Affirm; Opinion Filed December 10, 2021

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01388-CV

TARSHA HARDY, Appellant
V.
COMMUNICATION WORKERS OF AMERICA, INC., COMMUNICATION WORKERS OF AMERICA LOCAL 6215 AFL-CIO, COMMUNICATION WORKERS OF AMERICA, AFL-CIO, AND BONNIE MATHIAS, Appellees

On Appeal from the 14th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-04027

MEMORANDUM OPINION

Before Justices Schenck, Pedersen, III, and Reichek
Opinion by Justice Pedersen, III

The trial court granted summary judgment in favor of Bonnie Mathias and the Communication Workers of America Local 6215 (CWA), and against Tarsha Hardy, and dismissed Hardy's claims for defamation. In two issues, Hardy contends the trial court: (1) erred in granting summary judgment in favor of Mathias and CWA, and (2) abused its discretion by admitting and considering Mathias's affidavit in support of summary judgment. We affirm the trial court's judgment.

In October 2013, CWA hired Hardy as a data specialist. Hardy worked for CWA in this capacity for approximately two months. Hardy took a medical leave on December 18, 2013, returning to work in February 2014. She worked for a day-and-a-half, and she was laid off on February 17, 2014.[1]

When interviewing for the data specialist position, Hardy informed CWA that she planned to run for the office of Dallas County District Clerk. She ran against five opponents in the March 4, 2014 Democratic Party primary election. None of the candidates received over fifty percent of the primary vote. Accordingly, Hardy, who received the most votes, and Felicia Pitre, the second-place finisher, faced a run-off election scheduled for May 27, 2014.

WFAA Channel 8, a local television station, contacted CWA and asked to interview a CWA spokesperson about Hardy. On April 22, 2014, Mathias, the vice president of CWA, made statements that were published by WFAA about Hardy's job responsibilities at CWA and about an incident that occurred while Hardy was employed by CWA. A month later, Pitre won the run-off election by a large margin.

On April 9, 2015, Hardy filed suit against Mathias, CWA, and others[2] alleging she was slandered by Mathias's statements and the statements caused her to lose the

[1] CWA later changed Hardy's employment status from "laid off" due to a reduction in force to "terminated" for making false statements and for unsatisfactory job performance.

[2] Hardy also sued Communication Workers of America, Inc. and Communication Workers of America, AFL-CIO. On July 10, 2015, Hardy filed a notice of nonsuit, with prejudice, of her claims against Communication Workers of America, Inc. and Communication Workers of America, AFL-CIO. The trial court signed an order of partial nonsuit on August 6, 2015.

run-off election. Mathias and CWA filed amended answers and affirmative defenses, including the affirmative defense that because Hardy had failed to comply with the Defamation Mitigation Act, her claims should be dismissed. *See* TEX. CIV. PRAC. & REM. CODE §§ 73.051–.062 (the DMA). They subsequently filed motions for summary judgment on the grounds that there was no evidence that (1) Hardy requested a correction, clarification, or retraction of Mathias's statements as required by section 73.055 of the DMA; (2) Mathias's statements were untrue at the time they were made; (3) Mathias acted with actual malice; and (4) Mathias's conduct in publishing the statements was a proximate cause of any injury or damage to Hardy. A hearing was scheduled on Mathias's and CWA's no-evidence motions for summary judgment; the hearing was specifically limited to consider whether Hardy failed to meet the requirements set forth in section 73.055. The trial court granted the no-evidence motions for summary judgment and dismissed Hardy's claims with prejudice. Hardy appealed.

After a de novo review of the statutory provisions as a whole, this Court concluded that the Legislature did not intend to subject a plaintiff's defamation claim to dismissal based on the plaintiff's failure to request a correction, clarification, or retraction. "[T]he DMA does not expressly state that dismissal of the plaintiff's claim is the consequence for failing to make the required request." *Hardy v. Commc'n Workers of Am. Local 6215 AFL-CIO*, 536 S.W.3d 38, 46 (Tex. App.—

Dallas 2017, pet. denied). We reversed and remanded the case for further proceedings.

Back in the trial court, Mathias and CWA conducted additional discovery and filed amended no-evidence and traditional motions for summary judgment. After the trial court granted Mathias's and CWA's motion,[3] Hardy filed a motion for new trial. The trial court denied Hardy's motion for new trial, and she filed this pro se appeal.

Discussion

Hardy raises two issues on appeal. First, she contends that because she raised genuine issues of material fact, the trial court erred by granting the no-evidence and traditional motions for summary judgment filed by CWA and Mathias. Second, she maintains the trial court erred by "permitting the use of Bonnie Mathias's sham testimony."

Defamatory Statements

Hardy identifies two statements that Mathias made to WFAA that she alleges were defamatory concerning her. The first statement pertains to a confrontation that allegedly occurred on October 23, 2013, between Hardy and another CWA member. WFAA reported, "Mathias said Hardy had only been on the job for a few weeks when she falsely accused a fellow employee of coming into her office and pulling

[3] The trial court signed the order submitted by Mathias and CWA with their amended traditional motion for summary judgment. The order states that "Defendant Communication Workers of America Local 6215's and Defendant Mathias's Motion for Summary Judgment is granted." However, the express language of the order does not state whether the order granted their no-evidence motion or their traditional motion. Nor does the order indicate the grounds for the trial court's summary judgment.

out a black military knife and making the comment, 'A lot of people would cut you over this position.'" Both parties agree that a confrontation occurred on October 23, 2013, between Hardy and Vernetta Broadnax, a CWA union member. Hardy claimed that Broadnax came into her office, pulled out a black serrated military knife, and told Hardy, in a threatening manner, that a lot of people would cut her for her job.

The second statement pertains to Hardy's job responsibilities at CWA. Mathias informed WFAA that Hardy had no direct reports, was not a member of CWA management, and did not have any responsibility over funding.[4] Both parties agree that CWA hired Hardy as a data specialist to assist the CWA Treasurer with accounting duties. Hardy does not dispute Mathias's statement that Hardy did not have any direct reports and that Hardy was not a member of CWA management. Hardy only challenges Mathias's statement that Hardy did not have responsibility over CWA's funding.

Sham Affidavit

Because the outcome of Hardy's second issue affects our resolution of her first issue, we begin by considering her challenge to Mathias's affidavit. We review a trial court's decision to admit or exclude summary judgment evidence under an abuse of discretion standard. *See Starwood Mgmt., LLC v. Swaim*, 530 S.W.3d 673, 678 (Tex. 2017) ("We review the rendition of summary judgments de novo. But we

[4] A mailer distributed by Hardy's campaign touted that she was managing a multi-million dollar budget. Hardy later clarified—after repeated questioning—that she "helped" manage a multi-million dollar budget.

review a trial court's decision to exclude evidence for an abuse of discretion.") (citations omitted); *Nelson v. Pagan*, 377 S.W.3d 824, 830 (Tex. App.—Dallas 2012, no pet.). We will affirm the trial court ruling unless the court acted unreasonably or in an arbitrary manner, without regard for any guiding rules or principles. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 211 (Tex. 2002).

Summary judgment evidence filed by CWA and Mathias in support of their motions included, among other evidence, an affidavit from Mathias. In her brief on appeal, Hardy refers to Mathias's affidavit as a "sham affidavit" and urges that it was not admissible summary judgment evidence. However, the record does not show that Hardy: (1) made the trial court aware of her objection to the Mathias affidavit, or (2) asked the trial court to exclude the affidavit as improper summary judgment evidence. *See* TEX. R. APP. P. 33.1(a)(1). Hardy did not object to Mathias's affidavit in her response to the motions for summary judgment, and she did not object to the affidavit during the trial court's hearing to consider pretrial motions, including the motions for summary judgment. *Id*. Finally, the record does not show that the trial court ruled, or refused to rule, on an objection to Mathias's affidavit. *See* TEX. R. APP. P. 33.1(a)(2). Accordingly, Hardy's second issue—that the trial court erred by permitting the use of Mathias's affidavit—is not preserved for our review.

Even if this issue had been preserved, Hardy's complaint is without merit. Hardy complains that Mathias's 2016 and 2019 affidavits contained "significantly different statements." Mathias's 2016 affidavit was filed in support of the 2016

summary judgment motions filed by CWA and Mathias, arguing that section 73.055 of the DMA barred Hardy's cause of action for defamation. Mathias's 2019 affidavit was filed in support of the 2019 amended motions for summary judgment filed by CWA and Mathias, addressing the factual accuracy of the alleged defamatory statements themselves. The 2019 affidavit does not mirror the 2016 affidavit—it is organized differently, it is longer, and it contains more factual detail. However, a side-by-side comparison of Mathias's statements in the two affidavits does not reveal material contradictions. Nor does Hardy direct us to the specific statements that she asserts are contradictory. Instead, she complains that Mathias fails to explain: (1) why she created a new affidavit, (2) why the new affidavit did not include every statement from the 2016 affidavit, and (3) why certain statements were worded differently.

Because the affidavits are not identical, Hardy cites *Lujan v. Navistar, Inc.*, 555 S.W.3d 79 (Tex. 2018), in support of her argument that Mathias's 2019 affidavit is a "sham affidavit" that should have been disregarded by the trial court. In *Lujan*, the Texas Supreme Court considered the federal sham affidavit rule[5] which provides that a "nonmovant cannot defeat a motion for summary judgment by submitting an affidavit which directly contradicts, without explanation, his previous testimony."

[5] The sham affidavit rule originated in the federal courts. *See Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999). Federal appellate courts "have held with virtual unanimity that a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) without explaining the contradiction or attempting to resolve the disparity." *Id.*

Id. at 85 (quoting *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223, 228 (5th Cir. 1984)). The court noted that most Texas appellate courts "have followed the federal courts by recognizing the sham affidavit rule as a valid application of a trial court's authority to distinguish genuine fact issues from non-genuine fact issues under Rule 166a." *Id*. at 86 (citations omitted). However, the sham affidavit rule does not apply here. First, as noted above, the 2019 affidavit does not contradict the 2016 affidavit. Second, we are not faced with a contradictory affidavit by the nonmovant, seeking to raise a fact issue in order to avoid summary judgment. Instead, Hardy attempts to apply the sham affidavit rule to an affidavit filed by the movant in support of summary judgment. She also confusingly argues that Mathias "cannot excuse her conduct simply by claiming that her own sworn contradictory statements raise a fact issue." Mathias, in fact, argues the opposite—that there is no genuine issue of material fact.

Summary Judgment

Turning to Hardy's first issue, we consider whether the trial court erred in granting the motion for summary judgment filed by Mathias and CWA. We review a trial court's ruling on a motion for summary judgment de novo. *See Tarr v. Timberwood Park Owners Ass'n*, 556 S.W.3d 274, 278 (Tex. 2018). When reviewing both traditional and no-evidence summary judgments, an appellate court considers the evidence in the light most favorable to the nonmovant. *See Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009); *City of Keller v. Wilson*, 168 S.W.3d

802, 824 (Tex. 2005). When a party has moved for summary judgment on both no-evidence and traditional grounds, an appellate court generally addresses the no-evidence motion first. *See Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). When a trial court's order does not specify the grounds for its summary judgment, an appellate court must affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious. *See Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003).

A no-evidence motion for summary judgment is essentially a motion for a pretrial directed verdict. *See Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 581 (Tex. 2006). The motion must specifically state the elements for which no evidence exists. TEX. R. CIV. P. 166a(i). The trial court must grant the motion unless the nonmovant produces summary judgment evidence that raises a genuine issue of material fact as to the elements specified in the motion. *See Timpte Indus*., 286 S.W.3d at 310.

In a traditional motion for summary judgment, the movant has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *see Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511 (Tex. 2014). To be entitled to traditional summary judgment, a defendant must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish

each element of an affirmative defense. *See Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010).

A statement is defamatory if it "tends to injure a living 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 . . . ." CIV. PRAC. & REM. § 73.001; *see Main v. Royall*, 348 S.W.3d 381, 389 (Tex. App.—Dallas 2011, no pet.). To maintain a defamation action, a plaintiff must prove that the defendant (1) published a statement of fact, (2) that was defamatory concerning the plaintiff, (3) while acting with actual malice regarding the truth of the statement if the plaintiff was a public official or public figure, or while acting with negligence regarding the truth of the statement if the plaintiff was a private individual. *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015); *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998). To be actionable, a statement must assert an objectively verifiable fact. *See Bentley v. Bunton*, 94 S.W.3d 561, 579–80 (Tex. 2002).

It is undisputed that Hardy, as a candidate for public office, is a public figure. *See Freedom Newspapers of Texas v. Cantu*, 168 S.W.3d 847, 853 (Tex. 2005) (candidate for office of county sheriff was public figure); *Dallas Morning News, Inc. v. Mapp*, No. 05-14-00848-CV, 2015 WL 3932868, at *4 (Tex. App.—Dallas June 26, 2015, no pet.) (mem. op.) (candidate for public office is public official for defamation standards). Public officials and public figures cannot recover for

defamatory statements made about them absent proof of actual malice. *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 161 (Tex. 2004).

To establish actual malice, a plaintiff must prove that the defendant made the statement "with knowledge that it was false or with reckless disregard of whether it was true or not." *Huckabee v. Time Warner Entm't Co*., 19 S.W.3d 413, 420 (Tex. 2000) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)). "Knowledge of falsehood is a relatively clear standard; reckless disregard is much less so." *Bentley*, 94 S.W.3d at 591. Reckless disregard is a subjective standard that focuses on the state of mind of the defendant. *Isaacks*, 146 S.W.3d at 162. Mere negligence is not enough. *Id*. Rather, the plaintiff must prove "the defendant in fact entertained serious doubts as to the truth of his publication," or had a "high degree of awareness of . . . [the] probable falsity" of his statements. *Bentley*, 94 S.W.3d at 591 (quoting *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989)).

CWA and Mathias moved for summary judgment asserting that: (1) the statements made by Mathias to the WFAA reporter were true at the time they were published; (2) Mathias or CWA acted without actual malice in making the statements about Hardy; and (3) the statements were not a proximate cause of any injury or damage to Hardy. We resolve this case solely on the issue of whether CWA and Mathias negated actual malice as a matter of law. *See Isaacks*, 146 S.W.3d at 161 (public figure cannot recover absent proof of actual malice).

The Knife Incident

Hardy argues that Mathias acted with actual malice in telling WFAA that Hardy lied about the knife incident. A defendant can negate actual malice as a matter of law by presenting evidence that she did not publish the statement with knowledge of its falsity or reckless disregard for its truth. *Huckabee*, 19 S.W.3d at 420. Here, there is no evidence that Mathias knew her statements were false or that she acted in reckless disregard for the truth when she made the statements to the WFAA reporter. CWA and Mathias presented summary judgment evidence that included an affidavit from Hardy's direct supervisor, Nancy Lee Brown, the current President and past Treasurer of CWA. Their evidence also included an affidavit from Bonnie Mathias, Vice President of CWA. These affidavits do not support Hardy's assertions and instead, support the conclusion that Mathias believed her statement to be true.

In her affidavit, Brown described CWA management's investigation of the confrontation between Hardy and Broadnax. Management reviewed a copy of Hardy's police report. Management also interviewed Hardy and Broadnax. Brown stated that Broadnax, a 20-year union member with no disciplinary issues, admitted saying the words reported by Hardy; however, Broadnax explained that she meant it as a joke. She also admitted having a box cutter in her hand (not a military knife) that she had been using to prepare for a victory party for an employee giving campaign. According to Brown's affidavit, CWA President Bret St. Clair, Brown, and other members of management concluded that Broadnax's version of the events

was the more reasonable—that Broadnax was holding a box cutter and had not pulled a military knife on Hardy. Brown stated that the facts in her affidavit were within her personal knowledge and were true.

In her affidavit, Mathias explained that she was a member of the CWA executive committee. Mathias said that after CWA's executive committee interviewed both Hardy and Broadnax about the knife incident, and reviewed the police report that Hardy filed, the executive committee concluded that Hardy had exaggerated her claims. She further stated that they concluded there was no black serrated army knife. Instead, they concluded that Broadnax was holding a box cutter in a non-threatening manner. To negate actual malice, an affidavit from an interested witness "must establish the defendant's belief in the challenged statements' truth and provide a plausible basis for this belief." *Id*. at 424. We conclude Mathias's affidavit was sufficient to: (1) show that she believed that the challenged statement was true and (2) provide a plausible basis for this belief.

Once a defendant has produced evidence negating actual malice as a matter of law, the burden shifts to the plaintiff to present controverting proof raising a genuine issue of material fact. *See id*. at 420 (citing TEX. R. CIV. P. 166a(c)). In support of her response to the motions for summary judgment filed by CWA and Mathias, Hardy offered excerpts from Mathias's deposition to show that Mathias did not have firsthand knowledge of the knife incident. Hardy reasoned that without such direct knowledge, Mathias acted with reckless disregard in telling the reporter that

Hardy made false accusations against Broadnax. Hardy claimed that Mathias obtained her knowledge of the incident from Brown. She further claimed that Brown had stated on several occasions that the recounting of the incident by Hardy and Broadnax was "essentially the same." However, the deposition excerpts, and Brown's affidavit, do not support Hardy's assertions. In her deposition, Mathias explained how she found out about the knife incident—who told her, what they told her, and why she believed that Hardy had lied about the knife. When Hardy's counsel repeatedly questioned Mathias about the truth of her statements to the WFAA reporter, Mathias stated she wanted to tell the truth and was just stating facts as to the knife incident. Also, Brown's affidavit clearly establishes that the stories told by Broadnax and Hardy were not "essentially the same" with respect to the alleged weapon held by Broadnax and whether a threat was made to Hardy.

Hardy also offered her own affidavit in which she complained that Mathias gave a very biased and untruthful interview to WFAA. In the affidavit, Hardy stated that none of Mathias's statements about her were true; however, Hardy did not state that Mathias made those statements with actual malice. Hardy attached other evidence to her response but the trial court refused to consider it.[6] Hardy did not

[6] Hardy urged the trial court to consider other evidence, including: (1) an incomplete and edited transcript from a telephone conversation Hardy allegedly had with Brett St. Clair, CWA's President, (2) the transcript from a meeting of CWA officers to consider two grievances filed by Hardy for hostile work environment and wrongful termination, (3) the transcript from a meeting of CWA officers and Hardy to discuss her removal of CWA documentation from the CWA premises, (4) the transcript of an arbitration proceeding to consider Hardy's termination, and (5) a campaign flyer comparing the qualifications of Pitre and Hardy.

raise an issue with respect to the court's ruling on this evidence, and we do not consider it on appeal.

The record establishes that Hardy failed to come forward with any evidence that Mathias had any doubt as to the truth of her statement about the knife incident, or that Mathias had any awareness that her statement might be false. *See Bentley*, 94 S.W.3d at 591. Thus, Hardy failed to raise an issue of material fact that Mathias acted with actual malice in making the statement to the WFAA reporter about the knife incident.

Responsibility for CWA's Funding

Hardy also asserts that Mathias acted with actual malice in telling the WFAA reporter that she was not responsible for CWA's funding. Hardy argues that Mathias knew her statement was false because Hardy processed Mathias's paychecks and expense vouchers. She also claims that Mathias knew her statement was false because Mathias was aware of Hardy's job description as a data base specialist.

Mathias and CWA presented summary judgment evidence that CWA funding was the exclusive domain of the officers of CWA. In her affidavit, Mathias asserted that she became aware that Hardy was inflating the importance of her position with CWA, sending out campaign materials stating, among other things, that she managed CWA's multi-million-dollar budget. Mathias stated that Hardy's campaign information was not correct. She further stated that as a member of the CWA executive committee, she was aware that CWA's budget was managed by the

Treasurer acting in concert with the President; it was not the responsibility of a data specialist.

In her affidavit, Brown, Hardy's supervisor and CWA's Treasurer at the time, stated that she hired Hardy to assist her with accounting duties. She stated that the determination of funding issues for CWA was the exclusive domain of the CWA officers. She stated that no non-officer employee had the discretion to unilaterally commit CWA funds to any project without management's approval. Brown further affirmed that Hardy never participated in CWA funding decisions.

The parties do not dispute that Hardy was hired as a data specialist. They also agree that her job duties included using "Quick Books," processing payroll, processing state and federal taxes, managing accounts receivable and payable, and processing monthly financial statements. Although Hardy continues to argue that her data specialist position—involving the processing of payments and reports as directed by management—somehow equates to having responsibility over funding, she did not come forward with any evidence to rebut the truth of the statement that she did not have *responsibility* for CWA funding.

The record establishes that Hardy failed to come forward with any evidence that Mathias had any doubt as to the truth of her statement that Hardy was not responsible for CWA funding or that Mathias had any awareness that her statement might be false. *See Bentley*, 94 S.W.3d at 591. Thus, Hardy failed to raise an issue

of material fact that Mathias acted with actual malice in telling the WFAA reporter that Hardy was not responsible for CWA's funding.

Reviewing the record as a whole, we conclude there is no evidence that Mathias acted with actual malice in making the two complained-of statements to the WFAA reporter. *See Isaacks*, 146 S.W.3d at 161. Because Hardy failed to produce summary judgment evidence that raises a genuine issue of material fact as to actual malice, the trial court did not err in granting Mathias's and CWA's motion for summary judgment. *See Timpte Indus.*, 286 S.W.3d at 310. We overrule Hardy's first issue.

Conclusion

Having resolved both of Hardy's issues against her, we affirm the trial court's judgment.

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/Bill Pedersen, III//
BILL PEDERSEN, III
JUSTICE

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TARSHA HARDY, Appellant No. 05-19-01388-CV V. COMMUNICATION WORKERS OF AMERICA LOCAL 6215 AFL-CIO and BONNIE MATHIAS, Appellees	On Appeal from the 14th Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-15-04027. Opinion delivered by Justice Pedersen, III. Justices Schenck and Reichek participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees COMMUNICATION WORKERS OF AMERICA LOCAL 6215 AFL-CIO and BONNIE MATHIAS recover their costs of this appeal from appellant TARSHA HARDY.

Judgment entered this 10th day of December, 2021.