RENDERED: DECEMBER 22, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000543-MR

J.C. MONTGOMERY, INDIVIDUALLY,
AND IN HIS CAPACITY AS
ADMINISTRATOR OF THE ESTATE OF
BRENDA MONTGOMERY, DECEASED — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE THOMAS SMITH, JUDGE
ACTION NO. 13-CI-00454

JAMES E. MACE,
AND COMMUNITY
TRANSITIONAL SERVICES, LLC,
A/K/A, D/B/A DISMISS HOUSE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, D. LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: J.C. Montgomery ("J.C."), individually, and in his capacity as Administrator of the Estate ("Estate") of Brenda Montgomery, Deceased

("Brenda"), challenges an opinion and order entered by the Floyd Circuit Court dismissing with prejudice an amended complaint alleging negligence against Community Transitional Services, LLC, A/K/A, D/B/A Dismiss House ("CTS"). Upon review of the record, the briefs and the law, we affirm.

James E. Mace[1] was convicted of second-degree burglary, theft by unlawful taking and receiving stolen property. Near the end of his incarceration, he was transferred to CTS—a halfway house in Louisville, Kentucky—to begin transitioning back into society. Mace walked away from CTS and made his way home to Floyd County where approximately nine days later, while in a high-speed chase with police, he crossed the center line of Kentucky 114, and struck a vehicle driven by Brenda. She died soon after the wreck.

On May 14, 2013, a complaint was filed alleging Mace, who was ultimately charged with wanton endangerment and fleeing or evading police, caused Brenda's death by driving "in a grossly negligent and wanton manner." Also named as defendants were Louisville Metro Department of Corrections and its director, Mark E. Bolton, both alleged to be jointly and severally liable for Brenda's death by allowing Mace to escape, cause danger and harm, and cause the fatal motor vehicle collision. J.C., Brenda's husband, alleged loss of consortium.

One year later, on May 14, 2014, an amended complaint was filed. Mace was still named, and CTS was added as a new defendant. CTS was

[1] Mace is without counsel and filed no pleadings in the underlying case or this appeal. The opinion and order entered by the trial court dismisses only the claims against CTS.

described as a for-profit company that had experienced over 1,000 inmate walkaways since 2010. Describing CTS's conduct, the complaint alleged:

> [CTS] owed a duty to the Plaintiff and to Brenda Montgomery, and to all citizens of the Commonwealth to prevent this from happening, and to safeguard the safety of all citizens of the Commonwealth of Kentucky, and that the halfway house is jointly and severally liable to the Plaintiffs for all of the causes of actions set forth herein, on grounds that its director and its agents and employees negligently, and in breach of their duties and responsibilities, as custodians of the Defendant, James E. Mace, who was housed there, allowed him to escape, failed to properly supervise him, failed to properly report his escape in order to facilitate his apprehension, thereby causing danger to Plaintiff and other individuals as he had been convicted of crimes, and was incarcerated as a result thereof and that they had a duty and responsibility to the Plaintiff and others to diligently maintain custody and supervision of him, and not allow him to escape so as to cause the danger, and to cause harm, and to cause the motor vehicle collision which caused the pain and suffering and wrongful death of Brenda Montgomery. That the negligence referred to above was the direct and/or proximate and/or joint and/or several cause of Brenda Montgomery's death, as set forth herein, and of all other damages to the Plaintiffs.

On May 30, 2014, J.C. and the Estate moved to voluntarily dismiss Louisville Metro Department of Corrections and Director Bolton from the suit upon discovering Mace had been in the custody of CTS, not Metro Corrections.

CTS answered the complaint asserting fifteen affirmative defenses—the first being failure to state a claim upon which relief may be granted—and asking the court to dismiss all claims against it with prejudice. In a supporting memorandum, CTS argued first, to prove negligence, J.C. and the Estate must

show CTS owed a duty to Brenda, CTS breached that duty, and, Brenda's injury (death) resulted from that breach. *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 247 (Ky. 1992). Second, CTS alleged it owed no duty to Brenda, because it had no "special relationship" with her, and, she was an unforeseeable victim. *Commonwealth, Corrections Cabinet v. Vester*, 956 S.W.2d 204, 205 (Ky. 1997), *as modified on denial of reh'g* (Nov. 20, 1997), *holding modified by Gaither v. Justice & Public Safety Cabinet*, 447 S.W.3d 628 (Ky. 2014). Third, assuming CTS owed Brenda a duty, breaching that duty was not the proximate cause of the collision—Mace's escape from custody and the motor vehicle accident that occurred more than a week later and about 190 miles away from CTS, were remote, intervening and superceding causes for which CTS argued it cannot be held responsible. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 93 (Ky. 2003).

J.C. and the Estate opposed the motion to dismiss, describing it as premature and requesting time to conduct discovery. They also argued the escape and collision were foreseeable. The motion to dismiss was heard on November 14, 2014, but no recording is included in the record.

On December 26, 2014, an opinion and order was entered dismissing all claims against CTS pursuant to CR[2] 12. The trial court concluded CTS did not have a special relationship with Brenda triggering a duty of care, and it was not foreseeable Mace would walk away from CTS, travel from Jefferson County to

[2] Kentucky Rules of Civil Procedure.

Floyd County, steal a car, and, while attempting to evade police in a high-speed car chase cause a collision with Brenda which would result in her death.

A motion to alter, amend or vacate the opinion and order sought the addition of finality language to permit appeal under CR 54.01 and 54.02. The motion also took issue with the breadth of the written opinion and order noting the trial court's ruling from the bench was limited to the accident being unforeseeable, whereas the written order, drafted by opposing counsel and entered without alteration, covered much more ground and reached the wrong result.

CTS responded to the motion to vacate stating it was instructed to draft a proposed order, it complied with the directive, and mailed the draft to the court and to opposing counsel. J.C. and the Estate neither objected to the proposed language nor offered a different version.

On March 12, 2015, the trial court[3] entered the same language as that contained in the previous opinion and order entered on December 26, 2014, with the lone addition of finality language. Timely notice of appeal was filed.

ANALYSIS

The brief for Appellants is non-compliant with CR 76.12(4)(c)(v) which requires each argument to begin with a "statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." The brief for Appellant contains no statement of preservation for

[3] The first opinion and order was signed by the Honorable John David Caudill, Judge. The second opinion and order was signed by the Honorable Thomas Smith, Judge.

any argument. We have options to punish non-compliance such as reviewing the record only for manifest injustice and striking the brief. *Mullins v. Ashland Oil, Inc.,* 389 S.W.3d 149, 154 (Ky. App. 2012). The record in this appeal being small, we have chosen to review the arguments, but warn counsel such generosity may not be forthcoming in the future.

CR 12.02 requires dismissal "unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Edmonson County v. French,* 394 S.W.3d 410, 413 (Ky. App. 2013). CR 12.03 allows judgment to be granted on the pleadings when "it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief." *City of Pioneer Village v. Bullitt County ex rel. Bullitt Fiscal Court,* 104 S.W.3d 757, 759 (Ky. 2003). The trial court concluded dismissal was appropriate under both rules. We agree.

The underlying question in any negligence case is whether the defendant owes a legal duty to the plaintiff. Citing *Norris v. Corrections Corp. of America,* 521 F.Supp.2d 586, 588 (W.D. Ky. 2007), and *Fryman v. Harrison*, 896 S.W.2d 908, 910 (Ky. 1995), *holding modified by Gaither v. Justice & Public Safety Cabinet*, 447 S.W.3d 628 (Ky. 2014), the trial court found CTS owed no duty of care to Brenda and her injuries were not foreseeable.

Under facts similar to those we review here, Norris sued a private contractor operating a prison under a state agreement. Norris alleged the prison operator negligently allowed a prisoner to escape. Traveling less than seven miles

in several hours, the escaped prisoner reached the service station where Norris was working and assaulted, robbed and raped her. "[F]oreseeability of the injury defines the scope and character of a defendant's duty" and whether harm is foreseeable is a "pure question of law for the Court." *Norris,* 521 F.Supp.2d at 588-89. Part of foreseeability is "victims specifically identified and those readily identifiable." *Fryman,* at 911. The federal court denied relief to Norris finding the escapee's attack on Norris was unforeseeable and an "intervening and superceding cause." *Norris,* at 592.

Intertwined with the issue of foreseeability is whether a "special relationship" exists between the victim and the entity alleged to have been negligent. *Fryman,* 896 S.W.2d at 910. In *Fryman,* Harrison was assaulted by an inmate freed from jail without posting bond. Harrison claimed he would not have been assaulted but for the negligence of two government officials—the circuit clerk and the jailer—in releasing the prisoner without following established procedures. The "special relationship" needed to create a duty of care

> exists only when the victim is in state custody or is otherwise restrained by the state at the time in question. Since the victim (as opposed to the perpetrator) in *Fryman* was not in state custody, no "special relationship" existed. And since the victim of the injury was not readily identifiable to the governmental officials, they were under no duty to protect him from harm.

Id. at 909-910.

In our case, it is not alleged Brenda was in custody or restrained at the time she collided with Mace and sustained injury. Therefore, based on *Norris* and

Fryman, no "special relationship" existed between CTS and Brenda, and CTS owed her no duty of care.

Assault on a third party is not foreseeable as a matter of law. *Id.* at 911. Here, Mace's conduct—driving a vehicle at a high rate of speed 190 miles away and nine days after absconding from CTS and being involved in a serious accident—was not foreseeable. Therefore, CTS's actions were not the proximate cause of Brenda's injuries. Rather, Mace's actions interrupted the sequence of events and served as an intervening or superceding cause similar to *Vester*, 956 S.W.2d at 206. Buford and Myrtle Vester lived about fifty miles from the Kentucky State Penitentiary. Their deaths, at the hands of escapees from the prison, occurred six days after a prison break. *Vester* states the Department of Corrections had a duty to prevent prisoner escapes, but "did not owe a duty to Buford and Myrtle Vester to protect them from harm caused by the escapees." We see no reason to reach a different result in this scenario.

Under no set of facts could Appellants prevail. *French,* 394 S.W.3d at 413. For the reasons expressed above, we affirm the Floyd Circuit Court's dismissal with prejudice of all claims against CTS.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jerry A. Patton
Prestonsburg, Kentucky

BRIEF FOR APPELLEE,
COMMUNITY TRANSITIONAL
SERVICES, LLC, A/K/A, D/B/A
DISMISS HOUSE:

Katherine L. Kennedy
R. Morgan Salisbury
Ft. Wright, Kentucky