1970

Claudia Hill, by and Through (Her Guardian Ad Litem,) Mary Hiil Fogel v. Grand Central, Inc., a Corporation : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

CLAUDIA HILL, by and through her Guardian Ad Litem, MARY HILL FOGEL,

Plaintiff and Appellant,

vs.

GRAND CENTRAL INCORPORATED, a corporation

Defendant and Respondent.

C

BRIEF OF RESPONDE

Appeal from the Judgment of
District Court of Weber Coun
Hon. John F. Wahlquist, Judge

HANSON, BA
BRANDT & WA
REX J. HA
LEONARD H.
702 Kearns Bu
Salt Lake City,
Attorneys for Re

PETE N. VLAHOS
302 Eccles Building
Ogden, Utah
Attorney for Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES

TEXTS

IN THE SUPREME COURT OF THE STATE OF UTAH

CLAUDIA HILL, by and through her Guardian Ad Litem, MARY HILL FOGEL,
Plaintiff and Appellant,
vs.
GRAND CENTRAL INCORPORATED, a corporation
Defendant and Respondent.

Case No. 12082

BRIEF OF RESPONDENT

STATEMENT OF CASE

The appellant, Claudia Hill, has appealed from the decision of the Honorable John F. Wahlquist, Judge, Second Judicial District Court, granting a summary judgment in favor of the respondent, Grand Central, Inc.

DISPOSITION IN LOWER COURT

The appellant brought the instant action against her former employer, the respondent, claiming defamation of her character in the manner in which she was

discharged from employment. The trial court granted judgment in favor of the respondent upon the grounds that the case is one of conditional privilege, that there is no evidence of actual malice on the part of respondent to remove the said privilege, that there is no genuine issue of a material fact remaining to be tried, and therefore, respondent is entitled to summary judgment as a matter of law.

STATEMENT OF FACTS

The appellant was employed by the respondent as a cashier on November 6, 1969, and discharged on December 21, 1969. The appellant was presented with a Utah State Department of Employment Separation Notice indicating she was being discharged for "misconduct" because of "excessive shortages in the register in which she worked." (R-1)

The separation notice was filled out by one Ellen Fitzpatrick at the request of the respondent's store manager, John Davis. The notice was then given to Frank Adams for delivery to the appellant. All of the aforementioned individuals were employees of the respondent. (R-6-A)

The respondent in answer to appellant's interrogatories stated that those cash registers, at which appellant worked, consistently checked out short on the days she worked them and that such shortages were considered too frequent and too consistent to justify her further employment. (R-6-A)

Following her discharge, the appellant filed a complaint against the respondent alleging that the separation notice was libelous on its face and had excessive publication.

The respondent filed a motion to dismiss upon the grounds that appellant had failed to state a cause of action against the appellant upon which relief could be granted in that the matter was one of conditioned privilege and there was no malice or the existence of any evidence thereof. The trial court held that inasmuch as the complaint did allege malice, a cause of action had been stated. However, the trial court questioned the appellant as to the evidence of actual malice. Upon the failure of appellant to show any such evidence, the court granted her 30 days from February 5, 1970 to produce some evidence, by discovery or otherwise, of actual malice.

Appellant submitted one set of interrogatories during this period of time which was promptly answered by the respondent. Respondent did not move for summary judgment until April 3, 1970, thereby allowing appellant additional time to produce such evidence. No further discovery was utilized.

Respondent moved for a summary judgment on April 3, 1970, at which time the appellant's claimed evidence of actual malice was reviewed. The trial court granted summary judgment in favor of the respondent upon the grounds that the matter is one of conditional privilege, and there being no evidence of actual malice to remove the said privilege, there is no genuine issue

of a material fact to be tried, and respondent is, therefore, entitled to summary judgment as a matter of law.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENT.

It is well established in this jurisdiction, and the weight of authority generally, that an employer has a right to protect it's interests and, in so doing, to communicate with and carry out protective measures through its own employees. In such matters an employer has a conditional privilege.

In *Combes vs. Montgomery Ward & Co.*, 119 Ut 407, 228 P 2d 272 (1951) this court cited with approval *Harris vs. Garrett,* 132 N.C. 172, 43 S.E. 594, for the rule that:

> . . . Any communication between employer and employee is protected by this privilege, provided that it is made bona fide about something in which (1) speaker or writer has an interest or duty; (2) the hearer or person addressed had a corresponding interest or duty; and provided (3) the statement is made in protection of that interest or in the furtherance of that duty. There must be also an honest belief in the truth of the statement. Where these facts are found to exist, the communication is protected by law, unless the plaintiff can show malice on the defendant's part; the burden in this respect being upon the plaintiff.

The substance of the aforementioned rule was said to be statutorily recognized by Sec. 103-38-8, Utah Code Annotated, 1943 (now 76-40-8 Utah Code Annotated 1953) which provides that:

> A communication made to person interested in the communication by one who is also interested, or who stands in such relation to the former as to afford the reasonable ground for supposing his motive innocent, is not presumed to be malicious, and is a privileged communication.

Also similar is Sec. 45-2-3, Utah Code Annotated 1953. These two statutes deal with criminal libel and newspapers, respectively.

In *Knight vs. Patterson,* 20 Ut. 2d 242, 436 P 2d 801 (1968), where one partner accused the other partner of embezzlement before a third party who had loaned the partnership money, this court affirmed the trial court's granting of a summary judgment upon the grounds that the statement was in the area of conditional privilege, and that "they were thus all involved together in a business transaction."

In *Spielberg vs. Kuhn Brothers, et al.,* 39 Ut. 276, 116 P 1027 (1911), where one businessman wrote to another busisessman accusing a mutual employee of "blackmail" and "selling company products and appropriating the money to his own use," the Utah Supreme Court affirmed the trial court's verdict in favor of the defendant, holding that the evidence was sufficient to show that the communication was qualifiedly or conditionally privileged. Both businesses had

> . . . a common interest in the subject matters concerning which the communications were carried on between them, and that they sustained such a relation toward each other in the premises as to make it reasonably proper for one to give to the other information concerning the conduct in the dealings of the plaintiff . . .

In the case at bar, there is no question but that a conditional privilege existed in behalf of the respondent to protect its property and to communicate with those individuals who have a common interest — in this case employees, to assure such protection. The respondent employer had every reason to take the precautionary measures it did inasmuch as there were consistent and excessive shortages at those particular cash registers worked by the appellant.

The appellant contends there was excessive publication of the separation notice. However, the respondent, being a corporation, must deal through its employees. In this case the manager of the respondent's store instructed his secretary to fill out the separation notice which was then given to one other employee for delivery to the appellant.

In 33 Am.Jr., Libel and Slander, Section 189, we read:

> It is a rule recognized by many authorities that a privilege is not lost so long as the occasion is used in a reasonable manner and in the ordinary course of business. Applying this rule, it has been held that the *privilege is not lost by reason of the passing of the defamatory matter in the usual course of business through the hands of stenog-*

> *raphers and clerks whether in the employ of the writer or of the addressee.* For example, it has been held that the privilege attaching to a letter written to a firm on a privileged occasion containing statements defamatory of a third person made with out expressed malice is not lost because the writer knows that it will probably be as it was in fact first opened and read by a clerk.... (emphasis added)

The appellant contends that the acts of the respondent were done wantonly and maliciously in that the separation notice gave "misconduct" as the reason for discharge. It is claimed, therefore, that the conditional privilege was removed.

In *Combes vs. Montgomery Ward & Co., supra,* a case nearly identical to the case at bar, this court examined the question of malice after it had already established conditional privilege. In that case, the employer's investigator questioned two employees concerning certain missing money and the "honesty" of a third employee, Mr. Combes, who later the same day was fired. Combes based his complaint for slander upon the communication of the company's investigator with the other two employees. This court held there was conditional privilege and no evidence of actual malice, and affirmed the trial court's directed verdict in favor of the employer. In discussing malice, this court distinguished between "implied malice" and "actual malice" concluding that only actual malice overcomes and destroys the privilege. This court stated:

> It should be borne in mind that there is a distinction between the malice which is implied from

every defamatory publication and the actual malice which is necessary to remove a conditional privilege, the privileged communication being an exception to the rule that every such defamatory publication implies malice; *National Standard Life Ins. Co. vs. Billington,* Tex. Civ. App. 89, S.W. 2d 491 at page 403, states a definition of this type of malice which has been used and approved by numerous courts:

> This kind of malice . . . which overcomes and destroys the privilege, is, of course, quite distinct from that which the law, in the first instance, imputes with respect to every defamatory charge, irrespective of motive. It has been defined to be an indirect and wicked motive which induces the defendant to defame the plaintiff.

Where the conditional privilege exists, the defendant is protected unless plaintiff pleads and proves facts which indicate actual malice in that the utterances were made from spite, ill will or hatred toward him and, unless the plaintiff produces such evidence, there is no issue to be submitted to the jury. (Emphasis added)

This court defined actual malice as that malice which has a "wicked motive" and upon which utterances are made from "spite, ill will or hatred."

This court in *Combes, supra* concluded that the record failed to show any evidence of actual malice and, in fact, the:

> . . . investigation was carried on in a business-like and courteous manner, without any undue notice being given to it. There were no outright accusations of theft or dishonesty, and no threat nor any unnecessary unpleasantness. The whole

> examination into the disappearance of the money in that department and the suspicion as to the plaintiff seemed to be a bona fide inquiry about the facts and circumstances. It was properly limited to those persons who would be closely concerned with the transaction and the questions did not go beyond what was reasonably necessary and appropriate to the investigation.
>
> It follows that the trial court did not err in holding that there was no showing of malice so as to make a question for submission to the jury.

In the instant case the appellant's complaint alleged that the information contained in the separation notice was not true and that by issuing said notice, discharging the appellant for "misconduct," the respondent had acted maliciously. However, the said notice explained "misconduct" as "excessive shortages in the registers in which she worked." Furthermore, respondent's answers to interrogatories clearly show it had every reason to believe that the information stated on the separation notice was correct. The appelant has produced no evidence to the contrary.

The State of Utah requires an employer to issue a separation notice to each departing employee and the respondent, in this regard, was required to prepare the said separation notice honestly and accurately. As to respondent's choice of the word "misconduct," such is not evidentiary of malice. In *Woolston vs. Montana Free Press,* 2 P 2d 1020 (Montana 1931) where one accused another of being "unethical" and "underhanded" the court in sustaining defendant's demurrer to plaintiff's complaint, stated:

> It is well settled law that the words used in the alleged libelious article must be susceptible of but one meaning to constitute libel per se . . .
>
> Both 'unethical' and 'underhand' are words of such broad meaning that they may or may not carry a libelous meaning.

The trial court in the instant case correctly acknowledged that the "words used in the separation notice are as capable of allegations of neglect or incompetency as they are of theft."

The trial court applied the rule set out in the *Combes* case and as the pleadings failed to indicate actions by the respondent of actual malice it granted the appellant time in which to produce some such evidence. This, the appellant failed to do. It follows that the trial court did not err in holding there was no showing of actual malice. As stated in the *Combes* case, quoting with approval from *Newell, Slander and Libel* at page 1111:

> *The jury, however, will be the proper tribunal to determine the question of express malice where evidence of ill will is forthcoming; but if, taken in connection with admitted facts, the words complained of are such as must have been used honestly and in good faith by the defendant, the judge may withdraw the case from a jury, and direct a verdict for the defendant. See also Newell, Slander and Libel, 4th ed. Sec.* 395. (Emphasis added.)

As a result of appellant's failure or inability to produce such evidence of actual malice, there was no material issue remaining to be tried and therefore, the trial court did not err in granting respondent's motion for summary judgment.

POINT II.

APPELLANT WAS GRANTED SUFFICIENT TIME IN WHICH TO PRODUCE EVIDENCE OF ACTUAL MALICE.

The appellant claims she did not have adequate time to produce evidence of actual malice. However, the trial court did not require that appellant prove actual malice but only that she produce some evidence of actual malice that could form an authentic issue of a material fact. Upon the failure of the appellant to produce any such evidence, the trial court granted appellant thirty days from February 5, 1970, to produce merely some evidence of actual malice. The appellant served one set of interrogatories upon the respondent on February 26, 1970, 20 days after being granted 30 days time to produce. The respondent answered these interrogatories and served the same five days later. The appellant did not object to any part of respondent's answers, nor did appellant move for any order to compel answers if she felt the same were insufficient.

On April 3, 1970 respondent's motion for summary judgment was heard and granted. Therefore, appellant had 56 days in which to merely show the existence of some evidence of actual malice.

The trial court stated in its Bench Ruling On Motion For Summary Judgment:

> As far as I know there has been no other effort to take depositions or anything else. It would appear to the court that the plaintiff does not have — has been given a reasonable amount of

> time to produce evidence or show that he has some and has not done so. The action seems to be one of harassment. The motion to dismiss is granted. (R-16).

The responsibility of an opposing party upon a motion for summary judgment is well stated in *Dupler vs. Yates,* 10 Ut. 2d 251, 351 P 2d 624 (1960) wherein this court affirmed the trial court's granting of summary judgment upon the grounds that no genuine issue of material fact was raised. This court there stated:

> Upon a motion for summary judgment, the courts ought to recognize, as a minimum, that the opposing party produce some evidentiary matter in contradiction of the movant's case or specify in an affidavit the reason why he cannot do so.
>
> Where, as in the instant case, the materials presented by the moving party are sufficient to entitle him to a directed verdict and the opposing party fails either to offer counteraffidavits or other materials that raise a credible issue or to show that he has evidence not then available, summary judgment may be rendered for the moving party.
>
> The record made by the defendant, in support of his motion for summary judgment, controverted the unverified allegations in the plaintiffs' amended complaint and therefore, in the absence of counteraffidavits, no genuine issues of material fact were created.

In the case at bar, the appellant had adequate time in which to produce some evidence of actual malice and upon her failure to do so the summary judgent was well taken and should be affirmed.

Upon the failure of the appellant to produce any evidence to support its claim of actual malice, to remove the respondent's conditional privilege, no issue of any material fact remained and the respondent was entitled, therefore, to the summary judgment.

CONCLUSION

Respondent respectfully submits that as an employer, it was conditionally privileged in its relationship with the appellant which privilege could be removed ony by actual malice on its part. The appellant was given every reasonable opportunity by the trial court to produce some evidence of actual malice but failed to do so. If such evidence did, indeed, exist, the same could have been produced by affidavit, deposition, or request for admissions. The appellant sought only answers to interrogatories which merely proved the honest intent of the respondent.

The judgment of the Second District Court from which this cause arises must be affirmed.

HANSON, BALDWIN
BRANDT & WADSWORTH
REX J. HANSON
LEONARD H. RUSSON
Attorneys for Defendant
702 Kearns Building
Salt Lake City, Utah