

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

IN THE MATTER OF THE COMPLAINT
AGAINST
Candidate Rosana Skelton

SUMMARY OF FACTS
AND
STATEMENT OF FINDINGS

I. Introduction

Rep. Hal Harper, the Democratic incumbent in House District 52, filed a complaint against his Republican opponent, Rosana Skelton, on October 21, 1994. Rep. Harper alleges that candidate Skelton has misrepresented and/or made false statements about Rep. Harper's voting record on property tax relief and workers' compensation reform. Rep. Harper alleges that candidate Skelton's campaign flier constitutes political criminal libel and violates the Code of Fair Campaign Practices provisions in Montana's campaign finance laws (Sections 13-35-234 and 13-35-301, MCA).

II. Summary of Facts

1. Rep. Harper alleges that the following quote from candidate Skelton's campaign flier is false and misrepresents his voting record:

" . . . [Rep. Harper] voted across the board against a package of bills designed to clean up problems in Montana's worker compensation system."

2. Rep. Harper submitted a list of twenty-two bills considered by the 1993 Montana Legislature dealing with workers' compensation reform. Most, if not all, of the bills were

considered by the Select Committee on Workers' Compensation. Rep. Harper voted in favor of fifteen of the twenty-two bills on the final vote taken on the floor of the House during the 1993 session.

3. Candidate Skelton's flier discusses Rep. Harper's workers' compensation votes under the heading of "Good Jobs Needed for Montana". The pertinent text of candidate Skelton's discussion of Rep. Harper's workers' compensation reform vote reads as follows:

"Hal Harper has consistently antagonized business and failed to support public policy that would encourage business formation and help provide good jobs," she said.

Over the last eight years he has compiled a dismal record of under twenty-five percent support for bills that would help create good new jobs. He voted across the board against a package of bills designed to clean up problems in Montana's worker compensation system.

4. Candidate Skelton denies that she has misrepresented Rep. Harper's votes on workers' comp reform. She alleges that Rep. Harper did vote for the noncontroversial reform measures during the 1993 session but opposed the substantive bills considered crucial by employers (S.B. 347, H.B. 504, H.B. 361 and H.B. 487). Candidate Skelton relied in part on voting records compiled by the Chamber of Commerce for S.B. 347, H.B. 504 and H.B. 361. Rep. Harper voted against S.B. 347, H.B. 504 and H.B. 487 on both second and third reading. He voted for the Governor's amendments to S.B. 347. Rep. Harper voted against H.B. 361 on second reading but

"yes" on third reading.

5. Rep. Harper alleges that the following statement in candidate Skelton's campaign flier is false and misrepresents his voting record on property tax relief:

Hal Harper voted against every property tax relief measure in the last special session.

6. Rep. Harper was a member of the House Taxation Committee during the last special session and voted in favor of three property tax relief bills considered by the Committee. Rep. Harper voted for H.B. 47, H.B. 73 and S.B. 25 in the House Taxation Committee but none of these bills were reported to the floor of the House for consideration.

7. Candidate Skelton maintains that her campaign flier only references votes taken on the floor of the House of Representatives. She states that she was not aware of Rep. Harper's committee votes and had no access to the information. In an October 25, 1994 Great Falls Tribune article concerning this complaint, candidate Skelton is quoted as follows:

"Maybe I do owe . . . [Rep. Harper] a little bit of slack on that one [Rep. Harper's assertion that he voted in favor of three tax relief proposals in the House Taxation Committee]."

8. Candidate Skelton denies that she intentionally or knowingly misrepresented Rep. Harper's voting record.

III. Statement of Findings

Rep. Harper alleges that candidate Skelton violated the Code

of Fair Campaign Practices, Sections 13-35-301 and 302, MCA. The Code of Fair Campaign Practices is a voluntary code and the Commissioner of Political Practices is given no authority to enforce the Code. The Commissioner's responsibilities under the Code are limited to preparing and sending a copy of the fair campaign practices form to each candidate (Section 13-35-302, MCA). If the Montana Legislature wants an enforceable Code of Fair Campaign Practices, it must amend the law to grant such enforcement authority and provide the necessary budget to deal with the numerous complaints that will be filed. Absent enforcement authority and an adequate budget to deal with fair campaign practice complaints, I must respectfully decline to determine whether candidate Skelton's flier violates the Code of Fair Campaign Practices.

Montana's political criminal libel statute reads as follows:

"13-35-234. 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."

A candidate commits political criminal libel if the misrepresentation of an opponent's voting record is made "with knowledge of its falsity or with a reckless disregard as to whether it is true" The law requires proof not only that a misrepresentation occurred, but that the misrepresentation was made knowingly or with a reckless disregard for the truth.

The evidence does not support a finding that candidate Skelton misrepresented Rep. Harper's voting record on workers' compensation reform bills. While candidate Skelton's language could be more precise and the term "across the board" is troublesome, her flier does not describe the "package" of bills to which she refers. Candidate Skelton maintains that the package of bills relied on for the language in the flier included the following legislation considered by the 1993 Legislature:

1. S.B. 347 (managed care of medical claims to control costs);
2. H.B. 504 (tax assessment against workers to help pay off \$500 million dollar deficit in the Old State Fund);
3. H.B. 361 (general reform of workers' comp which included provision requiring objective medical findings as a basis for payment); and
4. H.B. 487 (constitutional amendment to affirm legislature's right to control workers' comp benefits).

Rep. Harper voted against S.B. 347, H.B. 504, H.B. 361 and

H.B. 487 at some point in the 1993 legislative process. Rep. Harper voted against S.B. 347, H.B. 487 and H.B. 504 on both second and third reading but eventually voted for the Governor's amendments to S.B. 347. Rep. Harper voted against H.B. 361 on second reading but then voted for the bill on third reading. If this is the "package" of workers' comp reform bills referenced in candidate Skelton's flier, the statement does not misrepresent Rep. Harper's voting record.

The evidence does support a finding that candidate Skelton's flier misrepresents Rep. Harper's voting record on property tax relief. Candidate Skelton suggests that committee votes don't count and that a narrow definition of the term "voting record" should be adopted. I respectfully decline to adopt such a narrow definition. While it may be difficult to research committee votes and most organizations base their analysis of voting records on second and third reading votes, nothing in Montana's Campaign Finance laws suggests that committee votes are not part of a legislator's voting record under Section 13-35-234, MCA.

The problem with candidate Skelton's flier is not her choice of which votes to count. The problem is with her statement that Rep. Harper voted against every property tax relief measure considered during the last special session. The word every connotes all bills introduced, not just the bills that made it to the floor of the House. Rep. Harper voted for three property tax

relief bills considered by the House Taxation Committee. Those bills died in committee and Rep. Harper had no opportunity to cast floor votes on these bills. There would have been no misrepresentation of Rep. Harper's voting record if candidate Skelton had said that Rep. Harper voted against every property tax relief bill that reached the floor of the House of Representatives.

The next question is whether candidate Skelton's misrepresentation was made knowingly or with a reckless disregard for the truth. Section 13-35-101, MCA, 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." Section 45-2-101(33), MCA, defines "knowingly" as follows:

Knowingly - 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.

Section 13-35-234, MCA, prohibits a misrepresentation made "with knowledge of its falsity". In determining whether a misrepresentation was made "knowingly" or "with knowledge", it

would be necessary to prove that candidate Skelton was "aware of a high probability" that the representation 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 Section 13-35-234, MCA, note that the source of the "standard" in subsection (1) of the statute is "apparently drawn from New York Times Co. 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 279-80. 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 or 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:

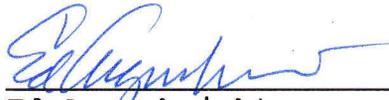
Reckless disregard, for these purposes, means conduct that is heedless and shows a wanton indifference to consequences; it is conduct which is far more than negligent. [citation omitted] There must be sufficient evidence to permit the inference that the defendant must have, in fact, *subjectively entertained serious doubts as to the truth of his statement* (italics in original).

Applying these principals to the facts of this matter, the evidence does not support a finding that candidate Skelton acted with the requisite knowledge or reckless disregard in misrepresenting Rep. Harper's voting record on property tax relief bills during the last special session. Candidate Skelton's flier correctly describes Rep. Harper's voting record on property tax relief bill considered by the full House of Representatives. There is no evidence that candidate Skelton was aware of Rep. Harper's committee votes when the flier was written. Candidate Skelton correctly points out that most organizations analyze a legislator's votes based on second and third reading votes by the full House or Senate. While candidate Skelton may have been negligent in not considering the committee vote issue, a failure to investigate Rep. Harper's committee votes is not sufficient to establish reckless disregard.

Based on the preceding, there is insufficient evidence to

conclude that candidate Skelton violated Section 13-35-234, MCA, even though her campaign flier misrepresents the voting record of Rep. Harper on property tax relief issues.

DATED this 31st day of October, 1994.



Ed Argenbright
Commissioner of Political Practices