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# Supreme Court of Kentucky

83-SC-376-DG

ALBERT CRAFT AND IRENE CRAFT — MOVANTS

V.

ON REVIEW FROM COURT OF APPEALS
No. 82-CA-1346-MR
(Boyd Circuit Court, CA No. 80-CI-343)

ROY RICE, ASHLAND OIL, INC., AND
ASHLAND COAL, INC., A SUBSIDIARY
OF ASHLAND OIL, INC. — RESPONDENTS

Dissenting Opinion by Justice Stephenson

In my opinion the trial court and the Court of Appeals are exactly right in applying the one-year statute of limitation to this case. The "gist of the action" here is personal injury, and the "grave desecration" cases simply do not stand scrutiny as authority for utilizing the five-year statute of limitation.

If the majority opinion is any indication, almost any insulting activity will be cause for a lawsuit for the test of "outrageous conduct."

The Comments to §46 describe the conduct which gives rise to the cause of action:

> "d. Extreme and outrageous conduct. The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct had been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme

> in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intollerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'
>
> "The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities. ...."

I am of the opinion it is a mistake to adopt §46 of the Restatement. I predict the majority opinion will give rise to a spate of friolous lawsuits. I cannot think of a more dismal case to use in adopting §46 of the Restatement (Second), Torts. The majority opinion blithely sends the case back to the trial court for a new trial as to all parties without regard to the evidence.

The opinion neglects to recognize that the respondents made a motion for a directed verdict at the close of movants' testimony, also on the ground of insufficient evidence. It has long been the law in this Commonwealth that even if a verdict was directed on an erroneous theory, if the parties were entitled to a directed verdict on other grounds, the erroneous theory is immaterial and the directed verdict shall stand. Slusher v. Brown, Ky., 323 S.W.2d 870 (1959). First, movants' counsel agreed that the allegation of conspiracy to indict Albert Craft should be dismissed. Secondly, as the Court of Appeals' opinion stated the complaints by Albert Craft are trivial. Albert Craft's testimony was that Roy Rice over a citizens band radio stated, "well here comes Sleepy. He said how are you and your lawyer doing getting a warrant for me?" Albert Craft testified, "well it's pretty well upset me and I've never been the same person." Furthermore, he

testified that he stayed "pretty well tore up and I'm ashamed to go in public." Craft further testified that Rice, over the CB radio, on one occasion stated, "well there's Sleepy said I'm going to see that he goes to the penitentiary before this year is out." There is nothing said that this upset Albert Craft in any way. By any test, this does not constitute "outrageous conduct," but is a frivolous complaint, and the respondents were entitled to the directed verdict on the ground of insufficient evidence. This should remove Albert Craft from the case.

As to the balance of the case, it is pretty vague. Irene Craft testified that unknown persons kept her under surveillance for about two weeks. Her witness on this point testified these people were employees of Ashland Coal and were observing the company coal dock. He testified they could not see the Craft house unless they went outside the building. The record does not reveal the reason for the people observing the coal dock. Irene Craft testified these people were watching her house. This activity continued until two employees of Ashland Coal appear before the grand jury which indicted Albert Craft for forgery in the second degree.

The medical testimony revealed a complaint by Irene Craft to her doctor that she was receiving anonymous phone calls and that this made her nervous. She complained at trial of losing her hair, but did not mention this to her doctor.

During this period, Albert Craft, a former employee of Ashland Coal, was under indictment for allegedly forging a coal truck weigh ticket. He was later found not guilty. I infer that this indictment is the principal complaint of Albert Craft and surely was a major part of Irene Craft's nervous condition.

The allegation that Roy Rice is an employee of Ashland Coal and committed the complained acts during the course of his employment is not sustained by the evidence. I cannot find anywhere in the record proof that Rice was acting within the scope of his employment in committing the alleged acts. There is nothing in the evidence to show any involvement by Ashland Oil.

In reading the Commentary to §46 of Restatement (Second), Torts as to the quality of proof needed, I would seriously suggest a directed verdict if the evidence at the new trial is the same as portrayed in this record, and the directed verdict should surely stand as to Albert Craft, Ashland Oil, and Ashland Coal.

I therefore dissent. Aker, J., joins this dissent.