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Freedom of Speech & Press: Prozeralik v. Capital Cities Communications, Inc.

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."[1076]

Prozeralik v. Capital Cities Communications, Inc.[1077]
(decided November 23, 1993)

Defendant claimed that his right to free press under the State[1078] and Federal[1079] 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."[1080] 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."[1081] The New York Court of Appeals reversed,[1082] 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."[1083] The court concluded that punitive damages were not appropriate absent a showing of "common law malice."[1084]

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.[1085] The news reports also incorrectly stated that the FBI was investigating the possibility that plaintiff owed money to organized crime figures.[1086] 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."[1087] 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."[1088] 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.[1089] 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.[1090] Furthermore, based upon the information obtained in the television broadcast, WKLB Radio aired three radio broadcasts which essentially repeated Channel Seven's account.[1091]

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."[1092] 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.[1093] The appellate division affirmed, and defendant appealed.[1094]

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

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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.[1095] 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[1096] and actual malice.[1097] Determination of these issues, the court explained, "cuts to the heart of the critical elements necessary to prevail in such [defamation] cases."[1098] 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.[1099] 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,[1100] and determined that although reversal was appropriate, dismissal was not.[1101]

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.[1102] 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.*[1103] This standard, which has been enhanced by the Supreme Court's subsequent decisions,[1104] 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."[1105]

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 . . . ."[1106] In *Harte-Hanks Communications Inc., v. Connaughton*,[1107] 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."[1108] Rather, as the Court stated in *Bose Corp. v. Consumers Union of United States, Inc.*,[1109] 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.[1110]

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

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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."[1114] It was more likely, the court explained, that the statements were a product of misunderstanding.[1115] The court in *Prozeralik* stated that the instant case was a "different" and "stronger" case than *Mahoney*, and factually distinguished the two cases.[1116] 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.[1117] 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.[1118] Therefore, the court concluded, dismissal of plaintiff's action was not proper.[1119]

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

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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."[1120] 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.[1121] The appellate court relied upon the federal standard which was developed by the Supreme Court in *Gertz v. Robert Welch, Inc.*,[1122] 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."[1123] 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.[1124] 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.[1125] 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

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.[1126]

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 . . . ."[1127] 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,[1128] 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."[1129]

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT

Polish American Immigration Relief Committee, Inc. v. Relax[1130]
(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,

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).