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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000571-MR

LAURA ELIZABETH CECIL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 03-CI-002086

WALGREEN COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, JOHNSON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Laura Elizabeth Cecil brings this appeal from a February 8, 2005, order of the Jefferson Circuit Court dismissing Laura's claims against Walgreen Company (Walgreen) allegedly arising under Kentucky Revised Statutes (KRS) 620.030 and 18 U.S.C. §§ 2251-2253.¹ We affirm.

¹ In the complaint against Walgreen Company (Walgreen), Laura Elizabeth Cecil asserted a civil cause of action derivative of Kentucky Revised Statutes (KRS) 620.030 regarding Walgreen's failure to report suspected child abuse. Laura also asserted a claim against Walgreen for violation of the Protection of Children Against Sexual Exploitation Act of 1977 (18 U.S.C. §§ 2251-2253). On November 3, 2004, the circuit court entered summary judgment dismissing Laura's civil claim under KRS 620.030. On January 21, 2005, the circuit court entered a second summary judgment dismissing Laura's claim under 18

In 2000, Laura, then age fourteen, met via the internet, Robert Smith, then age twenty-three. Beginning in October 2000, Laura would sneak out of her home and meet Robert to engage in sexual relations. Robert took photographs of Laura while she was engaged in various sexual acts. The photographs were processed at a Walgreen's store. Ultimately, Robert was convicted for his conduct with Laura under applicable laws and is presently serving a ten-year sentence at Eddyville, Kentucky.

Sometime during the relationship, Laura's parents, Delmer Lee Cecil and Laura W. Cecil, became aware of Laura's sexual activities with Robert and further learned of the photographs taken by Robert. In March 2003, Delmer and Laura, as parents and on behalf of Laura, filed a complaint in the Jefferson Circuit Court against Walgreen, Robert Lewis Smith, Jr. and Robert Lewis Smith, Sr.² The circuit court entered summary judgments on November 3, 2004, and January 21, 2005, which were made final and appealable by an order entered February 8, 2005. This appeal follows.

U.S.C. §§ 2251-2253. Laura filed appeals from both summary judgments although they were not made final and appealable until the February 8, 2005, order was entered. The three appeals were subsequently consolidated by this Court. By Opinion and Order rendered March 10, 2006, the two earlier appeals were dismissed since Laura had subsequently filed a timely notice of appeal from the final order entered on February 8, 2005.

² The Complaint was originally filed by Laura's parents, Delmer Lee Cecil and Laura W. Cecil, as Laura had not yet attained the age of majority. Upon Laura's reaching the age of majority, the court entered an order substituting Laura as plaintiff.

Laura initially contends the circuit court committed error by entering summary judgment dismissing her claim under KRS 620.030 against Walgreen. Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991).

KRS 620.030 states, in relevant part, as follows:

- (1) Any person who knows or has reasonable cause to believe that a child is dependent, neglected or abused shall immediately cause an oral or written report to be made to a local law enforcement agency or the Kentucky State Police; the cabinet or its designated representative; the Commonwealth's attorney or the county attorney; by telephone or otherwise.

Under KRS 620.030, a duty to report is imposed upon a person who knows or has reasonable cause to believe that a child is being abused; thus, the failure to report abuse by a person who knows or has reasonable cause to suspect such abuse constitutes a violation of the statute. However, KRS 620.030 does not impose a duty upon an individual to discover abuse; thus, the negligent failure of an individual to discover abuse does not constitute a violation thereof. This distinction is pivotal.

In Laura's complaint,³ she specifically alleged:

³ Laura filed an amended complaint, but the relevant allegation against Walgreen under KRS 620.030 remained unchanged.

13. That during the times referred to herein, the Defendant, Walgreens, directly and/or by and through its agents, servants, employees or contractors, processed the photographs of the minor child, had a duty to inspect the photographs and to discover the explicit sexual content of the photographs as part of the processing procedures, but negligently failed to inspect the photographs, negligently failed to discover the explicit, sexual photographs of the minor child, negligently failed to adopt and implement proper policies and procedures, negligently failed to train and instruct its employees and negligently failed to report such photographs to proper and appropriate legal authorities, all in violation of K.R.S. 620.030

The gravamen of Laura's complaint is that Walgreen breached a duty to inspect the photographs and to discover the sexual content of the photographs. Essentially, Laura is alleging that Walgreen negligently failed to discover the child abuse and report same.⁴ The negligent failure to discover suspected child abuse is simply not a violation of KRS 620.030. Rather, KRS 620.030 only creates a duty to report suspected abuse if a person knows or has reasonable cause to believe that a child has been abused. Accordingly, we hold that Laura failed as a matter of law to state a cause of action under KRS 620.030 and that the circuit court properly entered summary judgment dismissing this

⁴ This opinion should not be misconstrued as requiring certain specific recitations in the complaint in order to state a cause of action under KRS 620.030. We merely conclude the negligent failure to discover child abuse is not a violation of KRS 620.030.

claim. See Commonwealth Natural Res. and Env't Prot. Cabinet v. Neace, 14 S.W.3d 15 (Ky. 2000).

Laura next asserts the circuit court erred by entering summary judgment dismissing her claim under the Protection of Children Against Sexual Exploitation Act of 1977 (18 U.S.C. §§ 2251-2253). Specifically, Laura contends:

The alleged violations of the Act [Protection of Children Against Sexual Exploitation Act of 1977 18 U.S.C. §§ 2251-2253] are found in Section 2251 (a) (Sexual exploitation of children) and Section 2252 (Certain activities relating to material involving the sexual exploitation of minors) and Section 2252A (Certain activities relating to material constituting or containing child pornography).

Laura's Brief at 18. Therefore, our analysis centers upon 18 U.S.C. §§ 2251(a), 2252, and 2252A. These sections state, in relevant part, as follows:

Section 2251 -

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in

interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

Section 2252 -

(a) Any person who--

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if--

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if--

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(3) either--

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in [section 1151](#) of this title, knowingly sells or possesses with intent to sell any visual depiction; or

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means, including by computer, if--

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; or

(4) either--

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in [section 1151](#) of this title, knowingly possesses 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or

(B) knowingly possesses 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if--

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct

Section 2252A-

(a) Any person who--

(1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography;

(2) knowingly receives or distributes--

(A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

(3) knowingly--

(A) reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer; or

(B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains --

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct;

(4) either--

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in [section 1151](#)), knowingly sells or possesses with the

intent to sell any child pornography;
or

(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

(5) either--

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in [section 1151](#)), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

(6) knowingly distributes, offers, sends, or provides to a minor any visual depiction, including any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct--

(A) that has been mailed, shipped, or transported in interstate or

foreign commerce by any means,
including by computer;

(B) that was produced using
materials that have been mailed,
shipped, or transported in interstate
or foreign commerce by any means,
including by computer; or

(C) which distribution, offer,
sending, or provision is accomplished
using the mails or by transmitting or
causing to be transmitted any wire
communication in interstate or foreign
commerce, including by computer,
for purposes of inducing or persuading a
minor to participate in any activity that is
illegal.

We shall address these sections seriatim.

As to Laura's claim under 18 U.S.C. § 2251(a), we think the circuit court properly entered summary judgment dismissing the claim. In reaching such conclusion, we are persuaded by the reasoning of United States v. Petrov, 747 F.2d 824 (2nd Cir. 1984). In that case, Petrov was a commercial film processor. Petrov advertised in adult magazines that he would provide "'confidential' and 'uncensored' photo processing service." Id. at 825. A jury found Petrov guilty of violating 18 U.S.C. § 2251, for processing sexually explicit photographs of minors. In reversing this part of Petrov's conviction, the Second Circuit Court of Appeals held that a commercial photo processor is not within the ambit of 18 U.S.C. § 2251. The Court reasoned:

Indisputably, Petrov had no direct involvement in using, employing, or persuading minors to engage in any explicit

sexual conduct depicted in any of the photographs Spectra developed. Instead, the government argues that because processing film is an integral part of the production of child pornography, Petrov's position is not materially distinguishable from that of the person who actually induces the minor to be photographed. Consequently, the government argues, by advertising his availability to process such "confidential" photographs, and by repeatedly doing so, Petrov has conspired to violate § 2251. We disagree.

The plain language of § 2251(a) defeats the government's argument. Its proscribed acts are those of someone who "employs, uses, persuades, induces, entices or coerces" a minor to engage in sexually explicit conduct, and even those acts are not covered unless done "for the purpose of producing any visual or print medium depicting such conduct". Section 2251(a) does not purport to proscribe the entire process that creates child pornography; instead, it is narrowly drawn to reach only those people who deal with children directly.

Petrov, 747 F.2d at 827.

We view the reasoning of Petrov as compelling and, likewise, conclude that Walgreen's activities, as a commercial photo processor, are not proscribed under 18 U.S.C. § 2251.⁵ Accordingly, we hold the circuit court properly entered summary judgment dismissing Laura's 18 U.S.C. § 2251 claim. See Neace, 14 S.W.3d 15.

⁵ We note that 18 U.S.C. § 2251 was later amended in 1986. In its amended form, § 2251 is currently applicable to photo processors who advertise their services to print or reproduce sexually explicit depictions of minors. In this appeal, there is no allegation that Walgreen engaged in such advertising; hence, we view United States v. Petrov, 747 F.2d 824 (2nd Cir. 1984) as still persuasive upon the facts of this appeal.

As to Laura's claims under 18 U.S.C. §§ 2252 and 2252A, we also believe the circuit court properly entered summary judgment dismissing these claims. To constitute a violation of either 18 U.S.C. § 2252 or § 2252A, we are persuaded that the perpetrator must have "knowingly" been aware of the sexually explicit nature of the visual depiction and the minor status of the performer. See United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) and United States v. Pabon-Cruz, 255 F. Supp. 2d 200 (S.D. N.Y. 2003). As hereinbefore pointed out, Laura's complaint alleged that Walgreen breached a duty to inspect the photographs and to discover the sexual content of the photographs. As there is no allegation that Walgreen knew of the sexually explicit nature of the photographs or of Laura's age, we conclude that Laura failed as a matter of law to state a cause of action under either 18 U.S.C. § 2252 or § 2252A. As such, we are of the opinion the circuit court properly entered summary judgment dismissing Laura's claims under 18 U.S.C. §§ 2252 and 2252A. See Neace, 14 S.W.3d 15.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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