IN THE SUPREME COURT OF MISSISSIPPI

NO. 2016-CT-01638-SCT

SHARON MARK

v.

CITY OF HATTIESBURG, MISSISSIPPI, MAYOR JOHNNY DUPREE, KIM BRADLEY, DEBORAH DENARD DELGADO, CARTER CARROLL, DAVE WARE AND HENRY E. NAYLOR

ON WRIT OF CERTIORARI

DATE OF JUDGMENT:	08/02/2016
TRIAL JUDGE:	HON. MICHAEL H. WARD
TRIAL COURT ATTORNEYS:	KIM T. CHAZE L. CLARK HICKS, JR. JAMES W. GLADDEN, JR.
COURT FROM WHICH APPEALED:	FORREST COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	KIM T. CHAZE
ATTORNEYS FOR APPELLEES:	L. CLARK HICKS, JR. JAMES W. GLADDEN, JR.
NATURE OF THE CASE:	CIVIL - TORTS-OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE
DISPOSITION:	AFFIRMED - 02/06/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

MAXWELL, JUSTICE, FOR THE COURT:

¶1. An investigation into the Hattiesburg municipal court system led to several local news stories. One online story posted a copy of the police department's internal-affairs investigative report of the court system, which the media outlet obtained from a city councilman. Attached to this report was a copy of municipal court clerk Sharon Mark's

medical-leave form. The form indicated Mark had asked for leave to undergo breast-cancer surgery. Aggrieved by public disclosure of her medical condition, Mark sued the mayor and five city council members for invasion of privacy. To get around the Mississippi Tort Claims Act, Mark asserted that the mayor and city council members were *individually* liable because they had acted with malice. But at trial, the evidence showed the disclosure of her medical-leave form was at most negligence. Because Mark failed to support her claim that the mayor and council members *maliciously* invaded her privacy, the trial court did not err by granting these individual defendants a directed verdict.

Issue on Certiorari Review

¶2. Initially, Mark sued the City of Hattiesburg, Mayor Johnny Dupree, and the five city council members—Kim Bradley, Deborah Delgado, Carter Carroll, Dave Ware, and Henry Naylor. After the City was dismissed on summary judgment, Mark proceeded to trial against the mayor and city council members in their individual capacities on claims of slander, invasion of privacy, and intentional infliction of emotional distress. At the close of her case-in-chief, the trial court granted the defendants a directed verdict on all claims. Mark appealed, and the Court of Appeals affirmed.

¶3. Mark filed a petition for writ of certiorari with this Court, claiming the Court of Appeals made three reversible errors. We granted her petition to review one issue only—whether the Court of Appeals erred by ruling that Councilman Bradley's disclosure of Mark's breast-cancer diagnosis and surgery, through the release of her medical-leave form to the news media, would not be "be highly offensive to a reasonable person" and thus did

not support a claim for invasion of privacy. ***Mark v. City of Hattiesburg***, No. 2016-CA-01638-COA, 2019 WL 125656, at *5 (Miss. Ct. App. Jan. 8, 2019) (quoting ***Grey v. Town of Terry***, 196 So. 3d 211, 220 (Miss. Ct. App. 2016)). But after further review, we find this particular question need not be resolved due to the way Mark pled her invasion-of-privacy claim against the mayor and city council members.[1]

¶4. At trial, Mark sought to hold the mayor and city council members *individually* liable. Again, the City was dismissed on summary judgment. As part of that judgment, the trial court ruled the City could not be held liable for its employees' allegedly tortious actions because Mark framed her claims in a way to try to avoid the Mississippi Tort Claims Act and its bench-trial requirement. She did this by alleging the mayor and city council members acted intentionally and with malice.[2] ***Id.*** at *3. Claims based on allegedly tortious acts by government employees acting within the course and scope of their employment fall under the MTCA and may only be brought against the employees in their representative capacity. Miss. Code Ann. § 11-46-5(2) (Rev. 2019); Miss. Code Ann. § 11-46-7(2) (Rev. 2019). But a government employee is not considered to be acting within the course and scope of his or her employment—and may be sued in his or her individual capacity—if the allegedly tortious conduct "constituted fraud, malice, libel, slander, defamation or any criminal offense other than traffic violations." *Id.*; *see* ***Univ. of Miss. Med. Ctr. v. Oliver***, 235 So. 3d 75, 82-83

[1] To be clear, we are not resolving if a jury question exists over whether the public disclosure of Mark's breast-cancer surgery would have been highly offensive to a reasonable person.

[2] The Court of Appeals affirmed this part of the judgment. ***Mark***, 2019 WL 125656, at *3. And Mark did not seek certiorari review of this issue.

(Miss. 2017) (holding that malice-based tort claim could only be brought against a law-enforcement officer in his individual capacity). In other words, for the mayor and city council members to be individually liable, they must have been acting outside the course and scope of their employment with the City of Hattiesburg—in this case, with malice. *See* Miss. Code Ann. § 11-46-7(2) (Rev. 2019).

¶5. While Mark may have sought to prove the disclosure of her medical-leave form was motivated by malice, she failed in this endeavor. So even if we assume, as Mark argued in her petition, that publication of her medical-leave form would be highly offensive to a reasonable person, based on our decision in ***Young v. Jackson***, 572 So. 2d 378, 381 (Miss. 1990), we still find the trial court did not err by granting the mayor and individual city council members a directed verdict because there was no evidence of malice.

I. No Evidence of Collective Action

¶6. First, the evidence showed undisputedly that it was Councilman Bradley—and Bradley alone—who publicized the medical-leave form, which was attached to an investigative report of the municipal court system. This is an important undisputed fact as we consider the mayor and city council members' potential individual liability. While Bradley was president of and spokesman for the city council, the question before us on writ of certiorari is not whether the city may be liable for Bradley's actions. Instead, the question is whether the mayor and other city council members may be *individually* liable for Bradley's actions.

¶7. The evidence shows undisputedly that Mayor Dupree did not want to release the

investigative report to the city council, let alone to the news media. So there is no way Bradley's action can be somehow imputed to the mayor. Likewise, there is no evidence to implicate the other city council members. The only evidence Mark offers of a concerted city council action is a letter to the mayor signed by all five board members asking for more transparency in the investigation. But this is not evidence that the other city council members agreed to Bradley's disclosing the investigative report to the news media. Further, while Bradley was the designated spokesperson for the city council—a fact on which the dissenting justice relies heavily—there is no evidence Bradley was acting in this capacity, i.e., acting for the entire city council, when he decided to release the report. Councilpersons Ware, Naylor, and Delgado testified they only learned what Bradley had done *after* the media published the reports and disapproved of his action. Councilman Carroll testified he was aware of and approved Bradley's plan based on the public's right to know what the investigation uncovered. But Carroll was clear that he never got together with Bradley or any other council member and *agreed* to release the report.

¶8. At best, Mark's evidence showed the mayor and other city council members did not publicly denounce Bradley or publicly distance themselves from him *after* he inadvertently made the disclosure. When specifically asked at trial what proof she had of malice, Mark replied that "no one tried to stop and find the truth." But this is hardly evidence that city council members conspired with Bradley or are individually liable for Bradley's action.

II. No Evidence of Malice

¶9. Turning to Bradley's action, there is also no evidence for a reasonable juror to

conclude that he acted maliciously—that is, with any ill will toward Mark or in wanton disregard of her privacy rights. *See* ***Cantrell v. Forest City Pub. Co.***, 419 U.S. 245, 252, 95 S. Ct. 465, 470, 42 L. Ed. 419 (1974).

¶10. Mark argued that Bradley had been motivated by animosity toward fellow defendant Mayor Dupree based on the mayor's handling of the investigation into the municipal court. But this is not evidence that Bradley acted with ill will toward Mark, the plaintiff. *See* ***id.*** ("[C]ommon-law malice . . . [is] frequently expressed in terms of . . . personal ill will toward *the plaintiff* . . . ." (emphasis added)). Mark herself testified that she only knew Bradley through city council meetings and that there had been no conflict between them. There was no animosity and "no axe to grind." Likewise, Bradley testified he did not know Mark or her professional reputation. He said his sole motivation at the time was to restore public trust in the municipal court system by shedding light on problems discovered during the internal-affairs investigation.

¶11. Further, there is no evidence Bradley released the reports in wanton disregard of Mark's privacy rights. *See* ***id.*** Bradley admitted at trial that gave the reports to the media and that the medical-leave form was attached to the back of one of the reports. But Bradley testified he was not aware the form was part of the report. He had been in a hurry and did not fully read each report. And once he learned the form was among the reports, Bradley said he regretted it. He even called the news reporter to try to rectify the situation. At worst, Bradley acted negligently.

Conclusion

¶12. If we were dealing with a simple negligence-based invasion-of-privacy claim against a private individual, our inquiry would end with whether the jury should have been able to consider if disclosing breast-cancer surgery is highly offensive to a reasonable person. But we are not dealing with a private individual. We are dealing with a city councilman. To skirt the MTCA's immunity provisions and hold this city councilman individually liable, he must have acted with malice. And his admittedly negligent act does not rise to this level. For this reason, we affirm the decision of the Court of Appeals, which affirmed the grant of a directed verdict to all individual defendants on all claims, including invasion of privacy.

¶13. **AFFIRMED.**

RANDOLPH, C.J., COLEMAN, BEAM, CHAMBERLIN AND ISHEE, JJ., CONCUR. KITCHENS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, P.J. GRIFFIS, J., NOT PARTICIPATING.

KITCHENS, PRESIDING JUSTICE, DISSENTING:

¶14. Because I would allow Mark's invasion of privacy claim against the individual city council members to go to the jury, I respectfully dissent. I would find that a jury question exists on whether the public disclosure of Sharon Mark's breast cancer surgery would have been highly offensive to a reasonable person. I further would find that Mark's evidence of malice was sufficient to create a jury question on that element of her claim.

¶15. Shortly after Mark took medical leave, City Councilman Kim Bradley, allegedly acting on behalf of the city council, released to the media a packet of documents about the purported misconduct in the clerk's office. Mark's medical leave form was among those

documents and was posted on a local news website. Bradley testified, and Mayor Dupree confirmed, that Bradley acted as the city council's spokesperson. Bradley testified that he had disclosed the medical leave form inadvertently because he had been in a hurry to release the information to the media and had failed to review all the documents in the packet before disclosure. He testified that he had not intended for the form to be included and that he regretted it. Another city councilman, Carter Carroll, testified that, when he was in Bradley's office, he had reviewed the documents slated for release. Carroll testified that, after he left Bradley's office, it occurred to him that the medical form should not be released. In an attempt to prevent its release, he called Bradley, but Bradley already had released the packet, including the form, to the media. Mayor Dupree and all the city council members who testified agreed that releasing Mark's private medical information to the media had been wrong and against city policy. Mark testified that the release of her medical information had caused her emotional distress. She sought to show that the disclosure had been malicious and motivated by animosity that others testified existed between the city council and the mayor.

¶16. This Court has recognized the tort of invasion of privacy, which includes four distinct sub-torts:

1. The intentional intrusion upon the solitude or seclusion of another;
2. The appropriation of another's identity for an unpermitted use;
3. The public disclosure of private facts; and
4. Holding another to the public eye in a false light.

Williamson ex rel. Williamson v. Keith, 786 So. 2d 390, 396 (Miss. 2001) (quoting

Candebat v. Flanagan, 487 So. 2d 207, 209 (Miss. 1986)). Mark's arguments focus on the third sub-tort of public disclosure of private facts. For public disclosure of private facts, this Court has adopted the Restatement (Second) of Torts' definition:

> [o]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

Young v. Jackson, 572 So. 2d 378, 382 (Miss. 1990) (quoting Restatement (Second) of Torts § 652D (Am. Law Inst. 1977)).

¶17. Mark contends that the city council members' revelation to the media that she had requested medical leave due to a breast cancer diagnosis and surgery was not of legitimate concern to the public and would be highly offensive to a reasonable person. The city council members do not dispute that this information was of no legitimate concern to the public. The trial court and the Court of Appeals found that the disclosure would not have been highly offensive to a reasonable person. But neither of these holdings addressed or cited the controlling precedent, ***Young v. Jackson***.

¶18. In ***Young***, Betty Dee Young, a decontamination laborer at the Grand Gulf Nuclear Power Station, collapsed at work. ***Young***, 572 So. 2d at 380. Fearing radiation poisoning, she was rushed to the hospital; she later informed her supervisor that she had collapsed due to complications from having had a partial hysterectomy several weeks earlier. ***Id.*** Young said that she had begged her supervisor to keep the information private. ***Id.*** But because other employees were concerned that Young had collapsed due to radiation poisoning, Young's supervisor informed his supervisor of the real reason for Young's collapse. That supervisor

then informed Young's coworkers that Young had collapsed due to her having had a hysterectomy. ***Id.*** at 380-81. Young sued both supervisors and their employers for invasion of privacy based on the public disclosure of a private fact. ***Id.*** at 382.

¶19. Rejecting the defendants' argument that publicizing another's hysterectomy would not be highly offensive to a reasonable person, this Court said that

> A person may not be held liable for public disclosure of facts about another unless he should reasonably have foreseen that the person would be likely offended. It requires little awareness of personal prejudice and human nature to know that, generally speaking, no aspects of life is [sic] more personal and private than those having to do with one's sexual organs and reproductive system. It may be the fact that many women who have undergone a hysterectomy do not keep that fact secret, but this is not the test. We do not regard it unreasonable that a woman would consider the fact a private matter, nor unforseeable that she would so consider it.
>
> Without further ado, we hold that the fact that she has undergone a hysterectomy is a fact that a woman ordinarily has the right to keep private if she wishes and that public disclosure of that fact by unauthorized persons and without her consent may be actionable.

Id.

¶20. ***Young*** held that the fact that one has undergone a hysterectomy is within the realm of information that, ordinarily, a person has a right to keep private. ***Id.*** The Court emphasized that "generally speaking, no aspects of life [are] more personal and private than those having to do with one's sexual organs and reproductive system." ***Id.*** The Court's analysis dovetails with the Restatement, which classes "unpleasant or disgraceful or humiliating illnesses" as "entirely private matters." Restatement (Second) of Torts § 652D cmt. b (Am. Law Inst. 1977), Westlaw (database updated Oct. 2019). "When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man,

there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest." *Id.* No meaningful distinction can be made between Young's hysterectomy and Mark's breast cancer diagnosis and surgery. Both constituted unpleasant medical conditions or procedures and, just as in ***Young***, Mark's medical unpleasantry involved the female reproductive system. I would hold that Mark had a right to keep her breast cancer diagnosis and surgery private if she chose to do so.

¶21. Mark presented evidence that Bradley, acting as the spokesperson for the city council, disclosed her medical leave form to the media. Because she is proceeding against the city council members in their individual capacities, Mark had to prove malice. ***Univ. of Miss. Med. Ctr. v. Oliver***, 235 So. 3d 75, 82 (Miss. 2017) (citing Miss. Code Ann. § 11-46-5(2) (Rev. 2012)). "[C]ommon-law malice—frequently expressed in terms of either personal ill will toward the plaintiff or reckless or wanton disregard of the plaintiff's rights—would focus on the defendant's attitude toward the plaintiff's privacy, not toward the truth or falsity of the material published." ***Cantrell v. Forest City Pub. Co.***, 419 U.S. 245, 252, 95 S. Ct. 465, 42 L. Ed. 2d 419 (1974). Malice may be shown by circumstantial evidence. ***Strong v. Nicholson***, 580 So. 2d 1288, 1293 (Miss. 1991).

¶22. The trial court granted a directed verdict on Mark's invasion of privacy claim. "[I]f a verdict for the nonmoving party can possibly be supported by the evidence—when viewed in the light most favorable to that party—then a directed verdict is not appropriate." ***Thompson v. Dung Thi Hoang Nguyen***, 86 So. 3d 232, 236 (Miss. 2012) (citing ***Solanki v. Ervin***, 21 So. 3d 552, 556 (Miss. 2009)). "[T]he question of malice is to be determined by

the jury unless only one conclusion may reasonably be drawn from the evidence." ***Brown v. Watkins***, 213 Miss. 365, 373, 56 So. 2d 888, 891 (1952). Under ***Cantrell***, all Mark had to show on the malice element was "reckless or wanton disregard of [her] rights."

¶23. Mark sought to prove that the disclosure was motivated by ongoing animosity between the city council and the mayor of which she, having been hired by the mayor, was a victim. The trial transcript discloses a toxic environment in which tensions ran high between the mayor and city council. Given this evidence, a decision that the disclosure was accomplished in reckless or wanton disregard of Mark's right to privacy is not outside the realm of reasonable conclusions. Bradley acted as the city council's spokesperson and released Mark's medical leave form to the media. Another city council person recognized that disclosure of the form was wrongful and tried, unsuccessfully, to intercept it before its release. Because a reasonable jury could interpret Bradley's actions in handling Mark's medical leave form as reckless disregard of her right to privacy, the question of whether malice was proved is for the jury. While the majority sets forth a thorough analysis of the evidence to support its conclusion that the disclosure was merely negligent, it does so by viewing the evidence in the light most favorable to the city council members rather than by viewing the evidence in the light most favorable to Mark, the nonmovant. That approach is improper. While Mark's case for malice may not have been the strongest, I would find that, viewing the evidence in the light most favorable to her, the trial court erred by granting a directed verdict on her claim for invasion of privacy based on the public disclosure of her medical leave form.

KING, P.J., JOINS THIS OPINION.