IN THE COURT OF CLAIMS OF OHIO

BENJAMIN C. MALLORY	:	
Plaintiff	:	CASE NO. 99-04593
v.	:	DECISION
OHIO UNIVERSITY	:	Judge Fred J. Shoemaker
Defendant	:	

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This case was tried to the court on the sole issue of liability. Plaintiff contends that defendant's employee, Jeanine Woodruff, defamed him in a statement that was published in *The Athens News*. Defendant denies liability.

In 1997, plaintiff was a student at defendant university. On the evening of November 19, 1997, plaintiff joined another student, Audrey Delong, at a local bar to celebrate her twenty-first birthday. Delong and her friends had been drinking at the bar for some time before plaintiff arrived. According to plaintiff, both he and Delong were intoxicated when they left the bar and walked to Delong's sorority house. Soon after the couple arrived at the sorority house, Delong engaged in a brief argument with her "housemother" concerning the house policy forbidding male guests at night. Delong then left the house with plaintiff. The couple walked across the campus to plaintiff's dormitory room where they began to engage in sexual conduct. While in the dormitory room, Delong became ill and vomited. The couple then elected to clean up in the dormitory showers. While in the showers they engaged in sexual relations. After dormitory residents discovered the couple, a resident advisor asked them to leave. According to witnesses, Delong was visibly intoxicated when she walked out of the shower.

The next morning, Delong was questioned by campus police about the events that took place the night before. Delong was also counseled by Jeanine Woodruff, Assistant Director of defendant's Department of Health, Education and Wellness (HEW). Delong informed Woodruff and the police that she did not remember any of the events that happened at the dormitory on the night in question.

Plaintiff was subsequently charged with sexual assault under defendant's code of student conduct and was required to appear at a "Judiciaries Hearing." Following the hearing, plaintiff was found "responsible" on the sexual assault charge and was expelled from the university. Plaintiff was also indicted by an Athens County grand jury for the crime of sexual battery and stood trial on that charge in October 1998. The trial ended in a hung jury, with eleven jurors voting for acquittal and one juror voting for conviction. The Athens County Prosecutor decided not to retry plaintiff and all charges against him were dismissed with prejudice.

Plaintiff's criminal trial and the prosecutor's decision not to retry plaintiff were covered extensively by the Athens newspapers. In addition to reporting the facts of the case, the newspapers published editorials, press releases and letters that expressed varied opinions about the case. Among these publications was a letter written by plaintiff's parents that characterized the actions taken by defendant in plaintiff's case as "appalling." The letter specifically criticized HEW for providing Delong with counseling and support while denying assistance to plaintiff. Jim Phillips, an associate editor for *The Athens News*, contacted Woodruff and asked her to respond to the letter. Woodruff orally answered several of Phillips'

questions and later provided a written statement in response to the Mallorys' letter.

On November 12, 1998, *The Athens News* published an article entitled, "After sexual battery charges are dismissed Mallory's parents lash out at OU, media." The article quotes statements that were made by plaintiff's parents, his defense attorney, prosecuting attorneys, a member of a feminist student group, and defendant's employees, including Jeanine Woodruff. Woodruff testified that she was accurately quoted and that she understood her comments might appear in a newspaper article.

The section of the article that reports Woodruff's comments to Phillips reads as follows:

> Jeanine Woodruff, assistant director of the department, defended OU's actions in the Mallory case, arguing that Mallory is almost certainly guilty of sexual battery, whether or not a jury was willing to convict him of one.
>
> 'The information generated by the (university) police definitely met the definition of sexual battery, and certainly was a violation of the student code of conduct,' Woodruff said. 'It's not like some people want to make out, that this was two drunk people having a good time, and one of them felt bad about it the next day. For them to say (Mallory) was treated unfairly just seems kind of ridiculous, from my perspective. He definitely committed a sexual battery, from the information that was gathered.'
>
> Woodruff said that while she and other officials are convinced Mallory committed the crime, 'unfortunately,' the criminal justice system does not always follow the definition of the law in its decisions as to innocence or guilt.

> 'Instead,' she added, 'decisions are influenced by irrational and emotionally charged arguments made by highly paid defense attorneys whose job it is to represent this [*sic*] interests of their client. In my estimation, this is what happened in the Mallory trial.'

Plaintiff asserts that Woodruff's statement that plaintiff "definitely committed a sexual battery" was a false statement accusing plaintiff of a crime and, therefore, libelous.

The elements of a claim for libel are "a false written publication, made with some degree of fault, reflecting injuriously on plaintiff's reputation or exposing the plaintiff to public hatred, contempt, ridicule, shame, or disgrace, or affecting plaintiff adversely in his trade, business or profession." *Huntington Trust Co., N.A. v. Chubet* (Nov. 10, 1998), Franklin App. No. 97APF12-1591; *A & B-Abell Elevator Co., Inc. v. Columbus-Central Ohio Bldg. & Constr. Trades Council* (1995), 73 Ohio St.3d 1, 651 N.E.2d 1283.

PRIVATE v. PUBLIC FIGURE:

The parties presented extensive arguments on the issue of whether plaintiff is a private or public figure for the purpose of his libel claim. "The degree of 'fault' required on the part of the publisher varies depending on whether the injured party is a private individual or a 'public figure.'" *Huntington Trust Co., supra*; *Gertz v. Welch, Inc.* (1974), 418 U.S. 323, 94 S. Ct. 2997. A plaintiff achieves public figure status "from some purposeful activity that thrusts that person 'into the vortex of an important public controversy.'" *Talley v. WHIO* (1998), 131 Ohio App.3d 164, citing, *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130, 155. A limited purpose public figure is a person

who becomes a public figure for a specific range of issues. *Gertz, supra* at 351.

If a plaintiff is a private figure, he must prove both that the statement was false and that defendant was at least negligent in reporting or publishing it. *Dale v. Ohio Civil Serv. Employees Assn.* (1991), 57 Ohio St.3d 112, 114, 567 N.E.2d 253; *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc*. (1985), 472 U.S. 749, 766. However, where plaintiff is a public figure, he may not recover for libel absent proof by clear and convincing evidence that such defamation was undertaken with actual malice. *Talley, supra.* Actual malice exists when a defendant makes the statement with knowledge of the statement's falsity or with a reckless disregard for the truth. *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 279-80.

Defendant asserts that plaintiff must prove the higher standard of actual malice since he became a public figure as a result of his father's active attempt to influence the public debate surrounding him. Specifically, defendant maintains that plaintiff's father personally contacted the author of a letter that was published in an Athens newspaper and that he wrote a letter to the editor that was harshly critical of defendant.

Although the events surrounding plaintiff's university hearing and criminal trial were widely reported in the local media, the mere fact that events are newsworthy is not conclusive of the public figure issue. "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. *** A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of

New York Times." *Wolston v. Reader's Digest Ass'n., Inc*. (1979), 443 U.S. 157, 167-168.

The court finds that plaintiff did not seek media attention in an attempt to influence the resolution of either the university proceedings or his criminal case. Plaintiff assumed no "special prominence in the resolution of public questions." See *Gertz, supra* at 351. The court further finds that any consequence for the actions by plaintiff's parents to influence public opinion through correspondence with the media or other interested parties cannot be imputed to plaintiff. There is no evidence that plaintiff invited media attention, or otherwise sought to influence public sentiment in his favor.[1] Accordingly, the court concludes that plaintiff is a private person for the purposes of his libel claim.

FACT v. OPINION:

For a statement to be actionable by a plaintiff, it must be established, as a matter of law, that the allegedly defamatory statement was one of fact, rather than an opinion. Opinions are constitutionally protected speech. *Vail v. The Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 281. Ohio courts use a "totality of the circumstances" test to determine whether a statement is fact or opinion. *Id.* at syllabus. Using this test, a court must weigh the following four factors: (1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; and, (4) the broader context of the statement. *Id.* The weight to be given to each of these

[1]The United States Supreme Court and Ohio courts have rejected the suggestion that any person who is indicted for a crime becomes a limited purpose public figure concerning any alleged defamation arising from that crime. See *Talley, supra*, at 170; *Wolston v. Reader's Digest Assn., Inc.* (1979), 443 U.S. 157, 168.

factors varies depending upon the circumstances of the case. *Id.* at 282.

Regarding the specific language used, it must be determined whether the average reader would view Woodruff's statement to be factual, where its meaning is readily ascertainable, or opinion, where its meaning is ambiguous. *Id.* The court finds that Woodruff's assertion that "[plaintiff] definitely committed a sexual battery, from the information that was gathered" is unambiguous. An ordinary person could view this statement as an assertion of fact since its meaning is clearly ascertainable. The Supreme Court of Ohio has observed that an allegation of a punishable crime is a typical example of actionable language in a defamation claim. *Id.*

However, there is also specific language in Woodruff's statements that suggests she was expressing an opinion. For example, in response to plaintiff's parents' criticism of defendant Woodruff stated, "[f]or them to say [plaintiff] was treated unfairly just seems kind of ridiculous, *from my perspective*." (Emphasis added.) The final quote attributed to Woodruff reads: *"In my estimation*, this is what happened in [plaintiff's] trial." (Emphasis added.)

Next, the court must consider whether Woodruff's statements are verifiable. Generally, statements that imply the author "has firsthand knowledge that substantiates the opinions [s]he asserts" suggest that the statement has specific factual content. *Vail, supra* at 283. In this case, Woodruff claims that her assertion is based upon "the information that was gathered." Although the statement implies that she has proof to substantiate her allegations, the context of the statement suggests that it is

a subjective, opinionated statement regarding plaintiff's criminal case.

In analyzing both the general and broader context in which Woodruff's statements appear, the court finds that the purpose of the article was to report differing reactions to the prosecutor's decision to dismiss criminal charges against plaintiff. The opening paragraph of the article reports that the case "has polarized the Athens/Ohio University community" and that even though the case was dismissed following a hung jury, "[t]he frustration and anger aroused by the case, however, won't go away so easily." The article clearly informs the reader that plaintiff's criminal case was tried before a jury and that he was not convicted. In this context, the impassioned statements made by community members concerning plaintiff's "guilt" or "innocence" are necessarily opinions and not facts.

Based upon the totality of the circumstances, the court concludes that the ordinary reader would view Woodruff's statements as opinion and not as fact. Consequently, the court finds that her statements are constitutionally protected speech and that plaintiff has failed to establish his claim for defamation. Judgment shall be rendered in favor of defendant.

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FRED J. SHOEMAKER
Judge

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The court has considered the evidence and rendered a decision filed concurrently herewith. Judgment is rendered for defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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FRED J. SHOEMAKER
Judge

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