



SUMMARY

In early 2023, Brett Favre filed three defamation lawsuits against a Mississippi state official and two sports broadcasters. Favre sued the individuals after a Mississippi state audit revealed the misuse of money from the state's welfare program and Favre's connection to specific expenditures became the subject of much commentary by newspapers and other news sources.

There is an apparent trend of wealthy and powerful people increasingly using the threat of defamation lawsuits to suppress important speech by others. In the Favre cases, the defendants appear to have the means to defend themselves. But that is not always the situation, and even lawyers who don't represent clients involved in such high-profile matters should understand the First Amendment principles looming in defamation cases.

The Favre disputes offer a helpful lens for analyzing the intersection of reputational interests and the right to free speech.

BY DAVID P. HOLLANDER & DOUGLAS M. POLAND

Brett Favre's Hail Mary: Defamation Cases and First Amendment Protections



When do statements about people and events in the news cross the line from legitimate commentary and become libel or slander (collectively, defamation)? Ongoing litigation involving former football star Brett Favre might help clarify the law.

As he so often was during his 15 years as the Green Bay Packers quarterback, Brett Favre was prominent in the news cycle during and since the NFL's 2022-23 playoff season. But there's a key difference: Favre is considered newsworthy now because of his involvement in litigation in Mississippi rather than his accomplishments at Lambeau Field. After a Mississippi state audit revealed the misuse of money from the state's welfare program, Favre filed three defamation lawsuits against a Mississippi state official and two sports broadcasters who allegedly tarnished the football legend's good name.¹ CNN summarized Favre's involvement:

"A 2020 state audit found that tens of millions of dollars were improperly used from the state's welfare program. Portions of the money were to be used to build a volleyball facility at the University of Southern Mississippi, Favre's alma mater, as well as \$1.1 million paid to the former quarterback for a public service announcement campaign, according to investigators.

"Favre returned \$500,000 in May 2020 and repaid the remaining \$600,000 in October 2021 after the state auditor issued a demand letter for it, according to the auditor's office. But the auditor's office maintains Favre still owes \$228,000 in interest payments.

"Favre has denied knowing the money he received was welfare money, saying in a statement last year that he was being 'unjustly smeared in the media.'"²

Commenting on this episode, one sportscaster allegedly called Favre a "sorry mof to steal from the lowest of the low" and said that Favre "stole money from people that really needed that money."³ A second sportscaster

allegedly described Favre as a "thief" who was "stealing from poor people in Mississippi."⁴ In early February 2023, Favre filed defamation suits in Mississippi against both sportscasters and a Mississippi public official involved in publishing the audit.

Plaintiff's Burden in Defamation Cases

To cross the goal line on his defamation claims, Favre must prove: "(1) a false and defamatory statement concerning [him]; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication."⁵

On one hand, it is understandable why Favre would seek to vindicate his name in court – he apparently believes he was falsely accused of abhorrent conduct. But that desire to strike back at other people for expressing their views runs squarely into the First Amendment, particularly in situations in which public figures or public money are involved. Indeed, "speech concerning public affairs is more than self-expression; it is the essence of self-government."⁶

The Favre disputes offer a helpful lens for analyzing the intersection of reputational interests and the right to free speech. Favre likely will have to navigate two major defenses to succeed on his defamation claims: falsity and actual malice.⁷ These are difficult defenses to get around – and for good reason.

Provably False Statement

Because a defamation claim requires a "false statement," a communication is actionable only if it contains a "provably false" assertion



of fact.⁸ This rule has its roots in the First Amendment, which provides “protection for statements that cannot ‘reasonably [be] interpreted as stating actual facts about an individual.’”⁹

Requiring defamation claims to allege a provably false statement ensures that “imaginative expression” and “rhetorical hyperbole” will continue making important contributions to the “public debate.”¹⁰ Consequently, “if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.”¹¹

Courts have often held that use of words such as “crook” or “thief,” depending on the context, do not rise to the level of actionable, provably false statements. For instance, in *Terry*, an investigative news story included testimonials describing a wedding

videographer’s operations using phrases such as “[y]ou feel like you’re being robbed” and “[y]ou’re robbing these people[,] [y]ou’re cheating these people.”¹² Even though the plaintiff relied on “dictionary definitions” of the words that “may encompass criminal behavior,” the court found that the context – namely, frustrated customers characterizing their experiences – made clear that the speaker’s “statement did not imply criminal behavior.”¹³

Perhaps reasonable listeners would interpret the sportscasters’ use of “thief” and “stealing” to mean that Favre engaged in criminal activity. Or perhaps they would view the statements as mere hyperbole, suggesting that Favre used his fame in an unsavory way to sway governmental decision-makers. The Mississippi court will decide after taking a deep dive into the context surrounding each statement.

Assuming the court agrees with Favre that the statements are provably true or false, the question will become the following: Which are they? Favre will have to prove “a false and defamatory statement concerning [him.]”¹⁴ However, “[m]inor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified.”¹⁵ Falsity likely cannot be resolved until the parties delve into Favre’s actions, knowledge, and involvement in the underlying dispute. This highlights one of the inherent risks in defamation actions like these: Because the truth of the challenged statement is always at issue, plaintiffs like Favre invite invasive discovery into their personal lives to test the speaker’s veracity.

Actual Malice

Even if Favre can prove a false statement of fact, however, he might not put enough points on the board to get the win. As a public figure, Favre must clear a high bar to show that the speakers acted with the requisite state of mind.

In *New York Times Co. v. Sullivan*, the U.S. Supreme Court held that a “public official” bringing a defamation claim



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must establish that the speaker acted with “actual malice.”¹⁶ The Supreme Court later extended its application of the “actual malice” standard to “public figures,” not merely “public officials.”¹⁷ Favre is likely a public figure based on his Super Bowl victory, his three NFL Most Valuable Player awards, and the fame he has intentionally cultivated. But even if that were not the situation, “[a]ny person who becomes involved, voluntarily or involuntarily, in any matter of legitimate public interest [...] becomes in that context a vortex [or limited purpose] public figure who is subject to fair comment.”¹⁸ The extensive media coverage of Favre’s alleged wrongdoing and his own defamation lawsuits appears to have once again thrust Favre into the glare of the bright lights. He therefore must prove “actual malice” by the defendants.

“Actual malice,” despite its usual connotation, does not require “ill will, evil or corrupt motive, intention to injure, hatred, enmity, hostility, or spite.”¹⁹ It does require proving that the defendant made the false statement knowing that

it “was false or with reckless disregard of whether it was false or not.”²⁰ To show reckless disregard, the plaintiff “must show that the defendant in fact entertained serious doubts as to the publication’s truth.”²¹ This is a high burden – and purposefully so.

Conclusion

Did the sportscasters make “provably false” statement of facts? Will Favre be able to make the showing of actual malice? Or will Favre take a sack? Time will tell – as of this writing in April 2023 one defendant has moved to dismiss, but none of the presiding judges have entered substantive orders on the merits.

Although the underlying allegations are serious, this is a contest among public figures with the means to defend themselves. So, we can comfortably sit on the sidelines and make our Hail Mary puns. Increasingly, however, it seems that wealthy and powerful people are using the threat of defamation lawsuits to suppress important speech by others, including those without the means to defend against such tactics.

For example, a *Washington Post* opinion piece commented that “the past several years have seen a worrisome increase in libel lawsuits brought by a broad array of political candidates, elected officials and domestic corporate titans, not to mention foreign autocrats and oligarchs.”²² A recent paper by the group Protect Democracy raised similar concerns and pointed to two examples in nations without the constitutional actual malice standard: “French President Emanuel Macron successfully sued the owner of a billboard that depicted him as Hitler, and Italian anti-mafia journalist Roberto Saviano is on trial for calling a government official ‘minister of the criminal underworld’ on social media.”²³

Against this backdrop, the First Amendment guardrails are as important as ever to ensure that journalists and hecklers alike can express their views. **WL**

ENDNOTES

¹Alta Spells, Dianne Gallagher & Eric Levenson, *Brett Favre Files Motion to Dismiss Mississippi Lawsuit Against Him in Welfare Fraud Scheme*, CNN (Nov. 29, 2022), www.cnn.com/2022/11/28/us/brett-favre-welfare-fraud-motion-to-dismiss/index.html.

²Jamie Lynch, Dianne Gallagher & Mallika Kallingal, *Brett Favre Files Defamation Lawsuits Against Shannon Sharpe, Pat McAfee and Shad White over Welfare Fraud Case*, CNN (Feb. 10, 2023), www.cnn.com/2023/02/09/us/brett-favre-files-defamation-lawsuits/index.html.

³*Id.*

⁴*Id.*

⁵*Simmons L. Grp. P.A. v. Corporate Mgmt. Inc.*, 42 So. 3d 511, 517 (Miss. 2010).

⁶*Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

⁷Favre filed his lawsuits in Mississippi. We focus on Wisconsin law in this article – because it is where we live and where Favre made his name – but many of the principles apply similarly throughout the U.S. due to the First Amendment guardrails.

⁸*Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20 (1990); see also *Terry v. Journal Broad. Corp.*, 2013 WI App 130, ¶ 19, 351 Wis. 2d 479, 840 N.W.2d 255 (citing *Milkovich* for same proposition).

⁹*Id.* (quotations omitted).

¹⁰*Id.*

¹¹*Law Offs. of David Freydyin P.C. v. Chamara*, 24 F.4th 1122, 1130 (7th Cir. 2022) (citation omitted).

¹²*Terry*, 2013 WI App 130, ¶¶ 3, 9, 351 Wis. 2d 479 (emphasis added).

¹³*Id.* ¶¶ 23, 33; see also *Ghanam v. Does*, 845 N.W.2d 128, 144 (Mich. App. 2014) (“Terms such as ‘blackmailer,’ ‘traitor,’ ‘crook,’

‘steal,’ and ‘criminal activities’ must be read in context to determine whether they are merely exaggerations of the type often used in public commentary.”).

¹⁴*Simmons L. Grp.*, 42 So. 3d at 517.

¹⁵*Masson v. New Yorker Magazine Inc.*, 501 U.S. 496, 517 (1991) (internal citations and quotations omitted).

¹⁶*New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964).

¹⁷*Harris v. Quadracci*, 48 F.3d 247, 250 (7th Cir. 1995).

¹⁸*Simmons L. Grp.*, 42 So. 3d at 518; see also *Erdmann v. SF Broad. of Green Bay Inc.*, 229 Wis. 2d 156, 165, 599 N.W.2d 1, 5 (Ct. App. 1999) (To determine if someone qualifies as a limited purpose public figure under Wisconsin law, the court conducts a four-step analysis: “(1) there must be a public controversy; (2) isolating the controversy at issue to determine its scope; (3) examining the plaintiff’s role in the controversy to be sure it is more than tangential; and (4) determining if the alleged defamation was germane to the plaintiff’s participation in the controversy.”).

¹⁹*Carson v. Allied News Co.*, 529 F.2d 206, 209 (7th Cir. 1976).

²⁰*Id.* (quoting *Sullivan*, 376 U.S. at 280).

²¹*Biskupic v. Cicero*, 2008 WI App 117, ¶ 27, 313 Wis. 2d 225, 756 N.W.2d 649 (internal quotations omitted).

²²*Libel Suit Increase Shows Why We Need to Keep Protections for the News Media*, Wash. Post (March 8, 2022), www.washingtonpost.com/opinions/2022/03/08/libel-suit-increase-times-v-sullivan-news-media/ [behind paywall for some readers].

²³John Langford, Rachel Goodman & Rebecca Lullo, *Defamation and Democracy: The Democracy Case for Preserving the “Actual Malice” Standard*, Protect Democracy (Mar. 30, 2023), <https://protectdemocracy.org/work/democracy-case-actual-malice/>. **WL**