[Cite as *Georgalis v. Ohio Turnpike Comm.*, 2010-Ohio-4898.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94478

NICHOLAS C. GEORGALIS, ET AL.

PLAINTIFFS-APPELLANTS

vs.

OHIO TURNPIKE COMMISSION, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-648323

BEFORE: Dyke, J., Kilbane, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: October 7, 2010

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ANN DYKE, J.:

{¶ 1} Plaintiffs-appellants, Nicholas C. Georgalis ("Georgalis") and Teledata Services, Ltd. ("Teledata") (collectively "plaintiffs"), appeal the trial court's granting of summary judgment in favor of defendants-appellees, Ohio Turnpike Commission ("OTC"), HNTB Corporation ("HNTB"), and Kerry Ferrier ("Ferrier") (collectively "defendants"). For the reasons set forth below, we affirm.

{¶ 2} On June 19, 2007, OTC entered into a contract with non-party Telsource Corporation ("Telsource") to build a fiber-optic telecommunications system along the Ohio Turnpike ("Project"). Telsource's specific duties under the contract were to perform the installation and configuration migration only. The engineering portion and project management of the Project were to be completed by HNTB. In other words, HNTB was to provide drawings and specifications to Telsource so that Telsource could install and configure the equipment as required under the contract. OTC appointed Ferrier as program manager to oversee the Project, including the performance of Telsource and HNTB, on its behalf.

{¶ 3} Telsource, in turn, hired plaintiffs, Georgalis and his company Teledata, to act as Telsource's project manager on the Project. Georgalis was to report to Telsource's vice president of operations, Bob Cain. Per the agreement with OTC, Telsource submitted a list of duties and responsibilities of Georgalis to OTC. Among these duties and responsibilities, Georgalis was required to submit, in writing, any engineering deficiencies, including inadequacies and/or any lack of detailing in the engineering, via a numbered

Request for Information ("RFI") to the HNTB project manager. Additionally, per the terms of the agreement between OTC and Telsource, should OTC become dissatisfied with Georgalis' performance, he could be replaced as project manager. Also, Georgalis testified that he could terminate his relationship with Telsource at any time.

{¶ 4} As performance was undertaken on the Project, Bob Cain testified that Georgalis frequently demonstrated unprofessional behavior and a lack of professional interpersonal skills. Georgalis admitted that during one meeting, which was recorded, he shut his laptop and walked out of the meeting while it was still in progress. He also acknowledged talking over people at the meetings, cutting-off people when they were talking, and at one point, threatening to sue and/or tell the OTC to get their lawyers. Moreover, Bob Cain testified that Georgalis was prone to fits of screaming and table pounding. Finally, Caine testified that Georgalis made unauthorized changes and testing to the Project.

{¶ 5} As a result of the aforementioned antics, on October 17, 2007, Ferrier, on behalf of OTC, met with Bob Cain, as well as other employees of HNTB. Plaintiffs allege that during this meeting, which was recorded, Ferrier "made numerous false, defamatory, and libelous statements without privilege and in bad faith, which were published to several third parties, including Telsource." More specifically, it was discussed that Georgalis had no experience in installing the specific type of equipment called Cisco 15454, which was being installed for the Project. Georgalis does not dispute, and in fact acknowledges, that he had

never worked with this system before the Project. Also during the conference, the parties discussed Telsource's failure to have an employee at all weekly progress meetings.

{¶ 6} Additionally, plaintiffs complain of a letter ("Letter") Ferrier issued to Bob Cain on October 26, 2007, with a copy sent to Rich Ackerman, the Chief Engineer with HNTB, outlining a telephone conversation that occurred on October 10, 2007 among Georgalis, HNTB, OTC, and Ferrier. Plaintiffs contend that in the Letter, defendants made defamatory statements about Georgalis and his conduct regarding the Project, which damaged his reputation. In the Letter, Ferrier confirmed that a stop work order was issued due to Georgalis's unprofessional behavior and for a series of other issues related to Georgalis's work on the Project.

{¶ 7} Following these communications and in order to maintain Telsource's relationship with OTC, Bob Cain decided to remove Georgalis as Telsource's project manager. He then hired Georgalis in a consultive engineering role, leaving him with no contact with OTC or HNTB. Telsource, nevertheless, continued to compensate Georgalis. Ultimately, however, Georgalis quit this position by stating to Bob Cain, "Fuck you, Mr. Cain, I quit."

{¶ 8} Nevertheless, on January 23, 2008, plaintiffs instituted the instant action against defendants, alleging defamation, libel per se, libel per quod, slander, intentional infliction of emotional distress, tortious interference with business relations, tortious interference with contract, and illegal wiretapping.

{¶ 9} On May 8, 2008, the trial court dismissed plaintiffs' claim of intentional infliction of emotional distress pursuant to Civ.R. 12(B)(6). Additionally, the court struck all documents, including the complaint, filed by pro se plaintiff Georgalis on behalf of Teledata because Georgalis is not a licensed attorney and, under Ohio law, an unlicensed attorney may not represent a corporate entity in litigation. In response, the defendants filed, and the trial court granted, a motion to join Teledata as a necessary and indispensable party on November 17, 2008.

{¶ 10} On January 27, 2009, Georgalis filed an amended complaint which was essentially the same complaint he originally filed. On February 26, 2009, the trial court joined Teledata in all of the claims asserted in this amended complaint.

{¶ 11} Subsequently, on September 15, 2009, defendants OTC and Ferrier filed a supplemental motion for summary judgment adding to their original motion for summary judgment filed on September 16, 2008. Defendants HNTB joined this supplemental motion on October 15, 2009. Following the completion of briefing, the trial court granted summary judgment in favor of defendants and against plaintiffs on all remaining claims in their complaint on December 11, 2009.

{¶ 12} Plaintiffs now appeal and present seven assignments of error for our review. Because we find the first six assignments of error interrelated, we will address them together. These six errors provide:

{¶ 13} "I. Error In Applying The Proper Standard For Summary Judgment.

{¶ 14} "II. Error In Properly Considering The Evidence.

{¶ 15} "III. Error In Application Of Law To The Evidence.

{¶ 16} "IV. The Trial Court Contradicts Its Reasoning And Judgment In Its Denial Of Defendant/Appellees' Motion To Dismiss.

{¶ 17} "V. Agreement To Remove Project Manager If Not Satisfied Precludes Qualified Privilege And Defamatory Remarks Are Therefore Gratuitous And Prima Facie Malicious Whether True Or Not.

{¶ 18} "VI. Abuse of Discretion When Trial Court Cited Evidence That Contradicted Its Conclusions Thereby Acting Arbitrarily And Capriciously In Granting Defendants/Appellees' Motion for Summary Judgment."

{¶ 19} In these errors, plaintiffs essentially argue that the trial court erred in granting summary judgment in favor of defendants and against plaintiffs. Our review of the record supports the trial court's judgment in this regard.

{¶ 20} Concerning procedure, we note that an appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. The reviewing court applies the same standard as the trial court, viewing the facts of the case in the light most favorable to the nonmoving party and resolving any doubt in favor of the nonmoving party. *Stoll v. Gardner*, 182 Ohio App.3d 214, 2009-Ohio-1865, 912 N.E.2d 165, ¶11. Pursuant to Civ.R. 56(C), summary judgment is proper if:

{¶ 21} "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in the favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 22} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the nonmoving party assumes the burden of offering specific facts to show a genuine issue for trial. Id. The nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735, 600 N.E.2d 791.

DEFAMATION CLAIMS

{¶ 23} In Counts 1 through 4 of plaintiffs' complaint, they allege that defendant Ferrier, on behalf of OTC, defamed them during the meeting on October 17, 2007 with employees of Telsource and HNTB. Additionally, plaintiffs allege that Ferrier defamed them when he wrote the Letter to Bob Cain dated

October 26, 2007 and copied to HNTB. Because we find defendants possessed a qualified privilege in the communications and did not act with actual malice, we conclude that the trial court correctly granted defendants summary judgment as to these claims.

{¶ 24} To establish a defamation claim, a plaintiff must demonstrate the existence of a false publication causing injury to a person's reputation; exposing him to public hatred, contempt, ridicule, shame, or disgrace; or affecting him adversely in his trade or business. *Ashcroft v. Mt. Sinai Med. Ctr.* (1990), 68 Ohio App.3d 359, 588 N.E.2d 280, paragraph three of the syllabus.

{¶ 25} Where a plaintiff establishes a prima facie case of defamation, the defendant may invoke a qualified privilege defense. *Daubenmire v. Sommers*, 156 Ohio App.3d 322, 2004-Ohio-914, 805 N.E.2d 571,¶118. Statements between parties concerning a common business interest may be protected by a qualified privilege. *Evely v. Carlon Co., Div. of Indian Head, Inc.* (1983), 4 Ohio St.3d 163, 165, 447 N.E.2d 1290. Generally, a communication is qualifiedly privileged when it 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 duty * * * if made to a person having a corresponding interest or duty, even though it contains matter which, without this privilege, would be actionable[.]'" *Hahn v. Kotten* (1975), 43 Ohio St.2d 237, 246, 331 N.E.2d 713. The elements needed to prove a privilege are "'good faith, an interest to be upheld, a statement limited

in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.'" Id.

{¶ 26} "Courts in Ohio have found a 'common business interest' privilege exists where two entities share a mutual business interest, even if (1) the entities are not 'related' other than having a common business interest, or (2) the person making the statement and the recipient of the statement do not have the same employer. See *Smith v. Ameriflora 1992, Inc.* (1994), 96 Ohio App.3d 179, 644 N.E.2d 1038, appeal not allowed, 71 Ohio St.3d 1427, 642 N.E.2d 635 (holding that statements by officers of construction management firm made regarding a construction coordinator for an exposition were qualifiedly privileged where the statements were made to a sponsor of the exposition for which the firm had been hired); [*Wilson v. A.E.P.* (Apr. 21, 1992), Franklin App. No. 91AP-996] (holding a letter from a company representative to a contractor for the company regarding the contractor's employee was protected by common business interest privilege); *Gaumont v. Emery Air Freight Corp.* (1989), 61 Ohio App.3d 277, 289, 572 N.E.2d 747 (holding that communications made by Emery employees to employees of Emery's supplier, Mac Tool Company, were covered by the qualified privilege). See, also, *Buchko v. City Hosp. Assn.* (C.A.6, 1996), 76 F.3d 378 (determining comments by hospital administrator to third-party staffing company about plaintiff, who was employed by third-party staffing company, were privileged based on the common business interest between the hospital and the

third-party staffing company)." *Jurczak v. J & R Schugel Trucking Co.*, Franklin App. No. 03AP-451, 2003-Ohio-7039, ¶41.

{¶ 27} Once a defendant demonstrates the existence of the qualified privilege, a plaintiff can only prevail upon a showing of actual malice. *Hanley v. Riverside Methodist Hosp.* (1991), 78 Ohio App.3d 73, 81, 603 N.E.2d 1126. A statement is made with actual malice if the speaker knew it was false or acted with reckless disregard to whether it was false. *Kremer v. Cox* (1996), 114 Ohio App.3d 41, 682 N.E.2d 1006; *Patio World v. Better Business Bur. Inc.* (1989), 43 Ohio App.3d 6, 9, 538 N.E.2d 1098. Reckless disregard for the truth is more than mere negligence. *Kremer*, supra. The plaintiff must demonstrate that the defendant was highly aware of the probability of falsity. *Jacobs v. Frank* (1991), 60 Ohio St.3d 111, 115, 573 N.E.2d 609. The subjective belief of the speaker must be considered in determining whether a statement was made with actual malice. *Lakota Loc. School Dist. Bd. of Edn. v. Brickner* (1996), 108 Ohio App.3d 637, 649, 671 N.E.2d 578; *Varanese v. Gall* (1988), 35 Ohio St.3d 78, 80, 518 N.E.2d 1177.

{¶ 28} Because the evidence indisputably establishes that the communications made by defendants OTC and Ferrier are qualifiedly privileged, we find that the trial court did not err in granting summary judgment as to plaintiffs' defamations claims. Georgalis acknowledged during his deposition that Ferrier made these statements and communications about Georgalis to parties connected to the Project and for the purpose of addressing concerns with

the Project. Furthermore, Georgalis testified that only persons connected with the Project discussed the alleged defamatory statements with him. The record demonstrates that the only parties at the meeting on October 17, 2007 were employees of OTC, Telsource, and HNTB. Additionally, the Letter written by Ferrier was only distributed to Bob Cain, the vice president of Telsource, and Rich Ackerman, the chief Engineer of HNTB. According to plaintiffs, the Letter documented a telephone conference that occurred on October 10, 2007 among Georgalis, HNTB, and Ferrier. Moreover, the alleged defamatory statements were made during "a proper occasion" and in a "proper manner" as they were communicated during a meeting called to discuss the Project and in a letter on official OTC letterhead discussing matters concerning the Project.

{¶ 29} Finally, the record is void of any evidence indicating actual malice by defendants. Plaintiffs presented no evidence that Ferrier knew that the statements were false. In fact, we are not convinced that the statements were in fact false. During his deposition, Georgalis admitted that many of the alleged defamatory statements regarding his unprofessional conduct, inadequate training, and lack of Telsource employees at project meetings were true. Additionally, Bob Cain testified that Georgalis reconfigured the network without first seeking approval, which was the reason OTC issued the stop work order, and ultimately, why Cain removed Georgalis as the project manager.

{¶ 30} Accordingly, in light of the foregoing, we find, with regard to plaintiffs' defamation claims, that defendants demonstrated there is no genuine issue of material fact and that they are entitled to judgment as a matter of law.

TORTIOUS INTERFERENCE CLAIMS

{¶ 31} "When a privilege, qualified or absolute, attaches to statements made in a defamation action, those statements remain privileged for the purpose of derivative claims such as intentional infliction of emotional distress and tortious interference with a business relationship. *A & B-Abell Elevator Co., Inc. v. Columbus/Central Ohio Building & Construction Trades Council*, 73 Ohio St.3d 1, 15, 651 N.E.2d 1283, 1995-Ohio-66 ('where claims such as tortious interference and disparagement are based on statements that are qualifiedly privileged under defamation law, the protection afforded those statements * * * must also apply in the derivative claims'); *Doyle v. Fairfield Machine Co., Inc.* (11th Dist. 1997), 120 Ohio App.3d 192, 218, 697 N.E.2d 667 ('[t]he applicability of qualified privilege in tortious interference cases has been recognized by Ohio courts'); *Smith v. Ameriflora 1992, Inc.* (10th Dist. 1994), 96 Ohio App.3d 179, 187, 644 N.E.2d 1038 (applying qualified privilege to claims for tortious interference)." *Gintert v. WCI Steel, Inc.*, Trumbull App. No. 2002-T-0124, 2007-Ohio-6737.

{¶ 32} Because we have already determined that defendants had a qualified privilege under the defamation action and no actual malice existed, we find that no genuine issues of material fact exist and defendants are entitled to judgment as a matter of law as to plaintiffs' two claims for tortious interference.

WIRETAPPING CLAIM

{¶ 33} In plaintiffs' complaint, they also assert that defendants violated R.C. 2933.52 by illegally recording an October 25, 2007 conference call unbeknownst to Georgalis, who participated in the call. R.C. 2933.52(B)(4) provides that the wiretapping statute, which prohibits the interception of a wire, oral, or electronic communication, does not apply when the person intercepting the communication is a party to the communication. See, also, *Flanders v. U.S.* (1955), 222 F.2d 163. As the trial court correctly determined, in this instance, the defendants were parties to the communication, and thus, violated no law by recording it.

{¶ 34} Accordingly, having determined that there are no genuine issues of material fact and defendants are entitled to judgment as a matter of law with regard to all of plaintiffs' claims for defamation, tortious interference, and wiretapping, we overrule plaintiffs' first six assignments of error.

{¶ 35} Plaintiffs' final assignment of error provides:

{¶ 36} "VII. Abuse Of Discretion In Denying Plaintiffs/Appellants' Continuation Of Deposition Of Defendant/Appellee HNTB Employee Garrick Lipscomb."

{¶ 37} We reject plaintiffs' argument that the trial court erred in denying them the opportunity to continue their deposition of Garrick Lipscomb, an employee of HNTB. First, we note that plaintiffs fail to direct this court, pursuant to App.R. 16(A)(7), to the portion of the record evidencing that the trial court denied them the opportunity to further depose Lipscomb. Nevertheless,

assuming arguendo that such denial exists, we would find that plaintiffs failed to demonstrate that the trial court abused its discretion.

{¶ 38} A trial court has broad discretion on decisions regarding discovery matters. *Dandrew v. Silver*, Cuyahoga App. No. 86089, 2005-Ohio-6355, ¶35. Accordingly, absent an abuse of discretion, an appellate court must affirm a trial court's determination concerning discovery issues. *State ex rel. The V. Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 469, 692 N.E.2d 198. "The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an abuse of that choice, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias." (Internal citations and quotations omitted.) *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 256-257, 1996-Ohio-159, 662 N.E.2d 1.

{¶ 39} Because we find that plaintiffs previously had the opportunity to depose and, in fact, did depose Lipscomb on August 14, 2008, any alleged denial by the trial court to allow plaintiffs to depose Lipscomb a second time would not constitute perversity of will. Thus, plaintiffs' final assignment of error is without merit and the trial court's grant of summary judgment in favor of defendants is affirmed.

Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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

ANN DYKE, JUDGE

MARY EILEEN KILBANE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR