[Cite as *Hoover v. Record Publishing Co.*, 2006-Ohio-6752.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

DEAN S. HOOVER Appellant v. RECORD PUBLISHING CO., et al. Appellees	C. A. No. 23187 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2005-02-0685

DECISION AND JOURNAL ENTRY

Dated: December 20, 2006

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Judge.

{¶1} Appellant, Dean S. Hoover, appeals the judgment of the Summit County Court of Common Pleas, which granted the motion for summary judgment of appellees The Record Publishing Co., L.L.C., David E. Dix, Bill Hammerstrom, Jennifer Reece, Charles Dix, Andrew Dix, Robert C. Dix, Jr., Troy Dix and Ann Dix-Maenza. This Court affirms.

I.

{¶2} Appellant was a resident of Hudson at all times relevant to this case. Appellant filed a complaint alleging libel against appellees The Record Publishing Co., L.L.C. ("Record Publishing"), publisher of the Hudson Hub-Times; David E.

Dix, publisher of the Hudson Hub-Times; Bill Hammerstrom, editor of the Hudson Hub-Times; Jennifer Reece, a reporter for the Hudson Hub-Times; and John Does 1-25, unknown individual members, managers, officers and directors of Record Publishing. The complaint arose out of a January 30, 2005 front-page article in the Hudson Hub-Times, which reported that appellant had been found guilty of four minor misdemeanors for violating the city's zoning code on the same day that he was appointed to the Hudson Planning Commission. In fact, it was appellant's wife's company which owned the buildings in violation of the zoning code which was found guilty. Appellant demanded that appellees publish a retraction and corrected article pursuant to R.C. 2739.14. Appellees immediately complied. Appellees denied knowing at the time of the publication that appellant was not the owner of the building in violation.

{¶3} Appellant subsequently filed an amended complaint, naming appellees Charles Dix, Andrew Dix, Robert C. Dix, Jr., Troy Dix and Ann Dix-Maenza as the individual members, managers, officers and directors of Record Publishing. Appellant alleged that these added defendants were each personally liable under the theory of piercing the corporate veil and/or because Record Publishing was not properly formed or qualified to do business in Ohio. Appellees denied the allegations and asserted a defense of privilege in that appellant was a public official, public figure or a limited purpose public figure and the article was published without malice.

{¶4} Appellees filed a motion for summary judgment. Appellant responded in opposition.[1] Appellees replied. On April 7, 2006, the trial court granted appellees' motion for summary judgment, dismissing appellant's claim. The trial court found that appellees presented evidence that appellant was a public official and that appellees published the article without malice. Appellant timely appeals, setting forth two assignments of error for review. This Court has consolidated the assignments of error for ease of discussion.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED IN CONCLUDING THAT APPELLANT WAS A PUBLIC OFFICIAL FOR PURPOSES OF LIBEL ANALYSIS."

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED IN IMPOSING A HIGHER BURDEN OF PROOF OF ACTUAL MALICE, INSTEAD OF NEGLIGENCE."

[1] Appellant's response in opposition also contained a cross-motion for partial summary judgment. The trial court ordered appellant's cross-motion for summary judgment stricken from the record as having been untimely filed.

{¶5} Appellant argues that the trial court erred by granting summary judgment in favor of appellees upon its finding that appellant was a public official and that there was no evidence of malice. This Court disagrees.

{¶6} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶7} Pursuant to Civ.R. 56(C), summary judgment is proper if:

> "(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 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.

{¶8} To prevail on a motion for summary judgment, the party moving for summary judgment must be able to point to evidentiary materials that 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. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the

mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St.3d 447, 449.

{¶9} The Ohio Supreme Court has stated that "the right to sue for damage to one's reputation pursuant to state law is not absolute. Instead, the right is encumbered by the First Amendment to the United States Constitution." *Soke v. The Plain Dealer* (1994), 69 Ohio St.3d 395, 397. "The Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." *New York Times v. Sullivan* (1964), 376 U.S. 254, 283. In such cases, "the rule requiring proof of actual malice is applicable." Id. The *Soke* court continued:

> "Although *New York Times Co. v. Sullivan* stated that statements regarding 'official conduct' of public officials are protected, the United States Supreme Court broadened this scope of protection in *Garrison v. Louisiana* (1964), 379 U.S. 64. In *Garrison*, the court declared that the Constitution protects statements made about public officials when those statements concern 'anything which might touch on an official's fitness for office ***.' Id. at 77." *Soke*, 69 Ohio St.3d at 397.

Moreover, "a charge of criminal conduct against an official or a candidate, no matter how remote in time or place, is always 'relevant to his fitness for office' for purposes of applying the *New York Times* rule of knowing falsehood or reckless disregard of the truth." *Ocala Star-Banner Co. v. Damron* (1971), 401 U.S. 295, 300, quoting *Monitor Patriot Co. v. Roy* (1971), 401 U.S. 265.

{¶10} Appellant argues that his status as a private attorney does not give rise to public official status. This Court agrees with both the trial court and appellees that appellant's public official status arises out of his appointment as a member of Hudson's Planning Commission, rather than out of his employment as a private attorney.

{¶11} The United States Supreme Court has discussed the requirements for public official status, stating:

> "It is clear *** that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer* (1966), 383 U.S. 75, 85; see, also *Scott v. News Herald* (1986), 25 Ohio St.3d 243.

The United States Supreme Court further recognized the intent that the analysis of *Sullivan* be applied to candidates, as well as current occupants of public offices. *Roy*, 401, U.S. at 271.

{¶12} Appellant was appointed by city council to the Hudson Planning Commission on January 19, 2005, after he applied and interviewed for such appointment. Hudson Charter Section 9.02 defines the powers and duties of the Planning Commission. Specifically, city Council may not authorize the construction of buildings, streets, parks, bridges and the like; change the use of any such things; or pass any ordinance referring to zoning or building codes or other regulations controlling the use or development of land until it has submitted the same to the Planning Commission for a report and recommendation. In

addition, the Planning Commission is also the Platting Commission, which has the power, in part, to "review, approve, disapprove, or approve subject to conditions, all applications for zoning certificates for industrial buildings in industrial zones ***." Further, the Planning Commission has the authority and must "review and make any needed recommendation for the timely modification updating of the Continuing Comprehensive Plan of the Municipality[,]" which Plan is the operative growth management policy for the city. Under such a scheme, there is unrebutted evidence that appellant, as a member of the Planning Commission, would have or appear to the public to have "substantial responsibility for or control over the conduct of governmental affairs[,]" specifically as such affairs relate to the issues of zoning and development matters.

{¶13} Appellees presented evidence to establish that prior to appellant's appointment to the Planning Commission, the Akron Beacon Journal and the Hudson Hub-Times printed numerous articles regarding appellant's involvement in various disputes with the city regarding zoning matters. While some articles identified appellant as the attorney for his wife's limited liability company which owned the subject properties, many articles identified appellant as the owner of the properties. Appellant never requested a retraction or correction of such information.

{¶14} The article which forms the basis for this action involved incidents which occurred in November 2002, when appellant spray painted a sign on the

side of one of his wife's properties after the city stopped the work order on the renovation of the building because of the owner's failure to secure the appropriate zoning certificate for the work. The sign, which covered most of the side of the building, read: "The city of Hudson stopped work on this restoration project. Your tax dollars at work. This building could look like this one." Appellant, thereby, subjected the zoning issues surrounding properties which had been reported as his own to public debate. He further interjected his opinions regarding zoning issues into a public forum. Accordingly, appellant's appointment to the Planning Commission, whose duty it is to consider and make recommendations regarding zoning issues, was of interest to the public.

{¶15} This Court further agrees with the trial court's reasoning that appellant's appointment was of even greater public interest precisely because he had not yet taken an oath of office, which would allow the public to respond to the propriety of appellant's appointment. Notwithstanding the fact that Planning Commission members are appointed by city council rather than elected by the citizenry, this Court agrees that Commission membership constitutes an official post regarding which "the public has an independent interest in the qualifications and performance of the person who holds it[.]" *Rosenblatt*, 383 U.S. at 86.

{¶16} Appellees presented evidence to demonstrate that, at a minimum, the public would perceive that members of the Planning Commission would have substantial responsibility for or control over the conduct of certain governmental

affairs, in this case zoning issues. Appellees further presented evidence of a significant nexus between appellant's appointment to the Planning Commission and the inaccurate statement that appellant personally was criminally culpable of zoning violations. Such a claim was certainly relevant to appellant's fitness for office as a member of the Planning Commission.

{¶17} Appellant, however, failed to present any evidence to meet his reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *Tompkins*, 75 Ohio St.3d at 449. This Court finds that no genuine issue of material fact exists regarding appellant's status as a public official. Accordingly, the trial court did not err in so finding and in requiring evidence of actual malice on the part of appellees in publishing the inaccurate statement in question.

{¶18} "[T]here is a significant difference between proof of actual malice and mere proof of falsity." *Bose Corp. v. Consumers Union of United States, Inc.* (1984), 466 U.S. 485, 511. The United States Supreme Court has stated:

> "When, as here, the plaintiff is a public [official], he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, i.e., with 'knowledge that it was false or with reckless disregard of whether it was false or not.' *Sullivan*, 376 U.S. at 279-280. Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author 'in fact entertained serious doubts as to the truth of his publication,' *St. Amant v. Thompson* (1968), 390 U.S. 727, 731, or acted with a 'high degree of awareness of *** probable falsity,' *Garrison*, 397 U.S. at 74." *Masson v. New Yorker Magazine, Inc.* (1991), 501 U.S. 496, 510.

{¶19} In this case, appellees presented evidence that they learned that their published statement was false after publication. On the other hand, William J. Hammerstrom, III, editor of Record Publishing Company, testified during his deposition regarding the efforts that appellees used to verify the information published in the January 30, 2005 article in the Hudson Hub-Times. He testified that he read in the January 21, 2005 Friday Letter, a City of Hudson "newsletter for the Mayor, City Council & Other Interested Folks," that the owner of 230 North Main Street was found guilty of various local ordinances. He further testified that he called appellant to discuss both his appointment to the Planning Commission and the criminal convictions. Mr. Hammerstrom testified that he told appellant that he was found guilty of four minor misdemeanors and that appellant responded that that was "not entirely true. Some cases were dismissed, some were ruled on." Appellant testified in his deposition that Mr. Hammerstrom told him that some buildings were convicted. Mr. Hammerstrom testified that he would not have said such a thing, because he knows that buildings cannot be found guilty of crimes.

{¶20} Mr. Hammerstrom testified that he believed that appellant was the owner of 230 North Main Street because appellees had reported that information in previous articles. Appellant admitted that he never requested a retraction or correction of the several Hudson Hub-Times articles which named him as the owner of the property.

{¶21} Mr. Hammerstrom further testified that he attempted to verify appellant's criminal convictions with the Cuyahoga Falls Municipal Court. He testified that he accessed that court's on-line docket system which listed the violator's name as "C/O DEAN HOOVER 230 N MAIN LLC." Mr. Hammerstrom testified that, although he believed "c/o" meant courtesy of or care of, he noted that appellant's name was also listed on the docket as a violator.

{¶22} Although Mr. Hammerstrom admitted that he did not make any effort to obtain a copy of the municipal court's decision prior to publication and that he and his reporter could have done a better job in seeking verification of the information, he testified that appellees tried to call the municipal court for verification. He testified that there was no one available to elaborate on the information found on-line. Mr. Hammerstrom testified that Jennifer Reece, the reporter who wrote the subject article, tried to verify the information with the court.

{¶23} Ms. Reece averred in her affidavit that the Hudson Hub-Times previously named appellant as the owner of the subject property and that appellant had never contacted her or anyone else to her knowledge regarding any incorrect information. She testified that she believed that appellant was the owner of the property and that he had been convicted of the minor misdemeanors. She testified that she called the Cuyahoga Falls Municipal Court to verify the information.

{¶24} Appellant presented evidence that the Hudson Hub-Times printed an article on May 28, 2003 in which it identified him as an attorney representing "230 North Main LLC." The article did not identify any specific owner of the property. The article further stated that "Hoover plans to add a 700-square-foot infill building, plus a basement, between 230 and 238 N. Main St." leading to the inference that appellant had some authority beyond mere legal representation regarding the property. Appellant further asserts that a June 10, 2004 letter that he faxed to the Hudson Hub-Times disavowed any property ownership. However, the letter merely referred to city litigation against his "clients" without identifying them. This Court takes well appellees' argument that appellant's role as legal representative for the properties and ownership of the properties is not mutually exclusive and that appellant's letter did not serve to clarify the issue of property ownership.

{¶25} Under the circumstances, appellees presented evidence to establish that they believed, after investigation, that appellant was the owner of the property involved in criminal litigation and that they did not publish in reckless disregard of whether their information was false. Appellant, on the other hand, presented no evidence to rebut appellees' evidence and failed to present any evidence to meet his reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *Tompkins*, 75 Ohio St.3d at 449. Accordingly, the trial court did not err by granting summary

judgment in favor of appellees. Appellant's first and second assignments of error are overruled.

III.

{¶26} Appellant's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

DONNA J. CARR
FOR THE COURT

SLABY, P. J.
BOYLE, J.
CONCUR

APPEARANCES:

DEAN S. HOOVER, JILL R. FLAGG, and ALISON D. KINNEAR, Attorneys at Law, for appellant.

LEIGH E. HERINGTON, Attorney at Law, for appellees.

DAVID L. MARBURGER, Attorney at Law, for appellees.