

Why Fox News will probably not be penalized for airing a Seth Rich conspiracy theory

By Callum Borchers March 14 at 4:39 PM

By Fox News's own admission, a retracted report in May about the deceased Democratic National Committee staffer Seth Rich was bad journalism. Nevertheless, the network is well-positioned to fend off a lawsuit brought by Rich's family that alleges "intentional infliction of emotional distress," according to legal experts.

The Rich family would have to demonstrate that Fox News's actions were "outrageous," which sounds colloquial but is actually a technical term and "a fairly high standard," according to Doris Brogan, a law professor at Villanova University.

"'Outrageous' is something that would be totally unacceptable in normal society," Brogan said. "The conduct involved has to be more than just inappropriate, more than just rude, more than just nasty. That's a high hurdle."

Rich was shot and killed near his Washington home in July 2016 in what police ruled a random, botched robbery. Online conspiracy theorists concocted an alternative scenario in which Rich, not Russian hackers, had supplied DNC emails to WikiLeaks before being murdered in a coverup.

The theory appealed to some supporters of President Trump who sought to counter the conclusion of U.S. intelligence agencies that Russia hacked the DNC as part of an effort to assist Trump's campaign.

Fox News claimed to have confirmation from two sources that Rich was a WikiLeaks informant. One source was an unnamed "federal investigator who reviewed an FBI forensic report ... detailing the contents of Rich's computer." The FBI later said it was not involved in an investigation of Rich's death, meaning the forensic report did not exist.

The other source was a private investigator hired by the Rich family, who later said Fox News fabricated quotes attributed to him.

"The article was not initially subjected to the high degree of editorial scrutiny we require for all our reporting," Fox News said in a retraction statement.

The network has not offered a detailed explanation of how the faulty news report made it online and on the air. But John Goldberg, a professor at Harvard Law School, said he "would expect that most courts would be ... reluctant to impose liability on journalists — even highly irresponsible journalists — out of concern to protect freedom of the press."

Goldberg, Brogan and a third attorney with personal-injury expertise, Michael F. Mahoney, all pointed to the precedent set by a 1988 Supreme Court decision in a case involving the evangelist Jerry Falwell and Hustler magazine. Hustler had published a satirical alcohol advertisement that featured a fictional account of sex between Falwell and his mother in an outhouse.

The ad might have been tasteless, but it was not sufficiently outrageous for Falwell to win.

"Falwell failed to recover in his [intentional infliction of emotional distress] claim against Hustler magazine for speech that, on its surface, appeared far more intentional, extreme and outrageous than that at issue here" in the Rich case, said Mahoney, a personal-injury attorney in Massachusetts and an adjunct professor at Boston College Law School.

Fox News said in a statement that it "can't comment on this pending litigation." Brad Bauman, an attorney for the Rich family, said: "We have no further response to supposition or theories. The Riches' complaint speaks for itself."