

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001051-MR

LESLIE PRESCOTT AND
SOUTH WILLIAMSON LODGING, INC.

APPELLANTS

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 03-CI-01725

MARCELLA J. YATES

APPELLEE

OPINION
REVERSING AND
REMANDING

** ** * * * * *

BEFORE: NICKELL AND THOMPSON, JUDGES; ISAAC,¹ SENIOR JUDGE.

THOMPSON, JUDGE: Leslie Prescott and South Williamson Lodging, Inc.

(Prescott) appeal the Pike Circuit Court's judgment after a jury trial. We reverse.

On November 6, 2003, Marcella J. Yates filed her complaint alleging Prescott slandered her by stating that Yates was a thief. After proceedings

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

progressed over four years, the trial court scheduled a trial for October 6, 2008.

On September 10, 2008, Prescott's third counsel moved to withdraw, which was granted. The trial court granted Prescott twenty days, or until October 9, 2008, to retain new counsel. Despite its prior ruling, the trial court held a trial as originally scheduled on October 6, 2008, in the absence of Prescott and her counsel.

Upon Yates's motion, the trial court issued a ruling striking Prescott's answer and counterclaim. After brief testimony was heard, the trial court rendered a judgment for Yates in the amount of \$150,000. On appeal, in Case No. 2008-CA-002080-MR, this Court reversed the trial court's order and judgment. The Court concluded that the trial court had improperly issued a default judgment, because Prescott was not provided three days' notice nor was she in default at the time of the trial on October 6, 2008.

On remand, a trial commenced where both parties appeared with counsel and presented evidence. Yates testified that Prescott informed people, including her fellow employee Wilbert Hatcher, that Yates stole property from her company. She further testified that she and Prescott were involved in an altercation where Prescott allegedly accused her of stealing.

Hazel Brown, a former Super 8 Motel employee, testified that Angela Fields told her that Prescott informed Fields that Yates stole from the motel. This testimony was admitted over Prescott's hearsay objection. She further testified that Prescott had approved her employees' use of the pizza-for-rooms exchange arrangement. She testified that the exchange arrangement had been explained to

employees by the motel's upper management. When she was cross-examined, Brown admitted that she was terminated from employment at Super 8 Motel and subsequently filed suit against Prescott for racial discrimination.

Floyd Church, a former Super 8 Motel manager, testified that Prescott stated Yates was a thief in his presence. He further testified that motel audits indicated Yates was not stealing from the company and he had informed Prescott of this fact. Church then testified that he had been terminated from the motel and had filed suit against Prescott. During Church's testimony, it was revealed that he previously signed an affidavit that Prescott neither accused Yates of stealing nor inquired as to whether Yates was stealing in Church's presence.

Wilbert Hatcher, a former Super 8 Motel night watchman and auditor, testified that Prescott was worried that Yates was stealing. He testified that Prescott had approved all motel discounts, including the "pizza discounts," which were utilized by Yates and other employees. He further testified that his audits revealed that the books were not always balanced. Hatcher then testified that he was terminated from the motel and had filed a suit for wrongful termination on the basis of a workers' compensation claim. Yates then presented other witnesses, including her physician. At the close of Yates's case-in-chief, Prescott's motion for a directed verdict was denied.

During her case-in-chief, Prescott testified that she did not permit her employees to exchange motel rooms for pizza except on one previous occasion. She testified that she was unaware of the pizza-for-rooms exchanges her

employees were making with employees from a nearby pizza restaurant. She testified that she did not accuse Yates of stealing upon discovering this unapproved practice. Prescott testified that she and Yates had an altercation when Yates learned that her access to the company's computer audit system was terminated. Prescott testified that Yates's argument was the second incident of insubordination, which caused her to terminate Yates's employment with the company.

Prescott then called Cleve Justice, a former Super 8 Motel general manager, who testified that his review of the company's audits indicated that they were out of balance. He testified that he recommended that Prescott reduce access to the auditing system to certain high level employees. He further testified that Prescott did not inform him that the imbalance was caused by employee theft. Another witness, Papa John's Pizza Manager Tracy Williams, testified that she and Prescott did uncover and terminate an unofficial pizza-for-rooms exchange arrangement between employees of the motel and restaurant.

After closing arguments, the jury deliberated and returned a verdict in favor of Yates, awarding her \$50,000 in compensatory damages and \$50,000 in punitive damages. This appeal follows.

Prescott contends that the trial court abused its discretion by improperly admitting evidence of alleged communications regarding Yates between her and other motel employees. She argues that the testimony of her former employees should have been precluded under the qualified privilege defense.

Defamation is established by proof of four elements: “(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” *Harstad v. Whiteman*, 338 S.W.3d 804, 810 (Ky.App. 2011) (quoting the Restatement (Second) of Torts § 558 (1977)). If an oral statement contains untrue allegations of criminal behavior, it is slanderous per se and evidence indicating malice is not required to obtain damages. *Id.*

In the context of an employment defamation case, Kentucky courts have recognized a qualified privilege for defamatory statements regarding an employee’s conduct. *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 797 (Ky. 2004). Communications within a company are privileged if the communications were necessary for the company’s proper function and the enforcement of the law. *Dossett v. New York Min. & Mfg. Co.*, 451 S.W.2d 843, 846 (Ky. 1970). When a qualified privilege is established, the complainant must prove that a statement was false and defamatory and uttered in malice. *Stringer*, 151 S.W.3d at 798.

We first observe that Prescott misconstrues the implication of the qualified privilege defense in a defamation case. While Prescott argues that the qualified privilege operated to exclude the testimony of her motel’s employees, the privilege does not operate to exclude certain types of testimony but rather alters the burden of proof in a defamation case. Unlike the attorney-client and spousal privileges that restrict testimony, the qualified privilege defense exists to place a

burden on the plaintiff to prove actual malice in a slanderous per se case. *Id.* at 797.

From the *Stringer* decision, we find the following discussion to be illustrative:

The significance of the defense of qualified or conditional privilege is that it removes the conclusive presumption of malice otherwise attaching to words that are actionable per se and thereby casts on the plaintiff a technical burden of proof in that respect. This does not require any greater degree of proof by the plaintiff, because the offensive character of the words still is sufficient by itself to support an inference of malice. The practical difference, therefore, is that in the one case the instructions do not require a finding of malice as a condition to recover and in the other they do.

Id., citing *Tucker v. Kilgore*, 388 S.W.2d 112, 114 (Ky. 1965). Accordingly, we need not consider whether the trial court erred by permitting Prescott's employees to testify under the qualified privilege defense.

Further, we note that the trial court's instructions specifically required the jury to find malice rather than to presume malice as is generally the case in a slander per se action. The trial court's instructions properly removed the conclusive presumption of malice as required by the qualified privilege defense. *Id.* Therefore, regardless of any qualified privilege defense claim that Prescott could have argued on appeal, the trial court properly ruled on this issue at trial.

Prescott contends that the trial court committed prejudicial error by permitting Yates to discuss Prescott's father's wealth. Prescott contends that the introduction of evidence regarding her father was unduly prejudicial. We agree.

Prescott filed a motion in limine to prohibit any reference to her father's wealth or the motel's financial status. Yates's counsel argued that Prescott's father's information was relevant for the purpose of showing Prescott's reckless disregard for the truth. Prescott stated that any reference to her father, the founder of the Super 8 Motel chain, was irrelevant because he did not have an ownership interest in her motel. The trial court then denied Prescott's motion in limine.

“It has been the law of this Commonwealth for almost one hundred years that in an action for punitive damages, the parties may not present evidence or otherwise advise the jury of the financial condition of either side of the litigation.” *Hardaway Management Co. v. Southerland*, 977 S.W.2d 910, 916 (Ky. 1998). This rule even applies when punitive damages are not sought. *Id.* When evidence is improperly admitted, an appellate court must apply a test to determine if the error was harmless or prejudicial. If there is a reasonable possibility that absent the error the verdict would have been different (i.e., whether the error affected the jury's decision), the error will be deemed prejudicial and reversal is required. *Hawkins v. Rosenbloom*, 17 S.W.3d 116, 121 (Ky.App. 1999).

During opening statements, Yates's counsel stated that Prescott's father was the founder of the Super 8 Motel chain. Prescott's objection to the reference to her father was denied. During cross-examination of Prescott, Yates's counsel asked Prescott if her father was the founder of Super 8 Motel who once

owned 480 motels. During closing arguments, Yates's counsel stated the following:

It is hard to prove what they call actual damage in one of these cases. It is hard to prove it. The law presumes it, and you can find it. But, punitive damages are such that you are trying to tell somebody that you should not be doing this kind of stuff. You got to . . . you should not have done this and there is going to be a price. What price is there going to be in this case? What price is there going to be? And I don't care whether her daddy is rich or on SSI. It doesn't bother me, but I have found a certain arrogance in this case that is sometimes typical of the children of these barons. People who have grown up privileged and think that, "Well, whatever I want to do is okay."

After reviewing the record, we conclude that Yates's counsel's questions and comments regarding Prescott's father's wealth and her apparently prosperous upbringing were prejudicial. Prescott's counsel filed a motion in limine to exclude any referencing to this immaterial and prejudicial information but the trial court denied the motion without any explanation.

Prescott's counsel objected to the introduction of this information during the course of the trial but was again overruled by the trial court without explanation. The introduction of this testimony was improper and against long established decisions of our courts. *Southerland*, 977 S.W.2d at 916. The focus of a defamation trial must be on the alleged act or acts of the defendant and the alleged resulting damage rather than the ability of the defendant or her family to pay for an award due to personal wealth. *Dawson v. Shannon*, 225 Ky. 635, 9 S.W.2d 998, 999 (1928).

In *Southerland*, the court noted that the plaintiff had been largely unsuccessful in admitting the defendant's financial information at trial. *Id.* at 916. Although observing that some financial evidence had been referenced, the court observed that the trial court had sustained the defendant's objection to this line of questioning. *Id.* In determining if the defendant was prejudiced by the reference to financial information, the court stated that the amount of information was minimal and, importantly, the information was not used during the plaintiff's closing argument. *Id.* Based on these facts, the court concluded that there was no prejudice.

However, Prescott's objections to the use of financial information against her were overruled on multiple occasions. Prescott's counsel did everything he could do to prevent the evidence from being introduced but was unsuccessful. The trial court's erroneous ruling was compounded by the fact that Yates's counsel's closing argument exploited the use of Prescott's family's personal wealth to seemingly characterize her as an arrogant child of a rich man. These tactics were completely inappropriate and should not have been permitted. Therefore, based on the extensive use of financial information regarding Prescott's family and the exploitation of these facts during Yates's closing argument, we conclude that Prescott's substantial rights were violated and reverse the trial court's judgment.

Prescott argues that the trial court improperly denied her motion for a new trial because the verdict was not supported by sufficient evidence and was

influenced by prejudice. We will not address this issue because the trial was tainted with prejudicial evidence. We will only quote the following language regarding the proof requirements for damages in a defamation action as stated in *Gilliam v. Pikeville United Methodist Hosp. of Kentucky, Inc.*, 215 S.W.3d 56 (Ky.App. 2006):

If words are defamatory per se, damages are presumed and the plaintiff may recover without alleging or proving special damages. Statements classified as defamatory per se include those which attribute to someone a criminal offense, a loathsome disease, serious sexual misconduct, or conduct which is incompatible with his business, trade, profession, or office. Words may be actionable per quod, by contrast, only if there is an allegation and proof of actual damages. (Internal citations omitted).

Id. at 60-61. Additionally, if a defendant sufficiently asserts a qualified privilege defense, the jury must be instructed that the plaintiff must prove actual malice rather than rely on the conclusive presumption of malice in slanderous per se cases. *Stringer*, 151 S.W.3d at 797. On remand, any motion for a directed verdict must be analyzed based on the application of these legal requirements.

Prescott contends that she was entitled to a new trial because the trial court's judgment reflects a significant irregularity regarding the participation of an excused juror in awarding damages. Prescott did not preserve this issue by objecting and presenting it to the trial court. "It is well-settled that a trial court must be given the opportunity to rule in order for an issue to be considered on appeal, and the failure of a litigant to bring [a matter] to the trial court's attention is fatal to that argument on appeal." *Baker v. Weinberg*, 266 S.W.3d 827, 835

(Ky.App. 2008). This is particularly true when the error, as here, appears to be no more than a clerical error. Therefore, we will not address Prescott's argument because she did not present this matter to the trial court.

For the foregoing reasons, the Pike Circuit Court's judgment following a jury verdict is reversed and remanded for a new trial.

ALL CONCUR.

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