

BRUCE WAYNE,

Plaintiff-Appellee

v.

THE GOTHAM DAILY NEWS,

Defendant-Appellant.

No. 89-999

State Of Gotham Court of Appeals

Argued April 1, 1989

Decided April 10, 1989

ORDER AND OPINION

Robbin, Judge

On January 10, 1989, The Gotham Daily News published an article in its Sunday edition entitled, "CHILD SEX SCANDAL ROCKS GRAYSON ADMINISTRATION." The article (see Appendix A), citing numerous unnamed sources and medical records, accused Bruce Wayne, former Gotham Superior Court judge and current chairman of the Governor's Task Force to Restore and Promote Family Values, of sexually molesting a twelve-year old girl. Written by noted investigative reporter Jack Napier, the story sent shock waves through the state capital and greatly embarrassed the Governor. Although he vigorously denied the truth of the story, Wayne was forced to resign his position as head of the Governor's task

force on January 12, 1989. Wayne also was forced to resign his position as director of three highly profitable corporations.

Immediately after the story was printed, Wayne asked The Gotham Daily News for a retraction. The newspaper refused. On January 14, 1989, Wayne filed suit in Gotham Superior Court against the newspaper for defamation and sought damages in the amount of \$23,000. In its answer, pursuant to section 10-4 of the General Statutes of Gotham (see Appendix B), the newspaper elected to convert the action for damages into an action for declaratory judgment. In the alternative, the newspaper moved to dismiss the action for damages on the grounds that section 10-5 is unconstitutional because it allows recovery of monetary damages without proof of fault.

In compliance with Rule 12(f) of the Gotham Rules of Civil Procedure, which is identical to Rule 12(f) of the Federal Rules of Civil Procedure, counsel for Wayne filed a timely motion to strike asserting that the defendant had pleaded an insufficient defense in his answer. The motion to strike was based on the plaintiff's argument that section 10-4, which allows a defendant to trump a plaintiff's choice to pursue money damages by forcing a declaratory judgment action, is unconstitutional under the state and federal constitutions.

The trial court granted the plaintiff's motion to strike an insufficient defense, ruling that section 10-4 violated Wayne's rights under Art. I, sec. 12, of the Gotham state Constitution (see Appendix C). Since the lower court decided the issue on

state constitutional grounds, it did not address the plaintiff's argument that section 10-4 violated the Fourteenth Amendment of the U.S. Constitution.

The trial court also denied defendant's motion to dismiss, ruling that New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and its progeny did not create a federal constitutional requirement that a plaintiff prove fault as a predicate to an award of monetary damages. Since the Gotham Rules of Civil Procedure do not permit interlocutory appeals, the case went to trial as an action for monetary damages.

At trial the reporter refused to reveal his sources and did not produce the medical records cited in his article. It also was revealed that in 1976 Judge Wayne gave Napier a very stiff jail sentence for drunk driving.

The jury found the article to contain false facts that defamed and injured Wayne's character and reputation and awarded Wayne damages in the amount of \$23,000. The amount is the sum of Wayne's annual salary as Chairman of the Task Force on Restoring Community Values (\$5,000), and his salaries for serving as director on the boards of three major corporations (\$6,000 for each position). The defendant did not contest the amount of damages on appeal.

The issues before this court are: 1) whether the statutory provision allowing the defendant to force the plaintiff into declaratory judgment thereby trumping the plaintiff's decision to sue for monetary damages violates plaintiff's rights under Art.

I, sec. 12, of the Gotham state constitution or, in the alternative, whether it violates the Fourteenth Amendment of the United States Constitution; and 2) whether the statutory provision allowing an award of monetary damages without a showing of fault violates the First Amendment of the United States Constitution.

I. The Trumping Issue:

The first issue raised by this appeal is whether section 10-4 of the Gotham statute allowing the defendant to trump the plaintiff's decision to pursue money damages is constitutional under the state and federal constitutions. We hold that section 10-4 violates Art. I, sec. 12, of the Gotham state constitution. Therefore, we affirm the Superior Court's decision to grant the plaintiff's motion to strike and hold that the lower court properly allowed the plaintiff to proceed in his action for money damages.

The Gotham state constitution guarantees our citizens a remedy for reputational injury. We have looked to other state courts' decisions for guidance in interpreting Art. I, sec. 12, since the question of whether this provision limits the state legislature's ability to modify or abolish common law remedies is one of first impression in this jurisdiction.

In Madison v. Yunker, 180 Mont. 54, 589 P.2d 126 (1978), involving a state constitutional provision similar to ours, the Supreme Court of Montana held unconstitutional a statute allowing publication of a retraction to be a complete defense to a libel

suit. The declaratory judgment provision at issue here is analogous to the Montana retraction law because both eliminate the plaintiff's cause of action for money damages. In the case at bar, the defendant's ability to force the plaintiff into declaratory judgment means that Wayne will not receive any compensation for his serious economic losses. Therefore, section 10-4 as applied to the facts of this case, deprives Wayne of a meaningful remedy for his injuries in violation of Art. I, sec. 12, of the Gotham state constitution. Having decided the statute fails to withstand scrutiny under the Gotham state constitution, it is unnecessary for us to address the question of whether the statute violates Wayne's rights under the Fourteenth Amendment.

II. Monetary Damages without Fault:

The next issue raised on appeal is the constitutionality of section 10-5 of the General Statutes of Gotham whereby monetary damages may be awarded without a showing of fault. Section 10-5 is constitutional. Moreover, it is also consistent with the principal purpose of libel law which is to promote the restoration of a falsely damaged reputation.

In New York Times Co. v. Sullivan, 376 U.S. 254 (1976), the Supreme Court imposed on the plaintiff the burden of demonstrating that the defendant published the defamatory statement with "actual malice" in order to recover monetary damages. The Court hoped to preserve the willingness of the press to engage in "uninhibited, robust and wide-open" debate by diminishing the potential for large damage awards caused by the

availability of presumed damages. Id. at 270. The Alabama law at issue in Sullivan presumed reputational injury and allowed recovery of monetary damages without proof of injury. Conversely, the statutory provision at issue requires the plaintiff to prove injury to reputation by clear and convincing evidence in order to recover monetary damages. In addition, unlike the Alabama law at issue in Sullivan, section 10-5 severely limits the award of monetary damages by allowing only provable pecuniary loss as damages, thereby eliminating the Court's concerns in Sullivan regarding the chilling effect of large damage awards. The statutory provision at issue provides the gentle balance between the vital concerns of promoting robust discussion and protecting individual reputation.

Besides removing the Sullivan court's concerns, the statute actually offers assistance to the media. As a result of Sullivan's actual malice requirement, a plaintiff was allowed to intrude into the privacy of the press' investigative, writing and editing processes. By shifting the focus of the suit from the media's fault to the plaintiff's injury, the statute eliminates the need for plaintiffs to invade the defendant's editorial process. The statute will also lessen the cost of defending a libel suit by eliminating the time-consuming and complex fault requirement. Furthermore, the higher burden of proof under the monetary damages option of the statute will encourage plaintiffs to pursue the declaratory judgment remedy, thus removing the fear of monetary damages.

Additionally, the Court has seen fit to lessen the level of media protection in the wake of the Sullivan decision. See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

For the foregoing reasons, we affirm the decision by the Superior Court.

Separate Opinions

Judge Penguin, concurring in the judgment

I disagree with the majority's reading of our state constitution; however, I concur in the court's judgment that section 10-4 is unconstitutional because I think the statute violates the plaintiff's federal constitutional rights under the Fourteenth Amendment.

I would not read Art. I, sec. 12, of the Gotham state constitution in a manner which essentially prohibits legislative modification of common law causes of action and remedies. In Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), the Idaho Supreme Court upheld a statutorily imposed cap on the amount of damages a plaintiff may recover for medical malpractice, holding that their identical state constitutional provision allowed the legislature to abolish common law rights without providing a reasonable substitute. In my opinion, the declaratory judgment proceeding still provides a remedy for the plaintiff through a judicial declaration of the falsity of the

defendant's statement, and section 10-4 is simply a permissive legislative modification of the remedies available to the plaintiff.

Since I am unable to accept the majority's reasoning that section 10-4 violates our state constitution, I turn to the provision's validity under the Fourteenth Amendment of the U.S. Constitution. While the Supreme Court held in Paul v. Davis, 424 U.S. 693 (1976) that reputation is not a property or liberty interest encompassed within the protections of the Due Process Clause, the plaintiff has been deprived of other property interests which have been recognized by the court. The statute also allows the media defendant to deprive the plaintiff of his property interests in his cause of action and in his job by giving the defendant the ability to trump the plaintiff's decision to sue for money damages. See Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). I would rule, therefore, that the statute violates the Due Process Clause of the U.S. Constitution.

I also would hold that section 10-4 violates the Equal Protection Clause of the Fourteenth Amendment. In Quinn v. Millsap, 109 S. Ct. 2324 (1989), the Supreme Court reiterated the traditional principle that although state legislatures are given considerable deference, their legislation must satisfy a minimum level of rationality. Section 10-4 of the Gotham statute violates the Equal Protection Clause of the U.S. Constitution

because the legislative classification between libel plaintiffs and all other plaintiffs is wholly arbitrary and irrational. While the government's interest in protecting the First Amendment rights of the press is certainly legitimate, the means the legislature has chosen are irrational because the statute gives the choice of remedy to the media, the party most adverse to the plaintiff's interests. The legislature might as well have said, "The Superior Court shall flip a coin to determine whether the plaintiff will be allowed to pursue his cause of action for money damages."

The Superior Court, therefore, properly allowed the plaintiff to proceed with his cause of action for money damages, and I concur in the majority's judgment on this issue, though not in their reasoning.

Judge Riddler, dissenting in part

Although I agree that section 10-4 violates our state constitution, I strongly disagree with that part of the majority's opinion which holds that the statutory provision which permits an award of monetary damages without a showing of fault is constitutional. I therefore do not join their opinion and judgment on this issue.

First, the majority clearly misreads Sullivan. The Sullivan court required a plaintiff seeking monetary damages to prove fault because it hoped to reduce the "chilling effect" of large

damage awards on the press. As a result, the statutory provision that inhibits open discussion by allowing monetary awards without a showing of fault violates the fundamental purpose of the First Amendment. The majority correctly points out that the post-Sullivan cases indicate a trend toward lessening media protection; however, each case cited by the majority upholds the proposition that a plaintiff must prove fault in order to recover monetary damages. Consequently, the Court maintains its deep concern for the "chilling effect" that large monetary awards will have on the press. Despite the statute's elimination of punitive damages, the fear of large pecuniary monetary damages will likely result in media self-censorship. Finally, since reputational harm is such an amorphous concept, there is no significant correlation between the award of monetary damages and the redressing of reputational harm. Accordingly, the decision by the Superior Court should be reversed.

IN THE
SUPREME COURT OF THE STATE OF GOTHAM

October Term, 1989

No.89-999

THE GOTHAM DAILY NEWS, Petitioner

v.

BRUCE WAYNE, Respondent

The Petitioner, The Gotham Daily News, appeals from the
State of Gotham Court of Appeals.

The Supreme Court of the State of Gotham hereby certifies
the following questions on appeal:

I. Whether section 10-4 of the General Statutes of the State of Gotham which allows The Gotham Daily News to force Bruce Wayne into a declaratory judgment action, thereby trumping his decision to sue for monetary damages, violates Art. I, sec. 12, of the Gotham state constitution or, in the alternative, whether it violates the Fourteenth Amendment of the United States Constitution.

II. Whether section 10-5 which allows Bruce Wayne to recover monetary damages without proving fault on the part of The Gotham Daily News violates the First Amendment of the United States Constitution.

Appendix A

CHILD SEX SCANDAL ROCKS GRAYSON ADMINISTRATION

by Jack Napier

GOTHAM CITY- The administration of first-term governor Dick Grayson suffered a severe setback when reliable sources indicated that Bruce Wayne, a former Gotham Superior Court judge, engaged in sexual relations with a twelve-year old girl on several occasions in 1986. The girl's parents, who requested anonymity, revealed that Wayne sexually molested their child while she visited Wayne's grandchildren at the Wayne Manor estate. Apparently, Wayne lured the girl away from her friends with promises of special games and prizes. The parents suspected problems after their daughter's last visit to Wayne's home. The girl's mother noted, "She went straight upstairs to her room and refused to play with anyone, including her brothers. She would give one word answers to my questions and ignored her father. She even refused to hug him."

Doctors Discovered Repeated Abuse

Fearing the worst, the parents consulted a psychiatrist, specializing in child abuse. The psychiatrist discovered incidents of sexual molestation after extensive therapy sessions with the child. Physical examinations by a pediatrician corroborated the psychiatrist's diagnosis. In addition, review of the pediatrician's records revealed that the girl suffered repeated sexual abuse.

According to the mother, the psychiatrist believes the odds

that the girl will fully recover from the sexual trauma are slim. Unable to fight back the tears, the mother said, "I can't stand what this has done to my daughter and my family. My daughter is afraid of everyone, including her father and her grandfather. She won't let them near her and refuses to be left alone with either of them." The parents also expressed their outrage at Judge Wayne's conduct. The father lamented, "You think you know somebody, trust him, after all his years of public good. That animal has taken my baby away from me."

Grayson Administration Dealt Serious Blow

Revelation of these sordid incidents, if true, casts a dark cloud over the Grayson Administration. In 1987, then-District Attorney Dick Grayson rode the theme of restoring family values all the way to the Governor's mansion. He stressed that citizens needed to return to traditional family values and promised in numerous campaign speeches "to rid Gotham of the blight caused by drugs and pornography." On his first day as Governor, Grayson created the Governor's Task Force To Restore and Promote Family Values.

Pundits Hailed Wayne as Chairman

To illustrate his commitment, Governor Grayson appointed Wayne as the task force's chairman. At the press conference announcing the appointment, the governor stated, "Bruce Wayne represents the finest of what it means to be an American." At the same press conference, Wayne promised, "I will personally see to it that Gotham is freed from the suffocating grasp of drug dealers, smut peddlers and other criminal influences which

threaten the tranquility of our citizens and the very core of our families' existence." Political pundits applauded the appointment of the sixty-six year old former judge.

Wayne, a Marine corporal, earned the Congressional Medal of Honor during World War II. Upon his return from the war, he attended law school and began his career as a prosecutor. In 1955, he was appointed to the Superior Court and earned a reputation as a tough law and order judge. Even his critics agreed that this father of four and grandfather of two "practiced what he preached." He currently serves as a Deacon in the Church of the Holy Crusade. Both the Governor and Wayne refused comment on the allegations.

APPENDIX B

THE LIBEL REFORM ACT

PREAMBLE: The purpose of this statute is to provide an efficient and speedy remedy for defamation.

SECTION 10-1

A. One cause of action: One cause of action, for defamation, shall exist for any claim based upon a false defamatory statement. The cause of action for false-light invasion of privacy is abolished.

B. Publication Defined: Publication means a communication to a person other than the person claiming to be injured by the communication.

C. No Distinction Between Media and Nonmedia. The provisions of this Act shall apply without regard to whether the publisher of a statement secured any financial remuneration for the publication.

D. False Statements of Fact Required. Any action for defamation must be based upon publication of a false defamatory statement of fact of and concerning the plaintiff. No action may be based upon statements that are expressions of opinion.

E. Defamatory Defined. A statement is defamatory if, as reasonably construed by the finder of fact, it tends to injure the plaintiff's reputation.

F. Questions for the Court. Whether the statements giving rise to the action are capable of being reasonably understood as defamatory statements of fact is initially a question of law to be decided by the court. If the court determines that the statements are capable of being reasonably understood as defamatory statements of fact, it shall be for the trier-of-fact to determine whether the statements were actually so understood by recipients of the statements.

G. Preemption and Jurisdiction. The provisions of this statute are preemptive of applicable prior law governing defamation or false-light invasion of privacy. A cause of action under this statute may be brought in any state or federal court of competent jurisdiction.

SECTION 10-2: REQUEST AS A PREREQUISITE TO SUIT

A. No action for declaratory judgment or action for damages may be brought against any defendant, unless the plaintiff shall allege that the plaintiff made a timely request for either a retraction or an opportunity to reply, and the defendant failed to make a retraction or provide the plaintiff with a timely

opportunity to reply. A timely opportunity to reply is not a satisfactory response to a request for a retraction.

B. Retraction Defined: A retraction is a good faith publication of the facts, withdrawing and repudiating the prior defamatory statements.

C. Reply Defined: A reply is the publication of the plaintiff's statement of facts.

D. Timely Request Defined: A timely request for retraction or reply is a request made within thirty (30) days of the publication of the defamatory statement.

E. Timely Retraction or Reply: To be timely, the publication of a retraction or reply must be made within thirty (30) days of the request.

SECTION 10-3: DECLARATORY JUDGMENT

Subject to section 2, a person who is the subject of any defamation may bring an action in any court of competent jurisdiction for a declaratory judgment that such publication was false and defamatory.

A. The filing of such an action for declaratory judgment shall forever bar the plaintiff from asserting or recovering for any

other claim or cause of action arising out of the publication which is the subject of the action.

B. No damages shall be awarded in such an action.

C. Neither fault nor state of mind of the defendant shall be an element of such an action.

D. The plaintiff shall bear the burden by proving by a preponderance of the evidence that the publication was false and defamatory.

E. Actions for declaratory judgments in defamation cases shall be granted priority over other civil actions in setting trial dates, and all cases must be tried within one hundred-twenty (120) days of the filing of the complaint.

F. The court shall award the prevailing party reasonable attorney's fees. The court shall have the discretion to deny or reduce the award of attorney's fees to any prevailing party who litigated frivolous claims or defenses.

SECTION 10-4: DEFENDANT'S OPTION.

A. A defendant in an action for defamation shall have the right, at the time of filing an answer or within twenty (20) days from the commencement of the action, whichever comes first, to

designate the action as an action for declaratory judgment.

B. Any action designated by the defendant as an action for declaratory judgment pursuant to this provision shall be treated as if it had been filed originally as an action for a declaratory judgment by the plaintiff and shall forever bar the plaintiff from asserting or recovering for any claim or cause of action arising out of the publication which is the subject of such action.

SECTION 10-5: ACTION FOR DAMAGES

Subject to sections 2 and 4, a person who is the subject of any defamation may bring an action in any court of competent jurisdiction for damages.

A. The plaintiff shall bear the burden of proving injury to reputation by clear and convincing evidence in order to recover damages.

B. The plaintiff shall bear the burden of proving by clear and convincing evidence that the publication was false and defamatory.

C. No punitive or presumed damages may be recovered in any action for defamation.

D. Recovery shall be limited to reasonable compensation based on pecuniary damage resulting from reputational harm.

E. Each side shall bear its own attorney's fees, subject to the applicable rules of civil litigation.

SECTION 10-6: SEVERABILITY

A. The provisions of this Act are severable, and any judicial decision declaring any provision of this Act invalid shall not be deemed to invalidate other provisions of the Act.

Appendix C

Art. I, sec. 12, of the Gotham state Constitution states:

"Every person for an injury done him in his lands, goods, person or character, shall have a remedy by due course of law."