[Cite as *Mann v. Cincinnati Enquirer*, 2010-Ohio-3963.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

DAVID MANN,	:	APPEAL NO. C-090747 TRIAL NO. A-0906526
Plaintiff-Appellant,	:	*D E C I S I O N.*
vs.	:	
THE CINCINNATI ENQUIRER,	:	
GANNETT SATELLITE INFORMATION NETWORK, INC.,	:	
KIMBALL PERRY,	:	
and	:	
JULIE ENGEBRECHT,	:	
Defendants-Appellees.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: August 25, 2010

Wendy R. Calaway for Plaintiff-Appellant,

Graydon Head & Ritchey LLP, John C. Greiner and *Steven P. Goodin*, for Defendants-Appellees.

Please note: This case has been removed from the accelerated calendar.

DINKELACKER, Judge.

{¶1} Plaintiff-appellant, David Mann, filed a complaint against defendants-appellees, the Cincinnati Enquirer, Gannett Satellite Information Network, Inc., Kimball Perry, and Julie Engebrecht (collectively "the Enquirer"), alleging defamation, false-light invasion of privacy, and intentional infliction of emotional distress. The trial court granted the Enquirer's Civ.R. 12(B)(6) motion to dismiss the complaint. We affirm the trial court's judgment.

I. Facts and Procedure

{¶2} Mann's complaint alleged that on July 9, 2008, the Cincinnati Enquirer, a local newspaper, published an article with the headline, "Dancer's lawsuit can go on." Perry, a reporter for the paper, had written the article. It appeared on the front page of the "Local" section, which was edited by Engebrecht.

{¶3} The article reported on a lawsuit that Mann had filed in Hamilton County against Naughty Bodies, an adult entertainment company for which he had worked as an exotic dancer. He alleged in the suit that Naughty Bodies had constructively discharged him for refusing to engage in sexual acts with the clients. He further alleged that at the time he had accepted employment with the company, he had no idea that sexual contact was expected. To the contrary, the employee handbook he had received when he was hired had expressly stated that sexual contact would be "automatic grounds for dismissal."

{¶4} The Enquirer article misquoted a portion of Mann's complaint. He had stated, "If I was told at my interview that shows required dancer[s] to have sexual contact with client[s,] I would not have accepted [the] job." In the article, the quote

read, "I was told at my interview (with Naughty Bodies) that shows required dancers(s) to have sexual contact with [the] client[s]."

{¶5} Mann alleged that he was damaged by the inaccurate quotation. He stated, "By stripping the 'If' from the front of the quotation and the 'I would not have accepted [the] job' from the end of the quotation, the defendants completely changed the meaning of the quotation, particularly within the context of the article. The original quotation professed a wholesome unwillingness to engage in the immoral and illegal behavior at issue. The twisted rendition that appeared in the Enquirer stated in no uncertain terms that Mr. Mann knowingly and voluntarily agreed to engage in sexual acts with paying customers, an act that constitutes prostitution."

{¶6} He also claimed that the story incorrectly stated that he had been "on 17 jobs in the first four weeks" of his employment. He had stated in his wrongful-discharge complaint that he was called for seven jobs, but went on only two. On both of those jobs, he had refused to engage in sexual acts.

{¶7} Mann further alleged that Perry had made statements indicating that he knew the quotation was inaccurate. Additionally, Mann had asked the Enquirer to publish a corrected version of the article, but it had refused. Instead, it had published a small correction stating only that Mann did not state that he was required to have sex with clients.

{¶8} Finally, Mann contended that "[d]efendants' false statements paint a very unfavorable picture of Mr. Mann. The article claims that Mr. Mann knew when he accepted the job that sexual contact was required, that he went on fifteen jobs without complaining (with the implication that he engaged in prostitution on those fifteen jobs), and then for some reason he refused to engage in sex on the last two jobs. The truth is that Mr. Mann did not know when he accepted the job that sexual contact was required,

he was called for only seven jobs and went on only two of them, and he refused to engage in sex acts on both. The truth was clearly stated in Mr. Mann's complaint. The Enquirer knew the truth but chose to report otherwise."

{¶9} The Enquirer filed a Civ.R. 12(B)(6) motion to dismiss the complaint for failure to state a claim upon which relief could be granted. The trial court held that Mann's claims for defamation and invasion of privacy failed under the innocent-construction rule. It also held that the allegations in the complaint were not sufficiently extreme or outrageous to support a claim for intentional infliction of emotional distress. Consequently, it granted the Enquirer's motion and dismissed Mann's complaint with prejudice. This appeal followed.

{¶10} In his sole assignment of error, Mann contends that the trial court erred in granting the Enquirer's motion to dismiss the complaint. He argues that he alleged facts sufficient to support a theory of recovery, that the trial court considered evidence outside the pleadings, and that the court applied an incorrect legal standard. This assignment of error is not well taken.

II. Standard of Review

{¶11} A Civ.R. 12(B)(6) motion to dismiss tests the sufficiency of the complaint. In ruling on such a motion, the trial court must take all the allegations in the complaint as true and draw all reasonable inferences in favor of the nonmoving party.[1] It may dismiss a complaint on a Civ.R. 12(B)(6) motion only when the plaintiff can prove no set of facts that would entitle the plaintiff to relief.[2] The court should not rely on

[1] *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753; *Cincinnati ex rel. Zimmer v. Cincinnati*, 176 Ohio App.3d 588, 2008-Ohio-3156, 892 N.E.2d 987, ¶8.
[2] *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus; *Zimmer*, supra, at ¶8.

evidence outside the pleadings, but it may consider materials that are referred to or incorporated in the complaint.[3]

III. Defamation

{¶12} To establish defamation, the plaintiff must show (1) that a false statement of fact was made; (2) that the statement was defamatory; (3) that the statement was published; (4) that the plaintiff suffered injury as a proximate result of the publication; and (5) that the defendant acted with the requisite degree of fault in publishing the statement.[4] In determining whether a statement is defamatory as a matter of law, a court must review the statement under the totality of the circumstances.[5] It should read the statements at issue in the context of the entire article to determine whether a reader would interpret them as defamatory.[6]

{¶13} Ohio has seemingly adopted the "innocent-construction rule." While the Ohio Supreme Court did not specifically state that it was adopting the rule, it discussed a court of appeals decision relying on the rule and affirmed that court's judgment with respect to a cause of action for defamation.[7] Numerous courts of appeals, including this one, have also followed the rule.[8]

{¶14} Under the innocent-construction rule, "if allegedly defamatory words are susceptible to two meanings, one defamatory and one innocent, the defamatory

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[3] *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 1992-Ohio-73, 605 N.E.2d 378; *Coors v. Fifth Third Bank*, 1st Dist. No. C-050297, 2006-Ohio-4505, ¶10-11.
[4] *Pollock v. Rashid* (1996), 117 Ohio App.3d 361, 368, 690 N.E.2d 903.
[5] *Scott v. News-Herald* (1986), 25 Ohio St.3d 243, 253, 496 N.E.2d 699; *Belinky v. Drake Ctr., Inc.* (1996), 117 Ohio App.3d 497, 507, 690 N.E.2d 1302; *Mendise v. Plain Dealer Publishing Co.* (1990), 69 Ohio App.3d 721, 726, 591 N.E.2d 789.
[6] *Mendise*, supra, at 721.
[7] *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 372, 453 N.E.2d 666, abrogated on other grounds by *Welling v. Weinfeld*, 133 Ohio St.3d 464, 2007-Ohio-2451, 866 N.E.2d 1051.
[8] See, e.g., *Sweitzer v. Outlet Communications, Inc.* (1999), 133 Ohio App.3d 102, 112-113, 726 N.E.2d 1084; *Johnson v. Lakewood Hosp.* (Sept. 4, 1997), 8th Dist. Nos. 70943 and 71257; *Belinky*, supra, at 507; *Van Deusen v. Baldwin* (1994), 99 Ohio App.3d 416, 419, 650 N.E.2d 963; *Elwert v. Pilot Life Ins. Co.* (1991), 77 Ohio App.3d 529, 540-541, 602 N.E.2d 1219.

meaning should be rejected and the innocent meaning adopted."[9] In that case, the allegedly defamatory words are not actionable as a matter of law.[10]

{¶15} Mann contends that the only possible construction of the article's false statement is defamatory. He argues that the statement unequivocally states that he accepted a job with Naughty Bodies after an interviewer had told him that sexual contact with clients was required. The implication was that he willingly engaged in prostitution, a criminal act. This argument might have some validity if the false statement were read in isolation from the entire article.

{¶16} But, reading the false statement in context of the entire article yields a different result. The entire gist of the article was that Mann had adamantly refused to engage in sexual acts with the clients. He sued Naughty Bodies because he was fired for refusing to engage in that conduct.

{¶17} We agree with the trial court when it stated, "this Court also believes that a reader could reach a second, innocent conclusion from this same statement as the statement merely relays what an interviewer allegedly told Plaintiff during his interview and does not explicitly state that Plaintiff accepted the position based on the alleged requirement; thus, this statement could be interpreted as simply an offhand comment by the interviewer and not a condition of employment agreed to by Plaintiff Mann. This second interpretation is bolstered when the statement is read within the context of the entire Article, which contains numerous references in relation to Plaintiff's refusal to engage in sexual contact with clients."

{¶18} Since an innocent construction exists for the allegedly false statement, it is not defamatory as a matter of law. Consequently, Mann could prove no set of facts

[9] *Yeager*, supra, at 372.
[10] *Sweitzer*, supra, at 112; *Van Deusen*, supra, at 419.

that would allow him to recover for defamation, and the trial court did not err in granting the Enquirer's motion to dismiss that claim. Mann argues that the court went beyond the four corners of his complaint and failed to accept the allegations of his complaint as true in numerous instances. Even if we accept that argument, those instances were irrelevant because the statement was not defamatory as a matter of law.

IV. False-Light Invasion of Privacy

{¶19} Mann also argues that the trial court should not have granted the Enquirer's motion to dismiss his claim for false-light invasion of privacy. The Ohio Supreme Court recently recognized the tort of false-light invasion of privacy, although it had previously declined to do so.[11] The court held that "[o]ne who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy if (a) the false light in which the other was placed would be highly offensive to a reasonable person and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."[12]

{¶20} In granting the Enquirer's motion to dismiss, the trial court stated, "Plaintiff Mann's false light invasion of privacy claim fails for the same reason as his defamation claim. To prevail on a false light claim, the statement at issue must be false, but * * * the statement in this case is capable of innocent construction and thus not untrue." We disagree with the court's reasoning.

{¶21} While the law of defamation and false-light invasion of privacy overlap in some ways, they are two separate torts that vindicate different interests.[13]

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[11] See *Yeager*, supra, at 372.
[12] *Welling*, supra, at syllabus.
[13] Id. at ¶46-47; *Roe v. Heap*, 10th Dist. No. 03AP-586, 2004-Ohio-2504, ¶97-98; *Patrick v. Cleveland Scene Publishing* (N.D.Ohio 2008), 582 F.Supp.2d 939, 955.

We have found no cases that take the innocent-construction rule, a defamation concept, and apply it in a false-light-invasion-of-privacy case. Further, the innocent-construction rule does not go to whether the statement at issue is false; it goes to whether the statement is defamatory.[14] Thus, it would logically not apply in an invasion-of-privacy case.

{¶22} But, the trial court was right for the wrong reasons. In discussing the tort, the supreme court has also stated that a false-light claim is difficult to prove.[15] Liability attaches when "the publicity given to the plaintiff has placed him in a false light before the public, of a kind that would be highly offensive to a reasonable person. In other words, it applies only when the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity. * * * The Plaintiff's privacy is not invaded when the unimportant false statements are made, even when they are made deliberately. It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, there is a cause of action for invasion of privacy."[16]

{¶23} The article, when read as a whole, does not seriously represent Mann's character, history, activities or beliefs so that a reasonable person would feel seriously offended. The gist of the article as a whole is that Mann was fired because he had refused to engage in sexual activities with his clients. The one misstatement toward the end of the article simply does change that and does not paint him in a false light as a matter of law.

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[14] See *Sweitzer*, supra, at 112; *Johnson*, supra; *Belinky*, supra, at 507; *Van Deusen*, supra, at 419.
[15] *Welling*, supra, at ¶51; *Patrick*, supra, at 954.
[16] *Welling*, supra, at ¶55, quoting Restatement of the Law 2d, Torts, Section 652E, Comment c.

{¶24} We hold that Mann could prove no set of facts that would entitle him to relief. Consequently, the trial court did not err in granting the Enquirer's motion to dismiss his false-light-invasion-of-privacy claim.

V. Intentional Infliction of Emotional Distress

{¶25} Finally, Mann contends that the trial court erred in granting the Enquirer's motion to dismiss his intentional-infliction-of-emotional-distress claim. The Ohio Supreme Court has stated that "one who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another is subject to liability for such emotional distress[.]"[17] To state a claim for intentional infliction of emotional distress, the plaintiff must show that the defendant's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[18]

{¶26} In this case, the conduct alleged in the complaint does not, as a matter of law, rise to the extreme and outrageous level necessary for a prima facie case of intentional infliction of emotional distress.[19] Therefore, the trial court did not err in granting the Enquirer's motion to dismiss that claim.

VI. Summary

{¶27} In sum, we hold that the trial court did not err in dismissing all three causes of action in Mann's complaint for failure to state a claim upon which relief

[17] *Yeager*, supra, at syllabus; *Brose v. Bartlemay* (Apr. 16, 1997), 1st Dist. No. C-960423.
[18] *Yeager*, supra, at 375; *Pollock*, supra, at 369.
[19] See *Brose*, supra; *Pollock*, supra, at 369-370. Compare *Foster v. McDevitt* (1986), 31 Ohio App.3d 237, 511 N.E.2d 403.

could be granted. We overrule his assignment of error and affirm the trial court's judgment.

Judgment affirmed.

CUNNINGHAM, P.J., and **HILDEBRANDT, J.,** concur.

Please Note:

The court has recorded its own entry this date.