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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001573-MR

JAY MORGAN APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 13-CI-006576

GREG FISCHER APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: Jay Morgan appeals from an order of the Jefferson Circuit Court which granted summary judgment in favor of Greg Fischer. Morgan argues that summary judgment should not have been entered. We find no error and affirm.

Greg Fischer is, and was at all times relevant to this action, the Mayor of Louisville, Kentucky. Jay Morgan was formerly employed by Ford Motor

Company to facilitate the building of a worker's training facility in Louisville. Morgan was to apply for federal grants to help cover the cost of building the facility. Morgan brought the underlying action claiming that Fischer defamed him by telling Morgan's superiors at Ford that Morgan had promised Fischer that Ford would pay the entire cost of building the facility, as opposed to using federal grants.[1] Morgan was terminated from his employment with Ford and claims it was this statement that caused the termination. Morgan alleges Fischer made this statement in order to get him fired from Ford.

Before filing suit against Fischer, Morgan brought claims against Ford in federal court. That case settled and Morgan entered into a confidential settlement agreement. Morgan then filed his complaint against Fischer on December 16, 2013. Fischer filed two motions to dismiss in early 2014 alleging that the case should be dismissed due to the settlement with Ford. Both motions were denied by the trial court.

Fischer then sought to obtain Morgan's employment records and other documents from Ford. In June of 2014, Ford filed a motion with the trial court seeking to quash subpoenas served by Fischer and for a protective order shielding it from having to participate in any discovery in the underlying action. Ford argued that it and its employees should not be forced to participate in this action by virtue of the confidential settlement agreement. The trial court granted Ford's motion on July 25, 2014.

[1] Morgan does not know the exact words he alleges Fischer said, only an approximate idea.

Fischer then filed another motion to dismiss, but that too was denied by the court. Fischer then appealed the denial of his motion to dismiss to another panel of this Court, but the Court found the order to be interlocutory and dismissed the appeal.

On May 29, 2015, Fischer filed a motion for summary judgment in which he argued Morgan could not make a *prima facie* case for defamation because he was unable to produce any affirmative evidence that Fischer made any statement to Ford due to Ford being shielded from any participation in the cause of action. Included with this motion was an affidavit in which Fischer stated that he did not make any statements as alleged by Morgan and that any communication he had with Ford was done in his capacity as Mayor. While this motion was under submission, Fischer filed a second motion for summary judgment on July 10, 2015. This second motion reiterated the arguments in the previous motion and also included new arguments around the issue of qualified official immunity. Fischer argued that even if he did make statements to Ford as alleged by Morgan, he is protected by qualified official immunity.

On September 17, 2015, the trial court entered an order granting Fischer's motions for summary judgment. The trial court found that even if Fischer made the statements alleged by Morgan, they were made within his official capacity as Mayor, thereby entitling him to qualified official immunity. This appeal followed.

> The standard of review on appeal 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. Kentucky Rules of Civil Procedure (CR) 56.03. . . . "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." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest,* 807 S.W.2d at 480, *citing Paintsville Hospital Co. v. Rose,* 683 S.W.2d 255 (Ky. 1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. . . ." *Huddleston v. Hughes,* 843 S.W.2d 901, 903 (Ky. App. 1992)[.]

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001).

On appeal, Morgan claims summary judgment was granted in error because Fischer made the alleged defamatory statement to Morgan's Ford superiors maliciously and with the intention of getting him fired; therefore, Fischer is not entitled to qualified official immunity.

> The requisite elements for a defamation claim are: "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement

> irrespective of special harm or the existence of special harm caused by the publication."

Toler v. Sud-Chemie, Inc., 458 S.W.3d 276, 281-82 (Ky. 2015) (footnotes omitted).

> [A] defamation claim may be defeated by assertion of a "privilege." A privilege is recognized as a defense to a defamation claim; the defense may be either absolute or qualified. An absolute privilege affords a defendant a complete defense to a claim of defamation; whereas, a qualified privilege only affords a defendant a conditional defense to a claim of defamation.

Smith v. Martin, 331 S.W.3d 637, 640 (Ky. App. 2011).

> [W]hen sued in their individual capacities, public officers and employees enjoy only qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment. Qualified official immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or functions, *i.e.*, those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee's authority.

Yanero v. Davis, 65 S.W.3d 510, 522 (Ky. 2001) (citations omitted).

> [I]n the context of qualified official immunity, "bad faith" can be predicated on a violation of a constitutional, statutory, or other clearly established right which a person in the public employee's position presumptively would have known was afforded to a person in the plaintiff's position, *i.e.*, objective unreasonableness; or if the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive.

Id. at 523 (citation omitted).

Here, Morgan argues that the alleged defamatory statement made by Fischer was made maliciously and was outside the scope of his employment. First, we believe it is clear that if Fischer made these alleged statements, they were discretionary and made within the scope of his authority as Mayor. Fischer's discussions with Ford employees about building the training facility and improving the economic development of Louisville were discretionary statements made as Mayor.

The maliciousness of the statements is what Morgan focuses his argument on. We believe the trial court was correct when it held that Morgan "cannot establish what exactly was said by Fischer to Ford officials that allegedly led to his termination. Even if he could establish what Fischer said, there is no evidence, other than conjecture, which shows that the statement was malicious."

"A party opposing a motion for summary judgment cannot rely merely on the unsupported allegations of his pleadings, but is required to present some affirmative evidence showing that there is a genuine issue of material fact for trial." *Godman v. City of Fort Wright*, 234 S.W.3d 362, 370 (Ky. App. 2007) (internal quotation marks and citations omitted). Here, Morgan provided no evidence, other than hearsay, that Fischer made the alleged statements. He also provided no evidence, other than conjecture, that the statements were made specifically to get him terminated from his employment.

> Once a privilege has been placed in issue, "it thereupon falls upon plaintiff to defeat this defense by a showing that either there was no privilege under the circumstances

> or that it had been abused." If the plaintiff fails to adduce such evidence sufficient to create a genuine issue of fact, qualified privilege remains purely a question of law under the summary judgment standard.

Harstad v. Whiteman, 338 S.W.3d 804, 811 (Ky. App. 2011) (citations omitted). In addition, qualified immunity protects against "mistake or negligence." *McCollum v. Garrett*, 880 S.W.2d 530, 534 n. 6 (Ky. 1994). "In other words, not every erroneous statement is expressed with malice. As our highest court plainly stated, once a qualified privilege attaches, even 'false and defamatory statements will not give rise to a cause of action *unless maliciously uttered.*'" *Id.* at 813 (emphasis in original and citation omitted).

Fischer stated in an affidavit that he did not make the statement, or similar statements, alleged by Morgan. Morgan did not provide any affirmative evidence to rebut Fischer's affidavit. Further, Morgan provided no evidence that, even if the statement was made, it was made with malice.

Based on the foregoing, we affirm the judgment of the trial court.

NICKELL, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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