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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2011-CA-001315-MR

RONALD N. SIMON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 11-CI-02374

LEXINGTON-FAYETTE
URBAN COUNTY GOVERNMENT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: Ronald N. Simon, *pro se*, has appealed from the dismissal of his declaratory judgment complaint against the Lexington-Fayette Urban-County Government (LFUCG). We affirm.

This appeal is the culmination of a protracted legal battle between Simon and LFUCG based on events which occurred in 2003.[1] Simon's first action was filed in federal court in 2004 and was heavily litigated, ultimately resulting in summary judgment being granted to LFUCG. The judgment was affirmed by the Sixth Circuit Court of Appeals,[2] after which Simon unsuccessfully petitioned the United States Supreme Court for *certiorari*. In 2006, Simon brought an action in the Fayette Circuit Court seeking to litigate the state law claims which had not been adjudicated in federal court. LFUCG's motion to dismiss that action was sustained in 2007 for failure to state a claim upon which relief could be granted, lack of jurisdiction, and on sovereign immunity grounds. This Court affirmed the dismissal on direct appeal.[3]

On May 15, 2001, Simon initiated the instant suit seeking injunctive relief and a declaration of rights pursuant to KRS[4] 418.040. The factual basis for his claims was identical to that set forth in his two previous lawsuits; however, Simon advanced new theories of law in seeking relief. LFUCG filed a motion to dismiss the action on multiple grounds including: 1) failure to state a claim upon which relief could be granted; 2) lack of subject matter jurisdiction as no

[1] The historical facts are unimportant to our determination of the matter at bar and need not be recounted here.

[2] *Simon v. Cook*, No. 06-6514, 261 Fed.Appx. 873 (January 20, 2008, unpublished).

[3] *Simon v. Lexington-Fayette Urban County Government*, No. 2007-CA-001002-MR, 2007 WL 1991710 (May 9, 2008, unpublished).

[4] Kentucky Revised Statutes.

justiciable actual controversy existed; 3) *res judicata*; 4) untimely filing under the applicable statute of limitations; and 5) sovereign immunity. Simon responded and moved for leave to amend his complaint. Following a hearing, the trial court granted the Commonwealth's motion to dismiss and denied Simon's motion to amend his complaint. This appeal followed.

Simon presents four general allegations of error in seeking reversal. First, he contends the trial court abused its discretion in denying his motion to amend the complaint. Next, he argues the trial court erred in dismissing the complaint as it alleged a timely and actual controversy. Third, Simon alleges the issue of whether LFUCG is entitled to sovereign immunity on punitive damages claims under the Declaratory Judgment Act (DJA)[5] is a matter of first impression and therefore should not have been summarily dismissed. Finally, Simon claims the trial court erroneously found his claims to be barred by *res judicata*. Following a careful review of the record, the briefs and the law, we affirm.

A trial court's dismissal of an action for failure to state a claim upon which relief can be granted or for a lack of subject matter jurisdiction ordinarily involves only questions of law. Therefore, we review such decisions *de novo*. *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010); *Appalachian Regional Healthcare, Inc. v. Coleman*, 239 S.W.3d 49, 53-54 (Ky. 2007); *James v. Wilson*, 95 S.W.3d 875, 883-84 (Ky. App. 2002).

[5] KRS Chapter 418.

> The court should not grant the motion unless 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. In making this decision, the circuit court is not required to make any factual determination; rather, the 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?

*Id*. Thus, although Simon presents numerous theories and allegations of error, we need only determine whether the trial court erred as a matter of law in finding he would not be entitled to relief under any circumstances and dismissing his complaint. We are unable to discern any such error.

The trial court gave numerous reasons supporting its decision to terminate the suit, and we agree with its result. Nevertheless we believe the most compelling and dispositive reason for affirming the trial court's dismissal lies within the bounds of *res judicata*.

> The doctrine of *res judicata* "stands for the principle that once the rights of the parties have been finally determined, litigation should end." It is "an affirmative defense which operates to bar repetitious suits involving the same cause of action." The doctrine is comprised of two subparts: claim preclusion and issue preclusion.
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> . . . .
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> For further litigation to be barred by claim preclusion, three elements must be present: (1) identity of the parties, (2) identity of the causes of action, and (3) resolution on the merits. As in most cases involving claim preclusion, the only element in dispute in this case is the second—identity of the causes of action.
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> Closely related is the rule against splitting causes of action. The rule, "found in *Restatement (Second) of*

> *Judgments,* §§ 24 and 26, is an equitable rule, limiting all causes of action arising out of a single 'transaction' to a single procedure." It rests upon the concept that "parties are required to bring forward their whole case" and may not try it piecemeal. Therefore, it "applies not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."
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> "The key inquiry in deciding whether the lawsuits concern the same controversy is whether they both arise from the same transactional nucleus of facts."

*Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 371 (Ky. 2010) (internal citations and footnotes omitted).

It is uncontroverted that the first and third elements of claim preclusion are present in the instant suit. However, Simon strongly advocates there is no identity of causes of action and argues the issues raised in the present suit arise from differing facts and actions than those complained of in the two earlier actions. We disagree.

A review of the record indicates all of the actions spring from the "same transactional nucleus of facts" which occurred in mid-to-late 2003, culminating on October 31 of that year, as these are the facts plead by Simon in his initiating documents for each of the three lawsuits. Furthermore, there can also be no doubt that the legal grounds upon which Simon couched his latest complaint were known to him, or in the exercise of reasonable diligence should have been known to him, during the pendency of the previous actions. Indeed, the instant complaint seeks

similar relief to that sought in the prior actions, albeit couched in somewhat more specific terms. Although Simon argues the current suit contains an issue not previously raised—damage to his reputation—a review of his 2006 complaint reveals he was seeking "compensation for injuries to Simon's reputation" resulting from the 2003 incident. Thus, it is clear he was aware of his alleged injury and the purported cause thereof and reasonably should have presented his current arguments in the earlier suit.

Although acting *pro se*, Simon is an attorney and an active member of the Kentucky Bar. His previous actions were thorough, well-plead and skillfully litigated. Nevertheless, as correctly pointed out by LFUCG, the present claims represent a re-packaged version of the same claims which have previously been decided. Thus, under the plain language of *Coomer*, we conclude the trial court correctly determined Simon's claims were barred by *res judicata* and properly granted LFUCG's motion to dismiss the suit.

Based on our analysis of this singular issue and our determination of the correctness of the trial court's ruling, the necessity of fully discussing Simon's other allegations of error relating to the dismissal is negated. Nevertheless, we believe the trial court was also correct in holding Simon's claims were time-barred under the one-year limitations period contained in KRS 413.140(1)(a), that he presented no actual controversy sufficient to trigger the application of the DJA, and that LFUCG is entitled to sovereign immunity from claims for punitive damages.

Finally, we must dispose of Simon's assertion that the trial court erred in denying his motion to amend his complaint. Simon argues he was entitled under CR[6] 15.01 to amend his complaint as a matter of course and the trial court erroneously denied him that right. Simon is correct that the plain language of CR 15.01 permits the amendment of a complaint one time as a matter of course prior to the filing of a responsive pleading.

"The amendment offered to the complaint will be considered in determining whether a cause of action was stated. The burden is on the one alleging error to show prejudice therefrom. Unless the ruling is considered prejudicial, the error is not reversible." *Kentucky Lake Vacation Land, Inc. v. State Property and Bldgs. Commission*, 333 S.W.2d 779, 781 (Ky. 1960) (internal citations omitted). Thus, although it may have technically been erroneous for the court to deny Simon's motion, the inquiry does not end there as Simon must show he was prejudiced by the error. We perceive no prejudice.

The trial court considered the amended complaint before concluding it added no new issues or controversies to those raised in the original complaint. The amended complaint tendered to the trial court included three paragraphs not contained in the original complaint—two in the body, and one in the prayer for relief—along with several, minor grammatical corrections and additions. These additions, Simon argues, gave the trial court the opportunity to rule that: 1) reputation is a constitutionally protected liberty interest; and 2) "an implied private

[6] Kentucky Rules of Civil Procedure.

cause of action" to protect that interest exists under Section Two of the Kentucky Constitution.[7] He further argues the amended provisions of the complaint negated LFUCG's arguments in support of dismissal. Thus, he alleges he was clearly prejudiced by the trial court's failure to permit the amendment. We disagree.

Our review of the amended complaint reveals the additions did nothing but add specificity to arguments and allegations contained in the original complaint. These modifications, as the trial court correctly found, were insufficient to overcome LFUCG's motion to dismiss as they merely parroted arguments we have previously concluded are barred by the doctrine of *res judicata*. Simon has failed to show this Court any prejudice resulting from the trial court's technical error, nor that the outcome of the matter would have been different had the trial court allowed him to amend his complaint. Although he makes impassioned pleas and presents a lengthy legal argument in support of his position on the merits of his argument, the simple fact remains that his claims are all barred for the reasons stated by the trial court and affirmed herein. Therefore, we hold there was no prejudice and we have been presented no adequate basis for reversal.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

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[7] Simon likewise invites this Court to establish new law and declare the existence of a heretofore unrecognized "protected liberty interest" along with an accompanying implied cause of action from the text of Section Two of the Kentucky Constitution. However, the purpose of appellate courts is to correct errors, not create new laws. Furthermore, to the extent the trial court has not ruled on the merits of Simon's claims, they are not properly before this Court for our review or consideration. *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011); *Springer v. Commonwealth*, 998 S.W.2d 439, 446 (Ky. 1999). Thus, we respectfully decline Simon's invitation.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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Lexington, Kentucky

BRIEF FOR APPELLEE:

Carolyn C. Zerga
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