

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000845-MR

JENNIFER HICKS, BY AND THROUGH HER PARENTS
AND NEXT FRIENDS, LINDA HICKS AND DOUG HICKS;
DOUG HICKS, INDIVIDUALLY; AND LINDA HICKS,
INDIVIDUALLY

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE, SHEILA R. ISAAC, JUDGE
ACTION NO. 97-CI-02617

T & M JEWELRY, INC.,
D/B/A THE CASTLE;
CAROL'S SPORTING GOODS, INC.,
AND CAROL HARLIN

APPELLEES

OPINION
AFFIRMING IN PART
REVERSING IN PART
AND REMANDING

** **

BEFORE: BAKER, BARBER AND JOHNSON, JUDGES.

BARBER, JUDGE: Appellants, Jennifer Hicks, by and through her
parents and next friends, Linda Hicks and Doug Hicks, and Linda
Hicks, Individually and Doug Hicks, Individually, seek review of
a summary judgment of the Fayette Circuit Court in favor of the

Appellees, T & M Jewelry, Inc., d/b/a The Castle, Carol's Sporting Goods, Inc., and Carol Harlin. We affirm in part, reverse in part, and remand.

On July 24, 1997, Appellants filed a complaint in the Fayette Circuit Court alleging that on or about July 25, 1996, Scott Greer, then age 18, purchased a Jennings .22 caliber semi-automatic pistol from the defendant, T & M Jewelry, Inc., d/b/a/ The Castle and/or the defendant Carol's Sporting Goods. Appellants further alleged that on or about July 26, 1996, Greer fired the weapon hitting the Appellant, Jennifer Hicks, in the face and head causing serious injury.¹ Appellants maintained that the purchase of the handgun was accomplished by reason of Appellees' negligence and by reason of violations of Kentucky and Federal law² and regulations.

On June 12, 1998, Appellees moved for summary judgment on the grounds that the claims asserted against them for alleged violations of the Federal Gun Control Act, 18 U.S.C. § 922, *et*

¹ On September 5, 1997, the trial court granted Appellees' motion to file a third party complaint against Scott Greer. On September 19, 1997, Greer filed an answer.

² 18 U.S.C. 922 (b) provides: It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver –

(1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age[.]

seq., did not give rise to a private cause of action under KRS 446.070, citing *Alderman v. Bradley*;³ further, that any alleged negligence or violations by the Appellees were not a substantial factor in, or proximate cause of, Greer's firing the handgun.

In an Opinion and Order entered September 2, 1998, the trial court granted partial summary judgment in favor of Appellees:

Defendant argues that the recent Kentucky Court of Appeals decision, Alderman v. Bradley, Ky. App., 957 S.W.2d 264 (1997) is controlling and dispositive of this case and therefore, summary judgment must be granted. Courts across the country are divided on the issue of whether Congress intended to create a private cause of action for victims injured by firearms obtained in violation of Federal Gun Control Legislation. This Court agrees that Alderman clearly holds that a violation of 18 U.S.C., subsection 922, does not give rise to a claim for negligence per se under Kentucky law. However, Plaintiffs also present their claims under the theory of ordinary negligence. Citing Waldon v. Housing Authority of Paducah, 854 S.W.2d 777 (1991). Plaintff's [sic] argue that common law negligence will lie in an action involving the criminal use of firearms that results in personal injury. This Court agrees.

Therefore, Defendants motion for summary judgment is sustained in part and overruled in part. The Plaintiffs may proceed with the case on ordinary negligence theory, but may not use the theory of negligence per se pursuant to Federal or state statutes or regulations.

³ Ky. App., 957 S.W.2d 264 (1997).

On March 28, 2002, the trial court entered an Opinion and Order deciding the remaining issue of whether Appellants could maintain a claim for common law negligence. The decision contains a detailed summary of the facts necessary to an understanding of the issues before us:

On July 18, 1996, Scott Greer and Jennifer Hicks went to The Castle on Nicholasville Road. Scott Greer completed the required documentation in order to purchase a handgun. The documents contained proof that Greer was 18 years old. The employee, despite training to the contrary, sold the gun to the 18 year old. On July 25, 1996, Greer picked up the Jennings .22 caliber semi-automatic pistol he had purchased. Again at the time of the purchase he showed identification that confirmed his age. The following day, July 26, 1996, Scott Greer was in possession of the pistol while riding in the front passenger seat of a car that Jennifer Hicks was driving. Greer, who thought the gun was unloaded, pointed the gun at Hicks' head and pulled the trigger in order to scare her. Instead, he shot her in the face, causing a serious head injury. Criminal charges were brought and Greer pled guilty to Assault in the Fourth Degree.

Carol Harlin, previously a bookkeeper for T & M Jewelry, Inc. d/b/a The Castle, took over the firearms business from prior owners, Jimmy Lambert and Philip Block, convicted felons, who could no longer hold a federal firearms license. Carol Harlin, subsequently began Carol's Sporting Goods, Inc., in order to possess a federal firearms license, and operated that business on site in The Castle. Carol's Sporting Goods had two employees. However, the employees of T & M Jewelry, Inc. d/b/a, The Castle, were also trained to sell firearms, as well. In fact, it was both a T & M Jewelry employee

who began the sale on July 18, 1996, and who completed the actual sale transaction on July 25, 1996.

* * *

In analyzing whether a simple negligence claim can be made under the facts of this case, the Court must decide whether the Defendants owed a legal duty to the Plaintiffs and if they did, would the breach thereof be the proximate cause of the injury.

[The Court noted its struggle with the issue of foreseeability, commenting that "it is even clearer than ever why the Federal Gun Control Act restricts the sale of firearms to those 21 years or older, and that the statistics are "astonishing," in reference to the Report on Gun Crime in the Age Group 18-20 by the Department of Treasury and the Department of Justice, June 1999, attached as Appendix C to Plaintiff's response] . . . It may be that such actions as were taken by Greer might be foreseeable and if so, the universal duty would then apply to the Defendants, allowing the cause to proceed. However, it is undeniable, as already ruled upon, that the Federal Gun Control Act does not provide a private right of action. Further, Kentucky law does not possess the same restrictions as federal law, and it is permissible to sell a firearm to a person who is under 21 years of age.

The Plaintiffs cannot meet their burden of proving that they have the right to a common law negligence claim. Defendants did not have a common law *duty* to refuse to sell the handgun to Scott Greer. Even if it were found that Defendants did have such a duty, the law does not consider Scott Greer's conduct to be foreseeable and thus, as a *superseding cause*, Defendants are relieved of liability in this case.

The trial court granted summary judgment in favor of Appellees, concluding that duty and causation were "clearly absent."

On April 23, 2002, Appellants filed a notice of appeal to this Court. The 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. There is no requirement that we defer to the trial court, because factual findings are not at issue.⁴

On appeal, Appellants ask that we "decline to follow" this Court's recent decision in *Alderman*.⁵ *Alderman* holds that KRS 446.070⁶ is limited in its reach to violations of Kentucky statutes and does not give rise to a private cause of action for violation of the Federal Gun Control Act. Citing *Baker v. White*,⁷ this Court construed the term "statute," as presently

⁴ *Scifres v. Kraft*, Ky. App., 916 S.W.2d 779, 781 (1996).

⁵ *Supra*.

⁶ KRS 446.070 provides: "A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."

⁷ 251 Ky. 691, 65 S.W.2d 1022 (1933). In *Baker*, the issue was whether violation of a city ordinance gave rise to a cause of action predicated on section 466, Kentucky Statutes, which provided: "A person injured by the violation of **any statute** may recover from the offender such damage as he may sustain by reason of the violation,

used in KRS 446.070, to apply to "laws enacted by the supreme lawmaking body of the state."⁸

The legislature did not expressly include federal laws within the purview of KRS 446.070, and as related in *Baker, supra*, "statute" as utilized in Chapter 446, *et seq.*, refers to those laws enacted by *our* General Assembly. . . . When read in its entirety Chapter 446 clearly demonstrates the legislature's intention and attempt to establish rules for construing, interpreting and applying the statutes enacted by it - the supreme law-making body of our Commonwealth.⁹

Appellants argue that *Alderman* should be disregarded, in part, because *Baker v. White*, cited therein, has "never been cited by the Supreme Court of Kentucky as authority on any issue. . . ." That is neither correct, nor reason to disregard *Alderman*. We do not have the authority to declare that decisions of the Supreme Court of Kentucky or its predecessor court have implicitly been overruled because of age.¹⁰

although a penalty or forfeiture for such violation be thereby imposed." (Emphasis added). The high court construed the words, "any statute," according to "common usage and understanding" to apply to "laws enacted by the supreme lawmaking body of the state." *Id.*, at 695.

⁸ *Alderman*, 957 S.W.2d at 266-67.

⁹ *Id.*

¹⁰ *Revenue Cabinet v. Kentucky-American Water Co.*, Ky., 997 S.W.2d 2 (1999).

Appellants contend that *Cincinnati, N.O. & T.P.R.R. v. Gregg*,¹¹ “found . . . [KRS 446.070] to apply to federal statutes” not long after its enactment. We cannot assume, from our reading of *Gregg*, that the issue of whether Section 466 Ky. Statutes applied to federal statutes was actually litigated in that case. Notwithstanding, *Gregg* was decided 29 years before *Baker*.

Appellants also cite decisions from various federal and state courts, in an attempt to dissuade us from following *Alderman*. Those cases all predate *Alderman*, and unlike *Alderman*, do not have *stare decisis* effect, here. Moreover, this Court, in deciding *Alderman*, “reviewed cases from various state and federal courts that have considered the scope and effect of the federal legislation.”¹² *Alderman* is dispositive of the issue before us. Accordingly, we affirm the trial court’s September 2, 1998 Opinion and Order granting partial summary judgment in favor of Appellees, on the ground that KRS 446.070 does not give rise to a cause of action for violations of the Federal Gun Control Act.

However, *Alderman* is not determinative of whether or not Appellants can maintain a common law claim. To maintain a cause of action based on negligence, Appellants must establish:

¹¹ Ky. App., 80 S.W. 512 (1904).

¹² 957 S.W.2d at 267.

(1) a duty on the part of the defendant; (2) a breach of the duty; and (3) a causal connection between the breach and an injury suffered by the plaintiff. "The question of duty presents an issue of law. 57A Am.Jur.2d *Negligence* § 20; *Prosser and Keeton on Torts*, § 37 (5th ed. 1984). When a court resolves a question of duty it is essentially making a policy determination."¹³

Here, Appellants assert that Appellees had a duty to exercise ordinary care in their actions to ensure the safety of others. Ordinary care varies with the nature of the business and the use to which the premises are put. It is "'a care commensurate with the particular circumstances involved in the given case.'"¹⁴ We agree with Appellants that 18 U.S.C. § 922(b) is relevant to this inquiry. The fact that violation of the federal statute does not give rise to a private cause of action under Kentucky law does not mean that the federal statute should be disregarded entirely.

We believe that the reasoning in *Decker v. Gibson Products Company of Albany, Inc.*,¹⁵ is applicable to the facts of this case. Decker involved the sale of a pistol in violation of

¹³ *Mullins v. Commonwealth Life Ins. Co.*, Ky., 839 S.W.2d 245, 248 (1992).

¹⁴ *Murphy v. Second Street Corp.*, Ky. App. 48 S.W.3d 571, 574 (2001), citing *Sidebottom v. Aubrey*, 267 Ky. 45, 101 S.W.2d 212, 213 (1937).

¹⁵ 679 F.2d 212 (11th Cir. 1982).

18 U.S.C. 922(d)(1). That section of the statute prohibits a licensed dealer from selling firearms to felons. The purchaser, Etheridge, had been convicted of the felony of aggravated assault in 1967; at the time of purchase, he produced a restoration of civil rights form issued by the State of Florida in 1972. The sheriff had advised the salesperson when the sale was made that it was permissible to sell the pistol to Etheridge; however, the sale was in violation of the federal statute. Within 48 hours of purchasing the pistol, Etheridge used it to murder his former wife.

The U.S. District Court for the Middle District of Georgia had rejected a statutorily-created cause of action; further, the district court had failed to address plaintiff's argument that the Federal Gun Control Act created a standard against which to measure the seller's conduct for purposes of determining negligence. On appeal, the Eleventh Circuit concluded that:

Regardless of whether a violation of the Gun Control Act constitutes negligence per se in Georgia, a legal determination we leave to the trial court, plaintiffs are entitled to have the jury consider whether defendant's sale of the pistol to a person known to have been convicted of aggravated assault was reasonable in light of the federal statute, the restoration of civil rights shown to the salesperson, the response received from the sheriff, the alleged duty of the corporate defendant to properly instruct its employees concerning these matters, and all of the

other facts surrounding the gun transaction.¹⁶

In *Lipari v. Sears, Roebuck & Co.*,¹⁷ cited by Appellants, the plaintiff sued Sears for selling a shotgun to a mentally-impaired individual, who fired the gun into a nightclub, injuring the plaintiff and killing her husband. The Nebraska court explained that “[p]roof that Sears violated the federal Gun Control Act does not establish negligence per se. A violation of a statute is merely evidence of negligence which is considered by the trier of fact with all the other evidence.”¹⁸

The other evidence in the case *sub judice* includes the admitted failure of Carol’s Sporting Goods to follow its own rules. Carol’s trained its employees and employees of The Castle not to sell handguns to 18 year olds:

Carol Hardin testified by deposition:

Q314 As the owner, operator, sole proprietor of a corporation which sold weapons in July of 1996, did you have any personal knowledge as to how old an individual had to be before your corporation could legally sell a firearm to them?

A. Yes.

Q315 And how old did they have to be?

A Eighteen for a hand—a long gun and twenty-one for a –handgun.

Q316 So you were aware in July of 1996 that it would have been illegal for your company

¹⁶ *Id.* at 216.

¹⁷ 497 F.Supp. 185 (D. Neb., 1980).

¹⁸ *Id.* at 196.

or corporation to sell a handgun to Scott Greer?

A Yes.

Q317 What, if any, written policies did Carol's Sporting Goods have regarding the sale of handguns in July of 1996?

A The ATF books. They give you a book that has all the rule and regulations in it, and we use that.

* * *

Q319 Other than the ATF book, did you, Carol's Sporting Goods, provide any written policies to any of your employees regarding the sale of handguns?

A No.

Q320 What, if any, training did you give to your employees regarding the sale of handguns?

A They went over the - the highlights of the book, you know, the-like the age and the forms. . . . So they'd go over all the forms and the questions. There's questions that you-that-that are asked of the people: Are they a convicted felon; are they on drugs; are they under mental; are they under domestic violence, harassment.

Q321 Who, they, went over the highlights?

A Marilyn.

Q322 So Marilyn, as the manager of Carol's Sporting Goods, went over these highlights with all the employees of Carol's Sporting Goods?

A Oh, yeah.

Q Did anyone go over those highlights with the employees of The Castle?

A Yes, yes.

Q Who?

A Marilyn.

Q Tell me the procedures Marilyn would use to make sure that all employees of Carol's . . . and The Castle were aware of all those highlights.

A When you'd hire a new employee, they would receive training in sales, and then Marilyn would go over the forms and the book.

Hardin was asked what employees were instructed about selling handguns to 18 year olds. Hardin responded, "That you couldn't do it." Hardin's testimony reflects that when sales personnel got a date of birth, they were instructed to calculate how old a person was before selling a gun. Hardin testified there were calculators "all over the place" to do this.

Kentucky law recognizes that rules governing the conduct of a business may be considered as evidence of standard of care where an injured party seeks to recover for injuries inflicted because of violation or nonobservance of the rule. In *Williams v. St. Claire Medical Center*,¹⁹ we held that by failing to enforce its own rules and regulations, a hospital may breach its duty to a patient. In *Ray v. Hardee's Food Systems, Inc.*,²⁰ an off-duty employee brought a common law action against his employer, alleging that the negligence of the employer's agent was a substantial causative factor of his injuries, where the agent failed to comply with the employer's policy, thereby depriving him of adequate protection against an assailant. This Court held:

Viewing the evidence most favorably to . . .
[the plaintiff], we think there was
sufficient evidence to put Hardee's to its
proof as to precisely what information was
received as to the impending disaster and

¹⁹ Ky. App., 657 S.W.2d 590, 595 (1983).

²⁰ Ky. App., 785 S.W.2d 519 (1990).

whether it followed its own rules promulgated for employee safety. . . . The allegations in the case *sub judice* charged more than the mere failure to provide a safe place to work. Rather, this case is premised upon Hardee's failure to provide a safe place to work by not enforcing its own rules promulgated for employee safety. That violation of safety rules may properly be considered in a negligence action by an employee against his employer was long ago established. . . .

It has been so often decided by this court that the rules governing the conduct of a business may be read in a suit between the employer and employee by either party, when the injured party is suing to recover for injuries inflicted because of the violation or nonobservance of the rule²¹

Next, Appellants assert that the negligent sale of the handgun to Greer was a substantial factor in the shooting resulting in Jennifer Hicks' injuries. In determining whether summary judgment was properly granted, we must determine whether Greer's act was a superseding cause of the injuries to Jennifer Hicks. The issue is a question of law to be resolved by the court.²²

The trial court stated that if Greer's actions were foreseeable, then "the universal duty would then apply to the Defendants allowing the cause to proceed." Noting the

²¹ *Id.*, at 520.

²² *Hall v. Midwest Bottled Gas Distributors, Inc.*, Ky., 532 S.W.2d 449, 452 (1975).

intentional nature of Greer's act and the fact that he pled guilty to assault in the fourth degree,²³ the court concluded that "the law presumes Scott Greer's conduct was not foreseeable and was indeed a superseding event that caused Jennifer Hicks' injury and that the Defendants could not have been expected to foresee it." We disagree.

In *Britton v. Wooten*, our Supreme Court rejected "any all-inclusive general rule that . . . 'criminal acts of third parties . . . relieve the original negligent party from liability.'" The Court noted that "[t]his archaic doctrine has been rejected everywhere."²⁴

We agree with the reasoning in *Decker* that "[t]he Gun Control Act would seem to militate against" a determination that the conduct was not foreseeable.²⁵ "Citing statistics linking the use of firearms with the increase in violent crime, Congress stated the purpose of the Act was to restrict the availability of firearms to 'those not legally entitled to possess them

²³ KRS 508.030 provides:

(1) A person is guilty of assault in the fourth degree when:
(a) He intentionally or wantonly causes physical injury to another person; or
(b) With recklessness he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.
(2) Assault in the fourth degree is a Class A misdemeanor.

²⁴ Ky., 817 S.W.2d 443, 449 (1991).

²⁵ *Supra*, at 215.

because of age, criminal background, or incompetency.'"²⁶

Accordingly, we cannot say, as a matter of law, that Greer's act was so extraordinary and unforeseeable as to relieve Appellees of liability, in the event it is determined by a jury that they were negligent.²⁷

We therefore reverse the trial court's March 28, 2002 Opinion and Order and remand this case for trial. Appellants are entitled to have the jury consider whether the sale of the handgun to the 18 year-old Greer was reasonable in light of the federal statute, the rules governing the business, and all of the other relevant facts surrounding the subject transaction.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR
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²⁶ *Id.*

²⁷ *Midwest Bottled Gas, supra.*