IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

J. L. HUDGINS

v.

CHESAPEAKE FERRY CO.

PETITION TO REHEAR.

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THE RELIANCE PRESS OF NORFOLK, VA., INC.

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If the verdict of the jury in this case had been for the defendant, and the trial court had sustained it, we should have no criticism to make of this Court's opinion. But, inasmuch as it seems to us that the views of this Court can not by any possibility be reconciled with what we had hitherto conceived to be its proper function in passing upon such a verdict, and inasmuch as we also think that it has erred in regard to the one instruction upon which it saw fit to comment, we shall respectfully submit our reasons for the rehearing which we think the case demands.

I.

We shall consider first the action of this Court in holding the evidence insufficient to make out a case for the plaintiff.

The case is one in which the utter falsity of grave charges brought against the plaintiff is admitted. The

case is also one of qualified privilege, and, for this reason, it became necessary for the plaintiff to show actual malice on the part of the defendants existing at the time the charges were made.

We should bear in mind, however—what we fear that the Court has not done—that it was not incumbent upon Captain Hudgins to show malice in Eldredge at the time he was *discharged* by the latter. The discharge took place October 30, 1927. The slanderous charges were not made until November 22, 1927. This is shown by the dates of the letters in which the charges were contained. (Record pp. 70, 71.) During this period of more than three weeks many things had happened to cause Eldredge to have a feeling, not merely of irritation, but of hostility, towards Hudgins. We repeat that we fear that the Court has wholly lost sight of this.

In a case of this nature malice can be shown by the following:

1. Former disputes between the parties, or any other circumstances showing ill feeling on the part of the author of the charges.

2. The fact that the slanderer did not himself believe in the truth of his charges.

3. A *deliberate* repetition by the slanderer of the charges.

We shall consider each of these briefly in their order.

1. The following extrinsic facts, antedating the slanderous charges show—beyond a peradventure, we submit —that Eldredge *was* actuated by malice when the charges were made.

(1) Eldredge, through a glaring piece of negligence on the part of Hudgins (as Eldredge believed), "had been very much criticised, roasted by the press, and berated generally." (Record, page 68.) For this unhappy predicament in which he and his company found themselves he considered Hudgins primarily to blame. (Record, page 68.)

We respectfully ask if a general manager, who is in the process of being *criticised, roasted,* and *berated* by the press, might not reasonably be supposed to feel some irritation towards the employee who was (as he thought) the cause of his embarrassment?

(2) When called to account the very next morning for the misconduct which had had such serious consequences, this same Hudgins, instead of telling Eldredge in manly fashion the truth about the matter, had (as Eldredge believed) tried to lie out of it by saying that he had called down to the men on the deck and had been told by them "All right." Eldredge believed that this statement was a lie. He expressly says that he believed it was a lie. (Record, page 80, where Eldredge, in answer to a question by Mr. Maupin, said, *"I don't think he called down."*)

We respectfully ask again: What would be the natural feeling of any employer (let alone a very strict disciplinarian) towards an employee who had not only been guilty of a piece of negligence which had greatly embarrassed the employer, but had told this employer a deliberate lie about it? Mighn't it be reasonably supposed that *some* irritation had been produced by such misconduct as this?

(3) Then this negligent, lying employee—not content with having gotten his employer into a bad scrape —and not content with trying to lie out of it—called in certain members of his Union to take up his quarrel with Eldredge and show the latter the wrongness and absurdity of his position.

Mighn't this have added to Eldredge's irritation? Mighn't it have increased his feeling of antipathy towards Hudgins? Do general managers as a rule take kindly to the interference of Labor Unions? Would they take very kindly to such interference exerted at the instance of such a scoundrel as Eldredge conceived Hudgins to be?

(4) But this was not all. At the *first* meeting (long before the slanderous charges were raked up) between Eldredge and the representatives of the Union, there was presented to Eldredge the statement of the deck hands dated November 12, 1927, to be found on page 42 of the Record. Eldredge admits (page 80) that he had this statement before him *at that time.* Nevertheless he refused to reinstate Hudgins. (Record, page 69.) The reason why he refused to reinstate him was because he considered this statement a frame-up. (Record, page 80.)

We ask again: Mighn't Eldredge, who firmly believed that Hudgins had carelessly gotten him into a nasty scrape, and had *then* lied about it, and had *then* sought to have his Union take up the cudgels for him, and had *then* instigated others to lie for him, as he himself had already lied—mighn't Eldredge, we say, have reasonably felt some irritation toward such a man as this?

(5) But even this was not all. After Eldredge had refused, at the first meeting, to take Hudgins back, the representatives of the Union went straight over his head to the President of the Ferry Company, without even so much as giving Eldredge any notice of their intended action, so that Eldredge knew nothing about the second meeting until after it had been arranged. And the meeting itself was actually under way when Eldredge arrived to find the President and the Union representatives closeted together, and Rodgers disposed to overrule Eldredge and compel him to reinstate Hudgins. The Court admits that this attempt to supersede him was rankling in Eldredge's mind on December 12. Mighn't the jury have reasonably thought that, coming as it did on top of all the other offenses committed by Hudgins, it was rankling in his mind *at that very meeting?* The sting of such an affront as this might reasonably be supposed to be sharper at the very moment it was given than at a subsequent period.

We have thus called the Court's attention to five affronts given to Eldredge by Hudgins prior to the making of the slanderous charges by the former. We submit that they were, each and all, of a serious nature, and reasonably certain, if not absolutely certain, to leave a deep-seated feeling of resentment in Eldredge's mind.

The jury found that these affronts *had* left this feeling of resentment in Eldredge's mind, and that it was with this feeling that he directed his private detective to dig up the long buried charges of drunkenness and immorality against Hudgins. And yet this Court has said that all these affronts taken together, piled one upon another, were not sufficient to justify reasonable men

in reaching such a conclusion. And its chief reason apparently for saying this is that Eldredge denied on the stand that he had been actuated by any ill feeling, and because his demeanor toward the Union representatives, Downing and Hodges, was respectful and not accompanied by any intemperate language!

We submit that the jury had the right to contrast Eldredge's conduct toward Hudgins and the facts of the case with his statement as to his feelings, and to disregard the latter. We also submit that neither courts nor juries have hitherto given any great weight to such statements. But, in any event, this was a matter for the jury—not for this Court. And, if Eldredge's statements were so transparently true that the jury had no right to disregard them, why does this Court disregard them? Eldredge, when on the stand, solemnly told the jury that, even when he wrote the letter of December 12, 1927, he was not actuated by any feeling whatsoever towards Hudgins—that he had *never* had any feeling or animus towards him! (Record, p. 75.) But this Court says that this statement was false—that he *was* irritated—greatly irritated—when he wrote that letter. Why shouldn't the jury have had the same freedom in dealing with his testimony? Indeed we had thought that this was peculiarly the jury's province.

2. Malice can be shown by the fact that the utterer of a slander didn't believe in the truth of what he said —that is to say, did not act in good faith. The Court, in its opinion, says that the contention of Hudgins that Eldredge did not believe in the truth of his charges is only an inference with but little to support it and that little of an equivocal nature.

(1) To begin with, this Court wholly ignores in its opinion *all* of the evidence in favor of the plaintiff. Notwithstanding the fact that the jury resolved every conflict in favor of the plaintiff, the opinion reads as if the plaintiff, and not the defendant, were seeking to have the verdict set aside. Only the evidence for the defendant is relied upon. We say this with all respect, but it is the simple truth. Especially does the Court ignore the pregnant testimony of the witness Downing, at pages 37 and 41 of the Record. Downing there testifies that Eldredge stated emphatically at their *first* meeting that he *had no other* reason for discharging Hudgins than the fact that he was to blame for leaving the purser at the dock. It is true that Eldredge didn't admit this, and, of course, if the jury had been under a legal duty to believe Eldredge at all hazards, the point that we are about to make would go for nothing. But if the jury had the right to believe Downing, and not to believe Eldredge, then here was a clear admission by Eldredge—before there was any thought on his part that he might be overruled by Rodgers—that he knew of nothing else against Hudgins—certainly that he knew of nothing of a serious nature against him. Upon such an admission as this the jury had the right to put the interpretation that Eldredge did not at any time take any stock in any charges of drunkenness or immorality which had ever been brought against Hudgins. And if he didn't take any stock in them *then,* could he have sincerely believed in them a few days later? At least, wasn't it the province of the jury to weigh and pass upon this evidence?

We repeat that this pregnant piece of evidence has apparently not caught the eye of the Court—for it would not otherwise have passed over it in silence.

(2) The jury had the right to believe that Eldredge, who was such a disciplinarian that he thought it his duty to discharge a man for such an act of negligence as that of which Hudgins was (as he thought) guilty, would surely have thought it his duty to investigate the far more serious charges which had been brought against Hudgins, if he had thought them entitled to the lease credence. Surely the jury had the right to think that this strict disciplinarian would never have entrusted the lives and safety of his passengers to a man who was notoriously addicted to the use of liquor while on duty. Surely it had the right to say that no general manager would have retained such a man as Mate for a period of years after knowledge of those charges had come to him, if he had thought that the charges were entitled to a moment's consideration. Hudgins had been employed under Eldredge at odd times up to April or May, 1926. Then he was given a *permanent* position as Mate. (Record, p. 53.) At the time he was given this permanent position as Mate, Eldredge was Superintendent. (Record, p. 77.) The Mate is next in command to the Captain. The alleged reports of Hudgins' drunkenness and immorality had been made to Eldredge by Herman in the "regular line of business." It is fair to construe this to mean that he heard them from Herman when he (Eldredge) became Superintendent in September, 1925. Mighn't the jury have reasonably supposed that he wouldn't have made Hudgins permanent Mate, or have permitted him to be such without pro-

test, if he had thought that the rumors had any truth whatever in them?

The explanation of Eldredge to the effect that he always saw to it that the Captain was on the boat with Hudgins we should consider farcical if it hadn't been treated with respect by the Court. (Here again, we are compelled to say, the Court ignores the testimony of Hudgins that at least three times daily he had to be acting as pilot *alone*. Here again it ignores the testimony of Downing, at pp. 44, 50, of the Record, that no man addicted to the use of liquor could retain such a position as Hudgins held). But let us suppose that the record had shown that, not only the Captain, but Eldredge himself, felt it necessary to attend, and did attend, Hudgins during every moment of the day—an ideal pair of nurses for this drunken pilot! The mere statement of such a condition of affairs as this carries, we respectfully submit, its absurdity on its face. Would any general manager retain as Mate in the employ of his company one whom it was necessary to watch in this way?

3. Another fact from which malice may be inferred is the repetition of the slanderous charges. This repetition may even be after action has been brought. (Newell, section 287.) The Court construes the letter of December 12, 1927, as a reiteration, not of the charges, but of the propriety of Eldredg's action in discharging Hudgins on account of the purser incident. Is this even a possible construction?

The letter of December 12, 1927, should be read in connection with that of December 5, 1927, to which it is a reply. The latter refers particularly to the charges

which had been brought against Hudgins and to the conferences at which *these charges* had been discussed. It will be recalled that *only the charges* had been discussed at the third and fourth conferences. Referring particularly to *these two* conferences, the letter of December 5, 1927, Record, page 47, said:

> "After our several conferences and a very careful study of Capt. J. L. Hudgins' case, our convictions are as follows:
>
> "1st. That disciplinary action, to avoid a recurrence of the very disagreeable and awkward situation, resulting as it did, from Capt. Hudgins' leaving Turn-style Purser on the dock, should have been taken, but in all fairness, we do not believe, in the light of the facts established that this act justified his dismissal. *Investigation of other statements which were offered as further grounds for his dismissal were not fully established, which we believe you realize as fully as we do.*"
>
> (Italics ours.)

To this Eldredge replied as follows, Record, page 48:

> "Yours of December 5th.
>
> "*The several conferences to which you refer has only tended to confirm the management's opinion that action taken by us in the case of Captain J. L. Hudgins was the only proper one.*"
>
> (Italics ours.)

"*The several conferences* to which you refer." To what conferences had Downing and Hodges referred? They had referred especially to the last two conferences. And necessarily Eldredge was referring to them when he said that the several conferences to which they had

referred had confirmed his previous opinion that he had acted properly in discharging Hudgins. What else could he have had in mind except the charges which had been brought forward at the third conference? He meant that *these charges* had *confirmed* him in the opinion that Hudgins ought to go; just as, in the first instance, the mistake of leaving the purser had *induced* this opinion.

If further proof were needed that Eldredge was deliberately repeating, in the letter of December 12, 1927, the slanderous charges which he had caused to be raked up against Hudgins, it may be found on page 83 of the Record, where this bit of cross-examination took place:

> "Q. In that last letter you wrote to the Masters, Mates and Pilots on the table there by you, didn't you say that the several conferences which you in the impression that you had done correctly in firing Capt. Hudgins?
>
> "A. I did.
>
> "Q. But you have just admitted on the stand *that these reports of drunkenness and misconduct had broken down?*
>
> "A. They haven't been *entirely* substantiated.
>
> "Q. But then your *last word on the subject* is that you think that *these conferences* had thoroughly justified you in the course you had taken?
>
> "A. I think so, yes."
>
> (Italics ours.)

The Court says that it is not by any means a *necessary* inference from the language used in the letter of December 12 that Eldredge was repeating the slanderous charges. As we have pointed out, we differ *toto coelo* from the Court as to this. But we submit that it didn't

have to be a *necessary* inference. It had to be no more than a reasonable inference—of which the *jury* were the proper judges—in the light of all the facts and circumstances of the case.

Proof of a repetition of a slander is allowed because it tends to show anger, and because it is fairly to be inferred that anger which existed after the slander was uttered existed when it was uttered. In this case the Court admits that Eldredge *was* angry when he wrote the letter of December 12. Undoubtedly he was. But it is the view of the Court that this irritation arose *after* the slanderous charges had been brought forward. Upon what does it base this? Solely upon the testimony of Eldredge himself—and of Hodges, who was a witness for the defendants. Frankly, we can see nothing in the testimony of either witness to warrant this inference. Eldredge himself has repudiated any such theory, for we have already seen that he had denied emphatically that he was irritated in the least when he wrote the letter in question (Record, p. 75.) How then can it be said that "Eldredge's own evidence * * * with reference to said conversation and said letter warrant the inference that at the time of said conversation and at the time he wrote said letter he had become irritated by the insistence of Hudgins * * *"? Eldredge says bluntly that this *wasn't* so. But the Court says it is a fair inference from his evidence!

The Court proceeds to mention the things that must *necessarily* have been annoying Eldredge when he wrote the letter of December 12. Among these were the *insistence of Hudgins and his friends, and their purpose to attempt to go over his head.* Undoubtedly the Court is

correct as to this. These things were irritating him. But we don't infer this *from* his testimony—we infer it in spite of his flat denial to the contrary. We infer it because our knowledge of human nature teaches us that these things were obliged to annoy any superior officer. But both these irritants were in full operation *before and when* the slanderous charges were brought forward for the first time at the third conference! We have already mentioned them (along with several more just as irritating) in endeavoring to explain the *quo animo* of the slanderous charges. If these things were potent to produce irritation on December 12, why didn't they have at least *some* potency at the second and third conferences? The Court is able to observe a great change that (in spite of Eldredge's denial) came over his spirit after the fourth conference. We confess that we are unable to see any proof of this. If such there were, it seems to us that it was for the jury—and not this Court—to find it—and to ascertain its degree as well.

Another circumstance which the Court infers (from Eldredge's testimony, in spite of his denial, as we have repeatedly stated) must have irriated Eldredge when he wrote the letter of December 12 was "what he (Eldredge) believed, whether rightly or wrongly, to be indications of an attempt by Hudgins to foment trouble among the employees of the Ferry Company." Here again, as always, the Court accepts Eldredge's statements in regard to the rumors of a strike as if they were obliged to be true. Surely, the jury had the right to refuse to believe every particle of this testimony. Not only so, but they ought to have refused to believe it, for, when examined, it

"melts into air, thin air," being "of such stuff as dreams are made on."

Had there been such rumors, and had the evidence pointed to Hudgins as the probable fomenter of the strike, we agree that this could and probably would have *added* to Eldredge's already great irritation towards Hudgins. But it would not have *created* this irritation. Other causes had created it before the third conference was held. Each of these causes had operated just as powerfully, if not more powerfully, than the alleged rumors of this strike —and they had had their combined effect on Eldredge to such an extent *before* the slanders were raked up that it was *solely on their account* that the slanders *were* raked up—in order to crush Hudgins, thwart the Union, and save Eldredge's face. In our humble opinion the record in this case admits of no other possible interpretations!

II.

Three errors are pointed out by the Court in one of the instructions given at the instance of the plaintiff.

1. It is said that the instruction fails to confine the jury to the evidence in ascertaining whether or not Eldredge was actuated by malice. *Literally,* this may be true. But it is impossible to believe that the jury were in any way misled by this. The objection is meticulous in its character, and we feel confident that, if time permitted, we could show that the technical rule here insisted upon is honored quite as much in the breach as in the observance.

2. It is said that the instruction leaves the jury free to ascertain the law without having been satisfac-

torily told in other instructions what the law was. If a rehearing should be granted, we hope to be able to convince the Court that it is in error as to this. Time and space forbid this at this time. But we should like to point out that no such objection as this to this instruction was made at the trial, although it is urged in the petition. (Record, p. 99.)

3. The remaining objection to this instruction is a serious one, but, as we think, not well founded. The Court says that it was a proper instruction in the case of Williams Printing Co. v. Saunders, 113 Virginia, 156, because that was *not* a case of privilege. As we see it, the plaintiff in the Williams case, in asking for this instruction, put upon himself a burden that he was not required to assume, for, as the case was not one of privilege, he did not have to show malice. The defense of privilege had been raised in the case, and probably the plaintiff, in asking for such an instruction, was protecting himself against the possibility of this Court's taking a different view of that question. In *this* case, however, where malice *is* the gist of the action, such an instruction *was* proper, just as it was proper in the case of Ramsay v. Harrison, 119 Va. 682, which was also a case of privilege. See instruction 4 in that case, at the bottom of page 684.

This instruction can not be construed to authorize a verdict in the absence of actual malice. On the contrary, it expressly required the jury to find *wilful infliction of an injury.* This satisfied the proof of malice. And the jury were told that, this requirement having been met, the defendants couldn't escape by saying that they hadn't intended to injure the plaintiff. That is to say,

the jury were told that, if Eldredge, in order to rid himself of Hudgins and the Union, did deliberately slander Hudgins, we would be responsible for *all* the consequences whether he had contemplated them or not. To get rid of Hudgins was what Eldredge desired. This he had a right to do. But, notwithstanding this object was within his right, he had no right to accomplish it by a wilful disregard of Hudgins' rights, and, if he did so accomplish it, he was responsible for *all* the consequences, whether intended or not. Such an instruction, we submit, would be proper in any case where malice—actual malice—is the gist of this action.

III.

In conclusion we respectfully desire to say that we regard the opinion of the Court in this case as the most revolutionary departure from precedent that has ever come under our notice. A jury's verdict has been set aside, and the approving judgment of the trial court annulled, by this Court's rejecting substantially all the evidence of the prevailing party in the lower court, and the reasonable inferences to be drawn from this evidence, and accepting the disputed and contradicted testimony of the losing party. The Court reaches its result by holding that the inferences to be drawn from the plaintiff's evidence are not *necessary*. It does not hold that they are not such as reasonable men might reasonably draw. And it gives as a reason for rejecting these inferences (which the jury had accepted and the trial court had sustained) the fact that they are not consistent with the evidence of the defendant (which, of course, the jury had rejected). We are, of course, intensely disappointed because of our

personal interest in the case; but, as members of the profession, we are not without regret that the opinion of the Court (as we view it) is in conflict with principles which we had considered indisputable as well as inviolable.

For the foregoing reasons, we respectfully ask that this case may be reheard.

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