IN THE COURT OF APPEALS FOR FOR THE STATE OF NEW MEXICO

ANITA REINA,
Plaintiff/Appellee,

v.

No: A-1-CA-36351

LIN TELEVISION CORPORATION,
d/b/a KRQE and LARRY BARKER,
Defendants/Appellants

DEFENDANTS/APPELLANTS REPLY BRIEF

On Appeal from the Second Judicial District Court
for the State of New Mexico
The Honorable Denise Barela Shepherd

ORAL ARGUMENT IS REQUESTED

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I. Introduction

The interlocutory appeal before this Court involves a question of defamation law in New Mexico. Appellants KRQE News 13 and Larry Barker's conducted and subsequently broadcast an investigative report about the performance of Appellee Anita Reina's job duties outside normal working hours. The issue presented in this appeal is whether the Appellee, a former City of Albuquerque Hearing Officer, appointed by the presiding judge of the Second Judicial District Court, is a public official, thus triggering the application of the actual malice standard articulated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Despite the issue being framed so specifically before this Court, Appellee's Response brief nevertheless misses the mark and spends very little time focused on this primary issue.

Interlocutory Appeal, in this case, was primarily granted on the narrow issue of whether Appellee Anita Reina was a public official, and secondarily, whether she was a limited public figure for purposes on her defamation claim. The assessment of a "public official" for purposes of defamation liability under the First Amendment has generally been found to be someone in the government's employ who (1) has, or appears to the public to have, substantial responsibility for or control over the conduct of governmental affairs; (2) usually enjoys significantly greater access to the mass media and therefore a more realistic opportunity to

contradict false statements than the private individual; (3) holds a position in government which has such apparent importance that the public has an independent interest in the person's qualifications and performance beyond the general public interest in the qualifications and performance of all government employees; and (4) holds a position which invites public scrutiny and discussion of the person holding it entirely apart from the scrutiny and discussion occasioned by the particular controversy. U.S. Const. Amend. 1. *Young v. CBS Broadcasting*, Inc., 212 Cal. App. 4th 551, 151 Cal. Rptr. 3d 237 (3d Dist. 2012). Rather than provide any evidence or analysis which addresses this standard in her Response brief, Appellee avoided providing this Court with any compelling argument that she is not a public official for the purposes of this defamation action.

Appellee submitted a 22-page response brief to the Court which pays little attention to the issue of whether she is a public official. She conveniently ignores all established case law offered in Appellant's Brief-in-Chief and offers this Court no case law to support her position. If fact, when it comes to the issue of whether Ms. Reina is a public official, it appears that only two paragraphs of the entire 22-page response brief address the issue with a mention of only one case which is far removed from the issue in this case.

Appellee's brief argues facts which are not included in the Record Proper, facts which not properly cited and exaggerate facts cited to the Record Proper at

427. Appellee's citations to RP 427 in many instances do not support the contentions made despite Court requirements that they do so.

All in all, Appellee does not seem to appreciate the issue presented in this appeal. Rather, she appears to want to argue an entire case with a total and complete misunderstanding of the process of determining a public official as well as the understanding of satisfying the element of actual malice.

ARGUMENT

II. Appellee Does Not Provide An Argument That She is Not A Public Official

Appellee fails to provide this Court with the proper standard to determine who is a public official for purposes of a defamation action. Accordingly, she provides no consistent legal analysis on this issue nor does she cogently identify any facts indicating she lacks power and authority over others to make crucial governmental decisions. Instead, she very briefly and incompletely touches on the issue of whether she's a public official and simply offers a brief opinion not supported with any case law. Appellee falls far short of providing this court with any supporting legal authority or compelling analysis to counter Appellants' argument that she is a public official.

It is a well-established principle that a public official must provide clear and convincing proof of "actual malice" to recover damages for a defamatory

falsehood relating to his or her official conduct. *New York Times Co. v. Sullivan*, 376 US 254 (1964), The guiding doctrine for analyzing whether an individual is a public official was provided by the U.S. Supreme Court in *Rosenblatt v Baer*, 383 U.S. 75 (1966) (County recreation supervisor was a public official). A "public official," under the New York Times rule, "applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs" such that "the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all governmental employees." 383 U.S. 75, 85-86, (1966). While there is no bright line test, Appellants offered this Court legal analysis and multiple reasons why Appellee should be considered a public official along with a number of cases in which courts have assessed this issue consistent with *Rosenblatt's* guiding principles.

Notably, Appellee does not address the proper standard or rebut Appellants' factual arguments which are properly cited to the Record Proper or any of the case law provided in the Brief-in-Chief. Rather, Appellee seems confused with the concept of a public official for defamation purposes and relies mostly on opinion.

A. State Law Definitions of Public Officials Are Not Persuasive

Rosenblatt established that determinations regarding "public official" status of an allegedly defamed individual must satisfy federal constitutional standards, rather than state law standards. Yet, this authority does not deter Appellee whose argument that she is not a public official leads off with an inapplicable state law definition from a campaign reporting statute.

After meandering through a number of facts not relevant to the issue of whether she is a public official, Appellee finally gets to a very brief and unconvincing two-paragraph argument on whether she is a public official for purpose of a defamation claim on page 14 of her Response brief. Her argument is not compelling. First, she aptly concedes "Public officials are rarely defined by statutes..." but nevertheless contends that one definition of a public official under the New Mexico Campaign Reporting Act is someone who is "elected to office." Response Brief at p. 14. While applicable to the New Mexico Campaign Reporting Act, this definition is irrelevant to the issue of whether Appellee is a public official for the purposes of her lawsuit. The contention is a nonsequitor given that Appellee's asserted conclusion does not follow the premise.

Appellee does not offer the court any legal authority that the definition of a "public official" under the Campaign Reporting Act is synonymous with a "public official" for the purposes of the New York Times rule because that is not the law. It does not provide any useful evidence that applies to the issue at hand. Rather,

this passage simply seems to indicate that Appellee does not understand the defining legal principle or the applicable case law articulated by the U.S. Supreme Court in addressing this issue.

In *Rosenblatt v. Baer*, the Court acknowledged that states have developed definitions of "public official" for local administrative purposes. 383 U.S. at 85. However, those definitions are not applicable for the purposes of a national constitutional protection. Id. Since *Rosenblatt* established public official can occupy many different positions in government, there is no bright-line test which requires courts to analyze each position on a number of different levels when the issue arises. Certainly, the definition of a public official for the purposes of the New Mexico Campaign Reporting Act offers no guidance on whether Appellee is a public official for defamation purposes. Appellee does not engage in any legal analysis to provide this Court with guidance that the mere fact that she is *not elected* is dispositive of the issue of whether she is a public official when it comes to her role as a City of Albuquerque Hearing Officer. If Appellee is using this statutory definition to contend that only elected officials can be public officials, then that is not a correct statement of the law.

Appellee furthers this false assertion of the law by selectively mentioning New Mexico case law on public officials. Appellee cites a New Mexico case in which an elected New Mexico official was designated a public official while

ignoring other New Mexico cases where public official status was bestowed on non-elected officials for defamation purposes. Appellee cites *Andrews v. Stallings*, 119 N.M. 478 (1995) to provide an example of an elected official who was considered a public official for purposes of a defamation action. No one contests that an elected official, in all probability, is a public official. As stated, established case law does not require that a public official only be an elected official.

Yet, in attempting to make this argument, Appellee ignores the case of *Ammerman v. Hubbard Broadcasting, Inc.*, 91 N.M. 250, 572 P.2d. 1258 (Ct. App.) cert. denied, 91 N.M. 249, 572 P.2d 1257 (1977) which dealt with an *unelected* deputy sheriff who was considered a public official for defamation purposes. It also ignores *Collins v. Taos Board of Education*, 893 F.Supp. 2d. 1193, 1205 (2012) where the United States District Court determined that certain school officials were public officials. While Plaintiff does not cite to this case in her brief, it was authority provided in Appellant's brief in chief. Disregarding case law interpreting non-elected public officials in this regard is strange.

So, Appellee's apparent reliance that she was not elected to her position is grossly misplaced in terms of her public official status. Appellee freely admits she was appointed to this position by the Chief Judge of the Second Judicial District Court. That point along with her responsibilities is dispositive of the issue rather than whether she was elected to the post.

B. Appellee's Only Cited Authority Does Not Support Her Position

Plaintiff's next legal argument on the issue of her public official status is equally misplaced. Appellee's second paragraph on page 22 of her Response brief vaguely argues that a "Public Official is further defined in *Monitor Patriot Company v. Roy*, 401 U.S. 265 (1971) as not only an elected official but a candidate to be elected for a political office." Response at p. 14. Appellee does not explain how it is analogous or helpful to her case. It just appears to be dropped into the brief for no apparent purpose.

Monitor Patriot Company dealt with an issue of whether a candidate for the United States Senate was a public official, rather than a public figure, after a newspaper referenced him as a "former small-time bootlegger." Id. The U.S. Supreme Court concluded that he was properly designated public official because the allegation addressed his fitness for office. It held that candidates for public office must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office. 401 U. S. 270-272. The case did not "further define" a public official. Rather, it merely accentuated that the statement at issue in that case addressed a public official engaged in an official act and was worthy of constitutional protection. The case doesn't support Appellee's position and is nowhere close to the issue in this case.

Appellee offers no analysis to this Court challenging the cases Appellant offered in their Brief-in-Chief. Appellee does nothing to distinguish *Fiacco v. Sigma Alpha Epsilon Fraternity*, 484 F. Supp. 158 (D. Me. 2007). In that case, the United States District Court addressed a similar issue regarding a university administrator who was responsible for overseeing the process through which allegations of student misconduct were investigated, adjudicated and potentially sanctioned. That university administrator had the ability to adjudicate cases personally and to issue disciplinary sanctions even though his decisions were appealable. Id. at 168. In holding the university administrator was a public official, the Court held that he possessed discretion, influence and power in the community. Id. at 169. In its holding, the Court also noted that in the case of *Grossman v. Smart*, 807 F. Supp. 1404, 1408 (C.D. Ill. 1992) a federal district court deemed the Vice Chancellor for Research and for Graduate College and assistant to the Chancellor of the University a public official while noting that this Appellee was also the Hearing Officer in an administrative grievance hearing. These cases are consistent with Appellees duties and responsibilities as a City Hearing Offer where she is vested with authority and discretion to make decisions that are important to the citizens she serves. Appellee's failure to offer any cases or distinguish the cases offered in Appellants' Brief-in-Chief is telling.

C. Appellee's Remaining Arguments Are Not Persuasive

After the two paragraphs addressing the state law definition and the inapplicable *Monitor Patriot Company* case, Appellee segues into whether Ms. Reina is a "limited public figure" while meandering through a number of other, non-related arguments. Then, Appellee with no reference to Appellants' Brief-in-Chief, takes a left turn and seems to be raising an argument that Appellants are raising a qualified privilege when no such argument is ever presented. Appellee does not identify the qualified privilege and this portion on her Response brief is simply confusing. Appellee argues that since a qualified privilege cannot be established, she does not have to meet the malice standard. Again, this is a nonsequitor and the argument simply makes no sense.

The remaining portions of the Appellee's Response brief are equally confusing. Appellant provided citations to the record in which one of the duties of a City Hearing Officer is to determine the constitionality of certain ordinances. RP 518. This was an admission of the Appellant in her deposition and part of the record. RP 518 Appellants argued that this responsibility was obviously a matter of critical importance to citizens of the State of New Mexico to further their argument that Plaintiff occupied a position of substantial responsibility in government and was a public official. Essentially a member of the judiciary, the

Appellee is vested with the authority to rule on important legal issues whether they are constitutional questions or not.

In response, Appellee does not offer any evidence on the record that City Hearing Officers do not possess this type of authority. Rather, she attempts to minimize responsibility with arguments which are not supported by the Record Proper. See Response Brief at P. 16. Plaintiff offers two contentions without actual citations to the record which try to maintain that City Hearing Officers were merely a rubber stamp for previous decisions by district and appellate courts. Plaintiff offers without a citation to the record that 1) when "people challenged the constitutionality of the ordinance in front of a hearing officer, they merely denied it …." and, 2) "No hearing officer of any sort would reexamine or rule on their own whether an ordinance was constitional or not" while opining this argument is a "red herring." P. 15-16, Response Brief. This is but two of many attempted factual arguments throughout the brief which lacks a citation to the record. Appellants' contention that she was vested with the authority to decide constitutional issues was properly cited to the Record Proper. RP 518.

Both parties cite to *Titus v. City of Albuquerque*, 2011-NMCA-038, 149 N.M. 556, 252 P.3d 780 (2011), but for different purposes when it comes to explaining the authority of the City of Albuquerque hearing officers. Appellee seems to cite to the case for the purpose of demonstrating the that the

constitutionality of a program had already been decided in 2011, while ignoring the point that the hearing officers possessed this authority in the first place. Notably, the original determination of the constitutionality of the controversial Safe Traffic Operations Program (STOP) was, in fact, decided by a City Hearing Officer. *Id.* If anything, this indicates that City Hearing Officers were vested with substantial authority, including the ability to make judgments on the constitutionality of ordinances.

Even Appellee acknowledges the City Hearing Officer position was controversial among the public given the red light camera program which furthers Appellants argument that she held a position that the public had an interest in her qualifications and performance as well as there being much public scrutiny. Appellee states in her brief, "Over the years political and other complaints raged about the City's Red Light Cameras." Response Brief at p. 10. Clearly, the position was one that held the public's interest in terms of her adjudication being fair and impartial to the public who were suspect of this program.

The Response brief also argued that Appellee has a "special status" and was not subject to City of Albuquerque Personnel Rules and Regulations. Response Brief at p. 4 citing RP 425. Essentially, the "special status" was a position in which she felt personnel rules did not apply to her. As such, the public also had expectations regarding her qualifications and performance.

Finally, Appellee argues that she was not a public official because Appellant Larry Barker had not heard of her before his investigation and news story. Appellee provides no case law or authority as to whether Mr. Barker's recognition of her is dispositive of the issue of whether she was a public official. In actuality, the lack of recognition of Appellee or any other City Hearing Officer is not relevant to the core issue that is analyzed with the aforementioned analysis articulated in *Rosenblatt*.

III. Appellee Failed to Provide Any Facts to Support Actual Malice in Her Response to Defendants' Motion for Summary Judgment.

Finally, it should be noted that Appellee spends time in her brief addressing the issue of whether she can satisfy the element of actual malice. First of all, in response to Appellants' Motion for Summary Judgment, Appellee did not offer any evidence of actual malice. RP 399. Rather, it steadfastly argued a negligence standard although this was raised by Appellee's in the Motion. Second, none of the evidence Appellee now references comes anywhere close to the actual malice standard. Clearly, Appellee does not understand or appreciate the standard of proof necessary to create a genuine issue of material fact on the issue of actual malice. Her last ditch effort to raise this issue when not addressing it in the district court is dilatory and should be rejected.

Appellants argue that a determination by this Court that the actual malice standard applies because of the public official determination will lead to the dismissal of this case since Appellee failed to argue any evidence of knowledge of falsity or reckless disregard for the truth. It is for this reason, the district court entertained this matter for certification for interlocutory appeal.

CONCLUSION

Based on the foregoing, along with those arguments raised in Appellants' Brief-in-Chief, Appellee should be designated as a public official. Since Appellee failed to establish any argument below on the issue of actual malice, the case should be reversed and remanded to the district court for dismissal with prejudice.

Respectfully submitted,

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(G) NMRA, this brief complies with the type-volume limitations set forth in Rule 12-213(F)(3) NMRA, because it is prepared in a proportionally-spaced typeface 14 point Times Roman, and the body of the brief contains 3,259 words according to Microsoft Word 10.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was sent via email to the following on this 6th day of November, 2017:

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