RENDERED: JUNE 15, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000126-MR

A.P., A MINOR, BY HIS NEXT FRIENDS,
D.P. AND L.P., AND NOW A.P.,
BY AND THROUGH HIS GUARDIANS D.P. AND
L.P. APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 08-CI-00868

BETTY HAYES APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, KELLER, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: The Appellants appeal the grant of Appellee, Betty Hayes's motion for summary judgment concerning the allegations of negligence arising from A.P.'s disappearance from his school for two hours. After a thorough review of the record, the parties' arguments, and the applicable law, we find no

error and, accordingly, affirm the trial court's grant of summary judgment in favor of Appellee.

The facts of this case are not disputed. A.P. is a largely nonverbal child with autism in the special education program at Lexington Traditional Magnet School. Hayes worked as a teacher's aide in A.P.'s school and was assigned to watch A.P. and D.F., another special education student during their sixth-grade gym class on April 22, 2005. Hayes watched A.P. bounce a basketball around the perimeter of the gym. Hayes did a visual check for D.F. and when she looked for A.P. he had disappeared, presumably through the open gym door.[1] Hayes and the gym teacher immediately began searching for A.P. in the gym area. When he could not be located, Hayes informed the school officials. The search continued but A.P. was not located, and the police were informed that A.P. was missing.[2] The school also informed A.P.'s mother, Linda Parker, who was a teacher at the school.

A.P. was found approximately two hours later, a number of blocks away from school, naked and covered in mud. A.P. was examined at the University of Kentucky Hospital and by his pediatrician; neither examination found any signs of emotional or physical trauma and no evidence of sexual abuse.

[1] Apparently, the gym door had been left open because the gym was experiencing air conditioner issues.

[2] Hayes contends that, unbeknownst to her, A.P. was known to his parents to be a flight risk, which was information that they had not shared with the aides.

A.P.'s parents filed suit on his behalf in Fayette County Circuit Court alleging a violation of A.P.'s civil rights pursuant to 24 USC § 1983, negligence and the parents' claim for intentional infliction of emotional distress. The case was removed to federal court. On January 24, 2008, the United States District Court dismissed A.P.'s claims and stated: "The evidence establishes that A.P. was found dirty and unclothed, but there is no evidence of any trauma or injury, physical or otherwise. In fact, A.P.'s father testified that A.P. appeared to suffer no physical or psychological injuries stemming from his disappearance from LTMS." The Sixth Circuit affirmed this dismissal. Thereafter, Appellants revived the state law claims in Fayette Circuit Court.

Appellee moved for summary judgment in October 2009, which the court denied. After Appellants were unable to produce an expert witness to establish an injury and damages arising therefrom, Appellee renewed her motion for summary judgment. The court, after reviewing the record and having heard the arguments of counsel, granted Appellee's motion for summary judgment. It is from this summary judgment that Appellants now appeal.

Appellants present a single argument on appeal, to wit, that the trial court erred in granting summary judgment because Appellants established a cause of action for negligence. Appellee disagrees with Appellants' contention and instead argues that the trial court's ruling was correct. In support thereof, Appellee argues (1) the record does not establish a claim of negligence; (2) Appellant had ample time to submit proof of injury; (3) Appellant was unable to show proof of

injury; (3) Linda Parker is not qualified to offer expert testimony under Kentucky Rules of Evidence (KRE) 702; (4) A.P. is not entitled to presumed damages for unproven injury; (5) Appellant does not meet the elements of negligent infliction of emotional distress; and (6) Kentucky law does not permit presumed damages for negligence. We believe that these arguments may be properly condensed into the wholly dispositive issue on appeal, namely, whether the trial court erred in granting summary judgment given the lack of proof of injury. With this in mind we turn to our established jurisprudence.

At the outset, we note that the applicable 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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment "shall be rendered forthwith 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 judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. The trial court must view the record "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 v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.* However, "a party opposing a properly supported

summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson,* 841 S.W.2d 169, 171 (Ky. 1992), citing *Steelvest, supra*. *See also O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); *Hallahan v. The Courier Journal,* 138 S.W.3d 699, 705 (Ky.App. 2004). Since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001). With this standard in mind we now turn to the first and wholly dispositive issue on appeal, whether the trial court erred in granting summary judgment given the lack of proof of an injury.

Appellants contend that given A.P.'s limited ability to communicate and his mother's assertion that he no longer enjoys his book of the *Three Billy Goats Gruff* and calls the troll under the bridge a "bad man," that this court should presume that an injury was sustained by A.P. during the time he was missing. We disagree.

While we are sympathetic to the plight of A.P., it has long been the jurisprudence in this Commonwealth that in order to prevail on a theory of negligence one must establish an injury. *See Strong v. City of Harlan,* 267 Ky. 454, 102 S.W.2d 353, 358-59 (1937)(internal citations omitted) (*"*The burden is on the plaintiff to prove negligence naturally resulting in the injury. Unless the proof connects the proven injury as a rational and proximate result of the proven

negligence, there is nothing to be submitted to the jury."). Linda Parker's assertions concerning A.P. and the *Three Billy Goats Gruff* by itself, is simply insufficient to establish an injury in the case *sub judice.* *See O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (summary judgment is appropriate where nonmoving party relies on little more than "speculation and supposition" to support claims).

There was simply no evidence that A.P. was injured during his disappearance; indeed and to the contrary, there was evidence of absence of injury from medical professionals.[3] Thus, the trial court did not err in granting summary judgment because a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial. *Hubble v. Johnson,* 841 S.W.2d 169, 171 (Ky. 1992).

Finding no error, we affirm the trial court's grant of Appellee's summary judgment motion.

THOMPSON, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN RESULT ONLY.

[3] We duly note that A.P.'s father testified A.P. had no injury, however, if we accept this as competent evidence that A.P. had no injury, then the testimony of A.P.'s mother must be accepted as evidence of injury. We believe neither of the parents to be qualified under KRE 702 to express an expert opinion on medical or psychological injury. This is not to say that a duly qualified expert could take their observations of A.P. into account in formulating an expert opinion on injury if such observations are normally relied upon by experts in their respective fields.

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