

Court of Claims of Ohio

The Ohio Judicial Center
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BERTIE BURLEY

Plaintiff

v.

DEPARTMENT OF REHABILITATION AND CORRECTION

Defendant

Case No. 2007-02441

Judge Joseph T. Clark
Magistrate Steven A. Larson

MAGISTRATE DECISION

{¶ 1} Plaintiff brought this action alleging defamation. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 2} At all times relevant to this action, plaintiff was an inmate in the custody and control of defendant at the Pickaway Correctional Institution (PCI) pursuant to R.C. 5120.16. Plaintiff alleges that on March 12, 2006, following visitation time with his wife, PCI employees falsely accused him of possessing marijuana.

{¶ 3} Plaintiff testified that on March 12, 2006, his wife came to visit him at PCI. According to plaintiff, after visitation time was over, he and four or five other inmates were taken to the “shakedown” area to be searched. Plaintiff testified that he stripped down to his underwear and placed his clothes on a chair in front of him. Plaintiff related that the other inmates did likewise and stood in a line while a corrections officer (CO) searched the clothes. Plaintiff stated that when the CO approached him, the CO found marijuana on the floor near his clothes and stated that “I guess this belongs to you.” Plaintiff testified that he replied “that ain’t mine.”

{¶ 4} Plaintiff further testified that after the marijuana was found, “white shirts” came into the shakedown area, placed him in handcuffs and escorted him to the captain’s office. Plaintiff stated that the captain then took him to segregation. Plaintiff recalled that an investigation ensued that involved the institutional inspector and the Ohio State Highway Patrol (OSHP). Plaintiff testified that he gave several statements regarding the matter and that both the investigator and the OSHP threatened to charge both him and his wife with “conveyance” and possession of drugs. However, plaintiff was never charged with any crime, nor was his wife. Plaintiff stated that as a result of this incident his wife was no longer permitted to visit him.

{¶ 5} CO Robert Elliot testified that at approximately 11:30 a.m. on March 12, 2006, following visitation, he escorted plaintiff and three other inmates to the PCI shakedown area to be searched. According to Elliot, the inmates removed their clothes and placed them on chairs. Elliot testified that when he reached plaintiff, he ordered him to remove his undershirt and roll down the waistband of his undershorts. According to Elliot, as plaintiff rolled down the waistband, a finger from a rubber glove containing a substance that appeared to be marijuana fell to the floor and plaintiff had something in his hand. Elliot stated that he finished searching the other inmates, had them get dressed, and then notified the shift captain of the incident. Elliot testified that he then filled out a contraband control slip wherein he noted that “4 glove fingers of what appears to be marijuana” were confiscated from plaintiff.

{¶ 6} Jeff Howard was the PCI Investigator at the time of the incident. Howard testified that on March 12, 2006, at approximately 11:30 a.m., CO Elliot notified him that he had found a “green leafy substance” on plaintiff during a post-visitation strip search. Howard stated that he ordered that plaintiff be placed in segregation and contacted the OSHP. Plaintiff was later brought to his office to be interviewed by a trooper, but plaintiff would not talk about the incident, and he was sent back to segregation. Howard testified that he then took photos of the glove fingers (Defendant’s Exhibits F, G, H) and

tested a small amount of the substance with a narcotics field-testing kit. According to Howard, the substance tested positive for marijuana. Howard testified that he then had plaintiff brought back to his office. According to Howard, plaintiff admitted arranging to bring the marijuana into the prison to meet gambling debts he owed to other inmates.

{¶ 7} Defamation, which includes both libel and slander, “is defined as ‘the unprivileged publication of a false and defamatory matter about another * * * which tends to cause injury to a person’s reputation or exposes him to public hatred, contempt, ridicule, shame or disgrace * * *.’” *McCartney v. Oblates of St. Francis deSales* (1992), 80 Ohio App.3d 345, 353. As suggested by the definition, a publication of statements, even where they may be false and defamatory, does not rise to the level of actionable defamation unless the publication is also unprivileged. Thus, the threshold issue in such cases is whether the statements at issue were privileged or unprivileged publications.” *Sullivan v. Ohio Dept. of Rehab.& Corr.*, Ct. of Cl. No. 2003-02161, 2005-Ohio-2122, ¶ 8.

{¶ 8} Privileged statements are those that are “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. The essential elements thereof are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, publication in a proper manner and to proper parties only.” *Hahn v. Kotten* (1975), 43 Ohio St.2d 237, 244.

{¶ 9} Furthermore, a qualified privilege can be defeated only by clear and convincing evidence of actual malice. *Bartlett v. Daniel Drake Mem. Hosp.* (1991), 75 Ohio App.3d 334, 340. “Actual malice” is “acting with knowledge that the statements are false or acting with reckless disregard as to their truth or falsity.” *Jacobs v. Frank* (1991), 60 Ohio St.3d 111, 116.

{¶ 10} Plaintiff did not, in his complaint, or at trial, identify the individual or individuals that allegedly defamed him.

{¶ 11} Based upon the foregoing, it is recommended that judgment be rendered in favor of defendant.

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).

STEVEN A. LARSON
Magistrate

cc:

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MR/cmd
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