

defeated Senator Towe in the election, and is currently serving as senator for the district.

Claim 1

2. Senator Bishop alleges that the following language in a campaign flier in support of Senator Towe's candidacy misrepresents Senator Towe's own voting record:

. . . Here are just some of the taxes Tom Towe voted against:

1. The Sales Tax (SB 235)

. . .

3. Senate Bill (SB) 235, introduced in the 1993 Montana Legislature, provided that the question of whether a four percent sales and use tax should be enacted would be submitted to a vote of the qualified electors of Montana at a special election. Senator Towe voted against the bill on second and third reading in the Senate.

Upon its return from the House, Senator Towe voted "yea" on a motion to not pass, but then voted "yea" to adopt the Free Conference Committee report. As a result of the adoption of the Free Conference Committee report, the bill was sent to the Governor and signed. The sales tax was voted down at the special election held on June 8, 1993.

4. Senator Towe stated that his vote in favor of adopting the Free Conference Committee report was not a "critical vote" on the SB 235. According to Senator Towe, "while a failure to pass second reading or a failure to pass third reading would be fatal to the bill, failure to approve the Free Conference Committee report

. . . would not be fatal to passage of the bill." Based on the distinction Senator Towe drew between the two types of votes, he believes the statement that he voted against SB 235 is true.

Claim 2

5. One of the claims made by Senator Bishop during the campaign was that, in the 1993 regular and special sessions of the Legislature, Senator Towe voted for every new tax or tax increase except one. A campaign flier for Senator Towe stated, in part, as follows:

"Big Business" Bishop Lied to You.

He claims Tom Towe voted for every tax increase but one.

He Lied! Here are just some of the taxes Tom Towe voted against:

1. The Sales Tax (SB 235)
2. The Employee Old Fund Liability Tax (HB 504)
3. Realty Transfer Tax (SB 437)
4. Video Tax Increase (SB 410)
5. Immediate Sales Tax Without a Vote (SB 229)
6. Increase Tax on Homes (SB 162)
7. Increase Gas Tax (SB 376)
8. Realty Transfer Tax (SB 437)

Senator Bishop contends that the statement claiming he lied about Senator Towe's voting record is a false statement in violation of the statute.

6. Fact Summaries Nos. 3 and 4, above, set forth Senator Towe's voting record on SB 235. The following is a summary of actions taken on the other bills during the 1993 session that were referenced in Senator Towe's campaign flier.

House Bill (HB) 504 increased the employer payroll tax and imposed an employee wage tax to be applied to eliminate the State

Compensation Insurance Fund's "old fund unfunded liability." On April 13, 1993, Senator Towe voted "yea" on a motion to adopt certain amendments to the bill. On April 14, 1993, on third reading Senator Towe voted "yea" that HB 504 be concurred in. The bill was thus sent back to the House with amendments. On April 15, 1993, the House voted to reject the amendments, and the bill went to a Free Conference Committee.

Following adoption by the House of the Free Conference Committee report, the bill was sent back to the Senate. On April 24, 1993, Senator Towe voted "nay" on second reading, on a motion to adopt the Free Conference Committee report. The motion failed. On third reading, Senator Towe voted "nay" on a motion to adopt the report, and the report passed.

SB 437 (listed twice in the flier) imposed a tax on certain transfers of real property. The bill was referred to the Senate Taxation Committee, of which Senator Towe was a member. The bill was tabled on March 26, 1993, with Senator Towe voting to table.

SB 410 increased the video gambling machine tax to fund increased retirement benefits under the Sheriffs' Retirement System. Senator Towe voted in favor of adopting an adverse committee report on the bill, and the report was adopted. However, on the same day Senator Towe voted "yea" on a motion to reconsider the Senate's action in adopting the adverse committee report. The motion failed.

SB 229 was not a tax bill. It was a bill "defining and authorizing certain poker runs . . . "

SB 162 increased the tax rate on residences valued over \$200,000. The bill was referred to the Senate Taxation Committee. The bill was tabled on January 29, 1993, with Senator Towe voting to table.

SB 376 increased the gasoline and special fuels tax. The bill was referred to the Senate Taxation Committee. The bill was tabled on March 26, 1993, with Senator Towe voting to table.

7. Senator Towe believed that Senator Bishop's campaign statements regarding Senator Towe's voting record referred to both committee and floor votes on bills. Senator Bishop stated that when making the claim he was referring only to floor votes, not "obscure committee votes".

Claim 3

8. Another campaign flier for Senator Towe stated, in part:

Al Bishop will say anything to get elected, except the truth. One thing he won't tell you is how he voted on SB 307, a 5% sales tax (without a vote of the people) and a 22% income tax surcharge.

Al Bishop voted for a 5% sales tax twice. (SB 307, Senate Journal 1987, 2nd & 3rd reading). Bishop lied to us!

Senator Bishop contends that these statements are false statements made in violation of the statute.

9. A campaign flier for Senator Bishop stated, in part:

. . . Unlike you, Mr. Towe, I have consistently opposed the sales tax because it hurts those least able to pay, and it's just another tax in addition to all the other taxes we have, and we don't need more taxes!!! [Emphasis in original].

10. Senate Bill 307, introduced in the 1987 Montana Legislature, was a bill for a law entitled "An act to stimulate and

encourage the growth of the Montana economy by means of the Montana Economic and Tax Reform Act of 1987". Included within its provisions was a 5% sales and use tax. Senator Bishop voted "yea" on both second and third reading of the bill.

STATEMENT OF FINDINGS

Mont. Code Ann. § 13-35-234 provides:

Political criminal libel - misrepresenting voting records. (1) It is unlawful for any person to make or publish any false statement or charge reflecting on any candidate's character or morality or to knowingly misrepresent the voting record or position on public issues of any candidate. A person making such a statement or representation with knowledge of its falsity or with a reckless disregard as to whether it is true or not is guilty of a misdemeanor.

(2) In addition to the misdemeanor penalty of subsection (1), a successful candidate who is adjudicated guilty of violating this section may be removed from office as provided in 13-35-106 and 13-35-107.

Claim 1

It does not appear that an allegation that a candidate misrepresented his own voting record can establish a violation of the statute. The statute prohibits "any person" from knowingly misrepresenting the voting record of "any candidate". The choice of language by the Legislature suggests an intention to prohibit the misrepresentation of a candidate's voting record by a person other than the candidate. Had the Legislature intended to also specifically prohibit a candidate from misrepresenting his own voting record, it could easily have included express language to that effect in the statute. Its failure to do so supports a conclusion that the statute does not apply to this situation.

Mont. Code Ann. § 13-35-234 is a penal statute, which must be strictly construed and may not be extended by construction. Montana Automobile Association v. Greely, 193 Mont. 378, 389, 632 P.2d 300, 306 (1981); Shipman v. Todd, 131 Mont. 365, 368, 310 P.2d 300, 302 (1957). Court will not apply penal statutes to cases which are not within the obvious meaning of the language employed by the Legislature, even though they may be within the mischief intended to be remedied. State v. Aetna Banking & Trust Co., 34 Mont. 379, 382, 87 P.2d 268, 269 (1906). See also State ex rel. Penhale v. State Highway Patrol, 133 Mont. 162, 165, 321 P.2d 612, 613-14 (1958).

Further, even if the statute did apply to Senator Towe's representation, the statement that he "voted against" SB 235 is not a clear misrepresentation of his voting record. Senator Towe voted against the bill on second and third reading in the Senate, as shown by the record in the Senate Journal. At most, the statement presents an incomplete picture of Senator Towe's voting record with respect to the bill, since he eventually voted in favor of adopting the Free Conference Committee report. Mont. Code Ann. § 13-35-234, however, does not define the phrase "voting record". There is nothing in title 13, chapter 35, Mont. Code Ann. indicating a legislative intent that a candidate's voting record must be construed as consisting of all votes on a particular bill. Senator Towe's "nay" votes on second and third reading are obviously part of his voting record on the bill.

Claim 2

The allegation that Senator Towe published a false statement concerning Senator Bishop's characterization of Senator Towe's votes on tax bills during the 1993 Legislature requires an examination of the mental state requirement of Mont. Code Ann. § 13-35-234. Based on this analysis, it is unnecessary to resolve the disputed issue of whether the statement upon which this claim is based was a "false" statement.

Political criminal libel is committed only if the evidence supports a finding that a false statement is made "with knowledge of its falsity or with a reckless disregard as to whether it is true or not" Mont. Code Ann. § 13-35-101 states that the "penalty provisions of the election laws of this state are intended to supplement and not to supersede the provisions of the Montana Criminal Code." Mont. Code Ann. § 45-2-101(33) defines "knowingly" as follows:

. . . [A] person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when the person is aware of the person's own conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when the person is aware that it is highly probable that the result will be caused by the person's conduct. When knowledge of the existence of a particular fact is an element of an offense, knowledge is established if a person is aware of a high probability of its existence. Equivalent terms, such as "knowing" or "with knowledge", have the same meaning.

In determining whether a false statement was made "with knowledge" of its falsity, it would be necessary to prove that Senator Towe was "aware of a high probability" that the statement was false.

A violation of the statute can also be proved if there is evidence that a person acted with "reckless disregard". The Compiler's Comments to Mont. Code Ann. § 13-35-234 note that the source of the "standard" in subsection (1) of the statute is "apparently drawn from New York Times v. Sullivan, 376 U.S. 254 (1964)". That case involved a civil libel action filed by a public official against a newspaper. The Supreme Court held that recovery would only be allowed if the public official could prove that the alleged libelous statement was made with "actual malice"; that is, with "knowledge that it was false or with reckless disregard of whether it was false or not." Sullivan, 376 U.S. at 279-280.

In a later case, Herbert v. Lando, 441 U.S. 153 (1979), the Supreme Court, citing Sullivan, stated that "reckless disregard for truth" means that the defendant "in fact entertained serious doubts as to the truth of his publications". The Court noted that such "subjective awareness of probable falsity" may be found if "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Herbert, 441 U.S. at 156-57.

Other cases have held that "reckless disregard" is "more than mere negligence", Major v. Drapeau, 507 A.2d 938, 941 (R.I. 1986); and that "a failure to investigate is not sufficient in itself to establish reckless disregard", Bartimo v. Horsemen's Benevolent and Protective Association, 771 F.2d 894, 898 (5th Cir. 1985). In Green v. Northern Publishing Co., Inc., 655 P.2d 736, 742 (Alaska 1982), the Court observed:

Reckless disregard, for these purposes, means conduct that is heedless and shows a wanton indifference to

consequences; it is conduct which is far more than negligent. [Citation omitted]. There must be sufficient evidence to permit the inference that the defendant must have, in fact, *subjectively entertained serious doubts as to the truth of his statement*. [Italics in original].

Applying these principles to the facts upon which Claim 2 is based, the evidence does not support a finding that Senator Towe acted with the requisite knowledge or reckless disregard in making the statement regarding Senator Bishop's characterization of Senator Towe's voting record. Senator Towe believed that Senator Bishop was referring to all votes (both committee and floor) on all tax bills considered by the 1993 Legislature. Thus, he believed that Senator Bishop had mischaracterized his (Senator Towe's) voting record by claiming that Senator Towe had only voted against one tax bill. Senator Towe voted to table SB 162, SB 376, and SB 437, which were all bills which would have imposed or increased taxes. Senator Towe therefore believed that he had not "voted for" these tax bills, and that Senator Bishop's contention in his campaign literature that he (Senator Towe) had voted for every new tax or tax increase "except one" was untrue.

Under these circumstances, there is not sufficient evidence that when Senator Towe made the statements he was "aware of a high probability" that the statements were false, or that he "subjectively entertained serious doubts" as to the truth of the statements. As noted, in making this determination I find it unnecessary to decide whether or not the statements themselves were false.

Claim 3

The same analysis can be applied with respect to the statements upon which this claim are based. Senator Bishop had made statements in his campaign suggesting that he had always opposed "the sales tax". Senator Towe knew that during the 1987 session of the Legislature Senator Bishop had voted in favor of SB 307, which would have imposed a sales tax. Thus, Senator Towe believed that Senator Bishop had mischaracterized his own voting record concerning the sales tax, and he indicated that in his (Senator Towe's) campaign literature. Under these circumstances, there is not sufficient evidence that when Senator Towe made the statements he was "aware of a high probability" that the statements were false, or that he "subjectively entertained serious doubts" as to the truth of the statements. Again, in making this determination I find it unnecessary to decide whether or not the statements themselves were false.

Based on the preceding, there is insufficient evidence to conclude that Tom Towe violated Mont. Code Ann. § 13-35-234.

DATED this 12th day of January, 1995.



ED ARGENBRIGHT
Commissioner of Political Practices