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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007- CA-002301-MR

WILLIAM CAUDILL — APPELLANT

v.

APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 05-CI-00208

RANDALL CARPENTER AND
WILLINA WHITE — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND STUMBO, JUDGES.

DIXON, JUDGE: Appellant, William Caudill, appeals from an order of the Breathitt Circuit Court granting summary judgment in favor of Appellees, Randall Carpenter and Willina White. For the reasons set forth herein, we reverse and remand for further proceedings.

On May 31, 2005, Caudill filed a Complaint in the Breathitt Circuit Court alleging intentional infliction of emotional distress ("IIED") by his neighbors, Carpenter and White. Specifically, Caudill claimed that over a ten year period Carpenter and White continuously harassed him and subjected him to daily verbal abuse, as well as caused him to be arrested and charged with numerous crimes he did not commit. As a result, Caudill claimed that he suffered great emotional distress and financial hardship.

In June 2005, Carpenter filed an answer denying Caudill's allegations and claiming that the complaint failed to state a cause of action upon which relief could be granted.[1] In September 2006, the Breathitt Circuit Clerk issued a notice to dismiss the case for lack of prosecution. Caudill responded on October 10, 2006, requesting that the case remain active for an additional 90 days because criminal charges against various parties had kept him from completing discovery.

Carpenter and White's depositions were eventually scheduled for August 15, 2007. However, on July 31, 2007, Carpenter filed a motion for summary judgment or judgment on the pleadings. Further, on August 3, 2007, Caudill filed a motion for a special judge on the grounds that the case concerned a "continuous series of harassing actions involving both criminal complaints and actions by the Defendants which were reported to the Breathitt County Attorney's Office . . . during the term of the current judge as Breathitt County Attorney."

[1] White initially filed a letter requesting a court-appointed attorney. Although she has remained a *pro se* party in the case, she has never filed any pleadings below or in this Court.

Both motions were heard on August 10, 2007. The trial court declined to rule on the summary judgment motion because Carpenter and White's depositions were pending. However, with respect to the recusal issue, the trial judge noted that he had not been the Breathitt County Attorney since 1998. Despite the fact that Caudill pointed out that some of the charges against him had arisen during that time, the trial judge commented that he and Caudill used to have coffee together at Hardees and "ought to have some bond." Although the trial court took the motion under advisement, the record reveals that it was never ruled upon.

Carpenter and White's depositions were taken on August 15, 2007. On October 12, 2007, Carpenter renewed his motion for summary judgment. Seven days later, on October 19, 2007, the trial court heard the motion for summary judgment. During the hearing, Caudill argued that the hearing was inappropriate because he was not given 10 days notice as required by CR 56.03. Further, Caudill explained that the court reporter was still in the process of transcribing the deposition testimony. Therefore, he did not have the transcripts to respond to Carpenter's renewed motion for summary judgment, wherein he claimed, "[t]hat depositions of the Plaintiff and Defendants have been taken and there is nothing that is alleged that even comes close to 'being so outrageous.'" Finally, Caudill argued that summary judgment was not proper because genuine issues of material fact existed.

At the conclusion of the hearing, the trial court granted the motion for summary judgment, commenting to Caudill,

> [y]ou've got a fine attorney. You're attorney has done you a good job, but . . . the tort of outrage is something that is suppose to be pretty outrageous. . . . I go by there once or twice a week going to the golf course and it all looks like a pretty nice place up there, I don't know why it's difficult for every body to get along, you know, I mean, I feel like somehow everybody ought to get along up there. . . . There has to be an end to litigation and . . . the tort of outrage is a very difficult thing to prove. I'm gonna grant the defendant's motion for summary judgment. I know you have another case that I ruled on, on appeal where you plead guilty and then wanted to have it set aside. I know you, I like you, I don't know what's going on up there, but you know I have to do what in my mind I feel is right. I think what ever is going on up there; everybody ought to try to get along. Looks like to me you have a pretty place up there. I drive by it all the time and I drive by the other place there. I may be wrong, and Ms. Howard can appeal the case and the court of appeals may say that I'm wrong. I don't take offense to that. The court's gonna grant the motion for summary. I'm sorry. . . . Usually you use an abuse of process or something else, I think, that you can use on that.

Caudill thereafter filed a motion to set aside the summary judgment, objecting to the fact the trial judge used personal knowledge about the case in rendering his decision. Caudill also pointed out that the motion to recuse was still pending at the time of the summary judgment. On November 9, 2007, the trial court denied Caudill's motion to set aside the order. This appeal followed.

Summary judgment should only be used to terminate litigation when, as a matter or law, it appears that it would be impossible for the respondent to

produce evidence at the trial warranting a judgment in his favor and against the movant. *Jefferson County Fiscal Court v. Peerce*, 132 S.W.3d 824, 832 (Ky. 2004), (*citing Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 483 (Ky. 1991)). Summary judgment is to be cautiously applied and should not be used as a substitute for trial. *Id*. In ruling on a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-movant. *Steelvest, supra*, at 480 (*citing Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)). An appellate court reviewing a grant of summary judgment must determine whether the trial court correctly found that there were no genuine issues of material fact. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). As findings of fact are not at issue, the trial court's decision is entitled to no deference. *Id.*

Caudill argues on appeal that the trial court erred in granting summary judgment because (1) he did not waive the 56.03 requirement of 10 days notice prior to the hearing on the summary judgment motion; (2) the deposition testimony was not yet transcribed and thus unavailable for Caudill's use; and (3) genuine issues of material fact existed. Because we conclude that procedural errors warrant reversal of the summary judgment, we necessarily do not reach the substantive issues in the motion.

CR 56.03 provides, in pertinent part,

> The [summary judgment] motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers

> to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Kentucky courts have strictly adhered to the 10 day notice requirement. In *Rexing v. Doug Evans Auto Sales, Inc.*, 703 S.W.2d 491, 493-494 (Ky. App. 1986), a panel of this Court held,

> CR 56.03 requires a party to serve a motion for summary judgment on his opponent at least ten days prior to the hearing on the motion. In our opinion, a 'day' for purposes of CR 56.03 means a full twenty-four hour period. *See Drolenga v. Drolenga*, 288 Ky. 396, 156 S.W.2d 160 (1941). *See also* 306 Valentine's Law Dictionary (3rd ed. 1969).
>
> In this case, appellee served appellants' counsel with the motion for summary judgment at 4:45 p.m. on September 14, 1984. The hearing was scheduled for 9:00 o'clock a.m. on September 24, 1984, less than ten full days after the motion was served. We see no reason to permit appellee to circumvent the notice requirements of our Civil Rules by ambushing appellants with last minute motions and early morning hearings.

The CR 56.03 requirement is mandatory unless waived. *See Equitable Coal Sales, Inc. v. Duncan Machinery Movers, Inc.*, 649 S.W.2d 415 (Ky. App. 1983) (seven days notice not objected to and no prejudice shown by fewer days). As noted in *Storer Communications of Jefferson County, Inc. v. Oldham County Board of Education*, 850 S.W.2d 340, 342 (Ky. App. 1993),

> Even if it is appropriate for the trial court to enter a summary judgment on its own motion, the trial court's failure to afford the appellant the most basic procedural protections, notice of its intention and an opportunity to

> respond, is unjustifiable, constitutionally defective, and requires reversal.

Caudill clearly did not waive the ten-day notice requirement. However, Carpenter essentially ignores Caudill's CR 56.03 argument and responds that his July 2007 motion for summary judgment met the 10 day notice requirement and the October 2007 motion was simply a renewal of such. We disagree. As previously noted, Carpenter's renewed motion specifically referenced the parties' deposition testimony as evidence that there was no issue of material fact. That testimony did not exist at the time of the July 2007 motion.

In *Perkins v. Hausladen,* 828 S.W.2d 652 (Ky. 1992), the trial court granted a defense motion for summary judgment made on the morning of trial. The Perkinses argued on appeal that the motion not only violated CR 56.03, but that they were prejudiced by their inability to respond with evidentiary support. In reversing the lower court, our Supreme Court held,

> The treatise on Kentucky Practice by Bertelsman and Philipps, 4th ed. Civil Rule 56.03, Comment 3, states:
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> > "As the annotations following the sub-rule demonstrate, the 10-day lead time provided before hearing the motion is extremely important and, although not jurisdictional, may not be lightly disregarded. . . . [R]equests for extension of time to respond to such motions are usually freely granted, and it may be an abuse of discretion for the trial court to refuse to grant reasonable extensions."
>
> We need not decide whether there is an inflexible rule that violation of the ten day notice requirement requires

> automatic reversal. There may be unusual situations where no possible prejudice could have resulted from a premature hearing. But this case is not one of them. As pointed out in their Brief, the Perkinses were put at a "disadvantage by not being able to put on any affidavits, additional legal research, nor other evidence to contradict the motion."
>
> As stated in *Steelvest, Inc. v. Scansteel Service Ctr., supra:*
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> > "In Kentucky, we have clearly held that the consideration to be given to the two motions [summary judgment vs. directed verdict] is not the same and that a ruling on a summary judgment is a more delicate matter and that its inquiry requires a greater judicial determination and discretion since it takes the case away from the trier of fact before the evidence is actually heard." *Id.* at 482.

Perkins, supra, at 656-657.

Much like *Perkins*, Caudill argued that he was unable to use the deposition testimony to defend against summary judgment because the transcripts were not yet available at the time of the hearing. Certainly, this case does not involve complex legal issues as were present in *Perkins*. Nonetheless, Caudill was entitled to sufficient opportunity to respond to Carpenter's motion for summary judgment. Thus, we conclude that Caudill was prejudiced both by the violation of CR 56.03 and the trial court's decision to rule on the motion before the deposition transcripts were made available by the court reporter.

Finally, while not specifically raised as an issue on appeal, we are troubled by the trial court's failure to rule on the motion for a special judge. Based

upon his comments on the record in ruling in this case, it is clear that the trial judge had a great deal of personal knowledge about the facts and parties involved and based his decision on such. Furthermore, if the trial judge was, in fact, the county attorney at the time of the controversy herein and was involved in the charges against Caudill, then clearly a conflict existed and should have been resolved prior to any ruling on Carpenter's motion for summary judgment.

The order of the Breathitt Circuit Court is reversed and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Lexington, Kentucky

BRIEF FOR APPELLEE RANDALL CARPENTER:

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