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TO: Carmen Cardinal

FROM: Applicant

RE: Niesi v. Gosling and Hardy

DATE: July 27, 2022

Below please find my responses to your request.

1. Whether Niesi (N) would prove that Hardy's (H) statements, as quoted in the complaint, were defamatory if he were to prove the facts alleged.

Defamation Defined

According to the court in Anderson v. Walsh (Anderson) Defamation is (1) a publication of a false statement (2) to a third party, (3) which proximately results in injury to another. To be false the statement must be purported fact, not only opinion. If the statement is interpreted as either fact or opinion, the court will ask whether, under totality of circumstances, a reasonable trier of fact would conclude the statement is actual fact not expressed mere opinion.

Accusations of Moral Turpitude

Common tort law also holds that accusations against another regarding crimes of moral turpitude are preemptively defamatory because of the social harm, shame and lost reputation the injured person suffers. No matter how untrue moral turpitude accusations are, they will harm the person who is the subject of the defamation..

Here there are two statements at issue. These statements were made by H about N and published on G's online blog 3CU.

Statement 1 of June 11, 2022

Publication of False Statement

A statement must be false and published to be defamatory. Here H published statements about H online, which was read by others so publication and falseness elements are met as analyzed below.

Publication

H's statement about N is published in an online blog, 3CU.com blog. It is read and used by public subscribers who are also cable subscribers. This is a public platform and anything on the internet is published so this element is met.

The instant case is similar to the case in Anderson where statements were made online in Yelp, a consumer review platform, calling a specific company's executives unkind names. The online publication fact is met here but we must analyze whether the statements by H are opinion or factual.

The Anderson Court cited Insky which clarified whether a statement is fact or opinion, specifically on internet forums, such as G's blog. The Insky court noted that users online engage freely in a looser communication outlet to criticize others and debate each other. The Insky court held that a reasonable trier of fact would conclude that an online statement calling a company's executives "liars, losers, and crooks" was mere opinion and was "emotional catharsis" rather than information.

Here, there are differences between the instant case and Anderson. N is not a company executive like in Anderson, but merely an individual customer of the cable company. Company executives are public figures and often criticized by the public, which comes with the job. N is not an executive so he does not expect to be publicly criticized for his use of cable nor does he expect to be accused of stealing the cable. In Anderson the court found no fault with criticizing public company executives, but H is not that, he is a private individual so publication about N is much more harmful.

Falsity of Statement

The person committing defamation must know the statement is false be so reckless with regard to its truth or falsity that they publish it anyway. Here, H alleges he now N is stealing cable but does not say how he knows that. The 7/1/22 statement said N is "guilty of cable theft" and "uses unauthorized devices to get free phone, television and internet service to his condo." These statements do not appear to have any proof of their truth or any evidence to support them. H goes on to say "I'll bet he isn't even a cable subscriber and it's crooks like N who cause cable costs to go up for the rest of us." H simply states these things as fact but without any evidence. H does not care if it is true, even if he believes it is. H might try to claim it's just opinion, but it is hard to believe that defense because statement 2 H doubles down on his terrible accusations against N.

H is not calling N multiple bad names like Insky, but he is calling him one bad name - "crook" This reads more like an accusation of N's stealing from cable company. H offers not evidence of his statement but asserts it as fact. The only possible opinion is that H "bets" that N

does not subscribe which indicates H does not know if N subscribes or not. H is recklessly making statements about N without regard to their truthfulness because H does not know if N subscribes he only "bets so".

The Inksy court did not consider specific factual allegations only name-calling. H called N a crook but went on to allege facts regarding what devices N uses to steal cable. Additionally Inksy concerned a business but N is a private individual. Inksy should not apply to N's case because it is not similar to this instant case other than the online nature of the statements.

N's case is more like Anderson because in Anderson the Plaintiff was accused of perjury and fraud. Here H accuses N of fraud in that H alleges N steals cable. Though Anderson specifically stated "facts" and here H does not use the word facts, the allegations against N by H are so specific it appears that H meant them to be interpreted as facts. The Anderson court said Anderson was unlike Inksy because the statements were asserted as facts would not be reasonably interpreted as mere opinion. Like Anderson, H's statements about N are so specific in statement 1 that they are not "mere opinion".

The first statement is both false and defamatory in nature and injured N so N will recover from H for statement 1.

Injury

N's professional and personal reputation have been injured because H accused N of a crime of moral turpitude, stealing, fraud and N is easily identifiable because his address was published in the second statements (discussed below). Untrue accusations of crimes of moral turpitude need not be proven to cause specific injury as it will bring public shame and potentially lost income to the wrongfully accused when a certain percentage of those hearing the accusation, though untrue, believe it to be true. N has suffered injury and will likely recover for defamation for statement 1.

Statement 2 of July 1, 2022

See rules for falsity, publication, and injury above. Here those elements are also met with statement 2.

Instead of withdrawing his accusation against N, H doubles down and adds more allegations in the second statement. H has been watching N "closely" and notices an attractive young woman at the house while N's wife is at work. H alleges they are watching the stolen cable TV. H then brags about putting a note on N's wife's car to tattle about N's alleged cheating. This adultery accusation is another accusation of a crime of moral turpitude, cheating on a spouse. It is only vaguely connected to the first statement because they are allegedly watching the

stolen cable tv programs. Once again H has no proof, just observations and assumptions which may be very wrong. H alleges these are facts not opinion.

Statement 2 is also false or with knowing disregard for its truthfulness. H has also been injured by this statement, suffering shame and mortification because some people who read this or republish this adultery accusation will believe it is true and think badly of N forever more. N says his relationship with the young woman who comes over to his house is purely professional. Even if it is not, it is private information, not meant to be published online. The issue is not whether N is romantic with the woman, but whether H recklessly accused N of adultery in a public forum.

Because statement 2 is false, published and has injured N, N will recover against H for statement 2.

2. Whether Gosling (G) is immune from liability for Hardy's allegedly defamatory statements

In Columbia the court considered whether websites should be liable for statements made by members of the public about other members of the public which may be defamatory. The Columbia court noted that Section 230 of the General Statutes of Columbia said that the government interest is preserving free speech on the internet and commerce. Section 230 serves that rational basis by "immunizing interactive service providers from liability for content created by third parties." It all hinges on whether the internet platform is active or passive in content creation.

Here, the 3CU.com blog is a interactive service provider in that it is a place where subscribers can post comments about issues at hand on the blog. G posts a concern and users comment about it. The Columbia court held that these types of websites are "information content providers" because it enables computer access by multiple users to the internet via a computer server and post their comment content.. 3CU simply allows its users to create content in the form of blog comments. Like the Columbia Case analyzed, 3CU is a passive provider but the subscribers who comment are active contributors of content when they respond to the prompts G creates on the blog, such as the concern about cable prices.

Here, CCU provides the internet platform in a passive way. However H actively contributed his content in the form of 2 defamatory statements that are false about N and N has been injured by those statements.

User Registration

Columbia court notified that the platform in that case requires users to register in order to use

the platform. Here, 3CCU also requires users to subscribe and provide name, gender, age and whether the user is a cable subscriber. H had to register to be able to comment on the blog. However, in Columbia the Roommate site required users to state discriminatory preferences. The Columbia court said that Roommate was a content provider because it published the questions and discriminatory answers.

The instant case simply asks identifying information and whether the user is a cable subscriber. Users are not stating discriminatory preferences so despite the holding about Roommate platform, 3CU should be considered a passive interactive service provider not an active content creator. Asking users identifying info should not bar 3CU from immunity.

Platform Development of subscribers discriminatory preferences.

3CU is not asking users to discriminate against each other but simply to post gripes and concerns about their cable service. 3CU is an online venting or rant platform more like Anderson courts description of emotional catharsis. 3CU is unlike Roommate because it does not encourage or ask for discriminatory information to be posted. In fact the 3CU opening post states it wants users to have open constructive dialogue and action to further the community goals of better cheaper cable service. and use each others info to create carpools and other beneficiary activities in the community.

G is 3CU's founder, but G's goals are not at all like Roommate's goals. Therefore this case is very different from the Columbia case yet Columbia is still relevant for the following factor.

Display of discriminatory statements

H's statement on G's blog is not discriminatory but it is defamatory. G seems to encourage the statement by saying "tell me more". If the court finds this is G creating content by asking for more info, G may be liable to H for publishing the defamation or not removing it because an adultery accusation does not further the cause of cheaper cable.

The Columbia court said when damaging statements are published without revision immunity may be in jeopardy. However that they worried that websites would suffer death by ten thousand cuts if they were liable for comments by third parties. Ultimately the Columbia court felt that free flowing internet was legislative intent and the platform should be immune from liability for user comments.

Like the Columbia case, here G should be immune for H's statements on her blog. H will likely not recover from G because G has immunity under 230 for her blog platform 3CU.

Conclusion

Based on my research it appears that N has a good strong defamation case against H, but not G. We should be able to use Anderson's case law precedent and also Section 230 to successfully argue that G is immune from action for defamation by H against N. G has a strong chance of prevailing in this action.

Question #3 Final Word Count = 2089

END OF EXAM