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

ERIC M. ALBRITTON,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**NO. 6:08-CV-00089**
(1) CISCO SYSTEMS, INC.,	§	
(2) RICHARD FRENKEL, a/k/a	§	
"TROLL TRACKER,"	§	
(3) JOHN NOH and	§	
(4) MALLUN YEN,	§	
	§	
Defendants.	§	

PLAINTIFF'S OPPOSITION TO CISCO SYSTEMS, INC.'S MOTION FOR DISTRICT JUDGE TO RECONSIDER MAGISTRATE JUDGE'S ORDER DENYING CISCO'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

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 defamation in March of 2008. Albritton sued Cisco, Frenkel, Yen and Noh, 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 claims no damages for lost earnings, lost earning capacity or medical expenses resulting from Defendants' tortious conduct. To the contrary, in response to Cisco's request for Albritton's medical and financial records, Albritton repeatedly told Cisco that (1) he has not sought any medical treatment because of Defendants' conduct; and (2) cannot identify any specific lost employment or income attributable to the conduct. Despite a complete lack of relevance to the issues in dispute, Cisco moved to compel Albritton's most confidential and sensitive medical and financial records. Specifically, Cisco moved to compel Albritton to sign a broad waiver giving Cisco unlimited access to his entire medical history, his firm's balance sheets, income statements and statements of cash flows for every year since 2002, all engagement letters executed by the firm since October of 2007, and both his and his firm's federal tax returns since 2002. Magistrate Judge Bush considered the parties' arguments and briefs and agreed with Albritton. Cisco's motion to compel was denied.[1] DE# 74.

Cisco now seeks the Court's reconsideration, contending that Judge Bush's ruling is wrong. Yet to support its motion, Cisco does no more than disagree with his decision. Cisco fails entirely to meet the exceptionally high standard imposed by 28 U.S.C. § 636(b)(1)(A). ("A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been

[1] *See* DE#s 55, 74, 72 and 78. Albritton incorporates by reference his response (DE# 74) and sur-reply (DE# 78) in opposition to Cisco's motion to compel in support of this response to Cisco's motion for reconsideration.

discovery sought must have some evidentiary value before an order to compel disclosure of otherwise inadmissible material will issue. *Id.* at *7 Courts have likewise recognized the legal tenet that the rules should not be misapplied so as to allow "fishing expeditions in discovery." *Id.* In such circumstances, courts will enter a protective order preventing the propounding party from abusing the discovery process. *See id.* at *8.

II. Argument

Cisco cannot demonstrate that Judge Bush's ruling is clearly erroneous or contrary to law because the documents Cisco seeks are not relevant to Albritton's claim for damages. Cisco first argues that Albritton's private medical and financial records must be produced because in order to recover for mental anguish, Albritton must offer (1) evidence of compensable mental anguish and (2) evidence to justify the amount awarded. *See* Mot. at 5. According to Cisco, because Albritton must put on some evidence of his mental anguish to support his allegations, all documents remotely concerning his health or financial position are relevant. Cisco next contends that it is entitled to Albritton's complete medical history and seven years of financial records to rebut his claim of damages. Cisco's arguments lack merit. Albritton has not put his medical or financial history at issue in this case and seeks only general damages that are presumed under Texas law. Cisco fails to demonstrate that it is entitled to rebut a claim for damages with medical and financial records that are not relevant to any element of damages that Albritton claims. This motion is another attempt by Cisco to manufacture relevance where none exists so that it can undertake an unlimited search through Albritton's most sensitive documents. Judge Bush rejected those efforts once already. Because Cisco cannot demonstrate that Judge Bush clearly erred, so should this Court.

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, no pet.). General damages include compensation for "loss of reputation and mental

anguish." *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.* at 580 ("statements that are defamatory *per se* are actionable without proof of injury."); *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 general 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 Ctrs, Inc.*, 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, loss of earning capacity or medical expenses. 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, 444 (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, 1046 – 47 (5th Cir. 1998) (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. The Magistrate Judge's order was correct. Cisco has not, and cannot, demonstrate that the Court clearly erred in denying Cisco's irrelevant and invasive discovery.

B. Cisco is not entitled to Albritton's medical records

Judge Bush ruled that Cisco is not entitled to Albritton's medical records.[3] 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 5. But as

[3] See DE# 143, finding that "[a]ny marginal relevance that could be demonstrated is far outweighed by privacy consideration, especially in light of Albritton's binding admissions that he has not sought such treatment and is not making a claim for medical expenses."

rejection of the same argument by this Court in *Burrell*. There, while the Court found that medical records can be relevant as argued in Cisco's motion, it nonetheless held that a "tremendous potential for abuse" exists when a defendant has unfettered access to a plaintiff's 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.[5] 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. *See id.*

All of these issues were before the Magistrate Judge. There, Albritton argued that he need not present medical evidence to prove his claim, and has represented that he will not offer any such evidence at trial. Albritton has never asserted any claim for medical expenses. Albritton does not allege that he sought any health care because of Defendants' conduct. He has not designated any physicians or health care providers to corroborate his mental anguish. Indeed, he need not do so since Texas law entitles him to recover such damages as a matter of law upon establishing libel *per se*. As a result, the Court correctly concluded that Cisco's request to rummage through Albritton's medical history should be denied. *See id.* Cisco offers nothing in the instant motion to demonstrate that the Judge Bush's order was clearly erroneous, nor can it on this record.

C. Cisco is not entitled to Albritton's tax returns or other financial records

Judge Bush ruled that Cisco is not entitled to Albritton's tax returns and financial

---

[5] Cisco again cites to *Parkway Co. v. Woodruff*, 901 S.W.2d 434 (Tex. 1995) as supporting its argument. Mot at 5. *Parkway* is an appellate case in which the plaintiff's mental anguish evidence was reviewed for the *sufficiency of the evidence*. It does not address the relevancy issues that were before Judge Bush or this Court as part of its review of his decision. Cisco also cites *Montemayor v. Ortiz*, 208 S.W.3d 627 (Tex. App.—Corpus Christi 2006, pet. denied). That case does not address the relevancy questions at issue or mental anguish damages.

Albritton's proprietary business information for which Cisco has not shown relevance sufficient to warrant disclosure.[6]

Cisco's claimed need for Albritton's confidential tax returns is far too tenuous to demonstrate the type of compelling need required to order their production. Increases or decreases in Albritton's revenue may result from a myriad of reasons unrelated to Cisco's defamation. 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 witness testimony and/or is otherwise available from other less-sensitive sources. Judge Bush was not clearly erroneous in denying Cisco's motion to compel Albritton's financial documents. *See id.* at *9.

D. Cisco is not entitled to rebut Albritton's presumed damages

Cisco contends that even if Albritton does not need medical evidence to make his case, it is entitled to Albritton's medical records for purposes of rebutting the doctrine of presumed damages. *See* Mot at 9. Similarly, Cisco now claims for the first time that Albritton's personal and business finances are direct evidence of whether his mental anguish took a toll on his work life and whether it was caused by or related to financial stress. *See* Mot. at 8.[7] Notwithstanding that Cisco cannot demonstrate clear error by raising an argument for the first time in a motion to reconsider, this new theory fails for the same reasons discussed in Albritton's sur-reply to the underlying motion. Specifically, Albritton is entitled to presumed damages and no authority supports Cisco's contention that it is entitled to unfettered access to Albritton's most sensitive documents for purposes of rebutting those presumed damages. *See* DE #78 at 2-3.

Though Cisco has retreated from the position it took in reply to the underlying motion, it now contends that rebuttal evidence is relevant in cases of presumed damages. It attributes this

---

[6] 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* Mot. at 10.

[7] Here again Cisco sites to its new and improper evidence, the APA report. *See* Mot. at 8 & Ex. C. Presumably Cisco contends that Judge Bush clearly erred by not thinking of this argument on his own.

proposition to *Bentley v. Bunton*, 94 S.W.3d 561, 605 (Tex. 2002), which remanded a punitive damages award on an evidentiary challenge. While Bentley confirms that reputational and mental anguish damages are presumed in *per se* cases, 94 S.W.3d at 604, nothing in the case suggests that the presumption of damages is rebuttable. And Cisco fails to address the Beaumont Court of Appeals decision in *Mustang Ath. Corp. v. Monroe*, which cites *Bentley* for presumed damages in *per se* cases and treats the presumption as irrebuttable. 137 S.W.3d 336, 338 (Tex.App.—Beaumont, 2004, no pet. h.) ("The Supreme Court of Texas has not held that presumption is rebuttable."). Judge Bush was correct in rejecting Cisco's rebuttal-relevance argument.

E. The discovery Cisco seeks is unnecessary, unreasonably cumulative, overly broad and sought for the purpose of harassing Albritton

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.

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

ERIC M. ALBRITTON,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	NO. 6:08-CV-00089
(1) CISCO SYSTEMS, INC., (2) RICHARD FRENKEL, (3) MALLUN YEN and (4) JOHN NOH,	§	
	§	
Defendants.	§	

PLAINTIFF'S SUR-REPLY TO DEFENDANTS' MOTION FOR RECONSIDERATION

with a fact-based motion to compel. Cisco argued that the documents it sought were relevant to issues in this case. Albritton demonstrated that his medical records and financial records were not relevant. Albritton explained that under Texas law he could recover general and/or specific damages. General damages include damages to Albritton's reputation and mental anguish. Specific damages include lost income and medical expenses. Because—as Albritton has ***repeatedly*** told Cisco—he is not seeking damages for lost income or medical expenses, the tax returns and medical records Cisco seeks are not relevant. Judge Bush was correct in denying Cisco's motion.

In reply Cisco insists that Judge Bush's Order is contrary to law for five reasons. Each one can be dismissed in turn.

First, Cisco argues that because there has been no finding in this case that the articles are defamatory *per se*, Albritton cannot refuse to produce documents on that basis. *See* Reply at 3. Cisco misses the point. Because Cisco's accusations are *per se* defamatory, Albritton is entitled to presumed damages upon proof at trial. But, even if the jury were to rule against him on the *per se* issue, if it finds that Cisco's accusations are defamatory, Albritton can recover damages in an amount proven at trial. Albritton can recover general damages in this case based on his testimony alone. *See Williams v. Trader Publ'g Co.*, 218 F.3d 481, 486 (5th Cir. 2000) (plaintiff's testimony alone is sufficient proof of mental anguish damages). Albritton's trial testimony will be limited to general damages. He will not offer testimony regarding lost profits or medical expenses. For that reason, the tax returns and medical history Cisco seeks are not relevant. Judge Bush so held and Cisco has not shown his ruling to be clearly erroneous.

Second, Cisco argues that Albritton must prove actual malice in order to recover presumed damages. *See* Reply at 3. Cisco previously responded to Albritton's defamation *per se* case law by arguing that Cisco had a right to rebut the *per se* presumption. The reply has substituted Cisco's unwinnable "*per se* damages are rebuttable" argument with a new "required