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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000020-MR

KYLE HORNBACK; JAMIE SMITH; DILLON HORNBACK;
REBECCA SOMMER; AND OLIVIA CARRICO — APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 15-CI-005391

KATINA POWELL; IBJ BOOK PUBLISHING, LLC, D/B/A
IBJ CUSTOM & BOOK PUBLISHING, D/B/A IBJ BOOK
PUBLISHING; MICHAEL MAURER; DICK CADY;
AND IBJ CORPORATION — APPELLEES

AND

NO. 2018-CA-000055-MR

IBJ BOOK PUBLISHING, LLC; IBJ CORPORATION;
MICHAEL S. MAURER; AND DICK CADY — CROSS-APPELLANTS

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 15-CI-005391

KYLE HORNBACK; JAMIE SMITH; DILLON HORNBACK; REBECCA SOMMER; OLIVIA CARRICO; NADER GEORGE SHUNNARAH; AND J. ANDREW WHITE CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, NICKELL AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Kyle Hornback, *et al*., ("Appellants") appeal and IBJ Book Publishing, LLC, *et al.*, ("Cross-Appellants") cross-appeal from: an opinion and order of the Jefferson Circuit Court entered on April 29, 2016; an opinion and order entered on May 2, 2017; and, an agreed order entered on November 29, 2017, making the previous interlocutory orders final and appealable. Appellants are or were University of Louisville students who asserted a claim that the publication of Katina Powell's book *Breaking Cardinal Rules: Basketball and the Escort Queen* resulted in a tortious diminution in the value of their University of Louisville education. They contend that the Jefferson Circuit Court erred in concluding that Katina Powell and other Defendant-Appellees owed no duty to University of Louisville student Appellants, and erred in holding that the students were asserting claims not recognized by Kentucky courts. The Cross-Appellants argue that the Jefferson Circuit Court erred in dismissing their counterclaim for

abuse of process and malicious prosecution against the Cross-Appellees. For the reasons addressed below, we find no error and AFFIRM the orders on appeal.

Appellants alleged that Appellee Katina Powell claimed that she and her daughters engaged in or agreed to engage in sexual conduct with University of Louisville men's basketball players and recruits from 2010 to 2014 in exchange for a fee of $10,000 paid by a University of Louisville employee. This claim was memorialized in a book called *Breaking Cardinal Rules: Basketball and the Escort Queen*. The book was co-authored by Powell and Dick Cady, and published by Indianapolis Business Journal Publishing, LLC ("IBJ"). According to the record, Powell's claims resulted in the University of Louisville self-imposing a postseason ban on its men's basketball program for the 2015-16 season.

This litigation commenced on October 22, 2015, when University of Louisville student Kyle Hornback filed a complaint in Jefferson Circuit Court against Powell and IBJ Book Publishing, LLC, alleging that Powell was negligent *per se* for violation of Kentucky Revised Statutes ("KRS") Chapter 529, which addresses prostitution. The complaint also alleged claims against Powell for intentional interference with Hornback's contract and her economic relationship with the University, and civil conspiracy. The focus of Hornback's complaint was that Powell's claims tortiously diminished the value of Hornback's college education. Hornback also sought an order requiring IBJ Book Publishing to

deposit with the Jefferson Circuit Court any monies owed by IBJ Book Publishing to Powell. Thereafter, first and second amended complaints were filed, which added more student plaintiffs and asserted additional claims as against IBJ Book Publishing and Cady including intentional infliction of emotional distress. The Appellants also sought class certification.

In late December 2015, IBJ Book Publishing and Cady filed motions to dismiss for failure to state a claim upon which relief may be granted. In support of the motions, IBJ Book Publishing and Cady argued that the Appellants lacked standing to prosecute the action, and their claims must fail as a matter of law. The Circuit Court conducted a hearing on March 30, 2016, and entered an opinion and order on April 29, 2016, finding that the Appellants lacked standing. This order was interlocutory and the court granted the Appellants leave to file a third amended complaint.

The Appellants then filed a third amended complaint adding claims against IBJ Corporation and Michael Maurer. Maurer operates IBJ Book Publishing, LLC and IBJ Corporation. The Appellants repeated their claims that Powell and the IBJ parties violated Kentucky prostitution laws in KRS Chapter 529 to the detriment of the Appellants; intentionally interfered with the students' contracts with the University; were liable for intentional infliction of emotional distress; and engaged in civil conspiracy. The Appellants also reasserted their

previous claims for injunctive relief as to monies owed Powell, class certification, and joint and several liability.

On June 10, 2016, IBJ Book Publishing and Cady filed an answer, counterclaim, and another motion to dismiss. IBJ Corporation and Maurer also moved to dismiss the claims. The counterclaim asserted a litany of arguments centered on the contention that the Appellants and attorneys Nader Shunnarah and J. Andrew White were asserting claims they knew were not supported by extant Kentucky law for the purpose of extorting a monetary settlement, tortuously abusing the legal process, and damaging the reputations of IBJ Book Publishing and Cady. A complicated procedural history followed for the remainder of 2016 through April 2017.

On May 2, 2017, the circuit court entered an opinion and order dismissing for a second time the Appellants' claims upon concluding that they did not have standing, and because their claims were not recognized by Kentucky law. As to the counterclaim, the court determined that although the Appellants' claims were not supported by the law, they had probable cause to bring the action, were seeking an extension of existing law, and were not motivated by malice. This appeal followed.[1]

[1] A separate group of six plaintiffs claimed that Powell, the IBJ parties and Cady defamed them through writings and photographs in the book. These claims were dismissed by way of an

Appellants now argue that the Jefferson Circuit Court erred when it held that: 1) Appellees owed no duty to the Appellants and 2) the students' claims are not recognized by Kentucky law.[2] In support of this contention, they present five theories of recovery which they claim are recognized in Kentucky and upon which they may recover damages. They first assert that KRS Chapter 529 and KRS 446.070 may be applied in unison to sustain a cause of action against Appellees. KRS Chapter 529 addresses prostitution offenses, and Appellants direct our attention to case law holding that one of the purposes of prostitution statutes is to protect the public health and welfare. KRS 446.070 states that a "person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation[.]" Appellants argue that they are "within the class intended to be protected by the statute" (meaning KRS chapter 529), that prostitution and profiting therefrom is unlawful, and that KRS 446.070 may be applied to allow their recovery from Appellees for damages sustained by reason of the violation.

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agreed order entered on November 29, 2017, from which no appeal was taken. This agreed order is referenced because it made prior interlocutory orders final and appealable.

[2] Appellants have not complied with Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v), which requires an appellant to state at the beginning of the written argument if the issue was preserved and, if so, in what manner. We are not required to consider portions of the Appellants' brief not in conformity with CR 76.12 and may summarily affirm the trial court on the issues contained therein. *Skaggs v. Assad, By and Through Assad*, 712 S.W.2d 947 (Ky. 1986); *Pierson v. Coffey*, 706 S.W.2d 409 (Ky. App. 1985).

Appellants cite by analogy case law in which plaintiffs were found to be members of a protected class for purposes of recovering damages sustained by statutory violations. In *Blue Grass Restaurant Co. v. Franklin*, 424 S.W.2d 594 (Ky. 1968), for example, a plaintiff who was speaking at a hotel event was found to be within the protected class of an ordinance intended to prevent persons from falling down a stairway. Similarly, an employee of an independent contractor was held to be within the protected class pursuant to KRS 446.070 affording civil liability for violation of the Kentucky OSHA standard. *Hargis v. Baize*, 168 S.W.3d 36 (Ky. 2005). Having closely examined the record and the law, we conclude that the case law cited by Appellants is distinguishable from the facts at bar. Appellants have not demonstrated that Powell or others were charged with or convicted of KRS Chapter 529 violations. Even if Appellants had provided such proof, Appellants are at best remote and unconnected third parties who cannot reasonably be characterized as being injured or damaged by Powell's alleged unlawful conduct. We find persuasive the circuit court's reasoning that if Appellants' argument for recovery were allowed to stand, one could hardly foresee where the chain of liability would end. In sum, we find no error in the Jefferson Circuit Court's conclusion that KRS 446.070 may not be applied to the facts before us to sustain a cause of action against Appellees.

Appellants' second theory of recovery is based on KRS 49.450(1),[3] which states:

> Every person contracting with any person or the representative or assignee of any person accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, radio, or television presentation, live entertainment of any kind, or from the expression of such person's thoughts, feelings, opinions, or emotions regarding such crime, shall pay over to the Kentucky Claims Commission any moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representatives.

Appellants argue that Powell, IBJ and Cady conspired to profit from prostitution via the book *Breaking Cardinal Rules* and assert that the student Plaintiffs are victims for purposes of this statutory provision.

Appellants' argument on this issue is not persuasive. Again, they provide no citation to the record demonstrating that Powell was "accused or convicted of a crime in this state . . . ." Further, KRS Chapter 346 and the plain language of KRS 49.450(1) allows for the recovery of proceeds by the Kentucky Claims Commission, not by purported victims. And finally, Appellants cannot demonstrate that they are "victims" of Appellees' conduct in any meaningful sense. We find no error.

[3] Formerly KRS 346.165.

Appellants go on to argue that they have a cause of action stemming from their contractual relationship with the University of Louisville. Citing *Monumental Life Ins. Co. v. Nationwide Retirement Solutions, Inc*., 242 F. Supp. 2d 438, 450 (W.D. Ky. 2003), they maintain that they may prosecute a claim against Appellees for "tortious interference with a prospective business advantage." Under Kentucky law, in order to recover under this cause of action a plaintiff must plead and prove the following elements: "(1) the existence of a valid business relationship or its expectancy; (2) defendant's knowledge thereof, (3) an intentional act of interference; (4) an improper motive; (5) causation; and (6) special damages." *Id*. Appellants contend that they were prepared to offer evidence of the diminution in value of their University of Louisville degrees resulting from Appellees' actions, as well as the testimony of a psychologist who was expected to state that Appellants suffered depression, anxiety, stress, and ridicule. Appellants allege that when wearing University of Louisville logos and attire in public places, they are approached by strangers who make rude and hateful remarks because of the events chronicled in the book. The focus of their argument is that Appellees tortiously interfered with the contractual relationship between Appellants and the University, and that the Jefferson Circuit Court erred in failing to allow this cause of action to proceed.

Assuming, *arguendo*, that Appellants have or had a "valid business relationship" with the University of Louisville, they cannot demonstrate that Appellees committed an intentional act of interference with respect to that business relationship, nor that Appellees actions caused damages. In order to sustain a claim of tortious interference with a prospective business advantage, Appellants must offer "evidence of a motive or intent . . . to interfere" with the business relationship. *Id.* Appellants cannot demonstrate that Powell's alleged sexual contact with University of Louisville basketball players and recruits was motivated by an intent to interfere with a business relationship between remote third-party students and the University. Rather, the only motivator cited by Appellants was Powell's desire to be financially compensated. Appellants' claim on this issue must fail as a matter of law, and we find no error.

Appellants' fourth theory of recovery is that Appellees' actions constituted intentional infliction of emotional distress sufficient to sustain a claim for damages. The elements of this action, also known as the tort of outrage, are 1) intentional or reckless conduct, 2) that is so outrageous as to offend the generally accepted standards of decency and morality, 3) causing severe emotional distress as to the plaintiff. *Goodman v. Goldberg & Simpson, P.S.C.*, 323 S.W.3d 740, 746 (Ky. App. 2009).

The facts before us cannot sustain a claim for the tort of intentional infliction of emotional distress or outrage. While Appellants contend that strangers ridicule them when they are wearing University of Louisville logos on their clothing, they do not allege the degree of severe emotional distress necessary to sustain the cause of action. Further, this tort "requires conduct intended to cause emotional distress in the victim." *Brewer v. Hillard*, 15 S.W.3d 1, 8 (Ky. App. 1999). No allegation has been forwarded, nor could it be demonstrated under the facts before us, that Appellees intended to cause severe emotional distress in the Appellants. This theory of recovery also fails as a matter of law.

Appellants' final argument consists of a single sentence in which they baldly assert that Appellees were involved in a civil conspiracy intended to injure Appellants. With no reference to the record nor citation to any Kentucky case law or statute, this argument falls well short of overcoming the strong presumption that the ruling of the Jefferson Circuit Court was correct. *City of Jackson v. Terry*, 302 Ky. 132, 194 S.W.2d 77, 78 (1946). We find no error.

IBJ Book Publishing and Cady asserted a counterclaim of abuse of process and malicious prosecution. In their cross-appeal, they argue that the Jefferson Circuit Court erred in dismissing the counterclaim under CR 12.02 for failure to state a claim upon which relief may be granted. They maintain that Cross-Appellees and their attorneys had an ulterior motive in bringing the action

against them, *i.e.*, to restrain the free speech rights of the IBJ parties, to extort money and to gain notoriety for themselves. Further, the Cross-Appellants contend that the Cross-Appellees and their counsel grossly overstated their alleged causes of action under Kentucky law, and improperly sought joint and several liability as to all claims against all defendants. Cross-Appellants maintain that instead of accepting the truth of the factual allegations contained in the counterclaim, the circuit court improperly concluded that the student Plaintiffs were not prosecuting their action for a purpose other than the proper adjudication of the claim upon which the underlying proceeding was based. They argue that had the circuit court properly construed the facts in a light most favorable to the IBJ parties, it would not have granted Cross-Appellees' motions to dismiss the counterclaim.

"The essential elements of abuse of process, as the tort has developed, have been stated to be: First, an ulterior purpose, and second, a willful act in the use of the process not proper in the regular conduct of the proceeding." *Williams v. Central Concrete, Inc.*, 599 S.W.2d 460, 461 (Ky. App. 1979). This requires proof of "misusing, or misapplying, process justified in itself for an end other than that which it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance." *Id.* Conversely, to prevail on a claim of malicious prosecution, a plaintiff must prove that:

> 1) the defendant initiated, continued, or procured a criminal or civil judicial proceeding, or an administrative disciplinary proceeding against the plaintiff;
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> 2) the defendant acted without probable cause;
>
> 3) the defendant acted with malice, which, in the criminal context, means seeking to achieve a purpose other than bringing an offender to justice; and in the civil context, means seeking to achieve a purpose other than the proper adjudication of the claim upon which the underlying proceeding was based;
>
> 4) the proceeding, except in ex parte civil actions, terminated in favor of the person against whom it was brought; and
>
> 5) the plaintiff suffered damages as a result of the proceeding.

Martin v. O'Daniel, 507 S.W.3d 1, 11-12 (Ky. 2016). Thus, whereas abuse of process implicates an ulterior motive and improper use of the legal process, malicious prosecution requires proof of malice.

In considering these claims, the Jefferson Circuit Court acknowledged that the Cross-Appellees were pursuing common law claims not specifically recognized by the Commonwealth of Kentucky. In so doing, however, the court determined that the Cross-Appellees nevertheless had probable cause to assert their claims. That is to say, the court implicitly found that the Cross-Appellees did not have an ulterior purpose coupled with a willful act in the improper use of the

proceeding (abuse of process), nor did they act with malice as against the Cross-Appellants (malicious prosecution).

Historically, the tort of malicious prosecution has not been favored in the law. *Prewitt v. Sexton*, 777 S.W.2d 891, 895 (Ky. 1989). As such, the party claiming malicious prosecution must strictly comply with the elements of the tort. *Id.* In addition, a motion asserting a failure to state a claim shall be treated as a motion for summary judgment. CR 12.02.

> A motion to dismiss for failure to state a claim upon which relief may be granted "admits as true the material facts of the complaint." So a court should not grant such a motion "unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved . . . ." Accordingly, "the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true." This exacting standard of review eliminates any need by the trial court to make findings of fact; "rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?" Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue de novo.

Fox v. Grayson, 317 S.W.3d 1, 7 (Ky. 2010) (footnotes omitted).

On the question of whether the Cross-Appellants' claim for abuse of process was properly dismissed, we find no error. The mere determination that the Cross-Appellees' claims for relief were not supported by Kentucky law does not

demonstrate "a willful act in the use of the process not proper in the regular conduct of the proceeding." *Williams*, 599 S.W.2d at 461. As to the tort of malicious prosecution, Cross-Appellants could not prove the fourth element of *Martin*, *supra*, to wit, the termination of the underlying proceeding in favor of the Cross-Appellants. The counterclaim alleging malicious prosecution was filed *before* the underlying matter was resolved, rendering the satisfaction of the fourth element an impossibility. This fact, taken alone, supports the Jefferson Circuit Court's order dismissing the malicious prosecution claim. Further, we hold as moot 1) the issue of whether attorney White was a proper party to the counterclaim, and 2) the question of whether the circuit court should have granted Cross-Appellants' motion to add additional parties.

And finally, we are not persuaded that the Jefferson Circuit Court erred in dismissing the counterclaim before allowing additional time for discovery. Cross-Appellants acknowledge that in ruling upon a motion to dismiss, the circuit court is not to weigh the evidence or make findings of fact, but rather to adjudicate the matter on the pleadings. *Fox*, 317 S.W.3d at 7. As such, no additional discovery was warranted.

For the foregoing reasons, we AFFIRM the opinions and orders of the Jefferson Circuit Court.

ALL CONCUR.

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