

SUPREME COURT OF NEW HAMPSHIRE

Terry T. Thomas v. Telegraph Publishing Co. and another

929 A.2d 993 (2007) · No. No. 2005-751 · Decided August 29, 2007

SUMMARY

The Supreme Court of New Hampshire reviews cross-appeals from an order granting summary judgment to defendants in a defamation action arising from a newspaper article about the plaintiff's criminal history. The court reverses the determination that the plaintiff was libel-proof, adopts the issue-specific libel-proof plaintiff doctrine subject to cautious and sparing application, and discusses the fair report privilege and related malice standards. The matter is remanded for further proceedings.

CASE DETAILS

COURT	Supreme Court of New Hampshire
WRITING FOR THE COURT	Duggan, J.; Broderick, C.J.; Dalianis, J.
JURISDICTION	New Hampshire
DECIDED	August 29, 2007
DOCKET	No. 2005-751
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The plaintiff appealed, and the defendants cross-appealed, from the trial court's order granting summary judgment to the defendants in a defamation action.
STANDARD OF REVIEW	A denial of a motion to amend is reviewed for an unsustainable exercise of discretion. Summary judgment is reviewed de novo, construing the pleadings, discovery, and affidavits in the light most favorable to the nonmoving party. Whether a statement is capable of bearing a defamatory meaning or implying an actionable fact is a question of law, while factual questions concerning substantial truth and qualified privilege may be for the jury.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Terry T. Thomas v. Telegraph Publishing Company, Terence L. Williams, Joshua Trudell, Town of Hudson, Michael Gosselin, Roland Anderson, Albert Droney, Gene Bousquet, Edith Flynn

TOPICS

defamation

summary judgment

appellate procedure

civil procedure

remedies

PRACTICE AREAS

defamation

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QUESTIONS PRESENTED

1. Whether the trial court abused its discretion by denying Thomas's motion to amend the writ to name police defendants in their individual capacities.
2. Whether Thomas could be deemed a libel-proof plaintiff and thereby denied a jury determination of his defamation claims.
3. What statements and communications fall within New Hampshire's fair report privilege.
4. Whether the challenged statements were substantially true as a matter of law.
5. Whether statements attributed to defendant Flynn were protected opinions and whether statements attributed to the police defendants implied actionable undisclosed facts.
6. Whether Thomas was a limited-purpose public figure required to prove constitutional actual malice.
7. Whether the police defendants' statements were protected by a qualified privilege and whether that issue could be resolved as a matter of law.

HOLDINGS

1. The trial court did not unsustainably exercise its discretion by denying Thomas's motion to amend because the proposed amendment would add individual-capacity claims after substantial delay, create potential surprise, and potentially require different defenses and evidence.
2. New Hampshire adopts the issue-specific libel-proof plaintiff doctrine, but it must be applied cautiously and sparingly. The doctrine requires evidence that the plaintiff engaged in criminal or antisocial behavior, that the conduct was widely reported, and that the nature, number, and publicity of the offenses establish as a matter of law that the plaintiff's reputation could not have been further harmed by the challenged publication.
3. The fair report privilege protects accurate and complete reports, or fair abridgments, of official actions, proceedings, or public meetings concerning matters of public concern, but it does not automatically protect every private conversation between a police officer and a reporter. Reports of official police records and proceedings may qualify, while unofficial statements concerning investigatory facts require a fact-specific inquiry.
4. Common-law malice involving ill will or intent to harm may defeat New Hampshire's conditional fair report privilege, whereas constitutional actual malice alone does not defeat the privilege.
5. Defamatory statements must be evaluated individually in the context of the article as a whole. Summary judgment may be granted where the gist or sting of a statement is substantially true, but disputed statements concerning additional suspected criminal activity remained for the jury.

6. An opinion is not actionable unless it reasonably implies an underlying defamatory fact. Flynn's statements were protected opinions because they were based on disclosed hypothetical facts, while the police defendants' statements could reasonably be understood as factual assertions or opinions based on undisclosed investigative facts.
7. Thomas was not a limited-purpose public figure merely because he had engaged in criminal activity and therefore was not required to prove constitutional actual malice.
8. Whether the police defendants' statements were protected by a qualified privilege is a fact question governed by the general New Hampshire test: whether the statements were published on a lawful occasion, in good faith, for a justifiable purpose, and with a belief founded on reasonable grounds of truth. The trial court's contrary ruling was vacated.

KEY QUOTATIONS

"To justify applying the doctrine, the evidence of record must show not only that the plaintiff engaged in criminal or anti-social behavior in the past, but also that his activities were widely reported to the public." (*1005)

"A defendant who asserts the fair report privilege bears the burden of establishing its applicability, and the determination of whether the defendant has carried this burden is for the trial court." (*1006)

"In the law of defamation, truth is defined as substantial truth, as it is not necessary that every detail be accurate." (*1013)

"On remand, the trier of fact should determine the availability of the privilege by deciding whether it is 'established if the facts, although untrue, were published on a lawful occasion, in good faith, for a justifiable purpose, and with a belief, founded on reasonable grounds of its truth.'" (*1020)

FACTUAL BACKGROUND

Thomas sued over a Nashua Telegraph article reporting that he was being held on bail for receiving stolen property and was suspected of more than 1,000 home burglaries. The article included statements attributed to newspaper personnel, police officers from New Hampshire and Massachusetts, and a criminal justice professor. Thomas challenged approximately fifty-eight of the article's ninety statements as defamatory, while the record showed criminal convictions and admissions but little prior media publicity concerning those convictions.

PROCEDURAL HISTORY

Thomas filed a civil defamation action based on a December 22, 1999, newspaper article. The trial court denied Thomas's motion to amend the writ to name police defendants in their individual capacities and granted summary judgment to all defendants, ruling that Thomas was libel-proof and that various statements were privileged, substantially true, or opinions. The Supreme Court of New Hampshire affirmed in part, reversed in part, vacated in part, and remanded.

DISPOSITION

REMAND INSTRUCTIONS

The trial court must reconsider the defamation claims without treating Thomas as libel-proof and must allow the trier of fact to determine the availability of qualified privilege under the general New Hampshire test. The court may resolve qualified privilege on summary judgment only if no genuine issue of material fact exists. The trial court's other rulings were affirmed.

CASES CITED

- Thomas v. Telegraph Publ'g Co., 151 N.H. 435, 859 A.2d 1166 (2004)
- Clinical Lab Prod's, Inc. v. Martina, 121 N.H. 989, 437 A.2d 285 (1981)
- Porter v. Coco, 154 N.H. 353, 910 A.2d 1187 (2006)
- Tech-Built 153 v. Va. Surety Co., 153 N.H. 371, 898 A.2d 1007 (2006)
- Pierson v. Hubbard, 147 N.H. 760, 802 A.2d 1162 (2002)
- Thomson v. Cash, 119 N.H. 371, 402 A.2d 651 (1979)
- Cardillo v. Doubleday & Co., Inc., 518 F.2d 638 (2d Cir. 1975)
- Ferreri v. Plain Dealer Publishing Co., 142 Ohio App. 3d 629, 756 N.E.2d 712 (2001)
- McBride v. New Braunfels Herald-Zeitung, 894 S.W.2d 6 (Tex. App. 1994)
- Church of Scientology Int'l v. Time Warner, Inc., 932 F. Supp. 589 (S.D.N.Y. 1996)
- Jackson v. Longcope, 394 Mass. 577, 476 N.E.2d 617 (1985)
- Guccione v. Hustler Magazine, Inc., 800 F.2d 298 (2d Cir. 1986)
- Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563 (D.C. Cir. 1984)
- Masson v. The New Yorker Magazine, Inc., 960 F.2d 896 (9th Cir. 1992)
- Wynberg v. National Enquirer, Inc., 564 F. Supp. 924 (C.D. Cal. 1982)
- Ray v. Time, Inc., 452 F. Supp. 618 (W.D. Tenn. 1976)
- Solaia Technology v. Specialty Publishing Co., 221 Ill. 2d 558, 852 N.E.2d 825 (2006)
- Moreno v. Crookston Times Printing Co., 610 N.W.2d 321 (Minn. 2000)
- Duchesnay v. Munro Enterprises, Inc., 125 N.H. 244, 480 A.2d 123 (1984)
- Chagnon v. Union-Leader Co., 103 N.H. 426, 174 A.2d 825 (1961)
- Huskie v. Griffin, 75 N.H. 345, 74 A. 595 (1909)
- Yohe v. Nugent, 321 F.3d 35 (1st Cir. 2003)
- Wilson v. Slatalla, 970 F. Supp. 405 (E.D. Pa. 1997)
- Lewis v. NewsChannel 5 Network, L.P., 2007 WL 1585163 (Tenn. Ct. App. May 31, 2007)
- Costello v. Ocean County Observer, 136 N.J. 594, 643 A.2d 1012 (1994)
- Wynn v. Smith, 117 Nev. 6, 16 P.3d 424 (2001)
- Faigin v. Kelly, 978 F. Supp. 420 (D.N.H. 1997)
- Nash v. Keene Publishing Corp., 127 N.H. 214, 498 A.2d 348 (1985)

- Catalfo v. Jensen, 657 F. Supp. 463 (D.N.H. 1987)
- Burke v. Town of Walpole, 405 F.3d 66 (1st Cir. 2005)
- Jorg v. Cincinnati Black United Front, 153 Ohio App. 3d 258, 792 N.E.2d 781 (2003)
- Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
- Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979)
- Ruebke v. Globe Communications Corp., 241 Kan. 595, 738 P.2d 1246 (1987)
- Talley v. WHIO TV-7, 131 Ohio App. 3d 164, 722 N.E.2d 103 (1998)
- Touma v. St. Mary's Bank, 142 N.H. 762, 712 A.2d 619 (1998)
- Simpkins v. Snow, 139 N.H. 735, 661 A.2d 772 (1995)
- Lee v. City of Rochester, 195 A.D.2d 1000, 600 N.Y.S.2d 564 (1993)
- Trentecosta v. Beck, 703 So. 2d 552 (La. 1997)
- Bender v. City of Seattle, 99 Wash. 2d 582, 664 P.2d 492 (1983)
- Concord Group Ins. Cos. v. Sleeper, 135 N.H. 67, 600 A.2d 445 (1991)
- Figlioli v. R.J. Moreau Cos., 151 N.H. 618, 866 A.2d 962 (2005)

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