

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the)	SUMMARY OF FACTS
Complaint Against)	AND
Mary Jo Fox)	STATEMENT OF FINDINGS

On October 25, 2002, Christopher Harris filed a complaint against Mary Jo Fox, a candidate for the Senate District 26 seat in the 2002 election. The complaint alleges that Mary Jo Fox violated Montana Code Annotated Section 13-37-131(1) by misrepresenting her opponent's position on a matter that was relevant to the issues in the campaign.

SUMMARY OF FACTS

1. In 2002 Mary Jo Fox was a candidate for the Senate District 26 seat in the Montana State Senate. Her opponent, Mike Cooney, won the election.

2. On October 22, 2002, Mary Jo Fox placed a campaign advertisement in the Helena Independent Record. The advertisement was published one time. At the top of the advertisement was the question: "Where do the Senate candidates stand on gun rights?" That question was followed by what appeared to be a reproduction of a letter from Mike Cooney to Gary Marbut, President of the Montana Shooting Sports Association ("MSSA"). The letter, which appeared to have been printed on "Mike Cooney State Senate" letterhead, was dated April 15, 2002, and had the following text:

Thank you for your letter and candidate questionnaire. I appreciate your sharing your concerns with me as well as asking my response to several questions.

My campaign for Senator in District 26 will take me from neighborhood to neighborhood, door to door and face to face. I will be making myself

available to the voters of this district and responding directly to their questions.

As you might imagine, I am receiving numerous surveys from groups throughout the state and nation asking for my support and or positions on many issues. Although I understand that these inquiries are well meaning, I cannot possible [sic] respond in a thoughtful manner to each. I also find it very difficult to take solid positions on many of the issues without having the opportunity to hear all sides of the arguments. It appears that this survey addresses very important questions of public policy that should only be made after careful and thoughtful consideration. For these reasons I am not responding directly to your inquiry.

Free and open debate is a cornerstone of our democracy and one in which I strongly believe. Should I be elected to the State Senate you can be assured that I will visit with you or members of your organization at any time and listen to your positions with an open mind.

Thank you for taking the time to contact me.

Sincerely,

Mike Cooney

The letter included what appeared to be Mike Cooney's signature. Below the letter were the following campaign messages:

Excuses like that don't fly in Montana
Mary Jo Fox will defend the Second
Amendment before Election Day and always

CHALLENGING TIMES REQUIRE
STRONG LEADERSHIP

Mary Jo FOX
SENATE DISTRICT 26

Endorsed by the Montana Shooting Sports Association

NRA gives Mary Jo Fox a solid "A"

Vote for MARY JO FOX on November 5th

3. The complaint alleges that the advertisement placed by Mary Jo Fox deleted the following sentence from the actual letter sent by Mike Cooney to the MSSA:

I hope that you will take into account my past 16 years in public office and the strong stands I have taken in support of protecting the Second Amendment.

The complaint alleges that the deletion of this sentence created the false impression that Mike Cooney was simply declining to respond to the MSSA's survey questions, when in fact the actual letter reiterates his strong support of rights protected by the Second Amendment.

4. The MSSA refers to itself on its website as "the primary political action organization asserting the rights and prerogatives of gun owners, shooters, and hunters in Montana." Some time prior to April 15, 2002, the MSSA sent a questionnaire to various candidates for public office in Montana, apparently seeking to determine from the candidates' responses their positions on issues related to the MSSA's interests. Mike Cooney faxed an unsigned letter to the MSSA in response to the questionnaire. The letter was written on letterhead containing the following information:

COONEY FOR SENATE
PO BOX 754
HELENA, MT 59624

Aside from the different letterhead and the fact that it was unsigned, the actual letter faxed by Mike Cooney to the MSSA was in most respects identical to the letter that appeared in the Mary Jo Fox campaign advertisement. The one substantive difference was that the faxed letter included the following sentence at the end of the fourth paragraph: "I hope that you will take into account my past 16 years in public office and the strong stands I have taken in support of protecting the Second Amendment." As reflected in Fact 2, that sentence was not included in the letter that appeared in the

Mary Jo Fox campaign advertisement.

5. On April 15, 2002, Mary Jo Fox received an e-mail from Gary Marbut that stated: "Please keep this TOTALLY under your hat for the time being, but I received the text pasted below today in the form of an unsigned fax." Mr. Marbut's e-mail to Ms. Fox set forth the text from the actual letter that Mike Cooney had faxed to the MSSA, including the last sentence reading: "I hope that you will take into account my past 16 years in public office and the strong stands I have taken in support of protecting the Second Amendment."

6. After receiving the e-mail, Mary Jo Fox contacted Gary Marbut and asked him whether she could use the Mike Cooney letter, the text of which Mr. Marbut had e-mailed to her. Mr. Marbut stated that the board of directors of the MSSA preferred that she not use the letter she had received from him, but if she could "verify it through another source" then she could use it.

7. Several weeks later, Mary Jo Fox was being interviewed by Julie Millam and Jenny Dodge of the Montana Family Coalition (Coalition). Ms. Fox stated she noticed that Ms. Millam and Ms. Dodge had a three-ring binder containing her responses to a survey sent out to candidates by the Coalition. She also noticed a copy of a letter addressed to the Coalition that appeared to be the same letter sent from Mike Cooney to the MSSA. Ms. Fox requested and received from Ms. Millam and Ms. Dodge a copy of the Mike Cooney letter to the Coalition, intending to compare it with the Mike Cooney letter that Gary Marbut had e-mailed to her.

8. When Mary Jo Fox compared the two letters, she found they were nearly identical, except that the last line in the Mike Cooney letter to the MSSA (regarding his

position on the Second Amendment) was not included in the letter he sent to the Coalition.

9. In a later meeting with Julie Millam and Jenny Dodge, Mary Jo Fox stated to them that Mike Cooney had extreme views on partial birth abortion and pro-choice issues. Ms. Millam decided to telephone Mr. Cooney to discuss those issues. Ms. Fox requested that Ms. Millam verify with Mr. Cooney that the letter he sent to the Coalition was the same letter he sent to the MSSA. Ms. Millam agreed to do so and telephoned him while Ms. Fox was in the room. During this telephone conversation, Mr. Cooney was asked if the letter he sent to the MSSA was the same as the one he had sent to the Coalition, and, according to Ms. Millam, he confirmed that it was.

10. When Mary Jo Fox composed her newspaper campaign advertisement, she used the Mike Cooney letter to the Coalition, including the letterhead and the signature. She substituted the MSSA address for the Coalition address, and she also substituted the salutation "Dear Gary" (since the campaign advertisement letter was addressed to Gary Marbut) for the salutation in the Mike Cooney letter to the Coalition. Graphic artists Clay Schulz and Elaine Locati assisted Ms. Fox in the creation of the advertisement. Their recollection is that she brought them the letter as it appeared in the advertisement, and they did not make any changes. As noted previously, the letter, as it appeared in the advertisement, did not include the last sentence in Mike Cooney's actual letter to the MSSA, wherein he mentioned his past support of the Second Amendment.

11. When interviewed during the investigation of the complaint, Mary Jo Fox stated she brought the letter she had created to the graphic designers who scanned it

for the advertisement. She stated she did not notice that the last line in the actual letter Mike Cooney sent to the MSSA was missing from the letter she had inserted into her campaign advertisement until after the advertisement had been published and she had received a copy of the complaint. In her written response to the complaint, Ms. Fox stated: "I did leave out the last line of the letter. However, leaving it out did not change the fact that Mr. Cooney refused to answer the survey. I didn't make a determination of where Mike Cooney stands on gun rights because he won't answer questions to allow such a determination to be made."

12. In her response to the complaint, Mary Jo Fox contends she was careful to confirm that the letter Mike Cooney sent to the MSSA was "virtually the same letter" that he sent to the Coalition. She points out that both letters contained the same typographical error in the third paragraph (" . . . I cannot possible respond in a thoughtful manner to each."). Ms. Fox believes she was entitled to quote from the letter to the MSSA "for advertising purposes." While she admits she left out the last line of the actual letter Mike Cooney sent to the MSSA, she feels the omission was irrelevant considering the intended message of her campaign ad:

The purpose of my advertising was not to make a judgment about Mr. Cooney's stand on gun rights. I did not say in my ad that he was against gun rights. What I was demonstrating through my ad, using Mr. Cooney's own words, was that he is/was unwilling to answer the group's questions about gun rights. Mr. Cooney admits he sent the email to Gary Marbut. He says the last line in his letter was significant and needed to be included. I believe that the last line of his letter was insignificant. I believe that since Mr. Cooney refused to answer the group's survey, the only way that last sentence would have mattered would have been if that last sentence actually contained answers to the group's survey as he was requested. If that were the case, then my ad would have been misleading. However, Mr. Cooney refused to answer this group's survey, just as he has refused to answer many surveys for other groups on issues such as pro-choice, pro-life, conservation and gun rights, just to name a few.

STATEMENT OF FINDINGS

Mary Jo Fox is accused of violating Montana Code Annotated § 13-37-131(1), which provides:

Misrepresentation of voting record -- political civil libel. (1) It is unlawful for a person to misrepresent a candidate's public voting record or any other matter that is relevant to the issues of the campaign with knowledge that the assertion is false or with a reckless disregard of whether or not the assertion is false.

To establish a violation of this statute, it would be necessary to prove that when Mary Jo Fox published a campaign advertisement that omitted the last sentence of the letter Mike Cooney sent to the MSSA, she thereby misrepresented a “matter that is relevant to the issues of the campaign,” and she either did so “with knowledge that the assertion is false” or “with a reckless disregard of whether or not the assertion is false.”

The mental state requirement in the statute is derived from the seminal case of New York Times v. Sullivan, 376 U.S. 254(1964). In that case the United States Supreme Court held that a public official could not recover on a claim for defamation brought against a newspaper unless he proved “actual malice,” which the Court defined as “knowledge that [the statement] was false or with reckless disregard of whether it was false or not.” Id., 376 U.S. at 279-80. The Court based its decision on the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open” Id., 376 U.S. at 270. The high degree of First Amendment protection afforded by the New York Times rule is underscored by the requirement that actual malice must be proven with “convincing clarity.” Id., 376 U.S. at 285-86.¹

In several later opinions the Court applied the New York Times standard in libel actions brought by two candidates against newspapers that had printed allegedly

¹ In Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974), the Supreme Court noted that the New York Times rule calls for “clear and convincing proof that the defamatory falsehood was made with knowledge of a falsity or with reckless disregard for the truth.”

defamatory statements about them. Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971). In Monitor Patriot Co. the Supreme Court stated:

And if it be conceded that the First Amendment was “fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people,” [citation omitted], then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.

Monitor Patriot Co., 401 U.S. at 271-72.

While the standard enunciated by the Supreme Court in New York Times and its progeny developed in libel actions, the standard also applies to statutes authorizing penalties for violation of election laws that limit campaign speech:

Although the state interest in protecting the political process from distortions caused by untrue and inaccurate speech is somewhat different from the state interest in protecting individuals from defamatory falsehoods, the principles underlying the First Amendment remain paramount.

Brown v. Hartlage, 456 U.S. 45, 61 (1982). In Vanasco v. Schwartz, 401 F. Supp. 87 (E.D.N.Y. 1975) (affirmed 423 U.S. 1041 (1978)), Riccio, a political candidate who lost an election to Ferris, complained to the New York State Board of Elections that Ferris had misrepresented Riccio’s voting record in a handbill distributed prior to the election. The statute at issue, which was somewhat similar to Montana’s, provided:

No person, . . . during the course of any campaign for nomination or election to public office . . . shall . . . engage in or commit any of the following:

Misrepresentation of any candidate’s position including, . . . misrepresentation as to political issues or his voting record . . .

Vanasco, 401 F. Supp. At 101. The court found the statute unconstitutional because it did not include the New York Times actual malice mental state requirement. The court also noted that proof by “clear and convincing” evidence is a constitutional requirement,

and a standard of proof requiring only “substantial evidence” would be insufficient. Vanasco, 401 F. Supp. At 99.

It is important to note that the “clear and convincing” standard of proof is a “more exacting measure of persuasion” than the standard burden of proof by a preponderance of the evidence in typical civil actions. John W. Strong, et al., *McCormick on Evidence* § 340 at 575 (4th Ed. 1992). Moreover, the “actual malice” standard requires application of a subjective, rather than an objective test. In St. Amant v. Thompson 390 U.S. 727 (1968), the Supreme Court considered a case where a political candidate (St. Amant) made allegedly defamatory statements about his opponent. The Louisiana Supreme Court applied an objective test of recklessness in finding that St. Amant had violated the “reckless disregard of the truth” standard when making his statements. Rejecting this analysis, the United States Supreme Court held that proof of actual malice requires proof of “an awareness . . . of the probable falsity” of the statement. St. Amant, 390 U.S. at 732. As the Court explained, “reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.” Id., 390 U.S. at 731. See also Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 n. 6 (1974).

Of course, the New York Times standard itself reflects the principle that not all speech made during the course of a political campaign is protected by the First Amendment. The Supreme Court made this clear in Garrison v. Louisiana, 379 U.S. 64, 75 (1964), when it stated:

The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. . . . That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of a known lie as a tool is at once at odds

with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .” Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Thus, while there is no question that speech uttered during political campaigns is entitled to considerable protection under the First Amendment, it is equally clear that candidates are not entitled to deliberately lie, or use “calculated falsehoods” in their campaigns.

The question for resolution in this case is whether the campaign advertisement published by Mary Jo Fox meets the New York Times actual malice standard, thereby constituting a violation of Montana Code Annotated § 13-37-131(1). Upon review of the summary of facts, there is not “clear and convincing evidence” that it meets that standard.

There is no question the letter that appeared in the campaign advertisement was intended to appear to be a reproduction of an actual letter that Mike Cooney sent to the MSSA. There is also no dispute that, unlike the letter that appeared in the advertisement, the actual letter Mike Cooney sent to the MSSA had a different letterhead, was not signed by Mike Cooney, and contained the following sentence, which was omitted from the letter that appeared in the advertisement: “I hope that you will take into account my past 16 years in public office and the strong stands I have taken in support of protecting the Second Amendment.” Thus, the Mary Jo Fox campaign advertisement contained a misrepresentation of the letter that Mike Cooney sent to the MSSA, primarily because it omitted a portion of the actual letter that Mike Cooney sent to the organization.²

² The letter in the advertisement also constituted a misrepresentation based on the other differences between it and the actual letter sent by Mike Cooney—the different letterhead and the signature.

This also amounted to a misrepresentation of a “matter that is relevant to the issues of the campaign,” despite candidate Mary Jo Fox’s contention that the omission of the last sentence was irrelevant. In her written response to the complaint, Ms. Fox contends that the purpose of her advertisement was to demonstrate that Mike Cooney was unwilling to answer the MSSA’s questions regarding the Second Amendment. She states her advertisement was not intended “to make a judgment about Mr. Cooney’s stand on gun rights;” however, those contentions are contradicted by the content of the advertisement itself. As reflected in Fact 2, the heading of the advertisement asked the question: “Where do the Senate candidates stand on gun rights?” The omission from the letter of the sentence describing Mike Cooney’s past support of the Second Amendment was obviously significant, particularly when the text immediately following the letter is considered: “Excuses like that don’t fly in Montana. Mary Jo Fox will defend the Second Amendment before Election Day and always.” [Emphasis added.] While part of the advertisement’s message was that Mike Cooney refused to respond to the MSSA’s questions, another part of the message was that Mary Jo Fox was a strong supporter of the Second Amendment. Omission of the last sentence in the Mike Cooney letter portrayed in the campaign advertisement may have left the reader with the impression that Mike Cooney had no position on the Second Amendment, when in fact he contended that he historically had been a strong supporter of the Second Amendment.

Regarding Mary Jo Fox’s mental state, given her explanation of the sequence of events that led up to publication of the advertisement, the evidence is less than “clear and convincing” that she misrepresented a matter that was relevant to the issues in the campaign with knowledge that the assertion was false or with reckless disregard of whether or not the assertion was false.

Mary Jo Fox reviewed the text of the letter that Mike Cooney had sent to the MSSA when it was e-mailed to her by Gary Marbut. Mr. Marbut’s e-mail states that the

text was “pasted” into the body of the e-mail message. Although the e-mail mentioned that an actual letter had been faxed to the MSSA, Mr. Marbut did not provide Ms. Fox with a photocopy of the letter that Mike Cooney had faxed. Ms. Fox then came across what appeared to her to be a similar letter Mike Cooney had written to the Coalition. She attempted to verify, and believed she did verify, that the substantive text of the letter Mike Cooney sent to the Coalition was identical to the letter he sent to the MSSA. She assumed (incorrectly) that, like the letter Mike Cooney sent to the Coalition, the letter he sent to the MSSA would have the same letterhead and include his signature. Ms. Fox used the Mike Cooney letter to the Coalition as a template for the Mike Cooney letter to the MSSA that she included in her campaign advertisement. Having previously reviewed the text of the letter e-mailed by Gary Marbut, Ms. Fox was aware that Mr. Cooney’s letter to the MSSA contained a sentence that was not included in his letter to the Coalition. Ms. Fox contends, however, that she did not realize the last sentence was missing from the letter that appeared in the advertisement until after the advertisement was published and after she had received a copy of the complaint.

As noted previously, the standard for actual malice is subjective, and there is insufficient evidence that Mary Jo Fox had an “awareness . . . of the probable falsity” of the representations in the advertisement, or that she “in fact entertained serious doubts as to the truth” of the publication. St. Amant, 390 U.S. at 731 and 732. While she clearly was negligent, perhaps even grossly negligent, in failing to carefully check the advertisement for accuracy prior to causing it to be published, negligence falls short of the requisite New York Times standard of actual malice. Parisot v. Argenbright, Montana First Judicial District, Cause No. CDV-96-1555 (June 2, 1997).

Given the high bar established by the United States Supreme Court in New York Times and subsequent decisions, and the Court’s consistent recognition that First Amendment free speech rights are paramount in political campaigns, I have concluded

that there is insufficient evidence in this case to prove a violation of Montana Code Annotated Section 13-37-131(1).

CONCLUSION

Based on the preceding Summary of Facts and Statement of Findings, there is insufficient evidence to pursue a civil prosecution based on allegations that Mary Jo Fox violated Montana campaign finance and practices law.

Dated this _____ day of December, 2003.

Linda L. Vaughey
Commissioner