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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000085-MR

HAROLD DEAN JOHNSON, JR.,
AS ADMINISTRATOR OF THE ESTATE OF
HAROLD DEAN JOHNSON, SR.; AND
HAROLD DEAN JOHNSON, JR., INDIVIDUALLY — APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 14-CI-01021

SEAGLE PIZZA, INC.;
DOMINO'S PIZZA, LLC;
DOMINO'S PIZZA FRANCHISING, LLC;
DOMINO'S PIZZA DISTRIBUTION, LLC;
DOMINO'S PIZZA MASTER ISSUER, LLC;
DOMINO'S IP HOLDER, LLC;
DOMINO'S EQ, LLC;
CHARLES E. ENGLISH; AND
CRYSTAL ROBERTS — APPELLEES

OPINION
AFFIRMING IN PART
AND REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, JONES, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: Following an attempted robbery at a Domino's Pizza store in Bowling Green, Kentucky, a fleeing assailant shot and killed Harold Dean Johnson, Sr. The victim's son, Harold Dean Johnson, Jr. (hereinafter "Johnson"), claims to have been in the vicinity and witnessed the shooting. Johnson, both as administrator of his father's estate and individually, sued: the franchise owner, Seagle's Pizza, Inc. (hereinafter "Seagle"); the building's lessor, Charles E. English (hereinafter "English"); the Domino's employee who was behind the building during the attempted robbery, Crystal Roberts; and six of Domino's Pizza's limited liability corporations (hereinafter "the Domino's Pizza appellees").

The defendants moved to dismiss the complaint, and the trial court granted the motions, finding the fleeing robber's actions to be not reasonably foreseeable. Johnson appealed the dismissal of Seagle, the Domino's Pizza appellees, and English. For the reasons stated herein, this Court affirms the Warren Circuit Court's order granting summary judgment to the Domino's Pizza appellees, but reverses the order granting summary judgment to Seagle and English and remands for discovery.

FACTS

English owns a small, three-business strip mall at 2201 Stonehenge Avenue in Bowling Green, Kentucky. The mall has a store front and a back alleyway. In 2001, English executed a lease agreement with Seagle to rent space inside the strip mall for a Domino's Pizza franchise. Under the terms of the lease,

English was to construct the exterior and interior walls of the premises and leave a gravel floor. Seagle was responsible for finishing the interior of the building, including the floor, ceiling, bathrooms, and all other construction necessary for use and occupancy. Seagle's leased premises included only the west portion of the building. Seagle did not lease the parking lot surrounding the building; it was given the right to use the driveways and parking areas in conjunction with the other tenants.

The Domino's appellees executed a franchise agreement with Seagle. They neither signed a lease nor owned any property at 2201 Stonehenge Avenue. Seagle operated its Domino's business many years before the tragic events that led to Johnson, Sr. losing his life.

On August 26, 2013, Crystal Roberts, who was employed by Seagle at the Domino's store, went out the back door of the restaurant to smoke in the alley. She apparently left the door propped open while she smoked and talked on her cell phone to her boyfriend, Johnson, Sr., who was with his son, Johnson, in their apartment a block away from the Domino's. Roberts was approached by an armed man, alleged to be John Paul Shobe. Shobe allegedly demanded money and forced Roberts back into the store. According to the police report, Shobe allegedly made Roberts retrieve the money from the office. Shobe then allegedly secured the money in a plastic bag and exited through the rear door.

Johnson, Sr. became aware that a robbery was occurring, so he and his son went running toward the Domino's Pizza restaurant. Johnson, Sr. apparently

encountered the fleeing robber, who, in turn, shot and killed Johnson, Sr. His son, Johnson, witnessed his father yell, "Dean!", then heard a loud bang. Johnson saw his father hit the ground. According to the police report, Johnson, Sr.'s body was "laying face first on the ground near the Citizens First Bank ATM. Johnson was laying in a pool of blood and showed no signs of life." The ATM machine is located in front of the businesses on the strip mall's east side, slightly abutting into the parking lot. The Domino's Pizza store is the western-most store.

The appellants filed a Complaint for wrongful death and negligent infliction of emotional distress, alleging Seagle, the Domino's appellees, and English were negligent under various theories for failing to take reasonable steps to secure the premises from reasonably foreseeable, third-party criminal activity. The appellants also alleged Seagle, the employer of Roberts, was vicariously liable for Roberts's negligent act of leaving the back door propped open at closing time. The appellees filed respective motions to dismiss, attaching supporting affidavits and evidence. The motions were treated as summary judgment motions and granted. Appellants now appeal that order.

ISSUES

Appellants claim multiple issues on appeal, which can be grouped as follows: (1) whether summary judgment was proper as to the Domino's Pizza appellees; (2) whether summary judgment was proper as to Seagle and English. These issues are discussed below following the standard of review.

STANDARD OF REVIEW

Appellees filed a motion to dismiss pursuant to Kentucky Rules of Civil Procedure (CR) 12.02(f) for failure to state a claim upon which relief may be granted. A court considering such a motion should liberally construe the pleadings in a light most favorable to the plaintiff, "and all allegations taken in the complaint to be true." *Mims v. Western-Southern Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. App. 2007). "The test is whether the pleading sets forth **any** set of facts which – if proven – would entitle the party to relief. If so, the pleading is sufficient to state a claim." *Mitchell v. Coldstream Laboratories, Inc.*, 337 S.W.3d 642, 645 (Ky. App. 2010) (emphasis in original). As the issue before the reviewing court is a pure question of law, "a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue de novo." *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010).

When a court ruling on a motion to dismiss considers materials outside the pleadings, the motion to dismiss is treated as a motion for summary judgment. *Collins v. KCEOC Community Action Partnership, Inc.*, 455 S.W.3d 421, 423 (Ky. App. 2015). As such, "[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citing *Dossett v. New York Mining and Manufacturing Co.*, 451 S.W.2d 843 (Ky. 1970)). "Appellate review of a summary judgment involves only legal questions and a determination of whether a disputed material issue of fact exists." *Shelton v. Kentucky Easter Seals Society,*

Inc., 413 S.W.3d 901, 905 (Ky. 2013) (footnote omitted). "So we operate under a de novo standard of review with no need to defer to the trial court's decision." *Id*.

Under that review, summary judgment should only be granted "when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest*, 807 S.W.2d at 483 (quoting *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)). "The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Steelvest*, 807 S.W.2d at 482). "'[I]mpossible' is used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

With these considerations in mind, we now turn to appellants' issues.

I. Whether summary judgment was proper as to the Domino's Pizza appellees – the franchisor.

As the tragic act resulting in Johnson, Sr.'s death occurred at or about a pizza franchise that was leased inside a business complex, appellants claim the negligent conduct of the franchisor, the franchisee, and the landowner caused the damages. Appellants first claim the Domino's Pizza appellees are liable under a vicarious-franchisor-liability theory. Specifically, they claim the Domino's Pizza appellees, as franchisors, "were negligent regarding the instrumentalities over

which they retained the right of control, which are: (1) Domino's security procedures and equipment relating to the back door, (2) Domino's procedures relating to the handling of cash, and (3) Domino's choice of very late operating hours for the store."

The Domino's Pizza appellees respond that they owed no duty to the appellants to prevent a murder that occurred off Seagle's premises by a fleeing trespasser. They further argue they cannot be liable for the negligence of their franchisee as they retained no right to control those aspects of the franchise. As Kentucky law does allow a franchisor vicarious liability for acts over which it retains control, we first address whether the Domino's Pizza appellees can be liable for any negligence of its franchisee in this matter. This issue's resolution can be dispositive of the claim against the Domino's Pizza appellees.

In the seminal case of *Papa John's International, Inc. v. McCoy*, 244 S.W.3d 44 (Ky. 2008), the Kentucky Supreme Court adopted a control-or-right-to-control test for franchisor vicarious liability. Initially, the Court noted "a franchisor typically concentrates its control on the quality and operational requirements relating to its trade or service mark, as opposed to the day-to-day operations and management of the business." *Id*. at 54. However, because the amount of control varies, "the unique franchise arrangement" must be taken into consideration when determining if franchisors are vicariously liable for acts of its franchisees, to wit:

> . . . a franchisor may be held vicariously liable for the tortious conduct of its franchisee only if the franchisor has control or a right of control over the daily operation of the specific aspect of the franchisee's business that is alleged to have caused the harm.

Id. at 55 (quoting *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 341 (Wis. 2004)). Under this test, "standardized provisions commonly included in franchise agreements, which specify a right of inspection and such aspects as marketing, operational requirement, and uniform quality," do **not** open a franchisor to vicarious liability. *Id*.

Applying the test to a Papa John's franchise, the Kentucky Supreme Court found no vicarious liability by the franchisor when an employee who was delivering pizzas intentionally made a false statement to police officers, as the statement served no purpose to the employer. *Papa John's*, 244 S.W.3d at 56. "Here, Papa John's, the franchisor, had no control over the franchisee's employee's isolated and allegedly intentional, tortious conduct." *Id*.

The same result is necessitated in the instant case. The act that led to the death was a third-party's intentional act. Following a robbery, the perpetrator fled and shot and killed the victim at some distance from the Domino's store. The Domino's Pizza appellees had no control over this intervening, independent act.

However, even if we view the proximate cause broadly as appellants suggest – that it was a combination of Roberts's act of leaving the back door open so she could smoke, the store being open late, and the store operating primarily in cash – these acts were not under the Domino's Pizza appellees' day-to-day control.

Domino's Pizza has an operational manual – a Manager's Reference Guide – that explicitly states in its introduction:

> The standards in this section were developed through the joint effort of representatives of Domino's Pizza LLC, as Master Servicer and franchisees. Consequently, the standards are not imposed upon franchisees, nor should they be construed as requirements of Domino's Pizza LLC, as Master Servicer. Rather, **the standards represent the minimum guidelines for the operation of all Domino's Pizza stores**, both company-owned stores and franchise-owned stores, in order to promote the Domino's Pizza brand and trademarks in a favorable manner.
>
> These standards represent one set of standards for all Domino's Pizza stores, whether such stores are located within the continental United States or in the international market. The success of company-owned stores and franchise-owned stores depends in part upon compliance with these standards. As a result, all stores must comply with all standards. From time to time, the company-owned stores may establish and follow procedures that are more strict than these standards, and franchisees may also do the same for their individual operations.

(Emphasis added). The standards announced therein are lengthy, make for uniform and ubiquitous customer experiences across the globe, and cover quality and trademark control.

"The manual which Domino's provides to its franchisees is a veritable bible for overseeing a Domino's operation." *Parker v. Domino's Pizza, Inc.*, 629 So.2d 1026, 1029 (Fla. Dist. Ct. App. 1993). The Guide lays out hundreds of minimum guidelines for operation, including requirements that back and side doors not used as customer entrances must be kept locked at all times, that no door with

outside access is to be left propped open, and that at minimum the store should be open until midnight or later. The Guide outlines some security measures with which its franchisees should comply. These guidelines are minimum operational standards for a franchisee to follow.

On its face, then, it appears the franchisee, Seagle, had the requirement placed on it by the franchisor, Domino's Pizza, to remain open until at least midnight and to ensure its employees did not leave any door propped open. But the seminal question is not whether Domino's Pizza established ubiquitous franchise standards, but whether Domino's Pizza retained control over the implementation of those standards. As the Kentucky Supreme Court phrased it, is Domino's Pizza a franchisor who "has control or a right of control over the daily operation of the specific aspect of the franchisee's business that is alleged to have caused the harm[?]" *Papa John's*, 244 S.W.3d at 55 (citation omitted).

Here, appellants specifically claim the Domino's Pizza appellees "were negligent regarding the instrumentalities over which they retained the right of control, which are: (1) Domino's security procedures and equipment relating to the back door, (2) Domino's procedures relating to the handling of cash, and (3) Domino's choice of very late operating hours for the store." As the Domino's Pizza's Manager's Reference Guide speaks to minimum guidelines for these specific aspects of the franchisee's business that are alleged to have caused the harm, appellants' franchisor vicarious liability claims *as pled* appear to have merit.

However, appellants' artful pleading ignores the reality of the situation – the Domino's Pizza appellees did not retain or exert any control over the day-to-day implementation of these three operational requirements. The Domino's Pizza appellees cite to *In re Air Crash at Lexington, Ky. August 27, 2006*, 2008 WL 2945944 (E.D.Ky. 2008), which is not binding precedent but which is illustrative of the current issue. There, Delta Air Lines, Inc. (hereinafter "Delta") and Comair, Inc. (hereinafter "Comair"), among other corporations, were being sued for the deaths of almost all passengers and crew members aboard Comair Flight No. 5191 that crashed on August 27, 2006, while attempting to take off from Bluegrass Airport in Lexington, Kentucky. Delta owned Comair as a subsidiary. Delta moved for summary judgment, claiming it could not be vicariously liable for the conduct of Comair employees.

In light of the "control or right to control" test announced in *Papa John's*, *supra*, the court reviewed, "Delta's control or right of control over the alleged tortious conduct, *i.e.*, the negligence, of Comair employees . . . ." *In re Air Crash*, 2008 WL 2945944 at *5. The evidence against Delta's control was legion: it had its own management, it did not hire or train or manage any Comair employees, it did not own or operate or maintain the airplane designated as Comair Flight No. 5191, it had no legal control over the captain or first officer of that flight, it did not hire those pilots, it did not train those pilots, it did not supervise those pilots, and it did not manage those pilots. Furthermore, it had no right to fire or discipline Comair pilots for violating policies and procedures. *Id*. "In short, it

is clear that Delta had neither the ability nor the right to control any of the operational aspects of Comair Flight No. 5191." *Id*. at *6.

In the instant case, the underlying claim for vicarious franchisor liability is that Seagle is liable either on its own under a negligent premises security claim, or it is liable for Roberts's actions either under the doctrine of *respondeat superior* or through negligent hiring and supervision. The appellants have not demonstrated as much as a scintilla of evidence that the Domino's Pizza appellees exerted control or a right to control Seagle or Roberts under any of these theories of liability. It is undisputed that Seagle alone executed the lease agreement, had the facilities built, hired its employees, supervised its employees, maintained control of its premises, set its prices, implemented its policies, and maintained its own security. It is further undisputed that the Domino's Pizza appellees had no control over the hiring, firing, or discipline of Roberts. Indeed, the Domino's Pizza appellees and Seagle's combined brief concedes Seagle maintained control of the alleged tortious acts:

> None of the Domino's Appellees controlled nor had the right to control the acts of Crystal Roberts and it is indisputable that **Seagle solely controlled** the physical details of the implementation of the safety and security responsibilities for its store, including but not limited to, whatever workplace policies were implemented at
>
> Seagle's store concerning the use of the back door or where breaks could be taken.

> The physical details of implementing security measures – such as the permitted use of entering and leaving the store through the rear door, as well as particular methods Seagle used to lock and ensure the doors stayed locked were **exclusively controlled by Seagle**.

(Appellee's Brief. at 21) (emphasis and paragraph break added).

Simply put, the Domino's Pizza appellees established minimum operating guidelines with its Guide in order to create ubiquitous pizza stores across the world, but it had no control over the day-to-day operation of Seagle's store. Accordingly, the Domino's Pizza appellees cannot be vicariously liable for Seagle's acts, even if Seagle's acts were negligent. There being no genuine issue of material fact about the Domino's Pizza appellees' vicarious franchisor liability of Seagle, summary judgment was properly granted to the Domino's Pizza appellees. We affirm the trial court's order granting summary judgment to the Domino's Pizza appellees.

II. Whether summary judgment was proper as to Seagle and English– the franchisee and property owner.

The cause of action against Seagle and English is more straightforward. Seagle is the owner of the Domino's Pizza franchise at 2201 Stonehenge Avenue. Appellants claim Seagle is liable for Roberts's actions under the doctrine of *respondeat superior*, and/or that Seagle negligently supervised Roberts, and/or that Seagle negligently maintained its premises security. Appellants claim English, the property owner who leased the building to Seagle, is liable for the appellants' damages because he has a duty to maintain the property in

a reasonably safe condition and to maintain premises security. Because the trial court abused its discretion by prematurely ruling on the motions to dismiss, which were in actuality motions for summary judgment, we reverse and remand for the parties to conduct discovery.

In Kentucky, courts should not take up motions for summary judgment until "the opposing party has been given ample opportunity to complete discovery." *Blankenship v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010) (quoting *Pendleton Bros. Vending, Inc. v. Commonwealth Finance and Admin. Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988)). "It is not necessary that litigants be allowed to complete discovery but only that they be granted sufficient time to complete discovery and then fail to produce any evidence to create a genuine issue of material fact." *Martin v. Pack's, Inc.*, 358 S.W.3d 481, 485 (Ky. App. 2011) (citing *Pendleton, supra*). Only where the record is "very complete" and the non-moving party failed to provide "specific examples of what discovery could have been undertaken that would have affected the outcome had it been conducted[,]" is granting summary judgment not premature. *Benton v. Boyd & Boyd, PLLC*, 387 S.W.3d 341, 343-44 (Ky. App. 2012).

On appeal, if the issue of failure to be given ample opportunity to conduct discovery is raised, appellate courts must "consider whether the trial court gave the party opposing the motion an ample opportunity to respond and complete discovery before the court entered its ruling." *Blankenship*, 302 S.W.3d at 668. A

trial court's determination that a sufficient amount of time has passed for discovery is reviewed for an abuse of discretion. *Id*.

In *Blankenship*, a sufficient amount of time elapsed before the trial court ruled on the summary judgment motion: four months after the motion for summary judgment was filed and sixteen months after the lawsuit was initiated. *Id.* Other cases have found more than a year of discovery sufficient. *See also Love v. Walker*, 423 S.W.3d 751, 758 (Ky. 2014) (3 1/2 years for discovery sufficient); *Martin v. Pack's Inc.*, 358 S.W.3d 481 (Ky. App. 2011) (2 1/2 years for discovery sufficient).

In the instant case, no discovery was completed. Appellants filed their complaint in August, 2014, appellees filed their respective motions to dismiss shortly thereafter, and the trial court granted the same in December, 2014. Thus, only four months elapsed and no discovery was conducted. We find the trial court abused its discretion by prematurely granting summary judgment and not permitting the appellants to conduct discovery.

Seagle responds that discovery was not necessary because it owed no duty to prevent a murder that occurred off its premises by a fleeing robber, and it was not reasonably foreseeable that a shooting death would occur. In Kentucky, a wrongful death action based on negligence requires: "(1) a recognized duty; (2) a breach of that duty; and (3) consequent injury." *James v. Wilson*, 95 S.W.3d 875, 889 (Ky. App. 2002). Kentucky "has adopted a 'universal duty of care' which requires every person to exercise ordinary care in his activities to prevent

foreseeable injury." *T&M Jewelry, Inc. v. Hicks ex r. Hicks*, 189 S.W.3d 526, 530 (Ky. 2006) (citing *Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell*, 736 S.W.2d 328 (Ky. 1987)). "Whether a harm was foreseeable in the context of determining duty depends on the general foreseeability of such harm, not whether the specific mechanism of the harm could be foreseen." *Lee v. Farmer's Rural Elec. Co-op. Corp.*, 245 S.W.3d 209, 212 (Ky. App. 2007).

"Ordinary care is the same degree of care as a prudent person engaged in a similar or like business would exercise under the circumstances." *T&M Jewelry*, 189 S.W.3d at 530. Whether a duty exists is a legal question for the court, which requires a policy decision about "whether a plaintiff's interests are entitled to legal protection against the defendant's conduct." *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901, 908 (Ky. 2013) (quoting *James v. Meow Media, Inc.*, 300 F.3d 683, 691 (6th Cir. 2002)).

Furthermore, simply because the ultimate cause of the injury is a third-party's criminal act does not necessarily relieve a party of liability. "Even an intervening criminal act does not relieve one for liability for his or her negligent acts or omissions, where the criminal act is a reasonably foreseeable consequence of the defendant's negligent act." *Waldon v. Housing Authority of Paducah*, 854 S.W.2d 777, 779 (Ky. App. 1991).

In the instant case, viewing the evidence in a light most favorable to appellants and resolving all doubts in their favor, the facts as pled leave us with doubt as to whether a shooting death by a fleeing robber many yards away from the

Domino's store was a reasonably foreseeable result of any of Seagle's, Roberts's, or English's allegedly negligent acts. Furthermore, we are left with doubt concerning whether Seagle, Roberts, or English even had a duty to attempt to warn or protect appellants from the fleeing robber or put into place security measures to prevent the same. Those doubts cannot be resolved without further factual development in discovery.

The type and measure of evidence necessary to create foreseeability for a third-party's criminal act is best seen in *Waldon v. Housing Authority of Paducah*, 854 S.W.2d 777 (Ky. App. 1991). There, a public housing resident was shot and killed outside her apartment. Voluminous evidence placed the housing authority on notice that the resident was in danger: the decedent and others had told personnel at the housing authority that the perpetrator had repeatedly made threats to kill her; the housing authority was aware that the perpetrator was residing, without permission, in the housing complex; the housing authority took no steps to evict or remove the perpetrator or otherwise discourage his presence in the area; the housing authority was aware of frequent crimes in the complex; and, the housing authority posted no security guards nor proscribed any patrols in the area. *Id*. at 779.

In the instant case, appellants have alleged specific facts demonstrating Seagle or English may have been on notice that a violent crime was reasonably foreseeable. For example, appellants claim a myriad of shootings and armed robberies have occurred at the back doors of Domino's Pizza restaurants in

recent years. Appellants also claim 2201 Stonehenge Avenue is located in Bowling Green's highest crime district. Appellants have proffered statistics showing four murders and thirty-five robberies occurred in the district over an approximately two-year period. Furthermore, as the trial court noted, there were six robbery investigations at 2201 Stonehenge Avenue since the year 2000. While we are cognizant that none of the prior robberies involved a homicide or violent crime, the facts of those cases and the information Seagle or English knew about those cases might provide sufficient similarity to create foreseeability. *See Napper v. Kenwood Drive-In Theater Co.*, 310 S.W.2d 270, 271 (Ky. App. 1958) (requiring similarity between prior instances and the resulting event). At minimum, discovery is necessary to flesh out these allegations.

Appellant's claims also call into question what Seagle and English reasonably knew or should have known about crime in the area. "[P]rior to application of the universal duty of care to a particular fact pattern, it must appear that the harm was foreseeable, and foreseeability is to be determined by viewing the facts as they reasonably appeared to the party charged with negligence, not as they appear based on hindsight." *James v. Wilson*, 95 S.W.3d 875, 892 (Ky. App. 2002) (citing *North Hardin Developers, Inc. v. Corkran by Corkran*, 839 S.W.2d 258, 261 (Ky. 1992)). Discovery is necessary to flesh out what Seagle and English knew or should have known about the foreseeability of a murder in the parking lot. *See Isaacs v. Smith*, 5 S.W.3d 500 (Ky. 1999) (not foreseeable that an intoxicated patron would shoot another patron at a strip club when the two had argued roughly

30 minutes prior); *Grisham v. Wal-Mart Stores, Inc.*, 929 F.Supp. 1054 (E.D. Ky. 1995) (not foreseeable that a Wal-Mart patron would be injured by a criminal assault when there were no prior similar incidents at the Wal-Mart or in the general area). By prematurely granting summary judgment, we can only speculate about the facts underlying the murder's foreseeability.

While we reverse and remand this case for further discovery, we take a moment to note appellants' over-reliance on *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901 (Ky. 2013). Appellants read *Shelton* as requiring a jury to make a factual finding on foreseeability in all cases. We find their reliance misplaced largely because *Shelton* principally concerned open and obvious dangers, and, more importantly, because *Shelton* left summary judgment as a viable option in negligence cases.

In *Shelton*, the plaintiff was visiting her husband at a rehabilitation facility when she tripped over a bundle of wires, cables, and cords extending off his bedside. *Id*. at 904. Shelton sued Cardinal Hill for breaching its duty to exercise reasonable care in maintaining its facility in a reasonably safe manner. *Id*. The Court analyzed the bedside cords as an "open and obvious condition" that, traditionally, land possessors could not be held liable to invitees who were injured by such dangers. *Id*. at 906. Under the modern approach, however, land possessors could be liable for open and obvious dangers under certain circumstances: when the land possessor has reason to expect the invitee's attention will be distracted; and when the land possessor has reason to expect the invitee will

encounter the obvious danger because a reasonable person would weigh the advantages of doing so as greater than the risk. *Id*. at 907.

To that end, the modern approach to open-and-obvious dangers examines them under the factual question of breach of duty, not the legal determination of duty. In other words, rather than having an open-and-obvious danger result in a no-duty determination, liability is "suspended . . . when the danger is known or obvious to the invitee, *unless* the invitor should anticipate or foresee harm resulting from the condition despite its obviousness or despite the invitee's knowledge of the condition." *Id*. at 911. "In doing so, the foreseeability of harm becomes a factor for the jury to determine what was required by the defendant in fulfilling the applicable standard of care." *Id*. at 914.

The instant case does not concern an open-and-obvious danger. It concerns the foreseeability of an independent, third-party criminal murder. Thus, *Shelton*, inasmuch as it concerns the foreseeability analysis of open-and-obvious dangers, is inapplicable to the instant case.

However, even *Shelton*'s fact-based approach does not wholly eliminate summary judgment as the instant appellants seemingly argue. In fact, the Kentucky Supreme Court expressly rejected that all open-and-obvious cases would have to be submitted to a jury. "It is important to emphasize that summary judgment remains a viable concept under this approach." *Id*. at 916. "If reasonable minds cannot differ or it would be unreasonable for a jury to find breach or causation, summary judgment is still available to a landowner." *Id*.

(footnote omitted). Likewise, "when no questions of material fact exist or when only one reasonable conclusion can be reached, the litigation may still be terminated." *Id*. (footnote omitted).

In the instant case, should discovery leave no question of material fact and only one reasonable conclusion to be reached, summary judgment would be a viable option. *See, e.g., Dishman v. C&R Asphalt, LLC*, 460 S.W.3d 341 (Ky. App. 2014) (upholding summary judgment under *Shelton*); *Spears v. Schneider*, No. 2012-CA-000065-MR, 2015 WL 2153310 (rendered May 8, 2015) (disc. rev. denied Dec. 10, 2015) (upholding summary judgment under *Shelton*). Thus, based on the foregoing, we reverse and remand for the trial court to permit appellants to conduct discovery against Seagle and English.

CONCLUSION

In summary, we reverse and remand the trial court's grant of summary judgment to Seagle and English. We find the trial court abused its discretion by not giving appellants sufficient time to conduct discovery. We do not reach the same conclusion with respect to the Domino's Pizza appellees because their liability is premised on vicarious franchisor liability. Seagle, who filed a joint brief with the Domino's Pizza appellees, has expressly conceded that the Domino's Pizza appellees exerted no control over the day-to-day operations at this franchise.

Furthermore, it is patently obvious based on the record before this Court that the Domino's Pizza appellees had no control or right to control the allegedly negligent acts of Seagle or Roberts or the murderer. Thus, the trial court

did not err by granting summary judgment to the Domino's Pizza appellees. Accordingly, we affirm the order granting summary judgment in favor of the Domino's Pizza appellees, and reverse the order granting summary judgment in favor of Seagle and English and remand for discovery.

JONES, JUDGE, CONCURS IN RESULT ONLY.

TAYLOR, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

TAYLOR, JUDGE, DISSENTING: I respectfully dissent as it relates to the majority's opinion which reverses the summary judgment granted to the Appellee, English. I would affirm the trial court's decision as to English. Otherwise I concur with the majority's opinion.

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