10TH JUDICIAL DISTRICT COURT
PARISH OF NATCHITOCHES
STATE OF LOUISIANA

NUMBER: C-90,284

CALVIN W. BRAXTON, SR.

VERSUS

LOUISIANA STATE TROOPERS ASSOCIATION, ET AL.

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PLAINTIFF OPPOSITION TO DEFENDANT LSTA'S MOTION FOR LEAVE TO FILE FIRST SUPPLEMENTAL ANSWER WITH INCORPORATED MEMORANDUM

MAY IT PLEASE THE COURT:

FACTS:

This matter has been pending since May 14, 2018. Mr. Braxton contends he was defamed by defendant, the Louisiana State Troopers Association ("LSTA"), as a result of its June 19, 2017, publication. On June 7, 2018, defendant LSTA filed its original Answer and Affirmative Defenses. Thereafter, and in response to Mr. Braxton's Second Supplemental, Amending, and Restate Petition, defendant LSTA filed an Answer and Affirmative Defenses on March 1, 2021. Defendant now, after six (6) years of litigation, the filing of its original Answer, its Answer to the First Supplemental, Amending, and Restated Petition, and Second Supplemental, Amending, and Restated Petition, seeks to add two (2) new affirmative defenses: 1) that its 2017 publication was "privileged", and 2) that it "believed" the statements in the defamatory publication were true. For the reasons set forth herein, neither are viable defenses available to this defendant. Defendant fails to demonstrate good cause for amendment.

In this case, the parties took over twenty-four (24) depositions, exchanged several series of written discovery, and have engaged in what is best described as heavy litigation. The depositions of several LSTA principals, Mr. David Young (taken on June 25, 2019), Mr. TJ Doss (LSTA delegate and also member of the State Police Commission taken on June 25, 2019), Jay O'Quinn (LSTA Trooper and LSTA statewide elected President taken June 25, 2019), and Rodney Hyatt (LSTA Board member taken on September 25, 2020), were also taken. In each such deposition, the LSTA, through its representatives, testified the July 19, 2017, letter was because the LSTA wanted Mr. Braxton removed from the State Police Commission. Mr. Braxton contends LSTA

sought his removal from the State Police Commission because he reported, opposed, and complained about unlawful activities on the part of the LSTA.[1]

In the depositions of Young, Doss, O'Quinn, and Hyatt, each testified the incident report of Oliphant was specifically made an "incident report" in order that the LSTA could then obtain it via a Public Records request and use it against Mr. Braxton. Oliphant acknowledged that he was originally approached by the LSTA for him to "testify" or give an Affidavit against Mr. Braxton in order for LSTA to secure Mr. Braxton's removal from the State Police Commission.[2] Then LSTA Executive Director, David Young, testified he personally asked Oliphant to prepare a report so he could "carry it forward" (and disseminate the allegations against Mr. Braxton).[3] Young also testified Oliphant did not create the contents of the June 19, 2017, letter or the incorporated and republished July 11, 2016, document. This was, according to Young, something LSTA did on its own and the motivation was to remove Mr. Braxton from the State Police Commission.[4] For his part, LSTA Statewide President and LSP Trooper O'Quinn testified, "we [LSTA] were waiting for the incident report to be entered into the Department records so we could do a public records request."[5] When questioned in his deposition about the notes made by defendant Oliphant, attached as Deposition Exhibit 14 and about which Oliphant testified extensively[6], O'Quinn, quoting Oliphant at line 1278 of Oliphant's own notes, recounted, "[T]he information above [i.e., Oliphant's report] is supposed to be used in order to facilitate Calvin Braxton's removal from the LSP Commission." When asked about the purpose of the June 19, 2017, letter which specifically included and republished the original July 11, 2016, predecessor, O'Quinn testified the purpose of the letter was to remove Mr. Braxton from the LSP Commission.[7] O'Quinn testified the defamatory publication was made because "we [LSTA] can't remove him on our own."[8]

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[1] The LSTA entered into a Consent Order issued January 20, 2017, with the Louisiana Board of Ethics acknowledging violation of law and agreeing to the imposition of a $5,000.00 fine. Attached as Exhibit 1; see also Young deposition, Exhibit 2, pp. 16-19, 21-22.

[2] Oliphant deposition, Exhibit 3, pp.168, 179-184, 191-192, 196-197, 201-204, Deposition Exhibit 14

[3] Young deposition, Exhibit 2, pp. 125-127

[4] Young deposition, Exhibit 2, pp. 132-134, 141-145, 83-88, 95-99

[5] O'Quinn deposition, Exhibit 4, pp. 72-74

[6] Oliphant deposition, Exhibit 3, pp. 128-177, Deposition Exhibit 14; see also: Oliphant deposition, Exhibit 3, p. 167: Calvin never asked that his daughter's arrest be undone and never asked for an ticket to be fixed, 207-209: Lt. Col. Dupuy called him and told him the "letter" had been delivered

[7] O'Quinn deposition, Exhibit 4, pp. 106-107, 111 (Falcon was acting as an agent for LSTA), LSTA knew the letter(s) would become a public record, 116-117, purpose of the 6/19/17 letter "whether he [Braxton] was fit to serve on the Commission, 139-140: letter addressed to the Governor because LSTA Board knew the Governor could provoke a hearing to remove Braxton from Commission, 146-147: the purpose of the second letter by the LSTA was because "we can't remove him [Braxton] on our own".

[8] O'Quinn deposition, Exhibit 4, pp. 146-147; see also: Oliphant deposition, Exhibit 3, pp. 213-214, 216-217 stipulation by counsel the LSTA letters are not "verbatim" from his report

The June 19, 2017, letter, with its attachments[9]was published by LSTA to Governor Edwards **and to Taylor Townsend, Lenore Feeney, and to Jay O'Quinn.** This is evident from the face of the defamatory publication (which was also attached to Mr. Braxton's Petition and made part thereof). It is not, as defendant LSTA asserts in its newly minted affirmative defense, a statement made only "to a government official, namely the Governor of Louisiana." Instead, the defamatory 2017 publication was not to the "proper parties" "only".

Additionally, defendant LSTA attempts to add a defense of truth as set forth in proposed paragraph 3, stating, ". . . [A]ny of the alleged defamatory statements made by LSTA were made with the **belief in the truth of the matter.**" (Emphasis added). However, "belief" of truth is not the same as actual truth and there is no affirmative defense to a claim of defamation that one "believes" what he/she said was true. Either the statements were actually true, or they were not.

LAW AND ARGUMENT:

1. Amendment of Answer

Pursuant to La. C.C.P. Art. 1151, a defendant may amend its Answer, without leave of Court within ten (10) days after service of the petition (or amended petition). Present defendant LSTA's Motion to Amend its Answer is clearly more than ten (10) days following service of Mr. Braxton's Petition, his First Supplemental, Amending, and Restated Petition, and his Second Supplemental, Amending, and Restated Petition. The Second Supplemental, Amending, and Restated Petition was filed (leave was sought) on February 19, 2020. Defendant LSTA thereafter filed its Answer thereto on March 1, 2021.

In assessing the propriety of permitting this clearly untimely amendment to its Answer, analysis is guided by La. C.C.P. Art. 1155. La. C.C.P. Art. 1155 provides:

> The court, upon written consent of the parties, may permit the mover to file a supplemental petition or answer setting forth items of damage, causes of action or defenses **that have become exigible since the date of filing the . . . answer,** and that are related to or connected with the cause of action or defenses asserted therewith. . . (emphasis added)

If, as defendant LSTA claims, it is entitled to assert conditional privilege (which is denied by Mr. Braxton), that "defense" did not become "exigible" since the filing of its last Answer. The assertions of "privilege" by LSTA's co-defendants has been present in their pleadings since inception. By the time defendant LSTA filed its latest Answer on March 1, 2021, this Court had already granted the La. C.C.P. Art. 971 Motion filed by State Police and ruled on the Motion for

[9] June 19, 2017, letter with attachments, Exhibit 5 (also attached to Mr. Braxton's Petition as Exhibit 1, in globo and of record in these proceedings)

Summary Judgment filed by Mr. Oliphant.[10] Indeed, this Court had addressed the notions of privilege vis-à-vis the publications by the State Police in the incident report and Mr. Oliphant's publications in the incident report.

Very clearly defendant LSTA cannot cogently aver its current attempt to assert two (2) brand new affirmative defenses somehow only recently became exigible. As set forth herein, defendant LSTA's "me too" assertion is not based on existing law or the parameters of any applicable privilege found under the law.

2. Conditional privilege does not apply to this defendant

The notion of conditional or qualified privilege is not new, but it is significantly limited to a small microcosm of applicable circumstances. LSTA does not fit within that micro universe. Among the defamatory statements contained in its June 19, 2017, publication were that Mr. Braxton engaged in "corrupt practices", "abuse and attempted abuse of his position", citation to twenty (20) bulleted items which LSTA asserts factually demonstrate "abuse" of position, "intimidation" of a public officer, Mr. Braxton "repeatedly attempted to use the authority of his position on the State Police Commission to obtain what he apparently feels he deserves by virtue of the position he holds", and Mr. Braxton "has abused his office." LSTA asked that "charges" be proffered against Mr. Braxton, he be removed from office "for cause".

Although scant, defendant LSTA in its "Motion for Leave of Court to File First Supplemental Answer with Incorporated Memorandum", offers only that "other defendants" have asserted conditional privilege as an affirmative defense clearly implying a "me too" argument. The problem, however, is that the LSTA is not the Louisiana State Police or Mr. Oliphant, who, in accord with *Kennedy v. Sheriff of East Baton Rouge*, 2005-1418935 So.2d 669 (La. 7/10/06), were afforded privilege because they were the ones preparing the reports which were (as defined by this Court) part of the duties of their law enforcement jobs. The LSTA is not a law enforcement agency. The LSTA is a union-like, private association.

In *Trentacosta v.* Beck, 96-2388, 703 So.2d 552, 564 (La. 10/21/97), the Supreme Court stated it this way: "]W]hile we agree that law enforcement officers, whose duty includes charging persons with crimes, should be allowed to report the fact of a criminal investigation without fear of a defamation action if the person is cleared of the charges, an officer cannot add additional

[10] Interestingly, it is noted that in his brief to the Third Circuit Court of Appeal, at p. 3-4 Mr. Oliphant argues the LSTA's use of his June 2, 2016, incident report was not the "natural and probable consequence" of Oliphant's original preparation of his incident report. Yet, defendant LSTA now asserts it seemingly was.

injurious statements that the officer had no reason to believe were true." Here, however, the LSTA is not a law enforcement officer and possesses no "duty" to report the fact of a criminal investigation.

In *Doe v. Lewis*, 2020-CA-0320, 312 So.3d 1165 (La. App. 4th Cir. 12/30/20), the Court upheld a defamation award against the plaintiff who notified the nursing board of an accusation of rape. Holding the communication unprivileged and rejecting the plaintiff's argument to the contrary, the Court noted that plaintiff Doe, herself a nurse, had argued she "had a duty to report" the defendant's conduct under the Louisiana Administrative Code applicable to her as a nurse and to him as a nurse. The Court reiterated that in order to enjoy a conditional privilege, the defamation defendant must show that the communication/publication was made in good faith. Citing *Kennedy*, at 681 (which, in turn quoted *Madison*, 102 So.2d at 439 n. 7), "the elements of the conditional or qualified privilege have been described as " 'good faith', an interest to be upheld and a statement limited in scope to this purpose, a proper occasion, and publication in the proper manner **and to proper parties only.**" (emphasis added) In this case, defendant LSTA did not have a "duty" to report anything to the governor and, even should this Court cotton that notion, it is clear the publication to Ms. Feeney and Mr. Townsend is not a publication "only" to the "proper parties."

In the LSTA representatives' testimony, the impetus for the publication was the removal of Mr. Braxton. This is not a "duty" possessed by the LSTA nor is it a "proper occasion." (On comparison, the defamatory publication was not even in conjunction with the actual discipline of any officer before the Commission or otherwise deserving of a testamentary privilege accorded witnesses in judicial proceedings.) Likewise, it is undisputed the imprimatur for the LSTA's communication on June 19, 2017, was the removal of Mr. Braxton – even more than 18 months after the alleged encounter (which is hotly disputed by Mr. Braxton) in December, 2015. Neither Ms. Feeney nor Mr. Townsend possess any role – potential or otherwise – which ever could be envisaged as involved in the removal of Mr. Braxton from the Commission. At best, Ms. Feeney was a lawyer for the Commission who was utterly powerless to do anything vis-à-vis Mr. Braxton. Mr. Townsend was private counsel who had been retained by the then Executive Director of the Commission (who herself was forced out) to create a report on illegalities brought to light by Mr. Braxton. He, like Ms. Feeney, has no possible role or even ability to remove Mr. Braxton, much less, take any action against him. Clearly, neither Ms. Feeney nor Mr. Townsend were "persons

having an interest in and a duty to receive such communications." The subject communications are not privileged as a matter of law and the affirmative defense must be denied.

3. Truth as a defense

Defendant LSTA now attempts to assert an affirmative defense of "truth", but in reality, adds that its mere "belief" what it said was "true", is enough. However, "truth" as an "absolute defense" to a defamation claim does not mean someone's "belief." Instead, the proper defense of truth arises from the first element of a defamation claim, i.e., a false and defamatory statement concerning another. This is an element of Mr. Braxton's burden of proof. If Mr. Braxton fails to prove the statements by LSTA in its June 19, 2017, publication were false and defamatory, his claim fails. There is no circumstance under which if defendant LSTA merely "believed" what it said in the defamatory publication was "true" then it escapes liability. This is not a situation wherein LSTA simply sent a copy of a police report to someone. Instead, LSTA inserted its own false words that Mr. Braxton "abused" power, "intimidated" an officer, engaged in "corrupt practices", "abused his office". These words are nowhere found in the incident report and are the publications of this defendant.

While "truth" may be a defense to a defamation claim, one's "belief" that what he/she said is not. For this reason, the proposed affirmative defense, as written, should be rejected.

CONCLUSION:

Unquestionably, defendant LSTA failed to timely assert its newly minted affirmative defenses. This defendant offers no reason why it should now, some six (6) years after this suit was originally filed and more than four (4) years after its last Answer, be afforded leave to amend/supplement its Answer. Defendant's "me too" attempt to coopt the affirmative defenses of defendants, State Police or Mr. Oliphant, who are actual law enforcement officers vis a vis the incident report does not rest on any legal support. Conditional or qualified privilege simply does not attach, nor is it available, as a matter of law to this defendant. A mere "belief" that what one said was "true" is also not an affirmative defense.

For these reasons and those patent at law, the Motion for Leave should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that I have served a copy of the above and foregoing upon trial counsel of record for all parties hereto via email and/or First-Class United States mail, properly addressed with sufficient postage affixed thereto, on this 3 day of October, 2024.

Baton Rouge, Louisiana, this 3 day of October, 2024.

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