

# DEFAMATION

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# GAME

- S Hunt
- 4 misspelled words
- TEXT 202-997-9186 include your name
- OR PRIVATE Chat

# DISCLAIMER

- No legal advice

# LAW

- Background
- How formed

# FREEDOM OF SPEECH

- 1<sup>st</sup> Amendment
- Congress: Congress shall make no law ..... abridging the freedom of speech,.....
- State action

# EXCEPTIONS TO FREEDOM OF SPEECH

- Incitement
- Fighting Words
- Obscenity
- Commercial Speech

Defamation

# DEFAMATION DEFINITION

- A false statement about a person that the speaker or writer knew or reasonably should have known was false that harms the person's reputation as a result of the statement being published to third parties.

# DEFAMATION LAW

- Falls under Torts
- Lucas v Smith
- 2 parties

# DEFINITIONS

- Slander: Spoken defamation
- Libel: Written defamation
- <https://m.youtube.com/watch?v=XscaGDxuQqE>

# ELEMENTS

- The basic elements of a classic defamation claim are:
  - (1) The defendant published
  - (2) defamatory material
  - (3) of and concerning the plaintiff,
  - (4) which caused damages

# ELEMENT 1: THE DEFENDANT PUBLISHED

- virtually any kind of communication, written or oral,
- made to one person or a hundred million people
- any communication to someone who understood the statement

# EXAMPLE

- I tell Mary that John purposely killed a pt.
- Do we meet the definition of published?

# REPEATER?

- Mary then repeats what I said to Claire.
- Is Mary Liable?
- What if Mary says “Melissa said, John purposely killed a pt.”
- Is Mary Liable?

# ELEMENT 2: DEFAMATORY MATERIAL

- (1) Is false
- (2) tends to injure the plaintiff's reputation, such as by arousing animosity, mockery, or disdain or tending to lower the plaintiff's esteem in the community;
- (3) which is based on specific express or reasonably inferable facts and not mere opinion

# IS IT FALSE?

- burden on the plaintiff to prove falsity
- The statement must be untrue

# OPINION

- not defamatory unless it is based on express or necessarily implied facts
- So – John is a jerk is NOT defamatory. It is opinion.
- However, John is a jerk because he purposely killed his pt – is defamatory because it is an opinion based on implied facts.

# “OF AND CONCERNING” THE PLAINTIFF

- the statement must be about the plaintiff

# WHAT IF IT IS ABOUT A GROUP?

- All female CRNAs at Anytown General Hospital are drug addicts.
- Defamatory?
- VS – All female CRNAs in the country?

# WHAT ABOUT THESE STATEMENTS?

■ First Statement:

- A male CRNA in the LVH hospital system is an alcoholic.

Second Statement:

The oldest female CRNA at Anytown General Hospital is an alcoholic.

.

- the statement does not need to refer to the plaintiff expressly in order to be of and concerning the plaintiff, if it can be established through extrinsic evidence that a reasonable person hearing the statement can make the connection and figure out that the statement is referring to the plaintiff
- Just needs to be reasonable understood by the listener

# DEFAMATORY?

- Type yes or no for the next series of slides.

# DEFAMATORY?

- Bill is a fat slob

# DEFAMATORY?

- Carol is a poor CRNA

# DEFAMATORY?

- Jim calls off sick every week

# DEFAMATORY?

- I hate Tracey

# DEFAMATORY?

- Michelle is excellent at only general anesthesia

# TRICKY

- Not defamation on face.
- However, the statement implies that she is ONLY good at general anesthesia, which could ruin her reputation. Under these facts, the statement was defamatory, but Michelle would have to use facts that were extrinsic to the statement in order to establish its defamatory nature.

# DEFAMATORY?

- Linda was fired from her last CRNA position

# DEFAMATORY?

- Richard is a fraud

# DAMAGES

- the plaintiff must prove damages consisting of actual harm to the plaintiff's reputation.
- the two overarching types of damages are general damages and special damages.

# GENERAL DAMAGES

- nonmonetary harm arising from defamation, such as harm to reputation or mental anguish.
- In some cases, general damages may be presumed, meaning the plaintiff doesn't have to prove damages
- General damages, however, are presumed only if the defamation constitutes either libel or slander per se. (to be discussed)

# SPECIAL DAMAGES

- compensate for monetary injuries flowing from the defamation, for instance, lost business.
- never presumed.
- For the plaintiff to recover special damages, there are two steps.
  - First, general damages must be either presumed or, if not presumed, proven.
  - Second, the plaintiff must offer sufficient evidence of special damages in addition to the general damages.

# LIBEL DAMAGES

- General damages presumed
- courts will presume general damages on the theory libel defamation is apt to be longer-lasting and more widespread than mere spoken defamation to a small audience

# SLANDER PER SE

- General damages presumed
- Slander per se is when the defamation falls into one of four categories:
  - statements that accuse the plaintiff of committing a crime;
  - indicate that the plaintiff is afflicted with a loathsome disease
  - impute to the victim characteristics that are incompatible with the victim's profession or occupation, such as a statement that a CRNA lacks sufficient training;
  - statements accusing the victim of sexual misconduct, such as adultery or promiscuity.

# WAIT!!

- DON'T I HAVE THE FIRST AMENDMENT RIGHT OF FREEDOM OF SPEECH?
- Yes, you do

# NEW YORK TIMES CO. V. SULLIVAN

- The Supreme Court first started imposing First Amendment restrictions on common-law defamation suits in the landmark case of New York Times Co. versus Sullivan.
- Basic ruling: **a public official** cannot recover damages for defamation related to official conduct unless the public official proves that the statement was **actually false**, and that it was made with **actual malice**

# ACTUAL MALICE

- Actual malice means that the statement **was made either with knowledge that it was false, or with reckless disregard as to its truth or falsity.**
- Reckless disregard, in turn, refers to unreasonable disregard of a high probability or risk of falsity, or to the fact that the publisher of the defamatory remark had serious doubts as to truthfulness, or a high degree of awareness of probable falsity.
- Actual malice does not mean mere negligent failure to investigate, nor does it necessarily involve spite, ill-will, or dislike.

- the Supreme Court expanded the Sullivan rationale to embrace not only public officials, but also public figures.
- Thus, the requirements of falsity and actual malice apply to any defamation suit by a person who is either a public official or a public figure
- the subject matter of the defamatory remark must be sufficiently linked to or connected with the person's public stature.

# PUBLIC OFFICIALS V PUBLIC FIGURE

- Public Official – Govt etc (police commissioner, mayor, legislator, or judge)
- Public Figure
  - (1). Those who achieve such pervasive notoriety that they should be treated as public figures for all, or at least for most, purposes.
  - (2). Those who, though they might otherwise be private figures, thrust themselves into the middle of a public controversy, and thereby become known. These are generally treated as public figures only with respect to the particular issue into which they have injected themselves.
  - (3). There is a third general class of public figures, consisting of those who are thrust into a public controversy through no action or fault of their own--though the courts may be less stringent with the actual malice requirement with these plaintiffs, since they have not voluntarily thrust themselves into the public eye, and since they lack the same access to avenues of effective communications as what true public figures enjoy.

# NBCRNA PRESIDENT

- Different Rules?

# BETSY MJAMA OR MIKE MACKINNON

- FB group
- Different rules?
- Even though someone may be active on local civic groups and professional organizations, and may publish books and articles on a particular topic, such as law, and thereby achieve some notoriety in certain circles, this does not necessarily mean that the person is a public figure, which requires a more general notoriety in the community, or a public office.

# NEED DAMAGES

- <https://www.youtube.com/watch?v=-mqlquWI9NM>

# SOCIAL SITES LIABLE?

Aren't they private entities?

[https://www.youtube.com/watch?v=1\\_XDbnyFgls](https://www.youtube.com/watch?v=1_XDbnyFgls)

# REAL WORLD APPLICATION

- Critiques
- <https://www.youtube.com/watch?v=jITQQwIMPuI>

# REAL WORLD APPLICATION

- Being recorded
- <https://www.youtube.com/watch?v=GS1DDQ08RyY>
- Award 500 million

# ONLINE REVIEWS

- [https://www.youtube.com/watch?v=qVSt1M\\_g2CM](https://www.youtube.com/watch?v=qVSt1M_g2CM)

# CASE REVIEW

- On April 4, 2008, petitioner, an anesthesiologist and pain management specialist, entered into an employment contract with respondents under which petitioner agreed to work from July 1, 2008, to June 30, 2009. The contract could be renewed annually if neither party objected. Petitioner was to receive four weeks of vacation for each calendar year of employment under the contract, which was drafted by petitioner's wife, a Virginia attorney. The contract was silent regarding reimbursement of accrued, unused vacation leave upon termination.

- Petitioner received a copy of respondents' "Employee Handbook" ("Handbook") on his first day of work. Respondents' agent placed a handwritten note in the "Benefits" section of petitioner's copy of the Handbook that stated, "Individual terms stated in contract." In regard to fringe benefits, the Handbook stated that accrued, unused vacation leave was reimbursable where an employee resigned with notice

- A dispute arose between the parties in August of 2009, when Dr. Palumbo learned that petitioner had pre-signed fifty-four blank prescription forms ("signed blank script") and left them with his pain management nurse before he left for vacation. When petitioner returned to the office on August 31, 2009, Dr. Palumbo met with petitioner to discuss the signed blank script and then placed petitioner on a paid suspension pending further investigation.

- On September 2, 2009, petitioner discussed his suspension with Martinsburg surgeon, Dr. Joseph Cincinnati, who owned Tri-State Surgical Center ("Tri-State"). During their conversation, petitioner told Dr. Cincinnati that Dr. Palumbo had asked petitioner to pre-sign blank script before he left for vacation. Tri-State and Fast-Track were located in the same office building. Fast-Track was the exclusive provider of anesthesia services to Tri-State's patients, and Tri-State was Fast-Track's only client.

- Petitioner was subsequently fired, report to the BOM and lost his license

- Petitioner, in turn, filed a report with the West Virginia Board of Medicine against Dr. Palumbo. The Board dismissed petitioner's report with a finding that Dr. Palumbo had not violated the Board's rules.
- In March of 2010, petitioner filed an action against respondents for breach of contract; for failure to reimburse accrued, unused vacation leave in violation of the WPCA; and for three other claims that were subsequently dismissed. Respondents counterclaimed for breach of contract, defamation per se, and insulting words, but later dismissed the insulting words claim.

- In regard to respondents' counterclaim for defamation per se, the circuit court found that petitioner's statement to Dr. Cincinnati was defamatory per se because it imputed incapacity in Dr. Palumbo's profession. The circuit court awarded respondents \$100,000 in general damages

# ON APPEAL

- The circuit court did not abuse its discretion in finding petitioner's statement to Dr. Cincinnati to be defamatory on its face. Dr. Cincinnati is a fellow physician who, without explanation, understood the inflammatory nature of petitioner's statement