

we've already paid, like interest on our house payment, like donations to churches, I think that's only fair. Well, my opponent voted to take those away from us. That's her record".

6. The basis for the statement was two Montana Standard newspaper articles; one comparing Rep. Shea and her primary opponent, the other comparing Rep. Shea with Mr. Beaudry, each of which listed a response to questions posed by the press about issues deemed important to the election. The key to the basis of the ad written by Mr. Beaudry was the answer to the question, "Do you support the retention of House Bill 671, the \$72.7 million income tax increase and revision, which was passed by the 1993 legislature but later suspended?" Rep. Sheas's reply was, "Yes. The bill had bipartisan support and would force the wealthiest Montanans to pay their share of taxes. Would consider lowering the tax rate and allowing taxpayers to claim more deductions."

7. Candidate Beaudry, after receiving a call from a friend who advised that the ad sounded like Rep. Shea voted for the bill, realized the misperception and personally called to pull or withdraw the ad as worded with the use of the verb "voted".

8. During the investigation of this complaint, Mr. Beaudry expressed concern that his ad was misconstrued from his intended meaning, which he stated was to indicate Rep. Shea's support for the provisions of House Bill 671. The use of the word "vote" was not intended to indicate a legislative act marked by pushing a button indicating yes or no.

9. Mr. Beaudry denies that he intentionally or knowingly misrepresented Rep. Shea's voting record.

10. Subsequent Beaudry ads omitted use of the word "voted" and used instead "supports" to indicate Rep. Sheas's position on House Bill 671.

STATEMENT OF FINDINGS

Mont. Code Ann. § 13-35-234, Montana's political criminal libel statute 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.

The evidence clearly supports a finding that Mr. Beaudry's campaign ad misrepresents candidate Beck's voting record. The vote approving House Bill 671 was taken in the Montana House of Representatives before Representative Shea assumed the office of Representative of District 35. However, political criminal libel is committed only if the evidence supports a finding that the misrepresentation of a candidate's voting record 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.

Mont. Code Ann. § 13-35-234 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 Mr. Beaudry 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 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 of this case, the evidence does not support a finding that Mr. Beaudry acted with the requisite knowledge or reckless disregard in misrepresenting Representative Shea's voting record. When Mr. Beaudry wrote the text of the ad he believed it accurately reflected the position of Rep. Shea in her support of House Bill 671. He did not think use of the phrase "voted for" indicated anything more than support. In the context of Beaudry's thinking at the time he believed he was

using a word indicating favor of or endorsement and not the actual registering of a vote in a deliberative body.

Upon learning of the meaning conveyed Mr. Beaudry immediately acted to remove the ads from the air. He wrote the text by himself and was surprised at the meaning conveyed but not intended. The call from a friend describing how he understood the message of the ad was a surprise to Beaudry.

Under the circumstances, there is not sufficient evidence that when Mr. Beaudry wrote and submitted the ad to the stations he was "aware of a high probability" that the representations contained therein were false, or that he "subjectively entertained serious doubts" as to the truth of the representations.

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

DATED this 16th day of November, 1994.



ED ARGENBRIGHT
Commissioner of Political Practices