

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-1738

DAVID MANN,

Plaintiff-Appellant,

vs.

THE CINCINNATI ENQUIRER, et al.,

Defendant- Appellees.

: Case No. 10-0217
:
: **ON APPEAL FROM THE**
: **HAMILTON COUNTY**
: **COURT OF APPEALS,**
: **FIRST APPELLATE DISTRICT**
:
: **Court of Appeals No. C-090747**
:
: **Trial No. A 0906526**

MEMORANDUM *CONTRA* JURISDICTION OF THE STATE OF OHIO

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TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE DOES NOT CONSTITUTE A MATTER OF PUBLIC OR GREAT GENERAL INTEREST AND WHY IT DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION	1
STATEMENT OF THE CASE AND FACTS	3
DEFENDANTS-APPELLEES' ARGUMENTS <i>CONTRA</i> JURISDICTION	5
<u>PROPOSITION OF LAW NO. 1: WHERE A PLAINTIFF ALLEGES FACTS WHICH SUPPORT A THEORY OF INNOCENT CONSTRUCTION, A MOTION TO DISMISS PURUSANT TO CIV. R. 12(B)(6) IS APPROPRIATE</u>	5
CONCLUSION	10
CERTIFICATE OF SERVICE	11

**EXPLANATION OF WHY THIS CASE DOES NOT CONSTITUTE A MATTER OF
PUBLIC OR GREAT GENERAL INTEREST AND WHY IT DOES NOT INVOLVE
A SUBSTANTIAL CONSTITUTIONAL QUESTION**

There is simply no controversy here, constitutional or otherwise.

In the first paragraph of his Petition for Jurisdiction, Plaintiff-Appellant David Mann (“Mann”) claims that “the ‘innocent construction’ rule has never been adopted by this Court as an appropriate method by which to analyze allegations of defamation.”¹ But this is simply not the case.

This Court expressly adopted the “innocent construction” rule in 1983:

The court of appeals below followed the reasoning of several federal diversity opinions which adopted the ‘innocent construction rule.’ According to this rule, if allegedly defamatory words are susceptible to two meanings, one defamatory and one innocent, the defamatory words should be rejected and the innocent meaning adopted ... [W]e affirm the court of appeals in respect to the appellant’s defamation claim.²

(emphasis added) Lower Ohio courts have consistently applied the rule during the intervening 27 years, with no controversy and little deviation.³

Here, both the trial court and the First District Court of Appeals lawfully applied the “innocent construction” rule and found Mann’s Complaint to be without basis. These rulings present no mysteries for this Court to consider, as even a cursory reading of the controverted article reveals a self-evident non-defamatory interpretation.

¹ *Petition in Supprt [sic] of Jurisdiction of Plaintiff-Appellant David Mann*, p. 1.

² *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 372, 453 N.E.2d 666 (1983).

³ See, e.g., *Van Dreusen v. Baldwin*, 99 Ohio App.3d, 650 N.E.2d 963 (Ohio Ct. App. 1994) (holding that Ohio has adopted the “innocent construction” rule in evaluating defamation claims); *New Olde Village Jewelers v. Outlet Communications, Inc.* (6th Cir. 2000), 202 F.3d 269, 2000 WL 64942 (unpublished); see also *Halley v. WBNS 10 TV, Inc.* 775 N.E.2d 579 (Ohio Ct. App. 2002) (“innocent construction rule” shielded television station from liability because the word “abduction,” as used in telecast, did not necessarily connote “kidnapping”); see also *McKimm v. Ohio Elections Commission* (2000), 89 Ohio St.3d 139, 144, 729 N.E.2d 371 (referencing *Yeager* as key Ohio “innocent construction” rule case).

Faced with this body of law, Mann has sprinkled ill-founded secondary arguments throughout his Petition. These ancillary arguments likewise fail to articulate an issue worthy of this Court's jurisdiction.

For instance, Mann argues, apparently in the alternative, that only the allegedly defamatory article excerpts need be considered for purposes of an "innocent construction" analysis. Under Ohio law, however, an allegedly defamatory article must be considered in its entirety.⁴ The public policy rationale is obvious; most newspaper stories contain quotations which would appear defamatory if wrenched from context.

Mann also claims that the "innocent construction" rule cannot properly serve as the basis for a motion to dismiss pursuant to Ohio Civil Rule 12(b)(6). Again, Mann misconstrues both the pertinent facts and the governing law. The purportedly defamatory news article was attached in its entirety to the original Complaint. The trial court (and later the First District) had the evidence necessary to make a determination regarding the application of the rule. The fact that both did so in a uniform manner speaks volumes.

Finally, Mann posits that the trial court considered facts outside his Complaint in its Order of dismissal. This argument was also made before the First District, with no avail. What Mann calls improper factual extrapolations, the First District found to be fair characterizations of evidence. There is nothing new or novel about this argument, and there is no evidence that either the trial court or the First District lost their way in regard to the facts.

The Ohio Supreme Court Rules of Practice require a "substantial constitutional question" or the involvement of an underlying matter of "public or great general interest" in order for a civil

⁴ See, e.g., *Scott v. News-Herald* (1986), 25 Ohio St.3d 243, 253, 25 OBR 302, 310, 496 N.E.2d 699, 708; *Shallenberger v. Scripps Publishing Co.* (1909), 20 Ohio Dec. 651, affirmed (1912), 85 Ohio St. 492, 98 N.E. 1132.

matter to be even considered for jurisdiction.⁵ Mann has failed to satisfy either requirement. The “innocent construction” rule is indeed Ohio law; lower court applications of the rule span nearly three decades. And there is nothing about this idiosyncratic set of facts which could reasonably be of “public or great general interest.”

Mann has provided no compelling rationale for the Court to re-visit the “innocent construction” rule, other than its application in the dismissal of his ill-conceived complaint. In the end, he is really asking this Court to review *de novo* the lower courts’ interpretation of the article, absent any legal controversy. Such an errand is outside the province of this court.

Defendants-Appellees respectfully submit that there is no basis to grant jurisdiction in this matter and request that the Court accordingly dismiss Mann’s Petition.

STATEMENT OF THE CASE AND FACTS

In 2008, Plaintiff-Appellant David Mann (“Mann”), a 52-year-old part-time “exotic dancer,” filed a *pro se*, handwritten breach of contract action against his former employer, an adult entertainment service known as “Naughty Bodies,” in Hamilton County Municipal Court. A reporter for the *Cincinnati Enquirer* newspaper drafted a story about the dismissal hearing. It is uncontested that the reporter incorrectly transcribed a single sentence from the complaint in his article; in fact, the newspaper quickly printed a correction.

Based solely upon this quotation, Mann filed a complaint against the *Cincinnati Enquirer*,⁶ Gannett Satellite Information Network, Inc., Kimball Perry (the reporter) and Julie Engebrecht (his

⁵ S.Ct. Prac. R. 3.2.

⁶ Throughout the pendency of these proceedings, Appellant has repeatedly referred to “The Cincinnati Enquirer” as though it is a separate and distinct corporate entity. This is factually incorrect. The newspaper is a product of Gannett Satellite Information Network, Inc. and is not a corporate entity pursuant to the laws of Ohio or any other state.

editor) (collectively, "*The Enquirer*") alleging causes of action for defamation, false light invasion of privacy and intentional infliction of emotional distress.

Specifically, Mann claimed that the quotation could have given readers the apparently incorrect impression that he had taken the "Naughty Bodies" job with the expectation that he would have sexual contact with customers. Mann maintains this position despite the balance of the story's contents, which clearly articulate his refusal to engage in sexual contact with customers and his efforts to seek redress from "Naughty Bodies" for terminating his contract as a result

The Enquirer filed a motion to dismiss for failure to state a claim upon which relief may be granted pursuant to Civ. R. 12(b)(6) in lieu of an Answer. After reviewing memoranda from both parties and hearing oral argument, the trial court issued a Memorandum of Decision and Order on September 21, 2009 dismissing the complaint. Mann effected a timely appeal and, in a lengthy and well-reasoned decision, the First District Court of Appeals affirmed the trial court's ruling.

Both the trial court and the First District applied an analysis firmly rooted in Ohio law. The lower courts engaged in a two-step process: 1) They reviewed the controverted article in its entirety; and 2) They determined whether a reasonable non-defamatory construction could be readily ascertained from the story.

Now, Plaintiff petitions this Court for jurisdiction, alleging that the basis of both decisions – the well-established "innocent construction" rule – is without foundation in Ohio law. Plaintiff makes this claim in the face of numerous Ohio appellate decisions adopting the rule – and at least two explicit endorsements of the rule by this Court.

As outlined below, there is no legal or factual controversy here whatsoever – much less one of such import that it merits the jurisdiction and consideration of the Ohio Supreme Court.

DEFENDANTS-APPELLEES' ARGUMENT CONTRA JURISDICTION

**PROPOSITION OF LAW NO. 1: WHERE A PLAINTIFF
ALLEGES FACTS WHICH SUPPORT A THEORY OF INNOCENT
CONSTRUCTION, A MOTION TO DISMISS PURUSANT TO
CIV. R. 12(B)(6) IS APPROPRIATE.**

Mann's arguments for jurisdiction break down into three primary categories: 1) a full-frontal assault on the very existence of the "innocent construction" rule in Ohio; 2) an alternative-theory attack on the application of the rule in this case; and 3) and a series of boilerplate allegations about the facts considered by the trial court in its dismissal of his complaint. None of these arguments present a substantial new constitutional issue for this Court to consider. And the unique set of facts presented by the case certainly do not create an issue of public or great general interest worthy of this Court's time.

A. This Court Has Unambiguously Adopted The "Innocent Construction" Rule.

Despite Mann's protestations, the "innocent construction" rule is an established part of Ohio's First Amendment jurisprudence.⁷ In fact, more than a dozen Ohio courts have utilized the rule since this Court adopted it in its 1983 *Yeager v. Local Union No. 20* decision.⁸ An exhaustive search of Ohio case law failed to unearth an opinion in which an Ohio court has since rejected the existence of the rule. Learned treatises continue to treat Ohio as an "innocent construction"

⁷ See, *inter alia*, Ohio Jur 3d Defamation and Privacy §6 ("If, taking the totality of the circumstances into account, the allegedly defamatory words are susceptible of two meanings, one of which is defamatory and one of which is innocent, the defamatory meaning should be disregarded and the innocent meaning adopted.").

⁸ See, e.g. *Mendise v. Plain Dealer Publ'g Co.*, 69 Ohio App. 3d 721, 591 N.E. 2d 789, 18 Media Rep. 1325 (Cuyahoga App. 1990); *Nussbaumer v. Time, Inc.*, 15 Media Rep. 1745 (Cuyahoga App. 1986); *Bruss v. Vindicator Printing Co.*, 109 Ohio App. 3d 396, 672 N.E. 2d 238 (Mahoning 1996); *Early v. Toledo Blade*, 130 Ohio App. 3d 302, 720 N.E. 2d 107 (1998); *Ferreri v. Plain Dealing Publishing Co.*, 142 Ohio App. 3d 629, 756 N.E. 2d 712 (Cuyahoga App. 2001); *Holley v. WBNS 10TV, Inc.* 149 Ohio App. 3d 22, 2002-Ohio-4315, 775 N.E.2d 579 (Franklin App. 2002).

jurisdiction, and this Court employed an “innocent construction” analysis as recently as 2000.⁹ Simply put, the “innocent construction” rule is law in Ohio.

Mann cites only one Ohio case which purportedly reaches a contrary conclusion – the aforementioned *McKimm v. Ohio Elections Commission* (2000). Yet even a cursory review of that case reveals that it stands for the contrary proposition. The *McKimm* court approvingly references *Yeager* and assumes the existence of the “innocent construction” rule in Ohio; it merely found the rule inapplicable to the facts before it.¹⁰ Had this Court intended to overrule the portion of *Yeager* which sets forth the “innocent construction” rule, it could have done so in *McKimm*. And it did not.

Mann tacitly acknowledges as much in his Petition. He suggests that, in the alternative, *Yeager* is limited to its unusual fact pattern – handbills depicting a manager as a “little Hitler” during a labor dispute – and that its progeny unlawfully expanded the holding. A closer reading of *Yeager*, however, reveals that this Court’s application of the rule was not premised upon the nature of the publication of the statements, but upon their susceptibility to multiple interpretations. The Court expressly notes that “the language used is capable of different meanings” and did so in the context of a discussion of the lower court’s application of the “innocent construction” rule.¹¹ Further, the Court affirmed this portion of the court of appeals’ decision applying the rule without reservation.

The lion’s share of subsequent lower court decisions deal with straight news reports, and not expressions of opinion as Mann claims. His arguments to the contrary, the “innocent construction” rule has been a legal defense to defamation of all types in Ohio for nearly three decades. The fact

⁹ See Ohio Jur 3d Defamation and Privacy §6; see also *McKimm, supra*, at 144.

¹⁰ See *McKimm*. at 144-45. The controverted statement in *McKimm* was a cartoon on a mailed political brochure. This Court found that “the drawing of a hand passing cash under a table is susceptible to only one reasonable interpretation” – and thus found that the “innocent construction” rule did not apply. *Id.* at 149.

¹¹ *Yeager, supra*, at 372.

that Mann was not familiar with the concept at the time he filed his Complaint does not create an issue meriting this Court's jurisdiction.

B. The Lower Courts Correctly Applied The "Innocent Construction" Rule To The Facts Of The Instant Case.

Mann also argues an Ohio Civil Rule 12(b)(6) motion is not an appropriate vehicle for an "innocent construction" analysis. This proposition ignores one of the central tenets of Ohio law: Whether a story is defamatory is question of law for the trial court to decide.¹²

Mann also overlooks the well-established duty of Ohio courts to examine purportedly defamatory news stories under the totality of the circumstances.¹³ That is, a reviewing court *must* read the statement at issue in the context of the entire article before venturing to determine whether an ordinary reader would reasonably find it to be defamatory.¹⁴

In this context, application of the "innocent construction" rule is straightforward. The reviewing court must ascertain whether the article, taken as a whole, can be subject to a non-defamatory reading. If such an interpretation presents itself, the court is bound to accept it as a matter of law. This is so even if the defamatory interpretation is the more obvious one.¹⁵

Mann claims to have been defamed by the following quotation, which *The Enquirer* has always conceded was incorrectly transcribed from his municipal court suit against "Naughty Bodies":

¹²*Mendise v. Plain Dealer Publishing Co.* (1990), 69 Ohio App.3d 721, 726, 591 N.E.2d 789; *Bigelow v. Brumley* (1941), 138 Ohio St. 574, 590, 21 O.O. 471, 478, 37 N.E.2d 584, 592; *Matalka v. Lagemann* (1985), 21 Ohio App.3d 134, 21 OBR 143, N.E.2d 1220, paragraph one of the syllabus.

¹³*Id.*; *Scott v. News-Herald* (1986), 25 Ohio St.3d 243, 253, 25 OBR 302, 310, 496 N.E.2d 699, 708.

¹⁴*Id.*; *Shallenberger v. Scripps Publishing Co.* (1909), 20 Ohio Dec. 651, affirmed (1912), 85 Ohio St. 492, 98 N.E. 1132.

¹⁵*New Olde Village Jewelers v. Outlet Communications, Inc.* (6th Cir. 2000), 202 F.3d 269, 2000 WL 64942 (unpublished); *see also Halley v. WBNS 10 TV, Inc.* 775 N.E.2d 579 (Ohio Ct. App. 2002) ("innocent construction rule" shielded television station from liability because the word "abduction," as used in telecast, did not necessarily connote "kidnapping").

“I was told at my interview (with Naughty Bodies) that shows required dancer(s) to have sexual contact with client,” Mann noted in his suit.

The very next paragraph of the article, however, provides immediate context and supports Mann’s breach of contract claim:

But Mann said the company handbook notes “no one is required to nor expected to have any type of sexual encounters with our customers ... nor will it be tolerated,” adding that it was grounds for being fired.

From even this limited excerpt, it is reasonable to conclude that Mann took the “Naughty Bodies” job in reliance on the provisions of the official handbook, rather than on an unattributed statement at an interview. The second paragraph alone provides sufficient grounds for an alternate, non-defamatory reading which would satisfy the “innocent construction rule,” especially given the context of his action against “Naughty Bodies,” which, by its very nature, suggests that Mann relied upon the handbook.

The rest of the article provides myriad additional facts supporting Mann’s version of events. The article makes it clear that Mann *never* engaged in sexual contact with customers. It also relays how Mann adamantly refused the sexual advances of his first two customers, and immediately complained to company officials. Further, the reported fact that Mann is suing “Naughty Bodies” supports an interpretation in which he did not take the job knowing sexual activity was a prerequisite.

The article is thus subject to two interpretations. The most-readily ascertained is that Mann accepted the job in reliance on the company’s handbook, which assured him he would neither be expected nor required to have sexual contact with customers. Another is that Mann willingly accepted a job knowing that he would be required to have sexual contact with customers. The

former interpretation is the innocent one, and Ohio law *requires* this court to adopt that interpretation. The bungled quote, in context, does not magically create a defamation claim.

Even if this Court were to consider the controverted statement out of context, it would still not constitute defamation *per se* or *per quod*. A statement that an unnamed person commented to Mann that customers would expect sexual contact does not affect Mann's reputation in the slightest, particularly given the unique contextual implications contained within the quotation itself. That is, the quotation itself implies that an interview is occurring between a representative of a company called "Naughty Bodies" and an exotic dancer. Resultant damage to the dancer's standing in the community is, with all due respect, difficult to imagine.

In the end, the First District got it right:

The entire gist of the article was that Mann had adamantly refused to engage in sexual acts with clients. He sued Naughty Bodies because he was fired for refusing to engage in that conduct.

Mann, understandably, disagrees with the law and its application by the lower courts. But the law is the law, no matter how Mann's counsel tries to reinterpret it, and the just dismissal of Mann's claims presents no rational for a wholesale re-evaluation of the "innocent construction" rule.

C. The Lower Courts Did Not Improperly Consider Facts Outside the Complaint.

Mann contends that the trial court erred by going outside the pleadings in its Order of Dismissal – and that the First District failed to address the alleged error. A review of the facts, however, reveals that the trial court did nothing more than interpret the article before it, as is required by Ohio law.

Nothing in the trial court's ruling constitutes anything other than a reasonable characterization of the new story and the facts contained in Mann's complaint. The Ohio Civil Rules

obligate the trial court to accept the averments of the complaint as true at this stage, but they do not require the court to abandon its judgment and avoid reasonable interpretations of those facts.

More importantly, the “innocent construction” rule requires the reviewing court to make reasonable efforts to ascertain whether more than one meaning can be gleaned from a controverted article. The trial court did precisely that. And, even if the trial court had strayed beyond the Complaint in its ruling, such an error would be of neither constitutional significance nor public interest. The First District found no error here – because none exists.

CONCLUSION

In the end, Mann is asking this Court to second-guess two lower courts’ reading of a newspaper article – and, for good measure, to jettison the long-standing Ohio rule that allegedly defamatory publications be taken in their entirety. Further, Mann would have the Court believe that the “innocent construction” rule is not good law in Ohio, despite this Court’s repeated endorsements of it. Mann presents absolutely no rationale as to why any of these non-issues merit the Court’s jurisdiction.

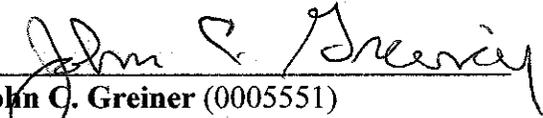
Worse, Mann advances no new arguments in regard to his ancillary claims for false light invasion of privacy and intentional infliction of emotional distress. Suffice it to say that the lower courts’ findings that both claims fail as a matter of law are well-reasoned, grounded in the extant facts and devastating to Mann’s slim reed of an argument. *The Enquirer* stands upon those findings in regard to these claims.

Based upon the foregoing, Defendants-Appellees respectfully request that this Court deny Mann’s Petition for Jurisdiction. He has failed to articulate why this case constitutes a matter of “public or general concern” and has likewise failed to articulate a “substantial constitutional issue” in relation to his Complaint and its dismissal. Accordingly, this Court must dismiss his Petition.

Respectfully submitted,

Of Counsel:

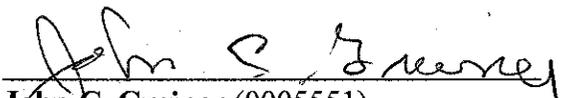
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served by regular U.S. Mail, postage prepaid, this 28th day of October, 2010, upon the following:

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