RENDERED: May 1, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-2911-MR

MILDRED E. CHAMBERLIN and RUSSELL CHAMBERLIN AS NEXT FRIEND OF SHERRA CHAMBERLIN — APPELLANTS

V.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 95-CI-49

MADISON GROCERY COMPANY, INC. — APPELLEE

OPINION
AFFIRMING

* * * * * * * *

BEFORE: BUCKINGHAM, GARDNER and SCHRODER, Judges.

GARDNER, JUDGE: Appellants appeal from an order of the Madison Circuit Court granting summary judgment for the appellee, Madison Grocery, Inc. (Madison), in this negligence action. The issue presented in this case concerns the legal duty owed by a truck driver for Madison, who had parked legally in a store's parking lot, to drivers travelling on an adjacent highway. Appellants claim the driver breached his duty to keep the exits visible for drivers pulling out of the store's lot. After carefully reviewing the record and the applicable law, we affirm.

This case arose from events occurring on July 27, 1994 near Lamb's Grocery (Lamb's) on Scaffold Cane Road in Madison County, Kentucky. Lamb's is a small rural grocery with gas pumps located directly in front of the store next to the road, and parking located on the south side of the store. A truck driver for Madison arrived at Lamb's on this day and because the parking lot was apparently full, parked his vehicle on the south side of the gas pumps, adjacent to the roadway. Michael Banks (Banks) was a patron of the store who attempted to pull out of Lamb's parking lot. Banks has contented that the only place to pull out of the lot when he left was beside Madison's truck. He maintains that the truck obscured his vision of the southbound lane of Scaffold Cane Road. Banks turned left and pulled out into the road and struck a car driven by Mildred Chamberlin (Mildred) in which her daughter, Sherra (Sherra), was a passenger. Mildred and Sherra both sustained injuries as a result of the accident.

In January 1995, Mildred filed a civil action in Madison Circuit Court against Banks and Madison alleging negligence by Banks for negligently, carelessly, and recklessly operating his motor vehicle and alleging negligence on the part of Madison for negligently parking its delivery vehicle so as to obstruct Banks' view. Mildred settled her case against Banks, and an order dismissing that suit was entered. In August 1996, Madison filed a motion for summary judgment, and a hearing was heard on the matter on September 6, 1996.

In an order of September 30, 1996, the circuit court granted summary judgment for Madison. The court found that Madison's driver could not have reasonably foreseen that the parking lot area immediate to the truck would have become the only possible exit opportunity from the parking lot. The court noted that the parking maneuvers of the other drivers of the vehicles in the lot which effectively sealed off all other potential avenues for exit, controlled the situation. The court therefore concluded that the truck driver did not fail in his duty of diligence to others on the roadway when he parked the truck within the confines of Lamb's lot. Therefore, it held there was no breach of duty owed to Mildred or Sherra by Madison. Appellants have appealed from the circuit court's order.

Appellants maintain that the circuit court incorrectly granted summary judgment for Madison. They argue that the driver of the delivery truck parking near a roadway owed a duty to all persons using the street not to park as to block the view of oncoming traffic from the parking lot's only exit. After carefully reviewing the facts of this case and examining the law from Kentucky and other jurisdictions, we have concluded that the circuit court correctly ruled as a matter of law that Madison and its driver did not owe a specific duty or breach any duty to appellants based upon the unique facts of this case.

Actionable negligence consists of a duty, a violation thereof, and a consequent injury. Commonwealth of Kentucky, Transportation Cabinet Department of Highways v. Shadrick, Ky., 956

S.W.2d 898 (1997); Howard v. Fowler, 306 Ky. 567, 207 S.W.2d 559, 561 (1947). The absence of any of these elements is fatal to the claim. Commonwealth of Kentucky, Transportation Cabinet Department of Highways v. Shadrick, 956 S.W.2d at 900. The concept of liability for negligence expresses a universal duty owed by all. Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell, Ky., 736 S.W.2d 328, 330 (1987); Sheehan v. United Services Auto. Ass'n., Ky. App., 913 S.W.2d 4, 6 (1996). There is a duty to exercise ordinary care commensurate with the circumstances and the potential harm encountered that does not turn on and off depending on who is negligent. North Hardin Developers, Inc. v. Corkran, by Corkran, Ky., 839 S.W.2d 258, 261 (1992); Grayson Fraternal Order of Eagles, Aerie No. 3737, Inc. v. Claywell, 736 S.W.2d at 330. In order to apply a universal duty of care to a particular circumstance, it must appear that the harm was foreseeable, and the facts must be viewed as they reasonably appeared to the parties charged with negligence. Fryman v. Harrison, Ky., 896 S.W.2d 908, 909 (1995). If the ultimate injuries were not foreseeable to the defendants, and if the victim of the injury was not identifiable, there was no duty to prevent such an injury. Id. The duty is limited to the natural and the probable. Howard v. Fowler, 207 S.W.2d at 562. The existence of a duty is an issue of law, and the court when making the determination regarding such existence, engages in what is essentially a policy determination. Sheehan v. United Services Auto. Ass'n., 913 S.W.2d at 6. Prior to the application of a

universal duty of care to a particular set of facts, it must appear that the harm was foreseeable and the facts must be viewed as they reasonably appeared to the party charged with negligence, not as they appear based on hindsight. North Hardin Developers, Inc. v. Corkran, 839 S.W.2d at 261. No person can be expected to guard against harm from events which are not reasonably to be anticipated at all, or are so unlikely to occur that the risk, although recognizable, would commonly be disregarded. Id., at 262, quoting W. Prosser, Torts, § 31 (1978).

In general, summary judgment should only be used to terminate litigation when as a matter of law it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his or her favor against the movant. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 483 (1991), quoting Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985); Farmer v. Heard, Ky. App., 844 S.W.2d 425 (1992). Summary judgment is properly granted only when there is no genuine issue as to any material fact, and the movant is entitled to prevail as a matter of law. Mullins v. Commonwealth Life Ins. Co., Ky., 839 S.W.2d 245, 247 (1992); Kentucky Rule of Civil Procedure (CR) 56.03. The granting of a summary judgment for failure to state a cause of action in negligence cases is proper in the absence of a legal duty. Sheehan v. United Services Auto. Ass'n., 913 S.W.2d at 6.

We have reviewed Kentucky authorities and have found no cases which are directly similar to the instant case; however, they

are helpful in determining whether a duty was owed to the travelling public in the case at bar. Bosshammer v. Lawton, Ky., 237 S.W.2d 520 (1951), relied on by appellants is factually distinguishable. The driver in that case had left his vehicle unattended on an icy highway in violation of a state statute. The court concluded that leaving a car unattended under such conditions created a situation which involved an unreasonable risk to other users of the highway because of the expectable actions of another driver or of a third person. Howard v. Fowler, supra, appears to be the closest Kentucky case in point to the case at hand. The court in that case found that the driver of a bus which was parked off a highway in a parking area had not failed to exercise proper care and had not breached a duty towards a pedestrian standing by the bus when a driver on the adjacent roadway hit a truck parked by the bus which struck the pedestrian. The court concluded that the bus played no part in the accident except that it was present in the vicinity. Finally, in Commonwealth of Kentucky, Transportation Cabinet Department of Highways v. Shadrick, supra, the Transportation Cabinet, Department of Highways had permitted a truck to remain for some time on the shoulder of a highway, approximately eight feet from the travelled roadway, and another vehicle went out of control and struck the stranded vehicle. The court concluded that the Board of Claims correctly found that no duty had been breached. The court held that no duty is imposed upon the Department with respect to maintenance of roads to guard against all reasonably foreseeable and reasonably preventable harm

to travellers, including those who are not exercising due care but whose lack of due care is not so extreme as to be unforeseeable. The court found that it would be unreasonable and impractical to hold the department responsible for the negligence of others.

Courts from other jurisdictions appear divided on the question of the duty by landowners and those parked on private property or public ways to drivers on adjacent streets in cases involving poor visibility. In Shaw v. Soo Line Railroad Co., 463 N.W.2d 51 (Iowa 1990), an occupant of a motor vehicle was killed by a train. The plaintiffs alleged that the nearby landowner obstructed the view of a railroad crossing by having two trailers parked on his land. The appellate court upheld the trial court's entry of summary judgment, because the landowner had breached no statutory or common law duty. The court held that the presence of obstructions to the view at a railroad crossing is a circumstance which bears upon the degree of care required to be exercised by both the railroad and the motoring public but does not provide a basis for a cause of action in tort against the landowner. Id. In Adame v. Munoz, 678 N.E.2d 26 (Ill. App. 1997), the plaintiff's son who was riding a bicycle was struck by the driver of an automobile. The plaintiff sued the owner of a nearby apartment building who controlled the parking lot and the nearby cul-de-sac where the accident occurred. She contended that the owner was negligent for placing trash dumpsters in an area which obstructed the view of bicyclists, motorists and others in the vicinity. The appellate court upheld the trial court's dismissal of the complaint, because

there was simply no duty in Illinois on the part of the landowners to maintain their property in such a way that property conditions do not obstruct the view of travelers on an adjacent highway, and this rule applied where the obstruction is an artificial condition. The court concluded that the driver was in the best position to prevent the injury by slowing down and driving cautiously. In reaching its decision, the court relied on Ziemba v. Mierza, 566 N.E.2d 1365 (Ill. 1991) (holding that in a case where the plaintiff, a bicyclist who was struck when a truck pulled out of the defendant's driveway, and claimed that the defendant had a duty to trim the foliage on his land near the driveway so that the driveway was visible to travellers on the street, no duty existed because the condition alone was not dangerous and the accident was a reasonably foreseeable event of the foliage only if it was reasonably foreseeable that the driver would violate his statutory duties when pulling out of the defendant's driveway and that the defendant had a right to expect that the truck driver would check for oncoming traffic and could not have reasonably foreseen that a driver would exit a driveway without first ascertaining whether any traffic was approaching on the adjacent road.) See also Manning v. Hazekamp, 569 N.E.2d 1168 (Ill. App. 1991).

In the instant case, the circuit court correctly held that Madison did not violate its duty of reasonable and ordinary care to motorists travelling upon Scaffold Cane Road. The court properly noted that it would not impose a specific duty upon Madison and its driver, because the driver had parked legally and

could not reasonably have foreseen that the spot at which Banks exited the grocery's parking lot beside his vehicle would become the only exit from the lot. We agree that based upon the specific facts involved, Madison's driver could not have anticipated or foreseen that the only exit from the lot would be directly beside his truck at the time that he legally parked his truck and went into the grocery to make deliveries. Appellants have cited no cases which would impose such a duty upon Madison. There was clearly no statutory duty breached here. Again, the parking maneuvers of other drivers in the lot which effectively sealed off all other potential avenues for exit controlled this situation. Further, because Madison's driver could not have foreseen this circumstance, he also could not have foreseen that someone would exit beside his truck without obtaining help in getting a clear view of the roadway. Since the trial court correctly concluded as a matter of law that there was no such duty owed and no breach of the duty of reasonable and ordinary care, summary judgment was appropriate, since it would have been impossible for plaintiffs to produce evidence at trial warranting a judgment in their favor.

For the foregoing reasons, this Court affirms the judgment of the Madison Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

James T. Gilbert
Richmond, Kentucky

BRIEF FOR APPELLEE:

Douglas L. Hoots
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