Online Defamation: Do Hyperlinks Constitute Republication for Florida Defamation and Trade Libel Claims?

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These days, businesses are at least equally associated with their websites as with their “brick and mortar” stores. Every Fortune 500 company has a website. The use of hyperlinks on websites is commonplace. In fact, adding hyperlinks to a website is a primary method of increasing the website’s exposure and thereby traffic through search engine optimization. But what if the hyperlink refers an Internet user to information that is purportedly defamatory or libelous? Is there a Florida cause of action for defamation or libel when a hyperlink refers the Internet user to previously published defamatory or libelous information?

Because no Florida appellate court has squarely addressed this issue, this article summarizes how other federal and state courts have ruled.

Florida Defamation Law

Florida trade libel and defamation claims both require a falsity to be published. The elements of a Florida trade libel claim are 1) a falsehood; 2) has been published or communicated to a third person; 3) when the defendant-publisher knows or reasonably should know that it will likely result in inducing others not to deal with the plaintiff; 4) in fact, the falsehood does play a material and substantial part in inducing others not to deal with the plaintiff; and 5) special damages are proximately caused as a result of the falsehood. Similarly, the elements of a Florida defamation claim are 1) publicity; 2) falsity; 3) the actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; 4) actual damages; and 5) the statement must be defamatory.

Other Jurisdictions

Courts in foreign jurisdictions have held that the use of hyperlinks does not constitute republication to support a cause of action for defamation or libel. In Haefer v. New York Media, LLC, No. 150189/08, 910 N.Y.S.2d 405(2009); N.Y. Slip Op. 52765, *1 (U) (N.Y. Sup. Ct. Oct. 22, 2009) (unpub.), an article containing allegedly libelous statements was originally published for the first time in New York Magazine in 2000. Plaintiffs claimed that in 2007, the magazine’s website republished the article for a second time on its own website, on another unrelated website, and in print. That second article contained hyperlinks referring to the original article but did not contain any of the original article’s material. James Haefer and other former police officers filed a class action, asserting various claims of libel. In almost summary fashion, the trial court ruled that because the hyperlinks in the second article merely redirected the reader to the first article, the hyperlinks did not constitute republication to support a cause of action for libel under New York law. In so holding, the court quoted Firth v. State of New York, 775 N.E.2d 463, 466-467 (N.Y. 2002), for the proposition that republication of a defamatory statement may retrigger the statute of limitations if the republication actually reaches a new audience, but that mere addition of unrelated information to a website “cannot be equated with the repetition of a defamatory matter in a separately published edition of a book or newspaper.”

In Salyer v. Southern Poverty Law Center, Inc., 701 F. Supp. 2d 912, 913-914 (W.D. Ky. 2009), the defendant, Southern Poverty Law Center, published a report on its website in July 2006 containing allegedly defamatory statements about the plaintiff, Salyer. In August 2006, the law center published a print version of that same report and mailed it to various subscribers. The article remained on the law center’s website without any changes until July 2008, when, at plaintiff Salyer’s request, all mention of plaintiff’s name was removed from the article. However, several articles on the law center’s website between the time of original publication and the date that the plaintiff’s name was removed referenced the original article and contained hyperlinks to the original article.

In granting the Southern Poverty Law Center’s motion to dismiss, the U.S. District Court for the Western District of Kentucky rejected the plaintiff’s contention that the subsequent articles referring to and containing hyperlinks to the original article republished the original article. In support of that ruling, the district court first reasoned that: a common thread of traditional republication is that it presents the material, in its entirety, before a new audience. A mere reference to a previously published article does not do that. While it may call the existence of the article to the attention of a new audience, it does...
not present the defamatory contents of the article to that audience. Therefore, a reference, without more, is not a republication.15

Applying traditional republication law, the district court concluded the hyperlinks at issue would not constitute a republication under Kentucky law because the hyperlinks did not change the substance or original text of the article, present the article to a new audience, or present the article in a new form. Rather, the hyperlinks simply provided the reader with a new and easier way to access the article.16 The Salyer court also noted that its decision was in accord with the rationale of Sundance Image Technology, Inc. v. Cone Editions Press, Ltd., No. 02CV2258JM(AJB), 2007 WL 935703 at *7 (S.D. Cal. Mar. 7, 2007) (holding that a hyperlink does not constitute a republication for purposes of California libel law), and Churchill v. State of New Jersey, 378 N.J. Super. 471, 876 A.2d 311 (N.J. Super. Ct. App. Div. 2005) (holding that press release posted on website, which referred to previous report containing allegedly defamatory statements, was not a republication of the original report for purposes of New Jersey defamation law).

More recently, in In re Phila. Newspapers, LLC, 690 F.3d 161, 165-166 (3d Cir. 2012), the U.S. Court of Appeals for the Third Circuit held that links on an Internet page do not “republish” the linked articles to support an action for defamation under Pennsylvania law. In support of its holding, the Third Circuit first noted that many other courts held that the single publication rule applies to information published on the Internet as well as print media.17 The Third Circuit quoted Firth:

[The rapid pace of changes in the way information is disseminated, the desire to avoid multiplicity of suits and the need to give effect to relevant statutes of limitation...gave rise to the “single publication rule,” those courts reason that there is “no rational basis upon which to distinguish publication of a book or report through traditional printed media and publication through electronic means...”]18

After concluding that Pennsylvania courts would extend the single publication rule to publicly available infor-

mation on the Internet, the Third Circuit ultimately held that a webpage link to a previously published article does not constitute republication for purposes of Pennsylvania defamation law when the link does not restate or alter the allegedly defamatory material.19 The Third Circuit summarized the policy behind the single publication rule and the doctrine of republication:

The single publication rule advances the statute of limitations' policy...that defamation suits are brought within a specific time after the initial publication. Websites are constantly linked and updated. If each link or technical change were an act of republication, the statute of limitations would be retriggered endlessly and its effectiveness essentially eliminated. A publisher would remain subject to suit for statements made many years prior, and ultimately could be sued repeatedly for a single tortious act the prohibition of which was the genesis of the single publication rule.20 Additionally, under traditional principles of republication, a mere reference to an article does not republish the material...Publishing a favorable reference with a link on the Internet is significantly easier. Taken together, though a link and reference may bring readers' attention to the existence of an article, they do not republish the article.21

In United States ex rel. Klein v. Omeros Corp., 897 F. Supp. 2d 1058, 1063 (W.D. Wash. 2012), the U.S. District Court for the Western District of Washington granted plaintiff Klein's motion for summary judgment on a defamation counterclaim by defendant Dr. Gregory Demopulos. In the counterclaim, Demopulos contended that Klein's reference on a website to a complaint filed in a civil action, and a URL to the complaint itself, constituted defamation under Washington
law. Based on Salyer, 701 F. Supp. 2d at 918; Sundance, 2007 WL 935703 at *7; In re Phila. Newspapers, 690 F.3d at 174; and Goforth v. Asewo Life Ins. Co., 368 F.2d 25, 29. n. 7 (4th Cir. 1966), the district court disagreed, and concluded that because the URL was a reference that merely provided the reader with access to the complaint, and did not publish any of the complaint’s contents, the defamation action failed.

In a recent case arising out of the U.S. District Court for the Middle District of Florida, Klayman v. CityPages, No. 5:13-CV-143-0C-22PRL, 2015 WL 1546173 at **1-7 (M.D. Fla. 2015), plaintiff Klayman brought a defamation action based on several news articles reporting on events related to two judicial proceedings brought in Ohio and Florida. After the defendant filed a motion for summary judgment on the defamation claims, Klayman contended that the motion should be denied in part because a hyperlink in the article “linked and reincorporated” one of the articles, and, therefore, “republished” the article. The court disagreed, and after researching the issue itself, the court concluded that no Florida authority supported the proposition that providing links to statements already published, without more, republishes those statements. Accordingly, the court granted the defendant’s motion for summary judgment on the defamation claims.

In Clark v. Viacom Intern’l, Inc., 617 F. Appx. 498, 505 (6th Cir. 2015), the U.S. Court of Appeals for the Sixth Circuit provided practitioners with a good summary of what types of activities do not constitute republication. The court stated:

[Replication must at least involve an “affirmative act”]. Statements posted to a generally accessible website are not republished by conduct such as: (a) “a third party’s posting the statement elsewhere on the internet;” (b) “passively maintaining the website to which the defamatory statement is posted;” (c) “failing to remove a statement from a website after receiving notice of its falsity;” (d) “adding an unrelated story to the web page that hosts the allegedly defamatory statement;” (e) “creating hypertext links to previously published statements;” (f) “revising other information at the URL at which the allegedly defamatory statement is found, but leaving the statement itself intact;” (g) “updating a website’s user interface to give visitors additional avenues to access the allegedly defamatory statements;” and, (h) “changing the URL at which the allegedly defamatory statement was posted (i.e., posting the statement verbatim to a new URL).”

Finally, in September 2015, a court in Delaware observed that hyperlinking alone does not constitute republication of defamatory material, and in November 2015, a Pennsylvania court held that the act of posting a link to an allegedly defamatory website with a “like” designation on a Facebook page does not constitute republication to support a cause of action for defamation.

Conclusion

At present, no reported decision from a Florida state court has addressed whether a hyperlink can serve as the basis for a defamation or trade libel claim under Florida law. However, the overwhelming majority of courts conclude that no Florida authority supports the proposition that providing links to statements already published, without more, republishes those statements. According to the court, the grant the defendant’s motion for summary judgment on the defamation claims.

2 Techterms.com, Hyperlink, http://techterms.com/definition/hyperlink ("A hyperlink is a word, phrase, or image that you can click on to jump to a new document or a new section within the current document. Hyperlinks are found in nearly all [web] pages, allowing users to click their way from page to page. Basically, hyperlinks allow people to browse information at hyperspeed.")
3 Michigan Tech, Five Ways to Improve Your Site’s Ranking (SEO), http://www.mtu.edu/umserv/services/web/seo
6 See Jews for Jesus, Inc., 997 So. 2d at 1105-1106 (citing Restatement (Second) of Torts §§558B, 580A-580B).
8 See id. at *11 and 5.
9 See id.
10 See id. at *4-5.
11 See id.
12 Salyer, 701 F. Supp. 2d at 914.
13 See id.
14 See id.
15 See id. at 916 (emphasis in original) (citing Davis v. Mitam, 347 B.R. 607, 611 (W.D. Ky. 2006); Kleen v. Biben, 69 N.E.2d 692 (N.Y. 1946); Firth, 775 N.E.2d at 466-467).