

Boxing Promoter Don King K.O.'d in Florida Appellate Court on Defamation Claims

Media Law Bulletin

September 2010

By: [Dana McElroy](#)

ESPN, Inc. put legendary boxing promoter Don King down for the count this summer when a Florida appellate court upheld summary judgment in favor of the sports media giant on King's defamation claims in *Don King Productions, Inc. v. Walt Disney Co.*, No. 4D08-3704, 2010 WL 2675308 (Fla. 4th DCA June 30, 2010). This heavyweight bout began when King brought suit against ESPN and several related entities for comments made during an ESPN "SportsCentury" television program about King's life and career. The trial court in Broward County, Fla., granted ESPN's motion for summary judgment, finding that there was no issue of material fact from which a jury could find -- by clear and convincing evidence -- that ESPN had published the statements with actual malice. Moreover, King had failed to establish the falsity of the statements. On appeal, Florida's Fourth District Court of Appeal affirmed, and in so doing, reiterated the exacting standards necessary for a public figure to prevail in a defamation claim against the media.

Let's Get Ready to Rumble!

King's original complaint alleged defamation and false light invasion of privacy against ESPN. On appeal, King pursued only the defamation claims, after the Florida Supreme Court ruled in an unrelated case that false light is not a recognized tort in Florida. King's suit was based on five statements made during the course of the "SportsCentury" program: four made by or based on information from fellow boxing promoter Don Elbaum; and one by Jack Newfield, a journalist and author of a book about King's life titled "Only in America." King asserted that Elbaum falsely made the following four statements: 1) King failed to pay \$1 million owed to fighter Meldrick Taylor; 2) King threatened to kill Taylor; 3) a hospital did not receive funds raised at a benefit fight organized by King; and 4) King solicited \$250,000 from doctors to invest in a movie about his life that was never made. As for Newfield, King took issue with his description of an encounter with King at a press conference where King allegedly threatened to have Newfield killed. Although the trial court found that King failed to produce evidence to even prove the falsity of these statements, the appellate court disagreed. It held that as to three of the five statements, there was at least an issue of fact as to their truth. However, the appellate court recognized that "falsity alone is insufficient to make a claim for defamation," and directed its attention to whether King provided proof from which a jury could find, by clear and convincing evidence, that ESPN acted with actual malice in publishing the five challenged statements.

King Jabs – and Misses

As proof of actual malice, King pointed to evidence allegedly establishing that ESPN harbored ill will and intended to portray him in a negative light as a "greedy conniver," "huckster," "thug" and "a

mob-connected guy." In fact, ESPN producers had exchanged emails that requested more ominous music to do so. There also were script notations where producers commented that King should be portrayed as more evil, greedy and as engaging in criminal activities. The Florida appellate court, however, was quick to point out that even though it seemed clear that ESPN had a particular theme, and purposely chose to portray King in a negative light, this did not amount to actual malice. Rather, King was required to show that ESPN purposely made false statements about him in order to bolster the theme of the program or to inflict harm. ESPN thus was not required to present positive statements about King to balance the negative portrayal, or "to search until it found someone who would defend King."

ESPN Lands an Uppercut

King's case suffered another blow when the court held that there was no record evidence that ESPN did or should have doubted the veracity of Newfield and Elbaum, the sources of the challenged statements. First, King asserted that ESPN knew or should have known that Elbaum was convicted of tax fraud in the early 1990s, thus casting doubt on his general credibility. But the court disagreed, ruling that even if ESPN knew of the conviction or had a duty to do a background check, a single criminal conviction more than a decade prior to the publication did not require a publisher to question a source's credibility on all matters.

Next, King contended that ESPN knew or should have known of a longstanding animosity between King and Elbaum, which would have given producers reason to question Elbaum's truthfulness and motives. While the court raised an eyebrow at this contentious relationship, it did not believe that an event sparking animosity between Elbaum and King in 1973 was sufficient to raise concerns about Elbaum's credibility. Moreover, the court found that King presented no evidence of long-lasting tension created by this event.

Finally, as to Newfield, King did not question ESPN's reliance on his general credibility, but charged that ESPN was in possession of video of the alleged encounter between King and Newfield that failed to support Newfield's version of the events. The court, however, pointed out that Newfield's account of his confrontation with King also was recounted in his book, that it was reasonable for ESPN to conclude that Newfield's account was accurate and that the events described by Newfield occurred off-camera. In fact, the court recognized that ESPN tried on numerous occasions to interview King for the program, but he had declined. The court, while not suggesting that King had any obligation to provide an interview, found that ESPN's lack of access to King's version of the confrontation was a factor in support of ESPN's reliance on Newfield's account.

Technically, a Knockout

The appellate court delivered its final knock-down punch by rejecting King's assertion that ESPN's failure to conduct a more searching investigation of the claims made by Elbaum and Newfield established a departure from accepted journalism standards. For example, in his appellate brief, King had relied heavily on the fact that ESPN did not contact Taylor to confirm Elbaum's claim that King cheated Taylor out of \$1 million owed to him from a fight, and that King threatened to have Taylor killed. In support, King produced a taped interview with Taylor in which Taylor denied that he ever discussed such matters with Elbaum. The court, however, unequivocally rejected this

argument and reiterated that -- under well-established First Amendment principles -- the failure to investigate alone does not constitute actual malice. In this regard, the court recognized that although a departure from journalistic standards is not entirely irrelevant, more is required. Here, the record revealed that ESPN had interviewed sources with direct knowledge of the events at issue, and the court again noted ESPN had unsuccessfully tried to interview King. Accordingly, because ESPN had no "obvious reasons" to doubt the challenged statements, its failure to further investigate was not evidence of actual malice.

Given its celebrity appeal and marquee matchup, this title fight was bound to draw significant attention. The decision here not only affirms the significant challenges faced by a public figure or official attempting to bring a defamation claim, but does so with striking force. Those plaintiffs will not prevail with mere speculation and argument about lack of balance or failure to investigate, but instead need to present concrete evidence that reporters or producers in fact entertained serious doubts as to the truth of their published statements. Even more importantly, in affirming summary judgment and ending the case without a jury trial, the court made clear its strong and continuing commitment to protecting and preserving First Amendment rights.

Related Practices:

[Media, Entertainment & Sports Law](#)