

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000300-MR

KIMBERLY BOOKER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOFF, JUDGE
ACTION NO. 98-CI-004781

GALEN OF KENTUCKY, INC.
d/b/a SOUTHWEST HOSPITAL

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: COMBS, McANULTY AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is an appeal from a judgment entered by the Jefferson Circuit Court in a negligence action arising out of an accidental hypodermic needle stick. For the reasons stated hereafter, we affirm.

It is undisputed that in August 1997, while appellant was a visitor in appellee's Southwest Hospital, her leg was punctured by a hypodermic needle which had been improperly discarded on a nurse's cart. Hospital personnel took appellant

to the emergency room, and on multiple subsequent occasions she received follow-up treatment including shots and testing. As the needle was never identified and isolated for testing, it is unknown whether it was contaminated by any harmful substances. Fortunately, appellant has continued to test negative for HIV and other infectious diseases.

Appellant filed this negligence action relating to the incident. The trial court granted appellee a partial summary judgment as to appellant's claim for damages relating to an increased risk of, and her fear of, contracting an infectious disease. A jury later awarded appellant \$1,150 for physical and emotional distress relating to the needle puncture and follow-up testing. This appeal followed.

Appellant's sole contention on appeal is that the trial court erred by granting summary judgment for appellee as to appellant's claim for damages relating to an increased risk of, and her fear of, contracting a disease in the future. We disagree.

It is well established in Kentucky that "[a] cause of action does not exist until the conduct causes injury that produces loss or damage." See Saylor v. Hall, Ky., 497 S.W.2d 218, 225 (1973). See also Louisville Trust Co. v. Johns-Manville Products Corporation, Ky., 580 S.W.2d 497 (1979). Thus, "a cause of action in tort requires a present physical

injury to the plaintiff." Wood v. Wyeth-Ayerst Laboratories, Ky., 82 S.W.3d 849, 852 (2002).

Consistent with that approach, in Deutsch v. Shein, Ky., 597 S.W.2d 141 (1980), our supreme court permitted a plaintiff to recover damages arising out of her doctor's negligent failure to administer a pregnancy test before the plaintiff underwent diagnostic x-rays. The plaintiff, who subsequently had a therapeutic abortion due to concerns that the x-rays had harmed her fetus, sought and was awarded damages relating to the doctor's negligence. The supreme court affirmed the award, concluding that the administration of the x-rays provided sufficient physical contact or injury to support the plaintiff's claim.

The supreme court revisited Deutsch in Capital Holding Corporation v. Bailey, Ky., 873 S.W.2d 187 (1994), which involved a plaintiff who was exposed to asbestos fibers while remodeling the basement of the defendant's building. It was undisputed that although the plaintiff had not yet developed any abnormalities or manifestations of disease, his exposure to the asbestos increased the likelihood that he would develop an asbestos-related disease in the future. Nevertheless, the supreme court concluded that because the asbestos exposure had not yet caused an injury which resulted in loss or damage, no cause of action had accrued. Thus, the claim was rejected because it pertained to "the potential consequences of a

negligent act where no harmful change was yet made manifest."

Id. at 193.

This line of cases was reaffirmed in Alagia, Day, Trautwein & Smith v. Broadbent, Ky., 882 S.W.2d 121, 126 (1994), wherein the supreme court noted that in negligence situations, the statute of limitations does not begin to run unless and until the plaintiff suffers the manifestation of a disease or some other injury which produces loss or damage. In other words, the court continued to hold that such damages are not compensable until they become fixed and nonspeculative. See also Meade County Bank v. Whitley, Ky., 910 S.W.2d 233, 234 (1995).

Most recently, in Wood v. Wyeth-Ayerst Laboratories, Ky., 82 S.W.3d 849 (2002), our supreme court affirmed a trial court's dismissal of a complaint for failure to state a claim upon which relief could be granted, based on the plaintiff's failure to present any proof that she had suffered a present injury as a result of her ingestion of the drug combination commonly known as "fen-phen." Relying upon Capital Holding, the court reiterated that even if "exposure and negligent conduct could be proven, a case must be dismissed if the plaintiff can prove no present physical injury." 82 S.W.3d at 852.

Here, despite appellant's assertion that the needle puncture constituted a physical injury, it is undisputed that the puncture has not resulted in any present physical injury or

loss. Instead, thus far the physical injury or loss has been limited to the past injury, caused by the actual needle puncture and the follow-up testing, for which appellant has already been awarded damages. Indeed, since the needle was never identified or isolated for testing, it cannot be shown whether or how it was contaminated, and appellant cannot show that the puncture exposed her to a harmful substance. Despite appellant's citation to contrary case law from other jurisdictions, in these circumstances Kentucky case law and SCR 1.030(8)(a) clearly compel us to find that no cause of action has accrued for damages relating to appellant's increased risk or fear of contracting an infectious disease. See Wood, 82 S.W.3d 849; Alagia, 882 S.W.2d 121; Capital Holding, 873 S.W.2d 187; Deutsch, 597 S.W.2d 141; Saylor, 497 S.W.2d 218. Hence, it follows that the trial court did not err by granting the partial summary judgment for appellee.

The court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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