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(2006-SC-0515-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001558-MR
AND
NO. 2004-CA-001709-MR

BARRY JOHNS — APPELLANT/CROSS-APPELLEE

v.

FIRSTAR BANK, NA,
N/K/A U.S. BANK — APPELLEE/CROSS-APPELLANT

APPEAL AND CROSS-APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 99-CI-01327

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND KNOPF, JUDGES.

DYCHE, JUDGE: In 1996, Barry Johns took part in an endeavor to establish a juvenile detention facility in Pike County, Kentucky. Johns sought to purchase the Sycamore School, which had previously been declared surplus by the Pike County Board of Education. Johns was to own 95% of the stock of the Youth

Opportunity Unlimited (YOU) and would purchase the Sycamore School through this entity. Since the project would require significant capital, Johns sought financing from Transfinancial Bank, n/k/a U.S. Bank, f/k/a Firstar (referred herein as Firstar). Firstar provided a personal loan to Johns and accepted his personal guaranty on several other project related loans. Johns requested complete confidentiality from Firstar because of recent public scrutiny of his father, Reo Johns, Superintendent of the Pike County Board of Education. In 1998, an unidentified employee or representative of Firstar revealed Johns's involvement with the project to John Blackburn, a member of the Pike County Board of Education, and through him to the public. Johns could not then be involved in the project as a stockholder of YOU.

Johns brought suit against Firstar in Pike Circuit Court in 1999. The complaint included claims for invasion of privacy, breach of implied contract, breach of fiduciary duty, and common law negligence. The case was brought to trial before a jury on May 5, 2004. The jury found that Firstar had invaded Johns's privacy and breached its duty of confidentiality. Damages were set at $250,000 for lost profits. These appeals follow.

On direct appeal, Johns argues that the trial court erred by overruling his motion for a new trial on damages alone. Johns asserts that the damages were inadequate and that the jury acted in contravention of the evidence by failing to award

monetary damages for real estate losses and emotional distress. We disagree.

Appellate review of the denial of a CR 59.01 motion for a new trial is limited to whether the trial court's decision was clearly erroneous. Miller v. Swift, 42 S.W.3d 599, 601 (Ky. 2001). As such, the reviewing court may not step "into the shoes" of the trial court and may not reverse unless its decision is not supported by substantial evidence. Id.

Johns cites to Smith v. McMillan, 841 S.W.2d 172 (Ky. 1992), for the proposition that a retrial on the issue of damages is warranted based upon improper arguments of trial counsel. Johns points to several instances of allegedly improper testimony given in disregard of the trial court's rulings. However, the difference between this case and Smith is that in Smith the trial court overruled the objections to the improper arguments. Here, admonitions were given by the court and no further relief was requested. We find that the admonitions cured any alleged error and that a new trial on this basis is unwarranted. Additionally, our review of the record indicates that the failure to award damages for emotional distress and real estate losses was not clearly erroneous under the facts and circumstances of this case. The denial of Johns's request for a new trial on the issue of damages is affirmed.

On cross-appeal, Firstar argues that Johns lacks standing to bring suit because he did not own stock in YOU at

the time of the disclosure and therefore Johns had only a mere expectancy interest in this case.

Standing to sue has been defined as the right to relief. Winn v. First Bank of Irvington, 581 S.W.2d 21, 23 (Ky.App. 1978). Standing to sue is distinct from capacity to sue, which is the right to come into court. Id. In order to have standing, a party plaintiff must have a real, direct, present, and substantial interest in the subject matter of the case or controversy. Id.

We find that Johns had standing to pursue his claims in this case. Johns had a present and substantial interest in the maintenance of his privacy and the confidentiality of his financial affairs. The fact that he did not own stock in YOU at the time of the disclosure and had an expectancy of stock implicates the amount of damages recoverable and does not affect the core issues of the case: whether Johns's privacy was invaded and whether a duty of confidentiality was breached.

Next, Firstar argues that the trial court erred by failing to grant a directed verdict or a judgment notwithstanding the verdict (JNOV) in its favor on the breach of confidentiality claim.

The standard for ruling on a motion either for a directed verdict or JNOV is well established. The trial court is required to consider the evidence in the light most favorable to the party opposing the motion. Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky.App. 1985). Additionally, the opposing party must

also be given the advantage of every fair and reasonable inference that can be drawn from the evidence. Id. A directed verdict or JNOV is inappropriate unless there is a complete absence of proof on a material issue or if no disputed issue of fact exists upon which reasonable persons could differ. Id.

Johns presented sufficient evidence of a confidentiality agreement between Firstar and himself. The evidence also tended to show a breach of that agreement. The trial court properly submitted this issue to the jury.

Firstar further argues that it was entitled to a directed verdict or a JNOV on this issue because Johns was merely a guarantor of the loans and was not a customer of the bank and as such it owed no duty to Johns. Firstar does not question the duties owed by a bank to its customers. We need not decide the question of what duties are owed under law to mere guarantors because evidence was presented that Johns was a customer of Firstar and took out personal loans in addition to the loans he guaranteed. This evidence is sufficient to preclude a directed verdict or JNOV under the standard set forth above. There was no error.

Thirdly, Firstar argues it was entitled to a directed verdict because there was no implied contract between it and Johns; therefore, there could be no breach of confidentiality. This claim fails because sufficient evidence was presented regarding the transaction between Johns and Firstar to preclude a directed verdict or JNOV on this issue.

Fourth, Firstar argues that it was entitled to a directed verdict or JNOV on the invasion of privacy claim.

The Kentucky Supreme Court adopted the principles of invasion of privacy as set forth in the Restatement (Second) of Torts (1976) in McCall v. Courier-Journal and Louisville Times Co., 623 S.W.2d 882, 887 (Ky. 1981), cert. denied, 456 U.S. 975 (1982). There are four separate theories under which a person may recover for invasion of privacy: 1) intrusion upon the seclusion of another, 2) appropriation of another's name or likeness, 3) unreasonable publicity given to another's private life, or 4) publicity that unreasonably places another in a false light before the public. Id.; Restatement (Second) of Torts §652A(2)(a-d)(1976). Johns argued this case as an intrusion upon his seclusion both at trial and on appeal.

According to Restatement (Second) of Torts §652B, an intrusion upon seclusion is defined as follows:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Comment (a) makes clear that liability under this section stems from the intrusion itself and is not dependent of any publicity given to the person whose interests are invaded. Comment (b) is illuminating in its descriptions of the behaviors encompassed by this section:

> The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself,

> as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home. It may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires. It may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents. The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the photograph or information outlined.

We find that the circumstances of this case are not within the category of behaviors contemplated under this section. This form of the tort concerns a prying into secreted information by physical force or other means. This section seems to assume the intrusion is made by an outside force into those personal areas normally withheld from public view. The disclosure of information held in confidence cannot be considered an intrusion under this section because Johns himself voluntarily revealed the information to the person and then made an agreement of confidentiality which was violated by the disclosure of the information to a third party. This is not an intrusion upon seclusion. We find that Johns produced no evidence of an intrusion upon his seclusion and therefore Firstar was entitled to a directed verdict on the invasion of privacy claim.

Although we have held that Firstar was entitled to a directed verdict on the invasion of privacy claim and was not entitled to a directed verdict on the breach of confidentiality claim, we must nevertheless address the jury instructions in this case. The jury found liability under the instructions on both invasion of privacy and breach of confidentiality. The instruction on damages contained three separate provisions for mental suffering, lost profits, and real estate losses. The jury awarded $250,000 for lost profits and $0 for both mental suffering and real estate losses.

Because the instruction on damages does not differentiate between the damages for invasion of privacy and breach of confidentiality, it is impossible to ascertain whether the jury relied on the invasion of privacy verdict to account for a portion of the damages for lost profits. Therefore, since the invasion of privacy instruction was in error, but liability was properly found for breach of confidentiality, we reverse and remand for a new trial on the issue of damages for breach of confidentiality. Duff v. Horton, 343 S.W.2d 380 (Ky. 1961).

We have reviewed the remaining arguments and find them to be without merit.

In conclusion, we affirm the direct appeal and we reverse and remand for a new trial on damages for breach of confidentiality on cross-appeal.

ALL CONCUR.

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