

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001850-MR

GLENN RAHAN DONEGHY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 14-CI-02888

WKYT 27 NEWS FIRST

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; TAYLOR AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Glenn Rahan Doneghy, *pro se*, appeals from a final judgment of the Fayette Circuit Court dismissing his defamation case against WKYT 27 News First.

Doneghy gained notoriety by causing the death of a police officer in Lexington, Kentucky:

In April 2010, a vehicle driven by Doneghy struck and killed Officer Bryan Durman as he was standing inside the door of an automobile investigating a noise complaint. Doneghy fled the scene, but police later found him barricaded inside his residence. After police forced him out of his apartment, Doneghy fought with officers in an attempt to escape. He was finally arrested and a search of his apartment produced several items of contraband.

Doneghy v. Commonwealth, No. 2014-CA-001028-MR, 2015 WL 1647922, 1 (Ky.App. 2015) (unpublished). After a jury trial, Doneghy was convicted of second-degree manslaughter, leaving the scene of an accident, second-degree assault, fourth-degree assault, first-degree possession of a controlled substance, possession of marijuana and possession of drug paraphernalia, resulting in a total sentence of twenty-years' imprisonment. His conviction was affirmed on direct appeal. *Doneghy v. Commonwealth*, 410 S.W.3d 95 (Ky. 2013).

WKYT, a Lexington television station, deemed Doneghy's parole board hearing newsworthy and obtained permission to attend and film it. On February 25, 2014, WKYT reported on Doneghy's parole board hearing during its 12:30 p.m. news report. The report contained a brief clip of Doneghy at the hearing stating: "As far as my case or anything like that there is always sympathy." Following this report, Doneghy filed a defamation case against WKYT.

Doneghy's defamation claim was based solely on the portion of the WKYT report that showed footage of his statement to the parole board. Doneghy alleged WKYT's footage combined two of his sentences in response to two separate

questions, resulting in a false quote that “in regards unto my case, I have sympathy.” Doneghy alleged that because of the report:

[He] has been marred, and possibly scarred beyond possible hopes of future employment in the city of Lexington, Kentucky, . . . thus completely hampering any future hopes of gainful employment, or that of entrepreneuralship [sic], not only in Lexington, but everywhere, with the advent of Googling one’s name

And then there was the hurt and injury to reputation that may cause [his] family, friends, and associates to look at him in an unsavory light; if not already. . . . And the possible future Suffering of Ridicule in the Community as a result of the comments.

WKYT moved to dismiss Doneghy’s complaint for failure to state a claim upon which relief could be granted or alternatively for summary judgment on the basis that: (1) its statement was true; (2) the statutory fair reporting privilege allowed it to report on a judicial proceeding so long as it did so without malice; (3) Doneghy as a career criminal is “libel-proof;” (4) Doneghy failed to request a retraction and, thus, would only be entitled to special damages, but failed to plead any special damages; and (5) Doneghy named as a proper party to this lawsuit WKYT, 27 Newsfirst, which does not exist. WKYT attached certified copies of portions of Doneghy’s criminal history which included final judgments, his arrest record and commitment orders. This criminal history included several convictions for assault (both domestic assault and assault of police officers), other convictions including prostitution, robbery and terroristic threatening, and

probation violations. WKYT also attached DVDs of the audio of the parole board hearing and video of the WKYT report.

Doneghy opposed the motion, arguing: (1) dismissal for failure to name the correct party was premature without allowing him discovery to determine the proper party; (2) WKYT slandered him in its motion by labeling him “libel-proof” and a career criminal; (3) the judicial proceeding privilege did not apply to WKYT’s report; (4) WKYT’s report defamed him because by cutting his sentence short it made its reporting partial, false and malicious; (5) WKYT incorrectly stated he was denied parole for a second time when it was only his first time before the parole board; and (6) WKYT slandered him in its motion by accusing him of prostitution rather than solicitation of prostitution.

Although the circuit court determined Doneghy adequately named WKYT, it granted WKYT’s motion on the basis that: (1) as a matter of law WKYT made a true and accurate report of the parole board hearing because the transcript of the hearing and the WKYT broadcast showed Doneghy’s words were not altered in its report; (2) Kentucky Revised Statutes (KRS) 411.060 statutory fair report privilege precludes liability because WKYT did not act with malice; (3) Doneghy could not suffer reputational damage given his lengthy criminal history; and (4) Doneghy did not seek correction of the error so he would only be eligible for special damages under KRS 411.061(1), (6), but failed to plead any. The circuit court dismissed the case with prejudice and Doneghy appealed.

We apply the summary judgment standard of review to the trial court's grant of the motion to dismiss because matters outside of the pleading were presented for review and relied upon by the trial court. Kentucky Rules of Civil Procedure (CR) 12.02. "The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment "should only be used 'to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.'" *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (quoting *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)).

As stated in *Toler v. Sud-Chemie, Inc.*, 458 S.W.3d 276, 281–82 (Ky. 2014) (quoting Restatement (Second) of Torts § 558 (1977)) (footnotes omitted):

The requisite elements for a defamation claim are: "(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."

The truth of the matter asserted and privilege are defenses in any defamation action. *Smith v. Martin*, 331 S.W.3d 637, 640 (Ky.App. 2011).

Doneghy is mistaken as to the content of the WKYT broadcast.

Doneghy inaccurately states the WKYT report contained the edited statement that

“in regards unto my case, I have sympathy[.]” The audio recording of the parole board hearing contains the following statement by Doneghy: “As far as my case or anything like that there is always sympathy anytime a life is lost, but, like I said, I’m fighting a 60.02 and I guess I have to leave it at that.” In the video clip of Doneghy on the WKYT report he stated: “As far as my case or anything like that there is always sympathy.” The clip of Doneghy was accurate and true, and not edited as to alter his meaning; therefore, it cannot be defamatory.

The circuit court correctly determined that as a matter of law, WKYT’s report on Doneghy’s parole board hearing was privileged. KRS 411.060 provides that “[t]he publication of a fair and impartial report of any proceeding before any state . . . board . . . shall be privileged, unless it is proved that the publication was maliciously made” or a requested retraction is not made. “[A] report is considered ‘maliciously made’ if it is published ‘solely for the purpose of causing harm to the person defamed.’” *Smith*, 331 S.W.3d at 641 (quoting *Pearce v. Courier–Journal*, 683 S.W.2d 633, 636 (Ky.App. 1985)). Doneghy never requested a retraction and the record is devoid of any evidence sufficient to raise an issue of fact that WKYT’s report was made solely to harm him. Therefore, the privilege protects WKYT’s report.

Moreover, Doneghy neither sought correction of the error before filing his defamation action nor sought special damages in his complaint. Therefore, he cannot recover under KRS 411.061(1), (6).

Because we affirm on the basis of truth, privilege and the failure to plead special damages, it is unnecessary for this Court to determine whether the trial court was correct in concluding that Doneghy was libel-proof based on his criminal history.

Doneghy's remaining arguments attempted to raise new defamation claims in his response to WKYT's motion. These new defamation claims are not properly raised on appeal because those should have been raised through an amended complaint or supplemental pleading if proper, rather than as part of his response to WKYT's motion, below. *See* CR 15.01 and 15.02; *Nichols v. Zurich Am. Ins. Co.*, 423 S.W.3d 698, 707–08 (Ky. 2014); *Taylor v. Moran*, 61 Ky. 127, 129–34 (1863).

Finally, the circuit court did not err in denying Doneghy time for additional discovery before granting the motion to dismiss. Doneghy was provided with a sufficient opportunity to develop the facts needed to pursue his defamation claim. *See Suter v. Mazyck*, 226 S.W.3d 837, 842 (Ky.App. 2007). Doneghy received discs containing the audio of his parole board hearing and the video of WKYT's report, which was the most pertinent information needed to establish his case. Doneghy did not state he needed discovery of anything else in order to oppose the motion to dismiss and on appeal has not explained what other evidence he hoped to discover and why it was needed. The record reflects that the only issue on which Doneghy sought additional time for discovery was whether he sued an appropriate

party, but the trial court determined that dismissal would not be justified on such ground.

Accordingly, we affirm the Fayette Circuit Court's final judgment dismissing Doneghy's case.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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