Whitney Information, et al v. Xcentric Ventures, et al Doc. 175

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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

WHITNEY INFORMATION NETWORK, INC.; a Colorado corporation, Plaintiffs, v. XCENTRIC VENTURES, LLC, an Arizona limited liability company; BADBUSINESSBUREAU.ORG, an Arizona limited liability company; and ED MAGEDSON, an individual, Defendants.	Case No: 2:04-CV-47-ftm-29 **DEFENDANTS' TRIAL BRIEF**

Defendants respectfully submit their trial brief addressing legal questions to be determined by the Court.

I. THE BURDEN OF PROOF IS ON PLAINTIFF TO OVERCOME THE PROTECTIONS AFFORDED BY THE COMMUNICATIONS DECENCY ACT

The Communications Decency Act ("CDA"), 47 U.S.C. § 230, which was passed by Congress with the intent to "promote unfettered speech," provides in relevant part that:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

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47 U.S.C. § 230(c)(1) (emphasis added). Section 230 further provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Green v. America Online,* 318 F.3d 465, 470 (3rd Cir. 2003) (noting that the CDA, "'precludes courts from entertaining claims that would place a computer service provider in a publisher's role,' and therefore bars 'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions - such as deciding whether to publish, withdraw, postpone, or alter content.'").

An outstanding explanation of this law and its history is set forth in the California Supreme Court's recent opinion in *Barrett v. Rosenthal*, --- Cal.Rptr.3d ----, 2006 WL 3346218 (Cal. Nov. 20, 2006), cited above. In fact, as the *Barrett* Court recognized, the CDA has been universally interpreted as providing immunity to interactive websites for content created by a third party. *See Barrett*, 2006 WL 3346218, *18 note 18; (citing *Blumenthal v. Drudge*, 992 F.Supp. 44, 51 (D.D.C. 1998); *Ben Ezra, Weinstein, and Co., Inc. v. America Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Morrison v. America Online, Inc.*, 153 F.Supp.2d 930, 933–934 (N.D.Ind. 2001); *PatentWizard, Inc. v. Kinko's, Inc.* 163 F.Supp.2d 1069, 1071 (D.S.D. 2001); *Green v. America Online*, 318 F.3d 465, 470-471 (3rd Cir. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123-1124 (9th Cir. 2003); *Doe One v. Oliver*, 755 A.2d 1000, 1003-1004 (Conn.Super.Ct. 2000); *Doe v. America Online, Inc.*, 783 So.2d 1010, 1013-1017 (Fla. 2001); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 40-42 (Wn.App. 2001); *Barrett v. Fonorow* 799 N.E.2d 916, 923-925 (Ill.App.Ct. 2003); *Donato v. Moldow* 865 A.2d 711, 720-727 (N.J. Super.Ct.App.Div. 2005); *Austin v. CrystalTech Web Hosting*, 125 P.3d 389, 392-394 (Ariz.App. 2005)).

Secondary authority has also explained that:

> [The CDA's] provisions set up a complete shield from a defamation suit for an online service provider, absent an affirmative showing that the service was the actual author of the defamatory content. Accordingly, a number of courts have ruled that the ISP was immune from liability for defamation where allegedly libelous statements were made available by third parties

> through an ISP or were posted by third parties on the server's billboards, as the ISP fell within the scope of 47 U.S.C.A. § 230.

Jay M. Zitter, J.D., Annotation—*Liability of Internet Service Provider for Internet or E–mail Defamation* § 2, 84 A.L.R.5th 169 (2000) (emphasis added) (citing Pantazis, Note, *Zeran v America Online, Inc.: Insulating Internet Service Providers From Defamation Liability*, 34 Wake Forest L. Rev. 531 (1999)); *see also Batzel v. Smith,* 333 F.3d 1018, 1027–28 (9th Cir. 2003) (recognizing, "Making interactive computer services and their users liable for the speech of third parties would severely restrict the information available on the Internet. Section 230 therefore sought to prevent lawsuits from shutting down websites and other services on the Internet.") (quoting *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 983–84 (10th Cir. 2000).

It is clearly the burden of Plaintiff to show that the defendants are the actual authors of the defamatory content. As is set forth in Florida Standard Jury Instruction MI 4.1, to prove defamation, the first element that a Plaintiff must prove is "whether (defendant) [made] [published] [broadcast] the statement concerning (claimant) as (claimant) contends." The CDA provides restrictions on how Plaintiff can satisfy that element. Plaintiff can not, pursuant to the express language of the CDA, prove the first element of defamation except to prove that at Defendant is "responsible, in whole or in part, for the creation of the content."

II. CERTAIN STATEMENTS IDENTIFIED BY WHITNEY INFORMATION NETWORK ("WIN")ARE OPINIONS AND NOT FACTS

A. The Preliminary Determination Of Opinion Versus Fact Is A Question Of Law For The Court

Although the question of whether a statement is a fact or an opinion might appear to be an issue for a jury to decide, this is not the law. On the contrary, "The vast majority of courts, and all of the federal circuits, agree that whether a statement is fact or opinion

is a matter of law for the court to decide." Robert D. Sack, *Sack on Defamation* § 4.3.7 at 4–59 (3rd ed. 2006) (emphasis added) (citing extensive authority for premise). As the *Sack* treatise explains, the Court serves as a gatekeeper in defamation cases, excluding from the jury's consideration any terms which, as a matter of law, could only be viewed as opinion, not fact; "it is the responsibility of courts to 'examine for [themselves] the statements in issue and the circumstances under which they were made to see … whether they are of a character which the principles of the First Amendment … protect." *Id.* at 4–59–60 (brackets in original) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)).

In other words, "[I]n effect, the judge is being asked whether a reasonable jury could find the term defamatory, and that obviously is a judgment that cannot be left to the jury." *Sack*, § 4.3.7 at 4–60 (emphasis added) (quoting *Dilworth v. Dudley*, 75 F.3d 307, 310 (7th Cir. 1996). Therefore, as part of its duty to safeguard matters of free expression and limit a jury to considering only statements which are truly assertions of fact, "a court may on appropriate facts determine as a matter of law that a statement before it is not provably false and therefore not actionable." *Sack*, § 4.3.7 at 4–61 (citing *Burns v. Denver Post, Inc.*, 5 Media L. Rep. (BNA) 1105 (D.Colo. 1979); *Catalano v. Pechous*, 69 Ill.App.3d 797, 387 N.E.2d 714, 723 (App. 1978)).

B. Many of WIN'S Identified Statements are Opinion as a Matter of Law

At the deposition of Ronald Simon, Mr. Simon was asked to identify the statements that WIN contends are defamatory. Counsel for Defendants provided Mr.

Simon with the exhibit to their Complaint that comprised all of the postings on Rip-off Report identified in the Complaint as the basis for the defamation claim and requested that he highlight the statements within those reports that WIN contends are defamatory. There are ten separate reports that were attached to WIN's complaint, which were identified as Plaintiffs' Composite Exhibit "G" to Plaintiff's Complaint. Those reports, with WIN's designation of the allegedly defamatory statements in yellow highlights are attached hereto as Exhibits 1-10.

Defendants have added green highlight to designate every statement identified by WIN as defamatory which Defendants believe the Court should rule are opinions.

An opinion is a statement which is subjective by definition and not capable of being proved false. *Information Systems and Networks, v. City of Atlanta,* 281 F.3d 1220 (11th Cir. 2002). In order to be actionable, a defamatory statement must assert or imply a provably false fact. *Milkovich v. Lorain Journal Co.,* 497 U.S. 1 (1990).

The Court in *Olman v. Evans,* 750 F.2d 970 (D.C. Cir. 1984) established a four factor test for determining whether a statement is fact or opinion. The Court stated that (1) it would analyze the common usage or meaning of the specific language of the challenged statement itself to determine whether the statement has a precise core of meaning for which a consensus of understanding exists or, conversely, whether the statement is indefinite and ambiguous; (2) it would consider the statement's verifiability — is the statement capable of being objectively characterized as true or false?; (3) it would consider the full context of the statement; and (4) it would consider the broader context or setting in which the statement appears, including the social conventions.

Applying the *Olman* Court factors, the statements highlighted in green in the attached exhibits are opinions and not statements of fact. The opinions include such statements as "the product isn't worth the cost of air from the outdoors," (Exhibit 3) "I never got a straight answer," (Exhibit 4) and "he always seemed a little too slick for my taste. (Exhibit 4) Despite the fact that these statements are classic opinions, WIN identified them as defamatory statements. The green-highlighted statements also include adjectives such as ripoff, crooked and corrupt. These descriptions are indefinite and ambiguous, and can not be objectively characterized as true or false, especially in the context used in Exhibits 1-10 and on a website where the social convention is for the authors to passionately express their opinions about business practices that are unfair to consumers. For example, where authors of the postings described how they paid "too much" for a WIN seminar, or paid for a seminar that they believe turned out to be a sales pitch for future seminars, they often summed up their experience as a "ripoff" or a "scam." These are indefinite and ambiguous terms that are not objectively characterized as true or false. They are opinions.

Defendants request that the Court analyze each of the green-highlighted statements and make a legal ruling that the statements are opinions.

III. WHITNEY IS A PUBLIC FIGURE

As an initial matter, this Court must determine whether Whitney is a public figure.[1] The threshold issue of whether Whitney is a [limited purpose] public figure is a question law to be resolved by the court. *Thompson v. Nat'l Catholic Reporter Pub. Co.*, 4 F.Supp.2d 833, 837 (E.D. Wisc. 1998). In Florida, that determination is a two-step process. First, there must be a "public controversy" of some type. Consumer reporting on complaints about businesses involves a "public controversy" as a matter of law. *Mile Marker, Inc. v. Petersen Publishing, L.L.C.*, 811 So.2d 841, 846 (Fla. App. 2002) (citing *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 280 (3rd Cir. 1980), which recognizes that consumer reporting involves inherent matters of particular interest to the public in that it enables citizens to make better informed purchasing decisions). Second, the plaintiff must have played a sufficiently central role in the controversy. *Mile Marker, Inc.*, 811 So.2d at 846. Relevant factors when considering this second prong include the nature and extent of the advertising and publicity campaigns previously undertaken by the plaintiff, paying particular attention to the pursuit of a marketing strategy that emphasizes the subject of the controversy; and, the plaintiff's use and access to the media, and whether the plaintiff uses that media access to attract attention to itself in ways other than in relation to a pending lawsuit. *Id.*, *Della-Donna v. Gore Newspapers Co.*, 489 So.2d 72, 75 (4th App. Dist. 1986).

[1] Whether a plaintiff is a public figure or simply a private person is a question of federal constitutional law and Supreme Court rulings are controlling. However, since the Supreme Court has not defined the contours of who constitutes a public figure, resort to state law is appropriate in diversity actions. *Harris v. Quadracci*, 48 F.3d 247, 250 (7th Cir. 1995).

Here, Whitney is a public figure. First, the lawsuit seeks damages from Xcentric for allegedly defamatory consumer complaints about Whitney published at Xcentric's website www.ripoffreport.com. (*See* Plaintiff's First Amended Complaint ("FAC"), Dkt. No. 56, at ¶¶ 56 – 66.) As a matter of law, therefore, the First Amended Complaint establishes the existence of a public controversy, thereby satisfying the first prong of the public figure test. The second prong is also satisfied.

Here, also, the second prong is satisfied. The subject of the controversy are allegedly defamatory statements about the effectiveness of Whitney's educational seminars and other educational programs. Whitney has engaged in extensive national and international marketing regarding its educational programs. For example, as Whitney admits in its First Amended Complaint, "Plaintiff spends millions of dollars each year on infomercial and other advertising to promote its products and services. (*Id.* at ¶ 21.) Whitney further admits that "Plaintiff has achieved wide-spread and substantial sales of their products and services," (*id.* at ¶ 25), and that "said products and services are now, and long prior to the acts of Defendants complained of herein, generally known among the trade and public . . . ," (*id.* at ¶ 26). Whitney also maintains an Internet website to promote its products and services, (*id.* at ¶ 29), and is believed to also advertise them on Craigslist, a well-known Internet website. Moreover, as a publicly-traded company, Whitney is required to make annual and quarterly filings with the SEC regarding is operations and activities. In its most recently filed annual report, Form 10-K, filed on April 2, 2007, Whitney discloses that its comprehensive marketing strategy includes television advertising concentrated in cities where their courses are held, newsprint

advertising, direct mail and email marketing, Internet marketing, cross-promotional advertising campaigns, and through strategic alliances with promoters. Clearly, Whitney has followed an extensive program of marketing its educational products and services—the subjects of the public controversy—to a national and international audience.

Moreover, Whitney has access to the media and has used that access to attract attention to itself in other ways not related to this lawsuit. For instance, on March 18, 2007, *The New York Times* printed a length article entitled Russ Whitney Wants You to Be Rich, which extolled Mr. Whitney, his rags-to-riches story and how his products and services could help the average Joe achieve like results. Whitney has also garnered media attention in local and regional publications such as *Florida Trend* magazine and *Golfshore Life* magazine. *See* www.wincorporate.com/profile.htm. Finally, Whitney's own website brags that,

> As the industry leader in financial education, Whitney Information Network, Inc. reached 600,000 people in 2005, holding almost 5,000 trainings across the United States, the United Kingdom, and Canada, providing local training in 185 of the top 210 U.S. markets and 5 of Canada's 11 provinces. Whitney conducted 131 training courses in 55 cities throughout the United Kingdom, Scotland and Ireland, reaching thousands of students.

Id.

Considering all the above factors, Whitney is a public figure, if not in general, then at least for a limited purpose applicable to this litigation.

DATED: February 5, 2008.

JABURG & WILK, P.C.

s/Maria Crimi Speth
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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of February 2008, I caused the attached document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF Registrants:

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