

RENDERED: JULY 19, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000568-MR

HARRY NOBLE WILSON, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 16-CI-00020

JULIE SORRELL AND LEXINGTON TROTS
BREEDERS ASSOCIATION, LLC,
D/B/A RED MILE RACETRACK

APPELLEES

AND

NO. 2016-CA-000569-MR

HARRY NOBLE WILSON, JR.

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
ACTION NO. 16-CI-00325

JULIE SORRELL; LEXINGTON TROTS
BREEDERS ASSOCIATION, LLC,
D/B/A RED MILE RACETRACK;
CHRIS CLARK AND KENTUCKY HORSE
RACING COMMISSION

APPELLEES

OPINION AND ORDER
AFFIRMING NO. 2016-CA-000568-MR AND
DISMISSING NO. 2016-CA-000569-MR¹

** ** * ** * **

BEFORE: DIXON, JONES AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Harry Noble Wilson, Jr. appeals from an order of the Fayette Circuit Court dismissing his action for tortious interference with contract against Lexington Trots Breeder Association, LLC (Red Mile) and Julie Sorrell, director of mutuels and simulcasting at Red Mile. Wilson alleges that Red Mile and Sorrell interfered with his employment contract with Keeneland Association, Inc. (Keeneland) when Red Mile revoked Wilson’s admission to Red Mile after he threatened to bring an AK-47 to Red Mile and shoot patrons at Red Mile. Wilson argues that his threat was not the reason for his banishment from the Red Mile but, rather, it was because Sorrell had personal animosity against him.

Sometime in 2013, Wilson was issued a Thoroughbred mutuel clerk license by the Kentucky Horse Racing Commission (the Commission). Mutuel clerk licenses are required for anyone serving as a mutuel clerk at a Kentucky racetrack. Separate licenses are issued for thoroughbred races and those for

¹ When final disposition of an appeal is made by an “Opinion and Order,” as in this case, the party adversely affected may move for reconsideration as provided by Kentucky Rules of Civil Procedure (CR) 76.38(2) within ten days of entry, but a petition for rehearing is unauthorized. CR 76.32(1).

standardbred races and both have specific criteria and processes required for licenses.

In 2013, Wilson was employed as a clerk at Keeneland. That same year, he applied for a job at Red Mile, but Sorrell did not hire him. In addition to his work, Wilson was a patron of racetracks, including Red Mile.

Several weeks after Sorrell did not hire Wilson, Wilson told Bill Keene, a fellow mutuel clerk at Keeneland, that he had gotten an AK-47 and was going to take it the Red Mile. He advised Keene that Keene “shouldn’t be around.” Wilson does not deny that he made the threatening statement.

After Red Mile learned of the threat made by Wilson, through Sorrell and Red Mile’s Director of Security, Harvey Taylor, it revoked Wilson’s admission to Red Mile by issuing a “Notice of Revocation of Admission to the Red Mile Grounds.” In the notice’s space for the cause of the exclusion it stated: “Threatened a patron and has been warned before this behavior will result in expulsion. The latest threat included statement he possessed an AK-47 firearm and would be using it against our patron(s).”

The incident was also brought to the attention of the Commission, which suspended Wilson’s 2013 License for 60 days and determined that Wilson’s eligibility for reinstatement was contingent upon Wilson’s completion of an anger management course. Although Wilson completed the course, he did not take any action to reinstate his 2013 License and it expired on December 31, 2013. 810

Kentucky Administration Regulation (KAR) 1:025, Section 3(2)(a) (licenses are issued for one calendar year).²

In August 2014, Wilson submitted his 2014 application to the Commission. The 2014 application asked whether Wilson had “ever had his license denied, revoked, suspended, or have a complaint pending in any jurisdiction.” Wilson checked “Yes” and explained it was for “Terroristic Threatening.” The 2014 Application also asked whether Wilson had been “ruled off, ejected or excluded from racing association grounds.” Wilson again checked “Yes” and again explained it was for “Terroristic Threatening.”

On August 18, 2014, the Commission’s Director of Licensing, Chris Clark, denied Wilson’s 2014 Application citing the fact that Wilson was currently ejected from Red Mile and that 810 KAR 1:025 Section 14(1)(h) allows denial of a license if an “applicant has been ejected, ruled off, or excluded from racing association grounds in the Commonwealth of Kentucky or a racetrack in any jurisdiction[.]” Wilson appealed and, on October 26, 2015, the hearing officer recommended the issuance of a final order affirming the denial. On December 1, 2015, the Commission affirmed the denial of Wilson’s 2014 Application.

Wilson appealed the Commission’s final order naming the Commission and Clark as parties. He also joined the appeal with tort claims

² This regulation was repealed effective May 31, 2019.

against Sorrell and Red Mile relating to his exclusion from Red Mile. Wilson alleged that “by reason of [Sorrell’s] personal malice against Wilson, and defendant, Red Mile, under the doctrine of respondeat superior, are liable in damages to Wilson by reason of their tortious interference with Wilson.” He further stated that Sorrell and Red Mile “invoked an impermissible ground . . . to exclude Wilson from the grounds for the purposes and expectation that the Commission would deny renewal of his application for a Thoroughbred Mutuel Clerk’s license.”³

Wilson filed his administrative appeal and tort action in the Fayette Circuit Court despite the requirement that any appeal of the Commission’s order must proceed in the Franklin Circuit Court. Kentucky Revised Statutes (KRS) 230.330. After the Commission and Clark moved to dismiss Wilson’s administrative appeal because it was not filed in the Franklin Circuit Court, Wilson moved to transfer the administrative appeal to the Franklin Circuit Court pursuant to KRS 452.105. Sorrell and Red Mile moved to dismiss the claims against them, relying on Red Mile’s common law right to remove Wilson from its premises for any nondiscriminatory reason.

The circuit court issued two orders entered on March 18, 2016. One granted Wilson’s motion to transfer his administrative appeal to the Franklin

³ Wilson filed an amended complaint, but that complaint did not affect the grounds for his claim.

Circuit Court. The order did not recite that it was final and appealable. The other order granted Sorrell's and Red Mile's motion to dismiss. That order stated it was a final and appealable order.

Wilson filed a notice of appeal in the Fayette Circuit Court. By the time it was filed, the case and complete record had been transferred to the Franklin Circuit Court. Wilson then filed a second notice of appeal on April 18, 2016, this time in the Franklin Circuit Court. The second notice of appeal identified only the Fayette Circuit Court's order dismissing all claims against Sorrell and the Red Mile and the order transferring the case "insofar as . . . [it] purports to exempt Defendants, Sorrell and Red Mile, from the Transfer Order" as the order being appealed from. However, for reasons unknown, Wilson named Clark and the Commission as parties.

Because Clark's administrative appeal had not been finally decided by the Franklin Circuit Court when Wilson filed his notices of appeal, the Commission and Clark filed a motion in this Court to dismiss them as parties to this appeal, which a motion panel denied. They instead request that this merit panel revisit the issue. Having done so, we agree that there are no issues presented concerning any administrative action taken by the Commission or Clark.

With the exception of limited circumstances not applicable here, appellate review is not appropriate until a case is finally decided. As stated in

Wilson v. Russell, 162 S.W.3d 911, 913 (Ky. 2005), “[o]ur rules require that there be a final order or judgment from which an appeal is taken.”

Although Wilson filed one complaint in the Fayette Circuit Court, there are two distinctively different cases. One, against the Commission and Clark, is an administrative appeal. The second is a tort action against Sorrell and Red Mile and is substantively unrelated to the Commission and Clark. There is nothing in the appellate record that shows, to date, that the administrative appeal has ever been resolved by an order of the Franklin Circuit Court. In fact, Wilson makes no argument on appeal as to the merits of his administrative appeal nor seeks any relief against the Commission or Clark. The only final order properly before this Court is the Fayette Circuit Court’s order dismissing Wilson’s claims against Sorrell and Red Mile.

Because we are affirming the Fayette Circuit Court’s order, in regard to 2016-CA-000568-MR, the Commission’s and Clark’s motion is moot.

However, we dismiss Wilson’s appeal from the Franklin Circuit Court (2016-CA-000569-MR), there being no final order of the Franklin Circuit Court from which Wilson could properly appeal. Our decision today in no way precludes any appeal from a final order in the administrative action in the Franklin Circuit Court.

In ruling on a motion to dismiss, a trial court “may properly consider matters outside of the pleadings in making its decision. However, reliance on matters outside the pleadings by the court effectively converts a motion to dismiss

into a motion for summary judgment.” *D.F. Bailey, Inc. v. GRW Engineers, Inc.*, 350 S.W.3d 818, 820-21 (Ky.App. 2011). In this case, it is unclear whether the trial court considered matters outside the pleadings or confined its decision to those facts stated in Wilson’s complaint and the documents that were referenced or attached to that complaint. If treated as summary judgement, we review the trial court’s order to see if “see there is any issue of material fact in this case and if none, whether [Red Mile] was entitled to a judgment as a matter of law. *Pearce v. Courier-Journal*, 683 S.W.2d 633, 635 (Ky.App. 1985). If treated as a motion to dismiss for failure to state a claim, it could be properly granted only where “it appears the pleading party 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, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). Under either standard, Wilson cannot prevail.

“[F]or many years racetrack proprietors, such as [Red Mile], have possessed a common law right to exclude a prospective patron for any reason, provided the exclusion is not based on the person’s race, creed, color, or national origin.” *James v. Churchill Downs, Inc.*, 620 S.W.2d 323, 324 (Ky.App. 1981); *see also Capital Theatre Co. v. Compton*, 246 Ky. 130, 54 S.W.2d 620 (1932). Wilson does not allege that he was excluded from Red Mile based on his race, creed, color or national origin. Therefore, under the common law, Red Mile had

the right to exclude him for any reason and certainly for threatening to commit violence at the racetrack.

A racetrack's common law right to exclude patrons is not abrogated by statutory or regulatory law. In *James*, the excluded patrons argued that the legislature, in enacting KRS 230.215 and KRS 230.260, intended to abrogate the racetrack's common law right of exclusion. *James*, 620 S.W.2d at 324.

KRS 230.215(2) provides in part:

In addition to the general powers and duties vested in the racing commission by this chapter, it is the intent hereby to vest in the racing commission the power to eject or exclude from association grounds or any part thereof any person, licensed or unlicensed, whose conduct or reputation is such that his presence on association grounds may, in the opinion of the racing commission, reflect on the honesty and integrity of horse racing or interfere with the orderly conduct of horse racing.

KRS 230.260(1) provides:

The racing commission is vested with jurisdiction and supervision over all horse race meetings in this Commonwealth and over all associations and all persons on association grounds and may eject or exclude therefrom or any part thereof, any person, licensed or unlicensed, whose conduct or reputation is such that his presence on association grounds may, in the opinion of the racing commission, reflect on the honesty and integrity of horse racing or interfere with the orderly conduct of horse racing or racing at horse race meetings; provided, however, no persons shall be excluded or ejected from association grounds solely on the ground of race, color, creed, national origin, ancestry, or sex[.]

The Court held in *James* “[i]t is crystal clear that these statutes are intended to vest the Kentucky State Racing Commission with the authority to exclude undesirable patrons from racetracks. It does not automatically follow, however, that they were also intended to abrogate [the racetrack’s] common law right of exclusion.”

James, 620 S.W.2d at 325. The Court concluded there is nothing in the statutory language that “expressly manifests an intention to abrogate the common law right of racetrack proprietors to exclude undesirable patrons” nor is there any language from which it can be concluded that the legislature intended by implication to abrogate the racetrack’s right to exclude patrons. *Id.* The Court reasoned that “KRS 230.215 and KRS 230.260 were actually intended to expand the common law right of exclusion by vesting an additional entity, the Kentucky State Racing Commission, with authority to exercise the right.” *Id.*

Wilson argues that “Red Mile, not Sorrell, has the common law right to ejection.” Red Mile as a corporate entity could only act (including exercising its common law right of ejection) through its officers and agents. *Maxwell v. Com. Dept. of Highways*, 404 S.W.2d 9, 12 (Ky. 1966). As stated in *Capital Theatre Co.*:

[I]n the absence of some statutory regulation or restriction to the contrary, and we have none in this state, theaters, circuses, racetracks, private parks, and other places of amusement and entertainment stand on the same basis as any other private business, and are under the sole control of the proprietor or manager, who may admit or exclude whomsoever he chooses.

Capital Theatre Co., 54 S.W.2d at 621.

Although Wilson suggests Sorrell's personal animosity toward him was the real reason he was ejected from Red Mile, as explained above, under the common law, that claim does not support a cause of action for tortious interference with Wilson's contractual relationship with Keeneland. Moreover, Wilson does not deny he threatened to bring an AK-47 weapon to Red Mile. Whatever may have been Sorrell's personal feelings about Wilson, that threat alone was enough to justify his exclusion from the racetrack. *Nat'l Collegiate Ath. Assoc., By and Through Bellarmine College v. Hornung*, 754 S.W.2d 855, 858 (Ky. 1988) (holding that if the alleged interference was justified, there is no liability for tortious interference with contract).

The order of the Fayette Circuit Court dismissing Wilson's claims against Red Mile and Sorrell is affirmed in Appeal No. 2016-CA-000568-MR.

On the Court's own motion, and for the reason Appeal No. 2016-CA-000569-MR had no final and appealable order from the Franklin Circuit Court, it is ORDERED that Appeal No. 2016-CA-000569-MR be, and it is hereby DISMISSED.

ALL CONCUR.

ENTERED: _____

JUDGE, COURT OF APPEALS

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