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Court Kills Web Defamation Verdict

A Company's Case Against Two Ex-Workers Moved Too Soon — High Court Tosses Online Defamation Verdict

By Craig Anderson
Daily Journal Staff Writer

SAN FRANCISCO — The California Supreme Court on Thursday tossed out a $775,000 jury verdict for defamation against two corporate gadflies who published thousands of Internet message board postings because their case went to trial before a critical appeal was decided.

A Santa Clara County jury in 2001 found Michelangelo Delfino and Mary Day, two former Varian Medical Systems employees, liable for damages because some of their messages about the company and its executives crossed the line into defamation.

But the court allowed the case to go to trial before appellate courts could rule on Delfino's and Day's motion, filed in 2000, to dismiss Varian's lawsuit against them as a strategic lawsuit against public participation. The trial judge rejected their anti-SLAPP motion as untimely, but Delfino and Day appealed.

In a 6-1 ruling, the Supreme Court said the lower courts were wrong to allow the trial to proceed before Delfino's and Day's anti-SLAPP appeals were exhausted. *Varian Medical Systems Inc. v. Delfino*, 2005 DJDAR 2531.

Justice Janice Rogers Brown, writing for the majority, cited the Code of Civil Procedure Section 425.16, which lets private citizens or public interest groups move to kill litigation if they can show the plaintiff's intent is to force defendants to spend huge sums of money fighting bogus claims.

The Legislature, in passing the law in 1999, "clearly intended that the perfecting of an appeal from the denial of an anti-SLAPP motion stay further trial court proceedings on the merits," Brown wrote.

"In this case, defendants' anti-SLAPP motions encompassed all of plaintiffs' causes of action," Brown noted. "As such, all of the matters on trial were embraced in and affected by defendants' appeal from the denial of that motion, and the trial court lacked subject matter jurisdiction over these matters."

The Varian case started as a test of how far free speech extends on the Internet. By the time it got to the Supreme Court, it had morphed into a test of the state's anti-SLAPP law.

Attorney General Bill Lockyer, a coalition of free speech advocates including the American Civil Liberties Union, and the California Newspaper Publishers Association filed amicus briefs supporting Delfino and Day.

"It seems to me that the court reached the correct results on the merits, and followed the plain language of what the Legislature has done," said Karl Olson, a partner with Levy, Ram & Olson in San Francisco who represents the newspaper association.

Jeremy Rosen, an attorney with Horvitz & Levy in Encino who argued the case before the Supreme Court, was pleased with the ruling not only on his clients' behalf, but also because of its implications.

"The broader significance is that it reinforces the anti-SLAPP statute as a powerful tool to protect free speech in the state," Rosen said. "If you don't [stay trial proceedings] when you appeal, it defeats the purpose of the statute."

Spencer Sias, Varian's vice president for investor relations and corporate communications, said company officials were "disappointed" with the ruling.

"We are reviewing our options," Sias added in a prepared statement. "This ruling is strictly a procedural technicality and has nothing to do with the facts or merits of the case. We continues to contend that Mr. Delfino and Ms. Day personally defamed and harassed our employees in the course of more than 13,000 postings on the Internet.

Lynne Hermle, a partner with Orrick Herrington & Sutcliffe in Menlo Park, who represented Varian, argued in court papers and to the justices that defendants could file frivolous appeals simply as a stalling tactic.

"As a matter of public policy, it would be horrendous for the defendants to halt the wheels of justice," she said in an interview, noting it can take more than a year for appellate courts to resolve an anti-SLAPP motion.

In her opinion, Brown said she shared Hermle's concern.

"In light of our holding today, some anti-SLAPP appeals will undoubtedly delay litigation even though the appeal is frivolous or insubstantial," she wrote. "Such an assessment is, however, a question for the Legislature, and the Legislature has answered it."

Brown urged courts to dismiss frivolous appeals as soon as possible and wrote that trial courts "should not hesitate to award attorneys' fees and costs to prevailing plaintiffs" if the motion is solely intended to delay matters.

Chief Justice Ronald George agreed with the majority's conclusion that the lower court rulings were wrong. But in a concurring and dissenting opinion, he wrote that the error was harmless.

"In the present case, the error clearly was not prejudicial, and I believe it defies both common sense and the logic and policy of our state constitutional harmless error provision to reverse the judgment and require a new trial under these circumstances," George wrote.

The court remanded the case to the trial judge. In effect, Rosen said, everything will go back to where it was five years ago.

Varian, which originally filed its lawsuit against Delfino and Day in February 1999, could choose to drop the case. Or the company could file an amended complaint and wait until the anti-SLAPP appeal is resolved before proceeding to trial.

Delfino and Day said in telephone interviews that they both expect another trial and are eager to litigate their own cross-complaint against Varian — which was dismissed long ago. The Los Altos pair said they have no money and, for now, will represent themselves pro per.

"If they want to go to trial, we're ready," Day said.

And they will continue posting messages about Varian on the Internet. Their Web site motto, after all, is: "We'll post until we're dead."