IN THE APPEALS COURT OF THE STATE OF OREGON

TIMOTHY C. ROTE

Plaintiff-Appellant

v.

LINDA MARSHALL, JOEL CHRISTIANSEN
Defendants-Respondents,

Clackamas County Circuit Court
16CV07564
CA A162972

APPELLANT'S AMENDED REPLY BRIEF AND EXCERPT OF RECORD

Clackamas County Opinion dated: August 15, 2016
Hon. Robert Herndon

TIMOTHY C. ROTE
24790 SW Big Fir Rd.
West Linn, OR 97068
(503) 702-7225
timothy.rote@gmail.com

Pro se Plaintiff-Appellant

MATTHEW KALMANSON
1000 SW BROADWAY
PORTLAND, OR 97205
(503) 222-4499
mjk@hartwagner.com

Attorney for Defendants-Respondents

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III. REPLY STATEMENT OF THE CASE

The trial court erred in ruling that Plaintiff's defamation and IIED claims were subject to dismissal pursuant to ORS 31.150 *et seq.*

A. ORS 31.150 (2) test.

The trail court erred in concluding that the defendants satisfied Prong 1 of the ORS 31.150 (2) test. The trial courts conclusion that the defamatory statements made to deputy clerk were made in judicial proceeding or made in conjunction with a matter under consideration is without merit factually. The issue then remains whether the series of statements made by defendants were on a matter of public interest. They are not. There are elements of the defendants' defamatory statements that if made to the police would be privileged, but if not made to the police were designed to accomplish something different than a public service or the protection of a human life and not protected speech under ORS 31.150.

B. ORS 31.150 (3) test.

Plaintiff also argues that he met his prima facie evidence burden with respect to his defamation and IIED claims under ORS 31.150 (3). Plaintiff argues that the statements made by the defendants were not connected to the content of a paragraph in a single blog post, but rather an attempt by the defendants to discredit the plaintiff's allegations of perjury, destruction of evidence and corruption during an arbitration (the subject of the blog) involving one of the defendants.

C. ORS 31.150 (4) Perjury.

The trial court is called upon to use pleadings and supporting affidavits. Defendants intentionally mislead the trial court as to what they said to the deputy clerk. The defendants' acts of perjury support the plaintiff's claims as the concealed comments to the clerk were not derivatives of the blog content, but were rather conclusions reached from other unpublished and unconfirmed sources, used recklessly by defendants.

IV. REPLY STATEMENT OF FACTS

The following facts are from the Trial Record including the Plaintiff's Complaint, Declarations, Exhibits and new evidence submitted with a Motion For Reconsideration.

A. Plaintiff's Chapter 19 Post

Defendant's cited the Chapter 19 post when they contacted the Judges Chamber. The blog was named "sitting duck Portland" [and has been rebranded as 'thefirstdutyportland.wordpress.com."]

The language the defendants cited motivating them to contact the deputy clerk was "The Honorable Robert E. Jones is receiving a lifetime achievement award tomorrow night. The press will be there. Congratulations Judge Jones. Perhaps more often than not our legacies are not what we wanted them to be."

Plaintiff argues that the blog post and attack on the blogger are not critiques of the blog, but are motivated and designed to impugn that plaintiff's character.

After all, in Blog post Chapter 10 the plaintiff acknowledged that "One of the best Judges I ever met is the Honorable Robert E. Jones, senior Judge for the United States District Court in Oregon. He was tough. He was fair. He was insightful."

B. Plaintiff's Ethics Complaint About Defendants

Plaintiff argues that exposing defendant Marshall's actions in the arbitration, the arbitrator's referral of the case to her, their prior partnership, the arbitrator's recusal and reinstatement, perjury and destruction of evidence lead to the defendants' punitive actions. Plaintiff files ethics complaints against the defendants based on the perjury, strategic destruction of evidence and abuse of process.

C. Defendants' Demand that the Blog be Taken Down

On October 3, 2015, defendant Linda Marshall wrote a letter demanding that the blog be taken down. There was no request for a retraction of any kind. This demand was continuous and just preceded the contact with the deputy clerk. ER-5. Refusal by plaintiff to remove the blog incited and motivated the defendants to take their punitive action.

D. Defendants' Retaliation was Not Protected

The defendants did not contact law enforcement. Ultimately the U.S. Marshals Service did call defendant Christiansen. Plaintiff will argue that the defendants intended for this to be an undisclosed contact, the design of which was to influence the Portland Division as to the plaintiff's character.

As a result of the defendants contact with the U.S. District Court, plaintiff-appellant is on a watch list with the U.S. Marshals Service. TR-2. p 26. Violence is not advocated in the blog. Exposure is.

E. Defendants' Consciousness of Guilt

Defendants, in their anti-SLAPP Motion to Dismiss, admit to only contacting the deputy clerk of The Honorable Robert E. Jones (on November 12, 2015) and conveying that Rote published Chapter 19 (ER-2, ER-3), as the record so indicates. Defendant Christiansen filed another lawsuit against plaintiff in Federal Court alleging again ORS 659A retaliation for plaintiff Rote publishing his blog and in that case made additional admissions (ER-8) to defend against counterclaims.

Plaintiff argues that these acts of omission represent the defendants' consciousness of guilt, to conceal the truth from the court. Those concealed statements refute arguments under ORS 31.150 (2) and support defamation *per se* under ORS 31.150(3). That new evidence was acquired via subpoena.

F. New Evidence Acquired Via Subpoena

In spite of the soft pedaling by defendant counsel on what was conveyed to the U.S. District Court, plaintiff confirmed that Christiansen and Marshall falsely accused the plaintiff of fraud, of having been arrested for stalking his ex-wife and alleged that the plaintiff was unstable.

Plaintiff will argue these allegations are not a critique of the blog post, but of the blogger, that these statements are too distant to be linked to the blog post

and were derived from other undisclosed sources. The behavior ascribed to the plaintiff was associated with the 2001 time period.

G. Perjury by Defendants

As a result of the perjury by omission, by defendants counsel and defendant Christiansen in his declaration, plaintiff filed a motion for reconsideration based on new evidence. ER-11, 12, 13. However, the Judge ruled he no longer had jurisdiction in this matter as it had been appealed.

Plaintiff would argue that this new evidence requires at a minimum remand for consideration, if not interpretation by the appeals court as an admission that defamation *per se* has been met. The subpoena documents are in the record.

H. Irrelevant Evidence of Letters

Submitting prior evidence of letters to Judge Kugler and the hearing therefrom is consistent with what defendant Marshal did when she submitted the transcript of the 2001 hearing in a 2010 arbitration, then requesting a favorable ruling from the arbitrator as a form of punishment to plaintiff.

Plaintiff will argue that this is kindergarten behavior by opposing counsel and should be striken.

V. REPLY ARGUMENT

A. Introduction

The parties have adequately briefed their positions, notwithstanding a few additional points the plaintiff would like to address.

First and foremost the lower court's opinion about the application of the anti-SLAPP statute, and in particular the ORS 31.150 (2) tests, showed an inaccurate factual application and gross misunderstanding of the law. On balance it is not factually possible to ascribe ORS 31.150 (2) (a)-(c) to the blog post paragraph, let alone the defendants' defamatory attacks on the blogger. The only credible question is whether ORS 31.150 (2) (d) is satisfied.

B. ORS 31.150 (2) (d) Public Interest and Public Forum

Both the plaintiff and defendant agree the blog addresses issues of public interest. Both parties agree that the blog is recognized as a public forum and that the plaintiff's expression of his opinion is protected free speech. See *Obsidian v Cox, 9th Circuit Court of Appeals No. 12-35238, 2014*.

However, that particular blog post paragraph, the subject of the references made by the defendants, was not a post on a matter of public concern.

Defendants' communicating their concern via telephone is not communication in a public forum.

C. ***Neumann v Liles, 358 Or 706 (2016), SC S062575***

The Oregon Supreme Court concluded that to determine whether a defamatory statement is protected under the First Amendment, the first question is whether the statement involves a matter of public concern. If it does, then the dispositive question is whether a reasonable factfinder could conclude that the statement implies an assertion of objective fact. To answer that question, the court adopted the following three-part inquiry: (1) whether the general tenor of the

entire publication negates the impression that the defendant was asserting an objective fact; (2) whether the defendant used figurative or hyperbolic language that negates that impression; and (3) whether the statement in question is susceptible of being proved true or false. Under that framework, the court did not consider the defendant's words in isolation. Rather, we must consider "the work as a whole, the specific context in which the statements were made, and the statements themselves to determine whether a reasonable factfinder could conclude that the statements imply a false assertion of objective fact and therefore fall outside the protection of the First Amendment." *Partington, 56 F3d at 1153*.

1. Not a Matter of Public Concern?

The **analysis adopted in Neumann v Liles is** whether those statements involve matters of public concern. *Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 US 749, 761, 105 S Ct 2939, 86 L Ed 2d 593 (1985)* (whether statement addresses matter of public concern must be determined by statement's content, form, and context, as revealed by whole record)**.** Plaintiff, while not wanting to minimize safety concerns for an individual, must argue that a congratulatory statement was not a matter of public concern. Nor was Judge Jones safety to be ascribed to the defendant attorneys who if having that concern would have knowingly called the police.

2. Defendants Statements Not Made in a Public Forum

Note that in *Neumann v Liles,* the court concluded that the defendant posted his statements on a public website. The defendants could have done so on

the plaintiff's website critiquing his analysis but did not do so. Rather, defendants called a deputy clerk with the intention of attacking the integrity of the plaintiff. And as a result of the attack, the plaintiff was placed on the U.S. District Courts watch list. A phone call and a phone system is not a public forum.

3. Applying the Three-Part Inquiry

If the First Amendment Protections are satisfied, such as the statements were made in a public forum and on a matter of public interest, then we must determine whether a reasonable factfinder could interpret defendants' statements as implying assertions of objective fact.

In ***Neumann v Liles*** the Oregon Supreme Court articulated a three-part inquiry.

a) The First Inquiry

The first step or inquiry is to consider whether the general tenor of the entire work negates the impression that defendants were asserting objective facts about plaintiff.

We can draw conclusions as to the defendants' intent based on the evidence produced by the U.S. Marshals Service. There was but one communication from Christiansen to the U.S. Marshals Service, conveying the name and contact information of someone he believed would corroborate the defendants' tale. We can also draw conclusions as to their initial representations of what was said to the clerk and what was provided to the clerk. And that evidence is Christiansen's declaration, ER-8, paragraph 5. There was no

admission by the defendants at any time that they supplemented their communication about the blog with accusations of fraud, stalking, violence and instability, but that is what happened. And even without the subpoena evidence it was enough for the U.S. Marshals Service to open a file, call the plaintiff and his attorney to determine plaintiff's intentions and place the plaintiff on the watch list.

Perjury by omission is tantamount to the plaintiff taking the Fifth Amendment protection for self -incrimination in a civil matter. The Ninth Circuit has been particularly active on this front: *SEC v. Colello,139 F.3d 674, 677-78 (9th Cir. 1998)* (holding that district court did not err in drawing an adverse inference against defendant based on his Fifth Amendment invocation in a summary judgment proceeding because there was "additional evidence" to support the SEC's case); *Doe ex rel. Rudy-Glanzer v. Glanzer,232 F.3d 1258, 1264-65 (9th Cir.2000)*("The Baxter holding is not a blanket rule that allows adverse inferences to be drawn from invocations of the privilege against self-incrimination under all circumstances in the civil context"); *SEC v. Jasper, 678 F. 3d 1116, 1126 (9th Cir. 2012)*("Jasper has no legal support for the proposition that a district court must make its evidentiary rulings and tailor its adverse inference instructions on a "question-by-question basis." … But Jasper has no warrant for treating every individual question as an "instance where the adverse inference was drawn" under Glanzer. As properly instructed, the jury could have concluded that the sum total of his Fifth Amendment invocations supported the adverse inference against him.")

The inference that can be drawn is that the defendants knew they were making false accusations and were otherwise intending to engage a judge in influencing another case in which they were counsel. Those actions are in and of themselves a crime. In so far as those actions are a crime the defendants should not be permitted the protections they seek under the anti-SLAPP statutes.

b) The Second Inquiry

The second inquiry is whether defendants' used figurative or hyperbolic language that negates the impression that they were asserting objective facts. There are no facts to support a conclusion that the defendants' statements were intended to be hyperbole or figurative. The deputy clerk took them seriously enough to engage the U.S. Marshals Service. And while the defendants may well have hoped their contact would have remained undisclosed, the clerk felt a duty to pass it to a law enforcement agency.

c) The Third Inquiry

Third and finally, the analysis requires the court to determine whether defendants' allegations against Rote are susceptible of being proved true or false. The allegation of instability for example made in the context of their statements is that the plaintiff is getting ready to come down to the awards ceremony and commit a crime, when in fact he was golfing. It can be proven false. That the plaintiff's prior arrest, while true, was not supplemented with the fact that no charges were filed, that there was no prosecution, that the arrest had been expunged and kept out of the public space until the defendants decided to

use it may with the intended inferences be proven false. The defendants used morsels of truth to accomplish or attempt to accuse the plaintiff falsely of criminal activity and to accomplish some influence on the District Court, an act consistent with Marshall's past behavior. Their allegations and the inferences that the defendants wanted the clerk to draw can be proven false.

Plaintiff reaffirms *Jon M. LeFebre v Alice LeFebre, (2011) 199 Cal.App. 4th 696* and *Paul v. Friedman (2002) 95 Cal.App.4th 853* and further that the defendants statements made post arbitration cannot garner absolute immunity.

D. The Kugler Hearing

It is very interesting that the defendants believe that citing a prior hearing in New Jersey does anything more than justify the defendants actions. There are only two conclusions one can draw from its inclusion in the answering brief.

The first is that because plaintiff sent a letter to Judge Kugler after the case was transferred to New Jersey State Court, the contact is somehow demonstrative of some salient point for which the plaintiff should be punished and his arguments ignored.

The second is that Judge Jones contacted Judge Kugler and that based on that conversation he dismissed the complaint with prejudice. The inference from this is that the plaintiff somehow knows that this was a plausible scenario that while worth exploring for its probative value in the blog, had no other meaning.

Plaintiff conveyed to Judge Kugler what he knew about the ex parte contact between defendants' client's girlfriend and one of his clerks. In response Judge Kugler demanded plaintiff appear for a contempt hearing, which he did. The U.S. attorney's office had already been informed by plaintiff of the ex-parte contact by the clerk and refused to prosecute plaintiff for filing his complaint. Judge Kugler had his hearing, after which he met with plaintiff counsel in chambers. While in chambers the Judge requested that plaintiff withdraw the complaint against his clerk and the complaint filed against Judge Kugler for initiating the contempt hearing.

E. Plaintiff's Low Burden: The Second Prong

The burden shifted to Plaintiff to (1) show his claims for defamation and Intentional Infliction of Emotional Distress were legally cognizable and (2) produce substantial evidence on each element of his claim.

The evidence necessary to satisfy the plaintiff's burden of a *prima facie* case is, however, a low bar. That low bar befits the pretrial nature of a special motion to strike under ORS 31.150; the goal, similar to that of summary judgment, is to weed out meritless claims meant to harass or intimidate—not to require that a plaintiff prove its case before being allowed to proceed further. See *Staten, 222 Or App at 32* ("The purpose of the special motion to strike procedure, as amplified in the pertinent legislative history, is to expeditiously terminate unfounded claims that threaten constitutional free speech rights, not to deprive litigants of the benefit of a jury determination that a claim is meritorious." (Emphases in original)).

The trial court may not weigh the plaintiff's evidence against the

defendants to determine whether there is a "probability" that the plaintiff will prevail. (Emphases added.) *Young v. Davis, 259 Or App 497 (2013), at 510.* The trial court erred in not allowing the case to proceed given the evidence it had available at the time, including evidence of defendants' perjury and that the plaintiff had been placed on the courts watch list.

1. Subpoena Evidence Not Hearsay

Plaintiff attempted to contact the deputy clerk and secure testimony from her but was rebuffed by the U.S. Marshals Service, confirmed in the new evidence which includes an email to the clerk from plaintiff and the clerk's response to a Marshal. ER-13.

Once defendants represented the content of their contact with the deputy clerk, contemporaneous records of the events are admissible. ORS 40.460, Rule 803, specifically provides an exception to the hearsay rule allowing the admission of the police record (U.S. Marshals Service). Defendants did not admit to direct contact with the U.S. Marshals Service, but the subpoena evidence shows at the very least that defendant Christiansen sent an email with plaintiff's ex-wife contact information acknowledging some conversation.

F. New Case Law

Park v Board of Trustees of The California State University, Super. Ct. No. BC546792. This opinion of the California Supreme Court was just issued. The instructional value in this case is that the defendants' activities and communications to the clerk cannot simply be wrapped within their citation to plaintiff's blog post and avail an anti-SLAPP motion.

VI. **CONCLUSION**

For the reasons stated above, the *Order* should be reversed as to Defamation and IIED or remanded to consider the new evidence.

Dated: May 12, 2017

Respectfully Submitted,

/s/ Timothy C. Rote

Timothy C. Rote
24790 SW Big Fir Rd.,
West Linn, OR 97068
503-702-7225 voice
timothy.rote@gmail.com
Plaintiff-Appellant-*Pro se*

CERTIFICATE OF COMPLIANCE

WITH LENGTH LIMITATIONS AND TYPE SIZE REQUIREMENTS ORAP 5.05

Length of Opening Brief on Review

I certify that (1) the foregoing REPLY BRIEF ON MERITS OF PLAINTIFF-APPELLANT TIMOTHY ROTE (1) complies with the word-count limitation of ORAP 5.05(2)(b)(i), and (2) the word count of this brief for elements of text described in ORAP 5.05(2)(a) is 3229 words as determined by the word-counting function of Microsoft Word.

Type Size

I certify that the size of the type is not smaller than 14 point for both the text and footnotes, as required by ORAP 5.05(2)(d)(ii).

Dated: May 12, 2017

/s/ Timothy C. Rote

Timothy C. Rote

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I FILED this date by Hand Delivery the original of the foregoing REPLY BRIEF ON MERITS OF PLAINTIFF-APPELLANT TIMOTHY ROTE and further that I SERVED by it by EMAIL AND REGULAR MAIL, per instructions of the Clerk of the Oregon Appeals Court, on all opposing counsel listed in this case in the records of this Court.

Matthew Kalmanson

OSB #041280
1000 SW Broadway
Twentieth Floor
Portland, OR 97205
(503) 222-4499
mjk@hartwagner.com
Attorney for Defendants-Respondents

Dated: May 12, 2017

/s/ Timothy C. Rote

Timothy C. Rote