

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-010723

01/20/2006

HONORABLE PAUL J. MCMURDIE

CLERK OF THE COURT
C.I. Miller
Deputy

FILED: 01/25/2006

TASER INTERNATIONAL INC

BARRY D HALPERN

v.

GANNETT CO INC, et al.

PETER KOZINETS

HEARING MINUTE ENTRY

11:33 a.m. This is the time set for hearing Defendant Gannett's Motion for Summary Judgment and Plaintiff's Motion for Partial Summary Judgment. Plaintiff is represented by counsel, Barry Halpern and Andrew Halaby. Defendants are represented by Peter Kozinets, David Bodney, and Karen Hartman.

Monica Hill, Court Reporter, is present.

Argument is heard.

IT IS ORDERED taking the above-noted motions under advisement.

12:25 p.m. Hearing concludes.

* * *

LATER:

The court has before it Defendants' motion for summary judgment, Plaintiff's response and cross-motion for summary judgment, Defendants' response and reply, and Plaintiff's reply. The court has considered the pleadings, the statements of fact and attached exhibits, and the oral argument of counsel. Based on the following analysis, the court grants Defendants' motion for summary judgment.

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Motion for summary judgment in defamation cases

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the United States Supreme Court defined the process of summary judgment screening for actual malice in a constitutional defamation case. The Supreme Court held that "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson*, 477 U.S. at 254; *Scottsdale Publishing, Inc. v. Superior Court*, 159 Ariz. 72, 83 (App., 1988). The court contrasted weighing the evidence to "determine the truth of the matter," a jury function, with screening the evidence to determine "whether there is a genuine issue for trial," a judicial function. 477 U.S. at 249; *Scottsdale Publishing, supra*. The court concluded:

Consequently, where the *New York Times* "clear and convincing" evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

477 U.S. at 255-56; *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 485-86 (1986); *Scottsdale Publishing, Inc. v. Superior Court*, 159 Ariz. at 83; *Heuisler v. Phoenix Newspapers, Inc.*, 168 Ariz. 278, 281 (App., 1991). The court will apply this standard in ruling on the competing motions.

Is Plaintiff a Public Figure?

The first amendment has been interpreted since *New York Times v. Sullivan*, 376 U.S. 254 (1964) to extend to journalists a wider margin of error in reporting about public figures than in reporting about private figures. In a libel action arising from a publication addressing a matter of public concern, a private figure may recover compensatory damages upon proof by preponderant evidence that he has been negligently defamed. *Dombey*, 150 Ariz. at 481; *Scottsdale Publishing*, 159 Ariz. at 75. A public figure, by contrast, "may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *Scottsdale Publishing*, 159 Ariz. at 75. Proving knowledge of falsity or reckless disregard for truth is defined in legal shorthand as proving "actual malice." *New York Times v. Sullivan*, 376 U.S. at 279; *Scottsdale Publishing*. Proof of actual malice requires clear and convincing evidence that permits the "conclusion that the defendant in fact entertained serious

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doubts as to the truth of his publication.” *Dombey*, 150 Ariz. at 487 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731-32 (1968)); *Heuisler*, 168 Ariz. at 281.

There are several factors a court must consider in determining if someone is a public figure. An individual may become a public figure if he "thrust[s] himself or his views into public controversy to influence others." *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). However, the media cannot create a public figure defense by raising an issue and naming the plaintiff. *Wolston v. Reader's Digest*, 443 U.S. 157, 167-68 (1979). As the Arizona Supreme Court has noted, the simple fact that events attract media attention "is not conclusive of the public-figure issue." *Dombey*, 150 Ariz. at 483. The issue revolves around whether the figure was drawn into the controversy against its will. *Wolston* 443 U.S. at 168-69, *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Dombey*, 150 Ariz. at 483-84.

Another factor to consider in determining public figure status is whether the individual's position with respect to matters of public concern gives them access to the media on a regular and continuing basis. *Hutchinson v. Proxmire*, 443 U.S. at 135; *Dombey*, 150 Ariz. at 483. Those who have such access possess the means to preserve their reputations by rebutting the charges made against them.

Also, the cases indicate that doing business with the government, being swept up in a controversy over an issue of public interest or concern, being named in articles creating a public controversy, and defending oneself against charges leveled in the media are all factors to consider in deciding if a private entity has transformed itself into a public one. *Dombey*, 150 Ariz. at 485 (one who engages in primarily public activities "cannot complain that the spotlight eventually turned on him.")

Dombey is particularly informative. *Dombey* sought, received, accepted and struggled to keep appointments as the designated insurance agent of record for a county and administrator of deferred compensation programs for its employees. While he was not employed by and received no direct benefits from the public body, he did receive significant and valuable benefits because of his position. He made recommendations resulting in substantial expenditures from the public for health and life insurance programs and of private funds obtained by payroll deductions from public employees for the deferred compensation program. *Dombey*, 150 Ariz. at 484.

The Arizona Supreme Court concluded that by assuming the position that he held, *Dombey* invited public scrutiny and should have expected that the manner in which he performed his duties would be a legitimate matter of public concern, exposing him to public and media attention. *Dombey*, 150 Ariz. at 484. The court cautioned, however, that "not . . . every provider of goods and services to the government becomes a public figure." *Dombey*, 150 Ariz. at 484. The court noted that on the continuum, those that provide more technical and substantive goods would be held to be public figures.

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We believe that no bright line can be drawn. A person who sells legal pads to the judicial department may legitimately expect to retain almost complete anonymity. Those responsible for providing rockets for the space program may not legitimately enjoy the same expectations. Dombey is at neither pole, but we believe that by assuming the positions of agent of record and administrator for the deferred compensation plans, he surrendered any legitimate expectation of anonymity with regard to the manner in which he performed in his positions, his relationship with executives of the governmental agencies and the other matters with which the articles were concerned.

Dombey, 150 Ariz. at 484. *See also, McDowell v. Paiewonsky*, 769 F.2d 942 (3rd Cir.1985) (an architect who occasionally worked on public building projects had undertaken "a course of conduct" that invited attention and scrutiny making him a public figure even though he neither sought nor desired public attention); *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C.Cir.1985) (air traffic controller was public figure with regard to public controversy over crash which occurred while he was on duty); *Kaufman v. Fidelity Federal Savings & Loan Assn.*, 140 Cal.App.3d 913, 189 Cal.Rptr. 818 (1983) (bank president who sought to influence governmental officials in charge of zoning was a public figure).

The court finds that Plaintiff "can be considered to have voluntarily assumed a position that invited attention." *McDowell v. Paiewonsky*, 769 F.2d at 950. Plaintiff is the sole manufacturer of a device marketed as an alternative method of force to be used by law enforcement and the military. (Exhibit 30 to Defendant's reply in support of its motion for summary judgment—TR at 16-17.) Nearly 98-99 percent of Plaintiff's business is to these public entities. (*Id.* at 45.) Given the large expenditures of public monies by law enforcement for Plaintiff's products, the fact that Plaintiff is probably the only provider of such equipment, that Plaintiff has more than adequate access to the media, that law enforcement and the military are subject to public attention and scrutiny, the court finds that Plaintiff qualifies as a public figure. Plaintiff has "assume[d] special prominence in the resolution of [a] public question." *Dameron*, 779 F.2d at 742; *Dombey*, 150 Ariz. at 484-5 ("Whatever requirement there might be to 'thrust' oneself into a public controversy . . . [is] satisfied by . . . [one's] voluntary participation in activity calculated to lead to public scrutiny."); *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 343 (1989) ("It is difficult to conceive of an area of greater public interest than law enforcement."); *Coronado Credit Union v. KOAT Television, Inc.*, 656 P.2d 896, 903-04 (N.M.App., 1982) ("corporations that have the requisite level of dealings with government agencies may be 'public figures' for that reason alone.")

The Allegedly Defamatory Publication

On Friday, June 3, 2005, USA Today published an article regarding schools around the country restricting the use of stun guns on campuses. (Exhibit 1—Defendants' motion for summary judgment.) In the front-page article, there was a tag line to page 13A regarding "Taser packs punch." The sidebar on page 13 had four pictures and approximately 5 inches of print. (Exhibit

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2—Defendants’ motion for summary judgment.) The four pictures were of a taser (Plaintiff’s stun gun), a lightening strike, an electric chair, and a New York City’s subway train. Under each picture the paper listed the amps for the average current of the respective items. The taser was listed between 2,100—3,600; the lightning strike between 10,000—100,000; the electric chair between 6—20; and the third rail in the New Your City subway between 4,000—9,000. (*Id.*)

The accompanying text read as follows:

The Taser is relatively safe compared with other objects that can transmit electricity to humans, says Vincent Amuso, Associate head of electrical engineering at the Rochester Institute of Technology. What makes the Taser less harmful is the short length of time it is held against the body, he says.

The electric chair uses much less current—less than 1% of that from a Taser—but that current is sustained, Amuso says.

Some people think of electricity in terms of volts, but voltage is actually a measure of how much electricity can be moved. Think of it as someone pushing a swing: the voltage is the power of the push.

Amperes, or amps, determine the strength of the current and how much damage it can do.

(*Id.*)

The parties do not dispute that the sidebar contained factual inaccuracies. The taser does not have between 2,100 and 3,600 amps as reported, nor does an electric chair use less than 1% of that from a taser. The listed amps for the taser was in fact 1,000,000 times greater than it should have been.

On the day of publication, Plaintiff contacted USA Today and complained about the inaccuracies. Plaintiff issued a press release complaining about the error. On Monday, June 6, 2005, the next day of publication, USA Today published a correction under a picture of a taser as follows:

Due to a mathematical error, a graphic Friday significantly over-stated the amount of electricity delivered by a Taser. The correct numbers are .0021 to .0036 amperes—a minuscule fraction of the electricity used by subway trains and the electric chair. The electricity produced by a Taser is less than that delivered by electroshock therapy used to treat pain and depression.

(Exhibit 3—Defendants’ motion for summary judgment.)

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The parties dispute whether the publication containing the inaccuracies was done with or without actual malice.

Has Plaintiff met his burden by coming forward with sufficient evidence to show the court that reasonable jurors could conclude by clear and convincing evidence that Defendants acted with actual malice?

The court recognizes the falsity of the information contained in the sidebar. The question then is has Plaintiff satisfied its burden of showing that there exists sufficient evidence that jurors could find that the Defendants either knowingly published the false information or that they entertained serious doubts as to the truth of the information, but proceeded in conscious disregard of such doubts. *St. Amant v. Thompson*, 390 U.S. at 731-32; *Dombey*, 150 Ariz. at 487; *Scottsdale Publishing*, 159 Ariz. at 83. The court finds that no jury applying the "clear and convincing" evidentiary standard could reasonably find actual malice from the evidence presented to the court.

Those responsible for the erroneous information in the contested publication deny that they did so with the requisite intent. (See Declaration of Melanie Eversley and Chris Fruitrich attached to the Motion for Summary judgment.) These declarations by those responsible for the publication are not, of course, conclusive. The elements of actual malice may be inferred from objective facts. *Bose v. Consumers Union*, 692 F.2d 189 (1st Cir.1982), aff'd 466 U.S. 485. The Arizona Supreme Court stated in *Selby v. Savard*, 134 Ariz. 222, 225 (1982), "[A] defamation defendant cannot escape liability merely by alleging subjective belief in the truth of the matter published. '[P]roof of the necessary state of mind could be in the form of objective circumstances from which the ultimate fact could be inferred'" *Scottsdale Publishing*, 159 Ariz. at 84. The determination whether a defendant "in fact entertained serious doubts as to the truth of the statement may be proved by inference, as it would be rare for a defendant to admit such doubts." *Bose*, 692 F.2d at 196; *Scottsdale Publishing*.

The objective evidence does not however call into question the statements of those responsible. Ms. Eversley claims that on June 2, 2005 she was assigned to research and write an illustrative sidebar and accompanying graphic comparing a taser to known emitters of electricity. (Eversley declaration at ¶ 2.) Eversley went to Plaintiff's website to obtain the electricity emitted by Taser weapons. On the website, Plaintiff listed the amperage of the taser as "2.1 milliamps to 3.6 milliamps." (*Id.* at ¶ 4.) Eversley then obtained the emission of electricity of the electric chair, lightening and the third rail of New York's subway. Eversley then sought comment from electrical engineers about her information, and eventually spoke with Dr. Vincent Amuso, a Rochester Institute of Technology Associate Professor of Electrical Engineering. Eversley then put the amperage information she had collected into uniform units by using an online measurement conversion tool. (*Id.* at ¶ 8.) Eversley claims that she believed "milliamps" was "million amps" and entered the wrong information into the conversion table thereby getting the information that ultimately was published. (*Id.*)

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Eversley claims that she then contacted Dr. Amuso again to discuss the amperage figures she had obtained, “including the 2,100 to 3,600 ampere range for Taser weapons.” (*Id.* at ¶ 10.) Dr. Amuso did not inform Eversley that her amperage range for the taser was erroneous, but explained that, even in view of the high amperage, Taser weapons do not cause damage to humans commensurate with the other listed items. (*Id.*) Given her conversations with Dr. Amuso, Eversley claims that she did not “entertain any doubt that the information in the Sidebar was true.” (*Id.* at ¶ 13.)

Mr. Fruitrich, the graphics editor, stated that he assigned the graphic to Eversley to “research and write an illustrative sidebar and accompanying graphic comparing Taser weapons to common emitters of electricity.” (Fruitrich Declaration at ¶ 2.) Fruitrich states that Eversley told him that she had discussed her research with an electrical engineering professor at Rochester Institute of Technology. (*Id.* at ¶ 4.) Fruitrich received the finished sidebar by e-mail and did not detect any errors. (*Id.* at ¶ 6.) Fruitrich claims that he did not “entertain any doubt that the information in the Sidebar was true. Indeed, my knowledge of Ms. Eversley’s conversations with this expert gave me additional confidence that the information in the Sidebar was accurate.” (*Id.* at ¶ 6.)

Ms. Eversley claims are supported in part by an exhibit offered by Plaintiff. Plaintiff has submitted an e-mail sent out by Ms. Eversley on June 2, to a Dr. Currie at Georgetown. In the e-mail, Eversley indicates the project she is working on, asks to consult with the Doctor, and tells the Doctor she needs to do so quickly as she is facing a deadline. (Exhibit 16—Plaintiff’s response.)

Ms. Eversley’s claims are likewise supported by the declaration of Dr. Amuso. Dr. Amuso confirms that he spoke with Eversley twice on June 2. (Amuso Declaration at ¶ 2—Defendant’s reply.) During the first phone call Amuso states that he told Eversley to obtain the amperage of the various capacitors of electricity. (*Id.* at ¶ 3.) Eversley then called back and told the Doctor the amperage values for the four sources of electrical energy and included in those numbers her computation of the Taser at 2,100 to 3,600 amps. (*Id.* at ¶ 5.) The Doctor declares that “the numbers Ms. Eversley supplied did not seem incorrect, because power is relative to resistance and involves more than amperage alone.” (*Id.* at ¶ 5.) Later, on June 2, the Doctor visited the Taser website and performed his own calculations, discovering that the figures Eversley had given him were wrong. (*Id.* at ¶ 6.) Doctor Amuso did not let Eversley know what he had discovered. (*Id.* at ¶ 7.) Doctor Amuso opines:

I am informed and believe that Ms. Eversley obtained inaccurate amperage figures for Taser devices by mistaking milliamps for kilo amps. I would not characterize her error as egregious or willful. Rather, it was the type of computational error that simply happens from time to time. Based on my conversations with Ms. Eversley, I detected absolutely nothing to suggest that she intended to misstate any information about, or lessen the reputation of, Taser.

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(*Id.* at ¶ 8.)

Plaintiff claims that Defendants had to know the information was false because representatives of the company had met with the editorial board and given the correct information about the amperage of the weapon earlier. However, Plaintiff has offered no proof that the two employees responsible for the error had the information. Moreover, there is no dispute that information obtained from the website by Eversley was incorrect. The error apparently occurred when Eversley attempted to put the information she had in a constant format.

There has been no evidence presented that the reporter and editor in question had an "obvious reason to doubt . . . the accuracy of" the numbers. *St. Amant*, 390 U.S. at 732; *Scottsdale Publishing*, 159 Ariz. at 85. In fact, the uncontroverted evidence is that the numbers were presented to an expert in the field, that expert did not have obvious reason to doubt their accuracy, and did not inform the reporter that they were in error. Also, given the fact that USA Today published an immediate retraction when the mistake was brought to their attention lends support to Defendants' claim that it was an accident. *Heuisler*, 168 Ariz. at 283. Plaintiff has failed "to present 'significant probative evidence' which would support a finding that defendant published even though it entertained a subjective doubt of truth." *Dombey*, 150 Ariz. at 488 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986) (quoting *Bose Corp.*, 466 U.S. at 512.))

Plaintiff claims that under the theory of agency, if the news editors knew of the correct amperage of the taser, then "the principal is liable if it knows the falsity and has reason to know the agent would make the statement." The cases cited by Plaintiff have no applicability to the issue at hand—a defamation action. As noted by Defendants, courts that have addressed imputed knowledge or agency claims under a defamation analysis have rejected it. *See Holbrook v. Harman Auto., Inc.*, 58 P.3d 222, 225 (6th Cir., 1995) (court focused solely on the state of mind of the employees responsible for the publication.)

Plaintiff also claims that the USA Today's investigation was grossly inadequate. However, the Arizona Supreme Court has rejected similar arguments noting that "failure to investigate, sloppy investigation, poor reporting practice and the like are not per se actual malice; 'inaccuracy . . . is commonplace in the forum of robust debate to which the *New York Times* rule applies.'" *Dombey*, 150 Ariz. at 488 (quoting *Bose Corp.* 466 U.S. at 513); *Heuisler*, 168 Ariz. at 283. The court finds that a reporter that shows her work to an expert in the field for comment prior to publication is not acting in a grossly inadequate manner.

Plaintiff also argues that malice can be inferred from other articles published by Defendants about Plaintiff. The court has reviewed the articles submitted. The articles may indicate that Defendants have disagreements with various policies and practices with Plaintiff and those who use Plaintiff's weapons. The articles do not appear to bear ill will toward Plaintiff. (See also, Exhibit 30, Tran. at 30—Defendants' reply.) Nor do they support the

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inference that the employees in question manufactured the mistake in question. Moreover, even if the court were to assume that the submitted articles did show some type of “bad motives or personal ill-will,” that would not establish actual malice. *Heuisler*, 168 Ariz. at 282.

Plaintiff, having failed to overcome the *New York Times* test to protect Defendants’ First Amendment rights, cannot proceed on the remaining claims. Therefore,

IT IS ORDERED granting Defendants’ motion for summary judgment and denying Plaintiff’s cross-motion for partial summary judgment.

The court also has before it Defendants’ motion for Rule 11 sanctions and award of attorneys’ fees as it relates to the dismissal of count 1. The court has considered the motion, response and reply; and reviewed the pleadings and minute entry dismissing count 1. The court finds that count 1 was clearly unjustified and warrants attorneys’ fees under Rule 11. Therefore,

IT IS ORDERED granting Defendants’ motion for attorneys’ fees as it relates to the dismissal of count 1. Defendants shall file a proposed order and a *China Doll* affidavit **by February 6, 2006**. Plaintiff may file a response to the proposed order **by February 20, 2006**. Any reply should be filed **no later than February 27, 2006**.