New Jersey Law Journal
STATEWIDE LEGAL AUTHORITY SINCE 1878
An ALM Publication
VOL. 202 - NO 13 DECEMBER 27, 2010 NJLJ.COM

IN PRACTICE
TORTS

Internet Users Post Defamatory Statements at Their Own Risk

BY ELLIOT OSTROVE AND JONATHAN GATES

As a general rule, the law of defamation provides recourse to a plaintiff who demonstrates that a defendant communicated to a third person a false statement about the plaintiff that tended to harm the plaintiff's reputation in the community. Whether a defamation plaintiff must also always provide "concrete proof" that third parties actually lowered their estimation of plaintiff, and that plaintiff suffered either emotional or pecuniary harm as a result, is less clear. Until recently, this murky area of law had experienced a trend away from the concept of presumed damages, a doctrine that in certain circumstances permitted a plaintiff to assert a cause of action for defamation despite the absence of damages. At the same time, the use of the Internet, e-mail and other electronic means of communication has proliferated exponentially.

A recent case before the Appellate Division confronted both of these issues, and examined whether the trend away from presumed damages required a private-figure plaintiff, defamed online, to demonstrate actual damages in order to pursue his claims. The case, *W.J.A. v. D.A.*, No. A-0762-09T3 (App. Div. Sept. 27, 2010), reveals that reports of the demise of the doctrine of presumed damages have been greatly exaggerated (at least in New Jersey). The decision demonstrates that the doctrine remains viable in certain cases, and that, in certain circumstances, a litigant's failure to present proof of actual damages, standing alone, will not necessarily preclude a claim for defamation.

In 1998, D.A. filed a complaint against his uncle W.J.A., alleging that he had sexually assaulted D.A. when he was a minor. W.J.A. filed counterclaims alleging several causes of action, including claims of libel and slander. When D.A.'s complaint was dismissed as time-barred, W.J.A. continued to pursue his defamation counterclaims which had arisen out of statements D.A. had made to the Ventnor City Police. A jury ultimately awarded W.J.A. $50,000 in compensatory damages, and the trial court separately awarded him $41,323.70 for D.A.'s frivolous litigation. D.A. unsuccessfully attempted to discharge these judgments in bankruptcy, and thereafter moved for relief from judgment pursuant to R. 4:50-1.

While D.A.'s motion was pending, he created a website where he discussed his litigation with W.J.A, and once again accused him of molestation. W.J.A. learned of the website in February 2007, and wrote a letter to a New Jersey attorney he believed represented D.A., demanding that D.A. shut down the website or face a second defamation suit. D.A., who had moved to Florida in the interim, shut down the website after receiving W.J.A.'s letter. On March 26, 2007, W.J.A. filed a complaint against D.A. in which he alleged that D.A.'s website contained defamatory statements. When D.A. failed to respond, W.J.A. moved for the entry of default, and thereafter to enter a default judgment for $500,000 against D.A. The entry of default was eventually vacated, and D.A. filed an answer on October 30, 2008.


Elliot D. Ostrove

In August 2009, following the close of discovery, the parties filed cross-motions for summary judgment. Despite determining that D.A.'s statements were defamatory per se because they accused W.J.A. of committing a criminal offense and engaging in serious sexual misconduct, the trial court granted summary judgment in favor of D.A., dismissing W.J.A.'s complaint. The court concluded that the defamatory Internet postings were more akin to libel than slander, and that W.J.A was therefore required to prove actual injury to reputation. W.J.A. had admittedly presented no proof of damages beyond his "individual subjective moral reactions," which the court termed "insufficient."

***Ostrove** is a partner and Gates is an associate at Day Pitney in Parsippany.*

The Appellate Division reversed and remanded. At the heart of the issue was the tension between the trend away from the doctrine of presumed damages, and the court's countervailing concern that a rigid requirement of concrete proof of damages could, in certain cases, provide defendants with "a license to defame." Before the court could resolve this tension, and because on-line statements arguably possess attributes of both oral and written communication, it was forced to decide the threshold issue of whether online defamation constitutes slander (oral defamation) or libel (written defamation). To answer the question, the court turned to another recent Appellate Division decision for guidance.

In *Too Much Media, LLC. v. Hale*, 413 N.J. Super. 135 (App. Div. 2010), Shellee Hale made various Internet postings implying that plaintiffs, owners of a software company, had purposely failed to inform their customers of a security breach and illegally profited from this concealment. When plaintiffs sued Hale for defamation, she moved to dismiss their complaint for failure to state a claim, arguing that plaintiffs were ensnared in a Catch-22 of defamation law. Hale contended that because plaintiffs could not show pecuniary harm, their sole potential cause of action was for slander per se, a cause of action which, according to Hale, plaintiffs were prevented from alleging because defamatory Internet postings could only be considered libel. Hale's litigation position resulted from a crucial, but largely unexplained, distinction between libel and slander: the requirement to demonstrate damages is waived when the defamation is oral and can be categorized as slander per se.

The Court observed that "slander per se exists when one accuses another: '1) of having committed a criminal offense, 2) of having a loathsome disease, 3) of engaging in conduct or having a condition or trait incompatible with his or her business, or 4) having engaged in serious sexual misconduct.'" The *Too Much Media* Court noted that in cases of slander per se, damages are presumed, whereas in the case of libel, even where the communication falls within one of the "per se" categories, actual damages must be proved.

Plaintiffs responded that because they had alleged actual damages in the form of reputational harm, their defamation action could continue absent proof of pecuniary loss.

The *Too Much Media* Court looked to the *Restatement (Second) of Torts*, § 568 (1977), for guidance in resolving the issue of whether defamatory Internet postings constitute libel or slander. The *Restatement,* promulgated in 1977, not only illustrated many of the methods for publishing a libel, ranging from the low-tech (writing on a piece of wood), to the then high-tech (writing on a mechanical device such as a typewriter), it also identified "important factors" for a court to consider when faced with a close call. These factors include the scope of the statements' dissemination, the degree of the statements' permanence, and the premeditation of the defamer.

Application of these factors led the court to conclude that defamatory Internet postings are libel. The court noted that defendant's postings were written words, published through a mechanical device — a computer — and that "as a general proposition," it may take more forethought to transmit Internet postings than to speak. The court observed that unlike spoken words, which are ephemeral and comparatively local, Internet postings are permanent and global.

The *Too Much Media* Court explained that "while the image of 'town crier' standing and speaking on his soapbox has literary appeal, the Internet is more akin to the town crier handing out printed papers." Having concluded that defamatory Internet postings are libel, the court held that plaintiffs' complaint withstood defendant's motion to dismiss because plaintiffs had sufficiently alleged damages in the form of reputational harm.

Relying upon *Too Much Media,* the *W.J.A.* Court rejected W.J.A's argument that the Internet postings were slander per se. The three-judge panel held that there was "no question" that defamatory Internet postings implicate a cause of action for libel, not slander. Because W.J.A. concededly had not presented proof of reputational harm, the court proceeded to the case's core question of whether damages could also be presumed in a libel action.

The Appellate Division observed that while both United States and New Jersey Supreme Court precedent reflected a shift away from the doctrine of presumed damages towards a requirement of "concrete proof" of damages, these decisions implicated matters of public interest. They therefore left open the issue of whether the doctrine of presumed damages applies to claims made by a private figure where no public interest is implicated.

The Court ultimately concluded that dismissal of W.J.A.'s action at the summary judgment stage, solely for failure to present proof of actual damage, would grant D.A. a "license to defame." Understandably averse to this result, it held that damages could be presumed, and that a jury could determine the appropriate amount of damages based upon "experience and common sense."

Despite the national trend away from the doctrine of presumed damages, New Jersey's Appellate Division has confirmed the continued viability of the doctrine in this state. Together, these two decisions instruct that online defamation will be treated as libel, and that a litigant may recover damages in an online libel action without proof of actual harm. The *W.J.A.* decision has effectively neutralized the slander/libel paradox that Shellee Hale attempted to exploit in *Too Much Media*.

Further, while the defamatory statements at issue in *W.J.A.* fall within two of the categories of defamation per se, the decision does not, on its face, limit application of the doctrine of presumed damages to defamation per se. Its holding is therefore consistent with the pronouncement of Sir Matthew Hale, Chief Justice of the King's Bench from 1671-1676, that damages were to be presumed for libel. An argument can be made that *W.J.A.* has therefore not only bucked the national trend away from the doctrine of presumed damages, it has restored the doctrine's scope to its 17th century boundaries. At the cross-roads of the 17th and 21st centuries is a warning — Internet users post defamatory statements at their own risk.■