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Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001563-OA

ROMAN CATHOLIC DIOCESE OF LEXINGTON — PETITIONER

v. ORIGINAL ACTION
REGARDING FAYETTE CIRCUIT COURT

HON. MARY C. NOBLE,
JUDGE, FAYETTE CIRCUIT COURT — RESPONDENT

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OPINION AND ORDER
DENYING PETITION UNDER CR 76.36

BEFORE: EMBERTON, CHIEF JUDGE; COMBS AND KNOPF, JUDGES.

EMBERTON, CHIEF JUDGE: This original action practiced under CR 76.36 concerns press and public access to a pleading in a civil action alleging that the petitioner, the defendant below, failed to properly respond to incidents of sexual abuse by clergymen of the diocese. It is alleged that the diocese's failure to control its clergy allowed such abuse to continue resulting in the abuse inflicted on the circuit court plaintiffs while they were minors and were in positions of trust in relation to the abusers and to the diocese. At issue here are portions of an amended complaint filed by the plaintiffs alleging various specific instances of

misconduct committed by named clergymen other than those who are alleged to have victimized the plaintiffs themselves. Some instances do not involve child sexual abuse or any actual criminal behavior but rather involve violations of sexual morals unacceptable to the church or violations of celibacy required of Catholic priests.

By order entered July 23, 2002, the trial court ordered certain paragraphs of the amended complaint to be stricken pursuant to CR (Kentucky Rules of Civil Procedure) 12.06 upon the trial court's finding that the allegations contained in the ruling were immaterial to the claims of the five plaintiffs. The trial court also stated that the allegations could be said to be impertinent and scandalous if untrue, but it declined to inquire into the veracity of claims found to be immaterial to the litigation before it. The trial court's action in striking portions of the amended complaint is not on review at this time. Plaintiffs could still challenge that decision on any appeal of a final judgment.

When the trial court entered its order of July 23 striking material from the amended complaint, it was still considering whether the record should be sealed from public view pursuant to KRS 413.249. The petitioner separately requested that the material stricken from the amended complaint be expunged from the record or sealed from public view even if the remainder of the record were opened. The trial court ruled that the stricken material would remain in the record and declined to seal the stricken material from public view.

The petitioner filed this original action seeking to prevent public disclosure of the stricken paragraphs of the amended complaint. It initially appeared that the petitioner was also seeking to prevent the opening of the entire record under a ruling expected from the circuit judge that KRS 413.249 was either inapplicable to an action against the petitioner or was unconstitutional. By supplemental pleading, the petitioner has clarified that it is seeking to keep sealed only the material stricken from the amended complaint by the trial court.

This Court is informed that the trial court has since ruled that KRS 413.249(3) is unconstitutional and cannot be used as authority to seal the circuit court record. The petitioner has not challenged that ruling, and we do not, therefore, find it necessary to address the constitutionality of the statute in this original action.

Likewise, we do not need to decide the meaning of the word "stricken" in all contexts. To strike something from the record may mean quite different things depending upon whether a court is striking a portion of a pleading, striking an entire pleading, striking an improper remark made before a jury or striking the witness testimony found to be improper.

However, we do need to decide what the word "stricken" means in this context. The trial court stated the following:

> There is no authority offered for sealing or removing pleadings or portions thereof that have been stricken. CR 12.06 merely states that on sufficient grounds the Court may order portions of a pleading be stricken. It does not say what "stricken" means, or how it is physically done.
> ....

> In the Court's experience, the most common approach is to leave the document containing the stricken portion in the record, but to give them no legal effect.

In some cases when documents are ordered stricken from the record and it would appear that no party would have any further use for the documents, they might be removed or expunged from the record without detriment to the litigation process. However, where, as in this litigation, it appears that a party may wish to make an issue of the ruling striking the material, the material must remain in the record as the trial court correctly decided. We further agree with the trial court that the essential result of striking material in this context is that the stricken material is given "no legal effect."

This leads to the principal issue of this original action which is whether those documents which have been stricken and given no legal effect but which have been retained in the record should be open to public view.

We do not find it necessary to detail the allegations stricken by the trial court. It is sufficient to say that they provide details of alleged sexual misconduct by priests of the petitioner diocese and allege that the diocese has failed to take proper or timely corrective action. The details of the stricken allegations are disturbing and distressing. However, they are no more so than the alleged victimization of the plaintiffs themselves.

The United States Supreme Court has emphasized the right of public access to judicial proceedings in stating: "[i]t is clear that the courts of this country recognized a general

right to inspect and copy public records and documents including judicial records and documents." Footnotes omitted. Nixon v. Warner Communications, Inc., 435 U.S. 589, 597, 98 S. Ct. 1306, 1312, 55 L. Ed. 2d 570 (1978). The importance of right of access to court documents and the critical role exercised by the news media in the process of information collection and dissemination is discussed in the Courier-Journal and Louisville Times Company v. Peers, Ky., 747 S.W.2d 125 (1988). It has also been recognized that "[S]uch right is not absolute and is limited by the condition that a prior restraint on news gathering must be 'necessitated by compelling governmental interest' and must be 'narrowly tailored to serve that interest'". Cape Publications, Inc. v. Braden, Ky., 39 S.W.3d 823, 826 (2001).

From our examination of the extensive pleadings before this Court, we are unable to find a compelling public interest that would justify the trial court's exercising its discretion to seal the stricken materials from public view. We are compelled to recognize that this is not simply a dispute between individual private parties. The plaintiffs in this case are alleging misconduct on the part of a large and significant institution of society. The public has a right to know what is being alleged and how the courts are conducting the litigation. In its Nixon opinion, the Supreme Court recognized exceptions to the right of inspection when that right would merely gratify private spite or serve to convert the court record into a reservoir of libelous statements. However, in this instance, the petitioner is an entity active in public life with the resources and experience to

protect itself from a libel.

Additionally, the civil rules governing litigation provide ample remedies for improper pleadings. In this case, petitioner's motion has resulted in the striking of the pleadings as immaterial to the litigation. We cannot accept the proposition that the remedy imposed by the trial court is meaningless to the media or to the public. Additionally, we note that the petitioner's memorandum supporting its motion to strike alleged that the offending paragraphs contained factual inaccuracies. Petitioner has the option of seeking sanctions under CR 11 for any untruthful allegations made in bad faith.

Based on the discussion, we find that the circuit court would have abused its discretion had it ordered the stricken material sealed.

Accordingly, the Court ORDERS that the petition for relief under CR 76.36 be, and it is hereby, DENIED. The order entered by a member of this Court on July 24, 2002 is hereby DISSOLVED.

However, in order to preserve the petitioner's opportunity to pursue a matter-of-right appeal to the Kentucky Supreme Court, the Court ORDERS that the enforcement of this order shall be STAYED for a period of seven (7) days from the date of the entry to allow the parties to seek intermediate relief in the Supreme Court to the extent that the material stricken by the trial court shall be kept sealed by that Court. The petitioner has limited the relief sought to the material stricken, and so only that material is to remain sealed. The

remainder of the circuit court record shall be subject to public access as ordered by the circuit court.

The Court of Appeals record of this original action contains references to the stricken material that remains sealed. Therefore, the Court ORDERS that the pleadings in the record of this original action shall REMAIN SEALED for seven (7) days from the date of this order and will thereafter be subject to whatever order is entered by the Supreme Court. If intermediate relief is not granted by the Supreme Court, the record in this original action shall be subject to public access after the seven-day period has expired.

COMBS, JUDGE, CONCURS AND FURNISHES A SEPARATE OPINION.

KNOPF, JUDGE, DISSENTS AND FURNISHES A SEPARATE OPINION.

ENTERED: August 9, 2002 /s/ Thomas Emberton
CHIEF JUDGE, COURT OF APPEALS

COMBS, JUDGE CONCURRING: The procedural posture of this case and the unique public policy context in which it has arisen both dictate the outcome announced in Chief Judge Emberton's opinion denying the petition and ordering the unsealing of the entire amended complaint. I concur with that opinion in full.

The original complaint, purporting to be a class action, was filed anonymously as to the five plaintiffs, naming them only as four "John Does" and one "Jane Doe." The stricken material at issue in this petition was not a part of that

complaint. In granting the motion of the dioceses[1] to compel a more definite statement, the trial court ordered, *inter alia*, that an amended complaint be filed revealing the names of the plaintiffs, the identity of the offending priests, and the details and circumstances pertaining to each allegation. The order also struck from the original complaint the amount recited as unliquidated damages. That damages item has not been the subject of these efforts to strike portions of the first amended complaint -- nor has *stricken* been argued to be tantamount to *expunged* as to the original complaint.

The first amended complaint was accordingly filed. Not only did it provide the items ordered to be revealed, but it set forth several paragraphs (numbered 43-65) briefly detailing incidents of other acts allegedly perpetrated by priests subject to the supervision and control of the defendant dioceses. The apparent justification for inclusion of this material was to establish the plaintiffs' theory of a pattern or practice of the failure of the dioceses to inform parishioners of the presence and activity of predatory priests. The conduct of three of the four priests involved was already a matter of public record by way of previous litigation or police record.

There has been no allegation that inclusion of these materials constituted a bad-faith claim under CR[2] 11. On the

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[1]The circuit court action was filed against both the Diocese of Lexington and the Diocese of Covington. Only the Diocese of Lexington has filed this original action.

[2]Kentucky Rules of Civil Procedure.

contrary, there is no reason to believe that they were filed for any reason other than to comply fully with the trial judge's order for a more definite statement of exactly what allegations the dioceses should expect to defend. Potentially, if establishing a "pattern or practice" of misconduct should develop during discovery or at trial, these paragraphs would be capable of being characterized as relevant and necessary to the plaintiffs' theory of their case. Thus, they cannot legitimately be labelled as "frivolous."

At present, the trial court has ruled that they are irrelevant to the claims alleged with respect to the five named plaintiffs. In ordering the paragraphs stricken, the trial court did not order that they be expunged or removed from the record. Under our strict standard of review of abuse of discretion, I perceive no abuse or misunderstanding by the trial court of either the nature of the order or the meaning of *stricken*. Clearly in this context, it meant "removed from the pleadings" as they are to be employed in the course of litigation without being removed from the record itself.

As correctly noted both in the Opinion and Order of this court and in the Dissenting Opinion, "Every court has supervisory power over its own records and files." Nixon v. Warner Communications, Inc., 435 U.S. 589, 55 L.Ed.2d 570, 580, 98 S.Ct. 1306 (1978). The trial court correctly exercised that supervisory power, and we find no abuse of discretion in the order unsealing the entire record, including the portions stricken for trial purposes but still a part of the court record

as originally filed in good faith and maintained by the court in the case of an appeal at the conclusion of the trial.

The diocese argues, and the Dissenting Opinion notes with approval, the concern voiced in Nixon, supra at 580, that abuse of court records could potentially convert them into "reservoirs of libelous statements for press consumption." Such is not the case with respect to the materials at issue here. Three of the four incidents are already in the public domain by virtue of court and police records. As to the fourth priest, there has been no charge that the matters alleged as to his conduct are false or defamatory. The Nixon admonition is simply not relevant to the paragraphs at issue.

In addition to our standard of review of abuse of discretion, we must be ever mindful of the legal presumption of free access by the press to court records and the concomitant right of access by the public. The Opinion and Order of Chief Judge Emberton has ably and thoroughly discussed that presumption and has correctly found it to be paramount in this case.

We can never adjudicate a case properly in an academic vacuum. The particulary disturbing and painful context of this case is an even more compelling basis for us to defer to the presumption of press and public access. The serious allegations involving breach of sacred, fiduciary duties both shock the conscience and sicken the spirit of society at large. The cloak of secrecy alleged to have shielded this reprehensible conduct from disclosure cannot be maintained, and this court has correctly ruled that it be removed in this case by denying the

petition and affirming the order of the trial court to unseal this record in its entirety.

KNOPF, JUDGE, DISSENTING: The right of full public access to court records and proceedings is a right characteristic of open societies and one of which Kentuckians should be both proud and protective.[3] It is not an absolute right, of course, no right is, but it is vitally important. It is deeply rooted in the public's common-law right to be informed about the administration of justice.[4] "It helps safeguard the integrity, quality, and respect in our judicial system and permits the public to keep a watchful eye on the workings of public agencies."[5] In accordance with this important right, I whole-heartedly concur in the order announced at the end of the majority's opinion to unseal for public scrutiny everything in the record of this case that has been legally and properly submitted to the trial court.

I am compelled to dissent, however, from my colleagues' decision to tolerate the release of immaterial allegations the trial court has stricken from the pleadings and which thus are not part of the record. I too am sickened and saddened by recent allegations of abuse by certain priests. However, I am convinced that the public's right of access is not truly implicated, much

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[3]Courier-Journal v. Peers, Ky., 747 S.W.2d 125 (1988).

[4]Nixon v. Warner Communications, Inc., 435 U.S. 589, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978).

[5]Picard Chemical Inc. Profit Sharing Plan v. Perrigo Company, 951 F. Supp. 679, 690 (WD Mich. 1996). (citations and internal quotation marks omitted).

less compromised, by the exclusion of matters that are no true part of the plaintiffs' claims and should never have been included among them. The point is not secrecy. Nothing prevents the plaintiffs or their counsel from disseminating any true information they want about the diocese and its priests. If they wish, they can direct others to information already in the public record. What I object to is the improper use of the trial court's record for this purpose. The majority's doctrinaire invocation of the right of access in this case permits that impropriety and thus diminishes an equally important right: the court's right to prevent misuse of its processes. Out of an understandable but exaggerated concern that the public will misperceive the Law's reason for denying access to the stricken material--irrelevancy, not secrecy--both the trial court and now this Court have abdicated their responsibility to insist upon proper pleadings and have failed to protect innocent third parties who are not priests and are strangers to this litigation, but who will suffer because of our lapse.

As observed by the United States Supreme Court in Nixon v. Warner Communications, Inc.,[6] "Every court has supervisory power over its own records and files."[7] This power enables the court

> to insure that its records are not used to gratify private spite or promote public scandal. . . . [And to] refuse[] to permit [its] files to serve as reservoirs of

[6] *supra.*

[7] *Id.* at 598, 580.

libelous statements for press consumption.[8]

The court's power to protect itself from such misuse is partially embodied in Kentucky in Civil Rule (CR) 12.06. That rule authorizes the court, upon motion of a party or upon its own motion, to "order stricken from any pleading any insufficient defense or any sham, redundant, immaterial, impertinent or scandalous matter." The Civil Rules do not contain a definition of "strike," but the word's plain meaning in this context is "to eliminate or expunge."[9] "Stricken from any pleading" means just that--eliminated, expunged, from the matters that may properly bear upon the court's decisions. If the judge finds grounds to strike something, he or she has no discretion. The stricken material should be expunged. The stricken material could, of course, be preserved for appeal if need be by placing it in a sealed envelope, but otherwise it should be physically as well as legally removed from the file.

The Fayette Circuit Court did not give proper effect to CR 12.06. The trial court determined that several paragraphs in the plaintiffs' amended complaint should be stricken. It found that those paragraphs contained allegations that are utterly immaterial to the plaintiffs' cause of action, which is based on abuse alleged to have occurred decades ago. Accordingly, the trial court properly ordered those immaterial paragraphs stricken from the complaint and announced that it would give them no

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[8] *Id.*

[9] *The American Heritage Dictionary of the English Language, Third Edition,* 1779 (1992).

consideration. When the diocese moved to have the stricken paragraphs physically removed from the record, however, so that there could be no public access to them, the trial court denied the motion. It, like the majority, was persuaded that "stricken" as used in the rule does not mean stricken, but something more like ignored. The "stricken" material would be disregarded, the trial court ruled, but it would remain physically in the record and would be subject to the public's right of access. The diocese thereupon sought a writ in this Court compelling the trial court to remove the stricken material from its file.

The issue before us is thus a narrow one. We are not concerned with the merits of the order to strike, with whether the stricken allegations were made in good faith, or with whether these allegations may be deemed material in the future. We are concerned solely with whether the right to public access applies to materials duly stricken from the pleadings. The majority opinion says that the public has a right of access to such material--at least if the stricken material pertains (as the majority describes) to a "large and significant institution of society . . . with the resources and experience to protect itself from a libel." Would the majority conclude differently if the parties were different? We need not involve ourselves in such a double standard; the Civil Rules should apply equally to all. I am persuaded that the right of access does not apply in this situation, regardless of the parties.

On the contrary, the right of public access only extends "to those materials which properly come before the court

in the course of an adjudicatory proceeding and which are relevant to that adjudication."[10] It extends "to materials on which a court relies in determining the litigants' substantive rights."[11] It does not extend to materials "which play no role in the adjudication process."[12] By definition, materials stricken, expunged, from the pleadings have not "properly come before the court," and they "play no role in the adjudication process." The right of public access, therefore, does not attach to them. The trial court clearly erred when it ruled otherwise, when it failed to give effect to the plain language of CR 12.06. The trial court should have physically removed the stricken paragraphs from its files and should not have permitted itself to be used as a conduit for immaterial allegations the airing of which is sure to cause harm to innocent people, not parties to this litigation.

The diocese is entitled to a writ; I respectfully dissent from the decision to deny it.

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[10] In re Providence Journal Company, Inc., 293 F.3d 1, 9 (1st Cir. 2002) (citations and internal quotation marks omitted).

[11] Federal Trade Commission v. Standard Financial Management Corporation, 830 F.2d 404, 408 (1st Cir. 1987).

[12] *Id.* *See also* United States v. Amodeo, 44 F.3d 141 (2nd Cir. 1995); Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3rd Cir. 1994); Smith v. United States District Court Officers, 203 F.3d 440 (7th Cir. 2000).

PETITION FOR ROMAN CATHOLIC DIOCESE OF LEXINGTON:

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ORAL ARGUMENT FOR ROMAN CATHOLIC DIOCESE OF LEXINGTON:

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RESPONSE FOR JUDGE MARY C. NOBLE:

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RESPONSE FOR LEXINGTON HERALD-LEADER CO.:

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