Pleading and Proving a Defamation Case

*by: Maxwell Goss**

At its core, defamation is a false statement that injures the reputation of another. It may come in the form of a remark in private conversation. It may come in the form of a newspaper article or a television or radio broadcast. It may come in the form of an online customer review, blogpost, or social media posting — possibly even a tweet or re-tweet. Though recognized in American law since colonial days, defamation has taken on heightened relevance in the Internet age, when anyone with access to a computer or smartphone can reach a worldwide audience.

Defamation is notoriously tricky to plead and prove. In Michigan, defamation must be pled with specificity. Only statements of fact, not opinion, can be defamatory, and the plaintiff bears the burden of proving the statement's falsehood. The very nature of the conduct (words) and injuries (reputational harm) can create unique evidentiary hurdles. And free speech protections under the First Amendment give rise to defenses that may defeat an otherwise viable claim.

This article addresses distinctive challenges facing defamation plaintiffs at the pleadings stage and beyond. The article reviews the framework of a defamation claim, discusses the heightened pleading standard applied by Michigan courts, and considers two heavily litigated areas, privilege defenses and the treatment of anonymous defendants. Along the way, it analyzes recent case law and offers guidelines for successfully litigating a defamation claim.

I. Defamation Basics

Defamation, an intentional tort, comes in two varieties: written (libel) and spoken (slander). Both varieties have the same elements: "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication."[1]

Because only a false statement of fact can be defamatory, truth is an absolute defense. Litigants should keep in mind that the standard here is "substantial truth." That is, where the "gist" or "sting" of a story is true, courts will look past "minor inaccuracies" that do not "'alter the complexion of the affair and would have no different effect on the reader than that which the literal truth would produce.'"[2] In *Rouch v. Enquirer & News of Battle Creek Michigan,* a newspaper reported that the plaintiff had been "charged" with criminal sexual misconduct. However, while the plaintiff had in fact been arrested, he had not been arraigned — and thus not literally charged with a crime. Despite this inaccuracy, the Michigan Supreme Court found the statement to be substantially true and remanded the case for entry of judgment in favor of the newspaper.[3]

Regarding state of mind, negligence is the default standard.[4] In many circumstances, however, the plaintiff must prove actual malice, *i.e.,* that the

defendant knew the statement was false or had reckless disregard for its truth or falsity.[5] The Michigan Supreme Court, following longstanding precedent of the United States Supreme Court, has explained that public officials and public figures "must establish that a defendant made defamatory statements with 'actual malice' in order to prevail in a defamation action."[6] Furthermore, as discussed below, actual malice must be shown where the defendant enjoys a qualified privilege, such as where an employer publishes statements about an employee to other employees with an interest in the subject matter.[7] Given that actual malice is a far more stringent standard than ordinary negligence, a defendant's status as a public figure, or the existence of a qualified privilege, can be outcome-determinative.

Finally, a plaintiff must prove either damages or show that the statement was defamatory per se. In general, statements implying a lack of chastity or commission of a crime constitute defamation per se.[8] There has long been confusion about this standard, particularly as to what types of crimes qualify. In 2016, the Michigan Court of Appeals clarified the matter by holding that where a defamation claim is based on an accusation of criminal activity, the crime must involve "moral turpitude" or "infamous punishment."[9] In that case, a Catholic nun had allegedly reported that an angry parishioner "put a finger" in her chest during an argument. The Court of Appeals rejected the trial court's conclusion that an accusation of battery is defamatory per se, reasoning that battery, by itself, does not involve moral turpitude (defined as vile or debased conduct) or subject a person to infamous punishment (defined as imprisonment in state prison).[10] In the absence of defamation per se, a court will grant summary disposition unless the plaintiff can provide evidence of actual damages.[11]

II. Pleading with Specificity

Plaintiffs are well-advised to avoid generalities, as Michigan courts require that defamation be pled with specificity.[12] First, the complaint must identify "the exact language that the plaintiff alleges to be defamatory."[13] The Michigan Court of Appels has explained the function of this rule:

> Because a plaintiff must include the words of the libel in the complaint, several questions of law can be resolved on the pleadings alone, including: (1) whether a statement is capable of being defamatory, (2) the nature of the speaker and the level of constitutional protections afforded the statement, and (3) whether actual malice exists, if the level of fault the plaintiff must show is actual malice.[14]

In short, courts expect to dispose of key questions of law early on in a defamation case. In addition to specifying the exact language at issue, the plaintiff must specifically identify where, when, and to whom the alleged defamatory statements were made.[15] Finally, the Michigan Court of Appeals has ruled in a number of unpublished opinions that a complaint must plead facts sufficient to overcome privilege to survive a motion to dismiss for failure to state a claim.[16]

The heightened pleading requirements can be traps for the unwary. In one case, the Michigan Court of Appeals ruled that the plaintiffs failed to state a claim where they attached transcripts of an allegedly defamatory broadcast to their complaint without "plead[ing] precisely the statements about which they complain[ed]."[17] In another case, the Court affirmed dismissal for failure to state a claim where the complaint did not "identify to whom defendants made the allegedly defamatory statements," but "merely allege[d] that the statements were made to 'third parties."[18] In another case, which involved an alleged statement by an executive officer at a

board meeting, the Court noted that officer duties confer a qualified privilege and affirmed dismissal for failure to state a claim because the plaintiff had "not pleaded any facts taking [the defendant's] statements outside of this privilege."[19] These cases illustrate that boilerplate allegations will not carry the day. A complaint should set forth defamation with as much factual detail as reasonably possible.

III. Privilege Defenses

A plaintiff needs to consider questions of privilege from the outset. Remarkably, an "absolute" privilege protects a statement even if it is false and maliciously published.[20] Such a privilege is narrowly limited to circumstances such as legislative proceedings, judicial proceedings, and military communications.[21] However, a more flexible privilege is the "qualified" privilege, which protects a statement "only in the absence of ill will, spite, or malice in fact."[22] In other words, the ordinary negligence standard does not apply to statements protected by a qualified privilege. The privilege extends "to all communications made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty."[23] Notably, it "embraces cases where the duty is not a legal one, but where it is a moral or social character of imperfect obligation."[24]

As noted above, several opinions have held that a complaint for defamation must plead facts sufficient to overcome privilege. Where a qualified privilege may be in play — and the flexibility and broad scope of the doctrine suggest that it will be at least colorable in a wide range of cases — a plaintiff should be sure to plead facts sufficient to show the malice needed to overcome the privilege. Importantly, the Michigan Supreme Court has held that state of mind in a defamation case can be established through circumstantial evidence.[25] In *Smith v. Anonymous Joint Enterprise,* the accuracy of a certain report was at issue. Because the defendant could have readily confirmed its accuracy by contacting the author, but failed to do so, the jury had ample evidence from which to conclude that the speaker was acting in purposeful avoidance of the truth.[26] Though direct evidence is generally preferable, a plaintiff may rely on circumstantial evidence to establish actual malice in the complaint, and when the matter is ultimately adjudicated on the merits.

IV. Anonymous Defendants

The Internet has made it exceedingly easy for individuals to publish and reach a large audience anonymously — sometimes with defamatory content. But a tension exists between the First Amendment and a plaintiff's interest in obtaining relief for defamation.[27] "The United States Supreme Court has . . . determined that 'an author's decision to remain anonymous, like other decisions concerning omissions or additions to the contents of a publication, is an aspect of freedom of speech protected by the First Amendment.'"[28] At the same time, the "right to anonymous expression over the Internet does not extend to defamatory speech, which is not protected by the First Amendment."[29] Plaintiffs seeking to "unmask" an unnamed defendant — for instance, by subpoenaing a webhost for the identity of an anonymous blogger or message board contributor — must be prepared to face exacting and somewhat uncertain requirements.

Michigan law is still developing with respect to defamation plaintiffs seeking disclosure of the identities of anonymous speakers. The Michigan Court of Appeals has issued three published opinions on the issue in recent years, all favoring defendants.[30] The most recent is *Sarkar v. Doe,* in which a professor of medicine sued an anonymous defendant who had posted online comments accusing him of research misconduct on a science message board.[31] When the plaintiff subpoenaed the operator of the message board to obtain identifying information for the individual or individuals who posted the comments, the operator filed a motion to quash.

Citing its earlier opinions, the *Sarkar* court applied a two-part test: First, the plaintiff must make reasonable efforts to provide the anonymous commenter with notice of the subpoena, and, second, the plaintiff's claims must be evaluated by the court to determine whether they would survive a motion to dismiss for failure to state a claim.[32] Interestingly, a court apparently is to undertake the dismissal analysis undertaken *sua sponte*.[33] Here the Court engaged in a lengthy analysis and concluded that none of the online comments were capable of being defamatory — many, for example, expressed opinions based on underlying facts available to the reader.[34] The Court granted the motion to quash and summary disposition against the plaintiff in most respects. The Court's earlier opinion in *Ghanam* reached a similar conclusion.[35] The implication of these cases for plaintiffs is clear: Disclosure of the identity of an anonymous defendant is unlikely where a defamation claim is not well-pled.

Conclusion

A well-pled complaint is always important, but never more so than in a defamation case, where a claim is subject to summary disposition if it fails to allege the exact statement at issue, the specific circumstances of the statement, and facts sufficient to overcome privilege, among other things. Nevertheless, the careful plaintiff can meet the unique challenges facing defamation claims. By thoroughly investigating a claim and setting forth its factual basis in appropriate detail, the plaintiff will be positioned to defeat a motion to dismiss and ultimately prevail on the merits.

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ENDNOTES

1 *Mitan v. Campbell,* 474 Mich. 21, 24 (2005) (citations omitted).

2 *Rouch v. Enquirer & News of Battle Creek Mich.,* 440 Mich. 238, 251 (1992), quoting *McCracken v. Evening News Ass'n,* 3 Mich. App. 32, 40 (1966).

3 *See id.* at 266-267.

4 *Dadd v. Mount Hope Church,* 486 Mich. 857, 860 (2010).

5 *Lins v. Evening News Ass'n,* 129 Mich. App. 419, 435 (1983).

6 *J & J Constr. Co. v. Bricklayers and Allied Craftsmen, Local 1,* 468 Mich. 722, 731 (2003), citing *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964); *Curtis Publishing Co. v. Butts,* 368 U.S. 130 (1967)); *see also* MCL 600.2911(2) (codifying rule).

7 *Smith v. Fergan, 1*81 Mich. App. 594, 597.

8 *Hope-Jackson v. Washington,* 311 Mich. App. 602, 620 (2015), citing MCL 600.2911(1).

9 *Lakin v. Rund, 318* Mich. App. 127 (2016).

10 *See id.* at 133-45.

11 *See, e.g., Viggers v. Viggers,* No. 15–000799–CZ, 2017 WL 3441433 (Mich. Ct. App. Aug. 10, 2017) (unpublished) (granting summary disposition against plaintiff who alleged that defendant had made accusations of illegal conduct to prospective employer where plaintiff provided no evidence that job offer was rescinded).

12 *See Royal Palace Homes, Inc. v. Channel 7 of Detroit, Inc.,* 197 Mich. App. 48, 52-57 (1992).

13 *Id.*

14 *Thomas M. Cooley Law Sch. v. Doe 1,* 300 Mich. App. 245, 263 (2013) (citations omitted).

15 *See Hernden v. Consumers Power Co.,* 72 Mich. App. 349, 356 (1976).

16 *See, e.g., Shipman v. Greenameyer,* No. 186917, 1997 WL 33354639, at *4 (Mich. Ct. App. Jan. 31, 1997) (unpublished) ("[T]he plaintiff must plead specific facts to avoid immunity or privilege.") (citing *MacGriff v. Van Antwerp,* 327 Mich. 200, 204 (1950)); cf. *Rouch,* 440 Mich. at 272) (Riley, J., concurring) ("I suggest that plaintiff's failure to allege and identify in his pleading, supplemental pleading, and answers to defendant's interrogatories, specifically which statements he considered to be materially false and how the newspaper either was negligent or reckless in publishing the story, were proper grounds for summary judgment by the trial court.").

17 *Royal Palace,* 197 Mich. App. at 56-57.

18 *Vaynsman v. Shane,* No. 287398, 2009 WL 3837357, at *4 (Mich. Ct. App. Nov. 17, 2009) (unpublished).

19 *Stoll v. Luce Mackinac Alger Schoolcraft Dist. Health Dep't Bd. Of Health,* No. 316287, 2014 WL 5364085, at *2 (Mich. Ct. App. Oct. 21, 2014) (unpublished); see also *Ted Nugent & Amboy Dukes v. Muskegon Summer Celebration,* Nos. 266445, 269804, 2007 WL 3033969, at *1 (Mich. Ct. App. Oct. 18, 2007) (unpublished) (explaining that plaintiffs were required to set forth "in what way the statements were made with malice or a reckless disregard for the truth," and affirming dismissal because plaintiffs "failed to include this information in the pleadings").

20 *See Oesterle v. Wallace,* 272 Mich. App. 260, 264 (2006).

21 *See Froling v. Carpenter,* 203 Mich. App. 368, 371 (1993).

22 *Postill v. Booth Newspapers, Inc.,* 118 Mich. App. 608, 620 (1982) (citation omitted).

23 *Bacon v Michigan Central R. Co,* 66 Mich 166; 33 N.W. 181 (1887), *quoted with approval by Rouch v Enquirer News of Battle Creek,* 427 Mich 157, 176; 398 NW2d 245 (1986).

24 *Id.*

25 *See Smith v. Anonymous Joint Enterprise,* 487 Mich. 102, 116 (2010).

26 *See id.* at 125.

27 *See Cooley,* 300 Mich. App. at 257.

28 *Id. at* 256, quoting *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 342 (1995).

29 *Ghanam v. Does,* 303 Mich. App. 522, 534 (2014).

30 *Cooley,* 300 Mich. App. at 245; *Ghanam,* 303 Mich. App. at 522; *Sarkar v. Doe,* 318 Mich. App. 156 (2016).

31 *Id.*

32 *See id.* at 216-217.

33 *See id.* at 219 ("[W]hen an anonymous defendant in a defamation suit is not shown to be aware of or involved with the lawsuit, some showing by the plaintiff and review by the trial court are required in order to balance the plaintiff's right to pursue a meritorious defamation claim against the anonymous critic's First Amendment rights." (quoting *Ghanam, 3*03 Mich. App. at 540)).

34 *See id.* at 220-229.

35 *See Ghanam,* 303 Mich. App. at 550 (finding that statements of anonymous online commenter "cannot be regarded as assertions of fact but, instead, are only acerbic critical comments directed at plaintiff based on facts that were already public knowledge").