

West Virginia Federal Court Dispenses With Pharmacist's Defamation Case Against CBS

By Max Mishkin

A federal judge in West Virginia has rejected a pharmacist's defamation claims arising out of two Peabody Award-winning *CBS Evening News* reports about the opioid epidemic. Granting CBS's motion for summary judgment, Judge Joseph R. Goodwin noted that the plaintiff's pharmacy had "filled eye-popping quantities of pain prescriptions written by reckless doctors," and the court described CBS's reporting as "applaudable." [Ballengee v. CBS Broadcasting Inc.](#), 2018 WL 3999719 (S.D. W. Va. Aug. 21, 2018). The court in its lengthy opinion emphasized plaintiff's failure to come forward with evidence on the basis of which he could meet his burden of proving material falsity.

The Underlying Litigation

Samuel "Randy" Ballengee formerly owned and operated Tug Valley Pharmacy in Williamson, West Virginia. When Mr. Ballengee opened Tug Valley in July 2007, it was located within two blocks of two pain clinics. According to West Virginia Board of Pharmacy records, Tug Valley filled tens of thousands of prescriptions from those pain clinics for controlled substances – mostly hydrocodone – in 2008 and 2009. In late 2009 and early 2010, both of the clinics were shut down by law enforcement, and several of the doctors who worked there later pleaded guilty to federal criminal charges arising out of their prescribing practices.

Starting in 2010, Mr. Ballengee began facing civil lawsuits from several of his own customers, who claimed that Tug Valley negligently filled prescriptions for controlled substances for them while "knowing, or having good reason to know, that [they] were addicted and that the prescriptions were not for any legitimate medical reason and were prescribed by physicians at offices which were widely known in the community as 'pill mills.'" Mr. Ballengee was deposed as part of that litigation in 2011, and he testified that when one of the local pain clinics was at its peak, he had filled "maybe 150 to 200" prescriptions a day for that clinic alone, and that "most" of the pain clinic's patients received pain medication.

Mr. Ballengee and his co-defendants in the negligence cases moved for summary judgment on the ground that the plaintiffs' own "illegal" and "immoral" conduct barred their claims, and the trial court certified that as a question of law to the West Virginia Supreme Court of Appeals. In May 2015, the high court issued its decision in *Tug Valley Pharmacy, LLC v. All*

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Plaintiffs Below in Mingo County, ruling that the customers' lawsuits could proceed. Those cases remain pending.

The Challenged CBS News Reports

In 2016, *CBS Evening News* aired a series of reports about the opioid epidemic in West Virginia, examining the roles that doctors, pharmacists, drug distributors, and others have played in its escalation and the various ways in which state and federal officials are attempting to address the epidemic. In the second of those reports, broadcast in January 2016, CBS reported that Mr. Ballengee was being sued for negligence and that his pharmacy had filled 150 pain prescriptions a day for one clinic alone. After seeing that report, Tug Valley's drug distributor conducted its own review and decided to stop supplying drugs to the pharmacy. In May 2016, CBS reported on a West Virginia lawsuit against that same drug distributor and mentioned its decision to cease doing business with Mr. Ballengee's pharmacy.

In January 2017, Mr. Ballengee sued CBS and three of its journalists for defamation, false light invasion of privacy, tortious interference, and intentional infliction of emotional distress. Mr. Ballengee claimed that CBS falsely reported that he had filled 150 pain prescriptions a day for one clinic alone, and that the broadcasts also conveyed several false and defamatory implications about him, namely that he (1) had been sued by the State of West Virginia, (2) had been criminally charged or was under criminal investigation, and (3) had intentionally acted illegally or immorally or contributed to the opioid epidemic for profit.

Mr. Ballengee alleged that he was forced to sell his pharmacy at a loss as a result of the CBS reports. In his complaint, he demanded \$15 million in compensatory and punitive damages.

In June 2018, CBS moved for summary judgment, principally arguing that everything it had reported about Mr. Ballengee was true. As for the defamation-by-implication claims, CBS argued that, because all of the allegedly false implications arose out of literally true statements, Mr. Ballengee could not make the "especially rigorous showing" required under *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1993). In that case, the Fourth Circuit held that, where a plaintiff alleges defamation by implication arising from true statements, the challenged language itself must (1) "be reasonably read to impart the false innuendo," and (2) "affirmatively suggest that the author intends or endorses the inference." CBS also has argued that Mr. Ballengee was a limited purpose public figure or an involuntary public figure, and that he could not carry the heavy burden of proving that CBS acted with actual malice fault.

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The Court's Decision

Judge Goodwin granted CBS's motion for summary judgment on August 21, 2018, six weeks before trial was scheduled to begin. Without reaching the public figure issue, the court determined that everything CBS had reported about Mr. Ballengee was true, noting in particular that records obtained by CBS during discovery showed that Tug Valley did in fact fill more than 150 pain prescriptions from just one clinic on multiple days.

The court further found that the implications identified by Mr. Ballengee either were also substantially true or were not reasonable interpretations of what CBS had actually reported. For instance, the court held that even if the CBS reports implied that Mr. Ballengee had been sued by the State of West Virginia, the sting of that implication was the same as the undisputed truth that in a lawsuit against several drug distributors, the State characterized Tug Valley as “among the most notorious of the pill mill pharmacies in Southern West Virginia,” and described in detail some of Tug Valley's concerning practices regarding the distribution of narcotics.”

Throwing out Mr. Ballengee's tag-along claims as well, the court concluded that CBS had “thoroughly investigated the opioid epidemic in West Virginia, an epidemic that has greatly harmed the State,” adding that “the people of West Virginia, indeed those all over the country, deserve to know about the evolution of the opioid epidemic and the identities of the bad actors.”

CBS and its journalists were represented by Anthony M. Bongiorno and Naomi B. Waltman of CBS; Michael D. Sullivan, Jay Ward Brown, Celeste Phillips and Maxwell S. Mishkin of Ballard Spahr LLP; and Thomas V. Flaherty and Wesley P. Page of Flaherty Sensabaugh Bonasso PLLC. Plaintiff was represented by James D. McQueen, Jr. of McQueen Davis PLLC and Christopher J. Heavens of Heavens Law Firm PLLC.

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