In The

Supreme Court of Virginia

RECORD NO. 110323

VERBENA ASKEW,

Appellant,

v.

BRENDA COLLINS,

Appellee.

REPLY BRIEF OF APPELLANT

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I

The plaintiff begins her brief with a mistaken premise, repeatedly claiming that the jury made a specific finding that the institutionalization statement was defamatory per se. Brief of appellee at 6, 13, 16. A review of the verdict form shows no such finding.

The parties submitted a special-verdict form to the jury, asking the jurors to decide whether Askew made any of seven specific statements. A. 122. Some of those statements may indeed be fairly characterized as defamatory per se; for example, the statement, "DOC wouldn't rehire her" could be prejudicial to the plaintiff in her work.

But the jury ruled in Askew's favor on these statements. The only statement that the plaintiff proved to the jury's satisfaction, concerning institutionalization, meets none of the tests for defamation per se. Such liability may be imposed only for: (1) the imputation of commission of a crime of moral turpitude; (2) an allegation of infection with a

contagious disease; (3) the imputation of unfitness to perform the duties of a particular office, or of want of integrity in the discharge of such duties; or (4) words prejudicing a person in his or her profession or trade. *Fleming v. Moore*, 221 Va. 884, 889 (1981).

Plainly, the first and second categories do not apply here. In this case, as in *Fleming*, a defamation-per-se finding "could only be based upon the effect of the allegation upon the plaintiff's work." *Id*. As this Court noted, the allegedly defamatory words "must contain an imputation that is 'necessarily hurtful' in its effect upon plaintiff's business and must affect him in his particular trade or occupation." *Id*. at 889-90.

These requirements are not lightly met. For example, in *M. Rosenberg & Sons v. Craft*, 182 Va. 512, 519 (1944), a letter referring to a "long past due" debt was held not defamatory per se where the words did not relate to the manner in which the plaintiff performed his work. In *Shupe v. Rose's Stores, Inc*., 213 Va. 374, 375 (1972), a customer

– a bookkeeper and secretary by trade – sued based on a store's statement implying that she was not creditworthy; the Court refused to find this defamatory per se. And in *Fleming*, the Court held that an allegation of racism against a college professor was not defamatory per se:

> We conclude that, while the allegation *might have* adversely affected Moore's work, the statements did not *necessarily* affect him in his particular profession and consequently were not defamatory *per se*.

221 Va. at 891 (emphasis in original).

Here, the plaintiff never even attempted to show how the institutionalization statement *necessarily* affected her in her profession. Her initial assumption in this appeal lacks a solid foundation.

II

The plaintiff next contends that alleging defamation per se relieves her of the obligation to prove that her claimed presumed damages were proximately caused by Askew. No

Virginia case authorizes a court to dispense with proof that damages were caused by the party who is being sued.

As the brief of appellant explained, proof of defamation per se relieves the plaintiff only of the burden to prove the *quantum* of claimed damages. But the rationale underlying this legal doctrine does not extend to the concept of proximate causation, which still must be proved by the plaintiff. Otherwise, a defendant could be held liable for damage that he demonstrably did not cause. No legal doctrine would sanction such a result; while an insurer may be liable without fault based on a contractual undertaking, a defamation tortfeasor is not. *Gazette, Inc. v. Harris*, 229 Va. 1, 17-18 (1985). This consideration is particularly appropriate where, as here, a plaintiff primarily claims that the actions of others primarily caused her claimed harm. See pp. 6-7 below.

At trial, the plaintiff disavowed any damages that did not arise from the publication of the newspaper article. A. 80-81.

She readily acknowledged that *all* of her claimed reputational damages came from the publication of the article:

> Q: So the first sense you had of any injury – and the only injury you discussed was emotional, correct?
>
> A: There was no physical injury. There was reputational injury and I think it went directly to the type of work I do specifically because my integrity and my truthfulness are just – it's just integral to the job I've done and always done. So it was reputational. It was emotional. It was devastating.
>
> Q: And all of that, all of that flows from the January 21st article?
>
> A: Yes, sir.

A. 81.

Having taken this position unambiguously in the trial court, the plaintiff cannot now ask this Court to infer that her damages came from elsewhere, simply because the jury gave her a verdict that was not founded in the article. This appeal, then, presents the question of whether the plaintiff may state in one court that her damages flowed from the newspaper article, and then argue in another court that they did not.

III

The plaintiff alleged below no separate injuries inflicted by the various defendants – no doubt in an understandable effort to secure joint-and-several liability. She now contends that her claims against the defendants were somehow discrete, in order to avoid having to account for the money that she has already received.

The most direct argument that the plaintiff offers here is that she identified separate statements by Askew, not the other defendants, so Askew alone should be liable for her damages. But at trial, the plaintiff told the jury at length about her mental anguish over the publication of the newspaper article (A. 49-57). She then pinpointed that article as the source of her entire damage claim, in the transcript excerpt quoted above in part II.

The article, of course, appeared in *The Daily Press* (A. 104), one of the defendants from whom the plaintiff received funds pursuant to a settlement agreement. It refers to statements by defendant Tracey Jenkins (A. 111) that are

quoted in the motion for judgment (A. 9-10) and the third amended complaint (A. 23). The plaintiff also settled with Jenkins before trial, but the plaintiff's presentation to the jury did not segregate the emotional effect of these statements upon her; she sought to pin upon Askew the responsibility for the entire article, including Jenkins's statements.

The plaintiff's approach would call for a fundamental shift in defamation law, and the implicit amendment of the joint-tortfeasor statute. She urges that "the other defendants could not, and did not, settle Collins's claim that the [institutionalization statement] defamed her." Brief of appellee at 17. But the statute refers to "the same injury," not to the same *cause*. Code §8.01-35.1(A). And this Court's caselaw refers to a single, indivisible *injury*, not an indivisible cause. *Cawthorn v. British Leyland*, U.K., Ltd., 233 Va. 202, 205 (1987).

The plaintiff never pleaded or proved that certain aspects of her claimed injury were caused by Askew and

other aspects were attributable to the other defendants. As such, the statute mandates an offset.

VERBENA ASKEW

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CERTIFICATE

I hereby certify that on this 26th day of August, 2011, pursuant to Rules 5:26(h), fifteen paper copies of the foregoing Reply Brief of Appellant, along with 10 copies on CD-Rom, have been hand-filed with the Clerk of the Supreme Court of Virginia. Three paper copies of the Brief, along with one copy on CD-Rom, have been served, via UPS Ground, upon:

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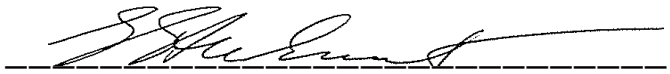

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