

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

RICHARD MARTIN,
Plaintiff,

Case No. 6778

vs.

JUDGMENT

DAVID PARRISH, et al,
Defendants.

DATE OF TRIAL: May 19, 1999.

DATE OF DECISION: July 7, 1999.

APPEARANCES:

For plaintiff: Mary C. Gaines with plaintiff.
For defendants: no appearance for any defendant.

SUBJECT OF ORDER: decision on the merits following trial to the court without a jury.

FINDINGS: The court finds and concludes that:

1. The plaintiff filed his petition in the District Court of Lancaster County, Nebraska, on April 7, 1998.
2. Although a document entitled “proof of service” appears in the file, no original summons appears in the file to show what process, if any, was served on the defendant Parrish. However, on May 6, 1998, the defendant Parrish filed a pro se answer, constituting his voluntary appearance. A voluntary appearance is equivalent to service. NEB. REV. STAT. § 25-516.01 (Reissue 1995). The court has jurisdiction of the parties and the subject matter.
3. The plaintiff filed an amended petition on May 28, 1999, with certificate of service including mailing to defendant Parrish. No subsequent answer or other pleading was filed by the defendant Parrish. He is thereby deemed to have elected to stand upon the answer filed on May 6, 1998.
4. Thereafter, on June 30, 1998, pursuant to motion of various defendants, the District Court of Lancaster County transferred the case to this court.

5. After filing the answer, the defendant Parrish has not actively participated in the litigation.

a. The “proof of service” has attached a photocopy of a certified mail return receipt, showing the address of 17 West 31st Street, Kearney, NE 68847. The plaintiff has consistently mailed its communications to that address.

b. The pro se answer is typed upon a business letterhead showing an address of P.O. Box 339, Kearney, NE 68848; however, the answer nowhere states the defendant’s address nor does it allege that the 17 West 31st Street address was incorrect.

c. Shortly after transfer of venue to this court, this court entered an order setting a telephone progression conference. The court clerk mailed a copy to defendant Parrish at the 17 West 31st Street address, and the mailing was not returned by the post office.

d. The progression order entered as a result of the ordered telephone conference was mailed to defendant Parrish at the same address by the court clerk on August 18, 1998, and again the mailing was not returned by the post office.

e. A discovery order (relating to a motion by another defendant) was mailed by the clerk to all counsel or pro se parties, including defendant Parrish at the same address, on December 16, 1998, and again the mailing was not returned by the post office.

f. No notice of change of address has ever been received by the court from the defendant Parrish.

6. The plaintiff filed a series of joint stipulations for dismissal, which resulted in orders of dismissal with prejudice as to all defendants other than defendant Parrish. The first order in this series was mailed by the clerk to all parties or counsel, using the West 31st Street address for defendant Parrish. This mailing was returned by the post office marked “returned to sender,” “not deliverable as addressed,” and “unable to forward.” The subsequent mailings by the court clerk were similarly returned with similar markings.

7. The court subsequently set the matter for trial to the court without a jury, setting a date certain for parties to request a jury and stating that upon failure to so request a jury would be deemed to have been waived.

8. Thereafter, pursuant to the order, trial was held to the court without a jury. The defendant Parrish did not appear or otherwise participate.

9. The plaintiff asserted two causes of action, for defamation and for tortious interference with a business relationship. Because the defendant failed to appear for trial, the evidence consisted solely of the testimony of the plaintiff and various exhibits offered by the plaintiff.

10. The court finds generally for the plaintiff and against the defendant Parrish, and finds that judgment should be entered against the defendant.

11. The defendant's answer sets forth a defense claiming some sort of justification or qualified privilege to make the communications.

a. However, because the defendant failed to appear for trial, no evidence was adduced in support of the claimed defense or defenses.

b. The plaintiff introduced evidence tending to disprove such claimed defense or defenses. Thus, the *only evidence* adduced on this issue tends to negate the claimed defense or defenses.

c. Even if the court rejected the plaintiff's evidence on any affirmative defense, there would remain no evidence to sustain the defendant's burden of proving any such affirmative defense.

12. In *McCune v. Neitzel*, 235 Neb. 754, 763-65, 457 N.W.2d 803, ___ (1990), the Nebraska Supreme Court discussed damages in a defamation action, stating the following principles:

a. In a suit for slander per se, no proof of any actual harm to reputation or any other damage is required for the recovery of either nominal or substantial damages. PROSSER AND KEETON ON THE LAW OF TORTS, *Defamation* 112 at 788 (5th ed. 1984). See, also, *Sheibley v. Nelson*, 84 Neb. 393, 121 N.W. 458 (1909); *Boldt v. Budwig*, 19 Neb. 739, 28 N.W. 280 (1886).

b. By definition, statements constituting slander per se are unambiguous in their defamatory meaning and do not require proof of extraneous facts. *Hennis v. O'Connor*, 223 Neb 112, 388 N.W.2d 470.

c. In recognition of the interests involved in a defamation action and the difficulty of proof in this area, in an action for libel or slander, the amount of damages is almost entirely in the jury's discretion. *Hall v. Vakiner*, 124 Neb. 741, 248 N.W. 70 (1933).

d. In an action for defamation, the damages which may be recovered are (1) general damages for harm to reputation, see, *Hall, supra*, and *Boldt v. Budwig*, 19 Neb. 739, 28 N.W. 280 (1886); (2) special damages, see *Lawrence v. Jewell Companies, Inc.*, 53 Wis.2d 656, 193 N.W.2d 695 (1972); cf. *Hruby v. Kalina*, 228 Neb. 713, 424 N.W.2d 130 (1988) (explaining that words which are not slanderous per se do not constitute a basis for recovery of damages in the absence of a specific allegation of special damages); (3) damages for mental suffering, see *Hall, supra*; and (4) if none of these are proven, nominal damages, see *Hutchens v. Kuker*, 168 Neb. 451, 96 N.W.2d 228 (1959). See, generally, RESTATEMENT (SECOND) OF TORTS 620-623 (1977); R. SMOLLA, LAW OF DEFAMATION 9.01-.07 (1990).

13. The only damages proved with reasonable certainty were special damages for the loss of the employment contract salary of \$5,000.00 for six months, the initial contract term, or \$30,000.00, less the amount of \$5,000.00 of salary received before termination, or a net total of \$25,000.00. Exhibit 5. The plaintiff's argument for continued salary after the initial contract term departs the region of reasonable certainty and enters the realm of speculation, into which this court declines to follow.

14. The plaintiff's amended petition also prays for attorney fees. In general, attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of an attorney fee. *Zimmerman v. Firstier Bank*, 255 Neb. 410, 585 N.W.2d 445 (1998). The general rule applies where the party to litigation is attempting to recover attorney fees in the very case being litigated. *Id.* The plaintiff seeks attorney fees in this case for the fees incurred in this case. The general rule precludes any recovery of attorney fees. The plaintiff fails to cite any statute or uniform course of procedure authorizing an award of attorney fees in this case.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED
that:

1. JUDGMENT is hereby entered in favor of the plaintiff, Richard Martin, and against the defendant, David Parrish, in the amount of \$25,000.00, together with the costs of the action taxed in the amount of \$58.00.

2. The judgment shall bear interest at the rate of 6.163% per annum from date of judgment until paid.

3. The plaintiff's prayer for attorney's fees is denied.

4. The clerk shall mail notice of the entry of this judgment to the defendant Parrish at **both** addresses referenced above, specifically: 17 West 31st Street, Kearney, NE 68847, **and** P.O. Box 339, Kearney, NE 68848.

Entered: July 7, 1999.

If checked, the Court Clerk shall:

- : Mail a copy of this order to all counsel of record and to any pro se parties, **including both addresses for defendant Parrish, but disregarding any parties (or their counsel) previously dismissed.**
Done on _____, 19__ by _____.
- : Enter judgment on the judgment record.
Done on _____, 19__ by _____.
- : Mail postcard/notice required by § 25-1301.01 within 3 days, **at both addresses specified in paragraph 4 of judgment.**
Done on _____, 19__ by _____.
- : Note the decision on the trial docket as: 7/8/99 Signed "Judgment" entered.
Done on _____, 19__ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge