

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001613-MR

DAN COBBLE d/b/a COVERWISE
INDUSTRIES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 00-CI-002414

KENTUCKY ASSOCIATION OF ELECTRIC
COOPERATIVES, INC. d/b/a KENTUCKY
LIVING MAGAZINE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, COMBS, and SCHRODER, Judges.

COMBS, JUDGE: Cobble appeals the June 21, 2000, order of the Jefferson Circuit Court dismissing his complaint (brought pursuant to Kentucky Rules of Civil Procedure (CR) 12.02(f)) for failure to state a claim upon which relief may be granted. We affirm.

Dan Cobble (Cobble) is the owner of Coverwise Industries, a business which manufactures covers for cooking grills. Cobble brought a defamation action against the Kentucky Association of Electric Cooperatives, publisher of the monthly

magazine, *Kentucky Living*. This action arises out of a contract between the parties pursuant to which Cobble agreed to pay \$297 for twelve months, beginning February 2000, for the publication of a two-inch advertisement for his grill covers in *Kentucky Living*. After Cobble expressed dissatisfaction with the quality of the first month's ad, *Kentucky Living* terminated the contract and released Cobble from any obligation to pay for future ads. The ad was published in the March 2000 issue of *Kentucky Living* at no charge to Cobble.

On April 10, 2000, Cobble filed a complaint alleging that he provided the magazine "with all layouts, graphics, and content of the advertisement"; that he relied on the magazine's representations that it would publish an advertisement for him "consistent with the quality of similar advertising in *Kentucky Living*"; that the advertisement actually published was of "extremely poor graphic and print quality" and that it portrayed his business "in a libelous and detrimental way." He also alleged that *Kentucky Living* had

exposed [him] to public riticule, [sic] contempt, and disgrace, and impuned [sic] the quality and respectability of [his] business and of his product.

The complaint contained a claim for breach of contract seeking refund of \$297 paid for the first month's advertisement.

Kentucky Living moved to dismiss the complaint on the grounds that defamation could not be premised on the "graphic quality of an advertisement," that the ad was not libelous per

se, and that the amount in controversy in the breach of contract claim did not meet the monetary threshold necessary to invoke the jurisdiction of the circuit court. The trial court dismissed the complaint with the brief explanation that it agreed in toto with the position advanced by *Kentucky Living*. This appeal followed.

Cobble contends that this case presents an issue of first impression in Kentucky; that is, whether the magazine's "false, crude, and misleading renderings" of his advertisement and product state a cause of action for defamation. Cobble does not argue that the actual words used in the ad are false. Indeed, a comparison of the copy furnished to *Kentucky Living* with the actual advertisement as printed reveals that the words used by Cobble were not changed by the publisher. However, Cobble argues that the depiction of his product, the grill cover, is so altered and distorted as to "create[] a false image of [him] in his business," an image that implies that he "is shoddy and careless in the conduct of his business."

Whether the advertisement in *Kentucky Living* is libelous *per se* is an issue of law. Columbia Sussex v. Hay, Ky.App., 627 S.W.2d 270, 274 (1981). Cobble reasons that a business person pays for advertising in order to create a positive image of his product. In general, a manufacturer relies on advertising to create a market for his product. However, advertising that falls short of that objective is not necessarily defamatory -- much less libelous *per se*.

In order to be actionable, a written or printed publication must "(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." 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. 849 (1982). Where, as in this case, a claim of libel *per se* is made in the context of injury to one's business or occupation, an additional showing is necessary: the alleged defamation must also "contain an imputation of fraud, deceit, dishonesty or other reprehensible conduct on the part of the merchant." White v. Hanks, Ky., 255 S.W.2d 602, 603 (1953). Even if we were to assume that the visual quality of the advertisement was so poor as to leave viewers with a negative image of Cobble's business acumen or the quality of his product, such a defect does not impute fraud nor does it rise to the level of "reprehensible conduct" necessary to support a claim of libel *per se*.

Kentucky law follows the Restatement (Second) of Torts, §573, which addresses the issue of defamation adversely affecting one in his business, trade, or profession. Comment g. of that section states:

Disparaging words, to be actionable *per se* . . . must affect the plaintiff in some way that is peculiarly harmful to one engaged in his trade or profession. Disparagement of a general character, equally discreditable to all persons, is not enough unless the particular quality disparaged is of such a character that it is peculiarly valuable in the plaintiff's business or profession.

Cobble does not argue that the advertisement consisted of anything other than general disparagement. Disregarding Kentucky precedent, he relies on Burton v. Crowell Publishing Company, Inc., 82 F.2d 154 (2nd Cir.1936), and Rejent v. Liberation Publications, Inc., 197 A.D.2d 240, 611 N.Y.S.2d 866 (1994), as authority for his argument that a false impression created by an altered photograph is sufficient in and of itself to support a claim of libel *per se*. However, neither case relates to an injury to the plaintiff's business or profession. Rather, each case involved an altered photograph of the plaintiff himself (not his product) and a claim that the plaintiff suffered personal ridicule as a result of the alleged alteration. The negative impressions of Cobble or his product (if any) created by the poor quality of the graphics in the advertisement fail to sustain a claim of libel *per se*. As Cobble did not allege the existence of special damages, the trial court did not err in dismissing his complaint for failing to state a cognizable claim for defamation. Hill v. Evans, Ky., 258 S.W.2d 917 (1953).

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
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ORAL ARGUMENT FOR APPELLEE:

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