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Commonwealth Of Kentucky

Court of Appeals

NO. 2009-CA-001411-MR

BRANDI PEYTON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 08-CI-004132

NEONATAL INTENSIVE CARE EXPERTS, II, PLLC; KETAN MEHTA, M.D. AND NORTON HOSPITALS, INC., D/B/A NORTON SUBURBAN HOSPITAL — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, KELLER AND LAMBERT, JUDGES

LAMBERT, JUDGE: Brandi Peyton appeals from a Jefferson Circuit Court order entered on May 21, 2009, which granted summary judgment in favor of Appellees, Neonatal Intensive Care Experts II, P.L.L.C., Ketan Mehta, M.D., and Norton

Hospitals, Inc. d/b/a Norton Suburban Hospital. Peyton filed lawsuits against Appellees, alleging gross negligence and malpractice in the generation and reading of a toxicology report rendered in conjunction with the labor and delivery of Peyton's son. Appellees reported incorrect toxicology results to Child Protective Services, who in turn removed Peyton's son from her care. The trial court determined that Appellees were immune from civil liability pursuant to Kentucky Revised Statutes (KRS) 620.030 and KRS 620.050. Finding a genuine issue of material fact precluding summary judgment, we reverse and remand for proceedings consistent with this opinion.

On or about April 14, 2007, Peyton, who was pregnant, checked into Norton Suburban Hospital to undergo an induction procedure. Upon intake, Peyton provided hospital staff with a detailed medical history. She also read and executed all necessary admission documents. During these interactions, Peyton displayed no signs of intoxication and, in fact, was noted as being alert and oriented. Peyton admitted to nurses that she had a history of drug and alcohol abuse. However, she denied any current use.

Thereafter, a toxicology screen of Peyton's blood was performed. This report indicated that Peyton's blood alcohol concentration was 0.3 milligrams per deciliter (mg/dl). For comparison, the report stated that the level for intoxication under Kentucky law is 80 mg/dl. Despite being nowhere near the level for intoxication in Kentucky, the report reflected an "H" marked near the result, which allegedly indicated "high."

The toxicology report also stated that to convert the above result into a blood alcohol percentage, the above result must be divided by 1,000. Thus, Peyton's blood alcohol percentage was 0.0003%. By comparison, the level for intoxication under Kentucky law is 0.08%.

Upon reviewing the report, Dr. Mehta, the attending neonatologist on duty, misread the report to indicate that Peyton had a blood alcohol percentage of 0.3%. Mistakenly believing that Peyton was four times the legal limit for intoxication, Dr. Mehta authorized the reporting of an erroneous intoxication level to Child Protective Services. In reliance on this false information, Child Protective Services caused the newborn to be removed from Peyton's care. The two-day-old infant was sent to foster care and has not since been returned to his mother's custody.[1]

Thereafter, Peyton filed a complaint against Appellees. She alleged that the hospital's agents were negligent and/or grossly negligent in failing to use reasonable care in the generation, reading, and reporting of Peyton's toxicology results. Appellees countered that they were immune from any responsibility for their allegedly negligent conduct pursuant to KRS 620.050(1). The trial court agreed with Appellees and granted summary judgment in their favor. An appeal to this Court now follows.

In reviewing a grant of summary judgment, our inquiry focuses on "whether the trial court correctly found that there were no genuine issues as to any

[1] Once the mistake in this case was discovered, other grounds were utilized to justify not returning Peyton's son to her care.

material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); Kentucky Rules of Civil Procedure (CR) 56.03. "[T]he proper function of 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). Kentucky black-letter law directs that "summary judgment is to be cautiously applied and should not be used as a substitute for trial." *Id.* at 483. "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id*. at 480.

In her first argument on appeal, Peyton contends the trial court improperly granted summary judgment because KRS 620.050(1) does not provide Appellees with immunity for reporting incorrect and/or misleading toxicology results to Child Protective Services. KRS 620.050(1) provides as follows:

> Anyone acting upon reasonable cause in the making of a report or acting under KRS 620.030 to 620.050 in good faith shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed. Any such participant shall have the same immunity with respect to participation in any judicial proceeding resulting from such report or action. However, any person who knowingly makes a false report and does so with malice shall be guilty of a Class A misdemeanor.

The trial court found that Appellees were immune because they were acting under KRS 620.030(1) in good faith. KRS 620.030(1) states, in pertinent part, the following:

> Any person who knows or has reasonable cause to believe that a child is dependent, neglected, or abused shall immediately cause an oral or written report to be made to a local law enforcement agency or the Department of Kentucky State Police; the cabinet or its designated representative; the Commonwealth's attorney or the county attorney; by telephone or otherwise. Any supervisor who receives from an employee a report of suspected dependency, neglect, or abuse shall promptly make a report to the proper authorities for investigation. . . . Nothing in this section shall relieve individuals of their obligations to report.

Peyton argues that the immunity established in KRS 620.050(1) is not applicable in this instance because Appellees were not acting under KRS 620.030(1). Peyton claims that her toxicology screen was performed only at the behest of Child Protective Services, and thus, Appellees never had an independent belief that Peyton's newborn son was dependent, neglected, or abused. The trial court's order granting summary judgment indicates that the test was performed before the abuse report was filed, and thus that the test was *not* performed at the request of Child Protective Services. However, the record conflicts with this finding in several respects.

First, in Dr. Mehta and Neonatal's memorandum in support of summary judgment, the appellees *clearly* state that during Peyton's pregnancy, CPS requested that Dr. Mehta have a toxicology screen performed on the infant

immediately after birth. Second, in its memorandum in support of its motion for summary judgment, Norton also states that CPS requested that Dr. Mehta obtain a toxicology screen of both Peyton and her child. Finally, in her brief to this Court on appeal, Peyton attaches as an exhibit a screen capture of Peyton's obstetric admitting record, which states in the comments section, "NEEDS TOX SCREEN PER SOCIAL SERVICES!!!!!!!!!!" (Emphasis in original).

Thus, it is unclear how the trial court determined that there was no genuine issue of material fact regarding whether the testing was performed at the request of CPS or whether Peyton's admissions to prior drug use triggered the screening. Because the outcome of Peyton's case, in particular the applicability of the immunity conferred under KRS 620.050(1), depends upon who initiated the report of abuse, this issue of fact must necessarily be resolved by the trial court, and summary judgment was premature.

Peyton also contends that even if the negligent reporting of abuse is not subject to civil liability, the negligent performance of medical diagnostic procedures is excepted from immunity pursuant to KRS 620.050(14). Peyton specifically claims that both Dr. Mehta and Norton committed direct negligence in the performance of medical diagnostic procedures.[2]

KRS 620.050(14) sets forth the following:

> As a result of any report of suspected child abuse or neglect, photographs and X-rays or other appropriate medical diagnostic procedures may be taken or caused to

[2] Dr. Mehta was allegedly negligent in reading and interpreting the report and Norton was allegedly negligent for including a misleading indicator ("H") next to Peyton's toxicology result.

> be taken, without the consent of the parent or other person exercising custodial control or supervision of the child, as a part of the medical evaluation or investigation of these reports. These photographs and X-rays or results of other medical diagnostic procedures may be introduced into evidence in any subsequent judicial proceedings. The person performing the diagnostic procedures or taking photographs or X-rays shall be immune from criminal or civil liability for having performed the act. Nothing herein shall limit liability for negligence.

"Subsection (14) of KRS 620.050 specifically provides an exception to immunity if the person acted negligently in performing medical diagnostic procedures at the request of the Cabinet based upon a report of abuse." *Garrison v. Leahy-Auer*, 220 S.W.3d 693, 700 (Ky.App. 2006). In *Garrison*, a medical team was alleged to have acted negligently in the performance of medical diagnostic procedures. *Id.* The *Garrison* Court determined that the medical team was immune from any civil liability for the negligent performance of these procedures pursuant to KRS 620.050(1). *Id.* Because the procedures had not been performed at the request of the Cabinet, this Court reasoned that the exception to immunity provided in KRS 620.050(14) did not apply.

Again, in the instant case there is conflicting evidence in the record as to whether Child Protective Services requested the screening performed on Peyton or whether her admissions to prior drug use triggered the screening. The record seems to indicate that Child Protective Services requested the screening, but the order granting summary judgment presumptively states that Peyton's admissions

triggered the screening. Thus, a genuine issue of material fact exists, and summary judgment was granted in error.

Accordingly, we reverse the May 21, 2009, order of the Jefferson Circuit Court, and this matter is remanded for further proceedings consistent with this opinion, including a determination of whether Peyton's admissions triggered the screening or whether Child Protective Services requested that the screening be conducted based on a prior report of abuse.

COMBS, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS AND FILES SEPARATE OPINION.

KELLER, JUDGE, CONCURRING: I concur with the majority in its conclusion that summary judgment was prematurely granted. Specifically, I agree that it is unclear at this point whether the toxicology screen was performed pursuant to a request by Child Protective Services (CPS) or whether the toxicology screen was triggered by Peyton's admission during her intake interview that she had a history of drug and alcohol use. I agree that if CPS requested the toxicology screen, then KRS 620.050(14) would apply.

However, I disagree with the majority in that I do not believe that the immunity conferred under KRS 620.050(1) depends on who initiated the report of abuse. KRS 620.030(1) requires "[a]ny person who knows or has reasonable cause to believe that a child is dependent, neglected or abused" to report that information to an appropriate state or local agency. KRS 620.050(1) provides immunity from criminal and civil liability to anyone who makes such a report "in good faith."

Nothing in KRS 620.030(1) indicates that the requirement to report suspected dependency, neglect, or abuse must be triggered by a report from CPS. Therefore, the immunity granted KRS 620.050(1) to a person making such a good faith report attaches whether or not the basis for the report came from CPS. Because I agree with the trial court that there is no evidence of bad faith, I believe the court correctly determined that the Appellees are immune from civil and criminal liability under KRS 620.050(1) for making the report.

However, the trial court did not address whether the Appellees are entitled to immunity from liability under KRS 620.050(14). KRS 620.050(1) only provides immunity from criminal and civil liability to those who make a good faith report of dependency, neglect, or abuse. KRS 620.050(14) extends immunity from criminal and civil liability to those who perform diagnostic testing on a child without the consent of a parent or guardian. That immunity attaches if the diagnostic testing is performed "[a]s a result of any report of suspected child abuse or neglect . . . ." I note that, as with KRS 620.030(1), KRS 620.050(14) does not state that the "report" of suspected child abuse must come from CPS or any other state or local agency in order to trigger the immunity.[3] However, the testing must be based on a report from some source. Therefore, I agree with the majority that this matter must be remanded to the trial court so it can determine whether the

[3] I note that *Garrison v. Leahy-Auer*, 220 S.W.3d 693 (Ky. App. 2006) appears to hold that a request to perform the diagnostic testing must come from CPS in order to trigger the immunity provided by KRS 620.050(14). However, to the extent *Garrison* does make such a holding, I believe its interpretation of KRS 620.050(14) is too narrow. As noted above, I believe that the immunity in KRS 620.050(14) is triggered regardless of the source of the report and is not dependent on a request for testing by CPS.

Appellees performed the diagnostic testing based on a report of suspected abuse or neglect and whether they have immunity under KRS 620.050(14) for performing that testing.

Finally, I note that, even if the trial court finds that the Appellees have immunity from criminal and civil liability under KRS 620.050(14), that immunity does not extend to any liability they may have for negligence in performing the testing. On remand, the trial court should take this into consideration when addressing any subsequent motions for summary judgment.

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