

"Quackbusters" Lose in Court

JUDGE THROWS OUT STEPHEN BARRETT'S DEFAMATION LAWSUIT ON GROUNDS OF FREE SPEECH

Editorial Staff

In a ruling that is expected to have a significant impact on future cases concerning free speech and the internet, a judge in Northern California has thrown out a defamation lawsuit brought by self-proclaimed "quackbusters" Stephen Barrett, MD, and Terry Polevoy against several individuals, including Ilena Rosenthal, a breast implant awareness activist, on the grounds that they "failed to prove by competent and admissible evidence a *prima facie* case of defamation." The judge also ordered Polevoy and Barrett to pay Rosenthal's attorney fees and related court costs.

Dr. Barrett is known to chiropractors for a variety of anti-chiropractic articles over the years, some of which are posted on his website (Quackwatch.com). Quackwatch lists chiropractic under the heading of "Questionable Products, Services, and Theories," and includes such articles by Dr. Barrett as "Don't Let Chiropractors Fool You."

This case stemmed from a number of statements allegedly written by Rosenthal, who heads an international support group for women who have had problems with breast implants. In postings made on newsgroups and online discussion forums between June and October 2000, Rosenthal allegedly referred to Barrett and Polevoy as "quacks" and that Barrett was "arrogant" and a "bully" who tried to extort money from her; in another message, she stated that Quackwatch.com, which is operated by Barrett, "appears to be a power-hungry, misguided bunch of pseudoscientific socialistic bigots," among other things.

Upon hearing of the postings Barrett, Polevoy, and attorney Christopher Grell filed suit against Rosenthal and several other defendants alleging libel and defamation of character. In turn, Ms. Rosenthal filed a special motion to strike based on California's anti-SLAPP (Strategic Lawsuits Against Public Participation) statute, which was designed to prevent lawsuits that appear to be brought specifically to prevent people from exercising their rights to free speech.

After hearing arguments from both sides, Alameda County Superior Court Judge James Richman rendered his ruling on July 25. He dismissed the claims of Barrett and Polevoy, stating that the plaintiffs "failed to prove by competent and admissible evidence a *prima facie* case of defamation." For example, the statements made by Rosenthal calling Barrett and Polevoy "quacks" were dismissed on the grounds that they were not necessarily factual, but merely "expressions of subjective judgment" that fall under the protection of the Constitution. "The publications attributed to Rosenthal are not statements of fact, and thus will not support any plaintiff's claim for libel," the judge wrote.

In addition, Judge Richman found that only one of the statements posted online by Rosenthal could be argued as defamatory. However, the statement Rosenthal posted was a re-posting of a document written by a third party, Tim Bolen, claiming that Dr. Polevoy had at one time stalked Christine McPhee, a radio talk show host in Canada. The judge held that this statement was protected under

section 230 of the federal Communications Decency Act, a 1996 law that "provides immunity to users, as well as providers, of interactive computer services," such as newsgroups and discussion forums.

"It is undisputed that Rosenthal did not 'create' or 'develop' the information in defendant Bolen's piece," the judge noted. He added that "as a user of an interactive computer service, that is, a newsgroup, Rosenthal is not the publisher or speaker" of comments made by a third party. Thus, he concluded, "she cannot be civilly liable for posting it on the Internet. She is immune."

Furthermore, Rosenthal was able to demonstrate that Barrett and Polevoy were public figures, which limited the amount of protection they were entitled to under libel laws. In one instance, she referenced a statement made by Barrett in the March 5, 2001 issue of Time magazine, in which he claimed, "Twenty years ago, I had trouble getting my ideas through to the media. Today, I am the media." (emphasis added)

"In light of all this, it hardly needs citation of authority to demonstrate that Barrett and Polevoy are public figures," wrote Judge Richman.

As public figures, Polevoy and Barrett bore the burden of proving, by clear and convincing evidence, that Rosenthal's comments were malicious, and that the comments were published with reckless disregard as to whether or not they were true. Richman found that the plaintiffs were unable to show such proof, and that they submitted no evidence that they suffered either physical or monetary damage from Rosenthal's statements.

"It is probably enough to note, as demonstrated above, that no plaintiff has asserted a cognizable claim for defamation against Rosenthal," the judge wrote. "Grell is not even mentioned by her; Barrett can show no statement of fact, false or otherwise, made by her; and the one statement of fact about Polevoy, the reposting of the Bolen piece, will not subject her to liability."

"Based on the above, the Court concludes that Section 425.16 applies to plaintiff's complaint, and that no plaintiff has established by competent evidence a probability that he will prevail on his claim," Judge Richman concluded. "Accordingly, Rosenthal's motion will be granted, and Rosenthal will be awarded reasonable attorney's fees and costs according to proof."

Judge Richman's complete ruling can be found online at www.healthfreedomlaw.com.

The free speech ruling in favor of Ilena Rosenthal is not the only legal battle being fought by Stephen Barrett and Quackwatch. In July of this year, New Century Press filed a \$10 million cross-complaint against Barrett, Quack-watch.com, the National Council Against Health Fraud, Inc., et al., alleging fraudulent business practices; malicious prosecution; extortion; terrorist threats; website tampering; harassment; intimidation; campaign to discredit reputation; subornation of perjury, and a slew of other offenses.

In June, Barrett asked the court of Lehigh County, Pennsylvania to dismiss a defamation of character suit he brought against Dr. Joseph Mercola, because Mercola (like Ilena Rosenthal) had re-posted comments made by Tim Bolen on the internet.

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