Social Media Defamation Under New Jersey Law

by Keith J. Miller

Most of the major New Jersey defamation cases decided over the past half-century have involved traditional media defendants, such as newspapers sued for libel (defamation through written words) or television and radio stations sued for slander (defamation through spoken words). Defamation lawsuits generally are not favored under New Jersey law, because "New Jersey Courts 'have recognized that First Amendment values are compromised by long and costly litigation in defamation cases.'"[1] Based on the state's express public policy of encouraging robust debate about matters of public concern, New Jersey courts often rely on the free-speech provision of the New Jersey Constitution, Article I, Paragraph 6, to provide even greater expressive protection than mandated by the First Amendment, in recognition of the fact that the "threat of prolonged and expensive litigation has a real potential for chilling journalistic criticism and comment upon public figures and public affairs."[2]

In traditional media defamation cases, it is usually relatively easy to ascertain the existence of the elements of a *prima facie* cause of action: publication (dissemination to a third party) of a false statement of material fact (not opinion) that causes reputational harm to an identifiable individual. In recent years, however, New Jersey courts have begun to apply traditional defamation law concepts to the vast new forms of speech on the Internet and in social media such as blogging, emails, Facebook posts, and website forums.

Not only has the explosion of social media speech greatly increased the number of opportunities for publication of false statements of fact, it has also raised novel legal questions about the elements of a defamation cause of action. For example, what is considered publication on the Internet? Can a defamation plaintiff force an Internet service provider (ISP) to identify an anonymous user who has posted allegedly defamatory comments in a public forum? Who is considered a journalist for purposes of the New Jersey Reporter's Shield Law, and should the privileges and protections afforded to journalists in their recognized role as the "eyes and ears of the public"[3] be extended to bloggers and other online critics who may not meet all of the recognized criteria of the traditional media? The cases discussed below show these seemingly simple questions have profound public policy implications.

For example, New Jersey courts have had to address the question of whether 'publication' of a defamatory statement has a different meaning on the Internet than it does in traditional media. New Jersey's strict statute of limitations requires defamation lawsuits to be filed within one year of publication of the allegedly defamatory statement.[4] In construing this statute, New Jersey has adopted the so-called single publication rule, which holds that a defamation plaintiff has a single cause of action that arises at the first publication of an allegedly defamatory statement, regardless of the number of times the statement is later republished, sold or recopied.[5] This means the one-year statute of limitations begins to run the first time an allegedly defamatory statement is published, and is not tolled by later republication of the same statement.

However, in *Churchill v. State*[6] the plaintiffs argued the single publication rule should not apply to allegedly defamatory statements published on the Internet, claiming Internet publications lack the professionalism and 'internal control' generally found in traditional print media and are subject to much wider potential dissemination and abuse due to 'hyperlinking' by Internet search engines. The Appellate Division held that Internet publications should be treated in the same manner as publications made through traditional mass media, including strict application of the one-year statute of limitations through the single publication rule. In so doing, the court noted the changing realities of the new media world:

> We find no principled basis in a situation like the one before us for treating the Internet differently than other forms of mass media. The Internet appears to be particularly suited to application of the publication rule because it is rapidly becoming (if it has not yet already become) the current standard for the mass production, distribution and archival storage of print data and other forms of media.[7]

Another fast-developing area of New Jersey defamation law concerns allegedly defamatory comments posted by anonymous users on the Internet or in social media. It is common practice for social media users to post their comments under pseudonyms instead of their actual names. It is well established that the right to anonymous speech on the Internet is protected by both the First Amendment of the United States Constitution and Article 1, Paragraph 6 of the New Jersey Constitution.[8] This right was recognized and expanded upon by the New Jersey Supreme Court in *State v. Reid*,[9] which held that citizens have a reasonable expectation of privacy in the subscriber information they provide to an ISP.

Problems arise when plaintiffs who allege they have been defamed by anonymous comments on the Internet or in social media attempt to identify the persons who allegedly made the offending comments so they can be added as named defendants to defamation lawsuits. It is not possible for a plaintiff to directly name an ISP as a defendant on the theory that it is responsible for 'publishing' the allegedly defamatory comments, because Section 230 of the Communications Decency Act of 1996[10] provides ISPs with immunity from defamation liability for the contents of postings made by others.[11] Because of Section 230 immunity, a plaintiff alleging defamation through anonymous comments on the Internet has to file a defamation complaint against a 'Doe' defendant, and then must issue and serve a non-party subpoena on the ISP that hosted the website at issue in an attempt to identify the 'real' defendant.

In light of the "well-established First Amendment right to speak anonymously," the Appellate Division, in the seminal case of *Dendrite International v. John Doe*,[12] set forth exacting procedural requirements and substantive standards that must be satisfied prior to issuance of an order allowing expedited discovery into the identity of an anonymous online poster. The plaintiff in *Dendrite* claimed to have been defamed by anonymous online postings about alleged irregularities in its accounting practices.

In denying the plaintiff's application for issuance of a subpoena to the ISP hosting the website on which the offending postings were made, the Appellate Division set forth what became known as the *Dendrite* test. To begin with, the plaintiff must take steps to notify the anonymous poster that an application has been made to the trial court to uncover his or her identity, usually by posting a legal notice on the forum from which the offending comments emanated. Additionally, the plaintiff is required to identify to the trial court "the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech."[13] The trial court must then carefully review the complaint and all information provided to the trial court to determine whether the plaintiff has set forth a *prima facie* cause of action against the anonymous defendant. This review goes beyond merely satisfying that the lawsuit would survive a motion to dismiss the complaint; the plaintiff must exceed that standard and "produce sufficient evidence supporting each element of its cause of action."[14] Additionally, even if the trial court concludes the plaintiff has presented a *prima facie* cause of action, the trial court must then "balance the defendant's First Amendment right of anonymous free speech against the strength of the *prima facie* case presented and the necessity for disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed."[15]

The *Dendrite* test is difficult for a plaintiff to satisfy because it favors anonymous speech on the Internet, but it is not insurmountable. The same Appellate Division panel that decided *Dendrite* issued the companion opinion of *Immunomedics, Inc. v. Doe*[16] to illustrate the limits of the *Dendrite* test. *Immumomedics* also involved a subpoena served on an ISP seeking to uncover the identity of an anonymous Internet critic who posted allegedly defamatory statements about the plaintiff. However, the record before the trial court contained evidence that the anonymous poster was likely an employee of the plaintiff who was posting confidential and proprietary financial information in contravention of a confidentiality agreement. Based on that record evidence, the trial court refused to quash the subpoena, and the Appellate Division affirmed, holding the *Dendrite* test had been satisfied by the plaintiff.

The court reasoned as follows:

> Although anonymous speech on the Internet is protected, there must be an avenue for redress for those who are wronged. Individuals choosing to harm another or violate an agreement through speech on the Internet cannot hope to shield their identity and avoid punishment through invocation of the First Amendment.[17]

So although the *Dendrite* standard is difficult to satisfy, it does not allow for unlimited anonymous speech on the Internet.

The *Dendrite* test has been applied in a variety of social media contexts in the years since the original opinion was

issued. For example, in *Juzwiak v. Doe*[18] a teacher who received anonymous harassing emails filed a Doe lawsuit for intentional infliction of emotional distress and then served a non-party subpoena on the ISP seeking to uncover the identity of the sender of the emails. The Appellate Division ruled the subpoena should have been quashed by the trial court under *Dendrite*, since the plaintiff had failed to sufficiently state a *prima facie* claim for intentional infliction of emotional distress.[19]

The *Juzwiak* court expressly reaffirmed the principle that

> [t]he right to speak anonymously is protected by the First Amendment and 'derives from the principle that to ensure a vibrant marketplace of ideas, some speakers must be allowed to withhold their identities to protect themselves from harassment and persecution.'[20]

The court rejected the plaintiff's assertion that the *Dendrite* test should not be applied because the allegedly threatening emails at issue were not protected by the First Amendment, holding:

> The test for whether a communication should lose the mantle of First Amendment protection must be an objective one, rather than one based upon the personal and individual reaction of the recipient of the communication.[21]

By its ruling, the Appellate Division made clear that a plaintiff cannot circumvent the *Dendrite* test merely by claiming to feel threatened by anonymous speech.

The Appellate Division applied the *Dendrite* test to a blogger in *Somerset Development, LLC v. Cleaner Lakewood*,[22] affirming the quashing of a subpoena seeking to uncover the identity of a blogger who posted anonymous criticisms about a real estate development project. The court found the anonymous statements at issue (*e.g.,* that the plaintiff "short changed the tax payers with millions" and was a "rip off artist" and an "under the table crook"), were not actionable statements of fact, but rather constituted non-actionable "rhetorical hyperbole" about a matter of public concern reflecting the anonymous author's opinion.[23]

In affirming the plaintiff was not entitled to uncover the identity of his critics, the Appellate Division once again expressly stressed the public policy importance of protecting anonymous speech about matters of public concern, especially when political matters are involved.

In *A.Z. v. Doe*,[24] the Appellate Division applied the *Dendrite* test to an allegedly defamatory anonymous email sent to a high school administrator involving photographs posted on a Facebook page. The email in question alleged the plaintiff (a student at the high school) had been involved in underage drinking, and claimed the Facebook photographs substantiated the allegation. The trial court found the plaintiff had established a *prima facie* case of defamation, but still quashed a subpoena to the ISP seeking to uncover the author of the email, because it found the author's right to engage in anonymous speech outweighed the plaintiff's interest in pursuing her defamation claim.

The Appellate Division affirmed the quashing of the subpoena, but for different reasons. After reviewing the Facebook photographs at issue (which were part of the record), the court found the plaintiff had not met her burden of proving the allegedly defamatory statement (that the plaintiff had been involved in underage drinking) was not true, because the photographs showed the plaintiff playing beer pong in the company of minors clearly consuming alcoholic beverages. Since truth is an absolute defense to any defamation claim, the subpoena was held properly quashed under *Dendrite*.[25]

The *A.Z.* opinion is especially interesting from a social media perspective because it involved affirmative use of social media by the court (reviewing Facebook photographs) to make its legal ruling under *Dendrite*.

The New Jersey Supreme Court delved into the world of social media when deciding the recent high-profile defamation case *Too Much Media, LLC v. Hale*.[26] Defendant Hale posted numerous messages on a public Internet message board about the plaintiffs' adult entertainment business, including allegations the plaintiffs had engaged in criminal activities, which Hale claimed to have learned from "confidential sources." The plaintiffs filed a defamation suit against Hale and other unknown Doe defendants, and subsequently sought to take Hale's deposition to learn, among other things, the identities of her sources. Hale moved for a protective order, claiming she was a journalist entitled to the protections of New Jersey's Reporter's Shield Law, which gives journalists the privilege to protect the confidentiality of their sources and of their newsgathering activities.[27]

After an evidentiary hearing, the trial court ruled Hale was not a journalist for purposes of the law, because her posting of messages on the Internet was not similar to the types of news media activities identified in the law. In a lengthy published opinion, the Appellate Division affirmed the trial court's ruling that Hale was not entitled to the protections of the Reporter's Shield Law, although it did not completely agree with the trial court's rationale.[28] The Supreme Court granted certification so it could issue a more definitive ruling on the tricky issue of who qualifies as a journalist on the Internet and in social media, and it also granted *amicus curiae* status to a number of media and civil liberties

organizations.

The opening paragraph of Chief Justice Stuart Rabner's *Too Much Media* opinion expressed how social media's rapid ascent had complicated the legal issues in the case:

> Millions of people with Internet access can disseminate information today in ways that were previously unimaginable. Against that backdrop…we are asked to decide whether the newsperson's privilege extends to a self-described journalist who posted comments on an Internet message board.[29]

The key question was whether Hale was covered by the Reporter's Shield Law's protections, which only applied to "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...."[30] Of course, when the law was drafted many decades ago, there was no such thing as social media or alternative media, only traditional media such as newspapers, magazines, televisions and wire services.

The *Too Much Media* Court noted:

> The existence of new technology merely broadens the possible spectrum of what the law *might* encompass—from daily print journalism, to websites like drudgereport.com, to chat rooms, personal blogs, and beyond. But these expanded formats are simply the mechanism for delivering information. Form alone does not tell us whether a particular method of dissemination qualifies as 'news media' under the statute.[31]

The Court held the proper analysis for determining the applicability of the Reporter's Shield Law was to consider whether the medium in question was "similar to traditional news media."[32] Turning to the specific facts of the *Too Much Media* case, the Court found the Internet message board on which Hale had posted her allegedly defamatory comments was not the functional equivalent of traditional news media, since it merely allowed people to "express their thoughts about matters of interest."[33] The Court noted the Legislature, when enacting the Reporter's Shield Law, surely did not intend to confer an absolute reporter's privilege on every person posting a comment about an article on NJ.com or other popular websites.[34] However, the Court did note it might be possible for a single blogger to qualify for the protections of the law under the right factual circumstances, which simply were not present in the record on review.[35]

The New Jersey Supreme Court recently issued another decision involving Internet defamation—*W.J.A. v. D.A.*[36] In that case, defendant Adams created a website for the express purpose of spreading his unproven allegations that his uncle had sexually abused him, which led the uncle to file a defamation lawsuit against Adams. Although the trial court found the allegations on the website were defamatory *per se*, an issue arose regarding whether and how the plaintiff was required to prove his reputation had been harmed in order to recover damages. The damages issue that was ultimately decided by the Supreme Court hinged upon the Court's finding that Adams clearly was not acting as a member of the media when he made his allegations about his uncle on the Internet; he was attempting to harm his uncle in a purely personal matter that did not raise an issue of public concern.

The Court held:

> Adams had the ability to exercise due care when making his statements, but chose instead to publish them online for anyone with an Internet connection to view.... Adams' desire to publish the Internet statements to the entire country and the fact that the statements refer to previous court proceedings do not necessarily make his allegations a matter of public interest.[37]

So both in *Too Much Media* and *W.J.A.*, the Court's determination that the defendants were not acting as members of the media when they posted allegedly defamatory information on the Internet was critical to the ultimate outcome of the cases.

The cases discussed above demonstrate that New Jersey courts have had no choice over the past decade but to continually adapt the state's body of defamation law to the ever-changing world of social media. New forms of online speech are developing constantly, and New Jersey's defamation law will have to continue developing along with them to uphold the state's policy of fostering "uninhibited, robust and wide-open" debate about matters of public concern.[38] ⚖

Endnotes

1. *Rocci v. Ecole Secondaire*, 165 N.J. 149, 158 (2000) (*citing Sedore v. Recorder Publishing*, 315 N.J. Super. 1371, 163 (App. Div. 1998)).
2. *Kotlikoff v. Community News*, 89 N.J. 62, 67 (1982).
3. *South Jersey Publishing Co. v. New Jersey Expressway Auth.*, 124 N.J. 478, 496-97 (1991).
4. N.J.S.A. 2A:14-3.
5. *Barres v. Holt*, 131 N.J. Super. 371 (Law Div. 1974), *aff'd o.b.*, 141 N.J. Super. 563 (App. Div. 1976), *aff'd o.b.*, 74 N.J. 461 (1977).
6. 378 N.J. Super. 471 (App. Div. 2005).
7. *Id.* at 483.
8. *See, e.g., Dendrite International v. John Doe*, 342 N.J. Super. 134, 148 (App. Div. 2001) (*citing Buckley v. American Constitutional Law Foundation*, 525

U.S. 182, 197-199 (1999)).

9. 194 N.J. 386 (2008).
10. Section 230 provides, in pertinent part, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. §230(c)(1). Section 230 also provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. §230(e)(3).
11. *See Green v. AOL*, 318 F.3d 465, 471 (3d Cir. 2003); *Zeran v. American Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); *Ben Ezra, Weinstein & Co. v. American Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) ("Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions").
12. 342 N.J. Super. 134, 141 (App. Div. 2001).
13. *Id.*
14. *Ibid.*
15. *Id.* at 142.
16. 342 N.J. Super. 160 (App. Div. 2001).
17. *Id.* at 167.
18. 415 N.J. Super. 442 (App. Div. 2010).
19. *Id.* at 452.
20. *Id.* at 447 (*quoting* M. Mazotta, Balancing Act: Finding Consensus On Standards For Unmasking Anonymous Internet Speakers, 51 *B.C. L.Rev.* 833 (2010)).
21. *Id.* at 450.
22. 2012 WL 4370271 (App. Div. 2012).
23. *Id.* at *4.
24. 2010 WL 816647 (App. Div. 2010).
25. *Id.* at *7.
26. 206 N.J. 209 (2011).
27. N.J.S.A. 2A:84A-21 *et seq.*
28. 413 N.J. Super. 135 (App. Div. 2010).
29. 206 N.J. at 216.
30. N.J.S.A. 2A:84A-21.
31. *Id.* at 233.
32. *Ibid.*
33. *Id.* at 235.
34. *Id.* at 236.
35. *Id.* at 237.
36. 210 N.J. 229 (2012).
37. *Id.* at 246.
38. *Sedore v. Recorder Publishing Co.*, 315 N.J. Super. 137, 146 (App. Div. 1998) (*quoting New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

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