STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: July 24, 2015)

LUCIANO SZTULMAN M.D. and LUCIANO SZTULMAN M.D., INC. d/b/a SKINSATIONAL LASER CENTER,	:	
Plaintiffs,	:	
v.	:	**C.A. No. PB 09-6897**
ALICE DONABEDIAN, TERESA COPPA, COMPREHENSIVE OB/GYN CARE, INC. d/b/a AESTHETIC LASER TREATMENT CENTER, and A. MICHAEL COPPA,	:	
Defendants.	:	

DECISION

SILVERSTEIN, J. This matter is before the Court on Plaintiff Luciano Sztulman M.D.'s (Dr. Sztulman) motion seeking summary judgment as to liability for Count I (libel and slander per se) of the Third Amended Complaint (the Complaint). Defendants, Alice Donabedian (Ms. Donabedian), Teresa Coppa (Mrs. Coppa), Comprehensive OB/GYN Care, Inc. d/b/a Aesthetic Laser Treatment Center (Aesthetic Laser), and A. Michael Coppa (Dr. Coppa) (collectively, Defendants) have filed an objection to the motion as well as a cross-motion for summary judgment as to Count I and Count II (interference with business relations) of Plaintiffs' Complaint pursuant to Super. R. Civ. P. 56.

I

Facts and Travel

Dr. Sztulman is a board-certified physician in Rhode Island practicing in the field of obstetrics and gynecology and is the president and owner of Plaintiff Luciano Sztulman M.D.,

Inc. d/b/a Skinsational Laser Center (Skinsational). In his Complaint, Dr. Sztulman alleges that Ms. Donabedian, as an employee of Aesthetic Laser and specifically at the direction of Mrs. Coppa, engaged in a series of defamatory statements against Skinsational on a "Yahoo! Local" webpage. Yahoo! Local is a service offered by Yahoo!, Inc. (Yahoo!) wherein businesses sign up with Yahoo! for placement of a listing in a searchable database. See Defs.' Ex. E, at ¶ 2.1 (Yahoo! Local Basic Listing Terms of Service). The listing affords users of the webpage the opportunity to write and submit their own written reviews and/or ratings of that particular business. As of February 16, 2011, the statements appeared on the webpage for view by the general public. See Ms. Donabedian Dep., Ex. 2, Oct. 13, 2011. On two separate occasions, Ms. Donabedian, allegedly under the alias of "Alicat," posted alleged defamatory comments on the Yahoo! Local webpage of Skinsational.

On July 29, 2009, Ms. Donabedian gave Skinsational a "user rating" of "1 out of 5 stars" and wrote the following corresponding review:

> "I was totally not impressed! I've heard on the radio a million times how they're 'voted the best laser center in town!' I don't know who voted but that's a lie! It was the worst experiance [sic] going in there and I DO NOT recommended [sic] it! They were so pushy and I didn't get that medical feel at all! I even searched the Dr. to see if it was a legitimate place and I found some interesting, disturbing things! I can't go somewhere and drop a lot of money when I know the Dr. running it isn't even credible! Its [sic] awful! And I don't care if they claim they have the best prices guarenteed [sic] - the quality of the service is what I care about. I would rather spend that extra 100… 200 dollars for a more professional/reliable service. Keep searching!" Id. at Ex. 3

A different Yahoo! Local user on November 27, 2009 responded to Ms. Donabedian's review explaining that he or she did not believe Ms. Donabedian's comments to be true and expressed generally positive comments about Dr. Sztulman. Ms. Donabedian responded to that post. Her comment, dated February 18, 2010, stated, as follows:

> "You didn't check him out extensively enough - I found a bunch of websites that have articles about him being sued, pressed charges against. It's awful. Theres [sic] PDF files on his court cases. You have got to be kidding me if you think he is great. He's a liar. He told me if my sister if [sic] she buys a package of hair removal she'd get 1 year free guareenteed [sic] - well he took his word back and said 'it was a misunderstanding' and blamed it on the esthetician [sic]. Seriously - it's an absolute ridiculous company, all hes [sic] after is your money, I got that feeling as soon as she was told she couldn't have maintenance treatments for free, that he said[.]" Id.

Thereafter, Dr. Sztulman hired legal counsel to determine the identity of "Alicat" because, according to him, he believed the comments were damaging to his reputation and business. On January 27, 2010, a correspondence from Yahoo! (addressed to a California attorney) indicated it was in receipt of a subpoena, dated January 7, 2010, that was seeking information on one of its users. On February 4, 2011, Christian Lee, the Custodian of Records for Yahoo!, signed a declaration submitted to a California Superior Court that provided Ms. Donabedian's account information with Yahoo!. See Pls.' Opp'n. to Defs.' Cross-Mot. Summ. J., Ex. C.

At all relevant times, Ms. Donabedian was an employee of Aesthetic Laser. Dr. Coppa and Aesthetic Laser compete for business in Rhode Island with Dr. Sztulman and Skinsational. According to Dr. Sztulman's affidavit, neither Ms. Donabedian nor her sister was a patient or customer of his or at Skinsational at any time. (Dr. Sztulman Aff. ¶¶ 4-5, Sept. 5, 2012). Mrs. Coppa, in her deposition, stated that she directed Ms. Donabedian to post a review for Skinsational, not based on her own personal experiences but based on what other customers had told her. Following the 2009 posting, Dr. Sztulman commenced this action on December 2, 2009 against John/Jane Does (1-3); however, Ms. Donabedian and Aesthetic Laser were

eventually named in the action on March 9, 2011 with the filing of the First Amended Complaint.

II

Standard of Review

"The purpose of summary judgment is issue finding, not issue determination." Saltzman v. Atl. Realty Co., 434 A.2d 1343, 1345 (R.I. 1981). In reviewing a motion for summary judgment brought forth under Rule 56 of our Rules of Civil Procedure (Rule 56), "it is the province of the trial justice to determine, by an examination of the pleadings, depositions, answers to interrogatories, admissions on file, and the affidavits of the parties, whether these documents present a genuine issue of material fact . . . ." Ludwig v. Kowal, 419 A.2d 297, 301 (R.I. 1980). To oppose a motion for summary judgment successfully, the nonmoving party must present the court with "evidence from which a jury could draw reasonable inferences sufficient to create a genuine issue of material fact." Mitchell v. Mitchell, 756 A.2d 179, 185 (R.I. 2000). "'Consequently, if no issues of material fact appear and the moving party is entitled to judgment as a matter of law, the trial justice may enter an order for summary judgment.'" Gliottone v. Ethier, 870 A.2d 1022, 1027 (R.I. 2005) (quoting Steinberg v. State, 427 A.2d 338, 340 (R.I. 1981). "Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990).

III

Discussion

Dr. Sztulman and Defendants have both moved for summary judgment as to Count I of the Complaint; Defendants have additionally moved for summary judgment as to Count II. In his motion, to substantiate his claims for libel, Dr. Sztulman argues that the statements made by Ms. Donabedian were calculated to injure his business and by asserting that Dr. Sztulman lacked integrity in his profession. Particularly, he alleges that the facts of this case present a unique circumstance in the context of Internet defamation because Ms. Donabedian was not a casual reviewer of his business expressing an opinion but had fabricated her and her sister's claimed experiences. As Dr. Sztulman argues, the statements, taken as a whole, are not only patently false but evidence her and her employer's malicious intent.

In response, Defendants set forth a series of arguments as to why summary judgment should enter in their favor, including, and most notably, Plaintiffs' lack of standing pursuant to G.L. 1956 § 7-1.2-402 and what has been presented to the Court as Defendants' First Amendment protected anonymous speech on the Internet. Furthermore, Defendants urge the Court to consider the statements in the context in which they appear: an anonymous post on a message board that was not likely to be construed by a reader as presenting actual fact but rather opinion loosely based on fact. Notwithstanding their arguments invoking the First Amendment, Defendants maintain that Skinsational and Dr. Sztulman were limited purpose public figures and, accordingly, Plaintiffs are unable to demonstrate that Defendants were motivated by actual malice.

At the outset, Defendants attack Plaintiffs' standing to bring the instant action. Section 7-1.2-402 of our General Laws, entitled "Fictitious business name," provides in pertinent part:

> "No domestic or foreign corporation transacting business under a fictitious business name contrary to the provisions of this section, or its assignee, may maintain any action upon or on account of any contract made, or transaction had, in the fictitious business name in any court of this state until a fictitious business name statement has been filed in accordance with this section." Sec. 7-1.2-402(e).

In support of their argument that Plaintiffs do not have standing to bring the instant Complaint, Defendants argue the fictitious business name of "Skinsational Laser Center" was not properly filed prior to Luciano Sztulman M.D., Inc.'s service contract with Yahoo!. As a result, Defendants argue Plaintiffs are precluded from bringing any claims emanating from their use of Yahoo! services because the fictitious business name of "Skinsational Laser Center" was not filed until after suit was commenced. Defendants' argument, however, is of no moment.

First, Dr. Sztulman is correct that this statute, even if applicable, has no bearing on his personal claims against Defendants—the relevant section of the statute applies only to "domestic or foreign corporations." See id. Next, it is abundantly clear to the Court that the statute operates to preclude those actions based on contracts entered into under a company's fictitious business name until such time that a fictitious business name statement has been filed with the Rhode Island Secretary of State's office. See § 7-1.2-402(b), (e). While there may be potential issues under the statute for contracts entered into with Yahoo!, see § 7-1.2-402(a), Luciano Sztulman M.D., Inc. filed a fictitious business name statement for "Skinsational Laser Center" on June 13, 2012. See Defs.' Ex. B (listing "Skinsational Laser Center" as fictitious name of Luciano Sztulman M.D., Inc.). Based on a literal reading of the statute, the filing of the fictitious business name statement retroactively cured any purported violation of the statute. Furthermore, the statute should not be construed in such a way as to allow Defendants to shield themselves from tort liability and the serious allegations set forth against them in the Complaint. Plainly, whether Skinsational properly entered into an agreement for use of the webpage does not, in any

way, impact its claims for defamation against Defendants when they were familiar with Dr. Sztulman and Luciano Sztulman M.D., Inc.'s use of that name. See Ms. Donabedian Dep. 33:21-34:23 (discussing Mrs. Coppa's request of Ms. Donabedian to write review of Skinsational in response to negative review received by Aesthetic Laser purportedly attributed to Dr. Sztulman). Therefore, as Skinsational is maintaining an action today, having since filed the required statement approximately three years ago, the issue is effectively moot and the Court finds Plaintiffs have the proper standing to bring their action before this Court.

A

Defamation

As to the merits of Plaintiffs' claims, an action for defamation requires a showing of: "'(1) the utterance of a false and defamatory statement concerning another; (2) an unprivileged communication to a third party; (3) fault amounting to at least negligence; and (4) damages . . . .'" Cullen v. Auclair, 809 A.2d 1107, 1110 (R.I. 2002) (quoting Nassa v. Hook-SupeRx, Inc., 790 A.2d 368, 373 n.10 (R.I. 2002)). Whether a particular statement is defamatory depends on a plaintiff's "show[ing] that the statement is false and malicious, imputing conduct which injuriously affects a [person's] reputation, or which tends to degrade him [or her] in society or bring him [or her] into public hatred and contempt . . . ." DiBattista v. State, 808 A.2d 1081, 1088 (R.I. 2002) (internal quotation marks omitted); see Alves v. Hometown Newspapers, Inc., 857 A.2d 743, 750 (R.I. 2004) (noting plaintiff carries substantial burden in proving that defendant communicated "false and defamatory" statement about plaintiff). It is generally accepted that "the question of whether a particular statement or conduct alleged to be defamatory is, in fact, defamatory is a question of law for the court to decide." Id. (citing Beattie v. Fleet Nat'l Bank, 746 A.2d 717, 721 (R.I. 2000)).

Our Supreme Court has written at length on the subject of whether an individual's opinion shall fall within the purview of a defamation claim. See, e.g., Beattie, 746 A.2d at 721 ("We have previously ruled that the First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, protects the expression of opinions that are based upon disclosed, non-defamatory facts and prevents such statements from constituting actionable-defamatory communications." (citing Belliveau v. Rerick, 504 A.2d 1360, 1362 (R.I. 1986))). Courts are often faced with the difficult task of determining whether a particular statement shall be interpreted as one of either fact or opinion. See Lauderback v. Am. Broad. Cos., 741 F.2d 193, 195 (8th Cir. 1984) ("While the right of free speech provides absolute protection to statements which are purely opinions, it is conceded that statements clothed as opinion which imply that they are based on undisclosed, defamatory facts are not protected." (citing Gertz v. Welch, 418 U.S. 323, 339-40 (1974))). As the Court made clear in Beattie, and relying on Restatement (Second) Torts § 566 (1976), there is no "wholesale defamation exemption for anything that might be labeled 'opinion,' . . . ." Rather, as the Court explained, in light of then-recent case law, certain types of derogatory opinions may be shielded from the realm of defamation if the opinion is based on "disclosed, nondefamatory facts." See Beattie, 746 A.2d at 724 ("[We] hold that a person does not abuse his or her state constitutional liberty of publishing sentiments on any subject if those sentiments are in the form of an opinion based upon disclosed, nondefamatory facts. To rule otherwise would be tantamount to judicial abridgment of free speech in Rhode Island.").

A particular statement may be subject to varying classifications of opinion depending on whether the opinion is formulated and based on facts unknown to the reader. See Sandals Resorts Int'l Ltd. v. Google, Inc., 86 A.D.3d 32, 40 (N.Y. App. Div. 2011). Clarifying the

interplay between fact and opinion, one New York court (discussing defamation in the context of the Internet) stated:

> "'A 'pure opinion' is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, be 'pure opinion' if it does not imply that it is based upon undisclosed facts. When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a 'mixed opinion' and is actionable. The actionable element of a 'mixed opinion' is not the false opinion itself—it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking.'" Id. (quoting Steinhilber v. Alphonse, 501 N.E.2d 550, 552-53 (N.Y. 1986)).

"As a result, if the non-defamatory facts underlying an expressed derogatory opinion are publicly known or disclosed, the opinion, justified or unjustified, is privileged as a matter of law." Beattie, 746 A.2d at 721. The Beattie Court therefore explained that "when determining the meaning of an allegedly defamatory statement, one must examine all parts of the communication that are heard or read with it." Id. at 725.

Defendants argue that, taken in the context of an Internet message board, the predominant thrust of Ms. Donabedian's[1] comments on the Yahoo! Local page should be construed as assertions of opinion rather than any verifiable fact. See Alves, 857 A.2d at 750-51 *("*When considering whether a statement or conduct is defamatory, the court must take into account 'the context of the statement in which the publication occurs and the plain and ordinary meaning of

[1] In moving for summary judgment, Defendants argue that Plaintiffs have violated Ms. Donabedian's constitutional rights by failing to give her notice that her identity would be released by Yahoo! to Plaintiffs. The Court need not dwell on this issue because it is clear that Plaintiffs have set forth sufficient evidence to show that Yahoo! apprised Ms. Donabedian of the subpoena for her identity and gave her the necessary opportunity to object to the disclosure if she so desired. See Pls.' Opp'n to Cross-Mot. Summ. J., Ex. C (letter dated January 27, 2010 from Yahoo! explaining user named in subpoena will be notified by email of subpoena request for identity and will have fifteen days to object).

the words in the community in which the publication occurred.'" (quoting DiBattista, 808 A.2d at 1088)). However, the Beattie Court, quoting the Supreme Court of the United States in Milkovich v. Lorain Journal Co., stated, "[e]ven if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." Beattie, 746 A.2d at 723 (quoting 497 U.S. 1, 18-19 (1990)). When looking at the statements made by Ms. Donabedian to determine whether they assert a "false assertion of fact," much of her statements facially appear to be based on her personal opinion of Skinsational and Dr. Sztulman while other portions of it, if capable of being proven false, would be defamatory. Cf. Mr. Chow of N.Y. v. Ste. Jour Azur S.A., 759 F.2d 219, 224 (2d Cir. 1985) ("[T]he inquiry into whether a statement should be viewed as one of fact or one of opinion must be made from the perspective of an "ordinary reader" of the statement."). The Beattie Court then cited two examples of opinions set forth by the Supreme Court in Milkovich to illustrate when a derogatory opinion, based on disclosed, nondefamatory facts, would be actionable. The first example consisted of a statement that "[i]n my opinion Mayor Jones is a liar"—the Court found that, without more, that statement could be defamatory if proven false. Beattie, 746 A.2d at 723. Similarly, in the case presented at bar, Ms. Donabedian specifically stated (referring to Dr. Sztulman[2]): "He's a liar. He told me if my sister

[2] Defendants submit in their papers that the allegedly defamatory statements were "of and concerning" Dr. Sztulman because there was no link between Skinsational and Dr. Sztulman at the time the postings were made. See Budget Termite & Pest Control, Inc. v. Bousquet, 811 A.2d 1169, 1172 (R.I. 2002) (stating "of and concerning" element of defamation is satisfied when ordinary reader would have reasonably understood statement is about the particular plaintiff even if never referenced by name). Specifically, Defendants contend that because Ms. Donabedian's statements only refer to "the Dr." and because no fictitious business name was filed by Luciano Sztulman M.D., Inc. to use "Skinsational Laser Center" at the time of the posts, a reader would have no reason to know which medical doctor was referenced. Clearly, at the time the second post was made—February 18, 2010—other posts on Skinsational's Yahoo! Local page had already identified Dr. Sztulman expressly by name. See Defs.' Obj. to Mot.

if [sic] she buys a package of hair removal she'd get 1 year free guareenteed [sic] - well he took his word back and said 'it was a misunderstanding' and blamed it on the esthetician [sic]." (Ms. Donabedian Dep., Ex. 3).

Now, ordinarily, this statement calling Dr. Sztulman a liar may be considered defamatory if Plaintiffs can prove it was false, i.e., that Dr. Sztulman, in fact, was not a liar and did not make certain promises to Ms. Donabedian's sister. See Beattie, 746 A.2d at 723; see also Alves, 857 A.2d at 750 ("In bringing a claim for defamation, a plaintiff bears the burden of proving that a defendant communicated a 'false and defamatory' statement about him or her."). Yet, the Court is not faced with such a clear-cut situation as Defendants argue Ms. Donabedian's statements should be afforded somewhat of a lesser-degree of credibility than is usually afforded to other published statements because of the unique nature of Internet communications. Essentially, Defendants urge the Court to adopt the line of reasoning employed by several courts that previously have considered traditionally-defamatory statements in the context of Internet posting and messaging. As the Sandals Resorts court (cited by Defendants as supporting authority) explained:

> "The culture of Internet communications, as distinct from that of print media such as newspapers and magazines, has been characterized as encouraging a 'freewheeling, anything-goes writing style.' 'It is . . . imperative that courts learn to view libel allegations within the unique context of the Internet. In determining whether a plaintiff's complaint includes a published 'false and defamatory statement concerning another,' commentators have argued that the defamatory import of the communication must be viewed in light of the fact that bulletin boards and chat rooms 'are often the repository of a wide range of casual, emotive, and imprecise speech,' and that the online

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Summ. J., Ex H (demonstrating posters' use of Dr. Sztulman's name in relation to dates of various posts). With respect to the first post, Defendants cannot hide behind the fact that Dr. Sztulman was not specifically referenced in the posts because, according to his affidavit, he is the only doctor associated with the business. See Dr. Sztulman Aff. ¶ 7.

> 'recipients of [offensive] statements do not necessarily attribute the same level of credence to the statements [that] they would accord to statements made in other contexts.' Because the context of a statement impacts its potentially defamatory import, it is necessary to view allegedly defamatory statements published on the Internet within the broader framework on which they appear, taking into account both the tenor of the chat room or message board in which they are posted, and the language of the statements. The low barrier to speaking online allows anyone with an Internet connection to publish his thoughts, free from the editorial constraints that serve as gatekeepers for most traditional media of disseminating information. Often, this results in speech characterized by grammatical and spelling errors, the use of slang, and, in many instances, an overall lack of coherence . . . .'" Sandals Resorts, 86 A.D.3d at 43-44 (quoting Jennifer O'Brien, Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases, 70 Fordham L. Rev. 2745, 2773-74 (2002)).

The reasoning contemplated by the Sandals Resorts court focuses on a casual reader's overall interpretation and understanding of Internet comments; to wit, that anonymous posters on a webpage oft times pay little attention to ensuring the accuracy of their statements. Arguably, due to the low bar to "publish" a comment on the Internet, it is suggested that courts should not be quick to label a certain opinionated statement as a "false statement of fact" (and therefore defamatory). Notwithstanding Defendants' arguments, the allegations in the Complaint suggest here that Ms. Donabedian did not just use "imprecise speech" or malapropisms but wholly fabricated her experience and the experiences of her sister in an attempt to maliciously injure the reputation of Dr. Sztulman's medical practice and impugn his integrity as a medical professional.

In spite of the false statements upon which Ms. Donabedian relies to support her statements (i.e., the encounters alleged to be experienced by her and her sister), Defendants request this Court label her statements as protected opinion. Presumably, *some* of the comments posted by Ms. Donabedian may, at least in part, be interpreted as her expression of opinion about Dr. Sztulman's services, given the context of where she posted her comments and the abundance

of grammatical and spelling errors in the post. However, taken as a whole, what ultimately proves detrimental to Defendants' argument is the fact that Ms. Donabedian's statements go beyond any sort of "freewheeling" writing style. Ms. Donabedian's comments are, specifically, entirely premised on *her own* experiences that stem from a specific (and untrue) encounter between Dr. Sztulman and Ms. Donabedian's sister. Furthermore, based on the record before the Court, there are indeed a host of other instances where her opinions are based on undisclosed, defamatory facts. See Healey v. New England Newspapers, Inc., 555 A.2d 321, 324 (R.I. 1989) ("[A] statement in the form of an opinion may be defamatory and therefore actionable if and only if 'it implies the allegation of undisclosed defamatory facts as the basis for the opinion.'" (quoting Belliveau, 504 A.2d at 1362)). For example, in Ms. Donabedian's July 29, 2009 post, she wrote, "I even searched the Dr. to see if it was a legitimate place and I found some interesting, disturbing things! I can't go somewhere and drop a lot of money when I know the Dr. running it isn't even credible! Its [sic] awful!" (Ms. Donabedian Dep., Ex. 3, Oct. 13, 2011). Simply, her failure to disclose what "interesting, disturbing things" she found (and considering her use of untrue statements in other facets) causes her statements to cross into the realm of actionable opinion.[3]

As to this point, Defendants maintain that the experiences referenced in the comments on the Yahoo! Local webpage are grounded in actual fact because the statements were a combination of real experiences told to her from customers and from a former employee of Skinsational. However, in order for the opinion to be protected from liability, the statements must be premised on *true* facts expressly outlined in the statement. See Flowers v. Carville, 310

[3] Other statements in Ms. Donabedian's comments capable of bearing a defamatory meaning include the statements about the status of Dr. Sztulman's medical licenses and whether he had civil suits or criminal charges pending against him. According to his affidavit, neither are true. See Dr. Sztulman Aff. ¶¶ 8-10.

F.3d 1118, 1129 (9th Cir. 2002) (internal citations and quotation marks omitted) ("We have held that when a speaker outlines the factual basis for his conclusion, his statement is protected. This assumes, however, that the factual basis itself is true. [W]here a publication sets forth the facts underlying its statement of opinion . . . *and those facts are true*, the Constitution protects that opinion from liability for defamation. A speaker can't immunize a statement that implies false facts simply by couching it as an opinion based on those facts."). As shown, Ms. Donabedian failed to expressly outline those true facts in her two posts. See Beattie, 746 A.2d at 724 (noting when bases of conclusion are fully disclosed, "'no reasonable reader would consider the term anything but the opinion of the author drawn from the circumstances related.'" (quoting Partington v. Bugliosi, 56 F.3d 1147, 1156 (9th Cir. 1995))).

Had Ms. Donabedian stated the true circumstances leading up to the basis of her "opinion" of Skinsational—that her opinions were based on what she heard from former customers, instead of creating a false encounter with Dr. Sztulman—a different conclusion may have been warranted. Indeed, Defendants cite to Quantum Elecs. Corp. v. Consumers Union of U.S., Inc., 881 F. Supp. 753, 766 (D.R.I. 1995) (internal citations omitted), for the proposition that "[t]o be actionable, the statement must be materially false, that is, the impact of the statement on the reader's mind must be different from the effect that a true statement would produce. Accordingly, a minor inaccuracy does not amount to an actionable falsehood unless it materially alters the substance of the statement." This is not a case about "minor inaccuracies." In her deposition, Ms. Donabedian stated that her sister never used the services of Skinsational. (Ms. Donabedian Dep. 9:1-3). She further described that her statements were based on an "overall feeling that [she and Aesthetic Laser] [had] gotten over the years from patient's past experiences." Id. at 11:2-4. With regard to the statements about a particular experience in the

second review on the Yahoo! Local webpage, Ms. Donabedian stated that she based her statements on a former employee of Skinsational that told her, according to Ms. Donabedian's testimony, that "[Dr. Sztulman] was a horrible person to work for, that she felt that he would lie to patients just to take their money. She said that he would say one thing to patients in the consultation to get them to book, and after they've completed their series of treatments he would take back any guarantees that he may have offered to the patients, and then blame it on the employee." Id. at 35:18-36:1.

These facts were not disclosed to the reader in her review of Skinsational. Ms. Donabedian's statements, as a whole, give the reader the impression that she was a former customer where, in reality, she never went there and based her claimed "experience" from what other individuals had told her in passing. See id. 45:25-47:5. Clearly, these are undisclosed and untrue facts on which her opinion is predicated and there is no evidence to suggest the alleged exchange with Dr. Sztulman actually occurred. See Burke v. Gregg, 55 A.3d 212, 221 (R.I. 2012) (internal quotation marks omitted) (emphasis in original) ("[W]hen the facts underlying a statement of opinion are disclosed, readers will understand they are getting the author's interpretation of the facts presented; they are therefore unlikely to construe the statement as *insinuating* the existence of additional, undisclosed [defamatory] facts."); Lauderback, 741 F.2d at 195-96 ("[W]hen an opinion held out for belief is stated so that the average listener would infer that the speaker had an undisclosed factual basis for holding the opinion, the listener does not have the tools necessary to independently evaluate the opinion and may rely on unfounded opinion that defames an individual.").

Consequently, the fact that Ms. Donabedian "couched" false facts as an opinion, and combined with the fact that her statements calling Dr. Sztulman a "liar" (a statement that can be

proven false by evidence presented at trial) and on her overall failure to disclose all true facts upon which her opinion was based, compels the Court to deny entering summary judgment in favor of Defendants at this time.[4] This Court, in reviewing the context in which these posts were

[4] Defendants argue in their papers that, as a matter of law, Plaintiffs are limited purpose public figures and are therefore required to demonstrate "actual malice" in order to overcome the "heightened degree of protection" afforded to derogatory opinions of public figures. See Beattie, 746 A.2d at 723 n.2; see also Cullen, 809 A.2d at 1110 ("A public figure defamation plaintiff meets the requisite burden of proof by demonstrating actual malice by clear and convincing evidence."). In support, Defendants explain that Ms. Donabedian did not have the high degree of awareness of the probable falsity of her statements—the "reckless or knowing falsity" test for actual malice. See Cullen, 809 A.2d at 1110. However, in asserting that the statements are of opinion and not of fact, Defendants have misinterpreted Rhode Island law. As expressly noted in Cullen, "the 'reckless or knowing falsity' test applied in defamation cases involving public figures is inapplicable when the contested statement is an idea or an opinion, as here, rather than a fact." Cullen, 809 A.2d at 1110-11 ("The [New York Times Co. v. Sullivan, 376 U.S. 254 (1964)] test for reckless or knowing falsity applies only to statements of fact. The defendant's alleged defamatory statements were his opinion, and therefore, need not be adjudged true or false."). Therefore, in claiming the statements are opinion, Defendants utilize the wrong line of inquiry. Their misstep, however, ultimately proves worthwhile.

As the Court has explained, Ms. Donabedian's statements are not protected opinion under the First Amendment due, in part, to their reliance on untrue and undisclosed facts; therefore, the New York Times test may then be warranted—only if Plaintiffs are limited purpose public figures. Be that as it may, the Court strongly disagrees with Defendants that Plaintiffs are any sort of public figure. See Major v. Drapeau, 507 A.2d 938, 941 (R.I. 1986) (holding trial justice is charged with determining whether a plaintiff is a public figure or a public official). In adopting the standard utilized by the United States Supreme Court, the Rhode Island Supreme Court stated how to classify an individual as a "limited purpose public figure": "If the individual has 'thrust himself into the vortex of this public issue' or has 'engage[d] the public's attention in an attempt to influence its outcome,' then he or she may, for the limited purpose of that issue, be considered a public figure." Id. (quoting Gertz, 418 U.S. at 352). In Healey, our Court elaborated on the definition: "[w]e would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. . . . It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." Healey, 555 A.2d at 325.

Here, there is no controversy to which Skinsational had inserted itself at the time Ms. Donabedian made her statements. Moreover, the mere fact that Skinsational welcomed comments on an advertisement webpage is not enough to generate the "notoriety" in the community required to designate Plaintiffs as a limited purpose public figure. See Gertz, 418 U.S. at 351-52. Accordingly, a determination of whether Defendants knew their statements were false or made them with reckless disregard for the truth by clear and convincing evidence is not required. In any event, as our Supreme Court has explained, "the lesser culpability standard

made, and in considering the nature of Internet posting and the overall tone of the statements made, simply cannot overlook the fact that Ms. Donabedian admitted to creating an untrue encounter between herself and her sister with Dr. Sztulman and Skinsational. Fundamentally, there is a stark difference between those derogatory statements construed as opinion on an Internet message board and those statements, like the ones presented here, which are based almost entirely on untrue, fictitious, and undisclosed statements of fact. It is for this essential reason that the Court must deny Defendants' cross-motion for summary judgment on Count I.[5] With respect to Dr. Sztulman's motion, the Court is similarly not prepared at this time to enter summary judgment in his favor as to Count I.

Importantly, the Court's holding is limited to the inquiry of whether the statement was capable of bearing a defamatory meaning. The Rhode Island Supreme Court, in its iterations of the principles of law associated with an action for defamation, explained that "whereas the

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applicable when the plaintiff is a private person as opposed to some sort of a public figure is irrelevant when determining the defamatory character of the communication." Beattie, 746 A.2d at 723 n.2.

[5] The Court additionally denies Defendants' request that summary judgment enter as a matter of law in favor of Dr. Coppa. The Complaint alleges that Dr. Coppa made defamatory statements (spoken to Ms. Donabedian) in 2009 or 2010 that Dr. Sztulman's medical license had been revoked. See Compl. ¶¶ 24-26. Based on a one-year statute of limitations, Defendants contend that because Dr. Coppa was not named until December 2011, with the filing of the Third Amended Complaint, the statute of limitations bars the claim. See G.L. 1956 § 9-1-14(a) ("Actions for words spoken shall be commenced and sued within one year next after the words spoken, and not after."); Mikaelian v. Drug Abuse Unit, 501 A.2d 721, 724 (R.I. 1985) ("Most jurisdictions have determined that a statute of limitations in respect to libel would begin to run from and after the date of publication."). Even though Dr. Coppa was named as a Defendant more than one year after allegedly making the defamatory statements, Plaintiffs contend they did not discover the defamatory statements were made by Dr. Coppa until Ms. Donabedian's deposition was taken on October 13, 2011. See Dr. Sztulman Aff. ¶ 1, Jan. 2, 2012. Because "plaintiff obtained knowledge of, or, in the exercise of reasonable diligence, should have obtained knowledge of the allegedly injurious statement and its possible nexus to the prospective defendant" at Ms. Donabedian's deposition and promptly filed an amended complaint thereafter, summary judgment is inappropriate. See Mills v. Toselli, 819 A.2d 202, 206 (R.I. 2003) (recognizing discovery rule as exception to § 9-1-14(a) where "compelling circumstances" will justify tolling statute of limitations).

threshold determination of whether a statement is capable of bearing a defamatory meaning is for the court to decide, the ultimate conclusion on whether such a meaning was indeed conveyed is for the jury to decide." Healey, 520 A.2d at 150; see also Burke, 55 A.3d at 221 (discussing two-factor analysis for actionable defamation claims). While the Court has concluded today that the statements are not protected opinion because they were based on undisclosed, defamatory facts, whether a reader of the Yahoo! Local webpage would have indeed read them as defamatory, as well as the issue of whether Plaintiffs can satisfy the element of damages in a defamation action will be left to a fact finder. Accordingly, based on the inability of the Court to make that determination at this time, the Court is compelled to deny Dr. Sztulman's motion on Count I.

B

Interference with Business Relations

In addition to the cross-motions for summary judgment on Count I of the Complaint, Defendants have moved for summary judgment on Count II which sets forth a claim for interference with business relations. The Complaint alleges that Defendants intentionally caused harm to Plaintiffs' future business relationships by submitting false reviews without any factual basis in order for Defendants to gain a business advantage over Dr. Sztulman and his practice. (Compl. ¶¶ 31-36). In moving for summary judgment as to this Count, Defendants cite to Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc., to assert that when a tortious interference claim is based on lawful speech, the activity is insufficient to establish that the interference was intentional and improper. See 175 F.3d 848, 858 (10th Cir. 1999); see also Avilla v. Newport Grand Jai Alai LLC, 935 A.2d 91, 98 (R.I. 2007) ("[T]he elements of [intentional interference with prospective contractual relations] require showing an "intentional and improper" act of interference, not merely an intentional act of interference. (citing

Restatement (Second) Torts § 766B, cmt. d at 22 (1979))). To that end, Defendants argue the speech at issue here was protected by the First Amendment; therefore, the inability of Plaintiffs to show actual malice should apply equally to this claim. As discussed supra, Ms. Donabedian's claims are not constitutionally protected speech (as "pure opinion") under the First Amendment; the statements are, in fact, opinion based on undisclosed, defamatory, and untrue facts and thus is actionable. See, supra, at 14-16. Thus, the Tenth Circuit's decision in Jefferson Cnty. Sch. Dist. is readily distinguishable. See Jefferson Cnty. Sch. Dist., 175 F.3d at 857 (reviewing case law that holds summary judgment is proper on non-defamation tort claims (i.e., tortious interference with business relationships) when plaintiff has failed to demonstrate challenged publication contained no false statements of fact and was therefore a tort claim based on speech protected by the First Amendment). Moreover, the Court has concluded that a showing of "actual malice" (as argued by Defendants as applying equally to the claim here) was not required because Plaintiffs were not limited purpose public figures. See, supra, n.4.

Furthermore, summary judgment is also not warranted on the basis that Plaintiffs are circumventing the alleged time-barred claims against Dr. Coppa by asserting a tortious interference claim against him, as argued by Defendants. As the Court explained in footnote 5, Plaintiffs could not have reasonably discovered the statements made by Dr. Coppa to Ms. Donabedian without first asking about the basis for such statements at her deposition. Once the statements were discovered, Plaintiffs amended their Complaint to include allegations against Dr. Coppa well within the one-year statutory period that was tolled until the date of the deposition. Thus, this argument advanced by Defendants must also fail. On these two grounds, Defendants' motion on Count II is denied.

IV

Conclusion

For the foregoing reasons, Dr. Sztulman and Defendants' cross-motions for summary judgment are both denied as to Count I. Additionally, Defendants' motion for summary judgment as to Count II is denied.

Counsel shall present an appropriate order consistent herewith.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Sztulman v. Donabedian, et al.**
CASE NO:	**PB 09-6897**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**July 24, 2015**
JUSTICE/MAGISTRATE:	**Silverstein, J.**
ATTORNEYS:	
For Plaintiff:	**Andrew J. Tine, Esq.**
For Defendant:	**James S. D'Ambra, Esq.**