Appellate Court: “Preponderance of the Evidence” Overcomes Privilege in Private Figure Defamation Lawsuits

By Rachel Mueller

The Court of Special Appeals of Maryland has reversed the jury verdict from a circuit court case between two former colleagues at the University of Maryland, Baltimore County, because the trial court erroneously instructed the jury that the plaintiff had to present *clear and convincing evidence* to overcome a conditional privilege defense raised by the defendant. The Court of Special Appeals clarified that the correct burden of persuasion for overcoming the conditional privilege is proof *by a preponderance of the evidence* in cases like this one. *Hosmane v. Sely-Radtke, et al.*, No. 689 (Md. Ct. Spec. App. Feb. 24, 2016).

A chemistry professor sued his former colleague – also a professor in the chemistry department – for accusing him of theft, calling him an “unbalanced individual” and a “nutcase,” claiming he was banned from campus, claiming he commented to students about the defendant’s breasts and buttocks, and claiming that he attempted to convince a student to file a complaint against her. The defendant claimed her communications were privileged and confidential communications. The trial court agreed, finding that her statements were privileged. Based on this finding, the trial court instructed the jury that the allegedly defamed professor had to prove *by clear and convincing evidence* that his colleague abused the privilege. The jury found in favor of the defendant, denying the plaintiff’s defamation claim.

The allegedly defamed professor appealed, arguing in part that the trial court erred in applying the clear-and-convincing standard.

The Court of Special Appeals agreed with the defamed professor on the standard, finding that the allegedly defamed professor had to prove *by a preponderance of the evidence* that the privilege was abused – a lower burden. The appeals court emphasized that the preponderance-of-the-evidence burden is specific to common law tort defamation cases between two private parties. On the other hand defamation cases governed by the First Amendment, such as public officials’ lawsuits, require the more stringent clear and convincing evidence to overcome the privilege.

The Court of Special Appeals reversed the judgment of the trial court and returned the case to the trial court for a new trial under the preponderance-of-the-evidence standard.

Rachel Mueller is an associate with Holland & Knight LLP in Washington, D.C.