

No. 17-1542

In the
Supreme Court of the United States

KATHRINE MAE MCKEE,
Petitioner,

v.

WILLIAM H. COSBY, JR.,
Respondent.

On Petition for Writ of Certiorari to the United
States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

As stated in the petition for certiorari, and not denied by Cosby, there is a split among the circuits as to whether persons in McKee's position are limited purpose public figures. (Cosby makes a half-hearted argument that it was only the "older" cases that maintained a narrower definition of a limited purpose public figure, but those cases have not been overturned and still create a circuit split.) McKee will not rehash that point here.

Rather, McKee files this Reply to correct several misstatements and irrelevant contentions made by Cosby in his Opposition.

First, Cosby proposes that because McKee was, perhaps, a minor celebrity decades ago, that this somehow made her a public figure for all purposes. This is false. Whatever McKee's notoriety may have been in the 1970's, it has nothing to do with the question of whether McKee injected herself into a public debate about sexual harassment and sexual abuse taking place in the second decade of the 21st century by merely saying that she too was raped by Cosby.

Second, the court of appeals' resolution of the "immunization" issue, involving whether Cosby's defamatory statements were opinions supported by disclosed, purportedly non-defamatory facts, was not an adequate and independent state ground for the decision. The court of appeals explicitly determined that some statements were not actionable based on the determination that there was no actual malice

(which in turn depended on whether McKee is a public figure), and certainly never made any plain statement that it was not relying on the First Amendment limited purpose public figure doctrine in making its determinations.

Third, Cosby identified several public statements made by McKee in 2015, claiming McKee was participating in a public debate about Cosby. However, in each case McKee did nothing more than recount her own story that Cosby raped her in a hotel room in Detroit in 1974, and say that she came forward in 2014, after hearing the accounts of other Cosby victims, in order to say that it happened to her too.

In all of the limited number of times McKee spoke in public about her rape by Cosby, McKee never injected herself into any public debate, never advocated for any changes to the nation's current sexual harassment policies or laws, and never addressed any other public policy issues. She just said that she too was raped by Cosby. Having the courage to stand up to a famous and powerful person, and credibly say you were raped, should not be tantamount to giving up your right to redress for libel or slander.

McKee urges this Court to grant the petition.

ARGUMENT

I. Cosby’s Claim that McKee Was a Minor Celebrity 40 Years Ago Is Irrelevant.

Cosby argues that McKee is “famous”, and is a “celebrity” who has “enjoyed regular access to the media for decades”. Cosby’s argument conflates the two types of public figures. A person who is so famous so as to be a household name becomes a public figure for all purposes. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) (general purpose public figure “achieve[s] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts”). It is beyond cavil that McKee is not a general purpose public figure.

In contrast, a person may become a limited purpose public figure if she injects herself into public debate regarding the “particular controversy giving rise to the defamation”. *Id.*, at 351-52. There is no hybrid “semi-general public figure” category.

Cosby’s argument is simply an attempt to change the subject. Whether McKee is a limited purpose public figure turns solely on whether she is voluntarily taking part in the current public debate over what to do about celebrity sexual misconduct, and nothing else.

II. **Cosby Has Not Shown an Adequate and Independent State Ground for the First Circuit’s Decision.**

Cosby argues that the court of appeals “relied primarily” on the state law ground that the defamatory statements were allegedly “immunized” by reason of their proximity to the disclosure of non-defamatory facts, rather than the determination under federal constitutional law that McKee was a limited purpose public figure. *Opp. to Pet. for Cert.*, at 6. This argument is false, for the following reasons.

The immunization finding by the court of appeals does not in any way constitute an adequate and independent state law ground for the decision. Under *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), a lower court decision that extensively discusses federal precedents and law is assumed to have relied on it, giving rise to jurisdiction in this Court, absent a plain statement that the precedents are cited for guidance only.

The court of appeals’ decision here extensively discusses the limited purpose public figure doctrine and contains no plain statement that this discussion was mere dicta or guidance. Thus, the case is reviewable by this Court.

Indeed, even Cosby concedes that the court of appeals relied on the First Amendment implications of its limited purpose public figure determination in its analysis of the defamatory statements. *Opp. to Pet. for Cert.*, at 7.

In fact, it is absolutely clear that the court of appeals analyzed the nature of the defamatory statements together with the actual malice standard, which it could do only after first determining that McKee was a limited purpose public figure under the First Amendment: “Singer admittedly does not include this important contextual information in the Letter itself, but the quotations, themselves accurate, are immediately followed by a hyperlink to the source article, allowing readers to put McKee's statements into proper context. On these facts, we cannot conclude that Singer knowingly or recklessly published a falsehood.” *Pet. App.*, at 20a-21a.

The court of appeals thus did not analyze the immunization issue solely on state law grounds.

III. None of the Media Appearances Cited by Cosby Amount to Voluntary Injection of McKee Into the Public Debate about Celebrity Sexual Assault.

Cosby argues that McKee “did far more than identify herself as an alleged victim on December 22, 2014”. *Opp. to Pet. for Cert.*, at 12. This is false. McKee gave an interview to the *New York Daily News* which resulted in the article dated December 22, 2014,¹ which was published in the physical newspaper and on its website.

The *Daily News* also posted McKee’s answers to the interview questions on YouTube.com (the

¹ *Pet. App.*, at 124a-128a.

“YouTube video”). See “Bill Cosby Raped Me, And This Is Why I’m Coming Forward: Actress” (December 22, 2014), <https://www.youtube.com/watch?v=BcJuU-232j8>.

This was not a separate and additional public appearance by McKee. In the YouTube video, McKee is shown responding to questions, although the questions have not been recorded. McKee’s answers on the YouTube video match her answers in the article, and like her statements in the article, amount to nothing more than the public affirmance that she was a victim. McKee says the following on the video:

- “I just felt that now I’d be safe with the other women in a group, and I would come forward and support them, and say, yeah, it happened to me also.”²
- “I do believe that all of the women that are coming up and stepping forward should take a lie detector test, which I would be more than happy to be the first one to do so, because I think then the whole mysterious thing about, everybody is saying well, we don’t know if it was true, we weren’t there, but why are they coming forward, well obviously all of these women are not coming forward and telling a lie, so I think that would be the first

² New York Daily News, Video: *Bill Cosby Raped Me, And This Is Why I’m Coming Forward: Actress*. (December 22, 2014) <https://www.youtube.com/watch?v=BcJuU-232j8>, at 2:11 to 2:20.

important step to do it.”³

- “As for what happens to [Cosby], basically I think it has already happened to [him]. I think all of the women coming forward and revealing the truth about the kind of person that he is, the other side, the other man, is enough for Bill Cosby. I think for him to face this is really, very difficult.”⁴

Cosby’s argument is based upon the false supposition that McKee is a prominent advocate on the issue of sexual abuse in Hollywood, or that she has become one of the leaders of the movement to reform the industry. This is entirely misleading. McKee has not entered any public debate—she has merely said that she too was raped by Cosby. Cosby responded to McKee’s “#metoo”-type statement by attacking her character and destroying her reputation.

If powerful figures like Cosby are permitted to make false statements about their accusers and discredit their accusers’ reputations, and succeed in getting defamation lawsuits dismissed simply because their accusers have been brave enough to publicly reveal the sexual misconduct by saying “me too”, then victims in the future may be dissuaded from speaking up.

³ *Id.*, at 2:21 to 2:45.

⁴ *Id.*, at 2:48 to 3:12.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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