

RENDERED: OCTOBER 25, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001280-MR

SHEMAEKA SHAW

APPELLANT

v.

APPEAL FROM JEFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 18-CI-001106

MARK HANDY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GOODWINE, LAMBERT, AND MAZE, JUDGES.

LAMBERT, JUDGE: Shemaeka Shaw appeals from the Jefferson Circuit Court's order granting Mark Handy's motion to dismiss Shaw's complaint pursuant to Kentucky Rule of Civil Procedure (CR) 12.02(f). We affirm.

Shaw's complaint, filed on February 22, 2018, was based on an incident that occurred April 20, 2016, when Handy and others entered Shaw's apartment to serve an eviction notice. The situation quickly grew into a

confrontation, with Shaw resisting the process because she had allegedly reached an agreement with her landlord, and Handy becoming physical and abusive, and ultimately having Shaw arrested. Shaw was eventually acquitted of all charges. Her grievance against Handy, filed with Louisville Metro's internal affairs division, was dismissed on August 20, 2017.

On February 22, 2018, Shaw filed suit against Handy (individually and as Metro's employee and agent) and against Metro, d/b/a Jefferson County Sheriff's Office.¹ Shaw alleged the following tortious activity by Handy: intentional and negligent infliction of emotional distress; excessive force in violation of Kentucky Revised Statute (KRS) 503.090; assault and battery; negligence; gross negligence; and negligence *per se*. She sought compensatory and punitive damages, pre-judgment and post-judgment interest, and attorney fees and costs.

Handy filed his motion to dismiss on March 27, 2018, arguing that Shaw had failed to state a claim of action upon which relief can be granted (CR 12.02(f)) and that she had filed her action outside the one-year statute of limitations enunciated in KRS 413.140(1)(a). Shaw filed her response, and the matter was set for hearings on May 7 and July 12, 2018. The circuit court took the

¹ The circuit court granted Metro's motion to dismiss on March 29, 2018; Metro is not a party to this appeal. We thus do not include Shaw's allegations against Metro in this discussion.

matter under submission and entered its order dismissing with prejudice on August 16 of that year. Shaw filed her timely notice of appeal five days later.²

We begin by stating the standard of review:

We review dismissals under CR 12.02(f) *de novo*. *Morgan & Pottinger, Attorneys, P.S.C. v. Botts*, 348 S.W.3d 599, 601 (Ky. 2011). CR 12.02(f) is designed to test the sufficiency of a complaint. *Pike v. George*, 434 S.W.2d 626, 627 (Ky. 1968). It is proper to grant a CR 12.02(f) dismissal motion if:

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. . . . [T]he question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

James v. Wilson, 95 S.W.3d 875, 883-84 (Ky. App. 2002) (internal quotation marks and citation omitted). For purposes of a CR 12.02(f) motion, this Court, like the circuit court, must accept as true the plaintiff's factual allegations and draw all reasonable inferences in the plaintiff's favor. *Pike*, 434 S.W.2d at 627.

Hardin v. Jefferson County Board of Education, 558 S.W.3d 1, 5 (Ky. App. 2018).

Shaw first contends that the circuit court's ruling was in error because there were sufficient facts in her pleadings to support a claim for intentional infliction of emotional distress (IIED), which falls under KRS 413.120(6) (a five-

² We note that Shaw's brief fails to comply with several directives contained in CR 76.12(4)(c). Counsel is advised to conform with the Rule in the future before submitting a brief.

year statute of limitations). *See Craft v. Rice*, 671 S.W.2d 247, 251 (Ky. 1984).

Therefore, she continues, her claim for IIED should have survived CR 12.02(f) scrutiny. We disagree.

[T]here can be only one recovery on a given set of facts. And while there is a much longer statute of limitations than for traditional torts, as *Rigazio [v. Archdiocese of Louisville]*, 853 S.W.2d 295 (Ky. App. 1993),] demonstrates, a complaint cannot be saved from limitations by pleading intentional infliction of emotional distress to reach the longer statute when the facts support a claim for a more traditional personal injury tort with mental pain and suffering as part of the damages rather than severe emotional distress caused by outrageous conduct. There can be only one recovery for emotional distress on the same acts. It will either be caused as a result of an injury done to the plaintiff physically or it will be caused by outrageous conduct the purpose of which is to inflict emotional distress.

Childers v. Geile, 367 S.W.3d 576, 582–83 (Ky. 2012).

[I]f a set of facts establishes a traditional tort, by definition it *cannot* establish intentional infliction of emotional distress. In a traditional tort, there is an impact on the victim that may or may not cause mental distress. . . . [W]here severe emotional distress is caused by outrageous conduct, the Court determined as a matter of policy that compensation should be available and allowed the gap-filler tort of intentional infliction of emotional distress.

Id. at 584 (emphasis original). “[T]he facts here are clearly based on conduct amounting to assault and battery [and other traditional torts.]” *Degolia v. Kenton County*, 381 F. Supp. 3d 740, 772 (E.D. Ky. 2019). In spite of Shaw’s arguments

to the contrary, the facts alleged to support her claim of IIED were not separate from Handy's alleged traditionally tortious conduct of excessive force, assault, battery, and negligence. *Id.*

Shaw secondly argues that the one-year statute of limitations (KRS 413.140) is unconstitutional because it "deprives citizens of due process." In this vein she contends that 48 states have longer statutes and that Kentucky's Motor Vehicle Repairs Act (KRS 304.39-230) provides for two years to bring an action under certain circumstances. However, as Handy aptly points out, Shaw failed to comply with the notice requirements in KRS 418.075(2), which states:

In any appeal to the Kentucky Court of Appeals or Supreme Court or the federal appellate courts in any forum which involves the constitutional validity of a statute, the Attorney General shall, before the filing of the appellant's brief, be served with a copy of the pleading, paper, or other documents which initiate the appeal in the appellate forum. This notice shall specify the challenged statute and the nature of the alleged constitutional defect.

Merely notifying the Attorney General in the certificate of service of Shaw's brief is insufficient. Likewise, the nature of her notice to the Attorney General at the circuit court level was deficient as well. See KRS 418.075(1). "[S]trict compliance with the notification provisions of KRS 418.075 is mandatory[,] meaning that even in criminal cases, we have refused to address arguments that a statute is unconstitutional unless the notice provisions of KRS 418.075 had been

fully satisfied.” *Benet v. Commonwealth*, 253 S.W.3d 528, 532 (Ky. 2008) (footnotes omitted). We thus decline to discuss the issue of whether the one-year statute of limitations is unconstitutional. *Id.* at 532-33; *see also Delahanty v. Commonwealth*, 558 S.W.3d 489, 507-08 (Ky. App. 2018).

The order of the Jefferson Circuit Court is affirmed.

MAZE, JUDGE, CONCURS.

GOODWINE, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Sam Aguiar
Lonita Baker
Louisville, Kentucky

BRIEF FOR APPELLEE:

Robert T. Watson
Chris J. Gadansky
Louisville, Kentucky