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DEFAMATION: A CASE OF MISTAKEN IDENTITY

Jackie Collins Lerman was surprised to find, in an advance copy of *Adelina* magazine, that she was misidentified as an actress who had appeared in a filmed orgy scene. On March 24, 1980, Ms. Lerman filed a libel action in the Southern District of New York. In *Lerman v. Chuckleberry Publishing Inc.*,¹ (“*Lerman I*”) the district court held in favor of Ms. Lerman for invasion of privacy and for violation of her right to publicity.² The Second Circuit Court of Appeals reversed, holding that Ms. Lerman was a public figure for the limited purpose of pornography, and thus had to prove actual malice on the part of the defendants in order to recover.³ Ms. Lerman could not accomplish this difficult task and, consequently, did not recover.⁴

The appellate court’s statement of the limited purpose public figure test in this case was consistent with current case law.⁵ However, the court incorrectly applied the limited purpose public figure label to an individual who should not have been held to have foregone her right to privacy concerning the subject matter of *Adelina*.

Since the landmark decision in *New York Times Co. v. Sullivan*,⁶ it has become difficult for a public figure or public official to win on a cause of action for defamation.⁷ The Supreme Court has reasoned that debate on public issues should be uninhibited and may include attacks on public officials.⁸ Thus, a public official cannot recover damages for defamation relating to official conduct unless the statement was made with actual malice.⁹ The Court has extended this protection of defamatory falsehoods to include statements about private individuals if the statements concern a matter of public interest.¹⁰ The Court has recognized that the public interest in encouraging comment upon matters of public concern

1. 544 F. Supp. 966 (S.D.N.Y. 1982).

2. *Id.* at 973.

3. *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 137 (2d Cir. 1984) (“*Lerman II*”).

4. *Id.* at 141-42.

5. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 364 (1974). There is a constitutional privilege protecting defamatory criticism of even non-public officials who are nevertheless intimately involved in the resolution of an important public question, or, by reason of their fame, shape events in areas of concern to society at large.

6. 376 U.S. 254 (1964).

7. *Id.*

8. *Gertz*, 418 U.S. at 364. *See also* *James v. Gannett Co.*, 40 N.Y.2d 415, 353 N.E.2d 834 (1976).

9. *New York Times*, 376 U.S. at 279-80.

10. *Gertz*, 418 U.S. at 339-48.

overrides the privacy interest of individuals in the public spotlight. Thus, in adopting the rule that public figures must prove actual malice in order to recover on a cause of action for defamation, the Court has tried to limit the danger that would-be critics of public figures may be self-censored because the truthfulness of many factual assertions is difficult to prove.¹¹

I. STATEMENT OF THE CASE

A. *The Facts*

At the time of this action, Ms. Lerman was the author of nine novels. She achieved great success in writing about the controversial topic of the unequal treatment of females in magazines, books and films. Her books contained many references to sex and included topics on deviate sexual practices. She frequently discussed sexual inequality, concerned that in magazines and films women appear nude much more than men. She had stated that this was unfair and that there should be equal nudity for men and women.¹²

Ms. Lerman was the author of a book titled "The World is Full of Married Men."¹³ This book became a film of the same title and Ms. Lerman wrote the screenplay, but did not appear in the film.¹⁴ Subsequently, Ms. Lerman was given an advance copy of the May, 1980 issue of *Adelina* magazine in which she was misidentified as an actress who had appeared nude in the film.¹⁵ The actress in the magazine appeared topless and in an orgy scene. Both scenes were taken directly from the film. A caption under the pictures identified Ms. Lerman as the starlet and the accompanying article discussed the willingness of serious actresses to appear nude in films.¹⁶

Ms. Lerman commenced her cause of action for libel, violation of her common law right to publicity and violation of New York's statutory protection of one's own name or portrait for advertising and trade purposes.¹⁷ She sued the publisher of the magazine, Chuckleberry Publish-

11. *New York Times*, 376 U.S. at 279.

12. *Lerman II*, 745 F.2d at 137. Ms. Lerman is the author of the following novels: *Lucky*, *Hollywood Wives*, *The Bitch*, *Sinners*, *Chances*, *The Stud*, *The Love Killers*, *The World is Full of Divorced Women*, *Lovers*, *Gamblers* and *Hollywood Husbands*.

13. *Id.*

14. *Id.* at 127. The court stated that Ms. Lerman had never appeared nude in public.

15. *Id.*

16. *Id.*

17. N.Y. CIV. RIGHTS LAW § 51(a), (McKinney 976). "Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained . . . may maintain an action in the Supreme Court of this

ing, Inc. ("Chuckleberry") and the original national distributor, Publisher's Distributing Co. ("PDC").¹⁸

The trial judge in the Southern District of New York issued a preliminary injunction, restraining the distribution of the May issue of *Adelina*.¹⁹ PDC endeavored to comply,²⁰ but after the May issue was in the process of distribution, Flynt Distributing ("Flynt") purchased PDC's contract to distribute *Adelina*.²¹ The judge granted Lerman's motion for summary judgment against all three defendants for violation of the New York Civil Rights Law and for invasion of plaintiff's common law right to publicity, but a jury question remained as to the amount of damages to be awarded. However, the libel cause of action was dismissed by the trial court, which held that the New York Civil Rights Law was merely a statutory embodiment of a common law libel cause of action.²² In February, 1983, Lerman settled with PDC for \$100,000 and Chuckleberry became insolvent.²³ In the damage trial against the remaining defendant, Flynt, the jury awarded Ms. Lerman \$7 million in compensatory damages and \$33 million in exemplary damages.²⁴ Flynt's appeal followed.

B. *The Court's Reasoning*

The Second Circuit Court of Appeals disagreed with the trial court's interpretation of the New York Civil Rights Law as a statutory embodiment of a common law libel cause of action.²⁵ The court of appeals interpreted the New York statute to consist of two alternative prongs. First, a defendant violates the advertising purposes prong when the plaintiff's name is used solely for the purpose of soliciting purchasers for the defendant's product. Second, a defendant violates the trade purposes prong when the defendant uses the plaintiff's name for the purpose of benefiting defendant's own trade.²⁶

The appellate court found that the plaintiff could not take advantage

state against the person, firm or corporation so using his name, portrait or picture. . . ." *Id.* There was no right to privacy at common law in New York. Such a right existed only statutorily. *Cardy v. Maxwell*, 169 N.Y.2d 547, 9 Misc. 2d 329 (1957).

18. *Lerman v. Chuckleberry Publishing, Inc.*, 496 F. Supp. 1105 (S.D.N.Y. 1982).

19. *Id.* at 1107.

20. *Lerman II*, 745 F.2d at 128. The June, 1980 and January, 1981 issues also contained a solicitation page which reprinted the May, 1980 cover of *Adelina*. *Id.*

21. *Id.* Flynt was joined as a party defendant in April, 1981.

22. *Lerman I*, 544 F. Supp. at 973. Duplication of claims thus mandated dismissal. *Id.*

23. *Lerman II*, 745 F.2d at 128. Chuckleberry subsequently filed for bankruptcy.

24. *Id.* The court reduced the exemplary damages to \$3 million, leaving intact an award of \$10 million.

25. *Id.* at 130.

26. *Id.* at 130-31.

of the advertising purposes prong because the defendant had not used the plaintiff's name to solicit new subscribers.²⁷ With respect to the trade purposes prong, the court ruled that Ms. Lerman would not normally be able to state a cause of action because she was held to be a public figure involved in a newsworthy event. Thus, the use of her name or portrait would be held to constitute a comment upon a newsworthy event, rather than a trade purpose.²⁸ However, Ms. Lerman was allowed to state a cause of action under the trade purposes prong of the statute because she made a showing that Flynt had forfeited the privilege of reporting newsworthy events by using false material.²⁹

The Second Circuit looked to the United States Constitution in order to define the degree of fault Ms. Lerman should have been required to prove under the trade purposes prong of the statute.³⁰ First, the court stated that Ms. Lerman was a limited purpose public figure. The court enunciated the following test to determine what constitutes a limited purpose public figure:

A defendant must show that the plaintiff has:

- (1) Successfully invited attention to her views in an effort to influence others;
- (2) Voluntarily injected herself into a public controversy related to the litigation;
- (3) Assumed a prominent position in the controversy; and
- (4) Maintained regular and continuing access to the media.³¹

The court found that Ms. Lerman was a limited purpose public figure because she voluntarily chose to focus public attention on her views concerning sexual morality. She had been successful in achieving notoriety in the controversy concerning the inequality of female nudity in magazines and films.³² Thus, Ms. Lerman was a public figure for the limited purpose of this controversy.³³

Once labelled as a public figure, Ms. Lerman could recover compensatory damages only if Flynt acted with actual malice in publishing the

27. *Id.*

28. *Id.* at 131.

29. *Id.* at 132. While Flynt claimed that the statute was not applicable to him, the court reasoned that Flynt had "used" Ms. Lerman's name by purchasing the distributing contract entitling them to profits.

30. *Id.* at 135. Specifically, the court focused on the first amendment and the standard of proof required of a limited purpose public figure plaintiff in a libel cause of action. *Id.* at 136.

31. *Id.* at 136-37. In summary, the court stated that the essential element of a public figure is that the publicized person has taken affirmative steps to attract public attention. *Id.*

32. *Id.* at 137.

33. *Id.*

falsehood.³⁴ This requirement proved to be fatal to Ms. Lerman's claim because she could not prove that Flynt possessed a high degree of awareness of the probable falsity of the article.³⁵

II. ANALYSIS

The importance of the *Lerman* decision lies in the appellate court's application of the limited purpose public figure test to Ms. Lerman. The topic of libel and public figures has attracted much attention since the landmark decision in *New York Times Co. v. Sullivan*.³⁶ There, the Supreme Court stated that a public official cannot recover compensatory damages for defamation related to official conduct unless the plaintiff proved that the statement was made with actual malice, that is, with conduct that was highly unreasonable and an extreme departure from normal standards. The Court reasoned that punishing publication of an erroneous statement concerning a public official may induce over-cautious exercise of freedom of the press.³⁷ A few years later, in *Curtiss Publishing Co. v. Butts*,³⁸ the same standard of proof was logically extended to apply to public figures.

To decide whether the plaintiff is a public figure, the court must look at the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.³⁹ By voluntarily participating in a public controversy, an individual has purposefully surrendered part of what would otherwise have been a protectable privacy right.⁴⁰

The appellate court in *Lerman* drew upon a long line of first amendment case law in stating that a limited purpose public figure also must prove that a defendant has acted with actual malice in publishing a falsehood concerning the plaintiff's involvement in the controversy into

34. *Id.* at 139. The court recognized that the first amendment guarantees a certain amount of protection to publishers who are commenting on newsworthy events. The court stated that the imposition of liability without proof of a high degree of fault would amount to an unacceptable chill upon publishers' first amendment rights.

35. *Id.* at 141. Although the district court failed to instruct the jury that, in order to find Flynt liable, it must find that Flynt acted with actual malice, the court held as a matter of law that a properly instructed jury could not have found that Flynt acted with actual malice. *Id.*

36. 376 U.S. 254 (1964).

37. *Id.* at 279-80.

38. 388 U.S. 130 (1967). In *Curtiss*, the court held that a college athletic director, accused in a published article of conspiring to "fix" a football game, had not surrendered any of his protectable privacy rights because he was not a public figure. The article was based on a telephone conversation in which he had been accidentally overheard. *Id.*

39. *Gertz*, 418 U.S. at 352.

40. *James*, 40 N.Y.2d at 423, 353 N.E.2d at 840.

which the plaintiff has voluntarily injected herself.⁴¹ Thus, the *Lerman* decision seems consistent with current thought concerning the competing interests of the first amendment and an individual's right to privacy.

When the limited purpose public figure test is applied to Ms. Lerman, it is certainly clear that she has successfully invited public attention to her views concerning a particular controversy. She has achieved celebrity status as an author and maintains continuous access to the media. Therefore, with respect to the particular controversy in which she was involved, Ms. Lerman had purposefully surrendered what would otherwise have been her protectible privacy rights. However, the exact manner in which the particular controversy is defined becomes crucial because both the plaintiff's and the defendant's conduct must involve the same controversy before the plaintiff will be required to prove malice on the part of a defendant publishing false material.⁴²

In *Schiavone Construction Co. v. Time, Inc.*,⁴³ the court recognized the need to define the precise controversy involved, analyze the plaintiff's role in the controversy and determine if the defamatory material was germane to the plaintiff's participation in the controversy.⁴⁴ However, in *Lerman*, the appellate court loosely defined the controversy when it stated that Ms. Lerman was a public figure for the purpose of commenting on sex and nudity in magazines and films.⁴⁵ *Adelina* also may have been commenting on sex and nudity in films when it published a mislabelled nude photograph with an article discussing the willingness of serious actresses to appear nude in films. However, the problem in the appellate court's reasoning lies in the fact that the controversy was too broadly defined as sex and nudity in films. Rather, it seems that Ms. Lerman was involved in a controversy relating to the unequal treatment of men and women in the media.⁴⁶

It was correct that Ms. Lerman sometimes wrote about sexual behavior, but it was only in the context of her primary topic concerning the unequal treatment of men and women and a double standard in sexual mores.⁴⁷ The appellate court was mistaken in ruling that Ms. Lerman

41. *Lerman II*, 745 F.2d at 139 (citing *Time, Inc. v. Hill*, 385 U.S. 254; *Geiger v. Dell Publ. Co.*, 719 F.2d 515 (1st Cir. 1983); *Bargar v. Playboy Enterprises, Inc.*, 564 F. Supp. 1151 (D.C. Cal. 1983)).

42. *Lerman II*, 745 F.2d at 137.

43. 619 F. Supp. 684 (D.N.J. 1985).

44. *Id.* at 702; *Waldbaum v. Fairchild Publ., Inc.*, 627 F.2d 1287, 1296-98 (D.C.Cir.), *cert. denied*, 499 U.S. 898 (1980).

45. 745 F.2d at 137.

46. *Id.* The focal point of Ms. Lerman's comments to the press concerned the unequal treatment of females.

47. *Id.*

had surrendered her privacy rights concerning any other controversy. If the controversy had been more narrowly defined, it would have been clear that *Adelina* was not commenting upon the double standard existing with respect to women. Rather, *Adelina* had merely mislabelled nude photographs with an accompanying article.

Further, as a participant in a public controversy, Ms. Lerman also had a right to exercise her own freedom of speech. It is possible that, as a result of the appellate court's decision, Ms. Lerman will curtail her comments on this particular controversy in fear that she will thereby expose herself to comment in less than reputable periodicals.⁴⁸ There is a conspicuous lack of recognition by the appellate court of Ms. Lerman's first amendment rights. Ms. Lerman achieved her status as a limited purpose public figure due to her reputation as a widely published author. Thus, Ms. Lerman is to be distinguished from other limited purpose public figures who do not publish novels which reach a wide audience. Therefore, there is a greater danger in Ms. Lerman's situation in that her public comments upon a newsworthy event will be denied from members of the public who are interested in the controversy.

In basing the decision upon a loosely defined controversy, it is possible that the appellate court was influenced by Ms. Lerman's viewpoint on the unequal treatment of the sexes. As a participant in that controversy, Ms. Lerman had, on occasion, advocated equal nudity for men and women in pornographic magazines in order to make a point concerning double standards. The appellate court believed that the controversy in which Ms. Lerman is involved should be defined to include material published in magazines such as *Adelina*. In doing so, the court may have been biased against Ms. Lerman's unusual viewpoint.

III. CONCLUSION

It is apparent that Ms. Lerman attempted to comment upon a genuine social problem, although in a somewhat unorthodox fashion. Yet, the appellate court's decision implies that, in terms of first amendment policies, the comments in the May, 1980 issue of *Adelina* are more important than Ms. Lerman's privacy rights. Also implicit in the court's decision is the fact that Ms. Lerman's comments concerning this particular controversy may be chilled. One questions whether this is the kind of public debate envisioned by the *New York Times* decision, where the Supreme Court stated that the purpose of the actual malice standard is to

48. Ms. Lerman's most recent novel is titled *Hollywood Husbands*, Simon and Schuster, 1986. The primary topic of this novel does not concern the present controversy.

encourage public debate.⁴⁹ It is difficult to classify a mislabelled nude picture as part of a public debate on a public controversy which is to be encouraged by the denial of an individual's right to privacy. Yet, this is precisely what the appellate court was doing when it ruled that the May, 1980 issue of *Adelina* magazine should take precedence over Ms. Lerman's rights to privacy and free speech.

The appellate court's decision does not seem to be entirely supported by logic or precedent. It is possible that the court's bias against Ms. Lerman's views lead it to broadly define the relevant controversy. The court should have taken a narrower view of the controversy. The manner in which the controversy is defined is of primary importance, due to the strong standard of proof required of a limited purpose public figure who attempts to enforce her right to privacy against a publisher.⁵⁰ The controversy Ms. Lerman was participating in should have been defined as the unequal treatment of female nudity in the media.⁵¹ A newspaper may comment on Ms. Lerman's involvement in this issue and commit factual errors as long as it is not done with malice.⁵² Ms. Lerman would then have given up her right to privacy concerning her views on this subject. But, in doing so, she did not also give up her right not to be identified as an actress appearing nude.

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49. *New York Times*, 376 U.S. at 279-80.

50. *Pring v. Penthouse Int'l. Ltd.*, 695 F.2d 438, 443 (10th Cir. 1982). In *Pring*, a participant in the Miss America beauty pageant brought a defamation action against PENTHOUSE for publishing a completely false article concerning plaintiff's participation in the pageant. The court held that the action must be dismissed because the publication was pure fantasy and it was unlikely that anyone would believe it. *Id.* at 443.

51. 745 F.2d at 137. The court stated that Ms. Lerman's novels were controversial in nature because of her firm conviction that there was inequality in the treatment of females as compared to males. The court stated that this was the focal point of her comments to the press. The court also stated that the short article in the May, 1980 issue of *ADELINA* discussed the increased willingness of serious actresses to appear nude in films. *Id.* at 127. The court then implied that Ms. Lerman's topic of sexual inequality was part of the controversy concerning serious actresses who appear nude in films. *Id.* at 137.

52. For example, a newspaper may erroneously report Ms. Lerman's views with respect to this issue.