IN THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THE WASHINGTON TRAVEL CLINIC, PLLC, *et al.*, **Plaintiffs,** **v.** **JOHN KANDRAC,** **Defendant.**	**Case No.: 2013 CA003233 B** **Judge Laura A. Cordero** **Next Court Date: Jan. 31, 2014** **Event: Initial Scheduling Conference**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR RECONSIDERATION

Defendant John Kandrac respectfully files this Memorandum of Points and Authorities in Support of Defendant's Motion for Reconsideration. As grounds for this Motion, Defendant states:

1. In its December 16, 2013 Omnibus Order (the "Order"), the Court found that "the claims at issue fall under the broad umbrella of the Anti-SLAPP Act" and that Plaintiffs were therefore required to "demonstrate a likelihood of success on the merits." Order at 7. Specifically, to overcome a defendant's special motion to dismiss under the Anti-SLAPP Act, a plaintiff "cannot simply rely on his or her pleadings, even if verified; rather, the plaintiff must adduce competent, admissible evidence." *Id.* at 5-6 (citations omitted). On this basis, the Court dismissed Plaintiffs' claim for defamation with respect to all but one statement in the Yelp review at issue, and dismissed Plaintiffs' claim for tortious interference with prospective business advantage in its entirety. *Id.* at 8-15, 24.

2. As the Court also recognized, to establish a claim for defamation, a plaintiff must show four elements, including that the statement is (1) false and defamatory, (2) published without privilege, (3) published with the requisite degree of fault, and, as is relevant to this motion, (4) "either that the statement was actionable as a matter of law irrespective or special harm or that its publication caused the plaintiff special harm." *Id.* at 7-8 (citations omitted). For their part, in responding to Kandrac's special motion to dismiss under the Anti-SLAPP Act, Plaintiffs also recognized that establishing a likelihood of success with respect to damages was part of their assigned burden. *See, e.g.*, Plaintiffs' Opposition (filed Aug. 15, 2013) at 3, 25 (repeatedly reciting these elements of a claim for defamation); *see also id.* at 5 (conceding that to withstand a special motion to dismiss under the D.C. Anti-SLAPP Act, Plaintiffs "must provide sufficient evidence to prove the probability of prevailing on the claim (outside of the allegations made in the complaint)").

3. Under applicable District of Columbia law, Plaintiffs are required to show special harm. As addressed in Kandrac's prior briefing, *see, e.g.*, Defendant's Reply (filed Sept. 11, 2013) at 17-21, the only exception – in which damages are presumed – is where "the contents of a defamatory publication [] impute . . . the commission of some *criminal offense* for which [the Plaintiff] may be indicted and punished, if the charge involves *moral turpitude*." *Raboya v. Shrybman & Assocs.*, 777 F. Supp. 58, 59 (D.D.C. 1991) (quoting *Farnum v. Colbert*, 293 A.2d 279, 281 (D.C. 1972), and *Harmon v. Liss*, 116 A.2d 693, 695 (D.C. 1955)) (emphasis added). Here, Plaintiffs do not – and could not – allege that the challenged statement asserts that they committed a crime of moral turpitude.

4. Plaintiffs were therefore required to put forward evidence of harm, and failed to put forward any such evidence. Indeed, in granting Kandrac's special motion to dismiss with

respect to Plaintiffs' claim for tortious interference with prospective business advantage, the Court expressly found that: "Plaintiffs have produced no evidence showing that they have suffered any damages as a result of Defendant's reviews, or that they will suffer harm in the future." Order at 17. Indeed, although it is Plaintiffs' burden to do so, Kandrac's affidavit confirming that this statement was removed from the review within a matter of days of its posting further negates any conceivable claim that Plaintiffs suffered actual damages.[1]

5. It appears that in concluding that Plaintiffs had "put forward a sufficient prima facie showing of facts that could sustain a favorable judgment if credited by the trier of fact," Order at 9, the Court addressed only the alleged falsity of the statement, rather than the separate and required element of damages, such that reconsideration of this order is appropriate. In considering a motion for reconsideration under Rule 59(e), a court "may exercise its discretion to correct a clear error of law," *Turkmani v. Republic of Bolivia*, 273 F. Supp. 2d 45, 53 (D.D.C. 2002), when the movant identifies errors "which compel the court to change its prior position," *Nat'l Ctr. for Mfg. Scis. v. Dep't of Defense*, 199 F.3d 507, 511 (D.C. Cir. 2000). *See also In re Estate of Derricotte*, 885 A.2d 320, 324 (D.C. 2005) ("A trial court may grant a Rule 59(e) motion in order to correct manifest errors of law or fact."). Further, a motion for reconsideration is properly considered where, as here, "there were facts or legal issues properly presented but overlooked by the court in its decision." *In re Motion of Burlodge Ltd.*, 2009 WL 2868756, at *2

[1] Moreover, even if Plaintiffs' claim fell into the narrow category in which damages are presumed, Plaintiffs would separately be required to submit evidence that Kandrac published the statement at issue with constitutional malice – "a showing of knowledge of falsity or reckless disregard for the truth." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). Here, because the uncontroverted evidence confirms that, even if the separate element of falsity is established, he subjectively believed that Plaintiffs sent him other patients' receipts or information, thereby negating as a matter of law any finding that he published this statement with actual malice. *See also* Defendant's Reply (filed Sept. 11, 2013) at 19-21 (addressing Plaintiffs' failure to offer any evidence on this issue as well).

(D.D.C. Sept. 3, 2009). *See also Blyther v. Chesapeake & Potomac Tel. Co.*, 661 A.2d 658, 662 (D.C. 1995) (Ruiz, J., concurring) ("Judges are constantly reexamining their prior rulings in a case on the basis of new information or argument, or just fresh thoughts . . . . No one will suggest that a judge himself may not change his mind and overrule his own order") (quoting, *inter alia*, *Dictograph Prods. v. Sonotone Corp.*, 230 F.2d 131, 134 (2d Cir. 1956) (Hand, J.)); *Berge v. United States*, --- F. Supp. 2d ----, 2013 WL 2433207, at *11 (D.D.C. June 5, 2013) (on motion for reconsideration noting that "[e]rrors, however, are not uncommon in our legal system, and in fact are expected, which is why motions for reconsideration and appellate review have been integrated into our legal process.").[2]

6. Reconsideration is particularly appropriate in cases involving challenges to the exercise of First Amendment freedoms because of their potential to chill or stifle speech. *See, e.g., Moldea v. New York Times Co.*, 22 F.3d 310, 311 (D.C. Cir. 1994) (where panel granted petition for rehearing, reversed its earlier opinion, and directed entry of summary judgment in libel case, finding that book review was not actionable as a matter of law); *Paul v. News World Commc'ns*, 2003 WL 23899003, at *1 (D.C. Super. Dec. 19, 2003) (granting motion to reconsider partial denial of summary judgment motion and, on further review, dismissing defamation claim in entirety with prejudice). Here, where the Court has already determined that the D.C. Anti-SLAPP Act protects Kandrac's on-line review, granting reconsideration facilitates

[2] In an abundance of caution, Kandrac has invoked in the alternative D.C. Superior Court Rule 54(b) which also allows for reconsideration of an order "as justice requires." This standard "amounts to determining, within the Court's discretion, whether reconsideration is necessary under the relevant circumstances." *Cobell v. Norton*, 355 F. Supp. 2d 531, 539 (D.D.C. 2005); *see also Judicial Watch v. Dep't of Army*, 466 F. Supp. 2d 112, 123 (D.D.C. 2006) (same); D.C. Super. Ct. R. Civ. P. 54(b) cmt. ("Rule 54 is substantially identical to Fed. Rule of Civil Procedure 54."). Defendant respectfully submits that denying Kandrac's motion without addressing required evidence of damages on the defamation claim – while at the same time finding that Plaintiffs failed to submit any such evidence on their tortious interference claim arising out of the same facts – satisfies the requirements of Rules 54(b), 59(e) *and* 60(b).

the speech-protective purposes of the Act, which is expressly designed to "expeditiously and economically dispense of litigation aimed to prevent [his] engaging in constitutionally protected actions on matters of public interest." Committee Report on Anti-SLAPP Statute (Nov. 18, 2010) at 4 (Jones Aff., filed July 15, Ex. 17). It would frustrate those purposes to require Kandrac to litigate through discovery, summary judgment, trial and appeal a single statement on which Plaintiffs have utterly failed to offer any evidence of damages, and one which they have accordingly failed to meet their burden of establishing a likelihood of success on the merits. Kandrac therefore respectfully requests that the Court reconsider that aspect of its ruling, grant his Anti-SLAPP motion with respect to that statement, and dismiss the case in its entirety (given that the rest of the claims have already been dismissed).

Proposed Order

A proposed order granting the relief sought is submitted herewith.

Dated: December 20, 2013

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, LLP

By: /s/ Shaina Jones Ward
Seth D. Berlin (D.C. Bar No. 433611)
Shaina Jones Ward (D.C. Bar No. 1002801)

1899 L Street, NW
Suite 200
Washington, D.C. 20036-5514
Telephone: (202) 508-1100
Facsimile: (202) 861-9888
E-mail: sberlin@lskslaw.com
sward@lskslaw.com

Counsel for Defendant John Kandrac