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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1171108

Ella Bell

v.

Cameron Smith et al.

Appeal from Montgomery Circuit Court
(CV-17-901624)

MENDHEIM, Justice.

Ella Bell, a member of the Alabama State Board of Education ("ASBE"), appeals from the Montgomery Circuit Court's dismissal of her complaint asserting claims of defamation, invasion of privacy, the tort of outrage,

negligence and wantonness, and conspiracy against Cameron Smith, Advance Local Media, LLC ("ALM"), and the R Street Institute ("R Street"). We affirm.

I. Facts

On June 21, 2017, Bell attended a special-called meeting of the ASBE concerning elementary- and secondary-education matters. Among other matters, the ASBE decided during the meeting not to renew the Alabama State Department of Education's contract with ACT Spire Solutions, which provided ACT Spire Assessments for the purpose of tracking academic progress of Alabama's public-school students in kindergarten through 12th grade. In the course of the discussion between ASBE members about that contract, Bell made some comments regarding special-education students and their effect on the aggregate test scores of public-school students throughout the state.

On August 24, 2017, AL.com published an article written by Cameron Smith in which he addressed some of Bell's comments in the June 21, 2017, ASBE meeting. The headline of the article stated: "Alabama School Board Member Considers Institutionalization for Special Ed Students." Because the

article is central to Bell's claims and to the defendants' motion to dismiss, we quote the article in its entirety.

> "Alabama State Board of Education (SBOE) member Ella Bell wants to know why we can't force special needs children into an institution in an effort to help improve test scores in Alabama's public schools.
>
> "That might be a reasonable question ... from someone who hasn't served on the SBOE for more than a decade and a half.
>
> "Under federal law, students with disabilities should have the opportunity to be educated in the same environment as their peers to the greatest extent appropriate. It's a practice commonly referred to as 'least restrictive environment' (LRE).
>
> "'Is it against the law for us to establish perhaps an academy on special education or something on that order,' asked Bell, 'so that our scores that already are not that good would not be further cut down by special-ed's test scores involved?'
>
> "When Bell's colleagues mentioned LRE, she didn't seem to understand. 'It doesn't matter about that. You can make it the least restrictive environment,' she said, 'I'm trying to see if you can move them out.'
>
> "When a SBOE member doesn't seem to have a real grasp for such an important aspect of public education, we have a problem. I looked up the Alabama State Department of Education's comprehensive FAQ on the issue in about two seconds.
>
> "If Bell had bothered to be even a little bit curious, she would have discovered the answers including how individualized education plans (IEP)

> for students approach assessments. She clearly didn't bother to look for answers before attending the meeting.
>
> "State Superintendent Michael Sentance[1] noted that even students with challenges similar to theoretical physicist Stephen Hawking would be considered 'special needs.' Bell responded, 'I'm just saying those who have special needs are truly not folks like [Hawking].'
>
> "She even said, 'It's almost not fair for LAMP (Loveless Academic Magnet Program in Montgomery) and them not to have special-ed folk to bring them down.'
>
> "Bell doesn't seem to have a clue about Alabama's public education system for special needs students, but she is pretty concerned that those students 'bring down' the rest.
>
> "Alabama has a process for building out IEPs consistent with LRE requirements. The underlying idea is that our students are better off in the classroom together. The idea that a SBOE member would even seriously ask the question about returning to a practice of institutionalization demonstrates a tragic lack of knowledge and thoughtfulness.
>
> "The way we balance the needs of students isn't easy, but it's a testament about the kind of state we want to be. We've decided to include people who face challenges that many of us might not. That's the right answer. We have a tragic history of exclusion in Alabama that we can't allow to make a comeback.

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[1]Michael Sentance is no longer the State Superintendent of Education.

> "Either we don't have enough information about our SBOE members to hold them accountable, or we simply don't care about the people shaping our state's education environment. Bell's jarring perspectives are right in front of us on video. We just need to decide whether Alabama's future matters enough for us to do anything about it."

At the conclusion of the article, AL.com included the following tagline: "Cameron Smith is a regular columnist for AL.com and vice president for the R Street Institute, a think tank in Washington, D.C." Immediately after the tagline, AL.com included the following statement: "Ella Bell's contact information may be found on the [ASBE] website" and contained an embedded link to the Web site of the ASBE. Following that statement, AL.com embedded a video of the discussion by ASBE members, which included Bell's comments that Smith addressed in the article. The "desktop" version of the article had a sidebar on the right side of the page that listed pictures and names of other AL.com columnists: John Archibald, Kyle Whitmire, and Roy S. Johnson. Bell asserts that the version of the article accessible on smart phones did not contain this sidebar.

According to Smith and ALM, the version of the article originally posted on AL.com contained a caption above the

headline that stated: "Alabama Opinion." Bell asserts that the caption was not posted with the original version of the article and that it was added at a later date.

R Street republished the article on its Web site on the same date as the publication on AL.com -- August 24, 2017.

On October 19, 2017, Bell sued Smith and R Street in the Montgomery Circuit Court. Bell asserted claims of defamation, invasion of privacy, the tort of outrage, and conspiracy against Smith and R Street. Bell alleged that Smith made statements that he knew were false about Bell's comments in the June 21, 2017, ASBE meeting. Specifically, Bell took issue with Smith's statement that Bell wanted to place special-needs students in an "institution." Bell noted that she never used the words "institution" or "institutionalization" in her comments.

On November 22, 2017, R Street filed a motion to dismiss the complaint based on Rule 12(b)(2), Ala. R. Civ. P., for lack of personal jurisdiction. R Street attached a copy of Smith's August 24, 2017, article to its motion.

On December 15, 2017, Smith filed a motion to dismiss the complaint pursuant to Rule 12(b)(3), Ala. R. Civ. P., based on improper venue.

On January 8, 2018, Bell amended her complaint to name ALM as a defendant. Bell asserted claims of defamation, invasion of privacy, and negligence and wantonness against ALM. ALM owns and is responsible for the publication of AL.com.

On June 27, 2018, ALM filed a motion to dismiss the complaint based on Rule 12(b)(6), Ala. R. Civ. P., for failure to state a claim upon which relief could be granted. ALM argued that Smith's article was protected political speech and that it was an opinion piece and thus that it could not support a defamation claim. ALM contended that the other claims were derivative of the defamation claim. ALM attached a copy of Smith's August 24, 2017, article to its motion to dismiss.

On July 9, 2018, Smith filed, pursuant to Rule 12(g), Ala. R. Civ. P., a supplement to his motion to dismiss in which he joined ALM's motion to dismiss for failure to state a claim.

On July 13, 2018, Bell filed responses in opposition to the defendants' various motions to dismiss. With regard to ALM's motion to dismiss, Bell specifically sought to refute ALM's contention that Smith's article was published as an "opinion piece." Bell attached a copy of Smith's August 24, 2017, article to her response to ALM's motion, as well as a copy of an online petition seeking Bell's immediate removal from the ASBE.

On July 16, 2018, the circuit court held a hearing on the motions to dismiss, listening to arguments from counsel for all of the parties. In the hearing, the circuit court orally denied R Street's motion to dismiss for lack of personal jurisdiction.

On July 30, 2018, the circuit court entered an order granting the Rule 12(b)(6) motion to dismiss in favor of ALM and Smith. The order stated:

> "Ella Bell, an elected official, sued for defamation after an article was published on AL.com. The article quotes Bell as asking whether special education students can be placed in an academy separate from other students so that their test scores cannot be used to lower test scores in public schools. Bell does not assert that she was misquoted; her complaint is that the author characterized her suggestion as urging that special education students be 'institutionalized,' thereby

> dredging up Alabama's sordid past of warehousing the mentally ill et al.
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> "ALM filed a motion to dismiss, joined in by Smith.
>
> "The only hesitation in granting the motion is that the suit is in its infancy. However, '[o]ne cannot recover in a defamation action because of another's expression of an opinion based upon disclosed, nondefamatory facts, no matter how derogatory the expression may be.' Sanders v. Smitherman, 776 So. 2d. 68, 74 (Ala. 2000). The article at issue meshes exactly with [the] Sanders maxim. Bell's actual words are in quotations whereas the term institutionalize is not. The author discloses the actual words used by Bell and editorializes by converting her use of 'academy' into 'institutionalize.' Because Bell is an elected official, she is fair game for such commentary.
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> "Because the speech is protected, [Bell's] claims must fail.
>
> "The claims against ALM and Smith are dismissed. The Court has not seen where R Street joined in this motion to dismiss and the claims as to it remain on life support."

On August 1, 2018, R Street supplemented its motion to dismiss pursuant to Rule 12(g), Ala. R. Civ. P., by joining the Rule 12(b)(6) motion to dismiss originally filed by ALM. On the same date, the circuit court entered a short order granting R Street's motion to dismiss.

Bell appeals.

II. Standard of Review

We note that the attachment of Smith's article to the various motions to dismiss does not convert those motions into motions for a summary judgment because "'"if a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss."'" Donoghue v. American Nat'l Ins. Co., 838 So. 2d 1032, 1035 (Ala. 2002) (quoting Wilson v. First Union Nat'l Bank of Georgia, 716 So. 2d 722, 726 (Ala. Civ. App. 1998), quoting in turn GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1384-85 (10th Cir. 1997)). Smith's article is the basis of Bell's complaint. Therefore, our standard of review is the familiar one for a ruling on a Rule 12(b)(6) motion to dismiss.

> "'On appeal, a dismissal is not entitled to a presumption of correctness. The appropriate standard of review under Rule 12(b)(6) is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle her to relief. In making this determination, this Court does not consider whether the

> plaintiff will ultimately prevail, but only whether she may possibly prevail. We note that a Rule 12(b)(6) dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.'"

Lloyd Noland Found., Inc. v. HealthSouth Corp., 979 So. 2d 784, 791 (Ala. 2007) (quoting Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993)).

III. Analysis

Bell primarily takes issue with the circuit court's conclusion that Smith's article was an expression of opinion for which Bell was not entitled to a recovery under a defamation claim.[2] Bell contends that in reaching this conclusion the circuit court "made a factual finding on a disputed issue at the Rule 12(b)(6) stage contrary to the standard of review." Bell's brief, p. 15. Bell argues that "there is a serious factual dispute here as to whether Smith's article was published as a news article or as an opinion piece." Id. at p. 14. This is so, she says, because there is

[2]Bell's arguments in her initial appellate brief focus solely on the circuit court's dismissal of her defamation claim. Accordingly, by implication Bell is not challenging the circuit court's dismissal of her claims alleging invasion of privacy, the tort of outrage, conspiracy, and negligence and wantonness against the defendants.

a discrepancy as to whether the original version of the article published on AL.com contained the words "Alabama Opinion" at the top. The version ALM attached to its motion to dismiss contained this label, but Bell argues that that was a later edited version. The version she attached to her response to ALM's motion to dismiss did not contain the "Alabama Opinion" label. Additionally, ALM had argued in the circuit court that the URL for the article contained the word "opinion" in the Web-browser address bar, but Bell contends that the URL does not appear when a reader views the article on AL.com on a smart phone or other smaller electronic device. Similarly, as mentioned in the rendition of the facts, Bell contends that the sidebar in the desktop version of the article that lists other columnists for AL.com is not visible when the article is viewed on a smart phone or other smaller electronic device.

The problem for Bell is that the features of the article she contends are disputed were not addressed by the circuit court in its order dismissing her complaint. The circuit court based its determination that Smith's article was an expression of opinion on the text of the article itself, not

on its URL, a label at the top, or a columnist sidebar. The circuit court observed that Smith accurately quoted Bell's statements from the June 21, 2017, ASBE meeting and then "editorializes by converting [Bell's] use of 'academy' into 'institutionalize.'" The circuit court concluded that Smith's article "meshes exactly with [the] Sanders maxim" that "'[o]ne cannot recover in a defamation action because of another's expression of an opinion based upon disclosed, nondefamatory facts, no matter how derogatory the expression may be.'" (Quoting Sanders v Smitherman, 776 So. 2d. 68, 74 (Ala. 2000).) The Sanders Court further explained that this rule exists because "the recipient of the information is free to accept or reject the opinion, based on his or her independent evaluation of the disclosed, nondefamatory facts." 776 So. 2d at 74.

Bell also argues that the determination of whether a communication is an expression of opinion or purports to be a statement of fact is a question of fact that should be submitted to a jury rather than a question of law for the

court. But Bell provides no authority for such an argument,[3] and, in any event, the law does not support Bell's argument.

> "'To establish a prima facie case of defamation, the plaintiff must show [1] that the defendant was at least negligent, [2] in publishing [3] a false and defamatory statement to another [4] concerning the plaintiff, [5] which is either actionable without having to prove special harm (actionable per se) or actionable upon allegations and proof of special harm (actionable per quod).'"

Delta Health Grp., Inc. v. Stafford, 887 So. 2d 887, 895 (Ala. 2004) (quoting Nelson v. Lapeyrouse Grain Corp., 534 So. 2d 1085, 1091 (Ala. 1988)). Thus, to be actionable, a statement must be both false and defamatory. "A decision whether a statement is reasonably capable of a defamatory meaning is a question of law." Cottrell v. National Collegiate Athletic Ass'n, 975 So. 2d 306, 346 (Ala. 2007). See also Finebaum v. Coulter, 854 So. 2d 1120, 1128 (Ala. 2003) (noting that "'if the communication is not reasonably capable of a defamatory meaning, there is no issue of fact, and summary judgment is

[3]"It is the appellant's burden to refer this Court to legal authority that supports its argument. Rule 28(a)(10), Ala. R. App. P., requires that the argument in an appellant's brief include 'citations to the cases, statutes, [and] other authorities ... relied on.'" Board of Water & Sewer Comm'rs of Mobile v. Bill Harbert Constr. Co., 27 So. 3d 1223, 1254 (Ala. 2009).

proper'" (quoting Harris v. School Annual Publ'g Co., 466 So. 2d 963, 964-65 (Ala. 1985))).

The circuit court plainly concluded Smith's statements were not reasonably capable of a defamatory meaning because Smith had provided exact quotes of Bell's words and the reader was able to make his or her own judgment as to whether Smith was construing Bell's statements fairly.

Bell disagrees. Bell argues that the headline "Alabama School Board Member Considers Institutionalization for Special Ed Students" together with the first sentence of Smith's article -- "Alabama State Board of Education (SBOE) member Ella Bell wants to know why we can't force special needs children into an institution in an effort to help improve test scores in Alabama's public schools" -- makes it "fair to say ... that the average, if not all readers, would conclude that Mrs. Bell wanted to 'force special needs children into institutions' which she never suggested." Bell's reply brief, p. 8. Bell adds that "[t]he fact that other parts of the article include Mrs. Bell's use of the words academy in quotation marks would not have alerted readers to disregard

the headline and first sentence and conclude that Smith's use of institution was just his opinion." Id. at pp. 8-9.

Bell is essentially arguing that a sensational headline and the lead sentence of the article override the context of the article as a whole. But as we noted above, the test is whether the statement is "reasonably capable of a defamatory meaning." Cottrell, 975 So. 2d at 346 (emphasis added).[4] A reasonable person reading Smith's article would readily conclude that Smith was expressing his opinion about Bell's comments during the June 21, 2017, ASBE meeting and about the competency of ASBE members in general, not that he was

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[4]This Court has further explained:

> "'It seems to be the general rule that the test to be applied in determining the defamatory nature of an imputation is that meaning which "would be ascribed to the language by a reader or listener of ordinary or average intelligence, or by a 'common mind'." 50 Am. Jur. 2d Libel and Slander § 138. Thus, [a newspaper advertisement] "must be construed in the sense which readers of common and reasonable understanding would ascribe to it." 50 Am. Jur. Libel and Slander, supra.'"

Kelly v. Arrington, 624 So. 2d 546, 548 (Ala. 1993) (quoting Loveless v. Graddick, 295 Ala. 142, 148, 325 So. 2d 137, 142 (1975)).

purporting simply to report what occurred at the meeting, which was held two months before Smith wrote the article. Smith made several statements throughout the article that carry the tenor of opinion statements. Smith made statements such as: "When a SBOE member doesn't seem to have a real grasp for such an important aspect of public education, we have a problem."; "Bell doesn't seem to have a clue about Alabama's public education system for special needs students, but she is pretty concerned that those students 'bring down' the rest."; "The way we balance the needs of students isn't easy, but it's a testament about the kind of state we want to be."; "Either we don't have enough information about our SBOE members to hold them accountable, or we simply don't care about the people shaping our state's education environment."; and "We just need to decide whether Alabama's future matters enough for us to do anything about it." The article is clearly a piece of advocacy expressing Smith's opinion that the people of Alabama should pay more attention to whom they elect to the ASBE.

It is true, as Bell repeatedly states in her brief, that she did not use the words "institution" or

"institutionalization" in her comments at the June 21, 2017, ASBE meeting. It is equally apparent, however, that in using those terms Smith was putting his own spin on Bell's comments about establishing an "academy on special education or something of that order" and "trying to see if you can move them [special-education students] out" of regular classrooms, comments Smith accurately quoted in the article. Such "editorializ[ing]," as the circuit court labeled it, is frequently employed with regard to comments from public officials. The fact that Bell does not believe Smith's interpretation of her comments was fair does not make such commentary defamatory.

Bell's remaining objection is that the circuit court should have waited at least until the summary-judgment stage of the litigation to render a final judgment as to the efficacy of her claims rather than granting the defendants' motions to dismiss. The circuit court itself hinted at this issue, stating that "[t]he only hesitation in granting the motion is that the suit is in its infancy." In support of this argument, Bell observes that Sanders was decided on a motion for a summary judgment.

Certainly in some cases it would not be appropriate to determine whether a communication is reasonably capable of a defamatory meaning at the motion-to-dismiss stage because submissions beyond the pleadings would be necessary to establish the context of the communication at issue. Indeed, this Court has observed:

> "'"Whether a given representation is an expression of opinion or a statement of fact depends upon all the circumstances of the particular case, such as the form and subject matter of the representation and the knowledge, intelligence and relation of the respective parties. The mere form of the representation as one of opinion or fact is not in itself conclusive, and in cases of doubt the question should be left to the jury."'"

McGowan v. Chrysler Corp., 631 So. 2d 842, 846-47 (Ala. 1993) (quoting Harrell v. Dodson, 398 So. 2d 272, 274-75 (Ala. 1981), quoting in turn Fidelity & Cas. Co. of New York v. J.D. Pittman Tractor Co., 244 Ala. 354, 358, 13 So.2d 669, 672 (1943)).

However, in this case the article that is the source of the defamation claim was before the circuit court as an

attachment to various motions. Bell does not highlight any additional context that is needed to determine whether the communication is one that is reasonably capable of a defamatory meaning.[5] The information that was before the circuit court from the motions to dismiss and Bell's responses thereto is the same information the circuit court would rely upon in making a determination on a summary-judgment motion, a determination that is a question of law for the court. Accordingly, in this case, where a fair reading of Smith's article reveals it to be an expression of opinion that did not mislead readers about the content of Bell's actual statements,

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[5]A determination concerning whether Smith's communication was made with "actual malice," which the parties also discuss in their briefs, is another matter. Bell concedes that she is a public official.

> "If a plaintiff is determined to be a public official, public figure, or limited-purpose public figure, then the plaintiff has the burden of establishing by clear and convincing evidence that the defamatory statement was made with '"actual malice" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'"

Cottrell, 975 So. 2d at 332–33 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964)). Whether Smith's communication was made with "actual malice" would, at the least, require discovery. But "actual malice" becomes a relevant issue only if the communication in question is reasonably capable of a defamatory meaning.

it was not necessary for the circuit court to wait until the summary-judgment stage to dispose of the claims against Smith, ALM, and R Street.[6]

IV. Conclusion

For the foregoing reasons, the circuit court did not err in dismissing Bell's defamation suit. Accordingly, the circuit court's judgment is affirmed.

AFFIRMED.

Parker, C.J., and Shaw, Bryan, and Mitchell, JJ., concur.

[6]Because we conclude that the circuit court's judgment is due to be affirmed on the basis of the defendants' Rule 12(b)(6), Ala. R. Civ. P., motions, we pretermit discussion of R Street's contention that the judgment is also due to be affirmed as to R Street based on a lack of personal jurisdiction.