

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000893-MR

TEN BROECK DUPONT, INC., D/B/A
TEN BROECK HOSPITAL

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 01-CI-006581

ARTEMECIA BROOKS

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: TACKETT¹ AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.²

TAYLOR, JUDGE: Ten Broeck Dupont, Inc., d/b/a Ten Broeck Hospital (the Hospital) brings this appeal from a November 30, 2004, judgment of the Jefferson Circuit Court upon a jury verdict awarding Artemecia Brooks (Brooks) two million ninety-

¹ Judge Julia K. Tackett concurred in this opinion prior to her retirement effective June 1, 2006.

² 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 Kentucky Revised Statutes 21.580.

one thousand dollars (\$2,091,000.00) in compensatory and punitive damages. We affirm.

Brooks was voluntarily admitted to the Hospital from January 5-9, 2001, and continued treatment in partial hospitalization programs as a day patient from January 10-16, 2001. While a patient at the Hospital, Brooks alleged that Feotis Gilbert, a former employee of the Hospital, forced her to have nonconsensual sexual intercourse. Brooks raised various causes of action against the Hospital. The matter was tried before a jury, and the jury returned a verdict in favor of Brooks in the amount of one hundred sixty-one thousand dollars (\$161,000.00) in pain and suffering, one hundred thirty thousand dollars (\$130,000.00) in future pain and suffering, and one million eight hundred thousand dollars (\$1,800,000.00) in punitive damages. This appeal follows.

The Hospital initially contends the evidence was insufficient to prove that it negligently hired or retained Gilbert, thus entitling it to a directed verdict. A directed verdict is proper when drawing all inferences in favor of the nonmoving party, a reasonable juror could only conclude that the moving party was entitled to a verdict. Ky. R. Civ. P. (CR) 50.01; Morrison v. Trailmobile Trailers, Inc., 526 S.W.2d 822 (Ky. 1975). Here, the Hospital argues that "[e]ven in the light most favorable to Brooks, evidence adduced at trial does not

demonstrate that the Hospital could have known that Gilbert would engage in sexual contact with patients"

Hospital's Brief at 6. For the reasons hereinafter stated, we disagree.

The tort of negligent retention and hiring was recognized in Oakley v. Flor-Shin, Inc., 964 S.W.2d 438 (Ky.App. 1998). Therein, the Court held "the established law in this Commonwealth recognizes 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." Id. at 442. The test is whether the employer knew or reasonably should have known that (1) the employee was unfit for his job, and (2) the employee's placement or retention created an unreasonable risk of harm to a third person. In the case at hand, we are of the opinion that Brooks introduced sufficient evidence to induce a reasonable juror to believe that the Hospital knew or should have known that Gilbert was unfit for his employment and that his retention created an unreasonable risk of harm to patients.

The testimony of Detective Brad Geffrey is most compelling upon this issue. In his testimony, Detective Geffrey indicated that he had contacted the Hospital's attorney regarding a problem with one of its employees, identified as an Otis or Feotis Gilbert, before Brooks became a patient.

Detective Geffrey specifically testified that he received a tip concerning Gilbert's inappropriate sexual conduct with patients in the adolescent section of the Hospital. Detective Geffrey indicated that the tip was from a Hospital employee and occurred in December 2000. Detective Geffrey stated he told the attorney that an employee named Gilbert who worked on the adolescent wing had "perped on" some female patients. Detective Geffrey further testified he was advised that there was no employee by that name or description at the Hospital.

Upon the whole, we believe Detective Geffrey's testimony alone was sufficient to create a material issue of fact upon whether the Hospital negligently retained Gilbert. Indeed, Detective Geffrey's testimony indicated the Hospital knew or reasonably should have known that Gilbert was unfit for this job and that his continued placement in that job certainly created unreasonable risk of harm to patients. As such, we are of the opinion the circuit court did not err by denying the Hospital's motion for directed verdict.

The Hospital next argues the circuit court erred by excluding evidence of Brooks' "prior sexual conduct" under Ky. R. Evid. (KRE) 412. The Hospital specifically argues:

Brooks' prior sexual history was part of the reason for her admission to the Hospital. Her admission notes and hospital records indicate that she suffered depression associated with poor self esteem, secondary

to her sexual addiction. [Defendant Avowal Exhibit 9, App., p] Consequently, the evidence of her prior sexual history was "evidence directly pertaining to the act," both as to damages and consent. In addition, Brooks testified in her deposition that she had sex with one hundred men and one woman. [Brooks Dep. 08-19-02, p. 63]. This was consistent with Brooks' medical records which indicated that she could not say "no" to sex.

Hospital's Brief at 12.

KRE 412 is commonly referred to as the Kentucky Rape Shield Law and was designed to protect victims against unfair character attacks. KRE 412 states, in relevant part, as follows:

- (a) Evidence generally inadmissible.
The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
 - (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
 - (2) Evidence offered to prove any alleged victim's sexual predisposition.

. . . .

- (2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is

admissible only if it has been placed
in controversy by the alleged victim.

Under KRE 412(a), evidence of a victim's sexual behavior or sexual predisposition is generally inadmissible; an exception is found in KRE 412(b)(2). Thereunder, evidence proving the sexual behavior or sexual predisposition of a victim in a civil case may be admissible if it is otherwise admissible under the Rules of Evidence and if its probative value substantially outweighs the danger of harm to the victim and of undue prejudice to any party. There is little case law interpreting KRE 412(b)(2). The Hospital has cited this Court to various criminal cases interpreting KRE 412(b)(1). We do not view these cases as being dispositive upon KRE 412(b)(2). In Lawson, The Kentucky Evidence Law Handbook §2.30[5] at 170 (4th ed. 2003), the following notes of the advisory committee upon Federal Rule of Evidence 412 are cited as guidance for interpreting KRE 412:

The balancing test requires the proponent . . . to convince the court that the probative value of the proffered evidence "substantially outweighs the danger of harm to any victim and of unfair prejudice of any party." This test of admitting evidence offered to prove sexual behavior or sexual propensity in civil cases differs in three respects from the general rule governing admissibility set forth in Rule 403 [and governing the exceptions for criminal cases]. First, it reverses the usual procedure spelled out in Rule 403 by shifting the burden to the proponent to

demonstrate admissibility rather than making the opponent justify exclusion of the evidence. Second, the standard expressed in subdivision (b)(2) is more stringent than in the original rule; it raises the threshold for admission by requiring that the probative value of the evidence *substantially* outweigh the specified dangers. Finally, the Rule 412 test puts "harm to the victim" on the scale in addition to prejudice to the parties.

Thus, we must determine whether the evidence offered by the Hospital to prove Brooks' sexual behavior or sexual predisposition is otherwise admissible under the Rules of Evidence and whether its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. As pointed out by Lawson, The Kentucky Evidence Law Handbook §2.30[5] at 170 (4th ed. 2003), "the adoption of a probative value/prejudice yardstick . . . tilts very strongly towards exclusion over admission."

In reviewing the Hospital's Exhibit 9, we observe that Brooks was never diagnosed with "sexual addiction." Exhibit 9 is Brooks' discharge summary from the Hospital signed by Dr. Steve Gibson. Therein, it is reported that Brooks stated she had been sexually promiscuous and had unprotected sex. She also possessed feelings of guilt concerning her sexual promiscuity. As pointed out by the Hospital, Brooks also testified in her deposition that she had sex with over 100 individuals.

Considering the excluded evidence as a whole, we believe that it would have merely demonstrated that Brooks had been sexually promiscuous in the past, engaged in unprotected sex, and felt extremely guilty. Under KRE 412(b)(2), we are unable to say that the probative value of the excluded evidence substantially outweighed the danger of harm and of undue prejudice to Brooks. Hence, we do not believe the circuit court abused its discretion by excluding evidence of Brooks' "prior sexual history" under KRE 412(b)(2).

The Hospital also maintains the circuit court committed error by denying its motion for directed verdict upon the claim that it negligently hired and retained Gilbert because there was no evidence that Brooks suffered an injury. Specifically, the Hospital argues:

In the case at bar, Brooks never introduced any evidence of any diagnosable psychiatric, psychological, or emotional condition that was a "direct, natural, and proximate circumstance" of the Hospital's allegedly wrongful acts. In fact, the Hospital's proof (which was the only *direct* evidence of Brooks' mental state), demonstrated *by Brooks' own statements* to her health care providers (not just the Hospital's personnel), was that she got demonstrably better while at the Hospital. Brooks did not introduce one shred of evidence that she suffered any quantifiable psychiatric injury different from the condition with which she presented to the Hospital. Absent some competent evidence of causation of her current condition, or exacerbation of her pre-existing condition,

Brooks failed to prove a necessary element of her negligence claim, i.e., that the breach of some legal duty by the Hospital was the proximate cause of an injury to her.

Hospital's Brief at 20. The jury awarded Brooks one hundred sixty-one thousand dollars (\$161,000.00) for present pain and suffering and one hundred thirty thousand dollars (\$130,000.00) for future pain and suffering. We view the Hospital's argument in this regard as somewhat incredulous. To argue Brooks suffered no injury as the result of nonconsensual sexual intercourse ignores not only common experience but more importantly Brook's own testimony. In this regard, we specifically refer to Brooks' testimony:

I was asleep, um, I was asleep that night and he came into my room and shook me on my shoulder and, um, (crying) asked me did I want to suck his [expletive deleted] (crying). I was shocked when I woke up, I was - I didn't believe it (crying). I was - I said no (crying). He said okay and left out the room and I went back to sleep but I was feeling real groggy. (crying) Then a couple of minutes went past again (crying) and he came back in there (crying) and asked me can I eat your [expletive deleted] (crying) and I shook my head no cause I was more scared that time. (crying) I looked around a little bit. (crying) He said all right and he went back out the room again. (crying) That time I didn't fall right back to sleep. (crying) I realized there was a roommate in there and was thinking maybe he won't do nothing to me and I fell back asleep. (crying) He come in there the third time, (crying) shaking me on the shoulder again, and asked me (crying) are you ready? I'm like no (crying). Take me

by my hand, lift me off the bed (crying) and I back off a little bit (crying), he grabs on to me (crying) and lures me over there by the door (crying) in between a hutch and a door (crying). He pulled my pants down (crying) and performs oral on me (crying). He has me pushed up against the wall. I can't move (crying). I'm scared (crying). He gets up (crying), pushes me down by my shoulders (crying) and makes me do him (crying). He grabbed me by the arm, pulls me up (crying). There's a chair right there by the hutch, pushes me over and does me from behind (crying). He pulls his pants up (crying) and goes in a couple of times (crying). He pulls his pants up and he leaves (crying). I go back on the edge of my bed (crying). Rocking myself (crying). Scared (crying) and crying (crying). Thinking of all kinds of things I could do to get up out of there right then and there (crying). [11/16/04, Tape 1, 16:11:00 to 16:16:18]

Brook's Brief at 2-3. Upon the whole, we are of the opinion that the jury could have reasonably concluded that Brooks suffered present and future pain and suffering from the nonconsensual intercourse with Gilbert.

The Hospital further maintains the circuit court committed error by failing to direct a verdict in its favor upon Brooks' claim for punitive damages. Citing to Horton v. Union Light Heat & Power Co., 690 S.W.2d 382 (Ky. 1985), the Hospital argues that punitive damages may only be "*awarded for conduct that is outrageous*, because of the defendant's evil motive or his reckless indifference to the rights of others." Id. at 389 (quoting Restatement (Second) of Torts § 908(2) (1979)). The

Hospital argues there was a complete lack of evidence demonstrating that its conduct was outrageous.

Detective Geffrey testified that prior to Brooks' admission to the Hospital he contacted the Hospital's attorney regarding an Otis or Feotis Gilbert. He informed the attorney that Gilbert had allegedly been involved in inappropriate sexual conduct with patients at the Hospital. Detective Geffrey was told by the Hospital's attorney that no such person worked at the Hospital. As the Hospital is a psychiatric facility and houses mentally ill patients, the prior knowledge by the Hospital is particularly troublesome. Accordingly, we hold the evidence was sufficient to induce a reasonable juror to believe that the Hospital's conduct was outrageous and rose to a level of reckless indifference to the rights of its patients. See Morrison, 526 S.W.2d 822. As the evidence was sufficient to support a finding that the Hospital should have anticipated Gilbert's misconduct, we also hold that punitive damages were proper under Kentucky Revised Statutes (KRS) 411.184(3).

The Hospital also argues that punitive damages were improper because Gilbert committed the wrongful act outside the scope of his employment; thus, the Hospital cannot be held liable therefore. The Hospital is being held liable for its own negligence - breach of the standard of care and negligent hiring and retention. The punitive damage award has its basis in the

Hospital's own negligent conduct. Hence, the issue of whether Gilbert committed the wrongful act outside of his employment is simply irrelevant. Upon the whole, we are of the opinion the circuit court did not err by denying the Hospital's motion for directed verdict upon punitive damages.

The Hospital further maintains it was entitled to a directed verdict upon whether it deviated from the applicable standard of care owed Brooks. Again, a directed verdict is proper when drawing all inferences in favor of the nonmoving party a reasonable juror could only conclude that the moving party was entitled to a verdict. Lee v. Tucker, 365 S.W.2d 849 (Ky. 1963). Generally, a patient is entitled to such reasonable care and attention for his safety as his mental and physical condition may demand. Miners Mem'l Hosp. Ass'n of Kentucky v. Miller, 341 S.W.2d 244 (Ky. 1960). As hereinbefore pointed out, the evidence indicated the Hospital was made aware of Gilbert's inappropriate sexual conduct prior to Brooks being admitted to the Hospital. Moreover, there was evidence that sexual relations between an employee and a patient was a violation of the Hospital's policy and procedures. Considering the evidence as a whole, we believe the circuit court properly denied the Hospital's motion for directed verdict upon this issue.

The Hospital next argues the circuit court committed error by failing to give a comparative negligence instruction

under KRS 411.182. The Hospital sought a comparative negligence instruction to allocate fault between Gilbert and Brooks. The Hospital argues that the jury should have been allowed to consider the fault of both Gilbert and Brooks. As hereinbefore pointed out, the jury's verdict was based upon the negligence of the Hospital in hiring and retaining Gilbert and in deviating from the standard of care for patient safety. The verdict is not premised upon Gilbert's negligence; thus, any instruction that proportioned negligence between Gilbert and Brooks would have been clearly in error. As such, we reject the Hospital's contention that the circuit court should have given a comparative negligence instruction.

The Hospital also contends the circuit court erred by failing to instruct the jury upon the statutory definition of rape. We do not believe it was necessary to give an instruction concerning the statutory definition of rape. The tendered instructions conformed to the classic bare bones approach endorsed in Cox v. Cooper, 510 S.W.2d 530 (Ky. 1974). As such, we cannot hold that the circuit court erred by refusing to instruct the jury upon the statutory definition of rape.

The Hospital additionally argues the circuit court committed error by failing to direct a verdict upon whether Brooks suffered permanent injury. As hereinabove concluded, we disagree. The testimony of Brooks and the testimony of Dr. Lisa

Goodman provided sufficient evidence to base a future award of pain and suffering. As such, we are of the opinion that a jury could have reasonably concluded that Brooks would suffer future pain and suffering. Thus, the circuit court properly denied the Hospital's motion for directed verdict upon the issue of future pain and suffering damages.

Finally, the Hospital contends the circuit court committed error by admitting certain hearsay evidence. The Hospital points to some thirteen items of evidence admitted over the Hospital's objections. We have reviewed the substance of the evidence admitted at trial. Even if it were erroneously admitted, the admission constitutes mere harmless error. CR 61.01. Simply put, we do not believe that absent the admission of such evidence the outcome of the proceedings would have been different. See Crane v. Commonwealth, 726 S.W.2d 302 (Ky. 1987). Accordingly, we are of the opinion the circuit court did not commit reversible error in the admission of evidence.

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

ALL CONCUR.

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