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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002244-MR

DEBRA BROCK AND
LIBERTY MUTUAL GROUP — APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. McDONALD-BURKMAN, JUDGE
ACTION NO. 08-CI-009022

LOUISVILLE METRO HOUSING AUTHORITY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, LAMBERT, AND NICKELL, JUDGES.

COMBS, JUDGE: Debra Brock and Liberty Mutual Group,[1] an intervening party, appeal the order of the Jefferson Circuit Court which granted summary judgment to Louisville Metro Housing Authority. After our review, we vacate and remand.

On September 17, 2007, Brock arrived at her place of work, Barksdale, which is a dog-grooming and kennel business in Louisville. As part of her job

[1] Liberty Mutual has not submitted a brief. The trial record indicates that Liberty Mutual has joined in Brock's arguments throughout the litigation and has not submitted its own arguments. Therefore, we will refer to Brock alone as the Appellant.

duties, Brock took a husky for a walk. She proceeded along the same route that she routinely used for walking dogs. Part of the route included Brent Street, which does not have sidewalks. The dog led her to a tree at the corner of Brent and Winter Streets. Brock waited for the dog on the pavement. After the dog urinated, it turned around, and pulled Brock into the grass. She stepped into a hole and fell. She sustained serious injuries to her ankle and foot; she is no longer able to work due to the severe and permanent nature of her injuries.

The hole into which Brock fell was several inches deep but was covered by grass and leaves. It was not visible. The property is owned by the Housing Authority. On August 29, 2008, Brock filed a complaint in Jefferson Circuit Court alleging that the Housing Authority's negligent maintenance of its property caused her injuries. The Housing Authority filed a motion for summary judgment on October 14, 2011, which the trial court granted on November 22, 2011. This appeal follows.

The Housing Authority raises the defense of sovereign immunity before us. It concedes that it did not raise the issue during proceedings in the trial court; however, it is not precluded from raising the issue of immunity for the first time on appeal. *See Dept. of Corrections v. Furr*, 23 S.W.3d 615, 616 (Ky. 2000). Nonetheless, we believe that we are not permitted to consider the defense of immunity in this case. Kentucky Rule[s] of Civil Procedure (CR) 76.03(8) provides that issues not set forth in a prehearing statement must be raised in a motion to this Court in order to be considered. Pursuant to CR 76.03(4), Brock

filed a prehearing statement in which the only issue was whether the court had correctly determined her status as a trespasser. The Housing Authority did not file any motions to expand the scope of the preliminary hearing statement in order for this Court to consider the immunity doctrine.

The record shows that the Housing Authority claimed immunity as a defense in its initial answer to Brock's complaint on September 11, 2008. However, it did not raise the defense in subsequent proceedings, including its motion for summary judgment. Therefore, we conclude that it waived any defense to which it may have been entitled under the immunity doctrine. We also note that the Supreme Court declined to address immunity in a case in which the appellee had claimed it both in the trial court and in the Court of Appeals but had neglected to include it by way of filing a cross-motion for discretionary review. *3D Enterprises Contracting Corp. v. Lexington-Fayette Urban County Government*, 134 S.W.3d 558, 563 (Ky. 2004). However, because we are remanding, the Housing Authority will retain the opportunity to develop its claim of immunity in the trial court.

Summary judgment is a procedural device utilized by the courts to expedite litigation. *Ross v. Powell*, 206 S.W.3d 327, 330 (Ky. 2006). It is a "delicate matter" because it "takes the case away from the trier of fact before the evidence is actually heard." *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 482 (Ky. 1991). In Kentucky, the movant must prove that no genuine issue of material fact exists and "should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy." *Id*.

A trial court must view the evidence in favor of the non-moving party. *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). In order to overcome a motion for summary judgment, the non-moving party must present "at least some affirmative evidence showing the existence of a genuine issue of material fact." *Id*. *See also* CR 56.03. On appeal, the standard of review that we utilize is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Because summary judgments do not involve fact finding, we review *de novo*. *Pinkston v. Audubon Area Community Services, Inc*., 210 S.W.3d 188, 189 (Ky. App. 2006).

The trial court granted summary judgment to the Housing Authority because it found that Brock was a trespasser and that, therefore, it owed her no duty of care. We disagree.

Kentucky Revised Statute[s] (KRS) 381.231 defines *trespasser* as a "person who enters or goes upon the real estate of another without any right, lawful authority or invitation, either expressed or implied, but does not include persons who come within the scope of the 'attractive nuisance' doctrine." KRS 381.232 elaborates that "[t]he owner of real estate shall not be liable to any trespasser for injuries sustained by the trespasser on the real estate of the owner, except for injuries which are intentionally inflicted by the owner or someone acting for the owner."

Brock contends that she was not a trespasser because she had implied consent to be on the Housing Authority's property. She argues that she was a gratuitous licensee. Therefore, she claims, the Housing Authority owed her the duty to warn of unreasonably unsafe conditions. *Perry v. Williamson*, 824 S.W.2d 869, 873 (Ky. 1992).

The predecessor to our Supreme Court has held that when a property owner does not object to "customary and habitual use by the public[,]" the absence of a manifested objection transforms trespassers into gratuitous licensees. *Louisville & Nashville Railroad Co. v. Blevins*, 293 S.W.2d 246, 249 (Ky. 1956). A landowner does not even have to know about the use. Habitual trespassers are afforded the status of gratuitous licensees if, by the exercise of ordinary care, the landowner ***could*** have known about the habitual use. *Louisville Baseball Club v. Butler*, 160 S.W.2d 141, 144, 289 Ky. 785 (Ky. 1942). (Emphasis added). Whether the landowner knew or could have known was a question of fact for the jury. *Id*. Thus, summary judgment was inappropriate

In *Blevins*, the court considered it significant that the property on which the injury occurred was located "in a city alongside a street and not in the open country or a sparsely settled community[.]" *Blevins, supra*. For more than one hundred years, the courts of this Commonwealth have recognized a heightened standard of liability for hazards located close to a public road. *Johnson v. Paducah Laundry Co*., 92 S.W. 330, 331, 29 Ky. L. Rptr. 59 (Ky. 1906). This reasoning is reiterated in the Restatement (Second) of Torts, § 368 (1965):

> A possessor of land who creates or permits to remain thereon an excavation or other artificial condition so near an existing highway that he realizes or should realize that it involves an unreasonable risk to others accidentally brought into contact with such condition while traveling with reasonable care upon the highway, is subject to liability for physical harm thereby caused to persons who
>
> (a) are traveling on the highway, or
>
> (b) foreseeably deviate from it in the ordinary course of travel.

Comment e elaborates as follows:

> The public right to use the highway carries with it the right to protection by reasonable care against harm suffered in the course of deviations which may be regarded as the normal incidents of travel. This is true particularly where the deviation is inadvertent, as where one walking on the highway slips and falls into an excavation next to it, or misses his way in the dark, strays a foot or two to one side, and falls into the pit.

Middleton v. Reynolds Metal Co., 963 F.2d 881, 883 (6th Cir. 1992), is directly on point. In *Middleton*, the Sixth Circuit discussed KRS 381.232, which provides that a landowner is liable to a trespasser if he has "intentionally inflicted" the harm. The court held that "intentional infliction" includes conduct that is willful, wanton, or reckless. *Id*. (quoting *Kirschner v. Louisville Gas & Elec. Co*., 743 S.W.2 840, 842 (Ky. 1988)).

Our Supreme Court has further elaborated that willful and malicious[2] behavior occurs when a landowner has acted "with indifference to the natural consequences of its actions" and has demonstrated "want of care or great

[2]Although *Huddleston* was a case brought pursuant to the Recreational Use Act (KRS 411.190), we believe that it is instructive because it also involved a question of whether the plaintiff had implied consent to be on the property where the injury occurred.

indifference" to the safety of those who are foreseeably on its property. *Huddleston v. Hughes*, 843 S.W.2d 901, 906 (Ky. 1992).

The courts in *Johnson*, *Middleton*, and *Huddleston* all held that the issue of whether the landowners had acted negligently should be determined by juries. We reiterate the discussion of our Supreme Court on the sacrosanct role of juries in these cases:

> The judicial decision regarding when to save the interpretative function for the court and when to delegate the interpretative function to the jury is crucial to the development of negligence law. The more judges take cases away from juries, the more the concepts of reasonable conduct, negligence, and gross negligence become synonymous with the view of the judge or judges on that court. Likewise, the more the interpretative power is delegated to juries, the more these concepts become the aggregate of discrete findings by juries. By delegating interpretation to a jury the judiciary allows current considerations of equity and common sense to modify what might otherwise become anachronistic principles. The role of the jury in interpreting the evidence and finding the ultimate facts is an American tradition so fundamental as to merit constitutional recognition. The conscience of the community speaks through the verdict of the jury, not the judge's view of the evidence.

Horton v. Union Light, Heat, & Power Co., 690 S.W.2d 382, 385 (Ky. 1985). (Internal citations omitted).

We are persuaded that the same reasoning applies here. Brent Street does not have sidewalks. Brock argues that it is foreseeable that pedestrians are often forced on to the Housing Authority's property in order to avoid passing cars. Furthermore, she alleges that cars are frequently parked along the curbs, forcing

passengers who are exiting cars to step on the Housing Authority's property. Brock also contends that it is foreseeable that a pedestrian walking a dog might venture a few feet off the street lacking an adjacent sidewalk. The Housing Authority disagrees with all of these claims.

Therefore, several material issues of fact remain for jury determination: whether the Housing Authority should have been on notice and whether it acted negligently in not covering a deep, leaf-obstructed hole close to the public street. We conclude that summary judgment granted solely on the basis of Brock's status as a trespasser was premature.

We vacate the order of summary judgment and remand this case for additional proceedings.

LAMBERT, JUDGE, CONCURS IN RESULT ONLY.

NICKELL, JUDGE, CONCURS.

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