

RENDERED: NOVEMBER 20, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002063-MR

DAVID NICHOLS

APPELLANT

v. APPEAL FROM MARION CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 08-CI-00270

THE LEBANON ENTERPRISE
NEWSPAPER

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; THOMPSON, JUDGE; HARRIS,¹ SENIOR JUDGE.

THOMPSON, JUDGE: David Nichols appeals the Marion Circuit Court's dismissal of his complaint for intentional infliction of emotional distress and libel.

For the reasons stated herein, we affirm.

¹ Senior Judge William R. Harris 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.

As stated in *Nichols v. Commonwealth*, 142 S.W.3d 683 (Ky. 2004), on August 18, 2000, a group of individuals gathered at an apartment in Lebanon, Kentucky. Nichols then arrived but, according to some witnesses, was asked to leave. Nichols then departed but soon appeared at the ground floor of the apartment building taunting the group, shouting threats, and waving a knife. After he failed to respond to requests to leave, police were contacted.

When the dispatch was issued, Steven Pittman, a friend of the people inside the apartment, heard it over his police scanner and went to the scene. Upon his arrival, Pittman observed Nichols standing at the bottom of the steps leading up to the second floor apartment. After conferring with the apartment's occupants, Pittman approached Nichols and requested him to leave the premises. Nichols then struck the side of Pittman's head and began stabbing him.

Recognizing Pittman's distress, several individuals ran to his aid, including Joshua Wright. When Wright attempted to restrain him, Nichols stabbed Wright in the chest. Although Pittman survived his serious injuries, Wright died after arriving at the hospital. After a jury trial, Nichols was found guilty of wanton murder and assault under extreme emotional disturbance. He was further convicted of being a second-degree persistent felony offender.

Following the jury's recommendation, the trial court sentenced Nichols to life imprisonment for the murder conviction and ten years for the assault conviction for an effective life sentence. On direct appeal, in *Nichols*, 142 S.W.3d

at 693 (Ky. 2004), the Kentucky Supreme Court affirmed Nichols's murder conviction but reversed his assault conviction due to improper jury instructions.

On July 26, 2008, Nichols filed a complaint against the Lebanon Enterprise Newspaper, Stevie Daugherty, and Mary Anne Blair for intentional infliction of emotional distress and libel. According to Nichols, the Enterprise published an ad on August 17, 2007, that intentionally caused him to suffer. He requested injunctive relief and \$50,000 in damages. On August 18, 2008, the Enterprise filed a motion to dismiss pursuant to CR 12.02(f), which was granted. This appeal followed.²

Nichols first contends that the trial court abused its discretion by prematurely dismissing his complaint pursuant to CR 12.02(f). He contends that he did not murder Mr. Wright and should have been provided a reasonable opportunity to conduct discovery on the issue. Additionally, Nichols claims that the Enterprise's January 23, 2002, publication stating that Nichols used the "N-word" at the time of his crime was libelous. According to Nichols, this article provided a *prima facie* case of libel and, thus, was improperly dismissed. We disagree.

CR 12.02(f) provides that the failure to state a claim upon which relief can be granted is a sufficient ground for dismissal of a claim. When a motion to dismiss is made, trial courts cannot grant the motion unless it appears the pleading

² Although Nichols's complaint included a claim for intentional infliction of emotional distress, he failed to discuss the particular error in his brief and, thus, the issue is waived. *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky.App. 1979).

party would not be entitled to relief under any set of facts which could be proved in support of his claim. *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). “In determining whether a complaint should be dismissed, the issue is a matter of law.” *Grand Communities, Ltd. v. Stepner*, 170 S.W.3d 411, 417 (Ky.App. 2004).

“Four elements are necessary to establish a defamation action, whether for slander or libel, to wit: (1) defamatory language; (2) about the plaintiff; (3) which is published; and (4) which causes injury to reputation.” *McBrearty v. Kentucky Community and Technical College System*, 262 S.W.3d 205, 213 (Ky.App. 2008). A writing is defamatory when it subjects a person to public hatred, causes a person to be shunned, or injures a person’s occupation. *Id.* at 214. Notwithstanding, Kentucky adheres to the legal principle that the truth is an absolute defense for an action of libel regardless of the intent of the publishers. *Bell v. Courier-Journal & Louisville Times Co.*, 402 S.W.2d 84, 87 (Ky. 1966).

Having reviewed the record, Nichols’s claim that the Enterprise’s publication on August 17, 2007, was libelous was correctly rejected. In that date’s publication, Joshua Wright’s family purchased space in the newspaper to memorialize him. In pertinent part, the classified ad provided the following:

You were taken so suddenly,
At a very young age,
We fight all the feelings,
It doesn’t take away the rage.
The young man that killed you,
And put us in this hell.
We wait for you to come home,

Just out with your friends,
But we know what won't happen,
David Nichols brought your life to an end.

While Nichols contends that Wright's aggressive grabbing of him resulted in Wright's death due to Nichols's right of self-defense, our Supreme Court affirmed Nichols's conviction for wanton murder. Indeed, Nichols does not deny that he brought Wright's life to an end. Accordingly, while Nichols is free to maintain his assertion of innocence, the trial court correctly found that the Enterprise's publication was not libelous because its contents were true.

Regarding Nichols's additional argument, KRS 413.140(1)(d) provides that actions for libel must be commenced within one year after the action accrued. The publication of allegedly libelous material commences the running of the statute of limitations. *Caslin v. General Elec. Co.*, 608 S.W.2d 69, 70 (Ky.App. 1980). An action commenced following the expiration of the applicable statute of limitations constitutes a sufficient ground for its dismissal. *Id.* Thus, Nichols's citation to an article published over six years before he filed his action for libel failed to satisfy the applicable statute of limitations. KRS 413.140(1)(d).

Although Nichols cites *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), for the proposition that the continuing and accumulating harm caused by a libelous publication has no statute of limitations, we simply note that *Hanover Shoe, Inc.* was a federal Sherman Act antitrust case that has no relevance to this appeal. Therefore, we find no error in the trial court's decision to dismiss Nichols's six-year-old claim.

Nichols next argues that the trial court erred when it prevented him from amending his complaint to reflect a new action arising after the filing of his original complaint on July 26, 2008. Following the filing of his complaint, he contends that the Enterprise published lies regarding his use of a racial slur at the time of his crime. Therefore, he contends that he should have been permitted to amend his complaint to reflect this new grievance. We disagree.

When Nichols filed his motion to amend his original complaint, his complaint had already been dismissed. Thus, his motion was effectively a motion to alter, amend, or vacate the trial court's order dismissing his case. However, the reconsideration of judicial orders is an extraordinary remedy which is sparingly granted. *Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005). In *Gullion*, 163 S.W.3d at 893, stating the criteria for granting a motion to amend, our Supreme Court wrote the following:

First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice. Serious misconduct of counsel may justify relief under this theory. Fourth, a ... motion may be justified by an intervening change in controlling law.

We believe that the trial court weighed the relevant factors and denied Nichols's motion to amend its order. The Enterprise published testimony from witnesses who testified that Nichols yelled a racial slur at the scene of the crime. While

Nichols disagrees, this publication was not libelous and, thus, the trial court's decision could not be erroneous.

For the foregoing reasons, the order of the Marion Circuit Court dismissing Nichols's complaint is affirmed.

ALL CONCUR.

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