IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2004 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 31542

DANNY L. BENSON,
Plaintiff Below, Appellant

v.

AJR, INC., A WEST VIRGINIA CORPORATION,
AND JOHN M. RHODES,
Defendants Below, Appellees

Appeal from the Circuit Court of Wood County
The Honorable Robert A. Waters, Judge
Civil Action No. 99-C-105

AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Submitted: February 25, 2004
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Walt Auvil
Employment Law Center
Parkersburg, West Virginia
Attorney for the Appellant

Niall A.Paul
Eric E. Kinder
Spilman Thomas & Battle, PLLC
Charleston, West Virginia
Attorneys for the Appellees

The Opinion of the Court was delivered PER CURIAM.
CHIEF JUSTICE MAYNARD concurs in part and dissents in part and reserves the right to file a separate opinion.
JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 4, *Painter v. Peavy*, 192 W.Va.189, 451 S.E.2d 755 (1994).

2. "A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment." Syl. Pt. 6, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co.*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

3. "An 'invasion of privacy' includes (1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public." Syl. Pt. 8, *Crump v. Beckley Newspapers, Inc.*, 173 W.Va. 699, 320 S.E.2d 70 (1983).

Per Curiam:

Danny L. Benson appeals from the July 23, 2002, order of the Circuit Court of Wood County granting summary judgment to the Appellees, AJR, Inc. ("AJR") and John M. Rhodes, in connection with the breach of employment contract and invasion of privacy claims Appellant asserted against Appellees. Upon our full review of this matter, we determine that there is a genuine issue of material fact concerning the basis for Mr. Rhodes' decision to terminate Mr. Benson's employment with AJR. Accordingly, the grant of summary judgment was improper and the decision of the lower court must be reversed to permit this factual issue to be resolved by a jury. With regard to the lower court's decision to grant summary judgment on Appellant's false light invasion of privacy claim, we find no error and accordingly, affirm.

I. Factual and Procedural Background

AJR is a small heavy manufacturing business engaged in the manufacture and welding of truck beds. At the time when Appellant was first employed by AJR as a general welder in 1990, the company was owned by three individuals: Jackie L. Benson; Robert W. Benson; and Patricia Benson. Appellant is the son of Jackie Benson. On May 1, 1997, Appellant was promoted to supervisor and was assigned primary responsibility over three aspects of the company's operations, one of which was safety. In his supervisory position,

Appellant was charged with the responsibility for directing and leading the company's safety programs and ensuring that AJR's safety rules were both observed and enforced.

During the summer of 1997, the three AJR shareholders decided to sell the company to an employee, Appellee John M. Rhodes.[1] As part of the sales transaction, Mr. Rhodes agreed to enter into an employment agreement with Appellant whereby Mr. Benson would be guaranteed employment for a period of eight years beginning on August 29, 1997.[2] While AJR had the right to terminate Appellant with only one day's written notice under this agreement, it was required to continue paying Mr. Benson his salary for the balance of the eight-year term of employment in the absence of three specified conditions. Those conditions were: (a) dishonesty; (b) conviction of a felony; and (c) voluntary termination of the agreement by Appellant.[3]

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[1]He became the sole shareholder on August 29, 1997.

[2]In explanation of why this agreement was entered into, the document states that "it is in the best interests of the Company that key management employees, including the Employee [Mr. Benson], continue to be employed by the Company upon" the sale of AJR.

[3]This Court *sua sponte* recognized an issue regarding the contract's interpretation based on the words chosen to draft the agreement. Because the contract was written in terms of permitting AJR to terminate Appellant "without cause," and because the subsequent salary payment obligations arise in reference to a termination "without cause," we initially questioned whether the payment obligations would be invoked in a case, such as this, where the employee was undeniably dismissed for cause. We determine, however, that the contract should be read in the fashion undertaken by the parties and the court below predominantly because the three contractual conditions that excuse AJR's requirement to pay

(continued...)

Within less than a month after the execution of the employment agreement, Appellant acknowledged in writing his receipt of an employee manual which specified certain acts that were grounds for termination. Those grounds included the sale, possession, or use of controlled substances while on the job, during working hours, or while on company business. At the end of September 1997, concurrent with his receipt of the employee manual, Appellant signed a consent form permitting his employer to conduct random controlled substance tests.

On March 2, 1998, a drug test was administered to the employees of AJR. The results of the drug testing revealed that Appellant had more than three times the limit utilized by the United States Department of Transportation ("DOT")[4] to establish drug use and impairment. Between the time when the drug test was administered and the results were made available, Mr. Rhodes conducted meetings with various AJR personnel during which he inquired of those in attendance whether anyone was aware of an employee who was using

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[3](...continued)
Appellant his salary (two of which are clearly "for cause" type of dismissals) would be rendered meaningless if the payment provisions could only be invoked in a non-cause dismissal situation. *See Bischoff v. Francesa*, 133 W.Va. 474, 498, 56 S.E.2d 865, 878 (1949) (recognizing as "elementary [the] principal [sic] that, in interpreting contracts, or any written instruments, an attempt should be made to give force and meaning to all of the language employed therein").

[4]According to the test results, Appellant had 1088 nanograms of cocaine metabolite benzoylecgonine per mililiter of urine in his system. Under DOT rules, 300 nanograms is the cut-off figure for establishing a positive test for metabolized cocaine.

illegal drugs or who was arriving at work with illegal drugs or alcohol in their system. Appellant attended one of those meetings and admits that he did not respond to this question despite personal knowledge[5] that his drug test would come back positive.[6]

Along with eleven other employees who also tested positive for drug use, Appellant was terminated from the employ of AJR on March 6, 1998. AJR prepared two different termination forms in connection with Appellant's dismissal from the company. The first of the two forms indicated that Mr. Benson had resigned from his employment.[7] The second of the two termination forms lists a different reason for termination – "controlled substance testing" and "tested positive for cocaine."[8]

On March 4, 1999, Appellant filed a complaint in the circuit court in which he alleged two causes of action: breach of contract and false light invasion of privacy. After hearing argument on cross motions for summary judgment, the lower court ruled in favor of

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[5]Mr. Benson testified at his deposition: "I kn[ew] I had something in my system."

[6]The drug test was administered on a Monday morning and Appellant contends that he had used cocaine for the first time on the previous Saturday.

[7]While Appellant was given the opportunity to resign from AJR, he did not choose to resign his employment.

[8]Appellant suggests that the second termination form was backdated to March 6, 1998, the same date on which the original termination form was prepared.

Appellees by order entered on July 23, 2002. It is from this order awarding summary judgment to AJR and Mr. Rhodes that Appellant seeks relief.

II. Standard of Review

It is well-established that our review involving orders granting summary judgment is *de novo*. *See* Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." *Id.* at 190, 451 S.E.2d at 756, syl. pt. 4. As we recognized in syllabus point six of *Aetna Casualty & Surety Co. v. Federal Insurance Co.*, 148 W.Va. 160, 133 S.E.2d 770 (1963), "[a] party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment." With these standards in mind, we proceed to determine whether the lower court was in error in granting summary judgment to Appellees AJR and Mr. Rhodes.

III. Discussion

A. Breach of Employment Contract

At the center of this dispute is whether AJR is required to comply with the salary payment obligation contained in the employment agreement. Under the terms of the agreement, in the event AJR decided to terminate Mr. Benson, the company was required to pay Appellant the salary that was in effect on August 29, 1997, absent a dismissal that was based on dishonesty, conviction of a felony, or if Mr. Benson voluntarily terminated the employment agreement. Appellant contends that the lower court erred in its determination that the basis for AJR's termination of Mr. Benson was dishonesty. Arguing that the circuit court wrongly adopted an overly broad definition of dishonesty, Appellant maintains that drug use and dishonesty are not synonymous and that he was not terminated on grounds of dishonesty.

To resolve the critical question of whether Appellant's positive drug test fell within the parameters of "dishonest" conduct, the trial court defined the term "dishonesty" by referring to entries in Webster's Dictionary and Black's Law Dictionary.[9] Relying on these generalized definitions, the lower court concluded that Appellant's "actions in failing

[9]The trial court cited a definition in Webster's, which described dishonesty as "a lack of honesty or integrity; a disposition to defraud or deceive." *Webster's New Collegiate Dictionary* 363 (9th ed. 1989). As defined by the legal dictionary, dishonesty included a "[d]isposition to lie, cheat, deceive, or defraud; untrustworthiness; lack of integrity." *Black's Law Dictionary* 324 (6th ed., West 1991).

a drug test and arriving at work with drugs in his system demonstrates a lack of integrity, probity, or adherence to a code of moral values." Rather than limiting its analysis to just the definition of "dishonesty," however, the circuit court included a listing of various definitions of "integrity" and found that "[a]ctions which lack integrity are, by definition, dishonest." After weighing these two definitions in essentially *pari materia*, the trial court ruled that "[p]laintiff's positive drug test, in light of all the facts and circumstances of the case, demonstrates dishonesty and a lack of integrity."[10]

In marked contrast to the trial court's willingness to define the term "dishonesty" within the meaning of the employment contract at issue, we recognize the futility of attempting to fashion a "one size fits all" definition for such term. Dishonesty, like any term that has significance in a given contract, must be defined based on the subject matter of the contract and the intent of the document's drafters. *See Oresta v. Romano Bros.*, 137 W.Va. 633, 644, 73 S.E.2d 622, 628 (1952) (recognizing "general rule" that "words in a contract will be given their usual and primary meaning at the time of the execution of the contract") (citing 12 Am. Jur., *Contracts* § 236). We note, however, that it has been

[10]One of the circumstances relied upon by the trial court was Mr. Benson's admission that he had been dishonest in failing to answer Mr. Rhodes' question regarding knowledge of drug use in the work place when he "knew to an absolute certainty that he had used illegal drugs and had them in his system when asked the question." Additional evidence cited by the trial court to support its conclusion regarding Appellant's dishonesty was the fact that"[p]laintiff admitted that he used cocaine and does not challenge the drug test."

observed that "[d]ishonesty, unlike embezzlement or larceny, is not a term of art." *Gitelson v. Du Pont,* 215 N.E.2d 336, 338-39 (N.Y. App. 1966). More often than not, the issue of whether conduct qualifies as dishonest is determined to be a question best resolved by a jury. *See Wilson v. Neuhoff Bros. Packers,* 442 S.W.2d 470, 474 (Tex. Civ. App. 1969) (discussing *Fidelity & Dep. Co. v. Bates,* 76 F.2d 160, 167 (8th Cir. 1935); *accord Jacobs & Co. v. Fidelity & Dep. Co.,* 202 F.2d 794, 798 (7th Cir. 1953).

In this case, the record evidences Mr. Benson's admission that he was dishonest in connection with his failure to truthfully answer the question posed by Mr. Rhodes with regard to his awareness of drug use by any AJR employees. Given Appellant's clear admission of dishonesty, we proceed to determine what impact, if any, this admission of dishonesty has on the case at hand.

The lower court appears to have assumed that upon finding conduct that qualified as dishonest, this case could be resolved solely on legal grounds without requiring the assistance of a jury. The trial court reasoned that "[n]o reasonable jury could find that Plaintiff's failing of the drug test, under all the circumstances present herein, was not dishonest behavior." Critically, however, a factual issue that must be determined for purposes of ascertaining whether AJR was required under the terms of the contract to pay Appellant his salary for the remainder of the eight-year contractual period is the *reason* upon

which AJR relied in terminating Mr. Benson's employment. Under the employment contract at issue, the determining factor that controls the issue of continued salary payment is whether the basis for the termination was "dishonesty" or "conviction of a felony," or, alternatively, whether there was a "voluntary termination of . . . [the] agreement."

The record in this case is unclear as to whether AJR dismissed Mr. Benson from its employ for drug use or for dishonesty. As Appellant emphasizes in his argument, nowhere on either of the two termination forms that were introduced below is there any indication that he was dismissed for dishonesty. We are unwilling to make the leap that the trial court did to broadly encompass testing positive for drug use within the meaning of the term "dishonesty." Consequently, we conclude that Appellant is entitled to have a jury determine the basis for AJR's decision to terminate Mr. Benson from its employ. If the jury determines that drug use, rather than dishonesty, was the basis for the dismissal, then the provisions of the employment contract with regard to continued payment of Appellant's salary for the duration of the contractual term are applicable.[11] If, however, the jury

[11]We note, however, the salary which Appellant would be required to be paid is determined by the rate of salary that he was making at the time the employment contract was entered into on August 29, 1997. Under the clear terms of the contract, the continued payment of salary was expressly tied to the salary Mr. Benson was making "on the date of . . . [the] agreement." The terms of that salary arrangement are specified in paragraph 3 of the agreement and include a base salary plus a quarterly bonus of a net payment of $1,000 after "required payroll deductions."

determines that Mr. Benson was in fact terminated for being dishonest, then AJR is not required to pay his salary under the terms of the employment contract.

B. False Light Invasion of Privacy

As the basis for this claim, Appellant averred that AJR wrongly published and disseminated his drug test results to certain persons. According to the factual findings of the lower court, "Mr. Rhodes informed, at most, three (3) individuals of Plaintiff's drug test result: Robert Benson, a former owner and creditor of AJR; Mr. Rhodes' wife, AJR's corporate Secretary; and Brenda Benson,[12] an employee of AJR who served in the capacity of administrative assistant secretary and who assisted Mr. Rhodes in managing AJR's business office."

In *Crump v. Beckley Newspapers, Inc.*, 173 W.Va. 699, 320 S.E.2d 70 (1983), we discussed the tort of invasion of privacy. In syllabus point eight of *Crump*, we held that "[a]n 'invasion of privacy' includes (1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public." *Id.* at 703, 320 S.E.2d at 74. The lower court relied upon both *Crump* and the adoption of the Restatement of Torts definition of an invasion of privacy claim by

[12]Brenda Benson is the sister of Appellant.

the federal district court in *Davis v. Monsanto Co.,* 627 F.Supp. 418 (S.D. W.Va. 1986), in delineating the following as the elements of a false light invasion of privacy claim:

> (1) that there was a public disclosure by the Defendant of facts regarding the Plaintiff; (2) that the facts disclosed were private facts; (3) that the disclosure of such facts is highly offensive and objectionable to a reasonable person of reasonable sensibilities; and (4) that the public has no legitimate interest in the facts disclosed.

Id. at 421 (quoting *Restatement (Second) of Torts* § 652D (1977)).

In ruling that Appellant had failed to prove a claim for false light invasion of privacy, the trial court held:

> "It is not an invasion of privacy to communicate the private fact to a single person or a small group of persons. The tort of invasion of privacy requires widespread publicity." *See Davis*, 627 F.Supp. at 421; *see also Crump*, 173 W.Va. at 716, [320 S.E.2d at 88] (holding "false light" privacy action requires "wide spread publicity").

Applying this holding to the facts in the case at bar, the circuit court held that the "minimal communication" to three individuals, "all of whom are AJR employees, officers, or creditors" "does not amount to widespread publicity." We agree. Accordingly, we uphold the grant of summary judgment to Appellees on Appellant's claim of false light invasion of privacy.

Having found no error with regard to the grant of summary judgment to Appellees on the false light invasion of privacy claim, we affirm the July 23, 2002, order of the Circuit Court of Wood County on this issue. Given our separate determination that a genuine issue of material fact requires jury resolution on the breach of employment claim, we hereby reverse and remand this matter to permit proceedings consistent with the rulings herein stated.

Affirmed in part,
Reversed in part,
and Remanded.