

Rel: November 18, 2022

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0650), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2022-2023

SC-2022-0649

Frederick A. Burkes, Sr.

v.

James Franklin

**Appeal from Jefferson Circuit Court
(CV-22-18)**

WISE, Justice.

This appeal arises from a quo warranto action ("the present action") initiated by a February 4, 2022, complaint filed in the Jefferson Circuit Court by Frederick A. Burkes, Sr., on the relation of the State of Alabama, in which he alleged that James Franklin "has unlawfully usurped the public office of the constable for District 59 in Jefferson

County, Alabama." Franklin filed a motion to dismiss the present action, which the circuit court granted. We reverse and remand.

Facts and Procedural History

This is not the first time these parties have been before this Court. The following facts from this Court's decision in Burkes v. Franklin, [Ms. 1210044, July 15, 2022] ___ So. 3d ___ (Ala. 2022), will be helpful to an understanding of this case:

"In March 2020, Burkes defeated Franklin, the incumbent, in a primary election for the office of constable for District 59 in Jefferson County. Burkes was unopposed in the general election and was declared and certified as the winner of the election on Friday, November 13, 2020.

"Thereafter, Franklin sent a letter to the Jefferson Probate Court informing the probate court that Burkes had not filed an official bond within 40 days of the declaration of Burkes's election to the office of constable. On January 8, 2021, the probate court sent a letter to Governor Kay Ivey stating, in relevant part:

"'Under Ala[.] Code [(1975),] § 11-2-3, the official bonds of all county officials (except for the bond of the judge of probate) are to be recorded in the office of judge of probate. This includes the official bonds of duly elected county Constables.

"'Alabama Code [(1975),] § 36-5-2 provides that "[i]n all cases, official bonds must be filed in the proper office within 40 days after the declaration of election" Alabama Code [(1975),] § 36-5-15 provides in turn that "[i]f any officer

required by law to give bond fails to file the same within the time fixed by law, he vacates his office. In such case, it is the duty of the officer in whose office such bond is required to be filed at once to certify such failure to the appointing power, and the vacancy be filled as in other cases." Finally, Ala.] Code [(1975),] § 36-23-2 provides that "[v]acancies in the office of constable shall be filled by appointment of the Governor, and the person appointed shall hold office for the unexpired term until his successor is elected and qualified."

"'....

"'It is this office's understanding that by statute it is required to notify the Governor (as the "appointing power") of any duly elected Constable failing to file his or her bond within 40 days after election results are declared, as the office is then, by statute, vacated. Please consider this letter to be such declaration and certification with respect to Constable for District 59, Jefferson County, Alabama. This office takes no position with respect to any appointment to fill any vacancy; I would note, however, that Mr. Burkes, the duly elected Constable for District 59, ran unopposed in the November 2020 General Election.'

"The governor thereafter appointed Franklin to the office of constable for District 59.

"On April 22, 2021, Burkes, acting pro se, initiated this action, which he identified as a quo warranto action, in the circuit court. Burkes alleged in his complaint that he had been sworn into the office of constable on January 4, 2021, and that he had filed an official bond on December 31, 2020, which he contended was timely pursuant to § 36-23-4, Ala. Code 1975 ('Before entering upon the duties of his office, the

constable must give bond as prescribed by law.'). Burkes requested that Franklin be ordered to return 'all Constable paperwork back to the clerk's office and to cease and desist all actions concerning this office.'

"Also acting pro se, Franklin filed an 'answer' in which he also moved for a 'summary judgment.' In summary, Franklin asserted that Burkes had vacated the office of constable by failing to comply with the pertinent statutory procedure concerning the payment of official bonds. Franklin requested, among other things, that Burkes be ordered to cease and desist all activities concerning the office of constable and that Burkes's quo warranto action be 'dismissed with prejudice.' Franklin attached to his filing a copy of the probate court's letter to the governor and a copy of a February 26, 2021, letter from the governor to Franklin appointing Franklin to the office of constable.

"On August 19, 2021, the circuit court entered a judgment that provided, in relevant part:

"This matter came on before the Court for hearing on [Franklin]'s motion for summary judgment. [Burkes] neither filed a response nor appeared for oral argument. Accordingly, and after due consideration of the pleading and exhibits attached, the Court finds [that Franklin]'s motion is due to be granted.

"Therefore, [Franklin]'s motion for summary judgment is hereby granted. Judgment is entered in favor of [Franklin] and against [Burkes]. [Burkes]'s complaint is dismissed with prejudice. Costs taxed as paid.

"This constitutes a final order in this case. The Jefferson County Circuit Clerk is directed to remove this matter from the Court's active docket.'

"Still acting pro se, Burkes sent a letter to the circuit court on August 24, 2021, asserting that he had 'never received notices for court' and asking the circuit court to set a new court date. The circuit court appears to have construed Burkes's letter as a postjudgment motion to alter, amend, or vacate the circuit court's judgment. See Rule 59(e), Ala. R. Civ. P. On September 15, 2021, after conducting a hearing on Burkes's postjudgment motion, the circuit court entered an order that provided, in pertinent part:

"This matter came on before the Court for hearing on [Burkes]'s motion to vacate or modify this Court's order dated August 19, 2021, granting [Franklin]'s motion for summary judgment. All parties were present and presented pro se argument during the hearing. After due consideration of the pleadings and argument from the parties, the Court finds as follows:

"1. [Burkes], who was elected to the position of Constable, District 59[,] at the time of the November 2020 general election[,] failed to timely file his bond with the probate court and thereby vacated his office pursuant to [§] 36-5-2[, Ala. Code 1975].

"2. Subsequent thereto, the probate court wrote Governor Ivey certifying a vacancy in office of Constable, District 59[,] pursuant to [§] 36-5-15[, Ala. Code 1975].

"3. While regrettable in cases of mistake, the law regarding failure of an officer to timely file a bond is clear; by statute, if any duly elected Constable fails to file his/her bond within fort[y] (40) days after election results are declared, he/she vacates his/her office.

"'4. On or about February 26, 2021 (Revised: March 4, 2021), Governor Ivey reappointed ... Franklin as Jefferson County Constable, as representative of District 59.

"'5. Accordingly, judgment remains entered in favor of ... Franklin against ... Burkes

"'6. Per his reappointment, ... Franklin is hereby the Jefferson County Constable representing District 59.

"'7. However, all papers served by [Burkes] during the period after January 20, 2021, shall remain declared as "good service[.]" as this Court finds he was acting as a "de facto officer" while exercising the duties of a de jure officer under color of election. Gwin v. State, 808 So. 2d 65 [(Ala. 2001)].

"'[Burkes]'s motion to modify/vacate is hereby denied. As there is no just reason delay, the Court hereby directs the entry of a final judgment as to claims plead[ed].'"

___ So. 3d at ___-___. Burkes appealed to this Court, challenging the circuit court's judgment entered in the action initiated by the filing of his April 22, 2021, complaint ("the prior action").

On February 2, 2022, while the appeal in Burkes was pending in this Court, Burkes commenced the present action. In the present action, Burkes asserted that he had been certified the winner of the general election for the office of constable on or about December 31, 2020; that he

had "timely filed the appropriate bond with the Probate Court of Jefferson County on January 4, 2021, as required by Alabama law ... and said timeliness is confirmed by John H. Merrill, Secretary of State"; and that he had then been sworn into the office of constable on January 4, 2021. He asked the circuit court to enter an order holding that Franklin had unlawfully usurped the office of constable for District 59 in Jefferson County. Burkes further asked the circuit court to find that he was the properly elected constable for District 59 in Jefferson County; to find that the bond he had posted for that office had been timely filed; and to order that he assume the duties of constable as soon as practicable.

On March 3, 2022, Franklin filed a pro se motion to dismiss the present action "on the grounds that the parties, facts, issues, and claims raised in this case have already been heard and decided" in the prior action.

On April 20, 2022, Burkes filed his reply to Franklin's motion to dismiss. After addressing the merits of his underlying claims, Burkes went on to assert:

"Of significant relevance to the issue before the court in whether or not to dismiss the present action without an adjudication of the facts and a determination about whether or not this previous court's ruling is dispositive as to this case,

is the application of Code of Alabama 1975 § 6-6-591(b). This statute requires that when a person usurps, intrudes or unlawfully hold[s] public office, the action may be commenced on the information from any person who has given Security for Cost of the action to be approved by the clerk of the court in which the action is brought."

(Emphasis in original.) After discussing caselaw regarding this issue, Burkes pointed out that, in the appeal from the judgment entered in the prior action, which was then still pending before this Court, Franklin had argued that the prior action "was flawed and that there was no indication or documents in the record that Burkes had filed the security for cost which had been approved by the Circuit Clerk, as required by the Code of Alabama, § 6-6-591(b)." Burkes went on to argue:

"... The effect of failure of the giving of the security for cost in an action is that the trial court was without jurisdictional authority to have heard the matter in the first instance, and should have been dismissed based on jurisdictional grounds, again, consistent with the argument made by the Appellee Franklin in his reply brief.

"... Franklin should not now invite error by this court by making a favorabl[e] ruling on his Motion to Dismiss by disregarding the statutory provisions of § 6-6-591(b) as well as argument which Franklin has made before to the Appellate courts."

On June 7, 2022, after conducting a hearing, the circuit court entered a judgment granting Franklin's motion to dismiss the present

action. On June 10, 2022, Burkes filed a notice of appeal from the judgment dismissing the present action.

On July 15, 2022, this Court issued its decision in Burkes. In Burkes, this Court held that the circuit court had lacked subject-matter jurisdiction over the prior action because Burkes had not given the circuit court security for costs, as required by § 6-6-591(b), Ala. Code 1975, and that the circuit court's judgment in the prior action was therefore void. This Court then dismissed the appeal because a void judgment will not support an appeal. Burkes, ___ So. 3d at ___.

Discussion

Burkes argues that, because the circuit court did not have subject-matter jurisdiction over the prior action, the circuit court erroneously dismissed the present action on the grounds of res judicata and collateral estoppel.

"In Lee L. Saad Construction Co. v. DPF Architects, P.C., 851 So. 2d 507, 516-17 (Ala. 2002), this Court explained:

"Res judicata and collateral estoppel are two closely related, judicially created doctrines that preclude the relitigation of matters that have been previously adjudicated or, in the case of res judicata, that could have been adjudicated in a prior action.

""The doctrine of res judicata, while actually embodying two basic concepts, usually refers to what commentators label 'claim preclusion,' while collateral estoppel ... refers to 'issue preclusion,' which is a subset of the broader res judicata doctrine."

"Little v. Pizza Wagon, Inc., 432 So. 2d 1269, 1272 (Ala. 1983) (Jones, J., concurring specially). See also McNeely v. Spry Funeral Home of Athens, Inc., 724 So. 2d 534, 537 n.1 (Ala. Civ. App. 1998). In Hughes v. Martin, 533 So. 2d 188 (Ala. 1988), this Court explained the rationale behind the doctrine of res judicata:

""Res judicata is a broad, judicially developed doctrine, which rests upon the ground that public policy, and the interest of the litigants alike, mandate that there be an end to litigation; that those who have contested an issue shall be bound by the ruling of the court; and that issues once tried shall be considered forever settled between those same parties and their privies."

"533 So. 2d at 190. The elements of res judicata are

""(1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both actions."

"Equity Res. Mgmt., Inc. v. Vinson, 723 So. 2d 634, 636 (Ala. 1998). "If those four elements are present, then any claim that was, or that could have been, adjudicated in the prior action is barred from further litigation." 723 So. 2d at 636. Res judicata, therefore, bars a party from asserting in a subsequent action a claim that it has already had an opportunity to litigate in a previous action."

Austill v. Prescott, 293 So. 3d 333, 341-42 (Ala. 2019).

"The doctrines of res judicata and collateral estoppel apply only when a prior judgment was rendered by a court of competent jurisdiction. See, e.g., Lloyd Noland Found., Inc. v. HealthSouth Corp., 979 So. 2d 784, 793 (Ala. 2007) (reciting the elements of res judicata and collateral estoppel and recognizing that an essential element of both doctrines is that the claim or issue has been or could have been decided in a prior action by a court of competent jurisdiction)."

Stroeker v. Harold, 111 So. 3d 138, 147-48 (Ala. Civ. App. 2012).

In Burkes, this Court held that "Burkes's failure to give the circuit court security for the costs of [the prior] action deprived the circuit court of subject-matter jurisdiction over the [prior] action." ___ So. 3d at ___. Therefore, the circuit court's judgment in the prior action was not rendered by a court of competent jurisdiction. Accordingly, the doctrines of res judicata and collateral estoppel do not apply to bar the present action.

Conclusion

For the above-stated reasons, we reverse the circuit court's judgment dismissing the present action and remand the case for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Parker, C.J., and Bolin and Stewart, JJ., concur.

Sellers, J., concurs in the result.