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Justices Reinstate \$1M Defamation Award, but 23-Year-Old Case Lives On

The Pennsylvania Supreme Court has revived a \$1 million compensatory damages verdict in an orthopedic surgeon's defamation case that has been ongoing for more than two decades—but the case is not over yet.

By Zack Needles | July 18, 2019



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In a unanimous June 17 opinion (<http://www.pacourts.us/assets/opinions/Supreme/out/J-13-2019mo%20-%2010406696768863334.pdf?cb=1>) that laid out the proper appellate standard of review regarding defamation verdicts, the justices ruled in *Menkowitz v. Peerless Publications* that the Superior Court, in reversing a Montgomery County trial judge's denial of judgment notwithstanding the verdict (JNOV), failed to give appropriate deference to the trial court as factfinder.

The justices said the intermediate appellate court's analysis violated the Supreme Court's 2015 holding in *Joseph v. Scranton Times (Joseph III)*.

Justice Christine Donohue, writing for the court, said the appellate panel's duty when examining the trial court's denial of JNOV "was to determine whether the trial court had abused its discretion when it determined that sufficient, competent evidence existed in the trial record to sustain the jury's verdict."

"Instead, the Superior Court cited to other evidence that could support a contrary conclusion and, in so doing, did not review the record in the light most favorable to the verdict winner and afford him the benefit of all reasonable inferences," Donohue said. "As a result, the Superior Court disregarded this court's holding in *Joseph III* by failing to apply the appropriate standards of causation and deference."

Donohue was joined by Chief Justice Thomas Saylor and Justices Max Baer, Debra Todd, Kevin Dougherty, David Wecht and Sallie Updyke Mundy.

According to court documents, Dr. Elliot Menkowitz filed suit against Peerless Publications and now-former Pottstown Mercury reporter Eric Engquist after The Mercury published an April 1997 article, written by Engquist, which stated that Menkowitz had been suspended by Pottstown Memorial Medical Center and that his absence from the hospital had "spawned rampant rumors of professional misconduct regarding his treatment of an older female patient."

Menkowitz, according to court documents, argued that the statement "professional misconduct regarding his treatment of an older female patient" was defamatory per se and false and made with reckless disregard for the truth. He also argued that the statement portrayed him "as an incompetent doctor who engaged in criminal acts toward his patients" and "implied that Dr. Menkowitz had engaged in unlawful or unprofessional behavior."

On March 20, 2014, following a weeklong trial in Montgomery County Court of Common Pleas Judge Richard P. Haaz's courtroom, the jury awarded Menkowitz \$800,000 for past and future lost earnings, \$200,000 for harm to his reputation and \$1 million in punitive damages, according to the jury sheet.

But following post-trial motions by the plaintiffs, Haaz tossed out the punitive damages award, finding there was no evidence of malice.

On appeal, the Superior Court upheld the ruling on punitives but also vacated the compensatory damages award.

An en banc panel of the appeals court found that the phrase "professional misconduct regarding his treatment of an older female patient" could constitute defamation by implication because it could suggest Menkowitz engaged in improper sexual or physical conduct with an older female patient. Therefore, the panel said, the trial court properly submitted the case to the jury on a defamation by implication theory.

Nevertheless, the appeals court, pointing to the state Supreme Court's 2015 ruling in *Joseph*, said that because Menkowitz failed to show evidence of malice on the part of the newspaper, he would only be entitled to damages if he could prove that his reputation was injured by the allegedly false statements or innuendos.

He failed to do so, Judge Victor Stabile wrote for the appeals court.

"Not one witness testified that his or her view of the physician changed as a result of this communication," Stabile said in his Dec. 15, 2017, opinion (<http://www.pacourts.us/assets/opinions/Superior/out/opinion%20%20vacatedaffirmedremanded%20%2010335759930901217.pdf#search=>

Menkowitz%22). “Furthermore, even Dr. Menkowitz conceded that the harshness of suspension alone after 25 years would lead one to believe that he had done something horrible.”

Similarly, the court rejected Menkowitz’s argument that the article caused other hospitals with which he was associated to stop working with him.

“Absent is the causal connection required by *Joseph* between the alleged defamatory innuendos and the harm to reputation, as distinguished from the suspension itself,” the appeals court said. “All of the foregoing proof tends to confirm that any damage to Dr. Menkowitz’s reputation flowed from the suspension itself, not any implication of sexual or physical abuse. Thus, even if we were to find a basis for liability, the record contained insufficient proof that the defamatory statement or innuendos, rather than the fact of suspension, caused damage to reputation that would have supported a compensatory damage award.”

But Donohue said the appellate court overstepped its bounds by disregarding the evidence in the record that supported the jury’s verdict and instead pointing to contrary evidence to form its own conclusion.

Donohue said the Superior Court also failed to give Menkowitz “the benefit of every reasonable inference arising from the evidence while resolving any doubts in his favor.”

The justices did, however, remand the case to the Superior Court to address several issues that it did not examine in its original opinion, including the defense’s challenges to several jury instructions, as well as to the trial court’s decision to bar from evidence minutes of a board of directors’ meeting that documented the basis for Menkowitz’s suspension.

Menkowitz is represented by Alan Epstein and Jennifer Myers Chalal of Spector Gadon Rosen Vinci in Philadelphia.

Epstein, who noted that he's now been involved in the case for about half of his legal career, said he "was impressed with the court's decision to clarify the law regarding defamation and defamation by implication" and that his client "was pleased with the result and with the thoughtfulness of the decision."

Counsel for the defendants, Michael Berry of Ballard Spahr in Philadelphia, declined to comment.

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