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Global Protection of Free Speech Rights for American Journalists, Admirable or Overkill?

Trout Point Lodge, Ltd. v. Handshoe

Kelsey Bates

Introduction

In 1958, the United States became a signatory of the United Nations Convention of the Recognition and Enforcement of Foreign Arbitral Awards.¹ It has not, however, ratified any international agreement regarding the recognition of foreign judgment awards, nor is it bound by international law (comity) to recognize such awards.² Existing jurisprudence concerning the enforcement of foreign judgment is limited to the revised Uniform Enforcement of Foreign Judgments Act, ratified in 1964.³ This Act applies only to those “foreign” judgments of a United States court which is entitled to full faith and credit in the enacting state, namely sister state judgments.⁴ Judgments from courts of foreign countries are specifically excluded.⁵ Historically, this exclusion carried little significance, however in this modern era of globalized information and commercial markets a need arises for protection of the American citizen’s rights worldwide.⁶

In 2010, Congress made a move towards bestowing greater protection globally for American authors and journalists when it passed the Securing the Protection of our Enduring and Established

¹ Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgment: Is It Broken and How Do We Fix It?* 31 BERKELEY J. INT’L LAW. 150 (2013) citing United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. See *Status: 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, available at http://www.uncitral.org/uncitral_texts/arbitration/NYConvention_status.html

² Bruce D. Brown & Clarissa Pintado, *The Small Steps of the Speech Act*, 54 Va. J. Int’l L. Dig. 1, 8 (2014).

³ 31 A.L.R.4th 706 (Originally published in 1984).

⁴ *Id.*

⁵ *Id.*

⁶ Brown & Pintado, *supra* note 2, at 5.

Constitutional Heritage Act (“SPEECH Act”).⁷ This Act specifically targets foreign defamation judgments by providing that such judgments are presumed unenforceable in the United States.⁸ The Act was passed as an intended counter measure to the perceived growing trend of libel tourism, wherein plaintiffs forum shop and file in specific countries to take advantage of plaintiff-friendly defamation laws.⁹ Libel tourism produces a significant problem for U.S. publishers because they are sued overseas for content they published for a U.S. readership but under the much less speech-protective norms of foreign law.¹⁰ To combat this the SPEECH Act provides that the presumption of non-enforceability is rebuttable only when the party seeking enforcement can prove that: (a) the foreign law offers as much free speech protection as the First Amendment and the constitution of the enforcing court; or (b) the plaintiff would have been successful had the case originally been litigated in the enforcing court.¹¹ The Act faced its first challenge and application in a case involving enforcement of a Canadian defamation judgment.¹²

Trout Point Lodge Limited v. Handshoe

The Act was ushered in to application by the case *Trout Point Lodge Limited v. Handshoe*, wherein plaintiff attempted to enforce a damages judgment awarded by the Supreme Court of Nova Scotia.¹³ The United States Southern District Court of Mississippi who heard the case, ultimately found that Canadian freedom of speech protection did not adequately compare to that provided by US law, nor would any Mississippi court have awarded the judgment on the merits of the suit.¹⁴

⁷ Nicole M. Manzo, *If You Don't Have Anything Nice to Say, Say It Anyway: Libel Tourism and the Speech Act*, 20 ROGER WILLIAMS U.L. REV. 152, 156 (2015).

⁸ *Id.*

⁹ *Id.* at 154

¹⁰ Brown & Pintado, *supra* note 2, at 3.

¹¹ Manzo, *supra* note 7, at 156

¹² *Id.*

¹³ *Trout Point Lodge, Ltd. v. Handshoe*, 729 F.3d 481, 483 (5th Cir. 2013).

¹⁴ *Id.*

Facts of the Case

Trout Point Lodge is a hotel resort owned and operated by Vaughn Perret (“Perret”) and Charles Leary (“Leary”) located in Nova Scotia, Canada.¹⁵ In January of 2010, defendant Doug K. Handshoe (“Handshoe”) published articles on his blog, slabbed.org, alleging a connection between Trout Point Lodge (and by extension Perret and Leary) and the criminal activities of Aaron Broussard, the Parish president of Jefferson County, LA.¹⁶ Broussard owned property on a road nearby the lodge, Trout Point Road, and was himself indicted on charges of bribery and theft in the Eastern District Court of Louisiana.¹⁷

Handshoe’s blog was a purported “public-affairs” blog described as an “Alternative New Media for the Gulf South.”¹⁸ Prior to the indictment, the blog had published numerous articles discussing the ongoing corruption of Mr. Broussard, articles that Handshoe claimed were “instrumental” in reporting the corruption scandal, the indictment and the guilty plea involving Broussard.¹⁹ The *Times-Picayune*, a New Orleans based newspaper, also published articles alleging a connection between the two parties, specifically that Broussard had an ownership interest in Trout Point Lodge and that Jefferson Parish contractors had paid to rent the premises.²⁰ Perret and Leary contacted the *Times-Picayune* to alert the paper to factual errors in their article which led to the paper retracting the assertion and issuing a

¹⁵ *Id.* at 484.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 483.

¹⁹ *Id.* at 484.

²⁰ *Id.*

correction.²¹ Furthermore, the parent corporation of the *Times-Picayune* removed the offending article from Handshoe’s blog.²² After the removal of the article from slabbed.org, Handshoe took to other sites and continued publishing the allegations contained in the original article, even updating the allegations with comments that the district court noted could be characterized as derogatory, sexist, homophobic comments.²³

A. Decision of The Supreme Court of Nova Scotia

Trout Point Lodge filed suit in the Supreme Court of Nova Scotia on September 1, 2011 alleging defamation and related claims pursuant to the Canadian Constitution.²⁴ It claimed that the published articles were “directly defamatory and were also defamatory by both true and false innuendo in that they would tend to lower the opinion or estimation of the plaintiffs in the eyes of others who read the defamatory publications.”²⁵ Significantly, Trout Point Lodge did not specify which statements in individual blog posts were untrue, instead it merely alleged that the publications were false and malicious.²⁶ Nor did Trout Point Lodge provide any details about its actual connection to Broussard, if any.²⁷ Handshoe was notified of the suit but failed to appear, leading the Nova Scotia court to enter a default judgment against him.²⁸ The damages hearing that followed saw Trout Point Lodge awarded \$75,000 in general damages, \$50,000 in aggravated damages, \$25,000 in punitive damages and \$2,000 in costs.²⁹

B. Opinion of the Southern District Court of Mississippi

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 485

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

In March 2012, in an attempt to collect the damages awarded, Trout Point Lodge sought enforcement of the judgment in the Circuit Court of Hancock County, Mississippi.³⁰ Check what the case says. Handshoe countered by petitioning for removal to the Southern District Court of Mississippi pursuant to the SPEECH Act.³¹ The parties agreed that the issue was strictly legal in nature and elected to submit the matter to the court on cross-motions for summary judgment.³² The district court granted summary judgment in favor of Handshoe holding that Trout Point Lodge did not meet its burden of proof under the SPEECH Act.³³

The district court's analysis of this issue began with the first prong of the SPEECH Act.³⁴ By scrutinizing the finer points of Canadian law concerning freedom of speech, the court looked to determine if the protection provided by this provision was at least equal to the protection afforded by the first amendment of the U.S. Constitution.³⁵

It found that there are certain inherent similarities between Canadian and American law, given the long standing, special culture ties both nations have to each other and the shared connection to the United Kingdom. However, where Canada's defamation law is almost completely derivative of the U.K.'s, providing substantially less protection of free speech, the United States intentionally countered oppressive English restrictions by ratifying the Bill of Rights to secure greater freedom of expression.³⁶ Consequently, the United States has developed more permissive defamation jurisprudence, the most significant difference being the threshold for establishing a prima facie case. .

³⁰ *Id.* at 486.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 488.

³⁵ *Id.*

³⁶ *Id.* at 488-89.

In Canada, proving the falsity of the defamatory allegations is not an essential element in establishing a prima facie case for defamation, moreover the veracity of the claims is a defense, which if raised must be proven.³⁷ This approach to defamation law creates a pronounced advantage to a plaintiff considering bringing suit by maintaining a very low threshold for him to establish a viable prima facie case.³⁸ As for the defendant, he has numerous defenses available, however he bears the burden of adequately proving this defense.³⁹

Conversely, U.S. defamation laws place the burden of proof on the plaintiff, or the party defamed, because it is on the plaintiff to prove the wrongful nature of an injury to his reputation as part of his prima facie case.⁴⁰ The court found this stark difference in burden as sufficient to rule that Canada's defamation laws did not provide a level of protection for freedom of speech comparable to the protection offered in the U.S.⁴¹

After failing to adequately prove the first prong of the SPEECH Act, Trout Point Lodge's remaining option was to attempt to prove that the suit, if it had initially been brought in the district court, or any U.S. court, would have resulted in a favorable judgment.⁴² As discussed earlier, there is currently no blanket federal law setting the requirements to determine whether a foreign judgment should be enforced.⁴³ Rather, the SPEECH Act dictates that it be left to the state in which the suit is brought to determine if the defamation case is viable under that state's laws.⁴⁴ In this case, Trout Point Lodge sought enforcement in Mississippi. Under Mississippi law the threshold question in a defamation suit

³⁷ *Id.* at 489.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 490.

⁴² *Id.*

⁴³ 3 Litigation of International Disputes in U.S. Courts § 20.8

⁴⁴ *Id.*

concerns the falsity of the published statements.⁴⁵ It falls on the plaintiff to prove that the statements are in fact false, and when a statement is proven as true, the defendant has a complete defense.⁴⁶ As with most things, the truth is not black and white, and varying degrees of truth can exist. In Mississippi statements which are substantially true are not defamatory and minor inaccuracies do not amount to falsity so long as the substance of the libelous charge is justified.⁴⁷

Based on the Nova Scotia court's findings of fact, the Mississippi District Court determined that Handshoe had only made generalized allegations about connections between Perret and Leary and Broussard's crimes, and did not specify what role the two played in his crimes.⁴⁸ Some of Handshoe's articles appeared to be based in fact, while others had the tone of conspiracy theories that may or may not be substantiated.⁴⁹ The court was unable to determine the veracity of any of the statements given the record provided.⁵⁰ The inadequacy of Trout Point Lodge's claims, including its lack of response in refuting Handshoe's specific claims, became a particularly serious issue in this proceeding; while the Canadian court did not delve into this discussion because Handshoe did not appear, the Mississippi court had reason to scrutinize and evaluate the claims.⁵¹ The district court, unsurprisingly, found that Trout Point Lodge had failed to satisfy its burden of proof to show that the statements Handshoe made were, in fact, false.⁵²

C. Opinion of the Fifth Circuit Court of Appeals

On appeal, the Fifth Circuit were asked to address the district court's reason for finding that Trout Point Lodge had failed to prove the falsity of the statements because, (1) the Nova Scotia court

⁴⁵ *Handshoe*, 729 F.3d at 490.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

admitted the claims as is, and (2) that same court made factual findings in the course of awarding damages that purportedly establish the falsity of Handshoe's statements.⁵³

As to the first point, the appellate court established that a default judgment (like that rendered in the Nova Scotia court) does not equate with a general admission or an absolute confession.⁵⁴ Moreover, it recognized that allegations that are legal conclusions of law are not considered well-pleaded and therefore a defendant will not be held to have admitted such averments on default.⁵⁵ To adequately support a claim a plaintiff must present facts that contradict or undermine the allegedly defamatory statements, it is not enough to merely "cry false."⁵⁶

The court found that Trout Point Lodge's claims of defamation, specifically that Handshoe's statements were false, were unclear because they did not delineate each of the statements which were false.⁵⁷ Furthermore, even those statements that were identified as false were still legally insufficient because they were not supported by facts proving their falsity.⁵⁸ The complaint also stated that some of Handshoe's statements were defamatory by true innuendo, which creates an obvious problem for someone building his case on the falsity of alleged defamatory statements in a jurisdiction where statements that are substantially true are not defamatory.⁵⁹ The circuit court further found that even if the allegations had been admitted, they would still prove insufficient due to lack of subsequent evidence to satisfy Trout Point Lodge's burden of proof.⁶⁰ Either way, the court found that Trout Point Lodge could not show that a Mississippi court would enter default judgment against Handshoe.⁶¹

⁵³ *Id.* at 491.

⁵⁴ *Id.* at 491.

⁵⁵ *Id.*

⁵⁶ *Id.* at 494.

⁵⁷ *Id.* at 492.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

On the second point, the Fifth Circuit found it irrelevant that the Nova Scotia court had generated factual findings in the course of its damages hearing.⁶² Pursuant to the SPEECH Act, it does not matter what the Nova Scotia court found concerning the falsity of the statements; it only matters if a court in Mississippi would have found the falsity of the statements established.⁶³ The district court did not find adequate factual support that the statements were false, and therefore found Trout Point Lodge's claims insufficient.⁶⁴

Ramifications of the *Trout Point Lodge* decision

Both Mississippi courts in the *Trout Point Lodge* cases came to logical and fairly simple holdings given the facts presented, because the parameters of the case fit the application of the SPEECH Act. The instant case does however, raise interesting considerations about the reach and limits of this Act. The SPEECH Act does not address all potential situations involving protections of all rights encompassed in the First Amendment because it is limited to defamatory expression.⁶⁵ The Act does not address hate speech, privacy rights, nor does it prevent a foreign state's use of other deterrence measures.⁶⁶ Prison time is a relatively common remedy throughout the world for libel, as is the issuance of other strict measures like injunctions, banning books and censorship, but the Act specifically avoids interfering with criminal processes.⁶⁷ For example, because the SPEECH Act is limited in its application to defamation claims, it would likely not extend protection to offenders of laws like those of the Swedish and German penal codes which carry sentences for insults related to religion, ethnicity and race.⁶⁸

⁶² *Id.* at 494.

⁶³ *Id.* at 494-95.

⁶⁴ *Id.* at 490.

⁶⁵ Brown & Pintado, *supra* note 2, at 5.

⁶⁶ *Id.*

⁶⁷ *Id.* at 6.

⁶⁸ *Id.*

Conversely, the instant case also exposes the potential over inclusivity of the SPEECH Act because of its over broad application and lack of distinction between illegitimate and legitimate fora. Without the proper ability to distinguish between the two types of fora, the SPEECH Act penalizes those plaintiffs filing claims in good faith in appropriate fora.⁶⁹ The Act was meant to curb plaintiffs filing in an illegitimate forum, but in its vague, not concise language it inadvertently denies plaintiffs in legitimate cases, appropriate relief.⁷⁰ The plaintiffs in *Trout Point Lodge* were not engaging in the type of “forum shopping” noted earlier.⁷¹ They filed in a legitimate, appropriate forum because they resided in Canada, their lodge was located in Canada and the alleged defamatory statements were accessible by Canadian residents.⁷² However, the Fifth Circuit, pursuant to the SPEECH Act, analyzed the complaint submitted to the Nova Scotia court on its face, without consideration of the context in which it was filed.⁷³ The complaint was filed in a Canadian court and tailored to that jurisdiction’s procedural pleadings requirements. These pleadings requirements are, unsurprisingly, different from those held by the state of Mississippi.⁷⁴ The Fifth Circuit found *Trout Point Lodge*’s claims legally insufficient because they were not well pleaded against the standard of the Mississippi court.⁷⁵ This is a potential fundamental failing of the SPEECH Act.⁷⁶ It is very unlikely that a complaint filed in foreign jurisdiction will meet the procedural pleadings requirements of any given state in the United States. To remedy such a failing, perhaps the second prong of the Act should be amended to allow for filing of an amended complaint in the given United States jurisdiction so that a plaintiff might have an actual chance of proving a legitimate defamation claim under the state’s law.

⁶⁹ Manzo, *supra* note 7, at 179.

⁷⁰ *Id.*

⁷¹ *Id.* at 155.

⁷² *Id.* at 184.

⁷³ *Id.* at 190.

⁷⁴ *Id.* at 191-92.

⁷⁵ *Id.* at 190-92.

⁷⁶ *Id.* at 202.

Conclusion

Congress passed the SPEECH Act to provide more protection and support for U.S. journalists navigating this ever globalizing media market. It is admirable in its promotion of a founding principle of the United States: freedom of speech. But, it also has the capacity to over compensate. The Act creates a harsh standard for judging the speech protections of other countries, if Canada of all countries is not up to par, what country is likely to pass? Congress should also re-examine the unfair threshold it sets forth by prescribing that complaints from other jurisdictions be taken at face value. The Act should be amended to allow petitioners the opportunity to present their own amended complaint that would adhere to the standards of the American jurisdiction, including details or facts that may have been omitted from the initial suit which would now be relevant. This protects the integrity of the Act, while also providing parties a fair chance at obtaining a judgment.