Circuit Court for Baltimore City
Case No. 24C17003710

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1966

September Term, 2017

CLAUDIA BARBER

v.

MARYLAND REPORTER

Kehoe,
Friedman,
Wilner, Alan M. (Senior Judge, Specially Assigned)

JJ.

Opinion by Wilner, J.

Filed: September 10, 2019

Appellant appeals an order of the Circuit Court for Baltimore City dismissing her complaint against appellee, the Maryland Reporter. Appellee is a nonprofit news organization that publishes daily news articles relating to government and politics. On July 11, 2017, it published an "Op-Ed" piece written by Michael Collins concerning race relations and politics in Anne Arundel County. Appellant's complaint, which named only Maryland Reporter and not Collins, arose entirely from that publication.

In that column, Mr. Collins made reference to a 2016 election in which appellant, an African-American woman, was an unsuccessful candidate for election to the Circuit Court for Anne Arundel County. He noted that Carl Snowden, an African- American civil rights activist, had championed appellant's candidacy and that no African-American had ever been appointed or elected to the Circuit Court. He added that appellant would have had a better chance "had she been found qualified for the post by the Judicial Nominating Commission" and that "her election prospects might have improved had she not been found to be in violation of ethics standards in the District of Columbia where she served as an administrative judge – after a complaint was lodged by a fellow Democrat."

The Complaint contained four counts – Libel and Slander (Count 1), Intentional Misrepresentation (Count 2), Negligence (Count 3), and Casting Plaintiff in False Light (Count 4). The thrust of all four counts was that the article was factually inaccurate and that it was published in reckless disregard of the truth and for the purpose of smearing appellant and damaging her future career prospects. She averred that (1) she did not lose

the election entirely, in that she won a primary election but lost only in the general election, (2) she never served as "an administrative judge" in the District of Columbia but was instead "an administrative law judge," (3) she was never found "unqualified" by the Judicial Nominating Commission, as that Commission does not make such findings, and (4) the article did not disclose that the finding of ethical violations was on appeal before the District of Columbia Court of Appeals. Those were the operative facts alleged. They were set out in Count 1 and incorporated by reference as the basis for Counts 2, 3, and 4.

Appellee moved to dismiss the complaint on the ground that (1) the statements in the article were substantially true as a matter of law, (2) appellant was a public official or public figure and failed to show actual malice (knowing falsity or reckless disregard for whether the statements made were true or false), and (3) the statement regarding the ethics violation was protected by the "fair report" privilege recognized by Maryland law. The trial court found merit in all three arguments, granted the motion, and entered an order dismissing the complaint with prejudice. We shall affirm that order.

Extensive discussion is unnecessary. We review an order dismissing a complaint *de novo*. We accept as true all well-pleaded facts in the complaint and look to see only if the trial court's decision was "legally correct." *Napata v. UMMS*, 417 Md. 724, 732 (2011); *Holzheid v. Comp of Treasury of Md.*, 240 Md. App. 371, 387 (2019).

Had she been found qualified by the Judicial Nominating Commission

Those were the words used in the article – appellant would have had a better chance had she been found qualified for the position by the Judicial Nominating Commission. In her complaint, appellant treats that as an erroneous assertion that she had been found "unqualified" by the Commission. That is not, however, what the article alleged.

Judicial Nominating Commissions are created by Executive Order of the Governor. There is one for the appellate courts and others for the trial courts. They operate in part through Rules of Procedure adopted by the Court of Appeals and in part through provisions in the Governor's Executive Order. The Executive Order in place in 2017 was Executive Order No. 01.01.2015.09. It directed the applicable nominating commission to report to the Governor the names of the persons the commission found to be "most fully professionally qualified to fill a vacancy," and that is what the commission for Anne Arundel County did. Appellant's name was not on the list and, indeed, could not have been on the list because, as appellant concedes, she never applied to the commission for consideration. The Executive Order in effect in 2017 permitted the commission to consider only "applicants." Section F. (3) provided that "[t]he Commission shall evaluate each applicant."

The statement that appellant's chance of success would have been enhanced had she been found qualified by the commission may be speculative to some extent, but, as a matter of law, it clearly is not false, much less defamatory or misleading. Had appellant applied and been found "most fully professionally qualified," she had a chance of being

appointed by the Governor and, in any event, looked upon more favorably by the electorate.

An election "which she lost"

The article noted that appellant had lost the election. She complains that that statement, at least in part, was false in that she placed high enough in the Democratic primary to be included on the ballot for the general election. She clearly, and admittedly, lost in the general election, however, which obviously was the critical one. In fact, except for some write-in candidates, she came in last, with only 14.1% of the vote. The statement in the article was true, and therefore not misleading in any way.

Violation of ethical standards in the District of Columbia where she served as an administrative judge

Appellant served as an Administrative Law Judge (ALJ) with the District of Columbia Office of Administrative Hearings (OAH) from 2005 to August 2016. Section V(U) of the OAH Code of Ethics required that an ALJ resign when becoming a candidate in either a party primary or a partisan general election. The only exception to that requirement was a candidacy for election as a delegate to a Constitutional Convention. Section V(V) added that an ALJ should not engage in any other partisan political activity.

A complaint was filed with the D.C. Commission on Selection and Tenure of Administrative Law Judges of the Office of Administrative Hearings (COST) that appellant had violated those provisions by entering and participating in the 2016 Democratic and Republican primaries for election to the Circuit Court for Anne Arundel

County. The complainant was another candidate for election to the Circuit Court, who happened to be a Democrat. Appellant defended on the ground that those primaries, with respect to judicial elections, were not partisan elections because it was not required that candidates list their party affiliation and that she did not do so.

Based in part on a decision of the Maryland Court of Appeals (*Suessman v. Lamone*, 383 Md. 697 (2004)), COST rejected that defense.[1] COST noted that appellant had requested an Opinion on the matter from the OAH Ethics Committee but insisted that she receive the Opinion on an anonymous basis, and, when that demand was rejected, she decided not to pursue the request. She did receive an Opinion from the Chair of the Ethics Committee, however, informing her that "if you determine you are running in a primary election or in a partisan general election, you must resign your ALJ position in OAH." COST concluded that appellant had violated § V(U) of the Code of Ethics by running in the two partisan primary elections and removed her from her position as an ALJ.

As noted, appellant complains that the Op-Ed piece was inaccurate and misleading in two respects – first, by referring to her as an "administrative judge" rather than an

[1] *Seussman* held that party primaries in Maryland are partisan elections in that only party members may vote in them. With respect to judicial elections, judges may file and participate as *candidates* without being a party member and thus may cross-file as a candidate in both the Democratic and Republican primary. If they win either one or, where there is more than one vacancy, rank high enough, they will go on the ballot for the general election as the nominee of that party.

"administrative law judge," and second, by omitting to state that the COST decision was on appeal before the District of Columbia Court of Appeals. Neither complaint has merit.

We find nothing remotely defamatory or misleading in referring to appellant as an "administrative judge" rather than an "administrative law judge." Administrative law judges are Executive Branch officials who generally are empowered to make either proposed findings of fact, conclusions of law, and orders or, in some instances, final decisions on behalf of administrative agencies. Although not part of the Judicial Branch of government and thus not judges in that sense, they do perform a quasi-judicial function in contested cases of holding hearings, receiving and considering evidence, applying relevant legal principles, and making decisions and issuing orders that, even if recommendatory in nature, have some legal significance.[2] To the public, except perhaps in some very specific contexts, the two terms are essentially synonymous. In the law of defamation, a statement is false only if it is not substantially correct. "Minor inaccuracies do not amount to falsity so long as the 'substance, the gist, the sting, of the libelous charge can be justified.'" *Batson v. Shiflett*, 325 Md. 684, 726 (1992); *Chesapeake Pub. V. Williams*, 339 Md. 285, 296 (1995).

[2] The most obvious legal significance is that, on judicial review, the court is bound to accept the ALJ's proposed findings of facts unless the court finds them to be clearly erroneous and does pay some deference to their perceptions of laws that the ALJ is charged with administering. *See Dept. of Env. v. Anacostia Riverkeeper*, 447 Md. 88, 120 (2016); *Comm'r of Fin. Reg. v. Brown, Brown*, 449 Md. 345, 360 (2016)

Appellant stands no better with her complaint that the article neglected to mention that the Commission's decision had been appealed. We may take judicial notice of the fact that the appeal, which was filed in the District of Columbia Court of Appeals, ultimately was dismissed for want of jurisdiction in the appellate court. *See Hines and Barber v. COST*, 183 A.3d 1283 (D.C. App. 2018).[3]

Because we conclude, as a matter of law, that appellant has not sufficiently pled that the article was false, we need not consider whether, even if false, because appellant had been a public official and remained public figure, she was required to show, through well-pled allegations, that it was published with knowing falsity or with reckless disregard for whether it was true or false and failed to do so.

These conclusions also doom Counts 2, 3, and 4, which appellee views as "tag along" claims that do no more than recast a defamation claim as a non-reputational tort. Count 2 charged appellant with intentional misrepresentation, a tort that requires, first, that the representation be false. *B.N. v. K.K.*, 312 Md. 135, 149 (1988). Count 3 (Negligence) also is founded on the assertion that the story was false, the negligence being the failure to investigate the facts properly. Count 4 (False Light) charges that the story "intentionally and maliciously cast Plaintiff in a false light as an unqualified

[3] At oral argument, appellant denied that was the case. It was the case. In the very first sentence of the appellate Opinion, the Court noted that Barber was asking the court to review a decision by COST removing her as an administrative law judge, to which the court immediately responded "[w]e dismiss the petition[] for lack of jurisdiction." The very last sentence of the Opinion was "[t]he petitions for review in these matters are hereby dismissed for lack of jurisdiction." In a footnote, the Court observed that judicial review of COST decisions is properly sought in the Superior Court, which is a trial court.

candidate for judge on the Circuit Court for Anne Arundel County by falsely communicating to readers that Plaintiff was never found qualified by the Judicial Nominating Commission."

As we have concluded above, (1) the assertion that appellant was never found qualified by the Commission was true, because she never applied for the position and her qualification for it, *vel non*, therefore was never considered by the Commission, and (2) the article never asserted that the Commission had found her "unqualified" for the position.

JUDGMENT AFFIRMED; APPELLANT TO PAY THE COSTS.