

Question 4

ConsumerPro, a consumer protection group, published a manual listing the names, addresses, telephone numbers, and specialties of attorneys who represent plaintiffs in tort cases. The manual also included comments rating the attorneys. The manual was distributed by ConsumerPro to its members to aid them in the selection of an attorney should they need one.

Paul was listed in the manual as an attorney who litigates automobile accident cases. In the related comments, the manual stated that “Paul is reputed to be an ambulance chaser and appears to handle only easy cases.”

Paul sued ConsumerPro for defamation, alleging injury to reputation and requesting general damages. ConsumerPro moved to dismiss for failure to state a claim on which relief could be granted, on the grounds that (1) the statement was non-actionable opinion, (2) Paul failed to allege malice or negligence under the United States Constitution, (3) Paul failed to allege special damages, and (4) in any event, the statement was privileged under the common law.

How should the court rule on each ground of the motion to dismiss? Discuss.

Answer A to Question 4

1. Statements of Opinion May Be Actionable in a Defamation Action

To state a claim for defamation, the plaintiff must allege (1) a defamatory statement (2) that is published to another. ConsumerPro alleges that the statements about Paul in its manual are not actionable defamatory statements because they are opinions. This is incorrect. Statements of opinion are considered defamatory (and actionable) if a reasonable reader or listener would have reason to believe that the declarant has a factual basis for his or her opinion. Here, a reasonable person reading the manual would have reason to believe that ConsumerPro has a factual basis for its statements concerning Paul. A reader would reasonably assume that ConsumerPro – a consumer protection group – researched the various attorneys before writing and publishing its manual, that it investigated their reputations and their prior experience, and that it based its assertions on facts it had discovered through this investigatory process. In such circumstances, statements of opinion are actionable. Accordingly, the court should not grant ConsumerPro’s motion to dismiss on this ground.

2. Failure to Allege Malice or Negligence Does Not Defeat Liability Here

If the subject of a statement is a matter of public concern, the First Amendment requires a plaintiff in a defamation action to allege falsity and fault in addition to the elements listed above. If the plaintiff is a public official, public figure or limited public figure, the level of “fault” the plaintiff must prove is that the defendant acted with malice or recklessness. If the plaintiff is a private figure, he need only show that the defendant acted negligently. If, however, the subject matter of the statement is not a matter of public concern, the plaintiff need not prove malice, recklessness, or negligence. Even a non-negligent good faith publication of a defamatory statement on matters that are not of public concern will support liability for defamation.

Here, ConsumerPro may argue that the subject matter is a public concern because lawyers offer a service to the public, making their abilities and expertise relevant and important information for the public to know. This argument should fail. While an individual's qualifications to do a job may be relevant to specific people (or a specific group of people), it does not qualify as a matter of public concern that it [is] important information for the community at large. Accordingly, Paul did not have to allege fault (malice, recklessness, or negligence) here and ConsumerPro's motion to dismiss on this ground should also be denied.

3. Failure to Allege Special Damages Does Not Defeat Liability Here

In some defamation cases, the plaintiff is also required to allege special (i.e., actual economic) damages in addition to the elements discussed above. A plaintiff need not allege or prove special damages; however, in cases involving libel (written defamation) or slander per se (spoken statements concerning a person's ability to do his or her job, imputing unchastity to a woman, accusing someone of a crime of moral turpitude or stating that a person has venereal disease). Special damages are only a necessary element in complaints alleging regular slander. Here, the statements were made in writing and are therefore properly characterized as libel. Accordingly, Paul need not allege special damages, and ConsumerPro's motion to dismiss on this ground should be denied.

Notably, Paul may not be able to recover a substantial amount of money if he is unable to prove any special damages at trial, but failure to allege special damages is not a ground on which to dismiss a defamation action based on libel.

4. The Statements Are Subject to a Qualified Privilege

There are two types of privilege that may be asserted as a defense to a defamation action: Absolute privilege and qualified privilege.

Absolute privilege is available as a defense with respect to statements made by one spouse to another, and with respect to statements made by government officials (including lawyers) in the course of their duties. This privilege is not applicable here.

Qualified privilege is available when there is a socially useful context for the speech at issue. In such cases, statements will be privileged if (1) the speaker has a good faith belief in the truth of the statements and (2) the statements are relevant to and within the scope of the useful purpose for the speech. For example, a former employee providing a reference will have a qualified privilege defense to a defamation action if he believed the statements he made and refrained from injecting extraneous and irrelevant information into the communication. Here, ConsumerPro is providing a service to the public by providing information about lawyers to individuals who may require a lawyer's services. This is a socially useful context. The statements about Paul being an "ambulance chaser" and taking "only easy cases" are relevant to the purpose of the manual in that they provide information that a person looking to hire an attorney would be interested to know to inform his or her selection. Accordingly, the latter element of the qualified privilege defense is likely satisfied here.

Nevertheless, ConsumerPro's motion to dismiss on the ground of qualified immunity should be denied. A factfinder could find based on evidence presented at trial that ConsumerPro did not have a good faith belief in the truth of the statements. If so, the privilege would not be applicable and Paul could prevail at trial.

Conclusion

In sum, ConsumerPro's motion to dismiss should be denied in its entirety because none of the arguments asserted by ConsumerPro are meritorious.

Answer B to Question 4

Paul's motion to dismiss will be evaluated on the basis of the facts alleged in his complaint. The court will assume that the facts alleged by Paul are true and will determine whether Paul is entitled to relief on the basis of the facts as he alleges them.

Part One: Non-Actionable Opinion & Application of the Basic Definition of Defamation to Paul

Definition of Defamation

Paul sued ConsumerPro for defamation. Defamation requires a defamatory statement about the plaintiff that is published to a third person. A defamatory statement is one that tends to negatively affect the plaintiff's reputation. However, statements of opinion are usually excluded from the definition of defamatory statement. You may not hold someone liable for offering their opinion, unless the defendant gives the impression that the statement is based on verifiable facts known to the defendant.

Publication to a third person may be oral or written; the defamatory statement must be conveyed in some manner to someone other than the plaintiff. Truth is always a defense to defamation but, depending on the type of defamation alleged, the plaintiff may bear the burden of proving the untruth of the statement or the defendant may bear the burden of raising truth as an affirmative defense. Whether and what kind of damages plaintiff must prove depends upon the type of defamation alleged.

Here, Paul alleges that ConsumerPro's statement was defamatory and that it was published to the group of persons who read the ConsumerPro manual.

Defamatory Statement or Non-Actionable Opinion

To succeed in his claim, Paul must show a defamatory statement about him made by ConsumerPro. ConsumerPro stated in its manual that Paul “is reputed to be an ambulance chaser and appears to handle only easy cases.” Since Paul is a lawyer, the allegation that he is an “ambulance chaser” reflects poorly on Paul’s integrity and draws on stereotypes of lawyers propagated in the media. The statement suggests that Paul takes advantage of people by finding them at their weakest—immediately after an accident or illness—and trying to convince them to hire him. Moreover, stating that he only handles easy cases suggests that Paul is not a very good lawyer or that he is lazy and refuses to take challenges. Since the statement will negatively affect Paul’s reputation, it could be considered a defamatory statement.

As to the first part of the statement, ConsumerPro will argue that its statement is merely a non-actionable opinion. It will point out that the statement does not address a particular incident. For example, if ConsumerPro alleged that Paul was seen at the hospital yesterday talking to an accident victim, that would be a statement of fact that is either true or untrue. Here, the statement is more general and just says Paul is reputed to be an accident chaser.

Paul will argue that the claim that he is “reputed to be an ambulance chaser” gives the impression that ConsumerPro’s statement is based on fact. The opinion of ConsumerPro alone does not make a reputation. Rather, ConsumerPro gives the impression that it has talked to a group of people who all hold opinions about Paul and that the majority of the group believes Paul to be an ambulance chaser.

As to the second part of the statement, ConsumerPro will again argue that the statement that Paul “appears to handle only easy cases” is non-actionable opinion. ConsumerPro will point out that the statement cannot be proven true or

untrue because different people hold different views of which cases are easy and hard. Moreover, ConsumerPro will argue that the statement does not give the impression that it is based on any facts. Unlike the first statement, the second part of the statement does not imply that ConsumerPro's statement is based on the opinion of more than one person. Instead of referring to Paul's reputation (which implies many people's opinions), ConsumerPro directly asserts its own opinion by stating that Paul "appears" to only handle easy cases.

The court should conclude that the first part of ConsumerPro's statement is actionable because it gives the impression that it is based on facts. The statement could be verified by polling the relevant community and determining whether Paul indeed has a reputation for being an ambulance chaser.

The court should, however, conclude that the second part of ConsumerPro's statement is non-actionable because it is purely ConsumerPro's opinion. As explained above, it does not imply that it is based on any facts and it cannot be proven either true or false.

Conclusion: The court should deny ConsumerPro's motion to dismiss as to the first part of the statement (reputation as ambulance chaser) because it gives the impression that it is based on facts. It should grant the motion to dismiss as to the second part of the statement (only takes easy cases) because it is non-actionable opinion.

Part Two: Allegation of Malice

Whether or not a plaintiff must allege malice depends on whether the defamatory statement deals with public persons and public matters or not. When a defamatory statement involves a private person and a private matter, plaintiff need not allege any fault on the part of the defendant. However, if the statement involves a matter of public interest and a private person, the plaintiff must allege

and prove at least negligence on the part of the defendant. Finally, if the statement involves a matter of public interest and a public figure, the plaintiff must allege and prove malice. Malice requires a showing that the defendant made the statement either knowing that it was false or with recklessness to the truth or falsity of the statement.

Conclusion: As explained below, a court will conclude that the statement concerns a matter of public interest, but that Paul is a private figure. Therefore, Paul will be required to allege negligence or more on the part of the ConsumerPro. Because he did not do so, the motion to dismiss should be granted on this ground.

Matter of Public Interest

A matter of public interest is a topic that would be of general concern or interest to the community. ConsumerPro will argue that the statement is a matter of public interest because many people eventually need to hire attorneys. Consumers have a strong interest in knowing which attorneys will responsibly handle their cases and which will not. ConsumerPro will support its argument by pointing to the fact that members of the community join ConsumerPro, a consumer protection group, to learn more about the issues that ConsumerPro discusses in its manual. People go out of their way to access the information offered by ConsumerPro, suggesting that the information is of general concern to the community.

Paul, on the other hand, will argue that the matter is not of public interest. He might point out that ConsumerPro is only one group amidst the entire community, which shows that consumer protection issues are really of limited concern and interest only a small number of people. Paul will argue that, if consumer issues were really of public concern, they would be covered in the newspaper and ConsumerPro would not need to publish its manual.

Since the topic of ConsumerPro's statement is of interest to a number of people (ConsumerPro's members) and since the entire public has an interest in making an informed decision when it hires lawyers, the court will probably decide that the statement by ConsumerPro concerns a matter of public interest.

Public Figure

A public figure is one who lives their life in the public eye, for example, a politician or movie star. The person may have sought out fame or may have become notorious, for example, as a well-known criminal.

Paul will argue that he is not a public figure because he does not live his life in the public eye. Since the facts do not indicate that he is a famous lawyer or that he has had any particularly notorious cases, he probably does not give press conferences or appear on television. There is nothing to indicate that he even engages in public speaking, for example, at lawyer's conventions or continuing education events.

ConsumerPro will argue that Paul became a public figure by making himself available as an attorney. However, there are no facts to support this argument. Nothing suggests that Paul has sought out public attention or has unwillingly received it. Therefore, he is neither famous nor notorious. A court will conclude that Paul is not a public figure.

Since Paul is not a public figure but the statement does involve a matter of interest to the general public, Paul will be required to plead negligence on the part of ConsumerPro.

Did Paul Plead Negligence?

In order to plead negligence, Paul needs to allege that ConsumerPro did not act with reasonable care in making its statement about Paul. Paul has not alleged any particular actions by ConsumerPro in relation to the making of the statement. He alleges only that the statement was made. Negligence, on the other hand, requires more. For example, Paul could have pled negligence by alleging that ConsumerPro made the statement without engaging in a fact-checking process, even though it is standard for consumer protection organizations to do three hours of research before publishing a review of an attorney. If Paul had alleged that ConsumerPro fell below the normal standard of care, he would have alleged negligence. However, he failed to do so. Therefore, the motion to dismiss should be granted on this ground.

Part Three: Special Damages

Defamation carries a variety of damages requirements, depending on the type of defamation alleged. Plaintiffs injured by slander, which is oral defamation, but [sic] allege and prove special damages unless the statement falls into one of the four slander per se categories. However, plaintiffs injured by libel, which is written defamation, generally need not allege special damages. However, when the defamatory statement involves a public figure, the plaintiff must allege special damages even for libel.

As explained in Part Two, the court will conclude that ConsumerPro's statement concerns a matter of public interest but that Paul is not a public figure. Because Paul is not a public figure, he will not be required to allege special damages.

Conclusion: Because Paul is not a public figure and is not required to allege special damages, the motion to dismiss on this ground should be denied.

Part Four: Privilege?

At common law, to protect the free flow of information, certain types of statements received a qualified privilege. If a statement falls within the privilege, a defamation plaintiff must show that the speaker knew the statement was false when it was made.

Statements made for the benefit of either the speaker or the audience fall within this qualified privilege. For example, a statement in a credit report would fall within the qualified privilege because it is made for the benefit of the audience of the credit report. Because the public has an interest in ensuring the accuracy and reliability of credit reports, the publishers of such reports receive a qualified privilege. The privilege encourages them to openly and honestly report blemishes on someone's credit because they will be protected from suit unless the publisher knows the statement is false when it is made.

Does the Statement Fall within the Privilege?

Paul will argue that ConsumerPro's statement does not fall within the privilege because a manual reviewing attorneys is not as important as something like a credit report. He will argue that the public has a weaker interest in the accuracy of consumer information manuals than they do in other sorts of documents and that the privilege should not be applied to ConsumerPro's statement.

However, ConsumerPro will prevail in its argument for privilege. ConsumerPro's statement was made for the benefit of its members: to help them make informed decisions about hiring attorneys. Moreover, the public has a strong interest in being able to access accurate consumer information when it hires attorneys or buys products. Because the accuracy of ConsumerPro's statement is important to the audience and the statement was made for the benefit of the audience, the

court will conclude that ConsumerPro's statement falls within the qualified privilege.

Did Paul Allege Knowledge of Falsity?

Paul will argue that it is clear that ConsumerPro must have known that the first part of its statement was false when it was made. The statement gives the impression that ConsumerPro polled the community to determine Paul's reputation. Paul will argue that since he does not have a reputation as an ambulance chaser, ConsumerPro could not possibly have based the statement on a poll. If ConsumerPro did not make a poll, it must have known that the statement was false.

ConsumerPro will prevail, however, because Paul did not allege that ConsumerPro knew that the statement was false when it was made. Assuming for the moment that the statement implies that it was based on a number of opinions, ConsumerPro could only have known its statement was false if it had conducted a poll and determined that Paul has a reputation as a wonderful diligent lawyer. Paul has not alleged that ConsumerPro had any knowledge, good or bad, about Paul's reputation at the time it made its statement.

Conclusion: ConsumerPro's motion to dismiss should be granted because ConsumerPro's statement falls within the qualified privilege and Paul has not alleged that ConsumerPro knew that the statement was false when it was made.