

Commonwealth Of Kentucky
Court of Appeals

NO. 2006-CA-002329-MR

STEPHEN MANN

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE KEVIN HORNE, SPECIAL JUDGE
ACTION NO. 04-CI-01640

GLADYS WAGNER

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON AND STUMBO, JUDGES; GRAVES,¹ SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Stephen Mann appeals from an order of the Boone Circuit Court granting summary judgment to appellee Gladys Wagner. Mann contends that the trial court erred in awarding Wagner summary judgment on the basis that her motion

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

violated the 10-day notice requirement contained in CR² 56.03. Because the notice requirement of the rule was violated, we vacate and remand.

Mann and Wagner are siblings who have had an antagonistical past. On December 11, 2002, Mann filed an action against Wagner in federal court. The complaint alleged that on December 30, 1992, Wagner flourished a gun and threatened to kill him; that on November 22, 1999, Wagner again threatened to kill him; and that in November and December 1999 Wagner, based upon false allegations, obtained an EPO and DVO against him. Based on the foregoing, the complaint alleged causes of action based upon RICO;³ RICO conspiracy; theft by deception; harassment; intentional infliction of emotional distress; and outrageous conduct. The complaint also sought punitive damages. On March 15, 2004, the federal district court entered an opinion and order dismissing his RICO claims with prejudice. The court declined to exercise its supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367, and dismissed the state law claims without prejudice.

On October 15, 2004, Mann filed a substantially identical complaint in Boone Circuit Court save, of course, for the RICO claims. Litigation then proceeded in state court. A bench trial was set for August 7, 2006; however, Mann's counsel withdrew and the trial was continued until October 16, 2006. Mann retained replacement counsel, but he withdrew from the case on September 19, 2006.

On September 28, 2006, Wagner filed a motion for summary judgment. The motion was noticed for hearing on October 3, 2006. At the October 3, 2006, hearing, Mann, appearing pro se, submitted a written motion objecting to Wagner's motion as not

² Kentucky Rules of Civil Procedure.

³ Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 - 1968.

being in compliance with the 10-day notice requirement of CR 56.03, and seeking a continuance of the scheduled October 16, 2006, trial date so as to allow him to obtain new counsel. On October 16, 2006, the trial court entered an order granting Mann's motion for summary judgment. This appeal followed.

Before us, Mann contends that the trial court erred in awarding summary judgment to Wagner on the basis that her motion was not filed in compliance with the 10-day notice requirements of CR 56.03. We agree.

CR 56.03 provides as follows:

The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. (Emphasis added).

In *Perkins v. Hausladen*, 828 S.W.2d 652 (1992), Justice Leibson addressed the CR 56.03 10-day notice requirement, and its importance, as follows:

The only Kentucky case squarely addressing this issue [of compliance with CR 56.03's 10-day notice requirement] is *Rexing v. Doug Evans Auto Sales, Inc.*, Ky.App., 703 S.W.2d 491 (1986). In *Rexing* the court viewed it as error to force a hearing on summary judgment short of the ten days notice requirement, stating:

"We see no reason to permit appellee to circumvent the notice requirements of our Civil Rules by ambushing appellants with last minute motions and early morning hearings. The trial court erred in refusing to grant appellants a continuance. *Id.* at 494.

The treatise on Kentucky Practice by Bertelsman and Philipps, 4th ed. Civil Rule 56.03, Comment 3, states:

"As the annotations following the sub-rule demonstrate, the 10-day lead time provided before hearing the motion is extremely important and, although not jurisdictional, may not be lightly disregarded.... [R]equests for extension of time to respond to such motions are usually freely granted, and it may be an abuse of discretion for the trial court to refuse to grant reasonable extensions."

We need not decide whether there is an inflexible rule that violation of the ten day notice requirement requires automatic reversal. There may be unusual situations where no possible prejudice could have resulted from a premature hearing. But this case is not one of them. As pointed out in their Brief, the [nonmovants] were put at a "disadvantage by not being able to put on any affidavits, additional legal research, nor other evidence to contradict the motion."

Id. at 656-657.

The above discussion suggests that a violation of the rule 56.03 notice provisions requires "automatic reversal" except in "unusual situations where no possible prejudice could have resulted from a premature hearing." Particularly since Mann was not represented by counsel either when the motion was filed or at the hearing on the motion, we do not believe this case justifies a deviation from the normal situation when failure to comply with the notice rule is reversible error.

In her appellee brief, Wagner all but ignores Mann's CR 56.03 argument stating merely that "Appellant had adequate notice regarding the Motion for Summary Judgment, yet it was his decision to delay in retaining Counsel." Wagner instead focuses on the merits of her summary judgment motion and argues that all of the claims are barred by the statute of limitations. While Wagner makes reasonable arguments for her position, because of the procedural defects in the filing of her motion, we do not have the

full benefit of the appellant's rebuttal to her statute of limitations arguments. Thus our focus must remain upon her failure to comply with CR 56.03, and not the merits of her statute of limitations claims.⁴

For the foregoing reasons the judgment of the Boone Circuit Court is vacated, and the cause is remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Bridget A. Saunders
Covington, Kentucky

BRIEF FOR APPELLEE:

Shannon Devine Tomlinson
Williamstown, Kentucky

⁴ We note that in her brief, Wagner contends that the trial court "treated the Motion for Summary Judgments as a Motion to Dismiss" or Motion for Judgment on the Pleadings. CR 12.03. A review of her motion makes it clear that Wagner invoked CR 56.03 consideration of the record and that the order signed by the court was prepared by her counsel.