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Failure To Refute Should Be A Defamation Defense

By **Michael Dore** (March 25, 2021, 4:13 PM EDT)

Michael Dore

Rep. Devin Nunes, R-Calif., has asserted that he has told colleagues, "We should not be talking to the mainstream media." He has then followed his own advice — even in response to requests for comment about allegations he later claims are defamatory.

As Nunes told CNN when it asked him for a comment about a story over which he later sued CNN for more than $435 million, "I don't talk to you in this lifetime or the next lifetime." But should a plaintiff — or at least a public figure plaintiff — be able to sue a journalist for defamation after ignoring an opportunity the journalist gave him to correct purported falsehoods and set the record straight?

Last month, when the U.S. District Court for the Southern District of New York dismissed Nunes' case against CNN, it did not reach this issue. But Nunes' refusal to engage with CNN still cost him. There were many dots to connect, but the court held that the central failure of Nunes' case was that he had not contacted the network to seek a retraction.

The court found that California law applied, and California law requires defamation plaintiffs suing certain news publishers to seek a prompt retraction or be limited in what damages they can get. Nunes never contacted CNN to specify which statements he claimed were false, or to seek a retraction.

Having failed to seek a retraction, Nunes then failed to allege he was entitled to the limited damages that were available. Because Nunes failed to adequately allege that he had suffered legally available damages, the court dismissed his case.

The application of California law to the CNN case had a significant bearing on the result. California's protections for free speech are among the strongest in the nation. In addition to the retraction statute that ended up barring Nunes' claim, they include, for example, a broad anti-SLAPP statute that gives defendants an early opportunity to pause time-consuming and expensive discovery to file a motion to dismiss a plaintiff's strategic lawsuit against public participation.

But Nunes — who lives in California and represents California constituents — filed his suit 3,000 miles away in Virginia, before CNN had it transferred to New York, and argued that the laws of Virginia, New York, or even the District of Columbia applied to the case, but not the law of California.

The determination of which state's law applies to a defamation claim often makes a significant difference in how the claim is resolved. Defamation defendants are at the mercy of a patchwork of state laws that encourage plaintiffs to choose a forum with limited speech protections where their defamation claims are more likely to succeed — or at least where the plaintiff will not have to cover the defendant's attorneys' fees if they fail.

But a universally applicable defense based on the plaintiff's refusal to refute an alleged defamatory statement could cut through the significant variations in speech protections from state to state.

The U.S. Supreme Court held almost 50 years ago in New York Times Co. v. Sullivan that a public figure must show that an allegedly defamatory statement was made with "actual malice" — that is, knowledge that it was false, or with reckless disregard of whether it was false or not — no matter which court he files it in.

The actual malice standard is a higher bar than applies to a plaintiff who is a private person, and the Supreme Court has deemed it a constitutional requirement; no state defamation law can require less. But if a public figure refuses to rebut the claims to be included in an article or broadcast, it is hard to see how the journalist is acting in reckless disregard of whether a statement is false, let alone knows it to be false. The person best situated to refute the statement refuses to do so.

If that person then sues the journalist for defamation, the doctrine of consent could be employed as a powerful defense. It is one of the most widely recognized defenses to the publication of defamatory matter, and courts in the U.S. have applied it for well over a century.

Under the consent doctrine, if you repeat a purportedly defamatory statement at the plaintiff's prompting, that repetition cannot be the basis for a defamation claim. The plaintiff — whether through words or acts, or silence and inaction — is giving her apparent consent for you to make the statement, which justifies you assuming you can say it.

Courts have not considered whether the consent doctrine, or a variation of it, should apply when a defamation plaintiff has refused an opportunity to comment on and rebut a purportedly defamatory statement before it was published. But it is an argument worth making.

One of the primary purposes of the consent doctrine in defamation law is to prevent a party from laying the foundation of a lawsuit for his own pecuniary gain. If a subject ignores an opportunity to rebut a statement that has him subsequently claiming significant damages, the lawsuit smacks of a setup.

The subject's refusal to comment may be evidence that the purportedly false statement is true. More important, it should conclusively establish that the public figure plaintiff cannot meet his burden of showing that the journalist acted with actual malice in publishing a statement that the plaintiff would not even address, let alone deny.

Creative plaintiffs may try to muddy the waters with their allegations, to manufacture a dispute about whether a journalist acted in reckless disregard of the truth. But journalists still would be well-served to document in their articles what they asked their subjects to comment on.

Even if the subject of an article has assured a journalist's peers that she will not speak to them, a diligent effort to seek a comment or denial could — and should — show there was no actual malice in publishing the statements. Depending on what the plaintiff has alleged in her complaint, that might be enough to

dismiss the case at its earliest stage, no matter which state's law applies. That serves not just the journalist, but all of us who depend on a free press.

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Disclosure: The author previously represented The McClatchy Co. in Devin Nunes v. The McClatchy Co. et al., a defamation suit filed by Devin Nunes in the Circuit Court of Albemarle County, Virginia.

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