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## Freedom of Speech & Press: Gross v. New York Times, Co.

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## FREEDOM OF SPEECH & PRESS

*N.Y. CONST. art. I, § 8:*

*Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.*

*U.S. CONST. amend. I:*

*Congress shall make no law . . . abridging the freedom of speech . . . or of the press . . . .*

### COURT OF APPEALS

Gross v. New York Times, Co.<sup>1037</sup>  
(decided October 21, 1993)

Plaintiff, the former Chief Medical Examiner of New York City, filed a complaint against the New York Times Company, alleging libel.<sup>1038</sup> At issue in this appeal from the dismissal of the complaint was whether the complaint properly alleged that the newspaper articles, published by the defendant newspaper, contained “false, defamatory statements of *fact* rather than mere nonactionable statements of *opinion*”<sup>1039</sup> which afford the defendant free speech protection under the State<sup>1040</sup> and Federal<sup>1041</sup> Constitutions. The New York Court of Appeals found that although plaintiff’s complaint contained nonactionable

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1037. 82 N.Y.2d 146, 623 N.E.2d 1163, 603 N.Y.S.2d 813 (1993).

1038. *Id.* at 149, 623 N.E.2d at 1165, 603 N.Y.S.2d at 815.

1039. *Id.*

1040. N.Y. CONST. art I, § 8. This section provides in relevant part: “Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.” *Id.*

1041. U.S. CONST. amend I. This section provides in relevant part: “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .” *Id.*

opinions, it also included actionable statements of fact.<sup>1042</sup> Thus, the court held that defendants' motion to dismiss should have been denied and accordingly reversed the decisions of the trial court and appellate division.<sup>1043</sup>

On January 27, 1985, the newspaper began publishing a series of articles questioning plaintiff's autopsy findings in a group of high profile cases where individuals in police custody had died under mysterious circumstances.<sup>1044</sup> The initial article asserted that plaintiff had altered autopsy findings, and had instituted a special policy whereby he performed the autopsies in police custody cases.<sup>1045</sup> The article also contained interviews with other pathologists, one who worked with plaintiff, and another who reviewed some of plaintiff's findings.<sup>1046</sup> Those interviewed labeled plaintiff's conduct as "weaseling" and "unbelievably incompetent," and further intimated that plaintiff was engaging in illegal conduct.<sup>1047</sup> Subsequent articles characterized plaintiff's activities as ranging from "highly suspicious" . . . to 'possibly illegal.'"<sup>1048</sup>

Following a criminal investigation which resolved him of "professional misconduct [and] criminal wrongdoing," plaintiff instituted a libel action against the newspaper and affiliated persons.<sup>1049</sup> Prior to discovery, the defendants moved to dismiss the complaint, pursuant to section 3211(a)(7) of the Civil Practice Law and Rules,<sup>1050</sup> on the ground that the subject newspaper articles contained merely opinion, rather than actionable statements of fact, and hence, were protected under the State<sup>1051</sup> and Federal<sup>1052</sup> Constitutions.<sup>1053</sup> The trial court agreed with the

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1042. *Gross*, 82 N.Y.2d at 149, 623 N.E.2d at 1165, 603 N.Y.S.2d at 815.

1043. *Id.*

1044. *Id.*

1045. *Id.* at 149-50, 623 N.E.2d at 1165, 603 N.Y.S.2d at 815.

1046. *Id.* at 150, 623 N.E.2d at 1165-66, 603 N.Y.S.2d at 815-16

1047. *Id.* at 150, 623 N.E.2d at 1166, 603 N.Y.S.2d at 816.

1048. *Id.*

1049. *Id.* at 149, 623 N.E.2d at 1165, 603 N.Y.S.2d at 815.

1050. N.Y. CIV. PRAC. L. & R. § 3211(a)(7) (McKinney 1981 & Supp. 1993).

1051. N.Y. CONST. art. I, § 8.

1052. U.S. CONST. amend. I.

defendants, and dismissed the complaint.<sup>1054</sup> The appellate court affirmed.<sup>1055</sup> The New York Court of Appeals reversed the lower court decisions and sustained plaintiff's complaint.<sup>1056</sup>

In reaching its decision, the court explained that while defamation cases had previously been decided with reference to state common law, the United States Supreme Court had "injected a constitutional dimension" into the law of defamation.<sup>1057</sup> For example, in *New York Times Co. v. Sullivan*,<sup>1058</sup> the Supreme Court held that a public official would be precluded from recovering damages for defamatory statements concerning his official conduct unless he could demonstrate that the statements were made with "'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not."<sup>1059</sup>

The *Sullivan* decision and other such opinions explained that a heightened burden of proof imposed on public persons who bring defamation actions is necessary "to assure unfettered interchange

1053. *Gross*, 82 N.Y.2d at 150-51, 623 N.E.2d at 1166, 603 N.Y.S.2d at 816.

1054. *Id.* at 151, 623 N.E.2d at 1166, 603 N.Y.S.2d at 816.

1055. *Id.*

1056. *Id.*

1057. *Id.* at 152, 623 N.E.2d at 1166-67, 603 N.Y.S.2d at 816-17.

1058. 376 U.S. 254 (1964).

1059. *Id.* at 279-80. In *Sullivan*, a Commissioner of the City of Montgomery, Alabama, brought suit against four African-American clergymen and the New York Times Company, alleging that he had been libeled by a full-page advertisement published in the defendant's newspaper. *Id.* at 256. The advertisement detailed certain events occurring in Montgomery, pertaining to Dr. Martin Luther King, Jr. and the civil rights movement. *Id.* at 256-58. The newspaper published the advertisement without inquiry into the veracity of the allegations contained within, some of which, were found to be untrue, through subsequent litigation. *Id.* at 260-61. Although the advertisement did not refer to respondent by name, he alleged that reference to "the police" would be understood to encompass him, because he was "the Montgomery Commissioner who supervised the police department." *Id.* at 258. The Court reasoned that imposing an actual malice standard when a public official brought a defamation suit, was necessary to avoid "self-censorship." *Id.* at 279. Additionally, the Court considered the promotion of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ." *Id.* at 270.

of ideas for the bringing about of political and social changes desired by the people.”<sup>1060</sup>

Furthermore, in *Gross*, the court of appeals noted that the Supreme Court has proclaimed that “the Constitution imposes stringent limitations upon the permissible scope”<sup>1061</sup> of defamation actions, and specifically noted that statements amounting to mere rhetorical hyperbole have been held nonactionable.<sup>1062</sup> Although the Supreme Court has not recognized a special privilege for statements of opinion, as opposed to expressions of fact, it has stated that “a statement of opinion relating to matters of public concern which does not

1060. *Id.* at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)); see also *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (holding that burden of proof is properly placed on plaintiff “[t]o ensure that true speech on matters of public concern is not deterred . . .”), *cert. denied*, 475 U.S. 1134 (1986); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (holding that burden of proof should be placed on plaintiff to ensure that juries do not compensate unpopular opinion), *cert. denied*, 459 U.S. 1226 (1983); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). In *Butts* the Court found that the burden of proof rests with plaintiff because “[t]he dissemination of the individual’s opinions on matters of public interest is for us, in the historic words of the Declaration of Independence, an ‘unalienable right’ that ‘governments are instituted among men to secure.’” *Id.* at 149.

1061. *Greenbelt Coop. Publishing Ass’n v. Bresler*, 398 U.S. 6, 12 (1970).

1062. *Gross*, 82 N.Y.2d at 152, 623 N.E.2d at 1167, 603 N.Y.S.2d at 817. See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990). The Supreme Court in *Milkovich* discussed the development of defamation law, and the idea that a public official plaintiff must prove falsity of speech in order to recover damages. *Id.*; *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). The *Hustler* Court held that “when . . . speech could not reasonably have been interpreted as stating actual facts about the public figure involved,” a public figure could not be awarded damages for emotional distress “caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most.” *Id.* at 50; *Old Dominion Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264 (1974). The *Old Dominion* Court found that the use of the word “scabs” by appellant union publication in reference to appellees could be actionable if such words “were taken out of context and used in such a way as to convey a false representation of fact.” *Id.* at 286. However, the *Old Dominion* Court found that it was not actionable in the present action, since the word “scab,” as used here was “merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join.” *Id.* at 285-86.

contain a provably false factual connotation will receive full constitutional protection.”<sup>1063</sup>

New York has adopted a similar ideology under its constitution, and has formulated a test, for determining whether assertions are nonactionable expressions of opinion, which is “more flexible and is decidedly more protective of ‘the cherished constitutional guarantee of free speech.’”<sup>1064</sup>

Whether a court applies federal or New York law, the “dispositive inquiry . . . is ‘whether a reasonable [reader] could have concluded that [the articles were] conveying facts about the plaintiff.’”<sup>1065</sup> In New York, the test for determining whether statements constitute actionable assertions of fact requires the court to ascertain: “(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to ‘signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact.’”<sup>1066</sup> Further, a plaintiff who is a public official must prove that the defamatory statements were made with actual malice.<sup>1067</sup>

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1063. *Gross*, 82 N.Y.2d at 152, 623 N.E.2d at 1167, 603 N.Y.S.2d at 817 (quoting *Milkovich*, 497 U.S. at 20).

1064. *Id.* (quoting *Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 235, 256, 567 N.E.2d 1270, 1282, 566 N.Y.S.2d 906, 918, *cert. denied*, 111 S. Ct. 2261 (1991)).

1065. *Id.* at N.Y.2d at 152, 623 N.E.2d at 1167, 603 N.Y.S.2d at 817 (quoting *600 West 115th Street Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 139, 603 N.E.2d 930, 934, 589 N.Y.S.2d 825, 829 (1992), *cert. denied*, 113 S. Ct. 2341 (1993)). The *Gross* court explained that “[s]ince falsity is a necessary element of a defamation cause of action and only ‘facts’ are capable of being proven false, ‘it follows that only statements alleging facts can properly be the subject of a defamation action.’” *Id.* (quoting *Von Gutfeld*, 80 N.Y.2d at 139, 603 N.E.2d at 934, 589 N.Y.S.2d at 829).

1066. *Gross*, 82 N.Y.2d at 153, 623 N.E.2d at 1167, 603 N.Y.S.2d at 817. (quoting *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 292, 501 N.E.2d 550, 554, 508 N.Y.S.2d 901, 905 (1986) (quoting *Ollman v. Evans*, 750 F.2d 970, 983 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985))).

1067. *Id.* at 156, 623 N.E.2d at 1170, 603 N.Y.S.2d at 820.

In addition, New York continues to apply the common law distinctions between statements of opinion which imply a factual basis undisclosed to the reader,<sup>1068</sup> and an opinion which is either accompanied by a statement of the facts upon which it is based or does not “imply the existence of undisclosed underlying facts.”<sup>1069</sup> “The former are actionable . . . because a reasonable listener or reader would infer that ‘the speaker [or writer] knows certain facts, unknown to [the] audience, which support [the] opinion and are detrimental to the person [toward] whom [the communication is directed]’” and not because they represent “false opinions.”<sup>1070</sup> The latter, however, are not actionable because an opinion which is recited after full disclosure of the facts upon which it is based would be “understood by the audience as conjecture.”<sup>1071</sup>

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1068. *Id.* at 153, 623 N.E.2d at 1168, 603 N.Y.S.2d at 818.; *see also*, *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir.), *cert. denied sub nom.*, *Hotchner v. Doubleday & Co., Inc.*, 434 U.S. 834 (1977). “If an author represents he has private, first-hand knowledge which substantiates the opinions he expresses, the expression of opinion becomes as damaging as an assertion of fact.” *Id.*

1069. *Gross*, 82 N.Y.2d at 153, 623 N.E.2d at 1168, 603 N.Y.S.2d at 818.

1070. *Gross*, 82 N.Y.2d at 153-54, 623 N.E.2d at 1168, 603 N.Y.S.2d at 818 (quoting *Steinhilber*, at 290, 501 N.E.2d at 553, 508 N.Y.S.2d at 904).

1071. *Id.* at 154, 623 N.E.2d at 1168, 603 N.Y.S.2d at 818; *see also*, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 26-7, (1990) (Brennan, J., dissenting). In a footnote, the dissenting opinion stated that:

Conjecture, when recognizable as such, alerts the audience that the statement is one of belief, not fact. The audience understands that the speaker is merely putting forward a hypothesis. Although the hypothesis involves a factual question, it is understood as the author’s ‘best guess.’ Of course, if the speculative conclusion is preceded by stated factual premises, and one or more of them is false and defamatory, an action for libel may lie *as to them*. But the speculative conclusion itself is actionable only if it implies the existence of another false and defamatory fact.

*Id.* at 28 n.5; *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*, 829 F.2d 1280 (4th Cir. 1987). In *Potomac Valve & Fitting*, the defendant was sued for defamation based on his statement in an article, accusing his competitor in the tube fitting business of purposely designing the Bi-lock test “to snow his customer.” *Id.* at 1290. The court found that this statement was defendant’s conclusion based on the main points outlined in the article, rather than on any

The New York Court of Appeals then explained that applying the foregoing principles to plaintiff's complaint was difficult because the complaint cited the articles in their entirety as the basis for the action, rather than citing to specific individual assertions contained within each article.<sup>1072</sup> Nonetheless, the court held that the appellate division had erred in affirming the dismissal of the complaint because the statements contained within the articles were "not too vague to constitute concrete accusations of criminality."<sup>1073</sup> The statements were not actionable because they suggested criminal conduct,<sup>1074</sup> "but rather because in this context they convey[ed] 'facts' that are capable of being proven true or false."<sup>1075</sup>

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special information unknown to the general audience. *Id.* Based on such finding, the *Potomac* court held that "viewed in context [this statement] is clearly an opinion, and therefore protected by the First Amendment." *Id.*

1072. *Gross*, 82 N.Y.2d at 154, 623 N.E.2d at 1168, 603 N.Y.S.2d at 818.

1073. *Id.* at 154, 623 N.E.2d at 1169, 603 N.Y.S.2d at 819.

1074. *Id.* at 154-55, 623 N.E.2d at 1169, 603 N.Y.S.2d at 819; *see also* *Silsdorf v. Levine*, 59 N.Y.2d 8, 16, 449 N.E.2d 716, 720, 462 N.Y.S.2d 822, 826, *cert. denied*, 464 U.S. 831 (1983). "[A]lthough expressions of opinion are constitutionally protected, accusations of criminal or illegal activity, even in the form of an opinion, are not." *Id.*; *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 382, 366 N.E.2d 1299, 1307, 397 N.Y.S.2d 943, 951, *cert. denied*, 434 U.S. 969 (1977) "[T]here is a critical distinction between opinions which attribute improper motives to a public officer and accusations, in whatever form, that an individual has committed a crime or is personally dishonest. No First Amendment protection enfolds false charges of criminal behavior." *Id.*

1075. *Gross*, 82 N.Y.2d at 155, 623 N.E.2d at 1169, 603 N.Y.S.2d at 819. Specifically, the court noted that the alleged defamatory statements were not made in the heat of the moment, but were "made in the course of a lengthy, copiously documented newspaper series that was written only after what purported to be a thorough investigation." *Id.* at 156, 623 N.E.2d at 1169, 603 N.Y.S.2d at 819. Furthermore, the articles appeared neither in the editorial nor "op ed" sections of the paper. *Id.* Publication of the accusations under these circumstances thus "'encourag[ed] the reasonable reader to be less skeptical and more willing to conclude that [they] stat[ed] or impl[ied] facts.'" *Id.* (quoting *600 West 115th St. Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 142, 603 N.E.2d 930., 936, 589 N.Y.S.2d 825, 831 (1992), *cert. denied*, 113 S. Ct. 2341 (1993)).



Thus, whether a defamation action is governed by the Federal or New York State Constitution, the law under either is virtually identical. Both state and federal law require an actual malice standard when the plaintiff is a public figure. Similarly, the public official plaintiff must demonstrate that the allegedly defamatory statement is false. Further, only facts capable of being proven true or false are actionable. Lastly, both seek to preserve and protect "the cherished values embodied in the First Amendment."<sup>1076</sup>

Prozeralik v. Capital Cities Communications, Inc.<sup>1077</sup>  
(decided November 23, 1993)

Defendant claimed that his right to free press under the State<sup>1078</sup> and Federal<sup>1079</sup> Constitutions was violated because the trial court erroneously instructed the jury that retractions of earlier broadcasts were false as a matter of law, and because plaintiff did not prove that defendant acted with "actual malice."<sup>1080</sup> In addition, defendant contended that the award of punitive damages to plaintiff should be set aside "since there was no showing of common-law malice; and that the damages award [wa]s excessive."<sup>1081</sup> The New York Court of Appeals reversed,<sup>1082</sup> and ordered a new trial, holding that the trial

1076. *Id.* at 156, 623 N.E.2d at 1170, 603 N.Y.S.2d at 820; *Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 235, 256, 567 N.E.2d 1270, 1282, 566 N.Y.S.2d 906, 918 (stating that "the cherished constitutional guarantee of free speech is preserved"), *cert. denied*, 111 S. Ct. 2261 (1991).

1077. 82 N.Y.2d 466, 626 N.E.2d 34, 605 N.Y.S.2d 218 (1993).

1078. N.Y. CONST. art. I, § 8, which provides in pertinent part: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." *Id.*

1079. U.S. CONST. amend. I. The First Amendment states in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." *Id.*

1080. *Prozeralik*, 82 N.Y.2d at 472, 626 N.E.2d at 37, 605 N.Y.S.2d at 221.

1081. *Id.*

1082. *Id.* at 470, 626 N.E.2d at 36, 605 N.Y.S.2d at 220. Although the court of appeals reversed the appellate division's judgment, the reversal was

court's jury instruction on the issue of falsity, "impermissibly withdrew from the jury crucial interrelated issues of credibility and actual malice that are solely [within] the province of the factfinders."<sup>1083</sup> The court concluded that punitive damages were not appropriate absent a showing of "common law malice."<sup>1084</sup>

The libel action arose when television and radio stations owned by defendant broadcasted reports falsely identifying plaintiff as the victim of an abduction and beating that had occurred the previous evening.<sup>1085</sup> The news reports also incorrectly stated that the FBI was investigating the possibility that plaintiff owed money to organized crime figures.<sup>1086</sup> Neither the police nor the FBI had released the name of the victim, but during the defendant's employee meeting and conversation about the abduction, one of the reporters for Channel Seven News speculated that plaintiff, John Prozeralik, a prominent Niagara Falls businessman, may have been the victim because it was "the first name that came to mind."<sup>1087</sup> According to Cindy DiBiasi, defendant's news reporter, FBI Agent Thurston confirmed Prozeralik as the victim, and told her, "You can go with that unless I call you back."<sup>1088</sup> Thurston, however, declared that he never made such a statement, maintaining that he did not know

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based solely upon the erroneous jury instruction. *Id.* Therefore, most of the lower court analysis of the constitutional issues remained in tact. For example, the court of appeals was in agreement with the appellate division's reasoning that constitutional malice was the appropriate standard of review for a defamation action. *Id.* at 474, 626 N.E.2d at 38-39, 605 N.Y.S.2d at 222. The court of appeals, however, reversed the appellate division on the issue of punitive damages, holding that a showing of common law malice, rather than actual malice, was necessary to sustain a punitive damage award. *Id.* at 479-80, 626 N.E.2d at 42, 605 N.Y.S.2d at 226.

1083. *Id.* at 470, 626 N.E.2d at 36, 605 N.Y.S.2d at 220.

1084. *Id.* at 480, 626 N.E.2d at 42, 605 N.Y.S.2d at 226.

1085. *Id.* at 471, 626 N.E.2d at 36, 605 N.Y.S.2d at 220. Plaintiff Prozeralik and his attorneys notified defendant, owner of radio and television stations, shortly after defendant's broadcast program, that plaintiff was not the victim in the abduction story. *Id.* Furthermore, defendant verified that another man, David Pasquantino, was the victim. *Id.*

1086. *Id.* at 470-71, 626 N.E.2d at 36, 605 N.Y.S.2d at 220.

1087. *Id.* at 471, 626 N.E.2d at 37, 605 N.Y.S.2d at 221.

1088. *Id.*

the victim's name at the time of the phone call and had refused to confirm or deny any name.<sup>1089</sup> DiBiasi announced her story on defendant's noon news broadcast, naming Prozeralik as a victim of kidnapping and beating, possibly due to organized crime debt.<sup>1090</sup> Furthermore, based upon the information obtained in the television broadcast, WKLB Radio aired three radio broadcasts which essentially repeated Channel Seven's account.<sup>1091</sup>

After the misidentification became known, Steven Ridge, Channel Seven's news director, released a "retraction" on defendant's two evening broadcasts, which stated: "The FBI earlier today said and confirmed the victim was Prozeralik, but our independent investigation is revealing he was not involved."<sup>1092</sup> Prozeralik commenced a defamation action against the owner of the television and radio stations shortly after the broadcasts. Following a jury trial, and a reduction for financial loss by remittitur, the Supreme Court, Niagara County, awarded \$15,500,000 in compensatory and punitive damages.<sup>1093</sup> The appellate division affirmed, and defendant appealed.<sup>1094</sup>

The New York Court of Appeals reversed the appellate division's decision, holding that the trial court's jury instruction,

1089. *Id.* at 471-72, 626 N.E.2d at 37, 605 N.Y.S.2d at 221.

1090. *Id.* at 470-71, 626 N.E.2d at 36, 605 N.Y.S.2d at 220. Anchorwoman DiBiasi made the following news report on defendant's noon broadcast:

The FBI is investigating a beating and abduction in Cheektowaga last night. Today, investigators are questioning John Prozeralik, the owner of John's Flaming Hearth Restaurant, in Niagara Falls, New York. Prozeralik was either tricked or forced to the Howard Johnson's in Cheektowaga according to police, where he was beaten with a baseball bat or pipe, and tied up. Today, the FBI is investigating the possibility that Prozeralik owed money to organized crime figures.

*Id.*

1091. *Id.* at 470, 626 N.E.2d at 37, 605 N.Y.S.2d at 220. The defendant broadcast the same report during its 12:45 p.m., 1:45 p.m. and 2:45 p.m. news program on its radio station. *Id.*

1092. *Id.* at 471, 626 N.E.2d at 36-37, 605 N.Y.S.2d at 220-21.

1093. *Id.* at 472, 626 N.E.2d at 37, 605 N.Y.S.2d at 221. The plaintiff was awarded "\$5.5 million in financial loss and \$10 million in punitive damages." *Id.*

1094. *Id.*

declaring defendant's retractions false as a matter of law, was erroneous.<sup>1095</sup> By instructing the jury in this manner, the court found that the trial court had usurped the jury's responsibility to resolve issues of credibility<sup>1096</sup> and actual malice.<sup>1097</sup> Determination of these issues, the court explained, "cuts to the heart of the critical elements necessary to prevail in such [defamation] cases."<sup>1098</sup> The court concluded that because the trial court "failed to tender to the jury its full range of fact finding options," with respect to the telephone conversations and the retractions, reversal was necessary.<sup>1099</sup> The court then conducted an independent review of the evidence in the

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1095. *Id.* The jury instruction read in part:

In the case presently being tried before you, I have determined as a matter of law that defendant . . . made certain false statements about the plaintiff . . . . This means that it will not be necessary for you to decide whether or not the plaintiff has proved those elements of his libel case.

*Id.* The court of appeals found this instruction to be erroneous with regard to the retractions. *Id.* However, the court did approve of the instruction with respect to the original broadcasts. *Id.* at 473, 626 N.E.2d at 38, 605 N.Y.S.2d at 222. Defendant did not dispute the fact that Prozeralik was not the actual victim, therefore, the court stated, "there was no error in instructing that the initial broadcasts were false as a matter of law." *Id.*

1096. *Id.* In the instant case, the court of appeals explained that the trial court's instruction, in effect, directed the jury to completely ignore DiBiasi's testimony, and accept the FBI agent's account of the telephone conversation between DiBiasi and himself. *Id.* Thus, the jury was deprived of its duty to decide which witness, Thurston or DiBiasi, was the credible one. *Id.* at 472, 626 N.E.2d at 37, 605 N.Y.S.2d at 221; *see generally* *Dominguez v. Manhattan and Bronx Surface Transit Operating Auth.*, 46 N.Y.2d 528, 534, 388 N.E.2d 1221, 1224, 415 N.Y.S.2d 634, 637 (1979) (stating that "[a]ssessment of the weight of the evidence and the credibility of witnesses is a function of the finder of fact").

1097. *Prozeralik*, 82 N.Y.2d at 472, 626 N.E.2d at 38, 605 N.Y.S.2d at 221 (citing *Bose Corp. v. Consumer's Union of United States Inc.*, 466 U.S. 485, 511 n.30 (1984)). The court of appeals recognized that one critical question which the court deprived the jury of resolving was whether the defendant "realized that [its] statement was false or . . . subjectively entertained serious doubt as to the truth of [its] statement." *Id.* at 473, 626 N.E.2d at 38, 605 N.Y.S.2d at 222.

1098. *Id.* at 472, 626 N.E.2d at 37, 605 N.Y.S.2d at 221.

1099. *Id.* at 473, 626 N.E.2d at 38, 605 N.Y.S.2d at 222.

record,<sup>1100</sup> and determined that although reversal was appropriate, dismissal was not.<sup>1101</sup>

The New York Court of Appeals has recognized that the shield of protection provided by the qualified privilege of free speech may be defeated by either the common-law or constitutional standard of malice.<sup>1102</sup> However, in reaching its conclusion, the court of appeals in the instant case applied federal law, and relied upon several United States Supreme Court free speech decisions. For example, the court adopted the "actual malice" standard developed by the Supreme Court in *New York Times v. Sullivan*.<sup>1103</sup> This standard, which has been enhanced by the Supreme Court's subsequent decisions,<sup>1104</sup> requires that a public

1100. *Id.* at 474-75, 626 N.E.2d at 39, 605 N.Y.S.2d at 223. The court of appeals explained that although courts are normally without the power to disturb findings of fact and are restricted to review only the law, in defamation cases courts have a "constitutional duty" to exercise independent judgment in determining whether evidence in the record establishes actual malice with the "convincing clarity required to strip the utterance of First Amendment protection" guaranteed by the Constitution. *Id.* (citing *Bose Corp.*, 466 U.S. at 511).

1101. *Id.* at 478, 626 N.E.2d at 41, 605 N.Y.S.2d at 225. Based on the evidence, the court found that plaintiff had met the prima facie burden of proof required to sustain the defamation action, because even had the jury been correctly instructed, it could have found that defendant published the broadcasts with actual malice. *Id.* at 475, 626 N.E.2d at 39, 605 N.Y.S.2d at 223. Since there was sufficient and convincingly clear evidence to warrant submitting the case to the jury for its assessment of actual malice, the court ordered a new trial. *Id.* at 478, 626 N.E.2d at 41, 605 N.Y.S.2d at 225.

1102. *See Liberman v. Gelstein*, 80 N.Y.2d 429, 605 N.E.2d 344, 590 N.Y.S.2d 857 (1992). The *Liberman* court, recognized that the term "malice" now has "dual meaning." It includes "ill will" or "spite" under the common-law standard as well as "knowledge that [the statement] was false or . . . reckless disregard of whether it was false or not" under the constitutional standard. *Id.* at 437-38, 605 N.E.2d at 349-50, 590 N.Y.S.2d at 862-63; *see also Stillman v. Ford*, 22 N.Y.2d 48, 53, 238 N.E.2d 304, 306, 290 N.Y.S.2d 893, 897 (1968) (noting that the qualified privilege protecting speech is defeated if "defamatory statements were motivated by *either* 'actual malice' or 'actual ill-will'").

1103. 376 U.S. 254 (1964).

1104. *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). According to the Supreme Court in *St. Amant*, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the

official seeking to recover damages for defamation, first prove, that the statement was false, and second, that it was published with “‘actual malice’ — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>1105</sup>

The majority in *New York Times* recognized protection for statements that were not published with actual malice, thus reflecting a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . .”<sup>1106</sup> In *Harte-Hanks Communications Inc., v. Connaughton*,<sup>1107</sup> the Court emphasized “that the actual malice standard is not satisfied merely through a showing of ill will or ‘malice’ in the ordinary sense of the term.”<sup>1108</sup> Rather, as the Court stated in *Bose Corp. v. Consumers Union of United States, Inc.*,<sup>1109</sup> a plaintiff wishing to prove actual malice is required to show by clear and convincing evidence that defendant knew that her statement was false, or that she “subjectively entertained serious doubt” as to the truth of her statement.<sup>1110</sup>

The court also relied upon *Mahoney v. Adirondack Publishing Co.*,<sup>1111</sup> a free speech decision based upon the constitutional standard of “actual malice.”<sup>1112</sup> In *Mahoney*, the court held that plaintiff could not infer actual malice because the false publication was a product of misperception, not fabrication.<sup>1113</sup>

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truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.” *Id.*

1105. *New York Times*, 376 U.S. at 279-80.

1106. *Id.* at 270.

1107. 491 U.S. 657 (1989).

1108. *Id.* at 666.

1109. 466 U.S. 485 (1984).

1110. *Id.* at 511 n.30.

1111. 71 N.Y.2d 31, 517 N.E.2d 1365, 523 N.Y.S.2d 480 (1987).

1112. *Id.* at 36 n.1, 517 N.E.2d at 1367 n.1, 523 N.Y.S.2d at 481 n.1. The *Mahoney* court stated that the dispositive issue on appeal was whether the plaintiff had proved by clear and convincing evidence that defendants published the false assertions “knowing they [false assertions] were false or subjectively entertaining serious doubts as to their truth.” *Id.* at 37, 517 N.E.2d at 1367, 523 N.Y.S.2d at 481 (citing *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964)).

1113. *Mahoney*, 71 N.Y.2d at 40, 517 N.E.2d at 1369, 523 N.Y.S.2d at 484.

The *Mahoney* court determined that there was insufficient evidence to support the jury's conclusion of actual malice because plaintiff did not establish that defendant "knew the account was false or entertained doubt as to its truth."<sup>1114</sup> It was more likely, the court explained, that the statements were a product of misunderstanding.<sup>1115</sup> The court in *Prozeralik* stated that the instant case was a "different" and "stronger" case than *Mahoney*, and factually distinguished the two cases.<sup>1116</sup> In *Prozeralik*, plaintiff presented direct evidence from which a jury could infer "that the defendant knew or suspected that Prozeralik was not the victim" of the attack.<sup>1117</sup> Moreover, FBI agent Thurston gave testimony, which, had it been rightfully reviewed by the jury, could have supported a finding that defendant published the retractions with actual malice.<sup>1118</sup> Therefore, the court concluded, dismissal of plaintiff's action was not proper.<sup>1119</sup>

The court addressed defendant's remaining contention as to whether punitive damages can be awarded absent "common law

1114. *Id.* at 39, 517 N.E.2d at 1368, 523 N.Y.S.2d at 483.

1115. *Id.* at 39-40, 517 N.E.2d at 1368-69, 523 N.Y.S.2d at 483-84.

1116. *Prozeralik v. Capital Cities Communications, Inc.*, 82 N.Y.2d 476-77, 477, 626 N.E.2d 34, 40, 605 N.Y.S.2d 218, 224 (1993). In *Mahoney*, the defendant published a story in the sports section of a newspaper which proffered a reporter's account of a football coach "verbally abusing" his players. *Mahoney*, 71 N.Y.2d at 36-37, 517 N.E.2d at 1367, 523 N.Y.S.2d at 481. The reporter based his story upon statements which he allegedly heard at the game. *Id.* At trial, it was found that the coach had not uttered the words attributed to him, although what he did in fact say sounded similar. *Id.* at 37, 517 N.E.2d at 1368, 523 N.Y.S.2d at 482. The court concluded that actual malice could not be inferred from a mere misunderstanding. *Id.* at 39-40, 517 N.E.2d at 1368-69, 523 N.Y.S.2d at 483-84.

1117. *Prozeralik*, 82 N.Y.2d at 477, 626 N.E.2d at 40, 605 N.Y.S.2d at 224.

1118. *Id.* at 477-78, 626 N.E.2d at 40-41, 605 N.Y.S.2d at 224-25. In partial dissent, Justice Levine, relying on *Mahoney*, reasoned that there was insufficient proof to establish actual malice because even if a jury would accept Thurston's version of the telephone conversation, there was not (based on this record) clear and convincing evidence that DiBiasi could not have "misunderstood" Thurston's version of what he told her over the telephone. *Id.* at 483-84, 626 N.E.2d at 44, 605 N.Y.S.2d at 228-29 (Levine, J., concurring in part and dissenting in part).

1119. *Id.* at 478, 626 N.E.2d at 41, 605 N.Y.S.2d at 225.

malice.”<sup>1120</sup> The appellate division only required a showing of actual malice for an award of punitive damages, despite the contention proffered by both the defendant and dissenting Justice Lawton, that “common-law malice” or “conscious ill will” was necessary to sustain the punitive damage award.<sup>1121</sup> The appellate court relied upon the federal standard which was developed by the Supreme Court in *Gertz v. Robert Welch, Inc.*,<sup>1122</sup> and reasoned that an award of punitive damages may be justified if “the evidence establishes defendant’s indifference to plaintiff’s rights, manifested by a reckless disregard of the truth or falsity of its statements.”<sup>1123</sup> The court of appeals, however, determined that “actual malice” under the *New York Times* standard was not sufficient by itself to permit an award of punitive damages.<sup>1124</sup> The court explained that “circumstances of . . . outrage, . . . spite, . . . fraudulent or evil motive on the part of defendant” must exist to justify the public policy behind punitive damage awards.<sup>1125</sup> The court concluded that although there was no evidence in *this* record to support the inference that defendant published the reports out of “hatred,” “ill will” or

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1120. *Id.* at 480, 626 N.E.2d at 41, 605 N.Y.S.2d at 225. The court recognized that had a new trial not been ordered, the jury instruction on the issue of punitive damages would not have been reviewed because defendant had not objected to it. *Id.* However, the court noted its disapproval of the instruction “so as to provide guidance on the new trial and to settle the issue for future cases.” *Id.* at 479, 626 N.E.2d at 41, 605 N.Y.S.2d at 225.

1121. *Prozeralik v. Capital Cities Communications, Inc.*, 188 A.D.2d 178, 185-88, 593 N.Y.S.2d 662, 667-69 (4th Dep’t 1993).

1122. 418 U.S. 323 (1974). The *Gertz* standard states that in a defamation action, involving a matter of public concern, punitive damages may not be awarded absent a showing of actual malice. *Id.* at 349.

1123. *Prozeralik*, 188 A.D.2d at 185, 593 N.Y.S.2d at 667.

1124. *Prozeralik*, 82 N.Y.2d at 479, 626 N.E.2d at 42, 605 N.Y.S.2d at 226.

1125. *Id.* (citing PROSSER & KEETON ON THE LAW OF TORTS § 2, at 10 (5th ed. 1984)). For public policy purposes, punitive damages are intended to remedy the “defendant’s mental state in relation to the plaintiff and the motive in publishing the falsity . . . .” 82 N.Y.2d at 479, 626 N.E.2d at 42, 605 N.Y.S.2d at 226.



"spite," a different determination may be established during the new trial.<sup>1126</sup>

Both the State and Federal Constitutions provide the press with broad protection of free speech by requiring defamatory statements to be published with "actual malice." Under the Federal Constitution, only a showing of actual malice is necessary to sustain an award of punitive damages. However, New York law, seems to require an additional showing of common-law malice, finding "actual malice . . . insufficient by itself to justify an award of punitive damages . . . ."<sup>1127</sup> Together, these requirements not only reduce the "chilling effect" that large libel judgments may have on the "full and unfettered expression of ideas," but more importantly,<sup>1128</sup> these standards guarantee that the "broad cloak of protection afforded the press under the State and Federal Constitutions, . . . does not extend to the reckless and irresponsible infliction of injury by defendant."<sup>1129</sup>

## SUPREME COURT, APPELLATE DIVISION

### FIRST DEPARTMENT

Polish American Immigration Relief Committee, Inc. v.  
Relax<sup>1130</sup>  
(decided April 13, 1993)

Plaintiff, Polish American Immigration Relief Committee, Inc. [hereinafter PAIRC], a Polish immigrant aid corporation, brought suit against the magazine publisher and editor of "Relax," a small-circulation Polish language magazine, to recover for libel based upon the contents of a letter to the editor, and an interview,

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1126. *Prozeralik*, 82 N.Y.2d at 480, 626 N.E.2d at 42, 605 N.Y.S.2d at 226.

1127. *Id.* at 479, 626 N.E.2d at 42, 605 N.Y.S.2d at 226 (1993).

1128. *Prozeralik*, 188 A.D.2d at 186, 593 N.Y.S.2d at 668.

1129. *Id.*

1130. 189 A.D.2d 370, 596 N.Y.S.2d 756 (1st Dep't 1993).

which were published in its February 4, 1989, issue.<sup>1131</sup> In its defense, defendants claimed that the statements complained of were constitutionally protected opinion under both the New York State<sup>1132</sup> and Federal<sup>1133</sup> Constitutions<sup>1134</sup>. The court held that the statements at issue were non-actionable expressions of opinion under both the federal and state constitutional standards.<sup>1135</sup>

The subject of this lawsuit was a letter written by Marian Jablonski, a recent Polish immigrant.<sup>1136</sup> Mr. Jablonski complained about his family's treatment by PAIRC and the Polish American Congress upon their arrival to the United States.<sup>1137</sup> In the letter, Mr. Jablonski referred to the plaintiffs as "thieves who should have been put in prison long ago."<sup>1138</sup> Subsequently, Mr. Jablonski and his wife were interviewed, and Mr. Jablonski had an opportunity to elaborate on the letter.<sup>1139</sup> During the course of that interview, Mr. Jablonski explained why he considered PAIRC a "madhouse."<sup>1140</sup>

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1131. *Id.* at 371, 596 N.Y.S.2d at 756.

1132. N.Y. CONST. art. I, § 8. Section 8 provides in pertinent part: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." *Id.*

1133. U.S. CONST. amend. I. The First Amendment provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ." *Id.*

1134. *Relax*, 189 A.D.2d at 372, 596 N.Y.S.2d at 757.

1135. *Id.* at 374, 596 N.Y.S.2d at 758.

1136. *Id.* at 371, 596 N.Y.S.2d at 756.

1137. *Id.* at 371, 596 N.Y.S.2d at 756-57.

1138. *Id.* at 371, 596 N.Y.S.2d at 757.

1139. *Id.*

1140. *Id.* The comments which form the basis of plaintiff's claim included the following: "'PAIRC is a madhouse. For instance, they won't pick up people at the airport. Last year there was nobody to meet four families.'" Furthermore, he also stated:

As I said, I don't regret having left Poland. There's a lesson for me: forget the PAIRC, forget the Polish American Congress, forget others. Let them do their fund raisers that nobody understands the aim of, let them pretend they are just and democratic, let them have their pictures taken with whomever they choose, let them listen to national anthems. I

Mr. Jablonski's letter and the substance of his interview were published in "Relax."<sup>1141</sup> However, the magazine did not imply that the facts and opinions stated were accurate.<sup>1142</sup> In fact, the article was prefaced by a statement from the editor, Mr. Heyduk, which stated: "[t]he text really speaks for itself, yet if anything remains to be said, it is the institutions referred to that should say it."<sup>1143</sup> In addition, Mr. Heyduk notified the plaintiffs and offered to publish an article exhibiting plaintiff's version of the facts, but the plaintiffs failed to respond.<sup>1144</sup> Nevertheless, the plaintiffs claimed that the article published constituted libel and defamation. However, the defendants claimed that "the statements complained of were constitutionally protected opinion."<sup>1145</sup>

The court acknowledged the differing federal and state standards used to evaluate the contents of speech alleged to be constitutionally protected.<sup>1146</sup> With respect to the federal test, the court found that under such test, "the court must first define the words as they are commonly understood, then determine whether the words are subject to verification, and lastly, examine the type of speech at issue."<sup>1147</sup> As the court explained, "[o]nly if the expression fell within the category of loose, figurative, or hyperbolic speech could the impression that an apparently

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myself have found a job in my own occupation, and so I now have a chance to move out of here and really start living on my own instead of just treading water. The farther away from false do-gooders, the better. *Id.* at 371-72, 596 N.Y.S.2d at 757. In addition, with respect to Jablonski's claim that PAIRC pays rent for unoccupied apartments in a building that "is rumored to be owned by the director of the PAIRC," he stated "You know how it is. The PAIRC gets funds for immigrants from the Americans, from the federal government, so it is better to report that all the apartments are occupied, that rent must be paid and so on. This way business is booming." *Id.* at 372, 596 N.Y.S.2d at 757.

1141. *Id.*

1142. *Id.*

1143. *Id.*

1144. *Id.*

1145. *Id.*

1146. *Id.* at 373, 596 N.Y.S.2d at 758.

1147. *Id.*

verifiable assertion was intended, be negated.”<sup>1148</sup> As for the New York standard, the court set forth the “content, tone and purpose” test mandated by the New York State Constitution.<sup>1149</sup> However, despite the fact that the federal and state standards differ, the court recognized that under either standard, the dispositive issue is the same: “whether a reasonable listener could conclude that the defendant is conveying facts.”<sup>1150</sup>

In order to determine whether the publication at issue in this case could be understood to mean that the speaker was conveying “facts,” the court set out to distinguish between a “pure opinion,” which is not actionable under New York law, and a “mixed opinion,” which is actionable.<sup>1151</sup> Relying on *Gross v. New York Times Co.*,<sup>1152</sup> the court defined a “pure opinion” as “a statement of opinion which discloses the facts relied on, or

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1148. *Id.* To illustrate the application of this standard, the court cited *Greenbelt Coop. Publishing Ass’n v. Bresler*, 398 U.S. 6, 14 (1970), where the Supreme Court held that the term “blackmail,” used during a heated public debate, was not actionable because “[n]o reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense.” *Id.*

1149. *Relax*, 189 A.D.2d at 372, 596 N.Y.S.2d at 758. This test originated in *Steinilber v. Alphonse*, 68 N.Y.2d 283, 501 N.E.2d 550, 508 N.Y.S.2d 901 (1986). The *Steinilber* court stated that “[t]he essential task is to decide whether the words complained of, considered in the context of the entire communication and of the circumstances in which they were spoken or written, may be reasonably understood as implying the assertion of undisclosed facts justifying the opinion.” *Id.* at 290, 501 N.E.2d at 553, 508 N.Y.S.2d at 904.

1150. *Relax*, 189 A.D.2d at 373, 596 N.Y.S.2d at 758.

1151. *Id.* at 374, 586 N.Y.S.2d at 758. In *Steinilber*, the New York Court of Appeals set forth the reasoning behind this distinction. The court stated that “[a]n expression of pure opinion is not actionable. It receives the Federal constitutional protection accorded to the expression of ideas, no matter how vituperative or unreasonable it may be.” 68 N.Y.2d at 289, 501 N.E.2d at 552, 508 N.Y.S.2d at 903 (citations omitted). In contrast, “[t]he actionable element of a ‘mixed opinion’ is not the false opinion itself - it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking.” *Id.* at 290, 501 N.E.2d at 553, 508 N.Y.S.2d at 904 (citations omitted).

1152. 180 A.D.2d 308, 587 N.Y.S.2d 293 (1st Dep’t 1992), *aff’d in part, rev’d in part*, No. 178, 1993 WL 41949 (N.Y. Ct. App. Oct. 21, 1993).

does not suggest that it is based on undisclosed facts,"<sup>1153</sup> and a "mixed opinion" as one which is "published with actual malice as to the facts underlying the opinion," and therefore actionable.<sup>1154</sup>

The court found the words at issue here to be "pure opinion," and therefore, constitutionally permissible under the State and Federal Constitutions.<sup>1155</sup> It characterized the statements as "rhetorical hyperbole and vigorous epithet,"<sup>1156</sup> and concluded that "a reasonable reader would not interpret the expressions as factual."<sup>1157</sup> In reaching its decision, the court focused on the fact that the publication in question was based upon a letter written to the editor of a magazine.<sup>1158</sup> In the court's opinion, this fact assures that "[n]o reasonable person would conclude that PAIRC was literally a 'madhouse,' or that actual criminality is

1153. *Relax*, 189 A.D.2d at 374, 596 N.Y.S.2d at 758. *See also* John Grace & Co. v. Todd Assocs., 188 A.D.2d 585, 585-86, 591 N.Y.S.2d 477, 478 (2d Dep't 1992) (holding engineering company's report which indicated that plaintiff was responsible for project delays to be pure opinion since the expressions in the report "were adequately supported by the statement of the underlying facts" (citations omitted)); *Keller v. Miami Herald Publishing Co.*, 778 F.2d 711, 718 (11th Cir. 1985) (finding that a cartoon depicting a nursing home that was closed down by state order constituted a pure opinion because "[t]he statement was not capable of verification.").

1154. *Relax*, 189 A.D.2d at 374, 596 N.Y.S.2d at 758. *See also* Zeevi v. Union Bank of Switzerland, 1993 WL 148871 at \*6 (S.D.N.Y. Apr. 30, 1993) (holding statements contained in a Criminal Referral Form concerning a former employee to be actionable as a "mixed opinion" because the statement suggests that it is based upon underlying facts which are not disclosed).

1155. *Relax*, 189 A.D.2d at 374, 596 N.Y.S.2d at 759.

1156. *Id.* at 374, 596 N.Y.S.2d at 758. *See also* Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 286 (1974) (finding the word "scab" used in a union publication to describe nonunion letter carriers to constitute "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join"); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) (holding the word "blackmail" as used in an article about a public figure to be "no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable").

1157. *Id.* at 374, 596 N.Y.S.2d at 759.

1158. *Id.* at 374, 596 N.Y.S.2d at 758-59.

charged by the epithets ‘thieves’ and ‘false do-gooders.’”<sup>1159</sup> In addition, the court took into account the underlying free speech considerations involved in situations of this kind, and the importance of encouraging a public forum.<sup>1160</sup>

It has often been noted that the New York test is broader than the federal test.<sup>1161</sup> The federal test first requires a determination of “whether challenged expression . . . would reasonably appear to state or imply assertions of objective fact[,]” and second, the determination of “the impression created by the words used as well as the general tenor of the expression, from the point of view of the reasonable person.”<sup>1162</sup> In contrast, the state test examines “the content of the whole communication, its tone and apparent purpose.”<sup>1163</sup> In discussing the distinction between the two tests, the *Immuno AG*. court observed that by “[i]solating challenged speech and first extracting its express and implied factual statements, without knowing the full context in which they were uttered,” as required under federal law, an application of the federal test “may result in identifying many more implied factual assertions than would a reasonable person encountering that expression in context.”<sup>1164</sup>

Nevertheless, while the two tests diverge somewhat, the focus of the inquiry under both standards are the same: “whether a reasonable listener could conclude that the defendant is conveying

1159. *Id.* at 374, 596 N.Y.S.2d at 759.

1160. *Id.* at 375-76, 596 N.Y.S.2d at 359 (citing *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 255, 567 N.E.2d 1270, 1281-82, 566 N.Y.S.2d 906, 917-18 (1991) (discussing the public function of letters to the editor)).

1161. *See Immuno AG.*, 77 N.Y.2d at 249, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914 (stating that “‘protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by’ the Federal Constitution”) (citing *O’Neill v. Oakgrove Constr.*, 71 N.Y.2d 521, 529 n.3, 523 N.E.2d 277, 280 n.3, 528 N.Y.S.2d 1, 4 n.3 (1988)); *600 West 115th St. Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 145, 603 N.E.2d 930, 938, 589 N.Y.S.2d 825, 833 (1992) (stating that the federal test is narrower).

1162. *Immuno AG.*, 77 N.Y.2d at 243, 567 N.E.2d at 1273-74, 566 N.Y.S.2d at 909-10.

1163. *Id.* at 250, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914.

1164. *Id.* at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917.

facts.”<sup>1165</sup> Moreover, as is demonstrated by the case law, both tests often yield the same result.<sup>1166</sup> Thus, as long as an offensive utterance appears to communicate facts, it will be actionable under both state and federal law.

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1165. *Relax*, 189 A.D.2d at 373, 596 N.Y.S.2d at 758 (citations omitted).

1166. *See, e.g.*, 600 West 115th St. Corp. v. Von Gutfeld, 80 N.Y.2d 130, 145, 603 N.E.2d 930, 938, 589 N.Y.S.2d 825, 833 (1992) (finding statements made at a public hearing were not actionable defamation under Federal or State Constitutions); *McGill v. Parker*, 179 A.D.2d 98, 107-09, 582 N.Y.S.2d 91, 97-98 (1st Dep’t 1992) (finding statements published in pamphlets and leaflets regarding the treatment of New York City carriage horses considered protected opinion under federal and state law).