IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1545

BRIAN McCAFFERTY and,
MELISSA McCAFFERTY,
individually and on behalf of
their minor child C.M.,
Appellants
v.
NEWSWEEK MEDIA GROUP LTD,
Appellee

Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania at No. 2:18-cv-1276-JS

BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

Appellants' Amended Complaint was filed in the United States District Court for the Eastern District of Pennsylvania, which had subject matter and specific jurisdiction over the case pursuant to the principles of diversity set forth in 28 U.S.C. § 1332, and because the amount in controversy substantially exceeds $75,000.00. This Honorable Court has jurisdiction over this case pursuant to 28 U.S.C. § 1291, because this is an appeal of a final decision by the United States District Court for the Eastern District of Pennsylvania.

On March 7, 2019, the district court entered a final order granting Defendant/Appellee's Motion to Dismiss and dismissing Plaintiffs/Appellants' Amended Complaint with prejudice. A100. The next day, on March 8, 2019, Appellants timely filed their Notice of Appeal in compliance with Federal Rule of Civil Procedure 4(a)(1)(A). A101.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW[1]

1. Is it defamatory to C.M. for Newsweek to state, under C.M.'s picture no less, that "these kids are being weaponized… when, in fact, they are defending raw racism and sexual abuse?" The trial court stated that no, the statement and its context is not capable of being defamatory, and dismissed all claims. As will be set forth below, the trial court misapplied the law to these statements.

2. Did the trial court err in refusing to allow the parties to engage in any discovery based upon the well-pled allegations in this case? Specifically, if the trial court believed that Newsweek's article about the 12-year-old weird little army was not about C.M., why was C.M.'s picture headlining the article? The trial court erred by not permitting discovery. C.M. submits that discovery should have proceeded on that topic, among others, as will be more fully explained below.

3. In its short opinion, the trial court repeatedly references that the article "cannot reasonably be understood" to suggest that C.M.:

(1) is a member or spokesperson for the alt-right (A092-93);

(2) is being weaponized by adults of the political right (A092-93);

(3) is part of a "weird little army" (A094);

[1] In the Amended Complaint, the parent Plaintiffs/Appellants Brian and Melissa McCafferty had asserted claims for false light and defamation. After careful consideration, those specific claims only are not being pursued on appeal and to the extent that an order of reversal is hereafter entered, the parents' claims are not the subject of this appeal and will not be further pursued.

(4) defends racism and sexual abuse (A094-95)

(5) and, tying all of these negative statements together in context, that the article has anything to do with C.M.

However, if that is so, why is C.M.'s picture on the face of the article if the article is not about him or cannot be inferred to be about him? That is the conundrum of the trial court: on one hand, this article has nothing to do with C.M., but on the other, his picture headlines a grotesque article that has nothing to do with him. C.M. submits that the article is about him, and that it is defamatory and casts him in false light.

4. In his claim for false light, did C.M. properly allege malice? The trial court held that no, C.M. did not plead malice, and this finding was in error.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has never been before this Honorable Court previously, and Appellants are not aware of any other case or proceeding that is in any way related, completed, pending or about to be presented before this Honorable Court or any other court or agency, state or federal.

CONCISE STATEMENT OF THE CASE

In January of 2018, Newsweek published an article called "Trump's Mini-Mes." A001-3. The offending article's by-line claims that "the alt-right" deployed a 12-year-old Trump supporter and then continues, "she's not the only kid in this weird little army." This occurs directly underneath a large, charismatic photograph of C.M. Obviously, the clear inference is that C.M. is another "kid" in the weird little army. Otherwise, why use C.M.'s photograph to headline this grotesque article? Newsweek is both directly stating and falsely implying, factually, that the alt-right has created a weird little army and that C.M. is a part of it. These are Newsweek's own words, and are not capable of anything but their plain and ordinary meaning, all as published underneath a photograph of C.M. On the same page, Newsweek states factually that the purpose of this weird little army is to defend raw racism (a potential crime in Pennsylvania) and sexual abuse (an actual crime in Pennsylvania). Literally, Newsweek shamelessly states, again, under C.M.'s picture, that "**these kids are being weaponized,…when, in fact, they are defending raw racism and sexual abuse**." This statement is defamatory and places C.M. in false light.

Newsweek then wrote, edited and/or published its offending article, all under C.M.'s lead picture, touting that it is "**repulsive**"[2] to feature children as potential spokespersons, claiming that the voices behind C.M. are "hiding" behind children as part of a sinister plot to weaponize children through the seduction of becoming "a celebrity." The obvious import of the offending article is that not only is C.M. part of the alt-right's weird little army that is out defending raw racism and sexual abuse, is the direct inference that C.M.'s parents – either intentionally or because they are lousy parents – have permitted such "weaponization" of their child, that they are "the voices behind" their child, to be a part of this alt-right army that supports and defends raw racism and sexual abuse.

When challenged by this lawsuit, Newsweek reshuffled its position and claimed that the article was "not about C.M." Yet, if so, why did the article contain a huge picture of C.M. above it? The trial court never permitted discovery on this obvious and crucial issue; instead, most respectfully, it rushed to adopt Newsweek's still unexplained conduct and legal positions, all of which screamed for fact discovery.

Ultimately, to forever link C.M. <u>in any way</u> to supporting and defending racism and/or sexual abuse in any manner whatsoever is defamatory, false light

[2] How richly ironic: Newsweek's article asserts that it is "repulsive" to use children as spokespersons, when Newsweek itself does the exact same thing by placing C.M.'s highly charismatic photo as the lead to its despicable article.

and outrageous, and no reasonable journalist could possibly believe that what was written is true. Sadly, even if it was/is true, it is outrageous to headline such an attention-seeking piece with a child's picture – any child – who has nothing to do with it. As such, Newsweek's placement of C.M.'s picture leading the article constitutes reckless and malicious conduct. **In the end, if this conduct is not held to be false light and/or defamatory, the law has now become incapable of defining what is.**

On May 21, 2018, Newsweek filed a Motion to Dismiss Plaintiffs' Amended Complaint. Plaintiffs/Appellants' Response was filed on June 4, 2018, and a hearing was held on June 19, 2018. An Order granting Newsweek's Motion to Dismiss was entered on March 7, 2019.

Appellants appealed the trial court's Memorandum Order the next day, and specifically dispute the following rulings by the trial court: (1) that the Appellee's statements in the article are not capable of defamatory meaning; (2) that the Appellee's statements in the article are not capable of placing Appellant C.M. in a false light; and (3) that the article was not about C.M. Furthermore, Appellants submit that these are all issues of fact and are therefore capable of being proven false, and Appellants should be permitted to proceed with discovery and trial on the merits as this Honorable Court must conclude that the statements about and concerning C.M. are at least capable of being defamatory and false light.

SUMMARY OF THE ARGUMENT

Respectfully, the trial court turned untenable factual conclusions, without the benefit of any discovery no less, into errors and misstatements of law when it granted Newsweek's Motion to Dismiss for Failure to State a Claim. The Brief of the Appellant will be short, but not because the issues are not important or substantial; rather, the issues are so patently clear that the missteps of the learned trial court are readily apparent and easily rectified. The trial court has co-mingled general points of law with disputed and/or untested factual averments, with no discovery whatsoever – particularly with respect to the issue of malice – and reached a patchwork conclusion that bears little resemblance to the offensive and bombastic two-page article which forms the basis of this lawsuit.

At every turn, the trial court went out of its way to interpret language or recast inferences in such a way so as to reach its ultimate conclusion that the article was not capable of any defamatory meaning, while simultaneously and remarkably claiming that even if it was, then the article was not about C.M. Critically, if the article is not about C.M., why is his picture the first thing the reader sees when invited to review the article? And why is C.M.'s picture bigger and more prominently placed than M.M., who the article is purportedly about, at least according to the trial court? That issue cannot be as easily reconciled as the trial court has done; either the article is about C.M. and his picture is "appropriately"

placed for some still undiscovered reason, or the article is not about C.M. (as the trial court from time to time infers), and Newsweek had no justifiable basis to use C.M.'s picture in an article about 12-year-olds being weaponized to support and defend "raw racism and sexual abuse." The learned trial court cannot have this both ways, and discovery on the topic was and remains the more prudent, proper legal course.

Contrary to (some of) the trial court's conclusions, the article is obviously about C.M., and the fact that he is in any way associated with defending raw racism and sexual abuse is flat out defamatory. While the trial court relied on a series of stale and obviously untenable decades-old opinions which have very dubiously held that accusing someone of being a racist is not defamatory, that cannot possibly remain "the law" in 2018-19. Simply because an opinion is labeled as "precedent" does not make it bulletproof. When any opinion is obviously wrong, the law should be changed and the wrong corrected. For any court in America to state in 2018 that it is not defamatory to call someone a racist, or associate or impute "raw racism" to any human being, is completely wrong. Appellants are confident that this Honorable Court will correct such a wrong for all to hereafter see, and that old, stale law will catch up to the present time; it is respectfully submitted that this Honorable Court must seize this powerful opportunity.

No one should be able to write, with impunity, that "these kids are being weaponized…when, in fact, they are defending raw racism and sexual abuse." Regrettably, these words were marginalized and sanitized by the trial court in its effort to justify the early dismissal of the C.M.'s claims. However, to declare finally and definitively that these words are not capable of defamatory meaning, or that they do not apply to C.M. under these facts, required the trial court to make a massive and improper leap of faith into the world of facts without the benefit of any discovery whatsoever. The trial court tortures the pronoun "they," to twist and turn its way into a conclusion that the pronoun "they" does not apply to C.M. or the "kids," or raw racism and sexual abuse, but instead to someone else. Every time the trial court so twisted, turned and manipulated its legal analysis, it smacked squarely into the reality that C.M.'s picture is the visual highlight that invites the reader into the article. Ultimately then, the article <u>is</u> about C.M., and it <u>does</u> associate him with defending raw racism and sexual abuse, because that is the very topic of the article. This is now a <u>fact</u> which is capable of being legally proved or disproven in discovery. Words are words, and the ones deliberately chosen by Newsweek have plain meaning, and so does the meaning conveyed by placing C.M.'s picture on top of this despicable sort of article.

The balance of the article fares no better for Newsweek. C.M. is cast as a member of the weird little army that is being weaponized through the chapter and

verse text written by someone else, and being seduced with some celebrity status. C.M. is portrayed as the alt-right's little robot, and that is factually capable of being disproven and therefore legally defamatory as it lowers his esteem among members of his community. How could it not?

Finally, the trial court wrongfully sticks its toe into the pool of malice – albeit barely – without the benefit of any discovery whatsoever. On its face, the trial court's analysis of malice is a pure stretch, because the issue should have had the benefit of discovery, especially if the trial court is going to take it upon itself to decide what the pronoun "they" means –and decide it against C.M. – without any discovery. However, even if the trial court's understanding of malice could be in any way countenanced on these facts, one core fact remains clear and indisputable for all to see: if this article is not about C.M. as the trial court and Newsweek (most of the time) contend, why would anybody acting responsibly put a 12-year-old's picture on an article about raw racism and sexual abuse if it had nothing to do with that child? This single act by Newsweek is de facto "malice." Indeed, making reckless decisions to publish a child's picture over an ugly, highly controversial article about a grotesque topic reeks of malice, and the trial court cannot have it both ways in its analysis, especially without the benefit of an ounce of discovery.

ARGUMENT

I. Applicable Standard of Review

The final Order in this matter granted Newsweek's Motion to Dismiss, brought pursuant to Federal Rule of Civil Procedure 12(b)(6).

"This Court exercises plenary review over a district court's grant of a motion to dismiss for failure to state a claim." Grier v. Klem, 591 F.3d 672, 676 (3d Cir. 2010). "We must determine whether, under any reasonable reading of the pleadings, plaintiff may be entitled to relief, and we must accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996). "[W]e do not inquire whether a plaintiff will ultimately prevail when considering a motion to dismiss, only whether the plaintiff is entitled to offer evidence to support his or her claims." Watson v. Abington Twp., 478 F.3d 144, 150 (3d Cir. 2007). That is,

> Our review of a District Court's dismissal under Rule 12(b)(6) is *de novo*. Fowler v. UPMC Shadyside, 578 F.3d 203, 206 (3d Cir. 2009). Under the "notice pleading" standard embodied in Rule 8 of the Federal Rules of Civil Procedure, a plaintiff must come forward with "a short and plain statement of the claim showing that the pleader is entitled to relief." As explicated in Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009), a claimant must state a "plausible" claim for relief, and "[a] claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Although "[f]actual allegations must be enough to raise a right to relief above

> the speculative level," Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007), a plaintiff "need only put forth allegations that raise a reasonable expectation that discovery will reveal evidence of the necessary element." Fowler, 578 F.3d at 213 (quotation marks and citations omitted); see also Covington v. Int'l Ass'n of Approved Basketball Officials, 710 F.3d 114, 117-18 (3d Cir. 2013).

Thompson v. Real Estate Mortg. Network, 748 F.3d 142, 147 (3d Cir. 2014).

"[D]efendant bears the burden of showing that no claim has been presented" (Bruni v. City of Pittsburgh, 2016 U.S. App. LEXIS 10019, *16 n. 11 (3d Cir. June 1, 2016) (quoting, Hedges v. United States, 404 F.3d 744, 750 (3d Cir. 2005)), and dismissal may be affirmed "only if it appears that the plaintiffs could prove no set of facts that would entitle them to relief." Nami, supra, 82 F.3d at 65; Watson, supra, 478 F.3d at 150-51.

II. In Pennsylvania, It Is Clearly Defamatory And/Or False Light To Impute "Raw Racism" And "Sexual Abuse" To C.M.

"The kids are being weaponized…
when, in fact, they are defending raw racism and sexual abuse."

See article at A02.

The crux of C.M.'s appeal is the statement above. The trial court held that this statement is not capable of defamatory meaning and nor did it cast C.M. in false light. A088-100. However, well-settled Pennsylvania law states that when a court determines whether a statement is capable of a defamatory meaning, it must consider whether the statement tends to harm the reputation of another as to lower

him in the estimation of the community or to deter third parties from associating or dealing with him. A091. Simply put, to associate anyone with defending raw racism and sexual abuse is and must be defamatory in the year 2018. It is simply not credible for the trial court to have stated that being associated with defending raw racism and sexual abuse would not lower someone's estimation in the community. No legal cite is needed here; this is simply the common sense and logic that should be readily apparent to all of us.

In its opinion, the learned trial court concludes that the passage above cannot reasonably be understood to accuse C.M. of defending racism and sexual abuse. A094-95. In attempting to justify this sweeping conclusion, the trial court sidesteps the exact language and words, and states that the article is raising a "concern" that interviews with children are being used to "camouflage" their positions "as feel good sweetness and light." Id. This, respectfully, adds nothing to the equation; of course the interviews with children have a message, and in this instance, Newsweek's article specifically states that the message is to defend raw racism and sexual abuse. The trial court's analysis actually stops short of using the rest of the language that is actually the critical, defamatory part of the article in its analysis on this point. The trial court never really addresses the words Newsweek picked but simply individually picks other parts of the passage and somehow arrives at the conclusion that these words do not suggest that C.M. or any other

child defends (or is being used to defend) racism or sexual abuse. Literally and figuratively, the trial court sidesteps the key language and instead sets forth an interpretation which strains the actual words at issue.

It is clear from the trial court's opinion that it has individually scrutinized the words from the Newsweek article without any contextual assessment. Then, analyzing these words individually – in a virtual conga line format –the trial court concludes that the words themselves were not individually capable of being defamatory. Much like a puzzle, whose individual puzzle pieces make no or little sense until the puzzle is completed, that was the error of the trial court, and this is plainly evident by the manner in which the trial court has constructed its opinion. However, returning to the law, "[t]o determine the meaning of an allegedly libelous communication, it must be read in context." Corabi v. Curtis Pub. Co., 273 A.2d 899, 906 (Pa. 1971). Words are actionable as defamation where the innuendo is both defamatory and false because the implications that may be deemed defamatory are derived from the meanings ascribed to the language used and the manner in which the language is used when looking at the statement as a whole. Dunlap v. Phila. Newspapers, Inc., 448 A.2d 6, 15 (Pa.Super. 1982). Furthermore, for false light, the issue again speaks to the communication in context, because if the finder of fact determines that the overall impression created by the disputed statements was itself a "calculated falsehood," a claim for false

light will lie. Krajewski v. Gusoff, 53 A.3d 793, 808 (Pa.Super. 2012) (Proof of false light does not require that every single statement is false, but rather that the "scenario depicted created a false impression, even if derived from true statements. Furthermore, the Court in Krajewski held that, in that case, the whole opinion page must be considered in its entirety, and not just the three (3) separate pieces on that page that were the subject of the litigation.)

The definition of **impute** is to "credit to a person or a cause; attribute."[3] Here, Newsweek has clearly **imputed**, by its words, sexual abuse and racism to C.M. The trial court contends that the language does not impute defending raw racism and sexual abuse. Obviously, it does, and the words say so. "The kids" clearly include C.M. Newsweek's denial is even more contrived when C.M.'s picture is above the article. For Newsweek to claim that the reference is to "other kids," (A143-44; A154-59) but not C.M., is completely disingenuous. Then, the very next clause specifically states that "they" – i.e., the kids – are defending raw racism and sexual abuse. At the risk of oversimplifying the analysis, if the article is not about C.M., why use his picture instead of the alleged "other kids" the article was about? Id. While the trial court tries to explain away what Newsweek did, at best, the decision actually highlights why this case ultimately poses a jury question.

[3] Merriam-Webster.com. 2018. https://www.merriam-webster.com (May 22, 2018).

There can be no credible dispute that in Pennsylvania, "sexual abuse" is a crime, see e.g. 18 Pa.C.S. § 3101, et seq.; 18 Pa.C.S. §6312(d); 42 Pa.C.S.A. § 9799.14; 18 U.S.C. § 2241 through 2244. It is defamatory to impute a criminal offense to anyone. Restatement (Second) of Torts § 570; Clemente v. Espinosa, 749 F.Supp. 672, 677 (E.D.Pa. 1990).

Pennsylvania law is clear:

> A communication is defamatory if any portion of it tends to so harm the reputation of that person as to lower him or her in the estimation of the community or to deter third persons from association or dealing with him or her.
>
> * * *
>
> A communication that states or implies that a person or entity has committed a crime is defamatory.
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> * * *
>
> In deciding whether the communication was defamatory, you should consider the message the communication would send to the average people who could have been expected to receive it. This means you should consider the innuendoes and implications of what was said, as well as inferences the recipients would have drawn from what may not have been said. You should also consider the context in which the allegedly defamatory statement was made.
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> * * *
>
> A communication or any portion of it is defamatory if in context its stated or implied meaning is defamatory.

17.100 Defamation, Defamatory Meaning, Pa. Sugg. Std. Civ. Jury Instr., 4th Ed., Vol. I (2016); see also MacElree v. Phila. Newspapers, Inc., 675 A.2d 1050, 1054 (Pa. 1996); Corabi, 273 A.2d at 904.

Appellants could find no Pennsylvania Supreme Court opinions that hold that calling anyone a "racist" is not defamatory; only the trial courts and the intermediate appellate courts have generally touched the topic. However, the Pennsylvania Supreme Court has specifically stated that "it cannot be said that every such accusation [of racism] is not capable of defamatory meaning as a matter of law." MacElree, 674 A.2d at 1055. Here, one of the trial court's functions was to appropriately predict what the Pennsylvania Supreme Court would do when confronted with a specific situation, in this case in 2018, and decide whether imputing racism to someone is defamatory. Nationwide Mut. Ins. Co. v. Buffetta, 230 F.3d 634, 637 (3d Cir. 2000) ("Because there was no reported decision by the Pennsylvania Supreme Court or any other Pennsylvania court addressing the precise issue before it, it was the duty of the District Court to predict how the Pennsylvania Supreme Court would interpret [the issue] presented."); see also, Jodek Charitable Trust, R.A. v. Vertical Net Inc., 412 F.Supp. 2d 469, 474 (E.D.Pa. 2006) ("When the state's highest court has not addressed the precise question presented, a federal court must predict how the state's highest court would resolve the issue." (citations omitted)).

Appellants suggest that no court, by today's standards, would ever find that imputing racism to anyone is not defamatory. Indeed, in a recent decision, another Eastern District Court found that the term "racist" has a "deplorable

connotation in American culture" and thus, is disparaging to a person's character. Jungclaus v. Waverly Heights, Ltd., 2018 U.S. Dist. LEXIS 59635, at *13 (E.D.Pa. Apr. 9, 2018).

To be clear, Newsweek now absurdly advances the position that imputing racism to anyone, no less a 12-year-old child, is not defamatory in 2018. Yet, everyone knows that imputing racism in 2018 is defamatory because, by its legal definition, defamation is harm to the reputation of a person so as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her. Restatement (Second) of Torts § 559; see also, Cosgrove Studio and Camera Shop, Inc. v. Pane, 182 A.2d 751, 753 (Pa. 1962). The Pennsylvania Supreme Court specifically held that "[a] charge of racism clearly could have such an effect on the individual so charged. Where such a possibility exists, it is up to the jury as fact finder to determine its existence." MacElree, 674 A.2d at 1055. By today's standards, being associated or imputed as a racist certainly lowers an individual in the estimation of his or her community and further, obviously deters third persons from associating with him.[4]

[4] By way of example only, consider Donald Sterling, the former owner of the Los Angeles Clippers, who was recently banned from the NBA for life, fined $2.5 million and literally forced to sell his $2 billion basketball team after a recording of him surfaced telling his girlfriend "It bothers me a lot that you want to broadcast that you're associating with black people. Do you have to? The little I ask you is not to promote it...and not to bring them to my games," because his fellow owners and league sponsors did not want to associate or deal with him on that racial basis

In situations "where a plausible innocent interpretation of the communication exists, if there is an alternative defamatory interpretation, **it is for the jury** to determine if the defamatory meaning was understood by the recipient." Pelagatti v. Cohen, 536 A.2d 1337, 1345 (Pa.Super. 1987) (emphasis added) (citing Gordon v. Lancaster Osteopathic Hosp. Ass'n, Inc., 489 A.2d 1364, 1368 (Pa.Super. 1985)), appeal denied, 548 A.2d 256 (Pa. 1988). A publisher may be liable for the implications of what he has said or written, not merely the specific literal statements made. Dunlap 448 A.2d. at 15. The Superior Court then provided the following illustrious example of its point, “for example, that a man and a woman married, but not to each other, spent a night together in a hotel room, will be interpreted as an assertion of the pair engaged in sexual activities, because the average reader will assume that "they sayeth not a pater noster there.” Id. The innuendo created by Newsweek is no less repulsive here.

At best, Newsweek’s argument confirms that this case raises the issue for a jury to decide whether readers of the article interpreted it in its defamatory sense. This Court has already held that there was sufficient evidence for a jury to determine that when a publisher employed the label "lawyer-cum-fixer," it either deliberately cast this description in an ambiguous light in the hope of insinuating a

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alone. See A183-85. Obviously, there are piles of other such instances about how having anything to do with racism, in today’s world, is clearly defamatory.

false import to the reader, or that it knew or recklessly disregarded the possibility that its words would be interpreted by the average reader as false statements of fact. Sprague v. ABA, 276 F. Supp. 2d 365, 377 (E.D. Pa. 2003). As Pennsylvania law dictates, it is now a question for the jury whether readers of the Newsweek article interpreted it in its defamatory sense.

III. C.M.'s False Light Claims Were Sufficient

Pennsylvania has adopted the Restatement (Second) of Torts with regard to claims of false light invasion of privacy. Krajewski, supra. The Restatement defines a claim for false light as follows:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) Torts, § 652E, cited with approval in Krajewski, supra.

Comment b to this section of the Restatement further explains that the tort of false light occurs when a person is "given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and

so is placed before the public in a false position." Restatement (Second) Torts § 652E Cmt. b.

Based on all of the arguments above, but especially the fact that the article is clearly about "kids" defending raw racism and sexual abuse, it is simply incomprehensible to conclude that C.M. is not among those "kids" when his picture adorns the article.

IV. The Trial Court's Opinion Lacks An Analysis of Malice

The trial court's opinion does not include any analysis of malice, it simply concludes that there is none and clearly avoided the real evidence of malice, which is putting C.M.'s photo on a grotesque article that is allegedly not about him. The trial court specifically stated, at A93, that "the article also cannot reasonably be understood to suggest that C.M. is a 'member of' or 'spokesperson' for the alt-right." This finding, at this stage in the litigation no less, is completely contrary to the fact that C.M.'s charismatic photo headlines the article.

As required for a false light claim, actual malice means writing a piece "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co., 376 U.S. at 280. Here, Newsweek obviously wrote the article knowing certain key assertions were patently false, and approached its story with a reckless disregard of whether those claims were false. To show reckless disregard for the truth or falsity of a statement, "[t]here must be sufficient evidence

to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." Id. This is a subjective inquiry that requires "sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of…probable falsity.'" Harte-Hanks Communications, Inc., 491 U.S. 657, 688 (1989) (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964)). This is critical here because without any discovery, there was never an opportunity for C.M. to confirm what appears, on its face, should be Newsweek's logical doubt about the story.

There is however one huge piece of evidence that is, standing alone, proof of malice. If the article is not about C.M. as Newsweek admits (A143-44; A154-59) and the trial court accepts (A92-97) why is C.M.'s picture on the article? There has been no cogent or plausible explanation offered for that particular point. The article is obviously not flattering for any child who is being weaponized to defend raw racism and sexual abuse; to place any child's picture over such an article is, in fact, a reckless disregard for the truth as to the child whose photo was placed over such an article. Here, it is C.M. Newsweek could not address this issue below, because it has no response; the trial court did not touch this issue for some still-presently-unexplained reason(s). However, what is clear, is that by operation of law, it must be evidence of malice to place a child's picture over this type of article if the child has nothing to do with it. The reckless disregard for the truth is

evident, because the photograph not only states, it implies and confirms, that this particular child whose photograph headlines this article is actually part of this army that has been weaponized to defend raw racism and sexual abuse. That is malice.

This Honorable Court has said that "objective circumstantial evidence can suffice to demonstrate actual malice" and can even "override defendants' protestations of good faith and honest belief that the report was true." Schiavone Constr. Co. v. Time, Inc., 847 F.2d 1069, 1090 (3d Cir. 1988) (citing St. Amant v. Thompson, 390 U.S. 727, 732 (1968)). A court may infer actual malice from objective facts that provide evidence of "negligence, motive, and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice." Id. at 1090 n.35 (citations omitted). Actual malice can be shown "[t]hrough the defendant's own actions or statements, the dubious nature of his sources, [and] the inherent improbability of the story [among] other circumstantial evidence[.]" Celle v. Filipino Reporter Enterprises Inc., 209 F.3d 163, 183 (2d Cir. 2000) (quoting Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1293 (D.C. Cir. 1988)). Furthermore, Newsweek acted negligently and grossly departed from professional journalistic standards in not reaching the subject or his parents for comment. This supports the argument that the sources for the article were dubious at best, and Newsweek knew with high likelihood that its story about C.M. was false. Newsweek claims no reasonable person would believe a 12-year-old

was in an army that supported racism or sexual assault, and yet Appellee published those exact words. A.156. It is dubious advocacy to suggest there is no possible evidence proving doubt in the publisher's mind about the veracity of the actual written words.

There are many instances where the U.S. Supreme Court "and this Court have declined to dismiss a pleading prior to trial because a factual dispute with regard to a component of actual malice made it premature to do so." Tucker v. Phila. Daily News, 848 A.2d 113, 130 (Pa. 2004) (citing Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 521 (1991) (reversing grant of summary judgment; "at this stage, the evidence creates a jury question whether [the writer of the article] published the statements with knowledge or reckless disregard" of the falsity of the statements). In reality, even the Motion(s) to Dismiss already confirm that Appellee **knew** that C.M. was not part of any army and never supported or condoned "sexual assault" or "raw racism;" (A155-57) yet, Appellee still wrote and therefore imputed those words. This obvious falsity already exceeds the required threshold.

SHORT CONCLUSION STATING PRECISE RELIEF SOUGHT

Based on the foregoing, Appellants respectfully submit that the trial court's Memorandum Opinion with respect to its conclusions about the article not being capable of defamatory meaning or placing C.M. in false light be reversed and that the case be returned to the lower court for a reasonable period of discovery and trial on the merits.

Respectfully submitted,

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Date: July 23, 2019

CERTIFICATION OF BAR ADMISSION

In accordance with 3rd Circuit LAR 46.1(e), Dion G. Rassias, Esquire, certifies that he is a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

/s/ Dion G. Rassias
Dion G. Rassias, Esq.

Date: July 23, 2019

CERTIFICATE OF COMPLIANCE

In accordance with Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that the within Brief for Appellants is 25 pages, in 14 point Times New Roman font.

/s/ Dion G. Rassias
Dion G. Rassias, Esq.

Date: July 23, 2019

VIRUS CHECK COMPLIANCE

I hereby certify that this document has been checked for viruses and is virus free per Symantec Client Security virus software.

/s/ Dion G. Rassias
Dion G. Rassias, Esq.

Date: July 23, 2019

CERTIFICATION OF IDENTICAL BRIEFS

I hereby certify that the electronically filed version of the foregoing Brief of Appellant is identical to the hard copies of the said Brief filed with the Third Circuit Court of Appeals on this, the same date.

/s/ Dion G. Rassias
Dion G. Rassias, Esq.

Date: July 23, 2019

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 23rd day of July, 2019, service of true and correct copies of the Brief, Joint Appendix and Supplemental Appendix for the Appellants was made upon defense counsel, as listed below, by electronic filing and United States First Class mail:

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