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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001570-MR

BRANDON E. WALLING APPELLANT

v.

APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE WILLIAM W. TRUDE, JR., JUDGE
ACTION NO. 03-CI-00075

WAYNE ABNEY AND
ESTILL COUNTY FISCAL COURT APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND DIXON, JUDGES; ROSENBLUM,[1] SENIOR JUDGE.

ABRAMSON, JUDGE: On July 14, 2002, Harold Durham, Jr., assaulted Brandon Walling in the booking area of the Estill County Jail where both men were prisoners. Walling's cheek bone was shattered in the assault and the vision in one eye impaired. Several surgeries were required to repair the damage. In March 2003, Walling filed suit against Durham; Wayne Abney, who was the Estill County Jailer at the time of the

[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

assault; and the Estill County Fiscal Court. He alleged, in addition to Durham's assault, that the jailer and the Fiscal Court had negligently failed to prevent it. Durham was dismissed from the case in May 2003, pursuant to a settlement in which he agreed to pay Walling $25,000.00. The Fiscal Court was dismissed in October 2004, on the ground of sovereign immunity. Walling's claim against the former jailer, Abney, was dismissed pursuant to a July 13, 2006 Summary Judgment, in which the Estill Circuit Court ruled that Walling had failed to proffer any admissible evidence tending to show that the assault had been foreseeable. Appealing from the latter two rulings, Walling contends that the General Assembly has waived the Fiscal Court's immunity and that the trial court erred when it deemed his proffered proof either inadmissible or inadequate. Finding no error, we affirm.

Although Durham, Walling, and the deputies on duty at the time offered deposition accounts of the assault which differed in many particulars, there is no dispute that neither Durham nor Walling was a stranger at the jail, that the two men were known to be friends, and that Durham had, on at least one prior occasion, helped procure Walling's release from jail. Neither man had ever before been involved in an altercation in the jail, and, although Durham had once been charged as complicit in an assault, that charge had been dismissed. Neither Durham nor Walling otherwise had a record of or reputation for violence.

In July 2002, Durham was serving a sentence for a drug-related offense. The night before the assault, Walling was arrested, as he had been many times before, for

public intoxication. He spent the night in the jail's drunk tank, and the next day, when his father refused to bail him out, he asked one of the two deputies on duty if he could speak with Durham, hoping, he testified, that Durham would loan him bail money. He assured the deputy that there was no bad blood between them. Apparently one of the deputies while leading a group of prisoners to the recreation area allowed Durham to enter the booking area where Walling was waiting and left them there as he attended to the other prisoners. The other deputy was in the jail's control room. No sooner had Walling asked for bail money than Durham punched him, and, according to Walling, proceeded to beat and kick him. Walling testified at his deposition that the assault came out of the blue, that he and Durham were friends, but that, when he asked for the bail money, Durham "just started hitting [him]."

Walling contends, apparently, that the deputies should have disallowed or at least supervised the interview and that their failure to do so was symptomatic of an endemic laxness at the jail, a laxness created by the jailer's and the Fiscal Court's failure to provide suitable training as well as their failure to implement and enforce appropriate policies and procedures. There was deposition testimony, indeed, by one of the deputies and by Abney, suggesting that security in this small, seventeen-bed jail was possibly not as strict as it would be in a larger facility, but we agree with the trial court that this evidence was not sufficient to overcome Abney's summary judgment motion.

Summary judgment, of course, is appropriate only

> if the pleadings, depositions, answers to interrogatories, stipulations 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.

CR 56.03. As Walling correctly points out, summary judgment should not be granted unless, viewing the record favorably to the adverse party, it appears "that the adverse party cannot prevail under any circumstances." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). On the other hand, however,

> a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial.

Rowan County v. Sloas, 201 S.W.3d 469, 474 (Ky. 2006) (citations and internal quotation marks omitted). The question, then, is whether Walling's proffered evidence concerning allegedly lax supervision in general at the jail adequately raises an issue of negligence with respect to the particular assault that caused Walling's injury. We agree with the trial court that it does not.

As the parties correctly observe, under Kentucky law the county jailer has a duty "to exercise reasonable and ordinary care and diligence to prevent unlawful injury to a prisoner placed in his custody, but he cannot be charged with negligence in failing to prevent what he could not reasonably anticipate." *Lamb v. Clark,* 282 Ky. 167, 138 S.W.2d 350, 352 (1940); *Franklin County v. Malone,* 957 S.W.2d 195 (Ky. 1997). Walling apparently contends that the jailer should have anticipated that his allegedly lax supervisory practices would sooner or later result in the sort of assault and injury that Walling suffered. Even assuming, however, that the jail's discipline could be deemed lax

in the ways Walling alleges, we are convinced that the jailer's negligence liability requires a showing that he should reasonably have perceived not just a general potential for harm since jails are inherently dangerous places, but the particular harm that actually occurred. *Cf. City of Lexington v. Greenhow,* 451 S.W.2d 424, 426 (Ky. 1970) (noting that "[t]he jailer is not an insurer of the safety of the prisoners under his control."). Here it is clear that nothing in the background of either Walling or Durham was sufficient to put Abney or his deputies on notice that violence was apt to erupt between them. On the contrary, their friendship, their previous behavior as prisoners, and Walling's request to see Durham all suggested the contrary. We agree with the trial court, therefore, that Walling's evidence of allegedly lax security practices was not sufficient to raise a genuine issue concerning the jailer's negligence, and to that extent summary judgment was appropriate.

Following Abney's initial motion for summary judgment, Walling produced an affidavit by Luther Hall, who claims to have been Durham's cell mate in July 2002 at the time of the assault. Hall avers that "[p]rior to this assault I was present when Junior Durham called Wayne Abney on his cell phone and told him that the assault on Brandon was about to occur in two minutes. He then put on all of his rings and took a roll of quarters and left the cell." Walling maintained that Hall's testimony would raise a triable issue as to whether Abney and his deputies should reasonably have anticipated and attempted to prevent the assault. The trial court, ruled, however, that Hall's proffered

testimony was inadmissible hearsay, and thus that it could not serve to stave off summary judgment.

In reaching this conclusion, the trial court considered and rejected Walling's arguments that, although hearsay, Hall's testimony should be deemed admissible under KRE 801A(b)(5) as the statement of a co-conspirator; under KRE 801A(c)(3) as a statement of a person in privity with a party; and under KRE 804(b)(3) as a statement against Durham's interest. On appeal, Walling does not challenge any of the trial court's rulings as erroneous, but contends rather that yet another evidence rule, KRE 803(3), the "state of mind" exception to the hearsay rule, authorizes the admission of Hall's proffered testimony. This contention was not among those Walling addressed to the trial court, and thus we are again faced with a party attempting to feed one can of worms to the trial court and a different can to us, a practice our Supreme Court has many times condemned. *Carrier v. Commonwealth,* 142 S.W.3d 670 (Ky. 2004) (citing *Kennedy v. Commonwealth,* 544 S.W.2d 219 (Ky. 1976)). With respect to evidentiary rulings, our Supreme Court has noted that "[e]rror is not preserved if the wrong reason is stated for the objection." *Young v. Commonwealth,* 50 S.W.3d 148, 168 (Ky. 2001) (citing *Tamme v. Commonwealth,* 973 S.W.2d 13, 33 (Ky. 1998)). Because Walling did not preserve this new contention by giving the trial court an opportunity to consider it, we decline to address it now. We conclude, therefore, that Hall's proffered testimony was properly excluded and thus that it provided no basis for the denial of summary judgment.

Finally, with respect to the dismissal of Walling's complaint against the Fiscal Court, Walling acknowledges that as a general rule Kentucky's counties, as basic subdivisions of the Commonwealth, are entitled to sovereign immunity. *Lexington-Fayette Urban County Government v. Smolcic,* 142 S.W.3d 128 (Ky. 2004). The Fiscal Court, likewise, as the County's principal governing body, enjoys the same immunity. *Yanero v. Davis,* 65 S.W.3d 510 (Ky. 2001). Walling contends, however, that with KRS 441.025, which mandates that counties make provision for the incarceration of persons arrested in the county, and KRS 441.045, which requires the county governing body to prescribe rules for the safe, secure, and sanitary operation of the county jail and for the comfort and treatment of prisoners, the General Assembly waived the Fiscal Court's immunity with respect to damages claims based on the alleged mismanagement of the jail. We disagree.

In *Withers v. University of Kentucky,* 939 S.W.2d 340 (Ky. 1997), our Supreme Court held that waiver of immunity may be found only "where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Id.* at 346 (citations and internal quotation marks omitted). Suffice it to say that neither of the cited statutes states anything expressly about the waiver of immunity, nor do they discuss enforcement of their mandates or damages in such a way as to imply that waiver of immunity was the General Assembly's unstated intention. On the contrary, KRS 441.045(2), the only subsection that addresses enforcement, provides that "[w]illful violation of the rules

promulgated pursuant to subsection (1) of this section [the rules meant to govern the jail] shall be deemed a violation." If anything, this amounts to an implicit rejection of a damages remedy, not an overwhelming implication that one was intended. The trial court did not err, therefore, when it dismissed Walling's claims against the Fiscal Court on the ground of immunity.

In sum, although the attack on Walling was unfortunate, we agree with the trial court that Walling failed to proffer any proof that Abney or his deputies had reason to anticipate it. Without such proof Walling's claim against Abney could not succeed, and thus summary judgment dismissing that claim was appropriate. The trial court also correctly ruled that the Estill Fiscal Court is immune from Walling's damages claim. Accordingly, we affirm the October 8, 2004 Order and the July 13, 2006 Summary Judgment of the Estill Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Allan David Wickersham, Jr.
Luxon, Patterson & Wickersham, PLLC
Richmond, Kentucky

BRIEF FOR APPELLEE:

Shelby C. Kinkead, Jr.
Kinkead & Stilz, PLLC
Lexington, Kentucky