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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000216-MR

DONNIE AUTRY AND VIRGINIA WHITE,
CO-ADMINISTRATORS OF THE ESTATE OF
MELISSA KAYE AUTRY — APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVEN ALAN WILSON, JUDGE[1]
ACTION NO. 03-CI-01492

WESTERN KENTUCKY UNIVERSITY;
WKU STUDENT LIFE FOUNDATION, INC.;
SANDRA HESS, IN HER OFFICIAL CAPACITY;
AUBREY LIVINGSTON, IN HER OFFICIAL CAPACITY;
LYNN ALLISON TODD, IN HER OFFICIAL CAPACITY;
ALEX KUEHNE, IN HIS OFFICIAL CAPACITY; AND
AJA HENDRIX, IN HIS OFFICIAL CAPACITY — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; JOHNSON, JUDGE; AND MILLER, SENIOR JUDGE.[2]

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[1] Honorable Thomas R. Lewis presided in this case and signed various orders until he took senior status in June 2003. Then Judge Lewis was assigned to this case as a special judge until Judge Wilson took office in December 2003.

[2] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

JOHNSON, JUDGE: Donnie Autry and Virginia White, Co-Administrators of the Estate of Melissa Kay Autry (hereinafter Autry), have appealed orders of dismissal of the Warren Circuit Court entered on November 26, 2003, January 7, 2004, and January 26, 2004, dismissing Western Kentucky University (hereinafter WKU), WKU Student Life Foundation, Inc. (hereinafter SLF), and WKU employees, Sandra Hess, Aubrey Livingston, Lynne Allison Todd, Alex Kuehne, and Aja Hendrix (hereinafter WKU employees), in their official capacities only, from the wrongful death action filed by Autry alleging negligence by these appellees in failing to provide safe campus housing to their decedent.[3] Having concluded that the trial court did not err by dismissing WKU from the suit, as it is entitled to governmental immunity, we affirm that portion of the trial court's orders of dismissal. Having concluded that the WKU employees are entitled to immunity, in their official capacities, based on the governmental immunity granted to WKU, we further affirm that portion of the trial court's orders of dismissal. But having concluded that the trial court erred in dismissing the claims against SLF, we reverse that portion of the trial court's orders of dismissal and remand for further proceedings consistent with this Opinion.

[3] Hess, Livingston, Todd, Kuehne, and Hendrix remain defendants in the case in their individual capacities along with the defendants Pikes, Inc. and Pi Kappa Alpha Fraternity.

Melissa Kaye “Katie” Autry was a freshman student at WKU, a public university in Bowling Green, Kentucky, during the 2002-2003 school year and she was a resident of Poland Hall, a dormitory owned by SLF and managed by WKU. During the early hours of May 4, 2003, Katie returned to her dorm room, alone, after leaving a fraternity party. It is alleged that later that morning Stephen Soules and Lucas Goodrum entered Katie’s dorm room, assaulted and raped her, and set her on fire. Katie suffered third-degree burns and died three days later. Soules has pled guilty to the assault, rape, and murder of Katie, but Goodrum was acquitted of the same criminal charges by a jury on March 21, 2005. Neither Soules nor Goodrum was a resident of Poland Hall or a student of WKU at the time of the attack on Katie.

Poland Hall is owned by SLF, which is a non-stock, non-profit Kentucky corporation incorporated on May 29, 1999, having no employees. SLF’s purpose, according to its Articles of Incorporation, is to acquire, finance, and own residential dormitories at WKU; and it was formed to provide a vehicle to finance WKU’s renovation of its residence halls. WKU manages and operates the dorms according to an Amended and Restated Management Agreement between SLF and WKU dated November 20, 2000. WKU is responsible for all operations of the dorms and WKU, not SLF, enters into housing agreements with students.

WKU was responsible under the management agreement for hiring employees to work at Poland Hall. At the time Katie was attacked, the WKU employees working in Poland Hall, who have been sued in this action and their respective positions, are as follows: Hess, the hall director; Livingston, assistant hall director; Kuehne and Hendrix, resident assistants; and Todd, desk clerk. WKU had established safety regulations for the dorms it managed, including that outside doors were to be locked and all non-resident guests were required to check-in with the desk clerk, leave identification with the desk clerk, and be escorted by a resident to their dorm room.

On September 18, 2003, Autry filed a wrongful death action against the appellees alleging that their negligence in failing to provide adequate security caused Katie's death. Claims were asserted against the WKU employees in their official capacities as employees of WKU, and individually.[4] On October 3, 2003, and October 13, 2003, the appellees filed separate motions to dismiss, arguing that they were immune from liability based on governmental immunity and official immunity.[5] On November 26, 2003, the trial court in two separate orders granted motions to dismiss on behalf of SLF and WKU and all of the WKU employees in

[4] Autry's claims against the WKU employees, individually, were not addressed in the employees' motion to dismiss or the trial court's orders of dismissal.

[5] At the time of the hearing on the motions, the parties had not yet taken any depositions and were in the early stages of discovery.

their official capacities. On December 5, 2003, Autry filed a motion to alter, amend, or vacate the orders of dismissal, which the trial court denied by an order entered on January 7, 2004.[6] This appeal followed.

Autry asserts that the trial court erred in dismissing the negligence claims against all the appellees because none was entitled to any form of immunity. Since these appeals present purely legal issues, this Court reviews the matter de novo.[7] Despite the high standard imposed on the trial court in dismissing an action,[8] we find no error in the trial court's dismissal of Autry's claims against WKU based on WKU's governmental immunity, nor its dismissal of Autry's claims against the WKU employees in their official capacities based on their official immunity.

The Supreme Court of Kentucky in Yanero v. Davis,[9]

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[6] On January 26, 2004, the trial court entered another order making the order dismissing the claims against SLF final and appealable. Honorable Steven Alan Wilson replaced Judge Lewis and signed the orders of January 7, 2004, and January 26, 2004.

[7] Carroll v. Meredith, 59 S.W.3d 484, 489 (Ky.App. 2001).

[8] "[E]very well-pleaded allegation of the complaint must be taken as true and construed in the light most favorable to the party against whom the motion is made." City of Louisville v. Stock Yards Bank & Trust Co., 843 S.W.2d 327, 328 (Ky. 1992) (citing Gall v. Scroggy, 725 S.W.2d 867 (Ky.App. 1987)). "[A] court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim" [citation omitted]. Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club, 551 S.W.2d 801, 803 (Ky. 1977).

[9] 65 S.W.3d 510 (Ky. 2001).

provided a comprehensive summary of the law of sovereign immunity, governmental immunity, and official immunity, and their current applications in this Commonwealth. As the Supreme Court noted, the concept of immunity has its roots in the common law of England and was adopted early in the history of our country and as early as 1828 in this Commonwealth.[10] While sovereign immunity is not found in the Kentucky Constitution, Sections 230 and 231 of our Constitution allow the Legislature to "waive the Commonwealth's inherent immunity either by direct appropriation of money from the state treasury (Section 230) and/or by specifying where and in what manner the Commonwealth may be sued (Section 231)."[11] "It is an inherent attribute of a sovereign state that precludes the maintaining of any suit against the state unless the state has given its consent or otherwise waived its immunity."[12] "The absolute immunity from suit afforded to the state also extends to public officials sued in their representative (official) capacities, when the state is the real party against which relief in such cases is sought."[13]

[10] Yanero, 65 S.W.3d at 517.

[11] Id. at 524.

[12] Id. at 517 (citing Restatement (Second) of the Law of Torts § 895B(1) (A.L.I. 1979); and 72 Am.Jur.2d, States, Territories, & Dependencies, § 99 (1974)).

[13] Yanero, 65 S.W.3d at 518 (citing Alden v. Maine, 527 U.S. 706, 756, 119 S.Ct. 2240, 2267, 144 L.Ed.2d 636 (1999); 72 Am.Jur.2d, States, Territories, & Dependencies, § 104 (1974); e.g. Tate v. Salmon, 79 Ky. 540, 543 (1881); and Divine v. Harvie, 23 Ky. 439, 441 (1828)).

"The rationale for absolute immunity . . . is not to protect those individuals from liability for their own unjustifiable conduct, but to protect their offices against the deterrent effect of a threat of suit alleging improper motives where there has been no more than a mistake or a disagreement on the part of the complaining party with the decision made."[14] Thus, the immunity afforded to the Commonwealth and certain officials is sovereign immunity.[15]

Distinct from sovereign immunity is governmental immunity which "'is the public policy, derived from the traditional doctrine of sovereign immunity, that limits imposition of tort liability on a government agency.'"[16] Under the doctrine of governmental immunity, "a state agency is entitled to immunity from tort liability to the extent that it is performing a governmental, as opposed to a proprietary, function."[17]

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[14] Yanero, 65 S.W.3d at 518 (citing Restatement (Second) Torts, supra, § 895D cmt. c).

[15] Id. at 518. Those who are entitled to sovereign immunity include, but are not limited to, legislators in the performance of their legislative functions, judges for all their judicial acts, prosecutors with respect to initiation and pursuit of prosecutions, and a sitting President of the United States.

[16] Id. at 519 (quoting 57 Am.Jur.2d, Municipal, County, School & State Tort Liability, § 10 (2001)).

[17] Yanero, 65 S.W.3d at 519 (citing 72 Am.Jur.2d, States, Territories, & Dependencies, § 104 (1974)). The Court in Yanero acknowledged that the "application of the governmental/proprietary test does not guarantee consistent results. . . . However, that analysis has the attribute of relative simplicity in application and affords a reasonable compromise

In this case, Autry asserts that WKU's liability arises out of its failure, as operator and manager of the dorms, to provide adequate security and to follow its own security regulations at Poland Hall. WKU asserts that it is a state agency and that the operation of the dorms is a governmental function, whereby it is shielded from liability for any negligence. Autry asserts that WKU is not entitled to governmental immunity because its function as operator and manager of the dorms is a proprietary type of activity engaged in by private entities for profit, and not governmental in nature. Since WKU is a state agency, we must determine whether it is entitled to governmental immunity for any negligence in providing, managing, and operating dormitories for its students.

KRS[18] 44.073(1)[19] establishes that WKU, as a state institution of higher education, is an agency of the state. The Supreme Court of Kentucky in Kentucky Center for the Arts Corp. v. Berns,[20] also states that an entity is a state agency if it is

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between allowing state agencies to perform their governmental functions without having to answer for their decisions in the context of tort litigation, and allowing private enterprises to pursue their legitimate business interests without unfair competition from government agencies performing purely proprietary functions without the same costs and risks inherent in commercial enterprise." Id. at 521.

[18] Kentucky Revised Statutes.

[19] KRS 44.073(1) provides that state institutions of higher learning are state agencies within the meaning of the Board of Claims Act, which is found in KRS 44.070 – KRS 44.990.

[20] 801 S.W.2d 327 (Ky. 1991).

"'under the direction and control of the central State government[;]'" "'supported by monies which are disbursed by authority of the Commissioner of Finance out of the State treasury[;]'"[21] and thus, "when viewed as a whole, the entity is carrying out a function integral to state government."[22]

The Supreme Court of Kentucky has applied the Berns test to identify other educational entities as state agencies in Withers v. University of Kentucky,[23] (the University of Kentucky) and in Yanero (the Jefferson County Board of Education). KRS 44.073(1) and KRS 164.290(1) provide that WKU is a state university and an agency of the Commonwealth, and by serving as an institution of higher education under these statutes, WKU carries out a function integral to state government.[24] Further, WKU is supported by the state treasury.[25] Thus, WKU is clearly a state agency under the Berns test.

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[21] Berns, 801 S.W.2d at 331 (quoting Gnau v. Louisville & Jefferson Co. Metropolitan Sewer Dist, 346 S.W.2d 754, 755 (Ky. 1961)). In Berns, it was found that the Kentucky Center for the Arts Corporation was a municipal corporation, that while created by statute, does not perform services of central state government and was not entitled to governmental immunity.

[22] Id. at 332.

[23] 939 S.W.2d 340 (Ky. 1997).

[24] See Berns, 801 S.W.2d at 332.

[25] See KRS 446.010(31), which provides:

> "State funds" or "public funds" means sums actually received in cash or negotiable instruments from all sources unless otherwise described by any state agency, state-owned corporation, university, department, cabinet, fiduciary for the benefit of any form of state organization, authority, board, bureau,

The function of WKU at issue in this case; i.e., its providing, managing, and operating of housing for its students, is analogous to the function of the University of Kentucky in Withers and that of the Jefferson County Board of Education in Yanero. In Withers, the Supreme Court concluded that the University of Kentucky was a governmental agency[26] and entitled to immunity from a medical malpractice claim arising from its teaching hospital.[27] Then, the Supreme Court in Yanero, concluded that the Jefferson County Board of Education was an agency of state government[28] and that it was entitled to governmental immunity against the claim that it had negligently failed to promulgate rules requiring students playing baseball to wear batting helmets.[29] Since KRS 164.300 provides as part of WKU's purpose that it "render such supplemental services as conducting . . . dormitories . . . " and since WKU provides dormitories only to its students, we conclude that the

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> interstate compact, commission, committee, conference, council, office, or any other form of organization whether or not the money has ever been paid into the Treasury and whether or not the money is still in the Treasury if the money is controlled by any form of state organization . . . [emphasis added].

[26] Withers, 939 S.W.2d at 343.

[27] Id. at 342.

[28] Yanero, 65 S.W.3d at 527.

[29] Id.

dormitories serve an educational purpose by providing students with affordable and convenient housing on the university campus.

The Supreme Court in Withers held that the operation of a university hospital was a governmental function because it was integral to the teaching and research function of the university, noting that medical school accreditation would be "impossible" without the teaching hospital.[30] Autry attempts to distinguish this function of the teaching hospital from WKU's providing, managing, and operating dormitories for students by asserting that it would be possible to carry on the operations of the university without engaging in this housing function. However, the Supreme Court in Yanero did not follow that reasoning in determining whether a function was governmental. Despite Yanero's argument that sponsoring a baseball team was not a function integral to state government, the Supreme Court concluded that because interscholastic athletics was specifically included by statute as a function of the Board of Education, supervising athletic teams fell within the agency's governmental function.[31] Thus, we conclude that WKU's function of providing, managing, and operating dorms for its students is also a governmental function under the same rule delineated in Withers and Yanero.

[30] Withers, 939 S.W.2d at 343.

[31] Yanero, 65 S.W.3d at 527.

Autry further asserts that WKU should not be immune from liability for negligence in its providing, managing, and operating of student housing when private organizations engaged in the same business are not sheltered from liability. This same argument was rejected by the Supreme Court in Withers, where the appellants asserted that the university was engaged in a proprietary function because "the University of Kentucky Medical Center is nothing more than a hospital which is in full competition with and performs the same function as private hospitals."[32] The Supreme Court stated that governmental immunity to a state university will not be denied merely because a private entity provides similar services. The Supreme Court noted that only the Legislature can waive immunity,[33] and it had not done so under those circumstances.[34] In Yanero,[35] the Supreme Court reiterated this view and quoted Withers with approval. Likewise, in this case the providing of affordable on-campus housing is an essential function of a public university and the existence of alternative housing off campus does not destroy the essential role of this function in WKU's providing of higher education.

[32] Withers, 939 S.W.2d at 343.

[33] Id. at 344.

[34] Id. at 346.

[35] Yanero, 65 S.W.3d at 521.

In this case, we are not persuaded that the relationship between SLF and WKU has any relevance to WKU's entitlement to governmental immunity. There is no restriction in the enabling statute as to how WKU is to provide dorms to its students; i.e., whether the dorms are to be owned by WKU or managed by it as in this case. Nor, is it relevant that the money received by WKU for its management services comes from SLF rather than from the state treasury. Providing dorms to its students is a part of WKU's overall educational function, and as stated in Berns, WKU's educational function must be viewed as a whole in determining if it is carrying out a function integral to state government.

We disagree with Autry's argument that the New York Board of Claims case, Miller v. New York,[36] should be persuasive in denying WKU immunity. The New York Board of Claims did not discuss the university's role in education as a governmental function, nor did it evaluate the relative importance of a state university's operating dormitories as part of its educational function, taken as a whole. No party in the Miller case disputed that the operation of dorms was a proprietary function;[37] however, our Legislature has authorized the function as governmental in KRS 164.300. Further, the New York Board of

[36] 467 N.E.2d 493 (N.Y. 1984).

[37] Id. at 496.

Claims focused on the nature of the act, and it did not determine whether it was a governmental function or a proprietary function.[38] Thus, we are not persuaded by Miller.

The claims that Autry asserted against the WKU employees alleged that they failed to exercise reasonable care in providing security at Poland Hall in both their official capacities and individually. The trial court dismissed the claims against the employees in their official capacities only.

Yanero notes that "when an officer or employee of a governmental agency is sued in his/her representative capacity, the officer's or employee's actions are afforded the same immunity, if any, to which the agency, itself, would be entitled . . . ."[39] Thus, since WKU has governmental immunity in this case, the trial court also properly dismissed Autry's claims against the WKU employees in their official capacities. Since the trial court lacked subject-matter jurisdiction over these

[38] Miller, 467 N.E.2d at 497. As a state agency with governmental immunity, WKU cannot be held vicariously liable for any alleged negligence of its employees. Thus, Autry's claims against WKU were filed in the wrong forum. As stated in the Withers case, our Legislature has waived immunity against governmental agencies such as WKU by enacting the Board of Claims Act. See KRS 44.070 – KRS 44.990. The Board of Claims Act "represents not a creation of immunity, but rather a limited waiver of immunity to the extent that immunity exists." Yanero, 65 S.W.3d at 524. In affirming the decision to dismiss the claims against the University of Kentucky, the Court in Withers explained, "persons having negligence claims against the Commonwealth may be heard in the Board of Claims, but not elsewhere." Withers, 939 S.W.2d at 346. The Warren Circuit Court lacked subject-matter jurisdiction over WKU and consistent with Withers, the Kentucky Board of Claims is the exclusive forum for the claims asserted against WKU in this action.

[39] Yanero, 65 S.W.3d at 522.

claims against the WKU employees, the claims should have been brought in the Board of Claims.[40]

Autry also claims that SLF, as the owner of the fee simple interest in the dorm real estate, failed to exercise reasonable care in providing security for Poland Hall, resulting in the attack on Katie. Autry contends that SLF, as a non-profit corporation, was not entitled to any type of immunity; and thus, the trial court's dismissal of the claims against SLF was improper.

In support of its motion to dismiss, SLF asserted three arguments: (1) that it was entitled to official immunity as the agent of WKU, which was entitled to governmental immunity; (2) that the criminal attack on Katie by Soules and Goodrum constituted a superseding cause of her injuries and death; and (3) that Autry failed to join as defendants Soules and Goodrum, who were indispensable parties. Since the trial court did not provide any ground in its order of dismissal, we are given little insight into the basis for the trial court's ruling.[41] We conclude, as set forth below, that SLF was not

[40] Autry asserts that dismissal of their claims against WKU and its employees in their official capacities was premature because discovery had not been completed. However, since WKU and its employees in their official capacity are immune from liability, discovery as to their possible negligence in this matter is irrelevant.

[41] While CR 12 does not require the trial court to state the ground for dismissal, when multiple grounds are asserted, it obviously is helpful in appellate review for the trial court to state which ground or grounds it relied on in granting the dismissal.

entitled to immunity. Further, neither of SLF's other arguments justifies the trial court's dismissal of Autry's claims against it. Instead, whether SLF is liable for damages related to Katie's injuries turns on whether SLF was in possession of Poland Hall at the time of the attack; whether in the exercise of ordinary care, the employees in charge of Poland Hall should have foreseen the risk that Katie would be attacked by another person or persons in the dorm; whether the employees could have taken reasonable actions to prevent such an occurrence, but failed to do so; and whether such failure was a substantial factor in causing Katie's injuries.[42]

It is elemental tort law that a negligence action requires proof of: (1) a duty on the part of the defendant; (2) a breach of that duty; and (3) a consequent injury, which consists of actual injury or harm and legal causation between the defendant's breach and the plaintiff's injury.[43] Duty presents a question of law. "If no duty is owed by the defendant to the plaintiff, there can be no breach thereof, and

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[42] See Palmore, Kentucky Instructions to Juries § 24.19 (4th ed., 1989). But for WKU's governmental immunity, it would have been proper to determine its negligence, along with SLF's. However, WKU's immunity renders its negligence moot except as it may result in SLF's liability under the doctrine of respondeat superior as discussed infra.

[43] Mullins v. Commonwealth Life Insurance Co., 839 S.W.2d 245, 247 (Ky. 1992)(citing Illinois Central R.R. v. Vincent, 412 S.W.2d 874, 876 (Ky. 1967)). See also Pathways, Inc. v. Hammons, 113 S.W.3d 85, 89 (Ky. 2003).

therefore no actionable negligence."[44] "Breach and injury[ ] are questions of fact for the jury to decide" [citations omitted].[45] In Kentucky, the damages recoverable in a tort action are those that "actually flow from the wrongful act, although the particular consequences may not have been contemplated . . . ."[46]

"'It has long been recognized that "a possessor of land who holds it open to the public for entry for business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent or intentionally harmful acts of third persons . . . and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it."'"[47] Katie, as a resident of Poland

[44] Ashcraft v. People's Liberty Bank & Trust Co., Inc., 724 S.W.2d 228, 229 (Ky.App. 1987).

[45] Pathways, Inc., 113 S.W.3d at 89.

[46] Western Union Telegraph Co. v. Ramsey, 261 Ky. 657, 88 S.W.2d 675, 677 (1935).

[47] Isaacs v. Huntington Memorial Hospital, 695 P.2d 653, 657 (Cal. 1985) (quoting Peterson v. San Francisco Community College Dist., 685 P.2d 1193 (Cal. 1984) (quoting Restatement (Second) of Torts, § 344)). See also 62 Am.Jur.2d Premises Liability § 44 (1990).

Hall, a college dormitory, was both an invitee[48] and a tenant[49] of the possessor of Poland Hall.[50] Regardless of Katie's status as tenant, invitee, or other, the landlord's liability is not

[48] A duty is owed by a business to its invitees "to protect them from imminent criminal harm and reasonably foreseeable criminal conduct by third persons." Nivens v. 7-11 Hoagy's Corner, 943 P.2d 286, 293 (Wash. 1997). "If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it[.]" Id. at 292. Reasonable steps should be taken to prevent such harm in order to satisfy the duty. Id. at 293.

A person is an invitee if "'(1) he enters by invitation, express or implied, (2) his 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 or benefit to the owner.'" Johnson v. Lone Star Steakhouse & Saloon of Kentucky, Inc., 997 S.W.2d 490, 491-92 (Ky.App. 1999) (quoting Black's Law Dictionary 827 (6th ed. 1990)). "[T]he invitee, or . . . business visitor, is placed upon a higher footing than a licensee" [footnote omitted]. Prosser and Keaton, The Law of Torts, § 61 (5th ed. 1984). It is undisputed that Katie's presence at the dorm was by invitation; her presence was connected with the activity conducted on the land; and her presence provided both her and the possessor a benefit. Thus, Katie, as a resident of Poland Hall, was an invitee.

[49] It could also be argued that SLF and Katie had a landlord-tenant relationship, which "is contractual, created by a lease . . . for a term . . . and exists when one person occupies the premises of another with the lessor's permission or consent, subordinated to the lessor's title or rights." Black's Law Dictionary, 883 (7th ed. 1990). "A landlord owes its tenant the duty to take reasonable security measures to eliminate harm that is foreseeable, based on the nature of the known criminal activity on the premises." University of Maryland Eastern Shore v. Rhaney, 858 A.2d 497, 504 (Md.App. 2004). "[A] landlord's duty to maintain safe common areas is not limited to preventing harm that occurs only within the common areas. Rather, negligent maintenance . . . in areas under the control of the landlord may result in liability for injuries that occur within the leased premises[.]" Id. The housing agreement was executed between Katie and WKU. However, WKU entered into the housing agreement based on the authority it had been given by SLF through the management agreement, and thus, it served as an agent for SLF for the purpose of renting the dorm rooms. SLF was aware that there was a housing agreement between WKU and Katie, SLF accepted Katie's payment of rent through WKU, and SLF allowed Katie to reside in the dorm. By accepting the benefits of the contract between WKU and Katie, SLF adopted the housing agreement as its own. See Matzger v. Arcade Building & Realty Co., 141 P. 900, 905 (Wash. 1914).

[50] University of Maryland, 858 A.2d at 497.

affected, "because a landowner owes a duty of care to all lawful visitors."[51]

SLF argues that it owed no duty to Katie because, pursuant to the management agreement, WKU, not SLF, was the entity that contracted with Katie to provide her housing; that SLF was merely an agent of WKU; and that its only connection to Poland Hall was its ownership of the real property. Premises liability requires the presence of both possession and control over the premises, because the entity in possession is normally best able to prevent any harm to others.[52] A "possessor" is defined as a person who is in occupation of land with intent to control it.[53] It is undisputed that, at the time of the attack, SLF was the fee simple owner of Poland Hall; that WKU had entered into a management agreement with SLF to contract with students to live in the dorms; that under Article Four, Section 4.1 of the management agreement, WKU was responsible for providing security services to Katie and other residents of the dorms; that under Article Four, Section 4.9 of the management agreement, WKU was to hire all employees to manage and operate Poland Hall; and that all of WKU's duties under the management

[51] Michael J. Glazerman, Asbestos in Commercial Buildings: Obligations and Responsibilities of Landlords and Tenants, 22 Real Prop. Prob. & Tr. J. 661, 686 (1987).

[52] Merritt v. Nickelson, 287 N.W.2d 178, 180 (Mich. 1980).

[53] Restatement (Second) of Torts, § 328E (1965 & Supp. 2004).

agreement, were subject to the review and ultimate authority of SLF. In light of these facts, reasonable people might differ as to who had possession of Poland Hall; and thus, "the probative value of the evidence, and the conclusions to be drawn from it, lies in the hands of the jury."[54]

Article Six of the management agreement states that WKU shall have the status of independent contractor and shall have no authority, express or implied, to act as agent of SLF for any purpose "other than set forth in this Agreement" [emphasis added]. Restatement (Second) of Torts § 387 states that the fact that an independent contractor or servant, to whom the owner or possessor of land turns over its entire charge, is liable for its own negligence does not eliminate the liability of a possessor for the harm done. Further, if the relationship between the owner and the manager is a principal/agent relationship, the owner would be vicariously liable for the negligence of the manager under the doctrine of respondeat superior.[55] Thus, it is irrelevant for the purposes of managing the dorm whether WKU was SLF's agent or an independent contractor, as "[a] contract by which one party delegates and the other assumes a duty in respect to safety to persons or

[54] The Law of Torts, at § 37.

[55] See American General Life & Accident Insurance Co. v. Hall, 74 S.W.3d 688, 692 (Ky. 2002).

property . . . will not be permitted to [be used to] avoid personal responsibility to third persons" [citation omitted].[56] Therefore, if SLF were the possessor of Poland Hall and if the injuries to Katie were foreseeable, then SLF owed a duty to Katie to protect her from criminal acts of third persons.

In determining whether a duty exists, the most important factor is foreseeability.[57] "'"Forseeability"' means that a person of ordinary intelligence should have anticipated the dangers that his negligence created'"[58] [citations omitted]. In Waldon v. Housing Authority of Paducah,[59] this Court held that a landlord has a duty to take reasonable steps to prevent the infliction of injury on a tenant from reasonably foreseeable criminal acts of third persons. Waldon stated that "[i]n Kentucky, '[t]he rule is that every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury'" [emphasis original].[60] "A landlord is 'not a guarantor of the tenants' safety.' However, a landlord's conduct can make him liable to his tenant for the

[56] Louisville Cooperage Co. v. Lawrence, 313 Ky. 75, 78, 230 S.W.2d 103, 105 (1950).

[57] Pathways, Inc., 113 S.W.3d at 89.

[58] University of Maryland, 858 A.2d at 504.

[59] 854 S.W.2d 777, 779 (Ky.App. 1991).

[60] Waldon, 854 S.W.2d at 778 (quoting Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell, 736 S.W.2d 328 (Ky. 1987)).

criminal acts of third persons, if the landlord fails to take reasonable steps to avoid injury from reasonably foreseeable criminal acts" [citation omitted].[61]

In Waldon, the victim was shot and killed outside her public housing unit. The trial court granted summary judgment to the housing authority, but this Court reversed and held that there was a genuine issue as to a material fact as to whether the landlord took reasonable steps to prevent reasonably foreseeable criminal acts upon its tenant.[62] The housing authority argued that because the plaintiff estate could not prove that the housing authority "aided, abetted or participated" with the assailant, it could not prevail on its claim.[63] This Court disagreed and stated that "[e]ven an intervening criminal act does not relieve one for liability for his or her negligent acts or omissions, where the criminal act is a reasonably foreseeable consequence of the defendant's negligent act."[64]

Accordingly, in determining whether the injuries to Katie were foreseeable, evidence of prior similar incidents can

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[61] Waldon, 854 S.W.2d at 779 (quoting Davis v. Coleman Management Co., 765 S.W.2d 37 (Ky.App. 1989)).

[62] Id.

[63] Id. at 778.

[64] Id. at 779 (citing Wheeler v. Andrew Jergens Co., 696 S.W.2d 326 (Ky. 1985)).

be considered if relevant and if their probative value is not outweighed by undue prejudice.[65] This type of evidence may raise a triable issue of fact as to the foreseeability of the injuries.[66] If so, the jury will determine whether the security measures at Poland Hall as actually carried out by the employees prior to, during, and following the attack on Katie were reasonable under the circumstances,[67] and if not, whether the breach of the duty owed to Katie was a substantial factor in causing Katie's injuries. Only then could SLF, if it has in fact been found to be the possessor of Poland Hall, be held directly liable for Katie's injuries and resulting damages. Certainly the record in the case before us in its current state does not establish as a matter of law that SLF was not the possessor of Poland Hall, that the criminal acts in this case were not foreseeable, and that SLF did not breach its duty to Katie.

SLF made three arguments in support of the dismissal of Autry's claims against SLF. SLF concedes that it is not entitled to governmental immunity because it is not a governmental agency, but it asserts it is entitled to official immunity because it is an agent of WKU, a state agency entitled

[65] Isaacs, 695 P.2d at 663.

[66] Id. at 660.

[67] Id. at 663.

to governmental immunity in this case. There is no document of record establishing a relationship between WKU as principal and SLF as agent. While SLF is correct that an agency relationship can be established by implication[68] and by actions of the parties,[69] there is no basis for finding such a relationship in this case. SLF attempts to compare its relationship to WKU to that of the Kentucky High School Athletic Association (KHSAA) to the Board of Education in Yanero. However, a key distinction between the Board of Education/KHSAA relationship and the WKU/SLF relationship is that the Board of Education had statutory authorization to designate an organization to manage interscholastic athletics under KRS 156.070(2).[70]

WKU placed legal title of the dorm real estate in the name of SLF for the purpose of SLF's providing a vehicle to finance WKU's renovation of its residence halls and as part of a plan to use the bonding authority of Warren County to finance renovations of the dorms. SLF and WKU entered into an Amended and Restated Management Agreement dated November 20, 2000, wherein it is established that WKU is to manage the dorms for SLF and is SLF's agent to the extent as stated in the agreement, and is otherwise an independent contractor. There is no

[68] Kentucky-Pennsylvania Oil & Gas Corp. v. Clark, 57 S.W.2d 65 (Ky. 1933).

[69] Wedding v. Duncan, 310 Ky. 374, 380, 220 S.W.2d 564, 568 (1949).

[70] Yanero, 65 S.W.3d at 530.

contract between SLF and the students. The housing contract is directly between WKU and the students. Under the agreement, WKU charges fees to the students for housing, and then turns the fees over to SLF. SLF, in return, pays WKU $40,000.00 as a management fee. All renovations are the property of SLF; however, WKU has the exclusive option to purchase the real estate.

WKU's duties under the agreement include, but are not limited to: (1) management of the premises as residence halls for students of WKU; (2) billing and collecting revenues from students; (3) contracting on behalf of SLF for all services and utilities for the premises; (4) keeping the premises in good repair; (5) hiring, negotiating with, supervising, and discharging all employees (the employee shall be WKU employees but SLF reimburses WKU for all costs associated with said employees); (6) providing police services, fire protection services, and other reasonable security services; (7) maintaining insurance coverage; (8) inspecting the premises; (9) recommending the rate structure for housing fees; (10) establishing and enforcing housing policies; and (11) informing SLF of any problems or complaints at the dorms. An important aspect in the relationship between SLF and WKU is that all actions of WKU pertaining to the real estate owned by SLF are subject to the review and ultimate authority of SLF. Thus,

there is no support for SLF's claim that it was WKU's agent for the purpose of managing student housing.

SLF next asserts that Autry's claims against it were properly dismissed regardless of immunity because the criminal attack on Katie by Soules and Goodrum was a superseding cause of her injuries and death. SLF argues that since it had no direct contractual agreement with Katie, and since WKU was solely responsible for the operations of Poland Hall, SLF owed her no duty of care. Further, SLF argues that, since there is no dispute that intervening criminal acts caused Katie's death, it is a question of law as to whether the criminal acts constitute a superseding cause. SLF relies on James v. Meow Media, Inc.,[71] where the United States Court of Appeals for the Sixth Circuit held that a school shooting was not a foreseeable consequence of the viewing of the movies and the playing of the video games the defendants produced.[72] As stated above, we conclude under Waldon that there was no superseding cause that shielded SLF from liability.

As its third ground for dismissal of Autry's claims against it, SLF argues that Autry's failure to join the alleged criminal assailants, Soules and Goodrum, requires dismissal because they are indispensable parties to the action. In

[71] 300 F.3d 683, 691 (6th Cir. 2002).

[72] Id.

reviewing the record, it appears that the trial court found no merit in this argument, and we agree.

SLF bases its argument on KRS 411.182(1), which establishes that fault should be apportioned among those responsible for the injuries claimed and that CR 19 establishes that Soules and Goodrum are "indispensable parties." In Cabinet for Human Resources v. Kentucky State Personnel Board,[73] this Court discussed the law on indispensable parties as follows:

> When one litigant believes there to be an indispensable party it should request the court to order joinder by the simple expedient of filing a motion. If the court concurs then service of process shall issue, but in any event, it should be accomplished by a pleading or motion and a brief is neither. CR 7.01. Therefore, appellant did not preserve the issue in the trial court . . . .[74]

Similarly, SLF had the opportunity to request the joinder of Soules and Goodrum, but did not do so; and thus, it failed to preserve this claim for appellate review in the trial court. While Soules and Goodrum could perhaps be joined as parties for apportionment, that obligation falls on SLF and not Autry.

For SLF to be entitled to a judgment as a matter of law, it must show (1) that it was impossible for Autry to produce any evidence in her favor on one or more of the genuine

[73] 846 S.W.2d 711 (Ky.App. 1992).

[74] Id. at 714.

issues of material fact, (2) that under the undisputed facts of the case, it owed no duty to Katie, or (3) that, as a matter of law, any breach of a duty it owed to Katie was not a legal cause of her injuries.[75] Even though WKU was the manager and operator of Poland Hall, all its actions were under the ultimate authority of SLF. Before the trial court entered the orders of dismissal, very limited discovery had occurred. After viewing the facts in this case in the light most favorable to the party opposing summary judgment, we conclude that the trial court failed to consider the appropriate issues and improperly dismissed Autry's claims against SLF.

Accordingly, the orders of the Warren Circuit Court dismissing Autry's claims against WKU and the WKU employees in their official capacities are affirmed. The order of the Warren Circuit Court dismissing Autry's claims against SLF is reversed and this matter is remanded for further proceedings consistent with this Opinion.

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[75] Pathways, Inc., 113 S.W.3d at 89.

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