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James R. Knight v. Clyde C. Patterson and Ormond Konkle : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES R. KNIGHT,

Plaintiff-Appellant,

vs.

CLYDE C. PATTERSON and
ORMOND KONKLE,

Defendants-Respondents.

Case No.
10861

BRIEF OF APPELLANT

Appeal from the Judgment of the
Second District Court for Weber County
Honorable Ferdinand Erickson

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IN THE SUPREME COURT
OF THE STATE OF UTAH

JAMES H. ROBERTS,

Plaintiff-Appellant,

Case No.
10861

CLAUDE C. PATTERSON and
GREGORY BOKKIN,

Defendants-Respondents.

BRIEF OF APPELLANT

Appeal from the Judgment of the
Second District Court for Weber County
Honorable Ferdinand Erickson

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JAMES R. KNIGHT,

Plaintiff-Appellant,

vs.

CLYDE C. PATTERSON and
ORMOND KONKLE,

Defendants-Respondents.

Case No.
10861

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This was an action brought by plaintiff to recover from defendants the following: an accounting for a one-third (1/3) interest in a motel in West Yellowstone, Montana; damages for conversion of personal property; wages earned but unpaid; damages for defamation. The plaintiff pursued recovery of the above by filing a Complaint containing four (4) causes of action, the fourth cause of action being before this court on review.

DISPOSITION IN THE DISTRICT COURT

The case was heard upon a motion for summary judgment by defendant on the 10th day of February 1967, on plaintiff's fourth cause of action. The Honorable Ferdinand Erickson found that any statements made by defendant, PATTERSON, were subject to the defense of truth and within the area of qualified privilege. Pursuant to said finding, the defendant's motion for summary judgment was granted and plaintiff's fourth cause of action was dismissed.

RELIEF SOUGHT ON APPEAL

By this appeal, plaintiff seeks a reversal of the judgment of the lower court granting defendant's motion for summary judgment.

STATEMENT OF FACTS

The plaintiff and defendant, CLYDE C. PATTERSON, the latter hereinafter referred to as PATTERSON, on or about the 1st day of May, 1963, entered into an oral agreement in Ogden, Utah, whereby they were to purchase a motel located in West Yellowstone, Montana. A Uniform Real Estate Contract was negotiated with plaintiff and PATTERSON listed as purchasers thereon. (R-9. Defendant's answer to interrogatory 2(b)). After various investments had been made by the parties, the plaintiff undertook the management of said motel at an agreed weekly

wage. On or about November 4, 1963, a one-third (1/3) interest in said motel was conveyed to ORMOND KONKLE, co-defendant herein. (R-9. Defendants' answer to interrogatory No. 4.)

The plaintiff managed the motel during 1963 and 1964 and the wages earned but unpaid were credited to his investment in the motel venture. Upon plaintiff's return to West Yellowstone, Montana, to manage the motel in the spring of 1965, plaintiff was told that he had been replaced as the manager. Plaintiff was refused the right to remove his personal property located at the motel, which was later destroyed or lost, and was refused any payment of wages and/or an accounting of his interest in the motel venture. During 1965, PATERSON published to several persons in Ogden, Utah, and West Yellowstone, Montana, defamatory statements to the effect that the plaintiff had embezzled motel monies belonging to the motel venture.

On the 3rd day of January, 1967, defendants filed a motion for summary judgment against the plaintiff's fourth cause of action (R-13). The court, on the 10th day of February, 1967, after arguments of counsel, granted defendants' motion. The court expressly held that "Any statements made by the defendants to third parties involving any misuse, misapplication or embezzlement of motel funds, or words of similar import, were subject to the defense of truth and were within the area of qualified privilege." (R-18).

ARGUMENT

POINT I

THE COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DISMISSAL OF PLAINTIFF'S FOURTH CAUSE OF ACTION, AS THERE REMAINED GENUINE ISSUES OF MATERIAL FACTS AND THE DEFENDANT WAS NOT ENTITLED TO A JUDGMENT AS A MATTER OF LAW.

Plaintiff will limit the points of argument in this brief to the error as claimed in point two (2) of plaintiff's statement of points.

The sole issue before this court is whether the lower court was justified in its finding that no material questions of fact existed and that the defendant was entitled to judgment as a matter of law. The District Court expressly held that "Any statements made by defendant to third parties were subject to the defense of truth and were within the area of qualified privilege." (R-18).

It is the plaintiff's contention that the lower court, in finding "truth" as an affirmative defense, had no basis for its finding that the plaintiff had embezzled motel monies. Embezzlement is generally defined as the fraudulent or felonious conversion of property which has rightfully come into the possession of the converter. (*State v. Taylor*, 14 U. 2d 107, 378 P. 2d.

352.) What evidence was available to the court when it made its finding? The defendant filed an affidavit with attached exhibits and a statement from ARTHUR F. CAMPBELL, in support of his motion for summary judgment. (R-13). In addition to the above, the court had before it the pleadings, interrogatories and requests for admissions. I submit that there are no admissions of fact, either in the answers to defendants' interrogatories (R-7) or the answers to defendants' requests for admissions, upon which the lower court's ruling can be justified. Upon what basis then did the court find in defendants' favor?

From the record, it would appear that the lower court accepted as true the self serving statements of PATTERSON as contained in his affidavit and the attached exhibits. (R-13). In doing so, the lower court must have disregarded the plaintiff's counter-affidavit. (R-17). Should not the District Court have viewed the plaintiff's affidavit in the more favorable light? Had it done so, the defendant's motion for summary judgment would have been denied because the question of embezzlement would thus have been put at issue.

This court has often stated that the remedy of summary judgment is a harsh remedy and has often expressed a reluctance to affirm the granting of such a motion. (*Strand v. Mayne*, 14 U. 2d 355, 384 P. 2d. 396, and *Frederick May & Co. v. Dunn*, 13 U. 2d. 40, 368 P. 2d 266).

In the case of *Tangren v. Ingalls*, 12 U. 2d. 388,

367 P. 2d 179, and cases there cited, this court discussed the granting of a summary judgment using the following language found at p. 185:

“The privilege of presenting evidence should be denied only when, taking the view most favorable to the party’s claims, he could not in any event establish a right to redress under the law; and unless it clearly so appears, that doubt should be resolved in favor of permitting him to go to trial.”

Further, this court, in the *Frederick May & Co.* case, (supra), although upholding the lower court’s summary judgment, nonetheless suggested that it would have been more wise for the trial court to have denied the Summary Judgment where complicated legal questions were presented and to have determined the issue of fact by trial. The reason this court gave for the above suggestion was that if such procedure had been followed then this court could review the evidence in a light most favorable to the trial court’s finding. While on appeal from a summary judgment the court would be required to review the evidence in the light most favorable to the losing party. Based upon the foregoing this court must now review the evidence presented to the lower court in the most favorable light for the plaintiff.

It was the plaintiff’s contention, as evidenced by his affidavit, that PATTERSON was informed of all actions taken by the plaintiff in the management of the motel in question. (R-17). This would include the transactions referred to in defendants’ affidavits and

those evidenced by the exhibits attached thereto. (R-11). There was no attempt on the plaintiff's part to embezzle money belonging to the motel and there is no uncontroverted evidence in the record to substantiate such a claim. Thus, the question of embezzlement should have been determined by the trier of fact.

On the question of the court's finding of a qualified privilege, this language found in 33 Am. Jur. "Libel and Slander", Section 126, page 124, is pertinent:

"The essential elements of a conditionally privileged communication may accordingly be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only."

There is nothing in the record of this case which would justify the court's finding of the existence of a qualified privilege. The elements of a conditionally privileged communication, as mentioned above, might conceivably be found to exist in the statement of ARTHUR F. CAMPBELL. However, any such finding would necessarily be limited in scope to the publication made by PATTERSON to ARTHUR F. CAMPBELL and would not extend to any other parties to whom defamatory statements were published. Further, assuming that the lower court could find the elements necessary for the existence of a qualified privilege the plaintiff by alleging "malice" places in issue the question of defendants' "good faith". Here again

the court is faced with a genuine issue of fact which must be determined by jury.

CONCLUSION

It is respectfully submitted that the trial court erred in granting the motion of the defendant, CLYDE C PATTERSON, for summary judgment and that the court's order should be reversed and the case remanded to the District Court for trial on the issues of truth and conditional privilege.

Respectfully submitted,

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