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United States Court of Appeals Eighth Circuit, No. 14,681, Civil, Loren E. Lair, Appellant, vs. The Christian Restoration Association and Robert E. Elmore, Appellees, Appeal from the District Court of the United States for the Southern District of Iowa, Reply Brief of Appellant.

Paul W. Walters

Charles M. Bump

United States Court of Appeals

EIGHTH CIRCUIT.

NO. 14,681.
CIVIL.

LOREN E. LAIR,
Appellant,

VS.

THE CHRISTIAN RESTORATION ASSOCIATION
and ROBERT E. ELMORE,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF IOWA.

REPLY BRIEF OF APPELLANT.

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AUTHORITIES CITED.

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REPLY TO APPELLEES' STATEMENT OF THE CASE.

Attention is called to page 2 of Appellees' Brief, paragraph (1), which asserts that "The articles complained of were published as a part of a religious controversy which had existed for more than 30 years," was a defense. Appellant claims this was *not* a defense.

REPLY TO APPELLEES' MORE DETAILED STATEMENT.

Attention is called to that portion of Appellees' More Detailed Statement beginning with the last paragraph on

page 4 and ending on page 6, in that much of this is not supported by citations from the Record. Examples of this are such statements that the various churches were in unity of beliefs, that they had the same relationships as existed in Bible times, that it was believed that whatever was done by way of missions must be done inside the framework of the individual church, and the assertions made as to fundamentalists and modernists. Appellant claims that this portion is inaccurate and not supported by the Record.

The same is true of the statements beginning with the last paragraph on page 9 to the end of page 10.

The second paragraph on page 11 omits the fact that the meeting referred to was by request of the laymen mentioned.

Similar omissions occur in the second paragraph on page 12. (See R. 112 to 114)

In the last paragraph on page 13, the statement is made that:

> "Mr. Elmore's publications never referred to Mr. Lair except as he was *one of the class* included in the leadership of the United Christian Missionary Society and its affiliates."

Appellant claims that Mr. Lair is referred to as "the lair" in Exhibit "A", R. 37; as Loren E. Lair in Exhibit "B", R. 39; as The Lair in Exhibit "C", R. 41; by his full name in Exhibit "D", R. 43; as the State Secretary in Exhibit "E", R. 45; by name in Exhibit "F", R. 51; and by name in Exhibit "G", R. 51, and Exhibit H-1 and H-3. Appellant was also specifically included in the terms used. In his testimony, Mr. Elmore said: "He was included in the term 'false teachers'." (R. 223).

REPLY TO APPELLEES' HOW THE CASE AROSE.

Appellant claims that the statement which appears on page 14 of Appellees' Brief, namely: "Appellant succeeded in getting Mr. Elmore to travel from his home in Roanoke, Virginia, to the Pleasantville (Iowa) church, in the belief that Mr. Lair would be at Pleasantville to debate with Mr. Elmore," is untrue. The invitation to Mr. Elmore to come to Iowa did not come from Mr. Lair, but from Mr. J. F. Conn, who was a staunch supporter of Mr. Elmore's views. (R. 198) Further, Conn sent a letter inviting one Willis M. Meredith to come to the meeting of the church July 16, 1950. Whereupon Meredith, who was the only signer of the Committee of One Thousand advertisement, (Exhibit 2, the document which appears in the Record at page 116), forwarded the letter to Elmore, and wrote back to Pleasantville that they might be able to get Elmore. In response to this, Conn sent an invitation to Elmore. (R. 208) Arrangements were made to pay Elmore's expenses, (R. 173), an offer which was not made to Lair. The invitation to Lair (Exhibit 11, not in the printed Record), was not mailed until July 11, 1950, and could not possibly have reached him until July 12,—only 4 days before the meeting.

Lair did not reply to Mr. Conn's invitation so Mr. Elmore had no basis for thinking that Lair wanted to debate with him, or would debate with him. When July 16th came Lair merely went to attend the congregational meeting, which he did as state secretary of the churches. There was no reason for Lair to debate with the writer of such material.

Obviously the negotiations with Meredith and Elmore took place *before* the last minute issuance of the invitation to Lair, which was timed in such a way that Lair might not have been able to come on such short notice. There is no evidence of any kind in the Record that Lair had any part whatsoever in inducing Elmore to come to Iowa. Such a claim is without merit.

(This argument is ridiculous in view of the uncontradicted

REPLY TO ANSWER TO PROPOSITION I.

Authorities.

33 American Jurisprudence, Libel and Slander, Article 192, page 182.
Mowry vs. Reinking, 203 Iowa 628, 213 N. W. 274.
McCudden vs. Dickinson, 230 Iowa 1141, 300 N. W. 308.
Ryan vs. Wilson, 231 Iowa 33, 300 N. W. 707.
Klos vs. Zahorik, 113 Iowa 161, 84 N. W. 1046.
Wisner vs. Nichols, 165 Iowa 15, 143 N. W. 1020.
Odger, Libel and Slander, 6th Edition, page 570.
Newell, Libel and Slander, 4th Edition, Article 711, page 787.
Schulze vs. Jalonick, 44 S. W. 580, Texas Civil Appeals Report 296.
Washington Post. vs. Kennedy, District of Columbia Circuit Court of Appeals, 3 Federal 2nd, 207.
53 C. J. S., Libel and Slander, Article 177 page 275.

Argument.

Appellees have asserted throughout, the position that all the various statements made by them as to infidelity, apostasy, falsehood, deceit, and so forth, were about a class, and therefore proof of the truth of their statements as to any one member of the class would relieve them from liability to the plaintiff in this case.

This position ignores the facts. In all of the articles which appear in the Record, from page 37 to page 67 (save one, Exhibit H-2 on page 61 of the Record), plaintiff is specifically mentioned, and this alters both the libel and the evidence required.

(NOT TRUE

As is said in 33 American Jurisprudence, Libel and Slander, Article 192, page 182,

> "The situation is wholly different when it appears that the alleged defamatory matter points to a particular member of the group or class involved; in such case the person so singled out is entitled to redress, and his right thereto is not affected by the circumstances that the language used may also apply to others."

The case of *Mowry vs. Reinking,* 203 Iowa 628, 213 N. W. 274, cited by Appellees, does not help them. Truth is a defense, but the statements must be true *about the plaintiff.* It makes no difference whether they were true about someone else or not. The principal holding in the *Mowry* case is that the evidence must be part of the res gestae and relevant to be admissible. The Court said:

> "Surely testimony of matters occurring long prior to May, 1921, of the alleged secret society, of the customs, language and traditions of the community, of their attitude during the World War toward Germany, the Allies or war activities, could tend in no way to establish either the alleged conspiracy or damages recoverable by Appellee."

In this connection, it appears in the Record without dispute that Mr. Lair was never employed by, or connected with, the United Christian Missionary Society, yet Appellees were permitted to attempt to prove alleged occurrences in the work of that organization going back as far as thirty years before the trial of this case. (For the record of Plaintiff-Appellant's employment see R. 71-73). There was no record made at the trial that Appellant ever participated in any controversy prior to the events leading up to this case. How could all this ancient history have any bearing on the issue of whether or not the allegations were true against the Appellant?

BULL!

The case of *McCudden vs. Dickinson,* 230 Iowa 1141, 300 N. W. 308, cited by Appellees, is a holding that the truth is a complete defense, but there is also a holding in this case that the allegations as to truth must state specifically the acts or

offenses of which the plaintiff is guilty, which not only were not alleged here, but certainly were not proved as to the Plaintiff-Appellant.

The case of *Ryan vs. Wilson,* 231 Iowa 233, was one holding communications between state officials privileged. No such privilege exists here.

The case of *Klos vs. Zahorik,* 113 Iowa 161, states:

> "The defendant would have no right to make false statements with regard to what plaintiff did or said, nor would he have a right to extend by publication false statements made by others."

In this case, the judgment for the defendant was reversed.

The case of *Wisner vs. Nichols,* 165 Iowa 15, 143 N. W. 1020, states the rule. The Court said:

> "If the charge be against a class, and is or may be made of definite application, any one of that class may maintain an action upon showing that the words apply specifically to him."

Under that part of the Appellees' answer sought to be stricken Appellees were eventually permitted to attempt to prove the truth of their assertions of infidelity and apostasy as to the United Christian Missionary Society and Drake University, notwithstanding the fact that there is no proof in the Record that Appellant was in any way responsible for the policies or actions of these organizations or the members of their staffs.

In Odger's work on Libel and Slander, 6th Edition at page 570, it is said that where defendant's words have injured plaintiff it is no defense that he "intended them to refer to someone else. He should have been more explicit: his secret intention is immaterial."

In the same volume at page 570, it said that publication by others of the same charges is not admissible nor is it

evidence of the truth of such charges. Further "It is wholly immaterial that plaintiff omitted to contradict or complain of such publications."

In Newell on Libel and Slander, 4th Edition, article 711 page 787, it is stated that the fact that defendant has libeled other persons is inadmissible.

In *Schulze vs. Jalonick,* a Texas case, 44 S. W. 580, the Court held that evidence of charges made by defendants against other parties was properly excluded.

In *Washington Post vs. Kennedy,* Court of Appeals of the District of Columbia, 3 Fed. 2nd 207, an article was published by defendant, headlined "Attorney Held as Forger, Harry Kennedy Brought Back to Face Charge." The plaintiff was the only Harry Kennedy in the District of Columbia. Although the article was actually about a lawyer from Detroit of the same name, the Court held that the fact that the article was true about another Harry Kennedy was no defense and the judgment was affirmed.

It seems to us that the foregoing citations are a sufficient answer to Appellees' claim that their accusations were against a class, and that they were entitled to attempt to prove the truth of their allegations against other members of the class.

After all, they pleaded the truth, (R. 15, Par. 9, see also, R. 86 for Mr. Sibbald's statement and the Court's response.) As is stated in 53 C. J. S., Libel and Slander, article 177, page 275, the plea of truth or justification is one of confession and avoidance. It confesses that the words are spoken about plaintiff but seeks to avoid liability by asserting they are true as to him.

How, then, could allegations as to the practice of open membership, modernism, and waste of money on the part of others than the plaintiff have any place in the pleadings?

REPLY TO ANSWER TO PROPOSITION II.

Authorities.

Mowry vs. Reinking, 203 Iowa 629, 213 N. W. 274.
McCudden vs. Dickinson, 230 Iowa 1141, 300 N. W. 308.
Martin vs. Kentucky Christian Conference, Inc., 255 Kentucky 323, 73 S. W. 2nd 849.
Ragsdale vs. Church of Christ in Eldora, Iowa, 55 N. W. 2nd 539.
Odgers, Libel and Slander, 6th Edition, page 570.
Washington Post vs. Kennedy, Court of Appeals of District of Columbia, 3 Fed. 2nd 207.

Argument.

Appellees were permitted to go into the policy of Drake University as to "fundamentalists and modernists" in the cross-examination of Lair. They attempt to justify this inquiry by stating that the plaintiff, in his testimony in brief, "emphasized" his association with Drake University Bible College as Ministerial Counsellor." The "emphasis" claimed consisted of this, included in his answer to a routine question as to his various employments after college days, "I then became ministerial counsellor for Drake University from February 1944 to April 1946." (R. 72.)

In further attempt to justify this inquiry appellees claimed in the last paragraph on page 24 that the witness was "evasive" in his answers. A sufficient answer to that charge is in the Record itself, pages 94-97 inclusive. When the witness clearly stated that he knew of no policy as to "fundamentalists and modernists," and that he had nothing to do with the policy of the University, he certainly cannot be charged with anything contained in the letter, Exhibit 1, (R. 234), written by the Dean of the institution. Yet this whole inquiry was permitted. It did not tend in any way to

prove the truth or falsity of the charges against the plaintiff. The inquiry was improper and prejudicial.

With reference to the admission of Exhibits 2, 3 and 4, Appellees say that "Mr. Bump objected to their introduction for that purpose on the sole ground that these Exhibits do not 'establish a controversy that is involved in these articles published by the Restoration Herald'." Again Appellees are careless in statement. The objections included incompetency, relevancy, materiality, identification, lack of proof as to the accusations made therein, that the authority of Meredith to make them for an unidentified group was not shown, *and* that they did not tend to prove any issue as to the controversy between plaintiff and defendants. (See Appellant's Brief, pages 36, 37 and 38, for the objections and references to the Record.) Certainly how a document published in 1946, by persons unknown, can prove or disprove any facts regarding the libel of plaintiff or its justification, is difficult to see.

Counsel stated, when asked what the purpose of the offer of Exhibit 2 was, that it was only for the purpose of showing a controversy of long standing between the Restoration Herald and the United Missionary Society and its related societies and corporations. Then in argument, Counsel said to the jury that because no one had ever answered the charges in Exhibit 2, they were therefore true. (See Transcript page 786 and following pages.) The real purpose of the offer was thus revealed.

The same is true of the evidence as to the accusations of defendants against the United Christian Missionary Society, going back in time as far as the year 1919.

As before observed, in the first division of this Reply, the cases cited by Appellees do not sustain their view. *Mowry vs. Reinking,* 203 Iowa 629, 213 N. W. 274, cited by them is a holding that only evidence as to the res gestae is admissible. *McCudden vs. Dickinson,* 230 Iowa 114, 300 N. W. 308,

is mainly a holding that where the truth is pleaded, the specific things making the charge true must be pleaded and proved.

Martin vs. Kentucky Christian Conference, Inc., 255 Kentucky 322, 73 S. W. 2nd 849, is no more than a holding that the Conference could not enjoin a local church from severing affiliation with it.

Ragsdale vs. Church of Christ in Eldora, 55 N. W. 2nd 539, is a case of similar import. That was a suit brought by expelled members who were reinstated, but the Court held, as in the Kentucky case, that severance of affiliation did not constitute a change of basic faith and therefore would not be enjoined. There is no such issue here, and these two cases are not in point.

Exhibits 2, 3 and 4 are the charges of unidentified persons against the United Christian Missionary Society, the International Convention and the Christian Board of Publication. The rest of the rulings complained of go to the admission of evidence seeking to prove the truth of these articles as to the United Christian Missionary Society and Drake University, and, indeed, the trial became a trial of these organizations. Appellees specifically claim in Argument, page 22, that the charges contained in the articles in suit did not refer to plaintiff.

How, then, was this evidence admissible?

"If the defendants' words have in fact injured the plaintiff's reputation, it is no defense to an action that the defendant intended them to refer to someone else. He should have been more explicit; his secret intention is immaterial." Odgers, Libel and Slander, 6th Ed. page 570.

"That others have published the same charges against the plaintiff and have not been sued, is not in any way admissible. It is no justification for defendant's republication, nor is it any evidence of the truth of such charges. (Citing authorities) It is wholly immaterial that plaintiff

omitted to contradict or complain of such previous publications. (Citing authorities) (Odgers, supra, page 570.)

Washington Post vs. Kennedy, Court of Appeals of the District of Columbia, 3 Fed. 2nd 207, is a square holding that the fact a libel is true about a third party is not a defense.

We submit that this evidence was inadmissible.

REPLY TO ANSWER TO PROPOSITION III.

Authorities.

Commercial Publishing Co. vs. Smith, 149 Fed. Rep. 704.
Klos vs. Zahorik, 113 Iowa 161, 84 N. W. 1046.
Washington Post Co. vs. Chaloner, 250 U. S. 290, 39 Sup. Ct. 448, 63 L. Ed. 987.
Pittsburgh Courier Pub. Co. vs. Lubore, 200 Fed. Rep. (2d) 355.
53 C. J. S., Libel and Slander, Sec. 86.
Robinson vs. Home Fire and Marine Ins. Co., 242 Iowa 1120, 49 N. W. 2d. 521.
Stewart vs. Swift Specific Co., 76 Ga. 280, 2 Am. St. Rep. 40.
Hughes vs. Samuel Bros., 179 Iowa 1077, 159 N. W. 589.
Belknap vs. Ball, 83 Mich 583, 47 N. W. 674.
Dangerous Words, page 185.

Argument.

While appellees have apparently planted themselves in their answer to Proposition III upon their claim that they are somehow privileged to make any statements they see fit to make, some attention should first be given to the authorities they have cited.

Commercial Publishing Co. vs. Smith, 149 Fed. Rep. 704, is a holding that it was a jury question whether the article in question accused the plaintiff of being a murderer.

Klos vs. Zahorik, 113 Iowa 161, 84 N. W. 1046, was a holding that a priest, being a public man, was a proper subject of "comment *within proper limits*", but "the defendant would have *no right to make false statements* with regard to what plaintiff did or said, nor would he have the right to extend by publication *false statements made by others*". (Italics ours)

Washington Post Co. vs. Chaloner, 250 U. S. 290, 39 Sup. Ct. 448, 63 L. Ed. 987, was a holding that whether an article charged murder or a homicide without malice was a question for the jury.

Pittsburgh Courier Pub. Co. vs. Lubore, 200 Fed. Rep. (2d) 355, was a holding that an article was not privileged where false.

53 C. J. S., Libel & Slander, Sec. 86, cited, states: "It is no justification that defamatory matter has been previously published by a third person".

Robinson vs. Home Fire & Marine Ins. Co., 242 Iowa 1120, 49 N. W. 2d 521, was a case where plaintiff sued the insurance company for libel for statements made by its attorney to hers, and statements made by an adjuster to a prospective witness. Defendant's motion to dismiss the two divisions setting up these matters was sustained by the lower court. The Supreme Court held the conversation between the attorneys was absolutely privileged, based on public policy, but the statements by the adjuster to the witness were not. The case was therefore reversed. It should also be noted that the quotation given in Appellees' Brief, p. 31, is not the ruling of the Court. It is an authority cited by the Iowa Court, and the first six words have been omitted. They are "It has also been held that". The Court also quotes authority that the language may be such that the jury may be justified in finding malice from its use. The holding is that the case against the adjuster should be sent to the jury.

We pass Appellees' comments (page 32) on *Stewart vs.*

Swift Specific Co., 76 Ga. 280, 2 Am. St. Rep. 40, *Hughes vs. Samuel Bros.*, 179 Iowa 1077, 159 N. W. 589, with the statement we do not believe the comments are well taken; however, with regard to their comment on the case of *Belknap vs. Ball*, 83 Mich. 583, 47 N. W. 674, we think some of the language on page 676 is worthy of mention:

> "Publications of falsehoods never are privileged. No public interest can be served by the publication and circulation. If statements, though false, are published in good faith, and in an honest belief in their truth, the damage may be reduced to a minimum. No other rule will properly protect the freedom of the press and the rights of individuals."

The Court also said at page 675:

> "But a statement that he gave utterance, either in writing, or in speech, to certain language, is neither criticism, nor expression of opinion. It is a statement of fact, for the truth of which the publisher is responsible."

A late volume, "Dangerous Words", states:

> "Nor is there any protection in assuming that the language of the libel was intended to be fair comment and criticism, if such fair comment and criticism embodied statements of positive facts. Fair comment and criticism may not be libel because they constitute an honest expression of lawful opinion, but with the single exception of public officers in certain states, the facts upon which the comment is based must be true. In any event, where fair comment and criticism embody facts, the facts must be so. The assertion of a fact is not comment. Statements of facts are made at the peril of the writer". Dangerous Words, page 185.

As is said in effect above, and specifically in the *Zahorik* case, the defendants had no right to make false statements as to what plaintiff did or said.

REPLY TO ANSWER TO PROPOSITION IV.

Authorities.

Wisner vs. Nichols, 165 Iowa 15, 143 N. W. 1020.
Nieman-Marcus vs. Lait, 107 F. Supp. 96, 13 F. R. D. 311.
Mount Olive Primitive Baptist Church vs. Patrick, 252 Ala. 672, 42 So. (2d) 617.

Argument.

Appellant's Reply, (R. 26-28), stated plaintiff had not engaged in any controversy with the defendant, that he was not the author of the Brotherhood Action Committee documents, that they were not written, mailed or sent out by him, or under his direction, and that the Committee was not under his direction and control.

Plaintiff was surely entitled to have these issues submitted to the jury. They were not covered by the instructions in any way.

Instead, the excerpts from instruction 7 (R. 244, 245), cited by Appellees, permitted the jury to find that if plaintiff had *any* connection with or relationship to, the circulation of the Brotherhood Action Committee documents there *would* be legal excuse for the publications of the defendants. Thus, if plaintiff extended any courtesy to the members of the Committee, he could be "connected with" or "related to" what they did.

Further, the Brotherhood Action Committee documents refer only to a class, and could not cause any privilege to arise against a named individual unless he was the author, publisher, or broadcaster. Plaintiff had to be one of these three before any possible privilege could arise for a reply.

The instruction was most unfair and the court failed to instruct on the issues made by the reply.

As a part of their answer to Proposition IV. Appellees argue that their motion for directed verdict should have been sustained (see their brief 35).

Wisner vs. Nichols, 165 Iowa 15, at page 28, 143 N. W. 1020, cited, states the general rule that where words of application designate a class and can be held to apply to an individual, an action can be maintained.

The case, *Nieman-Marcus Co. vs. Lait,* 107 F. Supp. 96, 13 F. R. D. 311 was one in which the Court held that where the individuals were not ascertainable or capable of identification no recovery could be had, but that the corporation which was identified in the libel could proceed.

The case of *Mount Olive Primitive Baptist Church vs. Patrick,* 252 Ala. 672, 42 So. (2d) 617 is not in point.

We submit that since the articles in suit unquestionably referred to plaintiff, the motion could not properly have been sustained.

CONCLUSION.

We respectfully submit in the light of the foregoing that this case should be reversed and sent back for a new trial.

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