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Glennard M. Hollins v. The Reliance Insurance Co. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

GLENNARD M. HOLLINS,
Plaintiff and Appellant

VS

THE RELIANCE INSURANCE
COMPANY, a corporation,
Defendant and Respondent.

FILED
JUL 14 1964

Supreme Court, Utah

Case No.
10168

RESPONDENT'S BRIEF

Appeal from the Judgment of the Third District Court
for Salt Lake County
Honorable Aldon J. Anderson, Jr., Judge

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GLENNARD M. HOLLINS,

Plaintiff and Appellant,

vs

Case No.
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THE RELIANCE INSURANCE
COMPANY, a corporation,

Defendant and Respondent.

RESPONDENT'S BRIEF

STATEMENT OF KIND OF CASE

This purports to be an action in defamation against The Reliance Insurance Company, which had brought an action against its indemnitor (Hollins, plaintiff below), to recover losses sustained by it (The Reliance Insurance Company), as a result of writing an automobile dealer's bond in compliance with the Utah Motor Vehicle Dealer's Act.

DISPOSITION IN LOWER COURT

On motion of defendant and respondent the complaint was dismissed for failure to state a claim upon which relief could be granted.

RELIEF SOUGHT ON APPEAL

Defendant and respondent seeks an affirmance of the judgment below.

THE FACTS

This case is a companion to the case of *The Reliance Insurance Company vs. Glennard M. Hollins*, No. 10087, and grows out of the earlier case. However, the two cases have not been consolidated on appeal, and The Reliance Insurance Company (hereinafter called Reliance), is represented by separate counsel in each case. The only facts before the court in the instant case are those contained in the plaintiff's complaint, which is quite lengthy, and with its various attachments, runs to 21 pages. (R. 1-21). The essential facts, as set forth in the plaintiff's complaint, in chronological order, are as follows:

1. On the 14th day of June, 1964, plaintiff Hollins, on behalf of Hollins, Inc., made application for a Motor Vehicle Dealer's Bond as required by the Motor Vehicle Dealer's Act of the State of Utah. (R. 1, 19). The application *signed by Hollins* contained the following language:

"The undersigned further agrees to reimburse and save harmless and indemnify the Company for, from, and against any and all loss, damage or expense that it shall or may at any time sustain, incur, or become liable for by reason of or on account of its having executed the said bond or any extension, amendment, or re-

newal of said bond, or a new bond as a continuation thereof or a substitute therefor or in conjunction therewith; also for, from, and against any and all costs and expenses that may be incurred by the Company in investigating any claim made thereunder, or in or about prosecuting or defending any action, suit, or other proceedings that may be commenced or prosecuted by or against the undersigned, his or their heirs, executors, administrators, successors, or assigns, or against the Company, upon the said bond or otherwise in relation thereto." (R. 19)

2. Pursuant to said application a bond was issued by defendant July 6, 1954. (R. 1). Thereafter, the General Credit Company filed an action against The Reliance Insurance Company on the aforesaid bond, claiming violations by the principal on the bond (Hollins, Inc.), of the provisions of the Motor Vehicle Dealer's Act, and in particular, of failure on the part of the principal to deliver title certificates to two separate purchasers of automobiles. (R. 2). The file before this court does not contain the complaint or other pleadings in the General Credit case. However, the judgment in that case (in favor of Reliance) is attached to the complaint as an exhibit. (R. 11). The trial court specifically found in that case that both of the sale transactions were made by defendant's principal with full knowledge of the General Credit Company; that General Credit Company held in its possession the certificates of title to the automobiles and refused to deliver them to the purchasers, although it had knowledge of, and had approved of the proposed sales. (R. 12-13). The court further specifically

found, "That *as to the plaintiff*, [The General Credit Company] Glen Hollins, Inc., did not violate the provisions of Sec. 41-1-65, U.C.A. 1953, and *as to the plaintiff* did not violate the provisions of Sec. 41-3-23(d), U.C.A. 1953. (Emphasis Ours). (R. 13). The court also found that defendant's principal had not delivered title certificates to the purchasers. (R. 13).

3. Thereafter, Reliance commenced an action against Hollins, its indemnitor, to recover damages which it had sustained in settling claims of the purchasers hereinbefore mentioned, (who were not parties to the earlier action) and in defending the action commenced by The General Credit Company. (R. 14, et seq.). The allegations of the complaint in that case are entirely consistent with the findings of the court in the General Credit Company case. In the case of Reliance vs. Hollins, it was alleged in the complaint that Hollins was unable to deliver title to the purchasers, and that by reason thereof, Reliance became obliged to pay damages to the purchasers of the automobiles, and incurred attorneys' fees in defending said claims. While the complaint in that case may have been technically defective in alleging that Hollins individually could not make delivery rather than that the corporation, Hollins, Inc., could not make delivery, this was a technical defect only. Clearly Reliance was proceeding against Hollins on his indemnity agreement above mentioned. Even though he was individually free of fault or breach of statutory duty, he was contractually obligated to Reliance to hold it harmless. (R. 14-15).

4. The action brought by Reliance against Hollins was dismissed for reasons which do not clearly appear in the record. The judgment of dismissal does not set forth any reason for the court's ruling, but merely recites that the matter was argued to the court and that the court was fully advised in the premises. (R. 21).

5. Following dismissal of the case brought by Reliance against Hollins, and after it had initiated appeal proceedings, Hollins commenced this action against Reliance apparently on the theory of defamation. (R. 1, et seq.) There are many allegations in the complaint, the office of which we do not understand. For example there are many allegations suggesting that the attorneys who represented Reliance Insurance Company in the General Credit Company case were also acting as personal attorneys for Hollins. There is at least some inference or innuendo of breach of ethical conduct on their part. However, Hollins was not a party to the original action brought by General Credit Company. He did, however, cooperate with Reliance in the successful defense of that action. It was very much to his advantage to do so, since he would have been personally liable for any loss sustained by Reliance. However, the fact that he cooperated with the attorneys defending Reliance in that action did not create a relationship of attorney and client between the attorneys and himself. On the contrary, he well knew that said attorneys were engaged by Reliance, and were representing its interests.

6. Reliance attacked plaintiff's complaint by various motions, including a motion to dismiss for failure to

state a claim upon which relief could be granted. (R. 24-30). After oral argument, the motion to dismiss was granted, and plaintiff's case was dismissed. (R. 32). This appeal followed. (R. 31).

Based upon statements of counsel for the appellant in argument on the motion to dismiss in the lower court, and upon the argument set forth in his brief before this court, it appears that he considers this to be a case of defamation, and we therefore address our argument to that theory.

ARGUMENT

It may be noted at the outset that plaintiff's claim is based entirely upon the ruling of the court below in the case of *Reliance Insurance Company vs. Hollins*. If this court reverses that judgment, as we believe that it should, it necessarily follows that the judgment in the present action should be affirmed. However, even if it is determined that the appeal in Case No. 10087 is without merit, we believe that the judgment below in the instant case must be affirmed.

As we have pointed out in our Statement of Facts, the allegations of the complaint in the case of *Reliance Insurance Company vs. Hollins* are really not defamatory, even if they were not privileged. In that case the plaintiff merely alleged a failure on the part of Hollins to deliver title certificates to purchasers of automobiles from Hollins, Inc. This is no more demafatory than an allegation in a personal injury suit that defendant vio-

lated a statute or ordinance for the control of automobile traffic. The complaint is at worst, only technically defective, in alleging that the failure was that of Hollins personally rather than his corporation. There is no question, however, that the title certificates were not delivered, and Reliance, in good faith, claimed a loss by reason of the execution of its bond as a result thereof. However, even if the mistaken identification of Hollins individually, as the party who precipitated the loss, could be termed defamatory under other circumstances, as an allegation in the complaint it was absolutely privileged. The general rule of privilege as it pertains to litigants, is set forth in *Restatement of Torts*, Sec. 587, as follows:

"A party to a private litigation or a private prosecutor or defendant in a criminal prosecution 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."
(Emphasis Ours.)

In Comment *a* thereunder, the rule is further expounded as follows:

"The privilege stated in this Section is based upon the public interest in according to all men 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.* It protects a party to a private litigation or a private prosecutor in a criminal prosecution from

liability for defamation irrespective of his purpose in publishing the defamatory matter, of his belief in its truth or even his knowledge of its falsity. * * *” (Emphasis Ours.)

And in Comment *b* thereunder, the reporter states as follows:

“The rule stated in this Section is applicable to protect parties to any action before a judicial tribunal. It is immaterial whether the action is criminal or civil in character.”

See also Comment *d*:

“The rule stated in this Section affords to a party to litigation the same protection from liability for defamatory statements *made in his pleadings* as that accorded to an attorney under the rule stated in § 586.” (Emphasis Ours.)

The rule is the same with regard to attorneys. See *Restatement of Torts*, Sec. 586, and Comment *a* thereunder:

“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 a 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 a 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 defa-

mation irrespective of his purpose in publishing the defamatory matter, his belief in its truth or even his knowledge of its falsity. * * * The institution of a judicial proceeding *includes all pleadings* and affidavits necessary to set the judicial machinery in motion." (Emphasis ours.)

To the same effect see *Prosser on Torts*, 2d Ed. Sec. 95 page 606, et seq.:

"The defendant may be privileged to publish defamation for the protection or furtherance of a public or private interest recognized by the law as entitled to such protection. Privileged utterances fall into two classes:

"a. Those absolutely immune from responsibility, without regard to the defendant's purpose or motive, or the reasonableness of his conduct. These include:

"(1) Judicial proceedings.

* * *

"Absolute immunity has been confined to a very few situations where there is an obvious policy in favor of permitting complete freedom of expression, without any inquiry as to the defendant's motives. By general agreement, it is limited to the following situations:

"1. Judicial Proceedings. The judge on the bench must be free to administer the law under the protection of the law; independently and freely, without fear of consequences. No such independence could exist if he were in daily apprehension of having an action brought against him, and his administration of justice submitted to the opinion of a jury.

* * *

"For the same reason, a similar absolute immunity is conferred upon grand and petit jurors

in the performance of their functions, upon witnesses, whether they testify voluntarily or not, and upon counsel in the conduct of the case. Likewise, since there is an obvious public interest in affording to everyone the utmost freedom of access to the courts, *the immunity extends to the parties to private litigation*, as well as to defendants and instigators of prosecution in criminal cases, as to anything that may be said in relation to the matter at issue, whether it be in the pleadings, in affidavits, or in open court." (Emphasis ours.)

See also *1 Harper & James on the Law of Torts*, Sec. 5.22:

"‘Neither *party*, witness, counsel, jury or judge,’ said Lord Mansfield, ‘can be put to answer civilly or criminally for words spoken in offices.’" (Emphasis ours.)

And further:

"Counsel, of course, are also protected by the absolute privilege. Attorneys are officers of the court, and as such, have an obligation to society as well as to their clients. It is essential that they be free to act on their best judgment, without fear of answering in a civil action for defamation for anything said in the course of judicial proceedings in which they participate. *The protection extends to statements made in pleadings, affidavits or in open court.*" (Emphasis ours.)

To the same effect also see *33 Am. Jur.*, Libel and Slander, 1964 Cumulative Supplement, page 22:

"The doctrine of absolute privilege is based upon the principle of good public policy, in that

the interests and necessities of society require that on certain occasion utterances or publications of individuals, even though they are both false and maliciously made, shall protect the defamer from all liability to prosecution. * * *

A good judicial discussion is found in *Johnson vs. Schlarb*, (Wash.), 110 P.2d 190, where the court said:

"In determining whether or not matter spoken in the conduct of an action or contained in the pleadings is privileged, the test is not — is it legally relevant? But — Does it have reference and relation to the subject matter of the action? We quote from *Sacks v. Stecker*, 60 F.2d 73, 75, decided by the Federal Second Circuit Court of Appeals in 1932: 'By an almost unbroken line of authority in this country and England, *a party who files a pleading or affidavit in a judicial proceeding has absolute immunity*, though his statements are defamatory and malicious, if they relate to the subject of inquiry. * * *' (Emphasis ours.)

The court then went on to quote the Mansfield quotation which we have quoted from Harper & James, and the Restatement rules above quoted.

The foregoing rules have been codified in this state, and have received judicial recognition by this court. Sec. 45-2-3, U.C.A. 1953, provides, insofar as material here, as follows:

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

* * *

"(2) In any publication of or any statement made in any legislative or judicial proceeding, or

in any other official proceeding authorized by law."

In the recent case of *Carter v. Jackson*, 10 Ut. 2d, 284, 351 P.2d 957, this court said:

"There are two classes of privileged communications, absolute and qualified or conditional. In the case of absolutely privileged communications the utterance or publication, although both false and malicious, does not give rise to a cause of action. * * *

"Subsections (1) and (2) of 45-2-3, U.C.A. 1953, define the communications that are *absolutely* privileged. * * *" (Emphasis ours.)

See also the earlier case of *Williams vs. Standard Examiner Pub. Co., et al.*, 83 Utah 31, 27 P.2d 1, where this court said:

"In the case of absolutely privileged communications the utterances or publication, although both false and malicious, does not give rise to a cause of action."

CONCLUSION

The allegations of the complaint in *The Reliance Insurance Company v. Hollins*, are not defamatory and therefore are not actionable. Even if said allegations were otherwise defamatory they are absolutely privileged under both the statute and decisional law of this state. The judgment of dismissal should be affirmed.

Respectfully submitted,

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