Another Lawsuit To Suppress Legitimate Criticism – This Time SBM

Steven Novella on July 23, 2014

On September 30, the U.S. District Court for the Southern District of Florida granted Dr. Novella's motion for summary judgment, ending the lawsuit against him by Dr. Edward Tobinick and two of his companies. Earlier in the case, all of the other defendants had filed successful motions to dismiss or for summary judgment and were no longer parties to the case.

That he won the remaining issues in the case on a motion for summary judgment is highly significant. Summary judgment motions are granted sparingly by the courts. In granting his motion, the judge was required by law to view the facts in the light most favorable to Tobinick and the other plaintiffs and draw all reasonable inferences from those facts in their favor. Dr. Novella had to convince the judge that there was no dispute as to any of the relevant facts and that those undisputed facts entitled him to prevail. Because of this ruling, the case will not go to trial.

For a quick background, Tobinick filed a suit against Dr. Novella, the Society for Science-Based Medicine (SFSBM), Yale University and SGU Productions. The subject of his suit was an article Dr. Novella wrote here critical of his claims that perispinal etanercept can treat a variety of neurological conditions, as well as a second article, posted after suit was filed.

There were three plaintiffs in the case: Tobinick himself, his California corporation, and his Florida LLC. Last year Dr. Novella filed a motion to strike some of the claims brought by the California corporation under that state's anti-SLAPP statute. In June, the judge ruled in his favor. He was awarded attorneys fees and costs as well. The judge concluded:

> For the foregoing reasons, it is hereby ORDERED AND ADJUDGED that Steven Novella's Special Motion to Strike (Anti-SLAPP Motion) [DE 93] is GRANTED. Tobinick M.D.'s claims for unfair competition under 28 U.S.C. § 1338(b) (Count II), trade libel (Count III), and libel per se (Count IV) are STRICKEN from the Amended Complaint.

A post on the Anti-SLAPP ruling is here, and here is a subsequent update. In the latter, it is mentioned that, in November, 2014, the Medical Board of California had filed a complaint against Tobinick for false and/or misleading advertising, deceptive advertising, unprofessional conduct, and gross negligence. That complaint has been dismissed.

Following the court's Anti-SLAPP decision, Tobinick and the Florida LLC voluntarily dismissed their libel claims because of the likelihood that they would fail. All that remained in the case, therefore, were two counts: Count I for violation of the Lanham Act, and Count II for unfair competition.

The plaintiffs claimed that Dr. Novella's posts were "false advertising" under the Lanham Act. They argued that the posts constituted "personal advertising or promotion" misrepresenting Tobinick's treatments. To win, the plaintiffs had to show that what was said fell within the definition of "commercial speech." They tried to get the judge to buy their argument that, because SBM and SGU have advertising, memberships, and sell merchandise, the speech contained in those outlets is commercial speech.

Or, as the judge herself described it, the plaintiffs were claiming that Dr. Novella, in cahoots with others, had concocted:

> an interrelated scheme to 'funnel money' to Defendant Novella personally, and that the Articles [that is, the posts] are commercial speech in furtherance of this scheme.

This has always been, in our opinion, an absurd legal argument. If this were true, then every article appearing in every newspaper that has advertising is commercial speech, which means the First Amendment would be effectively gutted.

Significantly, the judge specifically rejected this view of the evidence. She found that

> [b]oth Articles clearly state their intent to raise public awareness about issues pertaining to Plaintiffs' treatments.

Later in the Order, she repeated this point:

> . . . the content of the Articles is directed toward raising public awareness of scientific issues, rather than promoting an economic interest.

Our position has always been that Science-Based Medicine represents science communication (technically journalism), is largely based on professional opinions and analysis, and the purpose of which is public education and consumer protection.

The judge had already spelled out, in her earlier decision granting SfSBM's motion for summary judgment, established precedent determining exactly what constitutes commercial speech. Dr. Novella's blog posts did not meet any of these criteria. The judge repeated this interpretation of the law when she denied the plaintiffs' motion for injunctive relief. In that decision she wrote:

> The Court concludes that Plaintiffs have failed to demonstrate that there is a substantial likelihood that they will be able to show that the speech at issue in the two articles is commercial in nature. Accordingly, Plaintiffs have failed to demonstrate a substantial likelihood of prevailing on the merits.

Despite having twice been denied relief based on the extraordinary theory that the articles constituted commercial speech, Tobinick continued to make this argument. In fact, rather than accept the inevitable, he became creative in trying to expand the case.

In August, he filed a motion for permission to amend the complaint with yet another theory, that Dr. Novella violated the Florida Deceptive and Unfair Trade Practices Act by publishing an unfair review of Tobinick's practice. He essentially compares SBM to the Better Business Bureau, and, repackaging his original claims, argues that the review was unfair and not objective. The judge denied his motion.

Nevertheless, he tried to amend the complaint yet again, this time with a bizarre conspiracy theory involving Dr. Novella and two other neurologists. Tobinick argued that Dr. Novella was the ringleader at the center of a web of conspiracy against him. He argued that the three neurologists were against him because they "hate innovation," a transparently absurd claim. The judge denied leave to amend this time as well.

Having ruled against the plaintiffs on the Lanham Act, the judge was able to quickly dispose of unfair competition. Because the state law unfair competition claim, like the Lanham Act claim, was based on a theory of false advertising, that claim failed as well.

As all the plaintiffs' claims had been resolved by the court in favor of the defendants, the judge directed the Clerk of Court to close the case.

The SBM Editorial Board

References:

Order granting the Society for Science Based Medicine summary judgement.

Order denying Tobinick's motion for injunctive relief.

Order granting Dr. Novella his motion to strike (Anti-SLAPP).

Order granting Dr. Novella his motion for summary judgement.

Other public documents on the case.

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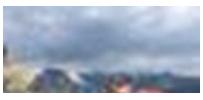

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