

1968

John Elwood Dennett v. Alvin I. Smith : Appellant's Brief

Utah Supreme Court

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Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errorsMr. John G. Marshall; Attorney for Defendant-Respondant: John E. Dennett; Plaintiff & Appellant Appearing Pro Se

Recommended Citation

Brief of Appellant, *Dennett v. Smith*, No. 11256 (Utah Supreme Court, 1968).
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IN THE SUPREME COURT
OF THE
STATE OF UTAH

JOHN ELWOOD DENNETT
Plaintiff & Appellant

vs. No. 11256

ALVIN I. SMITH
Defendant & Respondant

APPELLANTS BRIEF

Appeal from the Order of Dismissal of
the Honorable Judge Leonard Elton,
Judge of the Third Judicial District
Court, in and for Salt Lake County, State
of Utah

John E. Dennett
Plaintiff & Appellant
Appearing pro se
1243 East 2100 South
Salt Lake City, Utah

Mr. John G. Marshall, esq.
Attorney for Defendant-Respondant
53 East 400 South
Salt Lake City, Utah

FILED

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AUTHORITIES

Cases:

Kirby vs. Martindale, (1905) 103 NW 648.

Ellsworth vs. Martindale, (1936) 268 NW 400.

Legal Encyclopedias:

33 Am Jur, Libel & Slander, Section 236 (1941)

Corpus Juris Secundum, Libel & Slander, Section 161, Page 245 (1948)

Rules:

Rule 8(a), Rule 8(e), Rule 8(f) , Rule 9(b), Rule 12(b), Rule 12(c), Rule 12(e), Rule 12(f), Rule (50), Rule 56(c), Utah Rules of Civil Procedure (1950)

Texts:

Prosser, Torts, Libel & Slander, Pages 572 & 584.

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IN THE SUPREME COURT
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STATE OF UTAH

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JOHN ELWOOD DENNETT
Plaintiff & Appellant

vs.

Case No.
11256

ALVIN I. SMITH
Defendant & Respondant

- - - - -

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is a case to recover damages against Defendant for derogatory statements he made against Plaintiff.

DISPOSITION IN LOWER COURT

The lower court entered an order on April 3, 1968 dismissing plaintiff's complaint on the grounds that the same did not state a cause of action.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the order of dismissal, an order of this court reinstating the action, and a remand of this court to the district court for the taking of evidence and the entry of judgment thereupon.

STATEMENT OF THE FACTS

Alvin I. Smith is a prominent attorney and businessman with his offices in Salt Lake City, Utah. On September 14, 1967, the District Court nominated him as a receiver on some property in Sugarhouse, Salt Lake City, Utah, where plaintiff has his office.

Although that nomination was made without hearing any evidence, and although Mr. Smith has yet to file his bond and qualify to act in the office and calling to which the court has named him, he persists in believing that he has some status with respect to the property in question.

That matter, however, is not directly involved in this appeal, but is offered only as background. The relationship, during the period since his nomination, as between plaintiff and defendant has become gradually worse. During the months of September, October, November and December of last year, however, it was not totally bad. Both parties were making an attempt at getting along, especially in the month of September.

One tenant in the building was Phil Phillips,

a friend of plaintiff.

For reasons which plaintiff has not yet fathomed, Mr. Smith, as part of his office and calling, has undertaken to methodically discredit, disparage, undermine, slander, and degrade plaintiff. He acts as if he needs to lower the esteem of someone else so that he might appear grander and more majestic by comparison.

Mr. Smith told Mr. Phillips that plaintiff was a thief; that he had stolen his grandmother's money; that as a result thereof plaintiff had been disbarred. It is believed that he made similar statements to Louise Kirk and Robert Overby, two other tenants in the building, to Don E. Sparks, a third tenant in the building, and to Larry NicholSEN, a fourth tenant in the building.

While each tenant has intimated to plaintiff that Mr. Smith had made such statements, they have been unwilling to make any unequivocal statements to plaintiff upon which plaintiff can base a slander suit.

Mr. Phillips and Mr. NicholSEN, disgusted with Mr. Smith and his immature antics, decided that they could not continue to run a business with Mr. Smith around. They moved out. Upon moving out, Mr. Phillips sought plaintiff out and told him that he was now free to tell plaintiff what Mr. Smith had previously said to him about plaintiff.

It is anticipated that Mr. Overby and Mrs. Kirk, who have also moved out of the building in the meantime for the same reasons, will be willing to disclose to the plaintiff the details of Mr. Smith's stories to them, but

that matter has not yet been pursued.

The statements upon which this suit is based are those statements which Mr. Smith made to Mr. Phillips. The theory that underlies plaintiff's complaint is that a person who makes such statements as Mr. Smith is accused of making should be called to account and should respond in damages.

After learning about the statements, plaintiff waited a few days in order to gain some perspective about the matter, and then filed the action, following Prosser on Torts in framing the allegations of the complaint.

After waiting the full 20 days, and even 2 days longer than the 20 days in which to answer, Mr. Smith filed a motion to dismiss plaintiff's complaint, claiming that the complaint failed to state a claim against defendant upon which relief could be granted, and claiming further, that since plaintiff had been adjudged a bankrupt, he was not the proper party to bring the action.

At the hearing set for March 12th, 1968 before Judge Leonard Elton, Mr. John G. Marshall, appearing for Mr. Smith as counsel, argued that upon authority of a 1905 North Dakota case, (Kirby vs. Martindale, cited hereinafter), and upon authority of 33 AmJur Libel & Slander 236, an obsolete 1941 authority, the complaint was fatally defective because of its failure to set for the words of defamation verbatim. Mr. Marshall stated that they conceded the other grounds, namely that of the involuntary adjudication of bankruptcy, and that that premise was abandoned.

Judge Elton held, after taking the matter under advisement, that slanderous matter must be pleaded verbatim, and entered a minute order directing that plaintiff's complaint be dismissed.

When Mr. Marshall prepared the order, he used this verbiage:

WHEREFORE, IT IS ORDERED that plaintiff's complaint be, and the same is hereby dismissed unless plaintiff amends his complaint to set forth a legally sufficient cause of action within 20 days.

The right to amend is implicit in such an order, but being used to some of the tactics of Messrs. Smith & Marshall, plaintiff wanted to be sure that there would be no argument about plaintiff's right to amend, so plaintiff prepared an addendum to the order which gave plaintiff specific leave to amend.

This addendum was not rejected, it was not entered, it was not sent back. It was simply ignored.

Upon hearing for the first time in court that slander actions must set forth verbatim the defamatory words, plaintiff undertook some research on the subject. The findings are set forth later in the argument and need not be stated here. After concluding that the claim of Mr. Marshall was wholly untenable, plaintiff was faced with the question of whether to amend or appeal.

Even though the trial court was totally in error on this point, it seemed easier to comply than to dissent. It really didn't make that much difference, and an am-

anded complaint is much easier to write than an appeal is to prosecute. So after reserving an exception to the court's ruling, plaintiff wrote an amended complaint, sending it to Judge Elton, together with the addendum to the order, to be filed.

The order of Mr. Marshall, plaintiff's addendum to the order and plaintiff's amended complaint reached Judge Elton at approximately the same time. He let all three sit on his desk for most of a month. On April 3rd, he signed the order of dismissal, but did not sign the addendum or accept the amended complaint for filing. Various contacts were made with his clerk, Richard Porter to see what the trouble was, if any. Plaintiff received assurances from the clerk, that the amended complaint would be filed within the 20 days allowed. On April 23rd, the complaint was still not filed, and now could not be found. The time to amend had now passed, and the order of dismissal had become a final judgment.

The only recourse now was to stand on the original complaint, and file an appeal. To this end, and to minimize the number of items affecting plaintiff in the Supreme Court, plaintiff approached Mr. Marshall, by letter, asking that Mr. Marshall consent to the filing of the amended complaint, even after the 20 days allowed, to avoid an appeal, indicating that a response to this question must be received before May 3rd if an appeal were to be averted. Mr. Marshall ignored the letter. A telephone follow-up on May 3rd was brushed off. There was no recourse open to plaintiff except to file an appeal.

Plaintiff is prone to read into the actions of the District Court certain interpretations which may not be completely justified. Taken in the context of other treatment received in recent months, plaintiff is at a loss to know why the District Court would allow exactly 20 days in which to file an amended complaint, and then hold the amended complaint on the Court's desk until after the 20 days had expired. Had plaintiff not made a casual inquiry at the Clerk's office between the 20th and 30th day, the cause would have been gone forever, having been past the time for appeal and beyond the time allowed for amendment.

Be that as it may; the incident may have been accidental and inadvertant. This matter is now before this court on the original complaint and the order of dismissal which has now become a final judgment.

ARGUMENT

POINT ONE: A MOTION TO DISMISS ATTACKS THE LEGAL SUFFICIENCY, NOT THE FACTUAL SUFFICIENCY OF A COMPLAINT.

To use a colloquialism, a motion to dismiss is defendant's way of saying, "So what. " He is in effect saying, "Even if everything you allege turns out to be true, you haven't said anything or proven anything which would entitle you to anything. " In assessing the efficacy of a motion to dismiss, the court assumes, as a matter of course, that the evidence will rise to the allegations of the complaint. If the court finds that the allegations, if proven, would state a cause of action, it must deny the motion to dismiss. Conversely, if

the allegations, even assuming they were proven facts, fail to say anything, the court is compelled to dismiss.

Lawyers nowadays are prone to confuse a motion to dismiss with a demurrer. It is true that a demurrer would lie if a complaint failed to state a claim upon which relief could be granted. But a demurrer went further than that. Even if a complaint did state a claim upon which relief could be granted, a court was empowered to uphold a defendant's demurrer if some rule of pleading was overlooked or not complied with.

The narrower grounds for a demurrer still exist in our motions to dismiss. If a complaint fails to state a claim upon which relief can be granted, a motion will lie under the provisions of Rule 12(b)(6).

The broader grounds of the now obsolete demurrer are preserved under Rule 12(e) and Rule 12(f). If some technical requirement of pleading is not complied with, a person may take appropriate action, but it does not have as its consequence an order of dismissal, as does Rule 12(b).

This is important, because Mr. Marshall, in his argument to the District Court relied upon an old case, which while legally sufficient in terms of stating a claim, could not withstand the defendant's demurrer because the plaintiff had failed to set forth verbatim, the slanderous words and actions which were the basis of his claim.

POINT TWO: PLAINTIFF'S COMPLAINT STATES A CAUSE OF ACTION.

Prosser defines defamation as being:

. . an invasion of the interest in reputation and good name, by communication to others which tends to diminish the esteem in which the plaintiff is held, or to excite adverse feelings or opinions against him. The defamatory meaning of the communication may be apparent upon its face, or it may arise from extrinsic circumstances, which the plaintiff is then required to plead and prove. (Page 572)

Incidentally, Prosser adds this following interesting comment:

Some kinds of slander are actionable without proof of damage, Namely, (a) The imputation of a serious crime, (b) The imputation of certain loathsome diseases, (c) Imputations affecting the plaintiff in his business, trade, profession, or office, and (d) The imputation of unchastity of a woman. (Page 584)

Mr. Smith's ill advised remarks fall squarely within categories (a) and (c) above.

Now plaintiff's complaint alleges clearly each one of the elements. It alleges a defamation. It alleges a communication or publication to a third party, namely, Phil Phillips. It alleges when it took place. It alleges that the defendant is the party who committed the tort. It alleges that the plaintiff was damaged thereby.

What is defendant's contention, then? In the district court, Mr. Marshall argued that since the complaint did not set forth verbatim the slanderous language, it

should be dismissed. This, if proper would be grounds for a motion to strike, or for a more definite statement, but not to dismiss. The only question before the court on a 12(b)(6) motion is: Does this complaint, assuming the allegations to be capable of proof, state a claim upon which relief can be granted? If it does, the motion should be denied.

It is submitted that plaintiff's complaint does.

POINT THREE: IT IS NO LONGER NECESSARY, UNDER THE UTAH RULES OF CIVIL PROCEDURE TO PLEAD VERBATIM THE SLANDEROUS LANGUAGE WHICH CONSTITUTES THE TORT.

There is no record in this case, inasmuch as the whole proceeding thus far consists of pleadings and argument. There is nothing in either to disclose Mr. Marshall's thinking, but having heard the oral argument in District Court, plaintiff is constrained to anticipate his argument on appeal and reply to it in advance.

He begins by citing 33 AmJur Libel & Slander 236. At first blush, he is correct. On the top of page 215 where this section is to be found, Am Jur says:

"The great weight of authority supports the view that in the absence of any statutory provision to the contrary, it (the slanderous language) must be produced verbatim."

The leading case is set forth in footnote 15 on that same page (215), Kirby vs. Martindale,

103 NW 648. It was amazing how consistently this case was followed for more than two decades. The North Dakota Supreme Court followed its own decision in the case of Ellsworth vs. Martindale (268 NW 400 at 404). Several other courts followed the same holding, almost without variance.

Suddenly it was ignored and dropped. Shepard's citations indicate that the last and latest reference to the holding was in 1936, which was the Ellsworth case cited hereinabove. The court distinguished the Ellsworth case from the Kirby case, but dictumwise approved its former rule.

Volume 33 of AmJur was printed in 1941, which is the copyright date. Corpus Juris Secundum, which was printed in 1948 (this volume on Libel & Slander) does not even dignify the Kirby Case and its sequel with a footnote or comment. Why?

Something new was happening in 1948. Between 1941 and 1948 the nation was establishing a new trend--Rules of Civil Procedure were being born. Courts were getting away from code pleading and common-law pleading. Rules that had hitherto required plaintiffs to plead their evidence in their complaints were now obsolete. Defendant's remedy to get at plaintiff's case was through discovery--to eliminate rabbits out of hats and other sundry surprises at trial.

Before the rule upon which Mr. Marshall relies had suffered its final demise, in the Ellsworth case, the North Dakota court favored us with an explanation of the reason for the rule that slandered plaintiffs must

set forth the slanderous material verbatim. It said:

"(The reason is) to set before the court the material (so that its legal sufficiency could be examined) and to advise the defendant of the exact charge he would have to meet."
(268 NW/400)

How nicely our new rules handle all of this. By rules 26-45, defendant can be advised before trial of the exact evidence he will have to meet.

The court, under Rule 12(d) (Motion for judgment on the pleadings), or under Rule 56(c) (Motion for summary judgment), or Rule 50 (Directed Verdict) can consider the legal sufficiency of the slanderous material.

All of the reasons for the Kirby rule are now met under the Utah Rules of Civil Procedure.

After 1936, not one single court can be found that even mentions or considers this hitherto important case. Is there a reason?

Now how should matters be pleaded since the adoption of our rules in 1950? We might examine Rule 8(a).

"A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled."

Let us consider Rule 8(e):

"Each averment of a pleading shall be simple, concise, and direct. "

Let us also consider Rule 8(f):

"All pleadings shall be so construed to do substantial justice. "

Let us also consider Corpus Juris Secundum, Libel and Slander, Section 161 on page 245:

"Although at Common Law, great strictness and formality were required of the pleadings, and declarations were to have the same degree of certainty as an indictment, under modern practice, greater freedom is allowed in pleadings, especially in jurisdictions where statutes (or rules) have undertaken to simplify the pleadings in defamation actions, and to relieve them of undue formality and technicality."

The only vestige we have of common-law or code pleading is in the area of Fraud and Deceit, which must be pleaded with particularity, i. e. , the evidence must be pleaded, in accordance with Rule 9(b). All other pleadings are governed by Rule 8.

It is interesting to note that Am Jur is being revised and serially replaced by AmJur 2nd. The series as revised has not yet reached the Libel and Slander treatise, but it seems incredible to believe that the revised volume will state any rule different than Corpus Juris Secundum. The Kirby Rule and Ells-

worth rules simply fell by the wayside when the Rules of Civil Procedure were adopted.

POINT FOUR: THIS ACTION AGAINST MR. SMITH IS UNAFFECTED BY PLAINTIFF'S CHAPTER XII PROCEEDINGS IN FEDERAL COURT.

Mr. Marshall said, at the hearing on his motion to dismiss that he conceded this point to plaintiff, and abandoned the argument as being a valid premise. If so, conversation at this point is wasted, but since there is an unusual amount of unpredictability and shifting of counsel going on, it would be prudent to at least preserve the argument, augmenting it if respondent's brief shows any inclination to pursue it.

The petition pending before the Federal Court is a Chapter XII proceeding. This is not a bankruptcy, although it is provided for as part of the bankruptcy act. It is a rehabilitation proceeding, and was filed to bring to rest Messrs. Tuft, Marshall's and Smith's harrassment so that petitioner could finish school, some accounting work, and get some real estate investments productive again. It has failed its purpose in that regard. The District Court, as well as Messrs Tuft, Marshall, and Smith simply ignore the stay orders and proceed against plaintiff anyway.

That is really peripheral, and appropriate relief lies in other remedies. Important here is to note that Judge Christensen's order of ordinary adjudication is on appeal, and until he is upheld by the Circuit Court, it will remain a Chapter XII proceeding. While plaintiff feels that a summary reversal is a foregone

conclusion, that is not really important either. Important is only the fact that the petition was filed on September 15th, 1967. If the adjudication were to be upheld by the Circuit, it would not affect causes of action accruing after September 15th, 1967.

Moreover, slander actions and title thereto remain in an (alleged) bankrupt, and do not pass to the trustee even in valid bankruptcies, which plaintiff's proceeding is not.

Section Seventy of Chapters I-VII of Title 11 of USC, provides, inter alia:

(That) Rights of action ex delicto for libel, slander, injuries to the person of the bankrupt, or a relative, whether or not resulting in death, seduction, or criminal conversation, shall not vest in the trustee."

It is clear, that regardless of the outcome of the chapter XII proceeding, title will remain vested in this plaintiff to his cause of action and never pass to any trustee.

Moreover, even if some sort of title were to pass to a trustee, this does not create a defense for a tort-feasor. It merely means that the trustee would succeed to the plaintiff's right to collect the damages.

CONCLUSION

This is a very simple case, legally speaking. The requirements for pleading are governed by Rule 8 of

the Utah Rules of Civil Procedure and not by the Kirby and Ellsworth Rules from North Dakota, which are approved by Section 236 of AmJur on Libel and Slander, but which are now obsolete. Plaintiff's right to proceed is unaffected by the pendency of his Chapter XII proceedings, no matter how they turn out.

WHEREFORE plaintiff prays judgment reversing the order of dismissal heretofore entered herein, and that he be awarded his costs herein incurred.

Respectfully submitted,

John E. Dennett
Plaintiff and Appellant
Appearing pro se
1243 East 2100 South
Salt Lake City, Utah 84106