IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA **CIVIL ACTION**

STEPHEN B. RUSSELL,
Plaintiff,

CASE NO.: 17-CA-943

vs.

WATERMAN BROADCASTING CORP, et al,
Defendants.
_____/

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS CAUSE comes before the Court on Defendants' "Motion For Summary Judgment," filed March 14, 2019. Having reviewed the motion, Plaintiff's responses, Defendants' replies, the case file, the applicable law, and having reviewed the evidence and arguments presented by the parties on May 2, 2019, the Court finds as follows:

1. Plaintiff filed a complaint on March 21, 2017, alleging defamation. The language of the broadcast at issue is attached from the transcript of the hearing on the motion to suppress.

2. Defendants Waterman Broadcasting Of Florida, LLC and David Hodges argued in their motions for summary judgment that they were entitled to First Amendment protections as members of the media, and that the broadcast was protected by the fair reporting privilege. Defendants argued that there was no issue of material fact because: Plaintiff cannot prove Defendants acted with actual malice, cannot prove that the broadcast was false or contained defamatory statements, and cannot prove actual damages. Defendants further argued that Fla. Stat. §770.01 restricts Plaintiff's cause of action to the statements identified in his pre suit notice.

3. Plaintiff argued that the record demonstrated a genuine issue of many material facts. Specifically, Plaintiff argued that the Department of Justice report does not blame Plaintiff for

unsolved murders, yet the broadcast Defendants prepared and aired explicitly states that the report does blame Plaintiff. Plaintiff argued this demonstrated falsity and actual malice because Defendants failed to investigate and acted with reckless disregard or knowing falsity. Plaintiff states that he demonstrated damages in his deposition, detailing the harm the broadcast did to his reputation in the community as an elected official.

4. "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions – and to do so on pain of libel judgments virtually unlimited in amount – leads to a comparable 'self-censorship.'" New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964). Under New York Times, as a matter of law, "constitutional guarantees require ... 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." Id. at 279-280.

5. Even if a member of the news media publishes false and defamatory information about a public official, such is not enough to prove liability for defamation. *See* Times Publishing Co. v. Huffstetler, 409 So. 2d 112, 112-113 (Fla. 5th DCA 1982) (judgment for plaintiff "cannot be sustained on the proof presented. There was no proof that [defendant] deliberately falsified the statement or was aware of the probable falsity at the time of publication"); Newton v. Florida Freedom Newspapers, Inc., 447 So. 2d 906, 907 (Fla. 1st DCA 1984) (affirming summary judgment in favor of newspaper sued by public official for libel, holding "record fails to show that the alleged false statements in the article resulted from deliberate falsification or awareness of probable falsity" and noting that the article was substantially accurate and "simply recounts testimony given at depositions in an unrelated

criminal prosecution and any inaccuracies are of only minor significance when the entire story is considered") (internal citations omitted).

6. The reason such broad protection is accorded speech by the press is that "[a]llowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties." Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

7. Nothing in the broadcast amounts to a defamatory statement of fact. The "gist" of the broadcast was that the report mentioned criticisms against Plaintiff. *See* Smith v. Cuban American Nat'l Foundation, 731 So. 2d 702, 706 (Fla. 3d 1999) ("Under the substantial truth doctrine, a statement does not have to be perfectly accurate if the 'gist' or the 'sting' of the statement is true"). As a matter of law, the context of the broadcast, when viewed in its entirety, was that the report cited stakeholder's beliefs that Plaintiff would not authorize arrest warrants in murder cases unless that case could be proven beyond a reasonable doubt, rather than the probable cause standard for arrests. *See* Dockery v. Florida Democratic Party, 799 So. 2d 291, 295 (Fla. 2d DCA 2001) (in reviewing alleged defamatory statements, "it is necessary to read the entire publication in context, not simply the offending words") (internal citation omitted). This is an accurate statement of what the report said.

9. Defamation has the following five elements: (1) publication; (2) falsity; (3) the publisher acted with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) the statement must be defamatory. Jews For Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1106 (Fla. 2008). A public figure who brings a defamation action must prove the publisher acted with actual malice. Don King Productions, Inc. v. Walk Disney Co., 40 So.3d

40, 43 (Fla. 4th DCA 2010). Actual malice cannot be satisfied merely through a showing of ill will or "malice" in the usual sense of the word. Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 666 (1989). Instead, actual malice requires a showing, at a minimum, that the statements were made with reckless disregard for the truth. Id. at 667.

10. Summary judgment must be granted if the evidence shows 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." Fla. R. Civ. P. 1.510(c). In Florida, the moving party bears the burden of showing the absence of any material fact, and the court must construe facts in a light most favorable to the non-moving party. Holl v. Talcott, 191 So. 2d 40, 43 (Fla. 1996). To meet this burden, the movant must offer sufficient admissible evidence to support his claim of the non-existence of any genuine fact. Harvey Bldg., Inc. v. Haley, 175 So. 2d 780, 783 (Fla. 1965). The burden then shifts to the opposing party, who must do more than simply assert that an issue exists. Id. at 782. The non-movant must demonstrate the existence of a genuine issue by presenting sufficient evidence to defeat the motion. Id. If the nonmoving party fails in this regard, "he must suffer a summary judgment against him." Id. "[S]ummary judgments are to be more liberally granted in defamation actions against public-figure plaintiffs." Don King, 799 So. 2d at 44 (internal citation omitted). The Plaintiff bears the burden "to present record evidence sufficient to satisfy the court that a genuine issue of material fact exists which would allow a jury to find by clear and convincing evidence the existence of actual malice on the part of the defendant. Id. at 44.

11. As a matter of law, Plaintiff failed to meet his burden to prove falsity of the broadcast and failed to demonstrate a genuine issue of material fact exists on this issue. As a public figure, Plaintiff was required to prove falsity. Smith, 731 So. 2d at 706. Under the substantial truth doctrine, a statement does not have to be perfectly accurate if the "gist" of the

statement is true. Id. Falsity only exists if the publication is substantially and materially false, and not just technically false. Id. at 707. Here, although Defendants slanted the interview with Plaintiff, the editing, and the broadcast to sensationalize their pre-determined conclusion in an attempt to boost ratings, the statements in the broadcast were not substantially and materially false. The Department of Justice report does mention city stakeholders interviewed for the report who criticized Plaintiff for what they believed was his policy of choosing which cases to prosecute. It was only technically inaccurate to state that the report blamed Plaintiff for the high rate of unprosecuted murder cases, since the criticism was mentioned in the report. A stakeholder cited in the report appeared in the broadcast and made the same criticisms that were mentioned in the report. Plaintiff also appears in the broadcast, although the Court notes that he was not provided an opportunity to defend himself against that criticism because he was not asked a question about it.

12. The broadcast was biased, and the Defendants slanted the broadcast to portray the sensationalized result they were pursuing. However, this does not render the statements false. The "news media can phrase their coverage to 'catch ... the readership's attention.' They can also select the focus of a piece..." Folta v. New York Times Co., 2019 WL 1486776 *4 (N.D. Fla. Feb. 27, 2019) (internal citations omitted). "[T]he fair report privilege is broad and its 'fair and accurate' bar is a low standard, especially considering the importance placed on news media's responsibility to report on government action. Media defendants can add color. And they are not required to regurgitate the exact, precise language of their government sources. They can also summarize and focus publications as they choose." Id. at *7 (internal citations omitted).

13. In addition, Plaintiff failed to meet the clear and convincing evidence standard to demonstrate actual malice with respect to a public figure, and to demonstrate that a genuine issue

of material fact exists on this issue. Dockery, 799 So. 2d at 294. Plaintiff did not offer clear and convincing evidence that Defendants acted with actual malice. Rather, Plaintiff showed only that Defendants acted with bias in slanting the broadcast in a way so as to sensationalize the issue in order to boost news ratings. Further, Plaintiff has failed to show the existence of a genuine issue of material fact that Defendant's acted with reckless disregard. St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (evidence of deliberate falsification or reckless publication despite awareness of probable falsehood is required for recovery by public officials in a defamation action). While Defendants slanted the broadcast and what the report said, and did not present the whole story, the statements in the broadcast were not false. Bias or negative comments, or failure to fully verify, do not constitute actual malice. Palm Beach Newspapers, Inc. v. Early, 334 So. 2d 50, 52 (Fla. 4th DCA 1976); New York Times, 376 U.S. at 260-261.

Accordingly, it is

ORDERED AND ADJUDGED that Defendants' motion for summary judgment is GRANTED.

DONE AND ORDERED in Chambers in Sarasota, Sarasota County, Florida this 29th day of May, 2019.

Charles E. Williams
Chief Judge, 12th Judicial Circuit