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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000091-MR

NATIONAL COLLEGE OF KENTUCKY, INC. APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 14-CI-002942

WAVE HOLDINGS, LLC; ERIC FLACK;
MICHELE MOFFITT; COMMONWEALTH OF KENTUCKY,
EX REL. ANDY BESHEAR,[1] ATTORNEY GENERAL APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: National College appeals from a grant of summary judgment in favor of WAVE Holdings, Erick Flack, and Michele Moffitt. Appellant argues

[1] Former Attorney General, Jack Conway, was permitted to intervene in this case by the trial court. The Attorney General is still a party to this action; therefore, we have indicated the current Attorney General, Andy Beshear, in the caption of this opinion.

that there are still genuine issues of material fact regarding whether or not five published statements are actionable as defamation. Appellant also argues that it was not allowed to conduct sufficient discovery before summary judgment was granted and that the trial court erred in allowing the Attorney General to intervene. For the following reasons, we affirm.

The statements Appellant alleged were defamatory were made by reporter Eric Flack and former student Michele Moffitt over two days in August of 2013. WAVE, a Louisville television station, published the statements both during news broadcasts and via articles written online. The five statements at issue are as follows:

> 1. Statement by Flack: "But the Attorney General says National mislead [sic] potential students about graduation and job placement rates, financial aid and other financial incentives for students. Conway said it was a way to bring in revenue from federal student loans, loans Conway said the students have a tough time re-paying because he claims those National degrees don't always lead to the better jobs the school promises."
>
> 2. Statement by Flack: "Now, a group of schools known as 'for profit colleges' have come under fire for lying to students to get them in the door then sending them into the working world with what some call a worthless degree in addition to tens of thousands of dollars in debt."
>
> 3. Statement by Flack: "There are 141 for profit colleges in Kentucky. Even critics will say there's a place for that type of school, a handful in Kentucky are now facing lawsuits, for deceiving students to cash in."

> 4. Statement by Moffitt as reported by Flack: "Graduation day was a proud day for Michelle [sic] Moffitt. Seven years later, she is unemployed and saddled with debt."
>
> 5. Statement by Moffitt as reported by Flack: "'We just basically learned the same things we learned in high school,' Moffitt said. 'The classes had nothing to do with the technology world. It's supposed to be business classes to train you to work in those fields. And that's not what National was about.'"

Appellant filed the underlying suit on June 3, 2014. Appellant originally complained of 9 allegedly defamatory statements; however, only five are before us on appeal. On September 12, 2014, the Attorney General moved to intervene in the case because he believed the issue was of public importance and because he believed National College filed the suit in order to silence its detractors. The trial court ultimately allowed the Attorney General to intervene.

Over the next year, discovery progressed in the form of written interrogatories, production of documents, and the deposition of Ms. Moffitt. In September of 2015, all Appellees filed motions for summary judgment. The trial court granted the motions in November of the same year. In granting summary judgment, the trial court stated:

> Here, the Court finds that National College cannot establish a defamation claim against any defendant. All of the nine statements that National College alleges to be defamatory are either true or substantially true when read within the context of the articles, they are non-actionable opinion, rhetoric, epithet or hyperbole, they are non-

> defamatory, or they are broad statements not of and concerning National College.

This appeal followed.

> 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. . . . "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*, 843 S.W.2d 901, 903 (Ky. App. 1992)[.]

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

To establish defamation, a plaintiff must prove four elements: defamatory language; about the plaintiff; which is published; and which causes injury to reputation.[2] *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 793 (Ky. 2004), *overruled on other grounds by Toler v. Süd-Chemie, Inc.*, 458 S.W.3d 276 (Ky. 2014).

[2] The parties, with the consent of the court, elected to delay discovery on the injury to reputation element until it was determined if National College could first satisfy the other three elements.

> "Defamatory language" is broadly construed as language that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." . . . Element two, "about the plaintiff" largely speaks for itself, but it is worth noting that the plaintiff need not be specifically identified in the defamatory matter itself so long as it was so reasonably understood by plaintiff's "friends and acquaintances . . . familiar with the incident." The notion of "publication" is a term of art, and defamatory language is "published" when it is intentionally or negligently communicated to someone other than the party defamed.

Id. at 793-94 (footnotes omitted).

There are a number of defenses available in defamation actions. If a defendant can prove that the alleged defamatory statements were true or substantially true, then the cause of action will fail. *Id.* at 795-96. Also, a statement that consists of pure opinion is not actionable. *Yancey v. Hamilton*, 786 S.W.2d 854, 857 (Ky. 1989). "Pure opinion, which is absolutely privileged, occurs where the commentator states the facts on which the opinion is based, or where both parties to the communication know or assume the exclusive facts on which the comment is clearly based." *Id.* In addition, statements which can be considered "rhetorical hyperbole," "vigorous epithet," and "loose, figurative, or hyperbolic language" merit protection. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17, 21, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). Finally, if the statement is not reasonably understood to be about the plaintiff, there can be no liability. *Stringer*

at 794. In other words, "[w]hen the defamatory statement does not name the defamed person, that person must prove that the article refers to himself." *E. W. Scripps Co. v. Cholmondelay*, 569 S.W.2d 700, 702 (Ky. App. 1978) (citation omitted).

STATEMENT 1

> Statement by Flack: "But the Attorney General says National mislead [sic] potential students about graduation and job placement rates, financial aid and other financial incentives for students. Conway said it was a way to bring in revenue from federal student loans, loans Conway said the students have a tough time re-paying because he claims those National degrees don't always lead to the better jobs the school promises."

Appellant argues that summary judgment was premature as to this statement because genuine issues of material fact remain as to whether it misled students about graduation rates, job placement rates, financial aid, and other financial incentives for students. We disagree. This article must be read as a whole. *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 884 (Ky. 1981). The article at issue does not state as fact that Appellant is misleading students about these issues; rather, the article is describing the fact that the Attorney General believes it is. The article is about the Attorney General's investigation and case against National College.

We agree with the Appellees that this statement is true or substantially true. As the article describes, the Attorney General has brought suit against

Appellant for misleading students. Further, discovery in the underlying case has shown that the Attorney General has sought information regarding graduation rates, job placement rates, financial aid, and other financial incentives for students. The final sentence of the article makes clear that the article is describing the Attorney General's allegations and his ongoing investigation when it states that the Attorney General's office was trying "to determine whether there's enough evidence for it to take action against National and other for-profit schools in Kentucky under the Kentucky Consumer Protection Act." It is a fact that, at the time of the article, the Attorney General was investigating Appellant for misleading students; therefore, this statement is not defamatory as a matter of law.

STATEMENT 2

> Statement by Flack: "Now, a group of schools known as 'for profit colleges' have come under fire for lying to students to get them in the door then sending them into the working world with what some call a worthless degree in addition to tens of thousands of dollars in debt."

Appellant argues that there are still genuine issues of material fact as to whether or not it lied to students and whether its degree is worthless. Appellees argue that this statement is a general statement about for-profit colleges and is not of and concerning National College. Alternatively, Appellees claim this statement is true. Because this appeal comes from a summary judgment, we will view the record as favorable for Appellant and assume this statement is about Appellant.

That being said, we agree with Appellees that this statement is true or substantially true.

As stated previously, the Attorney General is investigating Appellant and brought suit against it for allegedly misleading students. The statement that Appellant has "come under fire for lying to students" is true or substantially true based on the Attorney General's investigation and lawsuit. Additionally, Ms. Moffitt is quoted later in the article as saying that she felt her diploma from the college was nothing more than a "piece of paper," an opinion based on the fact that she had been a graduate from National College for seven years and was still unemployed. This supports the truth of the "what some call a worthless degree" part of the statement. Again, this statement is based on the statements of the Attorney General following his investigation and Ms. Moffitt's opinion and experience as a graduate of National College. As the facts support this statement as being true or substantially true, defamation cannot be proven as a matter of law.

STATEMENT 3

> Statement by Flack: "There are 141 for profit colleges in Kentucky. Even critics will say there's a place for that type of school, a handful in Kentucky are now facing lawsuits, for deceiving students to cash in."

Appellant argues that it would not be impossible for it to prevail as to this statement because there is no proof that it misled students to "cash in." Appellees argue that this statement is about for-profit colleges in general and not of

and concerning National College. Appellees also claim that this statement is true or substantially true. Again, because this appeal concerns a summary judgment, we will assume the statement is about Appellant. We believe that summary judgment was proper for this statement because the statement is true or substantially true.

At the time of the article, Appellant was facing a lawsuit from the Attorney General. The article indicates that the Attorney General believed that Appellant was inflating job placement rates in order to entice students to enroll. The more students who enroll, the more Appellant would be able to "cash in." We agree with Appellees that summary judgment was appropriate for this statement. The statement is based upon the allegations made by the Attorney General and the fact that suit has been brought by the Attorney General's office; therefore, defamation could not be proven as a matter of law.

STATEMENT 4

> Statement by Moffitt as reported by Flack: "Graduation day was a proud day for Michelle [sic] Moffitt. Seven years later, she is unemployed and saddled with debt."

Appellant argues that this statement is true on its face, but that the inferences within it are false. In other words, it is undisputed that Ms. Moffit is unemployed and in debt; however, the article implies that this is because of her National College education. Appellant believes that a trial is required to prove

whether or not the inferences are defamatory. Appellees argue that this statement is true and not defamatory.

Appellant is correct that we must look not only at the statement itself, but the inferences within it. *Kentucky Kingdom Amusement Co. v. Belo Kentucky, Inc.*, 179 S.W.3d 785, 791 (Ky. 2005). Appellant believes that the inference in this statement is that National College's education caused Ms. Moffitt to be unemployed. We disagree and believe the inference is more akin to Ms. Moffitt's opinion that her National College degree did not aid her in becoming employed.

We agree with Appellees that summary judgment was appropriate. The plain meaning of the statement, that Ms. Moffitt is unemployed and in debt, is an undeniable truth. The inferences, however, are based on Ms. Moffitt's opinion. Ms. Moffitt testified in her deposition that after graduation, she applied to multiple jobs in the computer-related field for which she obtained a degree. Ultimately, she was unsuccessful in finding employment.[3] It is upon this experience that her opinion is based. *See Yancey, supra*.

As to Ms. Moffitt's debt, at the time of the article, she owed over $20,000 for her National College education.[4] Further, any reasonable unemployed

[3] Appellant alleges in its brief that Ms. Moffitt only applied to one job since her graduation. This is incorrect. Ms. Moffitt's deposition indicated that she applied for multiple jobs with multiple companies after she graduated, but could only remember the name of one of those companies.
[4] The article at issue mistakenly indicates that Ms. Moffitt only owed $11,500.

person, like Ms. Moffitt, would believe being over $20,000 in debt is being "saddled with debt."

STATEMENT 5

> Statement by Moffitt as reported by Flack: "'We just basically learned the same things we learned in high school,' Moffitt said. 'The classes had nothing to do with the technology world. It's supposed to be business classes to train you to work in those fields. And that's not what National was about.'"

Appellant argues that summary judgment was inappropriate for this statement because evidence in the record, in the form of her transcripts, shows that Ms. Moffitt took classes related to technology and business. Appellees argue that this statement is protected opinion. We agree with Appellees that this statement is Ms. Moffitt's opinion.

As stated earlier, pure opinion is absolutely privileged. *Yancey* at 857. In addition, rhetorical hyperbole is also non-actionable. *Milkovich*, 497 U.S. at 17. We believe that Ms. Moffitt was using rhetorical hyperbole to express her opinion. The article indicates that Ms. Moffitt was unhappy with the quality of her education, believing that it was on the same level as a high school education. In addition, she expressed her opinion that Appellant did not adequately train her to work in the technological and business fields. Any reasonable person reading the article or listening to the news broadcast would not think that Ms. Moffitt literally meant that Appellant did not teach any technology or business classes. Rather, it is

clear that Ms. Moffitt was merely stating her opinion that the level of education she received was not what she expected. This statement of opinion is not actionable as a matter of law.

Appellant next argues that the trial court did not allow ample opportunity for discovery. Appellant argues that it should have been allowed to depose Mr. Flack before summary judgment. Additionally, Appellant claims that WAVE and Mr. Flack provided insufficient responses to four of their interrogatories. Appellees respond that Appellant was given sufficient time and opportunity to conduct discovery.

A trial court has "broad power to control discovery[.]" *Ray v. Stone*, 952 S.W.2d 220, 223 (Ky. App. 1997). "A summary judgment is only proper after a party has been given ample opportunity to complete discovery, and then fails to offer controverting evidence." *Pendleton Bros. Vending, Inc. v. Com. Fin. & Admin. Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988) (citing *Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628 (Ky. App. 1979)). "Whether a summary judgment was prematurely granted must be determined within the context of the individual case." *Suter v. Mazyck*, 226 S.W.3d 837, 842 (Ky. App. 2007).

We believe that Appellant had ample opportunity for discovery and that further discovery would not change the outcome of this case. Discovery

progressed for approximately one year. The trial court limited discovery directed at WAVE and Mr. Flack because of the first amendment and media issues surrounding this case. WAVE, Mr. Flack, and Ms. Moffitt all responded to Appellant's interrogatories, requests for production of documents, and requests for admissions. Lastly, Ms. Moffitt was deposed. This issue was thoroughly litigated below, and we agree with the trial court's opinion that sufficient discovery was engaged in. Additional discovery would not have altered the result of the summary judgment because the statements attributed to Appellees were either true or protected opinion.

Appellant's final argument on appeal is that the Attorney General lacked the authority to intervene in this case. Because we are affirming the summary judgment at issue, we find that this issue is moot.

Based on the foregoing, we affirm the judgment of the trial court.

ALL CONCUR.

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