IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 20, 2015 Session

CHARLES GROGAN v. DANIEL UGGLA, ET AL.

Appeal from the Circuit Court for Williamson County
No. 2011-443 James G. Martin III, Judge

No. M2014-01961-COA-R3-CV – Filed September 22, 2015

This appeal concerns a home inspector's liability for a guest's injury following the collapse of a homeowner's second-story deck railing. The accident occurred just one month after the home inspection was performed. In his report to the homeowner, the inspector noted that the deck flooring was warped but failed to report the improper construction of the deck railing. The injured guest filed suit against the homeowner and the home inspector, among others. The inspector moved for summary judgment. The trial court granted summary judgment, finding that the inspector did not owe a legal duty to the guest. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

Matthew E. Wright, Franklin, Tennessee, and Edmund J. Schmidt III, Nashville, Tennessee, for the appellant, Charles Grogan.

Daniel W. Olivas, Nashville, Tennessee, for the appellees, Jerry Black d/b/a Pillar to Post of Middle Tennessee, and Pillar to Post, Inc.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 8, 2010, Charles Grogan was an invited guest at Daniel Uggla's home in Franklin, Tennessee. When Mr. Grogan leaned against the railing of a second-story exterior deck, the railing failed. Mr. Grogan fell two stories onto a concrete landing and

suffered serious injuries. An inspection following the accident revealed that the deck had been improperly constructed using interior finishing nails and violated applicable building codes.

Mr. Uggla purchased the home just a few weeks before Mr. Grogan's fall. Before completing the purchase, Mr. Uggla contracted with Jerry Black, doing business as Pillar to Post of Middle Tennessee, to visually inspect the home. Mr. Black is a franchisee of Pillar to Post, Inc.

Mr. Uggla and Mr. Black entered into a Visual Inspection Agreement, which specified the scope and nature of the inspection. Among other statements concerning the scope and nature of the inspection, the Agreement stated:

> **"Inspector will conduct a visual inspection of the Property only."**
>
> **"This is not a Building Code inspection . . . ."**
>
> **"This Inspection Report is based on the condition of the Property existing and apparent as of the time and date of the inspection."**
>
> **"Inspections are done in accordance with NAHI [National Association of Home Inspectors] Standards, are visual, and are not technically exhaustive."**
>
> "Inspector examines a representative sample of components that are identical and numerous, such as electrical outlets, bricks, shingles, windows, etc., and does not examine every single one of these identical items, therefore, some detectable deficiencies may go unreported."

Regarding third party reliance on the inspection, the Agreement explained that the inspection consisted of two parts: a verbal survey and a written report. Consequently, the Agreement placed several qualifications on the use of the written report, including the following:

> TH[E] REPORT IS NOT TRANSFERABLE TO THIRD PARTIES AS IT WILL NOT CLEARLY CONVEY THE INFORMATION HEREIN. TH[E] REPORT IS PREPARED BY INSPECTOR AT YOUR REQUEST, ON YOUR BEHALF, AND FOR YOUR USE AND BENEFIT ONLY; TH[E] REPORT AND ANY MEMORANDA OR INFORMATION PROVIDED TO YOU PURSUANT TO THIS INSPECTION AGREEMENT ARE NOT TO BE USED, IN WHOLE OR IN PART, OR RELEASED TO ANY OTHER PERSON WITHOUT INSPECTOR'S PRIOR WRITTEN PERMISSION.

On September 8, 2010, Mr. Black visually inspected the property and submitted the Visual Property Inspection Report to Mr. Uggla via his power of attorney. The report stated that the deck flooring showed "evidence of warping, twisting and sap rising to the surface," but did not indicate any flaws or concerns with the deck railing. Before Mr. Uggla moved into the home, the previous owner replaced the deck flooring.

On August 22, 2011, Mr. Grogan sued Mr. Uggla, Mr. Black, Pillar to Post, Inc., and two other defendants.[1] In his second amended complaint, Mr. Grogan alleged that Mr. Black and Pillar to Post were negligent in that they:

> [K]new or in the exercise of reasonable care as a professional inspector should have known that the second floor rear exterior deck railing was constructed with interior finishing nails in violation of local, state, and national building codes, and constituted an unreasonable risk of harm since it could not withstand reasonable force to prevent someone from falling from the second floor exterior deck.

Additionally, he alleged Mr. Black and Pillar to Post were negligent by failing to perform a "pressure test" to determine the railing's strength and by failing to report the railing's inadequate construction.

Following discovery, Mr. Black and Pillar to Post moved for summary judgment on the basis that they owed no duty to Mr. Grogan. The trial court granted the motion. In its June 16, 2014 order, the court stated in relevant part:

> Jerry Black owed no duty to third-party invitee, Charles Grogan, for the alleged misrepresentations in the home inspection report that Mr. Black prepared for his client and prospective home buyer, Daniel Uggla. Mr. Grogan was not a person for whose benefit and guidance Jerry Black intended to supply the information in the report. Mr. Uggla did not supply the information in the report to Mr. Grogan. Until he filed this lawsuit, Mr. Grogan did not receive a copy of the inspection report and did not rely on the information contained in it in any transaction that Jerry Black intended the information to influence.

On July 14, 2014, Mr. Grogan moved to alter or amend the court's order granting summary judgment. For grounds, the motion referenced Tennessee Rule of Civil Procedure 59.04;[2] the Restatement (Second) of Torts § 552A and a scope note to § 552A,

[1] Mr. Grogan has settled his claims against all defendants except Mr. Black and Pillar to Post.

[2] Rule 59.04 provides that "[a] motion to alter or amend a judgment shall be filed and served within thirty (30) days after the entry of the judgment." Tenn. R. Civ. P. 59.04.

which were attached to the motion; and a memorandum of law filed in support of the motion. In an order entered July 16, 2014, the trial court requested a response from the defendants and directed the parties to agree on a hearing date.

After conducting a hearing, the trial court denied the motion to alter or amend by order entered September 8, 2014. Mr. Grogan filed his notice of appeal on October 3, 2014.

II. ANALYSIS

Although not exactly stated as such, Mr. Grogan presents two issues for our review: (1) whether Mr. Black and Pillar to Post owe him a legal duty of care; and (2) whether there are disputed issues of material fact that preclude the grant of summary judgment. Additionally, Mr. Black and Pillar to Post ask us to determine whether the content of the motion to alter or amend was sufficient to extend the time for appeal.

A. JURISDICTION TO DECIDE APPEAL

Mr. Black and Pillar to Post request dismissal of the appeal for lack of jurisdiction. Specifically, they claim that Mr. Grogan's motion to alter or amend failed to specify grounds for relief, as required by Tennessee Rule of Civil Procedure 7.02. Therefore, they contend the motion did not extend the thirty-day period for filing a notice of appeal. If that is the case, Mr. Grogan's notice of appeal is untimely, and we lack jurisdiction to decide the appeal.

For this court to have jurisdiction to decide an appeal of a final judgment, a notice of appeal must be filed with the trial court "within thirty days after the date of entry of the judgment appealed from." Tenn. R. App. P. 3(a), 4(a); *Chorost v. Chorost*, No. M2000-00251-COA-R3-CV, 2003 WL 21392065, at *4 (Tenn. Ct. App. June 17, 2003). The thirty day period for filing a notice of appeal may be extended only by the timely filing of certain post-trial motions:

> (1) under Rule 50.02 for judgment in accordance with a motion for a directed verdict; (2) under Rule 52.02 to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59.07 for a new trial; or (4) under Rule 59.04 to alter or amend the judgment.

Tenn. R. App. P 4(b); *see also* Tenn. R. Civ. P. 59.01 (listing the same motions as "the only motions contemplated in these rules for extending the time for taking steps in the regular appellate process").

All motions, including a motion to alter or amend, must comply with Tennessee Rule of Civil Procedure 7.02. That rule requires written motions to state the grounds for the requested relief:

> An application to the court for an order shall be made by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

Tenn. R. Civ. P. 7.02(1).

Tennessee courts seek to resolve cases on their merits, rather than on "'legal technicalities or procedural niceties.'" *Doyle v. Frost*, 49 S.W.3d 853, 856 (Tenn. 2001) (quoting *Karash v. Pigott*, 530 S.W.2d 775, 777 (Tenn. 1975)). Accordingly, we "do not generally apply specificity requirements strictly." *Wright v. Serv. Merch. Co.*, No. 01-A-019003CV00116, 1991 WL 7805, at *2 (Tenn. Ct. App. Jan. 30, 1991). If a motion does not comply with Tennessee Rule of Civil Procedure 7, an appellate court has two options: (1) we may reverse an order based on the insufficient motion; or (2) "in the interests of judicial economy," consider the merits of the motion, if doing so would not be unfair to the other party. *Harris v. Jain*, No. E2008-01506-COA-R3-CV, 2009 WL 2734083, at *3 (Tenn. Ct. App. Aug. 31, 2009). We are inclined to consider an insufficient motion, "as long as it is evident that the trial court understood the grounds of the motion, and the non-moving party knew or had notice of the grounds on which the motion was based." *Wright*, 1991 WL 7805, at *2 (citations omitted). In this case, however, our review concerns whether we have jurisdiction to consider the appeal in light of an allegedly insufficient motion.

Under these circumstances, we conclude that the motion to alter or amend was sufficient to extend the time for filing an appeal and that we do have jurisdiction. The trial court and Mr. Black and Pillar to Post were able to discern the grounds for the motion to alter or amend. The court requested a response and a hearing on the motion. Mr. Black and Pillar to Post, although also objecting to the motion's lack of specificity, addressed the merits of the motion in their response. Our own review of the motion convinces us that the grounds can be discerned from the motion alone,[3] although not without difficulty and the need to make some reasonable assumptions.

[3] It is possible that the court and Mr. Black and Pillar to Post were only able to discern the grounds for relief by resorting to the supporting memorandum of law. Our Supreme Court has noted that including the grounds in a separate memorandum of law does not comply with Rule 7.02(1). *Willis v. Tennessee Dep't of Correction*, 113 S.W.3d 706, 709 n.2 (Tenn. 2003) (involving a Tennessee Rule of Procedure 12.02(6) motion to dismiss for failure to state a claim, which the Court addressed despite its lack of specificity).

B. SUMMARY JUDGMENT

Mr. Grogan asks us to reverse the trial court's grant of summary judgment in favor of Mr. Black and Pillar to Post. Specifically, Mr. Grogan claims the trial court erred in failing to find that Mr. Black and Pillar to Post owed him a legal duty. He also claims that there were disputed issues of material fact that precluded entry of summary judgment.

1. Standard of Review

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, 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." Tenn. R. Civ. P. 56.04; *see also Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 83 (Tenn. 2008); *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). The court is not to "weigh" the evidence when evaluating a motion for summary judgment or substitute its judgment for that of the trier of fact. *Martin*, 271 S.W.3d at 87; *Byrd*, 847 S.W.2d at 211. Instead, the court is to "take the strongest legitimate view of the evidence in favor of the nonmoving party." *Byrd*, 847 S.W.2d at 210. The court grants all reasonable inferences in favor of the nonmoving party and "discard[s] all countervailing evidence." *Id.* at 210-11.

To prevail on a negligence claim, a plaintiff must establish the following elements: "(1) a duty of care owed by defendant to plaintiff; (2) conduct below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate, or legal, cause." *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995). Summary judgments are appropriate in negligence cases where the dispositive issue is a question of law. *Marr v. Montgomery Elevator Co.*, 922 S.W.2d 526, 529 (Tenn. Ct. App. 1995). Whether a defendant owes a duty of care to the plaintiff is a question of law. *Id.* If a defendant has no duty of care to the plaintiff, the defendant is entitled to summary judgment on the negligence claim. *See* Tenn. Code Ann. § 20-16-101 (Supp. 2015) ("[T]he moving party who does not bear the burden of proof at trial shall prevail on its motion for summary judgment if it . . . [d]emonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim."); *McCall*, 913 S.W.2d at 153 ("[D]uty . . . [is] an essential element in all negligence cases.").

We review the summary judgment decision as a question of law, with no presumption of correctness. *Martin*, 271 S.W.3d at 84; *Blair v. W. Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004). Accordingly, we must review the record de novo and make a fresh determination of whether the requirements of Tennessee Rule of Civil

Procedure 56 have been met. *Eadie v. Complete Co.*, 142 S.W.3d 288, 291 (Tenn. 2004); *Blair*, 130 S.W.3d at 763.

2. Legal Duty

a. Restatement (Second) of Torts

Mr. Grogan contends that either § 324A or § 311 of the Restatement (Second) of Torts applies in this case to impose a duty on Mr. Black and Pillar to Post to protect third parties. Section 324A, "Liability to Third Person for Negligent Performance of Undertaking," provides:

> One who undertakes, gratuitously or for consideration, to render services to another which *he should recognize as necessary for the protection of a third person* or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
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> > (a) his failure to exercise reasonable care increases the risk of such harm, or
> >
> > (b) he has undertaken to perform a duty owed by the other to the third person, or
> >
> > (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

(emphasis added). Our Supreme Court has applied § 324A of the Restatement in addressing a tortfeasor's liability to third parties. *Biscan v. Brown*, 160 S.W.3d 462, 483 (Tenn. 2005); *Speaker v. Cates Co.*, 879 S.W.2d 811, 816 (Tenn. 1994). At oral argument, Mr. Grogan's counsel conceded that only subsection (c) of § 324A could be applicable. He argues that, because inspections address safety issues in the home, an inspector should recognize that a home inspection is necessary for the protection of a homeowner's guests.

We conclude that the section has no application to the facts of this case. Mr. Black and Pillar to Post had no reason to suspect that the home inspection report was "necessary for the protection of a third person." We base this conclusion on several facts. First, pre-purchase home inspections are common, and perhaps advisable, but not required for the purchase of a home. No one would argue that a home inspection is a necessary prerequisite before inviting guests into one's home. Second, although home inspections can reveal safety concerns, the home inspections are typically used in

determining whether a home should be purchased at all or as the basis for further bargaining over the terms of purchase.

Third, Tennessee statute and the parties' Agreement limit the scope of the inspection to such a degree that it falls short of a safety inspection. Tennessee Code Annotated § 62-6-302(3)(B), which is found in the Tennessee Home Inspector License Act, defines home inspections to exclude examination for building code compliance:

> "Home inspection" does not mean a compliance inspection for building codes or any other codes adopted by this state or a political subdivision of this state. "Home inspection" does not mean any work that is within the scope of practice of architecture, engineering or landscape architecture or is performed by a person qualified to use the title "registered interior designer," all as defined in chapter 2 of this title.

Likewise, the parties' Agreement specifically states that the inspection is "visual" only; that it is "not a Building Code inspection"; that it is not "technically exhaustive"; and that, in some instances, only "a representative sample of components" are examined.

Finally, Tennessee statute and the parties' Agreement do not permit third parties to see or rely upon a home inspection report. Generally, a home inspector may disclose the home inspection results only to the client or his legal representative. Tenn. Code Ann. § 62-6-308(a)(6) (providing that a home inspector may be subject to disciplinary action for disclosing the report to other individuals); *see also* Tenn. Comp. R. & Regs. 0780-05-12-.11(3). The Agreement states that the home inspection report is for Mr. Uggla's "use and benefit only" and that Mr. Uggla may not release the report to any other person without the inspector's permission.

As for § 311[4] of the Restatement (Second) of Torts, Tennessee has not adopted, or even applied, that section of the Restatement. We decline to do so in connection with home inspections, particularly in light of the Tennessee Home Inspector License Act.

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[4] Section 311 of the Restatement (Second) of Torts provides:

> (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results
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> > (a) to the other, or
> >
> > (b) to such third persons as the actor should expect to be put in peril by the action taken.
>
> (2) Such negligence may consist of failure to exercise reasonable care

b. Tennessee Common Law

Because neither § 324A nor § 311 apply in this case, we look to our common law to determine whether Mr. Black and Pillar to Post owed a legal duty to Mr. Grogan. To determine whether a defendant owes a duty to a third party, we consider whether "'such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of others—or, more simply, whether the interest of the plaintiff which has suffered invasion was entitled to legal protection at the hands of the defendant.'" *Turner v. Jordan*, 957 S.W.2d 815, 818 (Tenn. 1997) (quoting *Bradshaw v. Daniel*, 854 S.W.2d 865, 870 (Tenn. 1993)); *see also Bradshaw*, 854 S.W.2d at 871 ("'[C]ertain socially recognized relations exist which constitute the basis for . . . a legal duty.'" (quoting Fowler V. Harper & Posey M. Kime, *The Duty to Control the Conduct of Another*, 43 Yale L. J. 886, 887 (1934)). Therefore, "[t]he imposition of a legal duty 'reflects society's contemporary policies and social requirements concerning the rights of individuals and the general public to be protected from another's act or conduct.'" *Turner*, 957 S.W.2d at 818 (quoting *Bradshaw*, 854 S.W.2d at 870).

A duty is "the legal obligation that a defendant owes a plaintiff to conform to a reasonable person standard of care in order to protect against unreasonable risks of harm." *Burroughs v. Magee*, 118 S.W.3d 323, 329 (Tenn. 2003). To determine whether a particular defendant owed a plaintiff a duty, we apply a balancing approach, based upon principles of fairness, to determine whether the risk to the plaintiff was unreasonable. A "risk is unreasonable and gives rise to a duty to act with due care if the foreseeable probability and gravity of harm posed by defendant's conduct outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm." *McCall*, 913 S.W.2d at 153. We consider several factors in determining whether a risk is unreasonable and a duty of care arises, including:

> [T]he foreseeable probability of the harm or injury occurring; the possible magnitude of the potential harm or injury; the importance or social value of the activity engaged in by defendant; the usefulness of the conduct to defendant; the feasibility of alternative, safer conduct and the relative costs and burdens associated with that conduct; the relative usefulness of the safer conduct; and the relative safety of alternative conduct.

Id.

> (a) in ascertaining the accuracy of the information, or
>
> (b) in the manner in which it is communicated.

After weighing the applicable factors, we conclude that Mr. Black and Pillar to Post did not owe a legal duty of care to Mr. Grogan. We first consider the foreseeability of the harm. Although it is certainly foreseeable that Mr. Uggla, his family, and his guests could be exposed to harm by improper construction undiscovered by a home inspection, Mr. Black could not foresee whether his client, Mr. Uggla, would undertake repairs based on the inspection report. In some instances, a client might determine the needed repairs are too expensive. In the case of a pre-purchase inspection commissioned by a prospective home purchaser, the client might elect not to purchase the home in light of the deficiencies identified in the inspection report, again leaving any necessary repair undone. Even if repairs are undertaken, Mr. Black would have no mechanism to ensure that the repairs were sufficient to correct any problem identified by the inspection report. As in this case, repairs can be undertaken by someone other than the client.

Next, we consider the magnitude of the potential injury. This case demonstrates that the injury can be significant. However, as this case also demonstrates, home inspections can cover a range of items, some of which present only a risk of minor harm or injury.

The third factor is the social value of the defendant's conduct. We recognized the great importance of home inspections to the public and the practical necessity of such inspections in *Russell v. Bray*, 116 S.W.3d 1, 6-7 (Tenn. Ct. App. 2003), and *Carey v. Merritt*, 148 S.W.3d 912, 917 (Tenn. Ct. App. 2004). As a consequence, in those cases, we held that home inspectors cannot limit their liability to the other party to the contract. *Russell*, 116 S.W.3d at 8 ("Based upon our analysis of the public interest exception . . . we hold that the exculpatory clause in the contract between Plaintiffs and Defendants is contrary to public policy and, thus, unenforceable."); *Carey*, 148 S.W.3d at 918 ("[W]e hold that the exculpatory clause between the Plaintiffs and Defendant is contrary to public policy and void."). In light of the great importance of home inspections to the public and their practical necessity, we must be cautious in expanding the legal responsibilities of home inspectors. If home inspectors were potentially liable for injuries to third parties, the cost of home inspections would likely increase. *See Formet v. Lloyd Termite Control Co.*, 185 Cal. App. 4th 595, 603 (Ct. App. 2010).

In determining whether a risk is unreasonable, we also consider the "usefulness of the conduct to the defendant." The home inspector is compensated for conducting the inspection. The inspector could conduct more inspections in a given timeframe if the inspections were less than thorough; thus, the inspector could receive some degree of benefit. However, any such benefit would likely be outweighed by the increased risk of liability to the client.

Finally, we take into account the "feasibility of the alternative, safer conduct and the relative costs and burdens associated with that conduct; the relative usefulness of the safer conduct; and the relative safety of alternative conduct." *Id.* In this context, the

"alternative, safer conduct" is for all home inspections to take into consideration the risks of potential personal injury to homeowners and their invitees. This alternative conduct would likely increase the cost of home inspections because, presumably, an inspection would have to be more comprehensive. In addition, home inspections would take longer to perform.

We question whether such alternative conduct would be particularly effective. As noted above, a client may elect not to repair conditions noted in a home inspection report, and even if the client undertakes repairs, the repairs may not be performed properly. As in this case, the repairs may be undertaken by someone other than client, someone who would not be authorized by statute to see the inspection report. *See* Tenn. Code Ann. § 62-6-308(a)(6); *see also* Tenn. Comp. R. & Regs. 0780-05-12-.11(3).

3. Material Facts

Mr. Grogan also contends that there were disputed issues of material fact and, therefore, entry of summary judgment was inappropriate. "A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Byrd*, 847 S.W.2d at 215. The disputed material facts referenced by Mr. Grogan include: Mr. Black's statement that one of the purposes of a home inspection is to "make sure it is safe for people that are going to be occupying it"; Mr. Black did not check whether the nails securing the railing were appropriate; and the use of inappropriate nails and lack of sufficient connectors could be detected by a visual inspection.

Even taking all the facts relied upon by Mr. Grogan as true and granting him all reasonable inferences, we still conclude Mr. Black and Pillar to Post owed Mr. Grogan no duty of care. As a result, the trial court's grant of summary judgment was appropriate.

III. CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed.

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W. NEAL McBRAYER, JUDGE