

No. 1-13-3087

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

EDWARD ARNETT "EDDIE" JOHNSON,)	Appeal from the
)	Circuit Court of Cook County
Plaintiff-Appellant,)	
)	
v.)	
)	
THE CHICAGO TRIBUNE COMPANY,)	No. 13 L 743
)	
Defendant-Appellee.)	
)	
(Clear Channel Communications, Inc., Premiere Radio)	
Networks, Inc., John Edward "Skip" Bayless II, and)	Honorable Frank Castiglione,
Georgia Television Company, d/b/a WSB-Television and)	Judge Presiding.
WSBTV.COM,)	
)	
Defendants.))	

PRESIDING JUSTICE SIMON delivered the judgment of the court.
Justices Pierce and Liu concurred in the judgment.

ORDER

¶ 1 *Held:* Summary judgment was proper in libel action by public figure against defendant newspaper company where plaintiff failed to present clear and convincing evidence that defendant published the alleged libelous statement with actual malice or reckless disregard for the truth.

¶ 2 Plaintiff Edward Arnett "Eddie" Johnson filed the underlying libel complaint with three counts sounding in negligence, false light, and defamation *per se* on October 12, 2006. Plaintiff alleged that defendant Chicago Tribune Company (Tribune) published a story on August 9, 2006, in its newspaper that mistakenly identified plaintiff as a man identified as Eddie Johnson in an AP newswire story on August 8, 2006, detailing that man's arrest for residential burglary and sexually assaulting an 8 year-old girl. Remaining defendants were other media outlets and personalities that picked up this incorrect version of the story. These defendants settled with plaintiff and were dismissed with prejudice and the case advanced against Tribune. On September 4, 2013, the circuit court granted Tribune's motion for summary judgment and plaintiff appealed.

¶ 3 On appeal, plaintiff argues that the circuit court erred in finding plaintiff failed to present a genuine issue of material fact. Plaintiff argues that there is evidence of record from which a jury could find defendant acted with actual malice and reckless disregard for the truth. For the following reasons, we affirm the judgment of the circuit court.

¶ 4 I. BACKGROUND

¶ 5 Plaintiff hails from Chicago, Illinois, and starred as a basketball player for Westinghouse High School and the University of Illinois at Urbana-Champaign before being the 29th player drafted in the 1981 National Basketball Association (NBA) draft by the Kansas City Kings. Plaintiff played for 17 seasons in the NBA for the Kansas City Kings, Phoenix Suns, Seattle SuperSonics, Charlotte Hornets, Indiana Pacers, Denver Nuggets, and Houston Rockets before retiring in 1999. Plaintiff enjoyed success in the NBA, scoring over 19,000 points, earning the Sixth Man of the Year Award in 1999, and becoming the league's all-time leading scorer off the bench.

¶ 6 Following retirement, plaintiff parlayed his successful NBA career and public stature into various other endeavors. Plaintiff, who believes he is one of the greatest jump shooters to ever play in the NBA, created an instructional video on jump shooting, maintains instructional websites, gives motivational speeches, writes on the NBA, and has been a television personality serving as color commentary announcer for Phoenix Suns television broadcasts since 2001.

Plaintiff has also provided guest analysis for broadcasts on various national NBA game telecasts.

¶ 7 On August 8, 2006, an Associated Press (AP) news story was released at 11:42 p.m. The story, titled "Ex-NBA Star Johnson Accused in Sex Rap," arose out of Ocala, Florida, and began with the lede paragraph "Former NBA All-Star Eddie Johnson has been arrested and charged with sexually assaulting an 8-year-old girl, authorities said Tuesday night." The ten paragraph article detailed the charges of sexual assault of a minor and residential burglary involved. The article also noted that county court records indicated that Eddie Johnson had numerous prior convictions. The tenth and final paragraph indicated that "Johnson, a 6-foot-2 guard from Auburn University, played in the NBA from 1977-1987 with the Atlanta Hawks, Cleveland Cavaliers and Seattle SuperSonics. He represented the Hawks in the 1980 and 1981 NBA All-Star games and scored 10,163 points in his career."

¶ 8 At the time this article came across the AP wire, the Tribune sports section contained a daily feature entitled "Press Box," whereby the editors on duty would review incoming articles and digest them into short news reports to summarize sports stories of note. On the night the article came through, Mike Kates, Tom Carkeek, and Mark Shapiro were the editors on duty for the Tribune print edition. Shapiro was responsible for reading stories that came over the news wire and determining whether a story was newsworthy and should be included in the next day's paper. The deadline for closing the print edition was 12:30 a.m.

¶ 9 One of Shapiro's colleagues saw the AP article and told Shapiro that there was a story about Eddie Johnson and that Johnson had played at the University of Illinois. Shapiro clicked on the link and read the first three or four paragraphs of the story. Shapiro determined that the story was newsworthy, performed a cut and paste of the portion of the article he felt was pertinent, in this case most of the first two paragraphs of the AP article, and transferred it into the press box file. Shapiro also drafted the caption "Former NBA Illini Star Accused of Sexual Assault" and added the word Illinois to the first paragraph of the article.

¶ 10 Shapiro admitted that this was a mistake. Shapiro also admitted that he did not read the entire AP article before putting it in the press box file and trusted the statement of his colleague that it involved plaintiff who was a standout at Illinois. At the time, Shapiro was unaware that there was more than one Eddie Johnson who was a former NBA player. Shapiro also stated that he did not always read the entire AP article, but based on his experience might read only enough to determine if he wanted to go with the story.

¶ 11 Daniel McGrath, associate managing editor for sports, the top supervisor for the sports department, stated that this was typically all that was necessary and relevant for the purposes of adding a story to the press box section. McGrath explained that AP stories typically follow the inverted pyramid or "AP style" where all essential information is contained within the top two or three paragraphs. Given the volume of material that the wire editor must review, McGrath stated that it is not always practical or possible to read the entire article.

¶ 12 On the morning of August 9, 2006, McGrath identified the error in the press box section by reading the paper and by an e-mail sent to him from a reader. McGrath believed that there was an error because the AP story was from Florida, the Eddie Johnson he knew from Illinois lived in Phoenix, and he knew there was an age discrepancy. McGrath immediately contacted his

sports editor and asked him to check if the story was up on the Internet site and, if so, to take it down and get a correction posted. McGrath then went to his office and investigated how the error could have been made.

¶ 13 McGrath took a call from plaintiff's marketing representative and then from plaintiff himself. McGrath informed them that he was aware that plaintiff was misidentified, the Tribune was investigating the issue, and they were determining the best steps to set the record straight and rectify the situation. McGrath apologized and informed plaintiff that they were heartsick over this very serious issue. In the next day's paper, the Tribune published a retraction and apology entitled "An Apology to Chicago's Eddie Johnson" written by McGrath.

¶ 14 The 13 paragraph article was prominently placed on page two of the sports section and summarized the error made by the Tribune and highlighted plaintiff's distinguished career and many charity and community accomplishments. McGrath started the article by noting that "[h]aste to make deadline is no excuse for putting incorrect information in a newspaper." He also included several facts that were "tipoffs" or "red flags" in the story that made the error all the more embarrassing. Specifically, McGrath noted that the AP article included an Ocala, Florida dateline and plaintiff lives in Phoenix, Arizona and works in television there. In addition, he stated that the nature of charges against Eddie Johnson should have been a tipoff because "[a]nyone who knows or has had even limited contact with Chicago's Eddie Johnson would find it unfathomable that he would be linked to such behavior."

¶ 15 Plaintiff testified that he was in Hawaii on vacation with his family when the article was published, but that he received numerous calls, e-mails, and complaints regarding the article. Plaintiff explained that he had long dealt with this issue as the other Eddie Johnson had repeated troubles with the law that were incorrectly connected to plaintiff. He explained that this was not

only a nuisance but a hindrance to his professional life, particularly his online and video training, speaking, and community efforts, and he filed the underlying action.

¶ 16 Following discovery, the trial court granted defendant's motion for summary judgment. The court stated that there was "absolutely no evidence before the Court that the Tribune acted with actual malice. *** Nor is there even remotely any evidence that anyone involved in publishing the press box article purposefully avoided learning the truth that story was about the troubled Johnson rather than Plaintiff." This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 Summary judgment may be granted when the pleadings, depositions, admissions and affidavits on file demonstrate no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2006). We review an order granting summary judgment *de novo*. *Chicago Hospital Risk Pooling Program v. Illinois State Medical Inter-Insurance Exchange*, 397 Ill. App. 3d 512, 523 (2010). We review the evidence in a light most favorable to the nonmovant, but we cannot ignore evidence unfavorable to the nonmovant and may sustain the trial court on any basis called for in the record. *Ruane v. Amore*, 287 Ill. App. 3d 465, 474 (1997). While "facts contained in an affidavit in support of a motion for summary judgment which are not contradicted by counteraffidavit are admitted and must be taken as true for purposes of the motion" a plaintiff's assertions that are contradicted and unsupported are not taken as true for the summary judgment motion. *Purtill v. Hess*, 111 Ill. 2d 229, 241 (1986); *Village of Arlington Heights v. Anderson*, 2011 IL App (1st) 110748, ¶ 14.

¶ 19 Likewise, the question whether the evidence of record in a case is sufficient to support a finding of actual malice in a defamation claim is a question of law and reviewed *de novo*. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 685 (1989). In the landmark case of

New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the United States Supreme Court announced the actual malice standard for defamatory damages sought by a public official, stating that the public official must prove "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280. This requirement was later extended to public figures such as plaintiff. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Harte-Hanks*, 491 U.S. at 666; *Piersall v. SportsVision of Chicago*, 230 Ill. App. 3d 503 (1992). A summary judgment motion based on a claim that there was no actual malice by defendant may succeed where the plaintiff fails to set forth " 'clear and convincing' evidence that there is a genuine issue of material fact as to whether the defendant made an alleged defamatory statement with actual malice." *Piersall*, 230 Ill. App. 3d at 507-08, quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

¶ 20 Actual malice is not demonstrated through a showing of ill will or malice or motivation simply for profits, but with a reckless disregard for the truth that includes a high degree of awareness of the probable falsity or that the defendant had serious doubts as to the truth of the statement published. *Harte-Hanks*, 491 U.S. at 667; see also *Kuwik v. Starmark Star Marketing and Administration, Inc.*, 156 Ill. 2d 16, 24-25 (1993). It also is not shown by a simple failure to investigate or follow what a reasonably prudent person would have published or investigated. *Costello v. Capital Cities Communications, Inc.*, 125 Ill. 2d 402, 421 (1988). An actual malice determination requires a determination that the defendant seriously doubted the truth of the assertions. *Id.*

¶ 21 There is no dispute that plaintiff is a public figure having played major collegiate and professional basketball and appearing regularly on television as a color analyst for NBA games both regionally and nationally. There also is no dispute that defendant published a newspaper

article including false information that was hurtful and damaging to plaintiff and as defendant repeatedly admits, unacceptable. Plaintiff contends that the court erred by granting summary judgment because a genuine issue of material fact existed as a reasonable jury could find defendant acted with actual malice and reckless disregard in publishing the libelous article.

¶ 22 However, plaintiff failed to present clear and convincing evidence that defendant's employees Kates, Carkeek, and Shapiro, seriously doubted the truth of the article before it was published. Shapiro and McGrath testified to the traditional AP style of articles reviewed and that the AP article in this case atypically contained the information about Eddie Johnson at the end of the article. It is certainly a reasonable argument by plaintiff that there was a failure to investigate the truth and a failure to follow proper industry standards in publishing the article with reference to plaintiff. However, all of the testimony indicated that this was simply an error by the editorial staff and that they believed that they were correct in tying the article to plaintiff.

¶ 23 Plaintiff did not present any evidence that supports his argument that this case is like that in *Harte-Hanks* or *Edwards v. Paddock Publications*, 327 Ill. App. 3d 553 (2001). These cases involved a deliberate effort to avoid the truth or disputed issues of fact and credibility, whereas here there was no subjective understanding or awareness that the editors had identified the wrong Eddie Johnson. Rather, there was only evidence that there was a failure to read the entire AP article and no evidence presented to doubt the editors' good faith belief that they had the story correct. Under *Costello*, failing to follow industry standards is insufficient basis for a defamation claim by a public figure and that is the best that plaintiff can do in this case.

¶ 24 Plaintiff and the Eddie Johnson in the AP article played professional basketball around the same time, played for some of the same teams and were both All-Star players. This is precisely why plaintiff admitted that he has been "haunted" by the other Eddie Johnson and how

so many others have attached plaintiff to the other Eddie Johnson's long list of issues and malfeasance. The Tribune's malfeasance and nonfeasance do not rise to the level of malice necessary to create a genuine issue of material fact that would warrant a reversal of a motion for summary judgment on a claim for defamatory damages by a public figure. Therefore, because the plaintiff failed to produce evidence of the Tribune's actual malice or a reckless disregard for the truth, we hold that the circuit court did not err when it granted the Tribune's motion for summary judgment.

¶ 25

III. CONCLUSION

¶ 26 For the reasons stated, we affirm the judgment of the circuit court.

¶ 27 Affirmed.