

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF KENTUCKY  
NORTHERN DIVISION AT COVINGTON

CIVIL ACTION NO. 2:19-00056 (WOB-CJS)

NICHOLAS SANDMANN

PLAINTIFF

VS.

MEMORANDUM OPINION AND ORDER

NBCUNIVERSAL MEDIA, LLC

DEFENDANT

*Introduction*

This matter is before the Court on the motion of defendant NBCUniversal Media ("NBC") to dismiss the First Amended Complaint ("FAC"). (Doc. 29). The FAC was filed as a matter of right by the plaintiff because defendant had moved to dismiss the original complaint. Fed. R. Civ. P. 15(a)(1)(B).

The FAC runs 139 pages, including exhibits. The subject matter is very similar to the two other libel actions by the plaintiff which are pending in this Court. *Sandmann v. WP Co. LLC*, Case No. 19cv19; *Sandmann v. Cable News Network, Inc.*, Case No. 19cv31.

The Court recently denied in part motions to dismiss filed in those two cases, and the issues here are similar. Therefore, the Court deems oral argument unnecessary.

Plaintiff's claims against all three defendants in these cases arise out of an incident that occurred at the site of the

Lincoln Memorial in Washington, D.C. NBC, as did the other defendants, published news stories stating, *inter alia*, that plaintiff "blocked" the way of one Nathan Phillips, a Native-American elder, whom he encountered at the Memorial, and that plaintiff did not allow Phillips to retreat.

The FAC alleges that these statements were false and libelous. It alleges further that plaintiff was readily identifiable due to pictures of him published on the internet. The FAC also alleges that these broadcasts and articles were published maliciously or negligently and that plaintiff suffered emotional distress as a result. Plaintiff seeks both compensatory and punitive damages.

The motion to dismiss in this matter must be granted in part and denied in part for the same reasons discussed in the two related pending cases.

### ***Analysis***

The test under Kentucky law for a statement or news broadcast to be libelous is well established.

A communication is defamatory "if it tends to (1) bring a person into public hatred, contempt or ridicule; [or] (2) cause him to be shunned or avoided. . ." 13 David J. Leibson, *Kentucky Practice, Tort Law* § 15:2 (2nd ed. 2008) (quoting *McCall v. Courier-Journal and Louisville Times Co.*, 623 S.W.2d 882, 884 (Ky. 1981)).

The FAC alleges that this is exactly what occurred to the plaintiff. (FAC ¶¶ 619, 624). The FAC specifically alleges that, because of these publications, plaintiff became “the subject of overwhelming public hatred, contempt, disgrace and scorn from the public. (FAC ¶ 207).

At the pleading stage, plaintiff is entitled to have all inferences drawn in his favor. The Court also notes that, while it has viewed the videos filed in the record, it does not rely on them here as testimony will be necessary to lay a foundation for their admission.

Therefore, as in the two related cases, the Court finds that the statements that plaintiff “blocked” Phillips or did not allow him to retreat, if false, meet the test of being libelous *per se* under the definition quoted above.<sup>1</sup>

Therefore, the Court having reviewed this matter, and being advised,

**IT IS ORDERED:**

- (1) The Motion to dismiss the First Amended Complaint (Doc. 29) be, and is hereby, **GRANTED IN PART AND DENIED IN PART**, consistent with the above discussion;
- (2) The case shall proceed to the discovery and summary judgment phases;

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<sup>1</sup> FAC ¶¶ 402(c), 457(d)(e), 500(f), 549(c).

- (3) The defendant shall participate in the preliminary pretrial conference set in the two related cases on **January 7, 2020 at 1:00 p.m.**, observing all requirements of the Court's orders setting such conference; and
- (4) That copies of those orders are attached herewith and incorporated by reference.

This 21st day of November 2019.



**Signed By:**

**William O. Bertelsman** *WOB*

**United States District Judge**

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF KENTUCKY  
NORTHERN DIVISION AT COVINGTON

CIVIL ACTION NO. 2:19-00019 (WOB-CJS)

NICHOLAS SANDMANN

PLAINTIFF

VS.

ORDER

WP COMPANY LLC, d/b/a  
THE WASHINGTON POST

DEFENDANT

This matter is before the Court on the motion of the plaintiff for relief from judgment under Rule 60, reconsideration of the Court's previous Order granting defendant's motion to dismiss under Rule 59, and for leave to amend the complaint. (Doc. 49). A proposed First Amended Complaint has been tendered. (Doc. 49-2). Defendant has opposed this motion (Doc. 50), and plaintiff filed a reply. (Doc. 51).

The Court heard oral argument on this motion on October 16, 2019. (Doc. 57).

Federal Rule of Civil Procedure 15(a)(2) states that the Court "should freely give leave [to amend] when justice so requires." "Denial of leave to amend is disfavored; and a district judge should grant leave absent a substantial reason to deny." 3 James Wm. Moore et al., *Moore's Federal Practice* § 15.14[1] (Supp. 2019).

In the interest of moving this matter along, the Court will not set forth here a detailed analysis of the Proposed Amended Complaint, which is lengthy and highly detailed.

The Court first notes that the statements alleged by plaintiff to be defamatory have not changed in the proposed First Amended Complaint. They are the same 33 statements alleged in the original Complaint and set forth in the chart attached to the Court's July 26, 2019 Opinion and Order (Doc. 47).

The Court will adhere to its previous rulings as they pertain to these statements **except** Statements 10, 11, and 33, to the extent that these three statements state that plaintiff "blocked" Nathan Phillips and "would not allow him to retreat." Suffice to say that the Court has given this matter careful review and concludes that "justice requires" that discovery be had regarding these statements and their context. The Court will then consider them anew on summary judgment.<sup>1</sup>

The Court also notes that the proposed First Amended Complaint makes specific allegations concerning the state of mind of Phillips, the principal source of these statements. It alleges in greater detail than the original complaint that Phillips deliberately lied concerning the events at issue, and that he had

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<sup>1</sup> The Court has reviewed the videos filed by both parties and they confirm this conclusion.

an unsavory reputation which, but for the defendant's negligence or malice, would have alerted defendant to this fact.

The proposed First Amended Complaint also alleges that plaintiff could be identified as the subject of defendant's publications by reason of certain photographs of plaintiff and the videos. This should also be the subject of proof.<sup>2</sup>

Of course, these allegations will be subject to discovery and summary judgment practice. However, they do pass the requirement of "plausibility." See generally 2 James Wm. Moore et al., *Moore's Federal Practice* § 12.34[1] (Supp. 2019).

Therefore, the Court being advised,

**IT IS ORDERED** that:

- 1) The motion of the plaintiff for relief from judgment under Rule 60, reconsideration of the Court's previous Order granting defendant's motion to dismiss under Rule 59, and for leave to amend the complaint (Doc. 49) be, and is hereby, **GRANTED IN PART AND DENIED IN PART**, consistent with the above discussion;
- 2) The judgment (Doc. 48) previously entered herein be, and is hereby, **SET ASIDE AND HELD FOR NAUGHT**;
- 3) The proposed First Amended Complaint (Doc. 49-2) shall be **DEEMED FILED CONCURRENTLY HEREWITH**; and

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<sup>2</sup> The Court notes that defendant has acknowledged that the "blocking" statement concerned plaintiff. (Doc. 61 at 2).

4) Pursuant to Fed. R. Civ. P. 26(f), a scheduling conference is hereby **SET FOR TUESDAY, DECEMBER 3, 2019 AT 1:00 P.M.** in the Court's third floor conference room. The parties must comply with all requirements of the Federal Rules of Civil Procedure in preparation for such conference. The Court will, *inter alia*, set discovery deadlines at this conference, resolve any anticipated issues regarding discovery to the extent possible, and set a deadline for the filing of motions for summary judgment.

The scheduling conference will also serve as a preliminary pretrial conference which will address the following:

- a. Will the defendant seek to file a third-party complaint against the other media entities or individuals who are alleged to have defamed plaintiff?  
See KRS 411.182, Fed. R. Civ. P. 14, 19?
- b. Should the cases now pending, or to be filed later, arising out of the same event be consolidated, as contemplated by KRS 411.182?
- c. Is the Court required to order the joinder of any parties under Fed. R. Civ. P. 19?
- d. The applicability, with regard to punitive damages, of *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008); *BMW of North America, Inc. v. Gore*, 517 U.S. 559



(196); and *Clark v. Chrysler Corp.*, 436 F.3d 594 (6th Cir. 2006).

This 28<sup>th</sup> day of October 2019.



**Signed By:**

**William O. Bertelsman** *WOB*

**United States District Judge**

**NOV -7 2019**

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
NORTHERN DIVISION  
AT COVINGTON**

AT COVINGTON  
ROBERT R. GARR  
CLERK U.S. DISTRICT COURT

**NICHOLAS SANDMANN, by and** : **CASE NO. 2:19-cv-19-WOB-CJS**  
**through his parents and natural** :  
**guardians, TED SANDMANN** : **JUDGE BERTELSMAN**  
**and JULIE SANDMANN,** :  
: **MAGISTRATE JUDGE SMITH**  
**Plaintiff,** :  
: **ORDER GRANTING JOINT MOTION**  
**v.** : **TO CONTINUE SCHEDULING**  
: **CONFERENCE AND TO SET DATE**  
**WP COMPANY LLC d/b/a THE** : **BY WHICH TO ANSWER OR**  
**WASHINGTON POST,** : **OTHERWISE PLEAD**  
: **Defendant.** :

Plaintiff Nicholas Sandmann and Defendant WP Company LLC d/b/a The Washington Post having filed a joint motion to continue the scheduling conference currently set for December 3, 2019 and to extend the time by which the Washington Post must answer or otherwise respond to the Plaintiff's First Amended Complaint, and the Court having reviewed the motion and being otherwise sufficiently advised;

IT IS HEREBY ORDERED that the motion is <sup>→ (Doc. 66)</sup> GRANTED. The currently scheduled Fed. R. Civ. P. 26 (f) conference shall now be held on 7<sup>th</sup> day of January, 2020 at 1 pm .m. All other directives contained in the Court's Order (Doc #64) remain in place. Further, the Washington Post shall have up to and including December 11, 2019 to answer or otherwise respond to the Plaintiff's First Amended Complaint.

Dated this 7<sup>th</sup> of November, 2019.

William C. Bertelmann  
UNITED STATES DISTRICT JUDGE

Tendered by:

**/s/ Todd V. McMurtry**

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