Lakatos v. Office of Prof'l Regulation, Vt. Sec'y of State, No. 588-10-06 Wncv (Toor, J., Dec. 3, 2008)

STATE OF VERMONT
WASHINGTON COUNTY

PETER A. LAKATOS,D.M.D., Plaintiff v. OFFICE OF PROFESSIONAL REGULATION, VERMONT SECRETARY OF STATE Defendant	SUPERIOR COURT Docket No. 588-10-06 Wncv

RULING ON MOTION FOR SUMMARY JUDGMENT

This is a defamation case brought by plaintiff Lakatos against the Office of Professional Regulation ("OPR") in connection with postings about him on its website.[1] The postings related to the status of his dental license, which has been the subject of ongoing litigation for several years. Lakatos alleges that they were defamatory and seeks damages as a result. OPR has filed a motion for summary judgment.

Undisputed Facts

The parties agree on the following facts for purposes of the motion. Documents attached to OPR's motion as Exhibits A-D show the web pages during the period December 13, 2005 to April 8, 2008. The web pages showed that Lakatos' dental license was active and listed various status reports under a heading "Disciplinary Information."

[1] The complaint originally included a request for mandamus as well, but that claim was dismissed by a prior judge.

Those included the words "Charges Filed," "Conditioned," "Suspension," and Reversed/Remanded," with start and stop dates for each, as well as notes stating that some actions were "under appeal." Later versions also show "App Officer Affirmed," "Superior Ct Reversed/Remanded," and "Supreme Ct Rev/Remand." The web page also had links to certain scanned documents.

In 2000, OPR began posting disciplinary information regarding professionals it regulates on its website. The data is displayed in pre-set fields that are drawn from OPR's database. Entries are made in the database by staff at various stages of licensing proceedings.

Charges were filed against Lakatos by OPR on October 26, 2001. In September of 2003 his license was suspended by the Dental Board for six months. The Board's decision was posted as a link from the website, and the six-month suspension was listed on the webpage. The fact that conditions were imposed on his license was also posted.

Lakatos sought a stay from the Superior Court and the Supreme Court. Each request was denied. Lakatos appealed the suspension to this court. On December 13, 2005, this court reversed the Appellate Officer, vacated the Board's decision and remanded to the Board for a new hearing. Sometime after that decision was issued, OPR updated the website to show that Lakatos' license was no longer "conditioned." The web page at this point also showed that the conditions had terminated on the date of the court's decision, and that the suspension had terminated in April of 2004.

OPR appealed this court's decision to the Supreme Court, which reversed this court but nonetheless remanded to the Board for further proceedings. After the Supreme Court's decision in October of 2007, the website was updated to show the decision.

The parties then reached a stipulated resolution, effective April 8, 2008, by which Lakatos did not dispute certain findings of unprofessional conduct and which imposed conditions on Lakatos' license requiring additional training. The website was then updated to show only that the license had been suspended and conditioned, and the various intermediate steps in the process were no longer listed. In addition, the only documents linked to the site were the charges and the stipulation.

The Claims

The complaint asserts that the website postings constituted defamation by OPR. Specifically, Lakatos argues that the website contained false and misleading information during the period between this court's order vacating the Board decision (December 13, 2005) and the date of the stipulated resolution (April 10, 2008). What he asserts is as follows:

1. The website should no longer have shown any reference to a suspension or condition, even with end dates that had already passed, after the court decision vacating the Board order.

2. The website should have listed the suspension and condition as stayed.

3. The website incorrectly suggested that this court's decision was void the day it was issued.

4. The website should have included links to all the decisions, not just the Board decisions.

See, Plaintiff's Opposition to Motion for Summary Judgment, pp. 8-11.

Conclusions of Law

In its summary judgment motion, OPR argues that there were no false statements, and/or the statements were "substantially true"; that OPR has an absolute privilege for such statements; that OPR has a qualified privilege for such statements; and that sovereign immunity bars the claims here. Lakatos responds that whether there were false statements or not, and whether they were "substantially true," is a question of fact for the jury; that whether any privileges apply is also a jury question; and that sovereign immunity does not apply here.

1. Whether the Website Contained False Statements

The court agrees that the issues of whether there were any false statements, and whether the statements were "substantially true," are disputed questions not amenable to summary judgment.

2. The Issue of Absolute Privilege

OPR argues that because it is required by law to publish disciplinary information, citing 3 V.S.A. § 131(c), it has an absolute privilege against claims such as Lakatos'. The statute does not expressly direct that a website be used, but does direct that some sort of public registry be created. It mandates certain details that must be listed when, as here, disciplinary charges are brought. These are as follows: the name and address of the licensee and the complainant, the formal charges, the findings and conclusions of the board, any available transcript of the hearing, exhibits admitted at the hearing, stipulations filed with the board, and "final disposition of the matter by the appellate officer or the courts." Id. The statute does not require that details of intermediate steps towards final disposition be listed, nor does it require identification of any stays of board

orders. In fact, it specifies that no other information aside from what the statute lists is to be made public. Id. § 131(d).

OPR argues that it was mandated to make all of the disputed postings. The court is not persuaded. What Lakatos objects to in the postings is specified in his Opposition, as noted above. The specific objections are that (1) the website should no longer have shown any reference to a suspension or condition, even with end dates that had already passed, after the court decision vacating the Board order; (2) the website should have listed the suspension and condition as stayed; (3) the website incorrectly suggested that this court's decision was void the day it was issued; and (4) the website should have included links to all the decisions, not just the Board decisions.

The first three objections relate to details in the website that are not mandated by statute. The statute does not require a listing of start and stop dates for suspensions, whether suspensions are stayed, or start and stop dates for court decisions. Thus, OPR was not required by statute to provide them and cannot assert an absolute privilege as to those postings.[2]

The fourth objection, however, relates to a specific requirement of the statute: that OPR provide the findings of fact, conclusions of law and order of the board. 3 V.S.A. § 131(c)(2)(C). Because that specific document is required to be available, the court finds that OPR was mandated to make it available to the public. Lakatos' argument that

[2] The court rejects OPR's argument that because some records must be publicly available, whatever related information it posts is protected. If, when receiving a favorable court ruling in a case that was required to be publicly posted, OPR posted a statement saying "we won! The lying scumbag lost!" it seems unlikely that the statement would be privileged merely because it related to the required posting. Although OPR cites a case holding that an absolute privilege applies to a broad scope of disclosures about unprofessional conduct, the case turned not on the common law privilege for mandated reporting, but on a court rule providing immunity for acts of the board of bar overseers "in the course of official duties." Johnson v. Board of Bar Overseers, 877 N.E. 2d 279, 2007 WL 4234100 * 1 (Mass. App. 2007).

because that was available, OPR also had to provide other decisions, would contradict the statutory requirement.

The question, then, is whether compliance with the statute on that last point creates an absolute privilege for OPR. "One who is required by law to publish defamatory matter is absolutely privileged to publish it." Restatement (Second) Torts § 592A. For example, a teacher sued a school board for publishing the findings of misconduct on which its dismissal was based. The dismissal was later overturned on appeal. The court held that the board had an absolute privilege for the publication because it was required by statute to issue a public decision. Freier v. Independent School District No. 197, 356 N.W.2d 724, 729 (Minn. App. 1984). The court noted that "the teacher's mode of vindication was to challenge the findings against him" on appeal, not to bring a defamation action. Id. at 730. *See also*, Anderson v. Beach, __ N.E.2d __, 2008 WL4722558 * 2-3 (Ill. App. 2008) (police officer absolutely privileged for reporting fellow officer's alleged misconduct to supervisor, because department rules required report); Weber v. Cueto, 568 N.E. 2d 513, 517-19 (Ill. App. 1991) (lawyer absolutely privileged for making professional conduct complaint mandated by ethics rules).

Here, the court finds that the posting of the board decision was mandated, and thus its posting cannot be the basis for a defamation claim, regardless of whether its posting might have been misleading in the absence of other decisions being posted.

3. The Issue of Qualified Privilege

OPR asserts that its actions are protected by two types of qualified privilege. The court will address each in turn.

a. Communications Affecting Third Parties

The Restatement of Torts recognizes a qualified privilege for defamatory statements made by one with a reasonable belief that "there is information that affects a sufficiently important interest of the recipient or a third person." Restatement (Second) of Torts § 595. However, the evidence presented by the State does not allow the court to rule as a matter of law that such a qualified privilege applies here. Although the court accepts the general proposition that the point of the website is to convey important information to consumers of dental services[3], that is not the issue here. What Lakatos argues is that specific entries on the website were false or misleading. OPR's statement of material facts does not set forth any specific facts from which the court can find that the *specific postings* at issue here were posted because someone at OPR had a reasonable belief that they were important to the public. Thus, on the current state of the record the court cannot grant summary judgment on this basis.

b. Communications Required or Permitted

A qualified privilege also applies to public statements made by "inferior administrative officers" of a state that are "required or permitted in the performance of his [or her] official duties." Restatement (Second) Torts § 598A. OPR argues that the postings at issue here were made under such circumstances.

It is undisputed that the postings were actually placed on the website by lower-level administrative staff. It is also undisputed that the administrative assistant who made the entries into the website was acting within the scope of her employment as part of her

[3] *See, e.g.*, 3 V.S.A. § 131(a)(purpose of posting information is, inter alia, "to fulfill the public's right to know of any action taken against a licensee" for unprofessional conduct).

official duties. Statement of Material Facts ¶ 26.[4] Thus, as to the making of the entries themselves the court finds that a qualified privilege attaches.

The issue regarding the actions of the Director of OPR is a separate question. OPR asserts that the Director of OPR, who allegedly made the decisions about what would be posted, is also an "inferior officer," without any support for such a statement. This appears correct, however. Id., comment d and § 591(explaining that the privilege applies to all state employees to whom an executive absolute privilege does not apply, and that the absolute privilege generally applies to governors and cabinet level officers).

OPR's statement of material facts states that the Director "made the decision to post certain information regarding licensing" on the website, and that he "has discretion to decide the manner in which" disciplinary actions are made public in compliance with 3 V.S.A. § 131(c). Statement of Material Facts ¶¶ 4-5. These allegations are supported by the affidavit of the Director. Lakatos responds to these statements by saying they are disputed, but provides no factual support for the dispute. This is insufficient under Rule 56, which provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, *but must set forth specific facts showing that there is a genuine issue for trial*. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

V.R.C.P. 56(e)(emphasis added). Thus, the court finds the facts at issue are, as a matter of law, undisputed. Those facts establish that the Director was acting within the realm of

[4] Although Lakatos responds to this fact by saying "disputed," all he disputes is which administrative staff member did the posting. *See* Plaintiff's Separate Statement of Undisputed Facts in Opposition to Motion for Summary Judgment, ¶ 26. OPR's reply includes an affidavit from Rita Knapp clarifying that she was in fact the person who made the entries Lakatos was challenging. Lakatos argues that the court should not consider the clarification, and fails to respond to the supplemental statement of material facts. The court, however, sees no reason not to consider them.

decisions "required or permitted in the performance of his [or her] official duties." Restatement (Second) Torts § 598A. As such, the qualified privilege attaches.

The next question, then, is whether Lakatos has set forth adequate evidence of malice to overcome the qualified privilege. Lent v. Huntoon, 143 Vt. 539, 548 (1983) (qualified privileges "may be overcome by a showing of malice."). The burden is on the plaintiff to prove malice "by clear and convincing proof." Id. at 549. As our Supreme Court has explained, "the clear-and-convincing-evidence standard represents a very demanding measure of proof." In re N.H., 168 Vt. 508, 512 (1998). It is "substantially more rigorous than the mere preponderance standard usually applied in the civil context, and is generally said to require proof that the existence of the contested fact is 'highly probable' rather than merely more probable than not." Id.

Although Lakatos argues that the issue of malice is for the jury, "the sufficiency of evidence of actual malice [is] a question of law." Palmer v. Bennington School Dist., Inc., 159 Vt. 31, 39 (1992). *See also*, Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 685 (1989) ("question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law"). Thus, "the sufficiency of a … showing of actual malice may be decided by a trial judge on a motion for summary judgment." Id.[5]

Lakatos argues that malice may be inferred here from the facts that the website left out details with regard to stays or lack thereof, and failed to remove the board decision from the website after it was vacated. He is correct that malice may be inferred

[5] As has been noted by others, the terminology used by courts to discuss malice can be confusing (e.g., "actual malice" versus "simple malice."). *See* Crump v. P & C Food Markets, Inc., 154 Vt. 284, 293 n. 1 (1990). For purposes of this discussion, the court concludes that the differences in terminology are not of significance.

from appropriate facts. Lent, 143 Vt. at 549. However, Lakatos points to no such evidence. Although he refers ominously to OPR's "scheme to place Dr. Lakatos in a false light," he offers no evidence at all to support that dramatic allegation. Plaintiff's Opposition to Motion for Summary Judgment, p. 11. Lakatos offers absolutely no motive for OPR to intentionally misrepresent the facts, no proof of a vendetta against him, and no proof that any employee at OPR knew they were placing anything false on the website. While he argues that state of mind is a jury question, he cannot survive summary judgment merely by speculating that there might be some unknown mean streak to which no one has yet confessed. *See, e.g.*, Morgan v. Kooistra, 941 A.2d 447, 456 (Me. 2008) (plaintiff provided "no evidence of actual malice other than his own accusations … More than bald accusations must be presented in order to send the issue of abuse of a conditional privilege to the fact-finder").

Lakatos concedes that he "is not aware of the inner workings of the [OPR] officer and the personal motivations," yet offers no factual support for disputing the administrative worker's sworn statement that she believed the information she entered into the website to be true and accurate. Plaintiff's Separate Statement of Undisputed Facts in Opposition to Motion for Summary Judgment, ¶¶ 26-28; OPR Statement of Undisputed Material Facts ¶ 27.[6]

The court concludes that no reasonable jury could find "clear and convincing" evidence of malice on these facts. Thus, the court finds that the qualified privilege protects the alleged defamatory statements here.

4. Sovereign Immunity

[6] As noted above, the only allegation Lakatos makes to counter the claim of Ms. Knapp is that she said someone else entered some of the data. As noted above, that has been clarified by a later affidavit from her.

OPR asserts that its actions are also protected by sovereign immunity. Because the court's ruling on the issue of qualified immunity disposes of the case, the court does not reach this question.

Order

The court grants OPR's motion for summary judgment on the grounds that (1) the posting of the board decision on the OPR website was protected by an absolute privilege for statutorily mandated postings, (2) all of the disputed actions were protected by qualified immunity, and (3) Lakatos has not produced evidence of malice sufficient to overcome the qualified immunity. Judgment will be entered for OPR.

Dated at Montpelier this 2nd day of December, 2008.

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Helen M. Toor
Superior Court Judge