

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000046-MR

BRENDA HAMMONS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS PAISLEY, JUDGE
ACTION NO. 97-CI-04058

PATHWAYS, INC.

APPELLEE

OPINION
REVERSING AND REMANDING
** **

BEFORE: EMBERTON, GUIDUGLI AND McANULTY, JUDGES.

EMBERTON, JUDGE: Brenda Hammons was raped while a resident at Moore's Boarding Home. She filed a negligence action against Moore's, its owner, her counselor and Pathways, Inc. The rapist, Harry Lee Stacy, was named by Pathways as a third-party defendant.¹ The trial court entered summary judgment in favor of Pathways and this appeal followed.

Brenda has a lengthy history of mental illness and has been diagnosed with bipolar affective disorder. Pathways is a private corporation offering psychiatric and social services,

¹ Stacy pleaded guilty to sexual assault.

including residential programs, for the mentally ill in Boyd, Greenup, Rowan, Carter, Elliott, Bath, Menifee, Morgan Montgomery and Lawrence counties. Brenda's records at Pathways show that from 1982 through 1997, Pathways assisted her with daily living, including assistance in finding housing, psychiatric counseling, hotline counseling, and medical treatment.

On November 3, 1996, Brenda was admitted to Our Lady of Bellefonte Hospital in Ashland and was discharged on November 4, 1996. She sought the assistance of the Pathways Crisis Unit in Ashland, a unit designed to house Pathways' clients on a short term basis. A Pathways' social worker, Kim Royse, contacted Moore's Boarding Home in Lexington which agreed to accept Brenda as a resident. Moore's is outside the Pathways service area, but according to Royse, she did not believe a place for Brenda in the Pathways area could be found. She had never referred anyone to Moore's and despite Pathways having in its possession a list of boarding homes as current as 1995 and 1996, she obtained the boarding home name from a 1992 list of boarding homes sent by the Cabinet for Human Services. Moore's, however, did not have a permit to operate as a boarding home; it had in fact been ordered to cease operation under a temporary injunction on June 15, 1993. The injunction was made permanent on January 25, 1996.

While awaiting the transfer to Moore's, Brenda became hostile and threatened several of the employees at Pathways. As a consequence, she was transported to King's Daughters Hospital as a patient of Pathways' medical director, Dr. Kahn Martin. Ross Damron, a social worker at the hospital, began to assist

Brenda in finding a residence but after learning that Pathways had previously placed Brenda at Moore's, and without further investigation, referred Brenda to Moore's. He obtained a taxi voucher for her and she arrived at Moore's on November 12, 1996.

On November 18, 1996, after being struck by Harry Lee Stacy, Brenda voluntarily left Moore's and admitted herself to the Appalachian Regional Hospital in West Liberty. On November 19, 1996, she received a seventy-two-hour involuntary commitment to Eastern State Hospital. Following the expiration of the commitment she voluntarily admitted herself for further commitment. At the termination of that commitment, on November 27, 1996, despite the hospital's recommendation against it, Brenda returned to Moore's. As her reason for doing so she testified that she had no money, had paid rent at Moore's, and she had nowhere else to live. Then, on November 30, 1996, Brenda was ordered by Stacy to go into his room at Moore's. She complied, and was sodomized.

Pathways' initial contention is that any duty it owed to Brenda terminated at the time she left Pathways' care on November 6, 1996. It argues that regardless of any negligence in referring Brenda to a residence it knew, or should have known, was dangerous for her, Brenda voluntarily chose to return and "she must endure and cope with how all such decisions play out to affect her life."

Before a defendant can be held liable on a theory of negligence, there must exist a duty owed to the plaintiff by the defendant. Mullins v. Commonwealth Life Insurance Co., Ky., 839 S.W.2d 245, 247 (1992). Grayson Fraternal Order of Eagles v. Claywell, Ky.,

736 S.W.2d 328 (1987), indicates that "liability for negligence expresses a universal duty owed by all to all." However, and this is a point frequently overlooked by some, the duty to exercise ordinary care is commensurate with the circumstances. Id. at 330. The statement of whether or not a duty exists is but a conclusion of whether a plaintiff's interests are entitled to legal protection against the defendant's conduct. Id. The existence of a duty is an issue of law, and a court, when making the determination of such existence, engages in what is essentially a policy determination. Mullins, supra, at 248.²

Pathways is in the profession of providing services to mentally ill patients and owes a duty to render those services with reasonable care. Although it is true that on the date Brenda was raped she was no longer a client of Pathways, the alleged breach of duty by Pathways occurred on November 6, 1992, in referring her to Moore's.

Pathways contends that Brenda's admissions to King's Daughters Hospital, Appalachian Hospital, Eastern State Hospital, and her voluntary return to Moore's were superseding causes in that any one, or all, of those facilities could have found Brenda a different place to live or she could have chosen a different residence after she was struck by Stacy. Additionally, it contends that the criminal act of Stacy is, as a matter of law, a superseding cause.

Brenda contends that the issue of superseding cause is a matter for the jury to decide. However, in House v.

² Sheehan v. United Services Auto Ass'n, Ky. App., 913 S.W.2d 4, 6 (1996).

Kellerman,³ the court explained that the issue is generally a legal issue for the court to decide. There is no dispute that Brenda was admitted to various hospitals after Pathways' initial referral to Moore's, and that she voluntarily returned to Moore's knowing it was there she was struck by Stacy. Therefore, whether any of these events superseded Pathways' alleged negligence is an issue properly to be resolved by the court.⁴

A thorough discussion of intervening and superceding causes is found in NKC Hospitals, Inc. v. Anthony.⁵ After an analysis of authorities, the court found that a superseding cause possesses the following elements:

- 1) an act or event that intervenes between the original act and the injury;
- 2) the intervening act or event must be of independent origin, unassociated with the original act;
- 3) the intervening act or event must, itself, be capable of bringing about the injury;
- 4) the intervening act or event must not have been reasonably foreseeable by the original actor;
- 5) the intervening act or event involves the unforeseen negligence of a third party [one other than the first party original actor or the second party plaintiff] or the intervention of a natural force;
- 6) the original act must, in itself, be a substantial factor in causing the injury, not a remote cause. The original act must not merely create negligent condition or occasion; the distinction between a legal

³ Ky., 519 S.W.2d 380, 382 (1974).

⁴ Id.

⁵ Ky. App., 849 S.W.2d 564, 568 (1993).

cause and a mere condition being foreseeability of injury.

In response to Pathways' contention that Brenda's admission to King's Daughters Hospital, Appalachian Hospital and Eastern State Hospital and return to Moore's after the initial striking by Stacy are superceding causes, we apply the elements listed in NKC, supra. Although the events occurred after Pathways' referral, we cannot say that any were unassociated. There is no dispute, that as a result of Pathways' referral, Brenda paid rent to Moore's, and that King's Daughters aided her return to Moore's after finding that Pathways had referred her. The initial referral by Pathways was the force that brought Brenda back to Moore's after each hospital release.

Unforeseeability is a predominate component of any superseding cause. Was it foreseeable that after Pathways' referral Brenda would reside at Moore's and return following her release from her hospitalizations? Brenda was miles from her original home; she was in a city with unfamiliar surroundings; she had little money and had already paid rent to Moore's; she was mentally ill; and she had been referred to Moore's by Pathways who had cared for her, and who had referred her to various homes over the past fifteen years. We find it logical to conclude that her return to Moore's and the hospitals' release of her to return to the home was foreseeable by Pathways.

But for Stacy's intentional criminal act, Brenda would not have sustained the injuries of which she now complains. There is no general rule in this Commonwealth that criminal acts of third persons relieve the original negligent actor from

liability. Quoting extensively from the Restatement (Second) of Torts, the court in Britton v. Wooten,⁶ responded to the assertion that criminal acts of a third person are, as a matter of law, superseding causes.

Respondent cites Restatement (Second) of Torts, § 448 in support of the continued viability of criminal acts, per se, as sufficient to cut the chain of causation. That section postulates that "an intentional tort or crime is a superseding cause" where the defendant's "negligent conduct" only creates "a situation which afforded an opportunity" for another to commit an intentional tort or crime, but it adds an all important caveat:

" . . . unless the actor [the defendant] at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime."

Restatement (Second) of Torts, § 449, expands on the meaning of § 448. Section 449 postulates:

"If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor [the defendant] negligent, such an act [by another person] whether innocent, negligent, intentionally tortuous, or criminal, does not prevent the actor [the defendant] from being liable for harm caused thereby."

And these two sections, 448 and 449, also must be read in conjunction with Restatement (Second) of Torts, § 302B, "Risk of Intentional or Criminal Conduct," which states:

"An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of

⁶ Ky., 817 S.W.2d 443, 449 (1991).

harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal."

The court also quoted from a treatise by Harper, James and Gray, The Law of Torts, 2d ed. (1986):

"It is often said that an actor may assume that others will act lawfully and carefully. Rightly understood this is sound enough, and no more than a corollary of the general [negligence] principle. . . . But in this connection two things must be noted. The first is that such an assumption does not always correspond to the facts. It does not in situations where a law is generally disobeyed. . . . And it does not wherever the actor's [defendant's] conduct exposes some interest to risk from a large and indeterminate group of people that will probably include some who will be negligent or commit crime, so that the likelihood of some negligence or some crime is considerable, though the number of those who will be responsible for it is relatively small Perhaps the most significant trend that has taken place in this particular field, in recent years, has been the increasing liberalization in allowing the wrongs of other people to be regarded as foreseeable where the facts warrant that conclusion if they are looked at naturally and not through the lens of some artificial archaic notion." Id. § 16.12 at 495-96.

And from the same treatise, § 20.5, "Legal Cause," pp. 154-56:

"So far as scope of duty (or, as some courts put it, the relation of proximate cause) is concerned, it should make no difference whether the intervening actor is negligent or intentional or criminal. Even criminal conduct by others is often reasonably to be anticipated."⁷

⁷ Id. at 451.

With the general principles recited in Britton in mind, the legal analysis set forth in House, supra, is applicable in determining whether a criminal act is a superseding cause.

Brenda alleges that without proper investigation Pathways referred her to Moore's, which at the time was under an injunction to cease operations. There is evidence that one of the reasons for the issuance of the injunction was because of Stacy's presence in the home and his violent and disruptive tendencies. Whether Pathways' referral of Brenda to Moore's merely created the occasion for the injury or whether it was foreseeable that Brenda would be injured if she resided at Moore's, is the issue. We find that Stacy's criminal act was a foreseeable act and there was not a superseding cause.

Pathways purports to be a corporation offering the services of professionals in the mental health area to its clients who are unable to independently make decisions regarding their daily lives. Brenda was referred to a home ordered to cease operations by the court because investigations found it substandard, and found it to have a resident, Stacy, who the investigator found constituted an "immediate and serious threat to others." We have little difficulty in concluding that, under these circumstances, it was foreseeable that Brenda would be harmed by a resident at the home.

There was no superseding cause that relieves Pathways of liability. The liability, if any, of each of the other

defendants is to be properly included in any comparative fault instruction.⁸

The judgment of the Fayette Circuit Court is reversed and the case remanded for further proceedings.

⁸ NKC, supra, at 569.

ALL CONCUR.

BRIEF FOR APPELLANT:

William J. Gallion
Bruce D. Gehle
Lexington, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Bruce Gehle
Lexington, Kentucky

BRIEF FOR APPELLEE:

Nolan Carter, Jr.
Ronald L. Green
Todd P. Kennedy
Lexington, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Ronald L. Green
Lexington, Kentucky