RENDERED: DECEMBER 17, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2003-CA-001389-MR

WILLIAM NATHAN APPELLANT

v.

APPEAL FROM PENDLETON CIRCUIT COURT
HONORABLE ROBERT McGINNIS, JUDGE
ACTION NO. 01-CI-00181

ST. LUKE HOSPITALS, INC. APPELLEE

OPINION
AFFIRMING

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

BEFORE: BUCKINGHAM, DYCHE, AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: William Nathan appeals from an order of the Pendleton Circuit Court awarding summary judgment to St. Luke Hospitals, Inc., in a lawsuit related to an automobile accident in which Nathan was injured. Nathan contends that the circuit court erroneously applied the one-year statute of limitations contained in KRS[1] 413.140(1)(e) rather than the two-year statute

[1] Kentucky Revised Statutes.

of limitations contained in KRS 304.39-230(6), a section of the Motor Vehicle Reparations Act (MVRA). We agree with Nathan that the circuit court incorrectly applied KRS 403.140(1)(e). Nevertheless, because St. Luke is entitled to summary judgment on the merits of Nathan's claims, we affirm.

Viewing the evidence in the light most favorable to Nathan, the facts are as follows. On July 7, 2000, Nathan checked into St. Luke Hospital in Fort Thomas to undergo tests relating to his alcohol and drug dependency problem and for ongoing dental infections. Following initial testing, St. Luke personnel told Nathan that he needed to be transferred to the St. Luke facility located in Falmouth, Kentucky, for completion of the testing. The transfer was approved by Nathan's health insurance carrier, United Healthcare, which also agreed to pay for the cost of transporting Nathan by cab.

St. Luke called a cab service, Diamond Cab Co., to transport Nathan to the Falmouth facility. The cab was driven by Eugene Lee, a Diamond Cab employee. According to Nathan, a St. Luke representative walked him to the front lobby of the hospital and told him that he was still in the care of St. Luke, that he could not stop for any reason, that he was to go directly to the Falmouth facility, and that he was to have no contact with any person other than the person transporting him.

Nathan alleges that Lee initially attempted to persuade him to go to someone Lee knew in Cincinnati who could "take care" of his problem. After Lee headed the cab toward Cincinnati, Nathan told him that he wanted to go the Falmouth facility. Lee then headed the cab back in that direction. Nathan alleges that during this time he noticed that the vehicle was not braking and shifting properly and that Lee did not appear to be paying close attention to the road.

During the drive to Falmouth, two deer darted in front of the cab, and Lee slammed on the brakes. Nathan was thrown forward and hit the front seat headrest and/or the back of Lee's head, injuring his left jaw and neck. Moments later, a vehicle driven by George Campbell slammed into the back of the cab causing further injury to Nathan.

On November 17, 2001, Nathan filed a civil action in the Pendleton Circuit Court in connection with the events of July 7, 2000. Eugene Lee, Diamond Cab Co., and George Campbell were named as defendants.

On May 31, 2002, Nathan filed a motion to amend his complaint to name St. Luke as a party to the action. The motion was granted, and the amended complaint was filed on June 6, 2002. In his amended complaint, Nathan alleged that at the time of the July 7, 2000 accident, Diamond Cab Co. was acting with the consent of, for the benefit of, and subject to the control

of St. Luke. He further alleged that St. Luke had "carelessly and negligently allowed the Defendant, Diamond Cab Company, to transport the Plaintiff despite knowledge and belief that the Defendant, Diamond Cab Company would operate said vehicle in a careless and negligent manner." St. Luke was served on June 11, 2002.

St. Luke thereafter filed a motion for summary judgment. It argued that Nathan's claim against it was barred by the statute of limitations and, further, that Nathan had failed to present any affirmative evidence in opposition to the hospital's assertion that it had no agency relationship whatsoever with Diamond Cab Co., and had not presented affirmative evidence that St. Luke breached any duty owed to him by procuring Diamond Cab Co. to transport him to Falmouth.

On June 7, 2003, the circuit court entered an order granting St. Luke's motion for summary judgment on the basis that Nathan failed to file his action against St. Luke within the one-year statute of limitations contained in KRS 413.140(1)(e). This appeal followed.

In this appeal, Nathan contends that the circuit court erroneously granted summary judgment to St. Luke. He maintains that his appeal was timely filed because the two-year statute of limitations contained in KRS 304.39-230(6) applies in this case

rather than the one-year statute of limitations contained KRS 413.140(1)(e).

The standard of review of a trial court's granting of 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, Ky. App., 916 S.W.2d 779, 781 (1996). Summary judgment is proper when it appears that it would be impossible for the adverse party to produce evidence at trial warranting a judgment in its favor. James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Insurance Co., Ky., 814 S.W.2d 273, 276 (1991). Moreover, we are to view the record in the light most favorable to the party opposing the motion and resolve all doubts in his favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

KRS 413.140(1)(e) requires that an action against a physician, surgeon, dentist, or hospital licensed pursuant to KRS Chapter 216, for negligence or malpractice be brought within one year from the time the cause of action arises. The injuries to Nathan occurred, and thus his cause of action arose, on July 7, 2000,[2] whereas Nathan did not file his lawsuit against the St. Luke until June 6, 2002. If KRS 413.140(1)(e) applies, then

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[2] While Nathan alleges that the events occurred on July 7, 2000, the defendants contend that the events occurred on July 8, 2000.

Nathan did not file against St. Luke within the limitations period.

Nathan's claims against St. Luke sound in negligence. Nathan alleges that St. Luke was negligent in its selection of Diamond Cab Co. as the mode of transportation to the Falmouth facility. Alternatively, Nathan seeks to impose vicarious liability upon the hospital on the basis that Diamond Cab Co. was an agent of St. Luke's at the time of the accident. The vicarious liability theory asserted against St. Luke likewise sounds in negligence as Nathan's claim against Diamond Cab Co. is based upon negligence.

In Hackworth v. Hart, Ky., 474 S.W.2d 377, 380 (1971), the Kentucky Supreme Court stated, "[a]s we interpret [KRS 413.140(1)(e)], it governs **all** causes of action against physicians and surgeons regardless of whether the claim be alleged in tort or in contract." (Emphasis added). While Hackworth was concerned with a case involving a physician/surgeon, as hospitals licensed pursuant to KRS Chapter 216 (which St. Luke is) are covered by the same rule, it follows that the same principle stated in Hackworth applies to hospitals, i.e., KRS 413.140(1)(e) applies to "all" tort causes of action against hospitals.

However, KRS 304.39-230(6) "extends the statute of limitations to two years for actions 'with respect to accidents

occurring in this Commonwealth and arising from the ownership, maintenance or use of a motor vehicle,' when not 'abolished' by the Act." (Emphasis added).[3] Troxell v. Trammell, Ky., 730 S.W.2d 525, 527 (1987) (quoting Bailey v. Reeves, Ky., 662 S.W.2d 832, 833-34 (1984)); Fields v. BellSouth Telecommunications, Inc., Ky., 91 S.W.3d 571, 572 (2002). Under the MVRA, "'[U]se of motor vehicle' means any utilization of the motor vehicle as a vehicle including occupying, entering into, and alighting from it." KRS 304.39-020(6); Fields at 572. The determination of whether a plaintiff was "using" a vehicle is made in light of the basic rule of statutory construction that the "MVRA is to be liberally interpreted in favor of the accident victim." Id.; Lawson v. Helton Sanitation, Inc., Ky., 34 S.W.3d 52, 62 (2000). Nathan's cause of action against Diamond Cab Co., Lee, and Campbell arose from his "use" of the Diamond Cab Co. vehicle as a passenger. See D&B Coal Co., Inc. v. Farmer, Ky., 613 S.W.2d 853, 854 (1981); Troxell at 224.

Nathan argues that the two-year statute of limitations applies to the hospital even though it was a nonmotorist. We agree. In Bailey v. Reeves, Ky., 662 S.W.2d 832 (1984), the plaintiff struck a cow owned by the defendant in the case. The trial court dismissed the action on the ground that the action was barred by KRS 413.140 since it was not filed within one year

[3] A cause of action for the type of accident occurring in this case is not "abolished by the Act."

from the date of the accident. The Kentucky Supreme Court reversed "[b]ecause the literal language of the MVRA extends the statute of limitations to two years for actions 'with respect to accidents occurring in this Commonwealth and arising from the ownership, maintenance or use of a motor vehicle[.]'" Id. at 833. The court further stated that "[t]he purview of the Act is motor vehicle accident victims. . . . regardless of whether the tortfeasor is a motorist or a nonmotorist." Id. at 835.[4]

In Troxell v. Trammell, Ky., 730 S.W.2d 525 (1987), which also concerned a conflict between the provisions of KRS 413.140 and KRS 304.39-230(6), our supreme court provided additional rationale concerning the latter's precedence over the former:

> The one-year personal injury statute of limitations, KRS 413.140(1)(a), is a general statute of limitations "for an injury to the person of the plaintiff." It does not speak to motor vehicle accidents as such, and, indeed, it is so old that it may well have preexisted the advent of the motor vehicle. On the other hand, KRS 304.39-230(6) is a special statute of limitations, part of a comprehensive, integrated code (the MVRA) applicable to the rights and liabilities of motor vehicle accident victims. Our rules of statutory construction are that a special statute preempts a general statute, that a later statute is given effect over an

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[4] This is where the circuit court erred in the case sub judice. The circuit court held that the two-year MVRA statute of limitations could not apply because St. Luke was not involved in the accident. As the court in the Bailey case noted, however, the act covers motor vehicle accident victims regardless of whether the tortfeasor was a motorist or nonmotorist. Id.

> earlier statute, and that because statutes of limitation are in derogation of a presumptively valid claim, a longer period of limitations should prevail where two statutes are arguably applicable. Thus the statutory language in KRS 304.39-230(6) applies rather than the statutory language in KRS 413.140(1)(a) in the present situation where the cause of action is both a motor vehicle accident and a personal injury claim.

Id. at 528.

Therefore, with respect to the causes of action asserted by Nathan against St. Luke, we conclude that the two-year statute of limitations contained in KRS 304.39-230(6) takes precedence over the one-year statute of limitations contained in KRS 413.140(1)(e). Thus, we conclude that the circuit court erred by granting summary judgment on the basis that the limitations period had expired.

In its motion for summary judgment and in its brief in this appeal, St. Luke has argued that it was entitled to summary judgment on the merits because Nathan failed to present affirmative evidence supporting his theories of liability against the hospital so as to defeat its properly supported motion for summary judgment. We agree, and thus arrive at the same conclusion as did the circuit court, albeit by a different route. "[A] correct decision by a trial court is to be upheld on review, notwithstanding it was reached by improper route or

reasoning. Revenue Cabinet v. Joy Technologies, Inc., Ky. App., 838 S.W.2d 406, 410 (1992).

Nathan advances two theories of liability against St. Luke. First, he claims vicarious liability on the basis that Diamond Cab Co. was an agent of the hospital at the time it was transporting Nathan to Falmouth. Second, he claims that St. Luke was negligent in procuring Diamond Cab Co. as a means of transporting Nathan because it knew, or should have known, that Diamond Cab Co. would be careless and negligent in carrying out this function.

First, we address Nathan's theory that St. Luke bears vicarious liability on the basis that Diamond Cab Co. was an agent of St. Luke's at the time it was transporting him to Falmouth. St. Luke attached the sworn affidavit of Adele Cummins, Director of Risk Management of St. Luke, to its motion for summary judgment. In her affidavit, Cummins averred that St. Luke and Diamond Cab Co. did not, at any relevant time, have a written contract regarding the provision of taxi services; that St. Luke has never owned or controlled Diamond Cab Co.; that St. Luke did not own any of Diamond Cab Co.'s equipment, including but not limited to the cab operated by Eugene Lee at the time of the accident; that St. Luke has never been involved in any of Diamond Cab Co.'s operations; that Eugene Lee has never been an employee of St. Luke; that St. Luke has never

controlled the activities of Lee, including his activities as a taxi cab operator for Diamond Cab Co.; and that neither Diamond Cab Co. nor Eugene Lee have ever been employees or agents of St. Luke.

Under common law principles of agency, a principal is vicariously liable for damages caused by torts of commission or omission of an agent or subagent, other than an independent contractor, acting on behalf of and pursuant to the authority of the principal. Williams v. Kentucky Dept. of Educ., Ky., 113 S.W.3d 145, 151 (2003).[5] In determining whether one is an agent or servant or an independent contractor, substance prevails over form, and the main dispositive criterion is whether it is understood that the alleged principal or master has the right to control the details of the work. United Engineers & Constructors, Inc. v. Branham, Ky., 550 S.W.2d 540, 543 (1977).

The Cummins affidavit effectively disclaims that there was any agency or master/servant relationship whatsoever between St. Luke and Diamond Cab Co. In response to the affidavit, Nathan has failed to present any affirmative evidence that St. Luke had the right to control the details of Diamond Cab Co.'s

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[5] And when the principal is under a duty to provide protection for or to have care used to protect others and confides the performance of that duty to a servant or other person who causes harm to them by failing to perform that duty, vicarious liability attaches even if the agent or subagent is not a servant, i.e., is an independent contractor. Williams at 151. Such a nondelegable duty, however, is not at issue in this case.

work or in any way exercised control over Diamond Cab Co. in its function as a public conveyance. “[A] party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 482 (1991). Accordingly, St. Luke was entitled to summary judgment on Nathan’s theory that Diamond Cab Co. was acting as an agent of St. Luke at the time it undertook the charge to transport Nathan to Falmouth.

Alternatively, Nathan contends that St. Luke was negligent by hiring Diamond Cab Co. to transport Nathan on the basis that it knew, or should have known, that the cab company would operate the vehicle in a careless and negligent manner. A negligence case requires proof that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached the standard by which his or her duty is measured, and (3) consequent injury. Pathways, Inc. v. Hammons, Ky., 113 S.W.3d 85, 88 (2003). It is well established that "[t]he concept of liability for negligence expresses a universal duty owed by all to all." Gas Service Co., Inc. v. City of London, Ky., 687 S.W.2d 144, 148 (1985). "The rule is that every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury." Grayson Fraternal

Order of Eagles v. Claywell, Ky., 736 S.W.2d 328, 332 (1987). However, "[i]n any negligence case, it is necessary to show that the defendant failed to discharge a legal duty or conform his conduct to the standard required." Mitchell v. Hadl, Ky., 816 S.W.2d 183, 185 (1991); Seigle v. Jasper, Ky. App., 867 S.W.2d 476, 483 (1993).

While St. Luke owed a duty to Nathan to exercise ordinary care in selecting a mode of transporting him to Falmouth, Nathan has failed to identify any acts or omissions by St. Luke which involve a breach of that duty. For example, Nathan has failed to present any affirmative evidence that St. Luke knew or should have known that Diamond Cab Co. was an unsafe means for transporting Nathan to Falmouth, that Diamond Cab Co. was in fact an unsafe means of transportation, or even that a safer means of transportation was an available option.

There are no genuine issues of material fact concerning the issue of whether St. Luke was negligent in selecting Diamond Cab Co. to transport Nathan to Falmouth. St. Luke did not breach any duty it owed to Nathan by selecting Diamond Cab Co. as the method of transporting him to Falmouth, and St. Luke was entitled to summary judgment as a matter of law under this theory of liability.

For the foregoing reasons, the judgment of the Pendleton Circuit Court is affirmed.

DYCHE, JUDGE, CONCURS.

SCHRODER, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

SCHRODER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I agree with the Majority when it ruled the two-year statute of limitations[6] applies. I would reverse and remand to the trial court. The statute of limitations was an affirmative defense and the trial court never granted summary judgment on the merits. As an appellate court, we cannot grant summary judgment but must remand the matter to the circuit court where it may consider a motion for summary judgment on the merits.

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[6] KRS 304.39-230.