155-874

545

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

CHESAPEAKE FERRY COMPANY, ET AL,
Plaintiffs in Error,

v.

J. L. HUDGINS,
Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR.

W. R. L. TAYLOR,
Counsel for Plaintiff in Error.

THE RELIANCE PRESS OF NORFOLK, VA., INC.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

CHESAPEAKE FERRY COMPANY, ET AL,
Plaintiffs in Error,

v.

J. L. HUDGINS,
Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR.

The conception of defendant's case is admittedly based upon what he is pleased to term a terse statement of the facts. Indeed the statement is so terse that it completely fails to state the whole case and any number of salient facts disclosed by the evidence seem to be omitted.

For instance no mention is made of the fact that Mr. Eldredge as a result of the occurrence of the 29th day of October, 1927, discharged Mr. White, the automobile purser, as well as Capt. Hudgins. No mention is made of the fact that Capt. Morrisette who was suspended instead of being discharged was an employee of thirty years standing. Nowhere in the statement of facts is any credit given for the manner in which Mr. Eldredge conducted himself with reference to the parties interested throughout the various conferences and investiga-

tions following the discharge, although nothing could more clearly show his lack of animosity and malice than his actions and words when he was himself, in effect, put on trial by Capt. Hudgins' representatives. No mention is made of the precautions which are shown by the uncontradicted evidence were taken by Eldredge out of consideration for Capt. Hudgins to save him his job and also protect the interest of his company and the lives of the travelling public against the potentialities involved in the rumors reported to him of Hudgins' addiction to drink. Not only are these crucial facts omitted from the defendant's statement, but in addition the attempt is made to put a strained construction upon the conversation between Mr. Hodges and Mr. Eldredge and upon the letter of December 12, 1927, appearing at p. 48 of the Record, in an effort to show that Mr. Eldredge repeated the charges originally made. Such construction is so clearly refuted by the opening paragraph thereof that we quote it:

> "The several conferences to which you refer has only tended to confirm the managements opinion that action taken by us in the case of Capt. J. L. Hudgins was the only proper one."

It is plainly apparent that instead of referring to and repeating any charges whatsoever this letter refers solely to the **action** in discharging Capt. Hudgins and has no reference to the reasons therefor.

The Court is invited to make a comparison of the statements of facts made by Plaintiff in Error in its petition for the writ and the statement contained in Defendant's reply brief, and to read the two statements in the light of the Record. Even upon the defendant's

own statement it is not believed that a case appears from which malice can be inferred.

The Defendant in Error sets up a mythical unbiased mind as the rallying cry to show malice and then with the natural bias of the ardent advocate proceeds to pyramid this shibboleth. The constant repetition in the argument of the First Assignment of Error of the "unbiased mind" may strike pleasantly upon the tympanum but we doubt if it carries much weight to the judicial mind when it comes with its natural lack of bias to consider the evidence upon which the mythical mind has reached its conclusions. We will take up the argument of the defendant on the first assignment.

Eldredge does not admit that the real responsibility lay between Capt. Morrisette and purser White and that Capt. Hudgins was without fault for the occurrence of October 29th. On the contrary he found that the primary fault lay upon Capt. Hudgins in not seeing that the turnstile purser was aboard. Capt. Hudgins' own representatives in their letter of December 5, 1927, (p. 47 of the Record) made the statement that they considered Capt. Hudgins at fault and only complained of what they deemed the severity of the punishment. There is nothing in this to start any mind wondering as to motives.

Let us assume that Hudgins was perfectly right when he considered that he told Eldredge prior to his discharge that the purser not being in sight he called to the deckhand to know if both pursers were aboard and the deckhand's reply in the affirmative. Nevertheless, the uncontradicted evidence is that it was Hudgins' duty to know that the pursers were aboard, not to ask the

deckhands where they were, and the request of information by the responsible officer from an irresponsible negro deckhand was in no sense a discharge of his fixed duty and the action of Mr. Eldredge in discharging him for his dereliction creates no wonder.

Eldredge does admit that the signed statement by three deckhands was presented to him at the first conference with the Union officials, but this in no wise remotely has any connection with malicious intent. The statement had not been before Mr. Eldredge at any prior time. Hudgins stated that he had called to the head deckhand and had been told that the purser was aboard and then he shows up at the Union investigation with a signed statement from three deckhands. This fact would be sufficient to cause Mr. Eldredge to suspect the evidence but nowhere did he ever voice his suspicions that the statement of the deckhands was "a frame" until on the stand at the trial and after all of the conferences and after the discharge.

If any conclusion is to be drawn in this connection it would be that in the face of an admitted dereliction of duty on the part of Capt. Hudgins he was attempting to seek justification by putting blame upon a number of deckhands to whom he could not delegate his duty and in the face of his admission that he had only sought information from one of them. The only wonder generated in this connection is how and why after stating that he asked the head deckhand for information that he should find it necessary to corral all of the deckhands in the round robin of confirmation.

The conclusion of the Defendant in Error that Mr. Eldredge is obstinate and unreasonable and would

rather be consistent than right is wholly without foundation from the evidence. The evidence shows him to be firm but courteous, sincere in his convictions but regardful of the rights and feelings of others; that his mind was unbiased and that he expressed and acted with a willingness to treat with Capt. Hudgins' representatives and afford a full opportunity for them to be heard. An obstinate and unreasonable mind seeking to do malicious harm would have turned down the page and closed the book.

It is submitted upon all the evidence that Mr. Eldredge did believe the reports which had been verbally made to him from time to time by Herman regarding the addiction of Capt. Hudgins to drink while on duty, and while it is true that he made no investigation of them he did not confide the property of his company and the lives of the passengers to Capt. Hudgins after such report. He always saw to it (p. 85 of the Record) that Capt. Hudgins was never at any time in charge of a boat by himself, but that a captain was always in actual charge, and he further says that he took this position out of consideration for an old man. There is nothing startling in this. Eldredge did not wish to do anything which would injure Capt. Hudgins in his profession. He desired to close the investigation upon the original charge of dereliction of duty. He retained Capt. Hudgins in the employ of the company after the reports had come to him. He had him supervised so that, assuming the rumors to be true, neither the company nor the public could suffer as a consequence. His good faith is not only borne out by his own testimony but the testimony of Mr. Hodges. We are forced to the conclusion that in-

stead of being consumed by animosity Mr. Eldredge on the contrary went an extra mile to show his kindly feelings toward Capt. Hudgins and exerted every effort to aid and protect him.

The conclusion that Mr. Eldredge disclosed the reports which had come to him only to avoid being overruled by his superior is nowhere justified in the evidence. It is a violent assumption on the part of counsel.

Reference has just been made to the evidence of Mr. Hodges in which he stated that Mr. Eldredge was very reluctant to disclose the substance of these rumors; that it was only after the utmost insistence on the part of the Union officials that they were forthcoming and Mr. Eldredge then stated before the disclosure of their nature that out of consideration for Capt. Hudgins he would rather close the incident on the original charges. So far from attempting to justify himself he was attempting to protect Capt. Hudgins so that the matters which had been reported to him should not become public and thereafter prove detrimental to Hudgins. Not only is this true, but if his mind had been biased he would have never suggested after the disclosure and subsequent investigation that he would re-employ Hudgins.

There is some contention, of course, as to whether or not Mr. Eldredge ever did say that he had no other charges against Hudgins other than the dereliction of duty which had originally occasioned his discharge. Messrs. Downing and Hodges in what appears to be a conclusion, rather than a statement of the language used, are of the opinion that he had no other reason at the time of their first conference. Mr. Eldredge's statement which is just as consistent and far more plausible is that he

considered the reasons assigned to be sufficient. Eldredge's fairness throughout the entire transaction is admitted and certified to (p. 47 of the Record) by the letter of Messrs. Downing and Hodges, who were Capt. Hudgins' representatives.

If further evidence of his fairness is needed it is the fact that Eldredge himself stated at the conclusion of the fourth conference that the proof of charges preferred by Capt. Hudgins' own shipmates had not seemed strong. This fact can not even inferentially be taken as proof that he knew that the charges were false when they were made, but on the other hand is the very strongest circumstantial proof that he believed them to be true when made. It shows fairness, sincerity and wholly negatives malice.

The position subsequently taken by Mr. Eldredge in withdrawing his offer of re-employment to Capt. Hudgins can by no stretch of the imagination be construed into a repetition of the charges. Capt. Hudgins had been seen upon the boats of the company. Rumors that a strike was impending had been conveyed to Mr. Eldredge. In the interest of his company he had a perfect right to take all necessary precautions to protect their interest and to draw any conclusions he deemed proper from facts or rumors which had come to him. He communicated his determination to Mr. Hodges in person as well as to the Union. He told them that the "action" which he had taken was proper. He made no repetition of charges of any character. Nowhere did he say that he based his action upon the charges which had been the subject of investigation. He had himself admitted that such charges had not been strongly sustained. With the ru-

mors of strike before him and the inference of Capt. Hudgins in connection therewith his action was proper. No open minded man could complain of it. The conclusion that Mr. Eldredge was determined to get rid of Capt. Hudgins at any cost is a figment of the imagination, but if there is evidence of anything in this connection the only possible inference to be drawn is that Mr. Eldredge desired to protect the interest of his employer by avoiding a strike.

The climax of defendant in error's unbiased mind analogy is based upon the testimony of Mr. Eldredge to the effect that the Masters, Mates & Pilots had been dogging him. The evidence unquestionably shows that such an inference on his part was a correct statement of the fact, but whether this be true or not, he had shown no indication of it in any of the conferences. He had been courteous and considerate; had shown no irritation, made no derogatory comments and if he was vexed with the Masters, Mates & Pilots he certainly had not attempted to visit his vexation upon Capt. Hudgins. Mere irritation is not malice, nor is it evidence of malice. Particularly not when the irritation, if any, was directed toward third parties and not toward the plaintiff.

It has been demonstrated, and indeed plainly appears, that the additional charges which Mr. Eldredge produced at the third conference were not raked up to bolster his position to avoid being overruled by Mr. Rodgers. Certainly there was never a suggestion that Mr. Rodgers had any intention of overruling him. There is the clearest evidence that Mr. Eldredge did believe in the charges, that such charges were made in writing over the signature of Capt. Hudgins' own associates, people

who were in a position to know; that upon their face they were entitled to credence; that he had shown sufficient faith in them from the time they first verbally came to his knowledge to keep a Captain over Hudgins, and in charge of the ship so as to protect his company and the public from the consequence which might ensue if Hudgins were left in charge. With this belief clear and the showing of probable grounds for such belief Ayler v. Gibbs, 143 Va. 644, has no application, nor do Lightner v. Osborne, 142 Va. 19, and Spencer v. Looney, 115 Va. 767, aid the defendant, for there is no evidence of the repetition of the alleged defamatory matter by Mr. Eldredge at any time.

Eldredge was manifestly justified in doubting the signed statement of the negro deckhands in the face of Hudgins' own statement that he had called to one of them and never made any mention of having sought information from all three until after his discharge and at the first conference with the Union officials. Hudgins even made no such claim in his letter to the Union asking their assistance in an investigation. The defendant in error when cross-examining Mr. Eldredge with reference to the letter signed by the deckhands elicited from him the belief on his part that the statement of the deckhands was a "frame up." They, however, did not attempt to ascertain the facts on which he based his belief, nor did they impeach this belief. His belief, therefore, must be taken as an honest and true conviction on his part. It in no wise shows malice on the part of Eldredge in the presentation of the statements on which this action is based. We are firmly convinced that this case is practically on all fours with Chalkley v. A. C. L. R. R., 147

S. E. 661, and that the opinion of Mr. Justice Prentis in that case is controlling in this. We do not think that the Massachusetts case of Pion v. Caron, 129 N. E. 369, is at all persuasive inasmuch as there the defendant testified that at the time of the discharge of the plaintiff he did not believe the charge upon which the discharge was based. Mr. Eldredge in this case testified that he did believe the charges at the time they were made; that he had acted over a long course of time to avoid the consequence that might ensue from their truth, that he had faith in the man who reported the charges to him; he had the written statements of the persons upon whose supposed knowledge the charges were founded; he had in fact a basis upon which any reasonable man would have no hesitancy in acting upon matters of the most serious moment.

It is, therefore, submitted that the First Assignment of Error must prevail; the verdict of the jury and the judgment of the Court be set aside and judgment entered up for the Plaintiff in Error in accordance with the Prayer of the Petition.

ASSIGNMENT No. 2.

This assignment of error is directed toward instruction 5 under which the jury was enabled to find punitive damages. The objection is that there is no evidence of ratification or authorization. The excerpt of evidence quoted from p. 84 of the Record simply shows that the further investigation of the matter was left with Eldredge by Mr. Rodgers and in addition it shows that neither the Masters, Mates & Pilots Association nor Capt. Hudgins ever sought any further interview with Mr.

Rodgers. It shows that Mr. Rodgers never acted further and that the Board of Directors had never acted. Ratification or adoption can not be shown by inaction and of course authorization or ratification was necessary before punitive damages could be found.

Counsel are undeniably correct in their statement that this instruction went to the jury in the shape in which it appears in the Record as a result of an inadvertence on the part of all of counsel and of the Court. The error, however, was called to the attention of the Court on the motion for a new trial and it was pointed out that while punitive damages had been waived before the Court and in the absence of the jury, nevertheless, the jury had been instructed that they could award such damages. Upon the motion for a new trial all of the instructions, of necessity, came before the Court for a review and the Court had the right to and should have granted a new trial for the purpose of assessing damages, if for no other reason.

ASSIGNMENT No. 3.

Attention is again called to the fact that on the instruction upon which this assignment is based the jury were permitted to go to the heart of the case on their belief, whether such belief was generated by the evidence or otherwise.

ASSIGNMENT No. 4.

The objection to this instruction is that it is not supported by the evidence. We have no objection to the instruction as an abstract matter of law. We do repeat that there is not one word of evidence to support the

instruction nor is there a word of evidence to support the statement in Defendant in Error's brief that there was any repetition of the charges originally made in good faith by Mr. Eldredge.

Respectfully submitted,

CHESAPEAKE FERRY COMPANY,

By W. R. L. TAYLOR,
Its Attorney.