

RENDERED: May 30, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001037-MR

LAWRENCE M. FROMAN

APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
CIVIL ACTION NO. 96-CI-00098

MICHAEL O'DEA

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: DYCHE, HUDDLESTON and KNOPF, Judges.

HUDDLESTON, Judge: Lawrence M. Froman appeals from a Morgan Circuit Court order dismissing his "civil rights complaint" and granting summary judgment in favor of Susan Kessinger¹ because

¹ Although O'Dea is named as the sole appellee on appeal, in reality, O'Dea is no longer a party and Kessinger is the remaining appellee. Since a review of the record leaves no

she "cannot be held responsible under a respondeat superior theory" and, further, "her actions did not violate any section of the Kentucky Constitution."

In August 1993, Froman was an inmate at the Eastern Kentucky Correctional Complex (EKCC). At that time, Kessinger was employed by the Workforce Development Cabinet, Department of Technical Education,² as the Correctional School Director at EKCC. Included among the educational programs provided were technical drawing classes offered by Morehead State University at EKCC in conjunction with its extended campus program. Froman was enrolled in four such classes for the Fall 1993 semester courtesy of a Pell Grant which paid for his registration fees, tuition, books and supplies. However, Froman was transferred to the Kentucky State Penitentiary on August 26, 1993, necessitating his withdrawal from those classes which, in turn, meant that MSU would be unable to access his Pell Grant funds in order to be reimbursed for the textbooks and supplies that had been issued to him.³

doubt that the action below was litigated against both O'Dea and Kessinger and Froman did name Kessinger in the body of his notice of appeal, we have elected to overlook this technical error and will proceed accordingly.

² The Department of Technical Education provides educational programs for the Department of Corrections.

³ According to Kessinger: "[I]f the University could not be reimbursed for his property, it would have to bill Froman. If

Apparently, Froman's transfer was underway before Kessinger was notified of the move. Upon learning of his departure later that day, she faxed a letter to the deputy warden at KSP, Patty Webb, requesting that the books and supplies in Froman's possession belonging to MSU be returned to EKCC. Attached to the letter was an itemized list of MSU property as prepared by the MSU bookstore manager and faxed to Kessinger earlier that day.⁴ In response to Kessinger's request, Webb had two correctional officers collect all of the books and drawing materials in Froman's possession and returned them to EKCC. Froman contemporaneously documented the items seized, and Froman as well as both officers signed the list.⁵

he could not pay the bill he would be ineligible for further Pell Grants until the debt was satisfied." Further, had Froman been able to pay the bill himself, "he would not have been eligible for the Pell Grant in the first place."

⁴ In the letter, Kessinger indicated that Froman was "notorious for possessing books which do not belong to him." As attested to in her affidavit, Kessinger called Dixie Blankenbecker in the Dean of Extended Campus Programs Office to inquire as to whether MSU could avoid charging Froman tuition and registration fees before sending the fax to recoup the property in question. Blankenbecker informed her that if she sent a "drop" form immediately, Froman would not be assessed any fees, but unless the books and supplies were returned to the bookstore, he would be billed for those. Kessinger already had a list of books required for each course when she called the MSU bookstore manager to obtain a list of the supplies Froman had been sent and "the MSU bookstore prices and the prices listed on Froman's typewritten list do not correspond."

⁵ Above his signature and those of the two officers (James Polk and M. Dickerson), Froman wrote the following: "Items that

On April 16, 1996, Froman initiated a pro se civil action⁶ against Michael O'Dea, the warden at EKCC, and Kessinger alleging that Kessinger violated his civil rights as protected by the Fifth and Fourteenth Amendments of the United States Constitution and Section 13 of the Kentucky Constitution by improperly confiscating items of his personal property while he was incarcerated at KSP.⁷ In response, O'Dea and Kessinger filed a motion to dismiss arguing that Froman's claim was barred by the one-year statute of limitation set forth in Kentucky Revised Statutes (KRS) 413.140(1)(a). In an order entered on June 14,

were sent that should not have been return them to Lawrence Froman 100759."

⁶ Attached to Froman's complaint was a typed list (which differed from the handwritten list authenticated by Froman at the time of the alleged taking) of the items "owed" to him that were confiscated by Polk and Dickerson "per orders from Miss Susan Kessinger." Froman requested "either all the property returned or the money." Because "most likely the property [had] been stolen by other inmates," Froman sought reimbursement in the sum of \$367.94 (total value of the supplies listed) plus court costs.

⁷ Froman apparently filed an amended complaint alleging that this taking also violated Sections 1, 2, 10 and 11 of the Kentucky Constitution since the record contains an "answer to amended complaint and motion to dismiss" filed by O'Dea and Kessinger on November 26, 2001. Noticeably absent from the record, however, is either the original complaint or the amended complaint. Although this deficiency is potentially fatal to Froman's appeal since the appellant (Froman) is responsible for ensuring that the record on appeal is complete, in the interests of fairness and judicial economy we grant leniency to pro se litigants such as Froman. In keeping with that policy we will decide this case on the merits.

1996, the court granted their motion and dismissed Froman's claim on that basis thereby prompting Froman's first appeal.

In an unpublished decision rendered on November 21, 1997,⁸ this Court affirmed the circuit court's order dismissing Froman's claim regarding the alleged violations of his federal rights "as it was filed outside the applicable statute of limitations period of one year." However, we held that Froman's claim based on his state rights was timely since it was filed within the statutory limitations period of five years and, therefore, the court erred in dismissing that portion of his claim arising under Section 13 of the Kentucky Constitution. Accordingly, we reversed the order dismissing and remanded "with directions to reinstate Froman's claim that his rights under Section 13 of the Kentucky Constitution were violated as it was filed within the applicable statute of limitations period of five years."⁹ In an order entered on January 23, 1998, we denied Froman's petition for rehearing and, on August 26, 1998, the

⁸ No. 1996-CA-001735-MR.

⁹ As explained by Judge Combs, the author of the opinion:

In Leonard v. Corrections Cabinet, Ky. App., 828 S.W.2d 668 (1992), this Court recognized KRS 413.140(1)(a) as the applicable statute of limitations period in Kentucky for a federal civil rights claim; KRS 413.140(1)(a) provides a period of one year in which to bring a cause of action. We further stated in Leonard that the applicable statute of limitations period for a state civil rights claim is five years as set forth in KRS 413.120.

Kentucky Supreme Court denied his motion for discretionary review.

Following the initial discovery, O'Dea moved to dismiss Froman's complaint arguing that he was "protected by sovereign immunity" because "whether [he] took any action or not, he was performing a traditional governmental function as warden" and, therefore, was entitled to the same protection as the state itself under Franklin County v. Malone.¹⁰ O'Dea further argued that none of the evidence established his direct involvement in the alleged taking as required for a finding of vicarious liability, again citing Malone as authority. In an order entered on April 7, 2000, the court granted O'Dea's motion to dismiss having considered both his motion and Froman's response "agreeing to dismiss [O'Dea]." Accordingly, O'Dea is no longer a party to this action and further discussion as to the allegations against him is unnecessary.

After O'Dea's dismissal, discovery resumed¹¹ with a trial on the matter being scheduled for February 22, 2002.

¹⁰ 957 S.W.2d 195 (1997).

¹¹ In Kessinger's first set of interrogatories she asked Froman to identify each item allegedly taken from him, when and where he obtained the item, its cost and his method of payment as well as the factors "used to arrive at [his] amount claimed for damages and show your calculations." She also asked him to "[s]tate every fact relied upon to support [his] claim for punitive damages." Froman was unable to provide the requested information.

Prior to the scheduled trial date, however, Kessinger filed a motion for summary judgment with an affidavit¹² and memorandum of law attached in support thereof. According to Kessinger, she could not be held liable under a respondeat superior theory

¹² In relevant part, Kessinger's affidavit provides as follows:

8. When the officers at KSP checked Froman's property, they found a confusing array of duplicate supplies, so they boxed up all of them and returned them to me at EKCC to go through and return whatever actually did belong to him. Attachment 4, in Froman's own hand, witnesses by two officers, and sent to me by certified mail, lists what in his possession was sent to me; none of which appears on the invoice from Fidelity Products included in his complaint. So his allegation that he was not provided with an exact inventory of his property is untrue.

9. As I went through the books and supplies returned to EKCC, I noted anywhere from two to nine duplications of MSU Bookstore items for which Froman should have had only one or two. Since his transfer was based on his problems acquiring books and supplies not belonging to him or listed on his property, I photographed the duplicates and indicated under each photo the number of items in his possession and the number he had legally received in his supplies (copies of which are included in Froman's complaint) and attached them to a write-up I sent to KSP. (A comparison of the MSU Bookstore list of supplies and Froman's handprinted list shows these discrepancies in numbers).

10. I returned the fall semester supplies to Bill Sharp, bookstore manager. He told me to keep the duplicates as a donation to our school at EKCC since they were obviously paid for by other students in the MSU program. When I left EKCC in July of 1994, they were still in a box under the cabinet in the Teachers' Workroom. Those books and supplies which were not confiscated were sent to the EKCC Mailroom to be packed up and returned to Froman.

because she was not a supervisor within the DOC and, therefore, lacked authority or control over the actions of Polk and Dickerson. She further asserted that Froman did not own the items confiscated from him, meaning there could be no violation of his rights under Section 1 of the Kentucky Constitution. She also claimed that her actions were not arbitrary, but rather, were "based on substantial and legitimate reasons." Because the property allegedly taken improperly did not belong to Froman, he also "failed to establish an unreasonable search and seizure in violation of Section 10 of the Kentucky Constitution." Finally, Kessinger argued that Froman could not recover under Section 11 as that section applies only to criminal proceedings and he failed to establish that his personal property was taken for public use without just compensation in violation of Section 13 of the Kentucky Constitution. On March 6, 2002, the court granted summary judgment in favor of Kessinger. Froman appeals from that judgment.

Our standard of review in this context is well established. Kentucky Rules of Civil Procedure (CR) 56.03 authorizes summary judgment "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is not a genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Summary

judgment is only proper "where the movant shows that the adverse party could not prevail under any circumstances."¹³ However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial."¹⁴ In ruling on a motion for summary judgment, the circuit court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."¹⁵

On appeal from a summary judgment, we must determine "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."¹⁶ Since no factual findings are at issue, deference to the trial court is not required.¹⁷

As we remanded Froman's case solely for consideration of his claim(s) arising under Section 13 of the Kentucky

¹³ Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991), reaffirming Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985).

¹⁴ Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992).

¹⁵ Steelvest, supra, n. 13, at 480.

¹⁶ Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996).

¹⁷ Id.

Constitution in his first appeal, our review necessarily is limited to that narrow question here. In relevant part, Section 13 provides that: “. . . nor shall any man’s property be taken or applied to public use without consent of his representatives, and without just compensation previously made to him.” However, Froman continues to characterize his claim as a civil rights action thereby revealing his fundamental misunderstanding of the relevant law.

To clarify, Kentucky has a Civil Rights Act (KRS Chapter 344) that parallels its federal counterpart. Pursuant to KRS 344.020(1), the general purposes of the chapter are:

To provide for execution within the state of the policies embodied in the Federal Civil Rights Act of 1964 as amended, Title VIII of the Federal Civil Rights Act of 1968, the Fair Housing Act as amended, the Federal Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, and the Civil Rights Act of 1991 as amended;¹⁸

KRS Chapter 344 does not encompass actions arising under Chapter 13. According to KRS 344.450: “Any person injured by any act in violation of the provisions of this chapter shall have a civil cause of action in Circuit Court to enjoin further

¹⁸ Internal citations to federal statutes omitted.

violations, and to recover the actual damages sustained, together with the costs of the law suit."¹⁹ As the constitutional violation alleged by Froman is not an injury resulting from a violation of any of the named provisions, the Kentucky Civil Rights Act does not afford him any relief.²⁰ Thus, the threshold inquiry becomes whether Froman can proceed against Kessinger as an individual under Chapter 13.

In Lehman v. Williams,²¹ Kentucky's highest court was confronted with this question in the context of a taking claim arising under Chapter 13. Citing both Section 13 and Section 242 of the Kentucky Constitution and related case law as authority, the Court reiterated the rule that "where private property is taken for public use, or where there is a trespass thereon which amounts to such taking, the state's immunity from suit is waived through the sections of the Constitution just mentioned." Relevant for present purposes, the Court went on to state that, "Under these express provisions, an appropriate action will lie against the [C]ommonwealth as well as against corporations or individuals for damages growing out of the

¹⁹ Emphasis supplied.

²⁰ Beyond that, an individual employee/supervisor who does not otherwise qualify as an employer cannot be held liable in his/her individual capacity under Title VII or KRS Chapter 344. Wathen v. General Electric Co., 115 F.3d 400, 405 (6th Cir. 1997).

²¹ 301 Ky. 729, 193 S.W.2d 161, 162 (1946).

taking, injuring or destroying of private property for public purposes."²² Applying this principle to the instant facts, Froman is entitled to advance his claim against Kessinger under Section 13.

By Froman's own admission, however, the property in question is worth a maximum of \$367.94.²³ Even putting aside any factual dispute regarding ownership of the items and viewing the facts in the light most favorable to Froman, the amount in controversy does not satisfy the jurisdictional prerequisite for circuit court.²⁴ Although Kessinger has not raised this

²² Id. In Keck v. Hafley, Ky., 237 S.W.2d 527 (1951), as is the case here, the Commonwealth of Kentucky was not named as a defendant. Observing that the Commonwealth is the real party in interest in this type of suit and, therefore, should be named as a defendant, the Court found that the failure to do so did not constitute reversible error since the case had been tried as a suit against the Commonwealth insofar as damages were concerned and was defended by the Attorney General (Department of Corrections in this instance). In so doing, the Court reaffirmed its holding in Lehman ("[W]e held that this type of suit is essentially one against the Commonwealth for a taking of property, and for all practical purposes," state officials represent the Commonwealth). Id. at 528.

²³ Although Froman also sought punitive damages, the state and its political subdivisions are not liable for such damages since the goals of punishment and deterrence are not served when punitive damages are imposed against the state because, ultimately, the innocent taxpayer is punished. See Hubbard v. Town of Sand Lake, 667 N.Y.2d 496, 498, 246 A.D.2d 708, 710 (App. Div. 1998).

²⁴ According to KRS 23A.010.(1), the circuit court "is a court of general jurisdiction; it has original jurisdiction of all justiciable causes not exclusively vested in some other court." Under KRS 24A.120.(1), the "District Court shall have exclusive

argument, subject-matter jurisdiction may be raised by the parties or the court at any time and cannot be waived.²⁵ Further, subject-matter jurisdiction may be raised for the first time on appeal.²⁶ Since Froman cannot meet this threshold requirement under any possible scenario, the circuit court lacked jurisdiction to hear his action. In light of this determination, further elaboration as to his substantive arguments is unwarranted and his claim must be dismissed.

Consistent with the foregoing, we affirm the judgment dismissing Froman's complaint albeit for a different reason²⁷ - lack of subject matter jurisdiction.

KNOPF, Judge, CONCURS.

DYCHE, Judge, CONCURS IN RESULT.

jurisdiction in: (a) Civil cases in which the amount in controversy does not exceed four thousand dollars (\$4,000), exclusive of interest and costs"

²⁵ Privett v. Clendenin, Ky., 52 S.W.3d 530, 532 (2001)(citations omitted).

²⁶ Id.

²⁷ We are bound to affirm if the circuit court reached the correct result, even if in doing so it applied the wrong reasoning. Friend v. Rees, Ky. App., 696 S.W.2d 325, 326 (1985).

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