



# CRUMILLER P.C.

July 16, 2020

Via Electronic and First-Class Mail

David Lin  
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RE: *Khandker v. [REDACTED] et al*, Index No. 708671/20  
*NOTICE PURSUANT TO 22 NYCRR § 130-1.1(c)*

Dear Mr. Lin and Ms. Valli,

We represent defendants [REDACTED] and [REDACTED] in the above-referenced action, a defamation case against various women who have accused your client of sexual assault and/or mentioned accusations thereof within their networks. As you may know, the accusations have been widely and publicly reported, with at least seventeen anonymous victims having come forward (and counting).

Our client Ms. [REDACTED] has counterclaims of assault and battery against your client, which we will assert upon receipt of the complaint. However, your client has also sued Ms. [REDACTED] and Ms. [REDACTED] for defamation, on the basis of one Facebook post by Ms. [REDACTED] and a few Facebook comments by Ms. [REDACTED] claiming reputational damage. Not only is each post and/or comment factually truthful, but it is impossible to claim reputational damage on the basis thereof in light of the enormous body of other allegations. As such, this action is patently frivolous as against our clients and we demand you discontinue forthwith against Ms. [REDACTED] and Ms. [REDACTED] both to avoid the unnecessary expense of legal fees on both sides, and to avoid the invariable embarrassment to your client which will result from continuing to proceed in this misguided and retaliatory manner.

## **I. Factual Summary**

Dr. Ferdous Khandker is a well-known physician in the Bangladeshi community practicing internal medicine in Jackson Heights, Queens. As you are likely aware, in the last month, more than a dozen women have come forward in accusing your client of sexually molesting them or loved ones during routine medical appointments at his office. In late June, 2020, an Instagram user posted about a friend who had been subjected to one of your client's appalling breast-groping episodes. In response, she received an outpouring of support from

women within the community, who shared horrifyingly similar stories of assault. Soon after, an online petition was initiated, on the popular “change.org” platform, by some of the survivors of your client’s abuse. The explicit aim of the petition was to show support and spread awareness, in the hopes that this would lead to your client’s medical license being revoked. At this time 4,604 people have signed on to the petition. Additionally, upon information and belief, the New York State Office of Professional Medical Conduct has begun investigating Dr. Khandker based upon these credible allegations of sexual assault.

1. Defendant [REDACTED] Facebook Comment

Roughly twenty years ago, Ms. [REDACTED] sister – who was a teenager at the time – went to see Dr. Khandker for laryngitis treatment as she seemed to be losing her voice. Dr. Khandker did in fact diagnose her with laryngitis, but then proceeded to bizarrely ask her whether she had received her yearly breast exam. She stated no, but could not understand how this was relevant to her laryngitis diagnosis. Dr. Khandker then requested that she take off her shirt and proceeded to give her a breast exam with his hands. No one else was in the room. Ms. [REDACTED] sister felt uncomfortable, but as an adolescent who had always been taught to respect and trust medical professionals, she felt she had no choice but to comply. Understandably, she left the appointment disgusted and extremely distraught. Like many victims, she questioned what had happened to her, felt alone and ashamed, and endeavored to put the incident behind her.

However, during the COVID-19 pandemic, many members of the Bangladeshi community were looking to Dr. Khandker for advice and information regarding the virus as there was limited information within the community. His social media presence became widespread and Ms. [REDACTED] sister grew troubled by his apparent popularity. In early June, 2020, she disclosed her sexual assault by Dr. Khandker to Ms. [REDACTED]. Ms. [REDACTED] sought to advocate for her sister and to spread awareness so that he would be prevented from assaulting other young women. As such she posted the following truthful review on his Facebook page on June 25, 2020: “Dr. Ferdous sexually assaults all of his female patients. As a general physician why does he personally give breast exams to all of his female patients even if they come in just for a cough? He is disgusting and should have all of his licenses and certifications revoked. IF YOU ARE A WOMAN DO NOT SEE THIS DOCTOR.” Upon information and belief, Dr. Khandker immediately deleted the comment.

Ms. [REDACTED] also added the following comment to the change.org petition: “[h]e told my sister he needed to give her a breast exam when she went in for laryngitis. This happened 20 years ago so imagine how many victims he’s taken advantage since then. He molested her and many underaged women and older. Not only is he a sexual predator but a pedophile as well.”

Upon information and belief, the above two statements are the basis of Dr. Khandker’s purported defamation suit against Ms. [REDACTED]

## 2. Dr. Khandker's Sexual Assault of ██████

Ms. ██████ is a 23-year old woman who attends Berkeley College and lives in Queens. On February 5, 2020, Ms. ██████ went to Dr. Khandker for her yearly checkup. At the checkup, Ms. ██████ was surprised when Dr. Khandker removed her shirt, exposing her breasts, for reasons unrelated to the exam. She remained frozen in a state of fear and shock as he then proceeded to grope her breasts and grab her nipples, for no medical purpose whatsoever, and then summarily concluded the exam. Later that same day, Ms. ██████ posted the following to her own Facebook page:

Education doesn't really educate you or else every highly educated individual would be the most civilized human being ever. Dr. Ferdous Khandaker, some of you who lives in NY and goes to JH might know him. He's a bastard! I repeat he's a bastard!! One of my friends went for a regular checkup this morning and he tried to molest her. She was sooo in shock that she couldn't take actions right away. This is so absurd and unacceptable if your doctor does that to you. Where's the women's safety?? She can't sue the doctor for the lack of the evidence but that can't stop us to speak up against inhuman acts. I would suggest DO NOT VISIT THAT DOCTOR

Ms. ██████ posted about a “friend” because she felt very ashamed that she had been subjected to such assault and she simultaneously wanted to protect her identity. Since then, Ms. ██████ has suffered from frequent nightmares and panic attacks.

On June 9, 2020, during the height of Dr. Khandker's popularity in the Bangladeshi community, Ms. ██████ February 5th Facebook post went viral. Some Facebook users expressed support for Ms. ██████ “friend,” while others harassed her and questioned the veracity of her claims. As such, she posted another Facebook status defending her previous post and asking that anyone who wanted to share her words remove her name and photo from the post so that she would ostensibly be protected.

Dr. Khandker's response was to sue Ms. ██████ for defamation.

## 3. ████████████████████ Facebook Comments

On June 26, 2020, Ms. ██████ posted an article written in Bengali on her Facebook about the sexual assault allegations against Dr. Khandker, along with the comment (in Bengali), “I'm not sure about it.” A discussion ensued on Ms. ██████ Facebook wall regarding the merit of the allegations. Ms. ██████ wrote the following Facebook comments, all in Bengali:

- He destroyed my father's life.
- I'll let you talk to my father one day.
- He never helped any hospital, tell him to prove it if he did.

- He sent my mother for surgery under someone else's file and my father is lame from him today. He [Khandker] used to sit on his phone all day.
- Once he was a very good doctor, I'm not going to lie, but all of a sudden when he became famous, then he started neglecting his patients.
- Come to my house and see my father.
- He didn't misdiagnose him, he never treated him, he would just tell my father "go home, nothing is wrong with you."
- Yes, I complained to wellcare.
- Husband and wife (Khandker and his wife) asked for forgiveness for the event with my mother's file.
- I don't know anything about his character, I can't lie, he didn't do anything with me but one of his workers told me he asked her out and then I told her it doesn't take one person to do such a thing.
- Someone said one day the truth will come out, and I said of course, when you do too much sin, then the truth will come out.
- After he sent my mother under the wrong file, he and his wife asked for forgiveness. He didn't mistreat my father. He didn't misdiagnose him but he never treated him, he would just tell my father go home nothing is wrong with you. My father used to go again and again with problems but he would just send him home. When my father went to him again, he was on his phone that time too and two days later my father went into a coma from a heart attack. I have passed this time crying to god. He is not worthy of forgiveness.

Ms. [REDACTED] was upset that Dr. Khandker was being venerated in the press because she had taken her father to see him for a medical appointment and your client ignored and dismissed Ms. [REDACTED] father's concerns. As a result, Ms. [REDACTED] father ended up in a coma. This was obviously an extremely traumatic incident for Ms. [REDACTED] and her family.

Upon information, the above Facebook discussion forms the entire basis of Dr. Khandker's claim against Ms. [REDACTED]

## **II. Our Clients' Facebook Posts and Comments Were True**

False factual statements are the *sine qua non* of a libel claim (*Fleischer v NYP Holdings, Inc.*, 104 AD3d 536, 537 [1st Dept 2013]). To satisfy the falsity element of a defamation claim, a plaintiff must allege that the statements in issue are "substantially false" (*Franklin v Daily Holdings, Inc.*, 21 NYS3d 6, 12 [1st Dept 2015]). "Substantial truth" is all that is necessary to defeat a charge of libel (*Fairley v Peekskill Star Corp.*, 83 AD2d 294, 297 [2d Dept 1981]). If an allegedly defamatory statement is "substantially true," a claim of libel is "legally insufficient and ... should [be] dismissed" (*Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 301 [2d Cir.1986]). New York courts have held that a statement is substantially true if the statement would not "have a different effect on the mind of the reader from that which the pleaded truth would have produced" (*Fleckenstein v. Friedman*, 266 NY 19 [1934]). Thus, "it is not necessary to demonstrate complete accuracy to defeat a charge of libel. It is only necessary that the gist or substance of the challenged statements be true" (*Biro v Conde Nast*, 883 F Supp 2d 441, 458

[SDNY 2012], quoting *Printers II, Inc. v. Professionals Publishing, Inc.*, 784 F2d 141, 146 [2d Cir.1986]).

It is clear given the above factual summary that our clients' Facebook comments and posts are true and entirely based on personal experiences with Dr. Khandker. Our clients had no motive in posting these remarks about Dr. Khandker other than to share their personal stories and protect other women and/or patients who may be considering consulting Dr. Khandker. Why would our clients go to such great lengths to lie about and/or defame a doctor if he had not hurt our clients or their loved ones? It is evident that the summons with which our clients were served were meant as a scare tactic to prevent the truth about Mr. Khandker's disgusting and illegal practices from continuing to come out. Attempting to dissuade survivors in this manner can lead to devastating effects for young women particularly within the Bangladeshi community. Past efforts to shame and stigmatize survivors has in fact led to immense harm towards South Asian women.<sup>1</sup> Therefore, the culturally specific impact of this lawsuit makes this case particularly troubling, and Dr. Khandker – as a member of the Bangladeshi community – is or should be fully cognizant of the cultural pressure this tactic will have on his mostly young female survivors.

Purporting to sue survivors for defamation is also obviously an attempt to dissuade other survivors from coming forward with their own stories of sexual assault. Indeed, defamation lawsuits against survivors of sexual misconduct and assault are not a new phenomenon. As recently discussed in the news publication Mother Jones, “defamation lawsuits are often used by wealthy and powerful people to punish their critics. These frivolous cases, known as SLAPPs (Strategic Lawsuits Against Public Participation), are designed to prevent people from speaking out about matters of public interest. It's such a widespread strategy that 30 states have anti-SLAPP laws that protect defendants from these punitive suits by providing a mechanism to get them tossed before they go too far. SLAPP suits also fit into a common defense against accusations of sexual misconduct: deny, attack, and reverse victim and offender. This kind of response, known as DARVO, involves questioning an accuser's credibility while recasting the accused as the true victim.”<sup>2</sup>

To employ such a scare tactic against survivors for courageously speaking out is not only extraordinarily shameful and offensive, but clearly underscores the baseless nature of any purported claims against our clients.

### **III. Plaintiff Will Not Be Able to Allege Any Actual Damages Resulting from Our Clients' Facebook Comments**

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<sup>1</sup> See <https://medium.com/the-lily/samiha-khan-child-sex-abuse-and-the-south-asian-diaspora-4f06dc8747f0> and <https://www.forbes.com/sites/lipiroy/2020/01/17/sexual-harassment-is-no-laughing-matter-insights-from-a-south-asian-female-comic-and-doctor/#4ed9133a67c1> (“An Asian & Pacific Islander American Health Forum report showed higher suicide rates among young South Asian women versus South Asian American males or the general U.S. population. Yet, sadly, the report added that this same group had the lowest rate of utilization of mental health services. Why? Cultural influences are a major barrier to care, including a religious belief that suffering as a punishment for past acts reduces the likelihood of seeking care from a doctor.”)

<sup>2</sup> <https://www.motherjones.com/crime-justice/2020/02/metoo-me-too-defamation-libel-accuser-sexual-assault/?fbclid=IwAR2OISAN6h2aqUGvXzp-bkacggb3n4QHG7VFo7jJHMR36WT0QL4idrxtFOI>

To state a claim for defamation in New York, the purported false statement “must either cause special harm or constitute defamation per se” (*Plautz v. Eidlin-Quere*, 2011 NY Slip Op 33714([U] [Sup Ct NY County], citing *Dillon v. City of New York*, 261 AD2d 34, 38 [1<sup>st</sup> Dep’t 1999]). Special damages contemplate “the loss of something having economic or pecuniary value” (*Id.*, citing *Lieberman v. Gelstein*, 80 NY2d 429, 434-35 [192]), which are not stated herein. And to sustain the only possible claim here for defamation per se, i.e., an allegation that “the person or entity is “‘ignorant, incompetent, [or] incapable in his calling’ . . . and thereby tend to injury him in that capacity”, *Amelkin v Commercial Trading Co.*, 23 AD2d 830, 831 [1st Dept 1965] *affd.*, 17 NY2d 500 [1966](citations omitted), it is similarly required that “there must be something that addresses the element of injury to reputation” (*Sandals Resorts Intern. Ltd. v Google Inc*, 86 AD3d 32, 39 [1<sup>st</sup> Dept 2011]) (“a cause of action for libel per se requires the plaintiff to establish that the publication injured its business reputation or its credit standing”) (citations omitted).

There is no possible way that plaintiff can point to our clients’ actions as the cause of any reputational damage. Amongst the numerous allegations and personal stories of sexual assault by your client on social media, our clients’ Facebook posts are but a mere three examples of his abhorrent conduct. Any possible (and at this point, entirely hypothetical) reputational damage to your client would occur only as a result of *all* the dozens of stories, posts and online petitions concerning the breadth of his misconduct. Furthermore, in cases where a complaint only alleges speculative damages, the court must dismiss the action (*e.g.*, *Marchell v Littman*, 107 AD3d 1082, 1084 [3d Dept 2013]). It is difficult to imagine a different result here.

#### **IV. The Litigation Against our Clients is Frivolous, Misguided and Offensive**

For the reasons discussed herein, this litigation is patently frivolous, retaliatory and offensive. I am enclosing a stipulation of discontinuance with prejudice as against Ms. [REDACTED] and Ms. [REDACTED] that I request you execute promptly. Otherwise, we will move for an order dismissing plaintiff’s claims with prejudice, which I am confident will be issued. In such a case, we will thereafter move for an order of attorney’s fees pursuant to 22 NYCRR § 130-1.1, which governs frivolous conduct in civil litigation.

22 NYCRR § 130-1.1(c) provides that “[i]n determining whether the conduct undertaken was frivolous, the court shall consider ... whether or not the conduct ... was brought to the attention of counsel or the party.” This letter is to provide you the “safe harbor” contemplated by the court rule.

Please contact me upon receipt.

Sincerely,

  
Julia Elmaleh-Sachs

Encl.