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Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-000923-MR

MICHAEL R. RUSSELL

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 00-CI-007416

DANNY L. RHODES;
REGIONAL AIRPORT AUTHORITY OF LOUISVILLE,
AND JEFFERSON COUNTY REGIONAL AIRPORT AUTHORITY
OF LOUISVILLE AND
JEFFERSON COUNTY D/B/A AIRPORT POLICE;
SOUTHWEST AIRLINES CO.

APPELLEES

AND

NO. 2004-CA-000492-MR

MICHAEL R. RUSSELL

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 00-CI-007416

SOUTHWEST AIRLINES CO. ;
TRACY WRIGHT RAFFO; AND
JOE VANDERWIEL

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, KNOPF, AND TAYLOR, JUDGES.

KNOPF, JUDGE: On February 18, 1999, Michael R. Russell was arrested for alcohol intoxication by Officer Danny L. Rhodes, a police officer employed by the Regional Airport Authority of Louisville and Jefferson County (RAA), after Officer Rhodes received a report that Russell had engaged in disruptive behavior on a Southwest Airlines flight. Following dismissal of the criminal charge, Russell filed a complaint against Southwest Airlines, the flight attendants Tracy Wright Raffo and Joe Vanderwiel, the RAA and Officer Rhodes, alleging malicious prosecution, false arrest, negligence and negligent infliction of emotional distress. In separate orders, the Jefferson Circuit Court granted the defendants' motions for summary judgment and dismissed Russell's complaint. Russell argues that there were genuine issues of material fact which precluded summary judgment. We conclude, however, that even viewing the facts in the light most favorable to Russell, he cannot prevail on his claims. Hence, we affirm.

Russell was a passenger on Southwest Airlines Flight 863 from Phoenix, Arizona to Louisville, Kentucky. The flight attendants noticed that the airplane's lavatory smelled strongly of cigarette smoke after Russell used it. Several flight attendants testified that they smelled cigarette smoke on

Russell, as well as alcohol on his breath. When confronted about smoking in the lavatory, the flight attendants testified that Russell admitted to it in a disruptive and threatening manner. The flight attendants also testified that Russell made repeated requests to visit the cockpit of the aircraft.¹ Finally, the flight attendants asserted that Russell interfered with the flight crew's handling of a medical emergency. The attendants stated that while they were giving medical attention to another passenger, Russell disregarded instructions to remain seated and pushed his way through the aisle to reach the lavatory. The flight attendants state that Russell's actions interrupted their phone consultation with a doctor regarding the other passenger.

Eventually, the flight crew contacted the Louisville airport and alerted the RAA police that one of the airplane's passengers had become disruptive and unmanageable. In response, the RAA police dispatched Officer Rhodes to meet the arriving flight.² An attendant pointed out Russell as he left the aircraft. Officer Rhodes testified that Russell smelled strongly of alcohol, had red, blood-shot eyes, and was behaving in a loud

¹ Russell admitted that he asked to enter the cockpit and he later explained this behavior by relating a childhood experience of visiting an airplane cockpit. Additionally, Rhodes is licensed as a small-aircraft and helicopter pilot.

² Officer Rhodes was accompanied by several other RAA police officers, but those officers were not involved in Russell's arrest and are not parties to this action.

and disruptive manner. After talking with Russell for three to five minutes, Officer Rhodes concluded that Russell was a threat to his own security and to those around him. Consequently, Officer Rhodes placed Russell under arrest and handcuffed Russell's hands behind his back. Ultimately, Officer Rhodes issued Russell a citation for public intoxication³ and released Russell into the custody of a Meade County Sheriff's deputy.⁴

For the most part, Russell disputes the flight attendants' account of his behavior during the flight. Russell denies that he smoked in the lavatory, that he became disruptive on the aircraft, or that he interfered with the flight crew's performance of their duties. He does not dispute, however, that he had been drinking on the aircraft or that his eyes were bloodshot. He also admitted that he went to the lavatory during the medical emergency, but he denies that he interfered with the flight attendants' attempts to assist his fellow passenger. Russell's traveling companion, Elizabeth Hale, and three other passengers also dispute various aspects of the flight attendants' version of the events. None of Russell's witnesses overheard the

³ KRS 222.202(1).

⁴ Russell presented identification that he worked as a deputy sheriff for the Meade County Sheriff's department. It was later determined that Russell volunteered as a helicopter pilot for the Meade County Sheriff's department. He was given the title of special deputy but he did not have any police powers.

conversation with Officer Rhodes or actually witnessed the arrest. Russell states that he was arrested as soon as he left the aircraft, and several of Russell's witnesses agree with this aspect of Russell's account of the arrest.

Russell was tried in the Jefferson District Court on the alcohol intoxication charge. Following testimony from Officer Rhodes, Russell, and Hale, the district court directed a verdict of acquittal. Thereafter, on November 17, 2000, Russell brought this action against Southwest Airlines and the two flight attendants who reported Russell, Tracey Wright Raffo and Joe Vanderwiel. Russell asserted claims against Southwest and the flight attendants for negligence, malicious prosecution, humiliation, and negligent infliction of emotional distress. Russell asserted claims against the RAA and Officer Rhodes for malicious prosecution, false arrest and imprisonment, outrageous conduct, negligent infliction of emotional distress and assault and battery.

Prior to trial, the Southwest defendants and the RAA defendants separately moved for summary judgment. Russell stipulated that his outrageous conduct and assault claims should be dismissed. In an order entered on February 26, 2003, the trial court dismissed Russell's claims against the RAA and Officer Rhodes. Subsequently, on January 5, 2004, the trial

court dismissed Russell's claims against Southwest, Wright Raffo and Vanderwiell. This appeal followed.

The 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. Kentucky Rules of Civil Procedure (CR) 56.03. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992). "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., Ky., 807 S.W.2d 476, 480 (1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." Steelvest, 807 S.W.2d at 480, *citing* Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor ..." Huddleston v. Hughes, Ky.App., 843 S.W.2d 901, 903 (1992), *citing* Steelvest, *supra* (citations omitted).⁵

As the trial court correctly noted, the inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than

⁵ Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

what might be presented at trial.⁶ Although Russell questions this standard, he concedes that discovery was substantially complete and all relevant depositions and affidavits were filed in the record. Therefore, the matter was ripe for summary judgment.

In its February 26, 2003, order, the trial court first addressed Russell's claim of malicious prosecution as it related to Officer Rhodes. The trial court concluded that Officer Rhodes had probable cause to arrest Russell based on the credible report from Southwest that Russell had disrupted the flight. The trial court also noted that, based on the undisputed facts, Officer Rhodes had probable cause to believe that Russell was publicly intoxicated. Finally, the trial court found that, even if Officer Rhodes lacked probable cause to arrest Russell, there was no evidence that he acted out of malice.

In its January 5, 2004, order addressing the Southwest defendants, the trial court noted that Southwest merely reported Russell's conduct to the RAA. Officer Rhodes did not arrest Russell for that conduct, but for public intoxication, which he observed after Russell left the aircraft. Moreover, the trial court noted that Southwest was not the party responsible for initiating the public intoxication charge and it did not

⁶ Welch v. American Publishing Co. of Kentucky, 3 S.W.3d 724, 730 (Ky. 1999).

participate in the criminal proceeding. Since Southwest never initiated any proceedings against Russell, the trial court concluded that it could not be liable for malicious prosecution.

The parties agree that there are six basic elements necessary to the maintenance of an action for malicious prosecution:

(1) the institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding.⁷

The burden in a malicious prosecution action is on the plaintiff to prove lack of probable cause, and the probable cause issue is a question for the court to decide.⁸ Even viewing the evidence in the light most favorable to Russell, we agree with the trial court that Officer Rhodes had probable cause for the arrest. Russell asserts that Officer Rhodes arrested him immediately after he left the aircraft without making any independent inquiry beyond the report made by Southwest to the RAA. However, a report of disruptive behavior on an aircraft by

⁷ Collins v. Williams, 10 S.W.3d 493, 496 (Ky.App. 1999); *citing* Raine v. Drasin, 621 S.W.2d 895, 899 (Ky. 1981).

⁸ Prewitt v. Sexton, 777 S.W.2d 891, 894-95 (Ky. 1989).

the airline is sufficiently credible to constitute probable cause for an arrest.⁹ At the very least, Russell suggests no reason why the RAA or Officer Rhodes would have cause to doubt the reliability of Southwest's report.

Moreover, as the trial court noted, Russell admitted that he had been drinking on the flight and that his eyes were often bloodshot. When coupled with the report from Southwest about Russell's in-flight behavior, Officer Rhodes's observation of Russell's appearance gave him probable cause to believe that Russell was publicly intoxicated. Furthermore, as the trial court noted, Russell offered no evidence, other than his own opinion, that Officer Rhodes acted out of malice either by arresting him or by charging him with alcohol intoxication. Thus, Russell cannot establish the elements of malicious prosecution and that claim was properly dismissed.

Likewise, we agree with the trial court that the malicious-prosecution claim against the Southwest defendants also was properly dismissed. Southwest's actions were limited to notifying the police regarding Russell's alleged in-flight behavior and subsequently identifying him to police after the

⁹ See, e.g.: Lovett v. Commonwealth, 103 S.W.3d 72, (Ky. 2003), holding that when probable cause is based in part on a tip from an informant, the totality-of-the-circumstances test requires a balancing of the relative indicia of reliability accompanying an informant's tip. Id. at 78. See also Eldred v. Commonwealth, 906 S.W.2d 694, 705 (Ky. 1994).

airplane landed. Even if Russell is correct in his assertion that Southwest's flight attendants were acting out of malice and falsely reported his behavior during the flight in question, that behavior was not the basis for the charge of alcohol intoxication. That charge was based entirely on Officer Rhodes's observations after Russell left the aircraft. Southwest did not initiate or participate in the criminal proceedings, and no one from Southwest testified at the trial. Therefore, summary judgment was appropriate.

For the same reason, the trial court properly dismissed Russell's claim against the RAA and Officer Rhodes for false arrest and battery. A cause of action for false arrest will not lie where the officer had reasonable grounds for the arrest and used no more force than necessary.¹⁰ As previously noted, Officer Rhodes had probable cause for the arrest. Furthermore, Officer Rhodes did not strike or forcefully subdue Russell when making the arrest - he simply handcuffed Russell. Although Russell claims that the handcuffs damaged his hands, he offered no proof of any injury and he admitted that he has never sought medical attention for the alleged injury. In the absence of any

¹⁰ See Lexington-Fayette Urban County Government v. Middleton, 555 S.W.2d 613, 617-18 (Ky.App. 1977); See also City of Lexington v. Gray, 499 S.W.2d 72, 74 (Ky. 1972).

proof of unnecessary force, Russell cannot prevail on his claims of false arrest and battery.

Russell next asserts claims of negligence against the Southwest defendants and against the RAA defendants. These claims were also properly dismissed. As previously noted, Officer Rhodes had reasonable grounds to believe that Russell was publicly intoxicated. Even if Officer Rhodes erred in making this assessment, he is entitled to qualified immunity for discretionary acts taken in good faith and within the scope of his official duties.¹¹

As for the Southwest defendants, Russell merely asserts that Wright Raffo and Vanderwiel accused him wrongly of misconduct on the flight. Ordinarily, however, negligence cannot be inferred simply from an undesirable result. Expert testimony is necessary to establish both the standard of care and how the defendants deviated from that standard.¹² The only exceptions involve situations where "any layman is competent to pass judgment and conclude from common experience that such things do not happen if there has been proper skill and care," or where the doctrine of *res ipsa loquitur* is applicable.¹³

¹¹ Yanero v. Davis, 65 S.W.3d 510, 522-23 (Ky. 2001).

¹² Perkins v. Hausladen, 828 S.W.2d 652, 654 (Ky. 1992).

¹³ Id. at 654-55; *citing* Prosser and Keeton on Torts, § 39, p. 256 (5th ed. 1984).

Neither exception applies in this case. A crew of an aircraft in flight is charged with enforcing numerous federal regulations regarding the conduct of the passengers. The standard of care under which they must operate is not something that a layperson would be expected to know without expert testimony. Russell offered no evidence concerning how the flight crew should have handled their suspicions that he smoked in the lavatory or how they failed to comply with that standard of care. Likewise, Russell admits that he disregarded instructions from the flight attendants to remain seated during the medical emergency. Consequently, Russell cannot prove that Wright Raffo and Vanderwiel were negligent.

Similarly, Russell's claim of negligent infliction of emotional distress was properly dismissed. It is well established that an action will not lie for negligent infliction of emotional distress absent some showing of physical contact.¹⁴ Russell does not allege that there was any physical contact between him and the Southwest flight attendants. And while there was physical contact between Russell and Officer Rhodes, we have already concluded that Officer Rhodes was not negligent.

¹⁴ See Capital Holding Corp. v. Bailey, 873 S.W.2d 187 (Ky. 1994); Mitchell v. Hadl, 816 S.W.2d 183, (Ky. 1991); and Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980).

Furthermore, "humiliation" is not a separate cause of action. Rather, humiliation is a form of emotional distress that flows from the torts of false arrest and negligent infliction of emotional distress.¹⁵ Finally, in light of the dismissal of the underlying tort claims, Russell's claim for punitive damages was also properly dismissed.

Accordingly, the summary judgments granted by the Jefferson Circuit Court are affirmed.

ALL CONCUR.

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¹⁵ See Davis v. Graviss, 672 S.W.2d 928, 931 (Ky. 1984); and Banks v. Fritsch, 39 S.W.3d 474, 480 (Ky.App. 2001).

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