

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Constance Moran,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 11AP-604
	:	(C.P.C. No. 09CVH-07-10321)
Lesly Radtke,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 29, 2012

Cooper & Elliott, LLC, Rex H. Elliott, Bradley A. Strickling and Adam E. Crowell; Mark C. Collins Co., L.P.A., and Mark C. Collins, for appellant.

Harris McClellan Binau & Cox PLL, and Mark S. Coco, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Constance Moran is appealing the adverse finding of a jury trial. She assigns three errors for our consideration:

[I.] The Trial Court erred by sustaining an objection made by defense counsel and preventing plaintiff's handwriting expert from giving an expert opinion that the handwriting on the envelopes containing the defamatory letters belonged to the defendant.

[II.] The Trial Court erred by precluding plaintiff from offering evidence of other anonymous defamatory letters authored and distributed by the defendant.

[III.] The Trial Court erred by precluding plaintiff from presenting evidence that defendant's legal fees were being paid by her insurer after defendant claimed on the witness stand that she had suffered severe financial consequences in defending the lawsuit.

{¶ 2} This case is a defamation action which resulted from the mailing of an anonymous letter to various persons affiliated with the Columbus School for Girls ("CSG"). Moran became convinced that Lesly Radtke was the person who sent the letters and filed this lawsuit as a result. Radtke denied being the person responsible. The trial centered on that one issue.

{¶ 3} Counsel for Moran retained a handwriting expert to review the letters and the envelopes in which they were mailed. The expert initially concluded that the author of the letter could not be definitively identified because efforts had been made to alter the normal handwriting of the author and conceal the author's identity.

{¶ 4} Counsel for Radtke also retained a handwriting expert. That expert testified at trial that Radtke was not the author of the letter and was not the person whose handwriting appeared on the associated envelopes.

{¶ 5} Moran's counsel did not call her handwriting expert to the witness stand in her case-in-chief; instead, her expert was called in her rebuttal case to counter the testimony of Radtke's expert. Moran's expert testified at length about the efforts to alter the handwriting and to conceal the author's identity. That testimony was admitted for the jury's consideration.

{¶ 6} Counsel for Moran then attempted to have the expert testify that Radtke's handwriting was the handwriting on the envelopes and in the letter. The trial court judge refused to allow this additional testimony. The decision of whether or not to admit evidence rests in the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *Wightman v. Consol. Rail Corp.*, 86 Ohio St.3d 431, 437 (1999).

{¶ 7} Generally, the admission of rebuttal testimony is a matter within the trial court's discretion, and a decision admitting or excluding such testimony will not be reversed absent an abuse of that discretion. *Steffy v. Blevins*, 10th Dist. No. 02AP-1278, 2003-Ohio-6443, ¶ 23. The trial court judge was within his discretion to make that

ruling. First, there is an inherent conflict between testifying at length about how no one could definitively say who was responsible for the letter and then testifying a specific person was more likely than not the author.

{¶ 8} Second, Moran's expert was being called to undermine the testimony of Radtke's expert, not to add to the plaintiff's case by stating for the first time in rebuttal that Radtke was the author, based upon a handwriting analysis. A party possesses an unconditional right to present rebuttal testimony if: (1) the evidence is not cumulative; (2) the evidence would not be appropriate for the party's case-in-chief; and (3) the evidence is first addressed in the opponent's case-in-chief. *Brothers v. Morrone-O'Keefe Dev. Co.*, 10th Dist. No. 05AP-161, 2006-Ohio-1160, ¶ 6. This additional testimony had the significant risk of confusing the jury and making it difficult for the jury to sort out the proper use of the rebuttal evidence in weighing the evidence as a whole. Further, this evidence was appropriate for Moran's case-in-chief and went beyond rebuttal of the testimony of the handwriting expert presented on behalf of Radtke.

{¶ 9} As noted earlier, Moran's expert testified at length about the difficulties any handwriting expert would encounter in analyzing the handwriting on the envelopes and identifying the author. This testimony, which was proper rebuttal, was allowed. The trial court was within its discretion to limit the testimony to testimony which was truly rebuttal.

{¶ 10} The first assignment of error is overruled.

{¶ 11} The second assignment of error is based upon a circular logic. Moran believed that Radtke had authored a previous defamatory letter about James Moran which would serve as some proof that Radtke authored the letters central to her defamation suit. Apparently, a third letter or set of letters regarding another CSG parent was sent after this lawsuit was filed. Radtke denied involvement with this other correspondence.

{¶ 12} The use of testimony about these other acts was appropriately excluded by the trial judge. First, the authorship of these other letters was speculative. No clear proof indicated that Radtke was involved. This goes to Evid.R. 401, in that these letters lack the requisite relevancy to this case. Allowing the jury to speculate that, because other letters had been sent to other people in the CSG community, Radtke was responsible for all the

letters was inappropriate. The circular part of the evidence was the fact that each anonymous letter was being used to "prove" that the other anonymous letter was sent by Radtke. Further, since Evid.R 404(B) is an exception to the general rule excluding such testimony of other "bad act," it is strictly construed against admissibility. *See State v. Broom*, 40 Ohio St.3d 277, 281-82 (1988).

{¶ 13} Again, the trial judge was within his discretion to bar the testimony. The second assignment of error is overruled.

{¶ 14} The third assignment of error attacks the trial court's refusal to allow the jury to hear testimony that Radtke had insurance to cover the risks of loss in defamation claims. The insurance company was apparently responsible for the costs of defense in this action.

{¶ 15} The reasons for limiting a jury's knowledge about the existence of insurance in a given situation are numerous, but primarily center on the fact that a jury might be more willing to find liability and award sizable damages in a case where the person being sued would not pay the judgment but a large insurance company would.

{¶ 16} Radtke testified about how difficult her financial situation was. She complained to a friend or acquaintance about how mad she was that she had been sued. She viewed the lawsuit as being expensive at a time she was having difficulty paying her other bills, including her daughter's orthodontic expense.

{¶ 17} Evid.R. 411 governs the situation. It reads:

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership or control, if controverted, or bias or prejudice of a witness.

{¶ 18} The complaint from Moran about this testimony came up in the context of a Civ.R. 59 motion for new trial, not while the trial was being conducted. In order to receive a new trial, Moran must establish that Radtke gave false testimony and that it is probable that the adverse verdict against her is based on the false testimony. *Boyer v. Ohio State Univ. Med. Ctr.*, 10th Dist. No. 07AP-742, 2008-Ohio-2278, ¶ 21.

{¶ 19} Counsel for Moran did not fully present this issue while Radtke was on the witness stand. We cannot say that Moran and her counsel were entitled to a new trial because Radtke gave testimony that could be construed as saying she paid some of the costs of litigation which she did not. Other costs, such as travel, and room and board for Radtke presumably were not governed by the insurance policy.

{¶ 20} The trial court was within its discretion to exclude testimony about insurance.

{¶ 21} The third assignment of error is overruled.

{¶ 22} All three assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT and SADLER, JJ., concur.
