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TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2018-CA-001647-MR

SHIRLEY JANE JOHNSON

APPELLANT

v. APPEAL FROM WOODFORD CIRCUIT COURT  
HONORABLE BRIAN PRIVETT, JUDGE  
ACTION NO. 14-CI-00364

CITY OF VERSAILLES;  
BRIAN TRAUOGOTT, IN HIS  
OFFICIAL CAPACITY; TERRY BROWN,  
IN HIS OFFICIAL CAPACITY; AND  
PAUL SIMMONS, IN HIS  
OFFICIAL CAPACITY

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: LAMBERT, MAZE, AND L. THOMPSON, JUDGES.

MAZE, JUDGE: Shirley Jane Johnson (Johnson) appeals from a summary judgment order of the Woodford Circuit Court dismissing her negligence claims against the City of Versailles (the City), and Brian Traugott, Terry Brown, and

Paul Simmons, each in their official capacities (collectively, “the individual defendants”). Johnson argues that the trial court incorrectly characterized her as a licensee and that the court should have determined the City’s duties based upon her status as an invitee. We agree. We further find that there were genuine issues of material fact whether the City and the individual defendants breached their duties to Johnson and, if so, whether that breach was the proximate cause of Johnson’s injuries. Hence, we reverse the summary judgment and remand for further proceedings on the merits of Johnson’s claims.

### **I. Facts and Procedural History**

Except where noted, the relevant facts of this action are not in dispute. When her son died in 1985, Johnson arranged to have him buried at Rose Crest Cemetery, then a privately-owned cemetery in Versailles, Kentucky. She purchased a monument from Duell-Clark Funeral Home, who installed it at the grave. The monument consists of two pieces of granite. The upper piece of the monument containing the inscriptions (the headstone) sits on top of a lower piece (the base). The headstone and the base are held together by an adhesive placed at the time the monument was set. The monument also has two decorative vases, or urns, attached to the base on either side of the headstone.

At some point in the following years, the City acquired ownership and assumed maintenance of Rose Crest Cemetery. In August 2012, Johnson noticed

that one of the two urns had broken off at the base of the monument. Johnson stated that the detached urn had black tire marks on the side and the stem was broken, leading her to conclude that the urn was broken off by mowing equipment. Johnson contacted then-Mayor Fred Seigelman, who volunteered to replace both urns. However, Johnson was not satisfied with the appearance of the replacement urns.

Shortly thereafter, Assistant Public Works Director Paul Simmons offered to repair and re-attach the original urns. Following that repair, Johnson accompanied Simmons to the monument to view the urns. Johnson testified in her deposition that she was satisfied with that repair. However, she also stated that Simmons noticed that the headstone was loose, and he offered to have it repaired. Simmons testified that he never knew the headstone was loose and did not offer to repair it.

On December 18, 2013, Johnson was visiting her son's grave to place a wreath on the monument. She testified that, sometime between 12:35 and 12:40 p.m., she placed her right hand on the headstone and pulled herself up from a squatting position. As she rose, the headstone toppled onto her right foot. She flagged down another visitor for help, who called for an ambulance. Firefighters removed the headstone from Johnson's foot and she was transported to the

hospital. Johnson suffered a fractured foot, damaged knee, and she alleges that she has incurred permanent nerve damage.

After her injury, Johnson contacted Mayor Brian Traugott (who succeeded Mayor Seigelman) to ask the City to repair the monument. Mayor Traugott answered that the City had no duty to repair the headstone. Rather, he took the position that, since Johnson had purchased it and it was installed by Duell-Clark Funeral Home prior to the City's purchase of Rose Crest Cemetery, any repairs were the responsibility of Johnson and Duell-Clark. Despite this position, Mayor Traugott instructed Simmons to re-secure the headstone to the base.

Johnson filed this action on December 12, 2014, asserting negligence claims against the City, Mayor Traugott, Simmons, Cemetery Supervisor Terry Brown, and "unknown employees" of the City. The City and individual defendants filed a motion for summary judgment in 2016, which the trial court denied on April 21, 2017. On November 30, 2017, Johnson filed a motion for partial summary judgment on liability. Shortly thereafter, the City and individual defendants filed a motion to dismiss based on Kentucky's recreational use statute. They also requested summary judgment on Johnson's claims for punitive damages and against the individual defendants in their personal capacities.

On April 21, 2017, the trial court entered an order denying the motion for summary judgment. Subsequently, the City and individual defendants filed a

motion to clarify that order, as well as a renewed motion for summary judgment and a motion to dismiss. Additionally, Johnson filed a motion for partial summary judgment on the issue of liability.

On June 4, 2018, the trial court entered an order clarifying its prior order denying summary judgment and denying Johnson's motion for summary judgment. The court explained that it did not intend to make a finding that the City violated its statutory or common-law duties of care or to make a finding regarding causation. However, the court concluded that there were genuine issues of material fact on the issues of breach of duty and causation.

Shortly thereafter, the City and individual defendants filed a new motion for summary judgment. On October 11, 2018, the trial court granted the motion, finding that Johnson failed to establish that the City or the individual defendants owed a duty to maintain or repair the headstone, or that any actions on their part caused Johnson's injuries. After finding that Johnson was a licensee at the time of her injury, the court concluded that the City and individual defendants only had a duty to protect or warn against defects in the headstone of which they had knowledge. The court found no evidence that the City and the individual defendants were aware of the instability of the headstone before it fell. The court also found no evidence that any action by the City or the individual defendants caused or contributed to the headstone's fall. Consequently, the court determined

there were no genuine issues of material fact concerning their liability. This appeal followed. Additional facts will be set forth below as necessary.

## **II. Summary Judgment Standard**

Our standard of review on appeal of a summary judgment 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) (citing CR<sup>1</sup> 56.03). Appellate review of summary judgment does not involve fact-finding since only legal questions must be resolved. *Davis v. Scott*, 320 S.W.3d 87, 90 (Ky. 2010) (citing *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metro. Sewer Dist.*, 174 S.W.3d 440, 445 (Ky. 2005)). Consequently, this Court’s review of the trial court’s decision on summary judgment is *de novo*. See *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (citations omitted).

Summary judgment shall be granted “if 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 trial court must view the record “in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.”

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<sup>1</sup> Kentucky Rules of Civil Procedure.

*Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citations omitted). Summary judgment is proper only “where the movant shows that the adverse party could not prevail under any circumstances.” *Id.*

Summary judgment is an extraordinary remedy that should be “cautiously applied and should not be used as a substitute for trial.” *Id.* at 483. Instead, summary judgment is only appropriate “to terminate litigation 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.” *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985) (quoting *Roberson v. Lampton*, 516 S.W.2d 838, 840 (Ky. 1974)). “Impossible,” of course, should be interpreted in “a practical sense, not in an absolute sense.” *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

### **III. Elements of Negligence**

As discussed above, the trial court granted summary judgment after finding that Johnson failed to show that there were genuine issues of material fact on the essential elements of her negligence claim. It is well-established that a plaintiff seeking to establish a cause of action for negligence in Kentucky must prove the existence of a duty, breach thereof, proximate causation, and damages. *Boland-Maloney Lumber Co., Inc. v. Burnett*, 302 S.W.3d 680, 686 (Ky. App. 2009) (citing *Illinois Central Railroad v. Vincent*, 412 S.W.2d 874, 876 (Ky.

1967), and *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 247 (Ky. 1992)). The existence of a duty is a question of law for the court, while breach and injury are questions of fact for the jury. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003) (citations omitted). Causation presents a mixed question of law and fact. *Id.* (citation omitted).

#### **IV. Extent of Statutory Duties**

Johnson argues that KRS<sup>2</sup> 381.697(2) imposed an affirmative duty on the City to prevent tombstones and monuments from becoming “displaced.” That provision provides:

(2) The owner or owners of public or private burial grounds, regardless of size or number of graves, shall protect the burial grounds from desecration or destruction as stipulated in KRS 525.115(1)(a), (b), or (c) or from being used for dumping grounds, building sites, or any other use which may result in the burial grounds being damaged or destroyed. The provisions of this subsection shall not apply to the owner or owners of public or private burial grounds when the public or private burial grounds have been desecrated, damaged, or destroyed as the result of a crime by another as defined by KRS 500.080.

The plain language of KRS 381.697(2) merely requires cemetery owners, such as the City, to protect the burial grounds from being damaged or destroyed. Likewise, KRS 381.697(1) requires the City to maintain the cemetery

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<sup>2</sup> Kentucky Revised Statutes.



“in such a manner so as to keep the burial grounds or cemetery free of growth of weeds, free from accumulated debris, displaced tombstones, or other signs and indication of vandalism or gross neglect.” The statute imposes an affirmative duty on the City to maintain the cemetery, to protect the headstones from damage, and to identify or remove headstones which have fallen or become displaced. But we agree with the trial court that the statute does not impose an affirmative duty on the City to inspect headstones or to proactively repair headstones which have not fallen.

We further note that KRS 367.952 requires the creation of a perpetual care and maintenance fund from the proceeds of the sale of a gravesite. The prior owner of Rose Crest Cemetery was subject to this requirement when Johnson purchased the gravesite in 1985. 1984 KY. ACTS Ch. 116 §13 (eff. 7-13-84) (re-enacted from former KRS 307.130). However, the current version of the statute exempts cemeteries owned by a local government, which includes the City. 2008 KY. LAWS Ch. 168 §1(4). The record does not indicate the circumstances under which the City acquired Rose Crest Cemetery. But the parties have not argued that the City maintains a perpetual care fund. Moreover, Johnson does not argue that the existence of such a fund would create an ongoing business relationship between her and the City. Therefore, we do not address whether the existence of

such a fund would create a duty on the part of a cemetery to inspect or proactively repair headstones.

## **V. Johnson's Status as an Invitee or a Licensee**

Rather, this matter turns on the extent of the City's common-law duties to Johnson as either an invitee or a licensee. A person is an invitee if: (1) she enters by invitation, express or implied; (2) her entry is connected with the owner's business or with an activity the owner conducts or permits to be conducted on his land; and (3) there is mutuality of benefit to the owner. *West v. KKI, LLC*, 300 S.W.3d 184, 190 (Ky. App. 2008) (citing *Johnson v. Lone Star Steakhouse & Saloon of Kentucky, Inc.*, 997 S.W.2d 490, 491-92 (Ky. App. 1999)). Generally speaking, 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. *See Dick's Sporting Goods, Inc. v. Webb*, 413 S.W.3d 891, 897 (Ky. 2013) (citation omitted), and *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901, 909 (Ky. 2013) (citation omitted).

In contrast, a licensee is defined as a "person who is privileged to enter or remain on land only by virtue of the possessor's consent." *Smith v. Smith*, 563 S.W.3d 14, 17 (Ky. 2018) (citing RESTATEMENT (SECOND) OF TORTS § 330 (1965)). A possessor of land owes a licensee a duty to "not knowingly let[ ] her come upon a hidden peril or willfully or wantonly caus[e] her harm." *Id.* (quoting

*Terry v. Timberlake*, 348 S.W.2d 919, 920 (Ky. 1961)) (footnote omitted). The trial court concluded that Johnson was not an invitee because there was no mutuality of benefit to the owner of the cemetery. Hence, the court determined that the City did not have a duty to discover the defective headstone, but only to warn her of conditions of which it had knowledge.

In response, Johnson notes that the City, as owner of the cemetery, is in the business of selling lots and maintaining the gravesites. Johnson further argues that she is distinguishable from a mere visitor to the cemetery because she purchased the lot and installed the monument. Consequently, she contends that her ownership of a lot creates a mutuality of benefit sufficient to establish her status as an invitee.

In rejecting this argument, the trial court pointed out that the City was not the owner of the cemetery at the time Johnson purchased the lot for her son. We do not find this fact controlling. When the City acquired the cemetery and continued to operate it as an ongoing business, it also acquired any duties which it owed to owners of the respective lots. Consequently, the City owed Johnson the same duties as did the prior owners of Rose Crest Cemetery.

The trial court also found no mutuality because Johnson's visit to the cemetery did not benefit the City, nor did the City earn a profit because Johnson's son is buried in the cemetery. However, mutuality of benefit extends beyond

matters which are directly in connection with the business of the owner or occupant to matters “of mutual interest to them both[.]” *Shelton*, 413 S.W.3d at 909 (quoting *Scuddy Coal Co. v. Couch*, 274 S.W.2d 388, 390 (Ky. 1954)).

Consequently, Johnson’s status as an invitee is not dependent on a direct benefit to the City as long as her visit was in connection to their mutual interest in the property.

Johnson points out that the City operates the cemetery as an ongoing business and continues to sell gravesites and maintain the grounds. Ordinarily, the purchaser of a lot in a cemetery acquires only an easement or license to make interments therein exclusive of others. *Brunton v. Roberts*, 265 Ky. 569, 97 S.W.2d 413, 415 (1936); *see also Poe v. Gaunce*, 371 S.W.3d 769, 773 (Ky. App. 2011) (citation omitted), and *Fraser v. Tenney*, 987 S.W.2d 796, 798 (Ky. App. 1998) (citation omitted). This right of sepulture is a property right. *Id.* Furthermore, the right of a relative to visit the graves of deceased relatives is an easement. *Haas v. Gahlinger*, 248 S.W.2d 349, 351 (Ky. 1952) (citations omitted).

While there is no Kentucky case law directly addressing this issue, we conclude that Johnson’s possessory interest is sufficient to establish mutuality of benefit. Although the cemetery’s direct business relationship terminated with the transfer of the interest in the gravesite and the interment of the body, Johnson’s continued visits to her son’s grave was related to that original business interest.

This interest goes beyond a mere casual visitor to the cemetery or even that of a relative with no possessory interest in the gravesite. Under the circumstances, we find Johnson's interest in the cemetery plot created an ongoing mutuality sufficient to make her an invitee on the day of her injury.

Therefore, the trial court erred by classifying her as a licensee on the day of her injury. Consequently, the City had an affirmative duty to discover unreasonably dangerous conditions and either eliminate or warn of them. However, the City is not an insurer of the safety of invitees, and its duty is only to exercise reasonable care for their protection. "But the obligation of reasonable care is a full one, applicable in all respects, and extending to everything that threatens the invitee with an unreasonable risk of harm." *Bartley v. Educ. Training Sys., Inc.*, 134 S.W.3d 612, 615 (Ky. 2004) (quoting W. Prosser & W. P. Keeton, *Prosser and Keeton on Torts*, § 61 (5th ed. 1984)).

There are still genuine issues of material fact whether the City breached the duties which it owed to Johnson as an invitee and, if so, whether that breach was the proximate cause of Johnson's injuries. Johnson alleges that Simmons pointed out the loose headstone to her in August 2012, nearly a year and a half before it fell. She also states that Simmons offered to repair the headstone, recognizing that it posed a risk of harm.

Simmons denies that this conversation took place. The City argues, and the trial court agreed, that Simmons' alleged warning about the headstone was sufficient to satisfy the City's duties to Johnson either as an invitee or a licensee. But in either case, the City was required to exercise reasonable care either to make the land as safe as it appears, or to disclose the fact that it is as dangerous as it knows it to be. *Perry v. Williamson*, 824 S.W.2d 869, 874 (Ky. 1992) (citing RESTATEMENT (SECOND) OF TORTS § 342, cmt.e (1965)). If Simmons offered to repair the headstone, then Johnson may have reasonably relied on that offer to presume that the repairs were made. This is clearly a disputed issue of material fact.

Thus, we conclude that Johnson presented sufficient evidence to create a genuine issue of material fact that the City, through its agent Simmons, was aware of the hazardous condition of the headstone. Likewise, there are genuine issues of material fact whether the City breached its duties and whether that breach was the proximate cause of Johnson's injuries. Accordingly, we conclude that the trial court erred by granting summary judgment for the City and the individual defendants on this issue.

## **VI. Causation Issues**

In light of this holding, we will address the other issues raised in Johnson's appeal to the extent they may arise on remand. Johnson contends that

the trial court erred in finding no evidence that the City caused or contributed to the instability of the headstone. She points to her testimony that she found tire tracks or marks on the broken urn in August 2012. She argues that a fact finder could reasonably infer that the monument had been damaged by a lawn mower striking it and that the headstone was loosened by this damage. The City responds, and the trial court agreed, that such an inference was not supported by any physical evidence and would be mere speculation.

Evidence that the City caused the damage to the headstone would be relevant to the questions of breach and proximate causation, as well as apportionment of fault. Nevertheless, the City may have breached its duty if it failed to exercise reasonable care to discover a hazardous condition on the premises or warn of that hazard irrespective of whether it caused or contributed to the damage to the headstone. Of course, Johnson bears the burden of proof on all elements of her negligence claim, including breach and proximate causation.

On this matter, we point out that a fact finder is entitled to draw reasonable inferences from the evidence. *K.H. v. Cabinet for Health and Family Servs.*, 358 S.W.3d 29, 32 (Ky. App. 2011) (citation omitted). However, evidence of causation must be in terms of probability rather than mere possibility. *Baylis v. Lourdes Hosp., Inc.*, 805 S.W.2d 122, 124 (Ky. 1991). At this juncture, we need

not determine whether Johnson's testimony, standing alone, could be sufficient to meet this standard.

Lastly, Johnson argues that she was entitled to summary judgment on the issue of liability based on the doctrine of *res ipsa loquitur*. *Res ipsa loquitur* is an evidentiary doctrine which allows a jury to infer negligence on the part of the defendant. *Baxter v. AHS Samaritan Hosp., LLC*, 328 S.W.3d 687, 692 (Ky. App. 2010) (citation omitted). Reliance upon the doctrine is predicated upon a showing that: "(1) the defendant had full control of the instrumentality which caused the injury; (2) the accident could not have happened if those having control had not been negligent; and (3) the plaintiff's injury resulted from the accident." *Sadr v. Hager Beauty School, Inc.*, 723 S.W.2d 886, 887 (Ky. App. 1987) (citing *Bowers v. Schenley Distillers, Inc.*, 469 S.W.2d 565, 568 (Ky. 1971)); *see also Vernon v. Gentry*, 334 S.W.2d 266, 268 (Ky. 1960) (citation omitted). In this case, Johnson presents no evidence that the headstone could not have fallen without negligence on the part of the City. In the absence of any other proof on this matter, Johnson failed to show that the doctrine of *res ipsa loquitur* applies in this case.

## **VII. Conclusion**

As discussed above, we conclude that the trial court incorrectly classified Johnson as a licensee rather than an invitee. As an invitee, the City owed Johnson a duty to exercise reasonable care to discover the hazardous condition of



the headstone and either correct it or warn her of the danger. Since there were genuine issues of material fact whether the City and the individual defendants breached that duty, we find that the trial court erred by granting summary judgment on Johnson's claims.

Accordingly, the summary judgment of the Woodford Circuit Court is reversed, and this matter is remanded for further proceedings on the merits of Johnson's remaining claims as set forth in this opinion.

ALL CONCUR.

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