

Weller v. American Broadcasting Companies, Inc. 283 Cal. Rptr. 644 (Cal. Ct. App. 1991)

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Facts

2. *Id.* at 481.
3. *Id.* at 476.
4. The sculptural version was made of polychromed wood, which consists of wood sculpture painted different colors with oil paints.
5. 751 F. Supp. at 476.
6. *Id.* at 477.
7. *Id.* at 477.
8. *Id.*
9. The court relied on the Second Circuit decision in *Falk v. T.P. Howell & Co.*, 37 F.Supp. 202 (S.D.N.Y. 1888).
10. 751 F.Supp. at 477. The court relied on the decision in *Falk* as well as the Second Circuit decision in *King Features Syndicate v. Fleischer*, 299 F. 533 (2d Cir. 1924), for this proposition.
11. 751 F. Supp. at 477.
12. Quoting the Second Circuit opinion in *Ideal Toy Co. v. Fab-Lu Ltd.*, the court asserted that the appropriate test of substantial similarity is "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." *Id.* at 478, citing *Ideal Toy Co. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir. 1966).
13. 751 F.Supp. at 478.
14. *Id.* at 479.
15. *Id.* at 479-480.
16. *Id.* at 480, citing *Stewart v. Abend*, 110 S.Ct. 1750, 1769 (1990).
17. The Ninth Circuit in *Stewart* concluded that re-release of the film version of the original copyrighted story from which it was based adversely affected the ability to market new versions of the story. 110 S.Ct. at 1769.
18. 751 F. Supp. at 480.
19. *Id.*
20. *Id.*
21. *Id.* at 481, quoting *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).
22. 751 F. Supp. at 480.
23. *Id.*
24. *Id.* at 478, citing *King Features Syndicate*, 299 F. at 536.
25. *Id.* at 478, citing *King Features Syndicate*, 299 F. at 535.

Weller v. American Broadcasting Companies, Inc., 283 Cal. Rptr. 644 (Cal.Ct. App. 1991).

Introduction

The plaintiff, an antique silver dealer, filed a defamation action against the defendants, a television broadcasting company, a local station, and a reporter, for a broadcast concerning the origin and value of an antique silver candelabra. A Marin County Superior Court jury found the broadcast defamatory and awarded the plaintiff \$2.3 million in damages. In affirming the superior court's holding, the California Court of Appeals held that the broadcast could be understood as implying defamatory facts, and such facts were provable falsities.

In 1982, the plaintiff acquired two antique silver candelabra from a wealthy Texas family. After repairing the candelabra, the plaintiff sold them to the deYoung Museum in 1983 for \$65,000. The museum was appraised of the repairs to the candelabra. About a year later, one of the defendants, the local television station, received a telephone call from a confidential source suggesting the candelabra purchased by the museum was overpriced and did not originate from the Texas family, but rather from a well-known San Francisco sculptress' home. About this same time, Jerry Durham was convicted of insurance fraud involving silver and was suspected of stealing the candelabra in question from the sculptress' home.

The television station proceeded to air a series of short features on its regular nightly news program on the subject of the candelabra. The first broadcast was entitled, "Antique Fraud." The broadcast concerning the deYoung candelabra was entitled, "Museum Fraud?" The plaintiff contended that the broadcasts implied the following defamatory facts: (1) the plaintiff sold to the museum a stolen candelabra at an inflated price; (2) he misrepresented the origin, condition, and maker of the candelabra; (3) he was an associate of the convicted Jerry Durham; (4) he inadequately repaired the candelabra and did not inform the museum; and, (5) he generally defrauded the museum.

A jury trial found the defendants guilty of defamation and awarded the plaintiff general damages totaling \$2.3 million. The jury determined that an average viewer would understand the broadcasts to make one or more defamatory statements and these implied statements were false. Moreover, the jury found that the defendant/reporter made one or more of the statements with knowledge that the statements were false or with reckless disregard for the truth.

Legal Analysis

The issue faced by the California Court of Appeals was whether specific statements could be excluded from evidence because they constituted an opinion and were therefore constitutionally protected. In sustaining the trial court's admission of the statements, the court noted that the United States Supreme Court recently held there is no separate constitutional privilege protecting opinions.¹ In other words, there is no "wholesale defamation exemption" for a statement labeled an opinion.² In fact, the Supreme Court reasoned that an opinion often implies an assertion of an objective fact,

thereby subjecting the statement to a defamation analysis. Statements that are false are not protected.³ Nonetheless, courts are still admonished to protect statements that cannot reasonably be interpreted as stating actual facts, and as such are those statements classified as satirical, hyperbolic, imaginative, or rhetorical.⁴ Therefore, the California court found that opinions, such as the broadcast statements in question, were not absolutely privileged.

Once the court determined that the statements may not be protected, the defendants contended the broadcast statements should still be excluded from jury consideration because no reasonable juror could conclude these statements implied defamatory facts. Under constitutional analysis, a statement is defamatory if it expressly or impliedly asserts a fact that is susceptible to being proved false, and the language and tenor of the statement can reasonably be interpreted as asserting actual facts.⁵ Additionally, if statements are susceptible to both an innocent and libelous meaning, it is up to the jury to decide how the fact should be understood, even if the defendant has made qualifying statements regarding the accuracy of the fact.⁶

The court found that the broadcasts could be understood as implying defamatory statements. The court concluded the statements were implicitly defamatory because the defendants insisted on linking the plaintiff with the convicted felon, Jerry Durham, while consistently alluding to the candelabra as being stolen property sold at an inflated price. Moreover, the broadcasts could be defamatory because the defendant/reporter continually asserted that her efforts to obtain information from the plaintiff and the museum were being "stonewalled," thereby alluding that the plaintiff and museum had something to hide. Therefore, the court held there was no error in submitting these statements to a jury for determination.

Next, the court needed to determine whether the "context and tenor" of the statements negated the impression that the defamatory statements were assertions of actual fact. "If a 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 . . . even if the particular facts are correct."⁷ In other words, it is the implication of the statements, not the statements themselves, which must be examined to determine whether the statements are entitled to constitutional protection.⁸ Finally, couching a statement in interrogatory language does not entitle it to constitutional protection.⁹

The defendants contended that the speculative format of the features, coupled with cautionary language, negated any impression that the reports implied actual facts. In rejecting this position, the court determined that unlike hyperbole or satire, defamatory statements made in the context of a generally accepted notion that a news broadcast is objective and neutral is almost certain to give rise to a viewer believing the statements to be actual fact. The court then rejected the notion that placing the defamatory fact in cautionary language, or putting it in the form of a question, necessarily defused the impression that the statement is an actual fact.

Last, the court needed to determine whether some of the implied defamatory facts were false. An inquiry into whether a defamatory statement is false requires the plaintiff to prove that the statement was substantially false; not whether the defendants knew or could have known at the time the statement was made that it was false.¹⁰ In finding that the alleged defamatory fact, the true value of the candelabra, was a verifiable fact, the court rejected the defendants' contention that finding such a valuation for the candelabra was an inexact science because the experts would reach varying conclusions as to the candelabra's value. The court reasoned the only concern was whether the fact could be objectively verified. Therefore, a range of reasonable valuation of the candelabra, which covered the plaintiff's sale price, was found by the court to be an objective verification. Additionally, the court found that the origin of the candelabra asserted by the defendants was a fact that was either true or false and could be proved in court by the plaintiff.

Conclusion

In finding that the alleged defamatory statements were correctly submitted to the jury for consideration, the California Court of Appeals cautioned that had the defendants' arguments prevailed, "similar false broadcasts would be protected without regard to the degree of fault involved in their publication and without regard to [a] plaintiff's status as a private individual."¹¹ However, as a final note, this court emphasized that it is still unclear what impact the *Milkovich* decision will have on state defamation laws in light of prior defamation laws which distinguish between opinion and fact. Ω

Karen R. Brown

1. *Weller v. American Broadcasting Companies, Inc.*, 283 Cal. Rptr. 644, 649 (Ca. Ct. App. 1991), citing *Milkovich v. Lorain Journal Co.*, 110 S.Ct. 2695 (1990).

2. 110 S.Ct. at 2705.