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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002105-MR

PHILIP C. KIMBALL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NO. 08-CI-005453

COURIER-JOURNAL, INC.; AND
ANDREW WOLFSON

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND DIXON, JUDGES; HENRY,¹ SENIOR JUDGE.

DIXON, JUDGE: Philip C. Kimball appeals an order of the Jefferson Circuit Court granting summary judgment in favor of Courier-Journal, Inc., and Andrew Wolfson. Finding no error, we affirm.

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Kimball is an attorney in Louisville, Kentucky, engaged in the practice of civil litigation. Kimball has also sought public office, including running in the Republican primary for Attorney General of Kentucky in May 2007. Andrew Wolfson, a reporter for the Courier-Journal newspaper, wrote an article titled, "Conway, Lee go beyond primaries with jabs," which ran on the front page of the newspaper on Saturday, May 19, 2007, prior to the primary on May 22. The story addressed the rivalry between Democratic front-runner Jack Conway and Republican front-runner Stan Lee. The article, which continued to the back page of the newspaper, also addressed the campaign of Lee's "GOP rival," Tim Coleman, a Commonwealth's Attorney from Morgantown, Kentucky. The article noted:

Coleman, 49, is also the only candidate in either primary who has prosecuted a case. He has been endorsed by 16 elected prosecutors representing 24 counties, while Lee has the support of 27 state legislators.

Coleman has raised \$94,185 and Lee \$106,476 for their races, while the two other Republican candidates [Jon Larson and Philip Kimball] have raised less than \$1,500 each and are not mounting active campaigns.

Kimball was unhappy with the content of the article and complained to the Courier-Journal. The following day, May 20, 2007, the newspaper ran a "Clarification" on page two, which stated:

Attorney general race

A story yesterday dealing with the Republican race for attorney general may have given the impression that only

one candidate has prosecuted cases. Candidate Philip Kimball said he has prosecuted more than 1,000 civil cases.

He also said he is running an active campaign, visiting courthouses in 34 counties and placing newspaper and radio ads.

A year later, on May 16, 2008, Kimball filed a complaint against the Courier-Journal and Wolfson, alleging defamation. Kimball asserted he was defamed by two statements – that Coleman was the only candidate who had prosecuted a case and that Kimball had not mounted an “active” campaign. On June 2, 2008, the Courier-Journal and Wolfson moved for summary judgment. Over Kimball’s objection, the circuit court granted summary judgment on October 9, 2008. This appeal followed.

Summary judgment is proper only when “there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” *Steevest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (quoting Kentucky Rules of Civil Procedure (CR) 56.03).

Kimball asserts that the circuit court erred in summarily dismissing his complaint because the statements were defamatory and injured his reputation as a civil litigator. He also alleges the newspaper failed to comply with KRS 411.050(4) in publishing a correction. After thorough review, we conclude that Kimball’s claims are without merit.

The elements of a defamation claim are: (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). The first requirement, defamatory language, is established if the statement “tends 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 v. Courier-Journal and Louisville Times Co.*, 623 S.W.2d 882, 884 (Ky. 1981).

Kimball asserts that the offensive statements implied he lacked qualities essential to his profession, such as “prosecuting” a case. Kimball points out that, although he has never prosecuted a criminal case, he has prosecuted more than a thousand civil cases. Kimball further opines that describing him as “not mounting an active campaign,” falsely implied he had not campaigned at all.

In *McCall, supra*, the Kentucky Supreme Court stated:

It is an elementary principle of the law of libel that the defamatory matter complained of should be construed as a whole. The alleged defamatory words must be measured by their natural and probable effect on the mind of the average lay reader and not be subjected to the critical analysis of the legal mind. We must, therefore, analyze the article in its entirety and determine if its gist or sting is defamatory.

Id. (internal citations omitted). Furthermore, “[w]here the defendant is a newspaper, the rule is that it is not to be held to the exact facts or to the most minute details of the transactions that it reports. What the law requires is that the publication be substantially true.” *Bell v. Courier-Journal & Louisville Times Co.*, 402 S.W.2d 84, 87 (Ky. 1966) (citation omitted).

Kimball goes to great lengths to attribute a defamatory meaning to the article; however, we believe his complaints are the result of a “critical analysis of the legal mind,” which was discouraged by the *McCall* Court. *See McCall*, 623 S.W.2d at 884. Despite Kimball’s belief that his reputation was sullied in the eyes of the public, we conclude the “gist or sting” of the article does not rise to actionable defamation. *See Id.*

Because Kimball cannot establish the requisite defamatory language, we decline to address his contentions further. Accordingly, the circuit court properly granted summary judgment in favor of the Courier-Journal and Wolfson.

For the reasons stated herein, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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