IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
SHELBY COUNTY

ANTHONY WAGNER

CASE NO. 17-2000-15

PLAINTIFF-APPELLANT

v.

SHELBY COUNTY, OHIO, ET AL.

O P I N I O N

DEFENDANTS-APPELLEES

CHARACTER OF PROCEEDINGS: **Civil Appeal from Common Pleas Court.**

JUDGMENT: **Judgment Affirmed.**

DATE OF JUDGMENT ENTRY: **May 31, 2001**

ATTORNEYS:

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HADLEY, J. The plaintiff-appellant, Anthony Wagner ("the appellant"), appeals from a judgment of the Shelby County Court of Common Pleas dismissing his complaint against the defendants-appellees, Shelby County, Ohio, Shelby County Prosecutor James F. Stevenson, Shelby County Sheriff Mark Schemmel, City of Sidney, City of Sidney Mayor Thomas Miller, City of Sidney Law Director Michael Smith, City of Sidney Chief of Police Steven Wearly, Lodge No. 138 of the Fraternal Order of Police of Sidney, Ohio, and Root Outdoor Advertising Inc. For the following reasons, we affirm the judgment of the trial court. The facts and procedural history of the case follow.

On May 28, 1996, the appellant pleaded guilty to and was convicted of trafficking in narcotics and was sentenced to a five to fifteen year term of

imprisonment. The appellant was subsequently incarcerated and served his sentence at an Ohio Department of Rehabilitation and Corrections unit located in Lima, Ohio.

In February 1998, the Shelby County Prosecutor's Office leased a billboard in Sidney, Ohio, and displayed the following message: "Think Dope is cool? Ask these people currently serving time for it." Below the foregoing message was a list of twenty-three individuals, including the appellant, who had been convicted of drug-related trafficking crimes in Shelby County, Ohio. The billboard purportedly identified the appellant as "Anthony Fat Boy Wagner." The billboard message was erected in response to a dramatic increase in drug trafficking and drug activity in Shelby County.

On February 7, 2000, the appellant, proceeding *pro se*, filed a complaint in the Shelby County Court of Common Pleas. The appellant's complaint initially sets forth a cause of action against the appellees for defamation of character. The complaint further alleges that the appellees violated his civil rights in contravention of Title 42 U.S.C.A. § 1983 and conspired to deprive him of his rights in violation of Title 42 U.S.C.A. § 1985(3). The appellant also seeks redress for purported invasion of privacy, false light invasion of privacy, alienation of affection, bodily injury, and injury to personal property, and asserts

negligence on the part of the appellees which caused him emotional distress, humiliation, and loss of reputation.

On March 3, 2000, the City of Sidney, Ohio, Thomas Miller, Michael Smith, and Steven Wearly jointly filed an answer to the appellant's complaint.[1] On March 6, 2000, Shelby County Sheriff Mark Schemmel, Shelby County Prosecutor James Stevenson, the Fraternal Order of Police of Sidney, Ohio, and the Board of County Commissioners of Shelby County[2] jointly filed a motion to dismiss the appellant's complaint. Likewise, on March 24, 2000, the City of Sidney, Ohio, Thomas Miller, Michael Smith, and Steven Wearly jointly filed a motion to dismiss the appellant's complaint for failure to state a claim upon which relief could be granted. By judgment entry of June 5, 2000, the trial court granted the appellees' motions to dismiss.

The appellant now appeals, asserting the following two assignment of error for our review.

<u>Assignment of Error No. I</u>

> **If the trial court abused its discretion by dismissing plaintiff's civil rights claim 47 U.S.C. § 1983 [sic] as failing to state facts upon which relief could be granted in violation of Article I section 10, 11, 16 of the Ohio Constitution and the First, Fifth and Fourteenth Amendments to the United States Constitution. [sic]**

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[1] On March 7, 2000, Root Outdoor Advertising Inc. also filed an answer to the appellant's complaint.

[2] The appellant's complaint incorrectly names this defendant as "Shelby County, Ohio."

<u>Assignment of Error No. II</u>

> **If the trial court abused its discretion whereby reby [sic] incorrectly finding that plaintiff were not entitled to defamatory relief because (1) defendant's actions reflected more upon their own character, (2) he cannot plead special damages because of lack of current pecuniary opportunities, and (3) that plaintiff's claims of damages are purely speculative, in violation of plaintiff's rights to Article I section [sic] 10, 11, and 16, of the Ohio Constitution, and the First, Fifth, and Fourteenth Amendments of the United States Constitution. [sic]**

For purposes of clarity and brevity, we will address the appellant's assignments of error together.

A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545. It is well settled that "when a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party." *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 60, citing *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. While the factual allegations of the complaint are taken as true, "[u]nsupported conclusions of a complaint are not considered admitted * * * and are not sufficient to withstand a motion to dismiss." *State ex rel. Hickman v. Capots* (1989), 45 Ohio St.3d 324. In light of these guidelines, in order for a court to grant a motion to dismiss for failure to state a claim, it must appear "beyond

doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242, 245.

In this appeal, the appellant alleges numerous claims for relief. The appellant's primary argument and emphasis on appeal, however, is that the billboard contained information defamatory to him. Specifically, the appellant argues that the use of the alias "Fat Boy" and the reference that he is serving a term in prison for using or selling drugs is defamatory.

Defamation is a false publication that injures a person's reputation. *Dale v. Ohio Civ. Serv. Emp. Assn.* (1991), 57 Ohio St.3d 112, 117. There are two kinds of defamation, per se and *per quod*. *McCartney v. Oblates of St. Francis DeSales* (1992), 80 Ohio App.3d 345, 353. Defamation per se is defamatory on its face and by the very meaning of the words spoken or written. *Id*. Examples of defamation per se include words which "import an indictable criminal offense involving moral turpitude or infamous punishment, impute some loathsome or contagious disease that excludes one from society or tend to injure one in one's trade or occupation." *Id*., citing *Schoedler v. Motometer Gauge & Equip. Co.* (1938), 134 Ohio St. 78, 84. In contrast, defamation *per quod* exists where words appear harmless but become defamatory by innuendo or extrinsic evidence. *Id.*

The issue of whether defamation is per se or *per quod* is a question of law to be decided by the trial court. *Bryans v. English Nanny & Gov. School* (1996), 117 Ohio App.3d 303, 316. The issue is significant because it determines whether special damages will be presumed or must be alleged and proven by a plaintiff. In the case of defamation per se, the defamatory words are likely to cause harm and special damages are presumed as a matter of law. *McCartney* at 354; *Cramton v. Brock* (Mar. 23, 1992), Clinton App. No. CA91-05-011, unreported. However, in the case of defamation *per quod*, the harm caused by the defamatory words is not readily apparent and the plaintiff bears the burden of alleging and proving special damages. *Id.*

After reviewing the appellant's complaint and the attached exhibits, we find that the trial court properly dismissed the appellant's claim for defamation. First, it is undisputed that the appellant was convicted of one count of drug trafficking. It is also undisputed that the appellant served a term of imprisonment as a result of this conviction. Therefore, any reference that he was serving a term in prison for using or selling drugs was not defamatory in any respect. Second, the appellant's allegation that the use of the alias "Fat Boy" was defamatory is merely a conclusory statement that is insufficient to withstand a motion to dismiss. Moreover, the appellant's allegation could only be considered defamatory by innuendo or extrinsic evidence. Therefore, the appellant's allegation, at best,

constitutes defamation *per quod*. Because the appellant failed to allege special damages, the trial court did not err in dismissing the appellant's defamation claim.

With respect to the appellant's remaining claims for relief, we have reviewed his complaint and accompanying exhibits and find beyond doubt that he can prove no set of facts in support of his claims which would entitle him to relief. Therefore, we find no merit to this appeal. Accordingly, the appellant's first and second assignments of error are overruled.

Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment affirmed.

WALTERS, P.J., concurs.
SHAW, J., concurs in Judgment only.

/jlr