

Not So Neutral?

By Amelia R. Selvig

Imagine the last hearing you attended where you were confronted with a misrepresentation of fact. The source of the misrepresentation was most certainly “the other side,” and your time was then spent setting the record straight by educating the neutral party in the room about what actually happened. This scenario is familiar to all litigators and one that all litigators must be prepared to face in any adversarial proceeding. For at least one litigant in California, however, the scenario was completely unexpected because the source of the alleged misrepresentation was the neutral herself.

Kevin Kinsella sued JAMS and retired Judge Sheila Prell Sonenshine for violations of the Consumer Legal Remedies Act, fraud, negligent misrepresentation and false advertising in California state court. California allows judges the discretion to

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appoint a neutral (*i.e.*, a temporary judge) in lieu of formal judicial proceedings. Kinsella alleged that he relied on misrepresentations and omissions on the JAMS website about Judge Sonenshine’s background when he hired Judge Sonenshine as a temporary judge for his marital dissolution case.

Kinsella’s dissolution proceedings involved assets worth approximately eight figures, which included assets from venture capital partnerships. Kinsella, therefore, sought a temporary judge who understood the principles of business ventures and private equity funding. Kinsella reviewed Judge Sonenshine’s biography on the JAMS website and agreed to hire her because of the representations on the website regarding her business experience. After Judge Sonenshine began making rulings, however, Kinsella began to question Judge Sonenshine’s background and found information that suggested that her biography on the

JAMS website misrepresented her qualifications. Kinsella claimed that Judge Sonenshine’s biography omitted key information regarding allegedly adverse details about her business experience. Kinsella also claimed that the statements on the JAMS website about the integrity of its neutrals were deceptive.

Defendants filed a Strategic Lawsuit Against Public Participation (anti-SLAPP) motion to strike the argument that Kinsella’s complaint was an attempt to improperly stifle their free speech. Kinsella argued that the statements on the JAMS website fell within the commercial speech exemption to the anti-SLAPP law. In response, defendants argued that the exemption applies to representations of fact, not to omissions or non-factual representations and Judge Sonenshine’s biography was not purely commercial speech because it was used for non-commercial purposes.

The trial court denied defendants’ mo-



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tion to strike. The court of appeals unanimously affirmed the trial court and held that the commercial speech exemption of the anti-SLAPP law covered more than "positive assertions of facts." *JAMS, Inc. v. Superior Court*, No. D069862, 2016 WL 4014068, at *4 (Cal. Ct. App. July 27, 2016). The court found that statements on the JAMS website about the alternative dispute resolution (ADR) services it provides and statements about Judge Sonenshine's qualifications to provide ADR services were commercial speech. The representations in Judge Sonenshine's biography were factual. The statements regarding JAMS services and how it conducts its operations were "certainly intended to be relied upon by customers of its services, otherwise they would serve no legitimate purpose." *Id.* at *6.

The court also rejected defendants' argument that the statements were not within the exemption because they may be used for multiple purposes, such as the judicial duty of disclosure. The court found that the statements were there to be reviewed by consumers of ADR services and Kinsella used them for that very purpose. Thus, "the statements or conduct from which Kinsella's causes of action arise is more 'commer-

cial speech' than anything else. Whether or not the statements may be used for other purposes does not change the analysis." *Id.* at *8.

Finally, the court rejected defendants' argument that Kinsella's claims arose from post-retention conduct, not commercial speech. The court found that references to Judge Sonenshine's post-retention statements did not defeat the commercial speech exemption. Those allegations were about how Kinsella found out about the discrepancies on the website, not about the speech that allegedly misled him.

Although the holding of the case is based, in part, on unique factual allegations, it involves anti-SLAPP legislation, which all states, including Minnesota, have passed in some form. The case could also have potential ramifications if other courts adopted a similar theory when deciding cases brought against arbitrators and arbitral institutions by parties who are disappointed in the outcome of arbitration. At the very least, both arbitrators and arbitral institutions should review carefully the statements and possible omissions on their websites and statements that arbitral institutions make regarding the qualities of their arbitrators.

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