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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

RESPONDENTS' BRIEF

Appeal from the District Court of Salt Lake County
Honorable Stewart M. Hanson, Judge

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STATUTE

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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

RESPONDENTS' BRIEF

NATURE OF CASE

Plaintiff sought damages from the owner of a radio station and from an announcer for defamation in a raido broadcast.

DISPOSITION IN LOWER COURT

The trial court granted defendants' motion for summary judgment and dismissed the action.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the judgment.

STATEMENT OF FACTS

Defendant Star Broadcasting Company operates radio station KSXX in Salt Lake City. The station's programming centers around "two-way radio," in which listeners telephone "communicasters" and discuss on the air various topics of public interest. Defendant Larry Wilcox was a KSXX communicaster.

In the fall of 1970, plaintiff was a candidate for a four-year term on the Salt Lake ~~City~~ County Commission (Demman 8). On the afternoon of November 3, 1970, election day, an unidentified man telephoned defendant Wilcox and initiated a discussion concerning plaintiff's qualifications for the office he was seeking. During the conversation, the following exchange was broadcast:

> *Caller*: * * * now, you cannot name me, you cannot tell me, nor any of these Democratic callers, where that man is qualified to handle 29 million dollars of the taxpayers' money, that's comin up in here. He has not had any qualifications, his schooling is not for that, uh uh, he's in debt with his brother in here, through the state, because they don't pay their bills. Now, now let's look a little bit further. What kind of an outfit does that man run down there?
>
> *Wilcox*: I don't know. Is he a business man?

Caller: Business man. * * * Demman, right across the street from the Utah Power & Light Company.

Wilcox: Oh.

Caller: If, if you want to go to the Go-Go Girls, that's it. If you want to go buy liquor by the drink, that's it. If you want to, ha, I won't say it.

Wilcox: Ha, ha.

Caller: If you want to get to other places on here, it's, it's available for ya, uuh

Wilcox: Well, then, he's qualified as a, well, I won't say.

Caller: He's qualified.

Wilcox: Ha, ha, ha.

Caller: He's qualified for the, uh right in with the underworld, 'n I think uh if he can get in in here, he wants to make these laws prosperous for his business out here.

(R. 22)[1]

About ten or fifteen minutes later, an unidentified woman telephoned defendant Wilcox and chastised him for the conversation concerning plaintiff. The conversation was interrupted by Paul Droubay, one of the officers of Star Broadcasting Co., and Mr. Droubay made a

[1]R-22 refers to page 22 of the court record. References to deposition testimony are preceded by the deponent's name.

public apology for statements made during the first broadcast (Demman 12, R. 24). The two conversations and the retraction were taped by Star Broadcasting Co. and a transcription was made of them. The transcript is set out in full at R. 21-24.

In order to keep some control over what callers may say during the two-way radio conversation, the defendant Star Broadcasting Co. utilizes a system under which the broadcast runs seven seconds behind the two-way conversation. If something occurs during a conversation that a communicaster believes should not go on the air, he may push a button which cuts off the delayed broadcast and puts the parties on a direct live broadcast, thereby excising seven seconds of talk. If a caller continues to make proscribed comments, the communicaster can cut off the conversation altogether. Defendant Wilcox did not cut off any of the conversation concerning plaintiff.

Defendant Wilcox did not know plaintiff personally. He knew his name and that he was running for office but nothing more about him (Wilcox 9). At the time of the broadcast, he didn't know whether the statements were true (Wilcox 9, 11). There is no evidence that any other officer or employee of Star Broadcasting Co. was aware of the contents of the broadcast at the time it was made. Defendant Wilcox, during his employment at radio station KSXX, had used the delay button only three or four times and sometimes had been confused as to whether or not he should use it (Wilcox 16).

In addition to being a candidate for public office,

the plaintiff was one of the principals in a company known as Demman Enterprises, Inc. (Demman 4). The company owned property across the street from the Utah Power and Light Company on North Temple Street in Salt Lake City, part of which was leased to a private club known as the Putter Club (Demman 6, 7). This club is licensed to sell liquor and does in fact employ go-go girls (Demman 7, 18).

Respondents agree with appellant's statement of facts except as follows: the paraphrase of the conversation in Paragraph 5 is not accurate; and for the purposes of the summary judgment motion no admissions were made, though respondents did and do contend that the truth or falsity of the information, in light of the "malice" tests hereinafter discussed, is not a material fact.

ARGUMENT

POINT I

IN ORDER TO RECOVER IN THIS ACTION THE PLAINTIFF, BEING A PUBLIC FIGURE, MUST SHOW "ACTUAL MALICE" ON THE PART OF DEFENDANTS.

In the past eight years, the law of defamation, particularly as it relates to public officials, public figures, and public issues, has been rewritten. The United States Supreme Court in *New York Times Company v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964),

held that in certain instances common law tort rules relating to libel and slander had to give way to requirements of Amendments I and XIV, United States Constitution. In that case, the trial court had entered a judgment in the amount of $500,000 against the New York Times based on an advertisement which in effect accused the plaintiff, a Montgomery (Ala.) City Commissioner, of intentional interference with civil rights. The United States Supreme Court reversed the judgment saying:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions —and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. * * * Under such a rule, would-be critics of official conduct would be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. * * * The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.
>
> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"

> —that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

The court noted that a like rule already had been adopted by a number of state courts including those in North Carolina, Michigan, Kansas, West Virginia, Iowa, California, South Dakota, Arizona, and Minnesota.

Decisions since *New York Times* have applied the rule to public figures as well as public officials, and to public issues in which private figures are involved, and have refined the definition of "actual malice."

In *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 28 L.Ed.2d 35, 91 S.Ct. 621, 642 (1970), the plaintiff, a candidate for United States Senator in a Democratic primary in New Hampshire, brought a libel action against a daily newspaper for carrying a Washington Merry-Go-Round column referring to him as a "former small-time bootlegger." The court noted that the need for the New York Times rule is a least as acute in the case of a candidate for public office as in the case of a public official. The court said:

> The trial judge instructed the jury that Roy, as a candidate for elective public office, was a "public official," and that characterization has not been challenged here. Given the later cases, it might be preferable to categorize a candidate as a "public figure," if for no other reason than to avoid straining the common meaning of words. But the question is of no importance so far as a standard of liability in this case is concerned, for

> it is abundantly clear that, whichever term is applied, publications concerning candidates must be accorded at least as much protection under the First and Fourteenth Amendment as those concerning occupants of public office.

The court also disapproved the practice of letting a jury determine whether particular conduct is "official conduct," or whether it is relevant to the qualifications of a candidate for public office. The court pointed out that:

> The principal 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 which he thinks may lead the electorate to gain a good impression of him. A candidate who, for example, seeks to further his cause through the prominent display of his wife and children can hardly argue that his qualities as a husband or father remain of "purely private" concern. And the candidate who vaunts his spotless record and sterling integrity cannot convincingly cry "Foul!" when an opponent or industrious reporter attempts to demonstrate the contrary. Any test adequate to safeguard First Amendment guarantees in this area must go far beyond the customary meaning of the phrase "official conduct."

The cases now also make it clear that "actual malice" cannot be proved by the contents of the publication itself; that it is not equivalent to ill will; and that it must be proved by establishing that the person publishing the defamatory statement knew it was false or acted with "reckless disregard" of whether it was true or false. Moreover,, "reckless disregard" has now been

defined to the point where it is possible to determine many cases by summary judgment or directed verdict. In *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6, 26 L.Ed.2d 6, 90 S.Ct. 1537 (1970), the court said:

> In his charge to the members of the jury, the trial judge repeatedly instructed them that Bresler could recover if the petitioners' publications had been made with malice *or* with a reckless disregard of whether they were true or false. This instruction was given in one form or another half a dozen times during the course of the judge's charge. The judge then defined "malice" to include "spite, hositility or deliberate intention to harm." Moreover, he instructed the jury that "malice" could be found from the "language" of the publication itself. Thus the jury was permitted to find liability merely on the basis of a combination of falsehood and general hostility.
>
> This was error of constitutional magnitude, as our decisions have made clear. "This definition of malice is constitutionally insufficient where discussion of public affairs is concerned; '[w]e held in New Times that a public official might be allowed the civil remedy only if he establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true.' "

POINT II

THE DEPOSITIONS ON FILE ESTABLISH THAT THERE IS NO EVIDENCE WHICH WOULD JUSTIFY A FINDING OF ACTUAL MALICE.

The pleadings and depositions establish that except for an unknown caller, only defendant Wilcox was involved in the broadcast concerning the plaintiff. The question thus becomes one of whether he could be said to have acted with actual malice in permitting the telephone conversation to be broadcast. In order to establish this actual malice, plaintiff must prove that when the broadcast was made defendant Wilcox knew that the statements were false or acted in reckless disregard of whether they were false or true, and "reckless disregard" is itself a term of art.

In *Garrison v. State of Louisiana*, 379 U.S. 64, 13 L.Ed.2d 125, 85 S.Ct. 209 (1964), the Supreme Court pointed out what is meant by reckless disregard:

> * * * Only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be subject to either civil or criminal sanctions.

In *St. Amant v. Thompson*, 390 U.S. 727, 20 L. ED.2d 262, 88 S.Ct. 1323 (1968), the Supreme Court went into more detail in explaining the term, saying:

> Purporting to apply the New York Times malice standard, the Louisiana Supreme Court ruled that St. Amant had broadcast false information about Thompson recklessly, though not knowingly. Several reasons were given for this conclusion. St. Amant had no personal knowledge of Thompson's activity; relied solely on Albin's affidavit although the record was silent as to Albin's reputation for veracity; he failed to verify the information with those in the union office

who might have known the facts; he gave no consideration as to whether or not the statements defamed Thompson and went ahead heedless of the consequences; and he mistakenly believed he had no responsibility for the broadcast because he was merely quoting Albin's words.

These considerations fall short of proving St. Amant's reckless disregard for the accuracy of the statements about Thompson. "Reckless disregard," it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law. Our cases, however, have furnished meaningful guidance for the further definition of a reckless publication. In New York Times, supra, the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In *Garrison v. Louisiana*, 379 U.S. 64, 13 L.Ed.2d 125, 85 S.Ct. 209 (1964), also decided before the decision of the Louisiana Supreme Court in this case, the opinion emphasized the necessity for a showing that a false publication was made with a "high degree of awareness of * * * probable falsity." 379 U.S. 74, 13 L.Ed.2d 133. Mr. Justice Harlan's opinion in *Curtis Publishing Company v. Butts*, 388 U.S. 130, 153, 18 L.Ed.2d 1094, 1110, 87 S.Ct. 1975 (1967), stated that evidence of either deliberate falsification or reckless publication "despite the publisher's awareness of probable falsity" was essential to recovery by public officials in defamation actions. These cases are clear that reckless conduct is not measured by whether a rea-

> sonably prudent man would have published, or would have investigated before publishing. *There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.* Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice. (Emphasis added.)

In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 29 L.Ed.2d 296, 91 S.Ct. 1811 (1970), plaintiff had been described in radio broadcasts as a "smut peddler," but in another proceeding a court had found that the material being sold by plaintiff was not obscene. A jury returned a verdict and judgment was entered for the plaintiff for general and punitive damages. The court of appeals held, as a matter of law, that the evidence was insufficient to sustain a judgment under the standards of *New York Times*. Directing itself to the question of actual malice, the court said:

> Following petitioner's complaint about the accuracy of the broadcast, WIP checked its last report with the judge who presided in the case. While we may assume that the district court correctly held to be defamatory respondent's characterizations of petitioner's business as "the smut literature racket," and of those engaged in it as "girlie-book peddlers," there is no evidence in the record to support a conclusion that respondent "in fact entertained serious doubts as to the truth" of its reports.

In *Beckley Newspapers Corporation v. Hanks*, 389 U.S. 81, 19 L.Ed.2d 248, 88 S.Ct. 197 (1967), the plain-

tiff had relied largely upon the fact that defendants had not made a pre-publication investigation of material that turned out to be defamatory and that for this reason there was a "reckless disregard" of whether the statements were false or true. Although the record disclosed that no pre-publication investigation had been made, the jury verdict for the plaintiff was not permitted to stand. The Supreme Court said:

> Neither this passage nor anything else in the record reveals "the high degree of awareness of * * * probable falsity demanded by New York Times * * *" *Garrison v. Louisiana*, 379 U.S. 64, 74, 13 L.Ed.2d 125, 133, 85 S.Ct. 209; it cannot be said on this record that any failure of petitioner to make a prior investigation constituted proof sufficient to present a jury question whether the statements were published with reckless disregard of whether they were false or not.

See also *Time, Inc. v. Pape*, 401 U.S. 279, 28 L. Ed.2d 45, 91 S.Ct. 633 (1971), and *Tilton v. Cowles Publishing Company*, 76 Wash.2d 784, 459 P.2d 8 (1969).

In the present case, a summary judgment was taken after the court had before it depositions of all of the persons involved in the publication including the plaintiff, the communicaster, an officer of, and the program director of Star Broadcasting Co. Considering all available evidence, a jury would have to base a finding of actual malice solely on the fact that defendant Wilcox had failed, during the seven second delay, to use the cut

off button. Wilcox testified that he didn't know whether the statements were true and that he had no knowledge about Fred Demman (Wilcox 9, 11, 13). Paul Droubay, one of the officers and stockholders of Star Broadcasting Co., pointed out that because of the nature of "talk" programs, broadcasters sometimes forget that they are on the radio and some confusion exists with respect to hitting the cut off button (Droubay 14, 15).

There is nothing in the record suggesting that defendants had any awareness, let alone the required "high degree of awareness" that the statements were probably false. During plaintiff's deposition, he and his counsel took the position that actual malice would be shown by the following facts: that the telephone conversation occurred at 2:30 p.m. on election day when nobody had a chance to say anything in defense; that plaintiff had been ahead in the polls; that Wilcox was not apologetic; that no investigation had been made to determine the truth; that Mr. Wilcox didn't use the seven second delay button; and that Mr. Wilcox must have know they were damaging (Demman 9-11, 27-28). Otherwise stated, the malice was based upon (1) what the man said, (2) the way Mr. Wilcox laughed and carried on, and (3) that defendant Wilcox encouraged the caller and didn't cut him off.

But actual malice, as pointed out above, cannot be established by the content of the communication itself; neither may it be based upon a concept of hate, spite, or ill feeling. It requires a finding that the communication

was known to be false, or that the publisher had a high degree of awareness of its probable falsity.

In *St. Amant v. Thompson*, 390 U.S. 727, 20 L.Ed. 2d 262, 88 S.Ct. 1323 (1968), the court noted that the defense of good faith would not be likely to prevail "when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation." Even this statement does not help plaintiff because the statements made by the anonymous caller were not inherently improbable. In fact, the plaintiff's own testimony shows some cause to believe that the statements were substantially if not technically true. A private locker club known as the Putter Club was located on property owned by Demman Enterprises, Inc., of which plaintiff was one-third owner; liquor was dispensed by way of mini-bottles at the Putter Club; and go-go dancers were employed at the Putter Club. The other statements made by the caller, about getting other things, and about plaintiff being qualified like a member of the underworld, were vague expressions of opinion based upon the facts and did not impute crime or immorality to the plaintiff.

Under the circumstances, there is not sufficient evidence of actual malice to present the case to a jury. Therefore, the court should have granted summary judgment. In *Washington Post v. Keogh*, 355 F.2d 965, (D.C.Cir. 1966), the plaintiff had sued a newspaper because of statements in a column by Drew Pearson. The newspaper moved for summary judgment on the ground

that the record raised no genuine issue as to actual malice on its part. The district court denied the motion for summary judgment but was reversed by the court of appeals on interlocutory appeal. The court of appeals said:

> That state of mind should generally be a jury issue does not mean it should always be so in all contexts, especially where the issue is recklessness which is ordinarily inferred from objective facts. Summary judgment serves important functions which would be left undone if the courts too restrictively viewed their power. * * *
>
> In the First Amendment area, summary procedures are even more essential. For the stake here, if harrassment succeeds, is free debate. One of the purposes of the *Times* principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself. * * *
>
> It is undisputed that no issue of fact exists here as to publication with actual knowledge of falsity. The unimpeached Post personnel depositions are dispositive of this issue. * * * Rather, Keogh asserts the columns were published with reckless disregard for their truth or falsity. His principal argument on appeal, accepted by the District Court, is that the "character and content of the publication itself" is sufficient to take the case to the jury on actual malice in light of the Post's

failure to check the accuracy of Pearson's columns before publication. The Supreme Court held in *Times*, of course, that the character and content of the publication there involved was a constitutionally impermissible evidentiary basis for a finding of actual malice, even though the Times had failed to verify its contents. * * *

But even if it were tenable to argue that the charges here are "more serious" than those in *Times*, the seriousness of the charge, in itself, is not probative of recklessness with respect to the truth. The most serious charges, which if anything we have the most reason to avoid deterring, may be made responsibly with no hint of anything contrary to common knowledge, while less serious charges may be made rashly, with internal inconsistencies, citing facts contrary to common knowledge. * * *

As the court indicated in *Times*, evidence offered in a libel case might be sufficient to raise a jury question as to a publisher's negligence but insufficient to raise one as to his actual malice. * * *

We would be hesitant to impose responsibilities upon newspapers which can be met only through costly procedures or through self-censorship designed to avoid the risks of publishing controversial material. The costliness of this process would especially deter less established publishers from taking chances and, since columns such as Pearson's are highly popular attractions, competition with publishers who can afford to verify or to litigate would become even more difficult. * * * What matters is that *a rule requiring verification in the absence of evidence that the publisher had good reason to suspect falsity would curtail sub-*

stantially a protected form of speech. (Emphasis added.)

The foregoing and other cases have established a federal libel law that governs state action insofar as political candidates are concerned. But there is no conflict with Utah law in this regard, for Utah Legislature has adopted the "actual malice" test. It is provided in 45-2-5 Utah Code Annotated 1953:

> No person, firm or corporation owning or operating a radio or television broadcasting station or network of stations shall be liable under the laws of libel, slander, or defamation on account of having made its broadcasting facilities or network available to any person, whether a candidate for public office or any other person, or on account of having originated or broadcast a program for discussion of controversial or any other subjects, in the absence of proof of actual malice on the part of such owner or operator. 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.

It is apparent from the depositions on file in this case that the plaintiff has no evidence of actual malice and has no prospects of obtaining any. It would thus be futile to return the case for trial.

POINT III

PLAINTIFF'S ACTION IS BARRED BY THE PROVISIONS OF 45-2-5 UTAH CODE ANNOTATED 1953.

The final sentence of 45-2-5 Utah Code Annotated 1953, quoted above, provides that the owner or operator of a radio station may not be held liable for any damages for defamatory statements made by or on behalf of any candidate for public office.

The statements made by the unidentified caller were made during a political campaign, on the day of the election, when numerous persons were calling the station to talk about various candidates. A reading of the broadcast transcript shows that the statements made by the unidentified caller were made in behalf of plaintiff's opponent in the election. As admitted by plaintiff (Wilcox 34), candidates frequently have people call KSXX in their behalf.

Although the phrase "on behalf of" has not been defined by the statute or by any decision of this court, the statute indicates a legislative intent to encourage the freest possible discussion of election issues, candidates for public office, and the qualifications of such candidates. The statutory provision, therefore, should be interpreted to include statements by persons in support of a particular candidate over another, whether or not any technical relationship can be shown between the candidate and the person who speaks.

CONCLUSION

Before defendants moved for summary judgment, the parties had had an opportunity for discovery and had taken it. All persons who had anything to do with

the case, except the unidentified caller (who will probably remain unidentified) were deposed and the court had before it all of the testimony that could reasonably be produced at a trial. If all of the evidence available to the plaintiff had been presented at a trial of the case, there would have been insufficient evidence to let the case go to the jury on the question of "actual malice." Moreover, considering the context in which statements were made, it is clear that they were made "on behalf of" a political candidate during a political campaign and hence an action will not lie against the broadcaster or the owner of the radio station. This being the case, summary judgment was properly granted and the judgment should be affirmed.

Respectfully submitted,

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