[Cite as *Yoakam v. Boyd*, 2010-Ohio-3628.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Carol A. Yoakam

Appellant

v.

Karen Boyd

Appellee

Court of Appeals No. OT-09-031

Trial Court No. 07CV287C

DECISION AND JUDGMENT

Decided: August 6, 2010

* * * * *

R. Jeffrey Lydy, for appellant.

James D. Caruso, for appellee.

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HANDWORK, J.

{¶ 1} This appeal is from the October 13, 2009 judgment of the Ottawa County Court of Common Pleas, which denied summary judgment to appellant, Carol A. Yoakam, granted summary judgment to appellee, Karen Boyd, and dismissed the complaint of Yoakam. Upon consideration of the assignments of error, we affirm the

decision of the lower court. Yoakam asserts the following assignments of error on appeal:

{¶ 2} "I. THE TRIAL COURT ERRED IN ITS OCTOBER 13, 2009 DECISION AND JUDGMENT ENTRY BY BASING ITS DECISION ON AN ISSUE NOT ARGUED BY MS. BOYD IN HER MOTION FOR SUMMARY JUDGMENT.

{¶ 3} "II. THE TRIAL COURT ERRED IN ITS OCTOBER 13, 2009 DECISION AND JUDGMENT ENTRY BY GRANTING KAREN BOYD'S MOTION FOR SUMMARY JUDGMENT RESULTING IN THE DISMISSAL OF MS. YOAKAM'S LIBEL PER SE CLAIM."

{¶ 4} This case is on appeal for the second time. In the first appeal, we determined that the trial court erred by granting a default judgment and remanded the case for further proceedings. On February 10, 2009, the trial court permitted Yoakam to file an amended complaint against Boyd in which Yoakam alleged claims of libel per se, intentional infliction of emotional distress, and defamation of character. Yoakam moved for summary judgment on all of her claims. Boyd opposed the motion and also moved for summary judgment on all of the claims.

{¶ 5} The undisputed facts presented on summary judgment are as follows. When Boyd began working as a realtor for Scott Street, she was assisted by Yoakam, who had some familial relationship to her but Boyd was not sure how they were related. In March 2006, Boyd and Yoakam had a disagreement about certain properties. Boyd determined that she could not work with Yoakam, so she changed her license to inactive,

moved to Tennessee, sought counseling, and then wrote a letter dated June 15, 2006, to their real estate broker, Scott Street, and his wife, Cindy, regarding the disagreement.

{¶ 6} In that letter, Boyd inquired as to whether the Streets knew if Yoakam had been previously convicted of felony theft.[1] Boyd testified that she had heard this information from two people approximately a month prior to writing the letter. Boyd testified that she learned that Yoakam had a prior felony conviction from a friend and later confirmed the limited information with Boyd's aunt, who knew Yoakam's mother, and her friend's husband. Later, Boyd asked Yoakam if she had ever "gotten cross wise with the law" and observed Yoakam get angry and "her eyes bugged," but she did not respond. Yoakam testified that she told Boyd that she had never even received a traffic ticket. For purposes of summary judgment, Boyd admits that Yoakam has never been convicted of felony theft. Yoakam testified that the friend had in fact accompanied Yoakam to a hearing before the Firelands Board of Relators approximately 15 years earlier regarding a theft allegation.

{¶ 7} Boyd further accused Yoakam of deleting Boyd's name from 24 properties on which Boyd was co-listed with Yoakam in the "Firelands MLS" account and "whitening out" Boyd's name and signature from a listing contract for the sale of

[1]"It has been brought to my attention that Carol Yoakam has, in the past, been convicted of Felony Theft. Could you please inform me of any facts that you are aware of that this could possibly be true?"

447 Lynn Street, Lakeside, Ohio.[2] Boyd stated in her letter that she believed she was co-listed as an agent after Yoakam asked for Boyd's password to the MLS account and said that she would add Boyd to the listings as a co-listing agent. Boyd also recalled signing the listing agreement for the Lynn Street property. Later, when Boyd called the representative of the Board of Realtors in charge of auditing the accounts, Boyd learned that her name was no longer listed on the 24 accounts, including the Lynn Street property. The representative also informed Boyd that it appeared that something adjacent to Yoakam's signature had been "whitened out" on the listing agreement. Yoakam alleged in her appellate reply brief that she did list Boyd on the "MLS listings" to help her get started, but that Boyd was never actually on the listing agreements.

{¶ 8} Finally, Boyd also asserted that Yoakam had told Boyd not to disclose to potential buyers that another home could not be rebuilt if it ever burned down and that Boyd believed such action was unethical if not illegal.[3] Boyd also stated in the letter that

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[2]Boyd's statement at issue is: "I was immediately struck by the egregious, criminal and civil unlawfulness of this act from Carol."

[3]"I feel that you should be aware of the difference of opinion and intention of practice that I indicated to Carol. * * * It had come to my attention from a couple * * * that were interested in the cottage * * * that Carol and I had Co-Listed. They * * * said that David Geyer had told them that IF that particular cottage were to burn down that a cottage could not be rebuilt on that site/lot. * * * I indicated to Carol that * * * we should immediately inform the Seller * * * AND that this information, by law, had to be revealed to any and all further/future interested Buyers. She angrily told me that she was not going to do that and that I was not to either, nor was I to talk to Scott about this issue. * * * I indicated to her the next day that I could not follow her instructions concerning that listing, that what she was telling me to do was illegal in my mind, and I planned to tell anyone interested in the property what the couple had discovered from Mr. Geyer.

she had written a letter to Yoakam in May 2007 after their disagreement about the information to be passed along to potential buyers. Later that week, Boyd checked the "MLS accounts" and noticed the change in the listing agent. Yoakam testified that there was no truth to any of the allegations made in the letter.

{¶ 9} Boyd suggested in her letter that these matters be brought before the Ohio Real Estate Commission and that she would not work in the same office with Yoakam until these issues were addressed. After Scott Street did not respond to her letter, Boyd also filed a complaint against Yoakam with the local board of realtors regarding the sale of the Lynn Street property. Boyd admits for purposes of summary judgment that she included a copy of the letter at issue with the complaint. A complaint was also filed with the Division of Real Estate and Professional Licensing against Yoakam on July 12, 2006. The superintendent held that there was insufficient evidence to establish a violation of R.C. Chapter 4735.18. Boyd requested that the Real Estate Commission review the superintendent's decision. Following a hearing, the commission affirmed the superintendent's determination.

{¶ 10} On October 13, 2009, the trial court granted summary judgment to Boyd, denied summary judgment to Yoakam, and dismissed Yoakam's complaint. The court concluded that the letter did not contain any false and defamatory "statements." The portion of the letter questioning whether Yoakam had been convicted of a criminal

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She said that I would therefore be removed from the listing and was not to talk to anyone about that property. * * *."

offense was not libelous per se because the portion of the letter was a question and not a statement. Furthermore, the court held that the other statements regarding the Lynn Street listing and withholding information from potential buyers were not libelous per se because they are statements of opinion rather than fact. The court then considered whether the statements in the letter were not libelous per quod and found that because Yoakam had neither pled nor established special damages, she could not assert a claim of libel per quod. Finally, the court held that even if the statements at issue constituted libel per se or libel per quod, the letter in this case was protected by a qualified privilege because the letter and subsequent complaints were written to the appropriate parties to raise the issue of Yoakam's fitness to work as a real estate agent and were limited in scope and made in good faith and without actual malice. Yoakam then sought an appeal from this decision.

{¶ 11} The appellate court reviews the grant of summary judgment under a de novo standard of review. *Advanced Analytics Labs., Inc. v. Kegler, Brown, Hill & Ritter*, 148 Ohio App.3d 440, 2002-Ohio-3328, ¶ 33, and *Grafton v. Ohio Edison Co*. (1996), 77 Ohio St.3d 102, 105. Applying the requirements of Civ.R. 56(C), we uphold summary judgment when it is clear "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have

the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66-67.

{¶ 12} Yoakam first argues that the trial court erred by granting summary judgment to Boyd based upon issues not raised in her motion for summary judgment. Yoakam argues that the court erred by holding that she had not established a libel per quod claim because she had failed to plead or submit evidence of special damages. Furthermore, she argues that she had shown special damages. While Yoakam's original complaint alleged "libel," her amended complaint limited her cause of action to libel per se. Boyd sought summary judgment only on the issue of libel per se. Therefore, we agree that the trial court erred in considering whether Yoakam could maintain an action for libel per quod.

{¶ 13} Appellant's first assignment of error is found well-taken. However, this extraneous finding by the trial court does not affect the ultimate outcome of the case. Therefore, we find that the error was not prejudicial to appellant.

{¶ 14} In her second assignment of error, Yoakam argued that the trial court erred when it determined that she had not established her libel per se claim. First, she argues that the trial court erred by finding that the statements regarding a prior crime was an inquiry rather than a statement accusing Yoakam of committing a crime and that the statements in Boyd's letter regarding the listing contract for the Lynn Street cottage and the information about rebuilding the cottage were an expression of opinion. Furthermore,

Yoakam agues that Boyd's statements were not made in good faith, which defeats her claim of a qualified privilege.

{¶ 15} "In Ohio, 'libel' is * * * a false written publication, made with some degree of fault, reflecting injuriously on a person's reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace or affecting a person adversely in his or her trade, business or profession." *A & B-Abell Elevator Co., Inc. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council* (1995), 73 Ohio St.3d 1, 7. To avoid summary judgment, Yoakam was required to submit clear and convincing evidence to establish that: "(1) a false and defamatory statement; (2) about plaintiff; (3) [was] published without privilege to a third party; (4) with fault of at least negligence on the part of the defendant; and (5) that was either defamatory per se or caused special harm to the plaintiff [libel per quod]." *Gosden v. Louis* (1996), 116 Ohio App.3d 195, 206, citing *Akron-Canton Waste Oil, Inc. v. Safety-Kleen Oil Serv., Inc*. (1992), 81 Ohio App.3d 591, 601, which cited 3 Restatement of the Law 2d, Torts (1977) 155, Section 558.

{¶ 16} A statement is false and defamatory if it is directed "against an individual with an intent to injure his reputation or to expose him to public hatred, contempt, ridicule, shame, or disgrace or to affect him injuriously in his trade, business or profession." *Robb v. Lincoln Publishing (Ohio), Inc*. (1996), 114 Ohio App.3d 595, 616. A statement accusing a person of committing any crime is libelous per se. *Akron-Canton Waste Oil, Inc. v. Safety-Kleen Oil Servs., Inc.* (1992), 81 Ohio App.3d 591, 601, and *State v. Smily* (1881), 37 Ohio St. 30, 34.

{¶ 17} The trial court found that the first statement was not actionable because it was a question and clearly not a statement of fact. The court appears to conclude that what is clearly a question cannot be defamatory. We agree in part. Whether or not the alleged defamatory publication was in the form of a question or a statement is relevant, but it is not determinative, of whether a publication is defamatory. The trial court, as the trier of fact, must consider the context within which the publication was made to determine whether the publication was defamatory. *Becker v. Toulmin* (1956), 165 Ohio St. 549, 555, and *Ryan v. State Farm Fire and Cas. Co.* (U.S.D.C., N.D.Okla.2010), case No. 09-CV-138-GKF-PJC, at 6.

{¶ 18} Upon a review of the letter in this case, we agree with the trial court that the question of whether Yoakam had been convicted of a theft offense is not defamatory. Here, the purpose of the question is to put the intended readers of the letter (the broker and real estate board) on notice that it was because of this rumor that Boyd had heard that she felt compelled to tell them of the events that had transpired. Boyd does not imply unstated facts or knowledge as a basis for her question.

{¶ 19} Yoakam also takes issue with the trial court's determination that the second and third statements were opinion, and thus protected speech under the Ohio Constitution. She asserts that because the statements accused her of committing a crime and unethical behavior, they are libelous per se.

{¶ 20} "[A] statement deemed to be an opinion as a matter of law cannot be proven false." *Wampler v. Higgins* (2001), 93 Ohio St.3d 111, 127, fn. 8. Therefore, opinions

are not deemed to be actionable under the Ohio Constitution as defamation irrespective of whether the defendant is part of the media or not. Id. at 125. The determination of whether a statement is opinion or a statement of fact is a question of law for the court to determine. Id. at 126-127. Based upon the totality of the circumstances the court makes this determination after considering four factors: "First is the specific language used, second is whether the statement is verifiable, third is the general context of the statement and fourth is the broader context in which the statement appeared." *Scott v. News-Herald* (1986), 25 Ohio St.3d 243, 250, and *Vail v. Plain Dealer Publishing Co*. (1995), 72 Ohio St.3d 279, 282, certiorari denied (1996), 516 U.S. 1043.

{¶ 21} "Terms such as 'in my opinion' or 'I think' are highly suggestive of opinion but are not dispositive, particularly in view of the potential for abuse." *Scott v. News-Herald*, supra, at 252. The court's role is to determine whether the statements are "objectively capable of proof or disproof, for 'a reader cannot rationally view an unverifiable statement as conveying actual facts.'" *Wampler v. Higgins* (2001), 93 Ohio St.3d 111, 128, citing *Ollman v Evans* (C.A.D.C.1984), 750 F.2d 970, 981. But, a statement of opinion which accuses a person of a crime is not protected if it conveys "false representations of defamatory fact, even though there is no implication that the writer is relying on facts not disclosed." *Cianci v. New Times Pub. Co*. (C.A.2, 1980), 639 F.2d 54, 65, and *Scott v. News-Herald*, supra, at 251. The court must determine if a reasonable reader would give the words a "* * * readily ascertainable meaning" or would find the words ambiguous. *Vail v. Plain Dealer Publishing Co.*, supra.

{¶ 22} First, the specific language used in this case clearly sets forth the facts which Boyd believes will demonstrate her belief that Yoakam's conduct was unethical, unprofessional, or illegal. While stated in the form of an opinion, we find that it clearly conveys an accusation of improper behavior for which Boyd expects the reader to take action.

{¶ 23} Second, the allegations are easily verifiable upon investigation of the circumstances by the brokers, the real estate commission, or courts of law.

{¶ 24} Third, these comments were made as part of a series of factual complaints regarding Yoakam's conduct that impacted Boyd. Their purpose was not to influence the brokers' opinions about some issue, but to seek resolution of the issues.

{¶ 25} Finally, the trial court looked at the broader context of the whole letter to conclude that the final two statements at issue were simply differences of opinion. We disagree. These statements were set forth in a letter to the common employer with the specific intent that the employer should take action. Whether removing a signature from a contract and withholding critical information from potential buyers is unethical or illegal is not a matter of opinion. Such matters are the type that can be declared to be proper or not by the real estate commission and courts of law.

{¶ 26} Therefore, we conclude that the second and third statements at issue were not constitutionally protected opinions and were libelous per se. Therefore, we must address the issue of whether these two libelous statements were protected by a qualified privilege as a matter of law.

{¶ 27} A qualified privilege exists to make what would be a defamatory communication if it is made in good faith, it was made in a proper occasion and manner to proper parties only, and was limited to the interest, right, or duty sought to be upheld. *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, ¶ 9 citing *Hahn v. Kotten* (1975), 43 Ohio St.2d 237, 245-246. The defense can be lost if abused, which is shown by evidence of convincing clarity that the defendant acted with actual malice. *Jackson v. Columbus*, supra, citing *Jacobs v. Frank* (1991), 60 Ohio St.3d 111, paragraph two of the syllabus. "'Actual malice' is defined as acting with knowledge that the statements are false or acting with reckless disregard as to their truth or falsity." *Jackson v. Columbus*, supra, at ¶ 10, citing *Jacobs v. Frank*, supra. "'Reckless disregard' applies when a publisher of defamatory statements acts with a 'high degree of awareness of their probable falsity,' or when the publisher 'in fact entertained serious doubts as to the truth of his publication.'" Id. (Citations omitted.) On review of a decision granting summary judgment, we review the trial court's decision to determine if there was insufficient evidence to find actual malice as a matter of law. Id. at ¶ 12.

{¶ 28} Yoakam asserts with respect to the second and third statements only that Boyd lacked good faith in making the publication and acted with actual malice because she made the statement about "whitening out" the signature knowing it was false. Yoakam asserts that because the accusations are false, Boyd knew the information was false, and, therefore, must have acted with actual malice in publishing the false accusations. However, a question of fact remains as to whether the contract was altered.

Yoakam attested that she did not "white out" any signature on the contract. She further alleged while she said that she would put Boyd's name on several accounts, Boyd was never actually on the listing agreements. Boyd set forth in her letter that she relied upon information supplied by the representative of the Board of Realtors in charge of the "MLS accounts" and responsible for auditing the information.

{¶ 29} Yoakam also argues that Boyd's failure to personally inspect the document or directly confront Yoakam with the charges evidences that Boyd was acting with actual malice. We disagree. Boyd clearly states what information she relied upon and based upon that information expected the broker to investigate the matter. There is no evidence to establish that Boyd was reckless in not seeking confirmation of the information supplied to her by the representative of the Board of Realtors.

{¶ 30} Yoakam takes issue with the fact that Boyd did not place the contract at issue into evidence. Yoakam argues that this is further evidence that Boyd knew that her accusation was false. We disagree. Either party could have submitted the contract into evidence, but neither did. Therefore, we cannot draw any conclusion from the lack of the contract in evidence. The fact of whether the contract was altered is not material to the disposition of this case. The issue is what Boyd knew at the time she made the statements.

{¶ 31} Yoakam also argues that Boyd demonstrated actual malice by appealing the decision of the Superintendent of the Ohio Department of Commerce, Division of Real Estate and Professional Licensing after a finding that the allegation was false and without

checking the actual document to verify the truth of her accusation. We find that asserting one's appeal rights is irrelevant to the resolution of this case. Furthermore, the existence of actual malice is determined at the time of the communication, not a year later.

{¶ 32} Boyd argues that she had an absolute privilege with respect to the publication of defamatory statements in a complaint filed pursuant to R.C. Chapter 4735. The trial court did not address this issue and we do not need to reach it in order to resolve this case.

{¶ 33} In conclusion, we find that there is evidence to support a finding as a matter of law that Boyd made the accusations she did in good faith and under a qualified privilege. She sent the letter to her employer and limited it to matters related to her employment. We further find that Yoakam failed to present any evidence of actual malice to defeat the privilege. The issue of whether the statements were false remains a question of immaterial fact, and Yoakam presented no actual evidence to establish that Boyd knew the information was false or had reason to suspect the truthfulness of her accusations.

{¶ 34} While we found that the trial court did err in finding that the second and third statements were not libelous per se, we ultimately find that the trial court did not err in finding that Boyd had a qualified privilege to make the statements and did not act with actual malice. Therefore, we find that the trial court did not err in finding that Yoakam had failed to establish a claim of libel per se and that Boyd was entitled to summary

judgment as a matter of law. Appellant's second assignment of error is found not well-taken.

{¶ 35} Having found that the trial court did not commit error prejudicial to appellant and that substantial justice has been done, the judgment of the Ottawa County Court of Common Pleas is affirmed. Appellant is hereby ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE