IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Robert E. Murray, et al.,

Plaintiffs,

v.

The Huffington Post.com, Inc., et al.,

Defendants.

Civil Action No. 2:13-cv-1066

Judge Gregory L. Frost

Magistrate Judge Terence Kemp

REPLY BRIEF IN SUPPORT OF DEFENDANT STARK'S MOTION TO DISMISS

Plaintiffs' brief in opposition to Stark's motion to dismiss simply ignores key facts and precedents relevant to the motion – facts and precedents that, we respectfully submit, should compel this Court to dismiss the case.

1. **The statements in the article are constitutionally-protected opinion**

One important precedent ignored by Plaintiffs is a holding of the Sixth Circuit in *Bentkowski v. Scene Magazine*, 637 F.3d 689 (6th Cir. 2011), a case interpreting Ohio defamation law. Of the four statements in Stark's Article that Plaintiffs contend are actionable, three relate to Plaintiff Murray's motivation for firing his workers. As we contended in our initial brief, *Bentkowski* is directly on point with respect to these statements.

Bentkowski was the mayor of Seven Hills, Ohio. He sued *Cleveland Scene* magazine for defamation over an article, entitled "The Bizarre Boy Mayor," that discussed a letter that Bentkowski had sent to younger residents of his town. The letter described the town as "awesome" and on the verge of becoming "hip" and asked these residents to respond to a questionnaire with their names, ages, and Internet addresses. This, the letter said, "will help us

notify you of various things that may be of interest to you. For example, if you have an 18-year-old daughter we can invite her to participate in the Miss Seven Hills Pageant." The article asserted that Bentkowski had "insisted" that he be the master of ceremonies at this pageant and claimed the 34-year-old mayor "brags about his youth [and] proudly wears Superman tights." The article went on to say that while Bentkowski claimed he was "just trying to stay in touch with residents … the letter left some members of city council scratching their heads… Nowhere does the questionnaire say it's voluntary or that personal information will be kept private. The letter doesn't appear on city letterhead and includes the mayor's personal web address." Bentkowski claimed that this portion of the article "falsely implies that he sought personal information about his constituents, including young women, for illicit purposes."

The Sixth Circuit, in addressing whether this claim met the verifiability prong of the test for distinguishing a statement of opinion from a statement of fact under Ohio law, noted that the Ohio Supreme Court had stated that if a "statement lacks a plausible method of verification, a reasonable reader will not believe that the statement has specific factual content." *Bentkowski*, 637 F.3d at 694, quoting *Scott v. News-Herald*, 496 N.E.2d 699, 707 (1986). Applying that principle, the Sixth Circuit held, "Whether Bentkowski had improper motives in sending the 'young residents' letter is not verifiable because there are no objective tests to determine his internal motivation in sending the letter." *Bentkowski*, 637 F.3d at 694.

This principle applies here. A reasonable reader would understand that Stark could not purport to actually know why Murray fired his workers, because there are no objective tests to determine Murray's internal motivation. As we said in our initial brief, no one, not a historian, nor a psychiatrist, nor even Murray himself, would be able to verify precisely why Murray made the decision that he made, because the internal workings of the human mind are not knowable in

that way. Mike Stark could, at most, only offer his opinion. Stark's statements related to why Murray fired his workers are, under *Bentkowski*, not verifiable, and this reality supports a finding that the statements were protected opinion, and thus not actionable.

This principle makes good sense. Academic papers, and entire academic conferences, are held on topics like why Japan attacked Pearl Harbor or why Supreme Court Justice Owen Roberts in 1937 switched to voting with the pro-regulation bloc to uphold a minimum wage law in *West Coast Hotel Co. v. Parrish*. The authors can offer their theories as to why a decision was made, but in the end, they are only theories, not facts susceptible to conclusive proof. Nor, in light of constitutional protections for opinion, can such theorizing be the basis of a defamation suit.[1]

Plaintiffs' only remaining claim is based on Stark's article referring to Murray as an extremist. Here, plaintiffs admit that "labeling someone as an 'extremist' could, in some contexts, be viewed as mere hyperbole…." Plf. Opp. Mot. To Dismiss, Doc #25, at 8. But Plaintiffs contend that because Stark called Murray an "extremist" in the same discussion that speculated on Murray's motive for firing his workers, then the word "carries a precise meaning."

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[1] Although Plaintiffs' brief does mention the *Bentkowski* case, it does not acknowledge this highly relevant holding in the Sixth Circuit's opinion, describing the principle as merely "Stark's suggestion," Plf. Opp. Mot.To Dismiss, Doc #25, at 11. In a footnote, *id*., at fn. 3, Plaintiffs attempt to escape this principle by noting that employer motivations are an element for a court to address in federal employment discrimination cases. In that context, and others, where statute or common law dictate that motive or intent is an element of a civil or criminal offense, the fact-finder is obligated to make determinations regarding motivation. But even there, the fact-finder is generally required to find only that the improper motive was one motive, not the sole motive – a task more suited to factual determination than divining a single motivation. Here, by contrast, Plaintiffs contend that the Article alleges that Murray acted with a single motivation -- "Defamatory Statements in the Article intended to convey, and did convey, to the average reader of The Huffington Post … the false and harmful impression[] that … that Murray cares so little for his employees that he would fire them en masse just to make a political statement." First Am. Compl. Doc. #16, ¶ 25. More importantly, the context of the present case is something else altogether: The issue is the standards for balancing the right of a plaintiff to protect his or her reputation versus the strong public interest in free speech and robust debate, especially as to statements of opinion. And in this context, in this state, analysis of the Article's statements regarding Murray's motivation for firing his workers is controlled, not by federal antidiscrimination law, but by principles of Ohio tort law and the Ohio and U.S. constitutions, including the principles that the Sixth Circuit articulated in *Bentkowski*.

Id. But "extremist" is a word that relates to the political arena, and to views at the far end of a political spectrum ("a person who holds extreme or fanatical political or religious views, especially one who resorts to or advocates extreme action" (Oxford Dictionaries online)), and tying that word to the action of firing workers does not transform it from a word that is considered hyperbole into a word with a precise meaning. A reasonable reader would understand that the word "extremist" in this context was an expression of opinion, not an assertion of fact capable of verification.

As to the context for the Article and its bearing on the question of whether the statements at issue are protected opinion, Plaintiffs' brief notes three times that on Stark's Huffington Post page he calls himself a "journalist," implying that readers should believe that Stark is writing straight news stories. But one can be called a "journalist" and still engage in expression of opinions; the field "journalism" includes branches known as "advocacy journalism" and "opinion journalism," encompassing writers who include their opinions in their work.[2] Moreover, Plaintiffs ignore what Stark's brief already pointed out, which is that Stark's Huffington Post bio actually says, "Mike Stark is a University of Virginia law student, a marine, extreme political activist and a citizen journalist." http://www.huffingtonpost.com/mike-stark/. It is entirely clear from that description, from Stark's body of work, Stark Mot. To Dismiss, Doc # 19, at 7, and from the Article itself that Stark is a political partisan with strong views on energy policy, the role of money in politics, and other issues. Plaintiffs also ignore Stark's arguments that *Huffington Post* blog content is separately labeled from *Huffington Post* news content, and that contributors to the blog tend to be not professional journalists writing unbiased news

[2] See, e.g., the website of the Association of Opinion Journalists, http://www.opinionjournalists.org/; "Nicholas Kristof: How a New York Times columnist rewrote opinion journalism," The Washington Post, Nov. 29, 2011, http://www.washingtonpost.com/business/on-leadership/nicholas-kristof-how-a-new-york-times-columnist-rewrote-opinion-journalism/2011/11/28/gIQA7PHY8N_story.html .

accounts, but politicians, political activists, policy analysts, and other people expressing a point of view. Stark Mot. To Dismiss, Doc # 19, at 8.

Plaintiffs' one-page effort, Plaintiffs Opp. Mot. To Dismiss, Doc #25, at 20-21, to avoid dismissal of the false light claim is also unavailing. Under the principles of *Welling v. Weinfeld*, 113 Ohio St.3d 464, 471; 866 N.E.2d 1051 (2007) and *Christiansen v. Pricer*, 2010-Ohio-2718, 2010 Ohio App. LEXIS 2238, 2010 WL 237782 (2010), discretionary appeal not allowed, 126 Ohio St. 3d 1601, 2010 Ohio 4928, 935 N.E.2d 47 (2010), statements of opinion that are not actionable as defamation are equally non-actionable as false light invasion of privacy.

Accepting all of the allegations in the First Amended Complaint as true, and looking at the totality of the circumstances, as required by *Scott v. News-Herald* and *Vail v. Plain Dealer Publishing Co*., 72 Ohio St. 3d 279, 649 N.E.2d 182 (1995), all of the Article's statements cited by Plaintiffs are expressions of opinion that are not actionable as defamation or false light invasion of privacy.

2. The facts pleaded do not support the claim that Stark acted with actual malice

Contrary to Plaintiffs' assertion, Plf. Opp. Mot. To Dismiss, Doc #25, at 4, counsel for Stark are familiar with the legal standards for a motion to dismiss; we recognize that Plaintiffs' claim, "on information on belief" that a writer named Jason Cherkis actually wrote the Article must be accepted as true for purposes of the motion. In our initial brief, we simply wanted to reaffirm, in hopes of encouraging Plaintiffs to proceed appropriately, that this claim is an absolute fabrication (we don't know by whom). But we cannot and do not rely on this point in pursuing dismissal on the separate, alternative ground that Plaintiffs plead no specific facts supporting the claim that Stark acted with actual malice.

Taking the allegations in the First Amended Complaint as true, there is still no pleading of facts that Stark acted with knowledge that the Article was false or with reckless disregard for the truth. The complaint only alleges that "a request was made to Defendant Stark for him to post the Article on The Huffington Post under his byline (as a third-party blogger), rather than have the Article posted on The Huffington Post under the byline of Defendant Cherkis." First Am. Compl. Doc. #16, ¶ 17. The complaint does not state that Stark knew that Cherkis had a controversial reputation; or even that Stark knew that the Article was prepared by Cherkis. Plaintiffs' counsel, in their opposition brief, imply that Stark knew Cherkis was involved, but that does not cure the failure to so plead in the complaint (and nor would that bit of knowledge, by itself, indicate malice). Moreover, as Plaintiffs point out, the *Huffington Post* is a "Pulitzer-Prize winning news outlet," Plf. Opp. Mot. To Dismiss, Doc #25, at 17, so Stark accepting that outlet's draft as his own would hardly seem like reckless disregard for the truth. The Article also contained links to articles in respected mainstream publications, including the *Cleveland Plain Dealer* and the *Washington Post*, thus giving Stark confidence that the information in the Article was accurate. In these circumstances, there is no showing of actual malice by Stark, and thus no basis to proceed with a defamation or false light claim against Stark.[3]

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[3] Plaintiffs barely attempt to claim that Robert Murray is not a public figure; they simply cite the legal standard for making that determination, Plf. Opp. Mot. To Dismiss, Doc #25, at 16, and ignore all the evidence to the contrary regarding Murray's aggressive efforts to insert himself into national politics -- evidence that Stark's brief noted was contained in the Article and the sources linked to the Article. Stark Mot. To Dismiss, Doc #19, at 14-16. As recently as last month, this alleged non-public figure was delivering a public speech charging that the coal industry is "being destroyed" by President Obama and "his radical followers and supporters." In his address at an energy summit meeting in Charleston, West Virginia, Murray added, "Mr. Obama's actions are a human issue to me. I know the names of those Americans whose jobs and family livelihoods are being destroyed as he appeases his radical environmentalist, unionist, liberal elitist, Hollywood character and other constituencies that got him elected." "Coal 'being destroyed' by Obama, energy executive says," Charleston Gazette, Dec. 17, 2013, http://www.wvgazette.com/News/201312170026.

As to Murray Energy, Plaintiffs' brief states, incorrectly, that "Stark's Motion says nothing regarding Murray Energy's status as a private or public figure." Plf. Opp. Mot. To Dismiss, Doc #25, at 17. In fact, it was Plaintiffs, in their complaint, who did not even bother to assert that Murray Energy was a private figure, even

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though it made that assertion as to Robert Murray -- a fact that Stark's brief expressly noted, Stark Mot. To Dismiss, Doc #19, at 16, in arguing that the actual malice standard applied. Even apart from its direct association with the politically-active Robert Murray, Murray Energy is a public figure, not some obscure local business; it proudly notes as the first sentence on its website home page, "Murray is the largest privately owned coal company in America." http://www.murrayenergy.net/

CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2014, I electronically filed the foregoing Motion with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Respectfully submitted,

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