

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2005-CA-001343-MR

DARCIE DIVITA

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE GEOFFREY P. MORRIS, JUDGE  
ACTION NO. 03-CI-009214

JOHN ZIEGLER; AND  
CLEAR CHANNEL BROADCASTING, INC.  
D/B/A 84 WHAS RADIO

APPELLEES

OPINION  
AFFIRMING

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BEFORE: JOHNSON<sup>1</sup> AND SCHRODER,<sup>2</sup> JUDGES; MILLER,<sup>3</sup> SPECIAL JUDGE.

JOHNSON, JUDGE: Darcie Divita has appealed from the orders entered by the Jefferson Circuit Court on January 21, 2005, and May 26, 2005, which dismissed her claims against John Ziegler

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<sup>1</sup> Judge Rick A. Johnson completed this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

<sup>2</sup> Judge Wilfrid A. Schroder concurred in this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

<sup>3</sup> Retired 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 Clear Channel Inc. D/B/A 84 WHAS radio<sup>4</sup> with prejudice. Having concluded that summary judgment was proper as a matter of law, that the jury was properly instructed, and that the trial court did not abuse its discretion in its evidentiary rulings, or that the evidentiary issue is moot, we affirm.

#### FACTS

Divita was hired by WDRB Fox 41 in January 2003 to co-anchor its morning show called "Fox In The Morning." Part of Divita's job as an employee of Fox was to speak at various public occasions, including graduations, charity events, fundraisers, and awards banquets. Divita also did paid endorsements for local businesses and served as a spokesperson.

After her arrival in Louisville, Divita became personally involved with another public figure, Ziegler—a radio talk show host in Louisville, employed by Clear Channel from July 2002 through August 2003. Ziegler's talk show covered various topics, including news, politics, local interest stories, and Ziegler's personal life. One segment of Ziegler's show was entitled "Ask John Anything," in which listeners would call in and ask Ziegler questions of their choice. Listeners with the most interesting or strangest questions would be

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<sup>4</sup> Clear Channel is a Nevada corporation, with its principal place of business in San Antonio, Texas, and licensed to do business in the Commonwealth of Kentucky as 84 WHAS Radio, a 50,000-watt AM radio station. For the remainder of this Opinion, WHAS and Clear Channel will be collectively referred to as Clear Channel.

awarded prizes. Prior to August 22, 2003, Ziegler had been warned by his employer not to discuss the personal lives of public figures, especially Fox 41 personnel and, in particular, Divita.

Divita and Zeigler met in early February 2003 through mutual friends. The seriousness of their relationship is disputed by the parties. Divita claims that the parties had a non-exclusive, dating relationship that spanned a period of over two months. During this time, the parties went to dinner, attended a basketball game, went dancing, and met for coffee. According to Divita, the relationship came to an end in April 2003 when Ziegler continued to discuss her and their relationship in a personal way on his show, even though she had asked him not to do so. Divita claims that each time Ziegler spoke of her on his show, she would ask him not to do so again, but that he continued to do so after promising that these actions would cease.

As their relationship began to deteriorate, Divita claims that Ziegler became angrier at her for seeing other men, despite the fact that she had told him she did not want an exclusive relationship with him. On April 9, 2003, Ziegler sent Divita an email in which he stated, "I am glad to know that I am now fully free to tell the WHOLE story without trying to protect you as I have been attempting to do. Good luck. You will most

certainly need it." On July 16, 2003, Divita's name was placed on Ziegler's official website on an "enemies" list, a list of people that Ziegler disliked.

Divita's last appearance on "Fox In The Morning" was on August 22, 2003. That same day, Ziegler entitled a segment of his talk show, "The Demise of Darcie Divita". During the segment, Ziegler referred to Divita as a pathological liar, insinuated that she was unchaste, discussed the quality of her breast augmentation surgery, stated that Divita did not wear underwear, and claimed that her genital area was groomed. Further, Ziegler referred to Divita's former Fox co-anchor and her as "the Dork and the Devil." Ziegler also implied that Divita lacked intelligence because she was a former cheerleader. Several of these statements were later published on Ziegler's website. Subsequently, in an article in the local Louisville weekly publication, The Louisville Eccentric Observer, Ziegler defended and reaffirmed his comments in writing.

In September 2003 Divita resigned from her anchor position at Fox. She attributed her leaving to program format changes and her desire to take some personal time to focus on her health after she had been preliminarily diagnosed with multiple sclerosis. Divita subsequently relocated to Atlanta, Georgia. She contends that she was not able to find a job in her field and that Ziegler's comments "have come up in

conversations [she] has had with potential employers, appears in website searches of [her] name, and appears in background checks and industry newsletters." Divita also contends that she has suffered embarrassment, humiliation, mental anguish, and a loss of reputation as a result of the appellees' acts.

Divita argues that despite the fact that Clear Channel knew that Ziegler had the propensity for making inappropriate and potentially defamatory remarks on the air, it failed to reasonably supervise him and his conduct caused irreparable injury to her and her reputation. Divita states in her brief, "Clear Channel was put on notice and warned about [ ] Ziegler's tendencies, but chose to ignore the warnings in favor of his high ratings. Clear Channel thereby acquiesced to his behavior and contributed significantly to [her] injuries."

#### PROCEDURAL HISTORY

On October 22, 2003, Divita filed her verified complaint, in which she alleged that both Ziegler and Clear Channel acted in reckless disregard for her rights and/or was grossly negligent, malicious, oppressive and/or fraudulent and that she was entitled to compensatory damages, including pain and suffering, damage to reputation/character, and past, present, and future lost wages, and punitive damages. Ziegler filed his answer on November 18, 2003, in which he admitted that during his employment with Clear Channel he made comments

regarding Divita. On November 20, 2003, Clear Channel filed its answer, in which it admitted that it had been Ziegler's employer and that during that time Ziegler made oral statements about Divita on his radio show, but denied that the statements concerned her private life. Both Ziegler and Clear Channel asserted various affirmative defenses in their answers.<sup>5</sup>

On September 28, 2004, Clear Channel filed its motion for summary judgment. In support of its motion, Clear Channel relied upon the deposition testimony of Kelly Carls, Ziegler's direct supervisor, and Bill Gentry, the General Manager of Clear Channel during the relevant time-period. Carls stated that at the time Ziegler was hired, he was made aware of the station's standards "[t]hrough the standard indoctrination process that [Clear Channel does] with new employees." He testified that he met with Ziegler on a "regular basis" over the 13 months that Ziegler worked at Clear Channel to discuss the station's standards.

The first time Carls had a discussion with Ziegler about his on-air comments was when Ziegler discussed a well-known local sports writer's alcohol problems on the air and Carls told him to stop. Carls had to revisit the issue when Ziegler started making comments on the air regarding Fox 41

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<sup>5</sup> Clear Channel amended its answer on November 21, 2003, and Ziegler amended his answer on November 24, 2003.

personnel, including Divita. Both Carls and Gentry met with Ziegler and told him not to discuss Divita's personal life on his program. They told Ziegler that he could discuss the professional and public affairs of Fox 41 personnel, but he should not discuss their personal lives. Gentry testified that this directive was explicit and that he believed Ziegler understood it.

For the next two months it appeared that Ziegler followed his employer's limitations. Then on Friday, August 22, 2003, Ziegler discussed the newsworthy story of Divita's departure from Fox 41 and the trials of his relationship with her. Carls testified that neither he nor anyone else at Clear Channel knew that Ziegler was going to discuss Divita's departure. Ziegler's superiors instructed him to apologize on his next radio show, which he did on Tuesday, August 26, 2003. The following day, Ziegler was terminated from his employment for disobeying Clear Channel's directive not to discuss his personal relationship with Divita on the air.

In its motion for summary judgment, Clear Channel argued that Divita's complaint against it should be dismissed because as a matter of law each of the statements she relied upon failed to support a viable claim. Clear Channel argued that, as an all-purpose public figure, Divita could not prove constitutional actual malice, by clear and convincing evidence,

regardless of the topics discussed,<sup>6</sup> because she could not establish that in making each challenged statement, Ziegler knew that the statement was false or acted with "reckless disregard" of its truth or falsity.<sup>7</sup> Clear Channel contended that to rule otherwise would "chill" the exercise of free speech.

Second, Clear Channel argued that Divita's defamation claim failed as a matter of law because some of the statements about which she complained were statements of protected opinion. In support of this argument, Clear Channel cited Stepien v. Franklin,<sup>8</sup> wherein a radio talk show host called the owner of a professional basketball team a "pathological liar," "stupid," "an obscenity," and "nuts."<sup>9</sup> The trial court found that a reasonable listener would know that these were statements of opinion and stated that "we cannot place on a commentator the burden to protect against listeners who are not reasonable."<sup>10</sup>

Third, Clear Channel argued that Divita's defamation claim failed as a matter of law because, based upon undisputed evidence, some of the statements about which she complained were true or substantially true. Specifically, Clear Channel was

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<sup>6</sup> See Welch v. American Publishing Co. of Ky., 3 S.W.3d 724, 728 (Ky. 1999).

<sup>7</sup> Welch, 3 S.W.3d at 727; Warford v. Lexington Herald-Leader Co., 789 S.W.2d 758, 771 (Ky. 1990).

<sup>8</sup> 528 N.E.2d 1324 (Ohio Ct.App. 1988).

<sup>9</sup> Stepien, 528 N.E.2d at 1327.

<sup>10</sup> Id. at 1329.



referring to the statements that Divita did not wear underwear and that she was "well-kept" in her genital area. Divita's own sworn testimony established that both of these statements were substantially true.

Fourth, Clear Channel argued that Divita's invasion of privacy claim failed as a matter of law because Ziegler's statements about Divita on Clear Channel were oral. It argued that Ziegler's comments were privileged under applicable defamation law because they are either protected statements of opinion or substantially true statements of fact, and that Ziegler's comments concerned matters of public or general interest, and that Divita could not show actual malice as a matter of law.

Fifth, Clear Channel argued that Divita's intrusion upon seclusion claim failed as a matter of law, because, pursuant to Section 652(B) of the Restatement (Second) of Torts, it required the showing of a physical intrusion, unauthorized snooping, or other investigation without Divita's authorization, which Divita had not offered to prove.

Sixth, Clear Channel argued that Divita could not establish the elements necessary for a false light claim, i.e., Divita could not show actual malice or reckless disregard as to the truth of the statements and she further could not show that the statements would be highly offensive to a reasonable person.

Seventh, Clear Channel argued that Divita's misappropriation claim failed as a matter of law because she alleged no facts showing that Ziegler misappropriated her commercial interest in her identity. Rather, the alleged facts only showed that Ziegler discussed her identity primarily for the purpose of communicating information or expressing ideas, which are not actionable as a misappropriation claim.

Eighth, Clear Channel argued that Divita's public disclosure of private facts claim failed as a matter of law because the story was newsworthy and Divita was a public figure. Clear Channel states in its brief that "there is a logical nexus between the topics covered on Ziegler's August 22, 2003[,] broadcast and this newsworthy story."

Finally, Clear Channel argued that Divita's tort of outrage claim failed as a matter of law, as she was unable to meet the four required elements of (1) intentionally or recklessly engaging in; (2) extreme or outrageous conduct; (3) that causes; (4) severe emotional distress.<sup>11</sup> In Kentucky, the claimant must also be able to show that the defendant solely intended to cause the plaintiff emotional distress when engaging in the offensive conduct.<sup>12</sup>

On January 21, 2005, the trial court granted

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<sup>11</sup> Craft v. Rice, 671 S.W.2d 247, 251 (Ky. 1984).

<sup>12</sup> Gross v. Citizens Fidelity Bank-Winchester, 867 S.W.2d 212, 215 (Ky.App. 1993).

Clear Channel's motion for summary judgment, in part, dismissing Divita's claims of negligent hiring, retention and/or supervision, misappropriation of property, and outrageous conduct. On May 21, 2005, the trial court granted Ziegler's motion for summary judgment, in part, dismissing Divita's claims of misappropriation of property.

On May 16, 2005, a jury trial was held in this matter on the remaining issues, including libel, intentional infliction of emotional distress, defamation, and invasion of privacy. At the close of the evidence, the jury was instructed by the trial court and returned a verdict in favor of both Clear Channel and Ziegler on all claims presented. On May 26, 2005, the trial court entered a trial order and final judgment dismissing Divita's claims with prejudice. This appeal followed.<sup>13</sup>

#### ARGUMENTS

##### Jury Instruction Properly Included Actual Malice

Divita argues that the trial court's jury instruction on her claim of intentional infliction of emotional distress was prejudicial and constitutes reversible error because it included the element of actual malice. The instruction stated as follows:

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<sup>13</sup> Both Clear Channel and Zeigler filed cross appeals in this case. However, both have been dismissed upon motion of the appellees by order of this Court dated June 14, 2006.

To recover under the Intentional Infliction of Emotional Distress Claim, [ ] Divita must have proved by clear and convincing evidence the following:

1. That during the period of time from March 2003 until May 2005 [ ] Ziegler made remarks to [ ] Divita or published remarks to others, made statements orally, in print, on his station, through email, etc., that were intended by him to cause emotional distress to [ ] Divita;
2. That such remarks or statements did in fact cause [Divita] to suffer severe emotional distress;
3. That such conduct on the part of [ ] Ziegler clearly exceeded the bounds of common decency as would be observed in any civilized community; AND
4. That [ ] Ziegler made the statements with "actual malice" as defined in these instructions.

Otherwise, you will find for [ ] Ziegler.  
[emphasis added].

"Actual malice" was defined in the jury instructions

as follows:

To prove "actual malice," a Plaintiff must prove by clear and convincing evidence that the speaker either (1) knew the statement was false at the time it was made or (2) acted with "reckless disregard" as to whether the statement was true or false.

"Reckless disregard" means the speaker either (1) entertained serious doubts as to the truth or falsity of the statements or (2) had a high degree of awareness as to whether the statement was probably false.

The jury returned a verdict in favor of Ziegler on Divita's claim of intentional infliction of emotional distress.

Clear Channel argues that the actual malice instruction was appropriate because the "knowing falsity" standard is mandated by the United States Constitution. Clear Channel states that "application of the constitutionally mandated 'knowing falsity' element to a public figure's<sup>14</sup> emotional distress claims arising from speech is entirely consistent with the 'restricted/limited' view of the tort of outrage under Kentucky law."<sup>15</sup> To meet this standard, the plaintiff must show that a defendant "'entertained serious doubts' as to the truth" of the statement [citations omitted].<sup>16</sup> Mere negligence is not enough.<sup>17</sup>

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<sup>14</sup> It is undisputed that Divita and Ziegler were both public figures. An individual who is a public figure in "all aspects of [the individual's] life" should be treated as an "all-purpose" public figure by the court. Gertz v. Robert Welch, Inc., 418 U.S. 323, 352, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). See also Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1295 (D.C. Cir. 1980). An individual becomes an all-purpose public figure when he or she gains "general fame or notoriety" which occurs when the individual is known to a large portion of well-informed citizens. Gertz, 418 U.S. at 352; Waldbaum, 627 F.2d at 1295, n.20. To be an all-purpose public figure, an individual must meet this requirement in the community where the alleged defamation occurred. Waldbaum, 627 F.2d at 1295, n.22. A determination of whether an individual is a public figure is made by the court as a matter of law. See Yancey v. Hamilton, 786 S.W.2d 854, 859 (Ky. 1989); Warford, 798 S.W.2d at 761.

<sup>15</sup> See Sacharnoski v. Capital Consolidated, Inc., 187 F.Supp.2d 843, 845 (W.D.Ky. 2002); Bevins v. Dollar General Corp., 952 F.Supp. 504, 511 (E.D.Ky. 1997).

<sup>16</sup> Welch, 3 S.W.3d at 727.

<sup>17</sup> Welch, 3 S.W.3d at 727. See Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 788 (Ky. 2004); Craft, 671 S.W.2d at 249; Restatement (Second) of Torts § 46, comment F (stating that "[t]he extreme and outrageous character of the

The trial court's decision to use the "actual malice" requirement in the jury instructions was based upon the United States Supreme Court's holding in Hustler Magazine v. Falwell,<sup>18</sup> which prohibited the plaintiff Falwell from attempting to bypass the actual malice standard for defamation of a public figure by asserting a claim for outrage as an end-run around the First Amendment limitations. The Supreme Court explained the need for the actual malice requirement as "it reflects our considered judgment that such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment."<sup>19</sup> First Amendment principles require protection of speech—even offensive speech.<sup>20</sup> Any holding to the contrary "would have an undoubted 'chilling' effect on speech relating to public figures that does not have constitutional value."<sup>21</sup> The limited holding in Hustler Magazine was that "public figures . . . may not recover for the tort of intentional infliction of emotional distress by reason of publications . . . without showing in addition that the publication contains a false

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conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. The conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know").

<sup>18</sup> 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988).

<sup>19</sup> Hustler Magazine, 485 U.S. at 56.

<sup>20</sup> Hustler Magazine, 485 U.S. at 55.

<sup>21</sup> Hustler Magazine, 485 U.S. at 52.

statement of fact which was made with 'actual malice,'<sup>22</sup> i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true."<sup>23</sup>

Divita argues that her case is distinguishable from Hustler Magazine in that her claims were based upon both false, defamatory statements and true statements which were outrageous in nature and made with the intent to cause her severe emotional distress. She contends that based upon the instructions given, the jury was not allowed to determine the truth of comments by Ziegler that were completely outrageous, especially for a 50,000-watt radio station. Clear Channel argues to the contrary that First Amendment principles require more—not less—protection for true statements about public figures than obviously false statements.

Clearly, Hustler Magazine is the controlling precedent concerning a challenged publication involving a public figure.<sup>24</sup>

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<sup>22</sup> In New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the Supreme Court established the "knowing falsity" standard in determining the constitutional limitations on the law of libel. In Sullivan, the Supreme Court used the phrase "actual malice," but the high Court explained the evidentiary standard was "knowing falsity."

<sup>23</sup> Hustler Magazine, 485 U.S. at 56.

<sup>24</sup> See New Times, Inc. v. Isaacks, 146 S.W.3d 144, 165 (Tex. 2004) (stating that "evidence of intent to ridicule is not evidence of actual malice. Rather, actual malice concerns the defendant's attitude toward truth, not toward the plaintiff"); Lam v. Ngo, 91 Cal.App.4th 832, 848 (2001) (public figures' infliction of emotional distress claims arising from publications are governed by the principles of Hustler Magazine); and Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1195 (9th Cir. 1989) (stating that "lack of [Sullivan] malice is a proper ground for summary judgment").

First Amendment principles—and the heightened “knowing falsity” standard—apply, regardless of the label placed on a plaintiff’s tort claim. Hustler Magazine makes clear that Divita may not attempt to “end-run around First Amendment strictures” by labeling her tort claim as the intentional infliction of emotional distress rather than as defamation.<sup>25</sup>

The Supreme Court further held in Sullivan, that the actual malice standard did not refer to a showing of “ill will” or “personal spite” in the ordinary sense,<sup>26</sup> “but rather is ‘a shorthand to describe the First Amendment protections for speech injurious to reputation’” [citations omitted].<sup>27</sup> Hustler Magazine goes on to state that “while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.”<sup>28</sup> “[T]he focus of the inquiry is not on the defendant’s attitude toward the plaintiff, but rather on the defendant’s attitude toward the

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<sup>25</sup> Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 522 (4th Cir. 1999).

<sup>26</sup> See Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 667, n.7, 109 S.Ct. 2678, 105 L.Ed.2d 562, (1989).

<sup>27</sup> Isaacks, 146 S.W.3d at 161.

<sup>28</sup> Hustler Magazine, 485 U.S. at 53.



truth or falsity of the statement alleged to be defamatory"

[emphases original] [citations omitted].<sup>29</sup>

Clear Channel argues that Divita's claim as to Ziegler's subjective intent is irrelevant to proving "knowing falsity." Further, Clear Channel argues that any profit motive it may have had was irrelevant and not proof of knowing falsity.<sup>30</sup> Clear Channel argues that "[b]ecause the First Amendment requires Divita to carry the burden of proving by clear and convincing evidence<sup>31</sup> that Ziegler spoke with actual knowledge of the falsity of his statements, or with reckless disregard for the truth of those statements, the jury instructions for Divita's emotional distress claim were proper. The underlying verdict itself has not been challenged, and is clearly supported by overwhelming evidence from trial. The jury's verdict—and the Judgment based thereon—must be affirmed."

Ziegler points out that none of the cases relied upon by Divita for the Kentucky standard of intentional infliction of emotional distress involved comments about a public figure.

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<sup>29</sup> Varanese v. Gall, 518 N.E.2d 1177, 1180 (Ohio 1988). See also Hustler Magazine, 485 U.S. at 53 (quoting Garrison v. Louisiana, 379 U.S. 64 (1964) "even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth"); and Cobb v. Time, Inc., 278 F.3d 629 (6th Cir. 2002).

<sup>30</sup> Harte-Hanks Communications, Inc., 491 U.S. at 667 (stating that "[i]f a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from [Sullivan] and Hustler Magazine would be little more than empty vessels").

<sup>31</sup> See Warford, 789 S.W.2d at 771.

However, virtually every court that has addressed this issue has followed Hustler Magazine and applied actual malice to many other types of tortious conduct when speech about a public figure was part of the claim.<sup>32</sup> Constitutional "actual malice" has been applied by all courts addressing this type of claim involving an issue of intentional infliction of emotional distress. Indeed, Constitutional "actual malice" applies to a variety of claims when such claims are based upon speech.<sup>33</sup> Thus, the trial court correctly instructed the jury on Divita's claim of intentional infliction of emotional distress, and we affirm on this issue.

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<sup>32</sup> See Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) (applying the actual malice standard to a product disparagement claim). See also Bichler v. Union Bank & Trust Co. of Grand Rapids, 745 F.2d 1006, 1013 (6th Cir. 1984) (examining a public disclosure of private facts, stating that "[t]he same constitutional standard applies in actions for invasion of privacy").

<sup>33</sup> See Bass v. Hendrix, 931 F.Supp. 523, 530 (S.D.Tex. 1996) (finding a claim for intention infliction of emotional distress barred unless the plaintiff can prove actual malice as required by the United States Supreme Court in Hustler Magazine); Deupree v. Iliff, 860 F.2d 300, 304-05 (8th Cir. 1988) (finding that Hustler Magazine precluded an award of damages for intentional infliction of emotional distress as a result of an expression of opinion); Dworkin, 867 F.2d at 1194-95 (9th Cir. 1989) (finding that a plaintiff must prove actual malice to prevail on her intentional infliction of emotional distress claim); Fasi v. Gannett Co., Inc., 930 F.Supp. 1403 (D.Haw. 1995) (granting motion to dismiss intention infliction of emotional distress claim for lack of actual malice and falsity and stating that "[w]hile it is true that the editorial page is no longer a safe harbor for otherwise actionable libel, it is also true that the First Amendment provides broad parameters within which comment upon public issues and public officials may safely be made"); Clyburn v. News World Communications, Inc., 705 F.Supp. 635 (D.D.C. 1989) (granting summary judgment on limited public figure plaintiff's claim for intentional infliction of emotional distress, following Hustler Magazine); Decker v. Princeton Packet, Inc., 561 A.2d 1122 (N.J.Super.Ct. 1989) (noting that federal courts have found that, "the first amendment requires that plaintiff establish at least the same level of intent to recover for the infliction of emotional harm as is necessary to find defamation"); and Isaacks, 146 S.W.3d at 144 (granting summary judgment when no evidence of actual malice).

Summary Judgment was Proper on Clear Channel's Alleged Negligent  
Hiring Claim

Divita also argues that the trial court erred in granting summary judgment to Clear Channel on her negligent hiring claim. The order entered by the trial court on January 21, 2005, granting summary judgment to Clear Channel on this issue stated as follows, "[ ] Ziegler's supervisors had no reason to believe that he would disobey their instructions. In this instance he did so with neither the concurrence nor the acquiescence of [Clear Channel]."

Under Kentucky law, it is well-settled that "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law."<sup>34</sup> CR 56.03 provides that summary judgment may be rendered "[i]f the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Summary judgment is improper unless "it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant" [citation

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<sup>34</sup> Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. 1996)

omitted].<sup>35</sup> "The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial."<sup>36</sup> The term "impossible" is to be applied in a "practical sense, not in an absolute sense."<sup>37</sup>

Summary judgment is favored in cases involving defamation claims against media defendants. The Supreme Court of Kentucky encourages trial courts to "resolve free speech litigation more expeditiously whenever possible" because "[t]he perpetuation of meritless actions, with their attendant costs, chills the exercise of press freedom. To avoid this, trial courts should not hesitate to use summary judgment procedures where appropriate to bring such actions to a speedy end."<sup>38</sup>

Clear Channel and Ziegler, as the moving parties, had the burden of proving entitlement to summary judgment,<sup>39</sup> which included establishing that there was no genuine issue as to any

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<sup>35</sup> Steele v. Scansteel, 807 S.W.2d 476, 483 (Ky. 1991).

<sup>36</sup> Welch v. American Publishing Co., 3 S.W.3d 724, 730 (Ky. 1999); see also Paintsville Hospital Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985) (noting that summary judgment is proper only where the movant shows that the adverse party cannot prevail under any circumstances).

<sup>37</sup> Perkins v. Hausladen, 828 S.W.2d 652, 654 (Ky. 1992).

<sup>38</sup> Welch, 3 S.W.3d at 729 (quoting Maressa v. New Jersey Monthly, 445 A.2d 376, 387 (N.J. 1982)).

<sup>39</sup> Christie v. First American Bank, 908 S.W.2d 679, 681 (Ky.App. 1995).

material fact, and entitlement to summary judgment with "such clarity that there is no room left for controversy."<sup>40</sup> The trial court was required to view the record in the light most favorable to Divita, the party opposing the motions, and all doubts were to be resolved in her favor.<sup>41</sup> If there is any genuine issue as to a material fact, the trial court should not render a summary judgment, regardless of its belief as to the opposing party's chance of success at trial.<sup>42</sup> If the burden shifts to the party opposing summary judgment, he or she "cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial," [citation omitted]<sup>43</sup> but, "the threshold [ ] is quite low."<sup>44</sup> The evidence presented by the moving party in support of its summary judgment "must be of such a nature that no genuine issue of fact remains to be resolved."<sup>45</sup> Otherwise, summary judgment is improper even when the party opposing summary judgment presents no contradicting evidence.<sup>46</sup>

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<sup>40</sup> Williams v. City of Hillview, 831 S.W.2d 181, 183 (Ky. 1992).

<sup>41</sup> Dossett v. New York Mining & Manufacturing Co., 451 S.W.2d 843, 845 (Ky. 1970); Puckett v. Elsner, 303 S.W.2d 250, 251 (Ky. 1970).

<sup>42</sup> Puckett, 303 S.W.2d at 251.

<sup>43</sup> Steelevest, Inc., 807 S.W.2d at 482.

<sup>44</sup> Commonwealth, Transportation Cabinet, Dept. of Highways v. R.J. Corman Railroad Company/Memphis Line, 116 S.W.3d 488, 498 (Ky. 2003).

<sup>45</sup> Carter v. Jim Walter Homes, Inc., 731 S.W.2d 12, 14 (1987).

<sup>46</sup> Id.

"When faced with a motion for summary judgment, the role of the trial [court] is not to decide issues of fact, but instead [it] must determine whether a real issue exists" [citation omitted].<sup>47</sup> "Because summary judgments involve no fact finding, this Court will review the circuit court's decision de novo[,]"<sup>48</sup> since it "involves only legal questions and the existence of any disputed material issues of fact" [citation omitted].<sup>49</sup>

For the tort of negligent supervision,<sup>50</sup> which is a derivative tort from the tort which is committed by the person being negligently supervised,<sup>51</sup> Kentucky has adopted the definition in Restatement (Second) of Agency § 213 (1957), as follows:

A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:

- (a) in giving improper or ambiguous orders [or] in failing to make proper regulations; or

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<sup>47</sup> R.J. Corman Railroad Co., 116 S.W.3d at 497.

<sup>48</sup> 3D Enterprises v. Metro Sewer District, 174 S.W.3d 440, 445 (Ky. 2005).

<sup>49</sup> Lewis v. B&R Corp., 56 S.W.3d 432, 436 (Ky.App. 2001).

<sup>50</sup> See Grego v. Meijer, Inc., 187 F.Supp.2d 689, 694 (W.D.Ky. 2001) (rev'd at Grego v. Meijer, Inc., 239 F.Supp.2d 676 (6th Cir. 2002); Turner v. Pendennis Club, 19 S.W.3d 117, 121-22 (Ky.App. 2000).

<sup>51</sup> Grego, 187 F.Supp 694.

- (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others[; or]
- (c) in the supervision of the activity; or
- (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

Divita argues, "Clear Channel knew or should have known the employment of Zeigler [sic] involved the risk of injury to others, including [Divita]." Divita contends summary judgment was inappropriate and that the trial court was clearly erroneous in light of the evidence mentioned above to find that there was no genuine issue as to any material fact. In support of her argument, Divita states that Clear Channel continued to employ Ziegler despite the numerous complaints against him because his show received high ratings. During the depositions, employees of Clear Channel including Gentry and Carls, demonstrated that they knew Ziegler's tendencies and both testified at their depositions that they were aware that Ziegler had been warned and fired from previous radio and TV positions for the same type of actions.<sup>52</sup> Divita contends that Bill Lamb,

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<sup>52</sup> Of the complaints voiced against Ziegler, one occurred just two weeks after his employment with Clear Channel began, when Catholic members of his audience complained that Ziegler had "disparaged the Catholic religion in the wake of sex scandals involving the priesthood." Lawsuits had previously been filed against Clear Channel and Ziegler because of his on-air comments regarding implication of a Lexington couple in a vote-buying scandal involving the husband's father, and another suit was threatened after Ziegler publicly accused a sports writer of being an alcoholic.

the general manager of WDRB and Divita's employer, called Gentry to complain about Ziegler's comments about Divita and Gentry openly admitted that his main concern was collecting revenues. Even after the August 22, 2003, broadcast, Gentry received a complaint from one of Clear Channels' advertisers, but again Gentry's concern was the protection of revenue.

Clear Channel responds with a two-part argument. First, it argues that because Divita's claim of negligent hiring/supervision is derivative of the underlying tort claims against its employee, Ziegler, and since those claims have been dismissed, the summary judgment issue is moot. In the alternative, Clear Channel argues that even if Ziegler had been found liable on one or more of the other tort claims, there was no evidence that Clear Channel had notice of the particular risk that Ziegler would broadcast defamatory falsehoods about Divita.

Because we have found that the jury instructions were proper and Divita's claims against Ziegler have been properly dismissed by the trial court with prejudice, the issue regarding Clear Channel's summary judgment award is moot. Divita concedes in her brief that "negligent supervision is a derivative tort from one which is committed by the person negligently

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Divita further argues that Clear Channel had notice of Ziegler's propensities as evidenced by the many letters written by listeners to Clear Channel during the period of time of August 2002 through July 2003. The letters describe Ziegler's actions as inappropriate, degrading, vulgar, offensive, and containing obscene language and subject matter.



supervised." Kentucky law supports this principle, and in such cases,<sup>53</sup> "a judgment on the merits in favor of an agent or servant is res judicata in favor of the principal or master."<sup>54</sup> Thus, we affirm on this issue.

However, Divita has also raised evidentiary issues on appeal which require us to address the summary judgment issue on the merits. We agree with Clear Channel that even if Ziegler had been found liable on the underlying tort claims, summary judgment in its favor would have been proper.

Under Kentucky law, an employer may be held liable for negligent hiring or supervision "only if he or she knew or had reason to know of the risk that the employment created."<sup>55</sup> "[T]here is liability only to the extent that the harm is caused by the quality of the employee which the employer had reason to suppose would be likely to cause the harm."<sup>56</sup>

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<sup>53</sup> See Grego, 187 F.Supp.2d at 694 (stating that "the tort of negligent supervision is a second tort that derives from a tort committed by the person negligently supervised").

<sup>54</sup> Overstreet v. Thomas, 239 S.W.2d 939, 941 (Ky. 1951). See Johnson v. Sawyer, 47 F.3d 716, 730-31 (5th Cir. Tex. 1995)(en banc)(stating that "in negligent hiring or supervision cases, the general rule is clearly that liability . . . must be predicated upon the wrongful act or omission of the employee at the time of the infliction of the injury complained of . . . and, if the employee is guilty of no such act or omission, there is no liability on the part of the employer, however inexperienced, incompetent, and unfit the employee may have been for his task. . . . No rational law would impose liability on an employer for the nontortious acts of its employee").

<sup>55</sup> Booker v. GTE.net LLC, 350 F.3d 515, 517 (6th Cir. 2003).

<sup>56</sup> See Restatement (Second) Agency , sec. 213, cmt. d.

In reviewing the record, we find no evidence that would allow a reasonable jury to find that [Clear Channel] failed to take adequate steps to supervise Ziegler. It is undisputed that Ziegler did not inform either Carls or Gentry that he was planning to discuss Divita on the day of the August 22, 2003, broadcast. The trial court stated, "[Clear Channel] requested and told [ ] Ziegler that he should not discuss his personal knowledge of . . . media personnel on the air . . . . [ ] Ziegler's supervisors had no reason to believe he would disobey their instructions." Accordingly, we affirm the trial court's granting of summary judgment on Divita's claim of negligent hiring.

Trial Court Barred Certain Evidence to be Presented at Jury Trial

We review a trial court's evidentiary rulings for abuse of discretion.<sup>57</sup>

Evidence of Ziegler's Prior Terminations from Previous Employment

Divita attempted at trial to offer evidence showing the reasons for Ziegler's termination at jobs in the past. The trial court based its denial upon irrelevance, stating that because summary judgment had been granted to Clear Channel on the claim of negligent hiring, supervision and/or retention,

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<sup>57</sup> Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

that Ziegler's previous terminations for on-the-job "bad acts" were inadmissible.<sup>58</sup> Divita argues that Gentry and Carls should have learned of the negative employment issues in Ziegler's history before hiring him; and if Clear Channel had properly supervised Ziegler, adequate steps would have been taken to prevent its employee/agent from causing Divita to suffer harm as a result of Ziegler's comments.

Clear Channel argues that after the trial court granted summary judgment on the negligent hiring/supervision claims, testimony relating to Ziegler's prior employment and Clear Channel's knowledge thereof was not relevant.<sup>59</sup> Clear Channel states that "the earlier actions of Ziegler or his prior employers were in no way related to whether Ziegler's statements about Divita were actionable under the First Amendment standards. In other words, the fact that Ziegler was fired from other jobs is unrelated to the 'actual malice' standards whether Ziegler knew his comments about Divita were false."

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<sup>58</sup> Divita argues in her brief that the employees of Clear Channel did not perform a formal investigation prior to bringing Ziegler to Louisville, despite the fact that Ziegler signed a background investigation consent form when he came to work for Clear Channel. Carls admitted in his deposition that during the interview process with Ziegler he learned that Ziegler had been terminated from past employments. Ziegler himself testified to having been terminated from previous radio positions on more than one occasion. Gentry testified that he was not aware of any negative factors concerning Ziegler's prior employment until after he was hired, but admitted being aware of the negative employment issues at the time Gentry gave his deposition.

<sup>59</sup> Kentucky Rules of Evidence (KRE) 402.

Based upon the record, we have found that summary judgment was proper in favor of Clear Channel in this case.<sup>60</sup> Therefore, under KRE 402, we affirm the trial court's refusal to admit evidence regarding Ziegler's prior employment terminations and problems.

Evidence that Clear Channel was put on notice of Ziegler's On-Air Conduct

After the trial court awarded summary judgment in favor of Clear Channel on Divita's negligent hiring, supervision, and/or retention claim, the trial court sustained (without a written order) a pretrial motion in limine disallowing the letters from individuals in the community to Clear Channel that Divita intended to introduce as evidence at trial as to Clear Channel's notice of Ziegler's inappropriate discussion of sexuality and sexual acts in his broadcasts. The individuals who had written the letters were subpoenaed by Divita to testify at trial. After the trial court granted Clear Channel's motion in limine as to the letters, the subpoenas were quashed.

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<sup>60</sup> If Clear Channel had not been entitled to summary judgment, then the trial court's refusal to admit evidence relevant to the claims against Clear Channel would have been problematic because Divita's claims against Clear Channel and Ziegler were heard together. The question would have become whether admission of the barred evidence could have reasonably changed the outcome of the underlying claims against Ziegler, and thus, allowed a derivative claim against Clear Channel.

Divita argues that if Clear Channel had not been granted summary judgment on the negligent hiring, supervision, and/or retention claim, these letters and the testimony of those who wrote the letters would have been admitted as proof that Clear Channel was on notice of the offensive nature of Ziegler's comments regarding Divita, as well as Ziegler's inappropriate sexual comments as a whole. Divita argues that this evidence would have been admissible under KRE 701, Opinion Testimony of Law Witnesses, which states as follows:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are: (a) Rationally based on the perception of the witness; and (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.<sup>61</sup>

Clear Channel responds to this argument by stating that all the letters identified by Divita were written after the August 22, 2003, show and after Ziegler's employment was terminated by Clear Channel. Therefore, it contends the letters

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<sup>61</sup> Kentucky's provision was modeled after the Federal Rule of Evidence 701. See Swajian v. General Motors Corp., 916 F.2d 31, 36 (1st Cir. 1990) (stating that "[f]or opinion testimony of a layman to be admissible three elements must be present. First, the witness must have personal knowledge of the facts from which the opinion is to be derived. Second, there must be a rational connection between the opinion and the facts upon which it is based. Third, the opinion must be helpful in understanding the testimony or determining a fact in issue"). See also Mills v. Commonwealth, 996 S.W.2d 473, 488-89 (Ky. 1999)(holding that lay witness opinion testimony based on the witness' own perceptions of which he had personal knowledge was admissible as well as helpful to the jury in evaluation other evidence presented at trial).

are not proof of any notice that Clear Channel had prior to August 22, 2003, or whether Ziegler knew his statements about Divita were false and actionable. Since we have held that the trial court's granting summary judgment in favor of Clear Channel was proper, we affirm the trial court's ruling regarding the inadmissibility of the letters written about Ziegler.

Evidence as to Divita's Employability Subsequent to Ziegler's  
Comments

At trial, Divita attempted to introduce the testimony of Kristen Cornette, an employee of Clear Channel, who testified by avowal, regarding her opinion as to the impact Ziegler's comments had on Divita's ability to become employed in the media industry after Ziegler's remarks on August 22, 2003. Divita also offered testimony from Lamb, General Manager of Louisville's WSRB Fox 41 station, who was to testify as to the damages Divita suffered as a result of Clear Channel's publications. The trial court ruled during the trial that opinions concerning Divita's decrease in employability after Ziegler's comments should have expressed through expert testimony, not through lay witnesses and that the testimony should have been included in Divita's Rule 26.02 disclosure of witnesses. Since we have affirmed on all issues related to liability, these issues which solely involve damages are moot.

For the foregoing reasons, the orders of the Jefferson Circuit Court are affirmed on all issues.

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