[Cite as *Montgomery v. Greater Cleveland Regional Transit Auth.*, 2021-Ohio-1198.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

SIMON MONTGOMERY, :

Plaintiff-Appellant, :

No. 109559

v. :

GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY, :

Defendant-Appellee. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: April 8, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-903089

Appearances:

Sandra J. Rosenthal, *for appellant*.

Gallagher Sharp, L.L.P., Richard C.O. Rezie, and Jennifer L. Gardner, *for appellee* Greater Cleveland Regional Transit Authority.

Janik, L.L.P., Steven G. Janik, and Audrey K. Bentz, *for appellee* Lieutenant Orlando Hudson.

LARRY A. JONES, SR., J.:

{¶ 1} Plaintiff-appellant Simon Montgomery ("Montgomery") appeals the trial court's decision to grant summary judgment in favor of defendant-appellee Greater Cleveland Regional Transit Authority ("GCRTA") and Montgomery's former supervisor, defendant-appellee Lieutenant Orlando Hudson ("Lieutenant Hudson"). Finding no merit to the appeal, we affirm.

Background

{¶ 2} Beginning in 2014, Montgomery worked for GCRTA as a part-time fare enforcement officer in the fare-enforcement division. Lieutenant Hudson was Montgomery's direct supervisor. This lawsuit stems from statements Montgomery alleges Lieutenant Hudson made during Montgomery's background check when Montgomery applied for a full-time position with GCRTA.

{¶ 3} At all times relevant to this case, Montgomery held numerous jobs. Besides his part-time job with GCRTA, he worked full time as a peace officer for the Northeast Ohio Regional Sewer District ("sewer district"), part time at the Bentleyville Police Department, and served in the Naval Reserve. According to Lieutenant Hudson, scheduling Montgomery to shifts at GCRTA was an ongoing problem due to his other commitments.

{¶ 4} In May 2017, Montgomery applied for a full-time officer position with GCRTA. As part of the hiring process, internal detectives conduct background checks on each applicant, including internal applicants. Detective Joseph Kemmett ("Detective Kemmett") performed the background check on

Montgomery and prepared a report with his findings and recommendations. As part of the application process, Montgomery signed a release ("Applicant Release") to release GCRTA and "its agents, officers, and representatives, and any person, * * * furnishing information from any and all liabilities of every nature arising out of the furnishing or inspection of such documents, records and other information, or the investigation made by or on behalf of the GCRTA police."

{¶ 5} As part of the background check, Detective Kemmett interviewed Montgomery's supervisor, Lieutenant Hudson. Lieutenant Hudson relayed two incidents of concern.

The Republican National Convention ("RNC") Incident

{¶ 6} The first incident occurred in 2016, when the RNC was held in downtown Cleveland. A week before the convention, Montgomery found out that Atlantis Security was hiring off-duty police officers to work Tower City Center, a shopping mall close to the convention site, at a rate of $75 per hour. Montgomery applied to Atlantis Security to work 40 hours during the convention week.

{¶ 7} According to GCRTA, in order to qualify for secondary employment wearing a GCRTA-issued uniform and gun, its officers must maintain a minimum of 24 working hours a week with GCRTA. GCRTA maintained that Montgomery did not qualify for secondary employment wearing GCRTA "colors."[1]

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[1]The record reflects that GCRTA's secondary employment agreement was revised in 2016 and the revisions became effective July 11, 2016. Montgomery contends he did not receive a copy of the revised policy until months after the RNC, so it did not apply to him. But the policy in effect prior to July 11, 2016, did not permit part-time officers to

{¶ 8} On Monday July 18, 2016, Montgomery arrived at Tower City Center to work for Atlantis. Lieutenant Hudson saw Montgomery in GCRTA uniform but knew that he was not on the GCRTA schedule. Montgomery told Lieutenant Hudson that he was working for Atlantis. Lieutenant Hudson informed Montgomery that he was not allowed to work for Atlantis. Montgomery returned to GCRTA to fill out a secondary employment form. Montgomery sent the form to Commander Sean O'Neil ("Commander O'Neil"), whose signature was required before the chief of police gave it final approval. Both the commander and the chief initially signed off on Montgomery's form.

{¶ 9} Once Commander O'Neil found out that Montgomery did not qualify for secondary employment, he rescinded his approval and emailed Montgomery, stating that he had been unaware that Montgomery did not qualify and, had he known, he would have "never signed, approved your paperwork, and forwarded it to the Chief." Lieutenant Hudson emailed the commander and stated that he was troubled that Montgomery told Lieutenant Hudson that he would be limited in the amount of time he could work for GCRTA during the RNC because he had to work at the sewer district "only to learn that he was scheduled to work every day this week for [Atlantis] security and again wearing GCRTA colors."

Little Italy Incident

{¶ 10} The second incident occurred in July 2017, when Montgomery was on duty at the Little Italy rapid station with a fellow officer and Sergeant Eric

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work secondary employment wearing a GCRTA uniform; thus, Montgomery did not qualify for secondary employment during the RNC under either policy.

Richards ("Sergeant Richards"). The officer was writing a ticket to a patron and learned the patron had an outstanding warrant for his arrest. The officer tried to handcuff the patron, but the patron pulled his arm away from the officer and ran away across train tracks. The officer ran after the patron and fell down during the pursuit. Montgomery, who was nearby, failed to assist the officer, call for backup, or alert the sergeant, who was in the vicinity.

{¶ 11} Sergeant Richards issued a "coaching" to Montgomery after the incident. Lieutenant Hudson was out of town at the time and did not meet with Montgomery for several weeks. Lieutenant Hudson later stated he thought the coaching was "premature," and that if he had been around, he would have issued "formal discipline" to Montgomery. Lieutenant Hudson testified at deposition that the chief of police agreed not to issue formal discipline to Montgomery because so much time had passed between the time of the incident and the meeting about the incident.

{¶ 12} Detective Kemmett investigated the Little Italy incident by viewing surveillance video from the event as part of Montgomery's background check. Detective Kemmett testified at deposition that, based on his independent review, he found that the patron was being combative, the matter was one of officer safety, and Montgomery did not respond appropriately.

{¶ 13} After completing his investigation, Detective Kemmett concluded that he would not recommend Montgomery for a full-time position with GCRTA. He based his recommendation on Montgomery's performance evaluations from

the sewer district and his failure to assist his fellow officer during the Little Italy incident. He testified that the RNC incident did not factor into his recommendation.

{¶ 14} GCRTA Chief of Police John Joyce ("Chief Joyce") reviewed Detective Kemmett's report and decided not to hire Montgomery for full-time employment. In addition to Detective Kemmett's recommendation, Chief Joyce based his decision on: (1) Montgomery's lack of reliability and ongoing scheduling issues; (2) Montgomery's lack of productivity; and (3) his own opinion that Montgomery was only "minimally competent."

{¶ 15} In August 2018, Montgomery filed suit against GCRTA and Lieutenant Hudson alleging that Lieutenant Hudson had defamed Montgomery by (1) providing false information about Montgomery during the background check, (2) causing Montgomery to fail the background check and be denied full-time employment with GCRTA, (3) sustain lost income and benefits, and (4) sustain emotional distress and damage to his reputation.

{¶ 16} GCRTA and Lieutenant Hudson moved to dismiss the complaint pursuant to Civ.R. 12(B)(6), which Montgomery opposed. The trial court denied the motions to dismiss. GCRTA and Lieutenant Hudson filed motions for summary judgment, which Montgomery also opposed. The trial court granted the motions for summary judgment, finding that reasonable minds could come to one conclusion and that GCRTA and Lieutenant Hudson were entitled to judgment as a matter of law.

Assignment of Error

{¶ 17} Montgomery appealed and raises the following assignment of error for our review:

> I. The court of common pleas erred in granting defendants' motions for summary judgment.

Law and Analysis

Standard of Review

{¶ 18} We review summary judgment rulings de novo, applying the same standard as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). We accord no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate.

{¶ 19} Under Civ.R. 56, summary judgment is appropriate when (1) no genuine issue as to any material fact exists; (2) the party moving for summary judgment is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion that is adverse to the nonmoving party.

{¶ 20} In his sole assignment of error, Montgomery contends that the trial court erred in granting summary judgment in favor of GCRTA and Lieutenant Hudson.

{¶ 21} Montgomery's claim fails for two main reasons — Montgomery signed a release waiving any claims related to Lieutenant Hudson and GCRTA's

participation in the background check when he executed the Applicant Release, and there is no genuine issue of material fact that the statements Lieutenant Hudson made were not defamatory.

Release of Claims

{¶ 22} When Montgomery applied for the full-time position with GCRTA, he signed an "Applicant Release" that provided, in part:

> I hereby expressly release and waive all provisions of state and federal law which may forbid the disclosure of information from any employer, or person, from disclosing any knowledge or information they have concerning me which is requested by the GCRTA Police. I further consent that the Chief of the GCRTA Police, or his representative, be provided with a copy of any such record concerning me upon request.
>
> I further release, discharge and exonerate the GCRTA police, its agents, officers, and representatives, and any person, agency company, organization, or firm furnishing information from any and all liabilities of every nature arising out of the furnishing or inspection of such documents, records and other information, or the investigation made by or on behalf of the GCRTA police.

{¶ 23} Montgomery claims that Detective Kemmett made him sign the release knowing that Lieutenant Hudson had already made false statements to Detective Kemmett about him, the release was illegal, and the release should be ignored because he was unilaterally mistaken in signing the release.

{¶ 24} Montgomery offers no evidence that Detective Kemmett had him sign the release knowing that Lieutenant Hudson had made false statements about him. Nor has Montgomery provided evidence sufficient to overcome summary judgment that the release was illegal.

{¶ 25} Montgomery contends his signing of the release was a unilateral mistake. A party asserting unilateral mistake must prove it by clear and convincing evidence. *In re J.W.*, 8th Dist. Cuyahoga No. 105337, 2017-Ohio-8486, ¶ 8, citing *Gartrell v. Gartrell*, 181 Ohio App.3d 311, 2009-Ohio-1042, 908 N.E.2d 1019 (5th Dist.). Clear and convincing evidence is evidence that produces in the mind of the trier of fact "a firm belief or conviction as to the facts sought to be established." *In re J.W.* at *id.*, citing *In re T.P.*, 8th Dist. Cuyahoga No. 102705, 2015-Ohio-3679, ¶ 34. Although Montgomery may now regret signing the release, he has provided no evidence, let alone established by clear and convincing evidence, that his unilateral mistake invalidates the Applicant Release.

Defamation

{¶ 26} We next consider whether Lieutenant Hudson's statements were defamatory.

{¶ 27} Montgomery contends that Lieutenant Hudson made the following defamatory statements:

> (1) Lieutenant Hudson would have imposed formal discipline for the Little Italy incident but he was out of town at the time and there was too large a gap in time to do so.
>
> (2) Montgomery refused to work for GCRTA during the RNC and Lieutenant Hudson "caught" him trying to work a "side job" at Tower City Center.
>
> (3) Montgomery had "gone behind his [Lieutenant Hudson's] back" to obtain approval to work the part-time job at Tower City Center.

{¶ 28} Defamation is a false publication that injures a person's reputation, exposes the person to public hatred, contempt, ridicule, shame or disgrace, or

affects the person adversely in his or her trade or business. *Matalka v. Lagemann*, 21 Ohio App.3d 134, 138, 486 N.E.2d 1220 (10th Dist.1985). The elements of a claim for defamation are: (1) a false statement; (2) the false statement was defamatory; (3) the false defamatory statement was published; (4) the claimant was injured and the defendant acted with the required degree of fault. *Kanjuka v. MetroHealth Med. Ctr.*, 151 Ohio App.3d 183, 783 N.E.2d 920, ¶ 15 (8th Dist.2002), citing *Celebreeze v. Dayton Newspapers, Inc.*, 41 Ohio App.3d 343, 535 N.E.2d 755 (8th Dist.1988).

{¶ 29} Where the defamatory statements are oral, the defamation is classified as slander. When the statements are written, it is known as libel. Defamation is either per se or per quod. *Kanjuka* at ¶ 16. Defamation per se occurs when the defamation is manifested by the very words spoken. Defamation per quod means a statement that is innocent on its face that becomes defamatory through interpretation or innuendo. *Id.*; *Gosden v. Louis*, 116 Ohio App.3d 195, 687 N.E.2d 481 (9th Dist.1996). A statement is defamatory per se where it supports an indictable criminal offense involving moral turpitude or infamous punishment, imputes some loathsome or contagious disease that excludes one from society or tends to injure one in the person's trade or occupation. *Kanjuka* at *id.*, citing *McCartney v. Oblates of St. Francis deSales*, 80 Ohio App.3d 345, 609 N.E.2d 216 (6th Dist.1992). Where the statement constitutes defamation per se, damages and actual malice are presumed; with defamation per quod, the plaintiff must plead and prove special damages. *Kanjuka* at *id.*, citing *McCartney*.

{¶ 30} GCRTA and Lieutenant Hudson contend that Montgomery cannot establish that any of Hudson's statements about him were untrue. In Ohio, truth is a complete defense to a claim for defamation. *Ed Schory & Sons, Inc. v. Soc. Natl. Bank*, 75 Ohio St.3d 433, 445, 662 N.E.2d 1074 (1996). "'It is sufficient [in defending against a defamation action] to show that the imputation is substantially true, or as it is often put, to justify the 'gist,' the 'sting,' or the substantial truth of the defamation.'" *Krems v. Univ. Hosps. of Cleveland*, 133 Ohio App.3d 6, 9, 726 N.E.2d 1036 (8th Dist.1999), quoting Prosser, *The Law of Torts*, 798-799 (4th Ed. 1971). Whether a defamatory statement is substantially true is a question of fact. *Sweitzer v. Outlet Communications, Inc.*, 133 Ohio App.3d 102, 110, 726 N.E.2d 1084 (10th Dist.1999).

{¶ 31} Montgomery contends that Lieutenant Hudson's statements were false and are not supported by the record. He further argues that even if Lieutenant Hudson's statements were substantially true, there is still a question of fact with regard to the statements. Summary judgment may be granted on the ground that a defamatory statement is "substantially true" only if there appears, from the evidence submitted pursuant to Civ.R. 56, that no genuine issue of fact exists with respect to this issue. *Roe v. Heap*, 10th Dist. Franklin No. 03AP-586, 2004-Ohio-2504, ¶ 22.

{¶ 32} Montgomery contends that these were statements of fact that impacted his professional status and reputation. According to Montgomery, GCRTA condoned Lieutenant Hudson's untrue and damaging statements and is

therefore jointly and severally liable. Lieutenant Hudson and GCRTA argue that Lieutenant Hudson offered his opinion about a subordinate in response to questions posed by Detective Kemmett as part of Lieutenant Hudson's background check.

{¶ 33} The expression of an opinion is generally immune from liability under the Ohio and United States Constitutions. *Mehta v. Ohio Univ.*, 194 Ohio App.3d 844, 2011-Ohio-3484, 958 N.E.2d 598, ¶ 38 (10th Dist.), citing *Vail v. The Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 649 N.E.2d 182 (1995). This is because "'there is no such thing as a false idea.'" *Mehta* at ¶ 27, quoting *Feldman v. Bahn*, 12 F.3d 730, 733 (7th Cir.1993). "'Society,'" however, "'has a pervasive and strong interest in preventing and redressing attacks upon reputation.'" *Feldman* at *id.*, quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966). Therefore, what is required is a delicate balance between the constitutional protections afforded to the free expression of ideas and the protections afforded to an individual's reputation under defamation laws. *Mehta* at *id.*, citing *Fechko Excavating, Inc. v. Ohio Valley & S. States LECET*, 9th Dist. Medina No. 09CA0006-M, 2009-Ohio-5155, ¶ 19.

{¶ 34} The threshold determination of whether the allegedly defamatory statement is one of fact or opinion is a matter of law to be decided by the court. *Byrne v. Univ. Hosp.*, 8th Dist. Cuyahoga No. 95971, 2011-Ohio-4110, ¶ 13, citing *Sikora v. Plain Dealer Publishing Co.*, 8th Dist. Cuyahoga No. 81465, 2003-Ohio-3218, ¶ 16. Courts apply a totality of the circumstances test to determine whether a

statement is fact or opinion. *Mehta* at ¶ 29. In reviewing the totality of the circumstances, courts examine the following 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 in which the statement appears. *Vail* at 282. "This analysis is not a bright-line test." *Id*. "The weight given to any one factor under this inquiry will vary depending on the circumstances of each case." *Wampler v. Higgins*, 93 Ohio St.3d 111, 126, 752 N.E.2d 962 (2001), citing *Vail* at *id*.

{¶ 35} Lieutenant Hudson maintains his statements were made in direct response to Detective Kemmett's request for a recommendation during a background check for a potential employee. Lieutenant Hudson cites *Byrne*, 8th Dist. Cuyahoga No. 95971, 2011-Ohio-4110. Byrne resigned from her position with University Hospitals ("UH") as a RN. Her supervisor completed a standard UH termination form. On the form was a check box asking the supervisor to indicate whether she would recommend rehiring Byrne in the future at another UH facility. The supervisor checked the box indicating that she would not recommend Byrne for rehire. Byrne sued for defamation and this court found that the supervisor's recommendation was protected opinion, finding that "[t]here is no objective way to prove or disprove this recommendation * * * [a] recommendation still hinges on the particular supervisor's individual value criteria." *Id*. at ¶ 17.

{¶ 36} The record shows that Lieutenant Hudson believed that Montgomery refused to work more hours for GCRTA during the RNC because of

his employment at the sewer district but instead learned that he had taken another job with Atlantis. He also believed that Montgomery went behind his back to get approval to work secondary employment. Lieutenant Hudson expressed these beliefs to Detective Kemmett in the broad context of providing information to another GCRTA employee during an internal background check.

{¶ 37} As to the Little Italy incident, Lieutenant Hudson told Detective Kemmett that he would have imposed formal discipline for the Little Italy incident but was out of town when it occurred and too much time had passed by the time he was able to meet with Montgomery. Lieutenant Hudson testified at deposition that it was Chief Joyce's decision not to impose formal discipline due to the time lapse. The reason Lieutenant Hudson gave for the delay in having the meeting was due to Montgomery's work schedule; that reason does not change the lieutenant's opinion that Montgomery should have been disciplined for the incident. Lieutenant Hudson believed Montgomery deserved a formal discipline; instead, Montgomery benefitted from a lapse in time and received a lesser form of discipline.

{¶ 38} Lieutenant Hudson's statements were either opinion, truthful statements, or substantially truthful statements as a matter of law. Thus, we find that Montgomery is unable to show either of the first two prongs of a defamation claim. Given that none of the statements are false statements of fact, we need not consider whether they were published to a third party or whether a qualified

privilege applied to the statements. *See Casale v. Nationwide Children's Hosp.*, S.D.Ohio No. 2:11-CV-1124, 2015 U.S. Dist. LEXIS 190751, 29 (Sept. 25, 2015).

{¶ 39} Montgomery also has not shown that there is a genuine issue of material fact that he was harmed by Lieutenant Hudson's statements. Detective Kemmett, who conducted Montgomery's background check, testified at deposition that he did not base his recommendation not to hire Montgomery for a full-time position on Lieutenant Hudson's statements:

> Q: And what bearing, if any, did Lieutenant Hudson's statements about Officer Montgomery have on your final opinion?
>
> Detective Kemmet: No bearing.

{¶ 40} Detective Kemmett testified that once he watched the surveillance video of the Little Italy incident, it was "game over," and he would not recommend Montgomery for a full-time position. The detective thought that Montgomery acted inappropriately during the Little Italy incident and that is what changed the background investigation to a "negative." He further testified that the RNC incident "honestly didn't matter" after he saw the Little Italy video.

{¶ 41} Montgomery claims that he was harmed because he had subsequent job interviews and did not get hired by those potential employers. He has not, however, shown any evidence that Lieutenant Hudson's statements or his GCRTA background check were used by other potential employers to deny him employment.

{¶ 42} The trial court did not err in granting summary judgment in favor of Lieutenant Hudson and the GCRTA. Montgomery signed a release waiving any

claims related to Lieutenant Hudson and GCRTA's participation in the background check when he executed the Applicant Release. In addition, Lieutenant Hudson's statements to Detective Kemmett about Montgomery in the context of an internal background check as part of an employment application were not defamatory.

{¶ 43} The sole assignment of error is overruled.

{¶ 44} Judgment affirmed.

It is ordered that appellees recover from appellant 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.

LARRY A. JONES, SR., JUDGE

ANITA LASTER MAYS, P.J., and
EMANUELLA D. GROVES, J., CONCUR