

RENDERED: JANUARY 22, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000747-MR

CHERYL CLARK

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 12-CI-005822

RICHARD M. KOLBELL

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART AND REMANDING

** ** * * * * *

BEFORE: DIXON, JONES AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Cheryl Clark appeals from a summary judgment granted on the basis that Kentucky lacked personal jurisdiction over Dr. Richard M. Kolbell.

Clark was employed by American Electric Power in Kentucky from 1984 until 1994, when she was determined to be totally disabled based on

psychological impairments and began receiving workplace disability benefits through American Electric Power's disability insurer.

In 2010, after Prudential Insurance Company of America began administering American Electric Power's disability policies, it reviewed Clark's records and noted inconsistencies between her providers' reports causing it to question her right to ongoing disability benefits. Prudential hired Psybar LLC, a Minnesota company, to perform an independent medical examination (IME) on Clark. PsyBar contracted with Dr. J. Robert Yohman to perform the IME. On November 15, 2010, following receipt of the results of the IME, Prudential terminated Clark's benefits.

On July 4, 2011, Clark appealed the termination of her benefits to Prudential and submitted her own IME, by Dr. Susan Lear. Prudential then requested that PsyBar perform a file review of the records it had about Clark from all sources to assist it in determining the merit of Clark's appeal, including comparing the methods used for each IME.

In the fall of 2011, PsyBar contracted with Dr. Kolbell to perform an independent review of Clark's records that Prudential requested and submit his report to PsyBar. Dr. Kolbell is a licensed psychologist in Oregon, with a practice in Portland, Oregon, who performs work for PsyBar as an independent contractor.

On October 14, 2011, Dr. Kolbell submitted his final report to PsyBar. Subsequently, after PsyBar submitted the report to Prudential, Prudential upheld its discontinuation of Clark's disability benefits.

On November 1, 2012, Clark filed a complaint against PsyBar and Dr. Kolbell, alleging: (1) PsyBar and Dr. Kolbell committed negligence *per se* by issuing a medical (psychological) evaluation without being licensed to practice medicine or psychology in Kentucky; (2) PsyBar acted negligently in hiring and relying upon Dr. Kolbell's opinion; and (3) the evaluation issued by PsyBar and Kolbell was defamatory *per se* because it implied Clark was untruthful concerning her disabling condition. Clark sought damages for the loss of her permanent disability benefits for the remainder of her life, damage to her reputation and punitive damages.

In his answer, Dr. Kolbell denied Clark's allegation that the circuit court had jurisdiction over him because he transacted business within Kentucky and raised the affirmative defense of lack of personal jurisdiction. Dr. Kolbell then filed a notice of removal to the federal district court, Western District of Kentucky, on the basis of complete diversity of citizenship and satisfying the minimum jurisdictional amount of \$75,000. In his notice of removal, he noted that his answer reserved the defense of lack of personal jurisdiction. Following removal, Dr. Kolbell filed a motion to dismiss for lack of personal jurisdiction.

Clark filed a motion to remand for lack of subject matter jurisdiction. Dr. Kolbell filed a response opposing this motion. Clark filed a stipulation waiving any damages against Dr. Kolbell above \$74,999. Subsequently, Dr. Kolbell withdrew his objection to remand.

However, PsyBar continued to object to remanding and the federal court denied Clark's motion. Clark then voluntarily dismissed PsyBar as a party. After PsyBar was dismissed, Clark filed another motion for remand and the federal court ordered the matter dismissed for lack of subject matter jurisdiction.

Upon remand, Dr. Kolbell filed a motion for judgment on the pleadings pursuant to Kentucky Rules of Civil Procedure (CR) 12.03 based on lack of personal jurisdiction and improper venue, CR 12.02(b)(c), arguing he had no contact with the Commonwealth of Kentucky either directly related to the facts alleged in the complaint or generally and attached the following documents: his affidavit denying transacting any business in the Commonwealth; PsyBar's letter confirming Dr. Kolbell would be performing a record review of Clark; and Prudential's letter explaining the record review of Clark that it sought.

Dr. Kolbell's affidavit explained his contacts as related to Clark and Kentucky generally:

6. My only contacts related to the file review of Ms. Clark were with PsyBar's office in Minnesota. I did not personally examine Ms. Clark. I never spoke with Ms. Clark or anyone else, other than PsyBar, in any manner related to my file review. I performed all of the work associated with my file review exclusively in the State of Oregon.

7. I maintain no offices and have no agents in the Commonwealth of Kentucky. I have never treated any patients in Kentucky, I do not practice psychology in Kentucky, and I have never directly advertised my services in Kentucky. I had no contact with anyone in Kentucky related to my review of Ms. Clark's records.

In Clark's opposition to Dr. Kolbell's motion, she argued he waived his objection to personal jurisdiction by agreeing to remand from federal court, was also subject to personal jurisdiction under Kentucky's long-arm statute and subjecting him to such jurisdiction complied with due process. She included federal court records to support her allegation that Dr. Kolbell waived his objection to personal jurisdiction.

The circuit court considered Dr. Kolbell's motion pursuant to CR 56 and determined Dr. Kolbell did not have the necessary minimum contact with the Commonwealth sufficient to satisfy its long-arm statute and dismissed. Clark appeals.

When matters outside of the pleadings are considered in dismissing a complaint pursuant to a motion originally brought pursuant to CR 12.03, we review the dismissal under the summary judgment standard. *Pearce v. Whitenack*, 440 S.W.3d 392, 395-96 (Ky.App. 2014). "The 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). Summary judgment "should only be used 'to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.'" *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (quoting *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)).

Clark argues the circuit court erred in considering Dr. Kolbell's motion pursuant to CR 56 without indicating what outside materials it relied upon and without notifying her so she would have an opportunity to conduct discovery or supplement the record.

CR 12.03 provides as follows:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on such motion, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided for in Rule 56, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

Clark is correct that the circuit court erred in deciding to treat Dr. Kolbell's motion as one for summary judgment without giving her a "reasonable opportunity to present all materials made pertinent to such a motion by Rule 56." CR 12.03.

Granting summary judgment pursuant to a CR 12.03 motion considered under CR 56 is only appropriate where an opposing party was previously given the opportunity to present evidence to reveal the existence of disputed issues of material fact. *Hoke v. Cullinan*, 914 S.W.2d 335, 337 (Ky. 1995). Summary judgment is not appropriate if the opposing party was not given an ample opportunity to complete discovery. *Suter v. Mazyck*, 226 S.W.3d 837, 841 (Ky.App. 2007). If any doubt exists as to whether the opposing party can produce evidence at trial warranting a favorable judgment, summary judgment should be denied; summary judgment may be appropriate at a later juncture once more

evidence is obtained. *Roberson v. Lampton*, 516 S.W.2d 838, 839-40 (Ky.App. 1974).

Based on Clark's allegations, the denial of an opportunity to conduct discovery and present evidence could only be prejudicial if there are contested issues of fact, rather than contested issues regarding the legal interpretation to be given to known facts. Therefore, summary judgment could be properly granted on issues where there are no disputed underlying facts.

Clark argues the circuit court erred in granting summary judgment to Dr. Kolbell for lack of personal jurisdiction because Dr. Kolbell waived his objection to personal jurisdiction under the long-arm statute. Clark argues she agreed to limit her damages in exchange for the case remaining in Kentucky courts. While this may have been Clark's expectation, there is no evidence to support her claim that there was either an explicit or implied contractual agreement between Clark and Dr. Kolbell on this issue and Clark makes no factual allegations requiring discovery.

Dr. Kolbell repeatedly denied personal jurisdiction in his answer, notice of removal, motion to dismiss for lack of personal jurisdiction in the federal court and motion for judgment on the pleadings for lack of personal jurisdiction in the circuit court. There was no waiver based upon his court filings which repeatedly preserved this issue. *Cornett v. Smith*, 446 S.W.2d 641, 642 (Ky. 1969); *Weant's Adm'r v. Ellis*, 287 S.W.2d 446, 448 (Ky. 1955).

While Dr. Kolbell made two offers to consent to a remand, neither offer constituted a consent to personal jurisdiction in the circuit court. In the first tentative offer, Dr. Kolbell asked in an email after Clark filed a motion to remand from federal court whether Clark would be willing to enter into a binding stipulation that she did not intend to seek a judgment in excess of \$75,000 and would not seek to enforce or collect upon any judgment amount in excess of that amount, and indicated that if she did “we may be willing to consent that the case be remanded.” In Dr. Kolbell’s response to Clark’s motion to remand, he stated he had requested by email that Clark stipulate she would not seek more than \$75,000 through this action and Clark failed to respond. He then offered “[i]f [Clark] will enter such a binding stipulation, Dr. Kolbell will consent to a remand of this action.” Neither offered to waive lack of personal jurisdiction defense. Both documents discussed consenting to remand in exchange for a stipulation limiting damages, with the response making this a firm offer. This left the issue of personal jurisdiction unresolved. *Compare with McGowan v. McGowan*, 663 S.W.2d 219, 222 (Ky.App. 1983) (separation agreement entering appearance and waiving all procedural requirements waived lack of personal jurisdiction defense). Therefore, summary judgment was properly granted to Dr. Kolbell on this issue.

Clark argues the circuit court erred in failing to conclude there is personal jurisdiction over Dr. Kolbell under Kentucky’s long-arm statute, Kentucky Revised Statutes (KRS) 454.210. We review the circuit court’s ruling regarding personal jurisdiction *de novo*. *Bondurant v. St. Thomas Hosp.*, 366 S.W.3d 481 (Ky. 2011).

the Kentucky Supreme Court set out a two-step process for Kentucky courts to follow in determining whether Kentucky can properly exercise personal jurisdiction over a non-resident defendant:

First, review must proceed under KRS 454.210 to determine if the cause of action arises from conduct or activity of the defendant that fits into one of the statute's enumerated categories. If not, then *in personam* jurisdiction may not be exercised. When that initial step results in a determination that the statute is applicable, a second step of analysis must be taken to determine if exercising personal jurisdiction over the non-resident defendant offends his federal due process rights.

Clark argues that long-arm jurisdiction was appropriate under KRS 454.210(2)(a)1., 3. and 4., which provide as follows:

(2) (a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:

1. Transacting any business in this Commonwealth;
...
3. Causing tortious injury by an act or omission in this Commonwealth;
4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth, provided that the tortious injury occurring in this Commonwealth arises out of the doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue within the Commonwealth[.]

Clark does not claim that Dr. Kolbell transacts business in the Commonwealth or caused a tortious injury in the Commonwealth except as his conduct in regard to reviewing her records and writing a report in Oregon may relate to these provisions. Clark alleges Dr. Kolbell transacted business in the Commonwealth by reviewing her records in Oregon arguing this constitutes practicing medicine in Kentucky and, thus, conducting business in Kentucky. She alleges Dr. Kolbell caused a tortious injury in Kentucky because the report he completed on her records was to be used in Kentucky.

Clark is fully aware of Dr. Kolbell's conduct regarding his review of her records and filing his report; discovery would not change the nature of the information she has regarding his conduct relative to her. It is the legal effect of whether his conduct regarding Clark subjected him to personal jurisdiction upon which the parties disagree.

In considering the evidence regarding Dr. Kolbell's preparation of his report most favorably to Clark, there is no evidence that Dr. Kolbell transacted any business within the Commonwealth or committed a tort within the Commonwealth. While Prudential may have contracted to supply services in the Commonwealth, Dr. Kolbell was two steps removed from Prudential, who contracted with PsyBar, who then contracted with him. *Compare with Hinnens v. Robey*, 336 S.W.3d 891, 896 (Ky. 2011) (concluding eBay seller of vehicle who executed vehicle transfer documents to enable Kentucky resident to obtain a Kentucky registration and title for the vehicle contracted to "provide for the supplying of services or good to be

transported into, consumed or used in Kentucky.”) The only evidence is that Dr. Kolbell transacted all his business outside the Commonwealth and the alleged tort was committed outside the Commonwealth, either in Oregon or when the report was delivered to PsyBar in Minnesota, rather than when the report was received by Prudential and used to support its decision upholding the termination of Clark’s benefits in the Commonwealth. Therefore, summary judgment was properly granted by the circuit court on KRS 454.210(2)(a)1. and 3., based on interpreting the uncontested facts regarding Dr. Kolbell’s report as not subjecting him to personal jurisdiction in Kentucky.

In contrast, Clark’s allegations as to why Dr. Kolbell is subject to personal jurisdiction under KRS 454.210(2)(a)4., raise contested issues of fact that require discovery. KRS 454.210(2)(a)4. only permits personal jurisdiction if a defendant both “[causes a] tortious injury in this Commonwealth by an act or omission outside this Commonwealth” and that defendant “regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from . . . services rendered in this Commonwealth[.]” This ground for personal jurisdiction allows an act taken outside of the Commonwealth to subject a defendant to personal jurisdiction if it is part of a larger course of conduct directed at the Commonwealth.

Clark alleges “it is highly probable [Dr. Kolbell] has performed similar acts—provided medical/psychological opinions on other Kentucky residents, demonstrating a persistent course of conduct” and Dr. Kolbell failed to offer any

evidence to the contrary. Clark is correct that Dr. Kolbell's affidavit does not address whether he has provided any record reviews regarding other Kentucky residents.

If Clark is the only Kentucky resident whose records Dr. Kolbell has reviewed, Kentucky law is clear that a single act would be insufficient for long-arm jurisdiction under KRS 454.210(2)(a)4. In *Bonderant*, the Kentucky Supreme Court held that a physician providing an incorrect prescription to be used in Kentucky for follow up care following surgery in Tennessee was insufficient contact with Kentucky for personal jurisdiction, explaining “[t]he mere fact that [a physician] may have known that [his] actions in [another state] might have an effect in Kentucky is alone insufficient to exercise personal jurisdiction.”

Bonderant, 366 S.W.3d at 486. In *Powers v. Park*, 192 S.W.3d 439, 442 (Ky.App. 2006), the Court rejected the argument that a physician's conduct subjected him to Kentucky jurisdiction “because his medical opinions were directed at Kentucky with the intent to control the course of [a patient's] treatment in Kentucky” and he “accepted the referral of business from Kentucky and was compensated for his work.” The Court explained that “[i]n order for the court to exercise specific jurisdiction on the basis of a single act, that act must take place within the Commonwealth” and though the activity had an effect in the Commonwealth, because it did not take place in the Commonwealth, it was insufficient for personal jurisdiction. *Id.* at 443. See also *Tube Turns Div. of Chemetron Corp. v. Patterson Co.*, 562 S.W.2d 99, 100 (Ky. Ct. 1978) (“it would be unreasonable for Kentucky

to exercise jurisdiction over [the defendant] solely on the basis of negotiations by telephone and mail which culminated in the acceptance of a single order in Louisville.”)

However, without discovery, it is impossible to determine whether Dr. Kolbell’s interaction with Kentucky is limited to the single act of reviewing Clark’s records and writing a report for PsyBar, or whether he has conducted the same type of review regarding Kentucky residents on an ongoing basis that might be sufficient for personal jurisdiction as part of soliciting business, engaging in any other persistent course of conduct or deriving substantial revenue from services rendered in this Commonwealth. Therefore, the circuit court erred in determining there was no factual scenario in which Dr. Kolbell could be subject to the personal jurisdiction of Kentucky and, therefore, granting summary judgment and dismissing the case on this basis was premature without allowing Clark discovery on this issue.

Accordingly, we affirm Jefferson Circuit Court’s grant of summary judgment as to the determination that no waiver of personal jurisdiction took place, affirm the grant of summary judgment as to lack of personal jurisdiction under KRS 454.210(1)(a)1., 3. and reverse and remand the grant of summary judgment as to lack of personal jurisdiction under KRS 454.210(1)(a)4. for Clark to have an opportunity to conduct discovery on this issue.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Michael D. Grabhorn
Louisville, Kentucky

BRIEF FOR APPELLEE:

Christopher E. Schaefer
W. Gregory King
Louisville, Kentucky