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Fuoco v. Polisena, 244 A.3d 124 (R.I. 2021)

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Defamation Law. *Fuoco v. Polisena*, 244 A.3d 124 (R.I. 2021). A public figure defamation plaintiff has the burden of proving by a preponderance of the evidence that the defendant's statement was false and must prove by clear and convincing evidence that the defendant made the statement with "actual malice." In the absence of such proof, judgment as a matter of law for the defendant is appropriate.

FACTS AND TRAVEL

On October 15, 2013, at a meeting of the Town Council of Johnston, Rhode Island, councilmember Eileen Fuoco, plaintiff, asked why only two streets in her district were selected for repaving and repair.[1] Mayor Joseph Polisena, defendant, responded that he attempted to contact her to get a list of roads that needed repair but she did not respond promptly.[2] Over plaintiff's objections, defendant then initiated a tense confrontation with her at the meeting, stating that she "spend[s] three months in Florida" and was "missing in action" based on her attendance records at council meetings.[3] He went on to suggest that plaintiff "had a problem" with his administration because "she tried to get healthcare from the town" and " she tried to put in for temporary disability, unemployment insurance."[4] Finally, alluding to plaintiff, defendant wondered aloud whether the public might "be concerned if someone tried to rip the system off."[5]

In response, plaintiff said that she had not sought disability compensation from the town and defendant was making an "incorrect statement."[6] The defendant then produced a letter from the

1. Fuoco v. Polisena, 244 A.3d 124, 126 (R.I. 2021).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

Temporary Disability Insurance Division of the Rhode Island Department of Labor and Training that the town's payroll clerk had brought to his attention earlier.[7] The letter alerted the town that plaintiff had "filed a claim for [Temporary Disability Insurance] benefits."[8]

Two weeks later, on October 23, 2013, plaintiff filed a complaint in Superior Court, alleging three counts: deprivation of her right to privacy, slander and libel, and intentional infliction of emotional distress.[9] The defendant responded with a two-count counterclaim for abuse of process and immunity under the Limits on Strategic Litigation Against Public Participation (anti-SLAPP) statute.[10] The trial went before a jury in June 2018.[11] After plaintiff's case-in-chief concluded, defendant moved for judgment as a matter of law (JMOL) pursuant to Rule 50 of the Superior Court Rules of Civil Procedure.[12] The trial justice reserved decision on the Rule 50 motion.[13] At the end of the evidentiary phase, the trial justice ruled on JMOL motions from both parties, dismissing plaintiff's claim of deprivation of privacy and defendant's counterclaim for abuse of process.[14] However, the trial justice reserved judgment as to whether JMOL was appropriate for the slander and intentional infliction of emotional distress counts and allowed the jury to decide defendant's claim of immunity under the anti-SLAPP statute.[15]

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7. *Id.*
8. *Id.*
9. *Id.* at 127.
10. *Id.* The anti-SLAPP statute states in part, "[a] party's exercise of his or her right of petition or of free speech under the United States or Rhode Island constitutions in connection with a matter of public concern shall be conditionally immune from civil claims, counterclaims, or cross-claims." 9 R.I. GEN. LAWS § 9-33-2(a).
11. *Fuoco*, 244 A.3d at 127.
12. *Id.* Rule 50 provides that "[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue." SUPER. CT. R. CIV. P. 50(a)(1).
13. *Fuoco*, 244 A.3d at 127.
14. *Id.*
15. *Id.*

The jury concluded defendant was not immune under the anti-SLAPP statute and found for plaintiff on the slander claim, awarding her $20,000 in damages.[16] At this point, the trial justice set aside the jury verdict and granted defendant's motion for JMOL.[17] The plaintiff timely appealed to the Rhode Island Supreme Court.[18]

ANALYSIS AND HOLDING

On appeal, plaintiff contended that the trial justice granted JMOL in error and that the jury verdict should be reinstated.[19] She specifically argued that three statements made by defendant at the Town Council meeting were defamatory: (1) that she attempted to "rip the system off" by seeking Temporary Disability Insurance (TDI) benefits from the town, (2) that she applied for unemployment insurance, and (3) that she was "missing in action" by dint of her absences from Town Council meetings.[20]

The Court reviews trial justice decisions on motions for JMOL *de novo*, so it examined the evidence relating to each of the three statements to determine if any were, in fact, defamatory.[21] Since plaintiff was a councilmember and therefore a public figure, she had to carry a heightened burden of proof and show by clear and convincing evidence that each of defendant's statements was false, defamatory, and made "with 'actual malice'—that is, with knowledge that [the statement] was false or with reckless disregard of whether it was false or not."[22]

A. *Temporary Disability Insurance*

The Court upheld the trial justice who found no evidence that the statement about plaintiff seeking TDI benefits to "rip the system off" was false.[23] Specifically, the trial justice noted that

16. *Id.*
17. *Id.* In the alternative, the trial justice also granted defendant's motions for a new trial and a remittitur. *Id.* at 127.
18. *Id.*
19. *Id.*
20. *Id.* at 127-29.
21. *Id.*
22. Cullen v. Auclair, 809 A.2d 1107, 1110 (R.I. 2002) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)).
23. *Fuoco*, 244 A.3d at 128.

plaintiff did not submit her TDI benefits application into evidence, which would show what benefits she did or did not apply for. Therefore, plaintiff failed to show that the statement was false by a preponderance of the evidence.[24] Furthermore, even if she had proved the statement's falsity, plaintiff made no effort to show it was spoken with actual malice, neglecting to "provide any evidence whatsoever, let alone clear and convincing evidence that would establish that defendant knew she had not applied for TDI against the town."[25] As such, the trial justice was correct that the TDI statement was not defamatory as a matter of law.[26]

B. *Unemployment Insurance*

The Court also agreed with the trial justice that plaintiff failed to prove actual malice concerning defendant's statement that she "put in for unemployment compensation."[27] Although there was no evidence that plaintiff applied for such insurance, the record showed that defendant likely conflated TDI with unemployment compensation.[28] After defendant made the unemployment comment, he pointed to the TDI letter and exclaimed, "it's right there."[29] The Court reasoned that whether defendant was confused or not, since plaintiff failed to examine him at trial, she could not prove that he knew the statement was false or recklessly disregarded that possibility.[30]

C. *Missing Meetings*

Finally, plaintiff contended that defendant's comment that she was "missing in action" was defamatory because defendant did not present any evidence as to how many meetings she missed. The

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24. *Id.*
25. *Id.* (internal quotations and brackets removed).
26. *Id.* at 128-29.
27. *Id.* at 129.
28. *Id*; *see also* Hall v. Rogers, 490 A.2d 502, 505 (R.I. 1985) ("As long as the sources of the libelous information appeared reliable, and the defendant had no doubts about its accuracy, the courts have held the evidence of malice insufficient to support a jury verdict, even if a more thorough investigation might have prevented the admitted error.") (quoting Ryan v. Brooks, 634 F.2d 726, 734 (4th Cir. 1980)).
29. *Fuoco*, 244 A.3d at 129.
30. *Id.*

Court disagreed, and again upheld the trial justice.[31] Reciting basic tenets of defamation law, the Court stated:

> [I]t was not defendant's burden to prove that his statements regarding plaintiff's attendance were truthful. Rather, plaintiff bore the burden of proving, by a preponderance of the evidence, that defendant's statements were false.[32]

Since plaintiff did not introduce her attendance record into evidence, the Court reasoned that she could not show the "missing in action" statement's falsity.[33] Therefore, the trial justice did not err in concluding that plaintiff failed to prove the falsity of the statement.[34]

The Court thus affirmed the trial justice's grant of JMOL.[35] Due to plaintiff's failure to put on relevant evidence, she did not meet her burden of proof to show that the three statements were each false and spoken with "actual malice."[36] Therefore, JMOL was appropriate, notwithstanding the jury's verdict.[37]

COMMENTARY

The Court's decision boiled down to plaintiff's complete failure of proof. In any defamation case, if the statement at issue is true, plaintiff cannot prevail. Furthermore, the onus is on plaintiff to show falsity by a preponderance of the evidence, not on defendant to prove the truth of his own statement. Here, plaintiff barely put on any evidence of falsity at all, let alone a preponderance of evidence. Her only attempt to do so was regarding the claim that she applied for unemployment compensation.

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31. *Id.*
32. *Id.*(internal citations omitted).
33. *Fuoco*, 244 A.3d at 129.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*; *see* O'Connell v. Walmsley, 93 A.3d 60, 65 (R.I. 2014) (noting JMOL is appropriate if "the trial justice 'determines that the nonmoving party has not presented legally sufficient evidence to allow the trier of fact to arrive at a verdict in his [or her] favor.'" (quoting McGarry v. Pielech, 47 A.3d 271, 280 (R.I. 2012)).

Assuming, for the sake of argument, that plaintiff did clear her first hurdle by proving the statements' falsity, she had a bigger problem. As a politician, she was the quintessential public figure defamation claimant. For a public figure to prevail in a defamation action, they must prove the defamatory statements were made with "actual malice," meaning defendant knew the statement was false or recklessly disregarded that possibility.[38] The Rhode Island Supreme Court requires the claimant to prove this element by clear and convincing evidence.[39]

Here, again, plaintiff fell short. She did not address defendant's state of mind at all concerning the TDI and "missing in action" statements. With regard to the unemployment compensation remark, plaintiff posited that defendant made a knowingly false statement because there was no proof that she applied for unemployment compensation.[40] That argument, however, ignores the possibility that defendant was simply mistaken.[41] The "actual malice" standard allows for such mistakes in the absence of "sufficient evidence . . . that the defendant in fact entertained serious doubts as to the truth of his publication."[42] Here, the record suggested the opposite, that defendant believed what he said.

Moreover, this disagreement between a town Mayor and Councilmember exemplifies the type of speech that the "actual malice" standard was meant to protect from its inception: political discourse.[43] In *New York Times Co. v. Sullivan,* the Supreme Court reasoned that a heightened evidentiary burden for public figure defamation plaintiffs sprang from "the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[44] The defendant's statements were certainly vehement and caustic. He

38. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

39. *See* Capuano v. Outlet Co., 579 A.2d 469, 472 (R.I. 1990).

40. *Fuoco,* 244 A.3d at 129.

41. *Id.*

42. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

43. *See* Garrison v. Louisiana, 379 U.S. 64, 77 (1964) (stating the actual malice requirement "protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant.").

44. *New York Times Co.*, 376 U.S. at 270.

admitted that he "crucified" plaintiff at the public meeting, and she likely lost a reelection bid as a result.[45]

Though the Court described plaintiff's appeal as "perfunctory,"[46] her failure is a valuable reminder of the importance of free expression in politics. As the trial justice remarked, "[o]ne politician vocalizing his opinion about the performance of another politician is not just non-defamatory as a matter of law—it is the very core of democratic discourse in a free society."[47] Considering the protected speech at issue and the insufficient evidence of falsity and "actual malice," the Court was correct that no reasonable jury could find for plaintiff in this case.

CONCLUSION

The Rhode Island Supreme Court affirmed the trial justice's grant of judgment as a matter of law in favor of the defendant. The Court reasoned that it was appropriate to set aside the jury's verdict for plaintiff because she failed to put on evidence showing defendant's statements were false and spoken with actual malice; thus, the statements were not defamatory.

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45. Fuoco v. Polisena, No. PC-2013-5356, 2018 WL 3965779 at *1, *8 (R.I. Super. Ct. Aug. 16. 2018).

46. *Fuoco*, 244 A.3d at 127 n.2.

47. *Fuoco*, 2018 WL 3965779 at *8.