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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

LAWRENCE E. TAYLOR et al., Plaintiffs and Respondents, v. EDWARD KUWATCH, Defendant and Appellant.	B161313 (Los Angeles County Super. Ct. No. BC252859)

APPEAL from a judgment of the Superior Court of Los Angeles County, David A. Workman, Judge. Affirmed in part and reversed in part with directions.

Horvitz and Levy, Peter Abrahams, Jon B. Eisenberg, Jeremy B. Rosen; Parker • Stansbury, Douglas Mori and Michael E. McCabe for Defendant and Appellant.

Morris, Polich & Purdy, Gerald P. Schneeweis, Richard H. Nakamura, Jr., and Lee I. Petersil for Plaintiffs and Respondents.

INTRODUCTION

Defendant Edward Kuwatch appeals from a judgment entered after a jury found he had defamed plaintiffs Lawrence E. Taylor and Law Offices of Lawrence E. Taylor and had engaged in unfair business practices by utilizing false, misleading or deceptive advertising. Defendant raises a variety of issues concerning the propriety of the judgment but we address only two: whether the statute of limitations bars plaintiffs' defamation claims, which plaintiffs are estopped from denying, and whether defendant's conduct constituted an actionable unfair business practice.

We hold that inasmuch as the single publication rule applies to Internet publications, the statute of limitations does bar plaintiffs' defamation claims. We further hold that the doctrine of judicial estoppel precludes plaintiffs from arguing otherwise. Finally, we hold that certain of defendant's statements on his website were false, misleading and deceptive, and did constitute an actionable unfair business practice. We consequently reverse the judgment in part.

FACTS[1]

Plaintiff Lawrence E. Taylor has a distinguished legal background that includes service with the county counsel, the public defender and the district attorney, as well as a career teaching and writing. Defendant's legal pedigree is considerably less illustrious. Each has a reputation as a leading expert in the field of drunk driving (DUI) defense.

Defendant maintains an Internet website that includes a section entitled "15 Tips: Secrets About DUI Attorney Marketing." Defendant made certain representations on his website that are false, misleading or deceptive.[2] Plaintiffs' business suffered.

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[1] We set forth the facts as briefly as possible, viewing the evidence in the light most favorable to that portion of the judgment which we affirm. (*Young v. Gannon* (2002) 97 Cal.App.4th 209, 225.)

DISCUSSION

Statute of Limitations

Uniform Single Publication Act

The uniform single publication rule is codified in Civil Code section 3425.3. It provides that "[n]o person shall have more than one cause of action for damages for libel or slander . . . founded upon any single publication or exhibition or utterance, such as one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture."

As noted recently in *Long v. Walt Disney Co*. (2004) 116 Cal.App.4th 868, "[b]oth in language and intent, the [Uniform Single Publication Act] is a broad enactment, applying to 'libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance.' [Citation.]" (At p. 871.) In view of its breadth, the Act works "to protect defamation-like claims, implicating First Amendment values and arising from mass communications, from ungovernable piecemeal liability and potentially endless tolling of the statute of limitations." (*Id*. at p. 874.) The uniform single publication rule therefore applies to publication on the Internet. (*Id*. at pp. 873-874; accord, *Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392.)

In general, publication occurs "on the 'first general distribution of the publication to the public.' [Citations.] . . . [Consequently,] the cause of action accrues and the period of limitations commences, *regardless* of when the plaintiff secured a copy or became aware of the publication. [Citations.]" (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1245-1246.) Inasmuch as defendant did not himself hinder plaintiffs' discovery of the Internet publications, the general rule applies in this case. (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 931-932.) Plaintiffs wisely do not dispute these principles.

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[2] We shall set forth at length the facts concerning these representations when they become pertinent to the discussion of the issues.

Applicable Limitations Period

Defamation is subject to a one-year limitations period. (Code Civ. Proc., § 340, subd. (c).) Again, plaintiffs do not dispute this. Plaintiffs argue, instead, that "[b]eginning in or about November 1999, Taylor had concerns regarding non-defamatory but false, deceptive and misleading advertising statements made by [defendant] on his website." In plaintiffs' view, defendant's "defamatory conduct began in August 2000, when he decided to 'up the ante' against Taylor."

Plaintiffs mischaracterize the record. In both their original and first amended complaints, plaintiffs alleged that the defamation began in "late 1999." Plaintiffs repeated these allegations in their trial brief.

All defendant did on August 18, 2000 was "place[] a link to my '15 tips' on every page of my website. On most pages the link appears in three different locations. As a result that page is now my third most popular one for visitors to my website (it had ranked #30 or so) . . . ." From defendant's August 18, 2000 statements, it is clear that the "15 tips" section, which allegedly contained the defamatory statements, existed well before that date.

When defendant objected at trial to proposed testimony concerning defamatory statements made before June 2000, plaintiffs agreed that the alleged defamation began in 1999. Plaintiffs argued that the limitations period was longer than one year. Taking note of plaintiffs' trade libel claim, the trial court agreed that the applicable period was two years.[3] On that basis, the trial court overruled defendant's objections and permitted testimony that plaintiffs lost more than $750,000 in income from December 1999 through October 2001 due to defendant's defamatory statements. Plaintiffs' expert assumed the defamation began in 1999 based on information provided to him by plaintiffs' attorney.

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[3] Defendant received a nonsuit on plaintiffs' trade libel claim. Inasmuch as a limitations period applies to a specific cause of action (3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 423, p. 532; cf. *Noble v. Superior Court* (1987) 191 Cal.App.3d 1189, 1192-1193) and plaintiffs did not prevail on their trade libel cause of action, they may not now rely on the existence of a two-year limitations period.

Judicial Estoppel

In a legal proceeding, a party may not take a position that is contrary to that taken previously in the same proceeding. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.) To establish grounds for judicial estoppel, the opposing party must establish that "(1) the same party has taken two positions; (2) the positions were taken in judicial . . . proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true; (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud or mistake." (*Id*. at p. 183.)

As discussed above, plaintiffs maintained throughout trial that the defamatory statements had been on defendant's website and had damaged them since 1999 but now claim the actionable statements were not present until August 2000. They have asserted both positions in judicial proceedings. Plaintiffs were successful in convincing the trial court that they could pursue defamation claims dating from 1999 and in convincing the jury that they should be awarded damages incurred from that date. Had defendant challenged the sufficiency of the evidence to support the damages award, rather than raising the statute of limitations bar, plaintiffs doubtless would have reasserted their original position and relied on their expert's testimony to sustain the award. The two positions therefore are irreconcilable. Finally, there is no evidence that plaintiffs acted from ignorance or mistake and no evidence that they asserted their original position due to the fraud of another.

In short, all the requirements for the invocation of judicial estoppel are present in this case. Plaintiffs accordingly are estopped from asserting that defendant first made his defamatory statements after 1999.

Inasmuch as plaintiffs filed their initial complaint more than one year after 1999, the limitations period bars their defamation claims. We therefore must reverse the defamation judgment, as well as its accompanying award of damages and injunctive relief.

Unfair Business Practices

Business and Professions Code section 17200 prohibits "unlawful, unfair or fraudulent business act[s] or practice[s]." The purpose of section 17200 is to protect the public from deceptive or other unfair acts. (*Motors, Inc. v. Times Mirror Co.* (1980) 102 Cal.App.3d 735, 740, fn. 2; *Plotkin v. Tanner's Vacuums* (1975) 53 Cal.App.3d 454, 459.) If a practice constitutes unfair competition, it may be enjoined and damages are available to those who have been damaged thereby. (Bus. & Prof. Code, § 17203.) False or misleading commercial speech may constitute an unfair or fraudulent business practice and enjoys no First Amendment protection. (*Kasky v. Nike, Inc*. (2002) 27 Cal.4th 939, 953.)

Statutory Interpretation

Plaintiffs relied on defendant's violation of Business and Professions Code section 6158, which is one of several provisions regulating attorney advertising, to establish that defendant engaged in unfair business practices. Section 6158 provides that "[i]n advertising by electronic media, *to comply with Sections 61571.1 and 6157.2*, the message as a whole may not be false, misleading, or deceptive, and the message as a whole must be factually substantiated. The message means the effect in combination of the spoken word, sound, background, action, symbols, visual image, or any other technique employed to create the message. Factually substantiated means capable of verification by a credible source." (Italics added.)

Invoking the doctrine of *expressio unius est exclusio alterius*, "'the expression of certain things in a statute necessarily involves the exclusion of other things not expressed'" (*Dyna-Med, Inc. v. Fair Employment & Housing Com*. (1987) 43 Cal.3d 1379, 1391, fn. 13), defendant argues that the prohibition against including in attorney advertising certain items enumerated in Business and Professions Code section 6157.2 and the enumeration of rebuttable presumptions of false, misleading or deceptive statements in Business and Professions Code section 6158.1 means that he "cannot have

violated section 6158 if his conduct did not invoke the statutory proscriptions or rebuttable presumption[s]." His reliance is misplaced.

In interpreting a statute, we look first to its words. If the meaning is clear and unambiguous, we need not and do not "'go beyond that pure expression of legislative intent.'" (*White v. Ultramar, Inc*. (1999) 21 Cal.4th 563, 572.)

The essence of Business and Professions Code section 6158 is that one cannot comply with the dictates of sections 6157.1 and 6157.2 unless the "message as a whole" *also* is not "false, misleading, or deceptive." (§ 6158.) Clearly, then, it is not enough to avoid the "[p]rohibited contents or references" enumerated in section 6157.2, subdivisions (a) through (d). Even if one *does* avoid them, one's "message as a whole" still may be "false, misleading, or deceptive" (§ 6158). Neither is it enough to avoid making "false, misleading, or deceptive *statement*[*s*]" or to avoid *omitting* "to state any fact necessary to make the statements made, in light of circumstances under which they are made, not false, misleading, or deceptive." (§ 6157.1.) Again, even if one *does* avoid these pitfalls, one's "message as a whole" still may be "false, misleading, or deceptive" (§ 6158).

In summary, then, one may avoid all of the prohibitions and pitfalls identified in Business and Professions Code sections 6157.2 and 6157.1, yet be guilty of false, misleading or deceptive advertising. The enumeration of prohibitions in section 6157.2 therefore provides no basis for invoking the doctrine of *expressio unius est exclusio alterius*.

With respect to Business and Professions Code section 6158.1, the creation of rebuttable presumptions does nothing other than shift the burden of proof. A plaintiff ordinarily would bear the burden of proving not only that a defendant made a particular statement but also that it was false, misleading or deceptive. When a plaintiff alleges that a defendant has made one or more of the claims subject to a rebuttable presumption, the plaintiff need only prove that the defendant made the claim or claims. The burden then shifts to the defendant to prove that the claim is *not* false, misleading or deceptive.

(§ 6158.1.) The creation of burden-shifting rebuttable presumptions does not evince an intent to limit false advertising claims to those enumerated in the statute.

In short, the meaning of Business and Professions Code section 6158 is clear. As a consequence, defendant *can* have violated its provisions even though his conduct did not involve the statutory prohibitions and rebuttable presumptions.

Propriety of Verdict

Plaintiffs advanced three theories of false or misleading advertising: (1) defendant falsely advertises that he is the "top DUI lawyer in California"; (2) he makes untrue statements about his competition; and (3) he leaves the misleading impression that he has law offices all over the state when he only has of-counsel arrangements and a referral service. Defendant characterizes these three theories as "meritless." He is correct about the second theory.

The only untrue statements about defendant's competition identifiable in defendant's website advertising are statements referring to plaintiffs that are alleged to be defamatory. Plaintiffs' defamation claims are barred by the statute of limitations, as discussed earlier. They cannot "circumvent the statutory limitation by proceeding on a theory other than defamation." (*Fellows v. National Enquirer, Inc*. (1986) 42 Cal.3d 234, 240.)

Plaintiffs' first and third theories of false advertising are valid, however. The first theory ordinarily would be nothing more than commonplace advertising hyperbole. In this instance, in contrast, it is something else.

In one sense, the statement that defendant is the "top DUI lawyer in California" is true: he is a lawyer in California and he is one of the foremost experts in the field of DUI defense. In another sense, however, the statement is misleading and deceptive. When a member of the general public reads such a statement, he or she assumes it refers to a lawyer who handles clients and tries cases. Defendant does not accept clients and has not done so since 1993. Instead, he interviews prospective clients over the telephone after they complete an Internet form, after which he refers the clients to other attorneys at one

of the eight firms with which he has of-counsel relationships. In exchange, defendant receives a referral fee.

Defendant discloses his of-counsel relationship with *individual* attorneys in his website advertising but does not explain the meaning of the term "of counsel." Other statements in the advertising create the false impression that the lawyers with whom he is "of counsel" are part of his law offices and practice law with him or under his supervision. For instance, defendant refers to "*attorneys* affiliated with Kuwatch Law Offices," when, in fact, he is the *only* attorney affiliated with that law firm. He also refers repeatedly to "Kuwatch Law Offices attorneys." Defendant additionally misleads and deceives by creating the false impression that he has law offices all over the state, noting that "[w]ith one exception, all the Kuwatch Law Offices attorneys only handle cases locally. The exception is an attorney who flies all over Northern California, where he is well known in most courts."

Defendant argues that his of-counsel relationships are not improper. That is not the point. Defendant misleads and deceives prospective clients with respect to the nature of his law practice and his involvement in cases. Inasmuch as the evidence supports that conclusion, the unfair business practices verdict was appropriate.

The judgment is reversed insofar as it finds that defendant defamed plaintiffs and awards damages and injunctive relief for such defamation. The judgment is affirmed insofar as it finds that defendant committed unfair business practices.[4] The trial court is directed to fashion appropriate injunctive relief for the unfair business practices cause of action. Plaintiffs shall recover their costs on appeal.

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SPENCER, P.J.

We concur:

ORTEGA, J.

VOGEL (MIRIAM A.), J.

[4] The special verdict did not request the jury to determine whether plaintiffs suffered damages due to defendant's unfair business practices and the jury made no such determination.