IN THE

Supreme Court of Virginia

RECORD NO. 110323

VERBENA ASKEW,

Appellant,

v.

BRENDA COLLINS,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Brenda Collins ("Collins") brought suit against former circuit court judge Verbena Askew[1] ("Askew") in the Circuit Court for the City of Williamsburg/James City County for defamation and other claims.[2] The claims against Askew, and those against other defendants, were set forth in detailed allegations in Collins' pleadings. The Complaint contained separate counts, each of which set forth the allegations for each type of tort alleged against the defendants, both individually and jointly. (App. 24-31.) The Complaint concluded with a general prayer for "joint and several" relief in combined amounts of compensatory and punitive damages, "per count, where applicable, per Defendant." (App. 32.)

Collins' defamation claims against Askew arose from a number of statements Askew made about Collins to an editor and reporter for the

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[1] In the same suit, Collins brought claims against three other defendants – The Daily Press, The City of Hampton, and Tracey Jenkins – for, variously, other defamatory publications, breach of contract, conspiracy to tortiously interfere with contract, and common-law conspiracy. These claims were resolved by the parties prior to the trial of this matter.

[2] Collins brought additional claims against Askew for breach of contract, conspiracy to tortiously interfere with contract, and common-law conspiracy. Collins did not pursue her claim for common-law conspiracy at trial, thereby releasing that claim. The jury found in Collins' favor on the breach of contract claim; this verdict was set aside on Askew's motion after trial. The jury found in Askew's favor on the conspiracy to tortiously interfere with contract claim.

newspaper The Daily Press in the course of one or more interviews conducted in January 2003. At trial, Collins introduced evidence that Askew made the statements, and of their defamatory nature. The jury received instruction on *per se* defamation, to which Askew did not object, and found in Collins' favor as to Askew's statement that "Collins was institutionalized – that's the only way you qualify for family leave," awarding $300,000 in compensatory damages and $50,000 in punitive damages.

After trial, Askew moved the trial court to set aside the jury's verdict for Collins on the defamation claim, and to credit against the award the amount of settlements recovered from other defendants prior to trial. The trial court denied these motions, and Askew appealed. This Court granted Askew's petition for appeal on June 10, 2011.

QUESTIONS PRESENTED

1. Whether the trial court erred in refusing to set aside the verdict on Collins' defamation claim, in light of the evidence presented at trial. (Appellant's Assignment of Error No. 1)

2. Whether the trial court erred in holding that Va. Code § 8.01-35.1 does not require the amount of the judgment be reduced. (Appellant's Assignment of Error No. 2)

STATEMENT OF FACTS

Collins does not dispute the facts set forth in Askew's brief, with the exception of two assertions made by Askew in her brief. First, Askew states that Collins sought "unitary damages against all defendants, jointly and severally." (Brief of Appellant at 3.) However, the substance of Collins' pleadings clearly set forth both individual and joint claims against the defendants, including allegations of multiple instances of defamation by Askew only. (App. 24-25.)

Second, Askew states that until The Daily Press article was published, Collins had no damages. However, Askew's assertion ignores Collins' testimony that she subsequently became aware of prior defamation by Askew to The Daily Press (including the statement about her being institutionalized) (App. 87-98, 101-102). As argued below, Collins accrued damages, as a matter of law, when Askew made the *per se* defamatory statements to The Daily Press. Thus the fact that Collins did not become aware of the statements until after the article was published has no bearing on her presumed damages.

ARGUMENT

A. Standard of Review

In examining a decision not to set aside a jury verdict (Appellant's Assignment of Error No. 1), this Court applies an abuse of discretion standard.[3] *See WJLA-TV v. Levin*, 264 Va. 140, 163, 564 S.E.2d 383, 396 (2002). The trial court should be afforded a "large measure of discretion regarding whether a verdict should be affirmed, set aside, or reduced 'because it saw and heard the witnesses while [the appellate Court is] confined to the printed record.'" *Id.* (quoting *Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277, 300, 362 S.E.2d 32, 45 (1987)). Notably, "[u]nless the amount of the award is so excessive as to shock the conscience of the court ... a verdict approved by the trial court will not be disturbed on appeal." *Id.* (quoting *The Gazette, Inc. v. Harris*, 229 Va. 1, 37, 325 S.E.2d 713, 738 (1985)).

The question of whether the defamation claim against Askew for which the jury awarded damages arises from a "single, indivisible injury" also alleged against the other three defendants, such that Askew would be entitled to an offset of the verdict by the amount of the earlier settlements

[3] Askew contends that the standard of review for Assignment of Error No. 1 is *de novo*. This is incorrect; however, even under a *de novo* review, as stated in footnote 4, the result is the same.

(Appellant's Assignment of Error No. 2), presents a legal question to be reviewed *de novo*.

B. Summary of Argument

The trial court properly found that the evidence was sufficient to support the jury's verdict, and was correct in its refusal to set aside the verdict against Askew under the clear precedent that damages for *per se* defamation are presumed and accordingly, a plaintiff need not present evidence of such damages. Askew does not dispute the *per se* instruction given to the jury without objection, or the jury's finding regarding same, but limits her argument to the erroneous assertion that the verdict should have been set aside because Collins failed to testify that Askew's defamation proximately caused her damages.

The trial court also ruled correctly in holding that Va. Code § 8.01-35.1 did not mandate an offset of the defamation award to Collins in the settlement amounts paid by other defendants because those other defendants were not liable – and were not alleged to be liable – for the defamatory statement the jury found was made by Askew.

The trial court's decisions – to deny Askew's motions to set aside the defamation verdict and to deny Askew a credit for the sums recovered from

other defendants for different injuries suffered by Collins – should be affirmed.

C. The Trial Court did not Abuse its Discretion in Refusing to Set Aside the Jury Verdict

With regard to her first Assignment of Error, Askew contends that the trial court should have set aside the jury verdict as to Collins' defamation claim because the defamatory statement upon which the jury found in Collins' favor and awarded damages – "Collins was institutionalized – that's the only way you qualify for family leave" – did not appear in The Daily Press article that Collins alleged contained other defamatory statements about her supplied to the newspaper by Askew. She argues that, because Collins "never testified about a cause of mental anguish other than the publication of the article, ... the statement that the jury attributed to Askew could not have proximately caused any of her damages." (Brief of Appellant at 5.) Askew does not challenge the jury's findings that she made the subject statement, that she acted with knowledge of falsity and/or reckless disregard for the truth, and that it was defamatory *per se*; and she does not challenge the instruction given regarding same, or the amount of damages awarded by the jury.

Instead, Askew argues only that the trial court should have set aside the jury verdict as to Collins' defamation claim because Collins did not testify that Askew's defamation proximately caused her damages. However, Askew's argument ignores Virginia's case law regarding the effect of presumed damages for *per se* defamation.

At trial, the jury was provided the following instruction, to which Askew did not object and which she does not challenge on appeal, as to the standard for *per se* defamation:

> If you find your verdict for the plaintiff, *the plaintiff is entitled to recover compensatory damages without any proof of actual or pecuniary injury.* The statements alleged in this case are understood to mean that the plaintiff has committed the crime of lying under oath; that the plaintiff is unfit to perform the duties of her employment; that the plaintiff lacks integrity or is dishonest in performing the duties of her employment; and/or the effect of the words is prejudicial to the plaintiff in her work. As a result, *injury to the plaintiff's personal and business reputation, humiliation, and embarrassment is presumed.*

(App. 119.)

The common law recognizes that when a speaker utters a defamatory statement regarding one's reputation, damage is presumed without evidence of any particular quantum of damages, or for that matter, without *any* proof linking the statement to the presumed damage. *See*

Restatement (Second) of Torts § 621 cmt. a (1977) ("At common law, general damages have traditionally been awarded not only for harm to reputation that is proved to have occurred, but also, in the absence of this proof.")

This Court has previously stated that "[i]t is difficult, if not impossible, to prove with mathematical precision the quantum of damages for injury to reputation, humiliation, and embarrassment which may flow from a defamation." *Great Costal Express, Inc. v. Ellington*, 230 Va. 142, 148, 334 S.E.2d 846, 850 (1985). "For this reason, the common law, as early as 1670, *modified the usual standard of proof of damages* in those cases where the words uttered were actionable *per se*." *Id.* (emphasis added) (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985)). Under Virginia's modified standard, "compensatory damages for injury to reputation, humiliation, and embarrassment in defamation *per se* cases are *presumed*." *Great Costal Express, Inc.*, 230 Va. at 151, 334 S.E.2d at 852 (emphasis added). *See Poulston v. Rock*, 251 Va. 254, 260-61, 467 S.E.2d 479, 483 (1996) (citing *Slaughter v. Valleydale Packers, Inc.*, 198 Va. 339, 347, 94 S.E.2d 260, 266 (1956), and noting that the trial court's decision to reduce a defamation award "ignores [the plaintiff's] acknowledged right to recover compensatory damages absent any proof of injury or of the

quantum of injury."). *See also* Restatement (Second) of Torts § 621 cmt. a (1977), *infra*; W. Page Keeton, et al., *Prosser and Keaton on the Law of Torts* § 112 795-797 (5th ed. 1984) and 108-112 (Supp. 1988); *Fox v. Parker*, 98 S.W.3d 713, 726 (Tex. Civ. App. 2003) ("in a case of defamation *per se*, there need be no inquiry in the charge about... 'proximate cause' and injury, or the jury may be instructed to so find.").

Askew's argument that "presumed damages must proximately result from a defendant's conduct" conflates proof of defamatory intent, the scienter requirement, with proof of defamation damages which are presumed to result from her defamatory statements. (Brief of Appellant at 6.) As such, Askew misstates the law in the context of *per se* defamation. This is illustrated by Askew's reliance on an excerpt from the decision in *Great Costal Express, Inc.*, 203 Va. at 152, 334 S.E.2d at 853: "a private plaintiff must still prove negligence as a predicate to recovery, even if the words published are actionable *per se*." *Id.*

In *Great Costal Express*, the "negligence" standard under consideration by the Court was the requirement that the plaintiff prove that the publication was false, and that the defendant knew it to be false, lacked reasonable grounds to believe it to be true, or acted negligently in failing to ascertain the facts – the required state of mind in Virginia to hold a speaker

liable for presumed damages in a *per se* defamation action not involving matters of public concern. *Great Costal Express,* 230 Va. at 151, 334 S.E.2d at 852 (citing *The Gazette v. Harris*, 229 Va. 1, 15, 325 S.E.2d 713, 725 (1985)). Earlier in the *Great Coastal Express* decision, before this Court's discussion regarding the negligence scienter standard, this Court makes it clear that, "if the published words are determined by the trial judge to be actionable *per se* at common law, compensatory damages for injury to reputation, humiliation, and embarrassment are presumed." 230 Va. at 151, 334 S.E.2d at 852.

The *Great Coastal* decision follows the U.S. Supreme Court's decisions in *New York Times v. Sullivan, 376 U.S. 254 (1964)* (establishing the actual malice defamation standard), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). In *Gertz*, the U.S. Supreme Court noted that "the common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). Balancing the common law's allowance of jury awards for reputational damage without specific proof of the damage against speech rights and concerns over awards of "substantial sums as compensation for supposed damage to reputation

without any proof that such harm actually occurred," *Id.*, the U.S. Supreme Court chose to heighten the defamation plaintiff's burden of proof regarding the speaker's state of mind by "restrict(ing) defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury." *Id.* Where such "actual malice" [or "*New York Times* malice"] is demonstrated, awards of significant presumed compensatory damages for *per se* defamation were held constitutionally permissible. The Court left to the states the appropriate standard for imposing liability when "actual malice" is proved by a plaintiff. *Id.*

In *Greenmoss*, the U.S. Supreme Court noted that when the alleged defamatory statement does not involve matters of public concern the First Amendment implications are diminished. *See* 472 U.S. at 761. Therefore, the Court held that "the state interest adequately supports awards of presumed damages and punitive damages – even absent a showing of 'actual malice'" in defamation actions based on speech concerning matters of private concern. *Id.*

In *Great Costal Express,* this Court stated that, Virginia "will not, as a matter of state law, apply to speech actionable *per se*, involving no matters of public concern, the *Gertz* ["actual malice"] rule inhibiting presumed compensatory damages." 230 Va. at 151, 334 S.E.2d at 852. Instead,

Virginia permits a recovery of presumed compensatory damages upon proof, by preponderance of the evidence,

> "that the publication was false, and that the defendant either knew it to be false, or believing it to be true, lacked reasonable grounds for such belief, or acted negligently in failing to ascertain the facts about which the publication was based."

Id. Thus, "the common-law principle that compensatory damages are presumed where words actionable *per se* are published does not mean that [the Court] has imposed liability without fault." *Id.* Instead, the "fault" or "cause" for plaintiff's presumed damages is defendant's knowledge of falsity or negligence in failing to ascertain the facts.

Moreover, like the plaintiff in *Gazette*, Collins has proved the *New York Times* malice necessary for an award of punitive damages, which is not challenged by Askew on appeal. *See Gazette*, 229 Va. at 18, 325 S.E.2d at 727. Thus, the negligence standard can be subsumed into the higher malice standard and it is plain that Collins has carried more than her requisite burden to establish predicate for the recovery of presumed compensatory damages. *See Great Costal Express*, 230 Va. at 152, 334 S.E.2d at 853.

At trial, Collins presented evidence that Askew knew her statement that Collins "was institutionalized – that's the only way you qualify for family leave" was false, or at the least that Askew lacked reasonable grounds for this belief or otherwise negligently failed to ascertain facts in support of the defamatory statement (App. 36-38), evidence not challenged by Askew on appeal. The jury found that the statement was defamatory *per se*, a finding not challenged by Askew. Thus, as a matter of law, the jury needed *no* proof of damages suffered by Collins as a result of the *per se* defamation negligently published by Askew. The reputational damage to Collins resulting from Askew's statement was properly presumed, and the jury's award of compensatory and punitive damages to Collins was appropriate under established common law principles for *per se* defamation. Accordingly, the trial court did not abuse its discretion[4] in refusing to set aside the verdict, and its decision should be affirmed.

[4] Even assuming, *arguendo*, that Appellant's Assignment of Error No. 1 presented a mixed question of fact and law, and therefore entitles Askew to *de novo* review, as she contends, the trial court properly upheld the jury's verdict as a matter of law.

D. The Trial Court was Correct in not Applying Virginia Code § 8.01-35.1 to Reduce the Amount of the Judgment

In support of her second Assignment of Error, Askew contends that under Va. Code § 8.01-35.1 she is entitled to an offset of the judgment for settlement amounts paid to Collins by other defendants prior to trial. Askew is wrong.

Section 8.01-35.1(A) is applicable only to a release or settlement given by a party to "two or more persons liable for the same injury..." Askew argues that Collins "asserted common claims against all of the defendants," "never asserted in the trial court that she sustained anything other than a single, indivisible injury," and "never alleged that her damage claims were severable into different components for the various defendants." (*See* Brief of Appellant at 7-8.) These assertions misstate the facts below and, again, ignore established Virginia law as to defamation claims.

As a preliminary matter, neither the fact that Collins' pleadings were organized into counts labeled by *type* of tort and given headings for ease of reference (*see* App. 10, 24), nor the fact that her prayer for relief generally requested a single, combined award, jointly and severally, without enumerating the specific counts with respect to her *ad damnum* (*see* App. 13, 32), establishes that all of Collins' claims against the various

defendants arose from the "one indivisible injury" required for offset under Va. Code § 8.01-35.1. *See, e.g., Cauthorn v. British Leyland, U.K., Ltd.*, 233 Va. 202, 207, 355 S.E.2d 306, 309 (1987). *See also*, *Sullivan v. Robertson Drug Co.*, 273 Va. 84, 92, 639 S.E.2d 250, 255 (2007). Followed to its logical end, Askew's position dictates that Va. Code § 8.01-35.1 entitles her to an offset of the judgment against her for defamation by the amounts paid by other defendants to settle claims for breach of contract, tortious interference, or common-law conspiracy – a result clearly not contemplated, let alone supported, by the statute or applicable case law. Askew's position likewise ignores the legal effect of both her initial publication of *per se* defamatory statements and the individual liability she bears for each republication of such statements as separately actionable torts.

Askew's assertion that Collins "never asserted in the trial court that she sustained anything other than a single, indivisible injury" is simply not true. While Collins availed herself of Virginia's standard for notice pleading, as is her right, *see CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24, 431 S.E.2d 277, 278 (1993), through the use of categorical headings and a general prayer for relief, this in no way undermines the specificity of her pleading as to the actions of the individual defendants, which, while

alleging joint liability for some claims, clearly asserts individualized actions (and resultant injury) as to others. It is clear from the substantive allegations in Collins' pleadings that she alleged a number of specific and separate instances of defamation against Askew only. (*See, e.g.*, App. 24-25.) Moreover, under Virginia law, each publication of a defamatory statement is a separate and distinct tort. *See* WJLA-TV, 264 Va. at 153, 564 S.E.2d at 390 (citing *Weaver v. Beneficial Finance Co.*, 199 Va. 196, 199, 98 S.E.2d 687, 690 (1957)).

Askew does not dispute that the evidence of defamation presented at trial concerned defamatory statements Collins alleged were made by Askew alone. There was no need to distinguish Askew's actions from those of other defendants at trial because those other defendants were not before the trial court. The jury was asked to make findings as to defamatory statements attributable to Askew, only, and it did so, finding that Askew's statement that Collins "was institutionalized – that's the only way you qualify for family leave" was defamatory *per se*.

Askew's assertions that "[i]f [Collins] 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" and that "[a]ll of [Collins'] damages flowed from the publication of a newspaper article in which only

the co-defendant, Jenkins, is quoted as saying anything critical of her" (Brief of Appellant 8-9), rely on the faulty premise that Collins is required to prove damages resulting from *per se* defamation. As stated above, Virginia law is clear that such damages are presumed, and that a plaintiff need not put on evidence of same in order to recover. Moreover, the presumed damages arise anew on each publication/republication of Askew's defamation – as does Askew's liability.

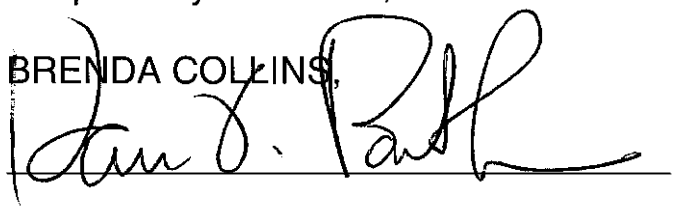
The defamatory statement for which Askew was found liable by the jury was never alleged to have been made by any defendant other than Askew. Simply put, the other defendants could not, and did not, settle Collins' claim that the statement – "Collins was institutionalized that's the only way you qualify for family leave" – defamed her. Accordingly, any other release of claims by Collins does not release her claims for that statement. Therefore, Va. Code § 8.01-35.1 is inapplicable, the trial court did not err in not allowing Askew credit for previous settlement amounts as to the defamation award, and the trial court's decision should be affirmed.

CONCLUSION

For the foregoing reasons, Brenda Collins requests that this Court affirm the rulings of the trial court.

Respectfully submitted,

BRENDA COLLINS,



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CERTIFICATE

Counsel hereby certifies the following:

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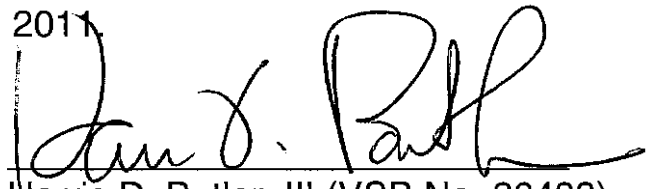

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