

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WALTER BYRNE, RANDALL WINSLOW : CIVIL ACTION  
and ROBERT WESSEL :  
 :  
v. :  
 :  
JOURNAL REGISTER COMPANY and :  
TROY PUBLISHING CO., t/a :  
SUBURBAN PUBLICATIONS : NO. 97-CV-5702

M E M O R A N D U M

Ludwig, J. September 17, 1998

Defendants Journal Register Company and Troy Publishing Company move for summary judgment. Fed. R. Civ. P. 56.<sup>1</sup>

On September 11, 1997 plaintiff Walter Byrne initiated this action based on two allegedly defamatory pieces that appeared in defendants' weekly newspaper, "The Suburban and Wayne Times." On October 24, 1997 plaintiffs Randall Winslow, pro se, and Robert Wessel<sup>2</sup> filed a separate defamation action – C.A. No. 97-CV-6585 – regarding the same articles. By order dated January 9, 1998, the

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<sup>1</sup> "[S]ummary judgment should be granted if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the non-moving party, the court concludes that there is no genuine issue of material fact to be resolved at trial and the moving party is entitled to judgment as a matter of law." Kornegay v. Cottingham, 120 F.3d 392, 395 (3d Cir. 1997) (quoting Spain v. Gallegos, 26 F.3d 439, 446 (3d Cir. 1994) (citations omitted)). Pro se plaintiff Randall Winslow joined in plaintiff Walter Byrne's response to the motion. All citations to plaintiffs' response will refer to Byrne's memorandum.

<sup>2</sup> On August 15, 1998 plaintiff Robert Wessel and defendants reached a settlement.

actions were consolidated for discovery purposes. Jurisdiction is diversity. 28 U.S.C. § 1332.

On October 22, 1996 the Tredyffrin Township, Pa. Police Department issued the following press release:

RECKLESSLY ENDANGERING:

10/18/96 at 2300 hours, Police received a report of gunshots at a residence in the 800 block of Yellow Springs Road, Malvern. Upon arrival at the residence, officers determined that Walter C. Byrne, 48, of Yellow Springs Road had fired a .22 caliber handgun in the direction of the Pennsylvania Turnpike. Officers recovered the weapon and numerous spent shell casings from Byrne's person. Byrne was charged with Recklessly Endangering and Simple Assault. Two additional subjects within the residence (Robert Wessel, 47, of Waterloo Avenue, Berwyn, and Randall Winslow, 47, of Sugartown Road, Malvern) were also charged with Hindering Apprehension and False Reports to Law Enforcement Agency. All three subjects were processed and released.

Motion, exh. b.<sup>3</sup> On October 24, 1996 defendants published the following article in the "Police Briefs" section of the "Suburban and Wayne Times":

GUNSHOTS

TREDYFFRIN - A report of gunshots at 11 p.m. on Oct. 18 brought police to the home of Walter C. Byrne, 48, on Yellow Springs Road in Malvern, where they found him taking shots at the Pennsylvania Turnpike. Police recovered

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<sup>3</sup> On December 6, 1996, at a preliminary hearing before a district justice, the criminal charges pending against plaintiff Byrne were dismissed, and he pleaded guilty to the summary offense of disorderly conduct, 18 Pa. C.S.A. § 5503(a)(3) (Recklessly or intentionally "us[ing] obscene language, or mak[ing] an obscene gesture" to "cause public inconvenience, annoyance, or alarm"). Response, at 7; motion, exh. e. No information was provided regarding the disposition of the charges against Randall Winslow and Robert Wessel.

the .22-caliber handgun and numerous spent shell casings before charging Byrne with reckless endangerment and simple assault. Also charged were Robert Wessel, 47, of Berwyn, and Randall Winslow, 47, of Malvern, with hindering apprehension and false reports to the police. All three were processed and released.

Id. exh. a. On December 26, 1996 the newspaper printed a retraction:

A police brief in the Oct. 24, 1996 issue of "The Suburban" was incorrect in stating that a man shot a .22-caliber handgun at the Pennsylvania Turnpike instead of in the direction of the turnpike. The brief, as distributed by Tredyffrin Police, is printed verbatim below:

[TEXT OF OCTOBER 22, 1996 PRESS RELEASE]

"The Suburban" regrets the error.

Id. exh. c.

According to the complaints, the October 24, 1996 "Police Brief" and the December 26, 1996 retraction were defamatory.<sup>4</sup> Byrne's compl. ¶¶ 16, 30; Winslow's and Wessel's compl. ¶¶ 16, 30. It is undisputed that the sole source of both was the October 22, 1996 press release. Plaintiffs attribute the retraction to protests made by them in telephone calls to the newspaper. Response, exh. 9.

Defendants' motion invokes the Pennsylvania fair report privilege. Motion, at 7-12. Plaintiffs contend that (1) the

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<sup>4</sup> Plaintiffs assert, factually, that (1) Byrne fired the gun into the ground rather than in the direction of the Turnpike; (2) the Turnpike is not visible from Byrne's property; and (3) police did not "discover" Byrne firing the gun, but found him inside his house. Response, at 4-5.

privilege is inapplicable to articles based on a police press release, response, at 30; and (2) even if the privilege applied, defendants have forfeited its protection through inaccuracy, exaggeration and malice, id. at 24-25, 27-28, 33.

The Pennsylvania Supreme Court has explained the scope and operation of Pennsylvania's fair report privilege as follows:

Upon the theory that it is in the public interest that information be made available as to what takes place in public affairs, a newspaper has the privilege to report the acts of the executive or administrative officials of government. . . . However, this is a qualified or conditional privilege, rather than absolute. If the newspaper account is fair, accurate and complete, and not published solely for the purpose of causing harm to the person defamed, it is privileged and no responsibility attaches, even though the information contained therein is false or inaccurate. . . . Further, it is not essential that . . . the official report, be set forth verbatim by the newspaper. A summary of substantial accuracy is all that is required. . . . However, this qualified immunity is forfeited if the publisher steps out of the scope of the privilege or abuses the "occasion." This can be done by exaggerated additions, or embellishments to the account. . . . Furthermore, this qualified privilege is lost if the defamatory material is published solely for the purpose of causing harm to the person defamed.

Sciandra v. Lynett, 409 Pa. 595, 600, 187 A.2d 586, 588-89 (1963) (citing Restatement, Torts § 611) (further citations omitted); see also Mosley v. Observer Publishing Co., 427 Pa. Super. 471, 476, 629 A.2d 965, 967 (1993) (citing Sciandra and Restatement (Second) of Torts § 611), appeal denied, 537 Pa. 664, 644 A.2d 1201 (1994).

Defendant bears the burden of proving to the court the category-specific applicability of the privilege. 42 Pa. C.S.A. §

8343(b)(2) (1982); Sciandra, 409 Pa. at 600, 187 A.2d at 589. "It is . . . a matter for the trial court to determine whether 'the occasion upon which the defendant published the defamatory material gives rise to a privilege.'" Oweida v. Tribune-Review Publishing Co., 410 Pa. Super. 112, 121, 599 A.2d 230, 235 (1991), appeal denied, 529 Pa. 670, 605 A.2d 334 (1992). Here, the police press release is a report of official action sufficient, if appropriate, to justify application of the privilege.<sup>5</sup>

"Once the existence of the privilege is established, the burden then shifts to the plaintiff to establish an abuse of that privilege." Oweida, 410 Pa. Super. at 121, 599 A.2d at 235; see also Medico v. Time, Inc., 643 F.2d 134, 146 (3d Cir.), cert. denied 454 U.S. 836, 102 S. Ct. 139, 70 L. Ed.2d 116 (1981).

The question of whether the fair report privilege has been abused has been distilled by the federal courts to a "gist" or "sting" test. "A statement is substantially accurate if its 'gist' or 'sting' is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced." Williams v. WCAU-TV, 55 F. Supp. 198, 202 (E.D. Pa. 1983). . . . If the reader could conclude that the article carries with

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<sup>5</sup> See Friedman v. Israel Labour Party, 957 F. Supp. 701, 714 (E.D. Pa. 1997) (fair report privilege applicable to press release issued by foreign government); Restatement (Second) of Torts, § 611 comment (d) (1977) ("The filing of a report by an officer or agency of the government is an action bringing a reporting of the government report within the scope of the privilege."); see also 18 Pa. C.S.A. § 9104(b) (1983) ("[P]ress releases and information contained therein shall . . . be considered public records."); cf. Barr v. Mateo, 360 U.S. 564, 574, 79 S. Ct. 1335, 1341, 3 L. Ed.2d 1434 (1959) (absolute privilege of government official in defense of libel charge applicable to statements made in press release because "issuance of press releases was standard agency practice").

it a materially greater "sting," then the fair report privilege has been abused and is thus forfeited.

Oweida, 410 Pa. Super. at 129, 599 A.2d at 239 (citing Lavin v. New York News, Inc., 757 F.2d 1416, 1419-20 (3d Cir. 1985)). Section 611 of the Restatement (Second) of Torts describes the degree of factual accuracy and fairness needed to preserve the privilege:

It is not necessary that [the article] be exact in every immaterial detail or that it conform to that precision demanded in technical or scientific reporting. It is enough that it conveys to the persons who read it a substantially correct account of the proceedings. . . . Not only must the report be accurate, but it must be fair. Even a report that is accurate so far as it goes may be so edited and deleted as to misrepresent the proceeding and thus be misleading.

The October 24, 1996 article: Plaintiffs contend that (1) the statement that the police "found" – rather than "determined that" – plaintiff Byrne was taking shots creates the impression of an eye-witness account and presents a greater likelihood of truth than the police press release; and (2) the statement that plaintiff Byrne was taking shots "at" – instead of "in the direction of" – the Turnpike suggests a higher degree of criminal intent than conveyed in the police press release. Response, at 24.

These factual distinctions, while arguably valid, are not substantial enough to create a triable issue as to the applicability of the fair report privilege. The police press release – entitled "Recklessly Endangering" – noted that Byrne was "charged with Recklessly Endangering and Simple Assault." Motion, exh. b. That the October 24, 1996 article reported that the police "found"

Byrne firing a gun "at" the Turnpike – rather than "determined that" Byrne had fired "in the direction of" the Turnpike – is not so materially different or unfair as to alter the "effect on the mind of the recipient which the precise truth would have produced." Oweida, 410 Pa. Super. at 129, 599 A.2d at 239 (quoting Williams, 55 F. Supp. at 202). The "sting" of the police press release and the article – that Byrne engaged in recklessly endangering conduct by firing a gun toward the Turnpike – is the same. Lavin v. New York News, Inc., 757 F.2d 1416, 1420 n.2 (3d Cir. 1985) ("The article and the affidavit had an equal sting, since both amounted to assertions that Lavin was corrupt"); id. at 1421 ("All in all, we are not persuaded that a reasonable fact-finder could conclude that the headlines, photograph, and article, separately and together, are more pejorative than the FBI affidavit"); Binder v. Triangle Publications, Inc., 442 Pa. 319, 325 n.4, 275 A.2d 53, 57 n.4 (1971) (immaterial factual discrepancies do not constitute "legally substantial inaccuracy"); Sciandra v. Lynett, 409 Pa. 595, 606, 187 A.2d 586, 592 (1963) ("It is the duty of the court to declare as a matter of law that no abuse of the occasion of privilege exists where the evidence adduced leads to but one conclusion") (internal quotations and citations omitted).

As to plaintiffs Randall Winslow and Robert Wessel, the information in the article was identical to that presented in the press release. No abuse of the fair report privilege, therefore, occurred with respect to these plaintiffs.

The December 26, 1996 retraction – This notice consisted of an admission that the October 24, 1996 article contained factual inaccuracies, followed by a verbatim account of the October 22, 1996 police press release. As such, it was a “fair and accurate rendition” of the press release, precluding a finding of abuse of privilege. Oweida, 410 Pa. Super. at 129, 599 A.2d at 239.<sup>6</sup> The repetition of the previous alleged inaccuracies – “at” as shorthand for “in the direction of” – was obviously to make clear the nature of the retractions. As discussed, the use of “at” was within the purview of the sting of recklessly endangering by firing a handgun, on numerous occasions, “in the direction of” the Turnpike.

Because plaintiffs have not satisfied their burden of showing an abuse of the fair report privilege, this action must be dismissed.

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<sup>6</sup> Plaintiffs’ response to the motion also states that defendants forfeited the privilege because of “actual malice.” Response, at 25, 27-28, 33. Malice – whether defendants entertained serious doubts as to the truth of the statement – has bearing on privilege analysis only if the publication was “solely for the purpose of causing harm to the person defamed.” Sciandra v. Lynett, 409 Pa. 595, 600, 187 A.2d 586, 589 (1963) (citations omitted). Plaintiffs have offered no evidence of such an intent.

Also irrelevant to the privilege question is plaintiffs’ contention, response, at 5, that defendants did not contact them prior to publication to verify the statements in the articles. See First Lehigh Bank v. Cowen, \_\_\_ Pa. Super. \_\_\_, 700 A.2d 498, 508 (1997) (“[I]t is irrelevant that Cowen did not contact [appellants] for comment on the pending lawsuit.”).

Edmund V. Ludwig, J.