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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000666-MR

ANDRE AZEROT

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 03-CI-004834

ROMAN CATHOLIC BISHOP OF LOUISVILLE

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: GUIDUGLI AND MINTON, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: Andre Azerot appeals the summary dismissal of his claims against the appellee ("Archdiocese") stemming from allegations of sexual abuse inflicted by a Roman Catholic priest while Mr. Azerot was a student at St. Ann Elementary School. In a thorough and well-reasoned opinion, the trial judge concluded that, viewing all material facts in the

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

light most favorable to appellant, his complaint was time-barred by the applicable statute of limitations and the Archdiocese was therefore entitled to judgment as a matter of law. Finding no error in that determination, we affirm the judgment dismissing appellant's complaint.

Born June 7, 1970, appellant Azerot attend school at St. Ann Church between 1980 and 1986, during which time he alleges that on numerous occasions he was the victim of sexual abuse committed by Joseph T. Herp, a Roman Catholic priest at the parish. Appellant moved to Florida in 1993 and has resided there since that time. Alleging that he first learned through a conversation with his mother sometime after June 1, 2002 that the Archdiocese had been accused in numerous lawsuits of engaging in a pattern of conduct designed to cover up abusive conduct committed by its priests, appellant filed a complaint on May 30, 2003 in which he asserted that the Archdiocese was 1) negligent in hiring and failing to adequately discipline Joseph Herp; 2) committed fraud by inducing him to attend St. Ann School without warning him about Fr. Herp; and 3) violated a fiduciary duty owed to him by failing to protect him from, or warn him about, the sexually abusive conduct attributed to Fr. Herp. The Archdiocese thereafter sought dismissal of the action contending that it had been filed well outside the applicable limitations period. The trial judge treated that motion as one

for summary judgment and dismissed appellant's complaint as time-barred, precipitating this appeal.

Conceding that the one-year limitations period for personal injury actions would ordinarily bar his complaint, appellant claims entitlement to application of the tolling provision of KRS 413.190(2) based upon the conduct of the Archdiocese in concealing its knowledge of Fr. Herp's acts of abuse and in failing to disclose such knowledge to the proper authorities. Relying upon Roman Catholic Diocese of Covington v. Secter,² appellant maintains that this pattern of conduct on the part of the Archdiocese is virtually indistinguishable from conduct found to trigger application of the tolling provision in that case. Because we fully concur in the trial judge's analysis that application of the tolling provision is nevertheless insufficient to salvage appellant's claims, we adopt the following rationale for distinguishing appellant's situation from that addressed in Secter:

However, even if all material facts are viewed in Mr. Azerot's favor, the law still imposes a duty on him to exercise reasonable care and diligence to in pursuing a cause of action. See, e.g., Newberg v. Hudson, Ky., 838 S.W.2d 384 (1992); Miller v. Thacker, Ky., 481 S.W.2d 19 (1972); Rigazio, [Rigazio v. Archdiocese of Louisville, Ky.App., 853 S.W.2d 295 (1993)]. In order for concealment on the part of the Archdiocese to toll the running the statute of

² 966 S.W.2d 286 (Ky.App. 1998).

limitations, it must hide the Plaintiff's cause of action in such a way that it cannot be discovered *by the exercise of ordinary diligence* on his part. St. Clair v. Bardstown Transf. Line, Ky., 221 S.W.2d 679 (1949). See also Walter Bledsoe & Co. v. Elkhorn Land Co., 219 F.2d 556 (6th Cir.). Thus, even if he is correct that for many years the Archdiocese hid the alleged abuse committed by Mr. Herp, Mr. Azerot was still under a legal duty to pursue his cause of action when facts or circumstances gave him, or at least would provide a reasonable person standing in his shoes, notice that a claim may exist. In other words, he cannot remain oblivious to a cause of action when information is available that it exists even though the Archdiocese may be taking steps to hide it.

In the matter *sub judice*, Mr. Azerot contends that the Archdiocese has engaged in a decades long pattern of covering up the unlawful conduct of Joseph Herp. He argues that this conduct continued well after the first lawsuit was brought against the Archdiocese on April 19, 2002, and well after the flood of news stories that began a week before. It is undisputed that on April 14, 2002, the *Courier-Journal* printed an article regarding the Archdiocese's alleged long-standing practice of concealing known incidents of sexual abuse of students by priests. A second article appeared in the same newspaper only two days later, on April 16, 2002. Possibly as a result of these news items, a flood of lawsuits against the Archdiocese began shortly thereafter, with the first being filed on April 19, 2002. Beginning with the first lawsuit, the actions brought against the Archdiocese became the subject of pervasive new reporting in all forms of media, including newspaper, radio and television. These actions and the controversies underlying them have continued to be a prominent media topic to the present day. Similarly, as the Archdiocese notes, between April 14, 2002

and April 30, 2002, twenty-eight articles appeared in the *South Florida Sun-Sentinel* regarding past sexual abuse committed by Catholic priests and the alleged cover-up engaged in by the Catholic church. An additional twenty-four articles regarding this topic also appeared in *USA Today* during this same period of time. By his own admission, Mr. Azerot learned of the Jefferson County lawsuits and the publicity surrounding them no later than the first few days of June, 2002, less than two months after the first lawsuit was filed and the first new story disseminated. Because of this it would be reasonable to conclude that with an ordinary exercise of due diligence, Mr. Azerot should have filed this action well within the year following April, 2002.

However, the analysis by which the trial judge concluded that appellant's claim was time-barred did not stop there. Noting that an out-of state residency might well affect a prospective plaintiff's notice concerning a potential cause of action, the trial judge concluded that the statute of limitations on appellant's claim expired long before he moved to Florida and before the flood of litigation initiated against the Archdiocese in 2002. In support of this conclusion, the trial judge cited documents produced by the Archdiocese and referenced by appellant in his response to the motion to dismiss. These documents, in the words of appellant, "confirm that the Plaintiff Andre Azerot contacted the Defendant Church complaining of abuses" as early as 1989. One of these documents, a handwritten note by an Archdiocese representative

dated July 3, 1989, when appellant was 19 years of age and before his move out-of-state, indicates that appellant had been engaging in a pattern of conduct which included personal visits and telephone calls to Fr. Herp, threatening to "get his parents involved" and sue Fr. Herp. The second document is a typewritten recollection by Fr. Herp dated July 4, 1989, summarizing appellant's visits and phone calls. In this document, Fr. Herp states that appellant's contacts, which at times included threats of violence which appellant claims were made by his brother, commenced in 1986. The note also reveals that on July 3, 1989, appellant informed Fr. Herp in person that his parents had been informed about the sexual abuse and that his family was attempting to build a case in order to sue him. Appellant did not dispute the authenticity of these documents.

On the basis of this undisputed evidence, the trial judge concluded that over one year after attaining majority appellant was aware of both his injury and the identity of his abuser, a priest and teacher appellant knew had been employed by the Archdiocese and placed at the St. Ann School. Thus, in light of appellant's own words and actions, it is clear that no conduct on the part of the Archdiocese can be said to have concealed from him facts essential to his claim. As noted by the trial judge, where at age 19 appellant knew with certainty the circumstances of his abuse, there is no justifiable

rationale by which one might conclude that his cause of action remained hidden until after June 1, 2002. We therefore concur in the trial judge's assessment that, regardless of any act of concealment on the part of the Archdiocese, appellant possessed requisite notice of the facts to allow him to file suit against both Fr. Herp and the Archdiocese in 1989.

A recent opinion from a sister jurisdiction provides additional support for the rationale expressed in the opinion of the trial judge. In Meehan v. Archdiocese of Philadelphia,³ the Court addressed almost identical contentions asserted by plaintiffs seeking to avoid a statutory bar to their claims. We find the reasoning of the Meehan court instructive in resolving the matter before us:

It is undisputed that the plaintiffs were aware that the Archdiocese employed their abusers and that the abuses all occurred on church property. These facts alone were sufficient to put the plaintiffs on notice that there was a possibility that the Archdiocese had been negligent. Neither the plaintiffs' lack of knowledge of the Archdiocese's conduct, nor the plaintiffs' reluctance, as members of the Catholic Church, to investigate the possible negligence of the Archdiocese of Philadelphia after having been abused by one of its priests or nuns, tolls the statute of limitations when the plaintiffs had the means of discovery but neglected to use them.⁴

³ 870 A.2d 912 (Pa.Super, 2005).

⁴ Id. at 921.

The Court also disposed of a contention that the existence of a fiduciary relationship between the plaintiffs and the Archdiocese rendered its conduct an affirmative act of fraudulent concealment which required a jury determination as to the tolling of the statute of limitations:

We agree with the Archdiocese that the doctrine of fraudulent concealment does not toll the statute of limitations here. The plaintiffs have not put forth any evidence to indicate that they made any inquiries to the Archdiocese prior to 2002 regarding their potential causes of action. The plaintiffs do not allege the defendants' silence misled them into believing that the alleged sexual abuse did not occur, that it had not been committed by the priests or nun, or that it had not resulted in injury to appellants. The defendants never concealed from any of the plaintiffs the fact of the injury itself. Nor do the plaintiffs allege that they were lied to by the Archdiocese with regard to the identity of their abusers or their abusers' place within the Archdiocese, which if relied upon, would have caused them to suspend pursuit of their claims.

Again, the essence of the plaintiffs' fraudulent concealment argument is that the defendants' general conduct and/or silence concealed from them an additional theory of liability for the alleged sexual abuse. As noted in the federal case, Kelly v. Marcantonio, "this argument misses the mark ...for a cause of action to accrue, the entire theory of the case need not be immediately apparent...as soon as [the plaintiffs] became aware of the alleged abuse, they should also have been aware that the [defendants], as the priests' employers, were potentially liable for that abuse."

Kelly v. Marcantonio, 187 F.3d 192,201 (1st
Cir. 1999).⁵

Thus, contrary to appellant's assertions that he had not been placed on "inquiry notice" and therefore the duty to exercise ordinary diligence never arose, the facts of this case plainly dictate otherwise. The trial judge quite correctly concluded that as early as 1989 appellant's own admitted actions in threatening to take action with the Archdiocese and/or sue Fr. Herp triggered a duty to exercise due diligence in pursuing his claim. We are convinced that these facts in and of themselves are sufficient to distinguish appellant's situation from the facts addressed in Secter.

Accordingly, the dismissal of appellant's complaint as time-barred is in all respects affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John D. Cox
Louisville, Kentucky

BRIEF FOR APPELLEE:

Edward H. Stopher
Raymond G. Smith
Louisville, Kentucky

⁵ Id. at 922.