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COURT OF APPEALS
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COURT OF APPEALS, STATE OF COLORADO
CASE NO. 03CA2117

Appeal from the District Court
La Plata County, Case No. 01 CV 77
The Honorable David L. Dickinson, and The Honorable Al H. Haas, and
The Honorable James D. Childress

SHEILA WILSON,

Plaintiff/ Appellant,

vs.

BALLENTINE DEVELOPMENT, LLC, CORTEZ NEWSPAPERS, INC., SUZY MEYER, JOSH MOORE, LOIS E. RUTLEDGE, SUSAN KECK, JAMES R. BEISEL, JR., RANDY SMITH, MONTEZUMA COUNTY SPECIAL HOSPITAL DISTRICT BOARD, KELLY R. McCABE, and DOES 1-10, Inclusive,

Defendants/Appellees

Attorney for Defendant/Appellee
KELLY R. McCABE, Individually
Hazen D. Brown, #13159
KELLY R. McCABE, P.C.
22 E. Main St., P.O. Box 1296
Cortez, CO 81321
Telephone: (970) 565-7209
Fax Number: (970) 565-6355

ANSWER BRIEF OF KELLY R. McCABE

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ISSUES FOR REVIEW

Defendant/Appellee, Kelly R. McCabe ("McCabe"), is only affected by certain issues for review, and will only brief those issues herein. The issues for review as to McCabe are as follows:

1. Under the facts of this case, does Plaintiff/Appellant, Sheila Wilson ("Wilson"), have a cause of action against McCabe for defamation?

STATEMENT OF THE CASE

Statement of Proceedings

McCabe adopts the Statement of Proceedings set forth in Wilson's Statement of the Case (Opening Brief, page 6), with the exception of the final statement therein claiming that Wilson filed her Notice of Appeal on October 31, 2003. Wilson's Notice of Appeal was filed with the Court of Appeals on November 3, 2003.

Statement of Facts

The relevant facts are not in dispute. On April 12, 2000, Wilson attended a public meeting of the Montezuma County Hospital District ("MCHD"), and during the meeting, an executive session was called and the general public was asked to leave the room. Wilson freely admits that she listened in on the executive session without the knowledge or consent of the board members.

Wilson's conduct on the evening of April 12, 2000 was first brought to public light when Wilson herself published a letter to the editor in the Cortez Journal on April 18, 2000 (Exhibit A attached). In this letter, Wilson admits to eavesdropping on the executive session.

At the next MCHD board meeting held on April 19, 2000, Board member Susan Keck read a prepared letter into the record in response to Wilson's letter to the editor. McCabe, as attorney to the Board, then rendered his legal opinion to the Board regarding the consequences of Wilson's

conduct and statements which resulted in further discussion between Wilson and McCabe (Exhibit B attached). At no time during the meeting on April 19, 2000 did Wilson deny her conduct in eavesdropping upon the executive session held during the April 12, 2000 meeting.

On April 22, 2000, the Cortez Journal published an article regarding the MCHD board meeting held on April 19, 2000 and also published an editorial and letters to the editor regarding Wilson's conduct in its issue on April 25, 2000.

It is Keck's letter, McCabe's statements at the April 19, 2000 MCHD meeting, and the published newspaper reports, editorials, and letters which Wilson claims gives her a cause of action in defamation.

ARGUMENT

Summary judgment is an appropriate remedy when 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. C.R.C.P. Rule 56(c), Bailey v. Clausen, 192 Colo. 297, 557 P.2d 1207 (1976). Admitted matters can constitute an adequate showing for summary judgment without the necessity of producing further supportive evidence, Cortez v. Brokaw, 632 P.2d 635 (Colo. App. 1981), and a "genuine issue" precluding summary judgment cannot be raised simply by means of allegations in the pleadings or by way of argument. Sullivan v. Davis, 172 Colo. 490, 474 P.2d 218 (1970), Vail National Bank v. J. Wheeler Construction Corp., 669 P.2d 1038 (Colo. App. 1983).

Once the moving party shows that genuine issues are absent, the burden shifts and the opposing party must deduce specific facts demonstrating that a true factual controversy exists. Pearson v. Sublette, 730 P.2d 909 (Colo. App. 1986), Webster v. Mauz, 702 P.2d 297 (Colo. App.

1985). Furthermore, a party cannot successfully resist a motion for summary judgment by speculation or by expressing the hope that the factual issues will be revealed at trial. See Kanardo Mining & Development Co. v. Sutton, 36 Colo. App. 375, 539 P.2d 1325 (1975).

The trial court entered summary judgment in favor of McCabe and against Wilson on September 11, 2003 finding that McCabe had presented an Affidavit demonstrating that he gave opinions to the MCHD Board of Directors regarding Wilson's conduct, and Wilson did not provide any affidavits, exhibits, or other factual evidence to dispute that claim. The Court concluded that McCabe was entitled to the protections of governmental immunity provided to officers and employees of governmental bodies. In reviewing this grant of summary judgment, the Appellate Court must apply the same standards as used by the trial court, C.R.C.P. Rule 56(c), Smith v. Boyett, 908 P.2d 508 (1995). Furthermore, the reviewing court should affirm the lower court decision if the trial court reached a correct result even though it's reasoning may be flawed. Crossroads West, Ltd Liability Co. v. Town of Parker, 929 P.2d 62 (Colo. App. 1996), Barham v. Scalia, 928 P.2d 1381 (Colo. App. 1996).

Even assuming *arguendo,* that Wilson is correct in her claim that McCabe is not covered by the Colorado Governmental Immunity Act, ("CGIA"), C.R.S. §24-10-101, et seq., the trial court's grant of summary judgment is nevertheless correct. Though the scope of the CGIA is somewhat ambiguous, and caselaw has done little to clarify its coverage, it is clear that the CGIA applies to "public employees" as defined at C.R.S. §24-10-103(4)(a). These protected individuals include officers, employees, servants, or authorized volunteers of a public entity, whether or not compensated, elected, or appointed, but does not include independent contractors or persons sentenced to participate in useful public service. Id.

The trial court found that McCabe fell within the protections offered to officers and employees of governmental bodies, and this is consistent with the declaration of policy set forth in C.R.S. §24-10-102 wherein it states "It is also recognized that public employees, whether elected or appointed, should be provided with protection from unlimited liability so that public employees are not discouraged from providing the services or functions required by the citizens or from exercising the powers authorized or required by law." As counsel to the Board, McCabe holds an appointed position in the nature of an officer, and in order to promote the purposes of the CGIA, McCabe should, as the trial court found, be accorded the protections of the CGIA.

Summary judgment in favor of McCabe, and against Wilson, is also proper on a number of other grounds based upon the undisputed facts. It is essential to note that Wilson was the first person to publish any statement regarding her conduct on the evening of April 12, 2000. In her April 18, 2000 letter to the Cortez Journal (Exhibit A) Wilson stated "Eavesdrop I did, because there was no reason for the first "secret" meeting". Wilson herself admitted to eavesdropping, and no defendant did anything more than to confirm Wilson's admission. Wilson's publication of the statement that she "eavesdropped" was first and foremost a true statement of fact, and her publication of that statement operated as a consent to publication which is a complete defense for McCabe's republication of that statement. See C.R.S. §13-25-125.5; Costa v. Smith, 43 Colo. App. 251, 601 P.2d 661 (1979).

McCabe's complete statements regarding Wilson are set forth on Exhibit B. Mr. McCabe first stated "I was more concerned regarding the legality of Ms. Wilson's indication that she sat and purposely eavesdropped on a governmental entity's executive session". This statement is merely an expression of Mr. McCabe's concern and opinion to the MCHD Board of Directors; restates the

fact first published by Wilson that she did indeed eavesdrop; and makes no false or defamatory references to Wilson.

McCabe further stated "Colorado Revised Statutes §18-9-304 makes the eavesdropping, as described by Wilson, an class six felony". This again is a true statement of fact, as one can refer to the cited statute to confirm that eavesdropping is a felony, and at no time did McCabe either state or elude that Wilson had been convicted or found guilty of any criminal conduct.

McCabe continued to express his opinion that he believed Wilson's letter to the Editor was a confession of commission of the crime of eavesdropping, and then he rendered his advice to the Board that it should proceed to advise the authorities regarding what he believed was criminal conduct. There are no other statements or actions attributable to McCabe upon which Wilson bases her claim for defamation.

McCabe's statements that Wilson admitted to committing eavesdropping were substantially true in that to the extent they reflected that Wilson did in fact commit eavesdropping, she herself had already made that admission. To the extent McCabe's statements were addressed to the fact of Wilson's admission to eavesdropping, those statements were also substantially true because she had indeed made such an admission. Because McCabe's statements regarding the eavesdropping and Wilson's admission of same were substantially true, Wilson has no claim in defamation against McCabe. C.R.S. §13-25-125; Gomba v. McLaughlin, 180 Colo. 232, 504 P.2d 337 (1972). The additional statements made by McCabe, regarding his opinion of the legal consequences of Wilson's conduct and admission, as well as his recommendations to the Board do not give Wilson a cause of action because opinions are not actionable, Sall v. Barber, 782 P.2d 1216 (Colo. App. 1989), and any statements or recommendations made by McCabe to the MCHD Board are in the

nature of legal advice and would be privileged based upon common interest and protection of the Board's legitimate interests. See for example Lininger v. Knight, 123 Colo. 213, 226 P.2d 809 (1951), Price v. Conoco, Inc., 748 P.2d 349 (Colo. App. 1987).

CONCLUSION

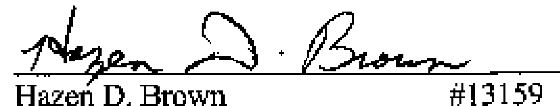
Wilson has claimed that McCabe defamed her on the basis of statements he made at the April 19, 2000 meeting of the MCHD Board of Directors. The trial court found that McCabe was entitled to the protections of the Colorado Governmental Immunity Act, and in order to promote the purposes of that Act, the trial court decision should be affirmed.

The facts are undisputed in this case, and significantly, it was Wilson's first publication of her admission that she had eavesdropped on an executive session that brought her conduct to light, and none of the publications herein did anything more than confirm Wilson's admission. McCabe is entitled to judgment as a matter of law because to the extent any of his statements were factually based, they were substantially true and are not actionable. Any of McCabe's other statements must be considered either opinions or advice to the Board and as such, do not give rise to a claim in defamation or are privileged against such claim.

Therefore, the trial court's grant of summary judgment in favor of McCabe and against Wilson should be affirmed.

Respectfully submitted this 7 day of May, 2004.

KELLY R. McCABE, P.C.



Hazen D. Brown #13159

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Kelly R. McCabe was mailed by placing in the United States Mail, postage prepaid, on this 7th day of May, 2004, addressed as follows:

Rebecca A. Pescador
Attorney at Law
4625 Gordon Dr.
Boulder, CO 80305-6734

Christopher P. Beall
Faegre & Benson
3200 Wells Fargo Center
1700 Lincoln St.
Denver, CO 80203

Gary Doehling
Doehling & Driscoll, P.C.
628 Rood Avenue
Grand Junction, CO 81501

Kent F. Williamson
Attorney at Law
P.O. Box 1618
Cortez, CO 81321