

Robust Decision from the Southern District of Ohio Rejects Academic's Libel Claims Against The New York Times

By Dana R. Green

In November, a district court in the Southern District of Ohio delivered a significant victory to The New York Times in a libel claim brought by a prominent cancer researcher. [Croce v. New York Times Company](#), No. 2:17-cv-402, 2018 WL 5808786 (S.D. Ohio Nov. 6, 2018). The court's nuanced and thoughtful reasoning creates valuable precedent in the Sixth Circuit for news organizations, especially when reporting on unproven allegations of wrongdoing.

Background

The plaintiff, Dr. Carlo Croce, is a prominent cancer researcher at Ohio State University and a prolific author in the field of cancer genetics. In early 2016, journalists James Glanz and Augustin Armendariz began investigating allegations that Croce's work was marred by data falsification and other scientific misconduct. On March 8, 2017 The New York Times published their resulting article on the front page of its digital version under the headline "Years of Ethics Charges, but Star Cancer Researcher Gets a Pass. Dr. Carlo Croce was repeatedly cleared by Ohio State University (OSU), which reaped millions from his grants. Now, he faces new whistle-blower accusations." The following day, the article appeared on the front page of the print edition, above the fold.

As summarized by the Court:

"[T]he Article describes Dr. Croce as a "prolific" scientist who "parlayed his decades-long pursuit of cancer remedies into a research empire." The Article reports on the "quotient of controversy" which has become attached to Dr. Croce, specifically "allegations of data falsification other scientific misconduct." The claims made by Dr. Croce's critics are recounted, as is Dr. Croce's response denying any wrongdoing. Varying explanations (from critics, Dr. Croce and other observers) are offered for the alleged bad data and errors—ranging from "falsification" to "reckless disregard" to "sloppiness" to "honest errors." The Article reports that Dr. Croce has not been sanctioned for misconduct by any oversight agencies or by Ohio State, which cleared him in at least five cases. The Article raises the concern that Ohio State has a financial incentive to overlook problems with Dr. Croce's work . . .

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Croce alleged that 15 statements in the story were defamatory. He also alleged that Glanz defamed him in a post-publication radio interview and in a letter that Glanz sent to OSU seeking comment on some of the allegations against Croce. In bringing his claims, Croce repeatedly relied, both in his Complaint and briefing, on negative anonymous reader comments published on The New York Times' website, to support his preferred interpretation of the article.

The Times moved to dismiss, asserting that none of the statements at issue were actionable because they were, variously, subject to unique protections under Ohio law for balanced reports of controversies, the innocent construction rule, were substantially true or were opinion.

The Court's Decision

In a lengthy and detailed decision, the District Court dismissed all but one of Croce's claims, concluding that "the Article and the statements made therein are not defamatory because, when viewed in context, they represent an accurate and balanced report of the allegations made by others against Dr. Croce." The court went on to find a variety of other grounds that also supported dismissing all the claims arising from the story and the radio interview and most of the claims based on Glanz's letter.

The court began by declining to recognize a broad "neutral reportage privilege" under Ohio law. However, the court adopted defendants' argument that publishers "may receive similar protection" pursuant to Ohio case law, which holds that "statements published in a 'balanced report of both parties arguments and defenses' are not, as a matter of law, defamatory in the first instance." Specifically, the court relied on three cases, *American Chemical Society v. Leadscope, Inc.*, 133 Ohio St.3d 366 (Ohio 2012), *Sabino v. WOIO, LLC*, 2016-Ohio-491 (Ohio Ct. App. 2016), and *Early v. The Toledo Blade*, 130 Ohio App.3d 302 (Ohio Ct. App. 1998) for the proposition that allegedly defamatory statements must be read in context, and "an accurate and balanced report, though not privileged, may support a finding that statements contained within are not defamatory."

Applying this standard, the court observed that the article signaled to readers from the outset that they were about to read about a controversy "to which there must be two sides." The article was laced with "qualifying language" and emphasized "that the issues were not clear-cut." While critical of Croce, the article presented the allegations against him "not . . . as proven facts but as the 'allegations,' 'arguments,' 'claims,' and 'complaints' . . . [made by] 'critics,' a term inviting a reader to treat their accusations with caution." In counterpoint, the article included Dr. Croce's and Ohio State's responses, and "season[ed] its portrayal of the

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controversy with a third-party view in Dr. Croce’s defense.” Taken as a whole, the court concluded, “the Article in its entirety presents an accurate and balanced report of the positions and arguments of both sides to the controversy” and therefore it was not defamatory as matter of law.

The court then turned to alternative arguments, beginning with the innocent-construction rule. Croce characterized the article as a hit piece that accused him of years of misconduct and fraud. Defendants characterized the article as a case study of a flawed system where institutions police the same researchers upon which they rely for prestige and money. The court observed that the article “contains elements of both parties’ characterizations.” Given a choice between two viable interpretations of the article—one defamatory, one innocent—the innocent-construction rule “tips the scales in favor of Defendants.”

The court also granted dismissal of eight of the 15 statements on the alternative grounds that the statements were substantially true. In dicta likely to be helpful to future defamation defendants, the court emphasized that this was a “low threshold,” and that truth could appropriately be addressed on a motion to dismiss. The court also dismissed two statements on the alternative grounds that they were non-actionable opinion. The statements at issue asserted that Croce had gone beyond norms of his profession. The court broadly held that “statements that someone toes a line of ethical conduct or that their behavior wasn’t ‘consistent’ with professional standards are opinion.”

The only statement to survive dismissal was an assertion made in a letter to OSU, seeking comment, that Croce had, as part of his involvement with the Tobacco Research Council, reviewed and awarded grants “in cases with clear conflicts of interest involving grantees at his own institution.” The court held that the statement was one of fact, not susceptible to a motion to dismiss.

In response to the ruling, Croce voluntarily dismissed his claims as to the sole surviving statement in order to expedite an appeal to the Sixth Circuit. Croce filed his notice of appeal on November 26, 2018.

The New York Times was represented by Jay Ward Brown, Michael Sullivan, Matthew Kelley, and Dana Green of Ballard Spahr LLP, by Keith W. Schneider of Maguire Schneider Hassay, LLP, and by in-house counsel David McCraw. Plaintiff Dr. Carlo Croce was represented by Thomas Walter Hill and Loriann E. Fuhrer of Kegler Brown Hill & Ritter and by Damion M. Clifford, Gerhardt A. Gosnell, II, and James Edward Arnold of James E. Arnold & Associates Co.