UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF
CORNELIA G. KENNEDY
CIRCUIT JUDGE
U.S. COURT HOUSE
DETROIT, MICHIGAN 48226

October 21, 1981

John P. Hehman, Clerk
United States Court of Appeals
for the Sixth Circuit
Cincinnati, OH 45202

Re: No. 80-1015, Cole v.
Dun & Bradstreet Publications
10/12/81

Dear Mr. Hehman:

Please sign and enter the enclosed order in the above case.

Judges Merritt and Unthank have concurred.

Sincerely,

Cornelia G. Kennedy

Enc.

cc: Judge Merritt
Judge Unthank

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PANEL REPORT

DATE: Monday, October 12, 1981, #1, 1:30 p.m.

PANEL: Merritt, Kennedy, and Unthank

NO: 80-1015, Dollie Cole v. Dun and Bradstreet Publications
E.D. Michigan - Boyle, J.

Attached for your review is an order in the above-entitled case, which is being circulated in lieu of a panel report. It is called to the particular attention of Judges Merritt and Unthank.

Cornelia G. Kennedy

Enc.

cc: All Judges

October 16, 1981

Dear Judge Kennedy:

I concur.

G. Wix Unthank

NO. 80-1015

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOLLIE COLE,

Plaintiff-Appellant,

v.

O R D E R

DUN & BRADSTREET PUBLICATIONS CORPORATION,

Defendant-Appellee.

_____/

Before: MERRITT and KENNEDY, Circuit Judges; and UNTHANK, District Judge.*

In this case we are asked to hold that a reference to appellant Dollie Cole in a 1976 article published in Dun's Review entitled appellant to relief under any of several theories of law. The District Court for the Eastern District of Michigan directed a verdict for appellee Dun & Bradstreet, the publisher of Dun's Review. We affirm.

Dun's Review is a business magazine distributed primarily to the top executives of various corporations. The October 1976 issue of Dun's Review carried an article on the Spalding Corporation. The article mentioned that in the coming year Spalding would be carrying a line of tennis wear designed by "Doli Cole (ex-wife of former General Motors President Edward Cole)." In fact, the "Doli Cole" who designed dresses for Spalding was not the "Dollie Cole" who is the appellant in this case and who also

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* The Honorable G. Wix Unthank, United States District Court, Eastern District of Kentucky, sitting by designation.

designs clothes. The Doli Cole who worked for Spalding was never married to Ed Cole. At all relevant times, appellant Dollie Cole was married to Ed Cole. Thus, Dun's Review erroneously described "Doli Cole" as Ed Cole's ex-wife. A retraction was published several months later.

Based on these facts appellant raised the following arguments in the District Court: that referring to her as Ed Cole's ex-wife was libelous per se, in that "divorce" carries with it an imputation of unchastity; that even if this was not libelous per se, it was still libelous when read in conjunction with a pair of nationally syndicated gossip columns that appeared in a major Detroit newspaper in 1974, two years earlier; that appellee either knowingly or recklessly published the mis-statement, with knowledge of appellant's weakened medical condition, and thus was guilty of either intentional or negligent infliction of emotional distress; and that the mention of her name in Dun's Review was an invasion of her right to privacy, in that appellee thereby appropriated her name to its own advantage or cast her in a false light.

At the close of appellant's proofs appellee moved for a directed verdict as to all counts. The District Judge carefully reviewed the evidence and the relevant law and granted the motion. Appellant argues that it was error to take any of these five counts from the jury.

It is for the court to decide whether a communication is reasonably capable of bearing the defamatory meaning attributed to

it. Michigan United Conservation Clubs v. CBS News, 485 F. Supp. 893, 902 (E.D. Mich. 1980). The District Judge held that in today's society, with divorce as prevalent as it is, the phrase "ex-wife" does not impute unchastity. No Michigan cases suggest that it is libel per se to refer to a woman as an "ex-wife." Courts in other states held as recently as 1958 that to merely imply that a marriage was in difficulty was libelous per se as to both husband and wife. See Gersten v. Newark Morning Ledger Co., 145 A.2d 56 (N.J. 1958); Gariepy v. Pearson, 104 F. Supp. 681 (D. D.C. 1952); Lyman v. New England Pub. Co., 190 N.E. 542, 544 (Mass. 1934); O'Neill v. Star, 121 N.Y. App. 849 (1909). Even these cases do not hold that to suggest marital difficulty is to impute unchastity, the ground relied on by appellant here; they hold that the suggestion of marital difficulty subjects the spouses to public hatred and ridicule.

However, the only court to address this question in recent years took the opposite position. In Andreason v. Guard Pub. Co., 489 P.2d 944 (Or. 1971), the court held that a motion for nonsuit should have been granted where plaintiff based a libel action on a false statement of impending divorce. The court distinguished the cases cited above as dependent on the mores in force at the time they were decided. To the extent we are able to divine what the Michigan courts would do, we think Michigan would follow the lead of the Oregon Supreme Court in Andreason. The District Judge correctly held that in this community appellee's reference to Ms. Cole as Edward Cole's ex-wife could not reasonably impute unchastity to her.

Since the phrase "ex-wife" is not actionable in and of itself, appellant cannot prevail in her libel action unless the words became actionable when considered in light of the surrounding circumstances. Appellant introduced into evidence two 1974 gossip columns in which it was rumored that a "Mrs. S" and a "Mr. T" were having an affair. Appellant also offered evidence that she was understood to be "Mrs. S." She argues that this evidence, coupled with the statement that she was divorced in 1976, would permit a jury to find that she was accused of unchastity by Dun's Review in 1976.

There can be no libel without publication, and publication requires not only that plaintiff prove that the defamation was brought to the attention of a third party, but that the party understood its defamatory significance. Prosser, Torts 747 (4th ed. 1971). The District Court noted that appellant did not produce any evidence that some person read both the 1974 gossip columns and the 1976 Dun's Review article, items that were addressed to vastly different audiences. Assuming that there was someone with knowledge of both articles, appellant did not introduce any evidence that this reader understood appellant to be the "Mrs. S' referred to in the 1974 articles, or understood the defamatory meaning of calling her an ex-wife in 1976. Thus, the District Court held that even assuming it could be libelous to call appellant an ex-wife after it was reported that she was having an affair, appellant here failed to offer proof from which one could find publication.

On appeal appellant claims only that her husband was aware of and understood both articles. However, as the District Judge noted, Edward Cole's only response to the 1976 article was "Now you are my ex-wife." The District Judge found that no rational jury could infer from this that appellant's husband thought appellant was being accused of unchastity, and we agree.

The tort of intentional infliction of mental distress will provide recovery for conduct "exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind." Prosser, supra, 56. The District Judge directed a verdict against appellant's claim that appellee intentionally caused her emotional distress because appellee's failure to inquire whether appellant was in fact divorced could not be considered this outrageous and the jury could not find that it was calculated to cause appellant mental distress. There was no evidence from which the jury could find Dun's Review was aware of the early articles or that they referred to appellant. It is clear that appellee's conduct was not outrageous of itself. Appellant's only evidence on the question of intent was that appellee was aware in 1972 that appellant had been warned by her doctor to "slow down." There was no evidence that appellee knew appellant might be especially sensitive to being labelled an ex-wife. The jury could not rationally infer this. Thus, the District Court correctly found that there was no proof of intent to harm appellant.

The cause of action for negligent infliction of emotional distress was also based on appellee's failure to inquire whether appellant was still married to Ed Cole. Michigan cases that have allowed a recovery for negligent infliction of emotional distress have all involved some major shock or injury. See, e.g., Daley v. LaCroix, 384 Mich. 4 (1970); Toms v. McConnell, 45 Mich. App. 647 (1973). There is nothing of that magnitude here. Thus, assuming a mere false statement could support such a cause of action in Michigan, recovery is not warranted on these facts.

Appellant also claimed that appellee used her name for its benefit, in that the article increased appellee's profits. The District Court dismissed this count because appellant adduced no proof that her name had any commercial value in 1976, or that appellee obtained any economic advantage by using her name. Under Michigan law, to be actionable an invasion of privacy must be unreasonable and serious, and supersensitiveness is not protected. Reed v. Ponton, 15 Mich. App. 423, 426 (1968). Appellee's identifying appellant as Ed Cole's ex-wife does not rise to this level. Nor is there any appropriation unless the name is used for commercial advantage; the incidental mention of a person's name in a publication is not an appropriation. Prosser, supra, 806. The use of appellant's name in this case falls into the latter category, not the former.

Appellant also claims that the article cast her in a false light. Professor Prosser indicates that actions for false light

invasion of privacy overlap to a great extent, but are somewhat broader than, actions for defamation; the hypersensitive person still is not protected. Prosser, supra, 813. Michigan law is in agreement. Beaumont v. Brown, 65 Mich. App. 465 (1975) (dictum), rev'd on other grounds, 401 Mich. 80 (1977). Thus, for the reasons stated above, appellant cannot recover on this count.

Accordingly, the judgment of the District Court is affirmed.

ENTERED BY ORDER OF THE COURT

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Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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