

RENDERED: AUGUST 20, 2004; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-001171-MR  
AND  
NO. 2003-CA-001198-MR

RANDY BARNETT

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE CRAIG Z. CLYMER, JUDGE  
ACTION NO. 01-CI-01171

MERCY HEALTH PARTNERS-LOURDES, INC.,  
A/K/A LOURDES HOSPITAL, INC., AND  
BERNIE L. BRUNSON, M.D.

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; TACKETT, JUDGE, AND EMBERTON,

SENIOR JUDGE.<sup>1</sup>

TACKETT, JUDGE: Randy Barnett appeals from a summary judgment of the McCracken Circuit Court dismissing his claim for intentional infliction of emotional distress against Dr. Bernie Brunson and Mercy Health Partners, Inc. a/k/a/ Lourdes Hospital,

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Inc. After examining the record before us, we have determined that, as a matter of law, Barnett failed to set forth a claim which would entitle him to any recovery for this cause of action. Therefore, the judgment of the circuit court is affirmed.

Barnett's cause of action arises out of a surgery performed on his deceased grandfather, Evert Barnett. Evert was admitted to Mercy Hospital for a lymph node biopsy on February 18, 2000. Barnett was present at the hospital in his capacity as grandson, caregiver and attorney in fact. Brunson was scheduled to perform the surgical procedure at 10:00 a.m.; however, Barnett alleges that the doctor arrived late, smelled of alcohol and appeared visibly intoxicated. Barnett further claims that another doctor present engaged in a physical altercation with Brunson regarding the latter's unfitness to operate while intoxicated. Brunson evidently submitted to a blood alcohol test, but performed the surgery before the results were obtained. Barnett, who was in a waiting area, was unaware of these events at the time they occurred.

Following the surgery, Barnett spoke briefly with Brunson and noted that the surgeon smelled of alcohol. Evert suffered some complications after his surgery, and Brunson did not respond to his pager or return to treat his patient. At some point in time, his staff privileges at Lourdes Hospital

were suspended. In May 2000, a third party informed Barnett of the circumstances surrounding his grandfather's surgery and of Brunson's alleged intoxication at the time. Barnett claims that he suffered mental anguish, depression and insomnia as a result of learning this information. Evert died on September 30, 2000, of conditions unrelated to his surgery at the age of ninety-five. Barnett filed suit, both on his own behalf and as the personal representative of his grandfather's estate, on November 15, 2001, against Lourdes Hospital and Brunson. The complaint contained, among other things, a request for damages for the tort of intentional infliction of emotional distress. The circuit court granted the defendants' motions for summary judgment on the pleadings and dismissed several of the causes of action. Barnett appealed from the dismissal of his claim of intentional infliction of emotional distress and we review the matter *de novo*.

Barnett argues that his complaint clearly stated a cause of action for intentional infliction of emotional distress and, therefore, the circuit court erred in granting the defendants' motions for judgment on the pleadings. Kentucky recognized intentional infliction of emotional distress as a recoverable cause of action in Rice v. Craft, Ky., 671 S.W.2d 247 (1984) which stated as follows:

We adopt the Restatement (Second) of Torts § 46, the following:

"§ 46. Outrageous Conduct Causing Severe Emotional Distress

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

Rice at 251. Lourdes Hospital responds that Barnett failed to show intentional or reckless conduct directed toward himself in that he was not present in the operating room where Brunson performed the surgical procedure on Evert, nor was Barnett even aware of the alleged circumstances surrounding the surgery until some three months after the procedure had occurred. Barnett claims that he was emotionally present during the procedure due to his close relationship with his grandfather and that hospital personnel were aware of that relationship and of his physical presence in the hospital waiting room. In support of this theory, he cites Osborne v. Payne, Ky., 31 S.W.3d 911 (2000), a case involving a man's attempt to recover for intentional infliction of emotional distress due to an adulterous relationship between his ex-wife and their parish priest with whom they sought marital counseling. Barnett points out that the husband in Osborne was neither present when the adulterous conduct occurred, nor was he aware of the relationship until after it ended. Nevertheless, this case is distinguishable from

the factual situation at hand. In Osborne, a special relationship existed between the priest and both spouses who went to him for marital counseling. The Kentucky Supreme Court found that a genuine issue of material fact existed as to whether the priest had acted outrageously in violating this special relationship. Barnett may have enjoyed a special relationship with his grandfather; however, he had no such special relationship with Lourdes Hospital. Therefore, his claim of being emotionally present during the surgery fails to establish that Lourdes Hospital or Brunson directed any conduct toward him.

In addition, Barnett points to our decision in Burgess v. Taylor, Ky. App., 44 S.W.3d 806 (2001), arguing that it supports his position that he need not have been present during the surgery for the alleged outrageous conduct to be directed toward him. The plaintiff in Burgess sought recovery after the defendants sent her beloved horses to the slaughterhouse. Taylor had owned her horses for over a decade and was emotionally attached to them as if they were her children. During her divorce, she became unable to physically care for them due to severe health problems. Consequently, she arranged for the Burgesses to board the horses and care for them with the understanding that Taylor would be allowed to visit them. Instead, the Burgesses sold the horses to be slaughtered and

lied about their whereabouts until Taylor was able to determine their fate through investigation. While Taylor may not have been present, or even aware of the situation, at the time her horses were slaughtered, there is no question that the Burgesses' conduct was directed toward her as the owner of the animals.

Barnett contends that Lourdes Hospital and Brunson actively concealed the surgeon's alleged intoxication from him. This concealment, he claims, amounts to outrageous conduct which was directed toward him. In support of this proposition, he cites Resthaven Mem'l Cemetery v. Volk, Ky. App., 286 Ky. 91, 150 S.W.2d 908 (1942), a case involving a cemetery's actions in disinterring a woman and reburying her in another grave without notifying her family who continued to visit and place flowers at the original grave site.

On appeal, the court held that the defendant could not benefit from concealing the reburial by relying on a defense that the statute of limitations had run before the plaintiff filed his complaint. However, this decision did not stand for the proposition that concealment itself was a tortious act; rather the court recognized that the cemetery had a duty to inform the family when the reburial occurred and that a breach of that duty was a cause of action. Lourdes Hospital, as previously mentioned, had no special relationship with Barnett

and no obligation to inform him of the circumstances surrounding his grandfather's surgery. Consequently, Barnett's allegation that Burnson was intoxicated when he operated on Evert and that Lourdes Hospital concealed this information from Barnett does not establish that either defendant acted outrageously toward him. Since Barnett's complaint failed to state any outrageous conduct toward himself on the part of either Lourdes Hospital or Brunson, the circuit court correctly granted the defendants' motions for summary judgment on the pleadings with regard to the claim for intentional infliction of emotional distress.

For the forgoing reasons, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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