

Supreme Court rules on advertising of dentist's mobile surgery

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Introduction

Physicians and dentists must follow strict rules regarding their professional conduct – in particular, in relation to advertising.

In accordance with Section 35 of the Dentists Act,⁽¹⁾ dentists must refrain from 'professional misconduct', which is defined as activities that impair or damage the reputation or interests of the profession. As such, dentists must refrain from advertising any false, subjective or discriminatory information which may harm the reputation of the profession. In execution of this provision, the Chamber of Dentists has adopted guidelines on advertising. Under Article 5(e) of the guidelines, dentists must refrain from television, radio, cinema, billboard or internet advertising (eg, advertising banners on third-party websites).

Facts

The defendant was the sole shareholder and managing director of a company which owned a business park. The business park let a surgery to the dentist. The defendant also worked as an assistant to the dentist.

The dentist told the defendant – who knew the editor at a local radio station – that he was interested in reporting on his house call model. The defendant subsequently contacted the radio station and interviewed the dentist (because the editor had a strong Hungarian accent). Before the interview, both the editor and a spokesperson for the radio station told the dentist and defendant that neither the dentist's name nor the name of the surgery could be mentioned in the interview for legal reasons. Both the dentist and defendant reserved the right to approve the interview before it was released. In the interview, the dentist's house call model and the advantages of the service were described without giving any details about the dentist or the surgery.

The interview was aired without the prior approval of the dentist or defendant. In addition, the radio presenter amended the edited interview to include the following statement: "the dentist's surgery in X is mobile more or less three times a day."

The Chamber of Dentists sued the defendant to cease and desist the radio advertising – in particular, in relation to the information provided about the dentist's mobile surgery in the interview. Both lower courts granted an interim injunction and held that the defendant's participation infringed Section 35 of the Dentists Act and Article 5 of the advertising guidelines.

Decision

The Supreme Court accepted the defendant's appeal⁽²⁾ as the lower courts had deviated from settled

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case law, according to which non-physicians must comply with professional advertising restrictions only if they advertise one or more specific physicians or if specific physicians are identifiable because of the information provided about a surgery or clinic.⁽³⁾ The interview in question did not refer to a specific surgery and the defendant neither mentioned the name or location of the surgery nor the name of the dentist working there. She described only the house call model offered by the dentist, which is not unusual in Austria and was also offered by a dentist in the neighbouring community. Therefore, according to the court, the defendant did not produce an ad and could rely on her civil right of freedom of expression according to Article 10 of the European Convention on Human Rights.

Even if the radio interview qualified as an ad for a specific dentist because of the reference to a "dental surgery in X", the court held that this was not enough to grant an interim injunction against the defendant because the location of the surgery was announced by the radio presenter, not the defendant. Further, the statement was inserted after the interview was recorded, despite the fact that the editor had informed the defendant that information about the surgery could not be mentioned for legal reasons.

The Supreme Court noted that a cease and desist claim can be made based on third-party infringements if the responsible party has the legal authority to stop the infringement; as such, in principle, there is an obligation on business owners to control reports about their businesses.⁽⁴⁾ However, the court held that the plaintiff could not rely on this remedy, as the defendant had reserved the right to approve the interview before it went live. Because the radio station violated its agreement with the defendant, she had no means to prevent or control potential infringements of the rules on professional conduct.

Comment

Interestingly, had the Chamber of Dentists sued the dentist rather than his assistant, the outcome of the case might have been drastically different as under Section 18 of the Unfair Competition Act, the owner of a business is responsible for infringements by aiders and abettors. As aiders and abettors are considered not only employees and freelancers, but also contractual partners, a loose affiliation to a business is sufficient for the business owner to be held responsible for the conduct of advertising agencies or internet providers. Thus, a business owner may be held responsible even if it was unaware of the third-party infringement if it could have suppressed the infringement.⁽⁵⁾

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Endnotes

(1) *Zahnärztegesetz*, Federal Law Gazette I 2005/126, as amended.

(2) 4 Ob 159/14g, RdM-LS 2015/32.

(3) 4 Ob 122/12p – *Zahnarztwerbung III* – RdW 2013, 28; 4 Ob 112/03d, RdW 2003, 701.

(4) 4 Ob 192/03v, ÖBl-LS 2004/22.

(5) For further details see Herzig in *Wiebe/G Kodek, Gesetz gegen den unlauteren Wettbewerb*², sec 18 margin no 15 ss.