MEMORANDUM

To: Professor Steefel
From: Jamie Bosten
Re: Defense of Larry Relon for Defamation Claims
Date: April 27, 2010

INTRODUCTION

To establish a prima facia case of defamation there are two questions whose answers may affect the burden of proof for the plaintiffs. First, are the Smiths public figures or officials? Second, is the issue one of public concern? An answer of "yes" to either of these questions may raise the burden of proof required, and may provide constitutional protections for the defendant's speech. Additionally, the answers to these questions may affect the level of damages.

The defendant's best position is to establish the plaintiffs as either limited purpose public figures or involuntary public figures. This would require the Smiths to show actual malice to establish their prima facia case. The Smith's burden is lessened if they successfully establish themselves as private citizens, and they will most likely defend this status. Under an analysis of the facts using Gertz v. Welch, Inc., 418 U.S. 323 (1973) and Time, Inc. v. Firestone, 424 U.S. 448 (1976), the court will likely conclude that the Smiths are private citizens.

Comments concerning issues of public concern receive additional constitutional protections from defamation claims. In determining if the matter in this case is an issue of public concern, Dun & Bradstreet, Inc. v. Grennmoss Builders, Inc., 472 U.S. 749 (1985) will provide a framework for the analysis. This analysis will likely conclude there is no issue of public concern.

The questions of public figure status and issue of public concern answered in the negative will leave this claim under the state common law defamation analysis. This will require the Smiths to establish by a preponderance of evidence that the statements were made negligently and damages will be presumed.

There is a strong defense to the defamation claims founded on the comments posted by "letthemeatcake" and to the reposting of the TMZ statements about Mrs. Smith from the Communications Decency Act, 47 U.S.C. § 230 (CDA). The CDA provides immunity to users of interactive computer services for the re-posting of content from other providers, and it does not permit users to be considered the publisher of third party statements. Mr. Relon will be able to successfully defend against the posting comments from "letthemeatcake" because they were posted by a third party. Further, Mr. Relon will also be able to defend his re-posting of the content from the TMZ website because TMZ is a content provider. However, Mr. Relon has no defense under the CDA for the statements he published based on his source.

New York Times offers an argument that a failure to check the facts from a known reliable source, may at most be determined negligent, suggesting it may not even rise to that level. This analysis may be used to try to defeat the negligence standard required by Colorado law. However, just as any person who publishes or re-publishes a defamatory statement would be liable for defamation under the common law, Mr. Relon is likely liable for his statements in the blog which he attributes to his "sources".

DISCUSSION

I. THE ISSUE IS NOT LIKELY ONE OF PUBLIC CONCERN

Though seemingly the second question in the analysis, the definition of an issue of public concern is intertwined with the analysis for two types of public figures and warrants consideration first.

A position that the Smiths were involved in an issue of public concern, should it be proven, would shift the burden of proof of falsity to the plaintiffs. In addition, if the statements concern an issue of public concern, then the damages must be proven with evidence of actual injury.

The Supreme Court ruling in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. sets out the analysis for issues of public concern. Dun & Bradstreet, Inc. v. Grennmoss Builders, Inc., 472 U.S. 749 (1985). The *Dun* Court held that unless the outcome of the controversy will have an impact on the general public as a whole, or at least some recognizable subset, then the controversy is a private matter. Id. at 761-762. The Court listed three factors it considered in this analysis: 1) the content of the statement, 2) the form of the statement, and 3) the context of the statement. Id.

In *Dun*, the Court considered inaccurate statements in a credit report distributed to five parties, each of whom was bound by contract not to redistribute the report. Id. The Court reasoned that these statements were aimed at the individual interest of the speaker and the five parties to which they were communicated; the speech warranted no special protections for First Amendment

issues because it was wholly false and clearly damaging to the plaintiff; and because it could not be further distributed, it was not a matter of commerce. Id. The Court's final thought on this discussion was, "There is simply no argument that this type of credit report requires special protection to ensure that debate on public issues [will] be uninhibited, robust, and wide open." Id.

Like the statements in *Dun,* Mr. Relon's statements were made in a blog created for an individual interest, conveying his private thoughts. Further, like the statements in *Dun,* these statements were also false and arguably damaging to the plaintiffs. However, unlike in *Dun,* Mr. Relon's blog is sponsored by paid advertisements and as such is in the stream of commerce. Though no single factor is determinative, here, more factors weigh against the statements involving a public controversy.

The event that brought the Smiths into public view was their attendance at a White House event, and a question about their status as invited guests. The only public controversy, if any, which arose from this, was one of concern over Presidential security. Mr. Relon's comments were not aimed at this issue, but rather at the Smiths themselves.

Failing an argument that the events or the statements will have an impact on the general public, and failing in the overall *Dun* analysis, it is highly likely that there is no public controversy tied to this claim.

II. THE SMITHS ARE LIKELY PRIVATE PERSONS

The Smiths do not hold and were not seeking public office; they are not employed by the government; and they do not hold a position in the public of high power or influence. There are no facts to support the position that they injected themselves into an existing public controversy in an attempt to influence the outcome, and they have not engaged in activities to place themselves in the vortex of a public issue. The Smiths are not public officials or public figures in any capacity. As such, they will need to show only the common law elements of defamation to establish their prima facia case. Additionally, under the common law, the standard of proof required is that of preponderance of the evidence.

A. Plaintiffs are not Public Officials

Public officials are those persons who currently hold, formerly held, and in some instance those who are seeking governmental office. New York Times Co., v. Sullivan, et al., 376 U.S. 254 at 273 (1964). Speech concerning the conduct of public officials enjoys Constitutional protections derived from the First and Fourteenth Amendments. Id. at 283. This protection raises the standard of proof in a defamation action to that of clear and convincing evidence of actual malice. Id. at 279.

At the time that the events surrounding this claim occurred, there were no facts to support a position that the Smiths were public officials; they did not hold and were not seeking any elected office. Further, the government did not employ

them. As such, any statements about them would not receive any constitutional protections from defamation claims.

B. Plaintiffs are likely not Public Figures

Though the Smiths are not public officials, they could still be public figures. The Supreme Court in Gertz v. Welch, Inc., 418 U.S. 323, extended the First Amendment protections from *New York Times* to a class of persons deemed public figures. The Court reasoned that, like public officials, public figures have attained positions of power and influence over prominent issues and affairs of society. Gertz v. Welch, Inc., 418 U.S. 323, at 345 (1973). The Court noted that such persons have accepted the risk to their reputations by voluntarily thrusting themselves to the forefront of public controversies to influence the outcomes. Id. Further, public figures have access to media outlets to rebut false reports made against them. Curtis Publishing Co. v. Butts, 388 U.S. 130, at 155 (1967), and Gertz, at 343-346.

Here, the Smiths do not hold any positions of public prominence on any issues and have not thrust themselves to forefront of any public controversies to influence the outcome. They are not spokes-persons for any national issues such as gay marriage or autism awareness. They were generally unknown to the public before the White House party event.

C. Plaintiffs are likely not Limited Purpose Public Figures

As previously discussed, the Smiths are not all-purpose public figures. However, they could be viewed as public figures for some limited purpose. In Time, Inc. v. Firestone, the Court was asked to decide if a woman participating in a very

public divorce was public figure for a limited purpose. Time, Inc. v. Firestone, 424 U.S. 448 (1976). The Court drew a distinction between a public controversy, and those events which may be of general interest to the public. Id. at 454. The Court reasoned that Mrs. Firestone was compelled to go to court for this process, and that her decision to participate in a few press conferences to answer media questions did not make her a public figure. Id. at 454-455; see also, Id. at FN 3 (discussing the issue of holding a few press conferences and how those press conference had no effect on the legal dispute in question, nor were they designed to thrust her to the forefront of some other controversy).

The Court in Wolston v. Reader's Digest Association, Inc., extended the analysis beyond the type of event. The Court considered "the nature and extent of the individual's participation in the particular controversy..." when finding that a man who refused to cooperate in a government investigation of espionage was not a public figure due to his limited role in the overall investigation. Wolston v. Reader's Digest Association, Inc., 443 U.S. 157 at 167 (1979). Further, in Wells v. Liddy, the court reasoned that when an individual has had contact with the press, the proper question to ask is if they intended to influence the outcome of the controversy. Wells v. Liddy, 186 F.3d 505 at 537 (4th Cir. 1999) (reviewing Wells' interviews with the press as they related to her personal observations and feelings on the Watergate controversy.)

Colorado courts have also considered the question of limited purpose public figure. In McIntyre v. Jones, the court reviewed comments made about a

homeowner's association bookkeeper and whether the bookkeeper was a limited purpose public figure. McIntyre v. Jones, 194 P.3d 519 (Colo. App. 2008). The court reviewed two questions in making this analysis: 1) whether the defamatory statements involved a matter of public controversy, and 2) whether the bookkeeper's level of participation in the controversy invited scrutiny. Id. at 527. The court held that the threshold question requires that the statements involve a matter of public concern, and that if they do not, no further considerations are needed. Id.

Here, the facts suggest that the media took notice of the Smith's attendance at the White House event, possibly without an invitation, and began an inquiry. The Smiths maintain that they were invited to the event. The Smith's attendance, possibly without an invitation, has created an investigation into Secret Service protocol and created media interest in Presidential Security.

Like the plaintiff in *Firestone,* the Smiths are in the public eye as a direct result of an investigation in which they must participate. Further, like the plaintiffs in *Wolston* and *Wells,* the Smiths have met with the media to answer questions, but do not appear to be doing any more than defending their attendance at the event as one of invitation. Further, the controversy, if one exists, appears to be concerning security for the President. The facts do not show the Smiths were attempting to influence the outcome of this controversy. Therefore, the Smiths are likely not limited purpose public figures.

D. Plaintiffs are likely not Involuntary Public Persons

There is one final category of public figures which requires consideration, that of involuntary public figure. The Court in *Gertz* held, and the Fourth Circuit re-affirmed in *Wells* that involuntary public figures "must be exceedingly rare." Gertz, 418 U.S. at 345; Wells, 186 F.3d at 538-539. The court in *Wells* went on to say that there are two elements a defendant must prove in order to establish the plaintiff is an involuntary public figure. First, they must show the plaintiff has become a "central figure in a significant public controversy." Id. at 540. Second, they must show the "allegedly defamatory statement has arisen in the course of the discourse regarding the public matter." Id.

As discussed previously, there is no significant public controversy established in this case. If however, there is a public controversy, it is most likely one of Secret Service protocols for Presidential security, and the statements at issue in this case do not comment on that controversy.

Absent the ability to persuade the court that the Smiths are some form of public figures, the Smiths will be viewed as private citizens. This will bring the claims under the common law for analysis and resolution.

III. THE STANDARD OF PROOF REQUIRED

If the defendant successfully proves the plaintiffs are some type of public figures, the plaintiff's prima facia case would have to include clear and convincing evidence of actual malice. If the defendant is unsuccessful then common law standards would apply to these statements.

A. Actual Malice

Should Mr. Relon succeed in proving the Smiths are public figures, the burden would both increase, and shift to the Smiths. The plaintiffs would need to prove actual malice to overcome the constitutional protections that *New York Times* and its progeny afforded to speech concerning such figures. New York Times, Inc., 376 U.S. 254 (1964). To prove actual malice, the Smiths would have to show with clear and convincing evidence, that Mr. Relon knew that the statements were false, or that he showed a reckless disregard for whether the statements were true or false. Id. at 280, 285-286. Further, they would have to prove actual damages. Id.

In this case, Mr. Relon relied on a source known to him to be reputable. Further, he did not know that any of the statements he was making were indeed false. The facts of this claim do not support a finding of actual malice.

B. Negligence

This leaves the common law of Colorado, which carries a negligence standard. The facts of this claim support this finding. "A statement may be considered defamatory *per se*, if it is specifically directed at the person claiming injury and if, on its face and without extrinsic proof, it is unmistakably recognized as injurious." Tonnessen v. Denver Publishing Company, 5 P.3d 959 at 963 (Colo. App. 2000) (noting that this is a question for the court and will be determined by examining the statement alone, and that imputing a criminal offense is defamatory *per se*).

Here the statements include allegations of fraud and tax evasion and the court will likely see them as defamatory *per se*. However, there is room for argument against the Colorado negligence standard.

There is a suggestion in *New York Times* that failing to check the facts from a known and reliable source may not even rise to the level of negligence. New York Times, Inc., 376 U.S. at 288. In discussing reckless disregard, the Court held that a failure to check facts when they came from sources known to have a good reputation was ***at most negligence and not reckless***. Id. at 288 (emphasis added). The Court made this comment about a media defendant, and it is arguable that the standard is even less stringent for a non-media defendant such as Mr. Relon.

The facts here are such that Mr. Relon's source had a good reputation for reliability. Further, Mr. Relon is not a member of the media and has no duty to check facts or sources. As such, using information from his previously reliable source may not be negligent.

IV. DEFENSES

There is a defense that Mr. Relon may rely on to reduce or eliminate his liability for certain statements in his blog. The Communications Decency Act (CDA) provides immunity for the posts on Mr. Relon's blog by the user "letthemeatcake," and for Mr. Relon's re-posting of the TMZ web materials.

A. Immunity under the Communications Decency Act

The CDA, enacted by Congress in 1998, was created to protect the developing internet and encourage the free expression of ideas. 47 U.S.C. § 230(a-b) (2006). The CDA reads in relevant parts:

> (c) Protection for "good samaritan" blocking and screening of offensive material
> (1) Treatment of publisher or speaker- No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
> (2) Civil liability- No provider or user of an interactive computer service shall be held liable on account of--
> **(A)** any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
> **(B)** any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1). 47 U.S.C. § 230(c) (2006).
>
> (f) Definitions: As used in this section:
> (1) Internet- The term "Internet" means the international computer network of both Federal and non- Federal interoperable packet switched data networks.
> (2) Interactive computer service- The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.
> (3) Information content provider- The term "information content provider" means any person or entity that is responsible, inwhole or in part, for the creation or development of information provided through the Internet or any other interactive computer service. 47 U.S.C. § 230(f) (2006).

Under the CDA, a user of an interactive computer service is not treated as the publisher of statements or information provided by another information content provider. Barnes v. Yahoo!, Inc., 570 F.3d 1096 at 1100-1101, (9th Cir. 2009). Specifically the court was concerned with any cause of action, which would require that the defendant be treated as the publisher, as would be the case in a defamation

action. Id. at 1102. The CDA specifically provides immunity for defamation actions based on the statements of a user of an interactive computer service. 47 U.S.C. § 230(c)(1) (2006).

Mr. Relon is a user of an interactive computer service. Barrett v. Rosenthal, 146 P.3d 510 at 526 (Cal. Sup. Ct. 2006) (simply defining user as someone who uses something); See also, 47 U.S.C. § 230(f)(2) (2006) (defining interactive computer service as "any information service, system or access software provider the provides or enables computer access by multiple users to a computer server,..."). Further, the comments he posted from the TMZ website are protected under the CDA by his status as a user and TMZ's status as an information content provider. Mr. Relon is not considered the publisher of these comments, and as such, the prima facia requirement of publication fails.

"Letthemeatcake" is an information content provider under the CDA definitions. Considering Mr. Relon's status as a user as discussed above, the CDA also provides that he is not to be considered the publisher of "letthemeatcake's" comments either. Here again, the plaintiffs would fail to establish the publishing element of their defamation action.

CONCLUSION

The Smiths are not likely public figures. Further, the statements are not likely pertaining to a public controversy. As such, Colorado common law defamation will apply.

To establish a prima facia case of defamation the Smiths will need to prove the following: 1) the defendant made defamatory statement; here this was accepted as a given. 2) The statement is about the plaintiffs; here again accepted as a given. 3) The statement was published; here we have a defense for several, but not all of the statements under the CDA. 4) The statement was published negligently; here there is some argument that Mr. Relon's reliable source could negate his negligence, though this is likely a question for the jury.

General damages are presumed, and therefore not part of the prima facia showing at common law in Colorado. The Smiths will also have an opportunity to provide evidence of special damages and to request punitive damages as well.

Under the facts as presented, Mr. Relon is likely liable, only for the statements he made in his blog, which he attributed to his reliable source.