

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

THOMAS W. BRYAN,	:	
Plaintiff	:	
	:	
v.	:	NO. 98-01,559
	:	
DONNA CARDUCCI and THE	:	
BOROUGH OF DUBOISTOWN,	:	
Defendants	:	

OPINION and ORDER

This action arose out of a heated and contentious interchange at a Duboistown Borough Council meeting during which Donna Carducci, a Council member, accused Thomas Bryan, a citizen addressing the Council, of selling drugs to her sister. Mr. Bryan then filed this suit for defamation.

The tort of defamation, nearly as old as the English common law itself, has long guaranteed the right to compensation for injury done to one's reputation from untrue statements made about them. Over the years, however, our society began to realize that the mere threat of a defamation lawsuit can interfere with treasured rights such as freedom of speech and freedom of the press. It can also deter public officials from discharging their duties to the best of their ability. To address these concerns and safeguard the rights so fundamental to a democracy, jurists and legislatures have altered the law of defamation in numerous ways.

One such change was the creation of the doctrines of absolute and conditional privilege, which exempt individuals from defamation suits in situations where unfettered speech is deemed to be of the utmost importance. In creating these privileges, our courts have attempted to strike a balance between the public's interest in open discussion and the right of individuals to be compensated for harm to their

reputation. The Duboistown Council case is one of the special instances where public interest must take precedence over individual rights. The court thus finds that Donna Carducci is protected by both an absolute and conditional privilege. She is therefore immune from a defamation lawsuit and the case against both her and the Borough of Duboistown must be dismissed.

Factual Background

On 4 June 1998 the plaintiff, Thomas Bryan, attended a regularly scheduled public meeting of the Duboistown Borough Council. Although there is some disagreement about exactly what transpired, it is clear from the depositions offered by both sides in this controversy, as well as a rather muddled tape recording of the incident, that Mr. Bryan aggressively confronted Council members about an ongoing police investigation against him for drug activity. Complaining that he was tired of being “harassed,” he demanded to know why the 1992 investigation against him for illegal drug activity was still continuing. Mr. Bryan’s outburst launched a public attack against the Police Chief and challenged the Council members to account for his behavior.

At the time of the meeting the Borough Police Chief was a controversial figure, with many ardent supporters and equally ardent detractors spread throughout the Borough. Mr. Bryan’s comments therefore created a hullabaloo and in the chaos that ensued Ms. Carducci rose to the Police Chief’s defense and shouted something to the effect of, “Well we know about your drug activity. My sister used to buy drugs from you.” At that point the meeting deteriorated into a screaming match, with a lone authority figure pounding his gavel in a futile attempt to restore order.

Discussion

A motion for summary judgment may be granted when there is no genuine issue of material fact regarding a necessary element of the cause of action or if, after completion of discovery, the plaintiff has failed to produce evidence of a fact essential to prove the cause of action. Pa.R.Civ.P. 1035.2. The purpose of the rule is to eliminate cases where a party cannot prevail on a claim or a defense. Eaddy v. Hamaty, 694 A.2d 639, 649 (Pa. Super. 1997). Summary judgment is appropriate in this case because the court finds that Ms. Carducci is protected by both an absolute and a conditional privilege.

I. Elements of Defamation

The defendants argue the plaintiff has not produced sufficient evidence to establish the elements of defamation. Specifically, they contend Ms. Carducci's statement is incapable of a defamatory meaning. That argument is sheer nonsense.

A statement is defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or deter third persons from associating or dealing with him. Kryeski v. Schott Glass Technologies, 426 Pa. Super. 105, 626 A.2d 595, 600 (1993). Ms. Carducci stated, at a public meeting of the Borough Council, that Mr. Bryan had sold drugs to her sister. In this time of widespread outrage over the devastating effects of drugs in our society, few accusations could be more damaging to one's reputation.

The defendants also argue the plaintiff must show he suffered a pecuniary loss from the defamatory statement. While such "special damages" are generally required in cases of slander, it is not necessary when the statement constitutes "slander per se."

Walker v. Grand Cent. Sanitation, Inc., 634 A.2d 237 (Pa. Super. 1993). Among the well established instances of slander per se is a crime involving moral turpitude, for which the party might be indicted and punished, such as selling drugs. Therefore, this argument has no merit.

II. Absolute Privilege

The doctrine of absolute privilege exempts a high public official from all civil defamation suits provided the statements are made in the course of the official's duties or powers and within the scope of the official's authority or jurisdiction. McKibben v. Schmotzer, 430 Pa. Super. 236, 700 A.2d 484, 488-489 (1997), citing Matson v. Margiotti, 371 Pa. 188, 88 A.2d 892 (1952). The doctrine rests upon the principle that "conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation." Montgomery v. City of Philadelphia, 392 Pa. 178, 140 A.2d 100, 102 (1958).

This sweeping immunity is not provided for the benefit of high public officials; it is for the benefit of the public. The privilege safeguards society's interest in the unfettered discussion of public business and promotes full public disclosure of the facts and conduct of that business. McKibben, supra, at 489. By removing inhibitions which could deter public officials from carrying out discretionary duties it also ensures that the public will receive the best possible service from its officials. Id. The statements Ms. Carducci made at the contentious council meeting fit squarely into the absolute immunity doctrine for the following reasons.

First, Ms. Carducci was a high public official. This designation depends on the nature of her duties, the importance of her office, and whether she had policy making functions. Id. A Borough Council member is without a doubt an important local official, with extensive policy-making duties as part of the legislative body that administers the Borough. A glance at the relevant case law supports this determination. Courts have found the following to be high public officials: Township Supervisors, Jonnett v. Bodiek, 431 pa. 59, 244 A.2d 751 (1968); a Borough Council President, Suppan v. Kratzer, 660 A.2d 226 (Pa. Cmwlth. 1995); a Deputy Commissioner of Public Property, Montgomery, supra.; a City Architect, id.; a Revenue Commissioner, Factor v. Goode, 149 Pa. Cmwlth. 81, 612 A.2d 691 (1992); and a City Comptroller, Rok v. Flaherty, 106 Pa. Cmwlth. 570, 527 A.2d 211 (1987).

Secondly, the statements were made in the course of her official duties or powers and within the scope of her authority or jurisdiction. According to the Borough Code, 53 P.S. § 46001 et seq., the Borough Council has the responsibility of providing police protection to the Borough, and is also given various administrative duties toward the police force. Particularly pertinent are § 46121, and § 46124, under which Borough Council may establish a police department and assign individuals to the offices; appoint a chief of police; and appoint, remove, suspend, discharge, reduce in rank, and reinstate Borough policeman. *See also* Borough of Bristol v. Downs, 48 Pa. Cmwlth. 46, 409 A.2d 467, 469 (1979) (Borough Council has the primary responsibility and discretion for determining whether and how a police officer should be disciplined). In Zdaniewicz v. Sands, 288 Pa. Super. 420, 432 A.2d 231, 233-234 (1981), the Superior Court addressed a similar issue, stating:

The acts and decision for which the township supervisors assert

immunity in the instant case were related to their duty to provide adequate and costs-effective police protection for residents of the township. Police protection is an area of policy-making which requires the exercise of wide discretion and sound judgment. . . . Few would question that the responsibility for providing police protection carries with it the right, if not the duty, to review the job performance of police officers employed by the township.

See also O'Donnell v. Yanchulis, 875 F.2d 1058 (3d Cir. 1989) (Township Supervisor who stated that a police officer was fired for insubordination was protected by absolute immunity.)

Because of their responsibility in regard to the police force, Township Supervisors have been granted absolute immunity when criticizing Township policemen. *See* Zdaniewicz, *supra* and O'Donnell, *supra*. If such officials are provided absolute immunity when *criticizing* policemen, Borough Council members should certainly be protected when *defending* them against attack, as Ms. Carducci was doing. As a Council member, Ms. Carducci had a shared responsibility to provide competent police protection to the residents of Duboistown. When the integrity of the police department was called into question it was well within the scope of her authority and jurisdiction to respond to the criticism and justify the investigation.

Nor did she step outside the scope of that authority when she stated that Mr. Bryan had sold drugs to her sister. Although the interchange unquestionably took on the character of a personal squabble, the issue was nonetheless one of vital public concern. Allegations of police harassment can seriously undermine confidence in law enforcement. Therefore, it was important for the citizens of Duboistown to hear from their Council members why the investigation was justified. In fact, one could argue it was Ms. Carducci's *responsibility* to respond, to provide the public with all facts

necessary to assess the conduct of the police force which they depend upon for protection and fund through their taxes. The doctrine of absolute immunity allows Ms. Carducci and other Council members to fully respond to such charges.

Nor does it matter whether Ms. Carducci was motivated by ill will toward Mr. Bryan.¹ Absolute immunity protects a high public official even when the official's statements were motivated by malice. McKibben v. Schmotzer, *supra*, at 488-489, citing Matson v. Margiotti, 371 Pa. 188, 88 A.2d 892 (1952). Long ago Judge Learned Hand explained the reasons for refusing to consider allegations of malice in this context:

The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. . . . In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

Gregoire v. Biddle, 177 F.2d 579, 581 (2nd Cir. 1949), quoted in Barr v. Matteo, 360 U.S. 564, 571-2, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959).

Ms. Carducci's statement was certainly incendiary, and her interchange with Mr. Bryan was surely unprofessional and unbecoming of a Borough Council member. However, that does not strip her of the absolute privilege. Public interest demands a liberal interpretation of whether statements fall within an official's duties, Barto v. Felix, 250 Pa. Super. 262, 378 A.2d 927 (1977), and courts are prepared to be highly

¹ The court also notes that Section 8550 of the Pennsylvania Subdivision Tort Claims Act, which permits public employees to be liable for wilful misconduct, does not abrogate the doctrine of absolute privilege for high public officials. Lidner v. Mollan, 677 A.2d 1194, 1196 (Pa. 1996).

permissive in this regard, as demonstrated by Lidner v. Mollan, 677 A.2d 1194, 1196 (Pa. 1996). In that case, the Pennsylvania Supreme Court held that a Mayor was protected by an absolute privilege when he told a Borough Council member at a public Council meeting, “[Y]ou’re the village idiot. . . . You’ve been dipping into the till. I know for a fact. And you know I know.”

In totalitarian regimes, public officials are not free to carry out their duties in accordance with their best judgment and abilities. In a democracy, however, our public officials are accorded the freedom—and the responsibility—to do exactly that. The doctrine of absolute privilege embodies our society’s judgment that it is far better for citizens to occasionally suffer harm to their reputation than for our public officials to operate under the constant threat of a lawsuit for everything they say in the course of executing their duties. Ms. Carducci, a high public official of the Borough of Duboistown, must be accorded such protection.

III. Conditional Privilege

Ms. Carducci is also protected by a conditional privilege, which grants the right to make statements on a proper occasion, from a proper motive, in a proper manner, and based upon reasonable cause. Elia v. Erie Ins. Exchange, 430 Pa. Super. 384, 634 A.2d 657 (1993). Examples of proper occasions include: (1) when some interest of the publisher of the defamatory matter is involved; (2) when some interest of the recipient of the matter, or a third party is involved; and (3) when a recognized interest of the public is involved. Id.

Ms. Carducci’s statement was a response to an attack launched by Mr. Bryan on the Borough Police Chief. Mr. Bryan asked why the investigation was ongoing,

and she answered his question. Ms. Carducci had a personal interest in the matter by virtue of her responsibility to provide police protection to Borough residents. She was also defending the interest of a third party, the Police Chief. And finally, her statement involved a recognized public interest, namely the integrity of the Borough police department. Therefore, her statement was made on a proper occasion.

The evidence also shows that her statement was made from a proper motive—the defense of the Police Chief and the Borough Council, which is ultimately responsible for hiring, firing, and disciplining police officials. Furthermore, her statement was made in the proper manner, as it was a direct response to questions Mr. Bryan himself raised at the public meeting. And finally, there appears to be reasonable cause for her statement, as she spoke from personal knowledge about what her sister had told her. *See* Deposition of Rose Marie Smith, pp. 9-11 and Deposition of Donna Carducci, p. 19. Therefore, the court finds that Ms. Carducci was conditionally privileged to make the statement.

Once a matter is deemed conditionally privileged, the plaintiff has the burden of establishing that the defendant abused that privilege. 42 Pa.C.S.A. § 8343(a)(7). Chicarella v. Passant, 343 Pa. Super. 330, 494 A.2d 1109 (1985). A person abuses a conditional privilege when the publication is made: (1) negligently or with malice;² (2) for a purpose other than that for which the privilege is given; (3) to a person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege; or (4) when the statement is not reasonably believed to be necessary for the

² “Malice” in this context exists when a wrongful act is done intentionally without just cause or excuse or generated from reckless or wanton disregard of another’s rights. Elia, supra, at 661 n.2.

accomplishment of the purpose. Beckman v. Dunn, 276 Pa. Super. 527, 419 A.2d 583, 588 (1980).

The plaintiff will not be able to meet his burden. It is clear from the record that Ms. Carducci made the statement with just cause—she was asked a question at a public meeting and duly answered it, based on information provided by her sister. She made the statement for the purpose the privilege is given—to protect her interest, the interest of the Police Chief, and the public interest. She made the statement to persons necessary to accomplish the purpose—those in attendance at the meeting, who had already heard Mr. Bryan’s allegations against the Police Chief. Finally, the information contained in the statement was reasonably necessary to accomplish the purpose of the privilege—to rebut the criticisms launched by Mr. Bryan.

The plaintiff claims he can prove Ms. Carducci abused the privilege by showing that at the time she made the statement there was a public controversy over the Police Chief and Ms. Carducci, one of his supporters, was attempting to discredit Mr. Bryan, one of his critics. Even if that were her motivation, however, it would not constitute an abuse of the privilege. In fact, as discussed above, a conditional privilege bestows the right to discredit someone in order to protect the interest of the publisher, a third person, or a public interest, so long as the statement falls within the limits set forth above.

IV. Borough of Duboistown

The plaintiff has included the Borough of Duboistown as a defendant, alleging it is vicariously liable for the tort of Ms. Carducci. This claim must fail because 42 Pa.C.S.A. § 8542(b) sets forth the limited situations when a local government agency

and its employee may be sued, and defamation is not one of them. Moreover, it goes without saying that if Ms. Carducci is not liable due to absolute or conditional privilege, the Borough cannot be held liable.

ORDER

AND NOW, this _____ day of June, 1999, for the reasons stated in the attached opinion, the motion for summary judgment filed by the defendants on 15 April 1999 is granted and the complaint in the above-captioned matter is dismissed.

BY THE COURT,

Clinton W. Smith, P.J.

cc: Dana Stuchell, Esq., Law Clerk
Hon. Clinton W. Smith
Scott T. Williams, Esq.
Mary Lou Maierhofer, Esq.
120 Lakemont Park Blvd.
Altoona, PA 16602
Gary Weber, Esq.