[Cite as *Townsend v. Ohio Dept. of Rehab. & Corr.*, 2024-Ohio-855.]

IN THE COURT OF CLAIMS OF OHIO

MICHAEL TOWNSEND, JR Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2023-00020JD Judge Lisa L. Sadler Magistrate Gary Peterson DECISION

{¶1} On December 29, 2023, Defendant filed a Motion for Summary Judgment pursuant to Civ.R. 56(B). Although Plaintiff received additional time to file a memorandum in opposition, Plaintiff did not file a timely response. On February 6, 2024, after the deadline for Plaintiff to file a response and without leave of the Court, Plaintiff filed a "Motion in Opposition for Summary Judgment". Even if Plaintiff had sought leave to file this untimely response, he did not demonstrate excusable neglect and such leave would be denied pursuant to Civ.R. 6(B)(2). Therefore, the Court will not consider Plaintiff's response.[1] The Motion for Summary Judgment is now before the Court for a non-oral hearing pursuant to L.C.C.R. 4(D). For the following reasons, Defendant's Motion is GRANTED.

Standard of Review

{¶2} Motions for summary judgment are reviewed under the standard set forth in Civ.R. 56(C). Civ.R. 56(C) states, in part, as follows:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits,

[1] Plaintiff's "Motion" is notarized however, the attached affidavit is not. *Rarden v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin Nos. 12AP-225 and 227, 2012-Ohio-5667, ¶ 29 (noting that a statement that is not notarized does not qualify as an affidavit or other form of evidence permitted under Civ.R. 56(C) and that there is no error in refusing to consider the document).

> transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

See also Gilbert v. Summit Cty., 104 Ohio St.3d 660, 2004-Ohio-7108, 821 N.E.2d 564, ¶ 6, citing *Temple v. Wean United, Inc.,* 50 Ohio St.2d 317, 364 N.E.2d 267 (1977).

{¶3} "The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact." *Starner v. Onda*, 10th Dist. Franklin No. 22AP-599, 2023-Ohio-1955, ¶ 20, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). "The moving party does not discharge this initial burden under Civ.R. 56 by simply making conclusory allegations." *Id.* "Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Id.*

{¶4} If the moving party meets its burden, the nonmoving party bears a reciprocal burden. "Once the moving party discharges its initial burden, summary judgment is appropriate if the non-moving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial." *Hinton v. Ohio Dept. of Youth Servs.*, 2022-Ohio-4783, 204 N.E.3d 1174, ¶ 17 (10th Dist.), citing *Dresher* at 293; *Vahila v. Hall*, 77 Ohio St.3d 421, 430, 674 N.E.2d 1164 (1997); Civ.R. 56(E).

Background

{¶5} According to the Complaint, Plaintiff is an inmate in the custody and control of Defendant, the Ohio Department of Rehabilitation and Correction (ODRC). Plaintiff's Complaint alleges one count of defamation. Plaintiff's claim arises from an incident that occurred on November 14, 2022, at Defendant's Ross Correctional Institution (RCI), whereupon a conduct report was written accusing Plaintiff of hugging and kissing another male inmate in violation of ODRC Rule 14.

{¶6} In seeking summary judgment, Defendant contends that Plaintiff cannot state a prima facie case of defamation. Defendant further argues that even if Plaintiff could state a prima facie case of defamation, ODRC employees are entitled to qualified privilege. Finally, Defendant asserts that the Rules Infraction Board (RIB) hearing and investigation is a quasi-judicial act for which it has absolute immunity from liability.

Facts

{¶7} The following facts are derived from the affidavits and documents attached to Defendant's Motion for Summary Judgment. On November 14, 2022, Officer Andrew Lansing observed Plaintiff and another inmate embrace and kiss at RCI. Andrew Lansing Affidavit ¶ 4 and 5. Officer Lansing viewed the camera footage of the incident prior to writing a conduct report and confirmed that he witnessed Plaintiff kiss another inmate. Lansing then wrote a conduct report stating that Plaintiff violated the Inmate Rules of Conduct Rule 14 as he was required to do per ODRC policy. Lansing Affidavit ¶ 5, Defendant's Exhibit B-1. Lansing only communicated the details of the incident with necessary ODRC staff as required by ODRC policy. Lansing at ¶ 6. To his knowledge, Lansing has never made any untrue statements about Plaintiff. Lansing at ¶ 7.

{¶8} On November 16, 2022, a RIB hearing was held regarding the incident described in Lansing's conduct report. Affidavit of Sargent W. Cokonougher ¶ 5. The hearing was held in accordance with disciplinary procedures including providing Plaintiff with notice of the hearing, allowing Plaintiff the opportunity to request a reasonable number of witnesses, and allowing Plaintiff to make a statement on his behalf. Cokonougher at ¶ 6. The RIB found Plaintiff guilty of violating Rule 14. Cokonougher at ¶ 5. Cokonougher only spoke to members of the RIB and Plaintiff regarding this incident.

Cokonougher at ¶ 7. To his knowledge, Cokonougher never made any untrue statements regarding Plaintiff. Cokonougher at ¶ 8.

Law and Analysis

{¶9} "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).

{¶10} "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.

{¶11} As a threshold matter, Defendant has put forth evidence that it did not publish any false statement about Plaintiff. The undisputed evidence establishes that Lansing and Cokonougher only made truthful statements about Plaintiff—that Plaintiff was kissing and hugging another inmate. *See generally* R.C. 2739.02 (truth is a complete defense in an action for libel or slander); *Ed Schory & Sons v. Francis*, 75 Ohio St.3d 433, 445, 1996-Ohio-194, 662 N.E.2d 1074 (1996) (stating that "[i]n Ohio, truth is a complete defense to a claim for defamation"); *Sweitzer v. Outlet Communications, Inc.*, 133 Ohio App.3d 102, 110, 726 N.E.2d 1084 (10th Dist.1999) (a defamation action may be "completely defended by showing that the gist, or imputation, of the statement is substantially true * * *.").

{¶12} Plaintiff failed to contradict the evidence put forth by Defendant. Civ.R. 56(E) provides: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

Because Plaintiff failed to meet his reciprocal burden, the Court must conclude that Defendant did not make any false statements about Plaintiff.

{¶13} Even if the statement was false, "'[u]pon certain privileged occasions * * * the law recognizes that false, defamatory matter may be published without civil liability.'" *M.J. DiCorpo, Inc. v. Sweeney*, 69 Ohio St.3d 497, 505, 634 N.E.2d 203 (1994), quoting *Bigelow v. Brumley*, 138 Ohio St. 574, 579, 37 N.E.2d 584 (1941). "The privileged occasions in which this principle applies are divided into two classes: (1) those that are subject to absolute privilege, and (2) those that are subject to a qualified privilege." *Mettke v. Mouser*, 10th Dist. Franklin No. 12AP-1083, 2013-Ohio-2781, ¶ 6. "'The distinction between these two classes is that the absolute privilege protects the publisher of a false, defamatory statement even though it is made with actual malice, in bad faith and with knowledge of its falsity; whereas the presence of such circumstances will defeat the assertion of a qualified privilege.'" *DiCorpo* at 505, quoting *Bigelow* at 579.

{¶14} "[A]bsolute privilege extends to '* * * legislative and judicial proceedings, and other acts of state, such as communications made in the discharge of a duty of the Governor and heads of the executive departments of a state.'" *Wrenn v. Ohio Dept. of Mental Health & Mental Retardation*, 16 Ohio App.3d 160, 162, 474 N.E.2d 1201 (10th Dist.1984), quoting *Costanzo v. Gaul*, 62 Ohio St.2d 106, 109, 403 N.E.2d 979 (1980); *see also DiCorpo* at 505. "[A] statement in a judicial or quasi-judicial proceeding is absolutely privileged and may not form the basis for a defamation action as long as the allegedly defamatory statement is reasonably related to the proceedings." *Savoy v. Univ. of Akron*, 2014-Ohio-3043, 15 N.E.3d 430, ¶ 19 (10th Dist.). "However, since an absolute privilege produces such profound results, it is quite limited in scope." *Wrenn* at 162.

{¶15} Qualified privilege, on the other hand, extends to a communication "'"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."'" (Emphasis deleted.) *McIntyre v. Ohio Bur. of Workers' Comp.*, 10th Dist. Franklin No. 12AP-1062, 2013-Ohio-2338, ¶ 6, quoting *Hahn v. Kotten*, 43 Ohio St.2d 237, 244, 331 N.E.2d 713 (1975), quoting 50 American Jurisprudence 2d, Libel and Slander, Section 195, at 698.

{¶16} The undisputed evidence establishes that the statements are subject to a qualified privilege. The statements were made in a conduct report and at the RIB hearing. The statements were only made to necessary ODRC staff and Plaintiff and were not made to any other inmates or other individuals. The statements were made pursuant to ODRC policy to report suspected rule violations. Defendant has also put forth evidence that the statements were made in good faith and with an interest to be upheld. The statements were also limited in their scope inasmuch as the statements only reported the suspected wrongdoing and were only made in an appropriate setting. Accordingly, Defendant has established that the statements are subject to a qualified privilege. *See Scott v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 22AP-387, 2023-Ohio-1647 (applying qualified privilege to statements made in a conduct report and before the RIB); *Hill v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 20AP-88, 2021-Ohio-561 (applying qualified privilege to statements made in a conduct report and before the RIB); *Watley v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 07AP-902, 2008-Ohio-3691 (applying qualified privilege to statements made in a conduct report and before the RIB).

{¶17} "A qualified privilege may be defeated only by clear and convincing evidence of actual malice on the part of the defendant." *Stainbrook v. Ohio Secy. of State*, 2017-Ohio-1526, 88 N.E.3d 1257, ¶ 18 (10th Dist.). "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 v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 07AP-902, 2008-Ohio-3691, ¶ 33 (quotations omitted).

{¶18} "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.

{¶19} Here, Plaintiff did not put forth any evidence to contradict that put forth by Defendant and create a genuine issue of material fact. Defendant met its initial burden pursuant to Civ.R. 56 demonstrating that the statement is subject to a qualified privilege and was not made with actual malice, and Plaintiff failed to meet his reciprocal burden pursuant to Civ.R. 56. As previously stated, Civ.R. 56(E) provides: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶20} Because the undisputed evidence establishes that the statements were not false and, even if they were, are subject to a qualified privilege, the Court need not address Defendant's remaining argument that the statements are also subject to an absolute privilege.

{¶21} Therefore, the Court finds that there is no genuine issue of material fact that the statements were true, and even if they were not true, a qualified privilege is applicable and bars Plaintiff's defamation claim.

Conclusion

{¶22} Based upon the foregoing, the Court concludes that there are no genuine issues of material fact, and Defendant is entitled to judgment as a matter of law. Defendant's Motion for Summary Judgment is GRANTED, and judgment is rendered in favor of Defendant.

LISA L. SADLER
Judge

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MICHAEL TOWNSEND, JR Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2023-00020JD Judge Lisa L. Sadler Magistrate Gary Peterson JUDGMENT ENTRY

IN THE COURT OF CLAIMS OF OHIO

{¶23} For the reasons set forth in the decision filed concurrently herewith, Defendant's Motion for Summary Judgment is GRANTED, and judgment is rendered in favor of Defendant. All previously scheduled events are VACATED. Court costs are assessed against Plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

LISA L. SADLER
Judge

Filed February 14, 2024
Sent to S.C. Reporter 3/8/24