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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002167-MR
&
NO. 2007-CA-002201-MR

JAMES M. THORNSBERRY — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE DANNY P. CAUDILL, JUDGE
ACTION NO. 03-CI-01398

KENTUCKY POWER COMPANY D/B/A/
AMERICAN ELECTRIC POWER AND
AMERICAN ELECTRIC POWER
SERVICE CORPORATION — APPELLEES/CROSS-APPELLANTS

OPINION
REVERSING AND REMANDING
WITH DIRECTIONS

** ** ** ** **

BEFORE: CLAYTON AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

CLAYTON, JUDGE: This appeal is from the Floyd Circuit Court after a jury verdict in favor of the appellees/cross-appellants, Kentucky Power Company d/b/a American Electric Power, and American Electric Power Service Corporation (Kentucky Power).

FACTUAL SUMMARY

Appellant/cross-appellee, James M. Thornsberry, brought an action in Floyd Circuit Court for loss of parental consortium. Thornsberry's father, Barry Thornsberry (the "decedent"), was killed when a ladder he was moving came into contact with an uninsulated high voltage power wire owned and in use of Kentucky Power. Thornsberry was a child at the time of his father's death and brought this loss of consortium claim after he attained the age of majority.

Kentucky Power moved the trial court for a dismissal of the action contending that the loss of consortium claim was not viable as the holding in *Giuliana v. Guiler*, 951 S.W.2d 318 (Ky. 1997), should not be read to be retroactive and that Thornsberry's loss of consortium claim should not have gone to trial. The trial court denied Kentucky Power's motion and the case proceeded to trial.

At trial the parties presented evidence regarding high voltage electrical lines and the dangers involved in relation to insulation and non-insulation. Kentucky Power presented evidence and testimony that they had abided by the National Electrical Safety Code (the "NESC") when installing and maintaining their electrical wires including the one with which the decedent came

into contact. Thornsberry's counsel, on the other hand, provided testimony and evidence that indicated Kentucky Power had other accidents involving its power lines and that it should have been aware that non-insulated wires were more dangerous.

Prior to the case being given to the jury, the parties submitted jury instructions. The trial court denied the use of Thornsberry's Instruction as follows:

> It was the duty of the Defendants, the Kentucky Power Company d/b/a American Electric Power and the American Electric Power Service [Corporation], to exercise the highest degree of care to have its wires so insulated or protected as to prevent injury to persons it should reasonably have anticipated might come in contact with them.

The trial court, however, submitted the following instruction to the jury:

> It was the duty of the Defendants, the Kentucky Power Company d/b/a American Electric Power and the American Electric Power Service [Corporation], to exercise the highest degree of care to prevent injury to persons it should reasonably have anticipated might come into contact with them.

Thornsberry contends that this instruction was in contrast to the mutually agreed upon instruction set forth above and that the trial court took it upon itself to so instruct in error.

The trial court stated that it made the above change as "there's been evidence that such insulation would not make any difference, there's been some testimony that it would," and that "part of the very crux of what this jury has to

decide." Thornsberry contends that this instruction was in error and that the proper standard of care requires an electric utility to use the highest degree of care and skill known in the conduct of such business that can or may be exercised to prevent injury to the public.

Thornsberry also argues that the trial court erred in failing to inform the jury that an electric company's compliance with safety standards does not in itself free the company of negligence in accord with this court's decision in *Lambert v. Franklin Real Estate Co*., 37 S.W.3d 770 (Ky. App. 2000).

In its cross-appeal, Kentucky Power contends that the trial court erred in denying its motion to dismiss on the issue of parental consortium. Specifically, Kentucky Power argues that the holding in *Giuliana* should not have applied retroactively to this action. If we decide the trial court erred in this regard, Thornsberry's issues become moot.

STANDARD OF REVIEW

Questions regarding jury instructions are questions of law and, as such, we will review them *de novo*. *Floyd County Bd. of Educ. v. Ratliff,* 955 S.W.2d 921 (Ky. 1997). Review of a trial court's refusal to give a requested instruction, however, is limited to abuse of discretion. *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 229 (Ky. 2005) (citation omitted).

Motions to dismiss are also considered to be matters of law and must be reviewed *de novo. James v. Wilson*, 95 S.W.3d 875, 883-884 (Ky. App. 2002). A motion to dismiss should be granted only if it appears that the party against

whom dismissal is sought is not entitled to relief under any set of facts that could be proven to support the claim. *Id*.

With these standards in mind, we will examine the issues before us.

DISCUSSION

We will begin our discussion with the motion to dismiss as a reversal on that issue would moot the remaining issues. Kentucky Power argues that the trial court erred in failing to grant its motion to dismiss. It contends that Kentucky's parental consortium law should not be applied retroactively pursuant to *Giuliani*, 951 S.W.2d 318, and *Daley v. Reed*, 87 S.W.3d 247 (Ky. 2002).

Daley simply reiterates the holding in *Giuliani* that:

> a claim for loss of consortium in which a *survivor* seeks damages for the loss of the decedent's companionship, services, etc., is a separate and independent cause of action from a wrongful death claim in which the *decedent's estate* seeks damages for the loss of the decedent's power to labor and earn money.

Daley, 87 S.W.3d at 249. It then goes on to address a specific insurance provision and its applicability to a loss of consortium claim. It does not deal with whether such a claim is retroactive.

In *Giuliani*, the Kentucky Supreme Court recognized the cause of action for loss of parental consortium. In that case, the minor children of a deceased mother who died during childbirth sued the attending physician for loss of parental consortium. Kentucky Power contends that, actions such as this one, which accrued prior to the court's decision in *Giuliani* should not stand.

"Given the legislatively expressed public policy of this Commonwealth to strengthen and encourage the family for the protection and care of children, KRS 600.010, it is only logical to recognize that children have a right to be compensated for their losses when such harm has been caused to them by the wrongdoing of another." *Giuliani* at 320. After Giuliani recognized the cause of action of loss of parental consortium, future cases provided that it was not an allowable cause of action for children who were adults at the time of the tort. While Thornsberry was not an adult when his father died as a result of this accident, he did not bring the action until he became an adult pursuant to KRS 413.170(1), which provides for tolling as follows:

> If a person entitled to bring any action mentioned in KRS 413.090 to 413.160, except for a penalty or forfeiture, was, at the time the cause of action accrued, an infant or of unsound mind, the action may be brought within the same number of years after the removal of the disability or death of the person, whichever happens first, allowed to a person without the disability to bring the action after the right accrued.

Kentucky Power argues that since Thornsberry's claim was not a viable one at the time his father died, once the wrongful death action was settled, it believed it no longer had any liability. As a result, it "closed the file" on the case and a future lawsuit would be unfair.

In *Rigdon v. Rigdon*, 465 S.W.2d 921, 923 (Ky. 1971), the Court dealt with the change in tort law of parental immunity. The Court held that:

> Generally, there is no basis for limiting to future cases the impact of a changed rule of tort law. In the

> present situation, however, valid reasons impel a different ruling. It will be recalled that the statute of limitation generally applicable in claims for personal injury requires the filing of the suit within a year of the accident. KRS 413.140(1)(a). The statutory period is extended as to persons under disability, such as infancy. KRS 413.170(1). Thus, abrogation of the parental-immunity rule would permit actions to recover for alleged personal injuries which occurred years ago. The claimed tort-feasors of those days justifiably omitted investigative procedures looking toward defense of such claims, relying on the rule of parental immunity. Stale and meritless claims might well succeed because of reasonable reliance upon the then-prevailing rule of tort law. (Citation omitted).

In cases of loss of parental consortium, there is also the applicability of KRS 413.170(1). As set forth above, while adult children may not bring a loss of consortium action under the laws of this Commonwealth, minor children may bring the action after they reach adulthood under KRS 413.170(1). As a result, years pass before claims are brought. As in *Rigdon,* 465 S.W.2d 921, reliance upon the tort law at the time the tort occurred may well lead to meritless claims succeeding. Consequently, we believe the Floyd Circuit Court erred in denying Kentucky Power's motion to dismiss the action. Therefore, this matter is reversed and remanded with directions to the Floyd Circuit Court to dismiss the action. As a result of this decision, the merits of Thornsberry's arguments are moot.

LAMBERT, SENIOR JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, CONCURRING IN RESULT ONLY: I concur with the majority's result. However, I believe that the trial court properly denied Kentucky Power's motion to dismiss Thornsberry's loss of parental consortium claim.

I differ with the majority's holding that *Giuliani v. Guiler*, 951 S.W.2d 318 (Ky. 1997), cannot be applied retroactively. My conclusion is supported by *Kotsiris v. Ling*, 451 S.W.2d 411 (Ky. App. 1970), in which the Court recognized a wife's cause of action for loss of consortium. Similar to the present circumstances, the husband's claim was settled before the wife asserted her claim. The Court rejected the contention that its opinion should have only prospective application and stated:

> We are of the view that, ordinarily, there is no good reason for a new rule of tort law not to be applied retrospectively. See *Haney v. City of Lexington*, Ky., 386 S.W.2d 738, 10 A.L.R.3d 1362. Since, as hereinbefore pointed out, the scope of the wife's cause of action as recognized by the instant opinion is such as to eliminate substantially any danger of double recovery and the cause of action is distinct and separable from that of the husband for his injuries, so that there is no need for a requirement of joinder, we think that except for the prior settlement feature there is nothing in the circumstances of this type of case to militate against retrospective application of the new rule. And we are not convinced that the fact that in a particular case, such as this one, the husband's claim was settled before the wife's claim was asserted is a valid ground for denying retrospective application.

Id. at 413.

I also point out that in *Roethke v. Sanger*, 68 S.W.3d 352 (Ky. 2001), our Supreme Court considered a parental loss of consortium claim which was the result of a wrongful death claim that accrued in 1992, seven years prior to its decision in *Giuliani*. Although it is unclear whether the issue of retroactivity was raised, I believe that it is not an unreasonable conclusion that the Supreme Court believed its opinion in *Giuliani* to be retroactive when it considered the claims on their merits.

The Court's recognition of a new tort has consistently been applied to causes of action based on events that occurred prior to the Court's decision. As indicated in *Kotsiris*, 451 S.W.2d at 413, there is a presumption that new rules of tort law should be applied retroactively so that all litigants are given an equal opportunity to present their claims.

I further believe that as in *Kotsiris*, joinder of the claims was not required and the settlement of the wrongful death claim did not preclude the consortium claim. The wrongful death action and loss of consortium claim are separate claims that belong to separate entities. A claim for loss of consortium may be asserted regardless of whether the personal representative of the decedent ever asserts a claim for wrongful death. Thus, it is logical that the settlement of a wrongful death claim does not preclude a loss of consortium claim.

A troublesome point for the majority is the lapse of time between the occurrence of the alleged tort and Thornsberry's complaint. I do not share its

concern that the application of *Giuliani* retroactively will result in stale and meritless claims. More than a decade has passed since the adoption of loss of parental consortium as a cause of action so that the scope of our decision in this case is limited. I also emphasize that Thornsberry's claim was filed well within the applicable statute of limitations which was extended as a result of Thornberry's infant status. KRS 413.170(1). Thus, it is not the application of *Giuliani* that promotes stale claims, rather it is by operation of the statute which permits claims to be filed that would otherwise be time-barred.

Although I believe that the majority's reasoning in regard to the loss of parental consortium issue is flawed, I agree that the judgment must be affirmed. Any errors in the jury instructions were harmless and, therefore, I would not disturb the jury's verdict.

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