

JURISPRUDENCE

There's a Big, New Defamation Lawsuit Against Trump. It's a Slam Dunk.

BY JOHN CULHANE

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Kevin Richardson, Yusef Salaam, Corey Wise, and Raymond Santana appear onstage with the Rev. Al Sharpton during the final day of the Democratic National Convention in Chicago on Aug. 22. Jasper Colt/USA Today via Reuters Connect

This dizzying election season took another surprise turn to little fanfare this week: The so-called Central Park Five sued Donald Trump for defaming them with a statement he made during the debate against Kamala Harris in Philadelphia on September 10. The Central Park Five, who now understandably prefer to be referred to by the more accurate sobriquet, “The Exonerated Five,” are five men who were accused in 1989 of a series of attacks in Central Park, including the rape of a woman and several serious assaults. At the time, Trump took out full-page ads in several New York newspapers calling for the execution of all five, who were teenagers at the time. And all were Black or Latino.

A confession years later by the actual rapist, corroborated by DNA evidence, resulted in the exoneration of these men in 2002. They received a settlement from the City of New York in the amount of \$41 million after the Five had sued the City for false arrest and malicious prosecution. But this new complaint alleges that during the debate Trump falsely stated that the men had pleaded guilty to the crimes, and that at least one of the victims had died. Neither statement is true. (Four of the five men did initially confess, but the confessions were obtained under duress, and not one of them pleaded guilty. No victim died as a result of the attacks.) This kind of reckless disregard for truth, if not conscious lying, is the stuff of which successful defamation claims are made. Public figures such as the Exonerated Five

have to clear the high hurdle of proving the defendant acted knowing the defamatory statement was false, or with “conscious disregard” as to whether the statement is true or false. But given Trump’s long and continuing obsession with the Five, that hurdle will be easily cleared—he knows what he’s saying. And his latest comments are also part of a continuing course of extreme and outrageous behavior towards these men that courts have consistently found sufficient to support a claim for the intentional infliction of emotional distress.

The case presents an interesting question on the intersection of two strong policies: On one hand, it’s almost impossible to sue anyone for defamation over statements made during campaigns—a moment’s reflection on the current bombardment of misleading and downright false campaign ads drives the point home. These contests are bruising, and it borders on comical to think one candidate can sue another for false statements. (There are exceptions: Falsely referring to an opponent as a murderer, for instance, would be actionable.) On the other hand, people who are not directly part of the campaign, such as the plaintiffs here, retain a strong interest in their reputation. And given the vast audience—some 67 million—for the candidates’ one and only debate, the potential for reputational injury here is great. Yet in a perverse way, Trump’s constant lying about, well, everything, might create problems for the plaintiffs. While I think they’d still be able to convince a jury that the statements were defamatory and harmful, their actual damages might be less just because the effect of their reputation based on Trump’s falsehood might not be that great. At some point, Trump’s onslaught of absurd falsehoods might diminish the force of the lie. (But the punitive damages could be great, given the source of the comments and the outrageousness of the lie.)

As to the case for emotional distress, here the complaint alleges a course of conduct spanning the years since Trump first began his campaign against these five men back in 1989, with the inaccuracies uttered during the debate just the latest incident. That’s a smart move by the plaintiffs’ counsel (the powerful Philly firm of Kline and Specter), because it serves as a reminder of the many years during which Trump has refused to apologize for his actions, thereby compounding the plaintiffs’ misery.

On the merits, the cases for both defamation and emotional distress are strong—perhaps unassailable. Eventually, the plaintiffs are likely to receive a substantial settlement, as they should.

At this point, it’s impossible to predict whether this late-breaking reminder of Trump’s decades-long racism and falsehoods will move the needle with voters any more than what we know already. But by reminding people of one particularly taut exchange during the debate, it might. Recall that Harris also referenced the 1973 federal lawsuit against the Trump Organization for alleged racial discrimination at their housing developments in New York. The case resulted in a consent order with no admission of guilt, but the case was regarded as highly significant at the time. And who can forget the racist birtherism conspiracy that dogged Barack Obama for years, until Trump finally admitted he had been wrong?

Then there’s the possible cumulative effect of *yet another* lawsuit against Trump; and one that might remind voters of the former president’s two defamation losses against E. Jean Carroll—juries didn’t buy Trump’s statements that he didn’t know her, much less his protestation that he did not sexually assault her. As with the Carroll case, it’s impossible to blame this latest civil suit on overzealous prosecutors. More and more, Trump shows out as a serial defendant, both criminally and civilly. He’s also a defendant who doubles down: recall that Carroll’s second defamation suit stemmed from comments he made after the verdict in the first one. Here again, he seems to have learned nothing from being wrong about the Exonerated Five. So, another lawsuit—some 35 years after the event that sparked all of this. The defamation claim won’t have any problem with the statute of limitations, because the defamatory statement is new. The fate of the emotional distress claim will hinge on whether the court believes the latest insult is part of an ongoing course of conduct, which it clearly is.

Whatever happens next month, Trump is headed for another loss in court over yet another set of defamatory statements. ■