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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001432-MR

BETTER BUILT GARAGES, INC., AND
BISHOP DWAIN WARREN D/B/A WARREN RENTALS APPELLANTS

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 06-CI-00097

KENTUCKY NEW ERA, INC.; NEWSCHANNEL 5, INC.;
AND NEWSCHANNEL 5 NETWORK, L.P. APPELLEES

AND: NO. 2007-CA-001754-MR

BETTER BUILT GARAGES, INC., AND
BISHOP DWAIN WARREN D/B/A WARREN RENTALS APPELLANTS

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 06-CI-00097

PAXTON MEDIA GROUP, LLC D/B/A
WPSD TELEVISION D/B/A NEWS CHANNEL 6 APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: MOORE AND STUMBO, JUDGES; GRAVES,¹ SENIOR JUDGE.

MOORE, JUDGE: Better Built Garages, Incorporated (BBG) and Bishop Dwain Warren d/b/a Warren Rentals (Warren Rentals),² appeal from two orders of the Graves Circuit Court in which the trial court granted summary judgment to the appellees. On appeal, the appellants argue that the trial court erred when it determined that news reports published by the appellees were not defamatory. Agreeing with the trial court, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

These appeals arise from a lawsuit filed by BBG and Warren Rentals in which they accused each of the appellees, Kentucky New Era, Incorporated (KNE); Newschannel 5, Incorporated and Newschannel 5 Network, L.P. (Newschannel 5); and Paxton Media Group, LLC d/b/a WPSD Television d/b/a News Channel 6 (Paxton), of publishing defamatory statements in separate news reports.

The events leading up to these appeals began when John and Debby O’Hearon entered into a land contract with Bruce Denny to purchase 16 acres of

¹ Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Bishop Dwain Warren owns Better Built Garages and Warren Rentals; thus, the appellants are interrelated.

land situated in Trigg County, Kentucky. At that time, there was no house on the property. The O'Hearons leased two portable storage buildings from Warren Rentals and converted them into a home.³

After altering the buildings, the O'Hearons abandoned the property and the portable buildings. Sometime thereafter, Bruce Denny entered into another land contract with Victor and Brandy Perez regarding the same property. The two buildings remained on the property, and the Perezes intended to use the buildings as their residence.

Prior to the Perezes moving into the buildings, Warren Rentals hired another company, Warren Construction, to repossess the buildings because the O'Hearons had stopped paying rent. After removing the buildings, the construction company left the makeshift roof and siding, which had been installed by the O'Hearons, strewn about the property.

The appellants were not aware that the Perezes had leased the property and intended to use the buildings as a residence. The day after the repossession, the Perezes contacted BBG and demanded the return of the buildings plus \$10,000.00. Further, the Perezes threatened to contact the media if BBG did not meet their demands. BBG refused.

The Perezes followed up on their threat to contact the media. KNE, Newschannel 5 and Paxton each sent reporters to investigate. Eventually, KNE published two articles regarding the Perezes. Newschannel 5, a Tennessee

³ From what we can ascertain from the record, BBG built the portable buildings that Warren Rentals leased to the O'Hearons.

television station, broadcast one story about the Perezes and the repossession.

After the broadcast, Newschannel 5 transcribed the contents of the story verbatim and posted it as an article on its website. Finally, Paxton, owner of News Channel 6, a local Kentucky television station, broadcast two stories about the Perezes. Like Newschannel 5, Paxton transcribed the contents of its two stories verbatim and posted them on its website.⁴

A year later, BBG and Warren Rentals filed suit in Graves Circuit Court against KNE, Newschannel 5 and Paxton, alleging defamation and invasion of privacy by casting them in a false light. Eventually, Newschannel 5 and KNE filed separate motions for summary judgment. Each argued their publications were not defamatory but were, instead, true or substantially true. Agreeing with the media defendants, the trial court granted summary judgment to them.⁵ Ultimately, BBG and Warren Rentals filed an appeal which solely addressed the defamation claims against Newschannel 5 and KNE.⁶

After the trial court granted summary judgment to KNE and Newschannel 5, Paxton moved for summary judgment, making the same arguments. In a brief order, the trial court granted summary judgment to Paxton.

⁴ Additionally, Paxton broadcast a brief statement, at BBG's and Warren Rentals's request, in order to correct inaccuracies contained in its prior reports.

⁵ In response, the plaintiffs moved the trial court to alter, amend or vacate its order, but the court denied the motion.

⁶ By agreement between the parties, this Court dismissed KNE as a party to these appeals.

BBG and Warren Rentals appealed from this decision as well, solely dealing with the defamation claim against Paxton.⁷

II. STANDARD OF REVIEW

When considering a motion for summary judgment, the trial court must view the record in a light most favorable to the party opposing the motion and must resolve all doubts in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Furthermore, the trial court should not grant summary judgment if any issue of material fact exists. *Id.* On appellate review, we must determine whether the trial court correctly found that no genuine issue of material fact exists and that, as a matter of law, the moving party was entitled to judgment in its favor. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Because the findings of fact are not in issue, we review the trial court's decision *de novo*. *Id.*

III. ANALYSIS

On appeal, the appellants insist the Graves Circuit Court erred when it determined that the news stories published by Newschannel 5 and Paxton were not defamatory. Citing *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 884 (Ky. 1981), the appellants argue the purportedly defamatory statements must be measured by their natural and probable effect on the mind of the average recipient. In this case, the appellants allege that the appellees' news reports left the average recipient with the impression that the appellants, either

⁷ By order of this Court, BBG's and Warren Rentals' appeals were consolidated.

intentionally or with callous disregard, destroyed the Perezes' residence which caused the appellants to be publicly hated, held in contempt, ridiculed, and shunned.⁸

Beginning with the basics, we note the elements of common law defamation are: 1) defamatory language, 2) about the plaintiff, 3) which is published, and 4) causes injury to the plaintiff's reputation. *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 793 (Ky. 2004).

Words will be considered defamatory language if they tend 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." *McCall*, 623 S.W.2d at 884. The alleged defamatory publication should be construed as a whole, and the words must be measured by their natural and probable effect on the mind of the average lay recipient. *Id.*; RESTATEMENT (SECOND) OF TORTS § 563, cmt. d (1977). Furthermore, the Court must analyze the publication in its entirety to determine whether its gist or sting is defamatory. *McCall*, 623 S.W.2d at 884.

Regarding Newschannel 5's publication, the trial court made the following analysis:

⁸ In addition to challenging the trial court's determination that the publications were not defamatory, the appellants take issue with apparent findings made by the trial court regarding the meaning of the words and phrases: "house," "home," "demolished," and "demolition crew." However, because we affirm the trial court's initial determination that the publications were not defamatory, we find it unnecessary to address this issue.

Furthermore, the appellants also claim that the trial court erred in finding that they were not injured by the appellees' news stories. However, the trial court addressed neither injury nor damages in either of its orders granting summary judgment. Thus, this issue is not properly before us, and we decline to address it.

An initial . . . review of the broadcast, causes the . . . listener to feel sympathy for the owners of the property, and some resentment toward the Plaintiffs. However, more than that is required for defamation. In many cases where a creditor repossesses property, the debtor is in financial straits, eliciting our sympathy, and we resent the actions of the creditor in repossessing the property. However, the law does not require the media outlet to give equal time to explore the desirability of having free access to credit by consumers, and the necessity of having an expedient way for a creditor to assert its rights. If the media wishes to focus its report of the effect on the debtor . . . that is within the discretion of the media. . . . Although we may feel sympathy for a debtor, whose property is repossessed, the lender has a right to effect a repossession. Commenting on the hardship that a repossession occasions is certainly fair comment. Those who lend money and retain a security interest are entitled to exercise their legal rights of repossession. Simply exercising a legal right cannot be said to cause a person to be publicly hated, held in contempt, or ridiculed, or to be shunned or avoided. Neither can the creditor's actions be said to injure him in his business or occupation, simply because he exercises a legal right.

Considering the publication as a whole and focusing on the appellants' legal rights as a creditor, the trial court determined the gist of Newschannel 5's publication was not defamatory.

Because these appeals come to us by way of summary judgment, we are not bound by the trial court's legal determination. *See Scifres*, 916 S.W.2d at 781. Regarding Newschannel 5's publication, it chronicled the repossession of the two portable buildings from the Perezes' perspective. Because the story was told from the Perezes' point of view, it focused on the shock and surprise experienced by the Perezes and quoted them extensively. The news report also explained BBG

ordered the repossession because it had the legal right to do so. In the publication, Newschannel 5 used sensational words and phrases, *i.e.*, “a true new home horror story,” “demolished,” and “demolition crew.” Moreover, Newschannel 5 quoted Victor Perez, who described the two portable buildings as his family’s “dream house.”

We must now decide whether the gist of Newschannel 5’s story, when considered as a whole, is defamatory. *McCall*, 623 S.W.2d at 884. The report contains some sensational language and is not particularly flattering to the appellants. However, none of the statements about the appellants, whether considered individually or collectively, are so outrageous they would cause the average lay recipient to shun, avoid, hate, hold in contempt, or ridicule the appellants. *Id.* Thus, we agree with the trial court that Newschannel 5’s coverage was not defamatory and that it was entitled to summary judgment.

Turning to the appeal concerning Paxton, in its first publication, Paxton focused on the impact the repossession had on the Perezes, describing their distress and surprise. Paxton also reported that the appellants owned the portable buildings and hired a company to repossess them because the O’Hearons failed to pay the rent. Like Newschannel 5, Paxton used various sensational phrases and words, *i.e.*, “home bulldozed to the ground,” “home destroyed,” “maliciously destroyed everything,” and “took everything but our kitchen sink.” Paxton also quoted Victor Perez, who claimed that “it was our dream for this house.”

However, in contrast to Newschannel 5, Paxton did not explain that the appellants had a legal right to repossess the buildings.

In resolving Paxton's motion for summary judgment, the trial court granted the motion without engaging in the analysis set forth in *McCall*, 623 S.W.2d at 884. However, like Newschannel 5's publication, the gist of Paxton's initial report is not defamatory despite containing some sensational language.

In Paxton's second story, Paxton recounted the local community's generosity toward the Perezes after the repossession, and the Perezes' reaction to this kindness. Like its prior report, Paxton's second publication contained sensational words and phrases, *i.e.*, "home bulldozed to the ground" and "bulldozed the rest."

While Paxton's second publication included some sensational language, its gist is the community's generosity in assisting the Perezes, not the repossession of the appellants' property. This is not defamatory in any manner. Because neither of Paxton's publications was defamatory, trial court correctly granted summary judgment as a matter of law.

In the alternative, the appellants challenge the trial court's determination that Newschannel 5's publication contained inaccuracies, but these inaccuracies did not preclude it from being substantially true. The appellants note that the trial court relied on the substantially true doctrine found in *Bell v. Courier Journal*, 402 S.W.2d 84 (Ky. 1966). According to the appellants, the substantially true doctrine applies only to the incidental information found in a publication, not

to its essential content. *Kentucky Kingdom Amusement Co. v. Belo Kentucky, Inc.*, 179 S.W.3d 785, 791 (Ky. 2005). Furthermore, the appellants insist that the inaccuracies in Newschannel 5's report relate to essential content, and, when coupled with the blatant falsities contained therein, the publication was false and defamatory.

Because we affirm on different grounds, it is not necessary for us to address the issue. However, we note that, regardless of the status of the substantially true doctrine, the trial court does not determine the truth or falsity of an allegedly defamatory publication. That determination is ordinarily reserved for the jury. RESTATEMENT (SECOND) OF TORTS § 617, cmt. a (1977).

For the reasons stated, we affirm the orders of the Graves Circuit Court granting summary judgment.

ALL CONCUR.

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