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TOO MUCH MEDIA, LLC, JOHN ALBRIGHT and CHARLES BERREBBI, : SUPERIOR COURT OF NEW JERSEY
: MONMOUTH COUNTY – LAW DIVISION
: DOCKET NO.: MON-L-2736-08

Plaintiffs,

CIVIL ACTION

vs.

OPINION

SHELLEE HALE and JOHN DOE :
Through 13,

Defendants.



DECIDED: MAY 24, 2012

Joel Kreizman, Esq. for Plaintiffs (Scarinci & Hollenbeck, LLC)
Jeffrey Pollock, Esq. for Defendant (Fox Rothschild, LLP)
John Prindiville, Esq. for Defendant (Barry & Prindiville, P.A.)

I. INTRODUCTION

This matter arises from a complaint filed on June 10, 2008 by Plaintiffs Too Much Media, LLC ("Too Much Media"), John Albright, and Charles Berrebbi ("Berrebbi") (collectively "Plaintiffs") against Defendant Shellee Hale ("Defendant"). The complaint alleges that Defendant defamed and otherwise made improper comments about the Plaintiffs in a series of comments posted by Hale on the Internet website, www.oprano.com, which calls itself "the Wall Street Journal of the online adult entertainment industry."

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In September 2008 Plaintiffs sought to depose Hale. Following a motion filed by Plaintiffs on December 12, 2008, the Honorable Louis F. Locascio, J.S.C., entered an Order on January 9, 2009 requiring Hale to appear within forty-five (45) days for deposition by way of teleconference from Hale's residence in the State of Washington. Hale filed a motion with the court for application of the newsperson's privilege, N.J.S.A. 2A:84A-21, and for a Protective Order and to seal court records and proceedings. Hale argued that the Shield Law protected disclosures by Hale of her sources, investigative process, and of any information obtained in the course of pursuing her investigation of the adult online entertainment industry. In support of the motion, Hale provided a February 26, 2009 certification to the court.¹ The certification described Hale's involvement in reporting investigative findings on weblogs, electronic bulletin boards and websites. Hale indicated that she currently maintained weblogs at www.camandago.com, www.shelleehale.net/blog, www.coachshellee.com, and www.shelleeland.com. Hale indicated that she also had disseminated information concerning the adult information industry on Internet bulletin board systems, and also indicated that she was involved in investigating and writing articles and reports on various matters of public concern that were published through www.selfgrowth.com, and had bylined articles and reports in several major publications, including the Wall Street Journal, Computer World, InfoWorld,

¹ The certification is dated February 26 2008, but it was submitted in support of a motion filed in March 2009 in response to Judge Locascio's January 9, 2009 Order requiring Hale to appear for deposition. The complaint in this matter was filed on June 10, 2008, which was after the February 26, 2008 date shown on Hale's certification, and it thus appears that the correct date of the certification would be February 26, 2009.

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Business Week, and other technology-related trade business magazines. There was no mention in the certification that Hale submitted to the Court concerning a website www.pornafia.com, or of either a fiction or nonfiction book by that name, or by any other name, concerning the adult entertainment industry. There was likewise no argument presented in the brief submitted to the court on behalf of Hale about the applicability of the Shield Law to www.pornafia.com or to any fiction or nonfiction book under development by Hale.

Judge Locascio held a hearing on April 23, 2009, as required under the statute, to determine whether Hale was entitled to the statute's protections in response to questions requesting information about her sources of the information that she posted in the Internet website comments. At the hearing, Defendant Hale and Plaintiff John Albright both provided testimony.

Hale testified that she had obtained a trademark for the name Pornafia, and had established a website, www.pornafia.com, for the purpose of disseminating information concerning the online adult entertainment industry. Hale testified that she had intended to publish information on the Pornafia website, but when asked whether she had actually published anything, Hale responded that she took the Pornafia website offline as a result of a threat made against her life by a customer of Too Much Media. Hale indicated at the hearing before Judge Locascio that she was working on a fictional story about the online entertainment industry, which she described as having "no relevance" to the issue of the applicability of the Shield Law, but at no point, either in her certification submitted to the court in support of her motion, or during direct or

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cross examination at the hearing before Judge Locascio, did Hale indicate that she had been in the process of, or had even considered, authoring a non-fiction book. Hale's claim that she was entitled to assert the protection of the Shield Law was thus considered by Judge Locascio in light of Hale's online activities, as those were the only activities that Hale asserted would provide her with Shield Law protections.

On June 30, 2009, Judge Locascio issued an opinion denying Hale protection under the Shield Law. Judge Locascio's opinion is as follows:

This case presents two questions of first impression. First, does a person who posts allegedly defamatory content on an Internet message board, which the poster contends is intended to inform the general public of a corporation's alleged business incompetence, and of the corporation's principals' alleged criminal conduct, have the right, pursuant to New Jersey's Shield Law, N.J.S.A. 2A:84A-21, to refuse to divulge her sources of information? Second, may a corporation and its principals, allegedly defamed by such Internet message board postings, recover damages absent a showing of a pecuniary loss? For the following reasons, this court answers the first question no, and the second question yes. [Trial Court Decision at page 1.]

Judge Locascio continued:

After considering the arguments of counsel, as well as defendant's testimony and the numerous exhibits and postings filed in the course of the plenary hearing, this court concludes that defendant has not made a prima facie showing that she is "engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public," under N.J.S.A. 2A:84A-21, and therefore she is not entitled to the protections of New Jersey's Shield Law. [Trial Court Decision at page 10 (citations omitted).]

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Hale filed a Motion for Reconsideration of Judge Locascio's decision, which, because of Judge Locascio's retirement from the bench, was heard and denied by the Honorable Daniel M. Waldman, J.S.C., by Order dated September 11, 2008. Based upon the undisputed representations of counsel, it appears that Hale did not raise in the Motion for Reconsideration any claim that she was entitled to assert the Shield Law privilege based upon her involvement with a nonfiction book.

Defendant Hale appealed Judge Locascio's decision, and on April 22, 2010, the Appellate Division affirmed. Hale made no attempt to expand the record before the Appellate Division to assert protections under the Shield Law based upon her work on a nonfiction book. The Appellate Division therefore addressed the applicability of the Shield Law to Hale's online activities:

While Oprano [the website on which Hale's blog posting were made] describes itself as the "Wall Street Journal of the Porn Industry" and could arguable be considered "news media" for purposes of the Shield Law, defendant had no control over the operation of the website and made no editorial or journalistic contribution to it by posting her comments. Nor did she represent herself to be a newsperson in her posts. Moreover, her comments were made not in the context of a writer for the online publication, but rather as a commenter in a public forum, where any person who cared to could post a comment. Analogizing to traditional media, Oprano may be a self-described "newspaper," and defendant's comments amount to no more than a letter to the editor commenting on an article on an article on an article published by the "newspaper." At worst, defendant is simply participating in a conversation among users about matters of mutual interest. In either case, defendant's comments on Oprano were not made in the context of any recognized aspect of

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the news process nor, we conclude, by a "newsperson" in the course of her professional activities. [Too Much Media, LLC, et al. v. Hale, 413 N.J. Super. 135, 161-62 (App. Div. 2010).]

Defendant Hale's Petition for Certification was granted by the New Jersey Supreme Court. There is no indication that Hale attempted to expand the record or otherwise raise before the Supreme Court her nonfiction book as a basis for assertion of the Shield Law. The Supreme Court's opinion was handed down on June 7, 2011, affirming the judgment of the Appellate Division. The Court determined that Hale's posting of comments on the Oprano message board did not constitute an activity that would be protected under the Shield Law, drawing the following distinction between online bulletin boards and conventional news outlets:

Those forums allow people a chance to express their thoughts about matters of interest. But they are not the functional equivalent of the types of news media outlets outlined in the Shield Law. Neither writing a letter to the editor nor posting a comment on an online message board establishes the connection with "news media" required by the statute. N.J.S.A. 2A:84A-21. Therefore, even under the most liberal interpretation of the statute, defendant's use of a message board to post her comments is not covered under the Shield Law. We do not believe that the Legislature intended to provide everyone who posts a comment on Oprano or a response to an article on NJ.Com an absolute reporter's privilege under the Shield Law. We cannot find support for that proposition in the words of the statute or any other statement of the Legislature's intent. [Too Much Media, LLC v. Hale, 206 N.J. 209, 235-36 (2011).]

The Court affirmed and remanded the matter to the trial court for further proceedings consistent with its decision. Id. at 243. Hale filed a motion with the

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Supreme Court requesting clarification of the June 7, 2011 decision, which the Court denied by Order dated July 21, 2011.

Upon remand to this Court, Hale contended that she was entitled to present evidence supporting her claim that she was entitled to assert the Shield Law privilege as a result of her work on an Internet site bearing the trademarked name "Pornafia." Hale argued that the Supreme Court established new standards governing the application of the Shield Law to Internet activities, and that Hale was entitled to show that her actions on Pornafia met this standards. Additionally, Hale indicated that she had in fact been working on a nonfiction book at the time that the allegedly defamatory statements were made about Plaintiffs, and that as a result of her work on the nonfiction book, which she indicated was also to be called "Pornafia," Hale was entitled under the Shield Law to refrain from revealing her sources.

Plaintiffs filed a Motion to Compel the Deposition of Hale, and to bar the assertion of the Shield Law privilege by Hale at that deposition. The motion was heard by the Court on February 3, 2012. As noted above, Hale asserted that she was entitled to assert the Shield Law privilege as a result of her work on a nonfiction book concerning the pornography industry, and also as a result of her internet activities involving the website www.pornafia.com, arguing that the Supreme Court had issued a new standard in its decision, and that she was entitled to present evidence to show that she met this new standard.

Hale had ample opportunity to present her case that she was entitled to assert the Shield Law privilege in connection with her work with

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www.pornafia.com at the hearing before Judge Locascio. Hale provided testimony at the hearing before Judge Locascio concerning not only her involvement in posting comments on the Oprano site, but also concerning her own website, www.pornafia.com. Pornafia the website was thus addressed by Judge Locascio in his opinion, and was also considered by the Appellate Division and the Supreme Court in their extremely detailed decisions in this matter. The New Jersey Supreme Court determined that Defendant Hale was not entitled to assert the newsperson's privilege under the Shield Law based upon her postings on the Oprano site or her own website, www.pornafia.com. As far as can be seen in the record in this matter, Hale made no application to the trial court, the Appellate Division, or to the Supreme Court to supplement the record to provide more information concerning www.pornafia.com in support of her claim that her activities with that website provide the basis for protection under the Shield Law. The Supreme Court remanded the case, which had been taken up on appeal on an interlocutory basis, but the Court did not, after carefully examining Plaintiff's claim that she was entitled to assert the Shield Law in connection to her activities on www.pornafia.com and www.oprano.com, instruct this court to conduct a hearing as to Hale's right to assert a privilege under the Shield Law as the result of any of her internet activities, or otherwise revisit the issues previously decided by the trial court, and reviewed by the Appellate Division and Supreme Court.

Based upon her testimony on cross examination on February 23, 2012, it appears that Hale viewed the hearing before Judge Locascio as one in which she should "present as little as possible":

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Q: And, Hale, when you first brought the motion for protective order, saying you were entitled to the Shield Law, you wanted to win that motion, didn't you?

(Pause in colloquy)

Q: Is that a hard question? -- I -- I mean -- this was a motion you and your attorneys brought.

A: I was trying to present factual information. I don't really look at it as winning or losing to be honest.

Q: But you wanted to get the Shield Law protection, correct?

A: That's the law. I deserve it.

Q: Okay. And you want -- and -- and when you had your attorneys bring the motion, you wanted -- because you deserved it, you wanted to win it, isn't that correct?

A: No -- no, it's not correct.

Q: You didn't want to win it?

A: It wasn't about winning or losing, I'm sorry. It's -- I don't understand where you're going.

Q: Whether it's -- you wanted the Judge to rule in your favor? You wanted Judge Locascio to rule in your favor, you wanted to Appellate Division to rule in your favor, you wanted the Supreme Court to rule in your favor, and now you want Judge Jones to rule in your favor, isn't that correct?? Isn't that why you're here?

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A: Yes.

Q: And in presenting to the Court – to Judge Locascio first, all the facts that you say you – that lead – should lead to the conclusion that you deserve the Shield Law, you wanted to present everything in – that you knew that entitled you to Shield Law?

A: Absolutely not. I wanted to present as little as possible, because I – I didn't want – I wanted to avoid giving up as much information –

Q: You wanted to present as little as possible about your sources, but do you – but your entitlement to the Shield Law, you wanted to present, didn't you?

A: I –

[Counsel for Defendant]: Objection Your Honor. This is –

A: Yeah.

[Counsel for Defendant]: – this is getting to legal strategy, which is really inappropriate for the witness.

The Court: Well, it's cross-examination. I'll allow it, because he's entitled to ask questions with reference to what she was thinking –

[Counsel for Defendant]: Understood, Your Honor.

The Court: – and her state of mind.

A: Okay.

Q: If I – do you want me to repeat?

A: Yup.

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Q: You didn't want to present information about your sources, because that's why you wanted the Shield Law. However, you did want to present anything, and everything that could show that you were a reporter entitled to the Shield Law protection, didn't you?

A: Remember I'm – I'm just a private person, and I don't – this is the first time I've ever really been in a courtroom. So, I don't – you know, I don't know all the laws, and everything. I – I was trying to be guided by counsel, and present the facts, and – and you know, follow the law. I – I was doing the best I could, and presenting – did I want to present everything? I'm a very complicated person. I'm – I'm not a very linear thinker. So, your questions are very hard for me to answer in a linear way.

Q: Were you withholding any information from the Court as to your entitlement to the Shield Law when you made the application?

A: Not intentionally. [February 23, 2012 Hearing, T 25-7 to 28-5.]

The Appellate Division and Supreme Court provided a detailed analysis of Defendant Hale's internet activities, specifically discussing her website Pornafia and her blogging activities on the Oprano message board, both of which were testified to by Hale at the hearing before Judge Locascio. In her assertion that she was entitled, as a journalist, to the protections of the Shield Law, Defendant Hale had the burden of proving that she was entitled to assert the Shield Law as protection from having to produce information concerning the sources of the statements that she posted on the Oprano message board. See N.J.S.A. 2A:84A-21.3 ("To sustain a claim of the newsperson's privilege under Rule 27 [Rule 508(a)], the claimant shall make a prima facie showing...". As determined by Judge Locascio, and as affirmed by the Appellate Division and the Supreme

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Court on appeal and on certification, Hale is not entitled to assert the protections of the Shield Law as a result of her activities with the Oprano or Pornafia sites, and this court denied Hale's request that this Court allow a hearing to supplement the record as to the applicability of the Shield Law to Hale's www.pornafia.com activities.

As noted above, however, Hale asserted before this court in opposition to Plaintiffs' motion to compel her deposition, after remand of the matter by the Supreme Court, that she was also entitled to assert the Shield Law privilege as a result of her work on a nonfiction book called "Pornafia," which she indicated was interrelated with her work on Pornafia the website. Plaintiffs objected to Defendant raising an additional basis for assertion of the Shield Law privilege at this stage of the proceedings, noting that the entire reason for the hearing held before Judge Locascio was to determine whether Defendant Hale was entitled to assert the Shield Law, and that allowing her to assert the privilege for different reasons would give her a "second bite at the apple."

Judge Locascio, the Appellate Division, and the New Jersey Supreme Court all considered and rejected Defendant's argument that she was entitled to assert the Shield Law in relation to her postings on Oprano and her own website, Pornafia, because Hale raised both as a basis for her assertion of the Shield Law privilege. The trial court, Appellate Division and New Jersey Supreme Court did not consider the issue of whether Defendant Hale would be entitled to assert the Shield Law privilege as a result of her work on a non-fiction book, because at no point either prior to or during the hearing before Judge Locascio did Defendant

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indicate in any way that she intended to or was in the process of writing a nonfiction book. Rather, at the hearing before Judge Locascio, Defendant indicated that she intended to publish a fictional story that Defendant said was not relevant to the issue pending before the court.

As noted by the Supreme Court, "the Appellate Division [has] found that the author of a nonfiction book, though not expressly covered under the statute, could avail himself of the Shield Law privilege." Too Much Media, 206 N.J. at 234 (referring to Trump v. O'Brien, 403 N.J. Super. 281 (App. Div. 2008)). Trump was decided on October 24, 2008, before the hearing held by Judge Locascio in the present matter.

It could certainly be argued that Hale had waived her right to assert the Shield Law privilege that may arise from her work on a nonfiction book, as she did not raise it previously in these proceedings, failed to raise the issue in a motion for reconsideration brought before the trial court after Judge Locascio's decision on her initial motion, and failed to advise the Appellate Division or the Supreme Court of this outstanding issue. But to allow Hale to fully present her claim and in the interest of considering this matter on its merits, this court ruled that Hale was not estopped from seeking protection under the Shield Law based on her nonfiction book. Hale was directed, however, to account for and submit to the Court all factual bases for any claim of privilege to which Hale considered herself entitled, thereby avoiding a further piecemeal resolution of Hale's Shield Law claim. Hale advised that her nonfiction book, also to be known as Pornafia, provided the sole remaining basis for Hale's assertion of the Shield Law.

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A hearing was held by this Court on February 22, 2012 and February 23, 2012 on the issue of whether Hale was entitled to assert the Shield Law privilege based upon her involvement in a nonfiction book. At the hearing, Hale contended that she had been at work on a nonfiction book that she intended to call "Pornafia."

Model Jury Charges 1.12(k) and 1.12(l) provide guidance for the jury in determining the credibility of a witness and serve as useful parameters for assessing credibility here. Model Charge 1.12(k) addresses credibility as follows:

In deciding what testimony to believe, you may take into consideration:

1. the witness' interest, if any in the outcome of this case;
2. the accuracy of the witness' recollection;
3. the witness' ability to know what he/she is talking about;
4. the reasonableness of the testimony;
5. the witness' demeanor on the stand;
6. the witness' candor or evasion;
7. the witness' willingness or reluctance to answer;
8. the inherent believability of the testimony;
9. the presence of any inconsistent or contradictory statements.

In asserting her work on a nonfiction book about the adult-entertainment industry as the basis for protection under the Shield Law, Hale was obliged to address and explain why she had not raised this basis in the initial hearing before Judge Locascio. Additionally, Hale had not only failed to raise the book to support the privilege at the prior hearing, she testified before Judge Locascio that

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she had been working on a fictional story during the relevant time period.

Specifically, Hale's testimony on April 23, 2009 was follows:

Q: Did you present –

A: I had not put together my—my position on it yet, and I wasn't just collecting information on Too Much Media. I was also collecting information on their competitor, which I have—would have pursued—probably found out some things about that software, based on information I have that may be similar.

Q: And you—you said there's two sides to every story. Did you present the two sides to any story?

A: I haven't presented a story yet. When I do, I will.

Q: And is that in the book that's coming out?

A: No.

Q: Is that book coming out?

A: I hope so. I—

Q: Okay. On your website it says, 2009.

A: I know—it was 2008.

Q: I'm working on it.

THE COURT: Working on what?

THE WITNESS: I'm working on a story.

THE COURT: You're going to write a book about what?

THE WITNESS: It's a — it's a fictional story, so it really has no relevance — relevance here.

THE COURT: Fictional story about —

THE WITNESS: It's loosely based on —

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THE COURT: – what subject?

THE WITNESS: – stuff that – the –

THE COURT: I'll decide if it's relevant or not.

THE WITNESS: – the organized crime, and online porn.

THE COURT: Organized crime, and what?

THE WITNESS: Online porn.

THE COURT: Okay. [February 23, 2009 P.M. hearing before Judge Locascio, T 178-25 to 180-11.]

Hale provided no explanation at the February 22, 2012 and February 23, 2012 hearing as to why she had failed to advise the court that she was working on a nonfiction book about the adult entertainment industry, and that the identity of sources that she was seeking to withhold were sources for that nonfiction book as well as for her other online activities. Even more troubling is Hale's failure to address, at the February 2012 hearing, her prior sworn testimony that she had been working on a "fictional story". Hale's failure to address this inconsistency is problematic and makes it difficult for the court to find her assertion that she had been working on a nonfiction book credible.

As indicated in the instruction to juries, one issue that the finder of fact may consider in determining credibility is "the presence of any inconsistent or contradictory statements." Under Model Jury Charge 1.12(L), jurors are instructed as follows:

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In deciding what to believe here are some factors you may want to consider. . . . Were there any contradictions or changes in the witness' testimony? Did the witness say one thing at one time and something different at some other time? If so, you may consider whether or not the discrepancy involves a matter of importance or whether it results from an innocent mistake or willful lie. You may want to consider any explanation that the witness gave explaining the inconsistency.

Hale's failure to raise the issue that she was working on a nonfiction book in the certification she submitted in support of her initial motion renders her current contention that her work on a nonfiction book justifies Shield Law protection problematic. Hale's failure to address and to explain in her current testimony this inconsistency additionally adversely affects her credibility in the eyes of the court.

Other aspects of Hale's testimony during the February 2012 hearing, especially when compared with her other sworn assertions provided to the court, widened Hale's credibility gap.

In her February 26, 2008 certification to the court filed in support of her initial application for the Shield Law privilege, Hale indicated that she had first become involved in Internet adult entertainment issues because, as a wife and mother, she heard parents complaining about unsolicited advertisements, referred to as pop-ups and spam, which they were receiving. In her testimony at the hearing before Judge Locascio, however, Hale testified that she became involved in investigating the online adult entertainment industry because individuals were exposing themselves to her, or, "cyber-flashing" her, on an Internet site at which Hale was conducting life-coaching sessions through a

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webcam. As noted in Judge Locascio's opinion, Hale testified that this spurred her to begin a campaign against what she perceived as criminal activity within the Internet adult entertainment industry. Hale has provided no explanation for these discrepancies.

Additionally, in her February 28, 2008 certification to the Court, Defendant Hale provided a lengthy description of her familiarity with and involvement in Internet activities. For example, Hale explained that she owned a private investigation consulting company through which she regularly assisted clients with Internet-security issues. Hale also described her regular use of weblogs and electronic bulletin boards, some of which she also operated. Hale also indicated that she is a former Microsoft employee, and that she had been published in various nationally-recognized publications on technology-related subjects. Defendant Hale also testified that she started a corporation called Camandago ("C-Amanda-go") in 2007 because her daughter, Amanda, had gotten into trouble as the result of her online communications with other online users. Defendant applied her Internet savvy to track her daughter down. Hale's efforts spawned Camandago, which, as of the February 2012 hearing, is still an active company in which Hale is still actively involved. When Hale was asked on cross examination at the February 2012 hearing about the Oprano message she posted that included information from a third party, however, Hale testified that she was uncertain how the information had been included in her post; her best explanation was that she had mistakenly cut and pasted the document into her Oprano posting. It is difficult to reconcile Hale's testimony concerning her

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extensive background and work with the internet, with her confusion as to how a document, the dissemination of which forms in part the basis for the present lawsuit, became attached to her own internet post.

The information generated by a third party that was included in Hale's internet post described Too Much Media, LLC as a company based in Freehold, NJ. Hale had previously testified that she did not know where Plaintiffs Too Much Media, LLC, John Albright and Charles Berrebbi were domiciled or resided. Hale's access to the information and inclusion of it in her post was inconsistent with her prior sworn testimony that she did not know where Too Much Media was located and this inconsistency, in addition to Hale's acknowledgement that her certification contained "significant untruthful statements," served as a basis for Judge Locascio's finding that Hale's credibility was "seriously compromised."

During the February 2012 hearing, Hale testified on a number of occasions that she had not read the portions of the documents she claimed she inadvertently included in her post that referred to Too Much Media's location. Hale appeared to challenge Judge Locascio's determination that she was not a credible witness. The crux of the present matter involves the posting of various comments and information by Hale on the Oprano Internet site. When confronted with whether she knew about information contained in her posts that would be detrimental to her interests now, Hale testified that she had not read those specific portions. Considering the criteria described in the Model Jury Charge, including the demeanor of the witness, her failure to address discrepancies and contradictions in her testimony, and her attempts to avoid

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providing direct answers to questions posed on cross examination, among other factors, Hale's testimony on these issues is not credible.

At the February 2012 hearing, Hale presented the testimony of Rachel Shaw, a resident of Pincourt, Quebec. Shaw explained that testifying in person in New Jersey Superior Court would constitute a hardship, and appeared by videoconference with the consent of all counsel and the verification that Shaw could adequately be seen, heard, and observed. Hale also presented the testimony of Elliot Wolf, a resident of Seattle, Washington, who also testified by videoconference with the consent of all counsel and the verification that the witness could adequately be seen, heard and observed, based on the difficulty that appearing in person in New Jersey to testify would pose to Wolf.

Shaw testified that she became familiar with the website Pornafia in the summer of 2007. Shaw indicated that Pornafia was also the title of a book for which Shaw was designing a cover and creating a website. Shaw testified that she had created and launched a "splash page," advertising the book on www.pornafia.com, where individuals could sign up on a mailing list for notification of the book's release. Shaw testified that at that time she anticipated the book's release date to be some time in 2009. Shaw testified that she discontinued working on the website www.pornafia.com in February 2008.

Shaw did not have any direct knowledge to support Hale's claim that she had been writing a nonfiction book. Shaw testified about her "understanding" that Hale had written two chapters of a book, but provided no factual basis to support her belief that the book was a work of nonfiction. Shaw offered no testimony that

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she had read anything authored by Hale, or that she had seen anything written by Hale. In evaluating the demeanor of the witness, it was noted that Shaw appeared extremely eager to provide testimony consistent with buttressing Hale's contentions. At times, Shaw provided narrative responses that did not necessarily correlate with the questions posed. But the principal problem with Shaw's testimony was that Shaw's "ability to know what she was talking about" was lacking. Aside from her testimony that she had designed the cover of a book that she understood was to be called "Pornafia," and that she had set up a website called Pornafia.com and Pornafia.org, Shaw lacked any personal knowledge, given the credibility factors cited above, to support Hale's claim that she was writing a nonfiction book about the pornography industry.

Elliott Wolf, the publisher at Peanut Butter Publishing, located in Seattle, Washington, also offered testimony on Hale's behalf. Wolf testified that he had spoken with Hale several years ago when she asked him for some advice about publishing a book. He testified that he met with Hale several times, and that he recalls that Hale had brought with her notes and parts of the work on which she had started. Based upon their meetings and discussion, Wolf testified that it was his understanding that Hale had begun writing a book, which he believed had several working titles.

Wolf's testimony is not helpful to Hale's argument that she is entitled to protection under the Shield Law based on her work on a nonfiction book. Whether Hale was writing a book is not in doubt and not critical to the issue here; Hale testified at the hearing before Judge LoCiccio that she was working on a

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fictional book. But Wolf offered no testimony as to whether Hale's book was a work of fiction or nonfiction.

Plaintiff Charles Berrebbi testified on behalf of Plaintiffs in opposition to Defendant's assertion of the Shield Law privilege. Berrebbi's testimony was principally directed at Hale's contention, as set forth in a prior certification submitted in opposition to Plaintiffs' efforts to require her to appear in New Jersey for her deposition, that she only traveled on weekends to accommodate her children's schedule. Berrebbi testified that trade shows in the adult entertainment industry typically begin mid-week and end with a "pack up" day on Saturday. Berrebbi's testimony thereby suggested that based on the trade shows Hale acknowledged attending, Hale's claim that she only traveled to trade shows on weekends must be false.

Although Berrebbi testified from personal knowledge that one of the trade shows that Hale indicated she had attended ran from Wednesday through Saturday, the remainder of Berrebbi's testimony was based upon his prior review of his calendar that listed the dates of trade shows, and the calendar was not presented at the hearing. While hearsay testimony may be presented at a Rule 104 hearing, Berrebbi's testimony was not relied upon by the court in determining the issue concerning which the testimony was presented, that is, the credibility of Hale.

If Hale's claim that she had intended to produce a nonfiction book about the adult entertainment industry was credible, the burden to follow would be

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whether Hale's nonfiction book meets the test enunciated by the New Jersey Supreme Court in this matter.

[I]f the Legislature had wanted to create an intent test alone, it could have done so. Instead, the Shield Law requires that claimants show three things: first, a connection to news media, as discussed above; second, a purpose to gather, procure, transmit, compile, edit, or disseminate news; and third, that the materials sought were obtained in the course of pursuing professional newsgathering activities. N.J.S.A. 2A:84A-21.3. The second prong has some similarities to the federal intent test. But proof of purpose — or intent — is not enough. The other two prongs of the statute must be met as well, in particular, the required link to news media. And unlike federal case law, the Shield Law explicitly defines "news" and "news media." See N.J.S.A. 2A:84A-21a. [citation]

The only reported case in New Jersey that addresses the issue of an assertion of the Shield Law by the author of a nonfiction book, involved a completed nonfiction book that had written and published. Trump v. O'Brien, 403 N.J. Super. 281 (App. Div. 2008). The present matter involves questions about a nonfiction work at the research stage, with perhaps some portion in draft format. It is unnecessary to resolve whether Hale's purportedly nonfiction book was sufficiently developed to meet the standards described above because Hale's contention that she was writing a nonfiction book is not credible and cannot be accepted.

Finally, although the February 2012 hearing was limited to the issue of whether Hale is entitled to assert the Shield Law privilege based on her nonfiction book, Hale additionally offered a substantial amount of testimony that

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she is entitled to protections under the Shield Law based on her work on the website Pornafia.com. For example, Hale produced documents and testimony that purported to reflect that Kathee Brewer had been "landed" to write for Pornafia.com. Brewer was previously the chief editor for Adult Video News, a magazine in the adult industry. The testimony about Brewer was provided by Rachel Shaw, and did not address the alleged nonfiction book, but rather the www.pornafia.com website. Furthermore, the information produced involving Brewer was sketchy and incomplete; any work supposedly performed by Brewer was not produced, and she did not testify herself.

Hale testified that she "began to work" with Brewer upon Brewer's agreement to write for Pornafia. When asked if she had retained or hired Brewer, Hale testified that Brewer had "made a commitment to work – to write for Pornafia.com." An email sent from Hale to Rachel Shaw on October 31, 2007 was as follows: "Just landed Kathee Brewer the former AVN chief editor to write for Pornafia. She will get me some stuff later today we might not have everything we need by Friday but we are on our way."

To the extent that the testimony and evidence about Kathee Brewer's involvement with Hale's work was submitted in support of a second attempt by Hale to argue that she is entitled to protection under the Shield Law based on her Pornafia.com work, that issue is not before this court. As noted above, this argument was specifically addressed, and rejected, by the Law Division, the Appellate Division, and the Supreme Court.

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No connection whatsoever was provided in the testimony of Hale or Shaw between the work allegedly performed by Brewer and Hale's nonfiction book. Even if such a connection had been established, the information offered about Brewer was too attenuated to support Hale's contention that she was writing a nonfiction book. Brewer did not testify at the February 2012 hearing, and no writings by Brewer were produced, in camera or otherwise, for review. The information related to Brewer, like the balance of the information produced about Pomafia.com, is inconsequential here because the issue of the website Pomafia.com was addressed and closed by the Supreme Court. Hale's admitted intention that in asserting her right to the Shield Law privilege at the hearing before Judge Locascio she wanted to "present as little as possible" does not provide a basis for reopening the issue now.

CONCLUSION

For the reasons set forth above, Defendant Hale's claim that she is entitled to assert a privilege pursuant to New Jersey's Shield Law, N.J.S.A. 2A:84A-21, is rejected. Hale is hereby required to appear for deposition.



HON. LINDA GRASSO JONES, J.S.C.