[Cite as *Christiansen v. Pricer*, 2010-Ohio-2718.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
VICKY M. CHRISTIANSEN	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellant	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 09-CA-126
DOUGLAS C. PRICER	:	
	:	
	:	O P I N I O N

and

WCLT RADIO, INC.

Defendants-Appellees

CHARACTER OF PROCEEDING:	Civil appeal from the Licking County Court of Common Pleas, Case No. 08CV02007
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 11, 2010

APPEARANCES:

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Gwin, P.J.

{¶1} Plaintiff-appellant Vicky M. Christiansen appeals a summary judgment of the Court of Common Pleas of Licking County, Ohio, granted in favor of defendants-appellees Douglas C. Pricer and WCLT Radio, Inc. Appellant assigns five errors to the trial court:

{¶2} "I. THE COURT ERRED IN DETERMINING THAT THE DEFAMATORY STATEMENTS MADE BY THE DEFENDANTS WERE NOT SUBSTANTIALLY FALSE.

{¶3} "II. THE COURT ERRED IN APPLYING 'INNOCENT CONSTRUCTION' TO THE DEFAMATORY STATEMENTS MADE BY THE DEFENDANTS.

{¶4} "III. THE COURT ERRED IN DETERMINING THAT THE DEFAMATORY STATEMENTS MADE BY THE DEFENDANTS WERE OPINION AND THEREFORE NOT ACTIONABLE.

{¶5} "IV. THE COURT ERRED IN DETERMINING THAT THE DEFAMATORY STATEMENTS MADE BY THE DEFENDANTS WERE NOT MADE WITH ACTUAL MALICE.

{¶6} "V. THE COURT ERRED IN NOT MAKING A DISTINCTION BETWEEN DEFAMATION AND FALSE LIGHT INVASION OF PRIVACY."

{¶7} The trial court set out the facts it found to be undisputed. Appellant was one of three candidates for the Licking County Domestic Relations Court. Appellee Pricer is the President and General Manager of appellee radio station. Appellant alleged defamation and false light invasion of privacy based upon an editorial that appellee Pricer read on the radio station and published on its website.

{¶8} The oral broadcast stated:

{¶9} "On November 4 the voters of Licking County are responsible for hiring a new Domestic Relations Judge. There are three candidates for this $121,350 per year public job.

{¶10} "The candidates are Richard Wright, Paul Harmon, and Vicky Christiansen. Upon review, it's our opinion that two are clearly inappropriate for this position.

{¶11} "Mr. Harmon is permanently barred from practicing law before two of our local judges, and in a letter to Ohio Supreme Court Justice Thomas Moyer from Judge Robert Hoover states "no Licking County judge is willing to hear Mr. Harmon's cases." Additionally, charges against Mr. Harmon for improper conduct relating back to a November 2006 motion filed in the Licking County Probate Court, have yet to be resolved.

{¶12} "In July of 2007, a police report alleging assault was filed with the Newark Police Department against Vicky Christiansen. In the report she is accused of striking a person in a courthouse elevator. She has also had several complaints concerning her behavior filed with the Ohio Supreme Court's Disciplinary Counsel.

{¶13} "Documents are available for your review at WCLT.com keyword 'bad candidates'.

{¶14} "The incidents are evidence of behavior that we would not expect or condone in the judge we choose to serve us in our Domestic Relations Court. Further investigation with people involved in our local legal system suggests that neither Harmon or [sic] Christiansen possess (sic) the demeanor suited to be a judge. The

power associated with this position is best served by a knowledgeable, stable, fair-minded individual.

{¶15} "The remaining candidate, Richard Wright has practiced before all our county courts, has a clean disciplinary record, has served as acting judge for the Licking County Municipal Court for ten years, and has received 'highly recommended' rating from the Central Ohio Association for Justice.

{¶16} "Richard Wright should be elected as the next Licking County Domestic Relations Judge.

{¶17} "We encourage you to question attorneys and members of the legal community concerning these candidates before you make your final decision in this critical race. This is an editorial from WCLT, I'm Doug Pricer."

{¶18} The radio station's website identified the language as an editorial.

{¶19} Appellant suggest the editorial was in retaliation for her representation of appellee Pricer's wife in their contentious divorce and post-decree divorce matters.

{¶20} The trial court found appellant did not dispute there was a police report alleging assault filed against her, and several complaints concerning her behavior had been filed with Disciplinary Counsel. The court found there was no genuine issue of material fact, because the two allegedly defamatory statements were true. The court found that the entire context of the allegedly actionable statements shows they are opinion statements and a reasonable listener or reader could accept their literal meaning without inferring wrongful conduct.

{¶21} Civ. R. 56 states in pertinent part:

{¶22} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

{¶23} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts, *Houndshell v. American States Insurance Company* (1981), 67 Ohio St. 2d 427. The court may not resolve ambiguities in the evidence presented, *Inland Refuse Transfer Company v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St. 3d 321. A fact is material if it affects the outcome of the case under the applicable substantive law, *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App. 3d 301.

{¶24} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court, *Smiddy v. The*

Wedding Party, Inc. (1987), 30 Ohio St. 3d 35. This means we review the matter de novo, *Doe v. Shaffer,* 90 Ohio St.3d 388, 2000-Ohio-186.

{¶25} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim, *Drescher v. Burt* (1996), 75 Ohio St. 3d 280. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist, Id. The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute over material facts, *Henkle v. Henkle* (1991), 75 Ohio App. 3d 732.

I.

{¶26} In her first assignment of error, appellant argues the trial court erred in finding the alleged defamatory statements were not substantially false.

{¶27} Both parties cite *McKimm v. State Election Commission*, 89 Ohio St. 3d 139, 2000-Ohio-118 729 N.E. 2d 364. In *McKimm,* the Ohio Supreme Court held a court should evaluate whether the statements at issue are factual defamatory statements, viewing these statements as a reasonable reader would.

{¶28} Appellee Pricer argues his statements are clear and true. He did not state appellant was charged with or convicted of an assault, and did not suggest appellant was actually disciplined by the Ohio Supreme Court.

{¶29} In *McKimm*, the statements at issue were contained in a campaign pamphlet and consisted of a "quiz" regarding the candidate's opponent, Randy Gonzales, which read in part:

{¶30} "7. Which of the following is true?

{¶31} "A. Trustees have a policy of bidding **all** contracts greater than $10,000.

{¶32} "B. Randy Gonzalez **ignored** bidding policy. He voted to contract an architect for $51,000 to design the Social Hall (pavilion) ***without taking bids."***

{¶33} (Emphasis sic).

{¶34} Accompanying question 7 was a drawing, which the Supreme Court described:

{¶35} "***In the drawing, a human hand extends toward the reader from underneath the corner of a table. The hand holds a bundle of cash, and small lines drawn around the bundle give the reader the impression of motion-as if the hand is waving the cash back and forth underneath the table. ***" *McKimm* at 140.

{¶36} The plaintiff claimed the cartoon implied Gonzales accepted bribes "under the table" while McKimm argued the drawing implied Gonzales awarded contracts on the basis of personal preference and "freebies".

{¶37} The Supreme Court found from the perspective of a reasonable reader, the average reader would view the drawing as a factual assertion that Gonzalez accepted cash in exchange for his vote to award the unbid construction contract.

{¶38} Here, appellant concedes the factual statements are literally true but imply she was charged or convicted of assault, and imply she was disciplined by the Supreme

Court. We do not agree. We find the trial court did not err in finding the statements were literally true.

{¶39} The first assignment of error is overruled.

II

{¶40} In her second assignment of error, appellant argues the trial court erred in applying the "innocent construction" rule to the statements. She refers us to G*upta v. Lima News* (2000), 139 Ohio App. 3d 538, 2000-Ohio-1918, 744 N.E.2d 1207. In *Gupta,* the *Lima News* published a news story claiming that Dr. Gupta had been found negligent and consented to one of the largest medical malpractice awards in the county for placing a patient into an irreversible coma. The news story was in fact false. Dr. Gupta had been previously dismissed from the case and the hospital had been found negligent. The statements in *Gupta* were false and were made in the context of a news report rather than an editorial.

{¶41} The *Gupta* court found the "innocent construction" rule did not apply because the statements were either false or misleading. The court found the report could not be reasonably interpreted with a non-defamatory meaning. Because falsity is an essential element of a claim for libel, an action must fail if the published statement was truthful. *Gupta* at 544, citing *Sweitzer v. Outlet Communications, Inc.* (1999), 133 Ohio App.3d 102, 110-111, 726 N.E.2d 1084 , 1089-1090.

{¶42} The *Gupta* case is distinguishable from the case at bar. Because the statements printed in the newspaper were presented as a news article, the newspaper could successfully defend if it could show the statements were "substantially true". Here the statements were part of an editorial and were factually correct.

{¶43} We find the trial court did not err in applying the innocent construction rule. The second assignment of error is overruled.

III

{¶44} In her third assignment of error, appellant argues the trial court erred in determining the statements were opinion and not actionable. Appellant urges us the trial court must look to the totality of the circumstances. *McKimm*, supra; *Vail v. Plain Dealer Publishing Company* (1995), 72 Ohio St. 3d 279. 1995-Ohio-187, 649 N.E.2d 182. She argues the totality of circumstances is fluid, and it is the conclusions a reader will draw from the factual references that determine whether it is fact or opinion. *Sikora v. Plain Dealer Publishing,* Cuyahoga App. No 81465*, 2003*-Ohio-3218.

{¶45} In *Vail*, the Supreme Court held: "When determining whether speech is a protected opinion a court must consider the totality of the circumstances. Specifically, a court should consider: the specific language at issue, whether the statement is verifiable, the general context of the statement, and the broader context in which the statement appeared. (*Scott v. News-Herald* [1986], 25 Ohio St.3d 243, 25 OBR 302, 496 N.E.2d 699, approved and followed; Section 11, Article I of the Ohio Constitution, applied.)" Syllabus by the court.

{¶46} The Supreme Court cautioned that each of the four factors should be addressed, but the weight given to any one will vary depending on the circumstances presented. Id at 282.

{¶47} The statements in *Vail* were captioned "commentary." The article was entitled "Gay-basher takes refuge in the closet," and used terms like gay basher, right-wing, bigoted, and hate-mongering. The commentary described Vail as a neo-numbskull

who engaged in anti-homosexual diatribe and who had latched onto homophobia as a campaign tactic. At least one of the statements purported to be factual, specifically, that Vail was a liar. The Supreme Court found nevertheless, an ordinary reader would believe the statement was the opinion of the writer.

{¶48} Appellant argues appellee Pricer stated the incidents are "evidence" of her unsuitability to serve as a judge. She asserts this statement relays to the public that the statements are factual. She argues appellee Pricer did not say that in his opinion if the allegations and complaints are true, then she is not fit to serve.

{¶49} The trial court found the factual statements appellees made were true, and the rest of the editorial commenting on her fitness to serve as a judge is a constitutionally protected opinion statement. We find the trial court did not err in determining the alleged statements were opinion and not actionable.

{¶50} The third assignment of error is overruled.

IV

{¶51} In her fourth assignment of error, appellant argues the court erred in finding the statements were not made with actual malice. The trial court found as a candidate for elective office, appellant was a limited purpose public figure who must show the statements were made with actual malice, which means knowledge that the statements were false or with a reckless indifference to the truth or falsity of the statement. Opinion at page 5, citing *Monitor Patriot Company v. Roy* (1971), 401 U.S. 265; *Jacobs v. Frank* (1991), 60 Ohio St. 3d 111, syllabus by the court, paragraph two.

{¶52} The trial court found there was some evidence appellee Pricer made the statements with what it referred to as "common law" malice, that is, hatred or ill-will. The

court found in the editorial appellee Pricer did not disclose his personal animosity that arose from appellant's representation of his wife in their acrimonious divorce case. The court found, however, actual malice may not be inferred from evidence of personal spite, ill-will, or intent to injure. *Peck v. The Dispatch Printing Company,* (June 18, 1987), Fairfield App. No. 47-CA-86, citing *Rosenblatt v. Baer* (1966), 383 U.S. 75 at 84. The court found there was no evidence appellees made the statements with knowledge they were false or with a reckless indifference to falsity, and in fact the statements were true.

{¶53} We agree with the trial court the statements were literally true, and for this reason, the court did not err in finding the statements were not made with malice.

{¶54} The fourth assignment of error is overruled.

V

{¶55} In her fifth assignment of error, appellant argues the court erred in not distinguishing between defamation and false light invasion of privacy.

{¶56} Appellant cites us to *Welling v. Winfeld,* 113 Ohio St. 3d 464. 2007-Ohio-2451, 866 N.E.2d 1051. In *Welling,* the Ohio Supreme Court set out the elements of false light invasion of privacy: (1) the false light in which the other was placed would be highly offensive to reasonable person, and (2) the actor had knowledge of or acted with reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

{¶57} Again, for false light invasion of privacy, the actual malice standard applies, as does the test of whether the challenged statements are actually false.

{¶58} We agree with the trial court the statements did not place appellant in a false light, given that the statements were literally true.

{¶59} The fifth assignment of error is overruled.

{¶60} For the foregoing reasons, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed.

By Gwin, P. J., and

Wise, J., concur;

Hoffman, J., dissents

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HON. W. SCOTT GWIN

_____
HON. WILLIAM B. HOFFMAN

_____
HON. JOHN W. WISE

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Hoffman, J., dissenting

{¶61} I respectfully dissent from the majority decision.

{¶62} While I agree the two statements published by Appellee (a police report alleging assault was filed with the Newark Police Department against Appellant, and Appellant had several complaints concerning her behavior filed with the Ohio Supreme Court's Disciplinary Counsel), standing by themselves, are true, the police report and disciplinary complaints take on a different nature when followed by the statement, "The incidents are evidence of behavior that we would not expect or condone in the judge we choose to serve us in our Domestic Relations Court." The innuendo created by the first two statements is cast in a different light when followed by the publisher's statement "[T]he incidents are evidence of behavior." The latter statement asserts an indicia of truthfulness. When considered in a light most favorable to Appellant as is required by Civ.R. 56, I find reasonable minds could differ as to whether a reasonable reader or listener would infer wrongful conduct.

_____

HON. WILLIAM B. HOFFMAN

[Cite as *Christiansen v. Pricer,* 2010-Ohio-2718.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

VICKY M. CHRISTIANSEN Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
DOUGLAS C. PRICER	:	
	:	CASE NO. 09-CA-126

and

WCLT RADIO, INC

Defendants-Appellees

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. JOHN W. WISE