STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: April 4, 2018]

RUSSELL HENRY	:	
	:	
v.	:	**C.A. No. PC-2014-2837**
	:	
MEDIA GENERAL OPERATIONS, INC., CHRIS LANNI, JAMES TARICANI, PETER LECLERC, RONALD JACOB, KAREN E. GUILBEAULT, AND JOHN DOES	:	

DECISION

LICHT, J. Defendants, moving separately, seek summary judgment on the basis that Plaintiff is a public official for purposes of defamation actions, and the conduct alleged does not rise to the level of "actual malice" required in such circumstances by the U.S. Constitution. Jurisdiction is pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

This case emanates from the renowned "Ticketgate Scandal" in the Cranston Police Department. On November 14, 2013, the Finance Committee of the Cranston City Council rejected a new contract with the police union. On the next night, Cranston Police Captain Stephen Antonucci (Captain Antonucci) ordered, via his personal cell phone, officers to blanket with parking tickets Wards 1 and 2, which were the wards of the Councilmen who voted against the contract. Residents of the two wards received a total of 128 overnight parking tickets on the evening in question—compared to 122 issued city-wide in the preceding two months combined. *See* Gregory Smith, *2 Cranston councilmen say city police retaliated because of their police*

contract votes by ticketing cars in their wards, The Providence Journal (Dec. 17, 2013), http://www.providencejournal.com/breaking-news/content/20131217-2-cranston-councilmen-say-city-police-retaliated-because-of-their-police-contract-votes-by-ticketing-cars-in-their-wards.ece. Mayor Allan Fung ultimately initiated an investigation of the incident and dismissed or refunded each of the tickets issued.

Defendant James Taricani (Mr. Taricani) was an investigative reporter with the "I-Team" on WJAR-TV (WJAR), the local NBC affiliate, then owned by Media General Operations, Inc. (Media General). Defendant Christopher Lanni (Mr. Lanni) served as WJAR's news director (collectively, Mr. Taricani, WJAR, and Media General are sometimes referred to as the Media Defendants). In early December 2013, Mr. Taricani received an anonymous tip about the excessive ticketing. He found out the tip was from Defendant Peter Leclerc (Officer Leclerc)[1], a current Cranston police officer. Mr. Taricani met with Officer Leclerc who gave him information about the ticketing and suggested that Mr. Taricani make an open records request from the City of Cranston (the City) concerning ticketing on the night in question. Mr. Taricani did just that, and the information corroborated what Officer Leclerc told him.[2]

On December 17, 2013, WJAR aired its first story about what was happening in the Cranston Police Department, particularly with the excessive ticketing. That report made no mention of Plaintiff, Captain Russell Henry (Captain Henry or Plaintiff).[3] In late December

[1] Officer Leclerc's name appears as both "Leclerc" and "LeClerc" throughout the depositions. However, Officer Leclerc's memorandum uses "Leclerc" which is the spelling the Court will use.

[2] The records request triggered a press conference by the City announcing it was investigating certain irregularities. This action led to a temporary takeover by the State Police of the Cranston Police Department and ultimately a report which castigated the department for its corruption and factionalism.

[3] At the time, Captain Henry was a lieutenant but the Court chooses to refer to Plaintiff by his current rank.

2013, Officer Leclerc informed Mr. Taricani that the Plaintiff had been ordered to use his personal cell phone to order officers to issue the parking tickets in Wards 1 and 2.

On December 23, 2013, Mr. Taricani received an email from Defendant Ronald Jacob (Mr. Jacob), a twenty year veteran of the Cranston police force who had retired in 2005, which stated:

> "My sources have stated that Lt. Russ Henry gave the order to the officers to ticket the vehicles. The problem I see with that is Lt. Henry is an extended family member of Captain and Union President Stephen Antonucci. I hope this information is what your [sic] getting from your sources. The Department needs a top to bottom makeover."

On December 28, 2013, Mr. Taricani received another email from Mr. Jacob reiterating Captain Henry's involvement and stating that the rumors were that Captain Antonucci and Plaintiff "were riding around the two districts that were mass ticketed and used their cell phones to contact the officer, [sic] who had those posts to ticket certain vehicles in those districts."

For purposes of their motion for summary judgment, the Media Defendants concede that Mr. Taricani spoke to the then Chief of Police, Colonel Marco Palumbo (Colonel Palumbo), who twice told him that Plaintiff was not involved in the ticketing.[4]

On January 10, 2014, WJAR aired a second "Ticketgate" story in which Mr. Taricani reported that Captain Antonucci, the then Cranston police union president, and Captain Henry used their personal cell phones to order other Cranston police officers to issue tickets in the wards of the councilors who voted against the proposed contract; specifically, "Antonucci allegedly told his cousin, Lt. Russell Henry, to use his personal cell phone to give the order to issue the tickets." (Am. Compl. 3.) The segment included an on-screen graphic that read: "Lt.

[4] While the Media Defendants concede that Mr. Taricani spoke with Colonel Palombo for purposes of this motion, they otherwise deny that any such conversation occurred.

Russell Henry . . . ordered officers to issue tickets." (Am. Compl. Ex. A.) The story also ran on WJAR's website.

Mr. Lanni, Mr. Taricani's producer, approved both stories prior to their airing.

In the afternoon prior to airing the story, Mr. Taricani called the Cranston police station looking for Captain Henry. He was not there, but Mr. Taricani left a voice message on another officer's phone. On the evening of January 10, 2014, after the story aired on the 6:00 news, Captain Henry encountered a photographer for WJAR and Captain Henry said he was upset about the story because he was not involved. The photographer called Mr. Taricani at home and relayed this conversation together with Captain Henry's phone number. Mr. Taricani then called WJAR and asked to have the story pulled from the 11:00 news and the website. He called Captain Henry the next day and offered him the opportunity to go on air and tell his side of the story. Captain Henry declined.

The parties now all agree that Plaintiff was not involved in the ticketing scandal. WJAR ultimately aired a correction on February 7, 2014.

During the time preceding the WJAR stories, Mr. Jacob and Captain Karen E. Guilbeault (Captain Guilbeault) had been in contact, primarily by telephone, regarding various issues with the Cranston Police Department. They were also in contact because Mr. Jacob was in need of certain personal records from the department, and Captain Guilbeault's position required she liaise with retirees about such requests. The specific content of those communications is not clear in the record, but Captain Guilbeault is the only active member of the Cranston Police Department with whom Mr. Jacob was in contact, and Mr. Jacob indicated at his deposition that

Captain Guilbeault may have been the source of his information.[5] Plaintiff contends that the defamatory information Mr. Jacob reported to Mr. Taricani originated with Captain Guilbeault.

Plaintiff brought this action seeking compensatory and punitive damages for libel, slander, and false light pursuant to G.L. 1956 § 9-1-28.1, as well as negligent and intentional infliction of emotional distress.[6] Defendants now separately move for summary judgment, and Mr. Jacob moves to dismiss.

II

Public Official

Customarily, the next section of a decision would be the Standard of Review to be applied by the Court. But in this case that standard depends on whether the Plaintiff is considered to be a public official.

If a plaintiff is a public official or public figure,[7] the plaintiff must demonstrate, by clear and convincing evidence, "actual malice" on the part of the defendant making the false statement:

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[5] Mr. Jacob is proceeding *pro se* in connection with this litigation and submitted an affidavit in connection with his motion which confirmed that Captain Guilbeault was the source of his information. At the hearing on these motions, the Court pointed out that it could not consider this affidavit as it was not notarized. The Court offered to accept the affidavit if Mr. Jacob would sign it in the presence of and have it notarized by one of the many notaries in the courtroom. He chose not to do so, and therefore, the Court will not consider it.

[6] Section 9-1-28.1 provides, in pertinent part:

> "It is the policy of this state that every person in this state shall have a right to privacy which shall be defined to include any of the following rights individually:
> . . . .
> "The right to be secure from publicity that reasonably places another in a false light before the public[.]"

[7] The terms "public official" and "public figure" appear interchangeably in the body of law surrounding this area with respect to the heightened burden required to prove defamation.

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering 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." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); *see Capuano v. Outlet Co.*, 579 A.2d 469, 472 (R.I. 1990) (holding that the "clear and convincing" evidentiary standard applies in Rhode Island); *see also* Restatement (Second) *Torts* § 580A (1977).

Whether a person is a public official is a question of law. *Capuano*, 579 at 472.

In Rhode Island, police officers have been held to be public officials for the purpose of defamation actions. *Hall v. Rogers*, 490 A.2d 502, 505 (R.I. 1985). In *Hall*, our Supreme Court concluded that police officers fit the test articulated by the United States Supreme Court in *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). *Id.* The Court held that police officers

> "have or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs, . . . and their position 'has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees.'" *Hall*, 490 A.2d at 504 (quoting *Rosenblatt*, 383 U.S. at 86).

Moreover, our Supreme Court is in accord with the overwhelming majority of other courts that have considered this issue: Indeed, "[p]olice and other law enforcement personnel are almost always classified as public officials."[8] Rodney A. Smolla, *Law of Defamation* § 2:104 (2d ed. 2017).

[8] *See, e.g.*, *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968) (deputy sheriff); *Henry v. Collins*, 380 U.S. 356, 357 (1965) (*per curiam*) (city police chief and county attorney); *Gray v. Udevitz*, 656 F.2d 588 (10th Cir. 1981) (ex-patrolman); *Meiners v. Moriarity*, 563 F.2d 343, 352 (7th Cir. 1977) (federal DEA agent); *Rosales v. City of Eloy*, 593 P.2d 688, 689 (Ariz. 1979) (police sergeant); *Willis v. Perry*, 677 P.2d 961 (Colo. App. 1983) (police officers); *Moriarity v. Lippe*, 294 A.2d 326 (Conn. 1972) (patrolman); *Coursey v. Greater Niles Twp. Publ'g Co.*, 239 N.E.2d 837, 841 (Ill. 1968) (patrolman); *Rawlins v. Hutchinson Publ'g Co.*, 543 P.2d 988, 992 (Kan. 1975) (patrolman); *Roche v. Egan*, 433 A.2d 757, 762 (Me. 1981) (all law enforcement

Plaintiff was a police lieutenant being accused of unethical behavior in his official capacity. Specifically, he was accused of improperly using his supervisory position as a lieutenant to order other officers to issue parking tickets—an official act—in retaliation for adverse political decisions. Our Supreme Court's ruling in *Hall*, 490 A.2d at 504, controls. Plaintiff argues that our Supreme Court misinterpreted the U.S. Supreme Court's holding in *Rosenblatt*, 383 U.S. at 85, and that the issue should be revisited. Plaintiff would reject a *per se* rule and have a case-by-case analysis depending on the degree of authority or notoriety of the individual officer. At oral argument, Plaintiff's counsel argued that the Court should determine what role the officer played in the controversy before deciding whether or not he is a public official. She contended further that since Captain Henry had no role he could not be a public official.

While Plaintiff is certainly free to make these arguments on appeal to our Supreme Court, they should not, and will not, be entertained by this Court:

> "It is well settled that an opinion of [the Supreme Court of Rhode Island] declares the law in Rhode Island and that law must be followed by the lower courts of our judicial system, regardless of whether that court or any of its judges agree or disagree with our holding. As the court of last resort in this state our decisions 'are not final because they are infallible, but rather they are infallible only because they are final.' . . . Therefore, lower courts . . . must follow our established precedents." *Univ. of R.I. v. Dep't of Emp't*

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personnel); *Akins v. Altus Newspapers, Inc.*, 609 P.2d 1263, 1265 (Okla. 1977), *cert. denied*, 449 U.S. 1010 (1980) (patrolman); *McNabb v. Oregonian Publ'g Co.*, 685 P.2d 458 (Or. 1984) (police officer); *Colombo v. Times-Argus Ass'n*, 380 A.2d 80 (Vt. 1977) (patrolman). *See also Spetalieri v. Kavanaugh*, 36 F. Supp. 2d 92 (N.D.N.Y. 1998) (administrative officer for the police department is a public figure); *McNamee v. Jenkins*, 754 N.E.2d 740 (Mass. App. Ct. 2001), *review denied*, 761 N.E.2d 964 (2001) (police officers are public officials for the purposes of defamation, and a police officer may not recover damages for defamation related to his public office unless he proves by clear and convincing evidence that a defendant made a false statement with actual malice).

> *& Training, 691 A.2d 552, 555 (R.I. 1997) (internal citations omitted).*

Moreover, even if our Supreme Court concluded that a *per se* rule declaring all police officers public officials was not appropriate, the facts of this case strongly support finding that Plaintiff was a public official. Even applying the standard that Plaintiff advocates, Plaintiff would still be best described as a public official. The U.S. Supreme Court concluded that:

> "Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, 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*, 383 U.S. at 85.

Plaintiff, by way of his supervisory position over other officers, was in a position to appear to the public to have "control over the conduct of governmental affairs[]" even more than the average police officer. *See id.* Police officers are the human face of government. They embody the laws they are sworn to enforce, and the manner of that enforcement is a matter of great public concern. Senior police officers have tremendous control and discretion over how our laws are applied, and indeed, the ticketing incident underlying this case is a prime example of that discretion run amok. Surely, all senior police officers—even if not all police officers in general—have the requisite control over the conduct of governmental affairs to fall squarely within the definition of a public official. *See id.*

Moreover, in *Hall,* our Supreme Court found a sergeant and a special police officer to be public officials. In *Capuano*, it found private municipal waste haulers to be public figures. Also, G.L. 1956 § 11-42-4, as amended, makes it a crime to threaten public officials and the definition of public official includes law enforcement officers.

Plaintiff's argument that the role in the controversy should assist in determining whether one is a public official would lead to the incongruous result that a police officer could be a public official on some occasions but not on others.

Accordingly, this Court concludes that Captain Henry, like all police officers in Rhode Island, is a public official for purposes of defamation claims. As such, he needs to show that Defendants acted with "actual malice" to sustain his claim. This standard applies to all his claims as Plaintiff may not "re-baptiz[e] [his defamation claim] as a different cause of action" to avoid the protections of the first amendment, *see Trainor v. The Standard Times*, 924 A.2d 766, 769 n.1 (R.I. 2007), each of Plaintiff's related claims must similarly meet this heightened standard.

This First Amendment protection also extends to related emotional distress claims:

> "[A] public figure . . . may not recover for the tort of intentional infliction of emotional distress . . . without showing . . . that the publication contains a false statement of fact which was made . . . with knowledge that the statement was false or with reckless disregard as to whether or not it was true." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

Our Supreme Court has also indicated, albeit in a footnote, that "many cases from other jurisdictions have held that one may not breathe life into an otherwise doomed defamation claim by re-baptizing it as a different cause of action. *See, e.g., Yohe v. Nugent*, 321 F.3d 35, 44 (1st Cir. 2003) (dismissing the plaintiff's emotional distress claim because it was 'premised on precisely the same facts as his defamation claim' and then ruling that 'a plaintiff cannot evade the protections of the fair report privilege merely by re-labeling his claim'); *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890, 893 n.4 (9th Cir. 1988) ('An emotional distress claim based on the same facts as an unsuccessful libel claim cannot survive as an independent cause of action.'); *see also Correllas v. Viveiros*, 410 Mass. 314, 572 N.E.2d 7, 13 (1991) ('A privilege which protected an

individual from liability for defamation would be of little value if the individual were subject to liability under a different theory of tort.'); *see generally Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988)." *Trainor*, 924 A.2d at 769 n.1.

III

Standard of Review

A

Summary Judgment

When deciding a motion for summary judgment, the trial justice must keep in mind that it '"is a drastic remedy and should be cautiously applied."' *Steinberg v. State*, 427 A.2d 338, 339–40 (R.I. 1981) (quoting *Ardente v. Horan*, 117 R.I. 254, 256-57, 366 A.2d 162, 164 (1976)). "Thus, '[s]ummary judgment is appropriate when, viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party, the [C]ourt determines that there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law.'" *Quest Diagnostics, LLC v. Pinnacle Consortium of Higher Educ.*, 93 A.3d 949, 951 (R.I. 2014) (quoting *Peloquin v. Haven Health Ctr. Of Greenville*, 61 A.3d 419, 424-25 (R.I. 2013)). During a summary judgment proceeding, the Court does not pass upon the weight or credibility of the evidence. *See DeMaio v. Ciccone*, 59 A.3d 125, 129-30 (R.I. 2013).

The party who opposes the motion for summary judgment "carries the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions." *Accent Store Design, Inc. v. Marathon House, Inc.*, 674 A.2d 1223, 1225 (R.I. 1996).

In this case, the Plaintiff must not only prove actual malice but he must do so by clear and convincing evidence. Through what lens therefore does the motion justice peer in trying to

determine if the issues of fact are material. Fortunately, the United States Supreme Court provided the necessary guidance to a trial judge who must rule on summary judgment in a defamation action involving a public official. Our nation's highest Court stated:

> "[W]e are convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits . . . where the First Amendment mandates a 'clear and convincing' standard, the trial judge in disposing of a directed verdict motion should consider whether a reasonable factfinder could conclude, for example, that the plaintiff had shown actual malice with convincing clarity
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> . . . .
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> "Just as the 'convincing clarity' requirement is relevant in ruling on a motion for directed verdict, it is relevant in ruling on a motion for summary judgment. When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*. For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence
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> . . . .
>
> "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor
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> . . . .
>
> "Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Anderson v. Liberty Lobby, Inc.* 106 S. Ct. 2505, 2512-14 (1986).

This Court will now endeavor to review the discovery submitted in the light most favorable to the Plaintiff subject to the clear and convincing standard.

B

Mr. Jacob's Motion

Mr. Jacob filed a document captioned "DEFENDANT RONALD JACOB PLEADING," which asks "this Court to dismiss any and all civil torts against defendant." (Jacob Mot.) Mr. Jacob is *pro se*.

When "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . ." Super. R. Civ. P. 12(c). Thus, the Court is free to "disregard[] the erroneous label" and proceed to evaluate the evidence for disputes of fact. Robert B. Kent et al., *Rhode Island Civil & Appellate Procedure* § 12:13 at 139. Since the resolution of the issues of whether Captain Henry was a public official and the standard of review to be applied would be the same for Mr. Jacob as the other defendants, and since the other parties had submitted substantial evidence some of which related to Mr. Jacob, the Court, at oral argument, suggested that Mr. Jacob's motion be converted to a motion for summary judgment. Mr. Jacob, the Plaintiff and the other Defendants stated on the record that there was no objection to the conversion. The Court also offered each party the opportunity to submit additional memoranda concerning Mr. Jacob and no party has done so.

IV

Analysis[5]

Defendants contend that the facts of this case could not support a finding of "actual malice" with convincing clarity. They do not, however, dispute the untruthful nature of the statements themselves. Captain Guilbeault also argues that she did not make any statement whatsoever to Mr. Jacob about Plaintiff.

With respect to Captain Guilbeault and Mr. Jacob, Plaintiff points out differences between Captain Guilbeault's deposition testimony and Mr. Jacob's filing in support of his motion presently before this Court as demonstrative of a disputed material fact. Namely, Captain Guilbeault denies making any statements about Plaintiff, whereas Mr. Jacob states that she was the source of the information he provided Mr. Taricani. As previously stated, Mr. Jacob's filing is not evidence the Court can consider.

Plaintiff also argues that Officer Leclerc's assertion that he learned of Plaintiff's involvement in the ticketing incident from several overheard conversations from unknown speakers within the secured area of the Cranston police station is so improbable that the

[5] None of the parties has briefed whether the statements allegedly made by Defendants meet the requirements of defamation. *See Mills v. C.H.I.L.D., Inc.*, 837 A.2d 714, 720 (R.I. 2003) (holding that an action for defamation may be sustained where the plaintiff can show: (1) the utterance of a false and defamatory statement concerning another; (2) an unprivileged communication to a third party; (3) fault amounting to at least negligence; and (4) damages.). Specifically, the Rhode Island Supreme Court has stated that "[a] defamatory statement consists of 'any words, if false and malicious, imputing conduct which injuriously affects a [person's] reputation, or which tends to degrade him [or her] in society or bring him [or her] into public hatred or contempt[.]'" *Id.* Furthermore, "the question of whether a particular statement or conduct alleged to be defamatory is, in fact, defamatory is a question of law for the court to decide." *Alves v. Hometown Newspapers, Inc.*, 857 A.2d 743, 750 (R.I. 2004). At oral argument, the Defendants' counsel conceded solely for the purposes of these motions that the statements were defamatory. Therefore, the Court will assume, without deciding, that the elements of defamation have been met for purposes of the instant motions.

circumstances support a finding that Officer Leclerc did not actually believe the information he allegedly overheard.

A

Actual Malice

"[T]he actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 666 (1989). In order to demonstrate "actual malice" by clear and convincing evidence, the plaintiff must either establish that the defendant had "actual knowledge that the published statement was false" or that the defendant acted with "reckless disregard for whether or not it was false." *Capuano*, 579 A.2d at 472.

The United States Supreme Court advises us '"reckless disregard' . . . cannot be fully encompassed in one infallible definition." *St. Amant*, 390 U.S. at 730.

> "A 'reckless disregard' for the truth . . . requires more than a departure from reasonably prudent conduct. 'There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication' . . . The standard is a subjective one—there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of . . . probable falsity' . . . As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." *Harte-Hanks Commc'ns, Inc., 491 U.S.* at 688 (internal citations omitted).

Adopting the *St. Amant* standard, our Supreme Court has said "[r]eckless disregard is more than mere negligence." *Major v. Drapeau*, 507 A.2d 938, 941 (R.I. 1986).

Our Supreme Court has concluded that '"[a]s long as the sources of the libelous information appeared reliable, and the defendant had no doubts about its accuracy, the courts have held the evidence of malice insufficient to support a jury verdict, even if a more thorough

investigation might have prevented the admitted error."' *Hall*, 490 A.2d at 505 (quoting *Ryan v. Brooks*, 634 F.2d 726, 734 (4th Cir. 1980)).

The Court will apply these criteria to each Defendant in turn.

1

The Media Defendants

Mr. Taricani relied on his principal source, Officer Leclerc, whose statements were in some ways corroborated by Mr. Jacob. Mr. Taricani received an anonymous tip that he pursued. He met with the source, Officer Leclerc, who told him about the excessive ticketing. He then made a public records request about the tickets and the response verified Officer Leclerc's information. The request even prompted the City to conduct an investigation, which eventually involved the State Police. As such, Mr. Taricani believed Officer Leclerc was a reliable source. WJAR then aired the December 17, 2013 story which exposed the "Ticketgate" affair.

Mr. Taricani began to hear from individual police officers about the factionalism and favoritism within the Cranston Police Department and Captain Antonucci's role in the "Ticketgate" scandal. Captain Antonucci was the union president, so being upset about the rejection of the collective bargaining agreement was not far-fetched. Officer Leclerc then told him that he had heard from two sources on two separate occasions that Captain Henry was involved. He was also told that Captain Henry was related to Captain Antonucci.

On December 23, 2013, Mr. Taricani received the email from Mr. Jacob which also stated that Captain Henry was involved in transmitting the order for excessive ticketing. Based upon his inquiry with others in the Cranston Police Department, Mr. Taricani considered Mr. Jacob a credible source.

Mr. Taricani discussed his proposed story with Mr. Lanni, his news director, and they ran with the January 10, 2014 story. Mr. Taricani tried unsuccessfully to reach Mr. Henry shortly before the story aired.

Plaintiff contends Mr. Taricani demonstrated a reckless disregard for the truth by (1) reporting rumors and hearsay without further inquiry; (2) ignoring Colonel Palumbo's denial that Captain Henry was involved; and (3) failing to reach Captain Henry prior to airing the story.

The media does not operate under the Rhode Island Rules of Evidence. Stories in print and on air are replete with statements based on sources and rumors. Plaintiff contends Mr. Taricani was reckless. Given Officer Leclerc's accuracy with respect to the initial information concerning the excessive ticketing and both sources' connection to the Cranston Police Department, Mr. Taricani was not unreasonable for believing that they were knowledgeable on the subject. Plaintiff's familial relationship with Captain Antonucci further supported the stories reported to Mr. Taricani—the scenario made logical sense to him. While a more thorough, independent investigation might have uncovered the truth about Plaintiff's involvement, such an investigation is not required prior to publication. *See Hall*, 490 A.2d at 504.

In *Hall*, the plaintiffs were two East Providence police officers—a father and son—accused by a Providence Journal reporter of colluding with each other to circumvent the department's system for assigning special detail work. *Id.* at 503. Specifically, the reporter alleged that the father, with many more years of seniority than his son, would sign up for details that his son would then work in his stead, thus resulting in a more junior officer working details that more senior officers wanted to work, ultimately resulting in the son earning an additional $10,000 during the year. *Id.* The source for the story was a member of the East Providence City Council and the assistant mayor. *Id.*

The plaintiffs in *Hall* contended that the reporter could have discovered the falsity of the report by conducting her own independent investigation. *Id.* at 504. The Supreme Court affirmed the Superior Court's grant of summary judgment in favor of the reporter because "[f]ailure to verify information, standing alone, does not constitute recklessness." *Id.* at 505. Despite Plaintiff's assertions to the contrary, the Media Defendant's failure to investigate every element of Mr. Taricani's story prior to publication fails to rise to the level necessary to support a defamation claim against a public official. *See id.*

In addition, Plaintiff points to two alleged conversations between Mr. Taricani and Colonel Palombo regarding Plaintiff's involvement in the ticketing incident as indicative of actual malice. During those two conversations, which were not reported on or included in the story, Colonel Palombo told Mr. Taricani that Plaintiff was not involved. Plaintiff's counsel at oral argument vigorously contended that because Colonel Palumbo was the police chief his statements were more credible and should have been given greater weight. The Plaintiff also cited *Harte-Hanks* as a case where malice was found when an obvious source was not pursued.

First of all, this Court cannot equate the circumstances in this case with *Harte-Hanks.* In that case, the newspaper published a defamatory story about a political candidate challenging an incumbent shortly before the election. It involved a disputed conversation between the candidate and another individual. Each gave much different versions of what was said. Prior to publication, the newspaper failed to interview the one eyewitness who was present for the conversation who might have resolved the differences in the accounts. The paper also was a supporter of the incumbent and was motivated to publish the story because it believed it would assist its competitive position with a rival newspaper. These and other facts, in the Court's opinion, supported a finding by clear and convincing evidence of malice. In this case, Colonel

Palumbo was not an eyewitness to the events, and Plaintiff has provided no evidence of improper motive on the part of the Media Defendants.

While our Supreme Court has not addressed a situation where a reporter ignores the denial of a higher official, at least one other court has, and found that it too fails to meet the standard for establishing actual malice. *See Kidder v. Anderson*, 354 So. 2d 1306, 1310 (La. 1978).

In *Kidder*, the plaintiff was the acting chief of police in Baton Rouge, Louisiana. *Id.* at 1307. A local newspaper published an article that alleged the plaintiff had been involved in a prostitution business, had accepted bribes, and had otherwise used his office for personal gain. *Id.* A jury awarded the plaintiff $400,000 in damages, and both the trial justice and intermediate appellate court upheld the award.[9] *Id.* The intermediate appellate court held that

> "since the information had been gathered from disgruntled police officers and persons whom the jury apparently found to be unreliable, the jury could reject good faith in publication and could find the malice test met, because recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of the reports." *Id.* at 1308 (internal quotations omitted).

The Supreme Court of Louisiana reversed the lower court, concluding that:

> "We do not find persuasive the contention that malice is shown because the mayor appointing Kidder, a very able, honest, and well-respected official, advised the local media that he had investigated rumors concerning Kidder prior to this appointment and, on the basis of his investigation, found no basis for the charges. The mayor's information, based on his investigation, was essentially irrelevant to the present query, in the absence of any indication that it gave the defendants substantial reason to doubt the authenticity of information gathered by their own different and possibly more detailed investigation, nor the veracity of the sources (including the police officers) relied upon by them." *Id.* at 1309-10.

[9] The Court of Appeals did, however, reduce the award to $100,000. *Kidder*, 354 So. 2d at 1307.

The court went on to determine that:

> "The endorsement of an appointee by his superior cannot be said to constitute reason to silence the publication of charges based on sources whom the publisher has no other reason to disbelieve." *Id.* at 1310.

This Court finds the Louisiana Supreme Court's holding in *Kidder* to be persuasive. Perhaps the Media Defendants could have conducted a more thorough investigation of the allegations against Plaintiff prior to airing their story, but failing to do so does not rise to the level necessary to support a defamation action against a public official. *See id.*

Moreover, this Court shares the Supreme Court of Louisiana's concern that "[t]o accept the plaintiff's position might well be to immunize from public discussion the prior conduct of persons whom highly placed officials, upon appointing them, endorse as without blemish based upon the appointing official's investigation, however thorough he deems it." *Id.* Such a finding would have a chilling effect on open discussion of public officials and of public corruption. This Court rejects the notion that a reporter has to find more reliable the official of higher rank and greater authority. History recounts the stories of many high officials whose denials were proven false by low level sources. The sources of the Media Defendants' information highlighted problems with the Cranston Police Department's leadership—specifically noting issues with Colonel Palombo, poor management, and factionalism—which were subsequently confirmed by the State Police investigation. Thus, disregarding Colonel Palombo's statement that Captain Henry was not involved could not, under these circumstances, be conceived as "reckless."

Finally, Plaintiff asserts that Mr. Taricani acted with reckless disregard for the truth of his story because, when trying to reach Plaintiff for comment, Mr. Taricani left a voicemail for him on a different officer's voicemail system. As discussed *supra*, Mr. Taricani was under no

obligation to investigate the claims of his sources at all and was similarly under no obligation to contact Plaintiff for comment prior to running the allegedly defamatory news report. *See Hall*, 490 A.2d at 504. As such, leaving a voicemail for Plaintiff on another officer's voicemail system could not be seen as contributing to a finding of recklessness—in fact, it does quite the opposite. It shows an attempt by Mr. Taricani to do more than was legally required of him prior to airing the story. *See* Rodney A. Smolla, *Law of Defamation* § 3:65.50 (2d ed. 2017) ("The failure of a defendant to further investigate a story before publishing it can never, standing alone, be actual malice[.]"). Even had Mr. Taricani reached Plaintiff prior to airing the story, and Plaintiff denied the allegations against him, such a denial would still be inadequate to meet the actual malice standard. *See Harte-Hanks*, 491 U.S. at 691 n.37 (quoting *Edwardo v. Nat'l Audubon Soc'y*, 556 F.2d 113, 121 (2d Cir. 1977)) ("[T]he press need not accept 'denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error.'").

This Court also notes that when Mr. Taricani found out that Captain Henry denied his involvement, he asked that the story be removed from the 11:00 news and the website. Furthermore, when it was firmly established within weeks that Captain Henry was not involved, WJAR promptly retracted the story. Prompt retractions are widely considered to be evidence of a lack of actual malice.[10] Smolla, *supra*, at § 3:81 ("The issuance of a prompt retraction may be utilized by a defendant to prove the absence of actual malice.").

[10] *See, e.g.*, *Hoffman v. Washington Post Co.*, 433 F. Supp. 600, 605 (D.D.C. 1977), *aff'd without opinion*, 578 F.2d 442 (D.C. Cir. 1978); *Cape Publ'ns v. Teri's Health Studio*, 385 So. 2d 188 (Fla. App. 1980); *Peisner v. Detroit Free Press*, 104 Mich. App. 59, 304 N.W.2d 814, 816 (1981); *Kuan Sing Enters. v. T.W. Wang, Inc.*, 86 A.D.2d 549 (N.Y. App. Div. 1982) (1st Dept.),

Taking all the evidence in the light most favorable to the Plaintiff can only establish that the story was wrong and that Mr. Taricani might have done further investigation. That in and of itself is not actual malice. Plaintiff has failed to show that there is sufficient clear and convincing evidence upon which a jury could find that the Media Defendants had actual malice or displayed a reckless disregard for the truth. As such, there is not a genuine dispute of a material fact in this case. Accordingly, this Court grants the Media Defendants' motion for summary judgment.

2

Captain Guilbeault

At his deposition, Mr. Jacob indicated that he could not remember who told him Plaintiff was involved with the ticketing incident. Mr. Jacob identified several individuals with whom he had been in contact and that could have provided the information, but Captain Guilbeault was the only one among them who was still an active member of the Cranston Police Department. Moreover, there are numerous emails and records of telephone calls between the two of them. For purposes of this motion, the Court will infer, as Plaintiff asks this Court to do, that Captain Guilbeault was the source of the information that Mr. Jacob shared with Mr. Taricani. *See Quest Diagnostics*, 93 A.3d at 951 (holding that the Court must view "the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party").

Captain Guilbeault had multiple conversations with Mr. Jacob after the ticketing incident occurred. Captain Guilbeault denied providing Mr. Jacob with any information about Plaintiff or the "Ticketgate" scandal, but maintained that her position required her to talk to retirees who sought records from the Cranston Police Department. The specifics of their conversations were

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aff'd, 58 N.Y.2d 708 (1982); *DiLorenzo v. New York News*, 81 A.D.2d 844, 432 N.Y.S.2d 483 (N.Y. App. Div. 1981) (2d Dept. 1980) (substituted opinion).

not described because of an asserted privilege. Additionally, a large number of questions about Captain Guilbeault's work environment were not answered because they related to the subject matter of her pending discrimination lawsuit against Plaintiff and the City, and this Court previously excluded those matters from the scope of the deposition.

Even assuming that Captain Guilbeault was the source of Mr. Jacob's information, there is no evidence that supports a finding of actual malice. As discussed at length *supra* "actual malice" must be proven by clear and convincing evidence by demonstrating "actual knowledge that the published statement was false" or "reckless disregard for whether or not it was false." *Capuano*, 579 A.2d at 472. "Under this test, actual malice is not synonymous with common-law spite or ill will; therefore, proof of a corrupt motive, spite, ill will, or general hostility will not satisfy the *New York Times Co.* standard." *Major*, 507 A.2d at 941 (citing *Belliveau v. Rerick*, 504 A.2d 1360, 1363 n.1 (R.I. 1986); *DeCarvalho v. daSilva*, 414 A.2d 806, 811 n.2 (R.I. 1980)).

While there is evidence of a grudge between Captain Guilbeault and Plaintiff—specifically, her pending discrimination suit and its underlying facts[11]—there is no evidence other than pure speculation that suggests Captain Guilbeault knew the information she allegedly provided Mr. Jacob was false. *See Beattie v. Fleet Nat'l Bank*, 746 A.2d 717, 728 (R.I. 2000) (holding in a defamation case that speculation was inadequate to create a genuine issue of material fact). *See also* 1 Robert B. Kent et al., *Rhode Island Civil & Appellate Procedure* § 56:4 at 517 (2017-2018 ed.) ("Bald assertions in an attempt to raise some doubt as to material facts when opposing a motion for summary judgment falls short of competent evidence required to demonstrate the existence of any genuine issues of material fact."). Given the familial

[11] The facts underlying Captain Guilbeault's discrimination suit are not in evidence in this matter.

relationship between Plaintiff and Captain Antonucci—the individual who was actually responsible for the ticketing incident—it is not a significant logical leap to conclude that Plaintiff was also involved. As such, even rumor and innuendo suggesting collusion between the two, which spread around the Cranston Police Department, could sound credible to a reasonable person.

Captain Guilbeault's naming Captain Henry is supported by a second, independent source within the Cranston Police Department—Officer Leclerc—reporting Plaintiff's involvement. There is no evidence before this Court suggesting any collusion on their part, other than the two met every morning in Officer Leclerc's office. All that Plaintiff can point to is Mr. Jacob and Captain Guilbeault are telling different stories and therefore there is a genuine issue of fact. But, for purposes of this motion, the Court must and has accepted the fact that Captain Guilbeault told Mr. Jacob that Captain Henry issued the order for excessive ticketing. However, there is no evidence to suggest that she knew this to be false. Plaintiff's counsel contended repeatedly that "everyone" knew Captain Henry was not involved. The Court looks to evidence, not argument, and nothing in the record supports Plaintiff's contention.

Given the exceptionally high evidentiary burden, Plaintiff has failed to show that there is clear and convincing evidence which if believed by a jury would constitute actual malice or a reckless disregard of the truth. Consequently, there is no genuine dispute of a material fact as it relates to this Defendant. Thus, this Court grants Captain Guilbeault's motion for summary judgment.

3

Officer Leclerc

Officer Leclerc was Mr. Taricani's principal source. During his deposition, Officer Leclerc indicated overhearing that Plaintiff was involved in the ticketing incident on two separate occasions while at the police station. He was not sure from whom he had heard it—in both instances Officer Leclerc overheard a conversation, the participants of which were out of his eye line. Both overheard conversations occurred within the restricted area of the police station that would indicate the participants were either Cranston police officers or civilian employees. He testified that he believed the information to be true having heard it from multiple sources. He also credited the information because of Plaintiff's relationship with Captain Antonucci, as well as Plaintiff's role on the union's executive board. Finally, Officer Leclerc credited the information as reliable because Plaintiff stood to lose about $10,000 in contractual wage increases because the contract had been rejected.

Plaintiff contends that Officer Leclerc's account of the facts is "impossible to believe." Plaintiff maintains that a jury could find that failing to ascertain the identities of the individuals that Officer Leclerc overheard discussing Plaintiff's involvement is enough to support a finding of "actual malice." Plaintiff's counsel passionately argued that Officer Leclerc's story was not believable, contending that he and Captain Guilbeault came up with the idea and were "going to peddle this story." (Hr'g Tr. 73:19, Jan. 12, 2018.) Plaintiff contends that Officer Leclerc's story is reckless because Plaintiff's counsel found it "ridiculous" and she doesn't "believe that story" (*Id.* at 69:23-70:10). She asserted that everyone knew Captain Henry was not involved. While the advocacy was passionate, no evidence was presented to the Court to support these contentions. Yet, while the Court must look at evidence in the light most favorable to the

Plaintiff, Plaintiff points to no evidence that suggests Officer Leclerc subjectively doubted Plaintiff's involvement at the time he provided Mr. Taricani with the ultimately inaccurate information. The Court is not bound to accept Plaintiff's theories or assertions that are not supported by evidence.

Officer Leclerc's failure to investigate the statements he overheard is inadequate to support a finding of actual malice. Our Supreme Court has stated:

> "We have held, however, that '[a]s long as the sources of the libelous information appeared reliable, and the defendant had no doubts about its accuracy, the courts have held the evidence of malice insufficient to support a jury verdict, even if a more thorough investigation might have prevented the admitted error.'" *Lyons v. R.I. Pub. Emps. Council 94*, 559 A.2d 130, 136 (R.I. 1989) (quoting *Hall*, 490 A.2d at 505).

There is even less evidence of a personal grudge between Officer Leclerc and Plaintiff than there was with respect to Plaintiff and Captain Guilbeault. Officer Leclerc identified two negative interactions that he has had with Plaintiff during Officer Leclerc's nineteen-year tenure as a police officer: the first occurred over a dozen years ago and was a disagreement over a salary cut. Officer Leclerc made a "twenty-nine five comment"[6] at roll-call to which Plaintiff responded in disagreement. The second, in 2011 or 2012, involved the union executive board denying Officer Leclerc a donation for a law enforcement ride in which he was participating. The request was denied because Officer Leclerc did not voluntarily donate to the union's political action committee. Officer Leclerc stated that he believed that the executive board's denial was unfair. These minor disputes that occurred years prior to the dissemination of information to Mr. Taricani are facially inadequate to overcome Plaintiff's "substantial burden" to prove actual

[6] It is unclear precisely what a "twenty-nine five comment" is, but from the surrounding context in Officer Leclerc's deposition, it appears that this is some sort of complaint process within the police union.

malice. *See Alves*, 857 A.2d at 750. Moreover, as discussed *supra*, "proof of a corrupt motive, spite, ill will, or general hostility will not satisfy the *New York Times Co.* standard." *Major*, 507 A.2d at 941.

Making all inferences in favor of Plaintiff, there is not clear and convincing evidence that would establish actual malice or a reckless disregard of the truth such that there is a genuine dispute over any material fact. Accordingly, Officer Leclerc's motion is granted.

4

Mr. Jacob

As stated previously, this Court, without objection, converted Mr. Jacob's motion to one for summary judgment. The Court afforded all parties the opportunity to submit additional memoranda concerning Mr. Jacob, and none, including Mr. Jacob, have done so.

Plaintiff's claim against Mr. Jacob is inexorably linked to Plaintiff's claims against Captain Guilbeault. Plaintiff has made clear that he believes Captain Guilbeault was the source of Mr. Jacob's information, which was in turn reported to Mr. Taricani—in fact, this belief is the entire basis of Plaintiff's claims against Captain Guilbeault.

As discussed *supra*, it is reasonable to conclude—as Plaintiff suggests that this Court should—that Captain Guilbeault, a senior member of the Cranston Police Department, provided Mr. Jacob with the information he disseminated to Mr. Taricani, as she was his only contact within the department at the time. For purposes of this motion, the Court will assume that to be the case as that puts the evidence in the light most favorable to the Plaintiff. While there may have been flaws in Captain Guilbeault's sourcing of the information,[7] those flaws cannot be attributed to Mr. Jacob. Plaintiff has offered no evidence that would undermine in Mr. Jacob's

[7] The source of Captain Guilbeault's information is not in evidence.

mind that Captain Guilbeault was a credible source for information about the inner workings of the department.

Plaintiff has offered no evidence that suggests Mr. Jacob entertained serious doubts about the accuracy of the information he provided to Mr. Taricani. As the "source[] of the libelous information appeared reliable, and [Mr. Jacob] had no doubts about its accuracy," Mr. Jacob cannot be held liable for defaming Plaintiff, a public official. *See Hall*, 490 A.2d at 505. Consequently, there is no clear and convincing evidence that if believed by the jury could constitute actual malice or a reckless disregard for the truth. As such there is no genuine issue of material fact. Accordingly, this Court grants Mr. Jacob's converted motion for summary judgment.

V

Conclusion

For the reasons articulated above, Defendants' motions are granted. Plaintiff is a public official, and as such, defamation claims brought by him are held to the higher "actual malice" standard established by the U.S. Supreme Court, which he cannot show any Defendant meets. In addition, Plaintiff's other claims based upon these facts must also fail, as Plaintiff's defamation claim cannot be rebaptized as another tort to evade the protections of the First Amendment.

Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Russell Henry v. Media General Operations, Inc., et al.

CASE NO: PC-2014-2837

COURT: Providence County Superior Court

DATE DECISION FILED: April 4, 2018

JUSTICE/MAGISTRATE: Licht, J.

ATTORNEYS:

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