

RENDERED: October 31, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002269-MR
AND
NO. 2001-CA-002270-MR

ROBERT E. BANKS

APPELLANT

v. APPEAL FROM CLAY CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NOS. 01-CI-00221 AND 01-CI-00222

CHARLES MARCUM; JAMES GARRISON;
OSCAR G. HOUSE; SHERRIE HOUSE; ANNA JACKSON;
ED JORDAN; CLAY M. BISHOP, JR.;
CLINT HARRIS; CLAY COUNTY FISCAL COURT;
AND COMMONWEALTH OF KENTUCKY,
CABINET FOR FAMILIES AND CHILDREN

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES

JOHNSON, JUDGE: Robert E. Banks has appealed, pro se, from two separate orders of the Clay Circuit Court entered on October 5, 2001, which dismissed both of Banks's complaints against the

named defendants. Having concluded that the trial court did not err in dismissing either of Banks's complaints, we affirm.

On May 15, 2001, Banks was arrested and charged with flagrant nonsupport in violation of KRS¹ 530.050.² According to Anna Jackson, an employee of the Cabinet for Families and Children, Child Support Division (the Cabinet), Banks had persistently failed to make his child support payments and his arrearages had grown to \$2,060.00. Banks spent one night in the Clay County Jail and was released on May 16, 2001, after he pled guilty to nonsupport³ and was sentenced to six months in jail by

¹ Kentucky Revised Statutes.

² Flagrant non-support is a Class D felony. KRS 530.050 reads in part:

(2) A person is guilty of flagrant nonsupport when he persistently fails to provide support which he can reasonably provide and which he knows he has a duty to provide by virtue of a court or administrative order to a minor or to a child adjudged mentally disabled, indigent spouse or indigent parent and the failure results in:

(a) An arrearage of not less than one thousand dollars (\$1,000)[.]

³ Nonsupport is a Class A misdemeanor. KRS 530.050 further states:

(1) A person is guilty of nonsupport:

(a) When he persistently fails to provide support which he can reasonably provide and which he knows he has a duty to provide to a minor or to a child adjudged mentally disabled, indigent spouse or indigent parent; or

(b) Upon a finding that a defendant obligor, subject to court order to pay any amount for the support of a minor child, is delinquent in meeting the full obligation established by such order and has been so delinquent for a period of at least two (2) months duration.

the Clay District Court.⁴

On June 15, 2001, Banks, once again acting pro se, filed two separate complaints in the Clay Circuit Court.⁵ In the first action, case number 01-CI-00221, Banks claimed that he had been subjected to "[d]iscrimination, unlawful detainment, cruel and unusual punishment, false arrest, [and] excessive bail." Banks named as defendants Clay County Jailer Charles Marcum, Clay County Judge-Executive James Garrison, Clay County Sheriff Ed Jordan, Clay County Attorney Clay Bishop, Jr., Assistant Clay County Attorney Clinton Harris, Clay District Judge Oscar G. House, Anna Jackson, the Clay County Fiscal Court, and Sherrie House, another employee of the Cabinet and the wife of Judge House. Banks sought \$4.5 million in damages in this complaint.

In the second action, case number 01-CI-00222, Banks claimed that the "Kentucky Child Support Enforcement Law" was unconstitutional on two grounds: (1) that it "was way too broad"; and (2) that it was a violation of the Contracts Clause of the United States Constitution.⁶ The Cabinet was named as the sole defendant in this second complaint.

⁴ Banks was also ordered to make continuing payments of \$75.00 per month, \$60.00 of which was to go toward child support and \$15.00 of which was to go toward arrearages.

⁵ Banks has acted without the assistance of counsel throughout the entirety of these civil proceedings.

⁶ U.S. Const. Art. I, § 10, cl 1.

On September 14, 2001, the trial court, sua sponte, scheduled a status conference for both of Banks's complaints. All of the named defendants in both complaints moved the trial court to dismiss Banks's claims against them. On October 5, 2001, the trial court entered two separate orders dismissing each of Bank's claims against all of the named defendants. This appeal followed.

We first address Banks's claim that the trial court erred by dismissing his complaint against the Cabinet. While Banks's brief to this Court is very difficult to understand, from our reading we discern seven arguments in support of his claim that the trial court erred: (1) that his children should be eligible for K-CHIP;⁷ (2) that such eligibility should relieve him of the obligation to pay \$60.00 per month in child support; (3) that KRS 205.992⁸ is unconstitutionally vague; (4) that forcing him to pay \$60.00 per month in child support and \$15.00 per month in arrearages amounts to double jeopardy; (5) that placing an unemployed person in jail for nonsupport is unconstitutional; (6) that his child support payments should

⁷ K-CHIP is an acronym for Kentucky Children's Health Insurance Program, which provides medical coverage and various child care services for the children of low income families.

⁸ KRS 205.992 provides penalties for child support recovery offenses:

Any person violating the provisions of KRS 205.785 shall be fined not more than five hundred dollars (\$500) or be imprisoned in the county jail for not more than one (1) year, or both.

have been held in abeyance until his "questions of constitutional law [are] answered;" and (7) that a person should not be jailed for non-payment of child support until a "financial hearing" can be held.

We first note that Banks has cited no authority whatsoever in support of any of these propositions. Moreover, all of these issues were either not raised before the trial court or were raised but not decided. Therefore, we will not consider these arguments for the first time on appeal.⁹ Accordingly, we affirm the trial court's dismissal of Banks's complaint against the Cabinet.

We now turn to Banks's claim that the trial court erred by dismissing his complaint against the Clay County Fiscal Court, and the various Clay County officials and county employees. First, as for Banks's claims against the Clay County Fiscal Court, it is well-settled that a county government, absent a waiver, enjoys the same immunity from suit as the

⁹ See Abuzant v. Shelter Insurance Co., Ky.App., 977 S.W.2d 259, 262 (1998) (quoting Commonwealth, Transportation Cabinet, Dept. of Highways v. Taub, Ky., 766 S.W.2d 49 (1988)(holding that an issue not presented to the trial court would not be considered for the first time on appeal); and Gailor v. Alsabi, Ky., 990 S.W.2d 597, 602 (1999)(holding that "[w]e will not address issues raised but not decided by the Court below. It is the rule in this jurisdiction that issues raised on appeal but not decided will be treated as settled against the appellant in that court upon subsequent appeals unless the issue is preserved by cross-motion for discretionary review'")).

state.¹⁰ Since there is no evidence of waiver, the dismissal of Banks's claims against the Clay County Fiscal Court is affirmed.

Next, Banks testified in his deposition that he was suing Clay County Judge-Executive James Garrison in his official capacity. A suit against a member of the fiscal court in his official or representative capacity is essentially a suit against the county, which is barred by sovereign immunity.¹¹ Moreover, Banks has admitted that he knows of nothing that Judge Garrison may have done to violate any of his rights. Accordingly, the trial court's dismissal of Banks's claims against Judge Garrison is affirmed.

Banks also filed suit against Clay County Jailer Charles Marcum, claiming that Jailer Marcum violated his right to be free from cruel and unusual punishment under the Eighth Amendment to the United States Constitution. Once again, it appears as though Banks sued Jailer Marcum in his official capacity. To the extent this is so, Banks's claims are barred since Jailer Marcum is cloaked with the county's sovereign immunity.¹² Nonetheless, Banks's assertion that he was subjected

¹⁰ Franklin County v. Malone, Ky., 957 S.W.2d 195, 203 (1997), overruled in part on other grounds, Yanero v. Davis, Ky., 65 S.W.3d 510 (2001).

¹¹ Id. at 201.

¹² Commonwealth, Board of Claims v. Harris, Ky., 59 S.W.3d 896, 899 (2001)(holding that "official capacity claims [against jailers] are in essence claims alleging negligent operation of the jail and are, therefore, claims against the county. . . . This cloaks the jailer, in his official capacity, with the county's sovereign immunity" [citations omitted]).

to cruel and unusual punishment when he was forced to sleep on the floor of the Clay County Jail for one night is plainly without merit. Banks admitted that he was provided with a mattress and a blanket. Obviously, this treatment does not rise to the level of shocking the general conscience or violating principles of fundamental fairness.¹³ Therefore, we affirm the trial court's dismissal of Banks's claims against Jailer Marcum.

Banks further named Clay County Sheriff Ed Jordan as a defendant. Once again, to the extent Banks has sued Sheriff Jordan in his official capacity, Banks's claims are barred by the doctrine of official and/or sovereign immunity.¹⁴ Further, Banks stated at the status conference that his sole reason for naming Sheriff Jordan as a defendant in his complaint was the fact that Sheriff Jordan called to inform him that a warrant had been issued for his arrest, and that it would be best if Banks turned himself in. Hence, Banks has failed to state a claim for which relief can be granted.¹⁵ Accordingly, the trial court's dismissal of Banks's claims against Sheriff Jordan is affirmed.

¹³ Workman v. Commonwealth, Ky., 429 S.W.2d 374, 378 (1968).

¹⁴ Yanero, 65 S.W.3d at 521 (stating that "[o]fficial immunity can be absolute, as when an officer or employee of the state is sued in his/her representative capacity, in which event his/her actions are included under the umbrella of sovereign immunity. . .").

¹⁵ See Kentucky Rules of Civil Procedure (CR) 12.03.

Banks also brought suit against Clay County Attorney Clay Bishop, Jr. Banks stated at the status conference that the sole basis for his claims against Bishop was the fact that Bishop made a recommendation to Judge House regarding the appropriate bond for Banks. This conduct on Bishop's part falls squarely within the scope of his authority as Clay County Attorney. As such, Bishop is entitled to absolute immunity from suit.¹⁶ Therefore, the trial court's dismissal of Banks's claims against Bishop is affirmed.

Banks further asserted a claim against Clay County District Judge Oscar House. According to Banks, since Sherrie House, Judge House's wife, was the complainant against Banks in his arrest warrant, Judge House exhibited bias toward Banks in issuing his arrest warrant. We first note that Banks is simply incorrect on the facts. It was Anna Jackson, and not Sherrie House, who is listed as the affiant on Banks's arrest warrant. Nonetheless, Judge House was acting within the scope of his judicial authority and is therefore protected from suit by judicial immunity.¹⁷ Therefore, we affirm the trial court's dismissal of Banks's claims against Judge House.

¹⁶ Malone, 957 S.W.2d at 202.

¹⁷ Henry v. Wilson, 249 Ky. 589, 61 S.W.2d 305, 307 (1933)(holding that "[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").

Banks also named Anna Jackson as a defendant. The crux of Banks's claims against Jackson was that the sworn statements she made which led to the issuance of Banks's arrest warrant, i.e., that Banks had failed to make his child support payments, were false. However, Banks has apparently overlooked the fact that he pled guilty to persistently failing to provide child support. Thus, Banks cannot now assert the falsity of the charges against him in the arrest warrant.¹⁸ Accordingly, we affirm the trial court's dismissal of Banks's complaint against Jackson.

Banks further named Sherrie House as a defendant in his complaint. According to Banks's version of the facts, Sherrie House, because she is married to Judge House, had a "conflict of interest" in making sworn statements which led to the issuance of Banks's arrest warrant. However, as we mentioned previously, it was Anna Jackson and not Sherrie House who is listed as the affiant on Banks's arrest warrant. Banks also alleges that Sherrie House falsely told "people" that in order to "get [Banks] out of jail," they would first have to pay Banks's back child support. Banks argues that these alleged statements denied him due process and equal protection under the Fourteenth Amendment to the United States Constitution.

¹⁸ McGrew v. Commonwealth, 308 Ky. 838, 215 S.W.2d 996, 997 (1948)(holding that "a plea of guilty confesses everything charged in the indictment, or warrant. . .").

However, Banks has cited no authority for these propositions, nor has he offered any explanation as to how these alleged statements led to the denial of his constitutional rights. Further, Banks's due process and equal protection arguments were not raised below and we will not consider them for the first time on appeal.¹⁹ Therefore, the trial court's dismissal of Banks's claims against Sherrie House is affirmed.

Finally, Banks asserted a "discrimination" claim against Assistant Clay County Attorney Clint Harris. The basis for this claim was that Harris allegedly told some individuals that "if . . . Banks had a law degree a man would have to send him to the penitentiary or have [Banks] shot." On appeal, Banks has apparently abandoned his contention that Harris's alleged statement constituted discrimination against him. Banks now claims that this statement was somehow defamatory. While it is unclear whether this defamation issue was ever properly raised before the trial court, we nonetheless hold that Harris's alleged statements, even if they could be proven, are not defamatory.

In Yancy v. Hamilton,²⁰ our Supreme Court adopted the approach taken by Section 566 of The Restatement (Second) of

¹⁹ See Abuzant, 977 S.W.2d at 262.

²⁰ Ky., 786 S.W.2d 854 (1989).

Torts with respect to stated opinions that are alleged to be defamatory. Comment e to Section 566 reads in part:

There are some statements that are in form statements of opinion, or even of fact, which cannot reasonably be understood to be meant literally and seriously and are obviously mere vituperation and abuse. . . . No action for defamation will lie in this case.²¹

We believe that Harris's alleged defamatory statements, i.e., that Banks would need to be shot or imprisoned if he obtained a law degree, must be considered as the kind of statement which "cannot reasonably be understood to be meant literally and seriously." Hence, even if Harris did in fact make such a statement, it does not rise to the level of an actionable claim for defamation. Accordingly, we affirm the trial court's dismissal of Banks's claims against Harris. Based on the foregoing, the orders of the Clay Circuit Court dismissing both of Banks's complaints are affirmed.

ALL CONCUR.

²¹ Restatement (Second) of Torts § 566, comment e (1977).

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