1998

# Robert Treff v.Thomas McCarthey, Salt Lake Tribune, et al.

Utah Court of Appeals

mail. 1-16



COURT

BRIEF



ROBERT S. TREFF
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P.O. BOX 250
DRAPER, UTAH 84020

IN THE SUPREME COURT
IN AND FOR THE STATE OF UTAH

ROBERT TREFF,

Plaintiff-appellant,

v.

THOMAS McCARTHEY, SALT LAKE TRIBUNE, et al.,

Defendants-appellees.

PLAINTIFF'S OPENING BRIEF

980053-CA

case no. ~~970465~~ 970902214

COMES NOW, the plaintiff-appellant Robert S. Treff who hereby files this brief in the above cited action. Within the parameters allowed, he will attempt to comply with the Court's filing requirements.

PARTIES

PLAINTIFF-APPELLANT:Robert Treff pro se; DEFENDANTS-APPELLEES; Kearns-Tribune Corporation, Thomas Kearns-McCarthey, Dominic Welch, Ed Kearns, Mark N. Trahant, James E. Shelledy, Tim Fitzpatrick, Dawn House, Kristin Moulton, David Noyce, Russell Weeks, Ted Cilivick, Sheila McCann, Sean Means, Steven Hunt, Mike Carter, Rodd Wagner-represented by Sharon Sonnenreich, esq. attorney for defendants and the Salt Lake Tribune.

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TABLE OF AUTHORITIES

In addition to those cites provided in appellant's Memorandum in Opposition to summary judgment (Motion to Dismiss), submitted to the Honorable Frank Noel, prior to his decision and which appellant requests this Court to include in its review, the following is offered:

## CONSTITUTIONAL OR STATUTORY PROVISIONS

Article I Section 1 of Utah State Constitution
"All men have the inherent and inalienable right to enjoy and defend their lives and liberties;..to protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for abuse of that right."
Article I Section 11 "All courts shall be open..."

Article I Section 15 "No law shall be passed to abridge or restrain the freedom of speech or of the press. In all criminal prosecutions for libel the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."
1st and 14th Amendments to U.S. Constitution.
Utah Annotated Code ("U.C.A.") 76-9-404 CRIMINAL DEFAMATION (1) a person is guilty of criminal defamation if he/she knowingly communicates to any person orally or in writing any information which he knows to be false and knows will tend to expose anyother living person to public hatred, contempt, or ridicule.

U.C.A. 76-9-501 libel defined, malicious defamation. Expressed either by printing or by signs or pictures or the like,...to impeach the honesty, integrity, virtue, or reputation... and thereby expose him to public hatred, contempt, or ridicule.

U.C.A. 76-9-509 CONVEYING FALSE OR LIBELOUS MATERIAL TO NEWSPAPER OR BROADCASTING STATIONS. Any person who willfully states conveys, delivers, or transmits, by any means whatsoever, to the manager, editor, publisher, reporter, or agent of any radio station...newspaper, for publication therein, any false or libelous statement concerning any person, and thereby secures actual publication of the same, is guilty of a class B misdemeanor.

U.C.A. 45-2-1 Retraction of Newspapers. Limit of Recovery

U.C.A. 76-9-503 Each author, editor, and proprietor of any newspaper, or serial publication is chargeable with the publication of any words contained in any part of a...newspaper.

## JURISDICTION

U.C.A. 78-2-2 Supreme Court jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutroy appeals, over:
(b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals.

## STATEMENT OF ISSUES AND STANDARD FOR REVIEW

I. DID THE COURT ERR IN ITS JUDGMENT AS TO WHEN PLAINTIFF WAS RESPONSIBLE TO BE AWARE OF ARTICLES RELEVANT TO THIS ACTION?

Fratus v. Deland, stated when causes of action accrue (i.e. start the clock on the statutes of limitations,). Generally, a cause of action accrues when a part becomes aware of the facts that would support a cause of action." When Fratus learned, or should have learned..." "Accrual, like tolling is a fact laden issue in the instant case.

II. DID COURT ERR IN HOLDING PLAINTIFF TO DIFFERENT AND UNEQUAL STANDARD AS TO KNOWLEDGE OF ARTICLES, IN COMPARISON WITH FREE CITIZENS OF THE STATE OF UTAH?

III. DID COURT ERR IN DECIDING INTENT OF SAID ARTICLES OF DEFENDANTS GILLWICK, MCCANN, AND MOULTON? IV. WOULD A REASONABLE JURY FIND AN INFERENCE THAT ARTICLES SOUGHT TO PORTRAY PLAINTIFF AS A FRIVOLOUS LITIGATOR?

IV. WAS THE COURT INFLUENCED IN ITS DECISION BY THE PUBLISHING OF ANOTHER DECISION (ON UNRELATED LITIGATION BY PLAINTIFF) IN THE SALT LAKE TRIBUNE, ON THE SAME DAY AS THE HEARING AND OPEN COURT DECISION?

The plaintiff-appellant filed a timely motion for rehearing, as soon as he learned of the publishing on the same morning of the decision of Judge Noel, of a decision regarding an unrelated litigation on which he was the plaintiff. He has received no information to date, to counter the claim that Judge Noel had seen said article before the hearing. He also requested in his complaint remedies, that defendants be precluded from printing any articles on plaintiff during the interim of this case. Apparently, they could not abide by such a fair request, as throughout this case they seem to have unlimited access to the court, outside the presence or knowledge of plaintiff-appellant.

## STATEMENT OF CASE

On September 13, 1996 plaintiff received approximately 30 articles regarding his crime, his Board of Pardons original parole hearing, comments from a purported victim, Carol Fay, and finally his supposedly being placed on a restricted list regarding litigations that he had filed in federal court.

The articles were sent to him by the Salt Lake City Library, and in response to an unrelated college assignment. Plaintiff was unaware (excepting those written by defendants McCann, Ciliwick, Moulton, and Means) of the contents and intent of these articles prior to his request.

Monies sufficient for service of process on all defendants was sent along with complaint to Third District Court, Clerk Brian Stark.

The case was filed on 4-1-97 in the Third District Court. Only some of the defendants were served and monies were sent back to plaintiff-appellant.

It was assigned originally to Judge Anne Stirba.

The plaintiff-appellant was brought before Judge Anne Stirba for a Scheduling Conference on June 6, 1997

Present were two other people besides the court clerk who were not introduced to plaintiff. They were also in chambers with Judge Stirba before plaintiff-appellant was brought into room.

Judge Stirba stated that the night before the scheduling conference she remembered that she had been an assistant U.S. attorney general on the federal case against plaintiff-appellant.

Carol Fay, purported victim of said case is the subject of one of the articles in which plaintiff was also mentioned in an untrue and defaming light. Judge Stirba recused herself on this basis.

Judge Stirba also heard and denied appellant's writ of habeas corpus in 1996 and did not recuse herself at that time. The state criminal conviction and federal charges were intermingled in the press, the trial, and prosecution of appellant. So how come, she didn't recuse herself in 1996?

A scheduling conference was indicated by the contract attorney firm of Angerhofer and Freestone to be indicative that this action against the Salt Lake Tribune would be going to trial as requested by plaintiff. That there would be at minimum, discovery conducted to clarify issues, etc.

A new judge Frank Noel, decided to have a hearing on Defendant's motion to dismiss instead. The case was assigned after a lengthy and mysterious delay to Judge Anne Stirba. Judge Anne Stirba recused herself. Judge Frank Noel was then assigned. He dismissed the case under Rule 12 ((b)(6) of Utah Rules of Civil Procedure pursuant to a motion to dismiss (summary judgment) June 6, 1997 by defendants, after a hearing in which plaintiff was present, but no transcripts were made.

Plaintiff filed timely appeal to the Utah Court of Appeals. On October 2, 1997 case was apparently transferred to this Court.

Plaintiff-appellant filed timely docketing statement, notice of transcripts not requested, etc.

## STATEMENT OF FACTS

The Salt Lake Tribune is a newspaper which is manufactured in Salt Lake City, Utah. The newspaper has written several articles naming the plaintiff-appellant. These articles have ranged from his crime, his Board of Pardons original parole hearing, and most recently comments from Carol Fay, a purported victim of plaintiff, and on his being placed on a restricted list regarding litigations. The articles contained several repeated inaccuracies and falsehoods which plaintiff has repeatedly requested retraction and/or correction upon. The defendants through their counsel have refused to retract and/or correct the inaccuracies.

The article entitled "Inmates Rantings Help Courts Silence other Sue-Happy Cons" was written by Sheila R. McCann and Ted Ciliwick. The article initially discussed the litigations of an inmate Robert Henry Werner. The attribution to the plaintiff as an "Other Sue-Happy Con", and "jailhouse lawyer" is made by naming the plaintiff directly. Further, the naming of appellant of some restricted list coincidental to "frivolous lawsuits" is absolutely without merit. The evidence supplied by the defendants themselves indicates an Order signed by Judge David Winder which shows that the term "frivolous" IS NOT EVEN STATED on the order. Further, it appears that the only issue concerning the judge on this document is if the appellant and the other inmates named

the materials he/she receives for publishing, before placing the information in the newspaper where the editor is employed.

The Tribune's own policy as submitted by appellant controverts in part, such a position of lackadaisical effort and apparent denial of responsibility for inaccurate information. Shinika Sikes is quoted by plaintiff in his Response memorandum in opposition. The very article by Shinika Sikes, the Salt Lake Tribune's Reader Advocate, was submitted in plaintiffs memorandum.

The Judge Frank Noel, also stated at the hearing in part of his reason for dismissal, is that the Salt Lake Tribune is disseminated statewide, and that it was appellant's responsibility to be aware of the articles, and their content within the statute of limitations.

The appellant submitted a letter from the Salt Lake City library confirming that he had no knowledge of those articles excepting those by Moulton, Ciliwick/McCann, and Means prior to September 13, 1996. The appellant was incarcerated in 1986. He did not and does not to date have daily access to a newspaper. Nor, contrary to the apparent assertion of the district court and the free citizens of Utah, is he required to purchase such in order to successfully challenge the statute of limitations claim, to show when he first became aware of these articles.

To hold the appellant to a differing standard that is likely not applied to any other citizen of this State goes against the very essence of fundamental fairness.

It also violates the 14th Amendment to the U.S. Constitution and the statutory and constitutional provisions of the State of Utah.

Judge Noel has also ruled on the intent of the articles. Intent is a matter which is left to the discretion of a jury and/or a judge during a full and proper trial, with all of the facts, issues, and evidence before it. We are concerned with the defendants' state of mind when they wrote the articles. Smith, 899 F. 2d at 949. Thus the question here, for purposes of summary judgment is whether a "fair-minded jury could return a verdict for the plaintiff, based on such circumstantial evidence. Id. at 949 (quoting Anderson, 477 U.S. at 252). The Court went on to hold, that "in considering whether the defendants are entitled to summary judgment, the court may not weigh the evidence, nor make credibility determinations, and that all justifiable inferences must be drawn in favor of the plaintiff. Thus an inference by a fair minded jury that the defendants took such actions and placed such inaccurate information in their articles about the plaintiff, at least in part, on improper motives is raised in this Action

SUMMARY OF ARGUMENT

The articles in question, do not state truths. They are full of inaccuracies. The plaintiff repeatedly sought correction and/or retraction upon his discovery of these articles. The defendant's own policy as outlined in the evidence submitted by plaintiff indicate the procedure and reasoning for such.

This reasoning does not excuse where the information came from, or editors(defendants) who do not look at all the material that crosses their desks. It is simple and direct. If something written is untrue it will be corrected.\

The articles of Ciliwick/McCann and Moulton, list plaintiff by name and inference as part of group of "frivolous" litigators. The document supplied by the defendants in support of this contention, the Order of Judge David Winder makes not a single reference to the word, or description, of "frivolous".

The defendants apparently thought that they could write whatever they felt was true about plaintiff, because as a prisoner, he has no right to challenge these assertions.

THE LAW SAYS OTHERWISE. THIS BODY CREATED BY LAW SAYS THAT THE PLAINTIFF IS STILL ENTITLED TO THE BASIC RIGHTS OF CITIZENS WITHIN UTAH, pursuant to the libel, slander, and defamation statutes of the Utah Annotated Code.

is raised in this action

Judge Noel said no. That plaintiff could not be seen as a "frivolous" litigator by these articles. The plaintiff and common people, of which juries are comprised of, assert otherwise. The language of the articles clearly states the terms "frivolous", "meritless", along with the inaccuracies of plaintiffs crime, history, etc. Correction was proper, at minimum, in this case.

The reasoning of Judge Noel's dismissal is flawed. The relevant information stated as "facts" were and remain untrue.

The specter of impropriety throughout this process of this case has some validity. The plaintiffs requested relief was and is informally and formally proper.

WHEREFORE: Appellant respectfully prays that this Court will overrule the decision of the district court and remand the complaint back to the district court for further proceedings.

## CERTIFICATE of service

I certify that on this 13th day of January, 1998 I sent a copy of the foregoing Opening Brief, via the U.S. mail, all postages prepaid, to:

Sharon Sonnenreich, esq. Salt Lake Tribune
400 Executive Bldg.
143 S. Main St.
SLC Utah 84111

Robert S Tuttle