

Anonymity and Defamation

Defamation can be achieved through libel and slander. This paper focuses on libelous lawsuits and their impact on the different parties that include plaintiffs and anonymous defendants. The plaintiff has a burden of proof to be successful, and these types of lawsuits focus on harm to the reputation of the plaintiff. In the United States, citizens place a premium on the value of their reputations that are protected by the First Amendment.

Nelson Ludlow created Wellstone, a mobile phone provider, and he subsequently became the chief executive of the company. The Internet allows users to communicate with a worldwide audience that consists of millions of readers, viewers, buyers and researchers. Any person or organization can make information available for public consumption by way of the Internet. If an Internet user wants anonymity, that is an option, because the First Amendment guarantees freedom of anonymous expression.

The burden of proof is on the plaintiff. To win damages in a civil case, the plaintiff must demonstrate the following information: (1) defamation, (2) identification, (3) publication, (4) fault, (5) falsity and (6) personal harm. This lawsuit stems from an anonymous email sent to an unknown number of individuals that did, however, include members of management at Wellstone. The anonymous sender used the services of The Suggestion Box (TSB), an Arizona email service provider (ESP) that allows people to build email lists for marketing purposes. One ESP claimed to have more than 130,000 small business customers.

The anonymous email contained information that addressed the personal relationship between Ludlow and Sarah Smith, the other participant named in the email. They were

intimate, and the anonymous email addressed the scope of the relationship between Ludlow and Smith. More importantly, the email was considered defamatory by the plaintiffs. Ludlow claimed defamation by an anonymous speaker. When anonymity is concerned, this creates problems outside the scope of normal legal proceedings.

The subject line in the email asked, "Is this a company you want to work for?" Wellstone compiled a list of potentially damaging claims against the 4 John Does, and he sought damages and monetary relief to provide retribution based on the fictitious nature of the allegations. This situation escalated when Wellstone attempted to force TSB to disclose the identity of the individual who used their services to send the anonymous email.

The United States Supreme Court has affirmed that the First Amendment protects the right to speak anonymously and this principle includes publishing anonymous content on the Internet. The right to utilize anonymous content is not an absolute privilege. One court called the Internet a "democratic forum" for potentially effective discussions. However, the right to speak anonymously fails to be an absolute right. The First Amendment should help victims find assistance unimpeded by individuals who attempt to hide behind unwarranted constitutional rights. Courts must find the balance between individuals who honestly need government protection and other people who want to hide behind the First Amendment without just cause. Truth is the best defense for defendants in these situations.

Defendants have the capacity to successfully protect themselves from libelous lawsuits. Here are some of the more common defenses: (1) protection for opinion, (2) exaggeration, (3) qualified privileges and (4) truth. Both plaintiffs and defendants are interested in reform

because of the high costs associated with bringing a case to trial. While plaintiffs often attain a favorable outcome, they frequently lose their case on appeal. In addition, even if a plaintiff wins his case, his reputation will not be completely restored. The same consideration goes for defendants as well.

A comparative analysis is optimal and the comparison case is *Dendrite International, Inc. v. Doe No.3*. A common thread in both cases focused on the rights of individuals to retain their anonymity when using the Internet and email for personal and professional purposes. The *Dendrite* case addressed the parameters of conducting discovery to identify the defendant. How much, if any, identifying information should an ISP provide while protecting the identity of the participant? The *Dendrite* case focused on different consequences offered by the First Amendment to various parties. Postings by anonymous users of message boards can impact reputations based on the actionable conduct of the anonymous, fictitiously-named defendants.

There are certain guidelines that trial courts can follow when presented with a request by a plaintiff for accelerated discovery that seeks to compel an ISP to adhere to the request within a subpoena. If the ISP adheres to this request, it will disclose the anonymity of the defendants. The court must determine how to balance the First Amendment rights of the defendant with the needs of the plaintiff to protect their reputation and proprietary concerns.

The trial court will require plaintiffs to notify the defendants that they are the targets of a subpoena. This will give the defendants an opportunity to analyze the situation. During this timeframe, the defendants will be able to file opposition to these accusations. This is done to determine the truthfulness attributed to the defendants actionable communications. This

information will be scrutinized by the court to determine if the plaintiff has laid the proper ground work for a lawsuit.

Dendrite became involved in a situation where an Internet poster used the web in an anonymous capacity to criticize the organization. In this opinion, the court examined the appropriate procedures to be followed when they are evaluating applications to discover the identity of anonymous users of ISP message boards. The plaintiff was denied his or her request for limited, expedited discovery where the objective was to determine the identity of the defendant from Yahoo!. Dendrite brought this conflict to the courts based on anonymous comments disseminated on a message board where Dendrite claimed they were defamed. The trial court needs to review disclosure applications by balancing the First Amendment right to speak anonymously while, at the same time, addressing the needs of the plaintiff.

Yahoo! maintains a message board for every publicly-traded company and permits anyone to post messages on it. As such, Yahoo! manages a bulletin board devoted to Dendrite. This hosting exchange allows users to post comments about issues related to the performance of stocks. Message boards can be used to address the effectiveness of management, and John Does asserted that owners planned to sell the company because of mismanagement. In these situations, bulletin boards post messages anonymously by using pseudonyms. Yahoo! requires, however, that users provide identifying information, including real names, mailing addresses, and e-mail addresses prior to using the service. Nonetheless, Yahoo! guarantees to a certain extent that information about the identity of their individual subscribers will be kept confidential.

Yahoo!'s privacy policy states that the ISP will not disclose personally identifiable information unless they have your permission to do so or if they are required by law to disclose this content. Yahoo! may also release account information in special situations such as when they have reason to believe that disclosing this information is necessary to identify, contact or bring legal action against someone who may be violating Yahoo!'s Terms of Service. Furthermore, Yahoo! will release identifying information if that content has potential to alleviate the capacity for harm.

Because Dendrite obtained certain information, this created a foundation for critical comments about the efficiency and effectiveness of Wellstone. Specifically, following the release of a document by The Center for Financial Research and Analysis (CFRA), Dendrite incurred negative comments on Yahoo! about the disclosures of the corporation. The report focused on the Change in Revenue Recognition.

On the Yahoo! bulletin board, at least two users mentioned the CFRA report as it relates to Dendrite. This same report also appeared on TheStreet.com. After the CFRA document was published, Dendrite responded by stating that the corporation never made claims about their revenue recognition policy as mentioned in the CFRA report. The defendants successfully refuted these accusations by using truth as a defense.

Over the course of three months, Wellstone defendant John Doe No.2 posted nine comments on the Yahoo! message board. The poster used the pseudonym "xxplr" when posting comments. Three of these comments addressed the purported policy changes by Wellstone. An acknowledgement by upper management claimed that the content publicized by

the defendants was clearly false. Wellstone also claimed that their organization did not change its revenue recognition policy. Furthermore, the corporation asserted that they did not change the structure of their contracts in order to defer income.

According to John Doe No. 2, Wellstone failed to acknowledge that the corporation does not appear to be competitively moving forward. John Doe No. 2 also claimed that the president of Wellstone is marketing the company for potential buyers. The same anonymous poster also noted that Siebel and SAP have already turned down the potential purchasing of the company. Wellstone refuted all of these claims. The company would not tolerate these accusations, and the organization claimed defamation against John Doe No. 2.

The court must balance the privacy of defendants with the right of plaintiffs to address his or her accusers. Dendrite did not prove defamation against any of the John Does. Wellstone failed to produce sufficient evidence that John Does Nos. 3 and 4 used their constitutional protection so that they could post messages in an unlawful manner or in a way that would warrant the court to revoke their constitutional protections. Furthermore, the court did not give Wellstone permission to conduct limited, expedited discovery related to John Does Nos. 3 and 4.

Whatever the motivation may be - at least in the field of literary endeavor - the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest that requires the disclosure of the identity of the writer. As a result, authors have the option to remain anonymous and they are protected by the First Amendment.

Concerning the Wellstone case, the plaintiffs needed to prove shame, disgrace and ridicule. Wellstone also wanted to demonstrate how these communications created a negative opinion of the organization. How was the reputation of the company impacted? Were these conclusions based on hearsay or truth? Communications on message boards referred to the shortcomings of Dendrite where the corporation was not able to prove defamation against their John Does as well.

During the American Revolution, many writers used pseudonyms when making information public. Thomas Paine is an example of a writer who used a pseudonym to advance the cause of patriots. Great books have been written under the protection of the First Amendment. It should be the decision of the writer to use his or her real name. Sometimes, readers want to know the real identity of the writer. It is difficult to gauge the reason for this objective because a pseudonym has no impact on the quality of the written work. This is curiosity for the sake of curiosity.

People on message boards praised the John Does for making information public that could potentially impact their decisions to purchase stock in Wellstone. This is a point of contention where the John Doe must prove truth. People on the message board praised John Doe for publicizing the financial status of the organization. Essentially, Wellstone would have a difficult time proving malicious intent against the defendants. The organization could not prove that the communications with publics and stakeholders were created to injure the person or organization, so Wellstone failed to demonstrate a burden of proof.

In the Wellstone case, the plaintiff needed to address defamation to be successful. The plaintiff needs information that will bring derogatory statements to light. At the same time, the defendants must demonstrate that their communications were not created with wrong doing, spite, or the intent to unjustly harm Wellstone. A fair comment is a privilege that allows the media to interact without the fear of punishment in the marketplace of ideas. A public figure is a person - such as a politician, celebrity, social media personality, or business leader- who has a formidable social position within a given scope and has a significant influence on publics and stakeholders.

To be successful, the defendants must focus on four defenses that include truth, consent, privilege and the statute of limitations. The most important category is truth. There are numerous employees who attested to the fact that the plaintiffs had a personal grudge against the defendants. The plaintiffs need to prove that the communications by the defendants were malicious. They also need to address the CFRA report and other documents profiling the financial well-being of Wellstone. There are several other posts on the Yahoo! message board regarding the accuracy of the CFRA communication. This was called a false claim by plaintiffs who needed to prove that the allegations were based on fraudulent intentions. The defendants, however, were able to prove truth as a defense.

In summation, the defendants demonstrated that the plaintiffs had malicious intent. Since the claims of the plaintiffs are false, the defendants needed to address defamation. The comments of the plaintiff are based on falsehoods that contain corrupt motives, and the John Does must prove that the plaintiffs utilized dishonest expressions to communicate their claims. The key is malice. There are documents and communications from witnesses that prove that

the plaintiffs knowingly disseminated false information in retaliation to accurate and honest criticisms by the defendants on the message board. The plaintiffs did not have an honest belief in the truth of their communications.