

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000155-MR

P. S. AND M. S., INDIVIDUALLY; AND
P. S. AND M. S., GUARDIANS OF M. S.

APPELLANTS

v.

APPEAL FROM MEADE CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
ACTION NO. 04-CI-00095

MEADE COUNTY BAPTIST TEMPLE AND
REVEREND RAY TOWER

APPELLEES

OPINION
AFFIRMING

** **

BEFORE: ACREE, JUDGE; BUCKINGHAM,¹ SENIOR JUDGE; HOWARD,²
SPECIAL JUDGE.

HOWARD, SPECIAL JUDGE: P. S. and M. S., parents of M. S., appeal from the
judgment of the Meade Circuit Court which dismissed their claims against the appellees,

¹ Senior Judge David C. Buckingham 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 Special Judge James I. Howard completed this opinion prior to the expiration of his Special Judge assignment effective February 9, 2007. Release of the opinion was delayed by administrative handling.

Meade County Baptist Temple and Reverend Ray Tower. Mr. and Mrs. S. filed a complaint against the appellees and against Timothy W. Tower and Community Baptist Church, Inc., seeking damages stemming from Timothy Tower's sexual abuse of their daughter, M. S. The circuit court granted summary judgment in favor of the appellees. The appellants contend that the appellees are directly and vicariously liable for Timothy's misconduct. We disagree and affirm.

The material facts relevant to this appeal are not in dispute. Rev. Ray Tower founded Meade County Baptist Temple and supervises all activities and functions of the church. Mr. and Mrs. S. and their children, M. S. and her older brother, joined Meade County Baptist Temple in 1996 and became actively involved with the church and its members. Rev. Ray Tower's adult son, Timothy Tower, was not a paid employee of the church, but voluntarily lead junior church for children and adolescents, preached in junior church, taught Sunday school and coordinated youth events. Mr. and Mrs. S. and their children formed a friendly relationship with the Towers that involved activities outside the church. M. S.'s brother assisted Rev. Ray Tower with his deer processing business which was conducted at his house, and M. S. and her brother would frequently stay overnight at the Tower home. At that time Timothy Tower and his wife, Penny, lived with his parents. Timothy and Penny moved into a separate residence in 1999, and M. S. continued to spend several nights a week with them. M. S. slept between Timothy and Penny in their bed when she spent the night.

Starting when M. S. was 12 years old in 1999, and continuing through late 2001 or early 2002, Timothy frequently touched M. S.'s genital area when she spent the

night at Timothy's house and also placed his hand on M. S.'s thigh when they traveled in his truck. M. S. testified that she feigned sleeping when the abuse occurred at Timothy's house in the bed shared with his wife. After the abuse stopped, M. S. continued staying with Timothy and Penny several times a week through May 2003. M. S. did not tell anyone about the abuse until 2003, at which time she told her mother. Following a criminal investigation, Timothy pled guilty to multiple counts of sex-related offenses and was sentenced to five years' imprisonment.

In April 2001, another member of Meade County Baptist Temple informed Rev. Tower that his son favored M. S., neglecting the other children involved with the youth ministry program. A church meeting conducted in May 2001 to address the issue quickly turned contentious, with M. S.'s mother vociferously defending Timothy Tower. After that meeting, Timothy and his wife left Meade County Baptist Temple and started Community Baptist Church. The appellants went with them and assisted them in founding the new church. Only after M. S. told her mother in 2003 about Timothy's abusing her, did Mr. or Mrs S. suspect Timothy of anything. Only then did Mrs. S., for the first time, inform Rev. Ray Tower of the allegations.

The appellants filed a complaint in the Meade Circuit Court against the appellees, Meade County Baptist Temple and Rev. Ray Tower and against Community Baptist Church and Timothy Tower. The appellants claimed that Rev. Tower and Meade County Baptist Temple had a duty to report Timothy's sexual abuse of M. S., that they took no action to inform the appellants of the abuse or to discipline Timothy, and that their failure to do so constituted an act of concealment. The appellants further asserted

that the appellees were negligent in hiring, retaining, and supervising Timothy. After depositions were completed, the appellees and Community Baptist Church separately moved for summary judgment. In an order made final pursuant to CR 54.02, the circuit court granted the appellees' summary judgment motion and dismissed the claims against the Meade County Baptist Temple and Rev. Ray Tower. In so far as the record before us shows, the appellants' claims against Timothy Tower and Community Baptist Church were not dismissed. Those claims are not at issue in this appeal.

On appeal the appellants assert that a genuine issue of material fact exists as to whether the Meade County Baptist Temple or Rev. Ray Tower are directly or vicariously liable for Timothy's sexual abuse of M. S.

Our standard of review of a summary judgment is whether the circuit court erred by finding that no genuine issue existed as to any material fact and that the appellees were entitled to judgment as a matter of law. *See Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment is appropriate “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.” CR 56.03. The movants must demonstrate that the adverse party cannot prevail under any circumstances. *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985). “The proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a

judgment in his favor.” *Steelvest, Inc. v. Scansteel Svc. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

The Kentucky Supreme Court clarified *Steelvest* in *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992), by stating that “impossible” is viewed in the practical sense, not the absolute sense. The party opposing a properly supported summary judgment motion cannot defeat it without affirmative evidence demonstrating the existence of a genuine issue of material fact. *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 199 (Ky. 2001). In its analysis, the trial court's focus should be on what is of record rather than what might be presented at trial. *Welch v. American Publishing Co. of Kentucky*, 3 S.W.3d 724, 730 (Ky. 1999). The record is viewed in a light most favorable to the opposing party and all doubts are resolved in his favor. *Steelvest*, 807 S.W.2d at 480. We review the order granting summary judgment *de novo* because only legal questions and no factual findings are involved. *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004).

The appellants first assert that the appellees are directly liable for Timothy's sexual abuse of M. S., and that a genuine issue of material fact exists as to whether the appellees knew or should have known of Timothy's abusing M. S. and failed to take action to prevent further abuse. The appellants emphasize the deposition testimony of M. S.'s father that “I believe to the bottom of my heart that, the day we left [Meade County Baptist Temple, Rev. Tower] made a comment that his son Timothy Tower lusted after my daughter.” The appellants assert that this testimony, and the evidence that another church member informed Rev. Tower that Timothy favored M. S. to the exclusion of

other youth group members, creates a genuine issue of material fact as to whether Rev. Tower knew of Timothy's sexual abuse of M. S. and failed to take steps to protect her. In support of their argument, the appellants cite *O'Roark v. Gergley*, 497 S.W.2d 931 (Ky. 1973). The Kentucky Supreme Court held in *O'Roark* that an employer had a duty to stop an employee from physically assaulting a customer on the employer's premises when the employer witnessed the employee's committing the assault. *Cf. Patterson v. Blair*, 172 S.W.3d 361, 367, n.2 (Ky. 2005)..

In a negligence case, a defendant is liable to the plaintiff where the defendant owed a duty of care to the plaintiff, the defendant breached that duty, and the breach was a substantial factor in causing the plaintiff's injury. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 88-89 (Ky. 2003). The existence of a duty is a question of law. *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 248 (1992). The duty is to exercise ordinary care in his activities to prevent foreseeable injury. *Grayson Fraternal Order of Eagles v. Claywell*, 736 S.W.2d 328, 332 (Ky. 1987).“Foreseeability is to be determined by viewing the facts as they reasonably appeared to the party charged with negligence, not as they appear based on hindsight.” *James v. Wilson*, 95 S.W.3d 875, 891 (Ky. App. 2002).

The appellants' reliance upon *O'Roark* is misplaced. Timothy's misconduct did not occur on the premises of Meade County Baptist Temple and, more importantly, the record contains no evidence which would tend to indicate that Rev. Tower either knew of or suspected Timothy's tortious acts before M. S.'s mother told him in 2003. Significantly, the record contains no evidence that Timothy had any history of sexual

misconduct prior to his abuse of M. S., or that the appellees had any reason to believe that Timothy might engage in such misconduct. Accepting as true the testimony that Rev. Tower stated in May 2001 that Timothy “lusted after [M. S.],” coupled with another parent's complaint that Timothy favored M. S., there still is no evidence that the appellees knew or should have known that Timothy might act on his alleged thoughts. The appellants also heard both of these allegations and did not suspect any misconduct. The record reflects that Mrs. S., the mother, vociferously defended Timothy at that meeting. The appellants left Meade County Baptist Temple with Timothy and assisted him in founding his new church. They continued to allow their daughter to spend the night at his home. Clearly, they suspected nothing and they offered the trial court no evidence to support their allegation that the appellees knew or suspected any more than they did.

Viewing the record most favorably to the appellants, they failed to present any evidence that would create an inference that the appellees knew or should have known that Timothy was abusing M. S. Therefore, no genuine issue of material fact exists concerning the circuit court's finding that the appellees were not directly liable for M. S.'s injuries.

The appellants also contend that a genuine issue of material fact exists as to whether the appellees are vicariously liable for Timothy Tower's actions. We disagree.

Vicarious liability, also called the doctrine of *respondeat superior*, imputes liability to a principal for the tortious acts of an agent committed in course of his duties. *American General Life & Acc. Ins. Co. v. Hall*, 74 S.W.3d 688, 692 (Ky. 2002). In determining whether an agent acts within the scope of his employment, the focus is on

the agent's motive for acting, not on the foreseeability of the agent's intentional acts. *Patterson v. Blair*, 172 S.W.3d at 369 (2005). “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.” *Osborne v. Payne*, 31 S.W.3d 911, 915 (Ky. 2000), citing *Hennis v. B.F. Goodrich Co., Inc.*, 349 S.W.2d 680 (Ky. 1961).

The appellants' argument to impose liability on the appellees for Timothy's tortious conduct is similar to that rejected in *Osborne*. In that case, a former husband asserted that a church was vicariously liable for a priest's affair with his former wife that preceded their divorce. The priest provided marriage counseling to the couple, which activity was sanctioned by the church and ordinarily performed by a priest. The Court held that the church was not vicariously liable for the actions of its priest, stating that “[t]o accept such a theory would in effect require the diocese to become an absolute insurer for the behavior of anyone who was in the priesthood and would result in strict liability on the part of the diocese for any actionable wrong involving a parishioner. We must conclude that such an argument is absurd. Certainly, the scope of employment of a priest could include marriage counseling, but it clearly does not include adultery.” *Osborne*, 31 S.W.3d at 915.

Here, Timothy's sexual abuse of M. S. clearly did not “advance the cause of [the appellees],” nor was his conduct “appropriate to the normal scope” of his activities in his leadership positions at Meade County Baptist Temple. *Osborne*, 31 S.W.3d at 915. Obviously, the scope of Timothy's duties at Meade County Baptist Temple did not

include sexual abuse. Thus, the appellees are not vicariously liable for Timothy's sexual misconduct toward M. S.

Although not directly asserted on appeal, in the circuit court the appellants also claimed that the appellees were negligent in supervising Timothy. “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.” *Oakley v. Flor-Shin, Inc.*, 964 S.W.2d 438, 442 (Ky. App. 1998). However, viewing the record in a light most favorable to the appellants, the evidence before the circuit court did not create any inference that Timothy's sexual misconduct toward M. S. was foreseeable. Again, Rev. Tower's statement that “Timothy lusted after M. S.” and the complaints that Timothy favored M. S. in the church youth group were known to the appellants and other members of Meade County Baptist Church as well as to Rev. Tower. There is no indication that anyone suspected Timothy of sexual abuse. The information which was known is simply insufficiently connected with the sexual abuse to establish the element of foreseeability. Because the appellants did not produce any evidence that created an inference that the appellees should have reasonably known that Timothy was abusing M. S. at the time he committed the crimes, they failed to establish that the appellees owed to M. S. a duty to prevent further abuse. The appellants' claims for negligent supervision must also fail.

Based on the facts and circumstances of this case, the circuit court did not err in concluding that it would be impossible for the appellants to prevail at trial on their claims against the appellees. Accordingly, the summary judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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Mark T. Scott
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BRIEF FOR APPELLEES:

Wayne J. Carroll
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ORAL ARGUMENT FOR APPELLANTS: ORAL ARGUMENT FOR APPELLEES:

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