Circuit Court for Howard County
Case No. C-13-CV-20-000187

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1609

September Term, 2022

JOHN DOE, ET AL.

v.

ILANA STERN KEIN, ET AL.

Wells, C.J.,
Zic,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zic, J.

Filed: August 9, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Md. Rule 1-104(a)(2)(B).

Appellant, the Estate of Jane Doe by John Doe as the personal representative for Jane Doe, (the "Doe Estate"), has brought this appeal because the Circuit Court for Howard County dismissed the Doe Estate's count of negligent defamation, initially individually brought by Jane Doe, against the State of Maryland.

The underlying case was originally filed on February 18, 2020 by Ms. Doe and Mr. Doe. Jane Doe subsequently passed away on December 6, 2021. As a result, the current appellees, Ilana Stern Kein and the State of Maryland, moved for summary judgment in the circuit court on the claims for defamation and negligent defamation because, they argued, the claims were originally brought by Ms. Doe, and under Md. Code Ann., Cts. & Jud. Proc. ("CJP") § 6-401(b) (1973, 2020 Repl. Vol.), (the "Abatement Statute"), the claims do not survive a plaintiff's death. The circuit court agreed, granting summary judgment and dismissing both claims with prejudice. The Doe Estate appealed the circuit court's dismissal of the negligent defamation claim, arguing against its abatement upon the death of Ms. Doe because a claim of negligent defamation is founded upon negligence rather than defamation, and therefore is not subject to the Abatement Statute, which refers only to claims of "slander."

QUESTION PRESENTED

The Doe Estate presents one question for our review, which we have rephrased and recast as follows:[1]

[1] The Doe Estate phrased its question on appeal as follows:

(continued)

Whether the circuit court erred in dismissing a cause of action for negligent defamation upon the death of Ms. Doe.

For the reasons that follow, we answer the Doe Estate's question in the negative and therefore affirm.

BACKGROUND

The Does' Basis for the Defamation Claims

On February 10, 2019, S.[2], a minor child of Jane and John Doe, suffered an accidental overdose. S. was taken to the emergency room at Shady Grove Adventist Hospital ("Shady Grove"), and then transferred to the Children's National Medical Center ("Children's Hospital") and placed in the Pediatric Intensive Care Unit. S. was discharged on February 13, 2019. As a result, a referral was made to Montgomery County Child Welfare Services ("CWS"),[3] and the Does were interviewed by CWS. CWS ruled out abuse, took no action, and determined S. was safe to remain in the Does' custody.

1. Did the Circuit Court err as a matter of law in holding that a cause of action for negligent defamation is subject to dismissal by Md. Cts. & Jud. Proc. § 6-401(b) upon the death of the injured party?

[2] To protect the privacy of the minor child, the pseudonym "S." has been assigned for use throughout this opinion.

[3] The Doe Estate refers to Montgomery County Child Welfare Services as "Montgomery County Child Protective Services." We refer to the entity as Montgomery County Child Welfare Services because that is how it is identified on the Montgomery County website. *Child Welfare Services Program*, MONTGOMERY COUNTY GOVERNMENT, https://www.montgomerycountymd.gov/HHS-Program/Program.aspx?id=CYF/CYFChildWelfare-p214.html (last visited on July 23, 2024).

Ms. Doe then took S. to the pediatrician on February 15, 2019, who advised that S. be taken to the emergency room and informed the hospital that the parents had "acted appropriately with regard to their child." S. was taken to the emergency room at Shady Grove, then, again, transferred to Children's Hospital. Mr. Doe accompanied S. in the ambulance to Children's Hospital while Ms. Doe went home to pack for anticipated overnight stays with S. in the hospital.

At some point during S.'s brief visit to Shady Grove, a Forensic Nurse Examiner contacted CWS concerning Ms. Doe. Citing to multiple reasons, CWS assigned its employee, Ms. Kein, to investigate the report of abuse and neglect regarding Ms. Doe. That afternoon, once S. was at the Children's Hospital, Ms. Kein informed the hospital that the Does' custody had been removed, even though no Emergency Custody Order had been issued at that point. A few hours later, as a result of Ms. Kein suspecting Ms. Doe suffered from Munchausen's Syndrome by Proxy ("MSP"),[4] the Does lost custody of S., and S. was placed in the care of Children's Hospital.

Ms. Kein informed staff and Children's Hospital that Ms. Doe was suffering from MSP and as such, was abusive to S. and put S. in immediate danger. These allegations were then placed in S.'s medical records, allegedly causing delays in S.'s future medical

[4] MSP is more recently known as Factious Disorder Imposed on Another ("FDIA"). *Factitious Disorder Imposed on Another (FDIA)*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/diseases/9834-factitious-disorder-imposed-on-another-fdia (last visited July 17, 2024). It is a "mental illness in which a person acts as if an individual he or she is caring for has a physical or mental illness when the person is not really sick." *Id.* "When a child is involved, FDIA is considered a form of child abuse by the American Professional Society on the Abuse of Children." *Id.*

treatments. On February 18, 2019, CWS and the Does agreed upon a Safety Plan, and the Emergency Custody Order was rescinded. S. was released from Children's Hospital on February 20, 2019, with a discharge summary that included "[a]ltered mental status . . . [c]hild affected by [MSP] . . . [and] [i]ngestion of substance."

In its brief before this Court, the Doe Estate refers to the act of Ms. Kein notifying the Children's Hospital staff of the loss of the Does' custody of S. and Ms. Kein's statements regarding her suspicion of Ms. Doe suffering from MSP as a "smear campaign." The Doe Estate characterizes Ms. Kein's diagnosis of MSP as "unfounded," "ignorant," and made in "bad faith" because the Doe Estate alleges Ms. Kein, as a social worker, was unqualified to make such "a rare and unusual psychiatric disorder" diagnosis. The Doe Estate asserts that the records that indicate Ms. Doe was abusive are "solely as a result of the false representations of [Ms. Kein]." The notes in S.'s medical records and the verbal notification to hospital staff of the Does' revoked custody and Ms. Doe's abusive nature are the basis for the defamation claims.

Procedural History

This appeal stems from the negligent defamation count from the Does' third-amended complaint ("complaint") filed in the circuit court on October 12, 2021.[5] The

[5] The Does filed their first complaint against Ms. Kein and Children's Hospital on February 18, 2020. On August 2, 2021, the Does filed an amended complaint against Ms. Kein and the State of Maryland who in turn filed a motion to dismiss the amended complaint. The Does filed a second-amended complaint on September 15, 2021. Again, Ms. Kein and the State of Maryland filed a motion to dismiss the second-amended complaint. The Does then filed a final third-amended complaint.

(continued)

complaint initially included four counts. The second count, which is at issue here, was brought by Ms. Doe, individually, against the State for negligent defamation of Ms. Doe. As Ms. Kein's employer, the State allegedly acted without due care for the rights of Ms. Doe when Ms. Kein allegedly defamed Ms. Doe and S. to hospital staff and in S.'s medical records.

The circuit court dismissed the third and fourth counts with prejudice after a motions hearing on December 22, 2021. During this hearing, the court learned that Ms. Doe had passed away on December 6, 2021, but the parties chose to move forward. Leaving only the first two counts, the State and Ms. Kein filed its answer to the complaint, and on January 9, 2022, the Does filed a Notice of Substitution of Party, replacing Jane Doe with the Estate of Jane Doe by John Doe. Mr. Doe was the "prospective" Personal Representative of the Estate of Jane Doe "upon the issuance of Letters of Administration."

On August 10, 2022, the State and Ms. Kein moved for summary judgment, or in the alternative, a Maryland Rule 2-502 judgment, and requested a hearing. The State and Ms. Kein argued that both remaining counts of defamation and negligent defamation "extinguished upon [Ms.] Doe's death." The Doe Estate filed an opposition to the motion for summary judgment solely pertaining to the count for negligent defamation, arguing it

While the Does removed Children's Hospital in their amended complaint as a defendant, they sought injunctive relief against Children's Hospital in the Circuit Court for Montgomery County, Case No. 476002V, on December 2, 2019. A consent order was entered on August 24, 2021, dismissing the case without prejudice, contingent upon Children's Hospital redacting specified information in S.'s medical records.

does not abate upon Ms. Doe's death. A hearing on the motion for summary judgment was held on October 19, 2022, and the court granted summary judgment for both counts of defamation and negligent defamation, dismissing it with prejudice. This appeal followed.

STANDARD OF REVIEW

We review a circuit court's grant of a motion for summary judgment based on a *de novo* standard. *Webb v. Giant of Maryland, LLC*, 477 Md. 121, 137 (2021). "'Only when there is an absence of a genuine dispute of material fact will the appellate court determine whether the trial court was correct as a matter of law.'" *Id.* at 135 (quoting *Dashiell v. Meeks*, 396 Md. 149, 163 (2006)).

We hold that the circuit court properly granted summary judgment in this case, as there was no dispute of material fact, and the moving parties, the State and Ms. Kein, were entitled to judgment as a matter of law.

DISCUSSION

I. THE CIRCUIT COURT DID NOT ERR IN FINDING THAT A CAUSE OF ACTION FOR NEGLIGENT DEFAMATION IS SUBJECT TO DISMISSAL UPON THE DEATH OF MS. DOE.

This appeal hinges upon whether the Abatement Statute applies to a cause of action for negligent defamation. The statute states that: "A cause of action for slander abates upon the death of either party unless an appeal has been taken from a judgment entered in favor of the plaintiff." CJP § 6-401(b). The Doe Estate argues that the "appellate courts of Maryland have not" yet addressed whether negligent defamation falls within the scope of the Abatement Statute. Specifically, the Doe Estate argues that a

claim of negligent defamation is a claim of negligence—and not a claim of defamation—for purposes of the statute's application. The State and Ms. Kein argue that a claim of negligent defamation is considered to be a claim of defamation, and not a claim of negligence. Accordingly, if negligent defamation falls within the ambit of the Abatement Statute as a cause of action for defamation, then the Doe Estate's cause of action abates upon Ms. Doe's passing. If negligent defamation does not stem from a cause of action for defamation—but is instead considered a cause of action under negligence—then the Abatement Statute does not apply, and the Doe Estate's claim survives the death of Ms. Doe.

As explained below, we hold that the Supreme Court of Maryland established a negligence standard in defamation causes of action and prescribed the appropriate evidentiary standard of proof in *Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580 (1976). In *Hearst Corp. v. Hughes*, 297 Md. 112 (1983), the Court extended the remedy for plaintiffs bringing negligent defamation claims to include compensatory damages. This precedent from our Supreme Court articulates that negligent defamation is a defamation cause of action with a standard of negligence.

A. The Doe Estate's Contentions

In sum, the Doe Estate argues that a lawsuit for negligent defamation arises under a cause of action for negligence, and not a cause of action for defamation. The Doe Estate contends its negligent defamation count should not be dismissed because: Maryland courts have not yet addressed this specific issue of "whether [CJP] § 6-401(b) encapsulates a cause of action sounding in *negligent* defamation[;]" negligent defamation

differs significantly from traditional slander claims; and the Abatement Statute intended to target traditional slander claims and not the newer concept of negligent defamation.

The Doe Estate's brief first argues that this is a case of first impression, and that the Maryland appellate courts have not yet resolved the issue of whether negligent defamation is encompassed by the Abatement Statute's reference to "[a] cause of action for slander[.]" CJP § 6-401(b). The Doe Estate characterizes its appeal as hinging upon "whether an action in negligent defamation . . . is encompassed by the term 'slander' as it appears in the Abatement Statute and [Md. Code Ann., Est. & Trusts ("ET") § 7-401(y)(1)(i) (1974, 2022 Repl. Vol.)[6]]."

The Doe Estate argues that *Sindorf* and *Hearst* "elucidate the significant structural and semantic differences between a cause of action for libel and/or slander, in its traditional form, and a cause of action for negligent defamation," reflecting the latter as being a separate and different cause of action from slander. The Doe Estate contends that the preponderance of evidence standard applied to negligent defamation cases, as established in *Sindorf*, aligns more closely with negligence cases than traditional defamation cases which typically apply a standard of clear and convincing evidence. The Doe Estate further contends that the *Hearst* decision transformed negligent defamation

[6] ET § 7-401(y)(1)(i) states:

> A personal representative may not institute an action against a defendant for slander against the decedent during the lifetime of the decedent.

into a claim of negligence because actual harm to reputation is not required and the recoverable damages sound in negligence.

The Doe Estate argues that when the Court in *Hearst* eliminated the requirement to prove actual harm to reputation, a cornerstone of traditional defamation or slander cases, and instead allowed recovery for emotional distress, the Court created a new cause of action distinct from traditional slander or defamation. The expansion of recoverable damages to include emotional injuries created, according to the Doe Estate, a "modern cause of action for negligent defamation . . . [which is] a personal injury claim" that is distinct from traditional slander, and not encompassed by the Abatement Statute, so even though "[t]he framers of the Abatement Statute sought to limit cases founded in reputational damage once the Plaintiff had passed," negligent defamation is damage to "an emotional injury" and not actual reputational harm.

The Doe Estate also argues that because the recoverable damages are for "emotional distress, mental anguish, [and] pecuniary loss" instead of actual damage to reputation, "these types of damages are almost identical to the recovery in an action for negligent infliction of emotional distress" and not defamation, demonstrating that negligent defamation is a negligence cause of action and not a cause of action for defamation.

Therefore, according to the Doe Estate, the change in recoverable damages, the change in requiring actual harm to reputation, and the change in standard of proof are

structural differences[7] that demonstrate negligent defamation is a separate, and different, cause of action from traditional slander. Accordingly, the Doe Estate argues that when the Abatement Statute references "slander," it does not encompass negligent defamation.

B. The State and Ms. Kein's Contentions

The State and Ms. Kein contend that "[Ms.] Doe's defamation claims extinguished upon her death, and the Doe Estate may not be substituted pursuant to Maryland Rule 2-241 and cannot recover for such claims" because the Supreme Court of Maryland did not "transmute the tort of defamation into the tort of negligence" when it adopted the negligence standard in cases of private defamation. The State and Ms. Kein argue that the negligence standard affected only "the standard of proof necessary to prove defamation and the level of fault necessary to show defamation; it did not render defamation a negligence action." Furthermore, the State and Ms. Kein point to ET § 7-401(y)(1)(i) which they argue "prohibits a personal representative from instituting an action for slander on behalf of the decedent[.]" Accordingly, the State and Ms. Kein contend that the circuit court properly granted summary judgment because "a negligent defamation action is a claim of defamation, which falls under the slander actions in the Abatement Statute, and the claim abates upon the death of the plaintiff."

[7] The Doe Estate also argues that the Abatement Statute does not encompass negligent defamation because the cause of action was not in existence during enactment of the statute and because the definition of slander as defined in *Cant v. Bartlett*, 292 Md. 611 (1982) is not the same as negligent defamation. We find these arguments unpersuasive and reject them for the reasons stated in our analysis.

C. Negligent Defamation Is A Defamation Cause of Action, And Thus Abates Under The Abatement Statute.

We rely on our Supreme Court's precedent and hold that the circuit court did not err in finding that the Doe Estate's claim of negligent defamation abates under the Abatement Statute.

As the Doe Estate acknowledges, our Supreme Court first recognized negligent defamation as a cause of action in *Sindorf*. The Court held that "a standard of negligence" is "applied in cases of . . . defamation." *Sindorf*, 276 Md. at 596. The Court clearly stated that it was applying a negligence standard within the context of a cause of action for defamation. This is evident by the repeated references to this approach. For instance, the Court stated throughout as follows:

> The adoption of a negligence standard *in cases of . . . defamation* hardly introduces a radical concept to tort law.
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> * * *
>
> [A] standard of negligence . . . must be applied *in cases of . . . defamation*.
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> * * *
>
> We hold that proof of fault *in cases of [] defamation* must meet the standard of the preponderance of the evidence.
>
> * * *
>
> [U]nder this standard, [the plaintiff] is already required to establish negligence with respect to such falsity.

Id. at 596-97 (emphasis added).

The Court then elaborated on the practical application of a negligent defamation claim. Specifically, as the Doe Estate references, the Court addressed the burden of proof necessary for a plaintiff to establish the defendant's fault. *Id.* at 597. The Court "noted" that truth cannot be an affirmative defense to a negligent defamation claim, because the plaintiff "is already required to establish negligence with respect to such falsity." *Id.* The Court adjusted the required standard of proof, holding that plaintiffs must demonstrate the lack of truth and the falsity of the statement by a preponderance of the evidence, and not clear and convincing evidence. *Id.* The Court wrote that preponderance of the evidence is the standard "ordinarily required in other types of actions for negligence, and is apt to be more readily understood by juries." *Id.* Although the standard of proof in negligent defamation cases resembles that of negligence claims, it is because the standard applied to the claim of defamation is a negligence standard. As explained previously and subsequently, the broader legal analysis demonstrates that negligent defamation remains a distinct cause of action.

Less than a decade later, in *Hearst*, the Court again interpreted negligent defamation. 297 Md. at 122. In determining the root of a negligent defamation claim, the Court provided a definition for negligent defamation in *Hearst*: "defamatory publication + falsity + fault by negligence standard + harm = Maryland cause of action for compensatory damages (punitive damages not allowed)." 297 Md. at 122. The Court intentionally constructed negligent defamation to be a defamation cause of action with a negligent standard, which the Doe Estate concedes: "the *Sindorf* Court recognized . . . an action for defamation with liability based on a negligence standard." Like *Sindorf*,

Hearst also explained that "*the phrase 'negligent defamation' means a defamation action . . . .*" *Hearst*, 297 Md. at 114 n.1 (emphasis added). The Court stated that an action for negligent defamation is a type of "defamation action in which a private individual has proven that a false defamatory statement was made, but has failed to prove that such statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* (cleaned up). Our Supreme Court has been clear that negligent defamation is a cause of action for defamation.

CONCLUSION

The Doe Estate's argument, at its essence, is that a cause of action for negligent defamation is a cause of action for negligence, not a cause of action for defamation. This is contrary to Maryland jurisprudence and defies logic.

Negligent defamation is defamation. The Doe Estate's claim abated when Ms. Doe passed away.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.