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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001238-MR

WAYNE DEASY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 95-CI-02593

COSMOS BROADCASTING CORPORATION
D/B/A WAVE-TV AND
NEL TAYLOR — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; GUIDUGLI AND TACKETT, JUDGES.

GUIDUGLI, JUDGE. Wayne Deasy (Deasy) appeals from a memorandum and order of the Jefferson Circuit Court entered April 28, 1998, which granted summary judgment in favor of Cosmos Broadcasting Corporation, d/b/a WAVE-TV (WAVE) and Nel Taylor (Taylor). We affirm.

At all relevant times hereto, Taylor was employed by WAVE as a "troubleshooter" reporter. In that capacity, she would investigate consumer complaints and report her findings in broadcast reports aired during WAVE's newscasts.

Deasy is the owner and operator of Deasy Auto Parts. In conjunction with his business, Deasy ran the following advertisement in a local publication:

> Engine Overhaul Special
>
> 4 Cyl. $399 6 Cyl. $499 8 Cyl. $599
>
> Most domestic engines up to 400 cu in.
>
> Includes standard rings, rod bearings, main bearings, cam bearings, lifters, timing chain or belt, expansion plugs, all gaskets and seals, valve job, and necessary machine shop labor. INSTALLATION AVAILABLE [emphasis in original]

According to Deasy, the price in the advertisement covered situations where people bring in engines, have them overhauled, and then pick them up and install them back into the vehicle. According to Deasy, installation would add $450-$800 to the advertised price. He also stated that most engines could be serviced "with these parts and services that are listed for this price," but indicated that other parts and services, at additional cost, were occasionally required to complete the job. Deasy testified in his deposition that it is hard to estimate the total cost of an engine overhaul because the extent of work needed usually cannot be determined until the engine has been removed and disassembled.

Deasy came to Taylor's attention when she received a letter from William Mitchell (Mitchell) accusing Deasy of false advertising. According to Mitchell's letter, he saw Deasy's advertisement and took his car in for an overhaul special. He was given an initial estimate of $900, and understood that other small charges were possible for repairs that could not be

anticipated. He left his car at Deasy's garage along with a $300 deposit on the work. According to Mitchell, once the engine was dismantled, he was told that he would have to OK further repairs before the work could continue, which would raise the cost to $1,600. Mitchell alleged that when he refused to consent to the additional work, he was told that he could either pay an additional $250 to have the engine reassembled so he could take it somewhere else, or that they would do the job as advertised for $900 with no guarantee. Mitchell stated that after further discussions with Deasy in which Deasy admitted that some of the extra work did not need to be done, he agreed in writing to pay $1,142 to have the engine repaired. Mitchell also stated that he was unable to take a planned vacation because of the length of time it took Deasy to repair the car.

Shortly after receiving Mitchell's letter, Taylor received a telephone call from Cheryl Jones (Jones) during a "Tell Nel" segment.[1] Jones told Taylor that she took her car to Deasy in response to the advertisement, was given a quote higher than the advertised price, and had to pay substantially more than the quoted price once the work was finished. Jones told Taylor that Patricia Smith (Smith) had similar problems with Deasy.

After receiving these complaints, Taylor taped interviews with Mitchell, Jones, and Smith. After completing these interviews, Taylor called Deasy and told him she had received complaints about his business. Deasy invited Taylor to

[1]Although unclear from the record, it appears that Taylor did not talk with Jones on the air.

come to his business and look around. Although he initially declined to be interviewed, he changed his mind when Taylor told him she would air her report regardless of whether he participated.

Taylor interviewed Deasy on September 27, 1994. The questions she asked him focused on why it is difficult to accurately estimate the cost of an engine overhaul. Deasy stated that he told Taylor that:

> projecting the cost of an engine overhaul was about like predicting the weather. You take all your information at hand and do the best you can. Sometimes you hit it, sometimes you don't.

Although Taylor did not tell Deasy who she had received complaints from, he assumed that one of the complaints was from Mitchell. Taylor asked Deasy if Smith's name "rang a bell," but he told her he did not recall Smith. Deasy and Taylor did not discuss the specifics of each complaint, nor did she show him the interviews she had already taped.

Beginning with the noon newscast on September 27, WAVE began running promotional spots for the story. The spots showed a shot of Deasy's business and stated that the report would be about automotive repair bill shock. The Deasy report aired during the 6:00 p.m. newscast.

On October 18, 1994, Deasy's attorney wrote a letter to WAVE detailing what he believed were inaccuracies in Taylor's report. Deasy demanded that WAVE produce and air a new report correcting the alleged inaccuracies. When WAVE failed to respond, Deasy filed a complaint alleging:

> the story as run was defamatory in nature and false and misleading, containing false accusations against the Plaintiff by former customers, and misleading in that [Taylor] indicated that the statements of the Plaintiff were in response to the particular complaints, when in reality she never told him what the complaints were.

On April 28, 1998, the trial court entered summary judgment in favor of WAVE and Taylor. The trial court noted that truth is an absolute defense to a charge of defamation, and stated:

> The complaints made by the customers have not been shown to be false by Mr. Deasy. "It has long been recognized that a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1991). The complaints made by Mr. Deasy's customer were substantially true, thus the defendants are not liable for defamation.
>
> Mr. Deasy also contends that Ms. Taylor did not allow him to address the specific complaints aired on her segment, but led the public to believe that she had. The complaints which were addressed . . . concerned the shock of receiving one quote when the vehicle was first taken to the garage and another when picking up the vehicle. Mr. Deasy addressed this complaint when speaking with Ms. Taylor.

The trial court also found that Deasy had failed to prove his allegations concerning false light defamation. This appeal followed.

Deasy maintains that the trial court erred in finding that the statements he alleged were false and misleading to be substantially true. As Deasy is appealing from entry of summary judgment, we note at the outset 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." Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996). Furthermore, as the trial court correctly stated, a party opposing a properly supported motion for summary judgment cannot defeat it without showing some evidence of the existence of a genuine issue of material fact. Hubble v. Johnson, 841 S.W.2d 169, 171 (1992).

In order to recover for defamation, the plaintiff must show publication of defamatory language about the plaintiff which is injurious to his reputation. Columbia Sussex Corp., Inc. v. Hay, Ky. App., 627 S.W.2d 270, 273 (1981). In construing the language complained of, we are to consider it as a whole as opposed to merely one statement isolated from its context. McCall v. Courier-Journal and Louisville Times Co., Ky., 623 S.W.2d 882, 884 (1981). Truth is an absolute defense to a charge of defamation. Bell v. Courier-Journal and Louisville Times Co., Ky., 402 S.W.2d 84, 87 (1966). Absolute truth is not required, it is enough that the statement complained of be substantially true. Bell, 402 S.W.2d at 87. Contrary to Deasy's argument, the question of whether a statement is substantially true is not necessarily one of fact to be decided by the jury. Id.[2] Faced

[2]Although Bell did not specifically hold that the truthfulness of a statement was not a question of fact, the Court noted that substantial truth is a defense to a claim of defamation and held that "the trial judge correctly determined that the. . . allegedly libelous statements relied on by appellant were not actionable," and affirmed entry of summary (continued...)

with WAVE's allegations that the statements complained of were substantially true, it was Deasy's burden to come forward with evidence creating a genuine issue of material fact as to their falsity. "Only if [Deasy] could have produced affirmative evidence at trial that the statements were defamatory would he have been entitled to prevail in opposing the summary judgment motion." Buchholtz v. Dugan, Ky. App., 977 S.W.2d 24, 27 (1998). Having reviewed the transcript of Taylor's report as well as the depositions of Taylor and Deasy, we agree that the statements complained of are either substantially true, or that Deasy failed to show a genuine issue of material fact as to their falsity.

Deasy maintains that Taylor's statement that a total overhaul would cost between $800-$1,000 is false. Deasy testified that a "total overhaul" as opposed to his "engine overhaul special" would cost between $4,000-$5,000, and that her statement would make people think he advertised a "total overhaul" for a low price and charged higher prices once people brought their cars in. Deasy contends that Taylor should have said that his "special" was $500 plus installation, bringing the total cost to $800-$1,000. A review of the transcript of the report shows that Taylor made this statement at the beginning of the report while discussing Deasy's advertisement. Although she did state a "total overhaul" would cost $800-$1,000, it is clear when reviewing her statement in the context of the report that she was referring to the advertised price plus the cost of

[2](...continued)
judgment in favor of the defendant. Id.

installation as opposed to a total overhaul. Deasy himself testified that the cost of installation would be $450-$800, which would bring the price of the special to $800-$1,400. Thus, the statement was substantially true.

Deasy claims that Taylor's statement "Listen to the final job" in regard to Smith's car is false and misleading because six months had passed between when he worked on her car and Taylor's report. He claims what Taylor showed was the same car six months later, and that Smith had never complained to him about her car. A review of Deasy's deposition shows that he testified that Smith brought the car back for an oil change and at that time had some sort of complaint. Deasy does not recall what the complaint was. Deasy maintains that he cannot be held responsible for how an engine runs after six months, but admits that he gives customers a 60 month/50,000 mile warranty. Because Deasy can show no evidence creating a genuine issue of material fact as to the falsity of this statement, summary judgment was proper.

Deasy maintains that Smith's statement that the cost of her engine work went "higher and higher and higher" until it reached $2,500 is false. However, Deasy testified in his deposition that a 6 cylinder overhaul plus installation would have been $949, and stated "she was told that if the job was done as advertised" that would be the cost. He agreed that it was possible that Smith was later told the cost would be $1,500. According to Deasy, the final price on Smith's car was $2,000, and he agreed that it could have been $2,400. He also admitted

that the final cost was higher than the initial estimate. Based on the foregoing, Smith's statement was substantially true.

Deasy contends that Taylor's statement that Smith had to borrow money to pay for her car repairs is misleading. He does not deny that Smith had to borrow money to pay for the car repairs, but claims that this statement would make people think he forced Smith to borrow money. Because this statement is not libelous on its face:

> the charge must be made by innuendo; that is, the extrinsic facts sought to be embraced must be set forth in the pleading, charging it is libelous. An innuendo, however, cannot enlarge or add to the sense or effect the words charged to be libelous, or impute to them a meaning not warranted by the words themselves, or in the connection in which the colloquium does not fairly warrant. . . . Words not libelous cannot be made so by an innuendo.

Sweeney & Co. v. Brown, Ky., 60 S.W.2d 381, 384 (1933). Examined in the context of the story, the statement shows only that Smith had to borrow money to pay for the car repairs. To accept Deasy's argument would improperly "impute to [the words] a meaning not warranted by the words themselves." The statement is substantially true, and therefore not actionable.

Next, Deasy argues that Mitchell's statement concerning the "bump" in price is misleading because he agreed in writing to pay $1,142 after the engine had been disassembled. However, Deasy offers no evidence to counter Mitchell's complaint that he was given an estimate of $900 and then told that the the price would be $1,600 after the engine was taken apart. Whether Mitchell later agree to pay $1,142 makes no difference, the

record shows that there was a sizeable increase between the initial estimate and actual cost. Deasy also overlooks the fact that Taylor stated in her report that Mitchell paid $1,100 to get his car back. The statement was substantially true.

Deasy states that the statement regarding Mitchell's lost vacation is misleading, however, Deasy testified that he doesn't know whether Mitchell missed his vacation or not. Because Deasy can show no evidence creating a genuine issue of material fact regarding the falsity of this statement, summary judgment was proper.

Deasy stated that Jones' statement that he tried to charge her $2,100 is false. However, he testified that he did charge her $2,100. Thus, the statement is true by his own admission.

Deasy states that the statement regarding Jones' use of an attorney to get her car released at a lower cost is false. Deasy admits receiving a letter from Jones' attorney regarding her car, but stated that his decision to release the car at a lower price was not influenced by the attorney's letter. Whatever influenced Deasy's decision, the statement that Jones used an attorney to help her get her car released is substantially true.

Finally, Deasy states that the comment "What does Wayne Deasy have to say about these complaints?" is misleading because viewers would think he was aware of the specifics of the three complaints and that the comments he made were in response to the complaints. We agree that the evidence shows that Taylor did

not inform Deasy about the specifics of the three complaints at the time she interviewed him. However, a review of the transcript shows that the gist of Taylor's report was that people were complaining about the final cost of their repairs being substantially higher than the initial estimate. Deasy's responses as aired in the report address these complaints. Therefore, the statement that Deasy was responding to the complaints is substantially true. Because we have examined the remarks which Deasy complains of and found that the either they were substantially true or that Deasy failed to create a genuine issue of material fact as to their falsity, the trial court's ruling on this issue was not erroneous.

Deasy also maintains that the trial court erred in finding that he had not stated a cause of action for false light defamation. Deasy contends that even if the statements he complains of are substantially true, he does not need to show defamation in order to recover under a cause of action for false light.

In order to show false light defamation, Deasy must show that:

> (1) the false light in which [he] was placed would be highly offensive to a reasonable person, and (2) the publisher had knowledge of or acted in reckless disregard to the falsity of the publicized matter and the false light in which the other was placed.

McCall, 623 S.W.2d at 888, citing Restatement (Second) of Torts, Sec. 652(E), 1976. In a footnote, the Court added that the plaintiff need not show defamation in order to recover, and that it was "sufficient that the publicity attribute to him

characteristics, conduct or beliefs that are false, and that he is placed before the public in a false position." Id. at 896, n.9. Thus, Deasy is correct in arguing that he need not be defamed in order to recover for false light defamation.

However, what Deasy overlooks is that McCall clearly requires the publisher of the statement in question to either have knowledge of or act in reckless disregard of the falsity of the statements. Therefore, if the statements complained of cannot be shown to be false, there is no cause of action for false light defamation. See Pearce v. Courier-Journal, Ky. App., 683 S.W.2d 633 (1985)(holding that if plaintiff could show published newspaper story to be false plaintiff could maintain cause of action for false light defamation).

Having considered the parties' arguments on appeal, the memorandum and order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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