

1955

William L. Beezley v. Elias Hansen : Brief of Defendant and Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Beezley v. Hansen*, No. 8287 (Utah Supreme Court, 1955).
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In the Supreme Court of the State of Utah

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WILLIAM L. BEEZLEY,
Plaintiff and Appellant,

— vs. —

ELIAS HANSEN,
Defendant and Respondent.

Case No. 8287

Appealed from Third District Court

HON. RAY VAN COTT, JR., *Judge*

BRIEF OF DEFENDANT AND RESPONDENT

J. GRANT IVERSON

*Attorney for Defendant and
Respondent.*

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In the Supreme Court of the State of Utah

WILLIAM L. BEEZLEY,
Plaintiff and Appellant,

— vs. —

ELIAS HANSEN,
Defendant and Respondent.

Case No. 8287

BRIEF OF DEFENDANT AND RESPONDENT

ADDITIONAL STATEMENT OF CASE

The statement made by appellant under the heading STATEMENT OF FACTS is so brief that the Court will find it difficult, if not impossible, from such statement to ascertain just what is the basis for the trial court's ruling awarding defendant and respondent a judgment dismissing plaintiff's complaint.

It is, therefore, deemed necessary to state in greater detail than is contained in appellant's brief, the admitted facts upon which the court below made the order complained of.

At the time and times complained of by the plaintiff and appellant, there was pending in the Third District Court of Salt Lake County a proceeding for divorce brought by Ella H. Beezley, the daughter of the defendant herein, against William L. Beezley, the plaintiff herein. It is so alleged in plaintiff's complaint (R. 1 and 2) and admitted in defendant's Answer (R. 3-7).

In that divorce proceeding the plaintiff in this action made the defendant herein a third party defendant. (See Excerpt from Deposition of Elias Hansen, certified to by Lois P. Crowder, R. 20-25).

In the above mentioned divorce proceeding the plaintiff herein filed a Counterclaim in which he sought to have awarded to him an interest in an apartment house located at 150 South 7th East, Salt Lake City, Utah. The title to the apartment house stood in the names of this defendant and his daughter, Ella H. Beezley, and the plaintiff herein was by his Counterclaim attempting to establish in himself a one-half of the interest which Ella H. Beezley held in said apartment house. Plaintiff herein, according to the affidavits of the defendant herein and Ella H. Beezley, which are not denied, sought to establish his right to such interest in the apartment house at 150 South 7th East because, as he claimed, he had paid the purchase price of a Harrison Avenue home and the title thereto taken in his name and the name of his wife, Ella H. Beezley. It is further made to appear by the affidavits of the defendant and his daughter, Ella H. Beezley, that when the plaintiff herein made the claim that he paid the whole of the purchase price

of the Harrison Avenue property his wife, Ella H. Beezley, requested the defendant herein to attempt to find the checks which he had given her in payment of an obligation which he, defendant herein, had owed to his daughter, Ella H. Beezley, and which she claimed she had paid on the purchase price of the Harrison Avenue property. That in the course of the conversation about such checks, the defendant herein, in substance, stated to his daughter, Ella H. Beezley that, "if he (plaintiff herein) were honest, he would admit that you paid that money on the property". (R. 23). Apparently the plaintiff herein had acquired information that defendant had made such a statement to his wife, Ella H. Beezley, because when the deposition of the defendant herein was taken the plaintiff herein examined the defendant with respect thereto. (See excerpt of deposition of Elias Hansen, certified to by Lois P. Crowder, Notary Public, R. 21-25). The statement made by the defendant to his daughter above mentioned forms the basis of one of plaintiff's claims that he is, by reason thereof, entitled to damages in the sum of \$50,000.00. The other basis for such claim is the fact that in answer to questions asked the defendant herein by the plaintiff herein during the course of taking defendant's deposition, he gave the answer above quoted.

It is further made to appear by the affidavits of the defendant herein and Ella H. Beezley that when she concluded to bring an action for a divorce from her husband, William L. Beezley, the plaintiff herein, she sought the advice of the defendant herein; that the de-

fendant advised her that it would be improper for him to represent her in court, but he would advise her with respect to her action. In one of the pleadings filed by the plaintiff herein in the divorce proceedings filed by his wife, he alleges that his wife is the daughter of a lawyer, who has advised her legally during all of the times herein mentioned. (R. 37) However, in his reply filed in this action, plaintiff denies that defendant has acted in the capacity of attorney for Ella H. Beezley and that J. Grant Iverson was her attorney.

Interrogatories were served upon the plaintiff herein. Among the questions asked in the Interrogatories so served and the answers given are the following:

“1. Where in Salt Lake County was the defendant, Elias Hansen, when it is alleged in plaintiff’s complaint that on or about July 17, 1953 the defendant stated concerning the plaintiff: “That guy isn’t honest and that if he were honest, he would admit that she paid that money on the property.”

Answer: Had no occasion to keep track of defendants’ whereabouts and therefore knew nothing as to defendants’ location.

2. What are the names of all persons who were present at the time the defendant is alleged to have made the statements set out in the foregoing Interrogatory No. 1.

Answer. Am unable to state at this time, but Ella H. Beezley to whom the statement was published can give you the desired information.”

It will be noted that in the Affidavit of Elias Hansen (R. 16-19) and in the Affidavit of Ella H. Beezley (R.

26-27), it is avered that at the time the defendant made the statement about which plaintiff herein complains, there was no one present other than the defendant herein and his daughter, Ella H. Beezley.

Upon the record thus made in the Court below, the judgment on the pleadings was properly granted for the following reasons:

POINT ONE

THE ESTABLISHED FACTS SHOW THAT THE PLAINTIFF IS NOT ENTITLED TO THE RELIEF PRAYED OR TO ANY RELIEF.

POINT TWO

THE ESTABLISHED FACTS SHOW THAT ANY STATEMENTS MADE BY DEFENDANT TO HIS DAUGHTER, ELLA H. BEEZLEY, RELATIVE TO THE LACK OF HONESTY OF THE PLAINTIFF WERE ABSOLUTELY PRIVILEGED, BECAUSE OF THE RELATION OF ATTORNEY AND CLIENT.

POINT THREE

THE ESTABLISHED FACTS SHOW THAT ANY STATEMENTS MADE BY THE DEFENDANT TO HIS DAUGHTER, ELLA H. BEEZLEY, IN GOING OVER THE EVIDENCE WITH HER TO BE PRODUCED IN HER DIVORCE PROCEEDING WERE ABSOLUTELY PRIVILEGED BECAUSE DEFENDANT HEREIN WAS TO BE A WITNESS IN SUCH PROCEEDING.

POINT FOUR

THE ESTABLISHED FACTS SHOW THAT ANY STATEMENTS MADE BY DEFENDANT TO HIS DAUGHTER, ELLA H. BEEZLEY, IN GOING OVER THE EVIDENCE WITH HER

TO BE PRODUCED IN HER DIVORCE PROCEEDINGS AGAINST THE PLAINTIFF HEREIN WERE ABSOLUTELY PRIVILEGED BECAUSE THE DEFENDANT HEREIN WAS A THIRD PARTY DEFENDANT IN SAID DIVORCE ACTION.

POINT FIVE

THE ESTABLISHED FACTS SHOW THAT THE ANSWERS MADE BY THE DEFENDANT HEREIN TO THE QUESTIONS ASKED HIM BY THE PLAINTIFF HEREIN IN TAKING THE DEPOSITION OF THE DEFENDANT ON OR ABOUT JANUARY 9, 1954 WERE ABSOLUTELY PRIVILEGED BECAUSE SUCH ANSWERS WERE GIVEN IN A JUDICIAL PROCEEDING AND PLAINTIFF REQUESTED SUCH ANSWERS.

POINT SIX

THE ESTABLISHED FACTS SHOW THAT THE STATEMENT MADE BY THE DEFENDANT WAS JUSTIFIED.

ARGUMENT

Before taking up a discussion of the foregoing points, it may be well to direct the attention of the Court to the distinction made by the authorities between conditional privileged communication and absolute privileged communications:

U.C.A. 1953, 76-40-8 provides:

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

Among the cases dealing with conditional privileged communications from this jurisdiction are: *Hales v. Commercial Bank of Spanish Fork*, 114 Utah 186; 197 Pac (2d) 910; *Williams v. Standard Examiner Pub. Co.* 83 Ut. 31, 27 Pac (2d) 1; *Spielberg v. A. Kuhn and Bros.* 39 Utah 276; 116 Pac 1027; *Malouf v. Metropolitan Life Ins. Co.* 75 Utah 175, 192, 283 Pac. 1065.

It will be noted in the last case just cited the question was raised as to the sufficiency of the complaint to state a cause of action because of its being faulty as to its allegations as to the injury complained of having been sustained concerning the business of the plaintiff. The rule is there recognized that in the absence of a slander per se, it must be made to appear that the communication complained of must be concerning the business of the plaintiff. The rule there recognized and discussed is thus stated in 33 Am. Jur. 70, Sec. 50, where it is said:

“Thus to accuse a person orally of cheating or of being a cheat, rascal, swindler, blackleg or the like is not actionable unless special damage is shown, or the charge is made of a person in connection with his occupation or with reference to his method of carrying on business.”

While the question of absolute immunity from liability for spoken words which may be slanderous was not involved in the case of *Williams v. Ogden Standard Examiner Publ. Co.*, supra, the court recognized the existence of such doctrine. On page 58 of the Utah report (83 Utah) it is said that there are two classes of pri-

vileged communications (1) absolute privilege and (2) qualified or conditional privilege. In the case of absolute privileged communication "the utterance or publication although both false and malicious does not give rise to a cause of action". The same classification is made by the authorities generally. In defining privileged communications, it is said in 33 Am. Jur. page 123, Sec. 125:

"An absolutely privileged communication is one in respect of which, by reason of the occasion on which, or the matter in reference to which it is made, no remedy can be had in a civil action, however hard it may bear upon a person who claims to be injured thereby, and even though it may have been made maliciously. . . . The privilege is not intended so much for the protection of those engaged in the public service and in the enactment and administration of law, as for the promotion of the public welfare, the purpose being that members of the legislature, judges of courts, jurors, lawyers, and witnesses may speak their minds freely and exercise their respective functions without incurring the risk of a criminal prosecution or an action for the recovery of damages."

Even if, contrary to our contention, the language complained of could, under some circumstances, give rise to an action for slander, the facts in this case makes the communication here involved absolutely privileged.

POINT ONE

THE ESTABLISHED FACTS SHOW THAT THE PLAINTIFF IS NOT ENTITLED TO THE RELIEF PRAYED OR TO ANY RELIEF.

In appellant's brief on page 3 thereof under paragraph 2, 3 and 4, it is said that the words spoken to plaintiff's wife injured and damaged plaintiff in his profession and occupation, destroyed the confidence in plaintiff, and charged plaintiff with embezzlement and fraudulently appropriating money entrusted to him.

By no stretch of the language complained of can the same be said to convey the meaning contended for in the appellant's brief. It is quite apparent that plaintiff had lost the confidence of his wife in that she had brought a suit against him for a divorce. It was the wife of the plaintiff who charged him with falsely making the claim that she had not contributed towards the purchase of the Harrison Ave. property. She it was who sought the aid of the defendant herein to establish such fact by trying to find the cancelled checks that she gave to the plaintiff herein to apply on the purchase price of the Harrison Ave. property. The language complained of did not charge the plaintiff with appropriating the money to a purpose other than that for which it was intended to be used. Quite the contrary, the language complained of tended to show that the money had actually been used for the intended purpose, but the plaintiff denied that it had been so used. Nor did the fact that the plaintiff denied that his wife had contributed to the purchase of the Harrison Avenue property even remotely have any bearing upon the occupation or profession of the plaintiff. If there was anyone who knew or should know what was done with the money which the defendant paid to his daughter, it was she. It is obvious that by the

defendant saying that if the plaintiff were honest he would admit that his wife had paid the money on the Harrison Avenue property did not relate to plaintiff's manner of doing business. The most that can be said of such language is that the defendant believed that his daughter spoke the truth when she said that she applied the money paid to her by the defendant on the purchase price of the property. It is, of course, elementary that to recover damages for slander the words spoken must have naturally and proximately injured the person concerning which such words were spoken. *Kuhne v. Ahlers*, 92 N.Y.S. 41. The plaintiff could not have been damaged merely because the defendant told his daughter that she spoke the truth.

POINT TWO

THE ESTABLISHED FACTS SHOW THAT ANY STATEMENTS MADE BY DEFENDANT TO HIS DAUGHTER, ELLA H. BEEZLEY, RELATIVE TO THE LACK OF HONESTY OF THE PLAINTIFF WERE ABSOLUTELY PRIVILEGED, BECAUSE OF THE RELATION OF ATTORNEY AND CLIENT.

We have a statute U.C.A. 1953 78-24-8 which provides that:

"There are particular relations in which it is the policy of the law to encourage confidence and to presume it inviolate. Therefore a person cannot be examined as a witness in the following cases: * * * (2) An attorney cannot, without the consent of his client be examined as to any communication made by the client to him, or his advice given therein, in the course of professional employment."

Apparently in this case the plaintiff acquired the information from his wife as to the observations made by the defendant concerning the honesty of the plaintiff. However, if communications had by an attorney with his client is to be inviolate as by law provided, it would seem obvious that the client may not render the attorney liable in damages by revealing what the attorney has told the client in the course of his employment. In this connection it may be observed that the mere fact that the attorney serves without compensation does not affect the relation of attorney and client. *Mark v. Sharp*, 138 Mich 448; 101 N.W. 631. Communications had between attorney and client are, by the authorities generally, held to be absolutely privileged. The law in such particular is thus stated in Restatement of the Law of Torts, Vol 3, Sec. 586, pages 229-230:

“An attorney at law is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as part of a judicial proceeding in which he participates as counsel, if it has some relation thereto; (a) The privilege stated in this section is based upon public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients. Therefore, the privilege is absolute. It protects the attorney from liability in an action for defamation irrespective of his purpose in publishing the defamatory matter, his belief in its truth or even his knowledge of its falsity. These matters are of importance only in determining the amenability of the attorney to

the disciplinary power of the court of which he is an officer. The publication of defamatory matter by an attorney is protected not only when made in the institution of the proceedings or in the conduct of litigation before a judicial tribunal, but in conference and other communications preliminary thereto. The institution of a judicial proceeding includes all pleadings and affidavits necessary to set the judicial machinery in motion. The conduct of the litigation includes the examination and cross-examination of witnesses, comments upon the evidence and argument, both oral and written, upon the evidence whether made to court or jury."

Among the numerous adjudicated cases where such doctrine is applied are the following: *Zern v. Cullam*, 63 N.Y. S. (2d) 439; *Rogers v. Thompson*, 88 N.J. Law 639, 99 Atl 389; *Lang v. Miller*, 70 N.E. 128; *Reed v. Thomas*, 99 Cal. App. 719; 279 Pac. 226. Additional cases to the same effect are collected in Note 4 of 33 Am. Jur, page 116. The cases so collected contain numerous other cases, some of which hold that a pleading filed in a cause is absolutely privileged. That being so it necessarily follows that evidence given in support of a pleading is likewise absolutely privileged.

It will be observed that before the defendant interposed as a defense in this action his relationship of attorney and client to his daughter the plaintiff alleged that the defendant at the times involved in the divorce proceeding acted as the legal adviser of his daughter. (R. 37) That after defendant filed his answer in which he alleged as one of his defenses to plaintiff's complaint

that the language complained of was absolutely privileged because of the relation of attorney and client existing between defendant herein and his daughter, the plaintiff then in a reply denies that such relation existed between defendant and his daughter. (R. 28) This court is committed to the view that a party may not be heard to thus change his position. *Tebbs v. Peterson*, 247 Pac. (2d) 897.

POINT THREE

THE ESTABLISHED FACTS SHOW THAT ANY STATEMENTS MADE BY THE DEFENDANT TO HIS DAUGHTER, ELLA H. BEEZLEY, IN GOING OVER THE EVIDENCE WITH HER TO BE PRODUCED IN HER DIVORCE PROCEEDING WERE ABSOLUTELY PRIVILEGED BECAUSE DEFENDANT HEREIN WAS TO BE A WITNESS IN SUCH PROCEEDING.

It is said in Restatement of the Law of Torts, Vol. 3 page 233, Sec. 588 that:

“A witness is absolutely privileged to publish false and defamatory matters of another in communications preliminary to a proposed judicial proceeding in which he is testifying if it has some relation thereto. * * * It is not necessary that he give his testimony under oath, it is enough that he is permitted to testify. It also protects him while engaged in private conference with an attorney at law with reference to proposed litigation, either civil or criminal.”

To the same effect is the law stated in 33 Am. Jur., Sec. 146, page 142 and the cases cited in the foot note.

If a communication of a prospective witness had with a party to an action or his attorney may subject the

party making such communication liable if perchance such statement turns out to be false, the purpose of the law providing for absolute privileged communication will have been violated. An attorney must rely upon his client for information as the testimony of the witnesses who are to be used and unless the attorney is informed as to what a witness will testify to before he is called as a witness, the orderly procedure of the trial will be rendered impossible.

POINT FOUR

THE ESTABLISHED FACTS SHOW THAT ANY STATEMENTS MADE BY DEFENDANT TO HIS DAUGHTER, ELLA H. BEEZLEY, IN GOING OVER THE EVIDENCE WITH HER TO BE PRODUCED IN HER DIVORCE PROCEEDINGS AGAINST THE PLAINTIFF HEREIN WERE ABSOLUTELY PRIVILEGED BECAUSE THE DEFENDANT HEREIN WAS A THIRD PARTY DEFENDANT IN SAID DIVORCE ACTION.

Again quoting from Restatement of the Law of Torts, Vol 3, page 231, Sec. 587, it is said:

“A party to a private litigation . . . is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of a judicial proceeding in which he participates, if the matter has some relation thereto. Comment A. The privilege stated in this section is based upon the public interest in according to all persons the utmost freedom of access to the courts of justice for the settlement of their private disputes. Like the privilege of an attorney, it is absolute.”

In this case the defendant and his daughter were both parties defendant and as such had a common interest in defeating plaintiff's claim that he had an interest in the apartment house, the title to which stood in their names.

POINT FIVE

THE ESTABLISHED FACTS SHOW THAT THE ANSWERS MADE BY THE DEFENDANT HEREIN TO THE QUESTIONS ASKED HIM BY THE PLAINTIFF HEREIN IN TAKING THE DEPOSITION OF THE DEFENDANT ON OR ABOUT JANUARY 9, 1954 WERE ABSOLUTELY PRIVILEGED BECAUSE SUCH ANSWERS WERE GIVEN IN A JUDICIAL PROCEEDING AND PLAINTIFF REQUESTED SUCH ANSWERS.

It will be seen that in taking defendant's deposition at the request of the plaintiff the following questions were asked defendant by plaintiff.

“Q. Now, you have talked with Ella about the Harrison Avenue property that we used to own, have you not?

A. I have.

Q. Now in talking to her recently did you say that guy isn't honest in referring to me?

A. In substance, yes. (R. 21)

Q. Do you have any proof that Ella gave me that money?

A. Except her statement.

Q. Where are your cancelled checks?

A. They are destroyed, as I told you. But I haven't any doubt.

Q. You are making pretty reckless statements.

A. I am certain as I sit here that that money went to pay on the Harrison Ave. property.

Q. How much?

A. I don't know how much.

Q. You don't know whether it is a fact, but you disregarded that and you made such malicious statements, why?

A. I made the statement to her that if you were honest you would admit that she paid that money on the property."

So far as we are able to ascertain the authorities are all to the effect that the answers given by the defendant to the foregoing questions are absolutely privileged. Again quoting from Vol. 3, Restatement of the Law of Torts, page 233, Sec. 588, it is said:

"The functions of witnesses is of fundamental importance in the administration of justice. The final judgment of the tribunal must be based upon the facts as shown by their testimony and it is necessary therefore that a full disclosure be not hampered by fear of private suits for defamation. The compulsory attendance of all witnesses in judicial proceedings makes the protection thus accorded the more necessary. The witness is subject to the control of the trial judge in the exercise of the privilege. For abuse of it, he may be

subject to criminal prosecution for perjury and to punishment for contempt.”

While the testimony was not given during the trial of the cause the Utah Rules of Civil Procedure provide that such testimony may, under some circumstances, be so used.

So also are the authorities to the effect that one who makes an inquiry may not be heard to complaint about the response given. *Welcher v. Beeler*, 48 Colo 233; 110 Pac. 181; *Christopher v. Akins*, 214 Mass 332; 101 N.E. 971, see also Restatement of the Law of Torts, Vol 3, page 220, Sec. 583 where it is said

“Except as stated in Sec. 584, the publication of false and defamatory matter of another is absolutely privileged if the other consents thereto.”

POINT SIX

THE ESTABLISHED FACTS SHOW THAT THE STATEMENT MADE BY THE DEFENDANT WAS JUSTIFIED.

The settled law in this jurisdiction is that truth is a defense to matters charged as being defamatory. *Williams v. Standard Examiner Publ. Co.* 83 Ut. 31; 27 Pac. (2d) 1; *Derouvian v. Stokes*, 168 Fed (2d) 305. In this case the plaintiff herein was asked this question and gave under oath this answer in the Interrogatories submitted to him pursuant to the Utah Rules of Civil Procedure:

“Q. Is it not true that your wife, Ella H. Beezley paid or furnished the money to make the down payment on the home you and she purchased in about 1934 on Harrison Avenue?

A. She didn't make the down payment in its entirety and to the best of my knowledge the down payment of \$250.00 was split equally between myself and my wife.

It will be seen from the foregoing answer that if the plaintiff denied that his wife had made any payment on the Harrison Avenue property, he was in error in making such statement.

From what has been said the judgment of the lower court was right and should be affirmed with costs.

Respectfully submitted,

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