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**IN THE
COURT OF APPEALS OF INDIANA**

THE DAILY CLINTONIAN, GEORGE B.)
CAREY and CONCERNED CITIZENS,)

Appellants-Defendants,)

vs.)

No. 83A01-0403-CV-97

RON SHEPARD,)

Appellee-Plaintiff.)

APPEAL FROM THE VERMILLION CIRCUIT COURT
The Honorable Diana J. LaViolette, Judge
Cause No. 83C01-0208-CT-32

October 28, 2005

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

George Carey, publisher of *The Daily Clintonian* newspaper, appeals a jury verdict in favor of Ron Shepard, the mayor of the city of Clinton, in a defamation suit. He raises one issue on appeal, which we restate as whether the evidence presented at trial was constitutionally sufficient to sustain the verdict.

We affirm.

FACTS AND PROCEDURAL HISTORY

The Daily Clintonian is a newspaper published in Clinton, Indiana. In the Friday, April 26, 2002 issue, the following paid advertisement appeared:

STATING THE FACTS

In July 2002, the taxpayers of the City of Clinton will start paying on a bond loan of \$580,130.00 of which we only received \$394,363.29. We are locked in on this debt for 16 years. That's (16 years) [sic] without wheel tax funding to cover the cost of any street repairs large or small.

This debt was incurred by the present administration to finish 1/3 of remaining streets that were assigned to be paved before the previous administration left office on January 2000.

In July 2002, we will also begin paying on the lease of the new fire truck. This was changed from \$395,000.00 bond, which would have been payed [sic] off at the end of 2003, to a 6 year bond totaling \$371,308.07. The interest alone on this bond is \$49,828.03. Yes, this is a few thousand less than the original bond. What the mayor failed to tell the public was that \$155,000.00 previously payed [sic] out on the original bond was non-refundable because your mayor choose [sic] to dissolve the bond before it's [sic] maturity date!

WAKE UP PEOPLE!!! It doesn't take math skills to see that he is losing money to spend more money! Your mayor continues to use other people's efforts as stepping stones to make himself look good to the public!

All these city projects were set in motion by previous administrations dating back to Mayor Hugh McGill!

Now that it's clear the C.T.W.C. intends to install their own water service, where will those lost revenues be collected? Out of Clinton City residents' pockets! Abuse of office is a criminal offense!

Look out behind you Mayor! There is a **BEE's** [sic] **NEST!!!** All these problems have been brought on by an unwillingness to listen and negotiate. A simple case of my way or no way!!!

Are we not the lamb being led to slaughter? You could have fooled me!!!

Paid for by Concerned Citizens.

(App. at 17.) At the time, Ron Shepard was the mayor of Clinton, and George Carey was the majority owner, publisher and managing editor of *The Daily Clintonian*. Carey reviewed the advertisement prior to deciding to publish it.

In a letter dated July 9, 2002, Shepard complained about the advertisement, informing Carey and the newspaper that “your accusations that Mayor Shepard has committed abuse of office as a criminal offense are libelous *per se* under Indiana law” (*id.* at 19) and demanding Carey print a retraction “that Mayor Ron Shepard has not committed an act of abuse of office or any other crime.” (*Id.*) Carey refused.

On August 27, 2002, Shepard filed a defamation suit against Carey, the newspaper and the unidentified “Concerned Citizens.” (*Id.* at 12.) Carey filed a Motion For Summary Judgment, which was denied on January 9, 2004. (*Id.* at 11.) Prior to trial, Carey and Shepard stipulated to certain facts including: “On April 26, 2002, the defendants George B. Carey and *The Daily Clintonian* published a paid political advertisement to its 5,400 readers which accused [Shepard] of the crime of abuse of office.” (*Id.* at 122-123, Tr. at 36.) After a two-day trial, the jury found in favor of Shepard and awarded him compensatory damages in the amount of \$225,000 and

punitive damages in the amount of \$10,000. Carey now appeals, claiming the jury verdict was constitutionally deficient as to actual malice.¹

DISCUSSION AND DECISION

Among the guarantees found in the First Amendment to the Constitution of the United States are freedom of speech and freedom of the press. U.S. Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press.”). This amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people,” *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964), and reflects a “national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Id.* at 270-71.

The rights under the First Amendment, even those afforded to the press, are not absolute, however. *Journal-Gazette Co., Inc. v. Bandido’s Inc.*, 712 N.E.2d 446, 451 (Ind. 1999), *cert. denied* 528 U.S. 1005 (1999). Although “erroneous statement is inevitable in free debate and . . . must be protected if the freedoms of expression are to have the breathing space that they need to survive,” *Sullivan*, 376 U.S. at 271-72 (internal quotations and marks omitted), these rights and freedoms must be balanced against other societal interests, including protecting individuals from defamatory statements made in the course of public debate. *Bandido’s*, 712 N.E.2d at 451.

¹ In his Appellee’s Brief, Shepard asserts Carey has failed to comply with the provisions of Ind. Appellate Rule 46(A)(4) and other Appellate Rules. That rule provides the statement of issues in a brief to this Court “shall concisely and particularly describe each issue presented for review.” Ind. App. R. 46(A)(4). We agree that Carey’s statement of the issues is lacking in clarity and precision; however, he somewhat clarified the issue in his Reply Brief. We also note numerous errors in the briefs submitted by both parties with respect to proofreading and, more importantly, citations. We admonish counsel for both parties to use more care when submitting briefs to this Court.

In *Sullivan*, the United States Supreme Court addressed this balance in the particularly delicate context of criticism of public officials for their official conduct, holding:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Sullivan, 376 U.S. at 279-80. While providing some measure of protection to public officials against defamation, such a rule would neither “damp[e]n the vigor [nor] limi[t] the variety of public debate.” *Id.* at 279.

In *Bandido’s*, our Indiana Supreme Court held that when proof of actual malice is required as a matter of federal constitutional law in a defamation case, the United States Supreme Court has “mandated that appellate courts use independent examination of the whole record as the standard of review.” 712 N.E.2d at 456. “The rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge.” *Id.* at 455 (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984), *reh’g denied* 467 U.S. 1267 (1984)). We are thus bound to “undertake an independent and searching review of the record” to determine whether Shepard has met his burden of proof with respect to the “actual malice” element of defamation. *Id.* at 454.

To establish defamation, a plaintiff must prove the following elements: (1) a communication with defamatory imputation, (2) malice, (3) publication, and (4) damages.

Poyser v. Peerless, 775 N.E.2d 1101, 1106 (Ind. Ct. App. 2002). Defamation is “that which tends to injure reputation or to diminish esteem, respect, good will, or confidence in the plaintiff, or to excite derogatory feelings or opinions about the plaintiff.” *Id.* A statement is defamatory *per se* if it imputes (1) criminal conduct; (2) a loathsome disease; (3) misconduct in a person’s trade, profession, office, or occupation; or (4) sexual misconduct. *Id.*

As noted above, a public official must prove “actual malice” to recover damages in a defamation suit regarding his official conduct. *Sullivan*, 376 U.S. at 279-80.

Actual malice exists when the defendant publishes a defamatory statement with knowledge that it was false or with reckless disregard of whether it was false or not. Reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. To demonstrate reckless disregard, there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication, or proof that the false publication was made with a high degree of awareness of their [sic] probable falsity. Hence, a defendant’s actual state of mind is a critical factor in the analysis. A defendant’s state of mind is a subjective fact and may be shown by indirect or circumstantial evidence.

Bandido’s, 712 N.E.2d at 456 (internal quotations and citations omitted).

The publication element requires that the defamatory matter be communicated to a third person or persons. *Schrader v. Eli Lilly & Co.*, 639 N.E.2d 258, 261 (Ind. 1994). Damages are presumed even without proof of actual harm to the plaintiff’s reputation if the communication is defamatory *per se*. *Poyser*, 775 N.E.2d at 1106.

Carey argues Shepard has assigned an erroneous meaning to the sentence: “Abuse of office is a criminal offense!” (App. at 17.) Carey asserts:

The underlying theory of [Shepard's] case complains that the disputed sentence means, and was known to mean by defendants, that "Ron Shepard has committed a criminal offense of official misconduct". Such a claim is a substantial rewrite of the sentence. Ron Sheperd's [sic] name is not mentioned anywhere in the ad. Official misconduct rates no mentioned [sic] either.

(Appellant's Br. at 16-17.) Before trial, however, Carey and Shepard entered into a number of stipulations, including that Carey had "published a paid political advertisement . . . which accused [Shepard] of the crime of abuse of office." (App. at 123 (emphasis supplied).) Shepard's counsel read this stipulation to the jury at the beginning of trial.

The nature of a stipulation is that it establishes a particular matter as a fact. *Ehle v. Ehle*, 737 N.E.2d 429, 433 (Ind. Ct. App. 2000). Once the parties enter into a stipulation, and the court approves it, the stipulation is binding on all involved.² *Id.* at 433-34. Carey stipulated that the advertisement accused Shepard of a crime, and he cannot now argue that the advertisement did not accuse Shepard of a crime.

The stipulation, coupled with Carey's own testimony, demonstrates he acted with actual malice in publishing the advertisement. On cross-examination, Carey testified as follows:

Q. Now . . . you knew Ron Shepard wasn't a criminal, didn't you?
A. Yeah.

² Neither the parties nor their attorneys may enter into a stipulation that purports to bind the trial court with respect to a question of law; any such stipulation is a nullity. *Marchal v. Craig*, 681 N.E.2d 1160, 1162 (Ind. Ct. App. 1997) (citing *Yelton v. Plantz*, 226 Ind. 155, 77 N.E.2d 895 (1948)). Whether a communication is defamatory is such a question of law for the court; it is presented to the jury as a question of fact only if the communication is reasonably susceptible of either a defamatory or non-defamatory interpretation. *Street v. Shoe Carnival, Inc.* 660 N.E.2d 1054, 1058 (Ind. Ct. App. 1996). Because the advertisement is susceptible of both a defamatory and non-defamatory interpretation, it was a question of fact for the jury and, thus, a proper subject for stipulation. As a result, the stipulation is binding on the parties.

- Q. You knew that he had not committed any offense of abuse of office or anything of that sort, didn't you?
- A. Well . . . short of the fiscal management that I have mentioned already, yeah.

(Tr. at 271-72.)

- Q. We don't have a right to say people are criminals when they are not, do we?
- A. Probably not.
- Q. Probably not?
- A. Yeah.
- Q. Do you think it's okay for some people to say people are criminals when they are not?
- A. Yeah. Well, subject to proof.
- Q. Well, you have no proof he has committed any crime, do you?
- A. No.
- Q. He has not been charged by the Prosecutor in Vermillion County?
- A. No.
- Q. Neither the former Prosecutor or the present Prosecutor has ever charged him with a crime, have they?
- A. No.
- Q. No Jury has ever convicted him of a crime?
- A. No.

(*Id.* at 272-73.) Although his testimony during direct and cross-examination is somewhat ambiguous, Carey testified on re-direct:

- Q. Do you or do you not think that the Mayor have [sic] committed a criminal offense?
- A. No.
- Q. In July . . . or excuse me, in May of 2002 . . . *did you think that the Mayor may have committed a criminal offense?*³
- A. *No.*
- Q. Then . . . why weren't you concerned about this statement abuse of office as [sic] a criminal offense?
- A. I probably should have been more concerned.

³ We assume counsel misspoke and was referring to late April when Carey published the advertisement at issue.

Q. Excuse me?

A. I said I probably should have been more concerned at the time.

(*Id.* at 277) (emphasis supplied) (footnote added).

Having stipulated the advertisement he published accused Shepard of a crime, Carey testified that when he published the advertisement, he did not think Shepard had committed a crime. In other words, he “in fact entertained serious doubts as to the truth” of the advertisement. *See Bandido’s*, 712 N.E.2d at 456 (“To demonstrate reckless disregard, there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication, or proof that the false publication was made with a high degree of awareness of [its] probable falsity.”). This is sufficient to demonstrate Carey’s reckless disregard of the truth or falsity of the advertisement and to support a finding of actual malice.

We affirm.

VAIDIK, J., and SHARPNACK, J., concur.