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Freedom of Speech and Press

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.

denying their separate motions to dismiss the plaintiff's complaint for failure to state a cause of action or, in the alternative, for summary judgment.[230] The grounds for the motion were based on the defendants' theory that since the three articles in question were expressions of pure opinion, they were protected forms of free speech under both the New York State and Federal Constitutions.[231]

The Appellate Division, Second Department, held that the denial of the defendants' motions to dismiss constituted reversible error.[232] Upon review of the statements in the three newspaper articles, the court was convinced that the statements were not reasonably susceptible to a defamatory meaning, but rather they constituted pure opinion and thus, were constitutionally protected.[233] In addition, the court ruled that, contrary to plaintiff's contention, the opinions in the articles were adequately supported by the statement of the underlying facts, and did not imply that they were based on undisclosed facts.[234] Finally, the court held that the articles were substantially true and since truth is an absolute bar to a libel action, the defendants' motions to dismiss should have been granted.[235]

Mr. Guarneri, an attorney, brought suit against Korea News, Inc. and Korea News Daily, Inc. after both newspapers printed articles stating that Mr. Guarneri was dismissed from a criminal

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230. *Id.*

231. *Id.* U.S. CONST. amend. I. The First Amendment states that: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." *Id.* N.Y. CONST. art. I, § 8. Article I, § 8 of the New York Constitution provides in pertinent part:

> "Every citizen may freely speak, write and publish his sentiments on all subjects . . . and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all . . . indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be [found not liable]."

Id.

232. *Guarneri*, 625 N.Y.S.2d at 292.

233. *Id.*

234. *Id.*

235. *Id.*

appeal case because he was unprepared and negligent in handling the appeal.[236] The articles alleged that his conduct resulted in a lost opportunity to appeal despite having been granted two extensions.[237] In addition, the articles disclosed that the attorneys appointed to replace Mr. Guarneri planned to pursue the appeal.[238]

Mr. Guarneri contended that he suffered damages resulting from the statements published by the defendants.[239] The defendants contended that the statements were not defamatory because they constituted pure opinion.[240] According to the court, "a pure opinion is a statement of opinion which is accompanied by recitation of the facts upon which it is based or does not imply that it is based upon undisclosed facts."[241] The court reviewed the statements and concluded that they were not reasonably susceptible to a defamatory meaning.[242] Furthermore, the court held that the statements actually "constituted pure opinion and thus were constitutionally protected."[243]

In reaching its decision, the *Guarneri* court relied on *Steinhilber v. Alphonse*[244] and *Immuno A.G. v. Moor-Jankowski*.[245] In *Steinhilber*, the New York Court of Appeals stated that "expressions of an opinion false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions."[246] The court continued, stating that "[w]hen . . . the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a 'mixed opinion' and is

236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. 68 N.Y.2d 283, 501 N.E.2d 550, 508 N.Y.S.2d 901 (1986).
245. 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, *cert. denied*, 500 U.S. 954 (1991).
246. *Steinhilber*, 68 N.Y.2d at 286, 501 N.E.2d at 551, 508 N.Y.S.2d at 902 (citations omitted).

actionable."[247] The *Steinhilber* court explained that "[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."[248]

In *Steinhilber*, the plaintiff was a member of the defendant's union, Communication Workers of America, Local 1120, and was employed at New York Telephone Company in Saugerties, New York.[249] On August 7, 1983, the plaintiff crossed a union strike line in violation of a union strike order and continued to work until August 11, 1983, the day she resigned.[250] The union subsequently issued a fine to plaintiff for working during the strike and the membership authorized officers of the union to take necessary steps to collect the fine.[251] The communication that gave rise to the cause of action in *Steinhilber* was a tape recorded message made by the union vice president of the local union office, which automatically played when anyone dialed the private union phone number.[252] The tape recorded message commented about the plaintiff's weight, looks, character and included other derogatory remarks designed to embarrass and hurt the plaintiff.[253]

The court addressed the issue of whether the statements were pure opinion and thus privileged.[254] The *Steinhilber* court stated that "if the statements are held to be expressions of opinion, they are entitled to the absolute protection of the First Amendment [of the Federal Constitution] by virtue of the Supreme Court's categorical statement that: 'Under the First Amendment there is no such thing as a false idea.'" [255] Thus, the court concluded that

247. *Id.* at 289, 501 N.E.2d at 552-53, 508 N.Y.S.2d at 904.
248. *Id.* at 290, 501 N.E.2d at 553, 508 N.Y.S.2d at 904.
249. *Id.* at 286-87, 501 N.E.2d at 551, 508 N.Y.S.2d at 902.
250. *Id.* at 287, 501 N.E.2d at 551, 508 N.Y.S.2d at 902.
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.* at 289, 501 N.E.2d at 552, 508 N.Y.S.2d at 903.
255. *Id.* (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974)).

although pure opinion statements are not actionable, mixed opinion statements are.[256]

Determining whether a given statement is fact or opinion is a complex question of law for the court to decide.[257] The test applied by the *Steinhilber* court was "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."[258]

The *Steinhilber* court also relied on a test set out in the plurality opinion of *Ollman v. Evans*.[259] The test sets out four factors for a court to consider in order to differentiate between fact and opinion. Those factors are:

> (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.'[260]

The plaintiff, in *Steinhilber*, specifically pointed out that the statement that she lacked "talent, ambition, and initiative" implied that the speaker had an undisclosed basis for such statement when examining "the whole communication as well as

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256. *Id.*

257. Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 381, 366 N.E.2d 1299, 1306, 397 N.Y.S.2d 943, 950, *cert. denied*, 434 U.S. 969 (1977).

258. *Steinhilber*, 68 N.Y.2d at 290, 501 N.E.2d at 553, 508 N.Y.S.2d at 904.

259. Ollman v. Evans, 750 F.2d 970, 976 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

260. *Steinhilber*, 68 N.Y.2d at 292, 501 N.E.2d at 554, 508 N.Y.S.2d at 905 (citing *Ollman*, 750 F.2d at 983). For an extensive discussion of the four factors, see *Ollman*, 750 F.2d at 978-84.

its tone and its apparent purpose."[261] The *Steinhilber* court concluded that due to the circumstances[262] surrounding the statement the recorded message would be taken not literally, but figuratively.[263] Subsequently, the court held that "[a]n analysis of the statement that plaintiff lacks 'talent, ambition, and initiative' in the light of the third and fourth *Ollman* factors (the full verbal context of the statement and its broader social context) thus compels the conclusion that the statement would be taken as pure opinion."[264]

However, the court stated that in another context "a flat statement that a person lacks talent or ambition or initiative might be viewed as a factual assertion, if considered under the first and second *Ollman* factors . . . ."[265] Further, the court noted that "even apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made in public debate, heated labor dispute, or other circumstances in which an 'audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole.'"[266] Notwithstanding these findings, the court, in *Guarneri,* adopted the rules set forth in *Steinhilber,* and concluded that pure opinion statements are constitutionally protected.[267]

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261. *Steinhilber*, 68 N.Y.2d at 293, 501 N.E.2d at 554-55, 508 N.Y.S.2d at 906.

262. *Steinhilber* involved a labor dispute where the plaintiff and other "strike crossers" were considered "traitors" since they failed to obey a union strike order. *Id.* at 294, 501 N.E.2d at 555, 508 N.Y.S.2d at 906. According to the court, "it [was] not surprising that union officials would speak of plaintiff to the membership in highly unflattering terms." *Id.* As observed by the United States Supreme Court, "such exaggerated rhetoric [as applying the word 'traitor' to an employee who crossed the picket line] [is a] commonplace in labor disputes." *Id.* (citing Letter Carriers v. Austin, 418 U.S. 264, 286 (1974)).

263. *Id.*

264. *Id.* at 294, 501 N.E.2d at 555, 508 N.Y.S.2d at 906-07.

265. *Id.* at 294, 501 N.E.2d at 555, 508 N.Y.S.2d at 907.

266. *Id.* (citing Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784 (9th Cir. 1980)).

267. Guarneri v. Korea News, Inc., 625 N.Y.S.2d 291, 292 (App. Div. 2d Dep't 1995).

The defendants sought support in *Immuno A.G. v. Moor-Jankowski*,[268] a case the *Guarneri* court also followed in reaching its conclusion. The *Immuno* case assisted the *Guarneri* court in analyzing the scope of free speech protection under the New York State Constitution versus the Federal Constitution. The *Immuno* court stated "the Supreme Court under the Federal Constitution fix[es] only the minimum standards applicable throughout the Nation, and the State courts supplement [] those standards to meet local needs and expectations."[269] The *Immuno* court, in describing a broader role for free speech under the state constitution, stated that "tradition is embodied in the free speech guarantee of the New York State Constitution, beginning with the ringing declaration that '[e]very citizen may freely speak, write and publish . . . sentiments on all subjects.'"[270] Furthermore, the *Immuno* court indicated that regardless of the method utilized by the courts in applying the relevant factors, be it "interpretive," using a textual and historic analysis, or "noninterpretive," employing a traditional policy approach, the "protection afforded by . . . the New York Constitution is often broader than the minimum required by" the Federal Constitution, particularly with respect to the freedom of press and freedom of speech.[271] The court continued on to explain that it "look[s] to our state law because of the nature of the issue in controversy - liberty of the press - where [New York] has its own exceptional history and rich tradition."[272] New York's common law reveals the well - settled standard that requires the published article at the center of a defamation action to be read "*in context* to test the effect on the

268. 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991).

269. *Id.* at 248, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913.

270. *Id.* The court determined that the wording of article one, section eight of the New York State Constitution signified that the citizens of New York State, in not strictly following the First Amendment of the Federal Constitution, "set forth our basic democratic ideal of liberty of the press . . . ." *Id.* at 249, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913.

271. *Id.* at 249, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914 (citing O'Neill v. Oakgrove Constr., Inc., 71 N.Y.2d 521, 523 N.E.2d 277, 528 N.Y.S.2d 1 (1988)).

272. *Immuno*, 77 N.Y.2d at 250, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914.

average reader [*and*] *not* to isolate particular phrases but to consider the publication as a whole."[273]

The *Guarneri* court also adopted the rationale of the New York Court of Appeals in *Rinaldi v. Holt, Rinehart & Winston, Inc.*[274] to reverse the Second Department. In libel actions, the general rule is that truth is an absolute bar to the action.[275] Under the common law theory, "the libelous statement was presumed to be false and the defendant carried the burden of pleading and proving, in defense, that the statement was true."[276] Today, however, "the burden is now on the libel plaintiff to establish the falsity of the libel."[277] In *Guarneri*, this burden had not been met.[278] In *Rinaldi*, the plaintiff was a New York Supreme Court judge and the defendant a controversial investigative journalist.[279] The defendant published stories describing the judge as "incompetent, and probably corrupt."[280] The defendant based the stories on an investigation he conducted concerning the sentencing practices of the judge.[281] Based on his investigation, he determined that the judge was "suspiciously lenient" on defendants involved in organized crime, and noticed a pattern whereby inconsistent sentences were apparently being handed down.[282] During the time in which the defendant conducted his investigation, the plaintiff was indicted on two counts of perjury by the Extraordinary Special Grand Jury of Kings County.[283]

The defendant maintained that at the time of publication the accusations were true and thus, a complete bar to a libel

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273. *Id.* (emphasis added).

274. 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943 (1977).

275. Guarneri v. Korea News, Inc., 625 N.Y.S.2d 291, 292 (App. Div. 2d Dep't 1995).

276. *Rinaldi*, 42 N.Y.2d at 379-80, 366 N.E.2d at 1305, 397 N.Y.S.2d at 950.

277. *Id.* (citing Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 490 (1975)).

278. *Guarneri*, 625 N.Y.S.2d at 292.

279. *Rinaldi*, 42 N.Y.2d at 373, 366 N.E.2d at 1301, 397 N.Y.S.2d at 945.

280. *Id.* at 376-77, 366 N.E.2d at 1303, 397 N.Y.S.2d at 948.

281. *Id.* at 376, 366 N.E.2d at 1303, 397 N.Y.S.2d at 947.

282. *Id.* at 377, 366 N.E.2d at 1303, 397 N.Y.S.2d at 948.

283. *Id.* at 374, 366 N.E.2d at 1302, 397 N.Y.S.2d at 946.

action.[284] The court found, however, minor inaccuracies upon which the plaintiff had no support, and thus, placed the truth of the statements in dispute.[285] The court concluded that a cause of action for libel per se existed because

> [a]ny written or printed article is libelous or actionable without alleging special damages if it tends 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.[286]

Despite this finding, the court went on to explain that even though the statements may have been defamatory, in this instance the plaintiff was a public official and was subject to a malice standard.[287] Further, the *Rinaldi* court recognized that "the burden is now on the libel plaintiff to establish the falsity of the libel."[288]

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284. *Id.* at 378, 366 N.E.2d at 1305, 397 N.Y.S.2d at 949.

285. *Id.*

286. *Id.* at 379, 366 N.E.2d at 1305, 397 N.Y.S.2d at 949.

287. *Id.* (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964)). In *New York Times*, the Supreme Court took note of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times*, 376 U.S. at 270. The *Rinaldi* court indicated that "the Court ruled that the First Amendment prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless the official proves that the statement was made with actual malice i. e., with knowledge that the statement was false or with reckless disregard of whether it was false or not." *Rinaldi*, 42 N.Y.2d at 379, 366 N.E.2d at 1305, 397 N.Y.S.2d at 949 (citing *New York Times*, 376 U.S at 279-80). The *Rinaldi* court further noted that, under *New York Times*, "[t]he constitutional standard requires that the plaintiff establish the existence of actual malice by proof of 'convincing clarity.'" *Id.* (citing *New York Times*, 376 U.S at 285-86). The malice standard requires that the statement be made with "knowledge that [it] was false or with reckless disregard of whether it was false or not." *Id.* (citing *New York Times*, 376 U.S at 285-86).

288. *Id.* at 380, 366 N.E.2d at 1305, 397 N.Y.S.2d at 950. According to the court, the requirement to establish falsity "naturally follows from the actual malice standard. Before knowing falsity or reckless disregard for truth can be established, the plaintiff must establish that the statement was, in fact, false." *Id.* In addition to falsity, "[t]he nature of the statement is [also] critical." *Id.*

The *Guarneri* court, citing to *Rinaldi*, stated that truth is an absolute bar to a libel cause of action.[289] The court found that "the newspaper articles were substantially true as to the basic facts" and "since truth is an absolute bar to a libel action, the defendants' motion for summary judgment dismissing the complaint should have been granted."[290] Thus, the *Guarneri* court concluded that the New York State Constitution affords greater protection than that of the Federal Constitution and ruled that the statements made by the defendants were constitutionally protected.[291]

The decision in *Guarneri* helped stress the differences between New York and federal free speech protections. It is evident that the New York State Constitution affords greater protection than the Federal Constitution with respect to expressions of pure opinion.[292] Under the New York State constitutional analysis, a

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The court also stated that no matter how "pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." *Id.* (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1964)).

289. Guarneri v. Korea News, Inc., 625 N.Y.S.2d 291, 292 (App. Div. 2d Dep't 1995).

290. *Id.*

291. *Id.* The court relied on the more expansive language of the New York State Constitution, particularly the clause stating that "[e]very 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.* (citing N.Y. CONST. art. I, § 8). With regard to the expansive free speech rights in New York, the *Immuno* court noted the following:

> [T]he recognition in very early New York history of a constitutionally guaranteed liberty of the press . . . and the consistent tradition in this State of providing the broadest possible protection to 'the sensitive role of gathering and disseminating news of public events' . . . all call for particular vigilance by the courts of this State in safeguarding the free press against undue interference.

Immuno A.G. v. Moor-Jankowski, 77 N.Y.2d 235, 249, 567 N.E.2d 1270, 1277, 566 N.Y.S.2d 906, 913-14 (1991) (quoting O'Neill v. Oakgrove Constr., Inc., 71 N.Y.2d 521, 528-29, 523 N.E.2d 277, 282, 528 N.Y.S.2d 1, 4-5 (1988)).

292. *Guarneri*, 625 N.Y.S.2d at 292.

court will first look to "the content of the whole communication, its tone and apparent purpose."[293] Therefore, the New York standard is whether a reasonable person would view statements as expressing or implying factual assertions.[294] On the other hand, under federal constitutional analysis, a court will begin its inquiry by using a narrower approach to construe the type of speech.[295] Under the federal approach, "[t]he fine parsing of its length and breadth that [is] required . . . for speech that is not loose, figurative or hyperbolic" reflects this narrower approach.[296] In distinguishing federal constitutional analysis from state constitutional analysis, the *Immuno* court stated that "[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."[297]

Further, article I, section 8 of the New York State Constitution specifically provides that if alleged libelous statements are found to be true, then "the party shall be [found not liable]"[298] for defamation. The Federal Constitution has no such provision. In fact, the First Amendment of the Federal Constitution makes no express reference to libelous statements at all.[299] The First Amendment applies specifically to Congress and stresses the restraint on their power to "abridge the freedom of speech, [and] the press."[300] Unlike the Federal Constitution, article I, section 8 of the New York State Constitution provides additional free speech protection, stating in affirmative terms, the right to "'*freely speak, write and publish*' and prohibits the use of official

293. *Immuno*, 77 N.Y.2d at 250, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914.
294. *Id.* at 254, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917.
295. *Id.* at 250, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914.
296. *Id.* at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917.
297. *Id.*
298. N.Y. CONST. art. I, § 8.
299. *See supra* note 231.
300. *Id.*

authority which acts to '*restrain or abridge* the liberty of speech or of the press.'"[301]

Town of Huntington v. Pierce Arrow Realty Corp.[302]
(decided June 5, 1995)

Plaintiff, Town of Huntington, sought a preliminary injunction enjoining the defendants from continuing the operation of an "adult entertainment cabaret"[303] within defendants' restaurant and bar establishment.[304] Plaintiff alleged that the defendants were in violation of a town zoning ordinance designed to restrict the location of premises which contain an "adult use"[305] to designated areas within the Town of Huntington.[306] The Supreme Court, Suffolk County, granted the preliminary injunction pending a determination of plaintiff's action for a permanent injunction.[307] The Appellate Division, Second Department,

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301. O'Neill v. Oakgrove Constr., Inc., 71 N.Y.2d 521, 529 n.3, 523 N.E.2d 277, 281 n.3, 528 N.Y.S.2d 1, 4 n.3 (1988).

302. 627 N.Y.S.2d 787 (App. Div. 2d Dep't 1995).

303. *See* TOWN OF HUNTINGTON CODE § 198-71[D][2] (1978). This section defines an "adult entertainment cabaret" as "[a] public or private establishment which present[s] topless dancers, strippers, male or female impersonators or exotic dancers or other similar entertainments and which establishment is customarily not open to the public generally but excludes any minor by reason of age." *Id.*

304. *Pierce Arrow Realty*, 627 N.Y.S.2d at 788.

305. *See* TOWN of HUNTINGTON CODE § 198-71[D][2] (1978). The following excerpt sets forth the relevant provisions of the Code which define the term "adult use":

> (a) The appearance of any person on commercial premises for the purposes of financial consideration in such a manner or attire as to expose to view any portion of the pubic area, buttocks, vulva, genitals or breast below the top of the areola, or any simulation thereof.
>
> (b) The appearance of any person on such premises in attire generally considered to be garments worn underneath normal streetwear for purient or commercial purposes.

Id.

306. *Pierce Arrow Realty*, 627 N.Y.S.2d at 787.

307. *Id.*