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First Amendment Law Comment

Stay informed on the laws that affect your business

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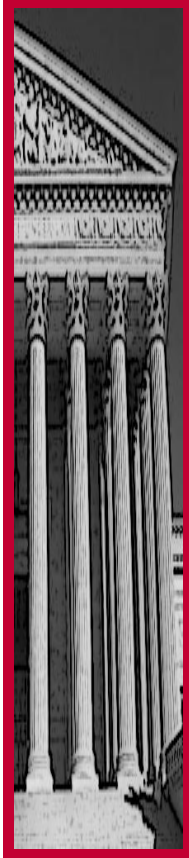

INTERNET

Hyperlink does not constitute republication of defamation

by Patrick Ogilvy
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BLOG VERSION

A U.S. District Court in Florida has determined a news article including a hyperlink to another article found to contain defamatory content did not constitute republication of the defamatory content, and accordingly, the publisher of the article containing the hyperlink was not liable for defamation.

The news articles in question

A prominent attorney licensed in several states and his former spouse were engaged in highly contentious child custody and support proceedings involving fourteen days of court hearings in an Ohio court. The magistrate judge presiding over the hearings issued a more than 90-page decision, including findings the attorney had engaged in inappropriate touching of his child based on evidence presented by the child's pediatrician and a social worker. Although the magistrate judge acknowledged the attorney denied touching his child, the magistrate judge also noted the attorney refused to answer questions from Children Ser-

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LIBEL

Defamation case dismissed when subject was not named

by Laura Mallory
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Allegations of sexual assault led to a published headline and accompanying news article, which a college professor alleges defamed him. Due to the general description of the alleged wrongdoer, an Illinois appellate court affirmed the dismissal of the professor's defamation complaint.

The professor taught at a prominent university in Illinois and was accused by one of his freshman students of sexual assault and harassment. The student claimed she attended an event with the professor and then dinner afterwards. Despite the student being under the age of 21, the professor allegedly ordered wine for both of them. The student also alleged the professor then took her to multiple bars and the professor's apartment, where he continued to insist she drink alcohol.

The student alleged the professor took sexual advantage of her in her intoxicated state. The next

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Newsroom Alert—First Amendment Law Blog

Are you familiar with the laws and regulations that affect news gathering and reporting? As editor of First Amendment Law Comment and blog, my goal is to provide you with updates on cases in areas such as libel, privacy, and access to government information. ***Newsroom Alert***, King & Ballow's First Amendment blog, provides you with updates on issues that may affect you and your company. Add the RSS feed below to subscribe to the blog and receive updates as they become available.

COPYRIGHT

Copyright Act preempts state law privacy claims

by Sean McLean
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A former professional wrestler sued the group of sports television networks known collectively as ESPN in a Missouri state court for their re-telecast of his wrestling performances. The wrestler claimed that ESPN failed to obtain his consent to the use of his identity, likeness, name, nick name, or personality to depict him in any way.

As such, the wrestler asserted the following four state law claims against the networks: (i) invasion of privacy, (ii) misappropriation of name, (iii) infringement of the right to publicity, and (iv) interference with prospective economic advantage. After getting the case to federal court, ESPN responded with a request to dismiss the wrestler's claims on the grounds that they are preempted by the Copyright Act, due to the network's ownership of the wrestling film copyrights. The federal trial court dismissed the case and the wrestler appealed.

Copyright subject matter

The Copyright Act defines the subject matter of a copyright generally as original works of authorship fixed in any tangible medium of expression from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include motion pictures and other audiovisual works.

The court quoted the Copyright Act: "A work is fixed in a tangible medium of expression when its embodiment in a copy or phonorecord is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."

Rights under Copyright Act

The Copyright Act gives copyright owners exclusive rights to do and to authorize among other things, the reproduction of the copyrighted work in copies or phonorecords; the preparation of derivative works based upon the copyrighted work; the distribution of copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or be rental, lease, or lending; and the display of certain copyrighted work publicly.

The U.S. Court of Appeals in St. Louis found that the filming of the wrestler's wrestling performances clearly generated an original work of authorship that was fixed in a tangible medium of expression and could be perceived, reproduced, or otherwise communicated. Therefore, the films were within the subject matter of the Copyright Act.

Furthermore, the wrestler's likeness could not be detached from the copyrighted performances that were contained in the films and was not used in an advertisement to promote commercial products without his permission. Accordingly, the court held that the Copyright Act preempted the wrestler's state law claims, which meant that those claims were properly dismissed.♦

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LIBEL

Reporting on matter of public concern cannot support defamation claim if the defamation is only implicit

BLOG VERSION

by Andrew Coffman
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An economics professor was quoted in a *New York Times* article as saying slavery "was not so bad -- you pick cotton and sing songs." The article, titled "Rand Paul's Mixed Inheritance," was about libertarianism. It also quoted the professor as saying Woolworth's had the right to exclude blacks from its lunch counters because "no one is compelled to associate with people against their will."

Unsurprisingly, the economics professor filed suit against the Times and its reporters for defamation. The professor filed his case in a Louisiana federal court. Perhaps more surprising is that the economics professor actually admitted he made the statements at issue. Thus, instead of arguing that the reporting of the statements was false, the economics professor argued that the statements were reported out of context and falsely painted him as a racist.

The *Times* moved to dismiss the case under Louisiana's anti-SLAPP statute. In its decision to dismiss the case, the court held, "Perceptions about [the professor's] notions of race related issues were largely fueled and published by [the professor] himself. In this regard, [the professor] cannot complain about resulting perceptions of insensitivity and levity on serious issues like slavery."

However, the basis for the court's decision was not that the professor brought this derision on himself. Instead, the court determined that even if the statements might imply some defamatory meaning, it was valid.

The Court held that under Louisiana law, defamation by implication was valid only if the alleged defamation was about a private party and about a private matter. In this case, the matter was one of public concern and thus was not capable of supporting a defamation claim.♦

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vices or the Sheriff's Department, and refused to answer questions on the subject during the hearings. The attorney appealed the magistrate judge's decision, but the Ohio Court of Appeals rejected the attorney's claims of error.

Ohio to Minnesota to Arizona

Sometime later, a Minneapolis lifestyle publication published an article referencing the attorney's alleged sexual abuse of his child, stating "Turns out, gays aren't the only ones capable of disturbing, criminal sexual behavior – apparently even conservative straight guys . . . can turn out to be total creeps." The author of the article explained he based the article on his review of an opinion by the Ohio Court of Appeals and used the word "criminal" because he understood the conduct described in the opinion about the attorney constituted "criminal" behavior.

Several months later, a Phoenix newspaper published an article about the attorney and the findings by the magistrate judge and court of appeals regarding the attorney's conduct. The Phoenix newspaper article also contained a reference and a hyperlink to the Minneapolis lifestyle publication article.

The same newspaper later published another article stating the attorney was under investigation by the Arizona Bar Association. Based on these articles, the attorney sued the publications and the authors in a Florida federal district court for defamation.

Regarding the article by the Minneapolis lifestyle publication stating the attorney engaged in "criminal" behavior, the district court found this statement could reasonably be viewed as implying the attorney had been convicted of a crime, which he had not. Accordingly, the court determined the attorney was entitled to a trial on his defamation claim against the Minneapolis publication and author.

Hyperlink not enough

The Phoenix newspaper article, however, made clear throughout it was referring to the decisions by the magistrate judge and Ohio Court of Appeals, which were both true. As such, the Phoenix newspaper made no defamatory statement.

The attorney then claimed the Phoenix newspaper should also be held liable for any defamation committed by the Minneapolis publication because the Phoenix newspaper article hyperlinked to the Minneapolis publication article. The district court rejected this argument, finding no support from any prior cases for the contention a hyperlink to a previously published defamatory statement constitutes republication of the statement.

The district court also found the attorney, who conceded to being a public figure, could not establish any of the publications had actual malice in publishing statements about him. In particular, the court noted the attorney had a fundamental misunderstanding of the type of "actual malice" at issue in defamation cases.

A defamation claim involving a public figure requires a showing the publisher knew or had reckless disregard for whether the published statements were false to prove actual malice. The attorney, on the other hand, repeatedly claimed the publications and authors sought to "maliciously smear and destroy the reputation and credibility of" the attorney and described how the articles "drip with malice and bitter intent."

The district court found no amount of repeating the word "malice" could overcome the constitutional actual malice requirement of knowledge of or reckless disregard for falsity of the statements. Therefore, the court dismissed the entire case.♦

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day, she reported the incident to another professor. The student filed a lawsuit against the college, asserting the school committed various discriminatory and retaliatory acts.

A report of rape

A newspaper published a story about the lawsuit against the school, with the following headline: "Student allegedly raped by professor suing [university]." While neither the student nor the professor was identified by name in the article, the article summarized the student's allegations. The newspaper article was later published on two news media's webpages.

The professor filed a complaint against the newspaper and the two other news outlets, alleging defamation resulting from the headline which used the word "rape." The professor argued the student never alleged she had been raped and the use of that word in the headline defamed the professor. All three news media moved to dismiss, and all three motions were granted. The professor appealed.

The lower court held that the alleged defamatory statement contained in the headline was susceptible to an innocent construction, as a reasonable person could interpret the headline to refer to someone other than the professor. The court also found that the headline was a fair summary of the student's complaint.

In order for a claimant be to successful on a defamation claim, he must present facts showing that the media made a false statement about the claimant, the statement was not privileged, was made to a third party, and the statement caused damage.

The innocent construction rule

The appellate court agreed with the lower court that the headline was capable of innocent construction, meaning it could reasonably be interpreted that it referred to someone other than the plaintiff. As a general rule, when applying the innocent construction rule, a newspaper headline and the accompanying article must be read together.

The appellate court carefully examined the article, which only referenced a tenured professor who taught a philosophy class. The professor's name was never used or any other identifying information. In order to specifically identify the professor, a reader of the articles would have to examine the student's complaint. However, the complaint was not referenced in or attached to the article.

Therefore, the appellate court agreed with the lower court that it is reasonable for a third person to believe the articles pertained to someone other than the professor. It is important to note that most states do not follow the innocent consideration rule that applies in Illinois.♦

"Jailbird"- Historically speaking, punishment for a crime has come in a variety of forms, but until most recently, one shared by most societies was public display. From the stockades to the guillotines, public punishments were events for all to see, serving as both deterrent and social gathering. At one time, it was common practice to imprison thieves and robbers in large iron cages, hung slightly above the ground level for all to see. It was from this particular punishment that the word "jailbird" was coined, playing off the obvious resemblance of the criminal to a bird in a cage.

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