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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000924-MR

LAVERNE BEASLEY — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 12-CI-003584

REBECCA KAELIN, ANGELA MCCOY
("CLERKS"); AND PURVIS PROFESSIONAL
CLEANING SERVICE, INC. — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: ACREE, COMBS AND MAZE, JUDGES.

ACREE, JUDGE: Appellant, Laverne Beasley, appeals the Jefferson Circuit Court's order granting summary judgment for Appellees, Rebecca Kaelin, Angela McCoy (collectively, "the Clerks"), and Purvis Professional Cleaning Services, Inc. After careful review, we affirm the summary judgment in favor of the Clerks

but reverse the summary judgment in favor of Purvis Services and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

Beasley filed this action after falling at the Bowman Field branch of the Jefferson Circuit Court Clerk's Drivers' Licensing office. At the time of the accident, Angela McCoy was employed as a Deputy Circuit Clerk and Rebecca Kaelin was the Chief Deputy of Drivers' Licensing.

Louisville Metro, as lessors, entered into a lease agreement with the Administrative Office of the Courts ("AOC"), to lease a portion of Bowman Field as the location for the Jefferson Circuit Clerk's Driver's Licensing Office. The remaining portion of Bowman Field was leased to the Kentucky State Police. Pursuant to its statutory duty, Louisville Metro contracted with Purvis Services to provide janitorial services for Bowman Field.[1]

On Sunday, July 10, 2011, Purvis Services waxed the floors at Bowman Field. Donna Purvis, CEO and owner of Purvis Services, testified in deposition that the air conditioning had not been turned on while Purvis Services workers applied the wax and "the excessive humidity" slowed the rate at which the wax dried. Nevertheless, Purvis stated that the wax had dried before she left.

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[1] Kentucky Revised Statutes (KRS) § 26A.110 requires Louisville Metro to provide, among other things, janitorial services for Bowman Field.

In her deposition, McCoy noted the floors were not slick when she arrived for work the next day. But, the temperature rose as the day progressed and she noticed the floor was "shinier" than when she arrived. It became apparent the air conditioning unit was not working. McCoy placed three "wet floor" signs at each of the entrances and contacted Kaelin and Purvis Services to address the situation. An employee of Purvis Services arrived at Bowman Field around noon that day and put up additional "wet floor" signs.

Kaelin testified in deposition that she arrived at Bowman Field at approximately 2:00 PM and condensation had accumulated on the floor. She asked Purvis, who was present to assess the situation, whether the Clerks should mop the floor. She responded that they should not, because it would "smear it." Shortly thereafter, Beasley slipped and allegedly suffered physical and mental injury.

Beasley filed a complaint against the Clerks, in their individual capacities, and Purvis Services. She alleged the air conditioning units at Bowman Field malfunctioned and the wax on the floor became slick; this caused her to slip and fall. She asserts the Appellees: (1) failed to maintain the property in a reasonably safe condition; (2) failed to warn of the condition, and (3) failed to close the premises. Beasley sought compensatory damages against the Clerks and Purvis Services, jointly and severally.

The Clerks moved to dismiss the case on various grounds, including that they were entitled to qualified official immunity. When the circuit court denied the motion, the Clerks appealed that interlocutory order. In *McCoy v. Beasley*, 2012-CA-002131-MR, 2014 WL 631667 (Ky. App. Feb. 14, 2014), this Court affirmed the circuit court's denial of qualified official immunity "until a reasonable opportunity is allowed for discovery." *Id.* at *3.

After both parties engaged in discovery, the Clerks and Purvis filed separate motions for summary judgment. In June of 2016, the circuit court entered an interlocutory order granting summary judgment to Purvis Services stating, "Insofar as Purvis [Services] did not have sufficient connection to Bowman Field (*i.e.*, did not own, manage, maintain, operate or otherwise have any responsibility for or control over Bowman Field), there are no circumstances under which Purvis [Services] could be held liable."

In May of 2017, the circuit court entered an opinion and order granting the Clerks' summary judgment. The circuit court found, specifically, that the Clerks "owed no duty to maintain Bowman Field in a reasonably safe condition or warn of any dangerous conditions in their individual capacities" and found, generally, that "there are no genuine issues of material fact which would make it possible as a practical matter for Ms. Beasley to prevail on her negligence claims against the Clerks in their individual capacities." This opinion and order resolved

Beasley's only remaining claim and, therefore, had the effect of re-adjudicating the June 2016 interlocutory summary judgment in favor of Purvis Services.

Beasley now appeals the orders granting summary judgment to the Clerks and Purvis Services.

STANDARD OF REVIEW

"The proper standard of review on appeal when a trial judge has granted a motion for summary judgment is whether the record, when examined in its entirety, shows there is 'no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.'" *Hammons v. Hammons,* 327 S.W.3d 444, 448 (Ky. 2010) (quoting Kentucky Rules of Civil Procedure (CR) 56.03). "Because summary judgment does not require findings of fact but only an examination of the record to determine whether material issues of fact exist, we generally review the grant of summary judgment without deference to either the trial court's assessment of the record or its legal conclusions." *Id.* (citing *Malone v. Ky Farm Bur. Mut. Ins. Co.,* 287 S.W.3d 656, 658 (Ky. 2009)).

ANALYSIS

Beasley asserts the trial court erred in granting summary judgment to the Clerks and to Purvis Services. We address each claim separately.

Summary Judgment for Clerks

Beasley's primary claim against the Clerks arises under common law premises liability. Under this theory, "a possessor of land owes a duty to an invitee to discover unreasonably dangerous conditions on the land and either eliminate or warn of them." *Shelton v. Kentucky Easter Seals Soc'y, Inc.*, 413 S.W.3d 901, 909 (Ky. 2013). A possessor is one who "is in occupation of the land with intent to control it." RESTATEMENT (SECOND) OF TORTS § 328E (1965). Both the Kentucky State Police and AOC are lessees and tenants of Bowman Field and each shares the public area of the building. Assuming AOC is a possessor of Bowman Field, the threshold question is whether its agents, the Clerks, in their individual capacity, are also possessors for purposes of premises liability.

It is possible for multiple individuals to be possessors of the same premises. The Supreme Court of Kentucky's recent opinion in *Grubb v. Smith*, 523 S.W.3d 409 (Ky. 2017), provides some guidance on the issue.[2]

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[2] *Grubb* addressed various issues related to premises liability and other torts. Justice VanMeter recused, having served on the panel that decided the case in the Court of Appeals. The Supreme Court proceeded in accordance with Supreme Court Rule (SCR) 1.020(1), which says:

> *(a) Final decisions and matters of policy.*
> The final disposition of all appeals and original actions in the Supreme Court and matters of policy or administration shall be decided by a concurrence of at least four of its members, except that in appealed cases if one member is disqualified or does not sit and the court is equally divided, the order or judgment appealed from shall stand affirmed.

The remaining Justices were equally divided in their analysis of this specific issue. The two opinions analyzing the issue are plurality opinions. As noted, *supra*, under either analysis, the Clerks would not be deemed possessors and would owe no duty on that basis.

The plaintiff in *Grubb* slipped and fell at a Speedway convenient store. She brought a personal injury suit against Speedway, the store's owner, and the store's non-owner manager under common law premises liability. The Supreme Court addressed, in part, whether the store's manager at the time of the accident owed a duty as a possessor to discover unreasonably dangerous conditions on the land and either eliminate or warn of them. *Id*. at 421-27, 432-34.

The opinion affirming the trial court, authored by Justice Hughes, held that "in order for a land-possessor's agent to be liable to a third party for breach of an employment duty, the agent must have sufficient control over the premises to remedy the premises' alleged defect." *Id*. at 425. Justice Hughes concluded the manager's duties came "nowhere near" the control necessary to impose upon her a duty owed by possessors of the premises. *Id*. at 427. Perhaps more importantly, this plurality opinion stated that, although the actual possessor of the premises like "Speedway can (indeed, as a corporation, it must) delegate to agents or others the performance of that duty, it cannot delegate to others its responsibility under the law of torts." *Id.* at 422 (citing *St. Joseph Healthcare, Inc. v. Thomas*, 487 S.W.3d 864, 877 (Ky. 2016)).

Justice Venters, authoring what the Court referred to as "the Separate Opinion," agreed that some degree of control is necessary for an agent to become a possessor, but disagreed with the standard applied by Justice Hughes. *Id*. at 433-

34. Emphasizing the manager's duties, this second plurality opinion concludes as follows:

> [The manager's] duties to inspect, sweep, and remove trash from the premises, together with her $100/day necessities budget, vested her with sufficient supervisory and possessory control of the premises to impose upon her a duty as a possessor on the land to report the hazardous pothole so that it could be repaired, and until that occurred, to post sufficient warning of the hazard.

Id. at 434.

Applying the analysis of either plurality opinion leads to the same conclusion – the evidence is not sufficient to establish that the Clerks had the requisite control to be deemed possessors of these premises. Unlike the manager in *Grubb*, the Clerks were not responsible for maintaining the premises or providing janitorial services. These responsibilities remained with Louisville Metro. Kentucky Revised Statutes (KRS) 26A.110 required Louisville Metro, as the city agency providing space for court operations, to provide: (1) lighting; (2) heating; (3) electricity; (4) other utilities, except telephone services; and (5) janitorial services. Furthermore, Louisville Metro delegated some of those responsibilities by contracting with Purvis Services to provide janitorial services to Bowman Field and to wax the floor. Those responsibilities were not delegated to the Clerks.

Unlike the manager in *Grubb*, the Clerks were not required to inspect or clean the premises. Furthermore, the Clerks were not authorized to adjust the thermostat and, according to McCoy, were not authorized to shut down the building due to the excessive heat.

This is not to say the Clerks had no control of any kind over Bowman Field. The Clerks noted in their depositions that there is an unwritten policy to place "wet floor" signs and mop up any floor hazards, such as a spill. They are responsible for opening and closing the building at the start and end of each business day. This is the extent of their control and it falls below either standard articulated in *Grubb*.

Because the Clerks are not possessors of Bowman Field, they did not owe Beasley a duty to maintain the property in a reasonably safe condition, warn of the condition, or close the premises.

Beasley also asserts that summary judgment was improper because "every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury." But reliance on this theory is misplaced. "[T]he 'universal duty of care' is not boundless." *T & M Jewelry, Inc. v. Hicks ex rel. Hicks*, 189 S.W.3d 526, 531 (Ky. 2006). One does not have a duty to protect others from dangerous conditions they have not created. *Grubb*, 523 S.W.3d at

426. Because the Clerks did not cause the condition giving rise to Beasley's injuries, they owed her no duty.

Based on the foregoing analysis, we agree with the trial court that "there are no genuine issues of material fact which would make it possible as a practical matter for Beasley to prevail on her negligence claims against the Clerks in their individual capacities." Because the Clerks owed no duty to Beasley, we need not address the issue of qualified official immunity.

Summary Judgment for Purvis Services

Beasley asserts Purvis Services, as an independent contractor, owed her the same duties as a possessor. She refers us to the RESTATEMENT OF TORTS, which provides:

> One who does an act or carries on an activity upon land on behalf of the possessor is subject to the same liability, and enjoys the same freedom from liability, for physical harm caused thereby to others upon and outside of the land as though he were the possessor of the land.

RESTATEMENT (SECOND) OF TORTS § 383. Beasley interprets this section as imposing liability on Purvis Services after they have "carried on an activity upon the land[.]" We disagree.

The Supreme Court in *Grubb* rejected such an expansive reading. *Id.* at 423-24. It noted that § 383 "applies only to harm done by some act done or activity carried on upon the land, where the rules which determine liability for

bodily harm caused by a dangerous condition created upon the land by persons acting on behalf of the possessor are stated in other sections." *Id.* at 424 (internal quotation marks and citation omitted).

Section 384 more directly addresses the liability of an independent contractor "for bodily harm caused by a dangerous condition created upon the land by persons acting on behalf of the possessor,"[3] but says that an independent contractor's liability *as a possessor of the premises* exists only "while the work is in his charge." RESTATEMENT (SECOND) OF TORTS § 384. It is undisputed Purvis Services was no longer in control of Bowman Field when Beasley fell. Therefore, Purvis Services is not subject to possessor liability.

But, we agree Purvis Services owes a duty of ordinary care to prevent foreseeable injuries. *Dick's Sporting Goods, Inc. v. Webb*, 413 S.W.3d 891, 897 (Ky. 2013). "To recover under a claim of negligence in Kentucky, a plaintiff must establish that (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached its duty, and (3) the breach proximately caused the plaintiff's damages." *Lee v. Farmer's Rural Elec. Co-op. Corp.*, 245 S.W.3d 209, 211-12 (Ky. App. 2007). We address each element in turn.

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[3] *Grubb*, 526 S.W.3d at 424.

Duty

"The most important factor in determining whether a duty exists is foreseeability." *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003) (citation omitted). "Foreseeable risks are determined in part on what the defendant knew at the time of the alleged negligence." *Id*. at 90. Purvis Services knew, at the time it was waxing the floor, that the Jefferson Circuit Clerk's Driver's Licensing Office would be open the following day and patrons would be present in the building. Therefore, they owed a duty to all patrons, including Beasley, to properly wax the floor and ensure it dried. This is a point Purvis Services does not contest.

Breach of Duty

Purvis Services argues there is no evidence to support a conclusion it breached any duty owed to Beasley. We disagree. "[S]ummary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Kendall v. Godbey*, 537 S.W.3d 326, 330 (Ky. App. 2017). "While a submissible case in such circumstances may be established by either direct or circumstantial evidence, it is also true that a mere showing that the floor was waxed and polished and the plaintiff thereafter fell on that floor is insufficient." *Jenkins Clinic Hosp., Inc. v.*

Hollon, 454 S.W.2d 357, 359 (Ky. 1970). Beasley must prove "some act of negligence, either in the initial waxing or in the method of cleaning." *Id*. at 360.

The record indicates Purvis Services was aware the HVAC was not functioning while they were waxing the floor. Donna Purvis expressed her concern in an email to McCoy the following day, noting "the air was not on at all yesterday, and it sort of made our job difficult working in the extreme heat as well as trying to get the floors to dry with the excessive humidity." Nevertheless, in her deposition, she stated the wax completely dried before the janitorial crew left the premises. Likewise, McCoy testified that when she arrived at Bowman Field the following day, the floor was not slick.

As the day progressed, the conditions of the floor changed. McCoy noticed it became "shinier" prompting her to place three "wet floor" signs in the building. Purvis Services arrived and placed an additional "wet floor" sign in the building. None of the "wet floor" signs was placed in the vicinity of Beasley's fall. Later, Kaelin arrived at Bowman Field to assess the situation and noted condensation had formed on the floor. She asked whether they should mop, to which Purvis responded "no" because she was afraid it would "smear it." Beasley slipped shortly after.

Viewing the evidence in the light most favorable to the nonmoving party, we conclude a reasonable juror could find the condensation that accumulated

on the floor was in fact the liquid wax used by Purvis Services. A reasonable juror could find that Purvis Services was negligent in applying the wax while the HVAC unit was not operating, knowing the circumstances would inhibit the drying process.

<u>Causation</u>

In Kentucky, to satisfy the cause-in-fact prong of negligence, the plaintiff must demonstrate the negligence of the defendant was a "substantial factor" in bringing about the injury. *Lewis*, 56 S.W.3d at 437. This is a factual issue to be determined by a jury. *Id.* at 438. We find a reasonable juror could conclude that Purvis Service's negligent application of the wax was a substantial factor in Beasley's fall.

CONCLUSION

Based on the foregoing, we affirm the Jefferson Circuit Court's order granting summary judgment for the Clerks, but reverse its order granting summary judgment for Purvis Services and remand for further proceedings.

ALL CONCUR.

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