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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001812-MR

TERESA JOHNSTON AND
STEPHANIE CARMINE, CO-ADMINISTRATORS
OF THE ESTATE OF MARSHALL CARMINE, APPELLANTS

APPEAL FROM NELSON CIRCUIT COURT
v. HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 95-CI-00058

SISTERS OF CHARITY OF NAZARETH
HEALTH SYSTEMS, INC., D/B/A FLAGET
MEMORIAL HOSPITAL, A DIVISION OF SISTERS
OF CHARITY OF NAZARETH HEALTH CORPORATION;
JOSEPH J. BUCHINO, M.D.; AND JOSEPH J.
BUCHINO, M.D. & ASSOCIATES,
P.S.C. APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: JOHNSON AND PAISLEY, JUDGES; AND MILLER[1], SENIOR JUDGE.

PAISLEY, JUDGE. This is an appeal from a summary judgment entered by the Nelson Circuit Court dismissing appellants' complaint against appellees Joseph J. Buchino, M.D. and Joseph J. Buchino, M.D. & Associates, P.S.C. and reaffirming a prior interlocutory summary judgment in favor of appellee Sisters of Charity of Nazareth Health Systems, Inc., D/B/A Flaget Memorial Hospital, dismissing appellants' complaint. The court found that Flaget was not liable for the wrongful death of Marshall Carmine (Carmine) because its physicians are independent contractors. The court also found that any claim against Dr. Buchino was barred by the applicable statute of limitations. For the following reasons, we affirm.

Marshall Carmine was treated at Flaget Memorial Hospital in January and February 1994. He died there on February 13, 1994 due to complications following surgery. On February 6, 1995, appellants Teresa Johnston and Stephanie Carmine, as co-administrators of Carmine's estate, filed a wrongful death action against Dr. Betty Lew Arnold, Dr. Mickey Anderson, and Flaget alleging that their negligent acts caused Carmine's death. Approximately five years later, appellants learned that Dr. Buchino, a pathologist, apparently misread

[1]Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

tissue specimens taken from Carmine while he was being treated at the hospital. Dr. Arnold and Dr. Anderson alleged that they would have followed a different treatment path if the results had been correctly reported. Appellants therefore amended their original complaint to add Dr. Buchino as a defendant. The trial court subsequently granted Dr. Buchino's motion to dismiss, which was treated as a motion for summary judgment, based on Dr. Buchino's assertion that the one-year statute of limitations set forth in KRS 413.140(1)(e) had long since run on any claim that appellants might have been entitled to assert against him. The court also granted Flaget's motion for summary judgment on the ground that Dr. Buchino was an independent contractor rather than an employee of the hospital. The entire complaint therefore was dismissed and this appeal followed.

In order to succeed on a motion for summary judgment, a "movant must show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Commonwealth v. Whitworth, Ky., 74 S.W.3d 695, 698 (2002) (citing CR 56.03). "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, Ky. App., 56 S.W.3d 432, 436 (2001).

Appellants first contend that the trial court erred by concluding that there is no genuine issue of material fact as to whether Dr. Buchino was an independent contractor rather than a hospital employee for whose actions Flaget was responsible. We disagree.

"As a general rule, an employer is not liable for the torts of an independent contractor in the performance of his job." Miles Farm Supply v. Ellis, Ky. App., 878 S.W.2d 803, 804 (1994). See also King v. Shelby Rural Electric Cooperative Corporation, Ky., 502 S.W.2d 659, 660 (1973). One reason this rule developed was "the unfairness of imposing liability upon an employer who had no means of imposing any control over the work." King, 502 S.W.2d at 664. As illustrated in Sam Horne Motor and Implement Company v. Gregg, Ky., 279 S.W.2d 755 (1955), nine different factors should be considered in determining whether a person is an employee rather than an independent contractor:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer; and

(i) whether or not the parties believe they are creating the relationship of master and servant.

Sam Horne, 279 S.W.2d at 756-757 (citation omitted). See also Mullins v. Western Pioneer Life Insurance Company, Ky., 472 S.W.2d 494, 495 (1971); Ambrosius Industries, Inc. v. Adams, Ky., 293 S.W.2d 230, 236 (1956). We also note that "[t]he ultimate test is the control reserved or exercised by the employer." Coleman v. Baker, Ky., 382 S.W.2d 843, 846 (1964).

Here, the circumstances relevant to factors (b), (c), and (d), as listed in Sam Horne, indicate that Dr. Buchino was an independent contractor because the business of pathology is distinct and highly specialized requiring a significant amount of skill but no supervision. The facts relating to factor (e) suggest that an employee relationship existed between Flaget and

Dr. Buchino since the hospital supplied the site of the lab as well as all necessary equipment. Next, the record shows that at the time of Carmine's death Flaget and Buchino were operating under a contract entitled "Proposal for Pathology Coverage", which was silent as to possible termination of their relationship. As such, the contract was implicitly terminable at will thereby suggesting an employer/employee relationship with respect to factor (f). Firestone Textile Company Division, Firestone Tire and Rubber Company v. Meadows, Ky., 666 S.W.2d 730 (1983), Shah v. American Synthetic Rubber Corporation, Ky., 655 S.W.2d 489 (1983). With regard to factor (g), the evidence reflects that, consistent with an independent contractor, Dr. Buchino billed patients directly and he was solely responsible for all social security and income tax withholdings. Further, even if providing pathology results falls within the normal business of a hospital, here it seems clear that both Flaget and Buchino believed that their contract created an independent contractor relationship.

Most important to our consideration of the independent contractor issue herein is factor (a), which pertains to the extent of control that Flaget exercised over the details of Dr. Buchino's work. Our review of the record indicates that any such control was minimal. More specifically, although the hospital provided the site of the laboratory, provided all of

the equipment, and set the fees charged to patients, Dr. Buchino billed the patients directly, provided his own malpractice insurance, paid his own social security and income tax withholdings, decided which physicians would provide services within the lab, and performed laboratory duties within his own professional discretion without interference from Flaget.

The record shows that there is no genuine issue of material fact with respect to the circumstances surrounding the relationship between Flaget and Dr. Buchino. That being so, the determination of whether Dr. Buchino was Flaget's employee or an independent contractor was an issue of law for the court's consideration. See Grubb v. Coleman Fuel Co., 272 Ky. 847, 114 S.W.2d 477, 479 (1938). Clearly, the court did not err by finding, as a matter of law, that Dr. Buchino was an independent contractor.

Next, appellants argue in the alternative that even if Buchino was an independent contractor, the trial court erred by failing to find that Carmine lacked adequate notice of Dr. Buchino's status since he allegedly displayed apparent authority to act on behalf of the hospital. We disagree.

> Apparent authority is not actual authority, but rather "is that which, by reason of prevailing usage or other circumstance, the agent is in effect held out by the principal as possessing. It is a matter of appearances, fairly chargeable to the

> principal and by which persons dealt with are deceived, and on which they rely."

Williams v. St. Claire Medical Center, Ky. App., 657 S.W.2d 590, 595 (1983) (quoting Estell v. Barrickman, Ky. App., 571 S.W.2d 650, 652 (1978)). Williams recognized that the existence of apparent authority may cause a hospital to be held liable for the acts of an independent contractor physician. However, Williams also recognized that absent either negligence in selection or establishment of liability under apparent agency principles, a hospital is insulated from liability for the negligence of independent contractor physicians. Similarly, in Paintsville Hospital Company v. Rose, Ky., 683 S.W.2d 255 (1985), the Kentucky Supreme Court held that apparent agency can be inferred from the circumstances "absent evidence that the patient knew or should have known that the treating physician was not a hospital employee when the treatment was performed." Paintsville, 683 S.W.2d at 256 (emphasis added).

Here, Carmine signed admission forms on six different occasions which explicitly stated that the pathologists and physicians at Flaget were independent contractors and not employees or agents of the hospital. While the courts in Paintsville and Williams may have reached a different result, those cases are distinguishable because here, unlike the patients in those cases, Carmine received clear and explicit

notice of Dr. Buchino's status as an independent contractor. These facts are closely related to those described in Floyd v. Humana of Virginia, Inc., Ky. App., 787 S.W.2d 267, 270 (1989), which found the appellant's testimony to be determinative because she admitted "that she had read and signed each of the admission forms to Humana of Virginia Hospital, Inc. d/b/a Humana Hospital University, which indicate[d] her knowledge that the doctors were independent contractors and not agents of the hospital." Thus, we conclude that the trial court did not err by finding that the hospital admission forms provided Carmine with adequate notice as to the status of the physicians working at Flaget.

Next, appellants assert that the court erred by failing to find that Flaget cannot delegate its liability to independent contractors because it is required to provide pathology services pursuant to 902 KAR 20:016 et seq. As Flaget complied with its statutory duty by contracting with Buchino to provide pathology services, this argument clearly lacks merit. The regulation does not suggest that these services cannot be provided by an independent contractor, and appellants have cited to no Kentucky authorities which would support such a conclusion. In fact, 902 KAR 20:016 §4(4) provides that pathology services may be provided by either "the hospital or by arrangement with other facilities."

Next, appellants contend that the trial court erred by finding that the statute of limitations had run prior to the filing of their action against Dr. Buchino. We disagree.

Appellants assert that they could not have known of the cause of action against Dr. Buchino until May 8, 2000, when an expert witness found a mistake by Buchino in reading Carmine's tissue specimens. "Under the 'discovery rule,' a cause of action will not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only that he has been injured but also that his injury may have been caused by the defendant's conduct." Wiseman v. Alliant Hospitals, Inc., Ky., 37 S.W.3d 709, 712 (2000) (quoting Hazel v. General Motors Corp., 863 F.Supp. 435, 438 (W.D. Ky. 1994)). However, although appellants claim that they could not have known that Dr. Buchino caused Carmine's death until the relevant slides were brought to their attention,

> [t]he discovery rule does not operate to toll the statute of limitations in a wrongful death case filed in a circuit court, absent a defendant's fraudulently concealing or misrepresenting the circumstances of the death, because the cause of action accrues when the fact of injury is known; the decedent's death provides the notice to investigate.

Gray v. Commonwealth, Ky. App., 973 S.W.2d 61, 62-63 (1997) (citing McCollum v. Sisters of Charity of Nazareth Health Corporation, Ky., 799 S.W.2d 15, 19 (1990)). See also Hackworth

v. Hart, Ky., 474 S.W.2d 377, 380 (1971). As further explained in McLain v. Dana Corporation, Ky. App., 16 S.W.3d 320, 326 (1999),

> [u]nder Kentucky law, the discovery rule provides that a cause of action accrues when the injury is, or should have been, discovered. However, the discovery rule does not operate to toll the statute of limitations to allow an injured plaintiff to discover the identity of the wrongdoer unless there is a fraudulent concealment or a misrepresentation by the defendant of his role in causing the plaintiff's injuries. A person who has knowledge of an injury is put on "notice to investigate" and discover, within the statutory time constraints, the identity of the tortfeasor.

Because appellants have failed to allege or show that appellees engaged in any concealment or misrepresentations and have failed to show that in the exercise of reasonable diligence, they could not have discovered Dr. Buchino's mistake and identity, they are not entitled to relief on this ground.

Finally, appellants argue that the trial court erred by failing to find that the amended complaint relates back to the original complaint. We disagree. CR 15.03 states in pertinent part that:

> (1) Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.
>
> (2) An amendment changing the party against

> whom a claim is asserted relates back if the condition of paragraph (1) is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (a) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (b) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Although it is not disputed that the claims in the original and the amended complaints arose out of the same occurrence, the parties disagree as to whether the conditions set out in CR 15.03(2) were satisfied herein. Appellants claim that those requirements were met because Dr. Buchino's identity was mistaken, he had notice of the wrongful death action, and he was not prejudiced in any way by the delay in being added as a defendant. However, appellants have provided no proof that Buchino received notice within the one-year statute of limitations applicable to this action. KRS 413.140(1)(e). Since the original complaint was filed only one week prior to the expiration of the statute of limitations, appellants cannot satisfy the requirements of CR 15.03(2) unless they can show that during that one-week period, Dr. Buchino was or should have been aware of both the institution of the action and of the fact that, but for a mistake in the identity of the parties, he would also have been sued. Although some cases have held that notice

may be imputed whenever potential defendants have sufficient identity of interests with the original parties, Halderman v. Sanderson Forklifts Company Ltd., Ky. App., 818 S.W.2d 270 (1991), Funk v. Wagner Machinery, Inc., Ky. App., 710 S.W.2d 860 (1986), Clark v. Young, Ky. App., 692 S.W.2d 285 (1985), we do not believe that notice should be imputed to Buchino in this case. Although Flaget and Buchino did have a business relationship, Flaget was under no duty to inform Buchino of a lawsuit filed against the hospital. Further, the interests that Flaget was protecting were not similar to those of Buchino since any negligence by Buchino, as an independent contractor, would have cleared Flaget of all financial responsibility for Carmine's death. Although we recognize that

> [l]imitations statutes are by nature arbitrary and so sometimes seem to operate harshly. This harshness, of course, does not authorize courts to disregard the strict duties such statutes impose. On the contrary, the statutory duty to develop and file one's case diligently has been interpreted as absolute except in the most compelling of circumstances.

Reese v. General American Door Company, Ky. App., 6 S.W.3d 380, 383 (1998). In addition, we note that "[t]he mere failure to identify a potential defendant within the limitations period . . . is not the sort of mistake contemplated by part (2)(b) of Cr 15.03." Reese, 6 S.W.3d at 383-384.

The judgment of the Nelson Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS:

Andrew J. Horne
Louisville, Kentucky

Douglas H. Morris
Louisville, Kentucky

BRIEF AND ORAL ARUGMENT FOR APPELLEES JOSEPH J. BUCHINO, M.D. AND JOSEPH J. BUSCHINO, M.D. & ASSOCIATES, P.S.C.

Ronald G. Sheffer
Louisville, Kentucky

Christopher T. Coburn
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE SISTERS OF CHARITY OF NAZARETH HEALTH SYSTEMS, INC., D/B/A FLAGET MEMORIAL HOSPITAL, A DIVISION OF SISTERS OF CHARITY OF NAZARETH HEALTH CORPORATION:

B. Todd Thompson
Louisville, Kentucky