

Hassell v. Bird

What's The Big Hassle, Yelp?

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It's the fear every attorney has when a client relationship sours – a one-star Yelp review. Dawn Hassell, an attorney from Hassell Law Group of San Francisco, briefly represented Ava Bird in a personal injury matter. They had trouble communicating and Hassell withdrew after only 25 days. Bird subsequently published a negative one-star review about her experience with Hassell on Yelp.com. Hassell immediately contacted Bird and requested that she remove alleged defamatory remarks from her Yelp review. Bird refused and purportedly followed up with two additional negative reviews under different pseudonyms. Hassell then sued Bird under various theories including defamation, and requested relief, including injunctive relief in the form of a take-down of the review.

Bird never responded to the complaint, and Hassell won a default judgment holding that Bird's comments were *defamatory*. The trial court ordered Bird to remove the reviews, and ordered Yelp to take down all existing and *any future reviews* by Bird or her agents.

Yelp contested the ruling. How was Yelp able to get standing if they weren't a party to the original action? Well, Yelp acquired standing by filing a nonstatutory motion to vacate a portion of the Bird judgment on the ground that it contains an allegedly void removal order. The trial court denied Yelp's motion and Yelp subsequently appealed.

The Court of Appeal upheld the trial court's ruling that Yelp must remove the reviews.¹ It further held that (1) Yelp's due process rights were not violated through lack of notice of the underlying lawsuit; (2) the removal order did not violate Yelp's First Amendment rights to the extent it required Yelp to remove the reviews; (3) the removal order was an unconstitutional prior restraint on speech to the extent it purported to cover future statements; and (4) Yelp's immunity from suit under the Communications Decency Act, 47 U.S.C. §230 et seq. did not extend to the removal order.

The case is now before the California Supreme Court. Yelp contends that: (1) trial courts may not enjoin non-parties, taking away their independent rights, without notice and a hearing; (2) Yelp has a First Amendment right to publish third-party speech; (3) Yelp has a due process right to challenge attempts to infringe its First Amendment right; (4) injunctions cannot bind non-parties without evidence that they aided and abetted the enjoined party; and (5) the review is necessary to make clear that plaintiffs cannot evade Section 230 by denying website publishers their due process rights.

Due Process & Non-Party Injunctions

Yelp was not a party to the underlying lawsuit and never received notice of it. Plaintiffs argue that,

¹ Hassell v. Bird (2016) 247 Cal.App.4th 1336, 1341.

nevertheless, injunctions are proper against those “through whom the enjoined party may act.”² Yelp contends, however, that pertinent case law uniformly holds that “an injunction cannot be applied to a non-party unless evidence establishes the non-party aided and abetted the party in evading the injunction, or engaged in similar conduct.”³ Yelp believes its relationship to Bird to be too tenuous to constitute aiding and abetting by merely publishing Bird’s comment(s), as Bird is “one of millions who post on Yelp.”⁴

Yelp hopes that the Court will agree that the narrow exception to due process for aiders and abettors does not apply here, so that Hassell “does not become a weapon to deprive non-parties of their constitutional rights.”⁵ Several amicus briefs echo this concern. Avvo, Facebook, Microsoft and Twitter all point out that Hassell makes possible a “heckler’s veto” that could be used to silence online speech in a way that evades the protections of Section 230 and decades of U.S. Supreme Court case law on due process and First Amendment issues: (1) sue a content creator, but not the platform hosting his or her content; (2) obtain a default judgment based on a wholly one-sided presentation of the evidence, without any notice to the platform; and (3) serve the platform with a judgment ordering removal of the objectionable content, without having provided any opportunity to the platform to contest.

First Amendment & Prior Restraint

Plaintiffs argue Bird’s speech is defamatory and thus unprotected by the First Amendment. Yelp counters that because it was not a party to the original action, Yelp was never allowed a chance to defend its First Amendment rights, or to litigate whether Bird’s speech was in fact defamatory, and Bird never even defended her speech. Issue preclusion “can be asserted only against a party to the first lawsuit, or one in privity with a party.”⁶ Yelp argues since plaintiffs chose not to make Yelp a party to the original litigation, they cannot now enforce the defamation holding against Yelp. Yelp cites to *Balboa Island*, where the Court reversed a prior restraint against defendant to the extent it applied to non-parties because there was no evidence that anyone other than the defendant defamed or was likely to induce others to defame plaintiffs.⁷ Moreover, Yelp argues the First Amendment protects not only those who created the speech, but those who have published the speech as well.

2 Brief for Plaintiffs and Respondents Dawn L. Hassell and the Hassell Law Group, P.C., *Hassell v. Yelp, Inc.*, S235968 (“Hassell Brief”), p. 11.

3 Reply Brief for Non-Party Appellant Yelp, Inc., *Hassell v. Bird*, S235968 (“Yelp Brief”), p. 10.

4 *Id.*, p. 13.

5 *Id.*

6 *DKN Holdings LLC v. Faerber* (2015) 61 Cal. 4th 813, 824.

7 *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141.

Section 230

Yelp argues the trial court’s order should fail based on a Section 230 argument because “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁸ The Court of Appeal opined, however, that pertinent Section 230 cases involved only “allegations of defamatory conduct by a third party” and not actual defamation, as is the case here.⁹ The Court also agreed with plaintiffs’ argument that no actual “liability” was imposed on Yelp.¹⁰ Several amici argue that plaintiffs and the Court of Appeal fail to acknowledge that in enacting Section 230, Congress made a policy judgment that commandeering Internet service providers would impose too great a cost to free speech, and that therefore providers like Yelp should be afforded broad immunity, not just to liability but to lawsuits themselves based on third-party speech

This case shows that our courts should not allow due process, First Amendment protections, and Section 230 to be eroded without extreme scrutiny.



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8 47 U.S.C. §230(c)(1).

9 Hassell, *supra*, 247 Cal.App.4th at 1365.

10 *Id.* at 1363.