

How Defamation Law Impacts Online Reviews

By Carolyn Conway Duff

Businesses no longer survive by word-of-mouth alone. Increasingly, business reviews are spread not person-to-person but instead online to the world at large. Websites and social media sites, such as Yelp and Facebook, provide a wealth of information to prospective customers. But they can also provide a platform for disgruntled customers to air their grievances. The law provides businesses with a potential recourse against a dishonest, negative review through a defamation lawsuit. A recent New Jersey appellate case sends a warning message to would-be online reviewers to ensure the accuracy of their reviews, while also cautioning businesses that any legal action can be lengthy and success is not guaranteed.

Case Summary

The Appellate Division addressed the issue of defamation in online reviews in *Okeke v. Anekwe*, A-3391-20 (N.J. App. Div. July 12, 2022). The plaintiff Joe Obi Okeke had been defendant Chinedu Sani Anekwe's accountant and prepared defendant's tax returns each year for five years. The relationship soured when defendant learned that he owed the government money from a prior year's tax returns due to unreported income. The parties did not dispute that there had been unreported income that year; they did dispute whose fault it was that the income was not reported.

Defendant sought plaintiff accountant's advice as to whether he could remedy the situation, and the parties scheduled a meeting. Yet it never occurred, and each party blamed the other for the failed meeting. This led to a heated exchange of text messages,

followed by defendant retrieving his file from plaintiff.

Defendant then embarked upon a series of online complaints against plaintiff, including a Facebook post and a one-star rating on Yelp. The Facebook and Yelp reviews accused plaintiff of "mess[ing] up [defendant's] tax returns." Defendant also accused plaintiff of sending him expletive filled texts. Defendant ascribed multiple quotes to plaintiff in his reviews, including one stating that plaintiff had said defendant was "only leaving [as plaintiff's client] to commit Fraud."

Plaintiff brought a defamation action against defendant. Eventually the matter went to trial. At the close of plaintiff's case, defendant made a Rule 4:40-1 motion for judgment. The trial court granted the motion, ruling that defendant's speech was protected as being either truthful or opinion. Additionally, despite the finding that the statements were not defamatory as a matter of law, the trial court went on to hold that plaintiff had failed to establish "actual malice," i.e., failed to prove that defendant knowingly published falsehoods or acted with reckless disregard.

The Appellate Division affirmed the dismissal of the defamation claim with regard to defendant's statement that his taxes were "mess[ed] up," but reversed and remanded for further consideration as to whether the quotations that defendant had incorrectly attributed to plaintiff, as well as the false allegation that plaintiff had cursed in the texts, were defamatory. The court provided a primer on defamation law, noting that the first question is whether the alleged defamatory speech is fact or opinion. If opinion, then no defamation claim can lie as a matter of law, but if fact, then the next consideration

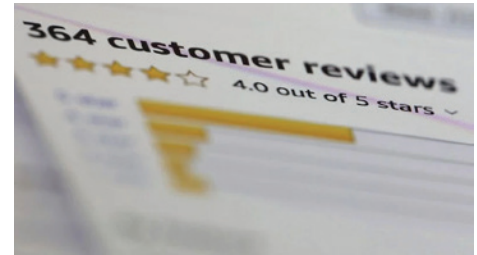


Photo: Jenny Kane/AP, File

is whether the statement is true (meaning substantially true) or false, including false attribution of a quote.

The court affirmed in regard to the statement that plaintiff had "mess[ed] up" defendant's tax returns, holding that was opinion. However, according to the appellate court, the defendant falsely attributed quotes to plaintiff, and falsely accused plaintiff of cursing him in texts. These could potentially constitute defamation. The appellate court held that if fault were considered, then the lower negligence standard, governing issues of private concern, should be used instead of actual malice, which governs issues of public concern, despite plaintiff's being a licensed accountant.

The Business Perspective of Online Reviews

Faced with a negative online review, a business must decide whether and how to respond (besides, perhaps, offering better service). An easy, but potentially futile, method is to respond directly to the post either via the website or contacting the poster directly. But a business stung by a particularly nasty and unjust review may be tempted to fight back in the courts.

A business should consider several things before filing suit. First, if the review is opinion (for example, saying the food tastes bad at a restaurant), then it is highly unlikely the business will succeed in a defamation action.

But if the statement is arguably factually false (for example, claiming that the chef spit in the food), then the business may have a claim.

Another consideration is which legal standard will govern the defamation claim. Although the determination of the legal standard is a fact intensive question, the *Okeke* court's determination that the matter was of private concern, and thus the less onerous negligence standard applied, may potentially discourage negative reviews as negligence is easier for businesses to prove than actual malice. However, large companies that are household names may find their claims to be of public concern, with the more difficult actual malice standard applying—particularly if they have previously weighed in on public controversies surrounding the products or services being criticized. Similarly, businesses engaged in activities affecting public health or safety may be considered public concern. In that vein, a New York appellate court recently ruled that under New York law, an online review of a medical provider was a matter of public interest. *Aristocrat Plastic Surgery v. Silva*, 169 N.Y.S.3d 272 (App. Div. 2022).

Lawyers have special concerns when addressing negative reviews about their services. For example, a lawyer choosing to respond directly to a negative review must take care not to reveal any confidential information. The American Bar Association's Standing Committee on Ethics and Professional Responsibility has issued Formal Opinion 496, which advises attorneys to "consider" not providing any response to a negative review, or simply responding that "professional considerations preclude a response."

As lawyers are well aware, sometimes just filing a lawsuit is enough to resolve an issue. In a recent case in Pennsylvania, a lawyer sued his former client for defamation, among other claims, after the client said in online reviews that the lawyer was "incompetent" (arguably opinion) and a "thief"

(more likely defamatory). Soon after a complaint was filed, *Kounoupis v. Evangelatos*, 5:22-cv-01757 (E.D. Penn. May 5, 2022), the court reported the matter was settled.

Lawyers may have difficulty succeeding, given the service-oriented nature of the business. For example, a lawyer and his firm found itself on the losing end of a defamation action where it was ruled that the negative reviews were opinion—even where some of the reviewers had never used the firm. *Law Offices of David Freydin v. Chamara*, 24 F. 4th 1122 (7th Cir. 2022). Yet lawyers can be successful, as a case out of Florida demonstrates. In *Blake v. Giustibelli*, 182 So. 3d 881 (Fla. DCA), *cert. denied*, 137 S. Ct. 161 (2016), an unlikely duo of a divorced couple teamed up to negatively review the former wife's attorney online. The attorney sued for defamation and won, to the tune of \$350,000, after the court found the former couple had made demonstrably false statements.

Another option for businesses, including law firms, is to ask the website to remove the offending review. However, given the protections afforded to websites under the Communications Decency Act (CDA), this may be difficult since the CDA precludes any claim for defamation by a business against a website, such as Yelp, that hosts an allegedly defamatory review. 47 U.S.C. § 230.

Businesses may be tempted to insert into their standard agreements (like the online "terms and conditions" readily accepted by many customers) that customers cannot post a negative review, but such broad language runs afoul of the federal Consumer Review Fairness Act. 15 U.S.C. §45b. That law prohibits, among other things, standardized contract provisions barring negative reviews if the review is honest. However, the law does not protect dishonest reviews.

The Consumer Perspective of Online Reviews

To review or not to review, that is the question for consumers. A negative review that is honest, or at least solely based upon opinion,

seems like a safe bet. But a lawsuit brought against a consumer can be financially devastating even if the consumer ultimately prevails. Consumers may be frightened into taking down a review, even if not defamatory, simply to avoid the hassle of a lawsuit.

In New Jersey, consumers lack a vital tool to fight against lawsuits based on speech: an anti-SLAPP (Strategic Lawsuit Against Public Participation) law. Currently, 32 states and the District of Columbia have these laws specifically designed to protect speech. The most robust allow defendants in speech-based lawsuits to secure a quick dismissal and recoup attorneys fees. Since New Jersey does not have an anti-SLAPP law, defendants seeking attorney fees must resort to the more difficult tactic of proving frivolous litigation.

Consumers who post anonymously may shield themselves from a lawsuit as a business may not be able to determine whom to sue. However, while a tech-savvy online poster may be able to completely hide their identity, the average internet user's identity can often be revealed even if they are posting as "anonymous." To unmask an online poster through the courts, though, a plaintiff must first meet the test announced in *Dendrite International v. Doe*, 342 N.J. Super. 134 (App. Div. 2001), which requires a plaintiff to make a heightened showing on the merits to obtain the identity of an anonymous speaker. Thus, anonymity affords an online poster a certain amount of protection but is not a guarantee that one will not be sued.

Conclusion

While consumers should not be afraid to post honest, negative reviews online, they also must take care not to state false facts about their experience with a business. Businesses should also be wary—a lawsuit for defamation can be difficult to win and hurt feelings alone are not enough for victory. Both parties may find it easier to work out their differences offline and out of court.

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