

WASHINGTON CASE UPDATE

Can Anonymous Customer Reviews Stay Anonymous?

From the desk of Joshua P. Hayward: Must a business turn over records regarding the identity of a user of its website, who posted a negative review anonymously, to a plaintiff who has filed a defamation claim against the anonymous reviewer? Read on to see how the Washington Court of Appeals addressed this new question.

Claims Pointer: For the first time in Washington, the Court of Appeals established that a court must apply the following analysis in determining whether to compel production of the identity of an anonymous speaker. First, the plaintiff must attempt to notify the anonymous poster in question that there is a claim against them, including posting on the message board where the statement was made. Second, the plaintiff must put forth sufficient evidence that would establish a prima facie case of defamation. In order to determine how much evidence is “sufficient,” the court must determine the nature of the speech (i.e. commercial, political, etc.) in order to determine the appropriate test. In this case, the court applied an intermediate standard of “prima facie” evidence because the speech was neither political (highly protected) nor was it purely commercial (less protected speech—i.e. advertising). The plaintiff could not force the business to turn over the anonymous poster’s identity because she presented no evidence to support her claim.

case in point...

Deborah Thomson v. Jane Doe, No 72321-9-1, 2015 WL 4086923, Washington Court of Appeals, Division 1, (July 6, 2015).

Deborah Thomson, a Florida attorney, filed a defamation action in a lawsuit in Florida against “Jane Doe” after she discovered the following review of her legal services on the attorney rating website “Avvo.com”:

“I am still in court five years after Ms. Thomson represented me during my divorce proceedings. Her lack of basic business skills and detachment from her fiduciary responsibilities has cost me everything. She failed to show up for a nine hour mediation because she had vacation days. She failed to subpoena documents that are critical to the division of assets in any divorce proceeding. In fact, she did not subpoena any documents at all. My interests were simply not protected in any meaningful way.”

Thomson alleged that the poster was not a client and that the person’s only purpose was to impugn her character and professional reputation.

Thomson then filed a subpoena in King County Superior Court in Washington, where Avvo’s main office is located. The subpoena requested that Avvo reveal the identity of the anonymous user that posted the review. Avvo responded that it would contact the user in order to allow the user the opportunity to quash the subpoena and to inquire into the matter further. After contacting the user, Avvo responded to Thomson that it believed that the user was in fact Thomson’s client and asked

that Thomson withdraw her subpoena. Thomson moved to compel Avvo to comply with the subpoena, which Avvo opposed. The trial court denied the motion to compel and Thomson appealed. (Note: Normally, an appeal is not available without a final order, but in this case, the Court of Appeals allowed discretionary review).

The Washington Court of Appeals commented that Washington Courts had not yet determined the appropriate standard for determining when a business must turn over anonymous user information. The Court looked to court decisions across the nation that have addressed this issue for guidance in crafting an analytical framework. The Court first concluded that a defamation plaintiff must attempt to discover the identity of an anonymous user or put them on notice before seeking that person’s information elsewhere. In this case, Thomson did not attempt to discover the user’s identity on her own, but the element was nonetheless satisfied when Avvo contacted the user, thereby notifying her of the action against her.

The second step the Court announced is that the defamation plaintiff must provide a sufficient showing of the legitimacy of their defamation claim. The Court pointed out that other courts have applied a wide range of standards. In cases where commercial speech (i.e., advertising) has been involved, other jurisdictions have applied a “good faith standard,” which only requires a plaintiff to assert a good faith belief that a claim is supported by evidence, and the motion to dismiss standard, which only requires a plaintiff to plead sufficiently to support a claim. The Court held that neither of



Contact: Josh Hayward | www.smithfreed.com | email: jhayward@smithfreed.com

Ph: 503.227.2424 | Fax: 503.227.2535 | 111 SW Fifth Avenue, Suite 4300 | Portland | OR | 97204

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those standards was stringent enough to protect the speech here, which deserved an intermediate level of protection. The Court also rejected the summary judgment standard, which has only been applied in cases involving political speech, which deserves a higher degree of protection.

The Court ultimately determined that in cases such as this, where a person criticizes another anonymously on an issue that is neither political nor purely commercial, a plaintiff must present evidence sufficient to establish a prima facie case for defamation. In other words, a plaintiff must present facts sufficient to meet the minimum elements of a defamation claim. Thomson presented no evidence to support her defamation claim, so she failed to meet her burden. In closing, the Court also commented that a business must turn over the evidence sought by the plaintiff for review by the judge, and that Avvo was incorrect in withholding the records from the trial court. The Court upheld the trial court's denial of Thomson's motion and affirmed.



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