# Freeman v. Becker Law Office

2010 | Cited 0 times | Court of Appeals of Kentucky | June 18, 2010

NOT TO BE PUBLISHED

OPINION

REVERSING AND REMANDING

BEFORE: VANMETER, ACTING CHIEF JUDGE; STUMBO AND TAYLOR, JUDGES.

Tonia T. Freeman brings this appeal from a December 10, 2008, summary judgment dismissing her complaint against Becker Law Office, PLC, Kevin Renfro, Bubalo, Hiestand & Rotman, PLC, n/k/a Bubalo & Hiestand, PLC, and Dianne E. Sonne, a/k/a Dianne E. Bluhm, (collectively referred to as appellees). We reverse and remand.

The circuit court succinctly set forth the underlying facts of this case as follows:

Plaintiff Tonia T. Freeman was the local Chairperson for the charitable organization Marine Toys for Tots. Freeman had volunteered with Toys for Tots for nine years prior to her injury. As Chairperson, Plaintiff was responsible for examining shipments, collecting and the distribution of toys to other counties. The toys were stored in a building located at Fort Knox for purposes of receipt, storage and distribution of toys. The location of the storage granted by Fort Knox changed from year to year. (Footnote omitted.)

On or about October 15, 2004[,] Plaintiff Freeman was notified of a shipment of toys and she went to the building to carry out her responsibility of examining the new shipment of toys. After completing her job, Freeman injured her left foot as she exited the building using the wooden stairs leading up to the door located outside of the building. Freeman had difficulty stepping down from the second step as she could not move her foot and asked the military volunteer for his assistance. Freeman had stepped on a wooden spike from the stairs but was unable to feel the spike in her foot because of the nercrotic [sic] place on the bottom of her foot due to her diabetic condition. Afterwards, Freeman then drove to the beauty salon.

While sitting in the beauty salon, Freeman crossed her legs, at which time her daughter said, "Mom, you have a rock in your shoe." After closer inspect, Freeman realized that the wooden spike had penetrated her left foot. Freeman took off her left shoe and saw the spike protruding from the bottom of her left foot. The military volunteer was called and a Military Medic came to Freeman's assistance.

The Medic removed the splinter/spike, administered a tetanus shot, and advised Freeman to see her physician.

According to [Freeman], she called her physician and was given the first available appointment for October 21, 2004. Freeman's physician cleaned out her injury and removed the remaining slivers of wood from her foot. Freeman developed an infection in her injured foot the weekend following her doctor's visit. She returned to her physician that following Monday, October 25, 2004[,] and was sent to Suburban Hospital where she was immediately sent to surgery for partial amputation of her left foot. Due to the infection, several amputation procedures have been made to Freeman's foot since the initial procedure resulting in the amputation of Freeman's [leg] above the knee.

While recuperating in the hospital, Freeman contacted the Becker Law Offices about her injury, after viewing a Becker Law Office advertisement on television. Freeman signed a contract with Becker Law Office on December 17, 2004[,] and received correspondence that Kevin Renfro was her attorney. Communications were exchanged between the parties up until the time of the filing of this suit. Plaintiff [Freeman] had her contacts with a paralegal that was assisting the Becker Law Offices.

In January 2005 an attorney for the United States Government advis[ed] Becker that the Federal Torts Claim Act may not be applicable to their client's claim because Toys for Tots is a private non-profit charitable organization. [Freeman] alleges that despite the information received from the attorney for the U.S. Government, Becker Law Offices continued to pursue her claim under the FTCA. Becker Law Offices transferred Freeman's case to Bubalo, Hiestand & Rotman, PLC (BH&R) which [Freeman] alleges was made without notice or her consent. Freeman's claim, filed by BH&R, was denied by Toys for Tots' insurance company.

On August 31, 2005, a claims attorney for the Military submitted a detailed response to Becker explaining why Freeman's claim was not covered under the Federal Tort Claims Act. Becker subsequently pursued the claim against Toys for Tots' insurance carrier. On November 28, 2006, a representative of the insurance carrier denied the claim. The insurance company denied Freeman's personal injury claim based upon expiration of the one-year statute of limitations in Kentucky Revised Statutes (KRS) 413.140. On May 18, 2007, Freeman received a letter from BH&R stating they were no longer interested in representing her on this claim.

After consulting with new counsel, Freeman discovered that appellees permitted the one-year statute of limitations in KRS 413.140 to expire and that her claim against Toys for Tots was time-barred. Consequently, on October 18, 2007, Freeman then filed a complaint against appellees alleging legal malpractice, violation of the Consumer Protection Act, and breach of fiduciary duty. Appellees answered and later filed a motion for summary judgment. By summary judgment entered December 10, 2008, the circuit court dismissed all claims set forth in the complaint against appellees. This appeal follows.

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Freeman contends the circuit court erred by rendering summary judgment dismissing her legal malpractice claim against appellees. For the reasons hereinafter elucidated, we agree.

Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56; Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991). When reviewing a motion for summary judgment, all facts are to be construed in a light most favorable to the nonmoving party. Our review shall proceed accordingly.

In a legal malpractice claim, plaintiff must prove the following elements: (1) an employment relationship with the attorney, (2) the attorney "neglected his duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances," and (3) such breach was the "proximate cause of damage to the client." Stephens v. Denison, 64 S.W.3d 297, 298-299 (Ky. App. 2001).

In the case at hand, Freeman demonstrated that an employment relationship existed with appellees. Furthermore, Freeman produced facts establishing that appellees failed to file her personal injury claim against Toys for Tots within the one-year statute of limitations in KRS 413.140. An attorney's failure to timely file an action before expiration of the statute of limitations certainly can constitute a breach of an attorney's duty to exercise ordinary care. As such, Freeman offered facts to establish the first two elements of a legal malpractice claim. However, the third element -- the attorney's breach of duty constituted the proximate cause of damages to the client -- presents a more troublesome issue.

To prove an attorney's negligence actually caused damage, plaintiff must present facts demonstrating that "he/she would have fared better in the underlying claim; that is, but for the attorney's negligence, the plaintiff would have been more likely successful." Marrs v. Kelly, 95 S.W.3d 856, 860 (Ky. 2003). Thus, to meet the third element of her legal malpractice claim, Freeman must present facts proving that "but for" appellees' legal negligence, Freeman would have probably been successful in her underlying personal injury claim against Toys for Tots. Marrs, 95 S.W.3d at 860.

As to the third element, the circuit court concluded that Freeman's underlying personal injury claim lacked merit, thus, that Freeman suffered no damage caused by appellees' alleged legal malpractice. Particularly, the circuit court reasoned:

A licensee is a person entering the land with permission but not for the purpose for which the property is maintained. The landowner has the duty to warn a licensee of known dangers on the land. Scuddy Coal Company Inc., v. Couch, 274 S.W.2d 388 (Ky. App. [sic] 1954). Conversely, an invitee enters the land with permission and for the purpose for which the land is maintained. The landowner has the duty to make reasonable inspections for dangerous conditions on the land and warn the invitee of all dangers known or could have been discovered by reasonable inspection. Id. The Court has further distinguished between licensee and invitee in that "an invitation is inferred where there

is a common or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it." Moody v. Louisville & N. R. Co., 39 S.W.2d 988, 989 (Ky. 1931); citing Louisville & N. R. Co. v. Snow's Adm'r, 30 S.W.2d 885 (Ky. App. 1930).

As a volunteer for Toys for Tots, Plaintiff Freeman was responsible for examining shipments, collecting and the distribution of toys to other counties for Toys for Tots and not for Fort Knox. The toys were stored in a building located at Fort Knox for purposes of receipt, storage and distribution of toys for Toys for Tots. The location of the storage granted by Fort Knox changed from year to year. [Freeman] was notified by Fort Knox personnel when shipments arrived to the warehouse ready for her inspection.

Defendants allege that [Freeman] was a licensee and not an invitee as [Freeman] argues. Based on the evidence on the record, the Court cannot find, as a matter of law, that [Freeman] falls within the definition of an invitee. A licensee enters the premises at his own risk and must take the premises as he find[s] them, thus, has no cause of action from dangers existing on the land which was entered with permission. Bales v. Louisville & N.R. Co., 200 S. W. 471 (Ky. 1918). The owner is only liable for injuries resulting from acts of negligence and to [sic] for injuries resulting from defects on the land since licensee takes the premises as he finds them. Louisville & N.R. Co., v. Page, 263 S.W. 20 (Ky. 1924). This Court, as a matter of law, finds that [Freeman] was a licensee at the time of her injury and thus was due only the duty to warn of known dangers of the land.

The Court is persuaded that no genuine issues of material fact exist in this matter precluding Summary Judgment at this time. Since [Freeman] cannot prevail on the underlying claim in any event, the Defendants are entitled to Summary Judgment and the Complaint filed against them should be dismissed.

Freeman argues the circuit court erroneously concluded that she was a licensee and not an invitee of Toys for Tots at the time of her injury. Alternatively, Freeman also contends that whether she was an invitee or licensee presented an issue of fact to be decided by the jury.

To begin, the issue of whether an individual is classified as an invitee or licensee generally presents a question of fact for the jury where underlying material facts are in dispute. Shoffner v. Dilkerton, 292 Ky. 407, 166 S.W.2d 870 (1942); see also 62 Am. Jur. 2d Premises Liability § 87 (1990). To survive summary judgment, it was incumbent upon Freeman to present sufficient facts that when viewed in a light most favorable to her created a material issue of fact precluding entry of summary judgment. Succinctly stated, Freeman must have presented sufficient facts demonstrating that she was an invitee of Toys for Tots at the time of her injury.

When viewing the facts most favorable to Freeman, it appears that Toys for Tots obtained a lease to use Building 48 for the storage of toys.[1] Freeman was a volunteer for Toys for Tots. She went to Building 48 to inspect and process the toys stored there. Building 48 was dilapidated and in a state of

disrepair. Upon exiting the building, Freeman was required to negotiate an exterior staircase. The staircase was also in need of repair. Some steps were missing and others were simply in a deteriorated condition. While descending the stairs, a wooden stake emanating from the steps pierced through Freeman's shoe and lodged into Freeman's foot. As a consequence, Freeman eventually suffered an amputation of her leg above the knee.

In this Commonwealth, the law is well-settled that an invitee is an individual who:

(1) . . . enters by invitation, express or implied, (2) [the] entry is connected with the owner's business or with an activity the owner [or possessor] conducts or permits to be conducted on his land and (3) there is mutuality of benefit or benefit to the owner" [or possessor]. Johnson v. Lone Star Steakhouse & Saloon of Kentucky, Inc., 997 S.W.2d 490, 491-492 (Ky. App. 1999) (quoting Black's Law Dictionary, 827 (6th ed. 1990)). . . .

West v. KKI, LLC, 300 S.W.3d 184, 190-191 (Ky. App. 2008). Also, where the premises is subject to a lease, the general rule is that the lessee is liable to an invitee or licensee for injury caused by a defect in the premises:

At common law, subject to certain exceptions, the occupier or tenant, and not the landlord, is liable for injuries to a third person on or off the premises caused by the condition or use of the demised premises. It is the well-settled general rule that the duties and liabilities of a landlord to persons on the leased premises by the consent of the tenant are the same as those owed to the tenant himself. For this purpose they stand in his shoes. This rule applies to the tenant's wife or child. Where the tenant has no redress against the landlord, those on the premises in the tenant's right are likewise barred. Visitors, customers, servants, employees and licensees in general of the tenant are on the premises as guests, etc., of the tenant, and not of the landlord. Whatever rights such invitation or license from the lessee may confer, as against such lessee, as against the lessor it can give no greater rights than the lessee himself has. Accordingly, it is a general rule that the landlord is not liable to persons on the premises in the right of the tenant for injuries from defects in the condition of the demised premises. This rule applies to the tenant's wife or child or to other members of his family. It also applies to the tenant's employees, even though the property is leased for a business purpose such as a mill or factory, or for a business purpose such as a store, a lease of which contemplates an invitation to the public to enter for the transaction of business.

The rule that the landlord is not liable to persons in the right of the tenant for injuries from defects in the condition of the demised premises applies also to structural defects.

Clary v. Hayes, 300 Ky. 853, 190 S.W.2d 657, 659-660 (1945); see also 13 David J. Leibson, Kentucky Practice -- Tort Law § 10.76 (2009).

In our case, Freeman testified that Building 48 was leased to Toys for Tots. Additionally, Freeman

presented facts demonstrating that: (1) Toys for Tots expressly invited her to enter Building 48, (2) her entry into Building 48 was directly related to Toys for Tots' charitable activity, and (3) Toys for Tots was benefited by her entry into Building 48. Thus, Freemen provided sufficient facts that her status on the premises at the time of injury could be determined as that of an invitee whereupon Toys for Tots would have been liable for her injury as lessee of Building 48. See West, 300 S.W.3d 184; and Clary, 190 S.W.2d 657.

It matters not that Freeman was an unpaid volunteer at the time of her entry into Building 48 and subsequent injury. We are convinced that an unpaid volunteer may be either an invitee or a licensee depending upon the particular facts of each case. Cozine v. Shuff, 378 S.W.2d 635 (Ky. 1964) (citing Cain v. Friend, 171 Cal. App. 2d 806; 341 P. 2d 753 (1959)).

Upon the foregoing, we are of the opinion that material issues of fact exist upon whether Freeman was an invitee or a licensee at the time of her injury. As such, there also exist material issues of fact upon whether appellees alleged legal malpractice caused damage, thus precluding entry of summary judgment dismissing such claim. Particularly, Freeman has raised issues of fact upon whether "but for" appellees' negligence she probably would have been successful in her personal injury claim against Toys for Tots. Marrs, 95 S.W.3d at 860.

In sum, we hold that the circuit court erroneously rendered summary judgment dismissing Freeman's legal malpractice claim against appellees.[2]

For the foregoing reasons, the summary judgment of the Jefferson Circuit Court is reversed and this cause is remanded for proceedings consistent with this opinion.

ALL CONCUR.

1. In her deposition, Tonia T. Freeman stated Toys for Tots held a lease upon Building 48.

2. We note that the summary judgment dismissed all claims against appellees. However, Freeman only challenges the dismissal of the legal malpractice claim in this appeal.