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PUBLISHED "WEB-GRAB" CAN SUPPORT A STATE LAW ACTION FOR DEFAMATION AND FALSE LIGHT

[Franklin Prescriptions, Inc. v. The New York Times Co., 2003 U.S. Dist. LEXIS 10617 (E.D. Pa June 19, 2003)]

Franklin is a pharmacy that has been in operation for over thirty-years.<sup>1</sup> It is a solely owned pharmacy located in Philadelphia that has developed a niche market in the field of infertility drugs through reputation and patient referrals.<sup>2</sup> While Franklin does have an information only website, it does not engage in extensive advertising nor does it sell drugs over the Internet.<sup>3</sup>

On October 25, 2000 the NY Times published an article about unscrupulous websites selling infertility drugs.<sup>4</sup> The initial paragraphs of the article dealt with the benefits that the Internet can offer.<sup>5</sup> However, the bulk of the article dealt with the serious health risks and dangers of buying e-medicines from unscrupulous on-line pharmacies.<sup>6</sup> Although the article did not reference the Franklin Pharmacy within its text, it used an edited web-grab of the Franklin webpage for the illustration accompanying the article.<sup>7</sup> Franklin's owner became aware of the article when he received a phone call from a friend.<sup>8</sup> After receiving a complaint from Franklin, the Times subsequently issued a correction on of the Article.<sup>9</sup>

Choice of Law

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The first issue the court dealt with was choice of law.<sup>10</sup> The Times argued that New York law should be applied because New York is the principal place of business of the Times.<sup>11</sup> Franklin argued that the applicable law should be Pennsylvania because that is where it suffered the greatest injury to its reputation.<sup>12</sup> The court acknowledged that a valid claim existed for applying either of the states' substantive law.<sup>13</sup> Pennsylvania's choice of law rules require that the court first determine whether the laws of the states conflict. If a conflict exists, then the court determines which state has "the most significant contacts or relationships with a particular issue."<sup>14</sup>

The appropriate standard of fault in a defamation case differs between New York and Pennsylvania. For media statements about a legitimate public concern affecting a private figure, New York requires a showing that the defendant acted in a grossly irresponsible manner.<sup>15</sup> Under Pennsylvania law, plaintiff is only required to show negligence.<sup>16</sup>

Because a conflict exists between New York and Pennsylvania law regarding the standard of fault, under Pennsylvania choice of law rules, the court then applies the law of the state with the greatest interest. In this case, the court concluded that a party's interest in their reputation is "a valuable asset in one's business or profession" therefore Pennsylvania has the greatest concern in vindicating its citizen's good name.<sup>17</sup>

#### The Defamation Claim

The court then turned to a discussion of the state law claim for defamation. It noted that in defamation cases there are two inquiries: "first, is there an infringement of a state protected right to be free from a tortious invasion of one's reputation; and second, even if there is, does the First Amendment nonetheless preclude recovery?"<sup>18</sup> Under Pennsylvania law there are seven elements that must be shown for defamation to occur. These are: "(1) the defamatory nature of the communication; (2) publication by the defendant; (3) the application of the communication to the plaintiff; (4) a recipient's understanding of the communication's defamatory meaning; (5) a recipient's understanding



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that the communication was intended to apply to plaintiff; (6) special harm resulting to the plaintiff from its publication; and (7) abuse of a conditionally privileged occasion."<sup>19</sup>

The Times first argued that Franklin could not satisfy the first requirement that the communication was defamatory in nature.<sup>20</sup> Although the court acknowledged that an innocent interpretation of the article was possible, it also noted that an alternative defamatory meaning existed as well.<sup>21</sup> "The test to determine whether the communication is defamatory takes into consideration 'the effect the communication is fairly calculated to produce, the impression it would naturally engender in the minds of the average person among whom it is intended to circulate.'"<sup>22</sup> Thus, where there is an innocent interpretation along with an alternative defamatory meaning, as there is here, it is appropriate for the issue to proceed to the jury to act as a fact finder.<sup>23</sup>

The Times then argued that Franklin could not establish the third prong, that is, that the communication applied to Franklin.<sup>24</sup> Because the article did not mention Franklin by name, but rather used an edited web grab as its illustration, the case becomes a case of defamation by implication.<sup>25</sup> Under Pennsylvania law, "if the defendant juxtaposes a series of facts so as to imply a defamatory connection between them, or otherwise creates a defamatory implication . . . he may be held responsible for the defamatory implication."<sup>26</sup> The court opined that in its view an ordinary reader of the article could infer that the publication referred to Franklin and that Franklin engaged in the unscrupulous conduct described in the article.<sup>27</sup>

The court concluded that there was a potential infringement of the state protected right to be free from a tortious invasion of one's reputation.

#### The Free Speech Defense

As a defense, the Times asserted that the First Amendment protected its right to free speech and that therefore recovery would be precluded in this case.<sup>28</sup> The First Amendment defense turns on the public vs. private



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distinction and whether Franklin can be considered a limited purpose public figure.

In the Third Circuit determining whether a plaintiff is a limited purpose public figure involves a two prong inquiry. First, the court determines whether the communication involves a public controversy and then it determines the nature and extent of plaintiff's involvement within the controversy.<sup>29</sup> Although the Times argued that, by advertising over the Internet, Franklin had placed itself in the controversy, the court was unpersuaded. The court noted that Franklin was a neutral party that had only posted a Website for information analogous to placing an advertisement in a telephone directory.<sup>30</sup> Further the court noted that Franklin had a limited involvement with the Internet which did not rise to the level of making it a public figure<sup>31</sup> The court distinguished Franklin's activities from the leading case of *Steaks Unlimited, Inc. v. Deaner*<sup>32</sup>. In *Steaks* the corporation had engaged in an advertising blitz.<sup>33</sup> The controversy in *Steaks* turned on whether *Steaks'* advertising was misleading or deceptive. The *Steaks* court concluded that *Steaks* had put itself in the Pittsburgh area and found that it was a public figure for the purpose of the controversy.<sup>34</sup> The court contrasted this case by noting that Franklin did not place itself in any controversy or engage in an advertising blitz, therefore the court was not persuaded that Franklin had attained public figure status.<sup>35</sup>

Even if Franklin were a limited purpose public figure, the court noted that summary judgment would not be appropriate because Franklin would only be required to show actual malice which, in this context, includes "publishing material knowing its falsehood or with reckless disregard for the truth."<sup>36</sup> The court concluded that Franklin had met its burden for summary judgment by showing that there was a genuine issue of material fact as to whether the Times published the article with the web-grab with a reckless disregard for its falsity.<sup>37</sup>

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<sup>1</sup> 2003 U.S. Dist. LEXIS 10617 at \*1.



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<sup>2</sup> *Id.*  
<sup>3</sup> *Id.* at \*2.  
<sup>4</sup> *Id.*  
<sup>5</sup> *Id.*  
<sup>6</sup> *Id.* at \*3.  
<sup>7</sup> *Id.*  
<sup>8</sup> *Id.* at \*5.  
<sup>9</sup> *Id.*  
<sup>10</sup> *Id.* at \*8.  
<sup>11</sup> *Id.*  
<sup>12</sup> *Id.* at \*9.  
<sup>13</sup> *Id.*  
<sup>14</sup> *Id.* (citing *Wilson v. Slatalla*, 970 F.Supp. 405, 413 (E.D. Pa. 1997)).  
<sup>15</sup> *Id.* at \*10.  
<sup>16</sup> *Id.*  
<sup>17</sup> *Id.* (quoting *Fitzpatrick v. Milky Way Prods., Inc.*, 537 F.Supp. 165, 171 (E.D. Pa. 1982)).  
<sup>18</sup> *Id.* at \*16.  
<sup>19</sup> *Id.*  
<sup>20</sup> *Id.* at \*17.  
<sup>21</sup> *Id.* at \*19.  
<sup>22</sup> *Id.* at \*17 (citing *Osby v. A&E Tel. Networks*, 1997 U.S. Dist. LEXIS 8656 at \*4 (E.D. Pa. 1997)).  
<sup>23</sup> *Id.* (citing *Tucker v. Merek & Co., Inc.*, 2002 U.S. Dist. LEXIS 23062 (E.D. Pa. 2002)).  
<sup>24</sup> *Id.* at \*17.  
<sup>25</sup> *Id.* at \*19.  
<sup>26</sup> *Id.* (quoting *Dunlap v. Philadelphia Newspapers, Inc.* 301 Pa. Super 475, 483).  
<sup>27</sup> *Id.* at \*20.  
<sup>28</sup> *Id.* at \*21.  
<sup>29</sup> *Id.* at \*23.  
<sup>30</sup> *Id.* at \*26.  
<sup>31</sup> *Id.* at \*27.  
<sup>32</sup> 623 F.2d 264 (3<sup>rd</sup> Cir. 1980).  
<sup>33</sup> *Id.* at 273.  
<sup>34</sup> *Id.*  
<sup>35</sup> *Franklin* at \*26.  
<sup>36</sup> *Id.* at \*28 (citing *New York Times v. Sullivan* 376 U.S. at 254).  
<sup>37</sup> *Id.* at \*29.