

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Brian Keith Alford,	:	
Plaintiff-Appellant,	:	
v.	:	No. 22AP-779
Ohio Department of Rehabilitation and Correction,	:	(Ct. of Cl. No. 2016-00038JD)
Defendant-Appellee.	:	(REGULAR CALENDAR)
	:	
	:	

D E C I S I O N

Rendered on January 4, 2024.

On brief: *Brian Keith Alford*, pro se.

On brief: *Dave Yost*, Attorney General, and *Jeanna Jacobus*, for appellee.

APPEAL from the Court of Claims of Ohio

BEATTY BLUNT, J.

{¶ 1} Plaintiff-appellant, Brian Keith Alford, an inmate in the custody and control of defendant-appellee, Ohio Department of Rehabilitation and Correction (“ODRC”), appeals from the December 7, 2022 judgment of the Court of Claims of Ohio overruling appellant’s objections to the magistrate’s decision and adopting the decision, and recommendation of the magistrate as its own and rendering judgment in favor of ODRC. Because we find no reversible error in this matter, we affirm the judgment of the trial court.

I. Facts and Procedural History

{¶ 2} Appellant filed a complaint against ODRC in the Court of Claims on January 14, 2016, asserting claims for defamation, excessive use of force, and punitive and retaliatory restrictions on his access to communications. (*See generally* Compl.) Appellant also asserted a claim in which he challenged certain decisions of the parole board. (*See id.*) Pertinent to the instant appeal are the facts allegedly giving rise to appellant’s defamation

claim. According to the complaint, ODRC employees Officer Renee Myers-Carnes and Officer Lucy Miller each wrote separate conduct reports in 2015 in which they stated that appellant was masturbating in violation of Rule 14, an institutional rule. (Compl. at ¶ 4-9, Ex. A.) Appellant further alleged these statements were false. (Compl. at ¶ 4, 8-10.)

{¶ 3} On February 24, 2016, ODRC filed a motion for partial judgment on the pleadings pursuant to Civ.R. 12(C). On May 23, 2016, the trial court issued an entry granting in part and denying in part ODRC's motion for partial judgment on the pleadings, dismissing appellant's claims for punitive and retaliatory restrictions on access to communications, and his challenge to the parole board hearing decision for lack of subject-matter jurisdiction. (May 23, 2016 Entry.) The trial court further found that appellant's claim for excessive use of force was actually a claim for negligence. *Id.*

{¶ 4} The issues of liability and damages were bifurcated for purposes of trial, and on February 23, 2022 the trial before a magistrate proceeded on appellant's claims for defamation and negligence as scheduled at the Court of Claims with appellant appearing by videoconference. (Feb. 23, 2022 Tr.)

{¶ 5} On April 20, 2022, the magistrate issued his decision finding that appellant had failed to prove his claim for defamation by presenting clear and convincing evidence of actual malice so as to overcome ODRC's employees' qualified privilege to report behavior believed to be in violation of an institutional rule. (Apr. 20, 2022 Mag.'s Decision at 4-8.) The magistrate further found that appellant had failed to prove his claim for negligence by a preponderance of the evidence. *Id.* at 8-10. Accordingly, the magistrate recommended judgment be entered in favor of ODRC. *Id.* at 10.

{¶ 6} After having been granted an extension of time in which to do so, appellant filed his objections on May 11, 2022. Appellant did not, however, file a transcript of the trial proceedings. Eventually, after receiving several extensions, appellant filed an affidavit of evidence in support of his objections pursuant to Civ.R. 53(D)(3)(b)(iii) on August 31, 2022. With leave of court, ODRC filed the trial transcript on September 23, 2022. Notably, although the trial court afforded appellant the opportunity to file amended objections containing references to the transcript within 45 days of the date of the entry granting leave to ODRC to file the transcript, appellant did not file any updated or amended objections.

{¶ 7} Thereafter, on December 7, 2022, the trial court issued its decision overruling the objections and adopting the magistrate’s decision. (Dec. 7, 2022 Decision.) Relevant to this appeal, the trial court parsed appellant’s fifth objection as asserting that the magistrate erred in determining that ODRC was entitled to “qualified immunity” because appellant had “present[ed] clear and convincing evidence of actual malice on the part of defendants, since they knew [or] should have known that their conduct reports were false.” (Dec. 7, 2022 Decision at 5.) The trial court rejected this objection, finding the testimony of both Myers-Carnes and Miller to be credible and based on what they personally observed. *Id.* at 5-6. The trial court further found no evidence that either Myers-Carnes or Miller knew the reports they wrote were false or that they wrote them with reckless disregard of the truth. *Id.* The trial court specifically found that appellant had not shown by clear and convincing evidence any actual malice on the part of either employee. *Id.* The trial court rendered judgment in favor of ODRC. (Dec. 7, 2022 Decision at 8; Dec. 7, 2022 Jgmt. Entry.)

{¶ 8} This timely appeal followed and is now before the court.

II. Assignments of Error¹

{¶ 9} Appellant asserts the following assignments of error for our review:

[I.] The trial court erred in denying appellants motion to compel discovery of the video of the incident.

[II.] The trial court erred in ruling that the appellees conduct reports were not written with actual malice.

(Sic passim.)

III. Law and Analysis

A. Standard of Review

{¶ 10} The trial court reviews a magistrate’s decision de novo, as required by Civ.R. 53. *Skorvanek v. Ohio Dept. of Rehab & Corr.*, 10th Dist. No. 17AP-222, 2018-Ohio-3870, ¶ 24, citing *Mayle v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-541, 2010-Ohio-2774, ¶ 15. Further, in ruling on objections to a magistrate’s decision, the trial court must

¹ Appellant has not assigned any error challenging the trial court’s finding that appellant failed to prove negligence on the part of ODRC.

undertake an independent review of the matters objected to in order “to ascertain [whether] the magistrate has properly determined the factual issues and appropriately applied the law.” *Id.*, citing Civ.R. 53(D)(4)(d).

{¶ 11} “An appellate court, however, reviews a trial court’s adoption of a magistrate’s decision for an abuse of discretion.” *Id.* at ¶ 25, citing *Mayle* at ¶ 15. Claims of trial court error must be based on the actions taken by the trial court itself, rather than on the magistrate’s findings. *Mayle* at ¶ 15. A trial court abuses its discretion when it exercises its judgment in an unwarranted way regarding a matter over which it has discretionary authority. *Johnson v. Abdullah*, 166 Ohio St.3d 427, 2021-Ohio-3304, ¶ 35. The term abuse of discretion, “ ‘ commonly employed to justify an interference by a higher court with the exercise of discretionary power by a lower court, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency.’ ” *Id.*, quoting *Black’s Law Dictionary* 11 (2d Ed.1910). Put another way, an abuse of discretion “implies that the court’s attitude is unreasonable, arbitrary, or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). Therefore, we may reverse the trial court’s adoption of the magistrate’s decision only if the trial court acted unreasonably, arbitrarily or unconscionably. *Skorvanek* at ¶ 25.

B. Appellant’s First Assignment of Error

{¶ 12} In appellant’s first assignment of error, appellant contends that the trial court erred in denying appellant’s motion to compel discovery of the video of the December 2015 incident which appellant alleges shows excessive use of force by Miller. We find this assignment of error meritless.

{¶ 13} The record in this case shows appellant did not file a motion to compel discovery of the video of the December 26, 2015 incident giving rise to his claim for negligence. He did file a motion to compel discovery on November 10, 2016, but that motion specifically requested an order to compel production of the documents which he had requested on July 29, 2016. A review of the discovery requests for production issued on July 29, 2016 shows they did *not* include a request for the video of the December 26, 2015 incident when Miller placed handcuffs on him. Furthermore, the magistrate *granted* that motion to compel—he did not deny it.

{¶ 14} Nevertheless, we acknowledge that appellant also attached as part of his November 10, 2016 motion to compel his *second* request for production of documents, which he issued to ODRC on September 15, 2016. Request for Production 2, of the September 15, 2016 second Request for Production includes “video footage of removal of the restraints by Officer John Doe.” Thus, a generous reading and interpretation of the November 10, 2016 motion to compel filed by appellant could lead to the conclusion that appellant meant to include in his motion to compel both his first *and* second requests for production, but mistakenly referenced only his first request for production in the body of the motion. Even assuming the foregoing conclusion is accurate, however, the record is clear that after the magistrate granted the November 10, 2016 motion to compel, appellant never brought to the trial court’s attention in any manner that a copy of the video he requested was never produced.

{¶ 15} It is well-settled that a party’s failure to notify the trial court of a possible error results in a waiver of the issue for appeal unless appellant can show plain error. *Noble v. Noble*, 10th Dist. No. 07AP-1045, 2008-Ohio-4685, ¶ 20, citing *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121 (1997). Because “the plain error doctrine is not favored” in civil appeals, it “may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.” *Goldfuss* at paragraph one of the syllabus.

{¶ 16} Here, as previously noted, the record does not show that appellant made any effort to make the trial court aware of the fact that the video of the December 26, 2015 incident had not been produced as requested. He failed to file a further, more specific motion to compel its production; a review of the trial transcript evinces that he did not raise the issue with the magistrate prior to the start of trial; he did not raise the issue in his objections to the magistrate’s decision; and he has delineated no other steps taken to bring the issue to the trial court’s attention. The trial court cannot be expected to rectify a situation of which it has not been made aware. Under these circumstances, we find no plain error on the part of the trial court on this issue; therefore, appellant has waived this issue for appeal. *See Anderson v. ODRC*, 10th Dist. No. 19AP-734, 2020-Ohio-4437, ¶ 10-11

(failure by appellant to raise a complaint about ODRC's responses to appellant's discovery requests to the magistrate before trial or as an objection to the magistrate's decision afterward resulted in failure to preserve issue for further appeal).

{¶ 17} Accordingly, based on the foregoing, appellant's first assignment of error is overruled.

C. Appellant's Second Assignment of Error

{¶ 18} In appellant's second assignment of error, appellant contends that the trial court erred when it found that the conduct reports were not written with actual malice. We disagree.

{¶ 19} "Defamation, which includes both slander and libel, is the publication of a false statement 'made with some degree of fault, reflecting injuriously on a person's reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business or profession.'" *Savoy v. Univ. of Akron*, 10th Dist. No. 13AP-696, 2014-Ohio-3043, ¶ 17, quoting *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, ¶ 9, quoting *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 7 (1995). "'Slander' refers to spoken defamatory words, while 'libel' refers to written or printed defamatory words." *Schmidt v. Northcoast Behavioral Healthcare*, 10th Dist. No. 10AP-565, 2011-Ohio-777, ¶ 8.

{¶ 20} To prevail on a claim for defamation, "a plaintiff must establish: (1) a false statement, (2) about the plaintiff, (3) published without privilege to a third party, (4) with fault of at least negligence on the part of the defendant, and (5) the statement was either defamatory per se or caused special harm to the plaintiff. (Further citations omitted.) *Watley v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 07AP-902, 2008-Ohio-3691, ¶ 26 "If a claimant establishes a prima facie case of defamation, a defendant may then invoke a conditional or qualified privilege." *Jackson* at ¶ 9, citing *A & B-Abell Elevator Co.* at 7, citing *Hahn v. Kotten*, 43 Ohio St.2d 237, 243 (1975)

{¶ 21} "A qualified privilege is an affirmative defense to a claim of defamation." *Morrison v. Gugle*, 142 Ohio App.3d 244, 258 (10th Dist.2001), citing *Cooper v. Baptist Church of Columbus, Ohio, Inc.*, 81 Ohio App.3d 728, 734 (10th Dist.1992), citing *Hahn* at 243. In *Jackson*, the Supreme Court of Ohio set out the essential elements of a

conditionally or qualifiedly privileged communication as follows: (1) good faith, (2) an interest to be upheld, (3) a statement limited in its scope to this purpose, and (4) a proper occasion, and publication in a proper manner and to proper parties only. *Id.* at ¶ 9, quoting *Hahn* at 246. A qualified privilege shields the defamer from liability to plaintiff where “society’s interest in compensating a person for loss of reputation is outweighed by a competing interest that demands protection.” *A & B-Abell Elevator Co.* at 8. “One type of interest protected by a qualified privilege is the public interest. The ‘public interest’ privilege ‘involves communications made to those who may be expected to take official action of some kind for the protection of some interest of the public.’ ” *Id.* at 9, quoting *Prosser & Keeton, on the Law of Torts*, Section 115, 830 (5th Ed.1984).

{¶ 22} Once established, “a qualified privilege may be defeated * * * if a claimant proves with convincing clarity that a publisher acted with actual malice.” *Jackson* at ¶ 9, citing *Jacobs v. Frank*, 60 Ohio St.3d 111 (1991), paragraph two of the syllabus. “In a qualified privilege case, ‘actual malice’ is defined as acting with knowledge that the statements are false or acting with reckless disregard as to their truth or falsity.” *Jacobs* at paragraph two of the syllabus. The phrase “reckless disregard” applies when a publisher of defamatory statements acts with a “high degree of awareness of their probable falsity” or when the publisher “in fact entertained serious doubts as to the truth of his publication.” (Internal citations omitted.) *Jackson* at ¶ 10. Evidence that establishes, at best, the publisher “should have known” of the alleged falsity of the statement is insufficient to establish actual malice. *Varanese v. Gall*, 35 Ohio St.3d 78, 82 (1988). “[M]ere negligence is constitutionally insufficient to show actual malice.” *Id.*, citing *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Dupler v. Mansfield Journal Co.*, 64 Ohio St.2d 116, 119 (1980). Furthermore, “[i]t is not sufficient for a libel plaintiff to show that an interpretation of facts is false; rather, he must prove with convincing clarity that defendant was aware of the high probability of falsity.” (Quotations omitted.) *Watley*, 2008-Ohio-3691 at ¶ 33.

{¶ 23} At the outset of our discussion of this assignment of error, we note that notwithstanding appellant’s reference in his appellate brief to “ODRC’s motion for summary judgment” being “predicated on the existence of a qualified privilege,” the record shows no such motion for summary judgment was filed in this case. (See Brief of Appellant at 12.) We also observe that although appellant states in his brief that “appellees were not

shielded by immunity,” he utterly fails to elaborate on this contention. More importantly, his second assignment of error does not assert that the trial court erred in finding that the conduct reports at issue in this case were subject to a qualified privilege. “This court rules on assignments of error, not mere arguments.” *Huntington Natl. Bank v. Burda*, 10th Dist. No. 08AP-658, 2009-Ohio-1752, ¶ 21, citing App.R. 12(A)(1)(b) (stating “a court of appeals shall...determine the appeal on its merits on the assignments of error set forth in the briefs”); *Williams v. Barrick*, 10th Dist. No. 08AP-133, 2008-Ohio-4592, ¶ 28 (holding appellate courts “rule on assignments of error only, and will not address mere arguments”). Accordingly, our review of appellant’s second assignment of error is limited to his contention that the trial court erred in ruling that the appellees’ conduct reports were not written with actual malice. As we have already intimated, we find this contention meritless.

{¶ 24} The entirety of appellant’s objection to the magistrate’s decision on this point is as follows: “[appellant] did in fact present clear and convincing evidence of actual malice on the part of defendants, since they knew [or] should have known that their conduct reports were false.” (May 11, 2022 Objs. at 4.) Appellant fails, however, to specifically elaborate any further on what exactly this evidence was.

{¶ 25} A charitable reading of appellant’s objections indicates that he may be relying on the fact that the hearing officer’s reports associated with the two conduct reports at issue in this case show that appellant was ultimately found not guilty of the rule violations. However, at trial, James Jones, a lieutenant at Warren Correctional Institution where the incidents occurred, testified that a finding of not guilty does not equate to a determination by the hearing officer that the report itself was false. (Tr. at 70-72.) The magistrate specifically found this testimony credible, and that appellant had failed to present clear and convincing evidence of actual malice in the preparation of the reports.

{¶ 26} The trial court agreed with this assessment of the magistrate, finding that “[i]t does not appear to the Court that either witness knew that the reports they wrote were false or that they wrote the reports with reckless disregard for the truth.” (Dec. 7, 2022 Decision at 6.) Based on the record before us, we find no abuse of discretion on the part of the trial court in overruling appellant’s objection and adopting the magistrate’s decision on the issue of actual malice.

{¶ 27} Therefore, we find the trial court did not err when it determined that the conduct reports were not written with actual malice. Accordingly, appellant's second assignment of error is overruled.

IV. Disposition

{¶ 28} Having overruled both of appellant's assignments of error, we affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

MENTEL and LELAND, JJ., concur.
