RENDERED: February 4, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002752-MR

RUBY J. (WOODS) McKENZIE — APPELLANT

v.

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JAMES A. KNIGHT, JUDGE
ACTION NO. 96-CI-00235

JONES-PRESTON FUNERAL HOME, INCORPORATED; AND DICK VANHOOSE, INDIVIDUALLY, AND AS A DIRECTOR OF JONES-PRESTON FUNERAL HOME, INCORPORATED — APPELLEES

OPINION
REVERSING AND REMANDING WITH DIRECTIONS
** ** ** ** **

BEFORE: BARBER, HUDDLESTON AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Ruby McKenzie has appealed from the summary dismissal of her complaint against Jones-Preston Funeral Home, Inc., and one of its employees, Dick VanHoose, in which she sought damages for their disturbance of her husband's grave. The trial court dismissed McKenzie's complaint solely for the reason that she failed to obtain an expert witness to prove the emotional injuries she sustained as a result of the appellees' alleged wrongful conduct. Having reviewed the record and the applicable case law, we conclude that the trial court erred as a

matter of law. We therefore reverse the summary judgment and remand for a trial on the merits of McKenzie's complaint.

McKenzie was married to Delano Woods on January 11, 1958. The marriage was of short duration due to Woods' untimely death as a result of an automobile accident on March 8, 1958. McKenzie caused Woods to be buried in her family's plot in the Dixon Cemetery located in Staffordsville, in Johnson County, Kentucky. In 1961, McKenzie remarried and eventually moved to Michigan. In her discovery deposition, McKenzie testified that she visited Woods' grave many times during the next thirty-eight years, and that members of her family residing in Kentucky took care of, and frequently decorated, the grave.

In August 1995, McKenzie was contacted by Ronald Woods, one of Woods' four brothers, who informed her that his mother, McKenzie's former mother-in-law, had died. Ronald Woods requested that he be allowed to bury his mother next to Woods, or in the alternative, that he be allowed to move Woods' body to a cemetery in Fallsburg, Kentucky. McKenzie testified that she told Ronald Woods that she did not have authority over any of the vacant spaces in her family's plot in the Dixon Cemetery, and that she would not consent to having her husband's body moved to a different location. Nevertheless, Ronald Woods and his brothers, Dennis, Mickey and Vaughn Woods, arranged to have Woods' body moved to Fallsburg.

VanHoose had over thirty years of experience in the funeral business. He had been a partner in Jones-Preston in years prior to 1978, and after that, worked at the funeral home

as a director. He was, at all times pertinent to McKenzie's action, employed as a funeral director by the appellee, Jones-Preston. VanHoose testified that he was contacted at Jones-Preston by the Woodses, persons to whom he was distantly related, who wanted to have their brother's body moved to Fallsburg. VanHoose acknowledged that he was aware at the time of the Woodses' request, that Delano Woods had been married to McKenzie at the time of his death. Nevertheless, VanHoose stated that it was his understanding of the law that upon her re-marriage McKenzie had lost her status as the next-of-kin with respect to Woods' remains.[1]

VanHoose and the Woodses reached an agreement for the disinterment and re-interment of Woods' body in Fallsburg. To that end, VanHoose prepared a document, at his place of employment and on Jones-Preston's letterhead, which he sent to the Woodses for their signatures as "next-of-kin," requesting that the body's removal be accomplished.[2] On behalf of Jones-

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[1]It is "firmly established" in Kentucky that as Woods' surviving spouse, McKenzie had the right to control the disposition of his remains. See Hazelwood v. Stokes, Ky., 483 S.W.2d 576, 577 (1972); see also Kentucky Revised Statutes 367.97501(1). Whether a jury will believe that a funeral director with VanHoose's years of experience could be mistaken about the viability of those rights remains to be determined.

[2]The document, signed by the four Woods brothers, reads

> To whom it may concern;
> This is to state that I, We, being the next o[f] Kin to Delano Woods who died March 8, 1958 in JOHNSON County, Kentucky[,] and was buried in the Dixon Cemetery at Staffordsville, Ky.[,] do wish to have his remains removed from the Dixon Cemetery and reintered [sic] in the [] Woods Family Cemetery, Fallsburg, Ky. Place of death was

(continued...)

Preston, VanHoose applied for and received from the Cabinet for Human Resources (Cabinet), a permit to disinter Woods' body.[3] The application listed Jones-Preston as the "Responsible Person or Firm" making the request and contained Jones-Preston's address and identified its telephone number as that belonging to the "Person or Firm" making the request. Finally, sometime between June and November 1995, VanHoose had grave diggers under contract with Jones-Preston, exhume Woods' body and place it in Jones-Preston's garage.

According to VanHoose, the agreement did not include his participation in the re-interment at Fallsburg. He claimed that the Woodses, in order to minimize their expenses, were going to open the new grave site themselves and that he agreed that the Woodses would be charged only for the cost involved in the disinterment. After the corpse had been stored at the Jones-Preston garage for some period of time, VanHoose learned that the Woodses had second thoughts about the project. They told VanHoose that they feared problems from the fact that they did not have McKenzie's consent and that they had decided not to go through with the re-burial at Fallsburg. VanHoose wrote to the

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[2](...continued)
Johnson County, Kentucky and Mr. James Trimble was coroner at that time.
Next of kin to Delano Woods

[3]The application, a one-page form provided by the Cabinet, contained the following information: "When there is more than one member of the same class of kin all members of that class must agree to the disinterment. A spouse who re-marries does not lose thereby next-of-kin status" (emphases original).

Cabinet, again on Jones-Preston letterhead, informing it that "[b]ecause of difficulity [sic] with the surviving brothers" of the decedent, he intended to re-inter Woods in the original grave. He requested that the permit be canceled and stated that there would be "no further action from the Jones-Preston Funeral Home."

McKenzie learned from family members that her husband's grave appeared to have been disturbed. She called the Cabinet and learned that a permit had been issued to Jones-Preston to exhume the body. She called James A. Preston, the manager of the funeral home and the son of its owner, who told her he knew nothing about the permit or the condition of her husband's grave. After many frustrating and unsuccessful attempts to learn what had actually happened to the grave, and in order to discover whether or not her husband's body was still where she had originally buried him, McKenzie had the body exhumed. McKenzie testified that during that process, the vault fell apart and that some of her husband's remains fell out of the vault in front of her. McKenzie testified that it was obvious that the body in the vault had been disturbed, but that she was satisfied, from dentures and jewelry on the body, that the vault contained her husband's remains.

On June 6, 1996, McKenzie filed her complaint in which she advanced several causes of action against the appellees including desecration of the grave site, abuse and mishandling of the corpse, violation of her rights with respect to the grave as the next-of-kin, trespass, violation of the right of sepulture,

and outrage. She alleged that the appellees acted "intentionally, negligently, and grossly negligent, maliciously, wantonly, and with reckless disregard for [her] rights" in desecrating the grave of Woods "by causing the gravesite to be subjected to physical injury, indignity, exposure, hurt, and displacement." McKenzie sought damages for the expenses she incurred in traveling to Kentucky, and the costs attendant to the disinterment, including the cost of a new vault. She further sought compensatory damages for her emotional distress, shock, mental anguish, and punitive damages.

A single answer was filed on behalf of both VanHoose and Jones-Preston. The answer acknowledged that VanHoose was employed by Jones-Preston as a funeral director, but stated that he "was not acting as an agent, employee, and/or director" for Jones-Preston "at the time and place of the disinterment and/or the reinterment of the corpse of Delano Woods." The appellees admitted that McKenzie was the "next of kin" of Woods and as such had "an easement, license, and privilege over the gravesite" of Woods. The answer alleged that VanHoose sought a permit for the corpse of Woods to be disinterred and reinterred "in good faith and based on an honest mistake."

On December 26, 1996, a motion for summary judgment was filed on behalf of Jones-Preston, in which it was alleged that VanHoose was not acting as its agent with respect to the disinterment and reinterment of Woods' body. Although McKenzie had responded to the motion on February 18, 1997, the motion was

still pending on the trial court's docket on April 29, 1998, the morning the trial was scheduled to commence.

On that morning, a conference, which was not recorded,[4] was conducted in the trial court's chambers. At the conclusion of that conference, the trial court dismissed McKenzie's complaint in its entirety. Despite the appellees' assertions in their brief that the trial court granted Jones-McKenzie's motion for summary judgment on the basis that VanHoose was an independent contractor, the trial court's order and judgment, set forth verbatim as follows, does not mention the pending motion for summary judgment, or address the arguments advanced anywhere therein:

> On Wednesday, April 29, 1998 at the hour of 9:00 a.m., the above captioned matter was scheduled to be called for trial by jury. Prior to the calling of the docket on that morning, counsel for the defendants requested and was granted an in-chambers conference during which he made a motion in limine. Specifically, counsel for the defendants requested that the plaintiff be precluded from offering any medical evidence regarding her claimed emotional damages. The defendants' reasoning was that medical evidence should not be allowed since the plaintiff had not retained and did not intend to call any expert witness regarding emotional damages. In response to this motion, plaintiff acknowledged that no expert witness had been obtained, but stated that evidence concerning plaintiff's emotional damages would be introduced through plaintiff herself, and through plaintiff's family members.

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[4]In the appellees' brief, counsel states that to the "[b]est of my recollection, a record was made of the hearing." Counsel's "recollection" does not correspond with the trial record. The judgment specifically states that the hearing "took place in chambers and off the record," and that McKenzie's "request to go on the record was denied."

> Upon presentation of the issue in this fashion, this Court, sua sponte, construed the defendants' motion in limine as a motion for summary judgment and determined to grant that motion and dismiss all claims based on the plaintiff's failure to retain any expert witness on the issue of emotional damages. The plaintiff's request to go on the record was denied. The plaintiff requested that a written ruling be issued, and this Order thus follows.
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> Based upon the above described proceedings, which took place in chambers and off the record, IT IS THEREFORE ORDERED AND ADJUDGED:
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> 1. That the defendants' oral motion in limine offered on the morning of trial is hereby sua sponte construed as a motion for summary judgment;
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> 2. That this motion for summary judgment is GRANTED;
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> 3. That based upon the plaintiff's failure to obtain an expert witness on the issue of emotional damages, all of plaintiff's claims are hereby DISMISSED WITH PREJUDICE, and this case is stricken from the active docket;
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> 4. This is a final and appealable order and there is no just cause for delay.
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> Entered this 1[st] day of Sept 1998.

McKenzie's motion to alter, amend or vacate the judgment was denied on October 20, 1998, and this appeal followed.

Before we address the single issue presented by this appeal, we believe it necessary to address certain statements and arguments contained in the appellees' brief which this Court finds disturbing, either for their inaccuracy, or their irrelevance to the propriety of the trial court's summary judgment. In the appellees' brief, VanHoose is repeatedly referred to as an "independent contractor," although there was no

determination by the trial court that his status was other than that of a Jones-Preston's employee at the time of his alleged tortious conduct. Further, no less than four times, the appellees state that the trial court granted Jones-Preston's motion for summary judgment based on its theory that VanHoose was not acting within the scope of his employment in his dealings with the Woodses.

It is, we believe, not possible to construe the trial court's summary judgment in this fashion. The judgment states, not once, but twice, that the reason for the dismissal of McKenzie's complaint was her "failure to obtain an expert witness on the issue of emotional damages." The judgment does not even hint at an alternative basis for the dismissal. It mentions, again twice, that the summary judgment was granted sua sponte. Thus, by definition, the ruling was not made in response to the pending motion for summary judgment made by Jones-Preston.[5]

We have no idea what has motivated the appellees to represent the basis of the summary judgment as one founded on

[5]We believe it apparent, from the facts set out in this opinion and from others in the record on appeal, that the motion for summary judgment could not withstand the scrutiny required in considering such motions in light of settled case law in the area of vicarious liability. Further, the funeral home's attempt in this action to avoid liability under the doctrine of respondeat superior is inconsistent with the position it took in proceedings before the State Board of Embalmers and Funeral Directors. In a verified response to McKenzie's complaint in that arena, James A. Preston stated: "The Jones-Preston Funeral Home, Inc. did nothing wrong, or illegal, by acting upon the request of the next of kin as represented to it, and as understood and thought to be correct and accurate."

agency principles.[6] In any event, the judgment speaks for itself. Whatever the trial court may have stated in the unrecorded hearing in chambers, but neglected to include in its written judgment, is not relevant to this appeal.[7] "It is elementary that a court of record speaks only through its records."[8] Thus, the only issue presently before this Court is whether the trial court erred in summarily dismissing McKenzie's complaint because she did not intend to introduce expert testimony to substantiate her claim that she suffered mental anguish and emotional distress by the appellees' disturbance of her husband's remains.

The ability of a trial court to resolve a legal dispute by means of summary judgment is very limited. A summary judgment is only "proper where the movant shows that the adverse party could not prevail under any circumstances." [9] Thus, the parameter of this Court's review of a summary judgment is to determine "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."[10]

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[6]It is difficult to believe that VanHoose would make these arguments if he were independently represented.

[7]Equitable Life Assurance Society of the United States v. Taylor, Ky.App., 637 S.W.2d 663, 665 (1982).

[8]Allen v. Walter, Ky., 534 S.W.2d 453, 455 (1976).

[9]Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

[10]Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

Utilizing that standard, it is immediately apparent that the trial court erred in dismissing McKenzie's complaint. There is no question that McKenzie is entitled to seek redress for her emotional distress resulting from the disturbance of her husband's grave and the removal of his remains to the garage at Jones-Preston.[11] There is no legal basis for the trial court's conclusion that McKenzie needed expert proof to establish her damages. There is not a single authority cited in the trial court's judgment, nor in the appellees' brief, which would justify the drastic action taken in this matter. We are unaware of any requirement in this jurisdiction that a plaintiff present expert medical or scientific proof to establish her damages for mental anguish and/or emotional suffering. To the contrary, such damages were recoverable long before the advent of psychiatry.

The appellees argue that "[i]t would appear logical that medical proof would be required to establish a psychological impairment." However, this contention is totally irrelevant to the discussion as McKenzie has not claimed to be disabled or to have developed a psychological impairment as a result of the appellees' conduct. While her "proof must be clear and satisfactory," McKenzie's damages do not even have to be

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[11]See Codell Construction Co. v. Miller, 304 Ky. 708, 202 S.W.2d 394 (1947)(cause of action for mental anguish allowed where graves were partly destroyed by blasting during road construction); R. B. Tyler Company v. Kinser, Ky., 346 S.W.2d 306, 308 (1961) ("right of next of kin to recover damages for the desecration of a grave is generally recognized as being for a common law tort"); Louisville Cemetery Assoc. v. Shauntee, Ky., 376 S.W.2d 533, 536 (1964)(plaintiff, the niece of the decedent who was only nine years old at the time of his death, was allowed to recover mental anguish for the "obliteration" of the uncle's grave).

established by direct evidence, but may include "circumstantial evidence from which the jury could infer that anxiety or mental anguish in fact occurred."[12] In this jurisdiction the rights of the next of kin with respect to the remains of their deceased loved ones are held in high regard.

> The tenderest feelings of the human heart cluster about the remains of the dead. . . . An indignity or wrong to a corpse is resented more quickly than a wrong to the living, and, if mental suffering may be recovered for in the one case, it is hard to see why it may not be recovered for in the other.[13]

We have no doubt that the type of emotional damages McKenzie seeks to recover are ones that could be appreciated by the average juror, unaided by expert testimony.[14]

Accordingly, the judgment of the Johnson Circuit Court is reversed, and the matter is remanded for further proceedings consistent with the Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT: BRIEF AND ORAL ARGUMENT FOR

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[12]Motorists Mutual Insurance Co. v. Glass, Ky., 996 S.W.2d 437, 454 (1997) (discussing damages for "'embarrassment, humiliation and mental anguish'" sought in a statutory bad faith claim against an insurer); see also Lexington-Fayette Urban County Government v. Middleton, Ky.App., 555 S.W.2d 613, 618 (1977) (the Court held that "even in the absence of testimony concerning mental pain and anguish, a verdict may award such mental pain" where such is the "only reasonable inference" from the testimony).

[13]Louisville & N. R. R. Co. v. Hull, 113 Ky. 561, 68 S.W. 433, 435 (1902).

[14]Even in medical malpractice cases where expert testimony is generally necessary to establish liability, an exception exists where "the negligence [is] so apparent that laymen with general knowledge would have no difficulty in recognizing it." Maggard v. McKelvey, Ky.App., 627 S.W.2d 44, 49 (1981).

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