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DEFAMATION: "MOUTHPIECE" LIBEL CLAIM FAILS TO SPEAK FOR ITSELF

Sticks and stones may break bones, but Milton Rudin, an attorney whose clients include many of the world's most famous entertainers,¹ thought names were what had harmed him. In *Rudin v. Dow Jones & Co.*,² a recent defamation suit, the court held that Rudin failed to sustain his burden of proving that a magazine had printed a caption which the average reader would understand as defamatory.³

Defamation is an invasion of one's interest in reputation; it may be either in the form of libel or slander.⁴ Libel includes the more permanent forms of defamatory matter: writing, printing, picture, effigy, or other fixed visual representations.⁵ Slander is the more transitory form. It is generally restricted to oral statements and gestures.⁶

In any action for defamation the plaintiff must prove that the matter complained of is 1) defamatory, 2) refers to the plaintiff, and 3) has been published to a third person.⁷ Proving that something is actually defamatory is the most complicated; consequently, most litigation centers on this element.

Dow Jones & Co. ("Dow") publishes Barron's Business and Financial Weekly ("Barron's"). On November 27, 1978, Barron's commented on the fact that Rudin and client Frank Sinatra ("Sinatra") had purchased a substantial amount of stock in Great Lakes Dredge & Dock Co. The article speculated as to the reasons Rudin and Sinatra had invested in the company and, rather sarcastically, pointed out that the action was far removed from gambling, Atlantic City, Las Vegas and show

1. Elizabeth Taylor, Richard Burton, Bob Hope, George Burns, Burt Lancaster, Lucille Ball, Liza Minelli and others have been represented by Milton Rudin. *Rudin v. Dow Jones & Co.*, 557 F. Supp. 535, 540 (S.D.N.Y. 1983).

2. 557 F. Supp. 535.

3. *Id.* at 543.

4. W. PROSSER, *THE LAW OF TORTS* § 111 at 737 (4th ed. 1971).

5. CAL. CIV. CODE § 45 (West 1982) states 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." See also *Dethlefsen v. Stull*, 86 Cal. App. 2d 499, 195 P.2d 56 (1948) (letter charging that former partner was an undesirable associate because he was dishonest in financial dealings was libelous).

6. CAL. CIV. CODE § 46 (West 1982). See also *Semple v. Andrews*, 27 Cal. App. 2d 228, 81 P.2d 203 (1938) (evangelist defamed by article that injured her reputation and occupation).

7. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

biz.⁸

Rudin wrote a letter to the editor defending the purchase as a lucrative business deal and denouncing Barron's for insinuating that he and Sinatra were only capable of understanding gambling stocks and the entertainment industry. The letter was published with the added caption "SINATRA'S MOUTHPIECE" on January 15, 1979.⁹

Rudin's law firm telegraphed Barron's the next day and protested that the caption defamed and impugned Rudin's professional reputation. The telegram demanded that the magazine print a retraction. In the January 22 issue, the editor commented on Rudin's objection to the caption and stated: "We meant to cast no aspersions on Mr. Rudin. Our dictionary defines 'mouthpiece' as 'spokesman.'" ¹⁰

Rudin brought a defamation action against Barron's in the United States District Court.¹¹ Under New York law a publication is libelous per se, therefore actionable as defamatory without pleading or proving special damages,¹² if it tends to disparage a person's business, office, profession or trade.¹³ Dow moved to dismiss the action on the grounds that "Sinatra's Mouthpiece" was simply not susceptible of any defamatory meaning.¹⁴ After hearing a wealth of evidence from both sides, the court denied the motion and concluded that Rudin had established that "Sinatra's Mouthpiece" was at least capable of a defamatory meaning. Whether in fact the phrase actually conveyed the meaning was a jury question.¹⁵

The parties went ahead without a jury and in 1983 found themselves again before the District Court in a proceeding that really amounted to a battle of evidence.

Rudin called three prominent attorneys to testify that "Sinatra's

8. *Rudin*, 557 F. Supp. at 536.

9. *Id.*

10. *Id.* at 536-37.

11. *Rudin v. Dow Jones & Co.*, 510 F. Supp. 210 (S.D.N.Y. 1981).

12. This is distinguished from libel per quod by the fact that libel per se is indisputably defamatory on its face without the aid of any extrinsic evidence. *Diplomat Electric, Inc. v. Westinghouse Electric Supply Co.*, 378 F.2d 377 (5th Cir. 1967).

13. *Nichols v. Item Publishers, Inc.*, 309 N.Y. 596, 600-01, 132 N.E.2d 860, 861-62 (1956) (church pastor only proved falsity of article, not defamation).

14. The motion was made pursuant to FED. R. CIV. P. 12(b)(6). They also claimed that in light of Dow's retraction no cause of action existed in the absence of a claim for special damages. While this is true under California law, the district court chose to apply New York law, which holds the opposite. See *O'Connor v. Field*, 266 A.D. 121, 41 N.Y.S.2d 492 (1943) (plaintiff was libeled by article characterizing him as a communist sympathizer since there exists widespread public aversion to communism).

15. *Mencher v. Chesley*, 297 N.Y. 94, 100, 75 N.E.2d 257, 259 (1947) (retraction admissible only to reduce punitive damages, not compensatory damages).

Mouthpiece" would have been understood by Barron's readers as defamatory.¹⁶ They all testified that the word "mouthpiece," when describing an attorney, generally implies underworld criminality and lack of independence, integrity and professional responsibility.¹⁷

Rudin offered the expert testimony of psychology professor Dr. Robert Buckhout, who had conducted studies to determine readers' reaction to "mouthpiece."¹⁸ Dr. Buckhout found that to a statistically significant degree all the respondents rated "mouthpiece" as more negative than "spokesman."¹⁹

Rudin introduced dictionary entries that defined "mouthpiece" as a criminal lawyer without integrity. He pointed to numerous examples of the word's defamatory use in newspapers and other publications.²⁰

Dow Jones & Co. was not to be outdone by Rudin's mass of evidence. Dow also introduced expert testimony of a psychology professor. Dr. Douglas Hermann's studies indicated that while "mouthpiece" was a slightly negative term, when paired with "Sinatra" the negative connotations were neutralized.²¹

Dow also presented testimony of a prominent journalist in support of its contention that the use of "Sinatra's Mouthpiece" was consistent with principles of responsible journalism.²²

Like Rudin, Dow introduced dictionary entries and examples of the use of the term "mouthpiece" in publications. Not surprisingly their evidence indicated that the primary meaning of the word was simply "one who expressed another's view."²³

The court understandably found the two psychologists' results ambiguous. The court reiterated that while "mouthpiece" may be generally perceived as a negative term, to prevail in a defamation action it is neces-

16. *Rudin*, 557 F. Supp. at 538. Bruce Kauffman, former Justice of the Pennsylvania Supreme Court, Peter Fleming, Jr., a partner in a New York City firm, and Paul Curran, former United States Attorney, testified on Rudin's behalf.

17. *Id.*

18. *Id.* at 539. Respondents indicated their impression of an attorney referred to in study no. 1 as "John Doe's Spokesman" or as "John Doe's Mouthpiece" and in study no. 2 as "Sinatra's Spokesman" or as "Sinatra's Mouthpiece." Respondents recorded their impressions by rating, on a scale of 1-7, the person on each of five different dimensions: just/unjust, clean/dirty, advisor/puppet, honest/crooked, ethical/unethical.

19. *Id.* at 539-40.

20. *Id.* at 538, 545.

21. *Id.* at 541-42. Herrmann sent out questionnaires designed to determine the respondent's evaluation of "mouthpiece" and "spokesman" in conjunction with certain occupations and persons, e.g., "Pope John Paul's Mouthpiece" or "Charles Manson's Custodian."

22. *Id.* Michael J. O'Neill, former editor of the New York Daily News, testified on Dow's behalf.

23. *Id.* at 545.

sary to demonstrate that the word was actually understood by the reader as defamatory — not just that the term was more negatively regarded than a possible alternative.²⁴ The studies did not address this crucial question.

The court concluded that while the three attorneys' testimony provided direct evidence that the defamatory meaning of "mouthpiece" was understood by them — and possibly other members of the legal community — it certainly did not establish what Barron's readers understood.²⁵ The dictionary entries, articles and other evidence were likewise inconclusive.²⁶ The court rejected Rudin's contention that defamation can be established if even a small number of readers understood the word as defamatory.²⁷ The court instead relied on more recent cases to reaffirm that the ordinary and average reader's understanding is the standard.²⁸

There is no general rule defining what works are defamatory; hence each case turns on its own facts.²⁹ Whether an idea injures a person's reputation depends upon the opinions of those to whom it is published. An alleged defamatory statement must be measured against what "right thinking" people might think of it,³⁰ or it must be opprobrious in the eyes of a "considerable and respectable class in the community."³¹

In light of the contradictory and ambiguous evidence and testimony,

24. *Id.* at 543. See also *Scheinblum v. Long Island Daily Press Pub. Co.*, 37 Misc. 2d 1015, 239 N.Y.S.2d 435 (1962), *aff'd* 18 A.D.2d 841, 239 N.Y.S.2d 533 (1963) (plaintiff not libeled by article regarding arrest of person using plaintiff's name as an alias).

25. *Rudin*, 557 F. Supp. at 544.

26. *Id.* at 540-41, 543. Rudin also testified that he was personally humiliated by the caption. However, Steven Anreder and Alan Abelson, the editors of Barron's, testified as to the appropriateness of the caption.

27. *Id.* at 543 n.7, citing *Ben-Oliel v. The Press Publishing Co.*, 251 N.Y. 250, 167 N.E. 432 (1929) (plaintiff defamed only in the eyes of those with expert knowledge of Palestinian culture).

28. *Mencher v. Chesley*, 297 N.Y. 94, 100, 75 N.E.2d 257, 259 (1947); *James v. Gannett Co.*, 40 N.Y.2d 415, 419, 353 N.E.2d 834, 837, 386 N.Y.S.2d 871, 874, (1976) ("Men is my business" published in newspaper interview with dancer not defamatory); *Everett v. Gross*, 22 A.D.2d 257, 258, 254 N.Y.S.2d 561, 563 (1964) (article not defamatory to corporate plaintiff since reader would have to possess special knowledge to form an adverse opinion).

29. *Catalano v. Pechous*, 69 Ill. App. 3d 797, 805, 387 N.E.2d 714, 721 (1978) (aldermen not libeled by newspaper that printed defamatory statement without actual malice), *aff'd*, 83 Ill. 2d 146, 419 N.E.2d 350 (1980), *cert. denied*, 451 U.S. 911 (1981).

30. Standards of "right thinking" vary from year to year and community to community. For example, in England during the reign of Charles II it was actionable to call a man a Roman Catholic although it would not be so today. *Kimmerle v. New York Evening Journal, Inc.*, 262 N.Y. 99, 102, 186 N.E. 217, 220 (1933) (libel suit brought against newspaper for printing woman was "courted by a murderer").

31. *Ingalls v. Hastings & Sons Pub. Co.*, 204 Mass. 31, 33, 22 N.E.2d 657, 658-59 (1939) (plaintiff libeled by newspaper that quoted him as making malicious statements against his neighbor).

the court was justified in holding that Rudin failed to sustain his burden of demonstrating that Barron's average reader would have understood "mouthpiece" to refer to a criminal lawyer lacking integrity. Consequently, he failed to prove libel.

The court suggested that a more successful legal theory might have involved proving Sinatra was associated with organized crime and "mouthpiece" exploited that association.³² Rudin, perhaps tactfully, did not pursue this course. However, had the court reached the merits, Dow was prepared to argue that since Rudin and Sinatra's relationship was a matter within the sphere of legitimate public concern, Rudin was required to prove Dow acted with gross irresponsibility³³ — a conclusion, Dow contended, not supported by the evidence.³⁴ The court did not address this issue and the standard of fault for defaming a private citizen is only negligence.³⁵

In *Rudin*, and in similar cases, an inordinate amount of time and money was spent trying to prove what an ordinary and average reader would understand. That standard by definition is subjective, changing, and practically impossible to establish. As illustrated by *Rudin*, the gateways were opened for floods of expert testimony by psychologists, journalists, linguists — all of whom, though certainly not claiming to represent the "right thinking man," suggest that they are experts on how one thinks. Direct proof of the necessary impact is also beset with difficulties. The actual readers' testimony concerning their perception of the libelous statement is never conclusive or even required. In fact some courts refuse to even hear such testimony.³⁶

The same result could have been reached more efficiently by applying simple principles of legal construction. For example, an almost universal construction rule is that particular words must be read in the

32. *Rudin*, 557 F. Supp. at 544.

33. The New York test in libel cases relating to publicity about matters of legitimate public concern is that of "gross irresponsibility." *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975) (public school teacher assumed not to be a public official).

34. *Rudin*, 557 F. Supp. at 546.

35. Although the test for defaming a public official or officer is actual malice, Rudin would be considered a private citizen. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (per Powell, J.), *appeal filed*, 680 F.2d 527 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983). In *Gertz* a prominent attorney had been libeled by a John Birch Society publication. The court held that *Gertz* was not a "public figure" merely because the article was about a matter of public or general interest or because *Gertz* was involved in a civil lawsuit.

36. 69 HARV. L. REV. 876, 884 (1956).

context of the entire communication.³⁷ This rule should apply to headlines and captions as well.³⁸ If this had been done in the *Rudin* case, it would have been obvious from the start that Barron's had not defamed Rudin. After all, the caption and letter read together present a fairly harmless piece of journalism. At any rate, in the grey area between neutral words and outright insults, the *Rudin* case illustrates just how difficult it can be to prove libel.

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37. *Rose v. Indianapolis Newspapers, Inc.*, 213 F.2d 227, 228 (7th Cir. 1954) (article regarding accidental shooting not libelous).

38. Some courts construe headlines separately when they are prominent and lead the reader to a conclusion entirely different from what the body of the story indicates. *Sprouse v. Clay Communications, Inc.*, 158 W. Va. 427, 211 S.E.2d 674, cert. denied, 423 U.S. 882 (1975).