RENDERED: June 12, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-3354-MR

LOIS DEVASIER, as Administratrix of the Estate of KENNEITHA CRADY — APPELLANT

v. — APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE EDWIN A. SCHROERING, JR., JUDGE
ACTION NO. 96-CI-003734

GALEN OF VIRGINIA, INC. d/b/a UNIVERSITY OF LOUISVILLE HOSPITAL; DR. WILLIAM JAMES; INPSYCH KY., INC.; DR. GERALD CHAMBERS; and CINDY DUNCAN, L.C.S.W. — APPELLEES

OPINION
REVERSING AND REMANDING

* * *

BEFORE: BUCKINGHAM, KNOX, AND MILLER, JUDGES.

KNOX, JUDGE: This is a wrongful death action in which the administratrix of the estate of Kenneitha Crady appeals from an order of the Jefferson Circuit Court dismissing her complaint for failure to state a claim. Because we believe that appellant's complaint does, in fact, state a cause of action, and because the trial court's summary dismissal was premature in light of CR 12.02 and CR 12.03, we reverse and remand.

In July 1995, the eight-year relationship between Kenneitha Crady (Crady) and her boyfriend, Rene Cissell (Cissell), was coming to an end. Cissell, however, did not want to end the relationship. In mid-July, Cissell apparently rammed his car into a parked car in which Crady was sitting, evidently with her new boyfriend, causing Crady minor injuries. A few days later, on the morning of July 18, 1995, Cissell put a knife to Crady's throat in anger, leaving a superficial flesh wound. Later that day, he presented himself at the emergency psychiatric unit of the University of Louisville Hospital (University Hospital), accompanied by Crady and his sister, Georgia Yount, where he apparently expressed his need for help in light of his recent violence toward Crady. He was referred to social worker Cynthia Duncan, at Inpsych Kentucky, Inc., and met with Ms. Duncan that afternoon.

Over the next two days (July 18th and 19th), Cissell met with, and was evaluated by, several mental health care providers, including appellees William James (a psychiatrist), Gerald Chambers (a psychologist), and Cynthia Duncan (a licensed clinical social worker). Crady accompanied Cissell to most, if not all, of these evaluations, and Cissell's sister, Ms. Yount, participated in at least two sessions. More than once, Cissell asked to be hospitalized at University Hospital to address his mounting emotions concerning Crady's break-up with him, and in fact was placed on security detention by an emergency room psychiatrist the day before Crady's murder, for being

"homicidal," according to the doctor's records. Later that day, however, Cissell was evaluated by Dr. James and released from detention. The next day, July 20th, Cissell attacked and killed Crady, stabbing her with a knife over forty times. Cissell later pled guilty to manslaughter and is now serving a sentence of thirteen years.

In June 1996, appellant, in her capacity as administratrix of Crady's estate, filed this wrongful death action against appellees, alleging breach of their duty to Crady to warn her of the seriousness of Cissell's mental condition and of the danger Cissell posed to her, and breach of their duty to treat and hospitalize Cissell when he was in need of emergency psychiatric care. Appellant believes that had appellees fulfilled their duty to Crady, the target of Cissell's violence, Cissell would not have had access to Crady on July 20, 1995, and would not have killed her.

Appellant's action arises under KRS 202A.400 (duty of qualified mental health professional to warn intended victim of patient's threat of violence), which addresses the liability of a mental health professional to a third party against whom a patient has made an actual threat of physical violence. Specifically, the statute precludes liability against a qualified mental health professional "for failing to predict, warn of or take precautions to provide protection from a patient's violent behavior, unless":

> [T]he patient has communicated to the qualified mental health professional an

> actual threat of physical violence against a clearly identified or reasonably identifiable victim, or unless the patient has communicated to the qualified mental health professional an actual threat of some specific violent act.

KRS 202A.400(1). The statute goes on to identify those ways in which the duties arising thereunder, if any, are discharged:

> The duty to warn a clearly or reasonably identifiable victim shall be discharged by the qualified mental health professional if reasonable efforts are made to communicate the threat to the victim, and to notify the police department closest to the patient's and the victim's residence of the threat of violence. . . . The duty to take reasonable precaution to provide protection from violent behavior shall be satisfied if reasonable efforts are made to seek civil commitment of the patient under this chapter.

KRS 202A.400(2). Appellant alleges these violations of the statute: (1)- Appellees failed to apprise Crady of the danger she was in, and failed to notify the police of Cissell's potential for violent behavior; and (2)- Appellees exposed Crady to Cissell's continuing violent behavior as a result of their failure to treat and ultimately hospitalize Cissell upon his voluntary application.

Appellant filed her complaint on June 28, 1996, supplementing it by way of two amendments, the latter of which was filed on July 30, 1996. One week later, on August 6th, appellee Inpsych, and its employees, Dr.Chambers and Ms. Duncan, filed a motion to dismiss the complaint for failure to state a cause of action. Appellees University Hospital and Dr. James followed suit, filing their motions to dismiss in mid-September.

In support of their position, appellees pointed to appellant's failure to allege anywhere in her complaint that Cissell had communicated to appellees an "actual threat of physical violence" toward Crady. Appellees took the position that KRS 202A.400 requires that such an allegation appear in the complaint, and that appellant's failure to include it therein was fatal to her cause of action.

Further, the motions to dismiss included affidavits from Dr. Chambers, Ms. Duncan, and Dr. James, all of whom stated that Cissell did not at any time communicate to any of them any actual threats of future physical violence toward Crady. Thus, appellees argued, regardless of whether appellant's complaint is facially deficient, the action is nonetheless prohibited under KRS 202A.400, which precludes liability in the absence of any "communication" of an actual threat of physical violence. In addition to relying upon appellees' affidavits, University Hospital attached copies of Cissell's psychological records covering events and evaluations which occurred over the course of July 18 and 19, 1995.

A hearing in the matter was held on October 14, 1996, one day after which the trial court issued its order dismissing the complaint. The court determined that appellant's failure to allege a specific incident in which Cissell communicated to appellees an actual threat of physical violence, was fatal to appellant's cause of action. Additionally, the court concluded

that appellant would be unable to produce <u>any</u> evidence of a threat, and apparently dismissed the complaint on its merits:

> Nowhere within the petition is there any allegation that any of the defendants, in the performance of their health care duties, received any information or specific threats as far as the deceased was concerned. In fact, the Affidavits filed with the Motion to Dismiss, specifically allege that there were no specific threats of violence to the deceased within the meaning of the statute. The Affidavits are undenied. In addition, at the argument of this matter, the plaintiff advised the Court that they would be willing to amend their petition to add the allegation of a specific threat, once they were able to discover such information, but that they had none to support any claim against the defendants at the time of the hearing on this motion.
>
> The motion before the Court is as much one on the pleadings as anything else. The plaintiff has simply failed to allege in the pleadings, any specific threat which is required under KRS 202A.400.
>
> . . . In the absence of any specific allegations in conformity with the statute this Court has no alternative but to sustain the motions to dismiss.

Trial court's order of October 15, 1996.

On appeal, appellant argues that: (1)- Her complaint gave fair notice to appellees of her claim, which is all it was required to do under Kentucky law, and should not have been dismissed; (2)- Appellant presented the trial court with facts sufficient to overcome the motions to dismiss; (3)- At this stage, prior to appellant's having had any opportunity whatsoever to conduct discovery on pertinent issues raised by appellees, summary dismissal of appellant's claim was premature; and, (4)-

The trial court's representation in its order that appellant advised the court at hearing that she had no information concerning actual threats of physical violence made by Cissell, is not an accurate representation of what occurred at the hearing, and is contradicted by the evidence in the record. We agree with appellant on these points.

We do not believe that the language of KRS 202A.400 sets out mandatory pleading requirements. Certainly, it makes no attempt to delineate the type of information which must be included in the complaint, as does, e.g., KRS 403.150, which recites very detailed information which must be included in a petition for divorce and also requires a specific allegation, i.e. that the marriage is "irretrievably broken," to be included in the petition. Conspicuously absent from KRS 202A.400 is any such language concerning mandatory allegations. Absent such mandates, appellant's complaint was subject only to review under CR 8.01, interpreted to require the following:

> The purpose of this Rule [8.01] is to assign to pleadings the function of giving notice and formulating true issues without the requirement that they detail every fact which in the past may have been necessary to constitute a formal "cause of action" or a defense.
>
> The true objective of a pleading stating a claim is to give the opposing party fair notice of its essential nature, the basis of the claimant's right, the adverse party's wrong, and the type of relief to which the claimant deems himself entitled.

Wells v. Morton, Ky., 388 S.W.2d 607, 609 (1965) (citation omitted). Wells involved an allegation of libel concerning

statements made in a newspaper and broadcast over a radio station. Plaintiff's complaint, however, failed to allege that the statements were made with actual malice, and was dismissed by the trial court on that basis. The appellate court held that, while actual malice is an element of libel and must eventually be proven, it was not necessary for the plaintiff to allege in his complaint that the statements were made with actual malice. It was enough that the complaint "gave the appellee more than adequate notice of the fact that he has been charged with falsely and maliciously publishing . . . a number of statements which are claimed to have been libelous on their face, and that appellant seeks to recover damages from him by reason thereof." Id. at 609-10.

In the present case, appellees were well aware that appellant's cause of action arose under KRS 202A.400, having based their motions to dismiss on that very statute. Admittedly, appellant's complaint was not precisely drafted, but it certainly did not mislead the appellees, who clearly understood the basis of appellant's claim. As such, appellees were on notice that an element of appellant's cause of action, as is clear from the language in the statute, is "an actual threat of physical violence" communicated to the mental health professional. We do not believe, however, that appellant's failure to allege the communication in her complaint was fatal to her cause of action. Appellees had fair notice of appellant's cause of action, and all elements thereof. Further, they were apprised in the complaint

of the "wrongs" they had allegedly committed and the relief to which appellant believes herself entitled. That is all that Kentucky law requires. The complaint should not have been dismissed for its failure to allege a specific incident involving the element of communication.

We briefly touch upon the other aspects of this appeal. The trial court clearly placed great weight on the affidavits of appellees, characterizing the statements therein, i.e. that Cissell made no actual threats of physical violence toward Crady, as "undenied," noting that appellant herself had admitted at the hearing that she had no information concerning any actual threats. Further, the court concluded that there would be no such proof forthcoming. This Court has reviewed the evidence before the trial court and the videotape of the hearing, and notes as follows:

(1)- There has been no opportunity for appellant to take discovery from individuals who, appellant asserts, may have knowledge of statements Cissell made to appellees over the course of July 18 and 19, 1995, including: (a)- Cissell himself, as well as his sister (both of whom are expected to contradict appellees' testimony); (b)- an emergency room social worker who conferred with Dr. James concerning Cissell's mental condition on the afternoon of July 19th, just prior to Dr. James's removal of Cissell from security detention; (c)- a neighbor who would have overheard Cissell during an emergency telephone conversation Cissell had with Dr. Chambers on the evening of July 19th, just

after Cissell had tried to choke Crady; and, (d)- a "crisis" social worker with whom Dr. Chambers spoke immediately following that phone conversation.

(2)- At the hearing, the trial court asked counsel for appellant whether she could stipulate to this: "As the case stands right now, plaintiff has neither pled nor are you aware of an actual threat." Counsel answered, "No, I can't stipulate to that." Moments later, counsel stated that appellant is aware of "threats," citing to specific testimony by Cissell's sister during Cissell's sentencing hearing. As such, we believe that appellant adequately challenged appellees' affidavits to the extent she could, given the very early stage of the proceedings. Appellant informed the court that, because appellees moved to dismiss her complaint just four weeks after she filed it, she had not yet had an opportunity to conduct comprehensive discovery supporting her position.

Appellant's complaint was not deficient on its face, and should not have been dismissed on that basis. Further, having reviewed the videotape, the records submitted by the parties, and the pleadings, we believe that the trial court's attempt to dismiss the complaint on its merits was premature. We do not believe at this early stage of the proceedings, absent an opportunity on appellant's part to conduct discovery, that it was within the province of the trial court to consider whether appellant could prove her allegations or ultimately prevail.

The order of the Jefferson Circuit Court dismissing appellant's complaint is reversed, and the case remanded for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

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