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New Jersey Supreme Court: Sloppy Journalism Is Not Malice

By Bruce S. Rosen and Kathleen A. Hirce – September 25, 2012

In a strong expression of actual-malice protection, the New Jersey Supreme Court has held that an editor's mistake made under deadline pressure was sloppy journalism, but it did not amount to a reckless disregard for the truth.

In a 5–2 opinion, the court affirmed the appellate division's decision granting summary judgment to the weekly tabloid *Nutley Sun* and its parent, North Jersey Media Group, Inc. *Ronald Durando and Gustave Dotoli v. The Nutley Sun and North Jersey Media Group, Inc.*, 209 N.J. 235 (2012). The defendants had argued that the editor's shoddy editing was based on his hectic schedule and his failure to understand the difference between a criminal prosecution and a civil securities case. The decision emphasizes that mistakes made by defendants due to hasty editing while managing multiple responsibilities are insufficient to meet the actual-malice threshold.

Almost as importantly, the decision bolstered the use of summary judgment in actual-malice cases by placing the burden on plaintiffs to show that the editor's version of events was "unworthy of belief."

The case involved a news story about civil charges brought by the Securities and Exchange Commission (SEC) against two Nutley, New Jersey, men for their alleged involvement in a $9 million penny stock "pump-and-dump" scheme. After North Jersey Media Group's *The Record* correctly wrote about the civil suit, Paul Milo, the editor at the *Nutley Sun*, one of North Jersey Media's (NJMG) weeklies, reprinted the story, cut the bottom three paragraphs to fit, and rewrote the headline. On deadline the next night, Milo inaccurately wrote a headline as part of a front-page teaser reporting that two local men had been arrested in a stock-fraud case. The teaser appeared on the cover of a promotional issue.

Although the men had been charged with illicit stock manipulation in the SEC's civil complaint, they were not arrested. Their names did not appear in the teaser.

The actual news story, which appeared on page 11, identified the men but explained that they were the subject of a civil complaint. There was no mention of arrests.

Milo acknowledged the headline error, and the newspaper agreed to run a front-page retraction, but the plaintiffs filed a libel suit before it was published.

While it quickly became apparent that the plaintiffs had no reputational damages, they hammered on Milo's credibility. The plaintiffs had alleged that NJMG had acted with malice because the headline was meant to grab attention in a promotional issue. They also argued that Milo's answers at his deposition created credibility issues that should be decided by a jury. But Milo's deposition failed to probe into his routine the night of publication and other issues.

Instead, he was asked the ultimate question of whether it was "possible that [he] entertained serious doubts as to whether or not [the plaintiffs] had been arrested?" Milo answered, "It's possible, but I don't remember," echoing his consistent responses that he did not recall specifically what happened on publication night. He maintained that he did not realize he had made a mistake until he was contacted by the plaintiffs' counsel. The plaintiffs also alleged that the defendants' counsel coached Milo during the lunch break to clarify his answer, which should create an inference against his credibility.

The court gave short shrift to the coaching allegations. Instead it examined the evidence and a certification submitted by Milo, which stated that, while he had no recollection of the error, he would not have subjected himself to professional ridicule by making such a mistake.

The certification detailed Milo's extensive work schedule, which included reading hundreds of pieces of news and correspondence each week, culminating in a late Tuesday-night deadline.

The court essentially concluded that, "[g]iven the heightened protections for free speech and a free press under the actual malice standard," "Plaintiffs' case can go forward only if, reviewing the entirety of the record in the light most favorable to them, Milo's professions are unworthy of belief."

The majority opinion, written by Justice Barry Albin, reiterated New Jersey's application of actual malice to matters of public concern. It echoed the federal standard from *Garrison v. Louisiana* that reckless disregard requires a showing that the defendant made the statement with a "high degree of awareness of [its] probable falsity," which is a much more stringent standard than whether an editor "should have known" or "should have doubted," a published statement. Actual malice, the court explained, "will shield careless acts of publication that would be considered irresponsible by common journalistic standards." In emphasizing this point, the court explained that "clumsy editing" and mistakes made in haste and on deadline are "insufficient to meet the actual-malice threshold" principle the dissent decried.

Other courts have similarly refused to equate arguably slipshod journalism with actual malice, including *Schwartz v. Worrall Publications, Inc.*, 258 N.J. Super. 493, (N.J. 1992), which Justice Albin's majority opinion here relied on. In *Worrall*, an editor testified that, "in his haste to edit [an] article while managing multiple responsibilities, he pared [the reporter's] text down to make it more readable, without realizing that his snap conclusions had actually changed the story's intended focus[]" and made it incorrect. *Id*. at 502. The plaintiff had not contradicted the evidence, and while the "explanation [did] not excuse the unfortunate result, . . . it also [did] not provide clear and convincing evidence of a reckless disregard for the truth." *Id*. As other courts have noted, with or without the pressure of a deadline, "where there was no reason to doubt the accuracy of the sources used, the failure to investigate further, even if time was available, cannot amount to reckless conduct." *Ryan v. Brooks*, 634 F.2d 726, 733 (4th Cir. 1980).

That media outlets ought not be subject to punishment for their mistakes is rooted in part in the U.S. Supreme Court's recognition in *New York Times Co. v. Sullivan* that "the publication of inaccurate statements is protected by the First Amendment: "'[E]rroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they need . . . 'to survive.'" *Worrall*, *supra*, 258 N.J. Super. at 502–03 (quoting *Sullivan*, 376 U.S. 254, 271–72 (1964)). Courts must maintain this breathing space even more so in today's media climate, where outlets are often functioning on tight deadlines and with fewer resources. It is the unfortunate reality of the news business that, as opportunities for coverage grow and reader and viewer demand increases, the number of reporters and editors available to sift, shape, and publish the vast quantity of material is rarely sufficient. The issues associated with the growing demands of the news business have been long debated by the courts. As the D.C. Court of Appeals presciently noted in 1966:

Verification of syndicated news reports and columns is a time-consuming process, a factor especially significant in the newspaper business where news quickly goes stale, commentary rapidly becomes irrelevant, and commercial opportunity in the form of advertisements can easily be lost. In many instances considerations of time and distance make verification impossible. Thus the newspaper is confronted with the choice of publication without verification or suppression. Verification is also a costly process, and the newspaper business is one in which economic survival has become a major problem, made increasingly grave by the implications of this fact for free debate. We should be hesitant to impose responsibilities upon newspapers which can be met only through costly procedures or through self-censorship designed to avoid the risks of publishing controversial material. The costliness of this process would especially deter less established publishers from taking chances and . . . competition with publishers who can afford to verify or to litigate would become even more difficult.
Washington Post Company v. Keogh, 365 F.2d 965, 972 (D.C. Cir. 1966).

Such policy considerations and the understanding that Milo's mistake should not be equated

with a knowing lie or reckless disregard were crucial to the court's reiteration of the actual-malice standard. While the standard is "difficult to meet," according to the opinion, it can be met if a plaintiff can show a story was fabricated, a product of the editor's imagination, or so inherently improbable that only a reckless person would have put the story into circulation—essentially the standard of *St. Amant v. Thompson*. Additionally, a publisher would not avoid liability if his or her story was so "inherently improbable" that "only a reckless man would have put them into circulation" or where the reasons for doubting a source were obvious.

Thus, the court said that the standard in the case should be whether, from the record, a reasonable jury could conclude that Milo, despite his admitted mistake, entertained serious doubts about the truth of the teaser when he published it. That is, could a reasonable jury conclude that Milo's conduct was so reckless that it "approache[d] the level of publishing a knowing, calculated falsehood?" *See Maressa v. New Jersey Monthly*, 89 N.J. 176, 200, 445 A.2d 376 (N.J. 1982). Milo must have actually doubted the truth of the teaser headline he published. Only if this standard was met would the case go to the jury.

Nevertheless, the majority echoed previous decisions dismissing defamation claims involving negligent editing or writing while correctly warning that these errors caused harm to the credibility of the press. The dissent, written by Justice Helen Hoens and joined by Justice Jaynee LaVecchia, said that the majority's application of the law actually created a new standard that belied those warnings: "The Court today moves the considerable bar that a defamed Plaintiff must overcome ever higher, with the likely consequence that sloppy and unprofessional journalistic practices will become the norm."

Justice Hoens seized on Milo's deposition as raising credibility issues that should have been determined by a jury. She attacked the majority as apologists for shoddy and careless writing, while insisting that the plaintiffs should have received the benefit of all inferences.

"The trial court, the appellate panel, and now a majority of the Court found that the evidence offered by defendant that Milo was 'busy' and 'under time pressure' to be significant and found that his increasingly strong articulations of his belief that his teaser was not accurate to be persuasive," Justice Hoens wrote, suggesting a jury might find that "I was too busy" was merely an excuse for a reckless choice.

Conflating recklessness with actual malice, the justice said the matter should be sent to a jury because it involved a front-page teaser, and the majority failed to weigh the factual assertions in accordance with summary-judgment standards. Justice Hoens argued that teaser headlines should not necessarily be evaluated with the adjacent headline and the news story, but she failed to address the fact that the teaser in this matter did not identify the plaintiffs.

Justice Hoens wrote that there was enough evidence from which a jury could have concluded by clear and convincing evidence that Milo acted with reckless disregard and that the majority and appellate division deprived the plaintiffs of the benefit of inferences to which they were entitled.

"Today's majority opinion creates a new approach, one that will completely shield a newspaper if the author or editor responsible for publishing the defamatory falsehood simply has the presence of mind to say what amounts to magic words," she added. The justice essentially criticized the defense counsel for putting words into Milo's mouth when consulting with Milo at a break in the deposition and when drafting a certification to be submitted by Milo at summary judgment.

The economics of First Amendment cases such as this impact more than just the newsgathering concerns addressed above. It took six years and three separate plaintiffs' counsel, extensive discovery, two summary judgment motions, an appellate argument and two New Jersey Supreme Court arguments to result in a final dismissal.

The trial court initially dismissed the defamation and ancillary claims through summary judgment for failure to produce evidence of sufficient damages, but it then ruled there was sufficient actual malice for the only remaining claim, false light, to go to trial. The trial court ultimately reversed itself, determining that the plaintiffs failed to show sufficient evidence of summary judgment to take the case to the jury.

Following a per curiam appellate division opinion, the matter was argued twice before the New Jersey Supreme Court for unknown reasons, but likely due to changes in the court's membership over time. It was, therefore, fitting that the court used this opportunity to reference its prior jurisprudence, wherein it has consistently indicated that summary judgment "may play an important role in defamation cases" and should be carefully assessed by courts, because "prolonged and expensive litigation" may cause a chilling effect on newspapers.

High litigation costs may chill the reporting of small journals and local newspapers in particular, the court noted, and such publications continue to hold an important place in the state's affairs. Accordingly, the court set forth its now familiar position encouraging trial courts to "'give particularly careful consideration to identifying appropriate cases for summary judgment disposition' in defamation cases against newspapers."

Bruce S. Rosen is a partner and Kathleen A. Hirce is an associate at McCusker, Anselmi, Rosen & Carvelli, P.C. They, along with Jennifer A. Borg and Dina L. Sforza, of the North Jersey Media Group, represented the defendants in this case.