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IN THE

Supreme Court of Virginia

Record No. 181014

WILLIAM D. SROUFE,

Appellant,

v.

MURIEL TAMERA WALDRON,

Appellee.

REPLY BRIEF OF APPELLANT

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ARGUMENT

WALDRON AGAIN AVOIDS THE ISSUE.

At trial and on brief in this appeal, Waldron avoided the primary issue in the case: the trial judge found as a matter of law that Sroufe's statement was opinion and/or true and did not contain the requisite sting for defamation in Virginia, yet he entered judgment on a jury verdict of defamation. The trial judge referred to Waldron's theory of the case as "smoke and mirrors," JA 67, "VAAP for Glory," JA 66, and "a clever, inflammatory fiction," JA 65. The trial judge concluded that the result was an angry jury who expressed their frustration with Waldron's removal as principal in the only way they could. JA 72. The trial judge's analysis demonstrates that the jury's defamation verdict was plainly wrong. *Carter v. Lambert*, 246 Va. 309, 313 (1993), citing *Lane v. Scott*, 220 Va. 578 (1979).

The Statement Was True.

Similar to trial, Waldron does not address her staff's lack of understanding of the 1% cap on brief. Rather, she repeats the trial approach of arguing that the SOL decisions for five particular students are correct and that the 1% cap was not a consideration in determining whether VAAP or SOL was appropriate for a student. She does not address Epperly's testimony that Epperly misunderstood the application of the 1% cap. Waldron does not address her testimony that Epperly's belief about the 1% cap would be a misunderstanding. Further, Waldron does not

explain her suggestion in the letter she wrote at the time of the events that Waldron thought Dr. Westphalen considered the 1% cap in determining whether students receive VAAP or SOLs. JA 562. Waldron did not address the agreement of experts Davis and Eisenberg that Epperly's view of the 1% cap was a misunderstanding.

Sroufe wrote in terms of teachers at Stuart Elementary understanding the 1% cap. Epperly admitted that she did not understand the 1% cap and that her misunderstanding could lead to students being evaluated by SOLs who should have been evaluated through VAAP. The only testimony from Waldron, her witnesses, or the experts about the teachers' understanding of the 1% cap confirmed the truth of Sroufe's statement – teachers at Waldron's school misunderstood the application of the 1% cap. Waldron testified that if a teacher believed that the 1% cap limited the number of students who could be evaluated by VAAP, that belief would constitute a misunderstanding of the VAAP criteria.

The trial judge opined, "[f]aced with this impossible impediment [the truth of the statement], the plaintiff simply constructed and tried a different case. The plaintiff glossed, reconfigured and intentionally misconstrued the defendant's VAAP statement to make it something it isn't." JA 71. Waldron narrowed the statement and focused on a subset of students at her school and put on expert evidence that the subset of students were properly evaluated for SOL's. *Id*.

While Sroufe spoke in general terms about all students and the possibility of incorrect evaluations from the misunderstanding of the 1% cap at Stuart Elementary, Waldron presented evidence at trial that five particular students were appropriately evaluated by SOL testing even though none of those students came remotely close to passing an SOL or likely ever would. JA 300-301. Waldron takes the same approach on appeal. In the Statement of Facts of her brief, Waldron continues to emphasize the correctness of the evaluation of five particular students as though Sroufe's allegedly defamatory statement was that staff at Stuart Elementary School incorrectly assessed those five students. Sroufe did not address or mention particular students. Sroufe specifically denied that he targeted the evaluation of particular students in his statement. JA 301.

The trial court has a duty to grant a motion to strike or set aside a verdict when reasonable men could not differ on the outcome. In this case, the trial judge found as a matter of law that Sroufe's statement was true based on the testimony of Waldron, her witness Epperly, and the experts. Under the circumstances, the trial court did not substitute his view of the evidence for that of the jury. Accordingly, the trial court correctly determined that Sroufe's statement was true and should have struck Waldron's evidence or set aside the verdict.

Sroufe's Statement Was Opinion.

During the trial and in his comprehensive review of the evidence in his opinion, the trial court consistently described Sroufe's statement as opinion and specifically found as a matter of law that Sroufe's statement was opinion. As this Court has repeatedly held, the trial court must determine as a matter of law whether or not an allegedly defamatory statement is opinion. *Hyland v. Raytheon Technical Services Company, et al.*, 277 Va. 40, 47, 670 S.E.2d 746, 750 (2009). The trial court did not substitute its view of the evidence for the jury's in finding as a matter of law that the statement constituted opinion. The trial court erred when it submitted the case to the jury and entered judgment on its verdict for improper reasons.

All of the witnesses who were experienced in the field of determining the evaluation process for ID children agreed that reasonable persons can differ whether or not a particular student should be evaluated by SOL or VAAP. JA 69-70. In essence, the determination is subjective and therefore constitutes opinion. Clearly, Sroufe's statement pertaining to understanding the application of the criteria for determining SOL or VAAP must be opinion. If the determination between VAAP and SOL is subjective, then criticism of that determination is likewise subjective and therefore opinion. As the trial judge described it, "it's apparent that significant subjectivity and myriad ad hoc considerations go into

every VAAP evaluation." JA 69. The trial court concluded that "[l]egally speaking, Dr. Sroufe's statement is an opinion and not actionable." JA 70.

Sroufe's Statement Lacked Sting.

Waldron tries to avoid the trial court's conclusion that Sroufe's statements did not contain the requisite sting as a matter of law by arguing that the trial court "held that Sroufe's statement constituted defamation per se." Brief of Appellee, p. 32. In support of this argument, Waldron cites several statements by the trial judge without context. The trial judge made both of the statements in the context of argument over whether or not Waldron submitted sufficient evidence for the jury to consider a claim of defamation per se. In response to counsel for Sroufe's objection that none of Waldron's damages witnesses said anything specifically about the effect of Sroufe's statement, the trial court responded, "if we get to that point, it's definitively defamation, per se. This is made in the context of employment." JA 229. The second statement occurred during the trial court's response to counsel for Sroufe's objection to an instruction on defamation per se. The trial court said, "it's a per se case. This was definitely vocational and work related and impacted her in her trade or profession, and so I refuse that [instruction]." JA 349. Despite Sroufe's objection, the trial court instructed the jury on defamation per se. JA 26. Clearly, the trial court did not rule as a matter of law that Sroufe's statement was defamation per se because it instructed the jury

on defamation per se. The trial court was saying if the statement was defamatory, it was defamation per se. Thus, Waldron had the obligation to establish sting in order to prove defamation but was relieved by the jury instruction of having to prove actual damages.

Waldron offers no authority for the novel proposition that a trial court instruction on defamation per se relieves a plaintiff from the obligation to prove sting as part of a defamation case. None of the previous decisions cited by Waldron equate sting with defamation per se. She has not cited authority for her argument and it must fail.

The Unusual Nature of this Case.

Waldron argues that the trial court's opinion letter is flawed and Sroufe "cannot rely upon" the letter because the trial judge went outside of the record.[1] Waldron's complaint is ironic because the trial judge's reliance upon factors outside the record was the basis for entry of judgment in favor of Waldron on the verdict. For example, after concluding as a matter of law that the statement in this case was not actionable, the trial judge discussed settlement attempts, the financial exposure of the school board, further mediation, the anger of the jury, and which party should bear the burden of appeal – all of which were outside the record. Based on those factors, and apparently to force the school board to work out a

[1]Waldron's placement of this apparent argument in her Statement of Facts blurs the distinction between Argument and a Statement of Facts.

compromise, the trial court entered judgment in favor of Waldron. It is ironic indeed that Waldron now argues that the trial judge erred by going outside the record.

The further irony in the case is that Sroufe does not take issue with the trial court's legal analysis of the issues; he challenges the final judgment that does not comport with that legal analysis. For the first 16 and a half pages of its opinion, the trial court seemed to be on track to render the correct decision. Only when the court veered away from the facts in the record and the law of defamation and began hypothesizing about how the school board should conduct its business did it lose its way. The ultimate irony and unfairness in all this is that the trial court's opinion left Sroufe with a $500,000 judgment against him even though the trial judge emphatically stated that Sroufe was not guilty of defamation.

CONCLUSION

For the foregoing reasons, Sroufe respectfully requests that this Court reverse the judgment against him and enter final judgment in his favor and award him such other relief as the Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Rule 5:26(e) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, a PDF version of this brief has been filed through VACES and three paper copies delivered to the Clerk's Office. An electronic version has also been delivered to opposing counsel via email to:

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