

News & Observer Wrongfully Loses Libel Litigation

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On Aug. 14, 2010, the McClatchy-owned Raleigh News & Observer in North Carolina published part of an award-winning investigative series by reporter Mandy Locke looking to practice by the State Bureau of Investigation in which 51-year-old SBI firearms analyst Beth Desmond was accused by independent firearms experts of unqualified for the job and, more damning, of falsifying evidence in a 2006 criminal trial that led to a murder conviction (Hutchins, 2016). In 2012, Desmond sued The News & Observer for libel. In a rare turn of events, the case went before a jury. This is significant because seven of 10 cases are dismissed in favor of the defendant before getting to trial; however, when a libel case does make it to trial, the plaintiff tends to come out the winner (DeBruyn, 2016). The grounds for the libel suit — naming Locke and The News & Observer as defendants — centered on Desmond’s assertion the article “triggered events that led to her developing post-traumatic stress disorder” (Hutchins, 2016, n.p.). The information came from Locke’s sources (Tucker, 2017). However, those same sources “testified that they were either misquoted or take out of context,” leading Locke to assert her sources were being pressured by colleagues in the firearms analyst community and, therefore, trying to “distance themselves” from the situation (Hutchins, 2016).

On Oct. 18, 2016, the jury awarded a \$1.5 million verdict against The News & Observer and Locke, and the next day the “jury came back with an additional \$7.5 million decision against the newspaper [. . .] as punishment for defaming a state government employee” (Murawski, 2016, n.p.). The putative damages “exceeded North Carolina’s cap on such punishments,” leaving the total amount to be \$6 million (Hutchins, 2016, n.p.). To take it a step further, the jury also awarded Desmond \$75,000 in punitive damages to be paid by Locke personally (Murawski, 2016). This came after an interesting bit of influence by the presiding judge. Prior to their deliberations, Judge A. Graham Shirley II told the jury The News & Observer’s net worth was in

excess of \$248 million (Murawski, 2016). The decision is being appealed (Hutchins, 2016).

This case presents an interesting point of inquiry that relates to research currently being conducted and analyze within Communication Law classes. Libel is a form a defamation, primarily associated with the printed word versus the spoken form that is referred to as slander, that boils down to “the publication of material that would tend to hold one up to hatred, ridicule, contempt or spite” (Hopkins, 2015, p. 94). In this case, therefore, what was reported to have been said about Desmond seems to fit within the definition of libel. The offending article reported, “Independent firearms experts who have studied the photographs question whether Desmond knows anything about the discipline. Worse, some suspect she falsified the evidence to offer prosecutors the answer they wanted” (Locke & Neff, 2010, n.p.). Tucker (2017) says Desmond pointed to 22 different instances of libel throughout the article in question, and in a brief filed by The News & Observer, the 22 instances of alleged libel are labeled “as either not defamatory, factually accurate, not concerning Desmond, opinion, fair reporting or a combination thereof” (n.p.). As Hopkins (2015) points out, “American courts have often noted the value of a good name” (p. 95). Such accusations leveled at Desmond would devalue her name, especially in terms of her professional life. This becomes more pertinent when considering some of the language considered to be warning signs for possible defamation. Specifically, words that “assert incompetence or lack of ability in one’s trade, business, profession or office” (Hopkins, 2015, p. 99). This appears to bolster Desmond’s case. However, the burden of proof rests on the plaintiff, which means Desmond would have needed to prove the statements were false and that actual damages resulted from the publication of such false statements (Hopkins, 2015). If one first considers that actual damages piece, the case appears questionable, especially when one takes into account the level of public concern this report highlights as it applies to validity of evidence

being collected by a governmental agency for criminal court cases. Tucker (2017) reports Desmond still works for the SBI, but she did transfer to the “criminal information and identification section [. . .] in part because the article seemed to imply that her purportedly dubious report was the reason” for the conviction (n.p.). This creates a question about the damages inflicted upon her. The subject of the article clearly held a high level of public concern. The New Mexico Supreme Court, drawing a line where defamation cases could succeed, addresses Desmond’s suggestion of emotional harm brought forth by the coverage by saying, “Evidence of humiliation and mental anguish, without evidence of actual injury to reputation, is insufficient to establish a cause of action for defamation” (as cited in Hopkins, 2015, p. 109). Desmond appears to have transferred under her own volition and is still employed, which would seem to point to a lack of injury. However, the crux of the matter is the accuracy of the report. Under normal conditions, Desmond, just as any private citizen, would only have to prove negligence on the part of Locke in her reporting, which equates to not taking the necessary steps to ensure accuracy (Hopkins, 2015). Locke says the article went through extensive fact-checking prior to publication, which came after she conducted numerous interviews and conducted hundreds of hours of research on the topic of ballistic analysis (Tucker, 2017). It’s basically a “he said, she said” situation. There is another wrinkle that makes the conditions of this case different, though. In working for the government, Desmond would be considered a public official. The bar for public officials to prove libel is much higher. They must prove actual malice, which means proving “knowledge of falsity or reckless disregard for the truth” (Hopkins, 2015, p. 104). Desmond’s suit alleges Locke and The News & Observer did act with malice (Tucker, 2017). Both concepts of knowledge of falsity and reckless disregard for the truth are subjective, though. “The actual malice standard traces back to freedom-of-the press case law

established 50 years ago, designed to encourage free and vigorous debate — particularly about the government” (Tucker, 2017, n.p.). It is difficult to prove, which helps protect the First Amendment from chilling affects (Hopkins, 2015). There appears to be a lack of evidence pointing toward actual malice in this case.

Locke and The News & Observer should not have lost this case, and they should win on appeal. None of the available information concerning this case points to the plaintiff adequately proving actual malice. The excessive nature of the damages that were awarded speaks to the larger issue at hand. Kevin Goldberg, legal counsel to the American Society of News Editors, said, “[J]uries like to rule in favor of plaintiffs and they like to really smack down the media when they have the chance” (as cited in DeBruyn, 2016, n.p.). The jury in this case clearly had an agenda and did not allow for a fair trial. This type of verdict sends a message and can cause news organizations to be overly cautious for fear of legal entanglements they cannot afford to defend. Attorney David Bralow, who has represented numerous libel defendants, said, “I can’t think of a trend that is scarier for the health of our republic. The idea is for our republic to function, we ought to have more speech, not less speech” (as cited in DeBruyn, 2016, n.p.). For this ruling to stand, the judge and jury would both have to be able to prove they know exactly what transpired. They can’t know that as they were not present at the time. Therefore, they have to rely on the facts of the case, and those facts all seem to favor Locke and The News & Observer. Important stories must be covered, especially when it is of grave concern to the public. A case like this can’t be allowed to stand and suppress such journalistic pursuits.

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