

RENDERED: DECEMBER 2, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001094-MR

CANDICE MARIE HAGAN

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE RICHARD BRUEGGEMANN, JUDGE
ACTION NO. 12-CI-02019

FRISCH'S RESTAURANTS, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, MAZE AND STUMBO, JUDGES.

STUMBO, JUDGE: Candice Marie Hagan appeals from an Order of the Boone Circuit Court granting Summary Judgment in favor of Frisch's Restaurants, Inc.

Hagan raises several claims of error, including her contention that Frisch's violated a statutory duty of care, and that Frisch's knew or should have known that Hagan was an abused or neglected child. For the reasons stated below, we AFFIRM the Order on appeal.

In 1995, while Hagan was 16 years old, she began employment as a waitress at Frisch's Restaurant in Burlington, Kentucky. She would later allege that one evening while closing the restaurant, Frisch's manager, Bryan Burrows, told her to meet him in the employee bathroom. Hagan complied with Burrows' request. Burrows met Hagan in the bathroom and allegedly raped her. At least two other Frisch's employees were at the restaurant during the alleged rape, but would later testify by way of deposition that they were not aware of the incident.

After the purported rape, Hagan returned to the common area where Frisch's employee, Jeff Underwood, asked her if she were okay and if Burrows did anything wrong. Underwood had assumed that Hagan and Burrows were in the employee bathroom because he could not locate them elsewhere in the restaurant. Hagan responded that "everything's okay".

Hagan would later testify that she returned to work at Frisch's the next day because she did not want anyone to suspect anything. When she came to work that day, two people from Frisch's upper-level management spoke with her at the restaurant. They were there to inquire if Burrows did anything improper to her the day before. Hagan responded that nothing had happened. She would later state that she responded in the negative because she wanted the incident to go away and she did not want to think about it anymore. Hagan quit her employment the following day.

Some 17 years later, on October 16, 2012, Hagan filed the instant action in Boone Circuit Court against Frisch's Restaurants, Inc.¹ By way of an Amended Complaint, Hagan sought damages for alleged Negligence, Negligence *Per Se*, Intentional Infliction of Emotional Distress ("IIED"), Loss of Consortium, and Hostile Work Environment. The basis of the Complaint was Hagan's allegation that Frisch's knew or should have known of the alleged rape/sexual abuse, and that Frisch's breached its duty under Kentucky Revised Statute (KRS) 620.030 to report the incident to authorities. Hagan argued that Frisch's had ample cause to believe that she had been abused, but intentionally, recklessly and/or negligently failed to report the incident in violation of statute.

The matter proceeded in Boone Circuit Court, whereupon Frisch's moved to dismiss some counts of the Complaint. By way of Order rendered on January 4, 2013, the court dismissed Count III for IIED and Count IV for Loss of Consortium. Thereafter, Frisch's moved for Summary Judgment on the remaining counts. Frisch's argued that the remaining claims should be dismissed for being filed outside the respective statutes of limitation.

On July 10, 2015, the court rendered an Order sustaining Frisch's Motion. The court determined that KRS 413.140 applied to all remaining claims other than Hostile Work Environment. Applying this provision to the negligence claim, the court found that because Hagan was a minor at the time of the alleged incident, the statute did not run until she reached the age of 18 on January 20,

¹ Hagan's husband, Paul, was also a Plaintiff, but did not join in the appeal.

1999. The court reasoned that under KRS 413.140, Hagan had 1 year, or until January 20, 2000, to file her Complaint. Hagan filed her initial Complaint on October 16, 2012.

As to Count V Hostile Work Environment, the court determined that KRS 413.120(2) imposed a five-year statute of limitations. It found that this period of limitation began on Hagan's 18th birthday, thus requiring this cause of action to be asserted, if at all, by January 20, 2004. Finally, the court addressed Hagan's claim of Negligence *Per Se*, which asserted that Frisch's violated KRS 620.030 in failing to report that she had allegedly been abused by Burrows. Citing *Readnour v. Gibson*, 452 S.W.3d 617, 621 (Ky. App. 2014), the court determined that a Negligence *Per Se* claim is merely another form of Negligence, thus implicating a one-year statute of limitations. The court rejected Hagan's contention that despite her repeated denials, Frisch's should have known that something occurred in the bathroom and therefore should have reported the possibility of abuse. Ultimately, the court concluded that Hagan had not overcome Frisch's proof or otherwise demonstrated a basis for tolling the statutes of limitation. It sustained Frisch's Motion for Summary Judgment, and this appeal followed.

Hagan now argues that the Boone Circuit Court erred in sustaining Frisch's Motion for Summary Judgment. Citing KRS 600.020(8),² which defines "child" as any person under eighteen years of age, Hagan maintains that she was a

² After the filing of the briefs in this case, KRS 600.020 was amended. The definition of "child" is now found in KRS 600.020(9).

“child” at the time of the alleged incident, and that Burrows was a “person in a position of authority” and a “person of special trust” pursuant to KRS 532.045(1)(a) and (b). Hagan contends that on July 25, 1995, Burrows, while exercising control over Hagan, used, allowed, permitted, and encouraged the use of Hagan for the purposes of his own sexual stimulation.

Hagan goes on to argue that Frisch’s knew or had reason to know that she was an abused or neglected child. She notes that Frisch’s investigated the incident the day after its alleged occurrence, interviewed all relevant parties, and was aware of the allegation of sexual abuse as against a minor. In her view, and given the foregoing, Frisch’s breached its duty under KRS 620.030 to report the allegation to the authorities. This breach, she maintains, forms a proper basis for the cause of action now asserted.

Finally, while acknowledging that Kentucky’s one-year statute of limitation applies to her claims, Hagan argues that the statute was tolled under the doctrines of discovery and concealment. That is, Hagan argues that she did not discover Frisch’s failure to report until 2012. She contends that she did not know prior to 2012 that Frisch’s had a duty to report, nor that Frisch’s had allegedly wrongfully failed to carry out that duty. Thus, Hagan argues that the statutory period was tolled until her discovery in 2012, and that the instant action was properly filed within one year of that discovery. In sum, Hagan seeks an Order reversing the Boone Circuit Court’s entry of Summary Judgment, and remanding the matter for further proceedings.

In considering these issues and sustaining Frisch's Motion for Summary Judgment, the Boone Circuit Court focused on the application of two statutes of limitations. The court determined, and Hagan so agrees, that the one-year statutory period set out in KRS 413.140 applies to each of Hagan's claims except Hostile Work Environment. The claim of Hostile Work Environment is subject to a five-year statute of limitations pursuant to KRS 413.120(2). It is undisputed by the parties that the statutory period does not commence until the Plaintiff reaches the age of majority. KRS 413.170.

As the respective statutory periods are not at issue, nor is there any dispute that the periods of limitation were tolled until Hagan reached the age of majority, the primary question for our consideration is whether the Boone Circuit Court properly rejected Hagan's contention that her claims were tolled under the doctrines of discovery and concealment. Hagan asserts that the negligence and/or gross negligence claims in this case arise from Frisch's violation of its statutory duty to report what it knew or had reason to know, to wit, that Hagan was an abused and neglected child. As noted above, Hagan maintains that she did not know prior to 2012 that Frisch's had a duty to report, nor that Frisch's had allegedly wrongfully failed to carry out that duty. Accordingly, Hagan argues that the doctrines of discovery and concealment operate to toll the running of the statutory periods until 2012 when she became aware of the cause of action.

“[T]he discovery rule is available only in cases where the fact of injury . . . is not immediately evident or discoverable with the exercise of

reasonable diligence[.]” *Fluke Corp. v. LeMaster*, 306 S.W.3d 55, 60 (Ky. 2010). KRS 413.140 begins to run from the date “the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that he has been injured but also that his injury may have been caused by the defendant's conduct.” *Louisville Trust Co. v. Johns-Manville Products Corp.*, 580 S.W.2d 497, 501 (Ky. 1979) (footnote omitted). The cause of action accrues on the date of the injury to the person even though the full extent of the injury is not known for years later. *Caudill v. Arnett*, 481 S.W.2d 668, 669 (Ky. 1972).

There is no question but that Hagan knew in 1995 that she allegedly was sexually assaulted. The damages were immediately known, and are not of the type requiring diligence or knowledge as in latent injuries. Hagan directs our attention to *Fayette County Bd. of Educ. v. Maner*, 2007 WL 1423966, 2007-CA-002243-MR (Ky. App. 2007), wherein the Plaintiff was a minor who was sexually abused while attending high school but did not prosecute a civil action until she was 40 years old. *Maner*, however, is distinguishable from the instant facts in that the *Maner* defendants actively concealed their conduct and intentionally obstructed the Plaintiff from a remedy. As the Boone Circuit Court properly determined in its order on appeal, the facts of *Maner* are significantly different from those now before us. Whereas in *Maner* both the abused child and her mother reported the abuse and sought help from the Fayette County Board of Education, Hagan never reported that she had been raped, abused or sexually harassed. Rather, she repeatedly denied to both Jeff Underwood and Frisch’s corporate supervisors that

anything improper had occurred. She maintains that despite her repeated denials, Frisch's should have known that something improper occurred in the bathroom and should have reported the matter to authorities. While one may sympathize with the plight of a minor who was allegedly sexually assaulted, and recognize the motivation for her denials, it is nevertheless true that the standard of care under KRS 620.030 requires a showing that Frisch's had reasonable cause to know Hagan was sexually assaulted.

The focus of Hagan's argument on this issue is that the statutory period must be tolled until 2012 when she learned that she had a statutory cause of action based on Frisch's alleged improper failure to report the matter at the time of its occurrence. It is one's knowledge that she has been wronged, not the knowledge that the wrong is actionable, which begins the running of the statute of limitation. "Perhaps it's true that appellant did not know she had a cause of action at that time, but that is immaterial. The knowledge that one has been wronged and by whom starts the running of the statute of limitations . . . not the knowledge that the wrong is actionable." *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 641 (6th Cir. 1986), quoting *Graham v. Harlin, Parker & Rudloff*, 664 S.W.2d 945, 947 (Ky. App. 1983).

As a general rule, a Plaintiff seeking the tolling of a statute of limitation bears the burden of establishing two elements: first, that she has pursued her rights diligently, and second that some extraordinary circumstance stood in her way. *Moorman v. Commonwealth*, 484 S.W.3d 751, 757 (Ky. App. 2016), citing

Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S.Ct. 1807, 1814, 161 L.Ed.2d 669 (2005). Hagan failed to meet this burden.

The matter is before us via an Order sustaining Frisch's Motion for Summary Judgment. Summary judgment "shall be rendered forthwith 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. "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 Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id.* "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.* Finally, "[t]he 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 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).

When viewing the record in a light most favorable to Hagan and resolving all doubts in her favor, we conclude that the Boone Circuit Court correctly found that there were no genuine issues as to any material fact and that Frisch's was

entitled to a Judgment as a matter of law. For the foregoing reasons, we AFFIRM the July 10, 2015 Order of the Boone Circuit Court sustaining Frisch's Motion for Summary Judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:

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