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12:31pm PT by Eriq Gardner

Prediction: It's CNN — Not the N.Y. Times — Headed to Supreme Court in Defamation Battle

Forget about Sarah Palin's case. Focus on what CNN is facing in Georgia — a dispute that's getting quite messy.

Being bold enough to predict which cases the Supreme Court will review is a foolish endeavor. The high court grants just five percent of the thousands of petitions it receives every year. Nevertheless, inspired by the intense feelings surrounding a federal judge's dismissal of Sarah Palin's defamation lawsuit against The New York Times, we'll go out on a limb to prophesize
the nine justices will accept a defamation case soon enough. However, it's not the Palin suit we envision being tackled. Before that case was rejected, CNN highlighted the case as an example of the media's tough year in the courtroom. Oddly, CNN ignored a decision earlier this year that's caused tremendous concern among media lawyers and one we'd bet is destined for the Supreme Court. It involves CNN, and there's even a Donald Trump cameo.

The Time Warner subsidiary is facing claims over its reporting in June 2015 on the infant mortality rate for open-heart surgery at West Palm Beach, Fla.-based St. Mary's Medical Center. CNN is actually facing two lawsuits. One comes from Dr. Michael Black, a heart surgeon who has made it past CNN's motion to dismiss in Florida state court. The other comes from David Carbone, who was the CEO at St. Mary's until he was forced to resign upon CNN's report. The Carbone action is the one to focus on for the time being.

Carbone filed his complaint in May 2016 in a Georgia federal court. He could have brought claims in the Palm Beach circuit as Black did, but interestingly, he did not. Citing the fact that he was a citizen of Florida and that CNN is a citizen of either Georgia or Delaware, Carbone invoked diversity jurisdiction to bring his claims to a federal court. His lawsuit questions CNN's conclusion that St. Mary's "death rate" was three times the national average. Carbone alleges CNN made an unfair comparison to hospitals that did both open-heart and closed-heart surgeries and that a more proper comparison would be adjusted for risk.

Every defamation lawsuit brings about a defense that depends on the circumstances and facts at play. In Palin's lawsuit, for example, The New York Times raised various rejoinders, but the winning one was the absence of actual malice, or knowledge of falsity or reckless disregard for the truth. Given Carbone's lack of notoriety, and the ambiguity about whether he'd qualify as a public figure, CNN chose to put aside the issue of malice in its initial motions. Instead, CNN argued that its reporting didn't concern Carbone, that an academic disagreement about methodology couldn't form the basis of a defamation claim and that its chosen methodology comparing mortality rates constituted non-actionable opinion.

Before proceeding any further, we must take a slight detour to discuss Trump.

As most people are aware, before Trump was elected to be leader of this country, a class action lawsuit was filed by former Trump University students claiming they were tricked into taking on debt to pay for a worthless education. What's gotten a lot less attention
is the way that Trump responded to the suit by counterclaiming defamation against lead plaintiff Tarla Makaeff.

Using California's anti-SLAPP statute, which provides early recourse for those facing frivolous litigation interfering with First Amendment activity, Makaeff attempted to strike Trump's counterclaims. The opposition from Trump — as hard as it might be to believe now — is that Trump University wasn't a public figure, and Makaeff couldn't demonstrate actual malice.

This question went up to the 9th Circuit Court of Appeals in 2013. Reversing the lower court, the appellate circuit ruled that Trump University was indeed a public figure, or at least, a limited one.

But that's not why the decision has left a mark.

Instead, it was former 9th Circuit chief judge Alex Kozinski's concurring opinion in the case where he wrote that the application of California's anti-SLAPP statute in federal court has created a "hybrid mess." According to Kozinski, federal courts should follow federal rules of procedure.

"Pre-discovery motions, discovery, summary adjudication and trial follow a logical order and pace so that cases proceed smartly towards final judgment or settlement," wrote Kozinski. "The California anti-SLAPP statute cuts an ugly gash through this orderly process. Designed to extricate certain defendants from the spiderweb of litigation, it enables them to test the factual sufficiency of a plaintiff's case prior to any discovery; it changes the standard for surviving summary judgment by requiring a plaintiff to show a 'reasonable probability' that he will prevail, rather than merely a triable issue of fact; it authorizes attorneys' fees against a plaintiff who loses the special motion by a standard far different from that applicable under Federal Rule of Civil Procedure 11; and it gives a defendant who loses the motion to strike the right to an interlocutory appeal, in clear contravention of Supreme Court admonitions that such appeals are to be entertained only very sparingly because they are so disruptive of the litigation process."

Now, judges throughout the nation are having second thoughts on burdening defamation plaintiffs with the higher standards evoked by SLAPP laws. Last week, a federal judge in New York in the midst of Gawker's bankruptcy cited Kozinski and said a SLAPP statute wouldn't apply to alt righter Chuck Johnson's defamation claims. One week earlier, in a libel case against The New York Times, the 5th Circuit Court of Appeals hinted it would consider doing the same should the issue be properly presented.

Then, there's Carbone's case against CNN.
In February, CNN failed to persuade a Georgia federal judge that it should get the benefit of Georgia's anti-SLAPP law. U.S. District Court Judge Orinda Evans decided to go with federal rules, which meant that Carbone only needed to show plausibility on his claims rather than probability in prevailing. The judge ruled that Carbone had succeeded.

The matter is now before the 11th Circuit Court of Appeals, where CNN suggests in its opening brief filed earlier this month that Evans’ decision could lead to forum shopping, meaning litigants who strategically pick the forums where a dispute is adjudicated. Standing by CNN is ABC, Bloomberg, Comcast, Dow Jones, the Motion Picture Association of America, National Public Radio, The New York Times Company, 21st Century Fox, Univision, The Walt Disney Company and other media organizations who argue in an amicus brief that anti-SLAPP provisions are needed in federal court to protect valuable speech.

But now, the appeal has become even more messy because of a Carbone motion last week.

CNN not only wants a review over whether a state’s free speech-protecting law has a place in federal court, but it's also arguing the appellate court has pendent jurisdiction to take up its alternative motion to dismiss (the federal standards one) because it's "inextricably intertwined" with the anti-SLAPP motion. Carbone’s lawyers respond that there is no link and thus no jurisdiction.

What it all adds up to is an extraordinary defamation battle that is highly worthy of Supreme Court review. What's more, it may be necessary for the high court to tackle this one to settle immense confusion among lower courts.

The New York Times in its win against Palin didn't redefine the standards by which public figures can sue for defamation, even if the 2nd Circuit takes a hard look at Judge Jed Rakoff's odd evidentiary sojourn in arriving at the conclusion that media companies require latitude for mistakes.

The case against CNN, on the other hand, presents some big issues about how federal courts operate. What are the standards? What's the procedure? Can states influence it? Is there an automatic right to an appeal? At what stage? Do losers have to pay winners’ legal bill? When does jurisdiction kick in?

At stake is not only defamation fights, but all kinds of disputes where speech is implicated and the battle somehow lands in federal court. Stolen scripts, privacy violations and discrimination allegations are among the topics that have triggered anti-SLAPP review in federal court in recent years. But defamation is certainly front and center. Trump once famously said he wanted to open up
libel laws. The truth might be that he participated in doing so before ever taking office.

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Richard Simmons' Libel Lawsuit Against National Enquirer Meets Skeptical Judge