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Don King Productions, Inc. v. Walt Disney Co.: Reinforcement of Actual Malice as the Seminal Defense to Public Figure Defamation Claims in Florida

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***DON KING PRODUCTIONS, INC. v. WALT DISNEY CO.:*
REINFORCEMENT OF ACTUAL MALICE AS THE SEMINAL
DEFENSE TO PUBLIC FIGURE DEFAMATION CLAIMS IN
FLORIDA**

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I. INTRODUCTION

Don King, a well-known boxing promoter, sued ESPN, Inc. for defamation based on certain statements made in a television program—ESPN *Sports Century*—broadcast about King’s life and career.¹ In *Don King Productions, Inc. v. Walt Disney Co.*,² the Florida Fourth District Court of Appeal affirmed the trial court’s grant of summary judgment for the broadcaster, holding that the promoter had failed to establish that the

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1. *Don King Prods., Inc. v. Walt Disney Co.*, 40 So. 3d 40, 42 (Fla. 4th Dist. Ct. App. 2010). *Don King and Don King Productions, Inc.* are referred to as “King.” *Id.* ESPN, Inc., ESPN Productions, Inc., and ESPN Classic, Inc. are referred to as “ESPN.” *Id.*

2. 40 So. 3d 40 (Fla. 4th Dist. Ct. App. 2010).

defendant broadcaster had acted with actual malice—with reckless disregard for the truth—in broadcasting the challenged statements.³

II. THE CASE

[Don King], an admitted public figure . . . had the burden of establishing—[by] *clear and convincing* record evidence—that ESPN published the *SportsCentury* biography program . . . with actual malice—i.e., that ESPN *knew* the challenged statements were false or *in fact* entertained *serious* doubts about their probable falsity. . . . [The First Amendment] require[s] that summary judgment be “liberally granted” [against plaintiffs] in public figure defamation cases [brought] against media defendants.⁴

In this case, the trial court evaluated King’s actual malice arguments, found them deficient as a matter of law, and granted ESPN’s motion for summary judgment in its entirety.⁵

Specifically, the trial court concluded that ESPN had not “published the statements with actual malice.”⁶ It concluded that “a failure to investigate or a failure to investigate sufficiently, does not constitute actual malice,” but found that ESPN had, in fact, sufficiently investigated the

3. *Id.* at 42, 46.

The contents of the . . . statements at issue consist of the following:

1. [Don] Elbaum indicated that King organized a benefit exhibition fight for Forest City Hospital. The hospital only received \$1,500 out of the \$85,000 in ticket sales.

2. [Don] Elbaum described a private conversation he had with Meldrick Taylor in which they discussed Taylor being owed \$1,300,000 for a fight, and King giving Meldrick a check for only \$300,000.

3. [Don] Elbaum asserted that King threatened to have Meldrick Taylor killed.

4. [Don] Elbaum stated that King convinced doctors to invest \$250,000 in a movie about his life that was never made; [and]

5. [Jack] Newfield described an encounter he had with King at a press conference where King went crazy and threatened to kill him.

Id. at 42–43.

4. Appellees’ Answer Brief at 1, *Don King Prods., Inc. v. Walt Disney Co.*, 40 So. 3d 40 (Fla. 4th Dist. Ct. App. 2010) (No. 4D08-3704) (footnote omitted); *see also Don King Prods., Inc.*, 40 So. 3d at 43 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

5. *Don King Prods., Inc.*, 40 So. 3d at 43–44; *see also* Order at 4–8, *Don King Prods., Inc. v. Walt Disney Co.*, No. 05-000524(02) (Fla. 17th Cir. Ct. July 28, 2008) [hereinafter Order for Summary Judgment].

6. *Don King Prods., Inc.*, 40 So. 3d at 43.

King story.⁷ The court also held that “casting doubt on the credibility of a journalist’s source is insufficient to sustain the burden of proving actual malice,” but in any event, found that ESPN’s sources were sufficiently credible.⁸ Finally, the trial court concluded that “[i]ll-will, spite, and negativity are wholly irrelevant to actual malice.”⁹ The trial court also granted summary judgment in favor of ESPN on the ground that “King had failed to establish the falsity of [certain] statements.”¹⁰

On appeal, however, the Fourth District Court of Appeal directed its attention solely to the lack of actual malice—the second basis for the trial court’s grant of summary judgment—affirming on the ground that the lower court determination “was proper because there [was] no record evidence . . . that a jury could find, by clear and convincing evidence, that ESPN acted with actual malice in publishing the five [challenged] statements.”¹¹

A. *The Factual Context*

“The sworn affidavits and testimony from the ESPN producers [reflected] . . . the[ir] belie[f] [that] everything contained in the [broadcast] was true and accurate. This testimony also . . . show[ed] that ESPN had no doubt . . . about the truth of the [p]rogram.”¹² “King’s principal argument focuse[d] on one [source], Don Elbaum. King claim[ed] that Elbaum was so incredible that there were ‘obvious reasons’ to doubt him.”¹³ The undisputed record evidence, however, showed that ESPN’s producers had no reason to doubt Elbaum.¹⁴

7. Order for Summary Judgment, *supra* note 5, at 6 (citing *St. Amant*, 390 U.S. at 733; *Palm Beach Newspapers, Inc. v. Early*, 334 So. 2d 50, 52–53 (Fla. 4th Dist. Ct. App. 1976) (per curiam)).

8. *Id.* at 6–7 (citing *Thomas v. Patton*, 34 Media L. Rptr. 1188, 1191 (Fla. 4th Cir. Ct. 2005)).

9. *Id.* at 8 (citing *Palm Beach Newspapers, Inc.*, 334 So. 2d at 52–53).

10. *Don King Prods., Inc.*, 40 So. 3d at 43.

11. *Id.*

12. Appellees’ Answer Brief, *supra* note 4, at 2; see also *Don King Prods., Inc.*, 40 So. 3d at 45. “King ha[d] no evidence to the contrary . . .” Appellees’ Answer Brief, *supra* note 4, at 2; see also *Don King Prods., Inc.*, 40 So. 3d at 45. The record testimony reflected that ESPN repeatedly tried to interview King. *Don King Prods., Inc.*, 40 So. 3d at 46. He refused. *Id.* “As part of the editorial process, [a] senior member of the production team [actually] deleted many [negative] items . . . he viewed as inadequately substantiated and added several positive statements about King.” Appellees’ Answer Brief, *supra* note 4, at 3.

13. Appellees’ Answer Brief, *supra* note 4, at 3; see also *Don King Prods., Inc.*, 40 So. 3d at 45–46.

14. *Don King Prods., Inc.*, 40 So. 3d at 45; Appellees’ Answer Brief, *supra* note 4, at 3.

[Elbaum had known] King intimately for over [thirty] years and had been personally involved in each of the statements he made [in the broadcast]. In addition, everything Elbaum said was consistent with what other interviewees had said and what prior [publications] had reported for decades. Extensive interview tape[s] and scores of [media] of all kinds . . . repeatedly stated that King was a huckster who had threatened, intimidated, and cheated, or underpaid many, including boxers.

Faced with this . . . evidence, King[] . . . attempt[ed] to “thread the needle” with the hope of finding *something* that constitute[d] actual malice. . . . King, [thus] claim[ed] that one ESPN producer expressed doubts about certain statements, which were ignored.¹⁵

“But the record actually show[ed] each of those statements was deleted” and each was not in the final broadcast.¹⁶

King also claim[ed] that ESPN, [in fact, did] doubt[] Elbaum[’s] [veracity] because ESPN’s fact-checker Larry Schwartz . . . testif[ied] that he “noticed” that Elbaum was a “con artist.” But Schwartz’ [sic] videotaped deposition makes clear that [he] *actually* stated the *exact opposite*: “I *never* said he [Elbaum] was a con artist.”

King [next] argue[d] that ESPN published five of 183 statements in the [broadcast] with actual malice because (i) ESPN’s producers were out “to get” King, (ii) [ESPN’s investigation was insufficient], (iii) two of ESPN’s 45 sources were not credible . . . and (iv) ESPN exhibited poor journalism in putting together the Program.¹⁷

None of these arguments satisfied King’s burden of proving actual malice by clear and convincing evidence.¹⁸ “In light of the . . . record [about] King’s . . . history, [his] focus on just seconds of the Program itself reveal[ed],” at best, a marginal defamation claim.¹⁹ The program had 178

15. Appellees’ Answer Brief, *supra* note 4, at 3–4; *see also Don King Prods., Inc.*, 40 So. 3d at 42, 44–45.

16. Appellees’ Answer Brief, *supra* note 4, at 4.

17. *Id.* (citing Exhibit 83, *Don King Prods., Inc. v. Walt Disney Co.*, 40 So. 3d 40 (Fla. 4th Dist. Ct. App. 2010) (No. 4D08-37004)).

18. *Don King Prods., Inc.*, 40 So. 3d at 45.

19. Appellees’ Answer Brief, *supra* note 4, at 5.

unchallenged statements.²⁰ ESPN submitted (with its summary judgment motion), a video of the broadcast, excluding the five challenged statements.²¹ “[A]s a matter of law, the gist of the Program [was determined to be] the same, with or without the five statements.”²²

B. *The Rationale of the Appellate Court*

The Fourth District Court of Appeal reasoned that King failed to establish that ESPN acted with actual malice.²³ Writing for that court, Judge Dorian K. Damoorgian began by explaining the general principle that governs claims for defamation.²⁴ He then analyzed the heightened standard concerning public figure defamation actions—“more than mere negligence on the part of the publisher” is required and the public figure “must prove that the publisher acted with actual malice.”²⁵

In the landmark case of *New York Times Co. v. Sullivan*,²⁶ the Supreme Court of the United States defined “actual malice” as knowledge by a publisher that a statement is false or that it was made in “reckless disregard of whether it was false or not.”²⁷ As Judge Damoorgian observed, “[r]ecklessness may be found where ‘there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.’ Under these circumstances, the publisher’s profession that he published the defamatory statements in good faith is generally insufficient to obtain a summary judgment.”²⁸ “Publishing with such doubt[] [may] show[] reck-

20. *Id.*

21. *Id.* (citing Exhibit 86, *Don King Prods., Inc. v. Walt Disney Co.*, 40 So. 3d 40 (Fla. 4th Dist. Ct. App. 2010) (No. 4D08-3704)).

22. *Id.*

23. *Don King Prods., Inc.*, 40 So. 3d at 42 (“At issue in this appeal are five of the statements made during the course of the Sports Century program, which King alleges are actionable defamatory statements.”).

24. *Id.* at 43 (citing *Mile Marker, Inc. v. Petersen Publ’g, L.L.C.*, 811 So. 2d 841, 845 (Fla. 4th Dist. Ct. App. 2002)) (“A common law claim for defamation requires the unprivileged publication (to a third party) of a false and defamatory statement concerning another, with fault amounting to at least negligence on behalf of the publisher, with damage ensuing.”).

25. *Id.* at 43 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)); *see also Mile Marker, Inc.*, 811 So. 2d at 845.

26. 376 U.S. 254 (1964).

27. *Id.* at 280; *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82–83 (1967) (per curiam) (quoting *N.Y. Times Co.*, 376 U.S. at 279–80); *Palm Beach Newspapers, Inc. v. Early*, 334 So. 2d 50, 52 (Fla. 4th Dist. Ct. App. 1976) (per curiam) (quoting *N.Y. Times Co.*, 376 U.S. at 279–80); *see also St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (clarifying definition of actual malice).

28. *Don King Prods., Inc.*, 40 So. 3d at 43 (quoting *St. Amant*, 390 U.S. at 731–32).

less disregard for [the] truth or falsity” of the statement and may constitute actual malice.²⁹

Although the appellate court did not adopt the trial court’s findings regarding the factual deficiencies of certain statements, it still found the defamation claim unsustainable because King failed to establish that ESPN published the statements with actual malice.³⁰ The court then separately addressed each of King’s contentions in support of his claim that ESPN had acted with actual malice.³¹

C. *The Ill Will Contention*

King argued “that ESPN harbored ill will towards him and intended to portray him in a negative light.”³² In support of this argument, he directed attention to unfavorable emails, script notations, and adverse comments made by ESPN producers.³³ The Fourth District Court of Appeal disagreed and pointed out that ill will is not actual malice under the standard established in *New York Times Co.*³⁴ “[A] showing of ill will, alone, cannot establish actual malice.”³⁵ “[W]hen combined with other evidence,” however, ill will or motive may be a factor in concluding that a publisher has acted with actual malice.³⁶ Yet, “[d]espite the relevance of ill will and motive,” the appellate court emphasized that “courts must be careful not to place too much [relevance] on such factors.”³⁷

The Fourth District Court of Appeal made clear in its opinion that “[a]ny ill will or evil intent in the emails and production notations . . .

29. *Id.* (quoting *St. Amant*, 390 U.S. at 731).

30. *Id.* at 44–45. In so doing, the appellate court held that “summary judgments are to be more liberally granted in defamation actions against public figure plaintiffs.” *Id.* (citing *Dockery v. Fla. Democratic Party*, 799 So. 2d 291, 294 (Fla. 2d Dist. Ct. App. 2001) (per curiam)).

[O]n a motion for summary judgment in a public-figure defamation case, the burden is on the plaintiff to “present *record evidence* sufficient to satisfy the court that a genuine issue of material fact exists which would allow a jury to find by clear and convincing evidence the existence of actual malice on the part of the defendant.”

Id. (quoting *Mile Marker, Inc.*, 811 So. 2d at 846–47).

31. *Don King Prods., Inc.*, 40 So. 3d at 44–46.

32. *Id.* at 44.

33. *Id.*

34. *Id.* at 45.

35. *Id.* at 44.

36. *Don King Prods., Inc.*, 40 So. 3d at 44 (citing *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 667–68 (1989)) (“[A] plaintiff [may prove] the defendant’s state of mind through circumstantial evidence such as evidence of motive.”).

37. *Id.* (quoting *Harte-Hanks Commc’ns, Inc.*, 491 U.S. at 668).

[did] not amount to actual malice.”³⁸ It concluded that “nothing in the record [indicated] that ESPN [knowingly or] purposely made false statements about King [either] to bolster the theme of the program or to inflict harm on King.”³⁹

The “intention to portray a public figure in a negative light, even when motivated by ill will or evil intent, is not sufficient to show actual malice unless the publisher intended to inflict harm through knowing or reckless falsehood.”⁴⁰

Moreover, the Fourth District Court of Appeal concluded that “ESPN was not required to present positive statements about King to balance any negative statements, or to search until it found someone who would defend King.”⁴¹

King argued “that ESPN knew or should have known that [witness] Elbaum was” a convict, unreliable, and harbored animosity towards King, and, accordingly, ESPN should have taken additional steps to verify Elbaum’s statements.⁴² “Unlike Elbaum, [however,] King [did] not question [Jack] Newfield’s general credibility, but assert[ed] that ESPN had reason to [question the truth] of Newfield’s statement[s] that King [had] threatened to kill him.”⁴³ King argued that ESPN “had a copy of the [subject] videotape which show[ed] . . . the confrontation between King and Newfield, and which [did] not contain any evidence of a death threat.”⁴⁴ The court nonetheless dispensed with King’s contention that ESPN ignored obvious reasons to doubt witness statements.⁴⁵

The appellate court responded to the argument by strictly focusing on the applicable evidentiary standard.⁴⁶ Thus, it concluded that the “evidence, even taken as a whole, [was] not sufficient to prove, by clear and convincing evidence, that ESPN acted with actual malice in publishing the statements about King.”⁴⁷ King, the court found, “had not pre-

38. *Id.*

39. *Id.* at 45.

40. *Id.* (citing *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991); *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964)). “Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will.” *Masson*, 501 U.S. at 510.

41. *Don King Prods., Inc.*, 40 So. 3d at 45 (citing *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1243 (11th Cir. 1999)).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Don King Prods., Inc.*, 40 So. 3d at 45.

47. *Id.*

sented any evidence that ESPN in fact doubted Elbaum's credibility or the veracity of Newfield's statement[s]."⁴⁸

The court reiterated that the evidence King relied on was "neither clear nor convincing."⁴⁹ Thus, "[a]ssuming ESPN knew of Elbaum's tax fraud conviction, or had any duty to perform a criminal background check on him, a single criminal conviction more than a decade before publication, [it opined,] does not require a publisher to question a source's credibility on all matters."⁵⁰ Although the "contentious relationship between King and Elbaum [was] more suspicious, [that was] still insufficient to show ESPN acted with reckless disregard for the truth."⁵¹

Finally, the Fourth District Court of Appeal noted that

[t]he event that sparked the animosity between King and Elbaum [had] occurred in 1973 [and that] King [had] presented no evidence that this event created long-lasting tension[s] between himself and Elbaum. Regarding [the] Newfield [matter], although the . . . video [did] not show King threatening Newfield's life, Newfield's account of the confrontation . . . support[ed], at the very least, his perception that King [had] threatened his life. In [his] book, Newfield recounted King's long tirade against him After King walked away from Newfield, someone associated with King approached [the author] and whispered, "Better watch your back, Jack. This is Don's town."⁵²

In the court's view, "[i]t was not unreasonable for Newfield to interpret this comment as a threat, nor did [it conclude that] ESPN ha[d] reason to doubt Newfield's perception of the comment. . . . ESPN producers testified . . . that they believed the events may have occurred off-camera."⁵³ The court accepted that as a reasonable conclusion.⁵⁴ "Moreover, King [had] declined ESPN's attempts to interview him . . . and thus provide . . . his version of the confrontation. [Although] King [wa]s under no obligation to participate in the production . . . the fact that ESPN did not have

48. *Id.*

49. *Id.*

50. *Id.*

51. *Don King Prods., Inc.*, 40 So. 3d at 45.

52. *Id.*

53. *Id.* at 45–46.

54. *Id.* at 46.

access to [his] version of the event[] [wa]s a factor . . . support[ing] . . . Newfield's account."⁵⁵

D. *The Contention that ESPN Failed to Conduct a Thorough Investigation*

"King contend[ed] that ESPN should have conducted a more searching investigation into the challenged statements, [in particular,] interviewing additional sources to verify the statements."⁵⁶ By its failure to do so, "King assert[ed] that ESPN [had] deviated from accepted standards of journalism."⁵⁷ Again, the court disagreed.⁵⁸ The law in this regard, in the view of the appellate court, is well established: "[T]he failure to investigate, without more, does not constitute actual malice."⁵⁹

"Although a publisher's departure from accepted standards of journalism is not entirely irrelevant," the court noted that "[a]ctual malice requires more than a departure from reasonable standards of journalism."⁶⁰ However, in this case, ESPN did produce evidence that it had "interviewed people with direct knowledge of the events" at issue, and thus, did satisfy professional standards.⁶¹ It also attempted more than once to interview King, but was rebuffed.⁶² In the record, "[t]here were no obvious reasons" to doubt the information that ESPN had compiled and used for the broadcast.⁶³ "[I]ts failure to conduct a more searching investigation" did not, in the court's view, constitute the requisite actual malice required to overcome the motion for summary judgment.⁶⁴

III. THE RULING

After reviewing the record and considering King's arguments, Judge Damoorgian, writing for a unanimous panel, determined that King could not meet his burden "that a genuine issue of material fact exist[ed] which

55. *Id.* at 46.

56. *Don King Prods., Inc.*, 40 So. 3d at 46.

57. *Id.*

58. *Id.*

59. *Id.* (citing *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968); *Palm Beach Newspapers, Inc. v. Early*, 334 So. 2d 50, 53 (Fla. 4th Dist. Ct. App. 1976) (per curiam)).

60. *Id.* at 46 (quoting *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1239 (11th Cir. 1999)).

61. *Don King Prods., Inc.*, 40 So. 3d at 46.

62. *Id.*

63. *Id.*

64. *Id.*

would allow a jury to find actual malice by clear and convincing evidence.”⁶⁵

The appellate court held that none of the following evidentiary scenarios presented by King constituted actual malice.⁶⁶ None were sufficient to satisfy the constitutional test set forth in *New York Times Co.* showing that a publisher acted with reckless disregard for the truth or without regard to the truth or falsity of a statement when publishing about a public figure.⁶⁷ The Fourth District Court of Appeal ultimately rejected King’s contentions that there is “actual malice” when a plaintiff shows (1) negativity or ill will;⁶⁸ (2) the failure to investigate or to interview every person with knowledge;⁶⁹ (3) use of sources who are biased or who have been convicted of crimes;⁷⁰ and (4) a “departure from reasonable standards of journalism.”⁷¹

IV. CONCLUSION

In *Don King Productions, Inc.*, the Fourth District Court of Appeal followed the standard set forth in *New York Times Co.*⁷² In so doing, it reiterated clear guidelines supported by governing precedent for the uniform application of law regarding the determination of actual malice where a public figure sues a media publisher in Florida.⁷³

65. *Id.* at 46.

66. *Don King Prods., Inc.*, 40 So. 3d at 44–46.

67. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); *Don King Prods., Inc.*, 40 So. 3d at 43, 46.

68. *Don King Prods., Inc.*, 40 So. 3d at 44–45.

69. *Id.* at 46 (citing *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968); *Palm Beach Newspapers, Inc. v. Early*, 334 So. 2d 50, 52–53 (Fla. 4th Dist. Ct. App. 1976)); see *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1243 (11th Cir. 1999).

70. *Don King Prods., Inc.*, 40 So. 3d at 45; see also *Secord v. Cockburn*, 747 F. Supp. 779, 794 (D.D.C. 1990); *Sunshine Sportswear & Elecs., Inc. v. WSOC Television, Inc.*, 738 F. Supp. 1499, 1508–09 (D.S.C. 1989); *Turf Lawnmower Repair, Inc. v. Bergen Record Corp.*, 655 A.2d 417, 433–34 (N.J. 1995).

71. *Don King Prods., Inc.*, 40 So. 3d at 46 (quoting *Levan*, 190 F.3d at 1239).

72. *Id.* at 43 (citing *N.Y. Times Co.*, 376 U.S. at 279–80; *Mile Marker, Inc. v. Petersen Publ’g, L.L.C.*, 811 So. 2d 841, 845 (Fla. 4th Dist. Ct. App. 2002)).

73. *Id.* (citing *N.Y. Times Co.*, 376 U.S. at 279–80).