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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000033-MR

ADRIA HUGHES — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 16-CI-00121

EASTLAND LEGACY CENTER, LLC; AND C&R ASPHALT, LLC — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: D. LAMBERT, MAZE, AND NICKELL, JUDGES.

MAZE, JUDGE: Adria Hughes appeals the orders of the Fayette Circuit Court dismissing her claims against appellees, Eastland Legacy Center, LLC (Eastland) and C&R Asphalt, LLC (C&R Asphalt), and imposing sanctions pursuant to CR[1]

[1] Kentucky Rules of Civil Procedure.

11. After careful review, we hold the trial court appropriately granted summary judgment to C&R Asphalt but erred by dismissing Hughes's complaint against Eastland. We also reverse the trial court's award of sanctions.

I. Background and Procedural History

Sometime in the winter of 2015, Hughes arrived for work at Kidz Konnection, a childcare center in Lexington, Kentucky, and parked in the parking lot. Upon exiting her truck, Hughes slipped on ice that had accumulated in the parking lot. A delivery driver, Bill Hackworth, was at the scene and witnessed Hughes's fall.

The parking lot was owned by Eastland, which had contracted with C&R Asphalt to remove snow and ice accumulation in the parking lot. Eastland and C&R's Asphalt's Service Agreement stated, in relevant part, the following:

> A. Drives, parking spaces, aisles and loading dock areas will be cleared of snow accumulations for the agreed upon price after 2" accumulation of snow and/or 1/4" sleet or ice. Salt will be applied after each plowing.
> . . . .
> E. Additional salting of drives, parking spaces, and aisles may be deemed necessary due to slick or hazardous conditions and accomplished at the discretion of the contractor.

The Service Agreement also required C&R Asphalt to indemnify Eastland for any liability caused by, or arising out of, its services under the contract.

On January 12, 2016, Hughes filed a complaint against Eastland and

C&R Asphalt, averring she fell "on or about February 16, 2015." The complaint alleged that Eastland had failed to keep its parking lot in a reasonably safe condition and that C&R Asphalt had failed to properly clear the parking lot of snow and ice. Eastland crossclaimed against C&R Asphalt based on the indemnity provision in the Service Agreement.

Discovery commenced, and Hughes was deposed. Hughes testified that there was not any snow in the parking lot on the day of her fall nor a quarter each of sleet or ice. Instead, Hughes contended the parking lot was covered in a layer of black ice when she fell. She also testified the parking lot had not been plowed or treated with salt when she fell. When notified that record-breaking snow fall fell on the city of Lexington on February 16, 2015, Hughes conceded the date provided in her complaint was likely incorrect.

C&R Asphalt then moved for summary judgment on Eastland's crossclaim and Hughes's negligence claim. It argued that Hughes's testimony showed that the weather conditions necessary for it to be obliged to remove snow and ice under part A of the Service Agreement—two inches of snow or a quarter inch of ice—did not exist on the date of Hughes's injury; therefore, it had no duty to treat the parking lot and could not be found negligent as a matter of law. Eastland responded that even if it could not prove the weather conditions set out in part A of the Service Agreement existed when Hughes fell, C&R Asphalt assumed

a duty to remove snow and ice whenever necessary under the language of part E of the Service Agreement stating that additional salting "may be deemed necessary" and "accomplished at discretion of the contractor."

Hughes's response also argued that C&R Asphalt owed a duty to remove snow and ice under part E of the Service Agreement. In support of this argument, Hughes cited to *Shelton v. Kentucky Easter Seals Soc'y, Inc.*, 413 S.W.3d 901 (Ky. 2013) and its progeny. She also contended summary judgment on her negligence claim was premature until the date of her fall was ascertained and requested additional time to conduct discovery on the issue. In support of this argument, Hughes provided an affidavit from Hackworth stating Hughes's fall occurred on a Monday in the winter of early 2015 but could not have occurred on February 16, 2015, because he was not able to work that day due to heavy snow fall. Eastland then filed a "reply"[2] in which it argued Hughes's complaint should be dismissed for failure to comply with CR 11. Eastland argued that Hughes's admission that her fall must have occurred on a date other than February 16, 2015, showed the assertion in her complaint about the date of her fall was made without the reasonable factual inquiry required under CR 11.

One day later, the trial court held a hearing on C&R Asphalt's and Eastland's motions. After hearing oral arguments, the trial court granted Eastland

[2] We use quotation marks because Eastland did not move for summary judgment. Its reply was actually a separate motion for sanctions.

and C&R Asphalt summary judgment on Hughes's claims. The trial court reasoned that Hughes's inability to present evidence regarding the date of her fall after a reasonable opportunity for discovery left no issue of material fact regarding her negligence claims. The trial court did not rule on C&R Asphalt's motion for summary judgment on Eastland's crossclaim, but the parties subsequently submitted an agreed order dismissing the crossclaim without prejudice.

Hughes then filed a motion to alter, amend, or vacate, arguing once again that the trial court's duty analysis was erroneous under *Shelton* and that additional discovery was necessary. She also argued the award of summary judgment in Eastland's favor was "manifestly unjust" because its reply was filed the day before the hearing and CR 56.03 required that a party receive ten days to respond to a motion for summary judgment. Eastland then moved for CR 11 sanctions once again.

The trial court then held oral arguments on both motions and expressly found that Hughes's assertion that she fell "on or about" February 16, 2015, was not a CR 11 violation. However, the trial court found that Hughes's motion to alter, amend, or vacate did violate CR 11 because it re-raised arguments already considered before granting summary judgment. The trial court also found Hughes's argument that its summary judgment order was procedurally improper meritless because it had the authority to grant summary judgment *sua sponte*.

Thus, it denied Hughes's motion to alter, amend, or vacate and ordered her to pay $1,500 in sanctions to Eastland and C&R Asphalt. This appeal follows.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. "The 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). In essence, for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985).

II. Summary Judgment for C&R Asphalt Was Proper

To establish a negligence claim the plaintiff must prove (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; (3) consequent injury; and (4) legal causation between the defendant's breach and the plaintiff's injury. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 88-89 (Ky. 2003). Whether the defendant owed the plaintiff a duty of care is a question of law. *Id.* at 89.

Hughes argues C&R Asphalt owed her a duty of care based on the

language in part E of the Service Agreement. Under this argument, Hughes contends C&R Asphalt could have been liable for failing to remove snow or ice from the parking lot under *Shelton* and its progeny. We disagree with Hughes's interpretation of this line of cases.

In *Shelton*, 413 S.W.3d at 907, the Kentucky Supreme Court held that a landowner may be liable for failing to eliminate or warn an invitee of an unreasonably dangerous condition on land, even when it was open and obvious, if the landowner could reasonably foresee the entrant proceeding in face of the danger. The Court subsequently clarified that this holding applied to naturally occurring outdoor hazards, *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288, 297 (Ky. 2015), and held that summary judgment is not appropriate if there is a genuine issue of material fact regarding the reasonableness of the steps the landlord took to eliminate the danger. *Goodwin v. Al J. Schneider Company*, 501 S.W.3d 894, 899 (Ky. 2016). These cases do not provide any guidance on C&R Asphalt's duty to Hughes because it was not the owner of the parking lot.

Hughes has not cited a single legal authority in which it could be inferred that a snow-removal contractor could be liable to third parties for failing to perform snow removal. Kentucky's "universal duty of care" is not boundless. *T & M Jewelry, Inc. v. Hicks ex rel. Hicks*, 189 S.W.3d 526, 531 (Ky. 2006). A duty of care will be found to exist in a particular situation only after considering public

policy, as well as statutory and common law theories of liability. *Id.* Hughes has not given any policy, statutory, or common law grounds for holding a snow-removal contractor liable to third parties for failing to remove snow. This Court is not obliged to construct such an argument for her. Hughes does not contend she could provide evidence C&R Asphalt treated the parking lot on the date of her fall and did so negligently. Based on her deposition testimony, the weather conditions requiring C&R Asphalt to treat the parking lot did not exist on the date of her injury. Thus, Hughes failed to produce evidence that C&R Asphalt breached any duty of care owed to her, and the trial court correctly granted summary judgment on this claim.

III. Summary Judgment for Eastland Was Premature

Unlike C&R Asphalt, Eastland's duty to Hughes was not dependent on an affirmative act or a condition precedent in a contract. As the owner of the parking lot, it owed Hughes a duty to discover unreasonably dangerous conditions on its land and either eliminate or warn of them. *Goodwin*, 501 S.W.3d at 897. The date of Hughes's fall is relevant only for determining whether her claim is time-barred. However, the statute of limitations is an affirmative defense and the burden of proof rested with Eastland to prove Hughes's claim is time-barred. *Lynn Min. Co. v. Kelly*, 394 S.W.2d 755, 759 (Ky. 1965). Hughes's deposition and Hackworth's affidavit created material issues of fact regarding the timeliness of

Hughes's complaint and whether Eastland breached its duty of care. The trial court's grant of summary judgment on this claim was premature and must be reversed.

IV. The Trial Court Erred by Awarding CR 11 Sanctions

CR 11 provides that "The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law . . . and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." CR 11 is intended for "exceptional circumstances." *Clark Equipment Co., Inc. v. Bowman*, 762 S.W.2d 417, 420 (Ky. App. 1988) (quoting *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3d Cir. 1987)). "The test to be used by the trial court in considering a motion for sanctions is whether the attorney's conduct, at the time he or she signed the allegedly offending pleading or motion, was reasonable under the circumstances." *Id.* A multi-standard approach is used when reviewing a trial court's order imposing sanctions for a CR 11 violation. *Id.* at 421. The trial court's finding that a violation occurred is reviewed *de novo*, and the type of sanction imposed is reviewed for an abuse of discretion. *Id.*

The trial court found CR 11 sanctions were warranted because Hughes's motion to alter, amend, or vacate was meritless. We disagree. One of the arguments raised in Hughes's motion was that the trial court should not have granted summary judgment to Eastland without giving her ten days to respond to Eastland's reply. This was a correct statement of law. *See* CR 56.03. A motion to alter, amend, or vacate under CR 59.05 is the proper remedy when a prior order is believed to be incorrect. *Gullion v. Gullion*, 163 S.W.3d 888, 891 (Ky. 2005). Hughes did not have an opportunity to make this argument in writing because Eastland's reply was filed the day before the hearing on the matter. Had she not done so in her motion to alter, amend, or vacate, it arguably would not have been preserved for appellate review. *Equitable Coal Sales, Inc. v. Duncan Machinery Movers, Inc.*, 649 S.W.2d 415, 416 (Ky. App. 1983) (holding that the ten-day requirement of CR 56.03 may be waived).

The trial court dismissed this concern as meritless on the grounds it had the authority to enter summary judgment *sua sponte*. However, its authority to do so is limited to circumstances that are not applicable to this case. As we have previously explained:

> While a court might be justified in using its inherent powers to dismiss *sua sponte* for lack of subject matter jurisdiction, it is fundamental that a trial court has no authority to otherwise dismiss claims without a motion, proper notice and a meaningful opportunity to be heard. CR 56.01 and CR 56.02 clearly provide that a "party"

> may seek a summary judgment. The rules do not contemplate such a proceeding on the court's own motion. CR 56.03 provides that one will have a minimum of ten days to respond to such a motion. This requirement is mandatory unless waived. Even if it is appropriate for the trial court to enter a summary judgment on its own motion, the trial court's failure to afford the appellant the most basic procedural protections, notice of its intention and an opportunity to respond, is unjustifiable, constitutionally defective, and requires reversal.

Storer Communications of Jefferson County, Inc. v. Oldham County Bd. of Educ., 850 S.W.2d 340, 342 (Ky. App. 1993) (internal citations omitted). Accordingly, we cannot hold that Hughes's motion to alter, amend, or vacate was meritless.

The trial court also found Hughes's CR 59.05 motion was inappropriate because it rehashed arguments already raised in her response to C&R Asphalt's motion for summary judgment. *See Gullion*, 163 S.W.3d at 893. Specifically, the trial court referenced prior arguments concerning the Appellees' duty under *Shelton* and the need for additional discovery on the date of her fall. However, these arguments were raised in response to C&R's Asphalt's motion for summary judgment. Hughes was never afforded the opportunity to argue in writing that her uncertainty of the date of her fall did not entitled Eastland to judgment as a matter of law. Thus, Hughes's motion to alter, amend, or vacate was warranted by existing law, and the trial court erred by finding a CR 11 violation.

V. Conclusion

Accordingly, we affirm Fayette Circuit Court's order granting C&R Asphalt summary judgment. We reverse the orders granting summary judgment to Eastland and imposing sanctions. This case is remanded to the Fayette Circuit Court for proceedings consistent with this opinion.

ALL CONCUR.

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