

IN THE SUPREME COURT OF OHIO

07-0297

CHARLES S. SPINGOLA :  
Appellant :  
-vs- :  
SINCLAIR MEDIA II, INC. et al., :  
Appellees :

On Appeal From The Franklin  
County Court of Appeals  
Tenth Appellate District

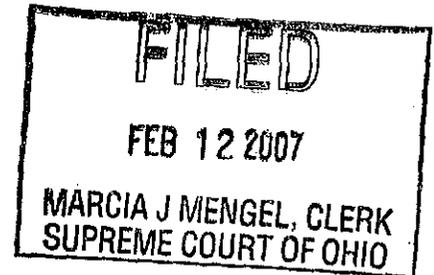
Court Of Appeals  
Case No. 06AP - 402

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT CHARLES S. SPINGOLA

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**EXPLANATION OF WHY THIS CASE  
IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST  
AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This is a defamation action originally brought by Plaintiff-Appellant Charles S. Spingola against three distinct sets of Defendants<sup>1</sup>, each of whom published false and defamatory statements about Spingola's conduct on June 23, 2001 when he burned the Homosexual Flag as a counter-demonstration to the Homosexual Parade in Columbus, Ohio. This case presents issues of great public and general interest as well as substantial constitutional questions affecting the right to one's reputation, freedom of speech, freedom of the press and the right to trial by jury.

As to public or great general interest, this case qualified more than most cases that reach this Court as evidenced by the decisions of the Outlet Defendants and the Sinclair Defendants to broadcast the events underlying this controversy as their lead television news story at 6:00 p.m. and 11:00 p.m. on June 23, 2001. Those broadcasts no doubt covered a geographical area that reaches millions of viewers. Moreover, there is unrebutted evidence in this record that the defamatory accusations at the core of this case subjected Mr. Spingola to significant public criticism on talk radio in the Columbus, Ohio area for weeks thereafter.

As to substantial constitutional questions, this case is a collision between (i) the First Amendment rights asserted by reckless television media, and (ii) a good man's right to engage in his own free speech activities without having his reputation savaged by false and misleading television broadcasts that portray him as a violent felon. This collision of rights raises important issues as to the proper scope and application of the constitutional libel standard first established

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<sup>1</sup> The Appellees before the Court of Appeals were Sinclair Media, II, Inc, WSYX-TV6 and Tram Mai ("Sinclair Defendants"); Outlet Broadcasting, Inc., WCMH TV4 and Leslie Siegel ("Outlet Defendants"); and former Columbus City Attorney Janet Jackson and her spokesman Scott Varner ("City Defendants"). This appeal is limited to Mr. Spingola's claims against the Sinclair Defendants and the Outlet Defendants.

for public officials in *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 84 S.Ct. 710, and extended to public figures in *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130, 87 S.Ct. 1975.

The *New York Times* standard requires public figures to establish that the defamation was published with “actual malice”, a constitutional term of art defined as publishing “with knowledge that it was false or with reckless disregard of whether it was false or not.” 376 U.S. at 279-80. Mr. Spingola submits that significant constitutional damage has been done by the Court of Appeals decision, because of its disregard of a single governing principle in the summary judgment context:

The issue of actual malice calls into question the defendant’s state of mind. It does not lend itself to summary disposition.

*Hutchinson v. Proxmire* (1979), 443 U.S. 111, 120, n.9, 99 S.Ct. 2675.

**A. Credibility Issues Preclude Summary Judgment As To Actual Malice.**

Unlike most media defamation cases, the case against the Outlet Defendants involves the report of crime *that did not happen* by a TV news reporter (Siegel) who was an eyewitness to the entire event and whose photographer filmed the event as it occurred. Consequently, the determination of whether the Outlet Defendants published with actual malice does not turn primarily on traditional defamation concerns such as selective or shoddy investigation, reliability of sources, or interpretations of statements made elsewhere. Rather, they turn on the credibility of Siegel herself, based upon a combination of (i) undisputed facts, and (ii) disputed facts arising from Siegel’s claim to have personally witnessed things that *would have* supported a good faith belief that a crime had occurred but which, according to Spingola, did not occur.

As to the case against the Sinclair Defendants, it turns not so much on fact disputes as on the liberty granted to them by the Court of Appeals to grossly exaggerate a peaceful flag burning

into a violent crime, and to engage in some serious *post hoc* sophistry to insist that the plain meaning of their TV broadcasts (fighting and violence) actually meant something else (speech).

None of the cases cited by the Court of Appeals present similar issues of fact. While giving lip service to summary judgment principles, the Court of Appeals disregarded evidence favorable to Spingola and construed other disputed facts to the benefit of the defendants. Such a decision subverts the delicate constitutional balance in public figure defamation cases.<sup>2</sup>

**B. Tension Between Freedom Of Press And Rights To Free Speech & Reputation**

The Court of Appeals decision heightens the “tension [that] necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury,” *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, 342, 94 S.Ct. 2997. Far from protecting First Amendment freedoms, such a decision does constitutional harm:

The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.

*Gertz* at 341, citing *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

But the constitutional harm is more far reaching than the injustice inflicted on one man’s reputation. “Neither the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust and wide-open’ debate on public issues.” *Gertz* at 340. With all due respect to the U.S. Supreme Court and the Supreme Courts of all 50 states, it is long overdue for them to recognize that the political correctness of too many media outlets is now **an impediment** to the “uninhibited, robust, and wide-open” debate that is allegedly desired on important public issues. Unwilling to tolerate public opposition to their favored Homosexual

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<sup>2</sup> Mr. Spingola stipulated that he is a public figure for purposes of this case precisely because of his prior publicity for protests against the Homosexual Parade. Having injected himself into the debate on this important public issue, he deserves constitutional protection from deliberate lies that demonize him and his message.

agenda, and being utterly indifferent to the First Amendment implications of Mr. Spingola's peaceful flag burning, *State v. Lessin*, 67 Ohio St.3d 487, 1993-Ohio-52, 620 N.E.2d 72, these media defendants did to Mr. Spingola what media outlets too often do to disfavored speakers: attack the messenger. It understates the problem to say that such media power can drive true debate on sensitive issues underground. Whatever else the framers of the U.S. Constitution intended to achieve with the First Amendment, it is doubtful that they intended for the right of a "free press" to stifle debate by others on important public issues.

### STATEMENT OF THE CASE AND FACTS

#### 1. A Peaceful Flag Burning On A Public Sidewalk.

On June 23, 2001, Mr. Spingola attended the 2001 Homosexual parade in downtown Columbus with family and friends. Spingola and Tom Meyer intended to burn a Homosexual Flag in counter-protest to the morally repugnant Homosexual agenda. After he gathered with others near the intersection of Broad and High Streets, Spingola was approached for interviews with TV reporters and photographers. Spingola *calmly*<sup>3</sup> spoke with multiple media outlets and then announced that he was going to burn the Homosexual flag.

At Spingola's request, Meyer produced the Homosexual Flag and a plastic container of lamp oil. Meyer then poured a small amount of lamp oil onto the flag. Spingola never touched the lamp oil or handled the container, nor was any gasoline or lamp oil ever sprayed or discharged in the direction of any bystander.<sup>4</sup> In fact, the container had no spray mechanism and

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<sup>3</sup> Spingola disputes the Defendants' characterization, as adopted by the Court of Appeals, that he was volatile at the scene. Spingola's evidence is that the parade itself was very loud, that he only raised his voice to a level that allowed him to be heard above the parade noise, and that nothing he did or said approached the noise level generated by the parade. The Court of Appeals on the other hand, has allowed the Sinclair Defendants in particular to exaggerate the intensity of the situation, blame Spingola for it, and then use their exaggerated and over-hyped reporting as a defense to their inaccurate attack on Spingola.

<sup>4</sup> It is beyond curious that the Court of Appeals used the passive voice to avoid mentioning who handled the container. Opinion at ¶3. By doing so, the Court sidestepped a disputed fact that puts the credibility of Leslie.

Meyer handled it in a manner that prevented any discharge onto bystanders. Immediately after Spingola lit the flag with a match, he and Meyer were arrested and removed from the scene by City of Columbus police officers. Spingola and Meyer submitted peacefully to the arrests, and no fighting or other violence erupted while they were present.

According to Spingola, even if Siegel and Mai were informed by “reliable” police sources that Spingola would be charged with a felony, aggravated assault and/or menacing, or some other type of violent crime, Siegel and Mai would have had to entertain serious doubt about the charge based upon what they and dozens of other people had witnessed. To the extent that Siegel and Mai reported or suggested that his activities involved any such conduct, they were deliberately lying or distorting what had occurred in their immediate presence.

**2. False Accusation Against Spingola By Homosexual Activist Andrea Critchett.**

After Spingola’s arrest, a Homosexual activist named Andrea Critchett<sup>5</sup> reported to police that Spingola had intentionally doused her with gasoline prior to lighting the flag. Critchett’s accusation was a fantastic fabrication contradicted by both Spingola and Meyer.

**3. Defamatory Broadcasts By TV Reporters Who Witnessed Everything.**

Appellees Leslie Siegel (TV4) and Tam Mai (TV6) were present with photographers and stood within five feet of Spingola during the flag burning and arrest. Both of them broadcast news reports that evening and the next day portraying Spingola as a violent felon.

**A. The Defamatory Broadcasts By Outlet Defendants (TV4).**

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Siegel directly in issue. Siegel claims both that she observed Spingola handling the container and that her pants leg was sprayed with “whatever Mr. Spingola was handling.” If a jury believes Spingola, it could reasonably conclude that Siegel concocted this lie to justify her republication of Andrea Critchett’s false accusation.

<sup>5</sup> The Court of Appeals’ Opinion (¶3) refers to Critchett merely as “a security officer.”

The Outlet Defendants (TV4) broadcast Siegel's reports about the Homosexual Parade, which included a republication of Critchett's false accusation that "Spingola sprayed her with gasoline during the flag burning." Siegel also stated on the 6:00 news that day that Spingola would be charged with either "aggravated arson or aggravated assault." Even though she had been present for the entire incident and had to know that Spingola had been calm and committed no such crime(s), Siegel further smeared Spingola by stating that "[f]or the most part, police say protestors were calm and restrained, except one man (Spingola)."

**B. The Defamatory Broadcasts By Sinclair Defendants (TV6).**

The Sinclair Defendants (TV6) broadcast Mai's reports about the Homosexual Parade, greatly exaggerating Spingola's behavior to portray peaceful behavior as a violent crime. Although the Sinclair Defendants did not explicitly report Critchett's false accusation, they conveyed the undeniable message that Spingola had committed a criminal act of violence against someone. The TV6 studio "Big Story" graphic that opened the 11:00 p.m. broadcast included the prominent words "Festival Fight." Mai's report began with a favorable portrayal of the Homosexual Parade, but soon shifted to coverage of Christian counter-protesters: "And that's when violence erupted." After referencing Spingola's demonstrations in years past, TV6 showed video footage of Mr. Spingola *calmly* stating to the camera:

We're trying to fight them. We're not going to lay down for these queers trying to get in the minds of the children.

After showing video of Spingola burning the flag in disregard of police warnings and then being arrested, Mai stated that "another fight broke out" minutes later, a statement accompanied by video footage of several City of Columbus police pounding on teenage girls to gain possession of the burned Homosexual Flag.

Although Mai's 11:00 studio report suggested that TV6 did not yet know what crime Spingola would be charged with, Mai's 6:00 field report left no doubt:

Two people were arrested, including Spingola. He will be charged with a felony, either aggravated assault or arson. Two juveniles involved in the second fight could be charged with obstruction of justice. Gabe, luckily no one was badly hurt.

Neither of the TV6 broadcasts qualified the terms "fight" or "violence" to suggest that Spingola's "violent" conduct was a mere "verbal" argument with police, nor did the Sinclair Defendants ever retract the report that Spingola would be charged with a felony, nor was there ever any discussion about retracting or clarifying the report when they learned otherwise.

TV6 did two other things to package its story. Although not themselves defamatory toward Spingola, these two items certainly constitute circumstantial evidence of a design by the Sinclair Defendants to tar Spingola. First, TV6 aired a comment by one bystander (Deborah Fisher), whose content Mai could not explain but which undoubtedly pointed back to Spingola, criticizing unnamed protestors for "[tear] gassing or macing people."

Second, TV6 followed the Spingola story with an out-of-context, insignificant sports item about the trade of infamous "bigot" and baseball pitcher John Roker. With a photograph of the nasty looking Roker on the screen behind the news anchor, the anchor began the story:

One of the most controversial athletes in sports and a man whose name is practically synonymous with intolerance is now an Ohioan.

Aside from the agenda-driven goal of linking Spingola to Roker, who was known more as a bigot at that point in his sinking career than for any athletic achievement, it is hard to imagine why such an insignificant sports story was reported so early in the news segment.

**4. What The Reporters Actually Witnessed.**

**A. Leslie Siegel's Testimony, Construed Most Favorably To Spingola.**

Siegel was within three or four feet of Spingola during the incident and did not see him deliberately throw gasoline on anyone, including Critchet. Nor did Siegel see Spingola do anything she would characterize as "violent" aside from the flag burning. Yet, Siegel did not bother to ask police what Spingola had done to justify charges of aggravated assault or aggravated arson, nor did she feel obliged to do so:

I was repeating what I had learned from officers... since they do the charging, that is what we reported.

Siegel believes there is nothing morally wrong with homosexual activity. Moreover, Siegel and her photographer actually rode on a Gay Pride float during the Homosexual Parade.<sup>6</sup>

**B. Tram Mai's Testimony, Construed Most Favorably To Spingola.**

Tram Mai interviewed Spingola immediately prior to the flag burning and was within three feet of him when he burned it. Leslie Siegel and her TV4 photographer were also nearby. Police were on the scene before the flag burning started. Mai conceded at deposition that Spingola was never physically violent during the incident. "He wasn't in a physical act of violence with anyone. It was verbal.... That was clearly shown in the video that there was no physical violence from Mr. Spingola. Yet, Mai reported at 6:00 that Spingola "will be charged with a felony, either aggravated assault or arson" on the basis of a last minute phone call from her source at the City Police Division. Mai explained:

[B]ecause he had gotten back to us much later than we had wanted him to – we're talking probably minutes before the live shot – that's what he told us.

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<sup>6</sup> Siegel cited her photographer's knee injury as one reason for riding on the Homosexual float. Because personal bias can be circumstantial evidence in the determination of actual malice, a fact finder would be entitled to consider Siegel's ride on the float as evidence of her sympathy of the Homosexual agenda, notwithstanding the photographer's injury. The fact finder may doubt, for example, that Siegel would have likewise taken a ride on a float sponsored by the America Nazi Party at a KKK Parade.

And I quickly tried to put it on the air. Then afterwards for the 11:00, obviously, that information had changed because he had called back and corrected himself.

After conceding in deposition that Spingola was non-violent, Mai stated in an affidavit that the “violence” that “erupted” at the parade began with the incident involving Spingola. However, all of the factors described by Mai to support her characterization involve non-violent speech or the conduct of others in response to the flag burning: (i) The message on Spingola’s clothing; (ii) Spingola’s loud speech and use of a bullhorn; (iii) Spingola’s disagreement with the police over his right to burn the flag; (vi) Spingola’s comment about “trying to fight them”<sup>7</sup>; and (v) the general commotion around Spingola’s flag burning scene.

**C. Siegel and Mai Offer Inconsistent Testimony About The Flag Burning Scene And Andrea Critchet’s Behavior.**

Having reported Critchet’s gasoline “dousing” accusation, Siegel later testified that she remembered Critchet screaming about having gasoline on her and that Critchet was immediately sprayed down with water. Yet, Mai observed the entire incident right next to Siegel without ever noticing Andrea Critchet. Mai’s first recollection of Critchet came when she viewed the video of Siegel’s TV4 report. As to the day of the flag burning, Mai stated: “I don’t remember Mrs. Critchet at all... I did not know there was a Mrs. Critchet involved in this.

**5. Procedural History**

On September 23, 2003, Mr. Spingola refiled a *Complaint For Money Damages* in the Franklin County Court of Common Pleas against the Outlet Defendants, the Sinclair Defendants, and the City Defendants. (The claims has been previously filed but dismissed without prejudice.)

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<sup>7</sup> Mai understood this comment by Spingola to mean political and public opposition to the Homosexual agenda, not fighting in a physical sense. Moreover, contrary to Mai’s spin on the meaning of her report, Siegel agreed that “violence erupting” generally connotes physical violence, not verbal disagreement.

In September 2004, the Outlet Defendants and the Sinclair Defendants moved for summary judgment. On April 4, 2006, the trial court entered a *Decision And Entry* granting summary judgment in favor of the Outlet Defendants and the Sinclair Defendants. Mr. Spingola filed a timely appeal. On December 28, 2006, the Franklin County Court of Appeals entered an *Opinion and Judgment Entry* affirming the judgment of the trial court. The Court of Appeals erred by disregarding direct and circumstantial evidence of actual malice, and by construing conflicting facts in favor of the Defendants. In support of his position, Mr. Spingola presents the following arguments.

### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

#### **Proposition of Law #1**

**WHEN A TELEVISION REPORTER HAS REASON TO DOUBT THAT A CRIME WAS COMMITTED BECAUSE OF HER PERSONAL OBSERVATIONS OF THE ACCUSED DURING THE ALLEGED CRIME, REPUBLISHES THE FALSE ACCUSATION ANYWAY, AND LATER JUSTIFIES HER REPORT BY STATING THAT SHE WITNESSED EVENTS THAT DID NOT OCCUR, A JURY SHOULD DECIDE ISSUES OF CREDIBILITY AND ACTUAL MALICE.**

This issue relates to the liability of the Outlet Defendants, and is directed to the befuddling refusal by the Court of Appeals to attribute relevance to Siegel's claim that (i) she saw Spingola handle the gas container, and (ii) whatever he was handling sprayed onto her pants. "Whether Siegel herself was splashed with the fluid ...is immaterial." Opinion at ¶27. The Court of Appeals has chosen to ignore a fact conflict to which Siegel herself is a party, and which goes to the core of whether Critchet fabricated, and Siegel knowingly republished (or republished with doubts), the false accusation.<sup>8</sup> Such an application of the summary judgment

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<sup>8</sup> "[O]ne may not avoid the consequences of making a libelous statement merely by saying that he is repeating the words of another, even when that person is identified....[T]he general rule is that one who repeats a libelous remark is liable for his republication." *Theiss v. Scherer*, 396 F.2d 646, 648 (6<sup>th</sup> Cir. 1968)(applying Ohio law). Spingola submits that this principle likewise applies to Siegel's reliance on a secondary police source when Siegel herself had a first-hand reason to doubt that a violent crime had occurred.

standard for defamation cases runs afoul of the Supreme Court's articulated principles for determining "actual malice" and deprives Mr. Spingola of his right to a trial by jury.

The U.S. Supreme Court has established a heightened standard for summary judgment in constitutional libel cases. A court must be guided by the "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists – that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). While discussing that principle, the Supreme Court stated:

Our holding that the clear-and-convincing standard of proof should be taken into ruling on summary judgment motions does not denigrate the role of the jury. *It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.*

*Id.* at 255 (citations omitted, emphasis supplied).

In *St. Amant v. Thompson* (1968), 390 U.S. 727, 731, 88 S.Ct. 1323, the Court defined actual malice as "sufficient evidence to permit the conclusion that the defendant in fact entertained doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for the truth or falsity and demonstrates actual malice." The court further stated:

The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. *Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant [or] is the product of his imagination... Nor will they be likely to prevail when the publisher's allegations are so inherently*

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*improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt... the accuracy of his reports.*

*Id.* at 732 (emphasis supplied). Siegel's claim to have been personally hit with fluid handled by Spingola is sufficient for the denial of summary judgment under this standard.

However, in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), the Supreme Court held that "a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence", and allowed the jury to resolve questions of disputed fact which, in conjunction with the undisputed facts, could have led to a reasonable conclusion that actual malice existed. Courts have recognized a variety of acts or omissions that qualify as circumstantial evidence probative of "actual malice". They include the failure to investigate, or to question an informed source, *Sharon v. Time, Inc.*, 599 F.Supp 538, 585 (S.D.NY 1984); reliance on questionable sources, or other conduct which "may tend to show that a publisher did not care whether an article is truthful or not, or perhaps that the publisher did not want to discover facts which would have contradicted his source," *Connaughton v. Harte-Hanks Communications, Inc.*, 842 F.2d 825, 846-47 (6<sup>th</sup> Cir. 1988); "the purposeful avoidance of the truth", *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. at 691; proof of common law malice, *Bose Corp. v. Consumers Union of United States*, 692 F.2d 189, 196 (1<sup>st</sup> Cir. 1982); knowingly or recklessly misstating the evidence or overstating the accusation to make it seem more convincing or condemnatory than it is, *Westmoreland v. CBS, Inc.*, 596 F.Supp. 1170, 1174 (S.D.N.Y. 1984); and "selective reporting" designed to reach a pre-conceived result. *Airlie Foundation, Inc. v. Evening Star Newspaper Co.*, 337 F.Supp. 421, 429 (D.D.C. 1972). When strong circumstantial evidence exists, actual malice may be inferred even where the defendant [publisher] protests his innocence. *Hunt v. Liberty Lobby*, 720 F.2d 631, 644

(11<sup>th</sup> Cir. 1983). Although a publisher does not have an absolute duty to investigate, he cannot feign ignorance or profess good faith when there are clear indications present which bring into question the truth or falsity of defamatory statements. *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 538 (7<sup>th</sup> Cir. 1982); *Fitzgerald v. Penthouse Intern'l, Ltd.*, 691 F.2d 666 (4<sup>th</sup> Cir. 1982).

In addition to disregarding Siegel's disputed claim that Spingola had sprayed her with fluid, the Court of Appeals decision forecloses a fact finder from considering the cumulative weight of the following circumstantial evidence:

- (a) The spectacularly bold and violent (i.e., improbable) nature of Spingola's alleged conduct, committed in a large crowd of people, police and TV photographers;
- (b) Siegel's failure to see Spingola deliberately throwing gasoline on anyone, including Critchet;
- (c) The failure of Siegel's TV photographer to record the alleged act;
- (d) Siegel's failure to interview Andrea Critchet, as well as Siegel's lack of recollection of anyone else she interviewed with respect to the published allegation;
- (e) Siegel's willingness to report that Spingola was to be charged with "either aggravated assault or aggravated arson" when she did not see anything that she would characterize as an act of violence;
- (f) Defendant Mai's testimony that (i) she was near Siegel during the flag burning and arrest but (ii) Spingola "never displayed...any conduct or action inconsistent with just trying to get the flag lit."
- (g) The contradiction between Mai's testimony that she did not see any fluid sprayed into the crowd, that she did not hear anyone claim that Spingola had sprayed gas into the crowd, and that she did not even know that Critchet existed that day and Siegel's testimony that all of these things happened.

Based on the totality of the evidence, a reasonable jury could infer actual malice from these facts and this Court should grant review of this case for a more detailed review of this summary judgment casualty.

**Proposition of Law #2**

**WHEN A TELEVISION REPORTER HAS REASON TO DOUBT THAT A CRIME WAS COMMITTED BECAUSE OF HER PERSONAL OBSERVATIONS OF THE ACCUSED DURING THE ALLEGED CRIME, SHE IS NOT ENTITLED TO RELY ON THE ACCUSER OR SECONDARY POLICE SOURCES TO BROADCAST THE ACCUSATION AND A JURY MAY PROPERLY CONCLUDE UNDER SUCH CIRCUMSTANCES THAT THE REPORTER PUBLISHED WITH ACTUAL MALICE.**

This issue relates to the liability of the Sinclair Defendants, and is directed to the Court of Appeals' willingness to engage in fact finding to the benefit of the Defendants. Opinion at ¶14-18. All of the case law cited in the previous section is incorporated here fully by reference.

The Sinclair Defendants reported that "violence erupted" with two fights and that Spingola "will be charged with a felony... either aggravated assault or arson." Yet, by Mai's own account and perceptions, all confirmed by the videotape shot by her TV6 photographer at the scene, Spingola's actions on June 23, 2001 were limited to (1) lawful verbal speech (which Mai insists on calling arguments); (2) a flag burning contrary to police directives, and (3) a peaceful, complaint arrest. In light of Mai's testimony, the TV6 broadcasts are such a mutation of the truth that actual malice can be inferred from them alone. They are certainly examples of what a fact finder may conclude to be "the purposeful avoidance of the truth", see *Harte-Hanks Communications, Inc. v. Connaughton*, supra, at 691, and "overstating the accusation to make it seem more convincing or condemnatory than it is." *Westmoreland v. CBS, Inc.*, supra, at 1174.

Yet, the Court of Appeals elected to construe all of the evidence in favor of the Defendants, accepting the exaggerated report that converted (for public consumption) Spingola's verbal disagreement with police into an unidentified violent fight. As with Siegel, the Court of Appeals permitted Mai to let a "trusted" police source override her own personal knowledge of what had transpired. The simple question of whether a jury could find that Mai and TV6

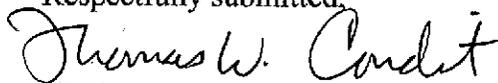
entertained doubts about what they were reporting was morphed by the Court of Appeals into an exercise of apologetics about Mai's good faith and lack of legal expertise.

Mai and her colleagues at TV-6 were educated professionals when they published the allegations of fighting and violence. That their attempts to sanitize the plain meaning of their words have been adopted by the Court of Appeals is grounds for further review at the summary judgment stage.

#### CONCLUSION

For all of the foregoing reasons, this case involves matter of public and great general interest and presents substantial constitutional questions. Appellant therefore requests that this court grant jurisdiction and review this case on its merits.

Respectfully submitted,



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**PROOF OF SERVICE**

I hereby certify that two copies of this Memorandum In Support of Jurisdiction has been served by First Class U.S. Mail this 12th day of February 2007 upon the following counsel for Appellees:

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\_\_\_\_\_  
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# APPENDIX

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
FRANKLIN COUNTY  
2006 DEC 28 PM 12:03  
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Charles S. Spingola, :  
Plaintiff-Appellant, :  
v. : No. 06AP-402  
Sinclair Media, II, Inc. et al., : (C.P.C. No. 03CVC-09-9815)  
Defendants-Appellees. : (REGULAR CALENDAR)

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O P I N I O N

Rendered on December 28, 2006

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*Thomas W. Condit*, for appellant.

*Richard C. Pfeiffer, Jr.*, City Attorney, and *Paula J. Lloyd*, for appellees Janet Jackson and Scott Varner.

*Frost Brown Todd LLC*, *Richard M. Goehler*, and *Kevin T. Shook*, for appellees Sinclair Media, II, Inc., WSYX-TV6 and Tram Mai.

*Frost Brown Todd LLC*, *Susan Grogan Faller*, and *Kevin T. Shook*, for appellees Outlet Broadcasting, Inc., dba WCMH-TV4 and Leslie Siegel.

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APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Charles S. Spingola, plaintiff-appellant, appeals from the judgments of the Franklin County Court of Common Pleas, in which the court granted the motion for summary judgment filed by Sinclair Media, II, Inc. (individually "Sinclair Media"), WSYX-

TV6 (individually "TV6"), and Tram Mai (collectively "Sinclair"), defendants-appellees; the motion for summary judgment filed by Outlet Broadcasting, Inc. (individually "Outlet Broadcasting"), WCMH-TV4 (individually "TV4"), and Leslie Siegel (collectively "Outlet"), defendants-appellees; and the motion to dismiss filed by city of Columbus, Janet Jackson, and Scott Varner (collectively "the City"), defendants-appellees.

{¶2} On June 23, 2001, the 2001 Columbus Pride Parade was held in downtown Columbus, Ohio. Appellant attended the parade, and, at some point, appellant announced his intent to light a flag on fire. Several news reporters and photographers gathered. Included in the news media was Leslie Siegel, a reporter for TV4, which is owned by Outlet Broadcasting, and Tram Mai, a reporter for TV6, which is owned by Sinclair Media.

{¶3} With the photographers filming and the other media standing nearby, appellant requested a canister from an associate, Tom Meyer. A flammable liquid was then poured from the canister onto the flag. Andrea Critchet, a security officer, claimed appellant doused her with the liquid when it was poured. Appellant announced to bystanders and city of Columbus police officers that he was going to light the flag on fire, and one officer told him not to do it. Appellant then used a match to light the flag. Appellant was subsequently arrested and taken to a police cruiser. After the flag was extinguished, police beat the arms of several teenage girls who would not release their grasp on the flag. On their 6:00 p.m. and 11:00 p.m. news broadcasts for that same evening, Mai, for TV6, and Siegel, for TV4, broadcast news stories about the flag burning incident involving appellant. Appellant's assignments of error, in part, relate to these

broadcasts, and their relevant contents will be discussed in addressing those assignments of error.

{¶4} In August 2001, the city of Columbus filed charges against appellant for assault and aggravated menacing. After the filing, Varner, the Communications Director for the Columbus City Attorney's Office, stated to the media that it had filed charges against appellant, and then explained that the city of Columbus and Jackson, the Columbus City Attorney at that time, had waited to file the charges until Critchett's account could be verified with other witnesses. Appellant was subsequently found not guilty pursuant to a jury trial.

{¶5} On September 23, 2003, appellant filed a complaint against the Sinclair defendants, the Outlet defendants, and the City defendants, alleging defamation. On October 9, 2003, the City filed a motion to dismiss under Civ.R. 12(B)(6), which the trial court granted on September 1, 2005. On September 15, 2004, Outlet filed a motion for summary judgment. On September 24, 2004, Sinclair filed a motion for summary judgment. The trial court granted both motions for summary judgment on April 4, 2006.

Appellant appeals the judgments of the trial court, asserting the following assignments of error:

[I.] THE TRIAL COURT ERRED BY GRANTING THE *SINCLAIR DEFENDANTS'* MOTION FOR SUMMARY JUDGMENT[.]

[II.] THE TRIAL COURT ERRED BY GRANTING THE *OUTLET DEFENDANTS'* MOTION FOR SUMMARY JUDGMENT.

[III.] THE TRIAL COURT ERRED BY GRANTING THE *CITY DEFENDANTS'* MOTION TO DISMISS UNDER CIVIL RULE 12(B)(6).

{¶6} Appellant argues in his first assignment of error that the trial court erred in granting summary judgment to Sinclair on his defamation action. When reviewing a motion for summary judgment, courts must proceed cautiously and award summary judgment only when appropriate. *Franks v. The Lima News* (1996), 109 Ohio App.3d 408. Civ.R. 56(C) provides that, before summary judgment may be granted, it must be determined that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the non-moving party, that conclusion is adverse to the non-moving party. *State ex rel. Howard v. Ferreri* (1994), 70 Ohio St.3d 587, 589. When reviewing the judgment of the trial court, an appellate court reviews the case de novo. *Franks*, supra. Summary judgment procedures are particularly appropriate when addressing First Amendment free speech issues in a defamation action. *Dupler v. Mansfield Journal Co., Inc.* (1980), 64 Ohio St.2d 116, 120.

{¶7} Although freedom of speech is a constitutionally protected state and federal right, the media is not protected when it publishes defamatory statements. 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. *A & B-Abell Elevator Co., Inc. v. Columbus/Cent. Ohio Bldg. and Constr. Trades Council* (1995), 73 Ohio St.3d 1, 7. Generally speaking, defamation can come in two forms: slander, which is spoken; and libel, which is written. See *Dale v. Ohio Civ. Serv. Emp. Assn.* (1991), 57 Ohio St.3d 112. The elements of a defamation action, whether slander or libel, are that: (1) the

defendant made a false and defamatory statement concerning another; (2) that the false statement was published; (3) that the plaintiff was injured; and (4) that the defendant acted with the required degree of fault. *Celebrezze v. Dayton Newspapers, Inc.* (1988), 41 Ohio App.3d 343. The entry of summary judgment in a defendant's favor is appropriate in a defamation action if it appears, upon the uncontroverted facts of the record, that any one of the above critical elements of a defamation case cannot be established with convincing clarity. *Temethy v. Huntington Bancshares, Inc.*, Cuyahoga App. No. 83291, 2004-Ohio-1253.

{¶8} In the present case, the trial court found appellant could not prove the fourth element indicated above. Concerning the fourth element, the publisher's required degree of fault varies depending on the status of the plaintiff, ranging from a private individual to a public figure. *Gertz v. Welch, Inc.* (1974), 418 U.S. 323, 94 S.Ct. 2997. When the plaintiff is a public figure, a successful defamation claim requires clear and convincing evidence that the statement was published with "actual malice." *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 280, 84 S.Ct. 710. In addition, courts have created a "limited-purpose public figure," which is a plaintiff who becomes a public figure for a specific range of issues from which the person gains general notoriety in the community. *Gertz, supra*, at 351. A limited-purpose public figure also has to prove that the defamatory statement was made with actual malice. See *Kassouf v. Cleveland Magazine City Magazines* (2001), 142 Ohio App.3d 413. It is undisputed, here, that appellant was at least a limited-purpose public figure for purposes of the present case.

{¶9} To demonstrate actual malice, a plaintiff must prove that the statement was made with knowledge that it was false, or with reckless disregard of whether it was false

or not. *New York Times*, at 280. To establish reckless disregard, the plaintiff must present clear and convincing evidence that the false statements were made with a high degree of awareness of their probable falsity, *Garrison v. Louisiana* (1964), 379 U.S. 64, 74, 85 S.Ct. 209, or that the defendant in fact entertained serious doubts as to the truth of his publication. *St. Amant v. Thompson* (1968), 390 U.S. 727, 731, 88 S.Ct. 1323. Whether the evidence in the record supports a finding of actual malice is a question of law. *Harte-Hanks Communications, Inc. v. Connaughton* (1989), 491 U.S. 657, 685, 109 S.Ct. 2678.

{¶10} In *St. Amant*, the United States Supreme Court discussed the evidence that is required to support a conclusion that a defamation defendant has acted with reckless disregard of the truth or falsity of his or her publication. The court held that "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.*, at 731. Thus, evidence of the defendant's subjective state of mind is required in order to satisfy the actual malice standard. *Id.*, at 733. However, the ability of defendants to subvert the standard with self-serving testimony is limited. The defendant cannot automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. *Id.*, at 732. The finder of fact must determine whether the publication was indeed made in good faith. *Id.* A defendant lacks good faith to make a statement shown to be false where there is either no basis in fact for the statement or no information upon which the defendant could have justifiably relied in making the statement. *Id.* Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. *Id.* While the proper standard requires a clear and convincing showing, it can be

satisfied by circumstantial evidence of the defendant's state of mind. *Citizens to Save Northland v. Ohio Elections Comm.* (Dec. 27, 2001), Franklin App. No. 01AP-115.

{¶11} As this court indicated in *Serv. Emp. Internatl. Union Dist. 1199 v. Ohio Elections Comm.*, 158 Ohio App.3d 769, 2004-Ohio-5662, at ¶24, where a statement is supported by some basis in fact, courts have found insufficient evidence of actual malice even if the statement is ultimately found to be untrue. *Id.*, citing *St. Amant*, at 733 (finding actual malice lacking where the defendant published a source's false statements about a public officer but the defendant had no personal knowledge that the statements were false, had verified other aspects of the source's information, and had affidavits from other sources substantiating the statements); *Flannery v. Ohio Elections Comm.*, 156 Ohio App.3d 134, 2004-Ohio-582 (finding no malice where ultimately incorrect statements were published but the defendant had a factual foundation and an arguably rational basis for making the statements); *Mosley v. Evans* (1993), 90 Ohio App.3d 633, 638 (finding no malice where some factual foundation existed for statements). Likewise, the United States Supreme Court in *Bose Corp. v. Consumers Union of United States, Inc.* (1984), 466 U.S. 485, 104 S.Ct. 1949, found clear and convincing evidence of actual malice lacking where the author's statement was one of a number of possible rational interpretations of an event that bristled with ambiguities. *Bose Corp.*, at 512, citing *Time, Inc. v. Pape* (1971), 401 U.S. 279, 290, 91 S.Ct. 633.

{¶12} With regard to Sinclair, appellant specifically cites two instances of defamation. Appellant argues that Sinclair acted with actual malice when Mai reported on TV6's 6:00 p.m. news broadcast that "violence erupted" with two fights at the parade and that appellant would be "charged with a felony – either aggravated assault or arson."

Appellant maintains that the undeniable message conveyed was that he had committed a violent crime, which was false. Appellant asserts that the TV6 broadcasts were such a "mutation of the truth" that actual malice can be inferred from them. In support of his position that Mai acted with actual malice, appellant relies almost solely upon Mai's deposition and affidavit. However, after reviewing Mai's testimony, we find it does not support appellant's contentions.

{¶13} Mai testified she and her photographer, Jeff Ritter, covered the parade for TV6. As they walked along the parade route, Mai heard appellant's voice and went to where he was standing near the intersection of Broad and High Streets, across the street from the Statehouse in downtown Columbus. Mai then interviewed appellant. Immediately after the interview, appellant lit the flag on fire. Mai stated she felt some of the fluid from the container splash on her leg, and she smelled it to identify it. At the time of the event, she never heard anyone say he or she had been splashed with the fluid, including Critchet. Appellant was then immediately arrested.

{¶14} Mai further testified that, besides two girls whose arms were being hit by police officers because they would not let go of the flag after appellant was arrested, she never saw anyone sustain any injuries. She stated that, in the 6:00 p.m. news broadcast, there was a woman, Deborah Fisher, interviewed who stated that the controversy did not ruin the spirit of the parade and that it was not nice to see them "gassing or macing people" with their kids there, and Mai did not know to what the woman was specifically referring and did not associate it with Critchet getting gas splashed on her. Mai believed the comment about the "gassing" referred to the application of the fluid onto the flag and that Fisher may have seen "macing," although Mai had not. Mai did not recall thinking that

she was referring to police mace. In her news broadcast, Mai stated that appellant would be charged with a felony – either aggravated assault or arson – and she testified that she received this information in a telephone call from Columbus Police Sergeant Earl Smith, the public information officer, minutes before she went live on the air. She stated she did not know whether the charges were going to be for the flag burning or something else. Mai stated she was given the information from Smith, and she went on the air with it. She changed her broadcast for the 11:00 p.m. show, after Smith called her and corrected the information. She did not say anything in the 11:00 p.m. show to retract the earlier comment about the charges. Mai stated she thought the information given to her from Smith for the 6:00 p.m. show was correct. Mai stated she was aware that the United States Supreme Court had found the burning of the American flag was constitutionally protected free speech, but she did not consider whether appellant's activities were legal. She stated that, at the scene, appellant made it clear that he believed he had a right to burn the flag. Mai stated she considered the flag burning a violent act, in that it was very confrontational. When appellant stated he was trying "to fight them" and was not going "to lay down for these queers trying to get in the minds of children," she viewed this as "fighting" in a confrontational and verbal sense, not a physical sense. She believed there had been a "fight," in that appellant had been in a dispute with others and with the police. She stated appellant did not resist arrest.

{¶15} In her affidavit, Mai averred to the same things included in her deposition testimony. In addition, she stated that, when she saw appellant at the parade, he was yelling loudly and was confrontational. During the course of her interview with him, appellant shouted and protested the parade. Appellant also argued with police over his

right to burn the flag prior to burning it, during the burning, and after he burned it. Mai averred there was a "good deal of commotion" around appellant. Mai averred that the "violence" and "disturbance" continued after appellant's arrest, as the police fought with two young girls over the remains of the burnt flag. She called Sergeant Smith, a trusted and reliable source, and she had no reason to doubt the information regarding the potential charges he told her minutes before the 6:00 p.m. broadcast. To the best of her knowledge, everything included in the broadcasts was either true or substantially true to the best of her knowledge, and at no time did she have any reason to doubt any of the information included in the broadcasts. Mai averred that there was no question that, in her mind, violence had erupted at the parade, and it began with the incident involving appellant. As for the statements of any other interview subjects, Mai stated that their comments were based upon their own perspectives, opinions, and observations. After getting updated information after the 6:00 p.m. broadcast, she reported in the 11:00 p.m. broadcast that criminal charges were expected to be filed, but there was no word at that point on exactly with what appellant would be charged.

{¶16} After reviewing Mai's testimony, as well as the other evidence cited by appellant, we fail to find any question of law as to whether Sinclair's broadcast was made with actual malice. The record is wholly lacking in any evidence that Mai's statements were made with knowledge that they were false. With regard to Mai's statement that appellant would be charged with a felony – either aggravated assault or arson – despite appellant's contention that Mai knew the statements were false because she personally observed the events, Mai cannot be held to know the legal elements of particular crimes and second-guess police authorities as to why they may or may not bring certain charges

under various circumstances. As the record reveals no evidence that Mai possessed the legal expertise to make her own legal judgments as to whether appellant's actions fulfilled the statutory requirements of felony counts of aggravated assault or arson, we find the record is devoid of any evidence to prove that she knew such statement was false.

{¶17} As to reckless disregard, we also find appellant has failed to present evidence to raise any question of law on this issue. Appellant failed to present clear and convincing evidence that the false statements were made with a high degree of awareness of their probable falsity or that the defendant in fact entertained serious doubts as to the truth of her publication. Lacking legal expertise herself, Mai relied upon the public information officer for the police department to tell her what charges would be brought. She reported precisely what Sergeant Smith told her. Despite appellant's contention that Mai wished to "report now, get the facts later," Mai, in fact, had the facts at the time of her broadcast and related the charges that authorities informed her would be forthcoming. That authorities later changed their minds about the charges does not have any bearing on any reckless disregard by Mai in her initial broadcast. Mai's 6:00 p.m. broadcast included the potential charges, as she knew them to be at the time. Sergeant Smith was a "trusted source" and was specifically assigned to relate such information to news media in these types of situations. There existed no better source of what charges would be filed than the arresting authorities. Thus, we fail to find Sinclair acted with reckless disregard, as a matter of law, in publishing the statement regarding potential criminal charges.

{¶18} Appellant also takes issue with Mai's statements that "violence erupted" and, later in the broadcast, that there had been "another fight," thereby implying appellant

was involved in some initial "fight." However, we find appellant submitted no evidence to support that Mai made such statements with knowledge of their falsity or with reckless disregard for their truth or falsity. That "violence erupted" and there was a "fight" are two interpretations out of a number of possible rational interpretations of the events in question. See *Bose Corp.*, at 512. Mai testified that appellant was shouting and yelling very loudly; appellant was being very confrontational with parade goers and supporters; the police were hitting the arms of two young girls to get the flag from them; appellant was arguing with the police both during, before, and after he lit the flag; there was a commotion around appellant; and Mai was pushed and jostled throughout appellant's activities. Mai also stated that she considered the flag burning a violent act in itself, because it was completed while appellant argued with bystanders and police. The video evidence also showed an angry crowd screaming at appellant both during and after the time the flag was lit. As police walked appellant to the cruiser, appellant traversed a gauntlet of angry shouts, screams, and ridicule. The video also showed the police very forcefully taking the flag from the two teenage girls.

{¶19} In addition, Siegel testified in her deposition that she saw a lot of verbal "conflict" and chaos at the scene, and, although she was uncertain if she would term it "violence," she understood why Mai used that word. She also stated when Mai stated that a second "fight" had broken out, she could understand how Mai may have viewed the first confrontation between appellant and police as a "fight," and that Mai's perspective would be one way of viewing the incident. Siegel also noted that Mai did not use the word "physical" to describe the first "fight." Siegel stated that she believed viewers could look at the Mai broadcast and view appellant's verbal altercation with police as the first "conflict."

{¶20} Given the circumstances as viewed on the submitted tapes, and, based upon the testimony and averments presented, we find that Mai's use of the terms "violence" and "fight" were reasonable interpretations of the entire incident, both in the physical and the non-physical senses of the words. Mai made the statements in good faith, as the events she witnessed, described above, formed a reasonable basis upon which she could have justifiably relied in making the statements. See *St. Amant*, supra, at 732.

{¶21} Appellant also claims that Mai's good faith should be doubted because TV6 decided to broadcast Fisher's comment about "them gassing or macing people," when Mai could not have believed this statement was true because she did not know about Critchett's accusation at that point that he had allegedly splashed gasoline on her legs, and Mai never witnessed anyone being maced. Mai countered that Fisher's comment was based upon her own observations and opinions as an eyewitness, and were not Mai's comments. Mai also stated that she thought the word "gassing" referred to the liquid used to light the flag.

{¶22} Fisher's comments add little to the defamation analysis. We first note that a review of the broadcast reveals that Fisher stated "tear-gassing or macing people," not "gassing or macing people," as has been repeated throughout the pleadings. The record suggests that the police did dispense tear gas or mace on the ground to clear the area around the incident. Thus, the statement appears to have been true. Notwithstanding, the meaning of Fisher's comment is immaterial. Fisher was making a statement based upon her own perspective and opinion, and Mai was reporting what Fisher believed she witnessed. Under Ohio law, for a statement to be defamatory, it must be a statement of

fact and not of opinion. *Vail v. The Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279; see, also, Section 11, Article I, of the Ohio Constitution. Whether an allegedly defamatory statement is an opinion or fact is a question of law for this court to decide. *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369. Here, Fisher's statement itself could not have been defamatory, as it was merely Fisher's opinion of the incident. Further, Mai stated that she and her photographer followed appellant to the police cruiser, so she had no knowledge of whether these events related by Fisher might have transpired at the scene after she had left. As Mai witnessed a chaotic scene, she could have reasonably believed the events to which Fisher referred could have occurred, and she had no reason to doubt Fisher. Therefore, we find this contention does not aid appellant's defamation argument, and Sinclair did not act with reckless disregard, as a matter of law, in publishing the statements that "violence erupted" and there had been "another fight." For these reasons, we find that the trial court did not err in granting summary judgment to Sinclair. Appellant's first assignment of error is overruled.

{¶23} Appellant argues in his second assignment of error that the trial court erred in granting summary judgment to Outlet. Specifically, appellant points out two instances of defamation with regard to Outlet. Appellant argues that Sinclair acted with actual malice when Siegel reported on TV4's 6:00 p.m. news broadcast that appellant "sprayed [Critchett] with gasoline during the flag burning," and that appellant would be charged with "either aggravated assault or aggravated arson." Appellant relies mainly upon Meyer's and Siegel's affidavits to support his arguments. However, after reviewing Meyer's and Siegel's averments, as well as the other evidence, we find no support for appellant's contentions.

{¶24} With regard to the spraying of Critchet, appellant claims that no person who was present at the scene, including Siegel, could have believed that he sprayed gasoline on Critchet or anyone else, thereby proving Outlet acted with actual malice. Meyer, who poured the lamp oil on the flag, averred that the gasoline did not have a spraying mechanism, and he was certain that no lamp oil sprayed onto bystanders. He stated he carefully poured a small amount of lamp oil onto the flag and allowed it to dribble down the flag. Meyer indicated he had witnessed other such flag burnings and had learned that, when too much fluid is used, the flag burns too quickly, so he only used a small amount of lamp oil.

{¶25} Siegel averred that, when she saw appellant at the parade, he was shouting and protesting the parade. She observed appellant engage in several arguments with both police and security regarding his right to burn a flag in public. After appellant shouted several minutes with police and security, Siegel observed fluid spraying into the crowd from appellant's direction. Siegel also stated she was lightly sprayed with the fluid, with the majority of the fluid spraying in Critchet's direction. Critchet started screaming, and the scene became very chaotic. Appellant then lit the flag. Siegel stated that Critchet was acting very concerned at this point, saying that she had been sprayed with gasoline. Bystanders doused Critchet's legs with water, and paramedics arrived. Siegel also saw police using their nightsticks to obtain the remnants of the burnt flag from two teenage girls. Siegel interviewed police officers at the scene, who indicated that appellant would be charged with either aggravated assault or aggravated arson. She also interviewed members of the Columbus Fire Department and the City Attorney's Office, who told her the crimes with which appellant would be charged.

{¶26} Siegel testified similarly in her deposition. Siegel stated that appellant announced he was going to burn the flag and poured fluid on the flag. Siegel was standing three to four feet from appellant at the time, and the fluid from the gas can landed on her pants. She did not see the fluid hit anyone else. She also did not see appellant intentionally spraying the fluid. Siegel stated an officer told appellant he could not burn the flag. Shortly after the fluid was poured on the flag, Critchet started screaming that gasoline had gotten on her, and bystanders doused her legs with water. Critchet had been standing in front of appellant, in the direction of the spray of fluid. Fire department personnel or paramedics went to her aid. After the incident, Siegel spoke with police officers, who told her what had happened and what charges would be filed. It was Siegel's impression that one of the charges pertained to appellant having deliberately sprayed Critchet. Siegel stated that she was aware at the time that the United States Supreme Court had struck down some laws that had been passed in an attempt to prevent the burning of the American flag; however, she recalled no discussion with colleagues about whether appellant's First Amendment rights had been violated by his arrest. When she reported what potential charges would be brought against appellant, she was repeating what officers had told her and she stated that she would only question an officer if the charges seemed totally unrelated to anything she had witnessed, which these did not.

{¶27} Although the discrepancy between Meyer's and Siegel's averments raises a genuine issue of fact as to whether appellant sprayed Critchet, such does not preclude summary judgment, as the pertinent issue is not whether Critchet was actually sprayed. Rather, what must be determined is whether Siegel acted with reckless disregard in

stating that appellant had sprayed Critchet. After reviewing the testimony above and reviewing the other evidence cited by appellant, we fail to find any question of law as to whether Outlet's broadcast, in this regard, was made with actual malice. Appellant claims Siegel's averments are self-serving; however, Meyer's averments to the contrary are equally self-serving. Notwithstanding, even construing this evidence in favor of appellant, as we must do, there exists un rebutted evidence to support the conclusion that Siegel could have formed a reasonable belief that the lamp oil had sprayed on Critchet. The video evidence submitted to the court reveals that Critchet claimed the fluid had been splashed on her. The video also reveals several bystanders pouring bottled water over her legs. Siegel witnessed these events, and they were included in the broadcasts. Siegel also stated that she saw Critchet standing near appellant as the liquid was poured, and she saw Critchet screaming. Siegel also averred that paramedics arrived to aid Critchet. Thus, having personally witnessed the scene, Critchet's accusations, and the reactions of Critchet, bystanders, and paramedics, Siegel had a sound factual basis with which to report Critchet's allegations on her news broadcast. Whether Siegel herself was splashed with the fluid or whether Critchet was actually splashed with the fluid is immaterial. The surrounding circumstances show Siegel acted in good faith in making the statement, as Siegel could have justifiably relied upon everything she viewed and heard to form a foundation for such statement. See *St. Amant*, supra, at 732. Appellant has failed to offer any evidence to show that Siegel had a high degree of awareness of the probable falsity of this statement or that she entertained any doubt as to the truth of her publication.

{¶28} With regard to Siegel's statement that appellant would be charged with "either aggravated assault or aggravated arson," for similar reasons as we cited with

regard to appellant's claim against Sinclair, we fail to find any question of law as to whether Outlet's broadcast was made with actual malice. Appellant failed to present clear and convincing evidence that Siegel made the statement knowing it was false, made it with a high degree of awareness of probable falsity, or that she entertained serious doubts as to the truth of her publication. Like Mai, Siegel averred that appellant was arguing with police and telling them he was going to light the flag on fire despite their warnings, the scene was chaotic, and appellant lit the flag while still arguing with police. Siegel also testified that Critchet was screaming and doused with water because she said she had been splashed with the fluid. Further, like Mai, Siegel interviewed police officers, who indicated that appellant would be charged with either aggravated assault or aggravated arson. She also interviewed members of the Columbus Fire Department and the City Attorney's Office, who told her the crimes with which appellant would be charged. Siegel also personally witnessed the events that may have reasonably been seen by a layperson as fitting the elements of the charged crimes. There is no evidence Siegel was aware of the statutory elements necessary to prove these crimes, and she cannot be faulted by the decision of the charging authorities to change their minds as to with what crimes appellant should have been charged. Further, the events Siegel viewed demonstrate she acted in good faith, as there was some basis in fact for her statement, and there was information upon which she could have justifiably relied in making the statement regarding the charges. See *St. Amant*, at 732. This is not a situation where Siegel wholly fabricated the charges or based them on an unverified anonymous informant. See *id.* For these reasons, we find Outlet was entitled to judgment as a matter of law. Therefore, appellant's second assignment of error is overruled.

{¶29} Appellant argues in his third assignment of error that the trial court erred in granting the Civ.R. 12(B)(6) motion to dismiss filed by the City. When reviewing a judgment on a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, an appellate court's standard of review is de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, at ¶5. 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. Guemsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548. In considering a Civ.R. 12(B)(6) motion to dismiss, a trial court cannot rely upon materials or evidence outside of the complaint. *State ex rel. Fuqua v. Alexander* (1997), 79 Ohio St.3d 206, 207. The trial court must review only the complaint and may dismiss the case only if it appears "beyond [a] doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242, syllabus. Moreover, a court must presume that all factual allegations in the complaint are true and all reasonable inferences must be drawn in favor of the non-moving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192; *Ritchie v. Ohio Adult Parole Auth.*, Franklin App. No. 05AP-1019, 2006-Ohio-1210, at ¶16. However, "unsupported conclusions of a complaint are not considered admitted and are not sufficient to withstand a motion to dismiss." *State ex rel. Seikbert v. Wilkinson* (1994), 69 Ohio St.3d 489, 490.

{¶30} Appellant alleged in his complaint against Jackson and Varner that Varner made a statement to the media in August 2001, that the City Attorney's Office had waited to file the charges against appellant until it could "verify" Critchet's allegations with "other witnesses." Specifically, appellant alleged in his complaint:

23. Varner's defamatory innuendo/statements were published after the City filed Assault and Aggravated Menacing charges against Spingola in August 2001. In spite of the fact that the City Defendants had found no witness to corroborate Critchet's false, defamatory and outlandish gasoline allegations, Varner stated to the media in August 2001 that the City and Jackson had waited to file the charges because the City had to "verify" Critchet's account with "other witnesses[.]" Not only was Varner's statement implying that other witnesses had verified Critchet's allegations itself a falsehood, but the City Defendants actually had evidence at that time that cast serious doubt on Critchet's story. Varner's unfounded statements therefore only added to defamatory attacks on Spingola's reputation previously published by the other Defendants, at a time when the City Defendants had a duty to be seeking truth and justice.

24. The City produced no witness during Spingola's criminal trial to corroborate Critchet's allegations, and a jury acquitted Spingola of both charges after only 20 minutes of deliberation.

{¶31} We first note that appellant conceded below that the city of Columbus is not liable under state law for Varner's statements, due to its immunity from liability under R.C. 2744.02. As for Jackson, the only theory appellant claimed against her was that she was liable because Varner made the statements on her behalf as her spokesperson; thus, any liability on behalf of Jackson would be solely based upon whether Varner's statement was defamatory. Accordingly, we must examine Varner's statement to determine if Jackson and Varner are liable. With regard to Varner's statement, the trial court concluded that appellant did not sufficiently plead a cause of action for defamation. The trial court found that, because the imputation or "gist" of the statement was that appellant had been charged with assault and aggravated menacing and not that other witnesses had verified Critchet's allegations, the entire statement was substantially true, so as to preclude a defamation action.

{¶32} Although in dismissing appellant's complaint with regard to the City, the trial court relied upon the insufficiency of the complaint to demonstrate the falsity element of defamation, we find that appellant's complaint failed to plead sufficient facts to demonstrate the actual malice element. With regard to actual malice, appellant pled in his complaint that the City "actually had evidence at that time that cast serious doubt on Critchet's story." The only factual allegation appellant relies upon in his complaint to support such a conclusion is that the city of Columbus "produced no witness during Spingola's criminal trial to corroborate Critchet's allegations, and a jury acquitted Spingola of both charges after only 20 minutes of deliberation." In his appellate brief, appellant reiterates that the only proof that he has to demonstrate that there were no "other witnesses" in existence, and Varner knew this when he made the statement, is the lack of any witnesses produced at trial by the city of Columbus. However, even if we were to construe this factual allegation in favor of appellant and consider it true, appellant would still be unable to demonstrate that Varner's statement was made with actual malice. Initially, merely because the city of Columbus produced no witnesses to support Critchet's allegation at appellant's trial does not demonstrate that Varner knew that it could not "verify" Critchet's account with other witnesses. There may be other reasons why no witnesses testified to Critchet's account at trial.

{¶33} In addition, Varner's statement that the City Attorney's Office had waited to file the charges until it could verify Critchet's account had other rational interpretations that were not defamatory. See *Bose Corp.*, at 512. The statement could have been reasonably interpreted to mean that the City Attorney's Office had located witnesses that could verify various elements of the crimes but not necessarily every element of the

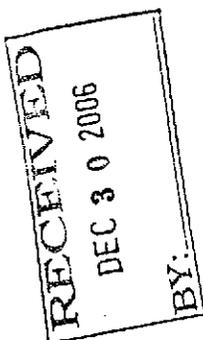
crimes. The City Attorney's Office could have planned to rely upon Critchet's own testimony to prove certain elements of the offenses. Also, the statement could have been reasonably interpreted to mean that the City Attorney's Office had spoken with witnesses who had been present at the scene, who had heard Critchet's allegations contemporaneously with the time it allegedly happened, and who had seen some corroborating evidence that she had been splashed with the flammable liquid. Despite appellant's claims to the contrary, Varner's statement did not indicate that it had found eyewitnesses to the actual dousing of Critchet. Therefore, we find appellant's complaint failed to allege operative facts that, even if believed, would have subjected Varner to liability for defamation. Because we cannot find Varner's statement defamatory, Jackson also cannot be liable. Although the City presents several other arguments in favor of dismissal, because Varner's statement was not defamatory, we need not address any additional grounds for dismissal. Therefore, appellant's third assignment of error is overruled.

{¶34} Accordingly, appellant's three assignments of error are overruled, and the judgments of the Franklin County Court of Common Pleas are affirmed.

*Judgments affirmed.*

KLATT, P.J., and FRENCH, J., concur.

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

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FILED  
COURT OF APPEALS  
FRANKLIN COUNTY  
2006 DEC 28 PM 12:06  
CLERK OF COURTS

Charles S. Spingola, :  
Plaintiff-Appellant, :  
v. : No. 06AP-402  
Sinclair Media, II, Inc. et al., : (C.P.C. No. 03CVC-09-9815)  
Defendants-Appellees. : (REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on December 28, 2006, appellant's three assignments of error are overruled, and it is the judgment and order of this court that the judgments of the Franklin County Court of Common Pleas are affirmed. Costs are assessed against appellant.

BROWN, J., KLATT, P.J., & FRENCH, J.

  
\_\_\_\_\_  
Judge Susan Brown

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