

RENDERED: JANUARY 22, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000667-MR

ELIZABETH S. JAMES; AND
ELIZABETH ANN JAMES, BY
NEXT FRIEND CLIDE JAMES

APPELLANTS

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE MARC I. ROSEN, JUDGE
ACTION NO. 03-CI-00133

ASHLAND HOSPITAL CORPORATION
D/B/A KING'S DAUGHTERS
MEDICAL CENTER

APPELLEE

OPINION AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; BUCKINGHAM,¹
SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Elizabeth S. James and Elizabeth Ann James,
by next friend, Clide James, appeal from a summary judgment granted in favor of

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Ashland Hospital Corporation, d/b/a King's Daughters Medical Center, on their claims of negligence arising from the birth of Elizabeth Ann. Appellants argue that summary judgment was inappropriate because there is sufficient evidence of physical injury to sustain Elizabeth Ann's physical injury claim and sufficient evidence of physical contact to sustain their claims for emotional distress. We disagree and thus affirm.

Elizabeth S. James arrived at King's Daughters Medical Center in Boyd County, Kentucky, on February 7, 2002. She was pregnant and delivery was imminent. Upon arrival, it was alleged that a nurse instructed Mrs. James to go into the bathroom and change into a gown before she was examined. While in the bathroom, Mrs. James gave birth while straddling the commode. The child fell into the water and was quickly pulled out. The child was examined following delivery and was determined to be a normal, healthy baby. Neither mother nor child received any additional medical treatment associated with the delivery.

Appellants filed a complaint in Boyd Circuit Court alleging negligence on the part of King's Daughters in connection with the delivery of the child. Following a hearing, the trial court entered summary judgment in favor of King's Daughters finding that a claim for emotional distress and suffering cannot stand without evidence of physical contact or injury.² This appeal followed.

“The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material

² The trial court's order did not specifically address Elizabeth Ann's physical injury claim.

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). “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr.*, 807 S.W.2d 476, 480 (Ky. 1991). “Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact.” *Id.* Further, “the movant must convince the court, by the evidence of record, of the nonexistence of an issue of material fact.” *Id.* at 482. “The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law.” *Pearson ex rel. Trent v. Nat’l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002).

Separate from the claim for emotional distress, Appellants first argue that there is sufficient evidence of Elizabeth Ann’s physical injury to overcome the motion for summary judgment. Specifically, they allege that the nurse dropped the child into the commode and had to pat the child on the back to remove water from her lungs after pulling her from the water.

In order to prevail on a claim of negligence, the plaintiff must prove: “(1) the defendant owed the plaintiff a duty of care, (2) the defendant breached the standard by which his or her duty is measured, and (3) consequent injury.”

Pathways, Inc. v. Hammons, 113 S.W.3d 85, 88 (Ky. 2003). “Consequent injury”

is separated into two distinct elements: “actual injury or harm to the plaintiff and legal causation between the defendant’s breach and the plaintiff’s injury.” *Id.* at 89.

Appellants have not demonstrated any evidence of actual injury to Elizabeth Ann. Mrs. James stated that the child has not been back to a doctor for any reason since the delivery, is not receiving any prescription medication, and is now school-age without any health problems. While the circumstances surrounding the birth were undoubtedly traumatic, there is no evidence that the child suffered any actual injury as a result of the delivery. Therefore, summary judgment on Elizabeth Ann’s physical injury claim was appropriate.

Next, Appellants argue that there was sufficient evidence of physical contact to support their claims for emotional distress. Appellants cite *Deutsch v. Shein*, 597 S.W.2d 141 (Ky. 1980), for the proposition that any contact, however slight or trifling, will support a cause of action for the negligent infliction of emotional distress.

In *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920 (Ky. 2007), the Kentucky Supreme Court examined *Deutsch* and stated the impact rule as follows:

It is not enough that emotional distress be accompanied by contact - it must be *caused* by the contact. This also means that any contact must precede the emotional distress before recovery is permissible under a negligence theory.

Id. at 929 (emphasis in original).

Appellants list five examples of contact to support their claims for emotional distress: (1) contact between Mrs. James and her child during delivery; (2) contact between Mrs. James and the bathroom wall as she beat on the wall while calling for help; (3) contact between Mrs. James and the commode as she sat on it; (4) contact between Mrs. James and the hospital gown as it was tossed to her from a nurse; and (5) contact between Mrs. James and a hospital wheelchair as she rode in it.

The record reflects that Mrs. James, her husband, Clide James, and another witness all testified that no nurse physically touched Mrs. James or the child until after the delivery. Further, the contacts listed above did not cause the alleged distress; rather, they merely accompanied it. We conclude that summary judgment on the emotional distress claim was likewise appropriate.

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

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE:

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