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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001538-MR

LAWRENCE E. BOWLING — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM GRAHAM, SPECIAL JUDGE
ACTION NO. 94-CI-00792

THOMAS J. SMITH, INDIVIDUALLY AND AS COMMONWEALTH'S ATTORNEY; LEXINGTON HERALD-LEADER; AND DARLA CARTER, INDIVIDUALLY AND AS REPORTER, LEXINGTON-HERALD LEADER — APPELLEES

OPINION
AFFIRMING APPEAL NO. 1999-CA-001538-MR
AND ORDER STRIKING PORTION OF APPELLANT'S BRIEF
** ** ** ** **

BEFORE: BARBER, EMBERTON AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Lawrence E. Bowling (Bowling) appeals pro se from several orders of the Madison Circuit Court entered in conjunction with his law suit against Thomas J. Smith (Smith), individually and as Commonwealth's Attorney, Darla Carter (Carter), and The Lexington Herald-Leader (the LHL). We affirm.

On January 25, 1994, Zhuo Wang (Wang) shot and killed his wife, Lin Cong (Cong), in her dormitory room at Berea College (the College) in Berea, Kentucky. Bowling, a retired Berea

college professor, took an interest in Wang's case and took it upon himself to aid Wang in his defense.

According to Bowling, Wang wrote him several letters from jail detailing the events leading to Cong's death and implying that the College's allegedly immoral and permissive attitudes towards sex were contributing factors to Cong's murder. Bowling allegedly showed these letters to several attorneys who indicated that Wang should not accept a plea bargain for 20 years' imprisonment in exchange for a guilty plea. Bowling believed that a conspiracy existed between the College, Assistant Public Defender Lynda Campbell (Campbell), and Smith to persuade Wang to accept the plea bargain in exchange for a promise from Cong's parents not to demand a trial or sue the College. Bowling also shared the letters with Campbell. Despite Bowling's pressure to do otherwise, Wang accepted the plea bargain on March 31, 1994.

In April 1994, Wang filed a pro se petition in the Madison Circuit Court seeking to withdraw the guilty plea on the ground that Campbell pressured him into accepting the plea bargain. The petition was prepared and filed by Bowling. On April 17, 1994, the LHL ran a story written by Carter captioned "Berea murder suspect wants to back out of agreement." The article stated that Smith "questions whether the petition is a genuine reflection of Zhou Wang's wishes," and quoted Smith as saying that the petition:

> is very suspect to me . . . . That's not Zhuo Wang's language. That's not the way he speaks. It wasn't even prepared by him. . .

> . I don't even know if it's a genuine signature.

The article noted that Bowling had prepared and filed the petition, and stated that "Bowling insists that he merely did the footwork for Wang, because Wang is in the Madison County Detention Center." Bowling alleges that Smith knew the signature on the petition was Wang's, but made libelous statements accusing him of forging Wang's signature on the petition and labeling the petition as "suspect."

On April 18, 1994, Bowling filed an affidavit in Wang's criminal case in which he contended that Wang was forced into accepting the plea bargain. In the affidavit, Bowling outlined what he believed to be an immoral atmosphere existing at the College and alleged that "Wang's best interest was going to be sacrificed as part of a "cover-up" in order to prevent the publication of facts which would embarrass [the College's president and administrators]." Bowling also alleged in the affidavit that he had complained to the College's president several years earlier about "widespread indecent and immoral conduct commonly being carried out by Berea College students . . . both on and off campus[.]" Bowling also alleged that (1) Wang and Cong were aware of and greatly influenced by the immoral atmosphere existing at the College; (2) Wang and Cong were only mildly punished for "shacking up" in Wang's dormitory room; (3) if the College would have discharged Wang and Cong when they were caught living together in the dormitory room Cong would still be alive and Wang would not be in prison; (4) College students, faculty and administrators knew that Cong was dating another man

while Wang was attending college elsewhere but no one did anything about it; and (5) College officials participated in the plea bargain proceedings "in order to pacify Lyn [sic] Cong's parents and to forestall bad publicity for Berea College." Bowling filed a second affidavit on April 20, 1994, detailing a conversation he had with Cong's alleged boyfriend concerning Cong's plot to force Wang to divorce her.

Wang was sentenced by Madison Circuit Judge William T. Jennings (Judge Jennings) on April 21, 1994. At the sentencing hearing, Judge Jennings denied Wang's petition and sentenced him to twenty years' imprisonment. According to Bowling, Judge Jennings would not allow him to participate in the hearing, referred to him as a "lunatic fringe," and made other libelous remarks about him in the courtroom.

On April 28, 1994, The Berea Citizen published a column written by Leetta Jackson (Jackson) entitled "Berea College didn't shoot Lin Cong, so don't blame it." In the article, Jackson stated that Bowling had filed several petitions "blaming the college for Cong's death." Jackson further stated that "to hold Berea College accountable for the action of students enrolled there when they are not on campus is ridiculous."

Following publication of Jackson's column, The Berea Citizen published a guest commentary written by Bowling entitled "Who Killed Lin Cong?" on May 5, 1994. In this article, Bowling set forth the examples of the allegedly reprehensible behavior of the College's students which he complained about in his letter to the College's president and detailed Wang's side of the incidents

leading to his wife's death. Bowling once again raised the question of whether the College was responsible for Cong's death because it failed to take responsibility for the allegedly immoral conduct of its students.

On May 12, 1994, The Pinnacle, a student-run newspaper of the College, ran a "farewell" editorial written by Melissa Ferguson (Ferguson), the student editor of the paper. In the editorial, Ferguson expressed her observations regarding the importance of having an open mind, and further stated:

> That's why it bothers me so much to see Berea students attacked by close-minded people who see only what they want to see and condemn everything else. As a Berea student, I consider the commentary recently published in the Berea Citizen to be a direct and unsubstantiated attack on the integrity of Berea college students. The author's premise, as best one can tell from his scattered argument, is that Berea College and its community is responsible for a moral downfall among its students, resulting in the death of Lin Cong . . . . I find this insidious accusation to be thoroughly offensive and of uncalibrated bad taste. . . . I would hope that out of common decency the author of the commentary and others like him might find some other way to prove their point about Berea[.]
>
> . . . .
>
> I think rather that it is a prevalent atmosphere of close-mindedness that is detrimental to the life of this college, and to humankind.[1]

Apparently The Berea Citizen received and published several letters to the editor in response to Bowling's commentary. On May 24, 1994, Travis Flora (Flora), editor of The

[1]Interestingly, opposite Ferguson's editorial was a letter to the editor expressing an opposing viewpoint.

Berea Citizen, published a "letter from the editor" addressing Bowling's commentary. In that letter, Flora defended the paper's publication of Bowling's commentary and stated:

> The assumption that Berea College can monitor the actions of its students 100 percent of the time is ludicrous.
>
> . . . .
>
> And though I disagree with Mr. Bowling, it would be hypocritical of me as a professional journalist to edit Mr. Bowling's thoughts for anything more than the libelous/slanderous statements he included in his original draft of the commentary (and there were several changes made before publication).
>
> . . . .
>
> Isn't it nice to know there's at least one newspaper left that will let you speak your mind, even if what you have to say is unpopular, politically incorrect, or makes you sound like an idiot? (Not to mention that what you've got to say is against one of the oldest and most respected colleges in the country.)[2]

Bowling responded to Flora's editorial with another commentary entitled "Corn Pone Opinions." This was apparently returned to Bowling by Mike French (French), the publisher of The Berea Citizen, with a note stating "We will no longer publish articles or opinions on this subject. This column is refused."

On November 4, 1994, Bowling filed suit against the College as publisher/sponsor of The Pinnacle, Ferguson individually and as editor of The Pinnacle, Campbell as Assistant Public Defender, Smith individually and as Commonwealth Attorney, Judge Jennings individually and as Circuit Judge of Madison

[2]Bowling denies that the commentary contained slanderous statements, or that it was edited prior to publication.

County, French individually and as publisher of The Berea Citizen, and several other individuals. The bulk of the causes of action raised by Bowling in his complaint were charges of libel and denial of his constitutional right of free speech. Although the article referenced Carter's article in the LHL, neither Carter nor the LHL were named as defendants in the complaint.

In an order entered December 20, 1995, the trial court entered an order dismissing most of Bowling's complaint with the exception of Count 5, which charged Ferguson with libel stemming from her May 1994 editorial and Count 8, which charged French with libel stemming from Flora's "letter from the editor." In so holding, the trial court was careful to note that it was not passing judgment as to the merits of Bowling's claims, but merely recognizing that dismissal of all of Bowling's complaint at this point would be premature.

On April 3, 1996, Bowling filed a motion seeking leave of the trial court to file a second amended complaint. The purpose of this complaint was to add causes of action for slander, libel, and false light defamation against Smith, Carter, and the LHL. Following the filing of Bowling's motion to amend his complaint, a flurry of motions seeking summary judgment and judgment on the pleadings were filed.

In an order entered July 25, 1997, the trial court dismissed the causes of action for libel and false light defamation against Ferguson and French. In regard to Bowling's claims against Smith, Carter, and the LHL, the trial court found

that Bowling had stated a cause of action in his second amended complaint and granted the motion to amend. The trial court refused to grant the motions for summary judgment and/or judgment on the pleadings, finding that a question of law existed as to whether the statements were made and published with actual malice. The trial court noted in a footnote that:

> The media defendants claim that the allegations against them do not "relate back" to the time of the original complaint and are thus time barred . . . . For purposes of this Order, we feel it better to address the actual merits of the claim in terms of the motions for final judgment.

On August 19, 1997, Carter and the LHL filed a motion for summary judgment, arguing that:

> This is a libel action over an April 1994 newspaper article. The original complaint was filed in November 1994 but did not name the Lexington Herald-Leader or Darla Carter (hereinafter collectively the "Herald-Leader"). Plaintiff's amended Complaint, which named the Herald-Leader as a defendant, was not filed until April 1996, long after the one-year . . . statute of limitations had expired. The only way the amended complaint will survive is if it relates back under Civil Rule 15.03.

Carter and the LHL argued that the doctrine of relation back under CR 15.03 did not apply because (1) Bowling was never mistaken as to the identity of Carter or the LHL at the time the original complaint was filed because he mentioned both in the body of the complaint; and (2) neither Carter nor the LHL had reason to believe that Bowling failed to sue them due to a mistake in identity. The trial court agreed that Bowling's amended complaint could not be saved by application of CR 15.03 and granted summary judgment in favor of the Appellees in an

order entered January 13, 1998. Bowling's motion to amend was denied inasmuch as it sought reversal of entry of summary judgment by order entered August 2, 1998.

On August 31, 1998, Bowling filed a motion asking the trial court to make the January 1998 order final and appealable. In the same motion, Bowling once again asked the trial court to reconsider its entry of summary judgment. In an order entered February 26, 1999, the trial court denied Bowling's motion to reconsider but did amend the August 1998 order for purposes of making it final and appealable.

Instead of appealing from the August 1998 and February 1999 orders, Bowling did nothing until May 5, 1999, when he filed a motion for CR 60.02 relief. The trial court denied this motion by order entered May 19, 1999. Bowling's subsequent motion to vacate was denied by order entered June 21, 1999, and this appeal followed.

Bowling contends that the trial court erred in finding that the doctrine of relation back does not apply to his amended complaint. Our review of the record shows that the trial court's August 1998 order granting summary judgment in favor of the Appellees was made final by the trial court's February 1999 order. Under CR 75.02(1)(a), Bowling had thirty days from the entry of the February 1999 order from which to either perfect an appeal to this Court or file a motion for other post-judgment relief which would have terminated the running of the time for appeal pursuant to CR 73.02(1)(e). However, Bowling did nothing until May 5, 1999, when he filed his motion for CR 60.02 relief.

Because Bowling failed to perfect a timely appeal from the order granting summary judgment to the Appellees, we will not address this issue on appeal and will grant the Appellees' request to strike this argument from Bowling's brief on appeal.

Bowling also contends that the trial court erred in denying his motion for CR 60.02 relief. In that motion, Bowling cited CR 60.02 and argued that "[t]he judgments entered on August 20, 1998, and the order entered on February 26, 1999, were mistakenly based on the policy of "strict construction," as opposed to the doctrine of substantial compliance as set forth in Ready v. Jamison, Ky., 705 S.W.2d 479 (1986) and Johnson v. Smith, Ky., 885 S.W.2d 944 (1994).

Under CR 60.02, a trial court may grant relief from its final judgment if the moving party shows:

> (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.

We will not reverse a trial court's denial of CR 60.02 relief unless we find that the trial court abused its discretion in denying relief. Bethlehem Minerals Company v. Church and Mullins Corporation, Ky., 887 S.W.2d 327, 329 (1994). Having reviewed

the record on appeal and the parties' arguments herein, we are not persuaded that an abuse of discretion occurred in this case.

The issues Bowling raises as grounds for CR 60.02 relief are clearly issues of law as opposed to fact. A review of the language of CR 60.02 shows that mistake of law is not one of the grounds for which relief is available. Furthermore, a review of case law in this area shows that CR 60.02 relief is not proper for a mistake of law. In Wimsatt v. Haydon Oil Company, Inc., Ky., 414 S.W.2d 908 (1967), the appellant sought to have a final judgment dismissing his claim for personal injury overturned pursuant to Cr 60.02 on the ground that his cause of action was not time barred. In holding that such relief could not be granted pursuant to CR 60.02, the Kentucky Supreme Court stated:

> We think it is plain that the appellant may not prevail in the appeal relating to the denial of his motion for relief in the original action under CR 60.02. If the trial court erred in dismissing the amended complaint, that error could have been challenged by a regularly prosecuted appeal. CR 60.02 is not a supplemental appeal procedure. The rule enumerates the instances wherein relief under it may be obtained. None of the instances listed is applicable to the situation at bar. The error, if any, was an error of law by the trial court, and subject to review upon appeal in due course; in such a circumstance CR 60.02 may not be invoked as an alternative method for review.

Wimsatt, 414 S.W. 2d at 910. In so ruling, the Court was following earlier precedent set in James v. Hillerich & Bradsby Company, Inc., Ky., 299 S.W.2d 92 (1957), where it succinctly stated that "[a]lthough CR 60.02 provides authority for reopening or vacating a judgment after 10 days, this Rule is not available for correction of an error or mistake of law by the court."

James, 299 S.W.2d at 93. See also City of Covington v. Sanitation District No. 1 of Campbell and Kenton Counties, Ky., 459 S.W.2d 85 (1970)(holding that error of law is not grounds for reopening judgment under CR 60.02). Thus, because Bowling sought relief from the trial court's judgment pursuant to CR 60.02 solely on the ground that the trial court committed errors of law, the trial court did not abuse its discretion in refusing to grant CR 60.02 relief.

Having considered the parties' arguments on appeal, pages 11 to 15 of Bowling's brief on appeal pertaining to the doctrine of relation back are stricken and the orders of the Madison Circuit Court are affirmed.

ALL CONCUR.

/s/ Daniel T. Guidugli
JUDGE, COURT OF APPEALS

ENTERED: September 1, 2000

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