STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0551

Dan Hynes
v.
New Hampshire Democratic Party & a.

RULE 7 APPEAL OF FINAL DECISION OF
HILLSBOROUGH SUPERIOR COURT

REPLY BRIEF OF APPELLANT, Dan Hynes

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TEXT OF RELEVANT STATUTES

ARGUMENT

I. APPELLEES' DEFAMATORY LIE IS NOT ENTITLED TO SPECIAL PROTECTION AS "POLITICAL SPEECH"

Appellees' state, suggest, and infer they are not liable (or deserve some special protection) for their defamatory speech because it was political speech. While appellees would love to have immunity to defame people in the course of political campaigns, courts have never adopted that approach. The fact that it is political speech already gives appellees added protection because Appellant must show actual malice. There is no special/added protection beyond the Sullivan test.

"As an initial matter, there is no blanket immunity for statements that are "political" in nature: as the Court of Appeals has put it, the fact that statements were made in a "political 'context' does not indiscriminately immunize every statement contained therein. It is true that courts recognize the value in some level of "imaginative expression" or "rhetorical hyperbole" in our public debate. But it is simply not the law that provably false statements cannot be actionable if made in the context of an election." Dominion v Giuliani, et al. Civil Action No. 1:21-cv-00213, (CJN), at pg. 15, as retrieved from https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2021cv0213-36. (internal citations omitted).

Appellees further argue appellant "does not cite a single case allowing a defamation claim to proceed in the context of a political campaign." Just this year, the high profile defamation case involving Sarah Palin / her PAC against The New York Times proceeded to a jury trial. The court in that case previously denied summary judgment for the defendants[1].

> "Ultimately, while much of plaintiff's evidence is circumstantial, as is often the case when actual malice is at issue, and while there is arguably contrary evidence as well, the Court finds that, taking the evidence in the light most favorable to plaintiff, she has sufficiently pointed to enough triable issues of fact that would enable a jury to find by clear and convincing evidence that Bennet knew, or was reckless not to know, that his words would convey the meaning in the minds of the readers that plaintiff asserts were libelous, to wit, that she bore a direct responsibility for inciting the Loughner shooting" Id. 25-26.

II. APPELLANT SUBMITTED OVERWHELMING EVIDENCE THAT APPELLEES ACTED WITH ACTUAL MALICE THAT APPELLEES CANNOT DISPROVE THROUGH AN AFFIDAVIT

Just like this case, defendants in Palin merely asserted they did not know the statement was false and provided an affidavit/testimony to attempt to prove it.

"Of course, because actual malice 'is a matter of the defendant's subjective mental state, revolves around facts usually within the defendant's knowledge and control, and rarely is admitted,' Dalbec v. Gentleman's Companion, Inc., 828 F.2d 921, 927 (2d Cir. 1987), a

[1] Palin v The New York Times Company Case 1:17-cv-04853-JSR Document 117 Filed 08/28/20 as retrieved from https://www.courtlistener.com/docket/6081165/117/palin-v-the-new-york-times-company/

defendant cannot 'automatically insure a favorable verdict by testifying that he published with a belief that the statements were true.' St. Amant v. Thompson, 390 U.S. 727, 732 (1968)." Id at 19-20. "… the Court cannot automatically credit this testimony at the summary judgment stage. " Id. at 20.

New Hampshire applies the same standard and reasoning.

"In the case before us, defendant Cash claims in his affidavit that he believes the language he used "to be a fair description of the events in question." The plaintiff claims that the statement is false; he claims that in founding Equity Publishing Company, he did not take any accounts belonging to his former employer. The plaintiff's claim is supported by his deposition, which details the circumstances of his setting up the new company. Because different inferences and conclusions may reasonably be drawn from the evidence in the record, the truth or falsity of the statement is a question to be decided by the trier of fact. 50 AM. JUR. 2d *Libel and Slander* § 182 (1970);" Thomson v. Cash, 119 NH 371, 377 - NH: Supreme Court 1979.

The evidence in this case is even stronger than in Palin. In Palin, the court eventually dismissed the complaint after the completion of evidence at trial. In part, because "It was also clear from argument that Palin was not seriously contending that Bennet published the Editorial with actual knowledge that the Challenged Statements were false; rather, Palin

argued that she established actual malice by virtue of reckless disregard.[2]" Id. at 42. Here, appellant has produced overwhelming evidence for a jury to find actual knowledge, in addition to the lower burden of reckless disregard[3][4].

III. APPELLANT PRODUCED SUFFICIENT EVIDENCE TO MEET THE ELEMENTS OF DEFAMATION

Appellees rely on the trial court finding that Appellant showed no greater harm to his reputation[5]. However, this goes against the weight of the disputed evidence and against actual caselaw.

Appellees correctly recognize Thomson v. Cash, which for defamation requires "the language complained of must be defamatory, that is, it must tend to lower the plaintiff in the esteem of any substantial and respectable group, even though it may be quite a small minority. The defamatory meaning must be one that could be ascribed to the words by

[2] Palin v The New York Times Company Case 1:17-cv-04853-JSR Document 196 Filed 03/01/22 Pg 42 as retrieved from https://www.nysd.uscourts.gov/sites/default/files/2022-03/17-cv-4853%20-%20March%201%202022%20-%20Post-Trial%20Opinion.pdf

[4] That evidence includes their knowledge of the events, their own research, the citation in the mailpiece specifically says "Check the facts" which showed appellant was not disbarred, drafts of the mailpiece, communication with former co-defendant, interrogatories of former co-defendants, (which appellees disagree with which makes it a substantial material fact for the jury), and that appellees produced zero evidence of anything they relied on showing appellant was disbarred (see pgs. 12-18 Appellant's brief). The sole evidence appellees produced was their blanket statement they didn't know, which cannot survive a motion for summary judgment standard. Further, appellees seem to combine the conduct of the parties of NHDP and Raymond Buckley even though NHDP includes the person who created the mailer. Appellees seem to find it fatal to appellant's case that no depositions were taken. However, depositions are not required in civil cases (also appellees never deposed appellant). The evidence is so overwhelming any testimony would be superfluous (assuming appellee Buckley wouldn't testify contrary to his affidavit which was provided under oath), or would not be fruitful because as shown, Appellees cannot prove their intent through an affidavit which is a question for the jury.

[5] Appellee's brief pgs. 33-34

hearers of common and reasonable understanding." However, appellees ignore further language in that case and other cases cited by and from that decision.

> "In this case, however, the plaintiff also alleges general damages or injury to his personal reputation as a result of the publication. Injury to reputation is an element of actual damages that may entitle a libel plaintiff to compensation. The plaintiff does not need to allege special damages or specific monetary loss resulting from the publication where *New York Times* "malice" is shown. We are mindful that in the libel area there is a possibility that "the jury may award not only nominal damages, but substantial sums in compensation of the supposed harm to the plaintiff's reputation without any proof that it has in fact occurred." Nevertheless, we find no reason at this time to depart from the settled rule that "[q]uestions of whether plaintiff has, in fact, sustained an injury or any damage, and, if he has, the nature and extent [thereof], are . . . questions of fact for determination by the jury or other trier of the facts. Because the question of damages is to be determined by the trier of fact, on this record, the trial judge properly denied the defendants' motion for summary judgment." (Internal citations omitted)". Thomson v. Cash, 119 NH 371, 376 - NH: Supreme Court 1979.

Further, appellee can bring a case for defamation based upon injury as a public official[6]. Appellees shouldn't be able to claim appellant is a public official (which he agrees for purposes of this suit) to get the heightened standard, while also claiming injured reputation as a public official is irrelevant and not recoverable.

Finally, it is worth noting appellees claim appellant can't succeed due to his "poor reputation". Any "poor reputation" is a result of appellees lying to voters claiming appellant was disbarred. At trial it would be shown appellant is a former State Rep. (which earns the title "Honorable" for

[6]"If the imputations published hold the Governor up as indifferent to a lynching in his State, or condoning it, and approving the work of the mob as saving trouble to the courts, they greviously reflect on him in his office, and if false and unprivileged are actionable per se, injury and damage being implied." Caldwell v. Crowell-Collier Publ. Co., 161 F.2d 333, 336 (5th Cir.) (1947), as referenced in Thomson v. Cash, 119 NH 371 - NH: Supreme Court 1979

life), and for over a decade has had a successful legal career including a unanimous decision with this court. Further, the difference between suspended and disbarred is a significant difference in this particular case where appellant informed the voters he was an attorney. Appellees' false allegation made him out to be a liar, and also therefore inferred he was practicing law without a license (which is a crime).

CONCLUSION

For the reasons stated in Appellant's brief and reply brief, summary judgment should have been denied as there is a dispute of material facts. This case should be remanded for jury trial.

Plaintiff waives oral argument

Certification for Rule 16 (3)(i)

The decisions being appealed are in writing and are attached through the e-file system as a separate appendix.

Respectfully Submitted,

/s/Dan Hynes_____

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CERTIFICATION

I hereby certify that a digital copy of the brief and exhibits/appendix have been provided to opposing counsel through the NH Supreme Court e-file system, at the time this document is e-filed.

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