PUBLICATIONS

Michigan Court of Appeals Clarifies and Narrows Defamation Per Se

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"A nun, a priest, and a parishioner…"

No, this is not the windup for a joke. It's the windup for an important development in Michigan's law on "defamation per se."

There are two kinds of defamation claims, one in which the injured party must prove they were injured, and one in which injury is presumed. When injury is presumed, it is called defamation per se. For generations, injury has been presumed in defamation cases when the speaker has falsely accused another of having committed a crime.

In *Lakin v. Rund*, a parishioner and a nun got into a disagreement over who would serve as a lector at one of the Sunday Masses. (Full disclosure: this happened at my parish and I know all of the parties involved, so I've taken a keen interest in case.) The nun reported the incident to the pastor, telling him that the parishioner had "put a finger" in her chest.

Leave it to creative lawyering to make mountains out of molehills. The parishioner sued the nun, alleging that her report to the pastor implied that the parishioner had committed battery, a misdemeanor crime. Thus, he claimed her report amounted to defamation per se—that injury should be presumed, and the only issue left was to determine the amount of his damages. The nun explained that she was not accusing the parishioner of battery; she was describing how he pointed his finger to punctuate his words.

The matter wound its way through the trial court and up to the Michigan Supreme Court before coming back to the Court of Appeals. On December 1, 2016, the Court of Appeals resolved the defamation issue in favor of the nun.

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Given the posture of the case, the court was legally required to assume that the facts alleged in the complaint were true and construe them in the light most favorable to the parishioner. It therefore concluded that the phrase "put a finger in her chest" could fairly be construed as alleging a battery—the intentional, unconsented, and harmful or offensive touching of another person or of something closing connected with the person (*e.g.*, something in their hand, etc.).

Importantly, however, the court ruled that the crime of battery could not support a claim of defamation per se. Instead, it held that only "crimes of moral turpitude" and "infamous crimes" can support a claim of defamation per se based on criminal activity. A crime of moral turpitude involves fraud, deceit, and intentional dishonesty for purposes of personal gain. An infamous crime is one resulting in a prison sentence, which means that the crime must be a felony punishable by more than one year. The court stated that "[c]rimes punished by imprisonment of one year or less are, in general, misdemeanors and not infamous crimes." Battery, which is punishable by up to 93 days and does not involve fraud, deceit, or intentional dishonesty, is neither a crime of moral turpitude nor an infamous crime, and therefore cannot support a claim of defamation per se.

Left unaddressed is the relatively unique creature in Michigan law called the "high misdemeanor" or "circuit court misdemeanor," because such misdemeanors are punishable by up to two years. The courts could treat them as "infamous crimes" because of the length of the potential punishment, or they could credit the Legislature's decision to style them as misdemeanors (so as not to brand offenders as felons). The criminal defense attorney in me favors the latter approach, but time will tell how the courts resolve this question.

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