

RENDERED: SEPTEMBER 5, 2003; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000224-MR

DENVER MCFADDEN

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE TOM MCDONALD, JUDGE  
ACTION NO. 01-CI-006596

CAPE PUBLICATIONS, INC,  
D/B/A THE COURIER-JOURNAL;  
AND BELO KENTUCKY, INC.,  
D/B/A WHAS 11 NEWS

APPELLEE

OPINION

AFFIRMING

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BEFORE: COMBS, AND McANULTY, JUDGES; AND JOHN D. MILLER, SENIOR  
JUDGE.<sup>1</sup>

McANULTY, JUDGE. Appellant, Denver McFadden, appeals the  
dismissal of his action in the Jefferson Circuit Court for

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

failure to state a claim upon which relief could be granted. Appellant had filed a complaint alleging invasion of privacy and intentional infliction of emotional distress against appellees Cape Publications, Inc, d/b/a The Courier-Journal and Belo Kentucky, Inc., d/b/a WHAS 11 News.

The circuit court was required to assume the allegations of the complaint were true for purposes of ruling on a CR 12.02 motion to dismiss the complaint for failure to state a claim upon which relief can be granted. On appellate review, this court makes the same assumption, and our review of the trial court's decision is de novo. James v. Wilson, Ky. App., 95 S.W.3d 875, 889 (2002).

Appellant first alleges that the court improperly dismissed his right of privacy claim because the publication of the information at issue, which he never claims was truthful, did not involve a legitimate matter of public concern. The "right of privacy" does not prohibit publication of a matter which is of public or general interest. McCall v. Courier-Journal, Ky., 623 S.W.2d 882, 887 (1981). We disagree. The trial court based its findings of a legitimate public interest in this case on both the fact that appellant is a public official and the fact that his questioning by police was a matter of public interest.

We agree that the fact that appellant was a high ranking official in the elementary schools and a member of the state Board of Education made him a public figure whose actions in this case were of public concern. Warford v. Lexington Herald-Leader Co., Ky., 789 S.W.2d 758 (1990). Appellant apparently occupied an appointed, rather than elected, position with the state board of education. The question as to whether a person is a public official or public figure is one of law, which we review de novo. Id. at 761. We do not agree with appellant that Sellers v. Henry, Ky., 329 S.W.2d 214 (1959) stands for the proposition that the question whether a publication involves a matter of public concern is a question of fact for the jury.

We agree with the trial court that under the standards delineated in Warford, and the United States Supreme Court cases on which it relied, appellant is a public figure or public official. Appellant, by virtue of the positions he held in public education, voluntarily involved himself in an area of controversy and interest to the general public. Therefore, actions of his which may have reflected on his position in the field of education were also of public interest. Therefore, we affirm the trial court's determination that appellant is a public figure.

Appellant next argues that the trial court erred in dismissing his claim for intentional infliction of emotional distress. While appellant argues the trial court did not use the correct standard as to intent, he does not discuss on appeal the trial court's conclusion that he failed to establish the element of "extreme and outrageous conduct." Craft v. Rice, Ky., 671 S.W.2d 247 (1984). The Kentucky Supreme Court defined this element of the offense by stating that it is required that "the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality." Humana of Kentucky, Inc. v. Seitz, Ky., 796 S.W.2d 1, 2 (1990). The court further explained the standards behind the element of the offense, quoting from the Restatement (Second) of Torts, § 46 Comment d, "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Although, appellant alleged in his complaint that the publication of the story constituted extreme and outrageous conduct, we agree that, even taking the claims in the light most favorable to appellant, he failed to state a claim for intentional infliction of emotional distress.

Appellant also raises an argument regarding his ability to assert punitive damages. Since we affirm the dismissal of the cause of action against appellees, the issue of damages is moot.

For the foregoing reasons, we affirm the trial court's dismissal of the appellant's action for failure to state a claim.

ALL CONCUR.

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