

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

FOX

v.

SMITH, et al.

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FEBRUARY TERM, 2018

NO. 1438

1942 EDA 2018
1952 EDA 2018
1968 EDA 2018
1938 EDA 2018

Fox Vs Smith Etal-OPFLD



18020143800072

OPINION

New, J.

August 30th, 2018

As Judge Richard Posner observed, the law lags science. Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 319 (7th Cir. 1996). This maxim applies not only to the admissibility of expert testimony, the context in which Judge Posner made his statement, but also to other areas of the law, including venue analysis.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff Joy Michelle Fox ran as the Democratic candidate for mayor of Chester Heights, Delaware County, Pennsylvania, in the November 2017 general election. Defendant Stacey Smith ran as the Republican candidate for mayor and defeated Plaintiff in the general election. Defendants Drew J. Baum, Ginamarie Ellis, Theresa Agostinelli, Steve Coccozza, Ellen Luongo, Steven Luongo, Maryann D. Furlong, Richard B. Kerns, William Pascale, Steve Coccozza, the Republican Committee of Chester Heights, and the Committee for the Future of Chester Heights are Republicans and Republican committees who supported Defendant Smith's election efforts and opposed Plaintiff's candidacy.

In opposing Plaintiff's candidacy, Defendants created a website, www.chfactcheck.com, and a campaign flyer. Defendants promoted the website using social media and by erecting

billboards in Chester Heights advertising the website. The campaign flyers were mailed to Chester Heights residents. Both the website and the flyer contained defamatory information, to wit – the State of North Carolina criminally charged Plaintiff with passing worthless checks.

The Complaint alleges Defendants cherry-picked information obtained from three background-search websites to “verify” the accuracy of their claims. Specifically, Plaintiff alleges Defendants relied on search results indicating “Joyce Watkins” had been charged in North Carolina with passing worthless checks. Although Plaintiff’s maiden name is Watkins, her first name, per her birth certificate, is Joy, not Joyce. Plaintiff informed Defendants of the falsity of their claims on multiple occasions; however, Defendants refused to take down the website or otherwise remove the defamatory information.

Plaintiff commenced this action on February 15, 2018 by filing a Complaint. The Complaint sounds in defamation, false light, and civil conspiracy. Defendants William Pascale, Drew Baum, and Theresa Agostinelli filed Preliminary Objections arguing improper venue. Defendant Stacey Smith also filed a Preliminary Objection in which she averred venue was improper in Philadelphia. Finally, Defendants Ellen Luongo, Steven Luongo, Republican Committee of Chester Heights, and Committee for the Future of Chester Heights filed Preliminary Objections in which they argued, *inter alia*, venue in Philadelphia is improper. Plaintiff’s Response averred venue was proper in Philadelphia County because her cause of action arose here. Plaintiff made two arguments as to why her cause of action arose in Philadelphia County: 1) the campaign flyers were processed at the U.S. Post Office’s bulk mail processing facility on Lindbergh Blvd in Southwest Philadelphia; therefore, it’s reasonable to believe the workers at the facility saw the defamatory information, and 2) the defamatory

information contained on the website was accessible to Philadelphians, including Plaintiff's friend, Kellie Clark.

On June 13, 2018, this Court heard oral argument on the issue of improper venue. By Order dated June 15, 2018, this Court overruled the preliminary objections to improper venue and found that a substantial issue of venue existed under Pa.R.A.P. 311(b)(2). Defendants William Pascale, Drew Baum, Theresa Agostinelli, Stacey Smith, Ellen Luongo, Steven Luongo, Republican Committee of Chester Heights, and Committee for the Future of Chester Heights filed Notices of Appeal pursuant to Pa.R.A.P. 311(b)(2).

ANALYSIS

Pennsylvania Rule of Civil Procedure 1028 provides improper venue must be challenged by preliminary objection. Pa.R.C.P. 1028(a)(1). As the moving party, the defendant bears the burden of proving improper venue. See e.g. Zampana-Barry v. Donaghue, 921 A.2d 500, 503 (Pa. Super. 2007). With respect to suits against an individual, the applicable Rule of Procedure provides:

- a) Except as otherwise provided by subdivisions (b) and (c) of this rule, an action against an individual may be brought in and only in a county in which
 - (1) the individual may be served or in which the cause of action arose or where a transaction or occurrence took place out of which the cause of action arose or in any other county authorized by law[.]

Pa.R.C.P. 1006(a)(1). Under Rule 2179, venue against a corporation is proper only in:

- (1) the county where its registered office or principal place of business is located;
- (2) a county where it regularly conducts business;
- (3) the county where the cause of action arose;
- (4) a county where a transaction or occurrence took place out of which the cause of action arose, or
- (5) a county where the property or a part of the property which is the subject matter of the action is located provided that equitable relief is

sought with respect to the property.

Pa.R.C.P. 2179. Finally, when a Plaintiff seeks to enforce liability against joint tortfeasors, the suit may be brought against all defendants “in any county in which the venue may be laid against any one of the defendants.” Pa.R.C.P. 1006(c)(1). In the case *sub judice*, Plaintiff argues venue is proper in Philadelphia County because her cause of action arose in Philadelphia County.

In a defamation claim, the cause of action arises in the place where the defamatory statement is published. Gaetano v. Sharon Herald Co., 231 A.2d 753, 755 (Pa. 1967).

Publication occurs in the county in which the defamatory statement is read and understood as being defamatory of the plaintiff. Id. As the Supreme Court explained,

If a newspaper is published and circulated in New York City which includes a defamatory statement of a person in Scranton, Pennsylvania, but no one in New York City recognizes the article as applying to the individual defamed, or if there is such recognition of identity but no realization that the article is defamatory of the person in Scranton, then there is no publication in New York City. However, if a few copies of this newspaper published in New York City are sent to Scranton and there read by the Scrantonian's neighbors or associates who recognize the reference to him and reasonably believe that it is defamatory, then the newspaper has libeled him in Scranton, and not in New York City, the place where the newspaper is printed and ‘primarily circulated.

Id. at 755-56.

First, Plaintiff alleges her cause of action arose in Philadelphia when workers at the U.S. Post Office bulk mail facility in Southwest Philadelphia read the defamatory information contained on the campaign flyers as those workers processed the mail. See Complaint at ¶¶ 90-92. Notably, the Complaint contains no allegations the workers at the bulk mail processing facility either 1) recognized the references to Plaintiff, a political candidate in Delaware County, or 2) understood the defamatory nature of the statements. As the Supreme Court observed, no cause of action arises in Philadelphia when postal workers read a defamatory statement but there

is no allegation the postal workers knew Plaintiff or recognized the defamatory nature of the statement about Plaintiff. Gaetano, 231 A.2d at 755. Accordingly, Plaintiff's first argument fails.

Second, Plaintiff argues her cause of action for defamation arose in Philadelphia because the social media posts and website containing defamatory information were accessible to Philadelphians, including her friend Kellie Clark. See Complaint at ¶¶ 93-94. Unlike the postal workers in Plaintiff's first argument, it is reasonable to infer Plaintiff's friend recognized the defamatory nature of the statements about Plaintiff.

The appellate courts of this Commonwealth have not yet addressed the issue of where venue properly lies in cases arising out of defamation on the internet. Plaintiff argues the Supreme Court's holding in Gaetano applies to defamation on the internet in the same manner it applies to defamation in newspapers - the Court must look to where the communication was received and understood to be defamatory. See Plaintiff's Memorandum of Law at pp. 8-9. In contrast, Defendant Stacy Smith argues the alleged defamation via the internet should not factor in the venue analysis because 1) Defendants did not use the internet to aim the defamation at Philadelphia County; rather, the alleged defamatory information was aimed at Delaware County and Plaintiff's friends in Philadelphia used the internet to affirmatively reach out to access the information, and 2) the purpose of a defamation action is to vindicate a plaintiff's name in their community, which is Chester Heights, Delaware County. Defendant Stacy Smith's Memorandum of Law at p. 6. Defendants Ellen Luongo, Steven Luongo, Republican Committee of Chester Heights, and Committee for the Future of Chester Heights advanced a similar argument and also argued if Plaintiff's position is to be accepted, venue would be proper in all 67 counties in Pennsylvania because a friend/relative of Plaintiff could access the internet in any of Pennsylvania's counties. See Defendants Ellen Luongo, Steven Luongo, Republican Committee

of Chester Heights, and Committee for the Future of Chester Heights' Memorandum of Law at p. 9, n.7.

Federal courts who encountered this issue found the arguments advanced by the Defendants to be persuasive. The Middle District of Florida recognized “[B]ecause the harm from an online defamatory statement can occur in any place where the website or forum is viewed, no one forum should be expected to stand out as a particularly strong candidate for venue.” Capital Corp. Merchant Banking, Inc. v. Corp. Colocation, Inc., 2008 WL 4058014 *3 (M.D. Fla. August 27, 2008). The Maryland District Court recognized “in the context of defamation publicized over the internet, such a rule would make venue proper in any district in the United States.” Seidel v. Kirby, 296 F. Supp.3d 745, 753 (D.Md. 2017). In resolving the issue of venue, federal courts often utilize an arrow not found in this Court’s quiver; the federal venue statute provides venue is proper where a *substantial* amount of the harmful actions occurred. 28 U.S.C. § 1391(b)(2) (emphasis added); Seidel, 296 F. Supp.3d at 753. Accordingly, federal courts, when confronting the issue of venue arising from defamatory postings on the internet, tend to find venue is proper in the district the defamatory statement was posted or in the district where the plaintiff resided. See e.g. Seidel, 296 F. Supp.3d at 753-54 (venue was proper in District of Maryland because the plaintiff resided in the District of Maryland, and therefore suffered harm within the district); Eakin v. Rosen, 2015 WL 8757062 * 4-5 (S.D.G.A. December 11, 2015) (venue in Southern District of Georgia was proper because the defendant, Ebony magazine, published the alleged defamatory information, both in its magazine and online, in the Southern District of Georgia and the plaintiff lived within 100 miles of the Southern District of Georgia); Wieland v. John Rigby & Co. (Gunmakers), Inc., 2010 WL 1528527 *1-2 (April 15,

2010) (venue was proper in Eastern District of Missouri because the plaintiff resided within the district).

In the matter *sub judice*, Plaintiff alleges her claim for defamation arose when her friend Kellie Clark read the alleged defamatory social media posts and visited the website while residing in Philadelphia. Therefore, under Pennsylvania law as set forth in Gaetano, venue is proper in Philadelphia because Philadelphia is where the defamatory statement was read and understood to be defamatory of Plaintiff. Gaetano, 231 A.2d at 755.

Under the principals of *stare decisis*, this Court's function is to apply the law as it exists, not to make new law. Cf. Bugosh v. I.U. North America, Inc., 971 A.2d 1228, 1241 n.22, 1242 n.25 (Pa. 2009) (observing trial courts, as courts of general jurisdiction, are responsible for addressing the issues before them, while it is the duty of the appellate courts to make and refine the law) (Saylor, J., *dissenting*). In the 51 years since Gaetano was decided, technology drastically changed the way in which we communicate, yet the venue rules related to defamation have remained stagnant. This Court humbly requests a reevaluation of these principals in relationship to the internet, social media, and the technology of the modern era.

WHEREFORE, for the above stated reasons, this Court overruled Defendants' preliminary objection to venue but found a substantial issue of venue existed.

BY THE COURT:



ARNOLD L. NEW, J.