

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Estephen Castellon,	:	
Plaintiff-Appellant,	:	No. 25AP-856
	:	(Ct. of Cl. No. 2024-00507JD)
v.	:	
	:	(ACCELERATED CALENDAR)
Ohio Department of Rehabilitation and Correction,	:	
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on August 31, 2026

On brief: *Estephen Castellon*, pro se. **Argued:** *Estephen Castellon*.

On brief: *[D. Andrew Wilson]*, Attorney General, *Lindsey M. Grant*, and *Duffy Jamieson*, for appellee. **Argued:** *Duffy Jamieson*.

APPEAL from the Court of Claims of Ohio

JAMISON, J.

{¶ 1} Plaintiff-appellant, Estephen Castellon, appeals from the September 19, 2025 decision of the Court of Claims of Ohio granting summary judgment in favor of defendant-appellee, Ohio Department of Rehabilitation and Correction (“ODRC”), and denying his motion for summary judgment. For the following reasons, we affirm the decision of the Court of Claims.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On June 14, 2024, Castellon, formerly an inmate in the custody and control of ODRC, filed a complaint against ODRC in the Court of Claims. The complaint alleged defamation, abuse of process, intentional tort, negligence, and breach of contract/promissory estoppel.

{¶ 3} As alleged in the complaint, in September 2023, Castellon sent “kites” to prison officials at the Noble Correctional Institution (“NCI”). (June 14, 2024 Compl. at ¶ 12.) These kites included complaints from Castellon about events he organized for Hispanic heritage month, subsequently approved, and then canceled last minute. Two days later, Castellon was escorted by a corrections officer (“CO”) wearing a body-worn camera to the office of Major Sean Frizzell. Castellon denied allegations that he made threats. Despite his denials, Frizzell ordered the CO to take Castellon to “the hole” for the weekend. *Id.* Castellon subsequently received a sanction of 29 days in the hole for extortion by threat of violence or harassment by use of an electronic device. It was alleged that this was based solely upon Frizzell’s conduct report.

{¶ 4} After serving 18 days in the hole, Castellon was transferred to two dorms and then told he was being transferred to Richland Correctional Institution (“RCI”). Castellon appealed the disciplinary action, which was reversed. At RCI, prison officials refused to provide Castellon with the necessary documents to file the instant matter. Castellon was told that because he was being released soon, he could obtain the documents at that point. It took approximately five months and a mandamus action for Castellon to obtain the documents. Attached to the complaint were documents in support of his claims.

{¶ 5} At the heart of Castellon’s claims is a conduct report written by Frizzell charging Castellon with violating institutional rules. The “Supporting acts” contained in that report are as follows:

On the above date and time I received a communication that had been sent by Castellon 704329 as a kite to Wardens Office. The following threatening statement was located in the kite “I sent to Auftenkamp, detailing the reason we as a community will not continue to be patronized. All the events with any substance was shut down and the banquet was the final straw he wants to give the appearance of acting in good faith but the Truth is he despises all of it. I’m done with the benefit of any doubt.” With the implied threats contained in the kite I had Castellon escorted to the Ops Wing to discuss. After Castellon arrived in my Office I asked him who he was referring to as ‘we’ and he said my community. He was very arrogant and portrayed himself as a “leader” of others here the institution. As I was questioning Castellon about this he continued to imply that “his people” would not put up with it. I continued to remind him that he was an individual who had written this as an individual. After 10 minutes of a conversation where he

continued with the implied threats I placed him in Restricted Housing. It was clear he was going to continue make vague threats against staff and the normal operations of NCI.

(Sic passim.) (Sept. 22, 2023 Conduct Report, attached to Compl.)

{¶ 6} On July 16, 2024, ODRC filed a motion to dismiss pursuant to Civ.R. 12(B)(1) and (6). ODRC argued that it was entitled to the privilege of discretionary immunity regarding Castellon's claims about his restrictive housing assignment, change in security classification level, and transfer to RCI. ODRC also argued that Castellon failed to adequately plead a claim for defamation. Next, it was contended that Castellon was barred from bringing claims for alleged violations of ODRC's internal policies and procedures. Lastly, the motion alleged that the Court of Claims did not have subject-matter jurisdiction over constitutional claims. ODRC requested that Castellon's complaint be dismissed in its entirety. Castellon filed a memorandum in opposition to ODRC's motion, to which ODRC replied.

{¶ 7} On November 22, 2024, the Court of Claims issued an entry of partial dismissal. The court determined that to the extent that Castellon's complaint could be construed as challenging his increased security status or transfer to RCI, the court was without jurisdiction. Castellon's defamation claim was not dismissed because, making all reasonable inferences in his favor, the court could not conclude that Castellon would be unable to prove his claim. As far as any claims regarding violations of internal policies or procedures and/or constitutional claims, the court determined that Castellon made no such claims. Ultimately, the court granted, in part, and denied, in part, ODRC's motion.

{¶ 8} On December 5, 2024, ODRC answered Castellon's complaint. In its answer, ODRC contended that Castellon's complaint failed to comply with Civ.R. 10(B)'s requirement that "[a]ll averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances." As such, ODRC alleged that it was nearly impossible for it to admit or deny Castellon's allegations specifically. ODRC went on to admit certain facts contained in the complaint, but generally denied that it defamed Castellon, and engaged in abuse of process, intentional tort, negligence, and/or breach of contract/promissory estoppel. ODRC listed a series of defenses that included, but are not limited to, the complaint failed to state a claim upon which relief could be granted, lack of

jurisdiction, privilege, immunity, contributory negligence, and Castellon was not entitled to the requested relief.

{¶ 9} Castellon filed a reply to ODRC's answer in which he requested a default judgment on his intentional tort, negligence, and breach of contract/promissory estoppel claims. He contended that he was entitled to judgment because ODRC allegedly failed to answer those claims.

{¶ 10} On March 4, 2025, Castellon filed a motion to compel discovery, asserting, among other claims, that ODRC claimed to not know the identity of the CO that escorted Castellon to Frizzell's office. Furthermore, ODRC claimed that body-worn camera footage from the CO did not exist. In ODRC's memorandum contra to Castellon's motion, it contended that Castellon failed to comply with the requirements of Civ.R. 37(A)(1) by failing to confer or attempting to confer with ODRC in an effort to obtain discovery without court action. Furthermore, ODRC contended that it responded in good faith to Castellon's requests. Notably, ODRC asserted that the identity of the CO that escorted Castellon to Frizzell's office is unknown and there is no body-worn camera footage. Castellon responded to ODRC's memorandum contra. Within that response, Castellon argued his request for default judgment that was included in his reply to ODRC's answer.

{¶ 11} On May 7, 2025, a magistrate of the Court of Claims issued an order denying Castellon's motion to compel discovery. As it pertains to compelling discovery, the court found that Castellon did not establish that he conferred or attempted to confer with ODRC in good faith. Even if Castellon conferred with ODRC, the court found his motion to be without merit because he failed to establish that ODRC's responses to his requests were evasive or incomplete. As for Castellon's request for default judgment, the court noted that his reply to ODRC's answer was not a permissible pleading under Civ.R. 7(A). Moreover, the magistrate found that ODRC did not fail to plead or otherwise defend under the Rules of Civil Procedure.

{¶ 12} Castellon did not file a motion to set aside the magistrate's order.

{¶ 13} Castellon was deposed on June 17, 2025. ODRC filed the transcript of that deposition on July 7, 2025.

{¶ 14} The same day Castellon's deposition transcript was filed, there was a series of filings with the Court of Claims. Castellon filed a dispositive motion to compel discovery

and for sanctions. It alleged that ODRC engaged in a pattern of evasive, incomplete, and non-compliant discovery responses to both interrogatories and requests for production. This motion rehashed the allegations contained in his previous motion to compel, except, that he added that ODRC failed to produce Frizzell for a deposition. Additionally, Castellon filed a motion for summary judgment as to each of his claims except for his abuse of process claim, which he withdrew. Finally, Castellon filed a motion to strike deposition transcripts and for protective order. Within that motion, he alleged that ODRC filed the transcripts without first allowing him to review and sign the deposition. He also alleged that the transcripts contained prejudicial information regarding his criminal case. Last, Castellon once again sought default judgment on the claims he alleged ODRC failed to answer.

{¶ 15} ODRC also filed a motion for summary judgment.

{¶ 16} On July 18, 2025, ODRC filed a memorandum contra to Castellon's motion to compel discovery, sanctions, and to strike his deposition testimony. In its response, ODRC asserted that it complied with Castellon's requests in good faith, that it did not know the identity of the CO that escorted Castellon to Frizzell's office, no body-worn camera footage existed, and that Castellon made no effort to depose Frizzell despite his availability. As for Castellon's request to strike his deposition testimony, ODRC asserted that despite filing the transcript, Castellon still had the right to review and sign the deposition. Castellon filed a response to ODRC's memorandum contra.

{¶ 17} In an order dated July 31, 2025, a magistrate of the Court of Claims denied Castellon's motions to compel and strike. As to Castellon's motion to compel, the trial court found that he failed to certify that he conferred or attempted to confer in good faith with ODRC. Moreover, the discovery he sought was the same as the previous motion to compel that was denied. The court again found that it was not established that ODRC was evasive or incomplete in its discovery responses. As for Frizzell's deposition, the court found that Castellon failed to take actions to secure the depositions of any ODRC personnel. The magistrate denied Castellon's request for default judgment for the same reasons as the prior denial. Regarding Castellon's motion to strike, the magistrate determined that the filing of the transcript was not improper and Castellon still had time to review and sign.

{¶ 18} Castellon did not file a motion to set aside the magistrate's order.

{¶ 19} On August 4, 2025, the parties filed competing memoranda contra to their respective motions for summary judgment. The following day, a signed errata sheet was filed detailing the changes Castellon wished to make to his deposition transcript.

{¶ 20} On August 8, 2025, the parties each filed replies in support of their respective motions for summary judgment.

{¶ 21} On September 19, 2025, the trial judge issued a decision granting ODRC's motion for summary judgment and denying Castellon's motion for summary judgment. With regards to Castellon's defamation claim, the Court of Claims found that there was no genuine issue of material fact because Frizzell's characterizations of Castellon's statements as threatening were opinions, not actionable statements of fact. Furthermore, the court found that Frizzell's statements in the conduct report were subject to qualified privilege. Castellon's claim of intentional tort failed to identify a particular theory of relief for his claim or specify the facts on which it was based. The court found that Castellon was essentially rehashing his defamation claim of which the court already disposed. Furthermore, to the extent that Castellon was challenging his institutional placement, it was noted that the court previously dismissed that challenge due to lack of jurisdiction. Ultimately, the court ruled that ODRC was entitled to judgment as a matter of law on the intentional tort claim.

{¶ 22} Castellon's negligence claim was based on allegations that Kelly Rose, Institutional Inspector at RCI, wrongfully withheld public records. However, the Court of Claims determined that a negligence action is not an available remedy for claims regarding denial of access to public records. Additionally, Castellon already pursued a mandamus action wherein he was provided with the requested documents. Therefore, Castellon could not also pursue an action under R.C. 2743.75. Thus, ODRC was entitled to judgment as a matter of law on Castellon's negligence claim. Similarly, Castellon's breach of contract/promissory estoppel claims were based on Rose's failure to provide him with public records in a timely manner. The court found that Castellon failed to produce evidence of a contract between the parties that could form the basis for such claims. Furthermore, as the court has already found, the proper actions for public records grievances are a mandamus action or an action under R.C. 2743.75. As such, ODRC was

entitled to judgment as a matter of law on Castellon's breach of contract/promissory estoppel claims.

{¶ 23} It is from the above decision that Castellon now appeals.

II. ASSIGNMENTS OF ERROR

{¶ 24} Castellon assigns the following as trial court errors:

[1.] THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTION TO COMPEL, THEREBY SHIELDING APPELLEE'S FAILURE TO DISCLOSE THE IDENTITY OF A CRITICAL EYEWITNESS (THE UNKNOWN CORRECTIONS OFFICER) AND PREVENTING THE PRODUCTION OF CRITICAL BODY-WORN CAMERA FOOTAGE, WHICH WAS ESSENTIAL TO BOTH EXCULPATE APPELLANT OF THE DISCIPLINARY CHARGE AND PROVE APPELLEE'S MALICE IN THE DEFAMATION CLAIM.

[2.] THE TRIAL COURT ERRED BY FAILING TO IMPOSE SANCTIONS ON APPELLEE FOR ITS BAD-FAITH MISCONDUCT IN PREMATURELY FILING THE APPELLANT'S UNSIGNED DEPOSITION TRANSCRIPT TO SUPPORT ITS DISPOSITIVE MOTION, THEREBY FORCING APPELLANT TO DEFEND AGAINST SUMMARY JUDGMENT USING UNVERIFIED, UNCERTIFIED EVIDENCE.

[3.] THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY ADMITTING TESTIMONY CONTAINED IN THE DEPOSITION TRANSCRIPT THAT WAS IRRELEVANT, HIGHLY PREJUDICIAL, AND CALCULATED TO UNDERMINE THE APPELLANT'S CREDIBILITY, IN VIOLATION OF OHIO EVIDENCE RULE 403.

[4.] THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO GRANT APPELLANT'S MOTION FOR DEFAULT JUDGMENT ON THE CLAIMS FOR INTENTIONAL TORT, NEGLIGENCE, AND BREACH OF CONTRACT/PROMISSORY ESTOPPEL, WHICH APPELLEE ODRC FAILED TO ANSWER OR OTHERWISE DEFEND AGAINST, IN VIOLATION OF OHIO CIVIL RULE 55.

[5.] THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT ON THE DEFAMATION CLAIM, AS IT IMPROPERLY WEIGHED DISPUTED ISSUES OF MATERIAL FACT REGARDING

FALSITY AND MALICE AND CONTRADICTED ITS OWN
PRIOR RULING THAT THE DEFAMATORY STATEMENTS
WERE FACTUAL AND ACTIONABLE.

III. STANDARD OF REVIEW

{¶ 25} Generally, we review a trial court’s decisions on pretrial motions and discovery disputes for an abuse of discretion. *Williams v. AutoZone*, 2011-Ohio-4985, ¶ 13 (10th Dist.) (trial court’s decision on a motion to compel discovery is reviewed for an abuse of discretion); *Bellamy v. Montgomery*, 2012-Ohio-4304, ¶ 7 (10th Dist.) (trial court’s decision on whether to impose sanctions for discovery violations is reviewed for an abuse of discretion). However, where a magistrate issues an order, “Civ.R. 53(E) imposes an affirmative duty on the parties to timely object . . . identifying any error of fact or law.” *Tassone v. Tassone*, 2025-Ohio-4389, ¶ 7 (10th Dist.). Civ.R. 53(D)(2)(b) states that a party may file a motion to set aside a magistrate’s order no later than ten days after the order is filed. Ohio courts have repeatedly held that a failure to file a motion to set aside waives the right to argue an abuse of discretion and, instead, warrants examination of the issue under a plain-error standard. *State ex rel. Sahbra Farms, Inc. v. Streetsboro*, 2026-Ohio-2364, ¶ 24-25 (11th Dist.).

{¶ 26} The Supreme Court of Ohio has stated that in applying the doctrine of plain error in civil cases, “reviewing courts must proceed with the utmost caution, limiting the doctrine strictly to those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse effect on the character of, and public confidence in judicial proceedings.” *Goldfuss v. Davidson*, 1997-Ohio-401, ¶ 24. “ ‘[I]n order for a court to find plain error in a civil case, an appellant must establish (1) a deviation from a legal rule, (2) that the error was obvious, and (3) that the error affected the basic fairness, integrity, or public reputation of the judicial process and therefore challenged the legitimacy of the underlying judicial process.’ ” *Tanner v. Umeh*, 2020-Ohio-3470, ¶ 11 (10th Dist.), quoting *State v. Morgan*, 2017-Ohio-7565, ¶ 40.

{¶ 27} Under Civ.R. 56(C), summary judgment is proper when the moving party establishes: (1) an absence of genuine issues of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) construing the evidence most strongly in favor of the nonmoving party, reasonable minds could only find in favor of the moving party. *See*,

e.g., *State ex rel. Duncan v. Mentor City Council*, 2005-Ohio-2163, ¶ 9; *Oliver v. Fox's Food, L.L.C.*, 2023-Ohio-1551, ¶ 8 (10th Dist.).

{¶ 28} “The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim.” *Plough v. Nationwide Children’s Hosp.*, 2024-Ohio-5620, ¶ 29 (10th Dist.). The moving party must point to evidence in the record affirmatively demonstrating that the nonmoving party has no evidence to support the nonmoving party’s claims. *Oliver* at ¶ 9, citing *Dresher v. Burt*, 1996-Ohio-107, ¶ 18 and *Vahila v. Hall*, 1997-Ohio-259, ¶ 20.

{¶ 29} If the moving party satisfies its initial burden, then the nonmoving party “has a reciprocal burden . . . to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.” *Dresher* at ¶ 18. The nonmoving party must submit evidentiary material that shows the existence of a genuine dispute over the facts. *A.M. v. Miami Univ.*, 2017-Ohio-8586, ¶ 30 (10th Dist.). A fact is material if it might affect the outcome of the case under the applicable substantive law. *Turner v. Turner*, 1993-Ohio-176, ¶ 8. There is a genuine dispute if the evidence presents a sufficient disagreement between the parties’ positions. *Id.*

{¶ 30} An appellate court reviews a decision granting summary judgment de novo. *Gabriel v. Ohio State Univ. Med. Ctr.*, 2015-Ohio-2661, ¶ 12 (10th Dist.). “Under the de novo standard of review, we apply the same legal standard as the trial court but conduct an independent review of the evidence without deference to the trial court’s decision.” *Plough* at ¶ 31. The trial court’s judgment must be affirmed if any grounds raised by the movant in the trial court support it. *Riverside v. State*, 2010-Ohio-5868, ¶ 17 (10th Dist.).

{¶ 31} It is well-established that “on a summary-judgment motion, any inferences regarding the evidence, including the resolution of ambiguities or inconsistencies, must be made in a manner that favors the nonmoving party.” *Smathers v. Glass*, 2022-Ohio-4595, ¶ 32. An appellate court is not only required “to construe evidence in a light most favorable to nonmoving parties but to also resolve inferences which may reasonably be drawn from the evidence in favor of nonmoving parties.” *Thompson v. Ohio State Univ. Physicians*,

Inc., 2011-Ohio-2270, ¶ 16 (10th Dist.). “ ‘Where competing inferences may be drawn or where the facts presented are uncertain or indefinite, summary judgment is not appropriate and such matters must be left to the trier-of-fact.’ ” *Id.*, quoting *Sprouse v. Allstate Ins. Co.*, 1989 Ohio App. LEXIS 3990, *4-5 (10th Dist. Oct. 17, 1989).

IV. LEGAL ANALYSIS

{¶ 32} In Castellon’s first assignment of error, he alleges that the Court of Claims abused its discretion in denying his motion to compel discovery, specifically the identity of his CO escort and any body-worn camera footage. In his second assignment of error, he contends that the court abused its discretion in failing to impose sanctions on ODRC for filing the transcript of his deposition prior to him reviewing and signing it. In his third assignment of error, Castellon argues that the court abused its discretion by admitting and “implicitly” relying upon inadmissible evidence regarding his criminal history elicited during his deposition. (Appellant’s Brief at 15.) In his fourth assignment of error, he contends that the court abused its discretion by not granting default judgment on his claims of intentional tort, negligence, and breach of contract/promissory estoppel. In the interest of efficiency, we address these assignments of error together.

{¶ 33} Generally, each of these assignments of error contend the Court of Claims abused its discretion in denying his motions to compel discovery and strike the deposition transcript, as well as his requests for a protective order and default judgments. However, each of these motions were disposed of by magistrate’s orders. A review of the record reveals that Castellon never filed motions to set aside either of the magistrate’s orders. As such, he has waived all but plain error. *Tassone*, 2025-Ohio-4389, at ¶ 7 (10th Dist.). Furthermore, Castellon failed to set forth a plain-error argument regarding any of his first four assignments of error. Although an appellant who forfeits an abuse of discretion argument for appellate review may still argue plain error on appeal, we will not sua sponte undertake a plain-error analysis if the appellant fails to do so. *Young v. Boyd*, 2025-Ohio-4450, ¶ 12 (9th Dist.); *see also Campbell v. Campbell*, 2021-Ohio-2045, ¶ 15 (10th Dist.). In short, although Castellon timely appealed, he did not invoke the plain-error doctrine in his first four assignments of error, and nothing in the record warrants its application.

{¶ 34} Castellon’s status as a pro se litigant is of no consequence because he is still required to comply with the Ohio Rules of Civil Procedure. *Buford v. Singleton*, 2005-

Ohio-753, ¶ 8 (10th Dist.). It is well-settled law that, “with respect to procedural rules, pro se litigants are to be held to the same standards as members of the bar.” *Id.* This is especially so here as the record reflects that Castellon possesses legal skills and knowledge far beyond the typical pro se litigant. As such, Castellon’s failure to file motions to set aside the magistrate’s orders or make plain-error arguments on appeal cannot be excused.

{¶ 35} Although Castellon waived all but plain error as to most of his first four assignments of error, we must separately address two arguments because they involve the decision on the parties’ motions for summary judgment, which were decided by the trial judge. In his third assignment of error, Castellon also appears to be arguing that the Court of Claims erred in relying on his criminal history in deciding on the parties’ motions for summary judgment. He contends that such evidence was inadmissible under Evid.R. 403(A). “In ruling on a motion for summary judgment, the trial court cannot rely on facts contained in inadmissible evidence.” *Jefferson Capital Sys., L.L.C. v. Darko*, 2026-Ohio-1826, ¶ 12 (10th Dist.). Evid.R. 403(A) states that “[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.”

{¶ 36} However, Castellon fails to point to any part of the record that demonstrates the Court of Claims even considered his criminal history in rendering its decision. “Unless the record indicates otherwise, the judge is presumed to have considered only admissible evidence.” *Stark Cty. Park Dist. v. Dickerhoof*, 2018-Ohio-4319, ¶ 49 (5th Dist.). Although Castellon argues that the court implicitly relied upon this evidence, our review of the decision reveals nothing to indicate that the court relied upon his criminal history in ruling on the parties’ motions for summary judgment. To the contrary, the court’s decision is thorough, well-reasoned, and overwhelmingly based on citations to legal authority. Moreover, the court was always going to be aware that Castellon had at least some criminal history because his complaint is based on the fact that he was in the custody of ODRC. As such, the limited, general questioning about the nature of Castellon’s conviction and how he came into custody was, at most, minimally prejudicial.

{¶ 37} In his fourth assignment of error, Castellon also appears to be arguing that his claims against Rose are not barred by res judicata. However, nowhere in the Court of Claims’ decision does it discuss res judicata. The court did find that the only two available

remedies for public records grievances are a mandamus action or an action under R.C. 2743.75, and that Castellon already pursued a mandamus action. That is not res judicata. The court was just simply stating that negligence and breach of contract/promissory estoppel claims were not available methods for litigating a public records request. This is a correct statement of the law. “A person allegedly aggrieved by a denial of access to public records in violation of R.C. 149.43(B) may now file either a mandamus complaint pursuant to R.C. 149.43(C)(1)(b) or a public-records-access complaint in the Court of Claims pursuant to R.C. 2743.75.” *Welsh-Huggins v. Jefferson Cty. Prosecutor’s Office*, 2020-Ohio-5371, ¶ 12. As such, Castellon’s argument in this regard is without merit.

{¶ 38} Based on the foregoing, Castellon’s first four assignments of error are overruled.

{¶ 39} In his fifth assignment of error, Castellon argues that the Court of Claims erred in granting summary judgment in favor of ODRC on his defamation claim. More specifically, Castellon contends that the court erred in determining that Frizzell’s statements were opinion and that they were subject to qualified privilege. “To establish a prima facie case of defamation, a plaintiff must show (1) the defendant made a false statement, (2) the statement was defamatory, (3) the statement was published, (4) the plaintiff was injured as a result of the statement, and (5) the defendant acted with the required degree of fault.” *Webber v. Dept. of Pub. Safety*, 2017-Ohio-9199, ¶ 36 (10th Dist.). “To survive a motion for summary judgment in a defamation action, a plaintiff must make a sufficient showing as to each of the five essential elements of the case.” *Murray v. Knight-Ridder, Inc.*, 2004-Ohio-821, ¶ 14 (7th Dist.).

{¶ 40} “Under Ohio law, for a statement to be defamatory, it must be a statement of fact and not of opinion.” *Spingola v. Sinclair Media, II, Inc.*, 2006-Ohio-6950, ¶ 22 (10th Dist.). The question of whether a statement is one of opinion or fact is a question of law. *Id.* In order to answer that question, courts apply a totality-of-the-circumstances test. *Gilson v. Am. Inst. of Alternative Medicine*, 2016-Ohio-1324, ¶ 53 (10th Dist.). In doing so, courts should consider four factors: (1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; and (4) the broader context of the statement. *Id.* “The weight given to any one factor under this inquiry will vary

depending on the circumstances of each case.” *Wampler v. Higgins*, 2001-Ohio-1293, ¶ 43. Moreover, these factors “depend on the reasonable reader’s perception of the statement—not on the perception of the publisher.” *McKimm v. Ohio Elections Comm.*, 2000-Ohio-118, ¶ 23.

{¶ 41} Initially, it should be noted that Castellon’s brief fails to specifically address any of the above factors. It is well-settled that it is the appellant’s burden to affirmatively demonstrate error on appeal. *White v. Cent. Ohio Gaming Ventures, L.L.C.*, 2019-Ohio-1078, ¶ 25 (10th Dist.). “[I]t is not the duty of an appellate court to create an argument on an appellant’s behalf.” *Saha v. Research Inst. at Nationwide Children’s Hosp.*, 2019-Ohio-1792, ¶ 29 (10th Dist.). Nevertheless, we will consider each of the aforementioned factors. With regards to the specific language of the statements, we focus on “‘the common meaning ascribed to the words by an ordinary reader.’” *Mehta v. Ohio Univ.*, 2011-Ohio-3484, ¶ 30 (10th Dist.), quoting *McKimm* at fn. 2. At issue here are Frizzell’s statements that Castellon’s communications were “threatening,” “implied threats,” and “vague threats.” (Sept. 22, 2023 Conduct Report, attached to Compl.) The fact that Frizzell used the terms “implied” and “vague” is strong evidence that his statements were his opinions or perceptions. “‘Readers are . . . considerably less likely to infer facts from an indefinite or ambiguous statement than one with a commonly understood meaning.’” *Wampler* at ¶ 46, quoting *Ollman v. Evans*, 750 F.2d 970, 979 (D.C.Cir. 1984).

{¶ 42} As for whether Frizzell’s statements were verifiable, “[s]tatements lacking a plausible method of verification are more obviously opinion because they do not rest upon implied or explicit fact.” *Cooke v. United Dairy Farmers, Inc.*, 2005-Ohio-1539, ¶ 24 (10th Dist.). We would note that what is seen as a threat varies from person to person, especially when the alleged threats are implied as opposed to explicit. A prison official in charge of security may perceive something to be a threat that an individual in a completely different environment with different experiences may not. Additionally, Castellon frequently points to the decision by ODRC’s Legal Services to reverse his infraction. However, we believe it actually works against his argument. The Rules Infraction Board (“RIB”) found that Castellon violated prison rules. Legal Services overturned that decision. The fact that two separate adjudicatory bodies came to different conclusions regarding the nature of

Castellon's statements is strong evidence that Frizzell's statements are not verifiable and, thus, more likely to be opinions.

{¶ 43} When considering the general context of the statements, a court must look to the entire statement or document to evaluate the objective and subjective context of the allegedly defamatory words. *Gilson*, 2016-Ohio-1324, at ¶ 63 (10th Dist.). We believe that this factor weighs in favor of the statements being opinions. The narrative in the conduct report is clearly written from his perspective. Frizzell includes the contents of Castellon's kite so that the readers can assess for themselves whether or not the statements were threatening. The narrative also discussed Castellon's behavior during a meeting with Frizzell regarding the kite. It is clear that Frizzell's statements were his interpretation of Castellon's statements during the meeting. In sum, the general context of Frizzell's allegedly defamatory statements would be perceived by a reasonable reader as being Frizzell's opinion.

{¶ 44} As to the last factor, the broader context, we have previously stated that "[s]ome types of writing or speech signal to the reader the likelihood of a statement being either fact or opinion." *Gilson* at ¶ 65. For example, in *Gilson*, we held that a complaint to the board of nursing weighed somewhat, although not heavily, in favor of the statement being one of fact. *Id.* at ¶ 66. Similarly, by its very nature, a conduct report filed by a prison official against an inmate would be more likely to contain statements of fact as opposed to opinions. Indeed, Frizzell's statements are in a box entitled "Supporting Facts." (Sept. 22, 2023 Conduct Report, attached to Compl.) It follows that, in this context, a reasonable reader would perceive statements contained in the conduct report as facts.

{¶ 45} In his brief, Castellon contends that the Court of Claims issued contradicting orders. Castellon argues that in the court's entry of partial dismissal, it determined that Frizzell's statements of fact about their meeting were not opinions, but in its decision on the parties' motions for summary judgment, it determined that the statements were opinions. We find this argument to be without merit. First, the two decisions were reached at different stages of the litigation with two different standards of review. Furthermore, at the summary judgment stage, the court had the benefit of a more complete record with far more information and evidence. Second, the court's decisions are not contradictory. In its ruling on ODRC's motion to dismiss, the court found that Frizzell's statements of fact were

not opinions. There are statements of fact within the conduct report. However, they are not the allegedly defamatory statements. In short, it appears that the court determined that there were at least some statements of fact in the conduct report when it decided ODRC's motion to dismiss. That is not inconsistent with its later decision finding the defamatory statements to be ones of opinion.

{¶ 46} In support of his argument, Castellon directs us to “Controlling Precedent” in *Hartman v. Kerch*, 2023-Ohio-1972 (8th Dist.). (Appellant’s Brief at 19.) First, Castellon’s characterization of *Hartman* as controlling precedent is inaccurate. *Hartman* was a decision of the Eighth District Court of Appeals. Thus, we are not bound by it. Second, even if we were, *Hartman* is distinguishable from this matter. In *Hartman*, the Eighth District held that the declarant’s statement that plaintiffs preyed on older, single women was not an opinion because the term “prey” was unambiguous, pejorative, and capable of proof, in that it could be confirmed or denied by other residents. *Id.* at ¶ 56. Here, Frizzell’s classification of Castellon’s statements as “implicit” or “vague” threats are by their very nature, ambiguous. Moreover, Frizzell’s statements are not necessarily capable of proof. As previously stated, what might be perceived as a threat by someone, may not be perceived as such by another.

{¶ 47} Based on the foregoing, reviewing the totality of the circumstances, the allegedly defamatory statements made by Frizzell were his opinions, not statements of fact, and thus cannot support a defamation action.

{¶ 48} Even if we were to find that Frizzell’s statements were ones of fact, the Court of Claims correctly found that the statements at issue were subject to qualified privilege. The elements of qualifiedly privileged communication are as follows: (1) good faith; (2) an interest to be upheld; (3) a statement limited in scope to this purpose; and (4) a proper occasion, and publication in a proper manner and to proper parties only. *Hill v. Ohio Dept. of Rehab. & Corr.*, 2021-Ohio-561, ¶ 17 (10th Dist.). Here there is no evidence Frizzell acted in bad faith. Based on the narrative in the conduct report, it appears that Frizzell wanted to talk to Castellon about the kite rather than summarily initiating disciplinary action. Furthermore, in the context of Castellon’s kite, his statements that “it was the final straw” and that he was “done with the benefit of any doubt” could reasonably be interpreted as threatening. (Sept. 22, 2023 Conduct Report, attached to Compl.) Castellon fails to make

any argument regarding the remaining three factors. It is undisputed that Frizzell had an interest in the security of NCI and that his statements in the conduct report were limited to that purpose. Moreover, the conduct report was published to the proper parties, the RIB and Legal Services. Thus, Frizzell's statements were subject to qualified privilege.

{¶ 49} “A qualified privilege may be defeated only if a claimant proves with convincing clarity that a publisher acted with actual malice.” *Jackson v. Columbus*, 2008-Ohio-1041, ¶ 9. In defamation cases, courts have defined actual malice as acting with reckless disregard to a statement's truth or falsity or with actual knowledge that the statement is false. *Hill* at ¶ 19. In his argument regarding malice, Castellon points to the reversal by Legal Services as proof that Frizzell's statements were false. However, that reversal does not mean Frizzell's statements were false. It simply means that Legal Services did not believe there was sufficient evidence to support the disciplinary action. As previously stated, whether something is perceived as a threat will vary from person to person. Again, Castellon's statements in his kite could reasonably be interpreted as threatening.

{¶ 50} Castellon also points to the alleged destruction of body-worn camera footage as evidence of malice. However, there is no evidence that body-worn camera footage actually existed. In fact, the record indicates that there was no such footage. Castellon further alleges that Frizzell's “[b]aseless” extortion charge is proof of bad faith and actual malice. (Appellant's Brief at 20.) However, Castellon's disagreement with Frizzell about what constitutes extortion does not establish bad faith or actual malice. There is a reasonable interpretation of Castellon's kite that his vague threats were made in order to reinstate his Hispanic heritage month events. In short, Castellon has failed to produce any evidence of actual malice to defeat qualified privilege in this matter.

{¶ 51} Based on the foregoing, Castellon's fifth assignment of error is overruled.

V. CONCLUSION

{¶ 52} Having overruled Castellon's five assignments of error, the judgment of the Court of Claims of Ohio is affirmed.

Judgment affirmed.

DORRIAN and LELAND, JJ., concur.
