McDOWELL v. KENTUCKY UTILITIES COMPANY

No. 2007-CA-002208-MR.

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Joy McDOWELL, Individually, and as Administratrix of the Estate of Lowell McDowell, Deceased, Appellants v. KENTUCKY UTILITIES COMPANY, Appellee

Court of Appeals of Kentucky.

February 13, 2009.

Attorney(s) appearing for the Case

Jimmy Dale Williams, Richmond, Kentucky, David Baird, Richmond, Kentucky, Brief for Appellants.

David R. Monohan, Patrick Shane O'Bryan, Louisville, Kentucky, Brief for Appellee.

Before: CAPERTON, TAYLOR, and WINE, Judges.

NOT TO BE PUBLISHED

OPINION

WINE, Judge.

Joy McDowell, individually and as Administratrix of the estate of Lowell McDowell (the estate), appeals from a summary judgment of the Bell Circuit Court dismissing their premises liability claims against Kentucky Utilities Company (KU). The estate argues that there were genuine issues of material fact regarding KU's duty to warn about its dam in the Cumberland River and whether that dam caused Lowell McDowell's (McDowell) death. However, we agree with the trial court that the dam was an open and obvious condition, and that the estate failed to present evidence establishing with reasonable certainty that McDowell drowned at the dam. Hence, we affirm.

The trial court set out the agreed facts of this action as follows:

> On April 05, 2005, Lowell McDowell left his home in Rockcastle County on an errand that would cost him his life. Several days prior to the fateful day, McDowell had discovered a small boat beached on a bank of the North Fork of the Cumberland River immediately below the Wallsend [B]ridge in Pineville, Kentucky. McDowell, a mail carrier, continued to observe the boat over the next few days while passing by on highway U.S. 25-E, and eventually concluded that the boat was abandoned and subject to salvage.
>
> McDowell's plan to retrieve the boat involved parking his truck at a river access point four to five miles below the Wallsend Bridge, walking back to Pineville and floating the boat downstream to the takeout point. McDowell left his truck at the takeout around 12:30 p.m. and began his walk to Pineville. McDowell's route of travel to Pineville is unknown. He had two options, one which led him within yards of [KU's] low-head dam, and which would have alerted him to the danger that awaited. This option also would have allowed him to more closely observe the condition of the river and any other potential trouble spots. McDowell's other choice was to walk back to Pineville along new U.S. 25-E, a four lane road with no view of the river with the exception of two bridge crossings. The dam is visible from the first crossing. The dam was also visible upstream from the

> location of McDowell's truck. McDowell was not in possession of a life jacket or any means to propel or steer the boat although he had borrowed a length of rope from a neighbor. The river was swollen and dingy from spring rain. At 6:30 p.m. an individual hunting bait along the riverbank observed a capsized boat, trapped by the boil below the dam. McDowell was not in sight. His body was recovered seven days later several miles downstream from the dam and McDowell's intended takeout.

The estate brought this action against KU for negligence in creating and maintaining the low-head dam and for failure to warn of the hazardous condition created by the low-head dam. After a period of discovery, KU filed a motion for summary judgment. On October 8, 2007, the trial court granted KU's motion, finding that the estate had failed to prove causation, and that the low-head dam was an open and obvious condition. This appeal followed.

As previously noted, the estate's claim against KU sounds in negligence. It is well-established that tort liability for negligence requires the plaintiff to establish: (1) a duty; (2) a breach of that duty; (3) proximate causation; and (4) damages. *Illinois Central Railroad v. Vincent,* 412 S.W.2d 874, 876 (Ky. 1967); *Helton v. Montgomery,* 595 S.W.2d 257, 258 (Ky. App. 1980). *See also Mullins v. Commonwealth Life Insurance Co.,* 839 S.W.2d 245, 247 (Ky. 1992). [1] The failure to prove any requisite element is fatal to a negligence claim. *Illinois Central Railroad v. Vincent,* 412 S.W.2d at 876, *citing Warfield Natural Gas Co. v. Allen,* 248 Ky. 646, 59 S.W.2d 534 (1933). Duty presents a question of law, while breach and injury are questions of fact for the jury to decide. *Pathways, Inc. v. Hammons,* 113 S.W.3d at 89. Proximate causation presents a mixed question of law and fact. *Id.*

KU argues that the estate has failed to present evidence supporting two of these elements: the existence of a duty and causation. On the issue of duty, KU asserts that it had no duty to warn of the hazardous condition because the low-head dam is an open and obvious condition. Even if it had a duty to warn, KU maintains that the estate cannot prove that the low-head dam caused McDowell's death. In granting summary judgment, the trial court primarily relied on the causation issue, but it also found that the hazard at the dam was an open and obvious condition. The estate argues that there were material issues of fact on both of these issues which should have been left for a jury to decide. We conclude that summary judgment was appropriate on both issues.

"[T]he proper function of summary judgment is 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." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). On appeal, this Court must determine whether the trial court erred in concluding "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* Kentucky Rules of Civil Procedure (CR) 56.03. "Because summary judgments involve no fact finding, this Court reviews them *de novo,* in the sense that we owe no deference to the conclusions of the trial court." *Blevins v. Moran,* 12 S.W.3d 698, 700 (Ky. App. 2000).

Although the trial court mainly addressed the causation issue, we will consider the duty issue first. The parties agree that McDowell had the status of a licensee on the river near KU's power plant. A possessor of property owes a licensee the duty to warn him of a dangerous condition already known to the possessor. *Mackey v. Allen,* 396 S.W.2d 55, 58 (Ky. 1965). However, there is no duty to warn a licensee of any danger or condition which is open and obvious or which should or could be observed by the licensee in the exercise of ordinary care. *Scifres v. Kraft,* 916 S.W.2d at 781.

KU argues that the presence of the low-head dam was or should have been open and obvious to McDowell. As the trial court pointed out, the dam was visible from the road and from either of the possible routes which McDowell could have taken to retrieve the boat. In addition, the dam was also visible from the takeout point where McDowell parked his truck that day. Therefore, KU contends that a reasonable person in McDowell's position should have known of the dam and the hazard it presented. *See Bonn v. Sears, Roebuck & Co.,* 440 S.W.2d 526, 529 (Ky. 1969).

In response, the estate argues that the presence of the dam was not obvious when viewed from upstream. In particular, the structure of a low-head dam generally does not rise above the surface of the water, the pool depth behind the dam is relatively shallow, and the drop is not far. Consequently, the estate contends that McDowell may not have realized that he was at the dam until he had reached it.

Even if McDowell knew or should have known of the presence of the dam, the estate argues that the danger posed by the dam was hidden by its design. The estate notes that a low-head dam creates a hydraulic backwash (or boil) at its base. The water pouring over the face of the dam is forced down to the riverbed and then circulates back up to the surface and to the face of the dam. A person who is swept over the dam can become caught in this boil and repeatedly pushed back under the water. However, a person viewing the dam from the shore would merely see a narrow area of turbulence along the base of the dam. For this reason, the estate argues that the hazardous condition created by the dam was not open and obvious.

We agree with the trial court that the presence of the low-head dam was open and obvious to a reasonable person in McDowell's position. The degree of the hazard posed by the condition at the base of the dam may have been less apparent. Nevertheless, no reasonable person in McDowell's position would have failed to recognize the danger in attempting to go over the dam, particularly in a small boat without oars or a motor. The danger to McDowell was enhanced by the facts that the river was high and he was not wearing a life preserver. McDowell had a duty to exercise reasonable care for his own safety, including not "to walk blindly into dangers which are obvious, known to him, or that would be anticipated by one of ordinary prudence." *J. C. Penney Co. v. Mayes,* 255 S.W.2d 639, 643 (Ky. 1953). Under the circumstances, we agree with the trial court that the dangerous condition at the dam was open and obvious, and therefore KU had no duty to warn McDowell of it.

Moreover, even if KU had a duty to warn about the dam, we agree with the trial court that the estate failed to present evidence showing with reasonable certainty that McDowell drowned at the dam. As a general rule, a plaintiff in this type of case must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of a defendant was a substantial factor in bringing about the result. "A mere possibility of such causation is not enough and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced it becomes the duty of the court to direct a verdict for the defendant." *Texaco, Inc. v. Standard,* 536 S.W.2d 136, 138 (Ky. 1976). KU argues that the circumstances surrounding McDowell's death are so uncertain that a jury would have to speculate in order to find that he drowned at the low-head dam.

In response, the estate argues that there was sufficient evidence for a jury to reasonably infer that McDowell drowned at the dam. McDowell and his wife, Joy, had several cell phone conversations throughout the day on April 5, 2005, the last of which was at 5:49 p.m. In her deposition, Joy testified that she heard the sound of running water just before the call was dropped. The boat was found capsized in the boil below the dam at approximately 6:30 p.m.

Causation may be proven by circumstantial evidence. *Wilder's Administrator v. Southern Mining Co.,* 265 Ky. 219, 96 S.W.2d 426, 429 (1936). But in

Wilder's Administrator, the defendant had control of all of the instrumentalities surrounding the decedent's death. Thus, while the exact circumstances surrounding his death were unknown, the former Court of Appeals found sufficient evidence for a jury to reasonably conclude that it was caused by the defendant's negligence. *Id.*

Similarly, in *Perry's Administratrix v. Inter-Southern Life Insurance Co.,* 248 Ky. 491, 58 S.W.2d 906 (1933), the decedent was found lying by a busy roadway with severe blunt-force injuries. His estate sought to recover life insurance benefits payable in the event of being struck by an automobile. Considering the nature and extent of the decedent's injuries, the presence of motor vehicles at the time and place he was injured, a downed mailbox adjacent to the decedent's body, and the absence of any evidence that his injuries could possibly have been inflicted other than by a passing motor vehicle, the former Court of Appeals found sufficient circumstantial evidence to submit the case to the jury. *Id.* at 908.

As in *Wilder's Administrator* and *Perry's Administratrix,* the exact circumstances of McDowell's death are unknown. Unlike in those cases, the evidence does not establish with reasonable certainty that McDowell drowned as a result of the condition of the dam. As the trial court noted, McDowell was attempting "to navigate a rain-swollen river with which he was totally unfamiliar. He did not wear a life jacket and he possessed no means of propelling or maneuvering the boat." And even "[a]ssuming McDowell was near the dam at 5:49 p.m. a jury would still be required to speculate on the location of McDowell's drowning and the manner in which he entered the water. McDowell might have drowned above the dam. He might have drowned in the boil of the dam. He may have drowned below the dam. No one will ever know."

We agree with the trial court's analysis. The estate's evidence would support a finding that McDowell drowned at the dam. But it is equally likely that McDowell went in the water and drowned above the dam. Likewise, he might have gone into the river at the dam, but escaped from the boil only to drown downstream. McDowell could have even waded into the water below the dam and slipped in the water as he approached to free the boat from the boil. Where the evidence is equally consistent with the absence as with the existence of negligence as the proximate cause of injury, the court should not submit the matter to the jury. *McKamey v. Louisville & Nashville Railroad Co.,* 271 S.W.2d 902, 904 (Ky. 1954), *citing Louisville & Nashville Railroad Co. v. Adams' Administratrix,* 301 Ky. 7, 190 S.W.2d 690, 691 (1945). Therefore, the trial court properly granted summary judgment for KU.

Accordingly, the judgment of the Bell Circuit Court is affirmed.

TAYLOR, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS.

CAPERTON, JUDGE, Dissenting:

I respectfully dissent from the reasoning of the majority. Specifically, I believe there was a duty to warn McDowell of the danger inherent in a low-head dam and that there was sufficient evidence to prevent summary judgment.

As to duty, *Scifes v. Kraft,* 916 S.W.2d 779 (Ky. App. 1996) sets forth the requirements as to when there is a duty and when there is no duty to warn of an open and obvious danger, citing both *Perry v. Williamson,* 824 S.W.2d 869 (Ky. 1992) and *Keown v. Keown,* 394 S.W.2d 915 (Ky. 1965).

In *Keown,* our Supreme Court stated that "[t]here is no duty to warn a licensee of any danger or condition which is open and obvious or which should or could be observed by the licensee in the exercise of ordinary care." *Keown* at 917. Subsequently, in *Perry,* the Supreme Court held that "[a] possessor of land owes a licensee the duty of reasonable care either to make the land as safe as it appears, or to disclose the fact that it is as dangerous as he knows it to be." *Perry* at 974.

The case before us is neither a swimming pool as in *Scifes* nor the entryway into a building as in *Keown.* [2] Here we have the danger inherent in a low-head dam, namely, a hydraulic boil immediately below the dam. While the above-water structure of the low-head dam as well as the water flowing over it may be obvious, the danger associated with the hydraulic boil created by the dam and immediately downstream thereof is covert. The hidden turning of the waters beneath the surface creates the danger.

In the words of the majority: "[t]he degree of the hazard posed by the condition at the base of the dam may have been less apparent." Indeed it so appears. It is the apparent or obvious nature of the danger that is at issue. Here the danger of the hydraulic boil was neither open nor obvious to a person exercising ordinary care. [3]

Perry has particular application to the facts before our Court. KU had the duty to make the hydraulic boil as safe as the surface water portrayed it to be, or to warn of the dangerous condition. It did neither.

As to summary judgment, the evidence before the trial court was that Joy, the wife of McDowell, heard running water while talking with McDowell over the phone just before she lost contact with him. McDowell was never to be heard from again; his boat being found in the hydraulic boil of the dam approximately 40 minutes later.

The running water certainly would allow the jury to infer that McDowell was at the location of the low-head dam when last speaking to his wife. The capsized boat would certainly allow inference that McDowell capsized while negotiating across the dam; absent the water running upstream for a bit and carrying the boat back to the hydraulic boil. As to when he might have drowned, it was certainly a question for the jury as to what part the low-head dam and hydraulic boil might have played.

I would reverse the trial court and remand for further proceedings not inconsistent with this opinion.

FootNotes

1. In some cases, the element of damages is included in the element requiring proof that the plaintiff suffered an injury which was proximately caused by the breach of a duty. *See Pathways, Inc. v. Hammons,* 113 S.W.3d 85, 88 (Ky. 2003).

2. Many of us are familiar with swimming pools and buildings, but few are acquainted with negotiating downstream over a low-head dam.

3. Absent an understanding of the structure of the low-head dam and the fluid dynamics of water, few persons would understand the dangers created by the hydraulic boil.
