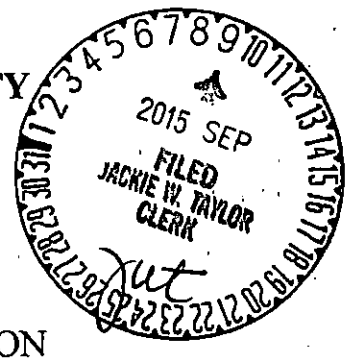
IN THE SUPERIOR COURT OF TROUP COUNTY
STATE OF GEORGIA



RICHARD CARY WOLFE,
a/k/a RICKY WOLFE,
Plaintiff

vs.

RON McCLELLAN,
Defendant

CIVIL ACTION

FILE NO. 2014CV0379

ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The above-captioned case came before the Court on Wednesday, August 27, 2015, on Plaintiff's Motion for Partial Summary Judgment. The Plaintiff was present with counsel and the Defendant appeared pro se. The Plaintiff submitted a brief in support of his Motion for Summary Judgment and, on the morning of the hearing, the Defendant timely filed a brief in opposition to the motion.

Plaintiff's counsel requested additional time within which to respond to the Defendant's brief, and the Court granted Plaintiff five (5) days from the date of the hearing within which to respond to Defendant's brief, and granted Defendant five (5) days from the date on which Plaintiff filed his response within which to respond to Plaintiff's responsive brief.

The Court proceeded to hear argument from the parties and took the

matter under advisement pending receipt of any supplemental briefs either party wished to submit in support of their respective positions. Both Plaintiff and Defendant filed supplemental briefs within the time set by the Court. The Defendant also submitted, as attachments to his Brief in Response to Plaintiff's Reply Brief, various documents[1]. The only evidence within the various documents was the affidavit of Claude F. Foster, III, which the Court has considered. The Court has read all of the other attached documents, and, to the extent the Court can discern the relevance and probative value of such documents, they have likewise been considered. After considering the briefs, affidavits, depositions and other discovery of record, argument of the parties and the entire record of the case, the Court enters the following order.

PROCEDURAL HISTORY

This case is a civil damages lawsuit for libel filed by the Plaintiff on June 11, 2014. The Defendant, who is pro se, filed an answer and counterclaim on July 14, 2014. The Plaintiff filed a motion to dismiss Defendant's counterclaim which was granted following a hearing conducted

[1] Attachments to Defendant's Brief in Response to Plaintiff's Reply Brief: A1 Internet article titled "How to Spot Financial Fraud in a Non-Profit: 2 Warning Signs"; A2 Winkipedia article titled "Accounting scandals"; A3 Internet article titled "Not-for-Profits Not Immune to Fraud"; B Copy of indecipherable picture on which is typed "April 8, 2014 Troup County Commission Meeting"; C Affidavit of Claude F. Foster, III; D1 Article titled "Volunteers participate in Paint the Town"; D2 Redacted Troup County Property Records for various properties; E1 Article titled "DASH for LaGrange: Cronyism and misrepresentation?" written by Defendant and published on Troup County Citizen blog; E2 Copy of Voluntary Dismissal of DASH, Inc.; G Redacted copy of page 6 of Plaintiff's Response to Defendant's Request for Production of Documents; H1 Copy of page 4 of Plaintiff's Response to Defendant's Request for Production of Documents; H2 Copy of various checks drawn on Plaintiff's checking account; H3 Copy of email dated January 12, 2015, from Defendant to Plaintiff's counsel; H4 2015 Annual Registration of Hayden Properties, LLC; H5 Copy of check drawn on Hayden Properties, LLC checking account; K1 Redacted copy of Plaintiff's Federal Income Tax Return for indeterminate year; K2 Redacted copies of Plaintiff's various Georgia Income Tax Returns; M Copy of emails between Plaintiff and Cathy Smith; P Redacted copies of LaGrange Daily News article titled "Commission, DASH Chair to sue web page administrator for libel" and Troup County News article titled "Wolfe to File Law Suit Against McClellan"

on December 2, 2014. The case now comes back before the Court on Plaintiff's Motion for Partial Summary Judgment as to the issue of liability.

FINDINGS OF FACT

The Plaintiff, at all times relevant to this case, was the elected Chairman of the Troup County Board of Commissioners and the founder and Chairman of a not for profit charitable organization known as DASH which was organized under § 501(c)(3) of the Internal Revenue Code.

The Defendant operates a Facebook page / internet blog which is known as the Troup County Citizen. Defendant makes frequent posts on that blog as well as on the LaGrange Daily News (a local newspaper with an internet edition) blog. Defendant has been unemployed for five years, has no source of income, and lives *"...on the good graces of Karran Mclelend"*, his girlfriend. [Deposition of Defendant, page 17, line 2 though page 18, line 13].

The Defendant published the following statements about Plaintiff either on the LaGrange Daily News blog or the Troup County Citizen blog:

(a) "Charitable causes are real popular with scammers like Ricky Wolfe" and "...that Mr. Wolfe was stealing money, skimming off the top."

(b) "...Ricky is only interested in one thing, making sure his Swiss bank account continues to grow with diverted funds."

(c) "...Mr. Wolfe, I still think you are an embezzler and a crook."

(d) "Our tax dollars are pretty much Ricky's retirement plan."

(e) "I think he has misappropriated thousands."

(f) Plaintiff is taking "...public or private money for personal use."

(g) Plaintiff is taking public money and "...cleaning it up."

(h) Plaintiff is turning public money into pocket money.

(i) Plaintiff is embezzling money and committing fraud.

(j) Plaintiff is funneling Callaway Grant money and tax receipts into his own pocket.

(k) Plaintiff is a crook, embezzler, taking kickbacks and converting illegal gains to his own use.

The Defendant knew that he was accusing the Plaintiff of committing crimes when he published the foregoing statements.

While it is not alleged by the Plaintiff to be libelous, the Defendant, in one post called the Plaintiff a *"sleazy piece of crap, a Nazi piece of shit."*

The Plaintiff sent the Defendant a letter prior to filing the complaint wherein he requested that the Defendant retract the foregoing published statements deemed by the Plaintiff to be libelous. The Defendant returned the letter to Plaintiff's attorney with the words "KISS MY ASS RICKY" written in bold hand across the text of the letter.

The only discovery conducted by the Defendant was a request for production of documents directed to the Plaintiff to which the Plaintiff responded with 1,700 pages of documents.

The Defendant admits that he has no evidence to support any of the foregoing statements, and at his deposition taken on January 9, 2015, after having conducted all the discovery he chose to conduct in this case, the Defendant affirmed all of the foregoing statements and stands by them.

The Defendant's position is essentially that, although his postings were declarative and accused the Plaintiff of committing crimes, they were merely "rhetorical" and "his opinion".

SUMMARY JUDGMENT STANDARD

O.C.G.A. § 9-11-56(c) reads as follows: *"Judgment sought shall be rendered forthwith if the pleadings, depositions, Answers to Interrogatories, and admissions on file, together with the Affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law, but nothing in this Code section shall be construed as denying to any party the right to trial by jury where there are substantial issues of fact to be determined. A summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damage."*

On Motion for Summary Judgment, the moving party has the obligation to demonstrate that there is no genuine issue as to any material fact, and that the undisputed facts, when viewed in the light most favorable to the non-moving party, warrant a judgment as a matter of law. *Lau's Corp.,*

Inc. v. Haskins, 261 Ga. 491 (1991). The moving party in a Motion for Summary Judgment may satisfy his burden by showing that there is an absence of evidence in the record to support the non-moving party's case. Once the moving party has satisfied his burden, the non-moving party may not rest on his pleadings, but must point to specific evidence in the record that creates a genuine issue as to a material fact to avoid summary judgment. *Lau's Corp., Inc., supra; Gardner v. Boatright, 216 Ga. App. 755 (1995).*

CONCLUSIONS OF LAW

"Libel is defined in Georgia as a false and malicious defamation of another, expressed in print, writing, pictures, or signs, tending to injure the reputation of the person and exposing him to public hatred, contempt, or ridicule. The publication of the libelous matter is essential to recovery." O.C.G.A. §51-5-1.

There are four elements in a cause of action for written defamation: (1) a false and defamatory statement concerning the Plaintiff, (2) an unprivileged communication (publication) to a third party, (3) fault by the Defendant amounting at least to negligence, and (4) special harm or the actionability of the state irrespective of special harm.

FALSE AND DEFAMATORY STATEMENTS

(1) Did the Plaintiff make false and defamatory statements concerning the Plaintiff? Yes. The statements made by the Defendant about

the Plaintiff are concluded to be false and defamatory as a matter of law because the Plaintiff filed an affidavit swearing that all of the statements made by the Defendant were false and the Defendant presented no evidence in support of their truthfulness.

STATEMENTS UNPRIVILEGED AND COMMUNICATED TO A THIRD PARTY

(2) Were the false and defamatory statements unprivileged and communicated to a third party (published)? Yes. With respect to privilege, O.C.G.A. § 51-5-7 reads as follows: *"The following communications are deemed privileged: (1) Statements made in good faith in the performance of a public duty; (2) Statements made in good faith in the performance of a legal or moral private duty; (3) Statements made with a good faith intent on the part of the speaker to protect his or her interest in a matter in which it is concerned; (4) Statements made in good faith as part of an act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public interest or concern, as defined in subsection (c) of Code Section 9-11-11.1; (5) Fair and honest reports of the proceedings of legislative or judicial bodies; (6) Fair and honest reports of court proceedings; (7) Comments of counsel, fairly made, on the circumstances of a case in which he or she is involved and on the conduct of the parties in connection therewith; (8)*

Truthful reports of information received from any arresting officer or police authorities; and (9) Comments upon the acts of public men or public women in their public capacity and with reference thereto."

The Court concludes that the false and defamatory statements made by the Defendant about the Plaintiff do not fall within any of the nine foregoing areas of recognized privilege.

With respect to communication to a third party, the false and defamatory statements made by the Defendant about the Plaintiff were published as that term is defined in Georgia law when they were posted to the LaGrange Daily News internet edition blog and the Troup County Citizen Facebook page / blog. *"Publication"* as required and defined in the Georgia libel statute includes internet postings. *Mathis, ibid.*

FAULT BY DEFENDANT AMOUNTING TO AT LEAST NEGLIGENCE
"ACTUAL MALICE"

(3) Were the false and defamatory statements made through the fault of the Defendant amounting at least to Negligence? Yes. The Plaintiff is a public figure as defined in *The New York Times Company v. Sullivan, et al., 82 S.Ct. 710, 376 U.S. 254 (1964)*, consequently in order to prevail, the Plaintiff must prove "actual malice" on the part of the Defendant.

It's important to note that *Times, supra* was a 9-0 opinion in favor of The New York Times and the clergymen who paid for the editorial

"advertisement". Perhaps more importantly, three of the nine justices joined in two concurring opinions that would have made it impossible for a public official to prevail in a libel suit. Justice Black believed that *"...the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Time advertisement their criticisms of the Montgomery agencies and officials."* Justice Goldberg, in his concurrence, wrote: *"In my view, the First and Fourteenth Amendments to the Constitution afford to the citizens and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses."*

Writing for the majority, Justice Brennan took a more moderate and balanced approach writing: *"We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable."*

A publication is made with actual malice if it is made with knowledge that it is false, or with reckless disregard of whether it is false or not. *Times, ibid; Gardner, ibid.* The Court concludes that when one publishes statements accusing another of committing serious crimes without one scintilla of evidence in support of those statements, such publication shows a reckless disregard of whether such statements are false or not.

While *Times, ibid,* is a seminal case, in the fifty years since it was decided, the field of publishing has undergone a dramatic transformation. In 1964, The New York Times was perhaps unrivaled amongst the media of the day in the breadth of its reach. Today, a twelve year old with a smart phone can reach more people faster than could The New York Times in 1964.

In several opinions (*Abrams v. United States 250 U.S. 616 (1919); United States v. Rumely, 73 S.Ct. 543, 345 U.S. 41 (1953); Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827 (1969))* the Supreme Court has used the term "marketplace of ideas" as a metaphor to discuss what speech if any should be regulated. Justice Oliver Wendell Holmes in his dissent in *Abrams, supra,* wrote *"But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment."*

Justice Holmes would stand aghast at the sheer volume of ideas (information) flooding the marketplace in the age of the internet. Is it possible for the best, truest ideas to rise to the top of the overwhelming

"mountain of noise" of the internet marketplace? It's not unreasonable to conclude that, at some point, the vast amount of information available with a few clicks of a mouse makes the task of truth finding more difficult rather than less.

The Defendant's sole defense in this libel case seems to be that he did not intend his words literally, and that his words were merely "rhetorical" and "his opinion". In *Mathis, ibid* the Georgia Supreme Court reversed the grant of summary judgment to a libel plaintiff on the issue of damages holding that *"...any person reading the postings on the message board-written entirely in lower case replete with question marks, exclamation points, misspellings, abbreviations, and dashes-could not reasonably interpret the incoherent messages as stating actual facts about Cannon, but would interpret them as the late night rhetorical outbursts of an angry and frustrated person opposed to the company's hauling of other people's garbage into the county."*

The Court's inclusion in its findings of fact concerning the Defendant's living situation and income was not meant to disparage the Defendant in any way, but was made solely to give context in a full and fair consideration of whether Defendant's statements amount to mere *"rhetorical hyperbole". Milkovich v. Lorain Journal Co., et al., 110 S.Ct. 2695 (1990).*

Justice Brennan gave guidance in *Times, ibid* regarding the Court's

role *"In cases where that line must be drawn, the rule is that 'we examine for ourselves the statements in issue and the circumstances under which they were made to see whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.'" Citing* Pennekamp v. Forida, *328 U.S. 66 S.Ct.1029.*

The analysis prescribed in *Ollman v. Evans, 242 U.S.App.D.C. 301, 750 F.2d 970 (1984)*, and quoted in *Milkovich, ibid,* has been followed by the Court to determine whether Defendant's utterances are fact or opinion for purposes of libel. Under that analysis, four factors are considered to ascertain whether, under the "totality of circumstances," a statement is fact or opinion. These factors are: (1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; and, (4) the broader context in which the statement appeared.

In following the *Ollman, ibid* analysis the Court finds that the language used by the Defendant was specific, clear, direct and unequivocal in ascribing the crime of theft to the Plaintiff. The Court finds that statements to the effect that the Plaintiff has a Swiss Bank account containing diverted public funds, that he has embezzled public money and converted it to his own use, etc. are the sort of statements that are verifiable – that is they are capable of objective proof and can be proved false. See *Atlanta Humane Society et al. v. Mills, 274 Ga. App. 159 (2005)* –

"Assertion that cannot be proved false cannot be held libelous..." Notwithstanding, Defendant offered no proof that the Plaintiff has stolen public money and converted it to his own use. The Court finds that the general context of the statements, i.e. posts to the LaGrange Daily News internet blog and the Troup County Citizen Facebook page blog about the Plaintiff were completely gratuitous in the sense that they were not directed toward the Plaintiff's official actions or toward specific matters of public concern, but were ad hominem attacks on the Plaintiff seemingly unrelated to his official duties and public position. Finally, the Court finds that in the broader context, posts on internet blogs have come to be a haven for the disaffected to vent their invective on the powers that be.

Considering the four factors under the totality of the circumstances of this case, the Court finds that the statements made by the Defendant about the Plaintiff were not merely opinion or rhetorical hyperbole and a reasonable reading of the statements found by the Court to be false and defamatory is that the Defendant did, intentionally impute the crime of theft to the Plaintiff.

All of the discussion in the cited cases about criticism of the official conduct of public figures occurred in factual circumstances wherein the offensive speech was directed toward some official policy or toward some official action taken on some topic of public interest. That is not the case

here, as the Defendant's speech about the Plaintiff is of a baser sort. It amounts to no more than name calling and does nothing to advance the legitimate cause of holding our elected officials to account.

None of the false and defamatory statements made by the Defendant about the Plaintiff referenced any specific public opinion or position espoused by the Plaintiff – they were clearly intended to be personal. In Times, *ibid* Justice Brennan wrote that *"Whatever is added to the field of libel is taken from the field of free debate."* The Court is convinced that to subtract this sort of speech from the marketplace of ideas will take nothing from the field of free debate with which we cannot do without.

O.C.G.A. § 51-5-5 reads: *"In all actions for printed or spoken defamation, malice is inferred from the character of the charge. However, the existence of malice may be rebutted by proof. In all cases, such proof shall be considered in mitigation of damages. In cases of privileged communications, such proof shall bar recover".*

The fact that the Defendant published his Constitutionally protected opinion that the Plaintiff is a *"sleazy piece of crap, a Nazi piece of shit"* and that the Defendant stands by all of his false and defamatory statements about the Plaintiff (even though the discovery process turned up not one scintilla of evidence to support the Defendant's statements) is evidence that the Court has considered, along with the character of the statements made, in

concluding that the Plaintiff has proven by clear and convincing evidence that the Defendant made the false and defamatory statements about the Plaintiff with actual malice.

Justice Black, in his concurring opinion in Times, *ibid* wrote: *"The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment."* His fear was that over time the malice requirement would fade away or be ignored and that legitimate speech in furtherance of the public interest would be eroded. In the fifty years since Times, *ibid* was decided, there has been no great erosion of the protection of the First Amendment, and the "public figure" compromise continues to provide sufficient protection to avoid inhibiting free and open public discourse.

ACTIONABILITY IRRESPECTIVE OF SPECIAL HARM.

(4) The false and defamatory statements published by the Defendant about the Plaintiff constitute libel per se because they charge that the Plaintiff is guilty of various crimes. Zarach, et al. v. Atlanta Claims Association, et al. and Claxton v. Zarach, et al., *231 Ga. App. 685, 500 S.E. 2d 1 (1998)*. In cases of libel per se (i.e. words which impute the commission of a crime to another) an injury to the reputation is presumed without proof of special damages. Riddle v. Golden Isles Broad, LLC, *292 Ga. App. 888*

(2008); Hayes v. Irwin, 541 F. Supp. 397 (1982); Webster v. Wilkins, 217 Ga. App. 194 (1995); Chong v. J.P. Morgan Chase Bank, N.A., 975 F.Supp.2d 1333(2013); American Southern Insurance Grouping v. Goldstein, 201 Ga. App. 1 (2008); Mathis v. Cannon, 276 Ga. 16, 573 S.E.2d 376 (2002).

PUNITIVE DAMAGES

The Plaintiff sent and the Defendant received Plaintiff's notice pursuant to O.C.G.A. § 51-5-11 requesting that Defendant retract the statements he posted which he deemed to be false and defamatory. The notice was received by the Defendant at least seven days prior to the Plaintiff filing the within action. The Defendant declined to make a retraction. The Plaintiff has satisfied all conditions precedent to presenting the issue of punitive damages to the jury.

CONCLUSION

There is no genuine issue as to any material fact with respect to whether the Defendant made false and defamatory statements about the Plaintiff, whether such statements were unprivileged and published, whether such statements were made with actual malice, whether the Plaintiff has been damaged, and, whether the Plaintiff has met the conditions precedent to allow the issue of punitive damages to be submitted to the jury. There remain genuine issues of material fact as to the appropriate amount of general damages and whether punitive damages should be awarded, and if so, in

what amount.

ORDER

IT IS THEREFORE ORDERED that Plaintiff's Motion for Partial Summary Judgment should be, and hereby is, GRANTED. The trial of this case shall proceed before a jury on the issue of the amount of general damages, and whether punitive damages should be imposed, and, if so, in what amount.

SO ORDERED this 9TH day of September, 2015.

Jack Kirby, Judge,
Superior Court of Troup County

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