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Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002161-MR
AND
NO. 2005-CA-002457-MR

JACQUES J. WIGGINTON — APPELLANT

v. APPEALS FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA ISAAC, JUDGE
ACTION NO. 04-CI-00091

MICHAEL SCANLON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS VICE MAYOR OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; SHAWN GILLEN; AND THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: ABRAMSON, JUDGE; KNOPF AND ROSENBLUM, SENIOR JUDGES.[1]

ABRAMSON, JUDGE: Jacques Wigginton, a former City Council member of the Lexington-Fayette Urban County Government (LFUCG), appeals from an August 17,

1 Senior Judges William L. Knopf and Paul W. Rosenblum sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

2005 judgment of the Fayette Circuit Court dismissing his defamation-based complaint against Mike Scanlon, LFUCG's former Vice Mayor; Shawn Gillen, an Administrator of LFUCG's City Council; and the LFUCG. The trial court ruled that Wigginton's claims are barred either by sovereign immunity, by statute of limitations, or, ultimately, by Wigginton's failure to prosecute. Wigginton challenges each of those rulings and contends additionally that the trial judge ought to have recused to avoid the appearance of partiality. Finding the trial court's partial dismissals on immunity and limitations grounds to be correct, but having concluded that the trial court abused its discretion when it dismissed Wigginton's remaining claims for lack of prosecution, we affirm in part, reverse in part, and remand for additional proceedings.

Scanlon was elected Vice Mayor in November 2002. In December, he met with Gillen for an orientation session, during which Gillen allegedly stated that Wigginton had sexually harassed one of the Council's staff workers and had misused Council travel funds. On or about December 12, 2002, Scanlon repeated Gillen's accusations in a letter to the LFUCG's Ethics Commission. That letter became the subject of a January 8, 2003, *Lexington Herald-Leader* newspaper article, in which Scanlon disavowed any personal knowledge of Wigginton's alleged wrongdoing, but repeated the letter's assurance that the accusations came from a reliable source. During the next week or two, Scanlon was interviewed by reporters from several local radio and television stations and, according to Wigginton, he repeated both accusations during those interviews. On or about January 21, 2003, Scanlon filed a formal complaint with the Ethics Commission, which included only the travel fund accusation. The record

indicates that even before Gillen made the alleged accusations regarding Wigginton to Scanlon, the County Attorney had investigated the alleged harassment, but ceased her investigations when the alleged complainant declined to pursue the matter or to give any information. In December 2003, the Ethics Commission exonerated Wigginton of any travel fund abuses.

Wigginton filed his suit on January 8, 2004, alleging that Scanlon and Gillen (and through them their employer, LFUCG) had defamed him: Gillen during the December 2002 orientation, when he voiced the harassment and travel fund accusations to Scanlon, and Scanlon each time he repeated those accusations to reporters and to the Ethics Commission. In addition to his defamation claims, Wigginton's original complaint sought damages for tortious interference with advantageous prospects, for the infliction of emotional distress, and for abuse of the Ethics Commission process.

In a June 18, 2004 order, the trial court dismissed Wigginton's claims against LFUCG and against Scanlon and Gillen in their official capacities under the doctrine of sovereign immunity. It dismissed all defamation claims against Scanlon and Gillen individually that were based on alleged defamatory communications prior to January 8, 2003, on the ground that such claims were barred by the one-year statute of limitations. Additionally, the trial court dismissed the tortious interference claim as inadequately pled under CR 12. The trial court left intact Wigginton's abuse of process/wrongful proceeding claims and did not rule on his emotional distress claim. In light of its limitations ruling, finally, the trial court accorded Wigginton an opportunity to

amend his complaint to allege more specifically any instances of defamation occurring after January 8, 2003.

Wigginton filed his Amended Complaint on August 2, 2004, in which he conceded that he knew of no defamatory publication by Gillen within the limitations period, and so "voluntarily dismisse[d] the remaining claims against Gillen without prejudice." However, the Amended Complaint referred to Scanlon's January 21, 2003 ethics complaint repeating the allegation that Wigginton had misused travel funds, and alleged that after January 8, Scanlon had appeared "on local television and radio stations, including, but not limited to, Clear Channel, Cumulus Broadcasting, WTVQ, WLEX, WDKY, and WKYT Television stations, wherein Scanlon repeated the defamatory statements regarding Plaintiff's character, purported sexual impropriety, sexual harassment, unethical, illegal, and improper activities, theft, deception, fraud and other purportedly inappropriate activities."

On August 17, 2004, Scanlon filed a Renewed Motion to Dismiss Wigginton's defamation claim on the ground that by failing to identify the alleged defamatory statements Wigginton's Amended Complaint still failed to allege defamation with adequate specificity. The trial court agreed, and by order entered September 24, 2004, required Wigginton to file a Second Amended Complaint "that specifically identifies (i) all statements made by Scanlon after January 8, 2003 that Wigginton believes supports his claim for defamation; (ii) the approximate date on which those statements were allegedly made; and (iii) the radio program, television show or other

event at which Scanlon allegedly made such statements." Wigginton then again amended his complaint, this time specifying the dates or approximate dates of several interviews Scanlon allegedly gave to specified radio and television stations and alleging that in these interviews Scanlon repeated, either verbatim or nearly so, the allegations of harassment and travel fund abuse that he first made in his December letter to the Ethics Commission.

Scanlon answered this Second Amended Complaint on October 4, 2004, and discovery commenced with Scanlon's deposition on October 8, 2004 and the submission of interrogatories. In April 2005, Wigginton moved the court to reconsider its prior decision not to recuse. The parties, meanwhile, engaged in protracted negotiations over the scheduling of Wigginton's deposition, but at last agreed on June 17, 2005 as the deposition date. When that date arrived and Wigginton failed to appear for his deposition, offering as excuse only that a family matter had arisen, Scanlon moved pursuant to CR 41.02 to dismiss Wigginton's remaining claims for lack of prosecution. As noted above, the trial court granted this motion by order entered August 17, 2005. The court opined that Wigginton's Second Amended Complaint still violated the court's order to identify any allegedly defamatory statements, and found Wigginton's inadequately explained failure to appear at the deposition that had taken so long to schedule a breach of his duty under CR 41.02 to prosecute his claim diligently. Wigginton sought reconsideration of this order and at the same time again moved the trial judge to recuse. When, on September 20, 2005, the court denied both the CR 59 and the recusal motions, Wigginton brought a timely appeal. He filed a second appeal following

the trial court's November 29, 2005, order denying his motion to reconsider his request for recusal. His two appeals have been consolidated for our review.

Wigginton first contends that the trial court erred by dismissing his claims against LFUCG and against Scanlon and Gillen in their official capacities on sovereign immunity grounds. We disagree. As the trial court correctly noted, under the doctrine of sovereign immunity, damage claims against the state, including claims alleging intentional torts are absolutely precluded, "unless the state has given its consent or otherwise waived its immunity. . . . The absolute immunity from suit afforded to the state also extends to public officials sued in their representative (official) capacities, when the state is the real party against which relief in such cases is sought." *Yanero v. Davis,* 65 S.W.3d 510, 517-18 (Ky. 2001). *Calvert Investments, Inc. v. Louisville & Jefferson Co. Metropolitan Sewer District,* 805 S.W.2d 133 (Ky. 1991). Kentucky counties, moreover, have been deemed "political subdivisions of the state and, thus, entitled to sovereign immunity." *Id.* at 526. Urban county governments, furthermore, such as LFUCG, constitute a "classification of county government," and therefore are "entitled to sovereign immunity." *Lexington-Fayette Urban CountyGovernment v. Smolcic,* 142 S.W.3d 128, 132 (Ky. 2004). The trial court did not err, therefore, when it ruled that LFUCG and Scanlon and Gillen in their official capacities are immune from Wigginton's damages claims.

Countering this result, Wigginton contends that the Claims Against Local Government Act, KRS 65.200 – KRS 65.2006, provides for a waiver of the county's

immunity. In *Schwindel v. Meade County, Kentucky,* 113 S.W.3d 159 (Ky. 2003), however, our Supreme Court rejected this proposition, noting instead that the Act "expressly disclaims any legislative intent . . . to modify the existing immune status of any local government." *Id.* at 164-65. Wigginton also contends that the trial court erred by deeming Scanlon and Gillen immune in their individual capacities. In fact, the trial court did not even reach the question of individual capacity immunity. It ruled instead that individual capacity defamation claims against Gillen, if any, were barred by the statute of limitations, and that individual capacity claims against Scanlon were barred by limitations if those claims alleged pre-January 8, 2003 defamation, and would otherwise fail due to Wigginton's dilatory prosecution.

With respect to the statute of limitations period, as the trial court noted, KRS 413.140(d) provides that an action for libel or slander "shall be commenced within one (1) year," and generally "it is the publication of the alleged libelous matter that causes the defamation or injury thus commencing the running of the one year statute of limitations." *Caslin v. General Electric Company,* 608 S.W.2d 69, 70 (Ky.App. 1980). Gillen's alleged defamation, which was published in December 2002, and any of Scanlon's alleged publications prior to January 8, 2003 thus fell outside the one year period prior to Wigginton's January 8, 2004 complaint. Wigginton contends, however, that he did not discover the earlier publications until the *Lexington Herald-Leader* article appeared on January 8, 2003, and that the limitations statute should be deemed tolled until he had a reasonable opportunity to make that discovery. He notes that the discovery

rule has been adopted in Kentucky with respect to legal malpractice actions and certain construction defects claims, and he contends that it should also be extended to defamation claims such as his. KRS 413.245; KRS 413.135; *Perkins v. Northeastern Log Homes,* 808 S.W.2d 809 (Ky. 1991).

This contention is not without some merit. Several jurisdictions have applied the discovery rule to defamation claims, at least in cases where the alleged defamatory statement is contained in documents or other sources not available to the public. *See* Francis M. Dougherty, "Limitation of Actions: Time of Discovery of Defamation as Determining Accrual of Action," 35 ALR 4th 1002 (1985). We decline Wigginton's invitation to extend Kentucky law, however, because the General Assembly has shown itself capable of providing for the discovery rule when that is its intention. KRS 413.140 itself, for example provides in subsection (2) that medical malpractice actions shall be deemed to accrue when discovered or when they should have been discovered. If the General Assembly had intended a similar rule to apply to defamation actions, it surely would have said so. *Cf. Roman Catholic Diocese of Covingtonv. Secter,* 966 S.W.2d 286 (Ky.App. 1998) (noting the reluctance of this Court in particular to extend the discovery rule beyond the narrow channels mapped by the General Assembly). The trial court did not err, therefore, by dismissing Wigginton's claims against Gillen and Scanlon that are based on allegations of defamatory statements made prior to January 8, 2003.

Wigginton next contends that the trial court abused its discretion under CR

41.02 when it dismissed his remaining claims for lack of prosecution. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Sexton v. Sexton,* 125 S.W.3d 258, 272 (Ky. 2004) (citation and internal quotation marks omitted). CR 41.02(1) provides that

> [f]or failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him.

Dismissal, of course, is the harshest sanction and is usually invoked only against plaintiffs who have allowed their claims to sit idle for so long as to indicate no real intention to have them heard. *See Modern Heating & Supply Co., Inc. v. Ohio Bank Building & Equipment Company,* 451 S.W.2d 401 (Ky. 1970) (upholding dismissal of case that had been pending without meaningful progress for over three years). "Length of time is not alone the test of diligence," however, *Gill v. Gill,* 455 S.W.2d 545, 546 (Ky. 1970), and in applying CR 41.02 the trial court should consider the totality of the circumstances, including such factors as

> (1) the extent of the party's personal responsibility; (2) the history of dilatoriness; (3) whether the attorney's conduct was willful and in bad faith; (4) the meritoriousness of the claim; (5) prejudice to the other party; and (6) the availability of alternative sanctions.

Toler v. Rapid American, 190 S.W.3d 348, 351 (Ky.App. 2006).

This case had been pending for slightly over a year-and-a-half when dismissed and had been actively enough litigated in that time to generate a record of some 450 pages. The trial court believed, nevertheless, that Wigginton's "failure" to

state a defamation claim and his possible obstruction of the discovery process by resisting and then failing to attend his deposition amounted to such an intolerable delay of the proceedings as to merit the ultimate sanction. Because this was an unduly harsh sanction under the totality of circumstances, we must reverse that portion of the trial court's judgment dismissing Wigginton's post-January 8, 2003 claims against Scanlon individually and remand for additional proceedings.

The trial court deemed Wigginton's Complaint inadequate and a violation of its order to identify Scanlon's allegedly defamatory statements. We agree with Wigginton, however, that his Second Amended Complaint adequately pled a defamation claim. As he notes, CR 8.01 requires only a "short and plain statement of the claim," CR 8.01(1), sufficient to put the defendant on notice of the "essential nature of the claim presented." *Roberts v. Conley,* 626 S.W.2d 634, 638 (Ky. 1981). In *Disabled American Veterans, Department of Kentucky, Inc. v. Crabb,* 182 S.W.3d 541, 547 (Ky.App. 2005), this Court ruled that an allegation that the defendant "made false, defamatory and slanderous accusations against [the plaintiff] causing [her] embarrassment, humiliation and mental distress to her damage and detriment on that account," adequately pled a claim for defamation. Wigginton's far more detailed accusations responded meaningfully to Scanlon's CR 12.05 motion for a more definite statement and gave Scanlon sufficient notice of Wigginton's essential claim. Indeed, Scanlon acknowledged the sufficiency of Wigginton's Second Amended Complaint by answering it. If, after a reasonable period of discovery, Wigginton can not come forward with some factual

support for his allegations, then Scanlon's remedy is a motion for summary judgment. In the meantime, however, Wigginton's Second Amended Complaint adequately stated a defamation claim, and the trial court abused its discretion to the extent that it sanctioned him for not pleading more specifically.

The trial court also abused its discretion by imposing the ultimate sanction of dismissal for Wigginton's apparent discovery abuse. Although the trial court need not tolerate refusals to abide by the discovery rules or to cooperate in advancing the litigation, until Wigginton's failure to appear at his deposition, this case had advanced at a reasonable pace and was certainly being actively litigated. The delay occasioned by scheduling Wigginton's deposition and by his failure to appear as agreed, though serious and certainly meriting some sanction, was not enough to imply an intention on his part not to bring this matter to a reasonably timely hearing. Nor did it so prejudice Scanlon as to entitle him to the ultimate relief of dismissal. The major prejudice to Scanlon was the expense of the aborted deposition, and that prejudice was adequately addressed by the court's order imposing that expense on Wigginton. Absent some clearer indication than this record provides that Wigginton is neglecting his suit or maintaining it in bad faith, it was inappropriate to terminate his cause of action for failure to appear at his deposition. *Cf.Gill v. Gill, supra* (holding that nine month delay in bringing a case that required considerable investigation did not justify the ultimate sanction of dismissal, notwithstanding the fact that counsel had apparently neglected the case for part of that period while he campaigned for office). Because the trial court's dismissal of

Wigginton's post-January 8, 2003 claims against Scanlon individually was erroneous as to the issue of the requisite specificity for a defamation claim and unduly harsh given the circumstances of the litigation as a whole, we must reverse the judgment to that extent and remand for additional proceedings.

Finally, Wigginton contends that Judge Sheila Isaac should have recused herself. Judge Isaac is a first cousin of Teresa Isaac, who, at all times during the trial court proceedings, was LFUCG's Mayor. Canon 3E(1) of the Kentucky Code of Judicial Conduct provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Wigginton maintains that Judge Isaac's familial relationship with the Mayor was a circumstance giving rise to reasonable questions about her impartiality with respect to LFUCG and defendants such as Gillen and Scanlon for whom LFUCG must provide a defense. Wigginton maintains that in deference to that perception Judge Isaac was obliged to recuse. Apparently Judge Isaac has recused from at least one case for that reason, and Wigginton argues that if recusal was appropriate in that case, then it was appropriate in this case as well.

This argument might have some force were it not for the fact that at the outset of this case Judge Isaac disclosed her relationship with the Mayor to all the parties and their counsel, and everyone involved waived any objection to Judge Isaac's participation. Our Supreme Court has held that knowledge of the grounds for a judge's disqualification coupled with a failure to object constitutes a waiver of the disqualification. *Bussell v. Commonwealth,* 882 S.W.2d 111 (Ky. 1994); *Bailey v.*

Bailey, 474 S.W.2d 389 (Ky. 1971). Wigginton's belated attempt to recuse Judge Isaac, nearly a year-and-a-half into this case and after numerous dispositive rulings, was clearly untimely and was properly denied.

For essentially the same reason, Wigginton's further objection to Judge Isaac on the ground that she allegedly harbors a personal bias against Wigginton's counsel is without merit. Counsel did not voice this objection until after his client's case had been dismissed, although he was necessarily aware of the alleged grounds—prior cases with Judge Isaac—before this case began. His failure to object in a timely manner at the outset of the case constitutes a waiver of the alleged disqualification. We note, furthermore, that the Supreme Court rejected Wigginton's ninth-hour KRS 26A.020 motion belatedly raising this issue. Our review of the record, likewise, has revealed no support for counsel's claims. Judge Isaac's rulings were not always to Wigginton's liking, but they were not without legitimate reason and suggest no bias toward counsel. Of course, a judge's adverse rulings, by themselves, do not imply bias. *Stopher v. Commonwealth,* 57 S.W.3d 787 (Ky. 2001).

In sum, we agree with the trial court that Wigginton's claims against LFUCG and against Gillen and Scanlon in their official capacities are barred by the urban county's sovereign immunity. We further agree that the statute of limitations bars any claims against Gillen and Scanlon individually that accrued prior to January 8, 2003. The trial court abused its discretion, however, by dismissing Wigginton's remaining claims against Scanlon. Wigginton's Second Amended Complaint, which adequately alleges

defamation against a public official, merited no sanction at all, and Wigginton's failure to appear for his scheduled deposition, where otherwise he had actively prosecuted his case, did not merit the most severe of sanctions, dismissal. Finally, the trial court did not err by denying Wigginton's untimely motions for recusal. Accordingly, we affirm that portion of the Fayette Circuit Court's judgment reflected in its order of June 18, 2004, reverse that portion reflected in paragraph three of its order of August 17, 2005, and remand for additional proceedings consistent with this opinion.

ALL CONCUR.

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