

MLBers Have Little To Gain, Much To Lose In Al Jazeera Suits

Law360, New York (January 7, 2016, 3:15 PM ET) --

Philadelphia Phillies first baseman Ryan Howard and Washington Nationals first baseman Ryan Zimmerman filed separate federal defamation lawsuits in Washington, D.C., Monday. The suits were filed against Al Jazeera, along with reporters Liam James Collins and Deborah Davies, stemming from the infamous documentary that aired on Al Jazeera, "The Dark Side: Secrets of the Sports Dopers," that suggested Howard and Zimmerman used performance-enhancing drugs.



Benjamin A. Levine

The documentary, which aired last week, focused on the claims of Charles Sly, who was a pharmacy intern at the Guyer Institute in Indianapolis in 2011. Explosive footage from the documentary shows Collins secretly recording Sly, where Sly contends that he provided Zimmerman and Howard with performance-enhancing drugs while an intern at the Guyer Institute. Sly began retreating from his comments even before the report aired and has since retracted his statements.[1] Howard and Zimmerman both sent letters to the Al Jazeera network prior to the broadcast denouncing these allegations as well as after the documentary aired demanding a full and immediate retraction of the report. Al Jazeera refused to withdraw the report resulting in the present litigation.

While these lawsuits may help Howard and Zimmerman in the court of public opinion, it is hard to see the upside of such a legal strategy. As a public figure, it is incredibly hard to prevail on a defamation claim, and by filing a lawsuit both Howard and Zimmerman have opened themselves up to having to testify under oath regarding their alleged performance-enhancing drug use. The truth is a complete defense to defamation, thus both Zimmerman and Howard will be forced to testify regarding their training regimens if the case proceeds.

The track record of baseball players testifying under oath is not particularly good from a public relations standpoint. Mark McGwire's infamous, "I'm not here to talk about the past" or Sammy Sosa "forgetting" how to speak English routine were both detrimental to their image. Sworn testimony can even sometimes lead to criminal liability, as was the case with the Roger Clemens and Barry Bonds perjury indictments.

Defamation is defined as any statement that hurts someone's reputation. If the statement is made in writing and published, the defamation is called "libel." If the disparaging statement is spoken, the statement is considered "slander." Defamation is a civil wrong that allows someone that has suffered from a defamatory statement to sue the person or entity.[2] In order to win a defamation lawsuit, one must show that:

- Someone made a statement;
- that statement was published;
- the statement caused you injury;
- the statement was false; and
- the statement did not fall into a privileged category.[3]

People in the public eye get less protection from defamatory statements and face a legal higher burden in order to prevail in a defamation claim. The U.S. Supreme Court in *New York Times v. Sullivan* held that certain defamatory statements were protected by the First Amendment. The case involved a newspaper article that said unflattering things about a public figure. The court pointed to "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." [4] The court made a rule that public officials could sue for statements made about their public conduct only if the statements were made with "actual malice." The court defined "actual malice" to mean that the person making the statement knew the statement was not true at the time he made it, or had reckless disregard for whether it was true or not. [5]

Almost every court addressing the issue has determined that professional sports personnel are public figures. [6] The rationale to consider sports personnel as public figures is that "one's voluntary decision to pursue a career in sports whether as an athlete or a coach invites attention and comment regarding his job performance and thus constitutes an assumption of the risk of negative publicity." [7] Therefore, athletes suing in defamation actions must show that the defendant had "actual malice" when they issued the defamatory statement.

The lawsuits filed by Howard and Zimmerman remind me of the lawsuit filed by current Los Angeles Angels of Anaheim first baseman Albert Pujols against Jack Clark in 2013. Pujols sued Clark over comments made on a local radio show accusing Pujols of using steroids. Clark made the comments on Aug. 2 on WGNU-AM radio's "The King and the Ripper Show," saying he knew "for a fact" that Pujols used steroids and performance-enhancing drugs. [8] Before Pujols subjected himself to a deposition, the lawsuit was dropped, and Clark retracted and apologized for alleging that Pujols used performance-enhancing drugs. [9] It is unclear if Pujols would have dropped his lawsuit, but for Clark's retraction, however Pujols played the allegations against him perfectly.

Pujols' aggressive defense strategy immediately following Clark's comments helped how Pujols was portrayed in the media while the story was still a national headline. However, when the story died down a few months later (and before Pujols subjected himself to testimony under oath), he quietly withdrew the complaint. Don't be surprised if Zimmerman and Howard do the same in a few months. They have very little to gain and much to lose. Just ask Roger Clemens or Barry Bonds.

Defamation lawsuits are often about character damage and the need to vindicate one's good name. At the same time, defamation claims involving professional athletes are not easy to litigate. Athletes, such as Howard and Zimmerman, are considered public officials and have a higher burden to overcome in order to win on a defamation action. These athletes need to show that the defendant had "actual malice" when they made the defamatory statement. However, with their reputation on the line, Howard and Zimmerman are likely going to adopt an aggressive posture, fiercely contesting the allegations while the story is in the limelight and then withdraw the claim as soon as things settle down.

—By Benjamin A. Levine, Gordon Rees Scully Mansukhani LLP

Ben Levine is an associate in Gordon & Rees' New York office. His clients have included Alex Rodriguez, Jonathan Martin, Jameis Winston and Dustin Johnson. He has appeared as an independent legal analyst on Bloomberg Law radio and the Fox News Network, and is also on the faculty of St. John's School of Law as part of its International and Comparative Sports law program.

This article was written with the help of Daniel Altaras, a student at Brooklyn Law School and a law clerk in Gordon & Rees' New York office.

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[1] http://www.csnphilly.com/baseball-philadelphia-phillies/ryan-howard-files-defamation-lawsuit-against-ped-accuser?utm_source=twitterfeed&utm_medium=twitter

[2] <http://injury.findlaw.com/torts-and-personal-injuries/defamation-law-the-basics.html>

[3] Id.

[4] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

[5] <http://www.nolo.com/legal-encyclopedia/defamation-law-made-simple-29718.html>

[6] www.jw.com/publications/article/139; See, e.g., *Brewer v. Memphis Publishing Cox Inc.*, 626 F.2d 1238, 1255 (5th Cir. 1980) (professional football player); *Time, Inc. v. Johnston*, 448 F.2d 378, 380 (4th Cir. 1971) (professional basketball player); *Cepeda v. Cowles Magazines and Broadcasting, Inc.*, 392 F. 2d 417 , 419 (9th Cir . 1968) , cert . denied, 393 U. S. 840 (1968) (professional baseball player); *Bell v. Associated Press*, 584 F. Supp. 128, 130 (D.C. 1984) (professional football player); *Howe v. New York Post Co., Inc.*, 23 Media L. Rep. (BNA) 1955, 1957 (N.Y. Sup. Ct. 1995) (professional baseball player); *Brooks*, 773 P.2d at 1101 (professional soccer player); *Wilsey v. Saratoga Harness Racing, Inc.*, 528 N.Y.S.2d 688, 690 (N.Y. App. Div. 1988) (professional jockey); *Gomez v. Murdoch*, 475 A.2d 622, 625 (N.J. Super. Ct. App. Div. 1984) (professional jockey); *Rood v. Finney*, 418 So.2d I, 3 (La. Ct. App 1982), cert. denied, 460 U.S. 1013 (1983) (professional golfer); *Dempsey v. Timex Inc.*, 252 N.Y.S.2d 186, 188 (N.Y. Sup. Ct. 1964), aff'd, 254 N.Y.S.2d 80 (N.Y. App. Div. 1964) (professional boxer); *Oma v. Hillman Periodicals, Inc.*, 118 N.Y.S.2d 720, 724 (N.Y. App. Div. 1953) (professional boxer); *Cohen v. Marx*, 211 P.2d 320, 322 (Cal. Dist. Ct. App. 1949) (professional boxer). See also Christopher H. Hall, Annotation, Defamation of Professional Athlete or Sports Figure, 54 A.L.R.4th 869, 872 (1987); Craig H. Thaler, The National Collegiate Athletic Administration, Random Drug-Testing, and the Applicability of the Administrative Search Exception, 17 HOFSTRA L. REV. 641, n.202 (1989).

[7] *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1119 (N.D. Cal. 1984).

[8] http://espn.go.com/los-angeles/mlb/story/_/id/9769100/albert-pujols-los-angeles-angels-sues-jack-clark-steroid-accusations

[9] <http://sports.yahoo.com/blogs/mlb-big-league-stew/albert-pujols-jack-clark-resolve-defamation-lawsuit-born-015041320--mlb.html>

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