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Daily Dicta: These Defamation Cases Hit a Little Too Close to Home.

Usually, the federal constitutional privilege that protects accurate reports of judicial proceedings (and liberal use of the word "allegedly") is enough to ward off defamation suits, no matter how unhappy the subject of a story may be. But not always.

By Jenna Greene | April 25, 2019

Writing about litigation can be tricky, especially when the proceedings involve ugly personal accusations and sealed court filings. The line between protected content and defamation is sometimes a bit blurry.

A pair of decisions issued yesterday—one in New York involving a former Big Law associate versus the New York Post, the other in Florida pitting a former CNN pundit/Donald Trump staffer against Gizmodo Media —are both good examples.

There is of course a federal constitutional privilege that protects accurate reports of judicial proceedings. Usually that (and liberal use of the word "allegedly") is enough to ward off suits against reporters, no matter how unhappy the subject of a story may be.

But not always.

The New York Post defamation suit was brought by Anthony Zappin, a 2010 Columbia Law School graduate who'd been an associate at Mintz Levin; Quinn Emanuel Urquhart & Sullivan and Latham & Watkins. He was embroiled in a wildly contentious divorce and custody fight with his ex-wife, Claire Comfort, a former Weil, Gotshal & Manges associate who according to her Linked In profile is now a lawyer at the International Trade Commission.

How bad was it? Zappin was sanctioned $10,000 and subsequently disbarred (https://www.law.com/newyorklawjournal/2018/03/15/manhattan-lawyer-disbarred-for-unbridled-conduct-during-divorce-custody-battle/) in New York for what the court said was his "egregious and outrageous" conduct during the proceedings.

Along the way, he also sued the New York Post for defamation.

It's strange to me that the Post even covered the divorce—it's not as if Zappin or his ex-wife were celebrities. But for whatever reason, reporter Julia Marsh was in court on November 12, 2015 when a court-appointed psychiatrist testified.

In her story—"'Hostile' mega-lawyer accused of abusing pregnant wife (https://nypost.com/2015/11/13/hostile-mega-lawyer-accused-of-abusing-pregnant-wife/)" —Marsh wrote that the doctor said Zappin's ex-wife told him her spouse "got angry and slapped me. He hit my glasses, he hit my head a couple of times. He grabbed my hand hard and hit my stomach with the car keys."

The district court dismissed Zappin's defamation complaint. But on appeal, the

Second Circuit dug into his assertion that the law protecting "fair and true" reports about judicial proceedings didn't apply to matrimonial proceedings. And indeed, a New York state appeals court in *Shiles v. News Syndicate Co.* previously held that news stories based on sealed court records in a divorce case were not protected.

But what about a reporter's observations about a divorce case in open court?

The Second Circuit held

(http://www.ca2.uscourts.gov/decisions/isysquery/e332d799-6d44-48e0-86ae-aa5cbf61e3ee/4/doc/18-647_so.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/e332d799-6d44-48e0-86ae-aa5cbf61e3ee/4/hilite/) that unlike sealed records, this is protected. "Given that the reporters were permitted to attend the court hearing and the matrimonial judge did not ban the public from the courtroom, Shiles does not bar the defendants from asserting a privilege."

The New York Post story did contain a minor error. Marsh wrote that Zappin was fired from Quinn Emanuel, when in fact he was fired from Mintz Levin. "This small error—confusing from which firm Zappin had been fired—does not substantially undermine the article's overall accuracy," the appeals court held. (I'm pretty sure the average reader of the New York Post does not know or care about the difference between Mintz Levin and Quinn Emanuel.)

The Post and Marsh were represented by Robert Balin and Eric Feder of Davis Wright Tremaine. Zappin was pro se.

My colleague Colby Hamilton at The New York Law Journal has more on the case (https://www.law.com/newyorklawjournal/2019/04/24/second-circuit-sinks-ex-mintz-levin-lawyers-defamation-appeal/), and also a comment from Zappin, who in an

email wrote, “The New York Law Journal, the tax-payer financed propaganda arm of the New York State Unified Court, is writing yet another smear piece about Anthony Zappin on behalf a fundamentally corrupt state court system and a federal court covering its tracks.”

When Colby in a follow-up email asked if he was currently employed at a law firm, Zappin responded with an obscenity.

The Stripper, the Smoothie and the Abortion Pill

In some ways, Zappin’s suit is similar to one brought by Jason Miller against Gizmodo Media Group, which publishes Splinter.com, as well as Katherine Krueger, who is the publication’s managing editor. It also deals with litigation involving a breakup and a custody fight, but on a larger stage. And this time, the media may be on the hook.

“This case is a terrifying example of how people can use false accusations of violence against women to destroy someone’s life,” Miller’s 2018 complaint (https://images.law.com/contrib/content/uploads/documents/407/1682/Miller-complaint.pdf) in the Southern District of Florida seeking $100 million in damages begins.

Miller was the communications director for President Trump’s transition team, slated to serve as the first White House communications director. He withdrew from consideration after fellow Trump staffer Arlene “A.J.” Delgado “with whom Miller had an affair, prompted press coverage of their relationship and resulting pregnancy,” Miller’s lawyers Kenneth Turkel and Shane Vogt of Bajo Cuva Cohen Turkel wrote.

In their complaint, they say Delgado “waged ‘lawfare’ against Miller” in a custody fight over their son.

Last fall, she filed a (pro se) supplement to a pending motion in family court that contained an explosive allegation—that Miller, who is married, impregnated a stripper in Orlando and secretly slipped her an abortion drug in a smoothie, terminating the pregnancy.

Splinter obtained the filing and published a story about the allegations, which quickly went viral.

As a result, Miller—who adamantly denies the allegations—says he was labeled a "'murderer,' he lost his job on CNN, he is being harassed and threatened online, he and his family are being shunned in their community, and his personal, professional and family life have been permanently scarred—all without a shred of proof or corroborating evidence."

Miller claimed the filing was sealed, and thus the article isn't entitled to protection.

Gizmodo and Splinter, represented by Davis Wright Tremaine (who else?) countered (https://images.law.com/contrib/content/uploads/documents/407/1682/Miller-Gizmodo-reply.pdf)that "this allegation is false; no order exists sealing Delgado's filing at issue; nor does Miller's complaint identify one… Put simply, absent a sealing order, the article was nothing more than a straightforward report on a public record."

U.S. District Judge Cecilia Altonaga on Wednesday refused to dismiss the complaint, ruling that the article "was not a fair and true report."

But her standard of "fair and true" is awfully high.

This is the passage from the Splinter.com story at issue: "[T]he court documents claim, when the woman found out she was pregnant, Miller surreptitiously dosed her with an abortion pill without her knowledge, leading, ***the woman claims***, to the pregnancy's termination and nearly her death." (emphasis added)

But Delgado's filing doesn't actually specify that the stripper claimed Miller spiked her smoothie. The filing just states, "Mr. Miller visited [the stripper] at her apartment with a Smoothie beverage. Unbeknownst to Jane Doe, the Smoothie contained an abortion [p]ill. The pill induced an abortion, and Jane Doe wound up in a hospital emergency room, bleeding heavily and nearly went into a coma."

To me, this at least implies the stripper accused Miller of giving her the pill—because if not him, then who else? The Jamba Juice guy?

But Altonaga seized on the mistake, perhaps because it was the only way to hold Splinter accountable. “By reading the [court filing], the average reader may conclude that Delgado, relying on indirect sources, and in the context of a contested paternity action, has accused plaintiff of misconduct. By reading the article, the average reader may conclude Jane Doe –– the alleged victim herself –– has accused plaintiff of misconduct.”

Yeah, I don’t think so. Presumably, if those three words—“the woman claims”—were omitted, then the article would have passed muster. And it still would have been a disaster for Miller.

Look, I’m not defending Splinter. They don’t seem to have made any effort whatsoever to check out the allegations before publishing their story—and indeed, Miller says the stripper has “denied the accusations, told two reporters that they were not true, and never even spoke to Delgado about them.”

That’s pretty reprehensible.

But this is one of those bad facts/ bad law situations. If all it takes to lose the constitutional privilege when reporting on judicial proceedings is one errant attribution—“the woman claims”—then my job, and the job of every reporter who writes about litigation, just got a lot harder.