Reverse and Remand; Opinion Filed August 29, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00248-CV

PILAR SANDERS A/K/A PILAR LOVE EL DEY, Appellant
V.
DEION L. SANDERS, Appellee

On Appeal from the 366th Judicial District Court
Collin County, Texas
Trial Court Cause No. 366-04718-2014

MEMORANDUM OPINION

Before Justices Lang, Myers, and Stoddart
Opinion by Justice Myers

Pilar Sanders a/k/a Pilar Love El Dey appeals the trial court's judgment rendered in favor of Deion L. Sanders on his claim for defamation. The trial court granted Deion's motion for partial summary judgment on Pilar's liability for defamation. Following a trial before the court, the court determined Deion's damages from defamation were $2.2 million. Pilar brings five issues on appeal; however, we address only Pilar's second issue contending the trial court erred by granting Deion's motion for summary judgment on Pilar's liability for defamation. We conclude the trial court erred by granting the motion for summary judgment because Deion failed to establish conclusively Pilar's negligence or malice regarding the truthfulness of her statements. We reverse the trial court's judgment and remand the cause to the trial court.

THE RECORD

The trial in this defamation case was consolidated with the hearing on the parties' suit affecting the parent–child relationship, including motions to modify child custody, a bill of review, a motion to enforce the divorce decree, and a motion to revoke the suspension of a contempt order in the child-custody litigation. The trial court entered an order sealing the records of the family-law matters, but the court did not seal the records of the defamation case. Because the family-law and defamation cases were tried together, there was only one reporter's record for both cases. Thus, the reporter's record for the defamation case is under seal.

This Court is required to hand down a public opinion explaining our decision based on the record. *See* TEX. R. APP. P. 47.1, 47.3; *In re N.G.G.*, No. 05-16-01084-CV, 2017 WL 655953, at *1 (Tex. App.—Dallas Feb. 17, 2017, no pet.) (mem. op.). We cannot fulfill this duty without describing, to some extent, the pleadings, evidence, findings, and judgment in the case. "To the extent we include any sensitive information in this memorandum opinion, we do so only to the degree necessary to strike a fair balance between the parties' interest in keeping portions of the record confidential and our responsibilities to the public as an appellate court." *In re N.G.G.*, 2017 WL 655953, at *1 (quoting *TMX Fin. Holdings, Inc. v. Wellshire Fin. Servs., LLC*, 515 S.W.3d 1, 4 n.1 (Tex. App.—Houston [1st Dist.] Oct. 11, 2016, pet. filed)).

BACKGROUND

Deion Sanders is a former player in the National Football League and a Pro Football Hall of Famer. He was married to Pilar Sanders. After concluding his NFL career, Deion became a commentator on the NFL Network, and he and his children were the subject of a television program called "Deion's Family Playbook" on the Oprah Winfrey Network (OWN). Deion also endorsed products.

Deion and Pilar divorced in 2013, and the divorce decree required Deion to pay Pilar $1 million pursuant to the parties' premarital agreement. In this lawsuit, Deion alleged that, after the divorce, Pilar made statements on social media, in online videos, and on a national television news program that Deion had physically abused her and their children and had attempted to murder her. He alleged these statements damaged his reputation and caused him economic damages.

Deion sued Pilar for defamation per se. He moved for summary judgment as to liability on his defamation claim. At the beginning of the consolidated trial on the family-law and defamation cases, the trial court announced it was carrying the motion for summary judgment during the trial. On the last day of the trial, the court granted the motion for summary judgment as to Pilar's liability on the defamation claim. At the conclusion of the trial, the court awarded Deion damages for defamation of $2.2 million and ruled that Deion could offset the $1 million dollars he owed Pilar from the divorce against the $2.2 million of defamation damages.

JURISDICTION

Before addressing the merits of the appeal, we must address Deion's assertion that this Court lacks jurisdiction over the appeal because Pilar did not timely file her notice of appeal.

The trial court signed the final judgment on December 2, 2015. Pilar timely filed a request for findings of fact and conclusions of law on December 22, 2015, which was twenty days after the court signed the final judgment. *See* TEX. R. CIV. P. 296 (request for findings of fact and conclusions of law "shall be filed within twenty days after judgment is signed"). She filed her notice of appeal on March 1, 2016, which was ninety days after the court signed the final judgment.

Pilar's notice of appeal was due no later than the thirtieth day that was not a weekend or a holiday after the trial court signed the final judgment, January 4, 2016. *See* TEX. R. APP. P. 26.1.

However, the notice of appeal would be due ninety days after the final judgment, March 1, 2016, if Pilar timely filed a request for findings of fact and conclusions of law and the findings and conclusions could be considered by the appellate court. TEX. R. APP. P. 26.1(a)(4).

The supreme court has stated that findings of fact and conclusions of law may be considered following "any judgment based in any part on an evidentiary hearing." *IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 443 (Tex. 1997). In this case, the trial court's judgment was based on the summary judgment on Pilar's liability and on the nonjury trial to determine the amount of Deion's damages. The nonjury trial was an evidentiary hearing and included testimony concerning the amount of Deion's damages. Because the judgment was "based in part on an evidentiary hearing" without a jury, findings of fact and conclusions of law could properly be considered by this Court. Therefore, Pilar's request for findings of fact and conclusions of law was proper and extended the time for her to file her notice of appeal.

We conclude Pilar's notice of appeal was filed timely and that this Court has jurisdiction to consider her appeal.

DEFAMATION

To prevail on a defamation claim, the plaintiff must prove the defendant (1) published a statement, (2) that was defamatory concerning the plaintiff, (3) while acting with either actual malice, if the plaintiff is a public official or a public figure, or negligence if the plaintiff is a private individual, regarding the truth of the statement, and (4) the plaintiff suffered damages or the statements were defamatory per se. *D Magazine Partners, L.P. v. Rosenthal*, No. 15-0790, 2017 WL 1041234, at *8 (Tex. March 17, 2017); *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998). A statement is defamatory if it tends to injure a person's "reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of

anyone and thereby expose the person to public hatred, ridicule, or financial injury." TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (West 2011).

LIABILITY

In her second issue, Pilar contends the trial court erred by granting Deion's motion for partial summary judgment on Pilar's liability for defamation. The standard for reviewing a traditional summary judgment is well established. *See Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985); *McAfee, Inc. v. Agilysys, Inc.*, 316 S.W.3d 820, 825 (Tex. App.—Dallas 2010, no pet.). The movant has the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). In deciding whether a disputed material fact issue exists precluding summary judgment, evidence favorable to the nonmovant will be taken as true. *Nixon*, 690 S.W.2d at 549; *In re Estate of Berry*, 280 S.W.3d 478, 480 (Tex. App.—Dallas 2009, no pet.). Every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in its favor. *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005). We review a summary judgment de novo to determine whether a party's right to prevail is established as a matter of law. *Dickey v. Club Corp.*, 12 S.W.3d 172, 175 (Tex. App.—Dallas 2000, pet. denied).

Pilar argues that the summary judgment record[1] fails to establish conclusively that she was at fault for making the defamatory statements. The status of the plaintiff determines whether the plaintiff must prove the defendant was negligent or whether the defendant acted with malice.[2]

[1] The summary judgment record in this case consisted of (1) Deion's affidavit and its attachments, (2) the affidavit of Larry Boyd, Deion's attorney for the defamation case, and the attachment to his affidavit, (3) Pilar's affidavit to the extent it was not struck by the trial court, and (4) the reporter's record and exhibits from the December 16, 2014 hearing, which the trial court took judicial notice of for the summary judgment as well as for the trial. *See* TEX. R. CIV. P. 166a(c). During the trial, the court took judicial notice of other documents, including the divorce decree and other records of the divorce proceeding, but nothing shows those documents were made part of the summary judgment record.

[2] In his motion for summary judgment, Deion asserted that plaintiffs in a defamation per se action are not required to prove the defendant was at fault in making the statement, citing *Hurlbut v. Gulf Atlantic Life Insurance Co.*, 749 S.W.2d 762, 766 (Tex. 1987). In that case, which involved business disparagement, the supreme court referred to the Restatement's description of the burden of proof under the common law and stated, "Regarding fault, the defendant in a defamation action was strictly liable for his false statement whereas the defendant in an action for business disparagement or injurious falsehood is subject to liability 'only if he knew of the falsity or acted with reckless disregard concerning it, or if he acted with ill will or intended to interfere in the economic interest of the plaintiff in an unprivileged fashion.'" *Id.* (quoting

If the plaintiff is a private figure, then the plaintiff must prove negligence, that is, the plaintiff must show the defendant knew or should have known the defamatory statement was false. *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015); *French v. French*, 385 S.W.3d 61, 73 (Tex. App.—Waco 2012). However, if the plaintiff is a public figure, the plaintiff must prove malice, that is, the plaintiff must show the defendant made the statement with actual knowledge of its falsity or with reckless disregard of its truth. *In re Lipsky*, 460 S.W.3d at 593. Because Deion failed to prove conclusively either negligence or malice, we need not determine whether Deion is a public figure.

Deion asserted in his motion for summary judgment that his testimony in the December 16, 2014 hearing and in his affidavit prove Pilar knew the statements were false or that she should have known they were false. At the hearing, Deion was asked, "Does Pilar Sanders know that these statements are untrue," and he answered, "Yes." In his affidavit, Deion stated, "Defendant knew or should have known that each of the defamatory statements . . . were [sic] false. . . . I have previously so testified." Pilar did not object to these statements in the trial court. However, on appeal, she asserts the statements are substantively defective because they are conclusory.

A conclusory statement is one that does not provide the underlying facts to support the conclusion. Conclusory statements in affidavits are not proper as summary judgment proof if there are no facts to support the conclusions. *Rizkallah v. Conner*, 952 S.W.2d 580, 587 (Tex. App.—Houston [1st Dist.] 1997, no pet.). Defects in the form of an affidavit must be objected to

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RESTATEMENT (SECOND) OF TORTS § 623A cmt. g (1977)). However, as comment g to section 623A also states, the United States Supreme Court's opinions have "narrowed the distinctions set forth above." One of those changes is the requirement of proving fault. The Restatement provides that a defendant who published a false and defamatory statement concerning a person who is not a public figure is subject to liability only if the defendant knew the statement was false and defamatory, acted in reckless disregard of these matters, or acted negligently in failing to ascertain them. *See* RESTATEMENT § 580B. The Texas Supreme Court has also required plaintiffs in defamation actions to prove fault. *See Hancock v. Variyam*, 400 S.W.3d 59, 65 n.7 (Tex. 2013) ("After *Gertz* and *Dun & Bradstreet*, there must still be a showing of fault in a defamation *per se* claim between private parties over a matter of private concern. That appropriate standard of fault in such a case in Texas is negligence if the plaintiff is a private figure, or actual malice if the plaintiff is a public or limited-purpose public figure." (Citations omitted.)).

in the trial court, the opposing party must have the opportunity to amend, and the trial court must rule on the objection; otherwise, the objection is waived and the objected-to material is in evidence. *S & I Mgmt., Inc. v. Choi*, 331 S.W.3d 849, 855 (Tex. App.—Dallas 2011, no pet.). Substantive defects may be raised for the first time on appeal. *Id.* Factual conclusions in an affidavit are substantive defects. *Bastida v. Aznaran*, 444 S.W.3d 98, 104 (Tex. App.—Dallas 2014, no pet.).

Deion asserts the evidence proving Pilar knew or should have known her statements were false included the testimony of an investigator for CPS who investigated Pilar's claims that Deion had abused the children. After investigating Pilar's allegations, CPS issued a report that "Ruled Out" Pilar's child-abuse allegations. The report defined "Ruled Out" as meaning "based on the available information, it was reasonable to conclude that the alleged abuse or neglect did not occur." However, that report was addressed only to Deion, and no evidence showed Pilar was aware of the report. Because the evidence did not show Pilar was aware of the report, the evidence could not have conclusively proved the report put her on notice that her statements were false.

Deion also asserts Pilar knew or should have known that her statements were false because, despite police investigations, no charges were filed against Deion, no police department has found he has ever undertaken any criminal actions, no civil claims alleging the assaults have been filed outside of the parties' divorce action, and no court has found Deion committed the assaults. However, none of these matters conclusively prove Pilar knew or should have known the statements were false. There could be many reasons why police might choose not to file charges, and a police department's failure to file charges against Deion does not conclusively prove Pilar knew or should have known the statements were false. No evidence showed any police department that investigated Deion issued findings from investigations when charges were

not brought, and Deion did not provide evidence of any police department's findings. Because no charges were filed, no court could have determined whether Deion committed the assaults. Nor was Pilar's failure to bring suit outside the divorce proceeding conclusive evidence that she knew or should have known her statements were false.

On appeal, Deion argues the parties' divorce proceeding put Pilar on notice that her statements were false. Deion asserts the jury in the divorce proceeding was charged that it could not name as managing conservator a person with a history or pattern of abuse against a child, parent, or spouse, and the jury found that Deion should be managing conservator of his and Pilar's two sons and joint managing conservator of their daughter. However, Deion did not present this argument in his motion for summary judgment in support of his assertion that he conclusively proved Pilar's negligence or malice. Instead, he presented the jury-finding argument in support of his assertion that there was no evidence of Pilar's affirmative defense that the statements were true. We may not uphold a summary judgment on grounds not presented in the motion for summary judgment. *Ashton v. KoonsFuller, P.C.*, No. 05-16-00130-CV, 2017 WL 1908624, at *1 (Tex. App.—Dallas May 10, 2017, no pet.) (mem. op.); *see Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009) ("It is well settled that a trial court cannot grant a summary judgment motion on grounds not presented in the motion."). Because Deion did not present the jury-finding argument in support of his assertion that Pilar acted negligently or with malice, we do not consider the argument on appeal for that purpose.

Deion's testimony that Pilar knew or should have known her statements were false was conclusory. After reviewing the summary judgment evidence, we conclude Deion failed to establish conclusively that Pilar acted with negligence or malice regarding the truthfulness of the statements. Because Deion failed to prove conclusively one of the elements of defamation, the trial court erred by granting his motion for summary judgment. We sustain Pilar's second issue.

Having concluded the trial court erred by granting the motion for summary judgment on Pilar's liability, we need not consider her remaining issues. *See* TEX. R. APP. P. 47.1.

CONCLUSION

We reverse the trial court's judgment and remand the cause to the trial court for further proceedings.

/Lana Myers/
LANA MYERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

PILAR SANDERS A/K/A PILAR LOVE EL DEY, Appellant

No. 05-16-00248-CV V.

DEION L. SANDERS, Appellee

On Appeal from the 366th Judicial District Court, Collin County, Texas
Trial Court Cause No. 366-04718-2014.
Opinion delivered by Justice Myers. Justices Lang and Stoddart participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant PILAR SANDERS A/K/A PILAR LOVE EL DEY recover her costs of this appeal from appellee DEION L. SANDERS.

Judgment entered this 29th day of August, 2017.