RENDERED: MAY 31, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000695-MR

S.T.P. ENTERPRISES, INC.
AND DAVID SIMON — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS McDONALD, JUDGE
ACTION NO. 97-CI-005157

KENTUCKY FINANCIAL GROUP, INC.
AND ERNIE A. SAMPSON — APPELLEES

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

BEFORE: BUCKINGHAM, McANULTY, AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: S.T.P. Enterprises, Inc. (STP) and David Simon appeal from an order of the Jefferson Circuit Court granting summary judgment to Ernie A. Sampson and Kentucky Financial Group, Inc., in a defamation lawsuit. The appellants contend that the trial court erroneously determined the allegedly defamatory statements were qualifiedly privileged. We affirm.

STP is an insurance brokerage company headquartered in Illinois. The company is engaged in the business of marketing and selling financial planning services to persons and businesses located in the central region of the United States. It is also a

licensed broker for Lincoln Benefits Life Insurance Company. David Simon is the president of STP.

In marketing its various products and services, STP utilizes independent agents. Among the independent agents used by STP are Harry Mandelbaum and Thomas P. Cardosi, neither of whom are residents of Kentucky. Mandelbaum became a licensed agent for STP in May 1997 and became licensed to sell insurance in Kentucky on July 14, 1997. It appears that Cardosi was never a licensed agent for STP and had never been licensed to sell insurance in Kentucky.

Among STP's products is an insurance program referred to by STP as the "Arbitrage Life Payment System." STP describes this product as "a unique life insurance and financial planning device utilizing an arbitrage system to finance the purchase of large amounts of life insurance at relatively little out-of-pocket expense to the owner of the policy."

In the spring of 1997, Mandelbaum identified Spati Industries of Ludlow, Kentucky, and its chairman and chief executive officer, Robert Berberich, as potential clients and approached Berberich regarding the arbitrage insurance program. Cardosi thereafter presented Berberich with a proposal of the program. In conjunction with the presentation of the program, Berberich and Cardosi engaged in a telephone conference call with Simon, which was tape recorded. Berberich was also presented written materials explaining the program, including charts illustrating it. Based upon documents used in the sales

presentation, it appears that the presentation occurred in mid to late April 1997.

Following the sales presentation, Berberich contacted Ernie A. Sampson of Kentucky Financial Group, Inc., and asked him to review the arbitrage insurance program. Sampson is a Certified Life Underwriter, Chartered Financial Planner, Certified Financial Planner, and Accredited Estate Planner. Sampson reviewed the proposal, performed various investigations, and, in a letter to Berberich dated August 5, 1997, reported his observations, opinions, and suggestions regarding the plan to Berberich. The letter was highly critical of the STP arbitrage program and the personnel involved in presenting it.

On September 9, 1997, Simon and STP filed a civil complaint in the Jefferson Circuit Court against Sampson and Kentucky Financial Group. The complaint alleged that Sampson's August 5, 1997 letter contained fourteen false and misleading statements which libeled Simon and STP. On March 2, 2000, the appellees filed a motion for summary judgment. The motion alleged that the appellees were entitled to judgment because the statements in the August 5, 1997 letter were protected by two privileges: (1) the absolute privilege for pure opinion, and (2) the qualified privilege for statement by and to parties with corresponding interests, or having some duty pertaining to the communication.

On March 5, 2001, the circuit court entered an order granting summary judgment to the appellees. The court determined that Sampson's letter to Berberich was protected by the qualified

privilege protecting "[c]ommunications made bona fide on subject matter in which the person communicating has an interest or with respect to which he has a duty, if made to a person having a corresponding interest or duty. . . ." See Rich v. Kentucky Country Day, Inc., Ky. App., 793 S.W.2d 832, 838 (1990), citing 53 C.J.S. Libel and Slander, Sec. 9(b). This appeal followed.

The appellants contend that the circuit court erroneously granted summary judgment. 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[1] 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). On appeal, the standard of review of a summary judgment is whether the trial court correctly found that there was no genuine issue 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).

The foundation for this lawsuit is Sampson's August 5, 1997 letter to Berberich. Following is the text of the letter in its entirety:[2]

> At your request I have reviewed the Arbitrage Life Payment System which is being promoted by STP Enterprises, Inc. of Chicago,

[1] Kentucky Rules of Civil Procedure.

[2] The fourteen alleged defamatory statements are numbered and underlined.

Illinois. I have met with Thomas P. Cardosi on two occasions who is trying to sell the arrangements and I have met once with Harry Mandelbaum who is involved as the designated "agent of record".

First, I want you to know I contacted the Kentucky Department of Insurance in order to determine whether either of these individuals were properly licensed to present to you the Lincoln Benefit Life proposals which accompanied their presentation. The concern was created because Mr. Cardosi represented himself by use of a business card of an insurance company that was declared insolvent over three years ago.

The Department of Insurance indicates that [1]neither man is licensed in the state of Kentucky to do business with Lincoln Benefit. I would suspect that [2]neither has sold this product to any other citizens in the State of Kentucky. [3]Harry Mandelbaum may be operating in the state of Kentucky illegally. [4]He does not possess a valid non-resident Kentucky license. [5]Therefore, any activity by Mr. Mandelbaum that requires an insurance license is strictly prohibited in Kentucky.

Because of this I would counsel you to obtain from both men copies of their proof of errors and omission/professional liability insurance. This will protect you to some degree should, at a later time, you need to file a claim against their liability insurance.

It also might be a good idea to obtain similar information about STP Enterprises, Inc., the promoter of this arrangement. In addition to John Cannon who spoke to us on the conference call you may wish to find out who the other principals of the firm are and determine whether they are properly licensed to conduct business in the state of Kentucky.

As to their proposal itself, I would suggest you obtain accurate illustrations directly from the insurance company which specifically reflects what they are proposing. [6]The illustrations which you were provided do not accurately reflect what has been proposed. Specifically, you should ask them to provide an illustration which shows the entire sum of

money, i.e., the $373,830.00 premium being paid into the insurance policy and the subsequent withdrawals occurring. The illustrations which they provided did not reflect the impact of withdrawal.

You should also request that the illustration be run for a Kentucky resident rather than an Illinois resident. If you should ultimately decide to apply for the coverage on your son or other members of the family, you should request that illustrations be provided based on the final underwriting classification which the insurance company approves. [7]The illustrations are now based on Preferred rates which provide the most optimistic possible scenario and will drastically change should they be approved on a less favorable basis.

You might recall that we spoke to your CPA on July 22nd 1997 via a conference call. He advised you to be "very cautions [sic]". I concur with him. I do not believe this transaction is in your best interest. [8]It has too many things that could go wrong and cost you substantial money in the future.

You might recall that all parties agreed to have the "sales presentation" taped. [9]The men involved implied things which I believe are not accurate and may be prohibited by law to say. They may be, in my opinion, making a fraudulent presentation to you.

[10]I have shared this information with the Fraud unit of the Kentucky Department of Insurance and they indicated that they may have violated the law. They plan to pursue this matter with them.

In regards to the "arbitrage concept", I believe there is some degree to [sic] risk for you as it relates to the entire arrangement and the various legal documents which will require your signature. In addition, I believe the arrangements proposed ignore the estate planning objectives which need to be addressed. [11]There's a lot of smoke and mirrors . . . but no real meat to their recommendations.

[12]The legal documents basically give up your rights to seek legal remedies should

> there be problems with the arrangement or adverse tax consequences for you, etc. [13]The documents disclose negative income tax implication[s] which I raised and do not entirely support the "statements" made by the promoters of the arrangements.
>
> The proposals obtained from the promoters included a sample policy which clearly had surrender penalties . . . the promoters stated the policy surrender penalties do not exist . . . The legal documents reference a "pay back" period of 12 years which require you to pay back a sum equal to a years' premium . . . this matches a 12 year surrender penalty.
>
> The "arbitrage" arrangement operates under a 45 basis point spread . . . It may be difficult to support the policy expenses and mortality charges under this small amount of a spread. Without a company illustration, which they said they could not provide, it is suspect that the policy does not support the loan interest payments and ultimately "blows up" the policy.
>
> The bottom line . . . I do not recommend you do this. It exposes you to potential problems in the future you may not wish to deal with. [14]The promoters may have operated illegally according to the Department of Insurance. I don't believe it solves your family estate and financial planning needs.
>
> The entire program is designed to get you to "buy" life insurance with little out of pocket costs . . . However, there is a cost associated with it that may be very significant in the future.

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. Yancey v. Hamilton, Ky., 786 S.W.2d 854, 857 (1989).

Published words are actionable per se if they directly tend to the prejudice or injury of anyone in his profession, trade or business. Tucker v. Kilgore, Ky., 388 S.W.2d 112, 114 (1964); Baker v. Clark, 186 Ky. 816, 218 S.W. 280, 283 (1920); Hill v. Evans, Ky., 258 S.W.2d 917, 918 (1953). The August 5, 1997 letter contains statements which would directly tend to injure the appellants in their trade or business.

However, there can be no recovery for defamation if the publisher of the defamatory statements enjoys a qualified privilege. One such qualified privilege is a communication made in answer to an inquiry and in reasonable protection of the publisher's own interest. For a defendant to succeed under this privilege, the following four requirements must be met:

> 1. The communication must have been made by the defendant in good faith, without malice, not voluntarily, but in answer to an inquiry, and in the reasonable protection of his own interest or performance of a duty to society.
>
> 2. The defendant must honestly believe the communication to be true.
>
> 3. There must have been reasonable or probable grounds known to him for the suspicion.
>
> 4. The communication, if made in answer to an inquiry, must not go further than to truly state the facts upon which the suspicion was grounded, and to satisfy the inquirer that there were reasons for the suspicion.

See Sharp v. Bowlar, 103 Ky. 282, 45 S.W. 90, 91 (1898); Felty v. Felty, 164 Ky. 355, 175 S.W. 643, 644 (1915); Baskett v.

Crossfield, 190 Ky. 751, 228 S.W. 673, 675 (1920); Miller v. Howe, 245 Ky. 568, 53 S.W.2d 938, 939 (1932); and Tucker v. Kilgore, 388 S.W.2d at 114.[3]

Once the privilege has been placed at issue, the burden falls upon the plaintiff to defeat the defense by showing either that the privilege does not apply under the circumstances or that it has been abused. Columbia Sussex Corp., 627 S.W.2d at 276. The question of whether appellee's statements were qualifiedly privileged is one of law. Id. However, whether there has been an abuse of that privilege is a question of fact unless the evidence points to only one reasonable conclusion. Id.

It is uncontested that Berberich contacted Sampson and solicited his advice regarding the merits of the arbitrage insurance program, that the letter was written in answer to the inquiry, and that Sampson made the communication in protection of his interest of providing professional financial advice to his client regarding the insurance plan. Hence, the preliminary elements of the privilege are satisfied.

STP and Simon argue that Sampson failed to meet at least the first and fourth requirements necessary to establish a qualified privilege. Concerning the first requirement, it is undisputed that Sampson's letter was in response to an inquiry

[3] See also The Restatement (Second) of the Law of Torts § 596, pg. 274, (1977)(An occasion makes a publication conditionally privileged if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know) and Rich v. Kentucky Country Day, Inc., Ky. App., 793 S.W.2d 832, 838 (1990) (Communications made bona fide on subject matter in which the person communicating has an interest or with respect to which he has a duty, if made to a person having a corresponding interest or duty, are qualifiedly privileged).

from Berberich and was in reasonable protection of his own interests. STP and Simon acknowledge this fact, but they allege that there was a fact issue regarding whether the communication was made with malice. The trial court held that "there is nothing to indicate that the statements of the Defendant contained in the August 5, 1997 letter were maliciously made."

If it is proven that a communication was malicious, the qualified privilege is destroyed. Shah v. American Synthetic Rubber Corp., Ky., 655 S.W.2d 489, 492-93 (1983). We agree with the trial court that there was no indication that the statements in Sampson's letter were made maliciously. There was no evidence of ill will, intent to harm, knowledge of falsity, or reckless disregard for the truth. Further, STP and Simon have not pointed to evidence which would indicate that Sampson made the statements for the purpose of procuring Berberich's business. In short, we agree with the trial court that there was no genuine issue of material fact concerning malice.

The second requirement in order to establish the qualified privilege is that the defendant must honestly believe the communication to be true. Miller, 53 S.W.2d at 939. There is no indication that Sampson believed the statements in his letter to be false. We conclude that there was no fact issue in this regard.

The third requirement is that there must have been reasonable or probable grounds known to him for the suspicion. We believe it is clear that Sampson had reasonable or probable grounds for suspecting that STP may have been engaged in a

fraudulent action. These grounds included the fact that Cardosi represented himself with the business card of an insolvent company; that, as of the date of Sampson's inquiry to the Department of Insurance, neither Cardosi nor Mandelbaum were licensed in Kentucky to do business with Lincoln Benefit Insurance; and that, as of the date of Sampson's inquiry to the Department of Insurance, Mandelbaum did not possess a valid non-resident license and that any activity without such license was prohibited in Kentucky. Again, we find no fact issue in this regard.

The fourth requirement for the existence of a qualified privilege is that the communication, if made in answer to an inquiry, must not go further than to truly state the facts upon which the suspicion was grounded, and to satisfy the inquirer that there were reasons for the suspicion. Sampson stated in his letter that he did not recommend Berberich enter into the arbitrage arrangement, and he further stated that he suspected that the appellants may have been operating illegally.

Concerning the arbitrage arrangement, Sampson set forth his concerns in detail and with specificity. For example, he stated that the concept ignored estate planning objectives which needed to be addressed. Further, he noted that the legal documents basically gave up Berberich's rights to seek legal remedies should there be problems with the arrangement or should there be adverse tax consequences. Sampson also expressed concern regarding surrender penalties and the 45 basis-point spread.

As for Sampson's suspicions that the appellants may have been operating illegally or fraudulently, Sampson referenced the fact that Cardosi represented himself with a business card of an insolvent company, the fact that the Department of Insurance indicated that neither Cardosi nor Mendelbaum was licensed in Kentucky to do business with Lincoln Benefit, and the fact that Mandelbaum did not possess a valid non-resident Kentucky license. The appellants assert that Mandelbaum became licensed in Kentucky on or about July 14, 1997, a date which was prior to Sampson's letter to Berberich. Thus, the appellants assert that the information concerning Mandelbaum was blatantly false. However, although Mandelbaum was licensed in Kentucky on July 14, 1997, this event occurred after Berberich received the arbitrage system proposal and after Berberich first sought advice from Sampson. Furthermore, Sampson did not make unsupported statements concerning the licensing of Cardosi and Mandelbaum, but he relied on the information given to him by the Department of Insurance. Mandelbaum did not become licensed in Kentucky until the middle of July, approximately three weeks before Sampson's letter to Berberich.

In short, we conclude that there were no genuine issues of material fact and that Sampson clearly met the requirements necessary to establish a qualified privilege concerning his communication to Berberich. Furthermore, we conclude that there were no genuine issues of material fact and that Sampson did not abuse the privilege. The trial court correctly found that there were no genuine issues as to any material fact and that Sampson

and Kentucky Financial Group were entitled to judgment as a matter of law.

The judgment of the Jefferson Circuit Court is affirmed.

TACKETT, JUDGE, CONCURS.

McANULTY, JUDGE, DISSENTS.

BRIEF FOR APPELLANTS:

John J. McLaughlin
Stephanie L. Morgan-White
Goldberg & Simpson, P.S.C.
Louisville, Kentucky

BRIEF FOR APPELLEE:

Kenneth A. Bohnert
I. G. Spencer, Jr.
Scott A. Johnson
Conliffe, Sandmann & Sullivan, PLLC
Louisville, Kentucky