In The

Supreme Court of Virginia

RECORD NO. 110323

VERBENA ASKEW,

Appellant,

v.

BRENDA COLLINS,

Appellee.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This appeal springs from a judgment in a defamation action. Plaintiff Brenda Collins sued four defendants, jointly and severally, on various theories of recovery based on statements about her in a newspaper article. She settled with three of the defendants, leaving as the sole remaining defendant Verbena Askew, a member of the bar of this Court.

The case was tried to a jury, which returned a verdict in favor of the plaintiff. Askew moved the trial court to set the verdict aside, or to reduce it, as required by Code §8.01-35.1, by the sums the plaintiff had received from the other two defendants. The trial court granted Askew's motion to set aside in part, but it refused to reduce the judgment by the amount of the settlements. It entered final judgment in favor of the plaintiff. This Court awarded Askew an appeal on June 10, 2011.

ASSIGNMENTS OF ERROR

1. The trial court erroneously refused to set the verdict aside, because the evidence established that Askew's statement did not proximately cause Collins's claimed damages. [Preserved by motion filed March 1, 2010.]

2. The trial court erroneously refused to apply Code §8.01-35.1 to reduce the amount of the judgment. [Preserved at A. 142-44.]

FACTS AND PROCEDURAL POSTURE

Askew is a former circuit-court judge. During her tenure on the bench, she occasionally interacted with the plaintiff, an administrator in the Newport News Drug Court.

Early in 2003, Askew was interviewed privately by two editors of *The Daily Press*, a newspaper published on the Peninsula. The plaintiff alleged, and the jury found, that Askew made the following statement to the editors: "Collins was institutionalized – that's the only way you qualify for Family leave." Plaintiff also complained of other statements, but the jury found in favor of Askew on those claims.

Plaintiff sued Askew, *The Daily Press*, and a City of Hampton employee named Tracey Jenkins. She later amended her complaint to add the City as a defendant. The pleading was amended twice more; in each instance, the plaintiff sought unitary damages against all defendants, jointly and severally. See A. 32.

During the course of the litigation, the plaintiff settled with Jenkins, the newspaper, and the City, and received $120,000 in proceeds from those defendants. The case then proceeded to trial, against Askew only, on three claims: defamation, breach of contract, and conspiracy.

During the trial, the plaintiff described to the jury her mental anguish arising from publication of an article (A. 104-15) in *The Daily Press*. A. 50-51, 79-80. She acknowledged that the statement about her being institutionalized did not appear in the story, A. 96-97, and admitted that until the story was published, she had no damages. A. 80.

The trial court gave the jury a special verdict form, asking it to make findings as to several specific statements attributed by the plaintiff to Askew. The jury found for the plaintiff on only one, and that statement had not appeared in the newspaper. It also found in favor of the plaintiff on the breach-of-contract claim, but it returned a defense verdict on the conspiracy claim. A. 122-23.

The trial court set aside the breach-of-contract verdict after trial, but denied defense motions to enter judgment in favor of Askew on the defamation claim, and to allow Askew a credit for the sums recovered from the two co-defendants.

ARGUMENT

Standard of Review

Assignment 1 challenges the trial court's finding that the evidence established that Askew's single statement was a proximate cause of the plaintiff's damages. In reviewing this ruling, this Court will view the evidence in a light most

favorable to the plaintiff, who prevailed below, but will review the trial court's legal analysis de novo, since this is a mixed question of law and fact. *Walton v. Mid-Atlantic Spine Specialists, PC*, 280 Va. 113, 123 (2010).

Assignment 2 evaluates whether the claims against Askew were for "the same injury" as those pleaded against the other two defendants. Resolution of this issue states a legal question that is reviewed de novo.

Discussion

1. Askew did not cause the plaintiff's damages. (Assignment 1)

At trial, the plaintiff testified at length about the *Daily Press* article's traumatic effect upon her. But the jury found that Askew made only one statement that the plaintiff identified as defamatory, and that statement did not appear in the story. The plaintiff never testified about a cause of mental anguish other than the publication of the article, so the statement that the jury attributed to Askew could not have proximately caused any of her damages.

Askew pointed out this analytical anomaly in her post-trial motion, and argued to the trial court that no causal nexus existed between this one statement and the plaintiff's damage claims. A. 125-28. This connection is essential because proximate causation is an indispensible element of any tort claim. *Town of West Point v. Evans*, 224 Va. 625, 627-28 (1983) (burden on plaintiff to "produce evidence of preponderating weight" to establish proximate cause).

The Plaintiff's defense of the verdict focuses on Instruction 13, which permitted the jury to presume damages from defamation per se. But even such presumed damages must proximately result from a defendant's conduct. *Great Coastal Express v. Ellington*, 230 Va. 142, 152 (1985) ("A private plaintiff must still prove negligence as a predicate for recovery, even if the words published are actionable per se. A plaintiff who proves the publication of words actionable per se is simply relieved of the necessity of proving the quantum of his damages . . ."). The jury in this

case was instructed on the necessity for the plaintiff to establish proximate causation (A. 120-21).

In addition, the jury was not entitled to presume damages contrary to the plaintiff's own unambiguous testimony. The plaintiff openly agreed that, before publication of the *Daily Press* story on January 21, 2003, she "didn't have any damages." A. 80.

The jury's special verdict effectively forecloses any liability, because the plaintiff's own testimony conclusively establishes that the institutionalization statement did not cause her any injury. Since her damages arose from the story, and the quoted statement did not appear there, the statements were not a proximate cause of the injury.

2. The verdict must be offset by the settlements with the other defendants. (Assignment 2)

In the event the Court reverses and enters final judgment in favor of Askew on Assignment 1, it need not address Assignment 2. Otherwise, Askew is entitled by statute to an offset for the sums paid by other defendants.

Code §8.01-35.1(A)(1) requires an offset where a plaintiff settles with one of two or more defendants who are jointly liable for the same injury:

> . . . any amount recovered against the other person or any one of them shall be reduced by any amount stipulated by the covenant or release, or in the amount of the consideration paid for it, whichever is the greater.

In this case, the plaintiff asserted common claims against all of the defendants, and sought a joint-and-several award of damages. A. 10 (Count I – defamation), 13 (joint and several liability). After settling with the newspaper, she continued to assert joint liability for the defamation claim. A. 24 (Count I – defamation), 32 (joint and several liability).

The plaintiff never asserted in the trial court that she sustained anything other than a single, indivisible injury, for which she is entitled to just one recovery. Whether the Court analyzes the claim from the standpoint of the defendants as joint tortfeasors, *Wright v. Orlowski*, 218 Va. 115, 120 (1977), or the unitary nature of the injury, *Cauthorn v. British Leyland, U.K., Ltd.*, 233 Va. 202, 205

(1987), the judgment must account for the sums the plaintiff has already received.[1]

If the plaintiff regarded her injuries to be different based on who the defendant was, she never identified any such claim, nor provided any such testimony, at trial. All of her damages flowed from the publication of a newspaper article in which only the co-defendant, Jenkins, is quoted as saying anything critical of her. Indeed, the plaintiff cited only Jenkins's statements in her pleadings. A. 23, ¶36.

Finally, in her pleadings, the plaintiff never alleged that her damage claims were severable into different components for the various defendants. A. 12, ¶43; A. 27, ¶50. She is bound by her pleadings, which allege a single, indivisible injury for which she sought joint-and-several liability.

[1] The previous rule barring any recovery after receipt of any funds from a jointly liable party has been amended by statute to require only an offset of the earlier recovery.

CONCLUSION

The verdict is wholly inconsistent with any cognizable theory of recovery for the plaintiff, because the newspaper article never quoted Askew as having uttered what the jury found. All of plaintiff's injuries flowed from other statements; the jury found in Askew's favor on those claims.

This Court should reverse the judgment below and enter final judgment in favor of Askew. In the alternative, the Court should reduce the amount of the judgment by the amount of the proceeds paid to the plaintiff by the settling defendants.

VERBENA ASKEW

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CERTIFICATE

I hereby certify that on this 19th day of July, 2011, pursuant to Rules 5:26(h) and 5:32(a)(3)(ii), fifteen paper copies of the foregoing Brief of Appellant and ten paper copies of the Joint Appendix, along with 10 copies on CD-Rom, have been hand-filed with the Clerk of the Supreme Court of Virginia. Three paper copies of the Brief and one paper copy of the Joint Appendix, along with one copy on CD-Rom, have been served, via UPS Ground, upon:

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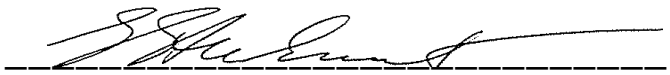

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