

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Willie Stark,

Plaintiff,

v.

Sam Snead,

Walter Burns,

The Unidentified Caller,

Defendants,

v.

The City of Milford,

Involuntary Plaintiff.

IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT

2013-CP-23-1982434

BRIEF OF Zackary Kendall

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¹ http://www.law.cornell.edu/supct/html/historics/USSC_CR_0403_0029_ZO.html

² <<<http://supreme.justia.com/cases/federal/us/376/254/>>> <<http://www.oyez.org/cases/1960-1969/1963/1963_39>>

³ <http://what-when-how.com/privacy/associated-press-v-walker-388-u-s-130-1967/>

⁴ http://www.leagle.com/xmlResult.aspx?xmlDoc=19661045261FSupp784_1899.xml&docbase=CSLWAR1-1950-1985

⁵ Freedom of Information Act, including exemptions thereof. <<<http://www.justice.gov/oip/amended-foia-redlined.pdf>>> <<<http://www.law.cornell.edu/uscode/text/5/552>>>

⁶ Freedom of Information Act, including exemptions thereof. <<<http://www.justice.gov/oip/amended-foia-redlined.pdf>>>

PRELIMINARY STATEMENT:

I, Zackary Earl Kendall, hereby submit this brief on behalf of Sam Snead, Walter Burns, and the Unidentified Caller. The relief requested is a counter-claim for the expense of court costs. The primary issues at hand include defamation, actual malice, invasion of privacy (private facts), freedom of the press and right to political speech under the First Amendment, intrusion or trespassing, access to public records (FOIA), and the right to confidentiality in not identifying the Unidentified Caller.

BACKGROUND OF THE CASE:

While working late one Friday night, Sam received a call on the tip line. The caller, who refused to identify himself, told Sam Snead that Mayor Willie Stark was receiving kickbacks on the garbage collection contract. The unidentified caller told Sam Snead that the evidence was all contained in a second secret contract that Willie Stark was keeping in his office at his home. The unidentified caller said that Sam would know that all this was true, because Willie kept the secret contract in the top left drawer of his desk.

Sam was dedicated to see if the secret contract was true.

To his dismay, there was no secret contract spelling out how Willie was receiving kickbacks. However, instead there was a copy of Willie's arrest record from when Willie was living in Point Roberts, Washington twenty-five years before. Willie had been arrested for shoplifting a rhinestone purse and toe-less hose. Sam knew that in the conservative little town of Milford, the voters would want to know about Willie's arrest record. He believed that they had a right to know.

On Monday, Sam turned in his exposé to Walter Burns. Walter was excited; he knew that this would be his chance to push Willie Stark out of office, so he, Walter Burns, could become the new mayor of Milford. He published the story - in its entirety - just as it had been written by Sam Snead.

The article was 1500 words in length. It described how Sam had received the call from the unidentified caller about the kickbacks in the secret contract and ended with thirteen

paragraphs detailing the fact that Willie Stark is a cross-dresser.

Sometime later, Willie was forced to resign from office in disgrace. The voters at some point showed up and started picketing on the street in front of his house from 6 am until 11 pm every night until he finally tendered his resignation.

Willie vowed revenge and sued the Milford Weekly Gazette, Sam Snead, Walter Burns, and the unidentified caller. In response, the Milford Weekly Gazette demanded that all of Willie's purchase records on behalf of the city be turned over. Clarence Darrow, the city attorney, refused and decided that Willie had gone through enough, besides Willie had already resigned.

The matter is now before the Superior Court on cross motions for summary judgment.

Milford, South Carolina, is near Greenville and Greer, and its official mayoral residence is Gracie Mansion. All the events occurred in South Carolina, and South Carolina law is the proper law except when appropriate federal law controls.

ARGUMENTS:

Freedom of Speech and Press

The defendant asserts his rights to the freedom of speech as well as to the freedom of the press as based in the First Amendment to the U.S. Constitution, "Congress shall make no law... abridging the freedom of speech, or of the press"

Freedom for Redress of Grievances

The newspaper was justified in its request of governmental documentation of expenditures performed by Mr. Stark on behalf of the city. The newspaper cites the First Amendment also in its defense, because "the right of the people... to petition the Government for a redress of grievances" is also protected. The newspaper by its request endeavored to exercise this First Amendment right on behalf of the taxpayers of the city.

EXPECTED COUNTERARGUMENTS:

I. VIOLATION OF PRIVACY VIA TRESPASSING, BREAKING AND ENTERING, OR THEFT

Walter Burns, the editor-in-chief, made it clear to Sam Snead that unless Sam could produce a story worth printing, he would be without a job. Sam knew that he needed a scoop to save his job. The opposition could claim that this pressure led Sam Snead to take criminal action in securing the juicy details about the mayor.

The fact that Sam sneaked into Willie's house and looked through Willie's desk could lead to a plaintiff accusation of breaking and entering (South Carolina Code title 16 or **§ 58-15-850**)⁷. As such, the prosecution could imply that Sam violated Willie's right to privacy or damage to other property. However, Snead did not break anything to enter into the mayor residence: it was *that easy* to enter at the time. So far as a criminal case against Snead is concerned, I would advise Snead to plead *Nolo Contendere*⁸, in which case he would be penalized for taking the arrest record but the results of the criminal case could not be admitted in this civil case. Snead took only the arrest record of the mayor while in the mayor's residence before leaving the house intact.

If it is a misdemeanor, then my client Snead may enter a *Nolo Contendere* plea.

"The defendant in any misdemeanor case in any of the courts of this State may, with the consent of the court, enter a plea of 'nolo contendere' thereto and upon so doing such defendant shall be dealt with in like manner as if he had entered a plea of guilty thereto " (South Carolina Code **§ 17-23-40** - *Nolo contendere* in misdemeanor cases).

But is taking a mere arrest record enough in SC law to constitute a felony, or is it only a misdemeanor? Snead was not

⁷ Section 16-1-10. <<<http://www.scstatehouse.gov/code/t16c001.php>>> (accessed 4 Apr. 2013) Web.

⁸ This plea is possible for Mr. Snead according to NY law. "Other Considerations Of The Alford Plea" <<<http://caught.net/prose/alfordplea.htm>>> (accessed 4 Apr. 2013). Web.

armed with a deadly weapon while committing the act. Second degree and Third degree burglaries are felonies; however, Snead's actions were committed in broad daylight not long before the Sun had set, while the mayor was eating at the Buckhead Corner Café. There was no injunction against stalking violated and thus no felony against privacy rights committed by Snead.

Neither Snead nor Burns destroyed any part of the mayoral residence and therefore should not be liable for maliciously injuring property (a class E felony). Snead merely wanted to keep his job at the and perhaps become a public figure himself via the fame that might come from releasing such a controversial story about Mayor Willie Stark.

Furthermore, any allegation of "forest product violation" is vague and should not be admitted in court as an accusation of a felony if it is brought forth by the plaintiff, since it is not clear that the value of the arrest record exceeds \$1000, that the meaning "violation" in the SC Code even applies to the context of this case, or that Snead's offense here is not his first (S.C. Code Ann. **§16-11-580C2**⁹). For Snead's act to be considered a felony under grand larceny would mean that the arrest records would be valued at over \$2000, according to title 16 of SC law.

Furthermore, Snead's entry into the mayoral residence did not involve the attempt to steal any document but rather to examine to see whether the document in question (according to the unidentified caller) was in fact the document that was mentioned. Therefore, no SC felony theft law was violated by Snead's actions.

Therefore, as regarding the physical actions of Snead in entering the mayor residence, the plaintiff's only option to pursue against privacy rights (a mere trespassing charge) should not be admitted in court.

II. PRIVATE FACTS, INTRUSION ARGUMENTS, AND FOIA

The plaintiff could assert that the sexual orientation and expression of the mayor was violated by Snead and the newspaper. If the claim that the former mayor was a cross-dresser is

⁹ *South Carolina Code of Laws Unannotated*. <<<http://www.scstatehouse.gov/code/t16c001.php>>>. 2012. Web.

accurate, the newspaper article's conclusion that the mayor is a cross-dresser would supposedly be a violation in a private facts case. However, because the topic was newsworthy, especially in light of the possibility that Mr. Stark could have been using city funds to continue in his cross-dressing ways by making more purchases, the newspaper asserts that it has a defense against private facts.

It seems abundantly clear from the nature in which Willie Stark's statements and demeanor that he seeks revenge, and that said revenge originated from a sense of anguish that the news article supposedly produced. He might even feel as though the newspaper has put a false light upon him.

If intrusion via trespassing is argued, then the defense may assert (from I above) that the *Nolo Contendere* plea by Snead excludes the trespassing portion from this civil case. Furthermore, because of the mayor's dual status as a public figure not only in government but also in pop culture, the newspaper's defense against the private facts' argument of intrusion will be that Willie Stark is newsworthy for life. (The newspaper invokes the newsworthiness defense against private facts.)

The Freedom of Information Act (FOIA) does have an exemption for law enforcement investigative records. Of the three specific exclusions¹⁰ under this exemption, only one may apply to this case.

"Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of [the FOIA] unless the informant's status as an informant has been officially confirmed."¹¹ (Exclusion C2)

Under *exemption 7d of FOIA*, information furnished by a confidential source, if compiled by a criminal law enforcement authority during a criminal investigation, cannot legally result

¹⁰ <http://www.foia.gov/about.html>

¹¹

in the disclosure of that confidential source¹². This section of FOIA does not apply in this case because, although the information obtained by Sneed was compiled by a criminal law enforcement authority, the info itself as a source was not confidential but rather a public arrest record.

Personnel files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy are also not permitted.

If the subject of a criminal investigation or proceeding is unaware of the existence of records concerning the pending investigation or proceeding and disclosure of such records would interfere with the investigation or proceeding.¹³ The requirements for exemption under the exclusion section C1 of FOIA include the fact that there must be "reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings¹⁴". Although Willie Stark was a suspect in a criminal investigation, the information that Sam Sneed obtained does not affect that criminal investigation. The investigation likely had closed decades ago, being now 25 years from the arrest of Stark.

Furthermore, the release of the content of Sneed's article is unlikely to produce an additional criminal or civil investigation tied to Stark's arrest, since the statute of limitations in the state of the arrest, Washington (RCW 4.16.080)¹⁵, is only 3 years' time for stolen personal property "including an action for the specific recovery thereof" (RCW 4.16.080).¹⁶ In South Carolina it must be within ten years (§15-3-600)¹⁷.

III. LIBEL, PRIVATE V. PUBLIC FIGURE, AND FALSE LIGHT ISSUES

A. All-Purpose Public Figure

¹² This link might creep you out. <<http://www.irs.gov/pub/irs-utl/irs_foia_guide.pdf>> (page 9/16)

¹³ http://www.fincen.gov/foia/foia_exemptionexclusions.html

¹⁴ <http://www2.ed.gov/policy/gen/leg/foia/exclusions.html>

¹⁵ <http://apps.leg.wa.gov/rcw/default.aspx?cite=4.16.080>

¹⁶ http://www.statuteoflimitations.net/washington_statute_of_limitations.htm ///

http://www.statuteoflimitations.net/south_carolina_statute_of_limitations.htm

¹⁷ <http://www.scstatehouse.gov/code/t15c003.php>

The fact that Sam Sneed knew due to common knowledge and without investigation that Willie Stark would be eating at the Buckhead Corner Café suggests that Willie Stark was well-known. This restaurant is in the section of Milford that is commonly known as Buckhead. Transportation to the restaurant would have been very quick, as well as transportation back to the mayoral residence. But more importantly, this fact that many in the town knew even Willie Stark's Friday evening eating habits (a delicious 24 1/2 ounce porterhouse cooked medium rare with parmesan encrusted asparagus with a side salad with Roma tomatoes) suggests that he is a public figure. The fact that Willie is a known TV personality who hosted *Drive-In's*, *Diners*, and *Dives* on the local PBS TV station confirms that he is a local public figure. This means that Willie is a public figure not only as a governmental official but also as a local celebrity.

According to *Rosenbloom v. Metromedia*, which established the concept of the "limited public figure," a limited public figure is an otherwise private person who is considered to be a public figure due to a connection with a specific news story issue. The fact that Willie Stark hosted the TV show implies that he signed a contract in order to do so and thus does not qualify as a limited public figure.

He therefore is an all-purpose public figure and does not have the same privacy rights to which an ordinary citizen is entitled. Therefore the plaintiff ought to be held legally to the standard of a public plaintiff in any defamation claim related to this case. If actual malice cannot be proven, a defamation case against Sneed, Burns, and the Unidentified Caller must fail.

B. Defamation

The four primary elements of defamation are falsehood of content, publication of content, an identifiable target of the content, and the result of (not purely emotional) damage against the target. Because Stark is an all-purpose public figure, the plaintiff must prove actual malice.

1. Undisputed Factors for Defamation Claim

The content was indeed published and indeed directed at an identifiable target, namely, the plaintiff Mr. Stark.

2. Disputed Factors for Defamation Claim

a. Causation

However, it is not certain that the protests from the people for Stark's resignation occurred due to Sneed's article. Protests were not immediate and were rather prolonged (from 6 am until 11 pm every night until Mr. Stark resigned), suggesting an action done by an organized coalition rather than individual irate newspaper readers. Sneed, the newspaper, and Mr. Burns deny any claim at involvement in producing this group of protestors, directly or indirectly.

The defendant reminds the court that, in accordance with the ruling of *Hustler v. Falwell*, if the plaintiff accuses the newspaper of rhetorical hyperbole, then either the duty or the causation factor needed for the tort in Mr. Stark's defamation claim would not be acceptable. Because the picketing was an influential factor in producing Mr. Stark's resignation, the picketing must be considered as a part of the causation factor that the plaintiff has the burden to prove in this case. Groups of people who picket for hours on end, including those at Mr. Stark's residence, generally do not picket without cause, and rhetorical hyperbole would have been clear enough as a work of fiction to the vast majority of readers that a prolonged picketing would not have occurred.

b. Truth

However, the defendants claim that the claim of Willie Stark being a former cross-dresser is indeed true, and the criminally acquired articles of clothing mentioned by the newspaper's article were not intended for any female that Willie Stark knew (girlfriend, spouse, prostitute, or otherwise). Furthermore, the great amount of words detailing the said articles of clothing suggest that the source of the information was in fact a credible one. The newspaper therefore declines to produce a retraction or official apology for print publication.

3. Lack of Actual Malice

If the plaintiffs allege a libel argument and put forth that Willie Stark is not a cross-dresser, then they must prove bias or reckless disregard for the truth on the part of the newspaper, according to *New York Times v. Sullivan* and *Associated Press v. Walker*.

According to *Goldwater v. Ginzburg*, malice can be proven based on the sources and content that a media outlet has requested for a publication. But Walter Burns, serving an editorial function for the newspaper, did not request the content of Sneed's article submission beforehand. Thus, the premeditation on the part of the newspaper that would prove malice does not, in fact, exist. Once more, Sneed as a reporter had no prior knowledge that the source of the arrest records was biased against Stark or the city government.

The plaintiff could contend that Walter Burns had bias in that Burns desired to publish the story to attack Stark's reputation, thereby increasing the likelihood that Burns would be elected as mayor. However, such a biased maneuver on the part of Mr. Burns is not likely, because the action's results could have turned the subscribers to the paper against the paper itself, including those potential voters who were undecided on whether to vote for Stark or Burns. By contrast, Burns entered the race for mayor because he believed that he could do a better job than Stark.

Any claim that reckless disregard for the truth occurred is quite unlikely. Sneed did show some degree of regard in endeavoring to do an investigative follow up on the call from the Unknown Caller. Furthermore, the over a dozen paragraphs (over a thousand words) depicting Mr. Stark as a cross-dresser suggest either real attention to detail of real items and activities or a claim with rhetorical hyperbole. (See under the second paragraph of "causation" in "Disputed Factors for Defamation Claim" [3B2a2] above in this section for the rhetorical hyperbole issue.)

C. False Light Issue:

Furthermore, it was Sneed's firm belief, after coming upon the arrest record, that Stark was a cross-dresser. Therefore, there was no willing publication of content known to be false.

It is possible that the plaintiff will contend that the defendants applied a false criticism of the personal character and habits of Willie Stark, particularly regarding the claim of cross-dressing. However, the claim is true. (See "Truth" in "Causation" under "Disputed Factors for Defamation Claim".)

Even if the story were false, the newspaper did not know for certain that the story was false in any detail. If the story's content that the mayor was a cross-dresser is false, the newspaper claims that no reckless disregard in pursuit of the truth occurred. (See "Lack of Actual Malice" under "Defamation" for more.)

The defense also disputes the causation element in this false light issue. Due to the rising acceptance of homosexuality and the larger LGBT community (which includes transgender sexual orientation), it is questionable as to whether Milford's citizens actually protested the mayor for the reason of his being a cross-dresser. Although the town is conservative, conservatives do not traditionally tend to protest for prolonged, sustained periods of time but rather in reaction to a change in policy or a possible new nominee that is against their conservative agenda. Thus, it is highly likely that cross-dressing was not the only issue that resulted in the protests that led Willie Stark to resign.

IV. REVEALING THE IDENTITY OF THE UNIDENTIFIED CALLER

The newspaper will assert its right of confidentiality and leave the unidentified caller to be unidentified.

According to S.C. Code Ann. **§19-11-100**, the state of South Carolina has a shield law that gives qualified privilege "against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news" in any "judicial, legislative, or administrative proceeding in which the compelled disclosure is sought and where the one asserting the privilege is not a party in interest to the proceeding". Although Snead is a party in interest to the proceeding, the plaintiff does not fit the remaining qualifications to override reporter privilege in South Carolina because "the party seeking to compel the production or testimony" must establish "by clear and convincing evidence"

that the reporter privilege has been knowingly "waived" or that the testimony sought is material, relevant to the controversy, cannot be reasonably obtained by alternative means, and is necessary to the proper preparation or presentation of the case of a party seeking the info. Ultimately, the info obtained from the unidentified caller is not necessary to the proper preparation or presentation of the plaintiff's case, which is one of defamation and or private facts based on a finding that the unidentified caller did not even hint at to Snead or the newspaper. Even if the intent of the Unidentified Caller were to lead Snead to the arrest records, those records are public information and therefore could be reasonably obtained by alternative means.

Furthermore, according to SC law, publication of the info does not constitute a waiver of reporter privilege.

V. FIGHTING WORDS

The plaintiff Mr. Stark could claim that the defense engaged in fighting words directed to harass. Mr. Stark could claim that being a cross-dresser gives him minority status; however, traditionally, minority status is given based on some genetic predisposition such as race or gender rather than a habitual behavior. If Mr. Stark wishes to prove that he is in fact a part of a minority group based on race, then he will need to substantiate his claim, for the newspaper is not aware of any such minority status of Mr. Stark.

ISSUES:

The decision of Snead to go to the mayoral residence was premeditated, and the day that he went to Gracie Mansion was not the same week as that of the call from the unnamed caller.

As far as the Unidentified Caller is concerned, unless the Unidentified Caller can be identified and subpoenaed, there is no way to successfully get him in the court. Thus, the issue of whether the reporter has the privilege to keep his source anonymous is key in the defense of the Unidentified Caller.

ETHICAL ISSUES:

Although there was no malicious intent on the part of reporter Mr. Snead, there was malicious intent, by contrast, on the side of the mayor.

Conclusion

For the foregoing reasons, the Petitioners, Sam Sneed and Walter Burns, respectfully request that the Superior Court hold that the actions of the unidentified caller and the Milford Weekly Gazette (including Sam Sneed and Walter Burns) do neither infringe upon the plaintiff's rights of privacy nor constitute a violation of libel law.

To demonstrate the lack of malice that the defense has concerning the plaintiff, the defense will drop any further pursuit for the official governmental purchase records of Willie Stark, and the newspaper shall give Willie Stark enough space for an article in which he may express his side of the story regarding Sneed's article in question.

Respectfully Submitted,

Zackary Kendall
Attorney for the Defense