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Defamation Claims Against and By Public Safety Personnel

Part 1 (Last month)

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This is part 2 of a three-part article. To read part 1, click here.

--Immunity and Privilege Defenses

There are a variety of immunity and privilege defenses that public safety personnel can assert in response to a defamation lawsuit against them. These are often created under state law by various tort claim immunity statutes. Additionally, the law provides various immunities, either absolute or qualified, for testimony

given in court, before a grand jury, or as part of the prosecution process. The following is an example selection of such cases.

In *Watson v. City of Akron*, C.A. #24077, 2008-Ohio-4995, 2008 Ohio App. Lexis 4208 (Ohio App. 2008), discretionary appeal not allowed,120 Ohio St. 3d 1524, 2009-Ohio-614, 901 N.E.2d 244 (Ohio 2009), *cert. denied*, #08-10746, 558 U.S. 851 (2009), the court ruled that an Ohio man's defamation lawsuit against a police department, based on an assertion that someone from the department was telling people in various places around the country that he was a "hit man," could not be the basis of liability. First, the police department could not be sued, as it was not a separate entity from the city. Second, the plaintiff failed to allege that the city's conduct was covered by any stated exceptions to the tort immunity provided for political subdivisions under Ohio state statutes. Additionally, since the plaintiff failed to name any individual city employees as defendants, he was unable to argue that the statements were made outside of the scope of employment or the pursuit of official duties that were covered by the tort immunity statute.

Similarly, in *Miller v. Central Ohio Crime Stoppers, Inc.*, #07AP-669, 2008 Ohio App. Lexis 1110 (Ohio App. 10th Dist.), a detective's passing on, to a newspaper, details of an arrest warrant for a man which subsequently turned out to be dismissed, resulting in the publication of his name within a "Most Wanted" list, did not fall within any exception to immunity from liability provided by an Ohio state statute, so that defamation claims against the city and the detective were properly rejected. There was no showing that the detective had any knowledge that warrants in the department's files were likely to be inaccurate.

There may be a privilege in making a statement to another law enforcement agency. See *Grier v. Johnson*, 232 A.D.2d 846, 648 N.Y.S.2d 764 (A.D. 1996), holding that a police officer's report to a state university law enforcement agency that a university employee had admitted using marijuana was entitled to qualified privilege against defamation, and the privilege could not be defeated, in the absence of a showing of "actual malice" in making the statements.

Statements made in the course of initiating, pursuing, or terminating a criminal prosecution will usually be granted absolute prosecutorial immunity. In *Joseph v. Yocum*, #01-4142, 53 Fed. Appx. 1 (10th Cir. 2002), for instance, a prosecutor was entitled to absolute immunity from liability for a decision to prosecute, even if it was purportedly based on an inadequate police investigation. The prosecutor was only

entitled, however, to qualified immunity for making statements to the media, but did not violate any clearly established constitutional rights when all that was communicated was the fact of the arrest, even if that caused the arrestee to be held up to ridicule and scorn.

Statements not made as part of the prosecutorial process will not be granted absolute prosecutorial immunity. See *Harrington v. Wilber*, #4:03-CV-90616, 353 F. Supp. 2d 1033 (S.D. Iowa 2005), ruling that statements made by a county attorney about a defendant in a press release and press conference after charges of murder against him were dropped were not protected by absolute immunity since they were not made incidental to the termination of the judicial proceeding. There were genuine issues, however, as to whether or not the statements were opinion protected by the First Amendment, and whether the statements, stating that the former defendant had committed the murder, were made with actual malice.

Also see *Harris v. Bornhorst*, #06-3729, 513 F.3d 503 (6th Cir. 2008), *cert. denied*, #07-1292, 554 U.S. 903 (2008), in which a twelve-year-old child was interrogated away from his mother and a prosecutor then ordered police to arrest him in connection with the death of a toddler. His conviction was subsequently overturned on the basis of a coerced confession in violation of the Fifth Amendment. He subsequently filed a federal civil rights lawsuit against the prosecutor and her employer for alleged violations of the Fourth and Fourteenth Amendments. After the lawsuit was filed, the prosecutor allegedly told a Marine recruiter that the plaintiff would "always" be a suspect in the murder, resulting in the rejection of his enlistment.

A federal appeals court overturned qualified immunity for the prosecutor, ruling that the prosecutor could not reasonably have believed that there was probable cause for the arrest. The court also ordered further proceedings on claims against the county based on its alleged withholding of exculpatory (Brady) materials, and on the Plaintiff's malicious prosecution, First Amendment retaliation, and defamation claims.

Some states provide an immunity or privilege defense for statements made to the press or in an official report. See, for example, *Harris v. News-Sun*, 269 Ill.App.3d 648, 646 N.E.2d 8 (Ill App. 1995), finding that Illinois state law gave a detective, who was the department's spokesperson on the matter, absolute immunity from liability for defamation in making statements to the press concerning a criminal sexual assault investigation. In accord was *Dolatowski v. Life Printing and*

Publishing Co, Inc., #88-3269, 197 Ill. App. 3d 23, 554 N.E.2d 692 (Ill App. 1990), ruling that a deputy superintendent was absolutely privileged in making statements to the press concerning the arrest of women for soliciting rides and a continuing crackdown on prostitutes.

Similarly, in *Carradine v. State*, #92-1070, 511 N.W.2d 733 (Minn. 1994), an arresting officer was entitled to absolute immunity, under Minnesota law, for making allegedly defamatory statements about an arrestee in an arrest report, but would not have absolute, but only qualified, immunity for making statements to the press to the extent that they differed significantly from the statements in the report.

State constitutional provisions or statutes may provide an immunity defense in the absence of a certain level of culpability. In *Colon v. City of Rochester*, 762 N.Y.S.2d 749 (A.D. 4th Dept. 2003), the court ruled that a city and county were not liable for defamation based upon a mistaken depiction of plaintiff's photograph from his pistol permit application as being a suspected murderer with the same name. The defendants had a constitutional privilege against liability for defamation under New York state law in the absence of any evidence that they acted in a "grossly irresponsible manner." The plaintiff also could not recover against the defendants under a theory of negligence in supplying the photograph to a television network.

--Damages

In order to recover money as compensation for defamation, it will be necessary for the plaintiff, in most cases, to show that they actually suffered a concrete injury that caused them damages.

This is illustrated by *Liser v. Smith*, #CIV.A.00-2325, 254 F. Supp. 2d 89 (D.D.C. 2003), ruling that a police detective was not liable for either defamation or intentional infliction of emotional distress under District of Columbia law for issuance of a press release identifying the plaintiff as having been involved in a murder, along with the arrestee's picture. The issuance of such press releases was within the scope of the duties of police investigators and it did not cause economic or physical harm to the plaintiff. Further, the release of the information involved the public's right to information and public safety.

When specific economic loss is caused by defamation, however, the damages can be immense. In *Yammine v. De Vita*, #501649, 43 A.D.3d 520, 840 N.Y.S.2d 652 (A.D. 3rd Dept. 2007), for instance, the court found that a Chief of Police was properly

held liable for damages of $200,000 to restaurant owners of Lebanese descent for his actions in making numerous statements in public asserting that they were terrorists, gunrunners, and drug dealers, as well as "associated with" Osama Bin Laden. These statements, made in a restaurant setting, caused some restaurant patrons to stop frequenting the plaintiffs' business. The court found that the amount awarded was not excessive on the plaintiffs' defamation claims.

Similarly, in *Valentin v. County of Los Angeles*, #C529739 (Los Angeles Super. Ct.), reported in The National Law Journal, p. A13 (May 28, 2001), there was a $9.9 million settlement in a lawsuit for false arrest/imprisonment and defamation brought by a couple arrested in their home without a warrant and charged with multiple child sexual molestation offenses, only to have most of their accusers recant that accusation even before a preliminary hearing.

--Per Se Defamation

Certain types of false statements may be regarded as slander per se or libel per se—statements that if false are regarded as so uncontrovertibly damaging that the element of damage in a defamation lawsuit were presumed so economic damages did not need to be proven in court (although lack of such proof might still influence the amount to be awarded). Examples of per se defamation historically included accusing someone of a crime, alleging that someone has a foul or loathsome disease (such as leprosy), adversely reflecting on a person's fitness to conduct their business or trade, or imputing certain serious sexual misconduct. Some courts have abandoned some of this analysis.

In *Anderson v. City of Troy*, #01-761, 2003 MT 128, 68 P.3d 805 (Mont. 2003), for example, the court held that a police chief's statements calling a resident a "gang banger" were not "slander per se" because they did not accuse him of any specific criminal activity, and could either refer to an actual member of a street gang or a "wannabe," which adds up to "nothing more than innuendo." Similarly, in *Tourge v. City of Albany*, 285 A.D.2d 785, 727 N.Y.S.2d 753 (A.D. 2001), the court ruled that an officer's statement to a school secretary that "we have a complaint about one of your teachers" did not constitute "slander per se" allowing the teacher to sue for slander based on accusation of criminal conduct without showing specific resulting damages.

--Statute of Limitations

Claims for defamation are subject to varying statutes of limitations in different states. Statements made via media may be subject to different statutes of limitations when printed or broadcast in multiple states. Accordingly, a defamatory statement that can no longer be the basis of a lawsuit in one jurisdiction because of a one or two-year statute of limitations may still be sued for elsewhere under another state's three, four, or six-year statute of limitations. There are often issues about when the right to sue on the claim "accrued" and whether the running of the statute of limitations may be "tolled" (extended).

In *Tourge v. City of Albany*, 285 A.D.2d 785, 727 N.Y.S.2d 753 (A.D. 2001) (also discussed in the last section), a man sued the U.S. government, contending that it violated his Fifth Amendment due process rights by accusing him of a crime during a criminal proceeding in which he was not a defendant. The trial court properly granted the U.S. government's motion to dismiss the lawsuit. The claim accrued when the accusation was first made. His mistaken belief that his claim had not yet accrued until he was notified that he would not be indicted (or such an indictment was time barred), the reason he did not file suit earlier, did not serve to toll (extend) the time period to sue, so his claims were barred by a six-year statute of limitations. *Doe v. United States*, #16-20567, 853 F.3d 792 (5th Cir. 2017). ***Federal courts apply the state statute of limitations in defamation lawsuits, including those brought against the U.S. government under the Federal Tort Claims Act.***

In *Churchill v. State of New Jersey*, 876 A.2d 311 (N.J. Super. A.D. 2005), a lawsuit by animal protection volunteers against employees of a government investigating commission who allegedly published defamatory material about them on a government website, the claim was time barred by a one-year New Jersey statute of limitations for defamation claims. The statute of limitations began to run on the date the material was first published on the website, and that time period was not extended by the fact that the website was subsequently updated or modified while continuing to contain the same allegedly defamatory material.

In *Shively v. Bozanich*, #S094467, 7 Cal. Rptr. 3d 576, 80 P.3d 676 (Cal. 2003), a statute of limitations barred defamation claims brought by a grand jury witness against a deputy district attorney and county based on statements made to the author of book allegedly falsely describing her as a "felony probationer." The time within

which to bring the defamation lawsuit started to run, at the latest, when the book was published and distributed to the public, and was not extended based on the fact that the plaintiff allegedly did not discover that the material was in the book until she subsequently read it.

--Protected Opinion

Viable claims for defamation must involve false statements of fact—not opinion. Opinions, even misguided, unpopular, or outrageous opinions, are protected by the First Amendment.

In *Weiner v. San Diego County*, #98-55752, 210 F.3d 1025 (9th Cir. 2000), for example, a prosecutor's statements to a newspaper following a murder suspect's acquittal could not be the basis for a defamation lawsuit under California state law since they only expressed opinions protected under the First Amendment and could not be interpreted as statements of facts; even if defamatory, they could not be the basis for a federal civil rights lawsuit, as a prosecutor was a state, not county, official for purposes of a wrongful prosecution claim, and therefore entitled to Eleventh Amendment immunity in their official capacity.

Some "opinions," however, may imply the existence of specific "facts" which may constitute grounds for a defamation claim. In *Weinstein v. Bullick*, #92-5127. 827 F. Supp. 1193 (E.D. Pa 1993), for instance, an **i**nvestigating officer's television interview expressing skepticism about woman's report that she had been abducted and sexually assaulted in a car could be the basis of a defamation lawsuit. The officer's statements, although "opinions," could reasonably be viewed as implying undisclosed facts that the woman had fabricated a story of abduction and rape.

❖ Defamation Claims By Public Safety Personnel

--Actual Malice Standard

The U.S. Supreme Court, in *New York Times Co. v. Sullivan*, #39, 376 U.S. 254 (1964) established the rule that ***for a public official (or other legitimate public figure, such as a celebrity or someone who injects themselves into a public controversy) to win a defamation case, the defamatory statement must have been made or published knowing it to be false or with reckless disregard to its truth***

(this is also referred to as actual malice). Negligence in determining whether the statement is true before making or publishing it is not enough.

This is a tough—but not impossible—burden for a plaintiff to meet. In *Lake Park Post, Inc. v. Farmer*, #A03A0841, 590 S.E.2d 254 (Ga. App. 2003), for example, a deputy sheriff sued a newspaper, its editor and publisher, and one of its columnists for libel under Georgia state law after the paper published a series of articles written by the editor and columnist which stated that he had murdered a man by "brutally and repeatedly hitting" him with a flashlight while he was handcuffed and not resisting arrest. The article claimed that "enhanced video footage" showed the deputy beating the man, and that the beating caused the man's death.

The deputy demanded a retraction, but the defendants refused to publish one, and continued to publish articles repeating their version of the incident. In all, according to the deputy, the newspaper called him a murderer 17 times and reported that he brutally beat the arrestee with the flashlight 48 times. In at least one instance, the columnist said that the deputy had "lynched" the arrestee.

A jury returned a verdict for the plaintiff deputy and awarded him $65,000 in compensatory damages and $10,000 in punitive damages against each defendant, for a total award of $225,000. On appeal, the defendants contended that the statements published were true, and that the trial court erred in refusing to grant their motion for a directed verdict because the plaintiff failed to prove by clear and convincing evidence that the statements were made with "actual malice," i.e., knowing that they were false or with a reckless disregard for their falsity.

An intermediate Georgia appeals court disagreed with the defendants, and upheld the jury's award to the deputy.

The court found that evidence in the case plainly demonstrated that the defendants had no reason to believe that the statements made in the article were true. The deputy had stopped the arrestee for driving on the wrong side of the road, and arrested him after he was unable to produce a driver's license or proof of insurance, and furnished the deputy with a name and date of birth that did not match the computer records. He also had slurred speech and a strong smell of alcohol.

The arrestee allegedly resisted the deputy, disobeying orders by putting his hands in his pockets and trying to resist handcuffing. When he was handcuffed, the deputy found a prisoner identification card and a pocketknife on him, and a computer search

showed that a warrant for the motorist's arrest existed. The arrestee resisted entering the patrol car and began pulling, pushing, and kicking the deputy, according to the court, escaping from the deputy's control, at which point the deputy executed a maneuver known as an "arm-bar take down" to regain control.

The deputy denied hitting the arrestee with a flashlight, and a video of the event taken by a camera in the patrol car of a backup officer who responded showed that the deputy's flashlight was attached to his police belt during the incident. All eyewitnesses to the incident testified that the deputy never hit the arrestee with anything. Videos taken by cameras in two patrol cars were played to the jury.

A medical examiner testified, after performing an autopsy, that the arrestee had died from blunt force trauma to the head that was received when the deputy took him to the ground, and not from a beating. The death was attributed to what otherwise would have been a minor injury except for the arrestee's brain atrophy and liver damage caused by his chronic alcoholism. An investigation by the Georgia Bureau of Investigation (GBI) found no evidence that the deputy hit the arrestee with a flashlight or with anything else.

Evidence in the lawsuit showed that when the columnist wrote his first article stating that the arrestee was murdered by the deputy, he had not seen the videos, attended the coroner's inquest or read its complete transcript, and had not reviewed the GBI report or interviewed any witnesses.

The evidence, the appeals court found, fully supported the jury's conclusion that the articles were published with "constitutional malice" and without a reasonable belief in their truthfulness. Anyone reading their articles would not know that the eyewitnesses, the coroner's inquest, the medical examiner's report, and the GBI report all contradicted the statements in the articles.

> We conclude that the defendants so doubted the truthfulness of their articles that they refused to print any information that contradicted their version of the events.

Public safety personnel are public officials and/or public figures. See *Smith v. Russell*, #64086., 456 So.2d 462 (Fla 1984) (police officer is considered a public official requiring that actual malice be shown for defamation). That does not, however, mean that their family members are. See *Sellers v. Stauffer*

Communications, Inc., 684 P.2d 450 (Kan App. 1984) (sheriff's wife was not considered a public figure).

It is worth mentioning here again that defamation, by itself, cannot be the basis for a constitutional claim, either by private individuals or government employees. See *Walker v. Wilson*, #01-6455, 67 Fed. Appx. 854 (6th Cir. 2003), ruling that a state investigator's allegedly defamatory statements to the FBI concerning an FBI agent's purported addiction to drugs and homosexual relationship with his psychiatrist were insufficient to support a federal civil rights claim for violation of his protected liberty interests in his employment. Defamation itself is not a constitutional claim, and an injury to reputation does not violate a protected liberty interest, nor does the disclosure of medical records. "Even an allegation of diminished employment opportunities resulting from harm to reputation is insufficient to state a due process claim."

In the next section of this three-part article, in the section on "stigma plus," we will examine what kind of claims can be made when there has been defamation and it has caused very specific damage to the public safety officer's career prospects.

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Bernard J. Farber
Civil Liability Law Editor
P.O. Box 75401
Chicago, IL 60675-5401 USA
E-mail: bernfarber@aele.org
Tel. 1-800-763-2802

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