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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

CHARLES TENBORG,

Plaintiff and Respondent,

v.

CALCOASTNEWS/
UNCOVEREDSLO.COM, et al.,

Defendants and Appellants.

2d Civ. No. B282952
(Super. Ct. No. CV130237)
(San Luis Obispo County)

COURT OF APPEAL – SECOND DIST.

FILED

Jan 29, 2019

DANIEL P. POTTER, Clerk

Yalitza Esparza Deputy Clerk

We are asked to reverse a judgment without the benefit of a record or settled statement. We decline the invitation.

Daniel Blackburn and Karen Velie are reporters for an online news site, CalCoastNews/UncoveredSLO.com, LLC (CalCoastNews). Charles Tenborg is a licensed hazardous waste transporter. Blackburn and Velie falsely reported that Tenborg encouraged San Luis Obispo County to engage in illegal hazardous waste transportation activities.

A jury awarded Tenborg \$1.1 million for libel, consisting of \$300,000 in economic damages, \$300,000 in presumed damages,

and \$500,000 in punitive damages (against Velie only). Blackburn and Velie appeal from the judgment.

They did not furnish an adequate record. We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

We previously affirmed the trial court's order denying Blackburn and Velie's anti-SLAPP motion to strike Tenborg's complaint because Tenborg demonstrated a probability of prevailing. (*Tenborg v. CalCoast News/UncoveredSLO.com LLC* (Jul. 28, 2015, B254094) [nonpub. opn.]; see endnote, *post*, pp. 7-8.)

Blackburn and Velie co-authored the article, as stated in the by-line. Entitled, "Hazardous Waste Chief Skirts Law," it identifies Tenborg as the waste disposal site manager for the County's Integrated Waste Management Authority. Tenborg challenged five statements in the article, including a statement implied by the image of a radioactive waste drum in the margin. The statements follow:

"a. 'In the mid-1990s, Tenborg was fired for undisclosed reasons from his job with the San Luis Obispo Environmental Health Certified Unified Program Agency (CUPA).'

"b. Mr. Tenborg was awarded a no-bid contract that was required by law to go out to bid since it was over \$15,000. [REDACTED]

"c. Mr. Tenborg encourages member public agencies to ignore state law by filling out IWMA forms that allege the municipality is a small generator and he then transports the loads himself in violation of state law.

"d. Mr. Tenborg illegally transports hazardous waste." [REDACTED]

"e. . . . Mr. Tenborg transported radioactive waste [as pictured]."

Tenborg, Blackburn, Velie, and their editor testified at trial. The first three days however were not transcribed because both

sides waived a reporter. The problem is compounded because Blackburn and Velie did not request a settled statement. We thus do not have a record of the first days of the trial, including motions in limine, jury selection, opening statements, and Tenborg's direct testimony. On the fourth day of trial, Blackburn and Velie hired a private court reporter who transcribed the remainder of the trial.

The parties stipulated to the verdict form and all jury instructions. Blackburn and Velie however contend they preserved an objection to part of an instruction that the above-listed statements are libel per se. Tenborg disagrees.

DISCUSSION

Sufficiency of the Evidence to Support Judgment Against Blackburn

Blackburn does not provide an adequate record for us to review his contention that there is no substantial evidence to support a finding that he was responsible for the part of the article that is about Tenborg, or that he acted with actual malice. (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 549.) “[A] party challenging a judgment has the burden of showing reversible error by an adequate record.” (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.)

Blackburn claims that he only wrote the second half of the article, which does not mention Tenborg. But even the partial record we have contradicts this: His name is in the byline, he testified that he discussed the story with Velie as she developed it, she testified he re-wrote parts she wrote, he sent a draft that included defamatory statements to their editor, and he conceded in deposition that he may have selected the photo of the radioactive waste drum. Blackburn's remaining contentions also lack merit as we shall explain.

Instructional Error Regarding Libel Per Se

Blackburn and Velie contend the court erroneously instructed the jury that all five statements were libelous per se. They assert that two of the statements were not libelous without reference to extrinsic materials: the statement that Tenborg had a no-bid contract and the photo of a radioactive waste drum.

Even if we overlook the stipulation and the lack of a record, the contention is without merit.¹ We conclude after de novo review that each challenged statement unequivocally tends to injure Tenborg with respect to his profession “without the necessity of explanatory matter, such as an inducement, innuendo, or other extrinsic fact.” (Civ. Code, § 45a; *Uriell v. Regents of the University of California* (2015) 234 Cal.App.4th 735, 743.)

Appellants contend the no-bid statement and the photograph were not defamatory without resort to extrinsic information because no-bid contracts can sometimes be legal, and the uncaptioned “stock” photo of the radioactive drum did not appear very close to the photo of Tenborg. But the article includes a statement that “as a public entity, the IWMA is required by law to put work of more than \$15,000 out to bid,” and states that Tenborg is a “contractor paid more than \$400,000 annually.” His involvement in such a process would tend to injure his professional reputation regardless of whose responsibility it is to obtain bids. Likewise, the photo of a drum of radioactive waste is juxtaposed with a quotation of Tenborg saying, “We manage it, pack it in drums and then transport it

¹ In the absence of a complete record we of course have no way of ascertaining whether any instructional error was prejudicial. (*Ballard v. Uribe, supra*, 41 Cal.3d 564, 574.)

. . . .” The record shows however that Tenborg does not transport radioactive waste and appellants had no information that he did.

Both statements in context unequivocally tend to injure Tenborg in his profession. No reasonable jury could find otherwise. The context of the article is not “extrinsic to the publication.” (*Bartholomew v. YouTube, LLC*. (2017) 17 Cal.App.5th 1217, 1226-1227.) And we look not only to express statements, but also to what is implied or insinuated. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1372.) The article “may not be divided into segments . . . ; it must be read as a whole in order to understand its import and the effect that it was calculated to have on the reader.” (*Selleck v. Globe International, Inc.* (1985) 166 Cal.App.3d 1123, 1131.)

Sufficiency of the Evidence of Actual Malice to Support Awards of Presumed and Punitive Damages

Appellants have not furnished an adequate record for us to evaluate their contention that there is insufficient evidence of malice to support the award of presumed damages against Blackburn or the award of punitive damages against Velie.

A private-figure plaintiff such as Tenborg must prove actual malice to recover punitive or presumed damages for defamation involving a matter of public concern. The court instructed the jury. (*Khawar v. Globe Internat.* (1998) 19 Cal. 4th 254, 274.) Appellants are correct that we do not review a finding of actual malice under ordinary substantial evidence principles. (*McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 846.) We “exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.” (*Khawar* at p. 275.) Without the full trial testimony, we do not have an adequate record to do so.

Appellants contend we have all that we need because we have their testimony that they harbored no subjective

recklessness or doubt. (*Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1365.) But we do not have, for example, Tenborg’s direct testimony about his two telephone conversations with Velie before publication which may have caused her to doubt its truth. “[I]t is presumed that the unreported trial testimony would demonstrate the absence of error.” (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992.) We do have Tenborg’s rebuttal testimony about phone records that contradict Velie’s claim he did not return her calls before publication. No witnesses or notes corroborated Velie’s testimony about her sources for the statements. Two of her claimed sources had died by the time of trial.

Blackburn waived his claim that the jury did not expressly find he acted with actual malice when he stipulated to the verdict form. (*Mixon v. Riverview Hospital* (1967) 254 Cal.App.2d 364, 376.)

DISPOSITION

We understand the protection afforded the press by the First Amendment. But these reporters have not given us the means to address their concerns.

The judgment is affirmed. Respondent shall recover his costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

We reproduce the relevant part of the article here: “A contractor paid more than \$400,000 annually by San Luis Obispo County’s Integrated Waste Management Authority (IWMA) illegally transports hazardous wastes and has exposed taxpayers to huge fines by encouraging member public agencies to ignore state law, a CalCoastNews investigation shows.

“Charles Tenborg, the IWMA’s hazardous waste disposal site manager, also owns [Eco] Solutions, a private waste disposal and management company recommended as a hazardous waste transporter by the IWMA.

“In the mid-1990’s, Tenborg was fired for undisclosed reasons from his job with the San Luis Obispo County Environmental Health Certified Unified Program Agency (CUPA), which licenses the five household hazardous waste facilities.

“He then formed ECO Solutions. His relationship with the IWMA started in 1997 when he was awarded a no-bid contract by IWMA manager William Worrell for \$21,000 a year to run the Household Hazardous waste facilities at Cold Canyon and Chicago Grade landfills. Each year since, the IWMA board has voted to approve a new no-bid contract, with the latest totaling more than \$400,000 for the management of the five county hazardous waste facilities.

“In a recent interview with CalCoastNews, Worrell said Tenborg got the no-bid contracts because he was the most qualified for the job. However, as a public entity, the IWMA is required by law to put work of more than \$15,000 out to bid and to avoid using public resources to support private business.

“IWMA is a joint powers authority formed in 1994 to deal with state regulation of hazardous waste disposal requirements. All seven San Luis Obispo County cities, the county, and eight special districts are members, and officials of each entity are represented on its board of directors.

“A primary responsibility of the authority is to plan for, suggest, and offer solutions to common waste problems through the creation and management of waste and recycling facilities.

Currently, the IWMA asks generators of hazardous waste to utilize its transportation services.

“If you are a conditionally exempt small business and generate less than 27 gallons or 220 pounds of hazardous waste per month, we can provide hazardous waste collection and disposal service for you,’ the IWMA says on its website.

“However, staff at the IWMA said the public agency does not transport waste, though it does serve as a work generator for Tenborg’s private transport company.

“State regulators require documentation of cradle-to-grave movement of waste materials of more than 50 pounds in any month, unless the entity is given a ‘small generator’ status. This is designed to prevent the illegal disposal of hazardous wastes by transporters or waste facilities that fail to properly manage the waste.

“The city of San Luis Obispo does not haul its own hazardous waste and regularly utilizes [Eco] Solutions as a transporter, city employees said.

“Under reporting requirements, a ‘small’ load of hazardous waste material—less than 220 pounds per month—can be exempted from state reporting regulations if it is hauled by a municipality itself after certification of the load’s weight.

“City employees said Tenborg encourages municipalities to ignore reporting protocols by filling out IWMA forms that allege the municipality is a small generator because it self-transport; then, Tenborg transports the loads himself in violation of state law. He charges the city \$2,000 to \$3,000 for each load, and takes them to one of IWMA’s five household hazardous waste facilities—all managed by Tenborg. The materials are then supposed to be transported ultimately to a hazardous waste facility like the one located near Kettleman City.

“Tenborg contends he stopped hauling hazardous waste for municipalities two years ago when IWMA manager Worrell said they needed to make sure cities claiming to be conditionally-exempt small waste generators moved their own waste.

“Nevertheless, employees in San Luis Obispo, one of whom said his departments did not utilize Eco Solutions, said that the city does not transport hazardous waste because of the liability

involved. City officials, however, still claim conditionally-exempt small waste generator status and rarely send reports to the state.

“In this way, municipalities get bargain-basement pricing on their hazardous waste loads.

“Keeping track of the hazardous waste and assuring that it is handled properly is difficult and time-consuming.

“Data showing how much hazardous waste San Luis Obispo produces is convoluted, because the city also utilizes the services of more than 10 other haulers.

“When asked, as manager of the county’s five hazardous waste facilities, how much waste the city of San Luis Obispo self-transported during the past month, Tenborg said he did not know and went on to explain what happens to waste after it arrives at the IWMA facilities.

“We manage it, pack it in drums and then transport it to the appropriate facility,’ Tenborg said.

“San Luis Obispo management’s response to a records request for hazardous waste manifests resulted in dozens of documents bearing the names of those transporters.

“Of those manifests, only five had been sent to regulators during a three-year period of time, according to the Department of Hazardous Substance Control. Three other manifests the city delivered to regulators were not part of the city’s response to CalCoastNews’ records request—demonstrating the city’s failure to properly keep records in a specific file as required by law.

“Tenborg’s and Worrell’s relationship dates back at least 15 years”

Barry T. LaBarbera, Judge
Superior Court County of San Luis Obispo

Alston & Bird, Paul J. Beard II, and Clynton Namuo, for
Defendants and Appellants.

Kerr & Wagstaffe, Michael Von Loewenfeldt, James M.
Wagstaffe, and Daniel J. Veroff, for Plaintiff and Respondent.