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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000122-MR
&
NO. 2007-CA-000221-MR

ROSE ANNETTE COOK,
INDIVIDUALLY; ROSE ANNETTE COOK,
AS ADMINISTRATRIX OF THE ESTATE
OF DAVID ALAN COOK; AND
WARREN LEE COOK — APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS-APPEAL FROM ANDERSON CIRCUIT COURT
v. HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 06-CI-00020

RUSSELL "RUSTY" TAYLOR, INDIVIDUALLY;
RUSSELL "RUSTY" TAYLOR, AS PARAMEDIC
FOR ANDERSON COUNTY EMERGENCY
MEDICAL SERVICES; GARY REYNOLDS, JR.,
INDIVIDUALLY; AND GARY REYNOLDS, JR.,
AS EMT FOR ANDERSON COUNTY EMERGENCY
MEDICAL SERVICES — APPELLEES/CROSS-APPELLANTS

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, JUDGE: Rose Annette Cook, both individually and as administratrix of the estate of David Allen Cook, and Warren Lee Cook appeal from the opinion and order of the Anderson Circuit Court dismissing her claims against paramedic, Russell Taylor, and Emergency Medical Technician (hereinafter EMT), Gary Reynolds. Taylor and Reynolds cross-appeal on the trial court's decision not to additionally dismiss the claims pursuant to the doctrine of release. After careful review, we reverse and remand.

On May 11, 2006, David Cook (hereinafter David) became lightheaded as he was driving home from work and pulled to the side of the road. A friend of David's contacted the Anderson County Emergency Medical Services (hereinafter EMS), who dispatched Reynolds and Taylor to the scene. Taylor and Reynolds determined that David was dehydrated, and allege that they advised him that he should be transported to the hospital for further treatment. David refused to be taken to the hospital, and his family was called to the scene to take him home. Upon arrival, David's wife, Rose, signed a release form from EMS, stating that David had refused transportation to the hospital and EMS was released from liability. David was taken home where, within five hours, he suffered a cardiac arrest. He was transported to the hospital and pronounced dead at the scene.

Rose filed suit against Taylor and Reynolds based on negligence and failure to meet the appropriate standard of care. She further alleged that Taylor altered and destroyed documents in an attempt to cover-up the alleged negligence. Taylor and Reynolds filed a motion to dismiss the claims pursuant to Kentucky Revised Statutes (KRS) 411.148, the Good Samaritan Statute, and the doctrine of release. Rose responded by arguing that KRS 411.148 did not shield Taylor or Reynolds, outlining several specific reasons. The trial court disagreed with Rose and entered an opinion and order holding that KRS 411.148 applied to Taylor and Reynolds, thus barring the suit. Rose now appeals the trial court's order and opinion. Taylor and Reynolds bring a cross-appeal, asserting that the trial court erroneously declined to additionally dismiss the claims against them pursuant to the doctrine of release.

Rose argues that the trial court erred in finding that Taylor and Reynolds were subject to the Good Samaritan immunity because KRS 411.148 does not apply to the regular professional work responsibilities of Taylor and Reynolds for which they were paid. We agree. As this is a matter of first impression in Kentucky, we look to foreign jurisdictions for guidance.

In pertinent part, Kentucky's Good Samaritan Statute, KRS 411.148(1) states:

> No . . . person certified as an emergency medical technician by the Kentucky Cabinet for Health and Family Services . . . shall be liable in civil damages for administering emergency care or treatment at the scene of an emergency outside of a hospital, doctor's office, or

> other place having proper medical equipment excluding house calls, for acts performed at the scene of such emergency, unless such acts constitute willful and wanton misconduct.

In 2002, the General Assembly enacted KRS 311A.150, which expands the protections afforded under KRS 411.148(1) to include paramedics. Specifically KRS 311A.150 states:

> [a] paramedic licensed pursuant to this chapter and a first responder certified pursuant to this chapter shall have the privileges and immunities specified in KRS 411.148, subject to the provisions of that statute.

The basic premise of Good Samaritan statutes is "to induce voluntary rescue by removing the fear of potential liability which acts as an impediment to such rescue. Thus they are directed at persons who are not under some pre-existing [sic] duty to rescue." *Lee v. State*, 490 P.2d 1206, 1209 (1971). When a preexisting duty to aid exists,

> no additional encouragement to the provider is needed because he already has a duty to respond to the emergency situation. The purpose of encouraging volunteerism would not be furthered as the responding provider could not be considered a volunteer. Rather, he would be compelled by a legal duty to act.

See Hirpa v. IHC Hospitals, Inc., 948 P.2d 785, 790 (Utah 1997). Courts in other states "have uniformly held that the law is not meant to exempt all medical personnel in every emergency situation, but only those personnel who happen across an emergency *outside the normal course of their work* and who otherwise have *no duty to assist*." *James v. Rowe*, 674 F.Supp. 332, 333-34 (D.Kan.1987)

(emphasis added); *see also, e.g., Clayton v. Kelly*, 357 S.E.2d 865, 868 (Ga.App. 1987) (the occurrence of an emergency will not invoke the immunity, if it was the person's duty to respond to the emergency); *Lee*, 490 P.2d at 1209 (Alaska 1971) (statute applies to those persons who otherwise have no duty to rescue) *overruled on other grounds* by *Munroe v. City Council for City of Anchorage*, 545 P.2d 165 (Alaska 1976); *Colby v. Schwartz*, 78 Cal.App.3d 885, 892, 144 Cal.Rptr. 624, 628 (Ca. 1978) (Good Samaritan law does not excuse physician rendering emergency care in the ordinary course of practice); *Lindsey v. Miami Development Corp.*, 689 S.W.2d 856, 860 (Tenn. 1985) (statute did not abrogate liability of person who otherwise had duty to render aid).

Taylor and Reynolds provided care to Cook in the normal course of their work. As an EMT and a paramedic who were called to the scene of the emergency while on duty, Taylor and Reynolds both had a duty to assist David. As Taylor and Reynolds point out,

> [w]here a statute on its face is intelligible, the courts are not at liberty to supply words or make additions which amount, as sometimes stated to providing *casus omissus*, or cure an omission, however just or desirable it might be to supply an omitted provision. It makes no difference that it appears the omission was mere oversight.

Commonwealth v. Allen, 980 S.W.2d 278, 280-81 (Ky. 1998), *quoting Hatchett v. City of Glasgow*, 340 S.W.2d 248, 251 (Ky. 1960). KRS 411.148(2) specifically states that "[n]othing in this section applies to the administering of such care or treatment where the same is rendered for remuneration or with the expectation of

remuneration." The legislature then carves out a specific exception to this rule in subsection (3), where the statute reads,

> [t]he administering of emergency care or treatment at the scene of an emergency by employees of a board of education shall not be considered to be rendered for remuneration or with the expectation of remuneration because such personnel perform such care as part of their regular professional or work responsibilities for which they receive their regular salaries from the school board which is their employer.

The legislature chose only to carve out this one exception to the remuneration rule. Therefore, we will not now carve out another exception to this rule for EMTs and paramedics in direct contravention of the legislature's omission to do so. We do not opine that an EMT is without the protection of KRS 411.148 when responding as a volunteer. In fact, due to their specialized training, this would be the very action the legislature seeks to encourage with the enactment of KRS 411.148. On the other hand, care or treatment for remuneration or due to a preexisting duty, as in the instant case, is specifically exempted from the immunity granted by KRS 411.148. Accordingly, we find that the trial court committed reversible error in applying the immunity granted under the Good Samaritan statute to Taylor and Reynolds when the care they provided was based on a preexisting duty, and we remand this issue for proceedings consistent with this opinion.

Rose additionally argues that KRS 411.148 is unconstitutional as it violates the "jural rights" doctrine, the premise of which is that Sections 14, 54, and 241 of the Kentucky Constitution, when read together, preclude any legislation

that impairs a right of action in negligence that was recognized at common law prior to the adoption of the 1891 Constitution. *See generally, Williams v. Wilson,* 972 S.W.2d 260 (Ky. 1998); *Ludwig v. Johnson,* 49 S.W.2d 347 (Ky. 1932).

When considering the constitutional validity of a statute, "[l]egislative acts are presumed to be valid; therefore, the burden is on one attacking a statute to show the negative." *Keith v. Hopple Plastics*, 178 S.W.3d 463, 469 (Ky. 2005). "[T]he violation of the Constitution must be *clear, complete, and unmistakable* in order to find the law unconstitutional." *Kentucky Indus. Utility Customers, Inc. v. Kentucky Utilities Co.,* 983 S.W.2d 493, 499 (Ky. 1998) (emphasis added).

"Among the police powers of government, the power to promote and safeguard the public health ranks at the top." *Graybeal v. McNevin*, 439 S.W.2d 323, 325 (Ky.App. 1969).

> [T]he legislature's power to pass laws, especially laws in the interest of public safety and welfare, is an essential attribute of government. Thus, we must always accord great deference to the legislature's exercise of these so-called 'police powers,' unless to do so would 'clearly offend [ ] the limitations and prohibitions of the constitution.'

See Posey v. Commonwealth, 185 S.W.3d 170, 175 (Ky. 2006) (internal citations omitted). The purpose of the Good Samaritan Statute is to encourage the rendering of medical assistance to those in need by trained medical personnel by removing the fear of liability that accompanies rendering aid under the common law. This purpose is clearly in the interest of public safety and welfare, and we accordingly

find that the adoption of the Good Samaritan Statute falls under the legislature's enumerated police powers.

Taylor and Reynolds counter-appeal on the issue of waiver. They contend that the action should have been additionally dismissed based on the execution of the "Release of Liability/Refusal to Consent to Treatment" by Rose at the scene of the emergency. There is a factual dispute, however, as to what was stated by Taylor and Reynolds to the Cooks about David's condition. Rose states that Taylor advised them that David would be okay, an EKG had been performed and David's heart was normal, his blood pressure was normal, and that he was just dehydrated. Rose also states that Taylor advised David to go home, get in the air conditioning, and drink Gatorade. She additionally contends that had they been told that David was having a heart attack, or that his EKG was abnormal, then they would have insisted that he be transported to the hospital immediately and that she would not have signed the release form.

Taylor and Reynolds specifically state that they advised David that he required further medical attention, requested to take him to the hospital and David, thereafter, refused medical transport. A court should not dismiss a claim unless the pleading party appears not to be entitled to relief under any state of facts which could be proved in support of his claim. Kentucky Rules of Civil Procedure (CR) 12.02; *Weller v. McCauley*, 383 S.W.2d 356 (Ky. 1964); *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801 (Ky. 1977).

In this case, there are allegations of facts that, if true, may entitle the Cooks to relief. The disputed facts bring into question the validity of the "Release of Liability/Refusal to Consent to Treatment" due to the disputed circumstances under which it was signed. Whether Rose would have signed the release depends on the version of the facts that is correct. Therefore, it was correct for the trial court to refuse to dismiss on the grounds of waiver due to this additional genuine issue of material fact.

The remaining issues raised by Rose are rendered moot by this opinion. We, accordingly, reverse the opinion and order of dismissal and remand the case back to the Anderson Circuit Court for proceedings consistent with this opinion.

ALL CONCUR.

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