

BUSINESS LAW NEWSLETTER

BUSINESS TORTS

By James V. Irving, Esq.

A Circuit Court Judge for the City of Richmond has awarded just under One Million dollars in a business tort case. Judge Melvin R. Hughes handed down his ruling on February 6, 2003. The case is Advante Designs v. McGinnis.

Prior to March, 2001, Christopher McGinnis was employed by Advante Designs and its subsidiary Repro 1. Both Advante and Repro 1 were engaged in print production. McGinnis managed Repro 1.

In 1999, McGinnis was approached by a Repro 1 customer called Creative Direct. Creative asked McGinnis to perform significant printing services, but instead of serving these needs through Repro 1, McGinnis allegedly referred the contract to his wife, a graphic designer. He then, according to the Court, permitted his wife to perform the requested services on Repro 1's equipment.

McGinnis testified that beginning in August, 2000, his employer advised him to discontinue Repro 1's relationship with Creative Direct because of its history of slow payment. Thereafter, and without the knowledge or consent of his employer, McGinnis serviced Creative Direct's printing needs - again using Repro 1's facilities - for his own benefit, under the auspices of a business he created called McGinnis Technologies. McGinnis took in approximately \$350,000 for these services, a substantial portion of which was allegedly repaid to the Vice President of Creative Direct as "commissions."

In March of 2001, McGinnis and several other Repro 1 employees resigned. These employees soon went to work for McGinnis' new printing company, Digital Inc.

When Repro 1 learned of this pattern of conduct, it sued McGinnis, his wife, and his companies under theories of breach of fiduciary duty, tortious interference with contract, and fraud. Judge Hughes ruled for the Plaintiff on the first 2 counts, but did not find sufficient evidence to support the fraud count.

After noting that his fiduciary duties prevented McGinnis from acquiring an interest in contracts to the detriment of his employer, the court ruled that even if it were to believe, as McGinnis contended, that Repro 1's managers had told him not to accept further work from Creative Direct, his fiduciary duty barred him from accepting the work himself.

Likewise, the Court had no difficulty in finding that McGinnis had knowingly and intentionally interfered with Repro 1's business. Since the business relationship was ongoing, Repro 1 did not need to show malice on the part of McGinnis to sustain the claim.

Fraud requires proof by clear and convincing evidence. The Court did not find that McGinnis had misrepresented his communications with Creative Direct with the intent to mislead.

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Subchapter-S status is a tax categorization established for certain corporations by IRS Code §1362. The practical distinction between an S corporation and a C corporation is the avoidance of double taxation. In both cases, corporate shareholders pay taxes on their income from the corporation, however the C corporation must also pay direct taxes on the profits it generates.

The Internal Revenue Code imposes several restrictions on who can be a shareholder of an S corporation. Most of these are familiar: an S corporation may have no more than 75 shareholders, and non-resident aliens, corporations and other entities may not be shareholders. Additionally, the S corporation can have only one class of shareholders, except that two classes are permitted if the only distinction is in voting rights.

Most practitioners also are aware that “some trusts” may own shares, but the distinction is not always fully understood. While other trust vehicles, including ESOPS may also comply, requirements of a Qualified Subchapter S Trust (a “QSST”) include the following:

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DEFAMATION

By James V. Irving, Esq.

On January 10, 2003, the Supreme Court of Virginia reversed the ruling of a Newport News Circuit Court judge who had dismissed a claim of defamation made by two doctors against their former employer.

Fuste v. Riverside Healthcare Association involved an apparently bitter separation between a Newport News pediatric practice and two of its doctors. After Drs. Fuste and Vanden Hoek left Riverside in 1999, callers to Riverside seeking the doctors were allegedly told, among other things, that the doctors had been “unprofessional” and “uncooperative”; that they had “left suddenly” and “abandoned their patients”; that there were “concerns about their competence” and that they “were not able to work in the area.”

Thereafter, the doctors sued, claiming wrongful discharge, defamation and conspiracy to injure the doctors in their profession. The only issue on the appeal was the trial court’s dismissal of the defamation claim.

In its opinion, the Supreme Court provided a succinct encapsulation of the law of defamation in Virginia. It noted that words that “prejudice a person in his or her profession or trade are actionable as defamation per se.” A defamatory statement may be made “by inference, implication or insinuation.... However, pure expressions of opinion, not amounting to ‘fighting words’ are protected by the First Amendment of the United States Constitution.”

The Court also provided guidance as to what constitutes non-actionable opinions. These include statements that are “relative in nature and depend largely upon the speaker’s viewpoint” and “speech which does not contain a provably false factual connotation, or statements which cannot reasonably be interpreted as stating actual facts about a person.”

Since the case was dismissed at a preliminary stage when the trial judge ruled that all of the allegedly defamatory statements were mere opinion, the Supreme Court analyzed whether any of the alleged statements contained a “provably false factual connotation.”

While the Court held that most of the statements were expressions of opinion, and thus not actionable when taken in their “plain and natural meaning,” statements challenging their competence, or accusing them of abandoning their patients could be proven to be true or false when viewed in light of their proper context. Therefore, these statements formed the basis of an actionable defamation claim, and the case was remanded to the Circuit Court for trial.

The old adage about keeping one’s opinions to oneself is good advice. However as Fuste demonstrates, it’s facts, not opinions that can expose you to civil liability. ♦

SUBCHAPTER S CORPORATIONS

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during the life of the current income beneficiary, there can be only one income beneficiary;

corpus distributions during the current beneficiary's life can only be made to that beneficiary;

the current income beneficiary's income interest must terminate at the earliest of: the current beneficiary's death, or the termination of the trust; and

if the trust terminates during the current income beneficiary's life, the trust assets must be distributed to the current income beneficiary.

Among additional S corporation rules is a requirement that all of a QSST's income be distributed currently to one individual who is a United States citizen or resident.

Being a creature of the Internal Revenue Code, S corporation regulations are both voluminous and arcane. Consequently, many businesses seeking the tax benefits of an S corporation often choose to organize as a limited liability company. Limited liability companies are now recognized in all 50 states and D.C., and are becoming quite popular as a result of their tax advantages and flexibility. ♦

BUSINESS TORTS

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The Court's opinion focused extensively on the formulation of a damages award. While the Court refused to order the repayment of the salary earned by McGinnis during the course of his improper competition, the court awarded the \$350,000 that Creative Direct paid to McGinnis while he was in Repro 1's employ, as well as lost profits valued by Repro 1's expert at \$597,887.79. Finally, the Court imposed a constructive trust on these amounts, requiring McGinnis to re-convey them to his former employer.

On its facts, Advante Designs v. McGinnis presents an extreme case. Although the "commissions" paid to Creative Direct's Vice President and the use of the Repro 1's facilities to complete the work colored the facts, the court did not award damages for outrageous behavior. The law established by this case, as well as the measure of damages, applies equally in any case where these torts can be proven. ♦

MEET OUR LAWYERS ...



Carol Schrier-Polak

Carol Schrier-Polak was recognized by Washingtonian Magazine in both 1995 and 2000 as one of the top family law attorneys in the metropolitan D.C. area. She is a past president of the Fairfax County Bar Association, a former member of the Board of Governors of the Family Law Section of the Virginia State Bar, a Fellow and Vice President of the Virginia Chapter of the American Academy of Matrimonial Lawyers, and chair of the Advisory Committee for Healthy Families -Fairfax. She is listed in Best Lawyers of America as well as Who's Who in American Law, and is rated "AV" by Martindale-Hubbe.

In addition to her proven success in client representation, Carol lectures and writes extensively for attorneys, mental health professionals and judges on such topics as prenuptial agreements, child and spousal support, division of marital property, child abuse, mental health and custody proceedings. Carol has been recognized for her success as a mediator as well as court appointed Neutral Case Evaluator in helping parties resolve family, commercial and employment related disputes.

Carol received her BA from Brandeis University. She holds a Masters in Social Work from State University of New York at Buffalo as well as a J.D. from Temple University. A principal of the firm since 1990, Carol has tried to bring balance to her life by practicing yoga, sailing, and traveling throughout the world with her husband, Rudy Polak. ♦



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About Our Organization...

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Our responsive and exceptional quality service, coupled with our sensitivity to client needs, has established a professional reputation in which we take great pride. We are dedicated to achieving exceptional results for our clients in every matter we are entrusted to handle, mindful of each client's resources and unique circumstances. Delivering greater value to our clients day in and day out is how we will continue our reputation as one of the most highly regarded law firms in the Washington metropolitan region.

This paper was prepared by Bean, Kinney and Korman, P.C. as a service to clients and friends of the firm. The purpose of this paper is to provide a general review of current issues. It is not intended as a source of specific legal advice. © Bean, Kinney and Korman, P.C. 2003



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