

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-001064-MR

JOYCE BOLES

APPELLANT

v. APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 01-CI-00178

SAM GIBSON, INDIVIDUALLY, AND IN HIS
CAPACITY AS SUPERINTENDENT
OF THE CLINTON COUNTY BOARD OF EDUCATION;
KATHY CONNER, NED DAVIS, BETH HUFF,
JUNIOR ELMORE and WAYNE HUGHES,
INDIVIDUALLY, AND IN THEIR CAPACITIES
AS MEMBERS OF CLINTON COUNTY BOARD OF
EDUCATION; AND CLINTON COUNTY BOARD
OF EDUCATION

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, BUCKINGHAM, AND HENRY, JUDGES.

BARBER, JUDGE: Appellant, Joyce Boles (Boles), appeals from an
order granting summary judgment to the appellees on her claim of
defamation for publication of a report in the local Clinton

County newspaper that suggested that Boles needed more training on how to operate her computer at work. We affirm.

Boles is employed as a special education testing coordinator in the Clinton County school system. In that capacity she is responsible for administering tests, entering data, and creating reports for various students in the school system. From 1994 to 2002 Sam Gibson (Gibson) was the superintendent of the Clinton County school system and Boles' immediate supervisor. By all accounts Boles and Gibson do not get along with one another. Sometime in May, 2001, Gibson ordered Boles' computer to be disabled by other employees in the school system. This was done but Boles was reconnected within a few days.

Boles subsequently filed a complaint on August 13, 2001, to the Clinton County Board of Education regarding the incident. In her complaint Boles alleged that Gibson was engaging in "job discrimination" toward her by having her computer disabled and also by requiring her to serve as a "time-out" counselor for one of the schools when her job as special education testing coordinator was full time and no other person in an administrative position was required to perform these duties. She also noted that she believed that Gibson's actions were retaliatory in nature in response to another lawsuit she had filed against him previously.

The Clinton County Board of Education (Board) enlisted the services of Winter Huff (Huff), an attorney in Somerset, to investigate the allegations in Boles' complaint. Huff did so, interviewing eleven individuals including Boles and Gibson. At the conclusion of her investigation, Huff generated a 15-page report, along with additional attachments (the Huff Report), that detailed her investigation, made findings, and made recommendations. The Huff Report found that Gibson did, in fact, order Boles' computer to be disabled and that it was returned to working order shortly thereafter. It also noted that Boles had problems operating her computer that could be attributed both to inadequate training and/or understanding on the part of Boles and to equipment problems. The Huff Report went on to find that prior to the Spring semester of 2001, there had not been a problem with Boles generating her reports in a timely fashion; that Boles' duties as a "time out" counselor were necessary; that Boles needed updated testing materials and software; and that Boles and Gibson did not have a good working relationship. In the recommendation section of the Huff Report it repeats many of the findings and recommends corrective action for the Board to take and also mentions that there was insufficient evidence to substantiate that Boles had used her computer for personal pursuits.

It is undisputed that the Huff Report was adopted by the Board. Apparently, the Huff Report, or parts of it, was published in the local Clinton County newspaper. It is unclear as to whether the entire Huff Report was published, portions of it were published, or whether it was simply summarized in the paper because the particular article is not part of the record.

Boles filed suit against Gibson, Individually, and in his capacity as Superintendent of the Clinton County Board of Education, Kathy Conner, Ned Davis, Beth Huff, Junior Elmore, and Wayne Hughes, Individually, and in their capacities as Members of the Clinton County Board of Education (collectively referred to as the Board Members), and the Clinton County Board of Education, alleging that she was defamed by the appellees' publication of false material about her, namely that she was inadequately trained to perform her job.

The circuit court granted summary judgment to all of the appellees and this appeal followed.

The standard for granting summary judgment is well-settled in Kentucky. There must exist no genuine issues of material fact for a jury to decide so that it appears the movant is entitled to summary judgment as a matter of law. Since it is a determination of law being made the appellate court need not defer to the trial court's conclusion, but should conduct a de

novo review. Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996).

On appeal Boles makes several arguments for reversal. She contends that the appellees are not entitled to immunity for their acts; that fact questions exist about whether the appellees acted in good faith; and that the statements in the Huff Report do not qualify as "pure opinion," and, thus, are not absolutely privileged. The appellees have responded to these arguments with opposite contentions and have added that there is no evidence that any of the appellees had a hand in the actual publication of the Huff Report, therefore, they should not be liable for its publication.

We begin with the basics. This is a lawsuit for defamation. Defamation in writing, as here, is libel. To prove a defamation suit Boles must show: (1) defamatory language; (2) about her; (3) that was published; and, (4) injury to her reputation. Columbia Sussex Corp., Inc. v. Hay, Ky. App., 627 S.W.2d 270, 273 (1981). Publication is a term of art and it is incumbent on Boles to show that it was done either negligently or intentionally. Id.; Restatement (Second) of Torts §577 (1977).

As the circuit court noted, it is difficult to say whether the material Boles complains of being published is, in fact, defamatory since she has declined to make the publication

part of the record. For this reason alone we believe that the court would be unable to compose proper instructions to any jury empanelled in this case because the jury would be left to speculate as to the content of the published material of which Boles complains.

However, assuming that the newspaper published the Huff Report,¹ the findings and recommendations sections that suggest Boles may have inadequate training in computer skills and that she needs further instruction in order to perform her job is defamatory on its face since statements regarding a teacher's qualifications, efficiency or competency are defamatory *per se*. Ghassomians v. Ashland Independent School District, 55 F.Supp.2d 675, 690 E.D.Ky. (1998).

The statements are clearly about Boles and injury is presumed since the statements are defamatory *per se*. Hill v. Evans, Ky., 258 S.W.2d 917, 918 (1953).

This does not end our inquiry. Two other lines of law must be considered: (1) publication; and, (2) affirmative defenses. The first, publication, requires Boles to show that Gibson, the Board Members, and/or the Board, negligently or intentionally caused the statements to be published. It is not enough to show that the statements were published, she must show

¹ The extent of the publication of the Huff Report is also questionable. In Boles' deposition when shown a copy of the Huff Report she denies having seen the section summarizing interviews with various people but maintains that she read the findings and recommendations in the paper.

that one or more of the appellees was somehow involved in causing the statements to be published. Brewer v. American Natl. Ins. Co., 636 F.2d 150, 154 (6th Cir. 1980); B.H. Hayes v. R.E. Rodgers, Ky., 447 S.W.2d 597, 599 (1969); Wyant v. SCM Corp., Ky. App., 692 S.W.2d 814, 816 (1985).

There is an utter lack of evidence that any of the appellees were involved in the publication of the Huff Report in the newspaper, if it was, in fact, published. Boles admitted in her deposition that she had no evidence or information to show that Gibson, the Board Members, or the Board had the Huff Report published. She plainly states that she had no idea how it came to be published in the paper.

Even if Boles' action did not fail on this element of her *prima facie* case, the affirmative defenses of immunity and pure opinion raised by the appellees would require the disposition reached by the circuit court.

A local school board is entitled to governmental immunity. Yanero v. Davis, 65 S.W.3d 510, 527 (2001). Whether the Board here is entitled to cloak itself in that immunity depends on whether it was performing a governmental or proprietary function when the Huff Report was requested. Id.; See also James v. Wilson, Ky. App., 95 S.W.3d 875, 904 (2002). We believe that the investigation of Boles' complaint against

Gibson is clearly a governmental function and therefore the Board is entitled to immunity in this case.

Likewise, Gibson and the Board Members, sued in their official capacities, are extended the same immunity as is applicable to the Board. Yanero, supra at 522.

Boles has also sued Gibson and the Board Members in their individual capacities. Gibson and the Board Members may claim qualified official immunity for any negligent act they may have committed. To do so it must be shown that they were performing a discretionary act, in good faith, in the scope of their employment. Id.

The Board Members, by pursuing Boles' complaint, were acting in a discretionary manner. They chose to have an independent third party conduct the investigation and report back to them. Once this has been shown the burden is on Boles to come forward with some evidence that the Board Members did not act in good faith in discharging their duty. Id. at 523. There is no evidence of record that the Board Members did not act in good faith. Therefore, they are entitled to claim qualified official immunity.

We are of the opinion that qualified official immunity simply has no application to Boles' claim against Gibson individually. This is because there is no evidence that he had any responsibility for setting the investigation into motion,

the choice of the investigator, or the writing of the Huff Report. Further, the statements he made to the investigator are not the statements about which Boles now complains. Boles has simply failed to state a claim against Gibson individually.

Finally, we agree with the circuit court that the statements in the Huff Report about which Boles complains are pure opinion. Pure opinion is defined as occurring when the commentator states the facts upon which the opinion is based. Yancey v. Hamilton, Ky., 786 S.W.2d 854, 857 (1989); Buchholtz v. Dugan, Ky. App., 977 S.W.2d 24, 28 (1998). Pure opinion is absolutely privileged. Yancey, supra. The statements in the Huff Report regarding Boles' need for training are amply supported by the accounts given to Huff through her interviews of the various people involved that Boles had repeated problems with the operation of her computer and its equipment, some of which was due to Boles' lack of understanding about how to properly operate the equipment.

The judgment of the Clinton Circuit Court is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEE, SAM
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