The Supreme Court of Ohio

CASE ANNOUNCEMENTS

May 4, 2021

[Cite as *05/04/2021 Case Announcements #2*, 2021-Ohio-1559.]

APPEALS NOT ACCEPTED FOR REVIEW

2021-0109. Missionaries of the Sacred Heart, Inc. v. Ohio Dept. of Youth Servs.
Franklin App. No. 19AP-872, 2020-Ohio-5596.

Fischer and Donnelly, JJ., dissent.

Brunner, J., dissents, with an opinion.

BRUNNER, J., dissenting.

{¶ 1} This case was originally filed in the Court of Claims by appellants, Missionaries of the Sacred Heart, Inc., Sister Michael Marie, and Sister Mary Cabrini—a nonprofit religious organization and two of its Traditional Catholic nuns[1] who volunteered at juvenile correctional facilities operated by the Ohio Department of Youth Services ("ODYS"). The Court of Claims dismissed the case under Civ.R. 12(B)(1) and (6) for lack of subject-matter jurisdiction and failure to state a claim for defamation and related claims. Appellants appealed the dismissal of their defamation claim, and the court of appeals affirmed.

{¶ 2} Appellants alleged in their complaint that when the sisters brought issues that they had encountered while volunteering at a juvenile correctional facility to the attention of the deputy

1. As relevant to the issues potentially to be considered by this court, appellants' complaint set forth the following facts. The sisters are nuns whose life work is to assist the poor and serve the common good of society. The Missionaries of the Sacred Heart is a Kentucky nonprofit religious corporation licensed to transact business in Ohio that has been in existence for approximately 30 years. Appellants value their integrity and reputation for volunteer work that is careful, conscientious, considerate, generous, responsible, and truthful. This reputation has been carefully cultivated over a span of almost 30 years of volunteer and charitable ministry. The activities of appellants are supported by voluntary contributions received in recognition and in support of their volunteer services to defray the expenses of their daily basic needs and their mission work.

director of facility support at ODYS, their volunteer privileges were suspended for 60 days by a letter containing false allegations against the sisters. Appellants further alleged that ODYS treated a query from the sisters about why they were suspended as a public-records request and included a copy of the suspension letter in its response to the sisters. The Court of Claims dismissed appellants' action on the basis that the release of the letter as a public record did not amount to publication for the purpose of proving defamation, because it had not been shared with a third party, even though the sisters obtained it in ODYS's response to what it perceived to be a public-records request. The Tenth District Court of Appeals affirmed the Court of Claims' judgment.

{¶ 3} We should accept jurisdiction to consider whether the element of "publication" is satisfied in a defamation claim when the defamatory content is a public record and has been released as a response to a public-records request. This case warrants our review, and this court should accept appellants' second and third propositions of law.

Second and Third Propositions of Law[2]

{¶ 4} Nearly thirty years have elapsed since this court addressed the issue of publication, which was then in the context of a defamation action filed by an attorney against a grievant to the Cuyahoga County Bar Association. *Hecht v. Levin*, 66 Ohio St.3d 458, 613 N.E.2d 585 (1993). In *Hecht*, this court held that "[*a*]*ny* act by which the defamatory matter is communicated to a third party constitutes publication." (Emphasis sic.) *Id.* at 460. We further stated that "it is sufficient that the defamatory matter is communicated to one person only, even though that person is enjoined to secrecy." *Id.* And in that context, we held that "publication of defamation consists in communicating it to a person or persons other than the person libeled." *Id.* In this case, the Tenth District relied on language from *Hecht* in determining that appellants had not alleged facts that would support an actionable defamation claim. *Hecht* was used as a sword instead of a shield to require appellants to plead facts that a third party received the allegedly defamatory statement in order to state a cause of action for defamation.

{¶ 5} A review of Ohio caselaw shows that other courts similarly have held that in school or employment settings, the mere inclusion of a record within a file open to public request or inspection is not enough to establish the publication element of a defamation claim if no third party

2. Proposition of law No. II is: "The 'publication' element in a defamation claim is inferred by factual allegations that defamatory content was released on behalf of the publisher as a response to a public records request."

Proposition of law No. III is: "The element of 'publication' in a defamation claim is stated by factual allegations that defamatory content is part of the public record."

actually accesses the information. *Potter v. RETS Tech Ctr., Co., Inc.*, 2d Dist. Montgomery Nos. 22012 and 22014, 2008-Ohio-993, ¶ 44 (involving a nursing student's notice of probation and holding that the possibility of a third party accessing her school file merely anticipates a publication that has not occurred and thus is not actionable for defamation); *Sheridan v. Columbia Local Sch. Dist. Bd. of Edn.*, N.D.Ohio No. 1:18 CV 1162, 2019 U.S. Dist. LEXIS 88201, *21 (May 24, 2019) ("Placement of a statement in someone's file, even if that file may be considered a public record, does not equate to publication for purposes of defamation if no third-party accesses the information.").

{¶ 6} There appears to be little authority addressing whether a public office's creation and release of a public record concerning a third party—when, as in this case, no formal relationship exists between the third party and the alleged publisher, such as employee-employer or student-educational institution—constitutes publication for the purposes of defamation. In my view, the legal application of *Hecht* and similar jurisprudence is outdated. In 1993, when *Hecht* was decided, not even e-mail was widely in use, let alone scanned or digitized records. The act of releasing a document to a third party in 1993 was primarily either in person or via the U.S. Postal Service. Today, "release" of a public record may be nearly instantaneous.

{¶ 7} Thus, applying *Hecht* as it was applied here elevates form over substance without good reason. It is no longer relevant to parse to whom a public record was released, because access to public records is relatively simple in this digital age. Moreover, extending *Hecht*'s application hypertechnically is inhumane. Why should parties such as appellants have to wait for damaging public records to be released to a third party in order to satisfy the publication element of a defamation claim, particularly when the release of those records—regardless of to whom they have been released—has already occurred according to public-record protocol? Applying *Hecht* as it was applied here is tantamount to requiring the infliction of visible wounds when the need for relief from pain is apparent.

{¶ 8} Finally, appellants stand in an unusual position compared to others with relationships to a public office, such as employee-employer or student-educational institution. Appellants hold no special relationship with ODYS that creates a right or an avenue to adjudication of ODYS's truthfulness. The allegedly defamatory material about appellants, who served as volunteers in ODYS's juvenile correctional facilities, was created by ODYS, placed in ODYS's records that are open to release to the public, and released to appellants by ODYS as if in response to a public-

records request. This court would well use its constitutional authority to examine whether this is sufficient to constitute the necessary element of publication for a defamation action.

Caselaw supporting jurisdiction

{¶ 9} There is some authority suggesting that placing a defamatory statement in a public file is actionable for defamation. In a case concerning a public investigator of police misconduct, this court held that "his role as investigator did not grant him license to publish unsubstantiated rumors if he 'in fact entertained serious doubts as to [their] truth.' " *Jackson v. Columbus*, 117 Ohio St. 3d 328, 2008-Ohio-1041, 883 N.E.2d 1060, ¶ 12, quoting *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262; *see St. Amant* at 732 ("recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports").

{¶ 10} Ohio's appellate courts have held that producing a public record in response to a public-records request may satisfy the publication element to support a claim for defamation. *Jamison v. Galena*, 2015-Ohio-2845, 38 N.E.3d 1176, ¶ 60 (5th Dist.), citing *Mehta v. Ohio Univ.*, 194 Ohio App. 3d 844, 2011-Ohio-3483, 958 N.E.2d 598 (10th Dist.). And there is also at least one appellate court holding that, although a new cause of action does not begin each day that an allegedly defamatory record is part of a court record that is accessible to the public, a cause of action does arise when the defamatory record is first entered onto the court's public record. *Fleming v. Ohio Atty. Gen.*, 10th Dist. Franklin No. 02AP-240, 2002-Ohio-7352, ¶ 14-15.

{¶ 11} A public record has been defined in statute for the last ten years as

> any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

{¶ 12} R.C. 149.011(G). No government agency should be permitted to publish statements about third parties, such as appellants, without those third parties being able to respond to the truthfulness of those statements.

Public records, their release, and the parties' relationship

{¶ 13} This court should provide guidance on what constitutes publication of a public record for the purpose of a defamation claim. This is especially important for third parties who have no institutional recourse to challenge the truthfulness of statements made about them by government actors.

{¶ 14} ODYS made adverse judgments about people whose very character and integrity sustain the lifeblood of their work. The funding of appellants' charitable and public-service efforts may be affected by allegedly defamatory statements placed in a public record by the agency they serve. There is no R.C. Chapter 119 administrative appeal from ODYS's action for third parties such as appellants. *See generally* R.C. 119.01(D) (defining "adjudication" for purposes of R.C. 119.01 through 119.13). There is no employment hearing to be held, as appellants are not ODYS employees. *See generally* R.C. 124.03(A)(1) (describing powers and duties of the state personnel board of review). There is no union with which to file a grievance for the same reason that appellants are not state employees. *See generally* R.C. 4117.03(A)(5) (setting forth the right of public employees under a collective-bargaining agreement to present grievances and have them adjusted).

{¶ 15} What ODYS alleged regarding appellants remains unrebutted in the public record, a record that appellants demonstrated can be obtained by anyone through ODYS's established public-record-request protocol. Is that enough to survive a motion to dismiss in the Court of Claims? We should answer that question.

Court of Claims and parties seeking relief from government actions

{¶ 16} There is only one court in this state that can adjudicate the defamation claims of appellants and persons similarly situated against a government agency such as ODYS. The Ohio Court of Claims is a court that by its very nature is the gatekeeper between unfettered government discretion and justice for people harmed by the actions of government. *See* R.C. 2743.03(A)(1) and (A)(3)(b). Ohio law denies an aggrieved party appearing before the Court of Claims a trial by a jury of the aggrieved party's peers. *See* R.C. 2743.03(C)(1).

{¶ 17} Coupled with this, justice can be slim in the Court of Claims, where jumping the initial hurdle of governmental immunity is accompanied by the trip wires of motions to dismiss and motions for summary judgment that may or may not be related to immunity issues. *See* R.C.

2743.03(D) ("The Rules of Civil Procedure shall govern practice and procedure in all actions in the court of claims, except insofar as inconsistent with this chapter.")

{¶ 18} When an aggrieved litigant actually achieves the benefit of a trial, the fact-finder is frequently not a judge but a magistrate, whose decision is not final, who presides over a trial. The trial's final outcome before a magistrate is inherently bound by the entanglements of Civ.R. 53, requiring a party objecting to a magistrate's factual findings to have the financial means to afford the production of a transcript and legal counsel to argue factual and legal objections based on that transcript. R.C. 2743.03(C)(1)), (C)(2), and (D).); *see* Civ.R. 53(D)(3)(b)(iii). If there are no timely objections filed, "the court may adopt a magistrate's decision, unless it determines that there is an error of law or other defect evident on the face of the magistrate's decision." Civ.R. 53(D)(4)(c). Even if objections are filed, absent a transcript, the party waives any appeal of the magistrate's findings other than claims of plain error. Civ.R. 53(D)(3)(b)(iv). *State ex rel. Pallone v. Ohio Court of Claims*, 143 Ohio St. 3d 493, 2015-Ohio-2003, 39 N.E.3d 1220, ¶ 11; *see* Civ.R. 53(D)(3)(b)(iv).[3]

{¶ 19} Considering these hurdles that persons such as appellants must face in order to redress grievances when allegedly defamatory statements are made by a government agency, this court, at the very least, should consider what constitutes publication and thereby whether the agency's activity gives rise to an action in defamation.

Conclusion

{¶ 20} There historically has been and continues to be some underlying distrust of the institutions of government. Government can be a force for good, and furthering that purpose is the basis of the work the sisters undertook in volunteering and serving in ODYS's facilities. There is not nor should there be unfettered discretion of public agencies to publish statements about third parties such as appellants that are not subject to some sort of review of their truthfulness or fairness.

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3. *See also Huffer v. Huffer*, 10th Dist. Franklin No. 12AP-883, 2013-Ohio-1575, ¶ 8 ("Therefore, because appellant presented no transcript to the trial court for ruling on the objections from the magistrate's decision, this court is bound by the magistrate's factual findings, subject to plain error, and any legal issues raised. *See* Civ.R. 53(D)(3)(b)(iv); *Petty v. Equitable Prod. & E. States Oil & Gas, Inc*., 7th Dist. No. 05 MA 80, 2006-Ohio-887, ¶ 23-24. In civil cases, the plain error doctrine applies only in 'the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.' *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 679 N.E.2d 1099 (1997), syllabus. The doctrine implicates errors that are 'obvious and prejudicial although neither objected to nor affirmatively waived which, if permitted, would have a material adverse [e]ffect on the character and public confidence in judicial proceedings.' *Schade v. Carnegie Body Co*., 70 Ohio St.2d 207, 209, 436 N.E.2d 1001 (1982)").

{¶ 21} A simple Google search, "what is publishing a public record," brings up a plethora of queries, answers, and links for further investigation by Internet readers. With many members of the public having become more computer adept since the COVID-19 pandemic began, these and similar questions being settled by this court would provide clarity for individuals and organizations of the general public, as well as practitioners and governmental entities among all levels of state and local government in Ohio.

{¶ 22} Public records underpin some of the core values of good government and in preventing public corruption—transparency and fair process. Public confidence in government can be strengthened by this court's review of this matter. Importantly, a major function of the court—truth seeking—would be served by permitting judicial review of at least some of the issues this appeal presents: whether there is recourse against a government agency when allegedly untruthful public records are created and released about persons who provide service to the government.

{¶ 23} This court should find that there is great general and public interest in whether a government agency's making allegedly false, damaging statements about persons who provide service to the agency, placing that information in a public record, and releasing the public record satisfies the publication element for purposes of a defamation claim.

{¶ 24} For these reasons, this court should accept jurisdiction to consider appellants' second and third propositions of law. I therefore respectfully dissent from the judgment of the majority not to accept appellants' appeal.
