7-20-2015

Amicus brief in support of motion for reconsideration, in the case of Murray v. Chagrin Valley Publishing Co., Case no. 2015-0127, Supreme Court of Ohio

David Forte
Cleveland State University, Cleveland-Marshall College of Law, d.forte@csuohio.edu

IN THE SUPREME COURT OF OHIO

ROBERT E. MURRAY, et al., *Plaintiffs-Appellants* v. CHAGRIN VALLEY PUBLISHING COMPANY, et al. *Defendants-Appellees*	)	Case No. 2015-0127 Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District, Case No. 101394

MEMORANDUM IN SUPPORT OF RECONSIDERATION OF *AMICUS CURIAE* DAVID F. FORTE, ESQ.

David F. Forte (0034381)
Cleveland State University
Cleveland-Marshall College of Law
1801 Euclid Avenue
Cleveland, OH 44115
Telephone: 216.687.2342
E-mail: d.forte@csuohio.edu

Amicus Curiae, Pro Se

J. Michael Murray (0019626)
(Counsel of Record)
Lorraine R. Baumgardner (0019642)
Berkman, Gordon, Murray & Devan
55 Public Square
2200 The Illuminating Building
Cleveland, OH 44113
Telephone: 216.781.5245
Facsimile: 216.781.8207
E-mail: jmmurray@bgmdlaw.com
lbaumgardner@bgmdlaw.com

Counsel for Appellees Chagrin Valley Publishing Company; H. Kenneth Douthit, III; Todd Nighswonger; David C. Lange; Douthit Communications, Inc.; Sali McSherry; and Ron Hill.

J. Philip Calabrese (0072709)
Tracy S. Francis (0080879)
Porter Wright Morris & Arthur LLP
950 Main Avenue, Suite 500
Cleveland, Ohio 44113
Telephone: 216.443.2542
Facsimile: 216.443.9011
E-mail: pcalabrese@porterwright.com
tfrancis@porterwright.com

Mark S. Stemm (0023146)
L. Bradfield Hughes (0070997)
Porter Wright Morris & Arthur LLP
41 South High Street
Columbus, Ohio 43215
Telephone: 614.227.2092
Facsimile: 614.227.2100
E-mail: mstemm@porterwright.com
bhughes@porterwright.com

Kevin Anderson (0092847)
Fabian & Clendenin, PC
215 South State Street, Suite 1200
Salt Lake City, Utah 84111
Telephone: 801.323.2225
Facsimile: 801.596.2814
E-mail: kanderson@fabianlaw.com

Michael O. McKown (0013378)
Gary M. Broadbent (0083876)
46226 National Road
St. Clairsville, Ohio 43950
Telephone: 740.338.3100
Facsimile: 740.338.3411
E-mail: mmckown@coalsource.com
gbroadbent@coalsource.com

Counsel for Appellants
Robert E. Murray, Murray Energy Corporation, American Energy Corporation, and The Ohio Valley Coal Company

Samuel L. Pipino (0061634)
(Counsel of Record)
Molly R. Gwin (0088189)
Isaac, Wiles, Burkholder & Teetor, LLC
Two Miranova Place, Suite 700
Columbus, Ohio 43215
Telephone: 614.221.2121
Facsimile: 614.365.9516
E-mail: spipino@isaacwiles.com
mgwin@isaacwiles.com

Counsel for Appellee
Patriots for Change

Dan L. Cvetanovich (0021980)
(Counsel of Record)
Sabrina Haurin (0079321)
Bailey Cavalieri LLC
One Columbus
10 West Broad Street, Suite 2100
Columbus, Ohio 43215-3422
Telephone: 614.221.3155
Facsimile: 614.221.0479
Dan.cvetanovich@baileycavalieri.com
Sabrina.haurin@baileycavalieri.com

Counsel for Amicus Curiae
Ohio Coal Association

Jeffrey Orr Brown (0016762)
(Counsel of Record)
2017 Sunset Boulevard
Steubenville, Ohio 43952
Telephone: 740.282.1911
Facsimile: 740.282-5639
Brown.jeffrey@comcast.net

Counsel for Amicus Curiae
Bryan Felmet, Esq.

INTERESTS OF *AMICUS CURIAE*

Amicus Curiae David F. Forte, a graduate of Harvard College, with a Ph.D from the University of Toronto and J.D. from the Columbia School of Law, is a law professor at the Cleveland-Marshall College of Law. I have taught law for nearly forty years since I first joined the law school as an Associate Professor in 1976. I served as Associate Dean for Academic Affairs at the law school from 1986-1988, and was the inaugural Charles R. Emrick, Jr./Calfee, Halter & Griswold Endowed Professor of Law at Cleveland-Marshall from 2004-2007. I am a lawyer in good standing in the State of Ohio.

My primary teaching competencies include Constitutional Law, the First Amendment, Islamic Law, Jurisprudence, Natural Law, International Law, International Human Rights, and Constitutional History. I write and speak nationally on topics such as constitutional law, religious liberty, Islamic law, the rights of families, and international affairs. I served as book review editor for the American Journal of Jurisprudence and am Senior Editor of *The Heritage Guide to the Constitution* (2006), 2d edition (2014), published by Regnery & Co, a clause-by-clause analysis of the Constitution of the United States.

During the Reagan administration, I served as chief counsel to the United States delegation to the United Nations and alternate delegate to the Security Council. I have sat as acting judge on the municipal court of Lakewood, Ohio and chaired the Professional Ethics Committee of the Cleveland Bar Association. I have authored a number of briefs before the United States Supreme Court, and I was among several academics to join an *amicus* brief in the recent *Noel Canning* case at the United States Supreme Court, regarding the legitimacy of President Obama's recess appointments to the National Labor Relations Board.

I have chosen to participate as an *amicus curiae* in support of the Motion for Reconsideration filed by Appellants Robert E. Murray, Murray Energy Corporation, American Energy Corporation, and The Ohio Valley Coal Company because as a career constitutional scholar, I believe that Appellants' case presents questions of keen interest to the bench and bar that merit this Court's attention. The interest that Appellants' appeal garnered from multiple *amici curiae* and from the press is no accident -- the case indeed presents a notable package of First Amendment issues worthy of this Court's review. In Ohio, where civil jury trials are becoming ever fewer and farther between, this appeal presents important questions concerning the tension between: (1) the freedom of the press; (2) the respect for the role of the jury, and (3) the compelling interests we all share in having access to meaningful judicial remedies for reputational harms, where demonstrably false assertions of fact have been published due to reporting or editorial commentary that a reasonable jury might find reckless and not just negligent.

Here, although I express no opinion on the merits of Appellants' claims for false-light invasion of privacy or defamation, I share Appellants' concern about the manner in which their non-frivolous claims were wrested from a jury just before trial. The trial court's "postcard" decision troubles me in light of the substantial summary-judgment record submitted by the parties. Such short shrift paid by the trial court fails to educate the parties or their counsel about the basis for removing the case from the jury. Nor does it facilitate meaningful appellate review of the underlying facts of the case, particularly given the voluminous record developed after substantial discovery. If a trial judge concludes that summary judgment is appropriate in a significant contested case such as this that implicates substantial constitutional questions, then

he or she should explain the basis for that conclusion. As I will explain below, an explanation of the manner in which the trial court examined the parties' submissions against the requisite burden of proof would have been particularly useful in light of the U.S. Supreme Court's *Liberty Lobby* decision – cited by Appellees to oppose discretionary review – which announced a new standard for trial courts to follow in this context without elaborating on *how* they are to do so. If a lack of time to draft meaningful decisions is the culprit for "postcard" summary-judgment decisions, then allowing a jury (instead of the overburdened judge) to sort through and decide disputed facts seems all the more appropriate for both practical and constitutional reasons – not to mention those compelled by Civil Rule 56.

The Eighth District's Opinion affirming the trial court's decision is also concerning. The panel largely ignored certain evidence presented by Appellants that would seem to present disputes of material fact on their defamation claim. Such evidence included, but was not limited to, an expert report by Professor Joel Kaplan, a respected journalist, academic, and ombudsman who opined that Appellees deviated from accepted standards of journalism. The Eighth District also failed to address materials suggesting that one or more of the Appellees harbored ill will toward Mr. Murray and his companies – an issue this Court has previously deemed relevant (though not determinative) to actual malice. It is difficult to instruct my law students about how to proffer evidence to survive a dispositive motion in a defamation case if trial courts and courts of appeal will so quickly bypass an expert report such as the one submitted here by Professor Kaplan, without bothering to address its substance, and without permitting a properly instructed jury to weigh the evidence.

For the reasons described more fully below, although I share the Eighth District panel's fundamental respect for the freedom of the press – a respect compelled by binding precedent from this Court and the U.S. Supreme Court as well as our people's long-standing traditions – I also share Appellants' concern that decisions such as the one below marginalize the critical role of the jury and threaten to leave without a chance at fair adjudication those injured plaintiffs who proffer substantial, credible evidence supporting non-frivolous claims of defamation.

Ohio can still protect the freedom of the press while allowing juries to resolve disputed facts, but decisions such as the one appealed here may marginalize the critical role that juries have had in effectuating the rule of law from the time our nation first began. (*See, e.g.*, the claim against the King: "For depriving us in many cases, of the benefits of Trial by Jury," The Declaration of Independence para. 20 (U.S. 1776), and the protection of juries in civil trials: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..." U.S. Const. amend VII.)

Personal and corporate reputations are worth protecting, and the First Amendment guarantees not only the freedom of speech and press, but also access to the courts. This Court should address Appellants' case to ensure that access is not irretrievably lost, and before jury trials in defamation cases become an irrelevancy.

ARGUMENT IN SUPPORT OF RECONSIDERATION

THIS APPEAL PRESENTS ISSUES OF GREAT GENERAL INTEREST CONCERNING THE QUANTITY AND CALIBER OF EVIDENCE REQUIRED TO PROCEED BEYOND SUMMARY JUDGMENT IN A DEFAMATION CASE, AND THE EXTENT TO WHICH FACTUAL ASSERTIONS BY EDITORS ON EDITORIAL PAGES ARE PROTECTED (OR NOT) BY OHIO'S PRIVILEGE FOR OPINIONS

I. Although the United States Supreme Court requires courts to assess summary judgment in defamation cases in light of the plaintiffs' ultimate burden of proof, Ohio juries should not be precluded from resolving genuine disputes of fact concerning

falsity and actual malice, particularly where credible experts have opined that the defendants deviated from accepted practices of journalism and other evidence suggests the possibility of reckless conduct.

Appellees say there is no reason for this Court to "revisit the evidentiary burden a defamation plaintiff faces at the summary judgment stage" because that question was "definitive[ly]" resolved by the U.S. Supreme Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). (Opp. at 6.)

The majority in *Liberty Lobby* held that, in ruling on a motion for summary judgment in a defamation case to which the actual-malice rule applies, the judge must view the evidence presented through the "prism" of the plaintiff's substantive evidentiary burden, meaning that the clear-and-convincing standard of proof "should be taken into account" by the trial judge as he or she examines the materials that the parties have submitted pursuant to Civil Rule 56. *Liberty Lobby*, 477 U.S. at 254-55. That conclusion left Justice Brennan, joined by former Chief Justice Rehnquist, perplexed. As Justice Brennan put it, "I am unable to divine from the Court's opinion *how* these evidentiary standards are to be considered, or what a trial judge is actually supposed to do in ruling on a motion for summary judgment." *Id.* at 258 (Brennan, J., dissenting; emphasis in original). He explained further: "In other words, how does a judge assess how one-sided evidence is, or what a 'fair-minded' jury could 'reasonably' decide?" *Id.* at 265.

That is the rub presented by this case and the very issue that the Court should reconsider in order to give appropriate guidance to courts below. On the issue of actual malice, Appellants (who as non-moving parties, all inferences were due) submitted more than a trifling quantity of competent, admissible evidence relevant to whether Mr. Lange may have published

certain false, factual assertions about Mr. Murray and his companies with the requisite degree of fault. Even a cursory review of the Eighth District's opinion and of Appellants' memorandum opposing summary judgment shows that Appellants presented substantial evidence from which a reasonable jury could have found in their favor. For example, the Eighth District failed to consider the opinions of Appellants' expert, Professor Kaplan, in any meaningful way. Professor Kaplan, an impressively credentialed professional who reviewed all pleadings, depositions, and exhibits, opined that Mr. Lange and the *Chagrin Valley Times* reporter departed from accepted standards of journalism in multiple respects. For example, Professor Kaplan noted that had Mr. Lange "done proper research or contacted Murray Energy Corp. or MSHA before writing his Commentary, he easily would have avoided" inaccuracies in the Commentary. These observations are relevant to the actual-malice question, according to the Supreme Court. *E.g.*, *Harte-Hanks Comm., Inc. v. Connaughton*, 491 U.S. 657, 692 (1989) (upholding jury verdict against newspaper that based its reports on allegations of a single source, without attempting to verify her claims by interviewing another key witness or reviewing other sources of information readily available).

Unfortunately, we do not know how the trial court considered Professor Kaplan's report under *Liberty Lobby*, or any of the other evidence Appellants proffered in the large summary-judgment record. The cursory decision entirely obscures the method. There is similar obscurity in the Opinion of the court of appeals. The portion of the Opinion devoted to Mr. Lange's (Opinion, ¶¶ 19-31) leaves that a mystery, just as Justice Brennan worried about in *Liberty Lobby*. It is a mystery worth investigating by this Court, at least so that future defamation

plaintiffs (who already must shoulder substantial burdens) have some clue as to the quantity or caliber of evidence that will get them to a jury in this State.

It has been nearly thirty years since this Court applied *Liberty Lobby* in a defamation case. The Court did so in a trio of opinions issued very soon after *Liberty Lobby* was decided. *See Grau v. Kleinschmidt*, 31 Ohio St.3d 84, 509 N.E.2d 399 (1987); *Varanese v. Gall*, 35 Ohio St.3d 78, 518 N.E.2d 1177 (1988); and *Perez v. Scripps-Howard Broadcasting Co.*, 35 Ohio St.3d 215, 520 N.E.2d 198 (1988). In each of these three cases, this Court *reversed* a lower court's decision in favor of the defamation plaintiff, holding that insufficient evidence of actual malice was contained in the record for a reasonable jury to find a reckless disregard for the truth. Taken together, *Liberty Lobby* and this Court's trio of dated cases applying it in the defamation context raise a compelling question as yet unanswered by this Court – what amount or quality of evidence *will* suffice? The substantial summary-judgment evidence unmentioned by the trial court here in its "postcard" decision, and bypassed by the Eighth District (including Mr. Kaplan's expert report, and the other materials cited in Appellants' memorandum opposing summary judgment) provide the occasion for this Court to begin to answer that important question.

The U.S. Court of Appeals for the Sixth Circuit, in *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (1989), addressed how *Liberty Lobby* and two other Supreme Court opinions issued the same year ushered in a "new era" of summary-judgment practice. *Street*, 886 F.2d at 1476-1481 (citing *Liberty Lobby*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986); and *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 89 L.Ed.2d 538, 106 S.Ct. 1348 (1986)). *Street* laid out ten "principles for 'new era' summary judgment practice" based on these three seminal summary-judgment opinions (including *Liberty Lobby*),

then applied those principles to the case at hand. *Street*, 886 F.2d at 1479-1484. Notably for our purposes, the *Street* court reversed summary judgment on certain claims, concluding:

> We determined *** that plaintiffs had not, Micawber-like, relied on a forlorn hope that "something would turn up" at trial. Nor were they merely grasping at the straw of possible impeachment of defense testimony, or relying on the now invalidated duty of the trial court to search the record for some "metaphysical doubt" as to a material fact that might be lurking there.
>
> Rather, they had produced more than a scintilla of affirmative evidence *** under the federal substantive law of fiduciary relations and fraud under the federal securities or commodities law. We found further that plaintiffs' factual theories were not implausible and that a rational trier of fact might resolve the issues raised by defendants' motion in plaintiffs' favor. Therefore, if the same evidence were produced at trial, a directed verdict motion would be denied. So then must the motion for summary judgment.

Id. at 1483-84.

To the best of my knowledge the only time *Street* has appeared in one of this Court's opinions is in a dissenting opinion drafted by former Justice Cook. *Dresher v. Burt*, 75 Ohio St.3d 280, 301, 1996-Ohio-107, 662 N.E.2d 264 (Cook, J., dissenting). This case thus presents this Court with the chance to adopt the ten principles the Sixth Circuit enunciated in *Street* of new-era summary judgment practice, apply them to a substantial summary-judgment record, and enlighten the bench and bar about what kind and quality of evidence in a defamation case qualifies as "more than a scintilla of affirmative evidence" of actual malice. The Eighth District, by failing to address the substance of Mr. Kaplan's report, or other evidence Appellants submitted on that issue, does not succeed in explaining the basis for its summary judgment. Nor, of course, did the trial court's "postcard" decision.

II. Given that Ohio's unique privilege for opinions is not compelled by U.S. Supreme Court precedent, Ohio courts must be cautious of applying Ohio's privilege too broadly to factual assertions by editors on editorial pages, lest editors be wholly immunized for reckless and damaging factual assertions they make on the State's editorial pages.

The history of Ohio's privilege for opinion speech is also worth noting in the context of this appeal. I recall that when the Ohio Supreme Court first adopted its four-factor test to distinguish opinions from actionable assertions of fact, the U.S. Supreme Court told this Court that no such test was compelled by the Constitution. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19, 111 L.Ed.2d 1, 110 S.Ct. 2695 (1990) ("We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment.") Former Chief Justice Rehnquist, who authored *Milkovich*, took pains to explain why that is so, and cautioned that "expressions of 'opinion' may often imply an assertion of objective fact." *Id.* at 18. He did so using an illustration that bears repeating here, in light of Mr. Lange's description of Mr. Murray as a "real liar" in the Commentary at issue in this case:

> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'" *** It is worthy of note that at common law, even the privilege of fair comment did not extend to "a false statement of fact, whether it was expressly stated or implied from an expression of opinion." *Restatement (Second) of Torts, § 566, Comment a* (1977).

Milkovich, 497 U.S. at 19.

Former Chief Justice Rehnquist's words remain trenchant, even though this Court decided to provide a "separate and independent" privilege for opinion speech, over and above the First Amendment. *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 281, 649 N.E.2d 182 (1995). For whether one's conclusion appears in an editorial, or is the result of one's interpretation of the evidence, or is termed an "opinion," calling a person "a liar" is still an assertion of fact. Cf. "[T]hat which we call a rose/By any other name would smell as sweet." William Shakespeare, Romeo and Juliet, Act 2, sc. 2.

Whenever Ohio's "separate and independent" hurdle is raised even higher by cursory and unjustified summary-judgment rulings, Ohio plaintiffs seeking to vindicate their reputations (not to mention the First Amendment's guarantee to petition the courts...) will find additional obstacles in their path to meaningful access to a judicial remedy.

In this instance, the Eighth District did in fact raise the bar for defamation claims against editors beyond what the First Amendment commands and what respect for our jury system entails. Although this Court has previously been careful to note that factual assertions on editorial pages may be actionable,[1] the Eighth District here concluded that the whole of Lange's Commentary "is protected opinion designed to convey the writer's opinion on a matter of importance in the community." (Opinion, ¶ 30.) Nonetheless, facts are facts. It is beyond peradventure that Mr. Lange intended to convey – and did convey – multiple <u>factual</u> assertions

[1] *Wampler v. Higgins*, 93 Ohio St.3d 111, 132, 2001-Ohio-1293, 752 N.E.2d 962 ("We do not suggest here that publication of defamatory statements in a letter to the editor will insulate the author from liability in every case.").

to the readers of the *Chagrin Valley Times* about the subject of his "Happy New Year" gift to Mr. Murray. One does not "opine" that a company was fined the government's "highest penalty" for violations that were "determined" to have "directly contributed to" the terrible tragedy at Crandall Canyon, even if such assertions happen to appear on an op-ed page. One makes such assertions fully intending them to be accepted as facts. And one should do so aware of the potential civil liability, under circumstances where personal animosity or bias toward the subject can lead to a reckless disregard for the truth. But that liability is really just a mirage, unless courts return the role juries have historically held in our republic to decide disputed facts.

CONCLUSION

For the foregoing reasons, I support Appellants' request for reconsideration and urge this Court to accept jurisdiction over this appeal.

Respectfully submitted,

Amicus Curiae
David F. Forte, Esq.
Pro Se

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Memorandum in Support of Reconsideration of *Amicus Curiae* David Forte, Esq. was served by First-Class U.S. Mail, postage pre-paid on the following counsel of record this 20th day of July 2015:

David Forte by L.B. Hughes (0070997) per telephone authority 7/20/15
Amicus Curiae

J. MICHAEL MURRAY
LORRAINE R. BAUMGARDNER
Berkman, Gordon, Murray & Devan
55 Public Square
2200 The Illuminating Building
Cleveland, OH 44113

KEVIN ANDERSON
Fabian & Clendenin, PC
215 South State Street, Suite 1200
Salt Lake City, Utah 84111

J. PHILIP CALABRESE
TRACY S. FRANCIS
Porter Wright Morris & Arthur LLP
950 Main Avenue, Suite 500
Cleveland, Ohio 44113

MICHAEL O. MCKOWN
GARY M. BROADBENT
46226 National Road
St. Clairsville, Ohio 43950

MARK S. STEMM
L. BRADFIELD HUGHES
Porter Wright Morris & Arthur LLP
41 South High Street
Columbus, Ohio 43215

SAMUEL L. PIPINO
MOLLY R. GWIN
Isaac, Wiles, Burkholder & Teetor, LLC
Two Miranova Place, Suite 700
Columbus, Ohio 43215

DAN L. CVETANOVICH
SABRINA HAURIN
Bailey Cavalieri LLC
One Columbus
10 West Broad Street, Suite 2100
Columbus, Ohio 43215-3422

JEFFREY ORR BROWN
2017 Sunset Boulevard
Steubenville, Ohio 43952