[Cite as *Lacey v. Aud. of State*, 2019-Ohio-1066.]

WANDA L. LACEY Plaintiff v. OHIO AUDITOR OF STATE Defendant	Case No. 2017-00868JD Judge Patrick M. McGrath Magistrate Robert Van Schoyck ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On December 6, 2018, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). On December 28, 2018, plaintiff filed a response. The motion is now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D).

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, 821 N.E.2d 564, ¶ 6, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 364 N.E.2d 267 (1977).

{¶4} The complaint provides that plaintiff served as the Fiscal Officer and Tax Administrator for the village of New Madison from December 2, 2009, until being put on administrative leave on November 19, 2015. Following an investigation, an employee of defendant, Investigator Nicole Beckwith, requested in October 2016 that the Darke

County Prosecutor consider five counts of theft in office against plaintiff, according to the complaint. Plaintiff alleges that "the evidence which Beckwith used was insufficient and inappropriate to come to the finding and conclusion that Plaintiff had committed theft in office" and that "[t]he lack of probable cause for a theft in office charge against Plaintiff is discernable from an examination of village administrative records, from an examination of the village financial records, and from an examination of the audit report." The complaint states that a grand jury nevertheless indicted plaintiff on December 27, 2016, but that the charges were later dismissed.

{¶5} Plaintiff claims to have been harmed in various ways including losing her job, having her professional reputation damaged and being unable to obtain comparable employment, spending money to defend against the charges, and suffering mental and physical harm. Plaintiff seeks damages under theories of malicious prosecution, defamation, and intentional infliction of emotional distress.

{¶6} In the motion for summary judgment, defendant argues that the communications with the Darke County Prosecutor upon which plaintiff's claims are predicated are protected by an absolute privilege against civil liability because they occurred in the context of judicial proceedings.

{¶7} "'Upon certain privileged occasions * * * the law recognizes that false, defamatory matter may be published without civil liability.'" *M.J. DiCorpo, Inc. v. Sweeney*, 69 Ohio St.3d 497, 505, 634 N.E.2d 203 (1994), quoting *Bigelow v. Brumley*, 138 Ohio St. 574, 579, 37 N.E.2d 584 (1941). "The privileged occasions in which this principle applies are divided into two classes: (1) those that are subject to absolute privilege, and (2) those that are subject to a qualified privilege." *Mettke v. Mouser*, 10th Dist. Franklin No. 12AP-1083, 2013-Ohio-2781, ¶ 6. "'The distinction between these two classes is that the absolute privilege protects the publisher of a false, defamatory statement even though it is made with actual malice, in bad faith and with knowledge of

its falsity; whereas the presence of such circumstances will defeat the assertion of a qualified privilege.'" *DiCorpo* at 505, quoting *Bigelow* at 579.

{¶8} "However, since an absolute privilege produces such profound results, it is quite limited in scope." *Wrenn v. Ohio Dept. of Mental Health & Mental Retardation*, 16 Ohio App.3d 160, 162, 474 N.E.2d 1201 (10th Dist.1984). "Specifically, absolute privilege extends to '* * * legislative and judicial proceedings, and other acts of state, such as communications made in the discharge of a duty of the Governor and heads of the executive departments of a state.'" *Id.*, quoting *Costanzo v. Gaul*, 62 Ohio St.2d 106, 109, 403 N.E.2d 979 (1980).

{¶9} "'An affidavit, statement or other information provided to a prosecuting attorney, reporting the actual or possible commission of a crime, is part of a judicial proceeding. The informant is entitled to an absolute privilege against civil liability for statements made which bear some reasonable relation to the activity reported.'" *Lee v. Upper Arlington*, 10th Dist. Franklin No. 03AP-132, 2003-Ohio-7157, ¶ 15, quoting *DiCorpo* at syllabus. In other words, "an individual cannot be held civilly liable for information, whether true or false, he or she provides to a prosecuting attorney so long as that information bears some reasonable relation to the alleged activity reported." *Fair v. Litel Communication, Inc.*, 10th Dist. Franklin No. 97APE06-804, 1998 Ohio App. LEXIS 930 (Mar. 12, 1998). The Supreme Court of Ohio has explained that the "extension of an absolute privilege under such circumstances will encourage the reporting of criminal activity by removing any threat of reprisal in the form of civil liability. This, in turn, will aid in the proper investigation of criminal activity and the prosecution of those responsible for the crime." *DiCorpo* at 505.

{¶10} In deposition testimony, Senior Forensic Audit Manager Elizabeth Akers and Investigator Nicole Beckwith, who are employees of defendant, describe the circumstances under which the Darke County Prosecutor was asked to consider criminal charges against plaintiff. After a regular audit of the village of New Madison led

defendant's regional chief auditor to issue a memorandum outlining several concerns (including village records being completely disorganized, the inability to obtain any income tax system reports, utility adjustments that could not be tracked, and explanations from plaintiff not matching the apparent facts), defendant's Special Audit Task Force, a group of officials that included the then-auditor of state himself, decided to open a preliminary investigation. (Beckwith Depo., pp. 49-50, 64-65, Ex. 1.) Akers and Beckwith, who were tasked with conducting the preliminary investigation, met with the presidents of the village council and board of public affairs at the village offices on November 19, 2015. (Beckwith Depo., pp. 18-19, 27, Ex. 2.) Beckwith described viewing plaintiff's office that day and having several concerns, including village records being in disarray, old checks lying around, tax documents with residents' Social Security numbers lying out in the open, and a surveillance camera that plaintiff had installed to monitor the office. (Beckwith Depo., pp. 18-24.) Village officials placed plaintiff on administrative leave that same day, and, after Akers and Beckwith consulted with defendant's legal counsel, the decision was made at that time to open a full investigation. (Beckwith Depo., p. 25.)

{¶11} Akers performed a special audit with a team of employees that included an audit manager and two staff auditors. (Akers Depo., p. 11.) Beckwith performed related investigatory activities that included obtaining a search warrant of plaintiff's home and executing it with other law enforcement authorities, subpoenaing village bank records and other documents, and conducting interviews. (Beckwith Depo., pp. 28-29, 35-38, Ex. 3.) Working with Akers, Beckwith prepared a Final Investigative Report describing defendant's audit and investigative activities with the village and reviewing the findings from the special audit report, a copy of which was attached, and Beckwith then submitted it for review and changes to defendant's chief of investigations and legal counsel. (Beckwith Depo. pp. 39, 80, 63, Ex. 3; Akers Depo., p. 26.) Thereafter, Beckwith met with Darke County Prosecutor Kelly Ormsby and presented the Final

Investigative Report along with a binder of supporting materials. (Beckwith Depo., pp. 40, 64.) The Final Investigative Report explained how the audit revealed what defendant saw as improprieties relating to utility adjustments and payments, village income tax payments, a bonus payment to plaintiff, and improper debit card expenditures. (Beckwith Depo., Ex. 3.) The Final Investigative Report requested that Ormsby consider five counts of theft in office against plaintiff totaling $21,734.89, but it was up to Ormsby whether to pursue charges. (Beckwith Depo., p. 40, Ex. 3.)

{¶12} Evidence has thus been identified demonstrating that after an audit and investigation of the village pursuant to defendant's authority under R.C. Chapter 117, there was some reason to believe plaintiff had possibly committed crimes, and defendant, through Beckwith, reported the same to the Darke County Prosecutor when making the communications upon which plaintiff's claims are based.

{¶13} Plaintiff, in her response, does not address defendant's argument that the communications are protected by absolute privilege. Instead, focusing on the fact that lack of probable cause is an element of malicious prosecution, *see Froehlich v. Ohio Dept. of Mental Health*, 114 Ohio St.3d 286, 2007-Ohio-4161, 871 N.E.2d 1159, ¶ 10, and that a grand jury indictment such as the one in this case raises a rebuttable presumption that probable cause exists, *see Dailey v. First Bank of Ohio*, 10th Dist. Franklin No. 04AP-1309, 2005-Ohio-3152, ¶ 16, the sole argument plaintiff makes is that there is evidence "sufficient to rebut a presumption of probable cause." (Response, p. 2.) Plaintiff goes through each of the five criminal counts on which she was indicted and points out what in her view are "important omissions made by Akers and Beckwith when auditing and investigating this case." (Response, p. 15.) Plaintiff contends that "little investigation went into the audit process," that "exculpatory evidence was not examined," and that Akers and Beckwith used "flawed methodology" and made various errors. (Id., pp. 10, 13.) Plaintiff points out that Akers acknowledged in her deposition that there may have been a mistake regarding $2,419 in funds that defendant

concluded was missing. (Akers Depo., p. 54.) Plaintiff also refers to an affidavit from Shelby Gibbs, a certified fraud examiner, who avers that she reviewed evidence relating to one of the five criminal counts and was able to trace a portion of the funds that defendant concluded was missing; as defendant notes, she admittedly could not trace most of those funds. (Gibbs Affidavit, ¶ 4.; Gibbs Depo., p. 52.)

{¶14} Construing the evidence most strongly in plaintiff's favor, even if it is assumed that the Final Investigative Report did contain some erroneous information, courts have applied absolute privilege to "protect persons from civil liability for damages even if they provide erroneous information to the police or prosecutor in reporting possible criminal felony activity by another person." *Lee*, 2003-Ohio-7157, at ¶ 18. There is uncontroverted evidence demonstrating that Beckwith's furnishing the Final Investigative Report to the Darke County Prosecutor was part of a judicial proceeding and the communications were reasonably related to the alleged criminal activity being reported. Because plaintiff's claims are based on statements or information provided to a prosecutor reporting the actual or possible commission of a crime, there is an absolute privilege against civil liability under any of plaintiff's theories of relief. *See DiCorpo*, 69 Ohio St.3d 497, 634 N.E.2d 203 (defamation; intentional infliction of emotional distress); *Haller v. Borror*, 10th Dist. Franklin No. 95APE01-16, 1995 Ohio App. LEXIS 3312 (Aug. 8, 1995) (malicious prosecution). Accordingly, defendant is entitled to an absolute privilege against plaintiff's claims in their entirety.[1]

{¶15} Finally, to the extent plaintiff has previously moved for determinations as to whether Akers and Beckwith are entitled to personal immunity as state officers or

[1]It is noted that while the court makes this conclusion based on defendant's assertion of absolute privilege in judicial proceedings, as stated above legislative and executive acts of state are also conferred with absolute privilege and at least one court has extended an absolute privilege to certain communications by defendant as official acts of an executive officeholder. *Grendell v. Ohio Aud. of State*, Franklin C.P. No. 15 CV 005643, 2015 Ohio Misc. LEXIS 15062 (Oct. 1, 2015).

employees under R.C. 2743.02(F) and 9.86, summary judgment is also appropriate. R.C. 9.86 states, in part:

> [N]o officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

"Malicious purpose encompasses exercising 'malice,' which can be defined as the willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through conduct that is unlawful or unjustified. Bad faith has been defined as the opposite of good faith, generally implying or involving actual or constructive fraud or a design to mislead or deceive another. Bad faith is not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." (Citations omitted.) *Caruso v. State*, 136 Ohio App.3d 616, 620-621, 737 N.E.2d 563 (10th Dist.2000). "'Wanton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result.'" *Wee Care Child Ctr., Inc. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. Franklin No. 13AP-1004, 2014-Ohio-2913, ¶ 29, quoting *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, paragraph three of the syllabus. "'Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct.'" *Id.*, quoting *Anderson* at paragraph four of the syllabus.

{¶16} There is no question that Akers and Beckwith were employees of the state at all times relevant. The issue then is whether they acted outside the scope of their employment, or with malicious purpose, in bad faith, or in a wanton or reckless manner. Akers and Beckwith's deposition testimony demonstrates that their auditing and

investigatory activities, as well as the presentation of the Final Investigative Report to the Darke County Prosecutor, were performed as part of their normal work duties. Even though plaintiff contends that Akers and Beckwith made errors and omissions in their work and came to the wrong conclusions, "[a]n employee's wrongful act, even if it is unnecessary, unjustified, excessive or improper, does not automatically take the act manifestly outside the scope of employment." *Elliott v. Ohio Dept. of Rehab. & Corr.*, 92 Ohio App.3d 772, 775, 637 N.E.2d 106 (10th Dist.1994). "'It is only where the acts of state employees are motivated by actual malice or other such reasons giving rise to punitive damages that their conduct may be outside the scope of their state employment. * * * The act must be so divergent that it severs the employer-employee relationship.'" *Siegel v. Univ. of Cincinnati College of Medicine*, 2015-Ohio-441, 28 N.E.3d 612, ¶ 31 (10th Dist.), quoting *Caruso* at 620. No evidence has been presented from which a trier of fact could reasonably conclude that Akers or Beckwith acted manifestly outside the scope of their employment, or with malicious purpose, in bad faith, or in a wanton or reckless manner. Therefore, the only reasonable conclusion to be drawn is that Akers and Beckwith are entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86.

{¶17} Based upon the foregoing, the court concludes that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. As a result, defendant's motion for summary judgment is GRANTED and judgment is hereby rendered in favor of defendant. All previously scheduled events are VACATED. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

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