

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-001679-MR

MICHAEL J. FLICK

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JAMES D. ISHMAEL, JUDGE  
ACTION NO. 06-CI-02088

RANDALL C. LAMBIRTH

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KELLER AND THOMPSON, JUDGES; SHAKE,<sup>1</sup> SENIOR JUDGE.

KELLER, JUDGE: Michael J. Flick (Flick) appeals from the trial court's judgment confirming a jury verdict and award in favor of Randall C. Lambirth (Lambirth).

Flick argues that the court did not notify him of the correct trial date and that the court improperly admitted evidence at trial. Lambirth argues that Flick did not

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<sup>1</sup> Senior Judge Ann O'Malley Shake 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.

raise these issues before the trial court; that he essentially did nothing to defend himself from Lambirth's allegations; and that he is therefore foreclosed from doing so on appeal. For the following reasons, we affirm.

## FACTS

We take the following underlying facts from the Supreme Court of Kentucky's opinion affirming Flick's conviction and sentence.

In 2003, Randall Lambirth contacted [Flick] about purchasing [Flick's] optometry practice in Lexington. [Flick] decided that he would sell his practice, and the two men reached an agreement. The arrangement contained a three (3) year employment contract for [Flick], which, upon its end, would complete the sale. The employment contract called for [Flick] to work four (4) days a week, Wednesday through Saturday, for Lambirth.

In early 2004, the relationship between Lambirth and [Flick] began to deteriorate. [Flick] did not agree with how Lambirth was running the practice and regularly argued with him. Christina Wittich, Lambirth's girlfriend and [Flick's] co-worker, confronted [Flick] in the parking lot one afternoon, as he tried to leave for lunch with a lobby full of patients. By the summer of 2004, [Flick] said he was "burned out" with work.

During this time, [Flick] asked Lambirth if he could have Saturdays off because his father was ill; Lambirth acquiesced to his request. However, shortly after letting [Flick] take off Saturdays, Lambirth discovered that [Flick] was actually working at an optical center in a local Wal-Mart on those days. Lambirth confronted [Flick] and told him he had to come back to work for him on Saturdays or he would be fired. [Flick] refused to come back. On November 17, 2004, Lambirth fired [Flick]. By the end of March 2005, [Flick] had filed a wrongful termination and breach of contract lawsuit

against Lambirth. The two men would not see each other again until May 20, 2005.

On May 20, 2005, [Flick] drove to Lambirth's house. Before exiting his vehicle, he grabbed a gun, which he had stolen from a friend. Upon entering the house, [Flick] shot and killed Christina Wittich. Shortly thereafter, Lambirth returned home accompanied by his brother. He went into the house and discovered Christina lying in a pool of blood. At this point [Flick] approached him with the gun. Lambirth tried to get away, but [Flick] shot him in the arm. A struggle ensued between the two men, at which time Lambirth's brother, Chris, entered the house and assisted Lambirth. The two men subdued [Flick] by holding him down and beating him. During the altercation, Lambirth was able to call the police.

Lambirth and Christina were taken to the University of Kentucky medical center where Christina was pronounced dead; Lambirth was treated for his wounds. [Flick] was also transported to the medical center for treatment of his injuries, which consisted of various cuts and bruises, one of which required stitches. [Flick's] injuries, however, were non-life threatening and he was awake and aware of what was happening while in the emergency room. He was evaluated for his level of consciousness and received the highest possible score. [Flick's] x-rays, ultrasounds, and CAT scans were all normal.

Officer Ben Shirley of the Lexington Police Department accompanied [Flick] from the crime scene to the hospital. Officer Shirley attempted to read [Flick] his *Miranda* warnings while en route to the hospital but stopped because he feared that [Flick] would not hear him, or would be confused because of all of the commotion in the ambulance. Once at the hospital, Officer Shirley read [Flick] his *Miranda* warnings at approximately 8:20 p.m. [Flick] was conscious and told the officer that he understood the warnings by answering, "yes." Following this, Officer Shirley proceeded to ask basic booking information questions, which [Flick] had no trouble answering.

Later, Detective Brotherton arrived at the hospital to question [Flick] about the events that had taken place. Brotherton did not re-Mirandize [Flick] because Officer Shirley had already informed him of his rights. [Flick] was able to talk with Detective Brotherton for some time and, in the process, was able to develop an elaborate kidnapping story. [Flick] told Brotherton that Lambirth and his brother kidnapped him and had taken him to Lambirth's house that night. However, Detective Brotherton did not believe [Flick] because he could not keep his story straight. When Detective Brotherton told [Flick] that he did not believe his story, [Flick] invoked his right to remain silent, which Brotherton honored, immediately ceasing the interview. Later, [Flick] was transferred to Fayette County Detention Center.

The next morning, Detective Brotherton went to the detention center to talk with [Flick]. A few hours earlier, [Flick] had returned to the detention center from the hospital after experiencing a bad reaction to medicine he was given. Detective Brotherton testified that [Flick] did not appear to be sleepy, confused, or disoriented. [Flick] told Brotherton that he did not remember him or the prior conversation from the hospital. After a few questions, [Flick] invoked his right to counsel. Detective Brotherton acceded to his request. Without further questioning from Brotherton, [Flick] continued to briefly speak, indicating that he did not want to say anything incriminating. Eventually, [Flick] again invoked his right to counsel and the interview stopped.

At trial, [Flick] moved to suppress all statements made to Detective Brotherton because of alleged *Miranda* violations. The trial court held a suppression hearing at which written memoranda of law were submitted by both parties. On March 13, 2007, the trial court denied [Flick's] motion to suppress the statements. The court made several findings of fact, to wit: 1) Officer Ben Shirley fully advised [Flick] of his *Miranda* warnings while at the hospital; 2) [Flick] indicated that he understood his rights by answering in the affirmative; 3) [Flick] was fully coherent at the hospital; 4) [Flick] was

able to provide Officer Shirley with accurate information that constituted appropriate responses to the questions; 5) nothing in the evidence suggested that [Flick] was incompetent due to mental illness; 6) fifteen (15) hours passed between the two interviews; and 7) there was no testimony that would have demonstrated that [Flick] was incoherent during the second interview.

At trial, [Flick] based his defense upon the presence of Extreme Emotional Disturbance (EED). Each side presented its evidence either for or against the existence of EED. At the conclusion of the Commonwealth's case, [Flick] made a motion for directed verdict arguing that a reasonable jury could not find the absence of EED. The trial court overruled the motion.

Ultimately, [Flick] was convicted of murder, second-degree assault under EED and first-degree burglary. He was sentenced to life imprisonment for the murder conviction, five (5) years for the assault conviction, and ten (10) years for the burglary conviction.

*Flick v. Commonwealth*, 2008-SC-000233, 2009 WL 1451923, \*1 -3 (Ky. 2009).

While the criminal case against Flick was pending, Lambirth filed a civil suit against Flick seeking compensatory and punitive damages. In his complaint, filed on May 16, 2006, Lambirth alleged that Flick negligently and/or intentionally shot him and shot and killed Wittich. Lambirth alleged that, as a result of Flick's actions, he suffered physical and emotional injuries and lost income. He also alleged that he incurred medical expenses.

On May 30, 2006, Flick, who was then represented by counsel, filed an answer directly denying or denying for lack of knowledge the allegations in Lambirth's complaint. Flick did not assert any affirmative defenses other than that the complaint failed to state a claim upon which relief could be granted. In July

2007, the court issued a notice that Lambirth's claim would be dismissed for lack of prosecution. In response to that notice, Lambirth filed a motion to hold the civil case in abeyance pending resolution of the criminal case. The court granted that motion and no further action took place in the civil case until February 2007.

In February 2007, Lambirth filed a motion for summary judgment as to liability. In support of his motion, Lambirth asserted that Flick admitted his guilt during the criminal trial and only offered evidence in an attempt to mitigate his sentence. Flick's counsel then filed a motion for additional time to respond to the motion, noting that Flick was imprisoned and that he had lost contact with Flick.

In March 2009, Flick's counsel moved to withdraw noting that Flick was serving a life sentence and was not able to pay counsel's fees. On April 23, 2009, the court granted counsel's motion to withdraw and gave Flick until May 22, 2009, to obtain new counsel and to respond to the motion for summary judgment. Flick did not respond to this order.

Lambirth then made a motion for default judgment and renewed his motion for summary judgment. Again, Flick did not respond. The court granted Lambirth's motion for summary judgment on June 8, 2009, and scheduled a pre-trial conference for June 15, 2009. Following that conference, the court issued an order setting deadlines for the submission of witness lists, exhibit lists, discovery, etc., and scheduling the trial for July 28, 2009. Apparently, because Flick had not

responded to any of the court's orders or to Lambirth's motions, the court appointed a guardian *ad litem* (GAL) for Flick.

The GAL filed a report with the court on July 10, 2009, indicating that she had written to Flick on June 23, 2009, advising Flick that she had been appointed to determine if he had any defenses but not to represent him. Flick did not respond to that correspondence. The GAL sent a second letter on July 5, 2009, advising Flick that a discovery deadline was approaching and that he should retain counsel if he intended to "present a defense in excess of that presented in the report of the guardian ad litem."

On July 10, 2009, Flick responded to the GAL, indicating that he intended to file a counter-claim against Lambirth asserting breach of contract and wrongful termination.<sup>2</sup> Flick asked the GAL to include in her report the following: Lambirth created a hostile work environment after Flick sold the business to Lambirth in order to induce Flick and his staff to quit; Lambirth "did what he could each day to torment Flick at work in hopes that he would quit so Lambirth would not have to pay Flick in full for the practice;" Lambirth's behavior lead to Flick's depression and attempted suicide; and Flick was wrongfully terminated. The GAL also submitted a witness list on behalf of Flick, asked the court to continue the trial so that Flick could obtain counsel or proceed *pro se*, and asked to be released as GAL. The court released the GAL but did not address any of the other requests.

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<sup>2</sup> We note that, based on the record, Flick had filed a civil suit against Lambirth prior to the shooting. However, Flick did not pursue his civil suit and the court dismissed for failure to prosecute.

On July 27, 2009, the court entered an order rescheduling the trial for August 9, 2009. We note, as did the parties, that August 9, 2009, was a Sunday. Flick states in his brief that his brother advised him that trial would not start on Sunday. Based on that assurance from his brother, Flick assumed the court would send an order with the correct date. However, Flick did not file any motion with the court or otherwise request clarification. Counsel for Lambirth states that he notified the court of the mistaken date and was assured that a revised order would be issued. However, no such order is in the record.

On August 10, 2009, Lambirth tried this matter to a jury. Flick was not present in person or through any representative. Following the presentation of evidence, the jury returned a verdict in favor of Lambirth and awarded him in excess of \$11,000,000 in damages. That amount included \$10,000,000 in punitive damages. Without seeking any other post-judgment relief, Flick filed a notice of appeal arguing that he was not given appropriate notice of the trial date and that the trial court erred in admitting testimony and exhibits that were not identified in compliance with the court's pre-trial order and that were only related to Wittich's death.

#### STANDARD OF REVIEW

Although Flick does not clearly state it, the issues he raises appear to be ones of law, which we review *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

#### ANALYSIS



We first address Flick’s argument that the court’s failure to notify him of the correct trial date violated his right to a trial under the Sixth Amendment of the United States Constitution. That argument is without merit because the Sixth Amendment applies only to criminal prosecutions, not to civil trials.

We next address Flick’s argument that the court’s failure to notify him of the correct trial date violated his right to present defenses under Kentucky Revised Statutes (KRS) 411.010. That statute provides that

[i]n any civil action for damages inflicted by an assault or by an assault and battery, the defendant may plead as a defense to the claim for punitive damages, and introduce in evidence in mitigation of punitive damages, any matter of provocation that preceded the assault or battery, if the provocation prompted the assault or battery and was of a nature to cause a person of ordinary prudence and judgment to take the action taken by the defendant.

In her report to the court, the GAL stated that Flick wished to assert a number of defenses, some of which would arguably fall within the defenses to assault and battery permitted under KRS 411.010. However, a party is required to assert any affirmative defenses in a “pleading to a preceding pleading.” Kentucky Rules of Civil Procedure (CR) 8.03. Furthermore, a party is required to assert “[e]very defense, in law or fact,” in response to any pleading that requires a response. CR 12.02. Flick did not assert the affirmative defense of provocation set forth in KRS 411.010 in his response to Lambirth’s complaint or at any other time until the GAL filed her report. Therefore, to the extent Flick’s defenses to Lambirth’s claim for punitive damages were valid, they were not timely asserted,

and would not have been proper for jury consideration. *See Gargotto v. Isenberg*, 244 Ky. 493, 51 S.W.2d 443, 445 (1932). Because the defenses he asserted were not available to Flick, whether he received notice of the trial is of no consequence.

Next we address Flick's claim that the trial court admitted evidence in violation of KRS 411.130, 411.133, and Section 241 of the Kentucky Constitution. Section 241 of the Kentucky Constitution and KRS 411.130 provide for the prosecution of wrongful death claims by the administrator of a decedent's estate. KRS 411.133 provides for the joinder of wrongful death claims and personal injury actions. Flick argues that Lambirth was permitted to enter evidence and to seek damages related to a wrongful death claim that properly belonged to Wittich's estate. However, that is not the case. In his complaint, Lambirth alleged that Flick intentionally or negligently injured him and he claimed damages related to those injuries. Lambirth did not claim damages directly related to Wittich's death; the jury instructions did not refer to any wrongful death claim by Wittich; and the damages awarded to Lambirth were related to his injuries only. Therefore, Flick's argument regarding this issue is without merit.

Furthermore, we note that, once he received a copy of the judgment, Flick should have sought relief from the trial court under CR 59 via a motion for a new trial or under CR 60 via a motion for relief from judgment. He did not choose either route. Because Flick did not seek a ruling from the trial court on the issues raised herein, "there is no alleged error for this court to review." *Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky. App. 1985).

We also note that Flick did not make objection to, move to strike, or otherwise bring to the attention of the trial court the fact that some of Lambirth's witnesses and exhibits were not timely identified. As noted above, Flick had a duty to obtain a ruling from the trial court before presenting these issues to us. This he did not attempt to do; therefore, they are not preserved for our review.

Finally, we note that, because this was a civil action, Flick was not entitled to counsel. *May v. Coleman*, 945 S.W.2d 426, 427 (Ky. 1997). Although he was not entitled to counsel, a prisoner is entitled to a GAL “[i]f for any reason the prisoner fails or is unable to defend an action . . .” CR 17.04(1). The court appointed a GAL for Flick and the GAL, as required by CR 17.04(1), reported to the court the defenses Flick stated he wanted to assert. Although we believe that it might have been preferable for the court to have appointed a GAL for Flick earlier so that Flick would have had a better opportunity to present any defenses, because Flick had no defenses available to him, an earlier appointment would not have made any difference.

#### CONCLUSION

For the foregoing reasons, we affirm the trial court.

THOMPSON, JUDGE, CONCURS.

SHAKE, SENIOR JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

Michael J. Flick, *Pro Se*  
West Liberty, Kentucky

BRIEF FOR APPELLEE:

T. Bruce Simpson, Jr.  
Ryan Colleen Daugherty  
Lexington, Kentucky