[Cite as *Whiteside v. Ohio Parole Bd.*, 2007-Ohio-5428.]

Court of Claims of Ohio
The Ohio Judicial Center
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NORMAN V. WHITESIDE

Plaintiff

v.

OHIO PAROLE BOARD

Defendant

Case No. 2002-05271

Judge J. Craig Wright
Magistrate Steven A. Larson

MAGISTRATE DECISION

{¶1} Plaintiff brought this action alleging defamation. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} As an initial matter, on November 14, 2006, defendant filed a motion to quash the subpoena served upon counsel for defendant. On November 16, 2006, defendant filed a motion to quash the subpoena duces tecum served upon Jodi Hoel. Upon review, both motions are GRANTED.

{¶3} At all times relevant to this action, plaintiff was an inmate in the custody and control of the Department of Rehabilitation and Correction pursuant to R.C. 5120.16. Plaintiff alleges that documents prepared by defendant's employees contain defamatory statements.

{¶4} Plaintiff testified that subsequent to his conviction of conspiracy to commit aggravated murder, supporters and friends "on the outside" requested a clemency hearing on his behalf. In preparation for the hearing, Parole Officer Jodi Hoel prepared an Offender Background Investigation Report (OBI) for plaintiff. Hoel testified that she gathered the information contained in the OBI by talking to the lead detective, prosecutor, defense attorney, and judge in plaintiff's criminal case. Hoel also reviewed the prosecutor's case file, including police reports. Hoel testified that she had no reason to believe that any of the information that she had gathered from the interviews and documents was false. Ultimately, plaintiff's request for clemency was denied.

{¶5} Plaintiff testified that over the next several years, while conducting discovery for other lawsuits that he had instituted, he obtained the OBI and other documents from defendant and determined that defamatory statements are contained in the following documents: Parole Board Information Sheets; the Parole Board Decision from the July 1999 hearing; and, several Parole Board Confidentials. Plaintiff testified that he made copies of these documents and gave them to supporters and family members. Finally, plaintiff alleges that a letter from defendant's employee, Melinda van der Zwan, to Regina Holland dated September 17, 2001, contains defamatory statements.

{¶6} To establish his defamation claim, plaintiff must establish by a preponderance of the evidence that defendant published false statements to another that caused injury to his reputation, exposed him to public hatred, contempt, ridicule, shame or disgrace, or affected him adversely in his trade or business. *Ashcroft v. Mt. Sinai Med. Ctr.* (1990), 68 Ohio App.3d 359. Once a prima facie case for defamation is established, defendant may avoid liability by establishing the defense of a qualified privilege. *Mosley v. Evans* (1993), 90 Ohio App.3d 633, 636; *Hahn v. Kotten* (1975), 43 Ohio St.2d 237, 243.

{¶7} Based upon the relevant testimony and evidence, the court finds that plaintiff has failed to establish a prima facie case of defamation. Although plaintiff asserts that many of the statements contained in the documents cited above are false, he offered no corroborating proof, other than his own self-serving testimony. Conversely, Melinda van der Zwan, Jodi Hoel, Eric Griffith, Sandra Mack, and Richard Spence testified that the information contained in the respective documents that they prepared or approved was correct to the best of their knowledge and that they had no reason to doubt the veracity of any of the statements contained therein. Furthermore, the court finds that, except for the September 17, 2001 letter, none of the documents that plaintiff identified were published by defendant. Indeed, plaintiff testified that he personally provided the documents to third parties, thereby publishing them himself.

{¶8} In the alternative, to the extent that the documents were published, "a publication of statements, even where they may be false and defamatory, does not rise to the level of actionable defamation unless the publication is also unprivileged." *Sullivan v. Ohio Dept. of Rehab.& Corr.*, Ct. of Cl. No. 2003-02161, 2005-Ohio-2122, ¶8. Privileged statements are those that are "made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right or interest. The essential elements thereof are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, publication in a proper manner and to proper parties only." *Hahn*, supra.

{¶9} A qualified privilege can be defeated only by clear and convincing evidence of actual malice. *Bartlett v. Daniel Drake Mem. Hosp.* (1991), 75 Ohio App.3d 334, 340. "Actual malice" is "acting with knowledge that the statements are false or acting with reckless disregard as to their truth or falsity." *Jacobs v. Frank* (1991), 60 Ohio St.3d. 111, 116.

{¶10} The court finds that the allegedly defamatory statements contained in documents that were utilized by employees of defendant in furtherance of their official duties were not made with actual malice and are therefore privileged. Accordingly, the only document at issue is the September 17, 2001 letter.

{¶11} Melinda van der Zwan testified that she prepared the letter in question in response to a letter from Regina Holland requesting an explanation as to why plaintiff was not granted parole. In her letter, van der Zwan stated that "[defendant] determined that there were aggravating factors in the offense behavior" and that "[t]he aggravating factors noted by [defendant] include: [plaintiff] ordered the killing of a male who was trying to get a percentage of money from [plaintiff's] illegal forgery racket, [plaintiff] procured the weapons for this act, and an innocent victim was killed during the gun battle." (Plaintiff's Exhibit 1.)

Plaintiff asserts that the statements that he "ordered the killing" and that he "procured the weapons" are defamatory.

{¶12} As stated above, plaintiff provided no evidence other than his own testimony to support his claim that the statements contained in the letter are false. Indeed, van der Zwan testified that the statements in the letter were taken directly from the decision sheet prepared by employees of defendant who presided over plaintiff's July 1999 parole hearing. (Plaintiff's Exhibit 6.) Additionally, statements concerning plaintiff's ordering the killing of another and procuring weapons to do so are found in a Parole Board Information Sheet dated May 5, 1998. (Plaintiff's Exhibit 3.) Ms. van der Zwan testified that she had no reason to doubt the veracity of the statements, and that she was merely reciting the reasons given for denying plaintiff's parole. Based upon this testimony, the court finds that plaintiff has failed to prove by a preponderance of the evidence that the statements in the letter are false. Accordingly, plaintiff's defamation claims must fail.

{¶13} To the extent that plaintiff disputes the findings and determinations of the Ohio Parole Board, this court lacks jurisdiction over such claims and does not act as an appellate court for decisions of the parole board. *Steward v. Dept. of Rehab. and Corr.* (1998), 94 Ohio Misc.2d 75; *Ross v. Shoemaker* (1981), 3 Ohio App.3d 31.

{¶14} Based upon the foregoing, it is recommended that judgment be rendered in favor of defendant.

A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual

finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).

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STEVEN A. LARSON
Magistrate

cc:

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Magistrate Steven A. Larson

MR/cmd
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