

RENDERED: NOVEMBER 2, 2012; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001347-MR

RON GIBSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 09-CI-003774

RAYCOM TV BROADCASTING,
INC., D/B/A WAVE 3 TV; AND
CHARLA YOUNG AND MIKE TAYLOR

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, COMBS, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: Ron Gibson appeals from the grant of summary judgment motions by the Jefferson Circuit Court in favor of the Appellees, Raycom TV Broadcasting, Inc., d/b/a as WAVE-3 TV (hereinafter “WAVE-3”), Charla Young, and Mike Taylor in an action for defamation. After careful review, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2006, Mike and Carmen Taylor entered into a contract with Ron Gibson and his company, Gibson Custom Homes, to build a home on property already owned by them. The purchase price for the home was listed in the contract as \$627,364. The parties arranged that Gibson provide the Taylors with monthly cost reports, which included copies of all invoices. Upon receipt of the monthly report, the Taylors were to pay the invoices. The arrangement was working until July 2007. At that time, the construction costs for the home were \$50,000 over budget, and construction was four months behind schedule. The Taylors refused to make any more payments until Gibson showed them invoices substantiating the additional costs.

Instead, Gibson and some of his subcontractors, at Gibson's suggestion, filed approximately \$200,000 in liens on the Taylors' home. The Taylors contended that some of these liens were fraudulent because they not only included amounts already paid by them but also were duplicative. Specifically, they claimed that Gibson's \$132,000 lien contained some amounts that were also included in the subcontractors' liens. Because of the liens, the Taylors maintain that they incurred financial difficulties because they could not close on a home loan. For the years 2007 and 2008, they had additional interest costs of more than \$70,000. This amount was much greater than if they had been able to obtain a traditional home loan.

Seeking assistance, the Taylors in 2007 filed a complaint with the Better Business Bureau and contacted the Oldham County Police Department. The Oldham County Police Department investigated the Taylors' claims. On February 28, 2008, Gibson was indicted by the grand jury for "Theft by Failure to Make Required Disposition of Property over \$300," which at that time, under Kentucky Revised Statutes (KRS) 514.070, was a Class D felony. Subsequently, he was prosecuted by the Commonwealth Attorney.

Following Gibson's indictment, Mike Taylor contacted WAVE-3 Consumer Troubleshooter, Charla Young, about his dealings with Gibson. As with most stories reported in the Troubleshooter segment of the news, an aggrieved viewer, here Taylor, contacted Young at the TV station. At this juncture, she investigated the allegations. Based on her perception that the Taylors' story was of public interest and offered an opportunity to educate consumers about Kentucky's lien system, she reported the story for WAVE-3 on April 22, 2008. Besides reporting about the lien issues, Young also chronicled the Taylors' experiences with construction problems at the home.

Almost one year after the broadcast, Gibson filed a defamation action against WAVE-3, Young, and Mike Taylor. In particular, Gibson claimed in the complaint that the following three statements defamed him:

They [the Defendant Mike Taylor and his wife, Carmen,] say a well-known home builder in town has taken them for \$200,000

They [the Defendant Mike Taylor and his wife[,] Carmen] are already tearing down parts of the house they just built. Plumbers are trying to figure out why they have no water on most days.

.....

And we already know they [liens placed upon the Taylors' property by the Plaintiff] are bogus, so we don't, but we don't know how to - - don't know how to get them [the liens] closed.

Gibson maintained that the statements were defamatory per se. He reasons that they are defamatory per se since they indicated that his conduct was incompatible with his business, plus he had acted illegally when he filed the lien.

With regard to the aforementioned criminal indictment, "Theft by Failure to Make Required Disposition of Property over \$300," on November 6, 2009, Gibson accepted the Commonwealth Attorney's offer and pled guilty to a lesser charge of "Contractor/Architect to apply payments to a Claim," a Class A misdemeanor. The Commonwealth's plea offer recommended that Gibson serve twelve months in jail on the charge and that it be probated for two years. The offer also required that Gibson ensure that the lien placed on the Taylors by Vittitow Cabinets be removed. He accepted these conditions when he pled.

After the entry of the plea, Gibson withdrew his claim of defamation based on the third statement in his complaint regarding "bogus liens" but proceeded with his allegations in the complaint that the first two statements were defamatory per se. The trial court, however, on July 20, 2011, granted the

Appellants' motion for summary judgment. Gibson now appeals the summary judgment order.

STANDARD OF REVIEW

Summary judgment is proper only “where the movant shows that the adverse party could not prevail under any circumstances.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citing *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)). Moreover, it is incumbent upon the trial court to view the record “in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in [this party’s] favor.” *Id.* at 480 (citing *Dossett v. New York Mining & Mfg. Co.*, 451 S.W.2d 843 (Ky. 1970)). But “[t]he moving party bears the initial burden of demonstrating that no genuine issue of material fact exists and then the burden shifts to the party opposing summary judgment to produce at least some affirmative evidence showing that there is a genuine issue of material fact requiring trial.” *First Fed. Sav. Bank v. McCubbins*, 217 S.W.3d 201, 203 (Ky. 2006).

On appeal, the standard of review of a “summary judgment is whether the trial [court] correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Id.* There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Here, we have examined the case in light of the standard and agree with the trial court that there is no genuine issue of material fact.

ANALYSIS

Gibson maintains that the WAVE-3's statement suggesting that he took the Taylors for \$200,000 was not true. Furthermore, Gibson also complains that Young's statements during the broadcast regarding the Taylors' water problems were also incorrect. Given that these statements were untrue, according to Gibson, he argues that they were defamatory per se and not protected by any constitutional privilege. To contravene him, WAVE-3, Young, and Taylor maintain that the facts, including Gibson's admissions, confirm that the statements are true. Besides that, the Appellees dispute that Gibson sustained any actual damage. The trial court reasoned in its decision granting the motions for summary judgment that the statements were substantially accurate; that no malice was implicated on the part of WAVE-3 or Taylor; that the information regarding unsatisfactory workmanship was legitimate; and, finally, that because WAVE-3 is a media defendant, a constitutional free speech issue was involved. We are in agreement with the trial court's analysis.

To establish a case of defamation in Kentucky, four elements must be proven. The elements require the plaintiff to prove: defamatory language, about the plaintiff, which is published, and which causes injury to reputation. *Columbia Sussex Corp., Inc. v. Hay*, 627 S.W.2d 270, 273 (Ky. App. 1981). Words are defamatory when the words tend "to (1) bring a person into public hatred, contempt or ridicule; (2) cause him to be shunned or avoided; or, (3) injure him in

his business or occupation.” *McCall v. Courier-Journal and Louisville Times Co.*, 623 S.W.2d 882, 884 (Ky. 1981).

Whether words are defamatory per se as been discussed by the Kentucky Supreme Court in *Hill v. Evans*, 258 S.W.2d 917 (Ky. 1953).

“Generally, defamatory words written or spoken of another are divided into two classes in determining the extent to which they are actionable. Words may be actionable per se, or per quod.” *Id.* at 918. If words are defamatory per se, damages are presumed and the plaintiff may recover without alleging or proving special damages. *Id.* Later, in another case, our Court went on to explain that:

Statements classified as defamatory per se include those which attribute to someone a criminal offense, a loathsome disease, serious sexual misconduct, or conduct which is incompatible with his business, trade, profession, or office, [but w]ords may be actionable per quod, by contrast, only if there is an allegation and proof of actual damages.

Gilliam v. Pikeville United Methodist Hosp. of Kentucky, Inc., 215 S.W.3d 56, 61 (Ky. App. 2006)(footnotes omitted).

Significantly, a claim of defamation may be defeated by establishing the truth of the matter asserted. If so, the party has an absolute defense to the claim of defamation. *Smith v. Martin*, 331 S.W.3d 637, 640 (Ky. App. 2011). Still, “the defendant has the burden of proving truth as an affirmative defense or ‘justification’ by a preponderance of the evidence.” *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 796 (Ky. 2004). Yet, in cases involving the media, the First Amendment precludes a defamation judgment if the contested statements were

“substantially true.” *Kentucky Kingdom Amusement Co. v. Belo Kentucky, Inc.*, 179 S.W.3d 785, 801 (Ky. 2005)(citing *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1228 (7th Cir. 1993)).

Having delineated the legal framework for the analysis herein, we address specifically Gibson’s contentions that the two statements were defamatory per se. The first statement is as follows:

They [the Defendant Mike Taylor and his wife, Carmen,] say a well-known home builder in town has taken them for \$200,000

Gibson supports the defamatory character of this statement by noting that the Taylors never said that they were taken for \$200,000, and the statement implies that Gibson is guilty of criminal activity. Notwithstanding Gibson’s assertions, we conclude that the statement is not defamatory because it is “substantially true.” Undoubtedly, the Taylors are not implicated because Gibson concedes that they never made this statement. With reference to WAVE-3’s utterances, factually it was demonstrated that the Taylors paid a large sum of money to Gibson for the construction of their home and that he asked them for roughly \$200,000 over the contract price. The \$200,000 is represented by the liens placed on the Taylors’ home by Gibson and other subcontractors, who did so at his request. Therefore, the statement is “substantially true,” and, therefore, not defamatory.

The second statement is as follows:

They [the Defendant Mike Taylor and his wife[,]

Carmen,] are already tearing down parts of the house they just built. Plumbers are trying to figure out why they have no water on most days.

Gibson argues that the plumbing problems were staged by the Taylors and supported by incomplete facts. Additionally, he maintains that the statement is defamatory per se because it imputes that Gibson was unfit to perform the duties under his construction contract. Nonetheless, Gibson has not established that the plumbing issues were staged nor has he been able to show that there were no plumbing problems. Lastly, WAVE-3's newscast accurately depicted the Taylors' home with plumbers working on a water problem and, hence, the WAVE-3 report was "substantially true" and not defamatory. We concur with the trial court's assessment that Gibson failed to perform work on the home or performed it in an unsatisfactory manner.

Gibson's final argument is that the statements were defamatory per se and not protected by any constitutional privilege. As referred to above, statements may be defamatory per se when they mention that someone committed a criminal offense or acted in a manner which is incompatible with his business, trade, profession, or office. Gibson suggests that because WAVE-3 suggested that he had participated in illegal activity, the statement was defamatory per se. But, he was charged with a crime to which he pled guilty. No defamation occurred. Furthermore, he maintains that the statement about his workmanship is defamatory per se because it imputes that Gibson was unfit to perform the duties under his construction contract. In this case, also, the plumbing did not work; the statement

was substantially true; and, thus, no defamation occurred per se or per quod.

Lastly, whether the statements were defamatory per se is immaterial to the entry of the summary judgment. The statements were true or substantially true, and therefore, we agree with the trial court's decision to grant the summary judgment.

Another issue discussed by some of the parties herein is whether the communication by WAVE-3 was protected by constitutional privilege. As stated in *Stringer*:

[A]lthough the prima facie case for common law defamation presumes malice, and therefore does not require the plaintiff to make an affirmative showing of it, we have determined that strict liability of that sort is inappropriate in circumstances where the publisher, a third person, or the public has a cognizable interest in communicating the defamatory information.

Stringer, 151 S.W.3d at 796. Moreover, “[t]he determination of the existence of privilege is a matter of law.” *Columbia Sussex*, 627 S.W.2d at 276. Here, because the report was made by a TV station, Gibson would have to prove the existence of malice on the part of the Appellees. Nevertheless, Gibson never established any malice by WAVE-3. The facts show that after the reporter investigated the Taylors’ statements, she offered Gibson the opportunity to respond. As such, the TV station took sufficient measures to establish the veracity of the Taylors’ statements. Additionally, the Troubleshooter’s report addressed the issue of liens in Kentucky, which, in our estimation, is a matter of public concern. Thus, even although Gibson has not established that the statements were defamatory or with malice, the speech was protected by the Constitution. Furthermore, the issue is

again immaterial because the statements were not defamatory and, thus, summary judgment is appropriate.

The Jefferson Circuit Court's order is affirmed.

ALL CONCUR.

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