[Cite as *Hogg v. Heath*, 2015-Ohio-515.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100188

MARK A. HOGG

PLAINTIFF-APPELLANT

vs.

MARK HEATH

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-11-767179

BEFORE: E.A. Gallagher, J., Keough, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: February 12, 2015

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EILEEN A. GALLAGHER, J.:

{¶1} Appellant, Mark Hogg, appeals the trial court's order granting summary judgment in favor of appellees Mark Heath, William Woo and Sean Herpka. Hogg argues that the trial court erred when it determined that his defamation and intentional infliction of serious emotional distress claims against appellees failed because appellees were protected by a qualified privilege and Hogg failed to introduce evidence to show, with convincing clarity, that the appellees acted with actual malice. For the following reasons, we affirm the decision of the trial court.

{¶2} Hogg's complaint alleges that each of the appellees incorrectly identified him to law enforcement as the perpetrator of an armed robbery after watching surveillance video of the crime. Hogg was arrested and incarcerated for five days. He was indicted on two counts of aggravated robbery, two counts of kidnapping and one count of felonious assault. Hogg was acquitted of all charges after a jury trial. Hogg's complaint asserts charges of defamation and intentional infliction of serious emotional distress against each of the appellees based on the identifications they made to police.

{¶3} Appellees moved for summary judgment claiming that they were entitled to a qualified privilege because the allegedly defamatory statements were made to law enforcement officers during the course of a criminal investigation. The trial court agreed and found that Hogg had failed to overcome the appellees' qualified privilege with evidence of convincing clarity that appellees made their statements with a high probability of falsity. Hogg's appeal asserts four assignments of error.

{¶4} In Hogg's first two assignments of error, he argues that the trial court erred by granting summary judgment in favor of the appellees because genuine issues of material fact exist

on each element of his defamation claims and on the question of whether the appellees acted with actual malice such that their statements were not protected by a qualified privilege.

{¶5} Our review of a trial court's grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. Pursuant to Civ.R. 56(C), summary judgment is appropriate when (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 1995-Ohio-286, 653 N.E.2d 1196, paragraph three of the syllabus; *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 1998-Ohio-389, 696 N.E.2d 201. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264.

{¶6} Defamation occurs when a publication contains a false statement "made with some degree of fault, reflecting injuriously on a person's reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business or profession." *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, 883 N.E.2d 1060, ¶ 9, quoting *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 7, 1995-Ohio-66, 651 N.E.2d 1283. If a claimant establishes a prima facie case of defamation, a defendant may then invoke a conditional or qualified privilege. *Id.*, citing *Hahn v. Kotten*, 43 Ohio St.2d 237, 243, 331 N.E.2d 713 (1975).

{¶7} "Any communications made by private citizens to law enforcement personnel for the prevention or detection of crime are qualifiedly privileged and may not serve as the basis for a

defamation action unless it is shown that the speaker was motivated by actual malice." *Lewandowski v. Penske Auto Group*, 8th Dist. Cuyahoga No. 94377, 2010-Ohio-6160, ¶ 26, quoting *Oswald v. Action Auto Body & Frame, Inc*., 8th Dist. Cuyahoga No. 71089, 1997 Ohio App. LEXIS 1642 (Apr. 24, 1997).

{¶8} A qualified privilege may be defeated only if a claimant proves with convincing clarity that the speaker acted with actual malice. *Jacobs v. Frank*, 60 Ohio St.3d 111, 573 N.E.2d 609 (1991), paragraph two of the syllabus. "In a qualified privilege case, 'actual malice' is defined as acting with knowledge that the statements are false or acting with reckless disregard as to their truth or falsity." *Id*. The phrase "reckless disregard" applies when a publisher of defamatory statements acts with a high degree of awareness of their probable falsity or in fact entertained serious doubts as to the truth of his publication. *Id.* at ¶ 10, citing *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964); *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). Actual malice may not be inferred from evidence of personal spite, ill-will or intention to injure on the part of the writer. *Dupler v. Mansfield Journal Co., Inc.*, 64 Ohio St.2d 116, 119, 413 N.E.2d 1187 (1980), citing *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 88 S.Ct. 197, 19 L.Ed.2d 248 (1967). Rather, the focus of inquiry is on defendant's attitude toward the truth or falsity of the publication. *Id.*, citing *Herbert v. Lando*, 441 U.S. 153, 160, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). Furthermore, the subjective belief of the speaker must be considered in determining whether a statement was made with actual malice. *Georgalis v. Ohio Turnpike Comm.*, 8th Dist. Cuyahoga No. 94478, 2010-Ohio-4898, ¶ 27, citing *Lakota Local School Dist. Bd. of Edn. v. Brickner*, 108 Ohio App.3d 637, 649, 671 N.E.2d 578 (6th Dist.1996).

{¶9} In the present case, Hogg concedes that a qualified privilege applies to the statements made to law enforcement relating to the identification of the perpetrator of the robbery by the appellees. However, he challenges whether summary judgment was appropriate because he believes a genuine issue of material fact exists on the issue of actual malice. The question before the court is whether a reasonable jury could find actual malice with convincing clarity. *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, 883 N.E.2d 1060, ¶ 11, citing *Dupler v. Mansfield Journal Co., Inc.*, 64 Ohio St.2d 116, 413 N.E.2d 1187 (1980). Although a heightened "convincing clarity" standard applies in this instance, we must construe all evidence most strongly in favor of Hogg, the nonmoving party. *Id.*; Civ.R. 56(C). Whether the evidence is sufficient to support a finding of actual malice is a question of law for the court to decide. *Lansky v. Rizzo*, 8th Dist. Cuyahoga No. 88356, 2007-Ohio-2500, ¶ 19; *Murray v. Chagrin Valley Publishing Co.*, 8th Dist. Cuyahoga No. 101394, 2014-Ohio-5442, ¶ 7.

{¶10} We now review the record to determine whether there is sufficient evidence to permit a finding of actual malice as a matter of law. *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, 883 N.E.2d 1060, ¶ 12. The record reflects that Cleveland police detective David Borden obtained a VHS recording of the robbery and provided it to Channel 19 news in Cleveland for the purpose of broadcasting the video in order to elicit tips as to the identity of the perpetrator. Mark Heath saw the video on Channel 19 and believed that the perpetrator was Mark Hogg, the ex-husband of Heath's niece and a man with whom Heath had significant contact with during his employment as an RTA bus driver and Hogg's employment as an RTA patrol officer. Heath watched the video of the robbery two dozen times and identified Hogg as the perpetrator and based his recognition on Hogg's strong, deep, distinctive voice and stiff body

mannerisms. Heath contacted Detective Borden and told him that he believed with a high percentage of confidence that the man in the video was Mark Hogg.

{¶11} After receiving the tip from Heath, Detective Borden identified Sean Herpka and William Woo as former law enforcement co-workers of Mark Hogg and asked them to review the video of the robbery for a potential identification of the perpetrator.

{¶12} Herpka is a sergeant with the RTA police department and he worked there with Hogg from 1998 to 2005. Hogg was one of Herpka's field training officers and Herpka testified that they worked together in the same patrol car for approximately one month. Hogg averred that he was Herpka's training officer for two weeks over a two-month period in 1998 and may have worked with Herpka "once or twice" after that. Herpka identified Hogg as the perpetrator in the video based on Hogg's unique, low-pitched voice, pronunciation and pattern of speech that Herpka distinctly remembered. Herpka also believed the overall movement of the perpetrator matched Hogg but could not point to specifics. At the time of this civil suit Herpka remained absolutely positive that Hogg committed the robbery based on the video.

{¶13} Woo worked with Hogg from 2002 to 2005 as a patrol officer for Cuyahoga Community College and was Hogg's supervisor for six months of that time period. After watching the robbery video, Woo could not be sure that the face in the video was Hogg but was confident that the perpetrator's voice matched Hogg's voice.

{¶14} Ronald Wynne also worked with Hogg at Cuyahoga Community College and was shown the robbery video. Wynne testified that although he thought the perpetrator was Mark Hogg because the perpetrator's size, face and chin resembled Hogg, he was not certain of the match and told police that he could not identify Hogg as the perpetrator.

{¶15} In opposition to appellees' motions for summary judgment Hogg denied that he was involved in any way in the robbery in question. He stated that he is "clumsy" and does not move with the speed or coordination exhibited by the perpetrator in the video. Hogg further averred that his voice is much lower than the voice of the perpetrator, that the tone and pitch of the perpetrator's voice differed from his own and "anyone who knows my voice would never mistake the voice on the videotape for me." Hogg introduced affidavits of five persons, including his own mother, who testified that they had viewed the video of the robbery and that the perpetrator was clearly not Hogg because the voice, mannerisms, size and agility of the perpetrator did not match Hogg. Each of these affiants further offered their legal conclusion that anyone who accused Hogg of the crime would be reckless.

{¶16} Viewing the above evidence in a light most favorable to Hogg we find that Hogg has failed to produce evidence sufficient to raise a genuine issue of material fact from which a reasonable jury could find actual malice with convincing clarity. If the issue before this court was simply whether Hogg has raised a genuine issue of material fact as to whether the appellees correctly identified him, then summary judgment would plainly be inappropriate. It is clear from the record that reasonable minds could, and in this instance did, in fact, reach different conclusions as to the identification of Hogg as the perpetrator in the video. However, in light of the qualified privilege possessed by the appellees, Hogg's burden is significantly greater. Because there is no evidence in the record to suggest that any of the appellees acted with knowledge that their statements were false or that they entertained serious doubts as to the truth of their identifications, Hogg needed to raise a genuine issue of material fact from which a reasonable jury could find, with convincing clarity, that appellees made their statements with a

high degree of awareness of their probable falsity. As a matter of law, we find that the evidence in the record fails to satisfy this significant burden.

{¶17} The context of the identifications at issue in this case is important. This is not an instance where a lone witness's identification is contradicted by convincing evidence of its reckless character. Instead, we are presented with a situation where several separate, unaffiliated witnesses who knew Hogg well and bore him no ill will all reached the same independent conclusion: they believed the voice in the surveillance video matched Mark Hogg. In their depositions for this case none of the appellees expressed doubt as to their identification despite Hogg's criminal acquittal. Nor is there any hint of conspiracy amongst the appellees against Hogg in regards to the identifications. Hogg argues that his height and weight differ from the perpetrator's such that the appellees should have known he was not a match. However Hogg's argument is flawed in several respects: (1) Herpka testified that the perpetrator's precise height and weight could not be deduced from the video, (2) Hogg admitted that he had gained 20 pounds between 2005 when he left the employment of the RTA and 2008, (3) none of the appellees had precise knowledge of Hogg's weight at the time of the robbery as none had encountered him in several years, (4) Detective Borden testified in his deposition that Hogg fit the size and stature of the perpetrator in the video, and (5) aside from varying opinions on the similarities of manner that Hogg and the perpetrator physically held themselves each of the appellees based their identifications on the *voice* of the perpetrator. Although the testimony of Ronald Wynne and the averments of Hogg's acquaintances demonstrate that differing interpretations of the video are possible these facts do not rise to a level from which we can conclude that a reasonable jury could find with convincing clarity that the appellees' statements were made with a high degree of awareness of their probable falsity such that actual malice could be established. Accordingly, the

trial court did not err by granting summary judgment in favor of the appellees on Hogg's defamation claims.

{¶18} Summary judgment was also appropriate on Hogg's intentional infliction of serious emotional distress claims. "When a privilege, qualified or absolute, attaches to statements made in a defamation action, those statements remain privileged for the purpose of derivative claims such as intentional infliction of emotional distress * * * ." *A & B-Abell Elevator Co., Inc. v. Columbus/Central Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 15, 1995-Ohio-66, 651 N.E.2d 1283. Because we have already determined that defendants had a qualified privilege for Hogg's defamation claims and no genuine issues of material fact exist on the issue of actual malice, appellees are entitled to judgment as a matter of law as to Hogg's claims for tortious interference. *Georgalis*, 8th Dist. Cuyahoga No. 94478, 2010-Ohio-4898, ¶ 32.

{¶19} Hogg's first and second assignments of error are overruled.

{¶20} In his third assignment of error Hogg argues that Woo and Herpka were not entitled to summary judgment based upon statutory immunity. In light of our resolution of Hogg's first two assignments of error, we find his third assignment of error to be moot.

{¶21} In his fourth assignment of error, Hogg argues that the trial court erred by refusing to consider a DVD allegedly containing the surveillance video footage from the robbery. Hogg submitted the DVD in conjunction with his own affidavit in which he stated that the DVD was a true and complete copy of the video recording of the robbery. The trial court held that the video was not proper Civ.R. 56(C) evidence and noted that it did not factor into its decision on summary judgment.

{¶22} The decision whether to admit or exclude evidence is subject to review under an abuse of discretion standard, and absent a clear showing that the court abused its discretion in a

manner that materially prejudices a party, we will not disturb an evidentiary ruling. *Pappas v. Ippolito*, 177 Ohio App.3d 625, 634, 2008-Ohio-3976, 895 N.E.2d 610 (8th Dist.).

{¶23} As an initial matter we note that video surveillance footage can be proper Civ.R. 56 evidence. *See, e.g., Busbee v. Eaton Med. Transp., Inc.*, 2d Dist. Montgomery No. 26262, 2014-Ohio-4701; *Cage v. Sutherland Bldg. Prods.*, 10th Dist. Franklin No. 14AP-227, 2014-Ohio-3891; *Findley v. Mem Hosp. of Union Cty. Sleep Lab*, 3d Dist. Union No. 14-13-20, 2014-Ohio-3547; *Washington v. Speedway Superamerica, L.L.C.*, 8th Dist. Cuyahoga No. 97717, 2012-Ohio-3260; *Joyce v. Rough*, 6th Dist. Lucas No. L-10-1368, 2011-Ohio-3713; *Blake v. Beachwood City Schools Bd. of Edn.*, 8th Dist. Cuyahoga No. 95295, 2011-Ohio-1099; *Cooper v. Tommy's Pizza*, 10th Dist. Franklin No. 09AP-1078, 2010-Ohio-2978; *Spears v. Akron Police Dept.*, 9th Dist. Summit No. 24847, 2010-Ohio-632; *Shirk v. Alger*, 3d Dist. Hardin No. 6-09-10, 2009-Ohio-6028; *Caywood v. Ryan's Family Steak House*, 9th Dist. Summit No. 23168, 2006-Ohio-6005; *Holbrook v. Lexis-Nexis*, 169 Ohio App.3d 345, 2006-Ohio-5762, 862 N.E.2d 892 (2d Dist.); *Zakaib v. Cleveland*, 8th Dist. Cuyahoga No. 77402, 2001 Ohio App. LEXIS 1779 (Apr. 19, 2001); *R.A.S. Entertainment v. Cleveland*, 130 Ohio App.3d 125, 719 N.E.2d 641 (8th Dist.1998); *Rogers v. Buckel*, 83 Ohio App.3d 653, 615 N.E.2d 669 (8th Dist.1992).

{¶24} On summary judgment, where supporting documentary evidence falls outside the materials listed in Civ.R. 56(C), the correct method for introducing such evidence is to incorporate it by reference into a properly framed affidavit. *Blanton v. Cuyahoga Cty. Bd. of Elections*, 150 Ohio App.3d 61, 2002-Ohio-6044, 779 N.E.2d 788, ¶ 13 (8th Dist.), citing *Martin v. Cent. Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990). Documents not properly incorporated are not to be considered by the trial court in deciding a motion for summary judgment. *Id.*, citing *Buzzard v. Pub. Emps. Retirement Sys. of Ohio*, 139

Ohio App.3d 632, 745 N.E.2d 442 (10th Dist. 2000). Video evidence falls into this category and must be incorporated through a properly framed affidavit. *Adams v. Ward*, 7th Dist. Mahoning No. 09 MA 25, 2010-Ohio-4851, ¶ 13.

{¶25} Although the trial court was incorrect in categorically stating that video evidence cannot be considered on summary judgment, we find no error in this instance because the video was not properly authenticated. In *Midland Steel Prods. Co. v. Internatl. Union, United Auto., Aerospace & Agricultural Implement Workers of Am., Local 486*, 61 Ohio St.3d 121, 573 N.E.2d 98 (1991), the Ohio Supreme Court explained the rules applicable to the proper authentication of video evidence:

> The admissibility of photographic evidence is based on two different theories. One theory is the "pictorial testimony" theory. Under this theory, the photographic evidence is merely illustrative of a witness' testimony and it only becomes admissible when a sponsoring witness can testify that it is a fair and accurate representation of the subject matter, based on that witness' personal observation. * * *. A second theory under which photographic evidence may be admissible is the "silent witness" theory. Under that theory, the photographic evidence is a "silent witness" which speaks for itself, and is substantive evidence of what it portrays independent of a sponsoring witness.

Id. at 129-130.

{¶26} "Under the silent witness theory, photographic evidence may be admitted upon a sufficient showing of the reliability of the process or system that produced the evidence." *Id.* at paragraph three of the syllabus. Photographic evidence includes video footage. *Id*. at 129.

{¶27} Hogg's affidavit fails to satisfy either of the above theories. In contrast to his averment that the DVD was a true and complete copy of the video recording of the robbery Hogg admitted in the same affidavit that he personally had never been to the store that had been robbed. In fact, his entire defamation claim relies on the proposition that he was *not present* at the time of the robbery. Although Hogg argues that the video was authenticated by witnesses at his

criminal trial, such testimony does not satisfy the affidavit requirement above. Even if that defect were to be ignored, Hogg does not explain where in the record it is established that the DVD he offered in opposition to summary judgment is the same DVD authenticated in his criminal trial.

{¶28} In regards to the silent witness theory, Detective Borden testified in his deposition that the surveillance footage from the store was originally obtained in VHS form. There is absolutely no explanation in the record as to how Hogg came into possession of the video or if or how the particular DVD copy offered by Hogg was derived from the original VHS copy. More importantly, Hogg has failed to introduce evidence through a properly framed affidavit establishing reliability of the process or system that produced the surveillance video. *See, e.g., State v. Pickens*, Slip Opinion No. 2014-Ohio-5445 (holding videos admissible under the "silent witness" theory where a witness testified from personal knowledge about the installation of the surveillance system, the positioning of the cameras, and the method used for recording the video).

{¶29} Under these facts we cannot say that the trial court abused its discretion in refusing to consider the video evidence offered by Hogg.

{¶30} Hogg's fourth assignment of error is overruled.

{¶31} The judgment of the trial court is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN A. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
MARY J. BOYLE, J., CONCUR