

July 1989 Question 3

For the last three months, Jane has been demonstrating during business hours on the well-traveled public sidewalk in front of a five-story office building. She wears a "sandwich-board" sign over her shoulders and blows a whistle to attract further attention. On the sign, she has hand lettered the following:

"Law Firm
of
Lawyer Services, Inc.
Is Crooked
The Firm Stole My Money!"

The law firm of Lawyer Services, Inc. is on the first floor of the building which is being picketed by Jane. The firm had represented Jane on a personal injury claim which was settled four months ago. Jane claimed that the firm wrongfully withheld \$100 of a \$200 fee that was supposed to have been paid to Dr. Dyer for the doctor's testimony on Jane's behalf at a deposition prior to settlement.

The law firm commenced a suit to enjoin Jane from further demonstration, claiming defamation and trade libel. The firm alleged that the injunction was needed to protect its reputation and to stop a continuing decrease in its earnings and in the number of walk-in clients.

At the hearing for the injunction, the law firm produced a cancelled check for the amount of \$200 which was paid to Dr. Dyer. The doctor herself confirmed that she had received the full amount of her \$200 fee. Jane offered no evidence other than her testimony that although she had spent her settlement money and was presently insolvent, she remained convinced that the firm had not paid Dr. Dyer the full \$200.

Is the firm entitled to an injunction? Discuss.

ANSWER A TO QUESTION 3

In order to be entitled to an injunction, Lawyer Services, Inc. will first have to establish that either one of its two alleged tort claims have any validity.

I. DEFAMATION

Defamation is a tort cause of action that alleges damage to reputation. In order to establish a prima facie case, the Lawyer Services must show that a defamatory statement was made, it was of or concerning the plaintiff, there was a publication, and that there were damages to the firm's reputation. Since this particular defamation action does not appear to be a matter of public concern, the additional factors of fault and falsity required by the First Amendment are not required.

1. Defamatory Statement

A defamatory statement is one based on fact, not opinion, and it must either be defamatory on its face or shown to be defamatory through the use of innuendo and insinuation. Here, the plaintiff carried around a sign saying that the law firm is "crooked" and that the "firm stole" her money. While "crooked" by itself would likely be more opinion based, the fact that it was combined with the words that the firm stole her money creates a sufficient factual foundation for a defamatory statement. Since such a statement would definitely affect the law firm's reputation, the first element of the cause of action is shown.

2. Of or Concerning Plaintiff

Lawyer Services, Inc. will not have to resort to the task of "pleading colloquium" as the statement clearly referred to the firm on its face, and thus this element is satisfied.

3. Publication

Publication can be either intentional or negligent. Sufficient publication occurs when the defamatory statement is conveyed to someone other than the plaintiff to one who understands the defamatory comment. Here, walking up and down the street for three weeks is sufficient to meet this requirement since it was intentional and, without a doubt, someone saw the sign and understood it.

4. Damages to Reputation

Since the "sandwich" board was written, this defamation action is based in libel. Further, because it is defamatory on its face, all jurisdictions will recognize presumed general damages of injury to reputation (i.e., minority view of libel per se and libel per quod is inapplicable). Thus, though Lawyer Services, Inc. would have to plead and prove pecuniary losses, they have a prima facie showing of defamation. (Note: Jane has no defense based on truth as the evidence shows that Dr. paid.)

II. TRADE LIBEL

Trade libel is an offshoot of a defamation action and has the same essential elements for its prima facie case. There is one critical distinction between a simple defamation action and trade libel in that many jurisdictions require the plaintiff to show actual injury in order to state a cause of action. Often, this requirement is only satisfied by actual evidence of lost

customers. Thus, if Lawyer Services, Inc. is in this type of jurisdiction, they will have to present such evidence in order to pursue a claim under this theory.

III. INJUNCTION

Since Lawyer Services, Inc. has made out a cause of action for defamation and probably one for trade libel, the firm is entitled to an appropriate remedy.

In order to get an injunction, the plaintiff must show that the legal remedy is inadequate, that a property interest is involved, that it is feasible, balancing and that there are no defenses.

1. Inadequacy of the Legal Remedy

Inadequacy of the legal remedy can take many forms. Two that are very on point here are that damages are too speculative and the possibility of multiplicity of suits.

In any action for an injury to reputation, the damages are likely to be too speculative due to the nature of the injury. It is extremely difficult to put a dollar amount on reputational harm. Further, there is the probability that this former client will not desist in her activities resulting in the firm having to make continuous suits to recover interval damages.

The firm alleged that an injunction was necessary to protect its reputation and to stop a continuing decrease in its earnings and the number of walk-in clients. These are not adequate grounds for the granting of an injunction because they merely display a relief for damages -- they do not indicate why the damages are inadequate. However, for the above reasons, the damages are inadequate.

2. Property Interest

At common law, injunctions were only granted when the dispute centered around personal or real property interest. Here, the injury is to reputation. Courts, however, have used two theories to get around the requirement of a property interest to allow injunctive relief in other types of harms. First, some courts just disregard the requirement altogether. Second, other more creative courts just enlarge the definition of property to include almost any kind of injury, including business and reputation.

Thus, while at common law, Lawyer Services, Inc. would not meet the property requirement, in all modern jurisdictions, the harm to reputation interests alone would be sufficient "property" for an injunction to lie.

3. Feasibility

Feasibility is really an issue of the ability of the court to enforce the contempt power associated with an injunction. The problem is often one of supervision, and for this reason, courts prefer to state injunctions in the negative as opposed to mandatory orders to do a specific act.

Feasibility will be accomplished here merely by the court telling Jane not to picket in front of the firm.

4. Balance

The balancing part of the test is usually limited to nuisance and encroachment cases and in all likelihood would not be applicable in a defamation action. If a court were to apply it, it would balance the hardship to Jane versus the hardship to the firm.

IV. DEFENSES

1. Prior Restraints

With defamation actions, an injunction is usually unavoidable due to the defense that an injunction is a prior restraint on free speech. The defendant's First Amendment right to free speech is greatly respected by the courts, and the United States Supreme Court has made it quite clear that a prior restraint on free speech is almost, per se, unconstitutional, requiring a very compelling state interest. Such an interest is not in existence in a factual setting between a deranged client and a local law firm.

Thus, even though Jane's attack on the law firm is apparently without basis, the firm will not be able to enjoin her on defamation grounds. A similar result occurred under substantially similar facts in one Supreme Court case.

A possibility still exists for the law firm under their trade libel theory. Assuming that they are able to state a cause of action by showing a direct loss of customers in those jurisdictions requiring it, courts are much more likely to grant an injunction over a prior restraints defense if the underlying cause of action is trade libel.

This is because the protection of such speech is not as essential as noncommercial speech.

However, it is unlikely that it would apply in this setting as Jane is not a commercial entity herself. Since injunctions are largely in the court's discretion, a court will likely distinguish this setting from one where, for example, Xerox defames IBM.

ANSWER B TO QUESTION 3

The law firm seeks an injunction to prevent Jane from demonstrating in front of their offices.

I. Protected Speech?

First, it must determine if Jane's demonstration consists of speech which is protected by the First Amendment. It is alleged that Jane's speech is defamatory. Defamation is not protected under the First Amendment.

To show defamation, Lawyer Services will first need to show that a defamatory statement has been made about it. Jane's allegation that Lawyer Services is crooked and that it stole her money is certainly defamatory if it is false. In view of the cancelled check and the doctor's confirmation that the \$200 fee owed to the Dr. was paid certainly seems to confirm that Jane's allegation that they are crooked because they wrongfully withheld the fee is false. The statement is defamatory.

The sign Jane carries specifically identifies Lawyer Services -- there is no doubt that the statement is about them.

Next, the plaintiff must show that the statement injures its reputation. It is clear that an allegation that a law firm is crooked and steals money from its clients would injure its reputation.

Since the statement is printed on the board, it can be classified as libel, for which damages are presumed. However, because it is only printed on one sign which Jane carries with her, the communication can be compared to less permanent types of communication which constitute slander. However, since the statement relates to Lawyer Services' ability to perform its profession, it would be slander per se, and damages will be presumed.

Since this case involves a private plaintiff against a private defendant, Lawyer Services need not show NY Times malice. This could be argued to be a subject of public interest since it relates to the lawyer's dealings with the public. If so, Lawyer Services may be required to show some fault on Jane's part in publishing this information without knowing that it was true.

It appears that Jane's statements are defamatory; therefore, they are not entitled to full First Amendment protection.

II. First Amendment Analysis

A. Content neutral?

In analyzing First Amendment issues, it is first necessary to determine restriction sought to be imposed is content neutral.

Lawyer Services does seek to enjoin Jane on the basis of the content of her communication. Normally, content based regulations are entitled to strict scrutiny -- the regulation can only be upheld if it is necessary to further a compelling state interest and is the least restrictive means. However, since the speech involved here is defamatory, it is not entitled to strict scrutiny.

B. Further a substantial government interest?

Next, one must ask whether the regulation at issue furthers a substantial government interest. It is clear that the government has a substantial or important interest in restricting defamatory speech.

C. Restricts no more speech than necessary?

Lawyer Services are requesting only that Jane's demonstrations be enjoined. Others are free to demonstrate outside of the same building. The proposed injunction would restrict no more speech than necessary.

D. Alternative channels of communication?

Jane has been demonstrating on the public sidewalk in front of the office building of Lawyer Services. Public sidewalks are generally considered to be traditional public forums -- places where people have traditionally gathered for public debate. In traditional public forums, the government is generally not entitled to restrict free speech. However, as

explained above, Jane's speech is not protected because of its defamatory nature.

Additionally, the Supreme Court has held that some restriction of free speech activities on public sidewalks is permissible. The Court has allowed restriction of picketing directed at a specific private residence. That restriction was upheld because the Court found that the state had a compelling state interest in protecting the privacy of citizens in their homes. In this case, the injunction proposed would protect the commercial interest of the law firm. It is doubtful that the state would have as compelling an interest in protecting commercial interests as it has in protecting privacy in the home.

Nonetheless, I think the state could be found to have a compelling state interest in protecting its citizens from defamation.

If the injunction only prevents Jane from demonstrating in front of Lawyer Services' building, it is clear that she will have alternate channels of communication -any other public forum will be open to her.

In light of the above factors, an injunction to restrict Jane's demonstrations will not be invalid as an unconstitutional restraint on free speech.

III. Is Injunction Permissible Remedy?

A. Inadequate remedy at law?

Lawyer Services will easily be able to show that they have no adequate remedy at law. Damages will simply not be sufficient to compensate them for the long term damage that may be done to their reputation if Jane's activities are allowed to continue. Their future damages will be too speculative to enable a court to award damages.

B. Irreparable injury

Lawyer Services will not have a difficult time showing irreparable injury either. Once they get a reputation for being crooked and stealing from their clients, there will be no way to remedy the adverse effects.

C. Property damage

Traditionally, plaintiffs have been required to show property damage in order to be entitled to an injunction. However, this requirement has been interpreted modernly in an expansive fashion. The damage to their reputation should be a sufficient allegation of property damage to satisfy this element.

D. Balancing

It is unclear whether the law firm is currently seeking a temporary or permanent injunction.

If a temporary injunction is sought, the court should balance Jane's interests and the probability that she will be successful against the burden which will be imposed upon Lawyer Services. Jane's interest in free speech would be so great as to preclude an injunction if she was engaging in protected speech. There is a general presumption that prior restraints on protected speech are invalid. However, since Jane is engaging in

unprotected speech, her interests are slight, even though she is convinced that her statements are accurate.

The probability that Jane will win is also slight. Her speech is defamatory and is obviously injurious to the defendant. Additionally, there is circumstantial evidence that she may be trying to get more money out of Lawyer Services. She is insolvent, so maybe she is trying to get the law firm to pay the \$100 she claims was not paid to the Dr. to her.

Finally, the burden on Lawyer Services is enormous. They are being portrayed as crooks who steal their clients' money. The firm has experienced a decrease in earnings and in the number of walk-in clients. It is likely that this burden will continue, and even escalate.

If a temporary injunction is sought, it should be granted.

If a permanent injunction is sought, the court will do a full hearing on the merits of the case, giving both sides an opportunity to present their cases. On the evidence presented, it is likely that a permanent injunction would be issued as well. Lawyer Services will be able to show that Jane's demonstrations are defamatory and therefore unprotected speech. Lawyer Services will also be able to show that constitutional considerations will not bar an injunction from being issued in this case. The injunction should issue.