

[Cite as *Becker v. Internat. Assn. of Firefighters Local 4207*, 2010-Ohio-3467.]
IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

BERNARD BECKER,	:	
	:	CASE NO. CA2010-03-029
Plaintiff-Appellant,	:	
	:	<u>OPINION</u>
- vs -	:	7/26/2010
	:	
INTERNATIONAL ASSOCIATION OF	:	
FIREFIGHTERS LOCAL 4207	:	
	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 08CV72713

Jeffrey M. Silverstein and Associates, Jeffrey M. Silverstein and Jason P. Matthews, 627 South Edwin C. Moses Boulevard, Suite 2-C, Dayton, Ohio 45417, for plaintiff-appellant

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POWELL, J.

{¶1} Plaintiff-appellant, Bernard Becker, appeals the decision of the Warren County Court of Common Pleas granting summary judgment to defendant-appellee, International Association of Fire Fighters Local 4207 (Union). We affirm the decision

of the trial court for the reasons outlined below.¹

{¶2} Appellant, who was fire chief for the Clearcreek Township Fire District, filed a complaint for defamation and false light invasion of privacy, claiming that his personal and professional reputation was damaged and he was presented in a false light by statements and allegations contained in a 2008 letter of complaint the Union forwarded to a Clearcreek Township administrator.

{¶3} The allegations included claims by members of the fire district that appellant engaged in acts of sexual harassment or inappropriate conduct, and abused his authority. Some time after the unsigned letter was given to the administrator, the allegations were also publicized by the media in a manner that was not fully explained, but is not contested for purposes of this appeal.

{¶4} The record indicates that appellant voluntarily retired as fire chief. He claims that he has been denied employment as fire chief with other jurisdictions because of the allegations.

{¶5} The Union filed a motion for summary judgment, which was granted by the trial court as to both defamation and false light invasion of privacy. The trial court indicated that appellant failed to show that the Union had knowledge that the allegations were false or acted in reckless disregard of whether they were false or not.

{¶6} Appellant filed this appeal, setting forth a single assignment of error for our review.

{¶7} Assignment of Error:

1. Pursuant to Loc.R. 6(A), we sua sponte remove this appeal from the accelerated calendar and place it on the regular calendar for purposes of issuing this opinion.

{¶18} "THE TRIAL COURT ERRED IN FINDING THAT APPELLANT DID NOT RAISE A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER APPELLEE ACTED WITH ACTUAL MALICE[.]"

{¶19} Defamation is a false statement published by a defendant acting with the required degree of fault that injures a person's reputation, exposes the person to public hatred, contempt, ridicule, shame or disgrace, or adversely affects the person's profession. *Jackson v. City of Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, ¶9; *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451, ¶53 ("publication" for defamation purposes is a word of art, which includes any communication by the defendant to a third person).

{¶10} There appears no dispute for purposes of summary judgment that appellant was a public official. See *Waterson v. Cleveland State Univ.* (1994), 93 Ohio App.3d 792, 795-796. Statements made about public officials are constitutionally protected when the statements concern anything that may touch on an official's fitness for office. *Burns v. Rice*, 157 Ohio App.3d 620, 2004-Ohio-3228, ¶20, citing *Soke v. Plain Dealer*, 69 Ohio St.3d 395, 397, 1994-Ohio-337.

{¶11} Under the standard enunciated in *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 279-280, 84 S.Ct. 710, a public official may not recover damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice," that is, with knowledge that it was false or with reckless disregard of whether it was false or not. *Perez v. Scripps-Howard Broadcasting Co.* (1988), 35 Ohio St.3d 215, 218 (law of Ohio and federal law are in accord on these principles). Proof of actual malice must be clear and convincing. *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, 342, 94 S.Ct. 2997.

{¶12} See, also, *Daubenmire v. Sommers*, 156 Ohio App.3d 322, 2004-Ohio-914, ¶¶118-120 (where plaintiff established prima facie case of defamation, defendant may invoke qualified privilege defense, which is recognized when a commonality of interest exists between publisher and recipient of communication and communication is of a kind reasonably calculated to protect or further that interest; however, qualified privilege is exceeded when statements are made with actual malice).

{¶13} In making a determination whether a defendant acted with actual malice, the focus is upon the defendant's attitude toward the truth or falsity of the published statements, rather than upon the existence of hatefulness or ill will. *Perez* at 218, paragraph one of the syllabus (inquiry into actual malice should focus on the publisher's attitude toward the truth rather than upon the publisher's attitude toward the plaintiff).

{¶14} The plaintiff's burden is to show with convincing clarity that the false statements were made with a high degree of awareness of their probable falsity, or the defendant entertained serious doubts as to the truth of the publication. *Id.* at ¶218.

{¶15} Appellant also averred in his complaint that publishing the Union's allegations constituted false light invasion of privacy.

{¶16} In Ohio, one 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 his privacy if the false light in which the other was placed would be highly offensive to a reasonable person, and 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. *Welling*, 2007-Ohio-2451 at syllabus, adopting

Restatement of the Law 2d, Torts, Section 652E. "Publicity" means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. Id. at ¶53.

{¶17} The Union argued that the allegations were the result of reports from several individuals who experienced the incidents or were present when the incidents allegedly occurred.

{¶18} Appellant asserts that the allegations, many of which occurred several months or years earlier, are false. He argues that witnesses admitted that the decision to compile a list of allegations was based, in part, on anger about appellant's interaction with and conduct toward two former fire district employees who were assisting during a medical emergency.

{¶19} According to deposition testimony of Ronald Wilhelm, township assistant administrator and safety director, Union officers initially approached a township trustee in 2008 to discuss the incident involving the former employees. Wilhelm indicated that he told the Union officers they should pursue their complaints about the incident through the chain of command. The officers indicated that they had additional concerns about the chief in reference to inappropriate touching or comments and other conduct they deemed inappropriate. Wilhelm testified that he told the officers to put their complaints in writing and submit it to the township for further investigation.

{¶20} Appellant argues that he presented evidence that the Union acted with reckless disregard of whether the allegations it subsequently presented were false or not when they failed to investigate the allegations before publishing, failed to timely

report the alleged conduct or follow township policy, grievance procedures, or the chain of command, and failed to obtain documentation from the accusers. Appellant also asserts that the president of the Union lacked credibility.

{¶21} On appeal, a trial court's decision granting summary judgment is reviewed de novo. *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296. Summary judgment is proper when there is no genuine issue of material fact remaining for trial, the moving party is entitled to judgment as a matter of law, and reasonable minds can only come to a conclusion adverse to the nonmoving party, construing the evidence most strongly in that party's favor. See Civ.R. 56(C); *Halsey, Inc. v. Isbel*, Warren App. No. CA2009-12-159, 2010-Ohio-2052, ¶9.

{¶22} In order to withstand a defendant's motion for summary judgment in a defamation action, a public official-plaintiff must produce evidence sufficient to raise a genuine issue of material fact from which a reasonable jury could find actual malice with convincing clarity. *Perez* at 218. Only factual disputes that might affect the outcome of the suit under the governing law will preclude the entry of summary judgment. *Id.* at 219.

{¶23} We will presume for summary judgment purposes that the allegations against appellant are false, that they defamed his reputation, and presented him in a false light.

{¶24} Applying the pertinent summary judgment standard, we find that appellant failed to produce evidence from which a reasonable jury could find that the Union had knowledge that the allegations were false or acted with reckless disregard of whether they were false or not in relation to the claims of both defamation and false light invasion of privacy. See *Dupler v. Mansfield Journal* (1980), 64 Ohio St.2d

116, 119 (since reckless disregard is not measured by lack of reasonable belief or of ordinary care, even evidence of negligence in failing to investigate the facts is insufficient to establish actual malice; investigatory failure alone, without a high degree of awareness of probable falsity, may raise the issue of negligence but not the issue of actual malice); see *Varanese v. Gall* (1988), 35 Ohio St.3d 78, 80 (actual malice in the context of defamation may not be inferred from evidence of personal spite, ill will, or deliberate intention to injure); see *Welling*, 2007-Ohio-2451.

{¶25} Appellant's single assignment of error is overruled. The trial court did not err in finding that appellant failed to raise a genuine issue of fact regarding whether the Union acted with actual malice.

{¶26} Judgment affirmed.

YOUNG, P.J., and RINGLAND, J., concur.