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Appeals Court Tosses Out Westchester Orthodontist's Defamation Suit Over a Bad Google Review

The Bronx trial-level court “should have considered the overall context in which the communication was made, an anonymous online review of plaintiff’s services,” wrote the Appellate Division, First Department court.

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Civil Appeals



Jason Grant

Staff reporter

In a reversal of the Bronx lower court, a state appeals court has thrown out an orthodontist’s defamation suit over a negative Google review, finding it wasn’t the court’s “province to sift through the communication for the purpose of isolating and identifying assertions of fact.”

“Contrary to Supreme Court’s holding, we find that, although defendants’ Google review contains elements of both fact and opinion, it nevertheless is not actionable,” the Appellate Division, First Department court said in an opinion reversing the denial of a motion to dismiss.

Bronx Supreme Court Justice Howard Sherman “should have considered the overall context in which the communication was made, an anonymous online review of plaintiff’s services,” a unanimous panel of [the appellate court further wrote](#).

Quoting the First Department’s 1999 holding in *Dillon v. City of New York*, the panel added that “a reasonable reader of defendants’ Google review would understand it to be pure opinion based on the context in which it was posted and its arguably ‘[l]oose, figurative, or hyperbolic’ tone.”

Justices Judith Gische, Cynthia Kern, Ellen Gesmer, Saliann Scarpulla and Julio Rodriguez made up the panel.

Salvatore DeRicco, who is a doctor of dental surgery, alleged in a 2017-filed suit that the parents of a former minor patient had posted the following review of him and his practice after their son had been treated at his Westchester County-based professional corporation:

"I was told there was no charges on my son's checkups which he insisted on having monthly but then got a 75 dollar fee every time. He says he is open at 9 but I always end up sitting in the parking lot waiting for him to arrive. He did a horrible job on my son's braces and were crooked and misplaced in a way were my son could literally not chew. all of these things forced me to change orthodontist. bad doctor"

The orthodontist and his practice lodged five causes of action that included the torts of libel per se, disparagement and injurious falsehood against the parents, Randi Maidman and Howard Ravikoff, according to the complaint.

In June 2020, Sherman denied the defendants' motion to dismiss the lawsuit.

"Taken as a whole, and from the standpoint of a reasonable consumer of on-line reviews, it is clear that the anonymous statement attributed to defendants [parents] is not opinion, but states, in non-hyperbolic terms, certain alleged facts which can be proven or disproved," Sherman wrote. "No allusion is made to undisclosed facts."

Moreover, Sherman said, "although inartfully expressed, the statements made [by the defendants] have none of the elements of rhetorical hyperbole, and are in their fashion quite concise and definite as to what Dr. DeRicco's shortcomings and inabilities were claimed to be, and those are directly related to the question of whether any reasonable person would select him to do their orthodontia."

The parents appealed Sherman's opinion to the extent it denied dismissal of DeRicco's libel per se, disparagement and injurious falsehood claims.

In reversing Sherman, the appellate panel said that the parents' "Google review was posted anonymously online and, as we have recognized, '[R]eaders give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts,'" quoting the First Department's 2017 *Torati v. Hodak* decision.

Joshua Horowitz of Horowitz Tech Law in Garden City represented in the appeal the defendant parents and their son who'd been treated at the practice, according to the First Department.

"We are pleased with the First Department's decision, which correctly recognizes long-standing First Amendment protections for Internet speech by reversing the lower court's decision and dismissing the Complaint in its entirety," Horowitz said by email.

DeRicco's counsel at the Pascale Law Firm could not be reached for comment.

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