Even Presumed Damages Must Be Proven

By: Charles E. Harris II

Plaintiffs' attorneys salivate at the mere possibility of a potential defamation *per se* claim because they think that, if the case gets past summary judgment, the defendant will feel pressure to settle due to the amorphous nature of presumed damages. In fact, ask any plaintiff's attorney what evidence of reputational harm they have to produce at a defamation trial to recover presumed damages. Their likely response would be: "Are you kidding? None."

Defense attorneys and their deep-pocket clients, who are often the targets of defamation *per se* claims, should not fret. In fact, case law has shown that even presumed damages must be supported by competent evidence and that the presumption of damages can be overcome. Defense attorneys should strongly consider moving for summary judgment based on a lack of presumed damages where there has been no evidence of reputational or emotional harm to the plaintiff adduced during discovery. Even if the motion is unsuccessful, it would still help remind the court of the type and amount of evidence that the plaintiff must present at trial to recover presumed damages. Also, the court will likely be more inclined to give a restrictive jury instruction if actual injury is questionable. In any case, defense attorneys must be vigilant in making sure that jury instructions explain the proper parameters for deciding presumed damage.

This article will first discuss defamation under Illinois law and the types of damages recoverable in defamation *per se* actions. We will then focus on the kind and amount of evidence that the plaintiffs presented in several cases, including two leading Seventh Circuit cases, to recover presumed damages. Next, there is a discussion of the recent recognition by Illinois courts that the presumption of damages in a defamation *per se* action is a rebuttable one. Finally, the advisability of moving for summary judgment due to a lack of damages is reviewed.

Defamation Generally Under Illinois Law and the Types of Damages Available in Defamation *Per Se* Actions

In Illinois, as in most states, there are two categories of defamatory statements: statements that are defamatory *per se* and statements that are defamatory per quod. A statement is defamatory *per se* if it is so obviously and inevitably hurtful to the plaintiff, on its face, that extrinsic facts are not needed to explain its injurious character. In contrast, a statement is considered defamatory *per quod* when it is not obviously hurtful on its face, thus requiring extrinsic facts to establish its defamatory nature.

The main difference between *per se* and per quod actions for the purposes of this discussion is that, when a statement is considered defamatory *per se*, actual damages are said to be "presumed."[1] The availability of this "extraordinary presumption" is what sometimes persuades plaintiffs' attorneys to race to the courthouse to file obviously marginal defamation *per se* claims against corporate defendants. They know that if the case can get

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past summary judgment, corporate defendants will often feel pressure to settle rather than go to trial because of the lack of predictability as to the amount a jury may award in presumed damages. In fact, just recently, a Los Angeles jury awarded $370 million in presumed damages to five former employees of Guess Jeans co-founder, Georges Marciano, in a defamation suit against him. As discussed below, it is a defense attorney's job to let opposing counsel and the court know early and often that she plans to actively defend the matter based on a lack of damages.

NOMINAL, PRESUMED AND SOMETIMES PUNITIVE DAMAGES ARE AVAILABLE.

The types of damages available for defamation *per se* in Illinois generally include presumed damages, as discussed above, and nominal damage. Punitive damages may also be available if the plaintiff can show that the defendant acted with actual malice. Each type of damage is discussed below.

Nominal damages. Nominal damages are awarded when the insignificant character of the defamatory matter, or the plaintiff's bad character, leads the jury to believe that no substantial harm has been done to her reputation. It is critical in a defamatory *per se* action that the jury be instructed concerning nominal damages; the jury should know awarding such damages is a viable option where it believes the plaintiff was defamed but has presented only modest proof of harm.

Presumed damages. Under Illinois law, presumed damages are defined as personal humiliation, embarrassment, injury to reputation and standing in the community, mental suffering, and anguish and anxiety. Importantly, courts have regularly recognized that Illinois law does not allow for recovery of economic damages, such as lost profits, as presumed damages. Nevertheless, plaintiff's attorneys will often attempt to argue to a jury that such losses should be considered in determining presumed damages. One effective way to prevent such an argument is through a motion in *limine*. Furthermore, defense attorneys should be aware that courts have repeatedly recognized that, in Illinois, presumed damages should never be substantial. A jury instruction setting forth this general rule should be sought.

Punitive damages. Under Illinois law, the court must function as a gatekeeper in deciding whether the facts of a particular case justify the imposition of punitive damages. If the court determines that punitive damages are appropriate, the jury may award them where a plaintiff can show actual malice. However, punitive damages cannot be awarded where there are no presumed damages, and likely cannot be awarded where a plaintiff has only sustained nominal damages.

Plaintiffs Must Produce Some Evidence of Actual Injury to be Entitled to Presumed Damages

The US Supreme Court first addressed the "oddity" of allowing the recovery of damages in defamation cases without evidence of actual loss in *Gertz v. Robert Welch, Inc.*[2] Recognizing the need for limitation on the reach of such damages, the Court found that the customary types of actual harm resulting from defamatory statements such as "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering" must be supported by competent evidence concerning the injury and that juries must be limited by appropriate jury instructions.[3] The Court did not use the term "presumed damages" to describe the defamation damage it was referring to in *Gertz*, but it was clearly referring to presumed damages; indeed, the same harms enumerated by the Court fall under the definition of presumed damages in Illinois. Like *Gertz*, Illinois state and federal courts now require that a plaintiff support an award of presumed damages with competent evidence.

For instance, in *Brown & Williamson Tobacco Corp v. Jacobson*,[4] a jury awarded the plaintiff cigarette company $3 million in presumed damages based on allegedly defamatory statements made by a local CBS broadcaster

who claimed the company adopted an advertising policy designed to attract children. The district court set aside the presumed damages award and entered an award in favor of the cigarette company for $1.00, finding that the company submitted no evidence showing actual injury. The court reasoned that: "[I]f [plaintiffs] want damages they must prove them. * * * * 'Presumed' damages does not … mean that a plaintiff is entitled to any amount a jury sees fit to award, entirely independent of the evidence…. Any other interpretation would allow a plaintiff to recover substantial sums without even attempting to introduce evidence as to injury and would preclude judicial review of the amount awarded."[5]

On appeal, the Seventh Circuit did not disagree with the district court's holding that presumed damages must be supported by evidence; however, it reinstated the presumed damages award to $1 million based on the following evidence of reputational harm that the plaintiff cigarette company introduced at trial:

> First, [the cigarette company's] general counsel testified that after the broadcast there were calls from the field sales force indicating that their contacts were asking 'how in the world could [the company] have done such a thing.' Second, a department sales manager for [the company] testified that sales managers in the Chicago area had received negative comments from distributors, retailers, and consumers. The reports he received indicated that the sales staff had been disrupted in their normal activities by questions from retailers and consumers about the broadcast. Third, the former Vice President of Marketing for [the company] testified that the company had a reputation it cared about and that he believed that [its] customers care about the reputation of the company from which they buy cigarettes. . . . Fourth, the company introduced evidence that the [broadcast at issue] (including its rebroadcasts) was seen by over 2.5 million people in the Chicago area…. [The company] also argued that the [broadcast] was especially devastating because Chicago area viewers believe that [the broadcasts] are reliable.[6]

The Seventh Circuit also recognized that presumed damages must be supported by competent evidence in *Republic Tobacco Co. v. North Atlantic Trading Co.*[7] In *Republic Tobacco*, representatives of the defendant cigarette paper company sent two purportedly defamatory letters to its customers and potential customers—many of whom were also customers of the plaintiff tobacco company—attacking the integrity of the plaintiff's business conduct. The court remitted the original $18.6 million jury verdict to $1 million. In doing so, it explained that "presumed damages serve a compensatory function—when such an award is given in a substantial amount to a party who has not demonstrated evidence of concrete loss, it becomes questionable whether the award is serving a different purpose."[8]

Illinois courts appear to have followed suit. In *Knight v. Chicago Tribune Co.*,[9] a former DuPage County prosecutor brought a defamation action against the Chicago Tribune and two reporters, claiming that a false statement in a newspaper report implied that he had obstructed justice. The trial court instructed the jury that, among other things, the plaintiff had the burden of proving "that as a result of the complained-of-statement, [he] sustained actual and/or presumed damages."[10] The trial court rejected a proposed jury instruction from the plaintiff, simply instructing the jury to "fix the amount" of damages with no proof of damages.[11] In *Gibson v. Philip Morris, Inc.*,[12] the Illinois Appellate Court found that the jury's $100,000 presumed damages award for personal humiliation, mental anguish and suffering was proper. The plaintiff was falsely accused by several co-workers of selling the company's incentive items in violation of company policy. Addressing the defendant's evidentiary challenge to the award, the court stated:

> At trial, plaintiff testified that he was unable to sleep as a result of his discharge and that

> he was afraid he would not be able to provide for his family. Plaintiff's wife confirmed these problems and stated that plaintiff sought medical help. A friend of plaintiff's . . . testified that plaintiff was devastated and was not the same person after his discharge. This evidence was uncontradicted and supported plaintiff's claim for emotional distress .... [13]

The cases cited above teach that, to recover presumed damages in Illinois federal and state courts, a defamation plaintiff must present some degree of competent evidence to establish reputational or emotional harm. Defense attorneys must make sure that the jury instructions are properly crafted to require that plaintiffs satisfy this evidentiary burden, and effectively use those instructions in closing argument to point out the lack of true damage.

Defense Attorneys Should Consider Moving for Summary Judgment Based on a Lack of Damages in Appropriate Cases

A fairly recent wrinkle in the law of presumed damages is the recognition by Illinois courts that the presumption is rebuttable. In *Knight*, the Appellate Court of Illinois acknowledged that Illinois law does not entitle a plaintiff to "an irrebuttable presumption of damages"[14] and that a defendant may present evidence of the plaintiff's reputation prior to the allegedly defamatory statement in mitigation of damages. The trial courts in *Knight and Thomas v. Page*[15] also instructed their juries that the presumption of damages "may be overcome or limited by evidence" to the contrary.[16] With this recognition by courts that a defendant may present evidence rebutting the presumption of damages, it logically follows that a defendant can move for summary judgment based on lack of damages where a plaintiff has adduced little evidence of harm. Indeed, there is precedent for such an argument.

In *Taylor v. Brinker International Payroll Corp.*,[17] a former cook at Chili's restaurant claimed that he was defamed by his former manager who allegedly made statements suggesting that the cook was dealing drugs. The defendant Chili's owner moved for summary judgment on the defamation claim, arguing, among other things, that the presumption of damages resulting from the alleged defamatory statement was rebutted by the deposition testimony of the former cook. The district court considered the argument, but found that the presumption of damages had not been rebutted and denied summary judgment.

An Ohio appellate court affirmed the dismissal of a defamation *per se* claim on summary judgment because the presumption of damages was rebutted. In *Wilson v. Wilson*,[18] the plaintiff brought a defamation claim against his former wife based on statements she allegedly made to his priest and family members accusing him of being a pedophile and watching child pornography. The trial court granted summary judgment, finding that the ex-husband could not prove any damages because he admitted in his deposition that the people who heard his ex-wife's allegations did not believe them and the allegations did not negatively impact his career. In affirming the decision, the appellate court stated that the ex-wife "rebutted the presumption of compensatory damages, and [the ex-husband] failed to show that there was a genuine issue for trial on this issue."[19]

The idea of moving for summary judgment based on a lack of damages in defamation *per se* actions is certainly novel. But *Taylor* and *Wilson* show that courts are willing to consider this argument under appropriate circumstances. In addition, as noted above, there can be strategic value in educating the court, prior to trial, about the law on presumed damages and the absence of evidence of damage. Defense attorneys should move for summary judgment based on lack of damages where there has been little or no evidence of harm to plaintiff produced during discovery or where there is evidence indicating that a plaintiff had a bad reputation prior to the allegedly defamatory statements being made.

Conclusion

Courts in some states have become so frustrated with the presumed damages doctrine they have eliminated it altogether in defamation *per se* actions.[20] Describing its reasoning for abolishing presumed damages, the Arkansas Supreme Court said that: "Among the problems inherent in presuming harm are the absence of criteria given to juries to measure the amount the injured party ought to recover, the danger of juries considering impermissible factors such as the defendant's wealth or unpopularity, and the lack of control on the part of trial judges over the size of jury verdicts."[21] It appears that the presumed damage doctrine is here to stay in Illinois despite these well-established drawbacks. Nonetheless, as detailed above, Illinois federal and state courts have indicated that presumed damages may not be recovered in defamation *per se* cases without some proof of damages. Thus, defense attorneys must make sure that trial courts properly instruct juries in order to reduce or prevent unsupported presumed damages awards.

Endnotes

1 *Green v. Rogers*, 917 N.E.2d 250, 461 (Ill. 2009).
2 418 U.S. 323, 349 (1974).
3 *Id.*
4 644 F. Supp. 1240, 1261 (N.D. Ill. 1986), *rev'd by*, 827 F.2d 1119 (7th Cir. 1987).
5 *Id.* at 1261.
6 *Brown & Williamson Tobacco Corp*, 827 F.2d at 1138-39.
7 381 F.3d 717 (7th Cir. 2004).
8 *Id.* at 734.
9 895 N.E.2d 1007 (Ill. App. Ct. 2008).
10 *Id.* at 1013.
11 *Id.*
12 685 N.E.2d 638 (Ill. App. Ct. 1997).
13 *Id.*
14 895 N.E.2d at 1015.
15 No. 04LK013, 2006 WL 3496222 (Ill. Cir. Nov. 14, 2006).
16 *Knight*, 895 N.E.2d at 1014.
17 No. 00 C 3866, 2002 WL 471994 (N.D. Ill. Mar. 22, 2002).
18 Case No. 21443, 2007 WL 127657 (Ohio Ct. App. Jan. 19, 2007).
19 *Id.* at *4.
20 *See, e.g., United Ins. Co. of Am. v. Murphy*, 961 S.W.2d 752, 756 (Ark. 1998); *Nazeri v. Mo. Valley College*, 860 S.W.2d 303, 308-13 (Mo. 1993); *Walker v. Grand Cent. Sanitation*, Inc., 634 A.2d 237, 243 (Pa. Super. Ct. 1993), *appeal denied*, 651 A.2d 539 (Pa. 1994) (adopting Restatement (Second) of Torts § 621); *Zoeller v. Am. Family Mut. Ins. Co.*, 17 Kan. App. 2d 223 (1992), *review denied*, 251 Kan. 942 (1992); *Memphis Publ'g Co. v. Nichols*, 569 S.W.2d 412, 428-29 (Tenn. 1978).
21 *Murphy*, 961 S.W.2d at 756.

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