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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000116-MR

NELLIE ELLISON — APPELLANT

v.

APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 05-CI-00249

KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY;
FLEMING COUNTY LITTLE
LEAGUE BASEBALL, INC.;
AND ANDREW JONES — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CAPERTON AND THOMPSON, JUDGES.

ACREE, JUDGE: Nellie Ellison appeals three decisions of the Fleming Circuit Court. First, she asserts the circuit court improperly granted summary judgment in favor of the Fleming County Little League. Second, she claims the circuit court

erred by granting summary judgment in favor of Kentucky Farm Bureau Mutual Insurance Company. Lastly, she asserts the circuit court erred by entering a directed verdict in favor of the remaining defendant and refusing to instruct the jury as to future medical expenses. We affirm.

Facts and Procedure

On July 9, 2005, a physical altercation erupted between Andrew Jones, then president of the Fleming County Little League, and Nellie Ellison, grandmother of a little league softball participant. As a consequence of the altercation, the Commonwealth of Kentucky filed criminal charges against Jones who pleaded guilty to first-degree wanton endangerment and fourth-degree assault. Ellison subsequently filed her complaint in this civil action in December of 2005. Ellison sought recovery from Jones, but also from the Fleming County Little League.

The cause of action against the Little League initially alleged that it failed to provide adequate security. However, she replaced this claim in an amended complaint and alleged negligent employment and/or retention of Jones as Little League President. On August 8, 2008, the circuit court entered summary judgment in favor of the Little League.

The action against Jones went to trial and the jury returned a verdict in favor of Ellison. The only issue arising from the trial is whether it was proper for the circuit court to refuse to instruct the jury as to future medical expenses and instead granting directed verdict on that issue.

Before trial, Farm Bureau sought and was granted leave to intervene for the purpose of obtaining a declaratory judgment on the issue of whether the altercation was insured by Jones' policy of homeowner's insurance. On May 23, 2008, the circuit court determined it was not and granted Farm Bureau's motion for summary judgment.

We now consider each of Ellison's claims of error. Where necessary we supplement the discussion with additional facts.

Summary Judgment in Favor of the Little League

When a trial court grants summary judgment, the appellate court must determine "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). Summary judgment is only proper when it appears impossible for the non-moving party to produce evidence at trial that warrants judgment in his favor. *Id*. 687-88. When reviewing a summary judgment order, only legal questions and the existence, or non existence, of material facts are considered. *Id.* Therefore, a grant of summary judgment is reviewed *de novo*. *Id.*

Ellison asserts the Little League negligently hired and retained Jones as president. There is considerable question as to whether Jones was an employee given that he was an uncompensated volunteer selected by Little League parents to serve on the board of directors, and by the board to head the league. Nevertheless,

even if he is considered an employee for purposes of our review, Jones' actions were not foreseeable.

An employer's liability for negligent hiring and retention is based on the employer's negligence in failing to exercise reasonable care in the selection and hiring of its employees. *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 732 (Ky. 2009). Thus, Ellison must establish that the Little League owed her a duty of care, that the duty was breached as a result of the Little League's hiring and retention of Jones, and that the breach of that duty caused her injury.

The primary issue here is whether the Little League owed a duty to Ellison. Ellison asserts the existence of a universal duty of care that required the Little League to protect her from Jones' actions. Ellison relies on *Grayson Fraternal Order of Eagles v. Claywell*, 736 S.W.2d 328 (Ky. 1987), to impose a universal duty on the Little League. However, as this court noted,

> *Grayson* is cited often by parties advocating a theory of liability or a cause of action where none previously existed and legal authority is otherwise lacking. In other words, parties turn to Grayson's sweeping statement of "universal duty" where the facts of their case do not support a duty based on recognized legal relationships.

Jenkins, 250 S.W.3d at 689.

Duty only extends to risks that are reasonably foreseeable. *Brooks*, 283 S.W.3d at 732. "[A]bsent foreseeability, no duty, the breach of which entails liability, could arise." *Id.* Therefore, Ellison must establish that Jones' violent act was foreseeable; otherwise, there can be no liability.

We agree with the circuit court that Ellison's injuries were not foreseeable. "Foreseeability is to be determined by viewing 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).

Ellison alleges her injury was foreseeable because Jones was involved in two prior "assaults." Notably, however, these alleged assaults did not result in criminal convictions or even charges. Furthermore, these incidents did not involve a spectator, but an individual who had served as an umpire and coach. The more serious of the two incidents occurred when the individual attempted to umpire a game after being banned by the league from umpiring and coaching.[1] In terms of violence, these prior incidents did not compare with Jones' assault of Ellison. At most Jones argued with the erstwhile umpire and threatened to call police, took him by the arm, and escorted him from the field.

Ellison asserts not only that the Little League should have punished or removed Jones from office as a result of his altercation with the umpire, but that these altercations made it foreseeable that Jones would assault her and, therefore, the league owed her a duty.[2] We disagree.

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[1] In a second, less-heated exchange, the same individual was warming up a pitcher (serving as a catcher) without wearing a facemask in violation of league rules. The individual did eventually comply with the league's rules but only after a heated verbal exchange with Jones.

[2] Ellison relied on *Pathways, Inc. v. Hammons*, 113 S.W.3d 85 (Ky. 2003), to establish that the Little League had a duty to protect her from Jones. The case before us is distinguished from *Pathways* because it involves a completely different factual scenario. *Pathways* involved a company that placed mentally ill clients into boarding homes. *Id.* The court held that it was foreseeable that placement in an unregistered boarding home might result in harm because the placement service was aware of legislation that required the registration of boarding homes to ensure that safety measures and standards were upheld. *Id.* Therefore, placement in an unregistered home made injury foreseeable even when caused by a third party staying at the

Jones' arguments with an umpire on two occasions, neither of which led to violence, did not make it foreseeable that Jones would physically attack an adult spectator. Indeed finding such an action foreseeable would imply that all little leagues are under a duty to protect all spectators from any little league official who has had a lively dispute with an umpire.

The injury inflicted upon Ellison was unique and unforeseeable. None of Jones' prior behavior made it foreseeable that he would violently attack a spectator, nor is there any indication that he had ever been previously involved in any altercation with a spectator, or was ever convicted of any assault in the past.

Thus, as a matter of law, summary judgment was proper because the harm suffered by Ellison was not foreseeable. Therefore, under these facts, the Little League was not under a duty to protect Ellison from Jones' unpredictable behavior. Summary judgment was therefore appropriate.

Summary Judgment in Favor of Farm Bureau

The circuit court determined that Jones' Farm Bureau homeowner's policy did not extend coverage to damages resulting from the altercation between Jones and Ellison. The circuit court reasoned that Ellison's harm was either intended or expected and coverage was excluded under the policy. As noted above, the decision of the circuit court is reviewed de novo.

The Farm Bureau policy extends coverage to bodily injury caused by an "occurrence." An "occurrence" is defined as an "accident." In addition to the

home. *See id.* However, the placement service was ultimately held not liable because the patient requested placement in the home. *Id.*

"occurrence" requirement, there is also an applicable exclusion. Specifically, the policy does not apply to bodily injury that is "intended." Therefore, the policy only covers occurrences (accidents) that are not intended.

Ellison argues that because Jones claims to have acted in self-defense he did not possess the requisite intent required to exclude coverage under the policy. We believe it more significant that in Jones' criminal trial, self-defense was not an issue. Additionally, the jury in this civil action determined that punitive damages were appropriate. That decision, rendered subsequent to the grant of summary judgment to Farm Bureau but serving as verification, is inconsistent with an assertion that Jones acted in self-defense.

Jones pleaded guilty to fourth-degree assault and first-degree wanton endangerment. Ellison points to the wanton endangerment charge and avers that because conviction only required a wanton act, intent to harm cannot be inferred. However, self-defense is also an affirmative defense to wanton endangerment. *Justice v. Commonwealth*, 608 S.W.2d 74, 75 (Ky.App. 1980) (finding of self-protection precluded conviction for wanton endangerment). Despite the existence of this defense, Jones pleaded guilty.

Ellison next points to this court's decision in *Walker v. Economy Preferred Insurance Co.*, 909 S.W.2d 343 (Ky.App. 1995), to support her claim that the issue of self-defense should have been submitted to the jury. In *Walker*, the court inferred intent when an individual struck another person in the face. *Id.* at 345. However, the court noted that the situation was distinguishable from

Farmers Insurance Exchange v. Sipple, 255 N.W.2d 373 (Minn. 1977), which involved a legitimate claim of self-defense. *Id.* at 346. In *Sipple*, the jury found that the act was in self-defense and was not intentional. *Sipple*, 255 N.W.2d at 377. We believe Ellison misreads *Walker*.

In the civil case against Jones, the circuit court's instruction to the jury stated that "the Court finds as a matter of law that the defendant intentionally struck plaintiff with his fist, thereby causing harm to the plaintiff." The jury also awarded punitive damages on a proper instruction. The circuit court's finding that Jones' act was intentional as a matter of law is not dispositive; however, the fact that the jury awarded punitive damages indicates that the claim of self-defense was without merit. We do not believe the jury would have found reprehensibility in Jones' striking of Ellison if it had been done in self-defense.

Considered in a light most favorable to Ellison, and having reviewed the record closely, we see no evidence that supports a legitimate assertion that Jones acted in self-defense. At trial, Ellison claimed she was entitled to a punitive damages instruction – a position antithetical to the claim she now asserts that Jones acted in self-defense.

Jones' actions were clearly not an "accident" and the criminal conviction and award of punitive damages in this case refute the legitimacy of Jones' claim of self-defense. Thus, it was not necessary to submit the issue of self defense to the jury and coverage is excluded.

Directed Verdict Denying Future Medical Expenses

Ellison's claim against Jones was the only cause of action that proceeded to trial. The circuit court concluded that Ellison failed to present sufficient evidence on the issue of future medical expenses and entered a directed verdict. Ultimately, the jury returned a verdict awarding Ellison $60,298.29 for past medical expenses, $20,000 for past and future pain and suffering, and $150,000 in punitive damages. Ellison now asserts that the circuit court's directed verdict and prohibition on an instruction for future medical expenses was in error. She avers that the jury should have been allowed to consider the requested $7,900 of future medical expenses.

> On a motion for directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion. When engaging in appellate review of a ruling on a motion for directed verdict, the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party. Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous.

Beirman v. Klapheke, 967 S.W.2d 16, 18 (Ky. 1998) (internal citations omitted).

The only evidence of future medical expenses came via the testimony of Dr. Lawson, Ellison's treating physician. Dr. Lawson indicated that Ellison suffered multiple fractures in her face including a broken nose, septum, and permanent nerve damage. Ellison had to have reconstructive surgery to repair her jaw, nose, and eye socket at a cost of $7,900. However, when asked if Ellison

would require future surgeries Dr. Lawson indicated that there was "no way to know" and he "had no idea what might happen in the future."

Evidence of future medical expenses must be "positive and satisfactory." *Howard v. Barr*, 114 F. Supp. 48, 50 (W.D.Ky. 1953). Speculation and supposition are insufficient to justify submission of a case to the jury. *Chesapeake & Ohio Ry. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951). If a physician testifies that he does not know the need, length, or cost of future medical expenses then no instruction should be given. *See Walton v. Grant*, 302 Ky. 194, 199, 194 S.W.2d 366, 368 (1946)(where doctor had no way of anticipating the cost, need, or length of future medical treatment, there was no evidence to warrant a finding for future medical bills), overruled on other grounds by *Rankin v. Green*, 346 S.W.2d 477 (Ky. 1960); *see also Terminal Railroad Co. v. Mann*, 312 S.W.2d 451, 454 (Ky. 1958)(physician's testimony that boy would need the services of a companion from time to time for the rest of his life was insufficient). The trial court correctly prevented the jury from engaging in speculation by granting the directed verdict as to future medical costs.

For the foregoing reasons, we affirm.

ALL CONCUR.

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