

New Jersey Appellate Court Holds That Truth Is a Defense to Defamation Claim Despite Expungement

By Carolyn Conway

In a case of first impression, a New Jersey appellate court recently held that the defense of truth is available to a defendant who publishes a statement relating to a plaintiff's criminal conviction, even if the conviction had been expunged at the time of the statement. [*G.D. v. Kenny et al.*](#), No. 3005-08 (N.J. App. Div. Dec. 21, 2009) (Wefing, P.J., Grall, LeWinn, JJ.).

Background

This case arose out of events surrounding the 2007 Democratic primary election for the New Jersey state senate. One of the Democratic candidates was Brian Stack, who in 2007 was a member of the State Assembly and served as the mayor of Union City. Years earlier Stack had served on the Hudson County Board of Freeholders, and Plaintiff G.D. had worked as a part-time aide for him. Despite their prior political connection, G.D. apparently was not working on Stack's 2007 campaign.

Although Stack was a Democrat, the Hudson County Democratic Organization (HCDO) did not support Stack's candidacy and instead backed another candidate. The HCDO hired Neighborhood Research Corporation (NRC) to assist them in opposing Stack's candidacy.

Through means that are unclear, NRC uncovered that in the early 1990s, G.D. had been charged with possession and distribution of a controlled dangerous substance. According to a 1993 judgment, G.D. was ultimately convicted of second degree possession of a controlled dangerous substance with intent to distribute, and sentenced to five years. G.D. had this record expunged in 2006; however, as late as August 2008, the information was readily available on the Department of Corrections' website. The HCDO decided to utilize this information by publicizing it in two campaign flyers distributed during the primary election, each containing information about G.D.'s conviction.

The first flyer, which included a picture of G.D. and was printed in both English and Spanish, stated in relevant part: "IT'S THE COMPANY YOU KEEP. And the sleazy crowd Brian Stack surrounds himself with says a lot about who Stack is. COKE DEALERS AND EX-CONS.... [G.D.] is

also a DRUG DEALER who went to JAIL for FIVE YEARS for selling coke near a public school."

The second flyer, also in English and Spanish, stated in relevant part: "We all know the threat that drugs and illegal guns have in our communities. But not Brian Stack. He continues to surround himself with one shady character after another -- not one but two convicted drug dealers and ex-cons, whom Stack got a high paying county job and a drugged out gun running lowlife who was his campaign manager." Although the second flyer did not mention G.D. by name, it also contained his picture. Approximately 17,000 copies of each flyer were disseminated.

Trial Court Decision

In his first lawsuit, G.D. sued the HCDO and its chief executive officer Bernard Kenny for defamation and intentional infliction of emotional distress based on the flyers' reference to G.D.'s 1993 conviction. In a second lawsuit, brought over a year later in May 2008, G.D. sued Craig Guy, the executive director of the HCDO; Howard Demellier, Raul Garcia and Nicole Harrison-Garcia, who had assisted the HCDO in the 2007 primary election; and NRC along with its principals, Richard Shaftan and CareyAnn Shaftan. This second lawsuit claimed: defamation, negligent or intentional infliction of emotional distress, invasion of privacy, misappropriation of one's name and civil conspiracy.

All parties filed cross-motions. The HCDO and Kenny filed motions to dismiss while the other defendants moved for summary judgment. G.D. filed a motion to prohibit all defendants from relying on truth as a defense.

The trial court judge denied the motions, ruling that an issue existed as to the fault standard G.D. was required to prove. All parties sought leave to appeal and the appellate court agreed to interlocutory review of the trial court's decision.

Appellate Court Decision

The appellate court began its analysis by noting that under New Jersey law, a defamation claim has three elements:

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1) a false and defamatory statement, 2) that was published, 3) with fault at least amounting to negligence. Defendants argued on appeal that G.D. could not satisfy the first element, because the statements were true, while G.D. argued that the expungement rendered any statement regarding his conviction false. The court observed that the trial court judge had mistakenly focused solely on the third element and ignored the first two.

Rather than focusing on the third element, as the trial court had done, the appellate court first analyzed whether the statement was defamatory. The crux of the issue as the appellate court viewed it was whether the expungement rendered the statement false. Expungements in New Jersey are governed by *N.J.S.A. 2C:52-1 to -32*. The statute provides that although an expunged record, such as a conviction, is “deemed not to have occurred,” *N.J.S.A. 2C:52-27*, there are certain instances in which the information may still be used, such as in setting bail or parole hearings. The statute does not address whether an expunged conviction can be relied upon as evidence in a defamation claim.

Without statutory guidance from the New Jersey Legislature, the court examined expungement statutes from other states. The appellate court found two state statutes, California’s and Oregon’s, relevant to its inquiry. In California, a minor’s sealed misdemeanor record is allowed to be opened for purposes of proving truth in a defamation claim. *Cal. Penal Code* § 1203.45(f). Oregon’s statute is even more expansive, allowing a court to disclose an expunged record to refute any claim to which truth is an affirmative defense. *Or. Rev. Stat.* § 137.225(9). As the *G.D.* court noted, an Oregon appellate court relied on that statute to hold that a newspaper could successfully assert truth as a defense to a defamation claim based on an expunged conviction. *Bahr v. Statesman Journal Co.*, 624 P.2d 664 (Or. Ct. App.), *review denied*, 631 P.2d 341 (Or. 1981).

The court also looked to other out-of-state decisions. In *Stephens v. Van Arsdale*, 608 P.2d 972, 986 (Kan. 1980), the Kansas Supreme Court noted in *dictum* that “a district court might in its discretion permit the release of certain documents contained in an expunged file in order to achieve the ends of justice.” The Supreme Judicial Court of Massachusetts also rejected the notion that a sealed conviction cannot be used to assert the truth of the conviction. *Rzeznik v. Chief of Police of Southampton*, 373 N.E.2d 1128, 1130 (Mass. 1978) (noting

that the sealing statute allowed sealed records to be maintained, and additionally provided for their use in certain circumstances).

The *G.D.* court noted an important similarity between the *Bahr* and *Rzeznik* cases: the plaintiff in both cases admitted the truth of the conviction. The court pointed out that although G.D. did not explicitly admit that the statements about his conviction were true, he did present the expungement order as an uncontested fact. “Thus,” the court opined, “like the Oregon and Massachusetts courts before us, we see no value in permitting plaintiff to use the expungement statute as a sword, rather than the shield it was intended to be.” *G.D.*, No. A-3005-08 (slip op. at 18).

G.D. also argued that the flyers, even if properly based on an expunged conviction, were defamatory because they inaccurately depicted him as dealing drugs near a school and erroneously alleged that he had served five years in jail. The appellate court rejected this argument, noting that in order to be considered truthful, a statement need only be “fairly accurate.” Because an individual anywhere in Union City is near a school, the court found that statement to be fairly accurate. Likewise, the court found the statement concerning G.D.’s incarceration to be fairly accurate since he was sentenced to five years in prison, regardless of the fact that he served less than the full sentence.

The court rejected G.D.’s additional claims of emotional distress, privacy torts and civil conspiracy on the basis of defendants’ valid truth defense. The court also dismissed G.D.’s claim of misappropriation, asserted only against the Shaftan defendants, stating that there must be a commercial purpose behind the use of a name for such a claim to succeed. The court found that the Shaftan defendants’ incidental financial gain from producing the flyers did not amount to a commercial purpose that would overcome the political nature of the flyers’ message.

Carolyn R. Conway is an associate at the law firm Wiley Malehorn Sirota & Raynes in Morristown, New Jersey, and is the former 2007-2008 MLRC Legal Fellow. Defendants Bernard Kenny, The Hudson County Democratic Organization, Inc., Craig Guy, Harold E. Demellier, Raul Garcia and Nicole Harrison-Garcia were represented by McManimon & Scotland, L.L.C. Defendants Neighborhood Research Corp., Richard K. Shaftan, and CareyAnn Shaftan were represented by Michael Patrick Carroll. Plaintiff was represented by Cohn Lifland Pearlman Herrmann & Knopf, L.L.P.