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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001515-MR

FLOYD RITCHIE APPELLANT

v.

APPEAL FROM CARROLL CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 09-CI-00052

TOURISM, ARTS AND HERITAGE
CABINET, DEPARTMENT OF PARKS,
COMMONWEALTH OF KENTUCKY, AND
DANA LYONS APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE, CAPERTON AND CLAYTON, JUDGES.

CAPERTON, JUDGE: Floyd Ritchie appeals from the grant of summary judgment in favor of the Appellees, the Department of Parks, Tourism, Arts and Heritage Cabinet, the Commonwealth of Kentucky, and Dana Lyons. Ritchie asserts that his constitutional rights were violated when he was denied access to

play golf at the General Butler State Park Golf Course. After a thorough review of the parties' arguments, the record, and the applicable law, we affirm the Carroll Circuit Court's grant of summary judgment.

The facts central to this appeal are not in dispute. In 2002, there was a dispute between Ritchie, an African-American man, and staff at the General Butler State Park Golf Course (hereinafter "General Butler") wherein he used profanity and was asked to leave the golf course that day. Thereafter, Ritchie was informed by multiple people, including an attorney for the Department of Parks who informed Ritchie in writing in January 2003, that he was free to play golf at General Butler. Ritchie did not return to play golf at General Butler until April 18, 2008. Ritchie contacted multiple state and federal entities concerning the 2002 incident, even though he had been informed that he was eligible to play golf at General Butler. All contacted governmental entities declined to pursue further action.

In the summer of 2007, Ritchie went to the pro shop at General Butler and informed Dana Lyons, the pro shop attendant and the wife of his friend, that he was not allowed to play golf at General Butler. Ritchie did not inform Lyons that he had been contacted by the Department of Parks confirming his eligibility to play golf at General Butler. On April 18, 2008, Ritchie went to General Butler to play golf and Lyons refused to let him play. Lyons testified that this refusal was based on Ritchie's representation that he was not allowed to play at General Butler.

After Lyons refusal to allow him to play, Ritchie filed an incident report. During a conversation between Lyons, the Park Ranger, and the Assistant Park Manager, Ritchie never clarified his prior comment about being barred from the course. A few days later when he went to pick up said report, the Park Manager, Eddie Moore informed Ritchie again that he was welcome to play golf at General Butler. On November 14, 2008, Ritchie was again informed by letter by the Department of Parks that he was eligible to play golf at General Butler.

Ritchie presented evidence that he was the only person ever excluded from General Butler State Park Golf Course and that in 2002 a Caucasian female was approached by staff concerning her payment for play at General Butler and that she was never prohibited from play.[1] Ritchie also relied upon the incident report wherein Lyons reported that she "was told that [Ritchie was banned] by someone higher up than her but would not say who." However, in the same report, Lyons stated that "Ritchie told her that he had been banned from the course."

After being presented with this evidence, the trial court granted Appellees' summary judgment motion. In granting the summary judgment motion, the court determined that based on the Kentucky Civil Rights Act ("KCRA") and its five-year statute of limitations, any claim arising from the 2002 incident was time-barred. The court also concluded that Ritchie had failed to establish a *prima facie* KCRA claim against the Department of Parks. Moreover, the court determined that Ritchie had not brought forth any evidence to establish a KCRA

[1] We note that there is no evidence actually concerning whether profanity was used by the lady, or whether she actually paid or not.

claim as the testimony showed that Lyons barred Ritchie from playing golf in 2008 based on his own statement that he was barred from the course. The court also concluded that Ritchie had not suffered a cognizable injury. Finding no individual liability under the KCRA claim or the constitutional violations, the court dismissed the claim against Lyons.

Alternatively, the court found that Lyons was entitled to qualified official immunity as the Department of Parks was entitled to sovereign immunity. The court also concluded that Ritchie's state constitutional claims against the Department of Parks were prohibited by Section 231 of the Kentucky Constitution. Lastly, the court concluded that Ritchie's tort claims were preempted by his claim under KCRA, and that if not preempted then Ritchie had not established the elements necessary under his tort claims. Thus, the trial court granted Appellees' summary judgment motion. It is from this order that Ritchie now appeals.

At the outset, we note that the applicable standard of review on appeal of a summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment "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 judgment as a matter of law." CR 56.03. The trial court must view the record "in a light most favorable to the

party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480 (Ky. 1991).

Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.* However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson,* 841 S.W.2d 169, 171 (Ky. 1992), citing *Steelvest, supra*. *See also O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); *Hallahan v. The Courier Journal,* 138 S.W.3d 699, 705 (Ky.App. 2004). Since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001).

On appeal, Ritchie presents seven arguments, namely, (1) the trial court misinterpreted the legal effect of KRS 344.120 and other sections of KRS Chapter 344, *i.e.*, the Kentucky Civil Rights Act; (2) the trial court misinterpreted the legal effect of violations of Sections 1, 2, and 3 of the Kentucky Constitution; (3) the trial court misinterpreted the legal effect regarding the tort of outrage; (4) the trial court was in error in holding that the Department of Parks is entitled to sovereign immunity; (5) Lyons is individually liable; (6) the court clearly erred in

its interpretation and the applicability of the case law regarding summary judgment; (7) the court erred with respect to damages.[2]

The Appellees present two counter-arguments, namely, (1) the trial court correctly concluded that the material facts are not in dispute; and (2) Appellees are entitled to judgment as a matter of law. In support of their first argument, the Appellees argue that the trial court correctly concluded that the following material facts are not in dispute: (1) Ritchie testified that he told Dana Lyons that he was "barred" from the General Butler Golf Course; (2) the Park Manager and other officials informed Ritchie that he was welcome to play golf at General Butler; (3) Ritchie presented no evidence that his race played a role in the events of April 18, 2008.

In support of their second argument, that the Appellees are entitled to judgment as a matter of law, the Appellees claim that: (1) Ritchie has not met his burden of proof on the KCRA claim; (2) Lyons cannot be held individually liable under KCRA; (3) Kentucky's Legislature has not created a private right of action for constitutional violations; (4) Appellees are immune from liability on tort claims as they are protected by governmental and official immunity; (5) the tort claims are legally defective. In further support of their argument that the tort claims are legally defective, the Appellees argue that the tort of outrage is preempted by the KCRA claim; the conduct does not give rise to an action for a tort of outrage; and

[2] We decline to address this argument as we are affirming the court's grant of summary judgment, rendering any argument concerning damages moot.

Ritchie's gross negligence claim must fail as the Appellees owe no affirmative duty to Ritchie.

We believe the parties' numerous arguments are more properly characterized by four issues, namely, whether summary judgment was appropriate for (1) the KCRA claim; (2) the constitutional claims; (3) the issue of immunity; and (4) the tort claims. We note that Ritchie has not challenged the trial court's ruling that KCRA claims have a five-year statute of limitations. As such, we find no error with the trial court's decision to limit the matter *sub judice* to the 2008 incident. With this in mind, we now turn to the first issue, the KCRA claim.

Ritchie's KCRA claim is based on KRS 344.120 which states:

> Except as otherwise provided in KRS 344.140 and 344.145, it is an unlawful practice for a person to deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation, resort, or amusement, as defined in KRS 344.130, on the ground of disability, race, color, religion, or national origin.

We agree with the trial court that Ritchie did not provide sufficient evidence in the case *sub judice* to survive a summary judgment motion. Ritchie was required to present at least some affirmative evidence demonstrating that there was a genuine issue of material fact requiring trial. *See Hubble v. Johnson,* 841 S.W.2d 169, 171 (Ky. 1992). Ritchie did not provide evidence that similarly situated persons outside his protected group were treated differently in the same circumstances, or that he was treated in a way that would objectively be viewed as discriminatory.

See Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992) (individuals must be similarly-situated in all respects). *See also Kentucky Center for the Arts v. Handley,* 827 S.W.2d 697, 701-702 (Ky.App. 1991) (more than plaintiff's substantive belief is required.)

Moreover, we "envision many circumstances where markedly hostile treatment, even in a purportedly service-oriented industry, would raise no inference of racial animus, but rather it would simply be yet another example of the decline of civility." *Lizardo v. Denny's, Inc.*, 270 F.3d 94, 102 (2d Cir. 2001). Given that Ritchie created the confusion himself, that he failed to clarify his status of being eligible to play golf at the golf course, that he failed to provide any evidence that was relevant to the 2008 incident or that he was treated differently from other similarly situated patrons, we find no error in the trial court's grant of summary judgment concerning the KCRA claims against the Appellees.

In addressing the individual liability of Lyons, first we consider that this Court has held "individual agents or supervisors who do not otherwise qualify as employers cannot be held personally liable in their individual capacities under KRS Chapter 344." *Conner v. Patton*, 133 S.W.3d 491, 493 (Ky. App. 2004)(internal citations omitted). Based on *Conner*, the trial court did not err in dismissing the KCRA claim against Lyons.

Turning to the second issue on appeal, namely the constitutional claims, Ritchie argues that his right to play golf is a property right that is protected by the Kentucky Constitution. While Ritchie certainly has the right not to be

discriminated against while playing golf at a state-operated golf course, said cause of action is encompassed by his KCRA claim, is duplicitous of that claim, and our affirmance, *supra*, of the trial court dismissing the claim eviscerates the constitutional claims. Thus, we find no error with the trial court's grant of summary judgment on this issue.

We now turn to the third issue on appeal, namely, whether the Appellees were entitled to governmental immunity. The trial court determined that based on *Yanero v. Davis,* 65 S.W.3d 510 (Ky. 2001), the Appellees were entitled to governmental immunity against tort liability. While the trial court's opinion was well-reasoned, we decline to address this issue at this time as it is not dispositive given that Ritchie's claim based in tort is without merit, see discussion *infra*, and an analysis of governmental immunity would only be fruitful if a valid tort claim were to exist.

Last, we address the fourth issue on appeal, namely, Ritchie's tort claims. We agree with the trial court that Ritchie's tort claims were preempted by his KCRA claim. *See Kroger Co. v. Buckley*, 113 S.W.3d 644, 647 (Ky. App. 2003) ("*Wilson* [*Wilson v. Lowe's Home Center*, 75 S.W.3d 229 (Ky.App.2001)] is clear and unambiguous in its holding that a KRS Chapter 344 claim preempts a common law IIED/outrageous conduct claim.") Even if this were not the case, Ritchie's tort claims are still defective.

First, Ritchie failed to establish how the 2008 incident at the General Butler Golf Course arose to the level of outrageous conduct, as "liability has been

found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990). Thus, the trial court properly concluded that Ritchie's tort of outrage claim was legally defective.

Second, Ritchie's claim of gross negligence must fail as he has not established that the Appellees owed him an affirmative duty to allow him to play golf at General Butler. *See James v. Wilson*, 95 S.W.3d 875, 889 (Ky.App. 2002) ("It is elemental tort law that a negligence action requires: (1) a recognized duty; (2) a breach of that duty; and (3) consequent injury."). To the extent that his claim of gross negligence is based on the "duty not to discriminate" while playing golf, the KCRA claim preempted any such tort claim. Thus, the trial court did not err in granting summary judgment on Ritchie's tort claims.

Finding no error, we hereby affirm the Carroll Circuit Court's grant of summary judgment to the Appellees.

CLAYTON, JUDGE, CONCURS.

TAYLOR, CHIEF JUDGE, CONCURS IN RESULT ONLY.

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