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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002019-MR

DIANE POWELL

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 09-CI-01370

ASHLAND HOSPITAL CORPORATION,
d/b/a KING'S DAUGHTERS MEDICAL CENTER;
AND ROBERT FRIED, M.D.

APPELLEES

AND

NO. 2012-CA-002073-MR

ROBERT FRIED, M.D.

CROSS-APPELLANT

CROSS-APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION 09-CI-01370

DIANE POWELL

CROSS-APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, DIXON AND VANMETER, JUDGES.

DIXON, JUDGE: Diane Powell appeals from a summary judgment of the Boyd Circuit Court in favor of Ashland Hospital Corporation, d/b/a King’s Daughters Medical Center (“KDMC”), concluding that Powell’s tort claims were barred by the exclusive remedy provision of the Kentucky Workers’ Compensation Act. On cross-appeal, Robert Fried, M.D., appeals a jury verdict in favor of Powell, awarding compensatory and punitive damages based on a finding that Fried intentionally kicked Powell. Finding no error, we affirm.

Powell was employed as a surgical nurse at KDMC. Dr. Robert Fried was a cardiothoracic surgeon in private practice with medical privileges at KDMC. On October 17, 2008, Powell assisted Dr. Fried with a surgical procedure. After the surgery concluded, Powell was speaking with a co-worker when Dr. Fried kicked Powell in the leg, causing a bruise.

Powell filed a civil complaint against KDMC and Dr. Fried, seeking damages for the injuries she sustained when Dr. Fried kicked her. Powell alleged Dr. Fried’s actions constituted an assault and battery. Powell asserted that KDMC was liable for her injuries based on theories of negligent hiring/supervision; intentional infliction of emotional distress by retaining Dr. Fried’s medical privileges; and vicarious liability for Dr. Fried’s actions. Prior to trial, the court

granted summary judgment in favor of KDMC, concluding that Powell's claims were barred by the exclusive remedy provision of the Workers' Compensation Act. Powell's remaining claims against Dr. Fried were tried before a jury. The jury returned a verdict in favor of Powell, finding that Dr. Fried had intentionally kicked her. The jury awarded Powell compensatory damages of \$5,000.00 and punitive damages of \$35,000.00. Powell now appeals the summary judgment in favor of KDMC, and Dr. Fried cross-appeals the jury verdict in favor of Powell.

I. Powell's Direct Appeal

Summary judgment is proper where no material issues of fact exist, and the moving party is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). On appeal, we undertake a *de novo* review of the legal questions presented, and we owe no deference to the decision of the trial court. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

The Workers' Compensation Act provides the exclusive remedy for an employee who is injured while working for a properly insured employer. Kentucky Revised Statutes (KRS) 342.690(1). However, in two specific circumstances, the exclusive remedy exemption may not apply. The first instance is when the injury was caused by the unprovoked physical aggression of another employee. *Id.* The second circumstance is when the employer intentionally caused the injury. KRS 342.610(4).

Powell contends that KDMC was not entitled to workers' compensation immunity because KDMC intentionally caused her injury. Powell essentially characterizes her negligence claims as intentional acts committed by KDMC, contending that KDMC failed to provide a safe workplace, failed to supervise Dr. Fried, and exposed her to the risks of working with Dr. Fried.

To establish that an employer intended an injury to occur, the Kentucky Supreme Court has explained:

the employer must have determined to injure an employee and used some means appropriate to that end, and there must be specific intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong.

Moore v. Environmental Const. Corp., 147 S.W.3d 13, 16-17 (Ky. 2004) (internal citations and quotation marks omitted).

In its order granting summary judgment, the trial court reasoned as follows:

It is undisputed that the Plaintiff was an employee of KDMC and that the injury of which she complains occurred in the work place while she was performing her duties as a surgical nurse. As a result thereof, the exclusive remedy provision of the Kentucky Workers' Compensation Act acts as a bar to her claims against the hospital unless Plaintiff can create a jury question with respect to whether the actions of KDMC were 'intentional.' It has now been approximately seventeen months since KDMC filed its motion and the record is completely void of any material which would suggest that KDMC intended for Dr. Fried to kick the Plaintiff or engaged in any conduct to encourage Dr. Fried's kicking of the Plaintiff. Under these circumstances, Plaintiff's

claim for battery is barred by the exclusive remedy provision of the Workers' Compensation Act.

Plaintiff also claims that KDMC is vicariously liable for the actions of Dr. Fried because he was the hospital's agent. These claims are rooted in the assertion that KDMC supposedly negligently hired Dr. Fried and failed to properly train him. Plaintiff also claims that KDMC negligently retained Dr. Fried at the hospital. There are two fatal flaws to such a theory. First, the claims are actually allegations of negligence rather than intentional conduct and are therefore barred by the Kentucky Workers' Compensation Act as discussed above. Secondly, Plaintiff has not presented any material to the Court to the effect that Dr. Fried was acting within the scope of his duties when he allegedly kicked Plaintiff. Such proof is necessary to establish vicarious liability of an agent.

Having carefully reviewed the record, we agree with the trial court's conclusion that Powell was unable to establish that KDMC acted with specific intent to cause her injury. Powell's claims involve, at most, negligence by KDMC. "Mere carelessness or negligence, however gross, wanton or reckless, does not establish such intent" necessary to defeat the exclusive remedy provision. *Moore*, at 17-18. The court properly granted KDMC's motion for summary judgment.

Next, Powell asserts the trial court erred by limiting the discovery she sought from KDMC regarding Dr. Fried's personnel file, disciplinary records, and employee grievances. KDMC objected, contending the requests were overly broad and encompassed confidential records. KDMC sought a protective order to limit the discovery pursuant to Kentucky Rules of Civil Procedure (CR) 26.03(1).

Following an *in camera* review of the documents produced by KDMC, the court deemed a portion of the records discoverable pursuant to a protective order.

Powell now contends that she was entitled to review the entirety of KDMC's file because the undisclosed records could have been relevant to establish KDMC's knowledge of Dr. Fried's behavior and in the assessment of punitive damages. We disagree.

A trial court has broad discretion in resolving a dispute over discovery. *Sexton v. Bates*, 41 S.W.3d 452, 455 (Ky. App. 2001). Pursuant to CR 26.03(1) a court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Here, the court did not issue a blanket prohibition on the requested discovery; rather, the court reviewed the entirety of KDMC's file and provided the information to Powell that was relevant to her claims. We discern no abuse of discretion by the court.

II. Dr. Fried's Cross-Appeal

Dr. Fried asserts that the court erred by admitting evidence of his prior bad acts toward Powell, and he contends the award of punitive damages was excessive.

Kentucky Rules of Evidence (KRE) 404(b) provides that evidence of other bad acts "is not admissible to prove the character of a person in order to show action in conformity therewith." However, the evidence of other bad acts may be admissible if it is "offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake

or accident[.]” KRE 404(b)(1). In determining admissibility, the evidence must be viewed in terms of “(1) relevance, (2) probativeness, and (3) its prejudicial effect.” *Driver v. Commonwealth*, 361 S.W.3d 877, 883 (Ky. 2012).

Prior to trial, Powell filed a KRE 404(b) notice of intent to introduce evidence of prior instances of misconduct by Dr. Fried. Powell alleged there were previous incidents where he kicked Powell during surgery, hit her hand with steel surgical instruments, clamped her arm with an instrument, and threatened to throw an instrument at her head. Powell asserted that the evidence was admissible to show that Dr. Fried intended to kick her on the day in question, which contradicted his defense that he was merely being playful. Dr. Fried argued the evidence was not relevant to the October 2008 incident and was unduly prejudicial. The court found the evidence relevant to whether Dr. Fried’s conduct on October 17, 2008, was accidental or intentional and admitted the evidence at trial. The court also provided a limiting instruction to the jury regarding the other acts evidence.

We review a trial court’s evidentiary ruling pursuant to the abuse of discretion standard. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000).

Dr. Fried’s defense was to deny that he intentionally kicked Powell; rather, Dr. Fried asserted that the contact was in a playful or joking manner. In presenting a defense regarding his lack of intent, Dr. Fried placed his mental state in dispute. *See Walker v. Commonwealth*, 52 S.W.3d 533, 535 (Ky. 2001). The evidence of prior misconduct toward Powell was relevant to establish Dr. Fried’s state of mind

on October 17, 2008, and refute his defense that he lacked intent. *See id.* Further, as the evidence was relevant to the material issue of intent, we are not persuaded that the probative value of the evidence was outweighed by undue prejudice to Dr. Fried. *See Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 717 (Ky. 2009). We discern no abuse of discretion by the trial court in admitting the prior acts evidence.

Dr. Fried also contends the punitive damage award was unconstitutionally excessive. In his brief, Dr. Fried failed to include a statement identifying how he preserved this claim for appellate review, as required by CR 76.12(4)(c)(v). Providing a statement of preservation ensures that the trial court “had an opportunity to correct its own error before the reviewing court considers the error itself.” *Hallis v. Hallis*, 328 S.W.3d 694, 696-97 (Ky. App. 2010). From our review of the record, there is no indication that Dr. Fried actually raised the issue of excessive damages in the trial court.

If such court has had no opportunity to rule on a question, there is no alleged error before us to review. This seems particularly true with respect to excessive damages, a matter about which the trial court ordinarily would be in a much better position to judge than we. Before this Court may review the issue of excessive damages . . . the trial court must have been given an opportunity to rule thereon.

Commonwealth, Dept. of Highways v. Williams, 317 S.W.2d 482, 484 (Ky. 1958).

We conclude Dr. Fried’s allegation regarding excessive damages was not preserved for our review.

For the reasons stated herein, the judgment of the Boyd Circuit Court

is affirmed.

ALL CONCUR.

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