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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000359-MR

SARAH JONES — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE HON PATRICIA M SUMME, JUDGE
ACTION NO. 12-CI-02700

JIM HANNAH; TERRY DEMIO; and
GANNETT DIRECT MARKETING SERVICES, INC.
d/b/a CINCINNATI ENQUIRER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON,[1] LAMBERT, AND TAYLOR, JUDGES.

CAPERTON, JUDGE: Sarah Jones appeals from the Kenton Circuit Court's January 28, 2013, judgment and order of dismissal of Jones's defamation action. We affirm.

[1] Judge Caperton authored this opinion prior to Judge Debra Lambert being sworn in on January 5, 2015, as Judge of Division 1, Third Appellate District. Release of this opinion was delayed by administrative handling.

Sometime in 2012, Jones was charged with one count each of first degree sexual abuse and unlawful use of electronic means to induce a minor to engage in sexual or other prohibited activities. The charges arose in connection with a sexual relationship between Jones, a teacher, and a seventeen-year-old student.

In response to these charges, Jim Hannah penned an article for the Cincinnati Enquirer on or about August 22, 2012, which stated, in relevant part: "Investigators say Jones, 27, had sex with a 17-year-old student four or five times between Oct. 1 and Dec. 31." A second article was penned by Terry DeMio on or about October 2, 2012, which repeated the above statement. On October 9, 2012, Jones pled guilty to the amended charges of custodial interference and sexual misconduct. In her plea colloquy, Jones admitted to having sexual contact, including sexual intercourse, with the student in question. Jones did not indicate how many times the sexual intercourse took place.

On October 26, 2012, Jones filed a complaint with the Kenton Circuit Court in which she alleged that the above-referenced statements in Hannah's and DeMio's articles constituted defamatory language, the result of which was injury to Jones'S reputation, humiliation, and embarrassment during the period of time between publication and the entry of her guilty plea. The complaint named the defendants as Hannah, DeMio, and Gannet Direct Marketing Services, Inc. d/b/a

Cincinnati Enquirer. Jones's complaint cited to additional articles from the Washington Post and the NY Daily News. However neither news outlet was named as a party.

In response to Jones's complaint, the defendants filed a motion to dismiss for failure to state a claim upon which relief may be granted. In a judgment and order of dismissal entered on January 28, 2013, that motion was granted. Therein, the trial court found that Jones would not be entitled to relief under any set of facts which could be proved in support of her claims because the information as published was substantially true and therefore did not support a claim for defamation. This appeal followed.

An action for defamation must contain four necessary elements: (1) defamatory language; (2) about the plaintiff; (3) which is published; and (4) which causes injury to reputation. *Biber v. Duplicator Sales & Service, Inc.*, 155 S.W.3d 732, 736 (Ky. App. 2004). Defamatory language is that which "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 793 (Ky. 2004). Truth is a complete defense in a defamation action. *Biber,* 155 at 737

Kentucky Revised Statutes (KRS) 411.060 governs the publication of judicial proceedings and grants qualified privilege to fair and impartial reports. As a general rule, as indicated by the trial court's judgment, paperwork in judicial proceedings enjoy absolute privilege unless they contain matter that is impertinent,

irrelevant, false, and malicious. *Schmitt v. Mann*, 291 Ky. 80, 163 S.W.2d 281, 283 (1942). This privilege has been extended to the publication of judicial proceedings. *Beiser v. Scripps-McRae Pub. Co.*, 113 Ky. 383, 68 S.W. 457, 459 (1902). The privilege remains so long as the matter printed by a newspaper is *substantially true*, regardless of whether the facts printed are exact. *Pearce v. Courier-Journal*, 683 S.W.2d 633, 636 (Ky. App. 1985). "Insofar as [the] article is an accurate account of judicial and administrative proceedings, then regardless of the falsity or defamatory character of its contents, it is absolutely privileged unless its publication "was maliciously made." *Id.* quoting KRS 411.060. For the purposes of KRS 411.060, this Court has defined "maliciously made" as "made solely for the purpose of causing harm to the person defamed." *Id.*

On appeal, Jones argues that she sufficiently alleged that the published statements were false and that the trial court improperly applied KRS 411.060. With regard to the veracity of the statements, Jones argues that the statements that she had been accused of having intercourse with a 17-year-old four or five times was information that actually related to another of her attorney's clients. She further maintains that the truthfulness of the statements is an issue of fact to be determined by a jury. We disagree in this instance.

In the case before us, Jones "testified that she had sexual contact, including sexual intercourse, with [the student] without specifying how often it occurred." The published information indicated that the news outlets had been *informed* that the conduct occurred four or five times. KRS 421.100 grants

immunity to news reporters who decline to disclose the source of information procured. Based upon Jones's own confession of guilt, we find no error with the trial court's conclusion that the printed information was "substantially true." Moreover, with the assertion of the grant of immunity thereby presenting the legal impossibility of discovering the source of the information, we find no error with the trial court's conclusion.

Moreover, any argument by Jones of maliciousness fails by her own admission that the specific facts contained in the articles were a result of confusion caused by her attorney's representation in two factually similar cases. An erroneous statement stemming from confusion is not an error "made solely for the purpose of causing harm to the person defamed," and is therefore outside the purview of maliciousness as defined by this Court. *Pearce*, 683 S.W.2d at 636. Thus, we find no error with the trial court's conclusion that "the information as published was substantially true and cannot support a claim for defamation." Jones's argument that the trial court interpreted KRS 411.060 to grant blanket immunity to newspaper defendants is clearly contradicted by the trial court's legal analysis.

Jones further argues that the trial court erred when it applied summary judgment standard to a motion to dismiss. Again, we disagree. Kentucky Rules of Civil Procedure (CR) 12.02 governs motions to dismiss for failure to state a claim upon which relief may be granted. Such motions are to be granted when a trial court concludes that "the pleading party would not be entitled to relief under any

set of facts which could be proved in support of his claim." *Edmonson County v. French*, 394 S.W.3d 410, 413 (Ky. App. 2013). "If, on such motion, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." CR 12.03.

Here, the trial court was clear that Jones's claim could not be supported because of the immunity afforded by KRS 411.060. In short, Jones was incapable of defeating the defense of substantial truthfulness. Thus, she would not have been entitled to relief under any set of facts which could have been proven. Jones argues that the trial court made its decision based upon outside evidence but fails to offer what evidence that may have been and we find no reference in the trial court's judgment to any such evidence. Accordingly, Jones's argument is without merit.

For the foregoing reasons, the Kenton Circuit Court's January 28, 2013, judgment and order of dismissal is affirmed.

ALL CONCUR.

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