

RENDERED: AUGUST 8, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001266-MR

GREGORY V. HARLAN, JR., AND
DORIS J. HARLAN

APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 05-CI-006712

G.C. WILLIAMS FUNERAL HOME, INC.,
AND GREEN MEADOWS CEMETERY,
LLC

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: LAMBERT AND MOORE, JUDGES; BUCKINGHAM,¹ SENIOR
JUDGE.

BUCKINGHAM, SENIOR JUDGE: Gregory V. Harlan, Jr., and Doris J. Harlan
appeal from a summary judgment granted by the Jefferson Circuit Court to G.C.
Williams Funeral Home, Inc., and Green Meadows Cemetery, LLC. We affirm.

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On July 31, 2004, Andre Lamont Cowan, the son of Doris J. Harlan and the stepson of Gregory V. Harlan, Jr., was shot and killed. Mrs. Harlan made arrangements with G.C. Williams Funeral Home for his funeral and burial. Their contract contained the following provision, entitled “Arrangements and Supervision,” under which the funeral home agreed to provide

the services of funeral director, other staff and use of equipment of funeral firm in all details related to arrangements, conduct and direction of the funeral and/or disposition of remains.

The contract also provided that \$575 would be paid for Cowan’s grave.

Arrangements were made for Cowan to be buried at Green Meadows Cemetery, although Green Meadows was neither named in the contract nor a party to it.

G.C. Williams provided for a security officer to be present at the funeral home during the service for Cowan. Jasper Crenshaw, the vice president of G.C. Williams, testified in his deposition that this was a precaution normally taken when the decedent was a young African-American male who had died from “a gunshot or something like that.” Crenshaw explained that the funeral home or the city police provided such security personnel because several years earlier a gun had been fired during a funeral service for a young African-American who had been killed by a gunshot. No arrangements were made for a security officer to be present at the Green Meadows grave site, however.

After the service at the funeral home, Cowan’s casket was transported to the cemetery, where a short ceremony was held in a shelter. The funeral

attendees and the employees of G. C. Williams then left the cemetery, leaving Cowan's casket with Green Meadows. The casket was moved from the shelter and placed in the vault (a large concrete receptacle) to await burial by employees of Green Meadows. The casket had no lock and was not sealed.

Several other funerals were being held that day at the cemetery, and Cowan's casket was left unattended while other caskets were being interred. During this period of time, several unidentified individuals opened the coffin and placed various items in the casket, including what appears to be a blindfold or bandanna on Cowan's head. They then took photographs of themselves with Cowan's body. These photographs were delivered to Mr. Harlan.

The Harlans filed a civil complaint in the Jefferson Circuit Court against G.C. Williams and Green Meadows. The claims included negligence and gross negligence, negligent interference with remains and mishandling of a corpse, intentional infliction of emotional distress, and breach of contract.²

After some discovery was taken, the funeral home and the cemetery filed motions for summary judgment. The circuit court granted the motions in an opinion and order entered on May 24, 2007. This appeal by the Harlans followed.

In reviewing a grant of summary judgment, our inquiry focuses on whether the trial court correctly found that there was no genuine issue 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. “[T]he proper function of

² The Harlans brought additional causes of action in their complaint, but they abandoned those before the summary judgment proceedings.

summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

The Harlans’ first argument is that the trial court erred in granting summary judgment on their negligence claims. In *Lewis v. B & R Corporation*, 56 S.W.3d 432 (Ky.App. 2001), this court stated as follows:

In order to state a cause of action based on negligence, a plaintiff must establish a duty on the defendant, a breach of duty, and a causal connection between the breach of the duty and an injury suffered by the plaintiff. The causal connection or proximate cause component traditionally was composed of two elements: cause-in-fact and legal or consequential causation. Cause-in-fact involves the factual change of events leading to the injury; whereas, consequential causation concerns the concepts of foreseeability and the public policy consideration on limiting the scope of responsibility for damages. In Kentucky, the cause-in-fact component has been redefined as a “substantial factor” element as expressed in Restatement (Second) of Torts 431. The scope of duty also includes a foreseeability component involving whether the risk of injury was reasonably foreseeable.

Id. at 436-37. Further, in *Ohio Casualty Insurance Company v. Commonwealth, Department of Highways*, 479 S.W.2d 603 (Ky. 1972), the court held that “[i]n Kentucky we always have determined proximate cause on the basis of whether the injury is the natural and probable consequence of the negligent act, which test involves the element of foreseeability.” *Id.* at 605.

The circuit court found that Mrs. Harlan's contract with G.C.

Williams did not create a duty requiring G.C. Williams to remain at the burial site after the body had been transported to the cemetery. The court also observed that Kentucky courts have determined that in analyzing legal duties in cases such as this, "[t]he major issue is the question of foreseeability." *Fryman v. Harrison*, 896 S.W.2d 908, 909 (Ky. 1995). The court found no evidence in the record that either G.C. Williams or Green Meadows could have foreseen the actions of the individuals who opened the casket at the cemetery and photographed themselves with the body. The court further stated that there is no duty to protect another from the criminal acts of a third party.

The Harlans contend that the contract did create a duty: specifically, the provision in which the funeral home had agreed to arrange and supervise "all details related to arrangements, conduct and direction of the funeral and/or disposition of the remains." The Harlans maintain that this duty to conduct and direct the disposition of the remains at the cemetery was breached when the employees of G.C. Williams left the cemetery after the service, rather than remaining until the casket had been safely interred. Similarly, they argue, Green Meadows negligently left the casket unattended long enough for several individuals to enter the cemetery, open the casket, and take photographs. They contend that an issue of fact exists as to whether the appellees had breached their duties to supervise and attend to all the details relating to the conduct and direction of the burial or disposition of the remains.

We agree with the circuit court's determination that the duty of the appellees, both in the exercise of ordinary care and as created by the contract, did not extend to anticipating the bizarre events that occurred and hence to providing an employee to guard the casket until it was interred. It was reasonable on the part of the appellees to assume that the casket could be left unattended in the vault to await burial. The harm that resulted from leaving the casket unattended was not foreseeable.

The Harlans argue that the fact that G.C. Williams provided a security guard at the funeral home shows that the appellees were aware that criminal activity was likely to occur at the funeral of a young African-American who had died violently. But, providing security at a crowded funeral home where an altercation could break out among visitors is materially different from providing continuous security for a casket contained in a vault awaiting burial.

The Harlans further argue that the appellees breached duties created by statute, specifically Kentucky Revised Statutes (KRS) 316.010 and KRS 381.697, and are liable for such actions.

KRS 446.070 provides:

A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.

In *Hargis v. Baize*, 168 S.W.3d 36 (Ky. 2005), the Kentucky Supreme Court held that

The statute creates a private right of action in a person damaged by another person's violation of any statute that is penal in nature and provides no civil remedy, if the person damaged is within the class of persons the statute intended to be protected.

Id. at 40. In *Alderman v. Bradley*, 957 S.W.2d 264 (Ky.App. 1997),

this court held that

In order for a violation to become negligence *per se*, the plaintiff must be a member of the class of persons intended to be protected by the regulation, and the injury suffered must be an event which the regulation was designed to prevent. Only when both requirements are affirmatively demonstrated is negligence *per se* established with the applicable regulation or statute defining the relevant standard of care.

Id. at 267.

KRS 316.010 (8) provides as follows:

“Funeral director” means a person who, for profit, engages in or represents himself or herself as engaged in the supervision, direction, and arrangement of funeral services, transportation, burials, and disposals of dead human bodies[.]

KRS 316.010(8) merely defines the term “funeral director.” It does not create or define any duties or responsibilities for funeral directors. Thus, the appellees could not have violated any duties in the statute since it contained no duties.

The other statutory provision relied upon by the Harlans, KRS 381.697(1), states as follows:

Every cemetery in Kentucky except private family cemeteries shall be maintained by its legal owner or

owners, without respect to the individual owners of burial plots in the cemetery, in such a manner so as to keep the burial grounds or cemetery free of growth of weeds, free from accumulated debris, displaced tombstones, or other signs and indication of vandalism or gross neglect.

The Harlans argue that this provision imposes a statutory duty on Green Meadows to anticipate the type of injury that occurred here.

However, the statute further provides as follows:

The owner or owners of public or private burial grounds, regardless of size or number of graves, shall protect the burial grounds from desecration or destruction as stipulated in KRS 525.115(1)(a), (b), or (c) or from being used for dumping grounds, building sites, or any other use which may result in the burial grounds being damaged or destroyed. **The provisions of this subsection shall not apply to the owner or owners of public or private burial grounds when the public or private burial grounds have been desecrated, damaged, or destroyed as the result of a crime by another as defined by KRS 500.080.**

KRS 381.697(2) (emphasis supplied.) The statute specifically exempts the owners of burial grounds from liability when the grounds are damaged as the result of a crime committed by another.

The appellants' second argument is that the circuit court erred in ruling that in Kentucky there is no duty to protect another from the criminal acts of a third party. This is an accurate statement of the law, insofar as there is no duty to protect against unforeseeable criminal acts of third parties.

In Kentucky, “[t]he 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, Aerie No. 3738, Inc. v.*

Claywell, Ky., 736 S.W.2d 328 (1987). (Emphasis added). In addressing questions of proximate cause, recent cases apply the general principles of foreseeability in those cases involving intervening or superseding cause. See generally *Montgomery Elevator Co. v. McCullough*, Ky., 676 S.W.2d 776 (1984). Even an intervening criminal act does not relieve one for liability for his or her negligent acts or omissions, where the criminal act is a reasonably foreseeable consequence of the defendant's negligent act. See, e.g., *Wheeler v. Andrew Jergens Company*, Ky., 696 S.W.2d 326 (1985).

Waldon v. Housing Authority of Paducah, 854 S.W.2d 777, 778-79 (Ky.App. 1991).

In *James v. Wilson*, 95 S.W.3d 875 (Ky.App. 2002), one the cases cited by the circuit court, a school shooter stole a gun that was kept unloaded in a storage case in a cabinet behind several other items. He also broke into a storage shed and stole ammunition. The court held that the owner of the gun “was under no duty to anticipate that [the shooter] would ransack his shed, steal his gun and ammunition, and use them in the intentional shootings of other students.” *Id.* at 886.

By contrast, in the *Waldon* case, the court observed that while a landlord is “not a guarantor of his tenants’ safety,” he may be liable to a tenant for the criminal acts of third persons “if the landlord fails to take reasonable steps to avoid injury from reasonably foreseeable criminal acts.” *Id.* at 779 (citations omitted). In *Waldon*, the Housing Authority of Paducah was aware that an individual named Williams had made repeated threats to kill a tenant, Smith, was aware that Williams was residing in the housing complex without permission, and

was aware that crimes frequently occurred at the complex. The housing authority failed to remove Williams from the complex and failed to provide any security guards. Williams subsequently killed Smith. The court held that the housing authority's inaction was sufficient to create a jury question on the issue of proximate cause of Smith's death such as to preclude summary judgment for the housing authority. *Id.*

Analyzing the factual circumstances of this case in the context of *James and Waldon*, we conclude that the circuit court correctly held as a matter of law that the criminal conduct was unforeseeable. The appellees were never informed of any threats to mistreat Cowan's body, and there is no evidence that a similar incident had ever occurred at the cemetery.

The appellants' reliance on *Degener v. Hall Contracting Corp.*, 27 S.W.3d 775 (Ky. 2000), is also misplaced. Under the principles of *Degener*, if there was liability on the part of G.C. Williams and Green Meadows, i.e., if the criminal acts in this case had been reasonably foreseeable, they would be entitled to complete indemnity against the anonymous perpetrators of those acts. *Id.* at 781. The *Degener* case did not address the issues present in this case, however.

The appellants' third argument is that the court erred in dismissing their claim for desecration of a dead body and/or negligent interference with remains and mishandling of a corpse. The circuit court rejected these claims by stating that this cause of action is exclusively one for mental distress and that damages may not be recovered for shock or mental anguish unaccompanied by

physical contact or injury. *See Heatrick v. Willis*, 439 S.W.2d 942, 943 (Ky. 1979). The court noted that nothing in the record supports a finding that the Harlans suffered any physical contact or injury.

The Harlans argue that there is an exception in Kentucky that allows for the recovery of damages for mental anguish for desecration, interference with, or mishandling of a corpse, even when unaccompanied by physical contact or injury. In *R.B. Tyler Co. v. Kinser*, 346 S.W.2d 306 (Ky. 1961), the court held that

It is the law of this jurisdiction that next of kin have a right to recover damages for mental anguish for “unwarranted interference with the grave of a deceased person” as well as for an act which affected the body interred therein if either act was done maliciously or wantonly or by gross negligence.

Id. at 308.

The Harlans have not cited any authority that would allow such an action to be brought against a third party who was not the perpetrator. Thus, we conclude that this type recovery may be made solely against the individual(s) who perpetrated the act. We agree with the appellees that this claim fails because there was no evidence that either appellee acted with the requisite intent or actually mishandled or interfered with the corpse.

The appellants’ final argument concerns their claim for breach of contract. They contend that they are third-party beneficiaries of a contract with Green Meadows Cemetery and consequently, although Green Meadows did not sign the written agreement that Mrs. Harlan made with G.C. Williams, there was

an implied contract between it and her to handle the remains of her son appropriately and to assure a proper interment. There is no evidence to support a claim of breach of contract, however, because the appellees provided everything outlined in the contract. The contract did not require them to anticipate an intervening, unforeseeable criminal act and to provide precautions against it.

The summary judgment of the Jefferson Circuit Court is affirmed.

LAMBERT, JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN RESULT ONLY.

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