

## **FALSE ADVERTISING/FRAUD**

***Knepper v. Brown*, 182 Or. App. 597, 50 P.3d 1209 (2002).**

### **FACTS:**

Plaintiff, Knepper, was interested in getting liposuction. She spoke to friends, attended health fairs and ultimately consulted the Yellow Pages when she decided to make an appointment. She checked under the specialization headings for a plastic surgeon and found Dr. Brown's name under the heading titled, Surgery, Plastic & Reconstructive. The ad also said Board Certified next to Dr. Brown's name. Knepper interpreted this to mean Dr. Brown was board certified in plastic or reconstructive surgery, when in fact Dr. Brown is a dermatologist who attended a few weekend seminars in liposuction procedures. He is board certified in dermatology, not plastic or reconstructive surgery. Knepper was not aware of this, and went ahead and scheduled her surgery with Dr. Brown. He negligently performed the surgery, causing Knepper multiple physical and psychological injuries. When plaintiff initiated a lawsuit against Dr. Brown and the Yellow Pages it was revealed that a sales agent of the Yellow Pages encouraged Dr. Brown to place his ad under the specialists category for plastic and reconstructive surgeons to drum up more business, if that was the direction Dr. Brown wanted his business to go. The active role the Yellow Pages sales agent played was a significant fact when the plaintiff appealed the original summary judgment granted in the Yellow Pages favor. This decision is plaintiff's appeal of the summary judgment in favor of the Yellow Pages.

**Handout Questions:**

1. Was Ms. Knepper reasonable in relying on the Yellow Pages ad?
2. What arguments should the Yellow Pages make in their defense?
3. Where do you think the line should be drawn between the advertiser's responsibility and the consumer's duty to educate themselves of the product or service they are receiving?
4. Do you think the Yellow Pages ad should be held responsible for the problems suffered later by the Plaintiff? Do you see the causal link?
5. The Court of Appeals decided to reverse the District Court's decision to grant summary judgment in favor of the Yellow Pages, how do you think they justified this decision? What was their reasoning?

## **Issues and Reasoning used in the Court's decision:**

### Causation:

The gravamen of plaintiff's complaint against defendant is that its placement of Brown's advertisement in the Plastic and Reconstructive surgeons section for the Yellow Pages, along with the text in the advertisement indicating that Brown was Board Certified, misled her to believe that Brown was board certified in plastic and reconstructive surgery. Because plaintiff was interested in undergoing liposuction only under the care of a plastic surgeon, her theory of causation was that, **but for** the misleading placement and text of Brown's advertisement, she never would have consulted him and, thus, would never have undergone the surgery that led to her injuries.

### Yellow Pages knowingly violated policy:

By adding the text Board Certified the advertisement violated one of defendant's internal standards, which required advertisers using the term certified to identify the certifying body. A sales agent of the Yellow Pages encouraged Dr. Brown to do this.

### Yellow Pages disclaimer:

The Appeals Court rejected the Yellow Pages argument that they have a disclaimer reading, For your convenience, the following doctors have chosen to list by type of medial practice. For information concerning physicians and/or qualifications call the proper state agency or your local medical or osteopathic association, and plaintiff, therefore, had no right to rely on Dr. Brown's ad and the representations made in it. The court responded by saying, the mere existence of the disclaimer does not as a matter of law, compel a conclusion that a person may not reasonably rely on a representation in a Yellow Pages advertisement.

### Other statements in Yellow Pages counteract the disclaimer:

Although the Yellow Pages included the disclaimer quoted above, they also contained statements that the Yellow Pages provided the most complete information about all the businesses and stores in your area, and that the Yellow Pages make it easy for you to select the one who can serve you the best. Such statements can certainly be viewed as promoting users' reliance on the contents of Yellow Pages advertisements. When allegedly disclaiming language is as indefinite as that at issue here, it must be viewed in the context of other representations made by defendant, and its meaning and effect are not susceptible to summary judgment.

### Plaintiff's reliance:

Had Dr. Brown's yellow page indicated the true nature of his board certification, i.e. dermatology, I would not have scheduled this initial consultation with Dr. Brown. But for the content and location of Dr., Brown's yellow page ad, Dr. Brown would not have been provided with further opportunity to mislead me as to his qualifications.

### **Court's Decision:**

Because this is an appeal addressing only the summary judgment decision granted in favor of the Yellow Pages, the Court of Appeals only decides if the summary judgment will survive or be overturned. The Court of Appeals decided to overturn the summary judgment decision, meaning Knepper will be given the opportunity to present her case in front of the jury. The original District Court decision would have prevented Knepper from doing that.

The Court of Appeals found there were genuine issues of material fact for the jury to consider. The case was remanded to District Court for a new trial.

### **Application:**

1. The opinion helps demonstrate the extent of causal links between misrepresentation in advertisements and consequential negligence as a result of the misrepresentation. More specifically, the case talks about the but for cause.
2. Opinions may vary about whether it is fair to hold an advertiser responsible for the negligent actions of a doctor. Some students may find this to be too far of a stretch. Does this kind of claim contribute to our already backlogged system and over-litigious society? Are the right people being held responsible?
3. Discuss tort reform, the pros and cons of it. Students should have the opportunity to put themselves in the shoes of both sides of the argument, what if this happened to them, what if they were the advertiser, how can they do their job? This should be effective to fully understand how difficult the issue of tort reform is to reconcile.