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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000167-MR

CATHY LONGWORTH AND
DAVID LONGWORTH

APPELLANTS

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE CATHY PREWITT, SPECIAL JUDGE
ACTION NO. 03-CI-00777-II

NOLAN BIRD, INDIVIDUALLY AND IN HIS OFFICIAL
CAPACITY AS A MAGISTRATE OF WHITLEY COUNTY,
KENTUCKY; MIKE PATRICK, INDIVIDUALLY AND IN HIS
OFFICIAL CAPACITY AS JUDGE EXECUTIVE;
BURLEY FOLEY, INDIVIDUALLY AND IN HIS OFFICIAL
CAPACITY AS A MAGISTRATE OF WHITLEY COUNTY,
KENTUCKY; JOHNNY LAWSON, INDIVIDUALLY AND IN
HIS OFFICIAL CAPACITY AS A MAGISTRATE OF
WHITLEY COUNTY KENTUCKY; WAYNE WILSON,
INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A
MAGISTRATE OF WHITLEY COUNTY, KENTUCKY; AND
WHITLEY FISCAL COURT OF WHITLEY COUNTY,
KENTUCKY

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KELLER AND MOORE, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Appellants, Cathy Longworth and David Longworth, appeal from a summary judgment entered against them on several different claims relating to a disputed public roadway. We affirm.

Cathy Longworth holds title to a piece of real property located in Whitley County, Kentucky. The Longworths moved into a home on that property in July 2001. The property adjoins a certain public roadway known as Pearl Street. Pearl Street has been located on subdivision plats dating as far back as 1921. Shortly after moving into their home, the Longworths erected a gate across what they purported to be the terminus of Pearl Street and claimed that the area behind the gate was never adopted by the county as a public roadway or had been abandoned by the county. Several neighboring landowners began to complain that the gate restricted access to their properties. Thereafter, certain actions were taken by the appellee magistrates of Whitley County to have the Longworths remove the gate. These actions culminated in a criminal warrant being issued against David Longworth for obstructing a public roadway in violation of KRS 525.140.

The Longworths filed a complaint in Whitley Circuit Court against the appellees alleging: (1) that the area located behind the gate was not a county or public road; (2) malicious prosecution and abuse of process; (3) defamation; and (4) the tort of outrage. Additionally, the complaint alleged that the Whitley County Fiscal Court negligently installed a bridge and culvert which caused water from a nearby creek to

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

trespass upon their property. Along with the appellees' answer, they filed a motion to dismiss the complaint and a motion to require the Longworths to remove the gate pursuant to CR 65.04. The criminal action against David Longworth was held in abeyance pending the resolution of the civil matter.

The Whitley Circuit Court held a hearing on this matter at which several witnesses testified. Ultimately, on December 3, 2004, the court entered an order containing findings of fact and conclusions of law which found that Pearl Street is a public road that has been in long and continuous use by the public. The court further found that the road had been maintained by the county as recently as 2002 and had not been abandoned or discontinued. The court specifically found that the Pearl Street extended beyond the gate erected by the Longworths.

The Longworths argue that the trial court erred by granting summary judgment against them on the issue of whether Pearl Street was, in fact, a public road. However, our review of the record indicates that this determination was made by the court after a two day hearing where witnesses testified and were subject to cross-examination. At the conclusion of the testimony, the trial court requested additional briefing by the parties before it rendered its decision. We are not pointed to nor can we find a specific objection to this procedure in the record. Therefore, the issue of the Longworths' right to a jury trial on this issue has been waived. *Equitable Life Assurance Society of the United States v. Taylor*, 637 S.W.2d 663, 665 (Ky.App. 1982). Accordingly, we will review the trial court's finding that Pearl Street is a public road under the appropriate standard.

In *Cole v. Gilven*, 59 S.W.3d 468, 472-3 (2001), this Court recited the standard of review for actions tried before the court without a jury as follows:

. . . factual findings “shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” A factual finding is not clearly erroneous if it is supported by substantial evidence. Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. “It is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence.”

(internal citations omitted.)

The issue of whether a certain piece of real property constitutes a public road is a mixed question of law and fact. In *Watson v. Crittendon County Fiscal Court*, 771 S.W.2d 47, 49 (Ky.App. 1989), the Court stated: “[w]e observe that the facts necessary to constitute an informal dedication [of a public road] by prescription present a question of law, but whether those facts, when in dispute, do or do not exist, is one for the fact finder.” Further, public roads that have not been adopted as county roads may be subject to abandonment without formal action. *Id.*

Pearl Street was dedicated as a public road on subdivision plats dating back as early as 1921. The deed to the Longworths' property describes the disputed section of Pearl Street as a boundary. There was evidence that the county had graded and graveled the disputed portion of Pearl Street for a long and continuous period and as recently as 2002. By grading, graveled, and otherwise maintaining Pearl Street, the county accepted the dedication. Although the evidence tended to demonstrate that the disputed portion was only used for the convenience of adjoining landowners for access to a barn and

garden, this fact, in and of itself, does not divest the roadway of its public nature. In *Sarver v. County of Allen*, 582 S.W.2d 40, 43 (Ky. 1979), our Supreme Court stated that “. . . the acts of county officials in improving or maintaining a road, standing alone, do not constitute a public user capable of ripening into a prescriptive title . . . by parity of reasoning neither can they alone amount to such a continued public user as will negate abandonment.” Subsequent to the decision in *Sarver*, the legislature enacted KRS 178.166 which provides for the discontinuance of a county road, or a road formerly maintained by the county or state. *Blankenship v. Acton*, 159 S.W.3d 330, 334 (Ky.App.2004).

KRS 178.116(1) provides as follows:

Any county road, or road formerly maintained by the county or state, shall be deemed discontinued and possession shall revert to the owner or owners of the tract of land to which it originally belonged unless at least (1) of the following conditions exists:

- (a) A public need is served by the road;
- (b) The road provides a necessary access for a private person;
- (c) The road has been maintained and policed by the county or state within a three-year period.

Contrary to *Sarver*, KRS 178.116 requires formal action to discontinue county roads or roads that were formally maintained by the county or state. *Blankenship, supra*. As stated above, there was ample testimony that the county had maintained the disputed portion of Pearl Street throughout the years and as recently as 2002. Therefore, without formal action by the county, the disputed portion of Pearl Street remains a public road

and is not subject to abandonment despite its limited use. The trial court did not err in its determination that Pearl Street is a public road.

Next, the Longworths argue that the trial court erred by dismissing their claim for malicious prosecution and by granting summary judgment in favor of the appellees. The Longworths argue that Nolan Bird inappropriately used the criminal process in order to obtain a civil result and that David Longworth was unjustly charged with obstructing a public passway under KRS 525.140.

The standard of review for summary judgments is well established:

The 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. Kentucky Rules of Civil Procedure (CR) 56.03. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. *Goldsmith v. Allied Building Components, Inc.*, Ky., 833 S.W.2d 378, 381 (1992). “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476, 480 (1991). Summary “judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances.” *Steelvest*, 807 S.W.2d at 480, citing *Paintsville Hospital Co. v. Rose*, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted “[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor” *Huddleston v. Hughes*, Ky.App., 843 S.W.2d 901, 903 (1992), citing *Steelvest*, supra (citations omitted).

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

In *Broaddus v. Campbell*, 911 S.W.2d 281, 283 (Ky.App. 1995), this Court set forth the six elements necessary to prevail on a malicious prosecution claim as follows:

(1)[T]he institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding.

The record does not disclose any termination of the criminal proceedings in favor of David Longworth because the case was held in abeyance pending the outcome of the civil case. Further, there could be no favorable outcome for Longworth because the road in question was determined to be a public road and he admitted to obstructing the same. Neither was any evidence presented that would indicate any malice on the part of Bird. Summary judgment was appropriate.

Third, the Longworths argue that the trial court erred by dismissing their claim for defamation and granting summary judgment in favor of the appellees. The basis of the defamation claim is Longworth's assertion that Bird stated "I can put you in jail" if Longworth did not remove the gate from the road. Bird allegedly made this statement to Longworth in the presence of appellee, Mike Patrick, as the three men discussed the gate situation. By making the statement, Longworth argues that Bird imputed that he was guilty of a crime and slandered him per se.

Four elements are necessary to establish a defamation action whether it is for slander or libel: (1) defamatory language; (2) about the plaintiff; (3) which is published; and (4) which causes injury to reputation. *Columbia Sussex Corp., Inc. v. Hay*, 627 S.W.2d 270, 273 (Ky.App.1981). However, the statement “I can put you in jail” is one of opinion. Statements of opinion are only actionable as defamatory if the statement implies the allegation of an undisclosed defamatory fact as the basis for the opinion. *Buchholtz v. Dugan*, 977 S.W.2d 24, 28 (Ky.App. 1998). Here according to Longworth's own deposition, there was no undisclosed defamatory implication, rather it was clear that the context of the statement was that his refusal to remove the gate might subject him to jail time for violating KRS 525.140. The road was determined to be public and Longworth admitted obstructing the road. Summary judgment was proper.

Next, the Longworths claim that summary judgment was inappropriate on their claim for the tort of outrage. David Longworth claims that the conduct of the appellees with regard to the gate subjected him to severe emotional distress. The requirements for a tort of outrage claim are as follows: 1) the wrongdoer's conduct must be intentional or reckless; 2) the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality; 3) there must be a causal connection between the wrongdoer's conduct and the emotional distress; and 4) the emotional distress must be severe. *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 788 (Ky. 2004). It is clear that the county's actions in attempting to secure the removal of an obstruction to a public road does not rise to the level of outrageous conduct

as defined in the caselaw. Furthermore, no evidence was presented of severe distress. Summary judgment was proper.

Finally, the Longworths argue that the trial court erred by dismissing their claim for negligence against the county. They alleged that the county was negligent in its installation of a bridge and culvert across Watts Creek which caused flooding to the Longworths' property. We agree with the trial court that the county is protected from suit by sovereign immunity because the maintenance and construction of roads and bridges are clearly governmental functions and not proprietary ones. *See Forsythe v. Pendleton County*, 205 Ky. 770, 266 S.W. 639 (Ky. 1924).

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

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