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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000848-MR

JOSEPH GAINES, A MINOR, BY
AND THROUGH HIS PARENTS
AND GUARDIANS, LESLIE GAINES
AND CANDACE GAINES

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 07-CI-03819

DIAMOND POND PRODUCTS, INC.,
A/K/A WATERSCAPES

APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; ACREE, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE.

TAYLOR, CHIEF JUDGE: Joseph Gaines, a minor, by and through his parents and guardians, Leslie Gaines and Candace Gaines (collectively referred to as appellants), bring this appeal from a May 4, 2009, order of the Fayette Circuit

[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 21.580.

Court granting a directed verdict in favor of Diamond Pond Products, Inc., a/k/a Waterscapes (Diamond Pond) and dismissing appellants' negligence claim. We affirm.

In October 2006, fourteen-year-old Joseph Gaines became involved with an annual charitable activity conducted in Lexington, Kentucky, known as "Terror on Tates Creek" (Terror). Terror had been sponsored by Diamond Pond since 2004 and was conducted on its 15-acre tract of land.[2] Terror customers would pay an admission fee to walk through "haunted" trails on the property and would be frightened by teenagers disguised as horror movie characters. Diamond Pond paid the teenagers $5 per hour to act as "scare characters." The proceeds from Terror were donated to local charitable organizations.

For Gaines' involvement with Terror, he chose to disguise himself as "Jason" from the movie "Friday the 13th." Gaines' costume included a mask provided by Diamond Pond. Each Terror participant was responsible for providing his/her own props. Gaines obtained a real machete from fellow Terror participant, Billy Kairn. Kairn had previously been given the machete by his grandfather. Gaines took the machete home before reporting to work at Terror. He hid the machete from his parents, admitting that his parents would not permit him to use the machete as a prop while acting as a Terror participant. The use of sharp instruments and weapons like the machete by participants were prohibited under Terror rules.

[2] Diamond Pond Products, Inc., a/k/a Waterscapes is in the landscaping business.

On the evening of October 14, 2006, Gaines was working on the Terror trails. Gaines was using the machete to chop wood for a fire, an activity also prohibited under Terror rules. Gaines was chopping the wood outside of his designated "scare station" when he was startled by another Terror participant. Gaines missed the log he was attempting to split and hit his finger with the machete, resulting in a serious injury to his finger.

In August 2007, appellants filed a complaint against Diamond Pond in Fayette Circuit Court alleging that Diamond Pond had breached its duty of care owed to Gaines as an invitee on its premises. Diamond Pond subsequently filed a motion for summary judgment which the circuit court denied. A jury trial commenced on April 21, 2009. At the close of appellants' case-in-chief, the court granted Diamond Pond's motion for directed verdict, thereby dismissing appellants' complaint. Kentucky Rules of Civil Procedure (CR) 50.01. This appeal follows.

Appellants contend that the circuit court erroneously granted Diamond Pond's motion for directed verdict. Specifically, appellants assert that the trial court erred by ruling that Diamond Pond owed no duty to Gaines either as an employee or as an invitee.

Upon review of a directed verdict, it must be determined "if a reasonable person could only conclude that movant was entitled to a verdict." *Zapp v. CSX Transportation, Inc.*, 300 S.W.3d 219, 221 (Ky. App. 2009)(citing CR 50.01; *Lee v. Tucker*, 365 S.W.2d 849 (Ky. 1963)) (footnote omitted). In so

determining, "the court must view the evidence and all reasonable inferences therefrom in a light most favorable to the nonmoving party." *Zapp*, 300 S.W.3d at 221.

In the case *sub judice*, the trial court granted Diamond Pond's motion for directed verdict after concluding that Diamond Pond owed no duty of care to Gaines as an employee or an invitee. We shall analyze each conclusion *seriatim*.

After hearing Gaines' proof at trial, the trial court concluded that Gaines was an employee of Diamond Pond as a matter of law. An employer owes an employee the duty to exercise ordinary care in furnishing a reasonably safe place to work.[3] *Faulkner v. Gatliff Coal Co.*, 228 Ky. 379, 15 S.W.2d 236 (1929). In this case, the uncontroverted facts indicate that Diamond Pond provided Gaines a reasonably safe place to work. The evidence demonstrated that Diamond Pond adopted rules that Gaines and the other employees were to follow: "no fires, no weapons, no touching the patrons, no drugs/alcohol." Circuit Court Order at 1. Gaines' injury resulted from activity that was indisputably in violation of the aforementioned rules. The trial court concluded:

> The evidence put forth by [Gaines] shows that [Gaines] was not in his designated area, was conducting an activity that he knew was against the rules while using an instrument that he also knew was not allowed on the premises. [Gaines] was hired to be a "scare character" and his actions of chopping wood with a machete, which was not permitted, to build a fire, which was also not permitted, was clearly outside the scope of his employment. [Gaines] violated the rules, of which he

[3] The applicability of the Workers' Compensation Act was neither pleaded below nor raised as an issue in this appeal. As such, it is deemed waived. *See Pennington v. Jenkins-Essex Constr., Inc.*, 238 S.W.3d 660 (Ky. App. 2006).

> admits he was aware, and said violation resulted in an injury. Reasonable minds cannot differ.

Considering the above, we believe the uncontroverted facts demonstrate that Diamond Pond provided Gaines a reasonably safe place to work. Any injury Gaines suffered was caused by his violation of Diamond Pond's rules and occurred while Gaines was engaged in activities outside the proper scope of his employment. Thus, we conclude that the circuit court correctly concluded that Diamond Pond breached no duty of care owed to Gaines as an employee.

However, Gaines argues that he was not an employee, but rather an invitee on Diamond Pond's land. As a general rule, a land possessor owes a duty to invitees to discover unreasonably dangerous conditions on the land and to either correct them or warn of them. *Perry v. Williamson*, 824 S.W.2d 869 (Ky. 1992). However, until recently in Kentucky, the open and obvious doctrine provided that land possessors could not be held liable to invitees injured by open and obvious dangers that were known to the visitor or otherwise so obvious that he would be expected to discover them. *Rogers v. Prof'l Golfers Ass'n of Am.*, 28 S.W.3d 869 (Ky. App. 2000).

Recently, the Kentucky Supreme Court has modified the open and obvious doctrine in *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010). In *Kentucky River*, the Kentucky Supreme Court has adopted the position of the *Restatement (Second) of Torts* with respect to open and obvious conditions. That position is stated as follows:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness.*

Restatement (Second) of Torts § 343A(1) (1965)(emphasis added).

Appellants argue that *Kentucky River* has abolished the open and obvious doctrine as concerns premises liability and thus, under the facts of this case, all of the issues raised must be decided by a jury trial and the directed verdict was otherwise not appropriate. *See Kentucky River*, 319 S.W.3d 385. We disagree with appellants' characterization and application of *Kentucky River* to this case. As noted, we believe *Kentucky River* modified the open and obvious doctrine, not abolished it, upon adoption of the position set forth in the *Restatement (Second) of Torts* § 343A(1). Likewise, under the facts of this case, we do not believe that *Kentucky River* precludes the entry of the directed verdict in this case. *See Kentucky River*, 319 S.W.3d 385.

The uncontroverted facts demonstrate that Diamond Pond did not breach its duty of care to Gaines, assuming he was an invitee, by failing to warn Gaines of a dangerous condition on its premises. In this case, Gaines created the dangerous condition that resulted in his injury by utilizing a dangerous weapon that was prohibited under Diamond Pond's rules for Terror workers. Applying the newly adopted *Restatement (Second) of Torts* position, as previously stated, Gaines' injury was not a foreseeable harm that Diamond Pond could anticipate nor was it caused by a known or obvious condition. *See Kentucky River*, 319 S.W.3d

385. If we were to follow appellants' argument, a land possessor would become liable for any negligent act of an invitee that causes injury to the invitee, effectively penalizing the land owner or possessor where the invitee creates the "open and obvious danger" to himself. In other words, the land owner or possessor would be held to a duty of protecting the invitee from himself. This is not the law in Kentucky. We can find no authority to support this position nor is there any authority that would allow a comparative fault jury instruction under these circumstances. Simply put, we do not believe it is reasonable for Diamond Pond to have anticipated the harm that Gaines would inflict upon himself while being on Diamond Pond's property. *See James v. Wilson*, 95 S.W.3d 875 (Ky. App. 2002).

In summation, the uncontroverted facts indicate that Gaines was injured by his own conduct in contravention of Diamond Pond's rules, regardless of whether he was an employee or invitee. We reject appellants' arguments that Diamond Pond breached various duties owed to Gaines and that breach of such duties caused Gaines' injury. Under the facts of this case, there was no forseeability of the self-inflicted injury that was incurred by Gaines while a participant in Terror.

Viewing the evidence in a light most favorable to appellants, we believe Diamond Pond was entitled to a directed verdict, which was properly granted by the trial court in favor of Diamond Pond.

For the foregoing reasons, the Order Granting Directed Verdict entered by the Fayette Circuit Court is affirmed.

ALL CONCUR.

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