

No. S235968

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

---

DAWN L. HASSELL and HASSELL LAW GROUP, P.C.,  
Plaintiffs and Respondents

v.

YELP, INC.  
Appellant.

SUPREME COURT  
**FILED**

JAN 24 2017

Jorge Navarrete Clerk

---

After a Decision by the Court of Appeal  
First Appellate District, Division Four, Case No. A143233

Deputy

Appeal from the Superior Court of the State of California,  
County of San Francisco, Case No. CGC-13-53025,  
The Honorable Donald J. Sullivan and the Honorable Ernest H. Goldsmith,  
presiding

---

RESPONDENTS' ANSWERING BRIEF ON THE MERITS

---

\*MONIQUE OLIVIER SBN 190835  
[monique@dplolaw.com](mailto:monique@dplolaw.com)  
J. ERIK HEATH SBN 304683  
[erik@dplolaw.com](mailto:erik@dplolaw.com)  
DUCKWORTH PETERS  
LEBOWITZ OLIVIER LLP  
100 Bush Street, Suite 1800  
San Francisco, California 94104  
(415) 433-0333

*Attorneys for Plaintiffs-Respondents*  
DAWN L. HASSELL & HASSELL LAW GROUP

No. S235968

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

---

DAWN L. HASSELL and HASSELL LAW GROUP, P.C.,  
Plaintiffs and Respondents

v.

YELP, INC.  
Appellant.

---

After a Decision by the Court of Appeal  
First Appellate District, Division Four, Case No. A143233

Appeal from the Superior Court of the State of California,  
County of San Francisco, Case No. CGC-13-53025,  
The Honorable Donald J. Sullivan and the Honorable Ernest H. Goldsmith,  
presiding

---

RESPONDENTS' ANSWERING BRIEF ON THE MERITS

---

\*MONIQUE OLIVIER SBN 190835

[monique@dplolaw.com](mailto:monique@dplolaw.com)

J. ERIK HEATH SBN 304683

[erik@dplolaw.com](mailto:erik@dplolaw.com)

DUCKWORTH PETERS

LEBOWITZ OLIVIER LLP

100 Bush Street, Suite 1800

San Francisco, California 94104

(415) 433-0333

*Attorneys for Plaintiffs-Respondents*  
DAWN L. HASSELL & HASSELL LAW GROUP

## TABLE OF CONTENTS

I.	ISSUES PRESENTED.....	1
II.	SUMMARY OF ARGUMENT .....	1
III.	STATEMENT OF FACTS AND PROCEDURE.....	3
	A. Yelp Is A Business That Permits Third Parties To Post Anonymous, Unvetted Comments Online. ....	3
	B. Bird Posts Defamatory Comments On Yelp.....	4
	C. After Bird Refuses to Remove Her Initial Posting and Publishes a Second One, Hassell Institute an Action Against Bird for Defamation and Ask Yelp to Remove the Postings.....	6
	D. The Trial Court Enters A Default And Conducts An Evidentiary Hearing.....	7
	E. The Trial Court Enters An Injunction, Enforceable Through Yelp, And A Money Judgment, Against Bird. ....	8
	F. Hassell Gives Yelp Notice And Yelp Refuses To Intervene And Refuses To Remove The Adjudicated Defamatory Statements.....	9
	G. The Court of Appeal Affirms The Trial Court’s Removal Order....	10
IV.	THE COURT OF APPEAL PROPERLY AFFIRMED A NARROW ORDER REQUIRING YELP TO REMOVE THREE POSTINGS THAT WERE JUDICIALLY DETERMINED TO BE DEFAMATORY .....	13
	A. This Case Does Not Involve A Challenge To The Underlying Defamation Finding And Injunction Against Bird. ....	13
	B. Yelp Does Not Have A First Amendment Right to Post Defamatory Content. ....	13

1.	Yelp Offers No Authority Supporting Its Novel Claim To A First Amendment Right to Publish Libel. ....	14
2.	Yelp’s Constant Refrain That A Prior Restraint Exists Here Is Entirely Unsupported By The Factual Record And The Law .....	18
C.	Yelp Was Not Deprived Of Due Process.....	21
1.	Yelp Has No Protected Interest Guaranteed By The Due Process Clause, And It Received Actual Notice In Any Event. ....	22
2.	It Is Well Established That Injunctions Can Be Enforced Against Non-Parties “With Or Through” Whom An Enjoined Party Acts. ....	26
V.	THE CDA DOES NOT PREVENT THE COURT FROM ISSUING A REMOVAL ORDER TO EFFECTUATE ITS VALID JUDGMENT. ....	32
A.	The Plain Language Of The CDA Does Not Prevent A Court From Enforcing A Valid Judgment.....	32
1.	A Court’s Enforcement Of A Judgment Against An Original Speaker Is Consistent With the CDA.....	32
2.	Yelp’s Responsibility To Comply With Enforcement Does Not Arise From Its Duties As A Publisher .....	33
3.	No Liability Is Sought Or Imposed On Yelp .....	39
B.	CDA Immunity Was Designed To Protect Internet Companies From Tort Damages.. ....	43
VI.	THE PUBLIC GOOD IS NOT SERVED BY PERMITTING YELP TO PERPETUATE ADJUDICATED LIBEL .....	46
VII.	CONCLUSION.....	49

## TABLE OF AUTHORITIES

### Cases

<i>A Quantity of Copies of Books v. Kansas</i> (1964) 378 U.S. 205 .....	17
<i>Aguilar v. Avis Rent A Car System, Inc.</i> (1999) 21 Cal.4th 121 .....	18
<i>Airbnb, Inc. v. City &amp; Cnty. of S.F.</i> (N.D.Cal. Nov. 8, 2016), No. 3:16 -cv-03615-JD, 2016 U.S. Dist. LEXIS 155039 .....	35, 37
<i>Alemite Mfg. Corp. v. Staff</i> (2d Cir. 1930) 42 F.2d 832 .....	27
<i>Anthony v. Yahoo! Inc.</i> (N.D.Cal. 2006) 421 F.Supp.2d 1257 .....	37
<i>Ark. Educ. Tv Comm'n v. Forbes</i> (1998) 523 U.S. 666 .....	16
<i>Ashcroft v. Free Speech Coalition</i> (2002) 535 U.S. 234 .....	2
<i>Association for Los Angeles Deputy Sheriffs v. Los Angeles Times Communications LLC</i> (2015) 239 Cal.App.4th 808 .....	21
<i>BE&amp;K Constr. Co. v. NLRB</i> (2002) 536 U.S. 516 .....	48
<i>Balboa Island Village Inn, Inc. v. Lemen</i> (2007) 40 Cal.4th 1141 .....	<i>passim</i>
<i>Barnes v. Yahoo!, Inc.</i> (9th Cir. 2009) 570 F.3d 1096 .....	34, 36, 39, 43
<i>Barrett v. Rosenthal</i> (2006) 40 Cal.4th 33 .....	<i>passim</i>
<i>Batzel v. Smith</i> (9th Cir. 2003) 333 F.3d 1018 .....	37

<i>Bd. of Regents v. Roth</i> (1972) 408 U.S. 564 .....	2, 22, 23
<i>Beauharnais v. Illinois</i> (1952) 343 U.S. 250 .....	14
<i>Benson v. California Coastal Com.</i> (2006) 139 Cal.App.4th 348 .....	25
<i>Berger v. Superior Court of Sacramento County</i> (1917) 175 Cal. 719 .....	26, 27, 28
<i>Bigelow v. Virginia</i> (1975) 421 U.S. 809 .....	16
<i>Bill Johnson's Rests. v. NLRB</i> (1983) 461 U.S. 731 .....	14
<i>Blockowicz v. Williams</i> (N.D.Ill. 2009) 675 F.Supp.2d 912 .....	29
<i>Blonder-Tongue Labs. v. University of Illinois Found.</i> (1971) 402 U.S. 313 .....	25
<i>Buchman</i> (1954) 123 Cal.App.2d 546 .....	25
<i>Carafano v. Metrosplash.com, Inc.</i> (9th Cir. 2003) 339 F.3d 1119 .....	37
<i>Carroll v. President &amp; Comm'Rs of Princess Anne</i> (1968) 393 U.S. 175 .....	17
<i>Chase Nat'l Bank v. Norwalk</i> (1934) 291 U.S. 431 .....	25
<i>Chi. Lawyers' Comm. for Civ. Rights Under Law, Inc. v. Craigslist, Inc.</i> (7th Cir. 2008) 519 F.3d 666 .....	35
<i>City of Chicago v. StubHub!, Inc.</i> (7th Cir. 2010) 624 F.3d 363 .....	37
<i>Cubby, Inc. v. Compuserve, Inc.</i> (S.D.N.Y. 1991) 776 F.Supp. 135 .....	43, 44

<i>Dart v. Craigslist, Inc.</i> (N.D.Ill. 2009) 665 F.Supp.2d 961 .....	38
<i>Delfino v. Agilent Technologies, Inc.</i> (2006) 145 Cal.App.4th 790 .....	38
<i>Doe v. Internet Brands, Inc.</i> (9th Cir. 2016) 824 F.3d 846 .....	36, 45
<i>Doe II v. MySpace Inc.</i> (2009) 175 Cal.App.4th 561 .....	38
<i>Evans v. Evans</i> (2008) 162 Cal.App.4th 1157 .....	21
<i>Fair Hous. Council v. Roommates.com, LLC</i> (9th Cir. 2008) 521 F.3d 1157 .....	37, 42, 43, 45
<i>Fazzi v. Peters</i> (1968) 68 Cal.2d 590 .....	25, 31
<i>Freeman v. Superior Court of San Diego County</i> (1955) 44 Cal.2d 533 .....	42
<i>Gentry v. eBay, Inc.</i> (2002) 99 Cal.App.4th 816 .....	38
<i>Gompers v. Bucks Stove &amp; Range Co.</i> (1911) 221 U.S. 418 .....	33
<i>Green Grp. Holdings, LLC v. Schaeffer</i> (S.D.Ala. Oct. 13, 2016), No. CIVIL ACTION NO. 16-00145-CG-N, 2016 U.S. Dist. LEXIS 142654 .....	32
<i>Hardin v. PDX, Inc.</i> (2014) 227 Cal.App.4th 159 .....	37
<i>Heller v. New York</i> (1973) 413 U.S. 483 .....	11, 16
<i>Herbert v. Lando</i> (1979) 441 U.S. 153 .....	14
<i>Hurvitz v. Hoefflin</i> (2000) 84 Cal.App.4th 1232 .....	18, 21

<i>Hustler Magazine v. Falwell</i> (1988) 485 U.S. 46 .....	48
<i>J.S. v. Vill. Voice Media Holdings, LLC</i> (2015) 184 Wash.2d 95 .....	37
<i>Kash Enterprises, Inc. v. Los Angeles</i> (1977) 19 Cal.3d 294 .....	17
<i>Kathleen R. v. City of Livermore</i> (2001) 87 Cal.App.4th 684 .....	38, 40
<i>Keeton v. Hustler Magazine, Inc.</i> (1984) 465 U.S. 770 .....	2
<i>Kerry v. Din</i> (2015) 135 S.Ct. 2128 .....	22
<i>Kimzey v. Yelp! Inc.</i> (9th Cir. 2016) 836 F.3d 1263 .....	46
<i>Lancaster v. Alphabet Inc.</i> (N.D.Cal. July 8, 2016), No. 15-cv-05299-HSG, 2016 U.S. Dist. LEXIS 88908 .....	38
<i>Lee Art Theatre, Inc. v. Virginia</i> (1968) 392 U.S. 636 .....	17
<i>Lennon</i> (1897) 166 U.S. 548 .....	26
<i>Levitt v. Yelp! Inc.</i> (9th Cir. 2014) 765 F.3d 1123 .....	<i>passim</i>
<i>M.A. ex rel. P.K. v. Vill. Voice Media Holdings</i> (E.D.Mo. 2011) 809 F.Supp.2d 1041 .....	39
<i>Macaluso v. Superior Court</i> (2013) 219 Cal.App.4th 1042 .....	38
<i>Marcus v. Search Warrant of Property</i> (1961) 367 U.S. 717 .....	15, 16
<i>Medytox Solutions, Inc. v. Investorshub.com, Inc.</i> (Fla.4th DCA 2014) 152 So.3d 727 .....	40



<i>Neb. Press Ass'n v. Stuart</i> (1976) 427 U.S. 539 .....	21
<i>Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.</i> (4th Cir. 2009) 591 F.3d 250 .....	46
<i>New York Times Co. v. Sullivan</i> (1964) 376 U.S. 254 .....	17
<i>Noah v. AOL Time Warner Inc.</i> (E.D.Va. 2003) 261 F.Supp.2d 532 .....	40
<i>O'Bannon v. Town Court Nursing Center</i> (1980) 447 U.S. 773 .....	23
<i>Oneida Indian Nation v. Madison County</i> (2d Cir. 2011) 665 F.3d 408 .....	25
<i>People ex rel. Gwinn v. Kothari</i> (2000) 83 Cal.App.4th 759 .....	2, 26, 28, 29
<i>People v. Conrad</i> (1997) 55 Cal.App.4th 896 .....	28
<i>People v. Ramirez</i> (1979) 25 Cal.3d 260 .....	25
<i>Planned Parenthood Golden Gate v. Garibaldi</i> (2003) 107 Cal.App.4th 345 .....	28, 29
<i>Regal Knitwear Co. v. NLRB</i> (1945) 324 U.S. 9 .....	27
<i>Richards v. Jefferson County</i> (1996) 517 U.S. 793 .....	25
<i>Ross v. Superior Court of Sacramento County</i> (1977) 19 Cal.3d 899 .....	<i>passim</i>
<i>Tokio Marine &amp; Fire Ins. Corp. v. Western Pacific Roofing Corp.</i> (1999) 75 Cal.App.4th 110 .....	31
<i>United States v. Hall</i> (5th Cir. 1972) 472 F.2d 261 .....	30

<i>United States v. Paccione</i> (2d Cir. 1992) 964 F.2d 1269 .....	27, 30
<i>United Student Aid Funds, Inc. v. Espinosa</i> (2010) 559 U.S. 260 .....	25
<i>Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council</i> (1976) 425 U.S. 748 .....	14
<i>Wilson v. Superior Court of Los Angeles County</i> (1975) 13 Cal.3d 652 .....	21
<i>Zeran v. Am. Online, Inc.</i> (4th Cir. 1997) 129 F.3d 327 .....	32, 37, 39, 45

**Statutes**

47 U.S.C. section 128(a)(4) .....	33
47 U.S.C. section 230 .....	<i>passim</i>
47 U.S.C. section 230(c)(1) .....	34
47 U.S.C. section 230(e)(3) .....	33, 34, 40
47 U.S.C. section 230(c)(1), (e)(3) .....	34
47 U.S.C. section 708.510 .....	38
47 U.S.C. section 1209(a) .....	42
Code Civ. Proc., section 585 .....	47
Code Civ. Proc., section 425.17 et seq. ....	48

**Other**

California Rules of Court, rule 8.500(c)(2) .....	3
---	---

## **I. ISSUES PRESENTED**

1. Does Yelp, an internet company that sells advertising to businesses and also permits third parties to post anonymous, unvetted and unedited reviews of those businesses, have a First Amendment right to post, in perpetuity, other people's statements that have been judicially determined to be defamatory? (No.)

2. Did the Court of Appeal err in adhering to this Court's precedent and holding that Yelp was not deprived of due process by the trial court's issuance of a removal order requiring Yelp to take down three postings that had been judicially determined to be defamatory? (No.)

3. Did the Court of Appeal err in finding that the Communications Decency Act, 47 United States Code section 230 *et seq.*, does not prevent the court from enforcing a valid order against a named individual through Yelp? (No.)

## **II. SUMMARY OF ARGUMENT**

Despite Yelp's overblown rhetoric, the issue before the Court is an exceedingly narrow one: May Yelp, an internet company that sells advertising to businesses and also allows third parties to post anonymous, unvetted and unedited reviews of those businesses, republish, in perpetuity, three postings that have been judicially determined to be defamatory? No reasonable reading of the law permits the answer to be yes.

Yelp invokes the First Amendment, the Due Process clause, and the federal Communications Decency Act. None of these law allows Yelp to ignore a court order preventing the republication of libel.

This case is not a First Amendment case involving merely critical reviews. Indeed, below its surface arguments, Yelp (1) acknowledges that the defamation judgment is against Bird, not Yelp; and (2) does not dispute

that it has no standing to challenge the underlying defamation judgment against Bird. (OBM, 14).<sup>1</sup> As this Court and the U.S. Supreme Court have held repeatedly, defamatory speech has long been recognized to fall outside the scope of First Amendment protections. (See *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 245-246; *Keeton v. Hustler Magazine, Inc.* (1984) 465 U.S. 770, 776 [false statements have “no constitutional value” because they “harm both the subject of the falsehood and the readers of the statement”]; *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1147). Yelp has no First Amendment right to distribute defamatory speech any more than the speaker has to create the speech in the first instance. Thus, to the extent that Yelp believes that it has a right to perpetuate defamation because it has a separate First Amendment right to distribute speech, it is entirely mistaken. There is no constitutional purpose in protecting the publication of proven lies.

Yelp admits that its due process arguments are largely based on the false premise that it has a First Amendment right to post proven libel. (OBM, 19). Without the protective cover of the First Amendment, Yelp’s due process argument withers. Yelp must, and cannot, identify any other protected interest that would trigger due process considerations. (*Bd. of Regents v. Roth* (1972) 408 U.S. 564, 570). Further, Yelp cannot escape the well-established rule that an injunction may run to classes of persons through whom the enjoined party may act. (*People ex rel. Gwinn v. Kothari* (2000) 83 Cal.App.4th 759, 766-767).

---

<sup>1</sup> References to Yelp’s Opening Brief on the Merits are designated “OBM.” References to the Court of Appeal’s opinion are designated “Op.” References to Appellate Record are designated by “AA” followed by the volume number, tab number, and page numbers, e.g. AA.V1.T3.1-3.

Yelp's brief is also marred by a fundamental and irreconcilable inconsistency. For purposes of its constitutional arguments Yelp insists that it is a publisher, but for purposes of its argument that the Communications Decency Act shields it from liability, it distances itself from the speech at issue, emphasizing that it played no role in the creation of the defamatory speech. The CDA was never intended to permit freewheeling defamation on the internet. Simply put, the CDA does not grant Yelp license to republish judicially determined libel in perpetuity.

Imagine an advertisement on the New York Times website falsely proclaiming that a person is a rapist or a serial killer. Under Yelp's reasoning, the website can never be compelled to remove the advertisement, even if the statements contained therein are proven in a court of law to be false. Yelp ascribes to Hassell a nefarious plan to undermine free speech and flout the law when in fact its own conduct must be scrutinized. Hassell simply followed the law. Indeed, she tried to resolve the matter out of court with both Bird and Yelp. Only after being met with outright refusal from both did she seek relief to which she is lawfully entitled.

### **III. STATEMENT OF FACTS AND PROCEDURE.<sup>2</sup>**

#### **A. Yelp Is A Business That Permits Third Parties to Post Anonymous, Unvetted Comments Online.**

Yelp hosts an online directory of businesses that permits users to post comments and rank businesses on a scale of one to five stars. Yelp

---

<sup>2</sup> The relevant background of the case is set forth accurately and in detail in the Court of Appeal's opinion. (Op., 2-10). As Yelp did not seek rehearing, this Court should accept the Court of Appeal's statement of the issues and facts, which is more complete and balanced than the statement Yelp offers. (See Cal. Rules of Court, rule 8.500(c)(2)).

sells paid advertising to businesses that runs alongside the user comments. Businesses cannot opt out of being listed on Yelp. (See *Levitt v. Yelp! Inc.* (9th Cir. 2014) 765 F.3d 1123, 1126).<sup>3</sup>

Yelp's online directory is akin to a neighborhood bulletin board: Yelp permits third parties to post anonymous, unvetted, and unedited comments to the directory. Comments can be removed by the reviewer. In addition, Yelp states that it may remove reviews for violating its Terms of Service or Content Guidelines such as "writing a fake or defamatory review." (AA.V3.T27.00748; see also AA.V3.T27.00757).<sup>4</sup> In addition, Yelp uses an undisclosed algorithm to highlight or hide certain reviews. (AA.V3.T33.00838; see *Levitt*, 765 F.3d at 1126).

**B. Bird Posts Defamatory Comments On Yelp.**

Plaintiffs and Respondents Hassell Law Group and its principal, attorney Dawn Hassell (collectively "Hassell" or "Plaintiffs"), represented Defendant Ava Bird in a personal injury case for less than a month in the summer of 2012. During that time, Hassell had at least two communications with Allstate Insurance Company about Bird's injury claim and notified Bird about those communications via e-mail. Hassell also had dozens of direct communications with Bird by e-mail and phone and at least one in-person meeting.

Bird, however, was largely nonresponsive to these communications. She failed to return promptly a signed insurance authorization, and did not respond to repeated attempts to set up a phone conference to discuss her

---

<sup>3</sup> "How do I add a business to Yelp?", Yelp, available at [https://www.yelp-support.com/article/How-do-I-add-a-business-to-Yelp?l=en\\_US](https://www.yelp-support.com/article/How-do-I-add-a-business-to-Yelp?l=en_US) (last visited Jan. 23, 2017).

<sup>4</sup> Yelp's Terms of Service, available at <https://www.yelp.com/static?p=tos> (last visited Jan. 23, 2017).

case. (AA.V1.T6.00054-55, 74-86; AA.V1.T7.00144-145, 168-183). After these communication difficulties, Hassell withdrew from representation on September 13, 2012. At the time, Bird had 21 months before the expiration of the statute of limitations on her personal injury claim, and had not lost any rights or claims relating to her injury. (AA.V1.T6.00055).

In response, Ava Bird wrote a defamatory post on Yelp that seriously and measurably harmed Hassell's business. (AA.V1.T.6.A00055 [the "January Post"]). The post, under the moniker "Birdzeye B.," gave Plaintiff one star of an available five stars, and contained malicious and false statements such as "dawn hassell made a bad situation much worse for me," "the hassell group didn't speak to the insurance company either," and that Hassell indicated "the insurance company was too much for her to handle." (AA.V1.T1. 00018).

Hassell attempted to contact Bird by phone to discuss the posting, but she failed to return the call, so the firm sent her an email "requesting she remove the factual inaccuracies and defamatory remarks from her Yelp.com written statement." (AA.V1.T6.00056, 94). Bird responded by email the next day, stating, among other things, that "you deserve the review I have given you on yelp," and "you will have to accept the permanent" review. (AA.V1.T6.00056, 95). Even though in her Yelp post, Bird had stated that Hassell had not communicated with her or with the insurance company, Bird's email to Hassell admitted that there were multiple email communications with Hassell and that Hassell had contacted the insurance company multiple times. (AA.V1.T6.00095-98). Bird also refused to remove the post stating that she posted it to "be a lesson to you," threatened to have a friend post another bad review, and stated that she

“giggled at the thought” of a defamation suit and would “be happy to present the evidence to the judge...” She concluded the email “FUCK YOU DAWN HASSELL, A CALLOUS, HEARTLESS, NO-GOOD ATTORNEY.” (*Id.*) Hassell did not respond.

Days later, Bird posted another review under the moniker “J.D.” (AA.V1.T6.57, 99-101[the “February Post”]). Hassell understood that Bird was “J.D.” because Hassell never represented a client with the initials J.D., and because the February Post was published shortly after the January Post and used similar language. (*Id.*) In addition, the posting was from Alameda, where Bird was served, and it was a first-time posting for that user. (*Id.*)

**C. After Bird Refuses To Remove The Review, And Writes A Second One, Hassell Institutes An Action Against Bird For Defamation And Asks Yelp To Remove The Reviews.**

Because the defamatory postings had palpably harmed the law firm’s business and Bird refused to remove them, Hassell filed suit against Bird on April 10, 2013. (AA.V1.T1.00001-21). The Complaint alleged four causes of action for damages relating to the “Birdzeye B.” and “J.D.” posts, (*id.* at 6-13), and a fifth cause of action for injunctive relief based on the continued irreparable harm to their business resulting from Bird’s defamatory posts. (*Id.* at 13). The prayer sought to enjoin Bird from continuing to defame Hassell, and requiring her to remove every defamatory review, from Yelp.com and elsewhere. (*Id.*) The Complaint attached the Yelp postings at issue. (AA.V1.T1.00015-20).

Over the next week, after Hassell made many attempts to serve Bird personally, they finally effected substitute service on April 17, 2013. (AA.V1.T3.00024-27). Just over a week later, on April 29, 2013, Bird “updated” her original post with a new post, stating that “Dawn Hassell has



filed a lawsuit against me over this review.” “She has tried to threaten, bully, intimidate, harrass [sic] me into removing the review!” (AA.V1.T6.00057, 102-105[the “April Post”]).

Not long after Bird was served, Yelp received actual notice of the litigation. On May 13, 2013, only one month after the Complaint was filed, Hassell’s attorney sent Yelp’s General Counsel (and its support page) a letter enclosing the file-stamped Complaint and explaining that Hassell expected Yelp “will cause these two utterly false and unprivileged reviews to be removed as soon as possible.” (AA.V3.T21.00601-601, 00617-634). The Complaint and letter plainly raised both the demand and practical reality that if Ms. Bird refused to take down the reviews, some affirmative conduct by Yelp would be the only way to stop the ongoing defamation. (*Id.*; see also AA.V3.T33.00837:13-15).

**D. The Trial Court Enters A Default And Conducts An Evidentiary Hearing.**

Neither Bird nor Yelp appeared in the action. On June 20, 2013, Hassell filed a Request for Entry of Default, and served the same upon Bird. (AA.V1.T3, T5.00031). On June 28, 2013, Plaintiffs received a letter from the Bar Association of San Francisco stating that Bird had expressed interest in mediating the dispute. Hassell conveyed an offer to Bird through the mediator to dismiss the lawsuit in exchange for Bird’s removal of her defamatory reviews on Yelp or her agreement not to publish any further defamatory reviews. Bird never responded to the proposal, and mediation efforts quickly ceased. (AA.V1.T5.00031-32).

Plaintiffs’ requested default was entered on July 11, 2013. (AA.V1.T3.00023). Hassell then moved for a default judgment. A hearing on the application for default judgment and request for injunctive

relief was set for January 14, 2014. (AA.V1.T4.00028-29).

The trial court reviewed and heard extensive evidence and argument in support of Hassell's claims, ranging from Bird's email admitting she had posted the review to teach Ms. Hassell "a lesson," (AA.V1.T6.00096), to Plaintiffs' efforts to serve Bird (AA.V1.T3.00024-26, AA.V1.T6.00124-140), to Bird's affirmative refusal to mediate the lawsuit, (AA.V1.T5.31-32), to detailed explanations why each of the reviews was demonstrably false, (AA.V1.T6-7), as well as thorough briefing on the merits of each claim, (AA.V1.T5.00036-51). Plaintiffs' briefing explained that if Bird refused to comply with the requested injunction, the only way to remove the posts would be a court order requiring Yelp to do so. (AA.V1.T5.50-51). Hassell also produced substantial documentation proving that Bird's statements were untrue.

**E. The Trial Court Enters A Money Judgment And Injunction, Enforceable Through Yelp, Against Bird.**

After the evidentiary hearing, the Court granted most of the relief Hassell sought. (AA.V1.T8.00211; AA.V1.T9.00212-216). It ordered \$557,918.85 in damages against Bird, denied the request for punitive damages, and granted injunctive relief. (*Id.*). The Judgment and Order provided:

...Defendant AVA BIRD is ordered to remove each and every defamatory review published or caused to be published by her about plaintiffs HASSELL LAW GROUP and DAWN HASSELL from Yelp.com and from anywhere else they appear on the internet within 5 business day of the date of the court's order.

Defendant AVA BIRD, her agents, officers, employees or representatives, or anyone acting on her behalf, are further enjoined

from publishing or causing to be published any written reviews, commentary, or descriptions of DAWN HASSELL or the HASSELL LAW GROUP on Yelp.com or any other internet location or website.

Yelp.com is ordered to remove all reviews posted by AVA BIRD under user names “Birdzeye B.” and “J.D.” attached hereto as Exhibit A and any subsequent comments of these reviewers within 7 business days of the date of the court’s order.

(AA.V1.T9.00213). Exhibit A attached the January Post, the February Post and the April Post. (*Id.* at 00212-215).

**F. Hassell Give Yelp Notice, And Yelp Refuses To Intervene And Refuses To Remove The Adjudicated Defamatory Statements.**

Plaintiffs hand-delivered the Judgment and Order, with a letter requesting that Yelp remove the posts, on January 15, 2014.

(AA.V3.T27.00704-718; AA.V3.T28.00798-799). Plaintiffs then personally served Yelp’s agent for service of process with the Order on January 29, 2014, along with a letter again requesting that Yelp remove the three posts. (AA.V3.T27.00720-730).

Yelp ignored the judgment and flatly refused to remove the libelous posts. Yelp’s Senior Director of Litigation Aaron Schur responded by letter dated February 3, 2014, claiming that Yelp was not subject to the injunction, that the default was improper, and that Plaintiffs had not adequately proved that Bird posted the reviews or that the reviews were defamatory. (AA.V3.T27.00732-734). He wrote:

[T]he judgment and order are rife with deficiencies and Yelp sees no reason at this time to remove the reviews at issue. Of course, Yelp has no desire to display defamatory content on its site, but the

defamation must be proven. A default judgment through a bench trial in a lawsuit in which it does not appear the defendant was ever served is an insufficient basis for Yelp to consider the review of Birdzeye B. to be defamatory – much less the review of J.D. Yelp would revisit its decision if the facts change, for example, if it receives evidence that the defendant is actually served, fails to defend herself, and is responsible for both reviews.

(AA.V3.T27.00734). In other words, Yelp chose to credit its own disingenuous<sup>5</sup> analysis over the court’s judgment after a default prove-up hearing.

Four months later, Yelp moved to vacate the entire judgment. (AA.V1.T11.00225). After considering briefing and hearing extensive argument (AA.V3.T33.829-854), the trial court denied the motion. (AA.V3.T30.808-810). The trial court observed that “injunctions can be applied to non-parties,” citing a line of cases allowing an injunction to run against those acting “in concert with or in support of” the enjoined party. (AA.V3.T30.00809, quoting *Ross v. Superior Court* (1977) 19 Cal.3d 899, 906). The court also noted evidence demonstrating that Yelp aided and abetted Bird in maintaining the false statements. (*Id.*).

Yelp appealed the ruling.

**G. The Court of Appeal Affirms The Trial Court’s Removal Order.**

The Court of Appeal largely upheld the trial court’s decision, soundly rejecting the arguments Yelp reiterates here.

---

<sup>5</sup> Yelp, of course, has the records it faults Plaintiffs for not subpoenaing (AA.V1.T12.00228) and can check who posted the comments.

First, in resolving standing issues (which Yelp does not contest, see OBM, 14), the court noted that Yelp’s appeal impermissibly attempted to mount a collateral attack on the underlying defamation judgment. “Yelp’s claimed interest in maintaining [its] Website as it deems appropriate does not include the right to second-guess a final court judgment which establishes that statements by a third party are defamatory and thus unprotected by the First Amendment.” (Op., 11).

Second, the Court of Appeal rejected Yelp’s argument that the removal order was barred by due process. The court embraced the “settled principles” and “common practice” of permitting an injunction, such as the removal order at issue here, to run to a non-party. (Op., 19). The court also rejected Yelp’s contention that it had a First Amendment right to distribute third-party speech that could not be denied without notice and a hearing, holding that Yelp did not have a First Amendment right to distribute speech that had specifically “been found to be defamatory in a judicial proceeding.” (Op., 23). Yelp failed, as it does here, to offer any authority “which confers a constitutional right to a prior hearing before a distributor can be ordered to comply with an injunction that precludes republication of specific third party speech that has already been adjudged to be unprotected and tortious.” (*Id.*). Further, the court noted that the United States Supreme Court has “never held, or even implied, that there is an absolute First or Fourteenth Amendment right to a prior adversary hearing” whenever any alleged unprotected materials is seized or impacted. (Op., 23 quoting *Heller v. New York* (1973) 413 U.S. 483, 488).

Third, the Court of Appeal rejected Yelp’s overbroad prior restraint argument. The appellate court, held, as this Court did in *Balboa Island*, 40 Cal.4th 1141, that “an injunction issued following a trial that determined

that the defendant defamed the plaintiff, that does no more than prohibit the defendant from repeating the defamation, is not a prior restraint and does not offend the First Amendment.” (*Id.* at 1148; Op., 24). The court did trim the removal order to remove subsequent comments that Bird or anyone else might post as an “overbroad prior restraint on speech.” (Op., 25).

Finally, the court found that any immunity from liability Yelp may enjoy under the CDA was inapplicable to its status as a third-party in this case. Looking to the plain language of the statute, the court reasoned that “[t]he removal order does not violate section 230 because it does not impose any liability on Yelp. In this defamation action, Hassell filed their complaint against Bird, not Yelp; obtained a default judgment against Bird, not Yelp and was awarded damages and injunctive relief against Bird, not Yelp.” (Op., 28). Yelp did not cite any “authority that applies section 230 to restrict a court from directing an Internet service provider to comply with a judgment which enjoins the originator of defamatory statements posted on the service provider’s Web site.” (*Id.*). It noted that California law both authorizes an injunction against statements adjudged to be defamatory, and permits injunctions to run to a non-party through whom the enjoined party may act, procedures which are not inconsistent with section 230 “because they do not impose any liability on Yelp, either as a speaker or as a publisher of third party speech.” (Op., 29). As a result, the court found that the CDA, which acts as a shield from tort liability, did not excuse Yelp from compliance with court orders. (Op., 31).

Yelp petitioned the Court for review. Bird’s libelous statements remain online to this day.

**IV. THE COURT OF APPEAL PROPERLY AFFIRMED A NARROW ORDER REQUIRING YELP TO REMOVE THREE POSTINGS THAT WERE JUDICIALLY DETERMINED TO BE DEFAMATORY.**

**A. This Case Does Not Involve A Challenge To The Underlying Defamation Finding And Injunction Against Bird.**

In an effort to transform this case into a First Amendment case, Yelp repeatedly refers to Bird's statements as merely "critical," and otherwise seeks to have this Court question the validity of the trial court's finding of defamation. (See, e.g., OBM, 9, 16). This attempt to blur the lines between protected and unprotected speech is a blatant misrepresentation of the record and is beyond the scope of the issues properly before this Court upon review.

The Court of Appeal found – a finding not challenged by Yelp in its petition to this Court – that Yelp did not have standing to challenge the judgment, and thus the underlying finding of defamation, against Bird. (Op. 10-11 ["Yelp has endeavored to blur the distinction between the judgment entered against Bird which awarded Hassell damages and injunctive relief, and the removal order in the judgment which directs Yelp to effectuate the injunction against Bird."], 17-18 ["Yelp cannot bootstrap its collateral attack of an allegedly void order into a substantive appeal of the default judgment itself. The question whether the trial court should have granted an injunction against Bird is outside the scope of this appeal."]).

Yelp acknowledges this ruling, but Yelp's refusal to honor it permeates its brief.

**B. Yelp Does Not Have A First Amendment Right To Post Defamatory Content.**

Yelp's insistence that its due process rights were violated largely