

PI attorneys make headway tackling online defamation

But service provider immunity remains key obstacle to relief

By Pat Murphy

patrick.murphy@lawyersweekly.com

Protecting a client's reputation can seem like an impossible task in the internet age when anyone with access to a computer can anonymously post defamatory material on websites visited by millions across the globe.

Yet some plaintiffs' attorneys are finding avenues to obtain meaningful relief for their clients in a legal landscape populated by uncooperative internet service providers and defendants who may turn out to be judgment proof.

Boston attorneys David H. Rich and Suzanne Elovecky recently obtained a \$3.5 million verdict against two women who allegedly used the web as part of a multi-year campaign to damage the reputation of Dr. Hayat Sindi, a Saudi Arabian scientist and entrepreneur.

While it remains to be seen whether Sindi will be able to collect the judgment, Rich and Elovecky were able to use the verdict as a stepping stone for obtaining a rare injunction restricting the defendants' online communications in the future.

"When you're talking about a defamation judgment against an individual who may ultimately end up being judgment proof for future lawsuits, there has to be a mechanism to prevent against the further perpetuation of statements that a jury has concluded are defamatory," Rich says.

Adds Elovecky: "It is important to look for the post-judgment injunction, especially when you have a very defiant defendant."

While the door has been opened to injunctive relief in certain cases,



David H. Rich

Suzanne Elovecky

attorneys agree that the virtual immunity afforded internet service providers under the federal Communications Decency Act remains a serious hurdle to getting ISPs to cooperate in erasing defamatory content from websites and identifying potential defendants.

When \$3.5M isn't enough

In 2013, Sindi sued Samia El-Moslimany and her mother, Ann, in Suffolk Superior Court. The plaintiff alleged that since 2011 the defendants had mounted a continuous campaign to publicly humiliate her by falsely claiming that she misrepresented her professional achievements. The campaign allegedly included disseminating defamatory content through various websites, social media and emails to Sindi's professional contacts.

According to Rich, the defendants were motivated by an erroneous belief that Sindi had had an affair with one of the defendants' husbands.

The case was removed to federal court where, following a seven-day trial in July, a jury concluded that the defendants' statements were published with knowledge of their falsity or in reckless

disregard for the truth, that the defendants had tortiously interfered with Dr. Sindi's business relationships, and that Samia El-Moslimany had intentionally inflicted emotional distress upon her.

Because so much of the defendants' conduct was directed through emails at Sindi's colleagues and professional associates, Elovecky says, the verdict is meaningful to her client even without the money damages.

"To be able to show the judgment and say, 'Look, this was found to be defamatory,' that does have power," Elovecky says. "Because of that, there was a huge benefit to this judgment, even if [the defendants] end up being judgment proof."

Rich had well-founded concerns that the defendants would not be deterred regardless of the outcome of the trial.

"At trial, I asked each of the defendants when they were testifying if it was their intention to continue publishing these statements," Rich recounts. "They both said yes."

Accordingly, Sindi sought a permanent injunction to put an end to the defendants' libelous campaign. Last month, U.S. District Court Judge Indira Talwani issued an order enjoining the defendants from repeating six categories of statements suggesting that Sindi was a professional and academic fraud.

In rejecting the defendants' argument that such an injunction would be a "prior restraint" of speech in violation of the First Amendment, the judge wrote that "because there 'is no constitutional value in false statements of fact,' the public interest will not be harmed by this injunction, narrowly drawn to prohibit Samia El-Moslimany and Ann El-Moslimany from making only false statements

of facts.”

Key to obtaining the permanent injunction were the jury’s verdict and the court’s findings that numerous statements that were the subject of the lawsuit were false and defamatory, Rich says. Talwani also explicitly noted the defendants’ admissions under oath that they intended to continue their defamatory campaign in the future.

“Once you have an adjudication on the merits, I would expect courts to continue to be quite open to fashioning remedies to aggrieved litigants who have real and sincere concerns about the perpetuation of the false and defamatory material,” he says.

Having an injunction in place is important for plaintiffs like Sindi because it gives them an avenue to get expedited relief from the court. Rich explains that it gives a judge the ability “to find the people who violate the injunction in contempt of court to impose all sorts of sanctions, including financial sanctions and jail if it’s egregious enough.”

Elovecky says it also gives plaintiffs more ammunition if they want to get materials removed from the internet.

Pulling back the curtain

One of the fundamental problems facing plaintiffs is that they typically need to rely on ISPs in identifying the author of a defamatory post, according to Daniel A. Lyons, a Boston College Law School professor.

Internet service providers often have a vested interest in protecting user anonymity, says Boston attorney Matthew C. Moschella.

“If they start giving away information, no one will use them and [people] will start going to their competitors,” Moschella explains.

Lyons says ISPs ordinarily will respond to a subpoena when there is a need to match an anonymous name or IP address to a name and address in the real world. But in order to get a subpoena, plaintiffs need to convince a court that their need for the identifying information outweighs the user’s First Amendment right to speak anonymously, he adds.

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— **Suzanne Elovecky, Todd & Weld**

Sometimes just identifying a “John Doe” defendant can go a long way toward resolving a case. For example, attorney Timothy G. Lynch succeeded last year in getting a Boston Municipal Court judge to order San Francisco-based Yelp to hand over information identifying the author of alleged defamatory statements included in consumer reviews about a family-owned jewelry store in Boston.

According to Lynch, the author of the posts “backed off” when faced with the possibility of a lawsuit, alleviating the need to pursue injunctive relief.

“Once we found out who the person was, we decided not to go forward. With defamation suits it’s hard to collect because you’re typically not insured like you would be for a car,” the Boston lawyer says. “What was concerning for my client was that this wasn’t a competitor down the block.”

Lynch recommends that plaintiffs file similar actions in state District Court as opposed to U.S. District Court because of the likelihood of getting a quick hearing.

ISP immunity

An even bigger obstacle to obtaining relief is the Communications Decency Act, which generally shields intermediaries such as ISPs from liability for defamatory content, according to Lyons. He notes case law that allows for liability if it can be shown that an ISP is, in some manner, the author in whole or in part of a defamatory statement.

While the most obvious result of the CDA is to remove a “deep pocket” ISP as a potential defendant in most cases, there are other consequences as well. Because of the protections of the statute, many ISPs do not feel obligated to cooperate with plaintiffs in removing defamatory content, Lyons says.

“I don’t know how many ISPs will voluntarily remove the information, but the point is they’re not legally compelled to do so,” he says.

Consumer websites Yelp and Ripoff Report actually have policies against removing posts, according to Rich.

“They say their policy is we’re not going to take anything down, and you can’t sue them over it,” Rich says. “It can create a very challenging, difficult set of circumstances for any persons who believe they’re the victims of internet defamation.”

But Moschella says ISPs will remove defamatory material identified as such in a court order.

“I have not seen [those orders] disregarded,” he says.

Boston attorney Richard A. Goren has been in a long-running dispute with the Ripoff Report in trying to delete a series of malicious reviews posted by a former litigant Goren had previously defeated in court.

The dismissal of Goren’s claims against the consumer website are currently on review before the 1st U.S. Circuit Court of Appeals, as is his appeal of U.S. District Court Judge Denise J. Casper’s award of \$124,000 in attorneys’ fees and costs to Ripoff Report’s parent company, Xcentric Ventures LLC.

Goren says that in a separate state court action, he obtained a permanent injunction from a Superior Court judge that prohibited the author of the posts from republishing comments the judge had found defamatory as a matter of law. According to Goren, Google and other search engines have procedures to “de-index” on their search engines material that a court has deemed to be defamatory.

Goren recommends that plaintiffs obtain judgments specifically identifying defamatory posts by their URL and serve those orders on Google, Bing, Yahoo! and other search engines to permanently remove those addresses from search results.

“Get a judgment as quick as you can, and don’t worry about the ‘gripe’ site,” he says. “Get it de-indexed.” 

