

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
MARYLAND, et al.,

Plaintiffs,

v.

JOHN R. LEOPOLD, et al.,

Defendants.

* IN THE
* CIRCUIT COURT
* FOR
* ANNE ARUNDEL COUNTY
* Case No. 02-C-12-174465 DJ
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OPINION

This case began in March 2012, when the eleven (11) Plaintiffs filed a 32 page, Three Count, 120 paragraph Complaint against the Defendants. Judge John Philip Miller granted a Motion to Dismiss Count I and Motions for Summary Judgment for Counts II and III. Those Orders were appealed to the Court of Special Appeals, which affirmed the Summary Judgments for Counts II and Count III and remanded Count I to this court for trial. *Am. Civil Liberties Union Found. of Maryland v. Leopold*, 223 Md. App. 97 (2015).

The current trial commenced on March 21, 2016, and concluded on March 22, 2016, with the plaintiffs calling seven (7) witnesses and submitting eleven (11) exhibits. Seven (7) of the eleven (11) plaintiffs - Jacqueline Irene Allsup, Lewis A. Bracy, Karla R. Hamner, Joan M. Harris, Eugene Peterson, Eric Lionel Martin Scott, and Mike Shay - did not appear or testify at trial. Because they have not proved their case, judgments must be rendered against them and in favor of the defendants.

The representing party, ACLU, concedes that it is not a plaintiff in Count I; therefore, judgment must be entered against ACLU and in favor of the defendants.

The plaintiff Thomas Redmond, Sr., is deceased and a proper party has not been substituted in his place; therefore, the plaintiff's claim is not before the court.

What remains before the Court for determination are the allegations in the complaint made by plaintiffs Carl O. Snowden and Marvenise V. Harris.

Maryland Record Acts Law

The Maryland Public Information Act (MPIA) is intended to “encourage and facilitate *public access to information* in the hands of state government.” *Am. Civil Liberties Union Found. of Maryland v. Leopold*, 223 Md. App. 97, 100 (2015) (emphasis in original).

Maryland General Provision (GP) § 4-501 (formerly Md. Code, SG, § 10-624) provides:

- (b)(1) Personal records may not be created unless the need for the information has been clearly established by the unit collecting the records.
- (2) Personal information collected for personal records:
 - (i) shall be appropriate and relevant to the purposes for which it is collected;
 - (ii) shall be accurate and current to the greatest extent practicable; and
 - (iii) may not be obtained by fraudulent means.

In *Leopold* the Court of Special Appeals reasoned that, “there is no dispute that the documents at issue were legitimately ‘created’ in the first place by whatever unit of County government possessed them in the first place, nor any dispute that County government had met the ‘established need’ requirement of § 10-624(b)(1) [now GP § 4-501] before the records were collected by Chief Teare or others and compiled into dossiers. So the fact that records were legitimately in the possession, custody, or control of County government cannot immunize from liability the officials or agencies who later re-collected and misused records they independently would have lacked any clearly established need to collect.” 223 Md. App. at 117.

The Court in *Leopold* further reasoned that “§ 10-626 provides that a person is liable for actual damages that the court considers appropriate after a finding (by clear and convincing

evidence) that he willfully and knowingly “permit[ted] inspection or use of a public record in violation of Part III of this subtitle,” a reference that encompasses § 10-624(b)(1).” *Id.* at 115.

Public official immunity

The doctrine of public official immunity does not apply to the current case.

[W]e see no basis on which Mr. Leopold or Chief Teare could invoke the doctrine in the first place, if we assume (as we must, for purposes of reviewing a motion to dismiss) that the allegations in the Amended Complaint are true. The Court of Appeals explained in *Houghton v. Forrest*, 412 Md. 578, 989 A.2d 223 (2010), that public official immunity “is reserved for public officials ... who perform negligent acts during the course of their discretionary ... duties.” *Id.* at 585, 989 A.2d 223. But we also have explained that the doctrine “is quite limited and is generally applicable only in negligence actions or defamation actions based on allegedly negligent conduct.” *Lee*, 384 Md. at 258, 863 A.2d 297. Because the doctrine protects people who make mistakes, it's reserved for negligence and similar actions and by its nature can't shield someone who is doing something illegal or beyond their job description. So as we explained in *Lee*, “most alleged ‘intentional torts’ ... do not involve legitimate policy choices or actions” of the type the doctrine protects. 384 Md. at 261, 863 A.2d 297. But because there is no legitimate policy choice that justifies malice on the part of the public official, a plaintiff who properly alleges malice gets the opportunity to prove it. But see *Baltimore Police Dep't v. Cherkas*, 140 Md.App. 282, 320, 780 A.2d 410 (2001) (“A conclusory allegation that a public official acted ‘maliciously’ without any supporting allegation of fact is insufficient to defeat a motion to dismiss on the ground of public official immunity.”).

Leopold, 223 Md. App. at 119-20.

Burden of Proof

The court must find that each individual defendant willfully and knowingly violated the statute by clear and convincing evidence. *Leopold*, 223 Md. App. at 111 (“[A] plaintiff in a PIA action must ‘meet a heightened burden of proof,’ *i.e.*, that he must prove his claims by ‘clear and convincing evidence.’”). In this case, the evidence consists of the testimony of the witnesses from the witness stand and the documentary exhibits admitted into evidence. Documentary exhibits not admitted into evidence may not be considered as evidence.

In evaluating the evidence, reasonable inferences may be drawn from the evidence based on common sense. Factors affecting the witnesses’ testimony can be considered in determining

whether a witness may be believed and found persuasive. MPJI-Cv 1:3 (4th ed. 2013). Other factors that may be considered are:

1. The witness's behavior on the stand and way of testifying;
2. The witness's opportunity to see or hear the things about which testimony is given;
3. The accuracy of the witness's memory;
4. Whether the witness had a motive not to tell the truth;
5. Whether the witness had an interest in the outcome of the case;
6. Whether the witness's testimony was consistent;
7. Whether the witness's testimony supported or contradicted other evidence;
8. Whether and the extent to which the witness's testimony in court differed from statements made by the witness on any previous occasion.

Id.

A party that asserts a claim under the Maryland Records Act has the burden of proving it by clear and convincing evidence. *Leopold*, 223 Md. App. at 111. To prove something by clear and convincing evidence, a party must prove to the satisfaction of the Court that “evidence should be ‘clear’ in the sense that it is certain, plain to the understanding, and unambiguous and ‘convincing’ in the sense that it is so reasonable and persuasive as to cause you to believe it.” MPJI-Cv 1:16 (4th ed. 2013). It requires more proof than a preponderance of the evidence, but less than proof beyond a reasonable doubt. *See Sass v. Andrew*, 152 Md.App. 406 (2003); *Spengler v. Sears*, 163 Md.App. 220 (2005).

To prove something by a preponderance of the evidence, a party must “prove that it is more likely so than not so. In other words, a preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces in your minds a belief that it is more likely true than not true.” MPJI-Cv 1:12 (4th ed. 2013).

Since there are multiple plaintiffs and defendants in this case, each party's case should be treated as a separate action. Each defendant is entitled to a fair and separate consideration of that

defendant's own defense. MPJI-Cv 1:16(b) (4th ed. 2013). However, in determining whether a party has met its burden of proof, all of the evidence is considered, regardless of who called the witness or introduced the exhibit and regardless of the number of witnesses that one party or the other may have produced. MPJI-Cv 1:12 (4th ed. 2013). If the evidence is evenly balanced on an issue, then a finding on that issue must be against the party who has the burden of proving it. *Id.*

DECISION

The Court has had the opportunity to hear the witness' testimony and to observe their manner and demeanor of testifying. After a consideration of all of the testimony, the Court is persuaded by the clear and convincing evidence that the defendant, Leopold, has willfully and knowingly violated the provisions of SG § 10-626 with regard to the plaintiffs, Carl Snowden and Marvenise Harris. There is no evidence that either of the plaintiffs have suffered any economic damages, so the Court will only award nominal damages. Judgments will be entered in favor of the plaintiffs, Carl Snowden and Marvenise Harris, against the defendant, John Leopold, for nominal damages.

The Court is not persuaded by clear and convincing evidence that the defendants, James Teare and Anne Arundel County, have willfully and knowingly violated the provisions of SG § 10-626. Judgment will be entered in favor of the defendants, James Teare and Anne Arundel County.

The issue of attorneys' fees will be determined after a further hearing that will be scheduled by the Case Management Office. The plaintiffs must file a petition for attorneys' fees setting forth all of the particulars –legal and factual— concerning the amount of any award they are requesting the Court to award. The petition must be filed on or before April 15, 2016. The defendants must file an answer to the Petition 15 days after the filing of the Petition.

All pending Motions are now moot and are denied.

All other forms of requested relief are denied as they are not supported by the law or the evidence.

March 30, 2016
Date


Hon. Arthur M. Monty Ahalt (Ret.)