

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C. DELORES TUCKER and	:	CIVIL ACTION
WILLIAM TUCKER, her husband,	:	
Plaintiffs,	:	NO. 97-4717
	:	
v.	:	
	:	
RICHARD FISCHBEIN, as	:	
Co-Administrator of the	:	
ESTATE OF TUPAC SHAKUR; AFENI	:	
SHAKUR, as Co-Administratrix	:	
of the ESTATE OF TUPAC SHAKUR,	:	
Defendants.	:	

**MEMORANDUM**

BUCKWALTER, J.

January 29, 1999

Before the court is the motion of defendants Richard Fischbein and Afeni Shakur, as Co-Administrators of the Estate of Tupac Shakur, requesting the court to enter summary judgment on their behalf as to all counts set forth in plaintiffs' amended complaint.

All other defendants named in the amended complaint were dismissed by order of this court dated February 18, 1998.

The amended complaint seeks relief against the defendants for:

1. Intentional infliction of emotional distress (Count II);
2. Slander (Count III);

3. Invasion of Privacy (Count IV); and
4. Loss of consortium.

The essence of the claims against the present defendants according to the complaint arise from: (1) publication of the song entitled “Wonda Why They Call U Bitch”; (2) publication of the song entitled “How Do You Want It”; and (3) published statements allegedly made by defendant Fischbein following the commencement of this action concerning Mr. Tucker’s loss of consortium.

As to item (3), those alleged statements are the subject of another suit filed by plaintiffs against Richard Fischbein and other media defendants, and will be discussed in a memorandum opinion to be filed in 97-CV-6150. This present suit has been filed against Richard Fischbein in his representative capacity only.

I will deal in this memorandum with items (1) and (2) only.

With regard to item (1), I am struck initially by a statement in plaintiffs’ reply brief as follows: “Plaintiffs’ counsel, who has never listened to the lyrics, has been advised by the Tuckers’ private counsel and friend, Paul Waters, that he (Waters) purchased and listened to the CD as part of the original fact finding. Mr. Waters also requested his son-in-law, Wayne Fleming, to listen to the CD. According to Mr. Waters and Mr. Fleming, the gangsta rap lyrics are not nearly as clear and understandable as Appendixes 1 and 2 (Defendants’ version of the lyrics) would indicate. A copy of the CD

is being supplied as Plaintiffs' Ex. 3." (See p. 3, *Plaintiffs' Memorandum of Law Contra Defendants' Motion for Summary Judgment.*)

And yet, having never listened to the CD, having apparently understood that the lyrics were hard to understand, counsel for plaintiff nevertheless signed the amended complaint which represented that the CD contained specific lyrics. Most offensive is paragraph 31 of the amended complaint signed by Richard C. Angino, which states as follows:

Contained in the aforementioned recording entitled "Wonda Why They Call B" were lyrics stating "Got your legs up trying to get rich. Keep your head up and your legs closed Dear Ms. Delores Tucker" alluding to prostitution and tells why women are called bitches.

The reference to the lyrics in paragraph 31 is flat out wrong. In deposition testimony in reference to the above, the following exchange took place:

Q. So what has happened here is that whoever put this quotation together, has taken snippets of words from the actual lyrics, words that are separated by many, many verses and run them together, as if they're a continuous statement, right?

Angino: Absolutely.

Q. Do you have any idea who did that?

Angino: No, I honestly don't.

Q. Would you agree with me that whoever did that was engaged in a gross and deliberate misrepresentation of these lyrics?

Angino: Yes.  
(Angino 62:18-24; 63:1-10)

Later in that same deposition, Angino agrees that, “Exhibit Number 9, which is ‘All Eyez On Me’; ‘Wonda Why They Call U’, if that in and of itself existed, I would not find an actionable basis, let’s use that.”

It seems that this whole lawsuit may not have been necessary if someone had carefully reviewed the lyrics complained of accurately and in the context of the entire song in which they appeared.

Contrary to the outrageous misstatement of the lyrics in paragraph 31, and the erroneous reference to the supposed lyrics in some newspapers (see plaintiffs’ reply brief p. 3-4), the lyrics to the rap song, “Wonda Why They Call U Bitch”, printed in their entirety as I heard and understood them on the CD supplied by plaintiffs, can be viewed in their own way, as quite poignant, referring as they do to the almost certain self-destruction of a young woman whose own fatalistic choices lead to that tragic end.<sup>1</sup>

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1. “WONDA WHY THEY CALL U BITCH”

U wonda why they call u bitch, U wonda why they call u bitch  
U wonda why they call u bitch, U wonda why they call u bitch  
U wonda why they call u bitch, U wonda why they call u bitch

Look here Miss Thang, hate to salt yo game,  
but yous a money hungry woman and you need to change.  
In the locka room all the homies do is laugh,  
high fives cause anotha nigga played yo ass.  
It was said you was sleazy, even easy, sleep’n around for what you need.  
Say it’s yo thang, and you can shake it how you wanna,  
give it up free or make your money on the corner.  
But don’t be bad, play the game, get mad and change.  
Then you wonder why these muthafucka’s call you names.  
Still lookin’ for a way out, and that’s O.K.  
I can see you when you stray, it’s a way out.  
Keep your mind on your money, enroll in school,  
and as the years pass by, you can show them fools.

(continued...)

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1. (...continued)

But you ain't tryin' to hear me cause you're stuck,  
you're headin' for the bathroom, 'bout to get tossed up.  
Still lookin' for a rich man, you dug a ditch.  
Got your legs up trying to get rich.  
I love you like a sista, but you need to switch.  
And that's why they called you bitch, I betcha.

U wonda why they call u bitch, U wonda why they call u bitch, I betcha  
U wonda why they call u bitch, U wonda why they call u bitch  
U wonda why they call u bitch, U wonda why they call u bitch, I betcha  
U wonda why they call u bitch, U wonda why they call u bitch

You leave yo kids with yo mama cause you headed for the club,  
in a skin tight mini skirt, lookin' for some love.  
Got the legs wide open while you sittin' at the bar,  
talkin' to some nigga 'bout his car.  
I guess he said he had a Lexus. What's next?  
You're heading to his car for some sex.  
I pass by, I can't hold back tears inside, cause lord knows for years I tried.  
And all the other people on my block hate yo guts,  
then you wonder why they stare and call you slut.  
It's like your mind don't understand.  
You don't have to kill your dreams plottin' schemes on a man.  
Keep your head up, legs closed, eyes open.  
Either a nigga wear a rubba or we die smokin'.  
I'm hearing rumors so you need to switch,  
and niggas wouldn't call you bitch, I betcha.

U wonda why they call u bitch, U wonda why they call u bitch, I betcha  
U wonda why they call u bitch, U wonda why they call u bitch, I betcha  
U wonda why they call u bitch, U wonda why they call u bitch, I betcha  
U wonda why they call u bitch, U wonda why they call u bitch

I guess times gettin' hard, even harder for you,  
cause hey now, got a baby on the way now.  
More money from the county, and thanks to the welfare,  
you about to get your hair done.  
You got a dinner date, can't be late, trick or treat,  
sweet thang got anotha trick to meet.  
The way you did it, it was smooth, plottin' while he's game'n you,  
so baby beat the rules.  
I should have seen it in the first case, the worst case,  
I should have never called you back in the first place.  
I remember back in high school, baby you was fast,  
straight sex, when you moved your ass.  
But now things changed, cause you don't look the same,  
let the ghetto get the best of you, baby that's a shame.  
You caught H.I.V., and now you're about to be deceased,

(continued...)

I am not totally clear whether counsel for plaintiffs has conceded that reference to his client in “Wonda Why They Call U Bitch” is not actionable.

Accordingly, I find as a matter of law that the only reference to plaintiffs as underlined in footnote #1 is not defamatory, since it does not tend to injure her reputation, her business or profession, or expose her to public hatred, contempt or ridicule. See discussion of Baker, p. 9. Now, I turn my attention to the only remaining argument of plaintiffs, and that is the use of the word “muthafucka.”

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1. (...continued)  
and finally be at peace.  
So where your nigga's at now? Cause everybody left.  
They stepped, and left you on your own.  
See, I loved you like a sista, but you died too quick.  
And that's why we called you bitch, I betcha.

U wonda why they call u bitch, U wonda why they call u bitch, I betch  
U wonda why they call u bitch, U wonda why we call u bitch, I betcha  
U wonda why we call u bitch, U wonda why we call u bitch, I betcha  
U wonda why we call u bitch, U wonda why we call u bitch

Dear Ms. Delores Tucker, you keep stressin' me,  
fuckin with a motherfuckin' mind.  
I figured you wanted to know, you know, why we call them ho's bitches.  
Maybe this might help you understand.  
It ain't personal.  
It's strictly business, baby, strictly business.

So if u wonda why we call u bitch, u wonda why we call u bitch  
If u wonda why we call you bitch, u wonda why we call u bitch

The entire text of “How Do U Want It” follows, as I understand it from

listening to the CD:

How do you want it? How does it feel?  
Comin’ up as a nigga in a cash game, livin’ in the fast lane, I’m fo’ real.  
How do you want it? How do you feel?  
Comin’ up as a nigga in a cash game, livin’ in the fast lane, I’m fo’ real.

Love the way you activate yo hips and push yo ass out,  
got a nigga wantin’ it so bad, I’m about to pass out.  
Want to dig you, and I can’t even lie about it.  
Baby just alleviate your clothes, it’s time to fly.  
Catch you at a club, oh shit you got me fiending,  
body talkin’ shit to me, but I can’t comprehend the meanin’.  
Now if you want to roll with me, then here’s your chance,  
doin’ 80 on a freeway, police catch me if you can.  
Forgive me, I’m rider, still I’m just a simple man,  
all I want is money, fuck the fame, I’m a simple man.  
Mr. International player with the passport,  
just like Aladdin, bitch, get you anything you ask for.  
It’s either him or me, the champagne, Hennessy,  
favorite of my homies when we floss on our enemies.  
Witness as we creep to a low speed, peep what a ho need,  
puffs some mo’ weed, funk, you don’t need.  
Approach a hoochie with a passion, been a long day,  
but I been driven by attraction, in a strong way.  
Yo body is bangin’, baby, I love it when you flaunt it,  
time to give it to daddy nigga.  
Now tell me how you want it.

How do you want it? How does it feel?  
Comin’ up as a nigga in a cash game, livin’ in the fast lane, I’m fo’ real.  
How do you want it? How do you feel?  
Comin’ up as a nigga in a cash game, livin’ in the fast lane, I’m fo’ real.

Now tell me is it cool to fuck? Did you think I come to talk?  
Am I a fool or what? Positions on the floor.  
It’s like erotic, ironic, ‘cause I’m somewhat psychotic.  
I’m hittin’ switches on bitches like I been fixed with hydraulics.  
Up and down like a roller coaster, I’m up inside ya,  
I ain’t quittin’ till the show’s over, ‘cause I’m a rider.  
In and out just like a robbery, I probably be a freak and let you get on top of  
me and rock your knees.

Nights full of Alizé, a livin' legend, you ain't heard about these niggas play these Cali days.

Delores Tucker, yous a muthafucka, instead of trying to help a nigga you destroy a brotha, worst than the others,

Bill Clinton, Mr. Bob Dole, you too old to understand the way the game's told.

You lame soul, I got to hit you with the high facts.

When some release makin' millions, niggas top that,  
they want to sentence me, they rather see me in a cell, livin' in hell,  
only a few of us will live to tell.

Now everybody talkin' about us, I can give a fuck,  
like we're the first ones to bomb and cuss.

Nigga tell me how you want it.

How do you want it? How does it feel?

Comin' up as a nigga in a cash game, livin' in the fast lane, I'm fo' real.

How do you want it? How do you feel?

Comin' up as a nigga in a cash game, livin' in the fast lane, I'm fo' real.

Raised as a youth, tell the truth, I got the scoop on how to get a bullet proof,  
'cause the shots are from the roof.

Before I was a teenager, mobile phone, sky pager, gained rules.

I'm livin' major.

My adversaries is lookin' worried, they paranoid of gettin' bumped.

One of us is going to see the cemetery.

My only hope to survive, if I wish to stay alive, gettin' high,  
see the demons in my eyes before I die.

I want to live my life in [indecipherable] with a couple of million,  
and then I'm chillin, fade 'em all.

These taxes got me crossed up, and people trying to sue me,  
media is in my business and they acting like they know me.

But I'm a mash out and peel out,

I'm with a clique that's quick to whip a fuckin' steel out.

Yeah nigga, it's some new shit, so betta get up on it.

When you see me tell a nigga how you want it,  
how do you want it.

How do you want it? How does it feel?

Comin' up as a nigga in the cash game, livin' in the fast lane, I'm fo' real.

How do you want it? How do you feel?

Comin' up as a nigga in the cash game, livin' in the fast lane, I'm fo' real.

How do you want it? How do you feel?

Comin' up as a nigga in the cash game, livin' in the fast lane, I'm fo' real.

Once again, the words set forth in the complaint are not correct but the mistake is not as flagrant. Any way you look at it, in this song C. Delores Tucker, one of

the plaintiffs in this case is called a muthafucka (see underlining in lyrics), an epithet which is unpleasant at best and vulgar at worst.

We can put to rest the initial argument over whether the word “muthafucka” was intended to be or would be understood as a statement of fact. Plaintiffs concede that Mr. Shakur did not intend and listeners did not understand those words to have literal, factual, sexual meanings. Rather, plaintiffs’ contention is that the word “muthafucka” is the ultimate insult that can be directed about someone among the intended audience of rap music. That is, the listeners understood Mr. Shakur intended the word to mean that C. Delores Tucker was a bad person who was out to hurt rather than help fellow African-Americans.

“In order for a statement to be considered libelous or slanderous, the trial court must, in the first instance, make a determination as to whether the communication complained of can be construed to have the defamatory meaning ascribed to it by the complaining party” is the oft-cited quote from Baker v. Lafayette College, 516 Pa. 291, 296, 532 A.2d 399, 402 (1987). In making that determination, the Baker opinion instructs the trial court that it must view the statement in context with an eye to determining:

- (a) whether the statement was maliciously written or published;  
and
- (b) whether it tended to blacken a person’s reputation or to expose him to public hatred, contempt, or ridicule, or to injure him in his business or profession.

Baker further advises that:

- (1) the test to be applied in evaluating any statement is the effect the communication is fairly calculated to produce, the impression it would engender, in the minds of the average persons among whom it is intended to circulate; and
- (2) a critical factor in determining whether a communication is capable of defamatory meaning is the nature of the audience hearing the remarks.

Finally, according to Baker, opinion without more does not create a cause of action.

Instead, the allegedly libeled party must demonstrate that the communicated opinion may reasonably be understood to imply the existence of undisclosed defamatory facts justifying the opinion.

The law with regard to opinion becomes important in this case because it is conceded that what Tupac Shakur is saying is opinion, not fact. His opinion, to express it in the words of plaintiffs' counsel, and as previously referred to, was that C. Delores Tucker was a bad woman who was out to hurt rather than help her fellow African-Americans. The statement from Baker that "opinion without more does not create a cause of action in libel" is based in part on the following:

"Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."

Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40, 94 S. Ct. 2997, 3007 (1974).

Thus, even though the opinion of Tupac Shakur, as conveyed in his rap music, may appear to promote false ideas which are destructive or disastrous to society in

the opinion of plaintiffs and others, the way to overcome such false ideas is through the effort to promote other ideas as being more worthy of following. Indeed, that is precisely the course of conduct which plaintiffs have been following. The Tuckers have been crusading for some time to make the public aware of their opinions. To the extent Tupac Shakur or others disagreed with plaintiffs, they have a constitutionally protected right to state their opinion.

This does not, however, give one a license to defame under the guise of simply stating an opinion. Statements of opinion are actionable if the alleged defamed party can “demonstrate that the communicated opinion may reasonably be understood to imply the existence of undisclosed defamatory facts justifying the opinion.” Baker, at 297.

There is of course no factual basis to the use of the word “muthafucka” in this case. The situation in this case seems more akin to the comment in Restatement (Second) of Torts § 556 cmt. e, which follows:

There are some statements that are in form statements of opinion, or even of fact, which cannot reasonably be understood to be meant literally and seriously and are obviously mere vituperation and abuse. A certain amount of name-calling is frequently resorted to by angry people without any real intent to make a defamatory assertion, and it is properly understood by reasonable listeners to amount to nothing more. This is true particularly when it is obvious that the speaker has lost his temper and is merely giving vent to insult.

Although the restatement referred to tends to be illustrative of a more direct confrontation, *i.e.*, face to face, than the one in this case, I find that what we have at most in this case by the transmission of the word “muthafucka” in the context of the song and the prior background of plaintiffs’ hard-fought crusade against gangsta rap is nothing more and nothing less than the use of a vigorous epithet; and by vigorous epithet I mean a powerful (in effect) term of abuse or contempt.

The Third Circuit, in an opinion written by Judge Arlen Adams, affirming an opinion written by then District Judge A. Leon Higginbotham, Jr., cited with approval the following language from Redding v. Carlton, 233 Pa. Super 136, 296 A.2d 880 (1972):

To prevent a chilling effect on free speech, the Supreme Court of Pennsylvania has held that “statements which represent differences of opinion or are annoying or embarrassing, are without more not libelous.” *Bogash v. Elkins*, . . . 405 Pa. 437, 440, 176 A.2d 677, 679 (1962). Neither is a statement libelous which is “no more than rhetorical hyperbole” or “a vigorous epithet” used to describe what the publisher believes to be another’s extremely unreasonable position. *Greenbelt Cooperative Publishing Ass’n v. Bresler*, 398 U.S. 6, 14, 90 S.Ct. 1537, 26 L.Ed.2d 6 . . . (1970).

Both plaintiffs and defendants also cite two U.S. Supreme Court cases as helpful to their argument. Plaintiffs argue that Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S. Ct. 2695 (1990), and Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 111 S. Ct. 2419 (1991), “indicate a turn of direction in favor of high profile victims of defamation.” Throughout this case, and in both oral and written argument, plaintiffs have

explicitly pointed out the background of C. Delores Tucker by way of confirming that she is a well-known, “high profile” person.

First, in my view, Milkovich clarifies prior law. Plaintiffs are correct that there is no wholesale exemption for anything that might be labeled opinion and Gertz, quoted above, did not intend that to be the case. What Milkovich affirms in its review of the law is “that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.” Milkovich, at 2706. Second, Masson follows the Milkovich statement relative to opinion. I do not believe that either case suggests any turn of direction in favor of high profile victims of defamation.

Based upon all of the foregoing, I conclude that the language plaintiffs object to is not actionable, and that the three other claims based upon it: intentional infliction of emotional distress; invasion of privacy; and the derivative consortium claim, must also fail.

An order follows.

IN THE UNITED STATES DISTRICT COURT  
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C. DELORES TUCKER and	:	CIVIL ACTION
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Plaintiffs,	:	NO. 97-4717
	:	
v.	:	
	:	
RICHARD FISCHBEIN, as	:	
Co-Administrator of the	:	
ESTATE OF TUPAC SHAKUR; AFENI	:	
SHAKUR, as Co-Administratrix	:	
of the ESTATE OF TUPAC SHAKUR,	:	
Defendants.	:	

**ORDER**

AND NOW, this 29th day of January, 1999, it is hereby ORDERED that summary judgment is entered in favor of defendants Richard Fischbein, as Co-Administrator of the Estate of Tupac Shakur and Afeni Shakur, as Co-Administratrix of the Estate of Tupac Shakur and against plaintiffs C. Delores Tucker and William Tucker.

BY THE COURT:

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RONALD L. BUCKWALTER, J.