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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001723-MR

SYBIL THOMAS

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 01-CI-007648

YOST LEGAL GROUP, THOMAS F. YOST, JR.,
AND STEVEN L. BUNOSKI

APPELLEES

OPINION
AFFIRMING

** **

BEFORE: KNOFF AND TACKETT, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

ROSENBLUM, SENIOR JUDGE: This is a legal malpractice action filed by the Appellant, Sybil Thomas, in which the circuit court granted summary judgment in favor of the Appellees, Yost Legal Group, Thomas F. Yost, Jr., and Steven Bunoski.² We hold that

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Bunoski and Thomas F. Yost, Jr., are practicing members of the Yost Legal Group alleged to have performed legal work for Thomas. For convenience, we refer to the Appellees collectively as Yost.

there is no material issue of fact presented and, as a matter of law, Yost is entitled to summary judgment.

On June 23, 1999, Thomas, a Baltimore, Maryland resident, was attending the National Baptist Convention held at the Kentucky Fair and Exposition Center when she fell on uneven pavement in the center courtyard and suffered injury to her left arm. Following her return to Maryland, Thomas hired Yost Legal Group to represent her in a legal action to recover compensation for her injuries. After investigation, Yost determined that the Exposition Center was responsible for the injury and, because it is owned and operated by the Commonwealth of Kentucky Tourism Cabinet, any claim against the Commonwealth had to be pursued before the Kentucky Board of Claims. On August 20, 1999, Yost filed a Proof of Claim on Thomas's behalf and began performing various legal services, including the submission to the Board of documentation of Thomas's damages.

In the early fall of 2000, the Board apprised Yost that since it was not licensed to practice law in Kentucky, pursuant to KRS 524.130(2), Yost had been stricken as counsel of record; ultimately, Kevan Morgan, who represents Thomas in the present action, pursued her claim before the Board. Following discovery and a hearing, the Board made the following findings:

Thomas was passing through a courtyard on the grounds of the Exposition Center when

she tripped on an uneven and raised portion of the pavement, causing her to fall.

The Board further found that:

[T]he condition had been in existence for some time, that the Fair Board knew or should have known of the condition and that the condition was the cause of Thomas's fall.

Having found the Fair Board negligent, the Board then turned to the issue of damages. Thomas's out-of-pocket medical expenses were stipulated to be \$275 all of which was awarded. However, recognizing that the Board of Claims Act is a limited waiver of sovereign immunity, the Board denied Thomas's claim for lost sick leave but permitted it for lost annual and compensatory leave. KRS 44.070. The Board also held that under the Act, Thomas could not recover her attorney's fees and costs incurred for her attendance at the hearing. No appeal was taken from the Board's judgment.

On November 29, 2001, Thomas filed this action for legal malpractice claiming that Yost: (1)failed to file an action in the Jefferson Circuit Court against the responsible parties; (2)failed to notify Thomas of the applicable statutes of limitations; and (3)failed to comply with the order of the Board of Claims.³ The complaint sought compensation for injuries and punitive damages in the sum of three million

³ Thomas does not address the third basis for her original complaint in her appellate brief.

dollars. Yost filed a motion for summary judgment on April 26, 2004, and, on June 3, 2004, one day after Thomas filed her response, an order granting Yost summary judgment was entered.

The standard for summary judgment is set-forth in Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991). It requires that the court view the record in a light most favorable to the party opposing the motion and all doubts be resolved in the non-moving party's favor. Summary judgment is to be granted only when there is no issue of material fact and the moving party is entitled to judgment as a matter of law. Id. at 480. "Summary judgment is not to be granted lightly, and, in fact, is not to be granted at all unless the 'right to judgment is shown with such clarity that there is no room left for controversy.'" Kirk v. Watts, 62 S.W.3d 37, 38 (Ky.App. 2001).

Despite the scrutiny applied to such motions, it remains the purpose of a summary procedure to expedite the disposition of cases. "The function of summary judgment is to terminate the litigation when it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273, 276 (Ky. 1991). Although the summary judgment standard places the initial burden on the movant to persuade the court

that there is no genuine issue of material fact, once met, the party opposing the motion is not entitled to rely on mere argument and speculation but must present some affirmative evidence that there is a genuine issue of material fact to be determined at trial. Hallahan v. The Courier-Journal, 138 S.W.3d 699, 705 (Ky.App. 2004). Because no factual issues are resolved and only legal issues are before the court on a motion for summary judgment, our review is de novo. Id. With these general legal principles applicable to summary judgments as our guide, we now address the facts and law applicable to this action.

A legal malpractice action is a “suit within a suit”. The plaintiff must prove that the attorney breached the duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances during the representation afforded in the underlying action and that, but for the attorney’s negligence, the plaintiff would have been more than likely successful. Marrs v. Kelly, 95 S.W.3d 856, 860 (Ky. 2003). For the purpose of defeating the summary judgment, Thomas must demonstrate that there is a material issue of disputed fact that Yost breached the applicable standard of care and that she would have prevailed in an action filed in circuit court. We agree with the circuit court that, as a matter of law, her claim fails.

Thomas does not claim that the representation by Yost in her claim before the Board of Claims was inadequate. Instead, she contends that Yost should have discovered that there were liable non-immune individuals and entities and pursued an action in circuit court prior to the expiration of the applicable statute of limitations. Had a circuit court action been pursued, Thomas contends, she would have recovered damages not permitted in a Board of Claims action, including those for pain and suffering. The glaring flaw in her present claim is the complete lack of evidence as to the identity of the potential defendants and lack of any affirmative evidence that would permit even a reasonable inference that parties other than the Commonwealth are liable for her injury.

Thomas contends that Jefferson Special Security, a private security firm contracted by the Exposition Center to provide police services, had a duty to discover and report any defects in the surface of pedestrian areas. Deborah Ann Sheppard testified that her duties in patrolling the grounds required her to inspect and report any known hazards to the Exposition Center; she admitted, however, that she was never told to inspect for defects in the condition of pedestrian walkways. Furthermore, the contract entered into between the Exposition Center and the security firm imposes no duty on the

firm to inspect the premises for defects and includes only those duties generally associated with police services.

Even if this court were to find that the firm assumed such a duty, the Board determined that the Fair Board was aware of the defect in the walking surface and failed to make proper repairs. Findings of fact and conclusions of law rendered by the Board of Claims, like those of any other administrative agency exercising judicial functions, are entitled to the same res judicata and collateral estoppel effect as any other judicial determination. KRS 44.160(2). Issue preclusion may be asserted either offensively or defensively by one who was, or was not, a party to the original action. Godbey v. University Hospital of Albert B. Chandler Medical Center, Inc., 975 S.W.2d 104, 105 (Ky.App. 1998). The findings of the Board that the Fair Board knew of the condition and failed to repair the defect, renders the security firm's duty to inspect and notify the Fair Board of the defect inconsequential. Therefore, even if the firm breached a duty of care by failing to notify the Fair Board of the defect, as a matter of law, its breach was not the proximate cause of Thomas's injury.

Immediately following Thomas's fall, she was given assistance by some unknown individual who placed a bread bag containing ice on her injury. Over five years after the injury and more than three years after Yost last represented Thomas,

Thomas remains unable to identify who placed the ice bag on her injury and speculates that the person was either an employee of the American Red Cross or the National Baptist Convention. The only testimony that the ice pack exacerbated Thomas's injuries was that of Ms. Sheppard who admitted that she was not qualified to render an opinion as to causation or whether its placement caused additional harm. She merely testified that her training as an Emergency Medical Technician required her to first place a splint on the arm prior to applying an ice pack.

To avoid summary judgment, Thomas is required to name the alleged tortfeasor and present some affirmative evidence to support her claim that she could have successfully recovered damages against the tortfeasor. Absent such evidence, she can not even suggest an issue of material fact and summary judgment is proper.

Yost filed the Board of Claims action against the Commonwealth (Kentucky State Fair Board) on behalf of Thomas after confirming that, under Kentucky law, recovery is permitted against the Commonwealth only under the provisions of KRS 44.070. In light of the limited recovery permitted under the Act, Thomas contends that an action should have been filed against the Fair Board members in their individual capacities in circuit court for their failure to inspect and repair the premises.

This is a legal malpractice case and, therefore, requires as an essential element that Thomas establish that Yost deviated from the reasonable standard of care exercised by a reasonably competent attorney in the same or similar circumstances. Marrs, supra. In 1999, and until 2001 when Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001) was decided, the immunity afforded government employees was controlled by the law set forth in Franklin County v. Malone, 957 S.W.2d 195 (Ky. 1997). In that case, the court broadened the cloak of immunity holding that a police officer sued in his individual capacity acting within the scope of the authority of his office is entitled to the same immunity as the government and the only recourse available is through the Board of Claims. Id. at 202. Yanero overruled Malone to the extent it shielded employees from claims for damages arising from the negligent performance of a ministerial act and for discretionary acts whether or not performed in good faith. Yanero, supra, at 522-523. At the time Yost determined the potential liability of any possible defendants, the law in Malone was the established precedent.

Thomas insists, however, that she can present expert testimony that despite the state of immunity law at the time Yost represented her, Yost deviated from the reasonable standard of care. In Stephens v. Denison, 150 S.W.3d 80 (Ky.App. 2004), this court held the rule regarding expert testimony in medical

malpractice actions applicable to those for legal malpractice. Expert testimony is required when the negligence is not so apparent that a layperson with general knowledge would not recognize its existence. Id. at 82. In this case, where the issue is the attorney's professional assessment of the law, the testimony of an expert is required.

Although this case was pending since 2001, there was minimal discovery conducted, and no expert was deposed and no sworn testimony submitted to the court that expresses an opinion on the standard of care and Yost's breach of that standard. The only reference to a possible expert is contained in an "Expert Disclosure" reciting the name and qualifications of an expert who is expected to testify that "Yost Legal Group deviated from acceptable legal standards in this case."

The non-moving party to a summary judgment is not required to produce evidence sufficient to succeed at trial; the party must, however, demonstrate that sufficient evidence exists to establish the necessary elements of the claim. This includes demonstrating that qualified expert testimony is available. Goff v. Justice, 120 S.W.3d 716 (Ky.App. 2002). The mere naming of an expert without any sworn testimony to support the malpractice claim is, under the circumstances, inadequate to defeat Yost's summary judgment motion. CR 56.03 states that the judgment shall be rendered 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 a judgment as a matter of law.” Based on the record and the law applicable to immunity at the time Yost handled Thomas’s case, the circuit court properly found Yost entitled to judgment as a matter of law.

Moreover, this court is unaware and Thomas has not provided any evidence or citation to authority of any statute or regulation that imposes a duty on individual Fair Board members to discover and repair any defects on the premises of the fairgrounds. She asserts only that it is likely that there are such regulations promulgated by the Fair Board. Again, her bald allegations are insufficient to meet the affirmative evidence standard required to defeat the summary judgment.

Thomas has failed to even present a scintilla of evidence to support her claim that Yost was negligent and that she could have succeeded in a court action against any party other than the Commonwealth. The summary judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kevan Morgan
Morgan Law Office, PLC
Georgetown, Kentucky

BRIEF FOR APPELLEE:

Mark S. Fenzel
Rebecca Grady Jennings
Middleton & Reutlinger
Louisville, Kentucky