13-3315-CV

In the United States Court of Appeals for the Second Circuit

Lorraine Martin,
individually and on Behalf of all Others Similarly Situated,
Plaintiffs-Appellants,

v.

Hearst Corporation, Southern Connecticut Newspapers, Inc.,
D/B/A Daily Greenwich, News 12 Interactive, Inc.,
Defendants-Appellees,
Main Street Connect, LLC,
Defendant.

On Appeal from the United States District Court
for the District of Connecticut (New Haven)

Brief of Reporters Committee for Freedom of the Press as *Amicus Curiae* in Support of Defendants-Appellees

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RULE 26.1 DISCLOSURE STATEMENT

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INTEREST OF *AMICUS CURIAE*[1]

The Reporters Committee for Freedom of the Press has, for 40 years, provided free legal advice, resources, support, and advocacy to protect the First Amendment and Freedom of Information rights of journalists. The Committee believes that attempts to use the law to remove factually accurate newspaper stories endanger the freedom of the press. Even worthy public goals, such as the rehabilitation of those accused of crime, cannot justify such suppression of published material.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

A statute cannot transform the truth into libel. Police arrested Lorraine Martin on August 20, 2010. But Martin argues that, more than a year later, a Connecticut statute transformed truthful accounts of what happened that day into libel—creating tort liability for defendant news

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[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief.

web sites, which had accurately reported on her arrest. Martin is mistaken. The government cannot require news sites to cleanse their pages of historical facts.

Fortunately, Connecticut law does not so require. When a criminal charge is dismissed, Conn. Gen. Stat. § 54-142a(a) requires erasure of "all police and court records and records of any state's attorney pertaining to such charge." Section 54-142a(a) does not require third parties to erase or alter news reports.

To hold otherwise would violate the First Amendment. If a news organization "lawfully obtains truthful information about a matter of public significance[,] then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979). The Supreme Court has held that the First Amendment generally protects the right to publish even a rape victim's name. If the First Amendment can bar liability for reports about the victim of a crime, it must also protect reports about the person arrested for committing the crime.

The news sites are likewise immune from liability under the modern common law of libel. The news sites posted the reports of Martin's arrest in 2010. The erasure took effect in 2012. The publications were true in 2010; they did not become false in 2012.

Martin argues that, when the news sites continued to host the news stories without updating them to reflect the erasure, this constituted a further publication—this time a false publication. But under the single publication rule, a claim premised on a mass media statement accrues when the statement first appears. The elements of the claim (including truth, actual malice, or negligence) are determined as of that date of first publication. Later events do not serve to retroactively make a published article libelous.

Moreover, an accurate report about Martin's arrest that did not mention a subsequent erasure would in any event not rise to the level of a material falsehood resulting in tort liability. A reasonable person reading of an arrest would realize that maybe the arrestee is guilty and maybe not, because arrestees are presumed innocent until proven guilty. A reasonable person reading of a dismissal—in a state that pro-

vides for routine dismissal without a finding of innocence, but based on a first offender's willingness to take drug education classes—would likewise conclude that maybe the arrestee is guilty and maybe not. Reporting on an arrest without later adding information about the dismissal would thus leave the reader with much the same impression about what the arrestee had done as if the information about the dismissal were included. A news report that is not updated to mention the dismissal is thus not materially false.

ARGUMENT

I. Connecticut's Erasure Statute Ought Not Be Read as Restricting the Speech of Non-Governmental Speakers

Conn. Gen. Stat. § 54-142a(a) by its terms does not restrict what people say. When a criminal charge is dismissed, § 54-142a(a) requires erasure of "all police and court records and records of any state's attorney pertaining to such charge." This provision is part of the Criminal Procedure title of the Connecticut General Statutes (title 54); it is not part of the title that deals with Civil Actions (title 52), such as libel, *e.g.*, Conn. Gen. Stat. § 52-237. There is no reason to think that the legislature understood the statute as restricting speech by the public, as op-

posed to recordkeeping and disclosure by the government. *See also* Appellees' Brief at 15-19 (discussing the legislative history of § 54-142a).

And there is especially good reason to assume that the legislature indeed did not seek to restrict speech by the public, given that such a restriction would violate the First Amendment. Arrests—actions of government officials enforcing the law—are a matter of public concern. *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011) ("Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community . . . .") (internal quotation marks and citations omitted); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 45 (1971) (plurality) ("[P]olice arrest of a person for distributing allegedly obscene magazines clearly constitutes an issue of public or general interest."), *abrogated on other grounds by Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Rosenbloom*, 403 U.S. at 48 n.17 (noting that all the Justices agreed "that this case involves an issue of public or general interest"); *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1113 (6th Cir. 1978) (holding that a story about an arrest for violation of securities laws was "about a matter of public concern"); *Robart*

v. Post-Standard, 418 N.E.2d 664, 664 (N.Y. 1981) (holding that allegation that plaintiff was arrested for driving an uninsured vehicle was on a matter of public concern); *Kurz v. Evening News Ass'n*, 453 N.W.2d 309, 310 (Mich. Ct. App. 1990) ("A newspaper report of a private person's arrest is speech of public concern . . . ."). "A broad reading of [what constitutes a matter of public concern] is required. The courts would otherwise be called upon repeatedly to play the constitutionally suspect role of super-editor, deciding on a case-by-case basis what is newsworthy." Robert Sack, *Sack on Defamation* § 3:3.2[A] at p. 3–9 (4th ed. 2010).

The Supreme Court has never sustained a tort claim based on truthful speech on a matter of public concern. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975); *Oklahoma Pub. Co. v. Dist. Ct.*, 430 U.S. 308, 311 (1977); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 840 (1978); *see also Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("[S]tate action to punish the publication of truthful information seldom can satisfy constitutional standards.") (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979)). Even Martin does not argue that

such a restriction would survive strict scrutiny. This Court should not treat this case as an exception.

Thus, for instance, in *Smith*, the Supreme Court reviewed a West Virginia statute under which it was "a crime for a newspaper to publish, without the written approval of the juvenile court, the name of any youth charged as a juvenile offender." *Smith*, 443 U.S. at 98. The Court found that the state's interest in protecting the anonymity of juvenile defendants could not justify punishing newspapers for truthfully reporting those names. *Id.* at 104.

Likewise, in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), the Supreme Court reversed a damages award to a rape victim who had sued a newspaper for publishing her name. *Florida Star*, 491 U.S. at 526. A Florida statute made it unlawful to print the name of a victim of sexual assault. *Id.* But the Court reversed the damages on First Amendment grounds, largely because a government official—in violation of police department policy—had placed the victim's name in the public domain. *Id.* at 538; *see also Gates v. Discovery Communications, Inc.*, 101 P.3d 552 (Cal. 2004) (relying on *Florida Star* to hold that a publisher could

not be held liable under the invasion of privacy tort for reporting on plaintiff's criminal record, even though the plaintiff's actions had taken place "more than a dozen years after the crime occurred").

The situation is comparable here. Just as in *Smith*, where the state's interest in protecting the anonymity of juvenile defendants was insufficient to punish newspapers for truthfully reporting their names, the state's interest in protecting the anonymity of adult arrestees likewise does not suffice in this case. And just as in *Florida Star* and *Gates*, imposing liability for reporting a matter that the government has placed in the public record cannot be constitutional.

II. Libel Law Does Not Require Publications to Update Information That Was Accurate When Reported

Martin's Complaint faults defendants for continuing to "publish[] and display[]" the statements about her arrest. First Amended Class Action Complaint, *Martin v. Hearst Corp.*, No. 3:12-cv-01023-MPS, ECF doc. no. 20, at 4. It demands that defendants be enjoined from "publishing in any manner whatsoever, any information that falsely indicates or suggests that Plaintiff and the Class were arrested on any charges for

which they were deemed to have never been arrested." *Id.* at 11. Martin has thus been seeking total *removal* of the reports of her arrest.

But even if Martin's claim can be interpreted as simply demanding that defendants *supplement* the information about the arrest with the information about the dismissal—on the theory that the report of the arrest, without the report of the dismissal, is now materially inaccurate and therefore libelous—that claim should still fail, for two reasons. First, under the single publication rule, the truth or falsity of a statement must be judged as of the time the statement was first published online, without regard to later events. Second, and independently, omitting the dismissal from an account of Martin's arrest does not materially diverge from the truth.

A. The Single Publication Rule for Internet Postings Is Fatal to Martins' Purported Cause of Action

When the news sites posted the fact of Martin's arrest in 2010, those posts were indisputably true. It was not until 2012 that the erasure took effect. And under the "single publication rule," the truth of a statement is to be determined based as of the time it is first published.

"The great majority of the states now follow 'the single publication rule.'" Restatement (Second) of Torts § 577A Reporter's Note (1977); *see also Sack on Defamation* § 2:6.1, at 2–105. The only Connecticut decision on the subject, *Hechtman v. Connecticut Department of Public Health*, CV094043516, 2009 WL 5303796 (Conn. Super. Ct. Dec. 3, 2009), expressly "adopts the single publication rule with respect to internet postings." *Id.* at *10. "[D]efamatory statements posted on the Internet are considered published on the date they are initially posted and not every time a third party views the statements." *Id.* (The multiple publication rule, under which each instance of distribution of material constitutes a new publication, is the Connecticut rule for non-mass-media publications. *See, e.g.*, *Cweklinsky v. Mobil Chemical Co.*, 837 A.2d 759, 767 (Conn. 2004) (discussing the multiple publication rule in the context of non-mass-media statements by employees to prospective employers); *Hechtman*, 2009 WL 5303796, at *9-10 (treating *Cweklinsky* as applicable only to non-mass-media statements).)

Under the single publication rule, "the publication of a defamatory statement in a single issue of a newspaper, or a single issue of a maga-

zine, although such publication consists of thousands of copies widely distributed, is, in legal effect, one publication which gives rise to one cause of action." *Firth v. State*, 775 N.E.2d 463, 464-65 (N.Y. 2002) (internal quotation marks and citations omitted) (quoted by *Hechtman*, 2009 WL 5303796, at *9). "[A]pplying the multiple publication rule to a communication distributed via mass media would permit a multiplicity of actions, leading to potential harassment and excessive liability, and draining of judicial resources." *Id. at* 465. Such concerns "are even more cogent when considered in connection with the exponential growth of the instantaneous, worldwide ability to communicate through the Internet." *Id.*

And under the single publication rule, the elements of a libel claim—such as truth, negligence, or actual malice—are determined as of the date of initial publication. *See, e.g.*, *Milligan v. United States*, 670 F.3d 686, 698 (6th Cir. 2012) ("Because the Operation news story originally aired on November 2, the Milligans' cause of action then accrued [under the single publication rule]. Any additional publications that occurred . . . after Fox 17 was aware of Milligan's erroneous arrest, are, there-

fore, not separately actionable under the single publication rule."); *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614-15 (7th Cir. 2013) (holding that, under the single publication rule, actual malice must be determined "at the time of first publication," even when the plaintiff "alerted the defendants by email after publication" that the statement was false).

B. Omission of the Fact of Erasure Does Not Materially Diverge from the Truth

Even setting aside the single publication rule, and evaluating whether defendants' stories are libelous as of today rather than as of the time they were posted, defendants would not be liable for defamation. No story can contain every detail. Nearly all stories omit something that might have placed their subjects in a better light. Journalism would be impossible if subjects of stories could routinely sue over material that they would have liked to see included in the story.

Because of this, an omission can constitute libel only when there are "additional *material* facts which, if reported, would have changed the tone of the article." *Strada v. Connecticut Newspapers, Inc.*, 477 A.2d 1005, 1010 (Conn. 1984) (emphasis added); *see also id.* at 1010 n.11

("The trial court was correct in not finding the defendants' omission of this fact to be material as its inclusion would not have changed the slant of the article."). And the materiality bar is a high one, requiring that the omission create "a substantially inaccurate portrait of the facts at hand." *White v. Fraternal Order of Police*, 909 F.2d 512, 525 (D.C. Cir. 1990) (stating that, "even if this court were to fully define a tort for defamation by omission, leaving out the unreported material did not create a substantially inaccurate portrait of the facts at hand"). "Newspaper reporters should not be required" to provide "an exhaustive, literal picture of what transpired." *Id.*

And mentioning the arrest but not the dismissal does not "create a substantially inaccurate portrait" related to the defendant's potential guilt of the underlying crime. To a reasonable reader, a report of an arrest conveys that the arrestee may or may not be guilty. An arrest is not a conviction. It is not a finding of guilt.

Conversely, a dismissal is not a finding of innocence or even of likely innocence. In Connecticut, for example, a first-time drug offender could have charges dismissed simply by going through a Drug Education Pro-

gram, as the Connecticut Judicial Branch web site expressly states. *See* State of Conn. Judicial Branch, *Bail, Frequently Asked Questions*, https://www.jud.ct.gov/cssd/bail_faq.htm ("15. What is the Drug Education Program? . . . . If the program is successfully finished, the criminal charges are dismissed."). Indeed, a press account states that "[t]he case against [Martin] was tossed out when she agreed to take some drug classes, and the official record was automatically purged." Bill Keller, *Erasing History*, N.Y. Times, Apr. 28, 2013. And even if that press account is not credited, reasonable readers would recognize that the dismissal might well have been based on such a reason.

To a reasonable reader, a report of a dismissal of drug charges—like the report of the arrest—conveys that the subject of the charges may or may not be guilty. Not mentioning such a dismissal, absent some evidence that the dismissal stemmed from an outright exoneration, does not make the article substantially inaccurate, so long as the report of the initial arrest is accurate.

Martin points to only two cases for the proposition that the mention of the arrest without mention of the dismissal would be libelous. Appel-

lant's Brief at 12-13 (citing *Acker v. Jenkins*, CV085019336S, 2010 WL 4276758 (Conn. Super. Ct. Sept. 24, 2010), and *LaMon v. Butler*, 722 P.2d 1373 (Wash. Ct. App. 1986)). But neither of these cases is on point.

In *Acker*, the court found that a letter to the editor did not convey the substantial truth because it implied a fact that was not true. 2010 WL 4276758, at *3. The letter stated that Acker, a kennel operator, "knew the restrictions when he moved [to a particular location] so I could never understand why, if he wanted to sell dogs on a grander scale, he just didn't move to a larger facility where he would be allowed to do so legally." *Id.* at *1. The court understandably concluded: "The implied meaning of the final sentence of Jenkins's letter is clear: Acker was selling dogs in knowing violation of the restrictions in place when he first moved to the premises." *Id.* at *3. And the court concluded that the implication was false, because Acker "never sold any dogs on the premises," and Acker had not "violated the restrictions in place in 1999, when he began operating the kennel." *Id.*

In this case, however, the news sites have not implied a fact that is not true. The news sites accurately published that Martin was arrested.

As noted above, a reasonable reader would perceive this simply as reflecting that Martin might or might not be guilty, not as an assertion that she was indeed guilty.

LaMon is a Washington Court of Appeals decision that the Washington Supreme Court later agreed to review. *LaMon v. Butler*, 770 P.2d 1027, 1029 n.3 (Wash. 1988). The Washington Supreme Court affirmed the Court of Appeals decision on other grounds, and concluded that it "need not address" the Court of Appeals' discussion of the libel by omission question. *Id.*

And to the extent that the Washington Court of Appeals decision remains good law in Washington state, it is inapposite to this case. In *LaMon*, a newspaper reported on LaMon's *conviction* without mentioning that the conviction had been dismissed with prejudice on appeal. 722 P.2d at 1376. The court found that LaMon had made a sufficient showing of falsity based on the fact that the dismissal was not mentioned. *Id.* at 1377.

Unlike in *LaMon*, the report at issue here concerns an arrest, not a criminal conviction. Arrestees are presumed innocent; convicts are

guilty. A report of a conviction conveys the message that the party is guilty, and the dismissal of a conviction with prejudice conveys the message that the party is again presumed innocent. As noted above, a report of an arrest conveys the message that the party may or may not be guilty, and a dismissal of the arrest, by itself, likewise conveys that the party or may not be guilty. So even if mentioning a conviction without mentioning its reversal is actionable, mentioning an arrest without mentioning its dismissal ought not be actionable.

The Court of Appeals decision in *LaMon* did also mention, in dictum, that, "[f]or example, a person who is arrested erroneously, based on mistaken identity, thereafter should not be subject to media reports citing his arrest while ignoring his subsequent vindication." 722 P.2d at 1377. But, if that is true, it is true only because of the proviso that the arrest was based on "mistaken identity," and that there was an express "vindication"—not merely dismissal of the charges. No such vindication took place here.

CONCLUSION

For the foregoing reasons, *amici* request that this Court affirm the decision below.

Respectfully Submitted,

s/ Eugene Volokh

Attorney for *Amicus Curiae* Reporters Committee for Freedom of the Press
March 17, 2014

CERTIFICATE OF COMPLIANCE WITH RULE 32

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3306 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in 14-point Century Schoolbook.

s/ Eugene Volokh

Attorney for *Amicus Curiae* Reporters Committee for Freedom of the Press

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on March 17, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Eugene Volokh

Attorney for *Amicus Curiae* Reporters Committee for Freedom of the Press