

Libel plaintiff must show actual damage



Broadcast fax advertising restricted

By JEAN MANEKE
MPA Legal Consultant



(Jean Maneke, MPA's Legal Hotline attorney, can be reached at (816) 753-9000; jmaneke@manekelaw.com.)

This month we had two court decisions rendered which are of interest to those in media. One, from the Missouri Supreme Court, adds to our information on the standards of proof required in a defamation case. The other, from the 8th Circuit Court of Appeals, perhaps is not as directly related to what you do every day, but it is interesting in that the court tackled the issue of whether it is a violation of freedom of speech to prohibit companies from sending mass fax transmissions.

The Missouri Supreme Court case involving defamation is the long-pending matter involving the missing-child poster that was displayed in a Wal-Mart store. The matter arose in the context of a child custody battle between father and mother.

While the matter was being litigated, a poster claiming the child was missing and last seen with the paternal grandmother was posted in a display case in the Wal-Mart store in Lee's Summit. At the grandmother's trial on the defamation claim, a verdict was entered against Wal-Mart in excess of \$400,000, with the bulk of the judgment for punitive damages.

The Supreme Court focused its attention on the jury verdict director and the sufficiency of proof of actual damages. The verdict director issue related to the difference between proof of a reputation being damaged versus the proof of damage to a client.

The model instruction requires proof of reputation being damaged, but this is not the instruction that was given to the jury in this case.

The court said that because the issue of reputational harm was not addressed by the jury, the matter must be reversed. In its opinion, the court quoted numerous authorities on the importance that harm to reputation plays in this cause of action. "Harm to reputation or good name is the essence of libel and slander, so the plaintiff can have no recovery in libel or slander for emotional distress or economic loss unless her reputation is implicated," the court said, quoting Dan Dobbs, author of *The Law of Torts*.

Secondly, the court addressed the issue of damages suffered by the plaintiff. It reiterated the court's long-standing position that in Missouri, a defamation plaintiff must prove actual damages. And it found the plaintiff's evidence lacking. She did not name anyone who held her in lower regard. She had minimal evidence of physical or emotional injury.

In short, her evidence fell short. In fact, the court opined that it seemed from the record unlikely that the plaintiff could prove any of these requirements. Still, the court acknowledged that its obligation in such circumstances is to send the case back to the lower court to give her the chance to prove her case.

Of special note is a footnote in this case, in which the court pointed out that Missouri has left an important unresolved issue in libel cases. Is truth an affirmative defense to be proved by the defendant or is falsity an element of a cause of action to be proved by the plaintiff? This is a constitutional issue, the court held, and it declined to resolve that issue in this case.

The fax case was brought by Jay Nix on, Attorney General for the State of Missouri, against American Blast Fax, Inc., a Texas corporation, and Fax.com, Inc., alleging these two companies violated a provision in the federal Telephone Consumer Protection Act (TCPA) of 1991 when they transmitted unsolicited advertisements to facsimile machines in the state.

The suit followed numerous consumer complaints made to Nixon's office regarding the actions of these two companies. The fax companies moved to dismiss the complaints, arguing that the federal law was an unconstitutional restriction on their freedom of speech.

Of course, the evidence in the lower court focused on the cost shifting to the recipients of the actual cost of this advertising, measured in increased ink, paper, wear on their fax machines and a tie-up of their lines. Defendants argued that fax advertising benefits both advertisers and consumers.

The lower court applied the four-part commercial speech test. Was the speech unlawful or misleading? Was there a substantial governmental interest in restricting this kind of speech? Did the federal law (TCPA) materially advance that interest? Are the law's restrictions more extensive than necessary?

The lower court found that the tests were not met and that the federal law (TCPA) violated the First Amendment, dismissing Nixon's suit. He then appealed (along with the United States, which by this time had entered an appearance in the case.)

On appeal, the court began by noting that the legislative record and the evidence produced in the lower court demonstrated the potential harm of unrestrained fax advertising. One statistic cited by the court was that unsolicited fax advertisements cost the recipient more than \$100/year in direct costs. Therefore, the court concluded that there is a substantial interest in restricting unsolicited fax advertisements.

In conclusion, the court felt that the evidence supported that the law's prohibition on unsolicited faxes advanced the governmental interest and was not overly broad in its prohibitions. It still allowed advertisers to obtain consent for their faxes.

It is not known if Blast Fax will appeal this ruling or ask for a re-hearing.