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CUYAHOGA COUNTY

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JEFFREY A. LANSKY
Plaintiff

WILLIAM BROWNLEE, ET AL.
Defendant

Case No: CV-14-833483

Judge: JOSE` A VILLANUEVA

JOURNAL ENTRY

89 DIS. W/PREJ - PARTIAL

OPINION AND ORDER GRANTING IN PART DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DISMISSING PLAINTIFF'S COMPLAINT IN FULL.

O.S.J.
PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE.

11/13/2015

Judge Signature Date

- 89
11/13/2015

IN THE COURT OF COMMON PLEAS
COUNTY OF CUYAHOGA, OHIO

JEFFREY LANSKY, Plaintiff/Counter-Claim Defendant vs. WILLIAM BROWNLEE, et al., Defendants/Counter-Claim Plaintiffs	)	CASE NO. CV 14 833483 **OPINION AND ORDER GRANTING IN PART DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DISMISSING PLAINTIFF'S COMPLAINT IN FULL**

José A. Villanueva, J.:

This matter comes before the court on the defendants/counter-claim plaintiffs' 7/27/2015 motion for partial summary judgment. The parties have briefed the issues and the court has considered all arguments.

For the reasons noted below, the court finds that there remain no genuine issues of material fact as to plaintiff's claims and defendants are entitled to judgment as a matter of law. The court enters an order granting defendants judgment as a matter of law and dismissing plaintiffs' complaint in full.

The court finds that there are remaining issues of fact as to the defendants' counterclaim for vexatious litigator and denies in part defendants' motion for summary judgment. The court reserves ruling on defendants' motion for summary judgment as to defendants' claim for Rule 11 sanctions, pending a full hearing pursuant to R.C. 2323.51(B)(2)(a).

BACKGROUND

Plaintiff Jeffrey Lansky alleges that the defendants William ("Bill") and Lynde Brownlee published false, defamatory statements about him and that he has suffered emotional distress and

damage to his reputation in the community as a result. Plaintiff additionally states a claim for intentional infliction of emotional distress. [1]

Plaintiff Jeffrey Lansky is currently the Mayor of Maple Heights. He was elected as Mayor in 2007 and re-elected in 2011. Mr. Lansky previously served as the president of city council from 1991 to 2003, and city councilman for District 7 from 1987 to 1991.

Defendant William Brownlee was elected to city council in November 2013. He was sworn in on January 1, 2014. Since then, Mr. Brownlee and Mr. Lansky have publicly disagreed with each other on several issues. (William Brownlee Aff. ¶ 8). Defendant Lynde Brownlee is William Brownlee's wife. The Brownlees own and manage a website, Maple Heights News ("the Website"). They are the primary authors and sole editors of the Website. The stated purpose of the Website is to build a better community by bringing information to the residents about what is happening in the community of Maple Heights. (William Brownlee Depo p. 183).

STATEMENT OF FACTS

On July 17, 2014, the Brownlees published an article in the editorial section of the Website. ("the Initial Article"). The Initial Article was titled "Throwback Thursday #TBT." Directly beneath the title states: "by Lynde Brownlee on July 17, 2014 in Editorial." The Initial Article took excerpts from Mayor Lansky's campaign literature from 2011 and compared them to actual events or actions that since then took place during his term. The Initial Article then gave an opinion of whether the event or action was a step forward or backward for the city of Maple Heights. The Initial Article was apparently inspired by Mayor Lansky's 2011 campaign brochure referencing the movie "Back to the Future" and titled "There is no reason to go back! Moving forward together!" (Lansky Depo Exhibit J).

[1] Plaintiff's complaint does not expressly make a claim for intentional infliction of emotional distress. However, the parties have argued the merits of this claim within their briefs. The court will therefore address this claim as if it were properly pled.

William Brownlee reviewed the Initial Article prior to its publication. However, he denies reading it for substance. He testified that he merely proofread the Initial Article for obvious grammatical and/or spelling errors, and did not discuss the factual accuracy of the statements at issue with Lynde Brownlee. (William Brownlee Depo p. 44-45).[2]

On July 21, 2014, four days after Lynde Brownlee published the Initial Article, Mr. Lansky called William Brownlee and suggested that he may file a lawsuit against the Brownlees for the alleged factual errors within the Initial Article unless the errors were corrected. William Brownlee requested that Mr. Lansky send him the information that was incorrect so he and his wife could make the proper corrections. (William Brownlee Aff.). Mr. Lansky admitted in deposition that he refused to clarify what facts he believed were untrue and was adamant it was not his responsibility to tell them about what they were mistaken. (Lansky Depo p. 63-64). Rather, he stated it was the Brownlees' responsibility to check their facts. (Lansky Depo p. 62-63).

Mr. Lansky's attorney sent the Brownlees a letter dated July 21, 2014 citing seven alleged defamatory statements and demanding that Mrs. Brownlee publish an immediate retraction or else face legal action. (Lynde Brownlee Aff. ¶ 10, Ex. B).

The seven alleged defamatory statements are:

1. "[she] voted no to printing and mailing city newsletters to residences."
2. "[she] voted no for renewal of the code red resident alerting system."
3. "closed Fire Station #2"
4. "eliminated recycling"
5. "Reduced van service for seniors"

[2] Mr. Lansky argues that Bill Brownlee published the Initial Article and had full knowledge of the statements contained therein. The court finds that a reasonable trier of fact could determine Bill Brownlee had full knowledge of the contents of the Initial Article because he did concede to reading it. Further, the Brownlees admit to jointly maintaining the Website, so it is not unreasonable to attribute the publication of the Initial Article to both. For the purposes of summary judgment, the court must resolve all doubts in favor of the non-moving party. Therefore, the court proceeds with the analysis under the assumption that the statements were written and/or published jointly by William and Lynde Brownlee.

6. "stopped/closed Safety Town"
7. "the Mayor vetoed legislation to put the November 2013 Property tax on the ballot."

Mr. Lansky alleged through his attorney that each of these statements was false and defamatory because:

1. Mayor Lansky does not have a vote on city council and could not have voted no to either printing the city newsletters or renewing the code red alert system.
2. The Fire Chief closed the fire station, not Mayor Lansky.
3. The Maple Heights city council voted through legislation to eliminate curbside recycling for residents.
4. There had been no reduction in van services for senior citizens because although a driver had retired and another had quit, volunteers had stepped up, so there was no loss in service.
5. Safety Town was discontinued because there was a lack of participation, not because of Mayor Lansky.
6. Mayor Lansky did not veto legislation to raise property taxes, but actually abstained from signing the legislation that was voted on by city council.

In response, the Brownlees made several modifications to the Initial Article (the "Revised Article"). Lynde Brownlee testified that she applied the standard from *The Reuters Handbook of Journalism* regarding blog corrections. (Lynde Brownlee Aff. ¶ 12). The Brownlees added a large box at the beginning of the Revised Article entitled "Note to Readers," which explained the changes to the Initial Article. It stated, "Note to our readers: This article originally contained 3 errors. A letter from Mayor Lansky's lawyer informed us that he did not veto the 2013 Property Tax Levy, that the Fire Station #2 was closed at the direction of the Fire Chief, and there was no loss of service for senior transportation. These errors have been "struck out" and updated. 7/23/14." William Brownlee testified that he wrote the Note to Readers at the beginning of the Revised Article, which was the only portion of either the Initial or the Revised Article he assisted with writing. (William Brownlee Depo p. 43).

The Brownlees lined out three challenged portions of the Initial Article and made a few visible additions to avoid confusion. (Revised Article, Exhibit D). They lined out "Reduced van

service for Seniors;" "While the Mayor vetoed the legislation to put the November 2013 Property tax on the ballot;" and "CLOSED Fire Station #2."

Mr. Lansky was aware of the changes to the Initial Article prior to bringing the lawsuit, but disputes that the changes were adequate corrections. (Lansky Depo p. 96-97). However, he testified that he is unfamiliar with whether or not the methodology was appropriate or common practice. (Lansky Depo p. 114-115).[3] Mr. Lansky understood both the Initial and the Revised Article to be an attack on him, regardless of the Initial and Revised Article containing positive feedback on certain things he did. (Lansky Depo p. 123).

Mr. Lansky's lawsuit against William and Lynde Brownlee states claims for defamation and intentional infliction of emotional distress. Mr. Lansky alleges that he has sustained damage to his reputation and has further incurred great emotional distress.

The Brownlees filed a counterclaim for vexatious litigation, Rule 11 Sanctions, and malicious prosecution. In their 7/27/2015 motion for summary judgment the Brownlees move for summary judgment on plaintiff's complaint and defendants' counterclaim for vexatious litigation and vexatious litigator status, as well as defendants' claim for Rule 11 Sanctions. The defendants will not pursue count III of the counterclaim for malicious prosecution and ask the court to dismiss that counterclaim without prejudice. For the reasons that follow, the court grants in part the defendants' motion for summary judgment, as to plaintiff's claims for defamation and intentional infliction of emotional distress.

[3] During plaintiff's deposition, the defendants reference an article from the website www.cleveland.com written by Mark Naymik. (Lansky Depo Ex. L). Mr. Naymik's article was published on 10/1/2014 and was titled "Maple Heights Mayor Jeffrey Lansky Sues Councilman and Wife for Defamation." In the article, Mr. Naymik describes Mr. Lansky's lawsuit against the Brownlees, and also addresses the corrections in the Revised Article. However, to the extent the defendants offer Mr. Naymik's article as evidence the legitimacy of the Brownlees' correction methods, the court strikes this article from the record because it is unsupported by an affidavit from Mr. Naymik and is not admissible pursuant to Civ. R. 56.

As a preliminary matter, the defendants move to strike portions of Jeffrey Lansky's affidavit. The court grants in part defendants' 10/1/2015 motion to strike portions of the affidavit of Jeffrey Lansky, and strikes the following portions of the affidavit for the reasons set forth below.

The court strikes the words "false/falsely" and "defamatory" from Mr. Lansky's affidavit as these words appear in Paragraphs 18, 24, 26, 27, 30, 31, 32, 35, 39, and 43. Statements of whether a statement is false and/or defamatory are legal conclusions, and not based upon Mr. Lansky's personal knowledge. Affidavits must set forth facts, and assertions of legal conclusions do not constitute evidence under Civ. R. 56 and cannot create a genuine issue of fact. *Tolson v. Triangle Real Estate*, 10th Dist. Franklin No. 03AP-715, 2004-Ohio-2640, ¶ 12.

Similarly, the court strikes in full the following paragraphs from Mr. Lansky's affidavit because the statements in these paragraphs constitute legal theories and/or legal conclusions as to the merits of the defendants' legal theories and defenses: Paragraphs 44, 45, 46, 47, 48, and 51.

The court strikes in full the following paragraphs from Mr. Lansky's affidavit because the statements within these paragraphs speak to the merits of prior lawsuits that Mr. Lansky has pursued and constitute legal conclusions: Paragraphs 54, 55, 56, 57, and 58. Mr. Lansky lacks the legal expertise to opine as to the merits of these lawsuits. The court records regarding these lawsuits speak for themselves.

The court strikes in full Paragraph 60 from Mr. Lansky's affidavit because the statements within this paragraph constitute legal conclusions as to the merits of prior lawsuits that Mr. Brownlee has pursued.

The court strikes the third sentence of Paragraph 32 from Mr. Lansky's affidavit. The statement is without foundation to establish how Mr. Lansky has personal knowledge that Mr. Brownlee knew whether certain statements were false.

DISCUSSION

A. Standard of Review

To prevail on a motion for summary judgment, the moving party must demonstrate that there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). The party moving for summary judgment under Civil Rule 56 bears the burden of showing that there is no genuine issue of material fact on the essential elements of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St. 3d 280, 293, 662 N.E.2d 264 (1996); *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 604 N.E.2d 138 (1992). The court must resolve all questions of credibility in the non-moving party's favor. *Dupler v. Mansfield Journal Co.*, 64 Ohio St. 2d 116, 121, 413 N.E.2d 1187 (1980).

When a moving party supports its motion for summary judgment with appropriate evidentiary materials, the nonmoving party may not rest upon mere allegations or denials of his pleadings. Rather, the nonmoving party in his or her response, by affidavit or as otherwise provided in Civil Rule 56, must set forth specific facts showing that there is a genuine issue for trial. *Wing v. Anchor Media, Ltd. of Texas*, 59 Ohio St. 3d 108, 111, 570 N.E.2d 1095 (1991).

B. Defamation

Defamation is an unprivileged publication of a false and defamatory matter about another. *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73

Ohio St.3d 1, 7 (1995). To establish a claim for defamation plaintiff must provide clear and convincing evidence demonstrating: (1) a false statement of fact was made about the plaintiff; (2) the statement was defamatory; (3) the statement was published; (4) the plaintiff suffered injury as a proximate result of the publication; and (5) the defendant acted with the requisite degree of fault. *Am. Chem. Sox. V. Leadscope, Inc.,* 133 Ohio St.3d 366, 388-89 (2012). Summary judgment in defendants' favor is appropriate if the plaintiff cannot establish any one of these elements of a defamation claim with convincing clarity. *Dupler v. Mansfield Journal Co.*, 64 Ohio St. 2d 116, 121, 413 N.E.2d 1187 (1980).

If the alleged statement is about a public figure, the plaintiff must additionally prove that the statements were made with actual malice. Malice indicates publication of a factual assertion "with knowledge that it was false or with reckless disregard of whether it was false or not." *Murray v. Chagrin Valley Publ. Co.*, 8th Dist. Cuyahoga No. 101394, 2014-Ohio-5442, ¶ 13. Whether a public figure has come forward with clear and convincing evidence that the defendant was acting with actual malice is a question of law. *Id.* at ¶ 7. There is no dispute that Mayor Lansky is a public figure.

Defendants argue that they are entitled to judgment as a matter of law on plaintiff's claim for defamation because the seven statements at issue were (1) not statements about the plaintiff; (2) protected opinion speech; (3) not defamatory; (4) not damaging as a matter of law; (5) constitutionally protected political speech about a public figure acting in his official capacity; and/or (6) not made with actual malice or in reckless disregard for the truth.

1. Plaintiff Failed to Present Evidence to Create a Genuine Issue of Fact that he will be Able to Prove by Clear and Convincing Evidence that he Suffered Damages

Mr. Lansky admitted that he has suffered no economic harm as a result of the Brownlees publishing the Initial Article or the Revised Article. (Lansky 2nd Depo p. 12, 17, 20). He does

claim he suffered damage to his reputation. As support for his claim that he suffered damage to his reputation, he stated in his affidavit, "I received numerous phone calls from residents in the community complaining about my actions. I believe, and therefore aver, that my standing in the community was significantly affected by the publication of these lies and my reputation for being a forward-looking, competent manager of the public's resources was affected." (Lansky Affidavit ¶ 39).

Yet, Mr. Lansky testified at deposition that neither the Brownlees nor their Website has any credibility in the community. (Lansky Depo p. 55, Lansky 2nd Depo p. 8). He also testified that he could not identify anyone who was misled by the Initial Article or the Revised Article. (Lansky Depo p. 124). He laughed and said "hell no" when asked if Mr. Brownlee scared him out of running for Mayor in 2015. (Lansky Depo p. 55).[4]

Mr. Lansky relies solely upon his affidavit statements in support of his claim for damages and offers no other documents or affidavits from other parties. He claims that his affidavit statements alone create a genuine issue of fact as to whether he suffered damage to his reputation as a result of the Initial Article or the Revised Article. Mr. Lansky ignores the fact that his affidavit statements contradict his deposition testimony. In his deposition, Mr. Lansky was adamant that no one in the Maple Heights community would find the Brownlees or their website credible. When a party has given prior clear answers to unambiguous questions that negate the existence of any genuine issues of material fact, that party cannot create a genuine issue of material fact by offering an affidavit that contradicts, without explanation previously clear testimony. *Alapi v. Colony Roofing, Inc.*, 8th Dist. Cuyahoga No. 83755, 2004-Ohio-3288, ¶ 24;

[4] Lansky has acknowledged he will not seek reelection for Mayor in 2015 and intends to leave office at the end of his current term.

Ohio Framers In.s Co. v. Ohio Sch. Facilities Comm'n, 10th Dist. Franklin No. 11AP-547, 2012-Ohio-951, ¶ 22.

Even without the contradicting testimony in his deposition, Mr. Lansky's affidavit does not create a genuine issue of fact as to damages because "a party's unsupported and self-serving assertions offered to demonstrate issues of fact, standing alone and without corroborating materials contemplated by Civ. R. 56 are simply insufficient to overcome a properly supported motion for summary judgment." *Shreves v. Meridia Health Sys.*, 8th Dist. Cuyahoga No. 87611, 2006-Ohio-5724, ¶ 27; *Lansky v. Ciaravino*, 8th Dist. Cuyahoga No. 90073, 2008-Ohio-2666, ¶ 35. Mr. Lansky failed to provide additional affidavit testimony supporting his claim that his reputation was damaged as a result of the Brownlees' Article.

Mr. Lansky additionally alleges that he suffered emotional distress as a result of the Brownlees publishing the Article. (Lansky Affidavit ¶ 41). In order to receive compensation for emotional distress, the distress must be "severe and debilitating." *Paugh v. Hanks*, 6 Ohio St. 3d 72, 78, 451 N.E.2d 759 (1983). "Serious emotional distress may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case." *Id.* Examples of emotional distress should include traumatically induced neurosis, psychosis, chronic depression, or phobia. *Id.*

Mr. Lansky testified that he receives treatment for hypertension from a cardiologist. (Lansky Depo p. 130). His hypertension is caused by the stress of his job, but this lawsuit allegedly adds to his condition. (Lansky Depo p. 133). He could not remember the name of his medical providers and refused to sign medical authorization to allow defendants to obtain his medical records. (Lansky 2nd Depo p. 4-5). He has not provided any medical records or doctors' affidavits to support his claim, nor has he cited examples of how his emotional distress interferes

with his ability to work or engage in normal activities. While he admitted that he has chosen not to run for a third term as mayor, he was adamant that his decision was not at all affected by the Article. (Lansky 2nd Depo p. 8).

Mayor Lansky claims that his mere conclusory statement that he suffered emotional distress, without evidence of treatment or corroborating evidence, should create a genuine issue of fact so as to overcome summary judgment. However, summary judgment is appropriate when the plaintiff presents no corroborating testimony from experts or third parties as to the emotional distress suffered and where plaintiff does not seek medical or psychological treatment for the alleged injuries. *See Lombardo v. Mahoney*, 8th Dist. Cuyahoga No. 92608, 2009-Ohio-5826.

The plaintiff has failed to prove that there is a genuine issue of fact as to whether he can prove by clear and convincing evidence that he suffered damages as a result of the Brownlees' Article. Accordingly, defendants are entitled to judgment as a matter of law.

2. Plaintiff Failed to Present Evidence to Create a Genuine Issue of Fact that he will be Able to Prove by Clear and Convincing Evidence that the Statements at Issue are False and Defamatory

Even if Mr. Lansky could prove that he suffered damages, the defendants are entitled to judgment as a matter of law because Mr. Lansky failed to prove by clear and convincing evidence that the statements were defamatory. A statement is defamatory if it "reflect[s] injuriously on a person's reputation, or expos[es] a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business or profession." *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St. 3d 1, 7, 1995-Ohio-66, 651 N.E.2d 1283.

"Veto" Statement

Mr. Lansky argues that the Brownlees' statement that he "vetoed legislation to raise property taxes" was false and defamatory. In reality, Mr. Lansky abstained from signing the

legislation to increase property tax, and Lynde Brownlee mistakenly believed that abstention constituted a veto. Mr. Brownlee also testified that he did not know at the time the Article was published that Mr. Lansky had not vetoed the legislation. (William Brownlee Depo p. 86).[5] The Brownlees have since lined-out this statement and provided an explanation to readers that the statement was an inaccurate characterization as to how Mr. Lansky opposed the property tax legislation.

Plaintiff failed to present clear and convincing evidence as to how the imprecise statement exposed him to public hatred. Rather, he stated that several members of city council were confused by the statement. He admitted that they did not believe he vetoed the legislation. (Lansky Depo 100-102). He further admitted that if he had chosen to veto the legislation to raise property taxes, that decision would have had no impact upon his reputation in the community. (Lansky Depo p. 98). Therefore, the statement that the Mayor "vetoed legislation to raise property taxes" cannot support a claim for defamation.

Mr. Lansky argues that the remaining statements are defamatory and reflected injuriously on his reputation, exposing him to public hatred, contempt, ridicule, shame, or disgrace. Mr. Lansky stated in his affidavit that he received hateful telephone calls in response to the Initial Article. However, as discussed above, he failed to provide specific information about the telephone calls – the identity of the caller, the time and date of the calls, or the "hateful" statements made by the caller. What's more, each statement is arguably true and accurately

[5] Mr. Lansky states in his affidavit that "Bill Brownlee is a Maple Heights City Councilman and because Lynde Brownlee is his wife and co-publisher of Mayple Heights News, they knew the statements they made about me were false or were probably false, and made them anyway." (Lansky Affidavit ¶ 43). However, Mr. Lansky's statement is not supported by personal knowledge explaining how he knew that the Brownlees had actual knowledge all of the statements were false. Mr. Brownlee became a councilman on January 1, 2014. (Lansky 2nd Depo p. 38-39). Mr. Lansky abstained from voting on the legislation at issue in November 2013, prior to Mr. Brownlee becoming a councilman.

summarizes events that occurred in the city during Mayor Lansky's term and/or his positions on issues.

"Closed Fire Station" Statement

Fire Station #2 was temporarily closed during the Mayor's term. Its closure was obvious. (Lynde Brownlee Depo p. 23-24). Although the Fire Chief made the decision, the Brownlees reasonably relied upon the town ordinances granting the Mayor authority over the Fire Chief, and reasonably believed that because of the Mayor's position as safety director the closure of the fire station could not have happened without his approval or knowledge. (Lynde Brownlee Depo p. 23-24). According to Mr. Brownlee, "it is understood that as the chief executive officer of the city [the Mayor] is responsible for most of the things that happen within the city. (William Brownlee Depo p. 58-59). Mr. Brownlee denied that he ever knew Mr. Lansky was opposed to closing the fire station or that Mr. Lansky did not make the decision to close the fire station. (William Brownlee Depo p. 65-66).

Mayor Lansky admitted in his deposition that as safety director, he ultimately had authority to order the Fire Chief to reopen the fire station. (Lansky Depo p. 33-34).[6] In his affidavit, he admitted that he had directed the fire chief at the time to reduce his budget by $500,000. (Lansky Affidavit ¶ 20). The fire chief's attempt to reduce the budget led directly to his closing fire station #2.

The Brownlees added a clarification to the top of the Revised Article indicating that the Fire Station was closed at the direction of the Fire Chief. The statement was arguably true at the

[6] Mr. Lansky later stated in his Affidavit that he did not have authority under the city's union contract to direct firefighters as to where they worked and whether to keep the fire station open. (Lansky Aff. ¶ 20-22). However, Mr. Lansky's affidavit statement directly conflicts with his deposition testimony in which he stated that he did have authority to keep the fire station open. In any event, Mr. Lansky failed to support his statement by including a copy of the union contract.

time it was written and was later corrected. Therefore, it cannot be a basis for a defamation claim.

"Closed/Stopped Safety Town" Statement

In Mayor Lansky's campaign literature, he took credit for reopening Safety Town. (Lansky Depo p. 75, Exhibit G). Since Mayor Lansky had authority to reopen Safety Town, Lynde Brownlee reasonably attributed its closure to him. Prior to writing the Initial Article, Lynde Brownlee did research by calling Linda Vopat, Maple Heights' Director of Human Services, to find out more information about why Safety Town was closed. (Lynde Brownlee Depo p. 18).

Mayor Lansky argues that it was not his fault that Safety Town closed down. Rather, it was a lack of participation. (Lansky Depo p. 77). However, he did make the decision with Linda Vopat to forego advertising for Safety Town in the city's newspaper in 2013 and only sent out targeted mailings, which may have affected the level of participation. (Lansky Depo p. 78).

"Eliminated Recycling" Statement

Mr. Lansky argues that Lynde Brownlee's statement that he "eliminated recycling" is false and defamatory, because city council, not him, voted on and approved legislation to re-negotiate the city's contract with Waste Management and eliminate curbside recycling. However, Mr. Lansky introduced the 2014 legislation that authorized the Mayor to enter into the contract without curbside recycling. (Lansky Depo p. 92-94). Lynde Brownlee knew at the time she wrote the Initial Article that he had introduced the legislation and that he had the power to veto it, even if it was passed by city council. (Lynde Brownlee Depo p. 38). Mr. Brownlee was a city councilman during the renegotiation talks between Waste Management and city council. He was opposed to changing the contract to eliminate curbside recycling. (William Brownlee

Depo p. 67-68). The Brownlees knew at the time the Initial Article was published that Mr. Lansky did not eliminate recycling on his own. (William Brownlee Depo p. 75). However, Mr. Lansky was involved in the process, so it was not unreasonable for the Brownlees to attribute this action to Mr. Lansky.

"Reduced Van Services for Seniors" Statement

Mr. Lansky argues that Lynde Brownlee's statement that he "reduced van service for seniors" was false and defamatory. In making this statement, Lynde Brownlee relied upon an article written by Mr. Lansky in the Maple Heights' February 2014 Senior Center newsletter and an open letter written by Linda Vopat that directly references the Mayor's article. (Lynde Brownlee Depo p. 41-45, Lansky Depo Ex. H). Mr. Lansky's article states that all city departments, including the Senior Center, "are tightening their belts and adjusting service to be more cost-effective." *Id.* Linda Vopat's letter states: "On the front page of this month's newsletter, Mayor Lansky's article discusses how all City Departments are committed to conserving our financial resources. The Senior Center will be doing our part by reducing the number of vans in service from three to five." (Lynde Brownlee Depo Ex. F). Ms. Vopat's letter goes on to state that grocery shopping would be done as group trips only.

The city was later able to reinstate van service through volunteer drivers, so there was no actual loss in service. The Brownlees corrected the statement by lining it out and adding a clarification at the top of the Revised Article. The statement was arguably true at the time it was written and later corrected to reflect the change to the service. Therefore, it cannot be a basis for a defamation claim.

"City Newsletter" Statement and "Code Red" Statement

The final two statements were not about the Plaintiff and cannot be the basis of a defamation claim. The statements (1) "[she] voted no to printing and mailing city newsletters to residences;" and (2) "[she] voted no for renewal of the code red resident alerting system" were quoted directly from Mr. Lansky's campaign literature and refer to his former political opponent, Neomia Mitchell.[7] These statements appeared in the Article under the heading "Let's take a look at his opponent in 2011 and see what he cautioned us to beware of . . ." (Brownlee Depo Ex. B).

Mr. Lansky argues in his Brief in Opposition that the statements are ambiguous and that reasonable minds could find that the statements were about him. However, there is no dispute that the statements always included the feminine pronoun "she." Mr. Lansky admitted at deposition that those statements were not about him because he is not a "she." (Lansky Depo p. 26, 29).

The newsletter statement was followed by ". . . Discontinued in 2014" and the code red statement was followed by ". . . Discontinued in 2013." Arguably, the statements imply that Mayor Lansky discontinued the newsletter and the code red alert system. However, Lynde Brownlee testified in her deposition that these statements were not intended to refer to actions by Mr. Lansky, only that these programs were discontinued.

Mr. Lansky does not contend that Ms. Brownlee was accusing him of discontinuing these programs. He is adamant in his affidavit that the "authors falsely contended that I voted 'no' regarding printing and mailing newsletters to residents of the City" and that the "authors falsely claimed I voted 'no' for the renewal of the 'code red' emergency alerting system." As discussed

[7] The brackets around the word "she" appeared in the Initial Article, because the statements in the campaign literature do not include the "she."

above, Mr. Lansky admitted that it would be unreasonable to attribute the statements to him because they include the female pronoun.

Even if reasonable minds interpreted these statements to mean that Mr. Lansky discontinued these programs, summary judgment is appropriate because, as discussed above Mr. Lansky failed to prove by clear and convincing evidence that he suffered damages.

Mr. Lansky alleges that the statements in the Article were false because they were not actions taken directly and/or solely by the Mayor. He further argues that Mr. Brownlee should have known that the Mayor alone did not take action. It is undisputed that more individuals than the Mayor were involved in making and carrying out these events. Nevertheless, the events referred to in the "Fire Station Statement;" the "Eliminated Recycling Statement;" the "Reduction in Van Services Statement;" the "Stopped/Closed Safety Town Statement;" the "City Newsletter Statement;" and the "Code Red Statement" all occurred during the Mayor's time in office. It is not unreasonable to attribute actions or events that occur during a Mayor's administration directly to the Mayor, despite the fact that others were also involved in carrying out the actions or events.

3. Plaintiff Failed to Present Evidence to Create a Genuine Issue of Fact that he will be Able to Prove by Clear and Convincing Evidence that the Brownlees Published the Statements with Actual Malice

Mr. Lansky's defamation claim fails because he cannot prove by clear and convincing evidence that the statements were made with actual malice. Actual malice is required in a defamation action brought by a public official because public discussion of public officials is a "fundamental principle of the American form of government," and thus a primary purpose of the First Amendment is to encourage self-government by permitting comment and criticism of those charged with its leadership. *N.Y. Times Co. v. Sullivan,* 376 U.S. 254, 275 (1964).

Given the importance of robust public debate, the First Amendment protects even false speech against public officials in most instances. To avoid chilling freedom of expression, the

Supreme Court requires a demonstration by clear and convincing evidence that statements against a public official were made with "actual malice" to state a claim for defamation – that is, "with knowledge that it was false or with reckless disregard of whether it was false or not." *Sullivan*, 376 U.S. at 269-73, 279-80; *see also Dupler v. Mansfield Journal Co.*, 64 Ohio St.2d 116, 118-119 (1980).

"To establish reckless disregard, the plaintiff must present clear and convincing evidence that the false statements were made with a high degree of awareness of their falsity or that the defendant in fact entertained serious doubts as to the truth of his publication. Evidence of negligence in failing to investigate the facts is insufficient to establish actual malice." *Lansky v. Ciaravino*, 2008-Ohio-2666, ¶ 30, quoting *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209 (1964) and *Sullivan, supra* at 287 (internal quotations omitted). Whether the evidence is sufficient to support a finding of actual malice is a question of law for the court to decide. *Lansky v. Rizzo*, 8th Dist. Cuyahoga No. 88356, 2007-Ohio-2500, ¶ 19.

As discussed above, the Brownlees reasonably believed that the events and actions discussed in the Article could be attributed to the action or inaction of Mayor Lansky. Several of the statements were verifiable through documents that Lynde Brownlee obtained from the city and relied upon in drafting the Initial Article. Mr. Lansky presents no admissible evidence that the Brownlees wrote the Initial Article with knowledge that their statements were false or with reckless disregard of whether the statements were false or not. The Brownlees even took steps to make corrections to the Initial Article when they were informed that certain statements were imprecise or in need of updating due to interceding circumstances.

Mr. Lansky believes the "Veto Statement" was made with actual malice because William Brownlee was on city council at the time, and would have known whether Mr. Lansky vetoed the

legislation or not. (Lansky 2nd Depo p. 18). However, the legislation was voted upon in 2013 and, as Mr. Lansky acknowledged, Mr. Brownlee began his term on city council on January 1, 2014. (Lansky 2nd Depo p. 38-39).

Mr. Lansky argues that the Brownlees' publication of the Article constitutes actual malice because they failed to speak with Mr. Lansky prior to publishing the Article. However, both Lynde and William Brownlee testified as to the evidence they relied upon when publishing the Article. The fact that the Brownlees took steps to correct and clarify any imprecise statements further supports a finding that the statements were not made with actual malice. Merely because Mr. Lansky disagrees with their interpretation of the facts does not amount to actual malice. Therefore, Mr. Lansky's claim for defamation fails because he cannot present clear and convincing evidence that the defendants made the statements with actual malice.

4. At Least Four of the Statements are Arguably Political Opinion

Section 11, Article I of the Ohio Constitution provides in relevant part: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press." Expressions of opinion are generally protected under Section 11, Article I of the Ohio Constitution as a valid exercise of freedom of the press. *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St. 3d 279, 280, 1995-Ohio-187, 649 N.E. 2d 182 (1995), citing *Scott v. News-Herald*,25 Ohio St.3d 243, 244-245, 496 N.E.2d 699 (1989).

An alleged defamatory statement is not actionable if the statement constitutes political opinion speech protected by absolute immunity. Whether speech is an opinion or a fact is a question of law to be determined by the court. *Ferreri v. Plain Dealer Publishing Co.*, 142 Ohio App.3d 629, 639 (8th Dist. 2001), quoting *Vail*, supra, at 280. "When determining whether speech is protected opinion a court must consider the totality of the circumstances. Specifically, a

court should consider: the specific language at issue, whether the statement is verifiable, the general context of the statement, and the broader context in which the statement appeared." *Murray*, 2014-Ohio-5442, at ¶ 20, quoting *Vail,* supra, at 282 (internal quotations omitted).

Although the court should consider each of the above factors, "the weight afforded to each varies based upon the circumstances presented in each case. Therefore, the analysis should be fluid and flexible rather than strict and mechanistic. Indeed, consideration of the factors should be used more like a compass to provide guidance rather than a map to establish rigid, delineated boundaries." *Lograsso v. Frey*, 2014-Ohio-2054, P34, 10 N.E.3d 1176 (8th Dist. 2014), citing *Scott v. News-Herald*, 25 Ohio St.3d 243, 250, 496 N.E.2d 699 (1986).

At least four of the five statements that are about Mr. Lansky constitute political opinions subject to absolute constitutional immunity. These statements include: (1) "closed Fire Station #2;" (2) "eliminated recycling;" (3) "reduced van service for seniors;" and (4) "stopped Safety Town."

Mr. Lansky argues that the statements at issue are not opinion because they were not subject to varying interpretations and were clearly understood by a reasonable reader to be factual. Mr. Lansky contends that the statements "asserted, as fact, that Lansky: Closed fire station #2, Eliminated recycling, Reduced van service for seniors, Vetoed legislation to raise property taxes, Closed and stopped Safety Town, Discontinued city newsletters, and Discontinued the code red resident alerting system."

Under the totality of the circumstances test, the four statements arguably constitute opinion. Under the first two factors, the statements could be construed as fact because they are short, affirmative statements that imply the Mayor took action. Such statements are verifiable. However, the third and fourth factors, examining the specific and broad context of the statements

should carry more weight in this analysis because the Article is political commentary labeled "Editorial."

A review of the specific context demonstrates that each statement is paired with a quote from the Mayor's own campaign literature about his accomplishments from his first term. The Mayor admits during his deposition that other individuals were involved with the accomplishments for which he takes credit. (Lansky Depo p. 83-84). Yet, in his campaign literature he takes full credit. Similarly, the Brownlees attribute set-backs and accomplishments in Maple Heights to Mayor Lansky, and then provide an opinion whether the event was a step backwards or forwards for the city.[8]

Mayor Lansky argues that others were really responsible for the set-backs. Yet, it was not unreasonable for the Brownlees to assert an opinion attributing certain set-backs to Mayor Lansky based upon his position of influence in Maple Heights. (Lansky Depo p. 83-84). As discussed above, Mr. Lansky was somewhat involved in all of the events referred to in the four statements.

Throughout the Article, the Brownlees examine whether the city has gone forward or backwards during the Mayor's term in office. Undoubtedly, whether an event is a forward or backward step is an opinion. During Mr. Lansky's deposition, he testified that in his opinion, the city has moved forward in some areas and backwards in others. (Lansky Depo p. 119-121). He agreed the Brownlees express a similar opinion in the Article.

In the broader context, the Article is labeled "Editorial" and appeared in the "Editorial" section of a Website created with the avowed purpose of giving voice to the residents of the

[8] Mr. Lansky admitted during deposition that during his term as Mayor, he's moved the city forward in many ways and a step backwards in other areas. He acknowledged that Lynde Brownlee expressed the same opinion in her Article. (Lansky Depo p. 122).

Maple Heights. Although not definitive, labeling a statement as "Editorial" puts the reader on notice that the statements contained therein constitute the writer's opinion.

As further evidence that the statements are opinion, the Article appears only on the Website. There is no corresponding print publication. The internet is more of a "freewheeling, anything-goes writing style" and thus typically bulletin boards, chat rooms, and blogs are often the repository of a wide range of casual, emotive, and imprecise speech, and the online recipients do not necessarily attribute the same level of credence to the statements that they would accord to statements made in other contexts. Cheverud, Comment, *Cohen v. Google, Inc.*, 55 N.Y. L. Sch. L. Rev. 333, 335; O'Brien, *Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 Fordham L. Rev. 2745, 2774-2775 (2002).

Mr. Lansky argues that the label "Editorial" was in small type and denies noticing it when he read the Article. Yet, Mr. Lansky provides no other evidence to suggest that a reasonable reader would not understand the Article to be an opinion piece. As discussed above, "a party's unsupported and self-serving assertions offered to demonstrate issues of fact, standing alone and without corroborating materials are insufficient to overcome a properly supported motion for summary judgment." *Shreves v. Meridia Health Sys.*, 8th Dist. Cuyahoga No. 87611, 2006-Ohio-5724, ¶ 27.

A reasonable person would arguably understand the Article as an opinion piece critiquing events in the city during the Mayor's current term as compared with his promises and claims at the beginning of the term. Readers are then free to draw their own conclusions based upon the facts presented. Thus, this type of statement is not actionable in defamation.

For the reasons discussed above, the court grants the defendants judgment as a matter of law on plaintiff's claim for defamation.

C. Intentional Infliction of Emotion Distress

In order to sustain a claim for intentional infliction of emotion distress, a plaintiff must allege conduct:

> [S]o outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!' The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam. *Yeager v. Local Union 20, Teamsters*, 6 Ohio St. 3d 369, 375, 453 N.E.2d 666 (1983).

Additionally, public figures seeking to recover for intentional infliction of emotion distress arising from a publication must prove that the publication contains a false statement of fact which was made with "actual malice." *Hustler Magazine v. Falwell*, 485 U.S. 46, 56, 108 S. Ct. 876 (1988). As discussed above, Mr. Lansky has failed to prove that the statements were made with actual malice. Additionally, the defendants' conduct in writing and publishing an Article constituting political commentary does not rise to the level of "atrocious and utterly intolerable" conduct necessary to prove a claim for intentional infliction of emotion distress.

What's more, as discussed above, in order to receive compensation for emotional distress, the distress must be "severe and debilitating." *Paugh v. Hanks*, 6 Ohio St. 3d 72, 78, 451 N.E.2d 759 (1983). Mr. Lansky claims he suffered such distress because he received numerous

telephone calls in response to the Article, "which was troubling for [him]." (Defendants' Ex. N, Plaintiff's Response to Interrogatory No. 4). Yet, he testified at deposition that neither the Brownlees nor their Website has any credibility in the community. (Lansky Depo p. 55, Lansky 2nd Depo p. 8). He laughed at the notion of the Brownlees' conduct scaring him out of running for Mayor in 2015. (Lansky Depo p. 55).

Mr. Lansky has failed to corroborate his suggestion that he suffered emotional distress resulting from the Brownlees' publication of the Article. A plaintiff must corroborate his/her testimony with testimony from experts or third parties as to the emotional distress suffered when plaintiff does not seek medical or psychological treatment for the alleged injuries. *Lombardo v. Mahoney*, 8th Dist. Cuyahoga No. 92608, 2009-Ohio-5826. Therefore, summary judgment is appropriate.

D. Rule 11 Sanctions

Defendants allege that they are entitled to sanctions because Mr. Lansky's lawsuit constitutes frivolous conduct under R.C. 2323.51. In determining whether to award sanctions, the court should consider whether the claim was frivolous, whether the aggrieved party was adversely affected, and finally if these determinations are made, the court then must finally determine what amount of reasonable attorney fees, costs, and expenses should be awarded to the aggrieved party. *Sigmon v. Southwest Gen. Health Ctr.*, 8th Dist. Cuyahoga No. 88276, 2007-Ohio-2117, ¶ 14.

Under R.C. 2323.51, frivolous conduct means conduct of a party to a civil action that satisfies any of the following:

> (i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.

(ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.

(iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

(iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

Defendants argue that plaintiff's conduct in filing this action constitutes frivolous conduct because plaintiff filed his complaint with (1) no evidence of actual damage or actual malice, yet demanded in excess of $25,000 in damages, (2) no reasonable basis for asserting that the statements were actually defamatory, (3) firm knowledge that the statements were political opinions in the "editorial" section of a website clearly protected by the state and federal constitution, and (4) without first doing any legal research to first confirm that the claims were legally viable.

Pursuant to R.C. 2323.51(B)(2)(a), the court must conduct a hearing prior to issuing any sanctions. Therefore, the court reserves ruling on defendants' claim for sanctions pending a full hearing.

E. Vexatious Litigation Claim

Finally, defendants seek summary judgment on their counterclaim for vexatious litigation. Pursuant to R.C. 2323.52 "vexatious conduct" means conduct of a party in a civil action that satisfies any of the following: (a) the conduct obviously serves merely to harass or maliciously injure another party to the civil action; (b) the conduct is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, and (c) the conduct is imposed solely for delay.

"Vexatious litigator" means any person who has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action or actions, whether in the court of claims or in a court of appeals, court of common pleas, municipal court, or county court, whether the person or another person instituted the civil action or actions, and whether the vexatious conduct was against the same party or against different parties in the civil action or actions. R.C. 2323.52 indicates that "the vexatious litigator designation may be based on conduct in a single civil action."

The vexatious litigator statute seeks to prevent abuse of the system by those persons who persistently and habitually file lawsuits without reasonable grounds and/or otherwise engage in frivolous conduct. Such conduct clogs dockets, results in increased costs, and often is a waste of judicial resources. *Mayer v. Bristow*, 91 Ohio St.3d 3, 13, 740 N.E.2d 656 (2000).

Mr. Lansky has filed at least four prior defamation lawsuits against ten other individuals and/or entities. Two of the individuals he sued were his political opponents, Neomia Mitchell and Michael Ciaravino. Defendants argue that these lawsuits were frivolous and merely intended to harass. Plaintiff argues in response that he pursued the prior litigation in an effort to protect his reputation in response to defamatory statements being made about him.

Declaring a person to be a vexatious litigator is "an extreme measure that should be granted only when there is no nexus between the filings made by the plaintiff and his or her intended claims." *Mansour v. Croushore*, 12th Dist. Butler No. CA2008-07-161, 2009-Ohio-2627 (June 8, 2009), *citing McClure v. Fischer Attached Homes*, 145 Ohio Misc. 2d 38, 2007-Ohio-7259, 882 N.E.2d 61, 2007 Ohio Misc. LEXIS 533 (Ohio C.P. Clermont County).

After a thorough review of the evidence presented, the court finds that reasonable minds could differ on whether the plaintiff pursued this and prior lawsuits merely to harass or

maliciously injure the various defendants. Although the defendants provided evidence that the plaintiff had been involved in litigation on numerous occasions, "it is the nature of the conduct, not the number of actions that determines whether a person is a vexatious litigator." *Mansour, supra* at ¶45.

The court finds that there remain genuine issues of fact as to whether the plaintiff's conduct rises to the level of vexatious litigation. The court denies summary judgment on defendants' claim for vexatious litigator.

CONCLUSION

After a careful review of the evidence, the court finds that there remains no genuine issue of material fact as to the plaintiff's claims in his complaint and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that defendants are entitled to judgment as a matter of law. The court grants in part defendants' motion for summary judgment and dismisses plaintiff's complaint with prejudice. The court denies in part defendants' motion for summary judgment as to defendants' counterclaim for vexatious litigation. The court reserves ruling on defendants' claim for Rule 11 Sanctions pending a full hearing.

IT IS SO ORDERED.

JOSE A. VILLANUEVA, JUDGE

DATE: November 13, 2015

CERTIFICATE OF SERVICE

A copy of the court's **Opinion and Order Granting in Part Defendants' Motion for Summary Judgment and Dismissing Plaintiff's Complaint** has been sent by ordinary U.S. mail this 13th day of November, 2015 to the following:

Brent English, Esq.
The 820 Building, 9th Floor
820 Superior Ave., West
Cleveland, Ohio 44113
Attorney for Plaintiff

David Tryon, Esq.
950 Main Ave., Suite 500
Cleveland, Ohio 44113
Attorney for Defendants

Maurice Thompson, Esq.
208 E. State Street
Columbus, Ohio 43215
Attorney for Defendants

JOSE A. VILLANUEVA, JUDGE