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Justice Thomas Suggests U.S. Supreme Court Should Reconsider "Actual Malice" Standard for Defamation Claims by Public Figures

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On February 19, 2019, the U.S. Supreme Court denied Kathrine McKee's petition for a *writ of certiorari* in *McKee v. Cosby*. In connection with that denial, Justice Clarence Thomas urged the U.S. Supreme Court to reconsider the Court's decision in *New York Times Co. v. Sullivan, 376 U.S. 254 (1964)*.

Factual Background: In 2014, Kathrine McKee accused Bill Cosby of sexually assaulting her approximately 40 years earlier. In response to Ms. McKee's allegations, Mr. Cosby's attorney wrote a letter that was widely published by various news outlets. Ms. McKee claimed this letter "damage[d] her reputation for truthfulness and honesty," and was written "to embarrass, harass, humiliate, intimidate, and shame" her. On these bases, she filed a civil lawsuit for defamation against Mr. Cosby in the United States District Court for the District of Massachusetts.

The District Court dismissed Ms. McKee's lawsuit, and the U.S. Court of Appeals for the First Circuit upheld the dismissal on the basis that Ms. McKee had "thrust herself" into the public controversy surrounding allegations of sexual assault against Mr. Cosby, and therefore, she was considered a "limited purpose public figure." As such, pursuant to the standard set forth in *New York Times Co. v. Sullivan*, Ms. McKee could not recover damages without a showing of "actual malice." In other words, a public figure would have to show that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." This has been described by the courts as an "almost impossible standard."

The U.S. Supreme Court denied Ms. McKee's request "to review her classification as a limited purpose public figure," and Justice Thomas wrote a separate concurrence agreeing with the Court's decision to deny *certiorari* but explaining that the Court should, in an appropriate case, reconsider the Court's prior cases that set a higher bar for public figures claiming defamation.

Justice Thomas' Concurrence: In calling for the Court to reconsider the "actual-malice" standard, Justice Thomas stated that *New York Times Co. v. Sullivan* and its progeny "were policy-driven decisions masquerading as constitutional law." He believes that "the Court fashioned its own 'federal rule[s]' by balancing the 'competing values at stake in defamation suits.'" In other words, because there might be First Amendment protections for those who make statements against public figures, the Court created a heightened standard for public figures to prove defamation. However, Justice Thomas suggested that "[i]f the Constitution does not require public figures to satisfy an actual-malice standard in state law defamation suits, then neither should [the U.S. Supreme Court]."

In the *New York Times* case, the New York Times published a full-page advertisement regarding the legal defense of Dr. Martin Luther King, Jr. and the civil rights movement. The advertisement contained several statements regarding the use of force by the Montgomery, Alabama police in response to Dr. King's peaceful protests. The New York Times did not make an independent effort to determine the veracity of the statements against the police, and in fact, some of the statements were inaccurate.

L. B. Sullivan, Montgomery's commissioner of public affairs, sued the New York Times and the jury awarded Sullivan $500,000, which was upheld by the Supreme Court of Alabama. The U.S. Supreme Court reversed the State court's decision on grounds that the statements made in the New York Times Advertisement were general statements against the police department and there were no statements identify Sullivan "by name or official position." On this basis, "the advertisement was an 'impersonal attack on governmental operations' and could not by 'legal alchemy' be transformed into a libel of an official responsible for those operations." Justice Thomas opines that this decision would have been sufficient to resolve the case and reverse the judgment against Sullivan. Nevertheless, the U.S. Supreme Court further addressed the extent to which the protections found within the U.S. Constitution relating to free speech and press may limit a State's power to award damages in a libel action brought by a public figure against an individual who was critical of his official conduct.

Justice Thomas reviewed the decision in *New York Times Co. v. Sullivan* against the requirements of the U.S. Constitution and the backdrop of common law defamation claims. He stated that the U.S. Supreme Court's "judge-made rule of law" was premised upon the U.S. Supreme Court's review of First and Fourth Amendment protections, but the Court "made no attempt to base that rule on the original understanding of those provisions."

In his historical overview, Justice Thomas mentioned that the common law of libel at the time the First and Fourteenth Amendments were ratified did not subject claims by public figures to heightened scrutiny. Indeed, the common law of libel already provided certain exceptions when the comments were based upon public questions and matters of public interest, but would not protect defamatory statements about a public official's private character. Justice Thomas concluded that prior to the *New York Times* case, the U.S. Supreme Court consistently recognized that free speech and free press protections found within the First and Fourteenth Amendments did not abrogate the common law relating to libel and defamation.

Justice Thomas also reviewed the Sedition Act, which criminalized criticism of the government, and the constitutional opposition thereto. He indicated that it does not support an "actual-malice" standard. Rather, he believes that the framers of the Constitution intended for government officials to retain the same rights and remedies for injured reputations as others. In urging the Court to reconsider its prior decisions, Justice Thomas stated: "In short, there appears to be little historical evidence suggesting that the *New York Times* actual-malice rule flows from the original under-

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standing of the First or Fourteenth Amendment... The States are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm."

Conclusion: Justice Thomas highlights viewpoints that have long been subject to political debate. Despite Justice Thomas' statements urging the court to reconsider whether the U.S. Constitution supports the use of an "actual-malice" standard, the law requiring such a standard remains good
law until the U.S. Supreme Court issues a decision deciding otherwise. There has been no further indication that such an appropriate case for the U.S. Supreme Court to reconsider the "actual-malice" standard is on the horizon. Accordingly, State and municipal leaders who are subject to defamatory statements remain required to satisfy the "actual-malice" standard.

Cindy Cieslak is a partner at Rose Kallor, LLP. Rose Kallor, LLP regularly represents and advises private and public sector employers on matters pertaining to the employer-employee relationship, including discrimination, harassment, and wage and hour issues. If you have questions about this legal update, please contact Rose Kallor, LLP at 860-361-7999. If you wish to receive future updates on labor and employment related topics, please contact Jacqueline Smith, CIRMA Communications Associate at jsmith@ccm-ct.org.

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