

1982

Jo Ellen Ray et al v. Edward Thomas : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

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 errors.

Bruce R. Baird; COounsel for Appellant;

Robert D. Barclay; Stephen Farr; Counsel for Respondent;

Recommended Citation

Brief of Respondent, *Ray v. Thomas*, No. 18319 (Utah Supreme Court, 1982).

https://digitalcommons.law.byu.edu/uofu_sc2/3005

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE
STATE OF UTAH

BRUCE E. LIND and KENT JOLLEY,

Plaintiffs - Appellants,

vs.

Case No. 18319

EUGENE B. LYNCH,

Defendant - Respondent,

BRIEF OF APPELLANT

Appeal from the Order of the Second
Judicial District Court of Weber County
Honorable Calvin Gould, Judge

LAWRENCE R. PETESON JR.
KING & PETERSON
2121 South State Street
Salt Lake City, Utah 84115
Attorney for Plaintiffs

GRANT C. AADNESEN
175 South West Temple, Suite 500
Salt Lake City, Utah 84101
Attorney for Defendant

FILED

APR 28 1982

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	3
POINT I	
DEFENDANT'S DEFAMATORY PUBLICATION RE- GARDING THE PLAINTIFFS IS NOT PROTECTED BY ANY PRIVILEGE	3
POINT II	
PLAINTIFFS' COMPLAINT STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED	6
STATUTES	
Utah Code Ann. §45-2-3 (1953)	4,5
CASES CITED	
<u>Heathman v. Hatch</u> , 13 U.2d 266, 372 P.2d 990 (1962)	7
<u>Hill v. Grand Central, Inc.</u> , 25 U.2d 121, 477 P.2d 150 (1970)	6
<u>People v. Glassman</u> , 12 Utah 238, 42 Pac. 956 (1895)	5
<u>Seegmiller v. KSL, Inc.</u> , 626 P.2d 968,977 (Utah 1981)	5
<u>Utah State Farm Bureau Federation v. National Farmers Union Service Corp.</u> , 198 F.2d 20 (10th Cir. 1952)	5
<u>Williams v. Standard-Examiner Publishing Co.</u> , 83 Utah 31, 27 P.2d 1 (1933)	5

IN THE SUPREME COURT OF THE
STATE OF UTAH

BRUCE E. LIND and KENT JOLLEY,

Plaintiffs - Appellants,

VS.

EUGENE B. LYNCH,

Defendant - Respondent,

Case No. 18319

BRIEF OF APPELLANT

NATURE OF THE CASE

This is an action brought by the plaintiffs-appellants, Bruce E. Lind and Kent Jolley, to recover for the damages caused by the publication by the defendant-respondent of a false and libelous document in connection with the solicitation of proxies for AMR Corporation, an Idaho corporation.

Defendant-respondent has not answered plaintiffs' complaint but has moved to dismiss plaintiffs' complaint for failure to state a claim upon which relief can be granted and for lack of jurisdiction.

DISPOSITION IN LOWER COURT

Defendant has filed a Motion to Dismiss which was granted by the Honorable Calvin Gould, dismissing plaintiffs' complaint on the grounds that, as a matter of law, the publication by defendant did not exceed a privilege which allowed defendant to refer to allegations made by the U. S. Attorney in a separate civil action filed by the government.

RELIEF SOUGHT ON APPEAL

Plaintiffs-appellants seek to have the judgment of the lower court reversed and seek to be allowed to proceed to a trial on the merits of the plaintiffs' claims.

STATEMENT OF FACTS

As alleged in plaintiffs' complaint, at the time of trial the plaintiffs will show that on or about March 18, 1981, the defendant published and mailed to the stockholders of AMR Corporation - an Idaho corporation in which Bruce Lind is President and Director and for which Kent Jolley is the attorney - a proxy solicitation, a copy of which is attached to this brief as appendix "A". The publication accuses the plaintiffs of "fraud, deceit and conspiracy" and cites allegations from a complaint filed by the U. S. Attorney for the District of Utah in support of the accusations.

Plaintiffs' complaint alleges that the defamatory accusations of the defendant's publication were false and that defendant knew them to be false. At trial the plaintiff's intend to show that

defendant knew that the allegations made by the U. S. Attorney in the government's complaint were based upon the false information supplied to the government by defendant and others closely associated with him. Plaintiff's complaint further alleges that the publication of the defamatory material which defendant knew to be false was malicious.

The proxy solicitation published by the defendant further accused the plaintiffs of placing a million dollars of debt upon the corporation to obtain additional personal shares of stock and that the same was done without full disclosure. Plaintiffs intend to show at trial that these accusations are also false and maliciously made.

ARGUMENT

POINT I

DEFENDANT'S DEFAMATORY PUBLICATION REGARDING THE PLAINTIFFS IS NOT PROTECTED BY ANY PRIVILEGE.

The full text of defendant's libelous publication is incorporated in plaintiffs' complaint by reference and is attached to this brief as appendix "A". The defendant apparently attempted to protect himself from liability for the defamatory nature of the accusations of "fraud , deceit and conspiracy" by stating that defendant's suspicions that the plaintiffs were guilty of the same were also held by the U. S. Government, and by citing allegations of fraud from a civil complaint previously filed by the government. The publication of the defendant goes

far beyond a report of the government's allegations, however, stating defendant's own alleged suspicion of fraud, his faith in the foundation of the government's claims, his analysis that criminal charges might result, his conviction that the defenses of Bruce Lind are self serving and false and finally an account of how the plaintiff's supposedly imposed a million dollars of debt on the corporation and took personal stock without full disclosure.

Even if the publication by defendant had confined itself to a report of the allegations in the government's civil complaint, it still would not have been a privileged communication as a matter of law because plaintiffs have alleged in their complaint that the defendant knew of the falsity of the claims of fraud when he published the claims and because the publication was the product of defendant's malice.

The privileges which are available as defenses to actions for libel are set out in Utah Code Ann. §45-2-3 (1953). Reports of official proceedings are referred to in §45-2-3 (4) as follows:

45-2-3. "privileged publication" defined.

A privileged publication which shall not be considered as libelous per se, is one made: . . .

(4) By a fair and true report, without malice, of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof, or of a charge or complaint made by any person to a public official, upon which a warrant shall have been issued or an arrest made.

By its own terms, this privilege applies only to communications which are made without malice. The Utah Supreme Court has recently confirmed that this privilege is only a "conditional

privilege", "being applicable only in the absence of malice." Seegmiller v. KSL, Inc., 626 P.2d 968, 977 (Utah 1981). See also Utah State Farm Bureau Federation v. National Farmers Union Service Corp., 198 F2d 20 (10th Cir. 1952); People v. Glassman, 12 Utah 238, 42 Pac. 956 (1895). A conditional privilege is distinguished from an absolute privilege which is a defence regardless of the presence of malice. Williams v. Standard-Examiner Publishing Co., 83 Utah 31, 27 P.2d 1 (1933). The allegation of malice in plaintiffs' complaint should be sufficient to prevent the dismissal of plaintiffs' action against claims that the defamation is privileged as a report of government action.

In addition to the malice issue, the standard set out in Utah Code Ann. §45-2-3 (4) (1953), requires that the report of official proceeding be "fair and true". In light of the obviously adversarial nature of defendant's publication and the animus tone which pervades it, the issue of whether the document is a fair and true report is at least a question for the finder of fact. The report could hardly be "fair and true" and free of malice if, as plaintiffs' allege, the defendant knew at the time he made the publication that the allegations of fraud were false and that even the government's allegations to that effect were based on false information supplied by defendant and his associates.

Read as a whole the defamatory publication by the defendant goes far beyond a report of judicial proceedings. The allegation of malice by the plaintiffs cannot be ignored even if all the

other elements of a conditional or qualified privilege were present, which, appellants respectfully submit, they are not.

POINT II

PLAINTIFFS' COMPLAINT STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

The defendant has filed no answer in this case. Defendant's response to plaintiffs' complaint was a Motion to Dismiss. In ruling on defendant's motion, the court, in its Memorandum Decision, referred to defendant's "Motion for Summary Judgment of Dismissal". The only issues presented by defendant's Motion to Dismiss were, 1) the alleged failure of plaintiffs' complaint to state a claim upon which relief can be granted, 2) lack of jurisdiction. The court made no mention of defendant's jurisdictional issue in its ruling.

Under such circumstances it would be clear error for the court to convert defendant's motion to dismiss into a motion for summary judgment. In the case of Hill v. Grand Central, Inc., 25 U.2d 121, 477 P.2d 150 (Utah 1970), this court ruled in another libel action that it was improper for the court to grant summary judgment where only a motion to dismiss was at issue. In the Hill case the court denied the motion to dismiss but required the plaintiff to produce evidence of actual malice within a certain period of time and on her failure to do so granted summary judgment. The Supreme Court said:

We think at a pretrial conference, after the issues are stated by way of pleadings on both sides, it is proper for the court to make inquiry as to what

evidence will support a contention and to eliminate those issues which cannot be supported by competent proof. However, we do not think it is proper for a court to require a plaintiff to state what proof he will produce on an issue which has not even been raised.

True it is that when a motion to dismiss is accompanied by affidavits it may be treated as a motion for summary judgment, yet the court should not on its own initiative try to convert a motion for dismissal into one for summary judgment. He has no more right to ask the plaintiff how he will establish his claim than he has to require the defendant to state what his defense will be. 25 U.2d at 123.

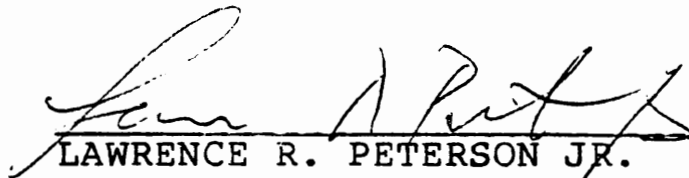
The decision of the trial court must, therefore, be construed as a mere granting of defendant's Motion to Dismiss for failure to state a claim upon which relief can be granted.

The standard for reviewing the dismissal of a complaint requires that the allegations of the complaint be assumed to be true. Heathman v. Hatch, 13 U.2d 266, 372 P.2d 990 (1962). Plaintiffs' complaint states with particularity the publication upon which plaintiffs' claims are based, alleges the falsity of the publication, the malice of the defendant and defendant's knowledge of the falsity of the publication, and alleges the damages which resulted from the defamation complained of. Since the court in its review, is required to assume the truth of the allegation of malice, no qualified privilege is available to the defendant to form the basis of dismissal prior to trial. Plaintiffs' complaint, therefore, states a claim upon which relief can be granted.

CONCLUSION

The defamatory statements made by defendant in the proxy solicitation published by the defendant are not confined to a report of the allegations of the U. S. Government nor are they a "fair and true" report of such allegations as a matter of law. Even if the statements were a report of an official proceeding, which it clearly is not, the allegation that the publication was the product of defendant's malice would remove it from the protection of any such qualified privilege. Appellants, therefore, respectfully submit that the dismissal granted by the trial court should be reversed and the plaintiffs-appellants be allowed to proceed to trial on the merits.

DATED this 28 day of April, 1982.



LAWRENCE R. PETERSON JR.
Attorney for Plaintiffs-Appellants
2121 South State
Salt Lake City, Utah 84115

MAILING CERTIFICATE

I Certify that I mailed a true and correct copy of the foregoing brief to Grant C. Aadnesen, Attorney for Respondent, at 175 South West Temple, #500, Salt Lake City, Utah 84101, Postage prepaid this _____ day of April, 1982.

After reviewing the recent voluminous mail-out and "Stockholder's Letter by AMR Officials, which hopefully was not at the expense of the Stockholders, we should realize more than ever that this is additional evidence to justify our continued suspicions and the U S Government's Complaint in which it alleges "fraud, deceit and conspiracy."

If the Government is right, the stockholders of AMR have been defrauded, deceived and conspired against for the personal gain of Bruce Lind and Kent Jolley. I personally find it very difficult to believe that the U S Government would file any complaint against Bruce Lind and Kent Jolley which was based only on falsehoods and misinformation. If allegations by the U S Government in its complaint against them are supported by the evidence and a judgement is taken against them, the Department of Justice could possibly file a criminal action against them! Furthermore, remarks by Bruce Lind and his collaborators about an officer of the Government, McMurray, et. al., might very well constitute grounds for personal actions. But that is for the future and should not enter into the present case.

According to Webster's dictionary, to deceive is a deliberate misrepresentation of facts to further ones end; is representing as true what is known to be false; is to make a person believe what is not true. Bruce Lind has tried to answer the Government Complaint by notations in the margin. If you read the complaint carefully, he will stand convicted unless he can prove that all of his notations are correct and that applies to Kent Jolley, also.

Though seemingly, "the wheels of justice turn slowly", we are willing to wait with confidence that in Court the rules of procedure and evidence will very adequately separate self-serving statements by Bruce Lind from actual facts.

Bruce Lind's weak answers in his letter and other material of the mailing all attempt to discredit the Government, pick on McMurray and Lynch and threaten stockholders. All he is trying to do is cloud or escape the issues! It is quite obvious that Glen McMurray knows more about Bruce Lind and Kent Jolley and their transactions than almost anyone. In fact they worked closely together from the beginning of AMR in 1972 until Feb. 1980 and until Glen McMurray opposed the private placement put thru by Lind and Jolley which the Government has identified as "fraudulent, willful and deceitful."

By that placement they put a million dollars of debt on AMR Corp. and overvalued the three properties so they could get 527,000 shares of AMR stock, which with Bruce Lind's 65,200 shares (plus or minus a few) and the 272,000 shares in the voting trust gives them control of the Corp. This was done without a full disclosure to all of the stockholders. Now they are trying to make the stockholders believe they were saving the Corporation from "raids, takeovers and control by parties detrimental to the interests of the stockholders."

Here is a recap of the stock ownership before and after the placement:

	Total	% before	% after	total	Control by Lind & Jolley
Utah Capital	292,000	27	18	292,000	%
" " voting trust	272,000	25	17	272,000	272,000 17
	564,000	52	35	564,000	
Minority stockholders	457,800	42	28	457,800	
Bruce Lind	65,200	6	4	65,200	65,200 4
Western States Inv.			33	527,000	527,000 33
Stock outstanding	1,087,000	100	100	1,614,000	864,200 54

PROXY FOR VOTE OF SHARES IN AMR CORPORATION

I/we, the undersigned Shareholder(s) of AMR Corporation, do hereby appoint E. B. Lynch, attorney and agent for me, & in my name, place and stead, to vote as my proxy at any stockholders' meetings held between the date of this proxy and December 31, 1982, unless sooner revoked, with full power to cast the number of votes that all my shares of stock entitle me to cast if I am their personally, and authorize him, or who he may appoint, to act for me and in my name and stead, giving to said E. B. Lynch, attorney and agent, full power of substitution and revocation. Dated _____, 1981
No. of shares _____ Name(s) the same as on certificate

A restatement of purpose: As minority stockholders we have organized committees in various towns of Idaho and Utah and submitted our proxy vote to our local committee chairman or Eugene Lynch for the following reasons:

1. We need to preserve our interest in AMR Corporation. The value of our stock was damaged when the \$1,038,000 personal debt of Lind and Jolley was transferred into AMR Corporation. The properties in the private placement were not bargains, were not needed, and especially untimely in a depressed economic market. The wedding reception center has been a losing business from the beginning and is foreign to our investment interests. 3 years with no returns to the investor is a very poor investment! We can change that and have a valuable investment!

2. We need new management which can be selected from the qualified stockholders in the various key cities of Idaho and Utah where committees are organized. We need to eliminate this perpetuating tenure situation with present officials. Add to the 51% control Lind and Jolley now have, additional stock from relatives and sympathetic stockholders and their overwhelming control will put in who they wish and run the company to suit themselves. The past record is an omen for the future!

3. We need to be prepared to purchase additional stock on easy terms if it becomes available from the Utah Capital receiver. Whoever has that block of stock (52%) has control of AMR Corp. Who has a better right and needs first consideration other than the Minority Stockholders who have organized to preserve AMR's values?

4. We need to continue our support of the motion filed with the court to permit the minority stockholders to intervene as Amici Curiae (friends of the court) to:

- prohibit the use of AMR funds to pay for defense of the individual defendants
- take a position on the side of Government to cancel the voting trust and the private placement.

The affidavit by the 4 misinformed stockholders requesting the minority stockholders to join with them and approve the use of AMR funds to defend the defendants, whether they are successful or not and to use AMR funds for mailing "Stockholder Letters" in which Lind and Jolley attempt to explain their actions is highly improper. As minority stockholders we have informed the Federal Court that one of the reasons we have sought to intervene is to prevent that very thing from happening. We are trying to prevent such detrimental use of AMR funds for this kind of extensive expense.

Some of the proxies obtained in 1980 expired as of Dec. 31, 1980 and need to be renewed. The card is provided for your convenience. If you wish, you can send your proxy to your local committee chairman by changing the name and address. The proxy will be voted for the above issues. If you need to make some changes with names, etc. on your certificates, please correspond with Olympic Transfer Co., 3600 Market St., Salt Lake City, Utah 84119.

We now have proxies representing 250,000 shares! That is about $\frac{1}{4}$ of the original shares (1,087,000) outstanding before the private placement by Lind & Jolley. That represents a very large block of unhappy investors. The efforts of Bruce Lind and his associates to minimize, neutralize, propagandize and intimidate stockholders who are members of the minority stockholder's committees has had very little success. The 8 year performance record capped off with the take over of the company with their private placement cries out for legal accounting to the many investors in this company and we intend to have it!

Sincerely

E. B. Lynch
E. B. Lynch
1105 Patterson
Ogden, Utah 84403



Domestic Rate

GENE LYNCH

Phone 393-4791

1105 PATTERSON STREET

OGDEN, UTAH 84403