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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001269-MR

JASON W. LOZE — APPELLANT

v.

APPEAL FROM OWEN CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 98-CI-00064

D. KEITH KEY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING
** ** ** ** **

BEFORE: GUIDUGLI, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal by Jason W. Loze from an order of the Owen Circuit Court granting summary judgment to D. Keith Key in a defamation lawsuit. The suit arose out of statements made by Key at a public meeting and in a letter written to the Kentucky Department of Insurance. We affirm summary judgment with respect to the statements made at the public meeting because the statements were true or not otherwise defamatory. We reverse and remand, however, with respect to the statements made in the letter to the Department of Insurance, because the letter falsely accused Loze of fraud and illegal conduct and, though the letter was conditionally privileged, it

would not be impossible for a jury to believe that Key was grossly negligent or acted with malice in making the accusations contained in the letter.

Loze and Key are both insurance agents. In late 1996 and early 1997, the two were in competition for the group health insurance business for the county employees of Owen County. In conjunction with the bidding process, the Owen County Fiscal Court, the authority in charge of awarding the insurance contract, convened a public meeting on May 13, 1997. Prior to the meeting, the Fiscal Court had issued a bid packet to interested insurance agents which included a census listing persons currently covered under the county health insurance plan. For some reason the census listed Harold H. Gaines as a county employee. In fact, Gaines was not a county employee; however, Gaines was the ex-spouse of a county employee and was entitled to coverage under the county health plan pursuant to his rights under COBRA.

At the meeting, Key gave a presentation to the Board which, Loze contends, included statements which slandered him by falsely accusing him of improper, illegal, and fraudulent conduct relating to the placement of a non-employee, Gaines, on the county's group health insurance plan. Immediately following the presentation by Key, Loze gave a presentation in which he explained that Gaines was properly included in the county's insurance plan under his COBRA rights as the ex-spouse of an existing county employee.

Despite the explanation given by Loze during his presentation at the public meeting, on May 16, 1997, Key wrote a letter to Janice Wilson of the Kentucky Department of Insurance. In the letter, Key unambiguously accused Loze of "fraudulently add[ing] an individual to a group health insurance plan who is not an employee" and, by innuendo, accused Loze of "blatantly violating the law." It is now undisputed that Loze did nothing fraudulent or unlawful with respect to the listing of Gaines as a county employee, and the erroneous listing apparently occurred as a result of a mistake by the insurance carrier.

On May 13, 1998, Loze filed a lawsuit seeking a judgment and damages against Key on the basis that the statements made by Key at the public meeting and in the letter to the Department of Insurance were defamatory. On February 26, 2000, Key filed a motion for summary judgment. On May 1, 2000, the trial court entered an order granting Key's motion for summary judgment. This appeal followed.

In order to qualify for summary judgment, the movant must "show that 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." CR 56.03. The record must be viewed in the 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 should only be used when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor

and against the movant. Id. at 483 (citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985)). A party opposing a properly supported motion for summary judgment cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial. Steelvest, 807 S.W.2d at 482.

We first consider the trial court's granting of summary judgment with respect to Key's statements made at the May 13, 1997, meeting of the Owen Fiscal Court. Specifically, Loze alleges that at the May 13, 1997 meeting, Key, with actual knowledge that Loze was the current agent providing the Owen County employee health insurance plan, made the following statements:

> I think you also want an agent who will continue to service the client after the sale - not just make the money and run, but to also be here and to serve us afterwards. . . .
>
> I think finally too, it is the responsibility of the agent to make sure that their health care plan not only fits the needs of the community and the employer, but it is also important for the agent to make sure that the health care plan maintains compliance with the state law. There is a concern that I have regarding your plan in that area now.
>
> On the census that you sent to me, that I have questioned whether this was the accurate census, and it was told to me that it was, there's an individual on here that probably does not work for the county, but is receiving group health care benefits. My concern about that is real, in two areas. Number one - if indeed he is on a group health care plan and he is not an employee of the county, and he were to go out and have a heart attack tomorrow, and the company were to find out that he was not an employee of the county, they would fight paying the claim. So he's paid all the premiums all along the way, and

he may not have the benefits. In that case, the agent's errors & omissions insurance would have to come forward to pay the claim. That's scary.

I think the second thing that is even more concerning to me that is the aspect that if there is an individual on here, which the census says there is, that is not an employee of the county, it opens up the whole issue of discrimination, and that is, "What about all the other residents of the county - would you make your health insurance available to them as well?". And if they were to find out about it, they might be upset.

So, if you look at this, I think it is the agent's responsibility not to let that happen. There are plenty of health care plans out there that are available for individuals; it takes someone who is willing to go out and look for it and find it. He could have the same coverage at approximately the same price as an individual. It's available.

The second aspect now is, in Kentucky, during the month of May - from May 1st to May 31st - there's open enrollment with all companies for individual health care. So now there's no need to have an individual on the health care plan that is not an employee of the county. He can get individual coverage. It's the agent's responsibility not to let that happen because it opens you up to a lot of issues that you really don't need to deal with.

So, if I present the plan - If I'm awarded the plan - the quote that I gave is "off" just a little bit because that individual would not be on our health care plan. We would find the individual coverage that they need.

So, when you look at that, we've presented to you the most flexibility. I think we've presented to you the lowest cost; in the meantime we've also provided to you the largest network of providers, and I think we are also presenting to you two agents who would work to serve you and the employees of Owen County. Thank you.

Four elements are necessary to establish a defamation action: (1) defamatory language; (2) about the plaintiff; (3) which is published; and (4) which causes injury to reputation. Columbia Sussex Corp., Inc. v. Hay, Ky. App., 627 S.W.2d 270, 273 (1981). Whether the words are defamatory is to be determined from the statement as a whole. Ball v. E.W. Scripps Co., Ky., 801 S.W.2d 684, 690 (1990), cert. denied, 499 U.S. 976, 111 S. Ct. 1622, 113 L. Ed. 2d 719 (1991) (quoting Yancey v. Hamilton, Ky., 786 S.W.2d 854, 857 (1989)); McCall v. Courier-Journal and Louisville Times Co., Ky., 623 S.W.2d 882, 884 (1981), cert. denied, 456 U.S. 975, 102 S. Ct. 2239, 72 L. Ed. 2d 849 (1982). Truth is a complete defense to a defamation action. Wolff v. Benovitz, 301 Ky. 661, 192 S.W.2d 730, 732 (1945). Ky. Rev. Stat. (KRS) 411.045. This is so even when the publication is made with malice, ill will, or is libelous per se. Bell v. Courier-Journal and Louisville Times Co., Ky., 402 S.W.2d 84, 87 (1966). Absolute truth is not the standard; as long as the statements are substantially true, the defense is available. Id. at 86.

We need not address whether Key's statements were, in fact, defamatory or entitled to a qualified privilege because Loze's slander case is fatally deficient in that he has failed to cite us to a single particular statement in Key's presentation that is untrue. To defeat summary judgment, Loze, as the plaintiff in this case, bears the burden of producing affirmative evidence so as to demonstrate that it would not be impossible for a jury to find that Key made defamatory statements about him

which are untrue. In its order granting summary judgment, the trial court stated with respect to this issue as follows:

> The Court queried Plaintiff's Counsel regarding which of the statements [before the Fiscal Court] were false, as falsity is the first consideration of a defamation case. Counsel was unable to point the Court to any specific false statements of the Defendant.[1] The Court having likewise been unable to find any falsity in reviewing those statements, the Court must find that there was none.

We have a similar problem in identifying any false statements among the eight paragraphs of comments made by Key at the meeting. It is uncontested that, in the bid package provided to Key by the Fiscal Court, Gaines was erroneously listed as a county employee. Further, it is undisputed that Key was aware that Gaines was not in fact a county employee because, among other reasons, he was the insurance agent for the county employees' group life policy. It was within this context that Key made the comments at the Fiscal Court meeting. Further, while Key was clearly alluding to the Gaines situation, he qualified his entire discussion of the issue by using such terms as "if indeed," "in that case," and "if there is." Given the qualified nature of Key's statements, we are unable to identify a single false statement in the entire text of Key's comments.

Moreover, Key's comments regarding the Gaines situation was in direct reference to information contained within the bidding packet provided by the Fiscal Court. The packet

[1]It appears that a pretrial conference was conducted on March 21, 2000, at which Key's motion for summary judgment was argued. The record on appeal does not include a transcript or video of that proceeding.

reflected a nonemployee who was listed as an employee. It was perfectly proper for Key to comment upon information of concern included within the bidding packet, and ultimately Key concluded his discussion of the Gaines matter by noting that his bid would be lower if Gaines was removed from the employee list.

We are persuaded that the trial court properly granted summary judgment as to the comments made at the Fiscal Court meeting.

Next, Loze contends that the trial court erroneously granted summary judgment with respect to the May 16, 1997, letter to Janice Wilson of the Kentucky Department of Insurance. The letter stated as follows:

> I am writing in response to the conversation we had on Wednesday, May 14 concerning Mr. Jason Loze. Mr. Loze owns the Owenton Insurance Agency in Owenton, KY. He has fraudulently added an individual to a group health insurance plan who is not an employee. The employer is aware of the addition and allows the individual to reimburse them on a monthly basis.
>
> I make this assertion after confirming the information. I will provide for you a brief sketch of the facts surrounding the case as well as a list bill which documents my claim.
>
> Recently, Mr. Loze and I were in a competitive bidding situation regarding the health insurance for Owen County Fiscal Court. Mr. Loze resides in the county, whereas, I do not. During the bidding process I received a bid packet from the Owen County Judge-Executive's Office which included a census (see attached). When I received the bid packet, I noticed a name (Mr. Harold Gaines) on the health insurance list which I did not have on the group life insurance plan. At this point, I was under the impression they had hired a new employee and he should be added to the group life. I called the office of the County Judge and

spoke with Ms. Cindy Ellis, Deputy Judge Executive. She informed me that the individual in question (Mr. Gaines) was not to be covered by the life insurance because he was not an employee. I questioned her as to why he was listed as an employee on the health insurance. She said, "We added him to our health insurance because his COBRA had run out and he needed insurance." Mr. Gaines is the ex-husband of a current employee of the county.

On Tuesday, May 13 I phoned United Healthcare Member Services to discover if Mr. Gaines was listed as an employee or for Cobra. They informed me he was indeed listed as an employee. Later that evening, at the County Court meeting, I mentioned my concern about the county knowingly having an individual on their group health insurance who was not an employee. Mr. Loze was quick to reply, "He is not listed as an employee, he is on COBRA."

The next morning, Wednesday May 14th, concerned that I may have been misinformed by Ms. Ellis and United Healthcare members services, I phoned members services again. Bob, an employee of United Healthcare, informed me that Mr. Gaines was an employee of the county. I questioned him again, "Are you sure Mr. Gaines is not on COBRA?" He replied, "He is an employee."

I am concerned for the insured and the integrity of the fiscal court. For the agent and the county to knowingly place an individual on their group health insurance who is not an employee, may be giving the insured a false sense of security regarding health insurance protection. Would it not be considered fraudulent for an agent to have an individual to sign a group health application as an employee when they are not employed by the county, thereby, jeopardizing the intended healthcare protection.

Also, if an agent is allowed to add an individual to a group bill, specifically a county government bill, could that not be considered discrimination by the possible uninsured residents of the county.

> Furthermore, as an agent who attempts to comply with state regulations, it gives an unfair bidding advantage for an agent to blatantly violate the law and to involve the county judge in the process.
>
> I would appreciate your investigation into this matter. I believe it to be in the best interest of all parties concerned. For Mr. Gaines, he would be able to attain the coverage he needs. For the county, it would remove the possible embarrassing situations which may occur. First, for an individual to be denied the coverage he has paid for because of fraudulent information on an application. Second, the perception of discrimination by the community at large. (emphasis added).

Libel is "the publication of a written, defamatory, and unprivileged statement." McCall v. Courier-Journal and Louisville Times Company, 623 S.W.2d at 884. A defamatory writing is a writing which tends to (1) bring a person into public hatred, contempt, or ridicule; (2) cause him to be shunned or avoided; or (3) injure him in his business or occupation. Id. As previously noted, the elements of defamation are: (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 at 273.

The May 16, 1997, letter is affirmative evidence sufficient to defeat summary judgment with respect to the issue of whether Key libeled Loze in the letter. In the letter, Key states that Loze had "fraudulently added an individual to a group health insurance plan who is not an employee" and, by innuendo, accuses Loze of "blatantly violat[ing] the law." It is, however, now undisputed that Loze did nothing fraudulent or unlawful in conjunction with the listing of Gaines as a county employee on

the health insurance records. Nevertheless, the trial court granted summary judgment in favor of Key based upon the qualified privilege prescribed in KRS 304.47-050. KRS 307.47-050 provides, in relevant part, as follows:

> (2) The following individuals having knowledge or believing that a fraudulent insurance act or any other act or practice which may constitute a felony or misdemeanor under this subtitle is being or has been committed shall send to the division a report or information pertinent to the knowledge or belief and additional relevant information that the commissioner or his employees or agents may require:
>
> (a) Any professional practitioner licensed or regulated by the Commonwealth, except as provided by law;
> (b) Any private medical review committee;
> (c) Any insurer, agent, or other person licensed under this chapter; and
> (d) Any employee of the persons named in paragraphs (a) to (c) of this subsection.
>
> . . . .
>
> (8) In the absence of malice, fraud, or gross negligence, no insurer or agent authorized by an insurer to act on its behalf, law enforcement agency, the Department of Workers' Claims, their respective employees, or an insured shall be subject to any civil liability for libel, slander, or related cause of action by virtue of filing reports or for releasing or receiving any information pursuant to this subsection. (emphasis added).

We are persuaded that the trial court erroneously granted summary judgment in favor of Key. The qualified privilege prescribed in KRS 304.47-050(8) is conditioned on the

requirement that there be no malice or gross negligence associated with the privileged defamatory statement.

While it is uncontested that Gaines was incorrectly listed as an employee on the group health plan and that Loze was the agent of the plan, it is obviously fallacious to add those two facts together and conclude that Loze is engaging in fraud and blatant violations of the law. As proved to be the case, there were possible innocent explanations for the erroneous listing. It would not be impossible for a jury to conclude that Key was grossly negligent in concluding, and then reporting to the Department of Insurance, that Loze was engaged in fraudulent and unlawful activity. While under the statute it appears that Key was required to report the discrepancy, his conclusion and accusations may be perceived by a jury as gross negligence. Alternatively, since Loze prevailed over Key in obtaining the Owen County insurance contract, the jury may conclude that Key accused Loze of fraud and illegal conduct out of malice. In either case, the qualified privilege as provided under KRS 304.47-050(8) would be unavailable to Key as a defense.

In summary, there is a genuine issue of material fact with respect to whether Key's accusations of fraud and illegal conduct in the May 16, 1997, letter are privileged under KRS 304.47-050(8). We accordingly reverse with respect to the trial court's granting of summary judgment regarding the statements made by Key in his May 16, 1997, letter to the Department of Insurance.

For the foregoing reasons, we affirm in part, reverse in part, and remand.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
H. Douglas Rouse Florence, Kentucky	Robert W. Kellerman Frankfort, Kentucky