RENDERED: DECEMBER 22, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002973-MR

SCOTT PRESTON — APPELLANT

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE STEPHEN M. SHEWMAKER, JUDGE
ACTION NO. 98-CI-00162

CITY OF DANVILLE AND
J. RALPH GREER — APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: JOHNSON, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Scott Preston appeals from an order of the Boyle Circuit Court finding that a previous order of the court was a final and appealable judgment. As the trial court erred in designating what was an interlocutory order as final and appealable, we reverse and remand for further proceedings.

On March 26, 1998 and April 24, 1998, Scott Preston, appellant, filed a complaint and amended complaint against appellees, J. Ralph Greer (Greer) and the City of Danville (the City). The complaint alleged that Preston was subjected to a hostile or abusive working environment after an incident of

unwanted sexual contact perpetrated upon Preston by Greer. The complaint alleged that the incident took place in May 1994, at which time Greer was Preston's supervisor at the Public Works Department of the City of Danville. Preston's complaint stated claims for sexual battery and sexual harassment against Greer and the City. Although he did not specifically state as such, we presume, as did the trial court and appellees, that Preston's allegation of hostile and abusive workplace sexual harassment was an attempt at stating a claim pursuant to KRS Chapter 344.

On May 29, 1998, the appellees filed a motion to dismiss Preston's complaint. In their accompanying memorandum of law, the appellees argued that 1) Preston's tort claims for sexual assault and battery were barred by the one-year statute of limitations set forth in KRS 413.140(1)(a); and 2) Preston's KRS Chapter 344 claim against Greer must be dismissed as a matter of law as KRS Chapter 344 does not impose liability against individual employees. The memorandum went on to state that "Plaintiff's only properly stated claim, to the extent one exists at all, which is denied, is against the City under KRS Chapter 344 for sexual harassment. The City reserves the right to move the Court for summary judgment dismissing that claim following an appropriate period of discovery."

On July 8, 1998, Preston filed a response to the motion to dismiss, contending that a reading of his complaint clearly indicates, as the 1994 incident did not cause him bodily harm but rather severe emotional trauma, that his complaint stated a claim for the tort of outrageous conduct, which has a five-year statute

of limitations. Additionally, the response reiterated Preston's KRS Chapter 344 claims against Greer and the City.

On July 13, 1998, the appellees filed a reply to Preston's response to the motion to dismiss, contending that 1) Preston cannot recast his complaint as the tort of outrage, rather than sexual assault and battery, in order to get the benefit of the five-year statute of limitations; and 2) Preston may not maintain a sexual harassment claim under KRS Chapter 344 against Greer in his individual capacity. The response concluded by requesting that the court "grant Defendants' Motion to Dismiss all claims against Mr. Greer, and the alleged sexual assault and battery claims against the City of Danville, and further to clarify that the Plaintiff may not properly state any purported 'tort of outrage' claim." (emphasis original).

In an order dated August 4, 1998 and entered on August 5, 1998, (hereinafter referred to as the "August 4, 1998 order") the court stated:

> This cause is before the Court pursuant to the Defendant's Motion to Dismiss and for Summary Judgment on behalf of the individual Defendant, J. Ralph Greer.
>
> The records and case citations clearly indicate that the individual J. Ralph Greer must be dismissed. A long list of cases indicates that a supervisory employee cannot be held liable in his personal capacity for damages as a result of violation of KRS 344, . . . or a violation of Title VII.
>
> That leaves the remaining claim of the Defendant for relief pursuant to the statute of limitations. In Plaintiff's original complaint he alleges in numerous places that his claim against Defendant Greer was for sexual battery, sexual touching and grabbing and holding. These allegations are clearly a

> sexual battery. The statute of limitations for such battery is one year. These claims were not filed within that time.
>
> Now Plaintiff attempts to recast his complaint as one for the tort of outrage. This same approach was attempted in the case of Rigazio v. Archdiocese of Louisville, Ky. App., 853 S.W.2d 295 (1993) and the Court determined that on the same or similar fact[s] that recovery for the tort of outrage is not permissible. Consequently, the Defendant's motion for Summary Judgment as to the claims of the Plaintiff on tort of outrage shall be granted.
>
> WHEREFORE, IT IS HEREBY ORDERED:
>
> 1. Defendant shall be granted Summary Judgment as to the claims made against Greer individually under KRS 344 as same does not permit recovery from the individual defendant.
>
> 2. The Defendant's motion to dismiss the sexual assault and battery claims against Greer and the City of Danville [is granted] as same are outside the one year statute of limitations.
>
> 3. The plaintiff's claim for outrage cannot withstand the motion for Summary Judgment pursuant to the case of Rigazio v. Archdiocese of Louisville, 85[3] S.W.2d 295 (1993), and the Defendant's motion for Summary Judgment shall be granted as to that claim as well.
>
> 4. This judgment having disposed of all claims of the Plaintiff, this case shall be DISMISSED from the active docket.

On August 10, 1999, Preston filed a motion to redocket on the grounds that the court's August 4, 1998 order was silent as to the KRS Chapter 344 claim, and the civil outrage relating thereto, against the City. Preston contended that, as all of the claims were not disposed of, and the order contained no finality language, per CR 54.02, the August 4, 1998 order was not final.

On September 9, 1999, the City filed a response in opposition to Preston's motion to redocket. Citing the court's language from the August 4, 1998 order "This judgment having disposed of all claims of the Plaintiff this case shall be dismissed from the active docket", (emphasis original), the City argued that the August 4, 1998 order was a final judgment, from which Preston did not timely object or appeal. On September 21, 1999, the court entered an order redocketing the action "on the issue remaining, sexual harassment and civil outrage relating thereto against defendant, City of Danville." On October 1, 1999, the City filed a motion to reconsider the order redocketing. On October 20, 1999, the court entered an order setting aside the September 21, 1999 order redocketing, and granting the parties additional time to file supplemental memoranda. Additionally, on November 9, 1999, Preston filed a motion to reconsider the court's order dismissing his civil outrage claim. A hearing was held on the motions, and, in an order dated November 24, 1999 and entered on November 29, 1999, the court denied Preston's motions to redocket and reconsider, stating that "the summary judgment Order entered August 4, 1998 was a final, appealable judgment." This appeal followed.

CR 54.01 defines a "final or appealable judgment" as "a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02." CR 54.02 states, in pertinent part:

> (1) When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved,

> the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

In the instant case, Preston's complaint and amended complaint clearly contained 1) a sexual battery claim against Greer; 2) a KRS Chapter 344 claim against Greer; 3) a sexual battery claim against the City of Danville; and 4) a KRS Chapter 344 claim against the City of Danville. The court's August 4, 1998 order disposed of the sexual battery claims against Greer and the City, the claim for outrage, and the KRS Chapter 344 claim against Greer. However, the order was silent as to the KRS Chapter 344 claim against the City. As the August 4, 1998 order failed to adjudicate all of the claims, and did not recite that it was final as to the issues decided and that no just reason for delay existed, it was not a final and appealable judgment. Signer v. Arnold, Ky., 436 S.W.2d 493, 494 (1969); Fruchtenicht v. United States Fidelity and Guaranty Co., Ky., 451 S.W.2d 835, 837 (1969); CR 54.01; CR 54.02.

For the aforementioned reasons, we reverse the order entered November 29, 1999 in which the trial court found that the August 4, 1998 order was final and appealable, and hold that the

August 4, 1998 order was interlocutory only. The case is remanded to the trial court for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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