InfoLaw

By: Jack Greiner on October 18, 2016 on graydon.law

This periodic service from Graydon's Media & Marketing Industry Group provides quick updates on what's happening in the worlds of E-Commerce, Communication, Information, and IP Law.

New York Times Favored in Trump Battle

The New York Times ran an article on October 12 quoting two women who claim to have been touched inappropriately by Presidential candidate Donald Trump. Trump's lawyer, Marc Kasowitz, fired off a letter to the Times that very same day, contending the article constituted "libel per se." The letter closed with the following demand: "[i]mmediately cease any further publication of this article, remove it from your website, and issue a full and immediate retraction and apology." If those demands aren't met, the letter promises to "pursue all available actions and remedies."
Judging from the New York Times response in which its lawyer David McCraw said the Times "would welcome the opportunity to have a court set [Trump] straight" it appears there is going to be no apology, retraction or removal from the website.

So, in the event Trump is not bluffing, and proceeds with a libel suit against the Times, the question is how will he come out? The answer is, in all likelihood, to use one of Trump's favorite words, the lawsuit will be "a disaster." For several reasons.

The first reason is the product of Trump's mouth and a live mic. As the Times points out in its letter, "Mr. Trump has bragged about his non-consensual touching of women. He has bragged about intruding on beauty pageant contestants in their dressing rooms. . . . Nothing in [the Times] article has had the slightest effect on the reputation that Mr. Trump, through his own words and actions, has already created for himself."

A libel claim seeks recovery for a damaged reputation – but if the report merely affirms conduct the plaintiff admits to, where is the harm to the reputation?

But there is a bigger value here that protects the New York Times – specifically the First Amendment. In the case of *New York Times v. Sullivan*, decided over 50 years ago, the United States Supreme Court ruled a public figure (and certainly a major party candidate is that) can prevail in a libel suit only if the publisher knows the information is false or is

reckless about the falsity. What this means in practical terms is, in this case, the Times was not required to know the women were telling the truth – they just had to not know they were lying. And given the women's accounts in many ways mirrored Trump's own "locker room banter" there's no obvious reason to assume they're lying.

This standard, which the courts call "actual malice" allows anyone to publish "newsworthy information about a subject of deep public concern" (to quote the Times' lawyer). If a newspaper was at risk for publishing this type of information merely because it turned out to be inaccurate, the free flow of important information would be choked off. And while that may suit the interests of different politicians at different times, it would be a terrible consequence for our democracy.

Cert Denied In "Police as Public Figure" Case

I came across an e-mail notification recently that discussed a case in which the United States Supreme Court had denied a certiori petition in the case of *Armstrong v. Thompson*. The ruling means the Supreme Court will not hear the case, and the decision of the lower appeals court will stand. The United States Supreme Court has the discretion as to what cases it wants to hear and which ones it doesn't. Parties who want the Supreme Court file a certiorari petition. And it is then up to the court whether to grant the petition – and hear the case – or deny the petition and decline to take it.

It was interesting to me because one of the key cases the petitioner relied on was a case I argued several years back in the Sixth Circuit Court of Appeals.

The issue in the Armstrong case was whether the court correctly ruled a "low level" police officer was a "public figure." The distinction is important. If any police officer is a public figure, then that officer is going to have to satisfy the actual malice standard to prevail in a libel suit. That standard requires the plaintiff to establish by clear and convincing evidence that the publication was not only false and defamatory, but the defendant published it knowing it was false or with reckless disregard for the truth or falsity.

In the Sixth Circuit's opinion in my case, the majority questioned whether the Ohio case law — which states all police officers are public figures — is the correct legal position. Interestingly, the plaintiff in that case never contested his status as a public figure. And because he convinced a jury the offending story had been published with actual malice, the issue was moot.

In the Armstrong case, the DC state court of appeals applied a per se rule, and found that

the plaintiff — who described himself as a "low level" law enforcement officer — was a public figure.

In his cert petition, Armstrong noted the states and federal courts have adopted four approaches on this issue. Some apply the per se rule — any cop is a public figure. Others find an officer with any supervisory role qualifies. A third approach, adopted by some states, finds officers "wielding general power and exercising broad discretion" are public officials for all purposes. Finally, some states apply the standard that Armstrong advocates — the plaintiff's status as a police officer does not influence the determination at all. If a police officer does not have substantial responsibility over the conduct of governmental affairs that officer is not a public official.

But Armstrong may have overreached. He framed his argument such that he asked the court for a rule that "low-level law officers are not "public officials." He asked the court to replace the "blanket rule" that all police officers are public figures. But he essentially asked one blanket rule (they **always** are) be replaced with a different blanket rule (they **never** are). He may have been better off with simply asking for a ruling that eliminated the blanket rule that all police officers are public figures.

As it stands, the law remains subject to the vagaries of the state where the case is filed. Which means, if you're a cop contemplating a libel suit, a little pre-suit research may be in order.

The Latest from Jack "Out of the Box"

Here are a few of the latest Jack "Out of the Box" updates:

Trumping Prior Restraint