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D. Kent Wright v. Kenneth D. Lawson : Brief of Respondent

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

D. KENT WRIGHT, GERALD A. VAN MONDFRANS, PHILLIP K. EVANS, and HUGH J. HINTZE,
Plaintiffs and Appellants,

vs.

KENNETH D. LAWSON, RAY M. UNRATH, LEONARD F. ZALLER, JAMES E. MITCHELL, and MICHAEL STECHLEY,
Defendants and Respondents.

Case No. 13719

RESPONDENTS' BRIEF

Appeal from Summary Judgment of the Third District Court for Salt Lake County, State of Utah, the Honorable G. Hal Taylor, Presiding.

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Case No. 13719

RESPONDENTS' BRIEF

THE NATURE OF THE CASE

Plaintiffs, all of whom are directors of a corporation, brought an Action alleging that a demand letter sent to one of the Plaintiffs, the president of the corporation, and to the corporation's counsel, by an attorney on behalf of Defendants, who are shareholders of the corporation, libels the Plaintiffs.

DISPOSITION IN LOWER COURT

After the Action was filed, Defendants Kenneth D. Lawson and Ray M. Unrath responded by a timely Motion for Summary Judgment, and, after argument before the Lower Court, summary judgment was granted against the Plaintiffs on grounds that even if the statements complained of were libelous, Defendants and their attorney were privileged to make such statements in connection with judicial proceedings.

RELIEF SOUGHT ON APPEAL

Defendants respectfully request that the decision of the Lower Court be affirmed.

STATEMENT OF FACTS

Defendants controvert Plaintiffs' Statement of Facts, in that Plaintiffs are required by Rule 75(p)(2)-(2)(d) of the Utah Rules of Civil Procedure to present the Court with "a concise statement of the material facts of the case citing the pages of the record supporting such statement." Plaintiffs' Statement of Facts not only does not cite the pages of the Record supporting many of its allegations, but their Statement alleges immaterial matters not contained in the Record such as the educational background and training of the Plaintiffs and the dates and circumstances of corporate matters wholly irrelevant to the question of the propriety of the summary adjudication ordered by the Lower Court.

The material facts from the Record are as follows:

Marketing Systems, Inc. ("MSI") and Com Tel, Inc. ("Com Tel") entered into a reorganization agreement providing for the transfer of all MSI shares to Com Tel in return for a certain number of Com Tel shares and a contingent payout of additional Com Tel shares to former MSI shareholders (Record at 14-15).

Disputes between Com Tel and the former MSI shareholders arose concerning the contingent payout of Com Tel shares. On August 30, 1973, the former MSI shareholders, Defendants herein, brought suit in the United States District Court for the District of Utah against Com Tel and the directors of Com Tel, Plaintiffs herein, alleging breach of the agreement, unjust enrichment, unlawful offer and sale of securities, fraud, and misrepresentation involving moral turpitude and culpability (Record at 11-28).

On September 10, 1973, an annual Shareholders Meeting of Com Tel was convened and was attended by Kenneth D. Lawson and Ray M. Unrath, former directors of Com Tel and former MSI shareholders, Defendants herein, and two of their attorneys in the federal suit, John Parsons and James Kruse. Because of feelings generated by the law suit, the election of directors did not proceed beyond the nomination stage, the meeting was adjourned "sine die", and no election of directors was held (Record at 4-6).

On September 25, 1973, John Parsons, acting solely as counsel for the former MSI shareholders, sent a demand letter by certified mail, return receipt requested,

to D. Kent Wright, President of Com Tel and a Plaintiff herein, stating that the former MSI shareholders had been denied their voting rights at an annual meeting of shareholders which had been adjourned and demanding reconvention of that meeting, that appropriate information regarding the federal law suit be forwarded to shareholders, and that the former MSI shareholders be allowed to forward to all shareholders a statement of their position concerning the issues raised by the pending litigation. According to Plaintiffs, a copy of the letter was also sent to the corporation's counsel. The letter also stated that the actions of Plaintiffs at the meeting were "opposed to good morals and against public policy" and that appropriate legal relief would be sought if the demands were not met (Record at 2, 4-10).

On March 9, 1974, the directors of Com Tel filed the Complaint herein against the former MSI shareholders, alleging that the demand letter was a libel of the Plaintiffs and held them up to public ridicule and scorn (Record at 1-10). On April 26, 1974, Defendants Lawson and Unrath moved the Lower Court for Summary Judgment on the basis that even if the statements complained of by Plaintiffs were otherwise libelous, there exists an unqualified privilege of an attorney and his clients to make such statements in the course of judicial proceedings or anticipated judicial proceedings (Record at 45-47). The motion was argued before the District Court on May 9, 1974, and summary judgment was granted (Record at 51). Notice of Appeal was filed on June 5, 1974 (Record at 57).

ARGUMENT

Plaintiffs' appeal from the summary judgment ordered by the Lower Court raises two legal issues:

1. Was the demand letter written by Defendants' attorney a privileged publication?

2. Are Defendants shielded from liability to Plaintiffs for libel because their attorney's letter was privileged?

POINT I.

A DEMAND LETTER WRITTEN IN RELATION TO PENDING LITIGATION AND IN CONTEMPLATION OF ADDITIONAL LITIGATION IS AN ABSOLUTELY PRIVILEGED PUBLICATION.

When a person's utterances further an interest of paramount social importance, that person is given the absolute privilege to make defamatory statements which would otherwise be actionable. *Fairbanks Pub. Co.* v. *Francisco*, 390 P.2d 784, 793 (Alaska, 1964). The privilege is a matter of public policy, *Iverson* v. *Frandsen*, 237 F.2d 898, 899 (10th Cir. 1956) (Idaho law), and is based upon the necessity of free and open communication. *Mills* v. *Denny*, 245 Iowa 584, 63 N.W.2d 222 (1954). *See also*, *Western States Title Ins. Co.* v. *Warnock*, 18 Utah 2d 70, 415 P.2d 316, 318 (1966); Veeder, *Absolute Immunity in Defamation*, 9 Colum. L. Rev. 463, 465 (1909).

Under the common law, absolute privilege was first granted to persons taking part in judicial proceedings. *Developments in the Law — Defamation*, 69 Harv. L. Rev. 875, 920 (1956). The rule, as stated by Lord Mansfield, was that "neither party, witness, counsel, jury, or Judge, can be put to answer, civilly or criminally, for words spoken in office". *Rex* v. *Skinner*, *Lofft* 55, 56, 98 Eng. Rep. 529, 530 (K. B. 1772). The words had to be spoken or written "in office", that is, while the person was acting as judge, juror, litigant, witness, or counsel, in the performance of the public duty or in the exercise of the private right upon which the immunity was based. *Laun* v. *Union Elec. Co.*, 350 Mo. 572, 166 S.W.2d 1065, 1069 (1943).

The reason for absolute privilege in a judicial proceeding is stated by Judge Van Vechten Veeder:

> The absolute immunity of parties litigant rests upon the public policy which deems it desirable that all suitors, whether malicious and bold, or conscientious and timid, should have free access to the conscience of the State with whatever complaint they choose to make. This is necessary to a thorough and searching investigation of the truth. Should the parties to a cause be placed in fear of suits for libel or slander for reflections cast upon parties or others, . . . the trial of civil causes would be far less likely to lead to correct results than where such embarassment [sic] was not felt. Perfect freedom to say in their pleadings whatever the parties choose to bring to the consideration of the court or jury tends obviously to promote the in-

> telligent administration of justice. The attainment of this result is of much greater importance than the prevention of evils arising from reflections on parties or others in the course of an action.

Absolute Immunity in Defamation, supra, at 477-478.

A. Absolute Privilege In Connection With A Judicial Proceeding Is Not Limited to Statements Made While A Proceeding Is Actually Pending.

Because absolute privilege rests upon considerations of public policy, courts have not limited its scope to statements made during trial. Absolute privilege has been accorded to a Justice's written opinion, *Dodge* v. *Henriod,* 21 Utah 2d 277, 444 P.2d 753 (1968) (Ellett, J., concurring), to a statement by an attorney or his client in a complaint, *Reliance Ins. Co.* v. *Hollins,* 16 Utah 2d 44, 395 P.2d 537 (1964), to a statement in an affidavit supporting an application for a search warrant, *Stone* v. *Hutchinson Daily News,* 125 Kan. 715, 266 P. 78 (1928), and to an answer made in a deposition. *Beezley* v. *Hansen,* 4 Utah 2d 64, 286 P.2d 1057 (1955).

In *Albertson* v. *Raboff,* 46 Cal. 2d 375, 295 P.2d 405 (1956), the Court held that the recordation of a defamatory notice of *lis pendens,* even though made outside the courtroom and involving no function of the Court or its officers, was absolutely privileged. The Court stated:

> If the publication has a reasonable relation to the action and is permitted by law, the absolute privilege attaches.

295 P. 2d at 409. *Accord, Stewart* v. *Fahey*, 14 Ariz. App. 149, 481 P.2d 519 (1971); *Smith* v. *Hatch*, 271 Cal. App. 2d 39, 76 Cal. Rptr. 350 (1969).

Indeed the necessity of free speech to a thorough administration of justice has resulted in this court holding that a statement by an attorney during a consultation with his client, regarding a pending divorce suit, is absolutely privileged, *Beezley* v. *Hansen*, *supra*, and a statement by an attorney to opposing counsel made immediately after the taking of a deposition is similarly privileged. *Western States Title Ins. Co.* v. *Warnock*, *supra*. Communications between counsel following a trial and concerning the possibility of an appeal were likewise held absolutely privilege in *Rodgers* v. *Wise*, 193 S. C. 5, 7 S.E.2d 517 (1940), wherein the court stated:

> If attorneys cannot freely and frankly discuss their client's business between themselves, by word of mouth when they are face to face, or by letter when separated, and thereby evaluate and determine their client's rights, then . . . the rights of all clients before the Courts are seriously endangered and the administration of justice is handicapped.

7 S. E. 2d at 517.

The leading case is *Johnston* v. *Cartwright*, 355 F.

2d 32 (8th Cir. 1966) (Iowa law), involving allegedly defamatory utterances of an attorney at a time when no judicial proceeding was pending. A false story about Johnston, a regional director for the United Auto Workers ("UAW"), was published in a newspaper during the heat of an election campaign by the UAW to replace a union already representing the employees of Kiowa Corporation ("Kiowa"). Cartwright was counsel for Kiowa and for the newspaper. After the election, the newspaper printed a retraction concerning the story and when Cartwright was asked about the story, he stated, "The story came to us on pretty good authority . . . I'm not at liberty to divulge where it came from". 355 F. 2d at 34. This statement was also published in the newspaper. When Johnston brought suit against Cartwright, Kiowa and the newspaper, the District Court held that Cartwright's words were absolutely privileged. On appeal, Circuit Judge (now Justice) Blackmun stated:

> It is true that [Cartwright's statement] was not uttered at the precise moment litigation between Cartwright or his client Kiowa or his newspaper client, on the one hand, and the UAW or Johnston, on the other, was pending or when judicial control was immediately at hand. But it was made when the heat of the controversy remained, when the board [N. L. R. B.] election was just concluded, and when an accusation of falsity and libel and a challenge to prove, obviously communicated to Cartwright, had been made by a representative of the UAW. *All signs Pointed to incipient litigation and to the necessity for protective action* . . . [Cartwright] was

> mindful of a probable suit against his client . . . [and the statement] was made in the course of his professional office . . . *in connection with possible litigation.* (Emphasis added.)

355 F. 2d at 37.

Thus, it is clear that the cloak of absolute privilege is not conditioned upon the formalism of filing a complaint, but is based upon a public policy which demands open communication and candor when litigation appears imminent and an attorney is called upon to present the claims or defenses of one of the adverse parties.

B. Limitations On Absolute Privilege In Connection With Judicial Proceedings.

Courts have not permitted persons to use absolute privilege to protect themselves from liability for defamatory statements which are concerned with matters totally outside the scope of pending or impending litigation. The English common-law rule covered any utterance reasonably related to a judicial proceeding, even though the statement was irrelevant to any of the issues. BOWER, ACTIONABLE DEFAMATION 91-92 (2d ed. 1923). American Courts are said to have restricted the rule so that an "entirely foreign and irrelevant defamation" may be actionable. PROSSER, TORTS 778-79 (4th ed. 1971); 50 AM. JUR. 2d, *Libel and Slander*, Section 236. Nevertheless, an utterance is considered relevant to a proceeding if it has some relation or reference to the

subject of inquiry. *Johnston* v. *Schlarb*, 7 Wash. 2d 528, 110 P.2d 190, 195 (1941); 3 RESTATEMENT, TORTS, Sections 585-589 (1938). According to Professor Prosser, "all doubts [are] resolved in favor of the defendant — a conclusion which seems in effect to adopt the English rule". Prosser, *supra* at 779.

A typical application of the American rule is found in *Richeson* v. *Kessler*, 73 Idaho 548, 255 P. 2d 707 (1953), which involved a defamatory letter written by an attorney to a District Judge and three interested attorneys, concerning a brief filed by an attorney whom the letter-writer had replaced. In holding that the letter was an absolutely privileged statement, the Court noted:

> Expressing objections and requesting action in the form of a letter to a District Judge, and serving copies of the same on other counsel is a customary practice well recognized and often followed. The letter was written with reference and relation to the subject matter of the cause being litigated . . . Proceedings connected with judicature . . . are so important to the public good it is only in extreme cases and circumstances that a libelous publication in a judicial proceeding can be used as the basis for damages in a libel suit.

255 P. 2d at 708-709.

Thus, it appears that an "entirely foreign and irrelevant defamation" is not privileged, but that a defamatory statement which has some relation or reference to

the subject matter of a pending or contemplated action is protected.

Within these limitations, it is clear that the case upon which Plaintiffs rely in their Brief herein, *Union Mut. L. Ins. Co.* v. *Thomas*, 83 F. 803 (9th Cir. 1897), is a properly decided case. (Appellants' Brief at 9). Derogation of the character of the attorneys who filed a life insurance suit is certainly a foreign and irrelevant defamation; the character of the attorneys had nothing at all to do with the pending suit. The case is, of course, distinguishable from this present Action because the demand letter written by Defendants' attorney was written with reference to the disputes pending before the federal court and was concerned with the continuation of those disputes at the Shareholders' Meeting and possible litigation resulting therefrom. The letter was not an "entirely foreign and irrelevant defamation".

C. Utah Law Is Not Contrary To The Foregoing Summary Of The Law.

Appropriate Utah cases have been noted above and they uphold Defendants' contentions as to the applicable law. Indeed, this Court has previously cited with approval 3 RESTATEMENT, TORTS, Section 586 and Comment A. thereto (1938), which state:

> An attorney at law is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a pro-

> posed judicial proceeding, or in the institution of, or during the course and as a part of a judicial proceeding in which he participates as counsel, if it has some relation thereto.
>
> . . .
>
> [The attorney's purpose in publishing the defamation and his knowledge of the falsity of the matter] are of importance only in determining the amenability of the attorney to the disciplinary power of the court of which he is an officer.

See *Beezley* v. *Hansen, supra.*

Plaintiffs intimate that the Legislature may have changed the foregoing rules by enacting 5A UTAH CODE ANN. Section 45-2-3(2) (1953), which provides:

> A privileged publication which shall not be considered as libelous per se, is one made
>
> . . .
>
> (2) In any publication of or any statement made in any legislative or judicial proceeding, or in any other official proceeding authorized by law.

This statute is contained in Title 45 of the Code, entitled "Newspapers and Radio Broadcasting". Section 45-2-3 deals with a "privileged publication" and Section 45-2-10, which is almost identical, deals with a "privileged broadcast". These statutes do not seek to define a "judicial proceeding", in the context of an attorney's absolute privilege but to establish the qualified privilege of a newspaper, radio broadcaster, or other publisher to re-

port statements made in official proceedings, whether or not the statements would otherwise be libelous per se. *See Prosser, supra* at 830-33.

D. Application Of Law To The Facts Of This Case.

This present Action is well within the rule as applied by Justice Blackmun in *Johnston* v. *Cartwright, supra,* and as stated in 3 RESTATEMENT, TORTS Section 586 (1938). Indeed, cases involving facts similar to this case have arisen in Ohio and New Mexico and both courts held against the Plaintiffs on the question of absolute privilege.

In *Theiss* v. *Scherer,* 396 F.2d 646, 36 A.L.R. 3d 1321 (6th Cir. 1968) (Ohio Law), an attorney wrote an allegedly defamatory letter to another attorney, regarding a possible will contest, at a time when administration proceedings were pending. Copies of the letter were sent to persons interested in the estate. The District Court dismissed the Complaint for failure to state a claim upon which relief could be granted. On appeal, the dismissal was affirmed, the Court of Appeals holding that the letter was an absolutely privileged communication.

The New Mexico case, *Romero* v. *Prince,* 85 N. M. 474, 513 P.2d 717 (Ct. App. 1973), involved a dispute between brother and sister over a tract of land. The sister, acting as administratrix for her parents' estate, filed suit against her brother in 1968. In 1970, the sister leased the land to a rancher who was later informed by

the brother that the estate did not have title to the land. The rancher consulted with the attorney who represented the brother in the title suit and, in May, 1971, the brother's attorney sent a letter concerning the dispute and requesting an accounting to the attorney for the estate, with a copy to the rancher. The sister and her husband then brought suit against the brother's attorney alleging among other things that the letter was libelous of them. The trial court granted summary judgment for the defendant, and, the Court of Appeals, assuming the statements in the letter were libelous per se, affirmed. The appellate court held that the brother's attorney was absolutely privileged, in connection with a pending title suit and a possible action for an accounting, to send the letter concerning his client's interest, to opposing counsel and to an interested party.

The demand letter involved in the instant case was written by Defendants' attorney in his capacity and office as counsel for Defendants. The circumstances in which the letter was written were wholly the result of disputes within the corporation which resulted in the filing of the federal suit. The Shareholders' Meeting was adjourned *sine die* because of the continuation of those disputes during the election of directors. The demand letter referred to the pending federal suit no less than six times (*See* Record at 4-8), and also referred to the possibility of additional litigation.

Clearly this is a case where not only was litigation actually pending to which the writing of the demand letter was related, but but also where all indications at the time pointed to the necessity for protective action and a probable additional suit, and where the statement made by the attorney was made in the course of his professional office.

POINT II.

AN ATTORNEY'S CLIENT IS ACCORDED THE SAME PRIVILEGE AS THE ATTORNEY IN CONNECTION WITH A PENDING OR POSSIBLE ACTION.

Plaintiffs may have sought to avoid the problems associated with the absolute privilege accorded to an attorney's statements in a judicial proceeding by naming the Defendants as the responsible parties' defendant. However, it has been consistently held that the privilege of parties to a judicial proceeding is co-extensive with that of counsel. Mr. Justice Cardozo, while sitting on the New York Court of Appeals, stated:

> There is no difference in respect of a degree between the privilege of counsel and that of parties and witnesses. They are phases of the same immunity.

Andrews v. *Gardiner*, 224 N. Y. 440, 121 N.E. 431, 343 (1918); *accord*, *Thourot* v. *Hartnett*, 56 N. J. Super. 306,

152 A.2d 858 (1959); *Robinson* v. *Home Fire & Marine Ins. Co.*, 242 Iowa 1120, 49 N.W. 2d 521 (1957); *Ginsberg* v. *Black*, 192 F.2d 823 (7th Cir. 1951), *cert. denied*, 343 U.S. 934 (1952) (Kentucky law).

Chief Justice Shaw, speaking for the Supreme Judicial Court of Massachusetts, in *Hoar* v. *Wood*, 44 Mass. (3 Met.) 193 (1841) gave the reasoning for the co-extensive privilege:

> We can perceive no substantial difference between the case of counsel and that of a party. The privilege is extended to the counsel for the interest and benefit of the party, and to allow him full scope and freedom in the support or defense of the rights of the party.

44 Mass. at 193.

CONCLUSION

The summary judgment granted by the Lower Court should be affirmed because:

(1) The allegedly defamatory letter was written by Defendants' attorney in his office as counsel and in relation to pending and impending judicial proceedings, and the letter was sent solely to interested parties; therefore, the letter was an absolutely privilege communication.

(2) The absolute privilege of parties being co-extensives with that of their counsel, Defendants cannot

be held liable in an action for damages for words written by their attorney in relation to a judicial proceeding.

Respectfully submitted,

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