IN THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

The Washington Travel Clinic, PLLC *et al.*	)	
	)	
Plaintiffs	)	C.A. No. 2013 CABSLD 003233
	)	
v.	)	
	)	
John Kandrac	)	
	)	
Defendant	)	

PLAINTIFFS' SURREPLY TO DEFENDANT'S MOTION FOR RECONSIDERATION

Ziad Akl, MD ("Akl") and The Washington Travel Clinic, PLLC ("WTC"), (collectively "Plaintiffs"), by counsel, hereby lodge this Surreply to Defendant's Motion for Reconsideration of the Court's order granting in part and denying in part Defendant's Motion to Dismiss the Complaint Pursuant to the D.C. Anti-SLAPP Act, or in the Alternative, Motion to Dismiss Pursuant to Rule 12(b)(6), contingent on the Court granting their Motion to File the Surreply.

1. Defendant cites Prins v. IT&T Corp., 757 F. Supp. 87, 90 (D.D.C. 1991) for the proposition that while there may have been significant distinctions between libel and slander at common law, those once separate categories are now typically treated together as defamation. Def. Reply at 3 n.2. Defendant seems to suggest that because the case law he cites requires that slander *per se* impute a crime of moral turpitude, so does libel.

In Prins, the court stated:

> A plaintiff bringing a defamation action (libel or slander) must show: (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant "published" the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm. *See* Restatement (Second) of Torts § 558, at 155 (1977); see also Avianca, Inc. v. Corriea, 705 F.Supp. 666, 682–83 (D.D.C.1989) (citing Restatement).

As shown, Prins relied on the Restatement (Second) of Torts ("Restatement") to define the elements of libel and slander. The same Restatement defines written or broadcast defamation as libel, *see* Restatement §§ 568(1) & 568A, and states that libel is defamation *per se*, regardless of the nature of the false and defamatory statements. *See* id. § 569. Defamation *per se* renders a defendant liable for general damages even where no special damages are proved. *See* id. § 569 cmt. b. *See also*, El-Hadad v. Embassy of the U.A.E., 2006 U.S. Dist. LEXIS 21491, 46 (D.D.C. Mar. 29, 2006). Thus, Defendant's reliance on Prins and his assertion that the elements required to prove defamation and libel are the same is not helpful to his case. On the contrary, Defendant's assertion is helpful to Plaintiffs, because, according to the reference relied on by Prins, i.e., the Restatement, written defamation is libel and libel is defamation *per se*.

Plaintiffs' Opposition, at 7, cites Meyerson v. Hurlbut, 98 F.2d 232 (1938), where the court stated:

> Since no special damages are alleged, the declaration is demurrable unless defendant's words are actionable as slander per se. To be so actionable, spoken words must 'import a charge that the party has been guilty of a criminal offense involving moral turpitude, or that the party is infected with a contagious distemper,' or they must be 'prejudicial in a pecuniary sense to a person in office or to a person engaged as a livelihood in a profession or trade.' Pollard v. Lyon, 91 U.S. 225, 227, 23 L.Ed. 308. The question here is whether the words are prejudicial to plaintiff in his trade.

Meyerson at 233. "Aspersions on the credit of a business man are clearly defamatory. As they tend to injure him in his business, they are slander per se." Id. at 234 (citations omitted). Defendant does not argue that his words do not injure Plaintiffs in their business. Rather, he argues that Plaintiffs have not proven damages. But as the above case law shows, Plaintiffs do not need to prove special damages as the words published by Defendant clearly tend to injure them in their business and are actionable *per se*. Even Harmon v Liss, 116 A.2d 693 (D.C.App.

1955), relied on by Defendant, cited Meyerson for the proposition that "some damage is presumed from words slanderous per se and damage therefore need not be alleged or proven." Harmon at 696.

2. Defendant has not cited a single authority that explicitly abandoned the notion first enunciated in Pollard v. Lyon, 91 U. S. 225, 227 (1875)—that if words "are prejudicial in a pecuniary sense to a person in office or to a person engaged as a livelihood in a profession or trade", they are in themselves actionable—and adopted in Meyerson, *supra*, Thackrey v. Patterson, 157 F.2d 614 (D.C.Cir., 1946) and Holt v. Boyle Bros., Inc., 217 F.2d 16 (D.C.Cir., 1954). On the contrary, Defendant cites cases that rely on the Restatement, which explicitly states that written defamation is libel and libel is defamation *per se*. Indeed, as recently as last year, the DC Court of Appeals relied on the Restatement when ruling on a case involving defamation. *See* Armstrong v. Thompson, 80 A.3d 177, 183 (D.C., 2013). Nor does Defendant's attempt to minimize the impact of Pollard—stating that that entire opinion analyzed whether a statement that a woman had engaged in fornication accused her of an indictable offence (Reply at 3-4)—negate the fact that the Supreme Court in Pollard did define the circumstances under which certain words are defamatory *per se*:

> Certain words, all admit, are in themselves actionable, because the natural consequence of what they impute to the party is damage, as if they import a charge that the party has been guilty of a criminal offence involving moral turpitude, or that the party is infected with a contagious distemper, or if they are prejudicial in a pecuniary sense to a person in office or to a person engaged as a livelihood in a profession or trade; but in all other cases the party who brings an action for words must show the damage he or she has suffered by the false speaking of the other party.

Id. at 227. Further, while Defendant claims that the case law relied on by Plaintiffs is old, he relies on Farnum v. Colbert, 293 A.2d 279 (D.C. 1972), which relies on the initial Restatement of Torts s 569 (1938). Farnum at 282. Yet, even Farnum supports Plaintiffs. There the court stated:

> The contention that the cause of action should fail because no one believed the statements is without merit. The nature of a cause of action under the theory of 'slander per se' allows the court to overlook any facts relating to damages for the reason that the false words spoken *inherently tend to damage a person's reputation.* Restatement of Torts s 569 (1938). Whether the statements were believed therefore becomes irrelevant in testing the evidentiary sufficiency in an action for 'slander per se'. The legal sufficiency of such a case is not affected by absence of demonstrable harm to reputation. Restatement of Torts s 559, comment d (1938) (emphasis added).

Id. at 282. Thus, even per Farnum, the underpinning of *per se* defamation is whether the words tend to damage a person's reputation. In this case, they clearly do.

3. Defendant further relies on Weaver v. Grafio, 595 A.2d 983, 988 (D.C. 1991), and Johnson v. Johnson Publ'g Co., 271 A.2d 696, 697-98 (D.C. 1970). However, Weaver relied on Johnson (Weaver at 988) and Johnson cited with approval Thackrey v. Patterson, 157 F.2d 614, 615 (D.C., 1946), reiterating that "[t]he mere assertion of marital discord has been held to be libelous." Johnson at 698 n.6. There is no crime in marital discord.

4. Defendant also relies on Shipe v. Schenck, 158 A.2d 910, 911 (D.C. 1960). There, the court rejected the *plaintiff's* contention that the words charged him with the crime of false pretenses:

> We think the trial court was correct in dismissing the complaint insofar as it charged slander. No special damages were claimed, and 'damn liar' and 'dead beat' are not slanderous *per se.*[FN1] Those words cannot reasonably be construed, as Shipe contends, to charge him with the crime of false pretenses.
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> FN1. Meyerson v. Hurlbut, 68 App.D.C. 360, 98 F.2d 232, 118 A.L.R. 313, certiorari denied 305 U.S. 610, 59 S.Ct. 69, 83 L.Ed. 388; Harmon v. Liss, D.C.Mun.App., 116 A.2d 693.

The court was addressing what plaintiff alleged. In fact, the footnote even cites Meyerson.

Similarly, in Von Kahl v. Bureau of Nat. Affairs, Inc., 934 F.Supp.2d 204 (D.D.C., 2013), Washburn v. Lavoie, 357 F. Supp. 2d 210, 214 (D.D.C. 2004), Wiggins v. Philip Morris, Inc., 853 F. Supp. 458, 465 (D.D.C. 1994), and Baldi v. Nimzak, 158 A.2d 915, 916 (D.C. 1960),

relied on by Defendant, the courts limited their discussion to criminal acts because the *plaintiffs* asserted that the defamatory statements were libelous *per se* because they imputed the commission of a crime to them. The courts merely rejected those assertions as false. Never did the courts opine on what constitutes libel *per se* in general nor did they hold that only the imputation of a crime can constitute libel *per se*. In fact, Baldi cited to Pollard v. Lyon, *see* Baldi at 916 n.1.

5. Defendant claims that Plaintiffs' argument—that libel *per se* extends to statements causing injury to one's trade or profession—is also undercut by "numerous" cases involving just such an injury where courts nevertheless refuse to treat the claim as libel *per se* (or to authorize an award of presumed damages) unless the challenged statement imputes to the plaintiff a crime of moral turpitude. Reply at 4. This assertion is incorrect. Despite claiming that "numerous" cases exist, Defendant only cites Baldi, *supra*, and contrary to what Defendant claims in his Reply at 4 n.4, there is no indication whatsoever that the plaintiff in Baldi alleged that he was injured in his trade.

6. Defendant claims that numerous decisions have required a challenged statement to impute the commission of a crime of moral turpitude before treating the statement as libel *per se*, even where such a statement is also critical of a plaintiff's trade or business. Reply at 5. This claim is also incorrect.

In Caldwell v. Hayden, 42 App. D.C. 166 (D.C. Cir., 1914), the court did not "otherwise [find the] statement non-actionable even though it also caused injury to plaintiff's profession or trade," as Defendant claims. In Schoen v. Washington Post, 246 F.2d 670 (D.C. Cir. 1957), the issue was not even before the court. The trial court determined that special damages needed to be alleged and dismissed the complaint, after allowing an amended complaint to be filed, on the

basis of deficiency in pleading special damages. On appeal, the plaintiff did not contest the ruling that special damages were required to be alleged, Id. at 671 n.1, and the circuit court only addressed whether special damages were alleged sufficiently. In Wiggins v. Philip Morris, Inc., 853 F. Supp. 458 (D.D.C. 1994), the court did not state, as Defendant contends, that "other statements about plaintiff's job performance are not [libel per se]". On the contrary, the court stated that "plaintiff makes no allegations as to the content of the defamatory statements placed in his personnel file." Id. at 466.

7. Defendant quotes *part* of a passage from Holt v. Boyle Bros. Inc., 95 U.S. App. D.C. 1, 3, 217 F.2d 16, 17 (D.C. Cir. 1954) and concludes that the statement addresses whether the statement is capable of a defamatory meaning, not whether it is libel *per se* for purposes of proof of injury. Reply at 5 n.5. The passage, faithfully quoted, reads thus:

> To say, as Boyle did in the letter to the personnel officer, that Holt refused to pay a just debt, was plainly defamatory, for this sort of charge 'obviously would hurt the plaintiff in the estimation of an important and respectable part of the community'. Nothing more is necessary to make written or printed defamation actionable as libel. Peck v. Tribune Co., 214 U.S. 185, 190, 29 S.Ct. 554, 53 L.Ed. 960. Thackrey v. Patterson, 81 U.S.App.D.C. 292, 157 F.2d 614. Statements in Holtz v. National Furniture Co., 61 App.D.C. 80, 57 F.2d 446, and Cohen v. Marx Jewelry Co., 67 App.D.C. 347, 92 F.2d 498, *which imply that a charge of failing to pay a just debt is not actionable unless special damage or some other special circumstance is shown, are therefore erroneous.* (emphasis added)

Thus, it is clear that the court was addressing the issue of damages, not the issue of what constitutes defamation.

8. The statement attributed by Defendant to Bannum, Inc. v. Citizens for a Safe Ward Five, Inc., 383 F. Supp. 2d 32, 40 (D.D.C., 2005), that libel *per se* requires the actual imputation of a criminal offense, was dictum and was only quoting Rabova v. Shrybman & Assocs., 777 F.Supp. 58, 60 (D.D.C.1991), which Defendant seems to rely upon heavily. But Defendant's reliance on Rabova is misplaced. In Rabova, the court stated:

> There are distinct differences between an action in libel and an action in libel *per se*. A defamatory publication need only be injurious to the reputation of another to constitute libel, while libel *per se* requires an actual imputation of a criminal offense. *See Smith v. District of Columbia*, 399 A.2d 213 (D.C.1979); 53 C.J.S. Libel and Slander §§ 2 and 38.

Raboya at 60. As shown, Raboya relied on the Restatement and on Smith v. District of Columbia, 399 A.2d 213 (D.C.1979). In Smith, the court stated as follows:

> The slanderous statement attributed to Sgt. Brock by plaintiff is the accusatory words made to Officer Trainor that plaintiff had stolen the patient's money. Such words, charging another with the commission of a criminal act, are actionable per se unless the statement, at the time made, was qualifiedly privileged. Farnum v. Colbert, D.C.App., 293 A.2d 279 (1972).(footnote omitted).

Smith at 220. Thus, it is clear that the Smith Court found that a statement imputing a criminal act is actionable *per se*. However, the court *never stated that this is the only instance where a statement can be so actionable.* Clearly, the Raboya court misinterpreted Smith. As stated in Plaintiffs' opposition, Raboya is not binding in this Court.

9. Defendant's attempt to have this Court narrow the definition of libel *per se* is strained and relies on convoluted logic and misinterpretation of the case law. Reply at 6-7. As stated *supra*, the DC Court of Appeals, as recently as last year, relied on the Restatement when ruling on a case involving defamation. *See* Armstrong v. Thompson, 80 A.3d 177, 183 (D.C., 2013).

10. Finally, Defendant conflates the definition of an "issue of public interest" within the meaning of the anti-SLAPP statute with that of an "issue of public concern" within the meaning of Ayala v. Washington, 679 A.2d 1057 (D.C., 1996) and Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749 (1985). Reply at 7-9. If Defendant's argument were to carry any merit, then in every claim of defamation "arising from an act in furtherance of the right of advocacy on issues of public interest," as defined by the anti-SLAPP statute, the plaintiff would have to demonstrate malice. This would run afoul of Ayala and Dun & Bradstreet. Defendant cannot

contend that the D.C. Council, in enacting the anti-SLAPP Act, meant to require every plaintiff to demonstrate malice or meant to overturn Supreme Court holdings that interpret the Constitution. The Council has no such authority. In fact, such a holding would render the anti-SLAPP Act unconstitutional. The allegations in this case are similar to the allegation made to the employer in Ayala:

> Washington's letters to Ayala's employer merely communicated information regarding the alleged misconduct of a single private individual, *albeit misconduct that could have a significant effect on public safety*. The allegations did not, however, address any issue concerning the conduct of government or the structure of society or any social issue. (emphasis added)

Id. at 1068. In any case, Plaintiffs *did* allege and demonstrate malice. See Amended Complaint at ¶¶ 49 et seq., and Opposition to Defendant's Special Motion to Dismiss, at 8-9.

Further, even if the issues at hand were matters of public concern, Plaintiffs, as private individuals, would have to demonstrate actual malice only if damages are presumed, but where damages are demonstrated, the standard is negligence. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-50 (1974). Plaintiffs did allege that they suffered special damages. Am. Comp. at ¶¶55 and 60. But for the anti-SLAPP statute, Plaintiffs would not have to demonstrate actual damages before trial, and then they would only have to prove negligence. However, even the anti-SLAPP statute provides for targeted discovery, which Plaintiffs have requested. Such discovery is not only intended to demonstrate actual damages that occurred, but also damages that could, in the future, occur.[1] Indeed, the Court agrees that future damages are part of the equation. *See* Court Order dated December 16, 2013, at 17.

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[1] The fact that Defendant removed one of his defamatory statements is of no moment. Defendant has not conceded that his statement is false (in fact he maintains that it is an opinion) and has not expressed any intent not to republish it. Thus, Defendant can republish said statement at any time absent an injunction from this Court.

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