

RENDERED: NOVEMBER 6, 2009; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002114-MR

TANYA A. CHILDERS AND
JEFFREY J. CHILDERS

APPELLANTS

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 06-CI-90320

SANDRA F. GEILE, M.D. AND
MARSHALL EMERGENCY SERVICES
ASSOCIATES, P.S.C.

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: LAMBERT AND STUMBO, JUDGES; HENRY,¹ SENIOR JUDGE.

STUMBO, JUDGE: Tanya A. Childers and Jeffrey J. Childers appeal from an
Order of the Montgomery Circuit Court sustaining the Summary Judgment motion

¹ Senior Judge Michael L. Henry 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 Sandra F. Geile, M.D. and Marshall Emergency Services Associates, P.S.C. In granting the motion, the circuit court determined that the Childerses could not prosecute a claim for the tort of outrage because damages for emotional distress were already recoverable via a claim for medical negligence. The Childerses now argue that the Kentucky Supreme Court has consistently held that the tort of outrage may co-exist with the traditional common law tort of negligence, and that the circuit court erred in failing to so rule. For the reasons stated below, we affirm the Order on appeal.

On December 31, 2005, Tanya Childers, whose pregnancy was in its second trimester, began experiencing profuse vaginal bleeding. Her husband, Jeffrey, called EMS, which transported Tanya from the couple's home to Mary Chiles Hospital in Montgomery County, Kentucky. Dr. Sandra Geile was on duty in the emergency room when Tanya arrived, and she began examining Tanya to determine if Tanya was experiencing a miscarriage.

Upon examining Tanya, Dr. Geile determined that Tanya's "cervical os was open"² and that "large clots with tissue noted in the vaginal vault." Dr. Geile concluded that Tanya had suffered a miscarriage. As part of the examination, Dr. Geile ordered an "hCG" test, which measures hormones associated with pregnancy. Dr. Geile would later state that she used a handheld doppler to search for the baby's heartbeat. Tanya would maintain that though Dr. Geile used a doppler on Tanya during a prior emergency room visit, she did not

² "Cervical os" appears to be an abbreviation of "cervical ostium," which is that portion of the cervical opening observable by pelvic examination.

use it on the visit at issue. Dr. Geile also stated that she observed tissue extruding through the cervical os, which she removed with forceps and discarded. She did not include this finding in Tanya's medical record.

The parties are in agreement that Tanya became hysterical when she was told of the miscarriage, and Ativan was administered to Tanya to calm her nerves. Sometime thereafter, the results of the hCG test indicated that Tanya's hormones were within the normal range for someone in Tanya's stage of pregnancy.

Dr. Geile would later state in deposition that she consulted with an obstetrician/gynecologist, who suggested that Dr. Geile prescribe Methergine to Tanya for the purpose of stopping Tanya's bleeding. The following day, Tanya took the Methergine, and had a follow-up visit with her physician, Dr. Cunningham. Upon examining Tanya, Dr. Cunningham determined that she had not experienced a miscarriage, that the fetus was 15-weeks old and in a breach presentation with a heart rate of 162 beats per minute. Dr. Cunningham told Tanya that Methergine causes contractions and should not have been prescribed to a pregnant patient.

Tanya was placed on bed rest, and according to her deposition, continued to have contractions. Tanya miscarried on January 5, 2006, and sadly the baby did not survive. She would later state that she experienced tremendous grief and guilt over what she believed was her failure to protect her son.

According to Jeffrey, she cried every day for months thereafter, was prescribed an

antidepressant, and in his opinion, never rebounded from the loss. It is also uncontroverted that Tanya suffered emotional distress from having taken Methergine, which she believed harmed her developing child.

The Childerses subsequently filed the instant action against Dr. Geile and Marshall Emergency Services Associates, P.S.C. alleging medical negligence and the tort of outrage. Shortly thereafter, they filed an amended complaint which dropped the negligence claim and proceeded solely on the tort of outrage.

On December 3, 2007, Dr. Geile and Marshall Emergency Services Associates filed a Motion for Summary Judgment, wherein they argued that the tort of outrage is a “gap filler” tort which may be asserted only where damages for mental distress are unavailable under traditional tort theory. They maintained that since the Childerses were availed of seeking damages for mental distress under a medical negligence claim, they could not proceed with the claim of outrage. The motion was denied. Dr. Geile and Marshall Emergency Services Associates filed a second Motion for Summary Judgment on February 6, 2008, wherein they again claimed that emotional distress is an element of damages in a medical malpractice claim, and that as such the Childerses could not proceed with the outrage action. The second motion was granted by way of an Order rendered on October 21, 2008, and this appeal followed.

The Childerses now argue that the Montgomery Circuit Court erred in granting the Summary Judgment motion of Dr. Geile and Marshall Emergency Services Associates. They maintain that the Kentucky Supreme Court has

consistently held that outrage claims may coexist with the traditional common law torts of negligence, assault and defamation. They also contend that it is reversible error for the trial court to give Court of Appeals Opinions greater precedential effect than those of the Kentucky Supreme Court, which they argue is what occurred when the circuit court sustained the motion for Summary Judgment. In support of this argument, the Childerses direct our attention to *Craft v. Rice*, 671 S.W.2d 247 (Ky. 1984), and several subsequent Opinions, which they contend stand for the proposition that the tort of outrage is not limited to the role of a “gap filler” which may be prosecuted only in the absence of other viable causes of action wherein damages for emotional distress may be awarded. Rather, they maintain that the tort of outrage may be prosecuted concurrently with the tort of negligence and other traditional common law torts.

The Childerses further argue that the trial court misapplied *Rigazio v. Archdiocese of Louisville*, 853 S.W.2d 295 (Ky. App. 1993), which was rendered several years subsequent to *Craft*. According to the Childerses, *Craft* allows for a claim of outrage to be prosecuted concurrently with a traditional tort, whereas *Rigazio* provides that it may not. The Childerses maintain that the trial court incorrectly imposed the *Rigazio* decision on *Craft*, resulting in the trial court improperly concluding that *Craft* did not allow for outrage to be prosecuted concurrently with a traditional tort. Stated differently, the Childerses argue that the trial court improperly gave greater precedential value to the Court of Appeals Opinion in *Rigazio* than to the Kentucky Supreme Court Opinion in *Craft*.

In contrast, Dr. Geile and Marshall Emergency Services Associates maintain that none of the Kentucky Supreme Court cases cited by the Childerses are inconsistent with the gap filler rule which, beginning with *Rigazio*, has been relied upon by this Court in at least six published opinions. Further, they contend that it is inconceivable that if the Kentucky Supreme Court did disapprove of the gap filler rule as the Childerses argue that the Court would not have allowed it to stand without comment during the decade since *Rigazio* was rendered.

Having closely examined the record, the law and the written arguments, we find no error in the Summary Judgment on appeal. We first look at *Craft, supra*, wherein the Kentucky Supreme Court adopted the tort of outrage. In *Craft*, the plaintiffs allegedly were harassed by Boyd County Sheriff Roy Rice, who repeatedly threatened to arrest Albert Craft, made threatening statements to the Crafts on a CB radio, surveilled the Crafts' home and forced the vehicle of Irene Craft into an oncoming lane of traffic. The Crafts suffered great emotional anguish, and Irene Craft experienced chronic diarrhea, colitis and a nervous condition. In adjudicating the Crafts' appeal from the trial court's dismissal of their action based on the statute of limitations, the Court adopted *Restatement (Second) of Torts* § 46 (Outrageous Conduct Causing Severe Emotional Distress) and recognized the tort of outrage which it characterized as "claimed interference with the plaintiff's rights causing emotional distress generating a cause of action regardless of whether the plaintiff suffers any bodily harm resulting from the emotional distress." *Craft*, 671 S.W.2d at 249. It went on to note that any physical

injury “is incidental to the emotional distress rather than essential to the cause of action as is the case in an action for personal injury.” *Id.* The Childerses apparently rely on this proposition for their conclusion that *Craft* allows for the tort of outrage to be prosecuted concurrently with the traditional tort of negligence.

Rigazio expanded on *Craft* some years later. In *Rigazio*, a former student of a parochial school brought suit against the archdiocese seeking damages for sexual abuse under theories of battery, intentional infliction of emotional distress, negligence and outrage. In affirming a Summary Judgment of the Jefferson Circuit Court in favor of the archdiocese and other defendants, a panel of this Court stated that,

we believe that § 47 recognizes that where an actor’s conduct amounts to the commission of one of the traditional torts such as assault, battery, or negligence for which recovery for emotional distress is allowed, and the conduct was not intended only to cause extreme emotional distress in the victim, the tort of outrage will not lie. Recovery for emotional distress in those instances must be had under the appropriate traditional common law action. The tort of outrage was intended to supplement the existing forms of recovery, not swallow them up.

Rigazio, 853 S.W.2d at 299. See also, *Banks v. Fritsch*, 39 S.W.3d 474, 481 (Ky. App. 2001), stating that:

the tort of outrage is intended as a “gap filler,” providing redress for extreme emotional distress where traditional common law actions do not. Where an actor’s conduct amounts to the commission of one of the traditional torts such as assault, battery, or negligence for which recovery for emotional distress is allowed, and the conduct was not intended only to cause extreme emotional distress in

the victim, the tort of outrage will not lie. Recovery for emotional distress in those instances must be had under the appropriate traditional common law action.

We are not persuaded by the Childerses' argument that *Rigazio* and *Banks* are inconsistent with *Craft*. *Craft* adopted the tort of outrage in Kentucky and held that any physical injury is incidental to the emotional distress rather than essential to the cause of action. *Craft*, 671 S.W.2d at 249. The *Craft* Court did not address whether the common law torts of negligence or assault could be argued concurrently with the tort of outrage. That issue was never addressed in *Craft* because it was "undisputed that no touching occurred to either plaintiff." *Id.* at 248. *Rigazio* and *Banks* do not supplant or otherwise contradict the *Craft* holding. Rather, they expanded upon it by holding that the tort of outrage could not be brought where the actor's conduct amounted to one of the traditional torts, such as negligence, for which recovery for emotional distress is allowed. Furthermore, it is of no consequence whether an action alleging one of the traditional torts is actually filed. All that is required in order to bar a claim of outrage is that the "conduct amounts to the commission of one of the traditional torts such as assault, battery, or negligence for which recovery for emotional distress is allowed" *Rigazio*, 853 S.W.2d at 299. In sum, *Craft*, *Rigazio* and *Banks* collectively recognize the application of the tort of outrage in Kentucky to facts where the conduct was intended only to cause extreme emotional distress in the victim, and where those facts would not otherwise sustain a cause of action for a traditional tort like negligence, assault or battery. And finally, it is worth noting that the Kentucky

Supreme Court cited with approval the *Rigazio* decision in *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781 (Ky. 2004). This further bolsters the argument of Dr. Geile and Marshall Emergency Services Associates that the gap filler characterization of the tort of outrage set out in *Rigazio* is not in derogation of the *Craft* holding.³

The Childerses final contention is that even if *Rigazio* were the law in Kentucky, their cause of action was erroneously dismissed. They argue that the tort of outrage is properly characterized as a gap filler under the instant facts because the only other cause of action available to them was a wrongful death claim and not an action alleging one of the traditional torts such as negligence. They argue that since emotional distress is not an element of damages in a wrongful death claim, *Rigazio* and *Banks* are not applicable to the instant facts and that the trial court erred in failing to so rule.

In order for the Court of Appeals to overturn a judgment of the trial court, it is necessary for the appellants to show some abuse of discretion by the trial court or that the judgment below is clearly erroneous. *Boggs v. Burton*, 547 S.W.2d 786 (Ky. App. 1977). The Childerses have done little to demonstrate that the instant facts might have supported a wrongful death claim but not a negligence action. The burden rests with them to demonstrate that the trial court abused its

³ Even if we were persuaded that *Rigazio* was inconsistent with *Craft*, Court of Appeals Administrative Order 2006-10 prohibits one panel of the Court from overruling the holding of another panel. Inconsistent holdings must be resolved by the Court of Appeals acting *en banc*, or on appeal to the Kentucky Supreme Court.

discretion in its application of the *Craft* and *Rigazio* holdings, and they have not met that burden. Accordingly, we find no error on this issue.

Summary judgment “shall be rendered forthwith 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 record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). “Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact.” *Id.* Finally, “[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

When viewing the record in a light most favorable to the Childerses and resolving all doubts in their favor, we find no error in the trial court’s determination that Dr. Geile and Marshall Emergency Services Associates were entitled to a Summary Judgment as a matter of law. Accordingly, we affirm the Summary Judgment of the Montgomery Circuit Court.

ALL CONCUR.

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