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Freedom of Speech and Press

SECOND DEPARTMENT

Ansorian v. Zimmerman[198]
(decided May 22, 1995)

Rosette Ansorian, the plaintiff and a high school French teacher, appealed an order granting summary judgment by the Supreme Court, Rockland County, based on her claim that defendant's written and oral statements concerning her constituted defamation and were not protected under either the free speech provisions of the New York State[199] and Federal[200] Constitutions.[201] The court denied the plaintiff's constitutional claim and held that the communications were not defamatory, but, instead, "constituted personal opinion and rhetorical hyperbole rather than objective fact."[202] The court explained that "[p]ure opinion is defined as a statement of opinion which is accompanied by a recitation of the facts upon which it is based or does not imply that it is based upon undisclosed facts."[203]

Rosette Ansorian was the defendant, Vanessa Zimmerman's, high school French teacher.[204] Mark and Sandra Zimmerman, Vanessa's parents, made written and oral statements in which they declared Ansorian "incompetent" and requested that she be replaced as Vanessa's French teacher.[205]

Rosette Ansorian sued the defendants for defamation and argued that the Zimmerman's oral and written statements, where they called Ansorian "incompetent" and requested her dismissal,

198. 215 A.D.2d 614, 627 N.Y.S.2d 706 (2d Dep't 1995).

199. N.Y. CONST. art. I, § 8. This section 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.*

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

201. *Ansorian*, 215 A.D.2d at 614, 627 N.Y.S.2d at 707.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

were not constitutionally protected free speech.[206] The court held that the alleged defamatory material constituted opinion rather than an assertion of objective fact, and, therefore, was constitutionally protected free speech.[207]

In reaching its decision, the court sought support from *Immuno A.G. v. Moor-Jankowski*,[208] which set forth the New York test to determine whether an alleged defamatory statement constitutes an assertion of objective fact which subjects a defendant to liability. In discussing whether an alleged defamatory statement constitutes an assertion of objective fact, the *Immuno* court stated:

> In making this inquiry, courts cannot stop at literalism. The literal words of challenged statements do not entitle a media defendant to "opinion" immunity or a libel plaintiff to go forward with its action. In determining whether speech is actionable, courts must additionally consider 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.[209]

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206. *Id.*

207. *Id.*

208. 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991), *cert. denied*, 500 U.S. 954 (1991). In *Immuno*, a libel action was brought against the editor of a scientific journal which published a letter to the editor that criticized a biologic products manufacturer's plan to establish an African facility for hepatitis research using wild chimpanzees. *Id.* at 240, 567 N.E.2d at 1272, 566 N.Y.S.2d at 908. The letter criticized the facility by stating that the facility was (1) created to avoid restrictions upon the importation of chimpanzees, (2) harmful to the population of chimpanzees because the capture of such animals required killing the chimpanzees' mothers and (3) capable of spreading hepatitis back to the healthy chimpanzee population. *Id.* The defendant also described the plaintiff's alleged attempts to avoid regulations on endangered species "scientific imperialism" and stated that such actions would "backfire on people like [the defendant] involved in the bona fide use of chimpanzees and other primate animals." *Id.* at 241, 567 N.E.2d at 1273, 566 N.Y.S.2d at 909. The *Immuno* court held that the letter in question "would not have been viewed by the average reader . . . as conveying actual facts about plaintiff," and, therefore, the court affirmed the summary judgment order. *Id.* at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917.

209. *Id.* at 243, 567 N.E.2d at 1274, 566 N.Y.S.2d at 909-10.

The *Ansorian* court adopted the language of *Immuno* and stated that expressions which constitute opinion are constitutionally protected.[210]

Further, in *Steinhilber v. Alphonse*,[211] the New York Court of Appeals defined constitutionally protected pure opinion as "a statement of opinion which is accompanied by a recitation of the facts upon which it is based . . . ."[212] The court stated that "[a]n opinion not accompanied by such a factual recitation may, nevertheless, be 'pure opinion' if it does not imply that it is based upon undisclosed facts."[213]

Applying both of the above principles, the *Ansorian* court concluded that the oral and written statements made by the defendants were supported by a recitation of the underlying facts, and therefore, were constitutionally protected.[214]

According to the *Ansorian* court, under the New York State Constitution, expressions of opinion are given greater protection than under the United States Constitution.[215] New York provides a "hospitable climate for the free exchange of ideas."[216] The words of article I, section 8, of the New York State Constitution "reflect the deliberate choice of the New York State Constitutional Convention not to follow the language of the First

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210. *Ansorian*, 215 A.D.2d at 614, 627 N.Y.S.2d at 707.

211. 68 N.Y.2d 283, 501 N.E.2d 550, 508 N.Y.S.2d 901 (1986). In *Steinhilber*, a former union member brought a defamation action against the union for an allegedly defamatory recorded telephone message which stated in pertinent part "[plaintiff] lacks only three things to get ahead, talent, ambition, and initiative," and for an allegedly defamatory banner which said "# 1 SCAB LOUISE STEINHILBER SUCKS." *Id.* at 287-88, 501 N.E.2d at 551, 508 N.Y.S.2d at 902. The court held that the telephone answering message would not be understood by the reasonable person to be "an assertion of fact or as [an] opinion based on undisclosed facts." *Id.* at 293, 501 N.E.2d at 555, 508 N.Y.S.2d at 906. The court reasoned that the banner, in its context, was intended to be "an expression of disapproval" and was, therefore, a non-actionable opinion. *Id.* at 295, 501 N.E.2d at 556, 508 N.Y.S.2d at 907.

212. *Id.* at 289, 501 N.E.2d at 552, 508 N.Y.S.2d at 903.

213. *Id.*

214. *Ansorian*, 215 A.D.2d at 614, 627 N.Y.S.2d at 707.

215. *Id.*

216. Immuno A.G. v. Moor-Jankowski, 77 N.Y.2d 235, 249, 567 N.E.2d 1270, 1277, 566 N.Y.S.2d 906, 913 (1991).

Amendment [of the Federal Constitution], ratified 30 years earlier, but instead to set forth [New York State's] basic democratic ideal of liberty of the press in strong affirmative terms."[217] Therefore, whether the "interpretive"[218] or "non-interpretive"[219] approach of constitutional analysis is applied to the New York State Constitution, the state's free speech provision affords broader protection than the Federal Constitution.[220]

In analyzing free speech cases under the New York State Constitution, there is no single formula or definitive procedure.[221] Thus, in the context of defining opinion for the purposes of adjudicating claims of free expression, "[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."[222] Thus, even if the actual words of a communication appear to be defamatory, they may still be constitutionally protected in New York if the reasonable person would not interpret the words to be an assertion of fact, based on the circumstances surrounding the communication.

The federal courts analyze the type of communication necessary for a valid defamation action differently than the New York courts. Generally, the federal courts have relied on the

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217. *Id.*

218. *Id.* at 249, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914 (defining the interpretive approach as emphasizing text and history).

219. *Id.* (defining the non-interpretive approach as emphasizing tradition and policy).

220. *Id.*

221. *Id.* at 251, 567 N.E.2d at 1279, 566 N.Y.S.2d at 915.

222. Steinhilber v. Alphonse, 68 N.Y.2d 283, 290, 501 N.E.2d 550, 553, 508 N.Y.S.2d 901, 904 (1986). In applying this analysis, the court held that the union head's allegedly defamatory words regarding the plaintiff's lack of "talent, ambition and initiative" were constitutionally protected under New York State's free speech provision because, under the circumstances of the plaintiff crossing her union's strike line, the ordinary person would not consider the statements to be "an assertion of fact or . . . opinion based on undisclosed facts." *Id.* at 293, 501 N.E.2d at 555, 508 N.Y.S.2d at 906.

following four part test illustrated in *Ollman v. Evans*.[223] Under the *Ollman* test, the court should consider:

> 1) an assessment of whether the specific language in issue has a precise meaning which is readily understood or whether it is indefinite and ambiguous; (2) a determination of whether the statement is capable of being objectively characterized as true or false; (3) an examination of the full context of the communication in which the statement appears; and (4) a consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might "signal to readers or listeners that what is being read or heard is likely to be opinion, not fact."[224]

Though the last two factors of the test envisioned by the plurality in *Ollman* seem to parallel New York State's propensity to view the entire statement in relation to the surrounding circumstances, the federal courts have combined the last two factors into one termed "type of speech."[225] From this viewpoint, "except for special situations of loose, figurative, hyperbolic language, statements that contain or imply assertions of provably false fact will likely be actionable."[226] Because the federal courts apply the second and third elements of their general test in such a way, communications which might not be actionable under the New York State analysis, due to their surrounding circumstances, will likely be actionable in federal court because the federal courts will only except loose, figurative, hyperbolic language from liability.

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223. 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

224. *Steinhilber*, 68 N.Y.2d at 292, 501 N.E.2d at 554, 508 N.Y.S.2d at 905 (citing Ollman v. Evans, 750 F.2d 970, 979-84 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985)).

225. *Immuno*, 77 N.Y.2d at 244, 567 N.E.2d at 1274, 566 N.Y.S.2d at 910.

226. *Id.* at 245, 567 N.E.2d at 1275, 566 N.Y.S.2d at 911. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990) (holding that defendant newspaper's assertion that the plaintiff had lied under oath "is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that [plaintiff] committed the crime of perjury").

Undoubtedly, there are many situations where allegedly defamatory communication is not made in a loose, figurative or hyperbolic way, but the surrounding circumstances of the communication would dictate to the average person that such communication is only an opinion and should not be taken as an assertion of fact. The *Immuno* court did not stop at the application of *Milkovich v. Lorain Journal Co.*, but went ahead and stated that the federal court's policy of "[i]solating challenged speech and first extracting its express and implied factual statements, without knowing the full context in which they were uttered, indeed may result in identifying many more implied factual assertions than would a reasonable person encountering that expression in context."[227]

In sum, in our system of federalism, the Federal Constitution provides the minimum of free speech protection. Since the federal courts will look to classify the communication by type rather than on the circumstances and context surrounding the communication, more allegedly slanderous and libelous statements will not be constitutionally protected under the Federal Constitution. Therefore, the New York State Constitution goes further than the Federal Constitution in protecting free speech. The New York courts will look at allegedly defamatory material from the reasonable person standard based on the communication's surrounding circumstances.

Guarneri v. Korea News, Inc.[228]
(decided April 17, 1995)

Attorney Stephen Guarneri brought a libel action against the newspapers Korea News, Inc. and Korea Central Daily News, Inc., based on statements printed in their respective newspapers about Mr. Guarneri's conduct as an attorney in a criminal case.[229] The defendants separately appealed from an order

227. *Immuno*, 77 N.Y.2d at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917.

228. 625 N.Y.S.2d 291 (App. Div. 2d Dep't 1995).

229. *Id.* at 292.