

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002774-MR

BONITA DAWSON, Individually
and as Executrix of the Estate
of Joseph R. Dawson, and
BONITA DAWSON, AS GUARDIAN,
MOTHER, AND NEXT FRIEND OF
ELIZABETH DAWSON

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 98-CI-01749

COMBS AND WILBERT, INC.,
WILBERT, INC., and
the LEXINGTON CEMETERY

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; BAKER AND HUDDLESTON, JUDGES.

BAKER, JUDGE: Bonita Dawson brings this appeal from the September 18, 2001, summary judgment of the Fayette Circuit Court. We affirm.

The facts are these: On February 22, 1996, Joseph R. Dawson, husband of the appellant, Bonita R. Dawson, died during a liver transplant operation. After her husband's death, Dawson contracted with the Pruitt Funeral Home to have his body embalmed and prepared for burial in a casket and vault. Pursuant to this agreement, Pruitt Funeral Home purchased a concrete vault from appellee Combs-Wilbert, Inc. The decedent was subsequently interred in Lexington Cemetery (Cemetery).

After the decedent's burial, appellant discovered a postoperative report that indicated a stab wound to the decedent's heart occurred during the liver transplant operation. Appellant filed a medical malpractice suit in Fayette Circuit Court against the physicians who performed the surgery. As a part of the discovery process, appellant had the decedent's body exhumed for an autopsy.

Employees of the vault company--Combs-Wilbert--and the Cemetery performed the disinterment on May 13, 1997. After it was unearthed, a crack in the top of the vault was noticed. When the body was removed, it was observed that the vault and casket contained a liquid. The record is not clear as to whether the liquid was ground water or body fluids from the decay process. Furthermore, the record is also unclear as to whether the crack occurred because of a defect in the vault, as part of the interment process, or as part of the exhumation process. Combs-Wilbert took possession of the vault the day of the exhumation, inspected it, and destroyed it. Pruitt Funeral Home reimbursed

the appellant for the cost of a new vault when the decedent was reburied.

On May 11, 1998, appellant filed a suit against Combs-Wilbert Inc., as the distributor and retailer of the vault, and Wilbert Inc., as the manufacturer of the vault, alleging product liability claims in strict liability and negligence and breach of express and implied warranties. Appellant also filed a claim against the Cemetery and Combs-Wilbert for mishandling of a corpse.¹ The circuit court granted summary judgment against appellant as to both Combs-Wilbert Inc., Wilbert Inc. and Lexington Cemetery. This appeal follows.

Standard of Review

Appellant argues that the circuit court erred when it granted summary judgment on appellant's claim of wrongful mishandling of a body. Review of a summary judgment is limited to whether the facts alleged by the appellant and the evidence in the record supporting her claim at the time of dismissal together with all reasonable inferences fail to support a claim. Capitol Holding Corp. v. Bailey, Ky., 873 S.W.2d 187, 189 (1994).

Summary judgment is proper when as a matter of law it appears impossible for the non-moving party to produce evidence at trial warranting a judgment in her favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 482 (1991). The record must be viewed in a light most favorable to the party

¹ Appellant also brought claims against Kentucky Mortuary Services, Inc., a/k/a Pruitt Funeral Home and Carriage Funeral Holdings, Inc., d/b/a/ Pruitt Funeral Home. The record is unclear why two entities exist that are doing business as Pruitt Funeral Home, or which entity is the one with which the appellant contracted. However, both entities have been dismissed from the action.

opposing the motion for a summary judgment and all doubts must be resolved in favor of that party. Commonwealth v. Whitworth, Ky., 74 S.W.3d 695, 698 (2002). While the standard for summary judgment is a high one, the party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence that there is a genuine issue of material fact. Buchholtz v. Dugan, Ky. App., 977 S.W.2d 24, 27 (1998). Thus, we must assume that the fluid in the casket was ground water.

Wrongful Mishandling of a Corpse

Appellant argues that the circuit court erred when it granted summary judgment on appellant's claim of wrongful mishandling of decedent's body by Lexington Cemetery. Under Kentucky law, a cause of action exists to recover for the wrongful mishandling of a corpse. In Louisville Cemetery Association v. Downs, Ky., 45 S.W.2d 5, 6 (1931), the Court stated:

A recovery may be had by the next of kin or the surviving spouse for an unwarranted interference with the grave of the deceased, or for the infliction of an injury to a corpse, if either be done (a) maliciously, (b) or by gross negligence, (c) or wantonly, i.e. with reckless disregard for the rights of another"²

A finding of malice requires proof that Lexington Cemetery or Combs-Wilbert intended to injure the corpse with an evil or unlawful purpose. Stearns Coal Co. v. Johnson, Ky., 37 S.W.2d 38, 40 (1931). A finding of gross negligence requires

² The case states further grounds for recovery but none have application to appellant's case.

proof of the absence of slight care on the part of the Cemetery or Combs-Wilbert. Shearer v. Hall, Ky., 399 S.W.2d 701, 703 (1965). A finding of wanton conduct requires proof of reckless disregard by the Cemetery or Combs Wilbert as to the consequences of their actions. The record is devoid of evidence to sustain any of these three grounds of recovery. While the record clearly demonstrates that the vault housing the corpse was damaged at some point, nowhere in the record does evidence exist for a finding of maliciousness, wantonness, or gross negligence against the Cemetery or Combs-Wilbert. Therefore, no genuine issue of material fact exists as to this claim.

Product Liability (Strict Liability and Negligence)

Appellant argues that the circuit court erred when it granted summary judgment on the questions of strict product liability and negligence. As a condition precedent to strict liability becoming operative in a particular case, the product sold must be "unreasonably dangerous" to the user or consumer or to his property. Nichols v. Union Underwear Co. Inc., Ky., 602 S.W.2d 429, 431 (1980); see also Dealers Transport Co. v. Battery Distributing Co., Ky., 402 S.W.2d 411, 446-47 (1965).

Appellant makes two arguments. First, she argues that the decedent's estate has a right to present a claim in that the decedent's corpse was the "ultimate user" who suffered physical harm because of the alleged defective condition of the burial vault. Even if we thought that a decedent's estate could bring a claim under product liability for damage done to the corpse as

user, we are of the opinion that there was no compensable damage done to the corpse.

Second, the appellant argues that the corpse was her property and, thus, she should be able to recover damages under product liability for injury to her property. As stated above, there was no compensable damage to the corpse. Therefore, the appellant could not recover anything for injuries to the decedent's body even if that body could properly be called her property.

Furthermore, though the appellant claims emotional distress and psychological injury from hearing about the decomposition of the corpse, she is barred from any recovery by law. In Kentucky, in the context of non-intentional torts, damages may not be recovered for shock or mental anguish unaccompanied by physical contact or injury. Hetrick v. Willis, Ky., 439 S.W.2d 942, 943 (1969); see also Wilhoite v. Cobb, 761 S.W.2d 625 (1988) (A mother could not bring an action under negligence theory for mental distress suffered by witnessing an accident resulting in her daughter's death, where the mother did not receive any physical contact or injury from automobile which caused accident). Neither appellant nor her daughter received physical injury from the cause of the corpse's decomposition. Thus, the circuit court was correct in granting summary judgment on this issue.

Breach of Express and Implied Warranties

The appellant argues that the circuit court erred when it granted summary judgment on appellant's claim of breach of express and implied warranties against the vault manufacturer. Appellant was reimbursed by the funeral home for the expense of a new vault. Thus, there are no damages to be claimed by the appellant for the vault, and, as stated before, even if we construed the corpse as property under the particular circumstances of this case, we find no compensable damage to the corpse. Thus, even if the express or implied warranties were applicable to the appellant, no damages are recoverable. The circuit court correctly granted summary judgment.

Timing of Grant of Summary Judgment

The appellant also argues that the circuit court granted summary judgment too early in the discovery process. A court should not grant summary judgment until the discovery of both parties is substantially complete. Pendleton Brothers Vending Inc. v. Comm. of Ky. Finance and Admin. Cabinet, Ky., 758 S.W.2d 24, 29 (1998). Appellant states that the circuit court granted summary judgment before she was able to depose the doctor who performed the autopsy on the decedent's body after exhumation. The appellant posits that the autopsy would have determined to a certainty if the fluid in the casket were ground water or bodily fluid. As part of the summary judgment standard, this Court has assumed that the water in the casket was ground

water and we note that the trial court assumed the same. Thus, a finding by the doctor that the fluid was ground water would have no effect on our decision.

Spoilation

The appellant argues that because Combs-Wilbert destroyed the original vault she is entitled under the spoilation doctrine to a presumption that the vault was favorable evidence. Spoilation refers to a party's deliberate destruction of evidence. Monsanto Co., v. Reed, Ky., 950 S.W.2d 811, 815 (1997). While Combs-Wilbert did intentionally destroy the vault, no evidence suggests that it did so believing the vault to be relevant evidence. The decedent's body was exhumed for an autopsy pursuant to a medical malpractice suit. The appellant did not file a suit against Combs-Wilbert until almost a year after the exhumation. Thus, the doctrine of spoilation is not applicable in these circumstances.

For the foregoing reasons, the judgment of the circuit court is affirmed.

ALL CONCUR.

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