2014

Material Falsity in Defamation Cases: The Supreme Court's Call for Contextual Analysis

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In the book *The Phantom Tollbooth*,[1] one of the characters, Milo, declares that he comes from a faraway land called *Context*. After a circuitous journey through many strange cities, bearing names that have meanings Milo struggles to understand, he finds himself back at home in his bedroom.

Context, by and large, is the home base for courts in defining the boundaries between actionable and nonactionable speech. Often, after circuitous travels through precedent and logic, courts meander back to the simple notion that the meaning and legal significance of words are determined by their context. Consider these examples involving various elements of defamation and related torts:

- Rebutting a debate adversary with the words, "Jane, you ignorant slut"[2] will draw nostalgic laughter from people of a certain age, but likely will not sustain a lawsuit because the audience will recognize it as hyperbole, not a factual allegation.[3] Telling people that a man had sex with another man at a party and that he did so behind his girlfriend's back may draw a plaintiff with a prima facie claim.[4]
- Calling a person a "thief" in a one-to-one discussion with him involves no publication to a third party and therefore will not give rise to a cause of action. Telling even one more person the same thing may support a viable claim of defamation per se.[5]
- Saying that "almost without exception" the "girls" who are employed by adult entertainment cabarets were sexually abused as children and suffer from drug and alcohol addiction is not sufficiently specific to be actionable by any individual plaintiff.[6] Saying it is true of a particular person, however, may result in valid claims for public disclosure of private facts or defamation—or both.
- Railing against a public figure's hypocrisy by depicting him as having sex with his mother is not a foundation for a successful emotional distress claim if a reasonable reader would understand that it is a parody.[7] But in Missouri, and probably elsewhere, falsely accusing someone of incest used to be a crime.[8]
- The U.S. Supreme Court has told us that context matters in considering damages. The standards in assessing punitive damages in defamation cases will differ depending on whether the speech is a matter of public or private concern.[9]

As these examples reflect, the courts in defamation and similar cases have considered the context of the expression as a significant, if not the determinative, factor. The case law teaches us that context is critical across the elements and defenses of identification of the plaintiff, verifiability of fact, rhetorical hyperbole, and damages.[10]

Last term, the Supreme Court of the United States in *Hoeper v. Air Wisconsin*,[11] applied a contextual analysis to yet another element of a defamation case: material falsity. Although the case involved immunity under a federal statute, the holding may have larger ramifications for constitutional interpretations of all defamation claims, especially in an increasingly niche new media environment. It also may signal the thinking of the author of the majority opinion, Justice Sonia Sotomayor, writing her first free speech decision since joining the Court.

The *Hoeper v. Air Wisconsin* Decision

In *Hoeper*, a unanimous Court held that defamation lawsuits brought under a federal security statute will only succeed if the plaintiff can establish a materially false impact on "the relevant reader or listener."[12] The Court diverged, in a 6-3 vote, in applying the rule to the facts of the case and on the ultimate outcome. Writing for the Court, Justice Sotomayor relied heavily on the overarching constitutional principles of *New York Times v. Sullivan*[13] and *Masson v. New Yorker Magazine*[14] in divining the congressional intent behind—and the constitutional constraints on—the statute.

The majority of the Court overturned a Colorado jury's $1.2 million verdict in favor of a former Air Wisconsin pilot, William Hoeper. The airline in 2004 had called the Transportation Security Administration (TSA) to report that Hoeper failed a flight-certification test, lost his temper with the instructor, and left for the airport to catch a plane home. According to the Court, Air Wisconsin told TSA that Hoeper, who was licensed to carry a weapon on board, "may be armed[,] . . . that the airline was concerned about his mental stability and the whereabouts of his firearm," and that he was an "unstable pilot" who "was terminated today."[15]

The pilot sued the airline and several of its employees for defamation. Defendants asserted that Congress had provided them with immunity under the Aviation and Transportation Security Act (ATSA).[16] Under the ATSA, passed following 9/11, Congress granted broad protection to airlines and their employees for

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Published in *Communications Lawyer*, Volume 30, Number 3, June 2014.

reporting potential security threats. The statute provides that the airlines will not be held liable unless the reports are made "with actual knowledge that the disclosure was false, inaccurate, or misleading" or "with reckless disregard as to the truth or falsity of that disclosure."[17]

Hoeper had overcome the airline's appeals of his jury verdict up through the Colorado Supreme Court. That court, in a 4-3 decision affirming the jury's $1.2 million defamation verdict and affirming the denial of ATSA immunity to Air Wisconsin, held that the employee's words to TSA were "overstated . . . to such a degree that they were made with reckless disregard of their truth or falsity."[18] In what the U.S. Supreme Court described as a "key footnote," the Colorado Supreme Court also said that it did not need to "decide whether the statements were true or false. Rather," the Colorado court declared, "we conclude that Air Wisconsin made the statements with reckless disregard as to their truth or falsity."[19]

The U.S. Supreme Court found that the exception to ATSA immunity is "patterned . . . after" the actual malice standard of *Sullivan*.[20] The Court recognized that it has "long held that actual malice requires material falsity."[21] The Colorado Supreme Court's footnote, however, showed that it erroneously "labored under the assumption that even true statements do not qualify for ATSA immunity if they are made recklessly."[22] Presuming that "Congress meant to incorporate the settled meaning of actual malice" into the statute, the U.S. Supreme Court held that "a statement otherwise eligible for ATSA immunity may not be denied immunity unless the statement is materially false."[23]

To analyze material falsity, the Court turned to its decision in *Masson* and its core holding that a "statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'"[24] Noting that the "identity of the relevant reader or listener varies according to the context," the Court observed that in "determining whether a falsehood is material to a defamation claim, we care whether it affects the subject's reputation in the community."[25] In the context of an ATSA communication, according to Justice Sotomayor—and in this portion of the opinion, the entire Court concurred—"we care whether a falsehood affects the authorities' perception of and response to a given threat."[26] Accordingly, in ATSA cases, inaccuracies in reports to security officials would not be considered material "absent a substantial likelihood that a reasonable security officer would consider it important in determining a response to the supposed threat."[27]

Applying the announced standard, the Court examined Air Wisconsin's statements to TSA. The majority determined, as a matter of law,[28] that a "reasonable security officer" would not view the difference between the literal truth and the report "important in determining a response to the supposed threat."[29] In this respect, the majority noted:

- The statement that Hoeper was a licensed flight officer "who may be armed" was literally true.[30]
- The statement that Hoeper "was terminated today" was not materially different than the literal truth—the airline had made plans to fire him but had not yet done so—because "[n]o reasonable TSA officer would care" if he "had just been fired or merely knew he was about to meet that fate."[31]
- The statement that Hoeper was "unstable" or that Air Wisconsin was "concerned about his mental stability" was not materially different than, for example, a statement that "in a professional setting" Hoeper "blew up" at the instructor.[32]
- The statement about Hoeper's "mental stability" also, according to the Court, "accurately conveyed 'the gist' of the situation." Air Wisconsin employees "did harbor concerns about Hoeper's mental state: They knew he had just 'blown up,' and they worried about what he might do next."[33]

Justice Antonin Scalia partially dissented in an opinion joined by Justices Clarence Thomas and Elena Kagan. Although the dissenters agreed with the majority on the legal standard, Justice Scalia wrote that the Court should have remanded the case to a jury to determine the "factbound question" that the majority decided.[34] A Colorado jury, according to the dissent, could find that Hoeper had stated a valid claim of material falsity in Air Wisconsin's report of a "brief, run-of-the-mill, and arguably justified display of anger . . . that did not cause anyone . . . to view him as either irrational or a potential source of violence."[35] It was "simply implausible" that "a reasonable jury would *have* to find that the report of mental instability would have no effect upon the course of action determined by the TSA."[36]

This is not the first time that Justices Sotomayor and Scalia have seen the facts of a case very differently. Their conflicting opinions in the confrontation clause case of *Michigan v. Bryant*,[37] for example, turn on arrestingly different characterizations of the underlying events—an unsettling tension that seems more appropriate to German New Wave films than to Supreme Court opinions. In this sense, *Hoeper*, like *Bryant*, pushes our attention away from the facts and how we should characterize them, which may seem a bit murky, and toward the law. Unlike the confrontation clause jurisprudence, however, the legal principles that emerge from *Hoeper* seem uncommonly clear and potentially very significant.

Why the *Hoeper* Decision Matters

A skeptic might dismiss *Hoeper* as a narrowly focused interpretation of a relatively obscure statute involving the unique sensitivities of air traffic security. It is, of course, possible that the Court will later confine its holding in this way. But unless and until the Court does so, four good arguments should convince us that the opinion is much more important.

First, in *Hoeper* the Court was interpreting *Sullivan* and its progeny every bit as much as it was interpreting the ATSA. After all, a unanimous Court recognized that the statute incorporated the *Sullivan* standard and turned its attention to that body of case law in its effort to explicate ATSA immunity. It therefore will not do to dismiss the Court's discussion of *Sullivan* and *Masson* as dicta or a detour. The Court's

analysis of those cases was essential to the business at hand.

Second, the Supreme Court's analytic move here is noteworthy. As observed above, for years courts have applied contextual analyses to defamation and similar cases. But the Court had not previously articulated a contextual analysis of material falsity that so clearly focuses on the specific "community" to which the audience belongs.[38] In *Hoeper*, the Court shifted the inquiry from the reaction of the reasonable person to the reaction of the reasonable TSA security officer—an adjustment in orientation that arguably makes all the difference in the outcome of the case. After all, in another context, the difference between having been fired and having been told you will be fired could be decisive. But the Court declared that, for purposes of the reasonable TSA security officer attempting to assess risk, it would not matter at all.

This seems particularly important because of the emergence of so many new media that are directed to niche audiences. *Hoeper* suggests that, in such cases, courts should not measure falsity by reference to what all reasonable people would think but, rather, by reference to what reasonable members of the niche target audience would think.[39] If the falsity would make no difference to the relevant audience, then the statement is not materially untrue in any relevant sense. It should be noted that this will often afford additional protection to the speaker—but not always. An understanding of the niche target audience can just as easily establish material falsity as rebut it.[40]

A third important dimension of *Hoeper* is its relationship to existing case law. For the reasons discussed, *Hoeper* adds some additional depth to our understanding of material falsity and actual malice, but it is certainly a more evolutionary than revolutionary development. The incremental nature of the change it works may lend it additional precedential force and may prevent the sort of retrenchment that we sometimes see when the Court effects a broader and more dramatic shift in approach. In this respect, the confrontation clause jurisprudence referenced above—where the Court made a wholesale change in the law from which it subsequently felt compelled to retreat—comes to mind.

Finally, *Hoeper* gives us a little insight into the First Amendment jurisprudence of Justice Sotomayor. We obviously should not read too much into a single opinion. But a decision that honors *Sullivan*, applies it thoughtfully, and extends its reach incrementally is no small development. Freedom of expression survives only through the restless vigilance of the Court, and it needs all the friends it can get. Granted, it seems unlikely that anyone will say of *Hoeper*, as Alexander Meiklejohn famously said of *Sullivan*, that it is "an occasion for dancing in the streets."[41] But there may be cause for at least a mild celebration in the fact that Justice Sotomayor found—in the idiosyncratic circumstances of *Hoeper*, of all places—an occasion to honor *Sullivan* on its fiftieth birthday. Perhaps we can get a small insight into her First Amendment views by paying a little attention to, well, context. ◘

Endnotes

1. Norton Juster, The Phantom Tollbooth (Epstein & Carroll Associates, Inc. 1961).

2. The phrase was famously directed toward Jane Curtin by Dan Aykroyd in their *Saturday Night Live* parody of the James Kilpatrick / Shana Alexander debates on *60 Minutes*.

3. "While the term 'whore' may impute a want of chastity and thereby constitute defamation in certain contexts, in other contexts the term may be nothing more than 'the kind of rhetorical hyperbole, epithets and figurative statements that are nonactionable.'" Rangel v. Am. Med. Response W., 2013 WL 1785907, at *23 (E.D. Cal. Apr. 25, 2013).

4. Stern v. Cosby, 645 F. Supp. 2d 258 (S.D.N.Y. 2009).

5. Ball v. White, 3 Mich. App. 579 (1966).

6. Steele v. Ritz, No. W2008-02125-COA-R3-CV (Tenn. Ct. App. Oct. 27, 2009).

7. Hustler Mag., Inc. v. Falwell, 485 U.S. 46 (1988).

8. State v. Bartley, 263 S.W. 95 (Mo. 1924).

9. *See* Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749 (1985). The Court more recently reemphasized the contextual distinction of public concern / private concern speech in *Snyder v. Phelps*, 562 U.S. ___ (2011).

10. It seems that the word *context* itself can have many meanings in the law. For example, in the influential en banc U.S. Court of Appeals for the D.C. Circuit decision *Ollman v. Evans*, 750 F.2d 970, 975 (D.C. Cir. 1984), the court devised a multipart test for deciding actionable statements of fact from nonverifiable statements of opinion, calling for evaluation of "the full context of the statement—the entire article or column," as well as "the broader context or setting in which the statement appears."

11. 134 S. Ct. 852 (2014).

12. *Id.* at 863. All nine justices joined in Parts I, II, and III-A of the Court's decision. A partial dissent by Justice Antonin Scalia, joined by Justices Clarence Thomas and Elena Kagan, is limited to Part III-B—the application of the material falsity standard to the record.

13. 376 U.S. 254 (1964).

14. 501 U.S. 496 (1991).

15. *Hoeper*, 134 S. Ct. at 859.

16. 49 U.S.C. § 44901 et seq.

17. *Id.* § 44941(b).

18. *Hoeper*, 134 S. Ct. at 860 (quoting 2012 WL 907764, at *7 (Mar. 19, 2012)).

19. *Id.* (quoting 2012 WL 907764, at *16 (Mar. 19, 2012)).

20. *Id.* at 861.

21. *Id.*

22. *Id.* at 860. *Hoeper* reiterated that the Court has "long held, to the contrary, that actual malice entails falsity. *See, e.g., Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 . . . (1986) ('[A]s one might expect given the language of the Court in *New York Times*, a public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation' (citation omitted)); *Garrison v. Louisiana*, 379 U.S. 64, 74 . . . (1964) ('We held in *New York Times* that a public official might be allowed the civil remedy only if he establishes that the utterance was false')." *Id.* at 861. But hinging a decision regarding actual malice on the truth or falsity of the statement—rather than on the defendant's attitude toward the truth or falsity—seems odd, especially under the ATSA, where actual malice is a defense. In a public figure's common law libel case, falsity and fault are part of the plaintiff's burden. Who has the burden to establish truth/falsity here? This gloss on the parties' burdens is curious for another reason: if a statement is not materially false, why would the Court need to reach the issue of fault at all?

23. *Id.* at 861.

24. *Id.* at 861 (quoting Masson v. New Yorker Mag., 501 U.S. 496, 517 (1991) (quoting Robert Sack, Libel, Slander, and Related Problems 138 (1980))).

25. *Id.* at 863.

26. *Id.*

27. *Id.* at 864.

28. The Court declined to "embrace or reject the Colorado Supreme Court's unanimous holding that [ATSA] immunity . . . is a question of law to be determined by the trial court." Instead, the Court's majority concluded that "even if a jury were to find the historical facts in the manner most favorable to Hoeper, Air Wisconsin is entitled to ATSA immunity as a matter of law." *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 865.

32. *Id.*

33. *Id.* at 866.

34. *Id.* at 867.

35. *Id.* at 869.

36. *Id.* at 870 (emphasis in original).

37. 562 U.S. 131 (2011). The confrontation clause analysis in *Bryant* revolves around the question of whether statements made by the victim, and later admitted against defendant, were made to address an ongoing emergency or to help the police catch the perpetrator. Justice Sotomayor's narrative portrays the victim as a man caught up in a crisis with a killer on the loose; Justice Scalia's narrative, in contrast, describes the victim as someone calmly and repeatedly reviewing with authorities the information they would need to catch the assailant.

38. Other courts have done this. *See, e.g.*, Fikes v. Furst, 81 P.3d 545, 551 (N.M. 2003) (relying on deposition testimony in defamation case between two academics, court affirms dismissal because "Criticism of the work of scholars is generally commonplace and acceptable in academic circles. Thus, statements that may appear in isolation to be defamatory may in fact be particularly appropriate or acceptable criticism when made in an academic setting.")

39. For an early treatment of the potential impact that emerging new media communities may have on traditional defamation doctrine, see Matthew D. Bunker & Charles D. Tobin, *Pervasive Public Figure Status and Local or Topical Fame in Light of Evolving Media Audiences*, 75 Journalism & Mass Comm. Q. 112 (1998).

40. Edith Rapp's claim is an excellent example of materiality for niche audiences in defamation claims. Rapp, a Jewish woman, sued Jews for Jesus after its Internet newsletter published statements from her son-in-law, who was an employee of the evangelical organization, that Rapp had become a follower. Although being a devout Christian ordinarily would not be considered odious—and therefore a false claim of devotion is not defamatory—Rapp claimed that the statement demeaned her specifically in the eyes of other Jews who knew her. The allegation supported Rapp's defamation-by-implication claim, the court held, because "a communication can be considered defamatory if it 'prejudices' the plaintiff in the eyes of a 'substantial and respectable minority of the community.'" Rapp v. Jews for Jesus, Inc., 997 So. 2d 1098 (Fla. 2008) (quoting Restatement (Second) of Torts § 559 cmt. e (1977)).

41. Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment," in* Free Speech and Association: The Supreme Court and the First Amendment84, 114 n.125 (Philip B. Kurland ed., 1975).