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RECENT DEVELOPMENT

SELEY-RADTKE V. HOSMANE: THE STANDARD OF PROOF REQUIREMENT IN A PURELY PRIVATE DEFAMATION ACTION FOR AN INDIVIDUAL ASSERTING A COMMON LAW CONDITIONAL PRIVILEGE IS PREPONDERANCE OF THE EVIDENCE.

By: Makeda Curbeam

The Court of Appeals of Maryland held that a party seeking to overcome a common law conditional privilege in a purely private defamation suit must do so by a preponderance of the evidence. *Seley-Radtke v. Hosmane*, 450 Md. 468, 474, 149 A.3d 573, 576 (2016). The court also held that evidentiary issues not addressed by the court of special appeals are not subject to review by the court of appeals. *Id.* at 510, 149 A.3d at 598 (citing Md. R. 8-131(b)(1)). Further, the court held that prejudicial evidence irrelevant to a claim is not admissible at trial. *Seley-Radtke*, 450 Md. at 513-14, 149 Md. at 600.

Katherine Seley-Radtke (“Seley-Radtke”) and Ramachandra Hosmane (“Hosmane”) were professors at the University of Maryland, Baltimore County (“UMBC”). Following allegations that Hosmane sexually assaulted one of his graduate students, Brahma Shukla (“Shukla”), UMBC officials conducted an investigation and determined that Hosmane violated UMBC’s sexual harassment policy. On January 1, 2010, Hosmane resigned from his position on the condition that the findings from the UMBC investigation would not be publicized. Later, Hosmane and Shukla entered into a settlement agreement in which Hosmane paid Shukla \$10,000 in return for Shukla dropping any civil and criminal claims against Hosmane.

On December 10, 2010, Hosmane filed a complaint against UMBC in the Circuit Court for Baltimore County. While this action was pending, Hosmane submitted a Maryland Public Information Act (“MPIA”) request to obtain various documents from UMBC. As a result of this request, Hosmane received several documents, including emails authored and sent by Seley-Radtke stating that Hosmane stole documents from the chemistry department and that he was a “nutcase,” among other things. On July 6, 2012, Hosmane filed a complaint against Seley-Radtke in the Circuit Court for Baltimore County asserting that Seley-Radtke made false statements about Hosmane in the emails. On April 4, 2013, Hosmane filed an amended complaint, adding UMBC and the State as defendants, and the circuit court subsequently consolidated the cases.

On April 29, 2014, Hosmane’s case against UMBC and Seley-Radtke proceeded to a jury trial. Prior to trial, Hosmane filed a motion in limine to suppress the unredacted emails and testimony relating to the settlement agreement, which was denied. At the close of trial, Seley-Radtke argued that

she had a common law conditional privilege, and the circuit court agreed, ruling that she was entitled to this privilege. Hosmane requested that the judge instruct the jury that the standard for overcoming such a privilege is by a preponderance of the evidence. However, the judge instructed the jury that Hosmane must prove his defamation action by clear and convincing evidence. The jury found in favor of Seley-Radtke, and Hosmane timely appealed the decision.

On February 24, 2016, the Court of Special Appeals of Maryland reversed the decision of the lower court, holding that the court erred in instructing the jury on the proper standard of proof needed to overcome a conditional privilege. Seley-Radtke petitioned for a *writ of certiorari*, which the Court of Appeals of Maryland granted.

The Court of Appeals of Maryland began its analysis by examining both federal and state precedent regarding the standard of proof. *Seley-Radtke*, 450 Md. at 482-83, 149 A.3d at 581. In *New York Times Co. v. Sullivan*, the Supreme Court noted that a privilege existed for citizens to criticize the government and public officials. *Id.* at 483, 149 A.3d at 582 (citing *New York Times v. Sullivan*, 376 U.S. 254, 282 (1964)). A decade later, the Court held in *Gertz v. Robert Welch, Inc.*, that private individuals are distinguishable from public officials for purposes of defamation actions. *Seley-Radtke*, 450 Md. at 487, 149 A.3d at 584-85 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974)).

Following *Gertz*, the Court of Appeals of Maryland “substantially changed the Maryland common law regarding defamation actions.” *Seley-Radtke*, 450 Md. at 488, 149 A.3d at 585 (quoting *Telnikoff v. Matusevitch*, 347 Md. 561, 593, 702 A.2d 230, 246 (1997)). In *Jacron Sales Co. v. Sindorf*, the court adopted a preponderance of the evidence standard for establishing fault in purely private defamation actions. *Seley-Radtke*, 450 Md. at 488-91, 149 A.3d at 585-56 (citing *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 596-97, 350 A.2d 688, 697-98 (1976)).

Next, the court of appeals discussed common law conditional privileges. *Seley-Radtke*, 450 Md. at 491-92, 149 A.3d at 586-87. A common law conditional privilege allows for a defendant to escape liability for an actionable defamation claim if the statement advances issues that are greater than the plaintiff’s reputational interest. *Id.* at 492, 149 A.3d at 587 (citing *Marchesi v. Franchino*, 283 Md. 131, 135, 387 A.2d 1129, 1131 (1978)). However, such a privilege can be lost if the plaintiff can show that the defendant abused their privilege by knowingly making false statements. *Seley-Radtke*, 450 Md. at 493, 149 A.3d at 588 (citing *Piscatelli v. Van Smith*, 424 Md. 294, 307-08, 35 A.3d 1140, 1147-48 (2012)).

While the court of appeals has held that the applicable standard of proof in a purely private defamation action is by a preponderance of the evidence, it has never addressed the standard of proof for overcoming a common law conditional privilege. *Seley-Radtke*, 450 Md. at 496, 149 A.3d at 589. The court looked to other jurisdictions and found the preponderance of the evidence standard more compelling. *Id.* at 498-501, 149 A.3d at 590-93. In

this case, the court of appeals determined that the balance of protecting private individuals from defamation and utilizing common law conditional privilege is best served with a standard of preponderance of the evidence. *Id.* at 502-03, A.3d at 593.

The court of appeals then briefly turned to the issue of whether it could review evidentiary matters not addressed by the lower appellate court. *Seley-Radtke*, 450 Md. at 507-11, 149 A.3d at 596-99. Ultimately, it determined that such matters not addressed by the intermediate court are not preserved for review by the court of appeals. *Id.* at 510, 149 A.3d at 598. As to the evidentiary matters that were addressed by the court of special appeals, the court held that evidence is considered relevant if it helps to make the determination of an action more or less probable. *Id.* at 512, 149 A.3d at 599 (citing Md. R. 5-401). The court affirmed the intermediate court's guidance and found that the admission of the evidence at issue was highly prejudicial and not relevant to the defamation claims, and thus not admissible in trial. *Seley-Radtke*, 450 Md. at 513-14, 149 A.3d at 600.

The dissent argued that there should be a clear and convincing standard of evidence used to overcome a common law conditional privilege. *Seley-Radtke*, 450 Md. at 514-15, 149 A.3d at 600-01. The dissent considered that if it is determined that a conditional privilege exists, then there are inevitably public interests at stake. *Id.* at 514, 149 A.3d at 600. The dissent concluded that those who come forward to report wrongdoings should be rewarded with a higher standard, that is, a clear and convincing standard, to overcome the conditional privilege. *Id.* at 515, 149 A.3d at 601.

In *Seley-Radtke*, the Court of Appeals of Maryland held that a preponderance of the evidence standard is required to overcome a common law conditional privilege in a purely private defamation action. The court also held that it may not review issues not addressed by the lower courts and that prejudicial and irrelevant evidence is inadmissible. This decision reinforces the primary consideration when reviewing a purely private defamation action – the protection of private individuals. A preponderance of the evidence standard puts a lower burden on private individuals, who bear a greater risk of their reputation, career, and social life being ruined than a public official. In addition, Maryland practitioners should ensure that all evidentiary matters are addressed and preserved before the lower courts; otherwise the Court of Appeals of Maryland will not review them.