RENDERED: MARCH 8, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002132-MR

MICHAEL SHELIGA — APPELLANT

v.

APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 11-CI-00189

BILLY TODD; VERNA TODD;
AND JAMIE TODD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, KELLER AND MAZE, JUDGES.

KELLER, JUDGE: Michael Sheliga (Sheliga) appeals from an order of the Rockcastle Circuit Court dismissing all of his claims against Billy Todd (Billy), Verna Todd (Verna), and Jamie Todd (Jamie) (collectively the Appellees), with the exception of his claim of assault. For the following reasons, we affirm.

FACTS

Sheliga filed a Complaint and an amended Complaint (collectively the Complaint) in the Rockcastle Circuit Court against the Appellees asserting: terroristic threatening and menacing; destruction of evidence; defamation; violations of Kentucky Revised Statute (KRS) 258.235; negligence; intentional infliction of emotional distress; and assault. In his Complaint, Sheliga alleged the following.

On May 25, 2011, the Appellees' dog chased Sheliga on a road while he was riding his bike nearly causing him to wreck into a car, a ditch, or the pavement. Sheliga further alleged that the dog chased him again and that he yelled at it to keep it away. Billy, who was standing in his front yard, screamed at Sheliga for yelling at his dog and told him that, "I'll blow your head off." Billy continued to yell at Sheliga, and Sheliga told Billy repeatedly that he would not yell at the Appellees' dog so long as they kept it off the road.

Sheliga left and, shortly thereafter, a truck came behind him and cut him off requiring him to stop. Billy was driving the truck and Jamie was in the passenger seat. Billy then continued to yell at Sheliga, and Sheliga told Billy that if he kept his dog off the road he would not say anything to the dog. After Sheliga rode away, Billy drove to a nearby store, got out of the truck, and stood on the road in order to fight Sheliga. Sheliga then went to the nearest house and asked to call the sheriff. Billy, Jamie, and Verna provided written statements to the police

providing their versions of what occurred on May 25, 2011, which Sheliga attached to his Complaint.

On August 8, 2011, the Appellees filed a motion to dismiss Sheliga's Complaint pursuant to Kentucky Rule of Civil Procedure (CR) 12.02(f) for failure to state a claim upon which relief may be granted, and the trial court held a hearing. In an order entered on October 26, 2011, the trial court granted the Appellees' motion to dismiss as to all claims except for assault.

This appeal followed. Additional facts are set forth as necessary below.

STANDARD OF REVIEW

Sheliga appeals from an order rendered pursuant to a motion to dismiss for failure to state a claim upon which relief may be granted. The motion to dismiss and the response refer to matters outside of the pleadings. "As such, the motion will be treated as a motion for summary judgment." *Bear, Inc. v. Smith*, 303 S.W.3d 137, 141-42 (Ky. App. 2010).

As stated in *Smith*:

> [W]hen considering a motion for summary judgment, the court is to view the record in the light most favorable to the party opposing the motion, and all doubts are to be resolved in that party's favor. The trial court must examine the evidence, not to decide any issue of fact, but to discover if a real issue of material fact exists. The moving party bears the initial burden of showing that no issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present at least some affirmative evidence showing that there is a genuine issue of material fact for trial.

Id. (citations omitted). Further, "[a]n appellate court need not defer to the trial court's decision on summary judgment and will review the issue *de novo* because only legal questions and no factual findings are involved." *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004).

ANALYSIS

At the outset, we note that Sheliga only appeals from the trial court's dismissal of the following claims: defamation; negligence *per se*; intentional infliction of emotional distress (IIED); negligence; and violations of KRS 258.235. Therefore, we only address those claims.

1. Defamation

Sheliga argues that the trial court erred in dismissing his defamation claim. Specifically, he argues that false statements that Billy, Verna, and Jamie made in written reports to Sheriff Mike Peters (Sheriff Peters), and statements they made to the County Attorney, William Reynolds (Reynolds), and members of Reynolds's office defamed him.

To establish defamation, a plaintiff must show: (1) defamatory language, (2) about the plaintiff, (3) which is published, and (4) which causes injury to reputation. *Columbia Sussex Corp., Inc. v. Hay*, 627 S.W.2d 270, 273 (Ky. App. 1981). Regarding the first element, a writing is defamatory if it tends to bring a person into public hatred, contempt or ridicule, causes the person to be shunned or avoided, or injures the person's business or occupation. *McCall v. Courier-*

Journal & Louisville Times Co., 623 S.W.2d 882, 884 (Ky. 1981). More specifically, "a written publication is [defamatory] which falsely charges or imputes dishonesty or engagement in fraudulent enterprises of such a nature as reflects upon the character and integrity of a person and to subject him to the loss of public confidence and respect." *Yancey v. Hamilton*, 786 S.W.2d 854, 858 (Ky. 1989) (*quoting Smith v. Pure Oil Co.*, 278 Ky. 430,128 S.W.2d 931, 932 (1939)). As for the third element, the term "'publication' is a term of art, and defamatory language is 'published' when it is intentionally or negligently communicated to someone other than the party defamed." *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 794 (Ky. 2004).

Finally, the "proof necessary to demonstrate an injury to reputation varies depending upon the characterization of the defamatory language . . . ." Defamatory language may be actionable *per se* or *per quod*. "In the former class, damages are presumed and the person defamed may recover without allegation or proof of special damages." *Id.* In the latter class, recovery may be sustained only upon an allegation and proof of "special damages, *i.e.,* actual injury to reputation." *Id*. at 795.

Statements that are considered 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." *Gilliam v. Pikeville United Methodist Hosp. of Ky., Inc.,* 215 S.W.3d

56, 61 (Ky. App. 2006). All other defamatory statements are merely defamatory *per quod*. *Stringer*, 151 S.W.3d at 795.

In this case, Sheliga complains of statements Billy, Verna, and Jamie made in their written reports to Sheriff Peters. In their reports, the Appellees stated that Sheliga was on their driveway and was cursing and screaming about their dog. Because the Appellees' statements do not attribute to Sheliga "a criminal offense, a loathsome disease, serious sexual misconduct, or conduct which is incompatible with his business, trade, profession, or office," their statements are not defamatory *per se*.

As set forth in *Rich for Rich v. Kentucky Country Day, Inc.*, 793 S.W.2d 832, 837 (Ky. App. 1990):

> In a defamation action based upon slander *per quod*, as here, the plaintiff must in his Complaint, allege specific damages resulting from the statements made, other than just mental pain, humiliation, disgrace or mortification. If plaintiff fails to allege facts which would show specific damages, and plaintiff's prayer is for general damages only, the Complaint does not state a cause of action for slander *per quod*.

In this case, Sheliga's Complaint only seeks general damages, and he does not allege special damages. Thus, the Complaint does not state a cause of action for defamation *per quod*.

Furthermore, we note that, in his Complaint, Sheliga alleges that the Appellees made statements to Reynolds and members of his office, but does not describe the nature of those statements. In his response to the Appellees' motion

for summary judgment,[1] Sheliga alleged that the Appellees made statements that he "engaged in criminal conduct." However, Sheliga does not further describe the statements the Appellees allegedly made.

As the party opposing the Appellees' motion for summary judgment, Sheliga was required to present some affirmative evidence to support his claim. *See Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 481 (Ky. 1991). Sheliga has not presented any evidence, other than his self-serving statements, that the Appellees defamed him. Accordingly, the trial court properly granted summary judgment in favor of the Appellees as to Sheliga's defamation claim.

[1] As previously noted, the Appellees' filed a motion to dismiss. However, as set forth above, the motion to dismiss and the response refer to matters outside of the pleadings. Therefore, we treat the motion to dismiss as a motion for summary judgment. *Bear, Inc.*, 303 S.W.3d at 141.

2. Negligence *per se*

Next, Sheliga argues that the trial court erred in dismissing his claim of negligence *per se*. As set forth in *Young v. Carran*, 289 S.W.3d 586, 588-89 (Ky. App. 2008):

> KRS 446.070 codifies the common-law doctrine of "negligence *per se*" in Kentucky. Negligence *per se* "is merely a negligence claim with a statutory standard of care substituted for the common law standard of care." KRS 446.070 provides an avenue by which a damaged party may sue for a violation of a statutory standard of care if the statute in question provides no inclusive civil remedy and if the party is within the class of persons the statute is intended to protect. It provides that "[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."

(Citations omitted).

In this case, Sheliga contends that his negligence *per se* claim is based on violations of KRS 508.050, menacing, and KRS 508.080, terroristic threatening in the third degree. Having carefully reviewed the record, we note that Sheliga did not allege a cause of action for negligence *per se* in the Complaint. Instead, he alleged that the actions of Billy constituted menacing contrary to the provisions of KRS 508.050 and terroristic threatening contrary to the provisions of KRS 508.080. Therefore, we need not address his claim of negligence *per se*, and choose not to do so.

3. IIED

As set forth in *Goebel v. Arnett*, 259 S.W.3d 489, 493 (Ky. App. 2007), "[i]t is for the court to decide whether the conduct complained of can reasonably be regarded to be so extreme and outrageous as to permit recovery." In order to recover, a plaintiff must make a *prima facie* case by showing that: the wrongdoer's conduct was intentional or reckless and so outrageous and intolerable that it "offends against the generally accepted standards of decency and morality;" that there is a causal connection between the conduct and the emotional distress; and that the emotional distress is severe. *Stringer*, 151 S.W.3d at 788.

The trial court found that Sheliga failed to make that *prima facie* case. We agree for two reasons. First, even taken in the light most favorable to Sheliga, the Appellees' conduct does not rise to the level of outrageous and intolerable. In reaching this conclusion, we note that this Court and the Supreme Court of Kentucky have found outrageous conduct

> where the defendants: (1) harassed the plaintiff "by keeping her under surveillance at work and home, telling her over the CB radio that he would put her husband in jail and driving so as to force her vehicle into an opposing lane of traffic"; (2) intentionally failed to warn the plaintiff for a period of five months that defendant's building, in which plaintiff was engaged in the removal of pipes and ducts, contained asbestos; (3) engaged in "a plan of attempted fraud, deceit, slander, and interference with contractual rights, all carefully orchestrated in an attempt to bring [plaintiff] to his knees"; (4) committed same-sex sexual harassment in the form of "frequent incidents of lewd name calling coupled with multiple unsolicited and unwanted requests for homosexual sex"; (5) was a Catholic priest who "used his relationship [as marriage counselor for] the [plaintiff] husband and the wife to obtain a sexual affair with the wife"; (6) agreed to

> care for plaintiff's long-time companion-animals, two registered Appaloosa horses, and then immediately sold them for slaughter; and (7) subjected plaintiff to nearly daily racial indignities for approximately seven years.

Id. at 789-90 (footnotes omitted).

On the other hand, this Court and the Supreme Court have found the requisite conduct lacking when

> the defendant: (1) refused to pay medical expenses arising out of an injured worker's compensation claim; (2) wrongfully converted the plaintiff's property in a manner that breached the peace; (3) negligently allowed his vehicle to leave the road and struck and killed a child; (4) committed "reprehensible" fraud during divorce proceedings by converting funds belonging to his spouse for the benefit of defendant and his adulterous partner; (5) wrongfully terminated the plaintiff; (6) displayed a lack of compassion, patience, and taste by ordering plaintiff, who was hysterical over the fact that she had just delivered a stillborn child in her hospital room, to "shut up" and then informing her that the stillborn child would be "disposed of" in the hospital; (7) erected a billboard referencing defendant's status as a convicted child molester; (8) wrongfully garnished plaintiff's wages pursuant to a forged agreement; and (9) impregnated plaintiff's wife. Courts have found other elements of the prima facie case missing, or have otherwise found recovery . . . unavailable, in cases where the defendant: (1) a Catholic priest, sexually abused a ten-year-old boy; (2) breached a promise to marry; (3) chained a high school student to a tree by his ankle and neck; and (4) shot and killed a beloved family pet, which had been misidentified as a stray dog.

Id. at 790-91 (footnotes omitted). We believe that this matter falls within the line of cases wherein the plaintiff failed to make a *prima facie* case of outrageous conduct.

Second, Sheliga, as the party opposing the Appellees' motion for summary judgment, was required to present some affirmative evidence of severe emotional distress to support his claim. *See Steelvest*, 807 S.W.2d at 481. Sheliga only presented his self-serving statements that he suffered severe emotional distress, which are not sufficient to meet his burden. Therefore, we conclude that the trial court correctly dismissed Shelgia's claim of intentional infliction of emotional distress.

4. Negligence

"A common law negligence claim requires proof of (1) a duty owed by the defendant to the plaintiff, (2) breach of that duty, (3) injury to the plaintiff, and (4) legal causation between the defendant's breach and the plaintiff's injury." *Wright v. House of Imports, Inc.*, 381 S.W.3d 209, 213 (Ky. 2012).

The injury Sheliga asserts is that the Appellees' dog caused him to be fearful and has prevented him from using a public road. Thus, it appears that Sheliga is actually making a claim of negligent infliction of emotional distress. It is well established that an action will not lie for negligent infliction of emotional distress absent some showing of physical contact. *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 928 (Ky. 2007). Because Sheliga does not allege that there was physical contact in this case, this claim also fails.

5. Violations of KRS 258.235

KRS 258.235(4) provides that, "Any owner whose dog is found to have caused damage to a person, livestock, or other property shall be responsible for that

damage." As to this claim, Sheliga argues he suffered damages as a result of the Appellees' dog because it caused him "fright, alarm, or terror," and has prevented him from using a public road.

The damages Sheliga asserts stem from either a claim of IIED or negligent infliction of emotional distress. Having already concluded that Sheliga could not prevail on either claim, we conclude that his claim pursuant to KRS 258.235 also fails. Accordingly, the trial court properly granted summary judgment in favor of the Appellees as to this claim.

CONCLUSION

For the foregoing reasons, we affirm the order of the Rockcastle Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Michael Sheliga, *pro se*[2]
Mt. Vernon, Kentucky

BRIEF FOR APPELLEES:

Frankie C. Blevins, Jr.
Valerie J. Himes
Berea, Kentucky

[2] After Sheliga filed his *pro se* brief, Jerome S. Fish, Mount Vernon, Kentucky, filed a Notice of Entry of Appearance with this Court.