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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001269-MR

CECIL SEAMAN, INDIVIDUALLY,
AND CECIL SEAMAN & CO., LLC — APPELLANTS

v. — APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 98-CI-00085

ED MUSSELMAN A/K/A
"INDIAN CHARLIE" — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BAKER, GUIDUGLI, AND KNOPF, JUDGES.

BAKER, JUDGE. Cecil Seaman (Seaman) brings this appeal from an April 11, 2002, summary judgment of the Fayette Circuit Court. We affirm.

Seaman filed a complaint and an amended complaint in the Fayette Circuit Court against Musselman. Therein, he alleged that Musselman defamed him by publishing three articles ("A Flag on the Play," "Cyberspace," and "Cecil Seaman Too Slick

for Injun Chuck”). These articles were published in a one-page free newsletter called Indian Charlie which is distributed several days each week at certain thoroughbred racetracks. It is undisputed that Musselman writes and publishes Indian_Charlie. On June 28, 1999, and on April 11, 2002, the circuit court entered summary judgments dismissing Seaman’s defamation claims. This appeal follows.

Seaman contends the circuit court committed error by entering summary judgment. Summary judgment is appropriate where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Ky. R. Civ. P. (CR) 56. Steelvest, Inc. v. Scansteel Service Center, Ky., 807 S.W.2d 476 (1991). To resolve this appeal, we must determine whether the circuit court properly entered summary judgments dismissing Seaman’s defamation claims as to the three articles. We therefore must undertake an examination of the three articles that Seaman claims to have defamed him.

We shall initially review the article “Flag on the Play,” which reads in part:

> It looks like we got a Steward’s inquiry on last week’s Cecil Seaman ad in the *Thoroughbred Times*.
>
> The ad refers to “matings” that Cecil Seaman has influenced, that have produced many top notch horses.
>
> One of the matings he is taking credit for in his ad is for Bates Motel.

> **It just so happens that the owners of Bates Motel, who were also his breeder, have gotten word to Injun Chuck that Cecil Seaman had absolutely no influence or input into the breeding of Bates Motel.**
>
> There could be many reason (sic) for this typographical error. It could be that Cecil Seaman just dreamed he was influential in the mating of Bates Motel or maybe his advertising people just made a mistake. You don't think that a guy like Cecil Seaman would deliberately mislead the public do you?
>
> Well, we don't know why a mistake like that got passed (sic) everyone, but it did not get passed (sic) the folks who bred him, cause they knew Cecil Seaman's impact on the mating of Bates Motel was zero. (Emphasis added).

In its entry of summary judgment, the circuit court concluded that Seaman was a limited public figure and that he failed to prove that Musselman acted with actual malice in the publication of the above article. To qualify as a limited public figure, there must exist 1) a particular and identifiable public controversy that 2) Seaman by some voluntary act involved himself to the extent that he assumed a role of public prominence, and 3) he must enjoy regular and continuing access to the media. Warford v. Lexington Herald-Leader Company, Ky., 789 S.W.2d 758 (1990), *cert. denied*, 498 U.S. 1047, 111 S. Ct. 754, 112 L. Ed. 2d 774 (1991). We must agree with the circuit court's conclusion that Seaman was a limited public figure and adopt herein its detailed rationale:

A particular and identifiable public controversy

The ability to choose racehorses and mating selections is an important and vital task in the thoroughbred industry, particularly in Kentucky, the center of the international thoroughbred industry. Traditionally, a method of combining a horse's confirmation and pedigree is utilized for this process. However, there are other theories which may be employed in choosing racehorses. Alternate and competing theories and methods by which one evaluates and chooses breeding selections has been and continues to be a particular and identifiable controversy within the thoroughbred industry.

The plaintiff's voluntary acts.

The plaintiff has developed a distinctive, singular and unique method of evaluating thoroughbred racehorses. He asked, and was granted, access to all the major thoroughbred farms in Kentucky, Florida and Ohio in order to build a data base and promote his theory. He promotes his theory internationally. He has in the past and continues to advertise in the major thoroughbred magazines. He also maintains a website.

The purpose of the plaintiff's acts is to promote his unique theory and demonstrate why his theory is a superior alternative to conventional methods of selection based on pedigree and confirmation. For thirty years, he has worked world-wide to promote his theory among the world of thoroughbred racing. His voluntary acts in developing and promoting bio-mechanics has (sic) brought him public prominence within the thoroughbred industry.

Access to Media.

> The plaintiff and his theory has (sic) been profiled in major thoroughbred publications including *The Racing Form*, *The Bloodhorse*, and *The Thoroughbred Times*. The plaintiff distributes his brochures to horsemen and potential clients in the barn areas of racetracks and horse sales which is the same target clientele and method of distribution used by the defendant. In addition to his website, he maintains a mailing list of 700 horsemen. Both parties target and access the thoroughbred community and both have gained a certain amount of notoriety therein.
>
> We find the plaintiff is a public figure in the limited context of methods employed to choose thoroughbred racehorses and breeding selections.

Upon the foregoing, we conclude that Seaman qualifies as a limited public figure upon the public matter of thoroughbred breeding methods.

In the article "Flag on the Play," Seaman takes issue with Musselman's statement that "[i]t just so happens that the owners of Bates Motel, who were also his breeder, have gotten word to Injun Chuck that Cecil Seaman had absolutely no influence or input into the breeding of Bates Motel." Seaman contends that such statement was defamatory because he had, in fact, consulted upon the breeding of Bates Motel.

In order to prevail, Seaman, as a limited public figure, must demonstrate that the alleged defamatory statement was published with "actual malice." Yancey v. Hamilton, Ky., 786 S.W.2d 854 (1989). To prove actual malice, there must be

some evidence that Musselman made the alleged defamatory statement with knowledge of its falsity or with reckless disregard of its falsity. Id. Here, the only evidence allegedly showing actual malice was Musselman's failure, before publishing the article, to verify with Seaman whether he in fact had any input in the breeding of Bates Motel. We think that the failure to investigate alone will not establish actual malice. White v. Manchester Enterprise Inc., 871 F. Supp. 934 (E.D. Ky. 1994), 50 Am. Jur. 2d Libel and Slander §38 (1995). Viewing the facts most favorable to Seaman, we must conclude that he failed to establish a material issue of fact upon whether Musselman acted with actual malice in the publication of the article "A Flag on the Play." Thus, the circuit court properly entered summary judgment dismissing Seaman's defamation claim as to the article "A Flag on the Play."

We shall now examine the second article "Cyberspace," which reads in relevant part:

> Another thing Injun Chuck did not know was that Cecil Seaman is the brains behind Lane's End Farm, Breteton (sic) Jones and John Nerud. We did see a note about Bail out Becky, the filly Seaman bought for Ken Ramsey for $40,000, who went on to earn over $650,000. Oddly enough, we did not see anything about those **other 299 crows** Cecil Seaman bought for Ken Ramsey. (emphasis added).

Seaman claims the phrase "those other 299 crows," defamed his reputation in the community. Conversely, Musselman argues that the phrase was a statement of opinion which is not actionable.

We initially observe that the determination of whether a statement is defamatory is a question of law and, likewise, the determination of whether a statement constitutes fact or opinion is a question of law. See Yancey, 786 S.W.2d 854; 50 Am. Jur. 2d Libel and Slander §162 (1995). In Yancey v. Hamilton, Ky., 786 S.W.2d 854 (1989), our Supreme Court adopted the Restatement Second of Torts' view of an "opinion":

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory fact as the basis for the opinion.

In this Commonwealth, a statement of opinion is not defamatory unless it implies allegations of undisclosed fact. The circuit court concluded that the phrase "those other 299 crows" was a statement of opinion that did not imply the existence of any undisclosed facts:

> The dispositive issue then becomes whether calling horses "crows" is pure opinion or if this statement implies any undisclosed facts known to the defendant. The plaintiff testified that the article meant that Seaman had purchased one good horse and all the rest were "bad." The only undisclosed fact that the defendant could have known was that the plaintiff had purchased some bad horses. However, horses

> cannot be objectively classified as good or bad. Some believe only graded stakes' winners are good horses and all the rest are bad. Others consider horses who win any type of race, even a claiming race, are good since they win and earn money. Still others believe some horses who have never won a race are good because they have not yet reached their full potential. This is no different than saying certain sports figures are good or bad. In the context of thoroughbred horses, pejorative terms such as "crows" or "bad" are quintessentially subjective and imply no allegations of an undisclosed fact and therefore are not actionable in a suit for defamation.

We agree with the circuit court that Musselman was simply giving his opinion that Seaman's horses were "bad horses." We also agree with the circuit court that whether a horse is bad or good is "quintessentially subjective and impl[ies] no allegations of an undisclosed fact." On the whole, we think that the phrase "other 299 crows" constitutes a statement of mere opinion and that the circuit court properly entered summary judgment upon Seaman's defamation claim as to the article "Cyberspace."

We shall now examine the third article "Cecil Seaman was too Slick for Injun Chuck", which provides in relevant part as follows:

> One year ago today, September 14, 1998, was the day we saw, with our own eyes, Cecil Seaman attempting to make off with a box containing over 1500 copies of *Indian Charlie*. Luckily we were there and able to

catch Mr. Seaman in the act, and retrieve those sheets.

We also filed charges against Cecil Seaman in Fayette District Court for his attempted theft.

In the months after that, Injun Chuck made at least a dozen trips from Louisville to Lexington to appear in court.

Every time we showed up it was the same thing. Cecil Seaman had pulled one slick legal maneuver after another and the case would be postponed until another date.

Well, Mr. Seaman finally exercised his Constitutional right to a trial by jury – for an offense that, at most, would have call for a fine in the neighborhood of $200.

On Friday, July 23rd, Cecil Seaman's day in court had finally come.

On the witness stand and under oath, Cecil Seaman testified that he had indeed picked up the box containing all the *Indian Charlie's*, but that he was not trying to steal them. Mr. Seaman testified he was going to take the sheets (all 1500) to show them to Bill Greely, even though he had appeared to be heading to the valet parking lot, and his car, when he picked up the box.

But under oath Cecil Seaman testified that the best way to get to Bill Greely's office was through the valet parking lot.

Well, the trial started at 9:00 a.m. and went to the jury at exactly 5:30 p.m. after a full day of testimony. At 5:35 p.m. the jury returned with a not guilty verdict.

After going through that whole ordeal, Injun Chuck came away with one final conclusion.

> **<u>Cecil Seaman is a whole lot better liar than he is a thief!</u>** (emphasis added).

Seaman contends that Musselman defamed him by the sentence "Cecil Seaman is a whole lot better liar than he is a thief!" Musselman argued, and the circuit court agreed, that the sentence constitutes pure opinion and is not actionable as a defamatory statement. In so concluding, the circuit court held:

> (I)t is clear that all facts upon which the defendant based his opinion that "Cecil Seaman is a whole lot better liar than he is a thief" are disclosed to the reader of the article. The article, read as a whole, is that the plaintiff is not a good thief, because he got caught in the act (as stated in the article), and that he is a good liar because, in the defendant's view, the jury believed the plaintiff assertion, which the defendant disputed, that the plaintiff was merely taking the publications to Bill Greely's office and did not intend to dispose of them (as stated in the article). Therefore, under the holding of *Yancey*, the statements are not actionable.

We believe it clear that Musselman did not intend the above sentence to be taken as an objective fact but rather intended it to be taken as his personal opinion. This is evident from the totality of the article in which the sentence appears. In the article, Musselman clearly explains that Seaman was found not guilty by a jury. Thus, Musselman discloses that the objective facts are that a jury found Seaman not to be a liar or a thief. As such, it is only reasonable to infer that

it was Musselman's mere opinion that Seaman was a liar and a thief rather than an objective fact. Additionally, we are unable to conclude that his opinion implied the allegation of any undisclosed defamatory facts as the basis thereof. Indeed, in the article "Cecil Seaman was too Slick for Injun Chuck," Musselman sufficiently outlines the history of the criminal charges against Seaman and sufficiently informs the reader of the bases of his opinion. See Buchholtz v. Dugan, Ky. App., 997 S.W.2d 24 (1998). Upon the whole, we must conclude that the statement "Cecil Seaman is a whole lot better liar than he is a thief" constitutes a statement of opinion and is not actionable as it does not imply the existence of undisclosed defamatory facts as the basis for it. Yancey, 786 S.W.2d 854. As such, we are of the opinion that the circuit court correctly entered summary judgment dismissing Seaman's defamation claim as to the article "Cecil Seaman was too Slick for Injun Chuck."

For the foregoing reasons, the summary judgments of the Fayette Circuit Court are affirmed.

ALL CONCUR.

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