RENDERED: JULY 13, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001239-MR

MARY BLAND — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 09-CI-01054

CITY OF MT. WASHINGTON, AND
HUMANA INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND MOORE, JUDGES.

CAPERTON, JUDGE: The Appellant, Mary Bland, appeals from a personal injury action in which the trial court entered a directed verdict on the issue of notice at the close of her case against the Appellee, City of Mount Washington. The final order entered by the court added additional grounds for dismissal that had previously been rejected via motions for summary judgment. This appeal

followed. Upon review of the record, the arguments of the parties, and applicable law, we affirm.

Bland claimed an injury from a fall which occurred on December 17, 2007, at Mt. Washington Elementary School following an event in which her granddaughter was a participant. Bland described cutting across an open grassy area in the dark and rain while holding her granddaughter. Bland stated that her husband was a few feet ahead of her when she suddenly fell in a hole, about 20 inches deep, with her granddaughter still in her arms. Bland estimated that the hole into which she fell was approximately 30 feet from the sidewalk in front of a school marquee, and had no sort of identification. Bland sustained injury primarily to her shoulder immediately after the fall and began medical treatment for the injuries she received shortly thereafter. Bland ultimately underwent surgical repair of the shoulder joint.

According to Bland's testimony, she and her husband returned to the scene of her fall on the day after it occurred. She indicated that she and her husband took photographs of the area, including the hole itself. She testified that when she and her husband examined the hole, there was only dirt at the bottom. Grass had grown over the hole, and there were no visible pipes to indicate that it was under the control of any utility company, nor was there a lid to indicate that it was a water company fixture. Bland stated that she believed it to be a hole being dug for the placement of a flag. Bland conceded that at that time, neither she nor her husband spoke to anyone at the school about the hole.

Bland initially believed that the responsibility for her injury resided with the school because the area in which she fell was on the premises of the Bullitt County Public Schools. Accordingly, Bland, represented by her present counsel, filed suit against the Bullitt County Board of Education.[1]

The instant action was filed on November 6, 2008, approximately 11 months after her fall and injury, following a drive that Bland took past Mount Washington Elementary School in March or April of 2009. Bland stated that she noticed that the Mount Washington Elementary School sign had been placed on the location where her fall had taken place. Bland stated that at that time, she pulled over and learned for the first time that the hole was covered by a water meter lid, and took photos of same. The court ultimately declined to place the picture into evidence, a decision which Bland now asserts was erroneous, as discussed herein, *infra*.

The hole into which Bland fell contained an air release valve maintained by the City of Mount Washington since early 2000. Evidence indicated that the air release valve was intended to release any air blocking a water line or causing air to come out of a household faucet. There are no state regulations requiring a public marking of an air release valve location. Air release valves are covered by a meter cover lid over the valve placement. Bland did not put forth any evidence to establish any violation of state law or administrative regulation by the City of Mount Washington in its placement of the air release valve. The City of

[1] That action was ultimately dismissed pursuant to the doctrine of governmental immunity.

Mount Washington also asserts that she presented no substantive evidence to suggest that it had any duty to regularly inspect the air release valve.

Evidence elicited at trial through Ronald Fick, the Mount Washington Utilities Superintendent, indicated that there had been no work orders generated concerning this particular air release valve prior to February of 2009, though it had been installed in the year 2000. Fick testified that the rim was installed above the ground for ease and less expense for the water company, rather than burying the rim and making it level to the ground. Fick also testified that the area in which the hole was located was mowed using a bush hog.

Richard Hamilton, a former employee of the Mount Washington Water District also testified below. Hamilton stated that he was trained to install these fixtures by burying the rim in order to make the cover level with the ground. Hamilton stated that such was the manner in which he had been instructed to install the covers for the sake of safety.

The Mount Washington Water District includes approximately 100 such air release valves in its responsible area. During the course of discovery, Mount Washington conceded that the cover to the valve was missing at some juncture.

Neither Bland nor the school system informed the City of Mount Washington of the fall or any defects in the covering of the air release valve in December of 2007. Fick testified that had a person called, someone could have identified the hole's purpose. However, the City of Mount Washington received

no notice of the lawsuit filed against the Bullitt County Board of Education nor of the suit's ultimate dismissal.

On February 10, 2009, the City of Mount Washington received the first notice of any problems with an air release valve cover on the school property. A work order prepared by the City shows that the release valve cover was replaced on February 10, 2009.

Prior to trial in this matter, Mount Washington made several motions for summary judgment based on the one-year limitations period, arguing that the claim was not filed within one year of the incident, but was filed within one year of Bland discovering that the water company was responsible for maintaining the hole. Those motions were overruled. At trial, the court questioned Bland directly regarding this issue, and ultimately entered a directed verdict at the close of Bland's proof. The court indicated that its directed verdict was based on failure to give notice to the water company of the defect. Bland now appeals to this Court.

Prior to reviewing the arguments of the parties, we note that the standard of appellate review of a trial court's grant of a directed verdict motion is well-established. In *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998), our Kentucky Supreme Court stated:

> On a motion for directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion. When engaging in appellate review of a ruling on a motion for directed verdict, the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party. *Meyers v. Chapman Printing Co., Inc.,* Ky., 840 S.W.2d 814

> (1992). Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous. *Davis v. Graviss,* Ky., 672 S.W.2d 928 (1984).

In reviewing the sufficiency of evidence, the appellate court must respect the opinion of the trial judge who heard the evidence. A reviewing court is rarely in as good a position as the trial judge who presided over the initial trial to decide whether a jury can properly consider the evidence presented. Generally, a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ. Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts, as well as matters affecting the credibility of witnesses. *Id.* Accordingly, a directed verdict is appropriate when, after drawing all inferences in favor of the nonmoving party, a reasonable jury could only conclude that the moving party was entitled to a verdict. *Lambert v. Franklin Real Estate Co.,* 37 S.W.3d 770, 775 (Ky.App. 2000) (quoting *Buchholtz v. Dugan,* 977 S.W.2d 24, 26 (Ky.App. 1998)). We review this matter with these standards in mind.

As her first basis for appeal, Bland argues that the court's findings regarding due diligence were erroneous, and that the court erred in directing a verdict on the basis that this matter was not timely filed. With respect to whether or not she exercised due diligence in trying to locate the party responsible for the hole, Bland asserts that at trial, it appeared that the court was satisfied that she had

tried to identify the hole, and that the sediment therein, overgrown grass, and complete absence of a rim and cover made the investigation unfruitful. However, Bland asserts that in entering a directed verdict against her, the court erred in asserting that she should have made more effort to look into the source of the hole, including taking steps such as searching land records, and conducting further physical inspection of the hole. Bland asserts that reviewing land records would be fruitless in directing her to the responsible party for the condition of the hole and, further, that her pictures are proof of her efforts to determine the party responsible for the hole, and that to conduct any further physical investigation would approach spoilation or criminal mischief. For reasons discussed herein *infra*, we disagree.

Bland also argues that Kentucky has adopted the discovery rule for those who act with due diligence, and that the discovery rule is applicable to this matter. She argues that the discovery rule, set forth in Kentucky Revised Statutes (KRS) 412.140, delays accrual of the statute of limitations until discovery takes place, or reasonably should have taken place.

Concerning the applicability of the discovery rule to this case, Mount Washington asserts that it clearly does not apply and asserts that Kentucky law mandates its use only when injuries are latent. Mount Washington states that in this instance Bland was immediately aware of her injury and began medical treatment shortly thereafter. Mount Washington argues that the evidence submitted by Bland indicates that she did no investigation to determine the reason for the hole's placement or the contents of the hole, either of which would have led

her to determine if it was a utility. Mount Washington asserts that Bland did not attempt to speak to anyone at the school to determine the hole's ownership.

In addressing this issue, we note that KRS 412.140, the "discovery rule," states in pertinent part that:

> (1)The following actions shall be commenced within one (1) year after the cause of action accrued:
>
> (a)An action for an injury to the person of the plaintiff ….

In *Hazel v. General Motors Corporation*, 83 F.3d 422 (6th Cir. 1996), the court explained Kentucky's discovery rule as follows:

> Kentucky's discovery rule provides that a cause of action does not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, both his injury and the responsible party. This rule is designed to protect the blamelessly ignorant plaintiff from losing the right to recover for an injury during the period in which the injury may remain inherently unknowable to the plaintiff. The typical scenarios for the application of the rule include medical malpractice and latent disease cases. Plaintiff argues that he had no reason to know that the design of the fuel system may have caused his injury until he watched the "Dateline" segment years later and that the cause of action did not accrue until that time.

Id. (internal citations omitted).

While Bland attempts to rely upon this case as support for her assertion that the discovery rule applies to her case, we disagree. We note that in *McClain v. Dana Corporation*, 16 S.W.3d 320 (Ky. 2000), this Court, in discussing the discovery rule, held that:

> The discovery rule does not operate to toll the statute of limitations to allow an injured plaintiff to discover the identity of the wrongdoer unless there is fraudulent concealment or misrepresentation by the defendant of his role in causing the plaintiff's injuries. A person who has knowledge of injury is put on "notice to investigate" and discovery, within the statutory time constraints, the identity of the tortfeasor.

Further, we note that, as stated by our Supreme Court in *Fluke Corp. v. Lemaster*, 306 S.W.3d 55, 60 (Ky. 2010):

> The discovery rule is available only in cases where the fact of injury or offending instrumentality is not immediately evident or discoverable with the exercise of reasonable diligence, such as in cases of medical malpractice or latent injuries or illnesses.

Sub judice, there was no question that Bland knew she had fallen into a hole, and that the fall was directly responsible for her injury. Bland immediately sought treatment for the injury, and shortly thereafter filed suit against the Bullitt County Board of Education. There was nothing latent about her injury, nor was the instrumentality hidden or unable to be discovered with the exercise of reasonable diligence.

To that end, we are in agreement with the court's conclusion, based upon the evidence of record, that Bland made no effort to remove the debris from the bottom of the hole or to conduct any additional research as to the owner of the hole or its purpose. We disagree with Bland's argument that because the hole had grass and debris around it, the identity of the owner was "obstructed" as that term has been defined by our courts. Further, we are in agreement with the court below

that a simple and routine title examination would have identified the owner of the hole. Indeed, prior to the expiration of the statute of limitations, Bland could have hired individuals to more thoroughly examine the hole with permission from the court and property owner, conducted title examinations, taken depositions or otherwise make efforts to ascertain the party responsible for the hole. While the pictures submitted by Bland showed the condition of the hole at ground level, we are not persuaded by her argument that these pictures amount to evidence of due diligence in this matter. Accordingly, we find no factual issue on the matter relating to the statute of limitations and affirm the granting of a directed verdict on this issue.

Upon finding that the statute of limitations is applicable to this matter, we turn now to Bland's argument that Mount Washington should be estopped from asserting the statute of limitations. Bland argues that Kentucky law favors tolling a limitations period when the defendant cannot be identified by virtue of the defendant's conduct. She asserts that in this case, Mount Washington concealed its identity, albeit perhaps unintentionally, by virtue of its neglect of the hole such that its ownership could not be identified upon inspection.

Concerning Bland's argument that negligence can be imputed to Mount Washington, it again asserts that there was a complete absence of proof to support this charge. Mount Washington asserts that there was no evidence submitted to establish that it had any knowledge of the missing meter cover or air release valve prior to the time that Bland stepped into the hole. Additionally,

Mount Washington argues that there is no evidence that it failed to exercise the appropriate care in maintaining the cover in a reasonably safe condition and indeed, asserts that immediately after obtaining knowledge that the cover was no longer on the hole, had it replaced.

In addressing this issue we note that KRS 413.190(2) provides as follows:

> When a cause of action mentioned in KRS 413.090 to 413.160 accrues against a resident of this state, and he by absconding or concealing himself or by any other indirect means obstructs the prosecution of the action, the time of the continuance of the absence from the state or obstruction shall not be computed as any part of the period within which the action shall be commenced.

The law in this Commonwealth is clear that by either statutory or equitable estoppel, the actions taken by Mount Washington must have been calculated to mislead or deceive, and to induce inaction by the party. *See Adams v. Ison*, 249 S.W.2d 791 (Ky. 1952). As the Court stated in *Fluke*, the essential elements of equitable estoppel require appellants to show:

> (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

Id. at 62 (citing *Sebastian-Voor Properties, LLC v. Lexington-Fayette Urban County Government*, 265 S.W.3d 190, 194-95 (Ky. 2008)).

Sub judice, there was simply no evidence that Mount Washington took any action to mislead or deceive Bland, nor any evidence to suggest that the utility company did anything to prevent discovery of the true owner of the air release valve. Accordingly, we decline to reverse on this basis.

As her next basis of appeal, Bland argues that Mount Washington had a duty to maintain its fixtures and had constructive notice of the defect. Mount Washington disagrees, and argues below that there was no evidence submitted to establish that it failed in its duty to maintain the cover in a reasonably safe condition. It notes that Bland's own witness, Richard Hamilton, a former Mount Washington employee, testified that he drove by the site where the hole was located on multiple occasions and was never aware that the cover for the air release valve was missing. Moreover, Mount Washington notes that as soon as it did become aware of the missing cover, it was replaced immediately. It notes that Bland put forth no expert testimony regarding any standards or policy requirements for any municipalities to maintain their air release valve covers differently than the manner that Mount Washington did herein. Accordingly, it argues that it complied with its duty under the law and requests this Court to affirm.

In addressing this issue, we acknowledge the holding of *Louisville Water Co. v. Cook*, 430 S.W.2d 322, 324 (Ky. 1968), in which the Supreme Court held that the water company has a duty to maintain the meter covers in a reasonably safe condition. Below, the court verbally predicated its decision to

grant the directed verdict on the fact that Bland did not provide actual notice of the defect in the value cover. As noted, Bland argues that she provided constructive notice of the defect. Again, we disagree.

Ultimately, Bland was unable to produce any testimony as to how long the meter cover remained off the hole, or as to the manner in which it was removed. Ultimately, she had the burden of establishing these factors by a preponderance of the evidence. While she submits that the growth of grass and the presence of debris are indicators that the top was removed long ago, we are in agreement with the trial court that liability cannot be based upon conjecture or speculation. As held by our Supreme Court in *City of Elizabethtown v. Baker*, 373 S.W. 2d 593, 595 (Ky. 1964):

> [U]nless it is proved that the city had knowledge of the defect or unless such knowledge can be imputed by the length of time the defect had existed, the city is not liable for the injury.

Id. at 595. Ultimately, absent any evidence to this end, and absent any showing that the city had knowledge of the missing cover and failed to take action, we decline to reverse on this basis.

Wherefore, for the foregoing reasons, we hereby affirm the June 22, 2011, order of the Bullitt Circuit Court.

MOORE, JUDGE, CONCURS.

LAMBERT, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

LAMBERT, JUDGE, DISSENTING: Respectfully, I dissent. Based on statute and caselaw, I would submit the case, *sub judice*, to a jury for consideration.

BRIEFS FOR APPELLANT:

J. Andrew White
Louisville, Kentucky

BRIEF FOR APPELLEES:

R. Allen Button
R. Thad Keal
Prospect, Kentucky