

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001596-MR

ONDRAUS CISSELL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE KATHLEEN VOOR MONTANO, JUDGE  
ACTION NO. 05-CI-005123

KFC CORPORATION  
AND JAYME MELTON

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Ondraus Cissell appeals from the dismissal of his claims against KFC Corporation and Jayme Melton as time-barred by the statute of limitations. After careful review, we affirm.

Jayme Melton was a victim of rape and assault. Following the assault, she provided a statement and description of her alleged assailant to the police. At the time,

Melton was an employee of KFC, and a sketch of her alleged assailant was distributed internally through the corporation.

On September 8, 2003, Ondraus Cissell went into a KFC restaurant in Jeffersontown, Kentucky, to purchase lunch. The manager saw Cissell dining there and contacted Melton, who then went to the restaurant and identified Cissell as her assailant. Upon leaving the restaurant, Cissell was surrounded by police and arrested for the rape, robbery, and kidnapping of Jayme Melton. Cissell spent twenty-two days in jail before being released after DNA testing and other evidence determined that he was not the assailant. All criminal charges were dropped.

On June 13, 2005, Cissell filed a complaint alleging that the actions of KFC and Melton constituted negligence, slander, libel, unlawful imprisonment, outrageous conduct, and violations of his civil rights. KFC and Melton promptly filed Motions to Dismiss based on causes of action being time barred by the statute of limitations and improper pleading. The trial court granted the Motions to Dismiss, and this appeal followed.

Cissell first argues that the statute of limitations applied by the trial court is improper as a “practical and equitable” matter. More specifically, he contends that the tolling of the statute of limitations should not have begun until the date of the dismissal of the criminal process, June 15, 2004. We disagree.

It is well-established that a trial court should not grant a judgment on the pleadings under CR 12.03 unless:

on the admitted material facts, the movant is clearly entitled to a judgment. Relief must be denied if there is a material issue of fact. ... The question thus presented is one of law....

*Archer v. Citizens Fidelity Bank & Trust Co.*, 365 S.W.2d 727, 729 (Ky.App. 1963)

(internal citations omitted). Because determining whether a complaint should be dismissed under this rule is a matter of law, our review is *de novo*. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky.App. 2005) (questions of law are reviewed *de novo* on appeal).

Cissell's argument asks us to expand *Pedigo v. Breen*, 169 S.W.3d 831 (Ky. 2004), in which the Kentucky Supreme Court held that the plaintiff's claim for damages arising out of inability to participate in a class action did not accrue until the plaintiff reached a settlement in the underlying case. The case is clearly distinguishable, however, in that the settlement was necessary to determine the plaintiff's monetary losses, whereas the dismissal of the underlying criminal complaint in this case is not necessary to provide proof of Cissell's claim.

It is undisputed that Cissell was arrested on September 8, 2003, and that the complaint was not filed until June 13, 2005. It is also undisputed that the one-year statute of limitations in KRS 413.140 applies to Cissell's claims for negligence, unlawful imprisonment, slander, and libel. Therefore, we find that the trial court properly held Cissell's claims for negligence, unlawful imprisonment, slander, and libel time-barred as a matter of law.

Cissell also contends that the trial court improperly dismissed his claim for outrage. We again disagree.

It has long been held in Kentucky that the tort of outrage as adopted by the Kentucky Supreme Court in *Craft v. Rice*, 671 S.W.2d 247 (Ky. 1984), is a gap-filler tort only available when the alleged tortious conduct cannot be redressed by traditional common law torts. *See also Banks v. Fritsch*, 39 S.W.3d 474, 482 (Ky.App. 2001); *Rigazio, v. Archdiocese of Louisville*, 853 S.W.2d 295, 298-99 (Ky.App. 1993). Because the damages for Cissell's claimed emotional distress were part of the recovery available to him under his claims of false imprisonment, slander, libel, and negligence, we find that the trial court properly held that he could not maintain an additional claim for the same damages under the tort of outrage. *See Banks*, 39 S.W.3d. at 481.

Cissell finally argues that his claim for civil rights violations was improperly dismissed. More specifically, he asserts that the trial court failed to consider applicable “facts” to his civil rights claim. After careful review, we disagree.

Under KRS 344.120,

it is an unlawful practice for a person to deny an individual the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation, resort, or amusement...on the ground of disability, race, color, religion, or national origin.

KRS 344.280 further defines “place of public accommodation, resort, or amusement” as “any place, store, or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts patronage or trade of the general public or which is supported directly or indirectly by government funds...”

There is simply no evidence that Cissell was denied any services based upon his race, nor does Cissell actually attempt to make this argument. Instead, he contends that he was discriminated against as outlined in KRS 344.120 by virtue of Jayme Melton having “falsely sworn” to being raped by a black man. This, however, is not an established fact nor is any proof offered that Melton's claim of rape was false or that her description was falsely sworn. The only claim Cissell is able to validly make is that he was falsely identified as the assailant due to his matching the description. The trial court properly held, however, that there was no indication of discriminatory intent in Melton's giving the description or in KFC distributing said description. Additionally, the trial court held that it cannot be said that Cissell was denied any services based upon his race. Therefore, we find that the trial court properly held that a claim based on violations of KRS 344.120 could not be maintained.

For the foregoing reasons, we affirm the judgment of the Jefferson Circuit Court.

DIXON, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, CONCURS AND FILES SEPARATE  
OPINION.

COMBS, CHIEF JUDGE, CONCURRING: I concur with the well-reasoned opinion in this sad case and do so separately simply to emphasize the unique nature of the tort of false imprisonment and its statute of limitations. Indeed, it is the only viable tort asserted in this case. The fliers circulated by KFC, allegedly the foundations of the claims for libel and slander, were prepared and posted long before Mr.

Cissell was apprehended. Thus, there could have been no intent whatsoever to slander one whose identity was as yet unknown.

It is undoubtedly tragic to stand falsely accused of a crime – a consequence in this case of human error and mistaken identification. Mr. Cissell suffered twenty-two days of incarceration prior to being vindicated by the wonder of DNA testing. But for that scientific advancement, he might have been mistakenly convicted of a crime that he did not commit.

Our law does not provide a remedy for human error – only for negligence or intentional wrongs. Neither occurred in this case. Mistaken imprisonment is not synonymous with false imprisonment – even if an action for false imprisonment had been timely filed. A very recent Kentucky case has directly addressed the issue of the relevant statute of limitations. The time for filing a claim commences to run when the detention ends – not when legal process is either instituted or completed. Favorable disposition of the underlying criminal charges is **not** the triggering mechanism for the time in which to assert a claim for false imprisonment according to *Dunn v. Felty*, 226 S.W.3d 68, 69 (Ky. 2007), in which the Kentucky Supreme Court held:

[T]he statute of limitations begins to run against an action for false imprisonment or false arrest when the alleged false imprisonment ends.

Thus, since Mr. Cissell's time for filing this claim began to run after he was released from his twenty-two day detention, his complaint was untimely. Accordingly, I

wholly concur with the opinion in this case without diminishing the anguish undoubtedly endured by Mr. Cissell.

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