

LEGAL NOTES

Defaming a Judge: *Murphy v. Boston Herald*

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Public officials and figures must satisfy a high standard to obtain damages for defamation, based on the Supreme Court's seminal decision on the First Amendment in *New York Times v. Sullivan*, 376 U.S. 254 (1964), and its progeny. Specifically, plaintiffs who are public figures or officials must prove by clear and convincing evidence that a defendant published false and defamatory material about the plaintiff with "actual malice" (at 280). In *Murphy v. Boston Herald, Inc.*, 865 N.E.2d 746 (2007), which garnered both local and national media attention, superior court judge Ernest B. Murphy apparently satisfied this burden of proof, as Justice John M. Greaney for a unanimous Supreme Judicial Court of Massachusetts upheld Judge Murphy's \$2 million defamation award against the *Boston Herald*.

This case began when the *Boston Herald* ran a series of articles beginning in February 2002 that were highly critical of Judge Murphy's actions on the bench. The gist of the articles, written by *Boston Herald* reporter David Wedge (who was also named as a defendant in the lawsuit), was that Murphy was soft on crime, biased in favor of criminal defendants, hostile to victims and prosecutors, and otherwise incompetent to sit on the trial bench.

At the heart of this series in the *Boston Herald* was an allegation that Judge Murphy made the following statement to prosecutors about a teenage rape victim: "She can't go through life as a victim. She's [fourteen]. She got raped. Tell her to get over it" (at 750). This statement, which was repeated throughout the series, attracted much attention. Indeed, shortly after publication reporter Wedge was a guest on the popular cable television show *The O'Reilly Factor*, on which he reiterated his claim that Judge Murphy made this callous remark about the teenage rape victim.

In June 2002 Judge Murphy filed a complaint in Massachusetts Superior Court against the *Boston Herald*, reporter Wedge, and three other individuals, claiming the stories were false, had damaged his reputation, and were published with actual malice. After a twenty-day trial, the trial judge entered judgment in favor of two of the defendants as a matter of state law. The jury was then given a lengthy questionnaire that "properly defined the requirements of defamation involving a public official" and constituted the foundation of the jury verdict (at 751). The jury returned a verdict in favor of Judge Murphy against two of the remaining defendants, the *Boston Herald* and Wedge, while finding the other defendant (Wedge's coauthor on the articles) not liable. The jury awarded Judge Murphy \$2.09 million in compensatory damages. After a defense motion for a judgment notwithstanding the verdict (JNOV) or for a new trial, the trial judge "upheld the bulk of the verdict, but concluded that three of the statements for which the jury found the defendants liable qualified as protected

statements” (at 751). Thus, the defendant’s JNOV motion was granted and denied in part, which resulted in a judge-modified jury verdict in favor of Judge Murphy of \$2.01 million.

The *Boston Herald* and Wedge filed an application for direct appellate review, which was granted by the Supreme Judicial Court of Massachusetts. In May 2007 the Massachusetts high court affirmed the judgment based on the jury’s verdict. The defendants’ claims on appeal centered on whether Judge Murphy met his burden of showing actual malice under First Amendment law. In this regard, the court stated that the “plaintiff is, indisputably, a public official” (at 752, n. 8). Accordingly, the *New York Times v. Sullivan* standard applied to Judge Murphy, who had to prove the published statements were false and defamatory and were made with actual malice.

The court concluded there was “overwhelming evidence” that statements in the articles were false and defamatory (at 754). Focusing on the alleged statement by Judge Murphy that the rape victim “get over it,” the court rehashed the testimony at trial to show that the evidence supported Judge Murphy’s version of the facts. In particular, the court discussed how Judge Murphy’s remarks were not made at or in the vicinity of the rape trial but instead were made at a lobby conference for a separate, unrelated robbery case. Moreover, the court felt that Judge Murphy was concerned about the well-being of the rape victim, such that counseling was available to her so she could get on with her life. The court believed, as apparently did the jury, that comments by Judge Murphy about the rape victim were sympathetic and caring, not callous and noxious.

Constitutional standards required that Judge Murphy go beyond simply proving the media made false statements about him, as he had to demonstrate actual malice on the defendants’ part. To prove actual malice, the plaintiff must show by clear and convincing evidence that “the defendants published each statement either knowing that it was not, or entertaining serious doubts that it was, true” (at 758-59). Judge Murphy fulfilled his burden here, in part because of the “lack of candor” (at 759) of reporter Wedge, whose testimony as a witness at trial was “discredited at every turn” (at 760). Accordingly, the evidence “strongly supports the inference that [Wedge] deliberately attempted to mislead the jury” (at 759).

In fact, the court doubted the “tell her to get over it” statement was ever made at all. To the contrary, the court stated there was clear and convincing evidence that reporter Wedge did not adequately investigate whether this comment was made, but instead included it in his articles solely to convey a false impression of Judge Murphy. “When substantial doubts have been raised as to the veracity of a reporter’s information, the purposeful failure to investigate known witnesses may be proof of actual malice” (at 760). The court concluded that Judge Murphy satisfied his burden in showing that the allegations, particularly the “tell her to get over it” comment, were made with actual malice by the defendants, as they published defamatory information about Judge Murphy “with knowledge of their falsity or with serious doubts as to their truth” (at 762).

The court also concurred with the jury that comments by reporter Wedge during his appearance on *The O'Reilly Factor* also were made with actual malice. When asked by the show's host, "Are you absolutely one hundred per cent sure" Judge Murphy made the "tell her to get over it" comment, Wedge replied, "Yes, he said this. He made this comment to three lawyers. He knows he said it, and everybody else that knows this judge knows that he said it" (at 763). The court believed these statements to be false and met the actual-malice standard: "Wedge possessed either a brazen disregard for the actual truth or a deliberate intent to give credence to a controversial story that he knew (at the time) to be false" (at 763). The court then held that defendants were liable for "subsequent republication" by other reporters at the *Boston Herald* (at 764).

A final point concerned two letters Judge Murphy sent to the *Boston Herald* after the trial and verdict. One of these letters was written on court letterhead. In one of these letters, Judge Murphy apparently suggested that his colleagues on the bench would side with him and not the media (*Boston Herald*, May 8, 2007, at 4). The defendants argued these letters were inappropriate and required that the complaint and judgment be dismissed. The court quickly dismissed these claims, as they were sent *after* the verdict and could not have affected the trial. "Whether there has been a violation of applicable ethical rules is a matter for determination by the Commission on Judicial Conduct" (at 766).

The court concluded with a defense of the First Amendment's protection of freedom of the press, including support of "the media's right (and duty) to examine the affairs of the judicial branch of government and to criticize activities of judges and other court officials that do not meet the high standards expected of judges and the courts" (at 767). Nevertheless, that protection is qualified by an obligation of the press not to publish false information about anyone, whether judges or others, with actual knowledge or reckless disregard of the truth.

The court maintained that the articles in the *Boston Herald* attacked "core attributes a judge must possess—even temperament, lack of any bias, fairness at all times, and a particular sensitivity to the plight of the victims of crimes" (at 767). The court seemed to warn the media that when investigating and critiquing the courts, they best ensure their facts are fully correct, with no gray area of dispute. Indeed, simply leveling charges that a judge is biased or otherwise incompetent is a serious accusation that denigrates the judge, and perhaps the judicial process more generally. As the court said, quoting from the writings of U.S. Supreme Court justice Joseph Story, "To say, that, as a judge, he was wise, impartial, and honest, is but to attribute to him those qualifications, without which the honors of the bench are but the means of public disgrace, or contempt" (at 754, n. 9).

Without saying so specifically, the court may be arguing that publishing insinuations of a lapse in judicial ethics is defamation *per se*, unless there is sufficient evidence to back up those statements. In this case, it seems relatively clear that reporter Wedge had an axe to grind with Judge Murphy and took inappropriate steps to dis-

credit him; as well, the *Boston Herald* was interested in creating a “media frenzy” with this series of articles (at 762), despite assertions to the contrary by Wedge, as seen in the *Boston Herald*, *Boston Globe*, and *New York Times* the day after the Massachusetts’s high court’s decision. Nevertheless, the question becomes, does this decision chill future media coverage on judges or the courts?

What will happen, for instance, the next time the media question a judicial decision, whether from a local trial court or the United States Supreme Court? Perhaps Wedge was the rogue reporter as the court implies, such that this defamation award was appropriate. However, the ramifications of the court’s opinion seem to apply beyond unethical reporting, as the ruling potentially ensnares as liable for defamation journalists or others who publish critiques about the courts. At a minimum, the opinion admonishes journalists to be thorough in their investigations. As Stephen Burgard, director of the School of Journalism at Northeastern University, said in reaction to this case, “This is a wake-up call to reporters everywhere that you better have your reporting down solid. You better have heard it yourself, or you better have people on the record” (*Boston Globe*, May 8, 2007, at B1). In addition, notwithstanding the actual-malice standard intended to protect the media under the First Amendment, when a judge sues his or her critics for defamation, the critics risk having the plaintiff’s judicial colleagues hearing the lawsuit siding with the judge alleging defamation, or at least having the plaintiff (as Judge Murphy perhaps did) try to leave the impression that defendants do not stand a chance. **jsj**