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Character Counts

A Primer on Defamation Law for Community Associations

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"Be more concerned about your CHARACTER than your REPUTATION because your CHARACTER is who you are and REPUTATION is what others think of you."

- Anonymous



Although this may be sage wisdom, we all still value our reputations and the law of defamation exists to protect them from unsubstantiated and unfair tarnishment. Of course, once a person's good name has been wrongly damaged, juries are fond of awarding large sums to the injured party. Defamation awards can frequently reach six figures. See, e.g., *McGovern v. Grapski*, 793 So. 2d 935 (Fla. 1st DCA 2001) (affirming a \$250,000 jury award for defamation when the plaintiff only sought \$25,000).

If there was a broken railing on a staircase, wouldn't you take the measures necessary to fix it? Of course, you would. Someone might get hurt, and if they got hurt, a lawsuit would not be far behind. Taking the time to educate yourself about the law of defamation is as advisable as fixing that broken railing. Someone's reputation can be a fragile and easily-damaged thing. "If you break it, you buy it."

With this in mind, community associations would do well to take the precaution of educating themselves. Can you be sued for negative comments made at a board meeting? What about when an ex-employee's past record comes up? Does every answer need to be "no comment" in order to avoid exposure to liability? Community associations should be aware of how this area of the law can affect them. But, armed with a bit of knowledge, they need not be paralyzed by the fear of an economically-crippling defamation suit.

The Basics of Defamation

Libel is a written or broadcasted defamation, and slander is a spoken defamation. The law looks at them both equally. The four essential elements of a defamation claim are set forth in *Valencia v. Citibank, Int'l.*, 728 So. 2d 330 (Fla. 3d DCA 1999). These are as follows: "(1) the defendant published a false statement (2) about the plaintiff (3) to a third party and (4) the falsity caused injury to the plaintiff." If the plaintiff cannot prove all four of these elements, then the defendant in a defamation action will prevail.

Publication - In order for an allegedly defamatory statement to be considered "published," it need not be splashed across the front page of your community's newsletter (although this certainly would constitute "publication"). Even a letter from one person to another, about a third person, is publication in the eyes of the law

[*Thomas v. Jacksonville TV*, 699 So. 2d 800, 803 (Fla. 1st DCA 1997)]. Whether it is an action for libel or slander, any defamation action requires only three people. The person making the allegedly defamatory statement, the person about whom the defamatory statement is made, and, the third party receiving the defamatory statement [See *Shafran v. Parrish*, 787 So. 2d 177, 179-80 (Fla. 2d DCA 2001)].

Proving Injury - One problem area for a defamation plaintiff is proving that the statement actually caused harm to his or her reputation. An off-hand remark about someone might be false, but, as they say, "no harm, no foul." One notable exception to this rule is when a statement falsely accuses another of committing a crime. Any such statement is presumed to harm the reputation of the subject and constitutes defamation per se [*Shafran v. Parrish*, 787 So. 2d 177, 179 (Fla. 2d DCA 2001)].

As an illustration, in the case of *Bass v. Rivera*, 826 So. 2d 534 (Fla. 2d DCA 2002), plaintiff Bass was attempting to purchase a home in a planned residential subdivision. Rivera, a police officer who lived in the subdivision, told Bass' contractor and future neighbors that Bass was a drug dealer. The court held that Bass did not need to prove damages, because "malice and the occurrence of damage are both presumed from the nature of the defamation." Any statements that accuse someone of criminal wrongdoing should be made with great caution.

Privilege

Sometimes, defamatory statements are made in the heat of an argument, or in a gossip session. Other times, there might be a legitimate business reason for a communication about another person. For example, discussions among a board of directors about a potential resident of a community do serve a legitimate interest. These statements may be protected by a "qualified privilege" as articulated in *Randolph v. Beer*, 695 So. 2d 401 (Fla. 5th DCA 1997). In *Randolph*, a member of a credit union's board of directors circulated a memorandum to the other members of the board containing a rumor that an insurance agent seeking to do business with the credit union was involved in a kickback scheme. The audience that received the allegedly defamatory statement had a legitimate business interest in the substance of the communication because, if true, the rumors reported would have affected the credit union. Therefore, even though the rumors might have been false, there was a legitimate business reason for making them, and they were privileged. This did not end the case, but rather placed the burden on the plaintiff of showing that the statements were motivated by malice and not out of a desire to fulfill a duty to the credit union.

What if an association fires an employee and a new potential employer calls the association for a reference? An employer who discusses the job performance of a former employee with that person's prospective new employer is presumed to be doing so in good faith and is immune from all civil liability for the consequences of such good faith statements, unless the former employee can dispel this presumption of good faith by showing clear and convincing evidence that the statements were made with malicious intent. Statements which are deliberately misleading or made for a malicious purpose will remove the statutory presumption of good faith [*Linafelt v. Beverly Enterprises-Florida, Inc.*, 745 So. 2d 386, 389 (Fla. 1st DCA 1999)].

Whether a privilege applies will depend on the mode, manner, and motivation of the speaker. If statements are made with malice, or made for an improper purpose, any potential privilege may be lost. Therefore, any otherwise defamatory statements made during the course of a board's review of a potential tenant's application, which are

motivated by a desire to protect the community from the possible ills that could accompany the tenant, will be protected by the privilege. However, if the potential tenant can show that the motivation for the statements was rooted in malice, then the privilege is waived. Simply using strong words or behaving with a lack of tact will not automatically dispel the privilege, but the law will look at whether the speaker used his or her privileged position in a manner to purposely harm the plaintiff.

Public Figures

Although many government officials complain that those who criticize them should be punished, the First Amendment says otherwise and demands that these people receive the least amount of protection from the law of defamation. This is to encourage the rest of us to participate in public discourse and self-government without concerns that we will be sued. The First Amendment demands that citizens have access to wide-open and robust political debate, and grants wide latitude to criticisms of public officials - even if those statements are false. The case of *New York Times v. Sullivan*, 376 U.S. 254 (1964), states that in order for a public official to sue for defamation, the allegedly defamatory statements must be made with actual malice - knowledge of the falsity of the published material or reckless disregard as to its truth. This leaves public officials with very little recourse in a defamation action, and protects Americans from having to fear the consequences of honest mistakes when discussing their government.

The definitions of "public figure" and "public official" are not necessarily always clear. While the mayor is, without question, a public figure, what about the president of your condominium association? It all depends on the context of the defamation.

Insurance Coverage for Defamation Cases

What if your association loses a defamation suit? Some cases can result in enormous awards for the plaintiff. Will the association's liability insurance cover this award? Your insurance policy may have an exclusion for intentional defamation torts. See *S.M. Brickell Limited Partnership v. St. Paul Fire and Marine Ins. Co.*, 786 So. 2d 1204, 1206-07 (Fla. 3rd DCA 2001). In this case, the insurance company was neither obliged to hire a lawyer to defend the association nor was it obliged to cover any damage award. Although your policy may cover the association for negligent defamation - that is, defamation caused accidentally - it may very well have a provision excluding coverage for intentional acts of defamation.

Conclusion

As you can see, this area of the law is marked by many intricacies and nuances that can save or cost your association money. The old adage, "think before you speak," is still the best practical advice.

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