RENDERED DECEMBER 18, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001278-MR

MICHAEL B. WHITTON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 07-CI-002372

SCOTT WEIS;
JOHN DOE #1, Aider and Abettor to Scott Weis; and
JOHN DOE #2, Aider and Abettor to Scott Weis

APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND VANMETER, JUDGES.

MOORE, JUDGE: Michael B. Whitton[1] appeals the Jefferson Circuit Court's

[1] We note that Whitton's last name was spelled "Whitten" in the briefs filed in this case, but because it was spelled "Whitton" in the notice of appeal, we will use that spelling in this opinion.

orders[2] granting summary judgment in this civil action involving allegations of fraud, perjury, forgery, and unjust enrichment. After a careful review of the record, we affirm because there is no civil cause of action for perjury committed by a witness or a party and the remainder of Whitton's claims are barred by the doctrines of res judicata and collateral estoppel.

I. FACTUAL AND PROCEDURAL BACKGROUND

Whitton and Scott Weis co-owned two companies: Consumer Cable Inc. (CCI) and High Power Technical Services, Inc. (HPTS). Whitton alleged in his complaint filed in this case that Dish Network wanted HPTS to become a Regional Service Provider for Dish, handling installations and service for Dish's retail stores in Kentucky and Indiana. However, in order for Dish to give HPTS a contract, which included a non-compete clause, Dish allegedly wanted proof that HPTS and CCI were separate and distinct, so Dish requested proof that Whitton had sold his shares in HPTS to Weis. Thus, a document entitled "Second Meeting of the Principles [sic] and Directors of [HPTS]" was created. This document essentially consisted of corporate meeting minutes. The document stated as follows:

> The second meeting of the principles [sic] and directors of [HPTS] took place on May 17, 1999 at the corporate office located at 914 A1 North English Station Rd.[,] Louisville, KY 40223.
>
> The Two – (2) directors of the Corporation Scott A. Weis and Michael B. Whitton announced that all shares of the

[2] There was an initial order granting partial summary judgment and a subsequent order granting summary judgment on the remainder of Whitton's claims.

> Corporation held by Michael Whitton have been sold to Scott A. Weis.
>
> Scott Weis announced that he should serve as President and Treasurer of the Corporation, and be the sole director.
>
> Michael Whitton after selling all interest in [HPTS] did resign as Vice President.
>
> The foregoing constitutes a record of the action taken on May 17, 1999 by Scott A. Weis and Michael B. Whitton.

Whitton contended in his complaint that he was "induced by fraud and deceit to sign this document" in which he attested "to a non-existent event."[3]

Whitton asserted that, after he signed the false corporate meeting minutes, his signature from that document was photocopied onto a Buy-Sell Agreement dated May 17, 1999, which was provided to Dish. That agreement stated that Weis sold his shares in CCI to Whitton, making Whitton the sole owner of CCI. Whitton, in turn, sold his shares in HPTS to Weis, making Weis the sole owner of HPTS. Whitton contended in his complaint filed in this case that his signature on the buy-sell agreement was forged.

Prior to the lawsuit at issue in this appeal, another lawsuit was filed in Jefferson Circuit Court which was captioned *MJM Advanced Communications, Inc. v. Consumer Cable, Inc*, case number 01-CI-03953. In that case, Whitton was

[3] We find it interesting that Whitton claims he knew at the time he signed the "Second Meeting of the Principles [sic] and Directors of [HPTS]" that the document was false, yet he asserts that Weis's act of convincing him to sign the false document was a criminally fraudulent act on Weis's part. We note that, under Whitton's version of the facts of this case, Whitton's act of signing the document as a means of getting Dish to enter into a contract with HPTS, even though Whitton admits knowing the document was false at the time he signed it, appears to itself be fraudulent.

a third-party plaintiff/third-party defendant, and he alleged in his third-party complaint that Weis, who was a third-party defendant in that case, had on or about May 17, 1999, "forged, created or manipulated by photocopying machine or otherwise fraudulently obtained the signature of . . . Whitton, on a document called buy/sell agreement." Whitton further contended that "Weis, in forging or otherwise fraudulently obtaining the said signature of Third Party Plaintiff, Whitton, was intentional or reckless," and that as a result of this "outrageous conduct, . . . Whitton[] suffered emotional distress."

The circuit court entered its findings of fact, conclusions of law, and judgment in the *MJM* case. The court noted that, in regard to the corporate meeting minutes,

> [w]hile Mr. Whitton testified that this document was signed in an effort to defraud another business entity and was intended to have no legal effect, the Court finds no other evidence or documentation to support Mr. Whitton's assertion. Mr. Whitton's explanation that the execution of this document was necessary to obtain a contract from Dish Network to become a regional service provider ("RSP") was also contradicted by Mr. Weis's testimony that Dish Network did not even have an RSP program for approximately one year after the signing of the document on May 17th, 1999.

The circuit court in *MJM* also noted that Whitton acknowledged having signed a particular letter in which he stated that "[CCI] accepts this summons and the judgment of the Court, but please delete [HPTS] from this summons as the two companies have no connection and are under totally different

ownership." Further, the court found that in another case, *Edwards v. High Power Technical*, Jefferson Circuit Court, case number 00-CI-02373,

> Mr. Whitton acknowledged that he had been a part owner of [HPTS] but that he was not an employee, officer or director of [HPTS] in November of 1999. He also acknowledged that the Buy/Sell Agreement . . . was signed in May of 1999. Interestingly, he never indicated that he had not signed the agreement himself but did note that "I never had anything to do with [HPTS] financially because it was [Weis's]."

The court noted that one exhibit

> substantiate[d] that Mr. Whitton did pay Mr. Weis approximately $62,500.00, the purchase price [under] the Buy/Sell Agreement.
>
> Furthermore, the parties' behavior following the May, 1999, Buy/Sell Agreement demonstrates that Scott Weis was no longer an owner of [CCI]. Mr. Whitton executed the Dealer Agreement with Knight Protective Industries in November of 2000. He acknowledged that he filled out the application and signed it. While the application asked for information regarding "principal owners, stockholders and officers" of [CCI], the only name listed was that of Mr. Whitton. The same was true of an Authorized Dealer Agreement and Owner Guarantee executed by Mr. Whitton on behalf of [CCI] on December 18th, 2000. While Mr. Whitton tried to explain that there was no room on these documents to list other owners, the documents themselves belie this.
>
> Thus, the circuit court in the *MJM* case concluded that "the Buy/Sell Agreement of May, 1999, was a valid and effective transfer of Mr. Whitton's ownership in [HPTS] to Mr. Weis," and ordered Whitton to pay Weis damages because Whitton's "continued assertions of ownership constituted a material breach of the Buy/Sell Agreement."

Whitton subsequently filed his complaint in the case presently before us. In his complaint, Whitton asserted the following claims: (a) Weis fraudulently induced him to sign false and misleading corporate meeting minutes; (b) Weis prepared and filed a fraudulent Buy/Sell Agreement by forging Whitton's signature on the agreement; (c) Weis and/or a John Doe defendant committed perjury and suborned perjury with respect to a fraudulent and forged Buy/Sell Agreement; (d) Weis and John Doe defendants are jointly and severally liable for civil damages to him pursuant to Kentucky Revised Statutes (KRS) 446.070 for violations of criminal statutes concerning perjury and forgery; (e) Weis was unjustly enriched by the fraudulent and illegal acts of himself and his agents, and he is therefore liable to Whitton for such unjust enrichment; and (f) Whitton is entitled to punitive damages for the fraudulent actions of Weis and his co-defendants.

Weis moved to dismiss Whitton's claims. The circuit court treated the motion to dismiss as a motion for summary judgment because the court reviewed evidence in ruling on the motion. The court granted the motion in part and denied it in part. Specifically, the circuit court found that Whitton's fraud claims arose "from the same transactions or occurrences that were litigated in the *MJM* case; that is: the fraudulent creation of the agreement." Thus, the court held that Whitton's fraud claims were barred by res judicata. The court further held that the "issue of fraud surrounding the creation of the agreement [was] also barred by the application of the collateral estoppel doctrine" because the "court hearing the *MJM* case made a specific finding that the agreement was a valid and binding document

and, in so doing, considered allegations of fraud and forgery in the preparation of that document and in its subsequent use at trial." Thus, summary judgment was granted concerning Whitton's fraud and forgery claims.

However, the court denied Weis's motion for summary judgment regarding Whitton's civil claim for perjury through KRS 446.070, which was based on Weis's alleged perjury during the *MJM* litigation.

Weis subsequently filed a renewed motion to dismiss concerning Whitton's civil claim for perjury, which the court treated as a renewed motion for summary judgment because the court had previously reviewed evidence when it issued its initial order granting summary judgment in part and denying it in part. Concerning Weis's renewed motion, the court this time granted Weis's motion for summary judgment regarding Whitton's civil claim for perjury because the court found that Kentucky does not recognize a civil action for damages based on the perjured testimony provided by a witness or party during litigation. The court further noted that the alleged perjured testimony "was and is covered by the judicial proceeding privilege." Thus, Weis's motion was granted.

Whitton now appeals the circuit court's orders granting Weis's motions for summary judgment. Whitton asserts the same claims that he brought in the circuit court, but he does not reassert the claim of unjust enrichment that he raised there, so his unjust enrichment claim is waived on appeal. *See Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 815 (Ky. 2004).

II. STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr. Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id*. Further, "the movant must convince the court, by the evidence of record, of the nonexistence of an issue of material fact." *Id*. at 482.

III. ANALYSIS

A. CLAIM OF FRAUDULENT INDUCEMENT IN SIGNING MEETING MINUTES

Whitton first alleges that Weis fraudulently induced him to sign false and misleading corporate meeting minutes, and that his signature on that document was in turn used to forge Whitton's signature on the May 1999 Buy/Sell Agreement. However, Whitton acknowledges that he knew the meeting minutes were false at the time he signed them. Furthermore, this is a claim that should have been brought in the *MJM* action, when Whitton originally alleged that Weis had forged his signature on the Buy/Sell Agreement.

"Res judicata is a doctrine that bars subsequent suits between the same parties and their privies on a cause of action that was previously decided upon its merits." *Buis v. Elliott*, 142 S.W.3d 137, 139 (Ky. 2004).

> Res judicata is generally thought of as consisting of two subparts. Claim preclusion bars a party from re-litigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action. . . . Issue preclusion, also known as collateral estoppel, bars a party from re-litigating any issue actually litigated and finally decided in an earlier action.

Id. at 140 (internal quotation marks omitted). Res judicata "may be used to preclude entire claims that were brought or should have been brought in a prior action." *City of Covington v. Board of Trustees of Policemen's and Firefighters' Ret. Fund*, 903 S.W.2d 517, 521 (Ky. 1995).

Both Whitton and Weis were parties to the *MJM* action, and this claim of fraud should have been brought in that action when Whitton contended that Weis had forged his signature on the Buy/Sell Agreement. Accordingly, this claim is barred by the doctrine of res judicata.

B. CLAIM THAT WEIS FORGED WHITTON'S SIGNATURE ON BUY/SELL AGREEMENT

Whitton next asserts that Weis prepared and filed a fraudulent Buy/Sell Agreement by forging Whitton's signature on the agreement. However, as noted by the circuit court, this claim was previously litigated in the *MJM* action, when a decision was made on the merits of this claim. Consequently, this claim is also barred by the doctrine of collateral estoppel. *See Buis*, 142 S.W.3d at 140.

C. CLAIM THAT WEIS AND/OR A JOHN DOE DEFENDANT COMMITTED PERJURY AND SUBORNED PERJURY WITH RESPECT TO THE BUY/SELL AGREEMENT

Whitton also alleges that Weis and/or a John Doe defendant committed perjury and suborned perjury with respect to the May 1999 Buy/Sell Agreement, which Whitton contends was fraudulent and forged. Specifically, Whitton contends that Weis coerced an employee, Bruce Schoeff, into testifying during the *MJM* proceedings that Schoeff witnessed both Weis and Whitton sign the Buy/Sell Agreement at issue.

Schoeff testified in October 2002 during the *MJM* proceedings that he had witnessed both Whitton and Weis sign the Buy/Sell Agreement. Schoeff thereafter remained an employee of HPTS until he was terminated in January 2006 for reasons that Schoeff did not want to discuss during his deposition in the present matter. Approximately seven months after his termination from Weis's employment at HPTS, Schoeff testified in his deposition in the present case that he had lied in the *MJM* proceedings when he said that he had witnessed Weis and Whitton sign the Buy/Sell Agreement. In fact, he attested in his deposition that he had not seen either of them sign the document. Schoeff explained that the reason why he lied initially was because his only income came from Weis, and Weis told him that if Schoeff did not testify that he saw Whitton sign the agreement, Schoeff's employment would be terminated. Thus, Schoeff testified that he lied to save his job at the time, and he remained an employee of HPTS for several more years thereafter, until his employment was ultimately terminated in January 2006.

Whitton asserts that Weis and/or a John Doe defendant are, therefore, liable for damages to Whitton caused by their perjury or subornation of perjury. However, "[i]t is the general rule that a civil action for damages will not lie for perjury made during litigation either by a party or a witness." *Lawson v. Hensley*, 712 S.W.2d 369, 370 (Ky. App. 1986). This is because such testimony "given in the course of a judicial proceeding is privileged." *Reed v. Isaacs*, 62 S.W.3d 398, 399 (Ky. App. 2000) (internal quotation marks omitted). However, the false statement must be relevant and pertinent to the judicial proceeding for the judicial proceeding privilege to attach. *See Smith v. Hodges*, 199 S.W.3d 185, 193 (Ky. App. 2005).

Because one of the issues in *MJM* involved whether the Buy/Sell Agreement was fraudulent and whether Whitton's signature on it was forged, Schoeff's testimony that he witnessed Whitton sign the document constituted a false statement that was relevant and pertinent to the judicial proceedings in *MJM*. Thus, the judicial proceeding privilege attaches, and this claim lacks merit.

D. CLAIM FOR DAMAGES UNDER KRS 446.070 FOR PERJURY AND FORGERY

Whitton next contends that Weis and John Doe defendants are jointly and severally liable for civil damages to him pursuant to KRS 446.070 for violations of criminal statutes concerning perjury and forgery. With respect to this claim, we first note that Whitton should have brought his claim concerning the violations of the forgery statutes in the *MJM* case, but he did not do so. *Covington*,

903 S.W.2d at 521. Accordingly, the forgery aspect of this claim is barred by res judicata.

Regarding the perjury aspect of this claim, KRS 446.070 provides as follows: "A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."

In *Heavrin v. Nelson*, 384 F.3d 199 (6th Cir. 2004), Heavrin argued that "notwithstanding the judicial-proceeding privilege, [KRS] 446.070 allows civil recovery for" perjury. *Heavrin*, 384 F.3d at 203. The Sixth Circuit held:

> To accept Mr. Heavrin's argument that K.R.S. 446.070 authorizes civil recovery in the circumstances presented here, we would have to conclude that the statute abrogates the judicial-proceeding privilege. But Kentucky courts have consistently recognized the privilege notwithstanding K.R.S. 446.070. Kentucky Statute 466, an almost identical forebear of K.R.S. 446.070, is a "very old" statute; it was cited by the highest court of Kentucky as early as 1900. [*State Farm Mutual Automobile Insurance Co. v. Reeder*, 763 S.W.2d 116, 118 (Ky. 1988)]. Yet, as we have seen, the judicial-proceeding privilege has remained vital in Kentucky. . . . *Reed v. Isaac*s, 62 S.W.3d 398, 399 (Ky. Ct. App. 2000) (no civil action for lying to grand jury), and *Lawson v. Hensley*, 712 S.W.2d 369, 370 (Ky. Ct. App. 1986) (no civil action for perjury). It is true that these decisions do not expressly hold that the judicial-proceeding privilege survives K.R.S. 446.070. Having found no case in which the statute was held to trump the privilege, however, we are unwilling to reject what is implicit in the cited decisions.

Heavrin, 384 F.3d at 203.

We find the rationale in *Heavrin* highly persuasive and hold that the judicial proceeding privilege survives KRS 446.070 given Kentucky's long and well-settled adherence to the American Rule. Under the American Rule an absolute privilege applies to statements made during the course of judicial proceedings. *See Smith*, 199 S.W.3d at 189-90. "[S]uch statements are privileged when pertinent and relevant to the subject under inquiry, however false and malicious such statements may be." *Id*. at 190. Thus, Whitton's claim for damages for perjury pursuant to KRS 446.070 lacks merit.

E. CLAIM FOR PUNITIVE DAMAGES FOR FRAUD

Finally, Whitton asserts that he is entitled to punitive damages for the fraudulent actions of Weis and his John Doe co-defendants. However, Whitton should have brought this claim in the *MJM* case, when he initially asserted his fraud claims, but he failed to raise this claim at that time. *Covington*, 903 S.W.2d at 521. Consequently, this claim is barred by res judicata.

Accordingly, the orders of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

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