

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

January 26, 2022

Lyle W. Cayce
Clerk

No. 20-20530

CANADA HOCKEY, L.L.C., DOING BUSINESS AS EPIC SPORTS;
MICHAEL J. BYNUM,

Plaintiffs—Appellees,

versus

BRAD MARQUARDT,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:17-CV-181

ON PETITION FOR REHEARING

Before OWEN, *Chief Judge*, SMITH and GRAVES, *Circuit Judges*.

JAMES E. GRAVES, JR., *Circuit Judge*:*

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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IT IS ORDERED that the petition for rehearing is DENIED. The opinion, filed September 8, 2021, is WITHDRAWN, and the following is SUBSTITUTED:

Michael J. Bynum and his publishing company sued Texas A&M University and its employees after they published a part of Bynum's forthcoming book without permission. Relevant here, the district court denied summary judgment for Brad Marquardt, a Texas A&M employee. We DISMISS for lack of jurisdiction.

I. Background

For purposes of this appeal, we accept the factual allegations stated in the complaint as true. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Michael J. Bynum is a sportswriter and editor that operates his own publishing company, Canada Hockey LLC d/b/a Epic Sports ("Epic Sports"). In 1980, Bynum became interested in the "12th Man" lore while working on his first book about Texas A&M University's (TAMU) football program. Plaintiffs describe the 12th Man story as follows:

The University's now famous 12th Man tradition was inspired by the actions of E. King Gill at the 1922 football game known as the "Dixie Classic." Gill, a squad player for A&M's football team, who was already training with the university's basketball team, was up in the press box watching his team face the then top-ranked Prayin' Colonels of Centre College, when he was waved down to the sideline before halftime to suit up in case his injured team ran out of reserve players. Gill stood on the sideline, ready to play, for the remainder of the game.

Gill's commitment to step up for his team when in need later became a legend that was passed down from generation to generation of Aggies. Today, the 12th Man tradition is a symbol of the Aggies' unity, loyalty, and willingness to serve when

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called upon to do so, and is woven into many aspects of life at A&M.

In 1990, TAMU registered “12th Man” as a trademark and has since aggressively enforced it.

Intrigued by the story, Bynum decided to write about Gill and his impact on TAMU’s football program for a forthcoming book titled *12th Man*. For many years, Bynum researched Gill and the 12th Man story, including reviewing primary documents, visiting relevant locations, and conducting interviews with personnel in TAMU’s Athletic Department, including Brad Marquardt, an Associate Director of Media Relations. Eventually, Bynum hired Whit Canning to write a short biography about Gill (the “Gill Biography”), titled “An A&M Legend Comes to Life,” which Bynum planned to use as the opening chapter of his book.

In June 2010, Bynum emailed Marquardt seeking photographs to include in his book, sending along a draft of the book in PDF form. In the email, Bynum specified that the PDF was “a draft version of the 12th Man Book” and “a work in progress . . . not in final form yet.” The draft contained Bynum’s name, copyright date, an indication that Epic Sports owned the copyright to the book, and a statement that “no part of the book may be reproduced or used in any form or by any means . . . without the permission of the publisher.” The Gill Biography was the opening chapter of the book. Bynum continued to email Marquardt as late as December 2013, asking questions related to the book. Bynum planned to publish his *12th Man* book in the fall of 2014.

In January 2014, TAMU’s Athletic Department directed its staff to find background information on Gill that could be used to promote the 12th Man story and raise money. Marquardt directed his secretary to retype the Gill Biography that Bynum sent to Marquardt in 2010; remove any references

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to Bynum or Epic Sports; rewrite the byline to read “by Whit Canning, special to Texas A&M Athletics” to suggest that Canning was commissioned to write the Biography exclusively for the Athletic Department; and change the original title of the Biography from “An A&M Legend Comes to Life” to “The Original 12th Man.” Marquardt provided the retyped Biography to his work colleagues.

Soon after, the Athletic Department published the contents of the Gill Biography as an article on its website. Then, on January 19, 2014, both TAMU and its Athletic Department tweeted a link to the article on their respective Twitter accounts. The posts were retweeted and discussed by news sources. The article was also featured on the TAMU Times’ e-newsletter and website.

On January 22, 2014, Bynum emailed Marquardt and another employee of the Athletic Department requesting immediate removal of the article. Several hours later, Marquardt responded that the article was no longer on the website, apologized for the “mix-up,” and asked whether it would “be possible to post the story as an ‘excerpt’ to [his] book.” He also stated: “I asked my secretary to key [the Biography] in for me which she did.” Though the article was removed, it was shared by others and reposted on various online forums. The book remains unpublished.

In 2017, Bynum and Epic Sports filed suit against the TAMU Athletic Department, the TAMU 12th Man Foundation, and employees of the Athletic Department, including Marquardt. Relevant here, Plaintiffs assert against Marquardt direct and contributory copyright infringement claims under the Copyright Remedy Clarification Act (CRCA), 17 U.S.C. § 501,¹ as

¹ A direct copyright infringement claim stems directly from the CRCA, but a contributory claim does not. Nevertheless, though “[the CRCA] does not expressly render anyone liable for infringement committed by another, these doctrines of secondary liability

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well as a claim under the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 1202.

Marquardt moved to dismiss the claims on qualified immunity grounds, which the district court denied. After discovery, Marquardt moved for summary judgment, as did Plaintiffs. The district court denied both motions for summary judgment, concluding that genuine issues of material fact exist as to whether Plaintiffs obtained a valid copyright in the Gill Biography. Marquardt appeals. The district court certified the appeal as frivolous.

II. Jurisdiction

Ordinarily, we do not have jurisdiction to review a denial of a summary judgment motion because such a decision is not final within the meaning of 28 U.S.C. § 1291. *Gobert v. Caldwell*, 463 F.3d 339, 344 (5th Cir. 2006). However, a district court's denial of summary judgment on the basis of qualified immunity is immediately appealable under the collateral order doctrine, to the extent that it turns on a matter of law. *Trent v. Wade*, 776 F.3d 368, 376 (5th Cir. 2015). "When a district court denies an official's motion for summary judgment predicated upon qualified immunity, the district court can be thought of as making two distinct determinations, even if only implicitly." *Heaney v. Roberts*, 846 F.3d 795, 800 (5th Cir. 2017) (internal quotation marks and citation omitted). These determinations are: (1) a certain course of conduct would, as a matter of law, be objectively unreasonable in light of clearly established law; and (2) a genuine issue of fact exists regarding whether the defendant did, in fact, engage in such conduct.

emerged from common law principles and are well established in the law." *Metro-Goldwyn-Mayer Studios Inc. v. Gorkster, Ltd.*, 545 U.S. 913, 930 (2005) (internal quotation marks and citations omitted).

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