

Exhibit F

Pagination

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Majority Opinion >

U.S. District Court, District of Columbia

JERRY GENE SUMMERLIN, et al., v. THE WASHINGTON STAR COMPANY

No. 81-2571

December 31, 1981

Libel action against newspaper. On defendant's motion to dismiss.

Granted.

Dana Dembrow, Washington, D.C., for plaintiff.

David J. Branson, of White & Case, Washington, for defendant.

Johnson, J.:

Full Text of Opinion

This matter is currently before the Court on the motion of defendant, The Washington Star Company, to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6). The defendant asserts that plaintiffs have failed to state a cognizable claim upon which relief can be granted, because as a matter of law the alleged defamation underlying this action was not "of and concerning" plaintiffs. After carefully examining the complaint, the defendant's motion to dismiss, and plaintiffs' opposition thereto, the Court finds itself in agreement with the defendant's position, and will dismiss the complaint accordingly.

BACKGROUND

On December 5, 1980, Dr. Michael J. Halberstam was shot and fatally wounded when he confronted a burglar in his Northwest Washington home. Dr. Halberstam insisted upon driving himself to the hospital, and while enroute he noticed his assailant running down the street approximately one block from the Halberstam residence. Dr. Halberstam proceeded to strike and disable the fleeing intruder with his automobile, and shortly thereafter police arrested the injured man and charged him in connection with the shooting incident.

On December 6, 1980, the morning edition of *The Washington Star* contained the following account of the Halberstam shooting:

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On the way to the hospital, the car Halberstam was driving struck and injured a man running down the street a block away. Police later charged the man with assault with a deadly weapon in connection with the doctor's shooting.

Police identified the suspect as Jerry Summerlin, 22, of the 5500 block of Dana Place, N.W. Summerlin was arrested after he collapsed in the front yard of a home near his own home — a block from the Halberstam residence. He was listed in satisfactory condition at D.C. General Hospital with internal injuries early today.

Dr. Halberstam's assailant was subsequently identified as Bernard Welch, whose criminal exploits have since become notorious in the metropolitan Washington, D.C. area. On December 7, 1980, *The Star* reported this new information in its morning edition and explained that an officer on the scene had thought that he recognized the suspect as Jerry Summerlin. That erroneous identification was apparently released to the media after Welch had steadfastly refused to provide any information to the police. Welch's identity was not firmly established until the FBI matched his fingerprints with its computerized records.

Welch was convicted of murdering Dr. Halberstam in April 1981. Six months later plaintiffs brought this libel action pursuant to 28 U.S.C. §1332 (1976), alleging that plaintiff Jerry Summerlin of 8809 Plymouth Street in Silver Spring, Maryland had been wrongfully identified as Dr. Halberstam's assailant in *The Star*. As a result of [*2] this allegedly libelous publication, plaintiffs claim that they are entitled to a judgment of \$2,000,000.00 in compensatory and punitive damages against *The Star*. *

Libel has been defined as a publication, in print or in writing, which reflects upon the character of the person being described and subjects him to ridicule, hatred, or contempt, or otherwise affects him injuriously in his trade or profession. 53 C.J.S. Libel and Slander §1 (1948). In order for a libelous statement to be actionable, the plaintiff must show that it was published "of and concerning" him; that is, the libel must designate the plaintiff in such a way as to let those who knew him understand that he was the person referred to in the libelous publication. *Fetler v. Houghton Mifflin Company*, 364 F.2d 650, 651 (2d Cir. 1966); *Julian v. American Business Consultants, Inc.*, 2 N.Y. 2d 1, 17, 155 N.Y.S. 2d 1, 17, 137 N.E. 2d 1, 12 (1956); *Smith v. Huntington Publishing Company*, 410 F. Supp. 1270, 1273 (S.D. Ohio 1975); *Robinson v. Guy Gannet Publishing Company*, 297 F. Supp. 722, 725-26 (D. Me. 1969). The person libeled need not be specifically named, but the surrounding circumstances must leave *no doubt* in the reader's mind as to the person's identity. *Hutchinson v. Proxmire*, 431 F. Supp. 1311, 1331 [2 Med.L.Rptr. 1769] (W.D. Wisc. 1977). Similarly, it is clear from the Restatement of Torts, an authority that is followed in the District of Columbia, see *Harmon v. Liss*, 116 A.2d 693 (D.C. Mun. 1955), that in a suit for defamation there must be proof of certainty as to the person defamed before liability can be imposed. Restatement of Torts §564(b) (1938).

The question posed by the defendant's motion is whether the complaint is so defective that it cannot be sustained even on the assumption that plaintiffs' factual allegations are true. "In this type of case, a dismissal is not justified unless it is clear and apparent to the court that from the allegations it cannot be deducted under any state of facts that the publication was of and concerning the plaintiff." *Riverhouse Publishing Company v. Porter*, 287 F. Supp. 1, 3 (D.R.I. 1968). The Court believes that such a deduction is justifiable in this case, for it cannot be said that plaintiffs "[have] been exposed to serious damage to reputation by the failure of defendant sufficiently to identify the person defendant intended to reference." *Ryder v. Time, Inc.*, 557 F.2d 824, 826 [2 Med.L.Rptr. 1221] (D.C. Cir. 1976).

In ascertaining whether the article in question could be reasonably understood to apply to plaintiff Jerry Gene Summerlin, the Court has resorted to a process of identification and "compared the plaintiff's characteristics to those of the person described in the article." *Smith v. Huntington Publishing Company*, supra, at 1273; see also *People on Complaint of Maggio v. Charles Scribner's & Sons*, 205 Misc. 818, 130 N.Y.S. 2d 514 (Mag. Ct. 1954). That process of identification reveals sufficiently distinct dissimilarities between plaintiff Jerry Gene Summerlin and the person referenced in the offending article to preclude any reasonable finding that plaintiff was the individual identified in the *Star* article. *In the first place*, the article specifically states that the suspect arrested in connection with the murder of

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Dr. Halberstam was twenty-two years of age; yet plaintiff has admitted that he was not twenty-two years old at the time of the events in question. See Memorandum of Points and Authorities in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss, at-1. *Second*, the article lists the address of the accused assailant as the 5000 block of Dana Place, N.W.; in contrast, the plaintiffs lived on Plymouth Street in Silver Spring, Maryland throughout the period.* *Third*, the article's reference [*3] to the suspect's home as being one block from the Halberstam residence is similarly inconsistent with plaintiffs' address at the time of the shooting. *Fourth*, the article locates the suspect at D.C. General Hospital on the day in question, and describes him as recovering from internal injuries. Plaintiffs' complaint, however, is devoid of any allegation that plaintiff Jerry Gene Summerlin was either confined to the D.C. General Hospital on December 6, 1980, or suffering from internal injuries.

In the final analysis, plaintiffs can point to nothing except a bare coincidence of first and last names to sustain their complaint. And even that facial correlation seems disturbingly contrived in light of the fact that plaintiffs' Request for Admissions filed with the complaint asks the defendant to admit that "Gerald G. Summerlin" was not arrested and charged with the murder of Dr. Halberstam. If plaintiff's legal name is Gerald rather than Jerry, his use of a sobriquet in the complaint to parallel the name printed in the article further robs the complaint of whatever credibility it might have originally possessed. In any event, the Court is convinced that in this case, *The Star* provided the additional information necessary to insure that plaintiff was not unfairly stigmatized by the newspaper's erroneous reference to a murder suspect ostensibly bearing the same name as plaintiff. Any libelous statements that might have been made in the article were therefore not "of and concerning" plaintiff Jerry Gene Summerlin. For that reason, both his claim and the derivative claim of his wife must be dismissed. An Order consistent with this Memorandum Opinion will be issued on this date.

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Plaintiff Juanita Summerlin has brought a derivative claim for damages she has allegedly sustained as a result of the libelous reference to her husband.

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The fact that plaintiff's brother, James Summerlin, may have resided at the Washington, D.C. address specified in the article cannot resuscitate this complaint in light of the clear, tangible differences in physical characteristics and relevant loci between plaintiff and the person described by *The Star*.