

MORRIS & STONE, LLP

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Is Rush Limbaugh Facing a Claim for Defamation?

I'm getting calls from media outlets about some comments made by Rush Limbaugh, and whether they constitute defamation. I'm always happy to talk to you reporters and provide comments, but thought I'd post this article to provide some background information.

Apparently Rush Limbaugh weighed in on the controversy over religious organizations being forced to pay for birth control under their health plans. He made his comments following an appearance by Sandra Fluke, a Georgetown University student, at an informal House Democratic hearing last month. Ms. Fluke testified in favor of Mr. Obama's mandate, which Georgetown and other Catholic institutions have roundly condemned as an infringement on their religious rights. At the hearing, Ms. Fluke said fellow students at her Jesuit university pay as much as \$1,000 a year for contraceptives that are not covered by student health plans.

On Wednesday, during his radio show, Limbaugh allegedly said:

"What does that make her? It makes her a slut, right? It makes her a prostitute she wants to be paid to have sex ... She's having so much sex she can't afford contraception."

Accusing a woman of being unchaste is the classic, old-school form of slander. Here is the definition of slander under California's Civil Code § 46:

Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:

1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;
2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;
3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;

4. **Imputes to him impotence or a want of chastity; or**

5. Which, by natural consequence, causes actual damage.

I'll bet you never knew it was slander to accuse a man of being impotent, but I digress. There it is in black and white – it is slander to impute to a woman a “want of chastity”. (For those of you who carefully read the section and see that it said “imputes to HIM . . . a want of chastity”, you get bonus points. However, there is a catchall statute that provides statements of gender in statutes don't exclude the other gender, so you can't accuse men or women of being loose.)

So is Rush Limbaugh toast?

Not at all, because defamation law makes clear that context is everything. Back in 2009 I wrote about [the case of radio commentator Tom Martino](#) who stated on his consumer show that the sellers of a boat were “lying”. The plaintiffs/sellers took umbrage with that remark, and sued Martino for defamation. Defendants responded with an anti-SLAPP motion, claiming the statement was merely an opinion and therefore could not constitute defamation. The trial court agreed with defendants and ruled that as a matter of law the comments did not constitute defamation. Under the anti-SLAPP statute, plaintiffs were ordered to pay all of defendants' attorney fees.

A true opinion cannot constitute defamation unless it is offered as an assertion of fact. While it was true that the radio program host accused the plaintiffs of “lying” to their customer, that could not seriously be taken as an assertion of fact given the context of the show. As the court observed, “The Tom Martino Show is a radio talk show program that contains many of the elements that would reduce the audiences' expectation of learning an objective fact: drama, hyperbolic language, an opinionated and arrogant host and heated controversy. In the context of the show, Martino was simply listening to the complaint of a caller, and possessed no independent knowledge of the facts beyond what he was being told. It could not be taken, in that context, that he intended his “lying” comment to be taken as a verifiable fact.

So it is with Rush Limbaugh. He knows nothing about this woman who believes others should pay for her birth control, and he was engaging in a little hyperbole about what that makes her. He was creating a false syllogism to make a point, claiming that based on her testimony she wants to have sex, she can't have sex without birth control, she wants someone else to pay for her birth control, so she is being paid to have sex.

As the old saying goes, you can sue for anything, but a defamation action by Ms. Fluke would not survive the first motion.