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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001622-MR

HOLLY WILSON, ADMINISTRATRIX OF
THE ESTATE OF CHESTER GRAY — APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 11-CI-00237

SPRING VIEW HEALTH & REHAB CENTER — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, STUMBO AND VANMETER, JUDGES.

STUMBO, JUDGE: Holly Wilson, the administratrix of the Estate of Chester Gray, appeals from an order of the Grayson Circuit Court which granted summary judgment in favor of Spring View Health & Rehab Center. Ms. Wilson argues that there are still genuine issues of material fact which preclude summary judgment

and that discovery had not yet been completed. We affirm in part, reverse in part, and remand for further proceedings.

Chester Gray was a long-term resident of Spring View and Ms. Wilson is his daughter. On July 7, 2010, the staff at Spring View became concerned for Mr. Gray's mental health. They arranged for Wellstone Regional Hospital to accept Mr. Gray for an inpatient psychiatric evaluation. In order to transport Mr. Gray to Wellstone, the Spring View staff contacted Grayson County EMS.[1] The EMS arrived and transported Mr. Gray to Wellstone via ambulance. Once at Wellstone, the EMS attempted to transfer Mr. Gray from the ambulance to a wheelchair. While doing so, Mr. Gray was dropped and injured.[2]

The Complaint against Spring View and Grayson County EMS was filed on July 6, 2011. Mr. Gray passed away July 27 of the same year; therefore, the case was held in abeyance until the estate could be opened and an administrator appointed. On November 2, 2011, the estate was substituted as the plaintiff with Ms. Wilson acting as administratrix. The Complaint alleged that Spring View was negligent in transferring Mr. Gray to Wellstone, which led to his injuries, and that Spring View violated Kentucky Revised Statute (KRS) 216.515, which concerns the rights of residents of long-term care facilities.

[1] Grayson County EMS was a defendant in the underlying action; however, they settled with Appellant after the entry of the summary judgment at issue and are no longer a party to this action.

[2] At the trial level, it was alleged that this caused Mr. Gray to suffer a broken hip. Because this case was decided by summary judgment before discovery could be completed, the cause of the broken hip was never proven.

On December 22, 2011, Spring View filed a motion for summary judgment. The trial court granted the motion on June 19, 2012. Ms. Wilson filed a motion to alter or amend the judgment, but that motion was denied. This appeal followed.

> 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. Kentucky Rules of Civil Procedure (CR) 56.03. . . . "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest,* 807 S.W.2d at 480, *citing Paintsville Hospital Co. v. Rose,* 683 S.W.2d 255 (Ky. 1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. . . ." *Huddleston v. Hughes,* 843 S.W.2d 901, 903 (Ky. App. 1992)[.]

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996).

We will first address Ms. Wilson's claim of negligence against Spring View. Negligence requires "(1) a duty on the part of the defendant; (2) a breach of that duty; and (3) consequent injury." *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 247 (Ky. 1992) (citation omitted). Ms. Wilson alleges that Spring View was negligent in its transfer of Mr. Gray because he was too sick to be transferred and there was no need for a psychological evaluation. Ms. Wilson

claims that had Spring View not negligently transferred Mr. Gray, he would not have been injured when the EMS dropped him.

Spring View argues that it did not owe a duty to Mr. Gray in this instance because his injury was not foreseeable. It also argues that even if it were negligent in transferring Mr. Gray to Wellstone, the actions of the EMS were a superseding cause which extinguishes any liability it may have.

"Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001). In looking at the evidence in a light most favorable to Ms. Wilson, even if we were to find that Spring View was negligent, we agree that the actions of the EMS were a superseding cause.

> A superseding cause is an intervening independent force; however, an intervening cause is not necessarily a superseding cause. We say that, if the resultant injury is reasonably foreseeable from the view of the original actor, then the other factors causing to bring about the injury are not a superseding cause.

NKC Hosps., Inc. v. Anthony, 849 S.W.2d 564, 568 (Ky. App. 1993).

> [A] superseding cause will possess the following attributes:
> 1) an act or event that intervenes between the original act and the injury;
> 2) the intervening act or event must be of independent origin, unassociated with the original act;
> 3) the intervening act or event must, itself, be capable of bringing about the injury;
> 4) the intervening act or event must not have been reasonably foreseeable by the original actor;

> 5) the intervening act or event involves the unforeseen negligence of a third party [one other than the first party original actor or the second party plaintiff] or the intervention of a natural force;
> 6) the original act must, in itself, be a substantial factor in causing the injury, not a remote cause. The original act must not merely create negligent condition or occasion; the distinction between a legal cause and a mere condition being foreseeability of injury.

Id.

Both parties agree that this issue revolves around the foreseeability attribute. In other words, was it foreseeable that the EMS would drop and injure Mr. Gray? The determination of whether an act is a superseding cause is an issue of law for the court. *Id*. at 569. Legal issues are reviewed *de novo*. *Commonwealth v. Long*, 118 S.W.3d 178, 181 (Ky. App. 2003).

We do not believe that Spring View could have foreseen that the EMS would drop Mr. Gray. Spring View contacted a professional EMS company to transfer Mr. Gray. Mr. Gray was successfully transferred from Spring View's facility into the ambulance. At the time of the injury, Mr. Gray was in the exclusive care and control of the EMS and the injury did not occur on the Spring View premises. Finally, according to the affidavit of Alicia King, Spring View's Director of Nursing, who was employed at Spring View at the time of the injury, Spring View regularly used Grayson County EMS to transfer residents and had never before had an incident of the EMS dropping a resident.

Even if we were to assume Spring View was negligent in its decision to transfer Mr. Gray, the act of dropping Mr. Gray was a superseding cause of the injury; therefore, Spring View has no liability.

Ms. Wilson also argues that summary judgment was premature because discovery had not been completed.

> Whether a summary judgment was prematurely granted must be determined within the context of the individual case. In the absence of a pretrial discovery order, there are no time limitations within which a party is required to commence or complete discovery. As a practical matter, complex factual cases necessarily require more discovery than those where the facts are straightforward and readily accessible to all parties.

Suter v. Mazyck, 226 S.W.3d 837, 842 (Ky. App. 2007) (footnote omitted).

In this case, we do not believe further discovery would be beneficial to the negligence issue. As stated above, the superseding cause issue is an issue of law to be determined by the court. The discovery of further facts would not change the outcome.

Ms. Wilson's final argument on appeal is that the trial court erred in granting summary judgment on the issue of KRS 216.515. We agree. KRS 216.515 states in pertinent part that:

> Every resident in a long-term-care facility shall have at least the following rights:
> . . .
>
> (4) The resident shall be transferred or discharged only for medical reasons, or his own welfare, or that of the other residents, or for nonpayment, except where prohibited by law or administrative regulation.

> Reasonable notice of such action shall be given to the resident and the responsible party or his responsible family member or his guardian.
> . . .
>
> (26) Any resident whose rights as specified in this section are deprived or infringed upon shall have a cause of action against any facility responsible for the violation. The action may be brought by the resident or his guardian. The action may be brought in any court of competent jurisdiction to enforce such rights and to recover actual and punitive damages for any deprivation or infringement on the rights of a resident. Any plaintiff who prevails in such action against the facility may be entitled to recover reasonable attorney's fees, costs of the action, and damages, unless the court finds the plaintiff has acted in bad faith, with malicious purpose, or that there was a complete absence of justifiable issue of either law or fact. Prevailing defendants may be entitled to recover reasonable attorney's fees. The remedies provided in this section are in addition to and cumulative with other legal and administrative remedies available to a resident and to the cabinet.

Also relevant to this inquiry are the Kentucky Administrative Regulations (KAR) which apply to rights of long-term care residents. Applicable to this case is 900 KAR 2:050 Section 1(4) which states "'Transfer or discharge rights'; means those rights of notification and appeal guaranteed in KRS 216.515(4) and (26), and as outlined in this administrative regulation." In addition, 900 KAR 2:050 Section 2 states:

> Transfer and Discharge Rights. (1) Transfer and discharge requirements. The facility shall permit each resident to remain in the facility, and shall not transfer or discharge the resident from the facility unless:

(a) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;
(b) The transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
(c) The safety of individuals in the facility is endangered;
(d) The health of individuals in the facility would otherwise be endangered;
(e) The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare, Medicaid, or state supplementation) a stay at the facility; or
(f) The facility ceases to operate.
(2) Documentation. Before a facility transfers or discharges a resident under any of the circumstances specified in subsection (1)(a) through (e) of this section, the reasons for the transfer or discharge shall be documented in the resident's clinical record. The documentation shall be made by:
(a) The resident's physician if transfer or discharge is necessary under subsection (1)(a) or (b) of this section; and
(b) A physician if transfer or discharge is necessary under subsection (1)(d) of this section.
(3) Notice before transfer. Before a facility transfers or discharges a resident, the facility shall:
(a) Notify the resident and, if known, a family member or legal representative of the resident, in writing, of the transfer or discharge and the reasons for the relocation in a language and manner they understand;
(b) Record the reasons in the resident's clinical record; and
(c) Include in the notice the items described in subsection (5) of this section.
(4) Timing of the notice.
(a) Except as specified in paragraph (b) of this subsection, the notice of transfer or discharge required under subsection (3) of this section shall be made by the facility at least thirty (30) days before the resident is transferred or discharged.
(b) Notice may be made as soon as practicable before transfer or discharge if:

> 1. An immediate transfer or discharge is required by the resident's urgent medical needs, under subsection (1)(a) of this section;
> 2. The resident's health improves sufficiently to allow a more immediate transfer or discharge, under subsection (1)(b) of this section;
> 3. The safety of individuals in the facility would be endangered, under subsection (1)(c) of this section;
> 4. The health of individuals in the facility would be endangered, under subsection (1)(d) of this section; or
> 5. The resident has not resided in the facility for thirty (30) days.

Ms. Wilson claims that Spring View violated KRS 216.515(4) and 900 KAR 2:050 when Spring View transferred Mr. Gray to Wellstone. Specifically, she argues that Mr. Gray was too sick to be transferred, that the psychological evaluation was unnecessary, and that she was not given written notice before the transfer. We believe summary judgment was erroneously granted as to this issue. Even though the only injury alleged in this case is due to the superseding actions of the EMS, Spring View could still be held liable for breaching KRS 216.515. KRS 216.515(26) allows for a cause of action when the sections of the statute are breached. Furthermore, that same subsection allows for a recovery even when the breach did not lead to any actual injury. KRS 216.515(26) allows for the recovery of actual and punitive damages. *See Murphy ex rel. Reliford v. EPI Corp.*, No. 2002-CA-002173-MR, 2004 WL 405754, at 4 (Ky. App. 2004). Even if Spring View's violation of this statute did not lead to actual injury, the estate could still recover punitive damages.

Here, Ms. Wilson alleges that she was not provided written notice of Mr. Gray's transfer, that the transfer was unnecessary, and that Mr. Gray was too sick to be transferred. We believe genuine issues of material fact still exist.

It is undisputed that Ms. Wilson was not provided written notice of the transfer beforehand.[3] Even though 900 KAR 2:050 Section 2(4) allows notice to be given later, it is unknown if she ever received such notice.

In addition, she alleged the psychiatric evaluation was unnecessary and that Spring View was simply trying to get rid of her father by transferring him to another facility. She presented evidence that other doctors at Spring View had declined to send Mr. Gray for inpatient psychological evaluations.

Finally, she alleged Mr. Gray's health was too fragile to be transferred. Evidence in the record shows that from July 1, 2010, to July 6, 2010, Mr. Gray was in the Twin Lakes Regional Medical Center being treated for pneumonia. Mr. Gray was sent to Wellstone the day after he returned to Spring View from Twin Lakes. At the time he was transferred to Wellstone, Ms. Wilson alleges Mr. Gray was still on an IV, receiving medication for the pneumonia, on oxygen, and receiving breathing treatments. Ms. Wilson states in her affidavit contained in the record that after Mr. Gray was transferred to Wellstone, she received a call from someone stating Mr. Gray was too sick to be at Wellstone and needed to be immediately sent to the emergency room.

[3] Spring View argues that Ms. Wilson did not raise the issue of written notice in the court below; therefore, the issue is unpreserved. We disagree. Ms. Wilson alleged violation of KRS 216.515 in the Complaint and discussed her lack of notice of the transfer in her objection and memorandum in response to Spring View's motion for summary judgment.

Based on the above, Ms. Wilson's argument that Spring View violated KRS 216.515 has potential merit. At the very least, there are genuine issues of material fact that preclude summary judgment.

For the foregoing reasons, we affirm the trial court's grant of summary judgment as it relates to the negligence cause of action. We also reverse the judgment as to the KRS 216.515 issue and remand for further proceedings.

CLAYTON, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS.

BRIEFS FOR APPELLANT:

Christopher J. Hoerter
Louisville, Kentucky

BRIEF FOR APPELLEE:

Heidi A. Barcus
Jennifer Pearson Taylor
Carrie O'Rear
Knoxville, Tennessee