RENDERED: FEBRUARY 12, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002129-MR

ELIZABETH RANGEL — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 12-CI-01160

VIRGILIUS CORNEA, M.D.; AND
UNIVERSITY OF KENTUCKY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON AND D. LAMBERT, JUDGES.

DIXON, JUDGE: Appellant, Elizabeth Rangel, appeals from orders of the Fayette Circuit Court dismissing Appellee, the University of Kentucky Hospital ("UK"), on sovereign immunity grounds, and granting summary judgment in favor of Appellee, Virgilius Cornea, M.D., in Rangel's medical negligence action. Finding no error, we affirm.

In August 2011, Rangel, a then 20-year-old student at the University of Kentucky, received an abnormal pap smear report from the University Health Service. As a result of the abnormal result, an endocervical curettage (ECC) was performed on September 30, 2011, for the purpose of obtaining a biopsy of Rangel's cervical tissue. The specimens obtained during the ECC were then sent to the histology and surgical pathology laboratories at UK, where they underwent a series of processing steps before they were affixed to slides for review by Dr. Cornea, a pathologist employed by UK. Dr. Cornea thereafter issued a pathology report on October 7, 2011, with a nonspecific diagnosis of "malignant neoplasm" and a recommendation for a re-biopsy of additional cervical tissue to further categorize the type of cancer.

Rangel was subsequently referred to Dr. DeSimone, an OB/GYN, who performed a second biopsy through a procedure called a cold knife conization. The cervical specimen was sent to pathology and found to contain no cancer cells. Following the receipt of the second pathology report, molecular testing was performed on the original specimen reviewed by Dr. Cornea and it was determined that the DNA therein had been contaminated with tissue from another patient. As a result, on October 31, 2011, Dr. Cornea's original pathology report was amended to reflect the new information regarding the absence of any cancer cells.

On March 8, 2012, Rangel filed a medical negligence action in the Fayette Circuit Court against UK and Dr. Cornea. On May 24, 2012, the trial court granted UK's motion to dismiss, finding that *Withers v. University of Kentucky*,

939 S.W.2d 340 (Ky. 1997), was dispositive and the hospital was entitled to immunity. On November 19, 2013, the trial court granted summary judgment in favor of Dr. Cornea. Therein, the trial court concluded that there was no genuine issue of fact that: (1) the misdiagnosis of Rangel's biopsy was the result of contamination of the tissue specimen during the processing of the tissue for preparation into slides; (2) Dr. Cornea had no involvement in the processing of the tissue specimen; and (3) there was no expert testimony that Dr. Cornea was negligent in his interpretation of the slides containing the contaminated specimen. Rangel thereafter appealed to this Court as a matter of right.

Rangel first argues that the trial court erred in ruling that UK was entitled to dismissal on grounds of governmental immunity. Rangel contends that UK does not satisfy the two-prong test set forth in *Kentucky Center for the Arts Corp. v. Berns*, 801 S.W.2d 327 (Ky. 1990), or the third prong of the analysis established in *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91 (Ky. 2009), and is therefore not entitled to immunity. Essentially, Rangel in focusing on the test set forth in *Berns*, contends that UK cannot be immune from liability because (1) it does not operate under the control of the "central state government" and (2) it performs a proprietary rather than essential governmental function.

Contrary to Rangel's assertion, *Withers v. University of Kentucky*, 939 S.W.2d 340, and its progeny are binding precedent and are dispositive of this issue. In *Withers*, the appellants brought a claim for wrongful death against UK and

physicians who were allegedly agents of UK. The claims against UK were dismissed by the circuit court based on sovereign immunity and that dismissal was affirmed by this Court. *Id.* at 342. On discretionary review, the Supreme Court of Kentucky was asked to determine if UK had sovereign immunity and, if it did, whether UK had waived that immunity by participating in a medical malpractice compensation fund. In finding that UK was entitled to immunity, the Court held:

> Contrary to appellants' contention, the University of Kentucky precisely meets the *Berns* test as set forth above. While we deem it unnecessary to repeat the analysis of the statutory existence of the University of Kentucky as contained in *Hutsell v. Sayre,* [5 F.3d 996 (6th Cir.1993)], it is appropriate to quote KRS 164.100 as follows:
>
> > The University of Kentucky located at Lexington, is recognized as established and maintained. It is the institution that was founded under the land grant of 1862 by the Congress of the United States under the corporate designation and title of "Agricultural and Mechanical College of Kentucky." The university shall be maintained by the state with such endowments, incomes, buildings and equipment as will enable it to do work such as is done in other institutions of corresponding rank, both undergraduate and postgraduate, and embracing the work of instruction as well as research.
>
> In addition, KRS 164.125(2), provides:
>
> > The University of Kentucky shall be the principal state institution for the conduct of statewide research and statewide service programs and shall be the only institution authorized to expend state general fund appropriations on research and service programs of a statewide nature financed principally by state funds.

> The language of KRS 44.073(1) establishes the University of Kentucky as an agency of the state and KRS 446.010(31) defines "state funds" or "public funds" in such a manner as to include sums paid to the University of Kentucky Medical Center for health care sciences.
>
> Numerous other statutes contained in KRS 164 establish unmistakably that the University of Kentucky operates under the direction and control of central state government and that it is funded from the State Treasury. The immune status of the University of Kentucky was expressly recognized in *Frederick v. University of Kentucky Medical Center*, Ky.App., 596 S.W.2d 30 (1980), a case involving the same statutory provision here under review, and likewise recognized in the leading case, *Dunlap v. University of Kentucky Student Health Services Clinic*, Ky., 716 S.W.2d 219 (1986). Even appellant virtually concedes the immune status of the University of Kentucky. Thus, on the basic question of whether the University of Kentucky is entitled to sovereign immunity, we have no reluctance to answer in the affirmative.

Id. at 343.

As does Rangel herein, the appellants in *Withers* argued that UK should be stripped of its immunity because its medical center performs a proprietary function in that it is nothing more than a hospital which is in full competition with and performs the same function as private hospitals. The *Withers* Court rejected this argument, explaining,

> The answer to this contention is simple. The operation of a hospital is essential to the teaching and research function of the medical school. Medical school accreditation standards require comprehensive education and training and without a hospital, such would be impossible. Medical students and those in allied health

> sciences must have access to a sufficient number of patients in a variety of settings to insure proper training in all areas of medicine. Such is essential to the mandate of KRS 164.125(1)(c).

Id.

As Rangel points out, in recent immunity cases, our Supreme Court has moved away from the strict adherence to the two-part "*Berns* test" in favor of a more general "governmental function" test. As noted by the Court in *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91, 99 (Ky. 2009), "[t]he more important aspect of *Berns* is the focus on whether the entity exercises a governmental function, which that decision explains means a 'function integral to state government.'" (Citation omitted). Yet contrary to Rangel's assertion, this "refocused" approach only strengthens the decision in *Withers* as it has clearly been determined that "notwithstanding the fact that [UKMC] competes with private hospitals, its essential role in the teaching mission of the University of Kentucky College of Medicine rendered its activities governmental." *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009). *See generally Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001).

Rangel cites to the recent decision in *Branham v. Rock*, 449 S.W.3d 741 (Ky. 2014), as evidence that the Kentucky Supreme Court is ready to overrule *Withers*. Therein, the Court noted,

> In light of the ever changing landscape of the provision of medical care, with hospitals becoming more and more monolithic and monopolistic, and with funding for all medical care providers coming from both the private and

> public sectors, there may come a time for us to revisit *Withers*.

Id. at 752. While it certainly may be the case that our Supreme Court chooses to revisit *Withers,* it has not yet done so and this Court is bound by the precedent established by *Withers* and its progeny. Thus, we conclude that UK is entitled to governmental immunity and the trial court properly granted its motion to dismiss.

Rangel next argues that the trial court erred in granting summary judgment in favor of Dr. Cornea. Rangel does not dispute that Dr. Cornea had no involvement in the processing or preparation of the pathology slides that were ultimately found to be contaminated. Rather, Rangel contends that because it was Dr. Cornea's incorrect diagnosis that led to the unnecessary conization procedure and that his report stated that he had reviewed the slides and was responsible for the diagnosis, he should be held liable. In fact, Rangel believes that Dr. Cornea's report is an evidentiary or judicial admission of negligence. We cannot agree.

"[I]n Kentucky, a physician has the duty to use the degree of care and skill expected of a competent practitioner of the same class and under similar circumstances." *Grubbs v. Barbourville Family Health Center*, P.S.C, 120 S.W.3d 682, 687 (Ky. 2003). In a medical negligence case, the plaintiff is required to prove that the treatment at issue fell below the standard of care expected of reasonably competent providers, and that such negligent care proximately caused the plaintiff's injuries. *Reams v. Stutler*, 642 S.W.2d 586, 588 (Ky. 1982). Thus, in order to prevail on her claim against Dr. Cornea, it was incumbent upon Rangel

to produce expert testimony that Dr. Cornea failed to meet the applicable standard of care of a reasonably prudent pathologist, and that his failure to do so was the cause of her injuries. *Id.* *See also Blankenship v. Collier*, 302 S.W.3d 665, 667 (Ky. 2010). Rangel did not, and quite frankly cannot, satisfy that burden.

Although the diagnosis of malignant neoplasm was eventually shown to be incorrect, there is absolutely no evidence of record that the misdiagnosis was due to any negligence on Dr. Cornea's part. Rather, such was due to the contamination of the specimen at some point during the processing stage prior to Dr. Cornea's review of the slides. We must agree with Dr. Cornea that with respect to his liability, it does not matter how or when the specimen became contaminated, whether by the negligence of an unknown employee (as argued by Rangel) or as an inadvertent consequence of the processing machine (as opined by Dr. Cornea's expert), so long as the contamination occurred prior to his contact and/or review of the slides. The inescapable fact remains that Dr. Cornea was in no manner responsible for the contamination of the specimen. Thus, the trial court properly granted summary judgment in favor of Dr. Cornea and dismissed Rangel's claims against him.

For the reasons set forth herein, the orders of the Fayette Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Charles C. Adams, Jr.
Lexington, Kentucky

BRIEF FOR APPELLEE:

Mark E. Nichols
Dean T. Wellman
Lexington, Kentucky