RENDERED: FEBRUARY 26, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000847-MR

C. WES COLLINS AND
JACOB COLLINS — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 06-CI-05254

ADELE BURT BROWN, JO ANN WISE,
JOSEPH E. LAMBERT, THE KENTUCKY
BAR ASSOCIATION, THE JUDICIAL CONDUCT
COMMISSION, ALLYSON HONAKER, AND
KEN WILLIAMS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND NICKELL, JUDGES; HARRIS,[1] SENIOR JUDGE.

[1] Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

NICKELL, JUDGE: C. Wes Collins (Wes), *pro se*, has appealed from the February 9, 2007, order of the Fayette Circuit Court dismissing his civil action against Fayette Family Court Judge Jo Ann Wise; Assistant Fayette County Attorneys Allyson Honaker and Ken Williams; Hon. Adele Burt Brown;[2] former Chief Justice of the Supreme Court of Kentucky Joseph E. Lambert; the Kentucky Bar Association (KBA); and the Judicial Conduct Commission (JCC). Wes's complaint alleged the defendants were part of a wide-ranging "Mixed War conspiracy" against him that ultimately caused him to lose custody of his minor son, diminished the value of his assets, and caused him to experience physical and mental pain, suffering and distress, loss of income, embarrassment and humiliation. He demanded $500,000.00 in compensatory damages and $1,500,000.00 in punitive damages. After a careful, thorough and thoughtful review of the record, we affirm.

Wes and his wife Peggy were divorced on February 3, 2004. Peggy was awarded custody of the parties' minor children and Wes was granted visitation. Shortly thereafter, Wes began a series of misdeeds culminating in his loss of all timesharing privileges until such time as he completed court-ordered counseling and otherwise agreed to comply with the trial court's orders. Wes failed to comply with the trial court's orders and was discharged from a domestic violence treatment program for failure to follow through with treatment recommendations. In affirming the trial court's decisions in a consolidated appeal

[2] Brown represented Wes's ex-wife during their divorce proceedings in Fayette Family Court.

styled *Collins v. Collins*, 2006 WL 3371891, Case Nos. 2005-CA-002404-ME, 2006-CA-000011-ME, 2006-CA-000083-ME (unpublished, rendered November 22, 2006, discretionary review denied June 13, 2007), we discussed additional facts which are equally relevant to the matter at bar.

> Shortly thereafter, Wes embarked upon a course of conduct which the trial court ultimately deemed to be vexatious and harassing, by filing a series of motions, affidavits, petitions for injunctive relief, complaints and writs seeking to bar enforcement of the trial judge's order, to restore visitation with his son, to change custody and to obtain an award of maintenance. Although the trial judge refused to consider any of Wes's pleadings until he complied with the order to undergo a psychiatric evaluation, the barrage of filings continued and even increased. The magnitude of Wes's filings in the family court, this Court and the Supreme Court was such that Peggy reached the point that she could no longer afford to pay her counsel to respond to them. Counsel was permitted to withdraw without filing a brief in these appeals.
>
> As was the case with his unsuccessful attempt to obtain relief by writ in the Supreme Court of Kentucky, Wes's assertions in these appeals consist only of vague and unsupported allegations that the trial judge and attorneys engaged in fraud, conspiracy and misconduct all calculated to deprive him of an alleged "vested liberty interest" as a parent to his minor child. The majority of his brief is devoted to reciting excerpts from the various hearings, along with accusations unaccompanied by any legal analysis or argument. In his summation, Wes asks this Court to declare all orders of the family court null and void as a matter of law; to bar enforcement of the order suspending visitation; to remand the case for entry of a judgment awarding him all of his "reasonable losses incurred in this case;" and to grant all other appropriate relief. We find no basis for granting any of the relief sought.

Id. at *1-2.

After our opinion was rendered, but before the Supreme Court had denied discretionary review, Wes filed the instant complaint.[3] Therein, Wes again contended the trial judge, two assistant county attorneys, and his ex-wife's attorney committed misdeeds against him during the divorce action. Like his prior filings, the complaint contained numerous vague and unsupported allegations of a grand conspiracy involving fraud and misconduct calculated to harm him and improperly benefit his ex-spouse. He also alleged bad acts against the Chief Justice of the Supreme Court of Kentucky, the KBA, and the JCC, apparently under some theory of vicarious liability, complicity, or negligent supervision, although it is difficult, if not impossible, to ascertain from the complaint the basis or applicability of any such theory.[4] Most, if not all, of the issues raised in the civil complaint had been previously asserted in earlier litigation.

All of the defendants filed motions to dismiss the complaint and most included supporting memoranda. All requested dismissal for failure of the

[3] Wes originally filed his complaint on December 5, 2006. He filed an amended complaint on January 5, 2007, which added as defendants two insurance companies and "unnamed insurance companys (sic)". However, no other reference to any of those companies was contained in the body of the complaint, nor were there any allegations of wrongdoing or liability for others. The amended complaint also added citations to three additional statutory provisions in the "Civil Bill of Particulars" section of the original complaint. Again, no further reference was made in the body of the complaint regarding these amendments. As these issues are likewise not raised before this Court, we must assume Wes has abandoned any arguments relating thereto and will comment no further on any of them.

[4] No factual allegations were ever asserted against the KBA or the JCC. Therefore, we are unable to determine on the face of the record what, if any, theory of liability was sought to be applied to these defendants.

complaint to state a claim upon which relief could be granted, citing CR 12.02. The judicial defendants, the KBA and the JCC additionally raised the defenses of judicial and sovereign immunity. Following a hearing on the various motions to dismiss, the trial court ruled from the bench that the complaint should be dismissed and subsequently entered a written order to that effect. The trial court found the complaint failed to state a claim upon which relief could be granted against any of the defendants. Further, the trial court concluded the claims against Judge Wise and Chief Justice Lambert were barred by judicial immunity, the claims against the KBA and the JCC[5] were barred by sovereign immunity, and the claims against the assistant county attorneys were barred by quasi-judicial immunity. Finally, the trial court concluded Brown represented Wes's ex-spouse at all relevant times and therefore owed no duty to Wes.

Following the dismissal, Wes filed a pleading styled "Motion for Proceedings in Lieu CR 59.07." After consideration of the motion and the responses thereto, the trial court entered an order denying the motion, and Wes subsequently appealed to this Court. Wes then unsuccessfully attempted to remove the action to the Supreme Court of Kentucky. The cause was returned to our active docket for a decision on the merits.

[5] Although the trial court ruled from the bench that the complaint was dismissed as to the JCC, the written order contains no such language. However, based upon our holding today, this oversight is of little consequence as the outcome would be no different, especially in light of Wes's complete failure to include any factual allegations against that entity in his complaint.

Wes's primary argument on appeal is that the motions to dismiss for failure to state a cause of action were somehow transformed, by means of CR 12.02, into a motion for summary judgment and that he was not given a reasonable opportunity to present all material made pertinent to such motion by CR 56. He also argues that the complaint did, in fact, state a claim for relief. Thus, he contends the dismissal of the action was improper. We disagree.

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 the dismissal was a matter of law, our review is *de novo. Revenue Cabinet v. Hubbard,* 37 S.W.3d 717, 719 (Ky. 2000). Upon completing our *de novo* review, we hold Wes's arguments fail on the merits, and we affirm.

In addition to the JCC and the KBA, there are three additional classes of defendants in this case: judicial, prosecutorial, and adversarial counsel. We will analyze each of these groups individually to determine the propriety of the trial court's dismissal of the complaint against each class.

First, as to the judicial defendants, Judge Wise and former Chief Justice Lambert, the trial court properly found them to have been shielded by absolute judicial immunity. The doctrine of judicial immunity is well-settled under

federal and common law and predates the adoption of the current Constitution of Kentucky. *See Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1977); *Vaughn v. Webb*, 911 S.W.2d 273 (Ky. App. 1995). So long as the judge has jurisdiction over the subject matter of the cause before him, he is entitled to immunity. *Id.* There is no question in this case that Judge Wise and former Chief Justice Lambert acted within their jurisdiction at all times pertinent to the matters raised in Wes's complaint. Thus, they are clearly entitled to immunity from civil complaints stemming from their judicial acts.

The function of absolute immunity in the performance of judicial duties is not to shield members of the judiciary from liability for their own misconduct, but rather "to protect their offices from the deterrent effect of suit alleging improper motives where there has been no more than a mistake or a disagreement on the part of the complaining party with the decision made." *Yanero v. Davis*, 65 S.W.3d 510, 518 (Ky. 2001) (citations omitted).[6] In *Henry v. Wilson*, 249 Ky. 589, 61 S.W.2d 305, 307 (1933), our Supreme Court stated "[i]t has been repeatedly held by this court in a long line of decisions that a judicial officer is not subject to civil suit when in the performance of his judicial duties and within his jurisdiction, although his ruling may be the result of mistake of law, error of judgment, or malice, or be done corruptly." Therefore, it is abundantly

[6] The *Yanero* Court's decision also discussed with approval the applicability of absolute immunity to legislators and prosecutors for acts done in the performance of their official functions.

clear that all of Wes's claims against the judicial defendants are barred by absolute judicial immunity.

In a similar vein, the official capacity claims against the judicial defendants must also fail on the basis of sovereign immunity. Sovereign immunity arose from the English common law and has been recognized as applying to the Commonwealth since at least 1828. *Yanero*, 65 S.W.3d at 517-18 (citing *Divine v. Harvey*, 23 Ky. (7 T.B. Mon.) 439, 441 (1828)). "[T]he absolute immunity from suit afforded to the state also extends to public officials sued in their representative (official) capacities, when the state is the real party against which relief in such cases is sought." *Id.* at 518. This absolute immunity has specifically been applied to judges performing their judicial functions. *See Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978), *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1871), *Vaughn v. Webb*, 911 S.W.2d 273 (Ky. App. 1995). There is again no question the judicial defendants herein were at all times acting in their judicial capacities. Therefore, the trial court correctly found Wes's claims to be barred under the doctrine of sovereign immunity.

Likewise, Wes's claims against the JCC must fail as they are also barred by the doctrine of sovereign immunity. The JCC is a state agency expressly created under Section 121 of the Kentucky Constitution. Consequently, a claim filed against it is tantamount to suing the Commonwealth itself. As stated earlier, the Commonwealth is absolutely immune from suit, *Yanero*, and this agency is undoubtedly cloaked with that same immunity. *See Withers v. University of*

Kentucky, 939 S.W.2d 340, 346 (Ky. 1997). Lest we be accused of oversimplifying the issue or misstating the rule of sovereign immunity, we are aware Section 231 of Kentucky's Constitution specifically states: "[t]he General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth." By the plain language of this provision, sovereign immunity is retained for the Commonwealth until the Legislature, by statute, expressly waives it. We have been directed to no such statutory waiver provision relating to the JCC and are convinced none exists. The trial court did not err in dismissing the complaint against the JCC on sovereign immunity grounds.

The KBA is not a constitutionally created state agency, but rather it is an independent agency of the Supreme Court and its powers and authority to regulate the legal profession are derived from Section 116 of the Kentucky Constitution. While based on its status as an agency of the Supreme Court, the KBA may be entitled to immunity in this matter, but we must disagree with the trial court's finding of immunity as the basis for its decision to dismiss the complaint against the KBA. "[B]ecause the [Kentucky Bar] Association is an arm of the court itself, and therefore cannot properly be sued in any of the other courts of the state, [the Supreme Court] is the only forum in which the controversy can be heard and resolved." *Ex Parte Auditor of Public Accounts*, 609 S.W.2d 682, 683 (Ky. 1980) (citing *Ex Parte Farley*, 570 S.W.2d 617, 620 (Ky. 1978)). It is clear Wes's claims were improperly brought before the circuit court which had no jurisdiction to adjudicate any claims against the KBA and thus, although the

complaint was properly dismissed, the trial court based its decision on the wrong reason. Nevertheless, "[w]e are bound to affirm if the trial court reached the correct result, but in doing so, applied the wrong reasoning. *See Keessee v. Smith*, 289 Ky. 609, 159 S.W.2d 56 (1941)." *Friend v. Rees*, 696 S.W.2d 325 (Ky. App. 1985). Here, the result was correct and the dismissal was proper.

In addition to the correctness of the trial court's dismissal on the previous grounds, we note Wes has also failed to present a cognizable claim against the JCC and the KBA as the trial court correctly found. The complaint on its face alleges no duty on the part of the JCC or the KBA, nor does it indicate how any such duty was breached. A cause of action in negligence can only be maintained upon the establishment of the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and facts supporting a causal connection between that breach and an actual injury to the plaintiff. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001). None of these facts were alleged in Wes's complaint. Thus, there was no set of facts presented under which Wes could be entitled to relief against the JCC nor the KBA and dismissal under CR 12.02 was proper. *Pari-Mutuel Clerks' Union*.

Next, the prosecutorial defendants, Honaker and Williams, are also cloaked with immunity for their official acts. If a prosecutor acts within the scope of the duties of his or her office, he or she is entitled to absolute quasi-judicial immunity. *McCollum v. Garrett*, 880 S.W.2d 530, 535 (Ky. 1994); *Jefferson County Commonwealth Attorney's Office v. Kaplan*, 65 S.W.3d 916 (Ky. 2001).

This immunity is derived from the absolute immunity afforded members of the judiciary and is grounded in sound public policy. *Imbler v. Pachtman*, 424 U.S. 409, 422-23, 96 S.Ct. 984, 991, 47 L.Ed.2d 128 (1976); *Dugger v. Off 2nd, Inc.*, 612 S.W.2d 756 (Ky. App. 1981). This has long been the rule in this Commonwealth. *See Mitchell v. Ripy*, 82 Ky. 516 (1885); *Dixon v. Cooper*, 109 Ky. 29, 58 S.W. 437 (1900). Wes admits that at all times pertinent to this action these defendants were acting in their official capacities as assistant county attorneys. Thus, it is beyond dispute that these prosecutors are entitled to absolute quasi-judicial immunity, *McCollum*, and the trial court's dismissal was correct.

Wes is laboring under the false assumption that the judicial defendants as well as the prosecutors have some burden of proof regarding their immunity claims. He cites no authority supportive of this position and we are convinced none exists based on the facts before us. Although a public official may bear some burden of proof when charged with negligent performance of a ministerial act, such is not the case here. All of the judicial, prosecutorial and state agency defendants were cloaked in absolute immunity. The complaint, on its face, alleged no set of facts under which the veil of immunity could be pierced as there was no implication that any of these actors was performing anything other than discretionary acts for which they would be entitled to absolute immunity. *Yanero*. Wes's argument to the contrary is wholly without merit.

We next turn our attention to the claims raised against Brown. She alone has no claim of immunity and the dismissal as to her was simply Wes's

failure to state a claim upon which relief could be granted pursuant to CR 12.02(f). The trial court found that at all times relevant to the complaint Brown represented Wes's ex-wife. Wes has agreed the trial court correctly found Brown owed Wes no duty. As stated earlier, a plaintiff must allege and prove the existence of a duty owed by a defendant, a breach of that duty, and a causal connection to an actual injury in order to state a cause of action for negligence. *Lewis*. Wes has again failed to plead the elements of a cognizable negligence claim and this failure was fatal to his complaint. Nevertheless, Wes contends Brown owed a duty to the "intended benefactors"[7] of the divorce proceedings and he is entitled to relief based on her alleged breach of that duty. However, his argument is based on conjecture, speculation, and incoherent and disjointed legal conclusions without citation or reference to any pertinent or relevant factual allegations. It is wholly unsupported by binding or applicable authority and his reliance on outdated cases dealing with probate and estate planning matters is misplaced.

Wes's contention that he has standing to bring a malpractice action against Brown is also without merit. To establish a cause of action for legal malpractice in Kentucky, a plaintiff carries the burden of establishing the following elements:

> 1) that there was an employment relationship with the defendant/attorney; 2) that the attorney neglected his duty to exercise the ordinary care of a reasonably competent

[7] Although he does not define this term, we have deduced that Wes is referring to the children born to the marriage, one of whom has now reached the age of majority and was not a named plaintiff in the instant action.

> attorney acting in the same or similar circumstances; and 3) that the attorney's negligence was the proximate cause of damage to the client.

Stephens v. Denison, 64 S.W.3d 297, 298-99 (Ky. App. 2001) (citing *Daugherty v. Runner*, 581 S.W.2d 12, 16 (Ky. App. 1978)). It is clear that neither Wes nor the "intended benefactors" had an employment relationship with Brown, and Wes has failed to allege facts sufficient to support findings in his favor on the remaining two factors required to sustain a legal malpractice action. Thus, as there was no actionable claim stated against Brown, and Wes had no standing to bring a legal malpractice action against her, the trial court correctly dismissed the complaint against Brown pursuant to CR 12.02(f).

Finally, 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 Wes's position to the contrary and are convinced none exists. The trial court based its ruling solely on the pleadings and the arguments of counsel 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 Wes'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 Wes had failed to allege any set of facts under which he could be entitled to relief against any of the defendants.

Pari-Mutuel Clerks' Union. Likewise, we find no merit in Wes's contention that he should have been allowed an evidentiary hearing.

We must note that the judicial defendants have argued the dismissal of the complaint was also proper under the doctrines of *res judicata* and collateral estoppel based on Wes's prior litigation of many of the issues presented herein. Although these may very well be viable defenses, because the earlier proceedings are not properly before this Court we would be unable to pass on the merits of such defenses if such a determination had been necessitated. However, based on our resolution of the matters presented, discussion of the applicability of those defenses is unnecessary and moot.

Therefore, for the foregoing reasons, the order of the Fayette Circuit Court dismissing the complaint is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

C. Wes Collins, *pro se*
Richmond, Kentucky

BRIEF FOR APPELLEES, JOANN WISE; JOSEPH E. LAMBERT; KENTUCKY BAR ASSOCIATION AND KENTUCKY JUDICIAL CONDUCT COMMISSION:

Jack Conway
Attorney General of Kentucky

Craig F. Newbern, Jr.
Assistant Attorney General
Frankfort, Kentucky

BRIEF FOR APPELLEES, ALLYSON HONAKER AND KEN WILLIAMS:

Larry S. Roberts
Fayette County Attorney

Richard E. Vimont
Assistant Fayette County Attorney
Lexington, Kentucky

BRIEF FOR APPELLEE, ADELE BURT BROWN:

Adele Burt Brown, *pro se*
Lexington, Kentucky