

RENDERED: MAY 20, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002718-MR

THERESA GERSTLE

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE TOM MCDONALD, JUDGE
ACTION NO. 03-CI-003376

COMMONWEALTH OF KENTUCKY,
CABINET FOR FAMILIES AND CHILDREN

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

HENRY, JUDGE: Theresa Gerstle appeals pro se from an order of the Jefferson Circuit Court dismissing her action against the Kentucky Cabinet for Families and Children² for failure to state

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110.(5)(b) of the Kentucky Constitution and KRS 21.580.

² On December 23, 2003, after the filing of the complaint herein, Governor Fletcher signed an Executive Order merging the Cabinet for Families and Children and the Cabinet for Health Services, to form the Cabinet for Health and Family Services.

a claim upon which relief can be granted under CR³ 12.02(f). This current action relates to a previous action in which Gerstle was found to have neglected her children. Temporary custody was given to their maternal grandmother, Mary Jarvis. Allegations then arose that Gerstle had violated conditions of her visitation with the children, resulting in Jarvis filing a motion for permanent custody. On May 2, 2002, permanent custody was awarded to Jarvis, and Gerstle was held in contempt by Jefferson Family Court. Jefferson Circuit Court affirmed the custody decision. In April of 2004, this Court affirmed the decision of the Jefferson Circuit Court upholding the Jefferson Family Court's decision. That case is currently under review by the Kentucky Supreme Court.

Gerstle filed this action on April 17, 2003. Though she never mentions the factual background of her complaint (or the appeal), the only logical conclusion to draw is that the allegations stem directly from the previous action. In her amended complaint, Gerstle claimed that the Cabinet discriminated against her, invaded her privacy, forced services upon her, and published statements that were false, fraudulent, insulting and unduly disrespectful. She also claimed that the Cabinet for Health and Human Services placed her children in settings where they suffered repeated neglect, abuse and/or

³ Kentucky Rules of Civil Procedure.

injury. The Jefferson Circuit Court dismissed her complaint for failure to state a claim upon which relief can be granted. Gerstle then appealed.

When a circuit court considers a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, the allegations contained in the complaint must be assumed to be true. James v. Wilson, 95 S.W.3d 875, 889 (Ky. 2002). The motion to dismiss should be granted only if "it appears to a certainty that the claimant is entitled to no relief under any statement of facts which could be proved in support of the claim." Ingram v. Ingram, 283 S.W.2d 210, 212 (Ky. 1955); Spencer v. Woods, 282 S.W.2d 851, 852 (Ky. 1955). The complaint must only make a concise statement of the facts, giving fair notice of the cause of action and the relief sought. Pike v. George, 434 S.W.2d 626, 627 (Ky. 1968). Appellate courts must review dismissals for failure to state a claim *de novo*. James, at 889. Under *de novo* judicial review the appellate court does not give deferential treatment to the trial court's judgment.

The Cabinet argues that it is immune from suit for actions taken during the conduct of its duties in this case. If the Cabinet is immune, then no set of facts presented by Gerstle could result in relief. Gerstle's brief is essentially a

pastiche of photocopied paragraphs from the Civil Rules and various legal articles.

The only defendant named in the action is the former Cabinet for Families and Children, an agency of state government. The Commonwealth cannot be sued except upon an explicit waiver of sovereign immunity. Commonwealth v. Whitworth, 74 S.W.3d 695, 700 (Ky. 2002); Yanero v. Davis, 65 S.W.3d 510, 517 (Ky. 2001). In addition to sovereign immunity, anyone, whether or not a state employee, acting with reasonable cause and in good faith in reporting or investigating suspected child mistreatment has immunity under KRS 620.050(1). The Commonwealth has not waived its immunity in cases involving the investigation of suspected dependency, neglect or abuse of children or the actions taken as a result of such investigations. There is no showing of bad faith or malice on behalf of the Cabinet or its employees. Employees of the Cabinet, acting within the course and scope of their duties, have official immunity from civil actions. See Yanero at 521-522. The circuit court properly dismissed the case for failure to state a claim upon which relief could be granted. Thus, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Theresa Gerstle
Louisville, Kentucky

BRIEF FOR APPELLEE:

Katherine A. Kingren
Frankfort, Kentucky