PTS Corporation v. Buckman, 263 Va. 613, 561 S.E.2d 718 (2002)

IN THE SUPREME COURT OF VIRGINIA

PTS CORPORATION, D/B/A
ALLIANCE BAIL BONDS, ET AL.,
v.
LARRY BUCKMAN

Record No. 011396
Decided: April 19, 2002

Present: All the Justices

In a suit for improper use of a person's name for advertising and trade purposes under Code § 8.01-40(A), the trial court erred in overruling a motion *in limine* to exclude evidence of a police investigation of the plaintiff. The trial court did not err in overruling the individual defendants' demurrer concerning personal liability under Code § 8.01-40(A). The judgment is reversed and the case is remanded.

Torts — Employment Law — Improper Use of Another's Name (Code § 8.01-40(A) — Advertising or Trade Purposes — Wilful, Wanton or Malicious Conduct — Punitive Damages — Evidence — Relevancy — Collateral Matters — Criminal Investigations — Liability of Person, Firm or Corporation — Personal Liability of Corporate Officers

The plaintiff worked as a bail bondsman for the defendant corporation for approximately seven years before leaving. Despite his departure, plaintiff's name was not removed from the company's advertisement in the next year's edition of the telephone Yellow Pages. Plaintiff filed a bill of complaint against the company and two of its officers, seeking injunctive relief, compensatory damages, and punitive damages. The individuals filed a demurrer to the complaint on the ground that Code § 8.01-40(A) allows suit for use of a person's name but that plaintiff did not allege that either of the individuals did so, only that the defendant corporation did. The trial court overruled the demurrer and transferred the action from equity to the law side of court. The court overruled a defense motion *in limine* requesting exclusion of the testimony of a police detective. The jury returned a verdict in favor of plaintiff for $490 in compensatory damages and $175,000 in punitive damages. Both the corporate defendant and remaining individual defendant appeal the adverse rulings of the trial court.

1. Code § 8.01-40(A) provides that a person whose name, portrait, or picture is used without written consent for advertising purposes or for the purposes of trade may maintain a suit in equity against the person, firm, or corporation using the name to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use. The statute further provides that if the defendant knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful, the jury, in its discretion, may award exemplary damages.

2. It is unnecessary to prove wilful, wanton and/or malicious conduct in order to support an award of punitive damages under Code § 8.01-40(A). All that is **[Page 614]** necessary under the statute to support an award of punitive damages is proof that the defendant knowingly used plaintiff's name, portrait, or picture without consent for advertising purposes or for the purposes of trade. While the statute does not require proof of wilful, wanton and/or malicious conduct, prior case law did not hold such evidence inadmissible.

3. Nothing in the statutory language of Code § 8.01-40(A) suggests a restriction upon proof of damages. Rather, the statute expands the circumstances in which punitive damages can be awarded. It would be an unreasonable interpretation of the intent of the General Assembly to expand the scope of punitive damages while limiting the proof of the quantum of damages awarded. Accordingly, proof of wilful, wanton and/or malicious conduct is not necessary to support an award of punitive damages under Code § 8.01-40(A), but such proof is admissible in support of a determination of the quantum of punitive damages awarded.

4. It is axiomatic in the law that proof of damages must be related to the wrong suffered. The proof required for punitive damages is subject to the same causal connection. The plaintiff's cause of action was based upon a statutory provision premised upon the concept that a person holds a property interest in his or her name and likeness. Such a property interest has value. A conversion occurs when another exercises dominion and control over such intangible personal property and uses it without the owner's consent.

5. Evidence of collateral facts, from which no fair inferences can be drawn tending to throw light upon the particular fact under investigation, is properly excluded for the reason that such evidence tends to draw the minds of the jury away from the point in issue, to excite prejudice and mislead them. The determination that proffered evidence is collateral is, in essence, a determination of relevance.

6. Here, evidence of the investigation was irrelevant to the issue of the use of the plaintiff's name in the Yellow Pages, and the four misleadingly handled telephone calls alleged. The defendants' complaint was prompted by the discovery of a power of attorney form in the plaintiff's former desk at the company office, a matter unrelated to the use of plaintiff's name in the Yellow Pages or during telephone calls. As such, it could not have been relevant to support an award of compensatory damages.

7. Additionally, evidence concerning the investigation was irrelevant to the award of punitive damages for knowing use of plaintiff's name. The premise underlying the use of someone's name, portrait, or picture in advertising or for trade purposes is that it has value. Surely, causing an investigation of the plaintiff for allegations that could have resulted in criminal charges and conviction was inconsistent with usurpation of such an asset. Simply stated, the evidence of use of plaintiff's name and the evidence concerning the investigation were at cross-purposes. As such, the evidence admitted in support of the award of punitive damages was irrelevant to the underlying statutory cause of action and it was inadmissible for any purpose in this action pursuant to Code § 8.01-40(A). Therefore, the trial court erred in denying the defendants' motion *in limine*. **[Page 615]**

8. The impact of the improperly admitted evidence of the investigation and the plaintiff's direct request for damages predicated upon it undoubtedly influenced the jury's award of both compensatory and punitive damages.

9. There is no error in the trial court's overruling of the remaining individual defendant's demurrer. While he maintains that only the corporate defendant may be liable on this proof, the express terms of the statute impose liability upon "the person, firm, or corporation so using such person's name." Corporate officers have previously been held liable for their tortious conduct. It is inconsequential that the cause of action is based on statutory rather than common law. The tort is one of conversion, recognized at common law.

10. Code § 8.01-40(A) requires that a "person, firm, or corporation" must use the name, portrait, or picture of the plaintiff in order for the plaintiff to recover. Under this statute, any one or more of the three named entities can be liable for "so using" the plaintiff's name, portrait, or picture. The demurrer as to the individual defendant's liability was decided prior to the trial of the matter. Of course the evidence at trial must support individual liability and sufficiently demonstrate that the individual defendant used the plaintiff's name.

Appeal from a judgment of the Circuit Court of the City of Virginia Beach. Hon. Thomas S. Shadrick, judge presiding.

Reversed and remanded.

Joseph R. Mayes (Wolcott, Rivers, Wheary, Basnight & Kelly, on briefs), for appellants.

Kevin E. Martingayle (Stallings & Richardson, on brief), for appellee.

Amicus Curiae: Virginia Trial Lawyers Association (Steven P. Letourneau; Fine, Fine, Legum and Fine, on brief), in support of appellee.

JUSTICE LEMONS delivered the opinion of the Court.

In this appeal of an action brought by Larry A. Buckman ("Buckman") against his former employer, PTS Corporation, d/b/a Alliance Bail Bonds ("Alliance") and Patsy D. Tauro ("Tauro") (collectively "defendants") alleging improper use of his name for advertising or trade purposes, we consider whether the trial court erred in overruling a motion *in limine* to exclude evidence of an investigation of Buckman. Also, we consider whether the trial court erred in overruling Tauro's demurrer concerning his personal liability under Code § 8.01-40(A). **[Page 616]**

I. Facts and Proceedings Below

Buckman worked as a bail bondsman for Alliance for approximately seven years before leaving in late March 1998 to work in used car sales. Despite his departure, Alliance did not remove his name from its

advertisement in the August 1998 — July 1999 edition of the Bell Atlantic Yellow Pages for South Hampton Roads, Virginia.

On March 25, 1999, Buckman filed a bill of complaint against Alliance, Tauro, and Joseph Scott ("Scott"), seeking injunctive relief, compensatory damages, and punitive damages. Tauro and Scott were both officers and owners of Alliance. The complaint alleged that "[t]he actions of the Defendants constitute[d] a blatant violation of Code of Virginia § 8.01-40, which authorizes Plaintiff to pursue a suit to prevent and restrain the unauthorized use of his name." Buckman claimed that Alliance's continued use of his name in its telephone book advertisement after his employment with Alliance ceased constituted a violation of the statute. Buckman also alleged that the named defendants "told and/or implied to prospective customers who called by telephone that Larry Buckman did still, in fact, work for Alliance, when the Defendants knew full well that he did not."

Tauro and Scott filed a demurrer to the complaint, claiming that Code § 8.01-40(A) allowed for suit "against the person, firm, or corporation so using such person's name" and that Buckman did not allege that either Scott or Tauro "used" his name, but only that Alliance "used" his name. Further, Tauro and Scott maintained that Buckman failed to allege facts to show that either Tauro or Scott acted "in any capacity other than as employees, owners, and officers of Alliance Bail Bonds." The trial court overruled the demurrer.

On January 31, 2000, the trial court entered an order by consent of the parties transferring the action from the equity side to the law side of the court. In the order, the trial court enjoined the defendants from committing any of the actions "complained of in the [b]ill of [c]omplaint . . ."

On October 27, 2000, the defendants filed a motion *in limine* for entry of an order excluding the testimony of Detective Gene Eller ("Detective Eller") of the Virginia Beach Police Department. In the motion, they represented that approximately one year after Buckman ceased working for Alliance, Tauro initiated a complaint with the State Corporation Commission Bureau of Insurance ("Bureau of Insurance") after he found a completed power of attorney that Buckman **[Page 617]** "checked out" but had never returned, and which had been reported as lost.[1] Upon the advice of the Bureau of Insurance, Tauro reported the matter to the Virginia Beach Police Department, and Detective Eller subsequently conducted an investigation. Ultimately, no criminal charges were initiated against Buckman as a result of the investigation. In the motion, the defendants argued that the testimony of Detective Eller "ha[d] absolutely no bearing on the underlying lawsuit," and was irrelevant to an alleged violation of Code § 8.01-40(A).

Immediately prior to the commencement of the jury trial on November 6, 2000,[2] the trial court heard arguments on the defendants' motion *in limine.* In response to the motion *in limine*, Buckman argued that Code § 8.01-40(A) allowed punitive damages, and that evidence of the investigation was relevant to the degree of punishment. Buckman claimed that Alliance and Tauro planned to argue that they acted in good faith toward Buckman, and that he wanted to demonstrate that both the unauthorized use of his name and the investigation were part of "their desperate effort to keep him out of the business" and demonstrated their lack of good faith in dealing with him. The trial court decided to "allow Detective

Eller to testify for whatever relevance his testimony might have." Buckman's counsel elicited testimony about the investigation from Tauro, Scott, Detective Eller, and Buckman himself.

To support his claim for compensatory damages, Buckman presented the testimony of various individuals who testified that when they telephoned Alliance asking for Buckman, they were led to believe that Buckman still worked for Alliance. Dean Dayton ("Dayton") testified that he telephoned Alliance in March 1999 and when he asked for Buckman, the person who answered the telephone said that Buckman "wasn't on duty." Another bondsman from Alliance wrote the $7000 bond for Dayton. Similarly, Garth Cooper testified that when he called Alliance looking for Buckman in October 1998, he was told that Buckman "wasn't in the office that day." A third witness, Kevin Hall, testified that when he called Alliance looking for Buckman he was told that Buckman "[was] busy." Buckman testified that he called Alliance himself, using another name, to see what kind of response he would get after asking to speak to Larry **[Page 618]** Buckman. The woman who answered the telephone told him that she would page Buckman and that "[a]s soon as we hang up, the page will go out and he'll call you back." Buckman asserted that this conduct by Alliance, which led at least three callers to believe that Buckman still worked for the company, constituted a violation of Code § 8.01-40(A).

The jury returned a verdict in favor of Buckman for $490 in compensatory damages and $175,000 in punitive damages. Alliance and Tauro moved to set aside the verdict, arguing that the compensatory damage award was without evidence to support it and that the award of punitive damages shocked the conscience. The trial court took the motion under advisement.

The parties submitted written memoranda in support of their positions on the motion to set aside the verdict and for a new trial. Alliance and Tauro argued that the compensatory damage award was contrary to the evidence and that the punitive damage award was excessive under state law and unconstitutional under federal law. Alliance and Tauro also alleged that the evidence of the investigation "was what drove the jury's award" and reiterated their argument that the investigation was irrelevant to the violation of Code § 8.01-40(A). In his memorandum in opposition, Buckman argued that the evidence supported both the compensatory and punitive damage awards. Buckman further argued that the trial court properly overruled the defendants' pretrial motion *in limine* regarding the relevance of evidence of the investigation.

By order entered April 2, 2001, the trial court denied the defendants' motion to set aside the verdict and for a new trial, and entered judgment against the defendants, jointly and severally, in the amount of $490 in compensatory damages and $175,000 in punitive damages, with interest from the date of trial. Alliance and Tauro appeal the adverse ruling of the trial court.

II. Analysis

On appeal, Alliance and Tauro argue that the trial court erred in overruling their motion to set aside the verdict and for a new trial. They further argue that the trial court erred in overruling their motion *in limine* to exclude the testimony of Detective Eller and evidence of the investigation of Buckman.

Finally, Alliance and Tauro maintain that the trial court erred in overruling Tauro's demurrer to the bill of complaint. **[Page 619]**

Buckman argues that the record supports both the compensatory and punitive damage awards and that the trial court properly allowed the testimony of Detective Eller and evidence concerning the investigation. Buckman further argues that the verdict was properly entered against Tauro personally.

[1-3] Code section 8.01-40(A) provides:

> Any person whose name, portrait, or picture is used without having first obtained the written consent of such person, or if dead, of the surviving consort and if none, of the next of kin, or if a minor, the written consent of his or her parent or guardian, for advertising purposes or for the purposes of trade, such persons may maintain a suit in equity against the person, firm, or corporation so using such person's name, portrait, or picture to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use. And if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by this chapter, the jury, in its discretion, may award exemplary damages.

In *Town & Country Prop. Inc. v. Riggins*, we held that it was unnecessary to prove "wilful, wanton and/or malicious conduct" in order to support an award of punitive damages under Code § 8.01-40(A). 249 Va. 387, 399, 457 S.E.2d 356, 365 (1995). All that is necessary under the statute to support an award of punitive damages is proof that the defendant "knowingly used" plaintiff's name, portrait, or picture without consent for advertising purposes or for the purposes of trade. *Id.*

While holding that the statute does not require proof of "wilful, wanton and/or malicious conduct," we did not state that such evidence was inadmissible. Nothing in the statutory language of Code § 8.01-40(A) suggests a restriction upon proof of damages. To the contrary, the statute expands the circumstances in which punitive damages can be awarded. We believe that it would be an unreasonable interpretation of the intent of the General Assembly to expand the scope of punitive damages while limiting the proof of the quantum of damages awarded. *See Catron v. State Farm Mutual Auto. Ins. Co.*, 255 Va. 31, 38, 496 S.E.2d 436, 439 (1998) (recognizing that when statutory language is clear, the plain meaning and intent of the enactment will be given to it); *see also Vaughn, Inc. v. Beck*, 262 Va. 673, 677, **[Page 620]** 554 S.E.2d 88, 90 (2001) (explaining that the Court determines the intent of the General Assembly from the words contained in the statute, unless a literal construction of the statute would yield an absurd result). Accordingly, we hold that proof of "wilful, wanton and/or malicious conduct" is not necessary to support an award of punitive damages under Code § 8.01-40(A), but such proof is admissible in support of a determination of the quantum of punitive damages awarded.

[4] However, it is axiomatic in the law that proof of damages must be related to the wrong suffered. The proof required for punitive damages is subject to the same causal connection. Here, Buckman's cause of action was based upon a statutory provision prohibiting the use of a name, portrait, or picture, without permission, for advertising purposes or for trade purposes. The statutory cause of action is

premised upon the concept that a person holds a property interest in his or her name and likeness. *Lavery v. Automation Mgmt. Consultants, Inc.*, 234 Va. 145, 154, 360 S.E.2d 336, 341-42 (1987). Such a property interest has value. A conversion occurs when another exercises dominion and control over such intangible personal property and uses it without the owner's consent. *Town & Country*, 249 Va. at 397, 457 S.E.2d at 364.

The trial court denied the defendants' pretrial motion *in limine* seeking to exclude testimony concerning the investigation of Buckman by the Bureau of Insurance or the Virginia Beach Police Department and the role played by Alliance or Tauro in causing such an investigation. Alliance and Tauro argue that such evidence was "wholly collateral and irrelevant to any issue" in the case. Buckman maintains that such evidence is proof of "wilful, wanton and/or malicious conduct" that is relevant to the quantum of punitive damages. Alliance and Tauro reply that even if such evidence is relevant, it should have been excluded because its probative value is far outweighed by its prejudicial effect.

[5-6] As we stated in *Spurlin v. Richardson*, 203 Va. 984, 990, 128 S.E.2d 273, 278 (1962):

> Evidence of collateral facts, from which no fair inferences can be drawn tending to throw light upon the particular fact under investigation, is properly excluded for the reason that such evidence tends to draw the minds of the jury away from the point in issue, to excite prejudice and mislead them. **[Page 621]**

The determination that proffered evidence is collateral is, in essence, a determination of relevance. *See Seilheimer v. Melville*, 224 Va. 323, 327, 295 S.E.2d 896, 898 (1982) (recognizing that the "collateral facts" rule is purely a question of relevancy); *see also* Charles H. Friend, The Law of Evidence in Virginia § 11-4 at 392 (5th ed. 1999). The evidence of the investigation in May 1999 was irrelevant to the issue of the use of Buckman's name in the Yellow Pages in August 1998 and the four misleadingly handled telephone calls, all of which occurred before April 1999. The defendants' complaint to the Bureau of Insurance and the Virginia Beach Police Department was prompted by the discovery of a power of attorney form in Buckman's former desk at Alliance, a matter unrelated to the use of Buckman's name in the Yellow Pages or during telephone calls. As such, it could not have been relevant to support an award of compensatory damages.

[7] Additionally, the evidence concerning the investigation was irrelevant to the award of punitive damages for "knowing" use of Buckman's name. The premise underlying the use of someone's name, portrait, or picture in advertising or for trade purposes is that it has value. Surely, causing an investigation of Buckman for allegations that could have resulted in criminal charges and conviction was inconsistent with usurpation of such an asset. Simply stated, the evidence of use of his name and the evidence concerning the investigation were at cross-purposes. As such, the evidence admitted in support of the award of punitive damages was irrelevant to the underlying statutory cause of action. Perhaps such evidence could support a different cause of action, but it was inadmissible for any purpose in this action pursuant to Code § 8.01-40(A). Therefore, we hold that the trial court erred in denying the defendants' motion *in limine*.

[8] At trial Buckman's counsel asked him, "what are you asking this jury to do?" Buckman replied:

> It's real hard to put an economic figure on what I feel that ya'll should award me. It's real tough. But I think that the law allows for punitive damages. I think that when somebody puts you through a lot of [undue] stress and aggravation and sleepless nights because you're being investigated for something you didn't do, I feel that you've got to hit them in the pocketbook. **[Page 622]**

The impact of the improperly admitted evidence of the investigation and Buckman's direct request for damages predicated upon it undoubtedly influenced the jury's award of both compensatory and punitive damages.

[9] Because a new trial may produce a different verdict, it is unnecessary to address any of the remaining assignments of error except one that will, of necessity, arise again. We find no error in the trial court's overruling of Tauro's demurrer. Tauro maintains that only the corporate defendant may be liable on this proof. However, the express terms of the statute impose liability upon "the person, firm, or corporation so using such person's name." We have previously held corporate officers liable for their tortious conduct. *See Miller v. Quarles*, 242 Va. 343, 347-48, 410 S.E.2d 639, 642 (1991); *see also Sit-Set, A.G. v. Universal Jet Exch., Inc.*, 747 F.2d 921, 929 (4th Cir. 1984). It is inconsequential that the cause of action is based on statutory rather than common law. The tort is one of conversion, recognized at common law. *Town & County*, 249 Va. at 397, 457 S.E.2d at 364.

Additionally, we have previously noted the similarity between Code § 8.01-40(A) and §§ 50 and 51 of the New York Civil Rights Act. *Town & Country*, 249 Va. at 394, 457 S.E.2d at 362 (citing N.Y. Civ. Rights Law §§ 50-51 (McKinney 1992)). Accordingly, we find the holding in *Anderson v. Strong Memorial Hospital* particularly persuasive. 531 N.Y.S.2d 735 (N.Y. Sup. Ct. 1988), *aff'd*, 542 N.Y.S.2d 96 (N.Y. App. Div. 1989).

In *Anderson*, the plaintiff brought an action against several doctors, a newspaper, and newspaper employees for invasion of privacy and breach of the doctor-patient privilege. While the patient was in an examination room at the doctors' office, a newspaper photographer took a photograph of him and assured him that he would not be recognizable in the photograph. *Id.* at 737. The photograph was published in a local newspaper two days later, and the plaintiff claimed he was identifiable and that the publication caused him significant stress and turmoil. *Id.* The court held that a plaintiff could only maintain an action for invasion of privacy against the doctors under § 51 of the Civil Rights Law if he demonstrated that the doctors "used" the photograph. *Id.* at 738. The court defined the term "used" in the statute and stated that although the plaintiff alleged that the doctors encouraged him to have his photograph taken, there were no allegations that they "took the photograph, sold it, published it, or otherwise **[Page 623]** exercised any control over it, to give rise to the conclusion that they 'used' the photograph." *Id.*

[10] Code § 8.01-40(A) similarly requires that a "person, firm, or corporation" must use the name, portrait, or picture of the plaintiff in order for the plaintiff to recover. Under our statute, any one or more of the three named entities can be liable for "so using" the plaintiff's name, portrait, or picture. The demurrer as to Tauro's individual liability was decided prior to the trial of the matter. Of course the

evidence at trial must support individual liability and sufficiently demonstrate that the individual defendant "used" the plaintiff's name. Because Tauro did not object to jury instructions permitting the imposition of individual liability, we will not, in this appeal, review the sufficiency of the evidence to support such an instruction.

Accordingly, we will reverse the judgment of the circuit court and remand for a new trial.

Reversed and remanded.

FOOTNOTES

[1] Powers of attorney authorize bail bondsmen to sign bail bonds on behalf of the surety company.

[2] The claim against Scott was nonsuited on the day of trial and an order was entered on November 20, 2000.