

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000175-MR

KATHLEEN BAYER

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT  
HONORABLE WILLIAM GRAHAM, SPECIAL JUDGE  
ACTION NO. 97-CI-01070

KIMBERLY N. MARTIN AND  
LEXINGTON HERALD-LEADER

APPELLEES

OPINION  
AFFIRMING  
\*\* \*\*

BEFORE: BUCKINGHAM, GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. Kathleen Bayer has appealed an opinion and order entered by the Madison Circuit Court, Special Judge, William L. Graham, Presiding, which granted appellees' motion for summary judgment in her action for defamation and intentional infliction of emotional distress. Inasmuch as Special Judge Graham's opinion thoroughly and accurately discusses the issues raised and the applicable law, and thus reflects our view of these matters, we adopt his opinion as our own:

### I. Background

Plaintiff Kathleen Bayer, *pro se*, brings this action against Defendants the Lexington

Herald Leader and its reporter, Kimberly Martin, for defamation and intentional infliction of emotional distress. Her claims are based upon an article written by Ms. Martin addressing Ms. Bayer's legal actions arising out of her divorce in 1989. The lawsuits originated with Ms. Bayer's claim that her husband was suffering from Alzheimer's disease at the time he filed for divorce, and was thus incompetent to seek a dissolution. Ms. Bayer then sued her husband's attorney, her daughter, the police, and other members of the community claiming that they exerted undue influence on her husband. She alleges they caused her marriage to break up and caused her to lose her fair share of her husband's estate.

Ms. Martin wrote an article in 1996 that summarized Ms. Bayer's lawsuits. However, Ms. Bayer claims that the article did not accurately depict her side of the events that transpired. Ms. Bayer claims that Ms. Martin's failure to describe the extent of Ms. Bayer's abuse by lawyers, judges, police and her children amount to defamation. In particular, she points out to the following parts of the article as defamatory:

1. The article states that Mr. Bayer "made the decision to leave her." Ms. Bayer contends her husband never made a decision to divorce her, and that the police instead forcibly removed him from their home.
2. Ms. Bayer contends that Ms. Martin failed to include all of the "legal issues" which amounted to unfairness and injustice, and that her injustice was supposed to be the purpose of the article.
3. The article states that Ms. Bayer learned she was not in her husband's will in 1988. She claims that she did not learn of this until his death in 1995.
4. The article states that Ms. Bayer's suit against her husband's attorney for malpractice was dismissed under the statute of limitations, and Ms. Bayer claims it was dismissed for another reason.

She further claims damages for the tort of intentional infliction of emotional distress based upon the inaccurate reporting.

## II. Discussion

### A. Defamation

In order to establish a claim of defamation, Ms. Bayer must be able to prove: (1) defamatory language; (2) about herself; (3) which was published; and (4) caused her injury. McCall v.

Courier-Journal & Louisville Times co., Ky., 623 S.W.2d 882, 884 (1981); Columbia Sussex Corp. v. Hay, Ky. App., 627 S.W.2d 270, 273 (1981). The injury must (1) cause the person hatred, contempt, or ridicule; (2) cause the person to be shunned or avoided; or (3) injure a person's business or occupation. Id. In order to determine if the words are defamatory, they must be construed as a whole. Ball v. E. W. Scripps Co., Ky., 801 S.W.2d 684, 690 (1990). Furthermore, the defamatory statements must be false. Bell v. Courier-Journal and Louisville Times Co., Ky., 402 S.W.2d 84, 87 (1966). Finally, the publisher must exercise reasonable care in checking the truthfulness of the communication before printing it. McCall, 627 S.W.2d at 886.

However, a newspaper has two defenses against a claim of defamation. First, truth is a complete defense to an action for defamation. See Brents v. Morgan, Ky., 299 S.W. 967. "Where the defendant is a newspaper, the rule is that it is not to be held to the exact facts or to the most minute details of the transactions that it reports. What the law requires is that the publication be substantially true." Bell v. Courier-Journal and Louisville Times Co., Ky., 402 S.W.2d 84 (1966) (citing State Journal Co. v. Redding, 194 S.W. 301; Plummer v. Commercial Tribune Pub. Co., Ky., 270 S.W. 793). Second, a newspaper is "privileged to print fair and accurate accounts of judicial proceedings." Pearce v. Courier-Journal, Ky. App., 683 S.W.2d 633 (1985) (citing Beiser v. Scripps-McCrae Publishing Co., Ky., 68 S.W. 457 (1902)). This privilege is maintained if the newspaper prints facts that are substantially true. Id.; Bell, 402 S.W.2d at 84. Therefore, the newspaper need not print the exact details of the story it reports.

#### 1. Mr. Bayer's Petition for Divorce

Ms. Bayer argues that the Herald Leader made a defamatory statement when it printed that "Kathleen Bayer has argued in every level of court in Kentucky that her husband was incompetent because of Alzheimer's disease when he made the decision to leave her." Ms. Bayer argues that her husband never decided to leave her. This Court must look at the statement in terms of the natural and probable effect it would have on an average reader. McCall, 627 S.W.2d at 884. Mr. Bayer's "decision" is read in context of Ms. Bayer's allegation that he suffered from Alzheimer's. This Court finds that a reasonable reader would most likely conclude that Mr. Bayer did not voluntarily file for divorce against Ms. Bayer. Thus, the reasonable reader would not subject Ms. Bayer to hatred, contempt, or ridicule based on this statement, and this Court cannot find that the statement defamed Ms. Bayer.

Furthermore, this Court must find that the statement is privileged insofar as it is substantially true. Pearce, 683 S.W.2d 633. In Mr. Bayer's filing for dissolution of the marriage, the decision for the marriage to end had been made. Therefore, the statement is a fair and accurate account of the

judicial proceedings. Id. When a newspaper fairly depicts a judicial proceeding, such as the Herald-Leader did with the Bayer divorce, then it is privileged from liability for defamation and libel. Therefore, this Court finds that Ms. Bayer's claim for defamation for the statement that her husband made the decision to leave her must be dismissed as a matter of law.

## 2. Incomplete Account of the Judicial Proceedings

Ms. Bayer also argues that the story's incomplete account of her court proceedings amounts to defamation. She argues that the purpose of the story was to show the unfairness and injustice that she suffered in the hands of the judicial system. While this may be true, the Herald Leader is only required to print what is substantially true of a story, and not every detail of that story. Pearce, 683 S.W.2d 633. The article, when taken as a whole, is substantially true. The article includes Ms. Bayer's argument that her husband suffered Alzheimer's disease; that Mr. Bayer was allegedly forced to file for dissolution; Ms. Bayer's malpractice suit against her husband's attorney, including his alleged conspiracy, an inappropriate change of venue, and wrongful removal of testimony from court records. This Court finds that this amounts to an accurate summary of Ms. Bayer's story, and the Herald Leader's decision to omit certain details does not amount lies nor to defamation. Therefore, Ms. Bayer's claim for defamation based on incomplete reporting must be dismissed as a matter of law.

## 3. When Ms. Bayer Learned of Mr. Bayer's Will

The article stated that Ms. Bayer's "battle began eight years ago, after she learned her husband, John B. Bayer, had written her out of his will." Ms. Bayer contends that this is not true, and that she did not learn that her husband left her out of his will until his death in 1995. She further argues that the article portrays her as a "mercenary" fighting for money. However, her fight did begin eight years ago, and in every aspect of the litigation Ms. Bayer has sought substantial sums of money in damages.

In determining whether a false statement is defamatory, this Court must read the article in its entirety and decide whether the "gist or sting" of the article is defamatory. McCall, 623 S.W.2d at 884. As stated above, when the story reported is substantially true, then minor inaccuracies cannot be the basis for a defamation action. Id.; Pearce, 683 S.W.2d at 635. This Court cannot find that an average reader would subject Ms. Bayer to hatred, contempt, or ridicule because the reader believed she began the litigation as a result of her husband's will. In fact, the context of the article is to the contrary. The article clearly sets out Ms. Bayer's attempts to reunite with her husband and obtain justice against those who came between them. Therefore, the gist or sting of the article did not portray Ms. Bayer as a mercenary, and this Court finds that this article

substantially narrated Ms. Bayer's story truthfully and accurately. Thus, Ms. Bayer's claim for defamation based on this statement must be dismissed as a matter of law.

#### 4. Mischaracterization of Dismissals

Finally, Ms. Bayer alleges that the Herald Leader defamed her by stating that her suit against her husband's attorney for malpractice was dismissed by the statute of limitations. In fact, the suit was dismissed as *res judicata*, and the Court of Appeals noted that the suit was barred by the statute of limitations as well. This Court finds absolutely no basis for defamation in this mischaracterization. The article stated that the suit was dismissed, which is substantially true. An average reader of the Herald Leader would not notice the distinction between *res judicata* and statute of limitations as a reason for dismissal of a lawsuit. Furthermore, the newspaper's decision to omit that her suits were dismissed without hearing does not amount to defamation. This omission does not make the statement about her dismissals untrue. Therefore, as this Court finds that the statements concerning Ms. Bayer's litigation were substantially true, it must dismiss her claims for defamation as a matter of law.

#### B. Intentional Infliction of Emotional Distress

Ms. Bayer's second cause of action against the Herald Leader is for Intentional Infliction of Emotional Distress ("IIED"). Ms. Bayer must establish a factual dispute for four elements of IIED to survive a summary judgment motion. The elements of IIED are intentional conduct of the defendant; conduct so outrageous or intolerable that it would offend generally accepted standards of morality and decency; a causal connection between the conduct complained of and the distress suffered; and severe emotional distress. Humana of Kentucky, Inc. v. Seitz, Ky., 796 S.W.2d 1,2-3 (1990). The Herald Leader argues that Ms. Bayer cannot prove the sufficiency of outrageousness of its conduct, and that IIED is not available to Ms. Bayer because she has the tort of defamation available to her. Thus, the newspaper asserts that there is no factual dispute with respect to IIED and that Ms. Bayer's claim for IIED must be dismissed as a matter of law.

Whether conduct is severe or egregious enough to amount to the tort of outrage is a legal question to be determined by the Court. The sufficiency of outrage is not a factual issue, and is therefore not an appropriate question for a jury. This Court finds that Ms. Bayer has not alleged conduct sufficiently outrageous to withstand a motion for summary judgment. The conduct of the Herald Leader and its reporter in no way goes "beyond all possible bounds of decency, and [is] regarded as atrocious, and utterly intolerable in a civilized community." Humana of Kentucky, Inc., 796 S.W.2d at 3. This Court cannot find that the newspaper's failure to report a complete story is outrageous. Indeed this conduct is nowhere near the level of

outrageousness in Humana where the action for IIED did not lie. Therefore, Ms. Bayer's claim for intentional infliction of emotional distress must be dismissed as a matter of law.

### III. Conclusion

Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. The Court in Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., Ky., 807 S.W.2d 476 (1991) made the following conclusion:

The relevant Kentucky rule relating to summary judgment, CR 56.03, authorizes such a judgment "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The benchmark case of Paintsville Hospital v. Rose, supra, specifically held that the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor. We further declared that such a judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances. Finally, in that opinion, we recognize that summary judgment is not a substitute for trial nor is it the functional equivalent of a motion for directed verdict.

While it has been recognized that summary judgment is designed to expedite the disposition of cases and avoid unnecessary trials when no genuine issues of material fact are raised, see, Dossett v. new York Mining and Manufacturing Co., Ky., 451 S.W.2d 843 (1970), this Court has also repeatedly admonished that the rule is to be cautiously applied. See, Rowland v. Miller's Adm'r, Ky., 307 S.W.2d 3 (1956). The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. Dossett v. new York Mining and Manufacturing Co., supra; Rowland v. Miller's Adm'r, supra. Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact. Puckett v. Elsner, Ky., 303 S.W.2d 250 (1957). The trial judge must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists. It clearly is not the purpose of the summary judgment rule, as we have often declared, to cut litigants off from their right of trial if they have issues to try. See, Bonded

Elevator, Inc. v. First national Bank of Louisville, Ky., 680 S.W.2d 124 (1983); Hill v. Fiscal Court of Warren County, Ky., 429 S.W.2d 419 (1968); Williams v. Elman, Ky., 394 S.W.2d 905 (1965); Rowland v. Miller's Adm'r, supra.

Steelvest, 807 S.W.2d 480. Upon examining the evidence this Court finds there are no disputed genuine issues of material fact concerning Ms. Bayer's defamation claim and claim for intentional infliction of emotional distress, and this Court finds that this matter is ripe for judgment as a matter of law. Therefore, the Herald Leader is entitled to summary judgment.

ACCORDINGLY, IT IS HEREBY ORDERED that Kimberly Martin and the Herald Leader's Motion for Summary Judgment shall be, and the same hereby is, AFFIRMED. IT IS FURTHER ORDERED that Kathleen Bayer's Complaint the Lexington Herald Leader and Kimberly Martin, shall be, and the same hereby is, DISMISSED.

The opinion and order entered by the Madison Circuit Court in this matter is affirmed.

ALL CONCUR.

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