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Defamation on Yelp: An appellate case you should know about

HASSELL v. BIRD MAY DICTATE HOW EFFECTIVELY YOU CAN FIGHT THE ONLINE DEFAMATION OF YOUR PRACTICE

Reputation is everything, and that rings especially true for plaintiffs' attorneys. As a result, many of us spend our careers manicuring the client experience, and doing everything possible to ensure a positive word of mouth. Despite those efforts, some clients leave our offices unhappy. And a small number of those unhappy clients may want to affirmatively harm our reputations by spreading negative comments, opinions and, in some cases, falsehoods and lies. The internet has enabled happy and unhappy clients alike a chance to post honest reviews about our services, but also has created the risk, and sometimes the reality, of indelible defamatory statements.

A case currently pending before the California Supreme Court, *Hassell v. Bird*, may dictate how effectively you can fight the online defamation of your practice. As it happens, the case involves a number of interesting issues at the intersection of tort law, constitutional law, and internet law. Whether you know about the case or not, it is important to become familiar with it, as the decision will ultimately have an impact on your fight to manage your own reputation (or whether and how you may help a client protect their own reputation).

The case also serves as a good reminder on other appellate-practice pointers. For instance, the case illustrates how a nonparty can successfully insert itself into a case, and ultimately appeal it up the ladder. It also demonstrates the need to meticulously prepare your trial-court record to reflect that possibility, even on cases where the chances of appeal seem remote.

Facts

The roots of the *Hassell* case are hardly extraordinary, and even may sound like a familiar nightmare to many readers.

Dawn Hassell and her law firm represented a client, Ava Bird, in a personal-injury matter for 25 days in the summer of 2012. During that time, Hassell initiated 15 communications with Bird (12 in writing), and had at least two communications with the insurance company about Bird's claim, but Bird was unresponsive to follow-up requests. Hassell withdrew as a result of her being unable to communicate with her client.


Hassell

After Hassell withdrew, Bird posted a defamatory review about her on Yelp. The review gave Hassell one star (out of Yelp's five-star rating system), and included a number of false statements about Hassell's representation. For example, the review claimed that "dawn hassell made a bad situation much worse for me," "the hassell group didn't speak to the insurance company either, nor did they bother to communicate with me" and that Hassell told her "the insurance company was too much for her to handle."

Needless to say, these statements, which were outright false, palpably harmed Hassell's law practice by turning away countless potential clients before they even walked in the door.

Hassell attempted to work with Bird to have her remove the factually false content from the Yelp page, but Bird sent

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an email refusingto budge and threatened to post more reviews of Hassell. Hassell did not respond to the email. Bird then posted another harmful review, leaving Hassell with no other option than to sue her former client.

In April 2013, Hassell sued Bird for defamation, seeking monetary damages and injunctive relief to have the defamatory reviews removed. Bird first evaded personal service, and promptly after being served by substitute means, went back onto Yelp indicating Hassell had sued her and then posted another review accusing Hassell of trying to intimidate her with the lawsuit.

Despite acknowledging the lawsuit in her new Yelp review, and her subsequent request to mediate the lawsuit, Bird never made an appearance in the lawsuit. Hassell eventually moved for a default judgment. At the prove-up hearing, she submitted proof of the merits of her defamation claims, and proof of her damages. The trial court made a finding that the statements were defamatory, awarded Hassell money damages, and entered an injunction requiring Bird to remove the defamatory postings. In the event that Bird did not do so herself, the injunction ordered Yelp to take down the reviews for her.

Bird did not comply with the injunction. Hassell then served Yelp with the injunction, and requested that Bird's reviews be taken down. Although that process seemed straightforward enough, Yelp also refused to comply, and eventually sought to intervene in the case, raising a smattering of arguments to excuse it from complying with the takedown order. After losing at the trial court, and the Court of Appeal, Yelp brought the matter before the California Supreme Court, where it is currently pending. The crux of Yelp's remaining arguments center around the First Amendment, due process, and the Communications Decency Act.

As of this writing, the defamatory reviews remain in Hassell's Yelp profile, perpetually causing her harm unless the California Supreme Court upholds the lower courts' rulings.

First Amendment

Any fight over online defamation will likely provoke some First Amendment arguments in response, regardless of how strong those arguments actually are.

As could thus be expected, Yelp champions itself as a defender of our First Amendment liberties. Of course, at least seventy years of U.S. Supreme Court precedent has made it clear that *defamatory speech* is not protected by the First Amendment. (See *Beauharnais v. Illinois* (1952) 343 U.S. 250, 256.) Here, a court of competent jurisdiction made findings as to Bird's defamation, and awarded monetary damages based on that finding. This case, then, despite Yelp's protestations, in fact has nothing to do with the First Amendment.

That fundamental restriction on First Amendment protections has not deterred Yelp in its quest to keep hosting the harmful content. First, citing the obscenity seizure case of *Marcus v. Search Warrant of Property* (1961) 367 U.S. 717, Yelp insists it has its own First Amendment right to host Bird's libelous speech, and should have therefore received notice and opportunity to respond before being subjected to Bird's takedown order.

But *Marcus* was a challenge to the seizure of purportedly obscene materials from a magazine wholesaler at the individual discretion of police officers. Crucially, the material in *Marcus* had not been reviewed prior to seizure, but was only suspected by the seizing officers of being obscene. By contrast, the court below reviewed Hassell's defamation claim against the speaker herself, and had the authority to enter or reject the injunction. *Marcus* surely would have turned out differently if a court had already entered judgments against the magazine publishers whose materials were subject to seizure by the police. In other words, *Marcus* dealt with the seizure of *allegedly* illegal materials, while this case is about the injunction of *adjudicated* illegal material.

Second, Yelp takes the misguided approach that the takedown order in this case is an unconstitutional prior restraint. This argument seems to misunderstand what a prior restraint is. Prior restraints are "[o]rders which restrict or preclude a citizen from speaking ***in advance***." (*Hurvitz v. Hoefflin* (2000) 84 Cal.App.4th 1232, 1241). As a result, the California Supreme Court has already found that "an injunction issued following a trial that determined that the defendant defamed the plaintiff that does no more than prohibit the defendant from repeating the defamation, is not a prior restraint and does not offend the First Amendment." (*Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1148.) Cases such as this one involving the adjudication of existing defamation, and related orders simply to remove that defamation from publication, fall precisely within that category.

As long as the tort of defamation has existed in our courts, people have attempted to use the First Amendment as a sword against it. With very few exceptions, those attempts have not been successful.

As important as the First Amendment is to the fabric of American society, its values generally yield to protect those who have been harmed by speech that is downright false. These same principles are likely to prevail in the context of online defamation as the California Supreme Court fashions its opinion in *Hassell*.

Due process

The crux of the due process issues in *Hassell* involves the ability of a court to enforce judgments and orders through third parties. To some, it is surprising that this part of the case is perhaps the most straightforward. To a certain extent, the law has always allowed injunctions to be enforced against non-parties, as long as the defendant who is being enjoined is acting *with* or *through* them. (*People ex rel. Gwinn v. Kothari* (2000) 83 Cal.App.4th 759, 766-767); *Ross v. Superior Court* (1977) 19 Cal.3d 899, 905-906 ["this practice has always been upheld by the

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courts"]; *Berger v. Superior Court of Sacramento County* (1917) 175 Cal. 719; see also *In re Lennon* (1897) 166 U.S. 548.)

A poster of defamatory reviews on a website like Yelp is clearly acting *through* that entity. Without Yelp, for example, Bird would not have the platform she needs to publish her remarks. Yelp, now on notice of the defamatory content, is the entity who is publishing those remarks in perpetuity. In many cases, an online host like Yelp may be the only entity that could help effectuate an injunction such as the one against Bird. What if Bird were to become incapacitated? What if she somehow lost access to her Yelp account? What if Yelp adopted a new policy barring users from deleting reviews? When an online user posts defamation, it seems far-fetched to argue that they are not acting through the host website.

Communications Decency Act

Any plaintiff's attorney who has sued an internet company is surely familiar with the Communications Decency Act (CDA). Although the CDA may broadly prevent lawsuits directly against internet companies, it does not mean that internet companies are above the law in other ways, such as in the enforcement of judgments against other individuals.

The 1996 CDA is an important piece of legislation that gives internet companies immunity from lawsuits that arise solely from third-party content. (See 47 U.S.C. § 230.) Under this immunity shield, "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with" the CDA. (47 U.S.C. § 230(e)(3).) Among other requirements, the CDA prevents interactive computer services from being treated as a publisher or speaker of third-party content. (47 U.S.C. § 230(c)(1).)

According to the legislative history, this CDA immunity shield came about following a trend of defamation lawsuits against internet companies for remarks that its users posted in chatrooms or online bulletin boards it hosted.

The first notable case from this trend did not turn out well for the plaintiff. (See *Cubby, Inc. v. CompuServe, Inc.* (S.D.N.Y. 1991) 776 F.Supp. 135.) The *Cubby* plaintiff sued CompuServe, a formerly popular internet service provider, for defamatory remarks appearing in its online forum. The *Cubby* Court ultimately entered summary judgment in favor of CompuServe because of the impracticality of holding CompuServe accountable for all of its stored content. (*Id*. at 140-41.) But the court left open the idea that the internet company could be subject to defamation liability as a secondary publisher, if for example it was on notice of the defamatory character of the statements. (*Id.*)

Next, picking up where *Cubby* left off, came the case that gave Congress the most concern. The investment brokerage house Stratton Oakmont (yes, the same Stratton Oakmont that was the subject of Martin Scorsese's *The Wolf of Wall Street*) sued Prodigy in a $200 million defamation case. The theory of the lawsuit was that an anonymous Prodigy user posted defamatory remarks about Stratton Oakmont in one of Prodigy's online bulletin boards. As it happened, Prodigy had a policy of manually reviewing all its users' messages prior to posting. The trial court held that Prodigy's heavy hand in screening material for offensive content elevated it to the status of a primary publisher, leaving it strictly liable for all its content. (See *Stratton Oakmont, Inc. v. Prodigy Services Co*. (N.Y. Sup. Ct. May 24, 1995) INDEX No. 31063/94, 1995 N.Y. Misc. LEXIS 229.)

The outcome in *Stratton Oakmont* is obviously startling, especially in hindsight from today's internet. Holding internet companies strictly liable for user comments appearing on their servers would have subjected these companies to endless tort liability, and it likely would have shut down the internet before it even had a chance to grow into its current form.

Recognizing this threat, Congressional reaction to *Stratton Oakmont* was remarkably swift. In crafting the CDA immunity shield, Congress hoped to encourage internet companies to engage in the kind of screening that Prodigy did without opening it up to this endless liability. Congress also noted that, by further encouraging the growth of the internet in this fashion, it could have the added benefit of promoting free speech.

This history makes clear that the CDA was enacted to protect internet companies from destructive tort liability. (*Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 330.) But it "was not meant to create a lawless no-man's-land on the Internet." (*Fair Hous. Council v. Roommates.com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1164.) As a result, courts refused to apply CDA immunity in a variety of contexts. (See e.g., *Doe v. Internet Brands, Inc.* (9th Cir. 2016) 824 F.3d 846, 851 [en banc] [failure to warn user of dangers of third parties not barred by CDA]; *Fair Hous. Council v. Roommates.com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1164 [website's duty not to discriminate as a housing broker held it responsible for prohibited third-party information]; *City of Chicago v. StubHub!, Inc.* (7th Cir. 2010) 624 F.3d 363, 366 [CDA did not shield website from its duty to collect municipal taxes on transactions occurring between third-party users; *Anthony v. Yahoo!, Inc.* (N.D.Cal. 2006) 421 F.Supp.2d 1257, 1262-63 [CDA does not apply to website's misrepresentations concerning third-party content.]; *Hardin v. PDX, Inc.* (2014) 227 Cal.App.4th 159 [duties related to software provider's own participation in creating content].)

Clearly, internet service companies want the CDA to be interpreted as broadly as possible. Indeed, Silicon Valley came out in full force with amicus curiae briefs in support of Yelp's arguments in *Hassell*. But it is hard to square their approach in *Hassell* to online defamation with either the text or history of the CDA.

The CDA bars "liability" and "causes of action" against internet service companies. "Liability" has not been imposed on Yelp; it has been imposed on Bird. Nor has any cause of action been asserted against Yelp. If the California Supreme Court were to read liability as encompassing the takedown order that Hassell needs to enforce her judgment against

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Bird, then it would seem at odds with the goal of the CDA, which was simply to protect internet companies from disastrous tort liability. The CDA was not intended to provide internet service companies a shield to help perpetuate online harms. Hopefully, the Supreme Court will agree and ensure that victims of online torts have a viable recourse.

General appellate lessons for attorneys

Even for attorneys who do not believe that they will be affected by the decision in *Hassell*, there are still lessons from the case that can help benefit you on future appeals.

The first lesson arises from the question of how Yelp even got involved in this lawsuit between Hassell and Bird in the first place. The answer is a good reminder that, under some circumstances, one does not need to be a party originally named in the litigation in order to pursue an appeal. Generally, to "have appellate standing, one must (1) be a party and (2) be aggrieved." (*In re Marriage of Burwell* (2013) 221 Cal.App.4th 1, 13.) But for purposes of appellate standing, "a party of record" includes one who takes appropriate steps to become a party of record in the proceedings. (*Id.*) That can be done, for example, by moving to vacate the judgment under Code of Civil Procedure 663, (see *County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 736-37,) or by filing a nonstatutory motion to vacate a void judgment. (See *Plaza Hollister Ltd. Partnership v. County of San Benito* (1999) 72 Cal.App.4th 1, 15-16.) In addition to that threshold step, the intervenor party must also be substantively aggrieved by the judgment at issue in order to have appellate standing. (*Carleson*, 5 Cal.3d at 737 [the "intervenor's interest must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment"].)

Here, Yelp followed this procedural roadmap by (1) filing a nonstatutory motion to vacate the judgment; and (2) pointing to the part of the order that required its assistance in complying with the injunction against Bird. But just because Yelp gained appellate standing to seek review of the removal order against it does not mean that it can challenge all aspects of the order. As the Court of Appeal appropriately pointed out, Yelp (as a non-party) cannot, for example, challenge the merits of the defamation judgment against Bird.

The second lesson invokes the refrain that so often comes from appellate lawyers, which is to be careful not to kill your appeal before it even starts. Although Hassell had a defaulting defendant, she was sure to create an extensive record at the trial court, and to get an adjudication on the record as to Bird's defamation. She did not expect there to be any appeals in her case, and certainly did not expect Yelp to intervene and take the matter all the way up to the California Supreme Court, but her record was ready when that happened.

Because you never know how your case will develop, it is important to approach each one as if it is going up on appeal, no matter how likely you think that is at the time. Even in the context of a default judgment, take care to create a solid written record memorializing the evidence, the holdings and the reasoning of the trial court. All of these steps become critical in any appeal.

Conclusion

The *Hassell* case has made headlines in the internet law community. Regardless of the outcome, it will undoubtedly have an impact on plaintiff's practice – whether you are protecting your own reputation, or fighting to restore a client's reputation.

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