IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC M. ALBRITTON	§	
	§	
	§	
v.	§	
	§	C. A. NO. 6:08-CV-00089
CISCO SYSTEMS, INC.,	§	
RICK FRENKEL, MALLUN YEN &	§	
JOHN NOH	§	

CISCO SYSTEMS, INC.'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

TO THE HONORABLE JUDGE:

Defendant Cisco Systems, Inc. ("Cisco") hereby files this Motion to Compel the Production of Documents ("Motion") pursuant to Rule 37 of the Federal Rules of Civil Procedure, this Court's Scheduling Order, and Local Rule 26(d) and would show the Court the following.

I. FACTUAL BACKGROUND

Eric Albritton ("Albritton") alleges in his Original Complaint ("Complaint") (a true and correct copy of the Complaint is attached as Exhibit A) that the Defendants published defamatory statements about Albritton that damaged his reputation and caused him "shame, embarrassment, humiliation, and mental pain and anguish." (Exhibit A at ¶39). He alleges that he "has and will in the future be seriously injured in his business reputation, good name and standing in the community" and " will, in all likelihood, be exposed to the hatred, contempt, and ridicule of the public in general as well as of his business associates, clients, friends and relatives." Defendants bring this motion to seek discovery of documents related to those claims because Albritton refuses to produce them.

The parties have conducted a meet and confer, and Albritton still refuses to produce certain documents. Specifically, Albritton refuses to produce the following documents:

- Documents evidencing Eric Albritton's damages;
- Documents evidencing Eric Albritton's mental anguish;
- A medical authorization for Eric Albritton's medical records;
- Documents evidencing all of Albritton's new matters or clients since October 16, 2007, including but not limited to engagement letters concerning such clients and matters;
- Eric Albritton and the Albritton Law Firm's tax returns for 2002 through the present; and
- Annual and interim balance sheets, income statements, and statements of cash flows for the Albritton Law Firm for 2002 through the present.

Defendants seek an order from the Court compelling Albritton to produce these relevant documents.

II. ARGUMENTS AND AUTHORITIES

Defendants seek an order compelling Albritton to produce the requested documents, which relate directly to his damage claims for mental anguish and damage to his reputation as set forth in his Complaint. Albritton has refused to produce documents related to Albritton's claim for mental anguish and his claim of damage to his business reputation. (*See* Exhibit A at ¶39).

Texas law provides that medical records and records related to the plaintiff's finances are relevant to a plaintiff's mental anguish claim. In order to recover for mental anguish, there must be (1) evidence of compensable mental anguish and (2) evidence to justify the amount awarded. *Saenz v. Fidelity & Guaranty Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996). With respect to the requirement that the plaintiff show evidence of mental anguish itself, the Texas Supreme Court has noted the difficulty of distinguishing "between shades and degrees of emotion."

Defendants' requests for financial information and costs of any medical care are also proper under Texas law to show damages or lack of damages. Texas law provides that when it comes to damages for mental anguish, the jury "cannot simply pick a number and put it in the blank," but rather must provide evidence of fair and reasonable compensation. *Saenz v. Fidelity & Guaranty Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996) (reversing the award of mental anguish damages because "there is no evidence in this case that Saenz suffered mental anguish or that $250,000 would be fair and reasonable compensation"). The Texas Supreme Court has held that evidence of mental anguish must not be simply a disapprobation of the plaintiff's conduct, but rather a "fair assessment" of the defendants' injury. *Bentley v. Bunton*, 94 S.W.3d 561, 605 (Tex. 2002) (reversing an award of $7 million in mental anguish on the basis there was insufficient evidence that the amount would "fairly and reasonably compensate" the plaintiff for his loss). In doing so, the Court held that "there must be evidence that the amount found is fair and reasonable compensation, just as there must be evidence to support any other jury finding." *Id.* at 606.

Defendants are seeking exactly the type of evidence the Texas Supreme Court has held is relevant to determine damages resulting from Albritton's alleged mental anguish. Albritton has produced no evidence of any damages resulting from his mental anguish. Evidence of the amount spent for medical care resulting from his mental anguish as well as any monetary loss he has suffered as a result of his mental anguish (or lack thereof) are directly related to his damages claims.

Similarly, evidence of an actual injury is directly related to Albritton's claim of damage to his business reputation. Certainly evidence of the financial condition of an attorney's practice is relevant to his claim that his business reputation has been injured. The very definition of libel

under Texas law acknowledges that financial injury is evidence of defamation. *See* TEX. CIV. PRAC. & REM. CODE § 73.001 (defining libel as "defamation expressed in written or other graphic form that tends to ... injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury.")

Simply put, Albritton should not be permitted to allege mental anguish and damage to his business reputation, yet refuse to produce the most obvious evidence concerning those claims. Accordingly, Defendants respectfully request an order requiring Albritton to produce the following:

- Documents evidencing Eric Albritton's damages;
- Documents evidencing Eric Albritton's mental anguish;
- A medical authorization for Eric Albritton's medical records;
- Documents evidencing all of Albritton's new matters or clients since October 16, 2007, including but not limited to engagement letters concerning such clients and matters;
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(1) CISCO SYSTEMS, INC.,	§	
(2) RICHARD FRENKEL, a/k/a	§	
"TROLL TRACKER,"	§	
(3) JOHN NOH and	§	
(4) MALLUN YEN,	§	
	§	
Defendants.	§	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COMES NOW, ERIC M. ALBRITTON, Plaintiff, and files this, his Response to ***CISCO SYSTEMS, INC.'s*** Motion to Compel Production of Documents, and, in support thereof, would respectfully show unto the Court as follows:

I. Introduction And Factual Background

In October of 2007, Richard Frenkel, acting in the course and scope of his employment with Cisco Systems, Inc. and in concert with Defendants Yen and Noh, published outrageous and patently false statements against Eric Albritton. Frenkel and his cohorts continuously published the statements until Plaintiff filed this action for damages in March of 2008. Albritton sued Cisco, Frenkel, Yen and Noh for defamation, seeking to recover damages for his shame, embarrassment, humiliation, mental pain and anguish; damage to his reputation, good name and standing in the community; and exemplary damages.

Albritton has made no claim for damages from lost earnings, lost earning capacity or medical expenses as a result of defendants' tortuous conduct. To the contrary, in response to Cisco's request for Albritton's medical and financial records, Albritton repeatedly told Cisco that

A. The Documents Cisco Seeks Are Not Relevant

The documents Cisco seeks are not relevant to Albritton's claim for damages. Under Texas law, compensatory damages allowable for defamation are divided into two categories: general and specific. *See Peshak v. Greer*, 13 S.W.3d 421, 427 (Tex. App. Corpus Christi 2000). General damages include compensation for "injury to character or reputation, injury to feelings, mental anguish and similar wrongs." *Bentley v. Bunton,* 94 S.W.3d 561, 604 (Tex. 2002). A plaintiff may also elect to recover additional, "special damages" that flow from the libel including loss of earning capacity, *Peshak,* 13 S.W.3d at 427, loss of past and future income, *Shearson Lehman Hutton, Inc. v. Tucker,* 806 S.W.2d 914, 922 (Tex. App. – Corpus Christi 1991, writ dism'd), and loss of employment, *Houston Belt & Terminal Ry. v. Wherry,* 548 S.W.2d 743, 753 (Tex. App. Houston [1st Dist.] 1976, writ ref'd n.r.e.).

When the actionable statements injure the plaintiff in his office, profession or occupation, *Knox v. Taylor,* 992 S.W.2d 40, 50 (Tex. App. – Houston [14th Dist.] 1999, no pet.), or charge him with the commission of a crime, *Leyendecker & Assocs., Inc. v. Wechter,* 683 S.W.2d 369, 374 (Tex. 1984), they are defamatory *per se*. *See e.g., Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.,* 219 S.W.3d 563, 581(Tex. App – Austin 2007, pet. denied). In such cases, Texas law presumes that the plaintiff is entitled to recover general damages even in the absence of specific evidence of harm to the plaintiff's reputation. *Id.*, *see also Peshak*, 13 S.W.3d at 427 ("In actions of libel *per se*, the law presumes the existence of some actual damages, requiring no independent proof of general damages."). In fact, the Texas Supreme Court has held that a plaintiff injured in his office or profession is entitled to recover actual damages for injury to his reputation and for mental anguish as a matter of law. *See Bentley*, 94 S.W.3d at 604 ("Our law presumes that statements that are defamatory *per se* injure the victim's reputation and entitle him to recover general damages, including damages for loss of reputation and mental anguish."); *see also Smith v. Lowe's Home Centers, Inc.*, No. SA-03-CA-1118-XR, 2005 U.S. Dist. LEXIS 12812, at *12 (W.D. Tex. June 29, 2005) (citing *Bentley* and holding

"statements which are defamatory *per se* entitle a plaintiff, as a matter of law, to recover actual damages for injury to reputation.").

In this case, Defendants attacked Albritton in his profession. The false statement that Albritton had "conspired" with the clerk of the court to falsify official documents is so outrageous and undeniably harmful that Texas law presumes that Albritton has suffered damage to his reputation and mental anguish. Further, Albritton has expressly disclaimed any recovery for special damages attributable to loss of income and loss of earning capacity. Because Texas law entitles Albritton to an award of damages for reputational injury and mental anguish as a matter of law, there is no need or requirement that Albritton introduce specific evidence in support of these damages. *See Peshak*, 13 S.W.3d at 427 ("In actions of libel *per se*, the law presumes the existence of some actual damages, requiring no independent proof of general damages."); *see* e.*g., Parkway Co. v. Woodruff*, 901 S.W.2d 434, 443-44 (Tex. 1995)(a plaintiff may recover damages for mental anguish based on evidence sufficient to establish a "substantial disruption in the plaintiff's daily routine."). Here, Albritton need not offer any evidence other than his own testimony to prove the extent and nature of his damages. *See Williams v. Trader Publ'g Co.*, 218 F.3d 481, 486 (5th Cir. 2000)(holding that plaintiff's testimony alone was sufficient to support the jury's award for mental anguish damages); *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (same); *Smith,* 2005 U.S. Dist. LEXIS 12812, at *16 (evidence of mental anguish need not be corroborated by doctors, psychologists, or other witnesses).

Because Albritton's general damages are presumed, and the extent of those damages can be supported by his own testimony at trial, his medical and financial records are not relevant to the damages issues in this case.

B. Cisco Is Not Entitled to Albritton's Medical Records

Cisco incorrectly argues that the very fact that Albritton has claimed he suffered mental anguish is enough to require production of his medical records. In support of its position, Cisco cites to *Patterson* v. *P.H.P. Healthcare Corp.*, 90 F.3d 927, 940 (5th Cir. 1996). *See* Mot. at 4. But as this Court has previously held in an opinion omitted from Cisco's brief, *Patterson* does

decreases in Albritton's revenue may result from a myriad of reasons unrelated to the defamation disseminated by Cisco. Thus, Albritton's tax returns and related financial information will provide no additional relevant information. To the extent that Cisco seeks information related to Albritton's damaged reputation, that information is available through Albritton's testimony and/or is otherwise available from other less-sensitive sources. Thus, Cisco's request for Albritton's financial documents should be denied. *See id.* at *9.

D. The Discovery Cisco Seeks Is Unnecessary, Unreasonably Cumulative, Overly Broad And Sought For The Purpose Of Harassing Plaintiff

To the extent that the documents Cisco seeks have any marginal relevance, they are duplicative of the evidence adduced in Albritton's deposition. *Cf.* FED. R. CIV. P. 26(b)(2)(C)(i). Albritton's testimony that he has not sought any medical treatment because of Defendants' conduct and that he cannot identify any specific lost employment or income attributable to Defendants' conduct eliminates Cisco's claimed need to discover his medical records, client lists, engagement letters, tax returns, and confidential financial statements. To the extent that Albritton's claim for mental anguish entitles Cisco to any discovery, Cisco had access to that discovery during Albritton's deposition. Cisco's demand for additional discovery is unreasonably cumulative and oppressive, especially given the sensitive nature of the documents it seeks.

Additionally, "the burden . . . of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action and the importance of the discovery in resolving the issues," *Cf.* FED. R. CIV. P. 26(b)(2)(C)(i)-(iii). Here, Cisco seeks all of Albritton's medical records, whether or not they are related to this case. In fact, Cisco seeks a medical authorization giving it unlimited access to Albritton's medical records without any limit as to time and scope. *See* Mot. at 3. Cisco's requests are fatally overbroad, and Cisco has offered no explanation for the breadth of its requests. Albritton's medical records are not relevant, and when weighed

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CISCO SYSTEMS, INC.'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS

TO THE HONORABLE JUDGE:

I. INTRODUCTION
(In Reply To Opp. at pp. 1-2)

Cisco, of course, denies that its employee Rick Frenkel ("Frenkel") published "outrageous and patently false statements" about Plaintiff (Opp. at 1), but this motion is about damages, not liability. In his disclosures, Plaintiff states that he seeks "only an appropriate award of damages for his mental anguish and punitive damages...".[1] Plaintiff's pleading, however, is much broader and seeks past and future damages to his business reputation, so we asked Mr. Albritton about this apparent discrepancy at his recent deposition: Q. (By. Mr. Babcock) "So...you're not going to claim reputational damages in this case?" His answer: "That's not true."[2]

He then testified that he would not rule out anything other than "economic damages, you know, health care, you know, something like that,"[3] concluding by saying "I think a jury ought to be able to award, you know, the damages it believes appropriate, except for I'm not asking for,

[1] Plaintiff's Initial Disclosures at 3, attached as Exhibit A.

[2] Albritton Dep. at p 76, attached as Exhibit B.

[3] *Id.* at 78.

you know, medical bills or economic damages."[4] His complaint continues to assert that he "has and will in the future be seriously injured in his business reputation (and) ... will be "exposed to the hatred, contempt, and ridicule of his business associates..." (Original Complaint (Docket #17) at 9.)

It is frequently the case that Plaintiffs who, as here, have **not** suffered damages will try to shield their financial information from discovery, which is the very reason why the Defendant seeks it, that is, to show that the Plaintiff's **business reputation** was **not** harmed. The fact finder is certainly entitled to hear that the Plaintiff made more money in the year following the alleged defamation than in the years preceding it (and how much) and that he filed more lawsuits, attracted more clients and had more financial success than before these alleged defamatory internet articles which hardly anybody read. To deprive Defendant this discovery is to deny it powerful, probative evidence in its defense.

It is an overstatement that Defendant seeks Plaintiff's "entire medical history" (Opp. at 2), but mental health information is certainly critical when Plaintiff is seeking mental anguish damages. There may be some pre-existing mental condition that will bear on whether these two articles caused him the mental anguish he claims. *See Doe v. Oberweis Dairy*, 456 F.3d 704, 718 (7th Cir. 2006), *cert. denied* 456 F.3d 704 (2006); 127 S.Ct. 1828 (2007) ("If a plaintiff by seeking damages for emotional distress places his or her psychological state in issue, the defendant is entitled to discovery any records of that state.")[5] As we argue more fully below, the motion should be granted.

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[4] *Id.* at 79.

[5] The Plaintiff certainly puts his psychological state at issue saying he suffered extreme trauma. Exh. B at 79. *See also* n. 6, *infra*.

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Defendants.	§	

PLAINTIFF'S SUR-REPLY TO DEFENDANTS' MOTION TO COMPEL

pet. denied) is even more problematic. Reply at 3. In *Swate*, the Court specifically acknowledged that injury to reputation as the result of libel *per se* is presumed. *Id.* However, in that case, defendants were permitted to rebut the presumption—not based on medical or financial documents as sought by Cisco in this case—but because the court found Swate's reputation was so deplorable prior to the publication of the alleged defamatory statements defendants could not have further injured his reputation. *Id.* "The [*Swate*] Court cited no authority for its position the presumption was rebuttable." *Mustang Ath. Corp.*, 137 S.W.3d at 338 (distinguishing *Swate*). Courts have refused to follow *Swate* because it is at odds with the doctrine of presumed damages. *Id.* at 339. Even so, the holding in that case is very limited and allows a presumption of injury to be rebutted by evidence that a plaintiff's reputation was already ruined. *Id.* at 338. As this Court recently held in *Gatheright v. Swindle*—a case distinguishing *Swate* but not cited in Cisco's brief—*Swate* only applies to a plaintiff with an already severely tarnished reputation. 2007 U.S. Dist. LEXIS 57587, at *19 (E.D. Tex. Aug. 7, 2007).

Having enjoyed a good reputation in his community, Albritton is entitled to presumed damages. *Id.* Nothing in his medical or financial documents is relevant to rebutting his claim for damages because none of that information bears on how Albritton is perceived in the community. Albritton's private information, by definition, cannot be probative of his public reputation. *See id.* Thus, Cisco's "rebuttal" relevance argument should be rejected.

B. Cisco is Not Entitled To Albritton's Medical Records

Cisco's Reply strains to distinguish this Court's well reasoned opinion in *Burrell v. Crown Central Petroleum, Inc.*, 177 F.R.D 376 (E.D. Tex. 1997). First, Cisco attempts to distinguish *Burrell* because it arose under federal law. Reply at 3. But the discovery issues in that case, like this case, required the application of the *Federal* Rules. Second, Cisco deceptively portrays this Court as "noting" that if plaintiffs had sued under state tort law, their mental conditions would be at issue. *Id.* But, that quotation isn't the Court's at all, but rather a statement made by the plaintiffs in that case that cannot be imputed to Albritton in this case. *See*

medical records." 177 F.R.D. at 383. That potential is even greater where the plaintiff's physical or mental conditions have not been placed in controversy. *Id.* Although Albritton's case is a cause of action for defamation, the same reasoning applies. Like the plaintiffs in *Burrell*, Albritton's mental anguish damages are premised on other damages he incurred, here damage to his reputation. Like the plaintiffs in *Burrell*, Albritton need not offer medical evidence to support his mental anguish damages.[2] And as in *Burrell*, the opportunity for abuse here is far too great to allow Cisco unfettered access to Albritton's medical records absent a stronger showing of relevance.

Cisco also claims that Albritton has mischaracterized the scope of Cisco's request as seeking Albritton's "entire medical history." Reply at 2. But Cisco asked Albritton to sign a medical release form, giving Cisco access to his files without limit as to time or the nature of medical treatment provided. *See* Exh. A. Cisco's request seeks confidential documents not relevant to the damages issues in this case and is therefore overly broad, burdensome and harassing. Albritton's opposition brief specifically challenged Cisco's request as sought for the purpose of harassment, a claim Cisco's Reply does not address or dispute. *See* D.E. 74 at 8-9.[3]

C. Cisco is Not Entitled To Albritton's Financial Documents

Cisco's Reply falsely alleges that Albritton does not contest the relevance of his financial records. Reply at 5. Albritton specifically challenged relevancy in his opposition brief. *See* D.E. 74 at 4 ("The documents Cisco Seeks Are Not Relevant), and 7 (Albritton's financial documents are not relevant to the damages issues in this case.").

Cisco's Reply acknowledges that Albritton is not seeking economic damages as a result of Cisco's defamatory statement. *See* Reply at 1-2. Because Albritton's financial documents

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[2] Cisco cites to *Parkway Co. v. Woodruff*, 901 S.W.2d 434 (Tex. 1995), and *Montemayor v. Ortiz*, 208 S.W.3d 627 (Tex. App. Corpus Christi 2006, pet. denied) as supporting its argument. Reply at 4. Those cases are appellate cases in which the plaintiff's mental anguish evidence was reviewed for the *sufficiency of the evidence*. They do not address the relevancy issue before this Court. Cisco specifically criticizes Albritton for not responding to its citation to *Montemayor* in its opening brief. Reply at 4, n. 7. That case is clearly distinguishable. There, the appellate court overruled an award of damages because plaintiff failed to show liability. *See* 208 S.W.3d at 659.

[3] If the Court is inclined to grant Cisco access to any medical records, the scope of those records should be limited to mental health records after the date of Cisco's defamatory statements.

cannot be relevant to damages not sought, Cisco argues that Albritton's financial information is relevant because if Albritton made more money after Cisco's defamatory statements were disseminated to a world-wide audience that generated as many as 16,000 hits on the Troll Tracker Blog alone, his business reputation could not have been harmed.[4] *See* Reply at 2. Cisco's argument is far too tenuous to demonstrate relevance. Changes in Albritton's revenue are not probative of the harm caused by Cisco's defamation because they do not show opportunities Albritton never received as a result of Cisco's conduct. The law does not require Albritton to prove a negative, which is why damages in this case are presumed. None of the documents Cisco seeks, including Albritton's internal financial documents and client lists are relevant to the damages in this case. Moreover, those documents raise issues concerning protection of attorney-client privileged information and seek Albritton's proprietary business information for which Cisco has not shown relevance sufficient to warrant disclosure.[5]

Even if Cisco could demonstrate relevance it must still show a compelling need for Albritton's tax returns, and arguably for other financial documents ultimately incorporated into those returns. *See Walker v. Rent-A-Center, Inc.*, 2006 U.S. Dist. LEXIS 72232, at *9 (E.D. Tex. Oct. 3, 2006). Cisco's argument that it has shown a compelling need for Albritton's tax returns because Albritton refused to answer its deposition questions is nonsensical. Requiring Albritton to disclose his tax returns via testimony as a precondition to not having them produced would render meaningless the protection those documents are afforded.

Cisco's request for financial documents from 2002 forward and for documents that implicate issues of privilege or contain proprietary businesses information should be denied because they are not relevant, are overly broad and are sought only to harass Albritton.

III. CONCLUSION

For all the forgoing reasons, Cisco's Motion to Compel should be DENIED.

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[4] Incredibly, Cisco's Reply brief argues that "hardly anyone read" its defamatory internet posts. Reply at 2.

[5] Cisco's request for financial records is egregiously over broad in seeking all financial documents from as far back as five years before Cisco's defamatory statements were published. *See* Exh. A.