

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

HOWARD K. STERN,

Plaintiff,

vs.

Case No. 1:07-CIV-8536-DC

RITA COSBY and
HACHETTE BOOK GROUP USA, INC., d/b/a
Grand Central Publishing, and
JOHN or JANE DOE,

ECF CASE

Defendants.

**PLAINTIFF HOWARD K. STERN'S MEMORANDUM IN OPPOSITION TO
DEFENDANT COSBY'S LIMITED MOTION FOR RECONSIDERATION**

COMES NOW Plaintiff Howard K. Stern ("Stern"), and pursuant to Federal Rule of Civil Procedure 59(e) and Southern District of New York Local Rule 6.3, hereby submits the following memorandum of law in opposition to Defendant Cosby's Limited Motion for Reconsideration ("Cosby's Motion").

This Court ruled correctly when it held that Stern is entitled to present Libelous Statements 1 and 2 to a jury. However, Stern submits that the Court erred in stating that Stern is required to prove special damages as to those statements.¹ As the Court noted in its August 12, 2009 Opinion ("Opinion"), neither Cosby nor Hachette moved for summary judgment as to damages. Opinion, p. 30, n. 12. Consequently, the issue of when a libel plaintiff must prove special damages was not addressed in the briefing submitted to the Court prior to the filing of

¹ To the extent deemed necessary by the Court for correction of this error, Stern requests that this memorandum in opposition to Cosby's Motion also be treated as a Motion for Correction of the Court's Opinion.

Cosby's Motion.² While Stern did rely in his Response to Defendants' Motions for Summary Judgment ("Response") on New York cases holding that imputations of homosexuality are libelous *per se*, that is not the only basis Stern asserted for finding the statements libelous *per se*. In fact, Stern alleged in his Complaint that "[t]he gist of *Blonde Ambition* is false and defamatory and constitutes libel *per se* in that it imputes actions to Stern that are defamatory and injurious to reputation on their face and can so be understood without reference to any additional facts." Complaint, ¶ 88; *see also* ¶¶ 84-87. Stern's Response focused on imputations of homosexuality in direct response to the limited arguments posed by Defendant Cosby and did not address the separate and unraised issue of whether Stern is required to prove special damages. As Stern pled in his complaint, however, Libelous Statements 1 and 2 are libelous *per se* and Stern is not required to prove special damages for those claims. Cosby's Motion should be denied and the Court should affirm its ruling denying summary judgment as to Statements 1 and 2.

I. LIBELOUS STATEMENTS 1 AND 2 ARE LIBELOUS *PER SE* AND STERN DOES NOT NEED TO PROVE SPECIAL DAMAGES.

Generally speaking, New York law distinguishes between libel and slander and maintains separate requirements for pleading special damages in each. "Slander as a rule is not actionable unless the plaintiff suffers special damage." *Lieberman v. Gelstein*, 80 N.Y.2d 429, 434 (1992). There are four established exceptions to this general rule applicable to **slander**, including "statements: (1) charging the plaintiff with a serious crime; (2) that tend to injure another in his

² To the extent Cosby's Motion is a new argument that could have been advanced at summary judgment, Cosby's Motion should be denied. *See Pension Committee of Univ. of Montreal Pension Plan v. Banc of Am. Securities, LLC*, 617 F.Supp.2d 216, 220 (S.D.N.Y. 2009) (noting that a "motion for reconsideration is not an opportunity for making new arguments that could have been previously addressed"); *Chenette v. Kenneth Cold Productions, Inc.*, 2008 WL 4344588, *1 (S.D.N.Y. 2008) (explaining that a moving party on a motion for reconsideration may not "advance new facts, issues or arguments not previously presented to the Court").

or her trade, business or profession;³ (3) that plaintiff has a loathsome disease; or (4) imputing unchastity to a woman.” *Lieberman*, 80 N.Y.2d at 435 (internal formatting omitted). Statements that fall within one of these four exceptions are deemed slanderous *per se* and do not require the plaintiff to prove special damages. *Id.* Contrary to the Court’s ruling, these four categories do not determine whether a statement is **libelous** *per se*. See *Sprewell v. NYP Holdings, Inc.*, 772 N.Y.S.2d 188, 193 (Sup. Ct. N.Y. Co. 2003) (holding that slander cases such as *Lieberman* may merely “provide guidance to the court in a libel action” in determining such issues as whether the imputation of a misdemeanor crime is serious enough to constitute libel *per se*).

Although under slander rules the majority of slanderous statements require proof of special damages, libelous statements receive a significantly different treatment. New York splits libel into two categories: libel *per se* and libel *per quod*. *Rinaldi v. Holt, Reinhart & Winston, Inc.*, 42 N.Y.2d 369, 379 (1977); *Hinsdale v. Orange County Publications, Inc.*, 17 N.Y.2d 284, 288 (1966); *Ava v. NYP Holdings, Inc.*, ___ N.Y.S.2d __; 2009 WL 1885099, *3 (1st Dept. July 2, 2009). Like slander *per se*, statements that are libelous *per se* do not require a plaintiff to prove special damages. Unlike the law of slander *per se*, however, libel *per se* is a broad category, encompassing all libelous statements where the defamatory nature of the statement appears on the face of the communication. *Ava*, 2009 WL 1885099 at *3. In other words, a statement is libelous *per se* if the publication itself, without regard to extrinsic facts, conveys a defamatory meaning. This means that that “[a]ny written or printed article is libelous or actionable *without alleging special damages* if it tends to expose the plaintiff to public contempt, ridicule, aversion, or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to

³ Stern contends that Statements 1 and 2 are defamatory in that they do injure him in his or her trade, business or profession. Alleging that Stern, Ms. Smith’s lawyer, engaged in a sexual relationship with Ms. Smith’s boyfriend while representing Ms. Smith tends to injure his professional reputation as a lawyer.

deprive him of their friendly intercourse in society.” *Rinaldi*, 42 N.Y.2d at 379 (emphasis added); *Mencher v. Chelsey*, 297 N.Y. 94, 100 (1947).

It is only in the limited cases of libel *per quod* where a plaintiff is required to prove special damages. Libel *per quod* refers to that narrow category of libelous statements where no defamatory statement is present on the face of the communication but a defamatory import arises only through reference to facts extrinsic to the communication. *Hinsdale*, 17 N.Y.2d at 288; *Spewell*, 772 N.Y.S.2d at 192. Consequently, libel *per quod* is sometimes referred to as “libel by innuendo” since the language complained of “is capable of communicating a defamatory idea when certain extrinsic facts are known or when the words are given a meaning not ordinarily attributed to them.” *Cole Fischer Rogow, Inc. v. Carl Ally, Inc.*, 29 A.D.2d 423, 427, 288 N.Y.S.2d 556 (1st Dept. 1968); *see also Oliveira v. Frito-Lay, Inc.*, 1997 WL 324042 (S.D.N.Y. 1997). It is only in these limited cases – cases in which the statement complained of is innocuous on its face and imports no defamatory meaning without reliance on extrinsic facts – that a libel plaintiff must prove special damages. *Id.* *See also Hinsdale*, 17 N.Y.2d at 288.

The Court of Appeals of New York has repeatedly affirmed this distinction between libel *per se* and libel *per quod*, and has repeatedly required only those plaintiffs alleging libel *per quod* to prove special damages. *Rinaldi*, 42 N.Y.2d at 379; *Hinsdale*, 17 N.Y.2d at 288; *Sydney v. MacFadden*, 242 N.Y. 208, 211-12 (1926). Lower New York Courts and Federal Courts interpreting New York law agree. *Ava*, 2009 WL 1885099 at *3; *Cole Fischer Rogow*, 29 A.D.2d at 427; *Spewell*, 772 N.Y.S.2d at 192; *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F.Supp. 826, 838-39 (S.D.N.Y. 1990); *Idema v. Wager*, 120 F.Supp.2d 361, 367-68 (S.D.N.Y. 2000), *aff’d*, 29 Fed.Appx. 676 (2d Cir. 2002); *Oliveira*, 1997 WL 324042 at *7. Based on this distinction, a plaintiff is only required to prove special damages if the defamatory import of the

allegedly libelous statement is not apparent on the face of the publication, but arises only by reference to facts extrinsic to the publication.

Here, Libelous Statements 1 and 2 do not fall into the limited category of libel *per quod*. The defamatory import of Libelous Statements 1 and 2 is apparent on the face of the statements themselves and one does not need facts extrinsic to the publication to find a defamatory meaning. This Court correctly held as much when it explained:

Statement 1 alleges that Stern engaged in a sexual act with Birkhead at a party in Los Angeles in 2005. A reasonable jury could find that engaging in oral sex at a party is shameful or contemptible, and the fact that this conduct may not be illegal does not alter this conclusion.... Statement 2 alleges that Stern made a sex tape with Birkhead. This allegation would expose Stern to contempt among most people – even if, arguably, not among the social circles in which he and Smith traveled.

Opinion, pp. 29-30. As the Court explained, Statements 1 and 2 are not innocuous on their face – they describe in vivid detail *these* two individuals engaging in alleged sexual acts taking place at a party in front of other people and on a videotape given to a third party. A reasonable jury could find that these actions expose Stern to public contempt, ridicule, aversion, or disgrace without reference to facts extrinsic to the book.

Moreover, Statements 1 and 2 cannot be read in isolation, but must be read in the context of the publication as a whole. In determining whether a statement is libelous *per se* or libelous *per quod*, the Court must look at the publication as a whole and “the words and phrases must be construed together in context.” *Tracy v. Newsday, Inc.*, 5 N.Y.2d 134, 137 (1959); *see also Sprewell*, 772 N.Y.S.2d at 192 (explaining that “the court must give the disputed language a fair reading in the context of the publication as a whole”). In other words, in determining whether Statements 1 and 2 are libelous on their face or libelous only by innuendo, the Court must look at the entire publication of *Blonde Ambition* and place the statements in the context of the book.

Considering *Blonde Ambition* as a whole, Statements 1 and 2 are defamatory on their face and are libelous *per se*. *Blonde Ambition* describes the relationship between Anna Nicole Smith, Stern, and Larry Birkhead and explains that both men were romantically involved with Ms. Smith and that both men contested paternity of Smith's daughter Dannielynn. As this Court explained, Cosby even wrote in *Blonde Ambition* that Birkhead and Ms. Smith were dating at the time of the party in which Ms. Smith witnessed Stern and Birkhead engaging in oral sex. Opinion, p. 29. Placed in this context, allegations of multiple sexual encounters between Stern and Birkhead, in front of Ms. Smith and on a tape provided to her and allegedly viewed by her in the presence of household employees, connote a defamatory meaning without regard to facts extrinsic to *Blonde Ambition*. There is no need to use innuendo to find a defamatory meaning in the Statements and, consequently, they are not libelous *per quod*. Instead, Statements 1 and 2 are libelous *per se* and Stern is not required to prove special damages for these claims.

II. WHEN CONSIDERED IN CONJUNCTION WITH THE REMAINING LIBELOUS STATEMENTS, STATEMENTS 1 AND 2 ARE LIBELOUS *PER SE*.

Throughout the book, Cosby also links Statements 1 and 2 to the idea that Stern used his alleged sexual encounters with Birkhead to extort and blackmail Birkhead into allowing Stern to remain as executor of Ms. Smith's estate. On page 176 of *Blonde Ambition*, Cosby detailed an alleged deal offered to Birkhead and then wrote that Birkhead was "going against both his family's wishes and those of his counsel" by considering making a deal with Stern, asking her readers, "What did Howard K. Stern have on Larry Birkhead?" Then, on page 201, Cosby relayed an alleged "eye-opening conversation" between Virgie Arthur and Birkhead. According to Cosby, the conversation went as follows:

Virgie asked Larry Birkhead about Howard. "What does he have on you?"

“They have so much stuff on me,” Larry told her.

“Son, what kind of stuff?” Virgie asked.

“They’re fixing to tell all about me,” he said. “They say they caught me dating other men. That I’m queer.”

“What do they have?” Virgie asked. “Do they have a tape?”

Cosby then hinted to the reader about what Stern allegedly had on Birkhead:

What Howard knew about Larry was something Larry didn’t want the world – but perhaps more importantly his devout Southern Baptist family – to find out. It is his skeleton in the closet. And, like others involved in this sordid tale, it is often these kept secrets that make people act in ways and do things that they normally would not do.

One of Anna’s closest friends, Jackie Hatten, says she knows what Howard has on Larry.

Blonde Ambition, 176, 201-02. These allegations comprise Libelous Statement 13, a statement that has survived summary judgment and that this court ruled a reasonable juror could find Cosby was reckless in publishing. Opinion, p. 47.

Immediately following Cosby’s statement that Hatten knew “what Howard has on Larry,” Cosby vividly described the sexual encounter between Stern and Birkhead allegedly witnessed by Hatten that comprises Libelous Statement 1 and the sex tape story that comprises Libelous Statement 2. *Blonde Ambition*, pp. 202-204. Cosby did not write Statements 1 and 2 in isolation – instead she incorporated them into a story of extortion and blackmail to paint a full picture of the alleged relationship between Stern and Birkhead.⁴ It was these sexual encounters that Stern allegedly used as leverage to extort and blackmail Birkhead. Cosby connected Libelous

⁴ In her deposition, Cosby repeatedly testified that Statements 1 and 2 could not be read in isolation, but needed to be read together and in the context of the book as a whole to “paint a full picture.” Deposition of Rita Cosby dated September 22, 2008, 235:3-4; *see also* 233:8-25 (in which Cosby explains that she wrote about Alex Denk and Birkhead’s sexuality because it was important support for her allegations in Statement 1 because Denk “indicated that Howard Stern was aware of Larry Birkhead’s sexuality, was obviously willing to sort of use that as leverage”), 235:5-19 (in which Cosby again explains that Denk’s information was important because “if you look at things as a whole and it talks about sexuality between the two men, it talks about using it as leverage. All these concepts I think come into play ...”).

Statements 1, 2, and 13 together in *Blonde Ambition*, and this Court should do so as well. The accusations of criminal conduct embodied in Statement 13, including extortion and blackmail, have a defamatory meaning present on the face of the communication, and are libelous *per se*. See *Sprewell v. NYP Holdings, Inc.*, 772 N.Y.S.2d 188, 193 (Sup. Ct. N.Y. Co. 2003) (holding that imputations of serious crimes constitute libel *per se*). Since “the words and phrases must be construed together in context,” Statements 1 and 2 cannot be considered apart from Statement 13 and Stern should not be required to prove special damages as to these claims. *Tracy*, 5 N.Y.2d at 137.

CONCLUSION

In conclusion, the Court correctly ruled that Libelous Statements 1 and 2 should go to a jury. Unless an allegedly libelous statement falls within the limited category of libel *per quod*, a plaintiff is not required to prove special damages to sustain a claim of libel. Libelous Statements 1 and 2 are not libelous by innuendo and do not fall within the libel *per quod* category. Whether taken in isolation, or in the context of *Blonde Ambition* as a whole, the defamatory import of Statements 1 or 2 is apparent on the face of the statements themselves and is not dependent upon extrinsic facts. Stern is not required to prove special damages as to these libel *per se* claims.⁵ Cosby’s limited motion for reconsideration should be denied.

⁵ While Stern does not believe he is required to prove special damages, to the extent the Court believes such proof is necessary, Stern respectfully requests that the Court consider his evidence of special damages regardless of his counsel’s misstatement at oral argument that he has suffered no special damages. In his deposition, Stern testified that in November of 2007, after *Blonde Ambition* was published, his mother forced him to go to a doctor because she was worried that he was letting himself die or that he would kill himself. Deposition of Howard K. Stern, dated September 16, 2008, 561:23-562:17. While Stern indicated in this testimony that he did not go to the doctor with the specific intent of using the medical exam or the bill incurred therewith as an element of damages in the litigation, he did not waive his right to do so and would testify at trial that the doctor visit cost \$500.00. Attached hereto as Exhibit A is a true and correct copy of the invoice for the medical exam. Since this is a public filing, portions of the invoice have been redacted to protect Stern’s medical privacy. Stern’s counsel did not review, include or recall this evidence of special damage in Stern’s response to the Defendants’ motions for summary judgment or at the hearing because damages were not at issue.

Dated: August 28, 2009.

/s/ L. Lin Wood

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