invitees of the change in elevation in the walkway, resulting in her fall. She sought damages to compensate her for $140,000 in medical bills, and—because she had to quit work as a

consequence of her injuries—she sought compensation for the loss of her $63,000 annual salary. Blue Velvet joined Phillips as a third-party defendant.

The case progressed normally, and the trial court entered a scheduling order setting pre-trial deadlines. On February 25, 2015, the Robinsons timely filed an expert witness report from Dr. Joseph Cohen, and ergonomics engineer and safety professional specializing in pedestrian accidents. The parties scheduled Cohen's deposition for August 7, 2015, in San Diego, California. Blue Velvet had moved for summary judgment, also on February 25, 2015, and the trial court entered an order granting the motion on August 3, 2015. The instant appeal ensued.

This trial court reached three conclusions in its judgment. The trial court concluded that Blue Velvet owed a duty to the Robinsons. The trial court determined, as a matter of law, that Blue Velvet had not breached any duty to the Robinsons. Finally, the trial court held that the Robinsons lacked proof sufficient to create an unresolved issue of fact as to the causation element of Cheryl's negligence claim. While the Robinsons only challenge the second and third conclusions, Blue Velvet challenges the first in its brief.

II. ANALYSIS

A. STANDARD OF REVIEW

The purpose of summary judgment is to further the interests of judicial economy by expediting the resolution of civil actions and avoiding unnecessary trials where the record presents no disputed material facts. *Steelvest,*

Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991). The trial court must review the record in the light most favorable to the non-moving party, and draw all reasonable inferences in his favor. *Bituminous Casualty Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633 (Ky. 2007). Only when it appears impossible from the record that the non-moving party can produce any evidence at trial upon which the fact-finder could possibly find in his favor should a court grant summary judgment. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky.App. 1996). The propriety of a summary judgment, because the trial court's examination only relates to the presence of unresolved factual issues, is a question of law, and is reviewed on appeal under a *de novo* standard. *Henninger v. Brewster*, 357 S.W.3d 920 (Ky.App. 2012).

B. THE TRIAL COURT CORRECTLY DETERMINED THAT THE POSSESSOR OF THE LAND OWED A DUTY TO INVITEES

Blue Velvet argued before the trial court that it owed no duty to any third parties who might enter onto the land during the estate sale. The trial court disagreed, and made two crucial findings. The first finding was that the record contained adequate proof of Blue Velvet's control over the property to render it a "possessor" of the property. Secondly, the trial court noted in its judgment that Manz's inspecting the premises for safety defects, amounted to "Blue Velvet [undertaking] a duty to ensure that the premises were safe for those patrons who would attend the estate sale."

We agree with both conclusions. First, because Blue Velvet's contract gave its agents unfettered access to Phillips' residence and personalty for approximately three weeks to facilitate the sale, and further because its agents were given complete discretion in staging and placement of items within the home, Blue Velvet was the possessor of the premises for that contractual period. Next, "[a]s a general rule, land possessors owe a duty to invitees to discover unreasonably dangerous conditions on the land and to either correct them or warn of them." *Kentucky River Med. Ctr. v. McIntosh*, 319 S.W.3d 385, 388 (Ky. 2010).

> First and foremost, a land possessor is subject to the general duty of reasonable care. "The concept of liability for negligence expresses a universal duty owed by all to all." […] [P]ossessors of land are not required to ensure the safety of individuals invited onto their land; but possessors of land are required to maintain the premises in a reasonably safe condition.

Shelton v. Kentucky Easter Seals Society, Inc., 413 S.W.3d 901, 908 (Ky. 2013) (quoting *Gas Serv. Co. v. City of London*, 687 S.W.2d 144, 148 (Ky. 1985). Moreover, it is well-settled that "a duty voluntarily assumed cannot be carelessly undertaken without incurring liability therefore." *Estep v. B.F. Saul Real Estate Inv. Trust*, 843 S.W.2d 911, 914 (Ky.App. 1992) (citing *Louisville Cooperage Co. v. Lawrence*, 230 S.W.2d 103 (Ky. 1950)).

Therefore, even assuming that Blue Velvet owed no duty to warn of this particular, allegedly reasonable, hazard, the general duty of care must still apply, and, more significantly, the voluntary performance of a safety inspection by its agent created such a duty on Blue Velvet's part. The trial court thus correctly

ruled that Blue Velvet owed a duty to patrons of the sale at the very least to discover and warn of any latent safety hazards located on the premises.

C. THE TRIAL COURT ACTED WITHIN ITS AUTHORITY WHEN FINDING THE ROBINSONS' PROOF INSUFFICIENT TO CREATE A TRIABLE ISSUE OF FACT

It is axiomatic in the law that the party seeking relief or compensation bears the burden of proving each element of the claim for damages. CR[2] 43.01; *Colovo's Adm'r v. Gouvas*, 108 S.W.2d 820, 822 (Ky. 1937) ("The burden in the entire action lies upon the party who would be defeated if no evidence were produced on either side.") The Robinsons therefore must offer affirmative evidence tending to prove the existence of a duty, a breach of that duty, and an injury caused by that breach. Proof on each element is essential.

Blue Velvet argued, and the trial court agreed, that Cheryl's deposition testimony, wherein she failed to identify any hazard which might have caused her fall, was insufficient to create a triable issue of fact. We, too, agree. The law requires plaintiffs in premises liability actions to identify the hazard or condition which caused their falls. *Tharp v. Tharp*, 346 S.W.2d 44, 46 (Ky. 1961) ("Considering the undisputed facts and the statements of appellant that he saw nothing and did not know what caused him to fall, the motion for a summary judgment was properly sustained."); *Williams v. Courier-Journal & Louisville Times, Inc.*, 399 S.W.2d 467, 468 (Ky. 1965) ("Williams failed to establish the

[2] Kentucky Rules of Civil Procedure

causation of his fall. He testified that he did not see what he slipped on and speculated…. We conclude that the directed verdict was proper because Williams did not establish that the appellee's negligence, if any, was the proximate cause of his fall.").

Absent some proof or testimony that the hazard of which Blue Velvet failed to warn Cheryl caused her fall, any attempt to lay blame for the fall, much like in *Williams*, is merely an exercise in speculation. Appellate courts in Kentucky have long held that "speculation and supposition are insufficient to justify submission of a case to the jury, and … the question should be taken from the jury when the evidence is so unsatisfactory as to resort to surmise and speculation." *Sparks v. Trustguard Ins. Co.*, 389 S.W.3d 121, 124 (Ky.App. 2012) (quoting *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006)) (citing *Chesapeake & Ohio Ry. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951)).

Having reviewed the record, we agree with the trial court that the Robinsons lacked proof on an essential element of the tort. Absent such proof, the Robinsons lack any basis for contending an unresolved issue of material fact exists, and the trial court's entry of summary judgment was appropriate.

D. THE TRIAL COURT ACTED WITHIN ITS AUTHORITY WHEN FINDING BLUE VELVET DID NOT BREACH THE DUTY OF CARE AS A MATTER OF LAW

After the Kentucky Supreme Court altered the landscape of premises liability cases by abolishing the last vestiges of contributory negligence in favor of

comparative fault principles in *McIntosh*, the law needed further clarification. Such clarification came in *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901 (Ky. 2013). The Court in *Shelton* shifted the determination of whether a particular hazard was open and obvious from the duty analysis to the breach analysis. *Id.* at 907. A defendant has not breached the duty of care to an invitee "when the danger is known or obvious to the invitee, *unless* the invitor should anticipate or foresee harm resulting from the condition despite its obviousness or despite the invitee's knowledge of the condition." *Id.* at 911 (emphasis in original).

Also important is the *Shelton* Court's definition of "unreasonable risk." A risk is unreasonable if it is "'recognized by a reasonable person in similar circumstances as a risk that should be avoided or minimized' or one that is 'in fact recognized as such by the particular defendant.'" *Id.* at 914. The Court continued: "Normally, an open-and-obvious danger may not create an unreasonable risk. Examples of this may include a small pothole in the parking lot of a shopping mall; steep stairs leading to a place of business; or perhaps even a simple curb." *Id.*

The walkway steps which Cheryl contends on appeal might have been the cause of her fall fit within the category of "not unreasonably dangerous conditions" listed by the *Shelton* Court. Though the issue of whether a defendant breached a duty is a question of fact (*Dick's Sporting Goods, Inc. v. Webb*, 413 S.W.3d 891 (Ky. 2013)), the trial court relied on *Shelton's* examples of reasonable open-and-obvious hazards, and found the steps at the Phillips residence (as depicted in the photographs in the record) to be sufficiently similar as to justify

similar legal treatment. Having concluded that the hazard was not unreasonably dangerous, the necessary extension of that conclusion was to rule that no breach had occurred. In so doing, the trial court made a proper application of binding case law to the situation before it.

However, the trial court's ultimate ruling in this matter was not based on the element of breach. The trial court's analysis as to whether Blue Velvet in some way breached that duty was obviated by its conclusion that the Robinsons' proof of causation was insufficient. Even assuming *arguendo* that the trial court did err in its application of the law on the element of breach, its granting of Blue Velvet's motion on the basis that the Robinsons lacked sufficient causation evidence nullified the effect of any alleged error relating to the element of breach.

III. CONCLUSION

This Court, having reviewed the record and finding no reversible error, we hereby AFFIRM the Jefferson Circuit Court's entry of summary judgment for the reasons discussed herein.

ALL CONCUR.

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