

Someone defamed my business and/or property, is there anything I can do about it?

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There certainly is. Initially one may want to consider making a traditional defamation claim (specifically slander if the falsehood was published orally, libel if published in writing). The facts will need to be assessed to see if traditional defamation is applicable. But there is a claim recognized under Massachusetts law known as commercial disparagement that one may also want to consider bringing. There has been a recent change in the law that makes this type of claim more attractive that this post will now briefly address.

The Massachusetts Supreme Judicial Court recently decided *Hipsaver, Inc. v. Kiel* and addressed the commercial disparagement claim in detail. *Hipsaver, Inc. v. Kiel*, 464 Mass. 517 (2013). The court stated that defamation and commercial disparagement are similar but that defamation is geared to address damage to reputation where commercial disparagement is geared to address damage to economic interests. It provided the elements of commercial disparagement, to wit:

- 1) The publication of a false statement to a third party;
- 2) The statement must be of and concerning the plaintiff;
- 3) The defendant had knowledge that the statement was false or made it with reckless disregard of its truth or falsity;
- 4) Financial harm to the plaintiff's interests was intended or foreseeable; and
- 5) The publication resulted in specific damages in the form of financial harm.

This author adds that the difficulty in these types of claims has been proving that financial harm occurred. Digging deeper into the legal substance required to satisfy this element, in general it must be shown that there was a "specific loss of sales to identifiable customers." *Hipsaver, Inc. v. Kiel*, 464 Mass. at 536. This means, for example, showing that the predominant reason company X did not buy more product or potential buyer did not buy the property is because the third party heard of the falsehood. Potential plaintiffs generally do not offer anything more than conjecture and thus do not support this element adequately. And even when the factual support may be there, a plaintiff may not want to get their customers involved or their customers may not want to be involved and/or are reluctant to say they stopped doing business with the plaintiff because of what the defendant said. Thus, in many instances, these claims are not brought.

However, the *Hipsaver* opinion made the fifth element easier to satisfy. The SJC has recognized a new exemption to the requirement of identifying specific customers. *Hipsaver, Inc. v. Kiel*, 464 Mass. at 539. It is when the false statement has been widely disseminated and it is impossible to identify specific customers that are affected by the falsehood. The plaintiff will still have to prove that the falsehood was the cause of the business harm, which still makes this one of the toughest elements to satisfy. Just the same, this new, more liberal and plaintiff friendly change may make the difference between a successful and unsuccessful claim in some future cases.

In the event that you believe you have a slander/libel/defamation or commercial disparagement claim, feel free to give this office a call.