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DEFAMATION CLAIMS AND RECENT APPELLATE DECISIONS

By Tessa M. McEllistrem

Throughout the years, there has been significant litigation regarding claims of defamation. However, defamation per se and the issue of public figures has always caused great contention. Most of that can be contributed to the fact that there has been little case law regarding these issues to clarify the standards set forth in defamation claims. However, the Minnesota Supreme Court and Court of Appeals have recently come out with significant decisions to help clarify standards at issue regarding claims of defamation.

Maethner v. Some Place Safe, Inc., et al

One case that helped significantly to clarify issues regarding defamation per se was *Maethner v. Some Place Safe, Inc., et al.*, 817-0998 (Minn. 2019). In this case, Curt Maethner had been married to Jacqueline Jorud, but divorced in 2010. During the divorce, Jorud became a client of Some Place Safe, a non-profit organization that provides services for victims of domestic violence. After the divorce, Jorud began volunteering with Some Place Safe and speaking at community events about her experience as a survivor of domestic violence. In 2014, Jorud received a survivor award from Some Place Safe and several local newspapers published this information. The articles did not mention Maethner by name, nor did they ever state that any domestic violence experienced by Jorud was during her marriage to Maethner. However, Maethner alleged that Jorud defamed him and sued both Jorud and Some Place Safe for defamation. He argued that because damages may be presumed because the statements accuse him of criminal behavior or moral turpitude, it would fall under defamation per se making damages presumed. The district court had granted summary judgment to Some Place Safe and Jorud on the defamation claims, claiming that a qualified privilege protected the statements and that Maethner had not shown proof of actual damages. The Court of Appeals reversed and remanded.

Case law is quite clear that, under common law, in order to pursue a defamation claim, a Plaintiff must prove: a) a false and defamatory statement about the plaintiff; b) in an unprivileged publication to a third party; c) that harms the plaintiff's reputation in the community. *Weinberger v. Maplewood Review*, 668 N.W.2d 667 (Minn. 2003). A qualified privilege can be overcome if there is a showing that a statement was made with malice. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910 (Minn. 2009). Malice is defined as a statement "from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff." *Stuempges v. Park, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980). Further, to satisfy the actual malice standard, a statement must be "made with the knowledge that it was false or with reckless disregard of whether it was false or not." *Weinberger,* 668 N.W.2d at 673.

The court first turned to the issue of damages in which Maethner argues that he is entitled to recover for damages for his emotional distress. The court held that emotional harm damages "are insufficient in themselves to make the slander actionable, but once the cause of action is made without them, they may be tacked on as 'parasitic' to it." *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 27 (Minn. 1996). The court found that because Maethner has conceded that he did not believe the statements have any impact on his reputation, the reputational harm requisite of a defamation claim failed unless Maethner

Firm Announcement

Welcome to **Jordan D. Sisto** who has joined JLO as an Associate.

Jordan received his J.D. from Mitchell Hamline School of Law in St. Paul, Minnesota.

Jordan is assisting clients in the areas of Civil Litigation.

can recover presumed damages under a defamation per se standard.

In cases of defamation per se, "the common law allowed harm to reputation to be presumed." *Richie,* 544 N.W.2d at 25. The Supreme Court noted that, on claims of defamation per se, such claims are actionable without proof of actual damages. *Stuempges*, 297 N.W.2d at 255. The Court in *Maethner* noted that there is a fine balance between protecting one's personal reputation without chilling the constitutional guarantees of the 1st Amendment. The Court found that when speech does not involve matters of public concern, permitting the recovery of presumed damages "absent a showing of actual malice does not violate the 1st Amendment." *Maethner*, *citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). Accordingly, the Minnesota Supreme Court stated that the inquiry must revolve around whether the matter at issue is one of public concern. Accordingly, a private plaintiff may not recover presumed damages in claims of defamation per se involving a matter of public concern *unless* the plaintiff can establish actual malice. However, the court noted that what can be considered a matter of public concern has not been well defined. Ultimately, the Court in *Maethner* held that "whether speech involves a matter of public or private concern is based on a totality of the circumstances," and that courts should look at the entirety of the circumstances of the speech, which would include what, where, and how a statement was made. *Maethner, citing Snyder v. Phelps*, 562 U.S. 443 (2011). The Supreme Court noted that the district court did not specifically decide whether the statements involved in this case were a matter of public concern and, therefore, remanded it to the district court to make that determination prior to going forward on a defamation per se analysis.

McGuire v. Bowlin

The next big Supreme Court decision this year is the case of *McGuire v. Bowlin*, 932 N.W.2d 819 (Minn. 2019). This case discusses the boundaries of when a person can be considered a public official within the meaning of defamation claims. In this case, McGuire was the head coach of a girls' basketball program for Woodbury High School. At some point, players of the team had concerns about McGuire's conduct and alleged that he swore, flirted with players, and inappropriately touched players. McGuire was then placed on administrative leave from his coaching duties and, ultimately, the school district decided not to renew his coaching contract. Two of the parents then filed maltreatment of minor reports against McGuire with the Minnesota Department of Education, which ultimately concluded that their daughter had not been subjected to maltreatment. McGuire then sued for defamation. The district court granted the defendants' motion for summary judgment, claiming that McGuire was a public official and there was no evidence that defendants "knowingly or recklessly" made a false report. The Court of Appeals upheld that decision and McGuire petitioned for further review.

In this matter, the case specifically turns on whether McGuire is a public official. In the United States Supreme Court decision of *New York Times v. Sullivan,* the Supreme Court held that the 1st Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the 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." *367 U.S. at 279*.

To determine whether an individual's position makes them a public official, there are three criteria one must look to: 1) whether an individual performs governmental duties directly related to the public interests; 2) whether they hold a position to influence significantly the resolution of public issues; and 3) whether they are government employees that have substantial responsibility or control over the conduct of government affairs. *Briton*, 470 N.W.2d 518. The Supreme Court looked at each criteria to determine if McGuire fell into any of these categories. As to the first issue, the court held that McGuire's duties as a basketball coach did not relate to "the core functions of government, nor did they impact a substantial portion of the public at large." *McGuire*, 932 N.W.2d at 825. As to the second criteria as to whether McGuire held a position to influence the resolution of public issues, the court held that McGuire's position did not have that ability and this element was likewise not satisfied. *Id.* Finally, the court held that McGuire did not have, or appear to the public to have, responsibility or control over the conduct of government affairs. Accordingly, the court ultimately held that McGuire was not a public official and that the district court erred when it granted summary judgment on that basis. This case is important because it helped to further clarify what actually constitutes whether one is considered a public official within the defamation realm.

Olson v. Lesch

The final case decided by the Court of Appeals is that of *Olson v. Lesch*, 931 N.W.2d 832 (Minn. App. 2019). In this matter, John Lesch was a State Representative and Lindsay Olson was the St. Paul City Attorney. When a new Mayor of St. Paul was elected in January of 2018, Lesch wrote a note congratulating the Mayor, but expressed reservations about appointing Olson as St. Paul City Attorney and claiming she was not fit for office and had committed prosecutorial misconduct in the past. Olson filed a lawsuit against Lesch for defamation per se, and Lesch claimed he was entitled to legislative immunity. The Court of Appeals, by first explaining the background and purpose of legislative immunity, held that it follows the speech and debate clause of the Minnesota Constitution, which is used to protect legislators "from intimidation by the executive branch and accountability before a possibly hostile judiciary." *Olson*, *citing United States v. Johnson*, 383 U.S. 169 (1966). The court noted that the speech and debate clause immunity extends to matters that are within the "sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367 (1951). The Court of Appeals also looked at Minn. Stat. § 540.13, which states that "no member, officer, or employee of either branch of the legislature shall be liable in a civil action on account of any act done in pursuance of legislative duties." *Id.* The Court of Appeals noted that the statute likewise applies to the same scope of activity which is within the sphere of legitimate legislative activity. *Olson*, 931 N.W.2d at 837.

Accordingly, the court held that the letter written by Lesch, while on his official letterhead, was not legislative activity because it predominantly discussed Lesch's dislike of the new St. Paul Attorney. The court noted that there was nothing in the record to establish that Lesch had any business before the legislature pertaining to the Mayor or St. Paul and that the letter appeared to be more personal in nature rather than legislative. The court further found that there was no evidence to indicate that Lesch's letter "was essential to deliberations occurring in the legislature or part of the deliberative process." *Id.* Accordingly, the court ultimately held that the letter was not a legislative act and there was no immunity.

These recent decisions help clarify some of the more ambiguous issues that result in defamation claims. These decisions will help to establish defenses when working with similar issues that routinely come up in defending against defamation claims. It will be interesting to see how the landscape continues to change in the realm of defamation, as more and more cases continue to further clarify issues of immunity, public official status, and what damages must be established for claims of defamation. For now, we at least have some additional insight into immunities and other defenses available against these claims.

Newsflash

In *Kedrowski v. Lycoming Engines,* A17-0538, 2019 WL 4282016 (Minn. 2019), the Minnesota Supreme Court reversed lower court decisions excluding an expert's testimony and granting judgment as a matter of law. In overruling the decisions, the Supreme Court found that excluding the expert's full testimony was overbroad. The relevant factual history is as follows: Mark Kedrowski, was involved in a crash of his personal aircraft when it lost power. He retained expert Donald Sommer who systematically tested all of the parts of the aircraft engine and found that the only part with defects was the fuel pump manufactured by Lycoming. Respondent challenged Mr. Sommer's foundation, because a flow-bench test that he used in his analysis was faulty. The lower courts were persuaded that, because the test was faulty, his entire opinion lacked foundational reliability and was inadmissible. In review, the Supreme Court agreed that the test done on the engine did lack foundational reliability. However, it overturned the rulings of the lower courts with regard to the wholesale exclusion of the testimony citing *Sorrels v. NCL (Bahamas) Ltd.,* 796 F.3d 1275, 1281 (11th Cir. 2015) which held that "where a portion of proffered expert testimony is reliable, wholesale exclusion can constitute and abuse of discretion." Here, Mr. Sommer's expert opinion was based on substantially more than the specific inadequate test, namely he "testified that his opinion was also grounded on his differential analysis—the complete disassembly of the engine, down to its nuts and bolts, [etc…]" *Kedrowski*, 2019 WL 4282016 at *9. The Supreme Court was not persuaded that an individually inadequate test tainted the expert testimony as a whole, because other portions of the analysis provided an independent basis for the opinion. *Id.* at *11. The court noted that, even where there are disputed facts, reliability of expert testimony is the province of the jury. *Id.* at *12. Therefore, the lower courts abused their discretion in excluding the whole testimony and awarding judgment as a matter of law. Thus, the decisions were reversed and the cause of action remanded for further proceedings allowing the jury to weigh the credibility of the expert opinion and render a verdict thereupon.

Jardine, Logan & O'Brien, PLLP Law Clerk and Mitchell Hamline student aims to use law degree to help people in parents' homeland of Liberia

BY TIM POST

Mitchell Hamline student Nikita Luyken's career goal is to help people in the West African nation of Liberia, the country her parents left in the late 1980s to escape civil war. Luyken is on her way to earning the real-world skills needed to fulfill that dream through the clerkships she's taken while attending law school.

The third-year student just started a position at Jardine, Logan, & O'Brien, a law firm in Lake Elmo, where she'll work on a wide range of assignments from business litigation to civil rights.

That move comes after she spent more than a year working in the St. Paul City Attorney's Office. The clerkship, which she started in the summer of 2018, had her doing the real work of a lawyer representing the St. Paul Public Housing Agency—handling first appearances, attending motion hearings, doing legal research, and communicating daily with clients. "It's pretty unique to be able to act as an attorney while you're still in law school," she says, noting that the clerkship was hard but fulfilling work. "At the end of the day we're maintaining homes and providing homes for people who otherwise wouldn't have a place to stay."

Luyken's desire to help others was inspired by the work of her mother, who set up a nonprofit to support disadvantaged youth in Liberia after leaving her home country and settling in the U.S. The non-profit gathers and sends food, medicine, and water sanitation equipment to Liberia. Luyken's mother has traveled back and forth from the U.S. to West Africa over the years to coordinate delivery of those supplies.

Luyken isn't waiting until she graduates to help people in need. When she's not studying or working as a legal clerk, Luyken helps low-income families prepare their taxes through Prepare + Prosper, a St. Paul-based nonprofit. She also works to encourage friends, family members, and other people in the Liberian community in the Twin Cities to pack relief supplies to be sent to Liberia.

Whether it's through volunteering, or the work she's doing as a law clerk, Luyken says she wants to help those in need. "The sky is the limit in law school," she says. "You have a platform to be able to make an impact on a lot of peoples' lives. Use that platform for something good. Use that in the community to make it better."

Luyken is a full-time student at Mitchell Hamline now, but she started in the part-time program. At the time, her mother was in Liberia and Luyken had to work while going to law school. She said she's grateful for the flexibility of the part-time program that allowed her to do that. During her 2L year, her mother returned to the U.S., and Luyken switched to the full-time program and also started working as a law clerk.

Luyken expects to graduate in the spring of 2020. She's not sure what she'll do after graduation but hopes to become a litigator while keeping her eyes on the ultimate goal of someday starting her own firm in Liberia.

"I definitely want to try to do my best to give back to the place where my parents came from," she says.

This article was originally written by Tim Post as a Mitchell Hamline advertisement. Reprinted with permission.

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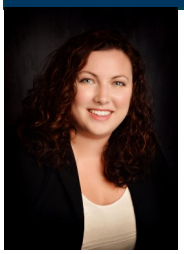
About the Author



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About the Firm

Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, Iowa, and Montona our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients.

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