

In the
United States Court of Appeals
for the Ninth Circuit

Nos. 12-35238, 12-35319

OBSIDIAN FINANCE GROUP, LLC, *ET AL.*,

Plaintiffs-Appellees and Cross-Appellants,

v.

CRYSTAL COX,

Defendant-Appellant and Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
No. 3:11-cv-00057-HZ
The Honorable Marco A. Hernandez

PETITION FOR REHEARING

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PETITION FOR REHEARING

Appellant Crystal Cox does not ask this Court to modify the substance of its opinion. She does, however, respectfully request that the Court amend its opinion to withhold the sentence that now says,

Cox apparently has a history of making similar allegations and seeking payoffs in exchange for retraction. See David Carr, *When Truth Survives Free Speech*, N.Y. Times, Dec. 11, 2011, at B1.

A judicial assertion of misconduct by a named person, even a judicial assertion modified with the word “apparently,” could be based on the record in a case, or on authoritative findings by another court. But it ought not be based on a newspaper column, which was written without the benefit of cross-examination, sworn testimony, or the other safeguards of the judicial process. The claims in the columnist’s assertion are neither facts found by a factfinder nor facts subject to judicial notice under Fed. R. Evid. 201.

Moreover, while the *New York Times* column does discuss Cox’s offering her consulting services to appellees in this case, it does not make any such allegations about other cases. There thus seems to be no “history” of “seeking payoffs” claimed in the article. The “history” that the column is positing appears to be only a history of Cox’s “making similar allegations.”

Unfortunately but unsurprisingly, some media outlets have not only repeated this sentence, but even omitted the term “apparently” in doing so.

The widely reprinted Reuters wire service, for instance, wrote,

According to the court’s opinion, Cox has a history of making allegations of fraud and other illegal activities “and seeking payoffs in exchange for retraction.”

Dan Levine, *Blogger Gets Same Speech Protections as Traditional Press:*

U.S. Court, Reuters, Jan. 17, 2014, <http://www.reuters.com/article/2014/01/17/us-usa-blogger-ruling-idUSBREA0G1HI20140117>;

see also, e.g., http://www.nbcnews.com/id/54102454/ns/technology_and_science-tech_and_gadgets/

(NBC News republication of the Reuters article). Of course, some

such media omissions of qualifiers (such as “apparently”) are inevitable.

Still, they highlight the fact that, when a statement is made in a Court of Appeals opinion—with the authority such opinions possess—journalists might

perceive the statement as a factual finding, and not just a report of what a newspaper column has alleged.

Judicial opinions are perceived as extraordinarily reliable sources of information. This reliability stems from the assumption that statements in the

opinion, especially statements that allege misconduct, generally rest on adjudicated facts. Because of this, Cox respectfully requests that this particular

allegation, which relies solely on a claim made in a newspaper column, be redacted from the opinion.

Respectfully submitted,

s/ Eugene Volokh
Eugene Volokh

Counsel for Defendant-Appellant and
Cross-Appellee Crystal Cox

January 31, 2014

CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitations of 9th Cir. R. 40-1(a) because the petition contains 428 words.

This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this petition has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman typeface.

Dated: January 31, 2014

s/ Eugene Volokh
Eugene Volokh

Counsel for Defendant-Appellant and
Cross-Appellee Crystal Cox

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Petition for Rehearing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 31, 2014. All participants in the case are registered CM/ECF users.

Dated: January 31, 2014

s/ Eugene Volokh
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