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Virginia Federal Court Dismisses Defamation Claim Against Broadcast Warning Of “Unscrupulous” Tax Preparers

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A TV news broadcast warning consumers about “unscrupulous” tax-return preparers, and recounting one man’s frustration with a Virginia company that made a mistake on his returns, did not defame the company’s owner, a federal court has ruled. The decision, [Hanks v. WAVY Broadcasting, LLC](#), No. 2:11-cv-439 (E.D. Va. Feb. 8, 2012), should support future consumer reporting in the Commonwealth.

In his decision, which cited Virginia common law, the First Amendment, and even Thomas Jefferson, Senior Judge Robert Doumar held that plaintiff Timothy Hanks failed to demonstrate the broadcast imputed to him personally an unfitness to perform the duties of his profession, a lack of integrity in the discharge of his duties, or the commission of a crime. In dismissing Hanks’ defamation lawsuit, the court found the broadcast was not of and concerning him, was protected opinion, that Hanks could not rely on the antiquated doctrine of presumed damages for libels per se, and that boilerplate allegations of actual malice were insufficient.

Background

In April 2010, defendant WAVY, a LIN Media station, and its sister station Fox 43 in Hampton Roads, VA, broadcast a news story about tax preparers and the looming income tax filing deadline. WAVY also published a substantially similar print story on the television station’s website. According to the complaint, the newscast informed viewers to “[s]tay tuned and we are going to show you how to avoid unscrupulous tax preparers,” and allegedly warned “[i]f you’re one of the many who have waited until the last minute to file, you could run the risk of working with unscrupulous preparers.” The website article, which was attached to the complaint, also stated, “[i]f you’re one of the many who have waited until the last minute to file, you could run the risk of working with unscrupulous preparers or even increasing you chances of mistakes.” Notably, a video embedded in the website did not use the term “unscrupulous.”

After discussing the potential dangers associated with tax preparation in general terms, the newscast and the web article included an interview with a consumer whose tax preparer had made a mistake on his return, causing him to owe more taxes than he was initially led to believe. The stories quote the consumer as saying: “I gave you \$400. You’re only going to give me \$54 back of the \$400 I paid you all. I said that’s not fair.”

The newscast identified the tax preparer as Reliable Tax, which is a Virginia corporation owned by plaintiff, Timothy Hanks, its president. Reliable Tax was not a plaintiff.

Based on the alleged statements and the context of the news stories, the plaintiff claimed that the defendants had falsely implied that “the plaintiff was an ‘unscrupulous tax preparer’ who had unlawfully converted customers’ incomes tax refund payments, or unlawfully withheld payments owed to customers, or fraudulently filed false tax returns for customers.” The complaint included counts for both libel per se and libel per quod.

The Decision

The court found defendant’s defamation claims wanting for a number of reasons. First, the complaint failed to satisfy Virginia’s requirement that the allegedly defamatory statements be “of and concerning” the plaintiff. The plaintiff sued in his individual capacity, but the stories referenced only his company, Reliable Tax.

The court drew on Virginia precedent holding that owners and employees lack standing to sue for injuries sustained by corporations. See *Landmark Commc'ns, Inc. v. Macione*, 334 S.E.2d 587, 589 (Va. 1985). In addition, the court recognized that references to a broader class of which the plaintiff is a member (e.g., “tax preparers”) are generally insufficient to sustain a cause of action for defamation. See *Ewell v. Boutwell*, 121 S.E. 912, 914 (Va. 1924). The reaffirmation of the “of and concerning” requirement is significant not only in that it provided a ground for dismissal in this particular case, but also because it prevents individuals from recovering general reputational damages through the back door, which are often not available to corporations.

The second ground for dismissal was constitutional. After quoting Thomas Jefferson’s adage that courts should not regulate opinion “where reason is left free to combat it,” the court cited a series of Virginia cases which indicated that “characterizations of a business’s performance or a professional’s character are generally considered to be expressions of opinion and are thus protected speech.” Taking into account the immediate context of the article as well as the broader social context of the impending tax-filing deadline, the court concluded that the alleged use of the term “unscrupulous” “was a broad, unfocused, and wholly subjective comment.”

In other words, it was not capable of defamatory construction. The court’s recognition that “unflattering” descriptions of a business deserve constitutional protection helps temper the advantage afforded plaintiffs in cases invoking defamation per se, which often presumes damages when the plaintiff’s economic interests are at stake.

Finally, the court concluded that dismissal was warranted due to the complaint’s pleading defects. In Virginia, “where a private individual alleges defamation by a new-media defendant involving a matter of public concern, presumed damages cannot be awarded in the absence of actual malice.” *WJLA-TV v. Levin*, 564 S.E.2d 383, 391-92 (Va. 2002). These “presumed damages” are what distinguish *liber per se* from *libel per quod*, both of which were alleged in the complaint. While the plaintiff made “boilerplate” allegations of actual malice in asserting a *libel per se* claim, the court found that simply including “a recitation of the *New York Times v. Sullivan* standard” is insufficient to state a claim for defamation against a media defendant reporting on matters of public concern.

With regard to the *libel per quod* count, the court found that complaint’s failure to plead special damages—i.e., damages which are not presumed but which relate to the “special character, condition, or circumstances of the person wronged”—was similarly fatal.

The court dismissed the complaint with prejudice.

As of press time, Hanks’ appeal deadline had not run, and he had not filed an appeal.

Charles D. Tobin and Thomas J. McIntosh, of Holland & Knight LLP, Washington, D.C., represented WAVY Broadcasting, LLC and LIN Television Corporation. Jeremiah A. Denton, III, of Jeremiah A Denton, III, P.C., Virginia Beach, Virginia, represented Timothy B. Hanks.

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