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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002188-MR

DERRICK D. AKINS

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 09-CI-00343

THE NEWS ENTERPRISE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: THOMPSON, VANMETER, AND WINE, JUDGES.

THOMPSON, JUDGE: Derrick D. Akins appeals from the Hardin Circuit Court's dismissal of his complaint for libel against *The News Enterprise*, a newspaper. For the reasons stated herein, we affirm.

On February 13, 2009, Akins filed an action for libel against *The News Enterprise*, alleging that the newspaper's use of the term "carjacking" in an article describing his criminal case constituted an incorrect, inflammatory, and

reckless statement of fact. Although he acknowledged being charged with rape, kidnapping, possession of a firearm by a convicted felon, and being a persistent felony offender in the first degree, he stated that he had been acquitted of the rape and kidnapping charges and was only found guilty of the remaining two offenses. Most notably, he contended that he had never been charged with carjacking.

In the May 21, 2008, *The News Enterprise* article giving rise to Akins's claim, the caption reads, "Acquitted in attack, Louisville man jailed on weapons charge." In relevant part, the body of the article contained the following:

Derrick D'Keith Akins was found not guilty of rape and kidnapping charges during an April 17 trial in Hardin Circuit Court, but the jury found him guilty of being a felon in possession of a handgun and, because of that, being a persistent felony offender.

Akins was arrested on several outstanding felony warrants last spring when Elizabethtown police found him walking along Valley Creek Road. When arrested, he was in possession of marijuana and a 9mm handgun — thought to be the same weapon used in the carjacking that spurred the rape and kidnapping charges.

He previously had been charged with assault in a case in which he allegedly choked a woman at a Ponderosa Mobile Home Park residence and police suspected that same weapon might have been used in the sexual assault case.

Moreover, *The News Enterprise* filed into the record an article from Sunday, July 1, 2007, written by Bob White. The article details Akins's alleged kidnapping of a woman during a car ride and alleged rape of her at gunpoint, according to Kentucky State Police (KSP) Detective Mark Gillingham.

Subsequently, *The News Enterprise* filed a motion to dismiss or, in the alternative, a motion for summary judgment. After Akins responded, the trial court granted *The News Enterprise's* motion to dismiss. The trial court's order provided the following:

The article did not report that Akins had been charged with "carjacking" but, rather that is the 9 mm handgun which Akins possessed while walking along Valley Creek Road (which he was found guilty) was the same weapon used in a "carjacking" that gave rise to the rape and kidnapping charges. Thus, the use of the term "carjacking" did not describe a particular offense charged, but a circumstance out of which the rape and kidnapping charges arose. This is an adequate and substantially true account of the court proceedings as it relates to Akins' various criminal charges in the Hardin Circuit Court.

Additionally, the trial court found that the complaint was void "of any allegations that the article in question was published maliciously or that Akins requested any explanation or contradiction as provided in KRS 411.060." Thus, the trial court found that Akins could not prove any set of facts that would entitle him to relief.

Akins contends that *The News Enterprise's* motion to dismiss should have been denied because he established the tort of libel against it. He argues that the Elizabethtown Police did not publicly use the term "carjacking," and that he was not charged or indicted for "carjacking." Thus, he contends that *The News Enterprise* knowingly printed incorrect and inflammatory information regarding an additional charge causing him mental anguish, pain, and suffering.

CR 12.02(f) provides that the failure to state a claim upon which relief can be granted is a sufficient ground for dismissal of a claim. When a motion to dismiss is made, trial courts cannot grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). “In determining whether a complaint should be dismissed, the issue is a matter of law.” *Grand Communities, Ltd. v. Stepner*, 170 S.W.3d 411, 417 (Ky.App. 2004).

“Four elements are necessary to establish a defamation action, whether for slander or libel, to wit: (1) defamatory language; (2) about the plaintiff; (3) which is published; and (4) which causes injury to reputation.” *McBrearty v. Kentucky Community and Technical College System*, 262 S.W.3d 205, 213 (Ky.App. 2008). A writing is defamatory when it subjects a person to public hatred, causes a person to be shunned, or injures a person’s occupation. *Id.* at 214. Notwithstanding, Kentucky adheres to the legal principle that the truth is an absolute defense for an action of libel regardless of the intent of the publishers. *Bell v. Courier-Journal & Louisville Times Co.*, 402 S.W.2d 84, 87 (Ky. 1966).

After reviewing the record, we conclude that *The News Enterprise* did not commit the tort of libel by publishing the article regarding Akins. Although Akins argues that he was neither charged nor convicted of “carjacking,” the article merely conveys that Akins’s rape and kidnapping charges arose from a carjacking. While Akins was not charged with “carjacking,” his alleged conduct giving rise to

his kidnapping and rape charges is generally referred to as “carjacking.” *Benton v. Crittenden*, 14 S.W.3d 1, 3 (Ky. 1999); *Hale v. Commonwealth*, 156 S.W.3d 274, 275 (Ky. 2005). Accordingly, we conclude that the term “carjacking” was a fair and accurate description of the alleged facts giving rise to Akins’s criminal charges.

Additionally, KRS 411.060 provides, in pertinent part, the following:

The publication of a fair and impartial report or the whole or a synopsis of any indictment, warrant, affidavit, pleading or other document in any criminal or civil action in any court of competent jurisdiction shall be privileged, unless it is proved that it was published maliciously, or that the defendant after request by the plaintiff has failed to publish a reasonable explanation or contradiction thereof, giving the explanation or contradiction the same prominence and space as the original publication, or that the publisher has refused after request by the plaintiff to publish the subsequent determination of the proceeding. This section shall not authorize the publication of any indecent matter.

Under KRS 411.060, a publication containing an accurate description of a judicial proceeding, regardless of the falsity or defamatory character of its contents, is absolutely privileged unless it was made for the sole purpose of causing harm.

Pearce v. Courier-Journal, 683 S.W.2d 633, 636 (Ky.App. 1985).

In this case, this article was written to inform the public regarding the results of Akins’s criminal trial and, thus, necessarily described the alleged conduct giving rise to his indictment for kidnapping and rape. The trial court found that Akins’s complaint was devoid of any allegation of maliciousness and that he did not request an explanation or contradiction concerning the article. Because these

findings are supported by the record, we conclude that the trial court's dismissal of Akins's libel complaint was further proper pursuant to KRS 411.060. *Id.*

For the foregoing reasons, the Hardin Circuit Court's order dismissing Akins's complaint for libel is affirmed.

ALL CONCUR.

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