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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000521-MR

TONIA T. FREEMAN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 07-CI-010400

BECKER LAW OFFICE, PLC; KEVIN RENFRO; BUBALO, HEISTAND & ROTMAN, PLC;[1] AND DIANNE E. SONNE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, NICKELL, AND STUMBO, JUDGES.

NICKELL, JUDGE: This is a legal malpractice case in which Tonia Freeman alleges the Becker Law Office, PLC (BLO); Kevin Renfro, BLO's managing

[1] When the legal services contract at the heart of this appeal was executed in December 2004, the firm's name was Bubalo & Heistand, PLC. The firm's current name is Renfro, Bubalo, Heistand & Rotman, PLC.

partner; the law firm of Bubalo, Heistand & Rotman, PLC (BHR);[2] and Dianne E. Sonne, an attorney employed by BHR (collectively Defendants), failed to file a premises liability claim against the Marine Toys for Tots Foundation, Inc.[3] (Foundation) before the one-year statute of limitations[4] expired. Having carefully reviewed the jury's verdict in favor of Defendants, we affirm the verdict and the trial court's judgment for the simple reason that Freeman did not prove the Foundation was responsible for the building at which Freeman sustained a foot injury that progressed to above-the-knee amputation.

FACTS

In 1994, Freeman, a civilian, began volunteering for the annual Toys for Tots holiday toy drive for needy children in Hardin County and the surrounding community. On October 15, 2004, at the request of James "Doc" Cochran, an active duty United States Navy medic assigned to the United States Marine Corps and the Assistant Coordinator for the 2004 toy drive, Freeman drove to the Fort Knox Military Reservation to meet Cochran and inspect a shipment of toys being stored on post in Building 48, a dilapidated warehouse slated for demolition. While descending a rickety, rotten staircase attached to Building 48, Freeman's left

[2] The Brief for Appellant identifies BLO as a subsidiary of BHR.

[3] The complaint references "Marine Toys for Tots (Toys for Tots)" and thereafter "Toys for Tots" without use of the word "Foundation." However, there were numerous references to the "Marine Toys for Tots Foundation, Inc." at trial and it is clear the Foundation is the entity Freeman believes was responsible for her injury and against whom Defendants should have filed suit.

[4] Kentucky Revised Statutes (KRS) 413.140(1)(a).

foot became "stuck" and with Cochran's assistance, she dislodged her foot and continued down the stairs. She then drove herself to a salon run by her parents. Freeman, a Type I diabetic suffering from diabetic neuropathy,[5] felt and noticed nothing unusual about her left foot.

While at the salon, Freeman's daughter observed what appeared to be a "rock" in her mother's shoe. Upon inspecting her shoe, Freeman discovered a piece of wood had penetrated her shoe and was lodged inside her foot. She called Cochran. He came to her location with his medical bag, removed wood fragments from her foot, cleaned the wound, administered a tetanus shot and advised her to see her doctor.

Freeman made an appointment with her primary care physician, Dr. Hariklia Wilk. At the appointment a few days later, Dr. Wilk cleaned the wound, removed more slivers of wood, prescribed an antibiotic and sent her home with instructions that she return to the office if her condition worsened. Over the weekend, an infection developed and upon returning to Dr. Wilk's office, Freeman was immediately referred to Dr. Neal Sharpe in Louisville who performed surgery on her left foot. Over the next twenty-eight months, Freeman underwent twenty-seven incremental surgical procedures, ultimately resulting in above-the-knee amputation of her left leg.

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[5] A form of nerve damage affecting sensation, movement and other aspects of health. Freeman's neuropathy manifested itself in a lack of sensation in portions of her feet. According to Freeman's deposition, she had no feeling in her left foot at the point of injury.

While recuperating from one of the medical procedures, Freeman saw a television commercial for BLO. She contacted the firm and on December 17, 2004, signed a contract for legal services on a "Federal Tort Claim." Renfro signed the contract on behalf of BLO.

In January 2005, Renfro addressed a letter of inquiry to the United States Army. William F. Ridlon, II, an attorney, responded on behalf of the Army on January 20, 2005. In the letter, Ridlon explained the Federal Tort Claims Act (FTCA),[6] the protocol for pursuing a claim for damages under the FTCA, and enclosed Standard Form 95 (SF 95), which is used to submit a claim under the Act. Ridlon's letter also stated, FTCA claims

> must be presented to "the Federal agency whose activities gave rise to the claim" and the the (sic) two-year statute of limitation is tolled "as of the date it is received by the appropriate agency." 28 CFR §14.2(b)(1). As the Toys for Tots program is operated under direction of the U.S. Marine Corps that may be the appropriate agency. The address for submitting claims to the U.S. Marine Corps is listed at the end of this letter. If, however, you are alleging negligence by a U.S. Army employee, then a claim should be submitted to this office.

Ridlon's letter also suggested that as a volunteer for a program "operated by the U.S. Marine Corps," Freeman might be covered by the Federal Employees Compensation Act (FECA)[7] and, because "the Toys for Tots program is operated

[6] 28 USC §§1346(b) & 2672-2680, as implemented by regulations of the Attorney General, 28 CFR Part 14, and the United States Army, 332 CFR Part 536.50 and Army Regulation 27-20. To trigger the limited waiver of sovereign immunity afforded by the FTCA, there must be proof of negligence or wrongful conduct by a government employee acting within the scope of employment that was the proximate cause of the alleged damages. Claims under the FTCA must be brought within two years. 28 USC §4201(b).

[7] 5 USC §§ 8101, et seq.

by the Marine Toys for Tots Foundation, . . . it may be that no 'employee of the government' was involved, and instead any remedy your client has is that (sic) against that organization."

By August 31, 2005, Renfro had submitted SF 95 to the "Marine Corps/Dept. of the Army" seeking $5,000,000.00 but also mentioning the figure $10,000,000.00. Ridlon responded in writing again to clarify from whom damages were being sought and the precise amount.[8] Ridlon explained the Marine Corps is part of the Department of the Navy and wholly separate from the Army. He encouraged Renfro to forward the SF 95 to the Marine Corps Commandant in Quantico, Virginia. Ridlon then mentioned several issues that concerned him.

> The identified or reasonably identifiable evidence does not provide any indication as for whom Ms. Freeman alleges she was volunteering. This is material to the investigation. No evidence has been presented on the issue of liability other than that Ms. Freeman alleges that she was injured at Building 48. The mere fact that she was injured on federal property does not support a claim under the FTCA. *Growdy,* (sic) *supra; Thompson, supra.*[9]
>
> Moreover, it is essential to determine her status and by what authority she alleges she was doing volunteer work, and specifically for whom she was doing volunteer work. Evidence on that is requested.

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[8] On October 9, 2006, Freeman submitted a revised SF 95 claiming a total of $10,000,000.00 for personal injury. The claim was again submitted to the "Marine Corps/Department of the Army."

[9] *Gowdy v. United States*, 412 F.2d 525, 535 (C.A.Mich. 1969); *Thompson v. United States,* 592 F.2d 1104, 1107 (C.A.Cal., 1979).

The Ft. Knox Military Reservation is an exclusive federal enclave. KRS 3.030. Kentucky ceded all jurisdiction over it to the United States. *Lathey v. Lathey,* 305 S.W.2d 920, 922 (1957); *Young v. Minton,* 344 F.Supp. 423, 426 (W.D.Ky. 1972). As such, the Military Reservation is not open to the public except on such terms and conditions as the Army has set.

Ridlon detailed the facts revealed by his investigation of the incident:

The available information indicates that in September 2004, the 8 I & I Duty, U.S. Marine Corps, requested the use of warehouse storage space on Ft. Knox, KY. This request was made pursuant to Fort Knox Reg. 420-13, Facilities Engineering, Buildings (21 NOV 2000) (copy enclosed). On September 14, 2004, Staff Sergeant Charles J. Green, Jr., USMC, then assigned to 8 I & I Duty, USMC, signed for Building 48 on USAARMC Form 185 (copy enclosed), for temporary use through December 25, 2004. The purpose of the temporary use was "Storage". A realty specialist in the Directorate of Based Operations Support (DBOS), Ft. Knox, signed the USAARMC Form 185 for the U.S. Army. The DBOS employee recalls that the USMC requested the use of a warehouse on Ft. Knox to store toys, etc., for the Toys for Tots program; that there was spare space in Building 48, and that the USMC was allowed to sign for it. No disclosure was made that non-military personnel would be working at the warehouse and no disclosure was made that any private organization would be involved.

Para. 2.c, Fort Knox Reg. 420-13, provides for a pre-occupancy inspection of buildings "to determine that the building will be acceptable, identify requirements for repairs or maintenance". No request for repairs or maintenance, including cleaning, was made as to Building 48, and it was accepted for use as storage. The form indicates that Building 48 was inspected on October 28, 2004, which was after Ms. Freeman alleges injury on October 15, 2004.

Your letter of August 11th states "[t]he Fort Knox military reservation advised [Freeman] and her 'crew' that toys

that had been collected for the Toys for Tots Program were stored. . .”

Please identify who allegedly so advised Ms. Freeman and provide copies of any supporting evidence.

As explained above, there are federal regulations directly addressing the issues concerning Ms. Freeman’s authority to perform volunteer work on Ft. Knox. Thus, one of the issues is whether the person who allegedly advised Ms. Freeman that toys for the Toys for Tots program were stored at Ft. Knox had authority to grant permission for her to enter the Military Reservation and do volunteer work.
. . .

Additionally, there is no evidence concerning where Ms. Freeman was allegedly injured. A number of photographs of the inside and outside of Building 48 were included as Exhibit A. However, neither the SF 95, Exhibits nor your letter identify where the injury allegedly occurred.. (sic) As Ms. Freeman did not report her injury, no investigation was conducted. Please identify the alleged site of the injury.

It is not apparent that Ms. Freeman has a viable cause of action under a premises liability theory. *Autry v. Western Kentucky University,* 2005 Ky. App. LEXIS 58*28-29 (KY. (sic) App., Mar. 4, 2005) (unpub.),[10] recently reviewed Kentucky law in premises liability actions:

> Premises liability requires the presence of both possession and control over the premises, because the entity in possession is normally best able to prevent any harm to others. [citing *Merritt v. Nickelson,* 407 Mich. 544, 287 N.W.2d 178, 180 (Mich.

[10] This Kentucky Court of Appeals opinion, also found at 2005 WL 497193, was depublished due to operation of Kentucky Rules of Civil Procedure (CR) 76.28(4) when the Kentucky Supreme Court granted discretionary review. The latest rendition of this case is found at *Autry v. Western Kentucky University,* 219 S.W.3d 713 (Ky. 2007). (footnote added).

> 1980).] A "possessor" is defined as a person who is in occupation of land with intent to control it. [citing Restatement (Second) of Torts, § 328E (1965 & Supp. 2004)].
>
> As the facts show that the Army had relinquished possession and control of Building 48 to the Marine Corps a month before Ms. Freeman was allegedly injured, the Army does not meet the definition of "possessor".
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> Further, even if that element of a premisese (sic) liability cause of action is established, due to the lack of authority for Ms. Freeman and whoever she was doing volunteer work for to secure written permission to perform such work on the Ft. Knox Military Reservation, Ms. Freeman's status appears to be no more than that of a licensee, and possibly not even that.

Ultimately, the Army and Navy denied claims under the FTCA. As liability carrier for Marine Toys for Tots, Travelers Insurance denied Freeman's claim against the Foundation stating:

> as to Marine Toys for Tots it is our position that this claim is time barred.[11] Marine Toys for Tots is not a governmental or military agency. It is a private non-profit corporation incorporated in the State of Virginia. The provisions of the Federal Tort Claim Act would not apply to the Marine Toys for Tots.
>
> Without filing a lawsuit against any entity, and without telling

Freeman the statute of limitations had expired on at least one potential claim,[12] Sonne sent Freeman a letter dated May 18, 2007, releasing her as a client because:

[11] The one-year statute of limitations would have expired October 15, 2005. (footnote added).

[12] Statutes of limitations had not expired on claims against the military, if any were viable.

> [u]nfortunately, after a review of your case, we have decided that we cannot continue as the attorneys in your case. Although we have completed a lot of work in your case thus far, our resources and time restraints do not allow us to go forward any further.

On October 18, 2007, after securing new counsel, Freeman filed a complaint against Defendants alleging: "Toys for Tots had sole possession, custody and control of" the building where she was injured; "Toys for Tots did, in fact, obtain a liability insurance policy" on the warehouse; as Freeman left Building 48 she injured her foot "as a result of the negligence of Toys for Tots, its agents and employees[;]" Freeman "never saw an attorney while she was represented by [BLO], although she received correspondence indicating that her claim was being handled by Defendant Renfro[;]" around March 3, 2006, BLO transferred Freeman's claim to [BHR] without securing Freeman's consent and Sonne assumed responsibility for the case; and, had Defendants filed a timely complaint against the "proper party," Freeman would have recovered. In the complaint, Freeman alleged Defendants committed legal malpractice, breached an express warranty, and violated the Kentucky Consumer Protection Act.[13] She sought a jury trial, damages for the injuries she incurred due to Defendants' negligence, pre- and post-judgment interest, attorneys' fees, and costs.

PROCEDURAL BACKGROUND

[13] KRS 367.170.

In 2008, the Jefferson Circuit Court granted summary judgment in favor of Defendants. In *Freeman I*,[14] Freeman appealed to this Court, maintaining that because Toys for Tots leased Building 48 from the Army and she went to the warehouse at the invitation of Cochran to do volunteer work benefitting Toys for Tots, the Foundation owed her a duty as an invitee. She further argued the trial court had erroneously deemed her to be a licensee and whatever her status, that was a decision to be made by the jury. As a result of Freeman's contentions and her deposition, the panel focused on whether she was an invitee or licensee at the time of injury. Believing there were sufficient facts upon which jurors could find Freeman was an invitee, the panel reversed and remanded for further proceedings.

On remand,[15] the trial court applied the "suit within a suit" procedure discussed in *Marrs v. Kelly,* 95 S.W.3d 856 (Ky. 2003). At Defendants' request, trial was bifurcated into two phases—phase 1 was to focus solely on the underlying premises liability claim and proof was to be restricted to whether Freeman would likely have succeeded on a claim against the Foundation if suit had been timely filed. If jurors found in favor of Freeman in phase 1, phase 2 would focus on the legal malpractice claim.

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[14] *Freeman v. Becker Law Office, PLC,* No. 2009-CA-000676-MR (2010 WL 2428135, unpublished). All three claims in the complaint were dismissed by the trial court in 2008, but only the legal malpractice claim was challenged on appeal to this Court. Thus, that was the only matter addressed on remand.

[15] As trial unfolded, Freeman's assertion in her deposition that the Foundation "leased" Building 48 was never proved; no lease was ever produced. Additionally, Defendants stipulated Freeman was an invitee.

A mistrial was declared in December 2011 due to prejudicial pre-trial publicity. Phase 1, focusing solely on "whether, but for the Defendants' legal negligence, Freeman would have probably been successful in her underlying personal injury claim against Toys for Tots," began in earnest on January 31, 2012.

Freeman's theory of the case was that she volunteered for "Marine Toys for Tots," a single entity comprised of military, civilian and business volunteers organized by the Toys for Tots Foundation, Inc., a not-for-profit charity enjoying 501(c)(3) status from the Internal Revenue Service. In contrast, Defendants argued the Toys for Tots initiative has two components—a military component known as the U.S. Marine Corps Reserve Toys for Tots Program, and a civilian component known as the Marine Toys for Tots Foundation that provides fundraising and support for the military Program. According to Defendants, a claim against the Foundation would have been doomed from inception because Building 48 was assigned to the Marine Corps, not the Foundation.

During closing argument, Freeman's attorney stated, "[t]he only question is whether the Foundation possessed the building." After an eight-day trial and a nine-to-three vote, jurors agreed with the defense and found the Foundation did *not* possess Fort Knox Building 48 when Freeman's foot was punctured by a piece of wood on a badly deteriorated exterior staircase. Having found against Freeman in phase 1, there was no need to proceed to phase 2 to explore the legal malpractice claim. This appeal followed.

ANALYSIS

We have reviewed the voluminous trial record and agree with the jury. The only witness to testify with direct knowledge of the procurement of Building 48 for the 2004 toy drive was Staff Sergeant Green. He testified he arranged for the building, and the completed Form 185 shows the Army temporarily assigned the warehouse to "USMC" for storage. Green further testified it was the local Toys for Tots Coordinator's responsibility to inspect the warehouse, identify needed repairs and submit a work request for those repairs. According to a handwritten notation on Form 185, the only inspection of the warehouse occurred on October 28, 2004, about two weeks *after* Freeman's injury. Green surmised this inspection occurred because Coordinator Arthur[16] had submitted an incident report *after* Freeman was injured. On cross-examination, Green admitted the Program and the Foundation were two separate entities. Neither Arthur nor Cochran could be found at the time of trial, and neither was called as a witness.

Freeman's underlying claim was one of premises liability. "Actionable negligence consists of a duty, a violation thereof, and consequent injury. The absence of any one of the three elements is fatal to the claim." *Illinois Cent. R. R. v. Vincent,* 412 S.W.2d 874, 876 (Ky. 1967) (internal citations omitted). To succeed on the premises liability claim against the Foundation, Freeman had to establish the Foundation was responsible for Building 48. She failed to carry her burden. The warehouse was located on federal property controlled by the Army. Via Form 185, the Army had temporarily assigned use of the warehouse to

[16] First name unknown.

"USMC" for storage. While Freeman argued the Foundation was in possession of Building 48, there was strong proof the Marines, not the Foundation, possessed the warehouse.

The jury heard the evidence and, as trier of fact, found the testimony offered by the defense to be more persuasive than that offered by Freeman, as was its prerogative. *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996). A question of fact was presented to the jury and there is no debate that the instruction about whether the Foundation possessed Building 48 was anything but proper. Following a review of the record, we cannot say the jury's verdict was unsupported by the proof or contrary to law. *See McCoy v. Kilgore's Adm'r,* 306 Ky. 678, 683, 209 S.W.2d 66, 69 (1948). We are confident that in light of the total lack of credible proof that the Foundation possessed Building 48, there was no means by which Freeman could have prevailed on the underlying premises liability claim.

Because Freeman failed to clear the critical first hurdle, proving likely success on the underlying claim against the Foundation, we have no reason to address the myriad of issues[17] raised on this appeal, fascinating though they may be. For the foregoing reasons, the judgment of the Jefferson Circuit Court is AFFIRMED.

[17] The issues raised are whether: the trial court properly applied the "suit within a suit" procedure discussed in *Marrs*; party admissions were wrongly excluded; the trial court improperly restricted Freeman's closing argument; the trial court erroneously allowed attorneys to give opinions on ultimate legal and factual issues; the trial court erroneously admitted evidence of Freeman's alleged noncompliance with medical advice; and, a jury instruction on the "open and obvious doctrine" was incorrectly worded and could have been modified after jury deliberations were underway. Due to our resolution of this appeal, we leave these issues for another day and another case.

ALL CONCUR.

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ORAL ARGUMENT FOR APPELLANT:

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