RENDERED: MARCH 7, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000259-MR

BOARD OF REGENTS OF KENTUCKY STATE UNIVERSITY; DR. MARY SIAS, INDIVIDUALLY AND AS PRESIDENT OF KENTUCKY STATE UNIVERSITY; WILLIAM D. PENNELL, INDIVIDUALLY AND AS CHIEF FINANCIAL OFFICER AND AS VICE-PRESIDENT OF KENTUCKY STATE UNIVERSITY; CALVIN CLARK, INDIVIDUALLY AND AS AN EMPLOYEE OF THE DIVISION OF FINANCE AND BUSINESS AFFAIRS; DEPARTMENT OF FACILITY SERVICES; AND HOWEIDY WILLIAMS, INDIVIDUALLY AND AS A SWORN POLICE OFFICER OF THE UNIVERSITY POLICE — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 05-CI-01030

PAUL WINTERS — APPELLEE

OPINION AND ORDER
DISMISSING APPEAL

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: The Appellants appeal the denial of their renewed motion for summary judgment by the Franklin Circuit Court. After a thorough review of the record, the parties' arguments and the applicable law, we conclude that the Appellants have appealed from an interlocutory order and, thus, we dismiss this appeal.

Paul Winters was employed by Kentucky State University (hereinafter "KSU") from 1989 until his termination on August 2, 2004, for allegedly improperly disposing of University property. Winters's primary responsibility to KSU was for ensuring that the University was following fire and safety codes. According to Winters, he had authority given to him by his superiors to dispose of items located in a campus storage site, the Red Barn. Winters did not follow University policy in disposing of the items. Instead, he organized a public sale where the only bid for the property was $0 by Mr. Risen. Winters accepted the bid. When Risen went to remove the property, KSU Safety Officer Howeidy Williams stopped him and questioned the removal of the property from the Red Barn. Based on these actions, KSU suspended Winters, reported the incident to the Commonwealth Attorney's Office and ultimately terminated Winters. Winters filed his complaint on July 29, 2005, presenting among other claims, a claim for defamation against Appellants.

The court first entertained a motion for summary judgment by the Appellants on May 20, 2010. Therein, the court ruled that KSU was not entitled to

sovereign immunity in the defamation case when it granted in part and denied in part KSU's motion for summary judgment. KSU did not appeal this order. The court's May 20, 2010, order disposed of all of Winters's claims except for his defamation claim where the court found that Winters raised genuine issues of material facts. Next, the court denied the Appellants' motion for summary judgment on February 24, 2011. This order was not appealed.[1]

The Appellants then presented the court with their third motion for summary judgment on the grounds of "statutory and qualified immunity" and asserted that the statute of limitations barred the defamation claim. In its January 17, 2013, order denying Appellants' motion for summary judgment, the court addressed the claim of KSU that it was entitled to qualified privilege and found that the basis for its prior rulings that KSU was not entitled to qualified privilege had not changed.[2] The court reiterated that the depositions presented by Winters established material issues of fact and placed the defamatory statements within a year of his filing suit, thereby rendering the statute of limitations defense inapposite. It is from this denial that Appellants now appeal.

On appeal, Appellants argue: (1) they are entitled to the defense of qualified privilege; (2) they are entitled to the defense of qualified immunity; (3) the Board of Regents and the individuals sued in their official capacity are entitled to the

[1] We note that this order did not address any claim on behalf of Appellants of immunity or privilege.

[2] We note that the court did not further address any claim of governmental immunity.

defense of sovereign immunity; (4) Winters's claim is barred by the statute of limitations; and (5) summary judgment is appropriate in this action.

In response, Winters argues: (1) interlocutory review is not appropriate as the appellate court is required to make a factual inquiry; (2) the Appellants are not entitled to the defense of qualified privilege for their defamatory statements; (3) the Appellants are not entitled to the defense of qualified immunity; (4) the defamation claim was filed within the applicable statute of limitations; (5) the court's denial of summary judgment on the defamation claim was appropriate. With these arguments in mind, we turn to the applicable issue on appeal, whether the Appellants have appealed an interlocutory order.

Generally, our appellate jurisdiction is restricted to final judgments. Absent an order determining all the rights of all the parties in an action or proceeding or having been made final by reciting the Kentucky Rules of Civil Procedure (CR) 54.02(1) language, an order is interlocutory and we are without jurisdiction to hear an appeal therefrom. *Wilson v. Russell*, 162 S.W.3d 911, 913–941 (Ky. 2005). *See also Stice v. Leonard*, 420 S.W.2d 672, 674 (Ky. 1967), citing *First Nat. Bank of Mayfield v. Gardner*, 330 S.W.2d 409 (Ky. 1959). Recently, we reiterated that, "This court is required to raise a jurisdictional issue on its own motion if the underlying order lacks finality." *Tax Ease Lien Investments 1, LLC v. Brown,* 340 S.W.3d 99, 101 (Ky. App. 2011), citing *Huff v. Wood–Mosaic Corp*., 454 S.W.2d 705, 706 (Ky.1970).

Ordinarily, an appeal from the denial of a motion for summary judgment would not be permitted because it is regarded as interlocutory. Nevertheless, in *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009), the Kentucky Supreme Court recognized an exception to the general rule that a denial of a motion for summary judgment constitutes an interlocutory order when it stated "that an order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment." *Prater* at 887. In *Prater,* the Court noted:

> [G]overnmental immunity shields state agencies from liability for damages only for those acts which constitute governmental functions, i.e., public acts integral in some way to state government. *Id*. The immunity does not extend, however, to agency acts which serve merely proprietary ends, i.e., non-integral undertakings of a sort private persons or businesses might engage in for profit.

Id. at 887.

In contrast, Appellants' argument concerning qualified *privilege* is not a claim of absolute immunity. Instead,

> [A] defamation claim may be defeated by assertion of a "privilege." A privilege is recognized as a defense to a defamation claim; the defense may be either absolute or qualified. An absolute privilege affords a defendant a complete defense to a claim of defamation; whereas, a qualified privilege only affords a defendant a conditional defense to a claim of defamation.

Smith v. Martin, 331 S.W.3d 637, 640 (Ky. App. 2011).

Specifically at issue *sub judice,* statements made in the context of the employment relationship are qualifiedly privileged. As pointed out in *Landrum v.*

Braun, 978 S.W.2d 756, 757 (Ky. App. 1998), the privilege is necessary "so that every day business can be carried out without the threat of suit." (Quoting *Wyant v. SCM Corporation*, 692 S.W.2d 814 (Ky. App. 1985)). When a privilege has been asserted, it can be defeated only by showing that there was "no privilege under the circumstances or that it had been abused." *Harstad v. Whiteman,* 338 S.W.3d 804, 811 (Ky. App. 2011). "If the plaintiff fails to adduce some evidence sufficient to create a genuine issue of fact, qualified privilege remains purely a question of law under the summary judgment standard." *Id.*

Sub judice, the trial court reiterated that Winters had raised a genuine issue of material fact precluding summary judgment on his defamation claim when it denied Appellants' renewed motion for summary judgment on the grounds of qualified *privilege*. This denial did not address the prior claims of Appellants of governmental immunity.[3] The current denial of summary judgment does not deny a substantial claim of absolute immunity thereby rendering the order interlocutory and, thus, we are without jurisdiction to review. Accordingly, we dismiss this appeal.

COMBS, JUDGE, CONCURS.

ENTERED: March 7, 2014

/s/ Michael O. Caperton
JUDGE, COURT OF APPEALS

[3] While Appellants present these arguments on appeal, we believe that such arguments should have been raised on appeal in 2010.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. I do so because the appellants have properly presented the issues of sovereign immunity and qualified official immunity in this interlocutory appeal, yet the majority has overlooked these issues basing its decision only on the issue of qualified privilege.

Kentucky State University, as a state agency, is entitled to absolute immunity. *Autry v. Western Kentucky University*, 219 S.W.3d 713, 717-718 (Ky. 2007). The appellants are entitled to that same immunity when acting in their official capacity. *Id*. at 718. In their individual capacities, the appellants are entitled to qualified official immunity. *Id*. at 717.

In *Commonwealth, Department of Highways v. Davidson,* 383 S.W.2d 346, 348 (Ky. 1964), the Commonwealth's failure to assert sovereign immunity as a defense in its answer did not preclude it from presenting the issue for the first time on appeal. The Court reasoned Section 231 of the Kentucky Constitution "would be of small stature if its precepts could be 'waived' by any state officer or agent other than the general assembly." *Id.* The same proposition was expressed in *Wells v. Commonwealth, Department of Highways,* 384 S.W.2d 308 (Ky. 1964), where the Court reiterated sovereign immunity "is a constitutional protection that can be waived only by the General Assembly and applies regardless of any formal plea." More recently, in *Department of Corrections v. Furr,* 23 S.W.3d 615, 616 (Ky. 2000), the Court held the Department of Corrections could present the issue

of sovereign immunity for the first time on appeal in a Kentucky Civil Rights Act claim.

Although the rule espoused may be an exception to our civil rules and sometimes problematic in application, nevertheless it is the law that immunity questions may be presented for the first time on appeal. Consequently, whether addressed by the trial court in the order now appealed or not, the appellants' claims of sovereign and qualified official immunity are properly before this Court.

I would not dismiss this appeal and consider the immunity claims on their merits.

BRIEFS FOR APPELLANTS:	BRIEF FOR APPELLEE:
William E. Johnson Frankfort, Kentucky	C. Gilmore Dutton, III Shelbyville, Kentucky