

Bonanno v County of Suffolk

2010 NY Slip Op 32172(U)

July 8, 2010

Supreme Court, Suffolk County

Docket Number: 27628/2006

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

-----X
ANTHONY BONANNO,

Plaintiff,

-against-

COUNTY OF SUFFOLK, POLICE OFFICER
SALVATORE P. YOVINO and SUFFOLK
COUNTY POLICE ATHLETIC LEAGUE, INC.,

Defendants.
-----X

INDEX NO.: 27628/2006
CALENDAR NO.: 2009002660T
MOTION DATE: 9/30/2009
MOTION NO.: 004 CASEDISP

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Upon the following papers numbered 1 to 19 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1- 11; ~~Notice of Cross Motion and supporting papers~~ _____; Answering Affidavits and supporting papers 12-17; 18-19; ~~Replying Affidavits and supporting papers~~ _____; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (004) by the defendants, The County of Suffolk, Police Officer Salvatore Yovino, pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted and the complaint of the action is dismissed in its entirety with prejudice.

This is an action to recover damages for the alleged libel, slander, negligent hiring and training and negligent supervision of the defendant police officer, Salvatore P. Yovino, by the defendant County of Suffolk. It has been alleged by the plaintiff, Anthony Bonanno, that on November 6, 2005, he was present at the Police Athletic League Sports Complex, Holtsville, New York at a football game and following the game, directed a combative, disgruntled park patron out of the park and advised police officer Salvatore P. Yovino. The plaintiff alleges that thereafter, he was sitting in his truck when Officer Yovino, in the presence and hearing of others, spoke to the plaintiff stating "I smell marijuana in your truck." The plaintiff contends he was not engaging in the use of marijuana and that Yovino refused to arrest him when he challenged him to do so. On November 9, 2005, Yovino allegedly submitted a written report of the incident to the Suffolk County Police Department to Lieutenant Robert Donohue. The plaintiff claims the report was false and was disseminated to the Police Athletic League in a board meeting with the intent to damage his employment, good name, reputation, and credit. The plaintiff claims he was thereafter terminated from his contract with the Police Athletic League (PAL) in December 2005.

The County of Suffolk and Police Officer Salvatore P. Yovino now seek an order granting summary judgment dismissing the complaint asserted against them.

In support of this application, the moving defendants have submitted, inter alia, an attorney's affirmation; copies of the pleadings and answer and amended answers, including the counterclaim by County of Suffolk and Police Officer Salvatore P. Yovino for contribution; a copy of the Internal Correspondence dated November 9, 2005 by Salvatore Yovino; and copies of the transcripts of the examinations before trial of Robert John dated June 18, 2008 and Anthony Bonanno dated April 11, 2008. In opposing this motion, the plaintiff has submitted, inter alia, an attorney's affirmation; the affidavits of Anthony Bonanno, Patricia Armine and John Deblasio.

The adduced testimony establishes that Officer Yovino was on duty at his job as a police officer and was present on November 6, 2005 at the PAL football field to observe a football game between twelve year olds from Huntington and the South Shore League to help defray any problems as there were previous complaints about the conduct of the players/coaches/referees on the playing field with regard to yelling and not controlling their conduct. Yovino was observing the game with Robert John, a PAL Board member, and when the game was over, spotted Mr. Bonanno's green van. Yovino wanted to let Bonanno know there was nothing further he could do about the woman who complained to him, to advise Bonanno that he was leaving, and also, because Yovino's his first van was green when he began his job, he thought Bonanno's van might have been the same one. Bonanno testified to purchasing the van from PAL. When John and Yovino approached the van, Bonanno was seated inside. Standing by the driver's side windows, both John and Yovino testified they could smell marijuana coming from the van when the van window was opened, there was smoke in the vehicle, and Yovino stated Bonanno's eyes appeared bloodshot. Bonanno denied that he had been smoking marijuana when Yovino questioned him and challenged Yovino to arrest him. Yovino did not arrest him and he and John walked away. At his next work day, Yovino prepared the written memo directed to his supervising officer, Lieutenant Donohue, concerning his observations of Bonanno at the PAL complex. Upon receiving the report, Bonanno's boss, George Waldbauer, who was employed by PAL and was responsible for hiring Bonanno, advised Bonanno that Donohue made a request for Bonanno to take a drug test which he did approximately two weeks later. Thereafter, a meeting was called by Donohue with the PAL Board, for which Donohue and Yovino and John were board members, to discuss the situation and make a determination as to whether or not Bonanno's employment should be continued. A copy of Yovino's report was disseminated to the board. After a vote by the PAL Board, it was decided that Bonanno's contract, which was due to expire December 31, 2005, was not to be renewed. Bonanno had been working for PAL for seventeen years.

Lieutenant Donohue recommended that Bonanno seek employment with J. King, another Board member. Bonanno subsequently commenced work with King in January 2006. It was the plaintiff's testimony that due to medical issues that he has been unable to work since the early spring of 2006 in that job. Anthony Bonanno testified to the effect that he has since been working full time for Suffolk County Transit as a bus driver since July 2008 and has a CDL license. On November 6, 2005 he arrived at the PAL Sports Complex on Furrows Road for a football game, but had no duties or responsibilities there, although he was a board member for the South Shore Football League. He was alone when he drove his green van which he bought from the PAL about a year prior. He met up with his friend Pat Armine and his friend John. He watched the whole game from about the second quarter on while sitting in his truck at about the 25 or 30 yard line on the east side of the field in an area designated as a parking area for board members. Patricia Armine joined him in the front passenger seat for about fifteen minutes in his vehicle

towards the end of the game. John Deblasio also spoke to him from outside the van on Pat's side. John left before the game ended and Pat left when the game ended. He left his vehicle for a time and returned to it after some incidents occurred about the field. He testified that he had been smoking cigarettes in his vehicle and after the incidents, smoked about three when he got back into his van and was approached by Yovino and John. When he opened his window, Yovino asked him if he was smoking marijuana, but he denied it and challenged Yovino to arrest him. The following week, his supervisor, George Waldbauer, asked him to take a drug test. He testified that he told Waldbauer he was afraid to take the drug test because he smoked pot on Columbus Day-that he "took a drag." He later testified that he did not say that he took a drag of a marijuana cigarette and that prior to November 6, 2005 he never smoked marijuana. He testified that he submitted to the drug test. Waldbauer later showed him a copy of the report of November 9, 2005 prepared by Yovino and given to Lieutenant Donohue. Waldbauer did not give him a copy, he stated, but when Waldbauer wasn't looking, he made a copy of the report on the fax machine, kept the copy and showed it to his fiancé. He also testified that although he had been working, he had not filed income taxes for the last five years prior to the incident and did not pay any taxes.

In her affidavit, Patricia Armine set forth that Anthony Bonanno did not use marijuana at the PAL facility in Holtsville on November 6, 2005 as she was watching the majority of the football game with him. However, Bonanno testified she was only watching the game with him for about fifteen minutes. John Deblasio has submitted an affidavit which is not signed or notarized and therefore is not in admissible form pursuant to CPLR 3212, and is not considered.

In support of the instant application, the moving defendants have also submitted a copy of the report prepared by Yovino dated November 9, 2005. In that report it is set forth, inter alia, that Yovino and Robert John, a member of the PAL Football Board of Directors, attended a football game between Huntington and South Shore at the PAL complex on Furoughs Road, Holtsville. For several weeks the PAL Board had received several complaints in regard to the behavior of the Huntington team's players and coaches. Yovino and John were there to observe the game and arrived shortly after the opening kick-off. The report indicated the game was well played and many of the spectators were loud. When the game ended, John observed the "handshake line" and Yovino observed the spectators. Anthony Bonanno, an employee of PAL, approached Yovino and John and advised he had just thrown out a Huntington fan who was cursing at the referees and that the person left the scene in a vehicle. However, Yovino and John, who were about 50 yards away, did not see or hear any such disturbance. Thereafter, a South Shore female parent approached and stated that during the game she had been verbally abused by an unknown Huntington parent who left. After retrieving two game referees to start the next game, Yovino and Robert John walked over to Bonanno's green van which Bonanno was sitting in to tell him the outcome of an incident at the game, and to let him know there was nothing further that could be done and that they were leaving. The report continues that "When Mr. Bonanno rolled down the window of the van which was parked behind the bleachers, both the undersigned and Mr. John smelled the unmistakable smell of marijuana coming from inside the van. The van had smoke inside it and Mr. Bonanno's eyes appeared to be bloodshot. The undersigned questioned Mr. Bonanno if he was smoking marijuana, which he denied. Finally Mr. Bonanno stated 'and what are you going to do, arrest me?'" The undersigned felt at that time that since Mr. Bonanno was an employee of PAL Inc. and that the atmosphere was very tense with

many South Shore parents still around, that exercising my Search and Seizure authority would merely exaggerate a bad situation and might put Mr. John in some form of physical danger. The undersigned has been a Police Officer for 23 years and have (sic) no doubts that Mr. Bonanno was indeed smoking marijuana. The undersigned strongly feels that Mr. Bonanno should be terminated from Suffolk PAL Inc. immediately, as how can we continue to state that we have a zero tolerance rule for drug use. Mr. Bonanno's actions can not be overlooked and he should receive a life time ban from all PAL activities as well as his immediate termination. It is the undersigned's opinion that Mr. Bonanno is an embarrassment to the Suffolk County Police Athletic League as well as the Suffolk County Police Department."

The plaintiff bases his defamation claim upon this report dated November 9, 2005, prepared by Yovino. In reviewing the same, it is determined as a matter of law that the report is non-actionable opinion and is also protected by qualified privilege.

QUALIFIED PRIVILEGE

A qualified privilege arises when a person makes a good faith, bona fide communication upon a subject in which he or she has an interest, or a legal, moral or societal interest to speak, and the communication is made to a person with a corresponding interest. The underlying rationale of this common interest privilege is that so long as the privilege is not abused, the flow of information between persons sharing a common interest should not be impeded (*Grier v Johnson*, 295 AD2d 888, 686 NYS2d 535 [3^d Dept 1999]). This common interest includes statements to fellow employees on a subject concerning the employer (*Curren v Carbonic Systems, Inc. et al*, 58 AD3d 1104, 872 NYS2d 240 [3rd Dept 2009]). The interest must be expressed in a reasonable manner and for a proper purpose (*Cucinotta v Deloitte & Touche, LLP*, 2008 NY Slip Op 51848U, 20 Misc3d 1133A; *see also, Toker v Pollack*, 44 NY2d 211 [1978]).

In the instant action it is determined that a qualified privilege has attached given the facts and circumstances in this action. It is determined that the moving defendant has demonstrated that a good faith, bona fide communication was made between an officer and his supervisor upon a subject which directly affects the officer in his overseeing the games with PAL in that PAL has a zero tolerance for drug use which is adverse to the tenants of the organization and detrimental to the goals set for the children who participate in PAL activities, also because Bonanno was employed by PAL as an independent contractor, and also because marijuana use is not a legal activity. The parties demonstrated a legal, moral, and societal interest to speak, and the communication was made to persons with a corresponding interest as Donohue was a member of the PAL Board as well as being Yovino's superior officer. Yovino was also a member of the PAL board as was Robert John. The report is determined to contain a flow of information between persons with common interest which should not be impeded; the statements of common interest were made to a fellow employee of the Suffolk County Police Department and member of the PAL Board on a subject concerning alleged drug use on the PAL fields during childrens' games.

The shield provided by a qualified privilege is dissolved if a plaintiff demonstrates that the defendant spoke with malice (*Lieberman v Gelstein*, 80 NY2d 429, 590 NYS2d 857 [1992]). The privilege will be lost where the statement was not made for its stated purpose or if it was made with malice, that is to say with ill will, spite, or culpable recklessness (*Cucinotta v Deloitte &*

Touche, LLP, supra). After a finding that the defendant has sustained its burden of demonstrating that the statements were protected by a qualified privilege, the burden then shifts to the plaintiff to demonstrate that the defendant spoke with malice either under the common-law or constitutional standard (see, *Demas v Levitsky*, 98 NY2d 728, 738 NYS2d 402 [2002]). Under common law, malice meant spite or ill will (see, *Lieberman v Gelstein*, supra), whereas constitutional malice requires a showing that a defendant acted with knowledge that [his] her statements were false or with reckless disregard of whether they were false (see, *Sanderson v Bellevue Maternity Hosp.*, 259 AD2d 888, 686 NYS2d 535 [3rd Dept 1999]). Accordingly, to overcome this prima facie showing, plaintiff has to establish that “malice was the one and only cause for the publication” (*Lieberman v Gelstein*, supra, quoting *Stukals v State of New York*, 42 NY2d 272, 397 NYS2d 740 [1977])” (see, *Lerwick v Krna*, 29 AD3d 1206, 815 NYS2d 767 [3rd Dept 2006]). “In a defamation context, malice includes spite, ill will, knowledge that the statements are false or reckless disregard as to whether they are false. Spite and ill will refer to the speaker’s motivation for making the allegedly defamatory comments, not to the defendant’s general feelings about the plaintiff. Thus a trial issue is raised only if a jury could reasonably conclude that malice was the one and only cause for the publication” (*Curien v Carbonics Systems, Inc. et al*, supra). In the instant action, no trial issue is raised in that the record does not support that a jury could reasonably conclude that malice was the one and only cause for the publication.

The record does not support an inference of malice by Officer Yovino concerning the within incident. It is further determined that a jury could not reasonably conclude that malice was the one and only cause for the publication. There has been no admissible evidence submitted to raise a factual issue in this regard. The record does not demonstrate any ongoing discord or problems between the parties prior to the date of the incident. Bonanno testified that he only received minor complaints made by Officer Donohue about garbage not being emptied and Halloween decorations not being removed, but he did not testify there was any animosity between the parties. Yovino’s testimony was supported by Robert John that they smelled marijuana and saw smoke coming from Bonanno’s vehicle and that his eyes appeared bloodshot.

The philosophy, goals and objectives and values of PAL include the zero tolerance for drugs, and Yovino is not only a Suffolk County Police Officer, but a board member for PAL. The record clearly demonstrates an objective basis for making the report based upon the belief by Yovino that Bonanno had been smoking marijuana in the van on PAL complex grounds while parents and children alike were utilizing the premises. No basis for animosity or ongoing problems between Yovino and Bonanno have been demonstrated. The plaintiff’s testimony that he made a complaint about Yovino after the incident is unsupported by any admissible evidence. Nor has the result of any drug testing been submitted by the plaintiff to demonstrate the results of the drug testing. There has been no expert testimony submitted on his behalf to raise a factual issue concerning the alleged marijuana use. Based upon the foregoing, it is determined as a matter of law that a jury could not conclude that malice was the one and only cause for the publication.

DEFAMATION

The first cause of action sounds in defamation. The second cause of action sounds in negligence premised upon the rule of evidence, *Res Ipsa Loquitur*, asserting that negligence can be inferred premised upon the defendant Yovino’s alleged defamatory report of November 9, 2005.

In reviewing the report of November 9, 2009, it is determined that the words claimed by Bonanno to be defamatory are protected by qualified privilege and are nonactionable opinion supported by the facts upon which they are based and are therefore afforded complete immunity and no negligence can be inferred therefrom.

Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance (*Sprewell v NYP Holdings, Inc.* 1 Misc3d 847, 772 N.Y.S.2d 188 [Supreme Court of New York, New York County 2003]). In determining whether a reasonable listener would have viewed defendant's communication as an expression of opinion or a statement of fact that would support a defamation claim, it is necessary to consider the content of the whole communication, its tone and apparent purpose (*Cook v Relin*, 280 AD2d 897, 721 NYS2d 885 [1st Dept 2001]). In all defamation cases, the threshold issue which must be determined, as a matter of law, is whether the complained of statements constitute fact or opinion (*Parks v Steinbrenner*, 115 AD2d 395, 520 N.Y.S.2d 374 [1st Dept 1985]). If they fall within the ambit of "pure opinion" then even if false and libelous, and no matter how pejorative or pernicious they may be, such statements are safeguarded and may not serve as a basis for an action in defamation (*Parks v Steinbrenner*, supra). A statement falls within the ambit of "pure opinion" so as not to give rise to defamation claim, if it is a statement of opinion, and if it is accompanied by recitation of facts upon which it is based or does not imply that it is based on any undisclosed facts (*Parks v Steinbrenner*, supra). So long as opinion is accompanied by recitation of facts upon which it is based, it is deemed "pure opinion and is afforded complete immunity, even though facts do not support opinion" (*Parks v Steinbrenner*, supra).

The law governing defamation actions involving communications purporting to convey opinion has been explored in a quartet of recent Court of Appeals decisions. As set forth in *Brian v Richardson*, 85 NY2d 808, 637 N.Y.S.2d 347 [1995], "the essence of the tort libel is the publication of a statement about an individual that is both false and defamatory. Since falsity is a sine qua non of a libel claim and since only assertions of fact are capable of being proven false, we have consistently held that a libel action cannot be maintained unless it is premised on published assertions of fact." Non-actionable "pure opinion" is a statement of opinion accompanied by recitation of facts upon which it is based, or, if not accompanied by such factual recitation, statement that does not imply it is based upon undisclosed facts (*Steinhilber v Alphonse*, 68 N.Y.2d 283, 508 N.Y.S.2d 901 [1986]). It is a settled rule that expressions of an opinion, "false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions" (*Steinhilber v Alphonse*, supra).

In *Steinhilber*, the Court referred to Judge Starr's plurality opinion in *Ollman v Evans*, 750 F.2d 970 (see also, *Felder v Sheresky*, 1989 NY Misc Lexis 906 [Supreme Court New York, New York County 1989]) which set forth a four factor analysis and which rejected any "mechanistic rule" based on the semantic nature of the assertion in favor of a determination on "totality of the circumstances." In distinguishing between fact and opinion, the four factors are: (1) an assessment of whether the specific language in issue has a precise meaning which is readily understood or whether it is indefinite and ambiguous; (2) a determination of whether the statement is capable of being objectively characterized as true or false; (3) an examination of the full context of the communication in which the statement appears; and (4) a consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might "signal to readers or listeners that what is being read or heard is likely to be opinion, not fact," (*Steinhilber v Alphonse*, supra, citing from *Ollaman v Evans*, supra). The four factors are applied as follows:

- (1) An assessment of whether the specific language in issue has a precise meaning which is readily understood or whether it is indefinite and ambiguous. It is determined that the specific language used by Yovino in his report is clear, definite and unambiguous. Yovino set forth the date, place and specifically indicated that when Bonanno opened the window of his van that Yovino smelled marijuana, saw smoke, and that Bonanno's eyes appeared bloodshot, and he further based his assessment of the situation upon his years of experience as a police officer.
- (2) A determination of whether the statement is capable of being objectively characterized as true or false. It is determined that the statement is not capable of being objectively characterized as true or false in that Yovino clearly set forth an opinion based upon his belief that Bonanno was smoking marijuana. No evidence has been submitted to establish that the statement was false when it was made and no expert testimony has been submitted to dispute the statement.
- (3) An examination of the full context of the communication in which the statement appears. It is determined that the examination of the full context of the communication in which the statement appears is that of an opinion set forth in a report prepared by an officer who was on duty at a PAL sponsored event in response to an incident involving the plaintiff at the event. Yovino further added in the report that he felt at that time that because Mr. Bonanno was an employee of PAL and that the atmosphere was very tense with many South Shore parents still around at the game, that exercising his Search and Seizure authority would merely exaggerate a bad situation and might put Mr. John in some form of physical danger. He further stated that based upon his being a Police Officer for 23 years he had no doubts that Mr. Bonanno was indeed smoking marijuana, and strongly felt that due to the zero tolerance for drug use, Mr. Bonanno should be terminated from Suffolk PAL immediately, that Mr. Bonanno's actions not be overlooked, and that he should receive a life-time ban from all PAL activities. It was Yovino's further opinion that Mr. Bonanno is an embarrassment to the Suffolk County Police Athletic League as well as the Suffolk County Police Department. It is determined that a clear recitation of the facts upon which Yovino based his opinion on were set forth in the report to prevent embarrassment to the PAL and to uphold the zero drug tolerance policy of PAL.

(4) A consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might signal to readers or listeners that what is being read or heard is likely to be opinion, not fact. Yovino was a Suffolk County Police Officer assigned to work the Suffolk County Police Athletic League which provides recreation and sporting activities to the children of Suffolk County. Officer Yovino was on duty at the time of the incident involving Mr. Bonanno. It is undisputed testimony that PAL has a zero tolerance concerning drug use. The totality of the circumstances strongly suggests to even the most tolerant of individuals that the appearance of permitting marijuana use to be tolerated at the children's games is contrary to the philosophy of PAL, its goals for the children, and the role models set for the children and that such conduct would not be permitted.

Based upon the foregoing application of the four factors set forth above, and considering the totality of the circumstances, it is determined that the words contained in the report constitute non-actionable opinion.

Accordingly, that part of the complaint premised upon defamation is dismissed with prejudice.

NEGLIGENCE AND GROSS NEGLIGENCE

The plaintiff has also asserted causes of action sounding in negligence by Yovino in making the alleged defamatory report; negligence and gross negligence by the County of Suffolk in the training, hiring, supervision and retention of Yovino based upon his failing to comply with the laws, rules and regulations governing police misconduct; the failure to investigate, discipline and remove police officers who failed to comply with laws, rules and regulations governing police misconduct, constituting deliberate indifference to the plaintiff's constitutional right.

In New York, to establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. In order to establish the third element, proximate cause, the plaintiff must show that the defendant's negligence was a substantial factor in bringing about the injury. If the defendant's negligence were a substantial factor, it is considered to be a "proximate cause" even though other substantial factors may also have contributed to plaintiff's injury (*Spiegel v Fine Paint Co.* 2006 NY Misc. LEXIS 2549, 236 NYLJ 51 [Sup. Ct. Nassau County 2006]).

Gross negligence is substantially and appreciably higher in magnitude and more culpable than ordinary negligence and is equivalent to the failure to exercise even a light degree of care; it is materially more want of care than constitutes simple inadvertence; it is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care; it is very great negligence, or the absence of slight diligence, or the want of even scant care; it amounts to indifference to present legal duty, and to utter forgetfulness of legal obligations so far as other persons may be affected; it is a heedless and culpable violation of legal duty respecting the right of others; the elements of culpability which characterizes all negligence is, in gross negligence, magnified to a high degree as compared with that present in ordinary negligence; gross negligence is manifestly a smaller amount of watchfulness and circumspection than the circumstances require of a prudent man (see, *O'Malley v Jegabbi*, 12 AD2d 389, 211 NYS2d 547 [3rd Dept 1961]). "Gross negligence means that the defendant is so extremely careless that it is equivalent to recklessness, while ordinary negligence is the doing of some act which a reasonably prudent person would not do under the circumstances or a failure to use ordinary and reasonable care under the circumstances. Gross negligence involves the thoughtless disregard of consequences without any attempt to avoid them" (*Veals v Consolidated Edison Company of New York*, 114 Misc2d 626, 452 NYS2d 153 [Civil Court of the City of New York, Kings County 1982]). While negligence is the failure to exercise ordinary care, gross negligence is more than the failure to exercise reasonable care and means a failure to use even slight care, or conduct that is so reckless as to show complete disregard for the rights and safety of others (*Johnson v Smith*, 2006 NY Misc Lexis 2618 [City Court of New York, Jefferson County 2006]). While the question of negligence, either ordinary or gross, is ordinarily one for the judgment of the trier of the facts, it may become a question of law (*Jensen v Fletcher*, 277 AD2d 454, 101 NYS2d 75 [4th Dept 1950]).

The unrefuted testimony has established that Yovino, a member of the PAL board and an employee of the Suffolk County Police Department, was assigned to observe and assess the situation at the game due to complaints about the conduct of some players/coaches/observers from the Huntington and South Shore. Yovino established a basis for his report in that he stated he smelled marijuana and saw the smoke in the plaintiff's vehicle and observed Bonanno's eyes to be bloodshot while present at the PAL football game. This smell of marijuana and the smoke

permeating from the plaintiff's vehicle was also observed by Robert John, also from PAL. Bonanno was a board member in the South Shore League and also employed by PAL as an independent contractor. It has been established prima facie that Yovino did not breach any duty to the plaintiff by making his observations and writing his report as part of his duty as a police officer assigned to the game at the PAL field. It has been demonstrated prima facie that Yovino exercised ordinary care and did not conduct himself in a manner that is so reckless as to show complete disregard for the rights and safety of others, including the plaintiff. Yovino wrote the report based upon his observation of the plaintiff as part of his job based upon the rules and procedures within the police department and the direction of his supervising officer. The plaintiff has not demonstrated by the submission of any admissible evidence that the defendant County of Suffolk negligently hired, retained or supervised Yovino or that the County of Suffolk was grossly negligent in their hiring, retention or supervision of Yovino. The plaintiff makes only conclusory assertions concerning the same. No rules or standards have been set forth which are claimed to have been violated, and no expert testimony has been submitted in support of this claim to raise any factual issue to preclude summary judgment. The plaintiff has not submitted any admissible evidence to raise a factual issue sufficient to preclude summary judgment on the issue of negligence or gross negligence. It is therefore determined as a matter of law that Yovino did not breach any duty to the plaintiff or that a breach of a duty proximately caused injury to the plaintiff, or that he acted in reckless regard of the rights of the plaintiff.

Accordingly, the cause of action asserted against Yovino for negligence (re ipsa loquitur) in writing the report is dismissed as a matter of law; and the causes of action asserted against the County of Suffolk for negligence and gross negligence in the hiring, retention and supervision of the defendant Yovino are dismissed as a matter of law.

Dated: July 8, 2010

PAUL J. BAISLEY, JR.

J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION