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a whole, thus affording more expansive free speech rights than the "narrow" federal approach. The analysis differs in that New York considers the "'context, tone, and purpose' of the communication"[487] as opposed to the "fine parsing" under *Milkovich*.[488]

However, since the court determined that the outcome would be the same under either the state or federal analysis, it did not conduct a full state analysis because '[n]o useful purpose would be served in articulating the difference between the two approaches."[489]

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT

Gross v. New York Times Co.[490]
(decided June 16, 1992)

The plaintiff, Dr. Elliot Gross, brought a libel action against the New York Times[491] claiming its series of investigative reports criticizing his performance as Chief Medical Examiner of New York City constituted actionable fact and not opinion protected by the free speech provision of the New York[492] and

487. *Id.*

488. *Id. See also* Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 255, 567 N.E.2d 1270, 1281, 566 N.Y.S.2d 906, 917, *cert. denied*, 111 S. Ct. 2261 (1991).

489. *Von Gutfeld*, 80 N.Y.2d at 145, 603 N.E.2d at 938, 589 N.Y.S.2d at 833.

490. 180 A.D.2d 308, 587 N.Y.S.2d 293 (1st Dep't 1992).

491. Doctor Gross also sued the individuals who were interviewed by the New York Times.

492. N.Y. CONST. art. I, § 8. Section 8 states 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.*

Federal Constitutions.[493] The appellate division held that the "complained of language [in the investigative reports] constitute[d] non-actionable opinion" protected by the New York Constitution and affirmed the supreme court's dismissal of the Doctor's complaint.[494]

Beginning in January 1985, the New York Times undertook a series of investigative reports of Dr. Gross and his office regarding certain autopsies performed on people who died in police custody.[495] One such autopsy was performed on Eleanor Bumpurs, an elderly woman who was shot to death by the police while attempting to evict her.[496] Another autopsy was the one performed on Michael Stewart, a black man who was arrested by white police officers for writing graffiti.[497]

The New York Times revealed that the doctor who performed the Bumpurs' autopsy had originally reported that the cause of death was the result of two shotgun wounds, but was subsequently ordered by Dr. Gross to reword his report to imply she may have only suffered one shotgun wound.[498] This ambiguity comported with the police report which stated that Mrs. Bumpurs was hit once.[499]

In a subsequent article, the New York Times reported that the Stewart autopsy report was devoid of the fact that the deceased had sixty hemorrhages and bruises all over his body.[500] The autopsy report simply stated that the cause of death was cardiac arrest, which meant that "'Stewart died because his heart stopped

493. *Gross*, 180 A.D.2d at 309, 587 N.Y.S.2d at 294-95.

494. *Id.* at 318, 587 N.Y.S.2d at 300.

495. *Id.* at 310, 587 N.Y.S.2d at 294. The ensuing controversy resulted in four investigations of the Doctor's office by public officials looking for possible misconduct or illegal activity. *Id.* However, the Doctor was cleared of any crime or professional misconduct. *Id.* at 310, 587 N.Y.S.2d at 294-95.

496. *Id.* at 313, 587 N.Y.S.2d at 297.

497. *Id.* at 314, 587 N.Y.S.2d at 298.

498. *Id.* at 313, 587 N.Y.S.2d at 297.

499. *Id.*

500. *Id.* at 315, 587 N.Y.S.2d at 298.

beating . . . .'"[501] The article included the Stewart family's charge that despite his agreement not to do anything to Stewart's body until their family doctor was notified, Dr. Gross removed the deceased's eyes and placed them in Formalin.[502] The eyes had evidence of petechial hemorrhages, or pinpoint bleeding, which is a "standard sign of strangulation" and Formalin, which preserves the tissue, erases any traces of blood.[503]

In addition to the autopsy reports, the New York Times articles included comments by professionals in the field, some of whom had worked with Dr. Gross. Some of the commentators criticized Gross' handling of these autopsies,[504] while others claimed that he had lied,[505] and used words such as "weaseling" and "whitewash" in describing Dr. Gross' conduct.[506]

To determine whether Dr. Gross had a cause of action in defamation, the court addressed whether the complained of articles were of a public concern, what the burden of proof was for the plaintiff, and whether the alleged defamatory statements were protected speech.[507] The court, in its determination that the conduct of Dr. Gross, in his official capacity as the city's Chief Medical Examiner, was a matter of public concern stated: "There is no question that the professional conduct of the Chief Medical Examiner, a public official, is a proper and necessary focus of public interest and discussion."[508] Therefore, the court deter-

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501. *Id.* at 316, 587 N.Y.S.2d at 298 (quoting internist Dr. Wolf, a medical professor at Mount Sinai Medical Center and doctor for the Stewart family).

502. *Id.* at 316, 587 N.Y.S.2d at 298-99.

503. *Id.* at 316, 587 N.Y.S.2d at 298-99.

504. *Id.* at 315, 587 N.Y.S.2d at 298. Mr. Oppenheim, a medical stenographer who worked with Dr. Gross on the Stewart autopsy, stated that Dr. Gross' report lacked any mention of the bruises on Stewart's body and the fact that Stewart died while in police custody. Oppenheim resigned stating that he "'want[ed] nothing to do with that place . . . .'" *Id.*

505. *Id.* Dr. Wolf stated that Dr. Gross' claim that the injuries sustained by Stewart did not cause his death was "'an outrageous statement—it's called a blatant lie.'" *Id.*

506. *Id.* at 318, 587 N.Y.S.2d at 300.

507. *Id.* at 311, 587 N.Y.S.2d at 295.

508. *Id.* at 316, 587 N.Y.S.2d at 299.

mined that Dr. Gross had the burden of proving that the alleged defamatory statements were false or made with actual malice.[509] The court defined actual malice as the publication of defamatory statements "'with actual knowledge that they were false or with a reckless disregard for their truth or falsity.'"[510] However, the court found the articles and name-calling to be protected opinion and non-actionable hyperbole, respectively.[511] Consequently, the appellate court affirmed the supreme court's order granting New York Times' motion to dismiss the complaint.[512]

In finding that the alleged defamatory statements were protected speech, the appellate division relied on the New York standard, established in *Steinhilber v. Alphonse*,[513] and recently reaffirmed in *Immuno AG. v. Moor-Jankowski*.[514] This standard requires that the alleged defamatory statements be viewed by looking at the whole publication from a reasonable person's point of view.[515] Non-actionable speech, according to the *Steinhilber* standard, is pure opinion.[516] A pure opinion is defined as a statement which is based on disclosed facts, or which does not imply that it was based on undisclosed facts.[517] Mixed opinion, on the other hand, is actionable because it allows the audience to infer that the statement is based on unstated facts that are known

509. *Id.* at 310, 587 N.Y.S.2d at 295; *see also* New York Times v. Sullivan, 376 U.S. 254 (1964). *New York Times* developed the "actual malice" standard of proof for public officials. *See id.* at 281.

510. *Gross*, 180 A.D.2d at 310, 587 N.Y.S.2d at 295 (quoting Silsdorf v. Levine, 59 N.Y.2d 8, 17, 449 N.E.2d 716, 721, 462 N.Y.S.2d 822, 827, *cert. denied*, 464 U.S. 831 (1983) (citing *New York Times*, 376 U.S. at 280).

511. *Id.* at 318, 587 N.Y.S.2d at 300.

512. *Id.*

513. 68 N.Y.2d 283, 501 N.E.2d 550, 508 N.Y.S.2d 901 (1986).

514. 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991), *cert. denied*, 111 S. Ct. 2261 (1991).

515. *Gross*, 180 A.D.2d at 312, 587 N.Y.S.2d at 296. The *Immuno* court declared that "[i]n 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." 77 N.Y.2d at 243, 567 N.E.2d at 1273, 566 N.Y.S.2d at 909-10.

516. *Steinhilber*, 68 N.Y.2d at 289, 501 N.E.2d at 552, 508 N.Y.S.2d at 903.

517. *Id.*

to the speaker "and are detrimental to the person about whom he is speaking."[518] Speech which is rhetorical hyperbole however, is not actionable, although the truth of this type of language is not usually verifiable.[519] Yet, if this type of language makes false accusations of criminal activities, then it is actionable.[520]

Although *Steinhilber* did not set a hard and fast test for determining what is protected speech,[521] the court of appeals found the four-part analysis in *Ollman v. Evans*[522] to be helpful.[523] The *Ollman* test analyzes the statement by looking at the common usage of the language, its verifiability, the context, and the setting of the statement.[524]

Applying this standard to the facts in this case, the *Gross* court found that New York Times had backed its statements with facts obtained from Dr. Gross' office and from other professionals. Furthermore, an account of each commentator's credentials and their relationship to the cases was provided.[525] Based on these facts, the court reasoned that "[e]specially when attributed to a source, the average reader will recognize that criticisms, allegations, and accusations are not statements of fact but rather expressions of opinion."[526] According to the court, these criticisms and allegations, along with language such as "weaseling" and "whitewash," did not rise to the level of accusations of criminal

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518. *Gross*, 180 A.D.2d at 311, 587 N.Y.S.2d at 295-96 (citing *Steinhilber*, 68 N.Y.2d at 289, 501 N.E.2d at 552, 508 N.Y.S.2d at 903).

519. *Id.* at 312, 587 N.Y.S.2d at 296.

520. *Id.* (citing 600 W. 115th St. Corp. v. Von Gutfeld, 169 A.D.2d 56, 63, 572 N.Y.S.2d 655 (1992) (quoting Privitera v. Town of Phelps, 79 A.D.2d 1, 3, 435 N.Y.S.2d 402, 404 (1981) (declaring that to be actionable, "words charging plaintiff with a crime . . . must impute to plaintiff the commission of an indictable offense upon conviction of which punishment may be inflicted")).

521. *Id.* at 312, 587 N.Y.S.2d at 296; *Steinhilber*, 68 N.Y.2d at 292, 501 N.E.2d at 554, 508 N.Y.S.2d at 905.

522. 750 F.2d 970 (1984), *cert. denied*, 471 U.S. 1127 (1985).

523. *Gross*, 180 A.D.2d at 312-13, 587 N.Y.S.2d at 296-97; *Steinhilber*, 68 N.Y.2d at 292, 501 N.E.2d at 554, 508 N.Y.S.2d at 905.

524. *Ollman*, 750 F.2d at 905.

525. *Gross*, 180 A.D.2d at 316, 587 N.Y.S.2d at 299.

526. *Id.*

activity.[527] The court observed that the most that could be said about the articles and the statements levied against Gross by his critics was that he was "entirely too solicitous of the interests of the Police Department . . . ."[528]

The *Gross* court noted that New York is a strong proponent of free speech.[529] In fact the court stated that in the past it has held that the state's own constitution "contains a more expansive language than the federal constitution."[530] In *Immuno AG. v. Moor-Jankowski*,[531] the court of appeals took the opportunity to reiterate its staunch belief in "providing the broadest possible protection to 'the sensitive role of gathering and disseminating news of public events . . . .'"[532] *Immuno* went up to the United States Supreme Court where it was remanded,[533] with instructions to apply the standard recently articulated by the Court in *Milkovich v. Lorain Journal Co.*[534] *Milkovich* moved away from the famous language in *Gertz v. Robert Welch, Inc.*,[535] which was frequently used in giving federal constitutional protection to opinions. *Gertz* stated that "[u]nder the First Amendment there is no such thing as a false idea . . . . However pernicious an opinion may seem,

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527. *Id.* at 317-18, 587 N.Y.S.2d at 299-300. If the statements did rise to the level of criminal activity, then such accusation, even if couched in an opinion, would not be constitutionally protected. *See* Rinaldi v. Holt, 42 N.Y.2d 369, 382 (1977).

528. *Gross*, 180 A.D.2d at 317, 587 N.Y.S.2d at 299.

529. *Id.* at 310, 587 N.Y.S.2d at 295. *See also* Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 249-50, 567 N.E.2d 1270, 1277-78, 566 N.Y.S.2d 906, 913-14 (discussion on New York's history and tradition of constitutionally guarding freedom of speech), *cert. denied*, 111 S. Ct. 2261 (1991); People *ex rel.* Arcara v. Cloud Books, 68 N.Y.2d 553, 557-58, 503 N.E.2d 492, 494-95, 510 N.Y.S.2d 844, 846-47 (1986) (New York State Constitution, art. I, § 8 grants broader free speech rights than the First Amendment of the Federal Constitution).

530. *Gross*, 180 A.D.2d at 310, 587 N.Y.S.2d at 295.

531. 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, *cert. denied*, 111 S. Ct. 2261 (1991).

532. *Gross*, 180 A.D.2d at 310, 587 N.Y.S.2d at 295 (quoting *Immuno*, 77 N.Y.2d at 249, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913).

533. *Immuno*, 110 S. Ct. 3266 (1990).

534. 110 S. Ct. 2695 (1990).

535. 418 U.S. 323 (1974).

we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[536] *Milkovich*, however did not recognize the "wholesale defamation exemption for anything that might be labeled 'opinion.'"[537] Instead, the *Milkovich* standard takes a more narrow view and looks at the statement on its own, and not in its context or setting. Under this revised federal standard, the court of appeals in *Immuno* found that the defendants would have been liable for libel had plaintiff succeeded in carrying out its burden of proof. The *Immuno* court, however, continued to decide the case under state law.[538]

In conclusion, New York state law analysis differs from federal analysis in that New York does not use "the fine parsing . . . that might now be required under the Federal law for speech that is not loose, figurative or hyperbolic."[539] Instead, New York considers the tone, context, and social setting of the statement. This approach does not stifle speech, thus giving "'full and vigorous exposition and expression of opinion on matters of public interest.'"[540]

Bingham v. Struve[541]
(decided December 8, 1992)

The defendant, the former mistress of the plaintiff-husband, challenged plaintiff's claim of libel by alleging that displaying a sign which accused the plaintiff-husband of raping her in 1953

536. *Id.* at 339-40.

537. *Molkovich*, 110 S. Ct. at 2705.

538. *Immuno*, 77 N.Y.2d at 248-50, 567 N.E.2d at 1277-78, 566 N.Y.S.2d at 913-14. The court reviewed the case under state law because of the open questions left by *Milkovich*, and because state law issues at stake in this case came to this court in the form of a summary judgment motion. *Id.* at 250, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914; *but see id.* at 261, 567 N.E.2d at 1285, 566 N.Y.S.2d at 921 (Simons, J., concurring) (disagreeing with the majority's review under independent and separate state law when the matter was disposed under federal law).

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

540. *Id.* (quoting Rinaldi v. Holt, 42 N.Y.2d 369, 384, 366 N.E.2d 1299, 1309, 397 N.Y.S.2d 943, 953 (1977)).

541. 184 A.D.2d 85, 591 N.Y.S.2d 156 (1st Dep't 1992).