

RENDERED: SEPTEMBER 4, 2015; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2014-CA-000232-MR

ANTOINETTE C. TAYLOR

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 13-CI-01051

KENTUCKY UNEMPLOYMENT  
INSURANCE COMMISSION

APPELLEE

AND

NO. 2014-CA-000233-MR

ANTOINETTE C. TAYLOR

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 13-CI-01225

KENTUCKY UNEMPLOYMENT  
INSURANCE COMMISSION

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, KRAMER, AND NICKELL, JUDGES.

NICKELL, JUDGE: In these consolidated appeals, Antoinette C. Taylor, *pro se*, has appealed from the Franklin Circuit Court’s dismissal of her actions for alleged violations of the Kentucky Open Records Act (“ORA”)<sup>1</sup> against Kentucky Unemployment Insurance Commission (“KUIC”). We affirm.

The historical facts precipitating these two appeals as well as their procedural history are strikingly similar. Nevertheless, in the interest of completeness and accuracy, we shall briefly discuss them individually.

**2014-CA-000232-MR**

On July 10, 2013, Taylor sent a request to KUIC seeking to inspect public records, documents and information related to KUIC and its members. An attorney representing KUIC responded to the request by letter dated July 17, 2013, indicating the requests were under review and additional time was required to make substantive responses. Unsatisfied with this response, Taylor appealed to the Office of the Attorney General (“OAG”) on July 20, 2013, seeking an Open Records Decision, maintaining KUIC had failed to timely respond to her request pursuant to the mandates of KRS 61.880(1). In response to the appeal, KUIC

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<sup>1</sup> Kentucky Revised Statutes (KRS) 61.870 to 61.884.

submitted a July 31, 2013, letter containing its substantive response to Taylor's request.

The OAG rendered a decision on August 22, 2013, concluding KUIC had procedurally violated the ORA by failing to substantively respond to Taylor's request within three business days of the request as required by KRS 61.880(1) and for failing to provide a detailed explanation for the delay. In addition, the OAG found KUIC had substantively violated the ORA by untimely disposing of Taylor's request and withholding public records without explanation—to the extent it had not turned over for inspection salary records, organizational charts, applications, job descriptions, appointment documents and résumés it actually had in its possession.

On September 3, 2013, Taylor appealed the decision of the OAG to the Franklin Circuit Court, alleging KUIC had willfully withheld public records in violation of the ORA. She sought an order requiring KUIC to produce the requested documents, imposition of statutory penalties for willfully withholding the documents, as well as an award of costs and attorney's fees. On October 2, 2013, KUIC moved to dismiss the complaint pursuant to CR<sup>2</sup> 12.02(a) for lack of subject matter jurisdiction, CR 12.02(d) for failure of service of process, and CR 12.02(f) for failure to state a claim upon which relief could be granted. KUIC contended KRS 61.882(1) provides jurisdiction only for enforcement of the ORA, and since it had provided all of the requested records, nothing was left to enforce;

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<sup>2</sup> Kentucky Rules of Civil Procedure.

there was no basis for a finding of willfulness; Taylor could not pursue an award of attorney's fees as she was proceeding *pro se*, nor was she entitled to an award of costs. Taylor filed a written response challenging KUIC's motion, insisting the trial court had jurisdiction and she was entitled to her requested relief. Taylor requested the trial court convene a hearing prior to deciding the issue. No hearing was scheduled outside the trial court's normal Motion Hour.

By opinion and order entered on January 25, 2014, the trial court agreed with KUIC and dismissed Taylor's complaint. The trial court found KUIC had provided the requested documents, and Taylor had failed to allege further documents were being withheld. Thus, it concluded there was nothing under the ORA for it to enforce. Additionally, the court acknowledged KUIC's procedural violation of the ORA, but concluded there was no showing KUIC acted willfully, in bad faith, or in conscious disregard of Taylor's rights. Therefore, it concluded no facts could be proved which would entitle Taylor to relief, making dismissal appropriate. Taylor timely appealed the dismissal to this Court.

#### **2014-CA-000233-MR**

On July 20-21, 2013, Taylor made three additional ORA requests seeking access to public records relating to KUIC and its members. On August 12, 2013, KUIC responded to Taylor's requests again indicating the need for additional time beyond the statutorily required three days to review and generate

appropriate responses. The letter also contained KUIC's substantive responses to Taylor's requests. Some of Taylor's requests were denied based on KUIC's determination they sought information rather than documents or lacked specificity to enable KUIC to properly determine whether it had responsive documents in its possession. Again unsatisfied, Taylor appealed to the OAG, arguing KUIC had improperly denied inspection and willfully withheld the requested records in violation of the ORA.

On September 18, 2013, the OAG issued its decision finding KUIC had procedurally violated the ORA by failing to substantively respond to Taylor's request within three days of receipt and in failing to provide a detailed explanation for the delay. No substantive violations of the ORA were found.

On October 29, 2013, Taylor appealed the decision of the OAG to the Franklin Circuit Court raising similar allegations as outlined above and seeking substantially identical relief. On November 14, 2013, KUIC moved to dismiss the complaint pursuant to CR 12.02(f) for failure to state a claim upon which relief could be granted. KUIC contended it had provided all requested documents it had in its possession, provided Taylor with necessary contact information for the records custodians of any responsive records it did not have in its possession, and the OAG had affirmed any denials of Taylor's requests. Taylor filed a written response in opposition to KUIC's motion, noting the existence of factual disputes, insisting she was entitled to her requested relief, and requesting a hearing on the issue be convened.

The trial court rendered its opinion and order on January 23, 2014, dismissing Taylor's claims upon concluding—based on the written record—it could not afford the relief sought

as the documents she wished to inspect are either not actually records but rather requests for information, not in the possession of the Commission or not sufficiently specific to afford the Commission the ability to respond with responsive records. As such, Taylor's Complaint fails to state a claim for which relief could be granted. Although the Commission did commit a procedural violation of the Act, the Commission did not substantially violate the Act.

The trial court further held the absence of a substantive violation of the ORA precluded, as a matter of law, the ability to find KUIC willfully withheld any documents. Thus, Taylor could not be entitled to an award of statutory costs or fees. Taylor timely appealed the dismissal to this Court.

In the interest of judicial economy, Taylor's two separate appeals were consolidated for treatment in a single Opinion. Having carefully reviewed the records, the briefs and the law, we discern no error and affirm.

CR 12.02(f) allows a defendant to seek dismissal when a complaint fails "to state a claim upon which relief can be granted." Dismissal should not be granted "unless it appears the [plaintiff] would not be entitled to relief under any set of facts which could be proved in support of his claim." *Pari-Mutuel Clerks' Union of Kentucky v. Kentucky Jockey Club*, 551 S.W.2d 801, 802 (Ky. 1977). *See also James v. Wilson*, 95 S.W.3d 875, 883-4 (Ky. App. 2002). Because a trial court is not required to make factual findings when ruling on a motion to dismiss,

the determination is purely a matter of law; consequently, we review the decision of the trial court *de novo*. *Mitchell v. Coldstream Laboratories, Inc.*, 337 S.W.3d 642, 645 (Ky. App. 2010) (citing *James v. Wilson*, 95 S.W.3d 875 (Ky. App. 2002), and *Revenue Cabinet v. Hubbard*, 37 S.W.3d 717 (Ky. 2000)).

Moreover, Open Records Act determinations are reviewed by this Court *de novo*. *Kentucky Bd. of Examiners of Psychologists and Div. of Occupations and Professions, Dept. for Admin. v. The Courier—Journal and Louisville Times Co.*, 826 S.W.2d 324, 328 (Ky. 1992). Thus, we owe no deference to the trial court on review. With these standards in mind, we turn to the issues presented.

First, we note Taylor's claims of error are not presented in the customary fashion; her specific legal claims are intertwined with generalized allegations and declarative statements without supporting citations to the law or the record. This format creates some difficulty for this Court—as well as opposing counsel—who must attempt to construe Taylor's pleadings liberally and decipher the legitimate legal arguments while separating out the general prose. Many of her assertions contain no factual support aside from her own self-serving statements, nor do they include citation to applicable legal principles.<sup>3</sup>

As we can best determine, Taylor appears to contend the trial court erred in: failing to find KUIC willfully withheld public records; failing to award her costs and fees; applying an incorrect legal standard; violating her right to

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<sup>3</sup> While her briefs are riddled with citations to authority, few actually come close to hitting the mark. Many concern legal principles which are not in dispute in the instant litigation or are otherwise wholly inapplicable.

procedural due process in not convening a hearing on KUIC's motions to dismiss; and ultimately in dismissing her complaints. We discern no error.

As is often the case with *pro se* litigants who are not versed in the science of the law, Taylor misapprehends the nature and scope of the statutes, case law, and general legal principles she quotes in support of her arguments. For example, Taylor spends a significant portion of her brief arguing the impropriety of *sua sponte* dismissals and assigning error to the trial court for dismissing her complaints. In law, *sua sponte*, or “on its own motion,” refers to acts taken by a court without formal prompting from a litigant via a motion or request. Here, KUIC clearly filed an appropriate motion seeking dismissal, so any action of the trial court on such motion cannot—by definition—be said to have been *sua sponte*. Thus, those portions of Taylor's arguments dedicated to *sua sponte* dismissals are inapplicable. Other similar deficiencies appear throughout Taylor's briefs which we need not detail. However, we have parsed the arguments presented and shall address only those which are germane to the issues actually presented for our review.

Taylor first contends the trial court erred in failing to find KUIC willfully withheld public records from her inspection. She argues the OAG's findings that KUIC violated the ORA were sufficient to support a finding KUIC acted willfully or in bad faith and the trial court's decision to the contrary was thus unsupported by substantial evidence. She attempts to bolster her position with conclusory statements and unsupported allegations.



It is undisputed KUIIC violated certain portions of the ORA, as found by the OAG. However, a mere technical violation is insufficient to support a finding of willfulness; a showing of bad faith is required. *Bowling v. Lexington-Fayette Urban County Government*, 172 S.W.3d 333, 344 (Ky. 2005).

‘Willfulness’ and ‘bad faith’ are not necessarily synonymous, of course, but as we indicated in *Bowling*, for the purposes of KRS 61.882(5), ‘willful’ connotes that the agency withheld requested records without plausible justification and with conscious disregard of the requester’s rights. We have characterized a trial court’s decision on the issue of willfulness as ‘a finding of fact’ and, as such, it is not to be disturbed on appeal ‘unless clearly erroneous.’ *Bowling*, 172 S.W.3d at 344. A factual finding is not clearly erroneous, moreover, if it is ‘supported by substantial evidence,’ *i.e.*, supported by ‘evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable [persons].’ *Owens–Corning Fiberglas Corporation v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998).

*City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 854 (Ky. 2013). *See also Sinha v. University of Kentucky*, 284 S.W.3d 159, 162 (Ky. App. 2008). To establish willfulness, the party seeking costs must show bad faith with intent to violate the Act, and there must be no plausible explanation for the alleged errors. *Id.* Willful violations occur when an agency’s conduct is intentional. *See Kirschner v. Louisville Gas & Electric Company*, 743 S.W.2d 840, 842 (Ky. 1988) (citing Prosser & Keeton on the Law of Torts, 5th Ed. (1984)).

Here, there has simply been no credible evidence of any intentional act, conscious disregard of Taylor's rights or bad faith by KUIC which would warrant a finding of willfulness. While Taylor's subjective belief is that the records were intentionally or maliciously withheld from her in retaliation for filing an unrelated civil action or to prevent her from fully participating in and preparing for that action, there is simply no objective proof that such was the case. "Belief is not evidence and does not create an issue of material fact." *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990). Thus, based on the record before us, we cannot conclude the trial court's decision was clearly erroneous and will not disturb it on appeal.

Next, Taylor argues the trial court erred in failing to award her costs and attorney's fees. She also contends the trial court's refusal to award her statutory sanctions was erroneous. Again, we disagree. KRS 61.882(5) states, in pertinent part

[a]ny person who prevails against any agency in any action in the courts regarding a violation of KRS 61.870 to 61.884 may, upon a finding that the records were willfully withheld in violation of KRS 61.870 to 61.884, be awarded costs, including reasonable attorney's fees, incurred in connection with the legal action. . . . In addition, it shall be within the discretion of the court to award the person an amount not to exceed twenty-five dollars (\$25) for each day that he was denied the right to inspect or copy said public record.

Thus, "KRS 61.882(5) gives a circuit court the discretion to award a prevailing party reasonable attorneys' fees and costs upon a finding that a public agency

‘willfully withheld’ records in violation of the Open Records Act.”

*Commonwealth, Cabinet for Health and Family Services v. Lexington H-L Services, Inc.*, 382 S.W.3d 875, 882 (Ky. App. 2012). “[S]imply succeeding against an agency in an open records action is not enough to merit an award of attorneys’ fees and costs; an additional showing that the agency refused to provide the records was (sic) in bad faith is required.” *Id.* Taylor has neither prevailed against KUIC in an action in the courts, nor shown entitlement to a finding of willfulness. In the absence of these two requirements, she was clearly not entitled to an award of costs, fees, or statutory sanctions based on the plain language of the statute. There was no error.

Next, Taylor argues the trial court erred in applying an incorrect legal standard. She appears to contend the trial court failed to liberally construe her pleadings, accept the allegations therein as true, and consider them in a light most favorable to her, as required by *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. App. 1987). As before, her argument consists chiefly of self-serving conclusory statements augmented by a recitation of alleged historical facts which appear nowhere in the record on appeal. Although it is clear she is dissatisfied with the trial court’s decisions on various matters and believes she has been treated unfairly due to her *pro se* status, she fails to point us to any evidence the trial court applied incorrect legal principles or that she has been discriminated against based on her status. Nevertheless, we have carefully reviewed the trial court’s well-written rulings and have been unable to discern any such error in the application of the

legal principles it relied upon in reaching its conclusions. Likewise, our review of the record does not indicate Taylor's status as a *pro se* litigant has been the impetus for any of the trial court's rulings.

Finally, Taylor argues the trial court violated her right to procedural due process in failing to convene an evidentiary hearing on KUIC's motions to dismiss. She initially contends the trial court erroneously dismissed her complaints *sua sponte*. Taylor then asserts the trial court considered matters outside the pleadings, thereby converting KUIC's motion to dismiss into a motion for summary judgment. Neither of these contentions has merit.

First, as we have previously noted, the trial court did not act *sua sponte* in dismissing the complaints at issue. Thus, no further discussion of this contention is warranted.

Second, although she contends the trial court considered matters outside the pleadings in reaching its determination, Taylor fails to specify what any of those matters were. There was no motion for summary judgment made, nor were any of the motions to dismiss treated as such. We find nothing in the record supportive of Taylor's position to the contrary and are convinced none exists. The trial court based its ruling solely on the pleadings and the arguments regarding those pleadings. We find nothing to indicate the trial court considered anything outside the pleadings in reaching its determination such that the mandates of CR 56 would come into play. Thus, contrary to Taylor's assertion, the trial court was not required to determine the existence of a genuine issue of material fact as that

was not the standard under which the motions were to be decided. The trial court properly analyzed the pleadings and determined Taylor had failed to allege any set of facts under which she could be entitled to relief. *Pari-Mutuel Clerks' Union*. Likewise, we find no merit in Taylor's vehement contentions that she should have been allowed an evidentiary hearing.

Apparently, Taylor is laboring under the mistaken belief she is entitled to an evidentiary hearing simply because she desires one, regardless of whether such a hearing is warranted or legally necessary. In support of her position, Taylor cites cases related to the requirement of convening an evidentiary hearing before depriving an individual of a property or liberty right. However, ruling on a motion to dismiss for failure to state a claim simply does not rise to the level of deprivation of a constitutionally protected right. Trial courts routinely make rulings on procedural motions—such as the ones at issue in this appeal—without convening evidentiary hearings, and rightfully so. Undoubtedly, were our courts tasked with conducting full evidentiary hearings for each and every motion filed, the justice system as a whole would quickly grind to a halt. Here, Taylor was given the opportunity to—and did—file a written response to KUIC's motion setting forth her arguments and support for her position.<sup>4</sup> She fails to indicate what additional arguments she would have made at an evidentiary hearing which she was precluded from making in her written pleadings. Further, Taylor fails to

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<sup>4</sup> Although Taylor contends the trial court did not consider “both sides” or take her pleadings “seriously and under submission,” she presents no substantive support for her position. Without more, we cannot conclude the trial court acted in error based solely on Taylor's supposition, innuendo and unsupported subjective beliefs.

appreciate the matter was brought before the court during its regularly scheduled motion hour and was rescheduled at her request on more than one occasion.

Simply stated, the trial court afforded Taylor the opportunity to be heard and did not deprive her of procedural due process. Even a cursory review of the record and the trial court's rulings reveal it was keenly aware of the issues presented and the respective positions of the parties. The opinions and orders were well-written and fully supported by sound legal principles. Taylor's disagreement with the propriety of the trial court's decisions notwithstanding, we discern no error in the proceedings entitling Taylor to the relief she seeks.

For the foregoing reasons, the judgments of the Franklin Circuit Court are AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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