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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000270-MR

KAYLEE CUPP, A MINOR, BY
AND THROUGH HER NEXT FRIEND
AND PARENT, CATHY CUPP — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE GEORGE W. DAVIS, III, JUDGE
ACTION NO. 11-CI-00581

CITY OF ASHLAND — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: COMBS, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Kaylee Cupp, a minor, by and through her next friend and parent, Cathy Cupp (referred to as Cupp) brings this appeal from a January 21, 2014, summary judgment of the Boyd Circuit Court dismissing Cupp's tort action against the City of Ashland (City). We affirm in part, reverse in part, and remand.

Joshua D. Broughton was a resident at a half-way house operated by Transitions, Inc., in Ashland, Kentucky. Transitions operated a residential facility for parolees in Ashland as part of their "transitioning to full release on parole." City's Brief at 3. Broughton was placed with the City's Parks and Recreation Department to perform community service. Broughton was supervised by a City employee, William Bruce Hall. Hall was hired in late 2009 as an employee of the City's Parks and Recreation Department and was a full-time probationary employee of the City at the time of the incidents discussed below.

On the afternoon of May 28, 2010, Broughton and Hall were working at a pool operated by the City. While at the pool, Broughton and Hall began conversing with two minor girls, Kaylee Cupp and T.R. Later in the day, Broughton and Hall left the pool and went to Ashland Central Park. While at the park, Broughton and Hall again encountered Kaylee and T.R. Hall and Broughton persuaded Kaylee and T.R. to accompany them inside a park maintenance building. Soon after entering the building, Hall and T.R. engaged in sexual intercourse. Broughton then allegedly restrained Kaylee and forced her to engage in sexual intercourse.[1] The record reflects that Hall was not aware of Broughton's conduct as concerned Kaylee at that time.

Cupp, as parent and next friend of Kaylee, filed the underlying action against the City, Transitions, Hall, and Broughton in 2011. Relevant to this appeal,

[1] Kaylee Cupp was fourteen years of age at the time of the incident and incapable of giving consent to sexual intercourse. Kentucky Revised Statutes 510.020. It is disputed by the parties as to whether Joshua D. Broughton forced her to engage in sexual intercourse.

Cupp claimed that the City was vicariously and directly liable for Broughton's intentional criminal conduct and for Hall's negligent conduct. The City filed a motion for summary judgment alleging that Hall and Broughton acted outside the scope of employment, thus relieving the City of vicarious liability. Also, the City maintained that it was not directly negligent in causing Kaylee's injury.

By summary judgment entered January 21, 2014, the circuit court concluded that the City was not liable and specifically determined:

> 4. On or about May 28, 2010, Defendant William B. Hall was an employee of the City of Ashland in its Parks Department Maintenance Division. Hall had been employed by the City for six months with satisfactory written work evaluations in the interim. At the time he was hired by Defendant City of Ashland, he had no criminal record and nothing in his background check or application that indicated any predisposition to criminal behavior or sexual misconduct. At the time of the incident herein, Hall was the sole full-time Parks Department employee assigned to work the three to eleven evening shift on May 28, 2010.
>
> 5. Hall's employment training was provided by the Director of the Parks and Recreation Department, Sean Murray. That training included instruction to refrain from any inappropriate contact with members of the public; that Transition workers were to have no contact whatsoever with members of the public; and that it was impermissible to have members of the general public in maintenance buildings except if absolutely required in the performance of official duties.
>
> 6. On May 28, 2010, while on duty with Defendant City of Ashland, Defendants Hall and Broughton encountered two minor girls, [T.R.] and Plaintiff, Kaylee Cupp. Defendants Hall and Broughton persuaded the underage girls to accompany them to a maintenance building in Central Park. In that building

Hall engaged in sexual intercourse with [T.R.] and Defendant Broughton engaged in sexual touching with Plaintiff Cupp, which may have included sexual intercourse. Apparently, no physical force or coercion was involved in either incident, but both girls were incapable of consenting to sexual activity because of their age.

7. Subsequently, after those acts were reported to police, both Defendants Hall and Broughton were charged with and either were convicted or plead guilty to felony charges related to unlawful transaction with a minor.

. . . .

2. The City of Ashland, as the employer of Hall and Broughton, is liable for the acts of its employees under the doctrine of respondeat superior only when the employee acts within the scope of his or her employment and in furtherance of the employer's business. When an employee leaves the purpose of his employer to effect some purpose of his own, the employer is not liable for his acts. Prosser and Keeton, "The Law of Torts," §500 (5th Ed. 1984).

. . . .

4. Although some reported Kentucky cases refer to a universal duty of care owed to all, to establish negligence against a municipal government, a duty must be identified which relates to the specific claimant and not to the public as a whole. *Fryman [v.] Harrison*, 896 S.W.2d 908 (Ky. 1995); *Janan [v.] Trammell*, 785 F.2d 557 (6th Cir. 1986).

5. Absent a special relationship, a municipality's duty to protect members of the public from inmates, prisoners, or criminals at large runs not to any individual, but to the public as a whole. *Ashby [v.] City of Louisville*, 841 S.W.2d 184 (Ky. App. 1992).

> 6. Therefore, in this case, the City of Ashland's duty to properly supervise work release inmates while they performed labor in its park system is one that runs to the public as a whole and under applicable Kentucky law, an individual such as Plaintiff Cupp cannot recover for a breach of that duty absent special circumstances which are not presented in this case. *Fryman [v.] Harrison*, 896 S.W.2d 908 (Ky. 1995); *City of Florence, Kentucky [v.] Chapman*, 38 S.W.3d 387 (Ky. 2001).

January 21, 2014, summary judgment at 2-5. Thus, upon granting summary judgment, the circuit court dismissed all claims against the City. This appeal follows.[2]

Cupp contends that the circuit court erred by concluding that the City was not vicariously liable for Hall's and Broughton's actions or directly liable for Kaylee's injury. In particular, Cupp argues:

> By Defendant's own admission, Defendant William Hall, was an employee of the City of Ashland with supervisory capacity over Defendant Joshua Broughton. For the purposes of respondeat superior, we are not concerned with the *criminal* act committed by Mr. Hall. We are concerned with his *negligent* act in failing to keep watch over his charge. The imposition of vicarious liability clearly fits the rationale here as Mr. Hall was engaged in an employer-employee relationship with the City . . . .
>
> In undertaking to supervise Mr. Broughton, Mr. Hall was performing an action "for the benefit of the employer." Plaintiff's position is that the City is liable under the theory of respondeat superior for Mr. Hall's negligence in failing to properly supervise Mr. Broughton. It is conceded that Mr. Hall's actions in going off to have illegal sexual relations with his "girlfriend" cannot be the subject of a negligence action. However, his leave-

[2] The January 21, 2014, summary judgment included complete Kentucky Rules of Civil Procedure 54.02 language, thus bestowing finality upon the judgment.

> taking, thereby leaving Mr. Broughton alone and unsupervised, is negligence for which the City should be held responsible.

Cupp's Brief at 3-7 (citations omitted).

Summary judgment is proper where there exist no material issues of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). All facts and inferences therefrom are to be viewed in a light most favorable to Cupp, as the nonmoving party. *Steelvest, Inc.*, 807 S.W.2d 476. However, it is well-established that the question of the existence of a duty presents an issue of law. *Mason v. City of Mt. Sterling*, 122 S.W.3d 500 (Ky. 2003). Our review proceeds accordingly.

An employer is vicariously liable for an employee's tortious conduct under the doctrine of respondent superior. For an employer to be liable under respondent superior, the employee must have been acting within the scope of employment at the time of his tortious act. *Osborne v. Payne*, 31 S.W.3d 911 (Ky. 2000). It is recognized that an intentional tort committed by the employee may still be in the scope of employment if "its purpose, however misguided, is wholly or in part to further the master's business." *Patterson v. Blair*, 172 S.W.3d 361, 369 (Ky. 2005) (quoting W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* 500, 505 (5th ed. 1984)). However, where an employee commits an intentional tort that is motivated by purely personal reasons, the employee acts outside the scope of employment, and the employer is not vicariously liable. *Papa John's Intern.,*

Inc. v. McCoy, 244 S.W.3d 44, 51 (Ky. 2008). Our Supreme Court has cited with approval the *Restatement (Third) of Agency* § 7.07 (2006), which provides, in part:

> (1) An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment.
>
> (2) An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.

See Papa John's Intern., Inc. v. McCoy, 244 S.W.3d 44, 51 (Ky. 2008). Thereunder, an employee is acting outside the scope of employment if the employee acts "within an independent course of conduct not intended . . . to serve any purpose of the employer." *Restatement (Third) of Agency* § 7.07 (2006).

Apart and distinct from vicarious liability is the direct liability of an employer. Thereunder, an employer is liable for its own improper and negligent actions. The tort of negligent supervision is based upon the employer's independent negligent act of failing to properly supervise an employee. To be liable under negligent supervision, the employer must have known or had reason to know of the risk that the employment created. *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274 (Ky. 2009) (recognizing that the Kentucky Supreme Court adopted *Restatement (Second) of Agency* § 213 setting forth the tort of negligent supervision). To set forth a *prima facie* case of negligent supervision, our Supreme Court noted:

> [T]he plaintiff must allege that the defendant knew or had reason to know of the employee's harmful propensities; that the employee injured the plaintiff; and that . . . , supervision, . . . of such an employee proximately caused the plaintiff's injuries.

Grand Aerie Fraternal Order of Eagles v. Carneyhan, 169 S.W.3d 840, 844 (Ky. 2005).

In this case, it is undisputed that Broughton and Hall committed intentional criminal acts by engaging in sexual intercourse and/or other sexual misconduct with Kaylee and T.R., respectively. These intentional criminal acts were not intended to advance the City's business; rather, it is patently obvious that both Broughton and Hall committed these criminal acts for purely personal benefit. Stated simply, Broughton's and Hall's intentional criminal acts constituted an independent course of conduct unrelated to the City and solely undertaken for personal motives. Consequently, we conclude, as did the circuit court, that Broughton's and Hall's intentional criminal acts were outside the scope of employment and that the City is not vicariously liable therefore under the doctrine of respondent superior.

Likewise, we do not believe that the City is directly liable upon the tort of negligent supervision. The record is devoid of any facts suggesting that the City knew or should have known that Hall would not properly supervise Broughton resulting in the criminal acts committed against Kaylee. Under this tort, the City may only be liable for its own negligence. Based on the record below, we agree

with the circuit court that the City is not liable upon the tort of negligent supervision.

Cupp next argues that the circuit court erred by concluding that the City possessed "no duty to prevent negligence on the part of its employee because no 'special relationship' existed." Cupp's Brief at 7.

It is generally accepted that "an actor whose own conduct has not created a risk of harm has no duty to control the conduct of a third person to prevent him from causing harm to another." *Grand Aerie Fraternal Order of Eagles*, 169 S.W.3d 840, 849 (Ky. 2005). There are, of course, well-recognized exceptions to this general rule as where a special relationship exists between either:

> (a) . . . the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) . . . the actor and the other which gives to the other a right to protection.

Grand Aerie Fraternal Order of Eagles, 169 S.W.3d at 849 (quoting *Restatement (Second) of Torts* § 315 (1965)).

Under subsection (b), a duty may be imposed where there is a special relationship between the actor and the victim. *Williams v. Ky. Dept. of Educ.*, 113 S.W.3d 145 (Ky. 2003). As to a special relationship between the City and Cupp, Cupp argues that a legally cognizable duty existed per the holding in *City of Florence*, *Kentucky v. Chipman*, 38 S.W.3d 387 (Ky. 2001). In *City of Florence,* two conditions must be satisfied to give rise to such duty:

> 1) [T]he victim must have been in state custody or otherwise restrained by the state at the time the injury

> producing act occurred, and 2) the violence or other offensive conduct must have been committed by a state actor.

City of Florence, 38 S.W.3d at 392.

Viewing the facts most favorable to Cupp, under the first condition set forth in *City of Florence*, it is incumbent that Kaylee prove she was in custody or "otherwise restrained by the state." *Id.* at 392. Although Kaylee voluntarily accompanied Broughton and Hall into the maintenance building, she alleged that Broughton forcibly restrained her and forced her to have sexual intercourse. If these allegations are viewed as being credible by the trier of fact, Broughton's restraint of Kaylee's freedom of movement once inside the maintenance building would satisfy the first condition of special relationship as set forth in *City of Florence*, 38 S.W.3d 387.

Under the second condition set forth in *City of Florence*, the violence must have been committed by a state actor. *See id.* Here, Kaylee claimed that Broughton forcibly restrained her and raped her. Again, if the trier of fact were to believe that Broughton did so, a state actor (Broughton) would have committed violence against Kaylee while being restrained, and the second condition of *City of Florence* would be satisfied.[3] *See id.*

Accordingly, we believe there exist issues of fact that preclude entry of summary judgment, and the circuit court erred by rendering summary judgment

[3] We note that throughout its brief, the City of Ashland treats Broughton as its employee and never advances an argument that Broughton was not a city employee.

upon the narrow issue of whether a duty exists under the precepts of *City of Florence*, 38 S.W.3d 387. Upon remand, if the trier of fact finds that Broughton forcibly restrained Kaylee's freedom of movement in the maintenance building and forced her to engage in sexual intercourse, a special relationship exists between the City and Kaylee, thus creating a duty upon the City pursuant to the *City of Florence*, 38 S.W.3d 387. *See Watson v. Crittenden Cnty. Fiscal Court*, 771 S.W.2d 47 (Ky. App. 1989).[4] If the trier of fact finds either disputed fact not to be true, no special relationship exists between the City and Kaylee, and thus there would be no duty owed by the City to Kaylee under these circumstances.

We view Kaylee's remaining contention of error regarding the tort of outrage as moot.[5]

In sum, we hold that the circuit court properly rendered summary judgment determining that the City was not vicariously liable under the doctrine of respondent superior or directly liable under the tort of negligent supervision. We, however, reverse entry of summary judgment upon the narrow issue of whether a duty exists upon the City pursuant to *City of Florence*, 38 S.W.3d 387, and remand for proceedings as set forth in this Opinion.

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[4] Of course, the trier of fact would also have to find that the City of Ashland breached its duty to Kaylee Cupp.

[5] Kaylee Cupp, a minor, by and through her next friend and parent, Cathy Cupp, lastly contends that the circuit court erred by dismissing her claim for the tort of outrage because "imposition of respondeat superior is proper in this case." Cupp's Brief at 10. Having concluded that the City of Ashland is not vicariously liable under the doctrine of respondent superior, this contention of error is moot.

For the foregoing reasons, the order of the Boyd Circuit Court is affirmed in part, reversed in part, and this case in remanded for proceedings consistent with this Opinion.

ALL CONCUR.

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