1972

Fred Demman, Jr. v. Star Broadcasting Co. And Larry Wilcox : Brief of Plaintiffs-Appellants

IN THE SUPREME COURT
of the
STATE OF UTAH

FRED DEMMAN, JR.,
Plaintiff-Appellant,

—vs.—

STAR BROADCASTING CO., and LARRY WILCOX,
Defendants-Respondents.

Case No. 12729

BRIEF OF PLAINTIFFS-APPELLANTS

Appeal from the Summary Judgment of the District Court for Salt Lake County, State of Utah
Honorable Stewart M. Hanson, District Judge

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

Page

CASES CITED

TABLE OF CONTENTS — Continued

Page

STATUTES CITED

AUTHORITIES CITED:

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APPELLANT'S BRIEF

Appeal from the Summary Judgment of the District Court for Salt Lake County, State of Utah, Honorable Stewart M. Hansen, District Judge.

NATURE OF THE CASE

This is a libel and slander case.

DISPOSITION IN LOWER COURT

Defendants received summary judgment.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the lower court summary judgment and a remand for trial.

STATEMENT OF FACTS

1. Defendant Larry Wilcox was a radio announcer with KSXX which is a radio station of defendant Star Broadcasting Company.

2. KSXX broadcasts telephone conversations between members of the public and the radio announcer.

3. There is a delay between the time a caller engages in conversation with the announcer and the time when said conversation is broadcast. The delay is for the purpose of allowing the announcer time to prevent the broadcasting and publication of defamatory statements by pushing a reject button.

4. Plaintiff was a candidate for Commissioner on the Salt Lake City Commission.

5. On the day of election, defendant Larry Wilcox allowed the broadcasting of statements to the effect that:

> The plaintiff was a procurer of fallen women, was engaged in a practice of violating State Liquor laws, and was a member of the "underworld."

6. For purposes of the motion for summary judgment and this appeal these statements were admitted to be broadcast and were admitted to be intentionally broadcast and were admitted to be false.

ARGUMENT

POINT I

PLAINTIFF IS ENTITLED TO A JURY TRIAL AS THERE IS AN ISSUE OF FACT AS TO WHETHER THE DEFENDANTS ACTED WITH MALICE.

The law of libel and slander has seen much development in the last decade. At common law it was sufficient to impose liability if the defendant intentionally uttered or published a false statement concerning the plaintiff. See *Prosser, Torts*, 572-578 (2d ed). For purposes of the motion for summary judgment and this appeal the defendant admitted the common law elements of defamation —intentional publication of a false statement concerning the plaintiff.

With respect to persons characterized as "in the public light" common law elements are no longer sufficient.

There must be a showing of malice. See *N.Y. Times Co. v. Sullivan,* 376 U.S. 254, 11 L. Ed. 2d, 686, 84 Sup. Ct. 710, 95 *ALR* 2d, 1412; *Garrison v. Louisiana,* 379 U.S. 64, 13 L. Ed. 2d, 125 85 Sup. Ct. 209 (1964); *Beckley Newspaper Corp. v. Hanks,* 389 U.S. 81, 19 L. Ed. 2d 248, 88 S. Ct. 197 (1967); *Green Belt Cooperative Publishing Association v. Brestler,* 398 U.S. 6, 26 L. Ed. 2d, 6, 90 Sup. Ct. 1537 (1970); *Monitor Patriot Co., et al. v. Roy,* ..... U.S. ....., 28 L. Ed. 2d, 35, 91 Sup. Ct. 621, 39 Law Week 4264 (1971); *Ocala Star-Banner Co. et al. v. Damron,* ..... U.S. ....., 28 L. Ed. 2d, 57, 91 Sup. Ct. 628 39 L.W. 4268 (1971); *Time, Inc. v. Pate,* 397 U.S. 1062, 28 L. Ed. 2d, ... 91 Sup. Ct. 633, 39 L.W. 4270 (1971). No longer is malice defined as a feeling of ill-will, nor will malice be inferred from the contents of the publication as at common law. See 50 Am. Jur. 2d, 978-980, *Libel and Slander* Section 454. Under present Supreme Court cases, malice can only be shown by the publication of a false statement with knowledge of its falsity or with reckless disregard of the truth. *Garrison v. Louisiana, supra; Beckley Newspaper Corp. v. Hanks, supra; Green Belt Cooperative Publishing Association v. Brestler, supra; Monitor Patriot Co., et al. v. Roy, supra; Ocala Star-Banner Co., et al. v. Damron, supra; Time, Inc. v. Pate, supra.*

The United States Supreme Court has held that the requirement of a finding of malice is necessitated by the first amendment which guarantees freedom of speech and press, *Ibid.* However, if the publication is made with

knowledge of the falsity or with reckless disregard of the truth, the protections of the First Amendment do not apply in a civil action for libel and slander. *Beckley Newspaper Corp. v. Hanks, supra; Green Belt Cooperative Publishing Association v. Brestler, supra; Monitor Patriot Co., et al. v. Roy, supra; Ocala Star-Banner Co., et al. v. Damron, supra; Time, Inc. v. Pate, supra.*

The protection afforded speech and press was gradually extended from publications and utterances defaming public officers to all persons coming into the public light, including candidates for office. *Ibid.* The Utah statutes are in accord with the federal laws. Section 45-2-5 *Utah Code Ann.* (Repl. Vol. 1970) provides that a broadcasting station will not be liable for defamation on account of having originated or broadcast a program for discussion of controversial or other subjects in the absence of proof of actual malice on the part of the owner or operator.

In the present case, summary judgment was granted against the plainiff. Plaintiff alleged all of the common law elements prerequisite to a defamation action together with an allegation of malice. (See paragraph 8 or the complaint.) For purposes of the summary judgment motion, the defendant stipulated that they had intentionally broadcast false statements concerning the plaintiff. They argued, however, that from the record there could be no genuine issue of fact as to malice. The defendants sup-

ported this motion for summary judgment with a transcript of the broadcast itself. The trial court agreed and granted summary judgment.

There can be no question that the issue of malice is normally a jury question. *New York Times v. Sullivan, supra; Washington Post v. Keogh* 125 App. B.C. 32, 365 F.2d 965, 20 *ALR* 3d, 972. However, it is equally settled that summary judgment may be granted in a proper case where there is no issue of fact. In *Washington Post v. Keogh, supra,* a libel case, the court stated:

> A motion for summary judgment should be granted where it is shown that no genuine issue of material fact exists and that the movement is entitled to a judgment as a matter of law. In deciding whether a genuine issue of fact is raised in any case, a number of general considerations are relevant. First, the right to a trial by a jury is at stake, so courts must be ever careful to grant summary judgment only when no issue of fact is controverted or turns upon a choice between permissible inferences from undisputed evidence. See *Pierce v. Ford Motor Co.,* 4 Cir. 190 F. 2d, 910 Cert denied 342 U.S. 887, 72 Sup. Ct. 178, 96 L. Ed. 2d 666 (1951). The need for care has given rise to valid generalizations but summary judgment must be denied when there is 'doubt whether an issue of fact has been raised, and that summary judgment is not usually appropriate when the issue raised concerns a subjective state of mind.'

In the *Washington Post v. Keogh*, supra, the defendants supported their motion for summary judgment with affidavits that the defendant and their employees had taken care to read the defamatory publications and had no reason to believe or evidence causing them to suspect that the information was false. The plaintiff did not rebut the averments. The court granted summary judgment holding, "it is undisputed that no issue of fact exists here as to the publication with actual knowledge of falsity" and "inference of recklessness from publications should no more be permitted in one case than the other."

In the present case, defendants' only support for the motion for summary judgment was the transcript of the broadcast. Plaintiff argues that such transcript hardly sustains the "burden of removing actual malice from the case." See *Tagawa Publishing Co.*, 427 P. 2d 79 (Hawaii) (1968). While malice may no longer be inferred from the publication itself, see *New York Times Publishing Co. v. Sullivan, supra,* no court has held that you can infer absence of malice from the publication. That is exactly what the defendants attempted to do on the motion for summary judgment when their only support was the transcript of the broadcast.

To oppose the motion for summary judgment, plaintiff moved to publish the depositions of witnesses and parties. Plaintiff, in his depostition, avers that the de-

fendants must have known of the falsity of the broadcast, therefore, satisfying the tests of actual malice. On page 9 of plaintiff's deposition, he swore:

> It had to be planned. It had to be planned with maliciousness because it was called at 2:30 in the afternoon, the day of election. Two-thirty in the afternoon approximately was the time it was called and nobody had a chance to answer, where nobody had a chance to say anything in my defense.

And at page 19, the plaintiff stated, under oath:

> Well, of course, I think the tone of the whole conversation with Mr. Wilcox and this unknown caller defamed me. The inferences in their voices, the laughing, it was maliciously done. Nobody, but nobody will ever know the damage and what this did to my life, what it did to my wife, to my brothers that are doctors, to my brother that is a counselor at high school, to my sister-in-law who is the supervisor of all business in the school system. Nobody will ever know what it did to our family.

Again, at page 24 and 25 the examination went on:

> Q. Now, I know you rely upon the laughter in his voice and the way it was presented and the timing of some evidence of this malice. What other facts, if any, do you know of that indicate malice to you?

A. Well, why didn't he use the seven second delay if his intention wasn't to hurt me and to destroy me? There is a seven second delay factor there. He could have put the man off the air, but he let him go on. He laughed and he carried on and his inferences to the public came over that he knew this was all true. The inference in his voice and the laughter and everything that was involved, the manner of the conversation, that it had to be planned and he let it go on because he does have this seven second delay he could have taken the man off the air. If it wasn't done with malice and an attempt to destroy my life, to destroy my public image, why didn't he use the seven second delay?

On pages 27 and 28 of the deposition, the examination went as follows:

Q. Do you state in your complaint that Wilcox acted with reckless disregard of the truth, Is that based primarily on the fact he didn't use the seven second delay?

Mr. Leedy: Objection, that calls for a legal conclusion as to what reckless disregard of the truth means.

Q. Do you understand what it means?

Mr. Leedy: I still object. I am not even sure I understand what it means. There has been a lot of cases on it in the recent past.

Q. Well, could you tell us if you know what facts you rely on to etsablish that, even if you don't know what it is?

Mr. Leedy: I can tell you the facts I rely on if it helps you, Bryce. If you are talking about the theory of our law suit.

Mr. Roe: Well, go ahead.

Mr. Leedy: The statements are obviously false. There was no investigation made to determine the truth of the statements before they were made. He did fail to use the seven second delay. He indicated that he had made no investigation whatsoever concerning the truth of those statements before letting them be broadcast and he knew they were damaging to Fred Demman at the time he broadcast them.

Mr. Roe: Is that from his deposition?

Mr. Leedy: Right.

On page 32, the plaintiff testified in response to a question:

Q. And it is from those facts that you conclude that there was malice, actual malice on the part of Mr. Wilcox?

A. There are no facts, it was malice. The facts are there. Malice is there. There is no question that I should say.

On page 36, the examination went as follows:

Q. Now you have been concentrating mainly on the broadcast between Wilcox and the caller who defamed you, but you have had occasion to read the transcript of the woman who called in subsequent to the caller who defamed you and heard dialogue with Wilcox, have you now?

A. Yes.

Q. And there are portions of that transcript are there not which would also tend to show Mr. Wilcox's malice?

A. Oh. Yes, certainly, certainly. I believe that anybody listened to her call, she knew that he was trying to destroy me and she knew in her opinion that it was very unfair, unjust and uncalled for a way to campaign or destroy a man's life and I think she inferred in that transcript that the man's destroying me.

Q. And in that transcript Wilcox stated to the woman that he agreed with the caller, did he not?

A. Yes.

Q. And from that particular statement, you would infer malice on the part of Wilcox, would you not?

A. Thats right. Yes.

The defendant, himself, in his deposition, swore:

> In response to the question, "at the time the statements were made, you indicated that you had no knowledge that they were true, is that correct?
>
> A. That's correct.

This case is clearly distinguishable from the *Washington Post* case where the defendants averred, under oath, that they had no knowledge of the falsity of the statement and the plaintiff, on motion for summary judgment, did not controvert those averments. In such a case, summary judgment may be correct; however, in the instant case, the plaintiff swore under oath that there had to be malice and the defendant testified that he had no knowledge that the statements were true when he allowed them to be broadcast. That has to raise an issue of fact for the jury to decide. If the defendant's theory is correct, then the only time an action for libel or slander will lie is when the defendant admits the malice. In the present case, there is no doubt that the defendant had not admitted the malice but such may be inferred from:

(1) The failure to use the seven second delay button to reject the broadcast;

(2) The defendant's statement that he allowed the broadcast but did not know whether the defamatory statements of the plaintiff were true;

(3) The defendant laughed when the defamatory statements were made;

(4) The defendant stated over the air that he agreed with the caller;

(5) The defendant made no effort to investigate the truth of the statements prior to broadcasting them.

It certainly appears in the present case that the defendant has not carried its burden of removing any genuine issue of fact concerning actual malice. See *Tagawa Publishing Co.*, 427, P.D. 79 (Hawaii 1968). The case should be remanded and the jury should be allowed to determine whether or not the defendants acted with actual malice.

POINT II

SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED ON THE THEORY THAT THE LIBELOUS STATE MENTS WERE MADE ON BEHALF OF A CANDIDATE FOR PUBLIC OFFICE.

Section 45-2-5 *Utah Code Ann.* (Repl. Vol. 1970) provides: "In no event, however, shall any such owner or operator be held liable for any damages for any defamatory statement uttered over the facilities of such station or network by or on behalf of any candidate for public office." Defendants moved for summary judgment asserting or contending that the defamatory statements were made on behalf of a candidate for public office, apparently the plaintiff's opponent.

All of the evidence shows that neither the plaintiff nor the defendants knew who the caller was. Therefore, it is impossible to state that the statements were made on behalf of the cadidate opposing the plaintiff in the election for City Commission. The fact that the slander statements incidentally benefitted Mr. Demman's opponent does not necessarily make the statements made on his behalf. For example, if an attorney is slandered, all other attorneys may be incidentally benefitted by the fact that a potential client may not go to the defamed attorney, but to other attorneys. However, that does not necessarily mean that the person uttering the slander was acting on behalf of the other attorneys. Almost every slander incidentally benefits others, however, that does not necessarily mean that the slander was made on behalf of the others.

POINT III

THE PLAINTIFF SHOULD BE ALLOWED A JURY TRIAL ON HIS CONTENTION THAT THE DEFENDANT WAS NEGLIGENT.

In paragraph 9 of plaintiff's complaint, he alleges:

> Star Broadcasting Co. failed to exercise due care in the hiring and/or training of defendant Larry Wilcox and/or in its method of programming for preventing defamatory broadcasting; the foreseeable results of which would be the broadcasting of defamatory matters; all or any one of which proximately caused the broadcasting of the matters (alleged to be libelous of plaintiff).

Section 45-2-7 *Utah Code Ann.* Repl. Vol. 5 (a) 1970 provides:

> Nor shall anything in this act be construed to relieve any person, firm, or corporation owning or operating a radio or television broadcasting station or network from liability under the law of slander, libel, or defamation on the account of any broadcast prepared or made by any such person, firm, corporation or by any officer or employee thereof in the course of his employment. In no event, however, shall any such person, firm or corporation be liable for any damages for any defamatory statement or act published or uttered in or as a part of . . . sound broadcast unless it shall be alleged and proved by the complaining

> party that such person, firm or corporation has failed to exercise due care to prevent the publication or utterance of such statement or act in such broadcast.

There is no question that the complaining party, the plaintiff, has alleged the failure to exercise due care. The defendant has not controverted these allegations except by way of answer. Therefore, there appears to be a genuine issue of fact and a trial by jury should result.

CONCLUSIONS

There are issues of fact and plaintiff is entitled to a trial by jury. This case should be reversed and remanded for a trial.

Respectfully submitted,

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