

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000842-MR

LAWRENCE E. BOWLING

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 94-CI-00792

THOMAS J. SMITH, III

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, GUIDUGLI, and SCHRODER, Judges.

COMBS, JUDGE. Lawrence B. Bowling appeals from entry of summary judgment by the trial court in favor of Commonwealth's Attorney Thomas J. Smith, III. We affirm.

Bowling, a former Berea College professor, instituted a civil action for libel against Smith in July 1997. In his complaint, he alleged that Smith had made false and defamatory statements concerning the nature and contents of a pleading drafted by Bowling and filed in a criminal action by murder

defendant, Zhuo Wang. At the time he made the allegedly offensive comments to Darla Carter, a reporter from the Lexington Herald-Leader, Smith was acting in the capacity of prosecuting attorney in the case against Wang. Wang was charged with the murder of his wife, Lin Cong, on the campus of Berea College. The comments were incorporated into an article appearing in the newspaper's Sunday edition on April 17, 1994. It reported, in relevant part, as follows:

The husband of a slain Berea College student wants to back out of an agreement that could yield him 20 years in prison for allegedly shooting his wife, a petition says.

But Madison County Commonwealth's Attorney Thomas J. Smith questions whether the petition is a genuine reflection of Zhuo Wang's wishes.

Wang, 24, is charged with first-degree murder in the death of his wife, Lin Cong, who was killed Jan.25 in her dormitory room at Berea College.

Wang pleaded guilty to the charge March 31 and gave up his right to a trial, in exchange for a recommended sentence below the maximum punishment of life imprisonment.

But a petition, filed in Madison County Circuit Court Friday, claims Wang was pressured into the plea bargain by his attorney, Lynda Campbell, and asks to have the agreement withdrawn.

Wang's signature is on the petition, but the request was prepared and filed by Lawrence Edward Bowling, a former Berea professor and friend of defendant.

The document is Ais very suspect to me,@
Smith said. AThat~~s~~ not Zhuo Wang~~s~~ language.
That~~s~~ not the way he speaks. It wasn~~t~~ even
prepared by him. . . . I don~~t~~ even know if
it~~s~~ a genuine signature.@

* * * *

But Wang~~s~~ decision to back out of the plea
bargain could hurt him if he~~s~~ granted a
trial, Smith said.

If we go to trial, I~~m~~ pressing for the
maximum because I think this kind of action
right here. . . is trifling with the court
and a cold callous disregard for the victims
(Cong and her family),@he said.

Bowling's lawsuit named multiple defendants -
including Darla Carter, the reporter; the *Lexington Herald-*
Leader; Madison Circuit Court Judge William T. Jennings; a
deputy sheriff in Madison County; Lynda Campbell, Wang's
attorney; and several individuals involved with the publication
of a Berea newspaper and a student publication (as well as those
publications themselves). Smith was among the litany of
defendants. He alone remained in the suit following dismissal
of all other defendants. The sole remaining issue with respect
to Smith was a matter of law: whether Bowling was a limited
purpose public figure in the context of the Wang case so as to
implicate the standard of actual malice in his defamation action
against Smith.

Bowling's lawsuit alleged that Smith had
misrepresented the facts and the law and that his statements

were defamatory. On November 7, 2001, finding that Bowling was a "limited purpose public figure," the Madison Circuit Court granted Smith's motion for summary judgment. Bowling's motion to alter, amend, or vacate pursuant to CR¹ 59.05 was denied on March 26, 2002. This appeal followed.

The only issue on appeal is whether the trial court properly granted Smith's motion for summary judgment pursuant to the standards governing CR 56. Since there remain no genuine questions of material fact in this case, our review of the law is *de novo*. Consequently, we must determine whether Smith was entitled to judgment as a matter of law. CR 56.02.

The complaint highlights as defamatory various statements by Smith: (1) that the petition was *A suspect@* (2) that he (Smith) did not know whether Zhou Wang's signature on the petition was *Agenuine@* and (3) that *Athis kind of action . . . is trifling with the court and a cold callous disregard for the victims.@* Bowling claims that the statements essentially portrayed him "as having committed the crime of forging a legal document in a court proceeding and as being a man not to be trusted.@ Second Amended Complaint at 2. Thus, Bowling contended that the comments slandered him and placed him in a *Afalse light@*-- not only as to the public, but also in the estimation of his closest friends and acquaintances.

¹ Kentucky Rules of Civil Procedure.

Smith denies that his comments were defamatory. He argues that the comments did not concern Bowling but that they were focused on the nature and contents of Wang's petition. At the time he made the comments, Smith contends that he was unaware that Bowling had a role in preparing the document. Thus, he reasons that he could not have indicated to reporter Carter that Bowling had played any part in the matter. He believes that his motion for summary judgment was properly granted.

In the alternative, Smith argues that he is entitled to a qualified privilege since his comments were made in the performance of his governmental duties. He argues that the motion for summary judgment was properly granted. Since communications to the media were a part of his investigatory and administrative duties as a prosecutor, he contends that Bowling consequently cannot show that he acted with actual malice.

As a second alternative, Smith contends that Bowling became a limited purpose public figure by virtue of his decision to interject himself into the high-profile, emotionally-charged murder case against Wang. Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976). If indeed he were a limited purpose public figure, the same standard for defamation applicable to public officials would apply under the reasoning of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), requiring proof of actual

malice or reckless disregard of the truth or falsity of the subject matter underlying the statements. No evidence was produced to show that the offending remarks were false, that they were made with knowledge that they were false, or that they were tainted by a reckless disregard of their truth or falsity. The Sullivan standard governing in such an eventuality was not met.

We do not believe that it is necessary to address either of the alternative arguments raised by Smith as to his own official capacity or as to Bowling's arguable status as a limited purpose public figure. We conclude that an analysis of the law of defamation in general will suffice to resolve this controversy.

Defamation requires the utterance of defamatory language about a plaintiff which is published and causes injury to reputation. Columbia Sussex Corp., Inc. v. Hay, Ky. App., 627 S.W.2d 270 (1981). Scrutinizing Smith's comments closely, we are not persuaded that they are defamatory. The words cannot fairly be construed by an ordinary reader as an accusation that Bowling had forged the petition or that he committed any criminal act whatsoever. Smith's reference to his suspicions about Wang's petition in no manner identified or alluded to Bowling; he did not disparage Bowling's character or competence. Thus, he did not injure Bowling. Smith directed his attack

solely at the petition and at Wang, speculating upon Wang's motivation underlying his decision to file the "curiously-worded petition." His words did not subject Bowling to disgrace, ridicule, or contempt. Bowling was never mentioned. The fact that he took umbrage at the remarks may illustrate the time-worn adage: "If the shoe fits" However, much more than subjective offense -- albeit correctly perceived and taken -- by the anonymous target of such suspicions is required as a matter of law to constitute a cause of action in defamation.

While it is not necessary that the allegedly defamatory comments refer specifically to a plaintiff by name, it must be shown that the comments pertain directly to a particular individual whose identity can be ascertained from the text and context of the publication. 50 Am. Jur.2d Libel and Slander '29 (1995). Nothing in Smith's comments linked Bowling to the criminal case or to the preparation of the petition. Those who read Smith's comments were able to identify Bowling as the drafter of the petition (to the extent that this recognition might be relevant) only because Carter² discovered and revealed his identity. The nature and contents of Smith's comments do not support Bowling's charge that Smith intended to portray him specifically as a scoff-law.

² As noted earlier, both Carter and the *Lexington Herald-Leader* were previously dismissed as defendants.

In summary, the comments are not reasonably susceptible of a libelous interpretation. The disputed comments pertained to Smith's assessment of Wang's petition as well as Wang's motives in filing it. They did not name or relate to Bowling. There is no rational indication that Smith intended to subject Bowling to ridicule or contempt. Thus, no legal injury exists. We agree that Smith was entitled to judgment as a matter of law and that his motion for summary judgment was properly granted.

Accordingly, the judgment of the Madison Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT *PRO SE*:

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BRIEF FOR APPELLEE:

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