
NOONAN V. STAPLES: LIBEL LAW'S SHOCKING NEW PRECEDENT AND WHAT IT MEANS FOR THE MOTION PICTURE INDUSTRY

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I. INTRODUCTION

A writer, still a bit angry at that bully that tortured him throughout his childhood, uses the bully's name for a character in his new script for a little taste of revenge. The character completely embarrasses himself in an extremely awkward situation, which also just so happens to have happened to that real-life bully years before. The name is real, and the story is true. Now a mild-mannered adult, the former bully is horrified by his portrayal in the movie, as it reminds the world of a time he would prefer to have forgotten forever. Angered, he sues the writer for libel. The claim cannot survive, however, because the story is true. So the writer and his movie are safe, regardless of his motive for including the bully. But what if that claim could survive? The result would be expensive payouts to many emotionally injured parties that could cost the motion picture industry millions. A recent First Circuit precedent is paving the way for exactly this scenario, and the consequences could be disastrous for media defendants.

As traditional case law across the nation, and logic, tell us, truth is an absolute defense to a claim of libel. At least it was until now. The recent First Circuit decision in *Noonan v. Staples*¹ has the potential to distort libel law and broaden its application beyond the biggest limitation it had ever faced: truth. In interpreting a century-old Massachusetts law, and consequently turning libel law on its head, the First Circuit held that a truthful statement, if said with malice, could be the basis of a libel claim. This dangerous precedent's disregard for the First Amendment's protections of free speech could pave the way for disastrous results in a variety of industries that can easily be subjected to lawsuits in Massachusetts. It could be especially harmful to the motion picture industry.

II. A BRIEF INTRODUCTION TO LIBEL LAW²

The law of defamation developed early on in American law.³ It protects an individual's right to be free to enjoy their reputations unimpaired by false and defamatory attacks.⁴ Libel is a

¹ *Noonan v. Staples, Inc.*, 561 F.3d 4 (1st Cir. 2009).

² For a thorough examination of the history of defamation law, see John G. Long, *High Standards for High School Athletes: Defamation Law and Tomorrow's Stars*, 16 SPORTS LAW. J. 255 (2009); John Bruce Lewis et al., *Defamation and the Workplace: A Survey of the Law and Proposals for Reform*, 54 MO. L. REV. 797 (1989).

³ For a review of the early development of defamation law in the United States and before, see Michelle A. Wyant, *Confronting the Limits of the First Amendment: A Proactive Approach to for Media Defendants Facing Liability Abroad*, 9 SAN DIEGO INT'L L.J. 367 (2008); Jamie D. Batterman, *The First Amendment Protection of the Freedoms of Speech and the Press and Its Effect on the Law of Defamation as Seen Through the Eyes of Justice Brennan: His Impact and Its Future*, 13 WHITTIER L. REV. 233 (1992); Michael C. Cox & Elizabeth M. Callaghan, *To Be or Not To Be, Malice is the Question: An Analysis of Nebraska's Fair Report Privilege from a Press Perspective*, 36 CREIGHTON L. REV. 21 (2002).

⁴ *Fairbanks Publ'g Co. v. Francisco*, 390 P.2d 784, 792 (Alaska 1964). See also *Gaetano v. Sharon Herald Co.*, 231 A.2d 753, 755 (Pa. 1967); *Maressa v. N.J. Monthly*, 445 A.2d 376, 383 (N.J. 1982); *Hearst Corp. v. Hughes*, 466 A.2d 486, 493 (Md. 1983); *Voit v. Madison Newspapers, Inc.*, 341 N.W.2d 693, 698 (Wis. 1984).

subset of defamation which involves words that have been published rather than just spoken.⁵ As a state law, the elements vary from one state to the next; however, they all tend to share the same general characteristics.⁶ Generally, a libel law claim requires (1) a statement published by the defendant (2) about the plaintiff (3) that is false, and (4) damages the plaintiff's reputation.⁷ This publication generally must be accompanied by some level of fault on the part of the defendant, usually negligence for statements regarding a private person and actual malice for a public figure.⁸

Although truth was once considered only a conditional defense to a libel claim, it has become an absolute defense, as this seems to be mandated by the First Amendment and its protection of speech.⁹ Both the case law and the commentary surrounding it seem to have taken the idea of truth as an absolute defense completely for granted, as there had been nothing to seriously contradict the idea pre-*Noonan v. Staples*.¹⁰ Courts that have considered the issue have focused on the important First Amendment considerations and implications of claims based on true statements.¹¹ These courts have found that truthful statements are protected.¹²

⁵ *Ravnikar v. Bogojavlensky*, 782 N.E.2d 508, 510 (Mass. 2003) (“The statement may be published in writing or some other equivalent medium (in which case it is designated as libel), or, as in this case, orally (in which case it is designated as slander).”).

⁶ The elements of libel under Massachusetts law are “(1) a false and defamatory communication (2) of and concerning the plaintiff which is (3) published or shown to a third party.” *Cornwell v. Dairy Farmers of America, Inc.*, 369 F. Supp. 2d 87, 110 (D. Mass. 2005) (quoting *Dorn v. Astra USA*, 975 F. Supp. 388, 396 (D. Mass. 1997)). Under New York law, “[t]he elements are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se.” *Dillon v. City of New York*, 704 N.Y.S. 2d 1, 5 (N.Y. App. Div. 1999). California statute provides that “[l]ibel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.” CAL. CIV. CODE § 45 (2007). Florida law requires (1) a false statement published by the defendant, “(2) about the plaintiff; (3) to a third party; and (4) the falsity of the statement caused injury to the plaintiff.” *Border Collie Rescue, Inc. v. Ryan*, 418 F. Supp. 2d 1330, 1348 (M.D. Fl. 2006). The restatement of torts provides that, “to create liability for defamation there must be: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” RESTATEMENT (SECOND) OF TORTS § 558 (1977).

⁷ See *Ravnikar*, 782 N.E.2d at 510-11.

⁸ See *id.*

⁹ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

¹⁰ *Meloff v. N.Y. Life Ins. Co.*, 240 F.3d 138, 146 (2d Cir. 2001); *Taylor v. Carmouche*, 214 F.3d 788, 795 (7th Cir. 2000); *Andrews v. Prudential Sec., Inc.*, 160 F.3d 304, 309 n.7 (6th Cir. 1998); Mass. Sch. of Law at Andover v. American Bar Ass’n, 142 F.3d 26, 42 (1st Cir. 1998) (“Truth is an absolute defense to a defamation action under Massachusetts law....”); Chad Baruch, “*If I Had a Hammer*”: *Defending SLAPP Suits in Texas*, 3 TEX. WESLEYAN L. REV. 55, 66 (1996) (“Of course, truth is an absolute defense to libel....”); Lisa Byrne Anastasio Potter, *Altered Realities: The Effect of Digital Imaging Technology on Libel and Right of Privacy*, 17 HASTINGS COMM. & ENT. L.J. 495, 513 (1995) (“Truth is an absolute defense to libel.”).

¹¹ *Sullivan*, 376 U.S. at 269 (“libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.”).

¹² See *supra*, note 10.

III. NOONAN V. STAPLES

Alan Noonan was a sales director for Staples. His job entailed significant amounts of travel, and thus, significant numbers of expense reports.¹³ After discovering that another employee was embezzling funds through false expense reports, Staples audited expense reports from a random sampling of North American employees.¹⁴ Noonan was a part of that random sampling. The review of Noonan's expense reports led to the discovery that there were significant differences between the reports and the money he actually spent. Staples discovered that many of the reports contained entries where exactly \$100 more than the actual amount spent was claimed and other entries in which the decimal point had been moved two places.¹⁵ Thanks to one of these "mistakes," Noonan was reimbursed \$1129 for a meal at an airport McDonald's that actually cost him \$11.29. Based on this evidence, the team concluded that Noonan "deliberately falsified" expense reports and Staples terminated him.¹⁶

The day after Noonan's termination, the Executive Vice President sent out an email to all of the employees in Staples's North American Division, which includes about 1500 people. The email, which reminded the employees of corporate policies and the availability of their ethics hotline, began with the following announcement: "It is with sincere regret that I must inform you of the termination of Alan Noonan's employment with Staples. A thorough investigation determined that Alan was not in compliance with our [travel and expenses] policies."¹⁷

Among other claims, Noonan's complaint against Staples alleged libel based on this email.¹⁸ The district court granted summary judgment for Staples on the libel claim, explaining that what was stated in the e-mail was true.¹⁹ While the Circuit Court agreed that the email was truthful, it disagreed with the District Court's final result. Citing a 107 year-old statute, the court recognized an exception in which truth is not an absolute defense: the libel action may proceed regardless of truth "if the plaintiff can show that the defendant acted with 'actual malice' in publishing the statement."²⁰

Initial commentary on this shocking new decision is not positive to say the least. Brimming with harsh, cautionary statements such as "it is the most dangerous libel decision in decades...the decision puts a crack in the bedrock that threatens to undermine free speech," "be afraid -- be very, very afraid -- of this precedent. If ill will is all that is needed to turn a truthful statement into libel, then everyone is a potential defendant," "the ruling is troubling on so many levels that it beggars the imagination" and "the case threatens to muzzle both news and entertainment media," none of the commentaries agree with the decision.²¹ In fact, it seems as if

¹³ Noonan v. Staples, Inc., 556 F.3d 20, 23 (1st Cir. 2009).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 24.

¹⁹ *Id.* at 25.

²⁰ *Id.* at 26; Mass. Gen. Laws ch. 231, § 92.

²¹ Media Law, <http://www.legaline.com/2009/02/think-you-know-libel-law-think-again.html> (Feb. 16, 2009, 10:20); Posting of Dan Kennedy to New England First Amendment Center, <http://firstamendmentblog.wordpress.com/2009/02/17/a-chilling-decision-about-libel/> (June 25, 2009, ; Posting of Martin Langeveld to Nieman Journalism Lab, <http://www.niemanlab.org/2009/02/the-most-dangerous-libel-decision-in-decades/> (Feb. 18, 2009, 10:23).

all who have spoken on the issue are simply waiting for the inevitable overturning of the decision.²² And they are likely correct. If this decision is not quickly overturned, its consequences could be disastrous for media defendants, especially for the motion picture industry.

IV. IMPACT ON THE MOTION PICTURE INDUSTRY

The *Noonan* court characterized this exception as “narrow.”²³ However, the court potentially opened up libel law to a huge number of cases in which the claim never before could have survived. Truth is still a defense in the other forty nine states, but since one state has opened that door, plaintiffs from all over the country will attempt to sue in Massachusetts in order to be compensated for true statements that were said about them. In many cases, jurisdiction over out of state defendants will be difficult. The same cannot be said of large media defendants.

Under *Keeton v. Hustler Magazine*, libel plaintiffs have a particularly easy time showing that a court has jurisdiction over a libel claim involving a media defendant because they generally knowingly release their publications in all fifty states.²⁴ The Court in *Keeton* held that the circulation of the magazine throughout the state of New Hampshire was sufficient to show that *Hustler* had purposefully directed its actions at the state, thus allowing special jurisdiction. The Court explained that the plaintiff was seeking damages for a nationwide claim, and that some of the harm was suffered in New Hampshire: “The communication of the libel may create a negative reputation among the residents of a jurisdiction where the plaintiff’s previous reputation was, however small, at least unblemished.”²⁵ Further, the Court found that a state has a significant interest in exercising jurisdiction over those who commit torts within the state, and thus a court has a significant interest in exercising jurisdiction over a defendant who has committed libel and directed it towards the state. Finally, the Court explained that the plaintiff need not have contacts with the state in order for there to be jurisdiction.

Keeton potentially allows libel plaintiffs to choose the state that has the laws most favorable to their claims. In the past, the biggest advantage to choosing your venue was a potentially longer statute of limitations period.²⁶ With the *Noonan* precedent, however, the advantage can become so much more: it can allow plaintiffs the chance to sue based on a true statement. It is a claim that would fail in every other state, but is now viable in just one. And with the ease of creating jurisdiction, many potential plaintiffs that have never actually stepped foot into the state of Massachusetts may be able to prove the validity of their claim there. And

²² *Id.*; see also posting of Sam Bayard to Citizen Media Law Project, <http://www.citmedialaw.org/blog/2009/sam-bayard/first-circuit-upends-accepted-understanding-truth-defense-defamation-cases> (Feb. 17, 2009) (“There’s a chance that the First Circuit will review the decision en banc (that is, with all the judges of the First Circuit hearing the case, rather than three), and the case has stark constitutional implications that make it a good candidate for Supreme Court review”).

²³ *Noonan v. Staples*, 556 F.3d at 26.

²⁴ *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984).

²⁵ *Id.* at 778.

²⁶ *Id.* at 779. The Court did not see a fairness problem in allowing the plaintiff to choose the jurisdiction that had the longest statute of limitations of any state in the nation, explaining that: “certainly *Hustler Magazine, Inc.*, which chose to enter the New Hampshire market, can be charged with knowledge of its laws and no doubt would have claimed the benefit of them if it had a complaint against a subscriber, distributor, or other commercial partner.”

an easy target would be the motion picture industry, which has pockets deep enough to make the suit worthwhile, and which could easily face claims in any state, as movies are typically distributed, heavily advertised and marketed, and often quite popular, nationwide.

Remember the bully from the introduction? A resident of Alabama, he is suing the studio that released the movie in Massachusetts, where it now doesn't matter that the writer only used truths so long as he wrote with anger in his heart. The bully has no problem showing that the Massachusetts courts have special jurisdiction, as the studio purposefully directed its actions at the state by distributing and advertising the movie there. Nor does he face major hurdles in proving his claim, as the writer's claim that he only told the truth is no longer a defense. Movie studios put in this position could face terrible financial consequences: the damages owed to a poor private individual who has had his reputation destroyed in fifty different states by a movie that grossed tens or hundreds of millions of dollars could be astronomical. Therefore, this precedent could be very dangerous to the motion picture industry.

While some cases would likely arise in such a way, the scenario of the angry writer is, while interesting, likely not the primary way that the motion picture industry will be damaged by this decision. Instead, the movies that will suffer the brunt of the damage will likely be documentaries. Documentaries are often made by those who are the most passionate about the subject matter. They have definitive beliefs on the issue and they want their side to win the debate. And as with debate on just about any subject, the members of the two sides are often not the best of friends. Also, often when a documentary tells a story completely unknown to the world, the story focuses on one group or person, while showing the other in quite negative ways. As the documentarian here is likely also passionate, it may not be extremely difficult to show anger and hatred towards the other side. Thus, malice in the use of the truths in a documentary may not be so difficult to prove, and so the cases will likely often survive.

Threats of lawsuits such as these can be extremely damaging to lower cost productions such as documentaries as they cannot afford to absorb such claims. And *Noonan v. Staples* opens the door to large numbers of libel claims based on truthful statements: any documentary that treats anyone in a less than favorable light could be the basis for a claim. While not every claim will win, simply having to defend meritless claims could likely prove too costly and thus prevent the creation and release of many documentaries. This is clearly not a desirable result, as an important value of our society is the free flow of information and ideas, which creates the debates which spark changes and innovations. The loss of many documentaries for fear of lawsuits will inhibit this free flow of information, as many stories will never be told, and thus many movements will never begin and many changes to the world will never be made.

While the ideal solution is of course to overturn the unthinkable decision in *Noonan v. Staples*, large media defendants that are likely come under attack may need to seek other solutions while they wait for the Supreme Court to take charge of the situation. Unfortunately, there do not seem to be many options for the studios to steer clear of trouble. Of course the case of the angry writer can be caught early and simply erased from the script; the case of the documentary is not so simple. The documentarian cannot make his point without using truths to show the weaknesses of the other side. He cannot erase all aspects of the film that may give rise to a lawsuit for fear that there be nothing left to film. Thus, it seems that the only course that may be taken that guarantees protection from such suits would be to refuse to release the movie in Massachusetts.

If the distributor does not market the movie or release it in the state, then it has not purposefully directed its actions at the state, and there can be no special jurisdiction. If there is

no jurisdiction, then the company may not be sued there, and thus is not subject to its laws. Thus, it seems that the only way they may protect themselves is to refuse to release the films in Massachusetts. This approach, however, hardly produces desirable results: the people of the state of Massachusetts will be uninformed on issues of social importance and the documentarian has weakened the effects of his film by limiting its viewership, and thus weakened the film's effect on his cause.

V. CONCLUSION

Noonan v. Staples sets a dangerous precedent. It opens the door for virtually anyone who wants to sue over a bruised ego from anywhere in the country. It creates a huge risk for media defendants who want to present their works in the state of Massachusetts, as this will leave them vulnerable to these lawsuits. The First Circuit's decision must be overturned on the grounds that it violates the First Amendment, which would be consistent with prior case law on the issue. Leaving this decision intact presents too costly of a situation for media defendants: it could lead to a situation where motion pictures, and all other media, would no longer be released in the state for fear of expensive judgments. This loophole presents so many problems that it cannot be ignored. Truth must remain an absolute defense to libel. *Noonan v. Staples* must be overturned.