

Roy Moore Allowed to Proceed to Discovery on Defamation Claim Against PAC

He'll Also Replead Claims Against Washington Examiner

By Christopher Proczko

On March 31, 2021, United States District Judge Corey L. Maze set the table for what remains of GOP Senate candidate Roy Moore's two defamation suits—one against political action committees that ran ads against Moore's candidacy in Alabama's 2017 special election, and one against the Washington Examiner and several of its editors and columnists—for calling Moore a “pedophile” and a “child molester.” See [Moore v. Cecil](#) and [Moore v. Lowe](#).

Background

Roy Moore, the twice-elected former Alabama Supreme Court Justice, decided to run for the U.S. Senate seat vacated by Jeff Sessions in February 2017 when Sessions was nominated to become Attorney General. On November 9, 2017—a few weeks before the special election—the Washington Post published an article in which four women accused Moore of courting them when he was in his early 30's and the women were between 14 and 18 years old. Moore denied the allegations, calling them “completely false” and “a desperate attack by the National Democrat Party and the Washington Post on [his Senate] campaign.”

The allegations continued, however, with subsequent reports by the New American Journal (November 12), The New Yorker (November 13), Al.com (November 13), a press conference held by a fifth accuser (November 13), another Washington Post report (November 15), an ABC News Interview of one of Moore's accusers (November 15), and another New American Journal report (November 27).

On November 6, 2017, three days before the Washington Post's first report on the allegations against Moore, the Highway 31 Super PAC filed its statement of organization. Highway 31 was created and funded to help Doug Jones defeat Moore in the special election. Highway 31 ran two ads that recounted the media reports “in the light least-favorable to Moore—labeling him a ‘child predator’ in the digital ad and quoting [New American Journal journalist] Glynn Wilson's initial report that ‘Moore was actually banned from the Gadsden Mall . . . for soliciting sex from young girls’ in the television ad.” Guy Cecil, the chair of Priorities USA (which, alongside the Senate Majority PAC (“SMP”), was a major funder of Highway 31), tweeted several statements treating the allegations against Moore with a

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similar level of veracity—calling Moore a “child predator,” a “Republican pedophile,” and a “sexually assaulting pedophile.”

Moore lost the 2017 special election. He filed suit against Cecil, Highway 31, Priorities USA, SMP, Waterfront Strategies (a media buying firm SMP used to place pro-Jones, anti-Moore ads) in United States District Court for the Northern District of Alabama, asserting claims for defamation, defamation by implication, and IIED.

After losing the 2017 special election, Moore decided to seek the same seat in when it reopened in 2020. Before Moore announced his candidacy, the *Washington Examiner* published four opinion pieces and two news stories that recounted the 2017 allegations and results. The articles presented an unflattering picture of Moore, referring to him as an “accused sexual assailant and pedophile,” “credibly accused sexually pedophilic predator,” “comic book villain,” “skunk,” and a “terrible human being.” The *Washington Examiner* articles also described one accuser’s account as saying that Moore was “attempting to rape her.” Moore then sued the *Washington Examiner*’s parent company WNPC, as well as several reporters, columnists, and editors, again asserting claims of defamation per se, defamation by implication, and IIED/outrage.

Both cases landed before U.S. District Judge Corey L. Maze, who issued two opinions on March 31—one in *Moore v. Cecil* granting in part and denying in part defendants’ motion to dismiss Moore’s amended complaint, and one in *Moore v. Lowe* granting the *Washington Examiner*’s motion and dismissing Moore’s complaint without prejudice, allowing Moore to attempt to correct his pleading deficiencies.

Moore v. Cecil

In his order in *Cecil*, Judge Maze first addressed Moore’s new actual malice arguments. The court quickly dismissed Moore’s challenge to the constitutionality of the New York Times actual malice requirement. Whatever Justice Thomas might say in a dissent, the actual malice standard from New York Times remains binding precedent.

The court then addressed Moore’s argument that pleading ill will or animosity was enough to plead actual malice. The court noted that Moore was attempting to impute a “common-law malice” standard from a state court case that involved a private figure seeking to overcome a conditional privilege. “Common-law malice,” which focuses generally on the defendant’s attitude toward the plaintiff, differs substantially from “constitutional malice,” which focuses on the defendant’s attitude towards the truth or falsity of his published material. In cases involving public figures and public officials, Alabama courts, as they must, apply the “constitutional malice” standard from New York Times.

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Defamation

Shopping Mall Ad

After reaffirming that Moore had to satisfy the New York Times standard of actual malice, Judge Maze turned to the political ads at issue. In a September 18, 2020 order, Judge Maze had already determined that the shopping mall ad created a false impression that Moore solicited sex from young girls at the Gadsden Mall. The defendants argued that the following statements in the ad were not also defamatory:

“Moore was actually banned from the Gadsden Mall...”;

“These stories have been going around for 30 years”;

“These women are being skewered for the truth”; and

“I actually voted for Moore...but I am basically disgusted now.”

The court agreed with the defendants with respect to the last three statements, but not the first. It determined that the phrase “Moore was actually banned from the Gadsden Mall . . .” as part of the larger, juxtaposed statement that the court had already ruled will go forward. There were no reports that Moore had actually been banned from the mall for soliciting sex from young girls at the mall. Because the defendants’ juxtaposition “tied the alleged mall ban to Moore asking a 14-year-old Santa’s Helper (and others) to have sex,” the court determined that Moore had sufficiently pleaded actual malice about a mall ban, entitling Moore to discovery about that statement.

Digital Ad

Moore also argued that the defendants’ digital ad used an image of a “young black girl seemingly under the age of 10” “to imply that Roy Moore has, or would prey on prepubescent black girls.” Moore argued that if the digital ad stated or implied that he “has or would prey on prepubescent black girls,” he might be able to show that Defendants were reckless in publishing the ad.

Judge Maze was not convinced. He determined as a matter of law that viewers of reasonable and common understanding would not come away from watching the digital ad thinking that Moore has or would prey on prepubescent black girls. (In the process, the court noted that Moore had not cast his claim with racial undertones in his initial complaint, and that he added the words “prepubescent” and “black” only after the court mentioned the diagnostic definition of “pedophilia” when rejecting his original actual malice arguments.) The court dismissed all claims related to the digital ad because it ultimately determined that the ad was not reasonably capable of conveying the defamatory meaning that Moore gave it.

Priorities USA Press Release

Judge Maze then turned to claims against Guy Cecil arising from his tweets and a Priorities USA Press Release. First, the court affirmed its earlier ruling that it has no personal jurisdiction over four tweets sent by Guy Cecil because no pleaded facts alleged that Cecil aimed his tweets at Alabama.

Judge Maze next addressed whether Moore sufficiently pleaded that Cecil acted with actual malice when he called Moore a “pedophile” in a Priorities USA Press Release. To do so, the court examined whether a reasonable reader would interpret the use of the word “pedophile” to suggest that Moore suffered from a mental disorder, and if so, whether Cecil acted with actual malice in calling Moore a “pedophile.”

Judge Maze first determined that readers of the press release likely understood the use of the word “pedophile” to refer to the allegations that Moore sexually assaulted a 14-year-old and 16-year-old girl. Defendants argued that Cecil used the word “pedophile” as laypeople understand it: “someone who is sexually attracted to children of any age.” After all, Cecil was not the first person to use the word in this manner. Nonetheless, the court determined that the press release was at least “reasonably capable” of being read to suggest that Moore suffers from a disorder that makes him want to have sex with prepubescent girls. Judge Maze pointed to both Webster’s dictionary definition of the term “pedophilia” and the fact that the Washington Post had “chastised persons for using the clinical terms ‘pedophile’ and ‘pedophilia’ to describe Moore.”

Because the press release could be reasonably read to suggest Moore was sexually attracted to, or had sexually assaulted, prepubescent girls, the court next examined whether Moore had pleaded that Cecil acted with actual malice when he called Moore a “pedophile” in the Priorities USA Press Release. To do so, Moore must show that “Cecil intended that the reader believe Moore had been accused of sexually assaulting a prepubescent girl, or Cecil knew that a reader might read the word ‘pedophile’ that way and was reckless with the implication.”

Judge Maze held that, when parties disagree about a word’s meaning, a public figure Plaintiff must prove the Defendant intended the reader to ascribe the defamatory meaning. Quoting extensively from *Kendall v. Daily News Publishing Co.*, 716 F.3d 82 (3d Cir. 2013), Judge Maze agreed that malice in general depends upon a showing that the defendant acted with improper motive. Where a word’s definition can be reasonably disputed, a “public figure must show that the defendant either intended to communicate the defamatory meaning or knew of the defamatory meaning and was reckless in regard to it.”

Looking at the Amended Complaint, however, the court determined that Moore did not plead that Cecil intended the Press Release to convey that Moore suffered from clinical pedophilia. Instead, the Amended Complaint alleged:

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The purpose of Cecil’s tweets and press release is apparent; the Defendants were supporting Doug Jones against Roy Moore and they wished to damage Roy Moore’s reputation to such an extent to deter support of Roy Moore and deter voters from choosing a ‘pedophile’ as a Senator. This was the end goal of all defamatory statements made by Cecil.

But an intent to smear Moore so that he would lose an election does not prove actual malice. Because Moore pleaded that Cecil intended to affect Moore’s election changes—and did not plead that Cecil intended the reader to believe that Moore suffered from a disorder that made him assault prepubescent girls (which is a false and defamatory fact that Moore alleged had no support in published reports)—Judge Maze determined that Moore had failed to plead actual malice and dismissed the defamation claim arising from the Priorities USA Press Release.

IIED

Judge Maze also dismissed Moore’s IIED claim. Because IIED requires actual malice, the only statement that could support an IIED claim is the portion of the shopping mall ad that the court determined above sufficiently pleaded actual malice—the portion that implied Moore had been banned from the mall for soliciting sex from young girls.

The court determined that Moore failed to allege conduct that was extreme and outrageous. Egregious sexual misconduct is one of the three circumstances in which the Alabama Supreme Court has recognized a viable IIED claim. However, Judge Maze reasoned that “being falsely accused of asking a child for sex in a political ad is far less outrageous than the sex-related conduct the Alabama Supreme Court has found viable—i.e., a family doctor giving a 13-year old boy opiate prescriptions in exchange for performing sexual acts, a practice that lasted 7-plus years and led to the boy becoming addicted to opiates.” And the court found no support for Moore’s argument that a false accusation in a political ad is sufficiently over-the-line outrageous and extreme to support a viable IIED claim.

New Claims

Finally, Judge Maze addressed two new claims that Moore added to his Amended Complaint—violation of the Voting Rights Act and invasion of privacy (false light). The court determined that Moore lacked standing to bring an action under the VRA because he did not plead a cognizable injury or redressability. As for Moore’s invasion of privacy (false light) claim, Defendants conceded that the claim should not be dismissed with respect to the portion of the shopping mall ad that the Court had already determined had been sufficiently pleaded.

Ultimately, the only claims that survived are defamation, defamation by implication, and invasion of privacy (false light) claims arising from the shopping mall ad. Judge Maze tied it all together by dismissing the rest of Moore’s claims with prejudice, finding that allowing Moore another chance to re-plead his claims would be futile. Moore later filed a motion for reconsideration and Defendants filed a motion for certification and to stay discovery, both of which the court denied, and the case is proceeding to discovery.

Moore v. Lowe

Judge Maze’s contemporaneous opinion in *Moore v. Lowe* was a much simpler affair. In response to the Defendants’ motion to dismiss, Moore conceded that he would amend his deficient complaint, and Judge Maze agreed that an amendment should be allowed under Eleventh Circuit precedent that a public figure who alleges actual malice “should be given the opportunity to amend his complaint to plead further facts in support of his claims.” *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 706 (11th Cir. 2016). In the order granting the motion and allowing Moore the opportunity to replead, Judge Maze noted a few specific issues present in the complaint.

First, Moore did not allege any facts that explain how the defendants were involved in publishing the defamatory statements, nor did he plead any facts that would show the defendants had constant and pervasive contacts that would allow the U.S. District Court for the Northern District of Alabama to exercise jurisdiction over them. As such, the court dismissed Defendants Clarity Media Group, Anschutz, and Klein for lack of personal jurisdiction.

Second, Judge Maze turned to Moore’s “deficient pleading” and addressed Moore’s claims one-by-one. He dismissed the defamation per se claim for failing to specify any specific defamatory statements, suggesting that any amended complaint should “specify the defamatory statement and then plead facts that would establish both defamation under Alabama law and actual malice under the First Amendment for that statement.”

Judge Maze then noted that Moore’s defamation-by-implication claim specified statements that used terms that the court, in its contemporaneous Cecil opinion (see above), had held lack the requisite actual malice—terms like “pedophile” and “sexually assaulted.” Because the court was going to grant leave to amend, it declined to analyze those statements and instead reminded Moore that he must plead facts that would establish both state-law defamation and actual malice for each individual statement.

As for Moore’s IIED claim, Judge Maze again referenced his contemporaneous order in Cecil, which held that making false accusations in a political ad is not one of the categories of action that are “so extreme and outrageous” that they can sustain an IIED claim. It logically follows that “if false accusations in a political ad cannot sustain an IIED claim, then neither can false accusations in a political news article or opinion piece.”

Nonetheless, the court dismissed Moore’s complaint without prejudice, allowing Moore a chance to file a second amended complaint, which he filed on April 30, 2021. At the time of this writing, Defendants’ expected motion to dismiss has not been filed.

Christopher Proczko practices media law at Sapia Law Group, PLLC in Minneapolis, Minnesota. Roy Moore is represented in both cases by Larry Klayman and the Isaak Law Firm, Montgomery, AL. Defendants in Moore v. Cecil are represented by Marc Elias, Perkins Coie, DC; and Barry Ragsdale, Sirote & Permutt, Birmingham, AL. Defendants in Moore v. Lowe are represented by Kellogg, Hansen, Todd, Figel & Frederick, DC; and Jonathan R Little, Lightfoot Franklin & White, Birmingham, AL.