Reporter’s Workshop – Black v. Cable News Network, Inc.

The Panel

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Introduction

Palm Beach billionaire Jeff Greene ran for the U.S. Senate in 2010 and became the leading candidate for the Democratic Party nomination. The Miami Herald and St. Petersburg Times published articles shortly before the election accusing Greene of involvement with mortgage fraud and of hosting Mike Tyson orgies on his yacht, the Summerwind. Greene lost the election. Represented by L. Lin Wood, Jr. Greene sued both newspapers for libel. The lawsuit initially was dismissed, but then reinstated by the Third District Court of Appeal which found the allegations of actual malice were sufficient. Judge Robert Luck denied a motion for summary judgment and the case was then settled, supposedly for seven figures.

Now another Florida libel suit poses a significant challenge for the news media. The following summarizes allegations from the complaint in Black v. CNN and from other documents in a related case, and from news accounts about the litigation.

Elizabeth Cohen is a Journalistic Superstar for CNN

1. Primary reporter is Elizabeth Cohen – a Superstar at CNN – Has “an Agenda-Driven Journalism Career.” BA from Columbia University and a Master of Public Health from Boston University.

2. In 2003 developed her “Empowered Patient” brand. Began speaking and writing as a patient advocate.

4. Writes an article in 2012 titled "10 Shocking Medical Mistakes" – based on 10 anecdotes – advises on ways not to become a victim.

5. She is supposedly predisposed to believe that doctors are bad.

**Dr. Michael Black is a Medical Superstar**

6. **Dr. Michael Black** has a B.S. from the University of Western Ontario and an MD from the University of Toronto. He has numerous awards. He goes to University of California at San Francisco then back to Toronto – then to Stanford University to become Chief of Cardiac Surgery at its Children’s Hospital. Then he starts a program at California Pacific Medical Center. He also gets an MBA from Berkeley.

7. Writes 75 papers, publishes books and articles. Receives numerous awards. Volunteers to help the poor.

8. He is recruited to and launches a Pediatric Cardiac Center at St. Mary’s Medical Center in West Palm Beach in 2011 due to the lack of such a facility in the immediate area.

9. The risk-adjusted mortality rate in his program is the same as the national morality rate.

**The Competition is Out to Get Him – Dr. Redmond Burke**

10. The competition is out to get Dr. Black from the beginning – Nicklaus (Miami) Children’s Hospital, Joe diMaggio Children’s Hospital (Hollywood), Arnold Palmer Hospital for Children (Orlando) – especially **Dr. Redmond Burke** of the Congenital Heart Institute at Nicklaus (Miami) Children’s Hospital. Burke allegedly tells Black: “Go back to California! You think you know competition in California; you haven’t seen anything yet!”

**Kelly Robinson is a Big Fan of Dr. Burke**

11. **Kelly Robinson** whose son was operated on by Dr. Burke, is a big fan of Dr. Burke. She wants to help him. She is a “heart mom.”

12. She has donated to Dr. Burke’s program and raised money for it.

13. She is not a doctor and has no medical training.

14. In October 2012, she starts warning parents to get their children out of St. Mary’s Hospital.

15. She urges Dr. Black to stop his program.
16. She tells others that Dr. Black has mangled, butchered, and left children in horrendous condition and that he imported children from Trinidad and Haiti.

17. In April 2015 she enters St. Mary’s Hospital and tells parents and staff: "Dr. Black is a baby killing wacko!" She says she is working for CNN.

18. She is removed from the hospital. On May 26, 2015, she goes to the home of a father of a patient and claims that Dr. Black is killing people.

19. Patient has the surgery and it is a success.

**The CNN Editorial Process**

20. CNN allegedly works with Kelly Robinson, but she is not named as a source in the story.

21. 01/26/2015 CNN contacts St. Mary’s – advices that it is working on a story about its cardiac pediatric surgery program and its mortality rate.

22. 01/27/2015 – St. Mary’s says it wants to provide information. CNN does not take up the offer.

23. 02/15/2015 – John Bonifield of CNN sends an email to St. Mary’s stating that its calculated that St. Mary’s mortality rate from 2011-13 is at least 12.5% and the nationwide average from January 2010 to December 2013 is 3.51%. He also notes that year two incremental operating profit was $876,752. CNN publishes additional follow up articles, e.g., “9th Baby Dies After Heart Surgery at Florida Hospital” and takes credit for shutting down the program.

24. 02/27/2015 – St. Mary’s CEO David Carbone sends letter stating mortality rate has been miscalculated. It is based on raw data and does not take into consideration the complexity and severity of each case.

25. 03/13/2015 - Cohen conducts an ambush interview of Dr. Carbone, head of St. Mary’s at his home. It portrays Carbone as unwilling to provide information. Shows him closing his garage door.

26. 04/03/2015 – Elizabeth Cohen emails and asks about a specific patient – HIPAA prevents disclosure.

27. 04/09/2015 – Elizabeth Cohen emails again – disclosure cannot be made due to HIPAA.

28. CNN does not attempt to obtain HIPAA waivers from the patients or parents.
29. 04/21/2015 – Elizabeth Cohen emails that the CNN mortality calculation was based on “open heart surgery cases.” While the national figures were based on both open and closed heart surgeries.

30. Promo airs on June 1, 2015 – states that “babies are dying at an alarming rate” at St. Mary’s.

31. St. Mary’s states respond after learning of the promo and prior to the broadcast that the information in the promo is not factual and is not consistent with the information provided to Elizabeth Cohen.

32. June 1, 2015 – CNN publishes on its website the article – “Secret Deaths: CNN Finds High Surgical Death Rate for Children at a Florida Hospital.” It also broadcasts on Anderson Cooper 360 a video version of the article with the title “The Hospital with a Serious Heart Problem.”

33. The program is here: https://www.cnn.com/2015/06/01/health/st-marys-medical-center/index.html

34. The article and video are heavily promoted by CNN on social media.

35. Dr. Black regards the article and the broadcast as “a scathing indictment of Dr. Black and St. Mary’s pediatric cardiac surgery program.” He and Carbone demand retraction.

36. CNN does not retract but does publish a clarification showing how it calculated the mortality rate. This admits that the comparison may not be valid and asserts that accurate comparison figures are not available.

37. 06/03/2015 – CIGNA terminates all participating-provider agreements with Dr. Black (Black appeals and ultimately prevails).

38. 06/12/2015 – Black receives a telephone call at home telling him that he would be “butchered just like his patients.” The threat was repeated via telephone and on other occasions, and on numerous other occasions. Florida Department of Health initiates investigation of him.

39. August 2015 – St. Mary’s decides to shut down its pediatric cardiac surgery program.

40. November 2015 – Carbone asserts he was forced to resign as St. Mary’s administrator as a result of the CNN allegations and that he cannot secure other employment.

41. 01/13/2016 – Florida Agency for Health Care Administration issues a statement “Setting the Record Straight” lambasting CNN’s inaccurate reporting and detailing the falsity of allegations made by CNN.
Dr. Michael Black’s Lawsuit

42. 02/16/2016 – Dr. Black files 24-Count, 208-page lawsuit in Palm Beach County Circuit Court. Tom Clare represents Dr. Black.

43. At the time, Clare also was representing Nicole Eramo, a former University of Virginia associate dean who had sued the magazine alleging that it defamed her in a 2014 story about an alleged gang rape on campus. The magazine’s November 2014 story, “A Rape on Campus,” recounted the shocking story of a young woman’s gang rape at a U-Va. Phi Kappa Psi fraternity house — a story that was discredited after serious flaws were revealed. An investigation by The Washington Post showed that aspects of the account were not true. For example, no one in Phi Kappa Psi, the fraternity in question, matched the name or description that the young woman gave for the person who allegedly was the ringleader in her 2012 assault. The fraternity and fraternity members also sue Rolling Stone.

44. Dr. Black’s complaint states that CNN omitted facts showing that the surgery did not cause the paralysis, presented misleading statistics, portrayed Black as inexperienced, and omitted portions of reports that were complimentary rather than critical.

45. The complaint seeks compensatory and punitive damages. Alleges that CNN report has undermined Dr. Black’s safety and have made him a target of threats of violence.

46. Complaint alleges that CNN refused to retract and published an article “What to Know About St. Mary’s Children’s Heart Surgery Mortality Rates.” States: “Bottom line: To calculate a mortality rate, you must know how many index operations were done, and we have no idea.” The retraction is used as evidence of actual malice.

47. 03/16/2016 – CNN removes Dr. Black’s lawsuit to federal court claiming that Kelly Robinson had been fraudulently joined to defeat diversity. Dr. Black moves to remand the case to state court.

Davide Carbone’s Lawsuit

48. 05/26/2016 – A second lawsuit is filed by Davide Carbone in Atlanta on May 26, 2016. Carbone is represented by L. Lin Wood. This suit is filed in federal court on diversity grounds. Carbone’s lawsuit is just 54 pages. It contains one count and alleges: “The gist of the CNN series was false and defamatory in accusing Mr. Carbone of unprofessional and unethical conduct in overseeing and operating a hospital medical program with a death rate three times higher than the national average.” Carbone says he lost his job as a consequence of the CNN report. He seeks $5 million in compensatory damages and $35 million in punitive damages.
49. 07/25/2016 – CNN moves to strike Carbone’s lawsuit in reliance on Georgia anti-SLAPP statute. The Eleventh Circuit previously had held that a verification requirement of the statute did not apply in state court, but had not addressed whether the requirement that the plaintiff show a probable success on the merits (not just a plausible claim) also applies in federal lawsuits. Georgia Press Association intervenes in support of CNN motion.

50. 07/25/2016 – CNN also moves to dismiss Carbone’s suit asserting that (1) the statements about the mortality rates are not “of and concerning” Davide Carbone, (2) Carbone’s academic disagreement with CNN’s methodology cannot form the basis of a defamation claim, (3) CNN’s chosen methodology is pure opinion and not a statement of fact, and (4) certain statements are protected by Georgia’s fair report privilege because they come from public records.

Where are the Black, Carbone and Eramo Lawsuits Now?

51. 07/26/2016 – Dr. Black’s case is remanded to Palm Beach County Circuit Court.

52. 08/24/2016 – On remand, CNN moves to dismiss Dr. Black’s case asserting that (1) Dr. Black is a public figure who must show actual malice, (2) many statements are not about Black, (3) Black has not alleged falsity, (4) some statements are rhetorical hyperbole, (5) many of the statements are protected by the fair report privilege, and (6) defamation by implication claims fail.

53. 10/2016 – Tom Clare’s libel claim for Dean Eramo against Rolling Stone goes to trial in October 2016. Clare claims that the reporter who wrote the Rolling Stone article, Sabrina Rubin Erdely, had arrived on the University of Virginia campus determined to write a story about a university’s callousness to the problem of sexual assault and did not let facts get in the way of the story, they argued, and she wrongly turned Eramo into the face of institutional indifference. Eramo testified that she faced threats, lost professional credibility and lost her ability to work as an advocate for sexual-assault prevention. At trial. Scott Sexton, an attorney for Rolling Stone, tells jurors in closing argument that the magazine “acknowledges huge errors in not being more dogged. . . . It’s the worst thing to ever happen to Rolling Stone.” Jury returns verdict for Dean Eramo - $3 million compensatory from Rolling Stone, $1 million in punitive damages against Rolling Stone, and $2 million in damages against the reporter, Sabrina Erdely.

54. 11/17/2016 – Palm Beach County Circuit Judge Richard Oftedal denies CNN’s motion to stay discovery pending disposition of motion to dismiss. He then retires.
55. 02/05/2017 - U.S. District Court for the Northern District of Judge holds requirement to show probability of success conflicts with the federal Rules Enabling Act and so denies the motion to strike. But the district court stays the order pending appeal.

56. On appeal, CNN also seeks review of denial of motion to dismiss on 12(b)(6) grounds. Carbone argues that although the Eleventh Circuit can review the denial of the motion to strike, it cannot review the denial of the order denying the motion to dismiss.

57. 04/11/2017 – Dean Eramo and Rolling Stone reach a confidential settlement.

58. 04/28/2017 – New Circuit Judge Joseph Curley denies CNN’s motion to dismiss Dr. Black’s case. Accepts allegation that Black is not a public figure, allegation of actual malice is sufficient, the allegations are of and concerning Dr. Black, falsity is adequately alleged by contending that mortality rate comparisons misled readers and viewers, statements were not rhetorical hyperbole, actual malice overrides the fair report privilege, and implications are actionable.

59. 06/13/2017 – Rolling Stone agrees to pay Phi Kappa Psi fraternity $1.65 million to settle its libel claim.

60. 10/21/2017 – CNN moves for partial summary judgment on the issue of whether Dr. Black is a public figure. Tom Clare conducts aggressive discovery campaign against CNN and witnesses.

61. 10/05/2018 – 30 Minute hearing on CNN’s motion for partial summary judgment in the Black case.

62. 11/05/2018 (week of) – Oral argument in the U.S. Court of Appeals for the Eleventh Circuit on CNN’s appeal from denial of its motion to strike Davide Carbone’s case.
**Topics for Discussion**

1. Plaintiff’s counsel – How selected, what sort of fee arrangements libel plaintiffs’ might be willing to make, and what sort of libel cases plaintiffs’ lawyers are willing to take on.

2. The retraction demand and negotiations over pre-suit settlements.

3. Early interaction between defense counsel and the editorial team – gathering and analysis of documents, and assessments of perceived vulnerabilities in the defense of the case – confidential sources, recordings without consent, lost or destroyed notes, availability of witnesses, disagreement among reporters and editors.

4. The role that insurance carriers and litigation funders play early in the litigation and as the litigation progresses.

5. Early strategies to attack the merits of the case. Anti-SLAPP statutes. Black elected to launch a very aggressive discovery salvo from nonparties to show that the CNN report was false. He also insisted on production of extensive CNN editorial materials and policies and procedures. Does running up the cost of defense work? Are defendants willing to invest in reputational research and discovery regarding the plaintiff.

6. Conflicts of interest that may arise. Who needs separate counsel and why?

7. The role that the media (including defendants) play in reporting about libel cases.

8. Deposition preparation and participation – what all witnesses can expect.

9. The battle over public figure status and actual malice. A turning point in every case. How the stakes may go up and down.

10. The role of mediation in the litigation and the role that reporter and editors may play.

11. Trial, appeal, and final resolution.

12. The aftermath of libel cases for plaintiffs and defendants, winners and losers.