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10/25/2021 10:29 AM

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Byron Johnson,

Plaintiff,

ORDER GRANTING SUMMARY JUDGMENT MOTION

vs.

Judge David L. Piper
Court File No. 27-CV-21-3888

Kaija Freborg,

Defendant.

The above-captioned Defamation case came before the Honorable David L. Piper on September 27, 2021 for a hearing on Defendant's Motion for Summary Judgment and Plaintiff's Motion to Add a Claim for Punitive Damages.

Samuel A. Savage, Esq. appeared on behalf of Plaintiff Byron Johnson ("Johnson"). The gist – as will be more fully explained herein - of Plaintiff's Motion is for punitive damages, due to what he asserts Defendant's postings on Facebook have done to him personally and professionally.

Chelsea L. Gauger, Esq. appeared on behalf of Defendant Kaija Freborg ("Freborg"). The gist – as will be more fully explained herein - of Defendant's Motion is that the First Amendment to the Constitution protects Defendant's negative postings about Plaintiff on Facebook.

Based on the pleadings, affidavits, memoranda, and arguments of counsel, the Court now makes the following:

Filed in District Court
State of Minnesota
10/25/2021 10:29 AM

SUMMARY OF UNDISPUTED FACTS

1. Plaintiff and Defendant had an intimate relationship that continued for approximately one year, starting around 2013. (Complaint ¶ 5; Answer ¶ 5).
2. The intimate nature of the parties' relationship ended sometime in 2015. (Complaint ¶ 7; Answer ¶ 7).
3. On or about July 14, 2020, Defendant posted on her Facebook page:

> Feeling fierce with all the women dancers coming out. So here it goes… I've been gaslighted/coerced into having sex, sexually assaulted, and/or raped by the following dance instructors: Byron Johnson, @Saley Internacional, and @israel Llerena. If you have a problem with me naming you in a public format, than perhaps you shouldn't do it.
> ☠☠☠
> #metoo
> #dancepredators

(Complaint ¶ 9; Answer ¶ 7).

4. Plaintiff did not rape Defendant. (Complaint ¶ 11; Answer ¶ 9).
5. Defendant, on one occasion at his residence, approached Defendant while she was intoxicated and alone, grabbed her hand and put it down his pants onto his genitals. (*Gauger Aff.*, Ex. 4, p. 2).
6. One text conversation between Plaintiff and Defendant seemingly involves a discussion about Plaintiff videotaping Defendant (while Plaintiff and Defendant were having sex) without consent. (*Gauger Aff.*, Ex. 2).

Filed in District Court
State of Minnesota
10/25/2021 10:29 AM

7. Plaintiff requested that Defendant tell him exactly what he did to her or why his name was mentioned in the posting. (Complaint ¶ 16; Answer ¶ 14). Defendant responded by commenting:

> In all honesty I'm not interested in any kind of manipulative cat and mouse game with you. If you're "confused" (as I've heard many people say when gaslighting others to get outcomes they want) I suggest you talk to the many, many other women you've done this to or better yet talk to a therapist. "We" do not need to do better, you do.

(Complaint ¶ 16; Answer ¶ 14).

8. Defendant later edited the post referenced in paragraph 3 to read as follows:

> Feeling fierce with all these women dancers coming out. So here goes... I've experienced varying degrees of sexual assault** by the following dance instructors: Byron Johnson, Saley Internacional, and Israel Llerena. If you have a problem with me naming you in a public format, then perhaps you shouldn't do it 🙈♀🙈♀🙈♀
> #metoo
> #dancepredators
> **I was given feedback from a good friend of mine about how words like rape from a white woman can be triggering for black men. I want to respect the black men out there reading this and so I have changed the wording in this post. These are important discussions to have and I
>
> appreciate the incredible friends I have who are willing to support me and also call me out. Thank you!! 🙏

(Complaint ¶ 20; Answer ¶ 18).

9. Defendant wrote in a private message to another individual: "I was feeling good for a moment and then this am they started sharing personal texts and calling me a liar. I get that this goes with the territory but every once in a while I doubt myself. Am I being unfair? Am I making this up? Was I too

Filed in District Court
State of Minnesota
10/25/2021 10:29 AM

harsh or vague in depicting Byron's role in all this. As he's never raped me but . . . I feel healed and don't mind these conversations but holy sh*t what about women who are not. No wonder women don't come forward. All the awful things people say and post." (*Pl. Memo. in Opp.*, Ex. 9).

CONCLUSIONS OF LAW

1. By posting the statements to Facebook, Defendant communicated them to someone other than the plaintiff.
2. These statements tended to harm Plaintiff's reputation.
3. These statements, nonetheless, were true. Plaintiff admits to non-consensual sexual contact with Defendant when he put her hand down his pants and onto his genitals at his house. This is correctly categorized as sexual assault.
4. "Taking *Gertz* and *Dun & Bradstreet* together, the proper focus regarding the availability of presumed damages is not on the status of the defendant as a media or nonmedia defendant. Rather, the dispositive inquiry is whether the matter at issue is one of public concern." *Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 877 (Minn. 2019).
5. The statements in Defendant's posts reached a matter of public concern, namely, the #metoo movement and sexual abuse, and therefore presumed damages are unavailable to Plaintiff absent a showing of actual malice.
6. Plaintiff has not shown that the Defendant acted with actual malice, primarily because the statements were not actually false. Therefore, it would

Filed in District Court
State of Minnesota
10/25/2021 10:29 AM

have been impossible for her to make the statements "with the knowledge that [they were] false or with reckless disregard of whether [they were] false or not." *Maethner*, *v. Someplace Safe, Inc.*, 929 N.W.2d 868, 873 (Minn. 2019).

7. Because the statements in Defendant's posts were true, Plaintiff is unable to prove an essential element of defamation. No genuine issue of material fact remains on this point, and therefore summary judgment should be granted because Plaintiff cannot sustain a cause of action for defamation as a matter of law.
8. Because Plaintiff has no underlying theory of harm remaining after Summary Judgment is granted on the defamation claim, his Motion to Add a Claim for Punitive Damages is legally insufficient and therefore should be denied as a matter of law.

ORDER

1. Defendant's Motion for Summary Judgment is **GRANTED**.
2. Plaintiff's Motion to Add a Claim for Punitive Damages is **DENIED**.
3. The attached Memorandum is incorporated as a part of this Order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: BY THE COURT:

Piper, David 2021.10.24 13:31:34 -05'00'

Judge David L. Piper

JUDGMENT
I Hereby Certify that the above Order
Constitutes the Entry of Judgment of the Court
Sarah Lindahl-Pfieffer, Court Administrator

By Deborah Lund
Oct 25, 2021

MEMORANDUM

Plaintiff Johnson filed a complaint against Defendant Freborg asserting a claim of common-law defamation *per se*—which, if proved, allows a plaintiff to recover for presumed damages—based upon a July 14, 2020 Facebook post and subsequent comments by Freborg on that post. On July 1, 2021, Plaintiff filed a Notice of Motion and Motion for leave to amend his complaint to add a count of punitive damages. On August 30, 2021, Defendant filed a Notice of Motion and Motion for summary judgment and dismissal of Plaintiff's action against her, together with costs and disbursements. The Court will first consider the Motion for Summary Judgment and then the Motion to Add a Claim for Punitive Damages.

I. Defendant's Motion for Summary Judgment

Standard of Review

"The Court shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. "A moving party is entitled to summary judgment when there are no facts in the record giving rise to a genuine issue for trial as to the existence of an essential element of the nonmoving party's case." *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 847–48 (Minn. 1995) (citation

Filed in District Court
State of Minnesota
10/25/2021 10:29 AM

omitted). The moving party must support its allegation that there is no genuine issue as to any material fact by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits, stipulations . . . admissions, interrogatory answers, or other materials . . . ." Minn. R. Civ. P. 56.03. The nonmoving party "may not rest on mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial." *Nicollet Restoration*, 533 N.W.2d at 848 (citations omitted). "Speculation, general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial." *Id.* (citations omitted).

Defamation

To prove defamation, a plaintiff must show that defendant (1) made a false statement; (2) communicated it to someone besides the plaintiff; and (3) that the statement "tended to harm the plaintiff's reputation and lower him in the estimation of the community." *Keuchle v. Life's Companion P.C.A.*, 653 N.W.2d 214, 218 (Minn. Ct. App. 2002) (citing *Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406 (Minn. 1994)).

However, actions for defamation implicate First Amendment interests. "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). In *Sullivan*, the Supreme Court decided that the First Amendment requires a plaintiff to show "actual malice" in order for a

Filed in District Court
State of Minnesota
10/25/2021 10:29 AM

State "to award damages for libel in actions brought by public officials against critics of their official conduct." *Id.*

Later, the Court held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). The *Gertz* Court distinguished the level of protections afforded to private persons involved in matters of public concern from that afforded to public persons involved in matters of public concern, allowing a "private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* [to] recover only such damages as are sufficient to compensate him for actual injury." *Gertz*, 418 U.S. at 350. Additionally, the Court later held that "permitting the recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985).

However, the Minnesota Supreme Court has spoken on the issue: "Taking *Gertz* and *Dun & Bradstreet* together, the proper focus regarding the availability of presumed damages is not on the status of the defendant as a media or nonmedia defendant. Rather, the dispositive inquiry is whether the matter at issue is one of public concern." *Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 877 (Minn. 2019). Explaining that "neither the Supreme Court nor our court makes a

Filed in District Court
State of Minnesota
10/25/2021 10:29 AM

media/nonmedia distinction in defamation cases brought by public officials or public figures," the Court clarified that "[t]he rule should not be different when the plaintiff is a private individual but the matter nonetheless raises an issue of public concern." *Id.* at 878. "Accordingly, it is the private or public concern of the statements at issue—not the identity of the speaker—that provides the First Amendment touchstone for determining whether a private plaintiff may rely on presumed damages in a defamation action. . . . Consistent with these principles, we hold that a private plaintiff may not recover presumed damages for defamatory statements involving a matter of public concern unless the plaintiff can establish actual malice." *Id.* at 878–79.

The statements obviously meet the publication requirement: they were posted to Facebook for others to read. They also clearly tend to harm Plaintiff's reputation. Therefore, the threshold issue before the Court is: (1) whether the statements were false for the purposes of the summary judgment motion. If the statements were true, then Plaintiff's defamation claim cannot survive summary judgment. If the statements were false, then the Court must decide the following two issues: (2) were the statements of *Freborg* matters of public concern; (3) were the statements made with "actual malice." If the statements were matters of public concern not made with actual malice, then Johnson cannot recover presumed damages under a theory of defamation per se.

(1) The statements were not false, and therefore do not support an action for defamation

As discussed above, one of the elements of defamation is that the defendant

Filed in District Court
State of Minnesota
10/25/2021 10:29 AM

made a false statement. *Keuchle*, 653 N.W.2d at 218. Defendant correctly points out that the statements were not even false. The first Facebook post clearly states: "I've been gaslighted/coerced into having sex, sexually assaulted, *and/or* raped by the following dance instructors . . ." (Complaint ¶ 9). Plaintiff's Admission to Defendant's Request for Admission No. 10 establishes the truthfulness of the statement:

> 10. Admit that, on at least one occasion at your residence, you approached Defendant while she was intoxicated and alone, grabbed her hand and put it down your pants onto your genitals.
> **RESPONSE: Admit.**

(*Gauger Aff.*, Ex. 4, p. 2). The Court finds that describing this nonconsensual contact as sexual assault is substantially accurate, if not completely truthful. Additionally, one text conversation in the record seemingly involves a discussion about Plaintiff videotaping Defendant without consent. (*Gauger Aff.*, Ex. 2). This fact also renders Defendant's statements substantially accurate.

Plaintiff's argument is essentially that Defendant falsely accused him of rape. But neither post accuses the Plaintiff of rape. The post references three different individuals and three different things: gaslighting/coercion, sexual assault, and/or rape. "And/or" clearly implies that the list is not necessarily disjunctive or conjunctive as applied to any or all of the individuals mentioned. Plaintiff asks this Court to read the statement as "and" thereby making it a false statement. The Court cannot meet Plaintiff's burden for him. The statements were not false, and therefore a cause of

Filed in District Court
State of Minnesota
10/25/2021 10:29 AM

action for defamation cannot be sustained. Summary judgment is GRANTED.

(2) The statements of Freborg were matters of Public Concern

"Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' . . . or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public . . . ." *Snyder v. Phelps*, 562 U.S 443, 453 (2011) (citations omitted). The Court in *Snyder* found that the public demonstration by the Westboro Baptist Church had a dominant theme which "spoke to broader public issues." *Id.* at 454. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147–48 (1983).

The Minnesota Supreme Court has held "that the determination of whether speech involves a matter of public or private concern is based on a totality of the circumstances. Specifically, courts should consider the content, form, and context of the speech. No single factor is 'dispositive;' rather, courts should 'evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said." *Maethner*, 929 N.W.2d at 881 (citing *Snyder*). "In *Snyder* the Court explained that '[s]peech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community' or when the subject of the speech is 'of general interest and of value and concern to the public.'" *Id.* at 880.

Filed in District Court
State of Minnesota
10/25/2021 10:29 AM

Importantly, the Supreme Court in *Connick v. Myers* clarified that "[t]he inquiry into the protected status of speech is one of law, not fact." *Connick*, 461 U.S. at 148, n. 7. Therefore, if the undisputed facts before this Court, interpreted in the light most favorable to the nonmoving party, Johnson, show that the statements reached a matter of public concern, then the issue can be resolved on summary judgment.

(a) What was said

As outlined above, Freborg's post and edited post (collectively "posts") accused three different individuals by name or handle of three different things: gaslighting/coercion into having sex; sexual assault; and/or rape. (Summary of Undisputed Facts ¶¶ 3, 6). Furthermore, Freborg included two hashtags in the post: "#metoo" and "#dancepredators." Hashtags enable users of social-media sites to cross-reference content in posts, sometimes facilitating exposure to a larger audience.

(b) Where it was said

The posts were both on Facebook. Facebook is a social media platform often used for public discussions. Some posts on Facebook are clearly matters of public concern, while others are not.

(c) How it was said

The inclusion of hashtags, especially "#metoo" weigh in favor of a finding that this speech reached a matter of public concern. Hashtags themselves are designed to share a topic or theme broadly, because they enable users to search the hashtag

Filed in District Court
State of Minnesota
10/25/2021 10:29 AM

and see posts from many different users who may not be in their immediate network.

The #metoo movement itself is certainly a matter of public concern. Plaintiff nearly admits as much. Founded in 2006 by Tarana Burke, the movement gained international prominence in 2017 when it went viral.

Plaintiff's argument is essentially that this post is too personal to be a matter of public concern. The Court is not persuaded. Plaintiff even attempts to distinguish the facts at issue here from those in *Snyder*, where the Supreme Court found that statements by members of the Westboro Baptist Church protesting a military funeral with signs that read "Thank God for Dead Soldiers," "Fags Doom Nations," "America is Doomed," "Priests Rape Boys," and "You're going to Hell" were on matters of public concern. Plaintiff argues that this case can be distinguished from *Snyder* because Johnson and Freborg had a prior relationship which involved casual sex. He further argues that a "trending hashtag cannot be all that is required to convert a personal, private attack on an individual into a matter of public concern . . . . To hold otherwise would open the door to defamatory statements being excused simply because the author included a trending hashtag of a related public issue when making the statement." (Pl. Memo. in Supp. at 10).

This argument is specious. First, the hypothetical conspicuously deemphasizes that the author would be including a trending hashtag "of a related public issue." Simply using any random hashtag would not make the statement reach a matter of public concern. Rather, the use of a hashtag to spread a

Filed in District Court
State of Minnesota
10/25/2021 10:29 AM

statement on a related public issue would be of public concern at least partly because of its content and not the hashtag, as is the case here. The record is replete with other content regarding this specific problem in this specific community. (*Gauger Aff.*, Ex. 7, 8). Context is important, and it is simply inaccurate to say that this Court is holding that a hashtag alone can allow a statement to reach a matter of public concern.

Furthermore, Plaintiff's argument is noticeably vulnerable to the same criticism: by this logic, anyone involved in a casual sexual relationship with another individual would be unable to speak to matters of public concern regarding that individual. Not only does the Court find the implications of that conclusion far-reaching and inconsistent with First Amendment principles, but the Court also refuses to carve out an exception for parties with prior relationships to the actual-malice standard applicable to statements of public concern absent any supporting binding precedent.

This Court finds that Freborg's statements were on a matter of public concern, namely the #metoo movement, based on the totality of the circumstances.

(3) The statements were not made with actual malice

"The question of whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 685 (1985); *Maethner*, 929 N.W.2d at 879; *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510–11 (1984) ("The question whether the evidence in the record in a defamation

Filed in District Court
State of Minnesota
10/25/2021 10:29 AM

case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'").

To meet the Constitutional actual-malice standard, a statement must be "made with the knowledge that it was false or with reckless disregard of whether it was false or not." *Maethner*, 929 N.W.2d at 873 (quoting *New York Times*, 376 U.S. 254). The standard is a heightened one: it requires a showing that the statement was made with a high degree of awareness of its probable falsity, or that the speaker entertained serious doubts as to the truth of the statement. *In re Charges of Unprofessional Conduct Involving File No. 17139*, 720 N.W.2d 807, 813 (Minn. 2006) (citations omitted). Actual malice is a subjective standard. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989).

It is difficult for the Court to analyze the hypothetical scenario in which Defendant's statements were false with respect to this element. Falsity is essential to the actual malice standard because subjective knowledge or reckless disregard of truth is not possible if the statements are true. However, if the Court were to interpret the statement as a false rape allegation, Plaintiff still would not have met the actual malice standard.

Plaintiff argues that various statements and messages with other individuals show Defendant's actual malice. For example, she said to one individual: "I was

Filed in District Court
State of Minnesota
10/25/2021 10:29 AM

feeling good for a moment and then this am they started sharing personal texts and calling me a liar. I get that this goes with the territory but every once in a while I doubt myself. Am I being unfair? Am I making this up? Was I too harsh or vague in depicting Byron's role in all this. As he's never raped me but . . . I feel healed and don't mind these conversations but holy sh*t what about women who are not. No wonder women don't come forward. All the awful things people say and post." (*Pl. Memo. in Opp.*, Ex. 9). Plaintiff argues that this statement shows that Defendant entertained the probability of the post's truth or untruth, which shows actual malice.

But that is not the standard. In fact, these posts show Defendant did not act with actual malice. Not only is this message a reaction to being called a liar, but it also shows only that Defendant was entertaining the implications of her true statement. She literally questions whether it was "too vague" or if she was "being unfair," both of which are compatible with telling the truth. An individual doubting herself after being called a liar by many people on the internet does not show that the statements were made with knowledge that the statements were false nor with reckless disregard for their truth or falsity; this just shows she was doubting a very serious accusation she made. There is room between doubt and actual malice.[1]

The Court's reasoning applies equally well to other statements the Plaintiff highlights, for example: "yes I grouped men and actions together . . . if they call me

[1] Additionally, even if these conversations tended to show actual malice, the Court doubts that this meets the Constitutional standard of "clear and convincing" evidence of actual malice. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 (1984).

Filed in District Court
State of Minnesota
10/25/2021 10:29 AM

a liar I'm not sure that I care." (*Pl. Memo. in Opp.*, Ex. 7). Plaintiff also points to a conversation between Defendant and another individual, in which Defendant asked whether deleting her post would "make [her] look guilty of wrongdoing." (*Pl. Memo. in Opp.*, Ex. 10 at 17). The individual responded that "[i]n the court of law, I doubt this would prove any guilt. In the court of public opinion it may be different." (*Id.*). Defendant responded: "And that's why I posted it. I think it really helped people begin to talk about this." (*Id.* at 18).

Again, even if the statements were false, these statements do not show actual malice. Defendant says she doesn't care if she's called a liar, not that she doesn't care if she lied. That statement is still compatible with her belief that her statement was true. The same goes for the other exchange: Defendant is worried that deleting the post would make her look guilty of something. That fear could exist even if what she said were true.

II. Plaintiff's Motion to Add a Claim for Punitive Damages

Plaintiffs cannot seek punitive damages at the commencement of a civil action. Minn. Stat. § 549.191. A plaintiff may only seek punitive damages through a motion to amend the complaint to add a claim for punitive damages. *Id.* "[I]f the court finds prima facie evidence in support of the motion," it shall grant the moving party permission to amend the pleadings. *Id.*

"The general rule is that punitive damages are not available without actual or compensatory damages." *Bucko v. First Minnesota Sav. Bank, F.S.B.*, 452 N.W.2d 244, 249 (Minn. Ct. App. 1990) (citing *Meizner v. Buecksler*, 13 N.W.2d 754

Filed in District Court
State of Minnesota
10/25/2021 10:29 AM

(Minn. 1944)). However, there is an exception "for defamation per se cases because of the intangible nature of the harm addressed by the tort." *Id.* (citations omitted).

However, here, there is no longer a defamation per se cause of action because the Court has granted summary judgment on that claim. Plaintiff then has no theory of underlying harm whatsoever upon which punitive damages could be collected. Therefore, Plaintiff's Motion to Add a Claim for Punitive Damages is DENIED.

In Sum

As is evident, this Court relies heavily upon the holding in *Maethner* in this decision: the issue herein is a matter of public concern and Plaintiff can not establish actual malice because Defendant's statements – albeit negative, hostile, and damaging to Plaintiff's personal and professional reputation - were true, reading Defendant's statements literally. See *Maethner v. Someplace Safe,* 929 NW 2d 868 (Minn. 2019). Absent Plaintiff's Admissions, a different decision may have been reached.

Conclusion

Because no genuine dispute of material fact exists as to whether the statements in Defendant's posts are true, Defendant's Motion for Summary Judgment is GRANTED. Even if a genuine dispute of material fact had been presented on that point, though, the Court still finds that the posts reached a matter of public concern, requiring the Plaintiff to show that Defendant made the

Filed in District Court
State of Minnesota
10/25/2021 10:29 AM

statements with actual malice. The Court finds that Defendant did not make the statements with actual malice—that is, knowledge of the statements' falsity or reckless disregard for whether they were true or not—because the statements were not false. Even if the statements were false, the record does not contain evidence presenting a genuine issue of material fact suggesting that Defendant's subjective outlook when she made the posts could meet the Constitutional actual-malice standard. Therefore, Plaintiff's defamation claim for presumed damages is insufficient as a matter of law, and presumed damages are Constitutionally impermissible. Defendant's Motion is also GRANTED on these grounds.

Because Plaintiff has no underlying theory of harm upon which a punitive damages claim could be added, Plaintiff's Motion to Add a Claim for Punitive Damages is DENIED.