

RENDERED: SEPTEMBER 29, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-001296-MR

DAVID L. WARDLE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 03-CI-01741

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; HUDDLESTON AND POTTER, SENIOR
JUDGES.¹

POTTER, SENIOR JUDGE: David L. Wardle appeals from an order of
the Fayette Circuit Court granting summary judgment to
Lexington-Fayette Urban County Government (LFUCG) in a lawsuit
initiated by Wardle in connection with a drug test he was
required to take, following a work-related automobile accident,

¹ Senior Judges Joseph R. Huddleston and John Woods Potter sitting as Special
Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of
the Kentucky Constitution and KRS 21.580.

in contravention of LFUCG's employee handbook. For the reasons stated below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The LFUCG Employee Handbook specifies that "[a]ny employee involved in a single vehicle accident with property damages of \$2,500.00 or more must immediately notify his or her supervisor and undergo a drug and alcohol test within two hours of the incident, but no later than eight hours after the incident."

In April 1999, Wardle was an employee of LFUCG. Wardle was employed as a carpenter in the Division of Building Maintenance and Construction. On April 28, 1999, Wardle backed into a concrete pillar while driving an LFUCG-owned vehicle during work hours. The incident caused damage to the vehicle. Wardle subsequently reported the accident to his supervisor, Ben Turpin. Turpin notified his superior, Carolyn Smith, of the incident, who directed Turpin to have Wardle tested for drugs and alcohol. Wardle was subsequently tested at an Urgent Treatment Center. According to Wardle, either on the day of the accident or the following day, LFUCG became aware that the amount of damages caused in the vehicle accident was less than \$2,500.00; LFUCG, however, alleges that it did not become aware of the damages estimates until after it had received the drug test results. As further discussed below, this factual dispute

was finally determined in the federal litigation adversely to Wardle, and, pursuant to the principles of res judicata, we assume that LFUCG did not become aware of the property damage estimates until after it received the results of the drug test.

On May 4, 1999, the Urgent Treatment Center notified LFUCG that Wardle had tested positive for drugs. In response to the test results, LFUCG ordered Wardle to submit to a mandatory substance abuse evaluation and suspended him for thirty days. Immediately after Wardle began to serve the suspension, however, because the damage to the vehicle fell below the \$2,500.00 threshold required to trigger a drug test, LFUCG rescinded the suspension, all record of his positive test was removed from his personnel file, and Wardle was reinstated with back pay.

On July 30, 1999, Wardle filed an action in United States District Court alleging various causes of action in connection with LFUCG's decision to require him to take a drug test following the April 28, 1999, accident. In his complaint, Wardle alleged that the testing violated his Fourth and Fifth Amendment rights as applied to the state by the Fourteenth Amendment. He also alleged violations of corresponding provisions of the Kentucky Constitution, and he asserted state law claims for breach of contract; breach of implied covenant of good faith and fair dealing; intentional infliction of emotional distress; and fraud, deceit, and misrepresentation.

On July 21, 2000, the District Court entered an Opinion & Order granting LFUCG summary judgment on those claims over which it had original jurisdiction, and dismissing Wardle's state law claims without prejudice. On September 5, 2002, the United States Court of Appeals for the Sixth Circuit Court of Appeals rendered an unpublished opinion affirming the District Court's decision. See Wardle v. LFUCG, 45 Fed.Appx. 505 (6th Cir. 2002). The Sixth Circuit noted that Wardle had not claimed that LFUCG had known about the property damage estimates prior to obtaining his drug test results until his post-judgment motion to vacate. This was held by the Sixth Circuit to be untimely, and binds us, pursuant to the principles of res judicata, to the factual determination that LFUCG did not know the results of Wardle's drug test until after it received the property damage estimates to the vehicle. On March 24, 2003, the United States Supreme Court entered an order denying certiorari. See Wardle v. Lexington-Fayette Urban County Government, 538 U.S. 923, 123 S.Ct. 1582, 155 L.Ed.2d 314 (2003).

On April 22, 2003, Wardle filed a Complaint in Fayette Circuit Court asserting state law claims substantially paralleling the state law claims asserted in his Federal complaint. In addition, Wardle asserted a Retaliation/Whistle Blower claim not previously raised in the Federal complaint. On

March 15, 2005, an order was entered granting LFUCG summary judgment on all claims asserted by Wardle. On May 23, 2005, an order was entered denying Wardle's motion to alter, amend, or vacate. This appeal followed.

STANDARD OF REVIEW

Before us, Wardle contends that the circuit court erroneously granted summary judgment to LFUCG. Upon application of the principles of res judicata, as previously discussed, the operative facts are not in dispute. Thus, our task is to determine whether LFUCG was entitled to judgment as a matter of law.

STATE CONSTITUTIONAL CLAIMS

In Count I of his Fayette Circuit Court complaint, Wardle asserted a State law constitutional claim under Section 10 of the Kentucky Constitution, which provides for protection against unreasonable searches and seizures parallel to the protections contained in the Fourth Amendment of the Federal Constitution. In Count II of his Complaint Wardle asserted a State law constitutional law claim asserting that LFUCG had failed to follow the written procedures in its Employee Handbook, which we construe to be a due process argument implicating Section 2, the Kentucky Constitution's parallel section to the Fifth Amendment due process clause. In Count III of his complaint Wardle asserts a State constitutional claim

alleging a taking of his property interest in his governmental employment, which we construe as an alleged violation of Kentucky Constitution Section 13, which is parallel to the takings clause contained in the Fifth Amendment of the Federal Constitution.

In his Complaint in Federal District Court, Wardle raised these same issues. While not ruling upon the State Constitutional Claims, the District Court held that LFUCG was entitled to summary judgment upon the parallel Federal Constitutional Claims. This determination was upheld on appeal to the Sixth Circuit, and certiorari was denied by the United States Supreme Court.

In the present Complaint, Wardle makes the same factual arguments he made in his Federal Complaint, except for his impermissible attempt to change the timing of LFUCG's knowledge of the property damage. In the present case, however, Wardle's claims are limited to violations of the aforementioned provisions of the Kentucky Constitution. It has been consistently held that the Kentucky Constitutional provisions upon which Wardle relies provide no greater protection than their respective Federal counterpart contained in the United States Constitution. See, e.g., LaFollette v. Commonwealth, 915 S.W.2d 747, 748 (Ky. 1996) (Kentucky State Constitution "provides no greater protection than does the federal Fourth

Amendment"). Therefore to prevail here Wardle would have to have the factual issues underlying his State claim decided differently than they were decided in his Federal action.

Based upon the Federal Court's disposition of the parallel federal constitutional claims in the federal lawsuit, and because the Kentucky Constitution's counterparts to the federal provisions provide no greater protections than the parallel federal provisions, we conclude that the doctrine of collateral estoppel, or issue preclusion as it is sometimes called,² bars relitigation of the issues underlying Wardle's constitutional claims in the present action.

In order for issue preclusion to be used as a bar to further litigation, certain elements must be present, Yeoman v. Commonwealth of Kentucky, Health Policy Board, 983 S.W.2d 459, 465 (Ky. 1998):

First, the issue in the second case must be the same as the issue in the first case. Here, because of the doctrine of res judicata, the factual issues in the present case are the same as those presented in the federal case. The only difference is that the operative provisions in this case are contained in the State Constitution instead of the Federal

² "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Restatement (Second) of Judgments §27 (1982).

Constitution. Again, however, the State provisions provide only the same level of protection afforded by the Federal Constitution.

Second, the issue must have been actually litigated. The constitutional issues were litigated in the Federal proceeding, and ultimately summary judgment was granted to LFUCG on all claims as raised under the federal constitution.

Third, even if an issue was actually litigated in a prior action, issue preclusion will not bar subsequent litigation unless the issue was actually decided in that action. This is similar to the previous requirement. The federal constitutional claims were actually decided against Wardle.

Fourth, for issue preclusion to operate as a bar, the decision on the issue in the prior action must have been necessary to the court's judgment. The District Court's determination that the federal constitution did not support the causes of action asserted by Wardle was necessary to its award of summary judgment to LFUCG.

In summary, we conclude that the State constitutional claims asserted by Wardle in the present action are barred by collateral estoppel.

Wardle argues that although he did not prevail in the federal action he will prevail here because he will try his case differently and present evidence that was not presented in the

Federal action. Such an argument does not avoid the reach of the doctrine of issue preclusion.³ Indeed such an exception would swallow the rule. Rare is the litigant who doesn't believe he would do better given a second bite at the apple.

SOVEREIGN IMMUNITY ISSUES

In his complaint, Wardle asserted the common law tort claims of invasion of privacy; breach of covenant of good faith and fair dealing; intentional infliction of emotional distress; and fraud/misrepresentation. Wardle also asserted a claim of breach of contract. We agree with the circuit court that LFUCG is entitled to summary judgment on each of these counts pursuant to the doctrine of sovereign immunity.

LFUCG is an urban county government. "Pursuant to KRS 67A.060(1) [an] urban county government retains the immunities of county government. It is, like a county government, an arm of the state entitled to the protective cloak of sovereign immunity." Hempel v. Lexington-Fayette Urban County Government, 641 S.W.2d 51, 53 (Ky.App. 1982).

The doctrine of sovereign immunity extends to actions sounding in both tort and contract. University of Louisville v. Martin, 574 S.W.2d 676, 677 (Ky.App. 1978) (citing All-American Movers v. Kentucky Ex Rel. Hancock, 552 S.W.2d 679 (Ky.App. 1977) and Foley Construction Co. v. Ward, 375 S.W.2d 392 (Ky.

³ Restatement (Second) of Judgments §28 (1982).

1964)). As such, pursuant to sovereign immunity, the circuit court properly granted LFUCG summary judgment on Wardle's common law tort claims of invasion of privacy; breach of covenant of good faith and fair dealing; intentional infliction of emotional distress; and fraud/misrepresentation; and on his claim of breach of contract.

RETALIATION/WHISTLE BLOWER CLAIM

Wardle further contends that the circuit court erroneously granted summary judgment to LFUCG on his Retaliation/Whistle Blower claim. Count IX of Wardle's complaint alleged that "the Defendant retaliated against Plaintiff by conspiring to and/or in fact actually retaliating against and discriminating against Plaintiff after Plaintiff opposed the LFUCG's unlawful drug testing policies and procedures, as well as increased retaliatory actions after Plaintiff filed his Federal complaint." While the complaint did not so state, the parties now agree that this count is brought pursuant to the Kentucky Whistle Blower Act, KRS 61.101, *et seq.*

KRS 61.103(2) provides that "employees alleging a violation of [the Whistle Blower Act] may bring a civil action for appropriate injunctive relief or punitive damages, or both, within ninety (90) days after the occurrence of the alleged violation." (Emphasis added).

Here, the alleged Whistle Blower Act violation occurred in the aftermath of the April 1999 automobile accident and subsequent drug test. Wardle did not file his State Law Whistle Blower action until April 22, 2003, over four years after the original events. Thus, unless the statute of limitations was tolled during the pendency of the Federal proceedings, Wardle's Whistle Blower action was filed well outside of the applicable limitations period.

28 U.S.C.A. § 1367(a) provides as follows:

Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C.A. § 1367(d) provides as follows:

The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.
(Emphasis added).

We construe 28 U.S.C. § 1367 as providing for the tolling of a state statute of limitations on a claim only if the claim is brought as part of the Federal case. Here, Wardle did not bring a Whistle Blower count in his Federal case. As such, this claim is not entitled to the benefit of the tolling provisions of 28 U.S.C.A. § 1367(d). It follows that at the time Wardle brought his claim in Fayette Circuit Court, his Whistle Blower claim was barred by the 90-day statute of limitations contained in KRS 61.103(2).

For the foregoing reasons the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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