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

GEORGE RHINE, Plaintiff, v. DICK CLARK PRODUCTIONS, INC., et al., Defendants.	CIVIL ACTION NO. 99-2736

MEMORANDUM

R.F. KELLY, J. JANUARY , 2000

Presently before this Court is Plaintiff George Rhine's ("Mr. Rhine") Motion to Amend or Alter Judgment Pursuant to Rule 59 (e) of the Federal Rules of Civil Procedure. Mr. Rhine brought a defamation suit against all Defendants. This Court heard the matter without a jury in a one day trial on November 22, 1999. On December 3, 1999 this Court entered Findings of Fact and Conclusions of Law and found in favor of Defendants. Mr. Rhine alleges errors of law with regard to the judgment. For the reasons which follow, Mr. Rhine's Motion is denied.

I. BACKGROUND

Defendant Dick Clark Productions, Inc. is a California corporation which owns and operates Defendant Dick Clark Restaurants, Inc., also a California corporation. Defendant Dick Clark Restaurants, Inc. owns and operates King of Prussia

Entertainment, Inc., which is a Delaware corporation. Defendant King of Prussia Entertainment, Inc. owns and operates Dick Clark's American Bandstand Grill located in King of Prussia, Pennsylvania.

On or about March 6, 1999, Mr. Rhine entered Dick Clark's American Bandstand Grill (the "Bandstand Grill") as a business invitee. There were approximately one hundred people present. The disc jockey at the Bandstand Grill announced, "I would like to bring everybody's attention to George, we are celebrating his coming out of the closet party." At or about the same time the statement was made, Mr. Rhine's image was broadcast on the televisions located in the Bandstand Grill and a spotlight was placed on him. Mr. Rhine had been dancing with a woman who immediately left him on the dance floor following the statement. Mr. Rhine's step-daughter, Keysha Durstine, entered the Bandstand Grill at the time the statement was made. Also, Anthony Ferst, a friend of Mr. Rhine's, heard the statement. Defendants admit that the statement was made.

Mr. Rhine asked for an apology from the disc jockey, but none was forthcoming. The disc jockey instead had the bouncers remove Mr. Rhine from the premises. James Ryan, manager of the Bandstand Grill, admitted that the statement was embarrassing. However, while the disc jockey was fired for making the statement, no apology or retraction has ever been made

by Defendants.

As a result of the above incident, Mr. Rhine claimed to have suffered personal humiliation, impairment of his standing in the community, and mental anguish and mental suffering. He also claimed that his relationship with his step-daughter changed because of the incident. He further claimed that his relationship with Anthony Ferst changed since the incident, and that Mr. Ferst spoke to him about the statement four months after the incident. Mr. Rhine also claimed that he was hesitant to go out in public after this incident; however, over a six month period he went back to the Bandstand Grill twice a month to try to overcome his fear. Nonetheless, Mr. Rhine claims he continues to be reluctant to go out in public for fear that someone will recognize him from the incident.

II. STANDARD

"The purpose of a motion to alter or amend a judgment under FED. R. CIV. P. 59(e) is to `correct manifest errors of law or fact or to present newly discovered evidence.'" Ruscavage v. Zuratt, 831 F. Supp. 417, 418 (E.D. Pa. 1993) (citation omitted). "Under Rule 59(e), a party must rely on one of three grounds: 1) the availability of new evidence not previously available, 2) an intervening change in controlling law, or 3) the need to correct a clear error of law or to prevent manifest injustice." Smith v. City of Chester, 155 F.R.D. 95, 96-97 (E.D.

Pa. 1994) (citing Reich v. Compton, 834 F. Supp. 753, 755 (E.D. Pa. 1993)); see also Cohen v. Austin, 869 F. Supp. 320, 321 (E.D. Pa. 1994).

III. DISCUSSION

Mr. Rhine asserts that this Court made errors of law in finding in favor of Defendants by (1) holding that because this was a non slander per se case, Mr. Rhine must prove special damages, which are pecuniary damages, and (2) considering Mr. Rhine's claim as sounding only in slander, rather than also in libel. We will address these alleged errors of law individually.

A. The Slander Claim

In the December 3, 1999 Findings of Fact and Conclusions of Law, we explained that under Pennsylvania law, an action for slander requires a showing of special harm unless the alleged defamatory statement fits within one of the following four categories constituting slander per se:

> (a) a criminal offense, as stated in § 571, or
> (b) a loathsome disease, as stated in § 572, or
> (c) matter incompatible with his business, trade, profession, or office, as stated in § 573, or
> (d) serious sexual misconduct, as stated in § 574.

SNA, Inc. v. Array, 51 F.Supp.2d 554, 564-565 (E.D.Pa. 1999); Synygy, Inc. v. Scott-Levin, Inc., 51 F.Supp.2d 570, 580 (E.D.Pa. 1999); City of Rome v. Glanton, 958 F.Supp. 1026, 1041 n.10 (E.D.Pa. 1997); Lubonski v. UIC, Inc., No. Civ. A. 90-5672, 1990 WL 175689, at *11 (E.D.Pa. Nov. 9, 1990); Restatement (Second) of

Torts § 570. In an action for slander where the defamatory statement does not fit within one of the above four categories, a plaintiff does not have an action for slander unless he proves special harm. Synygy, Inc., 51 F.Supp.2d at 580; Lubonski, 1990 WL 175689, at *11; Restatement (Second) of Torts § 575 cmt. a. Special harm is harm of an economic or pecuniary nature. Synygy, Inc., 51 F.Supp.2d at 580; Walker v. Grand Cent. Sanitation, 634 A.2d 237, 241 (Pa.Super. 1993); Agriss v. Roadway Express, 483 A.2d 456, 469 (Pa.Super. 1984); Restatement (Second) of Torts § 575 cmt. b. Moreover, mere loss of reputation is insufficient to prove special harm. Agriss, 483 A.2d at 469; Restatement (Second) of Torts § 575 cmt. b.

In the instant case, Mr. Rhine did not allege a defamatory statement within any of the four categories of slander per se, which would relieve him of the burden of showing special harm. Therefore, he had the burden of proving special harm, i.e., pecuniary damages. However, Mr. Rhine failed to establish, through the testimony and exhibits presented at trial, that he suffered pecuniary damages as a result of the alleged defamatory statement. As a result, this Court found in favor of Defendants on Mr. Rhine’s slander claim.

Nonetheless, in his Motion to Amend or Alter Judgment, Mr. Rhine points out that the issue of special harm in a slander case has not been revisited by the Pennsylvania courts since

1978, and, specifically, that "the Courts have not revisited the issue in a case that is not slander per se as to whether you need a pecuniary loss in order to prevail." As a result, he argues that "it is suggested to this Court that the definition of special harm in a case that is not per se slander, the Pennsylvania courts will adopt a position that would allow an individual to recover for loss to reputation, humiliation or damage to his good name."[1] Based on the above predictions, Mr. Rhine, essentially, is asking this Court to abrogate the distinction between slander per se and non slander per se, something that the Pennsylvania Superior Court specifically declined the opportunity to do in Agriss, 483 A.2d at 470 (noting that the distinction between slander per se and non slander per se remains although the distinction between libel per se and libel per quod has been abrogated). However, we decline to base our judgment on clairvoyance rather than law. Moreover, we cannot usurp the role of the state courts to interpret state laws simply for Mr. Rhine's benefit. "When federal courts are required to interpret or apply state law, we consider and accept the decisions of the state's highest court as the ultimate authority of state law." Colantuno v. Aetna Ins. Co., 980 F.2d

[1] Mr. Rhine's argument evades mention of the fact that all case law on point has continued to hold that pecuniary loss is required in non slander per se cases. The fact that the slander at issue in those cases may have been found to be slander per se is irrelevant.

908, 909 (3d Cir. 1992). Therefore, until and unless the Pennsylvania Supreme Court decides to consolidate the two forms of slander and remove the requirement of pecuniary loss in non slander per se cases, the distinction remains.

Mr. Rhine, however, urges this Court to ignore precedent and to award damages to Mr. Rhine based on the notion that his recovery is mandated by the Pennsylvania Constitution since his reputation was allegedly harmed. In support of this argument, Mr. Rhine relies on Hatchard v. Westinghouse Broadcasting, 532 A.2d 346 (Pa. 1987). In Hatchard, the issue before the Pennsylvania Supreme Court was whether the Pennsylvania Shield Law, 42 Pa.C.S § 5942(a), protects from discovery by a plaintiff in a libel action all unpublished documentary information gathered by a television station. In holding that it does not, the court reasoned that a broader interpretation of the Shield law would interfere with the plaintiff's right to protect his reputation. Id. at 351. The court also noted that "the Pennsylvania Constitution establishes reputation as one of the fundamental rights that cannot be abridged without compliance with state constitutional standards of due process and equal protection." Id. at 350.

Based on Hatchard, and notwithstanding the fact that no Pennsylvania Court has yet agreed, Mr. Rhine concludes that "special harm has to include loss to one's reputation since the

Pennsylvania Supreme Court has held that one's reputation under the Pennsylvania Constitution is a fundamental right and that any injury to one's reputation is compensable." However, Mr. Rhine overlooks the fact that Hatchard simply does not hold that pecuniary losses are not required in non slander per se cases, which is the issue in this case. Moreover, Mr. Rhine ignores the fact that the Pennsylvania Superior Court's explicit acknowledgment of the continued existence of the distinction between slander per se and non slander per se in Agriss is still good law.

B. The Libel Claim.

Mr. Rhine argues that his claim was for defamation generally, and that this Court erred in failing to consider his claim as one for libel as well as slander. Mr. Rhine now argues, for the first time, that the broadcast of his image on the television screens with the accompanying statement constitutes libel.

At the outset, we note that Mr. Rhine's Complaint does not assert a claim for libel, or even defamation. For that matter, the Complaint does not even state the cause of action it is based on. Moreover, Plaintiff makes no mention of libel in the Joint Pre-trial Memorandum. Rather, in the section entitled Plaintiff's Legal Issues, Mr. Rhine refers repeatedly to the "remarks of the disc jockey," and "the statement." Most

significantly, Mr. Rhine's Proposed Conclusions of Law, filed on November 30, 1999, contains no mention of the word libel. There is also no mention of Mr. Rhine's image on the television screen. Rather, Mr. Rhine's Conclusions of Law contain only references to the disc jockey's statement regarding Mr. Rhine's "coming out" party, which Mr. Rhine refers to repeatedly as "the defamatory statement," "the statement," or "the statement of the disc jockey." Morever, in his Conclusions of Law, Mr. Rhine acknowledges the burden on a plaintiff in a defamation case as imposed by 42 Pa.C.S.A. §8343 as follows:

> (a) Burden of plaintiff. - In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:
>
> 1. The defamatory nature of the communication.
> 2. Its publication by the defendant.
> 3. Its application to the plaintiff.
> 4. The understanding by the recipient of its defamatory meaning.
> 5. The understanding by the recipient of it as intended to be applied to the plaintiff.
> 6. Special harm resulting to the plaintiff from its publication.
> 7. Abuse of a conditionally privileged occasion.

However, Mr. Rhine has not met his burden of proof with respect to a libel claim. The only proof that Mr. Rhine has provided this Court to establish that a libel even occurred is his present summary statement, without citation to any authority, that "the broadcasting of an image of a person on a television screen with accompanying words is libel." Mr. Rhine assumes that what would ordinarily be a non-defamatory broadcast of a person's

image, without any written statement, becomes defamatory in nature when accompanied by a contemporaneous slander. Having made no showing of libel at any time during this case, and after judgment has been rendered, Mr. Rhine asks this Court to conclude sua sponte that the act complained of constitutes libel and to award damages to him, and this we decline to do. Mr. Rhine presented a slander case. He cannot at this time attempt to retroactively present another claim simply because he did not prevail on his first theory. Accordingly, Mr. Rhine's request for punitive damages is also denied.

An appropriate Order follows.