IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al*.,	:	**CASE NO. 2017 CA 005989B**
Plaintiffs,	:	**Judge Hiram E. Puig-Lugo**
vs.	:	**Next Scheduled Event: 2020 Hearing, To Be Determined**
DAVID H. HOFFMAN, *et al.*,	:	
Defendants.		

REPLY IN SUPPORT OF DEFENDANTS SIDLEY AUSTIN LLP, SIDLEY AUSTIN (DC) LLP, AND DAVID H. HOFFMAN'S CONTESTED SPECIAL MOTION TO DISMISS COUNT 11 OF THE FIRST SUPPLEMENTAL COMPLAINT UNDER THE DISTRICT OF COLUMBIA ANTI-SLAPP ACT, D.C. CODE § 16-5502

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INTRODUCTION

On March 21, 2019, Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and David H. Hoffman (collectively, "Sidley") filed a special motion to dismiss, pursuant to the D.C. Anti-SLAPP Act, D.C. Code § 16-5501, *et seq.* ("the Act"), the single new count Plaintiffs added in their First Supplemental Complaint. That new Count 11 alleges defamation by republication of Sidley's Report on the basis of changes that co-defendant American Psychological Association ("APA") is alleged to have made to its website in August 2018. Plaintiffs make two core factual allegations in their Supplemental Complaint about Sidley's involvement with the alleged republication: (1) that Sidley actively participated in and approved of the APA website changes, Compl. ¶ 534,[1] and (2) that, in any event, the website changes were reasonably foreseeable to Sidley on the basis of court filings Plaintiffs made earlier in 2018, Compl. ¶¶ 529, 531. Sidley's opening memorandum rebutted these sole bases for the republication claim against Sidley, by showing that: (1) Plaintiffs had provided no nonconclusory allegation that Sidley participated in the alleged 2018 APA website changes, Count 11 Mem. 11,[2] and (2) Plaintiffs' two court filings said nothing to put Sidley on notice about the APA website changes that actually followed, Count 11 Mem. 5-7, 11-12.

Plaintiffs have now silently abandoned both those allegations. Instead, Plaintiffs make a new argument in their Opposition: that the alleged 2018 APA website changes were reasonably foreseeable to Sidley at the time it submitted the revised Report to APA in *September 2015*. But

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[1] "Compl." refers to Plaintiffs' February 4, 2019 D.C. Supplemental Complaint.

[2] "Count 11 Mem." refers to Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and David H. Hoffman's Memorandum of Points and Authorities in Support of Contested Special Motion to Dismiss Count 11 of the First Supplemental Complaint Under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5502, filed March 21, 2019.

Plaintiffs cite to no allegation in their Supplemental Complaint of any conduct by Sidley in 2015 showing such website changes were reasonably foreseeable; indeed, Plaintiffs continue to cite to portions of their Supplemental Complaint alleging only events that occurred in 2018. Further, even if the Supplemental Complaint had made an allegation about Sidley's conduct in 2015, such an allegation would have rendered new Count 11 irrelevant as to Sidley, as that count would then be subject to anti-SLAPP dismissal on the same ground as the original Complaint: that Sidley did not publish any statements about Plaintiffs with actual malice when it submitted the Report to APA in 2015.

ARGUMENT

Under the Anti-SLAPP Act, Plaintiffs have the burden of showing that their claims are "'likely to succeed on the merits.'" Count 11 Mem. 7-8 (quoting D.C. Code § 16-5502(b)). This means that plaintiffs must present evidence in support of their claims, not "mere reliance on allegations in the complaint." Count 11 Mem. 7-8 (quoting *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1233 (D.C. 2016), *amended on other grounds* (D.C. 2018), *cert. denied*, 140 S. Ct. 344 (2019)). If the evidence fails to demonstrate "'legal sufficiency,'" such that they cannot "'establish the existence of an element essential to [the plaintiffs'] case,'" the case must be dismissed with prejudice. Count 11 Mem. 8 (quoting *Mann*, 150 A.3d at 1240; *Night & Day Mgmt., LLC v. Butler*, 101 A.3d 1033, 1037 (D.C. 2014)).

Plaintiffs' Opposition does not dispute this legal standard. *See* Count 11 Opp. 17-18.[3] Rather, Plaintiffs argue that the alleged August 2018 changes to APA's website constitute a republication of the Report posted on that website, and further, that Sidley has legal

[3] "Count 11 Opp." are to Plaintiffs' Consolidated Opposition to Defendants' Second Set of Contested Special Motions to Dismiss Filed March 21, 2019 Under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5502.

responsibility for such republication, on the theory that when Sidley submitted the Report to APA in 2015, it was reasonably foreseeable that three years later APA would make minute technical changes to their website that Plaintiffs contend is a republication of the Report. Neither aspect of Plaintiffs' argument has merit.

I. As a Matter of Law, the Alleged August 2018 Changes to the APA Website Do Not Amount to a Republication of the Report.

Plaintiffs contend that APA (and Sidley) republished the Report because APA (1) disabled the Report's previous standalone web page, thereby making the Report more difficult to access, Count 11 Opp. 3-4, 21, (2) added to its website hyperlinks to documents *other than* the Report, documents that Plaintiffs do not allege themselves are defamatory, *id.* at 23-25, and (3) posted to the APA Council's listserv an email notifying the Council of the Changes, *id.* at 3-4, 19. For the reasons discussed below, and in detail in APA's reply brief, APA Count 11 Reply 9-15, Plaintiffs' allegations misstate undisputed facts and none of these allegations in any event constitutes republication as a matter of law.[4] Plaintiffs' Count 11 of the Supplemental Complaint must therefore be dismissed.

First, Plaintiffs allege that APA published the Report "on separate occasions" in 2015 and 2018 "on different locations on the APA website." Count 11 Opp. 21. This ignores the undisputed evidence: Plaintiffs do not attempt to rebut the affidavit of APA's Director of Digital Strategy and Services making clear that both before and after 2018, the Report has been available at the same URL from the same webpage. Count 11 Mem. 4. Providing a link to a document that remains at the same online location is definitively not a republication under the law.

[4] References to "APA Count 11 Reply" are to Defendant American Psychological Association's Reply in Further Support of Its Contested Special Motion to Dismiss Count 11 of the Supplemental Complaint Under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502.

"[A]lerting a new audience to the existence of a preexisting statement does not republish it." *Clark v. Viacom Int'l, Inc.*, 617 F. App'x 495, 505-07 (6th Cir. 2015). And even if APA had moved the Report to a different location within the same website, "adding a verbatim copy of a statement to a different URL does not trigger republication." *Yeager v. Bowlin*, 693 F.3d 1076, 1083 (9th Cir. 2012); *see also* APA Count 11 Reply 10-11 & n.7.

Second, Plaintiffs allege that APA added additional documents to an APA website page titled "Timeline of APA Policies & Actions Related to Detainee Welfare and Professional Ethics in the Context of Interrogation and National Security" ("Timeline"). Count 11 Opp. 23-25. But as Sidley noted, the full text of the Report itself did not appear on the Timeline page, Count 11 Mem. 5; Plaintiffs do not dispute this, Count 11 Opp. 22. Nor do Plaintiffs argue that the Report changed with the addition of documents. *Id.* Moreover, even if additional documents were added to the same webpage as the Report, this would not constitute a republication. *Firth v. State*, 98 N.Y.2d 365, 371 (N.Y. 2002) ("republication . . . has no application at all to the addition of unrelated material on a Web site"); *see also* APA Count 11 Reply 13-14 (distinguishing Plaintiffs' Opposition case law).[5]

Third, Plaintiffs argue that APA republished the Report by sending an email notification of the 2018 changes to the Timeline, because the email "included people who would not have received its similar communications in 2015." Count 11 Opp. 19. But Plaintiffs do not allege that the email attached or even provided a hyperlink to the Report, *see id.*, and there is no republication where defendants "call the *existence* of the article to the attention of a new

[5] Nor do Plaintiffs allege that the additional documents were *themselves* defamatory, further showing the legal insufficiency of Plaintiffs' argument. *Enigma Software Grp. USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263, 277 (S.D.N.Y. 2016) (addition of new statements constitutes republication where publication of "additional statements which [are] allege[d] [to be] themselves defamatory").

audience" but "do[] not present the *defamatory contents* of the article to that audience." *Salyer v. S. Poverty Law Ctr., Inc.*, 701 F. Supp. 2d 912, 916 (W.D. Ky. 2009) (emphasis in original); *see also* APA Count 11 Reply 14-15 (APA did not publish Report to a *new* audience).

II. Sidley Has No Legal Responsibility for APA's August 2018 Website Changes.

Even if APA's August 2018 website changes could be considered a republication of the Report, Plaintiffs' Opposition confirms that they cannot establish that Sidley participated in any way in those website changes or could be held legally responsible for them. Accordingly, Plaintiffs fail meet their burden to demonstrate a likelihood of success on the merits based on the legal sufficiency of the evidence presented. Count 11 Mem. 7-8.

A. The Opposition Fails To Support the Legal Sufficiency of the Allegations Made in the Supplemental Complaint.

Plaintiffs' original theory of republication, as stated in their Supplemental Complaint, is that Sidley either directly participated in the alleged republication in 2018, or should have known in 2018, due to events in 2018, that its 2015 publication of the Report might be republished in 2018. Compl. ¶¶ 295-316. Sidley thoroughly addressed each of these arguments in its anti-SLAPP motion to dismiss Count 11 of the Supplemental Complaint. Count 11 Mem. 10-12. Plaintiffs' Opposition now abandons the first argument altogether, and changes Plaintiffs' second argument to claim that the Supplemental Complaint makes allegations about what was reasonably foreseeable to Sidley in 2015. But every allegation the Supplemental Complaint actually makes concerns 2018 activities, three years after Sidley published the Report to APA. Both arguments therefore fail, and Plaintiffs' Count 11 should be dismissed.

Website Changes Made with Sidley's Cooperation in 2018. Plaintiffs' Supplemental Complaint makes the bare assertion that APA made the August 2018 website changes "with Sidley's full cooperation, knowledge and acquiescence." Compl. ¶ 534. For this theory to

succeed, Plaintiffs would need to provide proof that a defendant "published or knowingly participated in publishing the defamation." Count 11 Mem. 10 (quoting *Tavoulareas v. Piro*, 759 F.2d 90, 136 (D.C. Cir. 1985)). In its opening brief, Sidley observed that Plaintiffs' assertion that the website changes were made with "Sidley's full cooperation, knowledge and acquiescence" is unsupported by any nonconclusory factual allegation about Sidley's conduct and, indeed, cannot be supported by any facts.[6]

In response, Plaintiffs have said nothing. Their Opposition does not attempt to defend this allegation. Count 11 Opp. 26-27. Thus, Plaintiffs have abandoned the claim that Sidley participated in the republication.

Website Changes Foreseeable to Sidley in 2018 or 2015. Sidley's opening memorandum also addressed Plaintiffs' then-argument that the Supplemental Complaint alleged the APA website changes were reasonably foreseeable to Sidley in *2018* because of court filings Plaintiffs submitted in D.C. and Massachusetts. Count 11 Mem. 11-12. Sidley clearly explained why this argument fails, for two reasons.

First, Sidley quoted in detail Plaintiffs' two 2018 court filings and explained why they in fact gave Sidley no notice of the APA website changes about which Plaintiffs later complained. The filings alleged that APA may have been planning to post the Report on a "third-party

[6] Plaintiffs' assertion that Sidley misstated the law on this ground for dismissal, *see* Count 11 Opp. 26, is wrong. Sidley correctly stated the law providing that an allegation a publication was made with Sidley's "full cooperation, knowledge and acquiescence," Count 11 Mem. 10, requires a nonconclusory allegation of Sidley's involvement in the publication. *Tavoulareas*, 759 F.2d at 136 (requiring showing that defendant "published or knowingly participated in publishing the defamation"). Plaintiffs do not argue that Sidley misquoted *Tavoulareas*, Count 11 Opp. 26, and Plaintiffs' inability to supply any such allegation is confirmed by their silent abandonment of the claim. Plaintiffs have now changed their theory to one of reasonable foreseeability three years *earlier*, a point not addressed in Sidley's memorandum because it appears nowhere in the Supplemental Complaint.

website"—this never happened. Count 11 Mem. 6. Nor did the filings complain about any new documents being placed next to the Report on APA's website. Count 11 Mem. 6. Review of these submissions shows this unmistakably. *See* Count 11 Mem. Exs. 1-A and 1-B. In response, Plaintiffs simply repeat their allegation without engaging with Sidley's argument about the content of the submissions. Count 11 Opp. 26-27. Second, without any factual allegation that Sidley took any *action* connected with publication in 2018, its alleged knowledge at the time is irrelevant.

Ignoring the allegations of their own Supplemental Complaint, Plaintiffs have now changed their argument. They now argue that Sidley should reasonably have foreseen an alleged republication of the Report not in 2018, but three years earlier, in 2015, when Sidley submitted the revised Report to APA. Count 11 Opp. 27 & n.52. The Opposition purports to find support for this allegation, *id.*, by citing a range of paragraphs in the Supplemental Complaint: paragraphs 295-316. But those paragraphs make allegations only about what happened with APA's website in *2018*, and Plaintiffs' statements in *2018*.[7] Plaintiffs again have no meritorious response to Sidley's opening memorandum.

In short, Plaintiffs now argue that in 2015, Sidley should have foreseen an alleged republication of the Report, because Sidley was put on notice *in 2018* such that 2018 changes to the website were reasonably foreseeable. To state this argument is to refute it. Accordingly, Plaintiffs' Opposition fails.

[7] Compl. ¶ 295 ("On August 21, 2018, APA affirmatively republished the . . . Revised Report through an email to a listserv . . . ."); ¶ 296 ("[O]n or before August 24, 2018, APA posted to its public website the minutes from the Council meeting . . . ."); ¶ 301 ("On July 3 and 23, 2018, Plaintiffs notified Defendants and the D.C. Superior Court of their concerns . . . ."); ¶ 302 ("On or about June 22, 2018, APA removed from its website the PENS Report . . . ."); ¶ 303 ("At the time of its August 21, 2018, changes to its website, APA either removed or made difficult to access [relevant] documents . . . .").

B. Even if the Supplemental Complaint Had Alleged Sidley Conduct in 2015, Plaintiffs Would Have No Viable Claim Against Sidley.

Even if the Supplemental Complaint had in fact alleged that the 2018 APA website changes were reasonably foreseeable to Sidley in 2015—that is, if the Court had before it an entirely different Supplemental Complaint—that would not change the result. Plaintiffs cite no authority for the proposition that a republication is reasonably foreseeable to an initial author where the republication occurred three years after the first republication, due to website changes the original author had no reason to expect.

The only case Plaintiffs *do* cite, *Stephan v. Baylor Medical Center*, 20 S.W.3d 880 (Tex. App. 2000), is irrelevant. Count 11 Opp. 28. In that case, a hospital submitted an investigative report to a board of examiners, and the board then immediately published the report on its website. The court there held that immediate publication of that report on the website was foreseeable, and understandably so—there, the hospital knew that, *by law*, the board was required to republish the report on its website. *Baylor Med.*, 20 S.W.3d at 889. That case is entirely inapplicable here given the passage of time between the provision and alleged "republication" of the Report, and the unexpected nature of APA's alleged website changes. *See Chandler v. Berlin*, 2019 WL 1471336, at *4 (D.D.C. Apr. 3, 2019) ("Courts have held . . . that republication after three years [is] not reasonably foreseeable.").

Finally, and independently, even if Plaintiffs had filed a Supplemental Complaint that could successfully allege reasonable foreseeability as to Sidley in 2015, the new legal claim would serve no purpose. For actual malice purposes, in addressing Plaintiffs' claims, Sidley's state of mind would *still* be assessed as of 2015 even if a third party's republication occurred later. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 286 (1964) (actual malice measured "at the time of the publication"); *Yiamouyiannis v. Consumers Union*, 619 F.2d 932, 942 (2d Cir. 1980)

(plaintiff must demonstrate actual malice at the time of the original publication, regardless of whether actual malice alleged at time between publication and alleged republication).

Sidley's anti-SLAPP motion, directed to the original Complaint, is before the Court and seeks dismissal of Plaintiffs' claims for inability to show actual malice. The allegations made in the original Complaint relate to publications by Sidley that occurred in 2015. If Plaintiffs had alleged in their Supplemental Complaint that Sidley's last act was indeed in 2015 and that the August 2018 website changes were reasonably foreseeable to Sidley at that time, the Supplemental Complaint would have been subject to dismissal on the same actual malice grounds as in the original anti-SLAPP motion. Accordingly, Plaintiffs' efforts to mischaracterize their own Complaint would be futile even if accepted.

CONCLUSION

For the reasons stated here and in Sidley's opening memorandum, Count 11 of Plaintiffs' Supplemental Complaint should be dismissed with prejudice.

Dated: December 13, 2019

Respectfully submitted,

/s/ Thomas G. Hentoff
John K. Villa (D.C. Bar No. 220392)
Thomas G. Hentoff (D.C. Bar No. 438394)
Krystal C. Durham (D.C. Bar No. 987768)
Alexander J. Kasner (D.C. Bar No. 1046343)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 434-5000
Email: jvilla@wc.com
thentoff@wc.com
kdurham@wc.com
akasner@wc.com

Attorneys for Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and David H. Hoffman

CERTIFICATE OF SERVICE

I hereby certify on this 13th day of December, 2019, that a true copy of the foregoing was filed through the Court's ECF system and served upon all registered participants.

/s/ Thomas G. Hentoff
Thomas G. Hentoff