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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001934-MR

WENDI COHORN, Individually and as Administratrix of the Estate of BLAKE COHORN, a deceased minor; and ROCKY COHORN, Individually — APPELLANTS

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE PAUL ISAACS, JUDGE
ACTION NO. 13-CI-00237

CARLOS CARCAMO; CITY OF VERSAILLES POLICE DEPARTMENT; AND RONNIE FIELDS — APPELLEES

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: KRAMER, D. LAMBERT, AND STUMBO, JUDGES.

D. LAMBERT, JUDGE: Wendi Cohorn, in her individual capacity and as the administratrix of the estate of Blake Cohorn, and Rocky Cohorn appeal from a November 12, 2014 order of the Woodford Circuit Court dismissing their claims

against Officer Carlos Carcamo, the City of Versailles Police Department, and Deputy Ronnie Fields. After review, we affirm.

I. BACKGROUND

On April 21, 2013, Wendi Cohorn and Blake Cohorn were passengers in a vehicle driven by Rocky Cohorn (collectively, "the Cohorns"). The Cohorns' vehicle was struck head-on by a vehicle traveling in the wrong direction operated by Alfonso Diaz-Diaz ("Diaz-Diaz"). The collision occurred in Woodford County, Kentucky, and resulted in the death of five-year-old Blake Cohorn. Wendi and Rocky Cohorn were also severely injured.

In the hours leading up to the fatal collision, Diaz-Diaz consumed alcohol while a patron of a public rodeo hosted by Hodge Stable and Arena in Woodford County. Hodge Stable and Arena sold alcoholic beverages to the rodeo's patrons without having a permit to do so. Diaz-Diaz was driving while intoxicated at the time of the collision.[1]

Appellee Carlos Carcamo ("Carcamo") was employed as an officer with the City of Versailles Police Department. Appellee Ronnie Fields ("Fields") was employed as a deputy with the Woodford County Sheriff's Department. Both were working security for Hodge Stable and Arena at the rodeo on the evening of April 21, 2013.

During the rodeo, Carcamo learned that two male patrons, one of whom was Diaz-Diaz, were causing a disturbance. Carcamo subsequently located

[1] Diaz-Diaz was subsequently convicted of murder, first-degree assault and first-degree wanton endangerment in Woodford Circuit Court.

the two men, confronted them, and observed that Diaz-Diaz was intoxicated. Carcamo then ordered Diaz-Diaz to leave the premises via the venue's parking lot. Diaz-Diaz complied. It is not clear from the record what interaction Fields had with Diaz-Diaz. Regardless, the fatal roadway collision occurred after Diaz-Diaz left the rodeo.

Based on the events of April 21, 2013, the Cohorns sued the appellees in Woodford Circuit Court. The appellees defended that they do not owe the Cohorns a duty of care under the circumstances and moved for the circuit court to dismiss the action. The circuit court granted dismissal on November 12, 2014, albeit after amending a previous opinion and order that compared the information contained in the Cohorns' complaint to information later provided in their response to the appellees' motion to dismiss. This appeal followed.

II. STANDARD OF REVIEW

Motions to dismiss present questions of law and are reviewed *de novo* on appeal. *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002). However, a motion to dismiss is treated as a motion for summary judgment pursuant to CR[2] 56 if "matters outside the pleadings are presented to and not excluded by the trial court." CR 12.02. The standard of review governing appeals from summary judgment is well-settled. Appellate courts must review a summary judgment decision to determine whether the trial court correctly found that there were no genuine issues of material fact and that the moving party was entitled to a

[2] Kentucky Rules of Civil Procedure.

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." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Furthermore, appellate courts do not need to defer to the trial court because no findings of fact are at issue. *Goldsmith v. Allied Building Components, Inc.*, 833 S.W.2d 378, 381 (Ky. 1992).

III. DISCUSSION

Here, the circuit court specifically compared the location of Hodge Stable and Arena as alleged in the Cohorns' complaint to the location they later provided in their response to the appellees' motion to dismiss. Therefore, we will analyze the Cohorns' arguments as an appeal from summary judgment. *Waddle v. Galen of Kentucky, Inc.*, 131 S.W.3d 361, 364 (Ky. App. 2004).

Having established the proper standard of review for this appeal, we must now uphold the circuit court's decision to grant summary judgment in favor of Fields because the Cohorns did not challenge this decision in their appellant brief and instead only focused on the potential liability of Carcamo and the Versailles Police Department. It is the law of this Commonwealth that appellants seeking review before this Court "must ensure their briefs comply with our Rules of Civil Procedure," and that the failure of an appellant's brief to include an "'ARGUMENT' conforming to the Statements of Points and Authorities" violates CR 76.12(4)(c)(v)). *Harris v. Commonwealth*, 384 S.W. 3d 117, 130-31 (Ky. 2014). Therefore, we will not address the allegations against Fields.

1. **Carcamo did not owe a duty of care to the general public under *Chipman* or *Gaither.***

Substantively, the Cohorns argue that the circuit court misapplied the holding of *City of Florence v. Chipman*, 38 S.W.3d 387 (Ky. 2001), in determining that Carcamo did not owe a duty of care. They further argue that the facts of *Chipman* are distinguishable from those of the instant case because of the foreseeable harm created when Carcamo knowingly ordered an intoxicated Diaz-Diaz to leave the rodeo. In support of this latter position, the Cohorns cite our Supreme Court's recent decision in *Gaither v. Justice & Public Safety Cabinet*, 447 S.W.3d 628, 636 (Ky. 2014). After examining both *Chipman* and *Gaither*, however, we agree with the circuit court.

In *Chipman*, police officers stopped two vehicles after one was spotted chasing the other down the road. There were two individuals in the lead vehicle, a driver and a passenger, and one driver in the chasing vehicle. As a result of the stop, the officers arrested the driver of the lead vehicle for DUI. They then allowed the passenger of the lead vehicle to leave with the driver of the chasing vehicle. The passenger was later killed when the driver of the chasing vehicle, who was also intoxicated, crashed his vehicle. The passenger's estate sued the city and the police officers for negligence. The Supreme Court held on appeal that summary judgment for the officers was appropriate because they did not owe the passenger a duty of care. According to the Court, "In order for a claim to be

actionable in negligence, there must be the existence of a duty" and absent a special relationship between the police officers and the victim, "there is no duty owing from any of the police officers to [the victim] to protect her from crime or accident." *Chipman*, 38 S.W.3d at 392. Such a special relationship is necessary to avoid imposing "a universal duty of care on the police to prevent any third party harm to each and every citizen with whom they have contact[,]" which would "severely reduce the ability of . . . [police officers] to engage in any discretionary decision-making on the spot." *Id.* at 393. The plaintiff must satisfy the following two conditions in order to show the existence of a special relationship: (1) the victim must have been in state custody or otherwise restrained by the state at the time the injury producing act occurred, and (2) the violence or other offensive conduct must have been committed by a state actor. *Id.* at 392 (citing *Fryman v. Harrison*, 896 S.W.2d 908 (Ky.1995)).

In *Gaither*, the Kentucky State Police (KSP) recruited an eighteen-year-old Gaither to make controlled drug buys from suspected drug dealers and provide grand jury testimony against them. The KSP did not make an effort to conceal Gaither's identity when he testified, however, and his status as a confidential informant was eventually compromised. Gaither was later killed during a botched drug-buy operation, and his estate sued the KSP before the Kentucky Board of Claims. On appeal from another panel of this Court, the Supreme Court deviated from the two-pronged "special relationship" test originally articulated in *Fryman* and applied in *Chipman* to hold that the KSP owed a duty of

ordinary care to Gaither. The Court explained that "[t]he 'special relationship' rule was developed in the context of injuries suffered by members of the general public disassociated with and far removed from negligent acts that allegedly caused their injuries." *Gaither*, 447 S.W.3d at 637-38. Moreover, the Court cautioned against applying "a rule based upon the lack of a foreseeable injury in a case where the injury was uniquely foreseeable" and where "a state agency actually created a connection with the injured claimant, and then repeatedly fostered the continuation of that relationship." *Id.* at 638.

Here, the Cohorns cannot establish the existence of a special relationship with a police officer even though Carcamo knowingly ordered an intoxicated Diaz-Diaz to leave the rodeo premises via the parking lot. The Cohorns were never in custody, and no state actor perpetrated the fatal collision. Moreover, though it was foreseeable that Diaz-Diaz would cause a fatal traffic collision, the circumstances do not resemble those "uniquely foreseeable" circumstances of *Gaither*. Carcamo had no connection with the Cohorns of any sort, much less a continuous state-created relationship. Instead, the Cohorns can more appropriately be classified as "members of the general public who . . . by happenstance indirectly [fell] victim[s] to police negligence." *Id.* at 639. Without a special relationship, Carcomo did not owe the Cohorns a duty of care and there was no negligence to impute to the Versailles police department. *See Cohen v. Alliant Enterprises, Inc.*, 60 S.W.3d 536, 538 (Ky. 2001) (explaining that the test as to the liability of the master is whether the servant was negligent). As we are

bound to follow *Chipman*, the decision of the Woodford Circuit Court is hereby affirmed.

ALL CONCUR.

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