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Legal Alert

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Trade Libel

QUESTION: WHO CARES IF I FALSELY DISPARAGE SOMEBODY'S BUSINESS?

ANSWER: FALSE STATEMENTS ABOUT PEOPLE, THEIR PROPERTY, OR BUSINESS CAN RESULT IN LAWSUITS FOR TRADE LIBEL.

What happens if you sabotage a doctor's application for surgical privileges by falsely saying that the doctor's first six patients died? Or what happens if you publish an erroneous alert to customers disparaging the quality of your competitor's products? Or say you make false statements to the U.S. Patent and Trademark Office which prevent your competitor from obtaining a trademark? How about if you screw up somebody's land sale by misleading people about title to the property or the zoning of the property?

All of the foregoing are actual, factual allegations from recent cases upholding the right to sue for trade libel!

So what is trade libel? Well, trade libel is also known as "injurious falsehood," "disparagement of property," and "commercial disparagement." If you communicate false statements to third parties about a person's business or property, you can be sued for trade libel.

Take the case of a board-certified surgeon who was denied vascular surgical privileges at a hospital in the case of *Patel v. Soriano*, 848 A.2d 803 (N.J.Super. 2004). Dr. Patel wanted vascular surgical privileges at Irvington General Hospital, but was blocked by Dr. Soriano, the Chief of Vascular Surgery at the hospital. Dr. Patel said that Dr. Soriano sabotaged his application by communicating false statements disparaging Dr. Patel's abilities and medical record. Dr. Patel testified that Dr. Soriano made the false statements to other members of the hospital staff in order to continue Dr. Soriano's monopolistic control over the hospital's vascular surgery department. The trial judge awarded damages of \$1,195,377.61 against the hospital and \$1,184,316.25 against Dr. Soriano.

Dr. Patel sued for defamation, breach of contract, tortious interference with economic advantage, and violation of the New Jersey Antitrust Act. The appellate court threw out the restraint of trade and monopolization theories. The appellate court affirmed the award for tortious interference with prospective contractual relationships. The defamation claim was barred by the statute of limitations, but the court thought that trade libel was the appropriate theory anyway. So Dr. Patel was allowed to go back to the trial court to establish his damages for lost income resulting from tortious interference with business relationships and trade libel. The court even said that he could try to prove punitive damages.

The court said that trade libel cases require proof of publication of information derogatory to property or business and designed to prevent others from dealing with someone. The communication has to be made to a third person and must be a material influence in causing others not to deal with the plaintiff. Unlike defamation where, in a slander per se case, the plaintiff does not need to show damages, proof of damages is essential to a trade libel case.

A trade libel or disparagement action requires proof of the following:

1. publication of information derogatory to the quality of someone's business;
2. the derogatory information was calculated to prevent others from dealing with someone or was intended to interfere with business relationships with others;
3. the falsehood must be communicated to a third person;
4. the false statement must be a substantial cause for others not to deal with the claimant;
5. the statement was false;
6. the defendant must have known the statement was false or recklessly didn't care whether it was false; and
7. the claimant must prove loss of present or prospective economic gain.

Of course, you want people to be able to freely exchange important business information, including information necessary for such important decisions as whether or not someone is allowed to operate on patients. "A communication made bona fide upon any subject matter in which the party communicating has an interest or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty." So the false communication is privileged or protected if it is appropriate to the occasion for which it is published. The false statement must be legitimate to the interest to be protected or promoted.

But someone "abuses the privilege if he knows the statement is false or acts in reckless disregard of its truth or falsity, if publication serves a purpose contrary to the interest sought to be promoted by the privilege, or if the statement is excessively published." In Dr. Soriano's case, the trial judge said that Dr. Soriano blew the qualified privilege when he made disparaging statements solely to keep his competitor out of the hospital.

So remember what your mother told you. Tell the truth. If you don't know, keep your mouth shut. And don't go poking your nose into other people's business!

If you or your business colleagues need guidance upon appropriate communications in business, please call me.