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New Remedy for Online Defamation

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September 3, 2014

The Texas Supreme Court recently set precedent by ruling that a court can order an author to delete a defamatory Internet posting, but cannot stop him from reposting the same statements elsewhere.

Rather than a permanent injunction to restrict future posts—which would be an unconstitutional prior restraint on free speech—the court's award of damages to the victim is the right way to deter any future defamation, wrote Justice Debra Lehrmann in *Kinney v. Barnes*.

"Kinney would have the trial court order Barnes to remove the statements at issue from his websites (and request that third-party republishers of the statements do the same) upon a final adjudication that the statements are defamatory. Such an injunction does not prohibit future speech, but instead effectively requires the erasure of past speech that has already been found to be unprotected," said the Aug. 29 opinion. "It is accurately characterized as a remedy for one's abuse of the liberty to speak and is not a prior restraint."

Lawyers familiar with the case said that the high court's finding gives defamation victims a new remedy.

"With courts still grappling with how to handle speech on the Internet, this is a decisive ruling saying, 'Yes, removal is appropriate if it's found the posting is defamatory,'" said First Amendment lawyer Laura Lee Prather, a partner in Haynes and Boone in Austin, who wasn't involved in the case.

Martin J. Siegel, who represents petitioner Robert Kinney, wrote in an email, "We think it sets an important precedent: A person can't destroy someone else's reputation online and have that stay on the Web forever, as the other side wanted. And thanks to this decision, a defendant can't hide behind the old and now defunct rule that injunctions are never available in defamation cases."

Before, there was "no avenue for relief" for a business that saw "untruthful statements posted about them online," said Brian J. Levy, an associate with Kennard Blankenship Robinson in Houston, who represented the Texas Apartment Association, an amicus curiae in the case.

"The Supreme Court, I think, did a very, very good job of laying out the law and the topic, and staying away from the First Amendment issues, but still creating a right to relief," said Levy.

The respondents in the case are Andrew Harrison Barnes and his three companies, BCG Attorney Search Inc., Employment Crossing Inc. and JD Journal Inc. Respondents' attorney Dale L. Roberts, a partner in Fritz, Byrne, Head & Harrison, wrote in an email that "we strongly disagree" with the court's determination.

"Prior to this case, courts have consistently recognized that damages, not injunctions, are the sole remedy in defamation actions. Although we are still evaluating our next steps on appeal, there are multiple other legal deficiencies that justify dismissal of Mr. Kinney's baseless claims," wrote Roberts.

Prior Restraints

The opinion explained the background of the case. Kinney worked for BCG as a legal recruiter, but he left in 2004 and started a competing company. Years later, Barnes posted statements on two websites "implicating Kinney in a kickback scheme during his time with BCG."

Kinney sued Barnes and his three companies. Kinney didn't seek damages but sought a permanent injunction to have the statements removed, among other things. In the trial court, Barnes won a motion for summary judgment, arguing that the relief would be an unconstitutional prior restraint on speech. The court of appeals affirmed.

Lehrmann wrote that the question in the case was whether it's unconstitutional for a permanent injunction to require removal or deletion of defamatory speech and prohibit future speech that is "the same or similar.

"While a permanent injunction requiring the removal of posted speech that has been adjudicated defamatory is not a prior restraint, an injunction prohibiting future speech based on that adjudication impermissibly threatens to sweep protected speech into its prohibition and is an unconstitutional infringement on Texans' free-speech rights," said the opinion.

Such a prior restraint is only permissible to avoid an "impending danger," and the restraint must be the "least restrictive means" to do so, she noted. Kinney wanted his injunction to extend to speech that was "substantially the same," noted Lehrmann, but that would trigger "the problem of overbreadth."

"Given the inherently contextual nature of defamatory speech, even the most narrowly crafted of injunctions risks enjoining protected speech because the same statement made at a different time and in a different context may no longer be actionable. Untrue statements may later become true; unprivileged statements may later become privileged," said the opinion.

The high court reversed the court of appeals and remanded the case to trial court.

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