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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002576-MR

CHARLENE COOPER; JIM COOPER
AND M.C. APPELLANTS

APPEAL FROM KENTON CIRCUIT COURT
v. HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 06-CI-01599

GARY UNTHANK, JR.; COMMUNITY
PENTECOSTAL CHURCH, INC. AND
COMMUNITY CHRISTIAN ACADEMY APPELLEES

AND

NO. 2007-CA-002596-MR

LORI EUBANKS AND A.T. APPELLANTS

APPEAL FROM KENTON CIRCUIT COURT
v. HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 06-CI-01513

GARY UNTHANK, JR.; COMMUNITY
PENTECOSTAL CHURCH, INC. AND
COMMUNITY CHRISTIAN ACADEMY APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: KELLER, MOORE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: The appellants, Lori Eubanks, individually and on behalf of her daughter, A.T., and Charlene Cooper, individually and on behalf of her daughter, M.C., filed actions against the Community Pentecostal Church, Inc., Community Christian Academy and Gary Unthank.[1] The claims were filed after A.T. had sexual intercourse with Gary Unthank, a volunteer girls' basketball coach at the Community Christian Academy, and after Unthank allegedly assaulted M.C.

The circuit court concluded, as a matter of law, that Unthank's acts were not foreseeable or known to the appellees and granted summary judgment to the appellees. The court held that the appellants were not vicariously liable for Unthank's acts because he was not acting within the scope of his duties as a coach when he committed the acts; that the appellants could not sustain a cause of action for loss of parental consortium; and that the facts alleged were insufficient to sustain a cause of action for the tort of outrage.

On appeal, only the issues of negligent retention/hiring and the tort of outrage are pursued. Because appellants presented sufficient evidence to create a

[1] Summary judgment was entered against Unthank and that portion of the case was held in abeyance pending the outcome of this appeal.

genuine issue of material fact as to whether the appellees knew or should have foreseen that Unthank would commit the acts alleged by appellants, we reverse. Otherwise, the judgment is affirmed.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. "[T]he proper function for a 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." *Paintsville Hospital Co. v. Rose,* 683 S.W.2d 255, 256 (Ky. 1985). (internal quotations omitted). "The records 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*., 807 S.W.2d 476, 480 (Ky. 1991). With the standard of review as our guide, we recite the facts presented by the appellants in response to the summary judgment motion.

In November 2005, the principal of the Community Christian Academy, Tara Bates, appointed twenty-three year old Unthank as the girls' basketball team coach. The Academy was a ministry of the Community Pentecostal Church of which Unthank was a member. Pursuant to the Academy's policy, a criminal background check was performed prior to Unthank's appointment.

Although Unthank previously resided in Ohio, only a Kentucky background check was performed which did not reveal any criminal history. However, Unthank had drug-related charges in March 2000, June 2000, and June 2003, and various traffic related offenses. Prior to his appointment, he told members of the congregation, including Bates, about his prior drug use and numerous church members confirmed that Unthank "testified" in church regarding his drug use.

A.T. and M.C. were members of the girls' basketball team. After his appointment as coach, Unthank began telephoning A.T. and providing her rides to her residence. Upon learning of the contact between her daughter and Unthank, on January 13, 2006, A.T.'s mother, Lori Eubanks, informed Bates about the late night phone calls A.T. received from Unthank and stated that she found his conduct inappropriate. Eubanks recalled that Bates was concerned that if she removed Unthank as coach, the team would be disassembled but assured Eubanks that Unthank would be supervised. Subsequently, Bates met with Unthank and the boys' basketball coach, Junior Philpot. Philpot recalled that Bates told Unthank to stop calling A.T. and giving her rides in his car.

Despite the admonition given by Bates, on January 21, 2006, Unthank had sexual intercourse with fourteen-year old A.T. On January 28, 2006, Unthank again had sexual intercourse with A.T. Subsequently, Unthank pleaded guilty to third-degree rape.

M.C. testified that Unthank's assault on her occurred on January 23, 2006. Unthank was permitted by the appellees to drive the Academy van to an away basketball game. During the girls' game, M.C. was struck by a basketball causing her to leave the game. Following the girls' game and after the boys' game begun, Unthank approached M.C. and asked her to walk to the van with him. M.C. followed Unthank into the van where he grabbed her legs and began rubbing her arm. M.C. testified that Unthank ceased his sexual advances because other team members came to the van. Unthank denies that he assaulted M.C.

During discovery, there was testimony offered by several team members that Unthank made sexual advances toward the girls and that he was "weird" and "creepy." There was also testimony that prior to Unthank's statutory rape of A.T. and alleged assault on M.C., a student who knew of Unthank's calls to A.T. suspected a possible sexual relationship between the two and informed Bates regarding his suspicions. Unthank had also been removed from the Church youth ministry because he engaged in drug-related activity.

In their appeals, appellants do not pursue their claims asserted against the appellees on the basis of respondeat superior, apparently conceding that Unthank's criminal acts were not in furtherance of the interest of the Academy or the church. *See Patterson v. Blair*, 172 S.W.3d 361 (Ky. 2005). They instead argue that the facts presented created a jury question on their claims for negligent hiring/retention.

Negligent hiring/retention claims were expressly recognized in *Oakley v. Flor-Shin Inc.*, 964 S.W.2d 438 (Ky.App. 1998), where the Court held that liability can be imposed on an employer who knew or should have known that the employee was unfit for the job in which he was employed and that his placement or retention in that job created an unreasonable risk of harm. *Id*. at 442. Negligent hiring/retention claims differ from liability based upon respondeat superior in that the law imposes a duty upon the employer to use reasonable care in the selection or retention of its employees. *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705 (Ky. 2009). Although under the doctrine of respondeat superior the employer is strictly liable for the act, under the theory of negligent hiring/retention the employer's liability may only be predicated upon its own negligence in failing to exercise reasonable care in the selection or retention of its employees. *Id*. at 732. Thus, the focus is on the employer's conduct and requires that the traditional negligence elements of a negligence claim be established --- duty, breach, and consequent injury. *Grubbs ex rel. Grubbs v. Barbourville Family Health Center, P.S.C.*, 120 S.W.3d 682, 687 (Ky. 2003). Generally, duty presents a question of law, while breach and injury are questions of fact for the jury to decide. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky.App. 2003).

The imposition of a duty upon the employer in a negligent hiring/retention claim arises from the special relationship between the tortfeasor and the defendant.

The Second Restatement provides that a special relationship exists between master and servant only if the servant is using an instrumentality of the employment relationship to cause harm, *i.e.,* either the master's chattel or premises entered by virtue of the employment relationship. Restatement (Second) of Torts § 317 (1965). The proposed Third Restatement puts this requirement more succinctly: "Special relationships giving rise to the duty provided in [§ 41(a)] include: ... (3) an employer with employees *when the employment facilitates the employee's causing harm to third parties.*" Restatement (Third) of Torts: Liability for Physical Harm § 41(b)(3) (Proposed Final Draft No. 1, 2005) (emphasis added). *See also Marusa v. Dist. of Columbia,* 484 F.2d 828, 831 (D.C.Cir.1973) (city had duty of reasonable care in training and supervision of police officer who caused off-duty injury with service revolver); *Ponticas v. K.M.S. Investments,* 331 N.W.2d 907, 911 (Minn.1983) (apartment owner had duty to exercise reasonable care in hiring employee who later used passkey issued by apartment owner to rape tenant); *McCrink v. City of New York,* 296 N.Y. 99, 71 N.E.2d 419, 422 (1947) (city had duty of reasonable care in retention of police officer who, while off-duty, shot and killed plaintiff's decedent with service revolver); *Hutchison ex rel. Hutchison v. Luddy,* 560 Pa. 51, 742 A.2d 1052, 1060 (1999) (evidence sufficient to support negligent supervision and retention claim against employer where employee used his status as such to enter minor's motel room where sexual abuse occurred). Again, the common thread through the above-described employment relationships is that the employer has a real means of control over the employee which, if exercised, would meaningfully reduce the risk of harm. *See Weaver v. African Methodist Episcopal Church, Inc.,* 54 S.W.3d 575, 582-83 (Mo.Ct.App. 2001) ("Such limitations serve to restrict the master's liability for a servant's purely personal conduct which has no relationship to the servant's employment and the master's ability to control the servant's conduct or prevent harm.").

Grand Aerie Fraternal Order of Eagles v. Carneyhan, 169 S.W.3d 840, 852 (Ky. 2005). We conclude that the requisite special relationship exists between a school and its students to impose liability on a school for negligent retention/hiring.

The duty of a school system and its employees to protect students entrusted to its care and control is one of utmost societal concern and one that must be adhered to with reverence. When a child is under the control and supervision of school personnel, the protective custody of their parents is substituted by teachers, coaches, and other school personnel. As a matter of public policy and morality, a basic assurance to each student must be that in their vulnerable position as a student, they will not be subjected to sexual acts by those in supervisory positions. The school's duty to protect its children from harm by its personnel applies whether the tortfeasor is a paid employee or, as in this case, a person placed in authority over children as a volunteer.

Despite the existence of the school's general duty to protect the children in its care, the scope of that duty is limited by the rule that the risk of injury must be reasonably foreseeable. *See, e.g., Lewis and B & R Corporation,* 56 S.W.3d 432 (Ky.App. 2001); *Fryman v. Harrison,* 896 S.W.2d 908 (Ky. 1995); *Standard Oil Co. v. Manis,* 433 S.W.2d 856 (Ky. 1968); *Commonwealth, Dept. of Highways v. Widner,* 388 S.W.2d 583 (Ky. 1965). "[A]bsent foreseeability, no duty, the breach of which entails liability, could arise." *Ten Broeck Dupont, Inc.,* 283 S.W.3d 705, 732 (Ky. 2009). The circuit court relied upon the lack of

foreseeability as the basis for its conclusion that no material facts existed and its award of summary judgment. We conclude that the trial court erred.

If the appellants' claims were premised solely on Bates's failure to conduct an Ohio background check and the disregard of Unthank's past drug use, we would agree with the circuit court. Although a voluntary assumption of a duty can give rise to tort liability, Unthank's criminal past did not render it foreseeable that Unthank would commit criminal sexual acts. *See Grand Aerie Fraternal Order of Eagles*, 169 S.W.3d at 847. While arguably Unthank's drug history and drug-related convictions did not render him a desirable athletic coach, there was nothing in his criminal history to suggest that he had a propensity to sexually abuse children. However, there are additional facts that compel reversal of the circuit court's judgment and our conclusion that there is a question of material fact as to whether it was foreseeable that Unthank would sexually abuse a child.

Bates was warned by students and A.T.'s mother that Unthank had engaged in inappropriate behavior toward girls at the school. As a result, Bates verbally reprimanded Unthank and instructed him to cease further contact with A.T. Furthermore, students informed Bates that they believed Unthank's conduct toward female students was inappropriate. Although Bates and other school personnel may not have known that Unthank would commit or was committing criminal acts, the law only requires that it be reasonably foreseeable that there was a risk of harm. *Flor-Shin, Inc*., 964 S.W.2d at 442. It is not beyond reason for a jury to conclude that Bates's knowledge of Unthank's late night phone calls to

female students, providing transportation to A.T. in his private vehicle, and information gained from A.T.'s mother and other sources, make it foreseeable that he would commit the acts alleged by the appellants. Therefore, we conclude that the summary judgment must be reversed.

The remaining issue is appellants' claim for the tort of outrage. We agree with the circuit court that under the facts presented, a claim for the tort of outrage cannot be sustained. An essential element of the tort is that the actor intended to inflict emotional distress and its infliction was not merely the consequence of a separate compensable tort. As explained in *Rigazio v. Archdiocese of Louisville*, 853 S.W.2d 295, 298-299 (Ky.App. 1993):

> Taking into account the history of the tort of outrage, and its reason for being as a "gap-filler" providing redress for extreme emotional distress in those instances in which the traditional common law actions did not, we believe that § 47 recognizes that where an actor's conduct amounts to the commission of one of the traditional torts such as assault, battery, or negligence for which recovery for emotional distress is allowed, and the conduct was not intended only to cause extreme emotional distress in the victim, the tort of outrage will not lie. Recovery for emotional distress in those instances must be had under the appropriate traditional common law action. The tort of outrage was intended to supplement the existing forms of recovery, not swallow them up.

Even when viewed most favorably to appellants, there is no evidence that the appellees intended to invade A.T.'s and M.C.'s right to be free from emotional distress. *Id*. Therefore, in regard to the claims for intentional infliction of emotional distress, summary judgment was proper.

Based on the foregoing, the summary judgment entered in favor of the appellees on appellants' claims for negligent hiring/retention is reversed. In all other respects, the judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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