1983

Shelia Ann Cox, Susan Keller And Susan Smith v. Orrin Hatch, Union Members For Hatch Committee, Friends For Orrin Hatch Committee, Hatch Election Committee, Michael Leavitt And John Does I-X : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

SHELIA ANN COX, SUSAN KELLER and SUSAN SMITH,

Plaintiffs-Appellant,

vs.

ORRIN HATCH, UNION MEMBERS FOR HATCH COMMITTEE, FRIENDS FOR ORRIN HATCH COMMITTEE, HATCH ELECTION COMMITTEE, MICHAEL LEAVITT and JOHN DOES I-X,

Defendants-Respondent.

Case No. 19257

BRIEF OF APPELLANT

AN APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
HONORABLE TIMOTHY R. HANSEN, DISTRICT JUDGE

A. HOWARD LUNDGREN
ANDREA C. ALCABE
The Judge Building #313
No. 8 East Broadway
Salt Lake City, UT 84111

BRIAN M. BARNARD
DEBRA J. MOORE
214 East Fifth South
Salt Lake City, UT 84111
Attorneys for Plaintiff-Appellants

ROBERT S. CAMPBELL, JR.
RICHARD B. FERRARI
CORY H. MAXWELL
WATKISS & CAMPBELL
310 South Main Street, Suite 1200
Salt Lake City, UT 84101
Attorneys for Defendants-Respondents Orrin Hatch and Michael Leavitt

IN THE SUPREME COURT OF THE STATE OF UTAH

SHELIA ANN COX, SUSAN KELLER and SUSAN SMITH,

Plaintiffs-Appellant,

vs.

ORRIN HATCH, UNION MEMBERS FOR HATCH COMMITTEE, FRIENDS FOR ORRIN HATCH COMMITTEE, HATCH ELECTION COMMITTEE, MICHAEL LEAVITT and JOHN DOES I-X,

Defendants-Respondent.

Case No. 19257

BRIEF OF APPELLANT

AN APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
HONORABLE TIMOTHY R. HANSEN, DISTRICT JUDGE

A. HOWARD LUNDGREN
ANDREA C. ALCABE
The Judge Building #313
No. 8 East Broadway
Salt Lake City, UT 84111

BRIAN M. BARNARD
DEBRA J. MOORE
214 East Fifth South
Salt Lake City, UT 84111
Attorneys for Plaintiff-Appellants

ROBERT S. CAMPBELL, JR.
RICHARD B. FERRARI
CORY H. MAXWELL
WATKISS & CAMPBELL
310 South Main Street, Suite 1200
Salt Lake City, UT 84101
Attorneys for Defendants-Respondents Orrin Hatch and Michael Leavitt

TABLE OF CONTENTS

AUTHORITIES CITED

CASES — PAGE

CONSTITUTION

STATUTES

RULES

IN THE SUPREME COURT OF THE STATE OF UTAH

SHELIA ANN COX, SUSAN KELLER and SUSAN SMITH,
Plaintiffs-Appellant,

vs.

ORRIN HATCH, UNION MEMBERS FOR HATCH COMMITTEE, FRIENDS FOR ORRIN HATCH COMMITTEE, HATCH ELECTION COMMITTEE, MICHAEL LEAVITT and JOHN DOES I-X,
Defendants-Respondent.

Case No. 19257

BRIEF OF APPELLANT

NATURE OF CASE

This is an action for injunctive relief and damages based upon a statutory claim for abuse of personal identity pursuant to §45-3-1 et seq. Utah Code Annotated (1953 as amended) and tort claims for defamation and invasion of privacy. (R.13-18)

DISPOSITION OF LOWER COURT

This matter came before the Third District Court for Salt Lake County, the Honorable Timothy R. Hanson, District Judge presiding, on defendants' Motion to Dismiss on March 28, 1983 at 2:00 p.m. (R.49). The Court heard the arguments of counsel for the respective parties and took the

matter under advisement to consider the memorandum filed by the parties and to further consider the entire file. On April 5, 1983 the Court entered its memorandum decision that "the Defendants' Motion to Dismiss should be granted on constitutional grounds alone and the claims for abuse of identity, defamation or invasion of privacy espoused by the plaintiff need not be addressed." (R.84-86) On April 19, 1983, the District Court entered its final order of dismissal with prejudice as against Michael Leavitt and Orrin Hatch. (R.101-103) It is from this order that appellants appeal.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the order entered by the Third District Court for Salt Lake County, Honorable Timothy R. Hansen, presiding, dismissing plaintiffs' complaint with prejudice and request an order of remand to the District Court for a full trial on the merits.

STATEMENT OF FACTS

Appellants are employees of the United States Postal Service, employed at the Main Salt Lake City Post Office, located at 2100 South Redwood Road. They are and were members of the American Postal Workers Union. (R.13) On or about Labor Day, September 6, 1982, respondent Orrin Hatch, along with his agents, came to the appellants' place

of employment for the purpose of taking photographs to be used in the political campaign for re-election to the United State Senate of respondent Hatch. (R.14) A photograph was taken of appellants standing near respondent Hatch. (R.14, 45, 53, 54, 90) This photograph was subsequently printed in a newspaper-like advertisement entitled, SENATOR ORRIN HATCH LABOR LETTER, UNION MEMBERS FOR HATCH COMMITTEE. (R.45) This publication was authorized and paid for by the Friends of Orrin Hatch Committee and was authorized by the Hatch election committee and the respondents. Appellants' photograph was used in this publication without their consent or authorization. The use of this photograph in the political advertisement described above, implied that appellants approved or endorsed the re-election of respondent Hatch. Appellants have never endorsed the re-election of Hatch. Further, as employees of the federal government, they are specifically precluded by federal law from publically approving or endorsing any political candidate or actively participating in a political campaign. (R.16) The appellants were harmed as a result of the conduct of the respondents.

Subsequent to the publication of the appellants' photograph in respondents' advertisement, appellants were investigated by their employers and supervisors and their union regarding the extent of their involvement and participation in Hatch's campaign.

ARGUMENT

POINT I

THE COURT ERRED IN DISMISSING APPELLANTS' AMENDED COMPLAINT IN THAT THE USE OF APPELLANTS' PHOTOGRAPH IS NOT CONSTITUTIONALLY PROTECTED SPEECH OR EXPRESSION

It is well settled that the First Amendment freedom of expression is not absolute.

> It is clear that there is no "absolute" right to freedom of expression. The government may impose certain limitations on even clearly First Amendment conduct; regulation of time, place and manner, for example, is permissible. U.S. vs. Baranski, 484 Fed. 2d 556, 569 (1973).

The fact that some government restrictions placed upon freedom of expression create a "chilling effect" in the exercise of these rights is not sufficient to prohibit this regulation. In Younger vs. Harris, 401 U.S. 37, 51; 77 L. Ed. 2d 669; 91 S. Ct. 746 (1971) The Supreme Court stated:

> . . . the existence of a "chilling effect," even in the area of First Amendment Rights, has never been considered a sufficient basis, in and of itself, for prohibiting State action. Where a statute does not directly abridge free speech, but - while regulating a subject within the State's power - tends to have the incidental effect of inhibiting First Amendment Rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and a lack of alternative means for doing so.

In this case, respondents Hatch and Leavitt prepared a political advertisement for the purpose of obtaining support and endorsement for Hatch's re-election to the United States

Senate. This is clear from the nature of the advertisement. (R.45) The Court will note that on the last page of this publication a return mail "reply" card is included. In this reply, respondents specifically solicit endorsements and request a signed consent under the statement "Yes", I will endorse Senator Hatch for re-election and allow my name to be used in advertisements." [emphasis added](R.45) Clearly, respondents knew that consent was required for the use of one's name as a portion of an advertisement endorsing Hatch's reelection effort.

Utah Code Annotated §45-3-3 (1953, as amended) defines abuse of personal identity as follows:

> The personal identity of an individual is abused if: (1) an advertisement is published in which the personal identity of that individual is used in a manner which expresses or implies that the individual approves, endorses, has endorsed or will endorse the specific subject matter of the advertisement; and (2) consent has not been obtained for such from the individual, . . .

Respondents contend that this statute is a unconstitutional restriction on their right to free expression. This, notwithstanding their attempts to obtain this required consent from other potential endorsers. In the instant case, appellants were never asked if they would permit their photograph with the Senator to be used in an advertisement. They were never informed that this photograph would be so used by the respondents. They were not even extended the

opportunity to make the choice as to the use of their likeness or identity in this photograph and by the respondents To the contrary, respondents made this choice for the appellants

Clearly the legislative intent in the adoption of the abuse of personal identity statute was to provide an individual a choice as to whether or not he or she will allow their likeness or their name to be used in an advertisement endorsing some subject matter. The provisions of this statute show that the legislature intended to avoid such wrongful use by requiring consent to be obtained prior to the use of one's identity in an advertisement. This statute is a reasonable restriction on the manner of expression. As the Supreme Court stated in Younger vs. Harris, supra,

> Just as the incidental "chilling effect" of such statutes does not automatically render them unconstitutional, so the chilling effect admittedly can result from the very existence of certain laws on the statute books does not in itself justify prohibiting the state from carrying out the important and necessary task of enforcing these laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and the constitution.

In the case at bar, the statute is one of general applicability. It in no way restricts or regulates the content of any expression. The Utah abuse of personal identity statute requires only that prior to the use of one's likeness or name in a context which implies an endorsement, the speaker or publisher must obtain consent from the putative

endorser so as to avoid deceptive or unfair endorsement in advertising.

> It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed. The Court has emphasized that "The publisher of a newspaper has no special immunity from the application of general laws. He has no special privileges to invade the rights of others. [Emphasis added] Branzburg vs. Hayes 408 U.S. 665, 683; 33 L. Ed. 2d 626, 640; 92 S. Ct. 2646 (1972) citing Associated Press vs. NLRB, 301 U.S. 103, 132-133; 81 L. Ed. 953, 961; 57 S. Ct. 650 (1937)

The respondents in this case should be allowed no greater protection than the organized press or any other citizen. The Utah legislature has specifically adopted methods by which an advertiser, be he a political advertiser or otherwise, may obtain and utilize the endorsements of others. This legislative purpose is clearly meant to avoid the invasion of the rights of others.

> The prevailing view is that the press is not free to publish with immunity everything and anything it desires to publish. Branzburg v. Hayes, supra.

The appellants submit that respondents' failure to comply with the provisions of §45-3-1 et seq Utah Code Annotated (1953 as amended) is not justified based upon their allegations that the unconsented use of the photograph of the appellants is "political speech" and is therefore

unconditionally protected by the First Amendment to the United States Constitution. It is clear that some restrictions, even in the area of "political speech," are valid.

> The guarantees of the first amendment have never meant "that people who want to propagandize protests or views have a constitutional right to do so wherever, however and whenever they please." Greer vs. Spock, 424 U.S. 828, 836; 47 L. Ed. 2d 505, 513; 96 S. Ct. 1211 (1976) citing Adderly vs. Florida, 385 U.S. 39, 48; 17 L. Ed. 2d 149; 87 S. Ct. 242.

In this case respondents apparently determined that Senator Hatch's views on labor and unions needed to be propagandized in his effort to obtain support from Utah union members in his bid for re-election. This decision alone, in the context of a re-election, does not extend any constitutional right to propagandize Senator Hatch's views, whenever, however and wherever he or his campaign staff choose.

> . . . the essence of time, place or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals. Consolidated Edison vs. Public Services Commission, 447 U.S. 530, 535; 65 L. Ed. 2d 319, 326; 100 S. Ct. 2326 (1980)

U.C.A. §45-3-1 et seq. (1953 as amended) is a reasonable restriction on the manner of expression one may employ in advertisements. This statute does not limit the type of advertisement to which it applies. It does not restrict what one may advertise but rather how one may advertise. Therefore, the restriction is a reasonable one of time, place

and manner and should not be overruled on the basis of respondents' claimed constitutionally protected speech.

POINT II

FIRST AMENDMENT PRIVILEGES ARE NOT APPLICABLE IN THIS MATTER

First Amendment guarantees of open exchanges of ideas and robust discussion of issues during a political campaign are not applicable to this case.

The United States Supreme Court in a series of cases beginning with New York Times Co. vs. Sullivan, 376 U.S. 254 (1964), established that certain defamatory publications were protected by First Amendment and Fourteenth Amendment guarantees of freedom of speech and of the press in libel actions brought by public officials against critics of their official conduct. In such libel actions, the Supreme Court held that public officials were prohibited from recovering damages for defamation relating to official conduct unless it was proven that the statement was made with "actual malice." In the cases of Curtis Publishing Co. vs. Butts, 388 U.S. 130 (1967) and Associated Press vs. Walker, 388 U.S. 130 (1967) the Court extended the New York Times standard to publications concerning "public figures."

In Monitor Patriot Co. vs. Roy, 401 U.S. 265 (1971), the New York Times standard was extended to apply to candidates for public office as well as public officials.

The Court stated:

> And if it be conceded that the First Amendment was "fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people" . . . then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.

Id. at 272.

The Court went on to say:

> The considerations that led us to reformulate the "official conduct" rule of New York Times in terms of "anything which might touch on official fitness for office" apply with special force to the case of the candidate. Indeed, whatever vitality the "official conduct" concept may retain with regard to occupants of public office, . . . it is clearly of little applicability in the context of an election campaign. The principle activity of a candidate in our political system, his "office," so to speak, consists in putting before the voters every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him.

Id. at 274.

The Court has, however, rejected extention of the constitutional privilege to include publications concerning any "public issue" regardless of the defamed party's status in Gertz vs. Welch, 418 U.S. 323 (1974). There, the Court discussed the factors which distinguish the state interest in compensating private individuals for defamatory statements from the analogous interest involved in the context of public persons.

> Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more

> realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater. . . more important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. Society's interest in the officers in government is not strictly limited to formal discharge of duties. . . . Those classed as public figures stand in similar positions.

Id.

The Court went on to say that instances of involuntary public figures would be exceedingly rare and that:

> for the most part, those who attain this status have assumed roles of special prominence in the affairs of society. Some occupied positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment . . .[A private individual] has not accepted public office or assumed an "individual role in ordering society" . . . he has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the Court for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures, they are also more deserving of recovery.

Id. at 345.

The use of plaintiffs' photograph by the respondents is not within the coverage of the constitutional privilege

elaborated by the United States Supreme Court. Plaintiffs are private individuals, not public officials or public figures. They are not candidates for political office or those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolutions of the issues involved." In fact, as postal employees, they are prohibited by the Hatch Act from actively participating in political campaigns. The misuse of their photograph in respondents campaign advertising is not a part of any political discussion on "vital public issues." Such protection would be given to Orrin Hatch making statements as to his opponent's political beliefs and policies; no such protection should be given to Orrin Hatch publically and falsely saying that he is endorsed by three ordinary members of the public, the plaintiffs in this action. The respondents' conduct in falsely implying endorsement of Orrin Hatch by the plaintiffs is not entitled to any constitutional privilege.

CONCLUSION

The provisions of Utah Code Annotated §45-3-1 et seq. (1953 as amended) are reasonable restrictions as to time, place and manner of advertising; those provisions are permissible restriction upon free speech even of a political nature. The respondents violated the Abuse of Personal Identity Act and are not entitled to claim immunity from that statutory provision simply because they were involved in a political campaign.

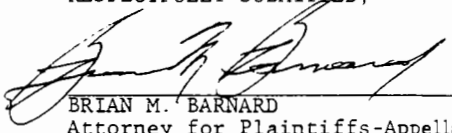
The plaintiffs-appellants as members of the public, and not public figures, are entitled to the protections of the laws regarding defamation and invasion of privacy. Orrin Hatch in a political campaign has no right to falsely imply that the plaintiffs, union members, endorse his re-election, and thereby jeoparize their employment and harm their reputations. Free speech in the context of a political campaign protects the expression and debate about the candidates and about the issues; free speech does not allow a candidate to falsely imply that three ordinary members of the public support and endorse the re-election of Orrin Hatch. The Court below did not examine the merits of this action but dismissed the plaintiffs' amended complaint under Rule 12(b)(6) of the Utah Rules of Civil Procedure with a ruling that the United States Constitution allows a political candidate to defame the reputation,

invade the privacy and abuse the identity of ordinary citizens with immunity in a political campaign. Such a conclusion is not supported by the decisions of the United States Supreme Court nor by the clear intent of the Utah State Legislature to reasonably regulate the time, place and manner of advertising.

The decision of the Court below should be reversed and this matter remanded for a full trial on the merits.

DATED this 5th day of October, 1983.

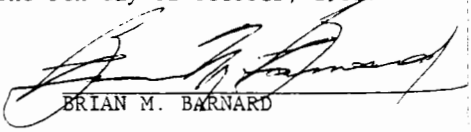
RESPECTFULLY SUBMITTED,



BRIAN M. BARNARD
Attorney for Plaintiffs-Appellants
214 East Fifth South
Salt Lake City, UT 84111

CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) true and correct copies of the foregoing to Robert S. Campbell, Jr. of WATKISS & CAMPBELL, 310 South Main Street, Suite 1200, Salt Lake City, Utah 84101, postage prepaid in the United States Postal Service on the 5th day of October, 1983.



BRIAN M. BARNARD