UP IN ARMS: SON OF FORMER ALBANIAN PRIME MINISTER CLAIMS DEFAMATION IN ARMS-DEALING CONTROVERSY IN *BERISHA V. LAWSON*

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In *Berisha v. Lawson*,[1] the U.S. Court of Appeals for the Eleventh Circuit addressed a defamation suit brought by Shkelzen Berisha ("Berisha"), the son of Albania's former Prime Minister, against a United States author, Guy Lawson ("Lawson").[2] In analyzing the defamation claim, the court considered whether Berisha was a limited public figure in this circumstance,[3] and, if so, whether he had to prove that Lawson acted with actual malice.[4] The court also expanded on the employee-equivalent theory as it relates to an independent contractor's ability to claim attorney-client privilege for communications when the contractor is not a traditional employee.[5]

In 2015, Lawson authored the book *Arms and the Dudes: How Three Stoners from Miami Beach Became the Most Unlikely Gunrunners in History*.[6] The book discussed the history of AEY, Inc. ("AEY"), an American arms-trading enterprise.[7] Lawson relied on numerous sources to recount a specific AEY transaction that took place in Albania and allegedly involved Berisha.[8] Lawson also described recorded conversations that implicated Berisha as a member of the Albanian mafia who received illegal kickbacks as part of a scheme to unjustly enrich various Albania officials, including his father.[9] Before the book's final publication in 2015, Lawson and his publisher, Simon & Schuster (a co-defendant), communicated with Simon & Schuster's in-house legal counsel to produce a final legal review of the book and its content.[10]

In 2017, Berisha filed suit against various defendants involved with the publication of the book, including Lawson and Simon & Schuster.[11] Berisha complained that Lawson's book, later adapted into a motion picture

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[1] Berisha v. Lawson, 973 F.3d 1304 (11th Cir. 2020).

[2] *Id.* at 1306.

[3] *Id.* at 1310.

[4] *Id.* at 1312.

[5] *Id.* at 1317–18.

[6] *Id.* at 1306. *See* GUY LAWSON, ARMS AND THE DUDES: HOW THREE STONERS FROM MIAMI BEACH BECAME THE MOST UNLIKELY GUNRUNNERS IN HISTORY (2016).

[7] *Berisha*, 973 F.3d at 1306.

[8] *Id.* at 1306–09.

[9] *Id.* at 1307–08.

[10] *Id.* at 1309.

[11] *Id.*

titled *War Dogs*, defamed him in scattered references throughout the book.[12] During discovery, the defendants produced almost 20,000 documents related to Lawson's research and editorial processes.[13] In July 2018, Berisha moved to compel production of additional pre-publication communications between Lawson and Simon & Schuster's in-house legal counsel.[14] However, a magistrate judge denied the motion, determining that the communications were covered by the attorney-client privilege.[15] Following discovery, the United States District Court for the Southern District of Florida granted the defendants' motion for summary judgment, reasoning both that there was insufficient evidence for a juror to find that the defendant defamed Berisha and also that Berisha failed to show that Lawson acted with serious doubts of his claims or with knowledge that the claims were false.[16] Berisha appealed to the United States Court of Appeals for the Eleventh Circuit.[17]

On appeal, and the court considered (1) whether Berisha is considered a public figure; (2) whether the district court erred in finding "insufficient evidence to support Berisha's claim that the defendants acted with actual malice"; and (3) whether the district court "abused its discretion in denying [Berisha's] motion to compel production of certain communications between Lawson and Simon & Schuster's attorneys."[18]

First, the court analyzed whether Berisha was a public figure by distinguishing between a general public figure—"one with such fame and notoriety that he will be a public figure in any case"—and a limited public figure—"where the individual has thrust himself into a particular public controversy and thus must prove actual malice in regard to certain issues."[19] The court easily determined that Berisha is not a general public figure and applied a two-part test, which considers the individual's role in the controversy and "whether the alleged defamation was germane to the individual's role in the controversy," to determine whether he is a "limited public figure."[20] The court ultimately concluded Berisha was a "limited public figure" and his involvement with the transaction played a central role in Lawson's book.[21] The court also determined that Lawson's alleged defamation was germane to the transaction because it was not only discussed in the book but was also widely covered in news media outlets, such as the

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[12] *Id.*
[13] *Berisha*, 973 F.3d at 1309.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 1310, 1312, 1317.
[19] *Berisha*, 973 F.3d at 1310 (citing Turner v. Wells, 879 F.3d 1254, 1272 (11th Cir. 2018)).
[20] *Id.* at 1310–11 (quoting *Turner*, 879 F.3d at 1273 (alterations in original)).
[21] *Id.*

New York Times.[22] Berisha argued that he was not a public figure because he did not voluntarily insert himself into the publicity of the transaction.[23] However, the court disagreed, reasoning that even if Berisha involuntarily became a public figure in terms of this specific controversy, his general status as the son of Albania's former Prime Minister coupled with his previous involvements with other public scandals were enough to categorize him as a limited public official for this case.[24] Thus, the Eleventh Circuit affirmed the district court's ruling that Berisha was a limited public figure.[25]

The court then analyzed whether Berisha showed, through clear and convincing evidence, that the defendant acted with actual malice.[26] The standard for actual malice requires the plaintiff to show that the defendant subjectively acted with actual knowledge of the statement's falsity or with a "high degree of awareness" that the statement had "probable falsity."[27] Berisha did not disagree that there was little evidence showing that Lawson knowingly published the falsehoods and instead argued that Lawson had serious doubts about the statements because Lawson's sources were uncredible and untrustworthy.[28] However, the court cited precedent establishing that source credibility issues are not enough to prove actual malice.[29] Additionally, Lawson disclosed to his readers the potential for minor inconsistencies based on his sources' credibility issues.[30] Contrary to Berisha's assertion, this acknowledgement was not enough to meet the actual malice standard.[31] Further, the court noted that, even if there was a cause of action based on Lawson's reliance on these sources, he did not solely rely on those sources; he also relied on published reports, such as the *New York Times*

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[22] *Id.* at 1310. *See, e.g.*, Nicholas Kulish, *Speculation Surrounds Case of Albanian Whistle-Blower's Death*, N.Y. TIMES (Oct. 7, 2018), https://www.nytimes.com/2008/10/08/world/europe/08albania.html [https://perma.cc/UY7X-3E4F].

[23] *Berisha*, 973 F.3d at 1310.

[24] *Id.* at 1311 ("[F]ederal courts have long made clear that one may occasionally become a public figure even if 'one doesn't choose to be.'") (quoting Rosanova v. Playboy Enters., Inc., 580 F.2d 859, 861 (5th Cir. 1978)).

[25] *Id.* at 1312.

[26] *Id.*

[27] *Id.* (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964)).

[28] *Id.*

[29] *Berisha*, 973 F.3d at 1312 (citing Spacecon Specialty Contractors, LLC v. Bensinger, 713 F.3d 1028, 1045 (10th Cir. 2013)).

[30] *Id.* at 1313.

[31] *Id.* The court reiterated that, "where a publisher in this manner 'inform[s] its audience that its primary source [is] not an unimpeachable source of information, it serve[s] to undermine claims showing that the report was issued with actual malice.'" *Id.* (quoting Michel v. NYP Holdings, Inc., 816 F.3d 686, 703 (11th Cir. 2016) (alterations in original))

articles.[32] Thus, Lawson's reliance on multiple accounts did not satisfy the actual malice standard.[33]

Berisha then argued that Lawson "exhibited a general pattern of dishonesty," and his fabrication throughout the book should be considered "in the aggregate" as evidence of Lawson's subjective knowledge that Berisha's portrayal was false.[34] However, the court noted that this argument was irrelevant and, even if Lawson did fabricate a few minor details, the fabrication was not enough to show he acted with actual malice.[35] Applying Florida law,[36] the court held that minor misstatements did not establish actual malice because the "'gist or sting'" of the depiction would not materially change if they were corrected, and, thus, Lawson's potential dishonesty was not enough to defame Berisha.[37]

Berisha next alleged that the district court abused its discretion by citing the attorney-client privilege in denying his motion to compel production of certain communications between Lawson and his publisher's attorneys.[38] Berisha argued that the Simon & Schuster in-house counsel's pre-publication legal review of the book was not protected under attorney-client privilege because Lawson was "merely a third-party contractor of the publishing house . . . ."[39] However, the Eleventh Circuit disagreed and applied the United States Supreme Court's "employee-equivalent" doctrine, as articulated by the United States Supreme Court in *Upjohn Co. v. United States*.[40] The court accepted the Supreme Court's extension and noted that extending such protection to non-employees in some instances helps to ensure that "'professional mission[s] [can] be carried out'" without fear of exposure in litigation.[41]

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[32] *Id.*
[33] *Id.* (citing *Rosanova*, 580 F.2d at 862).
[34] *Berisha*, 973 F.3d at 1314.
[35] *Id.*
[36] *Id.* at 1314–15; *see also* Levan v. Capital Cities/ABC, Inc., 190 F.3d 1230, 1240 (11th Cir. 1999) ("Under Florida law, a statement is not defamatory unless the 'gist or sting' of the statement is defamatory.").
[37] *Berisha*, 973 F.3d at 1315 (holding that the "gist" of Berisha's depiction in Lawson's book was that Berisha was involved with fraud and a criminal underworld, and Lawson's adjustment of minor details did not alter the overall meaning).
[38] *Id.* at 1317.
[39] *Id.*
[40] *Id.*; *see* Upjohn Co. v. U.S., 449 U.S. 383, 391–92 (1981) (holding that "where an attorney represents a corporation, the corporation's attorney-client privilege extends beyond individuals who 'control' the corporation to include other employees with whom the lawyer must consult in order to advise the company.").
[41] *See Berisha*, 973 F.3d at 1318–20 (quoting *In re* Bieter Co., 16 F.3d 929, 937 (8th Cir. 1994)) (second alteration in original).

Here, even though Lawson did not "look[], act[], and smell[] like a [Simon & Schuster] company employee," such a narrow application of the doctrine would be antithetical to the purpose of the doctrine.[42] Instead, the court found Lawson to be a "functional equivalent of an employee" because of his continuous and significant relationship with the company throughout the publication process.[43] Thus, the court held that the district court did not abuse its discretion in denying Plaintiff's motion to compel and such communications were protected.[44]

The importance of the Eleventh Circuit's ruling in *Berisha v. Lawson* is two-fold: (1) it upholds the importance of the First Amendment within the judicial system, even when a public figure is an involved party; and (2) it brings further definition to the Supreme Court's holding that the attorney-client privilege can be expanded to include non-traditional employees. This opinion continues to solidify the importance of the First Amendment in protecting freedom of speech by requiring a showing of actual malice based on a possibly defamatory statement.[45] This requirement could potentially be applied to different mediums, including the internet, other books, blog posts, and social media posts, and could protect Americans' ability to speak freely so long as they are not acting maliciously. Further, the expansion of the Supreme Court's decision in *Upjohn* involving the employee-equivalent doctrine creates an important precedent within the Eleventh Circuit. Adopting such a ruling creates the potential for the attorney-client privilege to apply between attorneys and independent contractors in certain circumstances.[46]

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[42] *Id.* at 1318–20.

[43] *Id.* The court rejected Berisha's suggestion that Lawson was "utterly disconnected" from Simon & Schuster. *Id.* at 1319.

[44] *Id.* at 1320.

[45] *Id.* at 1310.

[46] *Berisha*, 973 F.3d at 1318 ("[T]oo narrow a definition of 'representative of the client' will lead attorneys not being able to confer confidentially with nonemployees who, due to their relationship to the client, possess the very sort of information that the privilege envisions flowing most freely.").