IN THE COURT OF APPEALS OF IOWA

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No. 7-358 / 96-1196

FILED
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CLERK SUPREME COURT

MARK EMERSON WILLEY,
Appellant,

vs.

FRANCIS GLASER and **MICHAEL KANE,**
Appellees.

Appeal from the Iowa District Court for Jackson County, Patrick J. Madden, Judge.

Plaintiff appeals a district court ruling granting the defendants' motion for directed verdict in plaintiff's action against the defendants for denial of access to local cable television programming and for defamation and slander. **AFFIRMED.**

Mark E. Willey, Maquoketa, pro se, for appellant.

Michael Kane, Maquoketa, for appellees.

Considered by Sackett, P.J., and Streit and Vogel, JJ.

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PER CURIAM.

The plaintiff, Mark Emerson Willey, sought compensatory and punitive damages against the defendants, Francis Glaser and Michael Kane, claiming their comments and actions libeled and slandered Willey's character and violated his First Amendment rights to free speech. Finding no basis in Willey's claims, we affirm the district court in granting defendants's motion for directed verdict.

Background facts. Mark Willey produced twenty commentary programs regarding matters of public interest for viewing on the City of Maquoketa's local access cable channel. During one show, Willey stated three times that two school district officials were lying about compensation received by the school district educating students from another district. This program ran unedited twice in October and once in November 1994.

On November 17, 1994, Glaser, Maquoketa's city manager, wrote Willey a letter informing him he had imposed a concurrent ninety-day restriction on use of the access channel for allegedly slanderous material in the program. On November 17, 1994, Maquoketa's city attorney, Michael Kane, wrote Glaser a letter approving the suspension.

Willey appealed the restrictions to the local cable commission and the city council. On November 21, 1994, Maquoketa's city council voted to overturn the sanctions. On November 23, 1994, Kane wrote Glaser a letter supporting the cancellation of Willey's program based on Willey's comments that the superintendent

of schools was a liar. Kane maintained the superintendent, if he chose to file an action against the city, would have a case under the slander per se rule. Based on this letter, Glaser canceled the third and fourth broadcast of Willey's shows. In a December 8, 1994, letter, Kane again informed the city council that further rebroadcasts of Willey's program could place the city in danger of being the subject of a lawsuit by the superintendent for slander.

Willey then filed the current action claiming the comments and actions of Glaser and Kane constituted libel and slander on his character and were tantamount to a violation of his First Amendment rights to free speech. The district court granted Kane's and Glaser's motion for a directed verdict and Willey appeals.

Scope of review. A court ruling on a motion for directed verdict must view the evidence in the light most favorable to the nonmoving party. *Beitz v. Horak*, 271 N.W.2d 755, 757 (Iowa 1978); Iowa R. App. P. 14(f)(2). A directed verdict is appropriate in cases where each element of the claim is not supported by substantial evidence. *Oberreuter v. Orion Indus., Inc.*, 398 N.W.2d 206, 209 (Iowa App. 1986). Movant is considered to have admitted the truth of all evidence offered by nonmovant and every favorable inference that may be deducted from it. *B & B Asphalt Co. v. T.S. McShane Co.*, 242 N.W.2d 279, 284 (Iowa 1976). To overrule the motion the court must find substantial evidence in support of each element of nonmovant's claim. *Beitz*, 271 N.W.2d at 757. The trial court is vested with considerable discretion in

determining whether evidence is sufficient. *Hoover's Hatchery, Inc. v. Utgaard*, 447 N.W.2d 684, 687 (Iowa App. 1989).

Willey's claims. Willey argues the district court erred in: (1) ruling that he did not present a complete cause of action in defamation because defendant Glaser is a public official who possessed a qualified privilege; (2) finding that defendant Kane was a public official who possessed a qualified privilege; (3) finding he failed to prove actual malice with regard to statements made by the defendants; (4) finding that he did not present a complete cause of action under the First Amendment arising from the broadcast of his program twice but not a third or fourth time; (5) finding he had failed to prove his constitutional rights were denied because he was suspended from use of the city public access channels from October 28, 1994, to November 21, 1994; and (6) finding he had failed to demonstrate a violation of his constitutional rights when the defendants canceled his fourth program. Plaintiff lastly argues he was denied a right to a jury trial.

Our supreme court in *Rees v. O'Malley*, 461 N.W.2d 833, 837 (Iowa 1990) formulated a test to determine the applicability of a qualified privilege. The essential elements include "good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, *and publication in a proper manner and to proper parties only.*" *Id.* (Emphasis in original.) We conclude the publication to the city council of defendant's opinions was proper: City Attorney Kane was asked to render a legal opinion and he did so. The *Rees* test has been met and accordingly the

qualified privilege applies in this case. However, "[s]uch a privilege affords no immunity if actual malice is established." *See Vojak v. Jensen*, 161 N.W.2d 100, 107 (Iowa 1968). Willey did not prove malice by clear and convincing evidence to effectively vitiate the qualified privilege. Moreover, Willey did not testify, so no evidence appears in the record upon which to base his libel and slander claims, nor is there any evidence to indicate a violation of Willey's First Amendment rights. Assuming evidence was presented, the First Amendment argument would be undermined as Willey's program aired *three times*, unedited.

Furthermore, Willey's program containing the slanderous material was deemed an illegality under the Local Government Access Policy and Guidelines, Program Content, paragraph 1H, proscribed by federal, state, and local law. We determine City Manager Glaser acted within the scope of his duties under the guidelines enforcement procedures, and that the city thus complied with the guidelines with respect to the suspension of Willey's cable production.

With regard to Willey's last contention, we conclude the district court did not abuse its discretion under Iowa Rule of Civil Procedure 177 in denying Willey's untimely request for a trial by jury.

AFFIRMED.