

“What’s in a Name?,” Florida Community Association Journal

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When Shakespeare coined the phrase “the slings and arrows of outrageous fortune” in *Hamlet*, he probably wasn’t envisioning that sentiment could apply centuries later to volunteer board members. However, the Bard was opining that bad things can happen to a person, and in the present-day context, if you are serving on a community association board of directors, those bad things can arrive in the form of defamation: slander and libel.

Over the years, I’ve been contacted by far too many board members who recount stories about horrible things which had been said or written about them both during their board service and even years afterwards. After the tale is told, the next statement is usually, “I want to sue.” This article is not about whether or not those harsh words were warranted; it is about whether or not a board member can successfully pursue a defamation claim against his or her detractors. Defamation is a tort which refers to a false statement, either spoken (which is known as slander) or written (which is known as libel), that injures someone’s reputation.

Some types of false statements are considered so damaging that they are deemed defamatory on their face (which is known as defamation per se) and thus, do not require the plaintiff to prove the defamatory nature of those statements or the plaintiff’s damage. These are typical examples of these kinds of statements which are deemed inherently injurious to one’s reputation:

1. Statements that injure another’s reputation in his trade, business, or profession. For example, if the board president is a licensed real estate agent and the statements allege that he has cheated other brokers out of their fair share of commissions over the years, his reputation in the real estate industry would be injured.
2. Statements claiming someone has a “loathsome disease;”
3. Statements claiming that a person is “unchaste.” In one community, a

- manager was accused of engaging in an extramarital affair with the community's landscaper and thus was the victim of slander per se; and
4. Allegations that an individual has been involved in criminal activity

To state a cause of action for defamation in Florida, a plaintiff must allege the following:

1. The defendant published a false statement. The defendant's knowledge that the statement was or was not false is not the crux of the issue; the defendant's intent to publish the statement to a third party is.
2. The statement was made about the plaintiff.
3. The statement was made to a third party. The defendant must communicate the information with an intent to have someone hear or read it. For example, if the defendant made the statement with the reasonable belief that no one was around to hear it but the statement was overheard by a third party, that is not slander. The defendant must intend to have the statement read or heard by a third party. In addition, if the besmirched director is the only one who heard or read the statement, that does not constitute slander or libel.
4. The falsity of the statement caused injury to the plaintiff.

The following are some of the recognized defenses to a defamation suit:

1. Truth is a complete defense to any slander claim.
2. Opinion as a defense depends heavily on the credibility and reputation of the person rendering the opinion. If a third party would typically rely upon the person's statements, then simply prefacing the defamatory content with an "in my opinion" qualifier will not be sufficient to shield the statement maker from liability.
3. Consent is analogous to truth as an absolute defense. If the statement maker had the subject's consent to publish the statements, then that consent will bar a slander action.
4. Poor reputation is not a complete defense to slander but can be used by the defendant to mitigate his or her damages in a defamation lawsuit by proving that the plaintiff had a bad reputation for the character trait at issue.

Problems may be encountered when attempting to pursue a defamation lawsuit:

1. It can be difficult to prove that the statements are false. Statements that a director is a criminal can be easily proven false by submitting a clean criminal background as proof. However, statements that a director tampered with election ballot envelopes are harder to address unless the director can account for every step of the election process.
2. "She said, he said" situations can result in a stalemate. It will be necessary to have witnesses come forward when dealing with slander. Libel is easier because the written material can be produced.
3. Online defamation can be tricky. The plaintiff must prove that the defendant

- was actually the one making the statement(s), and that may require forensic investigation to uncover the identity of a particular online account.
4. Proving financial damage in a community association setting is not easy. Community association directors are typically unpaid positions. Unlike an employee who is slandered and subsequently fired as a result of the statements made, what real financial harm does a board member suffer as a result of statements made to ensure that he or she is not re-elected to the board? Emotional distress alone is not enough to mount a successful defamation claim.
 5. Directors may be considered limited purpose public figures rather than private figures. My law partner, Howard J. Perl, authored an article published in the Florida Bar's *ActionLine* periodical discussing the growing body of national case law which is making it harder for association board members to pursue defamation actions. According to Perl, "To support a claim for defamation, a private figure need only show negligence by the alleged defaming party, while a public figure must show 'actual malice.'" Board members can take themselves out of the realm of a private figure and wind up becoming a limited purpose public figure if they become "a key figure in a particular controversy." For example, if a director takes a very aggressive and outspoken approach on a particular capital improvement project in an attempt to gain membership approval for same, and a detractor decides to respond by listing all the reasons that director should not receive support for the project, including a regurgitation of past transgressions, the director may have to prove that the statements were made with actual malice.

If you serve on your board and you have been the victim of defamation, speak with an experienced association attorney who can walk you through the steps discussed herein to determine whether or not you have a viable cause of action.

Since I started with the Bard, I will end with him:

*"Good name in man and woman, dear my lord,
Is the immediate jewel of their souls:
Who steals my purse steals trash; 'tis something, nothing;
'twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed."* William Shakespeare-*Othello*