Polsby v. Spruill

United States District Court for the District of Columbia
July 31, 1997, Decided ; August 1, 1997, FILED
Civ. No. 96-1641 (TFH)

Reporter: 1997 U.S. Dist. LEXIS 11621; 43 U.S.P.Q.2D (BNA) 1904; 25 Media L. Rep. 2259

M. MAUREEN POLSBY, M.D., Plaintiff, v. STEVEN G. SPRUILL, et al., Defendants.

Disposition: **[*1]** Plaintiff's Motion for Leave to File an Amended Complaint DENIED; and Defendants' Motion to Dismiss and/or for Summary Judgment GRANTED and case DISMISSED.

Core Terms

novel, misappropriation, summary judgment, patient, false light, infringement, defamatory, amended complaint, microchip, material fact, defamation, fellowship, emotional, plaintiff's claim, sexual advances, no evidence, fictional, depicts, maliciously, outrageous, inflicted, neurology, distress, decency, motion for leave, reasonable jury, life story, recipients, lawsuit, pilot

Case Summary

Procedural Posture

Plaintiff claimed that defendants, an author and a publisher of a book, infringed on plaintiff's right to publicity, misappropriated her name or likeness, negligently and maliciously showed her in a false light, committed negligent and malicious defamation, and resulted in the intentional infliction of emotional distress. Plaintiff moved for leave to file an amended complaint. The author and publisher moved to dismiss and/or for summary judgment.

Overview

Plaintiff, a medical doctor, claimed that the life of a novel's main character paralleled her own except that the character in the book had an unethical romantic relationship with a patient and broke into two houses and an office. The court found no evidence that the novel even used her name or likeness or that there was any legally cognizable commercial benefit particularly associated with her name or likeness. Plaintiff had become a public figure and her life story became part of the public domain when she voluntarily testified before Congress regarding her experiences that were similar to those in the novel. However, the author produced evidence that he had the idea for a majority of the facts that were allegedly taken from the life of plaintiff before her accounts were made public. Despite a few likenesses, there were many more differences than similarities between the novel and plaintiff's life. Also, incidents in the novel did not meet the "highly offensive to a reasonable person" standard for defamation. Finally, it was not necessary for plaintiff to amend her complaint since she had a suit pending in federal court alleging her copyright claims against the identical parties.

Outcome

The court granted summary judgment for the author and publisher on all counts of the complaint and denied plaintiff's motion for leave to amend her complaint.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgments > Burdens of Proof > Movant Persuasion & Proof

HN1 Summary judgment is appropriate only if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56*. In considering a motion for summary judgment, a court may consider factual evidence outside the pleadings, but must draw all justifiable inferences in favor of the non-moving party. Material facts are facts that might affect the outcome of the suit under the governing law and are in dispute if a "reasonable jury" could return a verdict for the non-moving party.

Torts > ... > Invasion of Privacy > Appropriation > Elements
Torts > ... > Invasion of Privacy > Public Disclosure of Private Facts > Elements

HN2 Claims of infringement of the right to publicity and misappropriation are indistinguishable as a legal matter and should be treated as a single cause of action for misappropriation. In order to prove the defendants engaged either in infringement of the right to publicity or misappropriation, the evidence must show that the defendants used the plaintiff's name or likeness for a character portrayed in his fictional work and that they derived commercial benefit from the identity of the plaintiff, the public interest in the plaintiff or from any other value associated with the plaintiff's name or likeness. The

plaintiff must demonstrate that her name or likeness was used for the value associated with it, that she can be identified from the publication, that the defendants received a benefit from the use of the name or likeness, and that it wasn't used incidentally or for newsworthy purposes. However, the mere fact that the novel was published and the defendants intended to make a profit from this publication is not enough to constitute commercial benefit. It must be the case that the defendants used the name or likeness for the express purpose of appropriating the commercial benefit that is particularly associated with the name or likeness of the plaintiff.

Torts > ... > Invasion of Privacy > Appropriation > Defenses
Torts > ... > Invasion of Privacy > Public Disclosure of Private Facts > Defenses

HN3 Liability for misappropriation of one's name or likeness will not arise when the information in question is in the public domain, for the public figure no longer has the right to control the dissemination of the information.

Torts > ... > Invasion of Privacy > Appropriation > Elements
Torts > ... > Invasion of Privacy > Public Disclosure of Private Facts > Elements

HN4 It is simply not enough for a claim of misappropriation and infringement of the right to publicity to show merely that a character in a novel is based on a real individual.

Torts > ... > Invasion of Privacy > False Light > Elements

HN5 In order to demonstrate that she has been cast in a false light, the plaintiff must show that the publication actually depicts her persona, does so falsely, that the depiction would be highly offensive to a reasonable person, and that the defendant had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed.

Torts > ... > Invasion of Privacy > False Light > Elements

HN6 It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in plaintiff's position.

Torts > ... > Defamation > Elements > General Overview
Torts > Intentional Torts > Defamation > Libel

HN7 In order for a statement to be defamatory towards a plaintiff, the statement must be shown to be of and concerning the plaintiff. This is a factor in a claim for libel, but the same principle applies to a claim for defamation. It would, therefore, be impossible to find that a plaintiff was defamed by a statement made by a defendant if there is no evidence that the statement was even about the plaintiff. In addition, in order for a statement to be defamatory in general, the plaintiff must demonstrate that the statements made may be found to have a particular meaning and show that that meaning is defamatory. A statement has a defamatory meaning only when it is shown that the statement will injure the plaintiff in her trade, profession, community standing, or will lower her in the estimation of the community. The statements must make the plaintiff appear to be odious, infamous or ridiculous.

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > Elements

HN8 For a plaintiff to prove that a defendant intentionally inflicted emotional distress on her, she must prove that the novel is about her and her life. Beyond that, she must also prove that there was actual intent on the part of defendant to cause the plaintiff emotional harm through the writing of the novel. This conduct by the defendant must be shown to be so outrageous in nature that it goes beyond the bounds of common decency.

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > Elements

HN9 Using a small piece of someone's life in the plot of a novel that is clearly fictional certainly does not qualify as outrageous conduct that goes beyond the bounds of common decency.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview
Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN10 *Federal Rule of Civil Procedure 15(a)* states that a party may amend her pleading once as a matter of course at any time before a responsive pleading is served. *Fed. R. Civ. P. 15(a)*. However, once a responsive pleading has been filed, a party may amend her pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. *Fed. R. Civ. P. 15(a)*.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN11 To determine whether justice requires granting leave to file an amended complaint, a court must evaluate whether undue prejudice will be caused by granting this request.

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Attorney(s) for Defendant(s): Bruce W. Sanford, Esq., Henry S. Hoberman, Esq., Robert D. Lystad, Esq., Baker & Hostetler, Washington, D.C.

Judges: Thomas F. Hogan, United States District Judge

Opinion by: Thomas F. Hogan

Opinion

MEMORANDUM OPINION

Pending before the Court are the Plaintiff's Motion for Leave to File an Amended Complaint, and the Defendants' Motion to Dismiss and/or for Summary Judgment made pursuant to *Fed. R. Civ. P. 12(b)(6)* and *56*. For the reasons set forth below, the Court will deny the plaintiff's motion to file an amended complaint and grant the defendants' motion and enter summary judgment for the defendants on all counts of the Complaint.

BACKGROUND

This case is based on the plaintiff's allegations that defendant Spruill's book, My Soul To Take, is based on the plaintiff's life story. She claims that the life of the novel's main character, Dr. Lord, parallels **[*2]** her own to such an extent that it infringes on her right to publicity, constitutes misappropriation of her name or likeness, negligently and maliciously shows her in a false light, constitutes negligent and malicious defamation, and results in the intentional infliction of emotional distress. The plaintiff first filed this suit in December 1994 in the United States District Court for the District of Columbia based on a book written by the defendant Spruill and on an article in Good Housekeeping which was a shortened version of the book, printed by the defendant Hearst. Thereafter, the case was delayed for a number of reasons. First, in September 1995, a stipulation of dismissal without prejudice and a tolling agreement were entered into between the plaintiff and the defendants, allowing the plaintiff to re-file the Complaint by March 19, 1996. On March 18, 1996, the plaintiff, with new counsel, refiled the Complaint in D.C. Superior Court, [1] but did not serve the defendants immediately. The case was dismissed for failure to timely serve defendants under D.C. Superior Court Rule 4(m). Plaintiff received an order to vacate the dismissal and served the defendants with the complaint. **[*3]** The defendants then filed a Notice of Removal to this Court on July 15, 1996, based on diversity of citizenship.

The complaint which is now before the Court contains four counts against the two defendants and ten counts against defendant Spruill individually. Counts I and II are Infringement of the Right of Publicity by defendants Spruill and Hearst for the article and the book. Counts III and IV are Misappropriation of Dr. Polsby's Likeness, Persona, and Image by defendants Spruill and Hearst for the article and the book. Count V is Negligent False Light by defendant Spruill and Count VI is Malicious False Light by defendant Spruill. Both are based on the fact that the character in the book breaks into two houses and one office and that the plaintiff never did this. Counts VII and VIII are Negligent and Malicious Defamation by **[*4]** defendant Spruill based on the illegal breaking and entering by the character in the book. Counts IX and X are Negligent and Malicious False Light by defendant Spruill based on the fact that the character in the book has a romantic relationship with a patient, an act the plaintiff claims is unethical and that she never did. Counts XI and XII are Negligent and Malicious Defamation by defendant Spruill based on the fact that a relationship between a doctor and a patient is unethical. Counts XIII and XIV are Intentional Infliction of Emotional Distress based on the fact that the character in the book had a romantic relationship with a patient and broke into two houses and an office.

The defendants filed the present motion claiming that the plaintiff fails to state a claim upon which relief can be granted, and therefore the case must be dismissed under *Fed. R. Civ. P. 12(b)(6)*. In the alternative, defendants argue that they have provided sufficient evidence to demonstrate that there are no issues of material fact in question and, thus, they are entitled to summary judgment under *Fed. R. Civ. P. 56*. Because the central issue presented in this motion is the nature and extent of the similarities **[*5]** between the life of the plaintiff and the heroine's life in My Soul To Take and in the Good Housekeeping article, the Court will carefully review and compare the plaintiff's account of her experiences with the story in the book and the article in order to resolve these motions.

According to the plaintiff, the following is an account of the events in her life that were misappropriated by the defendants. In 1982, the plaintiff was offered a fellowship by Dr. Thomas Chase, the Scientific Director of the National Institute of Neurological and Communicative Disorders and Strokes (″NINCDS″), an institute of the National Institute of Health (″NIH″). At the time, the plaintiff was a neurology resident at the New England Medical Center of Tufts University in Boston. The plaintiff's job was to be the research assistant of Dr. Chase. The plaintiff was told by Dr. Chase that the fellowship was for at least two years, and for a third if the plaintiff wished. This fellowship was very prestigious due to its connection with the NIH and served as a stepping stone to academic neurology. In 1983 the plaintiff left Tufts with three months left in her residency based on assurances from Dr. Chase **[*6]** that her time at the NIH would serve as credit towards the completion of her residency.

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[1] The plaintiff's new counsel sought and was granted withdrawal from the suit on August 8, 1996, and the plaintiff filed a notice of intention to proceed pro se on August 14, 1996.

At some time after the plaintiff had accepted the fellowship, but before she actually started work at the NIH, the plaintiff encountered Dr. Chase at a conference in San Diego. According to the plaintiff, at this conference, Dr. Chase got the plaintiff into his hotel room on a pretext, held her by her shoulders, pushed her down onto the bed, put his arms around her and kissed her. He invited her to accompany him to Mexico for the week instead of attending the meeting. The plaintiff resisted the sexual advances and requested that their relationship be kept on a professional level and then left the room.

According to the plaintiff, she was willing to forget the incident occurred, but Dr. Chase was not. Though he never made another advance towards her, the plaintiff states that once she arrived at the NIH, she was treated significantly differently than the male fellows. The plaintiff repeatedly states that she found Dr. Chase to be arrogant, driven and impatient, despite having a ″patrician air″ about him. These words, according to the plaintiff, are similar to those used by the defendant Spruill **[*7]** to describe Dr. Lancaster, a character in his book. The plaintiff also claims that she found out later that Dr. Chase had a reputation as a womanizer and that many thought she had only been hired because Dr. Chase was attracted to her, as she was the first female medical staff fellow ever hired by Dr. Chase. The plaintiff also points out that she attended several staff parties at Dr. Chase's home and that his house was located at the end of a long driveway off of an isolated, winding country road. According to the plaintiff, this description is similar to the one used by the defendant when he described the location of the home of the character in the book who is alleged to be the counterpart to Dr. Chase.

Despite her problems with Dr. Chase, the plaintiff was able to perform research on the connection between clinical depression and various neurological ailments like Parkinson's disease and spasmodic torticollis (a disorder similar to Parkinson's). Dr. Polsby's hypothesis was that there was a connection between the pathophysiology of movement disorders and manic depression and she demonstrated that those with spasmodic torticollis could be treated with antidepressants. She created **[*8]** a pilot study for patients with spasmodic torticollis. After ten months of work, the plaintiff claims that Dr. Chase took over the study and that articles about the research failed to mention the plaintiff's involvement.

At the end of her two years, the plaintiff was not allowed to renew her fellowship for the third year, as had been assured by Dr. Chase. She was also not given the necessary credit towards her residency and, therefore, she could not get a residency or research position anywhere. The plaintiff claims this is due to the power and prestige of the NIH and that her career in neurology and research was over. The plaintiff was not eligible to take the examination to become a Board-certified neurologist because she had not finished her residency. Currently, the plaintiff is a disability claims examiner for the Social Security Administration.

Several years after the plaintiff left the NIH, she was contacted by Richard Duggan, one of the patients in her pilot study. Mr. Duggan had read an article describing the pilot study in a scientific journal. The plaintiff had been listed as a minor author of the article, apparently without her knowledge. Mr. Duggan notified the plaintiff **[*9]** because there were items in the article about the study that Mr. Duggan believed to be false, including the number of patients involved in the study, and the types of tests the patients had undergone. Mr. Duggan had contacted other members of the study and they supported his recollections. The plaintiff attempted to report this apparent fraud to the NIH and others in the government, but was not satisfied with the response, and so, according to the plaintiff, she filed her initial Title VII lawsuit in order to get relief.

According to the defendants, and based on the Court's reading of the book and article in question, the following is an outline of the plot of My Soul To Take and the story that was printed in Good Housekeeping. In 1988, Dr. Lord, the main character, is a lab assistant at the NIH, participating in a research project studying the brain's code for vision. While working on this project, Dr. Lord assists in the surgeries of fifty blind volunteers who receive a microchip that gives them sight. Unfortunately, one evening while she is in the lab her supervisor, Dr. Lancaster, makes an unwanted sexual advance towards her. She is then fired. Dr. Lancaster refuses to **[*10]** provide a recommendation for her to enter a neurosurgery program, but she does become a successful general surgeon. Five years later, Dr. Lord encounters Andrew Dugan, one of the volunteers from the NIH vision project, and learns of a dangerous side effect of the microchip. It gives people the power to see the future, a power which horrifies many of the microchip recipients but which also draws the interest of a rogue section of the CIA that sees many uses for the microchip. In the course of trying to help past recipients of the microchip, including Andrew Dugan, Dr. Lord breaks into a psychiatrist's office and Andrew Dugan's home. She is almost killed at the Pentagon Athletic Center by a group of rogue CIA agents who want the secret of the microchip for themselves, and is also run off the road, thrown into the polar bear den at the National Zoo and forced to set an operating room on fire to avoid being the unwilling recipient of her own microchip. Ultimately, Dr. Lord tells her story to the Secretary of Defense and prevent FDA approval of the microchip, as well as stop the rogue CIA agents.

DISCUSSION

In order to resolve the defendant's motion, the Court must look beyond the **[*11]** attorneys' filings to affidavits and the actual book and article in question. Therefore, the Court will treat the defendant's motion as one for

summary judgment. Fed. R. Civ. P. 56. ***HN1*** Summary judgment is appropriate only if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In considering a motion for summary judgment, the Court may consider factual evidence outside the pleadings, but must draw all justifiable inferences in favor of the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); Bayer v. United States Department of Treasury, 294 U.S. App. D.C. 44, 956 F.2d 330, 333 (D.C. Cir. 1992). Material facts are facts that might affect the outcome of the suit under the governing law and are in dispute if a ″reasonable jury″ could return a verdict for the non-moving party. Anderson, 477 U.S. at 248.***1. Right to Publicity and Misappropriation*** [2]

[*12] Counts I, II, III and IV allege that defendants Spruill and Hearst infringed on the plaintiff's right of publicity and engaged in misappropriation.

HN2 Claims of infringement of the right to publicity and misappropriation are ″indistinguishable as a legal matter″ and should be treated as a single cause of action for misappropriation. Lane v. Random House, Inc., 23 Media L. Rep. (BNA) 1385, 1387 (D.D.C. 1995). In order to prove the defendants engaged either in infringement of the right to publicity or misappropriation, the evidence must show that the defendants used the plaintiff's name or likeness for a character portrayed in his fictional work and that they derived commercial benefit from the identity of the plaintiff, the public interest in the plaintiff or from any other value associated with the plaintiff's name or likeness. See Restatement (Second) of Torts § 652C (1977); Lane, 23 Media L. Rep. (BNA) at 1387. The plaintiff must demonstrate that her name or likeness was used for the value associated with it, that she can be identified from the publication, that the defendants received a benefit from the use of the name or likeness, and that it wasn't used incidentally **[*13]** or for newsworthy purposes. Matthews v. Wozencraft, 15 F.3d 432, 437 (5th Cir. 1994). However, the mere fact that the novel was published and the defendants intended to make a profit from this publication is not enough to constitute commercial benefit. Lane, 23 Media L. Rep. (BNA) at 1388 (quoting Restatement 2d of Torts § 652C cmt. d.). It must be the case that the defendants used the name or likeness for the express purpose of appropriating the commercial benefit that is particularly associated with the name or likeness of the plaintiff. Restatement 2d of Torts § 652C cmt. d.

The plaintiff's claims for misappropriation and infringement of the right to publicity must fail for three reasons. First, the defendants did not receive any commercial benefit solely from the use of her name or likeness. Second, there is no evidence that the defendants even used her name or likeness in the novel or article. Third, she has no right to her life story because she became a public figure and the information became part of the public domain when she voluntarily testified before Congress regarding her experiences at the NIH and her testimony was broadcast on C-SPAN and CNN.

The defendants **[*14]** received no commercial benefit from any similarities that may exist between the plaintiff and Dr. Lord. As explained above, the mere fact that the novel was published and the defendants intended to make a profit from this publication is not enough to constitute commercial benefit. Instead, it must be the case that the defendants used the name or likeness of the plaintiff for the express purpose of appropriating the commercial benefit that is associated with the name or likeness of the plaintiff. No evidence has been submitted to the Court that could lead the Court to the conclusion that there was any legally cognizable commercial benefit particularly associated with the name or likeness of the plaintiff.

The Court is not convinced that the defendants, in fact, used the plaintiff's ″name or likeness,″ another necessary element for the torts of misappropriation and infringement of the right to publicity. Lane v. Random House, Inc., 23 Media L. Rep. (BNA) 1385, 1387 (D.D.C. 1995); Restatement (Second) of Torts § 652C (1977). The plaintiff claims that there are numerous similarities between her life and the life of the protagonist in the novel that are sufficient to establish that **[*15]** the novel is based on her life story. These similarities include that they were both subject to, and rejected, unwanted sexual advances by their supervisors, that they were both females working at the NIH as fellows in the field of neurology and that they both suffered professionally as a result of their rejection of their supervisors. The plaintiff also claims that she found Dr. Chase to be arrogant, driven, and impatient, despite having a ″patrician air″ about him. This description, she argues, is similar to that of Dr. Lancaster in My Soul to Take. The plaintiff further points out that similar to Dr. Lancaster's home in My Soul to Take, Dr. Chase's house was located at the end of a long driveway off an isolated, winding country road. The plaintiff finally claims that like Dr. Lord, the plaintiff paints as a hobby. Finally, the last similarity between Dr. Polsby's life and the story in My Soul to Take is that the plaintiff was allegedly contacted by Richard Duggan, one of the patients in her pilot study while Dr. Lord meets an Andrew Dugan who is one of the original fifty re-

[2] In the complaint, the plaintiff has listed separate counts first concerning the book and then the article. However, the article was taken from the book and the only difference between the two is the removal of two subplots in order to shorten the article. Therefore, the Court will treat the book and the article as one entity with regard to the various counts of the Complaint.

cipients of the microchip.

Despite these few likenesses, as is made clear through the affidavits **[*16]** and a reading of the book and article, there are many more differences than similarities. For example, the plaintiff was a medical staff fellow in the field of neurology working on a connection between movement disorders and depression. The character in the book, Dr. Lord, is described as a lab assistant, though she was training to become a neurosurgeon. In contrast to the plaintiff, Dr. Lord was working on a breakthrough new project involving the deciphering of the brain's code for vision. In addition, it is quite clear in the book that Dr. Lord was the victim of an unwanted sexual advance, while the same is not necessarily true for the plaintiff. In a previous lawsuit, the plaintiff was unable to prove that the alleged advance ever took place. In fact, the judge in that case found that the plaintiff had fabricated the entire story. [3] Additionally, in the plaintiff's situation, the sexual advance, if it occurred, took place before she began her fellowship, and despite this alleged advance, she was allowed to complete her two years at the NIH. Dr. Lord was already working for Dr. Lancaster when he made a pass at her, and he only kept her on for as long as he needed her to complete **[*17]** the surgeries for his pilot study. She was fired after eight months, before the completion of her fellowship. The plaintiff was unable to qualify to take the necessary board exams and as such she is now working for the Social Security Administration. She allegedly received no help from her supervisor. Dr. Lord, in the book, received a recommendation from her supervisor that allowed her to pursue a successful career in general surgery. Dr. Lord never filed suit against Dr. Lancaster or the NIH. Also missing from the plaintiff's life are, among other things, rogue CIA agents who can see the future, a near death experience in the locker room at the Pentagon Athletic Center, an escape from the polar bear den at the National Zoo, and a car chase through Langley.

[*18] The primary similarities between the plaintiff and Dr. Lord are limited to the fact that they are both women, and that they both worked for the NIH. Even if the Court grants the plaintiff the benefit of the doubt and assumes for the purpose of this motion that there was some advance made by plaintiff's supervisor, the circumstances surrounding this event and those that occurred in the book are completely different. The plaintiff's allegedly took place in a hotel room at a medical conference prior to her beginning work at the NIH. She still completed a two year fellowship. In contrast, Dr. Lord was accosted in the lab at the NIH and was forced out after eight months.

The plaintiff also cannot prove that the novel is based on her life story because she has produced no evidence that the defendant knew her or knew about her prior to writing the outline of his novel. In her brief, the plaintiff is only able to speculate as to the possibility that the defendant Spruill heard about her experience. There is no evidence that the defendant ever knew about the plaintiff or her experience. In fact, the defendant states in his affidavit that

> I do not know the plaintiff…. I have never met **[*19]** her, and I have never seen a picture of her. Before this lawsuit was filed, I had never heard of Dr. Polsby, never knew her medical background, never knew her employment history, and never knew she sued the NIH for sex discrimination. Before this lawsuit, I had never spoken to anyone about [the plaintiff] nor read any news articles about her.

Def. Spruill Aff. at 2-3. The plaintiff may not rely on allegations or denials of the defendants' motion, but must set forth specific facts showing that there is a genuine issue for trial. *Fed. R. Civ. P. 56(c)*. There is no evidence that the defendant Spruill was ever aware of the plaintiff prior to this lawsuit. In fact, the defendant produced evidence in the form of date stamped computer printouts of two outlines defendant Spruill had written in preparation for the composing of this novel, that show he had the idea of the sexual advance and a majority of the rest of the facts that were allegedly taken from the life of the plaintiff before any accounts of the plaintiff were made public. Because the plaintiff has produced no contrary evidence,

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[3] In 1988, the plaintiff filed a Title VII suit against the Department of Health and Human Services claiming gender discrimination and mistreatment during her fellowship at the National Institute of Health (NIH). She claimed that her mistreatment was the result of her complaining of the unwanted sexual advance by Dr. Chase. That suit endured through many procedural difficulties and was finally heard before Judge Deborah Chasanow in Maryland. On March 28, 1996, after a bench trial, Judge Chasanow found that there was no merit to the plaintiff's claims that Dr. Chase sexually harassed her. Judge Chasanow wrote:

> "Plaintiff's account of her treatment by [her supervisor] at the conference in San Diego simply is fabricated. . . . Not for a moment do I find [plaintiff's] account credible. . . . All in all, I simply do not believe that [plaintiff's supervisor] made an unwelcome and inappropriate 'pass' at Dr. Polsby at that or any other time. Unfortunately, I believe that the incident was concocted in order to give spice to her later claims that [her supervisor] treated her differently than male fellows hired to do research [at NIH]."

Polsby v. Shalala, Civil Action No. DKC 88-2344, mem. op. at 7-8 (D. Md. Mar. 28, 1996).

instead she merely speculates that defendant Spruill may have heard about her, it is clear **[*20]** to this Court that the defendant had come up with his plot and his characters before the plaintiff's story was ever made public.

Finally, plaintiff made her story public when she testified before Congress on June 25, 1992, prior to publication of the book or article. Her testimony described her alleged experience at the NIH and the alleged sexual advance by Dr. Chase and was broadcast on CNN and C-SPAN. ***HN3*** ″Liability for misappropriation also will not arise when the information in question is in the public domain, for the public figure no longer has the right to control the dissemination of the information.″ *Matthews*, 15 F.3d at 440 (finding no misappropriation in the novel about the life of an undercover narcotics officer because the protection of one's name or likeness does not include one's life story). See also *Doe v. Roe*, 638 So. 2d 826, 829 (Ala. 1994) (finding that because the book in question in Doe was clearly a work of fiction, and was advertised as such, the plaintiff had no claim for misappropriation). As soon as the plaintiff told her story in a public setting, she made herself into a public figure, and the information became ripe for the fair use by others, **[*21]** even in a fictionalized form. *15 F.3d at 440-41* (citing *Douglass v. Hustler Magazine*, 769 F.2d 1128, 1139 (7th Cir. 1985)). See also W. Page Keeton, et al., Prosser and Keeton on Torts, § 177 at 853 (1984) (″Nor is there any liability [for misappropriation] when the plaintiff's character, occupation, and the general outline of his career, with many real incidents in his life, are used as the basis for a figure in a novel who is still clearly a fictional one.″). ***HN4*** It is simply not enough for a claim of misappropriation and infringement of the right to publicity to show merely that a character in a novel is based on a real individual. See *Matthews*, 15 F.3d at 437.

For the foregoing reasons, the Court must grant summary judgment for the defendants on Counts I, II, III, and IV.

2. Negligent and Malicious False Light

Counts V, VI, IX and X allege that defendant Spruill is guilty of negligently and maliciously casting the plaintiff in a false light. ***HN5*** In order to demonstrate that she has been cast in a false light, the plaintiff must show that the novel actually depicts her persona, does so falsely, that the depiction ″would be highly offensive to a reasonable **[*22]** person, and [that the defendant] had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the [plaintiff] would be placed.″ *White v. Fraternal Order of Police*, 285 U.S. App. D.C. 273, 909 F.2d 512, 522 (D.C. Cir. 1990)(quoting *Restatement 2d of Torts § 652E* (1977)); *Matthews v. Wozencraft*, 15 F.3d at 432, 439 (5th Cir. 1994).

The plaintiff's claims for negligent and malicious false light fail for two reasons. First, as was demonstrated above, the plaintiff cannot show that the novel actually depicts her in any way. The Court will not repeat that discussion here. Second, assuming that the novel actually depicts the plaintiff, and does so falsely, the incidents in the novel that the plaintiff is concerned with do not meet the standard of ″highly offensive to a reasonable person.″ *White v. Fraternal Order of Police*, 909 F.2d at 522. Nothing that Dr. Lord does would cause the plaintiff to lose any prestige or decrease her standing in her community. In fact, the exact opposite would probably be the case because the woman in the novel is a heroine. Nothing written in the book would meet the standard of being **[*23]** ″highly offensive″ to a reasonable person or in ″reckless disregard″ to the falsity of the publicized incident. *Id.* at 522.

There are two specific situations that occur in the novel that cause concern to the plaintiff. First are the two incidents of breaking and entering. Dr. Lord breaks into the office of the psychiatrist of one of the implant recipients who recently attempted suicide. Dr. Lord was trying to find the individuals' file in order to determine if the person had been having the same visions as Mr. Dugan, and whether the implant was to blame. Dr. Lord later breaks into Mr. Dugan's home because she fears that he has been abducted or harmed by the rogue CIA agents. She is trying to save his life. The second situation of note to the plaintiff is characterized by the plaintiff as an unethical doctor/patient relationship between Dr. Lord and Mr. Dugan. In My Soul To Take, the relationship between Dr. Lord and Mr. Dugan consists of two kisses. Additionally, in the book, Mr. Dugan was never officially a patient of Dr. Lord's and, in any event, this relationship begins five years after Mr. Dugan received the implant when Dr. Lord is no longer involved in neurosurgery in **[*24]** any way.

It is clear that none of these activities would be highly offensive to a reasonable person. ***HN6*** ″It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in [Polsby's] position.″ *Lane v. Random House, Inc.* 1995 U.S. Dist. LEXIS 1332, 23 Media L. Rep. 1385, 1390 (1995) (citing *Restatement of Torts (Second) § 652E, cmt. c*.). No reasonable jury could find that the incidents mentioned by the plaintiff would cast the plaintiff in a false light. Therefore, the Court will grant summary judgment for the defendants on Counts V, VI, IX, and X.

3. Negligent and Malicious Defamation

Counts VII, VIII, XI and XII allege that defendant Spruill is liable for negligently and maliciously defaming the plaintiff. ***HN7*** In order for a statement to be defamatory towards the plaintiff, the statement must be shown to be ″of and concerning″ the plaintiff. *Liberty*

Lobby, Inc. v. Dow Jones & Co., 267 U.S. App. D.C. 337, 838 F.2d 1287, 1293-94 (D.C. Cir.) cert. denied, *488 U.S. 825, 102 L. Ed. 2d 51, 109 S. Ct. 75 (1988)*. This is a factor in a claim for **[*25]** libel, but the same principle applies to a claim for defamation. *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983). It would, therefore, be impossible to find that the plaintiff was defamed by a statement made by the defendant if there is no evidence that the statement was even about the plaintiff. In addition, in order for a statement to be defamatory in general, the plaintiff must demonstrate that the statements made may be found to have a particular meaning and show that that meaning is defamatory. See *Community for Creative Non-Violence v. Pierce*, 259 U.S. App. D.C. 134, 814 F.2d 663, 670-71 (D.C. Cir. 1987). A statement has a defamatory meaning only when it is shown that the statement will injure the plaintiff in her trade, profession, community standing, or will lower her in the estimation of the community. *Id.* at 670. The statements must make the plaintiff appear to be odious, infamous or ridiculous. *Fleming v. AT&T Info. Servs., Inc.*, 279 U.S. App. D.C. 15, 878 F.2d 1472, 1475-76 (D.C. Cir. 1989).

The key to the evaluation of a claim of defamation is to review the words or statements in their context, and not merely on their face. *Moldea v. New York* **[*26]** Times Co., 306 U.S. App. D.C. 1, 22 F.3d 310, 313 (D.C. Cir.), cert. denied, *513 U.S. 875, 115 S. Ct. 202, 130 L. Ed. 2d 133 (1994)*. Assuming that the book is about the plaintiff, in Counts VII, VIII, XI and XII, she is again concerned with the defamatory effect of Dr' Lord breaking and entering as well as her relationship with Mr. Dugan. However, in the context of the plot, Dr. Lord's actions are acts of heroism and serve to make Dr. Lord a more courageous and admirable protagonist. Her goal in the two instances of breaking and entering is to save the lives of two people she knows and cares about. This would hardly cause plaintiff's reputation to be sullied. Dr. Lord's romantic feelings for Mr. Dugan are also not cause for concern. In the book, Mr. Dugan is not depicted as a past patient of Dr. Lord, and so the plaintiff's allegations that Dr. Lord had an unethical relationship with a patient is simply overstated. Since in My Soul to Take, Mr. Dugan is not, and was never, a patient of Dr. Lord, there simply is no defamatory effect to the plaintiff by placing Dr. Lord in a relationship with him.

Reviewing the actions of Dr. Lord in breaking into the psychiatrist's office **[*27]** and Andrew Dugan's home as well as her relationship with Andrew Dugan in the context of the entire story, and not merely on each's face, it is clear that these words or statements could not injure the plaintiff in her trade, profession, or community standing, or lower her in the estimation of the community. Therefore, the words or statements are not defamatory. In addition, because the plaintiff is unable to demonstrate that the novel is about her, nothing said in the book can be defamatory to her. Based on the facts of this case, no reasonable jury could find that the defendant negligently or maliciously defamed the plaintiff. Therefore, the Court must grant summary judgment for the defendants on Counts VII, VIII, XI and XII.

4. Intentional Infliction of Emotional Distress

Counts XIII and XIV allege that defendant Spruill intentionally inflicted emotional distress on the plaintiff. ***HN8*** For the plaintiff to prove that the defendant intentionally inflicted emotional distress on her, once again, she must prove that the novel is about her and her life. Beyond that, she must also prove that there was actual intent on the part of defendant Spruill to cause the plaintiff emotional **[*28]** harm through the writing of the novel. See *Waldon v. Covington*, 415 A.2d 1070, 1078 (D.C. 1980). This conduct by the defendant must be shown to be so outrageous in nature that it goes beyond the bounds of common decency. *Profitt v. District of Columbia*, 790 F. Supp. 304, 310 (D.D.C. 1991).

The plaintiff's claims for intentional infliction of emotional distress fail for three reasons. Yet again the plaintiff cannot succeed on this claim because there is insufficient evidence for a reasonable jury to conclude that the novel is about her. Second, it is also the case that even if the defendant did use some of the plaintiff's story in the writing of his novel, this conduct can hardly be described as outrageous in nature or going beyond the bounds of decency. ***HN9*** Using a small piece of someone's life in the plot of a novel that is clearly fictional certainly does not qualify as outrageous conduct that goes beyond the bounds of common decency, especially when the supposedly objectionable parts of the novel actually serve to make the plaintiff's alleged counterpart a heroine. See, e.g., *Weaver v. Grafio*, 595 A.2d 983 (D.C. 1991)(finding that the sending of a letter to the D.C. Bar **[*29]** by the defendant, in which he falsely accused two attorneys of committing a felony was not outrageous). See also, Tackett v. KRIV-TV, 22 Media L. Rep. (BNA) 2092 (S.D. Tex. 1994) (finding that an accusation against a doctor claiming he was selling children for large sums of money was not sufficiently reprehensible as to be beyond the bounds of decency). Finally, as discussed earlier, the plaintiff has provided no basis for the belief that the defendant knew the plaintiff at all. The speculation on the part of the plaintiff that defendant Spruill may have heard about her is insufficient to show that there is a genuine issue of fact for trial. The defendant could not have ″intentionally″ inflicted emotional distress on the plaintiff if he did not even know her. Without the intent element, the plaintiff must fail. For these reasons, the Court will grant the defendants' motion for summary judgment on Counts XIII and XIV.

5. Plaintiff's Motion to Amend the Complaint

HN10 *Federal Rule of Civil Procedure 15(a)* states that ″a party may amend [her] pleading once as a matter of course at any time before a responsive pleading is

served." *Fed. R. Civ. P. 15(a)*. However, once a **[*30]** responsive pleading has been filed, "a party may amend [her] pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." *Fed.R.Civ.P. 15(a)*. The defendants responded to the complaint on September 16, 1996, long before the plaintiff filed the motion for leave to file an amended complaint on February 28, 1997. Therefore, she may only amend her Complaint if the Court gives her leave to do so. The question for the Court, therefore, is whether justice requires leave to amend in this case.

HN11 To determine whether justice requires granting leave to file an amended complaint, the Court must evaluate whether undue prejudice will be caused by granting this request. The only difference between the original complaint and the amended version was the addition of the claim of copyright infringement against both defendants. Upon review of the facts available, including a copy of the amended complaint that the plaintiff wishes to file, the Court finds that justice does not require granting the plaintiff leave to amend.

The two additional counts are completely unrelated to the other fourteen counts in the original complaint. **[*31]** Adding these claims six months after the defendants have already responded would be prejudicial and not warranted, especially given the fact that any amendment to the Complaint would delay decision of the dispositive motions in this case which are also the subject of this Memorandum Opinion. Also, it is simply not necessary for the plaintiff to file the copyright infringement claims against the defendant in the present case since she has a suit pending in the District Court in the Southern District of New York alleging the same copyright claims against the identical defendants. [4]

CONCLUSION

For the reasons set forth above, the Court will grant summary judgment for the defendants on all counts of the complaint and deny the plaintiff's motion for leave to amend her complaint. An Order will accompany this Memorandum Opinion.

July 31st, 1997

Thomas F. Hogan

United States District Judge

ORDER

Pending before the Court are **[*32]** (1) the Plaintiff's Motion for Leave to File an Amended Complaint, and (2) the Defendants' Motion to Dismiss and/or for Summary Judgment. For the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that the Plaintiff's Motion for Leave to File an Amended Complaint is DENIED; and it is further

ORDERED that the Defendants' Motion to Dismiss and/or for Summary Judgment is GRANTED and this case is DISMISSED.

July 31st, 1997

Thomas F. Hogan

United States District Judge

[4] Case No 97 Civ. 0690 (S.D.N.Y.), filed February 3, 1997.