

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002324-MR

HOWARD HODGE

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 97-CI-02516

E.W. SCRIPPS CO., WCPO-TELEVISION NEWS,
J.B. CHASE, STUART ZANGER, LAURE QUINLIVAN,
JEFFREY KEENE AND TONI ALLENDER

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BUCKINGHAM, COMBS, AND McANULTY, JUDGES.

BUCKINGHAM, JUDGE: Howard Hodge appeals the Kenton Circuit Court's summary judgment in favor of the appellees, The E.W. Scripps Company, WCPO Television News, J.B. Chase, Stuart Zanger, Laure Quinlivan, Jeffrey Keene, and Toni Allender on his claims of defamation and false light invasion of privacy.¹ He argues

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.

that summary judgment was improper because he was entitled to prove to a jury that the appellees defamed him and invaded his privacy with Afalse light.@ We disagree and affirm the trial court.

This suit arose from television broadcasts by WCPO Television News concerning a controversy which had been the subject of discussion within the business community and the government of the City of Covington for quite some time. The issue was the manner in which Howard Hodge, Housing Development Director for the City of Covington, administered the Covington Housing Department, specifically the federally funded loan program geared toward the rehabilitation of historic and low income properties.

Several members of the community, including Toni Allender, had voiced their complaints about favoritism by Hodge toward a local Arehabber,@ Esther Johnson. Those who complained asserted that, among other things, Johnson had received considerably more of the loan proceeds than any other person or entity. Indeed, the City Commission had inquired into the matter as early as the first half of 1997 and was in the process of establishing a committee to oversee the administration of the federal loans when the broadcasts were aired. Furthermore, in July and August of 1997, local newspaper articles had covered allegations and perceptions that Hodge gave favorable treatment to Johnson.

Allender contacted Laure Quinlivan of the WCPO I-Team and expressed her concerns.² Quinlivan's investigation led to WCPO broadcasts on September 3, September 4, and September 16, 1997. Hodge alleges that he was defamed in the broadcasts. As his claims relate to Allender, he alleges that two comments by her were defamatory. The first appears in the broadcast with Allender speaking:

. . . that the housing director of the City of Covington is on vacation with Esther Johnson, his number one rehabber/contractor. Isn't that - - there's something wrong with this picture here, but again, you have to understand Howard Hodge does what Howard Hodge wants to do, and he doesn't care what anybody thinks, and that's why I'm not taking it any more.

Second, Hodge complains about a comment by Allender that was aired at the beginning of the second broadcast. The second broadcast was predominantly about Esther Johnson. Allender's comment was, "I believe the money is not being used properly, that's what I believe." Shortly after the comment, the report shows Allender discussing what appears to be the incomplete rehabilitation of properties for which money was apparently loaned to Johnson.

Hodge filed suit against the appellees, as did Esther Johnson, alleging defamation and false light invasion of privacy. Johnson's suit was not joined with Hodge's, and her case proceeded

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

to trial.³ After the trial in Johnson's case, the court considered appellees' summary judgment motions in this case. The court concluded that no genuine issue of material fact existed and that the appellees were entitled to judgment as a matter of law. In granting summary judgment, the trial court specifically concluded that Hodge failed to present evidence to establish a prima facie case of defamation and false light invasion of privacy. This appeal by Hodge resulted.

Hodge admitted that he was a public figure. In order to sustain an action for defamation, the statements he complained of must have been facially defamatory, about him, false, and published with actual malice. New York Times Co. v Sullivan, 376 U.S. 254, 280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); Welch v. American Publishing Company of Kentucky, Ky., 3 S.W.3d 724, 730 (1999); Columbian Sussex Corp., Inc. v. Hay, Ky. App., 627 S.W.2d 270, 273 (1981). In order to sustain an action for false light invasion of privacy, the false light in which he objects to being placed must be highly offensive to a reasonable person, and the publisher must have had knowledge of, or acted in reckless disregard as to, the falsity of the publicized matter and the false light in which the plaintiff was placed. McCall v.

³Johnson's suit resulted in a directed verdict for the defendants except Toni Allender. However, the jury returned a verdict in favor of Allender finding that the allegedly defamatory statements were not false. The judgment is now on appeal, No. 2001-CA-002086, with an accompanying cross-appeal, No. 2001-CA-002272. Oral arguments in this case and the appeal and cross-appeal from Johnson's case were heard together.

Courier-Journal and Louisville Times Co., Ky., 623 S.W.2d 882, 888 (1981). If the statements or presentation that allegedly defamed the plaintiff or placed him in a false light were true or substantially true, the defamation and false light invasion of privacy actions fail. Bell v. Courier-Journal and Louisville Times Company, Ky., 402 S.W.2d 84, 86-87 (1966); McCall, 623 S.W.2d at 888; Buckholtz v. Dugan, Ky. App., 977 S.W.2d 24, 27 (1998). A statement is substantially true even if the exact facts and minute details are not reported accurately, Bell v. Courier-Journal & Louisville Times Co., Ky., 402 S.W.2d 84, 87 (1966), and if the inaccuracy does not appreciably affect the defamatory result. See Pearce v. Courier-Journal, Ky. App., 683 S.W.2d 633, 635 (1985).

Once the appellees presented a properly supported motion for summary judgment convincing the court of the absence of a genuine issue of material fact, Hodge was required to show the court affirmative evidence from the record of an existing issue of material fact to prevent summary judgment from being entered against him. See Lewis v. B & R Corporation, Ky. App., 56 S.W.3d 432, 436 (2001), citing Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 82 (1991), Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992), and Hibbitts v. Cumberland Valley Nat. Bank & Trust Co., Ky. App., 977 S.W.2d 252, 253 (1998). Hodge was not required to argue his case, but he was required to point out evidence of record in support of the

prima facie case he sought to prove at trial. However, he did not.

The trial court found that Hodge failed to present any evidence to establish the falsity of the statements by the media defendants he claimed were defamatory. It noted that to the extent the broadcasts dealt with Hodge, they focused on his position as Housing Director for the City of Covington, his close personal relationship with Esther Johnson including the fact that Johnson accompanied him on a European vacation, and the perception within the community that Hodge gave favorable treatment to Johnson. Further, it noted the evidence of record that substantiated the ~~Agist~~ of the broadcasts. For instance, the Department of Housing and Urban Development (HUD) investigated complaints concerning Hodge and found that Johnson benefited from the loan program to a greater extent than any other investor. In addition, the HUD report noted the appearance of favoritism toward Johnson. Moreover, Hodge acknowledged the close personal relationship with Johnson and the fact that there were rumors and a perception that he favored her. Furthermore, he did not present evidence to refute the results of the HUD investigation or to illustrate the falsity of any other statement he claimed defamed him.

The court also found that Allender's statement concerning Hodge doing what he wanted to do was non-actionable opinion. Allender made this comment after discussing Hodge's

European vacation. Allender's comment was simply her explanation of Hodge's apparent boldness in the face of public concern and criticism regarding his relationship with Johnson. While Hodge may have taken Johnson on vacation for a reason other than a lack of concern for what others think, his taking her was clearly the basis for Allender's opinion that he does not care what other people think.

An opinion is actionable if it implies an undisclosed defamatory fact. Yancey v. Hamilton, Ky., 786 S.W.2d 854, 857 (1989). However, if the basis for the opinion is disclosed, the opinion is not actionable. See Buchholtz, 977 S.W.2d at 28. Since the basis for Allender's opinion was disclosed, her opinion concerning Hodge's boldness was not actionable. The other allegedly defamatory statement made by Allender actually referred to Johnson and her use of loan money. Since it was not about Hodge, the statement was not actionable by him as defamatory. See Columbia Sussex, 627 S.W.2d at 273.

Finally, the trial court concluded that Hodge failed to present evidence from which a reasonable jury could conclude that the media defendants or Allender acted with actual malice. To prove actual malice, Hodge was required to present evidence, whether direct or circumstantial, to support a finding that the appellees knew the statements were false, that they entertained serious doubt as to the truth of the defamatory statements, or that they had a high degree of awareness of the statements

probable falsity. Ball v. E.W. Scripps Co., Ky., 801 S.W.2d 684, 689 (1990). Hodge claims Allender's deposition reveals proof that she acted with malice toward him when she made the allegedly defamatory comments. However, no part of the deposition excerpt he presented illustrates that she entertained serious doubt as to the truth of the defamatory statements or that she had a high degree of awareness of the statements' probable falsity. Indeed, the excerpts simply reveal Allender answering questions concerning the information upon which she based her statements about Hodge, Johnson, and some rehabilitated property. Since this evidence does not support his contention that Allender acted with malice and since this is the only evidence he presented to support that contention, he failed to present affirmative evidence that would support a finding of actual malice.

With regard to the media defendants, Hodge claims they improperly relied upon Allender without verifying her credibility. Further, he claims they failed to contact useful sources, such as public records, to support the allegations made against Johnson and him. He claims they knew the gravity of the suspected wrongdoing and the devastating effect it could have on him. He also claims Laure Quinlivan had a grudge against him and was out to get him. Furthermore, he claimed they only used sources on the broadcasts that were hostile to him. In addition, he claims Laure Quinlivan failed to look at City of Covington

files that would have documented her source's unreliability, and he concludes that the WCPO Appellants failure to retract can prove these false statements were broadcast with actual malice.

Then, he asserts, plainly, the statements in the WCPO broadcast are actionable because Howard Hodge can prove these false statements were broadcast with actual malice. Despite this list of supposed wrongdoing by the media defendants concerning the investigation of Hodge and the Housing Department, Hodge again fails to direct the court to evidence of record that illustrates these wrongdoings. Nevertheless, a review of the record and the broadcasts refutes Hodge's claims.

The evidence of record illustrates the media defendants' diligent efforts to ensure an accurate, balanced report. First, the broadcast does not appear to rely upon Allender as the only source for any conclusion it presented. Indeed, the broadcasts allow Allender's statements to stand on their own. In addition, the broadcasts presented sources who favored Hodge, including the mayor of Covington, as well as those who opposed him. Moreover, Quinlivan testified that she conducted numerous interviews, contacted more than 50 sources, and reviewed many Housing Department documents to ensure the accuracy of her report. Despite this, Hodge still claims WCPO acted with malice toward him by presenting only one side of the story. Nevertheless, he refused to take advantage of the

numerous offers made by WCPO to answer questions or conduct an on camera interview to explain his side of the story.

Hodge also claimed there was evidence of a grudge or vendetta by the media defendants against him. However, he failed to cite to evidence in support of this claim as well. Indeed, the court noted that ~~A~~there is no evidence in the record in this case that the media Defendants had a grudge or vendetta against the Plaintiff.[@] Hodge failed to illustrate either direct or circumstantial evidence upon which a jury could reasonably find that WCPO knew its statements were false, that it acted in reckless disregard as to the falsity of any of the statements, or that is entertained doubt as to the falsity of the statements.

This court reviews a summary judgment de novo. CR⁴ 56.

We seek to determine whether the trial court correctly determined that no genuine issue of material fact existed and, if so, whether the prevailing party was entitled to judgment as a matter of law. Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996). The party opposing a properly supported summary judgment motion may succeed on appeal by pointing out affirmative evidence from the record that illustrates the presence of a genuine issue of material fact. However, if it does not, we are left to conclude that no genuine issue existed and that the case was appropriate for summary judgment. We conclude that Hodge did not

⁴Kentucky Rules of Civil Procedure.

demonstrate the existence of genuine issues of material fact.
Thus, we affirm. Accordingly, summary judgment should be affirmed.

ALL CONCUR.

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