

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 22, 2015 Session

**KRYSTAL CHOATE EX REL. CLAYTON C. v. VANDERBILT
UNIVERSITY**

**Appeal from the Circuit Court for Davidson County
No. 10C3835, 10C2294 Hamilton V. Gayden, Jr., Judge**

No. M2014-00630-COA-R3-CV – January 25, 2016

A patient suffered a blunt-force trauma head injury when he fell while attempting to mount a wheelchair accessible scale at a dialysis clinic. Complications from this injury led to his death. Plaintiff, the patient's former spouse, brought two wrongful death actions on behalf of the patient's minor child. Each action eventually named as defendants the dialysis clinic and the owner of the property where the dialysis clinic was located. After the trial court consolidated the actions, the property owner filed a motion for summary judgment. The court granted the motion, concluding the property owner had no liability under any legal theory asserted by Plaintiff. We affirm the dismissal of the claims against the property owner.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and RICHARD H. DINKINS J., joined.

Larry D. Ashworth and Chelsea B. Ashworth, Nashville, Tennessee, for the appellant, Krystal Choate.

Steven E. Anderson, Sara F. Reynolds, and Sean C. Wlodarczyk, Nashville, Tennessee, for the appellee, Vanderbilt University.

OPINION

I. FACTUAL BACKGROUND¹

On July 2, 2009, David L. Cox, Sr. died, survived by his young son, Clayton. Among other ailments, Mr. Cox suffered from end-stage renal disease.² For patients with end-stage renal disease, dialysis replaces some of the functions of healthy kidneys by “removing waste, salt and extra water to prevent them from building up in the body” and maintaining “a safe level of certain chemicals in the blood.” A to Z Health Guide – “Dialysis,” National Kidney Foundation, <https://www.kidney.org/atoz/content/dialysisinfo> (last visited January 6, 2015).

Thirteen days prior to his death, on June 19, 2009, Mr. Cox visited the Vanderbilt Dialysis Clinic (the “Clinic”) for one of his thrice weekly dialysis treatments. He had been going to the Clinic for dialysis since the mid-2000’s. Although Vanderbilt University owns the building and property where the Clinic is located, Bio-Medical Applications of Tennessee, Inc. (“Bio-Medical”) operated the Clinic, and a Bio-Medical employee assisted Mr. Cox with his admission.

Prior to dialysis treatment, patients are weighed. According to Robin Hensley, a nurse practitioner who worked for Vanderbilt University and performed rounds at the Clinic, weighing helps in approximating the amount of fluid buildup since a patient’s last dialysis treatment. In this instance, before weighing, Mr. Cox requested to use the restroom. As on previous occasions, he arrived at the Clinic in a wheelchair. His right leg had been amputated below the knee two months before, so a Bio-Medical patient care technician wheeled him to the restroom. The patient care technician instructed him to signal her when he finished by using a call string inside the restroom.

After approximately ten minutes, the patient care technician checked on Mr. Cox, who had not yet signaled. Speaking through the restroom door, Mr. Cox said he was fine but not finished yet. The patient care technician again instructed Mr. Cox to signal her when he finished. The signal never came.

Mr. Cox left the restroom while his patient care technician was assisting another

¹ Except as otherwise indicated, the facts are taken from the complaints, the parties’ statements of undisputed material facts, or affidavits filed in support of the parties’ motions for summary judgment.

² End-stage renal disease is a “stage of kidney impairment that appears irreversible and permanent and requires a regular course of dialysis or kidney transplantation to maintain life.” 42 C.F.R. § 406.13 (2015); *see also* 42 C.F.R. § 482.70 (2015).

patient. At Mr. Cox's request, the facility secretary, who was also an employee of Bio-Medical, showed him into the treatment area and to an isolation room. The facility secretary instructed Mr. Cox to wait in the isolation room for his patient care technician to come get him. Despite acknowledging the facility secretary's instructions, Mr. Cox later left the room unaccompanied.

The Clinic had one scale, less than four inches tall and less than six feet long, with a ramp on one end. Bio-Medical employees advise patients in wheelchairs that they must be escorted to and assisted on and off of the scale, and employees receive training on weighing patients in wheelchairs. After leaving the isolation room, Mr. Cox attempted to mount the scale without assistance. A Bio-Medical employee present that day described what happened next:

I was standing at Station 4 about 20 feet away from the scales on which we weigh patients. Out of the corner of my eye, I saw Mr. Cox coming around the perimeter of the nurses^[1] station in a wheelchair at a fast pace without an escort. Before I could say or do anything, he reached the ramp to the scale and tried to roll up the ramp. He tipped over backwards and hit the floor.

Meanwhile, Mr. Cox's patient care technician was looking for him near the restroom when she heard a commotion coming from the treatment area. Going to the sound of the commotion, she discovered Mr. Cox lying on his back on the floor near the scale and his overturned wheelchair. Although several people were attending to him, including Ms. Hensley, the Vanderbilt nurse practitioner, he was conscious and talking. The patient care technician told Mr. Cox, "You were supposed to wait on me." He replied, "Yes, I know."

The Nashville Fire Department transported Mr. Cox from the Clinic to the Vanderbilt Emergency Department. A CT imaging study of his head revealed an acute, moderate size, left subdural hematoma and midline fracture of the occipital bone. After admission to the Vanderbilt University Medical Center ("VUMC"), Mr. Cox was transferred to the Neuro Intensive Care Unit for further treatment and observation. Mr. Cox's neurological condition worsened, and he exhibited weakness on his right side and confusion on June 21. That same day, Mr. Cox underwent an emergency craniotomy for evacuation of the subdural hematoma.

Following the operation and after sedation medication had been discontinued for twelve hours, Mr. Cox was minimally responsive and did not follow commands. By June 23, he was unresponsive, both generally and to painful stimuli. On June 24, Mr. Cox underwent an additional surgery, but he remained non-responsive the following day. VUMC discharged Mr. Cox on June 30, 2009, to Alive Hospice in Madison, Tennessee, where he died. His

death certificate showed the cause of death as “[b]lunt force head injuries.”

II. PROCEDURAL HISTORY

Krystal Choate, the former spouse of Mr. Cox and the mother of his minor son, filed two successive wrongful death lawsuits on behalf of Clayton in the Circuit Court for Davidson County, Tennessee. Her first complaint, filed on June 18, 2010, named as defendants Vanderbilt University and Fresenius Medical Care North America d/b/a Fresenius Medical Care. For causes of action, Ms. Choate asserted negligence, negligence *per se*, premises liability, and loss of consortium. In her first complaint, Ms. Choate acknowledged that “[t]he acts complained of in this Complaint occurred within the setting of a medical care facility” and that the causes of action “may be determined by a court of law to sound (in whole or in part) as theories of medical malpractice or medical negligence.” The complaint goes on to provide that “the Plaintiff w[ould] prior to expiration of the statute of limitations serve (or already will have at the time of filing of this Complaint served) upon these Defendants . . . proper Notice pursuant to Tenn. Code Ann. § 29-26-121 that a Complaint for medical malpractice, pursuant to Tennessee Code Annotated Title 29, Chapter 26, also known as the Medical Malpractice Act, will be timely and properly filed thereafter.”

On September 30, 2010, Ms. Choate filed her second complaint in which she named Vanderbilt, Fresenius, Renal Care Group, Inc. and Dialysis Associates, L.L.C. as defendants. She did this despite having amended her first complaint, on September 22, 2010, to substitute Bio-Medical for Fresenius. The second complaint asserts the same causes of action as the first with the addition of a claim of medical malpractice. The second complaint also attached copies of apparent pre-suit notice to the defendants and a certificate of good faith.

On December 1, 2010, the trial court entered an agreed order substituting Bio-Medical as the “sole correct Defendant” in the second suit. On that same date, the court also entered an agreed order consolidating Ms. Choate’s two actions.

Vanderbilt filed a motion for summary judgment along with supporting materials on August 1, 2013. The motion identified several grounds for dismissal. Vanderbilt argued that the second of Ms. Choate’s suits should be dismissed under the doctrine of prior suit pending and that the first should be dismissed due to Ms. Choate’s failure to comply with statutory pre-suit notice and certificate of good faith requirements. Vanderbilt also argued that each cause of action failed for various reasons. On the negligence claim, Vanderbilt claimed it owed no duty to Mr. Cox in connection with his admission or weighing at the Clinic and that Ms. Hensley’s care of Mr. Cox post-fall complied with the applicable standard of care. On the negligence *per se* claim, Vanderbilt asserted that the scale complied with the then

applicable provisions of the Americans with Disabilities Act (“ADA”),³ and even so, the ADA could not form the basis for a negligence *per se* claim. With respect to both the negligence and negligence *per se* claim, Vanderbilt also claimed that no reasonable jury could conclude that Mr. Cox was less than fifty percent at fault for his injury. Finally, Vanderbilt argued that a minor child had no independent cause of action for loss of consortium.

Bio-Medical filed its own motion for summary judgment along with supporting materials. Bio-Medical’s motion incorporated Vanderbilt’s arguments but also argued dismissal was appropriate because it did not receive pre-suit notice of either of Ms. Choate’s suits. Ms. Choate filed a motion for partial summary judgment on the issue of liability.

On February 7, 2014,⁴ the court entered an order granting Vanderbilt summary judgment as to both pending cases and denying Ms. Choate’s motion for summary judgment as to Vanderbilt. The court found “that Vanderbilt is not liable under theories of premises liability (non-delegable duty allegation); negligence; negligence *per se*; Americans with Disability Act (“ADA”) and alleged medical malpractice.” The court also found “no evidence . . . that Vanderbilt exercised any control over the weight scale in question.” As for Bio-Medical’s motion, the court held that both cases “sounded in medical malpractice” but that there were disputed facts warranting submission of the case to a jury. Additionally, the court held that the Dead Man’s statute did not apply to the case. *See* Tenn. Code Ann. § 24-1-203 (2000). The court apparently reserved judgment on the prior suit pending doctrine and the issue of pre-suit notice, stating “[t]he Court must still unravel the procedural aspects of the two pending lawsuits and directs additional briefs from [Ms. Choate and Bio-Medical].”

On February 21, 2014, Ms. Choate filed a motion to alter or amend the court’s February 7, 2014 order or for entry of a final judgment or for permission to pursue an interlocutory appeal. In addition, Ms. Choate filed a notice of dismissal of her first lawsuit.⁵ On March 25, 2014, the trial court entered an order denying Ms. Choate’s motion to alter or

³ 42 U.S.C. § 12111 (2015), *et. seq.*

⁴ Despite granting Vanderbilt’s motion for summary judgment, denying Ms. Choate’s motion for summary judgment as to Vanderbilt, and apparently denying Bio-Medical’s motion for summary judgment, the order further provided that “Vanderbilt will submit an Order as to their motion for summary judgment.” In response to the directive, apparently Vanderbilt and Ms. Choate filed competing orders with the court entering the proposed order submitted by Ms. Choate. The order, entitled “Plaintiff’s Competing Order Granting Vanderbilt University’s Motion for Summary Judgment,” largely tracked the language of the order entered on February 7, 2014.

⁵ The notice of voluntary dismissal does not appear in the record on appeal.

amend but granting her motion for entry of a final judgment. Six days later, the court entered an order voluntarily dismissing Ms. Choate's first lawsuit without prejudice.

Ms. Choate raises three issues on appeal. She contends that the trial court erred: (1) by dismissing her claims against Vanderbilt based on theories of premises liability, negligence, negligence *per se*, violations of the ADA, and medical malpractice; (2) in finding that Vanderbilt exercised no control over the property and/or weight scales in question; and (3) in finding the Tennessee Dead Man's statute inapplicable. In its reply brief, Vanderbilt argues that the claims against them were properly dismissed but that the court erred by not also dismissing the claims against it under the prior suit pending doctrine and comparative fault. Vanderbilt also submits that Ms. Choate's premises liability claim should have been additionally dismissed for failure to state a claim.

III. ANALYSIS

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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." Tenn. R. Civ. P. 56.04; *see also Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 83 (Tenn. 2008); *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000); *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993). The party moving for summary judgment bears the burden of demonstrating both that no genuine dispute of material facts exists and that it is entitled to a judgment as a matter of law. *Martin*, 271 S.W.3d at 83.

After oral argument in this matter, our Supreme Court overruled *Hannan v. Alltel Publishing Co.*, 270 S.W.3d 1 (Tenn. 2008). *Rye v. Women's Care Center of Memphis, M PLLC*, No. W2013-00804-SC-R11-CV, ___ S.W.3d ___, 2015 WL 6457768, at *22 (Tenn. Oct. 26, 2015). As a result, the moving party's burden of production is the same as that in the federal system:⁶

when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim, or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense.

⁶ Because the second lawsuit was filed prior to July 1, 2011, the summary judgment standard set forth by statute for parties that do not bear the burden of proof at trial is not applicable. *See* Tenn. Code Ann. § 20-16-101 (Supp. 2015).

Id. Furthermore, when a properly supported motion for summary judgment is made,

the nonmoving party “may not rest upon the mere allegations or denials of [its] pleading,” but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, “set forth specific facts” *at the summary judgment stage* “showing that there is a genuine issue for trial.” Tenn. R. Civ. P. 56.06. The nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co.[v. Zenith Radio Corp.]*, 475 U.S. [574,] 586, 106 S. Ct. 1348. The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party.

Id. (emphasis in original).

A. STANDARD OF REVIEW

A trial court’s decision on a motion for summary judgment enjoys no presumption of correctness on appeal. *Martin*, 271 S.W.3d at 84; *Blair v. W. Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004). We review the summary judgment decision as a question of law. *Martin*, 271 S.W.3d at 84; *Blair*, 130 S.W.3d at 763. Accordingly, we must review the record de novo and make a fresh determination of whether the requirements of Tennessee Rule of Civil Procedure 56 have been met. *Eadie v. Complete Co.*, 142 S.W.3d 288, 291 (Tenn. 2004); *Blair*, 130 S.W.3d at 763.

In granting a motion for summary judgment, the Tennessee Rules of Civil Procedure require the trial court to state the grounds for its decision. Tenn. R. Civ. P. 56.04; *Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 316 (Tenn. 2014). Here, the only basis given for the grant of summary judgment is the absence of evidence “that Vanderbilt exercised any control over the weight scale in question.” We read that statement to mean that the court concluded there was no duty of care on the part of Vanderbilt in this circumstance, and as a result, Ms. Choate could not establish an essential element of her claims.

B. DUTY OF CARE

All the appealed claims sound in negligence. To prevail on a claim for negligence, a plaintiff must show “(1) a duty of care owed by the defendant to the plaintiff; (2) conduct falling below the applicable standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate, or legal cause.” *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993). Whether a duty exists “is entirely a question of law for the

court.” *Id.*

Vanderbilt had no duty of care relating to the acts occurring when Mr. Cox was injured. The undisputed facts established that employees of Bio-Medical, who were not under the direction of Vanderbilt, were responsible for Mr. Cox’s admission to the Clinic and for weighing Mr. Cox prior to his dialysis treatment. We also find no evidence of an agency relationship between Bio-Medical and Vanderbilt. Although Vanderbilt employees saw patients at the Clinic, the record is devoid of any proof that they were responsible for admission of or weighing dialysis patients. The only Vanderbilt employee present at the Clinic at the time of Mr. Cox’s injury, Ms. Hensley, only interacted with Mr. Cox after his fall.⁷ She denied any responsibility for patient intake or discharge or any role in weighing patients.

Ms. Choate argues that the certificate of need creates a duty on the part of the holder of the certificate. A certificate of need is the required “permit granted by the [Tennessee Health Services and Development Agency] to any person for the establishment or modification of a health care institution, facility, or covered health service, at a designated location” Tenn. Code Ann. §§ 68-11-1602, -1607(a)(1) (2013). Ms. Choate’s certificate of need argument fails, however, because the record contains no proof that Vanderbilt held the certificate of need for the Clinic.

Vanderbilt did have a duty relating to the premises where Mr. Cox’s injury occurred. As our Supreme Court has stated, “an owner or occupier of premises has a duty to exercise reasonable care with regard to social guests or business invitees on the premises.” *Rice v. Sabir*, 979 S.W.2d 305, 308 (Tenn. 1998). However, when the owner has parted with control of the premises to some degree, the owner’s duty liability depends on degree of control the owner had or has over the defective or dangerous condition causing the injury. *See Lethcoe v. Holden*, 31 S.W.3d 254, 256, 258 (Tenn. Ct. App. 2000) (“[B]ecause the general rule of non-liability of a landlord is premised on the assumption that the landlord is not in control of the property, a landlord may be held liable where the landlord in fact retains control of the property.”). In this case, Vanderbilt had no control over the area in which Mr. Cox was injured, and Ms. Choate pointed to no dangerous condition existing at the time Vanderbilt surrendered possession to Bio-Medical that would give rise to potential liability for Vanderbilt.

For much of the same reason, we conclude Vanderbilt had no duty with respect to the

⁷ To the extent the second complaint can be interpreted as alleging that Ms. Hensley was negligent in her post-fall care of Mr. Cox, Ms. Hensley stated she “complied with the standard of care as to Mr. Cox on June 19, 2009, at all times,” and Ms. Choate presented no contrary opinion.

weight scale. The record contains no proof that Vanderbilt operated or maintained the scale. The scale also does not appear to be, and there is no allegation that the scale is, a fixture of the premises. Consequently, Vanderbilt would have no liability even if the scale did not comply with the ADA⁸ or applicable building codes⁹ as argued by Ms. Choate.

C. DEAD MAN'S STATUTE

In its order granting Vanderbilt summary judgment, the trial court also concluded that the Dead Man's statute did not apply to the witnesses in this case. The Dead Man's statute provides as follows:

In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be

⁸ We are not convinced that accessibility standards were established for medical diagnostic equipment, such as weight scales, at the time of Mr. Cox's injury. The Patient Protection and Affordable Care Act, which was enacted in 2010, directed the issuance of accessibility standards for medical diagnostic equipment. PL 111-148, March 23, 2010, 124 Stat 119. The Act added the follow the language to the Rehabilitation Act of 1973:

(a) Standards

Not later than 24 months after March 23, 2010, the Architectural and Transportation Barriers Compliance Board shall, in consultation with the Commissioner of the Food and Drug Administration, promulgate regulatory standards in accordance with the Administrative Procedure Act (2 U.S.C. 551 et seq.) setting forth the minimum technical criteria for medical diagnostic equipment used in (or in conjunction with) physician's offices, clinics, emergency rooms, hospitals, and other medical settings. The standards shall ensure that such equipment is accessible to, and usable by, individuals with accessibility needs, and shall allow independent entry to, use of, and exit from the equipment by such individuals to the maximum extent possible.

(b) Medical diagnostic equipment covered

The standards issued under subsection (a) for medical diagnostic equipment shall apply to equipment that includes examination tables, examination chairs (including chairs used for eye examinations or procedures, and dental examinations or procedures), weight scales, mammography equipment, x-ray machines, and other radiological equipment commonly used for diagnostic purposes by health professionals.

29 U.S.C. § 794f (2015).

⁹ None of the building codes cited by Ms. Choate appear applicable to the weight scale involved here.

allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party.

Tenn. Code Ann. § 24-1-203. The statute is intended “to protect decedents’ estates from fraudulent or fictitious claims.” *Boote v. Shivers*, 198 S.W.3d 732, 743 (Tenn. Ct. App. 2005). However, “it must be construed narrowly in favor of the admission rather than the exclusion of evidence.” *Id.* at 744.

Ms. Choate argues that the Dead Man’s statute does apply. She points out that she is the legal representative of the estate of Mr. Cox and that this action is brought in her capacity as legal representative. Therefore, she submits the action is brought by Mr. Cox’s estate. We disagree.

This case is clearly a wrongful death action, the benefit of which passed to Clayton because Mr. Cox had no surviving spouse. *See* Tenn. Code Ann. § 20-5-106(a) (2009). Although the action may be brought in the name of a personal representative, the action is “for the benefit of the [deceased] person’s . . . next of kin,” and any recovery would not be subject to claims of Mr. Cox’s creditors. *Id.*; *see also Memphis St. Ry. Co. v. Cooper*, 313 S.W.2d 444, 448 (1958) (In a wrongful death action, “[n]either the claim nor the recovery . . . becomes a part of the estate of deceased and the personal representative as such has no interest in recovery but is only a medium for enforcing the rights of others.”). When the estate has no interest in the outcome, the Dead Man’s statute does not apply. *See Hale v. Kearly*, 67 Tenn. 49, 51-52, (1874); *Newark Ins. Co. v. Seyfert*, 392 S.W.2d 336, 345-46 (Tenn. Ct. App. 1964).

D. ADDITIONAL GROUNDS FOR SUMMARY JUDGMENT

Because we conclude that Vanderbilt negated an essential element of each of Ms. Choate’s claims, we decline to address any additional grounds for summary judgment raised by Vanderbilt but either not relied upon or not considered by the trial court.

IV. CONCLUSION

On a properly supported motion for summary judgment, Vanderbilt negated an essential element of each of Ms. Choate’s claims. Specifically, under the circumstances referenced in the second complaint, Vanderbilt owed no duty to the decedent, Mr. Cox. We also conclude that the Dead Man’s statute is not applicable to this case. Accordingly, we affirm the judgment of the trial court.

W. NEAL MCBRAYER, JUDGE