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Freedom of Speech and Press

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).

and picketing outside of the plaintiff's residence was a form of protected speech under the First Amendment[542] and its New York State counterpart, article I, section 8.[543] Based on the fact that "defendant's charge of a 38-year-old rape [was] unsupported by any objective evidence or corroborating testimony,"[544] the court held that the defendant's continuous conduct of communicating the plaintiff-husband's alleged crime was not a protected form of speech.[545] Thus, the defendant's constitutional argument failed.[546]

The plaintiffs, husband and wife, brought an action for injunctive and monetary relief against the husband's former mistress for alleged libelous statements that accused the plaintiff-husband of raping her. It was uncontested by the parties that the plaintiff-husband and the defendant had been involved in two separate affairs, the first from 1953 to 1955 and the second from 1983 to 1989.[547] During the almost thirty years between the two affairs, the parties lived separate and apart.[548] The defendant asserts that it was during the second affair between the parties that the memory of the alleged rape, which she claimed to have repressed since their first encounter in 1953, was unlocked. As a result, in 1989, the defendant made repeated oral and written assertions to the plaintiffs, their friends, family, and associates, accusing the plaintiff-husband of raping her in 1953.[549]

542. U.S. CONST. amend. I.

543. N.Y. CONST. art. I, § 8.

544. *Bingham,* 184 A.D.2d at 89, 591 N.Y.S.2d at 158.

545. *Id.* The court modified an order of the trial court and granted plaintiff's motion for a preliminary injunction and directed an *in camera* inspection of the defendant's divorce records. *Id.* at 90-91, 591 N.Y.S.2d at 159.

546. *Id.* at 89, 591 N.Y.S.2d at 158. Although the court granted the plaintiffs a preliminary injunction enjoining the defendant from continuing her picketing, it found that the harm which the defendant's conduct caused to the plaintiffs did not warrant any compensatory damages. *Id.* at 89-90, 591 N.Y.S.2d at 158.

547. *Id.* at 88, 591 N.Y.S.2d at 157.

548. *Id.* The defendant's 1965 marriage ended in divorce in 1984. The plaintiff-husband's first marriage in the 1950s also ended in divorce, while his second marriage to the plaintiff-wife in 1967 continues to the present. *Id.*

549. *Id.*

Thereafter, in 1991, the defendant began to display a sandwich board which stated: "ATTENTION RESIDENTS OF 19 EAST 72ND ST. A. WALKER BINGHAM 3 RAPED ME AND IS NOW SUING ME FOR LIBEL," and picketed outside the plaintiff's residence.[550] The defendant claimed that this was the only way in which she could come to terms with the trauma of the alleged rape and recover from her "depressed and dysfunctional" life.[551] Moreover, she stated that the alleged rape was the cause of her failed marriage and her inability to pursue a career.[552]

The court began its analysis of the defamation claim by first stating that the plaintiffs had satisfactorily established a prima facie case of libel.[553] In the New York, "[a]ny published communication, spoken or written, of and concerning the plaintiff . . . which accuses him of a crime or tends to expose him to public contempt, scorn, obloquy, ridicule, shame or disgrace, or to induce an evil opinion of him in the minds of right-thinking persons . . . is defamatory."[554] The court then applied a balancing test, weighing the degree of harm to the defendant if she was enjoined from picketing the plaintiff's home against the harm caused to the plaintiffs if the defendant's conduct continued unabated.[555] It has been stated in New York that "[t]he devastating effect of targeted picketing on the quiet enjoyment of a home is beyond doubt and such offensive speech may be resisted when it intrudes upon a captive audience."[556] Thus, the court reasoned that the continued "communications and

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550. *Id.*

551. *Id.*

552. *Id.*

553. *Id.* at 89, 591 N.Y.S.2d at 158.

554. Lawlor v. Gallagher Presidents' Report, Inc., 394 F. Supp. 721, 726 (S.D.N.Y. 1975), *remanded,* 538 F.2d 311 (2d Cir. 1976).

555. *Bingham,* 184 A.D.2d at 89-90, 591 N.Y.S.2d at 159.

556. Trojan Elect. and Mach. Co., Inc. v. Heusinger, 162 A.D.2d 859, 860, 557 N.Y.S.2d 756, 758-59 (3d Dep't 1990). The court granted a preliminary injunction to the developer of a condominium project to enjoin a group of purchasers from picketing the condominium project after they lost their down payments for condominium when they were unable to obtain financing. *Id.*

the picketing of plaintiff's home is irreparable, as it is capable of injuring plaintiff-husband's standing and reputation . . . and of inflicting serious psychological and emotional damage."[557]

In *Immuno AG. v. Moor-Jankowski*,[558] the New York Court of Appeals in analyzing the defamation claim, considered "the content of the whole communication, its tone and apparent purpose."[559] That Court reasoned that by examining the entire communication in such a manner, it may properly balance the interests of the parties involved.[560] Thus, the Court held that allegedly libelous "statements must first be viewed in their context in order for courts to determine whether a reasonable person would view them as expressing or implying facts."[561] Clearly, the holding in the present case suggests that the libelous communication for which the defendant was accused met this standard.[562]

The United States Supreme Court has recognized the fact that "society has a pervasive and strong interest in preventing and redressing attacks upon reputation."[563] However, the Court has found that "[t]here will always be instances when the fact-finding process will be unable to resolve conclusively whether the speech is true or false."[564] To the contrary, in this case, the appellate

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557. *Bingham*, 184 A.D.2d at 90, 591 N.Y.S.2d at 158.

558. 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, *cert. denied*, 111 S. Ct. 2261 (1991).

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

560. *Id.*

561. *Id.* at 254, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917. *See also* Silsdorf v. Levine, 59 N.Y.2d 8, 13, 449 N.E.2d 716, 719, 462 N.Y.S.2d 822, 825 (1983).

562. *Bingham*, 184 A.D.2d at 89-90, 591 N.Y.S.2d at 158.

563. Rosenblatt v. Baer, 383 U.S. 75, 86 (1966). Justice Stewart, in his concurring opinion, stated: "[T]he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty." *Id.* at 93 (Stewart, J., concurring).

564. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) (Court held that private figure plaintiff alleging defamation has burden of proving falsity of alleged libelous communication when it is a matter of public concern).

division had little difficulty in finding the defendant's credibility made her accusations suspect,[565] thus defeating her claim of protected speech.[566] Although the court found that the defamatory assertions did not amount to a "societal interest,"[567] it did not answer the question as to whether the accusation of rape falls within the category of speech of a public matter.[568]

The court further stated that although the protections afforded by the First Amendment and its New York counterpart are intended to promote "debate on public issues [that is] uninhibited, robust, and wide open,"[569] it is not an absolute right.[570] In other words, "the freedom of speech . . . secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose."[571] Thus, applying the standards set by the United States Supreme Court in *New York Times v. Sullivan*[572] and *Nebraska Press Association v. Stuart*,[573] the court found that defendant did not have the right to publicly disseminate plaintiff-husband's alleged criminal conduct.[574]

In recognition of the fact that the Supreme Court fixes only minimum applicable standards of protected speech, the appellate division stated that the courts in New York have provided greater protection to free speech.[575] However, in the present case, the

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565. *Bingham*, 184 A.D.2d at 89, 591 N.Y.S.2d at 158.

566. *Id.*

567. *Id.*

568. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975) The Court found that "the commission of [a] crime . . . [is] without question . . . of legitimate concern to the public." *See also* Pesta v. CBS, Inc., 653 F. Supp. 350, 355 (E.D. Mich. 1986) (finding that "[r]eports of criminal charges and accusations are indeed matters in the public interest").

569. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

570. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976). The Court "reaffirm[ed] that the guarantees of freedom of expression are not an absolute prohibition under all circumstances." *Id.* at 570.

571. Gitlow v. New York, 268 U.S. 652, 666 (1925).

572. 376 U.S. 254 (1964).

573. 427 U.S. 539 (1976).

574. *Bingham*, 184 A.D.2d at 89, 591 N.Y.S.2d at 158.

575. *Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 235, 249, 567 N.E.2d 1270, 1278, 566 N.Y.S.2d 906, 914, *cert. denied*, 111 S. Ct. 2261 (1991). Judge Kaye stated in the majority opinion that "whether by the application of

court utilized the standard established in the line of United States Supreme Court cases which hold that the protections guaranteed in the First Amendment are not absolute.[576] Therefore, the court found that upon balancing the parties' respective harms, the defendant's claim that her picketing was a protected form of speech could not be sustained.[577]

THIRD DEPARTMENT

Montgomery v. Muller[578]
(decided February 13, 1992)

Plaintiff, the District Attorney of Warren County, contended that his state[579] and federal[580] constitutional right to free speech was violated when the town justice ordered that he remove an American flag lapel pin during a criminal jury trial.[581] The ap-

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'interpretive' (e.g., text, history) or 'noninterpretive' (e.g., tradition, policy) . . . factors, the '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." *Id.* at 249, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914 (quoting O'Neill v. Oakgrove Constr., Inc., 71 N.Y.2d 521, 529 n.3, 528 N.Y.S.2d 1, 5 n.3, 523 N.E.2d 277, 281 n.3); *see also* 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) ("[T]he minimal national standard established by the Supreme Court for First Amendment rights cannot be considered dispositive in determining the scope of this State's constitutional guarantee of freedom of expression.").

576. *See* New York Times v. Sullivan, 376 U.S. 254 (1964); Nebraska Press Ass'n v. Stuart 427 U.S. 539 (1976); Gitlow v. New York, 268 U.S. 652 (1925).

577. *Bingham,* 184 A.D.2d at 90, 591 N.Y.S.2d at 159.

578. 176 A.D.2d 29, 580 N.Y.S.2d 110 (3d Dep't), *lv. denied,* 80 N.Y.2d 751, 599 N.E.2d 691, 587 N.Y.S.2d 287 (1992).

579. N.Y. CONST. art. I, § 8 ("Every citizen may freely speak . . . on all subjects . . . and no law shall be passed to restrain or abridge the liberty of speech . . . .").

580. U.S. CONST. amend. I, cl. 3 ("Congress shall make no law . . . abridging the freedom of speech . . . .").

581. *Montgomery,* 176 A.D.2d at 31, 580 N.Y.S.2d at 111.