UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF
CORNELIA G. KENNEDY
CIRCUIT JUDGE
U. S. COURTHOUSE
DETROIT, MICHIGAN 48226

November 2, 1981

John P. Hehman, Clerk
United States Court of Appeals
for the Sixth Circuit
Cincinnati, OH 45202

Re: 80-1403, Elm v. Secretary
10/16/81

Dear Mr. Hehman:

Attached for signature and filing is an order in the above case.

Judges Engel and Unthank have concurred.

Sincerely,

Cornelia G. Kennedy

Att.

cc: Judge Engel
Judge Unthank

1.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RECEIVED
OCT 21 1981
ALBERT J. ENGEL
Circuit Judge

PANEL REPORT

DATE: Friday, October 16, 1981, Courtroom No. 1

PANEL: ENGEL, KENNEDY and UNTHANK

NO. 80-1403, Betty L. Elm v. Secretary of HEW
E.D. Michigan - J.Feikens

Attached is an order in the above-entitled case, which is being circulated in lieu of a panel report. It is called to the particular attention of Judges Engel and Unthank.

Cornelia G. Kennedy

Attachment

cc: All Judges

Date 10/21/81

Dear Judge Kennedy
I concur.
Albert J. Engel

cc: Judge Unthank

1.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PANEL REPORT

DATE: Friday, October 16, 1981, Courtroom No. 1

PANEL: ENGEL, KENNEDY and UNTHANK

NO. 80-1403, Betty L. Elm v. Secretary of HEW
E.D. Michigan - J.Feikens

Attached is an order in the above-entitled case, which is being circulated in lieu of a panel report. It is called to the particular attention of Judges Engel and Unthank.

Cornelia G. Kennedy

Attachment

cc: All Judges

October 29, 1981

Dear Judge Kennedy:

I concur.

G. Wix Unthank
Judge

NO. 80-1403

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BETTY L. ELM,

Plaintiff-Appellant,

v.

O R D E R

SECRETARY OF HEALTH, EDUCATION and WELFARE,

Defendant-Appellee.

_____/

Before: ENGEL and KENNEDY, Circuit Judges; and UNTHANK, District Judge.*

This is an appeal from a summary judgment affirming the decision of the Secretary of Health and Human Services which denied appellant's application for Social Security disability and Supplemental Security Income benefits. Appellant contends that the decision to deny benefits was not supported by substantial evidence.

The Administrative Law Judge found that appellant suffers from mild calicific bursitis of the right shoulder, mild diabetes mellitus, depression, lumbosacral strain with mild arthritic changes of the spine, and mild hypertension. He found that she was unable to return to her previous employment as a bakery worker because of her physical complaints, but that she could perform entry level sedentary work. The District Judge considered the entire record and found substantial evidence to support the ALJ's decision that appellant is capable of sedentary work.

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* The Honorable G. Wix Unthank, United States District Court, Eastern District of Kentucky, sitting by designation.

Appellant insists that the evidence requires a finding of disability. However, repeated trips to the hospital failed to disclose significant objective findings to support appellant's physical complaints. The psychiatric testimony was also inconclusive. As the District Court noted:

> Psychiatric evaluation gives a varying picture of the Plaintiff. Dr. Milton Steinhardt reported in January, 1976, prior to her hospitalization for depression, that claimant was in full contact with reality, though sluggish, and without evidence of thought disturbances. However, he observed Plaintiff to be depressed and exhibiting poor judgment and diagnosed multiple psychosomatic complaints, low IQ, and reactive depression. He recommended attempting to give Plaintiff "simple work" to perform. (Tr. 304.) Plaintiff's treating psychiatrist, whom she visits every two or three months for depression, reported in February, 1977 that Plaintiff's interests, appearance, behavior, thought content, judgment, abstract thinking, and memory were good, although her ability to get along with others was only fair, and her emotional state was depressed. (Tr. 341.)

Op. 4.

We agree with the District Court that the evidence did not require a finding of inability to do sedentary work. Accordingly, the judgment of the District Court is affirmed.

ENTERED BY ORDER OF THE COURT

_____

Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PANEL REPORT

DATE: Friday, October 16, 1981, Courtroom No. 1

PANEL: WEICK, KENNEDY and UNTHANK

NO: 80-1338, Bart Durham v. Brock, et al.
M.D. Tennessee - Morton, J.

Attached is an order in the above-entitled case, which is being circulated in lieu of a panel report. It is called to the particular attention of Judges Weick and Unthank.

Cornelia G. Kennedy

Att.

cc: All Judges

October 29, 1981

Dear Judge Kennedy:

I concur.

G. Wix Unthank
Judge

NO. 80-1338

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BART DURHAM,

Plaintiff-Appellee,

v.

HON. RAY. L. BROCK, JR., Chief Justice, et al.,

Defendants-Appellants./

O R D E R

Before: WEICK and KENNEDY, Circuit Judges; and UNTHANK, District Judge.*

The Supreme Court and the Attorney General of the State of Tennessee appeal a decision by the District Court holding unconstitutional those parts of Disciplinary Rule (DR) 2-101(B) and Ethical Consideration (EC) 2-8, Tennessee Code of Professional Responsibility, that forbid attorneys to advertise the fields of law in which they practice. The District Court's decision is reported at 498 F. Supp. 213.

Appellee Bart Durham is a practicing attorney in Tennessee, doing business with three other attorneys as the "Legal Clinic of Bart Durham." Prior to the adoption of the current DR 2-101(B) and EC 2-8 the clinic advertised in newspapers and the telephone directory yellow pages. The advertisements listed from one to sixteen fields of law that the clinic was willing to handle. None of the advertisements specified either

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* The Honorable G. Wix Unthank, United States District Court, Eastern District of Kentucky, sitting by designation.

routine legal services or the fees that the clinic charged.

On December 19, 1979, the Supreme Court of Tennessee amended the Tennessee Code of Professional Responsibility, including EC 2-8 and DR 2-101(B). The amended Code prohibits the advertisement of one or more areas of practice except for the purpose of listing routine legal services accompanied by a fee schedule. The amended Code prohibits advertisements of the type appellee used. The Supreme Court also appointed a Commission on Specializaation to make recommendations on the certification of legal specialists. The Commission released its report on January 14, 1980. Although the Supreme Court of Tennessee intends to issue a final rule to govern attorney advertising following the circulation of and comment on the Commission's report, this has not been done to date.

Appellee brought this suit to enjoin enforcement of and have declared unconstitutional DR 2-101(B) and EC 2-8. The District Judge denied the claim for injunctive relief and that decision is not being appealed. The District Judge granted appellee's claim for declaratory relief. He held that DR 2-101(B) and EC 2-8 restrict speech more than is necessary to accomplish Tennessee's goal of preventing the public from being misled by attorney advertisements, and thus violate the first amendment.

Appellants argue that: (1) appellee did not face such a threat of prosecution that there exists a case or controversy under Article III of the United States Constitution;

(2) under Younger v. Harris, 401 U.S. 37 (1971), the Tennessee Supreme Court's announced intention to amend DR 2-101(B) and EC 2-8 should have moved the District Court to abstain; (3) DR 2-101(B) and EC 2-8 are permissible regulations of commercial speech under the first amendment.

We note that the United States Supreme Court will hear oral argument November 9, 1981, in In re R__ M. J__, No. 80-1431. In that case the Supreme Court will review a Missouri rule that requires lawyers to advertise using only specified language and which does not permit any statement of limitation of practice. The rule was used to reprimand an attorney who advertised that he practices in certain areas of the law. In re R__ M. J__ appears to raise first amendment issues substantially identical to those presented here. It would be improvident for this Court to proceed further with this case, since a definitive holding is likely to be forthcoming soon from the Supreme Court.

Accordingly, it is ORDERED that further consideration of this case be stayed pending the Supreme Court's decision in In re R__M. J__, No. 80-1431.

ENTERED BY ORDER OF THE COURT

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Clerk

3.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PANEL REPORT

DATE: Friday, October 16, 1981, Courtroom No. 1

PANEL: WEICK, KENNEDY and UNTHANK

NO. 80-3486 Norfolk & Western Ry. Co. v. McDaniel Construction
N.D. Ohio - Young, J.

Attached is an order in the above-entitled case, which is being circulated in lieu of a panel report. It is called to the particular attention of Judges Weick and Unthank.

Cornelia G. Kennedy

CGK:hh
Attachment

cc: All Judges

October 29, 1981

Dear Judge Kennedy:

I concur.

G. Wix Unthank
Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 80-3486

NORFOLK AND WESTERN RAILWAY COMPANY,

Plaintiff-Appellee,

v. ORDER

McDANIELS CONSTRUCTION COMPANY,

Defendant-Appellant.

_____/

Before: WEICK and KENNEDY, Circuit Judges; and UNTHANK, District Judge.*

McDaniels Construction Company appeals from a judgment of the District Court (following a bench trial) requiring it to indemnify appellee Norfolk and Western Railway (N & W) for damages N & W was required to pay one of its employees. The N & W, in an earlier jury trial before the same District Judge, was required to pay its employee for injuries suffered when a section of pavement collapsed as the Railroad's van was passing over it. The present case was submitted to the District Court on the basis of the evidence heard in the previous trial plus depositions and exhibits. The District Court found that the pavement had, in fact, collapsed and that the collapse was caused by sewer construction performed by appellant. The District Court held that McDaniels was actively negligent in the installation of the sewer, that N & W was passively negligent and therefore entitled to indemnity. McDaniels concedes that if it was actively negligent, Norfolk and Western is

* The Honorable G. Wix Unthank, United States District Court, Eastern District of Kentucky, sitting by designation.

entitled to recover. Maryland Casualty Co. v. Frederick Co., 142 Ohio St. 605 (1944).

McDaniels raises two issues on appeal. First, that there was insufficient evidence on which to base a finding of negligence or proximate cause and therefore the findings of the District Court were clearly erroneous. Rule 52 Fed. R. Civ. P. Second, that the District Court erred in holding that the negative testimony of two witnesses was entitled to no weight.

Our review of the record discloses sufficient evidence to support the inferences drawn by the District Judge and the finding of liability. McDaniels had completed the sewer work on the street in question only six days earlier. There was some evidence that the sewer was within the travelled portion of the street. The District Judge found that the injury to the N & W employee occurred when a portion of the paved street collapsed. There was testimony that it is common for sewer excavations to collapse after being filled and that McDaniels regularly went about filling these depressed settled areas. There were complaints of collapsed areas on the street where the accident occurred. Although McDaniels argues that the collapse of a sewer was not negligence, since it was a common occurrence, the District Court was entitled to find, as he did, that where no warning devices are installed when the sewer contractor knows of the settlement problems that the sewer contractor is negligent. The conclusion that the area of the

highway settled because of sewer construction was warranted by the evidence. In Ohio proximate cause is ordinarily a factual issue. Utzinger v. U.S., 432 F.2d 485, 489 (6th Cir. 1970).

The District Court did not disregard the negative testimony of the witnesses who had no recollection of a collapse in the street where the accident occurred. Rather he rejected it for the direct positive testimony of witnesses who were involved in the accident caused by the collapse. It should be noted that one of the negative witnesses Dandrea, McDaniels' job superintendent, frankly stated he could not remember back that far.

The judgment of the District Court is affirmed.

ENTERED BY ORDER OF THE COURT

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Clerk

5.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PANEL REPORT

DATE: Friday, October 16, 1981, Courtroom No. 1

PANEL: WEICK, KENNEDY and UNTHANK

NO: 80-5322, United States of America v. Earl Wayne Avery
W.D. Tennessee - McRae, J.

Attached is an order in the above-entitled case, which is being circulated in lieu of a panel report. It is called to the particular attention of Judges Weick and Unthank.

Cornelia G. Kennedy

Attachment

cc: All Judges

October 29, 1981

Dear Judge Kennedy:

I concur.

G. Wix Unthank
Judge

NO. 80-5322

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EARL WAYNE AVERY,

Defendant-Appellant.

_____/

O R D E R

Before: WEICK and KENNEDY, Circuit Judges; and UNTHANK, District Judge.*

Appellant appeals his conviction by a jury of violating 18 U.S.C § 1001, which makes it a crime willfully to make a false statement to a government agency.

Appellant was the director of the Crockett County, Tennessee office of the Agricultural Stabilization and Conservation Service (ASCS) for 33 years. He also owned or operated several farms. In 1976, as a result of a drought, Crockett County was declared a disaster area. That made the farmers in the county eligible to apply for ASCS "low yield" payments (subsidies in the case of crop failure), Farmers Home Administration (FmHA) crop disaster loans, and Small Business Administration (SBA) farm disaster loans. Appellant applied for and received an ASCS low yield payment of $8,900.

Appellant also applied for an FmHA crop disaster loan.

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* The Honorable G. Wix Unthank, United States District Court, Eastern District of Kentucky, sitting by designation.

The form that appellant submitted for this loan contained several material errors. It stated that: appellant had 398 acres of cotton instead of the 244; the yield per acre was 299 lbs. instead of the actual 353; appellant did not receive an ASCS payment, although he had received $8,900. Appellant received a loan of $78,800 at 3% interest.

Appellant subsequently applied for an SBA loan as well, and this application also contained a material omission. Appellant did not list the FmHA loan in the blank for "monetary recoveries." The SBA apparently recognized that "monetary recoveries" was an ambiguous phrase that an applicant might construe not to include loans, as opposed to direct payments, so it sent a letter to all applicants defining "monetary recoveries" to include any reimbursement from any source whatsoever. The bottom of this letter asked whether the applicant had received any of several types of assistance, including FmHA disaster loans. Appellant responded that he had not received an FmHA loan. Appellant would not have qualified for the SBA loan, and would have qualified for less than one-half of the FmHA loan, had he responded truthfully.

Appellant was charged with three counts of violating 18 U.S.C. § 1001. Count 1 charged him with willfully falsifying his crop yield, acreage, and ASCS recovery on the FmHA application. Count 2 charged him with willfully omitting the FmHA loan from the initial SBA application. Count 3 charged him with willfully omitting the FmHA loan from the follow-up letter sent by the SBA.

The jury convicted appellant on Counts 1 and 3, and acquitted him on Count 2. The judge sentenced him to serve concurrent one-year prison terms and to pay a fine of $7,5000 on each count.

Appellant argues that: (1) the evidence was insufficient for the jury to convict on either count; (2) the trial court erred in not permitting him to introduce the responses of other applicants to the SBA follow-up letter, all of which indicated that no FmHA loan was received; (3) the District Court erred by not permitting appellant to cross-examine government witnesses about appellant's honesty and lack of criminal intent; (4) it was error to prevent appellant from introducing evidence as to a specific instance of his honesty; (5) the judge charged the jury incorrectly on the element of intent to deceive; (6) the District Court considered impermissible factors and abused its discretion in sentencing appellant.

We agree with the District Court that there was sufficient evidence to sustain the conviction on Count 1. It is true that appellant did not physically fill out the FmHA application. Following standard procedure in the ASCS office, the form was filled out by a clerk from a worksheet. However, appellant was the head of the office. The errors on the application apparently came from the worksheet, which the testimony indicated either appellant or one of two other people filled out. Contrary to normal office procedure, appellant asked another person in the office to sign his application to indicate

that the figures on it had been verified. Appellant did not ask this person to verify his application, and was aware that he did not verify it. As a long-time ASCS officer, appellant had a general knowledge of the FmHA loan programs, but did not alert the FmHA office to the fact that he received a loan more than twice as large as his actual crop losses would permit. Perhaps no single piece of evidence would sustain the conviction, but together the evidence strongly supports the finding of guilt.

We also find sufficient evidence to sustain the conviction on Count 3. Appellant's defense to this charge is that, notwithstanding the clear request for information about FmHA loans in the SBA follow-up letter, appellant was told by a Mr. Smith in the SBA office that that information was not necessary. Appellant introduced evidence that other government agents shared appellant's understanding. However, Mr. Smith testified to the contrary at trial. The jury was entitled to believe Mr. Smith, not appellant.

We have considered appellant's remaining contentions and find them to be without merit. Accordingly, the judgment of the District Court is affirmed.

ENTERED BY ORDER OF THE COURT

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Clerk

OFFICE FILE COPY

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PANEL REPORT

DATE: Friday, October 16, 1981, Courtroom No. 1

PANEL: WEICK, KENNEDY and UNTHANK *

NO: 79-3455, Meadows v. Kentucky Dept. for Human Resources, Logan County, et al.
W.D. Kentucky - Johnstone, J.

Appellants Thomas and Judy Meadows appeal the District Court's dismissal of several claims and defendants in this civil rights action.

Appellants are a married couple living in Tennessee. They allege that in May, 1970, they were brought into the County Court of Logan County, Kentucky on the pretense of answering to a bad check charge that had already been resolved. At this proceeding appellants' two children were forcibly removed from them for abuse. Appellees Kisselbaugh and Wilson are alleged to be the deputies who accompanied appellants to court and physically removed the children from their arms. Appellee Riley was the county prosecutor. Appellants allege that he falsely assured them that removal of the children would only be temporary. Appellee Judge Brown was then presiding judge of Logan County Court. Appellee Dr. Byrne allegedly conspired in the removal of the children by filling out a report of suspected child abuse.

Later in the summer of 1970, Judy Meadows again became pregnant. She claims that she was induced to undergo a sterilization operation after this pregnancy in exchange for a promise that her children would be returned to her. The operation was performed in 1971 at appellee Logan County Hospital by appellee Dr. Holt. Appellant was referred to Dr. Holt by appellee Dr. Dodson.

Ms. Meadows also alleges that in May, 1972, she was subpoenaed to appear in Logan County Court in an unnamed case, supposedly on behalf of the Commonwealth of Kentucky. She alleges that Judge Brown gave her oral assurances that the purpose of the subpoena was to talk about returning appellants' children to them, but that in fact, the hearing was used forcibly to remove Ms. Meadows' third child from her and to commit her to

*The Honorable G. Wix Unthank, United States District Court, Eastern District of Kentucky, sitting by designation.

a state mental hospital. Appellee Brown was the judge, and appellee Riley was instrumental in bringing Ms. Meadows before the court.

Appellants filed a complaint in the District Court in 1974. The complaint alleged that Ms. Meadows was deprived of her liberty without due process; that she was denied her due process and equal protection right to have children; that several social worker defendants, who are not appellees here, breached an oral agreement to return her children to her and to pay for her sterilization. The complaint alleged that appellees Dodson and Holt and the Logan County Hospital were negligent in not discovering that Ms. Meadows was incapable of consenting to the sterilization due to mental incompetency. Appellants sued under 42 U.S.C. § 1983, the 5th, 6th, and 14th amendments, and various Kentucky laws. They sought both damages and injunctive relief.

On January 31, 1975, the District Judge dismissed the Commonwealth of Kentucky on the ground that the 11th amendment barred the suit as to it. On October 23, 1975, after giving the parties a chance to present their evidence regarding Ms. Meadows' incompetency, the District Judge dismissed Logan County Hospital and Drs. Dodson and Holt on alternative grounds: (1) the Kentucky one-year statute of limitations for cases based on medical negligence had run; (2) even if the statute of limitations had not run, appellants presented no evidence that Ms. Meadows was incompetent at the time the sterilization was performed, nor any evidence that these appellees had any reason to believe that Ms. Meadows might be incompetent.

Nothing further happened in the District Court until July, 1978, when appellants were permitted to file an amended complaint. The amended complaint added defendants Dr. Byrne and Deputies Wilson and Kisselbaugh. The complaint expanded a great deal on the violations of appellants' various rights, now alleging that defendants conspired to deny appellants their right to have and bear children; that defendants denied appellants their right of privacy; and that the conspiracy was a continuing one, in that appellants' children have not yet been returned. The complaint added that the above violated 42 U.S.C. §§ 1985 and 1986, as well as the aforementioned section 1983. A claim for punitive damages was included. The complaint also added appellants' children as plaintiffs, by their next friend.

The District Judge again dismissed the State of Kentucky and the Logan County Department of Human Resources under the 11th amendment. He held that Judge Brown and Prosecutor Riley were absolutely immune from suit. The court ruled that the one-year statute of limitations under sections 1985 and 1986 had run, so dismissed those claims. The court noted that appellees Wilson and Kisselbaugh were not named in the original complaint, and it found that they did not have such notice of the institution of this suit at the time of the original complaint that the amended

complaint could relate back as to them under Fed. R. Civ. P. 15(c). The amended complaint alleged that these appellees were guilty of fraud, to which a 5-year statute of limitations applies. The District Court found that the five years had expired by the time the amended complaint was filed, so it dismissed the complaint as to Wilson and Kisselbaugh. The District Court also dismissed Drs. Dodson and Holt and Logan County Hospital for the reasons stated in the October, 1975 order of dismissal. It dismissed Dr. Byrne because the complaint did not allege that he took any actions of his own. The court also dismissed appellants' children, but later reinstated them, and their participation is not in issue here. The court refused to dismiss the complaint as to the several social workers.

On appeal, appellants argue that it was error to dismiss any of the above parties. This case is something of a procedural quagmire. Judges Weick, Kennedy and Unthank agree that further study is necessary simply in order to sort the case out. Judge Unthank volunteered to undertake the task and to prepare an opinion reflecting his findings.

All three judges agree that the dismissal of Judge Brown and prosecutor Riley should be affirmed and that the dismissal of the deputies can probably be affirmed. They further agree that all of the dismissals on statute of limitation grounds of Mr. Meadows' claims can be affirmed. The problem with affirming the remaining claims is that Mrs. Meadows asserts she is mentally incompetent and the statute of limitations has been tolled.

Cornelia G. Kennedy

cc: All Judges