[Cite as *Scott v. Ohio Dept. of Rehab. & Corr.*, 2022-Ohio-1596.]

ANTHONY A. SCOTT Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2020-00164JD Magistrate Gary Peterson DECISION OF THE MAGISTRATE

{¶1} Plaintiff brings this action against defendant for defamation. Plaintiff's claim arises out of a conduct report wherein he was accused of being involved in a drug ring while he was an inmate at the Noble Correctional Institution (NCI). The case proceeded to trial on the issues of liability and damages.

Findings of Fact

{¶2} NCI institutional inspector Jared McGilton authored the conduct report that gives rise to plaintiff's claim. McGilton has been an investigator at NCI for 8 years and conducts administrative investigations of criminal activity at NCI. McGilton commenced an investigation concerning drug activity at NCI at the end of 2015 or the beginning of 2016. Plaintiff was not the primary target of the investigation. The primary target of the investigation was moving drugs into the prison and distributing them throughout the compound. McGilton estimated that 8-12 inmates were at some point involved as suspects in the investigation.

{¶3} McGilton testified that plaintiff became a suspect after several visitors to the prison were strip-searched. McGilton explained that the searches did not prove to be successful; however, an informant stated that the drugs were passed through the fence and "Bama" in the chapel was picking them up. McGilton gathered job descriptions of offenders at NCI and determined that plaintiff, who worked in the chapel at the time, is

originally from Alabama. McGilton asserted that he then searched mail and JPay communications at the prison and determined that plaintiff was also known as Bama.

{¶4} McGilton began watching video surveillance of offenders moving in and out of recreation and noticed that plaintiff was meeting with many of the individuals involved in the investigation. McGilton also informally spoke with staff who worked in the chapel and learned that the door at the back of the chapel was an emergency door, or a "popper" door, meaning any individual on the inside of the chapel could open the door. Immediately outside the exterior popper door of the chapel is an outdoor visitation area. The chapel and the outdoor visitation area are separated by a chain link fence. Defendant's Exhibits 4-6. McGilton determined that plaintiff had access to the emergency door and had the opportunity to retrieve a package passed through the fence. McGilton believed that plaintiff would take the package to the staff restroom in the chapel and break the drugs down to distribute throughout the institution. McGilton was aware that plaintiff's job duties did not consist of cleaning the restroom in the chapel. McGilton added that the officer's desk is located outside another door at the far-left corner of the chapel, a distance of about 40-50 feet. According to McGilton, when standing at the officer's desk, the emergency door is not visible. McGilton conceded, however, that he did not personally witness, nor does he have surveillance video of plaintiff performing any activities as described above.

{¶5} As the investigation was winding down, McGilton authored a conduct report. The conduct report provides as follows:

> An investigation was opened related to multiple individuals operating an illegal drug conveyance network. The following pertains to the actions of multiple inmates, to include the main facilitators Davis A715783 D1E13 and Sweeny A514490 D2W99. Utilizing GTL phone monitoring, JPay information, and multiple confidential sources, it was discovered inmates Davis and Sweeny had been operating an illegal drugs network. Inmate Sweeny would contact individuals on the outside whom would collect the

> illegal drugs to be conveyed into NCI. Inmate Branch A730735 D1E48 would assist the network by having the illegal drugs conveyed into NCI during his scheduled visits. The package of illegal drugs would be placed through the fence of outside visitation area, near the exterior door of the small chapel. Inmate Scott A679876 worked inside the chapel as a program aid. Inmate Scott aka Bama would retrieve the package of illegal drugs and hide it within the female staff restroom inside the chapel. Inmate Scott, while cleaning the area, would repack the illegal drugs and move them to the compound, splitting them among multiple individuals to distribute for profit. Inmate Scott would also distribute illegal drugs for profit and launder monies obtained from sales of illegal drugs through Cashapp.
>
> Plaintiff's Exhibit A.

{¶6} Ultimately, McGilton charged plaintiff with violations of rules 40, 45, and 60. The charges are as follows:

> Procuring or attempting to procure, unauthorized drugs, aiding, soliciting, or collaborating with another to procure unauthorized drugs or to introduce unauthorized drugs into a correctional facility; Dealing, conducting, facilitating, or participating in any transaction, occurring in whole or in part, within an institution, or involving an inmate, staff member or another for which payment of any kind is made, promised, or expected; Attempting to commit; aiding another in the commission of soliciting another to commit; or entering into an agreement with another to commit any of the above acts[.]
>
> *Id*.

{¶7} McGilton added that nine individuals were administratively charged for being involved in the network and that he believed his statements in the conduct report to be true when he wrote them. McGilton continues to believe the statements in the conduct report to be true. McGilton never found drugs on any of the offenders and no one was

criminally charged because of the investigation. In McGilton's view, the evidence collected did not support a finding beyond a reasonable doubt.

{¶8} McGilton explained that after the conduct report is issued, it is sent to a hearing officer who then sends it to the Rules Infraction Board (RIB) where a hearing is held. McGilton does not sit on the RIB, but he stated that he did provide the RIB with his investigative file. McGilton testified that the RIB reviews the evidence and decides guilt. McGilton testified that the RIB relied on confidential informant statements, but he could not explain why the RIB failed to indicate that it relied on confidential informant statements. After the RIB decision, a security review is conducted by unit staff, and if an offender meets the criteria for a security change, the recommendation is sent to defendant's central office for approval or disapproval and potential placement in a different institution. McGilton added that plaintiff can also appeal the RIB ruling to the warden. McGilton is not involved in the appeal. Plaintiff's appeal was not successful. McGilton declined any involvement in plaintiff's disciplinary proceedings.

{¶9} Regarding distribution of the conduct report, the conduct report is uploaded into defendant's internal DOTS portal, a tracking system for offenders. Once the conduct report is in the portal, any employee of defendant can look up the administrative charges related to an offender. McGilton added that DOTS portal also tracks and makes a record of who accesses the files. McGilton did not show a copy of the conduct report to any inmates and inmates do not have access to DOTS portal.

{¶10} With respect to the claim in the conduct report that plaintiff would lauder money through Cashapp, McGilton testified that at the time he wrote the statement, he had information connecting plaintiff to money laundering through Cashapp. He did not know if he had a sticky note or other paperwork that supported that allegation, but the evidence for that statement is no longer in his file. McGilton conceded that the allegation may also have been intended for a different offender. McGilton explained that he used the same wording for all the conduct reports for the charged offenders and then changed

the last part to be specific to the offender charged in that particular conduct report. McGilton testified that regardless, the rule violation charges would not have changed.

{¶11} Gary Eno has been the Chaplin at NCI since 1997. Eno recalled that plaintiff was at one point a chapel librarian for a few years. Eno added that plaintiff mainly stayed at the desk in the chapel library while working. Eno stated that it was not within plaintiff's job duties to clean the staff restroom in the chapel. Eno could not recall testifying before the RIB; however, the RIB audio recording demonstrates that he did in fact testify. Eno also could not recall being questioned by McGilton about the restroom in the chapel.

{¶12} John Hutchison testified that he has been a corrections officer at NCI since 1996 and that for the last 4 years he has been assigned to work security in the chapel at NCI. Hutchison added that his shift was from 6 a.m. to 2 p.m. and that plaintiff usually worked in the afternoon beginning at 1 p.m. Hutchison recalled that plaintiff was the librarian and did not use the staff restroom in the chapel. Hutchison could not recall being questioned by McGilton about the restroom in the chapel.

{¶13} Plaintiff worked in the chapel at NCI for a couple of years. Plaintiff stated that while he worked in the chapel, he never had access to the staff restroom and that he never had access to the exterior chapel door. Plaintiff added that the staff restroom door remains locked until a staff member unlocks it. Plaintiff also stated that the exterior door is in plain view of the officer's desk. Plaintiff asserted that he never went out the exterior chapel door. According to plaintiff, he has never been called or known as "Bama." Plaintiff acknowledged that the conviction for which he is incarcerated was for possession of drugs and drug trafficking.

Conclusions of Law and Discussion

{¶14} "In Ohio, 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., Inc. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 7, 651 N.E.2d 1283 (1995). "'Slander' refers to spoken defamatory words, while 'libel' refers to written or printed defamatory words." *Schmidt v. Northcoast Behavioral Healthcare*, 10th Dist. Franklin No. 10AP-565, 2011-Ohio-777, ¶ 8.

{¶15} "To succeed on a defamation claim, a plaintiff must establish: (1) a false statement, (2) about the plaintiff, (3) published without privilege to a third party, (4) with fault of at least negligence on the part of the defendant, and (5) the statement was either defamatory per se or caused special harm to the plaintiff." *Watley v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 07AP-902, 2008-Ohio-3691, ¶ 26.

{¶16} "Under Ohio common law, actionable defamation falls into one of two categories: defamation per se or defamation per quod." *Am. Chem. Soc. v. Leadscope, Inc.*, 10th Dist. Franklin No. 08AP-1026, 2010-Ohio-2725, ¶ 49.

> In order to be actionable per se, the alleged defamatory statement must fit within one of four classes: (1) the words import a charge of an indictable offense involving moral turpitude or infamous punishment; (2) the words impute some offensive or contagious disease calculated to deprive a person of society; (3) the words tend to injure a person in his trade or occupation; and (4) in cases of libel only, the words tend to subject a person to public hatred, ridicule, or contempt.

Woods v. Capital Univ., 10th Dist. Franklin No. 09AP-166, 2009-Ohio-5672, ¶ 28.

> On the other hand, a statement is defamatory per quod if it can reasonably have two meanings, one innocent and one defamatory. Therefore, when the words of a statement are not themselves, or per se, defamatory, but they are susceptible to a defamatory meaning, then they are defamatory per quod. Whether an unambiguous statement constitutes defamation per se is a question of law.

(Citations omitted.) *Woods* at ¶ 29.

{¶17} "If a claimant establishes a prima facie case of defamation, a defendant may then invoke a conditional or qualified privilege." *Jackson* at ¶ 9, citing *A & B-Abell* at 7, citing *Hahn v. Kotten*, 43 Ohio St. 2d 237, 243, 331 N.E.2d 713 (1975).

> The purpose of a qualified privilege is to protect speakers in circumstances where there is a need for full and unrestricted communication concerning a matter in which the parties have an interest or duty. * * * A qualified privilege exists when a statement is: made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right or interest * * *. Further, the essential elements of a communication protected by qualified privilege are: [1] good faith, [2] an interest to be upheld, [3] a statement limited in its scope to this purpose, [4] a proper occasion, and [5] publication made in a proper manner and to proper parties only.

(Internal citations omitted.) *Mallory v. Ohio University*, 10th Dist. Franklin No. 01AP-278, 2001 Ohio App. LEXIS 5720, * 21-22.

{¶18} "A qualified privilege may be defeated only by clear and convincing evidence of actual malice on the part of the defendant. *Jacobs v. Frank,* 60 Ohio St.3d 111, 114-115, 573 N.E.2d 609 (1991). '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*., at 116." *Watley* at ¶ 32.

{¶19} "The phrase 'reckless disregard' applies when a publisher of defamatory statements acts with a 'high degree of awareness of their probable falsity' or when the publisher 'in fact entertained serious doubts as to the truth of his publication.' (Internal citations omitted.)" *Hill v. Ohio Dept. of Rehab. & Corr*., 10th Dist. Franklin No. 20AP-88, 2021-Ohio-561, ¶ 19, citing *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041,

883 N.E.2d 1060, ¶ 10. "It is not sufficient for a libel plaintiff to show that an interpretation of facts is false; rather, he must prove with convincing clarity that defendant was aware of the high probability of falsity." *Watley* at ¶ 33 (quotations omitted).

{¶20} "Evidence that establishes, at best, the publisher 'should have known' of the alleged falsity of the statement is insufficient to establish actual malice. *Varanese v. Gall*, 35 Ohio St.3d 78, 82, 518 N.E.2d 1177 (1988). '[M]ere negligence is constitutionally insufficient to show actual malice.' *Id*., citing *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968); *Dupler v. Mansfield Journal Co*., 64 Ohio St.2d 116, 119, 413 N.E.2d 1187 (1980)." *Hill* at ¶ 19.

{¶21} Based upon the evidence submitted, the magistrate concludes that plaintiff failed to prove his claim for defamation. Plaintiff's claim for defamation arises out of the conduct report authored by McGilton wherein plaintiff is accused of involvement in a drug ring. For the purposes of this decision, the magistrate finds that plaintiff established his claim of defamation per se, i.e., that a false statement about plaintiff was published to a third party, with fault of at least negligence, and that the statement qualifies as defamation per se because the words import a charge of an indictable offense involving moral turpitude or infamous punishment.

{¶22} However, defendant has established that the conduct report is protected by a qualified privilege. Indeed, McGilton credibly testified regarding the genesis of the investigation, the evolution of the investigation, and its ultimate conclusions. There is no credible evidence before the court that McGilton failed to exercise good faith while conducting the investigation. It appears to the magistrate that McGilton acted professionally at all relevant points of the investigation. Indeed, McGilton credibly testified that an informant alerted him that "Bama" in the chapel would retrieve the drugs outside the chapel door by the outdoor visitation area. Prison administrators, like McGilton, no doubt have an interest in investigating suspected criminal activity in the prison system. All the statements made in the conduct report relate to the investigation. Furthermore, the conduct report was only published to individuals who were involved in the disciplinary

process or the security review process. Accordingly, defendant established the defense of qualified privilege.

{¶23} To defeat the defense of qualified privilege, plaintiff was required to demonstrate, by clear and convincing evidence, actual malice. Plaintiff, however, did not establish actual malice by clear and convincing evidence. McGilton did not act with reckless disregard for the truth of the allegations. Indeed, McGilton relied on a confidential informant statement identifying an inmate in the chapel named "Bama" who would retrieve the drugs passed through the fence separating the chapel and the outside visitation area. Plaintiff was the only inmate from Alabama working in the chapel. McGilton believed that inmate correspondence established that plaintiff may also be known as "Bama." Furthermore, McGilton credibly testified that plaintiff was associated with a number of the other inmates who were already involved in the investigation. Any reasonable investigator would conclude at that point that plaintiff may be involved in a drug ring even if it is later determined that plaintiff was not actually involved.

{¶24} Furthermore, plaintiff testified that the officer's desk is in plain view of the chapel exterior door. However, it was established that the officer's desk is located outside the interior door and that if someone is standing at the officer's desk, that individual cannot see the exterior door. Additionally, anyone who wished to open the popper or exterior chapel door, would be able to open it from the inside. Because plaintiff worked in the chapel and conceivably had the ability to exit the popper door without being seen by a corrections officer, again, a reasonable investigator would conclude that plaintiff may be involved in the drug ring. In short, when McGilton authored the conduct report, an informant connected "Bama" in the chapel to the drug ring, plaintiff worked in the chapel and is originally from Alabama, plaintiff was associated with several suspects of the drug ring, and plaintiff had access and the ability to move drugs into the prison.

{¶25} Even if plaintiff had no involvement with the drug ring, that alone, does not demonstrate that McGilton published the conduct report with reckless disregard to its truth or falsity. An incorrect interpretation of the facts, or even negligence on McGilton's part,

is not enough to establish malice. *Hill* at ¶ 19. Indeed, it has not been established that McGilton authored the conduct report with a high degree of awareness of its probable falsity or that McGilton entertained serious doubts as to the truth of the publication. *Jackson* at ¶ 10. To the contrary, as noted above, McGilton had circumstantial evidence connecting plaintiff to the drug ring. Moreover, McGilton, after publishing the conduct report, indicated that he did not wish to have any involvement in the disciplinary recommendations.

{¶26} Regarding the statement that plaintiff laundered money through Cashapp, McGilton stated that he had information connecting plaintiff to money laundering through Cashapp. McGilton conceded that the documentation is no longer with his file or that the statement may have been intended for another inmate. However, the magistrate was not presented with evidence that McGilton acted with a *high probability of falsity* regarding that statement. At best, it was established that McGilton was *negligent* with respect to the money laundering statement, but it was not established by clear and convincing evidence that McGilton acted with reckless disregard for the truth of that statement, i.e., that McGilton entertained serious doubts as to the truth of his publication when he wrote it. Rather, it was established that McGilton may have had support for that claim, or McGilton negligently included the statement. Furthermore, it was established that the rule charges would not have changed even if the statement about money laundering had not been included in the conduct report. In short, plaintiff failed to establish actual malice.

{¶27} Finally, it must be noted that defamation occurs when a false statement injuriously impacts a person's reputation, or exposes a person to public hatred, contempt, ridicule, shame or disgrace, or affects a person adversely in his or her trade, business or profession. Plaintiff was accused of being involved in a drug ring at NCI; however, plaintiff acknowledged that he is currently incarcerated for drug trafficking and drug possession.

{¶28} For the foregoing reasons, the magistrate recommends that judgment be entered in favor of defendant.

{¶29} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

GARY PETERSON
Magistrate

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Sent to S.C. Reporter 5/12/22