IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 2000 Session

RONALD STEPHEN SATTERFIELD v. RENATA E. BLUHM, M.D., and OCCUPATIENT MEDICAL SERVICES, P.C.

Direct Appeal from the Circuit Court for Knox County
No. 2-600-97 Hon. Harold Wimberly, Circuit Judge

FILED APRIL 16, 2004

No. E2003-01609-COA-R3-CV

Plaintiff's claims for defendants aiding and abetting the State in terminating him and for libel and slander, tortious interference with his employment contract, outrageous conduct, and negligence were dismissed in the Trial Court by summary judgment. Plaintiff has appealed. We affirm the Trial Court's Judgment.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, J. delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

David S. Wigler, Knoxville, Tennessee, for Appellant.

Nathan D. Rowell, Knoxville, Tennessee, for Appellees.

OPINION

Plaintiff initially brought this action against the State of Tennessee, Tennessee Department of Safety, and Michael Greene, commissioner, as a result of plaintiff's termination from his employment as a commercial motor vehicle inspector. Plaintiff alleged he was discharged from his employment because he was asked to submit to a physical examination, and was deemed physically unable to perform the essential duties of the job, even though he had been performing satisfactorily. He alleged violations of the Americans with Disabilities Act, the Tennessee Human

Rights Act, and 42 U.S.C. §1983, and sought compensatory and punitive damages, reinstatement, and attorney's fees.

Plaintiff had worked for the Public Service Commission, which was abolished on July 1, 1996, when the Tennessee Department of Safety took over the functions relating to commercial motor vehicle enforcement, and Michael Greene as Commissioner became responsible for plaintiff's employment decisions. Plaintiff accepted continued employment as a commercial vehicle inspector with the Department of Safety, but was required to submit to physical and psychological exams as a condition of his continued employment. He submitted to a medical examination by Dr. Renata Bluhm of Occupatient Medical Services, P.C. In his affidavit, plaintiff stated he successfully performed all the tests administered by Dr. Bluhm, but that based on his medical records, Dr. Bluhm concluded that he was physically unable to perform the essential duties of a commercial motor vehicle inspector, and as a result, Greene terminated plaintiff's employment.

Procedurally after Dr. Bluhm and Occupatient Medical Services were added as party defendants, and the plaintiff had added new claims for malicious harassment, negligence, libel, tortious interference with plaintiff's contract of employment, outrageous conduct and civil conspiracy, the case was removed to the U.S. District Court.

The federal court remanded "all claims against the State of Tennessee, the Tennessee Department of Safety, and Michael C. Greene, in his official capacity" to the State Court. The parties agreed to stay the proceedings in State court, pending the outcome of appeal of the federal action. Thereafter, the parties stipulated that all claims against the State, Department of Safety, and Greene, in his official capacity, would be dismissed with prejudice, and the Court entered an Order dismissing these parties, with the remaining defendants being Dr. Bluhm and Occupatient.

The federal court had granted Bluhm and Occupatient summary judgment as to plaintiff's claims under the ADA and Rehabilitation Act.

Plaintiff filed a response to the Statement of Undisputed Facts filed on behalf of Bluhm and Occupatient, and disputed many of the statements. The contract between the State and Occupatient regarding physical examinations for employees/applicants of the State is in the record, and states that the doctor was to review the individual's "Medical History Form" and certify whether that "based upon the information recorded" the individual was capable of meeting physical fitness requirements. The Contract provides that the doctor was to perform tests necessary to qualify/disqualify an individual based upon the "Physical Examination Form" and was to follow the "Medical Examination Form Instructions" as a guide to determine whether the individual is qualified.

The doctor was also provided with "Physical Demand Analysis Forms" for each job position to determine the minimum physical requirements for each job. The "Physical Demand Analysis Form" for a commercial vehicle officer lists various concrete tests which the individual must be able to perform, such as lifting a weight of 65 pounds to a height of 50 inches, and carrying same up to 35 feet. It lists certain criteria of a more nebulous nature, such as "applicant must possess

the physical ability and skill in defensive training to make an arrest. Each individual must be able to produce unique levels of force as required." Dr. Bluhm testified that she was requested by the State to get plaintiff's medical records and turn those over to the State. She was advised by the State that plaintiff had been on leave of absence and that he had problems with depression and had attempted suicide, but that this information did not influence her evaluation in any way.

Dr. Bluhm testified that plaintiff provided his medical history on the requisite form and only mentioned having had one back surgery in his history. But later, he mentioned a second surgery. She stated that she needed to get plaintiff's prior medical records "to clarify the extensiveness of his problems".

Dr. Bluhm testified she was familiar with AMA guidelines that are used to evaluate permanent impairment, and that a person who had back surgery but fully recovered could still have a permanent impairment under the guidelines. When she was asked what physical functions plaintiff was impaired in performing, she responded "This wasn't an impairment, you know, situation." She testified that an impairment rating was not based just on observation, but on knowledge of the current nature of the disease, and an understanding of what physical functions might pose a high risk for that person. She testified that she did not observe any physical impairment during her examination of the plaintiff, and that he successfully completed lifting tests, range of motion tests, etc. She testified that plaintiff did have problems with his blood pressure and elevated heart rate, and that she had to follow instructions supplied by the State and based upon the State's criteria, plaintiff's elevated blood pressure and heart rate would have been enough to deem him unqualified.

Dr. Bluhm admitted she was never informed as to the essential job functions of a commercial motor vehicle inspector, and she never inquired. She testified that according to the instructions she was given, a back impairment could be disqualifying depending upon the circumstances. Dr. Bluhm stated that based upon the guidelines set out by the International Labor Organization, plaintiff should pursue sedentary work. Several depositions and affidavits were filed in the record and the Trial Court held a hearing on the summary judgment motion and entered an Order granting summary judgment to defendant Bluhm and Occupatient and dismissed plaintiff's claims.

The issues presented on appeal are:

1. Whether the trial court erred in granting defendants summary judgment on plaintiff's aiding and abetting claim under the THRA/Tennessee Handicap Act?

2. Whether the trial court erred in granting summary judgment to defendants on plaintiff's claim of libel and slander?

3. Whether the trial court erred in granting summary judgment to defendants on plaintiff's claim for tortious interference with an employment contract?

4. Whether the trial court erred in granting summary judgment to defendants on plaintiff's claim of outrageous conduct?

5. Whether the trial court erred in granting summary judgment to defendants on plaintiff's claim of negligence?

The standard of review of summary judgments is well stated in *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995), as follows:

> The standards governing an appellate court's review of a trial court's action on a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the trial court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tenn. R. Civ. P. 56 have been met. Tenn. R. Civ. P. 56.03 provides that summary judgment is only appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. The moving party has the burden of proving that its motion satisfies these requirements.
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> The standards governing the assessment of evidence in the summary judgment context are also well established. Courts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor. Courts should grant a summary judgment only when both the facts and the conclusions to be drawn from the facts permit a reasonable person to reach only one conclusion.

The Tennessee Handicap Act, codified at Tenn. Code Ann. §8-50-103, states that there "shall be no discrimination in the hiring, firing, and other terms and conditions of employment of the state of Tennessee or any department . . . against any applicant for employment based solely upon any physical, mental or visual handicap of the applicant, unless such handicap to some degree prevents the applicant from performing the duties required by the employment sought or impairs the performance of the work involved." The Act further states that, upon receipt of a complaint of discrimination by the Tennessee Human Rights Commission, "the Commission shall follow the procedure and exercise the powers and duties provided in §§4-21-302 - 4-21-311, and the person shall have all rights provided therein." Plaintiff relies upon this section of the THA in invoking the THRA [codified at Tenn. Code Ann. §4-21-101 et seq.] and its declaration that it is a discriminatory practice for any person to "aid, abet, incite, compel or command a person to engage in any of the acts or practices declared discriminatory by this chapter". Tenn. Code Ann. §4-21-301 (2). Thus, plaintiff argues that Dr. Bluhm should be held individually liable for aiding and abetting Greene and the State in discriminating against plaintiff in his employment.

In this regard, it must be noted that the THA only specifically includes the rights provided in Tenn. Code Ann. §§4-21-302 - 4-21-311, and the aiding and abetting provision is found in Tenn. Code Ann. §4-21-301. While our Supreme Court has previously recognized generally that the "THA embodies the definitions and remedies provided by the Tennessee Human Rights Act" (*see Barnes v. Goodyear Tire and Rubber Co.*, 48 S.W.3d 698 (Tenn. 2000)), it appears from the express language of the THA that the aiding and abetting provisions contained in the THRA do not apply to a claim of handicap discrimination.

Assuming *arguendo* that the provisions do apply, plaintiff's claim must fail because he cannot show that Dr. Bluhm took any affirmative action which aided or compelled plaintiff's employer to discriminate against him. In *Carr v. United Parcel Service*, 955 S.W.2d 832 (Tenn. 1997), the Supreme Court was asked to determine when individual liability could accrue under the THRA, and the Court discussed that an individual "who aids, abets, incites, compels or commands an employer to engage in employment-related discrimination has violated the THRA." The Court explained that the "accomplice liability" provision contained in Tenn. Code Ann. §4-21-301 (2) was not defined in the THRA, but would require some type of affirmative conduct, based on the common law civil liability theory of aiding and abetting, which required that "the defendant knew that his companions' conduct constituted a breach of duty, and that he gave substantial assistance or encouragement to them in their acts." *Id.* at 836, *quoting Cecil v. Hardin*, 575 S.W.2d 268 (Tenn. 1978).

Viewing the evidence in the light most favorable to plaintiff, there is no proof that Dr. Bluhm did anything other than examine plaintiff, review his medical records, and render her opinion regarding his fitness based on the criteria provided to her by the State. She did nothing to substantially assist or compel Greene and/or the State in making an employment decision regarding plaintiff, and had no authority to do so. Bluhm was not an employee of the State, but had a contract with the state to examine employees/applicants and render an opinion on their ability to perform certain job criteria based on checklists and requirements set out by the State. Greene admitted that he had the sole decision-making power over plaintiff's employment. Both Greene and Bluhm testified that they had never spoken, and there was no evidence that Bluhm had any say-so with regard to plaintiff's employment situation but for rendering her medical opinion based on specific objective benchmarks of blood pressure, pulse rate, etc.

As to the impairment rating which Dr. Bluhm reported, there has been no dispute that plaintiff had this impairment rating in his medical records, and that Dr. Bluhm reported the same accurately. Moreover, there was no showing that Dr. Bluhm did not have the appropriate authorization from plaintiff to obtain/release this information. Plaintiff presented no evidence of improper behavior, or motive on the part of Dr. Bluhm, and she testified there was none. Accordingly, there is no evidence to infer that Dr. Bluhm aided or abetted plaintiff's employer in discriminating against plaintiff, because there was no proof that Dr. Bluhm "knew that [the State's] conduct constituted a breach of duty" or that she "gave substantial assistance or encouragement to" the State. *See Carr*. Summary judgment was properly granted on this issue.

Plaintiff contends that Dr. Bluhm's statement that plaintiff was "not qualified physically for the position" was false and defamatory. Plaintiff does not dispute the veracity of any of the facts contained in Dr. Bluhm's report regarding the impairment rating he had previously been given by his orthopedic surgeon, his blood pressure, or his pulse rate, but rather takes issue with her ultimate opinion regarding his fitness.

As this Court has previously explained, a cause of action for defamation requires:

> One who publishes a false and defamatory communication concerning a private person . . . is subject to liability, if, but only if, he
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> (a) knows that the statement is false and that it defames the other,
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> (b) acts in reckless disregard of these matters, or
>
> (c) acts negligently in failing to ascertain them.
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> It is clear that in order to find one liable under this standard, it must be shown that the party charged had some knowledge or awareness of the defamatory communication before it was published.

Stones River Motors, Inc. v. Mid-South Pub. Co., 651 S.W.2d 713, 716 (Tenn. Ct. App. 1983).

As the U.S. Supreme Court and Tennessee Courts have recognized, statements of opinion are only actionable if they imply the allegation of undisclosed defamatory facts as the basis for the opinion. *See Old Dominion Branch No. 496 v. Austin*, 94 S. Ct. 2770 (1974), and *Stones River Motors, Inc. v. Mid-South Pub. Co.,* 651 S.W.2d 713, 716 (Tenn. Ct. App. 1983). Plaintiff relies on *Zius v. Shelton,* 2000 WL 739466 (Tenn. Ct. App. June 6, 2000), and *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (1990), for his assertion that "the distinction between fact and opinion has been abrogated". Our review of these cases reveals that such is not the case, however, and that the distinction still exists for opinions based on true facts versus opinions based upon false facts, and also for opinions on matters of public concern or concerning public figures as opposed to opinions regarding private individuals.[1]

In this case, the opinion involved a private individual, and was based on true, disclosed, non-defamatory facts. Dr. Bluhm clearly states in her report that her opinion is based on plaintiff's medical records and the permanent disability rating contained therein, as well as plaintiff's elevated heart rate and blood pressure as found during her examination. Plaintiff does not dispute that any of these disclosed facts are true. Dr. Bluhm was asked to render a medical opinion based on certain criteria, and she did. The opinion based on disclosed, non-defamatory facts is not

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[1] Both *Zius* and *Milkovich* dealt with matters of public concern and/or opinions about public officials, which is inapposite.

actionable.[2]

Plaintiff alleged that Dr. Bluhm tortiously interfered with his employment contract with the State, and relies on cases which deal with both interference with an employment contract, and interference with a business relationship, but plaintiff must show an intentional inducement by Dr. Bluhm, akin to malice, before he can recover. *See Forrester v. Stockstill*, 869 S.W.2d 328 (Tenn. 1994); *Oak Ridge Precision Industries, Inc. v. First Tennessee Bank Nat. Ass'n*, 835 S.W.2d 25 (Tenn. Ct. App. 1992). Viewing the facts in the light most favorable to plaintiff, there was no evidence that Dr. Bluhm acted intentionally to induce plaintiff's termination. This claim is also without merit.

As to the claim for outrageous conduct, our Supreme Court has previously recognized:

> under Tennessee law, there are three essential elements to a cause of action [for outrageous conduct]: (1) the conduct complained of must be intentional or reckless; (2) the conduct must be so outrageous that it is not tolerated by civilized society; and (3) the conduct complained of must result in serious mental injury.

Bain v. Wells, 936 S.W.2d 618 (Tenn. 1997).

Plaintiff concedes that these types of claims must meet a "high standard", but plaintiff argues he has shown Dr. Bluhm's conduct to be outrageous, in that she knew he had a previous suicide attempt, and yet intentionally caused his termination. However, he has shown no evidence that would indicate as we have noted that Dr. Bluhm intentionally caused plaintiff's termination. There is no evidence that her conduct was intentional or even reckless, and certainly was not "so outrageous that it is not tolerated by civilized society."

Finally, plaintiff claims that Dr. Bluhm should not have been granted summary judgment on plaintiff's claims of negligence and negligence per se, because she violated the THA, and failed to comply with applicable standards of care. As previously noted, there was no showing of violation of the THA by Dr. Bluhm, so there can be no negligence claim per se.[3]

Assuming that plaintiff has pled common law negligence, plaintiff has failed to show any duty to plaintiff that was breached by Dr. Bluhm. As our Supreme Court has explained:

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[2] See also Restatement (Second) of Torts §566 which states that "[a] simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is."

[3] Plaintiff's negligence per se claim regarding violations of federal statutes was extinguished in his federal lawsuit.

> A claim of common law negligence requires proof of the following elements: a duty of care owed by the defendant to the plaintiff; conduct falling below the applicable standard of care that amounts to a breach of that duty; an injury or loss; cause in fact; and proximate or legal cause.

Gunter v. Laboratory Corp. of America, 121 S.W.3d 636(Tenn. 2003).

Plaintiff's arguments regarding Dr. Bluhm's duties toward him, however, all stem from allegations that she violated the Tennessee Handicap Act. Plaintiff made no allegation either in his Complaint or his Brief regarding any other duty owed to plaintiff that was breached by Dr. Bluhm, and has not established one. This claim likewise was properly dismissed.

For all of the foregoing reasons, the summary judgment granted on plaintiff's claims to defendant is affirmed and the cause remanded. The cost of the appeal is assessed to Ronald Satterfield.

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HERSCHEL PICKENS FRANKS, J.