# MEDIA LAW

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## INTRODUCTION

This year's *Survey* covers a range of media law cases in both state and federal courts in New York. Litigation involving media entities include the tort of defamation, privacy as defined by state statute, and

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general free speech and First Amendment issues. This is the second year that the *Survey* covers developments with the Freedom of Information Law and pending challenges involving the repeal of New York Civil Rights Law section 50-a. Many of these cases involve high-profile media entities and litigants.

## I. FIRST AMENDMENT AND PRIOR RESTRAINTS

An advocacy group did not have a First Amendment right to paint a mural on a public street, the Second Circuit held in *First v. Adams*.[1] The group, Women for America First (WFAF), sued the City of New York in order to paint a mural on a city street, much like the "Black Lives Matter" (BLM) murals the city painted at seven locations within the city.[2] The city denied the request and the district court affirmed the denial because a public street is not a traditional public forum for all speakers.[3]

Because the city had painted numerous murals throughout the city supporting BLM, the plaintiff argued that it had a First Amendment right to paint similar murals and the denial was tantamount to government-backed content discrimination.[4] The court found that the government's message was an example of legitimate government speech but did not entitle WFAF or any other potential speaker to have similar access to public streets for messaging.[5] The court concluded that "the City defendants' acceptance, creation, and preservation of the Murals—as well as their denial of WFAF's application to paint its own—were a prototypical exercise of government speech."[6]

## II. DEFAMATION

### *A. Elements*

A newspaper story describing allegations that a man was drugged and spent thousands of dollars at two strip clubs could be reasonably susceptible of imputing false and harmful allegations, a trial court held in *RCI Hospitality Holdings, Inc. v. White*.[7] Though the newspaper

1. First v. Adams, No. 21-485-cv, 2022 U.S. App. LEXIS 14645, at *11 (2d Cir. May 27, 2022).
2. *Id*. at *2–3.
3. *Id*. at *3.
4. *Id*.
5. *Id*. at *5.
6. *Adams*, 2022 U.S. App. LEXIS 14645, at *5.
7. RCI Hosp. Holdings, Inc. v. White, No. 161752/2019, slip op. at 8–9 (Sup. Ct. N.Y. Cnty. Feb. 8, 2022).

was not named as a defendant and the court weighed in on whether the allegations sufficiently addressed a matter of public interest under New York's anti-SLAPP statute, the case is relevant to the discussion because it involves the potential liability sources may face.

The court held that the plaintiff, owner of the two strip clubs named by the defendant in two stories in The New York Post newspaper, established a prima facie case because the allegations of being drugged and overcharged at the strip clubs could harm the plaintiff's reputation.[8] The court summarized: "[t]he allegations irrefutably tend to injure plaintiffs in their business and accuse them of serious crime."[9]

While the court denied motions to dismiss the libel claims, it did dismiss claims for tortious interference and prima facie tort claims as well as the defendant's anti-SLAPP motion.[10]

Social media posts describing an acting coach's classes as "a cult" and financial scam did not meet the basic elements of defamation, a trial court held in dismissing *Gatollari v. Bendjillali*.[11] The statements failed to adequately identify the plaintiff and also failed to establish special or provable damages or per se harm.[12] Further, the court held that the statements "would not tend to 'expose the plaintiff to public contempt, ridicule, aversion or disgrace or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.'"[13]

### *B. Defenses—Truth*

Summary judgment was appropriately granted to a newspaper covering an ongoing dispute between tenants and a housing company because the stories describing horrid living conditions were documented by interviews, photographs, and separate litigation, the appellate division ruled in *Reus v. ETC Housing Corp*.[14] After discovery,

8. *Id*. at 9. ("The elements (of the cause of action) are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se.").

9. *Id*.

10. *Id*. at 11.

11. Gatollari v. Bendjillali, No. 152877/2021, slip op. at 3 (Sup. Ct. N.Y. Cnty. Jan. 18, 2022).

12. *Id*. at 3–4.

13. *Id*. at 3 (quoting Foster v. Churchill, 665 N.E.2d 153, 155 (N.Y. 1996)).

14. Reus v. ETC Hous. Corp., 164 N.Y.S.3d 692, 699 (App. Div. 3d Dep't 2022).

which included depositions, both the trial and appellate courts agreed that the newspaper, The Plattsburgh Press Republican, "demonstrated the truth of the article, hence establishing its prima facie entitlement to summary judgment."[15]

Further, "the burden shifted to plaintiffs to raise a triable issue of fact that the article was false, which they failed to do as their opposition was, once again, largely conclusory and failed to raise any significant issues as to the substantial truth of the article."[16]

### *C. Libel Per Se*

Though several passages in a celebrity memoir could be susceptible of a defamatory meaning, a book publisher was not liable for damages because the plaintiff could not show that the statements were published with actual malice, a state court ruled in *Carey v. Carey*.[17] The author, singer Mariah Carey, however, could face liability, for several statements she wrote about the plaintiff, her brother Morgan Carey, accusing him of domestic violence and dealing illegal drugs.[18]

The opinion provides a textbook rendition of libel law and the actual malice privilege, analyzing and ruling that the defendants, publisher Macmillan Publishing Group and its holding company and subsidiaries, should not be liable for publishing nine specific passages in the book.[19] Both the plaintiff and defendants agreed that the book was a matter of public interest because of Mariah Carey's celebrity status and her compelling life story.[20] The court rejected plaintiff's argument that even though Mariah Carey is a celebrity, anecdotes covered in the book constituted private matters.[21]

In its recitation of defamation law, the court noted that some of the passages could be proven true or false, but others were matters of pure opinion, incapable of being proven true or false.[22] Other statements could be construed as libel per se because they imputed criminal activity onto the plaintiff.[23] As libel per se, the plaintiff would not need

15. *Id*. at 699.

16. *Id*.

17. Carey v. Carey, No. 152192/2021, slip op. at 13 (Sup. Ct. N.Y. Cnty. Feb. 15, 2022).

18. *Id*. at 14. In its decision, the court severed the cases, holding Mariah Carey could still face liability for potentially defamatory statements in her book.

19. *Id*.

20. *Id*. at 6.

21. *Id*.

22. *See Carey*, slip op. at 7.

23. *See id*.

to prove damages.[24] But some general statements plaintiff pointed to were vague and not tied to any specific monetary loss.[25]

Overall, despite the point-by-point analysis of each of the passages, the court ultimately decided that it did not matter whether there was defamatory impact because plaintiff did not establish that the publisher acted with actual malice—known falsity or reckless disregard for the truth.[26] Plaintiff's pleadings showed no proof that the publisher entertained serious doubts about the veracity of the accounts and did not publish in a reckless manner.[27]

Plaintiff attempted to conflate actual malice with common law malice, arguing that because of the soured relationship between the siblings, defendant somehow published unflattering anecdotes out of vindictiveness.[28] The court rejected this and also countered plaintiff's secondary argument that he was not contacted during the vetting, editing or fact-checking process and that was proof of actual malice:

> Although plaintiff alleges that before the publication of the book, no one connected with writing, editing or publishing it approached him, asked him to verify anything in it or invited him to view a pre-publication copy, the failure to investigate the truth of a statement alone is insufficient proof of actual malice even if a prudent person would have investigated before publishing . . . It has also been held that a book publisher has no independent duty to investigate an author's story absent actual, subjective doubts as to the story's accuracy.[29]

The defendant's Anti-SLAPP motion for recovery of fees and costs was not granted "at this time," the court held.[30] On procedural matters, the court also refused to order discovery.[31]

The court allowed two claims against Mariah Carey to go forward, counts five, a libel per se claim based on allegations that plaintiff dealt drugs at New York City clubs and parties[32] and seven, a passage

24. *Id*. at 11.

25. *Id*. Plaintiff specifically referred to loss of a movie deal but could not produce an actual monetary figure he claimed to have lost.

26. *Id*. at 11–12 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964)). The actual malice distinction was critical to defendant's Anti-SLAPP motion under section 76 of New York Civil Rights Law.

27. *Carey*, slip op. at 12.

28. *See id*. at 12–13.

29. *Id*. at 12.

30. *Id*. at 13.

31. *Id*. at 14.

32. *Carey*, slip op. at 10.

in the book that describes that the plaintiff agreed to accept money to inflict violence on their stepfather.[33]

The court wrote:

> [U]sing a controlled substance is not a crime. Possessing and selling it [cocaine] is. And although statement 6 includes comments that are flattering to plaintiff, it nonetheless implies, if not outright alleging, that he was supplying an illegal controlled substance to "the beautiful people" who were part of the 1980s party scene, thereby alleging that plaintiff committed serious crimes.[34]

### *D. Public/Private Figure*

#### *1. Actual Malice*

After a seven-day trial, a federal jury returned a verdict that the New York Times did not publish false statements about former vice presidential candidate Sarah Palin with actual malice in *Palin v. New York Times*.[35] Further, the judge presiding over the case also granted a motion to dismiss the case while the jury was deliberating.[36] The background on this case was covered in last year's *Survey*, but briefly, the case focused on an error included in a 2017 New York Times editorial, falsely linking Palin and her Political Action Committee to the 2011 mass shooting in Arizona which maimed Rep. Gabby Giffords.[37] The case had already reached the Second Circuit and the February 2022 trial resulted from the remand.[38]

The former Alaska governor and former vice-presidential candidate with a highly public persona, was deemed to be a public figure who would have to prove, in addition to the prima facie elements of false publication of fact that causes harm to her reputation, the false statements were made with actual malice.[39]

33. *Id*. at 10 ("When read in this context, the average reader could conclude that the statement implies that the plaintiff would have agreed to inflict violence on their stepfather in exchange for money. Consequently, statement 7 is actionable for defamation.")

34. *Id*.

35. Palin v. N.Y. Times. Co., 588 F. Supp. 3d 375, 381–82 (S.D. N.Y. 2022).

36. *Id*. at 380.

37. *Id*. at 381; *see also* Roy S. Gutterman, *2021-22 Survey of New York Law: Media Law*, 72 SYRACUSE L. REV. 959, 970 (2022).

38. *Palin*, 588 F. Supp. 3d at 381.

39. *Id*. at 398–99.

Following both *New York Times v. Sullivan*, which constitutionalized libel law and created the actual malice standard and New York law under *Liberman v. Gelstein*,[40] the court wrote that Palin was unable to prove with clear and convincing evidence that the Times editorial and its editorial writer, James Bennett, published the errors either knowing they were wrong or entertained serious doubt about the veracity of the factual statements.[41]

The court wrote:

> Liability is therefore barred unless Palin adduced clear and convincing evidence supporting the conclusion that at a minimum, "a false publication was made with a high degree of awareness of probably falsity." Proof of negligence does not suffice to establish actual malice: "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing."[42]

The court also rejected a host of post-trial maneuvers, requests and appeals, including plaintiff's motion for reconsideration, retroactive disqualification, and a demand for a new trial.[43]

In another case, the Second Circuit affirmed dismissal of a defamation case by a writer and author described as a "white supremacist" and "anti-Semite" because he was not able to establish publication of falsity with actual malice, the court held in *Brimelow v. New York Times Co.*[44] The district court dismissed the defamation claims.[45] After reciting the blackletter law on defamation, the appellate court reiterated the actual malice standard under both *Sullivan* [46] and *Gertz v. Robert Welch, Inc.*, which subsequently applied the actual malice standard to a class of plaintiffs known as public figures.[47]

Plaintiff was determined to be a public figure, thus triggering actual malice, which required the plaintiff to prove that false statements were published either knowing they were false or with reckless

40. *See* Liberman v. Gelstein, 605 N.E.2d 344, 350 (N.Y. 1992).

41. *Palin*, 588 F. Supp. 3d at 400.

42. *Id*. (first quoting *Liberman*, 605 N.E.2d at 350; then quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968)).

43. Palin v. N.Y. Times Co., No. 17-cv-4853, 2022 U.S. Dist. LEXIS 97056, at *1–2 (S.D. N.Y. May 31, 2022).

44. Brimelow v. N.Y. Times Co., No. 21-66-cv, 2021 U.S. App. LEXIS 31672, at *3 (2d Cir. Oct. 21, 2021).

45. Brimelow v. N.Y. Times Co., 20 Civ. 222, 2020 U.S. Dist. LEXIS 237463, at *32 (S.D. N.Y. Dec. 17, 2020); *see also* Gutterman, *supra* note 37, at 978–79.

46. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964).

47. Gertz v. Robert Welch, 418 U.S. 323, 333–35 (1974).

disregard for their truth or falsity.[48] The court described that actual malice requires proof of publication of statements that "the inherent improbability of the story among other circumstantial evidence."[49]

The crux of plaintiff's argument was that he denied allegations prior to publication, which he argued put the newspaper on notice of falsity.[50] A pre-publication denial, however, does not suffice for knowledge of falsity, the court reiterated.[51] The court wrote, "It is well-settled that denials without more do not support a plausible claim of actual malice."[52]

In *Great Wall Medical P.C. v. Levine*, online reviews of a doctor, accusing the medical practice of questionable exams and billing practices involved public matters that fulfilled the basic elements of the anti-SLAPP statute, a trial court held in dismissing a defamation claim.[53] The anti-SLAPP statute, Civil Rights Law section 76-a, requires imposes a burden proof of actual malice, which plaintiff failed to establish here.[54]

Actual malice requires objective proof, the court held, writing, "defendant's animosity towards plaintiffs is irrelevant and even the truth or falsity of the statement is not necessarily dispositive for purposes of the anti-SLAPP law. Rather the court must determine whether defendant knew or had substantial doubts about the truth of her statements."[55]

The reviews were seen as both a public service and a warning to other women seeking medical treatment, the court held.[56]

*2. Gross Irresponsibility*

An online news site covering the health, medical and biotech fields did not publish a story with gross irresponsibility when detailing allegations that a hedge fund's wheelchair-bound managing partner

48. *Brimelow*, 2021 U.S. App. LEXIS 31672, at *4–5.

49. *Id*. (quoting Celle v. Filipino Rep. Enters., 209 F.3d 163, 183 (2d Cir. 2000)).

50. *See id.* at *6–7.

51. *See id.* at *7.

52. *Id*. (citing Edwards v. Nat'l Audubon Soc'y, Inc., 556 F.2d 113, 121 (2d Cir. 1977)).

53. *See* Great Wall Med. P.C. v. Levine, No. 157517/2017, slip op. at 1–2 (Sup. Ct. N.Y. Ctny. Mar. 8, 2022).

54. *Id*. at 2 (first quoting N.Y. CIV. RIGHTS LAW § 76-a (McKinney 2023); then quoting Prozeralik v. Cap. Cities, Commc'ns, 626 N.E.2d 34, 39 (N.Y. 1993)).

55. *Id.*

56. *See id*.

engaged in sexual harassment of female employees, the Second Circuit affirmed in *Isaly v. Boston Globe Media Partners*.[57] In 2020, a court dismissed the claim.[58] The plaintiff, a quadriplegic who needs assistance with most physical functions, argued that it was physically impossible for him to engage in the behavior detailed in the story.[59]

However, the story was based on interviews with five sources within the company, including one who went "on the record" and was publicly identified as an administrative assistant who was subjected to crude, offensive, sexually-based jokes, as well as being repeatedly exposed to hardcore pornography in emails and on plaintiff's office computer, as well as other forms of sexual harassment.[60] The company's human resources personnel also acknowledged complaints.[61]

After reciting the elements for defamation under New York state law—a written false statement about the plaintiff, published with fault and special damages or per se implied damages—the court focused on whether the statements met this standard and was published with gross irresponsibility.[62]

The gross irresponsibility standard requires plaintiff to prove that the publisher deviated from "sound journalistic practices."[63] The reporting was based on interviews with sources as well as an interview with the plaintiff, in which the reporter made several observations about his physical capabilities.[64] "The reality of Isaly's physical condition and the level of support he receives, as observed by Garde during the interview, do not undermine the allegations made in the article. Isaly has therefore not sufficiently alleged that BGMP acted in a grossly irresponsible manner by publishing Garde's story."[65]

Plaintiff also unsuccessfully argued that because the reporter relied on confidential or anonymous sources, the story was published

57. *See* Isaly v. Bos. Globe Media Partners LLC, No. 21-1330-cv, 2022 U.S. App. LEXIS 1006, at *4 (2d Cir. Jan 13, 2022).

58. Isaly v. Bos. Globe Media Partners LLC, No. 18 CV 9620, 2020 U.S. Dist. LEXIS 174845, at *1 (S.D. N.Y. Sept. 23, 2020).

59. *See Isaly*, 2022 U.S. App. LEXIS 1006, at *2–3.

60. *See Isaly*, 2020 U.S. Dist. LEXIS 174845, at *3.

61. *Id*. at *21.

62. *See Isaly*, 2022 U.S. App. LEXIS 1006, at *1–2 (citing Palin v. N.Y. Times Co., 940 F.3d 804, 809 (2d Cir. 2019)).

63. *See id.* (citing Hawks v. Rec. Printing and Publ'g Co., 486 N.Y.S.2d 463, 466 (App. Div. 3d Dep't 1985)).

64. *Id.* at *3–4.

65. *Id.* at *4.

with gross irresponsibility.[66] Nothing in the reporting caused either the reporter or editors to doubt the veracity or accuracy of the allegations and did not rise to gross irresponsibility.[67] The court also rejected plaintiff's request for depositions, likely intended to uncover the identity of the confidential sources rather establishing falsity of the facts.[68]

*3. Fair & Accurate Report Privilege*

A report describing a Chinese company as "blacklisted" was not defamatory because it was drawn from public records and was privileged under New York Civil Rights Law section 74, the fair and accurate report privilege, the Second Circuit affirmed in *BYD Co. v. Vice Media LLC*.[69] Plaintiff, a global manufacturer was listed on a government report barring government-backed Chinese companies from contracts under the National Defense Authorization Act.[70]

The headline in VICE stated, "Trump Blacklisted This Chinese Company. Now It's Making Coronavirus Masks for U.S. Hospitals."[71] The court found that "blacklisted" did not carry any special defamatory meaning and was a substantially accurate description and summary of the underlying facts that the company appeared on the government's list of Chinese-backed companies under the law.[72] "The claim that BYD was 'blacklisted' by President Trump is supported by the legislative history and text of Section 7613 of the National Defense Authorization Act for Fiscal Year 2020,"[73] the court wrote. The court added that in addition to the legislative history and other public comments, plaintiff had acknowledged that it met the criteria under the law for a government-backed company.[74]

Section 74, known as the fair and accurate report privilege, removes liability for defamation for reporting based on judicial or

66. *Id.* at *5.

67. *See Isaly*, 2022 U.S. App. LEXIS 1006, at *5.

68. *Id.* at *6 (citing DiStiso v. Cook, 691 F.3d 226, 230 (2d Cir. 2012)).

69. BYD Co. v. Vice Media LLC, No. 21-1097, 2022 U.S. App. LEXIS 5351, at *3–4 (2d Cir. Mar. 1, 2022).

70. *Id.* at *4–5.

71. *Id.* at *1.

72. *Id.* at *4–5 (first quoting National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 7613, 133 Stat. 1198, 2314 (2019) (codified as 49 U.S.C. § 5323); then quoting Holy Spirit Ass'n for Unification of World Christianity v. N.Y. Times Co., 399 N.E.2d 1185, 1186 (N.Y. 1979)).

73. *Id.* at *4.

74. *BYD*, 2022 U.S. App. LEXIS 5351, at *4–5.

legislative proceedings or other official or public records.[75] The law also employs some flexibility with the "substantially accurate" standard.[76] Citing extensive precedent, the court explained that the privilege allows for minor inaccuracies in reporting and that courts do not apply a "lexicographer's precision" to parsing editorial content.[77]

The statutory privilege was integral to an appellate division affirmation of a dismissal in the defamation case of *Mistretta v. Newsday Media Group*.[78] In *Mistretta*, a newspaper relied on a range of court documents and investigative documents for its story about a Long Island police sergeant linked to a police scandal.[79] The newspaper's story was titled, "A Politically Motivated Arrest on a Public Bus," which included descriptions of a police strip search of the subject who was engaged in an unrelated lawsuit.[80] "This evidence established that the comments in the article constituted a fair and true report of the allegations contained in the White federal action and the investigative findings by the Nassau County District Attorney's Office and were protected by the absolute privilege afforded by Civil Rights Law § 74," the court wrote.[81]

In a lower court decision, *Reeves v. Associated Newspapers*, a news story documenting a contentious marriage and divorce between a socialite businessman and an actress was based on a range of court documents, police reports, district attorney's office correspondence, and other court-related materials that was protected under the fair and accurate report privilege, the trial court ruled.[82] The story

75. N.Y. CIV. RIGHTS LAW § 74 (McKinney 2023).

76. *BYD*, 2022 U.S. App. 5351, at *3 (first quoting McRedmond v. Sutton Place Rest. & Bar, Inc., 851 N.Y.S.2d 478, 480 (App. Div. 1st Dep't 2008); then quoting Karedes v. Ackerley Grp., Inc., 423 F.3d 107, 119 (2d Cir. 2005); and then quoting *Holy Spirit*, 399 N.E.2d at 1186).

77. *Id.* (first quoting *Karedes*, 423 F.3d at 119; then quoting *Holy Spirit*, 399 N.E.2d at 1186).

78. *See* Mistretta v. Newsday Media Grp., 160 N.Y.S.3d 271, 274 (App. Div. 2d Dep't 2021).

79. *Id.* at 273.

80. *Id.*

81. *Id.* at 274; *see* Burke v. Newburgh Enlarged City Sch. Dist., 145 N.Y.S.3d 355, 356 (App. Div. 2d Dep't 2021). Section 74 states: "[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding." N.Y. CIV. RIGHTS LAW § 74 (McKinney 2023).

82. *See* Karl Reeves v. Associated Newspapers, No. 154855/2020, 2021 N.Y. Misc. LEXIS 11084, *15 (Sup. Ct. N.Y. Cnty. Aug. 4, 2021).

documenting the marriage included allegations and descriptions of plaintiff's physical abuse, drug use, police involvement, arrests, restraining orders and neo-Nazi leanings.[83]

The defamation claims, based on eleven published statements and descriptions in The Daily Mail, were all dismissed, as were the intentional infliction of emotional distress and prima facie tort claims.[84]

The dismissal analyzed each count and alleged defamatory statement and referenced the documents and materials upon which each statement was based.[85] New York Civil Rights Law section 74 provided absolute protection to most of the statements.[86] The court wrote

> New York courts routinely grant motions to dismiss defamation claims based on the fair report privilege where, as here, they arise from reporting on government proceedings, including court proceedings. Whether an article presents a fair and true report of a judicial or official proceeding is a threshold question of law for the court to decide.[87]

The court also explicitly held that statements drawn from both a police report and an arrest reporter were afforded the fair and accurate report privilege, as well as other documents, even if the published statements included some misstatements or inaccuracies.[88]

*4. Opinion*

Though the newspaper which published the underlying letter to the editor was not a party to the litigation, the appellate division affirmed dismissal of a defamation claim because the letter to the editor was protected opinion, the court held in *Fon v. Krowe*.[89] After establishing the elements of defamation, the court then explained how content could be protected under the opinion privilege.[90] The plaintiffs

83. *Id.* at *4–6.

84. *See id.* at *16–46 (The IIED and prima facie tort claims were deemed duplicative to the defamation claims and were thus dismissed because all the claims emanated from the same set of facts).

85. *Id.* at *17–44.

86. *Id.* at *16–17; *see, e.g.*, Nix v. Major League Baseball, 133 N.Y.S.3d 817, 817 (App. Div. 1st Dep't 2020).

87. *Karl Reeves*, 2021 N.Y. Misc. LEXIS 11084, at *11; *see, e.g.*, *Holy Spirit*, 399 N.E.2d at 1187.

88. *Karl Reeves*, 2021 N.Y. Misc. LEXIS 11084, at *19–20; *see* Mulder v. Donaldson, Lufkin & Jenrette, 611 N.Y.S.2d 1019, 1023 (Sup. Ct. N.Y. Cnty 1994).

89. Fon v. Krowe, 164 N.Y.S.3d 843, 843–44 (App. Div. 2d Dep't 2022).

90. *See id.* (quoting Mann v. Abel, 885 N.E.2d 884, 885–86 (N.Y. 2008)).

here, members of the Yorktown Planning Board were the subject of a critical letter to the editor by defendant, co-chair of the Yorktown Democratic Committee, published in the Yorktown News.[91]

The court reiterated determining whether content is non-actionable protected opinion is a matter of law.[92] The distinction between an actionable factual statement or protected opinion requires the court to consider three elements: (1) whether the specific language has a precise, "readily understood meaning;" (2) whether the statement is capable of being proven true or false; and (3) whether within the context and surrounding circumstances, a reader is signaled that the statement is opinion and not fact.[93] The court wrote:

> To the extent the plaintiffs contend that the statements at issue are reasonably susceptible of defamatory connotations, the complaint fails to "make a rigorous showing that the language of the [article] as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the [defendants] intended or endorsed that inference."[94]

In a social media case, a tweet by a New York City councilman amid a heated debate on a public issue was deemed a matter of pure opinion and rhetorical hyperbole and not actionable, the appellate division ruled in *Bowen v. Van Bramer*.[95] Though this defamation case does not necessarily involve media defendants, it addresses social media discourse and modern communications on important, high-profile public issues, in this case, Amazon's controversial plans to build a facility in the New York City area.[96]

The tweet at issue, plaintiff argued vaguely accused him of threatening behavior.[97] The court held that a matter of opinion fails the falsity element of libel per se.[98] The court held,

91. *Id*. at 843.

92. *Id*. (quoting *Mann*, 885 N.E.2d at 885).

93. *Id.* at 844 (quoting Stolatis v. Hernandez, 77 N.Y.S.3d 473, 476 (App. Div. 2d Dep't 2018)).

94. *Fon*, 164 N.Y.S.3d at 844 (quoting Udell v. NYP Holdings, Inc., 94 N.Y.S.3d 314, 317 (App. Div. 2d Dep't 2019)).

95. Bowen v. Van Bramer, 168 N.Y.S.3d 107, 109–10 (App. Div. 2d Dep't 2022) (citing *Stolatis*, 77 N.Y.S.3d at 476).

96. *See id.* at 108.

97. *Id.*

98. *See id.* at 109 (citing Kasavana v. Vela, 100 N.Y.S.3d 82, 86 (App. Div. 2d Dep't 2019)).

> The defendant's characterization of the plaintiff's text as containing 'several threats rolled into one' is not a statement which can be proved true or false but was, instead, an opinion. Moreover, 'there is simply no special rule of law making criminal slurs actionable regardless of whether they are asserted as opinion or fact,'[99]

A vitriolic war of words between an online influencer and a dietician in *Zuckerbrot v. Lande* tested the limits of both truth and opinion with the published allegations amounting to matters of fact possibly susceptible of defamatory meaning, a trial court ruled.[100] This complicated lawsuit also included a counterclaim and an unsuccessful motion to dismiss under the anti-SLAPP statute.[101]

The defamation dispute emanated from over 4,500 Instagram posts written and republished by defendant Emily Gellis Lande, who publishes on social media under the handle "@emilygellis."[102] Though she has no formal journalistic training or experience, Gellis shares details about her own life, fashion picks, and other opinions and promotes products on her social media feeds, generating income.[103] She described her account as "authentic, honest, and raw."[104]

Plaintiff argued that defendant's vitriolic, profane, and false statements caused sales of her dietary program, F-Factor, to plummet from $1 million per month to $90,000.[105] Plaintiff also argued that the false statements were tantamount to a campaign to harm her reputation, accompanied by a range of harassment.[106]

Summarizing the online content, it is fair to describe some of the posts as being critical of the F-Factor product, raising questions about its safety, adverse side effects and hazards.[107] Plaintiff argued the posts were false and published with actual malice, including some

99. *Id.* (first citing Thomas H. v. Paul B., 965 N.E.2d 939, 942 (N.Y. 2012); then citing Gross v. N.Y. Times Co., 623 N.E.2d 1163, 1169 (N.Y. 1993)).

100. *See* Zuckerbrot v. Lande, 167 N.Y.S.3d 313, 333–36 (Sup. Ct. N.Y. Cnty. 2022).

101. *Id.* at 328–29 (citing N.Y. CIV. RIGHTS LAW § 70-a (McKinney 2023). Other claims included product disparagement, deceptive trade practices, intentional infliction of emotional distress and civil harassment, which were all dismissed either as unprovable or repetitive to the underlying defamation claim.

102. *Id.* at 318–19.

103. *Id.* at 319–20.

104. *Id.* at 320.

105. *See Zuckerbrot*, 167 N.Y.S.3d at 318.

106. *Id*.

107. *Id*.

menacing, threatening, and personal notes intended to inflict harm on her name, reputation, and the product itself.[108]

Defendant, for her part, argued that she was simply expressing her opinion on an important product and performing an important public function as an online influencer, thus indemnifying her from liability under both § 230 of the Communications Decency Act and general First Amendment principles.[109] The court flatly rejected the § 230 defense stating the application was inappropriate and irrelevant because Gellis did not qualify for immunity as an interactive computer service.[110]

The court wrote: "The CDA does not shield Gellis here. Gellis is being sued as a 'content provider,' not a 'service provider.' She was not a passive conduit for the messages of third parties. All of the statements at issue were allegedly posted on Gellis's Instagram page by Gellis herself."[111]

Substantively, then, the court then determined that the statements were factual, not protected under the opinion privilege.[112] Gellis argued that she was entitled to protections because her published statements should be viewed as her opinions or substantially true.[113] As a matter of opinion, the court applied the three-part test to determine whether a statement is opinion or fact: (1) whether the language has a precise, readily understood meaning; (2) whether the statement can be proven true or false; and (3) whether the statement's full context signals to readers, listeners or viewers that the content is opinion or fact.[114]

The court held,

> The Complaint alleges with abundant evidence, that Gellis asserted specific, verifiable statements of fact about the F-Factor diet, the F-Factor company, and Zuckerbrot personally. She repeatedly stated or republished that it caused a wide array of negative health effects, including disordered eating, mental health problems, severe gastrointestinal problems, pregnancy

108. *Id*. at 319–27.

109. *Id*. at 318, 328.

110. *Zuckerbrot*, 167 N.Y.S.3d at 328 (quoting 47 U.S.C. § 230 (provides tort immunity for interactive computer services)).

111. *Id*. at 328–29.

112. *Id*. at 330–31.

113. *Id*. at 333–34.

114. *Id*. at 330 (citing Brian v. Richardson, 660 N.E.2d 1126, 1129–30 (N.Y. 1995)).

> miscarriage, colon damage, kidney stones, hernias, anxiety, panic attacks, a heart attack, and death.[115]

The court added that the statements conveyed "a precise, objective meaning which are verifiably true or false, they constitute potentially actionable statements of fact."[116] The statements were not "loose" or "figurative" examples of opinion simply because of the context, social media.[117] The court was skeptical of Gellis's countervailing arguments that she should be regarded as both a credible expert with no formal training or expertise but also a respectable "authentic, honest and raw" online critic.[118] The court noted "the obvious tension here" but rejected the defendant's arguments, finding many of her statements were factual.[119]

Likewise, the court rejected the substantial truth defense, at least at the pleading stage.[120] Also, plaintiff made a showing that the statements were also made with actual malice.[121]

*5. Section 230 Immunity*

A video hosting service did not lose its § 230 immunity when it removed a subscriber's videos touting misinformation relating childhood vaccines to autism, the appellate division held in *Word of God Fellowship, Inc. v. Vimeo, Inc*.[122] Plaintiff's complaint that its videos were taken down after being deemed "otherwise objectionable" violated contractual terms were also unavailing, the court held.[123]

The centerpiece of this dispute focused on § 230(c)(2) of the Communications Decency Act (CDA), which provides interactive computer services with widespread immunity from tort or other liability.[124] Though § 230 was part of the CDA, which aimed to curb

115. *Zuckerbrot*, 167 N.Y.S.3d at 330–31.

116. *Id.* at 331.

117. *Id*. ("Ultimately, context is more than just the medium through which a statement is conveyed; it is a holistic inquiry concerning 'the content of the communication as a hole' including 'its tone and apparent purpose.'") (quoting *Brian*, 660 N.E.2d at 1129).

118. *Id*. at 332.

119. *Id.*

120. *See Zuckerbrot*, 167 N.Y.S.3d at 333 (citing Tannerite Sports, LLC. v. NBCUniversal News Grp., 864 F.3d 236 (2d Cir. 2017)).

121. *Id*. at 336.

122. *See* Word of God Fellowship, Inc. v. Vimeo, Inc., 166 N.Y.S.3d 3, 6, 9 (App. Div. 1st Dep't 2022).

123. *Id*. at 7–8 (quoting 47 U.S.C. § 230(c)(2)(A)).

124. *Id*. at 6 (citing § 230(c)(2)).

offensive, sexual content online, the immunity section has given protection to computer services that operate with user-generated content, such as a video-sharing service like Vimeo.[125] The court held "Vimeo's removal of material it considered to be 'otherwise objectionable' and in violation of its Acceptable Use Policy is protected by the CDA."[126]

*6. Anti-SLAPP*

A news story describing the migration of Donald Trump's supporters to the Chinese spiritual movement Falun Gong and its newspaper the Epoch Times was not defamatory, a trial court ruled in *Epoch Group Inc. v. Politico, LLC*.[127] Politico, an online political news site, published the story under the headline, "MAGA voters discovered a new home online. But it isn't what it seems."[128]

The court rejected plaintiff's defamation per se, defamation per quod, and unfair competition claims on a motion to dismiss for failure to state a claim under CPLR 3211[g] and New York's Anti-SLAPP statute, Civil Rights Law section 76-a, because the claims were deemed an "action involving public petition and participation."[129]

An Anti-SLAPP motion hinges on whether a plaintiff can establish that the defendant published with actual malice—known falsity or reckless disregard "of whether it was false or not."[130] With plaintiff's inability to establish actual malice, the court viewed the lawsuit as an Anti-SLAPP violation, awarding defendants attorneys' fees and costs.[131]

125. *See id*. at 7.

126. *Id*. at 8.

127. *See* Epoch Grp. Inc. v. Politico, LLC, No. 652753/2021, slip op. at 3, 5 (Sup. Ct. N.Y. Cnty. Dec. 9, 2021).

128. *Id*. at 2.

129. *Id*. at 3–4, 6 (first quoting N.Y. C.P.L.R. 3211(g)(1) (McKinney 2023); then quoting N.Y. CIV. RIGHTS LAW § 76-a(1)(a) (McKinney 2023)).

130. *Id*. at 5.

> The actual malice standard [measures] the speaker's subjective doubts about the truth of the publication. If it cannot be shown that the defendant knew that the statements were false, a plaintiff must demonstrate that the defendant made the statements with reckless disregard of whether they were true or false, [i.e.] whether . . . the defendant in fact entertained serious doubts as to the truth of his publication.

*Id.* (first quoting Sweeney v. Prisoners' Legal Servs., 647 N.E.2d 101, 104 (N.Y. 1995); then quoting Lindberg v. Dow Jones & Co., No. 20-cv-8231, 2021 U.S. Dist. LEXIS 226987, at *8 (S.D. N.Y. Nov. 22, 2001)).

131. *Epoch Grp.,* slip op. at 6.

In another case, the appellate division ruled that amendments to New York's Anti-SLAPP statute were not retroactive in the high-profile defamation case involving the singer Keisha, in *Gottwald v. Sebert*.[132] The court referenced a decision, deemed nonbinding, in *Palin v. New York Times Co*.[133] The court did not find any support in the legislative history supporting retroactive application to the amendments.[134]

Negative online reviews alleging a botched plastic surgery procedure were deemed matters of public interest under New York's Anti-SLAPP law the appellate division held in *Aristocrat Plastic Surgery, P.C. v. Silva*.[135] The trial court dismissed claims for defamation, tortious interference, intentional infliction of emotional distress, and prima facie tort.[136] The comments posted on Yelp and RealSelf fell within the statute's definition of matters of public concern.[137]

The court wrote:

> [D]efendant posted her reviews on two public internet forums, one of which has a stated purpose of being a key advisor for people considering plastic surgery, and the purpose of defendant's reviews was to provide information to potential patients, including reasons not to book an appointment with Dr. Tehrani. Defendant's posts concerning the plastic surgery performed upon her by Dr. Tehrani qualify as an exercise of her constitutional right of free speech and a comment on a matter of legitimate public concern and public interest – namely, medical treatment rendered by a physician's professional corporation and the physician performing the surgery under its auspices.[138]

*7. Trade defamation/product disparagement*

A trade and product disparagement case emanating from online critiques of plaintiff's travel services business should be refiled with pleadings showing the "requisite particularity,"

132. *See* Gottwald v. Sebert, 165 N.Y.S.3d 38, 39 (App. Div. 1st Dep't 2022).

133. *See id.* (citing Palin v. N.Y. Times Co., 510 F. Supp. 3d 21 (S.D.N.Y. 2020)).

134. *Id.*

135. Aristocrat Plastic Surgery, P.C. v. Silva, 169 N.Y.S.3d 272, 276–77 (N.Y. App. Div. 1st Dep't 2022).

136. *See* Aristocrat Plastic Surgery, P.C. v. Silva, No. 153200/2021, 2021 N.Y. Misc. LEXIS 10589, at *7–10 (Sup. Ct. N.Y. Cnty. Aug. 20, 2021).

137. *Aristocrat Plastic Surgery*, 169 N.Y.S.3d at 277.

138. *Id*. at 276.

the appellate division held in *Gardner v. Virtuoso Ltd*.[139] The court also found the case was pled with requisite malice for the trade disparagement case over online criticism of the plaintiff's "high end" luxury travel business.[140]

### *E. Procedural*

#### *1. Res judicata*

A defamation case emanating from a follow-up newspaper story was properly dismissed because it was largely duplicative of an earlier dismissed case involving the same litigants and similar statements, the appellate division ruled in *Napoli v. New York Post*.[141] This case, like the earlier case that was dismissed in 2014, involved statements about a notorious New York City lawyer accused of infidelity and his wife.[142]

Because this case involved an action "arising out of the same transaction or series of transactions" with the same litigants, the bulk of the claims for defamation were properly dismissed under res judicata doctrine.[143] The court held "so much of the complaint was based on the contents of the 2014 article" and should be barred.[144] Further, additional claims, including the invasion of privacy and other defamation claims were also dismissed both on res judicata grounds and the plaintiff's failure to state a claim and not actionable as expressions of pure opinion.[145]

#### *2. Jurisdiction/Venue*

A press release distributed to a German news service and subsequently published by U.S. and New York-based news services did not satisfy personal jurisdiction elements, the appellate division held in *Kingston Capital Management LP v. CPI Property Group, S.A.*[146] The civil procedure question involved New York's Long-arm statute,

139. Gardner v. Virtuoso Ltd., 167 N.Y.S.3d 70, 71 (App. Div. 1st Dep't 2022).

140. *Id.* at 72.

141. Napoli v. N.Y. Post, 171 N.Y.S.3d 107, 109 (App. Div. 2d Dep't 2022).

142. *Id*. at 108; *see also* Napoli v. N.Y. Post, No. 161367/2015, slip op. at 4 (Sup. Ct. N.Y. Cnty. Nov. 4, 2016).

143. *Napoli*, 171 N.Y.S.3d at 108–09.

144. *Id*.

145. *Id*. at 109.

146. Kingston Cap. Mgmt. L.P. v. CPI Prop. Grp., S.A, 167 N.Y.S.3d 92, 93–94 (App. Div. 1st Dep't 2022).

CPLR 302(a)(1) and its application to a potentially defamatory press release distributed during an acrimonious business transaction.[147]

"However, placing allegedly defamatory content on the internet and making it accessible to the public does not constitute the transaction of business in New York, even when it is likely that the material will be read by New Yorkers," the court wrote.[148]

*3. Choice of Law*

A multi-state defamation lawsuit against CNN should apply California law because that is where the plaintiff, the litigious former Congressman Devin Nunes, would have suffered the most harm because that is where he lived, the Second Circuit held in *Nunes v. CNN*.[149] Nunes has brought numerous defamation suits against numerous media outlets all over the country.[150] This suit was initially filed in federal court in Virginia, then removed to New York, with the New York district court applying Virginia/District of Columbia choice of law standards to apply California law.[151]

*4. Discovery*

A trial court quashed a defamation plaintiff's subpoena seeking portions of an interview that was not broadcast on the television show Inside Edition in *Cedeno v. Pacelli*.[152]

> [M]ost notably, the subpoena seeks nonpublic statements and material which were not broadcast to the public, including unedited recordings of the interviews and communications between defendants and ViacomCBS related to the interview. There is no dispute that the requested material was never broadcast or published as part of the interview, and thus, cannot form the basis for a defamation claim.[153]

147. *Id*.

148. *Id*. at 94 (citing Symmetra Pty Ltd. v. Human Facets, LLC, No. 12 Civ. 8857, 2013 U.S. Dist. LEXIS 83428, at *30 (S.D. N.Y June 13, 2013)).

149. Nunes v. Cable News Network, Inc., No. 21-637, 2022 U.S. App. LEXIS 10074, at *4–6 (2d Cir. Apr. 14, 2022).

150. *Devin Nunes Files Libel Suit Against MSNBC Host Rachel Maddow*, FIRST AMEND. WATCH AT N.Y. UNIV. (Aug. 5, 2021), https://firstamendmentwatch.org/devin-nunes-files-libel-suit-against-msnbc-host-rachel-maddow/.

151. *Nunes*, 2022 U.S. App. LEXIS 10074, at *4–6.

152. Cedeno v. Pacelli, No. 452016/2018, slip op. at 4 (Sup. Ct. N.Y. Cnty. Dec. 13, 2021).

153. *Id.* at 3.

*5. Newsgathering/Prior Restraints*

On an order to show cause, a newspaper was ordered to cease using and destroy legal memos it obtained and used for news stories, also refusing to find a legitimate public interest in the documents, a court ruled in *Project Veritas v. New York Times*.[154] Plaintiff, an online news venture critical of legacy media, obtained a protective order under CPLR 3103, arguing that the defendant, Times' use of legal memoranda prepared by plaintiff's counsel on another matter, would cause harm or "unreasonable annoyance, expense, embarrassment, disadvantage," or otherwise prejudice plaintiff.[155]

Numerous other media entities had urged the court to deny the restraining order because of effects on newsgathering process and it would inspire future litigants from using emergency equity filings to chill reporting or publication on controversial matters of public concern.[156]

The court disregarded the media's arguments, devoting significant consideration to the underlying question of whether the Times should be permitted to continue to rely on the privileged documents that it was not authorized to access or see, much less report on.[157] In balancing the conflict between publishing unauthorized material and the sanctity of the attorney-client privilege, the court came down favoring the privilege.[158] This case, however, has serious implications on the newsgathering process, which is afforded some protections under the First Amendment.[159] "In the collision between attorney-client privilege and the free press, the interest on both sides are plainly rooted in the traditions and significant concerns of our society," the court wrote.[160]

Thus, it creates a question of whether prohibiting the press from using unauthorized, leaked or otherwise legally privileged materials justifies a prior restraint.[161] Under the First Amendment, courts require

154. *See* Project Veritas v. N.Y. Times Co., 161 N.Y.S.3d 700, 717, 719 (Sup. Ct. Westchester Cnty. 2021).

155. *Id*. at 705–06 (applying N.Y. C.P.L.R. 3103(a), (c) (McKinney 2023)).

156. *See id*. at 714–15.

157. *Id*. at 707.

158. *Id*. at 710 ("There is no dispute that Project Veritas is the holder of the privilege, and the Times has not claimed that it was waived by Project Veritas.").

159. *See Project Veritas*, 161 N.Y.S.3d at 710–11.

160. *Id*. at 711 (citing Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975)).

161. *Id*. at 711–12 (citing US v. Quattrone, 402 F.3d 304, 309 (2d Cir. 2005)).

the party seeking the prior restraint, most often the government, to establish proof of "immediate" and "irreparable" injury.[162]

The court was less concerned about the matter of public interest arguments in light of the privileged nature of the documents themselves.[163] The court acknowledged the difficulty of defining matters of public concern, citing both precedent and statutes.[164] The court wrote:

> Undoubtedly, every media outlet believes that anything that it publishes is a matter of public concern. The state of our nation is that roughly half the nation prioritizes interests that are vastly different than the other half . . . . These memoranda and hundreds of thousands of similar attorney-client privileged documents that in homes, offices, and businesses in every village, town, and city in this nation are only between an attorney and a client and it does not matter one bit who the attorney and client are. While the content of the advice is irrelevant to this court's analysis in this case, the subject memoranda here contain typical garden variety, basic attorney-client advice that undoubtedly is given at nearly every major media outlet in America, including between the Times and its own counsel.[165]

The court added: "The Times is perfectly free to investigate, uncover, research, interview, photograph, record, report, publish, opine, expose or ignore whatever aspects of Project Veritas its editors in their sole discretion deem newsworthy without utilizing Project Veritas' attorney-client privileged memoranda."[166]

### *F. Newsgathering*

#### *1. Newsgathering §50-a Repeal*

In the two years since the repeal of New York Civil Rights Law section 50-a, almost a dozen cases have found their way into courts across the state with at least two on appeal at the Fourth Department. The background and legislative history were covered in last year's *Survey*.[167] The repeal of section 50-a and the presumption of openness for public records under New York's Freedom of Information Law (FOIL) created potential for conflict with regard to a category of

162. Porco v. Lifetime Ent. Servs., LLC. 984 N.Y.S.2d 457, 458 (App. Div. 3d Dep't 2014).

163. *See Project Veritas*, 161 N.Y.S.3d at 716.

164. *See id.* at 716 (citing N.Y. CIV. RIGHTS LAW § 79-h(8) (McKinney 2023)).

165. *Id*. at 716–17.

166. *Id*. at 717.

167. *See* Gutterman, *supra* note 37, at 992–93.

public records relating to so-called "unsubstantiated" police misconduct complaints and records.[168]

Several trial courts across the state issued decisions interpreting and applying the 2020 repeal of New York Civil Rights Law section 50-a, governing the release of certain police records. The appellate division's fourth department heard oral arguments in two cases in September 2022 and other cases were in the pipeline.[169]

Two other cases also yielded conflicting results, *Rickner PLLC v. City of New York*[170] and *Gannett v. Herkimer*.[171] The legal challenges of these cases are the same: under FOIL, individual citizens, public interest groups or media entities sought and were denied access to police disciplinary, investigative, or internal affairs reports involving police brutality, police misconduct, or complaints to police.[172]

The denial prompted a statutory appeal and then an Article 78 hearing.[173] In *Rickner*, the police department denied the records request citing FOIL exceptions based on police officers' personal privacy and the nature of so-called unsubstantiated complaints.[174] The court held that the "NYPD has not met its burden to demonstrate that the requested materials fall squarely within the exemptions relied on to justify withholding the records sought."[175]

Thus, the trial court in New York City ordered the police department to release the documents to the requester, noting that certain personal information could be redacted.[176] An upstate court in Oneida, on the other hand, in *Gannett Co., Inc. v. Herkimer Police Department*

168. *See, e.g*., N.Y. Civ. Liberties Union v. Syracuse, 148 N.Y.S.3d 866, 868–69 (Sup. Ct. Onondaga Cnty. 2021).

169. *Id*. at 868; N.Y. Civ. Liberties Union v. City of Rochester, Decision and Order, No. E2020009879 (N.Y. Sup. Ct. Monroe Cnty. Aug. 10, 2021) ("The Court, in making this Decision, must weigh the public's right to discovery of policy disciplinary records against the privacy rights of the officers involved. This Court agrees with Petitioner that the public has a right to know when charges or complaints against public servants are sustained, but the Court does not agree that *unsubstantiated* claims are discoverable.").

170. Rickner PLLC v. NYC, No. 157876/2021, 2022 N.Y. Misc. LEXIS 2223, at *2 (Sup. Ct. N.Y. Cnty. May 25, 2022).

171. Gannett Co., Inc. v. Herkimer Police Dep't, 169 N.Y.S.3d 503, 504 (Sup. Ct. Oneida Cnty. 2022).

172. *See Rickner*, 2022 N.Y. Misc. LEXIS 2233, at *2.

173. *See id*.

174. *See id*.

175. *Id.* at *5.

176. *Id*. at *5–6.

came to a different conclusion in a similar case involving unsubstantiated claims against police officers dating from before the 2020 amendments.[177]

The Oneida court focused on two substantive issues: (1) whether unsubstantiated police abuse reports can be released under the law, and (2) whether the repeal of Civil Rights Law section 50-a should be applied retroactively to records before 2020.[178]

The court was not convinced that recent case law in *Schenectady Police Benevolent Association v. City of Schenectady* as well as the legislative history mandated release of unsubstantiated complaints.[179] Citing to *New York Civil Liberties Union v. City of Syracuse*, the court ruled that the release of the unsubstantiated claims of police misconduct would "constitute an unwarranted invasion of personal privacy."[180]

Two appellate division opinions supporting withholding based on unwarranted invasion of privacy as well as advisory opinions by the Committee on Open Government influenced the court's decision.[181] The court concluded that whatever value releasing the documents might have, it was outweighed by the police officers' or police departments' privacy concerns.[182] The court was also not convinced that the repeal should be retroactively applied.[183]

Similarly, in *New York Civil Liberties Union v. City of Syracuse*, the public interest group's request for police department investigative and misconduct documents was rejected by both the department and the state supreme court judge.[184] Even though Civil Rights Law section 50-a was repealed, the court ruled that the release of the documents would be "an unwarranted invasion of privacy."[185]

The court held that "when considering the repeal of Civil Rights Law section 50-a through the lens of previous case law, the court has

177. *Gannett*, 169 N.Y.S.3d at 504.

178. *Id*. at 505–06.

179. *Id*. at 506–07.

180. *Id*. at 507 (citing N.Y. Civ. Liberties Union v. Syracuse, 148 N.Y.S.3d 866, 873 (Sup. Ct. Onondaga Cnty. 2021)).

181. *Id*. at 508 (citing W. Suffolk Bd. of Coop. Educ. Servs. v. Bay Shore Union Free Sch. Dist., 672 N.Y.S.2d 776, 776 (App. Div. 2d Dep't 1998)).

182. *Gannett*, 169 N.Y.S.3d at 508.

183. *Id.* at 510.

184. *N.Y. Civ. Liberties Union*, 148 N.Y.S.3d at 873.

185. *Id.* at 872–73.

no choice but to deny the request for an order releasing all unsubstantiated discipline records."[186]

*2. Invasion of Privacy*

A model whose photograph was misappropriated and used for a strip club's promotional materials without her permission or any form of compensation won an award of damages, a federal court ruled in *Gibson v. SCE Group Inc*.[187] This case, which initially included a slate of 20 plaintiffs, is the latest in a spate of similar cases where strip or "gentlemen's" clubs have used photos of models without their permission for a range of promotional and advertising materials.[188]

After a summary judgment dismissal, the court allowed recovery for one plaintiff, Jessica Burciaga, under sections 50–51, awarding her $5,000 for the unauthorized use of her photos.[189] Awarding damages followed dueling expert opinions on the fair market value of the misappropriated photos.[190] "A fair market value analysis should consider or acknowledge price similar contracts and account for any additional obligations in those comparator contracts. In arriving at a particular rate, the valuation should not be speculative and the reasons behind the valuation should be explained," the court wrote.[191]

In arriving at the final damages award, the court pointed to plaintiff's previous work history, fair market appreciation, and comparison to comparable photography work.[192]

In a different case, a book of nude and semi-nude photographs, which included photos of the plaintiff, was deemed art actionable under New York's statutory definition of invasion of privacy, a trial court held in *Landwehrle v. Bianchi*.[193] Plaintiff was the subject of numerous photos taken by the defendant, his friend, in the 1980s.[194] The

186. *Id.* at 873.

187. Gibson v. SCE Grp., Inc., No. 15 Civ. 8168, 2022 U.S. Dist. LEXIS 54935, at *20 (S.D. N.Y. Mar. 25, 2022).

188. See Electra v. 59 Murray Enters., 987 F.3d 233, 238–39 (2d Cir. 2021) as discussed in Gutterman, *supra* note 37, at 16; Roy S. Gutterman, *2018-19 Survey of New York Law: Media Law*, 70 SYRACUSE L. REV. 535, 553–54 (2020).

189. *Gibson*, 2022 U.S. Dist. LEXIS 54935, at *20.

190. *Id.* at *4–9.

191. *Id.* at *17–18 (citation omitted).

192. *Id.* at *20.

193. Landerwehrle v. Bianchi, No. 155395/2020, slip op. at 4 (Sup. Ct. N.Y. Cnty. June 24, 2022).

194. *Id.* at 1.

court reiterated the long-standing conception that New York does not recognize a common law right of privacy.[195]

New York's invasion of privacy statute affords a cause of action only for unauthorized commercial or advertising use of a person's image or likeness.[196] Works of art, such as a photography book, would not fall under the commercial designation.[197]

The court wrote,

> [T]he advertising and trade provision of the privacy statute was drafted with the First Amendment to the United States Constitution in mind, and while the newsworthiness and public concern exceptions focus on protecting the press's dissemination of ideas that have informational value, that exemption has been applied to other forms of First Amendment speech, such as literary and artistic expression. . . . Therefore, when a plaintiff's name, portrait, picture, or voice is used in works of art without written consent, there is no recourse pursuant to Civil Rights Law §51.[198]

A YouTube video questioning a plaintiff's use of anatomical references in his own video recorded on his cell phone was not an invasion of privacy or defamatory under New York state law, according to a federal court in *Eggsware v. Winfrey*.[199] Plaintiff claimed that the defendant somehow gained access to a video he recorded on his cell phone and then made a video questioning plaintiff's use of the word "penis."[200]

The second video failed to meet the standards of New York's invasion of privacy statute, NY Civil Rights Law sections 50–51, which requires an unauthorized use of the plaintiff's "name, portrait, picture or voice" for advertising or commercial purposes.[201] The court rejected the claims because the use did not have any commercial or advertising element.[202]

195. *Id.* at 2 (citing Hampton v. Guare, 600 N.Y.S.2d. 57, 58 (App. Div. 1st Dep't 1993)).

196. *Id.* (citing N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2023)).

197. *See id.* at 3 (citing Baumblatt v. Battalia, 520 N.Y.S.2d 571, 574 (App. Div. 2d Dep't 1987)).

198. *Landerwehrle*, slip op. at 4.

199. Eggsware v. Winfrey, No. 1:22-CV-77, 2022 U.S. Dist. LEXIS 42947, at *3 (N.D. N.Y. Mar. 10, 2022).

200. *Id.*

201. *Id.* (quoting Farmer v. Patino, 18-cv-01435, 2019 U.S. Dist. LEXIS 1824, at *15 (E.D. N.Y. Jan. 4, 2019)).

202. *Id.*