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TOO MUCH MEDIA, LLC, John Albright and
Charles Berrebbi, Plaintiffs

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MONMOUTH COUNTY
DOCKET NO.: MON-L-2736-08

Vs.

Shellee Hale, Defendant

OPINION

Decided June 30, 2009

Joel N. Kreizman, attorney for plaintiffs (Evans, Osborne and Kreizman, LLC, attorneys)
Jeffrey M. Pollock, Barry J. Muller and Joseph Schramm III, attorneys for defendant (Fox Rothschild, LLP, attorneys)
John C. Prindiville, attorney for defendant (Barry and Prindiville, P.A., attorneys)

LOCASCIO, J.S.C.

"We sail on truly uncharted waters." Doe v. Poritz, 142 N.J. 1, 109 (1995). This statement of our late Chief Justice Wilentz accurately sets the stage for the issues raised by this internet defamation case.

This case presents two questions of first impression. First, does a person, who posts allegedly defamatory content on an internet message board, which the poster contends is intended to inform the general public of a corporation's alleged business incompetence, and of the corporation's principals' alleged criminal conduct, have the right, pursuant to New Jersey's Shield Law, N.J.S.A. 2A:84A-21, to refuse to divulge her sources of information? Second, may a corporation and its principals, allegedly defamed by such internet message board postings, recover damages absent a showing of a pecuniary loss? For the following reasons, this court finds answers the first question no, and the second question yes.

On January 9, 2009, because defendant resides in the state of Washington, this court ordered that her deposition be taken via teleconferencing. Because plaintiffs intend to inquire about defendant's sources of information, forming the basis of her allegedly defamatory internet postings, before the deposition took place, defendant, contending she's entitled to invoke the newsperson's privilege, moved to bar such inquiry. Therefore, this matter is now before the court on motions by defendant for (1) a protective order, pursuant to N.J.S.A. 2A:84A-21, seeking to keep confidential the identities of defendant's sources of information, and (2) a dismissal of the complaint, pursuant to R. 4:6-2(e), on the grounds that plaintiffs are unable to sustain a claim for slander per se because (a) the communications in question are posted on the internet and thus should be considered written (libel) and not spoken (slander) and (b) because plaintiffs have sustained no pecuniary damages. Pursuant to N.J.S.A. 2A:84A-21.3(b) and (c), a plenary hearing was held to determine whether defendant has made a "prima facie showing" that she is entitled to the protections of the Shield Law.

I. Facts

Plaintiff, TOO MUCH MEDIA, LLC, (hereafter referred to as "TMM") is the manufacturer of a software product called NATS, an affiliate management software. Different websites, affiliated with one another for business and advertising purposes, place links and banners on each other's web sites as a form of reciprocal advertising. NATS acts as the financial intermediary between the affiliate sites. Whenever a link or banner is clicked, thus transferring the user to the affiliate site, NATS functions to issue a commission to the referring website (the one on which the banner or link was clicked).

Defendant, Shellee Hale (hereafter "Hale"), operates websites (camandago.com and coachshellee.com) by which, according to Hale, she offers her services as a "life coach", i.e. as a "cheerleader" for her clients' family, educational and business problems. As part of this service, Hale offered the opportunity to electronically interact with clients via webcam, which permits a user, via a computer camera, to project real-time images of themselves to another person who is viewing a computer screen. These interactions can be one-way (where only one of the people involved displays an image) or two-way (where two or more people make their images viewable). This enables users, without leaving their computers, to interact face-to-face over long distances. In addition to her webcam interactions, Hale also kept a "blog," (shelleehale.net/blog) which is essentially a public diary, published on a website for interested people to read. Hale characterized the practice of blogging as "a passion," whose participants endeavor "to make the world a better place." Hale, who has a private investigator's license and a respiratory therapy degree, but no journalism degree, was never employed by any news agency, nor has she ever been paid for the information she placed on her blogs or websites.

At some point during her business ventures, Hale claims that she became aware of the practice of cyber flashing, i.e. certain webcam users would expose themselves naked on Hale's webcam. When Hale's server did not rectify the problem to her liking, Hale, apparently incensed by the pervasiveness of pornography on the internet, took it upon herself to begin a campaign against what she perceived as criminal activity in the online adult entertainment industry. In approximately 2007, Hale launched a website called Pornafia, purportedly to report information she obtained regarding technical and criminal activity in the adult entertainment industry. According to a press release posted by Hale, Pornafia came about: "in reaction to the unprecedented levels of criminal activity now rampant within the global adult entertainment

industry, which have until now gone largely unchecked, with the aim of providing a cost free information resource for victims, potential victims, legitimate industry players, and pertinent government agencies worldwide."

Despite this bold mission statement, because of Hale's alleged concerns for her own personal safety, the website was never fully launched and therefore published no such findings. Additionally, in order to develop relationships within the adult entertainment industry, Hale attended several adult entertainment industry conventions, and formed webcam porn sites under the monikers "Sexyteaser" and "Sexyteaserguys," which she used to interact on various adult industry websites.

One of the primary ways industry professionals communicate with one another is through the use of message boards- websites where members, in order to facilitate discussion on a particular topic, display their thoughts and opinions on various subjects. These boards are also known as "forums," and people who read and post on the forums often consider themselves members of an online "community." Most boards' content is available to the public for viewing; however, in order to contribute, or "post," on the board, one must become a registered user. A "post" is a statement that a user, whether identifiable or not, makes on a board or website. The process of becoming a registered user is simple- a person need only fill out and submit an online form and include a name and email address, as well as a chosen username. Once approved by a website administrator, a user is free to post on the board, which posts are unfiltered and, ordinarily, not subject to review by the site administrator prior to being posted. Hale was a registered user on at least two porn industries' sites, oprano.com and gfy.com, where she used, as her avatar (a photo to further identify the poster), either her head shot or a photo of a profile of

the lower half of a naked woman, wearing spiked high heels, lying on her back with her legs partially spread.

In January 2008, major news agencies began reporting that TMM became aware of a security breach, in its computers, that allowed a hacker to access various adult websites' subscriber lists by breaking into the NATS database (a server which maintains customer lists and keeps track of users of various sites and services). Such a security breach is potentially damaging to a websites' business and, due to the supposedly private nature of online pornography viewing, especially embarrassing for the customers of the website. This breach created a substantial amount of conversation, within the online porn industry, regarding TMM and NATS.

On several occasions, Hale contends that she weighed in on TMM's security breach for two reasons: (1) to inform the public about alleged (a) misuse of technology and (b) affiliate fraud and scams, taking place in the online porn industry, and (2) to facilitate debate on these issues. For example, on March 17, 2008, Hale posted the following on a website known as "Oprano . . . the business of porn," and the self-proclaimed "Wall Street Journal of porn": "Consumer's personal information is fair game to every thief online. Read the 2much media Nats depositions (not yet public but copies are out there- Charles [Berebbi, TMM principal] and John [Albright, TMM principal] may threaten your life if you report any of the specifics which makes me wonder.)" Other posts by Hale, which plaintiffs contend were made prior to Hale completing her investigation, and without ever contacting plaintiffs, allege that plaintiffs violated the New Jersey Identity Theft Protection Act, N.J.S.A. 56:8-161 to -67, and made a profit off the security breach. Plaintiffs allege, in their complaint, that defendant's conduct constitutes internet defamation because defendant's postings falsely allege:

(a) Plaintiffs have engaged in fraudulent, illegal and unethical uses of technology.
(b) Plaintiffs have engaged in threatening behavior, including physical threats against persons who release information concerning TMM's lawsuit with NR MEDIA.
(c) That plaintiffs have used TMM's NATS software to cause an influx of spam to its customers and "re-directs" to websites away from TMM's customers to websites owned by TMM or one of its employees.
(d) That TMM purposely failed to inform its customers of the security breach because TMM was making money off the security breach.

II. The Shield Law

N.J.S.A. 2A:84A-21 provides:

> [A] person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere.

Thus, in order to secure the Shield Law's protections, the party seeking it must make a prima facie showing that he or she is somehow statutorily connected with the "news media," which is defined as: "[N]ewspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public." N.J.S.A. 2A:84A-21(a). This court must therefore determine whether Hale's message board postings were similar to "newspapers, magazines, press associations, news agencies, wire services, radio or television."

New Jersey has liberally interpreted the newsperson's privilege because

> [I]n this day and age what is considered to be "news media" or what constitutes "news" is not to be given the narrow interpretation suggested by its origin. It is a recognition that we live in a society in which people are bombarded with all types of information, from publications which actually do report current events to those esoteric publications which describe the mating rights of penguins in the Antarctic

> at springtime. And it is the recognition that this society demands the open and full flow of information and ideas whatever they may be and from wherever they may come.
> [In re Burnett, 269 N.J. Super. 493, 501-502 (Law Div. 1993).]

Indeed, the Shield Law has been held to protect magazine reporters, Maressa v. New Jersey Monthly, 89 N.J. 176, cert. denied 459 U.S. 907, 103 S. Ct. 211, 74 L. Ed. 2d 169, (1982); the author of a biographical novel, Trump v. O'Brien, 403 N.J. Super. 281 (App. Div. 2008); and videotapes taken for the production of a documentary, Kinsella v. Welch, 362 N.J. Super. 143 (App. Div. 2003). Despite upholding the newsperson's privilege for film footage gathered in the production of a television documentary, in Kinsella, the court warned that, "[C]ourts should be chary of deciding what is and what is not news." Id. at 154 (quoting Harper & Row Publishers, Inc. v. Nation Enters, 471 U.S. 539, 561 (1985)); see also Trump v. O'Brien, supra, 403 N.J. Super. at 303. In addition, our courts have looked to the intent of the person claiming the privilege, holding, for example, that a public relations firm, whose intent is to "[M]anage the news rather than disseminate it," does not qualify for Shield Law protections. In re Napp Technologies, Inc., 338 N.J. Super. 176, 187 (Law Div. 2000).

The rate at which the internet has grown and evolved into a universal source of news and information has left the legal community in its dust. The time has come for the law to begin establishing its place in this vast abyss. Courts are now being faced with the task of evaluating a virtually limitless number of people who claim to be "reporting" on issues, but who are, many times, doing little more than shouting from atop a digital soapbox. When New Jersey's legislature enacted the Shield Law, it could not have anticipated the instantaneity with which people can now transmit information.

Although New Jersey's Shield Law is one of the nation's broadest, Maressa, supra., 89 N.J. at 186 ("These amendments left no doubt that the Legislature intended to provide

comprehensive protection for all aspects of news gathering and dissemination."), this court is unconvinced that defendant, a private investigator with a degree in respiratory therapy, is in any way involved with any "news media for the purpose of gathering . . . or disseminating news for the general public." N.J.S.A. 2A:84A-21. Defendant has presented no credible evidence to this court that she ever worked for any "newspapers, magazines, press associations, news agencies or wire services, radio or television." N.J.S.A. 2A:84A-21(a). Although Hale, in her certification filed in support of her within motion, vaguely contends that she has published articles in one legitimate newspaper and several trade journals (without indicating when, on what subjects, and whether or not she was paid), this court gives no credence to these contentions for three reasons.

First, Hale never mentioned, during her several hours of testimony at the plenary hearing, any such publications. The self titling of Oprano.com, a website on which defendant posted, as the "Wall Street Journal" of porn does not, by itself, place Oprano into the spectrum of a"newspaper." Oprano operates primarily as a message board in "the business of porn," which this court finds is no more than a forum for such conversation. Second, Hale's testimony at the plenary hearing was seriously compromised when she admitted that a previous certification filed with this court, in support of her motion to dismiss the complaint for lack of jurisdiction, contained significant untruthful statements. In that certification, she stated that, "Until receiving the complaint... I had no knowledge of the residence, or domicile of any of the plaintiffs herein. Even after receiving the complaint, I do not know where plaintiffs, Albright and Berrebbi, reside." However, Hale's own previous postings, which form the basis of the complaint, contradict this sworn statement because they refer to (a) a New Jersey Federal District Court action involving plaintiffs, and (b) plaintiffs' alleged violations of the Identity Theft Protection Act, the penalty for which is "$10,000 per violation in New Jersey."

Additionally, Hale conceded, at the plenary hearing, that, prior to filing her aforesaid certification, she had read a posting that stated: "NATS is made by Freehold, New Jersey based Too Much Media." Third, in view of the above, this court determines that Hale's certification, filed in support of the within motion, is a "sham affidavit" entitled to no credence. Shelcusky v. Garjulio, 172 N.J. 185, 194 (2002).

This court also fails to see how defendant's message board postings, although certainly an "electronic means" of transmission, could fall under the classification of "similar" to any of the aforementioned recognized news sources. N.J.S.A. 2A:84A-21(a). This court acknowledges that many newspapers and magazines now offer electronic services, and some news services are available only through the web. Additionally, although many of these services allow readers to comment on the posted articles, the original article is endorsed by and, in most cases, written by a reporter of the publication. However, the written public comments below the articles are made by people who need only provide a username, similar to posting on any message board, and thus should not qualify for the same protections as the author of the article in response to which the comments are made. There is no fact-checking required, no editorial review, and so little accountability for the statements posted that it is virtually impossible to discern the author or source of the posts. To extend the newsperson's privilege to such posters would mean anyone with an email address, with no connection to any legitimate news publication, could post anything on the internet and hide behind the Shield Law's protections. Certainly, this was not the intention of the Legislature in passing the statute.

By Ms. Hale's own admission, the alleged findings that she intended to place on her website, Pornafia, were never published (if they even existed in final form), and thus there is little evidence (other than her own self-serving statement) that Hale actually intended to disseminate anything newsworthy to the general public. The fact that she never contacted Too Much Media's representatives, to hear their side of the story, certainly does not suggest the kind of journalistic objectivity and credibility that courts have found to qualify for the protections of the Shield Law. For the foregoing reasons, including Hale's inconsistent certifications and sworn testimony, her contention that her posting intent was to disseminate "news to the general public" lacks credibility. Ibid.

After considering the arguments of counsel, as well as defendant's testimony and the numerous exhibits and postings filed in the course of the plenary hearing, this court concludes that defendant has not made a prima facie showing that she is "engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public," under N.J.S.A. 2A:84A-21, and therefore she is not entitled to the protections of New Jersey's Shield Law. See In re Napp, supra, 338 N.J. Super. at 187; In re Burnett, supra, 269 N.J. Super. at 501.

III. Defamation

A. The Cause of Action

"As a general rule, a statement is defamatory if it is false, communicated to a third person, and tends to lower the subject's reputation in the estimation of the community or to deter third persons from associating with him." Lynch v. N.J. Educ. Ass'n, 161 N.J. 152, 164-65

(1999). At common law, reputation was valued so highly "that a speaker or writer was held liable for the publication of a false and defamatory statement regardless of fault." Senna v. Florimont, 196 N.J. 469, 479 (2008) (citing Dairy Stores, Inc. v. Sentinel Publ'g Co., 104 N.J. 125, 136 (1986)). "Because every person was presumed to enjoy a good reputation, a defamatory statement was presumed to be false, and the speaker had the burden of proving the truth of the challenged statement." Senna, supra, 196 N.J. at 480 (citing Prosser & Keeton on Torts § 116, at 839 (5th ed.1984)).

As the law of defamation evolved, however, exceptions to strict liability were carved out by the United States Supreme Court. See Rosenbloom v. Metromedia, Inc., 403 U.S. 29; 91 S. Ct. 1811, 29 L. Ed. 2d 296 (1971) (requiring actual-malice be shown where the matter was one of public concern); New York Times Co. v. Sullivan, 376 U.S. 254, 280; 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (where an allegedly defamatory statement is made with respect to a public official's official conduct, plaintiff must show that the defamatory statement is made with actual-malice, i.e. "with knowledge that it was false or with reckless disregard of whether it was false or not").

New Jersey has similarly found situations which qualify for actual-malice protection. In Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 139 N.J. 392 (1995), cert. den., 516 U.S. 1066; 116 S.Ct. 752; 133 L.Ed.2d 700 (1996), actual-malice was required where a newspaper article accused a lawnmower repair business of widespread consumer fraud; i.e. numerous complaints about overcharging for unnecessary repairs. For example,

> In the third test, a reporter took a Bobcat mower in good working condition to Turf. Again, the spark plug clamp was pulled loose so the machine wouldn't start. Turf kept the machine four weeks and charged $ 63 for a tune-up. A Turf mechanic said he rebuilt the carburetor and installed new points. But the mower has a solid-state ignition. It has no points.
> [Id. at 422]

See also Dairy Stores Inc., supra., 104 N.J. 125 (actual-malice required where issue is of public concern, i.e. where convenience store was accused, by a media defendant, of selling contaminated spring water); Sisler v. Gannett Co., 104 N.J. 256 (1986) (newspaper's accusation that a bank president improperly benefited from insider dealing required plaintiff to prove actual-malice). The rationale for this actual-malice requirement is that

> [T]he public has a compelling "interest in any business charged with criminal fraud, a substantial regulatory violation, or consumer fraud that raises a matter of legitimate public concern." On that basis, we concluded that "[w]hen the media addresses those issues," the actual-malice standard will apply, regardless of whether the business is heavily regulated by the government. (emphasis added)
>
> [Senna, supra, 196 N.J. at 488 (quoting Turf Lawnmower, supra, 139 N.J. at 413.)]

It should be noted that each of the above cases involved a media defendant. The Senna court held that, because the public benefits from having the press act as "a consumer affairs watchdog," a heightened standard of liability would "protect both the public interest as well as the press." Senna, supra, 196 N.J. at 489 (quoting Turf Lawnmower, supra, 139 N.J. at 427).

In Rocci v. Ecole Secondaire Macdonald-Cartier, 165 N.J. 149, 156 (2000), a case that did not involve the media, the Court reasoned that because "there is a strong public interest in the behavior of teachers, especially concerning their conduct with and around their students," plaintiff was required to prove actual-malice where plaintiff's conduçt, on a class trip ,was criticized in a letter written by another teacher, to the principal of plaintiff's school. citing Di Cosala v. Kay, 91 N.J. 159, 180 (1982).

This court finds none of the circumstances in the above cases are present in the within matter. Hale is neither a journalist nor a member of the media; she is a private person with unexplained motives for her postings. She is not commercially competitive with plaintiffs, who are not public officials, nor is the issue, memberships in adult websites, an issue of public concern in the same way that a teacher's conduct around children, (Rocci, supra, 165 N.J. at 149), or contaminated water (Dairy Stores, supra, 104 N.J. at 125), are matters of public concern. Thus, in order to prove its case, plaintiff need not prove actual-malice.

B. Damages

In Gertz v. Robert Welch, Inc., 418 U.S. 323; 94 S.Ct. 2997; 41 L. Ed. 2d. 789 (1974), plaintiff, a lawyer representing the family of a victim who had been killed by a police officer (who was found guilty of second degree murder), sued the police officer for damages. During his representation in the civil litigation, the publisher of "American Opinion, a monthly outlet for the views of the John Birch Society," published an article that "labeled Gertz a 'Leninist' and a 'Communist fronter,'" and implied that plaintiff had a criminal record, all of which allegations were false. Id. at 325. Additionally, "the managing editor of American Opinion made no effort to verify or substantiate the charges against [plaintiff]." Id. at 327. Based upon these written false statements, plaintiff sued the publisher for libel. The trial court ruled that these comments "constituted libel per se under Illinois law and that consequently [plaintiff] need not plead special damages." Ibid. However, the trial court set aside a jury verdict of $50,000 in favor of plaintiff because plaintiff failed to prove actual-malice, per the NY Times v. Sullivan standard, and because there was no proof of injury. In reversing and remanding, the Court noted that:

> The common law of defamation is an oddity, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional

> rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred.
> [Id. at 349]

When dealing with a motion to dismiss a complaint for failure to state a claim upon which relief may be granted (as is the case before this court), courts must examine "the legal sufficiency of the facts alleged on the face of the complaint," and in doing so must search "the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Printing Mart Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989); quoting Di Cristofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244, 252 (App. Div. 1957). Indeed, "the test for determining the adequacy of a pleading is whether a cause of action is suggested by the facts." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988).

Canvassing the complaint in the within matter, as required by Printing and Velantzas, reveals that plaintiffs allege that defendant's defamation consisted of postings that referred to plaintiffs as:

(1) "every thief online,"
(2) "threatening your life,"
(3) Committing "fraud,"
(4) "the illegal and unethical use of technology,"
(5) Violating the N.J. Identity Theft Protection Act, and
(6) Making a profit off "stolen email addresses."

With respect to such allegations of threats and theft, it has been authoritatively stated that:

> One who publishes a slander that imputes to another conduct constituting a criminal offense is subject to liability to the other without proof of special harm if the offense imputed is of a type which, if committed in the place of publication would be (a) punishable by imprisonment in a state or federal institution, or (b) regarded by public opinion as involving moral turpitude.
> [Restatement (Second] of Torts §571 (1977)]

Certainly, in the within matter, defendant's allegations that plaintiffs threatened someone's life (N.J.S.A. 2C:12-3(b)), and committed theft (N.J.S.A. 2C:20-3), if true, would subject plaintiffs to both incarceration and public opinions that plaintiffs' conduct involves moral turpitude. Therefore plaintiffs' suit is actionable even "without proof of special harm." Ibid.

However, allowing recovery without proof of specific monetary damages, is not limited to published slander alleging criminal conduct; it is also applicable to such published slander "that ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession, or of his public or private life, whether honorary or for profit." Id. at §573. One of defendant's postings, in the within matter, could certainly be construed as suggesting that plaintiffs are incompetent businessmen. It read as follows:

> Does anyone have any idea how many consumer's processed their information through NATS. If 2 Much Media actually was aware of a security leak between them and the Billing Company why didn't anyone put out a fraud security announcement to the consumers? If this is true- How long have they been sitting on this information and doing nothing?

Although defendant might contend that the aforesaid posting is not a statement but simply asks questions and therefore is not defamatory, it is not for this court, at this stage of the proceedings, to make such a determination, for where the content is "capable of more than one meaning, one of which is defamatory and another not, the question of whether its content is defamatory must be resolved by the fact finder." Russo v. Nagel, 358 N.J. Super. 254, 263 (App. Div. 2003).

Thus, because plaintiffs' assertions, that defendant's postings allege either criminal conduct or incompetence in plaintiffs' business, are subject to at least one interpretation that is defamatory, to take those issues away from the fact finder, at this stage, would be error. Ibid. Further, if either of these allegations are proven to a jury, such allegations are actionable "without proof of special harm." Restatement (second) of Torts, supra, §571, 573

Defendant contends that the complaint should be dismissed because: (1) plaintiffs have limited their cause of action to one of slander per se; (2) defendant's postings are written and therefore can only be considered libel, and (3) plaintiffs contend their damages are not pecuniary but only damages presumed by virtue of the defamation, which are only awardable for slander per se.

A review of each of these contentions, seriatim, demonstrates that they are without merit.

(1) Defendant's contention that plaintiff's counsel, in the course of oral argument on a Jan. 9, 2009 motion, limited his case to slander per se, is inaccurate because it is taken out of context. Defendant relies upon a statement that plaintiff was limiting his damages to "presumed damages." However, thereafter, plaintiff's counsel explained that because plaintiffs allege this is a "defamation per se case," he was not seeking damages for "loss of income" but only damages to plaintiffs' reputation which he planned to prove by multiple witnesses who will testify that they believed defendant's allegations and thought "what miserable people they (plaintiffs) must be." Additionally, the complaint itself never uses the word "slander;" it only refers to defendant's comments as "defamatory," for which compensatory and punitive damages are sought.

(2) Although internet postings are indeed written, because of their instantaneity, they are also somewhat comparable to spontaneous oral statements. For this reason, our neighboring

state, in holding that a website owner was required to reveal the identities of anonymous internet posters, felt the more appropriate label for defamatory material on the internet is not slander per se, but rather "defamatory per se." Klehr v. JPA Development, No. 0425, 2006 Phila. Ct. Com. Pl. LEXIS 1 (Pa. C.P. Jan. 4, 2006), rev'd without opinion, 898 A.2d 1141 (Pa. Super. Ct. 2006). In so ruling, the court, noting how the internet has changed our society so as to require new visions in dealing with internet defamation cases, made the following observations:

> The internet is an international network of interconnected computers (that) . . . now enable(s) tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is a "unique and wholly new medium of world wide human communication."
> [Id. at 9, (citing Reno v. American Civil Liberties Union, 521 U.S. 844, 849-850; 117 S.Ct. 2329, 2334; 138 L.Ed.2d 847 (1997))]
>
> ***
>
> Certainly, the Internet constitutes one of the biggest and most exciting technological breakthroughs in recent memory and has revolutionized the manner in which we conduct our daily lives.
> [Id. at 10]
>
> ***
>
> The internet is a unique democratizing medium unlike anything that has come before. The advent of the internet dramatically changed the nature of public discourse by allowing more and diverse people to engage in public debate (which) . . . allows anyone with a phone line to "become a town crier with a voice that resonates farther than it could from any soapbox." Through the internet, speakers can bypass mainstream media to speak directly to 'an audience larger and more diverse than any the Framers could have imaged.'"
> [Id. at 10-11, (quoting Doe v. Cahill, 884 A.2d 451 (Del. 2005), citing Reno, supra, 521 U.S. at 896-897)]

(3) Defendant's contention that presumed damages are only awardable for slander per se is without merit. In Gertz, supra, 418 U.S. at 349, which involved a written article appearing in a monthly publication, the Court stated that because "Under the traditional rules pertaining to

actions for libel, the existence of injury is presumed from the fact of publication," plaintiff could recover damages for the

> [A]ctual harm inflicted by defamatory falsehood (which) include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.
> [Id. at 350]

Plaintiffs, in the within matter, concede that although they cannot put an actual dollar value on the damage done to their reputation, they are prepared to present multiple witnesses as "competent evidence concerning the injury." Ibid.

Therefore, if plaintiffs prove that defendant's published comments are defamatory, they can recover for the "actual harm inflicted" by such defamation including "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering," even if there is no evidence of "an actual dollar value to the injury." Ibid.

IV. Conclusion

For the foregoing reasons,

(1) because defendant has failed to make a prima facie showing that she was engaged in, engaged by, or connected with any news media or that her postings were intended to disseminate news to the general public, she is not entitled to the newsperson's privilege and therefore her motion for a protective order, with respect to her sources of information, is denied; and

(2) because defendant's message board postings allege that plaintiffs have engaged in criminal conduct and are incompetent with respect to their business practices, the complaint is actionable without proof of pecuniary damages, and therefore defendant's motion to dismiss the complaint is denied.