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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001189-MR

Z.A., A MINOR, BY HIS
NEXT FRIEND S.A. APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 02-CI-003418

CITY OF LOUISVILLE APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI AND MINTON, JUDGES; EMBERTON, SENIOR JUDGE.[1]

GUIDUGLI, JUDGE: Z.A., a minor, by his mother and next friend, S.A., has appealed from a directed verdict in favor of the City of Louisville (hereinafter "the City") entered by the Jefferson Circuit Court, dismissing his claim for personal injuries sustained as a result of a sexual assault at the Iroquois Branch

[1] Senior Judge Thomas D. Emberton, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

of the Louisville Free Public Library (hereinafter "the Library"). We affirm.

During a Halloween party on October 30, 2000, Z.A., a ten-year-old boy, was sexually molested by Charles Donovan, a student from Jefferson Community College who was working as a computer lab assistant in the Library's Computer Lab Center. JCC and the Library had a partnership whereby JCC students worked in the labs of the various branches, and it was through this agreement that Donovan obtained his position as a computer lab assistant. Three weeks previously, a patron called the Library regarding a display of graphic material on the overhead projector in the lab. After contacting the patron, Stacy DeCoste and Joan Pierce, the manager and assistant manager of the Library, respectively, went to the lab and located the inappropriate material on the instructor's terminal that had been accessed while Donovan had been working in the lab the previous day. DeCoste contacted Kitty Zachery and Karen Ingram, Donovan's supervisor at JCC, regarding the inappropriate display, ending her e-mail communication with the statement, "And frankly, I should not have to monitor or supervise what our lab assistants are doing in our lab."

On November 6, 2000, S.A. reported the sexual assault on her son by Donovan that had taken place a week earlier.

Pierce related the events in an e-mail communication to Dorothy Seymore and DeCoste sent the same evening:

> We had a major problem here at the branch tonight. A mother told me that her son had just told her today that one of the CLC assistants (Charles Donovan) had asked her son to touch Charles in his privates during the branch Halloween Party on Oct 30th. The son said he was afraid to tell his mother before today. This conversation took place at about 8:45 PM. I called the police, who sent out three uniformed officers who came and talked with the mother and the child. They then called in some detectives with the Crimes Against Children Unit, who also spoke to the mother and the child. The officers had asked me to call his supervisor (Karen Ingram) in order to get more information on Charles. I finally got a hold of [sic] Karen Ingram at about 9:45 PM. She came out and spoke with the detectives. Karen Ingram said that Charles will be told tomorrow that he won't be working in the CLC. Karen Ingram cover [sic] his shift or see that someone else covers it. The detectives said they will get in touch with Charles tomorrow.
>
> I've called Stacy and told her the situation (at about 10 PM) so she is aware of what is happening. We'll both be here at 9 AM tomorrow morning (Tuesday). Karen Ingram said she will be here arond [sic] 9:30 AM as well in order to let Charles know he won't be working with the program any more [sic].

Donovan was terminated from his employment in the lab the next day, and he later entered a guilty plea to first-degree sexual abuse in an ensuing criminal action.

Z.A., through his mother, filed suit against the Library, the City, and the Jefferson County Government on May 9,

2002. The Jefferson County Government, being immune from suit, was later dismissed as a party, and we note that the City is the fiscal agent for the Library. The City filed a motion for summary judgment, arguing that it did not owe any duty to Z.A. because his injuries were not foreseeable based solely on the display of pictures and because the sexual assault constituted a superseding cause. Z.A. objected to the motion, which the trial court denied in an Opinion and Order entered November 5, 2003, holding as follows:

> . . . . Kentucky courts have mandated that "every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury." Waldon v. Housing Auth., [] 854 S.W.2d 777 ([Ky.App.] 1991). Whether a duty of care is owed depends on any legal status or other direct relationship between the parties. See McDonald v. Talbott, [] 445 S.W.2d 84 ([Ky.] 1969). The Library, among other things, is a place for children, and in this particular instance, [Z.A.] was on the premises with his mother because the Library invited children to come to their [sic] branch by hosting a Halloween party for kids. The owner of premises where the public is invited at least has a general duty to exercise ordinary care to warn of dangers that are latent, unknown or not obvious. Lewis v. B&R Corp., [] 56 S.W.3d 543 ([Ky.App.] 2001).
>
> Upon establishing that a duty is owed, the court must determine the appropriate measures a reasonable person would take to fulfill this duty of foreseeability. Ross v. Papler et al., 68 F.Supp.2d 790 (W.D.Ky. 1998). The Kentucky Court of Appeals [sic] stated, "what constitutes ordinary care or

> reasonable foreseeability varies with the particular circumstances. It is proportionate to the danger to be apprehended." Ross v. Papler, 68 F.Supp.2d 790 (W.D.Ky. 1998) citing Napper v. Kenwood Drive-In Theatre Co., [] 310 S.W.2d 270 ([Ky.] 1958).
>
> Specifically if the only picture shown to the children in the computer lab was a baby giving the finger, the Court would agree with the Library in that the picture does not appear to be sexual in nature and Summary Judgment would be proper. The baby picture is most likely a staging and intended to be cute or at the very least an involuntary gesture made through pure lack of motor skills from a baby. However, where the degree of harm is great, but preventing it is not difficult, a relatively low degree of foreseeability is required. See U.S. v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). The picture of the obese lady's naked bottom in the pool does, albeit to a minimal degree, tend to be sexual in nature and could be seen as a reasonably foreseeable beginning of a future sexual assault by Donovan. Thus, the Court does not believe Summary Judgment is appropriate in this case.

The matter proceeded to trial on May 25, 2004. At the close of Z.A.'s case, the City moved for a directed verdict, arguing that no expert testimony was introduced to establish a link between the showing of the photograph and the propensity to commit a sex crime. In response, Z.A. argued that no expert testimony on that issue was necessary, and that he had established: 1) a breach of duty to provide reasonably safe premises; 2) a breach of duty to properly supervise an employee;

3) the elements to make the City vicariously liable for Donovan's actions; and 4) that Donovan's sexual assault on Z.A. was foreseeable. He also claimed that a factual question existed as to whether the breach was a substantial factor in causing the eventual harm.

The trial court first held that the test to hold an employer accountable for an employee's action was not met, so that the City could not be vicariously liable for Donovan's actions. In essence, it held that Donovan's conduct was not expectable in view of his duties, and was not in furtherance of the Library's business. The trial court also held that Z.A. failed to establish the notice, or foreseeability, issue, so that he also failed in his negligent supervision and retention claim. In open court the following day, Z.A. filed a motion opposing the City's motion for a directed verdict. The trial court declined to alter its ruling, and this appeal followed.

On appeal, Z.A. argues that the trial court improperly directed a verdict in the City's favor because he had established that a duty existed between the two parties and had specifically pled direct acts of negligence against the City in his complaint and later in his response to discovery requests. Furthermore, he argues that he established a claim for vicarious liability against the City for Donovan's acts. On the other hand, the City continues to assert that the trial court properly

granted its motion for a directed verdict because Donovan's actions were not foreseeable, constituted a superseding cause, and were not authorized or incidental to his duties in the lab.

The standard of review for an appellate court in reviewing a decision of a trial court on a motion for directed verdict made pursuant to CR 51.01 is well settled in the Commonwealth:

> In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.[2]

With this standard in mind, we shall review the trial court's ruling.

We shall first address Z.A.'s claims of negligence. He alleged in his complaint and during the course of the litigation that the City failed to exercise reasonable diligence in maintaining a safe and secure environment or to supervise its

[2] Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky.App. 1985).

employees.[3] In Pathways, Inc. v. Hammons,[4] the Supreme Court of Kentucky provided guidance in the area of negligence law. A negligence case, the Court held, "requires proof that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached the standard by which his or her duty is measured, and (3) consequent injury."[5] Whether a duty exists is a question of law and is subject to *de novo* review, while breach and injury are factual questions and causation is a mixed question of law and fact.[6] The issue in this case is whether the City owed a duty to Z.A. We must hold, as did the trial court, that it did not.

In Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell,[7] the Supreme Court of Kentucky stated that the general rule of duty "is that every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury." The same court later held in Fryman v. Harrison[8] that, "[i]n order to apply any 'universal

[3] There is some disagreement as to whether Z.A. properly raised a negligent supervision claim. For purposes of this opinion, we shall assume that he did.

[4] 113 S.W.3d 85 (Ky. 2003).

[5] Id. at 88.

[6] Id. at 89.

[7] 736 S.W.2d 328, 332 (Ky. 1987).

[8] 896 S.W.2d 908, 909 (Ky. 1995), citing North Hardin Developers v. Corkran, 839 S.W.2d 258 (Ky. 1992); Mitchell v. Hadl, 816 S.W.2d 183 (Ky. 1991).

duty of care' to a particular circumstance, 'it must appear that the harm was foreseeable and the facts must be viewed as they reasonably appeared to the parties charged with the negligence. . . .'" Finally, the court in Pathways stated, "[f]oreseeable risks are determined in part on what the defendant knew at the time of the alleged negligence."[9]

It appears in this case that Z.A. is attempting to identify the duty the City owed to him solely as it relates to a premises liability claim, which provides that "the owner of a premises to which the public is invited has a general duty to exercise ordinary care to keep the premises in a reasonably safe condition and warn invitees of dangers that are latent, unknown or not obvious."[10] However, he focuses in that section of his brief exclusively on the negligent supervision claim, which provides a different duty. In Oakley v. Flor-Shin, Inc.,[11] this Court held that "an employer can be held liable when its failure to exercise ordinary care in hiring or retaining an employee creates a foreseeable risk of harm to a third person." In order to establish that the City owed him a duty, Z.A. must prove that Donovan's sexual assault was foreseeable. We must hold that it was not.

[9] Pathways, 113 S.W.3d at 90.

[10] Lewis v. B&R Corp., 56 S.W.3d 432, 438 (Ky.App. 2001).

[11] 964 S.W.2d 438, 442 (Ky.App. 1998).

Z.A. rests his argument that the sexual assault was foreseeable on the report of Donovan showing inappropriate pictures in the lab three weeks before the assault took place. Z.A. argues that the picture of the woman in the pool provided the necessary basis for foreseeability. The trial court wrestled with the foreseeability element during the summary judgment stage and during trial, ultimately determining that Z.A. had failed to establish this element. The question of duty, as we have discussed, is a question of law, subject to *de novo* review. We are constrained to agree with the trial court, as well as the City, that there is just not enough of a connection between the showing of the picture, as inappropriate as it was, and the later sexual assault to establish this element of foreseeability. The staff at the Library could not have reasonably known that Donovan would sexually assault Z.A. based upon the showing of the inappropriate picture. Z.A.'s general premises liability claim must also fail because the City could not have reasonably known that Donovan would later sexually assault a visitor to the Library. Because Z.A. cannot establish that the City owed him a duty of care, his negligence claims must fail, and the circuit court properly granted a directed verdict in the City's favor.

In light of this holding, we need not address the City's claim that Donovan's criminal act constituted a superseding cause to break the chain of causation.

We shall next address Z.A.'s claim for vicarious liability against the City. "Under common law principles of agency, a principal is vicariously liable for damages caused by torts of commission or omission of an agent or subagent, other than an independent contractor, acting on behalf of and pursuant to the authority of the principal."[12] In addition to this case, the Supreme Court of Kentucky has addressed vicarious liability in Osborne v. Payne[13] and Roethke v. Sanger.[14] In Osborne, the Court held:

> The critical analysis is whether the employee or agent was acting within the scope of his employment at the time of his tortious act. . . . [F]or it to be within the scope of its employment, the conduct must be of the same general nature as that authorized or incidental to the conduct authorized. A principal is not liable under the doctrine of respondeat superior unless the intentional wrongs of the agent were calculated to advance the cause of the principal or were appropriate to the normal scope of the operator's employment.[15]

[12] Williams v. Kentucky Dept. of Education, 113 S.W.3d 145 (Ky. 2003).

[13] 31 S.W.3d 911 (Ky. 2000).

[14] 68 S.W.3d 352 (Ky. 2002).

[15] Osborne, 31 S.W.3d at 915.

The Roethke court held that "[v]icarious liability extends only to negligent acts of an agent committed in the course and scope of the principal's business. And the test is the same whether the agency relationship is one of partnership, principal/agent, or master/servant." [16]

In Coleman v. U.S.,[17] the Sixth Circuit Court of Appeals addressed the test to determine whether an employee is acting within the scope of his employment:

> (1) whether the conduct was similar to that which the employee was hired to perform; (2) whether the action occurred substantially within the authorized spacial and temporal limits of the employment; (3) whether the action was in furtherance of the employer's business; and (4) whether the conduct, though unauthorized, was expectable in view of the employee's duties.

Z.A. has also cited to the opinions of three foreign jurisdictions, each addressing the scope of employment question in relation to sexual assaults, which we have examined as well.

In order to establish vicarious liability on the part of the City, Z.A. must establish that Donovan was acting within the scope of his employment as a lab assistant when he sexually assaulted him. Z.A. claims that Donovan's act was incidental to his job when he (Donovan) offered to print out cartoon characters he (Z.A.) had requested in exchange for sexual

[16] Roethke, 68 S.W.3d at 361.

[17] 91 F.3d 820, 824 (6th Cir. 1996).

favors. Despite this, we cannot conclude that Donovan was acting within the scope of his employment when he sexually molested Z.A. Obviously, sexually assaulting Library patrons was not a part of Donovan's job duties, nor was it expectable in view of his duties in the lab. Furthermore, the act was certainly not in furtherance of the Library's business. While printing out pictures in the computer would, we assume, be considered a part of his duties, Donovan's trading of printed material from the lab for sexual favors could never be construed to advance the Library's cause. Because Z.A. could not establish that Donovan was acting in the scope of his employment, his vicarious liability claim against the City must fail, and the trial court correctly directed a verdict in its favor.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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