MEDIA LAW

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INTRODUCTION

This year's Survey covers significant cases involving the media. In addition to cases in state and federal courts in New York, the Survey covers legislative developments that affect the media. Topics cover the tort of defamation, statutory elements of invasion of privacy and

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challenges to the free speech and press principles, the First Amendment, and prior restraints. While media law cases tend to involve high-profile plaintiffs and local, national, and international media, across platforms, many cases in this Survey also have a distinct political bent, reflecting the contentious nature of contemporary public discourse, media coverage and potential liability.

I. FIRST AMENDMENT & PRIOR RESTRAINTS

A temporary restraining order seeking to block an author and publisher from publishing a book about the Trump family was vacated by a trial court and affirmed by the appellate division in *Trump v. Trump*.[1] The controversy emerged after family members sought to block author Mary Trump from publishing a book about the family, arguing that a 2001 settlement agreement regarding the estate of family patriarch Fred Trump required confidentiality on all family matters.[2] By the time the case made it to court, publisher Simon & Schuster already had the book, *Too Much and Never Enough: How My Family Created the World's Most Dangerous Man*, in circulation.[3]

While the underlying contract was legitimate, the substantial question was whether the family's temporary restraining order or injunction could meet the exacting standards judging a restraining order as a prior restraint against the media or a publisher.[4] Absent the First Amendment concern, a party seeking a preliminary injunction must show three elements: (1) likelihood of success on the merits; (2) irreparable injury; and (3) balancing the equities in the requester's favor.[5]

"It is the court's position that none of the three prongs necessary for the court to grant a preliminary injunction against S & S have been met," the court wrote.[6] The publisher was not a party to the underlying

1. *See* 69 Misc. 3d 285, 288, 128 N.Y.S.3d 801, 806 (Sup. Ct. Dutchess Cty. 2020), *aff'g* Trump v. Trump, No. 2020-05027, 2020 N.Y. App. Div. LEXIS 5683, *15–16 (2d Dep't, July 1, 2020) (holding the book publisher was not subject of the underlying confidentiality agreement and should be free to publish the book).

2. *See id.* at 287, 128 N.Y.S.3d at 806.

3. *See id.* at 287, 128 N.Y.S.3d at 806.

4. *See id.* at 309, 128 N.Y.S.3d at 821.

5. *See id.* (quoting Berman v. TRG Waterfront Lender, LLC, 181 A.D.3d 783, 785, 122 N.Y.S.3d 317, 320 (2nd Dep't 2020) (first citing Keller v. Kay, 170 A.D.2d 978, 981, 96 N.Y.S.3d 605, 608 (2d Dep't 2018); and then citing Carroll v. Dicker, 162 A.D.3d 741, 742, 80 N.Y.S.3d 69, 71 (2d Dep't 2018)).

6. *Trump*, 69 Misc. 3d at 297, 128 N.Y.S.3d at 813.

contract and cannot be bound by the confidentiality agreement.[7] Further, the public interest surrounding the Trump family did not justify the prior restraint.[8]

Blocking the publisher, the court wrote, would be unconstitutional because there was no privity in contract and the publisher was engaging in activities protected under the First Amendment and exercising its right to publish important matters of publish interest.[9] The court concluded:

> As can be seen by the instant proceeding, a question to be answered is whether the confidentiality clauses in the 2001 Agreement, viewed in the context of the current Trump family circumstances in 2020, would "offend public policy as a prior restraint on protected speech". Yes, it should, as it would be a prior restraint on speech.[10]

II. DEFAMATION

A. Elements

Determining the plaintiff's proof of the tort of defamation's prima facie elements were integral elements to many defamation cases. It is well established in New York: defamation is "the making of a false statement which tends to 'expose the plaintiff to public contempt, ridicule, aversion or disgrace, or [to] induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.'"[11]

7. *See id.* at 294, 128 N.Y.S.3d at 811 (citing Accardo v. Rabinowitz, 51 N.Y.S.2d 279, 280 (Sup. Ct. Queens Cty. 1944)).

8. *See id.* at 309, 128 N.Y.S.3d at 821. The court also referred to a contemporaneous prior restraint dispute involving former National Security Advisor John Bolton, who fended off an attempted prior restraint in federal court in Washington over his book that was critical of President Trump. *See id.* at 297, 128 N.Y.S.3d at 813 (citing U.S. v. Bolton, 468 F. Supp. 3d 1 (D.D.C. 2020)) ("Even as set forth in U.S. v. Bolton . . . where the plaintiff sought to have the court order the publisher 'to take any and all available steps to retrieve and destroy any copies of the book that may be in the possession of any third party', the court refused to do so. And Bolton was dealing with information pertaining to national security not 20-year-old family history.").

9. *Id.* at 298, 128 N.Y.S. at 813–14. The court also noted that there is a "significant presumption against the constitutional validity of a prior restraint." *Trump*, 69 Misc. 3d at 305, 128 N.Y.S. at 818 (citing Organization for a Better Austin v. Keef, 402 U.S. 415, 419 (1971)).

10. *Id.* at 308, 128 N.Y.S.3d at 821.

11. Foster v. Churchill, 87 N.Y.2d 744, 751, 65 N.E.2d 153, 157, 642 N.Y.S.2d 583, 587 (1996) *(*quoting Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 379, 366 N.E.2d 1299, 1305, 397 N.Y.S.2d 943, 949 (1977)).

Several statements about a former basketball player who was disruptive and removed from the seats during a game at Madison Square Garden failed to establish the elements of defamation and actual malice the Second Circuit ruled in *Oakley v. Dolan*.[12] After the former player, Charles Oakley was removed from the arena for disruptive behavior, the New York Knicks Executive Chairman, James Dolan, published statements on Twitter and in interviews on cable sports networks that were critical of Oakley's behavior.[13]

Dolan's most critical statements included accusations that the plaintiff "has a problem with anger. He's both physically and verbally abusive. He may have a problem with alcohol, we don't know, right."[14] Plaintiff argued that he was defamed by these statements and his reputation was harmed, pointing to cancelation of an appearance he had scheduled with an addiction clinic.[15]

Both the district court and the Second Circuit ruled that these statements failed the standards under New York's defamation law.[16] The court recited and applied the five prongs of New York defamation law: (1) a statement of fact about the plaintiff; (2) publication (to a third party); (3) fault; (4) falsity of the factual statement; and (5) special damages or per se actionability.[17] Because the plaintiff was a public figure, the publication must have been made with actual malice: known falsity or reckless disregard for the truth.[18]

There was no proof the defendant acted with actual malice, the court held.[19] Further, on the matter of special damages the court found no proof that plaintiff suffered any specific or actual monetary loss.[20] On the issue of per se liability, which would afford a plaintiff general damages without proof of monetary loss, the court held that the pleadings were insufficient to place any statements into one of the four per se categories: imputing unchastity of a woman; a loathsome disease (STD); statements that injure plaintiff in business, trade or

12. *See* 833 F. App'x 896, 902 (2d Cir. 2020).

13. *See id.* at 899.

14. *Id.*

15. *See id.* at 899–900.

16. *See id.* at 899.

17. *See Oakley*, 833 F. App'x at 899 (first citing Palin v. New York Times Co., 940 F.3d 804, 809 (2d Cir. 2019); and then citing Sleepy's L.L.C. v. Select Comfort Wholesale Corp., 909 F.3d 519, 528 (2d Cir. 2018))).

18. *See id* at 899–900 (citing *Palin*, 940 F.3d at 809).

19. *See id.* at 900. ("We agree with the District Court that the amended complaint lacks sufficient allegations from which to infer that Defendant knew or recklessly disregarded that their statements about Oakley's drinking were false.").

20. *See id.*

profession or falsely imputing a serious crime.[21] The published statements, even if critical of the plaintiff, do not fit into any of the per se categories for a retired basketball player.[22]

The court wrote: "In the absence of per se actionability, Oakley must instead plead that the statements resulted in special damages, or 'actual losses' that were specifically and 'causally related to the alleged tortious act.' The amended complaint fails to propose or support any such theory."[23]

In *Kesner v. Dow Jones*, most of a lawyer's complicated defamation suit against multiple business journalists was dismissed by a district court.[24] To summarize the fact-intensive complaint, plaintiff argued he was defamed in news accounts in Barron's financial newspaper, published by the Dow Jones Company, linking him to an U.S. Securities and Exchange Commission (SEC) investigation of a business client accused of a "pump and dump" stock scheme.[25] He also sued an independent investigative financial reporter, Teri Buhl, who generated her own stories on her website as well as disseminating other content via Twitter.[26]

The district court waded through a 2018 Barron's article and several articles Buhl published on her website between August 2018 and March 2019.[27] Many statements plaintiff pinpointed were not defamatory as a matter of law, the court held, including statements about plaintiff's employment history, his termination years earlier from a law firm in both text, and headlines.[28] Plaintiff unsuccessfully argued that statements about his termination from a law firm years

21. *See id.* (citing Liberman v. Gelstein, 80 N.Y.2d 429, 435, 605 N.E.2d 344, 347, 590 N.Y.S.2d 857, 860 (1992)).

22. *See Oakley*, 833 F. App'x at 900.

23. *See id*. at 901 (quoting L.W.C. Agency v. St. Paul Fire & Marine Ins. Co., 125 A.D. 2d 371, 373, 509 N.Y.S.2d 97, 100 (2d Dep't 1986)).

24. *See* Kesner v. Dow Jones & Co., 515 F. Supp. 3d 149, 189 (S.D.N.Y. 2021). Even before addressing substantive issues, the court went through a detailed choice of law analysis applying New York law because much of the allegations emanated from publications and reporting within the jurisdiction, not Florida, where plaintiff now lives. "Where authors accused of defamation are located in New York and the publishing entity is headquartered in New York, New York has a strong interest in the case." *Id.* at 169. The court also dismissed a series of non-defamatory claims including commercial disparagement, deceptive trade practices, tortious interference and civil conspiracy. *Id.* at 190.

25. *See id.* at 162.

26. *See id.* at 162–66.

27. *See Kesner*, 515 F. Supp. 3d at 162–66.

28. *See id.* at 174.

earlier as well as statements linking him to the investigation imputed criminal activity, constituting libel per se.[29]

Reciting blackletter law, the court listed the five prima facie elements for a defamation claim in New York: (1) a written false statement about (of and concerning) the plaintiff; (2) published to a third party; (3) with fault (liability); (4) with falsity of the defamatory statement and (5) either proof of special damages or per se liability in which damages would be implied.[30]

Assessing these stories' defamatory impact, the court assessed a treatise's worth of issues including libel per se, protected opinion, and both express libel and libel by implication.[31] However, with the Barron's articles, the court held, "[i]n any event, even if the article could be fairly read to impliedly defame Kesner, it would be protected by the fair report privilege of section 74. That is because the content tending to disparage Kesner came from MabVax's publicly filed complaint."[32]

Notably, the court referenced a Barron's headline, "The Lawyer at the Center of the SEC Pump and Dump Case," was not defamatory and not actionable under both the fair and accurate report privilege under New York Civil Rights Law section 74 because the news account was based on SEC investigative documents and the "fair index" privilege.[33]

The court also rejected as "of no consequence here" arguments that Barron should be held further liable because the articles were republished via re-tweets and other media.[34]

Content published by Buhl, the independent journalist, in an October 31, 2018 article, including a statement labeling plaintiff "a bad actor," could be actionable as a defamatory statement, coupled

29. *See id.* at 172.

30. *See id.* at 169–70 (quoting Palin v. New York Times Co., 940 F.3d 804, 809 (2nd Cir. 2019). The court invoked a long-standing definition: "Defamation is the 'making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or to induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.'" *Id.* at 169 (quoting Foster v. Churchill, 87 N.Y.2d 744, 751, 665 N.E.2d 153, 157, 642 N.Y.S.2d 583, 587 (1996)).

31. *See Kesner*, 515 F. Supp. 3d at 170–71.

32. *Id.* at 173–74.

33. *See id*. at 172, 176–78 (quoting Cummings v. City of New York, No. 19-cv-7723, 2020 U.S. Dist. LEXIS 31572, at *59 (S.D.N.Y. Feb. 24, 2020)) (citing Karedes v. Ackerley Grp., Inc., 423 F.3d 107, 115 n.1 (2d Cir. 2005)) ("New York common law also recognizes a separate 'fair index' privilege, whereby a headline is not actionable 'so long as it is a fair index of the article with which it appears.'").

34. *See id.* at 178.

with proof of special damages "in the form of lost clients and business."[35] The court also ruled that a series of Buhl's tweets could also be defamatory.[36]

In *BYD Co. v. Vice Media LLC*, a defamation claim by a global manufacturer that appeared in a government report blocking Chinese government-backed companies from government contracts under the National Defense Authorization Act was dismissed.[37] Plaintiff claimed the link to the report and the article's use of the term "blacklisted" constituted defamation.[38]

The claims failed on multiple grounds emanating from plaintiff's status as a limited purpose public figure that would have to prove publication with actual malice.[39] Plaintiff did not dispute its status as a limited purpose public figure but insisted that the allegations in the article and the headline were defamatory.[40]

The court wrote, "BYD takes umbrage at the reference to a 'blacklist,' but the context of the article makes clear to a reasonable reader that the reference to a 'blacklist' invokes a more colloquial use—one that at most constitutes 'rhetorical hyperbole."[41]

In addition to not coming close to establishing actual malice, the article and its headline was also based on significant findings government investigative reports under the NDAA, which should be privileged under New York Civil Rights Law section 74, which provides extensive protections to "fair and true" reports of legislative, judicial, and other government documents and records.[42]

A defamation and trade libel case involving lawyers subjected to negative comments on a review website did not have grounds to appeal denial of a motion to replead the complaint for special damages, the appellate division held in *Cedeno v. Pacelli*.[43] Plaintiff could not re-

35. *See id.* at 180–81.

36. *See Kesner*, 515 F. Supp. 3d at 182.

37. *See* No. 20-cv-3281, 2021 U.S. Dist. LEXIS 64027, at *31–32 (S.D.N.Y. Mar. 31, 2021).

38. *See id.* at *3–4.

39. *See id.* at *9–10.

40. *See id.* at *10–11.

41. *Id.* at *13 (quoting Greenbelt Co-op. Pub. Ass'n v. Bressler, 398 U.S. 6, 14 (1970)).

42. *See BYD Co.*, 2021 U.S. Dist. LEXIS 64027, at *16–17 (citing N.Y. CIV. RIGHTS LAW § 74 (McKinney 2021).

43. *See* 192 A.D.3d 533, 534, 140 N.Y.S.3d 693, 693–94 (1st Dep't 2021) (citing Waste Distillation Tech., Inc. v. Blasland & Bouch Eng'rs, P.C., 136 A.D.2d 633, 634, 523 N.Y.S.2d 875, 877 (2d Dep't 1988)). For a more detailed recitation of

plead the trade libel case with a showing of lost business, clients, and other reputation management costs, the court held.[44]

1. Of & Concerning

A newspaper photograph showing plaintiff walking into a church with other people, accompanying a news story detailing abuse allegations at a Staten Island church, did not identify the plaintiff for defamation purposes, the appellate division held in *DiMauro v. Advance Publications*.[45] Both parties appealed the case; plaintiff on the pre-trial CPLR 3211(a)(7) dismissal and the news organization appealing the denial of an award of sanctions.[46]

Because the plaintiff appeared in a group and was not otherwise named, the case was properly dismissed because it failed to meet one of the prima facie elements of defamation: identification of the plaintiff or the of and concerning prong.[47] "Since the defendants' article did not expressly or impliedly pertain to the plaintiff, it is unnecessary to determine whether the challenged statements were susceptible to a defamatory meaning," the court wrote.[48]

Plaintiff's second argument under New York Civil Rights Law sections 50–51 was also inappropriate because the newspaper did not use an image or likeness for commercial purposes.[49] The court echoed decades of precedent narrowly interpreting the statute on the commercial use definition and the broad discussion of the photo's newsworthiness.[50] "Here, it is undisputed that the publication in

the underlying facts, *see* Roy S. Gutterman, *Media Law*, 71 SYRACUSE. L. REV. 301, 304–05 (2021).

44. *See Cedeno*, 192 A.D.3d at 534, 140 N.Y.S.3d at 693–94 (citing *Waste Distillation Tech., Inc.*, 136 A.D.2d at 634, 523 N.Y.S.2d at 877).

45. *See* 190 A.D. 3d 942, 944 139 N.Y.S. 3d 627, 629 (2d Dep't 2021) (quoting Alf v. Buffalo News, Inc., 21 N.Y.3d 988, 990, 995 N.E.2d 168, 169, 972 N.Y.S.2d 206, 207 (2013)) (first citing Three Amigos SJL Rest, Inc. v. CBS News, Inc., 28 N.Y.3d 82, 87, 65 N.E.3d 35, 37, 42 N.Y.S.3d 64, 66 (2016); and then citing Russian Am. Found., Inc. v. Daily News, L.P., 109 A.D.3d 410, 413, 970 N.Y.S.2d 216, 218–19 (1st Dep't 2013)).

46. *See id.* at 943, 139 N.Y.S.3d at 628.

47. *See id* at 944, 139 N.Y.S.3d at 629 (quoting *Three Amigos SJL Rest., Inc.*, 28 N.Y.3d at 86, 65 N.E.3d at 37, 42 N.Y.S.3d at 66).

48. *Id.* (citing Udell v. NYP Holdings, Inc., 169 A.D.3d 954, 957, 94 N.Y.S.3d 314, 317 (2d Dep't 2019)).

49. *See id.* at 945, 139 N.Y.S.3d at 630 (quoting Messenger v. Gruner + Jahr Printing & Publ., 94 N.Y.2d 436, 441, 727 N.E.2d 549, 552, 706 N.Y.S.2d 52, 55 (2000)).

50. See *DiMauro*, 190 A.D.3d at 945, 139 N.Y.S.3d at 630 (quoting Finger v. Omni Publ'ns Int'l, 77 N.Y.2d 138, 142, 566 N.E.2d 141, 144, 564 N.Y.S.2d 1014, 1017 (1990)).

question was a newsworthy event and there is no contention that it was an advertisement in disguise," the court added.[51]

B. Defenses—Truth

A newspaper article exposing a landlord's negligence on a historic building falling into disrepair was substantially true and based on judicial records, a trial court held in *Reus v. Etc Housing Corp*.[52] Not only did the court dismiss the defamation case on a summary judgment motion, but it awarded the newspaper, *The Plattsburgh Press-Republican*, attorneys' fees and court costs because the lawsuit targeted the paper's public criticism on important public issues.[53]

In libel actions, the truth provides an absolute defense.[54] "The Defendant has provided voluminous evidence which indicates that the article in question is substantially true and that 'the substance, the gist, the sting, of the libelous charge [is] justified,'" the court wrote.[55]

The court added that minor or immaterial errors did not diminish the article's veracity.[56]

C. Libel Per Se

A public spat between actor-comedian Michael Rapaport and his former employer, Barstool Sports, rife with accusations of physical abuse, racism, unethical behavior, and STDs, did not rise to defamation because of the context—podcasts and social media—the court held in *Rapaport v. Barstool Sports, Inc.*.[57] The dispute arose in a the midst of a contract dispute between Rapaport and Barstool Sports, which did not extend its contract with the comedian who takes pride in raunchy and confrontational commentary.[58]

51. *Id.*

52. *See* 72 Misc. 3d 479, 481, 485, 148 N.Y.S.3d 663, 666, 668 (Sup. Ct. Clinton Cty. 2021).

53. *See id.* at 486, 488, 148 N.Y.S.3d at 670 (applying New York's Anti-SLAPP law N.Y. CIV. RIGHTS LAW . §76-a (Mckinney 2021)) ("[I]n libel claims against members of the press, due to concerns surrounding the chilling of free speech and the fundamental liberty interests at stake, the standard which a plaintiff is required to meet is heightened beyond that of ordinary negligence.").

54. *See id.* at 484, 148 N.Y.S.3d at 668 (citing Hope v. Hadley-Luzerne Pub. Libr., 169 A.D.3d 1276, 1277, 94 N.Y.S.3d 723, 724 (3d Dep't 2019)).

55. *Id.* (quoting Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991)).

56. *See id.*

57. *See* No. 18 Civ. 8783, 2021 U.S. Dist. LEXIS 59797, at *28, *31–32 (S.D.N.Y. Mar. 29, 2021).

58. *See id.* at *5–7. The court also dismissed breach of contract and fraud claims. *Id.* at *24, *27–28.

The allegations included that the plaintiff engaged in stalking and abusing an ex-girlfriend and also had an STD, herpes, the statements at issue. The plaintiff complained that the statements were defamatory by insulting him, calling him names and describing him as "being racist, being a fraud, a hack, and a wannabe."[59] The statements present two questions: whether they are factual and can be proven either true or false or whether they are simply unflattering, insulting terms of art or unprovable rhetorical hyperbole entitled to First Amendment protection.[60]

In New York, courts apply a three-prong analysis to determine whether the statements are protected opinion: (1) whether the language has a precise, readily understood meaning; (2) whether the statements can be proven true or false; and (3) whether the context informs the reader or viewer that the statements are factual or pure opinion.[61]

Ultimately, the exchange's context, a dispute playing out among a comedian and his foils online, cannot give rise to a defamatory impression.[62] The court wrote:

> [T]he statements were largely laden with epithets, vulgarities, hyperbole, and non-literal language and imagery; delivered in the midst of a public and very acrimonious dispute between the Barstool Defendants and Rapaport that would have been obvious to even the most casual observer; and published on social media, blogs, and sports talk radio, which are all platforms where audiences reasonably anticipate hearing opinionated statements.[63]

None of the other items the dispute, including cartoons, digitally altered photos, offensive videos and a t-shirt, rose to the level of defamation, the court held.[64]

D. Public Figure/Private Figure

A music producer accused of drugging and raping singer Kesha, was not deemed a public figure for his defamation case, the appellate

59. *Id.* at *7, *28.

60. *See id.* at *29–30.

61. *See Rapaport*, 2021 U.S. Dist. LEXIS 59797, at *29–30 (quoting Brian v. Richardson, 87 N.Y.2d 46, 51, 660 N.E.2d 1126, 1129, 637 N.Y.S.2d 347, 350 (1995)).

62. *See id.* at *37.

63. *Id.*

64. *See id.* at *41, *46.

division affirmed in *Gottwald v. Sebert*.[65] The court affirmed a partial summary judgment for the plaintiff, Lukasz Gottwald, also known as "Dr. Luke," who argued a series of statements by defendant, her agents and a blogger constituted defamation per se, falsely accusing him of a serious crime.[66] The trial court and appellate division also rejected defenses that the offending statements were not made with actual malice and constituted protected opinion.[67]

The case hinged on whether the plaintiff could be considered a public or private figure, which would require him to prove the false statements were published with actual malice.[68] While plaintiff achieved a degree of success as a music producer and was well-known in the entertainment industry, he was not a household name and could not be considered a celebrity or general-purpose public figure.[69] Also, he was not involved in a matter of public interest.[70] The court then analyzed whether his status could rise to that of a limited purpose public figure.[71]

The court went through a four-prong analysis for a limited purpose public figure: (1) the plaintiff invited public attention and intended to influence others prior to the litigation; (2) the plaintiff voluntarily injected himself into a public controversy; (3) the plaintiff assumed a position of prominence in the public controversy; and (4) he maintained "regular and continuing" access to the media.[72] Plaintiff had not achieved enough fame or recognition to satisfy any of the requirements for public figure status, the appellate division held, writing: "Although Gottwald has sought publicity for his label, his music and his artists—none of which are subject of the defamation here—he never injected himself into the public debate about sexual assault or abuse of the artists in the entertainment industry."[73]

65. *See* 193 A.D.3d 573, 577–78, 148 N.Y.S.3d 37, 43–44 (1st Dep't 2021).

66. *See id.* at 576, 581, 148 N.Y.S.3d at 43, 47.

67. *See id.* at 581, 148 N.Y.S.3d at 47.

68. *See id.* at 576, 148 N.Y.S.3d at 43 (quoting Gertz v. Robert Welch, 418 U.S. 323, 351 (1974)).

69. *See id.* at 577, 148 N.Y.S. 3d at 43 (citing Waldbaum v. Fairchild Publ'ns, 627 F.2d 1287, 1299 (D.D.C. 1980)). Evidence of fame, notoriety or "pervasive involvement in the affairs of society" would factor into public figure status. *Gertz*, 418 U.S. at 352.

70. *See Gottwald*, 198 A.D.3d at 578, 148 N.Y.S.3d at 44.

71. *See id.*

72. *See id.*

73. *Id.*

E. Actual Malice

Former Vice-Presidential candidate Sarah Palin's defamation lawsuit against the New York Times could proceed to trial to determine whether the editorial in question was published with actual malice, the Southern District held in *Palin v. N.Y. Times Co*.[74] Many facts in the case were recited in an earlier appeal to the Second Circuit, which were addressed in last year's Survey.[75]

In short, the court held that the question of whether the newspaper's actions rose to the level of actual malice were factual enough to overcome dueling summary judgment motions.[76] Plaintiff made multiple vociferous arguments that she believed that actual malice should not apply but the New York Times' editorial editor's edits and errors rose to the level of actual malice anyway.[77]

The actual malice standard, under *N.Y. Times Co. v. Sullivan*, requires public figures, such as Palin, to prove that defamatory statements about the plaintiff were published either with known falsity or reckless disregard for the truth.[78] The court's analysis focused on whether the editor, Bennet, made edits and contributions to the editorial in question with actual malice, whether he knew he was adding erroneous content to the editorial, or whether he harbored a blinding bias toward the plaintiff that clouded his judgment as to the truth.[79]

Plaintiff must prove actual malice was committed with clear and convincing evidence and whether an average reader would recognize the information as false.[80] That proof, however, is not easily ascertained and the court pointed to long-standing precedent used to

74. *See* 482 F. Supp. 3d 208, 214–15 (S.D.N.Y. 2020).

75. *See* Palin v. N.Y. Times Co., 933 F. 3d 160, 164–65 (2d Cir. 2019) (discussed in Roy S. Gutterman, *Media Law*, 71 SYRACUSE L. REV. 301, 307–10 (2021)).

76. *See Palin*, 482 F. Supp. 3d. at 221.

77. *See id.* at 214–15 ("[T]his court has 'a constitutional obligation' to follow the Supreme Court's precedent 'unless and until it is overruled by the Supreme Court.'") (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1416 n.84 (2020)).

78. *See id.* at 220 (quoting New York Times v. Sullivan, 376 U.S. 254, 280 (1964)).

79. *See id.* at 220–24.

80. *See id.* at 218, 220–21 (first quoting Solano v. Playgirl, Inc., 292 F.3d 1078, 1084 (9th Cir. 2002); and then quoting Dalbec v. Gentleman's Companion, Inc., 828 F.2d 921, 927 (2d Cir. 1987)).

establish that proof, such as outright fabrication, or statements that are so outrageous that they are improbable or actual known falsity.[81]

The court wrote:

> Ultimately, while much of plaintiff's evidence is circumstantial, as is often the case when actual malice is at issue, and while there is arguably contrary evidence as well, the Court finds that, taking the evidence in the light most favorable to plaintiff, she has sufficiently pointed to enough triable issues of fact that would enable a jury to find by clear and convincing evidence that Bennet knew, or was reckless not to know, that his words would convey the meaning in the minds of the readers that plaintiff asserts was libelous to wit, that she bore a direct responsibility for inciting the Loughner shooting.[82]

Importantly, the court noted that a simple failure to investigate does not necessarily rise to actual malice.[83] The court also acknowledged that the newspaper also retracted the editorial after criticism arose, which helps mitigate accusations of actual malice.[84]

In *Greenberg v. Spitzer*, a state court dismissed the nearly decade-long defamation suit involving a former CEO plaintiff and former New York Governor and Attorney General because there was no proof of publication with actual malice.[85] This protracted litigation emanated from accusations about Maurice Greenberg, the former CEO of AIG, made by Eliot Spitzer in his book.[86] Even though this extensive opinion presented both a detailed account of the facts and blackletter law, the court granted summary judgment following extensive discovery.[87]

The decision focused on plaintiff's inability, as a public figure, to prove that statements were published with actual malice.[88] The court concluded:

81. *See Palin*, 482 F. Supp. 3d. at 218–19 (first quoting *Dalbec*, 828 F.2d at 927; and then quoting St. Amant v. Thompson, 390 U.S. 727, 732 (1968)).

82. *Id.* at 220.

83. *See id.* at 221 (quoting Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 688 (1989)).

84. *See id.* at 222.

85. *See* No. 800004/2018, 2020 N.Y. Slip Op. 51318(U), at 34–35 (Sup. Ct. Putnam Cty Nov. 12, 2020).

86. *See id.* at 2. In footnote 1, the court noted that the dispute spanned 15 years with "armies of lawyers, experts, public relations personnel, and others." *Id.* at 4.

87. *See id.* at 35.

88. *See id.* at 1.

> Plaintiff has an affirmative duty to establish actual malice; that duty is not met simply by posing an alternative factual theory. The support in the record for Defendant's statements negates the conclusion that they were made recklessly. This conclusion is reached with the recognition that public debate is not measured by gentility. Instead, it is measured by "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."[89]

F. Gross Irresponsibility

A bodega owner who found himself in the news after a fifteen-year-old mistakenly sought help in the store and was moments later stabbed to death in front of the store, was deemed a private figure, but was unable to prove a local news report was false or broadcast with gross-irresponsibility, a trial court ruled in *Cruz v. Fox*.[90]For private figures involved in matters of public interest, New York employs the gross irresponsibility standard, an intermediate level of proof less rigorous than actual malice, but more protective of media than simple negligence.[91] Even though the story was substantially true, the court added:

> While the report may have minimized or entirely ignored the fact that the plaintiff called 911, and while plaintiff would naturally have preferred that the report focus on such conduct as would put him in the best light possible, the truth of the Fox report may be established from the complaint alone.[92]

In *Shuman v. N.Y. Magazine*, two news stories about a "complicated" relationship between the plaintiffs and a Harvard professor that included allegations of rape, paternity extortion, and abuse of the university's Title IX process, was both a matter of public

89. *Greenberg*, 2020 N.Y. Slip Op. 51318(U), at 34–35 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

90. *See* No. 27505/2019E, 2020 N.Y. Misc. LEXIS 5324, at *11 (Sup. Ct. Bronx Cty. June 23, 2020) (citing Ryan v. New York Tel. Co., 62 N.Y.2d 494, 503, 467 N.E.2d 487, 482, 478 N.Y.S.2d 823, 828 (1984)) ("The Fox News story was substantially true, it is well established that truth constitutes a complete defense to a defamation claim.").

91. *See id.* at *9–10 (quoting Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975)).

92. *Id.* at *12 (citing, Stega v. N.Y. Downtown Hosp., 31 N.Y.3d 661, 674, 107 N.E.3d 543, 553, 82 N.Y.S.3d 323, 333 (2018)).

interest and not published with gross irresponsibility, a trial court ruled.[93]

First, the court determined that the two articles satisfied the standards for covering a matter of public interest.[94] Plaintiffs argued that because the stories involved sexual and relationship matters they were "solely gossip and prurient," the stories should not be considered matters of public concern, and thus should be subject to a lower level of protection.[95] Even though the media cannot automatically make something a public concern simply by publishing on the topic, the court wrote that so-called "human interest" stories satisfy the matter of public interest standard.[96]

"Here, the core of the articles reasonably relates to deceptive and/or criminal activity in the community, which is of greater public significance than plaintiffs' private sexual encounters," the court wrote.[97] The court also pointed to an earlier proceeding in which another court refused plaintiffs' request to seal documents in the case.[98]

As a matter of public concern, the next substantive issue focused on whether the magazines published stories with gross irresponsibility, which is the standard that New York applies to matters of public concern.[99] Gross irresponsibility, the court explained means: "A publisher acts in a grossly irresponsible manner when it fails to exercise due consideration for the standards of information

93. No. 155577/2020, 2021 N.Y. Slip Op. 50699(U), at 1, 3–4 (Sup. Ct. N.Y. Cty. June 15, 2021) (first citing Ortiz v. Valdescastilla, 102 A.D.2d 513, 518, 478 N.Y.S.2d 895, 899 (1st Dep't 1984); and then citing Gaeta v. New York News, Inc., 62 N.Y.2d 340, 349, 465 N.E.2d 802, 805, 477 N.Y.S.2d 82, 85 (1984)).

94. *Id.* at 3 (first citing *Doe v. Daily News, L.P.*, 167 Misc. 2d 1, 3, 632 N.Y.S.2d 750, 752 (Sup. Ct. N.Y. Cty. 1995)).

95. *Id.* at 3.

96. *Id.* (first citing Huggins v. Moore, 94 N.Y.2d 296, 305, 726 N.E.2d 456, 462, 704 N.Y.S.2d 904, 910 (1999); and then citing *Gaeta*, 62 N.Y.2d at 349, 465 N.E.2d at 805, 477 N.Y.S.2d at 85).

97. *Id.* (first citing Hayt v. Newsday, LLC, 176 A.D.3d 787, 787, 108 N.Y.S.3d 204, 205 (2d Dep't 2019); and then citing Robart v. Post-Standard, 52 N.Y.2d 843, 845, 418 N.E.2d 664, 664, 437 N.Y.S.2d 71, 71 (1981)).

98. *Shuman*, 2021 N.Y. Slip Op. 50699(U), at 3 (citing generally Baldasano v. Bank of New York, 199 A.D.2d 184, 605 N.Y.S.2d 293 (1st Dep't 1993)). "Therefore, there is no clear abuse of discretion, and this Court will not second guess the judgment of the media as to what constitutes a matter of public concern." *Id.* (first citing *Ortiz*, 102 A.D.2d at 518, 478 N.Y.S.2d at 899; and then citing *Gaeta*, 62 N.Y.2d at 349, 465 N.E.2d at 805, 477 N.Y.S.2d at 85).

99. *Id.*

gathering and dissemination ordinarily followed by responsible parties."[100]

In determining whether the magazine, its reporters, and editors acted with gross irresponsibility, the court delved into the interviews and other materials the stories were based on.[101] In addition to interviews with several sources, reporters also relied on court records and, more importantly, a Harvard Title IX investigation into the subject, which covered a six-month investigation based on more than 2,000 lawyers' hours.[102] Reporters also interviewed the plaintiffs and gave them an opportunity to comment on the stories.[103]

Considering all the factors that went into the story, the court held that the magazine and staff "were not grossly irresponsible in their reporting."[104]

G. Fair & Accurate Report Privilege

Summary judgment in a defamation case based on statements in the so-called "Steele Dossier" was appropriate, a trial court ruled in *Fridman v. Buzzfeed, Inc*.[105] This is the latest decision on this case by Russian businessmen objecting to a Buzzfeed article linking them to a Russian plot to disrupt U.S. elections.[106] An earlier dismissal was affirmed by the Appellate Division in 2019.[107]

The fair and accurate report privilege applied to the foreign intelligence report upon which the controversial Buzzfeed article was based, the Supreme Court of New York held.[108] "[The] defendants were within their rights to publish the Dossier without being first required to investigate the internal operations of classified proceedings," the court held.[109]

Further, the court wrote that plaintiffs would not be able to meet the actual malice standard, and that even though the article in question

100. *Id.* (citing Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975)).

101. *Id.*

102. *Shuman*, 2021 N.Y. Slip Op. 50699(U), at 4.

103. *Id.*

104. *Id.*

105. No. 154895/2017, 2021 N.Y. Slip Op. 30860(U), at 11 (Sup. Ct. N.Y. Cty. Mar. 11, 2021).

106. *Id.* at 1–2; *see also* Roy S. Gutterman, *Media Law*, 69 SYRACUSE. L. REV. 937, 952–53 (2019).

107. *See* Fridman v. BuzzFeed, Inc, 172 A.D.3d 441, 441, 97 N.Y.S.3d 476, 476 (1st Dep't 2019).

108. *See Fridman*, 2021 N.Y. Slip Op. 30860(U), at 8.

109. *Id.* at 9.

was not based on subsequent proceedings following the Mueller report and congressional impeachment investigations, "they provide a strong evidentiary foundation for assessing whether the requirements for invoking the Privilege have been met."[110]

In *Haynes v. Bonner*, statements that a former employee made in media interviews, essentially summarizing her sexual harassment lawsuit against her former employers, were privileged under New York Civil Rights Law section 74, a trial court held.[111] The trial court dismissed the defamation per se claim.[112] This case involved allegations made in an underlying employment lawsuit filed against the plaintiff in the defamation case, accusing him of posting a white board in his office with offensive, sexually discriminatory statements.[113] The statements, plaintiff argued were defamation per se because they involved false statements impugning his reputation in his business or profession.[114]

The fair and accurate report privilege under the statute indemnifies speakers or publishers who draw from public records, which in this case involved the underlying employment action filed earlier in federal court.[115] Here, the court found that the defendant recounted many of the claims and statements from the underlying lawsuit.[116] Most critically to the dismissal, the court explained that the fair and accurate report privilege does not require 100 percent accuracy by the speaker.[117] The fact that the underlying lawsuit was dismissed also did not diminish the fair and accurate report privilege because plaintiff alleged that the underlying lawsuit was filed with the intent to harm his reputation.[118]

"'Substantially accurate' is interpreted liberally; the 'test is whether the published account of the proceeding would have a

110. *Id.* at 5.

111. No. 156576/2019, 2020 N.Y. Misc. LEXIS 6993, at *17 (Sup. Ct. N.Y. Cty. June 18, 2020) (citing N.Y. CIV. RIGHTS LAW § 74 (McKinney 2021).

112. *Id.* at *17–18.

113. *Id.* at *1–3. The underlying federal case had been dismissed because of an arbitration clause in the employment contract, which plaintiff in this action argued negated the privilege. *Id.* at *1–2.

114. *Id.* at *4–5.

115. *Haynes*, 2020 N.Y. Misc. LEXIS 6993, at *5–7 (citing N.Y. CIV. RIGHTS LAW § 74 (McKinney 2021)).

116. *Id.* at *9–10.

117. *Id.* at *5 (quoting McRedmond v. Sutton Place Rest. & Bar, Inc., 48 A.D.3d 258, 259, 851 N.Y.S.2d 478, 480 (1st Dep't 2008)) (The quotation "need only be substantially accurate.").

118. *See id.* at *17.

different effect on the reader's mind' than the actual true account," the court wrote.[119] Even though the interviews were not verbatim accounts of the underlying lawsuits, statements made throughout the interviews were related to the statements contained in the underlying lawsuits.[120]

H. Libel-Proof Plaintiffs

Retired baseball player Lenny Dykstra's reputation was already so damaged by the truth—a public history of racist, misogynistic, and homophobic comments as well as his own record of abusing drugs, steroids, bad sportsmanship and criminal activity—that his defamation action against a book publisher had to be dismissed, a state trial court ruled in *Dykstra v. St. Martin's Press*.[121] Further, plaintiff would also be unable to prove that any statements were false and published with actual malice, the court held.[122]

The book, *108 Stitches: Loose Threads, Ripping Yarns and the Damndest Characters from My Time in the Game*, by former New York Mets teammate Ron Darling and his ghostwriter Daniel Paisner was published in 2019 with numerous anecdotes and references to plaintiff.[123]

The most novel part of the court's decision was holding plaintiff as a libel-proof plaintiff, which means he could not show that his reputation was injured or harmed because it was already depleted by the truth.[124] The court explained that the doctrine is not commonly invoked, even though New York has recognized it since 1981.[125] While past criminal conduct is a critical element of a libel proof plaintiff's already-truthfully compromised reputation, other truthful factors can also weigh in on the finding, the court noted.[126]

119. *Id.* at *11 (first quoting Highland Cap. Mgt., L.P. v. Dow Jones & Co., Inc., 178 A.D.3d 572, 573, 116 N.Y.S.3d 18, 19 (1st Dep't 2019); and then quoting Daniel Goldreyer, Ltd. v. Van de Wetering, 217 A.D.2d 434, 436, 630 N.Y.S.2d 18, 23 (1st Dep't 1995)).

120. *See Haynes*, 2020 N.Y. Misc. LEXIS 6993, at *12–13.

121. *See* No. 153676/2019, 2020 N.Y. Slip Op. 31813(U), 19 (Sup. Ct. N.Y. Cty. May 29, 2020).

122. *Id.* at 13.

123. *See id.* at 1–2.

124. *See id.* at 16 (quoting Manfredonia v. Weiss, 37 A.D.3d 286, 286, 829 N.Y.S.2d 508, 509 (1st Dep't 2007)); *see also* Guccione v. Hustle Mag., Inc., 800 F.2d 298, 303 (2d Cir. 1986).

125. *Dykstra*, 2020 N.Y. Slip Op. 31813(U), at 10 (citing Da Silva v. Time Inc., 908 F. Supp. 184, 187 (S.D.N.Y. 1995)).

126. *Id.* at 10 ("The rationale behind the doctrine is that free speech interests should prevail over the interests of an individual who, due to an already soiled reputation, would not be entitled to recover anything other than nominal damages.")

In detailing the numerous reasons why plaintiff was libel-proof, the court devotes considerable space to his highly public history with colorful and graphic descriptions of plaintiff's unethical, illegal behavior as well as public racist, homophobic, and offensive statements.[127] Statements previously published in the media, which Dykstra did not litigate, as well as his own autobiography undercut his claims.[128] The court wrote:

> Dykstra was infamous for being, among other things, racist, misogynist, and anti-gay, as well as a sexual predator, a drug-abuser, a thief, and an embezzler. Further, Dykstra had a reputation—largely due to his autobiography—of being willing to do anything to benefit himself and his team, including using steroids and blackmailing umpires . . . Considering this information, which was presumably known to the average reader of the book, this Court finds that, as a matter of law, the reference in the book has not exposed Dykstra to *any further* "public contempt, ridicule, aversion or disgrace," or "evil opinion of him in the minds of right-thinking persons," or "depravation of friendly intercourse in society."[129]

I. Opinion

Referring to a woman who was paid so-called hush money to mute allegations of an extra-marital affair by Donald Trump as an "extortionist," was deemed a statement of opinion, a district court ruled in *McDougal v. Fox News*.[130] The appellation was broadcast by Tucker Carlson in a segment on the controversy involving Trump and his former lawyer Michael Cohen and a discussion of the payoff to Karen McDougal, a former model who stated she had an affair with Trump.[131]

The court analyzed whether accusing someone of extortion could be considered defamatory or defamation per se as imputing criminal

(quoting Guccione, 800 F.2d at 303) (first citing Stern v. Cosby, 645 F. Supp. 2d 258, 270 (S.D.N.Y. 2009); and then citing Simmons Ford, Inc. v. Consumers Union of U.S., Inc., 516 F. Supp 742, 750–51 (S.D.N.Y. 1981)).

127. *Id.* at 13–14, 16.

128. *See id.* at 13–14.

129. *Id.* at 13 (quoting *Manfredonia*, 37 A.D.3d at 286, 829 N.Y.S.2d at 509) (first citing 161 Ludlow Food, LLC v. L.E.S. Dwellers, Inc., 107 N.Y.S.3d 618 (Sup. Ct. N.Y. Cty. 2018); then citing Guccione, 800 F.2d at 304; and then citing Hinsdale v. Orange Cty. Publ'ns, Inc., 17 N.Y.2d 284, 290, 217 N.E.2d 650, 653, 270 N.Y.S.2d 592, 596 (1966)).

130. 489 F. Supp. 3d 174, 188 (S.D.N.Y. 2020).

131. *Id.* at 177.

activity.[132] This question was essentially answered no by the United States Supreme Court in *Greenbelt Cooperative Publishing Association v. Bresler*, which held that accusations of "extortion" or "blackmail" could not be interpreted in a literal sense because the language is rhetorical hyperbole.[133] The court held:

> The context in which the offending statements were made here make it abundantly clear that Mr. Carlson was not accusing Ms. McDougal of actually committing a crime. As a result, his statements are not actionable. While Mr. Carlson used the words "extortion," Defendant submits that the use of that word or an accusation of extortion, absent more, is simply "loose, figurative, or hyperbolic language" that does not give rise to a defamation claim.[134]

The Court was also firm that Carlson and Fox did not act with actual malice, which applies "a high bar," for plaintiffs involved in matters of public interest or public figures.[135] Discussing the Second Circuit's 2019 ruling in *Palin v. N.Y. Times Co.*, the court found no proof that defendant published statements with either "deliberate or reckless disregard for the truth."[136]

In its conclusion, the court held:

> [T]he statements are rhetorical hyperbole and opinion commentary intended to frame a political debate, and, as such, are not actionable as defamation. In addition, as a public figure, Ms. McDougal must raise a plausible inference of actual malice to sustain her defamation claim. She failed to do so.[137]

In *Brimelow v. N.Y. Times Co.*, descriptions of an author as "white nationalist," "white supremacist" and "anti-Semitic" in a series of articles published in a newspaper and its online sister publication could not meet the actual malice standard and were non-actionable as

132. *See id.* at 182.

133. *Id.* (first citing Greenbelt Coop. Pub. Ass'n v. Bresler, 398 U.S. 6, 14 (1970); then citing Hogan v. Winder, 762 F.3d 1096, 1108 (10th Cir. 2014); and then citing Small Bus. Bodyguard Inc. v. House of Moxie, Inc., 230 F. Supp. 3d 290, 313 (S.D.N.Y. 2017)). The court also applied Milkovich v. Lorain J. Co., 497 U.S. 1 (1990) (holding unprovable statements of rhetorical hyperbole would be immune from liability under the First Amendment).

134. *Id.* at 183 (quoting Brief for Defendant at 9, McDougal v. Fox News Network, LLC, 489 F. Supp. 3d 174 (S.D.N.Y. 2020) (No. 1:19-cv-11161-MKV)).

135. *See McDougal*, 489 F. Supp. 3d at 185.

136. *Id.* at 186 (quoting Palin v. N.Y. Times Co., 940 F.3d 804, 813 (2d Cir. 2019)).

137. *Id.* at 188.

a matter of opinion, a federal court ruled.[138] Adopting broad and "holistic" approach to determining whether the statements were factual or opinion, the court applied a three-prong analysis: (1) whether the language has a precise meaning; (2) whether it was capable of being proven true or false; and (3) whether context could signal the reader that the allegations are opinion.[139]

While some statements in the articles were deemed factual and others pure opinion, plaintiff's status as a high-profile, controversial author, required proof of falsity with actual malice, which was not shown in the pleadings.[140]

A series of real-time tweets documenting a company's earnings call were not actionable as pure opinion, the appellate division affirmed in *Eros International, PLC v. Mangrove Partners*.[141] "[T]he tweets come across as immediate, minute-to-minute, off-the-cuff, gut responses to comments made by plaintiff's representatives on an earnings call."[142]

In another appellate division decision, a series of statements accusing the plaintiff of being racist, including photos linking him with violent, racist imagery, were properly dismissed as pure opinion and rhetorical hyperbole, the court ruled in *Bacon v. Nygard*.[143] Dispute between the parties emanated from a property dispute in the Bahamas and included more than 100 statements, some which could have a defamatory impact.[144]

J. Libel in Fiction

A defamation claim against the writers and producers of the Showtime series *Billions* won dismissal because plaintiffs could not be specifically identified in the fictional television show, the court ruled in *Cayuga Nation v. Showtime Networks, Inc*.[145] The decision

138. *See* No. 20 Civ. 222 (KPF), 2020 U.S. Dist. LEXIS 237463, at *3–4, *23 (S.D.N.Y. Dec. 17, 2020).

139. *Id.* at *13–14 (citing Gross v. New York Times Co., 82 N.Y.2d 146, 153, 623 N.E.2d 1163, 1167, 603 N.Y.S.2d 813, 817 (1993)).

140. *See id.* at *32.

141. 191 A.D.3d 465, 465, 140 N.Y.S.3d 518, 519 (1st Dep't 2021).

142. *Id.* at 466, 140 N.Y.S.3d at 520 (citing Davis v. Boeheim, 24 N.Y.3d 262, 270, 22 N.E.3d 999, 1005, 998 N.Y.S.2d 131, 137 (2014)).

143. *See* 189 A.D. 3d 530, 531, 136 N.Y.S.3d 297, 299 (1st Dep't 2020) (citing *Gross*, 82 N.Y.2d at 153–54, 623 N.E.2d at 1168, 1167 N.Y.S.2d at 818).

144. *Id.* at 530, 136 N.Y.S.3d at 298.

145. *See* No. 157902/2019, 2020 N.Y. Slip Op. 32326(U), at 11 (Sup. Ct. N.Y. Cty. July 17, 2020).

was affirmed by the appellate division.[146] The episode initially ran on May 5, 2019, featured a series of exchanges between the main character Chuck Rhoades Jr. and fictional members of the Cayuga Nation tribe in which characters were depicted forging a shady land deal and possibly committing crimes.[147]

Plaintiff, the Cayuga Nation argued that the depictions of two characters, members of the tribal council, harmed the nation's reputation by imputing criminal activity and unethical conduct.[148] The plaintiffs also argued that the depictions violated their right to privacy under New York law as an unlawful appropriation of image and likeness for commercial purposes.[149]

In dismissing the defamation claims, the court held that the sovereign nation, much like any government organization, could not bring a defamation lawsuit.[150] Further, the plaintiffs would be unable to establish the prima facie element that the fictional television series was actually of and concerning or was specifically about them.[151] The court wrote:

> Further complicating the issue is the counterintuitive nature of a libel by fiction claim. The plaintiff must simultaneously assert that the character is "of and concerning" him and her because of their similarities, but also must deny significant aspects of the fictional character, i.e., the defamatory aspects of the character.[152]

Libel in fiction claims are rarely successful because the plaintiff must show that the fictional character is "so closely akin to the real person claiming to be defamed that a reader [or viewer] of the [alleged defamatory work], knowing the real person, would have no difficulty linking the two. Superficial similarities are insufficient."[153]

Additionally, the court noted that the show's credits include a disclaimer reiterating the fictitious nature of the show and that "[a]ny

146. Cayuga Nation v. Showtime Networks, Inc., 191 A.D.3d 573, 573, 138 N.Y.S.3d 873, 873 (1st Dep't 2021).

147. *Cayuga Nation*, 2020 N.Y. Slip Op. 32326(U), at 2–3.

148. *See id.* at 5.

149. *Id.* at 10 (citing N.Y. CIV. RIGHTS LAW § 51 (McKinney 2022)).

150. *See id.* at 7.

151. *See id.* at 10.

152. *Cayuga Nation*, 2020 N.Y. Slip Op. 32326(U), at 8–9.

153. *Id.* at 9 (citing Springer v. Viking Press, 90 A.D.2d 315, 320, 547 N.Y.S.2d 246, 249 (1st Dep't 1982)).

similarity to actual persons, living or dead, or to actual events, is purely coincidental."[154]

K. Damages

A Major League Baseball umpire was awarded $500,000 in defamation damages after a former player broadcast statement on a podcast accusing him of biased calls in games in *West v. Lo Duca*.[155] At the time of the podcast and the litigation, plaintiff, Joseph H. West, was the second-leading major league umpire in major league history and well on his way to breaking the record and eventual election to the baseball hall of fame.[156]

Statements on retired catcher Paul Lo Duca's podcast accused West of, among other things, shading ball and strike calls with a particular pitcher, who Lo Duca said curried favor with the umpire by lending him a vintage car.[157]

Because of a default judgment, plaintiff's defamation and defamation per se claims went to an inquest on the issue of damages, which defendant also did not challenge.[158] Plaintiff established sufficient special damages, provable monetary loss, including costs associated with reputation management consultants and other provable losses.[159]

As a per se claim arguing that the provably false statements imputed criminal activity—the intentional biased calls in baseball games inspired by bias and bribes—plaintiff was not required to plead general damages.[160] "In such actions, a successful plaintiff may recover reasonable compensation for mental anguish, loss of reputation, and humiliation," the court wrote.[161] The court added:

> Given the widespread dissemination of the defamatory statement at issue here, the nature of the statement and the legitimate anxiety that the plaintiff suffered in connection with

154. *Id.* at 2, 10.

155. *See* No. 160250/2019, 2021 N.Y. Slip Op. 31186(U), at 1, 11 (Sup. Ct. N.Y. Cty. Apr. 9, 2021).

156. *Id.* at 2.

157. *Id.* at 1.

158. *See id.*

159. *See id.* at 8 (quoting Liberman v. Gelstein, 80 N.Y.2d 429, 434–35, 605 N.E.2d 344, 346, 590 N.Y.S.2d 857, 860 (1992)).

160. *West*, 2021 N.Y. Slip Op. 31186(U), at 6–7 (citing Liberman, 80 N.Y.2d at 435, 605 N.E.2d at 347–48, 590 N.Y.S.2d at 860–61).

161. *Id.* at 7 (citing Nolan v. State of New York, 158 A.D.3d 186, 193–94, 69 N.Y.S.3d 277, 282–83 (1st Dep't 2018)).

> the possibility that he will not be elected to the Hall of Fame because of the statement, the court concludes that the plaintiff is entitled to an award of $250,000 for past mental anguish and emotional distress, from the date of the publication until the date of the inquest.[162]

On the issue of special damages, a plaintiff's compensation must be both probable and reasonable.[163] The witnesses' estimate that it would cost plaintiff more than $11 million to repair his reputation was too speculative.[164]

In *Pivar v. Kratz*, a statement linking an art patron to accused sex trafficker Jeffrey Epstein was factual and not susceptible of a defamatory meaning, a trial court ruled.[165] The statement that plaintiff had "introduced" Epstein to an art academy in the 1980s and then served on the board with him did not carry a defamatory connotation under the libel per quod[166] or libel per se causes of action.[167]

The court held: "Based on the subject matter of the article, reasonable people would not read the alleged defamatory statement and conclude that plaintiff has a connection to a crime, but merely that an introduction was made several decades ago."[168]

L. Section 230 Immunity

A cable tv personality who reposted two photos with a new potentially defamatory caption could not invoke section 230 immunity under the Communications Decency Act, the Second Circuit ruled in

162. *Id*. (citing Yammine v. DeVita, 43 A.D.3d 520, 522–23, 840 N.Y.S.2d 652, 654 (3d Dep't 2007)).

163. *See id.* at 8–10.

164. *See d.* at 9.

165. No. 154794/2020, 2021 N.Y. Misc. LEXIS 1522, at *6 (Sup. Ct. N.Y. Cty. Apr. 2, 2021).

166. Libel per quod would require additional proof that the statement was defamatory or at least proof connecting the allegation to a defamatory meaning or at least proof of special damages compared to the four categories of libel per se where the damages are implied. *See id.* at *3–5 (citing RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977)).

167. *Id.* at *9. The court lists the four categories of libel per se, in which general damages are implied or do not need to be proven: 1) falsely accusing the plaintiff of a serious crime; 2) falsely injuring the plaintiff in his or her business, trade or profession; 3) imputing a loathsome disease; or 4) imputing unchastity of a woman. *Id.* at *8–9 (citing Liberman v. Gelstein, 80 N.Y.2d 429, 435, 605 N.E.2d 344, 347, 590 N.Y.S.2d 857, 860 (1992)).

168. *Id.* at *9 ("[I]t is evident that the statement does not satisfy any of the per se exceptions.").

La Liberte v. Reid.[169] The plaintiff, Roslyn La Liberte, was photographed speaking with her mouth wide open into a microphone at a city council meeting in California debating hot-button immigration issues.[170]

A young man she was talking with appeared in the photo, which was posted on social media and then reposted by defendant, television host, Joy Reid, who added her commentary calling La Liberte a racist.[171] Reid compared the photo to a famous photograph from 1957 Little Rock where racist whites yelled epithets at a black student.[172]

This procedurally-complicated defamation case was filed in the Eastern District of New York but applied and discussed California substantive law on defamation and whether the plaintiff should qualify as a limited purpose public figure or a private figure.[173] Because the court applied California substantive law, the discussion in this article will not address the substantive elements of California tort law.

The Second Circuit, however, ruled on two critical procedural issues: whether California's Anti-Strategic Lawsuits Against Public Participation (Anti-SLAPP) law should apply and whether the defendant had a viable defense under the Communications Decency Act's section 230.[174] There is significant debate among circuits whether a state's Anti-SLAPP law[175] can be applied in federal court.[176] The law provides protections for speakers by affording defendants grounds for dismissal and collection of attorney's fees when lawsuits are aimed at the content of their speech.[177] The court found that California's Anti-SLAPP statute was somewhat duplicative of Federal Rules of Civil Procedure 12 motion to dismiss and 56 motion for summary judgment.[178]

169. *See* 966 F.3d 79, 83 (2d Cir. 2020).

170. *See id.*

171. *Id.* at 83, 94.

172. *Id.* at 83. In addition to describing what transpired in the photograph, Reid added, "He is 14 years old. She is an adult. Make the picture black and white and it could be the 1950s and the desegregation of a school. Hate is real, y'all. It hasn't even really gone away." *Id.* at 84.

173. *See La Liberte*, 966 F.3d at 83. The District Court's dismissal on plaintiff's status was overturned in this opinion.

174. *See id.* at 83, 85.

175. CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2021).

176. *See La Liberte*, 966 F.3d at 86.

177. *See id.* at 85 (first citing Annette F. v. Sharon S., 15 Cal. Rptr. 3d 100, 108 (Cal. Ct. App. 2004); and then citing CAL CIV. PROC. CODE § 425.16(c)(1)).

178. *Id.* at 87.

The section 230 immunity analysis provided a more substantive and practical discussion of contemporary media law issues and the merger of traditional journalism or commentary and modern social media. This section of the CDA states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[179]

Courts use a three-prong analysis to determine whether a speaker has immunity under the law: (1) whether the defendant is a provider or user of an interactive computer service; (2) whether the claim on information is provided by another information content provider; and (3) whether the claim treats the defendant as a publisher or speaker of the information.[180]

The second prong, the court held, was "dispositive" because not only did the defendant repost the tweet, she added her own commentary.[181] The court found no support for the defendant's argument that she should not be liable for any defamatory implication attached to the retweeted photos.[182] The circuit applies a "material contribution" test to establish liability for online content or re-posts and re-tweets.[183] Again, defendant's argument failed because she did not merely pass along or retweet the photographs and the underlying commentary, but she wrote and attached her own commentary to the photos which carried a defamatory connotation.[184]

There was no third-party "passing along" of the content.[185] The court wrote:

> Reid is arguing that a plaintiff can sue only the first defamer. If that were so, a post by an obscure social media user with few followers, blogging in the recesses of the internet, would allow everyone else to pile on without consequence. No one's reputation would be worth a thing.[186]

179. 47 U.S.C. § 230(c)(1) (2019).

180. *See La Liberte*, 966 F.3d at 89 (quoting FTC v. LeadClick Media, LLC, 838 F.3d 158, 173 (2d Cir. 2016)).

181. *See id.*

182. *See id.* at 89–90.

183. *Id.* at 90 (first citing *LeadClick*, 838 F.3d at 174; and then citing Force v. Facebook, Inc., 934 F.3d 53, 68 (2d Cir. 2019)).

184. *See id.*

185. *La Liberte*, 966 F.3d at 90.

186. *Id.*

M. Anti-SLAPP

The November 2020 revisions to New York's Anti-SLAPP law strengthened the defense against lawsuits aimed at punishing public participation by fully incorporating the actual malice standard for cases involving any matter of public interest.[187] The amendments to the nearly 30-year-old law, broaden the definition of public participation and also shift the burden of a motion to dismiss under CPLR 3211(g) to the plaintiff in a defamation lawsuit.[188]

The new law covers "any communication" relating to "the public or a public forum in connection with an issue of public interest."[189] The broadening also imports the constitutional standard for free speech on matters involving a public interest.[190] The amendment states:

> In an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.[191]

Section 70 adds an affirmative cause of action for the defendant to be able to recover damages from the plaintiff in such a lawsuit as well as court costs and attorneys' fees.[192]

The law was applied in a number of cases, most notably in *Palin v. N.Y. Times Co.*, in which shortly after the law was enacted, Judge Rakoff found it could be applied retroactively.[193] The anti-SLAPP law played prominently in two state court defamation cases: *Project*

187. *See* N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (McKinney 2021). The acronym SLAPP stands for Strategic Lawsuit Against Public Participation. These laws are on the books in more than thirty states and the District of Columbia.

188. *See* CIV. RIGHTS § 76-a. The law's earlier version applied only to parties who were linked to public participation through things like public permit applications or specific public participation.

189. CIV. RIGHTS § 76-a(1)(a)(1).

190. CIV. RIGHTS § 76-a(1)(a)(2).

191. CIV. RIGHTS § 76-a(2).

192. *See* CIV. RIGHTS § 70-a(1).

193. *See* Palin v. New York Times, 510 F. Supp. 3d 21, 29 (S.D.N.Y. 2020) (applying the statute but reaffirming that plaintiff already had the burden of proving the statements at issue were false and published with actual malice); *see also* Coleman v. Grand, 523 F. Supp. 3d 244, 258 (E.D.N.Y. 2021) (applying the law retroactively in a libel dispute associate with a failing relationship).

Veritas v. N.Y. Times Co.[194] and *Sackler v. American Broadcasting Co.*[195]

In *Project Veritas v. N.Y. Times Co.*, a trial court denied a motion to dismiss under New York's Anti-SLAPP statute, ruling the plaintiff, a right-wing new media start-up, could establish a legitimate defamation claim following a critical article.[196] This lawsuit, which the court characterized as a fight between a media "Goliath" and a new upstart, emanated from New York Times articles about Project Veritas videos critical of election practices in Minnesota.[197] Among other criticism, the newspaper called the videos "deceptive," which the court found to be a factual statement susceptible of a defamatory meaning.[198] The court denied defendant's motion to dismiss.[199]

In *Sackler v. American Broadcasting Co.*, publication of a photograph of the wrong person in a news story about the controversial family behind the pharmaceutical company that produces Oxycontin did not amount to actual malice for defamation purposes, a trial court held.[200] Here, the New York Post newspaper published a photo of the wrong David Sackler, erroneously linking plaintiff, a health and wellness consultant, to the David Sackler, who was the head of Purdue Pharmaceutical.[201]

Though much of the opinion focuses on the changes to New York's Anti-SLAPP law and their retroactive application,[202] the substantive question was whether the newspaper's erroneous publication and misidentification rose to the level of actual malice, which the court held did not.[203] A mistake and even a failure to investigate does not constitute actual malice, the court held.[204] There was no evidence that the publishers acted recklessly or should have

194. No. 63921/2020, 2021 N.Y. Misc. LEXIS 2264, at *14 (Sup. Ct. Westchester Cty. Mar. 18, 2021).

195. 71 Misc. 3d 693, 695, 144 N.Y.S.3d 529, 531 (Sup. Ct. N.Y. Cty. 2021).

196. *See* 2021 N.Y. Misc. LEXIS 2264, at *24–25.

197. *Id.* at *1, *16 (citing Cholowsky v. Civiletti, 16 Misc. 3d 1138(A), 1138(A), 851 N.Y.S. 2d 57, 57 (Sup. Ct. Suffolk Cty. 2007)).

198. *Id.* at *9, *10–11.

199. *Id.* at *25.

200. *See* 71 Misc. 3d at 701, 144 N.Y.S.3d at 535.

201. *Id.* at 694, 144 N.Y.S.3d at 530.

202. *See id.* at 698, 144 N.Y.S.3d at 532–33.

203. *See id.* at 700, 144 N.Y.S.3d at 534.

204. *Id.* (quoting Harte-Hanks Commc'ns v. Connaughton, 491 U.S. 657, 693 (1989)) (citing St. Amant v. Thompson, 390 U.S. 727, 733 (1968)).

done more rigorous investigation before publishing or "entertained serious doubts as to the truth of [the] publication," the court found.[205]

N. Procedural

1. Standing

Though no media entities were implicated in the *Carroll v. Trump* defamation cases, state and federal courts weighed in on the unique question of whether the sitting President could stand as a defendant in a libel and slander action emanating from comments he made about allegations that he raped a newspaper columnist more than twenty years earlier.[206] Excerpts of plaintiff's book, which was released in 2019, appeared in New York Magazine.[207] The excerpts detailed the author's encounter with Trump in the 1990s in a New York City department store, in which she says he forcibly raped her.[208]

Following publication, Trump issued a statement and made comments calling the allegations "fake news," and made numerous disparaging remarks about both the allegations and the author herself.[209] Trump essentially called Carroll a liar, prompting the current tort-based defamation case.

The substantive and unique elements at issue in this opinion revolve around Trump's attempt to have the Department of Justice intervene in his defense and Trump's argument of immunity under the Federal Tort Claims Act (FTCA),[210] which exempts federal employees from tort liability under the scope of their employment.[211]

Because Trump's potentially defamatory statements were related to his personal conduct related to his behavior decades before he was elected president, the FTCA or other calls for sovereign immunity were inapplicable.[212] Thus, the statements at issue were not made

205. *Sackler*, 71 Misc. 3d at 700, 144 N.Y.S.3d at 534 (quoting *St. Amant*, 390 U.S. at 731).

206. *See* 498 F. Supp. 3d 422, 426 (S.D.N.Y. 2020). Before being removed to federal court, a New York supreme court ruled that the case could proceed against the President over his request to stay the case. *See* Carroll v. Trump, No. 160694/2019, 2020 N.Y. Slip Op. 32571(U), at 4 (Sup. Ct. N.Y. Cty. Aug. 3, 2020).

207. *See Carroll*, 498 F. Supp. 3d at 431.

208. *See id.* at 430.

209. *See id.* at 431–32.

210. 28 U.S.C. § 1346(b)(1) (2019).

211. *See Carroll*, 498 F. Supp. 3d at 426–29.

212. *See id.* at 428, 450.

within the scope of Trump's official governmental duties.[213] His statements, the court wrote:

> [T]he undisputed facts demonstrate that President Trump was not acting in furtherance of any duties owed to any arguable employer when he made the statements at issue. His comments concerned an alleged sexual assault that took place several decades before he took office, and the allegations have no relationship to the official business of the United States. To conclude otherwise would require the Court to adopt a view that virtually everything the president does is within the public interest by virtue of his office. The government has provided no support for that theory, and the Court rejects it as too expansive.[214]

The court also held that the Office of the President was not covered under the FTCA or the subsequent Westfall Act.[215] While other federal officers are enumerated in the statute's definitions, the presidency itself is not, nor does an in-depth review of both statutes and caselaw suggest any finding that the presidency should be covered under the law.[216]

2. Choice of Law

The Second Circuit affirmed dismissal of a defamation claim brought by an out-of-state Justice Department lawyer, holding the case was properly situated and properly dismissed under New York's fair report privilege in *Kinsey v. N.Y. Times Co*.[217] Plaintiff argued the newspaper's account and descriptions of a sexual encounter with an employee at an office party in Washington, D.C. were false and defamatory.[218] The news reports, however, drew descriptions from court records, which were deemed absolutely privileged under New York's fair and accurate report privilege.[219]

While the application of the privilege was critical, it depended on the court's finding that New York was the proper venue for the lawsuit

213. *See id.* at 456–57.

214. *Id.* at 457.

215. *See id.* at 439.

216. *Carroll*, 498 F. Supp. 3d at 435–39.

217. 991 F.3d 171, 174 (2d Cir. 2021); *see* Roy S. Gutterman, *Media Law*, 71 SYRACUSE L. REV. 301, 320 (2021).

218. *See Kinsey*, 991 F.3d at 175.

219. *Id.* at 178–79 ("A statement comes within the privilege and 'is deemed a fair and true report if it is substantially accurate . . .'") (quoting Friedman v. Bloomberg L.P., 884 F.3d 83, 93 (2d Cir. 2017)).

by a Maryland resident who raised questions about events that occurred in Washington, D.C.[220]

Even though the court acknowledged that defamation law aims to protect a plaintiff's reputation, which is largely considered a local issue, reputation gets weighed against a national publication.[221] Because the newspaper is headquartered in New York and published a national story, the court affirmed that New York law would be appropriate.[222]

Reiterating the choice of law analysis, the Second Circuit affirmed the situs, pointing to: weighing the factors and interests including where the plaintiff suffered the most significant injury; where the statements were published; where the allegedly defamatory statements took place, and the policy implications of which state interest should control.[223]The court wrote:

> New York is the jurisdiction with the most significant interest in the litigation. As its name suggests, the Times is domiciled in New York and the alleged defamatory statement emanated from New York. Moreover, while Maryland has an interest in protecting its citizens from defamatory conduct, New York has strong policy interests in regulating the conduct of its citizens and media. The above-listed factors therefore weigh in favor of applying New York's fair report privilege to the instant dispute.[224]

3. Other Procedural Issues

A defamation claim based on court proceedings and papers that was already dismissed in a different lawsuit involving the same plaintiff was properly dismissed on procedural grounds, the appellate division affirmed in *Napoli v. Breaking Media, Inc*.[225] The underlying

220. *See id.* at 178.

221. *See id.* at 177 (quoting Catalanello v. Kramer, 18 F. Supp. 3d 504, 512 (S.D.N.Y 2014)).

222. *See id.* at 178.

223. *See Kinsey*, 991 F.3d at 177 (quoting Condit v. Dunne, 317 F. Supp. 2d 344, 353–54 (S.D.N.Y. 2004) (first citing Davis v. Costa-Gavras, 580 F. Supp. 1082, 1091 (S.D.N.Y. 1984); and then citing Merrill Lynch, Pierce, Fenner & Smith Inc. v. Savino, No. 06-CV-868, 2007 U.S. Dist. LEXIS 23126, at *21–22 (S.D.N.Y. Mar. 23, 2007)). The court also discussed the nine choice of law factors applied in the *Condit v. Dunn* defamation case. *Id.* at 177–78 (quoting *Condit*, 317 F. Supp. 2d at 353) ("In multistate defamation cases such as this one, 'the tort essentially lacks a locus, but rather injures plaintiff everywhere at once.'").

224. *Id.* at 178.

225. *See* Napoli v. Breaking Media, Inc., 187 A.D.3d 1026, 1028, 131 N.Y.S.3d 264, 265 (2d Dep't 2020).

dispute between plaintiff's husband and his law firm was the subject of an unsuccessful defamation suit against the New York Post, in a case pointing to fair and accurate report privilege under New York Civil Rights Law section 74.[226]

Because defendant's news coverage was essentially the same as the previously published coverage in the New York Post, which was dismissed and affirmed on appeal, the court applied the collateral estoppel and res judicata doctrines.[227]

The court held: "[B]y making substantially the same statements that were made in the Post articles, the defendants established that the compliant is barred by the doctrine of collateral estoppel."[228]

III. NEWSGATHERING

The New York Times won a freedom of information challenge, with a court ordering the Department of Health and Human Services to release a report on a doctor who committed sexual abuse on Native American reservations, a federal court ordered in *N.Y. Times Co. v. Department of Health and Human Services*.[229] The court held that the department's denial under the Freedom of Information Act's exceptions under both statutory and medical documents exceptions was not valid.[230]

The court went through a three-prong analysis: (1) determining whether the documents are personnel and medical documents; (2) whether the privacy interests are "'measurable' or 'more than de minimis'"; and (3) does the privacy interest outweigh to public's

226. *See* Napoli v. N.Y. Post, 175 A.D.3d 433, 434, 107 N.Y.S.3d 279, 281 (1st Dep't 2019) (first citing N.Y. CIV. RIGHTS LAW § 74 (McKinney 2021); then citing McRedmond v. Sutton Place Rest. & Bar Inc., 48 A.D.3d 258, 259, 851 N.Y.S.2d 478, 479–80 (1st Dep't 2008).

227. *See Breaking Media Inc.*, 187 A.D.3d at 1027, 131 N.Y.S.3d at 265 (quoting Ryan v. N.Y. Tel. Co., 62 N.Y.2d 494, 500, 467 N.E.2d 487, 490, 478 N.Y.S.2d 823, 826 (1984)).

228. *Id.* at 1028, 131 N.Y.S.3d at 265 (first citing N.Y. C.P.L.R. 3211(a)(5) (McKinney 2021); then citing Karakash v. Trakas, 163 A.D.3d 788, 789–90, 82 N.Y.S.3d 435, 438 (2d Dep't 2018); and then citing Constantine v. Tchrs. Coll., 93 A.D.3d 493, 494, 940 N.Y.S.2d 75, 76 (1st Dep't 2012)).

229. *See* N.Y. Times Co. v. Dep't of Health & Hum. Servs., 513 F. Supp. 3d 337, 342 (S.D.N.Y. 2021).

230. *Id.* at 349, 355–56 (quoting Carney v. U.S. Dep't of Just., 19 F.3d 807, 812 (2d Cir. 1994) (applying Freedom of Information Act (FOIA) 5 U.S.C. § 552 (2018)).

interest in the material.[231] Shortly after the decision, the government sought and won a stay, freezing disclosure pending an appeal.[232]

IV. INVASION OF PRIVACY

Litigants pressed New York's invasion of privacy statute in cases under New York Civil Rights Law sections 50–51, which prohibits the unauthorized commercial, trade or advertising use of the plaintiff's name, image or likeness.[233]

In the latest iteration of the *Porco v. Lifetime Enterprise* case, the appellate division rejected plaintiff's invasion of privacy claims relating to a docudrama based on a high-profile Long Island murder trial.[234] The court found that plaintiff's invasion of privacy claim under sections 50–51 was nothing more than a veiled false light claim, a common law invasion of privacy tort not recognized in New York.[235]

The court applied New York's broad definition of newsworthiness, a defense to the commercial appropriation claim, because the film was based on a highly public criminal trial in which plaintiff was accused and convicted of murdering his parents.[236] Thus, the television docudrama, based on true events, was "indisputably

231. *Id.* at 355 (quoting Associated Press v. U.S. Dep't of Def., 554 F.3d 274, 291–92 (2d Cir. 2009)) (first citing Associated Press, 554 F.3d at 291–93; and then citing Wood v. FBI, 432 F.3d 78, 87 (2d Cir. 2005)).

232. *See* N.Y. Times Co. v. Dep't of Health & Hum. Serv., No. 20 Civ. 3063 (GWG), 2021 U.S. Dist. LEXIS 13279 at *1, *7 (S.D.N.Y. Jan 25, 2021).

233. N.Y. CIV. RIGHTS LAW § 50–51(McKinney 2021).

234. *See* Porco v. Lifetime Ent. Servs., 195 A.D.3d 1351, 1357, 150 N.Y.S.3d 380, 386–87 (3d Dep't 2021) (quoting Howell v. N.Y. Post Co., 81 N.Y.2d 115, 123, 612 N.E.2d 699, 703, 596 N.Y.S.2d 350, 354 (1993) (citing Porco v. Lifetime Ent. Servs. LLC, 147 A.D.3d 1253, 1255, 47 N.Y.S.3d 769, 772 (3d Dep't 2017)).

235. *Id.* at 1357, 150 N.Y.S.3d at 386 (first citing Messenger v. Gruner + Jahr Printing & Publ'g, 94 N.Y.2d 436, 448, 727 N.E.2d 549, 556, 706 N.Y.S.2d 52, 59 (2000); and then citing *Howell*, 81 N.Y.2d at 123, 612 N.E.2d at 703, 596 N.Y.S.2d at 354).

236. *See id.* at 1353–54, 150 N.Y.S.3d at 383 (quoting *Messenger*, 94 N.Y.2d at 442, 727 N.E.2d at 552, 706 N.Y.S.2d at 55) (citing Lohan v. Take-Two Interactive Software, Inc., 31 N.Y.3d 111, 120, 97 N.E.3d 389, 393, 73 N.Y.S.3d 780, 784 (2018)).

events of public interest."[237] There was no commercial element to the film.[238] The court wrote:

> [T]he film is a dramatization that at times departed from actual events, including by recreating dialogue and scenes using techniques such as flashbacks and staged interviews, giving fictional names to some individuals and replacing others altogether with composite characters. The film nevertheless presents a broadly accurate depiction of the crime, the ensuing criminal investigation and the trial that are matters of public interest. More importantly, the film makes no effort to present itself as unalloyed truth or claim that its depictions of plaintiffs was entirely accurate . . . [239]

The invasion of privacy litigation brought by a group of models against strip clubs that used their photos without their consent could go forward for some plaintiffs whose claims were not barred by releases or the one-year statute of limitations, the Second Circuit held in *Electra v. 59 Murray Enters*.[240]

V. LEGISLATIVE MATTERS

The repeal of New York Civil Rights Law section 50-a could have implications on newsgathering by potentially lifting the veil on a range of law enforcement disciplinary records. Governor Andrew Cuomo signed the repeal on June 12, 2020.[241] The original law, passed in 1976, was initially intended to shield police disciplinary records from criminal defense attorneys.[242] In the wake of several high-profile police brutality cases across the country, including New York's Eric Garner police brutality case, the legislature sought to open up access

237. *Id*. at 1356, 150 N.Y.S.3d at 385 (first citing Alfano v. NGHT, Inc., 623 F. Supp. 2d 355, 359 (E.D.N.Y. 2009); then citing Freihofer v. Hearst Corp., 65 N.Y.2d 135, 140–41, 480 N.E.2d 349, 353, 490 N.Y.S.2d 735, 737 (1985); and then citing Bement v. N.Y.P. Holdings, 307 A.D.2d 86, 89–90, 760 N.Y.S.2d 133, 136 (1st Dep't 2003)).

238. *See id*. at 1357, 150 N.Y.S.3d at 386 (first citing Hicks v. Casablanca Recs., 464 F. Supp. 426, 432 (S.D.N.Y. 1978); then citing Univ. of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp., 22 A.D.2d 452, 457, 256 N.Y.S.2d 301, 306 (1st Dep't 1965)).

239. *Porco*, 195 A.D.3d at 1356, 150 N.Y.S.3d at 386.

240. *See* 987 F.3d 233, 240 (2d Cir. 2021); *see also* Roy S. Gutterman, *Media Law*, 70 SYRACUSE L. REV. 535, 553–54 (2020) (providing further discussion of this case).

241. N.Y. CIV. RIGHTS LAW § 50-a (Mckinney 2021); S. B. 8496, 243d Sess. (N.Y. 2020).

242. *See* 2019 LEGIS. BILL HIST. N.Y. S.B. 8496 (LEXIS) (Justification).

to records.[243] Over the years, courts have upheld the provision with the Court of Appeals recently in 2018 weighing in on the matter in *N.Y. Civil Liberties Union v. N.Y. City Police Department*.[244]

The repeal also implicates the Freedom of Information Law, which the Senate justification wrote:

> Due to the interpretation of Section 50-a, records of complaints or findings of law enforcement misconduct that have not resulted in criminal charges against an officer are almost entirely inaccessible to the public or to victims of police brutality. . . . The State Committee on Open Government has stated that Section 50-a 'creates a legal shield that prohibits disclosure, even when it is known that misconduct has occurred.' FOIL's public policy goals, which are to make government agencies and their employees accountable to the public, are thus undermined. Police-involved killings by law enforcement officials who have had histories of misconduct complaints, and in some cases recommendations of departmental charges, have increased the need to make these records more accessible.[245]

The legislative justification also points to well-established FOIL exceptions that public information officers could invoke in certain situations to redact information.[246]

The justification added: "Repeal of Section 50-a will help the public regain trust that law enforcement officers and agencies may be held accountable for misconduct."[247]

243. *See id.* The call for widening access also followed decades of expansion of the statute to encompass more police disciplinary records and keep them from public scrutiny. *See id.* (citing COMM. ON OPEN GOV'T, ANNUAL REPORT TO THE GOVERNOR AND THE STATE LEGISLATURE 3 (2014)).

244. *See* 32 N.Y.3d. 556, 560, 118 N.E.3d 847, 849, 94 N.Y.S.3d 185, 187 (2018). The NYCLU challenged §50-a in a FOIL case following a New York City Civilian Complaint Review Board records request for records of police brutality cases in NYC. After denial and administrative appeals, the case reached the state's High Court, holding, "We are not at liberty to second-guess the legislature's determination, or to disregard—or rewrite—its statutory text." *Id.* at 587, 118 N.E.3d at 854, 94 N.Y.S.3d at 192 (citing Wolpoff v. Cuomo, 80 N.Y.2d 70, 79, 600 N.E.2d 191, 195, 587 N.Y.S.2d 560, 564 (1992)).

245. 2019 LEGIS. BILL HIST. N.Y. S.B. 8496 (LEXIS) (Justification).

246. *See id.*

247. *Id.*

VI. STUDENT JOURNALISM PROTECTION

Bills for the Student Journalist Free Speech Act were re-introduced in the Assembly and the Senate in January and February.[248] This was the third introduction with similar bills introduced in the 2019–20 and 2017–18 terms where the bills did not see votes at the education committee.[249]

The law would extend protections to student journalists in public schools and seek to limit controls set forth in the landmark *Hazelwood v. Kuhlmeier* (1988).[250] The student journalist free speech act seeks to limit prior restraints and establish rights for student journalists akin to working journalists with First Amendment protections.[251] The protections would include barring student discipline or sanctions against student advisors.[252]

The proposal seeks to protect both journalism and political expression in school-sponsored media. The law, however, does not call for "anything goes" under the auspices of student journalism, reserving the right of student media advisors and administrators to edit or even censor content in four narrow, and reasonable categories: (1) libelous, slanderous or obscene content; (2) unwarranted invasions of privacy; (3) content that violates federal or state law; or (4) unlawful speech that would incite imminent lawless action or would "materially and substantially disrupt the orderly operation of such educational institution."[253]

248. *See* S. B. 2958, 244th Sess. (N.Y. 2021); Assemb. B. 4402, 244th Sess. (N.Y. 2021).

249. *See* S. B. 1594, 242d Sess. (N.Y. 2019); Assemb. B. 9801, 241st Sess. (N.Y. 2018).

250. *See generally* 484 U.S. 260, 260 (1988) (holding that schools may restrict what can be published in student newspapers if the papers have not been established as public forums).

251. *See* S.B. 2958, 244th Sess. (N.Y 2021).

252. *See id.*

253. *Id.*