

IN THE SUPREME COURT OF OHIO
Case No. 07-0297

CHARLES S. SPINGOLA,

Appellant,

v.

SINCLAIR MEDIA II, INC., et al.,

Appellees.

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:
: On Appeal from the Franklin County Court
: of Appeals, Tenth Appellate District
:
:
: Court of Appeals
: Case No. 06AP-402
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:

MEMORANDUM OF THE APPELLEES
IN OPPOSITION TO JURISDICTION

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I. INTRODUCTION

This is a failed defamation action brought by Plaintiff/Appellant Charles S. Spingola (“Spingola”) against two media defendants, Outlet Broadcasting, Inc. (“Outlet”) and Sinclair Media, II, Inc. (“Sinclair”), as a result of their television news reports about Spingola’s arrest at a 2001 gay pride parade. The essential events that transpired at the parade and the statements made in the news reports are all recorded on videotape and are not in dispute. The Court of Appeals properly affirmed the trial court Decision granting Outlet and Sinclair summary judgment because Spingola failed to bring forth clear and convincing evidence of “actual malice.”

II. THIS CASE DOES NOT INVOLVE A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST OR A SUBSTANTIAL CONSTITUTIONAL QUESTION.

This case does not present any unsettled legal question worthy of this Court’s jurisdiction. The issue for this Court is not whether this case involves *facts* that are generally interesting to the public. The issue for this Court is whether this case presents any *legal questions* that are of great or substantial interest. Spingola argues that this case is of great general or public interest because the challenged statements were broadcast to a wide audience on television. Obviously, the fact that the challenged statements were published on television does not render this case worthy of this Court’s review. If it did, then any case involving a television news report would be accepted by the Ohio Supreme Court.

Nor does this case present any substantial constitutional question. Rather, the constitutional issues in this case are well-settled in decades of United States and Ohio Supreme Court caselaw. On page 2 of Spingola’s Memorandum in Support of Jurisdiction, he bases his entire argument in support of jurisdiction into “one governing principle:”

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. 2676; 61 L.Ed.2d 411.

Spingola Memorandum in Support of Jurisdiction, pg. 2. Relying on this footnote, Spingola concludes that "significant constitutional damage has been done" because he believes that the determination whether a defamation defendant acted with actual malice is not appropriate for summary judgment.

However, since *Hutchinson*, both the U.S. Supreme Court and the Ohio Supreme Court have specifically and repeatedly found that: "[w]hether the evidence in the record supports a finding of actual malice is a question of law" for the court to decide. *McKimm v. State Elections Comm'n*, 89 Ohio St. 3d 139, 147-48; 2000-Ohio-18; 729 N.E.2d 364 (citing *Harte-Hanks Communications, Inc. v. Connaughton* (1989), 491 U.S. 657, 685, 109 S. Ct. 2678, 2694, 105 L. Ed. 2d 562, 587; see also *Grau v. Kleinschmidt* (1987), 31 Ohio St.3d 84, 92; 509 N.E.2d 399 (evidence did not support a finding of actual malice as a matter of law). Further, Spingola misquotes the *Hutchinson* footnote, and fails to mention that the same Court specifically noted that summary judgment is the "rule" in defamation cases involving actual malice; and the issue whether that "rule" was appropriate was not before the Court.¹

In fact, the U.S. and Ohio Supreme Courts have found that summary judgment is favored in cases involving defamation claims against media defendants. *Scott v. News-Herald* (1986), 25 Ohio St. 3d 243, 250; 496 N.E.2d 699; *Kleinschmidt*, 31 Ohio St. 3d at 90. "Summary

¹ The footnote reads: "Considering the nuances raised here, we are constrained to express some doubt about the so called 'rule.' The proof of 'actual malice' calls a defendant's state of mind into question, and does not readily lend itself to summary disposition. In the present posture of the case, however, the propriety of dealing with such complex issues by summary judgment is not before us." *Hutchinson v. Proxmire* (1979), 443 U.S. 111, 120, n.9 (citations omitted).

procedures are especially appropriate in the First Amendment area due to the potential chilling effect which the threat of a lawsuit may have on the exercise of First Amendment rights.” *Varanese v. Gall* (1988), 35 Ohio St. 3d 78, 80-81; 518 N.E.2d 1177, *cert. denied*, 487 U.S. 1206; *see also New York Times Co. v. Sullivan* (1964), 376 U.S. 254; 84 S.Ct. 710; 11 L.Ed.2d 686.

In Ohio, a trial court should enter summary judgment for the defendant if it appears that any one of the elements of defamation cannot be established with convincing clarity. *Celebrezze v. Dayton Newspapers, Inc.* (1988), 41 Ohio App. 3d 343, 535 N.E.2d 755, *citing Dupler v. Mansfield Journal Co.* (1980), 64 Ohio St.2d 116; 413 N.E.2d 1187; *Bertsch v. Communications Workers of America* (1995), 101 Ohio App. 3d 186, 190, 655 N.E.2d 243. For these reasons, summary judgment is indeed the rule, rather than the exception in defamation cases; and Spingola’s attempted challenge of this rule is in direct conflict with decades of well-settled U.S. and Ohio Supreme Court caselaw.² Accordingly, Spingola’s request for jurisdiction is without merit and should be denied.

III. STATEMENT OF FACTS

A. Background

Charles Spingola is a self-proclaimed “confrontational evangelist” who protests gay rights and has stated that it is justifiable to kill gay activists. For twenty-five years, Spingola has traveled to public places to spread his message in a confrontational style. He has been arrested

² Spingola also seems to argue that this case involves a substantial constitutional question because it causes a “heightened tension” between freedom of the press and Spingola’s right to free speech. However, this case has nothing to do with Spingola’s speech. In this case, Spingola is trying to impose civil liability against Outlet and Sinclair for *their* speech. Thus, Spingola’s arguments in support of “uninhibited, robust and wide-open” debate on public issues only lend further support to the Court of Appeals’ Decision.

over sixty times in his life. On June 23, 2001, the date at issue in this case, Spingola was arrested when he burned a gay pride flag and a security officer named Andrea Critchet accused Spingola of spraying her with gasoline.

B. The Undisputed Video of Spingola's Arrest

The essential facts related to Spingola's arrest and the relevant statements made by the news reporters are all on undisputed videotape. The videotapes clearly depict the following events: (1) Spingola stating: "We're going to fight them; we're not going to lay down for these queers;" (2) Spingola arguing with police over his right to burn the flag; (3) Spingola burning the flag in disregard of the warnings of Columbus City police officers; (4) a large, angry crowd gathering around Spingola that pushed and shoved and caused a commotion; (5) the police arresting, handcuffing and leading Spingola through the angry crowd to a police car; (6) Spingola shouting that it was his right to burn the flag in public while he was led away by police; (7) the Columbus police using their billy clubs on two young girls who refused to hand over the burnt flag; and (8) paramedics surrounding a parade security guard named Andrea Critchet and washing her legs with water.

C. The Investigation of the Outlet and Sinclair Reporters

Sinclair reporter, Tram Mai, and Outlet reporter, Leslie Siegel, both testified that they interviewed the City police, the fire department and/or the prosecutor after the 2001 arrest and were both told that Spingola would be charged with felonies, such as aggravated assault or arson. Leslie Siegel also testified that she witnessed a fluid spraying into the crowd from Spingola's direction and that some of the fluid was sprayed on her pants. Tram Mai testified that she did not personally see any fluid spraying, but the whole scene was chaotic and violent.

D. The Outlet News Reports

Outlet broadcast three news reports based upon Siegel's investigation. Each of the reports were essentially the same. In this appeal, Spingola challenges the following statement made in the Outlet report: "One of the parade security guards was being doused with water. . . after she says Spingola sprayed her with gasoline during the flag burning." Siegel testified that everything in the Outlet report was true to the best of Outlet's knowledge.

E. The Sinclair Television News Report

Sinclair broadcast two television news reports at 6 p.m. and 11 p.m. regarding the events that transpired at the 2001 Pride Parade. Spingola has argued that the following statements in the Sinclair reports were false and defamatory: (1) statements that "violence erupted" and "another fight broke out" at the parade; and (2) a statement that Spingola "will be charged with a felony . . . either aggravated assault or arson." Tram Mai testified that everything in the Sinclair report was true to the best of Sinclair's knowledge.

F. Spingola's Criminal Trial and Civil Claims

The City prosecutor eventually charged Spingola with slightly different crimes than the ones that Outlet and Sinclair reported based on their interviews. Specifically, Spingola was charged with open burning, aggravated menacing and assault. After a trial, Spingola was found guilty of open burning, but acquitted of assault and aggravated menacing. Following his acquittal, Spingola sued Outlet and Sinclair for their respective news reports regarding Spingola's arrest.

IV. ARGUMENT IN OPPOSITION TO APPELLANT'S PROPOSITIONS OF LAW

A. Response to Proposition of Law No. 1: The Trial Court Properly Granted Outlet Summary Judgment.

Spingola's Proposition of Law #1 focuses solely on Outlet's republication of Andrea Critchett's claim that Spingola sprayed her with gasoline. Spingola wrongly argues that the trial court should have conducted a jury trial to determine whether certain "circumstantial evidence" would have supported a finding of actual malice. Spingola's Proposition of Law #1 fails for the following reasons: (1) Outlet's report was supported by undisputed facts; (2) Spingola cannot create an issue of fact simply by submitting a self-serving affidavit that denies Critchett's claims; and (3) Spingola presents no circumstantial evidence that would prove actual malice by clear and convincing evidence as is required by law.

(1) Outlet's Report Was Supported By Undisputed Facts

In the trial court, Spingola stipulated that he is a public figure for purposes of this litigation and he is required to prove actual malice by clear and convincing evidence to prevail on his defamation claims. Under Ohio law, "actual malice" is established only by:

evidence that the defendant published the statement at issue 'with knowledge that it was false or with reckless disregard of whether it was false or not . . .' there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication

Varanese v. Gall (1988), 35 Ohio St. 3d 78, 80, 518 N.E.2d 1177, *cert. denied* (1988), 487 U.S. 1206 (quoting *New York Times Co. v. Sullivan* (1964), 376 U.S. 254). As the Court of Appeals correctly noted, "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." *Spingola v. Sinclair Media, II, Inc.*, 2006-Ohio-6950, ¶11 (citing *Serv. Emp. Internatl. Union*

Dist. 1199 v. Ohio Elections Comm., 158 Ohio App.3d 769, 2004-Ohio-5662, 822 N.E.2d 424, at ¶24.

In this case, Outlet's republication of Critchet's claim that she was sprayed with gasoline is consistent with what Siegel witnessed and consistent with the information provided to Siegel by the police, City Prosecutor, Columbus Fire Department and Critchet herself. Siegel testified that she witnessed fluid spraying into the crowd from Spingola's direction and toward Critchet and that some of the fluid actually landed on her own pants. Siegel also testified that she heard Critchet screaming as the fluid sprayed and saw people surrounding Critchet and washing her legs with water. Finally, Siegel learned from police that Critchet claimed Spingola sprayed her with gasoline. Under these circumstances, no reasonable jury could find that Outlet recklessly disregarded the truth when it reported Critchet's allegations. Rather, Siegel reasonably believed Spingola had sprayed Critchet with gasoline. Accordingly, the trial court properly granted summary judgment on the issue of actual malice.

(2) Spingola Cannot Create an Issue of Fact Simply by Submitting a Self-Serving Affidavit that Denies Critchet's Claims.

Spingola's entire argument rests upon the misguided view that summary judgment should not have been granted because Spingola provided an affidavit stating that Critchet's claims were false. This self-serving assertion does not approach what is needed as a matter of law to defeat summary judgment and was properly rejected by the trial court and Court of Appeals. "[I]f potential plaintiffs in libel suits could cut off a malice defense simply by ... giving a broad denial ... the first amendment policy embodied in *New York Times [v. Sullivan]* would be undermined." *Martin Marietta Corp. v. Evening Star Newspaper Co.* (D. D.C. 1976) , 417 F. Supp. 947, 960. In determining whether Outlet made publications with actual malice, the issue is not what Spingola believes happened. The issue is what Outlet believed happened and

whether Outlet recklessly disregarded the truth. The trial court correctly granted summary judgment because there was no clear and convincing evidence that Outlet recklessly disregard the truth.

(3) Spingola Presents No “Circumstantial Evidence” That Would Prove Actual Malice on the Part of Outlet.

On page 13 of Spingola’s Memorandum in Support of Jurisdiction, Spingola lists a series of facts that he believes are “circumstantial evidence” of actual malice. While the U.S. Supreme Court has said that “a plaintiff is entitled to prove the defendant’s state of mind through circumstantial evidence,” it has qualified that “courts must be careful not to place too much reliance on such factors. . . .” *Harte-Hanks v. Connaughton*, 491 U.S. 657, 658; 109 S.Ct. 2678; 105 L.Ed.2d 562. Further, the only “circumstantial evidence” that courts have found to be persuasive in the actual malice context is evidence of specific and egregious conduct where the defendant either (a) admittedly knew the information was false, but reported it anyway; or (b) willfully misrepresented the information provided by a source.³ The focus of the inquiry is not the degree of investigation conducted, but whether the defendant “purposefully avoided the truth,” as articulated by the United States Supreme Court in *Harte-Hanks*. *Id.* at 692. The defendants are unaware of any case where a court has denied summary judgment on the issue of

³ See e.g., *Harte-Hanks v. Connaughton*, *supra* (numerous significant bases for malice, including multiple contradictions of source’s account); *Airlie Foundation, Inc. v. Evening Star Newspaper Co.* (D. D.C. 1972), 337 F. Supp. 421, 425-26 (basis for malice included admission by reporter that he had known one of the statements was untrue when he wrote it, and testimony by editor-in-chief that a conversation with another source left him “considerably shaken” as to his belief in the charges that were reported); *Sharon v. Time, Inc.* (S.D.N.Y. 1984), 599 F. Supp. 538, 582 (possible basis for malice included defendant’s misattribution of an account so that it appeared it to be finding of quasi-judicial body); *Westmoreland v. CBS Inc.*, 596 F. Supp. 1170, 1174 (possible basis for malice included evidence of “willful falsity in the editing and presentation of evidence,” including the misleading editing of certain statements).

actual malice based upon the kind of “circumstantial evidence” that Spingola presents to this Court.

For example, Spingola claims that “the spectacularly bold and violent nature” of spraying gasoline into a crowd of people is circumstantial evidence of Outlet’s actual malice. There is no precedent whatsoever supporting Spingola’s reasoning on this point. Spingola also claims that Outlet’s failure to actually see Spingola throw gasoline and photograph Spingola spraying gasoline is circumstantial evidence of actual malice. However, the law does not require Outlet to photograph or actually witness every part of an event before reporting on the event. Finally, Spingola’s argument that *Outlet* reported Critchett’s allegations with actual malice because *Sinclair* did not specifically see fluid spraying into the crowd also fails as a matter of law. In reviewing Spingola’s claims against Outlet, the issue is not what Sinclair saw, but what Outlet believed. Spingola has never presented any evidence whatsoever that would prove actual malice with convincing clarity. *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248; *Perez v. Scripps-Howard Broadcasting Co.* (1988), 35 Ohio St. 3d 215, *cert. denied* (1988), 488 U.S. 870. The trial court properly granted Outlet summary judgment and this Court should deny Spingola’s request for jurisdiction on Proposition of Law No. 1.

B. Response to Proposition of Law No. 2: The Trial Court Properly Granted Sinclair Summary Judgment.

Spingola’s Proposition of Law #2 directs the Court’s attention to Sinclair’s statements that “violence erupted,” “another fight broke,” and Spingola “will be charged with a felony. . . either aggravated assault or arson.” Again, Spingola argues that the trial court should not have granted summary judgment and a finder-of-fact should have determined whether these statements were made with actual malice. Spingola’s Proposition of Law No. 2 fails for the following reasons: (1) the undisputed facts witnessed by Sinclair provide a factual basis for

Sinclair's statements that "violence erupted" and "another fight broke out;" and (2) Sinclair's report that Spingola "will be charged with a felony. . . either aggravated assault or arson" is substantially true and based upon information provided by a reliable source.

(1) The Undisputed Facts Witnessed By Sinclair Provide A Factual Basis For Sinclair's Statements That "Violence Erupted" And "Another Fight Broke Out."

Sinclair incorporates all of the law set forth above in response to Proposition of Law No.

1. As discussed, Spingola cannot survive summary judgment on the issue of actual malice simply by submitting a self-serving affidavit that sets forth Spingola's personal view that violence did not erupt and there was no "fighting" at the 2001 Parade. *Martin Marietta Corp. v. Evening Star Newspaper Co.* (D. D.C. 1976) , 417 F. Supp. 947, 960. More importantly, "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." *Spingola v. Sinclair Media, II, Inc.* (Ohio Ct. App. 2006), 2006-Ohio-6950, ¶11 (*citing* *Serv. Emp. Internatl. Union Dist. 1199 v. Ohio Elections Comm.*, 158 Ohio App.3d 769, 2004-Ohio-5662, 822 N.E.2d 424, at ¶24).

The statements in the Sinclair Report that "violence erupted" and implying that two fights occurred are completely consistent with Sinclair's undisputed videotape and Mai's eyewitness testimony. The first fight referenced in the Sinclair report was a verbal fight in which Spingola became confrontational with the police and the crowd. Spingola himself stated he was "going to fight them." Sinclair's statement that a "second fight broke out" was contemporaneous with the video footage of the police forcefully using their billy clubs on two young girls. The "violence" or "fight" referenced by Sinclair was not a "fabrication" or product of Sinclair's imagination. *St. Amant v. Thompson* (1968), 390 U.S. 727, 732; 88 S.Ct. 1323; 20 L.Ed.2d 262. Even Spingola

admitted that the police confrontation with the young girls was violent. Thus, Spingola's argument that Sinclair recklessly disregarded the truth makes no sense whatsoever.

(2) Sinclair's Report That Spingola Will Be Charged "With a Felony, Either Aggravated Assault or Arson" Is Substantially True and Based Upon Information Provided By a Reliable Source.

Similarly, it is indisputable that Sinclair did not recklessly disregard or purposefully avoid the truth when it reported that the police will charge Spingola "with a felony, either aggravated assault or arson." Mai testified that she received this information from the police who arrested Spingola. This is not a situation where the defendant had reason to doubt its source. See *Hunt v. Liberty Lobby* (11th Cir. 1983), 720 F.2d 631 (basis for malice included defendants' testimony that they "absolutely" had doubted their source's neutrality); *Fitzgerald v. Penthouse Int'l, Ltd.* (7th Cir. 1982), 691 F.2d 661 (possible basis for malice included evidence of reason to doubt the veracity of the sole source of the disputed account); *Gertz v. Robert Welch, Inc.* (1982), 680 F.2d 527 (basis for malice existed where source was reputed and known by defendant to be biased). There can be no more reliable source for the charges that the police intended to bring, than the police themselves.

Nor is this a situation where the defendant misrepresented or fabricated information provided by its source. See e.g., *Sharon*, 599 F. Supp. At 582; *Westmoreland*, 596 F.Supp. at 1174. Rather, Mai reported exactly what she learned from interviewing Sgt. Earl Smith, the public information officer for the Columbus Police Department, after the parade. Further, Sinclair's statements regarding the charges police would bring mirrors Outlet's report and even Spingola admits authorities considered charging him with these crimes. In the end, Spingola was charged with the very serious crimes of aggravated menacing, assault and open burning. The

fact that police did not end up charging Spingola with the exact crimes they originally planned is completely irrelevant.

Under these circumstances, no reasonable jury could possibly find that Sinclair “purposefully avoided” or “recklessly disregarded” the truth. The trial court correctly found that Spingola presented no clear and convincing evidence of actual malice as a matter of law. Accordingly, this Court should affirm the trial court decision dismissing Spingola’s claims against Sinclair with prejudice.

V. CONCLUSION

The law applied by the trial court and Tenth District Court of Appeals is well-established and not remotely in question. A limited purpose public figure, such as Spingola, must prove actual malice by clear and convincing evidence to defeat summary judgment. In this case, the essential facts are all recorded on videotape and there is no evidence whatsoever to support such a finding of actual malice. Accordingly, Spingola’s request for jurisdiction in the Ohio Supreme Court should be denied.

Respectfully submitted,



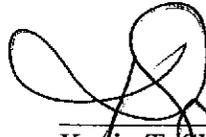
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