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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001161-MR

BRIDGETT SELF, ADMINISTRATRIX OF THE ESTATE OF MARY DANIEL WHELAN DOWNS; AND DONNA WHELAN, NEXT FRIEND, AUNT & LEGAL CUSTODIAN OF ALEXIS NICOLE DOWNS, A MINOR CHILD — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 10-CI-006445

BARRY MANTOOTH; KAREN MANTOOTH; AND HORACE EUGENE DOWNS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND KELLER, JUDGES.

KELLER, JUDGE: Bridgett Self, as Administratrix of the Estate of Mary Daniel Whelan Downs (Mary) and Donna Whelan, as Next Friend, Aunt, and Legal

Custodian of Alexis Nicole Downs, a Minor Child (hereinafter collectively referred to as the Appellants), appeal from the trial court's summary judgment in favor of Barry and Karen Mantooth (hereinafter referred to individually by their first names and collectively as the Mantooths). The Appellants argue that there are issues of fact regarding the death of Mary that precluded summary judgment. Having reviewed the record and the argument of counsel, we disagree and affirm.

FACTS

On September 25, 2009, Horace Eugene Downs (Geno) shot and killed his wife, Mary. Although the parties differ as to the timeframe, they generally agree as to what events led up to this shooting. Because the timeframe is not particularly significant, we do not dwell on the differences.

After arriving home from work on September 25, Geno prepared dinner for his wife and his two daughters, Alexis and Katie. While preparing dinner, Geno drank several beers. After dinner, Geno took four beers out onto his deck and continued drinking. Later that evening, Geno saw his neighbor, Barry. Geno took a beer over to Barry, and they drank and "shot the bull." They eventually ran out of beer, and Barry drove the two of them to a nearby store where they each purchased a case of beer. They then returned to Barry's house and sat on his porch where they continued to drink beer and smoked some marijuana.

At some point after they returned from the store, Geno walked to his house, got a revolver he had just purchased, and returned to Barry's to show it to him. Geno handed the gun to Barry. Barry looked at it, noticed that it was loaded,

and returned it to Geno. According to Barry, after getting the gun back, Geno began to "play" with the gun. We note that Barry could not or would not describe in any great detail what Geno was doing with the gun. Furthermore, Geno gave a number of inconsistent descriptions of what he was doing with the gun; however, it appears from his deposition testimony that he was cocking the gun so that he could spin the cynlinder. He would then pull the trigger and ease the hammer back into place.

Sometime around 11:00 p.m., Barry's wife, Karen, came outside of the house to smoke a cigarette. She did not see Geno's gun, but she did note that Geno was drunk. After smoking her cigarette, Karen returned to the house and went to bed.

After Karen went to bed, Mary walked over to the Mantooth house and sat with Geno and Barry on the porch. At some point thereafter, Mary told Geno to stop playing with the gun. The gun accidently discharged, a bullet struck Mary in the chest, and she died early the next day.

In his deposition, Barry stated that he was aware that an intoxicated person should not handle a loaded weapon. However, he was not concerned about Geno having the gun that night because he had previously seen Geno handle weapons when drunk and nothing bad happened. Furthermore, Barry admitted that he wished he had told Geno to take the gun home; kept the gun once Geno gave it to him; or unloaded the gun when he was holding it. However, he stated that he did not do so because it was Geno's gun.

On September 15, 2010, the Appellants filed a complaint alleging, in pertinent part,[1] that the Mantooths negligently "hosted an intoxicated [Geno] on their property while he was in possession of a deadly weapon, and ammunition, where he shot and killed Mary Downs." After filing their response to the Appellants' complaint, the Mantooths filed a motion for summary judgment. In their motion, the Mantooths argued that they had no liability because: they had not served Geno any alcohol; they could not have foreseen the shooting; and they had no special relationship with Mary that required them to protect her.

In their response to the Mantooths' motion, the Appellants argued that, after Geno gave Barry the gun, Barry had a duty to retain possession of the gun, to unload it, or to tell Geno to put it away. Furthermore, the Appellants argued that the Mantooths violated Kentucky Revised Statute (KRS) 411.150 by "aiding or promoting" the shooting. Finally, they argued that the Mantooths had a duty to protect Mary by controlling Geno or by removing him from their property.

On June 14, 2011, without explanation, the circuit court granted the Mantooths motion and dismissed the Appellants' claims against the Mantooths. This appeal followed.

STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson*

[1] The Appellants also named Geno as a defendant; however, this appeal only concerns the Appellants' claims against the Mantooths.

ex rel. Trent v. Nat'l Feeding Systems, Inc., 90 S.W.3d 46, 49 (Ky. 2002). Summary judgment is only proper when "it would be impossible for the respondent to produce any evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). In ruling on a motion for summary judgment, the Court is required to construe the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Id.* at 480. With these standards in mind, we address the issues raised by the Appellants.

ANALYSIS

The Appellants raise three issues: (1) because Mary's injury and death were foreseeable, Barry had a duty to keep Geno's loaded gun, to unload the gun, or to ask Geno to put the gun away; (2) the Mantooths had a special duty of care to protect Mary from Geno; and (3) the Mantooths are liable for aiding and promoting Mary's death under KRS 411.150. Because there is some overlap in the analysis of these issues, we first generally address the law of negligence, then we separately address each specific issue.

1. Negligence

In addition to damages, a negligence action requires proof that: the defendant owed a duty of care; the defendant breached that duty; and the breach caused the injury. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 88 (Ky. 2003). Generally, a defendant has the duty to exercise ordinary care to prevent foreseeable injuries. *Grayson Fraternal Order of Eagles v. Claywell*, 736 S.W.2d 328, 332

(Ky. 1987). However, a defendant generally has "no duty to control the conduct of a third person to prevent him from causing harm to another." *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840, 849 (Ky. 2005). Whether a duty exists is a question of law, *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 248 (Ky. 1992), and, whether harm was foreseeable is determined by viewing the facts as they reasonably appeared to the defendant, not as they appear in hindsight. *James v. Wilson*, 95 S.W.3d 875, 891 (Ky. App. 2002). Finally, legal causation must be established by "sufficient proof to tilt the balance from *possibility* to *probability*." *Briner v. General Motors Corp.*, 461 S.W.2d 99, 102 (Ky. 1970)(emphasis in original).

2. Whether Mary's Injury and Death Were Foreseeable

The parties agree that Barry had the duty to exercise ordinary care to prevent foreseeable injuries. However, they disagree whether Mary's injury was foreseeable. The Appellants argue that Barry, who they allege "furnished" a loaded gun to Geno, should have foreseen Mary's injury. This argument fails for three reasons.

First, the Appellants' use of the word "furnished," which implies that Barry supplied Geno with a loaded gun, mischaracterizes what occurred the night of September 25, 2009. Geno brought the gun, which he owned and which was loaded, to the Mantooths' house. Geno gave the gun to Barry, and Barry simply

returned the gun to Geno after examining it. Barry did not supply or "furnish" Geno with a gun, and the implication to the contrary mis-construes the record.

Second, while it is not necessary to establish that a particular form of injury is foreseeable, there must be evidence of "the probability of injury of some kind to persons within the natural range of effect of the alleged negligent [person] . . ." *Isaacs v. Smith*, 5 S.W.3d 500, 502 (Ky. 1999) (*citing Miller v. Mills,* 257 S.W.2d 520, 522 (Ky. 1953)). When Barry had control of the gun, only he and Geno were on the porch. No one else was present, and there is no evidence that either Geno or Barry anticipated that Mary or anyone else would be there. It would not have been possible for Barry, while he had control of the gun, to foresee injury to a person who was not present and whose presence was not anticipated. Once Mary arrived, Barry would have had to take the gun away from Geno, and the Appellants cite no law imposing a duty on Barry to do so.

Third, although the Appellants disagree, we believe that *Issacs* and *Napper v. Kenwood Drive-In Theater Co.*, 310 S.W.2d 270 (Ky. 1958) are instructive. In *Issacs*, Isaacs and Wilhoit, another patron at a bar/nightclub, engaged "in a brief shouting match." 5 S.W.3d at 501. Club security personnel separated the two but did not ask either to leave. The bartender continued to serve them alcohol and, approximately thirty minutes later, Isaacs shot Smith, Wilhoit's companion. Smith filed suit against Isaacs and the bar, alleging that bar personnel were negligent for continuing to serve Isaacs alcohol. *Id.*

The Supreme Court of Kentucky upheld the trial court's summary judgment in favor of the bar. In doing so, the Court held that "the establishment could not have anticipated that Isaacs would inflict injury upon Smith simply because the two had quarreled earlier in the evening." *Id.* at 503.

We agree with the Appellants that *Isaacs* is distinguishable because Isaacs' actions were intentional, not accidental. However, it is not so dissimilar as to be useless to our analysis. If the Court could discern no foreseeability in *Isaacs,* where the parties were in a bar/nightclub with other patrons and they had a history of arguing, we can discern none here where the evidence indicates that: Geno had not been fighting with Mary before the shooting; Geno occasionally shot a firearm after drinking, injuring no one; Barry had seen Geno handle firearms after Geno had been drinking, injuring no one; and, with the exception of the short amount of time Karen was on the porch, Geno and Barry were alone until Mary arrived.

In *Napper,* a group of boys assaulted several patrons of a drive-in theater. The evidence revealed that the boys had been bothering girls early that evening and had previously caused trouble. The victims of the assault sued the theater company alleging that its employees "negligently allowed the premises to become disorderly and knowingly permitted 'dangerous and disorderly patrons to remain on the premises.'" 310 S.W.2d at 271. The Court affirmed the trial court's dismissal of the victims' claims. In doing so, the Court noted that a proprietor of a place of business "has the legal duty to use reasonable care to protect his patrons from harm; and if he knows of activities or conduct of other patrons or third

persons which would lead a reasonably prudent person to believe or anticipate that injury to a patron might be caused, it is the proprietor's duty to stop such conduct." *Id.* However, the Court held that evidence of boisterousness and misbehavior by the boys was not sufficient to put the drive-in on notice that they would assault another patron. *Id.* at 272.

Again, we agree that *Napper* involved intentional, not negligent, acts by the perpetrators. However, as indicated above, if the Court could not discern foreseeability under those facts, we can discern none here.

3. Whether the Mantooths Owed Mary a Special Duty of Care to Control Geno's Behavior

The Appellants argue that the Mantooths owed Mary a special duty of care to control Geno's behavior because: Mary was an invitee; the Mantooths controlled their property and were in the best position to control the risk presented by Geno's actions; and Barry, who had training in the use and safe handling of firearms, should not have returned the gun to Geno.

> As a general rule, an actor whose own conduct has not created a risk of harm has no duty to control the conduct of a third person to prevent him from causing harm to another. "This rule derives from the common law's distinction between misfeasance and nonfeasance, and its reluctance to impose liability for the latter." The reason for this common law distinction is that misfeasance creates a new risk of harm to the plaintiff, whereas nonfeasance does not make the plaintiff's situation any worse, although it fails to benefit him.
>
> A duty can, however, arise to exercise reasonable care to prevent harm by controlling a third person's conduct where: "(a) a special relation exists between the actor and

> the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection." (Citations omitted.)

Grand Aerie Fraternal Order of Eagles v. Carneyhan, 169 S.W.3d 840, 849 (Ky. 2005).

Relationships that give rise to a duty to control a third person include that between: a parent and minor child; a master and servant; the owner of land and the person using the land; a mental health professional and patient; and one who takes charge of a person with dangerous propensities and that person. *Id.* at 850. The key to determining whether a special relationship exists between a defendant and the plaintiff or the tortfeasor is whether the defendant is "in the best position to protect against the risk of harm." *Id.* In order to have liability for breaching the duty to control, it must be shown that the "defendant's ability to control the person who caused the harm [was] real and not fictional and, if exercised, would meaningfully reduce the risk of the harm that actually occurred." *Id.* at 851. "A 'real' ability to control necessarily includes some sort of leverage, such as the threat of involuntary commitment, parole revocation, or loss of the livelihood provided by an employment relationship." *Id.* at 853 (internal citations omitted.)

The Appellants argue that the Mantooths, and Barry in particular, were negligent because of a failure to control Geno. Barry admits that: he could have asked Geno to take the gun home, he could have kept the gun and not returned it to Geno, he could have told Geno to put the gun away, and he could

have unloaded the gun before returning it to Geno. Furthermore, Geno admits that, if Barry had undertaken any of those actions, he would have complied and/or not objected. However, none of that creates the special relationship set forth in *Carneyhan.* There is no indication that Barry had any power to coerce Geno's compliance and that power to coerce is the hallmark of a special relationship. Therefore, we are not convinced that Barry had any special relationship with Geno that gave rise to a duty to control him.

4. Whether the Mantooths Violated KRS 411.150

KRS 411.150 provides that:

> The surviving spouse and child, under the age of eighteen (18) or either of them, of a person killed by the careless, wanton or malicious use of a deadly weapon, not in self-defense, may have an action against the person who committed the killing and all others aiding or promoting, or any one (1) or more of them. In such actions the jury may give vindictive damages.

The Appellants argue that, when Barry returned the gun to Geno, he aided and promoted Geno's killing of Mary. The statute does not define "aiding or promoting." Therefore, those terms should be "construed according to the common and approved usage of language." KRS 446.080.

Webster's New Twentieth Century Unabridged Dictionary, Second Edition (1979), defines aid as: "to help; to assist; to support, as by furnishing strength or means to effect a purpose; to forward; to facilitate;" and promote as: "to incite or urge on a person." These definitions are consistent with the three cases we found that, at least tangentially, address aiding or promoting.

In *Commonwealth v. Hurt*, 23 Ky.L.Rptr 1171, 64 S.W. 911 (Ky. 1901), the sheriff of Adair county, Hurt, appointed Williams as his deputy. Williams allegedly was "a man of low moral character, very ill-tempered, reckless in his conduct, [and] unfit for the position." *Id.* at 912. Williams killed a fellow deputy, Lester, and Lester's widow sued Hurt for aiding and promoting Lester's killing. The Court upheld the trial court's dismissal of the widow's suit because there was no evidence that Williams was acting in any official capacity when he killed Lester. However, the Court implied that, if Williams had been acting in an official capacity, it might have found that Hurt, by appointing Williams as a deputy, had aided and promoted Lester's killing.

In *Howard v. Caudill*, 228 Ky. 403, 15 S.W.2d 245 (1929), three Breathitt County deputy sheriffs, without justification, shot and killed Howard while attempting to arrest him for operating an illegal still. Howard's widow brought suit against the Breathitt County sheriff and the company that provided the sheriff's bond. The trial court dismissed, and the Court affirmed, because there was no evidence the sheriff aided or abetted in Howard's killing.

In *Casey v. Fidelity & Cas. Co. of New York*, 278 Ky. 426, 128 S.W.2d 939 (1939), a Pike County deputy sheriff shot and killed Casey while attempting to arrest him for being drunk in public. Casey's widow brought suit against the surety company that provided a bond for the sheriff. The trial court dismissed the suit holding that the bond did not cover the deputy. The Court affirmed. In doing so, the Court noted that the widow could not have brought suit

against the sheriff, who was covered by the bond, because he was not present and had not aided and abetted in the killing of her husband.

Reading the preceding cases in tandem with the dictionary definitions, we believe that "aiding or promoting" requires some active participation in the killing by the person so charged. The gun was not Barry's. He did not get it out, load it, or cock it. He did not incite or urge Geno to play with the gun, nor did he help or assist Geno in playing with the gun. Barry simply handled the gun and returned it to Geno. While everyone agrees that Mary might be alive today if Barry had acted differently, his actions and/or his failure to act do not rise to the level of aiding or promoting. Therefore, KRS 411.150 does not apply.

CONCLUSION

For the foregoing reasons, we affirm the circuit court's summary judgment.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANTS:

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BRIEF AND ORAL ARGUMENT FOR APPELLEES BARRY AND KAREN MANTOOTH:

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NO BRIEF FILED FOR APPELLEE HORACE EUGENE DOWNS