

2-10-84 at 11AM

SACT: Reverse - DCW to write

DOW: Reverse - 5 yrs

9/13/83
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Five

(#3)
Friedberg

JBS-1 yr

Grant + Vance Leubner K
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Grant

C. of A. #82-CA-1346-MR

mw

ALBERT CRAFT AND
IRENE CRAFT

V. 83-SC-376-D

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

BOYD CIRCUIT COURT

#80-CI-343

STATEMENT IN SUPPORT OF RECOMMENDATION TO GRANT by C. Theodore Miller

The opinion of the Court of Appeals by Judge McDonald is to be published. (Before McDonald, Gudgel and Miller, Judges, with Judge Gudgel concurring in result.)

In this case the Court of Appeals adopted the tort of "outrage". The new tort was created by way of obiter dictum, however, because the court affirmed the trial court's directed verdict, based on the one-year statute of limitations, for defendants Roy Rice, Ashland Oil, Inc. and its subsidiary Ashland Coal, Inc. Albert and Irene Craft seek discretionary review.

Mr. Craft, an Ashland Coal employee, was indicted for second degree forgery for allegedly falsifying weigh tickets. A jury acquitted him of the charge. The Crafts' suit sought relief for the conduct of Rice, an Ashland Coal employee and former Boyd County Sheriff, during the pendency of the criminal charge.

From May to July 1978, Rice allegedly harassed Mrs. Craft by keeping her under surveillance at work and home, telling her (twelve times) over the CB radio that he would put her husband in

prison, and driving so as to force her and her vehicle into opposing lanes of traffic. Rice also used the CB to talk to Mr. Craft, who complained of resulting mental anguish. The Court of Appeals called Mr. Craft's complaint "trivial". Mrs. Craft's complaints included mental anguish as well as chronic diarrhea, colitis and a nervous condition.

It is undisputed that no touching occurred. Further, the Crafts filed their complaint over one year after the last alleged act of harassment.

The Crafts contend that the courts below erred in deciding that KRS 413.140(1)(a), (b) or (c) controlled. That statute provides for a one-year limitation on the following cases:

"(a) An action for an injury to the person of the plaintiff, or of her husband, his wife, child, ward, apprentice or servant.

"(b) An action for injuries to persons, cattle or other livestock by railroads or other corporations,

"(c) An action for malicious prosecution, conspiracy, arrest, seduction, criminal conversation or breach of promise of marriage."

The Crafts urge application of the five-year period of limitation set forth in KRS 413.120(7) for actions "for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated."

Claiming that their cause of action compares to those in grave desecration cases, the Crafts rely heavily on Resthaven Memorial Cemetery v. Volk, 286 Ky. 291, 150 S.W.2d 908 (1941). In

Resthaven, this Court applied the five-year limitation for violation of "rights" rather than the one-year limitation on actions for personal injuries, reasoning that the one-year statute applies to cases such as assault and battery actions, the gist of which are personal injury. In Resthaven, recovery was permitted for mental anguish, without a touching, where Mrs. Volk was disinterred and reburied, without notice to the family, after the cemetery realized that her grave lot had been previously sold to another. The Crafts analogize Mrs. Volk's relatives' right to be notified to their right to be left alone and free from harassment, which Rice violated. The five-year statute was also applied in the later grave desecration case of Ferguson v. Utilities Elkhorn Coal Company, Ky., 313 S.W.2d 395 (1958).

Rice and Ashland counter with the argument that the one-year statute applies because the object of the Crafts' suit was not compensation for violation of rights but damages for physical and mental injuries. They rely on Carr v. Texas Eastern Transmission Corporation, Ky., 344 S.W.2d 619 (1961), in which this Court indicated that the object, not the form, of an action determines the proper period of limitation. Rice and Ashland distinguish the dead body cases, which do not involve direct damage to the plaintiffs. The Crafts contend that the focus of the object vs. form test is on the tort, not on damages.

Although the statute of limitations argument, standing alone, might not merit review, the Court of Appeals also determined that Rice committed an actionable tort. Following its conclusion

that this was not an invasion of privacy case, the court adopted the tort of outrage as set forth in Restatement (Second) of Torts, Section 46 (1) (1965), which reads as follows:

"(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

Determining that Rice's conduct, which drastically deviated from decency, was calculated to cause harm, the Court of Appeals specifically called into question the conduct held to be non-actionable in Reed v. Maley, 115 Ky. 816, 74 S.W. 1079 (1903) (no cause of action for mental suffering absent physical contact where man solicited sexual intercourse with a married woman). Further, the Court of Appeals concluded that, because the tort of outrage involves willful conduct and not simple negligence, it was not violating the physical contact rule recently reaffirmed in Deutsch v. Shein, Ky., 597 S.W.2d 141 (1980).

Rice and Ashland, who of course disagree with much of the Court of Appeals' opinion, take the position that there is no substantial issue before the Court because both courts below properly resolved the statute of limitations issue. They also attack the proof regarding damages and argue that Deutsch requires a physical impact for recovery.

I believe that "special reasons" exist for reviewing this decision. Accordingly, I recommend granting the motion.