

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

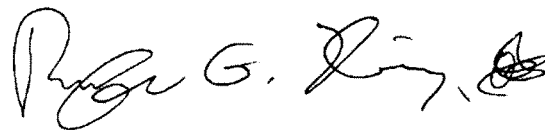
RICHARD K. LEHAN,)
) Case No. 2011 CA 004592 B
Plaintiff,)
) Judge Joan Zeldon
v.) Judge Rufus G. King III
)
FOX TELEVISION STATIONS, INC., *et al.*,)
)
Defendants.)

ORDER

For the reasons stated on the record at the November 21, 2011 hearing in this cause, as reflected in the transcript of the Court's findings and conclusions, which the Court attaches to and incorporates into this Order, the Court hereby GRANTS the Special Motion to Dismiss of Defendants Fox Television Stations, Inc., and Roby Chavez, and, pursuant to D.C. Code §16-5501 *et seq.*, DISMISSES the Plaintiff's Complaint WITH PREJUDICE.

The Court further reserves jurisdiction to consider an application by the Defendants for their reasonable attorneys' fees pursuant to the statute, and orders the Defendants to submit their application on or before December 10, 2011. The Plaintiff shall submit any response by December 15, 2011.

IT IS SO ORDERED AND ENTERED this 30th day of November, 2011.



Judge Rufus G. King III,
Superior Court Judge

Copies to all parties via eFile.

(Transcript begins on following page.)

1 PROCEEDINGS
2 (COURT'S FINDINGS)

3 THE COURT: I think that the findings and the conclusion
4 are, as follows.

5 The statute applies not only to acts which occurred before its
6 enactment but also to actions which were pending or in this case not
7 filed
8 until after it was passed.

9 That flows from its characterization as a procedural act
10 and I know that the legislature itself used the words substantive
11 in a couple of places.

12 But, my finding is that the burden of proof on the
13 Plaintiff does not change.

14 It simply is accelerated a little bit, in part.

15 So, that instead of having to actually provide
16 preponderance of the evidence proof, he has to show early on that
17 he is likely to be able to do so.

18 That is not a substantive change in his burden of proof.

19 It does not add anything that he will have to do.

20 It simply changes the timing of when he has to do it.

21 He has to do a little bit of it now. He has to show
22 likelihood, that he is likely to get there and then he actually has
23 to get there.

24 In the Court's view, it does not change the
25 substance of the law.

The statute then applies.

1 I note on that concern, that in the Montgomery v.
2 District of Columbia case, 598 Atlantic 2d. 162, the act occurred
3 more than two years before the statute was enacted.

4 So, it is not that there can't be retroactive application
5 applicable to the procedural law and it is different in the Court's
6 view than from if there were a significant change in the status of
7 the plaintiff in a libel suit under the law.

8 In this case, the statute simply shifts the time.

9 As to negligence per se --well, let me deal with first
10 as to whether the plaintiff is a public official.

11 My starting point is that I don't think that it makes the
12 critical difference in this case. I will get into what I think are
13 the applicable standards at different points.

14 But, I think that he is an official.

15 I think that the Eaton case suggested it.

16 I think that there were others that said that a person
17 not a member of the City Council, like the Mayor or anything like
18 that but someone in authority, and he could be characterized as
19 having an influential role in the police department or the fire
20 department, would be a public official for the purposes of applying
21 the standard of actual malice or the requirement of actual malice.

22 I don't think that there is even ordinary negligence
23 in this case because as I understand it, the newscaster
24 relied on publicly printed reports of what the City Council was up
25 to and did an investigation that frankly sounded very like the

1 showing that police officers have to make when they want to show
2 probable cause based on a confidential informant. They have to
3 show that they had experience with the informant; that it was substantial
4 and that there has never been an incident when the informant has been
5 proven false.

6 I think that they did that here.

7 So, I don't think that there was even negligence in using
8 that information even though it turned out in one incident that the
9 question of whether the Plaintiff was, in fact, in charge of the
10 computer system appears to have been mistaken.

11 It was not an act of negligence that led to that report
12 under all of the circumstances.

13 The information reported was, therefore, within a
14 standard of negligence but certainly within a standard of actual
15 malice--gross indifference to the truth or falsity of the reports.

16 For that reason, the proof on the first element that
17 there was false information published--that cannot be shown by a
18 clear and convincing standard or even a negligence standard.
19 Even though some of the information was false, it was not
20 done negligently or published negligently or without reasonable
21 care.

22 The information on the workings of a public matter such
23 as the way that the City's money is spent and, in fact, is within the Act,
24 which says that an issue of public interest includes
25 the District Government--any discussion with the District

1 Government.

2 Certainly, a publication that describes how the District Government
3 is spending its money would be a matter of public interest and
4 subject to comment.

5 As to whether the Plaintiff suffered damages, there was
6 not a showing and I don't think that we need to get to that.

7 Clearly, there would not be financial damage. There
8 would be possibly some embarrassment or humiliation, but, the
9 allegation is not that he was falsely reporting his hours. It was that
10 he simply worked a lot of hours when in the view of some, he should
11 not have been working those hours.

12
13 That is almost not even embarrassing in the normal daily
14 run of news on the operations of the city government.

15 I say almost. I don't need to get into whether it is or
16 whether it is not.

17 But, there is no showing of damage.

18 So, for those reasons, I will grant the motion to
19 dismiss.

20

21 (END OF COURT'S RULING)
(This transcript has been edited by Judge King to better reflect the
language intended.)