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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001080-MR

TIMOTHY J. HAMILTON — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 05-CI-00080

TODD SEALS; MONTY SLAYTON, JR. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; GRAVES,[1] SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Plaintiff Timothy J. Hamilton appeals from an order granting summary judgment to defendant Todd Seals in a lawsuit in which, among other things, Hamilton alleges that Seals negligently failed to render proper aid after Hamilton was injured at Seals' residence property. More specifically, Hamilton contends that Seals breached his duty to call emergency medical personnel following the injury. We affirm.

[1] Senior Judge J. William Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 11-(5)(b) of the Kentucky Constitution and KRS 21.580.

Because this is a summary judgment case, we view the evidence in the light most favorable to Hamilton. Viewed thusly, the facts are as follows. On January 25, 2005, between 11:00 p.m. and midnight, Hamilton and Monty Slayton were houseguests at the residence of Seals. In the course of the evening Hamilton and Slayton had an altercation in the driveway area of the residence. There had been an ice storm that day, and the driveway was extremely slick. As a result of the altercation Hamilton fell to the ground, struck his head on the concrete driveway, and was knocked unconscious. Seals was not present at the time of the altercation.

After Hamilton's fall, Slayton reentered the residence and told Seals that Hamilton was lying unconscious on the driveway. There was some delay while Seals dressed himself, following which the two went to check on Hamilton. Hamilton was still lying unconscious on the driveway. Seals and Slayton carried Hamilton back into the residence, during which time Hamilton began to regain consciousness.

After getting Hamilton back into the house, Seals asked Slayton to leave his residence, leaving Seals and Hamilton as the sole occupants of the residence. Seals questioned Hamilton briefly, and ascertained that Hamilton was sufficiently lucid to know where he was. During this period Hamilton talked and played with the family dog and knew the dog's name. Talking and playing with the dog was normal behavior for Hamilton. Seals noticed no signs of external injury to Hamilton. Seals then assisted Hamilton to a spare bed, whereupon Hamilton fell asleep. Seals then went to bed himself without seeking or providing any other aid or assistance to Hamilton.

Knowing that Hamilton was due at work at 4:00 a.m., at approximately 2:00 a.m. Seals woke Hamilton and asked him if he was going to work. Hamilton was sufficiently cognizant to understand the question and respond. The next morning Seals went to work himself

Later the next morning Seals' sister, Amy, awakened Hamilton. It was then discovered that Hamilton was completely incoherent. At this time emergency medical assistance was called.

As it turns out, the previous evening's fall had caused traumatic, permanent brain damage including, among other things, permanent partial blindness to Hamilton's left peripheral vision. The brain injury also affected his coordination and overall ability to exercise movement. As a result of the events, Hamilton also suffers ongoing depression.

Medically speaking, Hamilton had suffered a subdural hematoma, i.e., bleeding of the brain. As a result of not receiving immediate medical attention, the bleeding persisted and the subdural grew, thereby increasing the pressure on Hamilton's brain. This pressure caused permanent damage to Hamilton's brain. In his expert witness disclosure, Hamilton stated that his treating neurosurgeon would testify at trial that if Hamilton had received immediate medical care, he likely would have suffered no lasting injuries from his fall.

On January 24, 2005, Hamilton filed a Complaint in Bullitt Circuit Court relating to the injuries sustained on January 25, 2004. The Complaint named Seals and

Slayton as defendants, and alleged that the defendants were negligent by failing to call for emergency medical treatment immediately following the events.

On February 21, 2006, Seals filed a motion for summary judgment. On May 15, 2006, the circuit court entered an order granting Seals summary judgment. This appeal followed.

The standard of review on appeal when a trial court grants a motion for 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); Kentucky Rules of Civil Procedure (CR) 56.03. "The trial court must view the evidence in the light most favorable to the nonmoving party, and summary 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." *Lewis v. B & R Corp.*, 56 S .W.3d 432, 436 (Ky.App. 2001), *citing Steelvest v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480-82 (Ky. 1991).

"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*, 56 S.W.3d at 436, *citing Steelvest*, 807 S.W.2d at 482. The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." *Steelvest*, 807 S.W.2d at 480. The Kentucky Supreme

Court has held that the word "impossible," as set forth in the standard for summary judgment, is meant to be "used in a practical sense, not in an absolute sense." *Lewis*, 56 S.W.3d at 436. "Because, summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo." *Scifres, supra*.

A party moving for summary judgment in a negligence case is entitled to judgment as a matter of law if the moving party shows that (1) it is impossible for the non-moving party to produce any evidence in the non-moving party's favor on one or more of the issues of fact, (2) under undisputed facts, the moving party owed no duty to the non-moving party, or (3) as a matter of law, any breach of a duty owed to the non-moving party was not the proximate cause of the non-moving party's injuries. *Bruck v. Thompson*, 131 S.W.3d 764, 766 (Ky.App. 2004); *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003).

Before us, Hamilton contends that, having undertaken to assist him, the duty then attached to Seals to summon emergency medical personnel, and Seals breached that duty by failing to do so. More specifically, Hamilton contends that Seals breached his duty to call 911.

Under negligence law, in order to prevail the plaintiff must prove (1) the defendant owed him a duty of care, (2) a breach of that duty, and (3) a causal connection between the breach and the plaintiff's consequent injury. *Lewis v. B & R Corporation*, 56

S.W.3d at 436. *See also Pathways, Inc. v. Hammons*, *supra*.; and *Mullins v. Commonwealth Life Insurance Co.*, 839 S.W.2d 245 (Ky. 1992).

Our primary concern in this case is the issue of duty. More specifically, our concern is whether Seals had a duty to summon emergency medical personnel to assist Hamilton. While an interesting question, we need not broadly examine if and when such a duty may arise, because under the circumstances of this case, it is clear that as a matter of law, there was no such duty arose.

The general rule in Kentucky "is that every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury." *M & T Chemicals, Inc. v. Westrick*, 525 S.W.2d 740 (Ky. 1974); *Greyhound Corp. v. White*, 323 S.W.2d 578 (Ky. 1959); *Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell*, 736 S.W.2d 328 332 (Ky. 1987). The existence of a duty is a question of law, *Lewis v. B & R Corporation*, 56 S.W.3d at 438, and is accordingly reviewed de novo. *Brewick v. Brewick*, 121 S.W.3d 524, 526 (Ky.App. 2003).

"The most important factor in determining whether a duty exists is foreseeability." *Pathways, Inc. v. Hammons*, 113 S.W.3d at 89. Foreseeable risks are determined in part on what the defendant knew at the time of the alleged negligence. "The actor is required to recognize that his conduct involves a risk of causing an invasion of another's interest if a reasonable man would do so while exercising such attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence, and judgment as a reasonable man would have." Restatement (Second) of

Torts § 289(a); *see also Mitchell v. Hadl*, 816 S.W.2d 183, 186 (Ky. 1991). (Holding that liability for negligence is based on what the defendant was aware of at the time of the alleged negligent act and not on what the defendant should have known in hindsight); *Pathways, Inc. v. Hammons*, 113 S.W.3d at 90. Moreover, "a duty voluntarily assumed cannot be carelessly abandoned without incurring liability for injury resulting from the abandonment." *Johnson v. Brey*, 438 S.W.2d 535, 536 (Ky. 1968).

Assuming that there may arise circumstances when the duty would be imposed upon a host to summon emergency medical aid when a houseguest is in need of such aid, those circumstances are not present here. Hamilton has failed to plead facts or adduce evidence through discovery that Seals was aware of his perilous brain injury during the relevant time and thus could foresee the need to summon medical aid. To the contrary, the only facts of record are that Hamilton regained consciousness upon being carried back into the residence; that upon regaining consciousness Hamilton was cognizant enough to answer questions asked by Seals; that Hamilton knew where he was; that there were no external signs of injury; and that he interacted with the family dog and called the dog by name. Several hours later, Seals woke Hamilton and asked him if he was going to work, and Hamilton was lucid enough to understand the question, make the decision that he was not, and communicate his decision to Seals.

The unrefuted facts of record are that Hamilton was conscious, cognizant, and lucid following the accident and had no signs of external injury. There are no facts established in the record which would indicate that Seals could have foreseen the

seriousness of the injury or the need to summon medical help. To the contrary, if anything, the facts establish that a reasonable person would have believed that Hamilton, was sufficiently lucid so as to be capable of making his own decision concerning whether to seek medical help. As such, as a matter of law, a duty was never imposed upon Seals to unilaterally summon emergency medical care. It follows that Seals is entitled to summary judgment upon the negligence claim alleged in the complaint.

In support of his position that summary judgment was premature, Hamilton cites the Restatement (Second) of Torts, § 324, which provides as follows:

> One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by
>
> (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or
>
> (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him.

Kentucky has not specifically adopted this Restatement section, however, in any event, under the circumstances of this case, application of the rule would not defeat summary judgment. As noted in our previous discussion, the unrefuted fact is that Hamilton regained consciousness and cognizance following the initial events, and, thus, was not "helpless adequately to aid or protect himself." Hence, the rule does not apply.

Moreover, there is no evidence in the record that there was any outward

manifestation of the serious brain injury so as to permit Seals to know that emergency medical aid was immediately required. As such, as a matter of law, Seals did "exercise reasonable care" under the circumstances by bringing Hamilton in from the inclement weather and putting him to bed. Nothing more was required under the circumstances of this case.

For the foregoing reasons the judgment of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

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