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IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 5, 2017 Session

ROBERT WEIDLICH v. LISA RUNG

Appeal from the Circuit Court for Franklin County
No. 2016-CV-170 Justin C. Angel, Judge

No. M2017-00045-COA-R3-CV

This appeal concerns a defamation claim. Lisa Rung ("Rung") put up a Facebook post featuring a photograph of the back of Robert Weidlich ("Weidlich")'s vehicle. Weidlich's vehicle had a number of bumper stickers on it, some of which incorporated the Confederate Battle Flag. Along with the photograph, Rung asserted in her Facebook post that the Weidlichs were "white supremacist[s]." Weidlich sued Rung for defamation in a case eventually tried before the Circuit Court for Franklin County ("the Trial Court"). After trial, the Trial Court entered judgment in favor of Weidlich and awarded him damages. Rung appeals. We hold that Rung's Facebook post, viewed in its entire context, constitutes non-actionable commentary upon disclosed facts. We reverse the judgment of the Trial Court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed; Case Remanded

D. MICHAEL SWINEY, C.J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and W. NEAL MCBRAYER, J., joined.

Thomas H. Castelli, Nashville, Tennessee, and Gregory F. Laufer and Stephen C. Thompson, New York, New York, for the appellant, Lisa Rung.

Christopher P. Westmoreland, Shelbyville, Tennessee, for the appellee, Robert Weidlich.

OPINION

Background

This matter has its roots in a public controversy regarding the formation of a Gay/Straight Alliance at Franklin County High School. In February 2016, Rung, Weidlich, and approximately 300 other people attended a meeting of the Franklin County School Board. According to Rung, Weidlich attended the meeting and, to Rung's chagrin, expressed strong opposition to the formation of a Gay/Straight Alliance. Due to certain alleged outlandish comments from Weidlich, some people began referring mockingly to the Weidlichs as "the Fisty Family." Around this time, Weidlich's wife, Loretta Weidlich, made tentative plans to run for the Franklin County School Board, a bid that would impact the events of this case.

Following another meeting of the Franklin County School Board, Rung spotted Weidlich's vehicle in the parking lot. The back of Weidlich's vehicle featured several bumper stickers. One of the bumper stickers displayed a Confederate Battle Flag next to the word "SECEDE." Another read "God, Family, The South," next to another Confederate Battle Flag. Yet another one read "The League of the South." The Weidlich's family name also was spelled out above what appears to be a cartoon version of the family. Rung took a photograph of the back of Weidlich's vehicle. Rung later put up a Facebook post featuring the photograph she had taken, along with the statement: "Free Bonus Prize. The Fisty Family are also white supremacist! We'll need to keep this handy come election time."

In April 2016, Weidlich sued Rung for defamation based upon the Facebook post. This matter initially was tried in General Sessions Court. The General Sessions Court ruled in favor of Rung, finding that Weidlich had been unable to establish damages. Weidlich appealed to the Trial Court. This matter was tried anew in September 2016, and we summarize the pertinent testimony.

Rung testified as to why she made the Facebook post, as follows:

> Q. In any event, at a subsequent meeting -- public meeting at the school board about a month later, did you happen to observe the back of the vehicle that had a license plate and had a certain -- certain marks on the back of it?
> A. Yes.
> Q. And what was on the back of the vehicle?
> A. Well, it had the "Weidlich family" on it. That's how I knew it was his

car. And it had the League of the South which I knew was considered a hate group.

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Q. Insofar as Mr. Weidlich's wife was involved, it's a fact, was she running for school board?
A. Yes.
Q. Was she a public figure?
A. Yes.
Q. Did that concern you --
A. Yes.
Q. -- that the wife of the same man that made this speech was running for the school board?
A. Yes.
Q. Did you consider yourself as a blogger to have a mission as a public person?
A. Yes.
Q. What did you consider your responsibility?
A. That the voters had a right to know what people stood for and what they believed.
Q. Was that your motivation in doing that?
A. Yes. That's what it says this whole election time. That's what this original post says.
Q. So your statement was a matter of opinion --
A. Yes.
Q. -- based on a matter of public interest --
A. Yes.
Q. -- involving a public figure --
A. Yes.
Q. -- to apprise them that you need to consider that at election time?
A. Right. If you don't share these values, don't vote for them.
Q. Did you at that time have any private animosity --
A. No.
Q. -- or bias toward Mr. Weidlich or his family?
A. I had never met them before.

When Rung attempted to explain her basis for believing the League of the South was a racist organization, opposing counsel objected, and the Trial Court excluded the evidence as hearsay.

Weidlich is a mechanic and has his own business. He testified to the impact of the Facebook post upon his life. Weidlich stated that his business had suffered as a result of the publicity surrounding the controversy. Weidlich testified to his views:

> Q. Do you associate with any white supremacist group?
> A. No, sir.
> Q. Are you a member of any white supremacist group?
> A. No, sir.
> Q. Got to ask the question just because I have to. Are you a white supremacist?
> A. No, sir.
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> Q. Now, who was the only one in your family running for the school board?
> A. My wife.
> Q. Okay. The warning that's in that blog says you need to be aware at election time; isn't that right?
> A. Yes, that's right.
> Q. At that time, as a candidate for the school board, your wife was a public figure; wasn't she?
> A. No, because she wasn't a candidate for the school board at that time. There was just thoughts about doing it. That we might do it.
> Q. Okay. But she became a public figure?
> A. Yes, after this post.
> Q. I understand. Now, you have stated that there's no -- that you're not a white supremacist. But isn't it a fact that you have on your vehicle an insignia of League of the South?
> A. I don't know what their insignia is. It says, "League of the South" on the sticker.
> Q. What is the League of the South?
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> A. The way I understand it is they are a pro-southern culture institution. That's the way I understand it. And this sticker says, "Close the border. Save Southern jobs," which is what I liked about it. So that's why I let them -- or I put it on there.

A customer of Weidlich's, Daniel Hendon, testified he was outraged upon seeing the Facebook post and took his business elsewhere for several months. Hendon stated that he spent around $7,000 using a different servicer that he otherwise would have spent at Weidlich's business.

The Trial Court ruled in favor of Weidlich, awarding him $7,000 in compensatory damages and $5,000 in attorney's fees. Judgment was entered on September 29, 2016. On October 19, 2016, Rung filed a motion to amend the judgment pursuant to Rule 59.04, requesting that the written findings contained in the final judgment be replaced by the transcript of the Trial Court's oral findings from the conclusion of trial. By November 29, 2016 order, signed by counsel for both parties, the Trial Court granted Rung's motion to amend the judgment. The Trial Court's Amended Judgment Order stated:

> This matter came on to be heard on September 13, 2016, the Honorable Justin C. Angel presiding. Upon the testimony of witnesses and argument of counsel, the court made the following findings of fact and conclusions of law as transcribed by the court reporter. These finding[s] of fact and conclusions of law are incorporated in the order herein and marked as Exhibit A.
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> Upon these findings of fact and conclusions of law, it is therefore
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> **ORDERED**
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> 1. That a judgment, in favor of the plaintiff, against the defendant be entered.
> 2. That the statement was defamatory, constitutes libel, and was unprivileged.
> 3. That the plaintiff suffered a direct loss of $7,000 as a result of the defamatory statement.
> 4. That the statement was made maliciously and the plaintiff is awarded $5,000 in attorney's fees.

In its oral ruling incorporated into its final judgment, the Trial Court stated, in part, as follows:

> I find that Mr. Weidlich is not a public official. There's been no proof that he's a public official. Also, I find that his spouse at the time of this posting was also not a public official. Simply obtaining a petition to seek office does not make you a public official. Once you have the qualifying signatures on the petition, you then have to certify that, you have to turn it in to an election administration and they certify it, and then all of the sudden now, yes, you are an official candidate and you are a public

official. It’s been uncontroverted that at the time this post was made that Ms. Weidlich was -- had not yet returned her qualifying petition to the board of elections in regards to her potential election to the school board of Franklin County. So at the time the post was made, she was not a public official as well. So that definitely distinguishes this case from the case provided by counsel for the defendant, the *Eisenstein* case. This is Court of Appeals, Tennessee, Nashville, 2006, Tenn. App. LEXIS 303. In this case the aggreged [sic] party, the plaintiff in the case, was an actual circuit court judge, an elected official, definitely a public official. So the analysis of the Court is that of a public official, and the defendant is a news outlet. It’s WTVF TV in Nashville. They are absolutely a journalist and a media outlet. So the analysis set forth from the Court in that case is completely different from the analysis that I have to in this case. So I find that case is not persuasive or analogous to what we have to do here today.

Also, the persuasive precedent case set forth by counsel for the defendant, United States Court of Appeals for the Ninth Circuit, which is *Padrick v. Cox*, Case No. 12-35238, again, deals with a public official and a blog. Again, we’re not dealing with a public official in this case, and we’re also not dealing with a blog. So I find that that case is not helpful to the Court in making my determination today.

There are certain things you can call people in this society that are extremely harmful. If you’re labeled to be a rapist or a molester or pedophile, that’s something that can stick with you forever. If you’re labeled as a racist, especially as a -- well, as anybody. If you’re labeled as a racist in this country -- that is a very easy term to throw out but an extremely harmful label to put on somebody that can absolutely affect them, their livelihood, their business, and their life from that point forward. That’s why we have to be careful with words we use, especially in a public forum.

Looking at the elements of libel, the first element is a false and defamatory statement. The statement made in Exhibit 1 says – it’s posted by Ms. Lisa Rung, the defendant, “Free bonus prize. The Fisty family are also white supremacists! We need to keep this handy come election time.” So this statement does not say, in my opinion, they are white supremacists or they may be white supremacists or due to the fact they have this sticker on their car they could be white supremacists. It makes the statement, “They are white supremacists!” If that is her opinion, she definitely didn’t make it sound like her opinion. She made it sound as if it was a fact. And there’s also been no proof today for the Court that the “Fisty family,” as referred to here, but the Weidlich family are white supremacists. There’s

> been absolutely zero proof whatsoever. So I find that statement to be false and extremely defamatory.
>
> Factor number two, unprivileged publication to a third party. Again, Ms. Rung is not a journalist. She has no privilege and no special privilege in publishing this type of defamatory statement. She simply went on a public Facebook page and made a declaration to the world that these people are white supremacists. So factor number two is off the spectrum. Element one and element two are supported by the facts today.
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> Number three, that it was malicious and negligent. It absolutely was. It was malicious because Ms. Rung knew what she was doing. She knew what type of label this is, and she knew it was a public forum, and she knew the negative connotation and the derogatory nature of this statement, and also it's proven that she had no conversation or no personal knowledge that Mr. Weidlich or his family were white supremacists. So it's malicious and negligent. So that element is supported.
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> ***
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> So in conclusion, I find in favor of Mr. Weidlich. I find that this was a defamatory statement; it constitutes libel. It was an unprivileged publication to a third party which was malicious and negligent, and it caused damages in the amount of loss of profits to Mr. Weidlich's business in the amount of $7,000; and that due to the extreme unwarranted defamatory statements made in Exhibit 1 and the fact that Mr. Weidlich had to hire an attorney to clear his name and to go to court and so forth, I'm going to award attorney fees in the amount of $5,000 to Mr. Weidlich for a total amount of damages of $12,000.

Rung appealed to this Court.

Discussion

Rung raises a number of issues on appeal. We restate and consolidate Rung's issues into one dispositive issue: 1) whether the Trial Court erred in holding that the allegedly defamatory statement made by Rung was capable of carrying a defamatory meaning. Weidlich raises his own issue of whether Rung's appeal was filed timely.

We first address whether Rung's appeal was filed timely. On October 19, 2016, Rung filed a motion pursuant to Tenn. R. Civ. P. 59.04 to amend the Trial Court's September 29, 2016 judgment to substitute a transcript of the Trial Court's oral ruling for the written findings contained therein. The Trial Court granted Rung's motion to amend

by order entered November 29, 2016. Counsel for both parties signed the order. Rung did not file her notice of appeal until December 27, 2016, beyond 30 days from entry of the original September 29, 2016 judgment but within 30 days from entry of the November 29, 2016 order. Weidlich now argues that Rung's motion to amend did not toll the time limit for filing a notice of appeal.

Rule 59.01 of the Tennessee Rules of Civil Procedure states in regard to which motions serve to extend time in the appellate process as follows:

> (1) under Rule 50.02 for judgment in accordance with a motion for a directed verdict; (2) under Rule 52.02 to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59.07 for a new trial; or (4) under Rule 59.04 to alter or amend the judgment. These motions are the only motions contemplated in these rules for extending the time for taking steps in the regular appellate process. Motions to reconsider any of these motions are not authorized and will not operate to extend the time for appellate proceedings.

In addition, Tenn. R. App. P. 4(b) provides:

> (b) Termination by Specified Timely Motions in Civil Actions. In a civil action, if a timely motion under the Tennessee Rules of Civil Procedure is filed in the trial court by any party: (1) under Rule 50.02 for judgment in accordance with a motion for a directed verdict; (2) under Rule 52.02 to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59.07 for a new trial; (4) under Rule 59.04 to alter or amend the judgment; the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion.

Weidlich contends that Rung's motion was, in substance, a Rule 60.01 motion to correct a clerical mistake, rather than one that sought to substantively change the Trial Court's judgment. Thus, argues Weidlich, Rung's motion was not one of those serving to extend time to appeal, and her notice of appeal therefore was filed untimely. To review, the September 29, 2016 judgment entered by the Trial Court contained written findings. Rung sought to replace these written findings with an incorporated transcript of the Trial Court's oral ruling. In our judgment, this request sought not the correction of a mere clerical mistake but rather a substantive amendment to the Trial Court's judgment. As such, whether classified under Rule 52.02 or Rule 59.04, Rung's motion to amend

served to extend her time in which to file a notice of appeal. Rung's notice of appeal was filed timely.

We next address whether the Trial Court erred in holding that the allegedly defamatory statement made by Rung was capable of carrying a defamatory meaning. This Court has discussed defamation as follows:

> To establish a prima facie case of defamation, the plaintiff must prove the following elements:
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> > (1) a party published a statement; (2) with knowledge that the statement was false and defaming to the other; or (3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement.
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> *Hibdon v. Grabowski*, 195 S.W.3d 48, 58 (Tenn. Ct. App. 2005). The basis for a claim for defamation " 'is that the defamation has resulted in an injury to the person's character and reputation.' " *Brown v. Mapco Express, Inc.*, 393 S.W.3d 696, 708 (Tenn. Ct. App. 2012) (quoting *Davis v. The Tennessean*, 83 S.W.3d 125, 128 (Tenn. Ct. App. 2001)). This Court has adopted the following description of what constitutes a defamatory statement:
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> > For a communication to be libelous, it must constitute a serious threat to the plaintiff's reputation. A libel does not occur simply because the subject of a publication finds the publication annoying, offensive or embarrassing. The words must *reasonably be construable as holding the plaintiff up to public hatred, contempt or ridicule*. They must carry with them an element "of disgrace."
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> *Id*. (quoting *Kersey v. Wilson*, No. M2005-02106-COA-R3-CV, 2006 WL 3952899, at *3 (Tenn. Ct. App. Dec. 29, 2006)) (further citations omitted) (emphasis added). Furthermore, "[m]ere hyperbole or exaggerated statements intended to make a point are not actionable defamatory statements." *Farmer v. Hersh*, No. W2006-01937-COA-R3-CV, 2007 WL 2264435, at *5 (Tenn. Ct. App. Aug. 9, 2007)
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> Because a defamatory statement must be "factually false in order to be actionable, comments upon or characterizations of published facts are not in themselves actionable." *Stones River Motors, Inc. v. Mid-South*

Publ'g Co., Inc., 651 S.W.2d 713, 720 (Tenn. Ct. App. 1983). A writer's comments upon true and nondefamatory published facts are not actionable, "even though [the comments] are stated in strong or abusive terms." *Id.* The writer's opinions have constitutional protection under the First Amendment. *Id.* This Court has held that "an opinion is not actionable as libel unless it implies the existence of unstated defamatory facts." *Id.* at 722.

The question of "whether a communication is capable of conveying a defamatory meaning is a question of law for the court to decide in the first instance; it is then for the jury to decide whether the communication was in fact so understood by those who received it." *Brown*, 393 S.W.3d at 708-09 (citations omitted). In making this determination, a court "must look to the words themselves and [is] not bound by the plaintiff's interpretation of them." *Stones River Motors*, 651 S.W.2d at 719.

Davis v. Covenant Presbyterian Church of Nashville, No. M2014-02400-COA-R9-CV, 2015 WL 5766685, at *3-4 (Tenn. Ct. App. Sept. 30, 2015), *Rule 11 appl. perm. appeal denied Feb. 18, 2016* (Footnotes omitted).

Since both a visual image and accompanying written statement are at the heart of this case, we deem it necessary to display the entire communication at issue. Rung's Facebook post was as follows:

Rung's unabashed statement that the Weidlichs are "white supremacist[s]" is indeed a grave accusation. Such an accusation naturally can tend to damage the reputation of one so accused. Nevertheless, Rung's Facebook post did not consist merely of this statement. If that were so, then our analysis would be different. Rung's statement instead related to the photograph contained in her post. Anyone reading Rung's post had full access to the facts available to Rung—the photo. So informed, readers were free to accept or reject Rung's opinion as they saw fit. The surrounding dramatic, hyperbolic language in the post bolsters this determination. Had Rung simply written that "Weidlich is a white supremacist" with no accompanying photograph or context, that would be another matter. She, however, did not do this.

Weidlich and the Trial Court mistakenly focused only on the words of Rung's statement and ignored the photo which also was a part of her statement. Taking the statement in its entirety, including the photo, Rung's written statement could only be read as being her opinion based upon what the photo showed and did not "impl[y] the existence of unstated defamatory facts." *Davis*, 2015 WL 5766685, at *3. Rung's written statement was her comment upon true and published facts, the photo, and as such was not actionable even though "stated in strong or abusive terms." *Id.*

Weidlich argues on appeal that Rung's written statement on the sole basis of his bumper stickers was unsupported, false, and defamatory. Weidlich's bumper stickers featured, among other things, The League of the South, Confederate Battle Flags, and the word "secede." The Confederacy and its symbols have long been subject to debate in our state and country. Confederate symbols also are entangled in issues of race. By placing these bumper stickers on his vehicle, Weidlich put forth into the public sphere certain political connotations and meanings. Anyone sitting in traffic behind Weidlich or walking behind his car in a parking lot could see these same bumper stickers and draw her own conclusions. This case then hinges upon whether Rung defamed Weidlich by posting a photograph of the bumper stickers and expressing her opinion, correctly or incorrectly, that they revealed Weidlich to be a white supremacist. We hold she did not. Rung's Facebook post expressed an opinion on disclosed facts consisting of the imagery and symbolism presented in the photograph[1].

We take no position on the accuracy of Rung's assertion regarding the Weidlichs, and we need not. Rung's Facebook post was commentary on an accompanying photograph available for all to see. It is, therefore, of no moment to the resolution of this appeal whether the conclusion Rung expressed was correct. Readers could view the same photograph and decide for themselves. We hold, as a matter of law, that the

[1] Our resolution of this issue renders all of Rung's other issues moot.

communication at issue, an opinion based upon disclosed facts, when viewed in its entirety could not convey a defamatory meaning. We, therefore, reverse the judgment of the Trial Court, including its award of damages and attorney's fees to Weidlich.

Conclusion

The judgment of the Trial Court is reversed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellee, Robert Weidlich.

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D. MICHAEL SWINEY, CHIEF JUDGE