

[J-33-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

AMERICAN FUTURE SYSTEMS, INC	:	No. 46 EAP 2005
D/B/A PROGRESSIVE BUSINESS	:	
PUBLICATION,	:	
	:	Appeal from the Order of the Superior
Appellant	:	Court entered on March 21, 2005 at No.
	:	1042 EDA 2004
v.	:	
	:	
	:	ARGUED: April 3, 2006
BETTER BUSINESS BUREAU OF	:	
EASTERN PENNSYLVANIA AND	:	
BETTER BUSINESS BUREAU OF	:	
METROPOLITAN WASHINGTON,	:	
	:	
Appellee	:	

CONCURRING OPINION

MADAME JUSTICE BALDWIN

DECIDED: May 31, 2007

While I join the majority's result and agree to affirm, I would affirm the Superior Court's analysis of the conditional privilege, rather than relying on the limited-purpose public figure analysis reached by the majority. Justice Saylor, writing for the majority, in reliance on Williams v. Kroger Grocery & Baking Co., 337 Pa. 17, 10 A.2d 8 (1940) and Hepps v. Philadelphia Newspapers, Inc., 506 Pa. 304, 324, 485 A.2d 374, 385 (1984), rev'd on other grounds, 475 U.S. 767, 106 S.Ct. 1558 (1986), concludes that the concept of common law conditional privilege may no longer alter the level of fault that a defamation plaintiff must prove in order to recover compensatory damages, and that ordinary negligence is sufficient for liability to attach where the plaintiff is a private figure. Majority slip op. at 13-16. The majority indicates that "the concept of a conditionally privileged occasion embodying the negligence standard" has been rendered superfluous by the

application of the First Amendment to defamation law. Id. at 15. Such a conclusion fails to take into consideration the public policy reasons which gave rise to the conditional privilege originally and unnecessarily eliminates the heightened protection historically afforded by the recognized common law conditional privileges.

“A privileged communication is one made upon a proper occasion, from a proper motive in a proper manner and based upon reasonable and probable cause.” Baird v. Dun and Bradstreet, 446 Pa. 266, 275, 285 A.2d 166, 171 (1971). “The basis of the defense of privilege is public policy. That is, conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff’s reputation.” Corabi v. Curtis Pub. Co., 441 Pa. 432, 451, 273 A.2d 899, 909 (1971) (citations omitted). See also Elia v. Erie Ins. Exchange, 430 Pa.Super. 384, 392, 634 A.2d 657, 660 (1993) (“Examples of such occasions giving rise to conditional privileges are: (1) when some interest of the publisher of the defamatory matter is involved; (2) when some interest of the recipient of the matter, or a third party is involved; or (3) when a recognized interest of the public is involved.”).

The concept of privileged communications evolved under Pennsylvania common law when the law of defamation presumed the defamatory statement to be false, placing on the defendant the burden of proving that it was true. In addition to demonstrating the truth of the statements, the defendant was permitted to avoid liability by asserting the defense of privilege to make the statements. Corabi, 441 Pa. at 452, 273 A.2d at 909. Unless the defendant demonstrated that the statement came within some legal privilege, the statement was presumed to have been made with malice. Once the defendant had pled and proved the elements of privilege, it became the plaintiff’s burden to prove that the statements were made with actual malice. Sprague v. Walter, 518 Pa. 425, 441 n.8., 543 A.2d 1078, 1086 n.8 (1988).

The United States Supreme Court has since abrogated states' ability to assign liability without fault, which had required the defendant to bear the burden of proving the truth of its assertions. In so doing, this jurisprudence has significantly affected the extent and necessity of the common law conditional privilege. However, while the conditional privilege in its historical form has been abrogated, I disagree with the majority that it has lost all of its significance.

In New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964) and Curtis Publ'g Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975 (1967), the United States Supreme Court held that public officials or public figures could not recover damages for a defamatory falsehood absent proof that the statement was made with "actual malice," that is, that it was made with knowledge of or reckless disregard for the falsity of the statement.

With respect to defamatory falsehoods regarding public officials or public figures, the courts of this Commonwealth routinely apply the New York Times standard requiring a showing of actual malice. See Sprague, 518 Pa. at 437, 543 A.2d at 1084; Ertel v. Patriot-News Co., 544 Pa. 93, 100, 674 A.2d 1038, 1041 (1996). Consequently, with respect to public officials or public figures, the common law conditional privileges have lost their value because the constitutional protection set forth in New York Times requiring actual malice gives at least as much protection as the common law conditional privilege. As such, with respect to plaintiffs who are public figures or public officials, I agree with the majority that the conditional privilege has lost its significance.

With respect to private-figure plaintiffs, the United States Supreme Court has determined that when the defamatory falsehood is injurious to a private individual, the states may define for themselves the appropriate standard of liability so long as they do not impose liability without fault. Gertz v. Robert Welch, Inc., 418 U.S. 323, 324, 94 S.Ct. 2997, 2999 (1974). Accordingly, the majority in the instant case, in reliance on Gertz, concludes that that if a private-figure plaintiff is to maintain any cause of action at all he must at a minimum establish negligence on the part of the publisher, since there can be no liability

without fault. Majority slip op. at 17. The majority then reasons, however, that in light of Gertz, the conditional privileges have lost their significance even with respect to private-figure plaintiffs. Relying on Kroger and Hepps, the majority finds that the standard for overcoming a conditional privilege is still negligence. If a conditional privilege can be defeated by a showing of negligence, the privilege no longer serves any purpose since, according to Gertz, private-figure plaintiffs must necessarily establish negligence in order to maintain any cause of action. Hepps, 506 Pa. at 324, 485 A.2d at 385. I disagree with this holding and would instead find that where the plaintiff is a private figure and the matter falls within one of the recognized conditional privileges, the level of fault may be elevated from negligence to actual malice.

In Hepps, we indicated in dicta and in reliance on a comment to the Restatement (Second) of Torts, that “[i]f a private figure plaintiff is to maintain any cause of action at all, he must minimally establish the negligence on the part of the publisher. In so doing, ‘he has by that very action proved any possible conditional privilege was abused.’” Hepps, 506 Pa. at 324, 485 A.2d at 385. This Court’s statement in Hepps rests upon an incomplete analysis of case law and the Restatement (Second) of Torts and can hardly be said to constitute an affirmative holding that in all circumstances, conditional privileges are overcome by a showing of negligence.

The comment to the Restatement on which Hepps relies commences with an analysis of the conflict created by the fact that prior to Gertz, the Restatement (First) of Torts had recognized negligence as sufficient to overcome a conditional privilege. The comment acknowledges that Gertz required all plaintiffs to demonstrate negligence, at a minimum, in order to sustain a cause of action and thus many traditional conditional privileges may be defeated without a change in the level of fault that must be demonstrated. However, the comment additionally indicates that:

One important effect of this is that courts will be more cautious in holding that a conditional privilege exists. Under

circumstances when the court feels that the defendant should be held liable for defamation if he is merely negligent, as distinguished from being reckless, then it should hold that a conditional privilege does not exist in the particular situation. It will thus fully accomplish its purpose of holding the defendant liable if he was negligent.

Restatement (Second) of Torts, Special Note to Topic 3, Title A, Conditional Privileges and the Constitutional Requirement of Fault (1977). Clearly, if the negligence standard is applied to determine abuse of a conditional privilege, then conditional privileges no longer have any effect. However, as the Restatement (Second) of Torts acknowledges:

One consequence of this holding [Gertz] is that mere negligence as to falsity, being required for all actions of defamation, is no longer treated as sufficient to constitute abuse of a conditional privilege. Instead, knowledge or reckless disregard as to falsity is necessary for this purpose. . .

The courts will now find it necessary to reassess the circumstances under which it is appropriate to grant a conditional privilege. If a proper adjustment of the conflicting interests of the parties indicates that a publisher should be held liable for failure to use due care to determine the truth of the communication before publishing it [i.e., negligence], a conditional privilege is not needed and should not now be held to apply. The conditional privilege should be confined to a situation where the court feels that it is appropriate to hold the publisher liable only in case he knew of the falsity or acted in reckless disregard of it [i.e., actual malice].

Restatement (Second) of Torts § 599 cmt. d. (1977).

Contrary to the determination of the majority that the conditional privilege of a private defendant speaking on matters of public concern is defeated by a showing of negligence and therefore without effect, I would hold instead that where the plaintiff is a private figure and the statements fall within some recognized common law privilege, i.e., are in

furtherance of some interest of social importance, the conditional privilege may apply to elevate the level of fault required to actual malice.¹ Indeed, the United States Supreme Court, acknowledging the varying degrees of constitutional value of certain forms speech, has observed that speech involving matters of public concern has greater constitutional value than speech concerning matters of purely private concern. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 750, 105 S.Ct. 2939, 2490 (1985). Where a defendant makes a privileged statement about a private-figure plaintiff, but the statement relates to a matter of social importance, such speech should be afforded the heightened constitutional protection of a conditional privilege. In the instant case, I would agree with Superior Court and the trial court that the defamatory statement at issue touched upon a matter of social importance and was made on a “proper occasion, from a proper motive in a proper manner and based upon reasonable and probable cause.” Baird, 446 Pa. at 275, 285 A.2d at 171.

Thus, while I agree with the majority that the appropriate standard for a private-figure plaintiff is, generally, to prove that the defamatory matter was published with negligence, as the Restatement (Second) of Torts § 599 comment d suggests, I would leave the courts with the option of assessing the circumstances under which it is appropriate to grant a conditional privilege to elevate the level of proof that the plaintiff must overcome to actual malice. Such circumstances where a conditional privilege may

¹ This Commonwealth has historically permitted some conditional privileges to be defeated upon a showing of actual malice. See e.g. Dempsky v. Double, 386 Pa. 542, 547, 126 A.2d 915, 917 (1956); Biggans v. Foglietta, 403 Pa. 510, 512, 170 A.2d 345, 346 (1961) (if the court determines that the alleged defamatory publication is privileged and there is no intrinsic or extrinsic evidence of malice, the court has a duty to direct a nonsuit or give binding instructions for the defendant); Corabi, 441 Pa. at 452, 273 A.2d at 909 (“[I]f the privileged occasion is but a qualified one and it be shown that defendant was actuated by malice, the defense of qualified privilege is vitiated.”). Therefore, it would not be contrary to established precedent to require an actual malice standard for a private-figure plaintiff to overcome a conditional privilege.

apply would include situations in which there are private-figure plaintiffs and matters of social importance.²

² For additional situations in which the conditional privilege may apply to elevate the level of fault, see Restatement (Second) of Torts § 594 (Protection of the Publisher's Interest); § 595 (Protection of Interest of Recipient or a Third Person); § 596 (Common Interest); § 597 (Family Relationships); § 598 (Communication to One Who May Act in the Public Interest) (1977). See also MacRae v. Afro-American Co., 172 F.Supp. 184, 188 (1959) ("Proper occasions, which give rise to a conditional privilege, are classified . . . as follows: (1) situations in which some interest of the person who publishes the defamatory matter is involved, (2) situations in which some interest of the person to whom the matter is published or of some other third person is involved, and (3) situations in which a recognized interest of the public is involved.").