[Cite as *Spitulski v. O'Mara*, 2010-Ohio-186.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Ronald P. Spitulski

Plaintiff

v.

Richelle O'Mara, et al.

Appellees

[Board of Education of the Toledo City School Dist.

Appellant]

Court of Appeals No. L-09-1157

Trial Court No. CI 07-5494

DECISION AND JUDGMENT

Decided: January 22, 2010

* * * * *

Kimberly A. Conklin and Richard M. Kerger, for appellees.

Randy L. Meyer and Lisa E. Pizza, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant school district appeals the judgment of the Lucas County Court of Common Pleas, declaring that the district has a duty to defend teachers in a defamation suit brought by a former school principal. For the reasons that follow, we affirm.

{¶ 2} Ronald P. Spitulski is the former principal of Toledo Woodward High School. Woodward is one of the schools of appellant, Board of Education of the Toledo School District. Appellees, Richelle O'Mara, Michelle Williams, Sue Townsend, Margaret Miller, Cameron Demsey, Cassandra Seimet Paniagua, Diane Heft, Melissa Zeros, Rebecca Banghoff and Patrick Sweeney, were teachers at Woodward. Appellee Toledo Federation of Teachers ("TFT") is their teachers' union.

{¶ 3} In 2007, Spitulski initiated a suit against appellee teachers, alleging that "some or all" of them had participated in conduct that constituted slander, libel and false light invasion of privacy against him. Specifically, Spitulski alleged that some or all of appellees were responsible for sending an anonymous e-mail to school district administrators and Toledo media, advising that there would be a walk-out at Woodward if Spitulski returned as principal. Spitulski was accused of unprofessional conduct, inappropriate behavior with a teacher and permitting his wife to reprimand employees and make personnel changes. The e-mail also suggested that Spitulski's actions resulted in the high teacher turnover rate and the decline in academic performance at Woodward. Spitulski's complaint also alleged that some or all of appellees had announced to their students that Spitulski had been treated at a psychiatric unit, was fired, or was being investigated, for stealing money and that he had provided alcoholic beverages to underage students.

{¶ 4} Appellee teachers approached appellant, seeking aid in their defense against Spitulski's suit, pursuant to R.C. 2744.07. In response, on September 21, 2007, appellant

filed a complaint for declaratory judgment, seeking a declaration that it was not required to provide appellees with a defense. Appellees and their union responded with a third party complaint/counterclaim seeking a declaration that appellant was so obligated. This matter would eventually be consolidated with the defamation case.

{¶ 5} In the defamation case, appellees moved for summary judgment, supporting their motion with deposition testimony and affidavits in which each appellee denied involvement in any of the activities Spitulski alleged. On August 28, 2008, Spitulski dismissed his complaint pursuant to Civ.R. 41(A). The present dispute continued.

{¶ 6} This matter was submitted to the trial court on cross motions for summary judgment. On consideration, the trial court granted appellees' motion and denied appellant's. The court issued a declaration that appellant had a statutory obligation to provide a defense for appellees in the defamation suit.

{¶ 7} From this judgment, appellant now brings this appeal. Appellant sets forth the following three assignments of error:

{¶ 8} "1. The trial court erred in holding that Appellant had a duty under R.C. 2744.07 to defend Appellees against allegations that Appellees sent an anonymous e-mail to The Toledo Blade, local television stations, and school administration falsely suggesting the Plaintiff had an extramarital affair, and made false statements that Plaintiff was fired for stealing money, was confined to a psychiatric ward, served alcohol to minors, and had an extramarital affair with his neighbor.

{¶ 9} "2. The trial court erred when it denied Appellant's motion for summary judgment and granted Appellee's cross-motion for summary judgment with respect to whether R.C. 2744.07 obligated Appellant to provide Appellees with a legal defense against Plaintiffs' [sic] claims of libel, slander and false light invasion of privacy.

{¶ 10} "3. The trial court erred in determining that the Toledo Federation of Teachers is a party in this action."

{¶ 11} As appellant's first and second assignments of error constitute essentially the same argument, we will discuss them together.

{¶ 12} On review, the appellate court employs the same standard for summary judgment as trial courts. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated:

{¶ 13} "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 67, Civ.R. 56(C).

{¶ 14} A party seeking summary judgment must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. When a

properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleading, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery* (1984), 11 Ohio St.3d 75, 79. A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 304; *Needham v. Provident Bank* (1996), 110 Ohio App.3d 817, 826, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

{¶ 15} In material part, R.C. 2744.07 provides:

{¶ 16} "(A) (1) Except as otherwise provided in this division, a political subdivision shall provide for the defense of an employee, in any state or federal court, in any civil action or proceeding which contains an allegation for damages for injury, death, or loss to person or property caused by an act or omission of the employee in connection with a governmental or proprietary function. The political subdivision has the duty to defend the employee if the act or omission occurred while the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities. * * *

{¶ 17} "(C) If a political subdivision refuses to provide an employee with a defense in a civil action or proceeding as described in division (A)(1) of this section, upon the motion of the political subdivision, the court shall conduct a hearing regarding the political subdivision's duty to defend the employee in that civil action. * * * The

pleadings shall not be determinative of whether the employee acted in good faith or was manifestly outside the scope of employment or official responsibilities. * * *."

{¶ 18} Here and in the trial court, appellant argues, with multiple permutations, that because the acts of which appellees were accused are intentional torts and bear no relation to any responsibility for which they may have been hired, it is simply impossible for them to have been acting in either good faith or remotely within the scope of their employment or official responsibilities. Neither appellant nor plaintiff Spitulski produced even a scintilla of evidence that appellees had actually done the acts alleged.

{¶ 19} The statute specifically disclaims the determinativeness of the pleadings. Appellees presented with their summary judgment motion affidavits from each of them denying Spitulski's allegations. To escape summary judgment, the burden shifts to appellant to come forth with some evidence contradicting those affidavits to create a genuine issue of fact. This issue is material, because, absent some factual support for the defamation allegations, the presumption is that the allegations are false.

{¶ 20} All of appellees were teachers in one of appellant's schools and apparently this disagreement with their former principal is connected to that status. This relationship is not manifestly outside the scope of their employment or responsibilities. If they are innocent of the allegations against them, they are acting in good faith. This places them squarely within coverage of the R.C. 2744.07.

{¶ 21} As a result, the trial court properly declared that appellant had a duty to provide them with a defense in this civil action. Accordingly, appellant's first and second assignments of error are not well-taken.

{¶ 22} In its remaining assignment of error, appellant asserts that the trial court erred in concluding that appellee Toledo Federation of Teachers is a party to this action.

{¶ 23} According to the affidavit of the treasurer of the teachers' union, when appellee failed to respond to a request to provide a defense against the defamation claim, the union stepped forward to defend its members. At the time of appellees' motion for summary judgment, the union had spent in excess of $16,000 for this purpose. Nevertheless, the Toledo Federation of Teachers was not named in appellant's original declaratory judgment complaint.

{¶ 24} Appellees' response to appellant's declaratory judgment complaint included an answer and a "Counterclaim Complaint for Declaratory Judgment." The first paragraph of the counterclaim begins, "Now comes Third Party Plaintiff Toledo Federation of Teachers and Counterclaim Plaintiff's Richelle O'Mare [etc.]" who seek a declaration that appellant has a duty to defend in the defamation case. Under "The Parties," the union describes itself as a "duly organized, public employee organization" that represents teachers, including those named as defendants in the defamation action. Paragraph 19 of the answer/counterclaim states:

{¶ 25} "The TFT enters this action pursuant to Civil Rule 14(A) and Ohio Revised Code §1745.01 as the issues pending before the court materially affects [sic] TFT Members, to include its members currently named in the Spitulski complaint * * *"

{¶ 26} Appellant insists that, since the union was named in neither its complaint, nor Spitulski's complaint, nor brought in by summons and complaint as a third party plaintiff pursuant to Civ.R. 14, it is not a party to this suit.

{¶ 27} Appellee Toledo Federation of Teachers concedes that calling itself a third party plaintiff may have been "technically and procedurally incorrect." Nevertheless, it maintains, it is a proper party by virtue of its ability pursuant to R.C. 1745.01 to bring suits on behalf of its members and did so by virtue of its "filing a claim," pursuant to Civ.R. 3(A), in the counterclaim.

{¶ 28} We must concur with appellee Toledo Federation of Teachers' characterization of its procedural position. There are many ways by which appellee union could have become a party: through a complaint with summons served pursuant to Civ.R. 14(A), on a motion to intervene pursuant to Civ.R. 24(C), by joinder pursuant to Civ.R. 13(H) as a real party in interest, Civ.R. 17(A), or a subrogee, Civ.R. 19(A)(3). It does not appear, however, that appellee TFT wholly complied with any of these rules.

{¶ 29} Nevertheless, we are directed to construe the civil rules, "* * * to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice." Civ.R. 1(A). The trial court saw fit to overrule appellant's objections, in essence granting appellee union joinder. A decision to join a party rests within the trial court's discretion and will not be reversed absent an abuse of that discretion. *Gallia Cty. Genealogical Soc. v. The Gallia Cty. Hist. Soc.*, 4th Dist. No. 06CA11, 2007-Ohio-3882, ¶ 13. An abuse of discretion is more than a mistake of law or an error of judgment, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 30} Appellant was not surprised by the presence of appellee union as a party, nor has appellant articulated any manner in which the presence of the Toledo Federation of Teachers in the suit operated to appellant's prejudice. Absent such prejudice, we cannot find an abuse of the trial court's discretion in granting joinder, *Gallia County* at ¶ 14, nor may we reverse its decision. App.R. 12(B). Accordingly, appellant's third assignment of error is not well-taken.

{¶ 31} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay court costs of this appeal, pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE