

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001402-MR

GARY D. WARICK

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 14-CI-00414

PAINTSVILLE HOSPITAL, COMPANY, LLC
d/b/a PAUL B. HALL REGIONAL MEDICAL CENTER;
HEATHER BALDWIN; AND DAVID SAMMONS

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON, GOODWINE, AND MAZE, JUDGES.

MAZE, JUDGE: Gary D. Warick appeals the Johnson Circuit Court's order granting summary judgment in favor of appellees, Paintsville Hospital Company, LLC, Heather Baldwin, and David Sammons, as well as its order denying Warick's *pro se* motion to alter, amend, or vacate that order. The trial court found

the undisputed evidence showed each appellee was immune from liability under KRS¹ 503.040(b). For reasons set forth below, we affirm.

I. Factual Background

Warick was arrested by Deputy Sheriff Terry Tussey for driving while intoxicated. Warick failed all field sobriety tests administered by Deputy Tussey and was transported to the Big Sandy Detention Center. The presiding booking officer denied admission due to Warick's apparent impairment intoxication, manifested as slurred speech and trouble standing. Under 501 KAR² 3:120(2), a person in need of emergency medical attention shall not be admitted to the jail until a medical examination is conducted. The booking officer then requested that Deputy Tussey take Warick to obtain a medical examination. Upon arrival at Paintsville Hospital, Deputy Tussey directed Dr. Thomas Styer to test Warick's urine to determine if he was fit for incarceration. Warick had the option initially to use the "clean catch" method, that is, to urinate in a cup. However, Warick attempted to fool the staff by running water into the cup, attempting to pass this off as his urine. Deputy Tussey instructed Warick be catheterized for urine specimen collection. Dr. Styer ordered nurses David Sammons and Heather Baldwin to

¹ Kentucky Revised Statutes.

² Kentucky Administrative Regulations.

perform the procedure. Warick subsequently filed suit for assault, battery, and medical malpractice, alleging he was forcibly catheterized without his consent.

Discovery commenced, and requests for admission and interrogatory were served on Warick. The request for admission asked Warick to admit that he could not produce evidence that any of the appellees' conduct fell below the applicable standard of care. Warick failed to respond to these questions within 30 days. Accordingly, they were deemed admitted under CR³ 36.01(2). Appellees then moved for summary judgment based on Warick's admissions and on immunity grounds. The motion was supported by affidavits from Deputy Tussey, Baldwin, and Sammons. The affidavits stated that Warick had consented to the procedure, though consent was not required, and that the Sammons and Baldwin had acted under the orders of Dr. Styer, who in turn was instructed by Deputy Tussey.

Although Warick produced nothing in his discovery to support his claims, the trial court initially denied summary judgment because the court believed that there was a material issue of fact whether Sammons and Baldwin acted on the orders of the hospital or under the orders of Deputy Tussey. This was relevant because KRS 503.040 provides immunity to someone acting under orders of law enforcement. Dr. Styer's affidavit was subsequently added testifying that

³ Kentucky Rules of Civil Procedure.

he had ordered the catheterization under orders from Deputy Tussey, and this testimony was undisputed. The trial court granted summary judgment. Warick's counsel then moved to alter, amend or vacate, arguing the trial court's order inappropriately awarded attorneys' fees and legal costs against Warwick. Appellees responded that they had not incurred any recoverable costs in the case and were not seeking to recover against Warick. Before this motion could be ruled upon, Warick, then incarcerated, filed a timely *pro se* notice of appeal to the trial court's order granting summary judgment. The trial court subsequently denied the motion to alter, amend or vacate. Warick, again *pro se*, filed an additional motion to alter, amend, or vacate under CR 60.02. This motion was also denied by the trial court. Warwick now appeals the order granting summary judgment and the order denying his *pro se* motion to alter, amend, or vacate that order.

II. Summary Judgment⁴

The Kentucky standard for determining if summary judgment is appropriate 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); CR

⁴ This case was sent to the Court of Appeals only after Warick filed an additional notice of appeal to the denial of his *pro se* CR 60.02 motion. Despite this procedural irregularity, we address the merits of the trial court's summary judgment order because Warick filed a timely notice of appeal to the trial court's order granting summary judgment.

56.03. “[T]he proper function of summary judgment is 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.” *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). The standard for appellate review for a summary judgment is *de novo*. *Keaton v. G.C. Williams Funeral Home, Inc.*, 436 S.W.3d 538 (Ky. App. 2013).

Warick’s claims for assault and battery are clearly invalid. The Supreme Court of Kentucky has ruled that “[l]ack of consent is an essential element of battery. Therefore, the absence of consent must be proved as a necessary part of the plaintiff’s case.” *Vitale v. Henchey*, 24 S.W.3d 651 (Ky. 2000). This court defines assault as “the threat of unwanted touching of the victim[.]” *Banks v. Fritsch*, 39 S.W.3d 474 (Ky. App. 2001). By not producing any evidence to the contrary, Warick has not disputed that he consented to the catheterization as stated through multiple affidavits.

Warick’s claims of medical malpractice are also unsustainable. A claimant in a malpractice suit must present expert testimony in order to establish both: (1) that the defendant failed to meet the applicable standard of care; and (2) that the alleged negligence proximately caused the injury. *Baylis v. Lourdes Hospital, Inc.*, 805 S.W.2d 122, 124-25 (Ky. 1991). By not answering the requests

for admission, Warick admitted he could not produce the required expert testimony.

Even if Warick's admissions were not fatal to his claims, and he could introduce some evidence, the appellees would be entitled to immunity. KRS 503.040(1) states that "conduct which would otherwise constitute an offense is justifiable when it is required or authorized by a provision of law imposing a public duty[.]" The justification afforded by this statute applies when "[t]he defendant believes his conduct to be required or authorized to assist a public officer in the performance of his duties, notwithstanding that the officer exceeded his legal authority." KRS 503.040(2)(b).

Sammons and Baldwin were not acting upon the order of a physician for the wellbeing or treatment of Warick, but instead as a result of a request by Deputy Tussey acting on his duty. Nonetheless, Warick compares his case to *Saint Luke Hospital v. Straub*, 354 S.W.3d 529 (Ky. 2011). In *Saint Luke Hospital*, a 16-year-old female was found to be intoxicated and an officer had picked her up and took her to a hospital because he believed that she had hit her head while in her current state of intoxication. *Id.* at 532. Upon entering the hospital, the female was forcefully catheterized. *Id.* The final holding of the case was that the healthcare workers had acted independently from any "color of the law" and upon

independent healthcare decisions which meant they were not protected from liability under KRS 503.040(2)(b). *Id.* at 533.

However, *Saint Luke Hospital* case is easily differentiated from the present case because the young female was not taken to the hospital under 501 KAR 3:120. Deputy Tussey brought Warick in specifically under this regulation, and the hospital employees administered the medical examination under his orders; there are no material facts to the contrary. In *Saint Luke Hospital*, the officer did not order the same sort of medical examination under 501 KAR 3:120. There is no independent healthcare issue from the clearance for incarceration that the staff could have been attending to. Warick's catheterization was done for the sole purpose of determining fitness for incarceration in accordance with 501 KAR 3:120.

Warick also urges this court to apply the "shocks the conscience" exception to his case. The exception states that those that take part in a procedure that "shocks the conscience" could still be found liable. Warick cites *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952), as support that the catheterization was excessive in regard to the circumstances, however there is a strong difference. In *Rochin*, the Supreme Court of the United States held that the forced vomiting induced by the request of law enforcement through the use of a tube inserted into the throat and an emetic solution against the suspect's will

“shocks the conscience.” *Id.*, 342 U.S. at 172, 72 S. Ct. at 209. Rochin consumed two pills in an effort to destroy any evidence of them. *Id.*, 342 U.S. at 166, 72 S. Ct. at 206. To regain the evidence the officers escorted Rochin to the hospital upon which the qualified staff induced vomiting to regain the evidence. *Id.* The level of brutality had been more than to “offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience.” *Id.*, 342 U.S. at 172, 72 S. Ct. at 209.

There is simply no such level of comparable brutality in the present case. KRS 189A.103 states that consent is implied to test for alcohol concentration or substance which may impair driving ability with reasonable cause. 501 KAR 3:120 states that a person in need of emergency medical attention shall not be admitted to the jail until a medical examination is conducted. Warick was intoxicated at around three times the legal blood alcohol limit and he had crashed his truck. Upon admittance to the hospital, Warick was asked multiple times to urinate into a cup to test for active substances that may cause him to be a potential hazard to himself or others in the detention center. When the totality of the circumstances is taken into consideration, a reasonable person would not objectively consider this as an act that “shocks the conscience.” Accordingly, the trial court correctly granted summary judgment in favor of the appellees.

III. CR 60.02

CR 60.02 provides:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.

Warick's second CR 60.20 motion largely attacked the merits of the trial court's summary judgment order. CR 60.02 applies only to "extraordinary situations" and does not provide relief for orders that can be challenged on direct appeal. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). Warick also argued that the affidavits submitted by appellees were fraudulent but did not provide any evidence to support this allegation. Bare allegations will not suffice to establish "fraud affecting the proceedings" permitting relief under CR 60.02.

McMurry v. McMurry, 957 S.W.2d 731, 733 (Ky. App. 1997). Warick's request for relief under CR 60.02 was appropriately denied.

IV. Conclusion

Accordingly, the orders of the Johnson Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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