

## QUESTION 5

Andy, Ruth, and Molly decided to launch a business called The Batting Average (TBA), which would publish a monthly newsletter with stories about major league baseball players. Andy, a freelance journalist, was responsible for writing the stories. Andy conducted all of his business activities via a close corporation called Baseball Stories, Inc., of which he was the only employee. Ruth was responsible for maintaining TBA's computerized subscriber lists, mailing the newsletter every month, and billing TBA subscribers. Molly provided all equipment necessary for TBA. Andy, Ruth, and Molly expressly agreed to the following: Molly would have exclusive authority to buy all equipment necessary for TBA; and TBA's net profits, if any, would be equally divided among Andy, Ruth, and Molly.

Andy subsequently wrote a story in the newsletter stating that Sam, a major league baseball player, had been taking illegal performance-enhancing drugs. Andy knew that the story was not true, but wrote it because he disliked Sam. As a result of the story, Sam's major league contract was terminated. While writing the story, Andy's computer failed. He bought a new one for TBA for \$300 from The Computer Store. The Computer Store sent a bill to Molly, but she refused to pay it.

Sam has sued Andy, Ruth, Molly, TBA, and Baseball Stories, Inc. for libel.

The Computer Store has sued Andy, Ruth, Molly, and TBA for breach of contract.

1. How is Sam's suit likely to fare? Discuss.
2. How is The Computer Store's suit likely to fare? Discuss.

## QUESTION 5: SELECTED ANSWER A

### 1. Sam's Suit

#### 1-1. Does Sam have a valid claim for libel against Andy?

The issue is whether Sam has a valid claim for libel for the story Andy wrote. In order to claim a libel, a plaintiff must show that (i) there was a defamatory statement, (ii) of or concerning the plaintiff, (iii) which was published, and (iv) resulted in a harm to the plaintiff's reputation. When the plaintiff is a public official or a public figure, the plaintiff must also show (i) the defendant acted with malice, and (ii) the defendant's statement was false.

Defamatory Statement of or concerning the Plaintiff. For a claim for a libel, the defamatory statement cannot be a mere name calling but in general must allege a specific fact that is harmful to the reputation of the plaintiff. Also, it must identify the plaintiff. Here Andy wrote a story in the newsletter stating that Sam, a major league baseball player, had been taking illegal performance-enhancing drugs. The article specifically identified Sam and it specifically alleged that Sam took illegal performance-enhancing drugs. Therefore, there were allegations of specific acts of wrongdoing that were allegedly committed by Sam. Therefore, Andy's article constitutes a defamatory statement of or concerning the plaintiff.

Publication. Publication requires that the defendant share a defamatory statement at least with one person other than the plaintiff. Here Andy published his article in the newsletter with subscribers. Therefore, there was clearly a publication.

Damages. In a libel case, damages to the reputation can be presumed if the plaintiff meets all the requirements for defamation and also show malice and falsity. A libel is a publication of a defamatory statement in a written form. Here, as will be discussed below, Sam should be able to meet all the requirements so the damages can be

assumed. Also, the article constitutes a libel as it is a publication in a written form with subscribers. Even if the damages were not presumed, Sam's major league contract was terminated as a result of Andy's story. Thus, Sam would be able to show he suffered harm to his reputation as shown by his losing the contract. Therefore, Sam can show damages.

Malice. Given the constitutional protection of free speech, a public official or a public figure must meet a higher burden of proof in order to win in a defamation suit. A public official is a government official and a public figure is a figure well known in the society, such as celebrities or professional sportsmen. A public official or a public figure must show, in addition to the 4 requirements of defamation that the defendant acted with malice. In this context, in order to show malice, a plaintiff must show that (i) a defendant had actual knowledge that his statement was false, or (ii) a defendant acted with reckless disregard to the truth of his statement. Here Sam is not a public official but he is a public figure. He is a major league baseball player, not just a local player who plays for a hobby. Thus, Sam must be well known in the society and is a public figure. Thus, he must show that Andy acted with malice when he published his story. Andy published his story knowing that it is false because he disliked Sam. While the fact that he acted out of personal grudge or dislike of Sam does not show that Andy acted with malice, the fact that Andy published a defamatory article about Sam knowing that it was false shows that he acted with malice for purposes of defamation. Thus, if Sam can prove that Andy knew that the story was not true, Sam would be able to show Andy acted with malice.

Falsity. A public official or a public figure must also show that the defendant's story is not true. Here the facts indicate that Andy's story was not true so Sam should be able to meet this burden.

In conclusion, Sam is likely to succeed on his claim on defamation against Andy.

## 1-2. Is Baseball Stories, Inc. liable to Sam?

The next issue is whether Baseball Stories, Inc. ("BSI") can be held liable for Andy's libel. Andy, a freelance journalist, conducts all of his business activities via a close corporation BSI, of which he was the only employee. Under the theory of respondeat superior, an employer is liable for the employee's tort if the employee committed the tort within the scope of his employment. While an employer is not generally liable for an employee's intentional tort, the employer could still be liable if (i) the employee was motivated by a desire to further the employer's interest, (ii) the tort was authorized or ratified by the employer, or (iii) the tort was part of the nature of the employee's job.

Here Andy and BSI's businesses consist of writing articles for journals. Thus, Andy's publication of the article in the newsletter was within the scope of his employment. Here Andy is likely to be liable for intentional tort because he was not merely negligent in publishing the story but he intentionally published the story knowing that it was false. Sam can argue that Andy was motivated by his desire to increase subscription and popularity of the newsletter and BSI's business of publishing articles. Thus, Sam can argue that BSI should be held liable for the defamation committed by Andy.

## 1-3. Can Andy be held liable to Sam, notwithstanding Baseball Stories, Inc.?

A person is always liable for his or her own tort. Thus, Andy should be directly liable for the libel against Sam. Also, a court may pierce the veil and hold a shareholder liable for the tort committed by the corporation if, for example, (i) the shareholder did not treat the corporation as a separate entity and did not observe corporate formalities, or (ii) the corporation was inadequately capitalized. This is most likely in a closely held corporation and even more so when a plaintiff is a tort victim who did not rely on the limited liability of the corporation. Here BSI is a close corporation and Andy is the only employee. Thus, it indicates that Andy had a controlling influence over BSI. While a corporation can have a sole shareholder and only one employee, the corporate formalities must be observed in order to maintain the limited liability status of the

shareholder. Thus, if Andy commingled his personal funds with BSI's, used BSI's funds as if they were his own, used BSI's other assets as his own, or he inadequately capitalized BSI, Sam may be able to show that Andy and BSI are alter egos and Sam may be able to pierce the veil to reach Andy's personal assets for tort liabilities. Having said that, Andy should be directly liable to Sam in any case because it was tort committed by him personally.

#### 1-4. Did Andy, Ruth and Molly form a partnership when they launched TBA?

Given that Andy and BSI can be held liable for Andy's libel, the next issue is whether Ruth, Molly and TBA can be held liable for Andy's libel. A partnership is formed when two or more people agree to carry on a business as co-owners for profit. No specific formalities are required to form a general partnership and whether the parties intended to form a partnership does not matter as long as there was an agreement to carry on a business enterprise for profit. Here Andy, Ruth and Molly decided to launch a business called The Batting Average (TBA). It is not clear from the name what type of entity they intended to form. However, it was formed to publish a monthly newsletter with stories about major league baseball players. Also, there is no indication it was intended to be a non-profit organization. In fact, Ruth was responsible for maintaining the subscriber lists and billing the subscribers. Also, they expressly agreed that TBA's net profits, if any, would be equally divided among Andy, Ruth and Molly. Thus, they agreed to form a business venture of publishing articles about major league baseball players for profit. Also, an agreement to share net profits shows that they formed a partnership. It does not matter that they never used the word "partnership" or they never intended to form a partnership.

The next question is what type of partnership Andy, Ruth and Molly formed as a result to determine their and TBA's liability. A default partnership is a general partnership where all partners are liable for their liabilities of the partnership. A creditor of the partnership must first look to the assets of the partnership and if they are insufficient, they can pursue the partners' personal assets. Therefore, in a general partnership, the

partners act as guarantors for the partnership liabilities. There are other forms of partnership or business enterprise that provide some form of limited liability for some or all owners, such as a limited partnership, limited liability company, a limited liability partnership or a corporation. However, they all require filing a form of certification with the Secretary of State and they each require that their names indicate a limited liability by including the words such as "limited partnership," "LP", "limited liability company", "LLC" or "Inc." or "Incorporated." There is no indication here that Andy, Ruth and Molly or TBA filed any certificate of limited partnership to form a limited partnership or a certificate of qualification to form a limited liability company, nor did they file articles of incorporation to form a corporation. Also, the name, "The Batting Average" does not have any of the words indicating that they formed a business entity with limited liability. Since no formalities were observed, they would also not be able to argue that they formed a de jure corporation. Therefore, Andy Ruth and Molly formed a generally partnership when they decided to launch their business TBA.

#### 1-5. Can TBA be held liable to Sam for Andy's tort?

Given that TBA is a general partnership, the next issue is whether it or Ruth and Molly can be held liable for Andy's tort. A partnership is liable for tort committed by a partner in the scope of his partnership. Here Andy committed a tort while he was publishing the article for the newsletter published by TBA. Thus, TBA would be liable for the tort and Sam would be able to look to the assets of TBA. In a general partnership, all the partners are liable for the partnership liabilities if the partnership assets are insufficient to meet those liabilities. Thus, if TBA's assets are not sufficient to meet Sam's claim, Ruth and Molly could also be held liable and may be required to pay out of their own personal assets. However, Ruth and Molly may be entitled to indemnification from Andy since Andy was the tortfeasor.

In conclusion, Sam is likely to be successful on his libel claim against Andy. In such event, (i) TBA and BSI would likely be vicariously liable and (ii) if the assets of TBA are insufficient, Ruth and Molly would also likely be liable out of their personal assets.

## **2. The Computer Store's Suit**

The issue is whether (i) Andy, Ruth and Molly formed a partnership, (ii) Andy had an express, implied or apparent authority when he bought a computer for TBA, (iii) TBA can be held liable for Andy's contract liabilities, and (iv) Ruth and Molly can be held liable.

### 2-1. Did Andy, Ruth and Molly form a partnership?

As discussed above, Andy, Ruth and Molly agreed to carry on a business venture of publishing monthly newsletters for profit and to share any net profits derived therefrom. They did not make any necessary filings with the secretary of state and TBA does not have a name indicating limited liability. Therefore, TBA is a general partnership.

### 2-2. Did Andy have an Express, Implied or Apparent Authority when he bought a computer for TBA?

The next issue is whether Andy had an express, implied or apparent authority when he bought a new computer for TBA for \$300 from The Computer Store. All the partners of a partnership are considered agents of the partnership and they are generally authorized to act on behalf of the partnership relating to the partnership's business, although each partner's authority may be limited by agreement. Under the agency theory, a principal can be held liable under the contract entered into by the agent if the agent had an authority to enter into such contract. An authority can be actual or apparent. An actual authority arises when the principal either expressly grants the authority to the agent either by words or conduct or it is implied from (i) the past course of dealing between the principal and the agent, (ii) the principal's past acquiescence, or (iii) such authority is incidental to other express authority granted to the agent.

Here Andy is a partner of TBA and thus he generally had the ability to act on behalf of TBA. However, Andy, Ruth and Molly expressly agreed that Molly would have exclusive

authority to buy all equipment necessary for TBA. Therefore, Molly had the exclusive and express authority to buy all the equipment, including a computer used in the business. Since her authority was exclusive, Andy did not have an express authority to buy computers on behalf of TBA. There is no indication that TBA or Molly acquiesced in the past in Andy buying a computer. The Computer Store may argue that Andy was responsible for writing articles for TBA and thus using and buying a computer was incidental to his authority to write articles for TBA. However, given that buying equipment was Molly's exclusive authority, it is unlikely that Andy had any authority to buy equipment or computers on behalf of TBA.

The next question is whether Andy had an apparent authority to buy computers. An apparent authority arises when the principal holds the agent out to a third party as having certain authorities or powers. Given that TBA is an enterprise with only three owners and Andy was one of them and given that Andy was writing articles on behalf of TBA, The Computer Store is likely to argue that Andy had an apparent authority to buy a computer. On the other hand, TBA can argue that the fact that The Computer Store sent a bill to Molly indicates that they were aware that Molly was responsible for purchasing equipment. Also, the fact that Andy wrote articles for TBA can also only mean that he is an employee of TBA or a freelance writer. Thus, TBA may have a viable argument that Andy had neither actual nor apparent authority when he bought the computer and thus it should not be liable under the contract. However, even when the agent did not act with actual or apparent authority, the principal can be held liable if the principal later ratified the contract, which can be either express or implied if the principal kept the benefits of the bargain. Here, if TBA kept the computer and used it, there is likely to be ratification and thus TBA would be liable for \$300 to The Computer Store.

### 2-3. Can Andy, Ruth and Molly be held liable for breach of contract?

Assuming that Andy acted within the scope of authority on behalf of TBA when he bought the computer or TBA later ratified the contract by keeping the benefits, the next issue is whether TBA's partners, Andy, Ruth and Molly can be held personally liable. As

discussed above, they formed a general partnership. In a general partnership, partners are liable for the partnership liabilities. Thus, if TBA's assets are not sufficient to meet the liabilities to The Computer Store, they can each be held liable and required to pay out of their personal assets.

## QUESTION 5: SELECTED ANSWER B

### General partnership

A general partnership is an association between two or more people to carry on as co-owners a business for profit. There are no formalities required to form a partnership. There is no writing requirement or filing requirement with the Secretary of State. The subjective intent of the parties is immaterial. All that is required is that they intend to carry on as co-owners a business for profit. In other words, a partnership is formed, simply by meeting the definition of a partnership. Here, Andy, Ruth and Molly decided to launch The Batting Average (TBA), a business to publish monthly newsletters with stories about major league baseball players, and agreed to assign responsibilities among themselves for the management of the business. Furthermore, the sharing of gross profits gives rise to a presumption of partnership formation. Here, Andy, Ruth, and Molly expressly agreed to share TBA's net profits equally among themselves.

Andy, Ruth, and Molly formed a general partnership.

### Sam v. Andy

General partners are always liable for their own torts. Thus, if Andy is found liable for libel, he will be personally liable for the tort regardless of the liability of TBA.

### Libel

A prima face case for libel requires a defamatory statement, of or concerning the plaintiff, publication, and damages. In addition, when the defamatory statement concerns a public figure, such as a major league baseball player, the plaintiff must prove falsity and fault. For the fault requirement, a public figure must prove actual malice. Actual malice exists when the defendant knew that statement was false or recklessly disregarded the truth or falsity of the statement. Here, Andy wrote a newsletter stating that Sam, a major league baseball player, had taken illegal performance-enhancing drugs.

### Defamatory statement of or concerning the plaintiff

A statement is defamatory if it adversely reflects on the plaintiff's reputation. Here, the statement that Sam was taking illegal performance-enhancing drugs clearly lowers his reputation in the community and in his profession. In fact, his major league contract was terminated due to Andy's newsletter. Furthermore, while the facts do not present the newsletter, it is safe to assume that Andy at least mentioned Sam by name. As a result of the newsletter, Sam was terminated.

### Publication

For publication, the defamatory statement must be made to a third person who understands it. This requirement is clearly satisfied as Andy published the story in a newspaper.

### Damages

Sam suffered general and special damages. For libel, damage to reputation may be presumed and as his contract was terminated, Sam has also suffered pecuniary loss.

### Falsity and Fault

The facts state that Andy "knew that the story was not true". This would satisfy both additional requirements for constitutional damages as the statement is in fact false and Andy acted with actual malice when he published the newsletter knowing it was not true. The fact that he wrote the story because he disliked Sam would not establish actual malice, but his intentional disregard for the truthfulness of his statement satisfies.

Thus, Sam will be successful in a suit against Andy for libel.

### Liability of Baseball Stories

In terms on Baseball Stories' and TBA's liability for Andy's tort, the issue is whether Andy was acting as an agent and whether he was acting within the scope of his employment and/partnership. An employer/partnership will be vicariously liable for torts committed by agents/employees/partners that are within the scope of scope of

employment/partnership. Sam would argue that because Andy conducts all of his business via Baseball Stories and is its only employee he was acting within the scope of his employment and Baseball Stories is vicariously liable.

### Liability of TBA

A partnership is vicariously liable for torts committed by agents of the partnership that are within the scope of the partnership. General partners are agents of the partnership. Thus, Andy is an agent of TBA and TBA will be liable for Andy's tort if he was acting within the scope of TBA.

Sam could also argue that Andy was working on a computer purchased for TBA, and Andy was responsible for writing stories for TBA; thus he was acting as an agent of TBA and within the scope of his partnership.

### Liability of Molly and Ruth

General partnerships are jointly and severally liable for all partnership obligations. Thus, a tort judgment creditor may sue any general partner for his entire loss. However, the creditor must first exhaust partnership resources before seeking payment for partners individually. Thus, Sam could hold Molly and Ruth personally liable for Andy's tort, but Sam must first exhaust TBA's resources. If he fails to do so, Molly and Ruth could look to the partnership for indemnification and/or contribution from the partners.

## 2. Computer Store's suit

A partnership will be liable for contracts entered into on its behalf by agents who have actual or apparent authority or contracts that have been ratified by the partnership. Partners are agents of the partnership. Thus, Andy, Ruth, and Molly are agents of TBA.

To determine whether the principal (TBA) will be bound it must first be determined whether the agent (Andy) had actual or apparent authority or the TBA ratified Andy's purchase.

### Actual express authority

There is actual express authority when such authority is granted in the four corners of the partnership agreement or expressly granted by a requisite vote. Here, Andy, Ruth, and Molly agreed that Molly would have exclusive authority to buy all equipment necessary for TBA. There were no changes made to this agreement by the partners and Andy did not receive permission from Ruth and Molly to purchase a new computer for TBA. Thus, Andy did not have actual express authority.

### Actual implied authority

There is actual implied authority, when the agent reasonably believes he has authority based on the manifestations of the principal. As stated above there have been no such manifestations by TBA. Furthermore, it is unreasonable for Andy to believe he has such authority because the partnership agreement between him and Ruth and Molly expressly grants such authority to Molly.

### Apparent authority

Apparent authority is based on the reasonable expectations of a third party. Where a principal holds out an agent as possessing authority and a third party reasonably relies on such holding out, there is apparent authority. While TBA has not made direct representations to The Computer Store on behalf of Andy's authority, generally partners have authority to enter into contracts in the ordinary course of partnership business. Furthermore, apparent authority may be created by an agent's title. For example, if Andy told The Computer Store he was a partner of TBA, such an expression would reasonably induce The Computer Store to rely on Andy's authority as a partner. Thus, even though Andy did not have actual authority to purchase the computer for TBA he likely had apparent authority, which would bind TBA for the contract.

### Ratification

Ratification occurs where an "agent" purports to act on behalf of the principal when in fact he does not have actual or apparent authority, and the principal subsequently

ratifies the action (with full knowledge of its terms). There are no facts to suggest that TBA ratified Andy's purchase and thus ratification is not available to bind TBA.

### Liability

As mentioned above, general partners are personally liable for partnership obligations. Thus, if apparent authority is found, The Computer Store will have a claim against TBA, Andy, Ruth, and Molly.

Even though Molly will be personally liable to Computer Store, she may seek indemnification from TBA and may also seek contribution from Andy and Ruth as partners. In addition, Ruth and Molly are likely to have a claim against Andy for violation of the partnership agreement.