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## \$4.5 Million Defamation Award Against Anti-Gay Official Upheld

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# \$4.5 Million Defamation Award Against Anti-Gay Official Upheld

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**BY ARTHUR S. LEONARD** | A federal judge has affirmed a \$4.5 million jury verdict against a homophobic former Michigan assistant attorney general found to have committed wrongful acts against the gay student body president at the University of Michigan.

District Judge Arthur J. Tarnow's September 11 ruling came in a lawsuit brought by Christopher Armstrong, who graduated from Michigan in 2011, against Andrew Shirvell, fired by the attorney general's office in 2010 when it was learned he used his office computer to wage a vitriolic online campaign against Armstrong upon his election as student body president. Tarnow denied Shirvell's motions that he overturn the jury verdict as a matter of law, for a new trial, or to amend the damages judgment.

*Andrew Shirvell, ex-assistant attorney general in Michigan, loses in suit brought by gay student body president*

Shirvell, a University of Michigan alumnus, was angered when he read about Armstrong's election, becoming fixated on doing something to discredit him. He started a blog devoted to attacking Armstrong for his "radical homosexual agenda," claiming, among other things, that the student engaged in sexual misconduct in public places. Shirvell, who described gay life as "filthy," showed up on campus and outside Shirvell's home, ostensibly to "document" inappropriate conduct and to protest against Armstrong. The student complained about Shirvell's activities, and in addition to his discharge from the attorney general's office, Shirvell was also briefly barred from the university campus. His conduct was referred to legal profession disciplinary authorities and local law enforcement agencies, as well. The local prosecutor decided not to charge him with stalking, but Tarnow found that did not preclude Armstrong from seeking civil damages.

Armstrong claimed the blog attacks and stalking incidents were defamatory, an invasion of privacy, and constituted intentional infliction of emotional distress. Since Shirvell moved to Long Island after losing his job, Armstrong's suit, based entirely on Michigan state law, was heard in federal court as a dispute between citizens of different states.

Shirvell's defense, repeated over and over but unsuccessfully at his trial and in his post-trial motions, was that his activities were protected by the First Amendment as freedom of speech. Armstrong, he argued, qualified as a public figure since he was the elected student body president who put out press releases proclaiming his status as the first out gay man in that position. As a public figure, Armstrong could only hold Shirvell liable for defamation if he could show Shirvell made defamatory statements with "actual malice," a legal standard requiring proof he deliberately lied or spoke with deliberate indifference to whether his harmful statements were true.

Shirvell also claimed that Tarnow erred by not allowing him to argue to the jury that his remarks and conduct enjoyed First Amendment protections.

Tarnow found that the issue of First Amendment protection was a question of law to be decided by the judge, not by the jury, whose role was to decide questions of fact. It was up to the jury to determine whether the statements specified in Armstrong's complaint were assertions of fact that were either true or false.

Under Michigan law, however, because Armstrong was seeking damages for emotional distress, he had the burden of showing Shirvell made his statements either knowing they were untrue or with reckless disregard for whether they were true or false — the actual “malice standard” that applies in public figure cases.

The jury decided the overwhelming majority of Shirvell’s statements were false, many of them made with actual malice. The jury used evidence about the emotional distress Shirvell’s actions caused to Armstrong to determine the size of the award.

Given the jury’s conclusion that Armstrong met the actual malice standard required of his emotional distress claims, Shirvell would seem to have nothing to gain by continuing to insist the plaintiff be considered a public figure who must meet that very same demanding standard in making a defamation claim.

And, Tarnow’s opinion shows, in any event, just how hard the public figure argument might be for Shirvell to make on appeal. The judge rejected the assertion that Armstrong’s position at the university made him into a public figure.

“The mention of Plaintiff Armstrong in a limited number of mostly local news publications does not render Armstrong a ‘household word,’” he wrote. “Moreover, Plaintiff’s position as student body president did not provide Plaintiff with control or responsibility for government processes, and therefore does not qualify him as a public official. Finally, Defendant Shirvell also fails to identify a public controversy in which Plaintiff was involved, other than the attention brought on Plaintiff by Defendant’s own statements and actions.”

Shirvell’s blog and protest signs stated Armstrong had engaged in various kinds of misbehavior, offensive conduct, and even some criminal acts. Armstrong presented evidence that the statements were false. In the trial, Shirvell argued his statements were either true or non-actionable statements of opinion, but the jury disagreed, and courts are loathe to set aside a jury’s factual findings, especially when the evidence stands largely uncontradicted by the defendant. Shirvell, who represented himself in the trial, only offered witnesses on the public figure issue, which Tarnow found could not be presented to the jury, and provided no direct evidence the contested statements were true.

On the issue of actual malice, Shirvell rested largely on his own testimony that he believed all the statements he made about Armstrong to be true, but he provided no factual basis for those beliefs and, during the trial and in his briefs to the judge afterward, ignored many of his statements that were at issue. Tarnow noted that the post-hearing briefs made “specific reference to less than half of the statements at issue in this case.”

The judge also rejected Shirvell’s arguments against the size and scope of the damage award, finding that it fell within the normal range for cases involving this type of behavior.

Shirvell received volunteer legal assistance on his post-trial motions and will likely seek to appeal the court’s rulings, since he continues to maintain that all his conduct was shielded by the First Amendment.