

You Can't Unring the Bell: No Duty in Negligence to Remove a Defamatory Statement published by Mass Media

By: Carmen I. Abrazado



Carmen I. Abrazado practices in the New Jersey office of Walsh Pizzi O'Reilly Falanga. She focuses her practice on business and commercial litigation. Prior to joining Walsh, she clerked for the Honorable Mary Gibbons Whipple (Ret.) in the New Jersey Superior Court, Appellate Division. The author is grateful for significant input and support throughout the process by Marc D. Haefner and Jessica K. Formichella.

PICTURE it: A sheriff's department arrests a group of individuals for manufacturing and distributing a controlled dangerous substance. Eager to inform the community of the magnitude of the arrest, the department posts a notice on its website and social media pages, identifying the arrested individuals. The story is picked up by local news outlets—broadcast, internet, and print—and disseminated to a broader audience. Unfortunately for all involved, due to a typo, the posts misidentify one arrested individual and, instead, name an unrelated citizen who has lived an exemplary life of service to the community.

Once the exemplary citizen informs the department of the error, the department immediately posts

a correction on the same internet platforms, in the same size font and same format as the erroneous post and asks any news outlets that shared the story to likewise spread the correction. The department issues an apology to the exemplary citizen and removes the original post from each of its platforms where it was posted. But, because it is on the internet, the post later resurfaces on one of the department's webpages. When the exemplary citizen informs the department that their name is still erroneously online, the department removes the post again. The post resurfaces again. The exemplary citizen informs the department, and the department removes it again. And the process repeats. For five years.

Does the exemplary citizen have a cause of action under a theory of negligence? Under current defamation law, the answer is no. Because of the single publication rule, a defamation cause of action addresses all harm issuing from the initial publication by mass media of a false statement that injures an individual's reputation in the community. The continued availability of a defamatory statement via mass media distribution—even for an extended period of time—does not create a valid negligence claim. The single publication rule permits the plaintiff to claim all damages that issued from the initial publication—including a claim for unproven damages—but does not impose on the publisher of the statement any duty to remove the statement. Courts have long acknowledged that injunctive intervention is necessary to cease publication of a defamatory statement and that defamation law itself does not provide such relief. Absent a duty to remove the statement, the publisher cannot be held negligently liable for continued publication of a defamatory statement.¹

¹ Although the majority of the cases and statutes cited in this article are from New Jersey, the theories described apply in any jurisdiction that applies the single publication rule to internet publications—

I. Defamation Jurisprudence

Defamation law has developed over time to balance the need to protect a person's reputation in society with protecting others' freedom of speech as established by the Federal and State constitutions. To balance these policy interests, and because of the difficulty in assigning a value to reputational harm, defamation jurisprudence generally provides for expanded remedies that do not require as extensive proof of damages as other torts, while also shortening the statute of limitations during which a plaintiff is permitted to bring a claim of defamation and, under certain circumstances, providing for a higher burden of proof. This balance adapted to the advent of mass media with the development of the single publication rule, which most states have adopted with respect to publications on the internet, as statements that are communicated to multitudes simultaneously can be all but impossible to undo afterwards.

subject, of course, to any jurisdiction-specific variations in application and interpretation.

A. Development of Current Defamation Law

Society has long recognized the importance of an individual's reputation in the community, emphasizing that everyone "has a right to [their] good name, unimpaired."² The theory of defamation has developed to protect people's reputations from "false defamatory words, written and published, injurious to the reputation of another or exposing him to hatred, contempt or ridicule or subjecting him to a loss of the good will and confidence entertained towards him by others."³ Traditionally, this reputational integrity was valued so highly as to be protected by the imposition of strict liability on anyone uttering or publishing untrue statements about another; "[i]t made no difference that the speaker may have uttered the words believing them to be true and obtained the information from reliable sources."⁴ Even under this extreme protection, however, privileges restricted recovery for defamation in certain circumstances and reflected "the competing 'paramount public

interest [in] permitting persons to speak or write freely without being restrained by the possibility of a defamation action."⁵

Over time, defamation law has evolved to recognize not only that people are fallible, but also that, in certain circumstances, "the legitimate public or private interest underlying the publication outweighs the important reputation interests of the individual."⁶ With its decision in *New York Times Co. v. Sullivan*, the United States Supreme Court held that the protections of the First Amendment were such that a public official could not "recover[] damages for a defamatory falsehood relating to [their] official conduct unless [they] prove[] that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."⁷ The Court further emphasized the need to protect free speech by broadening the requirement for actual malice to encompass "public figures" as well

² *Leers v. Green*, 24 N.J. 239, 251 (1957).

³ *Id.*

⁴ *Senna v. Florimont*, 196 N.J. 469, 479 (2008) (quoting *Dairy Stores, Inc. v. Sentinel Publ'g Co.*, 104 N.J. 125, 136 (1986)).

⁵ *Costello v. Ocean Cnty. Observer*, 136 N.J. 594, 606 (1994) (alteration in original) (quoting *Swede v. Passaic Daily News*, 30 N.J. 320, 331 (1959)).

⁶ *Id.* (quoting *Erickson v. Marsh & McLennan Co.*, 117 N.J. 539, 564 (1990)).

⁷ 376 U.S. 254, 279–280 (1964).

as public officials⁸ and holding that this actual malice must be proven by “clear and convincing evidence,”⁹ rather than simply by a preponderance of the evidence. Now, across the board, “publishers may not be held liable for certain defamatory statements without [a] showing that they were at least negligent.”¹⁰

B. Balancing Competing Interests

In defamation law, the relationships among the statute of limitations, the level of intent and burden of proof required, and the remedies offered explicitly balance competing public policy interests. In a matter of private interest among private figures, a claim of defamation requires a plaintiff to demonstrate by a preponderance of the evidence that the defendant (1)

“assert[ed] . . . a false and defamatory statement” concerning the plaintiff; (2) published “that statement to a third party;” and (3) was negligent in publishing the defamatory statement.¹¹ Once they have satisfied those elements, the plaintiff is then entitled to an award of (a) actual damages or nominal damages and, potentially, (b) punitive damages.¹²

Actual damages may be either special damages—that is, damages that can be proven and assigned a monetary value—or general—that is, losses “that [are] not capable of precise monetary calculation”¹³ but “which are normal and usual and are to be anticipated when a person's reputation is impaired.”¹⁴ Unlike other tort actions, under a defamation claim—which is specifically designed to protect one’s reputation—if a plaintiff can demonstrate damage to their

⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) (A “public figure” is one who has achieved “pervasive fame or notoriety” or, in some circumstances, one who has “voluntarily inject[ed]” himself or been “drawn into a particular public controversy.”).

⁹ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255–256 (1986).

¹⁰ *Dairy Stores, Inc.*, 104 N.J. at 136 (quoting *Gertz*, 418 U.S. at 346–347).

¹¹ *Hyman v. Rosenbaum Yeshiva of N. Jersey*, 258 N.J. 208, 236–237 (2024), *reconsideration denied*, 258 N.J. 392 (2024) (quoting *Leang v. Jersey City Bd. of Educ.*, 198 N.J. 557, 585 (2009)); *see also* *W.J.A. v. D.A.*, 210 N.J. 229, 239 (2012) (citing *Senna*, 196 N.J. at 491; *Costello*, 136 N.J. at 612) (“New Jersey, like many other states, maintains a fault standard of negligence for defamation cases involving private-figure defendants.”).

¹² *See* *W.J.A.*, 210 N.J. at 239 (quoting PROSSER AND KEETON ON TORTS § 116A at 842 (5th ed. 1984) [hereinafter *Prosser*] (footnote omitted)).

¹³ *Nuwave Inv. Corp. v. Hyman Beck & Co., Inc.*, 221 N.J. 495, 499 (2015).

¹⁴ *W.J.A.*, 210 N.J. at 239 (quoting *Prosser* § 116A at 843 (footnote omitted)).

reputation, they do not necessarily need to demonstrate actual monetary losses in order to collect a damages award from a defaming defendant. If a plaintiff cannot demonstrate any actual damages, the jury may award nominal damages, which are “awarded for the infraction of a legal right” and “vindicat[e] the plaintiff’s character by a verdict of a jury that establishes the falsity of the defamatory statement.”¹⁵ If the jury awards actual damages, they may also award punitive damages.

On the other hand, if a defamation claim touches on a matter of public concern or involves a public official or public figure, then a plaintiff—in addition to showing, by a preponderance of the evidence, that the defendant has published a false and defamatory statement about the plaintiff to a third party other than the plaintiff—must also demonstrate, by **clear and convincing evidence**, that the defendant published the defamatory statement with **actual malice**—meaning either with knowledge of its falsity or in

reckless disregard of its truth.¹⁶ The remedies available to a plaintiff in such a “public defamation” case are similarly circumscribed, prohibiting application of the presumed damages¹⁷ doctrine absent a showing, by clear and convincing evidence, of actual malice.¹⁸

The higher burden of proof and higher threshold of knowledge required to sustain a “public defamation” claim reflect “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”¹⁹ In contrast, “private defamation” claims have a lower threshold because “private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.”²⁰ In addition, the New Jersey legislature has determined that defamation claims should be subject to a one-year statute of

¹⁵ *Id.* at 240–241. In New Jersey, nominal damages are generally capped at \$500. N.J.S.A. 2A:155.10; N.J. Model Civil Jury Charge 8.46(D).

¹⁶ *Senna*, 196 N.J. at 496 (citing *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 163–165 (1967) (Warren, C.J., concurring); *N.Y. Times*, 376 U.S. at 279–280; *Turf Lawnmower Repair, Inc. v. Bergen Record Corp.*, 139 N.J. 392, 413 (1995)) (“The actual-malice standard will apply when the alleged defamatory statement concerns a public figure or a

public official or involves a matter of public concern.”).

¹⁷ The presumed damages doctrine is a procedural device “that allows a defamation case to go to the jury in the absence of proof of actual damages.” *Nuwave*, 221 N.J. at 498–499.

¹⁸ *Rocci v. Ecole Secondaire Macdonald-Cartier*, 165 N.J. 149, 156 (2000).

¹⁹ *Senna*, 196 N.J. at 483 (quoting *N.Y. Times*, 376 U.S. at 270).

²⁰ *Gertz*, 418 U.S. at 345.

limitations, instead of the two-year window that controls causes of action for other torts, including negligence claims.²¹ The nuances that have evolved in defamation law clearly reflect policy judgments that our courts and legislatures have made to reflect our changing society. Another recent development that has adapted defamation jurisprudence to reflect the modern world is the single publication rule.

II. Single Publication Rule

Under traditional defamation law, “every repetition of a defamatory writing or utterance gives rise to a separate cause of action.”²² With the advent of mass media, however, the courts recognized that “the application of this rule to mass publications would lead to an endless replication of legal actions and threaten a publisher with boundless financial liability.”²³ Thus, to “mitigate the harshness and unfairness of the inflexible application of the

multiple publication rule,” courts developed the single publication rule.²⁴ The single publication rule applies to defamatory statements that are published to numerous third parties simultaneously and provides that “a plaintiff alleging defamation has a single cause of action, which arises at the first publication of an alleged libel, regardless of the number of copies of the publication distributed or sold.”²⁵ The single publication rule “effectuat[es] express legislative policy in favor of a short statute of limitations period for defamation[,] . . . allows ease of management whereby all the damages suffered by a plaintiff are consolidated in a single case, thereby preventing potential harassment of defendants through a multiplicity of suits[, and] . . . is more consistent with modern practices of mass production and widespread distribution of printed information than the multiple publication rule.”²⁶

The single publication rule initially evolved to address

²¹ *Petro-Lubricant Testing Lab'ys, Inc. v. Adelman*, 233 N.J. 236, 250 (2018) (citing N.J.S.A. 2A:14-3); *see also* *Smith v. Datla*, 451 N.J. Super. 82, 101 (N.J. App. Div. 2017) (citing N.J.S.A. 2A:14-2) (differentiating between a defamation claim, subject to a one-year statute of limitations, and a negligent invasion of privacy claim, subject to a two-year statute of limitations).

²² *Petro-Lubricant*, 233 N.J. at 250; *see also* *Churchill v. State*, 378 N.J. Super. 471, 479 (N.J. App. Div. 2005); *Barres v. Holt, Rinehart & Winston, Inc. (Barres I)*, 131 N.J.

Super. 371, 378–379 (N.J. Law Div. 1974), *aff'd o.b.*, 141 N.J. Super. 563 (N.J. App. Div. 1976), *aff'd o.b.*, 74 N.J. 461 (1977); RESTATEMENT (SECOND) OF TORTS § 577A(1) cmt. a (Am. L. Inst. 1977) [hereinafter *Restatement*].

²³ *Petro-Lubricant*, 233 N.J. at 250–251 (citing *Churchill*, 378 N.J. Super. at 480).

²⁴ *Id.* at 251 (citing *Churchill*, 378 N.J. Super. at 478–479; *Restatement* § 577A(2) cmt. b)).

²⁵ *Churchill*, 378 N.J. Super. at 478 (citing *Barres I*, 131 N.J. Super. at 375).

²⁶ *Id.* at 479 (internal citations omitted).

statements that were widely distributed in newspapers and magazines and then was expanded to apply to books.²⁷ This rule also applies to broadcasts on television or radio and in movies.²⁸ Then, as the claims of defamation based on publications on the internet became more prevalent, courts recognized that the policy reasoning that led to development of the single publication rule for print distribution applied as strongly to publications on the internet.²⁹ Because publications on the internet “resemble those contained in traditional mass media, only on a far grander scale,” the policies supporting the single publication rule “are even more cogent when considered in connection with the exponential growth of the instantaneous, worldwide ability to communicate

through the [i]nternet.”³⁰ “Books, magazines, and movies remain in libraries and homes, where they are continuously available to new viewers for unlimited periods. Articles attached to a website stand in a similar position.”³¹

III. Continuing Publication Under Defamation Law

Generally, a defamation cause of action arises at the moment of publication, when the defamatory statement is communicated to a third party other than the plaintiff, and, under the multiple publication rule, “each repetition of a libel . . . create[s] a new cause of action.”³² Further, where there is an intentional and unreasonable failure to remove defamatory matter “that [one] knows to be exhibited on land or chattels in [one’s] possession or under his control,” the Restatement (Second) of Torts provides that “an individual may be liable for defamation for continued publication of defamatory material.”³³ Under the single publication rule, however, apparently as an acknowledgement

²⁷ See *Barres I*, 131 N.J. Super. at 375.

²⁸ Restatement § 577A(3) (“Any one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication.”).

²⁹ *Firth v. State*, 98 N.Y.2d 365, 370 (N.Y. Ct. App. 2002) (“The policies impelling the original adoption of the single publication

rule support its application to the posting of the Inspector General's report regarding claimant on the State's Web site.”).

³⁰ See *Churchill*, 378 N.J. Super. at 480 (quoting *Firth*, 775 N.E.2d at 465–466).

³¹ *Petro-Lubricant*, 233 N.J. at 253.

³² *Churchill*, 378 N.J. Super. at 479.

³³ Restatement § 577(2).

of the near impossibility of removing from circulation every single publication of a mass-produced defamatory statement, this duty to prevent continued publication has morphed to a duty to retract the defamatory statement. The power of the single publication rule to limit a mass publisher's liability is so strong, however, that even this duty to retract does not create the potential for a separate cause of action. A failure to timely retract a defamatory statement after notice of its defamatory nature has limited potential to be used as circumstantial evidence of a publisher's actual malice³⁴ and may expand the type³⁵ and extent³⁶ of damages an injured plaintiff may collect. A failure to retract does not create additional liability for the publisher, and there is no duty under defamation law to remove a defamatory statement from mass publication once it has already been published.

³⁴ See *Schwartz v. Worrall Publications, Inc.*, 258 N.J. Super. 493, 503 (N.J. App. Div. 1992) (collecting cases considering failure to retract as potentially circumstantial evidence of actual malice).

³⁵ See GEORGIA CODE ANN. § 51-5-12 (providing that, without a failure to retract, "the plaintiff shall not be entitled to any punitive damages and the defendant shall be liable only to pay actual damages"); IOWA CODE ANN. § 659.2 ("[T]he plaintiff shall recover no more than actual damages,

A. Courts Have Explicitly Accepted This Result

In decisions that apply the single publication rule to postings on the internet, courts have acknowledged the reach and duration of items published on the internet and still decided it was appropriate to limit publishers' liability to a single cause of action based on the initial publication of a defamatory statement. In the seminal New Jersey case applying the single publication rule to an internet publication, the New Jersey Supreme Court quoted New York's highest court in acknowledging that "[c]ommunications posted on Web sites may be viewed by thousands, if not millions, over an expansive geographic area for an indefinite period of time."³⁷ Indeed, the extent of the internet's reach and duration was a justification for applying the single publication rule to internet publications in the first place.³⁸ "The policies impelling the original adoption of the single publication rule . . . are even more cogent when considered in

unless a retraction be demanded and refused.").

³⁶ See *Barres I*, 131 N.J. Super. at 379 (quoting Prosser, *TORTS* (4 ed. 1971)) ("[T]he plaintiff is permitted to plead and prove merely a general distribution of the libel and show the extent of the circulation as evidence bearing on the damages."); *Restatement*, § 577A(4), cmt. E.

³⁷ *Churchill*, 378 N.J. Super. at 480 (quoting *Firth*, 775 N.E.2d at 465-466).

³⁸ *Id.*

connection with the exponential growth of the instantaneous, worldwide ability to communicate through the [i]nternet.”³⁹ The single publication rule, therefore, developed as a reaction to the continued availability of defamatory statements that have been published and widely distributed and does not prohibit their continued availability.

In true defamatory law fashion, the seeming injustice of this—that a more widely distributed defamatory statement is granted more protection by limiting an injured party to only a single cause of action—is balanced by the ability of the injured party to both seek general damages without having to demonstrate actual monetary losses resulting from harm to their reputation⁴⁰ and bundle into a single claim all claimed damages from every instance that a third party received the defamatory statement.⁴¹ Thus, the extent of the publication—how far the statement is spread and for how long—is a factor in deciding the damages award to an injured party, without requiring specific proof of every single dollar claimed.⁴² Actual damages awarded under other tort laws would require the plaintiff to demonstrate they actually suffered

that monetary harm. Defamation law permits recovery for general reputational damage but curtails the availability of that remedy by shortening the statute of limitations, sometimes requiring a higher burden of proof of the plaintiff and actual malice by the defendant, and—when the single publication rule applies—encompassing perpetual availability of the defamatory statement within a single cause of action.

B. No Duty Even When Distribution Is Under the Publisher's Control

New Jersey case law demonstrates that, under the single publication rule, publishers do not have a duty to cease circulating defamatory statements, even when the publisher has means to control the distribution of previously published materials. In *Churchill v. State*, the New Jersey Superior Court Appellate Division considered a claim of defamation where the defendants allegedly published a report on a website they controlled after they “knew or had reason to know [that report] contained libelous statements” which injured the plaintiffs.⁴³ This allegedly defamatory report was

³⁹ *Id.* (quoting *Firth*, 775 N.E.2d at 465–466).

⁴⁰ See Part II.B, *infra*.

⁴¹ *Barres I*, 131 N.J. Super. at 381.

⁴² See *id.* at 379 (quoting *Prosser*, *supra* note 36, at 769) (“[T]he plaintiff is permitted to

plead and prove merely a general distribution of the libel and show the extent of the circulation as evidence bearing on the damages.”); *Restatement*, § 577A(4), cmt. E.

⁴³ 378 N.J. Super. at 475.

published on April 26, 2001, and the plaintiffs filed their complaint on April 24, 2003.⁴⁴ Although the website remained accessible throughout the pendency of the litigation (and, indeed, is even accessible today, twenty years later), the court still applied the single publication rule and held the plaintiffs' complaint time-barred by the one-year statute of limitations for defamation claims.⁴⁵

In cases when an allegedly defamatory statement has been published or further distributed after the defendant was notified of the allegation of libel, courts have consistently looked to defamation law to determine liability and damages but relied on equitable remedies to impose a duty to prevent further distribution. For example, in the seminal case on the single publication rule in New Jersey, *Barres I*, the Law Division considered under a theory of defamation a publisher's potential liability for "a libelous statement made in a book distributed in many states on a general release date where the publisher thereafter [sold] copies of such book for several years" from its own stock.⁴⁶ The allegedly libelous book was initially published in November 1971; the plaintiff filed his complaint alleging that the book contained libelous material in May

1973; and sales continued from the publisher's stock until at least the time that the Law Division considered the defendant's motion to dismiss in September 1973.⁴⁷ The publisher continued to offer for sale copies of the contested book even after it had been notified of the plaintiff's claim that the book included libelous passages. Even so, the court analyzed his claim only under a defamation action at law, "conclude[d] that the principles which underlie the single publication rule are in accord with the public policies of this State," and left to the "application of equitable principles" whether the plaintiff could seek an injunction to prevent further distribution of the book.⁴⁸ It is possible to seek to compel a publisher to cease distribution of a defamatory statement when the method of distribution is under the publisher's control, but such compulsion is not encapsulated in defamation law and can only be sought by means of an injunction.

C. Limitations Even When There Is a Duty to Remove

Even under the multiple publication rule, the duty to remove defamatory material described in the *Restatement* provides that a party may only be liable for defamation when one

⁴⁴ *Id.*

⁴⁵ *Id.* at 483–485.

⁴⁶ 131 N.J. Super. at 374–376.

⁴⁷ *Id.*

⁴⁸ *Id.* at 390, 393–394.

“intentionally and unreasonably fails to remove defamatory matter that [one] knows to be exhibited on land or chattels in [one’s] possession or under [one’s] control.”⁴⁹ A defendant is “required only to exercise reasonable care to abate the defamation” and may only “be found liable if [they] intentionally fail[] to remove it.”⁵⁰ Further, this duty to remove only arises when one has knowledge “that the defamatory matter is being exhibited on [one’s] land or chattels, and [one] is under no duty to police them or to make inquiry as to whether such a use is being made.”⁵¹ Consistent with the public policies that require severe limitations on potential liability for defamation to protect free expression, this theory of liability for failure to remove defamatory material relieves a defendant from the duty to actively monitor their property and dictates that a defendant may only be subject to additional liability if they “intentionally and unreasonably” fail to take steps to remove the defamatory material. Even under this theory of liability, a potential defendant is under no obligation to monitor their property for defamatory statements and cannot be held liable for negligently

permitting a defamatory statement to continue “to be exhibited on land or chattels in [their] possession or under [their] control,” especially if they did not know it was so exhibited.⁵²

IV. No Independent Duty to Remove Internet Publication

Outside of defamation law, there is no independent source of a duty to remove a defamatory statement on which a negligence claim can be based. To sustain a common-law negligence cause of action, a plaintiff must prove the following four elements: “(1) a duty of care, (2) a breach of that duty, (3) actual and proximate causation, and (4) actual damages.”⁵³ It is axiomatic that a plaintiff must show that the “defendant owes him a duty of care.”⁵⁴ Absent a duty of care, a negligence claim cannot succeed. There is no duty to remove the defamatory statement from circulation under defamation law, and there is no duty to remove outside of defamation. Therefore, there can be no negligence claim for failing to remove a mass-produced defamatory statement.

⁴⁹ *Restatement* at § 577(2).

⁵⁰ *Id.* at § 577(2), cmt. p.

⁵¹ *Id.*

⁵² *Id.* at § 577(2).

⁵³ *Jersey Cent. Power & Light Co. v. Melcar Util. Co.*, 212 N.J. 576, 594 (2013).

⁵⁴ *Id.* (quoting *Weinberg v. Dinger*, 106 N.J. 469, 484-485(1987)).

A. A Duty to Remove a Defamatory Statement Created by an Injunction

When the New Jersey Supreme Court affirmed the Law Division's decision to apply the single publication rule to books, it did so despite Justice Schreiber's objection that the single publication rule could "sanction[] the dissemination of libelous material [even] after a judgment [that the material is libelous] has been entered."⁵⁵ By adopting the single publication rule, then, the court implicitly also adopted the assertion that a defamation action at law offers redress for the publication of a libelous statement, but that an injunction is necessary to "prevent future distribution of the infected literature."⁵⁶ For a plaintiff to receive such an injunction ordering that a publisher remove a defamatory statement, the issuing court must consider, among other factors:

- (1) the character of the interest to be protected; (2) the relative adequacy of the injunction to the plaintiff as compared with other remedies; (3) the

unreasonable delay in bringing suit; (4) any related misconduct by plaintiff; (5) the comparison of hardship to plaintiff if relief is denied, and hardship to defendant if relief is granted; (6) the interests of others, including the public; and (7) the practicality of framing the order or judgment.⁵⁷

An injunction to remove defamatory information relies on an individualized consideration of the facts of a particular case and must be applied for in a separate claim from the defamation claim for damages. Even if a plaintiff receives an injunction compelling removal of a defamatory statement, a failure to comply with an injunction is vindicated by a contempt of court charge and not by a negligence claim.

B. A Voluntarily Assumed Duty to Remove

Under certain circumstances, in negligence claims where there is no settled duty, courts have found that a defendant may create their own

⁵⁵ *Barres v. Holt, Rinehart & Winston, Inc.* (Barres III), 74 N.J. 461, 466 (1977) (Schreiber, J., dissenting).

⁵⁶ *Id.*; see also *Churchill*, 378 N.J. Super. at 387 ("[I]n all situations where the publisher of a book has a quantity on hand, . . . the single publication rule will permit him to

continue to sell material which may be libelous.").

⁵⁷ *Paternoster v. Shuster*, 296 N.J. Super. 544, 556 (N.J. App. Div. 1997) (quoting *Sheppard v. Township of Frankford*, 261 N.J. Super. 5, 10 (N.J. App. Div. 1992) (citing *Restatement* § 936)).

liability, as “one who undertakes to render services to another, even absent a contract, may be found liable in tort for negligently performing or failing to perform the service gratuitously assumed.”⁵⁸ Such an instance of negligent undertaking is described in the *Restatement* such that:

[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.⁵⁹

A defendant can only be held liable under a theory of negligent undertaking if their negligent performance of the service (a) increases the risk of harm to the plaintiff compared to the risk of harm faced with non-performance; or (b) the plaintiff suffers harm by relying on the defendant's undertaking.

A defendant could create their own liability under a theory of negligent undertaking if they promised to remove a defamatory statement—despite no duty to do so—and ended up not only failing to remove it, but also bringing additional attention to the statement, perhaps by causing expanded media coverage of the issue or, similarly, if the plaintiff relied on the defendant's promise to remove the statement and suffered additional harm by somehow increasing traffic to the defendant's website where the posts had not yet been effectively removed. Absent increased risk of harm to the plaintiff resulting from a defendant's voluntary assumption of a duty, however, the defendant will not be liable under a theory of negligent undertaking.⁶⁰ Only

⁵⁸ Dawson v. Bunker Hill Plaza Assocs., 289 N.J. Super. 309, 327 (N.J. App. Div. 1996).

⁵⁹ *Restatement* § 323.

⁶⁰ See, for example, O'Neill v. Suburban Terrace Apartments, Inc., 110 N.J. Super. 541, 544 (N.J. App. Div. 1970) (emphasizing that “there would be no liability unless in [gratuitously undertaking a service] there is added a new element of danger or hazard”

other than those forces already at play); see also Dawson, 289 N.J. Super. at 327 (“Although a party may have an obligation to see that the work it voluntarily undertakes for another's benefit is done in conformance with accepted standards of care, the duty to foresee and prevent a particular risk of harm from materializing should be commensurate with the degree of

under very specific, fact-dependent circumstances of additional resulting harm could a defendant in a defamation-based case be held liable for negligently undertaking and failing to remove a defamatory statement?⁶¹

V. Negligence Claims Dismissed as Duplicative of Defamation Claims

Understanding the balance between public policy interests carefully embodied in defamation law, courts have repeatedly held negligence claims that rely on the same allegedly defamatory statements as a defamation claim should be dismissed as duplicative.⁶² Courts seek to maintain this balance among

responsibility which the party has agreed to undertake.”).

⁶¹ Notably, if—under such very narrow circumstances—a plaintiff was to succeed in bringing a claim based on a negligent undertaking to remove a defamatory statement from publication, the plaintiff would only be entitled to recover such monetary damages as could be proven, as under a simple negligence claim. The plaintiff would not be afforded the expanded protection of the presumed damages doctrine or awarded the general damages that are generally understood to result from reputational harm. *See* Part II.B, *infra*.

⁶² *See, for example*, *BrainBuilders, LLC v. Optum, Inc.*, No. A-0621-22, 2024 WL 1693717, at *7 (N.J. Sup. Ct. App. Div. April 19, 2024); *Gaber v. Mortgage Asset Research Inst., Inc.*, No. 08-4926, 2010 WL 3039885, at *4 (D. N.J. Aug. 3, 2010).

interests by “preclud[ing] [the p]laintiffs from circumventing the heightened standards of defamation by seeking relief under a theory of negligence.”⁶³ The balance of societal interests at play requires that “a party who claims that its reputation has been damaged by a false statement cannot circumvent the strictures of the law of defamation . . . by labeling its action as one for negligence.”⁶⁴ This is simply because, where a plaintiff alleges negligence for the failure to remove purportedly defamatory material from the internet, such a cause of action is already accounted for under defamation law as the continued publication of the alleged defamation.⁶⁵

⁶³ *Gaber*, No. 08-4926, 2010 WL 3039885, at *4.

⁶⁴ *Dairy Stores, Inc. v. Sentinel Pub. Co., Inc.*, 191 N.J. Super. 202, 217 (N.J. L. Div. 1983), *aff’d*, 104 N.J. 125 (1986).

⁶⁵ Because defamation law provides that a “plaintiff is permitted to . . . show the extent of the circulation as evidence bearing on the damages,” *Barres I*, 131 N.J. Super. at 379, it is particularly difficult to identify damages that issue from a defendant’s purported failure to remove a defamatory statement from the internet for an extended period of time that are separate from the damages contemplated by a defamation claim. The sheer challenge of writing comprehensible jury instructions and a decisive verdict sheet that make this distinction clear for a lay jury (including different burdens of proof and levels of culpability) should be argument enough that a claim for negligent failure to remove and a defamation claim cannot coexist in the same trial.

Other jurisdictions have rejected negligence claims based on defamatory publications. In a case in California, the plaintiff pled negligence based, in part, on the defendants' failure to remove a defamatory profile from a website under their control, but the court found that "publication of the [p]rofile not only describes the choice by an author to include certain information, but it also includes both the negligent communication of the [p]rofile and the failure to remove the [p]rofile."⁶⁶ Accordingly, the court found the plaintiff's "negligence claim is dependent on her defamation claim. While [the p]laintiff attempts to allege four separate omissions or acts by [the d]efendants as negligence, each rests on the alleged falsity of the [p]rofile."⁶⁷ Courts in other states have held similarly that negligence claims based on a failure to remove a defamatory publication are

duplicative of defamation claims and should be dismissed.⁶⁸

VI. Conclusion

Current defamation jurisprudence entirely subsumes any claims that result from reputational harm resulting from publication of a defamatory statement. The nuances and peculiarities of defamation law have developed specifically to balance the public policy interests implicated by pitting the value of one's reputation against another's freedom of speech. Harm to one's reputation can only be vindicated under the attending allowances and strictures of defamation law. Any means of removing a claim from theories of defamation necessarily remove the generous remedies that accompany a defamation claim.

The exemplary citizen of the Introduction, therefore, may bring a defamation claim against the sheriff's department that posted a

⁶⁶ Carafano v. Metrosplash.com Inc., 207 F. Supp.2d 1055, 1075–1077 (C.D. Cal. 2002).

⁶⁷ *Id.* at 1075.

⁶⁸ See, for example, Zeran v. Am. Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997) (citing *Restatement* § 558(b)) ("Although Zeran attempts to artfully plead his claims as ones of negligence, they are indistinguishable from a garden variety defamation action. . . . In addition, both the negligent communication of a defamatory statement and the failure to remove such a statement when first communicated by another party — each alleged by Zeran here under a negligence label — constitute publication"

under defamation law); Hechtman v. Conn. Dep't of Pub. Health, No. CV094043516, 2009 WL 5303796, at *7 and 10–11 (Conn. Super. Ct. Dec. 3, 2009) (holding that a "special relationship" between parties is necessary to create a "continuing duty after an initial wrongful act or omission" to remove allegedly defamatory material from the Internet, and this "special relationship" was absent when the plaintiff was a doctor and the defendant was the commissioner charged with maintaining physician's profiles online "by providing the public with readily available information . . . including their discipline records").

defamatory statement on the internet and thus harmed the citizen's reputation in the community. They may not, however, sustain a separate negligence claim based on the department's failure to effectively purge the statement from their webpages, even though the webpages were purportedly under the department's control. The same conclusion would be true even though five years elapsed from the time of initial publication, and even though the department attempted to remove the posts and failed. All these eventualities are encapsulated under the complexities of defamation law, and the exemplary citizen cannot sidestep the defamation jurisprudential restrictions by restyling the claim as one of negligence. Defamation recompenses all reputational harm issuing from the publication of a false statement.