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ARKANSAS COURT OF APPEALS

DIVISION I
No. CA12-675

BLAKE ROBERTSON APPELLANT V. TOM DANIEL and ELAINE JONES APPELLEES	**Opinion Delivered** March 6, 2013 APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT [NO. CV-2011-444-III] HONORABLE RUSSELL ROGERS, JUDGE AFFIRMED AS MODIFIED

RITA W. GRUBER, Judge

Appellant Blake Robertson appeals from an order of the Garland County Circuit Court dismissing his complaint with prejudice for slander against appellees, Tom Daniel and Elaine Jones, both members of the Board of Directors of the City of Hot Springs. On appeal, appellant contends that the court erred in granting appellees' motion to dismiss because all the theories in support of the motion present unresolved factual issues. We affirm the circuit court's order dismissing appellant's complaint, but we modify the order to a dismissal without prejudice.

In his complaint, appellant alleges that on April 5, 2011, at a public meeting of the Board of Directors of the City of Hot Springs, which was televised to the local community, Mr. Daniel slandered appellant by "intentionally stating publicly and on the record of the public meeting" that appellant "did false witness" against Mr. Daniel in an unrelated proceeding. He alleged that Ms. Jones slandered him by "intentionally stating publicly and

on the record of that public meeting" that appellant had "told a story" on Ms. Jones in an unrelated proceeding and that "it was a lie." Appellant was on the agenda for the board meeting for appointment to the Civil Service Commission for the City of Hot Springs, but the appointment was tabled until the next meeting after the allegedly slanderous statements were made. Appellant alleged that both statements were untrue, that appellees knew or should have known the statements were untrue, and that appellees made the statements "with malice and reckless disregard for the truth." He also alleged that the statements were made with the intention of damaging appellant's reputation in the community and his profession.

The complaint also contains allegations that appellant's appointment to the Civil Service Commission was brought up at the next meeting on April 19, 2011, but he did not even "garner a second." He alleged that the April 19, 2011, meeting was also broadcast to the entire community, further damaging his reputation. Appellant alleged that, because appellees' statements were "excessively broadcast to the entire community," he went from being approved to serve on the Civil Service Commission to not being able to even garner a second on a motion to approve. Appellant asked the court to award monetary damages of $1,000,000 from each of the appellees for damages to his reputation and profession, mental distress, and public embarrassment. He also requested punitive damages.

Appellees filed a motion to dismiss under Rule 12(b)(6) of the Arkansas Rules of Civil Procedure, arguing that their comments were made during the course and scope of proceedings before the Board of Directors of the City of Hot Springs, that appellant was a

nominee for the Civil Service Commission, and that he was, therefore, a public figure for purposes of the comments made about his suitability for public office. They also alleged that they were immune from suit under Ark. Code Ann. § 21-9-301 and because any statements they made were made during the course and scope of their actions as members of a legislative body.

At the hearing on appellees' motion on February 3, 2012, appellees conceded that the question whether appellant was a public figure was a fact question. They also conceded that statutory immunity under Ark. Code Ann. § 21-9-301 did not apply to intentional torts. Appellees' argument at the hearing focused on absolute legislative immunity in federal common law as set forth in the opinions of the United States Supreme Court. After the hearing, the circuit judge sent a letter to counsel for the parties on April 9, 2012, stating that the motion must be denied because there were questions of fact to be resolved. Appellees' counsel responded by sending a letter to the court, copying appellant's counsel, asking the court to rule on the motion to dismiss based on the issue of legislative immunity. A week later, the trial judge sent another letter to the parties stating that he must grant the motion to dismiss as he believed that the appellees were "under immunity at the time of making the alleged statements." On May 14, 2012, the circuit court entered an order dismissing the complaint with prejudice. The order contained two findings:

1. That at the time the remarks complained of were made, both Defendants, Tom Daniel and Elaine Jones[,] were members of the City Board of Directors of the City of Hot Springs[,] Arkansas.

2. That the statements complained of were made during the course and scope of a City Board Meeting.

Appellant filed this appeal from the court's order.

In reviewing a circuit court's decision on a motion to dismiss, we treat the facts alleged in the complaint as true and view them in the light most favorable to the plaintiff. *Dollarway Patrons for Better Schs. v. Morehead*, 2010 Ark. 133, at 5, 361 S.W.3d 274, 278. We look only to the allegations in the complaint. *King v. Whitfield*, 339 Ark. 176, 179, 5 S.W.3d 21, 22 (1999). In testing the sufficiency of a complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed. *Dollarway Patrons for Better Schs.*, 2010 Ark. 133, at 5, 361 S.W.3d at 278. We review the circuit court's decision granting a motion to dismiss for abuse of discretion. *Born v. Hosto & Buchan, PLLC*, 2010 Ark. 292, at 5, 372 S.W.3d 324, 330.

The circuit court gave no legal conclusion for its dismissal. Appellees assume on appeal that the circuit court dismissed under the theory of absolute legislative immunity and address only that theory in their brief. They admit that no Arkansas court has decided whether legislative immunity applies to members of local legislative bodies but cite a variety of other jurisdictions in support of their argument that absolute legislative immunity should apply to local legislative bodies. Appellant contends that none of the theories of immunity apply to his complaint.

Although the court's order does not state upon what conclusion of law the court based its decision to dismiss, we agree with appellees that the court's two findings suggest that it dismissed under the theory of absolute legislative immunity. Arkansas has no constitutional provision or statute extending absolute immunity to local legislative bodies. The Arkansas

Constitution does grant absolute immunity to the members of the General Assembly for "any speech or debate in either house." Ark. Const. art. 5, § 15. There is no statutory absolute immunity for any other legislative bodies, nor has the Arkansas Supreme Court chosen to extend absolute immunity to local legislative bodies. Absolute privilege was discussed by our supreme court in *Thiel v. Dove*, 229 Ark. 601, 317 S.W.2d 121 (1958), which involved a police officer speaking before a police committee. The court summarily rejected the theory, holding that any statements made before the committee might be entitled to a conditional privilege but not an absolute privilege. We express no opinion regarding the merits of adopting an absolute privilege for local legislative bodies but hold that there is no such privilege in Arkansas now, and we are not authorized to create one. Thus, the circuit court abused its discretion in granting appellees' motion to dismiss on the basis of absolute immunity.

We affirm the circuit court's dismissal of appellant's complaint, however, because the circuit court reached the right result, albeit for the wrong reason. *See, e.g.*, *Faulkner v. Ark. Children's Hosp.*, 347 Ark. 941, 957, 69 S.W.3d 393, 403 (2002). Appellant's claim in this case is for defamation, which requires proof of the following elements: (1) the defamatory nature of the statement of fact; (2) that statement's identification of or reference to the plaintiff; (3) publication of the statement by the defendant; (4) the defendant's fault in the publication; (5) the statement's falsity; and (6) damages. *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 444, 47 S.W.3d 866, 875 (2001). In *Faulkner*, our supreme court affirmed a dismissal under a right-result-wrong-reason analysis, holding that the plaintiff in that defamation case did not plead

sufficient facts demonstrating that she had suffered actual damage to her reputation but pleaded "only a conclusion to that effect." *Faulkner*, 347 Ark. at 957, 69 S.W.3d at 403. The *Faulkner* court noted that actual damages were an element of defamation, that Arkansas no longer recognized the doctrine of defamation per se, and that plaintiff's failure to plead facts supporting actual damage to her reputation warranted dismissal. Here, appellant alleged that he suffered damage by "being cast as untruthful and not being trusted to serve," and he pleaded for an award of $1,000,000 from each appellee for injury to his reputation in the community and in his profession, for mental distress, and for embarrassment publicly on live television and in the newspaper caused by their slander. He alleged no specific facts demonstrating actual damage to his reputation or profession. This is not enough to withstand a Rule 12(b)(6) motion.

In this case, appellees filed their motion to dismiss pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure, pursuant to which the trial court may dismiss a complaint for failure to state facts upon which relief may be granted. A dismissal pursuant to Rule 12(b)(6) should be without prejudice. *Ark. Dep't of Envtl. Quality v. Brighton Corp.*, 352 Ark. 396, 411, 102 S.W.3d 458, 468 (2003). The plaintiff then may elect to either plead further or appeal. *Id.* When the plaintiff chooses to appeal, he or she waives the right to plead further, and the complaint will be dismissed with prejudice. *Orr v. Hudson*, 2010 Ark. 484, at 5, 374 S.W.3d 686, 690. Because the court in this case dismissed appellant's complaint with prejudice under the presumed theory of legislative immunity, we modify and affirm the dismissal to one without prejudice.

Affirmed as modified.

PITTMAN and WHITEAKER, JJ., agree.

Benjamin D. Hooten, for appellant.

Philip M. Clay, for appellees.