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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001057-MR

EDWARD H. FLINT — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 10-CI-006750

GERALD MARX;
INDIVIDUAL JOHN DOES;
AND INDIVIDUAL JANE DOES — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, STUMBO, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Edward H. Flint, *pro se*, appeals from the Jefferson Circuit Court's grant of summary judgment as to his complaint of libel per se against Gerald Marx. He also presents a number of other issues for our consideration. After careful review, we affirm.

Facts and Procedural History

Appellant and appellee are condominium owners at the Coach House Condominiums in Jefferson County, Kentucky. On September 13, 2010, appellee, the then-president of the Coach House Condominium Association, wrote a letter to all association members[1] concerning issues that had arisen between appellant and association leadership regarding appellant's displeasure with the management of the property. This letter was critical of appellant.[2]

On September 30, 2010, appellant filed a complaint against appellee in which he claimed that appellee's letter to the condominium association membership was "slanderous, libel pro, se[.]" The trial court interpreted this as a claim of libel per se, and we treat it similarly. Appellant subsequently filed a motion asking the trial judge to recuse himself because of an alleged conflict of interest due to bias. This motion was denied on October 18, 2010. Appellant later filed two motions requesting a change of venue on similar grounds.

On November 4, 2010, appellee moved to dismiss the action. This motion was ultimately treated as one for summary judgment because of the introduction of matters outside the original pleadings. *See* Kentucky Rules of Civil Procedure (CR) 12.02; *Cabinet for Human Res. v. Women's Health Services, Inc.*, 878 S.W.2d 806 (Ky. App. 1994). On November 8, 2010, appellant filed a motion

[1] The condominium association membership included all individuals who owned units in the building.

[2] Prior to the letter's distribution, appellant had filed suit against the condominium association on three prior occasions.

for default judgment on the grounds that appellee had failed to timely reply to his complaint.[3] On June 8, 2011, the trial court granted summary judgment in favor of appellee. This appeal followed.

Analysis

On appeal, we first address appellant's contentions that the trial court erred in denying his motion to recuse and in refusing to grant a change of venue.[4] Appellant asked the presiding circuit court judge, Hon. A.C. McKay Chauvin, to recuse himself from the case because appellant had filed suit against him in federal court on March 8, 2010. According to appellant, this resulted in a conflict of interest meriting recusal because Judge McKay Chauvin was too biased to preside over the case. Appellant raised a similar complaint in his motions for a change of venue – citing to the fact that he had sued five Jefferson County circuit court judges (as well as two district court judges) in federal court.

Appellant raised these same arguments – unsuccessfully – in a related appeal, and we again reject them for the reasons set forth in that opinion:

> Flint cites KRS 452.010(2) as authority for a change of venue. Because Flint has sued Judge Chauvin and several other Jefferson County judges in federal court,

[3] The record does not reflect that the trial court ever ruled on this motion in a written order. We further note that no videotapes or DVDs of motion hours or hearings regarding this case were included in the record.

[4] The trial court never directly ruled on appellant's motions for a change of venue. We note, though, that on December 3, 2010, the trial court entered an order giving appellee twenty days to respond to appellant's first motion for a change of venue. Appellant was then charged with filing an AOC-280 form to submit the motion for a ruling. This was not done. Instead, appellant filed a second motion for a change of venue on June 7, 2011. The trial court granted appellee's motion for summary judgment the following day. For purposes of this appeal, we will assume that this constituted a denial of appellant's motion.

Flint concludes that the entire Jefferson County panel of judges must be prejudiced against his case. Flint alleges that his suits against these judges have somehow "tainted" the entire pool of judges in Jefferson County, thus necessitating a change of venue to Oldham County. However, this leap of logic is unsupported by any factual basis. Flint has come forth with no evidence of undue influence, or of any circumstances which would render it impossible for him to have a fair and impartial trial in Jefferson County, other than bare assertions that Jefferson County judges are "after him" because of said lawsuits. KRS 452.010(2). This is insufficient.

Flint also claims on appeal that Judge Chauvin should have recused himself. Flint alleges that Judge Chauvin should not be allowed to sit on the present case because he is the defendant in a suit in federal court where he is being sued by Flint.

The rule for recusal is that "[a] trial judge should disqualify himself in any proceeding where he has knowledge of any circumstances in which his impartiality might reasonably be questioned." *Webb v. Commonwealth*, 904 S.W.2d 226, 229 (Ky. 1995). However, "[a] party's mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds to require recusal." *Id.* at 230.

While we realize that a sitting judge should not ordinarily hear a case where he is involved as a party in another action with a litigant appearing in his courtroom, we also agree with Judge Chauvin that Flint cannot be allowed to "manipulate the court system" by suing any judge who hands down a contrary ruling and later seek their recusal. Other jurisdictions have agreed with this rationale, concurring that a judge should not be "disqualified merely because a litigant sues or threatens to sue him." *U.S. v. Grismore*, 564 F.2d 929, 933 (10th Cir. 1977), cert. denied, 435 U.S. 954, 98 S.Ct. 1586, 55 L.Ed.2d 806 (1978). One reason for this is to prevent "judge shopping," a practice where plaintiffs "name a judge as a defendant to get a new (and perhaps more favorably inclined) judge." *Anderson v. Roszkowski*, 681 F.Supp.

> 1284, 1289 (N.D.Ill. 1988). We agree that such a practice must be discouraged.
>
> Given the unique circumstances of this case, and the lack of evidence of Judge Chauvin's ability to be fair and impartial, we do not find that he should have been disqualified.

Flint v. Coach House, Inc., 2010-CA-001166-MR, 2011 WL 4502348 (Ky. App. Sept. 30, 2011), reh'g denied (Oct. 26, 2011).

Appellant next argues that the trial court erred in refusing to grant his motion for default judgment because appellee failed to respond to his complaint in a timely fashion. The trial record before us fails to specifically address how the trial court dealt with this issue (and the briefs are not very helpful on the matter), but the court obviously allowed appellee to proceed with his defense. It is well-established that permission to file a defense or pleading after the allotted time is a matter within the trial court's discretion and is, therefore, subject to review only to determine if the court abused that discretion. *See Moffitt v. Asher*, 302 S.W.2d 102 (Ky. 1957). Moreover, where a party is allowed to plead after the allotted time and the record is silent as to what was considered by the trial court in arriving at the decision made, it cannot be said that an abuse of discretion occurred. Instead, the presumption is that the ruling of the trial court was justified. *Id.* Therefore, no reversible error occurred in this regard.

We finally turn our attention to the question of whether the trial court erred in entering summary judgment as to appellant's claim of libel per se.[5] The

[5] Appellant also contends that he has a separate claim of slander, but the law is well-established that "[d]efamation by writing and by contemporary means analogous to writing ... is libel.

standards for reviewing a trial court's entry of summary judgment on appeal are well-established and were concisely summarized by this Court in *Lewis v. B & R Corp.*, 56 S.W.3d 432 (Ky. App. 2001):

> The standard of review on appeal when a trial court grants a motion for 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. The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present at least some affirmative evidence showing that there is a genuine issue of material fact for trial.

Id. at 436 (Internal footnotes and quotation marks omitted). Because summary judgments involve no fact finding, we review the trial court's decision de novo. *3D Enters. Contr. Corp. v. Louisville & Jefferson County Metro. Sewer Dist.*, 174 S.W.3d 440 (Ky. 2005); *Blevins v. Moran*, 12 S.W.3d 698 (Ky. App. 2000).

"Four elements are necessary to establish a defamation action, whether for slander or libel, to wit: (1) defamatory language; (2) about the plaintiff; (3) which is published; and (4) which causes injury to reputation." *McBrearty v. Kentucky Cmty. & Technical Coll. Sys.*, 262 S.W.3d 205, 213 (Ky. App. 2008). The standard for determining whether a written publication is libelous per se is long-standing:

Defamation communicated orally is slander." *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 793 (Ky. 2004), *quoting* 2 DAN B. DOBBS, THE LAW OF TORTS, § 401 at 1120 (2001).

> The general proposition is that words, written or printed, are libelous and actionable per se, justifying a recovery without allegations of special damages, if they tend to degrade and disgrace the person about whom they are written or printed, or tend to expose him to public hatred, ridicule, contempt, aversion, or disgrace, or to induce an evil opinion of him in the minds of right-thinking persons and to deprive him of their friendly intercourse and society.
>
> In order to be libelous per se, it is not essential that the words involve an imputation of crime, or otherwise impute the violation of laws, involving moral turpitude, or immoral conduct. But defamatory words, to be libelous per se, must be of such a nature that the court can presume as a matter of law that they do tend to disgrace and degrade the person, or to hold him up to public hatred, contempt, or ridicule, or to cause him to be shunned and avoided.

Shields v. Booles, 238 Ky. 673, 38 S.W.2d 677, 681 (1931) (Internal citations omitted). Whether a written publication is defamatory and actionable per se is generally an issue of law to be determined by the court. *See Yancey v. Hamilton*, 786 S.W.2d 854 (Ky. 1989); *Digest Pub. Co. v. Perry Pub. Co.*, 284 S.W.2d 832 (Ky. 1955); *Deitchman v. Bowles*, 166 Ky. 285, 179 S.W. 249 (1915).

As an initial matter, we note that the order of summary judgment entered by the trial court suggests that a written publication may be libelous per se only if it imputes unfitness to perform the duties of an office, occupation, or employment or if it has a tendency to prejudice a person in his/her trade, calling, or profession. However, this is an incorrect statement of the law. *See Courier Journal Co. v. Noble*, 251 Ky. 527, 65 S.W.2d 703, 703 (1933) (holding that spoken words are slanderous per se only if they impute crime, infectious disease,

or unfitness to perform duties of office, or prejudice one in profession or trade, or tend to disinherit him and written or printed publications, which are false and tend to injure one in his reputation or to expose him to public hatred, contempt, scorn, obloquy, or shame, are libelous per se.); *see also Stringer*, 151 S.W.3d at 794-95; *Shields*, 238 Ky. 673, 38 S.W.2d at 680-81. However, while the trial court's reasoning was wrong in this instance, "we, as an appellate court, may affirm the trial court for any reason sustainable by the record." *Kentucky Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 1991); *see also Kentucky Farm Bureau Mut. Ins. Co. v. Shelter Mut. Ins. Co.*, 326 S.W.3d 803, 805 n.3 (Ky. 2010).

Our review of this case has proven difficult because appellant's brief fails to directly identify which aspects of the subject letter he believes are defamatory in nature. Instead, appellant offers only a general assertion that the letter was libelous as a matter of law without explaining why that is, in fact, the case. Moreover, appellant has cited to no useful legal authority that would support his position. This lack of specificity and articulation was also a problem below.

For instance, appellant's complaint is replete with vague accusations such as that "the letter made statements that are not true and [are] taken out [of] context" or that the letter was part of the condominium association's "personal vendetta to turn owners against" him. The complaint's only direct reference to the specific content of the letter is in appellant's allegation that the "words in [appellee's] letter show that he has no feelings for other people and has no concern for the truth and or the Association's by-laws." This lack of specificity would not

be an issue if the remainder of the record gave a better sense of the basis of appellant's claims, but this is not the case. Instead, the only allusion to the content of appellee's letter in the record[6] is in a letter written in response by appellant to association members that was filed as an exhibit below. However, none of the statements referenced in appellant's letter can be reasonably viewed as defamatory in nature. At most, they arise to the level of mere insult, name-calling, or hyperbole.

Thus, we are left to speculate at the actual basis for appellant's claim, which we simply will not do. While we are generally willing to overlook inartful pleading by a pro se litigant, we are not willing to create his arguments or to conduct his legal research for him. *See Grant v. Lynn*, 268 S.W.3d 382, 391 (Ky. App. 2008). Appellant's brief provides no assistance in ascertaining exactly what content in appellee's letter merits legal recourse. Consequently, in light of appellant's failures in this regard, we are compelled to conclude that the trial court did not err in granting summary judgment as to appellant's claim of libel per se.

Conclusion

For the foregoing reasons, the decision of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

[6] Appellant has attached a number of other letters as exhibits to his brief, but since they were not presented to the trial court we shall not consider them herein.

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