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CASES OF INTEREST

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IP/ENTERTAINMENT LAW WEEKLY CASE UPDATE FOR MOTION PICTURE STUDIOS AND TELEVISION NETWORKS

February 9, 2011

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McNamee v. Clemens, USDC E.D. New York, February 4, 2011

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- In defamation action against former baseball player Roger Clemens filed by his former personal trainer, court grants in part and denies in part defendant's motion to dismiss the complaint, concluding that factual statements Clemens made at press conferences and other planned media events are actionable and not otherwise protected by the judicial proceedings privilege.

Defendant William Roger Clemens, a former major league baseball player with 354 victories and seven Cy Young Awards, hired plaintiff Brian G. McNamee as a strength and conditioning coach. In the spring of 2007, federal authorities contacted McNamee in New York City in connection with the government's criminal investigation of BALCO, a Bay Area laboratory allegedly involved in the development and sale of performance-enhancing drugs. At the interview, investigators from the United States Attorney's Office told McNamee that the government had sufficient evidence to secure a conviction against McNamee for delivering illegal performance-enhancing drugs to athletes. To avoid prosecution, McNamee accepted the investigators' offer for immunity and agreed to cooperate in the BALCO investigation. McNamee told investigators that he injected Clemens with steroids and Human Growth Hormone ("HGH") during the 1998, 2000, and 2001 baseball seasons. At the request of federal authorities, McNamee also cooperated with an investigation being conducted by former United States Senator George Mitchell into the use of performance-enhancing drugs in major league baseball (the "Mitchell Commission"). The Mitchell Commission subsequently released the findings of its investigation (the "Mitchell Report"), and named 89 MLB players, including Clemens, alleged to have used performance-enhancing drugs.

Clemens denied all allegations of drug use and made a number of public statements regarding McNamee's accusations.



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In January 2008, Clemens filed suit for defamation against McNamee in Texas state court. The district court dismissed Clemens's complaint on the grounds that McNamee's statements were absolutely privileged and the court lacked personal jurisdiction over McNamee, as the focal point of his statements about Clemens was not Texas.

In December 2008, McNamee filed a new action in New York state court against Clemens for defamation, intentional infliction of emotional distress and malicious prosecution. Clemens removed the action to the United States District Court for the Eastern District of New York. Clemens moved to dismiss McNamee's complaint for lack of personal jurisdiction and for failure to state a claim.

In addressing Clemens's assertions concerning personal jurisdiction, the court found that the complaint sufficiently pleaded personal jurisdiction based on an alleged contract, for personal training services to be performed in New York, between Clemens and McNamee. Although Clemens argued that the alleged contract was both oral and illegal, such that it could not give rise to jurisdiction, the court rejected that argument. After noting that "[w]hether or not a contract is illegal or otherwise unenforceable is an altogether separate question from whether a contract was negotiated, entered into, and performed in [a] fashion that conveys jurisdiction over the parties," the court held: "based on the allegations in the complaint . . . McNamee and Clemens were involved in an ongoing relationship, the type of which gives rise to personal jurisdiction under CPLR § 302(a)(1)."

The court next considered McNamee's defamation claims. McNamee alleged that Clemens committed multiple acts of defamation, divided into four general types of statements: statements that McNamee is a "liar," statements that McNamee "manufactured evidence," statements that McNamee "has a mental disorder," and statements that McNamee is "extorting" Clemens.

Under New York law, to state a claim, McNamee had to allege: (1) a false statement, (2) that was published without privilege or authorization to a third party, (3) that constituted fault as judged by, at a minimum, a negligence standard, and (4) that either caused a special harm or constituted defamation per se. The court noted, however, that "[t]o be actionable, a provable statement of fact is required; 'rhetorical hyperbole' or 'vigorous epithet' will not suffice."

Applying this legal standard to Clemens's statements that McNamee is a liar, the court concluded that such statements are capable of being proven true or false by a determination of whether or not McNamee in fact injected Clemens with steroids.



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While the court acknowledged that Clemens's general denials of accusations are not actionable, the court found that the denials coupled with accusations that McNamee will be proven a liar and has lied in front of members of Congress crossed the line from general denial to specific accusations reasonably susceptible of defamatory meaning. The court thus concluded that the statements branding McNamee a liar were sufficient to form the basis of a defamation claim.

With respect to the statements that McNamee manufactured evidence, Clemens argued that they could not support a defamation claim, as the mere refutation of false evidence is not defamation. The court rejected that argument. Although the court acknowledged that "the statements that the evidence was 'the most cheap mean-spirited stunt' [were] hyperbolic opinion incapable of objective determination," the court emphasized that "the same conclusion cannot be reasoned for the other statements suggesting that McNamee manufactured evidence." Like the statements that McNamee lied, the court found that those statements were reasonably susceptible to the interpretation that they were based on undisclosed facts.

Conversely, the court found that the multiple statements made by Clemens or his agents suggesting that McNamee has a mental disorder were not actionable. Unlike the statements implying that McNamee lied, the court found that these statements could not be interpreted by a reasonable listener as provable fact that McNamee has a medical condition. Likewise, the court found that colloquial phrases that McNamee "wanted to shake Roger down" and "is constantly lying" sounded in opinion, and not in fact.

The court next considered and rejected Clemens's assertions of truth. Reasoning that a dismissal of the complaint on the defense of truth would require the court to credit Clemens's version of events over McNamee's version, the court affirmed that such arguments were premature at the pleadings stage of litigation. The court also found Clemens's consent defense failed as a matter of law. According to the court, the type of consent accepted as a completed defense to a defamation action is specific consent, specifically initiated by the plaintiff, which clearly indicates that the plaintiff was aware of, and agreed to, the possibility that defamatory statements might be published. The court noted that McNamee did not base his claim for defamation on statements published in the Mitchell Report, which he consented to. Instead, the court found that McNamee's claim was based upon statements made by Clemens in reaction to that report. Accordingly, the court denied Clemens's motion to dismiss McNamee's claim for defamation.

Clemens also argued that the statements challenged by McNamee were absolutely



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privileged because they were made in the course and in furtherance of a Texas judicial proceeding. The court rejected that defense, finding that, under the law of Texas, "statements made at a press conference, and by extension other pre-planned events, fall outside the [judicial proceeding] privilege." It held: "Considering the statements at issue in context, many of which took place at press conferences or other pre-planned media events, the court finds that they were made in an effort to deny the accusations made in the Mitchell Report and were not in connected [sic] with or in furtherance of the Texas lawsuit."

In contrast to McNamee's defamation claims, the court found that McNamee's intentional infliction of emotional distress (IIED) claim must be dismissed as duplicative of the defamation claim. According to the court, McNamee's IIED claim was duplicative because the injuries allegedly caused by the defamatory statements are the same whether brought under the defamation claim or under the IIED claim. Although the court acknowledged that Clemens's revelation of private information about McNamee's child is non-duplicative, the court found that such conduct was not sufficiently extreme and outrageous to support an IIED claim.

Finally, in turning to McNamee's claim for malicious prosecution, the court concluded that McNamee could not establish two elements of the claim because (1) Clemens has not fully exhausted the appeals process of the Texas suit as a matter of law, and (2) the types of reputation damages claimed by McNamee do not satisfy the special injury requirement of a claim for malicious prosecution.

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