

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gary Heinke, :  
Appellant :  
v. : No. 2069 C.D. 2009  
County of Lancaster, Richard : Argued: September 14, 2010  
Shellenberger, Howard "Pete" :  
Schaub and Molly Henderson :

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE JOHNNY J. BUTLER, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE PELLEGRINI

FILED: October 14, 2010

Gary Heinke (Heinke) appeals from an order of the Court of Common Pleas of Lancaster County (trial court) dismissing his amended complaint and granting the motion for judgment on the pleadings filed by Richard Shellenberger (Shellenberger), Howard "Pete" Schaub (Schaub), Molly Henderson (Henderson) (collectively, County Commissioners) and the County of Lancaster (County). Finding no fault with the trial court's decision, we affirm.

The facts of this case according to Heinke's amended complaint are as follows. Heinke and Shellenberger met in 1997 and became friends. In 2001, Heinke moved from Lancaster, Pennsylvania, to Minneapolis, Minnesota, to work

as a consultant and later as a substitute teacher. In May 2003, Shellenberger and Schaub won the Republican primary election for Commissioners of Lancaster County. Sometime thereafter, Heinke visited Lancaster County for a hospital visit at which time he was invited by Shellenberger to meet for what turned out to be a preliminary screening for a potential job. Schaub was also in attendance. In November 2003, Shellenberger, Schaub and Democrat Henderson won the general election for Commissioners of Lancaster County. Shellenberger contacted Heinke and told him that he and Schaub were creating a position for County Chief Services Officer (CSO) and “wanted him” for that position. They encouraged him to apply for a position, which Heinke did. In March 2004, Heinke interviewed for that position with Shellenberger, Schaub, Henderson and Bonnie Ashworth, the County Human Resource Specialist. By a unanimous vote, he was hired as CSO, effective March 29, 2004, with a salary of \$80,000 per year, and Heinke, who had relocated, began working immediately.

Heinke resigned on October 28, 2005, because he was told that he would be paid the same salary of \$105,000 as the County Administrator, but he was not; his responsibilities were increased substantially from those which were represented to him by Shellenberger and Schaub; Schaub routinely verbally abused him, physically threatened him and threatened him with termination if he did not comply with all of his job responsibilities; and in October 2005, a series of local newspaper articles were published regarding alleged fabrications made by Heinke on his resume which he submitted as part of his application for the CSO position.

In September 2007, Heinke filed a four-count complaint, later amended, against the County and the three County Commissioners. In Count I, he alleged wrongful discharge stating that the County effectively terminated his employment because it added duties and responsibilities which were much greater than that which had been represented to him when he had his interview. As a result of his wrongful discharge, he suffered injuries including, but not limited to severe anxiety, depression, post-traumatic stress syndrome, difficulty in swallowing, problems sleeping, shortness of breath and panic attacks. He also alleged that he suffered a severe loss of earnings and an impairment of his earning power.

In Count II, Heinke alleged solicitation of employee by misrepresentation. He claimed that the County and the County Commissioners falsely and fraudulently and with the intent to induce him to enter into the contract of employment with the County made representations to him regarding his duties and responsibilities which he would be assuming once he became employed by the County. Heinke claimed that he relied on the representations and he was induced to move to Lancaster, Pennsylvania, and to accept a position with the County. As a result of his reliance on the County's representations and the County Commissioners' solicitation of employment, he suffered the aforesaid damages and relocation costs.

In Count III, Heinke alleged fraudulent inducement to enter into a contract of employment. He claimed that the job description for a CSO and the official County website were at variance from what his responsibilities actually

were. He claims that representations made to him were false and that the County and the County Commissioners made the representations knowing them to be false or with reckless disregard as to their truth or falsity with the intent to fraudulently induce Heinke to rely on them by accepting the proposed employment. The representations were material to Heinke's decision to accept the proposed employment and he reasonably relied on the representations in deciding to accept the employment. As a direct result of his reliance on those representations and by reasons of their fraudulent inducement to enter into a contract of employment, Heinke suffered the aforementioned damages.

In Count IV, Heinke again alleged willful misconduct. This time, he claimed that he was effectively terminated from employment due to the County and the County Commissioners' actions in abusing him and failing to provide him with any relief and allowing and/or contributing to false fraudulent information being disseminated to the press and public and their use of him to cover their own inadequacies, misconduct and malfeasance. Again, as a result, he suffered the aforementioned damages.

The County and the County Commissioners filed preliminary objections in the nature of a demurrer to the amended complaint alleging that Heinke failed to state a claim for wrongful discharge because he was an at-will employee and he resigned from employment, and he failed to state a claim for fraudulent inducement to accept employment because his averments did not establish a prima facie claim of fraud. The trial court denied the preliminary objections.

After filing an answer, the County and the County Commissioners filed a joint motion for judgment on the pleadings arguing that all of Heinke's claims against the individual County Commissioners were barred by the applicable statutes of limitations. They specified that his claims were barred by the six-month statute of limitations set forth in 42 Pa. C.S. §5522(b)(1);<sup>1</sup> even if the County Commissioners' actions were not in their official capacity, his claims of fraudulent inducement to enter into a contract of employment were barred by the two-year statute of limitations set forth in 42 Pa. C.S. §5524(7);<sup>2</sup> and his claims against the

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<sup>1</sup> 42 Pa. C.S. §5522(b)(1) provides:

The following actions and proceedings must be commenced within six months:

(1) An action against any officer of any government unit for anything done in the execution of his office, *except an action subject to another limitation specified in this subchapter.* (Emphasis added.)

<sup>2</sup> 42 Pa. C.S. §5524(7) provides:

The following actions and proceedings must be commenced within two years:

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(7) Any other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass including deceit or fraud, *except an action or proceeding subject to another limitation specified in this subchapter.* (Emphasis added.)

County were barred by governmental immunity granted under the Political Subdivision Tort Claims Act (Tort Claims Act) at 42 Pa. C.S. §8542.<sup>3</sup>

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<sup>3</sup> 42 Pa. C.S. §8542(a) provides:

(a) **Liability Imposed.** - A Local agency shall be liable for damages on account of an injury to a person or property within the limits set forth in this subchapter if both of the following conditions are satisfied and the injury occurs as a result of one of the acts set forth in subsection (b):

(1) The damages would be recoverable under common law or a statute creating a cause of action if the injury were caused by a person not having available a defense under section 8541 (relating to governmental immunity generally) or section 8546 (relating to defense of official immunity); and

(2) The injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed in subsection (b). As used in this paragraph, *“negligent acts” shall not include acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct.* (Emphasis added.)

(b) **Acts which may impose liability.-**

- (1) Vehicle liability.
- (2) Care, custody or control of personal property
- (3) Real property
- (4) Trees, traffic controls and street lighting
- (5) Utility service facilities
- (6) Streets
- (7) Sidewalks

**(Footnote continued on next page...)**

The trial court agreed that all claims against the County and the County Commissioners were barred by the statute of limitations because 42 Pa. C.S. §5522(b)(1) required an action against government officers for fraud and wrongful discharge within six months, and because Heinke resigned from his position as CSO on October 28, 2005, effective November 11, 2005, and he did not file a complaint until September 5, 2007, his filing fell outside the filing deadline. The trial court disagreed with Heinke that the “discovery rule” should apply to this case and that the statute of limitations should extend to 42 months (the date from which Heinke was hired – March 29, 2004, through the date his complaint was filed – September 5, 2007, a total of 42 months). The trial court also explained that because Heinke did not dispute that his claims did not fall under any of the enumerated exceptions of Section 8542 of the Tort Claims Act, and governmental immunity applied even where an official’s conduct constituted fraud, a crime or willful misconduct, the County and the County Commissioners were entitled to immunity. The trial court dismissed Heinke’s amended complaint and granted the County and the County Commissioners’ joint motion for judgment on the pleadings. This appeal by Heinke followed.<sup>4</sup>

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(8) Care, custody or control of animals

<sup>4</sup> In reviewing a grant of judgment on the pleadings, our review is limited to determining whether the trial court committed an error of law or abused its discretion. *Kerr v. Borough of Union City*, 614 A.2d 338 (Pa. Cmwlth. 1992).

Heinke contends that the trial court erred by concluding that the six-month statute of limitations found in 42 Pa. C.S. §5522(b)(1) applied because the County Commissioners' conduct "did not occur in their official capacity."<sup>5</sup> He contends that their "independent acts of misconduct, which clearly rise to the level of various torts and crimes...would result in the two year statute of limitation applying for assault, negligence and wrongful discharge" and only then from when he discovered the fraud. (Heinke's brief at 25.) Heinke further argues that the County Commissioners' behavior was *potentially criminal* consisting of harassment, blackmail, extortion and assault.

Heinke contends that 42 Pa. C.S. §8550 takes the County Commissioners outside the protections afforded by the Tort Claims Act. 42 Pa. C.S. §8550 provides that:

In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct, the provisions of Sections 8545 (relating to official liability generally), 8546 (relating to defense of official immunity), 8548 (relating to indemnity) and 8549 (relating to limitation on damages) shall not apply.

Because those defenses are not available, he contends that the two-year statute for fraud contained in 42 Pa. C.S. §5524(7) applies.

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<sup>5</sup> The County Commissioners did not raise whether they were entitled to immunity as high public officials. *See Lindner v. Mollan*, 544 Pa. 487, 677 A.2d 1194 (1996).



First, 42 Pa. C.S. §5524(7) is part of the Judicial Code, not what is commonly know as the Tort Claims Act and applies to a public official for “anything done in the execution of his office” and applies to “anything done” whether it is willful or not. Second, even assuming that willful misconduct takes the County Commissioners outside the tolling provisions of the Tort Claims Act, the interplay between 42 Pa. C.S. §5524(7) and §5522(b)(1) makes the six-month statute applicable even when the County Commissioners have engaged in fraud. 42 Pa. C.S. §5524(7) provides that it is applicable unless “an action or proceeding [is] subject to another limitation specified in this subchapter.” That is the identical language used in Section 5522(b)(1), a six-month statute of limitations. When both 42 Pa. C.S. §5524(7) and §5522(b)(1) apply, the six-month statute of limitation prevails. *Stoppie v. Johns*, 720 A.2d 808 (Pa. Cmwlth. 1998); *Kelly v. City of Philadelphia*, 552 F. Supp. 574 (E.D. Pa. 1982). Therefore, a claim of fraud against government officers is governed by the six-month statute of limitations in 42 Pa. C.S. §5524(7), and a claim of wrongful discharge against government officials is governed by the six-month statute of limitations in 42 Pa. C.S. §5522(b)(1).

As to Heinke’s argument that the complained-of conduct was not done in the County Commissioners “execution of [their] office,” Heinke averred in his amended complaint that the County Commissioners were at all times acting in their official capacity stating the following:

8. Lancaster County’s agents are, and at all times mentioned here were, employed by the County of Lancaster and were authorized and empowered by Lancaster County to act as its agents, and each and all of

the things alleged to have been done by them *were done in the capacity of, and as agents for Lancaster County and were within the scope of their authority and employment.*

9. Co-Defendant Shellenberger was, at all times material hereto, a County Commissioner, making, enforcing, and administering policies, practices and procedures within Lancaster County. At all times material Defendant Shellenberger *acted within the course and scope of his duties as a County Commissioner, and as the officer, agent and/or employee of Defendant-Lancaster County.* Defendant Shellenberger is being sued both individually and in his official capacity as agent for Lancaster County.

10. Co-Defendant Schaub was, at all times material hereto, a County Commissioner, making, enforcing, and administering policies, practices and procedures within Lancaster County. At all times material Defendant Schaub *acted within the course and scope of his duties as a County Commissioner, and as the officer, agent and/or employee of Defendant-Lancaster County.* Defendant Schaub is being sued both individually and in his official capacity as agent for Lancaster County.

11. Co-Defendant Henderson was, at all times material hereto, a County Commissioner, making, enforcing, and administering policies, practices and procedures within Lancaster County. At all times material Defendant Henderson *acted within the course and scope of her duties as a County Commissioner, and as the officer, agent and/or employee of Defendant-Lancaster County.* Defendant Henderson is being sued both individually and in her official capacity as agent for Lancaster County.

(Amended Complaint at 3-4.) (Emphasis added.) While Heinke now contends in his brief that their conduct was outside the execution of their office because their duties did not require them to “lie and abuse” him, because he alleged that the County Commissioners were acting within their official capacity, he did not plead

such in his complaint.<sup>6</sup> In any event, the complained of actions – setting salaries and assigning responsibilities – is part of the execution of the office of County Commissioner.

Finally, even if we applied the two-year statute of limitations, Heinke’s action would still be time-barred. In his complaint, Heinke alleged that he began working as CSO on March 29, 2004, for \$80,000, the same salary that he was told that the new County Administrator would be paid. However, when he actually began working, he discovered that the County Administrator made \$105,000. He also alleged in his complaint that it had been represented to him that he would be working with five county agencies, but when he actually assumed the position, he was provided with an additional long list of responsibilities and special projects which totally deviated from the original job responsibilities. Heinke was aware that he had been injured at least as early as March 29, 2004, or a few days after when he realized the facts as told to him during the hiring process had been misrepresented to him.<sup>7</sup> Because he did not bring the complaint until September 5,

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<sup>6</sup> Heinke did not raise any criminal counts in his complaint that he alleged occurred. He only alleged that the County Commissioners’ behavior was *potentially criminal*, i.e., harassment, blackmail, extortion and assault. Although Heinke mentioned in his amended complaint incidents of verbal harassment on the job and being blackmailed on his annual evaluation, there are no specific counts in his amended complaint for blackmail and actual physical assault. Because his arguments are limited to those which he raised in his complaint, and Heinke admitted that the County Commissioners were acting within the scope of their duties, Heinke’s contention that the two-year statute of limitations should have applied fails.

<sup>7</sup> Generally, the statute of limitations for a cause of action for fraud begins to run as soon as the right to institute and maintain a suit arises. *Fine v. Checcio*, 582 Pa. 253, 870 A.2d 850 (2005). The discovery rule is an exception to this rule. *Id.* Under the discovery rule, the statute of limitations does not begin to run until the injury is discovered or should reasonably have been discovered. *Id.* The purpose of the rule is to toll the running of the statute for those who have **(Footnote continued on next page...)**

2007, three years after he knew or should have known that he was paid less, even if we applied a two-year statute, his claim was still time-barred.

Accordingly, because it is admitted that the conduct complained-of here did not fall within any of the exceptions to immunity and the action against the County Commissioners was time-barred, the order of the trial court is affirmed.

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DAN PELLEGRINI, JUDGE

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not suffered an immediate ascertainable injury and are reasonably unaware that they have been injured. *Id.* Because Heinke was reasonably aware that he had been injured as of the date he was employed, the discovery rule does not apply to him, and the trial court did not err by finding that it was inapplicable to Heinke.

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Schaub and Molly Henderson :

**ORDER**

AND NOW, this 14<sup>th</sup> day of October, 2010, the order of the Court of  
Common Pleas of Lancaster County dated August 17, 2009, is affirmed.

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DAN PELLEGRINI, JUDGE