RENDERED: JANUARY 22, 2010; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000475-MR

EDWARD H. FLINT — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 08-CI-007865

DENNIS STILGER — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND DIXON, JUDGES; HENRY,[1] SENIOR JUDGE.

CAPERTON, JUDGE: Edward Flint, *pro se*, appeals the Jefferson Circuit Court's order which granted Dennis Stilger's motion for summary judgment against Flint's defamation claim. Flint contends that summary judgment was improper as there were material issues of fact to be resolved and that the law does not support the trial court's legal conclusions. Stilger disagrees. We conclude that Stilger was

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

only entitled to a qualified privilege, not absolute as found by the trial court. Accordingly, we reverse and remand to the trial court for a determination on whether Stilger acted with actual malice.

The facts which give rise to this appeal may be briefly summarized. Flint is an owner of a condominium with the Coach House. Accordingly, he is a member of the condominium association. Believing that the association funds were being misspent, Flint requested that the Board of Directors of Coach House ("the Board") allow him access to the financial records and minutes of the Board meetings from 2005 through September 2007. Flint requested that the records be brought to Coach House and that he be given access to the records three to four days per week for three hours per day in order to conduct his inspection.

Thereafter, the attorney for the Board, Dennis Stilger, responded to Flint's request. In this correspondence, Stilger informed Flint that his records request was unreasonable and that certain restrictions would be in place.

Flint then wrote to the Kentucky Attorney General asking that the matter involving the records request be pursued by the Attorney General. Flint asserted that he had a right to review the books under KRS 381.865 and the Coach House by-laws and that KRS 381.990 gave the Attorney General the authorization to prosecute those who fail to comply. Flint then requested that "you look into this matter and prosecute this matter to the fullest."

Stilger, as counsel for the Board, responded to Flint's letter seeking prosecution by writing a letter to the Attorney General detailing the reasons that

restrictions were placed on the access to the records and how Coach House had complied with its statutory obligations. The reasons for the restrictions were unflattering to Flint. Thereafter, Flint sued Stilger asserting that Stilger's letter to the Attorney General was defamatory and slanderous per se.

On Stilger's motion for summary judgment, the trial court undertook an evaluation of the record, which included the written correspondence between the parties and the letters to the Attorney General, the parties' memoranda, and the applicable law. The court noted that even statements which are libelous per se may be protected speech, such as those statements in judicial proceedings. *See Schmitt v. Mann,* 291 Ky. 80, 163 S.W.2d 281 (Ky. 1942)(statements in pleadings in judicial proceedings are absolutely privileged when they are material, pertinent, and relevant).

The court determined that Flint's letter to the Attorney General was clearly an appeal for prosecution; thus, it was a communication preliminary to a proposed judicial proceeding. Stilger's letter, although unflattering to Flint, was a direct response to Flint's letter to the Attorney General and detailed the reason for the restrictions placed on Flint in viewing the records; thus, Stilger asserts that the letter was material, relevant, and pertinent. The court determined that Stilger's letter was absolutely privileged and that, accordingly, he was entitled to summary judgment. It is from this order that Flint appeals.

On appeal Flint argues that he is entitled, as a *pro se* appellant, to leniency for any deficiencies[2] and presents a morass[3] of an argument as to why summary judgment was improper.[4] We have more appropriately, and concisely, re-characterized Flint's arguments regarding summary judgment as follows: Summary judgment was improper as there were material issues of fact to be determined and the trial court misinterpreted the applicable law.

In support thereof, Flint argues that the trial court used facts and law not contained within the record, that Stilger's letter to the Attorney General was not pertinent, material, or relevant, and that there was a dispute of fact as to whether Stilger was actually counsel for Coach House at the time the letter was written. In response, Stilger disagrees and argues that summary judgment was proper, that there were no material issues of fact to be resolved, and that the trial court correctly applied the applicable law. Stilger also argues that Flint's notice of

[2] While Flint is correct that more lenient standards apply to *pro se* pleadings, we have not interpreted this as an abandonment of our rules of procedure or jurisprudence. *See Brooks v. Commonwealth*, 447 S.W.2d 614, 618 (Ky. 1969). Thus, the civil rules are clearly applicable to Flint, including those associated with appeals discussed within this opinion.

[3] This at times included contradictory statements within the brief and also included multiple assertions that Stilger has violated his ethical duties as an attorney and/or misrepresented facts to this Court, which Stilger denies. This issue is not properly before us on appeal. There is no indication that Flint requested sanctions from the trial court or elected to pursue the matter through the Kentucky Bar Association. Moreover, these allegations are blanket assertions without any substantiation. Nor do we find relevant Flint's oft-repeated concern that Stilger was the new attorney for Coach House.

[4] Flint also argues that Stilger has failed to provide adequate law to support his position. However, a review of the record shows that Stilger did provide applicable caselaw to the trial court, and to this Court, regarding the propriety of the summary judgment motion, and why the letter in question was privileged or entitled to qualified immunity. As raised by Stilger, Flint has failed to provide this Court with applicable law regarding his assertion that the letter rises to the level of slander per se.

appeal and briefs are not in accord with Kentucky Rules of Civil Procedure (CR) 73.03 and, thus, should be stricken. We believe the issue concerning the propriety of summary judgment is dispositive of this appeal.

First, we briefly address Stilger's argument that Flint's appeal should be dismissed for failure to comply with CR 73.03, specifically for Flint's naming of additional defendants/appellees of "Jane and John Does."

CR 73.03(1) states that "[t]he notice of appeal shall specify by name all appellants and all appellees ('et al.' and 'etc.' are not proper designation of parties) . . . ." The failure to properly name parties under CR 73.03, i.e., the failure to name an indispensable party, is a jurisdictional defect that serves as a basis to dismiss an appeal. *Slone v. Casey*, 194 S.W.3d 336, 337 (Ky.App. 2006), citing to *City of Devondale v. Stallings*, 795 S.W.2d 954 (Ky. 1990); CR 19.02. It is a simple maxim of the law that without jurisdiction, a court cannot proceed. For purposes of appeal, a person is a necessary party if the person would be a necessary party for further proceedings in the circuit court if the judgment were reversed. *Land v. Salem Bank*, 279 Ky. 449, 130 S.W.2d 818 (Ky. 1939); *Hammond v. Department for Human Resources Bureau for Social Ins.*, 652 S.W.2d 91 (Ky.App. 1983).

Flint's usage of "Jane and John Does" is certainly tantamount to the usage of "et al" in CR 73.03. However, we do not think that the proposed "Does," i.e., the Board, qualifies as an indispensable party. The defamation claim by Flint

lies between Flint and Stilger. The Board would not be a necessary party for further proceedings in the circuit court if the judgment were reversed.

Secondly, we address Flint's failure to comply with CR 76.12. Flint, as a *pro se* appellant, is required to comply with CR 76.12, as on appeal both parties are charged with the duty to properly cite to the record the facts necessary to an understanding of the issues presented by the appeal. CR 76.12(4)(c)(iv)-(v) and CR 76.12(4)(d)(iii)-(iv). While we would be justified in not considering that portion of the briefs where the requirements of CR 76.12 are deficient, or in striking the briefs, we shall confine ourselves to a review for manifest injustice. *See Pierson v. Coffey* 706 S.W.2d 409, 413 (Ky.App. 1985); *Elwell v. Stone*, 799 S.W.2d 46, 47-48 (Ky.App. 1990); and CR 76.12(8).[5] Accordingly, we shall consider the merits of Flint's appeal under the standard of manifest injustice.

Turning to the substantive arguments of the parties, the dispositive inquiry in the case *sub judice* is whether summary judgment was properly granted. The applicable standard of review on appeal of a summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law."

---

[5] Absent specific citations as required by CR 76.12, we are required to assume that the evidence supported the findings of the lower court. *See Porter v. Harper,* 477 S.W.2d 778 (Ky. 1972). *See also Smith v. Smith,* 235 S.W.3d 1, 5 (Ky.App. 2006*),* where this Court addressed a similar issue:

> Carolyn is correct that it is not our responsibility to search the record to find where it may provide support for Jim's contentions. But rather than striking Jim's brief, we choose to give little credence to the arguments by either party that are not supported by a conforming citation to the record.

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, 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 judgment as a matter of law." CR 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991).

Thus, summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.* However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992), citing *Steelvest, supra*. *See also O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); *Hallahan v. The Courier Journal,* 138 S.W.3d 699, 705 (Ky.App. 2004). Since 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*, 56 S.W.3d 432, 436 (Ky.App. 2001).

In a defamation case, "the determination of the existence of a privilege is a matter of law." *Cargill v. Greater Salem Baptist Church*, 215 S.W.3d 63, 67 (Ky.App. 2006). Accordingly, we shall undertake a *de novo* review to

determine if Stilger was entitled to a privilege that entitled him to judgment as a matter of law.

We have concluded that this appeal presents this Court with a novel issue of law. The trial court relied on *Schmitt v. Mann*, 291 Ky. 80, 163 S.W.2d 281, 283 (Ky. 1942), wherein the highest court in this Commonwealth established "[t]he prevailing rule and the one recognized in this jurisdiction is that statements in pleadings filed in judicial proceedings are absolutely privileged when material, pertinent, and relevant to the subject under inquiry, though it is claimed that they are false and alleged with malice."

Flint argues that there is a significant difference between a proposed judicial action and a judicial proceeding. Finding no law directly on point in this Commonwealth given the facts *sub judice*, we turn to the persuasive authority contained in the American Jurisprudence Libel treatise.

As stated in Am. Jur. 2d *Libel* § 282, "[s]tatements made in the course of actions necessarily preliminary to judicial proceedings are absolutely privileged." This privilege is known as the attorney-litigation privilege. Am. Jur. 2d *Libel* § 290 states that, "[a]s a general rule, statements made by the attorneys in the course of a judicial or quasi-judicial proceeding are absolutely privileged . . . ." However, statements made to law enforcement authorities for investigation are only entitled to a qualified privilege, which may be overcome with a showing that the defamatory statement was made with malice. Am. Jur. 2d *Libel* § 275.

Likewise, communications made to the attorney general's office have been found to enjoy a qualified privilege as "the attorney general does not act in a judicial or quasi-judicial capacity because, although he or she investigates allegedly fraudulent or illegal acts, he or she must seek enforcement in court." Am. Jur. 2d *Libel* § 275.

Thus, there is conflict among the states as to whether a communication to a prosecuting attorney is absolutely privileged or only conditionally privileged, with some states holding that "[a]n absolute immunity against the imposition of liability in a defamation action does not attach to a complaint or information concerning the alleged commission of a crime which is given to a district attorney prior to the commencement of a criminal proceeding, since, at that point, he or she is not acting as a judicial or quasi-judicial officer." *Id.*

With this learned treatise in mind, we turn to the case *sub judice*. Flint's letter was clearly an appeal to prosecute and Stilger responded in kind. The Attorney General's office was, at this juncture, undertaking an investigation and had not made known whether it would pursue a judicial remedy. We find this to be more akin to an investigation than to an action necessarily preliminary to judicial proceedings. Accordingly, we hold that Stilger's letter was only entitled to a qualified privilege, which may be overcome by a showing of malice.[6]

[6] We note that once the Attorney General's office decides and makes known that it intends to resort to judicial proceedings that an absolute privilege *may* attach.

The trial court having found otherwise, we must reverse and remand for a determination on whether Stilger's letter was made with malice, given that Stilger was only entitled to qualified privilege. This being the dispositive issue, we decline to further address the arguments presented by the parties.

In light of the foregoing, we reverse the grant of summary judgment by the Jefferson Circuit Court and remand for further proceedings.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Edward H. Flint, *Pro Se*
Louisville, Kentucky

BRIEF FOR APPELLEE:

Dennis J. Stilger, Esq.
Louisville, Kentucky