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Marion S. Carter v. Edward B. Jackson : Brief of Respondent

Utah Supreme Court

Rawlings, Wallace, Roberts & Black; Counsel for Respondent;

Case No. 9055

In the Supreme Court of the State of Utah

MARION S. CARTER,
Plaintiff and Appellant,

—vs.—

EDWARD B. JACKSON,
Defendant and Respondent.

BRIEF OF RESPONDENT

RAWLINGS, WALLACE,
ROBERTS & BLACK
Counsel for Respondent

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STATEMENT OF FACTS

The statement of the case contained in Appellant's Brief is not complete and we submit the following additional facts which have a bearing on the case.

This case is a slander action instituted by plaintiff, a Deputy Police Marshall of the City of South Salt Lake against defendant, a City Councilman for said City. Plaintiff claims that on April 15, 1958, during the regularly scheduled City Council Meeting for South Salt Lake, defendant made the statement that plaintiff had propositioned a woman while issuing her a traffic ticket.

Plaintiff called as witnesses the City Recorder Tombs and her assistant, Frazier, who testified that according to the minutes of the Council Meeting defendant had made the statement as claimed by plaintiff (Exhibit 1). The witnesses testified they were not shorthand reporters and there was a considerable amount of interruptions and confusion during the entire meeting. (R. 21, 22, 46)

The witness Tombs further testified on cross examination that defendant and one other councilman had objected to the accuracy of the minutes taken at the meeting and this objection is noted in the subsequent meeting of the City Council held on April 29, 1958 (Exhibit 2) (R. 25, 26).

The witness, V. Allen Olsen, testified he was a City Councilman for South Salt Lake assigned to the Police Department (R. 80) and while attending an Executive Council Meeting in March, 1958, advised the defendant and other councilmen that one of the officers of the Police Force had been accused of propositionng a woman while she was receiving a traffic ticket. In view of this information he requested the members of the Council to relate to him any information they may have relative to the activities of the police officers (R. 82, 83).

The witness further testified that during the meeting of April 15, 1958, the issue which precipitated the discussion concerning the Police Department and its activities was the discharge of a police officer, William Krieg (R. 76-83).

Plaintiff testified he attended the Council Meeting believing the activities of the Police Department and particularly the discharge of Officer Krieg would be discussed (R. 97). The plaintiff further testified that prior to this meeting he had not known the defendant other than the fact he was an elected official; had never had any difficulty with him; and had never had any occasion to either talk to him or come in contact with him (R. 102-103). Plaintiff also admitted writing the resignation letter (Exhibit 4).

At the completion of plaintiff's case, the trial court directed a verdict of No Cause of Action for the reasons any statement made by defendant was privileged and plaintiff had failed to introduce any evidence showing defendant acted with actual malice. We respectfully submit the ruling by the trial court was correct and should be affirmed by this court.

STATEMENT OF POINTS

POINT I

THE TRIAL COURT DID NOT ERR IN RULING THE STATEMENT MADE BY DEFENDANT WAS ABSOLUTELY PRIVILEGED.

POINT II

THE TRIAL COURT DID NOT ERR IN RULING THAT PLAINTIFF HAD FAILED TO PROVE MALICE.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN RULING THE STATEMENT MADE BY DEFENDANT WAS ABSOLUTELY PRIVILEGED.

As a defense to this case, defendant claimed that the alleged statement concerning plaintiff was absolutely privileged and defendant was not liable. The basis for the defense of privilege was on the ground that the statement was made during a regularly scheduled City Council Meeting for the City of South Salt Lake and the statement was relative to a matter then under discussion by the Council.

Under Point I of his brief, plaintiff contends the defense is not applicable to this type of public meeting. In support of his position he cites an annotation contained in 2 A.L.R. 1371. This annotation discusses the application of the defense of absolute privilege to a Board of Pardons hearing and we submit is not in point.

Absolutely privileged communication has been defined in 33 *Am. Jur.* 123, *Libel and Slander, Section* 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 class of absolutely privileged communications is narrow and is practically limited to

> legislative and judicial proceedings and other acts of state, including, it is said, communications made in the discharge of a duty under express authority of law, by or to heads of executive departments of the state, and matters involving military affairs. 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."

This defense has been applied in cases involving public meetings similar to the case at bar. *Wachsmuth v. Merchants' Nat. Bank* (1893) 96 Mich. 426, 56 N.W. 9, plaintiff was a member of the Common Council of the City of Muskigan. The defendant, as alderman, presented a resolution to the effect that the City's money which was in a certain bank, was no longer adequately secured and should be deposited in another bank. The bank instituted a libel action and plaintiff was arrested and admitted to bail. Plaintiff instituted this action for false imprisonment for his arrest.

In discussing the statement made by the alderman, the court stated as follows:

> "The affidavit disclosed that the resolution was offered by plaintiff as a member of the Common Council to that body, and related to a matter in the line of plaintiff's duty as a public officer. In other words, the affidavit, upon its face, showed

> that the resolution charged as libelous was, as a matter of law, absolutely privileged."

In *Sanford v. Howard,* 185 Okla. 660, 95 P. 2d 644 (1939), judgment was entered in favor of plaintiff and against the defendant. The action was one in slander. Plaintiff was a teacher at a University, defendant was its president and appeared before the Board of Regents. He there stated concerning plaintiff that she had been arrested for immoral conduct, that she was naked at the time and was engaged in sexual intercourse. It appeared that the Board of Regents had imposed upon defendant the duty of reporting to the Board any misconduct or any irregularity on the part of any teacher at the University. Oklahoma has statutes similar to Utah's Section 45-2-3, Utah Code Annotated, 1953. The court stated:

> "Manifestly, in the light of these statutes, the Board of Regents being charged with the duty of governing the University 'in all its interests' deemed it essential to proper government of the institution to have information of the nature which the evidence shows the defendant conveyed to said board. And to that end, according to the record before us, said board had imposed upon the defendant as one of his duties as president of the University the matter of reporting to the board 'any misconduct' or 'any irregularity' on the part of 'any teacher or employee of the University.' Hence, we think it may be said, that in conveying to the Board of Regents such information as he had obtained regarding alleged misconduct of the plaintiff the defendant was acting 'in the proper discharge of an official duty' (Sec. 726, supra); and further, that the occasion upon

> which the defendant conveyed such information to said Board of Regents was one upon which absolute privilege attended the communication which he there made."

The judgment in favor of plaintiff was reversed and the trial court was ordered to dismiss plaintiff's action.

See also *Hughes v. Bizzel,* 189 Okl. 472, 117 P. 2d 763 (Board of Regents); *Harnish v. Smith,* 138 Cal. App. 2d 307, 291 P. 2d 532 (City Council); *Barton v. Rogers* 21 Idaho 609, 123 Pac. 478 (Board of Trustees of School District).

A reading of the Utah statutes conferring powers on a city council establishes that proceedings at its meetings should be held to come within an absolute privilege. Section 10-6-5, Utah Code Annotated, 1953, provides

> "Boards and councils as legislative and governing bodies. — The board of commissioners in cities of the first and second class, the mayor and city council in cities of the third class and the board of trustees in towns are and *shall be the legislative and governing bodies of such cities and towns,* and as such shall have, exercise and discharge all of the rights, powers, privileges and authority conferred by law upon their respective cities, towns or bodies, and shall perform all duties that may be required of them by law."

Thus we see that the city council is expressly declared to be both the legislative and governing body for South Salt Lake. Proceedings before such a body come within the principle of our statutes and law relating to privilege. A statement made by a councilman before that

body on a pertinent subject certainly comes within the category of a proper discharge of an official duty and is included within any statement made in any legislative or judicial hearing or in any other official proceeding authorized by law. Section 45-2-3 subdivision (1) and (2), Utah Code Annotated, 1953.

Also, it is clear that under section 10-6-68, Utah Code Annotated, 1953, the city council were properly considering the conduct of police officers. That statute provides:

> "Marshal in third class cities. — In cities of the third class the marshal shall be ex officio chief of police, and shall perform the duties and exercise the authority thereof. He shall, *under the direction of the council, direct and control the police of the city,* and whenever the interests of the city demand, by and with the consent of the mayor, shall appoint such number of special policemen as may be required, and perform such other duties as may be prescribed by ordinance."

In the case at bar the topic of discussion at the time the statement was made by Councilman Jackson was the police department and its personnel.

The subject of William Krieg's dismissal from the police force was mentioned (20) and then, according to the minutes, "a discussion ensued regarding the conduct of the police department * *" (21). It culminated in the following action, "After the discussion Mr. Olson (the councilman assigned to the police department) made the following motion that a transcript be typed of the state-

ments made at this meeting regarding the police department, that the City Marshal prepare a detailed report and that the City Council meet at the earliest possible date to consider the matter. Mr. Woods seconded the motion" (23, 24). The motion was unanimously carried (24).

In view of these circumstances, we contend the relating of this information is entitled to the protection of the law and was in performance of plaintiff's public duties outlined in Section 10-6-5 and 68, Utah Code Annotated, 1953. To subject an elected official to liability for making the statement would violate the absolute privilege accorded plaintiff in the performance of his official duties as councilman.

POINT II

THE TRIAL COURT DID NOT ERR IN RULING THAT PLAINTIFF HAD FAILED TO PROVE MALICE.

Without abandoning the argument made under Point I of this brief, defendant respectfully submits that if his statement is not absolutely privileged, it is at least qualifiedly or conditionally privileged. Defendant further contends that when a statement is qualifiedly privileged, burden is on plaintiff to show actual malice, and, if he fails, he has not proven a cause of action.

Plaintiff discusses the issue of malice under Points 2, 3, and 4 of his brief. Plaintiff admits that malice is an essential element to be proved in his case, but contends the required malice may be inferred from certain conduct of defendant. To prove this conduct, plaintiff

makes numerous references to statements made by defendant in his deposition. We respecfully submit this approach is improper in view of the fact the deposition of defendant was not introduced in evidence by plaintiff and is not even a part of the record on appeal. Without laboring this point, we submit this Court has previously considered this matter and defined the degree of proof necessary to show malice.

In *Combes v. Montgomery Ward & Co.*, 119 Utah 407, 228 P. 2d 272, an action was brought for slander. A directed verdict in favor of defendant was granted by the trial court and on appeal affirmed. The specific ruling was that the occasion on which the statements were made were qualifiedly privileged and that there was no proof of malice. Plaintiff was working for defendant. The trial court took the view that taking the circumstances altogether, that is: the loss of $1.50 from plaintiff's department, the questioning of two fellow employees and asking them about plaintiff's honesty, together with the fact that plaintiff was discharged at the end of the day, imputed dishonesty to plaintiff and was slanderous per se.

The court concluded that a conditional privilege existed. It then discussed whether or not actual malice was present and in finding that there was no proof thereof, held that the trial court properly directed a verdict. The 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. v. Billington, Tex. Civ. App. 89 S.W. 2d 491 at page 493, 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, Speilberg v. Kuhn & Brother Co., et al., 39 Utah 276, 116 P. 1027; Williams v. Standard Examiner Pub. Co., 83 Utah 31, 27 P. 2d 1."

In the case at bar, plaintiff failed to introduce any testimony which would show defendant acted with malice. Plaintiff also failed to produce one witness who testified to facts that a jury could find defendant was making the statement as a result of spite, ill will or hatred for the plaintiff. As a matter of fact, the testimony tended to establish lack of actual malice. Plaintiff testified he

had not known defendant before this time, had never talked with him or come in contact with him, and he had never had any difficulty with him. He only knew that defendant had been elected a Councilman. Under the evidence there was just no basis for a finding of spite, hatred, or ill will in defendant making any statement of, and concerning plaintiff.

We respectfully submit, that in view of this condition of the record, and applying the rule enunciated by this court, the trial court could do nothing but rule that plaintiff had failed to prove malice.

Plaintiff contends under Point IV of his brief that the issue of malice was a matter of fact for the jury and further he was entitled to punitive damages. We submit that *Combes v. Montgomery Ward & Co.*, supra, resolves this contention against plaintiff. Plaintiff in this case failed to prove malice and therefore plaintiff's cause of action fails and he is not entitled to receive any amount as damages.

The discussion under Point V and VI of plaintiff's brief is nothing more than a repetition of other points contained in the brief and we submit have been answered.

CONCLUSION

Defendant respectfully submits that the trial court did not err in ruling the statement made by defendant was absolutely privileged. We further contend if the statement is not absolutely privileged, it is at least con-

ditionally or qualifiedly privileged and plaintiff failed to prove malice.

We submit the trial court properly directed a verdict in favor of defendant and against plaintiff, No Cause of Action. The judgment of the trial court should be affirmed.

Respectully submitted,

RAWLINGS, WALLACE,
ROBERTS & BLACK
Counsel for Respondent

530 Judge Building
Salt Lake City, Utah