The General Practitioner

Newsletter of the State Bar of Michigan Solo and Small Firm Section

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EDITOR'S NOTES

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Readers are invited to submit their own articles, comments and opinions to Maury Klein, Editor, PO Box 871567, Canton, Michigan 48187. Publication and editing are at the discretion of the editor.

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The Bad Review Blues

By Odey Meroueh

In days past, reviews of products or businesses were generally confined to select magazines, newspapers, or other less socio-culturally permeating mediums. In 2015, you would be hard pressed to find a business or product that has *not* been critically reviewed online. And while checking the Internet for user reviews on sites like Yelp has become commonplace, so too has the emergence of the fraudulent review.

These online reputation attacks come in multiple flavors: some are valid criticisms of a legitimately bad business or product, but others are actively using the Internet as a weapon intent on damaging your potential client's business or product! Examples include:

- Competitors posing as customers posting fraudulent negative reviews
- Disgruntled employees posting multiple times as different customers attacking their former employer
- Customers extorting business owner by threatening to post negative reviews unless provided with discounts

These practices are happening at an alarming rate!

A sting by the New York Attorney General's Office in 2013 caught 19 companies writing negative fake reviews attacking their competitors across a number of websites. In fact, a Harvard Business School study entitled "Fake It Till You Make It" showed that roughly 16 percent of restaurant reviews on online review giant Yelp were fraudulent. Yelp and other review sites shield themselves from liability through the Communication Decency Act by not engaging in censorship, so business owners cannot rely on the websites to take down the fraudulent reviews.

Due to the ubiquity of consumer reliance on reviews, business owners are forced to pursue any and all means to combat these extortionists and/or to remove fraudulently posted reviews. Many of these owners' first instinct is to go to the police; however, in most instances, the police department has little time and fewer resources to pursue fraudulent reviewers. That leaves the client with a need that you as an attorney can fill.

So what do you do if a client comes to you asking how to combat a negative review?

First you need to investigate who made the post. Most of these postings are generally made anonymously and while there are sleuthing techniques that you can utilize to determine the location of the individual writing the review, most review websites will have safeguards in place to block these attempts and even if those obstacles are surmounted, savvy users will have masked their IP address, making it very difficult to hone in on a location or identification.

So if you cannot figure out who the perpetrator is without going to extreme lengths, what *can* you do? Look for motive. Although not easily accomplished, it is possible to discern the mental state or motive of the perpetrator from the content of the review.

Is it a person who has motive to damage the client? Is it a valid customer review with no malicious motive? Or in some extremes, is it a mentally unstable person who can automate a botnet to post negative reviews on hundreds of websites in a matter of a minutes? The latter are people not to be trifled with lightly.

Look to the contents of the review, the tone, the demeanor, and while it is difficult to make an accurate prediction, it is not impossible. Once you determine a probable motive, you can best determine your strategy moving forward. Would taking action poke a hornet's nest, or will you be successful in pursuing the removal of the review(s)? Will taking action result in negative press for your client in social media?

The easiest solution without stirring up too much trouble is the first thing you should try on behalf of your client—communicate directly with the website staff. They are a company just like any other, and their customer service department frequently handles fraudulent posting complaints. For large enough websites, you may even be diverted to their in-house legal counsel. Whatever method you use to contact the staff, you should courteously and thoroughly explain why your client has reason to believe a malicious motive is behind the review. Coming from an attorney, these letters can usually do the trick and get the review removed. But some companies like Google are loathe to remove reviews even if requested by an attorney.

One of the strongest but most overlooked methods of removing these postings is by utilizing the website's own terms of service to your advantage. Each of these review sites has terms of service readily available for your review. You can generally find a hyperlink near the bottom of the webpage directing you to the terms.

Locate these terms, and review them for possible regulations or policies that would allow for the removal of the content in question. One common term you will encounter is a prohibition against the use of employee names in postings. If the review in question contains a specific name, you can then e-mail the website and request the post be removed on that basis.

Another effective method of getting the content removed is by citing an intellectual property violation. A huge exception to the Communication Decency Act is that violations of intellectual property law can cause the website to be liable for contributory trademark infringement. In other words, if you can find any infringement on your client's intellectual property or other copyright or trademark violations, you can issue a Takedown Notice pursuant to the Digital Millennium Copyright Act ("DMCA Takedown Notice") to the website, and get the content removed immediately.

If none of the previous techniques worked, you need to decide if it is worth it for your client to pursue further action. If you have any inkling that the poster is more than just a run-of-the-mill fraudulent poster, it may best to advise the client to take his licks and move on. The last thing your client wants is Twitter abuzz with the incessant ravings of a lunatic directed at your client. Be sure to advise your client of all the risks of taking further action.

If you think that the review was genuine, you may be able to get the reviewer to take down the post himself. Frequently, well-run companies take advantage of negative online reviews by turning them into customer service victories. How is this accomplished? Reach out to the customer and try to address her concern. Offer a coupon or a promise of better service in the future. Caring enough to reach out is generally enough for reviewers to rescind their post. Sometimes that customer service victory can quickly go viral via social media and become a boon for your client. If you can accomplish this you will become an absolute hero in your client's eyes.

If the post is fraudulent, on the other hand, and none of the previous strategies worked, be very careful not to create a worse situation. For example, you can try to scare the reviewer into rescinding the post by e-mailing him a cease-and-desist letter or a DMCA Takedown Notice. But if you do so, be aware that the Internet is rife with cease-and-desist letters that make the writer and the client look like bullies stomping on the little guy. This would be a disaster for your client! If you send a cease and desist, make sure that it is extraordinarily professional and conciliatory, but firm enough to get your point across.

Save the Date

This roster of upcoming seminars will be held at Andiamo's at Maple and Telegraph from 5:00 - 7:30 p.m. Appetizers, dinner, soft drinks are included. A cash bar will also be available. Tickets are $45.00 in advance for Section members and $50.00 for non-Section Members and at the door. (Watch for registration details.)

- **Criminal Law and Procedure Basics - May 28**
- **Residential Real Estate and Landlord/Tenant Law - June 25**

Genuine Issues of Material Fact—Part II

By Howard Yale Lederman

This article continues my last newsletter "Genuine Issues of Material Fact" article. There, I declared that "under MCR 2.116(C)(10), a genuine issue of material fact is an issue of whether the proponent has proven a claim's or fact-based defense's non-damages proof element. Accordingly, in responding to an MCR 2.116(C)(10) summary disposition motion, the first step is to identify each relevant claim's or fact-based defense's non-damages proof elements. The second step is to review the evidence and facts supporting your position and determine which proof element(s) the evidence and facts support. The third step is to connect them with the above elements, explaining how your supporting evidence and facts help prove the elements." Now, "we will look at how to accomplish these steps." (Howard Yale Lederman, *Genuine Issues of Material Fact,* 39 The General Practitioner (March/April 2015), p 7).

We will focus mostly on the first two steps and the first part of the third. Since many of you represent third-party vehicle negligence clients, let's start with a third-party vehicle negligence case situation. Several years before the crash, Ms. H had suffered serious workplace injuries to her head, back, right hip, right shoulder, and right wrist and suffered severe depression. Though recovering somewhat (she returned to her normal daily activities about a year before the crash), she was receiving long-term partial disability benefits for these injuries. Then, the third-party vehicle crashed into her vehicle. She claimed that the crash had aggravated her old injuries and caused her new injuries and sued the third-party insurer, Stonewall Insurance Co., for noneconomic damages, like pain and suffering. She sued the third party.

To recover for her new injuries and old injury aggravations, Ms. H had to prove serious impairment of an important body function, meaning the following elements:

1. Objective evidence of her new injuries and old injury aggravations
2. Impairment of an important body function
3. The injuries' impacts on her general ability to lead her normal life

McCormick v Carrier, 487 Mich 180, 215; 795 NW2d 517 (2010).

When the parties do not dispute the injuries' nature and extent, whether the plaintiff meets above requirements is a question of law for the court. When the parties dispute the injuries' nature or extent, whether the plaintiff meets the above requirements is a question of fact for the trier of fact. *Id* at 192-193, MCL 500.3135(2)(a).

As expected, Stonewall moved under MCR 2.116(C)(10), asserting that Ms. H could not meet the serious impairment of body function standard. Stonewall argued that Ms. H did not suffer any new injuries. Stonewall also argued that Ms. H did not meet the first objective evidence of injury requirement.

In response, Ms. H had to decide whether she wanted to dispute Stonewall's argument that she had not suffered any new injuries. She decided that she did. She reasserted that the crash had aggravated her old injuries and caused her new injuries. She cited the medical records' diagnoses of and treatments for her new and aggravated injuries. So, Ms. H disputed Stonewall's characterization regarding her injuries' nature and extent. As a result, she changed the issue of whether she met the above three requirements from a question of law for the court to a question of fact for the trier of fact.

Next, Ms. H had to review the above three recovery elements and decide which evidence would support her claim on the expressly contested element, objective evidence of injury. But she could not stop there. She also had to review the summary disposition motion to be 100 percent sure that Stonewall did not hide an implied motion on the other two elements. If any doubt arose, she had to respond on all three elements. She could not let the trial court decide against her or the defendant win based on motion disorganization or subterfuge. Therefore, she had to match each piece of her evidence with the corresponding proof element. Some pieces might support more than one element. If so, she had to make sure that she used such pieces to support every corresponding element.

During this process, she found two MRIs, two CT scans, two EMGs, and range of motion test results. She also cited her need for a walker, leg brace, and cane. She then cited her permanent limp. Based on this evidence, her showing of a genuine issue of material fact on the objective evidence of injury element was strong. But to

prevent any trial court decision against her based on motion disorganization or subterfuge, she also cited evidence supporting her positions on the other two elements. On impairment of an important body function, she cited what the MRIs, CT scans, EMGs, range of motion test results, walker, leg brace, and cane showed: impairment of her ability to walk, an important body function. On her injuries' impacts on her ability to lead a normal life, she cited the diagnoses that the objective evidence confirmed, the extensive treatment that these conditions necessitated, and the connection between her impaired ability to walk and her ability to lead a normal life. Thus, most courts would find that based not only on the evidence itself, but on her use of it, Ms. H had shown genuine issues of material fact on all three third-party vehicle negligence recovery elements. Therefore, most courts would deny Stonewall's summary disposition motion.

Unlike Stonewall's motion, most such motions do not target only one claim recovery element. Instead, they target all recovery elements. These motions make keying your evidence on each recovery element more imperative than Stonewall's motion did.

A good example arises from Mr. Z's common law fraud in the inducement (intentional misrepresentation) and Michigan Consumer Protection Act [MCPA] suit against Naked Mole Rat Used Cars, Inc. Z bought a 10-year-old used Cadillac from Naked Mole Rat. Z claimed that before buying the Cadillac, he had told Naked Mole Rat's salesperson, Mr. Blobfish, that he [Z] was looking for a reliable and safe vehicle. Blobfish responded that Naked Mole Rat had inspected the vehicle completely and had found no actual or potential mechanical problems. Based on Blobfish's response, Z bought the vehicle. Besides signing a vehicle purchase contract, Z signed a vehicle order document stating that Naked Mole Rat was selling the vehicle as is, with no express or implied warranties, and that he [Z] was buying the vehicle as is, with no express or implied warranties.

Z drove the vehicle from Naked Mole Rat to his home, about 90 miles away. About 10 miles from home, the engine light came on, and the vehicle began lurching. The next day, Z drove the vehicle about five miles to a nearby GM dealership. There, a mechanic cleaned the throttle and replaced the fuel filter. A few days later, the engine light came on again. The vehicle was towed to a nearby repair center. The center found that the vehicle needed about $1,100 worth of repairs. The center repaired about half the items for about $550. When Z asked the center's mechanics about the vehicle's condition and repairs, the mechanics replied that if Naked Mole Rat had inspected the vehicle properly, it would have recognized that the vehicle needed these repairs before the sale.

When Z confronted Naked Mole Rat about all these events and repairs, Naked Mole Rat told him to go to hell. Naked Mole Rat assumed that Z could not afford the time, money, and effort to sue. But Naked Mole Rat's assumption was wrong. Z stopped vehicle payments and sued Naked Mole Rat for common law fraud in the inducement (intentional misrepresentation), MCPA violations, Michigan Motor Vehicle Service and Repair Act violations, breach of contract, and another six claims. Naked Mole Rat moved under MCR 2.116(C)(10) for summary disposition on all 10 claims. So, Z had plenty of work to do.

We will focus on the common law fraud in the inducement and the MCPA violation claims. To prevail on his common law fraud in the inducement claim, Z had to prove the following elements:

1. The defendant made a material representation;
2. The representation was false;
3. When the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth and as a positive assertion;
4. The defendant made the representation with the intention that the plaintiff act upon it;
5. The plaintiff acted in reliance upon it; and
6. The plaintiff suffered damage.

Hord v Environmental Research Institute of Michigan, 463 Mich 399, 404; 617 NW2d 543 (2000), *Custom Data Solutions, Inc v Preferred Capital, Inc,* 274 Mich App 239, 243; 733 NW2d 102 (2006), *M & D, Inc v McConkey [McConkey III]*, 231 Mich App 22, 27; 585 NW2d 33 (1998), *lv den* 459 Mich 962; 590 NW2d 576 (1999). The plaintiff's reliance must be reasonable. *Novak v Nationwide Mutual Insurance Co,* 235 Mich App 675, 689-691; 599 NW2d 546 (1999), *app dis* 611 NW2d 799 (2000), *Nieves v Bell Industries, Inc,* 204 Mich App 459, 464; 517 NW2d 235 (1994).

On the first four elements, Z emphasized the combination of Naked Mole Rat's representation that it had inspected the vehicle completely and found no problems, the numerous problems appearing right after the sale, and

the repair center's statement that if Naked Mole Rat had inspected the vehicle properly, it would have recognized that the Cadillac needed repairs before the sale. This combination furnished evidence of a false, material representation. This combination also furnished evidence of a knowing false, material representation or a material misrepresentation made recklessly without knowing if it was true and as a positive assertion. Naked Mole Rat's misrepresentation and its context provided evidence that Naked Mole Rat had intended that Z act on it, meaning buy the Cadillac. The repair and repair expense documents provided evidence of damages.

But to prevail on reasonable reliance, Z had to present some different evidence. Naked Mole Rat's vehicle inspection and result representation would continue relevant on reasonable reliance. But the other above evidence would not be relevant, because the vehicle purchase contract contained an integration provision declaring the contract the parties' complete agreement. Naked Mole Rat contended that the integration provision combined with the parol evidence rule made any Z reliance on any precontract Naked Mole Rat statements inherently unreasonable. In response, Z presented the contract and argued that it said nothing about the vehicle inspection or its result. Since the vehicle inspection statement did not contradict any contract provision or representation, the integration provision-parol evidence rule combination would not bar Z's reliance on the statement.

If the contract did contain the vehicle inspection and its result, the parol evidence rule-integration provision combination would not prevent Z from showing reasonable reliance on the statement. In that event, the precontract and contract representations would be the same. The precontract representation would be consistent with the contract representation, thus removing any contradictory representation from the scene. As the vehicle inspection statement did not contradict any contract provision or representation, the integration provision-parol evidence rule combination would not bar Z's reliance on the statement.

Lastly, Z could show that the as-is, no-warranty provision did not defeat reasonable reliance. After inspecting the vehicle and finding no problems, Naked Mole Rat could sell the Cadillac with an as-is, no-warranty provision. The latter provision did nothing to make reliance on the inspection and its result unreasonable.

Accordingly, by keying the evidence to the claim proof elements, and by recognizing an element requiring different evidence, Z should be able to show genuine issues of material fact and defeat Naked Mole Rat's summary disposition motion on common law fraud in the inducement (intentional misrepresentation).

Z had sued Naked Mole Rat for violations of the following MPCA provisions:

> "(c) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that person has sponsorship, approval, status, affiliation, or connection that he or she does not have."
>
> "(e) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another."
>
> ***
>
> "(y) Gross discrepancies between the oral representations of the seller and the written agreement covering the same transaction or failure of the other party to the transaction to provide the promised benefits."
>
> MCL 445.903(c), (e), (y).

What we have learned on keying your evidence to the claim recovery elements extends to alternative statutory provisions and subprovisions. Regarding subprovision (c), Z could present evidence (the post-sale events and repairs) that Naked Mole rat had stated that the Cadillac had characteristics (safe and reliable) it did not have. Concerning subprovision (e), Z could provide evidence (the post-sale events and repairs) showing that the Cadillac was safe and reliable, when it was unsafe and unreliable. As to subprovision (y), Z could furnish evidence showing the great differences between Naked Mole Rat's vehicle inspection and result representation and the contract's failure to include this representation. Alternatively, Z could furnish evidence of Naked Mole Rat's representation of the Cadillac as a safe, reliable vehicle and Naked Mole Rat's failure to provide a safe, reliable vehicle. Finally, Z should not forget to furnish the necessary proximate cause and fact of damages evidence. As a result, Z should be able to show genuine issues of material fact on the above MCPA subprovisions and thus prevail on Naked Mole Rat's summary disposition motion.

The above examples illustrate how to apply what we learned from my earlier article. In these examples, we

identified each relevant claim's or fact-based defense's non-damages proof elements. Then, we reviewed the evidence and facts supporting the nonmoving party's position and determined which proof element(s) the evidence and facts supported. Lastly, we connected them with the proof elements. Since the examples here involved clear proof elements and straightforward evidence and facts, we did not need to explain how the evidence and facts helped prove the elements, thus showing genuine issues of material fact on these elements. But in a future article, we will look at situations involving fewer or unclear proof elements. In these situations, clear, brief explanations are essential.

About the Author

Howard Yale Lederman *has been a Michigan appellate lawyer since 1984 representing civil plaintiffs and defendants and criminal defendants and a State Bar of Michigan Appellate Practice Section charter member since 1996. He has written over 10 appellate law and practice articles and has co-written an ICLE appellate law book section. He is a Cooley Law School adjunct professor. He has just opened his new law firm, Ledermanlaw, PC, to do appeals and legal writing projects for other lawyers and the general public.*

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Announcements

The Institutionalization of Justice

By Maury Klein

As we march into the future we need to be cognizant of exactly where the maxim "We are a nation of laws and not men" is taking us. More precisely and more ominously, the term "rules" is substituted for laws as our lawmakers abdicate their duties and leave governance to institutions. Such bodies are replete with rules which, on the surface, profess to treat all equally. However, it is left to people to administer such rules in the context of their specific institution and that institution is their livelihood and perhaps, even their raison d'être. As such, it is incumbent on those existing within the purview of that institution to protect it and to "play well" with other such entities.

Let's look at the matter of Ethan Couch. This teenager was driving with a significant amount of alcohol in his bloodstream (and I believe some Valium if memory serves) when he killed four people and injured 11 others. He was the poster child of the defense of affluence mounted by his attorneys who turned to the institution of psychology-as-a-means-of-justifying-anything. Although widely criticized, the probate judge in the case insisted that affluence didn't play into her decision. Her decision was based, rather, on the availability of a suitable treatment program. The facility was willing to provide in-house treatment for Ethan and did so while billing the family on a sliding scale, which billed the family for two days out of a month and got the rest of its money from other sources such as taxpayers.

In a different case, a young black man stole a truck, drove while drunk, killed one person and was sentenced to 10-20 years in prison. The commonality of the two cases is clear: The same judge presided over both. The differences, other than the number of fatalities and the vehicle theft, boiled down to the willingness of the treatment facility to accept Ethan but not the other young man. It left the administration of justice to the choice of whether or not a separate institution felt like taking in Kid A as opposed to Kid B. Was Kid B less profitable because the Couch family paid for two days out of pocket? Would Kid B require more monitoring? Did the director of the treatment facility just get a new Porsche?

Let's look at the administration of justice in Ferguson, Missouri. The local governmental entity needed money to run. Traffic tickets are a source of revenue. Who got hit with traffic tickets on a regular basis? The poor side of town—that's who. The amount of fines for any given violations were equal. The enforcement of traffic laws fell on the poor side of town. The institution of the police protected itself by not writing tickets against those likely to be able to push back: the wealthy and connected who could and would complain at the right levels that Officer Fairplay was rude/threatening/foul-mouthed etc. And the money kept coming.

A high-profile MSU football player got his public intoxication (coupled with another offense) reduced to—drum roll, please—littering! I'm taking a guess that the court involved might be located in Lansing.

The education institution in Atlanta sought to protect itself (and get those performance bonuses) by taking the standardized test results of students and erasing the wrong answers and substituting more profitable correct answers. After a months-long trial and 11 convictions, the various misbehaving educators presented a long list of character witnesses. The judge in their case gave them an out if they admitted what they actually did and took responsibility. Only two had the mental wherewithal to follow the judge's advice. The rest got prison time. They got the benefit of institutional influence but were not bright enough to use it.

Which brings us to the ultimate institutions: Our 13 too-big-to-fail banks. Any predictions as to what's coming next?