

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002086-MR
AND
NO. 2001-CA-002272-MR

ESTHER JOHNSON,
JOHNSON PROPERTIES, INC.,
CLASSIC PROPERTIES, INC.

APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS-APPEAL
FROM KENTON CIRCUIT COURT
v. HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 97-CI-02512

THE E.W. SCRIPPS COMPANY,
WCPO TELEVISION NEWS,
J.B. CHASE, STUART ZANGER,
JEFFERY KEENE, AND
LAURE QUINLIVAN

APPELLEES

AND

TONI ALLENDER

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING
** **

BEFORE: BUCKINGHAM, COMBS, AND McANULTY, JUDGES.

BUCKINGHAM, JUDGE: Following a trial by jury in the Kenton Circuit Court, Esther Johnson appeals from a directed verdict entered by the court in favor of The E.W. Scripps Co., WCPO

Television News, J.B. Chase, Stuart Zanger, Jeffery Keene, and Laure Quinlivan, and from a jury verdict in favor of Toni Allender.¹ We affirm.

The controversy which was the subject of Johnson's civil complaint arose after WCPO Television aired an investigative report by its I-Team² concerning favoritism and conflicts of interests between the director of the City of Covington's Housing Department and Esther Johnson. Johnson has been a real estate developer for many years in Covington and Northern Kentucky. She rehabilitates old houses for lower income and other individuals. Howard Hodge was the director of Covington's Housing Department, and his duties included overseeing the federally funded loan program geared toward the rehabilitation of historic and low-income properties.

The WCPO broadcasts occurred on September 3, September 4, and September 16, 1997. The broadcasts resulted from a controversy which had been the subject of discussion within the business community and within the government of the City of Covington for quite sometime. Furthermore, several members of the community, including Toni Allender, had voiced their

¹ WCPO Television News is a television broadcasting company which broadcasts in the Greater Cincinnati area, including Kenton County, Kentucky. E.W. Scripps owns the television station, and Chase, Zanger, Quinlivan, and Keene are employees. Allender is a real estate agent and a building rehabber who does business in the Covington area.

² The WCPO I-Team is a group of investigative reporters from WCPO Television that investigates and reports on viewer concerns.

complaints about favoritism by Hodge toward Johnson. Those who complained asserted that, among other things, Johnson had received considerably more of the loan proceeds than any other person or entity. Further, the City Commission had inquired into the matter as early as the first half of 1997, and it was in the process of establishing a committee to oversee the administration of the federal loans when the broadcasts were aired. Also, in July and August of 1997, local newspaper articles covered allegations and perceptions that Hodge had given favorable treatment to Johnson.

Johnson alleged in her civil complaint that statements made in the broadcasts by news personnel as well as by some of those interviewed defamed her. In addition, she alleged that the news reports depicted her in a false light.

During the jury trial of the case, the trial court directed a verdict in favor of all defendants except Toni Allender, one of the individuals whose interview was broadcast. At the conclusion of the trial, the jury returned a verdict in favor of Allender, finding that each of the allegedly defamatory statements made by her were not false. This appeal by Johnson from the directed verdict and from the jury verdict followed.

Johnson's first argument is that the trial court erred in determining that she was a limited purpose public figure. She asserts that any notoriety she achieved in the public's eye arose solely from the controversy from which the defamatory statements

arose. Thus, she claims she could not have been a limited purpose public figure because a person cannot be made a public figure simply by being pulled into a controversy and feeling forced to respond to allegations stemming from it.

Johnson was involved in the real estate development business for many years in the Northern Kentucky area. Much of this development involved the rehabilitation of historic buildings in the City of Covington. As she developed properties, her business, wealth, and name recognition grew. She was selected as the 1994 Outstanding Woman in Northern Kentucky by the Kentucky Post, a Northern Kentucky newspaper. The U.S. Small Business Administration recognized her as the Outstanding Woman of 1994 in Kentucky. Also, Provident Bank selected her for its advisory committee because she was one of the key people in the community. Furthermore, she was appointed to a city committee given responsibility for determining and recommending to the General Services Administration the best site for a new federal courthouse in Covington. In addition, the City of Covington profiled Johnson and her work for the city in its 1993 Annual Report.

In Warford v. Lexington Herald-Leader Co., Ky., 789 S.W.2d 758 (1990), the Kentucky Supreme Court noted that the decision as to whether a plaintiff is a public figure is a question of law. Id. at 761.³ The Warford court noted that the

³ Warford was a former University of Kentucky basketball

focus in cases such as this is upon ~~A~~the nature and extent of an individual's participation in the particular controversy giving rise to the defamation. @ Id. at 767, citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 352, 94 S.Ct. 2997, 3013, 41 L.Ed.2d 789 (1974). Further, the Warford court stated that questions must be answered in determining an individual's status as a public figure. The questions are:

- (1) in what particular and identifiable public controversy,
- (2) did appellant by some voluntary act involve himself to the extent that he either assumed a role of public prominence, or was in a position to influence others or the outcome of the controversy, and
- (3) did appellant enjoy regular and continuing access to the media?

Id. at 766.

Kentucky courts have not addressed the public versus private status of someone who had grown in prominence through his or her real estate development activities and interaction with city government as has Johnson. However, the U.S. Supreme Court resolved a similar fact situation in Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6, (1970). The plaintiff's role in his community's development in that case was very similar to Johnson's. The Supreme Court held that the plaintiff's status ~~A~~clearly fell

player who was an assistant coach at the University of Pittsburgh. The supreme court held that he was not a limited purpose public figure. Id. at 771.

within even the most restrictive definition of a public figure. @
398 U.S. at 8-9.

We conclude that the trial court in the case *sub judice* was correct in holding as a matter of law that Johnson was a limited purpose public figure. As we have noted, a public controversy involving Johnson and her relationship with the Housing Department existed prior to the WCPO Television broadcasts and the alleged defamatory statements. Johnson first argues that she did not voluntarily involve herself in the public controversy to the extent that she assumed a role of public prominence or was able to influence others or the outcome of the controversy.

Johnson was an integral part of the controversy. It was alleged that she received more loan money from the City of Covington than any other developer. It was also alleged that she Asnags most of the buildings that the city sells for one dollar. @

It was further alleged that Hodge, the Housing Department director, showed favoritism to Johnson and that she did not have to provide receipts to the Housing Department like other developers in Covington.

Johnson was a high profile business person who was accepting a large portion of the federal loan money disbursed by the City of Covington. Further, she had commented in a newspaper article that city commissioners who opposed her would see how much influence she wielded when the next election occurred.

Also, she was in a position to influence the outcome of the controversy by showing the concerned citizens and members of city government that no conflict of interest between her and Hodge existed and that she was not the recipient of favorable treatment. While Johnson claimed that she was pulled into the Housing Department controversy, her own actions, including her comments in the newspaper article and her taking a trip to Europe with Hodge and others, created more controversy and injected her further into it.

Johnson also maintains that she did not enjoy regular and continuing access to the media. See Warford, 789 S.W.2d at 766. Johnson had access to the media before this controversy erupted. As we have noted, she had climbed to a position of prominence in the community and was frequently the subject of newspaper articles of local interest. Often, these articles related to particular properties that she engaged to develop or rehabilitate. However, they occasionally dealt with other issues such as the location of the federal courthouse, her Outstanding Woman awards, and her role in the development of the city.

Her access to the media escalated as the controversy escalated. She was repeatedly requested to give her side of the story prior to the WCPO Television broadcasts. Thus, she had ample opportunity to counter any false statements. Her refusal to do so did not change the fact that media access was readily available.

Like the real estate developer in the Greenbelt case, Johnson was a public figure.⁴ We conclude that the trial court in the case *sub judice* did not err when it determined that Johnson was a limited purpose public figure.

Johnson's second argument is that the trial court erred in directing a verdict against the media defendants because there was sufficient evidence of actual malice to submit to the jury. In order to establish an action for defamation, there must be defamatory language about the plaintiff which is published and which caused injury to his or her reputation. Columbia Sussex Corp., Inc. v. Hay, 627 S.W.2d 270, 273 (1981). A defamatory statement about a public figure is actionable only if it was made with knowledge that it was false or with reckless disregard of whether it was false or not. New York Times Co. v. Sullivan, 376 U.S. 254, 280 84 S.Ct. 710, 726, 11 L.Ed.2d 686, 706 (1964). This is the actual malice standard.

Johnson's argument is that there was evidence produced by her at trial that showed that the media defendants acted with actual malice. However, Johnson overlooks the fact that the

⁴ Johnson seeks to distinguish the facts in this case from the facts of the Greenbelt case on the ground that the plaintiff in that case conceded that he was a public figure. We view that fact as unimportant because the Supreme Court noted that the concession was clearly correct. 398 U.S. at 8. The Court explained its statement by noting that the plaintiff was deeply involved in the future development of the city of Greenbelt, had conducted business with the city in the past, and was again seeking favors from the city in connection with the construction of housing units. Id.

trial court also based its directed verdict on the ground that reasonable jurors could not find that the broadcasts in question were false.@ Johnson neither attacked this portion of the trial court's directed verdict in the argument portion of her brief nor did she list the trial court's ruling in that regard in her prehearing statement. Accordingly, we need not address whether the statements made in the broadcasts were made with actual malice since Johnson's action necessarily fails due to her failure to contest the trial court's conclusion that the statements were not false. CR⁵ 76.03(8); Monticello Co., Inc. v. Commonwealth, Ky. App., 864 S.W.2d 921, 925 (1993).

Nevertheless, we conclude that the trial court's directed verdict in favor of the media defendants on the ground of lack of sufficient proof of actual malice was correct.

The directed verdict standard in civil cases is stated in Taylor v. Kennedy, Ky. App., 700 S.W.2d 415 (1985), as follows:

In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no

⁵ Kentucky Rules of Civil Procedure.

disputed issue of fact exists upon which reasonable men could differ.

Id. at 415. Furthermore, Actual malice must be shown by clear and convincing evidence.@ Welch v. American Publishing Co. of Kentucky, Ky., 3 S.W.3d 724, 728 (1999).

In support of Johnson's argument that the media defendants acted with actual malice, she maintains that they failed to perform an adequate investigation, that they were aware of the harm potential broadcasts would cause her, and that there was no deadline for the story. She argues that the investigators should have interviewed Stern-Hendy Development Co., another development company in the area, and that the investigators should have looked through her files and receipts.

However, we agree with the trial court that no reasonable fact-finder could conclude from the evidence that the media defendants failed to properly investigate Johnson or the controversy. The investigators interviewed nearly fifty people, including other developers, city officials, and concerned citizens. In addition, they repeatedly gave Johnson an opportunity to give an on camera interview or provide her side of the story in writing before the broadcasts were aired. Johnson refused to do either.

In short, we conclude that the trial court properly granted a directed verdict in favor of the media defendants due to lack of sufficient proof of actual malice. Also, we conclude that the trial court correctly based its directed verdict on the

lack of sufficient proof that the statements in the broadcasts were false.

Johnson's third argument is that the trial court abused its discretion when it refused to admit Johnson's evidence of the I-Team's harassment of her because this evidence showed actual malice on the part of the media defendants, placed the media defendants' credibility at issue, and contradicted the media defendants' evidence of Johnson's alleged paranoia. Johnson sought to introduce evidence that she and Hodge were chased in their vehicles at high speeds by I-Team investigators and that they were harassed by the I-Team's continuing efforts to get footage of her and Hodge together. She asserts that the evidence should have been submitted because it tended to prove the sort of harassment, ill will or spite necessary to establish the actual malice. In support of her argument Johnson cites Kroger Co. v. Willgruber, Ky., 920 S.W.2d 61, 67 (1996).

Whether to admit or exclude evidence to ensure the fairness of a trial is within the discretion of the trial court, and its determination will not be overturned on appeal in the absence of a showing of an abuse of such discretion. Mullins v. Commonwealth, Ky., 956 S.W.2d 210, 213 (1997). While Johnson argues that the evidence should have been admitted to prove ill will or spite, we note that the U.S. Supreme Court stated in Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 666, 109 S.Ct. 2678, 2687, 105 L.Ed.2d 562, 576 (1989), that the

actual malice standard is not satisfied merely through a showing of ill will or malice in the ordinary sense of the term. The Supreme Court went on to state that actual malice, instead, requires at a minimum that the statements were made with a reckless disregard for the truth. 491 U.S. at 667. Although Johnson argues that this evidence may be combined with other circumstantial evidence to support a finding of actual malice, the other evidence to which she refers, such as evidence of insufficient investigation, is not present.

Johnson also claims that the trial court abused its discretion when it excluded the evidence of the I-Team's harassing behavior because such evidence impacted upon the I-Team's credibility. She claims a document that instructed a cameraman to get pictures of her and Hodge together gave examples of stories the cameraman could tell Johnson so that she would not suspect he was with the I-Team. Johnson claims this document's apparent support of lying to get a story, combined with the I-Team's willingness to break the motor vehicle laws by driving at high speeds to get a picture, illustrated a lack of credibility that the jury should have been allowed to consider when evaluating testimony.

The court excluded the document but allowed Johnson to call the cameraman to testify concerning what he was instructed to do. Johnson had the opportunity to present this evidence to the jury. However, she did not do so. Furthermore, these

matters are collateral to the questions surrounding Johnson's defamation claim. They do not relate to a determination of whether the media defendants knew or should have known that their broadcasts were false. Thus, we conclude that the trial court did not abuse its discretion in excluding the evidence.

Johnson's fourth argument is that the trial court committed reversible error in its construction of Instruction No. III because it was confusing to the jury. She asserts that the instruction contained five conjunctions in one sentence and that it was nearly impossible for the jury to understand the decision they are about to make.⁶ Having reviewed the jury instructions, we conclude that any confusion due to combining the alleged defamatory statements in Instruction No. III was removed or rendered harmless by Instruction No. IV. By submitting separate and independent questions to the jury under Instruction No. IV, the trial court cleared up any confusion that may have been caused by Instruction No. III. We see no ground for reversing the judgment based on this alleged error.

The judgment of the Kenton Circuit Court is affirmed.⁶

ALL CONCUR.

⁶ By affirming the trial court's judgment, we have rendered the appellee's cross-appeal moot.

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