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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-001334-MR

SONNY T. POOLE — APPELLANT

v.

APPEAL FROM McLEAN CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 02-CI-00065

DOLLAR GENERAL CORPORATION, INC.;[1] DOLLAR GENERAL STORES, LTD.; RUTH ANN CONRAD; CHARLOTTE HOWARD — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** ** ** ** **

BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.[2]

MILLER, SENIOR JUDGE: Sonny T. Poole appeals from an Opinion and Order of the McLean Circuit Court granting judgment notwithstanding the verdict (jnov) to appellees Dollar General Corporation, Inc. and Dollar General Stores, LTD. (collectively

[1] Dollar General Corporation, Inc. also identified in the record as Dollar General Corporation.

[2] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

"Dollar General"); Ruth Ann Conrad; and Charlotte Howard. The order granting jnov overturned a jury verdict awarding compensatory damages of $500,000.00 to Poole based upon the jury's determination that Conrad and Howard had made defamatory statements concerning Poole in the course of their employment with Dollar General.

Adhering to the Kentucky Supreme Court's holding in Stringer v. Wal-Mart, 151 S.W.3d 781 (Ky. 2004), which we are bound to do, we reverse the trial court's entry of jnov. We remand for entry of judgment upon the jury verdict against Conrad, Howard, and Dollar General, jointly and severally.

BACKGROUND

Dollar General is a discount retail chain which operates an outlet in Calhoun, McLean County, Kentucky. On the afternoon of June 7, 2001, Dollar General employees Viki Humphrey and Ruth Ann Conrad were on duty at the store. In addition to assisting customers and operating the cash registers, they were stocking shelves. As Conrad was assisting a customer at the back of the store, Humphrey was alone as she shelved merchandise. Humphrey became aware that a man was shadowing her movements in the next aisle, which frightened her. Humphrey then went to the front of the store to check-out a customer's purchase. She completed the transaction, and when

she looked up, she saw a man standing in the center aisle of the store. His penis was exposed and he was masturbating.

Humphrey was shocked by the incident, and fled to an adjacent aisle. When she regained her composure, she looked around the shelf and saw that Conrad had returned to the front of the store to the cash register area. Humphrey observed Conrad checking-out a man purchasing two bottles of juice. Perhaps because of her emotional state, Humphrey mistook the man for the perpetrator of the lewd conduct.

When the man left the store Humphrey approached Conrad and asked her if she knew the person who had just purchased the juice. Conrad told Humphrey the man was Sonny Poole. Humphrey then told Conrad what had occurred, and that she believed that the man who purchased the juice was the person who had engaged in the conduct. Poole was, in fact, the person who had purchased the juice, but he was not the perpetrator.

Conrad called the store manager, Sandra DeHart. After speaking with Humphrey about what she had seen, DeHart called the McLean County Sheriff’s Department, which conducted an investigation of the incident. Semen was recovered from the floor of the store.

The matter was presented to the McLean County Grand Jury, which returned an indictment against Poole charging him

with the offense of criminal stalking.[3] At Poole's expense a DNA test was performed on the semen. The DNA test exonerated Poole. The criminal charges were dismissed. In the meantime, however, the falsehood that Poole was the perpetrator of the conduct had been widely circulated throughout the community.

On May 28, 2002, Poole filed a complaint in McLean Circuit Court alleging, inter alia, defamation of character. He named as defendants Dollar General; Ruth Ann Conrad; Viki Humphrey; Sandra DeHart; and Charlotte Howard (also a store employee). He sought compensatory and punitive damages against said defendants jointly and severally.

A jury trial was held on March 23 and 24, 2004. At the conclusion of the Plaintiff's case, defendants Humphrey and DeHart were awarded directed verdicts on the basis that any defamatory statements they had made were privileged communications to law enforcement officers and/or other employees of Dollar General.

Finally the case was submitted as to the remaining defendants upon the issues of defamation and compensatory damages only. The jury returned the verdict under question.

The Defendants moved for jnov or, in the alternative, for a new trial under Ky. R. Civ. P. (CR) 50.02. On May 10, 2004, the trial court entered an order granting the Defendants

[3] Kentucky Revised Statute 508.140.

jnov. In granting the motions, the trial court determined that the only trial testimony relevant to the defamation issue was that Conrad and Howard made statements to the effect that "someone exposed themselves [sic] in the Dollar General Store and masturbated, that Plaintiff had been accused of it by a store employee, and that Plaintiff was going to be arrested." The trial court concluded that these were true statements and, because truth is an absolute defense to defamation, granted the defendants jnov. This appeal followed.

STANDARD OF REVIEW

In ruling on a jnov motion, the trial court is required to consider the evidence in a light most favorable to the party opposing the motion and to give that party every reasonable inference that can be drawn from the record. Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky. 1985). The motion is not to be granted "unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ." Taylor, 700 S.W.2d at 416. On appeal, we are to consider the evidence in the same light. Lovins v. Napier, 814 S.W.2d 921, 922 (Ky. 1991); Brewer v. Hillard, 15 S.W.3d 1, 7 (Ky.App. 1999).

APPLICABLE DEFAMATION LAW

Whether libel or slander, 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, 627 S.W.2d 270, 273(Ky.App. 1981).

"Defamatory language" is broadly construed as language that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement (Second) of Torts § 559 (1977). See also Ball v. E.W. Scripps Co., 801 S.W.2d 684, 688 (Ky. 1990), and McCall v. Courier-Journal & Louisville Times Co., 623 S.W.2d 882 (Ky. 1981). "It is for the jury to determine, on the basis of competent evidence, whether a defamatory meaning was attributed to it by those who received the communication. The terms should be construed in their most natural meaning and should be 'measured by the natural and probable effect on the mind of the average [person].'" Yancey v. Hamilton, 786 S.W.2d 854, 858 (Ky. 1989) (quoting McCall, 623 S.W.2d at 884). "[W]ords falsely spoken will be defined according to their popular meaning, and as intended to be meant by the speaker and understood by the hearers. And, in arriving at the sense in which the defamatory language is employed, it is proper to consider the circumstances surrounding its publication and the entire language used." Abbott v. Vinson, 230 Ky. 786, 20 S.W.2d 995, 996 (1929). "It is a fundamental principle in the law of libel and slander that the defamatory matter

complained of should be construed as a whole, and that the language employed therein should receive its common and ordinary acceptation in the light of the conditions and circumstances under which it was published." Commercial Tribune Pub. Co. v. Haines, 228 Ky. 483, 15 S.W.2d 306, 307 (1929).

Element two, "about the plaintiff" largely speaks for itself, but it is worth noting that the plaintiff need not be specifically identified in the defamatory matter itself so long as it was so reasonably understood by plaintiff's "friends and acquaintances ... familiar with the incident." E.W. Scripps Co. v. Cholmondelay, 569 S.W.2d 700, 702 (Ky.App. 1978).

Element three, the notion of "publication" is a term of art, and defamatory language is "published" when it is intentionally or negligently communicated to someone other than the party defamed. Restatement (Second) of Torts § 577 (1977).

With regard to element four – regarding injury to reputation - generally, defamatory words written or spoken of another are divided into two classes in determining the extent to which they are actionable. Words may be actionable per se, or per quod.

In the case of defamation per se, damages are presumed and the person defamed may recover without allegation or proof of special damages. In other words, "[w]ords are said to be actionable per se when there is a conclusive presumption of both

malice and damage[,]" Walker v. Tucker, 220 Ky. 363, 295 S.W. 138, 139 (1927). Thus, when the defamatory language at issue is determined to be libelous or slanderous per se, recovery is permitted without proof of special damages because injury to reputation is presumed and the words are "actionable on their face -- without proof of extrinsic facts or explicatory circumstances." David A. Elder, Kentucky Tort Law: Defamation and the Right of Privacy, § 1.06 at 37 (1983). Statements classified as defamatory per se include statements attributing to someone a criminal offense; a loathsome disease; conduct incompatible with his business, trade, profession, or office; or serious sexual misconduct. Restatement (Second) of Torts § 570 (1977).

In the case of negligence per quod, recovery may be sustained only upon an allegation and proof of special damages[.]" Hill v. Evans, 258 S.W.2d 917, 918 (Ky. 1953). Defamatory statements that are merely libelous or slanderous per quod require "proof of extrinsic facts or explanatory circumstances and special damages." Id. Because the statements made by Conrad and Howard, as further discussed below, impute conduct to Poole in the nature of a criminal offense and serious sexual misconduct, the type of defamation involved in this case is slander per se.

LIABILITY OF EMPLOYEES CONRAD AND HOWARD

Based upon the defamation principles enunciated in Stringer v. Wal-Mart, 151 S.W.3d 781 (Ky. 2004), a case rendered subsequent to trial in this matter, we are, as to defendants Conrad and Howard, required to reverse the entry of jnov and remand for entry of judgment upon the jury verdict. Kentucky Rules of Supreme Court 1.030(8)(a). We are of the opinion that the statements made by Conrad and Howard come well within the orbit of the defamatory utterances made by the Wal-Mart Assistant Manager in Stringer.

RUTH ANN CONRAD STATEMENTS

With the foregoing in mind, we now turn to the specific statements made by Conrad and Howard cited by Poole as supporting the jury verdict in his favor. We first consider the statements made by Ruth Ann Conrad. As previously noted, Conrad was a Dollar General employee who was present in the store at the time of the June 7, 2001, incident. The Conrad statements were related in trial testimony presented by Lillian Floyd, a local citizen, and concern a conversation Ms. Floyd had with Conrad about three days after the incident. The conversation occurred at the Calhoun Dollar General outlet on an occasion when Floyd had entered the store as a customer. On direct examination Floyd first testified that she had already heard about the incident when she entered the store upon this

occasion. Then the following exchange occurred between Floyd and Poole attorney James C. Brantley:

> Q. And while you were in the Dollar General Store, Ms. Conrad said something to you?
>
> A. She said, What do you think about what Sonny – what's happened to Sonny Poole, and I said I don't – and I don't think he did what they accused him of doing.
>
> Q. And what did she say when you said that?
>
> A. She said, Well, I know Sonny Poole when I see him, and he was up there when I come out of the – when I come out front.
>
> Q. Did Ms. Conrad indicate to you that she thought Sonny Poole had done that?
>
> A. Well, she said, I know Sonny Poole when I see him, so I suppose.
>
> Q. Did she identify Sonny Poole by name?
>
> A. I don't remember. Probably so, but I know she said Sonny or Sonny Poole. Probably Sonny Poole because that's what -
>
> Q. But she either said Sonny or Sonny Poole? Did she make an indication that – put her hand on her chest and say, I never want to see anything like that again?
>
> A. Yes.

CHARLOTTE HOWARD STATEMENTS

The trial evidence cited by Poole in support of the jury verdict with respect to statements made by Charlotte Howard is contained in the trial testimony given by Susan North, also

an area resident. Poole was doing remodeling work on Ms. North's residence during the time the incident occurred. In a phone call made from the store, North was contacted by Dollar General employee Howard. At trial, the following direct examination between Poole counsel Brantley and North summarizes the contents of the telephone call:

> Q. Did anyone else contact you regarding this incident?
>
> A. Yes. After I had talked to Ms. McCalister sometime – I'm not sure how long that was – but I got a call from Charlotte Howard at the Dollar Store.
>
> Q. Did Mrs. Howard tell you that she was calling from the Dollar Store?
>
> A. No, she did not.
>
> Q. Did you know Mrs. Howard?
>
> A. Yes. Uh-huh.
>
> Q. Did you know that she worked at the Dollar Store?
>
> A. Yes, I did.
>
> Q. And what did Mrs. Howard say to you?
>
> A. Mrs. Howard just asked if we were having any work done on our house and who was doing it, and I told her that it was Mr. Poole, and she said, Well, you shouldn't be alone in the house with him because of what's happened at the Dollar Store.
>
> Q. Did she say because of what's happened or what he is accused of doing?

A. I think I believe she said what's happened because we didn't go into any details with that, about the –

Q. At that time, did you have an ID on your telephone, a caller ID?

A. Yes, I did.

Q. Okay. Did you know where the call originated –

A. Yes. I saw that it was from the Dollar Store.

APPLICATION OF STRINGER TO CONRAD AND HOWARD

In our review of whether the foregoing testimony is sufficient to support a jury verdict for defamation, we are compelled to follow, and are guided largely, by the recent Kentucky Supreme Court case Stringer v. Wal-Mart, supra. In Stringer, four Wal-Mart employees were fired for "unauthorized removal of company property" and "violation of company policy" for eating "claims candy," i.e., candy from open or torn bags removed from the store's shelves that had been taken to the store's "claims area" to be processed by a claims clerk and then either discarded or returned. James Carey, a Wal-Mart Assistant Manager, when asked by a subordinate employee whether the employees had been terminated for eating candy from the claims area, responded "'[t]here was more to it than that' and that he 'couldn't talk about it'." This exchange, which seemed to be but a polite response to a passing inquiry by a fellow employee,

occurred in the employee lounge and in the presence of at least three employees. In light of the context in which the words were spoken, the Supreme Court upheld the jury's determination that the utterance was defamatory. The Supreme Court determined that, within context, a jury could conclude that Carey had attributed theft to the employees above and beyond the taking of the claims candy.

Hence, in Stringer, what seems to have been a most trivial and innocuous utterance of the words "there was more to it than that" and that he "couldn't talk about it," in the context in which they were spoken, was deemed sufficient to uphold a jury verdict for defamation. From the holding in Stringer, we discern that we must examine the utterances of Conrad and Howard with particular emphasis on the context in which they were spoken.

In her conversation with Lillian Floyd a few days after the incident, Conrad unilaterally raised the issue of Sonny Poole with the customer, asking her "[w]hat do you think about what Sonny – what's happened to Sonny Poole[?]" When Floyd indicated that she did not believe Sonny was the perpetrator Conrad responded "Well, I know Sonny Poole when I see him, and he was up there when I come out of the – when I come out front." Viewed in the light most favorably to Poole, a jury could conclude that it was Conrad's intention to

communicate to Floyd that Floyd was mistaken in her belief that Poole was not the perpetrator because she, Conrad, had personally observed him at the front of the store immediately following the incident and knew from personal knowledge that Poole was, in fact, the perpetrator. Conrad followed up this statement by placing her hand on her chest and stating "I never want to see anything like that again." Because Conrad had originally brought up the issue, and in so doing had identified Sonny Poole by name, in context, a jury could conclude that this was an additional attempt by Conrad to communicate her belief to Floyd that Poole was the perpetrator of the June 7, 2001, incident.

The statements made by Conrad go considerably further than the vague and hazy statements made by the Wal-Mart Assistant Manager in Stringer ("it was more than that" and "he couldn't talk about it") in communicating a slanderous message to the recipient of the statement. Based upon Stringer, the trial court properly submitted the case to the jury for its evaluation of whether the statements made by Conrad communicated a slanderous message to Floyd. However, the trial court erred in setting aside the jury's determination in his jnov order. Based upon Stringer, we are compelled to reverse the trial court's award of jnov to Conrad.

Similarly, we must also reverse the jnov with respect to the statements made by Charlotte Howard to Susan North. Again, Howard, a Dollar General employee, initiated the conversation by placing a call to North from the store. After ascertaining that Poole was doing work for North at her residence, Howard stated "Well, you shouldn't be alone in the house with him because of what's happened at the Dollar Store."

Viewing this statement in the light most favorable to Poole, again, a jury could conclude that Howard was attempting to communicate to North that Poole was the perpetrator of the June 7 incident. Howard specifically referred to "what's happened at the Dollar Store," which the jury could reasonably have concluded was a reference to the June 7 incident. By warning North not to be alone with Poole, a reasonable juror could also conclude that Howard was directly attributing the conduct to Poole – there was no other apparent basis for warning North not to be alone with Poole unless Howard was intending to communicate to North that Poole was the perpetrator of the June 7 incident. Further, given her status as a Dollar General employee, the communication could be perceived not as the mere repeating of gossip but, rather, a communication from an "insider." Because, in context, a reasonable jury could conclude that Howard was communicating to North that Poole was

the perpetrator of the June 7 incident, pursuant to Stringer, we reverse the trial court's award of jnov as to Howard.

LIABILITY OF DOLLAR GENERAL

The jury instructions permitted the jury to assign liability to Dollar General for the statements made by Conrad and Howard if either they made the statements within the scope of their employment, or if Dollar General failed to exercise ordinary care in the supervision of its employees. The soundness of the instructions has not been raised in this appeal, and, accordingly, we need not discuss the finding of liability against Dollar General. Koplin v. Kelrick, 443 S.W.2d 644, 646 (Ky. 1969) (Court of Appeals would assume that issue was abandoned where it was not briefed.); Herrick v. Wills, 333 S.W.2d 275, 276 (Ky. 1959) (Errors not called to the attention of the appellate court prior to the time a decision is rendered may be deemed waived).

As we have reversed the award of jnov as to employees Conrad and Howard, it follows that reversal and reinstatement of the jury verdict is compelled against Dollar General.

PUNITIVE DAMAGES INSTRUCTION

Poole contends that the trial court erred by failing to render an instruction on punitive damages. He asks us to remand for trial on punitive damages only.

An instruction on punitive damages is warranted if there is evidence that the defendant acted with oppression, fraud, malice, or was grossly negligent by acting with wanton or reckless disregard for the lives, safety or property of others. See Phelps v. Louisville Water Co., 103 S.W.3d 46, 51-52 (Ky. 2003); KRS 411.184. A party is entitled to have the jury instructed on the issue of punitive damages "if there was any evidence to support an award of punitive damages." Thomas v. Greenview Hosp., Inc., 127 S.W.3d 663 (Ky.App. 2004) (quoting Shortridge v. Rice, 929 S.W.2d 194, 197 (Ky.App. 1996) (emphasis in original)).

The slanderous statements made by Conrad and Howard attributed a criminal offense to Poole and, as such, was slander per se. “[W]hen the defamatory publication is actionable per se there is a conclusive presumption of both malice and damage.” Baker v. Clark, 186 Ky. 816, 218 S.W. 280 (1920); Tucker v. Kilgore, 388 S.W.2d 112, 116 (Ky. 1964). As malice was to be presumed in this case, and, as such, there was some evidence to support an award of punitive damages, an instruction on such an award would have been appropriate. Pennsylvania Iron Works Co. v. Henry Voght Mach. Co., 139 Ky. 497, 96 S.W. 551, 553 (1906). However, under the circumstances with which we are faced, we are loath to remand for retrial on punitive damages alone.

We are aware of the long-standing rule authorizing retrial on damages alone. See Nolan v. Spears, 432 S.W.2d 425 (Ky. 1968). We are also aware that the rule in Nolan has been extended to permit retrial on punitive damages alone. See Shortridge v. Rice, supra, and Sand Hill Energy, Inc. v. Smith, 142 S.W.3d 153 (Ky. 2004) (Cases alleging negligence). For many reasons, not the least of which being that a retrial on punitive damages alone greatly enhances the probability of double recovery, we think the practice of remanding for retrial upon this single issue bears reexamination by our Supreme Court.

In any event, the case at hand involves an intentional tort. Poole was awarded compensatory damages of $500,000.00 based upon a presumption of malice in that the statements at issue were slanderous per se. While it may have been appropriate that the jury be instructed upon punitive damages as well as compensatory damages, see Pennsylvania Iron Works, supra., we are not inclined to expand the principle of remanding for punitive damages alone when an award has already been made upon the same premise, i.e., when the element of malice has already been factored into the compensatory damage award. Perforce we reject the Appellant's entreaty to remand for retrial upon punitive damages alone.

OTHER ISSUES

Poole also contends that the trial court erred because it excluded evidence concerning a similar incident at the store which occurred approximately a year after the June 7, 2001, incident. Because of our remand for entry of judgment upon the jury verdict, this issue is moot and we will not discuss same.

CONCLUSION

For the foregoing reasons the judgment of the McLean Circuit Court is reversed, and this cause is remanded for entry of judgment upon the jury verdict against Ruth Ann Conrad, Charlotte Howard, and Dollar General, jointly and severally.

ALL CONCUR.

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