Not Reported in N.E.2d, 1992 WL 82774 (Ohio App. 10 Dist.)

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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin County.

William E. WILSON and Debra A. Wilson, Plaintiffs-Appellants,
v.
AMERICAN ELECTRIC POWER, Columbus and Southern, and William C. Jewett, Defendants-Appellees.

No. 91AP-996.
April 21, 1992.

Appeal from the Franklin County Court of Common Pleas.
Michael A. Moses; and Sherry & Smith and Allan Sherry, for appellants.

Porter, Wright, Morris & Arthur, Joseph P. Ryan and Peggy W. Corn, for appellees.

OPINION

McCORMAC, Judge.
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Plaintiffs-appellants, William E. and Debra A. Wilson, appeal the summary judgment entered by the Franklin County Court of Common Pleas in favor of defendants-appellees, American Electric Power ("AEP"), Columbus and Southern ("C & O"), and William C. Jewett. Appellants' three assignments of error state:

"Assignment of Error Number One:

"IN GRANTING SUMMARY JUDGMENT, THE TRIAL COURT ERRED IN ASSUMING THAT THE DEFENDANTS WERE POSSESSED OF A QUALIFIED PRIVILEGE AND HAD NOT EXCEEDED THAT PRIVILEGE.

"Assignment of Error Number Two:

"IN GRANTING SUMMARY JUDGMENT, THE TRIAL COURT APPLIED A DEFINITION OF THE TERM 'ACTUAL MALICE' WHICH HAD RECENTLY BEEN REJECTED BY THE SUPREME COURT OF OHIO TO A CLAIMED QUALIFIED PRIVILEGE OF DEFAMATION.

"Assignment of Error Number Three:

"IN GRANTING SUMMARY JUDGMENT, THE TRIAL COURT ERRED IN HOLDING THAT PLAINTIFF/APPELLANTS HAD NOT PRODUCED SUFFICIENT EVIDENCE TO AVOID A SUMMARY JUDGMENT."

Civ.R. 56(C) provides for summary judgment only when the trial court has determined that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to

judgment as a matter of law; and (3) it appears that reasonable minds, after viewing the evidence most strongly in favor of the non-moving party, could reach only one conclusion which is adverse to the non-moving party. *Petrey v. Simon* (1984), 19 Ohio App.3d 285.

William E. Wilson was employed by Gerbus Brothers Construction Co./TransAsh Division of Cincinnati ("TransAsh"). Wilson supervised the performance of TransAsh's contract to remove waste products from an electrical generating facility owned and operated by C & O, a subsidiary of AEP, in Conesville, Ohio. William C. Jewett was a contract administrator in the construction division of AEP responsible for supervising the contract work performed by TransAsh at the Conesville facility.

Wilson's complaint alleged that he was verbally and physically threatened during an argument with a former TransAsh employee, Don Allen, at the Conesville facility on November 25, 1989. Consequently, Wilson drove from the scene of the argument to enlist the help of a co-worker, Mike Conley, in ejecting Allen from C & O property. Jewett testified that, shortly after Wilson retreated, Jewett was successful in convincing Allen to immediately leave the property without incident. Jewett witnessed Wilson speed to the nearby intersection, at which Allen was stopped as he exited the property. Jewett testified that Wilson jumped out of his truck and proceeded towards Allen's truck carrying a baseball bat over his head. Wilson testified that he carried the bat to protect himself from Allen due to Allen's prior threats. Jewett witnessed Conley exit the passenger side of Wilson's truck in order to stop Wilson from proceeding any further towards Allen's truck. Jewett photographed Conley taking the bat away from Wilson. Jewett approached Wilson as Allen drove away and ordered Wilson to calm down and leave the scene, but Jewett halted his approach when Wilson pointed a finger at him and verbally threatened that he would "get him (Jewett), too."

Jewett returned to his office and telephoned C & O management to report the incident. Jewett also included an account of the incident in his daily written report to his immediate supervisor at C & O. Jewett's reports specifically stated that he was threatened by Wilson with a baseball bat.

Jewett testified that, on each of the three days following the encounter, he requested that Wilson provide him with a written account of the circumstances leading to the confrontation between Wilson and Allen for inclusion in Jewett's reports to C & O. Wilson refused to explain the altercation, citing the instructions of his supervisor and attorney not to discuss the incident verbally or in writing.

On the basis of Jewett's written report, J.J. Nichols, a manager at AEP, informed Mr. Rudy Gerbus, President of Gerbus Brothers Construction, in a letter dated December 1, 1989, that Wilson was thenceforth prohibited from entering C & O's Conesville facility as a result of his having "grabbed the bat from Mr. Conley and (having) brandished it at our employee." TransAsh did not terminate Wilson when it received the letter from Nichols. Rather, TransAsh attempted to secure employment for Wilson at another contract site. When efforts to secure other work for Wilson were unsuccessful, Wilson was laid off from TransAsh for lack of work.

Wilson sued appellees for business defamation. Wilson's complaint alleged that he was terminated from TransAsh as a result of defamatory statements made to TransAsh by Jewett and Nichols. Appellants' defamation claim is limited to two statements: (1) the written statement in Jewett's daily report that Wilson threatened Jewett with a baseball bat; and (2) Nichols' written statement to TransAsh that Wilson "brandished" the bat at Jewett. Wilson's wife, Debra, asserted a derivative claim for loss of consortium.

The elements for a cause of action for defamation are: (1) an unprivileged communication; (2) false and defamatory language about another; and (3) requisite malice. *Tohline v. Central Trust*

Co., N.A. (1988), 48 Ohio App.3d 280, at 284. Moreover, where the defamation injures one in his trade or business, malice is presumed and the defamatory words are actionable *per se. Id.* Nevertheless, where a qualified privilege is established, the plaintiff must rebut the defense with clear and convincing evidence that the defendant acted with actual malice in order to establish his prima facie case, even if there is evidence that the words are libel *per se* or slander *per se.* *Jacobs v. Frank* (1991), 60 Ohio St.3d 111, at 114.

The trial court granted summary judgment for appellees after having determined that appellants' failure to demonstrate the existence of "ill will, spite, grudge or some ulterior motive" prevented their recovery on a defamation theory as a matter of law. Although the trial court's decision does not explicitly state that appellees proved the defense of qualified privilege for communications made in furtherance of a common business interest, the court's exclusive reliance on *Hahn v. Kotten* (1975), 43 Ohio St.2d 237, implies that the court accepted appellees' contention in their memorandum in support of their motion for summary judgment that the allegedly defamatory statements by Jewett and Nichols were not actionable because they were protected by a qualified privilege which existed by virtue of AEP's contractual business relationship with TransAsh.

For analytical purposes, we will initially discuss appellants' second assignment of error which maintains that the trial court erred by applying an incorrect definition of actual malice to render appellants' claim non-actionable as a matter of law. Clearly, the trial court considered the applicable definition of actual malice in this case to be the common-law defamation standard applied in *Hahn, supra,* at 248. Common-law malice connotes either hatred, ill will or a spirit of revenge, or a conscious disregard for the rights and safety of others that has a great probability of causing substantial harm. See *Jacobs, supra,* at 115. Appellees maintain that the correct definition of actual malice, which the trial court should have applied, is the more difficult public official standard approved in *Jacobs.*

In *Jacobs, supra,* the Supreme Court explicitly acknowledged that the confusion lower courts suffer regarding the applicable definition of actual malice in cases which squarely present the issue, whether the plaintiff's evidence defeats the defense of qualified privilege, is due to cases such as *Hahn, supra,* in which the court's syllabus law contradicts its opinion on the subject. The Supreme Court finally clarified the matter in *Jacobs, supra,* at 116, when it said that, in a qualified privilege case, "actual malice" is defined as acting with knowledge that the statements are false or acting with reckless disregard of their truth or falsity.

Although appellants' second assignment of error is well-taken to the extent that we agree that the trial court incorrectly applied the lesser common-law standard of malice, we reject appellees' assertion that the error, in itself, is of such magnitude to require reversal. Certainly, if the trial court was correct in its finding that appellees' evidence failed to raise a question of fact whether appellants acted with ill will and spite, it would be impossible for us to find that the same evidence was sufficient evidence to create a question of whether reasonable minds could differ as to the presence of the much higher degree of malice approved in *Jacobs, supra.* Whether appellants presented sufficient evidence to overcome summary judgment is the question presented specifically by their first and third assignments of error.

Appellants' second assignment of error is overruled.

Although the caption of appellants' first assignment of error alleges that the trial court erred in assuming that a qualified privilege protected the statements by Jewett and Nichols because they were made in furtherance of C & O's business relationship with TransAsh, appellants' argument in support of their first assignment of error is simply that their evidence on the issue of actual malice was sufficient to avoid summary judgment for appellees. Likewise, appellants primarily

assert in their third assignment of error that their evidence was sufficient to create material questions of fact of whether appellees acted with reckless disregard of the truth and whether appellees' publication of the defamatory statements exceeded the scope of their qualified privilege. We will discuss appellants' first and third assignments of error together because they both raise an issue of the sufficiency of appellants' evidence to overcome appellees' motion for summary judgment.

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Preliminarily, we find that the trial court's obvious reliance on the existence of a qualified privilege in this case was supported by appellees' evidence, despite appellants' vigorous argument to the contrary in their memoranda contra to appellees' motion for summary judgment. Each communication in this case contained all of the requirements of a conditionally privileged communication, as identified in *Hahn, supra,* at 246. Regardless of the fact that Wilson was not an employee of AEP or C & O, the statements about him by Jewett or Nichols, and subsequently from Nichols to Gerbus, were directed only at Wilson's fitness as an employee of TransAsh in the course of his performance of TransAsh's contract with C & O. The statements by Jewett and Nichols were furthermore made in good faith. Jewett's position as the contract administrator at the Conesville facility required that he complete a written daily report of all aspects of work progress, including work disturbances such as the incident between Wilson and Allen. Moreover, Nichols' statements were made to protect C & O's own business right to prevent violent eruptions between workers on its property. Nichols' letter to Gerbus clarified that it was not punishing or terminating Wilson and retained with TransAsh the decision of whether to reprimand Wilson. In short, appellees' statements were conditionally privileged according to *Hahn, supra,* because they were made in good faith and concerned a matter in which all parties had a common interest or duty.

In *Gray v. General Motors Corp.* (1977), 52 Ohio App.2d 348, at 351, the court recognized that, while protected by a qualified privilege, defamatory statements will impose liability only when the plaintiff proves either that the defamation was published to someone not within the scope of the privilege, or, if the defamation was published only to individuals within the scope of the privilege, the act was done with actual malice.

First, with regard to appellants' assertion that appellees exceeded the scope of their qualified privilege by allowing Nichols' letter to Gerbus to be carbon copied to the nine individuals named at the conclusion of the letter, we note that this argument was never raised by appellants in opposition to appellees' motion for summary judgment and is entirely unsupported by appellants' evidence. In any event, it appears now that the nine individuals copied on Nichols' letter were employees of AEP or C & O.

Second, we find that appellants adduced insufficient evidence in opposition to appellees' motion for summary judgment to create a material question of whether appellees acted with actual malice. Appellants' bold allegation in their complaint, that appellees' failure to investigate Wilson's version of his encounter with Allen and Jewett was a reckless disregard of the truth, was not supported by facts as required by Civ.R. 56(E). Moreover, Wilson's subsequent deposition testimony and affidavit to the same effect are no more than restatements of the unsubstantiated allegations in his complaint. Nor does the affidavit of Allan Sherry constitute evidence of appellees' actual malice. The affidavit does not state that C & O refused to investigate the incident. Rather, the record is clear that Wilson refused to offer his version of the occurrence to C & O representatives, and that C & O moved quickly to a resolution of the matter with the information at hand. Consequently, appellees' motion for summary judgment was properly determined by the trial court.

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Appellants' first and third assignments of error are overruled.

Appellants' assignments of error are overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

BOWMAN and DESHLER, JJ., concur.

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