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IN THE

Supreme Court of Virginia

Record No. 181014

WILLIAM D. SROUFE,

Appellant,

v.

MURIEL TAMERA WALDRON,

Appellee.

OPENING BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

The trial court erred when it denied Sroufe's motions to strike Waldron's evidence and enter judgment at the close of Waldron's evidence and at the close of all the evidence, and Sroufe's motion to set aside the verdict because statement 7 was either true or an opinion or did not contain the requisite sting to be defamatory. JA 48.

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS

This defamation case was brought by a former elementary school principal against the superintendent of schools. William Sroufe is the superintendent of public schools in Patrick County. Tamera Waldron was the principal of Stuart Elementary School in Patrick County until spring 2015. Sroufe reassigned her to a position in the central administrative office of the Patrick County School Division in the spring of 2015, and recommended that the School Board reassign Waldron to a teaching position for the 2015-2016 school year. Sroufe's letter to Waldron dated April 24, 2015, explained in bullet points his reasons for reassigning Waldron to a teaching position. The bullet points contain the allegedly defamatory statements upon which Waldron based her lawsuit. JA 19.

Waldron filed a complaint with three counts against Sroufe and the Patrick County School Board.[1] Subsequently, the trial court entered an order granting Waldron's motion for leave to file a fourth amended complaint. In Count 2 of the fourth amended complaint, Waldron alleged that statements 1, 2, 4, 6, and 7 of Sroufe's April 24, 2015 letter were false and defamatory.

On March 3, 2017, Sroufe moved for partial summary judgment on the grounds that statements 1 and 4 of Exhibit 15 were not defamatory as a matter of law. The trial court denied the motion with regard to statement 1 and sustained the motion with regard to statement 4. The trial court entered summary judgment in favor of Sroufe on statement 4.

At the beginning of the jury trial on March 27, 2017, Waldron advised the trial court that she would not present evidence in support of statement 1 and waived recovery for that statement. The trial court dismissed claims based upon statement 1 with prejudice. Waldron then presented her evidence that statements 2, 6, and 7 were defamatory. After Waldron rested, Sroufe moved to strike Waldron's evidence and enter summary judgment in his favor. The trial court granted the motion with regard to statements 2 and 6 and entered judgment for Sroufe on those statements. The trial judge concluded that statement 7 was true

[1] Waldron attached Sroufe's April 24, 2015 letter to the complaint as Exhibit 15 with Sroufe's bullet points numbered 1-7 for reference.

but he decided to allow it to go to the jury anyway.[2] JA 252-253, 257-258. Sroufe presented his evidence and rested. Waldron introduced rebuttal evidence and rested. Sroufe renewed his motion to strike and enter summary judgment with regard to statement 7 on the grounds that it was either true or opinion or lacked the requisite sting for defamation. JA 48. The trial court denied the motion. The jury returned a verdict in favor of Waldron in the amount of $500,000. Sroufe moved to set aside the verdict on the grounds that statement 7 was either true or opinion or lacked the requisite sting to be defamatory.

In his June 6, 2017 opinion letter denying the motion to set aside the verdict (amended August 2, 2017), the trial judge wrote that "[t]he statement before the jury in this case fails to be actionable for three reasons." JA 68. The trial court first concluded that the statement was "simply opinion" based upon Waldron's own evidence. Second, the trial court found that the statement was "literally and on its face, completely true …" JA 70. Finally, the trial court found that the statement does not carry the requisite sting required by Virginia law to establish defamation. JA 71.

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[2] Statement 7: "You failed to ensure that the IEP Teams understand the VAAP participation criteria and apply them appropriately when considering students with disabilities for the VAAP. Your actions will result in students being required to take SOL assessments who, under a correct interpretation of the criteria, should not have been required to do so." JA 20.

Nevertheless, the trial court denied the motion to set aside. Stating that he was "virtually certain that this verdict is legally flawed and will not survive appellant (sic) scrutiny," the trial judge denied the motion to set aside and stated his hope that the School Board[3] would participate in another mediation to try and settle the case. JA 73-74. On June 7, 2018, the trial court entered a final judgment order in favor of Waldron. Sroufe filed his notice of appeal on June 20, 2018. Waldron did not appeal the trial court's finding that statement 7 was not defamatory. This Court awarded Sroufe an appeal on December 18, 2018.

STATEMENT OF THE FACTS

From April 1, 2009 to April 24, 2015, Tamera Waldron served as the principal at Stuart Elementary School in Patrick County, Virginia. JA 84. William Sroufe became the superintendent of Patrick County Public Schools in 2014. JA 295. As superintendent, Sroufe had the authority to reassign principals. JA 306. After speaking with the school board attorney and members of his school board, Sroufe decided to reassign Waldron to the central office. JA 306-307.

On April 24, 2015, Sroufe called Waldron to his office. He advised her that he was reassigning her to the central office effective immediately. JA 119-120. Sroufe advised Waldron that Ms. Cassell would accompany Waldron back to Stuart Elementary School so Waldron could retrieve her personal belongings from

[3] Ironically, the School Board was not a party to the case at this time.

her office. JA 119-120. Upon advice of counsel, Sroufe directed the administration staff to close Waldron's email account and he went to Stuart Elementary School and advised the staff there that he had reassigned Waldron from the school to the central office. JA 121, 307.

In addition, Sroufe wrote a letter to Waldron dated April 24, 2015, giving notice that he planned to recommend that the school board reassign her to a teaching position for the 2015-2016 school year. JA 19. Sroufe cited seven reasons for the recommendation that were denoted by bullet points in the letter. As number 7 (JA 20), Sroufe wrote:

> You failed to ensure that the IEP Teams understand the VAAP participation criteria and apply them appropriately when considering students with disabilities for the VAAP. Your actions will result in students being required to take SOL assessments who, under a correct interpretation of the criteria, should not have been required to do so.

JA 20.

VAAP is the Virginia Alternate Assessment Program for some special education students. It is a collection of information that schools gather for students who are taught with aligned standards of learning. JA 268. Aligned Standards of Learning are alternatives to the Standards of Learning (SOLs) for disabled students. Instead of testing those students with the SOL tests, schools can test students who qualify using VAAP. IEP is an individualized education plan written for children determined to have disabilities of any kind. The IEP team considers

various criteria in determining whether or not to recommend a particular student for a VAAP. These criteria include items such as adaptive behavior which is the ability to take care of themselves, IQ score, and cognitive function. JA 156-158. Reasonable people can disagree whether or not a child qualifies for VAAP. JA 132.

VAAP regulations include a 1% rule. Sroufe was referring to the 1% rule in statement 7 when he wrote that the IEP Teams at Stuart Elementary School did not understand the VAAP participation criteria and appropriately apply them. JA 300. The 1% rule does not limit the number of students who can participate in VAAP. Waldron agreed it would be a misunderstanding to believe otherwise. JA 131, 217, 218. Anita Epperly, a special education teacher at Stuart Elementary School who had responsibility for determining whether students were eligible for VAAP misunderstood the 1% rule. JA 180. She thought the 1% cap limited the number of students who could participate in VAAP. In fact, the cap only limits the number of VAAP students a school can count positively in its SOL scores for school accreditation. Epperly admitted that the misunderstanding could result in students at Stuart Elementary being required to take SOL assessments who should not have been required to do so. JA 181-182.

ARGUMENT AND STANDARD OF REVIEW

The trial judge's August 2, 2017 opinion, incorporated into and made a part of the final judgment in this case, sets forth a well-reasoned and coherent argument in favor of reversing the judgment in favor of Waldron. The trial judge concluded that statement 7 of Exhibit 15 was "not, as a matter of law, defamatory, and it will not support a verdict in Ms. Waldron's favor." JA 73. With that finding, it was the duty of the presiding trial judge to sustain Sroufe's motion to strike Waldron's evidence and enter summary judgment or grant Sroufe's motion to set aside the verdict. In a surprise ending worthy of short story author O. Henry, the trial court denied the motion to set aside the verdict and expressed his hope that the school board would negotiate a settlement of the dispute. The trial court's failure to strike Waldron's evidence and grant summary judgment to Sroufe or set aside the verdict constitutes error. Accordingly, Sroufe requests that this Court reverse the trial court's judgment and enter final judgment in his favor.

THE TRIAL COURT ERRED WHEN IT DENIED SROUFE'S MOTIONS TO STRIKE WALDRON'S EVIDENCE AND ENTER SUMMARY JUDGMENT AND TO SET ASIDE THE VERDICT.

A. Standard of review.

Where the trial court has declined to strike the plaintiff's evidence or to set aside a jury verdict, the standard of appellate review in Virginia requires the appellate court to determine whether the evidence presented, viewed in the light

most favorable to the plaintiff, was sufficient to support the jury verdict in the plaintiff's favor. *Bitar v. Rahman*, 272 Va. 130, 141 (2006).

B. The role of the trial court in defamation cases.

The trial court serves a vital gatekeeping function in defamation cases. In every defamation action, the plaintiff's initial burden is to produce sufficient evidence to show that the allegedly defamatory statement was false. If the plaintiff does not establish the falsity of the statement by a preponderance of the evidence in his case in chief, he has not met this threshold burden and the trial court should strike the evidence and grant summary judgment to the defendant. *Union of Needletrades, Industrial and Textile Employees v. Jones*, 268 Va. 512, 520 (2004). The trial court also has the responsibility to determine as a matter of law whether an allegedly libelous statement is one of fact or one of opinion. It is not a jury issue. *Chaves v. Johnson*, 230 Va. 112, 119 (1985). Finally, the trial court must decide whether a statement is reasonably capable of defamatory meaning before allowing a jury to pass on it. *Schaecher v. Bouffault*, 290 Va. 83, 94 (2015). At the close of the plaintiff's evidence in a defamation trial, the trial court must determine that the allegedly defamatory statement was false, not opinion, and contained the requisite sting for the trial to continue. In this case, the trial court correctly concluded that the statement was either true or opinion, and lacked the requisite sting to be defamatory. Given those findings by the trial court, its reasons

for denying Sroufe's motions were not consistent with existing law in Virginia. There is no authority to support the trial court's denial of the motions as a means to force negotiation of a settlement or require one side over the other to prosecute an appeal. JA 73 and JA 74, n. 24. Accordingly, the trial court erred when it allowed the jury to consider the case and entered judgment on the jury's verdict.

1. The statement was true.

Even though the trial court described statement 7 as literally true, it submitted statement 7 to the jury as allegedly defamatory. There were two sentences in statement 7. The first sentence stated that the IEP teams did not understand and apply the participation criteria appropriately. The second sentence predicted that students would be required to take SOL assessments who should not have been required to do so as a result of the misunderstanding.

Waldron's evidence showed that both of Sroufe's sentences were true. On cross-examination, Waldron admitted that it would be a misunderstanding if someone thought the 1% rule limited the number of children who could participate in VAAP.

> Q. Would it be fair to say that if someone thought that one-percent rule in the VAAP limited the number of children who could participate, that that would be a misunderstanding of that criteria?
>
> A. That, it's possible it could be, lead to a misunderstanding.
>
> Q. Well, you just told me that the one percent doesn't limit the number of children who are, who can participate in VAAP.

A. Yes.

Q. So the opposite side of that is if someone thought that it did limit the number of children who can participate, they would be wrong, wouldn't they?

A. There would be a misunderstanding.

JA 131. Waldron also acknowledged she was the "captain of the ship" at the elementary school. JA 143.

Waldron's expert witness, Michelle Davis, confirmed the truth of the first sentence of statement 7.

Q. Ms. Davis, that last comment about the one percent, the one-percent cap should not be used to determine how many children are eligible or not eligible to, for the alternative testing. That's correct?

A. Correct.

Q. We are in agreement on that. And my question to you, then, is if a teacher says that she's limited by the VAAP, by the one percent as to how many students she can refer to VAAP, does that reflect a misunderstanding of the criteria for determining what tests should be taken?

A. It may.

Q. Is there some way that it wouldn't?

A. I don't know the context of that conversation. Are you giving me a hypothetical situation?

Q. I am, I am. Let's –

A. Can you repeat it.

> Q. Let's say the teacher says, "I have one students that has got a VAAP and that student is the one-percent cap," is that a correct understanding?
>
> A. I don't think so.
>
> Q. Is that an opinion that you would hold professionally to a reasonable degree of certainty in your field?
>
> A. Yes.

JA 217-218.

Anita Epperly, the Stuart Elementary School special education teacher who prepared IEPs the spring before, admitted under cross examination that she misunderstood the 1% cap.

> A. That it wasn't -- that's not my job, though. I didn't misunderstand my job.
>
> Q. I didn't say it was your job. I asked you did you have a misunderstanding about the one-percent cap?
>
> A. About the one percent I did.
>
> Q. Okay. And that's the criteria for VAAP, isn't it?
>
> A. Right. And I –

JA 180-181. The trial judge described this exchange as "fatal to the plaintiff's case." JA 41. Waldron's evidence effectively confirmed the truth of the first sentence of statement 7. Ms. Epperly also confirmed the truth of the second part of statement 7. As the trial judge noted, she "detailed how this Stuart Elementary misunderstanding could erroneously route students into the SOL testing,

explaining a scenario in which she might have perhaps chosen to VAAP certain students but would not have since she erroneously believed the 1% cap prohibited it." JA 71, citing JA 179, 180. Waldron did not offer any evidence that special education teachers at Stuart Elementary School understood and correctly applied the 1% cap. As the trial court concluded, Sroufe accurately told the School Board that Waldron and Stuart Elementary School's understanding of the 1% cap on VAAP was incorrect.

Waldron had the initial burden in this case to produce sufficient evidence to show that statement 7 was false. *Union of Needletrades Industrial and Textile Employees v. Jones*, 268 Va. 512, 520 (2004). She failed to meet that burden. Her own evidence undercut her allegation that statement 7 was false. In response to Sroufe's motion to strike and enter summary judgment, the trial court recognized that Waldron failed to meet her threshold burden of showing that the statement was false. In failing to sustain the motion, the trial court erred. It failed in its responsibility to "strike the evidence and grant summary judgment to the Defendant" when Waldron failed to prove the falsity of the statement. *Id*. The trial court compounded the error when it found the statement to be true and did not set aside the verdict.

2. The statement was opinion.

Whether or not someone understood or misunderstood the application of the VAAP criteria is inherently an opinion. Waldron's testimony and the testimony of two expert witnesses made it clear that application of VAAP criteria is subjective and generally based on opinion. When asked if reasonable people can disagree over whether or not VAAP applies to a particular student, Waldron responded, "Reasonable people can disagree." JA 132. Experts Davis and Eisenberg confirmed that the decision for VAAP is subjective because it considers such factors as daily living skills, adaptive skills, and learner characteristics. JA 219-220, 368.

The trial court based its conclusion that statement 7 is opinion as a matter of law on a thorough review of the evidence at trial. In his opinion letter, the trial judge cited the testimony from Waldron that "opinions differ" and "reasonable people can disagree" whether or not a particular student is eligible for VAAP. JA 69, citing JA 132. The trial court relied on testimony from defense expert Eisenberg who helped write the VAAP criteria that there is always subjectivity involved in VAAP assessments. JA 70, citing JA 359. Waldron's expert, Michelle Davis, testified that the ultimate decisions are subjective and opinion driven and based on fluid concepts such as "adaptive skills" and "learner characteristics" to gain a sense of the "whole child." JA 70, citing JA 210, 219-220. Waldron

presented no evidence to the contrary. That is, none of Waldron's witnesses testified that evaluations for VAAP are objective. It follows that a statement regarding lack of understanding of criteria whose application is subjective and prone to reasonable disagreement is necessarily opinion. The trial court correctly ruled that statement 7 was opinion. After concluding that statement 7 was opinion as a matter of law, the trial court should have sustained the motion to strike and granted summary judgment in favor of Sroufe or set aside the verdict. The trial court's failure to do so constitutes error.

3. The statement had no defamatory sting.

Defamatory language injures one's reputation in the common estimation of mankind. It is language which tends to hold up to scorn, ridicule, or contempt, or which is calculated to render an infamous, odious, or ridiculous. *Moss v. Harwood*, 102 Va. 386, 392 (1904). Although critical of Waldron's job performance, the statement did not suggest that she was incompetent or unfit for her position. In sum, the statement lacked defamatory sting.

The trial court recognized that statement 7 lacked the requisite sting to be defamatory. JA 71. Describing statement 7 as "bland," "temperate," and "made in a professional context," the trial court found that statement 7 did not rise to defamation under Virginia precedent. JA 71-72, citing *Schaecher v. Bouffault*, 290 Va. 83, 92 (2015). The trial court held that a statement that deals with the failure

to understand and apply an arcane set of state rules and standards about which reasonable people can disagree does not carry the requisite sting required by Virginia law to establish defamation. It does not have the sting to one's reputation nor does it make the plaintiff appear "odious, infamous, or ridiculous, or subject her to contempt, scorn, shame, or disgrace." *Schaecher*, 290 Va. at 95. Despite having concluded as a matter of law that statement 7 lacked defamatory sting, the trial court submitted the statement to the jury. The trial court erred in doing so. It further erred when it denied the motion to set aside the verdict.

CONCLUSION

This is a very unusual case. In a lengthy, detailed opinion, the trial judge advised the parties that Waldron failed as a matter of law to prove Sroufe defamed her. Yet, the trial court entered judgment against Sroufe on a $500,000 verdict for defamation. The trial court refused to set aside the verdict for reasons that are not recognized in Virginia law.

Under the circumstances, Sroufe respectfully requests that this Court reverse the judgment against him and enter final judgment in his favor.

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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