

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

AMY JACOBSON,

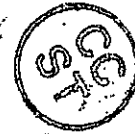
Plaintiff,

v.

08 L 7331

CBS BROADCASTING, INC.,
a New York corporation;

Defendant.



MEMORANDUM OPINION AND ORDER

On July 6, 2007, Amy Jacobson was employed as a reporter for a Chicago television station, WMAQ, NBC-5. She was assigned to report on the disappearance of Lisa Stebic, wife of Craig Stebic, who lived in Plainfield, Illinois. That morning, accompanied by her two children, she visited the Stebic home to discuss the case. While there, she was videotaped without her knowledge or permission by a reporter and cameraman from CBS's Chicago affiliate, CBS-2. Portions of the tape, showing Jacobson in a halter top bikini, standing behind a screen door at the rear of the Stebic home and walking in the pool area, were aired by CBS-2 on July 10, 2007.

The unedited tape lasts 15:59 minutes. The edited broadcast version is 1:45 minutes in duration.¹ The script for the broadcast was written by CBS reporter, Alita Guillen, whose voice is heard describing the scenes depicted on the tape and interviewing a journalism professor, Michele Weldon. The broadcast is introduced by another CBS reporter, Derrick Blakely.

¹ CBS has submitted a purported statement of undisputed facts in the form of an affidavit of one of its attorneys, Jay Ward Brown, (hereinafter "Brown Aff."). Each paragraph of the affidavit contains references to depositions and other exhibits, which are tabbed and attached thereto. A transcript of the broadcast tape is found at Brown Aff., Par. 82.

Jacobson claims that the taping and the broadcast violated her right to privacy and were defamatory. Her Fifth Amended Complaint consists of seven counts: I. Intrusion upon Seclusion, II. False Light, III. Intentional Infliction of Emotional Distress, IV. Defamation Per Se, V. Defamation Per Quod, VI. Tortious Interference with Business Relationship, and VII. Tortious Interference with Business Expectancy.

This court previously granted summary judgment to CBS on the intrusion upon seclusion count, by memorandum opinion dated September 10, 2012. CBS now moves for summary judgment on the remaining counts.

The Alleged Libel.

The broadcast begins with a statement by Derrick Blakely: "This morning a Chicago television reporter is in hot water over her technique in pursuing a source in the disappearance of Lisa Stebic." The tape then shows Jacobson standing behind a screen door at the rear of the Stebic home. Alita Guillen states: "This video shows NBC-5 reporter Amy Jacobson wearing a bikini and wrapped in a towel at Craig Stebic's home, the man who police say last saw his missing wife nearly two months ago. The tape next depicts Guillen interviewing Michele Weldon.

Guillen relates: "We shared the video with journalism professor, Michele Weldon . . . a case, she says, of gravely crossing a journalistic line, an error in judgment that damages Jacobson's credibility, as well as her colleagues'." Weldon opines that Jacobson's conduct is a "conflict of interest," which will make the audience question "what else has she done?" Guillen continues: "Neighbors tell CBS-2 that Jacobson has been visiting Stebic's home frequently since his estranged wife's disappearance. Why she's been there is unclear. Though she's covered the story, she's never mentioned her social relationship with Stebic or his family."

Weldon further declares that journalism ethics require reporters to steer clear of associations which may compromise their credibility and that Jacobson's behavior is "... an example to my students, this is not the right thing to do." At various points in the tape, Jacobson is shown walking by the pool in Stebic's back yard and Stebic is depicted climbing out of the pool while putting on a shirt.

Jacobson claims that the text of the broadcast, juxtaposed with the images of her and Stebic in bathing attire, was defamatory in that it implied a want of integrity in her profession and portrayed her as an adulteress. Fifth Am. Compl., Count IV, Par. 133.

Burden of Proof.

In the landmark case of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the United States Supreme Court held that a public official who seeks to recover damages for libel must prove the defendant guilty not merely of negligent publication of a falsehood, but of "actual malice," i.e. publication with knowledge that a statement is false or with reckless disregard of whether it is false or not. 376 U.S., at p. 279-280. In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the Supreme Court extended the "actual malice" rule to public figures. The court described public figures as persons who obtained notice by reason of their position or by thrusting themselves into the midst of a public controversy, and who have sufficient access to the means of counterargument to refute the falsehoods uttered about them. 388 U.S., at p. 154-155.

The concept of public figure was further refined in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The Supreme Court declared: "Those who, by reason of the notoriety of their achievements or the vigor or success with which they seek the public's attention, are properly classed as public figures. 418 U.S., at p. 342. *Gertz* notes that public figure status can be attained in two different ways. The court stated, 418 U.S., at p. 351:

“In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.”

There can be little doubt that Jacobson was a public figure for all purposes. Her own complaint alleges: “Four Emmys in four years showed industry wide recognition of her talent.” Fifth Am. Compl., Par. 7. She described herself as a “well known” reporter. Her agent called her a “very prominent” figure with “great name recognition.” Events in her personal and professional life were frequently reported in Chicago area newspapers. She was a featured guest at local affairs, such as “Dancing with Chicago Celebrities.” NBC-5’s web site invited the public to “Drop Amy a line.” Brown Aff., Par. 5-10.²

Whether and to what extent a defamation plaintiff is a public figure is a question of law to be decided by the court. *Kessler v. Zekman, supra*, at p. 182. This court finds that, as a matter of law, Jacobson is a public figure for all purposes.

Actual Malice.

Actual malice must be proven by clear and convincing evidence. *New York Times Co. v. Sullivan, supra*, at p. 285-286; *Catalano v. Pechous*, 83 Ill.2d 146, 170 (1980); *Costello v. Capital Cities Communications*, 125 Ill.2d 402, 419 (1988); *Kessler v. Zekman, supra*, at p. 188. This evidence must contain proof of the subjective state of mind of the persons directly responsible for publication of the

² Jacobson may also be considered a limited purpose public figure in that she meets the criteria cited in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C.Cir. 1980) and expressly relied upon in *Kessler v. Zekman*, 250 Ill.App.3d 172, 181-182 (1993). In the *Waldbaum* analysis, the court first isolates the public controversy and the extent to which the plaintiff has involved himself in it. Next the court determines whether the plaintiff has played a meaningful role in the controversy. Finally the court determines whether the alleged defamation is germane to the plaintiff’s participation. Where the defamatory statement bears on the plaintiff’s credibility in the controversy, it is germane. *Kessler v. Zekman, supra*, at p. 185.

Here, the controversy was Jacobson’s journalistic ethics. She was the major participant in the story, which was reported in the Chicago Tribune and Chicago Sun Times before the CBS broadcast. Brown Aff., Par. 80. The alleged defamatory statements clearly bore on her credibility.

libel. *New York Times Co. v. Sullivan*, *supra*, at p. 287; *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Kessler v. Zekman*, *supra*. Actual malice is not proven by evidence of selfish motive or personal animosity. As noted in *Kessler v. Zekman*, *supra*, at p. 190:

“ . . . proof of personal animosity alone is insufficient to meet the high burden imposed by the *New York Times* standard. [citation omitted]. Instead, the limited public figure plaintiff must also establish clearly and convincingly that the defendant coupled his rancor toward the plaintiff with a knowledge of the falsity of the statement complained of, or a reckless disregard as to its truth or falsity.”

Furthermore, in a case where the defamatory meaning must be implied, there must be clear and convincing evidence that the defendant published the libel with intent to imply a falsehood or, at least, with the subjective knowledge that such an implication was foreseeable. *Woods v. Evansville Press Co., Inc.*, 791 F.2d 480 (7th Cir. 1986); *Saenz v. Playboy Enterprises, Inc.*, 841 F.2d 1309 (7th Cir. 1988).

In *Saenz*, for example, the defendant published a magazine article which implied that the plaintiff had participated in the torture of political prisoners while serving in a diplomatic post in Latin America. The plaintiff pointed to the magazine's inability to cite any proof that he was complicit in torture as evidence of reckless disregard of the truth. The court observed, 841 F.2d, at p. 1318:

“Saenz contends that because the defendants admittedly lacked evidence of his participation in torture ‘they *knew* their statements either directly or in their implications and innuendo were false.’ This argument, however, assumes its conclusion. As in *Woods*, the Plaintiff fails to supply a missing link necessary to show that the defendants acted with actual malice. Not only must the plaintiff establish the statement is susceptible of a defamatory meaning which the defendants knew to be false or which the defendants published with reckless disregard for its potential falsity, but also that the defendants intended to imply or were reckless toward the implications.”

Any other rule would require a publisher to anticipate every possible meaning which a reader might draw from the text and impose the very self-censorship which is abhorrent to the First Amendment. See *Woods v. Evansville Press Co., Inc.*, *supra*, at p. 487.

To be sure, a defendant's bald assertion that he believed a story to be true will not automatically insulate him from liability. As noted in *St. Amant v. Thompson*, *supra*, at p. 732: "Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call."

Here, however, there can be no suggestion that anything concerning Jacobson was made up out of whole cloth. She asserts two theories to support her defamation claims: that she was directly libeled by the accusation that she had breached journalistic ethics and that she was indirectly libeled by the implication of the broadcast that she "used sex/seduction to do her job as a television reporter." Plaintiff's Resp., p. 10.

Direct Libel. Jacobson can hardly be aggrieved by the comments of Professor Weldon, As Judge Budzinski previously found, these were constitutionally protected expressions of opinion. Mem. Op., Feb. 17, 2009. This leaves three verifiable statements of fact: that Jacobson was in "hot water" because of her "technique" in pursuing a source, that she had an undisclosed social relationship with Craig Stebic, and that "Neighbors tell CBS-2 that Jacobson has been visiting Stebic's home frequently since his estranged wife's disappearance."

Jacobson can hardly claim that CBS had reason to know that the "hot water" statement was untrue, when, in fact, it was reported in the Chicago press before the broadcast, along with the additional facts that she had been taken off the Stebic story, told to hire a lawyer, and faced discipline from her employer ranging from reprimand to termination. Brown Aff., Par. 80, Tab 44. NBC-5 officials themselves confirmed to CBS-2's New Director, Carol Fowler, that Jacobson had been suspended prior

to the broadcast. Brown Aff., Par. 41. Nor can she claim that CBS knew that the statements about her visits to the Stebic home were untrue, when, in fact, neighbors had told CBS reporter Mike Puccinelli about it, and two neighbors, Tracy Reardon and Laurie Bingenheimer, later testified that they personally witnessed numerous visits.³ Brown Aff., Par. 52.

Innuendo. CBS assumes, for purposes of its motion for summary judgment, that the broadcast was "reasonably capable" of conveying the meaning that Jacobson was involved in a sexual relationship with Stebic. CBS Reply Mem., p. 1. However, all CBS personnel responsible for the script and video of the broadcast, including Alita Guillen and the John Petrosky, the video editor, were unanimous in denying that they intended to imply a sexual relationship or anticipated that anyone would jump to such a conclusion. Brown Aff., Par. 67-78.

Jacobson offers no evidence to the contrary. The best she can contrive is an e-mail from Fowler to Puccinelli the day after the broadcast, in which Fowler appears to gloat that "now that Amy is out of the way," Puccinelli has the best opportunity to own the story. Brown Aff., Par. 102.

While a party's self-serving declaration that he believed a false story to be true will not negate a showing of actual malice, in the absence of competent evidence to contradict it, it must be honored. *Kessler v. Zekman, supra*, at p.191. Because no such evidence exists in this case, the court finds as a matter of law that Jacobson has failed to raise a triable issue of fact with regard to actual malice.

Other Tort Claims.

Jacobson's remaining claims allege false light, intentional infliction of emotional distress, and two counts alleging interference with business relations.

³ CBS argues forcefully that Jacobson's claim that she was libeled in her profession must fail because the broadcast was substantially true. CBS Mem., p.-14-19. However, in light of courts disposition of the actual malice issue, it is unnecessary to address this contention.

The viability of an emotional distress claim brought by a public figure in conjunction with a claim for defamation was expressly addressed by the United States Supreme Court in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). There, *Hustler Magazine* published an ad parody which portrayed the Rev. Jerry Falwell committing an incestuous act with his mother in an outhouse. A district court jury acquitted the magazine of libel, but awarded damages for emotional distress stemming from the parody's outrageous content. The Supreme Court held that there was no workable definition of "outrageous" which could afford sufficient protection to the right of free expression protected by the First Amendment. It concluded, 485 U.S., at p. 56: "... Public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one at issue here without showing in addition that the publication contains a false statement of fact which was made with 'actual malice.'"

Jacobson concedes that she cannot recover on derivative claims which are predicated purely on a defamatory publication, but she asserts that the videotaping and subsequent editing of the tape are independent tort claims which may be prosecuted without having to meet the actual malice test. Pl. Mem., p. 30. However, her reliance on *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) is misplaced.

In *Food Lion*, two reporters concealed their identity in order to get jobs at a grocery store. They secretly filmed and later published reports showing that the store was mishandling food products. The court sustained claims of breach of loyalty and trespass, because they were unrelated to defamation. This is clearly distinguishable from Jacobson's case, since all her remaining claims arise from the publication of the tape.

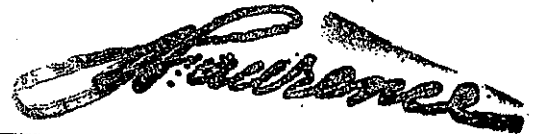
Jacobson might have a point, if the court had not previously dismissed her claim based upon intrusion upon seclusion. As to the editing of the tape, this was a purely internal operation which had

no meaning apart from the broadcast. Since Jacobson's other claims are all derivative from her defamation claims, CBS is entitled to summary judgment on those claims as well.

ORDER

The motion of CBS for summary judgment on Counts II-VII of the Fifth Amended Complaint is
GRANTED.

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JUDGE JEFFREY LAWRENCE