J. Remy Green, Attorney Identification Number: 310012019
COHEN&GREEN P.L.L.C.
1639 Centre Street, Suite 216
Ridgewood, NY 11385
Tel. (929) 888.9480
Email: remy@femmelaw.com

Justin Sadowsky, *pro hac vice forthcoming*
CAIR LEGAL DEFENSE FUND
453 New Jersey Ave, SE
Washington, DC 20003
Tel. (202) 488-8787
Email: jsadowsky@cair.com

TAMAR HERMAN, **Plaintiff,** **v.** **IBTIHAJ MUHAMMAD, SELAEDIN MAKSUT, COUNCIL ON AMERICAN-ISLAMIC RELATIONS A/K/A/ CAIR A/K/A CAIRFOUNDATION INC., and CAIR NEW JERSEY A/K/A CAIR NJ A/K/A CAIR NJ INC.** **Defendants.**	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION: UNION COUNTY** **DOCKET #: UNN-L-002913-22** **CIVIL ACTION** **NOTICE OF MOTION**

TO: All Counsel of Record

COUNSEL:

PLEASE TAKE NOTICE that on April 28, 2023, or as soon thereafter as counsel may be heard, the undersigned, attorneys for the Ibdihaj Muhammad, shall move before the Superior Court of New Jersey, Civil Division, Union County, whether at the Courthouse, or by remote means, for an Order as follows:

1. Granting this motion for summary judgment and for dismissal for failure to state a claim;
2. Granting ordinary costs of Court pursuant to R. 4:42-8;
3. Granting any such further relief the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that the undersigned shall rely upon the Certifications and the Letter Brief submitted simultaneously herewith.

PLEASE TAKE FURTHER NOTICE that pursuant to N.J. Ct. R. 4:46-1, as modified by consent and agreement of all parties, any opposing affidavits, certifications, briefs, and cross-motions for summary judgment, if any, shall be served and filed not later than April 11, 2023, unless the court orders otherwise. Any answers or responses to such opposing papers or to cross-motions shall be served and filed not later April 18, 2023.

COHEN&GREEN P.L.L.C

Dated: March 22, 2023

By: /s/ Remy Green
J. REMY GREEN

CERTIFICATION

I hereby certify that an original and one copy of the within Notice of Motion and supporting papers have been filed with the Clerk of the Superior Court at the Union County Superior Courtvia electronic filing on March 22, 203 and simultaneously served upon counsel for all parties by way automatic electronic filing notice, pursuant to the New Jersey Supreme Court's July 10, 2014 Notice to the Bar and June 3, 2014 Order relaxing and supplementing Rs. 1:5-2 and 1:5-3, within the time specified by the Rules of Court.

Dated: March 22, 2023

/s/ Remy Green
J. REMY GREEN

TAMAR HERMAN, **Plaintiff,** **v.** **IBTIHAJ MUHAMMAD, SELAEDIN MAKSUT, COUNCIL ON AMERICAN-ISLAMIC RELATIONS A/K/A/ CAIR A/K/A CAIRFOUNDATION INC., and CAIR NEW JERSEY A/K/A CAIR NJ A/K/A CAIR NJ INC.** **Defendants.**	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION: UNION COUNTY** **DOCKET #: UNN-L-002913-22** **CIVIL ACTION** **CERTIFICATION OF IBTIHAJ MUHAMMAD IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND TO DISMISS**

I, Ibtihaj Muhammad, of full age, hereby certify:

1. My name is Ibtihaj Muhammad. I am a defendant in the above-captioned action. I am over the age of 18, am competent to testify to the matters set forth below and I have personal knowledge of those matters.

2. I am an Olympic fencer and won a bronze medal at the 2016 Olympics in Rio de Janeiro, becoming the first Muslim American woman to win an Olympic medal. I am also a 5-time Senior World medalist and World Champion.

3. I am also an American Muslim, who was born and raised in Maplewood, New Jersey.

4. I have worn hijab since I was twelve years old. My parents and I chose fencing for me as a sport because it was one where I could participate while wearing hijab. I believe that, by fencing with hijab at the highest level of sport, I can inspire youth around the world to pursue their dreams and break boundaries— even if you wear hijab.

5. I am a co-owner, along with my siblings, of a clothing company (Louella by Ibtihaj), which manufactures modest clothing for women.

6. I am a sports ambassador, serving on the United States Department of State's Council to Empower Women and Girls Through Sport and have traveled extensively around the

world to elevate the global conversation on sports as a means of empowerment. I also work closely with the organization Athletes for Impact, a vehicle for athlete activism & a vital resource for athletes across all sports to be part of an intersectional movement for justice.

7. I am an author. I wrote a memoir entitled *Proud: My Fight for an Unlikely American Dream*, as well as a young readers edition entitled *Proud: Living My American Dream*. I have also authored two children's books. *The Proudest Blue: A Story of Hijab and Family*, co-authored by S.K. Ali and illustrated by Hatem Aly and released in 2019, is a story about the first day of school and two sisters on one's first day of hijab. The book, which I wrote to inspire young girls who wear hijab, is a New York Times bestseller, a Goodreads Choice Award nominee, a Booklist Editors' Choice selection in the youth category, a Rise: A Feminist Book Project's top ten book, received numerous starred reviews and has been translated into serval languages. I also later wrote and published (along with Ali and Aly) a sequel, *The Kindest Red: A Story of Hijab and Friendship*.

8. I remain close with my mother, with whom I speak with daily.

9. My mother is the legal guardian of my niece. My niece went to Seth Boyden Elementary School in Maplewood, New Jersey during the time of the events at issue in this case. She now goes to an Islamic school.

10. Because my mother has been in the Maplewood area Muslim community for over thirty years, I know people in our community look to my mother for advice and guidance.

11. Sometime around October 7, 2022, I had one of my regular conversations with my mother. Because of my social justice activism and my interest in ensuring that young girls can proudly wear hijab, my mother told me about her conversation with Cassandra Wyatt regarding her Ms. Wyatt's daughter. She told me that the daughter's teacher forcibly removed

her hijab, that the student resisted but the teacher pulled the hijab off, exposing her hair to the classroom, and that the teacher told her that her hair was beautiful and that she did not have to wear hijab anymore. I was shocked and appalled.

12. Thereafter, I posted about the incident on my professional Facebook account. I read the post to my mother word for word before posting it on social media, to confirm its accuracy. She agreed that everything in there was accurate.

13. I also included a photograph of a young girl holding a copy of her book. I included the photo in order to humanize the student's story.

14. I did not include any link or other way to purchase my book, which was already a bestseller and very likely already known by anyone who followed me online.

15. About a half hour later, I wrote a similar post on my personal Instagram account, except this time tagging civil rights groups CAIR and CAIR-NJ, and making no mention of my book at all.

16. Instead of a photo of a young girl holding a book, this time I used pictures of the school and of the teacher, Tamar Herman. At the time, I knew Herman only as the teacher who removed the hijab of a Muslim student. I obtained the photograph I posted on Instagram of Herman from Google.

17. At the time, I did not have Herman's phone number.

18. I do not believe that I was at any time Facebook friends with Herman. While I have a personal page on Facebook, I rarely use it. Instead, I post mostly on my professional "fan" page where members of the public may "follow" but not "friend" me. I rarely go on Facebook and use it mostly to reach out to my followers through my fan page.

19. I have no recollection of ever speaking with Herman, either before or after the events in question. While I believe Herman and I may have exchanged pleasantries at the gym, I do not recall any in particular.

20. That evening after I posted, I received a text. I had no idea who the text message was from but could surmise from context that it was from the person who pulled off the student's hijab, i.e., Tamar Herman. The text message claimed the allegations were not true. I responded by asking if the Student was lying. Herman responded by saying that if the Student said that, she would have been lying.

21. I did not and do not believe the Student, Wyatt's mother, or my mother was lying.

22. I was not even sure that the texter was Herman. This was the only communication I recall ever having with Herman.

23. I have never seen any video of any type of the Wyatt's, including any video about the incident in question.

24. I am not a member of SOMA Justice.

25. The only reason I know a video even exists is because of this lawsuit. I did not find out about its existence until after the lawsuit was filed.

26. Until the filing of this lawsuit, I knew nothing about any of the Wyatt family's views towards Jews or any other religious group. Indeed, all I knew about the Wyatt family was that they were Muslim, lived in the community, had a child who went to school with my niece, and that Herman forcibly removed the child's hijab.

27. Likewise, I did not know Herman was Jewish until after the filing of this lawsuit.

28. Immediately after Herman texted me, I texted with and then spoke with my trainer by telephone. My trainer confirmed that Herman went to the same gym.

29. I also spoke with my mother about Herman contacting me.

30. I also confirmed with my trainer Herman's phone number, so that I knew the texts were from Herman and not a hoax.

31. In retrospect, I recognize Herman by face (but not by name) from the gym. I do not remember whether I made that connection when I made my Instagram post and googled her photograph, or after my trainer confirmed we went to the same gym.

32. To this day, I do not know how Herman got my cell phone number.

33. The school district never attempted to reach out to me about the incident.

34. To this day, I believe that the statements I made about the incident are true.

35. I later learned that (a) the school district continues to keep Herman on administrative leave, (b) the school district settled with the Wyatt family for about $300,000, and (c) after the incident the Wyatts pulled the Student from school and placed her in a religious school. These three things only further confirm to me that the events are true.

36. Other than the above three things, I learned nothing new about the incident prior to the filing of this lawsuit.

I declare under penalty of perjury under the laws of the State of New Jersey that the foregoing is true and correct.

THEREFORE, I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

DATED: March 23, 2023

_____*Ibdihaj Mohammad*_____[1]
Ibdihaj Mohammad

[1] A copy of this document is being filed, with original signature on file with counsel, per R. 1:4-4(c).

TAMAR HERMAN, **Plaintiff,** **v.** **IBTIHAJ MUHAMMAD, SELAEDIN MAKSUT, COUNCIL ON AMERICAN-ISLAMIC RELATIONS A/K/A/ CAIR A/K/A CAIRFOUNDATION INC., and CAIR NEW JERSEY A/K/A CAIR NJ A/K/A CAIR NJ INC.** **Defendants.**	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION: UNION COUNTY** **DOCKET #: UNN-L-002913-22** **CIVIL ACTION** **ORDER ON NOTICE OF MOTION**

This matter having been opened by the Court on Notice of Motion filed by Defendant Ibdihaj Muhammad, represented by J. Remy Green, Esq. of the firm Cohen&Green, P.L.L.C.; and opposition from Plaintiff; and any other papers submitted by other parties, and the Court having considered the submissions of the parties; and for good cause shown:

It is on this _____ day of _____, 2023:

ORDERED that, pursuant to R. 4:46-2 and R. 4:6-2(e), Defendant Muhammad's motion for summary judgment and for dismissal for failure to state a claim, are hereby **GRANTED;**

ORDERED that, as the prevailing parties, the Whisper Network Defendants shall be entitled to their costs pursuant to R. 4:42-8 and the clerk of the Court is hereby directed to tax such costs;

IT IS FURTHER ORDERED that service of this order upon all parties will be made via eCourts upon its entry by the Court.

OPPOSED_____

UNOPPOSED_____

_____

Hon. _____, J.S.C.

COHEN&GREEN

March 22, 2023

Hon. Daniel R. Lindemann, J.S.C.
Superior Court of New Jersey
Union County Court House
2 Broad Street
Elizabeth, New Jersey 07207

LETTER BRIEF IN SUPPORT OF MOTION TO DISMISS PURSUANT TO R. 4:6-2(e)

By Electronic Filing.

Re: Docket No. UNN-L-002913-22, *Herman v. Muhammad, et al.*

Dear Judge Lindemann:

The undersigned and their firm, along with co-counsel,[1] represent Ibdihaj Muhammad in the case above. We write to join — and add to — the other Defendants' motions to dismiss at LCV2023467237 and LCV2023500864.[2] In keeping with that, we respectfully request the Court accept this letter brief in lieu of a more formal brief in support of Muhammad's motion to dismiss and for summary judgment.

As set out at more length below, the complaint ultimately fails to state a cause of action — and there is no triable factual issue as to what Muhammad believed when she made the statements at issue. In fact, she still holds each relevant opinion, and nothing in the complaint has changed her mind. Plaintiff is not seeking anything this Court can redress. Instead, she is litigating a personal and political grievance. That is not colorable, and so, the complaint should be dismissed.

FACTUAL BACKGROUND

A fuller statement of the factual background appears in the accompanying statement of material facts ("SOMF"). As set out therein, after Plaintiff admittedly pulled a hood off the head of

[1] Applications for *pro hac vice* admission are forthcoming.
[2] Ibdihaj incorporates the arguments contained in those motions as if fully set forth herein, and adopts them.

one of her (Plaintiff's) students (the "Student"), a public controversy ensued. SOMF ¶¶ 11-15. Plaintiff even admits that she pulled a "hood" off the head of a Muslim student, and found there was no other head-covering underneath. SOMF ¶ 11; *see also,* LCV2023468800 at 5-7; 8-9 (discussing the hijab in context, and explaining how "when Herman describes her observant Muslim student wearing a 'hood' to cover her head with nothing else underneath, Compl. ¶ 9, that 'hood' was the Student's hijab.").

Plaintiff's claims against Muhammad center on two, largely similar statements no one disputes Muhammad made:

> **Statement 1:**
>
> I wrote this book with the intention that moments like this would never happen again. When will it stop? Yesterday, Tamar Herman, a teacher at Seth Boyden Elementary in Maplewood, NJ forcibly removed the hijab of a second grade student. The young student resisted, by trying to hold onto her hijab, but the teacher pulled the hijab off, exposing her hair to the class. Herman told the student that her hair was beautiful and she did not have to wear hijab to school anymore. Imagine being a child and stripped of your clothing in front of your classmates. Imagine the humiliation and trauma this experience has caused her. This is abuse. School should be a haven to all of our kids to feel safe, welcome and protected – no matter their faith. We cannot move toward a post-racial America until we weed out the racism and bigotry that still exist in all layers of our society. By protecting Muslim girls who wear hijab, we are protecting the rights of all of us to have a choice in in the way we dress. Writing books and posting on social is not enough. We must stand together and vehemently denounce discrimination in all of its forms. CALL Seth Boyden Elementary (973) 378-5209 and EMAIL the principal sglander@somsd.k12.nj.us and the superintendent rtaylor@somsd.k12.nj.us.

SOMF ¶ 15.

> **Statement 2:**
>
> Yesterday, Tamar Herman, a teacher at Seth Boyden Elementary in Maplewood, NJ forcibly removed the hijab of a second grade student. The young student resisted, by trying to hold onto her hijab, but the teacher pulled the hijab off, exposing her hair to the class. Herman told the student that her hair was beautiful and she did not have to wear hijab to school anymore. Imagine being a child and stripped of your clothing in front of your classmates. Imagine the humiliation and trauma this experience has caused her. This is abuse. Schools

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> should be a haven for all of our kids to feel safe, welcome and protected— no matter their faith. We cannot move toward a post-racial America until we weed out the racism and bigotry that still exist in all layers of our society. By protecting Muslim girls who wear hijab, we are protecting the rights of all of us to have a choice in the way we dress. Writing books and posting on social is not enough. We must stand together and vehemently denounce discrimination in all of its forms. CALL Seth Boyden Elementary (973) 378-5209 and EMAIL the principal sglander@somsd.k12.Nj.us and the superintendent Rtaylor@somsd.k12.Nj.us.

SOMF ¶ 16. Muhammad made these statements out of a sincere concern about the treatment of a Muslim student, who faced an act which was experienced as a profound betrayal and act of discrimination. SOMF ¶ 15. She was shocked and appalled by the story, and felt a moral obligation to speak on the subject. *Id.*

Even so, Muhammad took the measures she could to confirm the accuracy of her statements. Specifically, she read it to the Student's mother, and confirmed it was accurate. SOMF ¶ 17. Even now, Muhammad continues to believe the story the Student and her mother conveyed. SOMF ¶ 32. She believes every part of Statement 1 and Statement 2 that can be evaluated for truth is, in fact, true. And the only explanation Plaintiff seems to offer for the discrepancy between her story and the Students is that the Student was — without any motivation at all — lying about it. SOMF ¶ 23. Of course, Muhammad does not believe the Student, or any one else conveying the story, was lying. *Id.* And no one disputes Muhammad accurately conveyed the version of the story she heard from others.

Nor does Muhammad appear to be the only one who believes the Student. The school district clearly believes the Student's version of events, having paid out multiple hundreds of thousands of dollars and continued to leave Plaintiff on administrative leave. SOMF ¶ 33. Knowing that only further reinforces Muhammad's judgment that the Student is a better source of accurate information. *Id.*

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LEGAL STANDARDS

Motion to Dismiss/for Summary Judgment. A motion to dismiss for failure to state a claim upon which relief can be granted under R. 4:6-2(e) depends on the pleadings themselves. *Rider v. State Dept. of Transp.*, 221 N.J. Super. 547 (App. Div. 1987). "Plaintiffs are entitled to every reasonable inference in their favor," ibid., but "conclusory allegations are insufficient" to survive a motion to dismiss for failure to state a claim upon which relief can be granted. *Scheidt v. DRS Techs., Inc.*, 424 N.J. Super. 188, 193 (App. Div. 2012).

Muhammad also seeks—as the New Jersey Supreme Court has endorsed for defamation cases like this one—a pre-answer grant of summary judgment. *Kotlikoff v. Cmty. News*, 89 N.J. 62, 67 (1982); *Orso v. Goldberg*, 284 N.J. Super. 446, 458 (App. Div. 1995). To survive a motion for summary judgment in a defamation action, a plaintiff "must produce substantial evidence to survive a motion for summary judgment. Although courts construe the evidence in the light most favorable to the non-moving party in a summary judgment motion, the 'clear and convincing' standard in defamation action adds an additional weight to the plaintiffs' usual 'preponderance of the evidence' burden." *Orso*, 284 N.J. Super. at 457, *quoting Costello v. Ocean Cty. Observer*, 136 N.J. 594, 614 (N.J. 1994); *see also Williams v. Bell Tel. Labs. Inc.*, 132 N.J. 109, 123 (1993).

Defamation. To state or establish a claim for defamation based upon a statement about a public official or figure, or touching on a matter of public interest or concern, a plaintiff must allege or show "(1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the statement was communicated to another person (and was not privileged); and (3) that the defendant published the defamatory statement with actual malice." *Durando v. Nutley Sun*, 209 N.J. 235, 248 (2012). That is because "[u]nlike most states, New Jersey accepted the invitation to provide

greater protection to speech involving matters of public concern than mandated by the United States Supreme Court's First Amendment jurisprudence … [in a] trilogy of New Jersey Supreme Court cases that rejected the negligence standard in favor of the actual-malice standard in private-figure defamation cases in which the challenged speech touches on matters of public concern." *Senna v. Florimont*, 196 N.J. 469, 484-85 (2008).

Moreover, unlike "factual assertions that could be proven true or false," expressions of opinion are not actionable because they are not amenable to being disproven. *Ward v. Zelikovsky*, 136 N.J. 516, 531 (1994).

LEGAL ARGUMENT

Herman alleges that Muhammad made two substantially similar "defamatory" posts on social media, each containing at its essence two defamatory statements. *See generally* Complaint ¶¶ 95. 99. The first statement is that Herman "forcibly removed the hijab of a second grade student." *Id.* This allegation is quite similar to the ones levies against the other defendants who repeated the Student's accusation, and should be dismissed for the same reasons in the other defendants' Motions to Dismiss. The second statement is that Herman "told the student that her hair was beautiful and she did not have to wear hijab to school anymore." *Id.* This statement is slightly different in that it implies that Herman was defending her actions after the fact. But that extra statement hardly changes the calculus: the allegation of intentional removal remains the same; Herman has admitted to intentionally (though not purposefully) removing the Student's hijab, and—perhaps most importantly—Muhammad was

doing nothing other than relaying information she heard from another source. That is simply insufficient to prove constitutional "actual malice."[3]

Herman separately alleges that Muhammad made three other defamatory statements, but even a cursory reading of both complaints show that this is not so.

First, Herman alleges that Muhammad accused Herman of stripping off the Student's clothes. Complaint ¶ 88. But Herman concedes all Muhammad said "***Imagine*** being a child and stripped of your clothing in front of your classmates." *Id.* ¶ 95 (emphasis added). And Herman said it after describing exactly what Herman admits she did: "forcibly remove[] the hijab of a second grade student." *Id.* Muhammad's post, which is expressly about "protecting Muslim girls who wear hijab," was simply making the point that hijab is clothing. *Id.* And since Plaintiff's own pleading makes clear there is nothing in the "stripping" portion of the statement beyond the baseline fact — which Plaintiff admits is true — that Plaintiff forcibly removed the Student's hijab, it is not separately actionable.

Second, Herman alleges that Muhammad accused Herman of abusing the Student. *Id.* ¶ 96. But what Muhammad actually said was, "***This*** is abuse." "This," again, refers plainly to the removal of the hijab — and the difference between the infinitive and the single instance noun is meaningful. But ultimately (1) calling something "abuse" — or someone an "abuser" or the like — is well-settled to be opinion and (2) specifically, whether or not removing a hijab constitutes abuse is constitutionally-

[3] A showing of constitutional "actual malice" means a showing "defendant ***in fact*** entertained serious doubts as to the truth of his publication." *St. Amant v Thompson*, 390 US 727, 731 (1968) (emphasis added). It is distinct from common law malice, and the United States Supreme Court has specifically noted that because of that possibility for confusion with simple "ill will," "the term ['actual malice'] can confuse as well as enlighten [and i]n this respect, the phrase may be an unfortunate one." *Masson v New Yorker Mag.*, 501 US 496, 511 (1991).

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protected opinion, and even without the context. There is no room for this theory that is consistent with the First Amendment's protection for opinion.

Third, Herman alleges that Muhammad accused Herman of being a racist and a bigot. Complaint ¶ 129. But this is quintessential protected opinion.

I. Muhammad's statements are substantially true.

A. Muhammad's statements as alleged are substantially true.

As explained in detail in the CAIR Foundation MTD (at 19-29), Muhammad's statement that Herman forcefully removed the Student's hijab is substantially true. In fact, Herman admits as much in her complaint. Herman also admits she did so intentionally.

Her only claim that the statement is in any way false is that she did not know it was a hijab and she merely "brushed the hood back" rather than pulled it off entirely. As the CAIR Foundation's MTD explains (at 20-22), the gist here hardly changes: "Herman admits she nonetheless intentionally put her hands on the Student's hood and uncovered the child's hair without permission, a plainly inappropriate act." CAIR Foundation MTD at 20 (citing Complaint at ¶ 9). Nothing about that changes the substantial truth of the statement — it is, in fact, much like the theory the *Sullivan* Court canonically rejected. *NY Times Co. v Sullivan*, 376 US 254, 289 (1964). That is, for constitutional purposes, the difference between fully removing a hijab and merely "brush[ing] the hood back" so as to expose her hair quite similar to the difference between an advertisement saying Alabama police "ringed the Alabama State College Campus" when they had merely been "deployed near" the campus. *Id.* As the New Jersey Supreme Court has expounded on that point, "[m]inor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.'" *G.D.*

v. Kenny, 205 N.J. 275, 294 (2011) (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991)). And the sting here, such as it is, is unambiguously "justified."

Nor does the addition of a statement that Herman told the student that "her hair was beautiful and she did not have to wear a hijab to school anymore," *see* Complaint ¶¶ 95, 99, change the substantial meaning of the broader allegation. Herman's Complaint does not explain exactly what this allegation adds to the overall gist — likely because it cannot: Although telling someone who wears hijab that they should not is offensive, it is ***certainly*** no more offensive than ***actually removing the hijab***. Herman may suggest in opposition that this shows that the hijab was removed purposefully rather than accidentally. But as the CAIR Foundation MTD explains (at 20-22), that is besides the point: no matter what Herman's motivations were, the removal was intentional, and the action both shocking and inappropriate.[4]

Herman separately alleges that Muhammad accused Herman of "'strip[ping]' the Student of her clothing in front of class." Complaint ¶ 96. But the context makes clear that this was not a separate accusation, a hypothetical — unrelated to anything Herman did — lead into by asking the reader to "***Imagine***" something happened, attempting to illustrate what it means to forcibly remove someone's hijab. SOMF ¶ 16. The statement isn't even really about Herman, and any theory resting on it can be dismissed on that basis alone — since a basic element of a defamation claim is that any statement must be "'of and concerning' [the] plaintiff." *Print. Mart-Morristown v Sharp Elecs. Corp.*, 116 NJ 739, 768, 563 A2d 31, 46 (1989).

[4] In any event, the (alleged) statement just shows Herman being defensive about her conduct, as if she knew it was wrong. Which she admits she did. Complaint ¶ 9.

But even read more broadly, the statement isn't a statement of fact, it is an opinion based on a fact—the hijab removal—that was separately described. And since the claim about the underlying fact is not defamatory, the opinion cannot be either. *Kotlikoff*, 89 N.J. at 72–73 ("[w]here an opinion is accompanied by its underlying nondefamatory factual basis, a defamation action premised upon that opinion will fail, no matter how unjustified, unreasonable or derogatory the opinion might be") (citation omitted). If Plaintiff disagrees with the metaphor Muhammad used, that is her right; just as it is Muhammad's right to use the metaphor to express her opinion. But nothing therein is actionable.

Herman further alleges that Muhammad accused Herman of committing abuse. But what Muhammad said was "***This*** is abuse." Complaint ¶¶ 95, 99; SOMF ¶¶ 15-16. This, again, is Muhammad's opinion about what the actions Muhammad had just described means. It is again protected opinion under *Kotlikoff*. A legion of cases reaches this result, on indistinguishable statements. *Comyack v. Gianella*, 2020 N.J. Super. LEXIS 49 at *82-90; *90 n. 6 (Super Ct Apr. 21, 2020)[5] (among other things, "He has a long history of being real scummy to women"; "predator"; "scumbag"; and "serial abuser" are all opinion); *Rosado v Daily News, L.P.*, 2014 NY Slip Op 33736[U], *4 (Sup Ct, NY County 2014) ("sexual predator" is opinion); *Reppucci v Salem News Publ. Co.*, 1994 Mass. Super. LEXIS 56, at *9 (Oct. 13, 1994) ("abuser of women" is opinion); *Mignogna v Funimation Prods., LLC*, 2022 Tex. App. LEXIS 6087, at *16 (Tex Ct App Aug. 18, 2022) ("Calling someone a 'sexual predator' falls within the broader principle that a speaker's individual judgment that rests solely in the eye of the beholder is mere opinion").

[5] All unpublished cases cited, along with any contrary authority known to counsel, are provided in an appendix hereto.

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Finally, Herman alleges that Muhammad accused her of racism and bigotry. These accusations are classic non-actionable opinion. *Ward*, 136 N.J. at 536.

B. Muhammad's statements in fact are substantially true.

Adding undisputed facts in and outside of the Complaint makes dismissal even more appropriate. Herman's defense—based on her own Complaint—was that "Herman believed in good faith that the student was wearing a hood, not a hijab." Complaint at ¶ 9. Herman removed the Student's hijab because "her eyes were partially blocked by the hood." This is implausible. *See Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J.520, 531 (1995) (adopting the standard in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), that judges decline to find a dispute of fact based on implausible assertions of the non-movant). And it certainly is insufficient for Herman to be able to meet the "clear and convincing" standard required for defamation. *Orso*, 284 N.J. Super. at 457; *Brill*, 142 N.J. at 532 ("where the First Amendment mandates a 'clear and convincing' standard, the trial judge in disposing of a directed verdict motion should consider whether a reasonable factfinder could conclude, for example, that the plaintiff had shown actual malice with convincing clarity") (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

Subsequent factual developments further establish the substantial truth. Herman, by her own admission, remains suspended, over a year later, due to her actions. *See* Complaint at ¶¶ 11-12. Her suspension occurred in the morning of October 7, before either of Muhammad's posts. *Id.* at ¶ 10. And the school then undertook a thorough investigation, which at ¶¶ 39, 69 90. Normally such investigations occur "quickly" but this one remains ongoing. *Id.* at ¶¶ 10-11. The school has not reached out to Muhammad at all in the course of this investigation, further confirming that it was the events in the classroom, and not the allegations by Muhammad, that have sparked and continued the

investigation. SOMF ¶ 31. And the school district paid $300,000 to resolve the claim by the Student against the school. SOMF ¶ 33. This all indicates that—unaffected by anything Muhammad did—the school clearly believed and still believes the Student's version of events, not the teacher's.

II. Muhammad did not act with constitutional "actual malice."

A. Herman has not adequately pled actual malice.

Herman makes the threadbare accusation that Muhammad acted with malice, but such threadbare accusation is entitled to no weight — and is the wrong standard besides. First "recklessness and/or malice," along with a litany of boilerplate (Complaint at ¶ 129) is not an allegation of actual malice.

Ultimately, however, actual malice is a question of law, and courts must look to the factual allegations that constitute malice. *Lynch v. New Jersey Educ. Ass'n*, 161 N.J. 152, 168-170 (1999). And Courts cannot simply take a threadbare allegation of "greed" or something like it (Complaint at ¶ 87) in the place of allegations about motivation. Rather, where — as here — statements concern an issue of public concern, and a Defendant obviously is speaking on that topic, allegations are insufficient where Plaintiff has "not offered an alternative motivation for making the disputed statements other than that provided by" the Defendants. *Comyack v Giannella*, 2020 N.J. Super. LEXIS 49, at *105, n 13 (Super Ct Apr. 21, 2020, No. SOM L 1356-19).

Herman's allegation of actual malice fail. There is no accusation that Muhammad made anything up. Rather, the allegations were that the Student told her mother what happened, which were

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passed along and published by Muhammad. *See* Complaint at ¶ 85 ("repetition and embellishment of [the Student's mother's] inflammatory and false accusations"); *see also* Point II(B) below (confirming).[6]

In defamation, there "is no duty to investigate." *Govito v. W. Jersey Health Sys., Inc.,* 332 N.J. Super. 293, 318 (App. Div. 2000) (citing *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). "The standard is whether the speakers published while entertaining serious doubts about the statement's truth." Here, as in *Govito*, Herman "presented absolutely no evidence that" Herman "had any reason to believe the statements were false."

Herman's allegation of actual malice is merely that "she was substantially motivated by profit and by drawing attention to herself and her personal brand." While this accusation is false—see Point II(B)—it is insufficient to prove actual malice in any event. Actual malice does not ask whether one's motivations are pure but whether one ***knew*** that one's statements were false, or acted with reckless disregard for their falsity. "[F]inancial motives" … cannot provide a sufficient basis for finding actual malice." *Schwartz v. Worrall Publications, Inc.*, 258 N.J. Super. 493, 504 (App. Div. 1992). Even "[s]pite, hostility, hatred, or the deliberate intent to harm demonstrate possible motives for making a statement, but not publication with a reckless disregard for its truth." *Lynch*, 161 N.J. at 166-67. "[O]nly evidence demonstrating that the publication was made with knowledge of its falsity or a reckless disregard for its truth will establish the actual malice requirement." *DeAngelis v. Hill*, 180 N.J. 1, 14 (2004). Plaintiff has come up entirely short on that front.

The complaint here is simply devoid of any pre-publication evidence or allegation that Muhammad might have had any reason to believe her accusations were false before Muhammad

[6] To the extent Herman's use of the word "embellishment" suggests that Muhammad lied or added any actionable facts that were not told to her by her mother, Herman presents zero evidence for this or any examples of it, and it is not true. *See* § B, below.

published them. The closest things there are to a reason to disbelieve is that (a) "Muhammad was familiar with [the Student's mother's antisemitic sentiments" and (b) that there was a video later produced that Herman alleges showed Wyatt coaching her daughter. While the former is false—see below and SOMF—the problem here is that by Herman's own admission, the Student's mother did not know at the time that Herman was Jewish. By Herman's own admission, the Student's mother only found out later. Complaint at ¶¶ 86-87. So even if Muhammad knew that the Student's mother was antisemitic and that Herman was Jewish, it would still not have given Muhammad any reason to believe either the Student or her mother was lying. And as far as the latter, even if it was true, there is no allegation or reason to believe that video came out prior to Muhammad publishing the two statements, much less that Muhammad ever saw it. And it is also just not the case that, as a matter of law, believing someone who is antisemitic is telling the truth ***in a particular case*** is — as a matter of law — so reckless as to amount to knowing the statement is untrue. That is not, and cannot, be the law consistent with the First Amendment.

Nor does Herman's attempts to resort to after-publication incidents to show doubt change the equation. Herman alleges that—after Muhammad published her statements—Herman reached out and informed Muhammad that the allegations were not true. And Herman alleges that a month later, in an Instagram video, Muhammad described the event as an "alleged incident" but did not retract, suggesting she later learned that the incident was false and that her failure to retract was actionable. The problem with these allegations are that, under the single publication rule, they're irrelevant. Muhammad published the two statements in the afternoon of October 7, regardless of whether or not those statements remain on social media. And while the failure to retract can be circumstantial evidence of malice in rare occasions, the question of malice is determined "at the time

the statement was published." *Schwartz*., 258 N.J. Super. at 503. Moreover, as set out in the SOMF, nothing in Herman's explanation changed anyone's mind — Plaintiff is imagining things.[7] Indeed, if anything, Muhammad has become ***more*** confident in her conclusions. SOMF ¶¶ 32-33.

B. Undisputed and indisputable facts further establish no malice.

As the undisputed evidence that Muhammad provides in support of summary judgment confirms, Muhammad learned of the events in the course of talking to her mother. *See* SOMF ¶¶ 12-15. Muhammad regularly talks to her mother as they are very close. SOMF ¶ 6.

Muhammad's mother is the legal guardian of Muhammad's niece. SOMF ¶ 7. The niece went to school with the Student at the time in question. *Id.* Because the Islamic community is small and close-knit, Muhammad's mother and the Student's mother are acquaintances (though not friends), and Muslims in the community like the Student's mother look to Muhammad's mother for advice. SOMF ¶¶ 8, 10.

Shortly after the incident happened, the Student's mother came to Muhammad's mother for advice. SOMF ¶ 12. Because of the shocking nature of the event—and because of Muhammad's demonstrated interest in protecting the rights of children to wear hijab—Muhammad's mother then told Muhammad about it. SOF ¶ 15. And, critically, Muhammad simply repeated what her mother told her, which in turn was simply what the Student's mother told Muhammad's mother. SOMF ¶¶ 15-17. And that, in turn, was simply a recitation of what the Student told her mother that day after the shocking and traumatic events occurred. SOMF ¶ 12.

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[7] Indeed, for basically the same First Amendment reasons the initial statements are protected, there would be a chilling effect on discussions of topics of public concern if ***later*** statements that use slightly different words could somehow be imputed to show knowledge that earlier statements are inaccurate. And even if that concept were not fundamentally flawed, something ***far*** stronger than

This confirms that Muhammad was simply relaying what she was told in publishing her two posts on social media. And, as Section A above confirms, doing so is not malicious absent some extraordinary reason to doubt the accuracy of what she was told. In contrast, here, at every level, nobody had any reason to be dishonest. The Student had no reason to lie to her mother. Her mother had no reason to lie to Muhammad's mother, particularly since the mother was relaying the story to Muhammad's mother for the purpose of soliciting advice. And Muhammad's mother had no reason to lie to her own daughter. Further confirming that nobody had any reason to lie, the school continues to keep Herman on paid administrative leave, forgoing her services, showing that they too believe the Student. SOF ¶ 33. The School also believed the Student's story to such degree it agreed to a $300,000 settlement.. *Id.* ¶ 33. And if the school has good reason to believe the student's Story, Muhammad certainly had no good reason not to.

Nor did Muhammad have any duty to investigate. *See* § A, above. To be clear, Muhmmad had no reason to believe that either the Student or her mother was antisemitic. She had never spoken to the Student or the Student's mother. Muhammad's mother never talked to her daughter about the Student's or the Student's mother's views towards Jews. SOF ¶ 27. Indeed, Muhammad only became aware of the antisemitic social media posts the Student's mother made as a result of this lawsuit. SOF ¶¶ 26-27. So, similarly, she never saw any video that would supposedly show Wyatt coaching her daughter. SOF ¶ 26.

Herman's accusations about Muhammad's intent further has things entirely backwards. Muhammad did not post about Herman's actions in order to draw attention to her New York Times bestselling children's book about hijab. Rather, it was—as the post itself makes clear—her belief in supporting children wearing hijab that drove her both to write the children's book back in 2019 and

for her to post the story. SOF ¶ 15. In her Facebook post, she used a photo of a small girl holding the book as symbolism to show that she believes in the right of children to wear hijab and be proud of wearing hijab. SOF ¶ 18. In her Instgram post, she did not mention the book at all. SOF ¶ 20. And she did not otherwise discuss the book in her post, other implicitly to say that "[w]riting books and posting on social is not enough." SOF ¶ 16. Nor is there a description of the book, or a link or explanation of where to buy the book, in either of her two posts. SOF ¶ 18.

While that conclusively resolves the matter, nothing that happened thereafter has given Muhammad any new reason to change her opinion that everything she was originally told was indeed true.

Herman alleges that "Herman and Muhammad had been friendly for many years, having met at a gym where they shared the same personal trainer." SOF ¶ 82. In reality, Muhammad barely knew who Herman was. SOF ¶¶ 22, 24, 28. She recognized her vaguely by face after the fact, but did not know her by name until the events occurred. SOF ¶ 29.

Contrary to Herman's allegations, they never "exchanged phone numbers," and Muhammad remains mystified as to how Herman even has Muhammad's number. SOF ¶ 30; Complaint ¶ 82. Muhammad, who uses Facebook infrequently, is not friends on Facebook with Herman. SOF ¶¶ 22, 26. Nor did Muhammad know Herman's religion. SOF ¶ 28. And while Muhammad appreciates the support of all her fans, she is not actually friends with all her fans.

When Herman texted her after she made her two posts, Muhammad could only tell from context that the texter was the teacher, and had no idea how the texter got her phone number. SOF ¶¶ 23, 30. She contacted her trainer to ask what Herman's number was to confirm it was her. Herman's text said the story was untrue and requested she take it down. Muhammad responded,

asking if the student was a liar, confirming that the story came from the student. SOF ¶ 23. And Herman responded yes, if that is what the student said. *Id.* Even if this new information were relevant, under the malice standard, Muhammad had a right to believe the Student over Herman.

And Muhammad has learned nothing since that would give her any reason to change her views. The only information she learned thereafter was that the school suspended Herman and has kept her suspended to this day, that the school settled with the Student's family for $300,000, and that the Wyatt's have since removed the Student from the public school and placed her in private religious school—facts which only further confirm the truth of what Muhammad was originally told. SOF ¶¶ 33.

For all these reasons, and based on the law as described above, even if Herman's claims could survive a motion to dismiss, they cannot survive summary judgment. Either way, the claims against her should be dismissed.

C. Herman cannot even establish ordinarily negligence.

Even if the standard were not malice (it unambiguously is, *see Senna*, 196 N.J. at 484-85 (2008)), Muhammad would still be entitled to dismissal or summary judgment. The evidence shows that Herman reasonably relied on the Student's version of events, which were reasonably passed along through the Student's and Muhammad's mothers. *See Crescenz v. Penguin Grp. (USA), Inc.*, 561 F. App'x 173, 177 (3d Cir. 2014) (it was not negligent "for an author, 'without a high degree of awareness of [the facts'] probable falsity, [to] rely on statements made by a single source even though they reflect only one side of the story'") (quoting *Vandenburg v. Newsweek, Inc.,* 507 F.2d 1024, 1028 (5th Cir. 1975)). And as set out above, Plaintiff has offered ***nothing*** — no explanation at all — that explains Muhammad's motivation. And "the statements in issue are replete with expressions of crusading to

protect" children in school, no matter their faith, and "these expressions corroborate the purpose." *Comyack*, 2020 N.J. Super. LEXIS 49, at *109.

III. Herman's tagalong claim for false light invasion of privacy falls with the defamation claim.

Herman's claim for false light invasion of privacy must die whatever death her claim for defamation suffers. As explained in more detail in the CAIR Foundation Motion to Dismiss (at 17-19), a false light claim is unavailable where, as here, it is based on the same underlying conduct as a deficient defamation claim. *Williams v. MLB Network, Inc.*, No. A-5586-16T2, 2019 WL 1222954, at *30 (N.J. App. Div. Mar. 14, 2019) (when there is no actionable defamation, "'there can be no claim for damages flowing from the alleged defamation but attributed to a different intentional tort whose gravamen is the same as that of the defamation claim'") (citing *LoBiondo v. Schwartz*, 323 N.J. Super. 391, 417 (App. Div. 1999)); *Walko*, 235 N.J. Super. at 155 (observing that "where the court has already determined that no reasonable reader would interpret [the statements] . . . as a factual claim about the plaintiff . . . the false light cause of action must also fail.").

CONCLUSION

For the reasons discussed above and in the accompanying papers, Defendant Muhammad requests that her motion be granted, judgment be entered in her favor, and that the Court grant such other and further relief as it may deem just and proper.

We thank the Court for its time and consideration.

Respectfully submitted,

____/s/_____
J. Remy Green
Honorific/Pronouns: Mx., they/their/them
N.J. Attorney ID: 310012019

COHEN&GREEN P.L.L.C.
1639 Centre St., Suite 216
Ridgewood, New York 11385

Justin Sadowsky, *pro hac vice forthcoming*
CAIR LEGAL DEFENSE FUND
453 New Jersey Ave, SE
Washington, DC 20003
Tel. (202) 488-8787
Email: jsadowsky@cair.com

cc:
Counsel for all parties by electronic filing.

APPENDIX: UNPUBLISHED CASES

Comyack v. Giannella

Superior Court of New Jersey, Law Division, Somerset County

March 27, 2020, Returnable; April 8, 2020, Oral Argument Held Remotely Via "Zoom"; April 21, 2020, Decided

Docket No. SOM L 1356-19

Reporter
2020 N.J. Super. LEXIS 49 *

Comyack v. Giannella, et al.

Case Summary

Overview

HOLDINGS: [1]-Defendants' statements were protected by the Communications Decency Act (CDA) in plaintiff's defamation action because defendants were acting as "users of an interactive computer service," namely the online platforms on which they republished the content, 47 U.S.C.S. § 230(c)(1) and(f)(2), and such republications were absolutely privileged under the CDA, and any state law claims complained of as to such statements were precluded by the CDA; [2]-Plaintiff failed to state a defamation claim for those statements subject to the fair comment and common interest privileges, which had to be evaluated under the actual malice standard because plaintiff's general allegations as to actual malice basically amounted to the definition of actual malice and recitation of the applicable standard as if they were "magic words" simply did not suffice.

Outcome

Motion for summary judgment and cross-motion granted in part and denied in part. Complaint dismissed without prejudice.

Opinion

[*1] Defendants Brown, Devaney, and Valentinos' Motion to Dismiss and Motion for Summary Judgment.

Defendant McGann's Cross-Motion for Summary Judgment.

Defendant Franco's Cross-Motion for Summary Judgment.

I. PARTIES AND RELIEF SOUGHT

Defendants Shannon Brown, Alexis Devaney, Jaclyn Valentino, and Nicole Valentino, collectively self-named the Whisper Network Defendants ("WN Defendants"), by and through their counsel, J. Remy Green, Esq. of Cohen & Green P.L.L.C., move to dismiss the Complaint for failure to state a claim and move for summary judgment. WN Defendants also filed a Reply on March 26, 2020, which was considered by the Court.

Defendant Ryan McGann ("McGann"), by and through his counsel, Mark S. Carter, Esq., cross-moves for summary judgment. McGann also filed a Reply on March 16, 2020, which was considered by the Court.

Defendant Justin Franco ("Franco"), by and through his counsel, Edward G. Washburne, Esq. of McKenna, DuPont, Higgins, & Stone, originally cross-moved for summary judgment. However, during the pendency of his Cross-Motion, Franco filed for bankruptcy protection. As a result of the bankruptcy "stay," the Court will not decide Franco's Cross-Motion.

Plaintiff Brent Comyack **[*2]** ("Comyack"), by and through his counsel, Paul R. Rizzo, Esq. of DiFrancesco, Bateman, Kunzman, Davis, Lehrer & Flaum, P.C., opposes the Motion and the Cross-Motion presently before the Court.

II. POSITIONS OF THE PARTIES[1]

A. Motion and Cross-Motions

i. WN Defendants

a. WN Defendants' Statement of Facts

WN Defendants' Statement of Facts is as follows:

1. Comyack's primary place of residence and domicile is in Florida.

2. As of June 29, 2019, Comyack had his primary place of residence in Asbury Park, New Jersey.

3. At an unknown time near or around June 30, 2019, Comyack moved from New Jersey to North Carolina.

4. At a time between the move from New Jersey to North Carolina and July 13, Comyack moved from North Carolina to Tennessee.

5. At the latest, Comyack moved to Tennessee on July 13, 2019.

6. At the latest, Comyack moved to Florida on November 25, 2019.

7. Comyack has not left Florida since that time and presently resides there.

8. Comyack has specifically posted on social media that he no longer resides in New Jersey while living in Florida.

9. Alexis Devaney is a resident of and has at all relevant times been domiciled in New York State.

10. The other WN Defendants are New Jersey residents.

[*3] 11. On June 29, 2019, Shannon Brown made a Facebook post ("Brown1").

12. On August 15, 2019, Shannon Brown made a Facebook post ("Brown2").

13. On June 29, 2019, Shannon Brown made a Facebook post ("Brown3").

14. On August 15, 2019 Shannon Brown made a Facebook post ("Brown4").

15. On July 6, 2019, Alexis Devaney posted a link to a Reddit post entitled, "Women: If this man is your bartender in Asbury, don't trust his drinks." ("Devaney1").

16. The headline quoted in Devaney1 would be and was automatically generated by Facebook when Alexis Devaney entered text linking to the Reddit post.

17. Non-parties generated all of the content in that Reddit post.

18. Between posting Devaney1 and Devaney2 below, Alexis Devaney saw a picture of a positive drug test result for methadone with an indication that it had been taken by someone who had been drugged by Comyack.

19. Between posting Devaney1 and Devaney2 below, Alexis Devaney received dozens of accounts of misconduct in private messages and saw/reviewed other accounts in the Reddit post.

20. On July 23, 2019, Alexis Devaney made a Facebook post ("Devaney2"), republishing a of screenshot of an Instagram Story.

21. Alexis Devaney has not made any post **[*4]** that described Comyack as "being very scummy" and "all around human trash" and stating that she would be in New Jersey "banging on the door of the bar trying to find him and rip his dick off" if she had a car.

22. On August 21, 2019, Jaclyn Valentino made a Facebook post ("JValentino1").

23. Between June 29 and July 13, 2019, Nicole Valentino made a Facebook post ("NValentino1").

24. Between June 29 and July 13, 2019, Nicole Valentino made a Facebook post ("NValentino2").

25. Between June 29 and July 13, 2019, Nicole Valentino made a Facebook post ("NValentino3").

[1] The positions of the parties are provided near verbatim for completeness of the record, with citations omitted.

26. Prior to making any of NValentino1, 2, or 3, Nicole Valentino saw a picture of a positive drug test result for methadone with an indication that it had been taken by someone who had been drugged by Comyack.

27. On or about July 1, 2019, Nicole Valentino had received dozens of accounts of Comyack's misconduct in private messages.

28. Comyack was fired by his former employer in New Jersey on or around June 30, 2019.

29. Brown2 and 4, Devaney1 and 2, JValentino1, and most likely all of the NValentino posts were made after Comyack was fired from his New Jersey job.

30. The sole alleged damages accruing from posts after approximately **[*5]** June 30, 2019 could not cause any of the harm alleged to have taken place in New Jersey.

31. For all posts made after June 30, 2019, any alleged harm must have accrued in one of either North Carolina, Tennessee, or Florida.

32. Comyack has "drugged and raped girls."

33. Comyack is "known for [drugging and raping girls]," and, as of June 29, 2019, the incident involving Giannella "isn't the first [people ha]ve heard of him doing this."

34. Prior to making any post referencing a "criminal history," the WN Defendants saw a video that suggested that Comyack had as many as twenty criminal cases.

35. Comyack has at least two felony convictions available in the public record, and he was sentenced for both of which on February 1, 2013.

36. There are at least ten years' worth of allegations, publicly available as early as July 1, 2019 (the date of the Reddit post), that Comyack engaged in serious sexual misconduct.

37. Those allegations include that Comyack:

- gave a 12-year-old girl a bottle of "ever clear [sic] and tried to take advantage of [her] in his car at the mall"

- "insisted that" a 15-year-old girl have sex with him "even though [she] said no about a hundred times and was physically pulling **[*6]** away. But he INSISTED."
- "[o]ne woman went to the hospital and the toxicology report stated there was methadone in her system."
- "is extremely manipulative, and lied about a previous arrest. He claimed to have been arrested for assaulting a man at a college party who was forcing himself on a girl."
- "the pod (area) of the jail that Brent claimed to be in was specifically reserved as a population separation pod (for people who are not safe in general population such as sex offenders, rapists, those who are being targeted by other inmates, etc.)"
- was involved with "numerous young women who had experiences with him while they were minors (ages 14-16) and he was over the age of 20, where he would attempt to force himself sexually on them or be extremely inappropriate."
- "Worked with him for a bit, has a serious drug problem. Would dose people at work for fun. I'm off hard drugs 10 years and he put blow in my Pepsi thinking it was funny. Has a dick tattoo of a cross that he uses as an excuse to pull it out."
- "Assaulted a friend of mine. After filing a police report he threatened her life, she was scared enough to drop the charges."

- Has been the subject of "'hearsay' [that] has been consistent **[*7]** for multiple years and dozens of women. Anyone who doesn't see that he's a menace is wearing rose colored glasses."
- That a non-party "can confirm: he drugged my sister and her friend. Luckily my sister only had a little of her drink, but her friend drank both hers and my sister['s] . . . [B]rent kept insisting the entire time she wasn't good to drive and he'll take them to new Brunswick"

38. Any readers of the relevant statements were

aware of the ongoing conversation relating to Comyack's alleged misconduct.

39. All readers of the relevant statements understood the statements to be stating the opinion, in sum and substance, "because I do not believe that this many people would make up stories, I believe that these allegations are true," referencing the disclosed facts of the existence of the Reddit post and various other collections of allegations.

The Amended Complaint alleges that WN Defendants made the following statements, after being provided information by Alexis Giannella and others, accurately repeating the information that they received. Comyack's counsel provided to all counsel what he described as a collection of all "statements made by the defendants" that are "known to" **[*8]** Comyack and verified that "[t]here are no other statements known at this time." WN Defendants note that the production lacks some of the statements alleged in the Amended Complaint and reveals that the Amended Complaint misattributed or misdescribed several statements. WN Defendants assert that they have attempted to correct such errors. Shannon Brown made the following posts:

> • Brown1: June 29, 2019, Facebook post, stating, "A woman was drugged by someone that tends bar at [Modine] . . . He has a long history of being real scummy . . . and this is how Modine responds. By being more worried about their reputation than the fact that they hired a rapist."
>
> • Brown2: August 15, 2019, Facebook post, stating, "Calling out rapists is bullying, according to Facebook. Brent Comyack has a long criminal history and has drugged SEVERAL women in his history as a bartender."
>
> • Brown3: June 29, 2019, Facebook post, stating, "We've got a live one right here in Asbury, folks. A manager at Modine drugged a woman last night at another establishment. This isn't his first offense. Be careful and guard your drinks. And maybe let's let Modine know what their bartenders/managers are doing to young women in the **[*9]** community . . . Please let anyone you may know in the bar communities know that this is a dangerous person with a long criminal record and repeated cases of assaulting women."
>
> • Brown4: August 15, 2019, Facebook post, with an image containing text, reading, "Brent Comyack is . . . reporting posts that mention what he's done. He is a predator. He fled the state once word got out. He is a scumbag."

Alexis Devaney made the following posts:

> • Devaney1: July 6, 2019, Facebook post, republishing a Reddit post by non-party user "123dontfukwithme" entitled, "Women: If this man is your bartender in Asbury, don't trust his drinks," with no modification or addition made by Alexis Devaney.
>
> • Devaney2: July 23, 2019, Facebook post, republishing a screenshot of an unknown nonparty's Instagram post, with the text, "Brent Comyack is now in North Carolina[.] Spread the word of the rapey bartender!!!! Don't let him get by! [Instagram's indication of a geo-tag, stating a location of "NORTH CAROLINA], NORTH CAROLINA[.] Don't let bars let him in!"

Jaclyn Valentino has made one post, as alleged in the Amended Complaint:

> • JValentino1: August 21, 2019, Facebook post, stating, "Brent is from N.J. He has drugged, **[*10]** sexually assaulted, r*ped, etc[.] multiple women. He has also gotten a couple women pregnant after providing false documentation about being sterile. He bragged about spreading chlamydia 'for fun.' There are other things you can find on his record . . . There ha[ve] been a handful of rape kits that came back positive. There are text messages from him laughing about the shit he's done . . . We're tired of having to explain why women deserve to be safe. You can share or copy paste to keep others aware. I don't mind. I just want people safe."

Nicole Valentino has made these posts, "[b]etween the dates of June 29 and July 13":

> • NValentino1: Facebook post, republishing a post by non-party Rae Ashlee.
>
> o The underlying, re-published post stated, "Hey to all my friends who bar hop or hang

out in [A]sbury heads up. This man has been rumored (with many girls coming out having a similar story) to [be] spiking girls drinks!," and included an image of Brent Comyack's Facebook profile, with his name.

o Nicole Valentino's re-publication included the comments: "First he lies about being sterile and impregnates multiple women then ghosting them. Tries to hit on my [girlfriend] in front of me (which we **[*11]** both laughed at) but he's clearly a [expletive-]ing creep[.] I've also heard he's gotten girls drink or high to sleep with them. And now this [shrug emoji] date rape ain't cool."

• NValentino2: Facebook post, stating, "NOT A 100% LEAD. AWAITING CONFIRMATION. BRENT C. is back in New Jersey . . . SHARE. [A]ny information helps. Keep our state rapist free."

• NValentino3: Facebook post, stating, "In the moment of all this time of hatred I just wanna say thank y'all to everyone for banding together. Getting a rapist to practically be publicly demonized (as he should be), raising awareness, and tracking moves is a hard task . . . Y'all are the best, love y'all. I feel like a damn cult leader but it's actually for a good ass cause. Let's keep it rollin!"

These statements were part of an ongoing, online conversation. While produced in isolated form, the relevant statements were either made on a Facebook "timeline," amid other relevant posts, or in the context of a comment thread discussing the full collection of allegations. As to the truth of underlying allegations, WN Defendants state that Comyack drugged Alexis Giannella. In support of that proposition, WN Defendants cite to a positive test **[*12]** for methadone showing as much in the record. Comyack has at least two serious felony convictions. As such,

WN Defendants claim that those convictions reflect serious and disturbing misconduct. And, before making most of the statements at issue, WN Defendants saw records suggesting that Comyack had faced more than twenty criminal cases, saw the positive methadone test, and were aware of the dozens of allegations of misconduct, including those above, spanning multiple decades.

WN Defendants also assert that, well before most of the posts at issue, other non-parties have "confirmed" that "this [e.g., to Giannella] isn't the first time [people] have heard of him doing this," and, indeed, as of June 30, 2019, Comyack was "known for this kind of shit" (e.g., allegedly drugging and attempting to assault Alexis Giannella). WN Defendants submit that, in all events, readers were aware of the broader conversation regarding Comyack's conduct. In the context of that conversation, WN Defendants claim that all participants were not only aware of the "extraordinarily disturbing allegations that already existed about Plaintiff" but that that the purpose of the conversation was to discuss and share those **[*13]** allegations. Besides the alleged drugging and attempted sexual assault of Giannella, WN Defendants assert that these publicly available allegations, all made by non-parties, included, among other things, the allegations listed in paragraph 37 above.

WN Defendants also proffer that, beyond the publicly available allegations, the stories of dozens of Comyack's victims, who are all non-parties, are included below with identifying information removed. WN Defendants assert that they "are happy to provide unredacted versions for in camera review."

• "He definitely had sex with me while I was unconscious[.] And tried to justify it by saying he put my phone on my head and tried calling me twice[, s]o he did try to let me know[.] I was like 14."

• "So[,] when I was 18 . . . not only did he randomly whip out his dick to show me he had a tattoo of a cross on it, but when we were driving home . . . he kissed me and immediate shoved his hands up my dress and began vigorously fingering my vagina. I pushed him away and he kept trying until [I] loudly said STOP and then he called me a 'little fucking tease,' even though

[I] never told him it was okay to touch me there[.]"

• "If you block out my info I'll **[*14]** share my Brent experience . . . I was like 17, got drunk at a party[,] and fell asleep next to my friend in an upstairs bedroom[. We] locked the door and everything but I woke up still wasted to his dick being shoved inside of me. My friend was still asleep next to me."
• "Same story as the other girl, I was super young (15, 16?) and he forced himself on me[,] and I tried to reject him multiple times but he just kept going."

b. Summary of WN Defendants' Argument

WN Defendants argue (1) that the defense of truth protects their statements, (2) that liability for some of their statements is precluded because they are statements of opinion, (3) that their statements are protected by the common interest privilege, (4) that liability for some of their statements is precluded by the Communications Decency Act ("CDA"), (5) that Comyack's failure to adequately allege actual malice in his Amended Complaint is fatal to his claims, (6) that Comyack's preexisting reputation precludes a finding of causation for any injury alleged, and (7) that, because Comyack's claim for defamation must fail, the other claims asserted in the Amended Complaint also must fail.

ii. McGann

a. McGann's Statement of Facts **[*15]**

McGann's Statement of Facts is as follows:

1. In late June or early July of 2019, McGann received post(s) on Facebook as to allegations against Comyack.

2. McGann has never met Comyack or had any interaction with him.

3. On July 4, 2019, McGann forwarded said Facebook posts and made comments thereto.

4. McGann never changed the content of the original Facebook post.

The Amended Complaint alleges that McGann was a bartender who knew Comyack. It further alleges that McGann was informed of the allegations made by Alexis Giannella or WN Defendants and then posted false allegations on Facebook and the Bartenders Guild Website (Fraternal Order of Bartenders).

Specifically, the statements made by McGann on the Fraternal Order of Bartenders site, undated, are as follows:

• McGann1: "I wouldn't want him working at a bar I work at or a bar near me. So yes I say blacklist him. Maybe they have called the police or maybe they were scared to come forward. Of course u can judge a book by its cover that's why books have them"

• McGann2: responding to a question as to Comyack's blacklisting, "That [I] don't have an answer to because I am not involved in it all I know is I hope his life is ruined like he ruined **[*16]** other people's lives"
• McGann3: "He was in town he is pretty much been blacklisted"
• McGann4: "yeah he was fired"
• McGann5: "wow what a prick"
• McGann7: "well if you google "Brent Comyack" you can see his picture and what a douche he looks like"

McGann also re-posted the following on the Fraternal Order of Bartenders site, on July 4 at 9:58 a.m.:

• McGann6: "****Anonymous Post**** This didn't happen to me, but this has been the talk of NJ for quite some time. Asbury Park and [s]urrounding areas, keep out for the name Brent Comyack. This guy has been known for quite some[ ]time for drugging and attempting to rape women (and apparently successful, if that's the word you want to use) He has an open charge against him as of currently and has recently lost his job due to it, but has been popping up at different places. I also have a friend who was sexually assaulted by him and has known of him doing this for about 10+ years. Keep your reputation in tact [sic] and his name off of your

bartending roster."

b. Summary of McGann's Argument

McGann advances (1) that his statements are protected against the imposition of liability for defamation as statements of opinion, (2) that the imposition of **[*17]** liability for defamation as to his statements at issue is precluded by the CDA, (3) that no proof of malice has been presented, and (4) that Comyack has failed to provide any evidence of actual injury to reputation or any "physical or mental injuries."

iii. Franco[2]

a. Franco's Statement of Facts

Franco's Statement of Facts is as follows:

1. Comyack has filed a lawsuit against multiple defendants, including Franco, alleging defamation in making or responding to internet postings concerning Comyack's alleged drugging of a young woman and his alleged activities of sexual abuse.

2. The alleged incidents of defamation by Franco occurred in mid-July of 2019 and not before. Franco posted and/or responded to posts on July 13, 2019.

3. No posts were made prior to July 13, 2019.

4. Numerous individuals, not defendants in this matter, posted comments to the Franco posts.

Specifically, the statements made by Franco on the Fraternal Order of Bartenders site are as follows:

> • Franco1: on July 13, "Tennessee bartenders/owners, watch out...[T]his guy just moved to your neck of the woods. He fled New Jersey after allegedly drugging a girl's drink at a bar in Asbury Park. This is not the first instance of him **[*18]** doing this, there are multiple women who have come forward with accounts of him drugging and sexually assaulting women, sometimes at the bars he works at. I heard he moved to Nashville but can't be 100% certain. Keep your integrity and be wary. Edit: ALLEGEDLY because I received Facebook messages from known acquaintances that could be interpreted as an attempt at intimidation so covering my butt."
> • Franco2: undated, "The word so far is he was in Salem and is now in Knoxville but the dude is so manipulative that anything could be a lie."

Further, the statements made by Franco in "Justin's Post," undated, are as follows:

> • Franco3: "Danielle Hartung not my picture, it's from the Reddit post about him. I do know him though, he started working at his last employer shortly after I left them. He has a number of arrest records but the verbal accounts from multiple women in New Jersey, along with comments about rape he had made to me in person, are enough to convince me."
>
> • Franco4: "Tyler Wykoff there is a link above to a video of his rap sheet, and I am currently working on finding a record of his arrest for the most recent incident, which, to my knowledge, occurred a few days ago. I will post **[*19]** a link to the reddit and twitter threads on him with multiple (anonymous) firsthand accounts from the women he has victimized over the years."
> • Franco5: posting a Reddit article entitled, "Women: If this man is your bartender in Asbury, don't tru "
> • Franco6: posting a Twitter page entitled, "Who is Brent (@brentcomyack)"
> • Franco7: responding to potential allegations against Comyack, "Shannon Michele that's consistent with two other accounts that I've read AT LEAST. I know he's worked in asbury, highlands, New Brunswick, Somerset county, red bank and Trenton in Jersey, who knows where else"
> • Franco8: responding to potential allegations against Comyack, "Could have been him. As far as I know, he was run out of the New Brunswick community for that behavior."
> • Franco9: "Becky West unfortunately, I don't

[2] Given that Franco filed for bankruptcy protection during the pendency of his Cross-Motion, his factual assertions are provided merely for context and completeness of the record.

have any [pictures of Comyack] and I believe all his socials are deleted. His IG might still be up, his username was roughxhands (seriously). The reddit thread I linked a while back has a few in there as well I believe."

• Franco10: "Good to see the word is out and we as a fraternity/sorority of bartenders are doing all we can to keep this guy from doing what he does to another woman and **[*20]** abusing the power our career provides."

b. Summary of Franco's Arguments

Franco joined in the arguments made by WN Defendants.

B. Opposition

i. Comyack

a. Comyack's Statement of Facts

Comyack's Counterstatement of Facts is as follows:

1. Comyack's domicile is New Jersey. He is residing in Florida on a temporary basis, but, at all times in which the actions that are the subject of this litigation took place, he was a resident of New Jersey.

2. Giannella ingested and consumed marijuana, THC oil, prescription medication, numerous alcoholic drinks, and cocaine during the day and into the evening hours of June 28, 2019 and June 29, 2019 and prior to contacting Comyack.

3. Giannella contacted Comyack in the early morning hours of June 29, 2019, advising that her friends had "ditched" her and requesting that he pick her up.

4. Comyack and Giannella went to a bar. Due to her intoxicated state, Comyack urged her to drink water.

5. Upon returning home, Giannella told her sister that Comyack had placed drugs in her water and had attempted to convince her to have sexual relations with him. She repeated such allegations to the Asbury Park Police Department but, in a second interview with a detective, acknowledged **[*21]** that she did not know that it had happened and stated that her sister and friends had started a social media frenzy over the allegation.

6. Giannella has claimed to have obtained a home drug test and sent a sample to a lab for testing, but she has never produced the results of such testing.

7. On June 29, 2019, WN Defendants began to post social media comments, stating that Comyack had drugged a woman the night before, that it was not his first offense, that he had a history of doing such, that he was a rapist, that he had a long criminal history, and inviting others to post comments about Comyack.

8. Nicole Valentino and Alexis Devaney have claimed to have seen test results indicating the presence of methadone in Giannella's system prior to July 23, 2019.

9. The only evidence of an alleged test does not show evidence of any result of such test, and no test results have ever been produced by Giannella.

10. As a result of the posts of WN Defendants, McGann, Franco, and others, by July 1, 2019, Comyack's employer, Modine's, was receiving threats that caused them to notify the Asbury Park Police Department.

11. Comyack went to the Asbury Park Police Department and discussed the claims against **[*22]** him. No arrest warrant was ever issued for Comyack, and no charges were ever filed.

12. Comyack's only criminal history involves one event in which he pled guilty to conspiracy to commit theft and theft and received a suspended sentence.

13. Comyack attempted to obtain work in North Carolina and Tennessee but was unable to do so due to the posting of defamatory statements by McGann and Franco.

On June 28, 2019, Comyack was employed in Asbury Park, New Jersey at a bar/restaurant called Modine's. After midnight, Giannella texted Comyack, asking if he was in Asbury Park and stating that her friends had "ditched" her and that she was trying not to "get kidnapped." Comyack responded that he was in

Asbury Park, and Giannella asked him to let her know if he got off soon and expressed some concern that she was alone. By 12:49 a.m., Comyack responded that he was going to her, and she asked that he "come thru."

When Comyack met with Giannella, he found her to be extremely intoxicated and offered to take her home, but she declined and indicated that she wanted to accompany him to another bar. Comyack agreed, and they proceeded to another bar. Due to Giannella's extreme level of intoxication, Comyack **[*23]** repeatedly urged her to drink water. Ultimately, another friend of Giannella took her home that night.

That same day, Giannella told her sister that Comyack had drugged her and attempted to have sexual relations with her. According to her statement to the police, her sister and her sister's friends then began posting allegations about Comyack.

On that same date, June 29, 2019, Shannon Brown posted a social media message on Twitter stating that a manager at Modine's had drugged a woman "last night" at another establishment; that it was not his first offense; and that Comyack is a dangerous person with a long criminal record and repeated cases of assaulting women. She requested that her message be shared as she was "trying to clean up the trash." In fact, Comyack had not drugged a woman the prior night; prior to her post, he had never been accused of drugging or sexually assaulting women; and he does not have a long criminal record, the only such record being a guilty plea to theft and conspiracy to commit theft, which arose from the same set of facts and resulted in a suspended sentence. In support of their Motion, WN Defendants have attached numerous posts by individuals who are not **[*24]** parties to this action, none of which were posted prior to June 29, 2019. On or about June 30, 2019, Shannon Brown posted a message on Facebook stating that Comyack has a long history of being "really scummy to women" and that there was a police report currently being filed against him. In fact, no police report was being filed. Shannon Brown also posted a photograph of Comyack on or about July 6, 2019, stating that if he was your bartender, you should not trust his drinks. She further posted on August 19, 2019 messages again claiming that Comyack had a long criminal history and had drugged several women in his history as a bartender, stating that Comyack was a predator who fled the State, and calling him a "scumbag." In fact, Comyack never fled the State and, as previously stated, has no long criminal history. On or about July 23, 2019, Shannon Brown further posted a message claiming that Comyack had been found in North Carolina. In fact, he never resided in North Carolina but had applied for work there. She again referred to him as a predator and a scumbag.

Between the dates of June 29 and July 13, 2019, Nicole Valentino posted messages on Facebook referring to Comyack as a rapist; **[*25]** claiming that he had drugged a girl who then had a "police drug test" which was positive for methadone which had been slipped by Comyack into water drunk by the girl; and referred to Comyack as a man who drugs women, forces himself on them, takes advantage of them, and has assaulted them. She further claimed that Comyack had in the past lied about being sterile and impregnated multiple women and that he had sexually assaulted, raped, and drugged women for years. She encouraged individuals to trace his whereabouts to prevent him from working or contacting other women. In fact, there was never a "police drug test," and by July 13, 2019, there was no test result indicating that the person who made the allegation had tested positive for methadone. Comyack had never lied about being sterile and had not impregnated "multiple women," nor had he ever been accused of assaulting, drugging, or raping women. Defendant Nicole Valentino began posting on social media and solicited others to submit posts about Comyack.

On or about July 21, 2019, Jaclyn Valentino posted messages on Facebook stating that Comyack had drugged, sexually assaulted, raped, etc., multiple women and had gotten a couple of women **[*26]** pregnant after providing false documentation of being sterile and that, for fun, he bragged about

spreading chlamydia. All of these allegations were false. She further claimed there had been a "handful of rape kits that came back positive," which was also a lie, and claimed there were current court cases going on. There were no court cases concerning the types of allegations made by WN Defendants, and there have been none other than this civil case. She further claimed that Comyack had been jumping from state to state to avoid arrest, court cases, and further proof of his actions. In fact, Comyack had gone to the Asbury Park Police on his own and had been cooperating with them; he was never threatened with arrest, and there were no court cases pending. Comyack had merely attempted to find work in North Carolina and Tennessee, which had been thwarted because of the actions of WN Defendants, McGann, Franco, and Giannella. On July 7, 2019, Jaclyn Valentino advocated violence against Comyack, responding to a message that he was in Asbury, which stated that they should tell "heads" to pay him a visit, by stating "let's vigilante this" with a depiction of a knife.

Modine's began receiving **[*27]** threats as a result of the claims and, as of July 1, 2019, suspended Comyack from employment. On the night of July 3, 2019, Comyack was advised that he was being fired from Modine's not because they believed the false information being circulated but because it would have an adverse impact upon their business to keep him. According to the Asbury Park Police Department report, on July 1, 2019, Christopher Davin of Modine's went to police headquarters to advise that they were receiving threats as a result of the postings. He reported that the business was receiving harassing phone calls and social media posts and that one caller had threatened that, if Comyack was not fired by that night, the business would be set on fire. The Asbury Park Police Department attempted to trace the phone call that was the source of the threat and noted that the number had referred to an individual named Leonardo Morales-Sanchez who resided in Brooklyn, but investigation revealed there was no individual by that name at that residence. It is noted that Alexis Devaney is a resident of the State of New York.

As a result of this information, the Asbury Park Police Department contacted Giannella, and she visited **[*28]** police headquarters at approximately 8:15 p.m. on July 1, 2019. She gave an account in which she claimed that, prior to meeting Comyack, she went to the Bond Street Bar in Asbury Park. She could not state when she had met with Comyack, but she reported that they had one drink together and that she was not drunk. She claimed that she began to feel ill, that Comyack recommended that she have some water, and that he retrieved a cup of water. She claimed that she began drinking but quickly stopped drinking the water and claimed that it tasted "acidic in the pallet." She then claimed that, after ten or fifteen minutes, her body went numb, and she called for a friend to pick her up. She also claimed at that time that, while waiting for her friend, Comyack kept telling her to relax and asked her repeatedly to go up to his hotel room with him. In fact, Comyack did not have a hotel room. She then advised that, after she was driven home, she explained what had occurred to her sister, and her sister then reached out to several social media groups to explain the situation and warn women about Comyack. She then claimed that she went to Walgreens and purchased an at-home drug test, which she sent **[*29]** out to a lab and which tested positive for methadone. She acknowledged that from 11:00 p.m. to 11:30 p.m., she "did a line of cocaine along with a key bump of cocaine." However, she maintained she was not drunk. The police report indicates that Comyack met with police and cooperated fully.

There is a supplemental report by Detective Dillon Gourley. His report indicates that he was first assigned the matter on July 9, 2019, and that "weeks later" he made contact with the woman who was making the claim that she was drugged and accusing Comyack. Giannella recounted the events but this time made no mention of the claims that Comyack had attempted to get her to go up to his hotel room. She also noted that, during the entire time in which she was waiting for her friend to come to pick her up, Comyack merely stayed with her and offered to take her wherever she needed to go. She acknowledged that at no time did she observe Comyack or anyone

else put anything in her drink. When asked if she had taken any type of medication or illegal narcotics, Giannella then admitted that she smoked marijuana at approximately 10:00 p.m. the night before the incident and again around 11:00 a.m. the morning of **[*30]** the incident. She further advised that she used THC oil throughout the day of the incident and stated that she takes prescription medication for numerous conditions. She stated that, prior to going to the Bond Street Bar, she had numerous drinks at a friend's apartment and had ingested cocaine. She advised that she had taken a home drug test and sent the results to a lab, but she had not gotten the results at that point. Although she was asked to provide the police with a copy of the results, she never responded. The results of the test have never been provided. She never claimed to the detective that the home drug test had shown a positive result for methadone. When the detective inquired of Giannella as to why she had not reported the incident to social media, she advised that she did not really know if it had happened. She further stated that her sister, with her sister's other friends, were the ones who started the whole incident.

The only claimed evidence submitted to date of a drug test having been completed is the image attached to the moving papers under Exhibit 19 of attorney Green's Certification. Alexis Devaney claims to have seen a "substantially identical photograph" of **[*31]** the image between the dates of July 6 and July 23, 2019 in a private forum, and she further claims that she understood the photograph to represent a drug test that was positive for "MTD," which she understood to be methadone. The image in Exhibit 19 does not reference a positive drug test, nor do the initials "MTD" appear in the image. Nicole Valentino similarly claims that she saw such an image on or about July 1, 2019 in a private forum and had the same understanding.

Alexis Devaney has alleged that, on or around July 1, 2019, she saw a video discussing Comyack on Facebook, and Shannon Brown has claimed to have seen the same video on or around July 1, 2019. They have not produced a video but have only produced what they claim are "screen shots" of such a video, which does not reflect any discussion of Comyack but appears to purport to be some type of accounting of a criminal record.

Nicole Valentino and Alexis Devaney have alleged that, on or about July 1, 2019, less than 72 hours after the events leading to this litigation, they began to receive numerous accounts from women who had been assaulted by Comyack. They neglect to mention that they had solicited such accounts. They specifically **[*32]** do not allege that such accounts were in posts made prior to July 1, 2019. No evidence has been submitted to date of posts made prior to June 29, 2019 alleging that Comyack had assaulted other women.

On or about July 4, 2019, McGann, a bartender who knew of Comyack but did not know him personally, became aware of the allegations and made comments and republished allegations with comments on social media and a Bartenders Guild website, referring to Comyack as a "douche" and a "prick," posting a photograph of Comyack, and advocating for individuals to "make it known the kind of person he is" and blacklist Comyack. He further stated that he had hoped that Comyack's life was ruined, as he had ruined other people's lives. He republished posts accusing Comyack of being a rapist who drugs girls while making these comments. He further posted a message stating that Comyack had been known for quite some time for drugging and attempting to rape women; that he had an open charge against him at that time; that he had a friend who had been sexually assaulted by Comyack; and that he has known of Comyack doing such things for approximately ten plus years.

On or about July 13, 2019, Franco, also a bartender, **[*33]** posted messages on Facebook and the Bartenders Guild website stating that it was good to see that the word was out and that they were doing all they could as bartenders to prevent Comyack from doing what he does to another woman. He further stated that, after receiving information that Comyack was attempting to find work in Tennessee, he posted messages that Comyack had moved to that area. He

claimed that Comyack had fled New Jersey after allegedly drugging a girl's drink at a bar in Asbury Park; that it was not the first instance of him doing so; that there were multiple women coming forward with accounts of him drugging and sexually assaulting women; and that he used "allegedly" because he had received Facebook messages from known acquaintances that could be interpreted as an attempt at intimidation so he was "covering my butt." He further posted messages that Comyack had a number of arrest records and that verbal accounts from multiple women in New Jersey, along with comments about rape that Comyack had made to him in person, were enough to convince him that the allegations against Comyack were true. He further claimed that Comyack had an arrest warrant out for him "currently." **[*34]** At no time was an arrest warrant ever issued for Comyack.

One individual in the ongoing discussion indicated that he had a tracker on Comyack's vehicle, and, accordingly, all of the individuals participating in the social media discussion were aware that Comyack had gone to Tennessee and North Carolina. At one point, they reported that Comyack was in Salem, Massachusetts, which was inaccurate. WN Defendants, McGann, Franco, and other individuals continue to track Comyack, trying to prevent him from engaging in his employment.

Comyack filed a Complaint on October 10, 2019, alleging defamation and intentional infliction of emotional distress. Giannella, McGann, and Franco filed Answers. WN Defendants filed a Motion seeking to compel Comyack to file a more definitive statement. The Court granted the application, stating that the Complaint failed to specify dates on which statements were made, platforms on which statements were made, and other details that would allow WN Defendants to respond to the allegations, despite the fact that three of the seven defendants had, in fact, filed responses to such allegations. The Court further stated that a defamatory statement may be subject to an absolute **[*35]** or qualified privilege. WN Defendants had expressed an intention of asserting a common interest privilege, but the Court stated that further detail was necessary for it to evaluate whether any such privilege may be lost to the abuses of the privilege. The Court noted that the Complaint did not set forth whether Comyack alleges that WN Defendants republished defamatory statements or whether they made original or sufficiently altered defamatory statements. The Court noted that, while the falsity of statements was indicated in the Complaint, the Complaint failed to allege that McGann and Franco acted negligently or with reckless disregard as to the truth or falsity of the statements or with knowledge of their falsity.

In response to the Court's decision, Comyack filed an Amended Complaint. The Amended Complaint set forth specific dates, platforms, and the defamatory statements. Comyack has alleged that the statements were made, not that they were republished. The Amended Complaint, referring to all defendants, stated that their statements were false and resulted in damage to Comyack; that the statements of all defendants purported to be statements of fact; that the statements of all defendants **[*36]** contain false and misleading statements; and that all of the defendants either knew that their statements were false or acted in reckless disregard of the truth or falsity. The Second Count of the Amended Complaint further states that all defendants acted with actual malice by either knowing that their statements were false or acting in reckless disregard of their truth or falsity, forfeiting any alleged privilege.

The Court has parsed the following statements identified by Comyack but not previously identified by WN Defendants, McGann, or Franco:

> • Brown1: a more complete version of the Facebook post, dated June 29, 2019, "A woman was drugged by someone that tends bar at @modineasbury last night and they're more concerned about their reputation as a small business than they are about one of their managers drugging someone! Are you serious•• Brent Comyack (see screenshots) drugged someone last night. He has a long history of being real scummy to women and there is a

police report currently being filed against him. And this is how Modine responds. By being more worried about their reputation than the fact that they hired a rapist. Great work, #modineasbury. We won't be untagging anything. **[*37]** Expect more tags now."

• Brown2: a more complete version of the Facebook post, dated August 15, 2019, "Calling out rapists is bullying, according to Facebook. Brent Comyack has a long criminal history and has drugged SEVERAL women in his history as a bartender. Don't let Facebook shut this down."

• Brown3: a more complete version of the Facebook post, dated June 29, 2019 and with images attached, "We've got a live one right here in Asbury, folks. A manager at Modine drugged a woman last night at another establishment. This isn't his first offense. Be careful and guard your drinks. And maybe let's let Modine know what their bartenders/managers are doing to young women in the community. Please share. Hold people accountable. Clean up the trash. Edit 2: Modine has now posted a comment about this employee being fired. Edit 1 has been removed. Edit 3: At last confirmation, Brent was in North Carolina. Please let anyone you may know in the bar communities know that this is a dangerous person with a long criminal record and repeated cases of assaulting women. Edit 4: As of yesterday 8/20, he is believed to be back in NJ. Please be careful and tell your friends to be careful."

• Brown5: an additional **[*38]** Facebook comment, undated, "[H]e's now joking on Facebook about being a rapist, fun fact. But the restaurant supposedly has a zero tolerance policy [eye roll emoji]"

• Brown6: an additional Facebook comment, undated, "Lol Facebook changed their minds and the post was reinstated. Still brought back attention to it, so why not talk about it again!"

• JValentino1: a more complete version of the Facebook post, dated August 21, 2019, "FAQ section before y'all all ask the same damn questions: 'Who is Brent Comyack? What has he done?' Brent is from N.J. He has drugged, sexually assaulted, r*ped, etc[.] multiple women. He has also gotten a couple women pregnant (girlfriends mostly it seems) after providing false documentation about being sterile. He bragged about spreading chlamydia 'for fun.' There are other things you can find on his record. 'Is there any proof? Did anyone go to the police? Why isn't he behind bars?' Well obviously. There has been a handful of rape kits that came back positive. There are text messages from him laughing about the shit he's done. There are current court cases going on. Brent has been jumping from state to state to avoid arrest, court case, and further proof **[*39]** of his actions. I can tag people who have more information, photos of the kits and drug tests, screenshots, whatever you want. I don't think it's really about witch hunting the women though so please be prepared for the attitude you will get from people. We're tired of having to explain why women deserve to be safe. You can share or copy paste this to keep others aware. I don't mind. I just want people safe."

• JValentino2: an additional Facebook comment, undated, "Kylie he[']s in [A]sbury at the moment! He loves to move around when word gets loose"

• JValentino3: an additional Facebook comment, undated, responding to a non-party's comment stating that "ima def tell some heads to pay him a visit" and calling Comyack a "[f]uckin clown," "That's what I'm sayin [knife emoji] let's vigilant this"

• JValentino4: an additional Facebook comment, undated, responding to a non-party's comment that Comyack "hollered multiple times on here and the gram but I always dubbed him cuz ew look at him," "[U]r too cute for him omg"

• NValentino1: a more complete version of the comments, between June 29, 2019 and July 13, 2019, "First he lies about being sterile and impregnates multiple women then ghosting **[*40]** them. Tries to hit on my [girlfriend] in front of me (which we both

laughed at) but he's clearly a [expletive-]ing creep[.] I've also heard he's gotten girls drink or high to sleep with them. And now this [shrug emoji] date rape ain't cool .. Also for his gang of apologists who defend him fuck y'all too you're part of the problem."

• NValentino2: a more complete version of the Facebook post, between June 29, 2019 and July 13, 2019 and with images attached, "NOT A 100% LEAD. AWAITING CONFIRMATION. BRENT C. is back in New Jersey. Currently believed to be in HILLSBOROUGH, NJ area. SHARE. [A]ny information helps. Keep our state rapist free"; "EDIT: DO NOT further contact Asbury Ale House, they claim to have him removed from the bar if he was to work there."

• NValentino3: a more complete version of the Facebook post, between June 29, 2019 and July 13, 2019, "In the moment of all this time of hatred I just wanna say thank y'all to everyone for banding together. Getting a rapist to practically be publicly demonized (as he should be), raising awareness, and tracking moves is a hard task. I couldn't have done this without everyone's support and following moves, my group of super snoopers, and **[*41]** the support of everyone. Y'all are the best, love y'all. I feel like a damn cult leader but it's actually for a good ass cause. Let's keep it rollin!"

• NValentino4: an additional Facebook post, between June 29, 2019 and July 13, 2019, "!!!!UPDATE!!!! The girl who was drugged got her police drug test back and it was positive for methadone. Which was slipped into her water by him. ..... If you support a man who drugs women "alleged" (which it's not. There's so many people who've come forth they can't be lying). Who's forced himself on, taken advantage, and assaulted women. If you're friends with him, if you think he's telling the truth, if you are feeding him information you're dead to me."

• NValentino5: an additional tweet on Twitter, dated July 1, 2019, that Comyack claims is authored by Nicole Valentino and is authored by "goth fieri" with Twitter handle @alexis_psd, "There is power in numbers and we need all the evidence against Brent we can get. If you are comfortable sharing your experiences with Brent Comyack please message me and I will put you in contact with the people who need it" and including an image with similar information

• McGann8: an additional comment on the Fraternal **[*42]** Order of Bartenders site, undated, "His profile is active again and he is still a member of this group Brent Comyack" and linking to Comyack's Facebook profile

• McGann9: an additional comment on the Fraternal Order of Bartenders site, undated, "[T]his is what he looks like, please make it known the kind of person he is" and including an image of Comyack

• Franco1: alternate ending to a post on the Fraternal Order of Bartenders site, dated July 13, 2019, emphasized, "Keep your integrity and *don't give this creep a job*" and including an image of Comyack's Facebook profile

• Franco10: an additional comment on the Fraternal Order of Bartenders site, undated, "Furthermore, he made extremely homophobic comments to Ryan. That shit does not fly in AP..."

Comyack's Response to WN Defendants' Statement of Facts is as follows:

1. Denied. None of the photographs referenced in Devaney Exhibit 3 reference the State of Florida, and Alexis Devaney clearly has no personal knowledge of the location of Comyack. Page 3 of Green Exhibit 4 is not accurately quoted. Counsel has injected reference to New Jersey, which does not exist in the conversation. WN Defendants have misrepresented the statements in Green **[*43]** Exhibit 4 at page 4. Nowhere in the conversation is there a reference to New Jersey, and nowhere on that page is there a statement "if I was in NJ man." The fact that Comyack had interactions with two individuals who may reside in Florida does not establish domicile. Comyack remains domiciled in New Jersey.

2. Denied. Nowhere in the Amended Complaint is there an allegation that, as of June 29, 2019, Comyack's primary place of residence was Asbury Park.

3. Denied. Comyack has stated that he attempted to obtain employment in North Carolina and Tennessee. He has never stated that he moved to either state, and he did not do so. WN Defendants have provided no proof of such but merely jump to such conclusion from the fact that he sought employment in those states, which he ultimately did not obtain.

4. Denied. Comyack has stated that he attempted to obtain employment in North Carolina and Tennessee. He has never stated that he moved to either state, and he did not do so. WN Defendants have provided no proof of such but merely jump to such conclusion from the fact that he sought employment in those states, which he ultimately did not obtain.

5. Denied. WN Defendants reference discussion by individuals **[*44]** with no knowledge of Comyack's residence.

6. Denied. None of the referenced posts are evidence that Comyack has moved to Florida. Comyack does not deny visiting Florida.

7. Admitted that Comyack currently resides in Florida temporarily.

8. Denied. The conversation cited does not contain a statement that Comyack has posted that he no longer resides in New Jersey while living in Florida.

9. Comyack neither admits nor denies, as he does not have information sufficient to form a belief as to the truth and accuracy of the statement.

10. Admitted.

11. Admitted.

12. Admitted.

13. Admitted with a note that WN Defendants received a copy of documents produced to McGann, as there has been no exchange of discovery with WN Defendants.

14. Admitted.

15. Denied. At this stage, Comyack has no information other than the claims of Alexis Devaney.

16. Denied. There is no evidence that counsel or Alexis Devaney have expertise concerning Facebook and linking to Reddit posts and articles. WN Defendants reference self-serving statements, which Comyack has not had an opportunity to challenge.

17. Denied. All of the comments are by individuals using aliases, and no information is provided as to the identity of these individuals **[*45]** who may be one or more of WN Defendants. The statement does not reference anything in the record and is not made by a person with personal knowledge.

18. Denied. The referenced paragraphs of Alexis Devaney's Certification do not discuss the "picture of a positive drug test," and there is no identification concerning the picture attached as Green Exhibit 19. There is no reference to any drug having been found, of any positive or negative result, or who was posting the picture at that time. It is further noted that Alexis Devaney does not claim that she saw the picture that is Green Exhibit 19 but claims to have seen a "substantially identical photograph," which she has not produced.

19. Denied. Alexis Devaney has attached what appear to be two messages, with no identification of the author. She proposes to provide other messages *in camera* to the Court, which is unacceptable and inappropriate.

20. Admitted.

21. Denied.

22. Admitted.

23. Admitted.

24. Admitted.

25. Admitted.

26. Denied. WN Defendants have not provided the alleged photograph allegedly viewed by Nicole Valentino, and neither the photograph referenced as Green Exhibit 19 nor the information alleged in this paragraph provides any **[*46]** identifying information.

27. Nicole Valentino has provided five posts, with no identification of the author and no other evidence in support of the claim to have received "dozens of similar messages." As with Alexis Devaney, she improperly seeks to have the Court review alleged messages *in camera* so that Comyack cannot challenge them.

28. To the extent this paragraph references Modine's, Comyack admits to having been terminated as a result of the allegation by Giannella and the posts by WN Defendants, McGann, and Franco.

29. Comyack makes no response to this allegation, as it states a probability and does not set forth a claimed undisputed material fact.

30. Denied. Comyack also notes that this paragraph does not allege an undisputed material fact and argues a position.

31. Denied. Comyack also notes that this paragraph does not allege an undisputed material fact and argues a position.

32. Denied.

33. Denied.

34. Denied. WN Defendants have not produced a video, and Comyack has not "had as many as 20 criminal cases."

35. Admitted that Comyack has convictions for theft and conspiracy, which arose from the same underlying facts. Denied that the details or the facts are as alleged by Nicole Valentino **[*47]** and noted that she has provided a Certification with such allegations despite having no personal knowledge of such information.

36. Denied. Comyack cannot address a claim of ten years' worth of allegations.

37. Denied. The allegations referenced in this paragraph in Exhibits 20 and 22 do not provide dates of the postings, and there is no evidence submitted that these comments were posted and available "as early as July 1 , 2019."

38. No response is made to this paragraph, as it expresses opinion and not fact.

39. No response is made to this paragraph, as it expresses opinion and not fact.

Comyack's Response to McGann's Statement of Facts is as follows:

1. Admitted.

2. Comyack can neither admit nor deny this statement. McGann does not refer to any part of the record of the case, and the statement in his Certification is that he has no recollection of ever meeting Comyack or ever having any interaction with him, rather than that he, in fact, ever met Comyack or ever had any interaction with him.

3. Admitted.

4. To the extent that McGann states in this paragraph that he made no changes to the messages or posts that he had received, admitted, although Comyack notes that McGann added his own comments **[*48]** to such posts.

Comyack's Response to Franco's Statement of Facts is as follows:

1. Admitted.

2. Comyack can neither admit nor deny this statement, as Franco does not make reference to the record or any Certification or Affidavit.

3. Comyack can neither admit nor deny this statement, as Franco does not make reference to the record or any Certification or Affidavit.

4. Comyack can neither admit nor deny this

statement, as Franco does not make reference to the record or any Certification or Affidavit.

b. Summary of Comyack's Argument

Comyack argues (1) that summary judgment is inappropriate at this juncture, (2) that he has alleged and has sufficient proof to satisfy all of the elements of defamation, (3) that he has alleged sufficient facts in the Amended Complaint to support a claim of defamation, (4) that determining whether the disputed statements are protected by the CDA is premature, (5) that the disputed statements are protected by neither the fair comment privilege nor the common interest privilege, (6) that the disputed statements are not merely statements of opinion, and (7) that the argument asserted as to lack of causation is frivolous.

C. Replies

i. WN Defendants

WN Defendants' Response **[*49]** to Comyack's Counterstatement of Facts is as follows:

1. Deny. Comyack's bare denial that he has changed his domicile to New Jersey is contradicted by his publicly visible conduct and his own statements. These include dated posts reflecting Comyack in Florida and appearing shirtless outdoors in winter, etc.; statements that Comyack will not "be back [in New Jersey] for xmas"; Comyack declining an invitation "get drunk and look stoopid together" in New Jersey, stating "if [I] was in nj[,] man"; statements that Comyack will "move into" "my own place" in the "next like 72 hours and then after work I'm free" to spend time with non-party Haley, who"[l]ives in Tampa, Florida"; and Comyack's complaints about the conduct of someone "at the bar [he is] at," whose spouse's Facebook profile lists the couple as living in "Pinellas Park, Florida." Comyack's counsel also appeared on New Jersey radio (101.5), stating Comyack "had to move out of state" and "can't live in New Jersey." Convenient, self-serving denials in Certifications at the summary judgment stage need not be credited when contradicted in this manner by both other evidence and public statements of Comyack and his counsel.

Deny further, **[*50]** insofar as Alexis Devaney is a New York resident and has not been in or acted in New Jersey at any relevant time.

As to the implications regarding the "subject of this litigation," deny in that comments on the internet are generally not considered to have a locus.

Deny further, in that Comyack seems to be asserting that the actions that are the subject of this litigation, or what might be called the "he said, she said" story of Comyack's encounter with Alexa Giannella, are the strongest connection to any jurisdiction that exists in this case. That may be so, but, in order to assert this, Comyack must admit that there is a sequence of events about which there is a dispute and that the allegations are not invented from whole cloth. Rather, in matters of "he said, she said" in the defamation context, the resolution "need not turn on the resolution of whether [either of the persons involved] told the truth about their relationship [to third parties]."

2. Admit for the purposes of this Motion. This is not a material fact relevant to this case. By asserting that it is, Plaintiff seems to be suggesting that it would be either (1) completely permissible or, (2) at a minimum, something like "not **[*51]** as bad" for him to drug and assault someone who had "ingested and consumed marijuana, THC oil, prescription medication, numerous alcoholic drinks, and cocaine." That conclusion and argument should trouble the Court.

3. Admit.

4. Deny. There is, at a minimum, a material dispute of fact as to whether Comyack "urged [Giannella] to drink water" "[d]ue to [her] intoxicated state" or because he had drugged the water. At the summary judgment stage, especially as to the question of whether the WN Defendants made statements with "actual malice," it is entirely appropriate for the Court to consider the dozens of accusations that exist mirroring this pattern, as well as Comyack's prior criminal history and reputation in the community for

doing this kind of thing. Comyack fails to provide an alternate account of his criminal conviction other than the account provided that involved Comyack's use of sex as a tool to rob someone. In that regard, Comyack's bare denial in a Certification arguably fails to raise a material question of fact in the opposite direction.

Admit that Comyack and Giannella went to a bar.

5. Admit that Exhibit B states that Giannella made the statements identified, but this paragraph **[*52]** does not provide admissible evidence thereof. Therefore, as to the assertion of material fact, deny. A third party's repetition of a statement by Giannella offered against WN Defendants, as here, is admissible hearsay, because it is offered solely for the truth of the matter asserted and involves two layers of hearsay.

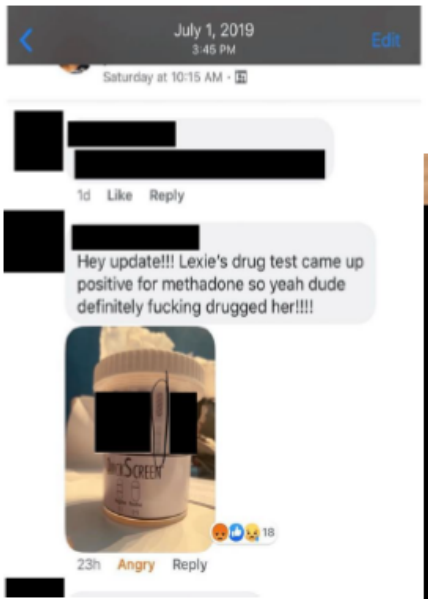
Deny further that Giannella's statement that "she did not know that it happened" has any probative value as to the ultimate truth of the matter involved, even if she did make it and it were offered in an admissible form. Rather, studies have shown that "victim characteristics," intoxication, and prior relationships with an alleged rapist, in particular, "can be more influential than assault and evidentiary characteristics in determining legal case outcomes." Studies also show that a victim ultimately declining to press charges after discussions with detectives is common and is likely not an indication one way or another as to the ultimate truth of the matter. Indeed, there is no indication of whether the detective authoring the report was ultimately also driving the withdrawal of the complaint, but that kind of scenario is tragically common.

6. Deny. The result is shown **[*53]** in Green Exhibit 19, Devaney Reply Exhibit A, and in paragraph 9 below.

7. Insofar as this is consistent with the more specific recitation of facts in WN 4:46-2, paragraphs 11-27, admit. Otherwise, deny. WN Defendants hereby incorporate by reference to the same record pin cites provided in WN 4:46-2, paragraphs 11-27.

8. Admit.

9. Deny. Green Exhibit 19 shows a positive QuickScreen for methadone. It is unclear why Comyack asserts this "does not show evidence of any result of a test," unless he is making some distinction between a "test" and a mere "QuickScreen." However, to respond to the concerns here and expressed by Comyack in his answer to WN 4:46-2, paragraphs 18 and 26, WN Defendants refer to Devaney Reply Exhibit A:



10. Deny. Exhibit B cannot show causation in the sense asserted by Comyack, and, if offered for that purpose, it is either hearsay (offered for truth) or speculation. Moreover, Exhibit B standing alone certainly cannot separate the ultimate proximate cause question: whether what really caused Comyack's termination was his own actions and decade of reputation for sexual misconduct coming back to haunt him (or indeed, the hundreds of other comments about him, though, admittedly, **[*54]** the fact asserted technically includes "and others").

11. Admit, as to this case. Note that there are allegations that other charges have been dropped after Plaintiff's intervention, for example, this July 8, 2019, non-party comment, available in the Reddit article at https://www.reddit.com/r/AsburyPark/comments/c7zfn5/women_if_this_man_is_your_bartender

_in_asbury/ and excerpted in Green Exhibit 20:

12. Deny. Admit that Comyack's adult criminal history only includes a conviction as described. However, insofar as "criminal history" includes charges that were ultimately dropped or that have been sealed or is intended to encompass conduct beyond conduct for which a conviction exists, Comyack's bare assertion is contradicted by allegations made publicly.

13. The fact asserted regards issues not at stake in the WN Defendants' Motion, and a formal response is unnecessary from WN Defendants. Note, however, that the WN Defendants' response in paragraph 10 above likely covers the same problems with the material fact asserted here.

ii. McGann

McGann's Reply Certification is as follows:

1. I am one of the defendants in this matter and make this Certification in reply to the Opposition filed by Comyack **[*55]** as to my Cross-Motion.

2. As stated in my moving papers, I received a Facebook post concerning allegations regarding Comyack. The post that I received was dated July 3, 2019 at 3:34 p.m.

3. The July 3 post was the first time that I heard of any allegations against Comyack. I had no knowledge of any events involving the Asbury Park Police Department on June 28, 2019. The first post that I made was on July 4, 2019, and I just republished the post sent to me the day before. I did not alter the original post.

4. All other posts made by me were comments emanating from the July 3 post. It is my understanding that, under federal law, this action is preempted and must be dismissed.

5. Therefore, I respectfully request that my Cross-Motion be granted.

ost about blacklisting Comyack. I was only
opinion as to what was originally sent to

III. COURT'S OPINION

The Court will review the Motion and Cross-Motion filed by WN Defendants and McGann, respectively, under the standards of dismissal for failure to state a claim upon which relief can be granted per *R.* 4:6-2(e) and summary judgment per *R.* 4:46-2, as either or both standards may have applicability to their requests.[3]

A. Standards of Review

i. Dismissal **[*56]** Under *R.* 4:6-2(e)

Under *R.* 4:6-2(e), a party can file a motion to dismiss for failure to state a claim upon which relief can be granted. In deciding such a motion, "the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim." *P. & J. Auto Body v. Miller*, 72 N.J. Super. 207, 211, 178 A.2d 237 (App. Div. 1962). Courts therefore "consider allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim." *Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 183, 876 A.2d 253 (2005) (quoting *Lum v. Bank of Am.*, 361 F.3d 217, 222 n.3 (3d Cir.), *cert. denied*, 543 U.S. 918, 125 S. Ct. 271, 160 L. Ed. 2d 203 (2004)) (internal quotation marks omitted).

"The test for determining the adequacy of a pleading is whether a cause of action is suggested by the facts." *Velantzas v. Colgate-Palmolive Co.*, 109 N.J. 189, 192, 536 A.2d 237 (1988) (internal citations omitted). A complaint should not be dismissed under *R.* 4:6-2(e) if a cause of action is suggested by the facts such that it can be articulated by way of amendment. *See, e.g., Muniz v. United Hsps. Med. Ctr. Pres. Hsp.*, 153 N.J.

[3] As Franco filed for bankruptcy protection during the pendency of his Cross-Motion, the Court will not address his Cross-Motion in its analysis.

Super. 79, 82-83, 379 A.2d 57 (App. Div. 1977). Although all well-pleaded allegations in the complaint must be accepted as true and legitimate inferences are to be drawn in favor of the pleader, courts need not give credence to a complaint's unsubstantiated and conclusory statements of fact and law. *See Holmin v. TRW, Inc.*, 330 N.J. Super. 30, 32, 748 A.2d 1141 (App. Div. 2000), *aff'd*, 167 N.J. 205, 770 A.2d 283 (2001); *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (internal citations omitted). When a complaint therefore fails to make "the necessary factual allegations and claims for relief **[*57]** sufficient to sustain a cause of action," the pleading must be deemed inadequate. *Miltz v. Borroughs-Shelving, a Division of Lear Siegler, Inc.*, 203 N.J. Super. 451, 458, 497 A.2d 516 (App. Div. 1985) (internal citations omitted). Such pleadings that are lacking in factual support will not be permitted to proceed to discovery. *See Glass v. Suburban Restoration Co., Inc.*, 317 N.J. Super. 574, 582, 722 A.2d 944 (App. Div. 1998) (internal citations omitted).

ii. Summary Judgment Under *R.* 4:46-2

Pursuant to *R.* 4:46-2, courts should grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show [(1)] that there is no genuine issue as to any material fact challenged and [(2)] that the moving party is entitled to a judgment or order as a matter of law." *Brill v. Guardian Life Insurance Co. of America*, 142 N.J. 520, 528-29, 666 A.2d 146 (1995) (quoting *R.* 4:46-2) (internal quotation marks omitted). With respect to the first prong, courts can grant a motion for summary judgment if the party opposing the motion merely points "to *any* fact in dispute," but summary judgment is unavailable to the movant "where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" *Id.* at 529, 666 A.2d 146 (quoting *R.* 4:46-2). A genuine issue of material fact exists if "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational **[*58]** factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Id.* at 540, 666 A.2d 146. By contrast, "[i]f there exists a single, unavoidable resolution of the alleged disputed issue of fact, that purported issue is insufficient to constitute a 'genuine' issue of material fact for purposes of *Rule* 4:46-2." *Ibid.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). The function of the judge under these circumstances is not "to weigh the evidence and determine the truth of the matter but" rather is "to determine whether there is a genuine issue for trial." *Ibid.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)) (internal quotation marks omitted). With respect to the second prong, if "the evidence is so one-sided that one party must prevail as a matter of law," courts "should not hesitate to grant summary judgment." *Ibid.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)) (internal quotation marks omitted).

In the context of defamation claims, courts have favored the summary judgment mechanism to address such actions in appropriate circumstances. *See, e.g., Kotlikoff v. Cmty. News*, 89 N.J. 62, 67, 444 A.2d 1086 (1982) (recognizing that "[t]he summary judgment device, *as employed by the trial court here in the pre-discovery stage*, winnows out nonactionable claims, avoids the expenditure of unnecessary legal fees, and discourages frivolous suits" and encouraging "trial courts to give **[*59]** particularly careful consideration to identifying appropriate cases for summary judgment disposition in this area of the law"). Additionally, "[a] motion for summary judgment is not premature merely because discovery has not been completed, unless plaintiff is able to demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action." *Badiali v. N.J. Mfrs. Ins. Grp.*, 220 N.J. 544, 555, 107 A.3d 1281 (2015) (internal quotation marks and citation omitted); *see also Trinity Church v. Lawson-Bell*, 394 N.J. Super. 159, 166, 925 A.2d 720 (App. Div. 2007) (finding that "[a] party opposing summary judgment on the ground that more discovery is needed must specify what further discovery is required, rather than simply asserting a

generic contention that discovery is incomplete") (internal citations omitted). However, as in any contested matter, when material facts are in dispute, courts generally defer a determination of summary judgment until the parties have had an opportunity to conduct appropriate discovery. *Salzano v. North Jersey Media Group, Inc.*, 403 N.J. Super. 403, 424, 958 A.2d 1023 (App. Div. 2008), *aff'd in part, rev'd in part on other grounds*, 201 N.J. 500, 993 A.2d 778 (2010); *Standridge v. Ramey*, 323 N.J. Super 538, 547, 733 A.2d 1197 (App. Div. 1999).

The Court will analyze the Motion and Cross-Motion in the above context. While no discovery has been conducted, the Court will be competent in parsing any issues that are appropriate for an early disposition and can **[*60]** be appropriately decided as a matter of law from those that rest on even a hint of a factual issue or a credibility determination and require the Court to defer consideration until discovery has been conducted.

B. Analysis

i. Count One for Defamation[4]

The "essential elements" of defamation, in addition to damages, are "(1) the assertion of a false and defamatory statement concerning another," "(2) the unprivileged publication of that statement to a third party," and "(3) fault amounting at least to negligence by the publisher." *DeAngelis v. Hill*, 180 N.J. 1, 12-13, 847 A.2d 1261 (2004) (internal citations omitted). The Court will analyze the elements in the context of Comyack's pleadings and the record before the Court.

a. Assertion of a False and Defamatory Statement Concerning Another[5]

With respect to the first element, the Court will address (1) whether the statements at issue are defamatory and (2) whether the statements at issue are false.

1. Whether the Statements at Issue Are Defamatory as a Matter of Law

With respect to the first element, generally, "[a] defamatory statement is one that is false and injurious to the reputation of another or exposes another person to hatred, contempt[,] or ridicule or subjects another person to a loss of the **[*61]** good will and confidence in which he or she is held by others." *Romaine v. Kallinger*, 109 N.J. 282, 289, 537 A.2d 284 (1988) (internal quotation marks and citations omitted). The threshold inquiry for courts that is dispositive of whether a statement is defamatory "is whether the statement at issue is reasonably susceptible of a defamatory meaning." *Id.* at 290, 537 A.2d 284 (internal citations omitted). "Whether the statement is susceptible of a defamatory meaning is a question of law for the court. In making this determination, courts must consider three factors: (1) the content, (2) the verifiability, and (3) the context of the challenged statement." *DeAngelis v. Hill*, 180 N.J. 1, 14, 847 A.2d 1261 (2004) (internal quotation marks and citations omitted). However, "[c]ertain kinds of statements denote such defamatory meaning that they are considered defamatory as matter of law," a "prime example" being "the false attribution of criminality." *Romaine v. Kallinger*, 109 N.J. 282, 291, 537 A.2d 284 (1988) (internal citations omitted).

Statements at issue here that are potentially non-defamatory as a matter of law include:

Go to table1

Go to table2

WN Defendants have not directly addressed these statements.

McGann also has not directly addressed these statements.

Comyack has asserted, however, that all of "the statements of all of the [d]efendants sound to the disreputation of" Comyack and "are defamatory on

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[4] As Franco filed for bankruptcy protection during the pendency of his Cross-Motion, the Court will not address his Cross-Motion in its analysis.

[5] As Franco filed for bankruptcy protection during the pendency of his Cross-Motion, the Court will not address his Cross-Motion in its analysis.

their face."

The Court's analysis reveals that the indicated statements are simply not defamatory, as a matter of law, given that they are not injurious to Comyack's reputation. These statements amount to (1) assertions as to Comyack's geographic location, (2) a non-responsive answer to an inquiry regarding Comyack, and (3) **[*65]** an indication of Comyack's status on social media. The Court grants summary judgment as to any claims that Comyack has made or intends to make with respect to as to those non-defamatory statements; such claims are therefore DISMISSED WITH PREJUDICE.

2. Whether the Statements at Issue Are False as a Matter of Law

The next issue to be analyzed is whether certain statements at issue are false. This Court will address (1) whether such statements are true as a matter of fact and law and (2) whether such statements are not factual but rather are statements of opinion.

A) Whether the Statements at Issue Are True as a Matter of Law

"True statements are absolutely protected under the First Amendment. Factual statements, unlike non-factual statements, are uniquely capable of objective proof of truth or falsity." *Ward v. Zelikovsky*, 136 N.J. 516, 530, 643 A.2d 972 (1994) (internal citations omitted). In addition, "[t]ruth may be asserted as a defense even when a statement is not perfectly accurate. The law of defamation overlooks minor inaccuracies, focusing instead on 'substantial truth.'" *G.D. v. Kenny*, 205 N.J. 275, 293-94, 15 A.3d 300 (2011) (internal citations omitted).

First, the Court has identified the statements alleging that Comyack drugged and attempted to assault Alexis Giannella and containing other similar accusations. **[*66]** The statements included in that category are:

Go to table3

Go to table4

Go to table5

Go to table6

Second, the Court has identified the statements containing allegations as to Comyack's criminal past and record. This category of statements includes:

Go to table7

Go to table8

WN Defendants themselves concede that "all that appears to be in dispute is the ultimate truth of allegations that . . . [WN] Defendants accurately repeated." They further urge that "the kind of micro-parsing facts for ultimate truth" in which Comyack asks this Court to engage "was specifically and emphatically rejected by the United States Supreme Court" in *Sullivan*; rather, they ask this Court to consider the substantial truth of their statements. As to the first category of statements alleging that Comyack has engaged in a pattern of drugging and assaulting women, WN Defendants assert that "the dozens upon dozens of accusations" against Comyack and the incident described by Giannella evidence the substantial truth of their statements. Along those **[*76]** lines, with respect to the prior accusations, WN Defendants posit that Comyack "[t]ellingly . . . concedes [that] he cannot even begin to 'address a claim of "ten year[s'] worth of allegations,'" even when ten of them are presented with specificity." Additionally, with respect to Giannella's accusation, WN Defendants proffer that "[a] [h]e [s]aid, [s]he [s]aid [s]cenario [or, '[m]ore accurately' here, a 'he said, dozens-of-shes said' scenario,] [c]annot [b]e the [b]asis for a [d]efamation [a]ction [a]gainst a [t]hird [p]arty"; the two versions of events here are evidenced by Giannella's "positive QuickScreen test for methadone (a drug [that] no one would take recreationally, or in combination with recreational drugs[,] for obvious reasons)," on the one hand, and the police report offered by Comyack "suggesting that Giannella omitted that she had taken recreational drugs the same night she alleged . . . [Comyack] drugged her," on the other hand. WN

Defendants argue that, while, "[r]ead generously to" Comyack, "'there is reason to doubt both versions,'" their "choice to believe Giannella's version (the 'she said') is simply not actionable." As to the second category of statements indicating **[*77]** that Comyack has a criminal past, WN Defendants posit that Comyack does have "a confirmed criminal record," in which he "pleaded guilty to two serious felonies and paid a significant sum in restitution," and that WN Defendants' misinterpretation of that record as including more than twenty "unique criminal charges" is in accordance with the interpretation that "reasonable lay members of the community" would adopt.

McGann does not specifically address the issue of truth as a defense to this defamation action that has been brought against him. Nonetheless, the Court will address the issue with respect to McGann here.

Comyack counters that the statements made by WN Defendants and McGann are false and that he "has specified the specific false claims." With respect to the first category of statements alleging that he has drugged and assaulted women, those false claims include, in his words, that he is a "rapist"; that "he had drugged a girl who then had a 'police drug test[,]' which was positive for methadone"; that he "drugs woman [sic], forces himself on them, takes advantage of them[,] and has assaulted them"; "that he had in the past lied about being sterile and impregnated multiple women"; **[*78]** "that he sexually assaulted, raped[,] and drugged women for years"; and "that there had been a 'handful of rape kits that came back positive.'" As to the prior accusations, Comyack posits that "many" of the "'dozens upon dozens' of accusations" cited "were anonymous" and may derive from "'throw away accounts' created by . . . [WN] Defendants [and McGann]." Comyack further notes that, "prior to her [Shannon Brown's] post, he had never been accused of drugging or sexually assaulting women." As to Giannella's accusations, in Comyack's view, she "has admitted that she does not know that . . . [Comyack] did what these [d]efendants have alleged," "that she never saw . . . [Comyack] put anything in her water," and that she ingested "various drugs and numerous drinks on the day and night in question." With respect to the second category of statements indicating Comyack's alleged criminal past, he asserts that the false claims include, in his words, "that there were current court cases involving" Comyack, that he "had been jumping from state to state to avoid arrest and the court cases," and "that he had a 'long criminal history.'" Along those lines, he asserts that he "never fled the State," **[*79]** that "no police report was being filed" against him, and that "he does not have a long criminal record," with "the only [such] record being a guilty plea to theft and conspiracy to commit theft, which arose from the same set of facts and resulted in a suspended sentence."

In the Court's view, attempting to determine the truth, as a matter of law, of the statements (1) concerning Comyack's history as an alleged serial sexual offender and (2) concerning Comyack's criminal record is premature. As to the first set of allegations, at this juncture, the record before the Court as to these statements plainly presents a classic case of a genuine issue of material fact: WN Defendants advance that Comyack is a serial predator who has preyed upon many women, one of whom is Giannella, but Comyack counters that Giannella's alcohol and drug use was self-inflicted, that he cannot address accusations against him that span a decade, and that he has not previously faced such accusations. As to the second set of allegations, while no party disputes that Comyack has a criminal record, the context in which such record is raised by WN Defendants could suggest to the reasonable reader that his criminal record **[*80]** concerns sexual assault, rape, or related crimes, rather than the unrelated crimes of theft and conspiracy, which would be an inaccurate representation. For the Court to determine the truth or falsity of both categories of statements at this stage of the proceedings and before any discovery has occurred would therefore be inappropriate and premature. Even for this Court to evaluate whether any inaccuracies contained in the disputed statements are insubstantial would require the Court to weigh the disparate factual accounts, which is also presently improper. As such, the Court

therefore declines to do so. *Miele v. Rosenblum*, 254 N.J. Super. 8, 15, 603 A.2d 43 (App. Div. 1991) (citing *Romaine v. Kallinger*, 109 N.J. 282, 295, 537 A.2d 284 (1988)). This aspect of the Motion and Cross-Motion is DENIED WITHOUT PREJUDICE.

B) Whether the Statements at Issue Are Statements of Opinion and Therefore Not Defamatory as a Matter of Law

"Opinion statements, in contrast, are generally not capable of proof of truth or falsity because they reflect a person's state of mind. Hence, opinion statements generally have received substantial protection under the law." *Ward v. Zelikovsky*, 136 N.J. 516, 531, 643 A.2d 972 (1994). With respect to whether a defendant can be found liable in defamation for a statement of opinion, our Supreme Court has said:

> [u]nless a statement explicitly or impliedly rests **[*81]** on false facts that damage the reputation of another, the alleged defamatory statement will not be actionable. We require verifiability because[,] insofar as a statement lacks a plausible method of verification, the trier of fact who is charged with assessing a statement's truth will have considerable difficulty returning a verdict based upon anything but speculation.

Ibid. (internal quotation marks and citations omitted).

Even at this juncture, it would be appropriate for the Court to analyze certain statements or portions of statements made by WN Defendants and McGann to determine if those statements constitute nonactionable and protected opinion. The following statements at issue are potentially nonactionable statements of opinion:

Go to table9

Go to table10

WN Defendants advance that "[t]here can be no liability in defamation for a statement of pure opinion." They further assert that at least some of the **[*89]** statements at issue are "unambiguously matters of pure opinion," such as those referring to Comyack as a "scum bag," a "douche," a "prick," and a "predator," to name a few. WN Defendants further note that, "in context, all readers of the posts alleged to be defamatory knew that the ultimate conclusions were an opinion based on the disclosed facts of the allegations shared in earlier and continuing conversations."

McGann argues that his statements "are opinion and therefore protected as opinion."

Comyack counters that statements of opinion "may trigger liability if they imply false underlying objective facts." He also argues that statements that he "is a sexual predator and that you cannot trust his drinks are not opinion" but rather are statements "based on false allegations[,] which . . . [WN] Defendants [and McGann] accepted as facts." Comyack further "acknowledges that[,] standing alone, calling an individual a 'douche' or a 'prick' would not be defamatory" but urges this Court that parsing the disputed statements "is not appropriate."

The Court has viewed these statements not from the perspective of their authors but from a purely objective standard in deciding whether such statements **[*90]** or portions thereof are statements of opinion; application of a subjective standard, by contrast, would be inappropriate at this stage of the proceedings and prior to discovery being conducted. The above statements fall into two categories.

The first category is words used to describe Comyack: "scummy," "live one," "trash," "predator," "scumbag," "creep," "prick," and "douche." In the Court's view, these descriptors are not capable of verification as to their truth or falsity but rather reflect the authors' opinions on Comyack.[6] The

[6] The tougher issue is whether the word "predator" is simply an expression of opinion. Referring to Comyack as a "predator" is the descriptor that is closest to being verifiably true or false. The New Jersey courts have not directly addressed whether use of this term to describe a person is an opinion. The New York Supreme Court in New York County, however, has considered this issue in an unpublished Opinion, and the Court finds convincing its reasoning. That Court

Court grants summary judgment in favor of WN Defendants and McGann regarding their statements of opinion.

The second category includes judgments as to **[*91]** how people have responded or, in the authors' views, should respond to the allegations against Comyack: "[a]nd this is how Modine responds . . . Great work, #modineasbury. We won't be untagging anything. Expect more tags now."; "[d]on't let Facebook shut this down."; "[b]e careful and guard your drinks . . . And maybe let's let Modine know what their bartenders/managers are doing to young women in the community. Please share. Hold people accountable . . . Please be careful and tell your friends to be careful."; "[b]ut the restaurant supposedly has a zero tolerance policy [eye roll emoji]"; "[l]ol Facebook changed their minds and the post was reinstated. Still brought back attention to it, so why not talk about it again!"; "I don't think it's really about witch hunting the women though so please be prepared for the attitude you will get from people. We're tired of having to explain why women deserve to be safe. You can share or copy paste this to keep others aware. I don't mind. I just want people safe."; "[t]hat's what I'm sayin [knife emoji] let's vigilant this"; "ur too cute for him omg"; "[a]lso for his gang of apologists who defend him fuck y'all too you're part of the problem."; **[*92]** "any information helps."; "EDIT: DO NOT further contact Asbury Ale House, they claim to have him removed from the bar if he was to work there."; "[i]n the moment of all this time of hatred I just wanna say thank y'all to everyone for banding together . . . I couldn't have done this without everyone's support and following moves, my group of super snoopers, and the support of everyone. Y'all are the best, love y'all. I feel like a damn cult leader but it's actually for a good ass cause. Let's keep it rollin!"; "[i]f you're friends with him, if you think he's telling the truth, if you are feeding him information you're dead to me."; "[t]here is power in numbers and we need all the evidence against Brent we can get. If you are comfortable sharing your experiences with Brent Comyack please message me and I will put you in contact with the people who need it"; "I wouldn't want him working at a bar I work at or a bar near me. So yes I say blacklist him . . . Of course u can judge a book by its cover that's why books have them"; and "all I know is I hope his life is ruined like he ruined other people's lives." These expressions reflect either (1) states of mind that neither have a readily **[*93]** understandable meaning nor can be verified as true or false or (2) pure opinion of the author.[7] The Court will thus grant summary judgment in favor of WN Defendants and McGann with regards to these statements as well.

Accordingly, Comyack's claim for defamation as to both categories of statements of opinion that are specifically referenced above is DISMISSED WITH PREJUDICE.

b. Unprivileged Publication of Statement to a Third Party[8][9]

With respect to the second element, "[a]lthough defamatory, a statement will not be actionable if it is subject to an absolute or qualified privilege." *Erickson v. Marsh & McLennan Co.*, 117 N.J. 539, 563, 569 A.2d 793 (1990). "An absolute privilege is an immunity from liability which springs from society's recognition that the need for unfettered expression is crucial to

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reasoned that:

> [s]tatements like 'convicted felon,' or 'HIV positive[,]' or '20-weeks pregnant' have objective verifiable meaning; 'sex predator' does not. Rather, it is the sort of loose, figurative[,] or hyperbolic language that is immunized from defamation claims. Indeed, sister-state judges have tossed out of court cases predicated on 'sexual predator' language. So-called 'Nazis,' 'racists,' 'terrorists,' 'scabs,' 'fraudsters,' and 'traitors,' no doubt a woefully incomplete list, have all come up empty-handed in court.

Rosado v. Daily News, L.P., 2014 N.Y. Misc. LEXIS 6163, 2014 N.Y. Slip Op. 33736(U) 3-4 (Sup. Ct. 2014). In addition, the word "predator" is defined in the Oxford Dictionary as "a person . . . that ruthlessly exploits others." In that context, the determination of whether one exploits another is a matter of opinion that is incapable of being proven to be true or false.

[7] Such as whether to take an action such as "blacklisting."

[8] That the statements at issue were published to a third party is not in dispute and therefore will not be addressed by the Court.

[9] As Franco filed for bankruptcy protection during the pendency of his Cross-Motion, the Court will not address his Cross-Motion in its analysis.

the public weal"; this "privilege is complete." *Salzano v. North Jersey Media Group Inc.*, 201 N.J. 500, 527, 993 A.2d 778 (2010), *cert. denied*, 562 U.S. 1200, 131 S. Ct. 1045, 178 L. Ed. 2d 864 (2011) (internal quotation marks and citations omitted). A qualified privilege, by contrast "serve[s] to balance the individual's interests in reputation with the public's interest in the reporting of important public matters." *Ibid.* (internal citations omitted). Deciding "whether a defamatory statement is privileged is a threshold determination to be made by a judge rather than a jury." *Govito v. West Jersey Health System, Inc.*, 332 N.J. Super. 293, 310, 753 A.2d 716 (App. Div. 2000) (internal citations **[*94]** omitted).

In this matter, WN Defendants and McGann contend that three privileges apply to all or some of the statements that they made about Comyack: (1) the "fair comment" privilege, (2) the "common interest" privilege, and (3) the CDA. The Court will consider the application of each of those privileges below.

1. Whether the Statements at Issue Are Protected by the Fair Comment Privilege

The New Jersey Supreme Court, recognizing "that the need for the free flow of information and commentary on matters of legitimate public concern required heightened protection for the speaker, regardless of whether the target of the speech was a public official or public figure," has found that, "[a]lthough the United States Supreme Court has withdrawn full First Amendment protection for speech involving matters of public interest in *Gertz*, we found that such speech is sheltered under our common law privilege of fair comment." *Senna v. Florimont*, 196 N.J. 469, 486, 958 A.2d 427 (2008) (internal quotation marks and citations omitted). In order to determine whether speech warrants protections of the privilege, courts must consider the content, form, and context of such speech, analysis of which "allows for clear distinctions between speech worthy of the heightened protection **[*95]** of the actual-malice standard, and speech of a subordinate kind meriting the negligence standard," in addition to "the disinterested nature of the speaker." *Id.* at 492-96, 958 A.2d 427 (contrasting media defendants, which are "unlikely, for the most part, to derive a direct economic benefit from harming the reputation of a person who is the subject of a story," with "a business owner [who] maligns his competitor in the marketplace for apparent economic gain"); *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761-62, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985) (providing that determining whether particular speech addresses a matter of public concern requires a review of the content, form, and context of the speech, including the identity of the speaker and the targeted audience) (internal quotation marks and citations omitted). More specifically, while "[d]iscourse on political subjects and critiques of the government will always fall within the category of protected speech that implicates the actual-malice standard," "[p]ublic policy and common sense also suggest that the same protections be given to speech concerning significant risks to public health and safety." *Id.* at 497, 958 A.2d 427 (internal citations omitted). The New Jersey Supreme Court has also found, in discussing "a cause of action based upon the invasion of **[*96]** privacy by the unreasonable publication of private facts," that "the facts surrounding the commission of a crime are subjects of legitimate public concern." *Romaine v. Kallinger*, 109 N.J. 282, 297, 302, 537 A.2d 284 (1988) (internal citations omitted). The rationale for such privilege is that

> speech involving matters of public interest and concern needs adequate breathing room in a democratic society. The significant societal benefit in robust and unrestrained debate on matters of public interest demands that we not impose a regime in which speakers will engage in self-censorship for fear of a ruinous defamation lawsuit. Even the fear of having to defend against a defamation suit may make some too timid to venture into discussions where speech may be prone to error. In those circumstances, actual malice is the proper standard.

Id. at 492-93, 958 A.2d 427 (internal citations omitted).

The following statements potentially implicate the fair comment privilege:

Go to table11

Go to table12

WN Defendants did not initially address the application of the fair comment privilege. However, in their Reply, they cite to the New Jersey Supreme Court's decision in *Kotlikoff v. Cmty. News* for the proposition that the United States Supreme Court's decisions in *Sullivan* and *Gertz* have rendered the fair comment privilege obsolete.[10]

McGann generally implicates the privilege when he asserts that "[a] timely grant of summary judgment in a defamation action has the salutary effect of discouraging frivolous lawsuits that might chill the exercise of free speech on matters of public concern."

Comyack counters that the fair comment privilege turns on whether the facts are "truly stated" as "the honest expression of the writer's real opinion," rather than statements that "contain imputations of corrupt or dishonorable motives." Comyack further argues that determining application of the privilege is premature. **[*105]**

For purposes of its analysis, the Court must consider the alleged conduct to be true *only for the purpose* of analyzing whether the statements in dispute implicate the fair comment privilege. Whether any such privilege may have been abused is discussed below in Section III.B.i.c.

First, the content of these statements concerns drugging, sexual misconduct, sexual assault, rape, and the consequences thereof, which could constitute criminal behavior that certainly implicates the interests of public safety. As such, the public certainly has an interest in being apprised of such conduct.[11][12] Second, the form of these statements is informal online messaging to spread awareness of Comyack's conduct. Third, the context of these statements is generally twofold: (1) social media postings as part of a so-called "whisper network" to protect women potentially at risk and (2) social media postings involving those in the bartending and restaurant industry. Finally, the authors of these statements are undoubtedly economically disinterested in spreading such information.[13] As such, the Court finds that the

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[10] The Court recognizes WN Defendants' argument and agrees that jurisprudence surrounding the fair comment privilege has evolved over time. The simplified approach suggested by Comyack, by contrast, of course ignores whether a given statement was made with actual malice, even if false. In *Kotlikoff v. Cmty. News*, the New Jersey Supreme Court reasoned that,

> [t]raditionally, one could be found liable for defamation if one published an opinion that harmed another's reputation. However, expressions of opinion were privileged if they constituted "fair comment" on a matter of public concern. This Court [in *Leers*] has articulated the following definition of the fair comment privilege:
>
> > In a word, "fair comment" (a) must be based on facts truly stated, and (b) must not contain imputations of corrupt or dishonourable motives on the person whose conduct or work **[*104]** is criticized, save in so far as such imputations are warranted by the facts, and (c) must be the honest expression of the writer's real opinion; and if the comment complies with these conditions, it is fair comment, however incorrect be the views expressed by the critic, or however exaggerated or even prejudiced be the language of the criticism; the "limits of criticism are exceedingly wide."
>
> However, with the Supreme Court decisions in *New York Times v. Sullivan* and *Gertz v. Welch*, the "fair comment" doctrine became obsolete insofar as its application is confined to a mere expression of opinion.

Kotlikoff v. Cmty. News, 89 N.J. 62, 68, 444 A.2d 1086 (1982) (internal citations omitted). While the Court takes note of this shift in the law, it also recognizes that the New Jersey Supreme Court has since continued to apply a modernized version of the fair comment privilege and will therefore do so here. *See generally, e.g., Senna v. Florimont*, 196 N.J. 469, 958 A.2d 427 (2008).

[11] The Court also notes that the publication of an article about this matter in the Sunday Edition of the Star Ledger, on page one and "above the fold," corroborates this Court's finding that this story is a matter of public interest.

[12] In spite of this finding, the Court does not adopt WN Defendants' assertion in their Reply that Comyack, in fact, conceded that the disputed statements implicate the public interest and should therefore be evaluated under the appropriate privilege.

[13] The Court notes that Comyack has not offered an alternative

statements cited are protected by the fair comment privilege. Accordingly, this aspect of the Motion and **[*106]** Cross-Motion is GRANTED.

2. Whether the Statements at Issue Are Protected by the Common Interest Privilege

The common interest privilege, or conditional special-interest privilege, is a qualified, "historical, traditional common-law privilege which arises out of a legitimate and reasonable need, in particular situations, for private people to be able freely to express private concerns to a limited and correlatively concerned audience, whether or not those concerns also touch upon the public interest in the broad sense." *Govito v. West Jersey Health System, Inc.*, 332 N.J. Super. 293, 309, 753 A.2d 716 (App. Div. 2000) (internal quotation marks and citations omitted). Determining whether such privilege exists requires an assessment of "the circumstantial justification for the publication of the defamatory information," the "critical elements" of which "are the appropriateness of the occasion on which the defamatory information is published, the legitimacy of the interest thereby sought to be protected or promoted, and the pertinence of the receipt of that information by the recipient." *Id.* at 309-310, 753 A.2d 716 (internal quotation marks and citations omitted).

The common interest privilege potentially applies to the same statements noted and analyzed in this Court's discussion of the fair comment privilege **[*107]** at Section III.B.i.b.1. The Court therefore incorporates those statements in discussing the common interest privilege here.

WN Defendants argue that their "statements were made as part of the operation of an online, New Jersey whisper network," "by which women protect one of another from men who are not necessarily held accountable for sexual misconduct"; that the content of such statements themselves evidences the legitimacy of the subject interests and the pertinence of their receipt; and that they viewed their making of such statements as a moral duty to other women. At the heart of this argument is the proposition that, when facing a moral dilemma as to whether to speak out and express an opinion on a subject that is in others' interest or to sit back and shirk one's moral duty, the role of the courts should be to protect the decision made by applying the privilege and therefore requiring the actual malice standard to be met prior to assessing liability.

McGann did not directly addressed the issue in his briefing.

Comyack counters that WN Defendants and McGann had no firsthand knowledge or evidence of the allegations but rather acted on "a hearsay account" and that such defendants **[*108]** failed to "direct their statements to any particular individual or group," as required. Comyack additionally argues that determining application of the privilege is premature. Further, Comyack's counterarguments that WN Defendants and McGann's statements are "false" and/or "malicious" conflates the type and level of proofs that will be necessary if the statements in question are determined to be subject to the privilege.

Again, for purposes of its analysis, the Court must consider the alleged conduct to be true *only for the purpose* of analyzing whether the statements in dispute are protected by the common interest privilege.

Whether any such privilege may have been abused is discussed below in Section III.B.i.c.

First, the social media platforms on which the disputed statements were published appear to be an appropriate forum for accomplishing the twofold goals of dispersing messaging about Comyack's conduct to women that may be in his vicinity for their protection and informing bartenders and others in the restaurant industry of Comyack's past conduct in order to warn them as to potential future conduct. Second, protecting women from drugging, sexual misconduct, sexual assault, and rape **[*109]** is certainly a legitimate interest sought to be promoted. Along those lines, the statements in issue are replete with expressions of crusading to protect women in Comyack's vicinity; these expressions corroborate the

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motivation for making the disputed statements other than that provided by WN Defendants and McGann.

purpose of the moving defendants in protecting women from Comyack.[14] Third, women and bartenders and restaurateurs potentially in the same geographic region as Comyack are certainly important recipients of such information, given Comyack's actions.

Accordingly, the Court finds that the cited statements are protected by the common interest privilege. Therefore, this aspect of the Motion and Cross-Motion is GRANTED.

3. Whether the Statements at Issue Are Protected by the Communications Decency Act ("CDA")

"Generally, the law of defamation provides redress against a party that reprints defamatory statements." *Costello v. Ocean County Observer*, 136 N.J. 594, 606, 643 A.2d 1012 (1994). "[T]he common law rule [is]that a person who republishes a defamation uttered by another was subject to liability as if he or she were the original defamer." *Orso v. Goldberg*, 284 N.J. Super. 446, 451, 665 A.2d 786 (App. Div. 1995) (internal citations omitted).

> [T]hat defendants accurately reported information from another source will not relieve them of liability. Under that analysis the defense of truth does not refer to the truthful republication **[*110]** of a defamatory statement but to the truth of the statement's contents. Thus, if defendant published that a third person stated that plaintiff has committed a crime, it is no justification that the third party did in fact make that statement. Defendant must prove that in fact plaintiff committed the crime.

Lawrence v. Bauer Publishing & Printing, 89 N.J. 451, 461, 446 A.2d 469 (1982), *cert. denied*, 459 U.S. 999, 103 S. Ct. 358, 74 L. Ed. 2d 395 (1982) (internal citations omitted).

However, the CDA contains an express policy statement that proclaims the United States' desire to preserve the vibrant and competitive free market that presently exists with respect to the internet and other interactive computer services. In adopting the CDA, Congress found in 47 *U.S.C.* § 230(a) that:

> (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
>
> (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
>
> (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural **[*111]** development, and myriad avenues for intellectual activity.
>
> (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
>
> (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

Accordingly, Congress recognized that tort-based lawsuits pose a threat to freedom of speech on the new internet medium. As such, Congress acknowledged that the common law policy needed to be adjusted, given our current modes of electronic communication, so it stated the following as the policy in the United States in 47 *U.S.C.* § 230(b):

> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
>
> (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
>
> (3) to encourage the development of technologies which maximize user control over what information is received by individuals,

[14] Yet, Comyack has not offered any alternative explanation to rebut their offering or to bring forth any disputed issue of fact regarding the issue. To simply say that the moving defendants acted with actual malice does not defeat the argument that they are entitled to the privilege. The claim of actual malice, if properly pled, only bears on whether the moving defendants are liable, notwithstanding their privileged status.

families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives **[*112]** for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

Those policies specifically recognize that the imposition of tort-based lawsuits are another form of intrusive government regulation of speech. The policies also encourage the unfettered and unregulated development of free speech on the internet and caution against lawsuits shutting down or stifling websites and other services on the internet.

In order to effectuate such policies, which, in certain respects, are in derogation of the common law, 47 *U.S.C.* § 230(c)(1) provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." An "interactive computer service" is defined by 47 *U.S.C.* § 230(f)(2) as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service **[*113]** or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." An "information content provider" is defined by 47 *U.S.C.* § 230(f)(3) as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." Further, a provider or user who engages in minimal editing and commenting of information provided by an information content provider does not themselves become an information content provider. *See, e.g., Donato v. Moldow*, 374 N.J. Super. 475, 486, 489, 497-98, 865 A.2d 711 (App. Div. 2005) (considering whether a provider and user becomes "an information content provider with respect to . . . anonymously-posted defamatory statements" due to his activities as a provider and user and finding that he is immune from liability for the statements of others and the management of such statements as a provider but that posting "messages of his own and" participating "in the discussion does make him an information content provider with respect to his postings," though none were "alleged to be actionable").

47 *U.S.C.* § 230(e)(3) additionally sets forth that "[n]o cause of action may be brought and no liability may be imposed under any **[*114]** State or local law that is inconsistent with this section." "In a clear exercise of its Commerce power, Congress preempted any contrary state law provisions . . . Because of this provision and Congress' expressed desire to promote unfettered speech on the Internet, the sweep of § 230's preemption includes common law causes of action." *Donato v. Moldow*, 374 N.J. Super. 475, 486, 865 A.2d 711 (App. Div. 2005) (internal citations omitted). The CDA is absolute, rather than qualified, in its sweep and effectively functions as an absolute common law privilege.

The statements at issue that potentially implicate the CDA are:[15]

Go to table13

Go to table14

WN Defendants argue that Comyack "continues to seek liability as to three statements in a manner barred by Section 230." Along those lines, they seek for immunity from liability under the CDA as to Devaney1, Devaney2, and NValentino1, stating that such statements are mere republications with, in one case, limited added commentary that falls within the

[15] These statements have not been discussed previously in this Opinion because they are plainly encompassed within the CDA, and Comyack's claims as to such statements are clearly precluded on this basis. Exceptions that were previously addressed are italicized; these statements were analyzed in other contexts because they are plainly or arguably outside the scope of permissible privileged commentary under the CDA.

scope of the CDA's protections.

McGann offers **[*117]** that he is immune from liability under the CDA because his posts "are protected[,] as the content was not changed, but opinions were offered by" him.

Comyack counters that he does not allege defamation by republication or otherwise as to Devaney1, Devaney2, NValentino1, and McGann6 but that, while he agrees that the CDA "provides immunity if an individual merely republishes a message" with the possibility of liability for additional comments, determining application of the CDA at this juncture is premature.

In Devaney1, Devaney2, NValentino1, and McGann6, the information content providers per 47 *U.S.C.* § 230(f)(3), or those who created the subject content, are 123dontfukwithme, an unknown person, Rae Ashlee, and Kelly Davis, respectively. With respect to these republications, WN Defendants and McGann were acting as "user[s] of an interactive computer service," namely the online platforms on which they republished the content, per 47 *U.S.C.* § 230(c)(1) and 47 *U.S.C.* § 230(f)(2). That WN Defendants and McGann resposted messages originated by anonymous users or users whose identities were known to them does not affect the broad immunity granted to them by the CDA. *See generally Donato v. Moldow*, 374 N.J. Super. 475, 865 A.2d 711 (App. Div. 2005). Therefore, such republications are absolutely privileged under the CDA, **[*118]** and any state law claims complained of as to such statements are precluded by the CDA. As such, this aspect of the Motion and Cross-Motion is GRANTED. Comyack's claims as to these statements are DISMISSED WITHOUT PREJUDICE.[16]

c. Fault[17]

With respect to the third element, New Jersey law "always" requires proof of fault in a defamation action. *See Senna v. Florimont*, 196 N.J. 469, fn. 16, 958 A.2d 427 (2008). Generally, "a plaintiff claiming to be damaged by a false statement will succeed if he shows that the speaker acted negligently in failing to ascertain the truth of the statement." *Id.* at 473, 958 A.2d 427. Cases involving the negligence standard require a showing of fault by a preponderance of the evidence. *See id.* at fn. 16, 958 A.2d 427 (internal citations omitted). However, if a qualified privilege has been implicated, "[a] plaintiff may overcome this privilege by proving that the immunized defendant abused its privilege" if, among other things, "the publisher knows the statement is false or the publisher acts in reckless disregard of its truth or falsity." *Govito v. West Jersey Health System, Inc.*, 332 N.J. Super. 293, 312, 753 A.2d 716 (App. Div. 2000) (internal quotation marks and citations omitted). While the knowledge prong is self-explanatory, with respect to reckless disregard, the actual malice standard requires "a high degree of awareness of . . . probable falsity" **[*119]** or "serious doubts as to the truth of the publication." *DeAngelis v. Hill*, 180 N.J. 1, 13, 847 A.2d 1261 (2004) (internal quotation marks and citations omitted). Along those lines, "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968). While that standard may be difficult to prove, it intentionally balances "the important public policy that individuals should generally be free to enjoy their

[16] With regards to the Court's decision to dismiss Comyack's claims as to these statements without prejudice, the Court notes that Comyack speculates, without citation or evidence, that the cited statements made by WN Defendants and McGann may have been concocted from "throw away" accounts that they themselves created. Comyack's allegations are not supported by any Certification of any witness or party but are simply his (conspiracy) theory that has no apparent basis. Further, Comyack's Amended Complaint makes no such allegation, meaning that he has failed to state a cause of action regarding his claims as to the republished materials. Nonetheless, given that no discovery has yet occurred with regards to Comyack's claims, the Court will only enter a dismissal of these "republished" statements or comments without prejudice.

[17] As Franco filed for bankruptcy protection during the pendency of his Cross-Motion, the Court will not address his Cross-Motion in its analysis.

reputations unimpaired by false and defamatory attacks" with the "vital counter policy that in certain situations there is a paramount public interest permitting persons to speak or write freely without being restrained by the possibility of a defamation action." *Swede v. Passaic Daily News*, 30 N.J. 320, 331, 153 A.2d 36 (1959) (internal citations omitted). The privileges are "designed to protect speech in those narrowly defined instances in which the public interest in unrestrained communication outweighs the right of redress." *Fees v. Trow*, 105 N.J. 330, 336, 521 A.2d 824 (1987). In such a case, if the court has found the qualified privilege to be applicable, an abuse "must be proven by clear and convincing evidence." *Govito v. West Jersey Health System, Inc.*, 332 N.J. Super. 293, 312, 753 A.2d 716 (App. Div. 2000) (internal citations **[*120]** omitted). Further, "[t]he jury determines whether the defendant abused a special-interest privilege." *Ibid.* (internal citations omitted); *Bainhauer v. Manoukian*, 215 N.J. Super. 9, 40, 520 A.2d 1154 (App. Div. 1987) (internal citations omitted).

In terms of the pleading burden with respect to actual malice,

> when the allegations of a defamation complaint . . . are limited to the fact of publication and a bare conclusory assertion that the press defendants knew and/or reasonably should have known that the statement . . . was false, with no other factual reference to lend support to the contention, the court may not simply take the facial assertion as a given, but rather must evaluate the circumstances as best it can to determine whether there is any reasonable basis upon which the defamation claim can be seen to be viable. Were it otherwise, any person or entity claiming First Amendment protection would be at the mercy of a claimant's empty assertions unsupported even by any contentions regarding surrounding facts.

Darakjian v. Hanna, 366 N.J. Super. 238, 248, 251, 840 A.2d 959 (App. Div. 2004)[18] (internal quotation marks omitted) (finding that, "because the complaint is bereft of any particular factual allegations beyond a bare contention that the press defendants acted in a way that permits plaintiff to overcome the insulation the fair-report privilege confers, **[*121]** we conclude that count two of the complaint should be dismissed. This result is required by First Amendment policies and the responsibilities of courts to avoid rulings that unduly chill the press's freedom to report on matters of public interest").[19][20] As "[m]alice is merely a conclusion of law which is based upon facts," "[m]ere averment that the words printed or published were malicious is not sufficient . . . To withstand a demurrer, the plaintiff must allege the ultimate facts constituting actual malice." *Id.* at 250, 840 A.2d 959 (quoting *Stice v. Beacon Newspaper Corp.*, 185 Kan. 61, 340 P.2d 396, 401 (1959)) (internal quotation marks omitted). Further,

> [i]t is not enough for [a] plaintiff to assert . . . that any essential facts that the court may find lacking can be dredged up in discovery. A plaintiff can bolster a defamation cause of action through discovery, but not [] file a conclusory complaint

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[18] Notwithstanding Comyack's argument in his brief and at oral argument that the precedential authority requires that discovery be conducted before the Court can opine on this issue, Professor Kestin's opinion in *Hanna* belies that proposition.

[19] Given that the fair report privilege is also a qualified privilege that requires a showing of malice, or "knowledge that the reported statement was false or with a reckless disregard for its truth or falsity," the Court sees no reason as to why the pleading burden with respect to actual malice under the fair report privilege would differ from the pleading burden with respect to actual malice under the fair comment or common interest privileges. *Darakjian v. Hanna*, 366 N.J. Super. 238, 245, 840 A.2d 959 (App. Div. 2004) (internal quotation marks and citations omitted).

[20] Additionally, the Court takes note of *R.* 4:5-8(a), which states, in pertinent part, that "[m]alice, intent, knowledge, and other condition of mind of a person may be alleged generally"; however, this sentence is preceded by the following language: "[i]n all allegations of misrepresentation, fraud, mistake, breach of trust, willful default or undue influence, particulars of the wrong, with dates and items if necessary, shall be stated insofar as practicable." None of the parties have cited any authority as to the applicability of this Rule to an action based upon allegedly defamatory speech, and the Court's plain reading of the Rule provides no support for its applicability. Accordingly, the Court finds the general pleading requirements for malice under *R.* 4:5-8(a) to be inapplicable to consideration of the defamation claim that is the subject of this Motion.

> to find out if one exists. [A] plaintiff must plead the facts and give some detail of the cause of action.

Id. at 248-49, 840 A.2d 959 (internal quotation marks and citations omitted); *see also Campbell v. St. James African Episcopal Church*, 2014 N.J. Super. Unpub. LEXIS 2072.

Courts should decide whether to dismiss a complaint if a plaintiff in a defamation action failed to adequately plead a cause of action under the applicable standard; such a plaintiff does not have the benefit of the general **[*122]** indulgence to broad brush pleadings that sweep in elements of a particular cause of action but rather, in view of the "expressive interests and constitutional policies at stake," has the responsibility not merely to allege that a defamatory comment was made and that the defendant entitled to a privilege knew or should have known that it was false. *Printing Mart v. Sharp Electronics*, 116 N.J. 739, 773, 563 A.2d 31 (1989). Similarly, courts should consider whether to "grant summary judgment dismissing the complaint if a reasonable jury could not find that the plaintiff has established actual malice by clear and convincing evidence"; but,

> [b]ecause the issue of a defendant's state of mind does not readily lend itself to summary disposition, courts are wary of disposing of cases involving actual malice through summary judgment. Plaintiffs nonetheless must produce substantial evidence to survive a motion for summary judgment. Although courts construe the evidence in the light most favorable to the non-moving party in a summary judgment motion, the 'clear and convincing' standard in defamation action adds an additional weight to the plaintiffs' usual 'preponderance of the evidence' burden.

DeAngelis v. Hill, 180 N.J. 1, 12, 847 A.2d 1261 (2004) (internal quotation marks and citations omitted); *Costello v. Ocean County Observer*, 136 N.J. 594, 615, 643 A.2d 1012 (1994) (internal quotation **[*123]** marks and citations omitted). Nonetheless, such a disposition may ultimately be appropriate in a given case.

WN Defendants plainly assert that Comyack has only set forth conclusory allegations relating to any claim of actual malice and has therefore failed to meet his pleading burden, although "[t]he Court more than flagged the issue for" him. Along those lines, WN Defendants note that Comyack makes a clear error in citing the New Jersey Supreme Court's decision in *Leers v. Green* "for the outdated proposition that '[f]acts must be completely true'" in order "to urge the Court to return to a pre-fault era of defamation law." However, they proffer that, "[i]n short, without specific facts suggesting *each* defendant entertained serious doubts as to the truth of the various statements, the . . . [Amended Complaint] fails to state a cause of action and should therefore be dismissed." Further, WN Defendants, along with McGann, relay that their sole motive is to protect women from and to inform bartenders and restauranteurs of Comyack's conduct.

McGann concurs when he contends that "[t]here is also no proof of malice" asserted by Comyack against McGann and that "[t]here is no triable fact as **[*124]** to actual malice."

Comyack counters that WN Defendants and McGann have "spread vile, false statements about" him "and now attempt to impose a higher legal standard by claiming [that] they were performing a public service" and "warning others about" Comyack "in the interest of public safety."[21] Comyack effectively suggests that absolutely "no basis" exists for the claims made against him and that WN Defendants and McGann have more surreptitious motives for their actions than they have yet revealed. In support of that argument, Comyack points to the "fact" that the drug test alleged to have been obtained by Giannella, as well as his criminal history, will not

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[21] Comyack perplexingly seems to suggest that, because he believes that the allegations about him are, in fact, false, no privilege can apply, and the actual malice standard is not triggered. He, however, has stated the standard incorrectly. Where the actual malice trigger applies, as it does here, the actual malice analysis takes place wholly independent of the question of truth.

and could not have been known to WN Defendants before they instituted their campaign against him. He further insinuates (but does not specifically allege) that WN Defendants are zealous proponents of a cause, or, as one of the moving defendants described it, a "cult," who have exploited, contrived, and then embellished allegations against him in order to promote their agenda, at the expense of his reputation. Comyack further advances that "argument concerning the existence of actual malice is inappropriate at this point" and that he **[*125]** "must be given an opportunity to explore such." Finally, Comyack sets forth that he has satisfied his pleading burden as to actual malice by alleging that WN Defendants and McGann "knew their statements were false or acted in reckless disregard of the truth or falsity" and again alleging that "they acted with actual malice either knowing their statements were false or acting in reckless disregard of their truth or falsity[,] forfeiting any alleged privilege they may assert."

Preliminarily, the Court looks to its Opinion of January 10, 2020, in which it referenced Comyack's initial Complaint and reasoned that:

> Again, the allegations against WN Defendants as to their allegedly defamatory statements amount to the following: Jaclyn and Nicole Valentino "began posting messages on social media," which stated that "Plaintiff was a serial abuser who drugged and raped girls," and Devaney and Brown "also began to post similar messages alleging Plaintiff to be a serial abuser drugging and raping girls." No mention of the truth or falsity of these statements is made, let alone whether WN Defendants acted negligently or with reckless disregard as to their truth or falsity or with knowledge of their **[*126]** falsity. As to McGann and Franco, Plaintiff's Complaint sets forth that they "were informed of the allegations" and subsequently "posted the false allegations on the Bartenders Guild website." While the falsity of the statements is indicated here, Plaintiff's Complaint fails to allege that McGann and Franco acted negligently or with reckless disregard as to the truth or falsity of their statements or with knowledge of their falsity. Without such allegations by Plaintiff as to the requisite degree of fault, not only is a more definite statement required, but Plaintiff's First Count for defamation is deficient.

The statements that must be evaluated under the actual malice standard are those that the Court found are protected by the fair comment and common interest privileges.[22] At this stage of the proceedings, in which little to no discovery has been conducted, the Court looks to Comyack's Amended Complaint in order to determine if there are adequate allegations of actual malice contained within the pleading itself. Comyack's general allegations as to actual malice as to WN Defendants and McGann in his Amended Complaint amount only to the following: "[t]he Defendants either knew that their **[*127]** statements were false, or acted in reckless disregard of the truth or falsity"; "[t]he Defendants had knowledge of or acted in reckless disregard as to the truth or falsity of the published matter, and the false light in which the Plaintiff would be placed"; and "[t]he Defendants acted with actual malice by either knowing that their statements were false, or acting in reckless disregard of their truth or falsity, forfeiting any alleged privilege they may have to make a statement about the Plaintiff that was defamatory." Comyack's allegations as to actual malice in his Amended Complaint basically amount to the definition of actual malice and are precisely the type of allegations that the Appellate Division in *Hanna* held to be insufficient to sustain a claim for defamation. Recitation of the applicable standard as if they were "magic words" simply does not suffice.[23] The Court further notes

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[22] The Court notes that, at this juncture, all non-privileged statements to which Comyack has asserted a claim have already been disposed of, whether with or without prejudice.

[23] While Comyack has expanded somewhat on those claims in the papers submitted in his Opposition to the Motion and Cross-Motion, those claims are not found in his pleadings. For instance, he attaches an Asbury Park Police Department report to suggest that the version of events that WN Defendants relied upon is fallacious. Even if the hearsay report is considered by the Court, there is no indication that WN Defendants were aware of its contents. Additionally, even the

that, despite his conclusory claims to the contrary, Comyack has not indicated in his Amended Complaint specific facts suggesting that each or any of the moving defendants knew or entertained serious doubts as to the truth of each of their statements; per *Hanna*, in the absence of such factual allegations, **[*128]** the bare claim that certain undescribed words were malicious cannot stand. As such, Comyack's Amended Complaint does not, on its face, state a cause of action. Therefore, with regards to Comyack's claims as to the statements identified by the Court that are subject to the fair comment and common interest privileges, the current version of Comyack's Amended Complaint does not state a cause of action. Accordingly, in this respect, the Motion and Cross-Motion are GRANTED. Comyack's claims as to those identified statements are therefore DISMISSED WITHOUT PREJUDICE.

d. Damages[24]

With respect to the final element,

> [i]n an action for slander, or oral defamation, the plaintiff must prove that the defamatory statement caused actual harm to his or her reputation through the production of concrete proof. The plaintiff must prove special damages in the form of proof of pecuniary or economic harm to his reputation. By contrast, in an action for written defamation, or libel, the plaintiff may prove any form of actual damage to reputation, either pecuniary or non-pecuniary. This element of the slander plaintiff's prima facie case is waived if the statement is deemed slander *per se*, because damage to reputation **[*129]** is presumed to flow from such statements. This means that a slander plaintiff may establish a cause of action not only without proving special damages but without proving any form of actual damage to reputation. Four types of slander qualify as slander *per se:* (1) accusing another of having committed a criminal offense; (2) accusing another of having a loathsome disease; (3) accusing another of engaging in conduct, or having a condition or trait, incompatible with his or her business; and (4) accusing another of having engaged in serious sexual misconduct. However, the slander *per se* doctrine has been criticized in recent years, resulting in the courts' refusal to expand any of these four categories or to invoke the doctrine unless it 'clearly' applies.

Ricciardi v. Weber, 350 N.J. Super. 453, 475-76, 795 A.2d 914 (App. Div. 2002), certif. denied, 175 N.J. 433, 815 A.2d 479 (2003) (internal citations omitted).

"The libel proof plaintiff doctrine[, however,] prohibits a plaintiff from recovering for libelous statements where the plaintiff's reputation in the community was so tarnished before the publication that no further harm could have occurred. To hold a plaintiff libel proof, the court must determine as a matter of law that the plaintiff would not be able to prove compensatory damages." *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1079 (3rd Cir. 1988) **[*130]** (internal quotation marks and citations omitted).

WN Defendants argue that Comyack is "libel proof," given his "pre-existing reputation . . . as . . . a scumbag at a minimum, and a serial sexual predator at the worst."

McGann also notes that Comyack "has failed to produce any evidence of actual injury to reputation or injuries physically and mentally."

Comyack counters that the argument as to causation on the basis of his purported preexisting reputation is frivolous and without basis, as he "has alleged special damages" due to his termination of employment and challenges in securing other employment.

As a preliminary matter, the statements at issue here plainly accuse Comyack of both having committed a criminal offense and of having engaged in serious

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discussion in Comyack's Opposition does not clearly suggest a motive or intent that can be ascribed to the moving defendants other than what they themselves have described in an uncontradicted manner. Rather, it leaves the Court to inappropriately speculate as to their potential ulterior motives.

[24] As Franco filed for bankruptcy protection during the pendency of his Cross-Motion, the Court will not address his Cross-Motion in its analysis.

sexual misconduct. Any statements relating to these charges are therefore defamatory per se, in which case damages are presumed to flow from such statements. Further, the Court declines at this time to decide as a matter of law that Comyack is "libel proof," given that a reasonable factfinder could find that he was damaged by the statements at issue. That aspect of the Motion and Cross-Motion are DENIED WITHOUT PREJUDICE.

ii. Count Two for **[*131]** False Light and Count Three for Intentional Infliction of Emotional Distress[25]

> [I]f an intentional tort count . . . is predicated upon the same conduct on which the defamation count is predicated, the defamation cause completely comprehends the malicious interference cause. That is to say, if the alleged defamation is not actionable, then its consequences are also not actionable because the conduct that caused those consequences was privileged. The Supreme Court has also so held in considering the interplay between defamation and intentional infliction of emotional distress based on the same conduct. It would obviously be intolerably anomalous and illogical for conduct that is held not to constitute actionable defamation nevertheless to be relied on to sustain a different cause of action based solely on the consequences of that alleged defamation. Thus, since there was no actionable defamation here, there can be no claim for damages flowing from the alleged defamation but attributed to a different intentional tort whose gravamen is the same as that of the defamation claim.

G.D. v. Kenny, 411 N.J. Super. 176, 194, 984 A.2d 921 (App. Div. 2009) (internal quotation marks and citations omitted), *aff'd*, 205 N.J. 275, 15 A.3d 300 (2011). Essentially, a plaintiff cannot effectively "circumvent" **[*132]** the requirements of and defenses to a defamation claim by pursuing an alternative cause of action. *See, e.g., Griffin v. Tops Appliance City, Inc.*, 337 N.J. Super. 15, 24, 766 A.2d 292 (App. Div. 2001) (internal citations omitted).

WN Defendants argue that, "[b]ecause the 'gravamen' of all of . . . [Comyack's] claims is the same," "all claims rise and fall on the same . . . analysis."

McGann did not address this issue.

Comyack also did not address this issue.

The Court finds that, with respect to Comyack's Amended Complaint, Count Two for false light and Count Three for intentional infliction of emotional distress are both predicated on the same conduct as Count One for defamation. Therefore, the Court's findings as to Count One are also applicable to Counts Two and Three.

CONCLUSION

For the foregoing reasons, WN Defendants' Motion and McGann's Cross-Motion are GRANTED IN PART AND DENIED IN PART, as more particularly provided for in the Court's Opinion. The net effect of the Court's ruling is that Comyack's Complaint against WN Defendants and McGann is dismissed without prejudice at this time.

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[25] As Franco filed for bankruptcy protection during the pendency of his Cross-Motion, the Court will not address his Cross-Motion in its analysis.

Table1 (Return to related document text**)**

Statement Reference	Date	Location
Brown3	June 29, 2019	Facebook
JValentino1	August 21, 2019	Facebook

Statement Reference	Date	Location
lentino2	Undated	Facebook

Statement Reference	Date	Location
lentino	Between June 29, 2019 and July 13, 2019	Facebook
McGann2	Undated	Fraternal Order of Bartenders Website
McGann8	Undated	Fraternal Order of Bartenders Website

Table1 (Return to related document text**)**

Table2 (Return to related document text**)**

Statement [*62] Reference	Content	Non-Defamatory Portions
Brown3	"We've got a live one right here in Asbury, folks. A manager at Modine drugged a woman last night at another establishment. This isn't his first offense. Be	"Edit 1 has been removed. Edit 3: At last confirmation, Brent was in North Carolina . . . Edit 4: As of yesterday 8/20, he is believed to be back in NJ."

Statement [*62]	Content	Non-Defamatory Portions
Reference		
	careful and guard your drinks. And maybe let's let Modine know what their bartenders/managers are doing to young women in the community. Please share. Hold people accountable. Clean up the trash. Edit 2: Modine has now posted a comment about this employee being fired. Edit 1 has been removed. Edit 3: At last confirmation, Brent was in North Carolina. Please let anyone you may know in the bar communities know that this is a dangerous person with a long criminal record and repeated cases of assaulting women. Edit 4: As of yesterday 8/20, he is believed to be back in NJ. Please be careful and tell your friends to be careful."	
JValentino1	"FAQ section before y'all all ask the same damn questions: 'Who is Brent Comyack? What has he done?' Brent is from N.J. He has drugged, sexually assaulted, r*ped, etc[.] multiple women. He has also gotten a couple women pregnant (girlfriends **[*63]** mostly it seems) after providing false documentation about being sterile. He bragged about spreading chlamydia	"Brent is from N.J."

Statement [*62]	Content	Non-Defamatory Portions
Reference		
	'for fun.' There are other things you can find on his record. 'Is there any proof? Did anyone go to the police? Why isn't he behind bars?' Well obviously. There has been a handful of rape kits that came back positive. There are text messages from him laughing about the shit he's done. There are current court cases going on. Brent has been jumping from state to state to avoid arrest, court case, and further proof of his actions. I can tag people who have more information, photos of the kits and drug tests, screenshots, whatever you want. I don't think it's really about witch hunting the women though so please be prepared for the attitude you will get from people. We're tired of having to explain why women deserve to be safe. You can share or copy paste this to keep others aware. I don't mind. I just want people safe."	
lentino2	"Kylie he[']s in [A]sbury at the moment! He loves to move around when word gets loose"	"Kylie he[']s in [A]sbury at the moment!"
lentino	"NOT A 100% LEAD. AWAITING CONFIRMATION. BRENT C. is back in New	"NOT A 100% LEAD. AWAITING CONFIRMATION. BRENT C. is back in New

Statement [*62] Reference	Content	Non-Defamatory Portions
	Jersey. Currently believed to be in HILLSBOROUGH, NJ area. SHARE. [A]ny information helps. Keep our state rapist free"; "EDIT: DO NOT further contact Asbury Ale House, they claim to have him removed from the bar if he was to work there."	Jersey. Currently **[*64]** believed to be in HILLSBOROUGH, NJ area. SHARE."
McGann2	"That [I] don't have an answer to because I am not involved in it all I know is I hope his life is ruined like he ruined other people's lives"	"That [I] don't have an answer to because I am no involved in it"
McGann8	"His profile is active again and he is still a member of this group Brent Comyack"	"His profile is active a and he is still a member this group Brent Comyack

Table2 (Return to related document text)

Table3 (Return to related document text)

Statement Reference	Date	Location
Brown1	June 29, 2019	Facebook

Statement Reference	Date	Location
Brown2	August 15, 2019	Facebook
Brown3	June 29, 2019	Facebook

Statement Reference	Date	Location
Brown4	August 15, 2019	Facebook
Brown5	Undated	Facebook
JValentino1	August 21, 2019	Facebook

Statement Reference	Date	Location

Table3 (Return to related document text)

Table4 (Return to related document text)

Statement Reference	Content	Portions Concerning Comyack's Alleged Drugging and Assaulting of Giannella and Others

Statement Reference	Content	Portions Concerning Comyack's Alleged Drugging and Assaulting of Giannella and Others
Brown1	"A woman was drugged by someone that tends bar at @modineasbury last night and they're more concerned about their reputation as a small business than they are about one of their managers drugging someone! Are you serious???? Brent Comyack (see screenshots) drugged someone last night. He has a long history of being real scummy to women and there is a police report currently being filed against him. And this is how Modine responds. By being more worried about their reputation than the fact that they hired a rapist. Great work, #modineasbury. We won't be untagging anything. Expect more tags now."	"A woman was drugged by someone that tends bar @modine Asbury last night . . . Brent Comyack (see screenshots) drugged someone last night."
Brown2	"Calling out rapists is bullying, according to Facebook. Brent Comyack has **[*67]** a long criminal history and has drugged SEVERAL women in his history as a bartender. Don't let Facebook shut this down"	"Brent Comyack . . . has drugged SEVERAL women in his history as a bartender."
Brown3	"We've got a live one right here in Asbury, folks. A manager at Modine drugged a woman last	"A manager at Modine drugged a woman last night at another establishment . . . Please

Statement Reference	Content	Portions Concerning Comyack's Alleged Drugging and Assaulting of Giannella and Others
	night at another establishment. This isn't his first offense. Be careful and guard your drinks. And maybe let's let Modine know what their bartenders/managers are doing to young women in the community. Please share. Hold people accountable. Clean up the trash. Edit 2: Modine has now posted a comment about this employee being fired. Edit 1 has been removed. Edit 3: At last confirmation, Brent was in North Carolina. Please let anyone you may know in the bar communities know that this is a dangerous person with a long criminal record and repeated cases of assaulting women. Edit 4: As of yesterday 8/20, he is believed to be back in NJ. Please be careful and tell your friends to be careful."	let anyone you may know in the bar communities that this is a dangerous person with . . . repeated cases of assaulting women."
Brown4	"Brent Comyack is . . . reporting posts that mention what he's done. He **[*68]** is a predator. He fled the state once word got out. He is a scumbag."	"He fled the state once word got out."
Brown5	"[H]e's now joking on Facebook about being a rapist, fun fact. But the restaurant supposedly has a zero tolerance policy	"[H]e's now joking on Facebook about being a rapist, fun fact."

Statement Reference	Content	Portions Concerning Comyack's Alleged Drugging and Assaulting of Giannella and Others
	[eye roll emoji]"	
JValentino1	"FAQ section before y'all all ask the same damn questions: 'Who is Brent Comyack? What has he done?' Brent is from N.J. He has drugged, sexually assaulted, r*ped, etc[.] multiple women. He has also gotten a couple women pregnant (girlfriends mostly it seems) after providing false documentation about being sterile. He bragged about spreading chlamydia 'for fun.' There are other things you can find on his record. 'Is there any proof? Did anyone go to the police? Why isn't he behind bars?' Well **[*69]** obviously. There has been a handful of rape kits that came back positive. There are text messages from him laughing about the shit he's done. There are current court cases going on. Brent has been jumping from state to state to avoid arrest, court case, and further proof of his actions. I can tag people who have more information, photos of the kits and drug tests, screenshots, whatever you want. I don't think it's really about witch hunting	"FAQ section before y'all all ask the same damn questions: 'Who is Brent Comyack? What has he done?' . . . He has drugged, sexually assaulted, r*ped, etc[.] multiple women. He has also gotten a couple women pregnant (girlfriends mostly it seems) after providing false documentation about being sterile. He bragged about spreading chlamydia 'for fun.' . . . There has been a handful of rape kits that came back positive. There are text messages from him laughing about the shit he's done."

Statement Reference	Content	Portions Concerning Comyack's Alleged Drugging and Assaulting of Giannella and Others
	the women though so please be prepared for the attitude you will get from people. We're tired of having to explain why	

Table4 (Return to related document text**)**

Table5 (Return to related document text**)**

JValentino2	Undated	Facebook
NValentino 1	Between June 29, 2019 and July 13, 2019	Facebook
NValentino 2	Between June 29, 2019 and July 13, 2019	Facebook

NValentino 3	Between June 29, 2019 and July 13, 2019	Facebook
NValentino 4	Between June 29, 2019 and July 13, 2019	Facebook

NValentino 5	July 1, 2019	Twitter
McGann2	Undated	Fraternal Order of Bartenders Website

Table5 (Return to related document text**)**

Table6 (Return to related document text**)**

	women deserve to be safe. You can share or copy paste this to keep others aware. I don't mind. I just want people safe."	
JValentino2	"Kylie he[']s in [A]sbury at the moment! He loves to move around when word gets loose"	"He loves to move around when word gets loose"
NValentino 1	"First he lies about being sterile **[*70]** and impregnates multiple women then ghosting them. Tries to hit on my [girlfriend] in front of me (which we both laughed at) but he's clearly a [expletive-]ing creep[.] I've also heard he's gotten girls drink or high to sleep	"First he lies about being sterile and impregnates multiple women then ghosting them. Tries to hit on my [girlfriend] in front of me (which we both laughed at) . . . I've also heard he's gotten girls drink or high to sleep with them."

	with them. And now this [shrug emoji] date rape ain't cool .. Also for his gang of apologists who defend him fuck y'all too you're part of the problem."	
NValentino 2	"NOT A 100% LEAD. AWAITING CONFIRMATION. BRENT C. is back in New Jersey. Currently believed to be in HILLSBOROUGH, NJ area. SHARE. [A]ny information helps. Keep our state rapist free"; "EDIT: DO NOT further contact Asbury Ale House, they claim to have him removed from the bar if he was to work there."	"Keep our state rapist free"
NValentino 3	"In the moment of all this time of hatred I just wanna say thank y'all to everyone for banding together. Getting a rapist to practically be publicly demonized (as he should be), raising **[*71]** awareness, and tracking moves is a hard task. I couldn't have done this without everyone's support and following moves, my group of super snoopers, and the support of everyone. Y'all are the best, love y'all. I feel like a damn cult leader but it's actually for a good ass cause. Let's keep it rollin!"	"Getting a rapist to practically be publicly demonized (as he should be), raising awareness, and tracking moves is a hard task."
NValentino 4	"!!!!UPDATE!!!! The girl who was drugged got her	"!!!!UPDATE!!!! The girl who was drugged got her

	police drug test back and it was positive for methadone. Which was slipped into her water by him. .... If you support a man who drugs women "alleged" (which it's not. There's so many people who've come forth they can't be lying). Who's forced himself on, taken advantage, and assaulted women. If you're friends with him, if you think he's telling the truth, if you are feeding him information you're dead to me."	police drug test back and it was positive for methadone. Which was slipped into her water by him. .... If you support a man who drugs women "alleged" (which it's not. There's so many people who've come forth they can't be lying). Who's forced himself on, taken advantage, and assaulted women."
NValentino 5	"There is power in numbers and we need all the evidence against Brent we can get. If you are comfortable sharing your experiences with Brent Comyack please message me and I will put you in contact with the people who need it"	"There is power in numbers and we need all the evidence **[*72]** against Brent we can get. If you are comfortable sharing your experiences with Brent Comyack please message me and I will put you in contact with the people who need it"
McGann2	"That [I] don't have an answer to because I am not involved in it all I know is I hope his life is ruined like he ruined other people's lives"	"[A]ll I know is I hope his life is ruined like he ruined other people's lives"

Table6 (Return to related document text**)**

Table7 (Return to related document text**)**

Statement Reference	Date	Location
Brown1	June 29, 2019	Facebook

Statement Reference	Date	Location
Brown2	August 15, 2019	Facebook
Brown3	June 29, 2019	Facebook

Statement Reference	Date	Location
JValentino1	August 21, 2019	Facebook

Statement Reference	Date	Location

Table7 (Return to related document text)

Table8 (Return to related document text)

Statement Reference	Content	Portions Concerning Comyack's Alleged Criminal Past
Brown1	"A woman was drugged by someone that tends bar at @modineasbury last night and they're more concerned about their	"[A]nd there is a police report currently being filed against him."

Statement Reference	Content	Portions Concerning Comyack's Alleged Criminal Past
	reputation as a small business than they are about one of their managers drugging someone! Are you serious???? Brent Comyack (see **[*73]** screenshots) drugged someone last night. He has a long history of being real scummy to women and there is a police report currently being filed against him. And this is how Modine responds. By being more worried about their reputation than the fact that they hired a rapist. Great work, #modineasbury. We won't be untagging anything. Expect more tags now."	
Brown2	"Calling out rapists is bullying, according to Facebook. Brent Comyack has a long criminal history and has drugged SEVERAL women in his history as a bartender. Don't let Facebook shut this down."	"Brent Comyack has a long criminal history"
Brown3	"We've got a live one right here in Asbury, folks. A manager at Modine drugged a woman last night at another establishment. This isn't his first offense. Be careful and guard your drinks. And maybe let's let Modine know what	"This isn't his first offense . . . Please let anyone you may know in the bar communities know that this is a dangerous person with a long criminal record"

Statement Reference	Content	Portions Concerning Comyack's Alleged Criminal Past
	their bartenders/managers are doing to young women in the community. Please share. Hold people accountable. Clean up the trash. Edit 1 has been removed. Edit 3: At last confirmation, Brent was in North Carolina. Please let anyone you may know in the bar communities **[*74]** know that this is a dangerous person with a long criminal record and repeated cases of assaulting women. Edit 4: As of yesterday 8/20, he is believed to be back in NJ. Please be careful and tell your friends to be careful."	
JValentino1	"FAQ section before y'all all ask the same damn questions: 'Who is Brent Comyack? What has he done?' Brent is from N.J. He has drugged, sexually assaulted, r*ped, etc[.] multiple women. He has also gotten a couple women pregnant (girlfriends mostly it seems) after providing false documentation about being sterile. He bragged about spreading chlamydia 'for fun.' There are other things you can find on his record. 'Is there any proof? Did anyone go to the police? Why isn't he behind bars?' Well	"There are other things you can find on his record. 'Is there any proof? Did anyone go to the police? Why isn't he behind bars?' Well obviously . . . There are current court cases going on. Brent has been jumping from state to state to avoid arrest, court case, and further proof of his actions."

Statement Reference	Content	Portions Concerning Comyack's Alleged Criminal Past
	obviously. There has been a handful of rape kits that came back positive. There are text messages from him laughing about the shit he's done. There are current court cases going on. Brent has been jumping from state to state **[*75]** to avoid arrest, court case, and further proof of his actions. I can tag people who have more information, photos of the kits and drug tests, screenshots, whatever you want. I don't think it's really about witch hunting the women though so please be prepared for the attitude you will get from people. We're tired of having to explain why women deserve to be safe. You can share or copy paste this to keep others aware. I don't mind. I just want people safe."	

Table8 (Return to related document text**)**

Table9 (Return to related document text**)**

Statement Reference	Date	Location
Brown1	June 29, 2019	Facebook

Statement Reference	Date	Location
Brown2	August 15, 2019	Facebook
Brown3	June 29, 2019	Facebook

Statement Reference	Date	Location
Brown4	August 15, 2019	Facebook
Brown5	Undated	Facebook
Brown6	Undated	Facebook
JValentino1	August 21, 2019	Facebook

Statement Reference	Date	Location

Statement Reference	Date	Location
JValentino3	Undated	Facebook
JValentino4	Undated	Facebook
NValentino 1	Between June 29, 2019 and July 13, 2019	Facebook
NValentino 2	Between June 29, 2019 and July 13, 2019	Facebook
NValentino	Between	Facebook

Statement Reference	Date	Location
3	June 29, 2019 and July 13, 2019	
NValentino 4	Between June **[*82]** 29, 2019 and July 13, 2019	Facebook
NValentino 5	July 1, 2019	Twitter

Statement Reference	Date	Location
McGann1	Undated	Fraternal Order of Bartenders Website
McGann2	Undated	Fraternal Order of Bartenders Website
McGann5	Undated	Fraternal Order of Bartenders Website
McGann7	Undated	Fraternal Order of Bartenders Website

Table9 (Return to related document text**)**

Table10 (Return to related document text**)**

Statement Reference	Content	Embedded Opinion
Brown1	"A woman was drugged by someone that tends bar at @modineasbury last night and they're more concerned about their reputation as a small	"He has a long history of being real scummy to women . . . And this is how Modine responds . . . Great work, #modineasbury. We won't

Statement Reference	Content	Embedded Opinion
	business than they are about one of their managers drugging someone! Are you serious???? Brent Comyack (see screenshots) drugged someone last night. He has a long history of being real scummy to women and there is a police report currently being filed against him. And this is how Modine responds. By being more worried about their reputation than the fact that they hired a rapist. Great work, #modineasbury. We won't be untagging anything. Expect more tags now."	be untagging anything. Expect more tags now."
Brown2	"Calling out rapists is bullying, according to Facebook. Brent Comyack has a long criminal history and has drugged SEVERAL women **[*83]** in his history as a bartender. Don't let Facebook shut this down."	"Don't let Facebook shut this down."
Brown3	"We've got a live one right here in Asbury, folks. A manager at Modine drugged a woman last night at another establishment. This isn't his first offense. Be careful and guard your drinks. And maybe let's let Modine know what their bartenders/managers are doing to young women	"We've got a live one right here in Asbury, folks . . . Be careful and guard your drinks. And maybe let's let Modine know what their bartenders/managers are doing to young women in the community. Please share. Hold people accountable. Clean up the trash . . . Please be careful and tell your friends to be

Statement Reference	Content	Embedded Opinion
	in the community. Please share. Hold people accountable. Clean up the trash. Edit 2: Modine has now posted a comment about this employee being fired. Edit 1 has been removed. Edit 3: At last confirmation, Brent was in North Carolina. Please let anyone you may know in the bar communities know that this is a dangerous person with a long criminal record and repeated cases of assaulting women. Edit 4: As of yesterday 8/20, he is believed to be back in NJ. Please be careful and tell your friends to be careful."	careful."
Brown4	"Brent Comyack is . . . reporting posts **[*84]** that mention what he's done. He is a predator. He fled the state once word got out. He is a scumbag."	"He is a predator . . . He is a scumbag."
Brown5	"[H]e's now joking on Facebook about being a rapist, fun fact. But the restaurant supposedly has a zero tolerance policy [eye roll emoji]"	"But the restaurant supposedly has a zero tolerance policy [eye roll emoji]"
Brown6	"Lol Facebook changed their minds and the post was reinstated. Still brought back attention to it, so why not talk about it again!"	"Lol Facebook changed their minds and the post was reinstated. Still brought back attention to it, so why not talk about it again!"
JValentino1	"FAQ section before y'all all ask the same damn questions: 'Who is Brent	"I don't think it's really about witch hunting the women though so please

Statement Reference	Content	Embedded Opinion
	Comyack? What has he done?' Brent is from N.J. He has drugged, sexually assaulted, r*ped, etc[.] multiple women. He has also gotten a couple women pregnant (girlfriends mostly it seems) after providing false documentation about being sterile. He bragged about spreading chlamydia 'for **[*85]** fun.' There are other things you can find on his record. 'Is there any proof? Did anyone go to the police? Why isn't he behind bars?' Well obviously. There has been a handful of rape kits that came back positive. There are text messages from him laughing about the shit he's done. There are current court cases going on. Brent has been jumping from state to state to avoid arrest, court case, and further proof of his actions. I can tag people who have more information, photos of the kits and drug tests, screenshots, whatever you want. I don't think it's really about witch hunting the women though so please be prepared for the attitude you will get from people. We're tired of having to explain why	be prepared for the attitude you will get from people. We're tired of having to explain why women deserve to be safe. You can share or copy paste to keep others aware. I don't mind. I just want people safe."

Statement Reference	Content	Embedded Opinion
	women deserve to be safe. You can share or copy paste this to keep others aware. I don't mind. I just want people safe."	
JValentino3	"That's what I'm sayin [knife emoji] let's vigilant this"	"That's what I'm sayin [knife emoji] let's vigilant this"
JValentino4	"[U]r too cute for him omg"	"[U]r too cute for him omg"
NValentino 1	"First he lies about being sterile and impregnates multiple women then ghosting them. Tries to hit on my [girlfriend] in front **[*86]** of me (which we both laughed at) but he's clearly a [expletive-]ing creep[.] I've also heard he's gotten girls drink or high to sleep with them. And now this [shrug emoji] date rape ain't cool .. Also for his gang of apologists who defend him fuck y'all too you're part of the problem."	"[B]ut he's clearly a [expletive-]ing creep . . . Also for his gang of apologists who defend him fuck y'all too you're part of the problem."
NValentino 2	"NOT A 100% LEAD. AWAITING CONFIRMATION. BRENT C. is back in New Jersey. Currently believed to be in HILLSBOROUGH, NJ area. SHARE. [A]ny information helps. Keep our state rapist free"; "EDIT: DO NOT further contact Asbury Ale House, they claim to have him removed from the bar if he was to work there."	"[A]ny information helps"; "EDIT: DO NOT further contact Asbury Ale House, they claim to have him removed from the bar if he was to work there."
NValentino	"In the moment of all this	"In the moment of all this

Statement Reference	Content	Embedded Opinion
3	time of hatred I just wanna say thank y'all to everyone for banding together. Getting a rapist to practically be publicly demonized (as he should be), raising awareness, and tracking moves is a hard task. I couldn't have done this without everyone's support and following moves, my group of super snoopers, and the support of everyone. Y'all are the best, love y'all. I feel like a damn cult leader but it's actually for a good ass cause. Let's keep it rollin!"	time of hatred I just wanna say thank y'all to everyone for banding together . . . I couldn't have done this without everyone's support and following moves, my group of super snoopers, and the support **[*87]** of everyone. Y'all are the best, love y'all. I feel like a damn cult leader but it's actually for a good ass cause. Let's keep it rollin!"
NValentino 4	"!!!!UPDATE!!!! The girl who was drugged got her police drug test back and it was positive for methadone. Which was slipped into her water by him. .... If you support a man who drugs women "alleged" (which it's not. There's so many people who've come forth they can't be lying). Who's forced himself on, taken advantage, and assaulted women. If you're friends with him, if you think he's telling the truth, if you are feeding him information you're dead to me."	"If you're friends with him, if you think he's telling the truth, if you are feeding him information you're dead to me."
NValentino 5	"There is power in numbers and we need all the evidence against Brent we can get. If you are	"There is power in numbers and we need all the evidence against Brent we can get. If you are

Statement Reference	Content	Embedded Opinion
	comfortable sharing your experiences **[*88]** with Brent Comyack please message me and I will put you in contact with the people who need it"	comfortable sharing your experiences with Brent Comyack please message me and I will put you in contact with the people who need it"
McGann1	"I wouldn't want him working at a bar I work at or a bar near me. So yes I say blacklist him. Maybe they have called the police or maybe they were scared to come forward. Of course u can judge a book by its cover that's why books have them"	"I wouldn't want him working at a bar I work at or a bar near me. So yes I say blacklist him . . . Of course u can judge a book by its cover that's why books have them"
McGann2	"That [I] don't have an answer to because I am not involved in it all I know is I hope his life is ruined like he ruined other people's lives"	"[A]ll I know is I hope his life is ruined like he ruined other people's lives"
McGann5	"[W]ow what a prick"	"[W]ow what a prick"
McGann7	"[W]ell if you google 'Brent Comyack' you can see his picture and what a douche he looks like"	"[W]ell if you google 'Brent Comyack' you can see his picture and what a douche he looks like"

Table10 (Return to related document text**)**

Table11 (Return to related document text**)**

Statement Reference	Date	Location
Brown1	June 29, 2019	Facebook

Statement Reference	Date	Location
Brown2	August 15, 2019	Facebook
Brown3	June 29, 2019	Facebook

Statement Reference	Date	Location
Brown4	August 15, 2019	Facebook
Brown5	Undated	Facebook
JValentino1	August 21, 2019	Facebook

Statement Reference	Date	Location

Statement Reference	Date	Location
JValentino2	Undated	Facebook
NValentino 1	Between June 29, 2019 and July 13, 2019	Facebook
NValentino 2	Between June 29, 2019 and July 13, 2019 **[*97]**	Facebook
NValentino 3	Between June 29,	Facebook

Statement Reference	Date	Location
	2019 and July 13, 2019	
NValentino 4	Between June 29, 2019 and July 13, 2019	Facebook

Table11 (Return to related document text**)**

Table12 (Return to related document text**)**

Statement Reference	Content	Portions in Which the Fair Comment Privilege Potentially Applies
Brown1	"A woman was drugged by someone that tends bar at @modineasbury last night and they're more concerned about their reputation as a small business than they are about one of their managers drugging someone! Are you serious???? Brent Comyack (see screenshots) drugged someone last night. He has a long history of being real scummy to women and there is a police report currently being filed against him. And this is how Modine responds. By being more worried about their reputation than the fact that they hired a rapist. Great work, #modineasbury. We won't be untagging anything. Expect more tags now."	"A woman was drugged by someone that tends bar at @modineasbury last night and they're more concerned about their reputation as a small business than they are about one of their managers drugging someone! Are you serious???? Brent Comyack (see screenshots) drugged someone last night . . . [T]here is a police report currently being filed against him . . . By being more worried about their reputation than the fact that they hired a rapist."
Brown2 **[*98]**	"Calling out rapists is bullying, according to Facebook. Brent Comyack has a long criminal history and has drugged SEVERAL women in his history as a bartender. Don't let Facebook shut this down."	"Calling out rapists is bullying, according to Facebook. Brent Comyack has a long criminal history and has drugged SEVERAL women in his history as a bartender."
Brown3	"We've got a live one right here in Asbury, folks. A manager at Modine drugged a woman last night at another	"A manager at Modine drugged a woman last night at another establishment. This isn't his first offense . . . Edit 2:

Statement Reference	Content	Portions in Which the Fair Comment Privilege Potentially Applies
	establishment. This isn't his first offense. Be careful and guard your drinks. And maybe let's let Modine know what their bartenders/managers are doing to young women in the community. Please share. Hold people accountable. Clean up the trash. Edit 2: Modine has now posted a comment about this employee being fired. Edit 1 has been removed. Edit 3: At last confirmation, Brent was in North Carolina. Please let anyone you may know in the **[*99]** bar communities know that this is a dangerous person with a long criminal record and repeated cases of assaulting women. Edit 4: As of yesterday 8/20, he is believed to be back in NJ. Please be careful and tell your friends to be careful."	Modine has now posted a comment about this employee being fired . . . Please let anyone you may know in the bar communities know that this is a dangerous person with a long criminal record and repeated cases of assaulting women."
Brown4	"Brent Comyack is . . . reporting posts that mention what he's done. He is a predator. He fled the state once word got out. He is a scumbag."	"Brent Comyack is . . . reporting posts that mention what he's done . . . He fled the state once word got out."
Brown5	"[H]e's now joking on Facebook about being a rapist, fun fact. But the restaurant supposedly has a zero tolerance policy [eye roll emoji]"	"[H]e's now joking on Facebook about being a rapist, fun fact."
JValentino1	"FAQ section before y'all	"FAQ section before y'all

Statement Reference	Content	Portions in Which the Fair Comment Privilege Potentially Applies
	all ask the same damn questions: 'Who is Brent Comyack? What has he done?' Brent is from N.J. He has drugged, sexually assaulted, r*ped, etc[.] multiple women. He has also gotten a couple women pregnant (girlfriends mostly it seems) after providing false documentation about being sterile. He bragged about spreading chlamydia 'for fun.' There are other things you can find on his record. 'Is there any proof? Did anyone go to the police? Why isn't he behind bars?' Well obviously. There has been a handful of rape kits that came back positive. There are text messages from him laughing about the shit he's done. There are current court cases going on. Brent has been jumping from state to state to avoid arrest, court case, and further proof of his actions. I can tag people who have more information, photos of the kits and drug tests, screenshots, whatever you want. I don't think it's **[*101]** really about witch hunting the women though so please be prepared for the	all ask the same damn questions: 'Who is Brent Comyack? What has he done?' . . . He has drugged, sexually assaulted, r*ped, etc[.] multiple women. He has also gotten a couple women pregnant (girlfriends mostly it seems) after providing **[*100]** false documentation about being sterile. He bragged about spreading chlamydia 'for fun.' There are other things you can find on his record. 'Is there any proof? Did anyone go to the police? Why isn't he behind bars?' Well obviously. There has been a handful of rape kits that came back positive. There are text messages from him laughing about the shit he's done. There are current court cases going on. Brent has been jumping from state to state to avoid arrest, court case, and further proof of his actions. I can tag people who have more information, photos of the kits and drug tests, screenshots, whatever you want."

Statement Reference	Content	Portions in Which the Fair Comment Privilege Potentially Applies
	attitude you will get from people. We're tired of having to explain why women deserve to be safe. You can share or copy paste this to keep others aware. I don't mind. I just want people safe."	
JValentino2	"Kylie he[']s in [A]sbury at the moment! He loves to move around when word gets loose"	"He loves to move around when word gets loose"
NValentino 1	"First he lies about being sterile and impregnates multiple women then ghosting them. Tries to hit on my [girlfriend] in front of me (which we both laughed at) but he's clearly a [expletive-]ing creep[.] I've also heard he's gotten girls drink or high to sleep with them. And now this [shrug emoji] date rape ain't cool .. Also for his gang of apologists who defend him fuck y'all too you're part of the problem."	"First he lies about being sterile and impregnates multiple women then ghosting them. Tries to hit on my [girlfriend] in front of me (which we both laughed at) . . . I've also heard he's gotten girls drink or high to sleep with them."
NValentino 2	"NOT A 100% LEAD. AWAITING CONFIRMATION. BRENT C. is back in New Jersey. Currently believed to be in HILLSBOROUGH, NJ area. SHARE. [A]ny **[*102]** information helps. Keep our state rapist free"; "EDIT: DO NOT further contact Asbury Ale House,	"Keep our state rapist free"

Statement Reference	Content	Portions in Which the Fair Comment Privilege Potentially Applies
	they claim to have him removed from the bar if he was to work there."	
NValentino 3	"In the moment of all this time of hatred I just wanna say thank y'all to everyone for banding together. Getting a rapist to practically be publicly demonized (as he should be), raising awareness, and tracking moves is a hard task. I couldn't have done this without everyone's support and following moves, my group of super snoopers, and the support of everyone. Y'all are the best, love y'all. I feel like a damn cult leader but it's actually for a good ass cause. Let's keep it rollin!"	"Getting a rapist to practically be publicly demonized (as he should be), raising awareness, and tracking moves is a hard task."
NValentino 4	"!!!!UPDATE!!!! The girl who was drugged got her police drug test back and it was positive for methadone. Which was slipped into her water by him. .... If you support a man who drugs women "alleged" (which it's not. There's so many **[*103]** people who've come forth they can't be lying). Who's forced himself on, taken advantage, and assaulted women. If you're friends with him, if you think he's telling the truth, if you are feeding him information	"!!!!UPDATE!!!! The girl who was drugged got her police drug test back and it was positive for methadone. Which was slipped into her water by him. .... If you support a man who drugs women "alleged" (which it's not. There's so many people who've come forth they can't be lying). Who's forced himself on, taken advantage, and assaulted women."

Statement Reference	Content	Portions in Which the Fair Comment Privilege Potentially Applies
	you're dead to me."	

Table12 (Return to related document text**)**

Table13 (Return to related document text**)**

Statement Reference	Date	Location
Devaney1	July 6, 2019	Facebook, from Original Source Non-Party "123dontfukwithme" on Reddit
Devaney2	July 23, 2019	Facebook, from Original Source Unknown Non-Party on Instagram
NValentino1	Between June 29, 2019 and July 13, 2019	Facebook, from Original Source Non-Party Rae Ashlee

Statement Reference	Date	Location
McGann6	July 4, 2019	Fraternal Order of Bartenders Website, from Original Source Non-Party Kelly Davis

Table13 (Return to related document text)

Table14 (Return to related document text)

Statement Reference	Content	Modification or Addition by Party
Devaney1	Article entitled, "Women: If this man is your bartender in Asbury, don't trust his drinks"	None
Devaney2	"Brent Comyack is now in North Carolina[.] Spread the word of the rapey bartender!!!! Don't let him get by! [Instagram's **[*115]** indication of a geo-tag, stating a location of "NORTH CAROLINA], NORTH CAROLINA[.] Don't let bars let him in!"	None
NValentino 1	"Hey to all my friends who bar hop or hang out in [A]sbury heads up. This man has been rumored (with many girls coming out having a similar story) to [be] spiking girls drinks!"	*"First he lies about being sterile and impregnates multiple women then ghosting them. Tries to hit on my [girlfriend] in front of me (which we both laughed at) but he's clearly a [expletive-]ing creep[.] I've also heard he's gotten girls drink or high to sleep with them. And now this [shrug emoji] date rape ain't cool .. Also for his gang of apologists who defend him fuck y'all too you're part of the problem."*
McGann6	"*****Anonymous Post********* This didn't happen to me, but this has been the talk	*"I wouldn't want him working at a bar I work at or a bar near me. So yes I say blacklist him.* Maybe

Statement Reference	Content	Modification or Addition by Party
	of NJ for quite some time. Asbury Park and [s]urrounding areas, keep out for the name Brent Comyack. This guy has been known for quite some[ ]time for drugging and attempting to rape women **[*116]** (and apparently successful, if that's the word you want to use) He has an open charge against him as of currently and has recently lost his job due to it, but has been popping up at different places. I also have a friend who was sexually assaulted by him and has known of him doing this for about 10+ years. Keep your reputation in tact [sic] and his name off of your bartending roster."	they have called the police or maybe they were scared to come forward. *Of course u can judge a book by its cover that's why books have them"* *"That [I] don't have an answer to because I am not involved in it all I know is I hope his life is ruined like he ruined other people's lives"* "He was in town he is pretty much been blacklisted" "yeah he was fired" "*wow what a prick*" *"well if you google "Brent Comyack" you can see his picture and what a douche he looks like"* *"His profile is active again and he is still a member of this group Brent Comyack"* "[T]his is what he looks like, please make it known the kind of person he is"

Table14 (Return to related document text**)**

Mignogna v. Funimation Prods., LLC

Court of Appeals of Texas, Second District, Fort Worth

August 18, 2022, Delivered

No. 02-19-00394-CV

Reporter
2022 Tex. App. LEXIS 6087 *; 2022 WL 3486234

VICTOR MIGNOGNA, Appellant v. FUNIMATION PRODUCTIONS, LLC, JAMIE MARCHI, MONICA RIAL, AND RONALD TOYE, Appellees AND MONICA RIAL AND RONALD TOYE, Appellants v. VICTOR MIGNOGNA, Appellee

Subsequent History: Petition for review filed by, 11/14/2022

Prior History: [*1] On Appeal from the 141st District Court, Tarrant County, Texas. Trial Court No. 141-307474-19.

Case Summary

Overview
HOLDINGS: [1]-Appellees met their initial Texas Citizens Participation Act (TCPA) burden, in part because appellant failed to preserve his complaints about their evidence, and because appellant withdrew the principal evidence supporting his prima-facie burden before a hearing on appellees' TCPA dismissal motions, he was unable to meet his TCPA burden on any of appellees' claims; accordingly, the trial court did not err by granting appellees' TCPA motions, by imposing sanctions on appellant, or by awarding attorney's fees to appellees; [2]-The trial court abused its discretion when it awarded to two appellees collectively just over one-third of their requested amount of attorney's fees, a significant reduction in light of, among other things, a third appellee's counsel's testimony that he had made use of their additional work.

Outcome
Judgment affirmed in part and reversed and remanded in part.

Counsel: For Toye, Ronald, Rial, Monica, Appellees: Rusty J. O'Kane, J. Sean Lemoine, Jeffrey W. Hellberg, Jr., Casey S. Erick, Andrea Perez, Ethan Minshull.

For Mignogna, Victor, Appellant: Michael S. Martinez, Jim E. Bullock, An Lee Hsu, Ty Beard, Richard Ryan Sellers.

For Funimation Productions, LLC, Appellee: John D. Volney.

For Marchi, Jamie, Appellee: Samuel H. Johnson.

Judges: Before Sudderth, C.J.; Womack and Wallach, JJ. Memorandum Opinion by Justice Wallach. Concurring Memorandum Opinion by Chief Justice Sudderth. Concurring and Dissenting Memorandum Opinion by Justice Womack.

Opinion by: Mike Wallach

Opinion

MEMORANDUM OPINION

I. Introduction

The Texas Citizens Participation Act (TCPA) is an anti-SLAPP[1] statute intended "to encourage and

[1] "SLAPP" is an acronym for "Strategic Lawsuits Against Public Participation," *see Miller v. Schupp*, No. 02-21-00107-CV, 2022 Tex. App. LEXIS 93, 2022 WL 60606, at *1 n.1 (Tex. App.—Fort Worth Jan. 6,

safeguard the constitutional rights of persons to petition, speak freely, associate freely,[2] and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." Tex. Civ. Prac. & Rem. Code Ann. § 27.002. The TCPA "was intended to provide protection for the involvement of citizens in the exchange of ideas." *Bilbrey*, 2015 Tex. App. LEXIS 2359, 2015 WL 1120921, at *10. To that **[*2]** end, the TCPA provides a procedural mechanism for dismissal of lawsuits that could unjustifiably interfere with these rights. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.002.

Under the TCPA,[3] the first step in the statutory burden-shifting analysis is for a defendant-movant to show by a preponderance of the evidence that the plaintiff's claim is based on, relates to, or is in response to the movant's exercise of the rights of free speech, of association, or of petition. *See id.* § 27.005(b); *Ray v. Fikes*, No. 02-19-00232-CV, 2019 Tex. App. LEXIS 10584, 2019 WL 6606170, at *2 (Tex. App.—Fort Worth Dec. 5, 2019, pet. denied) (mem. op.).

If the defendant-movant satisfies its burden, then to avoid dismissal, the plaintiff-nonmovant must establish "by clear and specific evidence a prima[-]facie case for each essential element of the claim in question." Tex. Civ. Prac. & Rem. Code Ann. § 27.005(c); *TotalGen Servs., LLC v. Thomassen Amcot Int'l, LLC*, No. 02-20-00015-CV, 2021 Tex. App. LEXIS 471, 2021 WL 210845, at *2 (Tex. App.—Fort Worth Jan. 21, 2021, no pet.) (mem. op.). If the nonmovant satisfies its clear-and-specific, prima-facie burden, the movant may still have the claims dismissed by establishing each element of a valid defense to the claims. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.005(d); *SSCP Mgmt. v. Sutherland/Palumbo, LLC*, No. 02-19-00254-CV, 2020 Tex. App. LEXIS 10209, 2020 WL 7640150, at *3 (Tex. App.—Fort Worth Dec. 23, 2020, pet. denied) (mem. op. on reh'g). The application of this structured burden-shifting analysis controls this case.

Appellant Victor Mignogna sued Appellees Monica Rial, Ronald Toye, Jamie Marchi, and Funimation Productions, LLC,[4] for defamation, conspiracy, tortious interference with existing contracts, tortious interference **[*3]** with prospective business relations, and—as to Funimation—vicarious liability for Rial, Toye, and Marchi's actions based on their postings on Twitter. Appellees moved to dismiss Mignogna's claims under the TCPA,[5] and the trial court granted their motions. At a subsequent hearing, the trial court ordered Mignogna to pay litigation expenses and attorney's fees and imposed sanctions. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.009 (requiring that if the trial court orders dismissal under the TCPA, it shall award to the movant court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action and "sanctions against the party who brought the legal action as the court determines sufficient to deter the party who

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2022, no pet.) (mem. op.), which are civil actions brought for the purpose of, among other things, chilling public discussion. *Bilbrey v. Williams*, No. 02-13-00332-CV, 2015 Tex. App. LEXIS 2359, 2015 WL 1120921, at *7 (Tex. App.—Fort Worth Mar. 12, 2015, no pet.) (mem. op.).

[2] The TCPA defines the exercise of the rights of free speech and association as, respectively, "a communication made in connection with a matter of public concern" and a communication between individuals who "join together to collectively express, promote, pursue, or defend common interests." *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.001. The TCPA defines a communication as "the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic." *Id.*

[3] The most recent TCPA amendments became effective September 1, 2019, and September 1, 2021. *See* Act of May 17, 2019, 86th Leg., R.S., ch. 378, §§ 1-12, 2019 Tex. Gen. Laws 684, 684-87 (codified at Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001-.010); Act of May 27, 2021, 87th Leg., R.S., ch. 915, § 3.001 (codified at Tex. Civ. Prac. & Rem. Code Ann. § 27.010). Because the instant lawsuit was filed before the effective date of these amendments, it is governed by the pre-amendment version of the TCPA, and our citations refer to that version. *See* Act of May 21, 2011, 82nd Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961, 961-64, *amended by* Act of May 24, 2013, 83rd Leg., R.S., ch. 1042, 2013 Tex. Gen. Laws 2499, 2499-2500.

[4] Funimation, a Sony Pictures Entertainment subsidiary, specializes in the dubbing and distribution of foreign content, mostly anime.

[5] Appellees relied only on their free-speech and association rights in their TCPA motions.

brought the legal action from bringing similar actions").

In eight points, Mignogna appeals, complaining that the trial court erred by finding that Appellees' evidence was legally and factually sufficient to satisfy their TCPA "first step" burden based on their evidence's lack of admissibility; by dismissing his claims; by refusing to consider his second amended petition; and by ordering him to pay sanctions and attorney's fees.

On the record before us, Appellees met their initial TCPA **[*4]** burden, in part because Mignogna failed to preserve his complaints about their evidence, which the trial court considered along with Mignogna's allegations in his first amended petition. *See Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017) (stating that in determining whether the TCPA applies, the court initially looks to the plaintiff's allegations). And because Mignogna withdrew the principal evidence supporting his prima-facie burden before the hearing on Appellees' TCPA motions, he was unable to meet his TCPA burden on any of Appellees' claims. Accordingly, the trial court did not err by granting Appellees' TCPA motions, by imposing sanctions on Mignogna, or by awarding attorney's fees to Appellees, and we affirm this portion of the trial court's judgment.

On cross-appeal, Rial and Toye complain that the trial court should have awarded to them the full amount of attorney's fees they requested. Because we hold that the trial court's order on attorney's fees is against the great weight and preponderance of the evidence, we reverse this portion of the trial court's judgment and remand the case to the trial court on that issue. *See* Tex. R. App. P. 44.1(b).

II. Factual Background

For more than a decade, Mignogna, Rial, and Marchi worked as anime voice actors **[*5]** for Funimation and appeared together at fan conventions. During that time, various rumors about Mignogna's behavior had circulated to the point that he held a "rumor panel" at a 2010 fan convention to try to dispel them.

More rumors resurfaced on January 16, 2019, the same day that Funimation's major anime film starring Mignogna's voice in the lead debuted. That day, someone with the Twitter handle @hanleia tweeted, "Hey @Funimation why do you employ a known pedophile" with a link to allegations of sexual misconduct by Mignogna at anime conventions. Another person, with the Twitter handle @ActuallyAmelia tweeted, "How is Vic Mignogna still working in anime? Every time assault in fandom comes up in a conversation, no matter who I talk to, so does his name. Every time. At some point an open secret becomes common knowledge and inaction becomes inexcusable." Mignogna did not sue @hanleia or @ActuallyAmelia or any of the online magazines covering the allegations—Polygon, Anime News Network, and Gizmodo—for defamation. Instead, after meeting online with his fan club and encouraging them to speak of their positive experiences with him, Mignogna posted a tweet on January 20, issuing what he **[*6]** characterized as a "generic" apology for unintentionally offending anyone.

Funimation and its parent company began an investigation and terminated Mignogna's contract on January 29. Funimation commented about Mignogna's termination in a tweet on February 11. During the Mignogna-related social-media maelstrom between January and February 2019, Rial, Marchi, and Rial's fiancé Toye published some tweets,[6] as did Mignogna, whose fans paid into a GoFundMe account, "Vic Kicks Back," set up by Nick Rekeita on February 19, to cover Mignogna's litigation expenses.[7] Mignogna sued Funimation, Rial, Toye, and Marchi in April 2019.

III. Procedural complaints

We begin with Mignogna's procedural complaints

[6] We will address the subject tweets in our TCPA analysis below.

[7] By the time of the attorney's-fees hearing in November 2019, Mignogna's GoFundMe account contained $261,700.

because they are dispositive of his appeal. We review most procedural complaints for an abuse of discretion. *See In re Mahindra, USA Inc.*, 549 S.W.3d 541, 550 (Tex. 2018) (orig. proceeding) ("The abuse of discretion standard is []typically applied to procedural and other trial management determinations[.]" (quoting *In re Doe*, 19 S.W.3d 249, 253 (Tex. 2000)). A trial court abuses its discretion if it acts without reference to any guiding rules or principles—that is, if its act is arbitrary or unreasonable. *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007); *Cire v. Cummings*, 134 S.W.3d 835, 838-39 (Tex. 2004). A court's failure to analyze or apply the law correctly is an abuse of discretion. *In re Acad., Ltd.*, 625 S.W.3d 19, 25 (Tex. 2021) (orig. **[*7]** proceeding).

The abuse-of-discretion standard governs amended petitions, *see Dunnagan v. Watson*, 204 S.W.3d 30, 38 (Tex. App.—Fort Worth 2006, pet. denied), and evidentiary rulings, *see Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 347 (Tex. 2015). In contrast, a trial court generally has a ministerial duty to enforce a Rule 11 agreement once it exercises its discretion to determine the agreement's validity. *See In the Interest of I.G.*, No. 02-21-00119-CV, 2021 Tex. App. LEXIS 6678, 2021 WL 3556955, at *3 (Tex. App.—Fort Worth Aug. 12, 2021, pet. denied) (mem. op.); *see also Univ. of Tex. v. Ramos*, No. 13-11-00302-CV, 2012 Tex. App. LEXIS 707, 2012 WL 256137, at *3 (Tex. App.—Corpus Christi—Edinburg Jan. 26, 2012, pet. denied) (mem. op.) ("Where there is a valid Rule 11 agreement that is not subject to any exception such as fraud or mistake, the trial court has a ministerial duty to enforce its terms.").

A. Mignogna's late-filed second amended petition

In his sixth point, Mignogna argues that the trial court erred by not considering his second amended petition and its attachments in deciding whether he had met his burden to defeat Appellees' TCPA motions.

Funimation filed its TCPA motion on July 1, 2019. Rial, Toye, and Marchi filed their TCPA motions on July 19. The motions were originally set for a hearing on August 8, but the parties agreed to move the hearing to September 6 to allow Mignogna more time to respond. On August 6, the parties signed a Rule 11 agreement wherein they agreed that Mignogna would file his response to the TCPA motions by August 30. *See* Tex. R. Civ. P. 11.

According to the subsequently filed "Plaintiff's Motion for Leave to File **[*8]** Late Response to Defendants' TCPA Motions to Dismiss Due to Technical Issues," Mignogna's counsel unsuccessfully attempted to file Mignogna's TCPA response just after midnight on Saturday, August 31. He successfully served Marchi's counsel, however, who asked him to provide a certified copy of all notary-book pages for the notarizations performed by him on August 30, the date that the affidavits of Mignogna, Chuck Huber, and Christopher Slatosch—which were attached to Mignogna's TCPA response—were signed according to Mignogna's counsel's notary stamp. At 9:04 a.m. on September 2, Rial and Toye's counsel asked Mignogna's counsel for an explanation of how Mignogna, Huber, and Slatosch could have signed their affidavits in his presence when none of them were in Tyler with him on August 30.

Mignogna's counsel successfully filed the TCPA response at midnight on September 3, the day after Labor Day, along with a motion for leave to file the late response due to technical issues. In addition to the three affidavits described above, Mignogna's counsel attached to the TCPA motion the depositions of Mignogna, Rial, and Toye, along with 342 tweets that were attached as exhibits to Toye's deposition; **[*9]** the unsworn declaration of E.M.,[8] a convention representative who wrote the declaration in response to statements about her by the CEO of the Kawaii Kon Convention, whose affidavit was

[8] We use initials for the names of the various nonparty affiants involved in the sexual-harassment allegations to protect their privacy. *See* Tex. R. App. P. 9.8 cmt.

attached to Rial and Toye's TCPA motion;[9] and an affidavit by Stan Dahlin regarding his recollection (none) of an incident involving Mignogna that Rial had described as having occurred at the November 2007 Izumicon—a total of eight exhibits.

When Mignogna's counsel filed the TCPA response at midnight on September 3,[10] he simultaneously filed a second amended petition containing twenty new paragraphs of factual allegations. To the second amended petition, he attached seventeen exhibits, which he described as "prima[-]facie evidence sufficient to prove each element of each claim" and referenced the exhibits in eighteen of the petition's paragraphs. Nine of the seventeen exhibits contained evidence that was not attached to the TCPA response. The remaining eight exhibits consisted of three unsworn declarations (from Mignogna, Huber, and Slatosch, with the same contents as their affidavits), the three depositions, E.M.'s unsworn declaration, and Dahlin's affidavit.

Forty-five minutes after filing the TCPA response **[*10]** and second amended petition, Mignogna's counsel replied to opposing counsel's September 2 affidavit inquiry, stating that he would withdraw the three affidavits and that they had been "mistakenly submitted with defects in form." He filed a notice of withdrawal of the affidavits around half an hour later. At the TCPA hearing on September 6, Mignogna's counsel stated that he had filed the second amended petition after opposing counsel notified him of the defective affidavits.

Appellees objected to Mignogna's late filing of his TCPA response, to the filing of his second amended petition, and to the attempted late submission of evidence, citing surprise and their mutually agreed August 30 deadline. *See* Tex. R. Civ. P. 11, 63. Funimation also argued that under Rule of Civil Procedure 59, Mignogna could not attempt to meet his evidentiary burden by attaching evidence to his second amended petition. *See* Tex. R. Civ. P. 59 (allowing parties to make only certain items—"notes, accounts, bonds, mortgages, records, and all other written instruments, constituting, in whole or in part" a claim or defense—part of the pleadings by attaching them to the petition or answer). *But see Fawcett v. Grosu*, 498 S.W.3d 650, 659-60 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (op. on reh'g) (reviewing TCPA nonmovant's live pleadings and exhibits incorporated **[*11]** therein when movants failed to object).

In ruling on the TCPA motions, the trial court granted Mignogna's motion to late-file the TCPA response and deemed it timely filed but stated that because Mignogna had withdrawn the three affidavits, it did not consider them—or any evidence attached to the second amended petition. Mignogna's remaining TCPA evidence consisted of the depositions, E.M.'s declaration, and Dahlin's affidavit.

The record reflects that Mignogna essentially tried to use an amended pleading as a late TCPA response to remedy his lack of evidence and thereby avoid the parties' Rule 11 agreement deadline. The trial court has a ministerial duty to enforce a valid Rule 11 agreement, *Kerulis v. Granbury Lake Props.*, No. 2-05-247-CV, 2006 Tex. App. LEXIS 5720, 2006 WL

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[9] In the affidavit attached to Rial and Toye's TCPA motion, Faisal Ahmed, CEO of the Kawaii Kon Convention and Anime Weekend Atlanta, averred that, among other things, in 2015, E.M., a volunteer at Anime Weekend Atlanta who was Mignogna's "personal handler/assistant" and had been a die-hard Mignogna fan, asked him to not assign her to Mignogna because "he was not who [she] thought he was," and when Ahmed pushed for details, "she was hesitant and uncomfortable to say anything." Ahmed stated that he learned later that year from someone else that Mignogna had forcibly kissed E.M. without her consent.

In her unsworn declaration, E.M. denied having ever been Mignogna's personal handler/assistant or die-hard fan and declared that she had no recollection of asking Ahmed not to assign her to Mignogna. E.M. stated that she had made the request to the director of guest relations in charge of the American and Japanese guest handlers at Anime Weekend Atlanta and several of Ahmed's other conventions because she "was tired of being 'pigeonholed' into handling [Mignogna] at conventions" and "just wanted a change and the opportunity to work with other guests." She further stated that she had never been afraid of Mignogna and that, contrary to Ahmed's affidavit, Mignogna had "never 'forcibly kissed [her] without [her] consent.'"

[10] As pointed out by Rial and Toye's appellate counsel, although Mignogna's counsel informed the trial court that his TCPA response was late because of "technical issues," the TCPA response itself was "rife with missing citations, incomplete arguments, and other errors."

1791617, at *3 (Tex. App.—Fort Worth June 29, 2006, no pet.) (mem. op.), and Mignogna did not argue in the trial court or in this appeal that the parties' Rule 11 agreement setting a deadline for the TCPA response—and therefore evidence—was invalid. Accordingly, we hold that the trial court did not abuse its discretion by refusing to consider Mignogna's second amended petition and attachments filed in violation of the Rule 11 agreement. *See EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 91 (Tex. 1996) (orig. proceeding);[11] *Neely v. Allen*, No. 14-19-00706-CV, 2021 Tex. App. LEXIS 4189, 2021 WL 2154125, at *6 (Tex. App.—Houston [14th Dist.] May 27, 2021, no pet.) (mem. op.) (citing *EZ Pawn* for the proposition that when affidavits are filed late in violation of a Rule 11 agreement on deadlines, and **[*12]** the opposing party seeks enforcement of the agreement in the trial court, neither the trial court nor the court of appeals can consider the affidavits). Because the trial court did not abuse it discretion by excluding Mignogna's second amended petition as being in violation of the parties' Rule 11 agreement, we need not address Mignogna's alleged Rule 59 violation. *See* Tex. R. App. P. 47.1. We overrule Mignogna's sixth point.

B. The trial court's evidentiary rulings

In his seventh point, Mignogna enrobes his TCPA sufficiency complaint about Appellees' motions within his argument that the trial court should have struck Funimation's and Rial and Toye's evidence.[12] However, he ignores that in her TCPA motion, Marchi incorporated and adopted by reference all of the evidence attached by Funimation and by Rial and Toye to their respective TCPA motions to prove Mignogna's status as a public figure and that their respective statements were made on a matter of public concern. Mignogna did not object to Marchi's evidence or to her incorporation and adoption of the other parties' evidence, and he does not complain about Marchi's evidence on appeal.

Because Marchi's evidence (and Mignogna's own evidence) generally established **[*13]** his public-figure status and the matters of public concern, the error, if any, was harmless. *See* Tex. R. App. P. 44.1(a); *see also Bay Area Healthcare Grp., Ltd. v. McShane*, 239 S.W.3d 231, 235 (Tex. 2007) (explaining that to preserve error for appellate review, a party must timely and specifically object to the evidence and obtain a ruling and that error is waived if the party allows the evidence to be introduced without objection); *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 907 (Tex. 2004) (stating that the general rule is that error in the admission of evidence is deemed harmless if the objecting party subsequently permits the same or similar evidence to be introduced without objection). We overrule Mignogna's seventh point without reaching the merits of his evidentiary arguments.

Because Mignogna raises no other challenge to whether Appellees met their initial TCPA burden, we consider that burden established for our analysis.[13]

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[11] In *EZ Pawn*, the parties entered a Rule 11 agreement whereby the defendant agreed to delay the hearing on its motion to compel so long as the plaintiff filed his response to the motion at least one *week* before the hearing. 934 S.W.2d at 91. The plaintiff did not file his response until one *day* before the hearing, and the defendant sought to enforce the Rule 11 agreement at the hearing. *Id.* The supreme court held that neither the trial court nor the court of appeals should have considered an affidavit filed in violation of the Rule 11 agreement. *Id.*

[12] That is, Mignogna argues that the trial court "considered inadmissible evidence" in determining that he was a public figure and in determining that Funimation's and Rial and Toye's tweets related to a public controversy under the TCPA. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.001(7) (including in definition of "matter of public concern"—for purposes of TCPA applicability—that an issue relates to a "public figure").

[13] Beyond his evidentiary complaints in his seventh point, Mignogna does not challenge the applicability of the TCPA to his defamation claim based on Appellees' statements. As pointed out by Rial and Toye in their appellate brief, "Mignogna's Brief barely mentions 'Step 1' of the TCPA analysis, presumably because his Petition, together with the evidence and affidavits, show unequivocally that he sued Appellees for engaging in two prongs of protected communications: the rights to associate and speak freely." The record reflects that the TCPA applies to Appellees' statements in that all of the statements of which Mignogna complained in his first amended petition were made in a public forum (Twitter) to the anime community and other voice actors about matters of health and safety—Mignogna's alleged inappropriate sexual behavior with fans (including underage fans), convention workers, and voice actors—as part of a public discussion involving the

IV. TCPA Analysis

In his first, second, third, fourth, and fifth points, Mignogna argues that he met his burden to establish a prima-facie case for each essential element of each of his claims. We review de novo a trial court's ruling on a TCPA motion. *UATP Mgmt., LLC v. Leap of Faith Adventures, LLC*, No. 02-19-00122-CV, 2020 Tex. App. LEXIS 8186, 2020 WL 6066197, at *2 (Tex. App.—Fort Worth Oct. 15, 2020, pet. denied) (mem. op.) (citing *Bevings v. Beadles*, 563 S.W.3d 399, 404 (Tex. App.—Fort Worth 2018, pet. denied)); *PNC Inv. Co., LLC v. Fiamma Statler, LP*, No. 02-19-00037-CV, 2020 Tex. App. LEXIS 7212, 2020 WL 5241190, at *3 (Tex. App.—Fort Worth Sept. 3, 2020, no pet.) (mem. op). In our review, we consider the pleadings **[*14]** and supporting and opposing affidavits stating the facts on which the liability is based. *Bilbrey*, 2015 Tex. App. LEXIS 2359, 2015 WL 1120921, at *8.

Regarding the nonmovant's burden to establish by "clear and specific evidence a prima[-]facie case" for each essential element of his claims, "prima[-]facie case" is given its traditional legal meaning, which is evidence sufficient as a matter of law to establish a given fact "if it is not rebutted or contradicted." *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015) (orig. proceeding). It is the "minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *Id.* (citation and internal quotations omitted); *see also Miller v. Watkins*, No. 02-20-00165-CV, 2021 Tex. App. LEXIS 1879, 2021 WL 924843, at *8 (Tex. App.—Fort Worth Mar. 11, 2021, no pet.) (mem. op.). "Clear and specific evidence" is not defined by either the TCPA or the common law, but our sister court has aptly summarized it as follows:

> [P]roof by clear and specific evidence is not simply "fair notice" of a claim. [citing *Lipsky*, 460 S.W.3d] at 590. Rather, under the clear and specific evidence standard, a plaintiff must provide enough detail to show the factual basis for the plaintiff[']s claim. *Id.* at 591. This is not an elevated standard, does not categorically reject circumstantial evidence, and does not impose a higher burden of proof than that required of the plaintiff at trial. *Id.*

Harper v. Best, 493 S.W.3d 105, 114 (Tex. App.—Waco 2016), *aff'd as modified* ***[*15]***, 516 S.W.3d 1 (Tex. 2018). Conclusory statements and speculative evidence, however, will not support the nonmovant's burden. *Mogged v. Lindamood*, No. 02-18-00126-CV, 2020 Tex. App. LEXIS 9445, 2020 WL 7074390, at *9 (Tex. App.—Fort Worth Dec. 3, 2020, pet. denied) (en banc mem. op. on reh'g); *Miller*, 2021 Tex. App. LEXIS 1879, 2021 WL 924843, at *8.

The TCPA does not forbid using circumstantial evidence or rational inferences to establish a prima-facie case, but an inference is not reasonable if it is premised on mere suspicion or if it is susceptible to multiple, equally probable inferences, requiring the factfinder to guess to reach a conclusion. *Mogged*, 2020 Tex. App. LEXIS 9445, 2020 WL 7074390, at *13 (quoting *Suarez v. City of Tex. City*, 465 S.W.3d 623, 634 (Tex. 2015)).

A. Defamation

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anime-and voice-actor community. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001(2), (3), (7)(A), .005(b); *Ray*, 2019 Tex. App. LEXIS 10584, 2019 WL 6606170, at *2.

The record also supports the trial court's finding that Mignogna met the general-purpose public-figure threshold of having "achieved such pervasive fame or notoriety" that he was a "public figure[] for all purposes and in all contexts" for defamation purposes. *Lane v. Phares*, 544 S.W.3d 881, 886 (Tex. App.—Fort Worth 2018, no pet.); *see* Tex. Civ. Prac. & Rem. Code Ann. § 27.001(7)(D). Mignogna had been voicing Broly in the anime series *Dragon Ball Z* since 2004 and had voiced his most famous character, Edward Elric, in *Fullmetal Alchemist*, which ended in 2009. He had also provided voice characters for so many video games that he no longer "ke[pt] track anymore," and he had voiced Broly in the *Dragon Ball Z* video games. By his own admission, he had voiced "hundreds of characters" and had been hired repeatedly for fifteen years, and his Internet Movie Database listing showed that he had been in over 356 productions. He also played Captain Kirk and self-funded the first of eleven episodes in a fan-made live-action web series called *Star Trek Continues*, of which the remaining episodes were crowdfunded, and he had starred in some other short live-action films and some Christian films. His fan club, the Risembool Rangers, was named after the hometown of his *Fullmetal Alchemist* character, and he had "roughly" 113,000 Twitter followers.

The elements of a defamation cause of action are

> (1) the publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, at least amounting to negligence, and (4) damages, in some cases. A defamatory statement is one that "tends [ ] to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

Innovative Block of S. Tex., Ltd. v. Valley Builders Supply, Inc., 603 S.W.3d 409, 417 (Tex. 2020) (citations omitted); *Miller*, 2021 Tex. App. LEXIS 1879, 2021 WL 924843, at *8.

A defamatory statement must proximately cause damages unless the statement is defamatory per se. *Mogged*, 2020 Tex. App. LEXIS 9445, 2020 WL 7074390, at *9 (citing *Bedford v. Spassoff*, 520 S.W.3d 901, 904 (Tex. 2017)). A statement is defamatory per se if it accuses someone of a crime, of having a foul or loathsome disease, or of engaging in serious sexual misconduct. **[*16]** 2020 Tex. App. LEXIS 9445, [WL] at *10. Whether a statement is defamatory per se is generally a legal question. *Id.* Statements of opinion about a public figure on matters of public concern are not actionable as defamation because they cannot be proved false. 2020 Tex. App. LEXIS 9445 [WL] at *16. Calling someone a "sexual predator" falls within the broader principle that a speaker's individual judgment that rests solely in the eye of the beholder is mere opinion. *Id.* (noting another court's explanation that unlike "convicted felon," which has an objective, verifiable meaning, "sex predator" is the sort of "loose, figurative or hyperbolic language that is immunized from defamation claims").

Furthermore, for a public-figure plaintiff, an essential element of the defamation claim is that the defendant published the alleged falsehood with "actual malice." *Greer v. Abraham*, 489 S.W.3d 440, 443 (Tex. 2016); *Lipsky*, 460 S.W.3d at 593 ("The status of the person allegedly defamed determines the requisite degree of fault."). In this context, "actual malice" means "knowledge of, or reckless disregard for, the falsity of a statement," i.e., proof of the defendant's state of mind at the time of the publication. *Greer*, 489 S.W.3d at 443-44 (noting that the constitutional focus is on the defendant's attitude toward the truth, *not* his attitude toward the plaintiff). The **[*17]** mere failure to investigate the facts, by itself, is no evidence of actual malice. *Mogged*, 2020 Tex. App. LEXIS 9445, 2020 WL 7074390, at *9 (citing *Bentley v. Bunton*, 94 S.W.3d 561, 595 (Tex. 2002)). Likewise, the mere fact that a defamation defendant knows that a public figure has denied harmful allegations or offered an alternative explanation of events is not evidence that the defendant doubted the allegations. *Hearst Corp. v. Skeen*, 159 S.W.3d 633, 639 (Tex. 2005). Proof of reckless disregard requires evidence that the defendant had serious doubts about the publication's truth. *Rodriguez v. Gonzales*, 566 S.W.3d 844, 852 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).

For a TCPA nonmovant to make a prima-facie showing of the elements of defamation, the party's pleadings and evidence must establish "the facts of when, where, and what was said[;] the defamatory nature of the statements[;] and how they damaged the plaintiff." *Lipsky*, 460 S.W.3d at 591; *Miller*, 2021 Tex. App. LEXIS 1879, 2021 WL 924843, at *9. This is because in defamation claims, context matters. *Bilbrey*, 2015 Tex. App. LEXIS 2359, 2015 WL 1120921, at *12 (stating that without providing the context of the allegedly defamatory statements that plaintiff was "abusive," there was no basis for the trial court to conclude that the statements were defamatory per se). In construing a statement to determine whether it was defamatory, we view it as a whole in light of surrounding circumstances based on how a person of ordinary intelligence would perceive it. *Hand v. Hughey*, No. 02-15-00239-CV, 2016 Tex. App. LEXIS 3934, 2016 WL 1470188, at *4 (Tex. App.—Fort Worth Apr. 14, 2016, no pet.) (mem. op.).

1. No evidence of actual malice as to [*18] Marchi, Rial, or Funimation

a. Marchi

Mignogna argues that Marchi defamed him through her statement that he had assaulted her by grabbing her hair, yanking her head back, and whispering something "sexual" in her ear. In his first amended petition, he alleged that on February 8, 2019, "[Marchi] tweeted that [he] had assaulted her several years prior by grabbing her hair and whispering in her ear (what he whispered she couldn't remember), that '[i]n the last week or so, I've heard accounts of him doing this exact thing to half a dozen other women that I personally know,' and that [Mignogna] is a 'predator.'"[14]

Marchi's entire February 8, 2019 Tweet stated,

> I stand with the victims. My experience is minor in comparison to many others; however, having realized this wasn't an isolated incident, I felt compelled to share.
>
> Several years ago, I was in the lobby at my job when I was approached by a co-worker. This guy gave me the creeps already (he gave almost all the women at my job the creeps), but I always felt like I had to be nice to him anyway because of how revered he was in the industry. As we said hello, he stood to the side of me and started running his fingers through my hair. Now, I **[*19]** do work in an affectionate industry; we hug a lot, and on occasion, will give a kiss on the cheek. But even for an affectionate environment, this felt off. I didn't say anything to him about it, though. It was just his fingers in my hair; I didn't think it was a big deal. At that point, he splayed his fingers, put his hand at the base of my skull, and made a fist. When he did this, he grabbed my hair close to the root, effectively preventing me from moving my head at all. He then jerked his fist, yanking my head backwards and towards him, and whispered something in my ear. I don't remember what he said specifically, but I do remember it being sexual in nature. This was not normal. This was not just a hug or a kiss on the cheek. I did not like it. I have no memory of getting out of his grasp, but I assume, 'What the f[***] are you doing?' was part of my technique.
> Afterwards, I completely and utterly dismissed this experience. I dismissed the way I had been touched. I dismissed having this man grab me. I dismissed having my head jerked back. I dismissed the inappropriate comment. I dismissed this entire encounter.
>
> I never reported this event to the company. It actually didn't even occur **[*20]** to me that I should have. Although, if it had occurred to me, I can't say I would have reported him. This guy was worshipped by his fans. He was worshipped by the studios because of his fans. He was the most popular voice actor on the convention circuit. Everyone treated him with kid gloves because he was the one and only Vic Mignogna. Who was I? A nobody in comparison. I didn't matter, and I knew it. Risking being blacklisted from my work and conventions simply wouldn't have been worth it.
> As I look back on this moment and discuss it with my family and friends, I can see that his actions qualify as simple assault.[15] Would he have gone to jail had I pressed charges? I'm not sure. Why would people believe me over a man who holds bible studies in hotel lobbies? And even if they did, would they care about the truth if that meant tarnishing the reputation of their favorite voice actor?
>
> In the last week or so, I've heard accounts of him doing this exact thing to half a dozen other women that I personally know. I am friends with

[14] Because this is Marchi's only statement that Mignogna references in his brief, it is the only one of her statements that we will address in this appeal. *See* Tex. R. App. P. 47.1.

[15] Under the Penal Code, a person commits assault if, among other things, he "intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative." Tex. Penal Code Ann. § 22.01. And "[a]lthough trivial, everyday physical contacts" are not necessarily tortious for purposes of civil liability, "[t]aking indecent liberties with a person" is. *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 802-03 (Tex. 2010) (quoting W. Page et al., Prosser and Keeton on the Law of Torts 42 & n.36 (5th ed. 1984)).

these women, and we never told each other about our experiences. Some dismissed it, like me. Others felt too ashamed or scared to say anything. I struggle with the guilt **[*21]** I feel for having been so dismissive of his actions. Had I been able to speak up then, maybe less women would have had to experience what happened when they were unable to get out of [Mignogna's] grasp.

I'm speaking up now because I didn't even think about this event until I realized other women had experienced the same thing. I thought it was just me. And at first, I didn't want to say anything because my experience was not nearly as bad as what other people have suffered at the hands of this man. I wanted their stories to be heard first because they were the important ones. But, in this moment, I want the others who I know are out there to hear this: it wasn't just you. It's okay if you didn't say anything, to him or anyone else. You are not responsible for what happened. You do not have to be dismissive, ashamed, or afraid. Also, I hope if anyone ever goes through a similar experience, they will know from the start that their body is not up for debate. Their body is not property of the most popular person in the room. Their body is not responsible for a company, or a show, or an artform. Their body is most definitely not responsible for the reputation and livelihood of a predator. **[*22]**

In her unsworn declaration, Marchi stated that she decided "to publicly state the truth about what [Mignogna] did to [her]" in early 2019 after other "women began coming out with the truth about their various experiences" with him and that she did it "so that other women who were victims of [Mignogna] or other aggressors would know that they are not alone" and to show solidarity with and empathy for those victims. Marchi further declared that she had told the truth and had since been "harassed, threatened, and lambasted" by Mignogna's supporters and his legal team even though she had "not made these statements out of malice or any desire to hurt" him and despite her own hurt and anger. Marchi stated, "[M]y intent in my outcry was always to provide an opportunity for healing and encouragement for bravery for both myself and other victims."

In his deposition, Mignogna admitted to the incident involving Marchi's hair but stated that it "was not painful, it was not hurtful, it was not sexual, and it happened at least four or five years ago, maybe longer," and he denied ever having whispered anything sexual in her ear or having had any sexual interest in her. Mignogna testified that Marchi **[*23]** had defamed him by publicly posting and "mischaracterizing a very casual, brief interaction in public and the lobby at Funimation" and that to his recollection, "it was [a] very casual, playful interaction as happens all the time in the hallways of Funimation." However, he agreed that Marchi could have perceived the incident differently. He did not recall if he said anything in her ear but said, "If I did, it was literally something about, ooh, I love your hair, or, love it, it's awesome." He also agreed that Marchi was not the only woman whose hair he had pulled[16] and when asked if he had any evidence that Marchi did not believe the statements to be true when she wrote them, he replied, "I can't answer for her. I don't know what's in her mind. I -- I can't say whether she believes it's true or whether she was joining in to pile on. I don't know."

Mignogna's TCPA evidence did not show that Marchi had published a false statement of fact[17] or

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[16] Rial and Toye attached to their TCPA motion the affidavit of N.P., a member of the female dance troupe Orion's Envy, which attended Bayou Con in June 2013. N.P. described having gone to an after-convention party at which she saw Mignogna walk up to D.P., another Orion's Envy member, "grasp her hair from the back with his hand, aggressively pull her backwards, and whisper into her ear." N.P. stated that she did not hear what he said to D.P. but that afterwards, D.P. was "noticeably pissed, angry, uncomfortable, and upset." N.P.'s boyfriend also signed an affidavit about the neck-grabbing incident. He further stated that since speaking out publicly about what he had seen, he had received messages, threats, and other harassment from Mignogna's fans.

[17] *Cf. Van Der Linden v. Khan*, 535 S.W.3d 179, 198-99 (Tex. App.—Fort Worth 2017, pet. denied) (explaining that when a case implicates constitutional issues—including a public figure or matter of public

that she did so with knowledge of, or reckless disregard for, the statement's truth or falsity.[18] *See Greer*, 489 S.W.3d at 443. Accordingly, the trial court did not err by granting Marchi's motion on this claim, and we overrule this portion of Mignogna's first point.

b. Rial

In his first amended petition, Mignogna alleged that Rial had made the following statements or had taken the following actions to defame him:

- On January 16, 2019, Rial "liked" and "retweeted" a tweet by @hanleia that accused Mignogna of being "a homophobic rude asshole who has been creepy to underage female fans for over ten years."
- On January 17, 2019, Rial liked and retweeted two tweets by @marzgurl that accused Mignogna of "great volumes of sexual misconduct," that urged Funimation to "reconsider hiring Vic Mignogna as a voice actor in the future," and that initiated the hashtag "#KickVic."
- On February 6, 2019, Rial tweeted, "IT HAPPENED TO ME!"[19] and that she was "only one voice on a sea of many . . . He's hurt enough people. He's a sick man and he needs help . . . ."
- In a February 11, 2019 thread under the Funimation tweets, Rial tweeted, "There were multiple investigations[20] with testimony, proof, evidence. Companies don't cut ties without those

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concern—the burden is on the plaintiff to prove falsity, not upon the defendant to prove truth). In *Van Der Linden*, we held that the private-figure plaintiff met his TCPA burden on falsity because "under the circumstances unique to th[at] case, the same evidence that prove[d] falsity also prove[d] the requisite standard of liability." *Id.* at 201. That case involved alleged private comments made between the parties that were subsequently published by the defendant to the plaintiff's business partners. *See id. at* 198-02. Only the parties knew whether the plaintiff had actually made the comments, so under the negligence standard, he met his TCPA prima-facie burden on falsity and negligence when he denied in his affidavit that the conversation ever took place. *Id.* at 185, 201-02.

Here, in contrast, Marchi stated that Mignogna whispered something sexual in her ear, and in his deposition, he first denied whispering anything and then stated that he did not recall but added, " ***[*24]*** *If* I did, it was literally something about, ooh, I love your hair, or, love it, it's awesome." [Emphasis added.] As a public-figure plaintiff, Mignogna had the burden on falsity and actual malice but provided nothing but speculation. *See Fieldtech Avionics & Instruments, Inc. v. Component Control.Com, Inc.*, 262 S.W.3d 813, 833 (Tex. App.—Fort Worth 2008, no pet.) ("Speculation is not evidence."); *cf. Miller*, 2021 Tex. App. LEXIS 1879, 2021 WL 924843, at *11 (noting that in a "she said/she said" defamation case, when there are only two parties to a communication, a plaintiff can do no more than deny having made the statement).

[18] Although Mignogna argues in his appellate brief that he specifically denied that he did this to Marchi or anyone else, he refers us only to his unspecific January 20, 2019 tweet that "any allegations of sexual harassment . . . are COMPLETELY AND UTTERLY FALSE" and to his February 13, 2019 tweet that he characterized as a generic apology, in which he stated, "If anyone has been made uncomfortable by me, it's not for me to contradict them." *See Hearst Corp.*, 159 S.W.3d at 639. Mignogna also references the statements in his affidavit and his unsworn declaration, but he withdrew the affidavit prior to submission of the TCPA motions and his unsworn declaration containing the same information was not admitted into evidence because it was attached to his second amended petition, which the trial court did not consider.

[19] Rial described in her deposition a 2007 incident involving Mignogna at Izumicon during which he had forcibly kissed her, pushed her onto the bed, and got on top of her after she accompanied him to his hotel room so he could show her a fan film before a dinner with Dahlin, the convention chair. Rial testified that when Dahlin came to the hotel room's door, Mignogna jumped up and answered it. Rial recounted that Dahlin had asked her if she was okay as they were leaving and that she had told him she was fine because she was "in shock the whole time." In his affidavit attached to Mignogna's TCPA response, Dahlin stated that he had no recollection of the November 2007 incident. Dahlin also stated, "*If* I had noticed Monica Rial being distressed leaving Victor Mignogna's room, I am certain that I *would* remember it." [Emphasis added.] This statement is mere speculation. *See Fieldtech Avionics*, 262 S.W.3d at 833 ("Speculation is not evidence.").

[20] In his first amended petition, Mignogna alleged that an executive from Sony, Funimation's parent company, informed him that she was investigating three sexual-harassment allegations made against him: (1) an incident at a convention six years earlier, when Rial wrote her name on a jellybean and gave it to him, and he ate it and joked that he "ate Monica"; (2) inappropriate conduct between Mignogna and two fans at a convention three years earlier; and (3) a single consensual kiss between Mignogna and a Funimation employee. Funimation attached to its TCPA motion the affidavit of the Sony executive who conducted the investigation and who averred that based on her interviews, she had "concluded that the allegations of inappropriate conduct made against Mr. Mignogna were credible." During her deposition, Rial testified that there had been "quite a few" investigations of Mignogna over the years, including one by ADV Films in the early 2000s, an investigation by Rooster Teeth, an investigation by Sentai Filmworks, and a few done by conventions. She stated, "I know that he's not allowed on the property at Sentai Filmworks."

things. However, that information is classified. I am one of dozens of men and women who participated. Stop harassing me." She also tweeted, "And just so we're clear, he's the legal definition of harassment: Harassment **[*25]** is governed by state laws, but is generally defined as a course of conduct which annoys, threatens, intimidates, alarms, or puts a person in fear of their safety."

• On February 19, 2019, in a Tweet, Rial accused Mignogna of "sexual harassment,"[21] of kissing her without her consent,[22] and of treating others similarly at conventions;[23] referenced having spoken with "investigators" to "corroborate" the "testimony" of others telling stories similar to hers; and spoke of Funimation's "investigations." She stated, "The investigations were incredibly thorough. Each person was interviewed, the evidence weighed, and a decision made. Each company has to look out for the safety of their employees. In this instance, these companies felt they made the best decision to protect their employees and contract workers. Also, these companies aren't obligated to share any information with you. Many of the women who've come forward have chosen to remain anonymous, especially after seeing the way that I've been attacked. Please respect their privacy."

Mignogna argues that he specifically denied Rial's accusations against him, but to support his assertion, he primarily references his affidavit and Slatosch's **[*26]** affidavit, both of which he withdrew before the TCPA hearing, and his unsworn declaration and Slatosch's unsworn declaration, neither of which the trial court considered because they were attached to his second amended petition. Further, despite having attached Rial's entire deposition to his TCPA response, Mignogna provided no evidence of her state of mind with regard to the actual-malice element.

To the contrary, as to at least one of the complained-of statements, Rial testified in her deposition that her February 11, 2019 tweet—which stated, "And just so we're clear, he's the legal definition of harassment: Harassment is governed by state laws, but is generally defined as a course of conduct which annoys, threatens, intimidates, alarms, or puts a person in fear of their safety"—contained a typo. Rial testified that she had intended to say, "*here's* the legal definition of harassment." [Emphasis added.] She stated that she had copied and pasted the definition of harassment she found on the internet into the post. Mignogna provided no evidence to refute this characterization of her statement and likewise failed to meet his burden to show a prima-facie case of each element of

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[21] When asked in her deposition how many times Mignogna had taken a fistful of her hair and whispered in her ear, Rial testified, "Oh, I can't even count how many times that's happened."

[22] Rial described in her deposition that Mignogna had forcibly kissed her in 2007 at Izumicon.

[23] To their joint TCPA motion to dismiss, Rial and Toye attached affidavits from women who averred that—from as far back as 1989—Mignogna had sexually harassed them. R.M.B. stated in her affidavit that when she was a high school sophomore in 1989, Mignogna had invited her to watch a "Christian worship video" at his house, where he had partially disrobed and made inappropriate advances. K.E., a voice actor, stated in her affidavit that Mignogna had propositioned her in 2008 at a North Carolina convention and in 2010 at a Florida convention and that she had refused three convention invitations in 2019 because Mignogna planned to attend those conventions, and she was "scared of his fans and of their harassment."

They also attached affidavits from convention workers attesting to Mignogna's behavior—"inappropriately touching fans, guests, and other convention patrons," and stalking a female Japanese singer in 2007 "to the point that convention chairs . . . had to . . . assign security detail"—some of which led to his occasional banning from attending future conventions. And they attached the affidavit of Ahmed, CEO of the Kawaii Kon Convention and Anime Weekend Atlanta, who attested that he had seen Mignogna "being overly friendly with a female cosplayer" near the Funimation booth and that the cosplayer had looked very uncomfortable and had fled from Mignogna. When Ahmed reported what he had seen to a Funimation employee, she told him that was normal for Mignogna, and he informed her that if it happened at one of his conventions, he would not allow Mignogna back. A former Funimation employee stated in an affidavit that he and other employees referred to the security system that Funimation had put into place to separate employees from the voice actors as "Vic Locks."

METROCON'S special-guest coordinator averred that she had met Mignogna in 2010 and had been his assistant and handler at several anime conventions. She stated that Mignogna "likes to make advances on females in their early 20's and younger" and that she had personally witnessed Mignogna grab another female voice actor (K.E.) "by the back of the head, [and] pull her hair and her head back forcibly."

defamation, **[*27]** particularly falsity and actual malice, as to Rial in his TCPA response. Accordingly, the trial court did not err by granting Rial's motion on this claim, and we overrule this portion of Mignogna's first point.

c. Funimation

Mignogna argues that Funimation defamed him by publishing two statements about him that, when viewed together, conveyed a false and defamatory meaning. In his first amended petition, Mignogna alleged that Funimation had defamed him when it published the following tweets on February 11, 2019:

> • "Everyone, we wanted to give you an update on the Vic Mignogna situation. Following an investigation, Funimation recast Vic Mignogna in Morose Mononokean Season 2. Funimation will not be engaging Mignogna in future productions";[24] and
> • "We do not [condone] any kind of harassment or threatening behavior being directed at anyone."

As with the other defendants, Mignogna produced no evidence to meet the actual-malice standard. Accordingly, the trial court did not err by granting Funimation's TCPA motion on Mignogna's defamation claim, and we overrule this portion of Mignogna's first point.

2. No evidence of the context of Toye's tweets or actual malice

In his first amended petition, **[*28]** Mignogna alleged that Toye made the following statements or took the following actions:

• On January 26, 2019, Toye tweeted that Mignogna was "a predator."
• On January 31, 2019, Toye tweeted that he knew of "at least 4 assaults"[25] by Mignogna and that he was "glad to see conventions cancelled."
• On February 1, 2019, Toye tweeted that he knew Mignogna was "guilty of at least 4 accounts."
• On February 2, 2019, Toye tweeted that Mignogna needed to prove himself "not to be a predator" and that Mignogna "is a predator" based on Toye's "[i]nsider knowledge" about Sony's investigation.
• On February 4, 2019, Toye tweeted multiple times that Mignogna was a "predator," called him a "perp," and posted: "He is down because he took advantage of girls, buddy. [H]ow about get a grip on reality and stop harassing people. Over 100 accounts and still more to come and you defend this sack of shit? Get a life!"
• On February 5, 2019, Toye tweeted an accusation that Mignogna was a "predator."

• On February 6, 2019, Toye tweeted that over 100 women had made accusations "of assault" against Mignogna that were "corroborated," that "[there were] mountains of testimony," and that Funimation had "proof. That's why **[*29]** they fired him."
• On February 13, 2019, Toye tweeted, "Evidence: He has been fired, there was an investigation[, and] these actions have corroborated testimony."
• On February 16, 2019, Toye tweeted, "[L]et's see who walks away a registered sex offender."
• On February 18, 2019, Toye tweeted, "Their

[24] Mignogna conceded in his deposition that the first Funimation tweet was not defamatory, but he argued that any reasonable person would infer that he had been terminated for sexual harassment based on Funimation's second tweet, even though Funimation did not use the word "sexual." To the contrary, evidence presented by Appellees showed that Mignogna's fans had engaged in a pattern of harassment of anyone who spoke out against him and that his fans' harassment was to what this tweet referred.

[25] During his deposition, Toye testified about Mignogna's 2007 Izumicon incident involving Rial and Mignogna's interactions with the two fans and the Funimation employee, who were all friends of his. Toye stated that Mignogna had invited the two fans to his room at a convention, and they went because they "thought he was a nice guy, a good Christian guy." Once in his room, though, Mignogna told them that he would like to see them strip, and one replied, "You're old enough to be my dad." The two fans told Toye that Mignogna became angry and defensive, stating, "I'm not that old. I look like I'm in my forties" and that Mignogna had forcibly kissed them before allowing them to leave his room.

> [Funimation's] decision was on things that happened to [F]unimation employees."
>
> • On February 21, 2019, in a Tweet, Toye accused Mignogna of "assaulting" Rial.
>
> • On February 23, 2019, in a Tweet, Toye accused Mignogna of "cheat[ing] on his fiancée,[26] assault[ing] ladies, [and] rob[bing] fans" and assaulting "way more people" than Rial.
>
> • On April 7, 2019, in a Tweet, Toye accused Mignogna of "forc[ing] himself on people in a sexual manner without consent and that resulted in assault."

Mignogna also alleged that Toye had tweeted "more than 80 times that [Mignogna had] sexually assaulted or assaulted [Rial], more than 10 times that [Mignogna had] sexually assaulted or assaulted three of [Toye's] 'very close friends,' more than 10 times that [Mignogna] has been accused of hundreds and possibly thousands of assaults, and at least 17 times that [Mignogna] is a 'predator.'"

Mignogna's pleadings and evidence had to establish "the facts of when, where, and what was said[;] the defamatory nature of the statements[;] and how they damaged [him]." *Lipsky*, 460 S.W.3d at 591. However, Mignogna merely attached 342 purported tweets by Toye without their surrounding context—the tweets to which Toye was responding—which is required to determine if a statement is defamatory per se. *Bilbrey*, 2015 Tex. App. LEXIS 2359, 2015 WL 1120921, at *12. Further, the tweets referring to Mignogna as a "sexual predator" or variations thereof were nonactionable opinion, *Mogged*, 2020 Tex. App. LEXIS 9445, 2020 WL 7074390, at *16, and as with Marchi, Rial, and Funimation, Mignogna also failed to show that Toye had acted with actual malice. Because Mignogna failed to meet his burden to show a prima-facie case of defamation as to Toye, the trial court did not err by granting Toye's motion on this **[*31]** claim, and we overrule the remainder of Mignogna's first point.

B. Tortious-interference claims

In a claim for tortious interference with an existing contract, the plaintiff must show that (1) the plaintiff had a valid contract with a third party, (2) the defendant willfully and intentionally interfered with the contract, (3) the defendant's interference with the contract proximately caused the plaintiff's alleged injury, and (4) the plaintiff incurred actual damage or loss. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 207 (Tex. 2002) (op. on reh'g).

The elements of a tortious-interference-with-prospective-business-relations claim are (1) there was a reasonable probability that the plaintiff would have entered into a business relationship with a third person, (2) the defendant intentionally interfered with the relationship, (3) the defendant's conduct was independently tortious or unlawful, (4) the defendant's interference proximately caused the plaintiff's alleged injury, and (5) the plaintiff suffered actual damage or loss. *Coinmach Corp. v. Aspenwood Apt. Corp.*, 417 S.W.3d 909, 923 (Tex. 2013).

Mignogna testified that he averaged attending between 20 to 30 conventions a year and by the time of his June 26, 2019 deposition, he had attended 9. He further testified that it was not unusual to not be invited to a convention **[*32]** he had attended the

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[26] Rial and Toye attached the affidavit of Mignogna's former fiancée, who attested that she and Mignogna had dated from 2006 to 2010 and were engaged from 2010 to 2018. The former fiancée sponsored and attached a copy of emails she had exchanged with Mignogna between March 14 and March 22, 2019. In the first email, she accused him of having cheated on her with fans, friends, acquaintances, and strangers—including prostitutes—and of having "systematically targeted dozens upon dozens of fangirls (most at least half [his] age)," and she stated that

> private wounds were cracked open by the public declarations of other women speaking up about the harassment or abuse you inflicted upon them. And since the few who came forward openly, so very many more have reached out privately [to her and others] all of them in tears, pain, and shame. Colleagues, cosplayers, fans (one of whom was underage at the time of her 'experience' with you), and most heartbreaking of all: **[*30]** members of our own [*Star Trek Continues*] family.

In his responses to these emails, Mignogna did not rebut his former fiancée's statements but rather told her that he was "so ashamed and so deeply sorry" and that he was working with a counselor and was "fully committed to healing" and to "try to somehow make amends if possible."

year before "[b]ecause once the convention has you as a guest, they don't typically bring the same people back every year because of the number of people in the industry." Mignogna added, "In fact, I'm actually . . . an exception because I . . . do get invited back often to the same events, so I — if somebody doesn't invite me back, there's nothing really unusual about that." He stated that the number of conventions "fluctuates from year to year," and while some would involve written agreements, others were based on oral invitations. Mignogna agreed that he did not go back to METROCON Tampa in 2018 and was not invited back in 2019, that he had not been back to Anime Central since 2016 or 2017, and that although he was at Tekkoshocon in 2018, he was not invited back in 2019.[27] Mignogna then repeated, "As I said, typically with 70 or 80 voice actors and industry people, writers, directors, artists, they don't typically invite the same people back every year."

Mignogna admitted in his deposition that with the exception of one convention—Kameha Con—he had no written evidence, emails, text messages, or anything to show that Appellees had contacted or encouraged conventions **[*33]** not to invite him.[28] Further, Mignogna was able to attend Kameha Con.[29] Although Mignogna testified in his deposition that prior to 2019, to his knowledge, he had not been banned from a convention or asked not to come back, Rial and Toye's evidence—affidavits by convention officers—showed otherwise. And Mignogna's primary evidence to show that Rial and Toye had interfered with his Kameha Con contract—Slatosch's affidavit and unsworn declaration—were not admitted into evidence.[30] In his deposition, Mignogna acknowledged that he did not know of any instances when Funimation pressured a convention not to hire him or to allow him to attend, and he failed to link any specific Funimation statement to any lost business. Appellees' evidence also showed that there was substantial negative press[31] arising from claims of other individuals made before, around the same time, and after Appellees made the statements Mignogna complained about, and Mignogna failed to show that any conventions'

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[27] As noted above, Rial and Toye attached to their TCPA motion affidavits of convention workers in which Mignogna's behavior at conventions was described.

[28] Ahmed, the Kawaii Kon and Anime Weekend Atlanta CEO, attested that Rial, Toye, Marchi, and Funimation had not contacted him to request Mignogna's banning and that he was not aware of any signed contract with Mignogna that guaranteed his appearance at either convention; rather, "[t]he invitations for Mignogna to attend Kawaii Kon w[ere] made in the sole discretion of the management staff and could be withdrawn at any time without penalty." Ahmed also stated that since he had agreed with the victims, Mignogna's fans had targeted, stalked, and harassed him.

[29] As pointed out by Rial and Toye in their appellate brief, "With regard to Kameha Con, Mignogna admitted that he actually attended this convention under a superseding contract that he did not enter into evidence. Mignogna's entire claim for tortious interference is based on a single convention that he was not barred from attending."

[30] As pointed out by Rial and Toye in their appellate brief, "the thirteen references in Appellant's Brief to statements allegedly made by them to [Slatosch] are improper because that evidence was withdrawn and excluded by the trial court."

[31] To its TCPA motion, Funimation attached several articles showing media coverage, including Polygon.com's January 25, 2019 article, "Dragon Ball Super: Broly voice actor responds to sexual harassment, homophobia claims," with the subtitle, "Though lots of allegations began to surface recently, some go as far back as 2010"; Anime News Network's January 30, 2019 article, "'Far from Perfect': Fans Recount Unwanted Affection from Voice Actor Vic Mignogna"; Polygon.com's February 11, 2019 article, "Funimation removes voice actor Vic Mignogna from anime, while harassment allegations keep growing"; Anime News Network's February 14, 2019 article, "Dub Voice Actor Vic Mignogna Issues Statement: 'Taking Time to Recommit to God, Seeking Help'"; Gizmodo's February 19, 2019 article, "One of Anime's Biggest Voices Accused of Sexual Harassment"; and Screenrant's February 25, 2019 article, "Anime Voice Actor Vic Mignogna Accused of Sexual Harassment," which noted that Mignogna had been accused of "a years-long history of unwanted touching, advances, and more by dozens of convention-goers and fellow voice talent" and that Mignogna "consistently argues that each of these encounters were consensual in nature." The Gizmodo article's author stated that in researching the article, she had spoken to

> more than 25 voice actors, cosplayers, industry professionals, convention employees, **[*34]** and former fans about their experiences with Mignogna. Many of them asked not to be named in fear of retaliation from Mignogna or his fanbase. These, along with the testimonials circulating online, paint a picture of a 56-year-old man who aggressively hugs, grabs, touches, kisses, and propositions women—often without asking for their consent. It happens at panels, in autograph lines, at private events, and behind closed doors. His behavior has become so known in the anime and comic convention communities that it's more than an open secret.

decisions not to invite him stemmed from Appellees' statements rather than from routine decisions or as a response to the negative press.

On the record before us, Mignogna failed to present any evidence that he had a valid contract or would have had a valid contract but for interference by Marchi,[32] Rial, Toye, or Funimation; that any such interference proximately caused him actual damage or loss; or that he was not invited to a convention because of something any of them did. Accordingly, the trial court did not err by granting Appellees' motions on these claims, and we overrule Mignogna's second and third points.

C. Civil conspiracy and vicarious liability

A claim for conspiracy requires showing that (1) a defendant was a member of a combination of two or more persons; (2) the combination's **[*35]** object was to accomplish either an unlawful purpose or a lawful purpose by unlawful means; (3) the members had a meeting of the minds on the object or course of action; (4) one of the members committed an unlawful, overt act to further the object or course of action; and (5) the plaintiff suffered injury as a proximate result of the wrongful act. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 222 (Tex. 2017). An actionable civil conspiracy exists only as to those parties who are aware of the intended harm or proposed wrongful conduct at the outset of the combination or agreement. *Id.* A conspiracy claim is a derivative tort because recovery is not based on the conspiracy but on an underlying tort. *Agar Corp. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136, 142 (Tex. 2019) ("Civil conspiracy requires an underlying tort that has caused damages."); *Bell v. Bennett*, Nos. 02-10-00481-CV, 02-11-00057-CV, 02-11-00063-CV, 2012 Tex. App. LEXIS 2097, 2012 WL 858603, at *13 (Tex. App.—Fort Worth Mar. 15, 2012, no pet.) (mem. op.). Vicarious liability is also a derivative tort. *See Painter v. Amerimex Drilling I, Ltd.*, 561 S.W.3d 125, 131 (Tex. 2018) (explaining that vicarious liability "arises only if the tortious act falls" within the scope of employment); *see also Nettles v. GTECH Corp.*, 606 S.W.3d 726, 738 (Tex. 2020) (noting that liability-spreading theories like derivative or vicarious liability "depend upon liability for an underlying tort, and they survive or fail alongside that tort"); *Soon Phat, L.P. v. Alvarado*, 396 S.W.3d 78, 97 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) ("Broadly speaking, vicarious liability principles impute liability arising from the conduct of an active tortfeasor to **[*36]** another party based upon a relationship between them.").

Because Mignogna failed to establish a defamation or tortious-interference claim against any of Appellees, his derivative claim of civil conspiracy against them failed.[33] Thus, the trial court did not err by granting the TCPA motions on this claim, and we overrule Mignogna's fifth point.

Furthermore, without evidence of a tortious act by Rial or Marchi,[34] Funimation could not be held vicariously liable for them, regardless of their

[32] When asked by the trial court at the hearing on the TCPA motions who Marchi had contacted, Mignogna's counsel replied, "She did not, as far as we can tell." When asked by the trial court about the tortious-interference-with-prospective-business-relations claim as to Marchi, Mignogna's counsel replied, "Same answer."

[33] As pointed out by Rial and Toye in their appellate brief, although Mignogna argues that the TCPA does not apply to his conspiracy claim because the Twitter comments were public statements about private matters, he failed to raise this argument in the trial court and thus has not preserved it for our review. *See* Tex. R. App. P. 33.1. *But cf. Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 897 (Tex. 2018) ("We have not previously cabined our TCPA analysis to the precise legal arguments or record references a moving party made to the trial court regarding the TCPA's applicability. Our focus instead has been on the pleadings and on whether, as a matter of law, they are based on or relate to a matter of public concern."). As we note in footnote 13 above, the tweets addressed matters of public concern as to health and safety—Mignogna's alleged inappropriate sexual behavior with fans (including underage fans), convention workers, and voice actors—as part of a public discussion involving the anime-and voice-actor community. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001(2), (3), (7)(A), (D), .005(b); *Ray*, 2019 Tex. App. LEXIS 10584, 2019 WL 6606170, at *2.

[34] Mignogna alleged in his first amended petition that in addition to Marchi's and Rial's actions, Funimation was also vicariously liable for the actions of Toye, a mortgage loan officer. On appeal, Mignogna has abandoned that argument.

employee or independent-contractor status. Accordingly, we overrule Mignogna's fourth point.

V. Attorney's Fees and Sanctions

The TCPA in effect at the time of the litigation required the trial court to award to the successful movant "reasonable attorney's fees" and sanctions, among other items. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.009(a). Mignogna challenges the imposition of attorney's fees and sanctions while Rial and Toye challenge the amount of their attorney's-fee award.

A. Award of attorney's fees and sanctions to Appellees

In his eighth point, Mignogna argues that the attorney's fees and sanctions awarded by the trial court are improper because "the trial court improperly dismissed [Mignogna's] claims against Appellees." Because, **[*37]** as set out above, Mignogna's claims were properly dismissed under the TCPA, the trial court's order on fees and sanctions was not improper because it followed the statutory requirements. *See id.* Accordingly, we overrule Mignogna's eighth point.

B. Amount of fee award to Rial and Toye

In their single cross-appeal issue, Rial and Toye complain that the final judgment "improperly awards [to them] an amount of attorneys' fees ($100,000.00) lower than the amount requested and supported by competent evidence in their motion for fees ($282,953.80)." They argue, "[T]he arbitrary manner in which the trial court awarded attorneys' fees, coupled with [their] uncontroverted evidence," requires us to reverse and render an award of fees because they faced a more complex fact pattern than Marchi or Funimation and were forced to respond to significantly more attacks by Mignogna. Rial and Toye point out that their counsel had to defend two individuals instead of just one and that they were the only defendants who were deposed and the only ones who answered discovery, as well as the ones who "bore the brunt of bad-faith litigation brought by a well-funded plaintiff bent on harassment and obstruction." **[*38]**

1. Standard of review and applicable law

Under the TCPA, a "reasonable" attorney's fee "is one that is not excessive or extreme, but rather moderate or fair." *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016). The "reasonableness" determination—a fact question—rests within the court's sound discretion. *Id.* When a claimant wishes to obtain attorney's fees from the opposing party, the claimant must prove that the requested fees are both reasonable and necessary, and these elements act as limits on the amount of fees that a prevailing party can shift to the nonprevailing party. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 489 (Tex. 2019) (noting that the distinction between "reasonable" and "necessary" is immaterial).

A trial court abuses its discretion if its decision is arbitrary, unreasonable, and without reference to guiding principles. *Iola Barker v. Hurst*, 632 S.W.3d 175, 186 (Tex. App.—Houston [1st Dist.] 2021, no pet.). To determine whether evidence is sufficient to support the trial court's exercise of discretion, we consider (1) whether the trial court had sufficient information upon which to exercise its discretion, to which we apply the legal and factual sufficiency standards of review,[35] and (2) whether the trial court

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[35] In determining whether legally sufficient evidence supports the finding under review, we must consider evidence favorable to the finding if a reasonable factfinder could and must disregard contrary evidence unless a reasonable factfinder could not. *Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 827 (Tex. 2005). When reviewing an assertion that the evidence is factually insufficient to support a finding, we set aside the finding only if, after considering and weighing all the pertinent record evidence, we determine that the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the finding should be set aside and a new trial ordered. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986) (op. on reh'g); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965). When the party with the burden of proof appeals from a failure to find, the party must show

erred in its application of that discretion, i.e., whether, based on the evidence before it, the trial court made a reasonable decision. *Jones-Hospod v. Maples*, No. 03-20-00407-CV, 2021 Tex. App. LEXIS 7285, 2021 WL 3883884, at *6 (Tex. App.—Austin Aug. 31, 2021, pet. denied) (mem. op.). A **[*39]** trial court does not abuse its discretion when its ruling is based on conflicting evidence and some evidence of substantive and probative character supports its decision. *Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 97 (Tex. 2009). When the trial court does not specify the basis for its attorney's-fee award, we will uphold its ruling on any basis supported by the evidence. *Iola Barker*, 632 S.W.3d at 186.

The supreme court has stated that the factfinder's starting point for calculating an attorney's-fee award is to determine the reasonable hours worked multiplied by a reasonable hourly rate and that the fee claimant bears the burden of providing sufficient evidence on both counts. *Rohrmoos*, 578 S.W.3d at 498. Sufficient evidence, at a minimum, includes evidence of (1) particular services performed; (2) who performed those services; (3) approximately when the services were performed; (4) the reasonable amount of time required to perform the services; and (5) the reasonable hourly rate for each person performing the services. *Id.* at 498, 502. Reasonableness and necessity are not dependent solely on the contractual fee arrangement between the prevailing party and its attorney; the base lodestar calculation should reflect hours reasonably expended for services necessary to the litigation and a reasonable hourly **[*40]** rate for the attorney to prosecute or defend successfully against the claim at issue. *Id.* at 498-99; *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 760 (Tex. 2012) (explaining that the trial court calculates the lodestar).

"[T]here is a presumption that the base lodestar calculation, when supported by sufficient evidence, reflects the reasonable and necessary attorney's fees that can be shifted to the non-prevailing party." *Rohrmoos*, 578 S.W.3d at 499. If a claimant seeks an enhancement of the base lodestar, it must produce specific evidence showing that a higher amount is necessary to achieve a reasonable fee award, and considerations already incorporated into the base calculation may not be applied to rebut the reasonable-and-necessary-fee presumption of the base calculation. *Id.* at 501. Most *Arthur Andersen* factors—"the time and labor required," "the novelty and difficulty of the questions involved," "the skill required to perform the legal service properly," "the fee customarily charged in the locality for similar legal services," "the amount involved," "the experience, reputation, and ability of the lawyer or lawyers performing the services," "whether the fee is fixed or contingent on results obtained," "the uncertainty of collection before the legal services have been rendered," and "results **[*41]** obtained"—are already incorporated into the base lodestar. *Id.* at 500. The remaining *Arthur Andersen* factors—"the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer," "the time limitations imposed by the client or by the circumstances," and "the nature and length of the professional relationship with the client"—may be considered in enhancing or reducing the base calculation. *See id.* at 494, 499-500.

Even if a fee claimant's testimony is uncontroverted, a trial court is not obligated to award the requested amount. *Iola Barker*, 632 S.W.3d at 193 (citing *Smith v. Patrick W.Y. Tam Tr.*, 296 S.W.3d 545, 547-48 (Tex. 2009)). Attorney's fees may be proven as a matter of law in some cases by uncontroverted expert testimony if that testimony is (1) readily controvertible if untrue; (2) clear, direct, and positive; and (3) uncontradicted by the "attendant circumstances." *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990). However, the "attendant circumstances" may indicate that the claimed attorney's fees are unreasonable or incredible. *Id.* Further, the recovery of attorney's fees must be reasonable under the particular circumstances of the case and bear some reasonable relationship to the amount in controversy. *Iola Barker*, 632 S.W.3d at

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that the failure to find is against the great weight and preponderance of the credible evidence. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001); *Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 651 (Tex. 1988); *see Gonzalez v. McAllen Med. Ctr., Inc.*, 195 S.W.3d 680, 681-82 (Tex. 2006).

193. When determining an appropriate fee award, the trial court is entitled to examine the entire **[*42]** record and to view the matter in light of the amount in controversy, the nature of the case, and his or her personal experience as a lawyer or judge. *Id.* at 193-94.

The amount of "reasonable" attorney's fees has become a frequent subject of TCPA appeals and remands since *Rohrmoos*, which, as set out above, clarified the evidentiary standards for shifting attorney's fees. *See*, *e.g.*, *Berry v. Bay, Ltd.*, 643 S.W.3d 424, 435 (Tex. App.—Corpus Christi—Edinburg 2022, no pet.) (noting that when prevailing party's attorney requested $27,816.50 in pre-appeal TCPA attorney's fees, the trial court's award of $10,000 was not an abuse of discretion when the trial court "could have determined that the times and rates reported by [the prevailing party's attorney were] excessive, inadequately documented, or duplicative"); *Iola Barker*, 632 S.W.3d at 181 (addressing claim that trial court erred by not awarding full amount of attorney's fees, costs, and expenses); *Broder v. Nexstar Broad. Grp., Inc.*, No. 03-19-00484-CV, 2021 Tex. App. LEXIS 4394, 2021 WL 2273470, at *1 (Tex. App.—Austin June 4, 2021, no pet.) (mem. op.) (addressing nonmovants' claim that TCPA attorney's fee award of $113,510 was excessive).

In *Iola Barker*, our sister court considered the appellants' complaint that the trial court erred by not awarding the full amount of their attorney's fees, costs, and expenses after they had prevailed on a TCPA motion. 632 S.W.3d at 181. The appellants attached detailed billing statements and the affidavits of **[*43]** their trial and appellate counsel and their expert on attorney's fees to their memorandum in support of attorney's fees, and the appellees had responded with affidavits on attorney's fees from their own experts. *Id.* at 184. The appellate court determined that the appellees' affidavits were conclusory and constituted no evidence to overcome the base lodestar calculation's presumptive reasonableness. *Id.* at 192-93.

The court then examined the appellants' evidence. Despite that evidence, which reflected 219.10 hours of work and total billing, after discounts, of $59,500, *id.* at 188-89, the trial court had ordered recovery of only $7,000 in attorney's fees, court costs, and expenses from one nonmovant and recovery of only $9,000 from the other, in addition to conditional appellate attorney's fees, from the nonmovants, who had sought less than $100,000 in damages. *Id.* at 184, 191, 194. The case had begun in 2017, and the movants had immediately sought dismissal under the TCPA and then spent four years pursuing that goal. *Id.* at 194. The court concluded that the trial court had abused its discretion based on the fact that the trial court's attorney's-fee awards amounted to "just 17% of appellants' evidence of attorney's fees incurred," resulting in awards **[*44]** "reduced to approximately $1,600 in attorney's fees per appellant, per year." *Id.* The attorney's-fee awards therefore bore "no relationship to the uncontroverted evidence of attorney's fees incurred." *Id.* at 194-95. Accordingly, the court remanded the issue to the trial court for a redetermination. *Id.* at 195.

In contrast, in *Broder*, the nonmovants appealed, seeking to reverse the trial court's assessment of $112,217.50 in TCPA attorney's fees, but the court of appeals upheld the award. 2021 Tex. App. LEXIS 4394, 2021 WL 2273470, at *1, *16, *18. The nonmovant doctor (and his company, Belleza Medspa) had sued a reporter and the reporter's broadcaster for reporting on, among other things, a patient's death after plastic surgery. 2021 Tex. App. LEXIS 4394, [WL] at *1-2. When the movants prevailed on their TCPA motion, they sought $124,357 in attorney's fees plus conditional appellate attorney's fees. 2021 Tex. App. LEXIS 4394, [WL] at *15. The movants provided testimony of the number of hours on the case by their lead attorney (123), by a partner at her firm (43.6), by an associate (81.9), and by a paralegal (26.7), and their hourly rates—$475, $575, $400, and $225, respectively. 2021 Tex. App. LEXIS 4394, [WL] at *17. They also provided evidence of the tasks performed and various complications, such as the nonmovants' petition, which was over 40 pages long and failed to clearly articulate **[*45]** the complained-of statements; the nonmovants' multiple and voluminous filings,

including their TCPA response, which was over 900 pages; and dueling objections to TCPA evidence. *Id.* The nonmovants' pleadings did not specify a damages amount, but they had alleged losses that would have amounted to approximately $4 million. 2021 Tex. App. LEXIS 4394, [WL] at *18. The trial court set out in its order awarding $112,217.50 in attorney's fees that it had accepted the legal team's hours and rates except for lowering the associate's hours from 81.9 to 64.9 and reducing the associate's hourly rate from $400 to $350. 2021 Tex. App. LEXIS 4394, [WL] at *16. After applying *Rohrmoos* to the record, the appellate court concluded that the trial court had not abused its discretion by awarding $112,217.50 in attorney's fees. 2021 Tex. App. LEXIS 4394, [WL] at *18.

We recently considered the amount of attorney's fees awarded under the TCPA in *Mogged*, 2020 Tex. App. LEXIS 9445, 2020 WL 7074390, at *1. After prevailing on their TCPA motion, the movants requested $177,350 in attorney's fees, but the trial court awarded only $38,190. 2020 Tex. App. LEXIS 9445, [WL] at *7-8. We noted that the movants "used the lodestar method, addressed the *Arthur Andersen* factors, and presented detailed evidence of their attorney's fees." 2020 Tex. App. LEXIS 9445, [WL] at *18. Beyond characterizing its award as encompassing "reasonable" attorney's fees, the trial court's order **[*46]** did not indicate why it had reduced the requested award, and the trial court made no written fact findings. *Id.* We observed that although reduced attorney's-fee TCPA awards can be and have been upheld as a proper exercise of the trial court's discretion if conflicting evidence of reasonableness exists, based on the movants' evidence, the trial court's award was against the great weight and preponderance of the evidence, constituting an abuse of discretion. 2020 Tex. App. LEXIS 9445, [WL] at *18-19. Accordingly, we reversed the award and remanded the case to the trial court for a redetermination by applying *Rohrmoos*'s guidance, which the trial court did not have when awarding fees initially. 2020 Tex. App. LEXIS 9445, [WL] at *19.

In another TCPA case remanded for reconsideration under *Rohrmoos*, the trial court awarded to the TCPA movants $256,689 in attorney's fees. *Toledo v. KBMT Operating Co.*, 581 S.W.3d 324, 326-27 (Tex. App.—Beaumont 2019, pet. denied). The appellant complained that there was insufficient evidence to support the award because the movants' attorneys had filed only one short, form motion and two strikingly similar briefs and had made only three court appearances. *Id.* at 327. The movants' attorneys had supported their request with a business records affidavit authenticating 177 pages of bills and supporting documents and an affidavit by their lead attorney **[*47]** in which he described his professional experience and his role as lead counsel in the case; identified the other attorneys and paralegals who participated in defending the case together with the hourly rate of each; described the course of the litigation; and averred that the charged fees were usual and customary as well as reasonable and necessary. *Id.* at 328. The movants' lead attorney subsequently testified at the attorney's-fee hearing. *Id.* Although the nonmovant objected to the movants' evidence and supported her objections to an excessive award with her attorney's affidavit, the trial court granted the movants' request to strike that affidavit—a ruling that was not challenged on appeal. *Id.* at 328-29.

On appeal, the nonmovant complained that the award was excessive because the invoices reflected substantial duplication of effort by the firm's attorneys; that the firm had over-researched legal issues by using many attorneys to perform essentially the same research; that the firm had billed for time it would have taken to do original research and writing even though it recycled the same arguments and authorities in its motions and briefs in the trial court; that the firm had billed paralegal and attorney **[*48]** rates for tasks that it should have classified as clerical or ministerial work; that many tasks described in the invoices used vague terms and did not adequately describe the work performed; that the firm had billed for work the court should have eliminated as nonreimbursable; that the firm had charged for work based on invoices from local counsel whose work

duplicated the same tasks performed by the firm; that the firm's attorneys had charged time for attorneys who prepared for oral argument but then did not participate in presenting the arguments; that the firm had charged for time spent communicating with the client's insurance carrier and adjuster, for researching court procedures and rules, and for obtaining extensions of time unrelated to the TCPA motion to dismiss; that the firm had presented a bill that showed a lack of billing judgment given the requested award's amount; and that the firm had charged rates higher than those prevailing in the legal market where the nonmovant sued. *Id.* at 331.

The Beaumont court agreed that the trial court had awarded an excessive fee because the movants' lead counsel's testimony was "rather conclusory" as to the reasonableness of the hours worked, and **[*49]** his conclusory testimony and invoices did not establish that the amount sought was reasonable when he failed to explain why the attorneys who billed for working on the case were not needlessly duplicating and revising each other's work. *Id.* The evidence before the trial court also failed to establish the amount of damages at stake in the dispute, preventing the trial court from reasonably determining whether the award was grossly disproportionate to the amount at stake on the defamation claims. *Id.* at 331-32. Our sister court reversed the award and remanded the case after concluding that the trial court had failed to apply the lodestar method properly and that it had abused its discretion by failing to apply the guiding rules and principles to determine the reasonableness of the amount it awarded in attorney's fees. *Id.* at 333.

Having reviewed how we and other courts have previously treated TCPA attorney's-fee awards, both large and small, we now turn to the instant case to determine whether the trial court erred by awarding too little in attorney's fees to Rial and Toye.

2. Trial court's attorney's-fee order

Here, in its order awarding attorney's fees, the trial court labeled the amount of fees "reasonable **[*50]** and necessary" and awarded $48,137.50 to Marchi—the specific amount she had requested—and awarded to Funimation, Rial, and Toye $50,000 each despite their substantially larger requests. The trial court's order did not explain why it had reduced the fee awards requested by Rial and Toye (or Funimation), and the trial court made no written fact findings about the fee awards. When the trial court makes no fact findings, we infer all facts supported by the evidence that are necessary to support the trial court's ruling. *Jones-Hospod*, 2021 Tex. App. LEXIS 7285, 2021 WL 3883884, at *6.

3. Attorney's-fee evidence

During the attorney's-fee hearing, each of Appellees' lead attorneys testified about their qualifications and work on the case. Mignogna also testified about the case but presented no evidence to contradict Appellees' attorney's-fee evidence. We will review all of the attorney's-fee evidence because the record makes apparent that the trial court considered all of it in making its determination.

a. Rial and Toye's evidence

The trial court admitted into evidence the billing records of Rial and Toye's attorneys, and J. Sean Lemoine, their lead counsel, testified that he had brought unredacted billing records to submit in camera if Mignogna's counsel **[*51]** challenged the redactions.

Lemoine testified that in 2000, he graduated from Vermont Law School and became licensed in Texas, and in 2004, he joined Wick Phillips at its inception and practiced commercial litigation. Lemoine stated that Wick Phillips began litigating TCPA cases in 2013, that the firm had a "pretty robust anti-SLAPP practice," and that he was "probably the lead attorney within the firm that advises on that particular statute." He had a blog, www.antislapptexas.com; wrote a version of recommended changes to the TCPA during the 2019 legislative session; gave continuing legal education presentations about the

TCPA; and had litigated "at least 12 to 15 TCPA motions" through attorney's-fee hearings. He stated that he was familiar with the tasks necessary to represent a client in litigation and specifically on a TCPA motion.

In researching Tarrant County attorney's-fee rates, Lemoine testified that Wick Phillips opened a Fort Worth office in 2006, and that he had spoken with one of the attorneys in that office—who had joined from Haynes Boone—about the office's rates as well as Haynes Boone's Fort Worth office rates. He also talked to a senior-level partner at Jackson Walker **[*52]** "to determine what their Fort Worth rates are" and "got additional data points" from the Kelly, Hart & Hallman partner who had worked on *In re Lipsky*, "[which] went all the way to the Texas Supreme Court on anti-SLAPP."

Lemoine also spoke with an attorney at Barnes & Thornburg who had received an award of attorney's fees in Fort Worth in February 2019. From this research, he "was able to get a range of the fees . . . kind of starting at Harris [Finley] Bogle all the way up to Jackson Walker . . . and Haynes [] Boone, they're the top end of fees." Lemoine then addressed the *Rohrmoos* factors and testified that a lawyer with 25 years' experience would command a higher rate than a first-year lawyer, as would a board-certified lawyer, or one with expertise in a particular case's topical basis. He stated that the reasonable fee under *Rohrmoos* could be calculated via a blended rate of all of the timekeepers multiplied by a total number (reasonable hours x reasonable rates) or by determining the reasonable hourly rate for each timekeeper "and then how many hours [each lawyer] should . . . have spent on a particular case or a particular activity, and then you multiply that out, and you do that for each timekeeper," **[*53]** followed by exercising "billing discretion" to eliminate excessive or duplicative time "or time that wasn't properly spent on recoverable issues."

Lemoine testified that his hourly rate was $515 and testified about the Wick Phillips lawyers who worked on the case with him:

- Jeff Hellberg, a double board-certified attorney with 23 years' experience, who was "one of the foremost people in terms of arguing Texas anti-SLAPP cases at the Court of Appeals," and whose hourly rate was $650, which Lemoine stated was consistent for the Fort Worth area with a Jackson Walker or Haynes Boone rate but a little higher than a Kelly Hart rate;
- Jeff Mills, an attorney with 9 years' experience and an hourly rate of $470;
- Ethan Minshull, an attorney with 8 years' experience and an hourly rate of $435; and
- Zac Farrar, an attorney with 5 years' experience and an hourly rate of $395. Lemoine also testified about two co-counsel attorneys from outside his firm—Casey Erick, who had an hourly rate of $275, and Andrea Perez, who had an hourly rate of between $275 and $300—who performed most of the factual investigation and obtained all of the affidavits supporting Toye and Rial's TCPA motion to dismiss. On **[*54]** cross-examination, Lemoine stated that the bottom rate for associate fees was "probably in the $250 range" and the top range was "probably 350 to 365."

Lemoine stated that he arrived at the reasonable fee based on his analysis of market rates in Dallas County and Fort Worth and that he "didn't try to ask for an enhancement." He opined that all of the rates set out above were reasonable based on his research and "the factors that you can consider under *Rohrmoos* and the Texas Disciplinary Rule[s]." He testified about his billing-discretion determinations—reductions "based on [his experience of] 19 years of litigation and six years of TCPA work"—and pointed them out in the billing records admitted into evidence.

Lemoine testified that Rial and Toye's fees through October 31 amounted to $271,923.80. The trial court admitted into evidence a summary of Lemoine's testimony. Lemoine's affidavit sponsoring his firm's billing records contained the following chart:

Go to table1

Lemoine added the $199,050.55 to co-counsel's

$60,662.49[36] to reach $259,713.04—the total attorney's-fee amount prior to anticipated costs to secure the final judgment.

Based on the invoices, Lemoine worked a total of 244.50 hours from April to October 2019, and multiplied by his hourly rate of $515, his billing would have been $125,917.50; Minshull worked a total of 203 hours over those same months, and multiplied by his hourly rate of $435, his billing would have been $88,305; Hellberg worked 11.50 hours over three months (July, September, and October 2019), and multiplied by his hourly rate of $650, his billing would have been $7,475; Mills worked 1.0 hour in August 2019 at an hourly rate of $470, amounting to $470; Farrar worked 2.30 hours in September 2019 at an hourly rate of $395, amounting to $908.50; and a paralegal worked .20 hours in July 2019 at an hourly rate of $185, amounting to $37. There were 462.50 total hours worked on the case by the Wicks Phillips attorneys, and their total billing, **[*56]** before the exercise of billing discretion, would have been $223,113. Lemoine discounted the bill by $24,018.95, for an after-discount attorney's-fee total of just over $199,000. With their co-counsels' $60,662.49 in billing, the amount prior to November was just over $259,000.

Lemoine estimated $11,250 for fees through November at a blended rate of $450 (a split between himself and Minshull) multiplied by 30 hours. He requested a total amount of $282,953.80.

Lemoine acknowledged that the $282,953.80 total amount was bigger than in other TCPA cases but explained,

> This case had a layer of complexity to it that you don't typically see in a defamation case. The first issue is that it primarily deals with Twibel, which is the people's combination of Twitter and libel. There is no real Texas case law on Twibel, so you have to research outside of the state of Texas for that[.]
>
> [F]urther[,] [i]t was compounded by the fact that there was something done in this case that I have never seen done before. When you proceed under a l[ibel] case, you have to include the entire context of the alleged defamatory statement because it's a publication rule, and the courts have uniformly said you have to have **[*57]** a context to it.
>
> Well, here we were dealing with statements completely out of context with no surrounding what the person was responding to, who they were even talking about. At the depositions there w[ere] 200 pages of Twitter posts [with] . . . blanks all around it.
>
> Well, that's not how Twitter works. The response is to something. In order to determine defamation, whether or not the statement was defamatory, you have to know what the context is.
>
> That is compounded by the fact that people [who] are no longer proud of what they wrote on Twitter can make it disappear. And so we don't know and we'll never know what the context was around several hundred pages of evidence that the plaintiff tried to introduce. So that was the first issue.
>
> The second issue is the concept of whether [being called] a sexual predator . . . is defamatory. . . . The only case to address it that I have been able to find is the Mogged . . . versus Lindamood case [which was then on appeal] . . . . And that's the only one that talks about whether or not being called a sexual predator, you know, is defamatory. So we had that particular issue.

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[36] In his affidavit, Erick stated that he had been licensed since 2002, was a shareholder at Cowles & Thompson, P.C., and had over 17 years' experience in civil trial matters. He stated that approximately 282.40 of attorney hours had been worked on the claims against Rial and Toye at $275, an agreed rate at the low end of the $275-$515 hourly rate that he said was reasonable for Tarrant County; he billed $32,418.75 in fees at one firm (Kessler Collins, P.C.) and $25,932.50 after joining Cowles & Thompson, P.C., for a total of $58,351.25. He attached his billing records to his affidavit.

Perez averred that she was an attorney at Carrington, Coleman, Sloman & Blumenthal, L.L.P., licensed since 2009, that she had worked 8.1 hours of attorney time on the case, and that her rate was $300 per hour, for a total request of $2,430.

> Then we had . . . just within this, the context of this particular argument, **[*58]** you had a fight over public versus private distinction, because whether or not a person was either a public figure or a limited public figure changes radically the standard in which the Court evaluates defamation. So that was a big fight and, you know, in those contexts there is not always a lot of case law that is on point. So you had to do that type of research.
>
> We were hit with a battery of evidentiary objections at every turn. This morning is a good example. Right before we walked in, we got hit with seven pages of every objection you can come up with. And that was every evidentiary issue we had. We were met with that.
>
> We were met with continuances, things that really drove up the cost. We had to fight harder in this case than I've had to fight in most anti-SLAPP cases.
>
> The other thing that was unusual about this case is that the plaintiff was actually put up for deposition. I've never seen that before in the 15 cases that I've done in anti-SLAPP.
>
> You never put the plaintiff up if you don't have to.[37] And so that added a layer of cost, but it was really good for us, because we got to shut down or flesh out the lack of support for the claims in the case, and we were able to introduce **[*59]** that through a fairly complex anti-SLAPP motion.
>
> Our anti-SLAPP motion in this case is the most complex anti-SLAPP motion that I've ever litigated before. There are a couple of unique issues in that . . . regard . . . there is a Communications Decency Act affirmative defense that has never been ruled on in the state of Texas with regard to what is called retweet liability, meaning I retweet something that somebody else says, am I protected by the Communications Decency Act.
>
> There is a libel proof affirmative defense that you rarely see in defamation cases. There is a consent affirmative defense that you rarely see in defamation cases. We also had some weird vicarious liability issues.
>
> In addition, we had some TCPA specific issues, including a fight over whether or not we could supplement the motion to dismiss. There is no case law on it. So we had to pick a fight with the . . . plaintiff over that.

He further testified that beyond the motion to dismiss itself and other filings, there was "the notary fraud issue" and the second amended petition filed three days before the hearing.

Lemoine testified that he had not billed his clients for time spent watching YouTube videos posted by Rekeita, **[*60]** who had set up Mignogna's GoFundMe site and to whom information about the litigation had been leaked. Lemoine said that he watched the videos because Rekeita "would actually say things that we would see showing up in motions and in hearings" and "because he tells us what the plaintiff's legal counsel is thinking[;] otherwise I would not watch him." He stated, "I had to suffer through those, but I didn't bill the client. . . . [O]nly one of us had to suffer through that, and they shouldn't have to pay for it, so I did it." Lemoine also said that he had reduced an invoice by an hour because his "having to deal with the death threats that are caused by what is being said about this case outside the courtroom has nothing to do with defending the TCPA motion," so he could not pass it along to the other side.[38]

Lemoine testified that the requested $15,526.96 in litigation costs included deposition fees and costs, Westlaw research costs, parking costs, mediation costs, and the costs of getting "witness affidavits around the country." On cross-examination, Lemoine agreed that duplicative efforts were something the

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[37] On cross-examination, Lemoine testified that it was normal to spend 10 times the length of a deposition to prepare for it because "when you get a shot at a plaintiff in a defamation case and he goes first. That's a kill shot opportunity."

[38] Each lead attorney for Appellees testified about conditional appellate fees, but because those are not challenged, we will not address that testimony.

trial court could consider in reducing fees. He agreed that he had coordinated **[*61]** with defense counsel outside his firm to avoid duplication of effort.

b. Funimation's evidence

Funimation's lead counsel, John Volney, testified that he was a partner at Lynn, Pinker, Cox & Hurst in Dallas and that he had overseen the work in the case "by virtue of [his] experience as a litigator at the trial court level and appellate court level in the state of Texas since 1997," when he graduated from Duke Law School. He had been a partner in his firm since 2006. Regarding his methodology, Volney stated, "I went through the same methodology that Mr. Lemoine described . . ., which was to review . . . *Rohrmoos* and apply the framework that the Texas Supreme Court mandated in that case." He stated that in addition to himself as the lawyer in charge (hourly rate $500), he worked with an associate attorney (hourly rate $410) who had been licensed since 2012 and who had attended Stanford University as an undergraduate and Vanderbilt Law School, was licensed in California and Texas, and had clerked at the federal court in El Paso for two years. He also worked with an experienced paralegal (hourly rate $220) who graduated with a bachelor's degree in Business Administration in 1995 and received a paralegal **[*62]** certificate in 1999. Volney opined that their rates were reasonable "for substantially the same reasons as [Lemoine's]," although he said, "[T]here is really not that much of a difference in terms of the legal market" in Dallas County and that of Tarrant County: "I think it's really sort of the DFW market." Volney said his firm charged the same rates regardless of county.

Volney provided an affidavit in which he set out his reasoning on reasonable attorney's fees through entry of judgment, and his exhibits were admitted into evidence. His redacted billing records showed the hours worked, who worked them, and the amount charged, along with a brief description of the services rendered and which items had been excluded from the billing.

From May to October, Volney worked 261.90 hours, which multiplied by his $500 rate amounted to $130,950. His associate worked 131.20 hours, which multiplied by her $410 rate was $53,792. His paralegal worked 67 hours, which multiplied by his $220 rate was $14,740. Based on the above, Funimation's counsel's total hours, including the paralegal's, amounted to 460.1—or just 2 hours fewer than Rial and Toye's counsel's total hours (not counting outside co-counsel **[*63]** Erick and Perez) of 462.50 and Funimation's counsel's pre-billing-discretion total would have been $199,482, or approximately the same amount as Wick Phillips' total amount sought (i.e., not counting outside co-counsel) after they applied billing discretion.

Volney stated that the case had "involved some pretty nuance[d] issues, the first amendment law and the TCPA," and noted that it was only his second TCPA motion as a litigator. He also noted that Mignogna had originally sought $1 million in damages, making it a serious case for his client, and stated that because it was a TCPA case, they "had to move rather quickly from the time the lawsuit was filed" and did not seek an extension of the TCPA deadline. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.003 (setting out TCPA deadlines). He opined that the reasonable amount of attorney's fees incurred by Funimation through entry of judgment was $168,941.

Volney stated that he had exercised billing discretion, going through the invoices on an entry-by-entry basis and citing, as an example, having reduced his associate's entry by 50 percent of the time he spent "researching case law related to the TCPA." He also removed charges for time spent traveling from Dallas to Tarrant County and to attend depositions **[*64]** and hearings, as well as "other entries that in [his] billing discretion [he] thought could be excluded from the overall number," which had reached "just under $200,000." Volney stated that his firm was not seeking fees for the fees-and-sanctions hearing and that he had calculated a total percentage reduction of 15.2 percent, which included any redrafting and rewriting he did of his associate's work. He sought $7,504 for litigation expenses that included outside

copying of exhibits for depositions and for the TCPA hearing, a court-reporter fee for the TCPA hearing, the mediation fee, Westlaw charges, court parking, and some in-house copying charges. He stated that he had brought unredacted invoices for the trial court to review in camera if the trial court wanted to see beneath the work-product and attorney-client-privilege redactions.

When asked on cross-examination why the TCPA motion was not filed until July when Funimation's plan had been to file the motion in May, Volney stated that he had waited after Mignogna's counsel decided to take depositions of Mignogna, Rial, and Toye because he "felt like [his] TCPA motion would be stronger if it occurred after those depositions had taken **[*65]** place," and he concluded that ultimately that strategy worked correctly.

At the conclusion of Volney's testimony, the trial court observed that Funimation's bill was $100,000 less than Rial and Toye's, and Volney agreed that Lemoine's team had spent 200 more hours to prosecute the case[39] and opined that their extra work was reasonable because the claims against Rial and Toye were different from the claims against Funimation. The trial court apparently disagreed, stating, "I mean, [Rial and Toye's counsel is the] expert. It shouldn't take him 100 more hours than you."

c. Marchi's evidence

Marchi's counsel, Samuel H. Johnson, testified that he was one of two managers of the law firm Johnson & Sparks, PLLC, which was an iteration of several different entities he had been involved in since starting his own firm in 2012. Johnson stated that he had a bachelor's degree from the University of Texas at Austin and had attended South Texas College of Law; he had been licensed in Texas in 2008 and had "been practicing regularly throughout the Metroplex ever since," primarily in business litigation. The trial court admitted into evidence a declaration Johnson had prepared and signed in conjunction with **[*66]** Marchi's motion for attorney's fees and sanctions, which contained his business records, including his fee agreement with Marchi. He also brought his unredacted bills for the trial court to review in camera.

Johnson testified that his standard rate was $350 per hour and that his firm had agreed to represent Marchi at $250 per hour for attorney time and $125 an hour for paralegal time, with a success bonus of $100 per hour if they were able to get the claims dismissed within six months. His paralegal, whose usual rate was $150 per hour, had been a paralegal since 1992, was a certified paralegal and member of the paralegal section of the State Bar of Texas, and had a bachelor's degree in legal studies and a master's degree in technology. He explained that his paralegal's rate was lower than that of paralegals of similar qualifications, "[b]ut we are a smaller firm and generally have smaller clients, so we also have smaller bills." Johnson stated that his firm had billed 127 hours of attorney time and 6.6 hours of paralegal time through the end of October. He had billed for his paralegal at a reduced rate of $125 in the case. This had been his first TCPA case.

Johnson testified that the **[*67]** $48,137.50 in attorney's fees requested by Marchi was an amount that was reasonable and necessary, and he requested conditional appellate attorney's fees.

Johnson stated, "This has been an intense case to work on. Oftentimes we would receive late filings that required our office to basically drop everything we were doing, to make sure that not only . . . we were responding as promptly as possible, but oftentimes to make sure we didn't miss anything." He was the only attorney in his small firm to work on the case and "all of the hours spent on this were not spent working for other clients or seeking out new clients." Johnson stated that he was familiar with fees that firms of all sizes charged their clients throughout

[39] The record reflects that Rial and Toye had incurred 290.5 additional hours, which were attributable to co-counsel outside of Wick Phillips. There was only a 2.4-hour difference between the hours worked by the Wick Phillips attorneys for Rial and Toye and the hours worked by the Lynn, Pinker, Cox & Hurst attorneys for Funimation.

the Metroplex and other counties in the state. He used LexisNexis for legal research, and those costs, along with a receipt for parking at the courthouse and $1,500 for mediation, were included in his litigation costs.

Johnson stated that one thing that had helped keep Marchi's costs so low was that "the co-defendants . . . bore a lot of the heavy lifting on some of the legal research and getting materials prepared for the hearings and drafting some of the objections, . **[*68]** . . [s]o there was a lot of legal research that [he] didn't have to do for Ms. Marchi because [he] knew that the other defendants would be doing that."

The trial court asked Johnson, "So how is it possible that you could do this case for $48,000, and . . . you've never done this before . . . [a]nd he's an expert . . . on these, and it took him . . . $282,000, right?" Johnson pointed out that Lemoine had twice as many clients and to the extent that Mignogna had any actual claim pleaded against Marchi, "it was only maybe as to one tweet, which actually wasn't a part of their pleadings." Johnson also pointed out that he had "a lot less record to deal with." The trial court noted, "$234,000 difference. Either you're not billing enough or he's billing too much." Johnson replied, "A lot of people do tell me I'm not billing enough or high enough, for what it's worth."

d. Mignogna's counsel

Mignogna did not put on any controverting attorney's-fees evidence. When asked during closing arguments if he thought the amount of Marchi's fees were reasonable, Mignogna's counsel replied, "Ms. Marchi's attorney's fees in general, yes, they're fairly reasonable."

e. Trial court's additional comments

During **[*69]** the hearing's conclusion, the trial court—obviously troubled by the range of fees from $48,137.50 to $282,953.80—stated, "[I]f you brought me a repair bill on a car or something, and one is 48,000 and one is 282,000, you can't say those are both reasonable, or that the 282,000 was reasonable. It's the same causes of action."

4. Analysis

As noted above, we recently addressed the award of TCPA attorney's fees in *Mogged*. *See* 2020 Tex. App. LEXIS 9445, 2020 WL 7074390, at *17-19. In that case, we observed—before concluding that the court's attorney's fee award was against the great weight and preponderance of the evidence—that

> [a] trial court is not, of course, a mere rubber stamp or bean-counter; even when evidence of attorney's fees is uncontroverted, a trial court is not obligated to award the requested amount. And as part of its exercise of discretion, the court may consider the entire record and common knowledge of the participants as lawyers and judges in making its determination.

2020 Tex. App. LEXIS 9445, [WL] at *18 (citations and quotation marks omitted).

The record shows that in his original petition, Mignogna sought "over $1,000,000.00" and that in his first amended petition, he changed the amount to "over $1,000,000.00 but not exceeding $5,000,000.00." And as set out above **[*70]** in our TCPA analysis, Mignogna brought substantially heavier allegations against Rial and Toye, who were deposed, as compared to Marchi and Funimation, who were not deposed. Although each party faced the $5 million lawsuit, Mignogna's case against Rial and Toye was more complicated and therefore required more work to defend against it.

Rial and Toye attached 19 exhibits, some with multiple attachments, to their TCPA motion, and many of those exhibits were affidavits acquired from witnesses around the country. In contrast, Funimation attached 24 exhibits to its TCPA motion, but 3 were affidavits from Funimation and Sony employees, 16 were online news articles, 1 was Mignogna' internet-movie-database listing, and the remaining exhibits were Mignogna's and Funimation's tweets—all easily obtainable

information as compared to Rial and Toye's exhibits. And to her TCPA motion, Marchi attached her tweet, her declaration, Mignogna's deposition, and Mignogna's electronically-stored-information-preservation and cease-and-desist letters, but she also incorporated and adopted by reference all of Funimation's and Rial and Toye's evidence attached to their TCPA motions.

The trial court had before it **[*71]** evidence from two other legal teams on the same side as Rial and Toye—those of Funimation and of Marchi—from which to help gauge reasonableness and necessity. *But cf. In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794, 809-10 (Tex. 2017) (orig. proceeding) (noting that an "apples-to-oranges comparison" in the same case of plaintiff's fees to defendant's fees does not help determine whether either are reasonable or necessary). Rial and Toye's attorneys had higher rates (and more experience, including TCPA experience) than Marchi's attorney, there were more attorneys working for Rial and Toye, and their attorneys performed substantially more work on the case than Marchi's counsel, as supported by their respective billing records and their respective TCPA motions. Lemoine, Rial and Toye's lead counsel, was licensed in 2000. His principal associate Minshull was licensed in 2011, just three years after Marchi's counsel Johnson was licensed. Funimation's lead counsel Volney, who was not a TCPA expert, was licensed in 1997 and lacked Lemoine's TCPA experience but otherwise had a comparable hourly rate to Lemoine; other than the outside co-counsel hours, Volney had billed similar hours for Funimation in this case.

By awarding essentially the same amount the trial **[*72]** court apparently failed to factor in all of the testimony addressing expertise and experience, as well as the distinction between a large firm's billing rate and a small firm's billing rate and the fact that Marchi's counsel had leveraged the "heavy lifting" by Rial and Toye's legal team to prevail with significantly fewer hours at a significantly lower cost. Rial and Toye's legal team, although it had more expertise in the subject matter, also had higher billing rates and more people, which they used to address the novel issues raised in this complex case that were not reached on appeal only because Mignogna failed to preserve or brief those issues.[40] Rial and Toye's team also had to address significantly more allegations against them, as set out in our TCPA analysis above.

On the record before us, the trial court had ample evidence upon which to exercise its discretion. However, the trial court's comments make apparent what the record otherwise shows—that despite the *Rohrmoos* base-lodestar presumption of reasonableness, *see* 578 S.W.3d at 499, and Rial and Toye's evidence, which was not controverted by Mignogna, the trial court abused its discretion when it awarded to Rial and Toye collectively just over one-third **[*73]** of their requested amount of attorney's fees.

Although the trial court was not obligated to award any of the specific amounts requested by the parties' attorneys and had the discretion to reduce the amount of attorney's fees, the trial court abused its discretion by assessing such a significant reduction in light of, among other things, Marchi's counsel's testimony that he had made use of their additional work and "heavy lifting" in the case. *See Statler v. Challis*, No. 02-18-00374-CV, 2020 Tex. App. LEXIS 8519, 2020 WL 6334470, at *18 (Tex. App.—Fort Worth Oct. 29, 2020, pet. denied) (mem. op.) (concluding that award of "approximately 5% of the . . . proven attorney's fees, which necessarily were incurred with respect to the challenged claims in the trial court and with respect to claims that [the plaintiff] argued arose from 'one of the biggest frauds . . . that has ever existed,'" in Rule 91a case was against the great weight and preponderance of the evidence). Contrary to the trial court's comments about car repair bills, legal services are not fungible,[41]

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[40] That is, because Mignogna failed to preserve his challenge to Appellees' evidence or to submit the necessary evidence to support his claims, we did not reach the qualified-privilege, libel-proof, and other defenses raised by Rial and Toye.

[41] *See* Donald R. Lundberg, *Will You Take Fries for That? Bartering for Legal Services*, Res Gestae 32 (2009) ("[B]ecause neither lawyers nor legal services are fungible, there tends to be a high degree of variability in what any given lawyer can demand and what any given client will pay.

nor was Mignogna's case against each defendant exactly alike, and the trial court should have properly calculated each base lodestar with that in mind. *See Rohrmoos*, 578 S.W.3d at 499 (incorporating into base lodestar the *Arthur Andersen* factors such as the required time and labor, novelty and difficulty, **[*74]** skill, experience, and customary fees for similar legal services, among others).

Rial and Toye each supported the base lodestar calculation with more than sufficient evidence. Therefore, there is a "strong presumption" that the amount calculated using the lodestar method can be shifted to Mignogna. *See Iola Barker*, 632 S.W.3d at 194. Mignogna offered no evidence to controvert Rial and Toye's presumptive evidence. The fact that other codefendants' lawyers, with differing levels of expertise and clients with different postures in the case, had different fee totals was not sufficient to rebut the presumptions raised by Rial and Toye's lodestar evidence.

Accordingly, we sustain Rial and Toye's cross-issue and remand this portion of the case for a redetermination of a reasonable attorney's-fee award in light of the *Rohrmoos* standards.

VI. Conclusion

Having overruled all of Mignogna's points and having sustained Rial and Toye's sole cross-issue, we affirm the trial court's judgment except for the attorney's-fee amount awarded to Rial and Toye. Having determined that the attorney's-fee amount awarded is not supported by factually sufficient evidence, we remand this issue **[*75]** to the trial court for a redetermination in light of the above guidance.

/s/ Mike Wallach

Mike Wallach

Justice

Delivered: August 18, 2022

Some lawyers are more qualified, some practice niches are more competitive, and some clients have greater need.").

Concur by: Bonnie Sudderth; Dana Womack

Concur

CONCURRING MEMORANDUM OPINION

I write separately only to reiterate what has already been said both in the majority opinion and in the concurring and dissenting opinion.

First, I agree with the concurring and dissenting opinion that there is ample room in this record to support the trial court's decision to award a lesser amount of attorney's fees than Rial and Toye sought.

But I also agree with the majority opinion in holding that a one-size-fits-all approach to determining appropriate attorney's fees violates guiding rules and principles and, therefore, that the trial court abused its discretion in the manner in which it reduced the fees awarded to Rial and Toye here.

/s/ Bonnie Sudderth

Bonnie Sudderth

Chief Justice

Delivered: August 18, 2022

Dissent by: Dana Womack

Dissent

CONCURRING[1] AND DISSENTING MEMORANDUM OPINION

I. INTRODUCTION

The trial court awarded Monica Rial and Ronald Toye $100,000 in attorney's fees. Both Appellant Victor Mignogna and Cross-Appellants Rial and Toye

[1] I concur with the majority opinion's disposition of the Texas Citizens Participation Act (TCPA) claim.

challenge this award. While Mignogna disputes the award of any fees because **[*76]** "the trial court improperly dismissed [his TCPA] claims,"[2] Rial and Toye dispute the amount of the attorney's-fees award, complaining that it was lower than the amount they requested. The majority agrees with Rial and Toye, reversing and remanding for a redetermination of fees. Because I do not agree that the trial court abused its discretion, I respectfully dissent.

II. Discussion

In their sole cross-appeal issue, Rial and Toye complain that the trial court's award of $100,000 in attorney's fees is improper because they requested and provided evidence of $282,953.80 in fees. Mignogna responds that the trial court acted within its discretion in reducing the attorney's-fees award in light of the following: Rial and Toye's "heavily redacted billing statements"; "deficiencies in Rial and Toye's attorney billing statements, including Rial and Toye's attempt to recover attorney's fees for block billing, billing for unnecessary tasks such as discussions with a NY bankruptcy attorney, several hours of discussions regarding alleged death threats to Rial and Toye from unknown individuals, unreasonably large time spent on discre[te] tasks such as billing over fifty (50) hours to prepare for **[*77]** a single deposition, duplicative and excessive attorney work, and for billing time spent on opposition research not related to resolving a case under the TCPA"; the fact that Mignogna's attorney "informed the trial court Rial and Toye's attorney's fees rates were excessive"; deficiencies in their attorney's fee expert; and the testimony of Jamie Marchi's expert witness that Marchi's reasonable and necessary fees for "defending the exact same claims and achieving the exact same results as Rial and Toye" were $48,137.50. For these reasons and others, I agree with Mignogna that the trial court acted within its discretion in reducing the attorney's-fees award to Rial and Toye.

A. Standard of Review

When a trial court dismisses a suit under the TCPA, it must award "reasonable attorney's fees" to the successful movant. Tex. Civ. Prac. & Rem. Code Ann. § 27.009(a)(1); *Sullivan*, 488 S.W.3d at 299. A reasonable attorney's fee "is one that is not excessive or extreme, but rather moderate or fair." *Sullivan*, 488 S.W.3d at 299 (citing *Garcia v. Gomez*, 319 S.W.3d 638, 642 (Tex. 2010)).

We review the trial court's decision to award attorney's fees under this section for an abuse of discretion. *Navidea Biopharmaceuticals, Inc. v. Capital Royalty Partners II, L.P.*, No. 14-18-00740-CV, 2020 Tex. App. LEXIS 6973, 2020 WL 5087826, at *6 (Tex. App.—Houston [14th Dist.] Aug. 28, 2020, pet. denied) (mem. op.) (citing *Sullivan v. Tex. Ethics Comm'n*, 551 S.W.3d 848, 857 (Tex. App.—Austin 2018, pet. denied)). "A trial court abuses its discretion if its decision 'is arbitrary, unreasonable, and without reference to guiding principles.'" *Sullivan*, 551 S.W.3d at 857 **[*78]** (quoting *Goode v. Shoukfeh*, 943 S.W.2d 441, 446 (Tex. 1997)); *see In re A.L.M.-F.*, 593 S.W.3d 271, 282 (Tex. 2019). A trial court does not abuse its discretion when its ruling is based on conflicting evidence and some evidence of substantive and probative character supports its decision. *Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 97 (Tex. 2009). And a trial court does not abuse its discretion merely because the appellate court would have ruled differently in the same circumstances. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995); *see Low v. Henry*, 221 S.W.3d 609, 620 (Tex. 2007).

B. Analysis

The hearing on attorney's fees spanned 192 pages of testimony from four witnesses as well as fifteen exhibits. After examining the evidence, the majority

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[2] I agree with the majority opinion that, due to its disposition of the TCPA claim, it was proper for the trial court to award some amount of attorney's fees to the successful movants. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.009(a)(1); *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016).

opinion states that "[b]y awarding essentially the same amount [to Rial and Toye as it did to Marchi,][3] the trial court apparently failed to factor in all of the testimony addressing expertise and experience, as well as the distinction between a large firm's billing rate and a small firm's billing rate and the fact that Marchi's counsel had leveraged the 'heavy lifting' by Rial and Toye's legal team to prevail with significantly fewer hours at a significantly lower cost." While noting that "the trial court had ample evidence upon which to exercise its discretion," the majority opinion then concludes that "the trial court's comments[4] make apparent what the record otherwise shows," that "the trial court abused its discretion when it awarded to Rial and Toye collectively just over one-third of their requested amount of attorney's fees." I believe that this analysis goes beyond the scope of our review, interferes with the trial court's discretion, and substitutes our opinion for that of the factfinder.

The determination of what is a reasonable amount of attorney's fees cannot be made by application of some mechanical formula. *USX Corp. v. Union Pac. Res. Co.*, 753 S.W.2d 845, 858 (Tex. App.—Fort Worth 1988, no writ). While a movant must prove that its requested attorney's fees are both reasonable and necessary, whether a fee is reasonable and whether it is necessary are both "questions of fact to be determined by the fact finder," and each "act[s] as [a] limit[ ] on the amount of fees that a prevailing party can shift to the non-prevailing party." *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 489 (Tex. 2019). And here, where the fees were presented under the *Rohrmoos* lodestar method, the determination of what constitutes a reasonable attorney's fee involves two steps, and the trial court may adjust the base lodestar up or down if relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case. *Id.* at 494. This second step permits the factfinder to determine whether evidence of other considerations overcomes the presumption of reasonableness. *Id.* at 501. Here, those considerations could have included the following:

- Rial and Toye's attorney's fees were $282,953.80 while Marchi's were $48,137.50 and Funimation's were $168,941;

- Rial and Toye's attorneys' rates were $650 and $515 per hour as compared to Marchi's **[*80]** attorney's rate of $250 per hour plus a $100 per hour "success bonus" by getting the claims dismissed within six months and Funimation's

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[3] While the majority opinion says that the amounts awarded by the trial court were "essentially the same amount," this is not what the judgment reflects. Rather, the judgment states that different amounts of attorney's fees—trial and appellate—and different amounts of litigation expenses were awarded to Funimation Productions, LLC; Rial and Toye; and Marchi. *See* Exhibit A.

[4] When referring to the "trial court's comments," the majority opinion is apparently citing its earlier statements that "the trial court observed that Funimation's bill was $100,000 less than Rial and Toye's"; that the trial court noted that there was a "$234,000 difference [between the requested attorney's fees for Marchi as compared to Rial and Toye]"; and that the trial court stated, "[I]f you brought me a repair bill on a car or something, and one is 48,000 and one is 282,000, you can't say those are both reasonable, or that the 282,000 was reasonable. It's the same causes of action."

These comments by the trial court should not figure into the abuse-of-discretion analysis as there were no findings of fact or conclusions of law filed in this case; therefore, we must infer all findings necessary to support the trial court's judgment. *Lemons v. EMW Mfg. Co.*, 747 S.W.2d 372, 373 (Tex. 1988); *see* ***[*79]*** *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002); *see also Sprute v. Levey*, No. 04-14-00358-CV, 2015 Tex. App. LEXIS 7271, 2015 WL 4638298, at *7 (Tex. App.—San Antonio July 15, 2015, no pet.) (mem. op.) (holding that where the trial court did not expressly state its reason for a reduced fee, "we must infer that the trial court found 'some of the claimed fees to be unreasonable, unwarranted, or some other circumstance which [made] an award of the uncontroverted claim wrong'" (quoting *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990)). In addition, a court of appeals is not entitled to look to any of the trial court's comments at the conclusion of a bench trial as a substitute for findings of fact and conclusions of law. *In re W.E.R.*, 669 S.W.2d 716, 716 (Tex. 1984); *see Elgohary v. Lakes on Eldridge N. Cmty. Ass'n*, No. 01-14-00216-CV, 2016 Tex. App. LEXIS 8876, 2016 WL 4374918, at *12-13 (Tex. App.—Houston [1st Dist.] Aug. 16, 2016, no pet.) (mem. op.) (concluding that despite the "trial court's off-the-cuff statement" that it was "going to arbitrarily reduce the award for attorney's fees," the "trial court heard testimony, exhibits, and the cross-examination contesting an award of attorney's fees" and did not act arbitrarily in reducing attorney's fees); *see also Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 240-41 (Tex. 2001) ("A trial court has the authority to express itself in exercising this broad discretion [over the conduct of a trial]."). Therefore, the trial court's comments did not limit the scope of what we may infer from the judgment. *See In the Interest of Q.M.*, No. 02-19-00367-CV, 2020 Tex. App. LEXIS 1442, 2020 WL 827595, at *4 (Tex. App.—Fort Worth Feb. 20, 2020, no pet.) (mem. op.).

attorneys' rates of $500 and $410 per hour;

• two attorneys for Rial and Toye testified by affidavits that were admitted into evidence that, in their experience, "a rate between $275.00 per hour and $515.00 per hour is a reasonable hourly rate for the attorneys working on this matter in Tarrant County";

• Rial and Toye's attorney spent sixty hours preparing for a ten-hour deposition;

• Rial and Toye had three attorneys appear at one deposition; and

• few documents were filed prior to the granting of the motion to dismiss.

Further, while the attorney for Marchi—who had the lowest attorney's fees—testified that this was the first TCPA motion he had ever drafted, and the attorney for Rial and Toye—who had the highest attorney's fees—testified that he had extensive experience with the TCPA, all movants achieved the same result—dismissal of the lawsuit at the same hearing and in the same judgment. All of these considerations could have factored into the trial court's decision to reduce the amount of attorney's fees awarded to Rial and Toye.

Rial and Toye's attorney **[*81]** even agreed that the trial court had wide discretion in setting their attorney's fees. At the hearing on attorney's fees, he stated, "[T]he Court doesn't have discretion to award zero, but the Court does have the discretion to set the amount." Their attorney admitted that while his rate was $650 an hour, his "rate at $300 would also be reasonable, or any rate below [his] 650 rate." Although Rial and Toye had "more timekeepers," "higher rates," and "spent more time on the file," their attorney agreed that they "got the same result" as the other movants. Ultimately, he simply "ask[ed] the Court to just fill in the blank on what the Court finds as a reasonable fee." Now, on appeal, Rial and Toye urge otherwise.

However, the trial court was not required to award the amount requested by Rial and Toye. Rather, as we have stated before, "a trial court is not, of course, a mere rubber stamp or bean-counter; even when evidence of attorney's fees is uncontroverted, a trial court is not obligated to award the requested amount." *Mogged v. Lindamood*, No. 02-18-00126-CV, 2020 Tex. App. LEXIS 9445, 2020 WL 7074390, at *18 (Tex. App.—Fort Worth Dec. 3, 2020, pet. denied) (mem. op.); *see McGibney v. Rauhauser*, 549 S.W.3d 816, 821 (Tex. App.—Fort Worth 2018, pet. denied) ("In the proper exercise of its discretion, the trial judge is obliged to do more than simply act as a rubber-stamp, accepting carte blanche the amount **[*82]** appearing on the bill."). And, as noted in *Mogged*, reduced attorney's-fees awards under the TCPA can be and have been upheld as a proper exercise of the trial court's discretion if conflicting evidence of their reasonableness exists. *Mogged*, 2020 Tex. App. LEXIS 9445, 2020 WL 7074390, at *18 (citing *Ruder v. Jordan*, No. 05-16-00742-CV, 2018 Tex. App. LEXIS 970, 2018 WL 672091, at *3 (Tex. App.—Dallas Feb. 2, 2018, no pet.) (mem. op.)); *see Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978) (stating that "[a]n abuse of discretion does not exist where the trial court bases its decisions on conflicting evidence").

On appeal, we must defer to the trial court's role as factfinder and its role in evaluating the complexity and necessity of the legal services in light of the $282,953.80 requested. *See Pro-Care Med. Ctr. & Injury Med. Grp. v. Quality Carriers, Inc.*, No. 14-18-01062-CV, 2020 Tex. App. LEXIS 2747, 2020 WL 1617116, at *3 (Tex. App.—Houston [14th Dist.] Apr. 2, 2020, no pet.) (mem. op.). We must recognize that the trial court did not need to award the full amount of fees requested even if the evidence was undisputed.[5] *Smith*

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[5] The Texas Supreme Court has made it clear that even uncontroverted evidence of attorney's fees does not necessarily require a finding of reasonableness as a matter of law:

> In order for the court to award an amount of attorneys' fees as a matter of law, the evidence from an interested witness must not be contradicted by any other witness or attendant circumstances and the same must be clear, direct and positive, and free from contradiction, inaccuracies and circumstances tending to [cause] suspicion thereon. The court, as a trier of fact, may award attorneys' fees as a matter of law in such circumstances, especially when the opposing party has the means and opportunity of disproving the testimony or evidence and fails to do so . . . . *In [some situations,] the evidence may be uncontradicted, but the trial judge could find some of the claimed fees to be unreasonable, unwarranted, or some*

v. Patrick W.Y. Tam Tr., 296 S.W.3d 545, 547-48 (Tex. 2009). While the testimony of Rial and Toye's attorney was some evidence of a reasonable fee, it was not conclusive. *See Garcia*, 319 S.W.3d at 642. Rather, the determination of reasonableness "rests within the court's sound discretion." *Sullivan*, 488 S.W.3d at 299. As part of its discretion, the trial court could "consider the entire record and common knowledge of the participants as lawyers and judges in making its determination." *Mogged*, 2020 Tex. App. LEXIS 9445, 2020 WL 7074390, at *18 (citing *In the Interest of A.M.*, No. 02-18-00412-CV, 2020 Tex. App. LEXIS 5334, 2020 WL 3987578, at *4 (Tex. App.—Fort Worth June 4, 2020, no pet.) (mem. op.)); *see McMahon v. Zimmerman*, 433 S.W.3d 680, 693 (Tex. App.—Houston [1st Dist.] 2014, no pet.) ("Trial courts are considered experts on the reasonableness of attorney's fees."). **[*83]** After adhering to these principles and considering the entire record, I would conclude that the award of $100,000.00 in attorney's fees to Rial and Toye was well within the discretion of the trial court.

III. Conclusion

The majority concludes that the trial court's "attorney's-fee amount awarded is not supported by factually sufficient evidence" and remands the issue to the trial court for a redetermination. **[*84]** But the trial court—an expert on the reasonableness of attorney's fees—considered the entire record, heard the disputed evidence, exercised its discretion, and reduced the amount of attorney's fees awarded to Rial and Toye. Because the determination of attorney's fees is within the trial court's sound discretion and there are insufficient grounds to second-guess that discretion in this case, I would affirm the trial court's award of attorney's fees.

/s/ Dana Womack

Dana Womack

Justice

Delivered: August 18, 2022

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other circumstance which would make an award of the uncontroverted claim wrong.

Ragsdale, 801 S.W.2d at 882 (emphasis added).

EXHIBIT A

Reasonable and Necessary Attorneys' Fees

Fees to Funimation: Funimation shall have and recover from Plaintiff Victor Mignogna the amount of $50,000.00, representing Funimatton's reasonable and necessary attorney's fees, plus the amount of $7,504.00, representing Funimation's litigation expenses in defense of this matter through November 21, 2019.

Funimation shall also have and recover from Plaintiff Victor Mignogna the following reasonable and necessary appellate attorney's fees, in the event Plaintiff files a Notice of Appeal:

1. $$50,000.00 in the event there is no modification of or change to the Judgment or the Judgment is affirmed by the Court of Appeals;

2. $25,000.00 **[*85]** in the event a Petition for Review is filed by any party and the result is that there is no modification of or change to the Judgment;
3. $15,000.00 in the event the Texas Supreme Court requests briefs on the merits and the result is that there is no modification of or change to the Judgment; and
4. $10,000.00 in the event the Texas Supreme Court sets the case for oral argument and through the conclusion of the case, and the result is that there is no modification of or change to the Judgment

Fees to Rial and Toye: Rial and Toye shall have and recover from Plaintiff Victor Mignogna the amount of $100,000.00, representing Rial's and Toye' reasonable and necessary attorney's fees, plus the amount of $15,526.96, representing Rial's and Toye' litigation expenses in defense of this matter through November 21, 2019.

Rial's and Toye' shall also have and recover from Plaintiff Victor Mignogna the following reasonable and necessary appellate attorney's fees, in the event Plaintiff files a Notice of Appeal:

1. $55,000.00 in the event there is no modification of or change to the Judgment or the Judgment is affirmed by the Court of Appeals;

2. $12,500.00 in the event a Petition for Review is filed by **[*86]** any party and the result is that there is no modification of or change to the Judgment;
3. $22,500.00 in the event the Texas Supreme Court requests briefs on the merits and the result is that there is no modification of or change to the Judgment; and
4. $15,000.00 in the event the Texas Supreme Court sets the case for oral argument and through the conclusion of die case, and the result is that there is no modification of or change to the Judgment.

Fees to Marchi: Marchi shall have and recover from Plaintiff Victor Mignogna the amount of $48,137.50, representing Marchi's reasonable and necessary attorney's fees, plus the amount of $1,873.96, representing Marchi's litigation expenses in defense of this matter through November 21, 2019.

Marchi shall also have and recover from Plaintiff Victor Mignogna the following reasonable and necessary appellate attorney's fees, in the event Plaintiff files a Notice of Appeal:

1. $37,500.00 in the event there is no modification of or change to the Judgment or the Judgment is affirmed by the Court of Appeals;

2. $22,500.00 in the event a Petition for Review is filed by any party and the result is that there is no modification of or change to the Judgment; **[*87]**
3. $12,50000 in the event the Texas Supreme Court requests briefs on the merits and the result is that there is no modification of or change lo the Judgment; and
4. $10,000.00 in the event the Texas Supreme Court sets the case for oral argument and through the conclusion of the case, and the result is that there is no modification of or change to the Judgment.

Table1 (Return to related document text**)**

Invoice	Amount	Total Hours	Deductions	Total
111790 [Oct.]	$34,036.50	70.80	$6,221.00 (13.4)	$27,815,50
110397 [Sept.]	$54,527.00	110.60	$7,272.00 (14.0)	$47,255.00
108830 [Aug.]	$30,643.00	62.40	$2,890.00 (5.5)	$27,753.00
106647 [July]	$47,577.50	95.70	$3,045.95 (6.2) **[*55]**	$44,531.55
105110 [June]	$49,406.00	107.60	$4,590.00 (10)	$44,816.00
103485 [May]	$4,319.00	9.8	0	$4,319.00
101701 [Apr.]	$2560.50	5.5	$0	$2,560.50
			[Total discount: $24,018.95]	Total After Discount $199,050.55

Table1 (Return to related document text**)**

End of Document

Reppucci v. Salem News Publ. Co.

Superior Court of Massachusetts, At Middlesex

October 13, 1994, Decided ; October 20, 1994, Filed

93-3009-C

Reporter
1994 Mass. Super. LEXIS 56 *; 1994 WL 903010

Joseph Reppucci v. Salem News Publishing Company and Nelson Benton, III

Disposition: [*1] Motion for summary judgment ALLOWED.

Case Summary

Procedural Posture
Defendants, employer and managing editor, filed a motion for summary judgment in plaintiff injured employee's action for defamation based on statements made by the managing editor to the injured employee, alleging that on two separate occasions, in the presence of other employees, the managing editor accused him of being an "abuser of women."

Overview
The injured employee filed an action for defamation against his employer and its managing editor based on statements made by the managing editor to the injured employee alleging that on two separate occasions, in the presence of other employees, the managing editor accused him of being an "abuser of women." The employer filed a motion for summary judgment arguing that the managing editor's remarks were not defamatory because they were truthful, privileged, represented an expression of opinion, and were not overheard by any third party. The court granted the employer's motion for summary judgment. The court found that the managing editor's statements during his initial conversation with the injured employee were not published, and therefore not defamatory. The court found that the managing editor's statements were of opinion, and the term "abuser of women" was susceptible to varying interpretations. The court reasoned that the phrase "abuser of women" communicated why the managing editor felt the injured employee had to leave the employment premises. The court found that the phrase represented an assertion of the managing editor's opinion rather than a verifiable fact.

Outcome
The court allowed the employer's motion for summary judgment on the injured employee's action for defamation.

Judges: Hinkle.

Opinion by: HINKLE

Opinion

Memorandum of Decision and Order on Defendants' Motion for Summary Judgment

INTRODUCTION

The plaintiff, Joseph Reppucci, brings this defamation suit against his employer, the Salem News Publishing Company, Inc. and its managing editor, Nelson Benton, III based on statements made by Benton to Reppucci on May 24, 1990. [1] Reppucci alleges that on two separate occasions, in the presence of other employees, Benton accused him of being an "abuser of women."

Defendants move for summary judgment arguing

[1] During the summary judgment hearing before this court, plaintiff conceded that Counts III and IV should be dismissed.

that Benton's remarks were not defamatory because they were truthful, privileged, represented an expression of opinion, and were not overheard by any third party. Based on affidavits, memoranda of the parties and oral argument, defendants' motion for summary judgment is ALLOWED for the reasons set forth below.

BACKGROUND

The **[*2]** record before me, viewed in favor of the plaintiff as nonmoving party, indicates the following. On February 6, 1990, the plaintiff called a female co-worker a "dictator" and a "f---ing ayatollah." Deposition of Reppucci at 60-62. As a result, plaintiff received a three-day disciplinary suspension.

On May 24, 1990, Benton informed the plaintiff that he wanted to meet with him and another individual regarding an alleged incident between the plaintiff and a co-worker, Jill Pollard, that had occurred two days earlier. When the plaintiff asked for clarification, Benton responded,

> I don't want to talk to you about it. I'll talk to you at ten o'clock. You're not going to go around this building anymore abusing, harassing and intimidating women . . . I'm tired of you going around being a woman abuser and I'm not going to put up with it anymore.

Continued Deposition of Reppucci ("Reppucci II") at 98.

The defendant does not know whether the workers present during this exchange overheard the statements. Reppucci II at 101.

At approximately 10:00 a.m. on May 24, Benton, the plaintiff and four other individuals met. Two of those other individuals were officers in **[*3]** the local union. Plaintiff described the relevant events at the meeting as follows:

> The first thing that was said in the meeting was Mr. Benton said that he wanted me out of the building. And I asked him why. And he said because I'm an abuser of women. That I have a history of being an abuser of women and being abusive to women. And he was concerned about Jill Pollard's safety, that I had threatened her with violence a couple of nights ago. And that she would be there at eleven o'clock and it was imperative that he wanted me out of the building immediately.
>
> . . .
>
> [Asked for clarification, Benton] again mentioned Ms. Pollard saying that I had either hit her or threatened to hit her. He mentioned the incident of February 6 with Ms. Crowfoot . . . And he mentioned a situation that he said he had heard about involving Kate Parker at a softball game. And he reiterated that I have a long history of being an abuser of women and that he was going to put a stop to it once and for all.

Reppucci II at 105.

DISCUSSION

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment **[*4]** as a matter of law. *Cassesso v. Commissioner of Correction*, 390 Mass. 419, 422, 456 N.E.2d 1123 (1983); *Community National Bank v. Dawes*, 369 Mass. 550, 553, 340 N.E.2d 877 (1976); Mass.R.Civ.P. 56(c). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, "and [further] that the moving party is entitled to judgment as a matter of law." *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17, 532 N.E.2d 1211 (1989). A party moving for summary judgment who does not have the burden of proof at trial may demonstrate the absence of a triable issue either by submitting affirmative evidence that negates an essential element of the opponent's case or "by demonstrating that proof of that element is unlikely to be forthcoming at trial." *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 575 N.E.2d 1107 (1991); accord, *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716, 575 N.E.2d 734 (1991). "If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact in order to defeat [the] motion." **[*5]** *Pederson*, *supra*, 404

Mass. at 17. "The opposing party cannot rest on his or her pleadings and mere assertions of disputed facts to defeat the motion for summary judgment." La Londe v. Eissner 405 Mass. 207, 209, 539 N.E.2d 538 (1989).

"A motion for summary judgment is particularly appropriate in defamation cases because if the allegedly libelous material is not actionably defamatory, there is no genuine issue of material fact for trial." *Aldoupolis v. Globe Newspaper Co.*, 398 Mass. 731, 733, 500 N.E.2d 794 (1986) citing *Godbout v. Cousens*, 396 Mass. 254, 258, 485 N.E.2d 940 (1985).

I. Initial Incident between Benton and Reppucci

The essential elements of a defamation claim include (1) a false and defamatory communication; (2) of and concerning the plaintiff; (3) which is published or shown to a third party. *McAvoy v. Shufrin*, 401 Mass. 593, 597, 518 N.E.2d 513 (1988). Viewing the facts in favor of the plaintiff, I find that Benton's statements during his initial conversation with the plaintiff were not published. To be published the alleged defamatory statement need only be heard by a third party. *Brauer v. Globe Newspaper Co.*, 351 Mass. 53, 56, 217 N.E.2d 736 (1966). **[*6]** Here, however, plaintiff offers no evidence beyond the physical presence of co-workers to prove the statement was heard by a third party. Therefore, I conclude that the first statement was not published and therefore not defamatory.

II. Statements at the 10:00 a.m. Meeting

Statements of pure opinion, [2] as distinguished from mixed opinion, [3] are protected under the First Amendment to the United States Constitution. Consequently, they are not actionable in a defamation suit. *Aldoupolis*, 398 Mass. at 733; *Pritsker v. Brudnoy*, 389 Mass. 776, 778, 452 N.E.2d 227 (1983). "However 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." *Gertz v. Robert Welch*, 418 U.S. 323, 339-40, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974) .

[*7] While a pure opinion is not actionable no matter how unjustified, unreasonable or derogatory, a mixed opinion may be. The plaintiff must demonstrate that the opinion is reasonably understood as implying the assertion of undisclosed facts about the plaintiff that must be defamatory in order to justify the opinion. *Pritsker v. Brudnoy*, 389 Mass. at 779.

In order to receive protection, a challenged statement first must qualify as an expression of opinion. *Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 263, 612 N.E.2d 1158 (1993). Determination whether, in context, the alleged defamatory statements *unambiguously* constitute facts or opinion or whether they could be read by a reasonable person as fact or opinion is for the court. *Yovino v. Fish*, 27 Mass. App. Ct. 442, 447, 539 N.E.2d 548 (1989). Determining what is "unambiguously" fact or opinion is not self-evident and requires evaluation of several factors. The court must:

> examine the statement in its totality in the context in which it was uttered or published . . . must consider all the words used, not merely a particular phrase or sentence . . . must give weight to cautionary terms used by the person publishing **[*8]** the statement . . . [and] must consider all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published.

Myers v. Boston Magazine Co., 380 Mass. 336, 341-42, 403 N.E.2d 376 (1980), quoting *Information Control*

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[2] Statements based on disclosed or assumed nondefamatory facts. Pritsker v. Brudnoy, 389 Mass. at 778.

[3] Statements apparently based on facts that have not been stated or assumed to exist. Id.

Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784 (9th Cir. 1980).

Where it is determined that the challenged statements could be understood only as an expression of opinion, the court must decide whether these statements were based on disclosed nondefamatory facts or whether they implied "that there [were] undisclosed facts on which the opinion is based." *Lyons v. Globe Newspaper Co.*, 415 Mass. at 264, quoting *National Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp.*, 379 Mass. 220, 227, 396 N.E.2d 996 (1979), *cert. denied*, 446 U.S. 935, 64 L. Ed. 2d 788, 100 S. Ct. 2152 (1980).

Viewing the statements made by Benton at the 10:00 meeting and at the initial meeting in context and in their entirety, I find and rule that they can be understood only as statements of opinion. Unlike an accusation of a definite crime which would likely support **[*9]** an action for defamation, the term "abuser of women" is susceptible to varying interpretations [4] and therefore represents a statement of opinion. See *Friedman v. Boston Broadcasters, Inc.*, 402 Mass. 376, 379-80, 522 N.E.2d 959 (1988) (characterizing plaintiffs as "insurance crooks," who engaged in "insurance fraud" constitutes a statement of opinion and not fact); *Ollman v. Evans*, 242 U.S. App. D.C. 301, 750 F.2d 970, 980 (D.C. Cir. 1984) (accusations of criminal conduct are statements with well-defined meaning and therefore actionable).

[*10] Benton's statements at the 10:00 meeting were made in the context of persuading his co-workers to act quickly and to discipline the plaintiff. The stated purpose of the meeting was to discuss an alleged incident between the plaintiff and a co-worker and determine the appropriate measures to take. Both union representatives and management attended the meeting, suggesting an atmosphere of potential conflict. At the meeting Benton demanded that the plaintiff be off the premises before Jill Pollard arrived because "he was concerned about her safety." Reppucci II at 105.

In this context, I find and rule that Benton used the phrase "abuser of women" to communicate why he felt the plaintiff had to leave the employment premises. *See Information Control*, 611 F.2d at 784 (even apparent statements of fact may assume the character of statements of opinion when made in circumstances in which an audience may anticipate efforts by the parties to persuade others to their position). As such, the phrase represented an assertion of Benton's opinion rather than a verifiable fact. *See Cole v. Westinghouse Broadcasting Co., Inc.*, 386 Mass. 303, 311, 435 N.E.2d 1021 (1982) (phrases "sloppy **[*11]** and irresponsible reporting" and "history of bad reporting techniques," viewed in context, could not reasonably be viewed as statements of fact). Additionally, Benton's statement does not rest on any undisclosed facts since Benton listed three separate incidents on which he based his opinion.

Because I find Benton's statements nondefamatory, I need not reach the issue of conditional privilege. See *Yovino v. Fish*, 27 Mass. App. Ct. at 450.

ORDER

For the foregoing reasons, it is ORDERED that the defendants' motion for summary judgment be ALLOWED.

[4] The parties set forth separate definitions of the term "abuse" in their briefs. Defendants quote Webster's New World Dictionary, (Second Ed.)(1982) which defines "abuse," in part, as "1. To use wrongly; misuse; 2. To mistreat; 3. To use insulting language about or to revile; . . . 4. Insulting language."

Plaintiff quotes Webster's Unabridged New International Dictionary (Third Ed.)(1986) which includes as a definition of abuse, "to violate sexually = RAPE; c. to commit indecent assault on."

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Rosado v Daily News, L.P.

Supreme Court of New York, New York County

January 31, 2014, Decided

157674/13

Reporter
2014 N.Y. Misc. LEXIS 6163 *; 2014 NY Slip Op 33736(U) **

[1]** PETER ROSADO, Plaintiff, - v - DAILY NEWS, L.P., Defendant. INDEX NO. 157674/13

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Judges: **[*1]** PRESENT: Hon. Arthur F. Engoron, J.S.C.

Opinion by: Arthur F. Engoron

Opinion

DECISION AND ORDER

Upon the foregoing papers, the instant motion is granted pursuant to CPLR 3211(a)(1) and is denied without prejudice solely as moot pursuant to CPLR 3211(a)(7).

This is one of those lawsuits that should never have been brought.

Prior to the events directly here in issue, three public school students complained that plaintiff Peter Rosado had engaged in inappropriate conduct against them. The Special Commissioner for Investigation for the New York City School District substantiated allegations that plaintiff "inappropriately touched and made inappropriate comments to" three female students and recommended that he be fired for misconduct. An arbitrator empowered to impose discipline declined to terminate plaintiff because plaintiff was "contrite and remorseful" and "very unlikely" to act the same way again. I le specifically found that plaintiff did "not [act] in a sexual manner." He sustained certain allegations; he dismissed others; and he noted that certain allegations had been withdrawn. Among the sustained allegations (Report at 14-15) were that plaintiff had touched female students' hair, which was "inappropriate under these circumstances" **[*2]** and "an unwelcome sign of affection that made students uncomfortable, and [which] continued even after students told him to stop." I le found that Plaintiff had "engaged in misconduct serious enough to warrant discipline," and he disciplined plaintiff by imposing a $10,000 fine.

On or about June 23, 2013 defendant Daily News, L.P. published, in widely-read print and on-line versions, an article titled "Sex predators remain in NYC schools thanks to discipline system, group finds." The sub-head of the article states that "Many school workers busted for creepy behavior have been able to hang onto their jobs because of a cumbersome disciplinary process, says [a] statewide group, the Parents Transparency Project." The on-line version of the article includes five photographs, in the following order: former CNN news anchor Campbell Brown, **[**2]** the head of the parents' group; a teacher accused of raping a student; Schools Chancellor Dennis Walcott and United Federation of Teachers President Michael Mulgrew; a former school librarian accused of various improprieties against students; and plaintiff.

The caption under this last photograph states as follows:

> When Pete Rosado was a math teacher at Intermmediate **[*3]** [sic] School 219 in the

> Bronx, he was accused of tickling kids, rubbing their legs and bizarrely telling one girl, "I slept with your mother last night." Because he was 'contrite and remorseful' and 'learned a valuable lesson,' an arbitrator thought Rosado was 'very unlikely' to act the same way again. He currently teaches at Public School 92 in he [sic] Bronx.

Plaintiff is not mentioned by name elsewhere in the article. However, the text, without qualification, says that one teacher, presumably Rosado, told a student, "I slept with your mother last night."

The instant complaint essentially alleges that the subject article defamed plaintiff by falsely tarring him as a "sex predator." Defendant now moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss.

Defendant argues that the complaint must be dismissed for three reasons: the article is a "fair and true" report of an official proceeding and therefore absolutely privileged pursuant to NY Civil Rights Law § 74; the headline is a "fair index" of the article as a whole; and the phrase "sexual predator" is a non-actionable statement of opinion. This Court agrees.

Civil Rights Law § 74 provides that "A civil action cannot be maintained ... for the publication of a fair and true report of any ... official **[*4]** proceeding, or for any heading of the report which is a fair and true headnote of the statement published." Here, plaintiff's disciplinary proceeding was "official"; within reasonable limits of tolerance, the article was an accurate report of the proceedings (infra); and the headline was an accurate summary of the article. As defendant argues, the article is privileged even if the allegations in the underlying proceeding are false.

In eminently quotable language, the Court of Appeals has summarized what "fair and true" means in this context:

> For a report to be characterized as "fair and true" within the meaning of the statute, thus immunizing its publisher from a civil suit sounding in libel, it is enough that the substance of the article be substantially accurate. As stated by this court in Briarcliff Lodge Hotel v Citizen-Sentinel Publishers (260 NY 106, 118, 183 N.E. 193): "[A] fair and true report admits of some liberality; the exact words of every proceeding need not be given if the substance be substantially stated."
>
> **[**3]** * * *
>
> [N]ewspaper accounts of . . . official proceedings must be accorded some degree of liberality. When determining whether an article constitutes a "fair and true" report, the language used therein should not be dissected and analyzed with a lexicographer's **[*5]** precision. This is so because a newspaper article is, by its very nature, a condensed report of events which must, of necessity, reflect to some degree the subjective viewpoint of its author. Nor should a fair report which is not misleading, composed and phrased in good faith under the exigencies of a publication deadline, be thereafter parsed and dissected on the basis of precise denotative meanings which may literally, although not contextually, be ascribed to the words used.

Holy Spirit Assn. for the Unification of World Christianity v New York Times Co., 49 N.Y.2d 63, 67-68, 399 N.E.2d 1185, 424 N.Y.S.2d 165 (1979) (some citations omitted). This Court finds that the instant article easily passes muster under this unexacting standard.

The headline, "Sex Predators Remain in NYC Schools Thanks to Discipline System, Group Finds" is an accurate summary, and thus a "fair index," of the article. See generally, Gunduz v New York Post Co., 188 AD2d 294, 294, 590 N.Y.S.2d 494 (1st Dept 1992). Indeed, "A newspaper need not choose the most delicate word available in constructing its headline; it is permitted some drama in grabbing its reader's attention, so long as the headline remains a fair index of what is accurately reported below." Text Masters Educ. Servs. v NYP Holdings, Inc., 603 F. Supp. 2d 584, 589 (SDNY 2009). "Sex Predators" surely is more dramatic than delicate, and meant to grab the reader's attention, but that is exactly what the case law allows.

The gravamen of the instant complaint, **[*6]** the heart of this case, is the "implication," to use plaintiff's word, that he is a "sex predator." In and of itself, this is problematic. The article does not call him that; and two of the five photographs contain portraits of people clearly not being so labeled. See generally, Kamalian v Reader's Digest Assn., Inc., 29 AD3d 527, 814 N.Y.S.2d 261 (2d Dept 2006) ("Doctors' Deadly Mistakes" headline not actionable because some doctors' mistakes were fatal, even though plaintiff's mistakes were not); White v Berkshire-Hathaway. Inc., 10 Misc. 3d 254, 802 NYS2d 910, 912 (Sup Ct. Erie County 2005) ("headline that does not directly name ... plaintiff ... not independently actionable").

However, even assuming, arguendo, that a reasonable reader might conclude that the article is accusing plaintiff of being a "sex predator," it still would not be actionable. New York law has long recognized that opinions are not actionable "no matter how unreasonable, extreme or erroneous." Rinaldi v Holt, Rinehart & Winston, Inc., 42 NY2d 369, 380-81, 366 N.E.2d 1299, 397 N.Y.S.2d 943 (1977). By their very nature opinions are not "capable of being proven true or false." Gross v New York Times Co., 82 NY2d 146, 155, 623 N.E.2d 1163, 603 N.Y.S.2d 813 (1993). Statements like "convicted felon," or "HIV positive" or "20-weeks pregnant" have objective, verifiable meaning; "sex predator" does not. Rather, it is the **[**4]** sort of "loose, figurative or hyperbolic" language that is immunized from defamation claims. E.g., Dillon v City of New York, 261 AD2d 34, 38, 704 N.Y.S.2d 1 (1st Dept 1999). Indeed, sister-state judges have tossed out of court cases **[*7]** predicated on "sexual predator" language. Burgoon v Delahunt, 2000 Minn. App. LEXIS 1227, 2000 WL 1780285 (Minn App) (reasonable person could apply "sexual predator" to inappropriate touching and offensive sexual comments); Terry v Davis Community Church, 131 Cal App 4th 1534, 1555, 33 Cal. Rptr. 3d 145 (2005) (inappropriate relationship with minor). So-called "Nazis," "racists," "terrorists," "scabs," "fraudsters," and "traitors," no doubt a woefully incomplete list, have all come up empty-handed in court.

Plaintiff is quick to point out that the arbitrator specifically found that plaintiff did not act in a "sexual manner." However, that problematic conclusion is not binding on defendant, or in the court of public opinion, given plaintiff's "inappropriate ... misconduct," consisting of his touching several young female students. Defamation claims should not sink or swim on the tenuous distinction between a "sexual predator" and a male teacher who bestows "unwelcome sign[s] of affection that made [his young, female] students uncomfortable, and [which] continued even after students told him to stop." Report at 14-15. The arbitrator had the final word in the disciplinary hearing; but his finding is not binding on journalists, who, in fact, did not mischaracterize his conclusions. As defendant argues (Reply Memo at 5):

> the arbitrator's conclusion does **[*8]** not change the fact that the [Education] Department believed that Rosado's conduct was sexual in nature .... Indeed, the entire point of the Article is that the arbitration system allows teachers who engage in "creepy" behavior to remain the in the classrooms when the Department tries to fire them.

Plaintiff argues that "[t]ruth and fairness requires [sic] the full story." However that may be, the law is otherwise. Court must be "slow to intrude" on editorial judgments as to what to include or exclude. Weiner v Doubleday & Co., 142 AD2d 100, 109, 535 N.Y.S.2d 597 (1st Dept 1988), aff'd 74 NY2d 586, 549 N.E.2d 453, 550 N.Y.S.2d 251 (1989). "It is not the business of government" to determine such matters. Id. See also Sprecher v Dow Jones & Co., 88 AD2d 550, 551, 450 N.Y.S.2d 330 (1st Dept 1982):

> To hold that a possible omission of this nature [i.e., that a suit was dismissed "with prejudice"] by a reporter may be deemed defamatory would place upon the press the onerous and unreasonable burden of having to ascertain, whenever a news story is published, if something might conceivably have been left out which could be subject to misconception.

On point is Becher v Troy Publ. Co., Inc., 183

A.D.2d 230, 589 N.Y.S.2d 644 (3d Dept 1992) (articles referring to "bribery trial" and naming plaintiff as defendant was not defamatory even though plaintiff was not charged with bribery, as other defendants were).

[5]** Plaintiff argues that the subject caption, which he admits is "technically **[*9]** an accurate excerpt from allegations made against [him]" (Memo at 11), should have indicated that the arbitrator rejected some of the students' allegations. Perhaps in a perfect world, it would have. Perhaps an academic journal would have. However, nobody would mistake the Daily News for the Harvard Law Review. In any event, the article does not say that the arbitrator accepted all the allegations. And allegations are just that, allegations.

Plaintiff argues (Memo at 15-16) that "'Sexual predator' has a precise meaning which is readily understood." Not by the average Daily News reader, probably not one in fifty of whom would know that Corrections Law § 168-a(7)(a) defines, somewhat loosely, "sexual predator." Furthermore, those readers who would know absolutely would not assume that the phrase as used in the article is the same as the phrase as used in the statute. As plaintiff points out, citing Alf v Buffalo News, 21 NY3d 988, 990, 995 N.E.2d 168, 972 N.Y.S.2d 206 (2013) "what is important is what the 'average reader' would conclude upon reading the entirety of the story." Thus, plaintiff's argument (Memo at 17), drawing upon the Corrections Law language, that "In order to prevail in this matter, defendant must prove that [plaintiff] is a sex offender that has been convicted of a sexually violent offense and that he **[*10]** suffers from a mental abnormality or personality disorder that makes him likely to engage in predatory sexually violent offenses" is nothing short of silly. Nobody reading the article would conclude this about plaintiff. See Sprecher v Dow Jones & Co., 88 AD2d 550, 551, 450 N.Y.S.2d 330 (1st Dept 1982) ("Further, the term 'with prejudice' is a legal one which has little, if any, meaning to the average reader."); Torain v Liu, 279 Fed. Appx 46, 2008 WL 2164659 (2d Cir 2008) (labeling plaintiff as "pedophile" not actionable; "There is simply no special rule of law making criminal slurs actionable regardless of 'whether they are asserted as opinion or fact."). As defendant notes, the article goes to great lengths to distinguish between criminal behavior, which results in teacher termination, and "creepy" behavior, which usually does not. So if anything, syllogistically, the article concludes that plaintiff is not a criminal, because he is still employed after disciplinary action.

Similarly silly is plaintiff's contention that the article is misleading because it does not mention that an allegation ("Specification 4") of pulling on a girl's shirt and bra was withdrawn. The article never mentions that allegation! Would plaintiff have been better off if the article had said that an allegation that **[*11]** plaintiff had pulled on a girl's shirt and bra was withdrawn? Obviously not.

In the final analysis, the Daily News article, albeit somewhat salacious (at least as to other teachers), was an attempt at a public service: to sound a tocsin that due to a problematic disciplinary process, public school teachers who have engaged in inappropriate conduct can and do remain in the classroom. Plaintiff is not the best example of this; he is not the poster child of predatory sexual misconduct. But his inappropriate touching of young girls, even when asked to stop, after which he was allowed to remain a teacher, does help illustrate the danger at which the article was aimed. The press must be allowed to paint with a broad brush. That plaintiff was **[**6]** swept up in this crusade may not have been totally fair (and one can feel sorry for what happened to him); but as a matter of law it was not defamatory.

Dated: January 31, 2014

/s/ Arthur F. Engoron

Arthur F. Engoron, *J.S.C.*

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Williams v. MLB Network, Inc.

Superior Court of New Jersey, Appellate Division

January 14, 2019, Argued; March 14, 2019, Decided

DOCKET NO. A-5586-16T2

Reporter
2019 N.J. Super. Unpub. LEXIS 578 *; 2019 WL 1222954

MITCHELL WILLIAMS, Plaintiff-Respondent/Cross-Appellant, v. THE MLB NETWORK, INC., Defendant-Appellant/Cross-Respondent, and THE GAWKER MEDIA GROUP, INC. and GAWKER MEDIA, LLC, Defendants.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

Subsequent History: Certification denied by Williams v. MLB Network, Inc., 2019 N.J. LEXIS 872 (N.J., June 18, 2019)

Prior History: **[*1]** On appeal from Superior Court of New Jersey, Law Division, Camden County, Docket No. L-3675-14.

Williams v. MLB Network, Inc., 2015 N.J. Super. Unpub. LEXIS 2160 (App.Div., Sept. 10, 2015)

Counsel: Peter O. Hughes argued the cause for appellant/cross-respondent (Ogletree, Deakins, Nash, Smoak & Stewart, PC, attorneys; Peter O. Hughes and Ryan T. Warden, on the briefs).

Rahul Munshi (Console Mattiacci Law, LLC) of the Pennsylvania bar, admitted pro hac vice, argued the cause for respondent/cross-appellant (Console Mattiacci Law, LLC and Rahul Munshi, attorneys; Laura C. Mattiacci, on the briefs).

Judges: Before Judges Sabatino, Haas and Mitterhoff.

Opinion

PER CURIAM

Plaintiff Mitchell Williams is a former major league baseball pitcher. Several years after retiring from his professional career, Williams began working as a broadcaster and sports commentator for defendant, Major League Baseball Network ("the Network").

This appeal and cross-appeal center upon the Network's decision to terminate Williams based upon his employment contract's "morals clause." In pertinent part, the morals clause allowed the Network to fire Williams for engaging in "non-trivial" conduct that brings him "into disrepute, scandal, contempt or ridicule, or which shocks, insults or offends a substantial portion [of the] group of the **[*2]** community or reflects unfavorably (in a non-trivial manner) on any of the parties."

The Network invoked the morals clause after the emergence of news reports accusing Williams of using profane language and engaging in other inappropriate conduct while he was coaching his son's youth baseball team at a weekend tournament in Maryland. Portions of two of those games were captured on videotape. In reaction to the reports, the Network sought to have Williams sign an agreement that would, among other things, censor his use of social media, and bar him temporarily from coaching or attending youth sporting events. Williams refused to accede to those restrictions, and the Network terminated him from the remaining portion of his contract.

Williams sued the Network for breach of contract and also pled other theories of liability. The Network brought a counterclaim against Williams, asserting that he breached his contract's confidentiality provision by publicizing the contract and attaching a copy of it to his complaint.

By a divided vote, a Camden County jury found the Network failed to prove Williams had actually engaged in the alleged conduct violating the morals clause. The jury accordingly awarded **[*3]** Williams compensation for the uncompleted term of his contract, but declined to award him damages for the Network's failure to exercise the contract's option year.

The Network now appeals the trial judge's failure to award it judgment as a matter of law, the judge's dismissal of its counterclaim, and various evidentiary rulings that allegedly skewed the jury's consideration. Meanwhile, Williams cross-appeals the judge's dismissal of the additional counts of his complaint beyond his breach of contract claims.

For the reasons that follow, we reject the appeal and cross-appeal. Although there is no existing published opinion in this State involving a contractual "morals clause" to provide guidance, we are satisfied the trial judge and the jury resolved the parties' disputes in this case fairly and soundly, and did so based on ample relevant evidence and general legal principles. Neither side has demonstrated the alleged errors, if any, were clearly capable of producing an unjust result.

Table of Contents

Williams is a former professional baseball player who retired in 1997. During his eleven-year career in the major leagues, Williams pitched for the Philadelphia Phillies and five other teams. He was voted to the National League All-Star team in 1989, and pitched for the Phillies in the 1993 World Series. Williams was known by the nickname "Wild Thing," the title of a 1966 song and the nickname of the protagonist pitcher in the 1989 film *Major League*.

Following his retirement as a player, Williams briefly pursued a coaching career in the minor leagues, and then worked as a marketing executive for a casino. In 2006, he began working in broadcasting as a baseball commentator, participating in radio shows and providing pre- and post-game commentary for the Philadelphia Phillies.

Williams also created a youth baseball team, the New Jersey Wild, apparently named after his baseball moniker. His son played on the Wild. The team played in tournaments in various states, but did not participate in a regular league. Williams coached the team.

The Network is the company **[*6]** responsible for operating the "MLBN" television channel, which was launched in 2009. It is a subsidiary of Major League Baseball. From the inception of the Network and through all times relevant to this case, Anthony Petitti, a key trial witness, was the Network's chief executive officer.[1]

B. *The Parties' Contract*

In 2009, the Network approached Williams for an audition, and thereafter hired him as an on-air analyst pursuant to an initial one-year contract. The Network extended the term by another year pursuant to an option in the initial agreement.

In November 2011, Williams entered into a five-year professional services contract with the Network to run from November 1, 2011, to November 1, 2016. The written agreement contained an optional one-year extension available to the Network at its discretion. Petitti signed the contract on behalf of the Network.

As we noted in our introduction, the contract

[1] By the time of trial, Petitti had left the Network and had been appointed chief operating officer of Major League Baseball.

contained a "morals clause," which allowed the Network to terminate the relationship if Williams engaged in certain conduct. The clause, Section 15.03, reads as follows:

> 15.03 *Morals* If Artist should, prior to or during the Term hereof commits any act, or omits from any action, which: (i) violates widely **[*7]** held social morals; (ii) brings Artist into (non-trivial) public disrepute, scandal, contempt or ridicule or which shocks, insults or offends a substantial portion or group of the community or reflects unfavorably (in a non-trivial manner) on any of the parties; or (iii) materially reduces Artist's commercial value as a professional sports commentator, then Company may, in addition to and without prejudice to any other remedy of any kind or nature set forth herein, terminate this Agreement at any time after the occurrence of any such event upon written notice to Artist. Notwithstanding the foregoing, the parties hereto agree that no act or omission of Artist occurring prior to the Term, which is known to the general public at large as of the date hereof, shall entitle Company to terminate this Agreement pursuant to this Section 15.03.

The contract also contained a confidentiality provision, which obligated Williams to keep non-public information that he received from the Network "strictly confidential in perpetuity," apart from being allowed to show the information to personal legal or financial representatives. The Network retained the right to seek specific performance or terminate Williams's **[*8]** contract upon a breach of the confidentiality provision.

C. *The May 2014 Ripken Tournament Games*

The key events that gave rise to this litigation occurred on May 10 and 11, 2014, when Williams and the Wild participated in a youth baseball tournament held by the Ripken Baseball organization in Aberdeen, Maryland ("Mother's Day tournament"). At the time, the Wild players were ten years old. The Wild participated in several games in the tournament, but only two games are relevant to this case: the game against the Olney Pirates on Saturday, May 10, 2014 ("the Saturday game"), and the championship game against the South Jersey Titans on Sunday, May 11, 2014 ("the Sunday game").

D. *The First Deadspin Article*

On Sunday, May 11, 2014, the sports website "Deadspin" published an article entitled "Mitch Williams Ejected From Child's Baseball Game For Arguing, Cursing." The article opened by claiming that Williams was ejected from the Saturday game "after a profanity-laced tirade in which he called an umpire a 'motherfucker' in front of the children," citing unnamed sources. The article also stated that one umpire confronted Williams after he made a comment to parents in the stands about getting an umpire fired, which led **[*9]** to a face-to-face argument with that umpire. The article contained photographs depicting the confrontation. The article also contained quotations from Williams's Twitter account.

Williams learned of the Deadspin story on Sunday night after his son showed it to him. Petitti and Lorraine Fisher, then the Director of Media Relations at the Network, also learned about the article Sunday night. Fisher spoke with Williams that night and again the following day, and Williams denied any wrongdoing.

E. *The Network's Review of the Incidents and Its Actions*

On Monday, May 12, Williams and Petitti discussed the initial Deadspin article. Williams denied using any profanity during the Saturday game. He explained that he was not arguing a call at the time of his ejection, but was speaking with a parent. According to Petitti, Williams did not mention at that time any incidents regarding the Sunday game.

On Wednesday, May 14, Petitti and Fisher watched a video recording[2] of the Saturday game after obtaining it from Bill Ripken. Ripken, who testified as a defense witness at the trial, is a former professional

[2] We have reviewed this video, as well as another video from the Sunday game, which were exhibits from the trial court proceedings.

baseball player. Ripken is an on-air analyst for the Network, and a co-owner of the Ripken Baseball **[*10]** organization.

The video from the Saturday game shows two incidents between Williams and the two umpires. The first incident occurred when Williams disputed a call at home plate early in the game. Only some of the exchanged words come through on the audio track, but no curse words are discernable. For most of the game, the words of the coaches cannot be heard over the cheers and noises from the crowd.

The most notable incident that is somewhat observable in the Saturday game video occurred in the final inning when, while coaching first base, Williams was ejected by the outfield umpire, Scott Bolewicki. Prior to that ejection, Williams had been conversing with individuals out of the camera's frame.

After the ejection, the video shows Williams confronting Umpire Bolewicki, and then yelling that the umpire had threatened him. Williams demanded to speak with a Ripken representative, and did not immediately leave the field. After about two and a half minutes, the umpires walked away from Williams towards home plate, and the Wild coaches, including Williams, congregated near first base. About three minutes later, Williams left the field and the game resumed. The vast majority of Williams's words **[*11]** are not discernable on the recording.

Upon watching the Saturday game video on Wednesday, Petitti and Fisher concluded that it did not comport with Williams's explanation that the umpire had initiated the altercation. Nevertheless, Williams went on the air as scheduled through Thursday night, May 15.

F. *Deadspin's Second Article*

On Friday, May 16, 2014, Deadspin published a second article entitled "Witnesses: Mitch Williams Called Child 'A Pussy,' Ordered Beanball," regarding events that occurred during the Sunday game.[3] According to this second article, Williams ordered his pitcher to strike the opposing batter by issuing such instructions to his catcher, and insulted an opposing player by calling him a "pussy." Like the first article, the second Deadspin posting cited and contained quotes from unnamed sources. It also included two video clips from a recording of the Sunday game.

The videos from the Sunday game show Williams speaking with his catcher, and his catcher speaking to the Wild pitcher, before a pitch struck a Titans' batter in the body. However, the microphones did not pick up the substance of his instructions. Nor do the recordings contain any evidence that Williams **[*12]** had insulted an opposing player.

After Petitti learned of the second Deadspin article on Friday, he ordered Williams to not go on air. Petitti called Williams and told him to go to Fisher's office, where he watched the video clips of the Sunday game embedded in the second article. The following day, Petitti and Williams discussed the matter over the phone.

In his conversations with Petitti, Williams denied ordering a beanball, and denied insulting a child using inappropriate language. Williams explained that he was "trying to knock the kid off the plate" by having his pitcher pitch inside rather than down the middle of home plate, and did not intend to have the ball hit the child. Petitti found the explanation inappropriate, even though pitching "inside" is not prohibited by the rules of baseball and he admitted that he was unaware of a tournament rule that would otherwise prohibit the practice. In Petitti's opinion, ten-year-old children do not possess sufficient ball control to safely pitch inside, and it was inappropriate to seek to intimidate such a young batter.

G. *The Network Places Williams On A Leave of Absence*

On Saturday, May 17, after the phone call between Petitti and Williams, **[*13]** the Network issued a

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[3] A "beanball" is "a pitch intentionally thrown at the batter's head." *Webster's II New College Dictionary* 96 (3rd ed. 2001).

statement placing Williams on a leave of absence. According to Petitti, during the Saturday phone call, the parties mutually agreed upon a leave of absence. Williams denies that the decision was mutual. In any event, Williams never spoke with Petitti after May 17.

H. *The Proposed Contract Amendment*

Over the next several days, Petitti engaged in discussions with Williams's agent, Russ Spielman, in an attempt to establish conditions for Williams's return from suspension.

The Network proposed a contract amendment to Williams. The proposed amendment acknowledged that Williams was "involved in reported incidents of inappropriate behavior" at "certain youth athletic events." It stated that, in consideration for the Network's "covenant not to exercise its right to terminate the Agreement," Williams would not: (1) attend any amateur athletic events of any kind for one year; (2) coach, or otherwise participate in, any amateur athletic event for the remainder of the contract; (3) engage in social media posting without the Network's prior approval; (4) and would engage in therapeutic counseling. According to Petitti, the Network was willing to negotiate these conditions. Petitti called Spielman several times **[*14]** to obtain a response to the amendment proposal, but was unsuccessful.

After receiving the Network's proposal, Williams sought legal advice because Spielman is not an attorney. On June 25, 2014, counsel for Williams sent a letter on his behalf to the Network, asserting that Williams "has not engaged in any conduct that in any way violates his Agreement." The attorney also stated, "MLB Network's suspension constitutes a breach of the Agreement and has caused significant damage to Mr. Williams." The attorney continued, "[t]he purpose of this letter is to determine whether or not an amicable resolution can be reached in connection with Mr. Williams's Agreement."

I. *The Network Terminates Williams*

The Network did not respond to the June 25, 2014 letter. Petitti interpreted the attorney's letter as threatening, and believed that it changed the "tenor" of previous conciliatory discussions with Spielman.

The next day, on June 26, 2014, Petitti terminated Williams's contract with the Network, immediately halting his salary payments. The stated basis for the termination was a violation of the contract's morals clause, and Williams's perceived rejection of the proposed contract amendment.

J. *Other* ***[*15]*** *Publicity*

Nothing in the record indicates that the Williams story gained any particular notoriety beyond the two Deadspin articles. According to Fisher, some local news stations in the Philadelphia broadcast market reported the story. One national television show contacted Fisher regarding Williams's conduct at the tournament, but never ran a story on the subject. The final article dealing with the subject was issued on May 27, 2014, about a month before Williams's termination from the Network.

II. Procedural History

A. *The Complaint and Counterclaim*

In September 2014, Williams filed a complaint in the Law Division against the Network, The Gawker Media Group, Inc., and Gawker Media, LLC.[4] The complaint was venued in Camden County, where Williams resided at the time of the complaint.[5] As to the Network, the complaint alleged breach of contract; breach of the implied covenant of good faith and fair dealing; negligent misrepresentation; negligence; violation of the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 to -42; three defamation counts; intentional interference with

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[4] The Gawker Media Group and Gawker Media LLC were dismissed from the case prior to trial and are not involved in this appeal.

[5] According to his trial testimony, Williams has since moved out of state. There is no claim by either appellant that the jury was biased in favor of or against Williams because of his popularity or notoriety in the greater Philadelphia and South Jersey area, where he formerly played and resided. Nor is there any assertion of bias as to potential jurors who may have been satisfied or dissatisfied subscribers of the Network. We presume the voir dire process, which the parties chose not to have transcribed, removed any openly biased jurors to the satisfaction of counsel.

prospective economic advantage; invasion of privacy; violation of the Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1 to -14; and prima **[*16]** facie tort. Williams annexed a copy of his employment contract, upon which his claims were based, to the complaint.

The Network moved to dismiss the complaint or, in the alternative, for summary judgment. On February 5, 2015, the trial court granted the Network partial summary judgment, dismissing all counts as to the Network with prejudice, apart from Williams's breach of contract claim. The Network then filed a counterclaim, which alleged that Williams violated the parties' confidentiality agreement by annexing his employment contract to the complaint.

During a pretrial hearing on June 6, 2017, the court dismissed the Network's breach of contract counterclaim. The ensuing jury trial took place over several days in June 2017.

B. *The Trial Proofs*

1. *Williams's Trial Testimony Explaining His Conduct*

Williams testified at trial and provided his version of the Mother's Day tournament incidents.

Regarding the Saturday game, Williams denied using "any foul language or curse words at this ball game whatsoever." He testified that, immediately prior to his ejection, one of his team's parents told him "Mitch, you know there's nothing you can do about it," after the umpire called a strike on his batter. **[*17]** Williams claims that he responded to the parent, "I know there's nothing I can do about it," and, while laughing, stated "[t]he only thing I can do about it is maybe call the Ripken folks and see if we can't find these guys other employment." Umpire Bolewicki ejected him after that statement.

Williams explained that he confronted Bolewicki because he did not understand why he was ejected. Bolewicki stated, "no one is getting to threaten my job," but in Williams's view that was not a valid basis for ejection. In his view, Bolewicki was being aggressive towards him. Williams claims he told Bolewicki, "[g]et out of my face," and, "[d]o you honestly think I'm scared you're going to beat me up?" He testified that Bolewicki responded "[n]ame a time and a place." After that comment, Williams demanded to speak to a Ripken tournament representative and did not immediately leave the field. After leaving the field, Williams watched the remainder of the game near the field accompanied by a tournament director.

Williams resumed coaching on Sunday. Williams testified that during the Sunday game, an umpire informed him that the opposing coach accused him of calling an opposing player "the 'P' word." **[*18]** Williams denied it, and the umpires said they did not hear anything of that sort.

According to Williams, later in the game, he instructed his son — his team's catcher — to tell the pitcher to "try and keep the ball inside on this kid" to either force a foul ball or "jam" the batter. After the Wild pitcher struck a Titans' batter with a pitch, the opposing coach reacted angrily. The umpire allegedly said, "[k]ids get hit every now and then," and nothing came of it. Williams denied ordering his pitch to hit the batter and denied insulting the opposing player.

2. *Petitti's Trial Testimony*

Williams called Petitti as an adverse witness. In his testimony, Petitti described his understanding of the alleged incidents from the tournament, including ordering a beanball, insulting a child, and engaging in a profanity-laced tirade against an umpire, as justifications for the termination. According to Petitti, the "combination of those events," and the reaction by the public, embarrassed the Network and provided adequate grounds for the Network's invocation of the morals clause.

3. *Other Witnesses Who Were At the Games*

Williams presented the testimony of several other persons who were present at the **[*19]** Saturday and Sunday games.

Corey Ahart, an assistant coach of the Wild who was present at the tournament, testified as a fact witness.

Regarding the Saturday game, Ahart largely corroborated Williams's account, noting that he did not recall "any profanity whatsoever." Ahart was present for the exchange between Williams and Bolewicki, and interpreted the events as Bolewicki threatening Williams. Regarding the Sunday game, Ahart testified that he was unaware of any instruction for the pitcher to hit a batter, and he did not hear Williams insult a child. He stated he had never seen Williams directly or indirectly order a beanball, and testified that "it wouldn't be allowed."

Craig Yates, another assistant coach of the Wild, also testified on behalf of Williams, and provided similar testimony to Ahart.

L.R.,[6] a spectator whose son played for the Wild, also testified on behalf of Williams. She was present at the championship game on Sunday. She testified that she was seated about ten feet away from Williams for most of that game, and that she never heard him order a beanball or insult a child. However, L.R. acknowledged that when Williams coached first base when the Wild were batting, she had **[*20]** sat far away from him.

R.W., another parent whose child played for the Wild, testified as to her observations at the Saturday and Sunday games. She testified that, before the Saturday game started, she heard one of the umpires say to a tournament representative, "I'm not going to put up with Coach Mitch Williams." During the game, she sat close to first base, where the ejection and confrontation occurred. Her account of the lead-up to the ejection differed slightly from that of Williams. She testified that the umpire ejected him after overhearing a joke he made to his assistant coaches, rather than the parents. According to R.W., Williams asked his assistants, "hey, what would happen to me if I was calling balls strikes, I would get fired," which prompted the ejection.

R.W. also testified that she never heard Williams use any profanity, apart from using the word "ass" in a non-insulting manner on one occasion. She testified that the umpire, not Williams, repeatedly used profanity during his confrontation with Williams. At the Sunday game, she heard nothing regarding a beanball, and did not hear Williams insult the opposing player.

The final witness presented by Williams was A.M., another **[*21]** spectator of the Sunday game, whose video deposition was entered into evidence with redactions. A.M.'s son played for the Titans at the time, but had previously played for the Wild. A.M. sat behind home plate during the game. He testified that he did not hear Williams insult a child using a vulgar word, and did not hear Williams tell the catcher to order a beanball. He also discussed his observations from other youth baseball games, noting that pitching inside "is a key point of winning" and "[a]ll our pitchers pitch inside and do it well, as well as outside."

At the conclusion of Williams's case in chief, the Network moved for involuntary dismissal as a matter of law. The trial court denied the motion.

4. *The Network's Trial Witnesses*

The first witness for the Network was K.N., who played for the Titans during the championship game on Sunday. K.N. testified that, at the end of an inning, after the Titans' pitcher struck out Williams's son, Williams turned his head to the pitcher and said, "you're too pussy" to "throw my son a fastball." K.N. informed the pitcher's father, who coached the Titans, about this remark.

5. *The Umpires' Testimony*

The Network next presented the video deposition **[*22]** testimony of Joseph Addis and Scott Bolewicki, the umpires from the Saturday game. Addis testified that before the game started, he overheard Williams use the word "fucker" and warned him not to use profane language on the field. Addis was the home plate umpire during the game. He stated that Williams frequently complained about calls during the game. He described one incident at home plate in which Williams vociferously disputed a

[6] We use initials for the children, parents, and spectators to protect the privacy of the minors.

call for "five to ten minutes," although the video only showed the dispute lasting for less than a minute and a half. Addis also recounted the altercation between Bolewicki and Williams and the aftermath of the ejection.

According to Addis, Williams was ejected after physically pushing Bolewicki, but the video does not depict any pushing and the ejection occurred prior to the altercation. Addis heard parts of the discussion between Williams and Bolewicki, but heard no profanities during the altercation. He denied hearing Williams engage in a "profanity-laced tirade," as alleged in the Deadspin article, because he was not close enough. Addis never heard Williams use any profanity on the field, although he did hear Williams mutter "bastards" when walking back **[*23]** to the dugout.

Umpire Bolewicki testified that he also heard Williams use the term "fucker" before the game, but denied giving him any warning. Bolewicki was the outfield umpire during the Saturday game. He testified that during the home plate incident with Addis, Williams used a "lot of profanities" during his objections to the call, including "a lot of MF's and a lot of F's," even though Addis had testified he heard no profanities during the game. Bolewicki claimed the cursing was loud enough for spectators to hear, even though no profanities appear on the video's audio during the exchange.[7] Bolewicki claimed that he heard Williams use profanity "just about every inning in the game," contrary to Addis's testimony.

However, Bolewicki also testified that, "it's in the rules at Ripken, you drop an F bomb, you're gone." He explained that, "the minute everybody can hear it, and it's in the earshot of the kids and everything and the other team, the other managers, the other parents, [the umpires] have to step up and do something." Bolewicki did not explain why, despite these principles, he did not address until the ejection what he claims was Williams's constant and loud use of profanity **[*24]** throughout the game.

As to the ejection, Bolewicki recalled that he heard Williams proclaim the following, in essence, to the spectators:

> [T]hese fucking guys don't know who I am and who I fucking know. They make fourteen to fifteen dollars a fucking hour . . . That's what you get from Ripken when you give these guys some money, and this is what you expect from Ripken . . . [Y]ou guys will both be out of jobs tomorrow.

Bolewicki testified that after hearing this alleged remark, he ejected Williams from the game. He recalled Williams repeatedly screamed "Why?," and "chased" him, and would not leave the field. Bolewicki also contended Williams called him an "asshole" and "motherfucker."

According to Bolewicki, Williams yelled at him between fifteen to twenty minutes, and then threatened him "in a low tone where nobody else would hear it." Bolewicki admitted to responding, "time and place." As shown by the video, the game resumed about five and a half minutes after the ejection.

6. *The Ripken Organization Witnesses*

The Network further presented the video deposition of Brett Curll, the assistant director of amateur baseball for the Ripken Baseball organization. Curll was one of the directors **[*25]** at the Mother's Day tournament. After another tournament official called Curll regarding a complaining coach, Curll responded to the field and began watching the Saturday game. He observed one inning, then left to make a phone call. He ended the call early after hearing a commotion on the field.

When Curll arrived to the field, Williams already had been ejected and was refusing to leave. Williams was yelling, claiming the umpire threatened to fight him. Curll did not hear, and no one reported, Williams calling the umpire a "motherfucker" or "asshole."

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[7] The video camera and microphone were located behind home plate, and thus picked up much more of the conversation between Addis and Williams following the home plate incident than the subsequent ejection and confrontation between Bolewicki and Williams that occurred further away by first base.

Williams repeatedly claimed the umpire threatened to fight him, and Curll eventually escorted him off the field after advising that his team would forfeit if he did not leave. He remained with Williams until the game was over.

After the game, Curll attempted to speak with Bolewicki to "get his side of the story." However, Bolewicki stormed off stating, "You're taking his side. That's fucking bullshit," and left before Curll could question him further. At a later date, Curll eventually did speak with Bolewicki, who explained that Williams had uttered a profane word prior to the game and repeatedly challenged calls during the game. Bolewicki **[*26]** did not report any frequent use of profanity to Curll.

Curll explained that Williams was allowed to return to coaching the following day because, at the time, tournament officials were unable to dismiss Williams's argument that Bolewicki threatened him, due to Bolewicki storming off and failing to provide his side of the story. He also testified regarding the games on Sunday, which he and other tournament officials closely monitored. Curll explained that, after the alleged beanball incident, neither umpire believed anything malicious had occurred. According to Curll, some pitchers at that age have "pretty good control of where they want the ball to go," but batters get hit "often."

Bill Ripken also testified on behalf of the Network. Ripken did not attend the Mother's Day tournament. He testified instead about his role in the Network's response to the allegations, including forwarding the first Deadspin article to Fisher after the Sunday game, and watching the video of the first game with Williams the following Wednesday.

Ripken initially did not think the Saturday game incidents were significant, but he changed his mind after watching the video. After the second Deadspin article came **[*27]** out discussing the alleged beanball incident, he regarded that as the bigger issue.

Following the presentation of evidence, the parties each moved for judgment as a matter of law. The court denied the motions, and sent the case to the jury after closing arguments and the jury charge.

C. *Verdict and Post-Trial Motions*

1. *The Jury Verdict*

The court submitted the following questions to the jury:

> 1. Did Defendant The MLB Network, Inc., prove by a preponderance of the evidence that Plaintiff Mitchell Williams violated the morals clause of his November 2011 Contract?
>
> . . . .
>
> If you answered "NO," please proceed to Question 2. If you answered "YES," your deliberations are over, you have reached a verdict for Defendant The MLB Network, Inc.
>
> 2. Did Plaintiff Mitchell Williams prove by a preponderance of the evidence that had he not been terminated, it was reasonably likely he would have been offered the option year of November 2016 to November 2017?

By a vote of six to two,[8] the jury responded "NO" to both questions, which resulted in a verdict for Williams. The jury awarded Williams $1,565,333.34 in stipulated compensatory damages. The court also awarded Williams $9,700 in prejudgment interest and $2,990 **[*28]** in costs.

2. *Post-Trial Motions*

After the verdict, the Network moved for a new trial, based on alleged evidentiary errors, and for judgment notwithstanding the verdict. Regarding the motion for a new trial, the court relied upon its prior evidentiary rulings and denied the motion. As to the Network's motion for judgment notwithstanding the verdict, the court identified disputed issues of fact, such as whether Williams used profanity against an umpire. The court also noted that the jury had to consider not only Williams's disputed conduct but also his undisputed actions, because it had to make a determination as to whether the conduct rises to the

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[8] Counsel evidently consented to let the two alternate jurors deliberate. *See R.* 1:8-2(b)(3).

level of a morals clause violation.

The Network also moved for judgment notwithstanding the verdict based on the contract's confidentiality provision. The Network argued that Williams had breached the confidentiality provision when he appended the contract to his complaint, ending any obligations the Network had towards Williams. The court disagreed, finding that Williams did not act in bad faith and that he substantially complied with the contract's notice and objection provisions.[9]

This appeal and cross-appeal **[*29]** followed.

III. The Network's Appeal

On appeal, the Network raises several points advocating reversal. It argues: (1) the trial court erred in failing to grant the Network judgment dismissing all of Williams's claims as a matter of law during or after trial; (2) the court erred by dismissing the Network's counterclaim alleging breach of confidentiality; (3) the court unjustifiably denied the Network's motion for a new trial based upon unsound evidentiary rulings that skewed the jury's fair assessment of the case; (4) the court should have granted the Network a new trial based upon allegedly improper comments by plaintiff's counsel; and (5) the court should have granted summary judgment dismissing all of the plaintiff's claims, including the breach of contract claim that went to trial.

We have carefully considered each of these arguments in light of the record and the applicable law. Having done so, we reject the Network's demands for relief. On the whole, the Network has failed to demonstrate that any of the errors it claims are "of such a nature as to have been clearly capable of producing an unjust result." *R.* 2:10-2. We proceed to discuss these arguments, although in a somewhat different sequence. **[*30]**

A. *Dismissal of the Counterclaim*

We first address the Network's contention that the trial court improperly dismissed its counterclaim alleging that Williams breached the confidentiality provision in his employment contract by attaching the contract to his complaint. We discern no such actionable breach in the circumstances presented.

As we understand it, the Network required Williams (and apparently other "talent" it employs) to sign a confidentiality agreement to prevent the terms of compensation, contract length, renewal or extension options and other details from being divulged to other employees or prospective hires. According to the Network, if those contract terms were made known to other on-air analysts or their agents, that information might put the Network at a disadvantage in contract negotiations.

We need not decide here whether or not the objective of secrecy is legally enforceable and consistent with public policy. Even presuming, for the sake of discussion, the confidentiality provision is generally enforceable, the particular context of this contract litigation in a public forum bears heavily upon the analysis.

As the trial court quite correctly recognized, the November 2011 **[*31]** contract inevitably would have been made part of the public record even if Williams had not attached the document to his complaint. *See R.* 1:2-1 (generally directing that "[a]ll trials, hearings of motions and other applications . . . and appeals shall be conducted in open court unless otherwise provided by rule or statute."). This court made clear in its September 10, 2015 unpublished opinion that the trial court did not abuse its discretion in denying the Network's motion to seal the record. *Williams*, No. A-1674-14, 2015 N.J. Super. Unpub. LEXIS 2160 at *8 (App. Div. Sept. 10, 2015). We found — and continue to find — that the Network failed to demonstrate a serious injury that would result upon publication of Williams's contract, and that any harm resulting from its dissemination would be "impermissibly speculative." *2015 N.J. Super. Unpub. LEXIS 2160, [slip op.]* at 8. If the

[9] In a prior unpublished appeal, this court rejected the Network's argument that the trial court abused its discretion in declining to seal portions of the record in this case. *Williams v. MLB Network, Inc.*, No. A-1674-14, 2015 N.J. Super. Unpub. LEXIS 2160 at *4-6 (App. Div. Sept. 10, 2015).

Network wanted to have an eventual dispute with Williams resolved in a private arena, it could have attempted to negotiate an arbitration or some other alternative dispute resolution provision in the contract. It failed to do so.

Any suggestion by the Network that it suffered damages because the contract's contents were disclosed sooner, rather than later, is not supported or persuasive.[10] We reject the Network's **[*32]** argument that Williams's disclosure of his contract by attaching it to his complaint operated to cut off his prospective damages.

Nor are we persuaded that Williams separately violated the confidentiality clause by issuing a press release after filing the complaint. As we have already noted, the details of the contract — including plaintiff's terms of compensation — surely would have been divulged out of necessity during the course of the litigation, through motion practice and the proofs at an ultimate trial. The trial court had no compulsion to deviate from the New Jersey tradition of "open court proceedings" reflected in *Rule* 1:2-1 and seal the documents in the record containing the actual contract that is at the very heart of this case. Our prior opinion rejected the Network's claim for sealing under *Rule* 1:38-11. Moreover, a jury trial in this civil action would not have been conducted behind closed doors.

In sum, the dismissal of the counterclaim was entirely appropriate and consistent with our laws and Rules of Court.

B. *Denial of Judgment as a Matter of Law*

We next consider the Network's related contentions that the trial court should have granted it summary judgment, as a matter of law, **[*33]** dismissing all of Williams's claims before trial, or at least the court should have dismissed them during or after the trial. We disagree.

The breach of contract claim brought by Williams against the Network was clearly viable. The crux of the parties' contractual dispute was whether or not Williams, by his reported behavior at the Ripken baseball tournament on May 10 and 11, 2014, violated the morals clause set forth in Section 15.03 of his employment contract. We agree with the trial judge that this issue involved hotly disputed genuine issues of material fact. As such, the judge was justified in denying summary judgment under the standards of *Rule* 4:46-2 and having those factual disputes resolved by a jury. *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540, 666 A.2d 146 (1995). Moreover, the judge also acted appropriately within his authority in denying the Network's motions at the close of plaintiff's case to dismiss the contractual claim, as well as its post-verdict motion to set aside the jury's adverse determination. *See Verdicchio v. Ricca*, 179 N.J. 1, 30, 843 A.2d 1042 (2004) (regarding the similar standards for directed verdict and a new trial according the non-moving party the benefit of all legitimate inferences from the evidence).

There are no reported cases in our State involving an alleged breach of a morals clause within **[*34]** an employment contract. Nevertheless, general principles of contract law can inform the analysis. "To prevail on a breach of contract claim, a party must prove a valid contract between the parties, the opposing party's failure to perform a defined obligation under the contract, and the breach caused the claimant to sustain[] damages." *EnviroFinance Grp., LLC v. Envtl. Barrier Co., LLC*, 440 N.J. Super. 325, 345, 113 A.3d 775 (App. Div. 2015).

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[10] Our reasoning in this regard is consistent with that of courts in other jurisdictions. *See, e.g., Tax Matrix Techs., LLC v. Wegmans Food Mkts., Inc.*, 154 F. Supp. 3d 157, 188 (E.D. Pa. 2016) (dismissing breach of confidentiality counterclaim in part because no evidence of damages, in case where defendant alleged breach in part due to filing of lawsuit); *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. Cir. 2009) (dismissing property management company's argument that tenants' breach of confidentiality when filing motion nullified its obligations, because "the discernable consequences to the company of the tenants having attached a copy of the agreement to the motion were nil"); *Kronenberg v. Katz*, 872 A.2d 568, 606, 609 (Del. Ch. 2004) (holding, in case where plaintiff breached confidentiality agreement by annexing contract to complaint, that breach could not give rise to compensable damages because "[o]nce this court applied the appropriate standards, the complaint would have been promptly unsealed — which is what happened.").

In this instance, the existence of the parties' written contract is undisputed. The issues instead concern whether Williams breached the contract through his actions at the Ripken tournament. If those actions rose to the level covered by the morals clause, then Williams was in breach of the contract and the Network was justified in terminating him. Conversely, if Williams did not violate the morals clause, then the Network had no contractual right to terminate him and therefore would be liable for his damages caused by that wrongful termination.

To interpret the meaning of the morals clause, the court must consider the language of the agreement and the parties' mutual intent and understanding. *See Manahawkin Convalescent v. O'Neill*, 217 N.J. 99, 118, 85 A.3d 947 (2014) (explaining that courts interpret contracts pursuant to the intent of the parties, and consider the plain language of the agreement and all other evidence **[*35]** to discern intent).

From the plain language of the agreement, to trigger the morals clause the alleged conduct must either: (1) bring the employee into *non-trivial* public disrepute, scandal, contempt or ridicule; (2) shock, insult, or offend a *substantial portion* of the public; or (3) reflect unfavorably on the contracting parties in a *non-trivial* manner. (Emphasis added). Petitti acknowledged his understanding that this language required the conduct to be significant. The contract does not define or provide examples of non-triviality, nor does it define what it means by offending a "substantial portion" of the public.

It is evident from this contractual language that, to trigger the morals clause, the employee must *actually engage* in the acts that form the basis of employer action. In other words, under the terms of the agreement, it is not enough for a media company to publish a disparaging article about an employee. To justify termination, the employee must have engaged in the conduct asserted in the article.

That plain reading is in accord with the parties' mutual understanding. Petitti, who signed the November 2011 contract on behalf of the Network, admitted that to trigger the morals **[*36]** clause, the underlying conduct alleged in a publication must have actually occurred. The trial judge noted in this regard that both sides agreed that proving the underlying inappropriate conduct was the ultimate issue in the case.

On appeal, the Network predicates its argument for judgment as a matter of law entirely upon the initial article and the events of the Saturday game. However, Williams presented sufficient evidence for a reasonable juror to conclude that he did not actually engage in the conduct described in the first article.

The initial Deadspin article alleged that Williams engaged in a "profanity-laced tirade" against an umpire, but Williams testified that he used no profanity during the Saturday game. The article also alleged that Williams called the umpire a "motherfucker," which he denied. Other witnesses from the Saturday game — the two assistant coaches and R.W. — testified that they did not hear Williams use any profanity against the umpire.

Tellingly, although Umpire Bolewicki testified that Williams used profanity "just about every inning in the game," Umpire Addis testified that he never heard Williams use profanity on the field. Thus, even among the Network's own **[*37]** witnesses, factual disputes persisted regarding Williams's actual conduct that day and the accuracy of the article's allegations.

The Network also argues that the video itself constitutes sufficient proof to corroborate the first Deadspin article, but no instance of profanity by Williams is discernable from the video's audio. Thus, the video does not prove the article's most serious allegations. The morals clause does not hold Williams to the words utilized by reporters citing anonymous sources. Instead, it holds him to his own actual conduct.[11]

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[11] We need not reach here whether a contractual morals (or "morality") clause could properly allow an artist, sports figure, or other employee to be terminated based on adverse publicity alone, even if the publicity is baseless. *See* Patricia Sánchez Abril & Nicholas Greene, *Contracting Correctness: A Rubric for Analyzing Morality Clauses*, 74 *Wash. & Lee L. Rev.* 3, 35-36 (2017) (proposing that "[i]n light of the increasing breadth and use of morality clauses across many ranks, the time is right to examine

Whether the conduct displayed in the video rises to the level of a morals clause violation was a proper matter for the jury to decide. Based on the evidence presented at trial, reasonable minds could also disagree on whether the articles brought Williams into non-trivial public disrepute, offended a substantial portion of the public, or reflected unfavorably upon him in a non trivial manner. Weighing triviality and measuring the level of shock or offensiveness to the public is uniquely suited to the jury's capabilities, particularly in light of the November 2011 contract's failure to define or illustrate the meaning of "non-trivial."

The Network **[*38]** further argues that the video shows Williams remonstrating with the umpires, but a reasonable juror could conclude, after viewing the video, that such remonstrations are commonplace at youth sporting events and fall under the category of trivial conduct. In addition, Fisher testified that the last article on the subject issued on May 27, 2014, just over two weeks after the tournament and weeks before Williams's termination. A reasonable juror could view the short-lived coverage as evidence of the allegations' arguable triviality.

A reasonable juror also could rely upon the Network's own initial conduct to find at least some of the allegations in the first Deadspin article were not significant enough to trigger the morals clause. Following Petitti's receipt of the first article, the Network took zero action against Williams. Williams continued to appear on-air through the next week. It was only after publication of the second article, which contained more serious allegations that Petitti ordered Williams to refrain from going on-air. If the Network did not initially consider the first article's allegations sufficiently serious to justify suspending Williams, a reasonable juror could **[*39]** come to the same conclusion.

The only fact on which the parties apparently agree is that an umpire did eject Williams from the Saturday game. But the jurors could reasonably find that the ejection alone, without additional facts being established by the Network, was not enough to violate the contractual morals clause and justify his discharge.

In sum, the trial court did not err by denying the Network's motion for dismissal and motion for a directed verdict. The jurors appropriately decided the close factual issues in this case. By a non-unanimous vote permitted under *Rule* 1:8-2(c)(3), they concluded that Williams had established his breach of contract claim and that the Network had not proven his violation of the morals clause.

Notably, the jurors sided with the Network on Williams's separate contention that the Network would have exercised its extension option if he had not been wrongfully terminated. Williams has not cross-appealed that adverse determination. These verdicts reflect a thoughtful and careful assessment of the case. We perceive no injustice in the jurors' decisions that the judge rightfully entrusted to them.

C. *Allegedly Incorrect Evidentiary Rulings*

The Network raises several arguments **[*40]** contending the trial judge made several incorrect evidentiary rulings that had the cumulative effect of depriving it of a fair trial. We are unpersuaded by those arguments. Before we address them in detail, we present a few important preliminary comments that must frame the discussion.

It is well established that appellate review of a civil trial judge's evidentiary rulings is limited. We generally will not set aside a civil trial judge's decisions to admit or exclude evidence unless the appellant demonstrates the judge abused his or her discretion. *See Hisenaj v. Kuehner*, 194 N.J. 6, 16, 942 A.2d 769 (2008); *see also In re Accutane Litigation*, 234 N.J. 340, 391, 191 A.3d 560 (2018). The judge's various evidentiary rulings that displeased the Network must be viewed through this deferential prism.

Upon thoroughly canvassing the record, it is plain that the trial judge's evidentiary rulings were not skewed, on the whole, against the Network. In fact,

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these restraints closely, taking into account their potential legal failings and adverse consequences on public policy grounds.").

the judge made a number of rulings on motions in limine and midtrial objections that went against plaintiff.

By way of non-exhaustive examples, we note the trial judge: denied plaintiff's motion in limine to limit the evidence to conduct actually known by Petitti before terminating plaintiff; denied plaintiff's motion in limine to preclude the defense from offering **[*41]** the "beanball" proof as cumulative evidence; granted the defense motion in limine to bar plaintiff from presenting comparative evidence concerning the Network's termination of its contract with another sports analyst; sustained defense counsel's objection to Williams testifying about team parents pulling their children from the Wild team after the incidents; sustained a defense objection to Williams recounting hearsay testimony about what a family friend had advised him concerning his contract; and overruled plaintiff's objections concerning certain emails and anger management therapy.

An objective review of the transcripts as a whole reflects that the trial judge, in whom we must afford considerable discretion, even-handedly kept the focus of the trial where it belonged. The judge commendably prevented both sides from straying into collateral matters, or from exposing the jurors to incompetent proofs or inadmissible hearsay. The Network's suggestion that the judge skewed the case against it is belied by the record. The suggestion is also undercut by the judge's important ruling in the Network's favor dismissing eleven of the twelve counts in plaintiff's complaint.

We now proceed to **[*42]** examine the Network's discrete evidential arguments with these general observations in mind.

1. *Redactions of the Deadspin Articles*

The Network argues the court abused its discretion by granting Williams's application to redact the two Deadspin articles. We disagree.

During the Network's cross-examination of Petitti, who had been called by Williams as part of his case-in-chief, counsel for the Network moved to admit the first Deadspin article into evidence. Counsel for Williams objected based on hearsay. The court recognized that the article's assertions citing unnamed sources were "classic prejudicial inadmissible hearsay," but decided to give the jury a "very strong limiting instruction" explaining that the hearsay information is not reliable. After counsel for the Network moved the second Deadspin article into evidence, the court issued an instruction to the jury indicating that the hearsay statements in the document were unreliable and admitted for a limited purpose.

After both sides rested, counsel for Williams asked the court to reconsider and redact the articles. At that point, the court changed its earlier decision, concluding that some of the statements contained in the articles were unduly prejudicial under N.J.R.E. 403. **[*43]** The court noted that, "[i]t's not the type of thing that anybody would want to have their reputations or their livelihoods based upon the allegations by unidentified double, triple, quadruple hearsay declarants." It found that providing the articles to the jury in their entirety would be far too prejudicial, because they contain "[wholesale] inadmissible hearsay about allegations from unnamed sources."

Counsel for the Network opposed this approach, arguing that Williams's proposed redactions eliminated the substance of the articles. The Network maintains the same argument on appeal, claiming the redacted versions of the articles were "virtually meaningless."

Pursuant to N.J.R.E. 403, relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence. "The trial court has broad discretion in making this determination." *Toto v. Princeton Twp.*, 404 N.J. Super. 604, 620, 962 A.2d 1150 (App. Div. 2009). A trial court's application of "N.J.R.E. 403 should not be overturned on appeal 'unless it can be shown that the trial court palpably abused its discretion, that is, that its finding was so

wide [of] the mark that **[*44]** a manifest denial of justice resulted.'" *Green v. New Jersey Mfrs. Ins. Co.*, 160 N.J. 480, 492, 734 A.2d 1147 (1999) (quoting *State v. Carter*, 91 N.J. 86, 106, 449 A.2d 1280 (1982)).

The Network's suggestion that the redacted articles are "meaningless" is a severe overstatement. Even in the redacted articles, the following allegations are clearly presented: that Williams was ejected from the Saturday game for arguing with and insulting an umpire, cursing, and engaging in a "profanity-laced tirade;" that Williams called a child a "pussy" at the Sunday game; and, most serious of all, that Williams ordered a beanball of an opposing batter during the Sunday game. The inclusion of the most serious allegations in the redacted version of the article weighs in favor of the court's application of N.J.R.E. 403 to exclude other, less relevant allegations from unnamed sources. The redactions did not cause a manifest denial of justice. The redacted articles displayed — and the parties presented ample evidence concerning — the most serious allegations of misconduct by Williams at the Mother's Day tournament.

The Network maintains that the court's redactions shielded other allegations of "improper conduct," which prevented the jury from concluding that those actions were publicized. According to the Network, the redactions prevented the **[*45]** jury from learning that Williams's "tirade" following his ejection during the Saturday game was made public. However, the opening line of the first article, which was not redacted, references allegations of a "profanity-laced tirade in which he called an umpire 'motherfucker'" as the basis for his ejection. That the article's author seemingly erred by describing the tirade in the opening line as taking place before, rather than after, the ejection, is not particularly important to the ultimate issues in the case. The notable allegation is the alleged profanity-laced tirade itself, which the redacted article presents. The Network was not unfairly prejudiced. The jury clearly had enough information from the redacted article to conclude that Williams's alleged "tirade and obnoxious conduct," as the Network puts it, were made public.

Other allegations redacted from the articles include that Williams "complained about numerous calls throughout" the Saturday game leading to "repeated arguments with umpires on the field"; that Williams refused to leave the field for ten minutes following the ejection on Saturday; and that Williams heckled the opposing coaches throughout the Sunday game, citing **[*46]** unnamed sources. The Network argues these allegations were relevant because Petitti "repeatedly testified that the Network terminated Plaintiff because of the totality of his conduct at the Mother's Day [t]ournament."

The trial court did not abuse its discretion excluding these statements under N.J.R.E. 403. With respect to the allegation that Williams complained about numerous calls throughout the game or heckled umpires, the first article's unredacted headline indicates that Williams was ejected both for cursing and arguing ("Mitch Williams Ejected from Child's Baseball Game for Arguing, Cursing"). The unredacted portion of the second article notes that Williams was "aggressive and argumentative" at the Sunday game. Thus, the redacted articles contained ample information for the jurors to conclude that Williams's disputes with the umpires were publicized, without providing them with the article's inflammatory hearsay statements from unnamed sources.

With respect to the allegation of Williams causing a ten-minute delay, the jury viewed the video of the Saturday game, which showed that the delay was only about five-and-a-half minutes. Thus, the ten-minute claim in the article redacted by the court **[*47]** was clearly exaggerated, unduly prejudicial, and far less relevant than the video itself.

The Network further argues that it was prejudiced by the procedure employed by the trial court, because the court ordered the redactions after the Network had rested. However, the record does not reveal any attempt by the Network to reopen its case to address the redacted articles. Moreover, "[t]he order of proof and the reopening of a case on rebuttal rest within the sound judicial discretion of the trial court." *Healy v. Billias*, 17 N.J. Super. 119, 122, 85 A.2d 527 (App.

Div. 1951); *see also Magnet Res., Inc. v. Summit MRI Inc.*, 318 N.J. Super. 275, 297, 723 A.2d 976 (App. Div. 1998) (whether to permit party to reopen case to present additional testimony was within discretion of trial court). In sum, no such abuse of discretion occurred here.

2. *Testimony Regarding the Source of the Deadspin Articles*

Next, the Network challenges the following portion of the transcript of the video testimony of A.M., whose son played on the Titans:

> Q. Okay. So, [A.M], we were talking about how after the game you received communications from coaches of the Titans, which indicated to you that they were looking to bury Mitch Williams; is that correct?
> [redacted]
> Q. Okay. And that, I'm sorry, your answer was?
> A. Yes, I did. I received a, an e-mail from [the Titans coach] telling me this.
> [redacted]
> Q. Okay. Go ahead.
>
> A. So then I found **[*48]** out that they had put an article out on Deadspin, you know, about Mitch Williams and all these accusations. And I then proceeded to speak with [the Titans coach] and ask him to retract that.

At trial, counsel for the Network objected to admission of this testimony. The court overruled the objection, finding the statements admissible under the "state of mind" exception to the general ban on hearsay evidence. On appeal, the Network argues the court incorrectly applied the hearsay exception. We disagree.

Pursuant to N.J.R.E. 803(c)(3), statements of "then existing mental, emotional, or physical condition" are not excluded by the hearsay rule. "Under this exception, hearsay statements reflecting a declarant's intentions or future plans are admissible to show that the intended act was subsequently performed." *Brown v. Tard*, 552 F. Supp. 1341, 1352 (D.N.J. 1982) (citing *State v. Thornton*, 38 N.J. 380, 389, 185 A.2d 9 (1962)).

The Network argues that N.J.R.E. 803(c)(3) does not apply because the coach's state of mind was irrelevant. In support, it cites the Supreme Court's admonition that the "'state of mind' hearsay exception should be construed narrowly, focusing specifically on the declarant's state of mind and whether that state of mind is directly relevant to the issues at trial." *State v. McLaughlin*, 205 N.J. 185, 189, 14 A.3d 720 (2011). In *McLaughlin*, a criminal case, the Court held **[*49]** that admission of hearsay statements under the state of mind exception was in error because the defendant's state of mind was not directly relevant to the prosecution, and the statement imputed the intent to commit a crime to defendant. *Ibid.* The court held that, to be admissible, a state of mind statement "must satisfy not only the requirements of the hearsay exception, but it also must provide a causal link between the identity of the hearsay declarant and the party or issues on trial." *Id.* at 205-06. Here, the statements in question are of the opposing coach's "intent" to bury Williams. Statements of intent are expressly delineated as a hearsay exception in N.J.R.E. 803(c)(3).

Regarding the Network's relevancy argument, the court reasonably found that the coach's state of mind was relevant because the central issue in the case was whether the Deadspin articles contained false allegations. The record supports the court's conclusion that the coach's intent to plant stories to "bury" Williams was highly relevant to that issue. Therefore, the court did not abuse its discretion when overruling the objection and permitting this testimony into evidence.

3. *The Court's Decision to Mute Portions of the Saturday Game Video* ***[*50]***

The Network objected at trial to Williams's request to mute certain statements from spectators from the Saturday game video, arguing there the statements fall under the "present sense impression" exemption to hearsay, N.J.R.E. 803(c)(1). The court granted the redaction request, finding the statements to be inadmissible hearsay.

According to the Network, the court muted the following off-camera comments made by

unidentified spectators: men yelling at the umpire to "get rid" of someone, presumably Williams; several people cheering and clapping after the umpire ejected Williams; a man screaming "come on, we're talking ten year old baseball" after the ejection; and a man yelling "get off the field, let the kids finish" after the ejection.[12]

The court ruled these statements were not merely present sense impressions; they were statements of belief. The court also concluded that the statements would be excludable under N.J.R.E. 403 because the risk of prejudice substantially outweighed the probative value.

On appeal, the Network argues that even if the statements were hearsay, they were admissible as either present sense impressions or excited utterances. That may be so, but the statements were nonetheless properly excludable **[*51]** under N.J.R.E. 403.

The Network argues that it properly offered the spectator statements to show "the contemporaneous reactions the crowd had to [p]laintiff's conduct." However, the crowd's reaction to Williams's conduct was not highly relevant to any issue at trial. The Network claims that the comments "would have provided the jury an opportunity to experience the 'feel' of what had occurred that day," but admitting the statements for that purpose would have minimal, if any, probative value to the issues.

The Network argues that the statements are relevant because they prove that Williams engaged in conduct that brought him into disrepute. However, the morals clause's reference to "public disrepute" surely must have encompassed more than displeasing an umpire or a handful of presumably oppositional spectators at a youth sporting event.

In contrast, the risk of the crowd's reaction coloring the jury's interpretation of events depicted in the video could have unduly prejudiced Williams, particularly in light of the fact that the Network did not identify the declarants.

Spectator complaints at youth sporting events, particularly in response to incidents involving the children of those spectators, are **[*52]** often team-biased and not proportional responses. Additionally, the statements seem to have been in response to some conduct not depicted in the video, because the video did not record all of Williams's comments and interactions with the umpires.

As the trial court sensibly explained, "[t]he jury can look at what occurred, make up their own mind about as best they can with what they observe — with what they're observing without anybody being influenced by what the spectators are thinking."

Finally, even if the court erred by failing to admit the statements of these spectators into evidence, we do not see how such a mistake constitutes reversible error. As noted, the spectator comments had minimal probative value regarding the key issue in the case, which was whether Williams actually *engaged* in conduct that brought him into non-trivial public disrepute. Exclusion of the spectator statements was not "clearly capable of producing an unjust result." *R.* 2:10-2.

4. *The Court's Exclusion of Media Reports of Williams's Past Behavior*

Next, the Network claims that the court erred by preventing Petitti from discussing his knowledge of a 2008 article describing Williams's ejection from his daughter's youth **[*53]** basketball game for yelling obscenities at a referee. Petitti was also aware of a 2014 article that described Williams acting inappropriately and yelling at referees at a high school basketball game.

The Network asserts that counsel for Williams attempted at trial to portray the Network as arbitrarily requiring him to agree to no longer attend his children's sporting events through the proposed contract amendment. According to the Network, Petitti's testimony regarding Williams's bad conduct at other sporting events would have established the

[12] Counsel represented to us at oral argument that the muted portions of the recording total about sixty-four seconds.

Network's motivation for offering the contract amendment with that condition, and for terminating Williams's contract after he did not accept the addendum.

The trial court rightly expressed concern with such testimony opening the door to "a trial within a trial" regarding Williams's conduct at past sporting events. In order to balance that scope concern with the Network's interest in submitting evidence about Petitti's state of mind when offering the conditions in the addendum, the court permitted Petitti to testify that he had relied upon two prior reports of "bad behavior" at youth sporting events. The court cautioned counsel for Williams that **[*54]** if she sought to cross-examine Petitti regarding his reasons for requesting the addendum, the door would be opened for additional evidence regarding those prior instances.

In accordance with the court's instruction, Petitti testified as follows:

> Q. And you remember that one of the terms in the addendum was a proposal that he agreed not to attend any amateur sporting events, and that was intended to include his children's sporting events; correct?
> A. Correct.
> Q. Why did you include that provision?
> A. You know, I thought that, given the behavior over the weekend, given, you know incidents that had happened before that I was aware of, I thought it was a way to protect him and the network.
> . . . .
> Q. Okay. And you said you were aware of prior incidents. And without going into detail of them, your understanding of that was bad behavior by Mr. Williams at youth sporting events?
> A. Correct.
> Q. Okay. And did you understand that that was reported to the public?
> A. Yes, I did.
> Q. Okay. And who is — do you know who Phil Mushnick is?
> A. Yes.
> Q. Okay. And who is he?
> A. He's a columnist for the New York Post who covers sports media, basically, —
> Q. Okay. Is the —
> A. — business —
>
> Q. — *New York Post* a widely read **[*55]** —
> A. Yes.
> Q. — publication?
>
> Okay. During the time that Mr. Williams was on leave, did you become aware of a story in Mr. Mushnick's column in the *New York Post* about bad behavior by Mr. Williams at a youth sporting event involving his daughter?
> A. Yes, it was in Mushnick's column, yes.

As the Network notes, the instances of prior bad conduct discussed in those news articles were only relevant insofar as they informed Petitti's state of mind when requesting the addendum. As the above exchange demonstrates, the court fairly permitted Petitti to testify that part of the reason he requested the addendum was because of prior reports of Williams's bad behavior at youth sporting events. Petitti explained that those prior reports were public.

The record does not support the Network's claim that the court "prohibited [the Network] from rebutting" Williams's characterization of the addendum as an arbitrary act. The Network argues that the court should have admitted the past media reports into evidence, but it is unclear what those reports could have added to Petitti's testimony. Admitting those reports would have created numerous fact issues regarding events not directly relevant to the case, and **[*56]** could have confused the jury. The court did not abuse its discretion in how it balanced these concerns.

In addition, N.J.R.E. 404(b) supports the court's ruling. *Rule* 404(b) prescribes that evidence of other wrongs or acts is "not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith." Without a very strong limiting instruction, admission of the articles would have created the risk of a N.J.R.E.

404(b) violation. The court's decision wisely avoided the risk of unduly prejudicing Williams by admitting evidence of prior wrongs. The jury could have misinterpreted those prior acts as evidence of a character disposition to engage in similar acts at the Mother's Day tournament.

The court adequately balanced the need to avoid a "mini-trial" on Williams's past conduct with allowing the Network to demonstrate the reasons for Petitti requesting the addendum. Therefore, the court did not abuse its discretion on this issue and committed no reversible error.

5. *The Court's Decision to Exclude Evidence of Williams's Prior Statements About Intentionally Hitting Batters*

The Network further argues that the court should have allowed it to introduce evidence from his deposition testimony **[*57]** and from a post-retirement autobiography, in which he discussed his strategy of intimidating batters to obtain a psychological advantage while playing professional baseball. In his book, Williams provided a specific example, explaining that he struck the player Barry Bonds with a pitch on one occasion. Prior to trial, Williams moved to preclude the Network from utilizing this evidence. The court granted the application under N.J.R.E. 403.

On appeal, the Network claims the court should have admitted the evidence from Williams's book so the jury could decide whether the batter who was hit in the Sunday game "was an accident or part of [Williams's] strategy." However, as the trial court explained, inferring how Williams behaves when coaching youth sports from his comments regarding strategy when he was playing professional baseball is not appropriate. Admitting the statements would have run the risk of the jurors making that illogical inference, which supports the court's finding that the statements would be unduly prejudicial. As the record supports the court's application of N.J.R.E. 403, we are satisfied it did not abuse its discretion.

6. *Exclusion of Alcohol-Related Testimony*

The Network also argues that, **[*58]** in their video depositions, Bolewicki and Addis testified that Williams smelled of liquor during the Saturday game, slurred his words, and appeared to be intoxicated. According to the Network, the trial court improperly permitted Williams to redact these statements.

During a preliminary hearing before trial, counsel for Williams informed the court that she had recently received a list of the conduct that the Network claimed constituted morals clause violations, which included allegations regarding Williams's alleged alcohol use during the Mother's Day tournament. Counsel pointed out that in previous interrogatory responses, the Network never stated it intended to rely upon that allegation as a reason for termination.

The trial court ruled, "[i]f that wasn't alleged in answers to interrogatories, it's not coming in an hour — a minute before opening statements." Counsel for the Network explained that the applicable testimony from the umpires arose after the Network had responded to interrogatories. The court responded that the Network should have amended its interrogatory responses if it wished to assert the alcohol use at trial. The court's ruling was not unfair, nor an abuse of discretion. **[*59]**

During trial, the alcohol issue came up again when the parties discussed redacting the video depositions. Counsel for the Network asserted that it did not seek to introduce the alleged use of alcohol as a reason for terminating the contract. Rather, it sought to introduce the evidence to rebut testimony from R.W. that, before the Saturday game, she observed one of the umpires tell a Ripken representative, "I'm not going to put up with Coach Mitch Williams." According to the Network, the testimony from the umpire regarding smelling alcohol on Williams's breath would explain why he made those comments to the Ripken representative.

After the parties read a portion of the Addis transcript that contained the alcohol allegation, the court ruled, "[a]lcohol is out. Everything but the alcohol could stay in." The court cited its previous ruling. In addition, the court alluded to automobile negligence in which evidence of driver intoxication

generally is only admitted in limited circumstances. *See, e.g., Gustavson v. Gaynor*, 206 N.J. Super. 540, 545, 503 A.2d 340 (App. Div. 1985) (an automobile negligence case, in which certain evidence of alcohol use was properly excluded because of its capacity to inflame jurors).

In addition, the trial court observed that "[t]he umpire, **[*60]** presumably, was concerned about Williams' behavior, not about — not — not concerned about what was causing that behavior." It noted that, for the legal issues in this case, "it's behavior that counts." It observed that prior to that point in the trial, alcohol had never been mentioned by any witness, and that Williams would be prejudiced if the issue were introduced so late in the case.

The record supports the trial court's conclusion that the risk of prejudice by admitting the alcohol evidence outweighed its probative value under N.J.R.E. 403. The Network argues on appeal that evidence of alcohol use is probative of whether Williams engaged in the conduct, but, as we have noted, it did not proffer the evidence for that purpose at trial. To the extent the allegations that Williams consumed alcohol prior to the game would have informed the jury regarding whether he engaged in the subsequent alleged inappropriate conduct, it is only minimally probative, especially in light of the numerous eyewitness accounts of his conduct that day. *See State v. Long*, 173 N.J. 138, 164, 801 A.2d 221 (2002) ("[R]elevant evidence loses some of its probative value if there is other less inflammatory evidence available to prove that point.").

As the court reasonably observed, **[*61]** the core issue at trial was Williams's behavior during the Mother's Day tournament, not the underlying cause of the behavior. Had Williams consumed alcohol but remained silent at the games, he would not have breached the morals clause, because the articles do not mention any allegations of alcohol use.

D. Comments By Plaintiff's Trial Counsel

Finally, the Network argues for reversal because of comments made by counsel for Williams during trial and four comments she made in her summation. We consider these arguments guided by well-established principles.

In general, counsel are afforded "'broad latitude' in summation." *Diakamopoulos v. Monmouth Med. Ctr.*, 312 N.J. Super. 20, 32, 711 A.2d 321 (App. Div. 1998) (quoting *Condella v. Cumberland Farms, Inc.*, 298 N.J. Super. 531, 534, 689 A.2d 872 (Law Div.1996)). "'[C]ounsel may draw conclusions even if the inferences that the jury is asked to make are improbable, perhaps illogical, erroneous or even absurd.'" *Bender v. Adelson*, 187 N.J. 411, 431, 901 A.2d 907 (2006) (quoting *Colucci v. Oppenheim*, 326 N.J. Super. 166, 177, 740 A.2d 1101 (App. Div. 1999)).

To be sure, "[s]ummation commentary . . . must be based in truth," and counsel "may not 'misstate the evidence nor distort the factual picture.'" *Ibid.* If summation commentary exceeds these limits, the court is to grant a new trial motion only if the comments are "so prejudicial that 'it clearly and convincingly appears that there was a miscarriage of justice under the law.'" *Ibid.* (quoting *R.* 4:49-1(a)).

A trial **[*62]** court "has broad discretion in the conduct of the trial, including the scope of counsel's summation." *Litton Indus. Inc. v. IMO Indus. Inc.*, 200 N.J. 372, 392, 982 A.2d 420 (2009). Accordingly, the abuse of discretion standard of review applies on appeal to the trial court's rulings concerning such matters to the extent they were the subject of a timely objection. *Id.* at 392-93.

Moreover, to the extent the Network did not make a timely objection, it must not only demonstrate error but "plain error." The "[f]ailure to make a timely objection indicates that . . . counsel did not believe the remarks were prejudicial at the time they were made," and it "also deprives the court of the opportunity to take curative action." *State v. Timmendequas*, 161 N.J. 515, 576, 737 A.2d 55 (1999). "Where . . . counsel has not objected, we generally will not reverse unless plain error is shown." *Jackowitz*

v. Lang, 408 N.J. Super. 495, 505, 975 A.2d 531 (App. Div. 2009).

First, the Network argues that plaintiff's counsel improperly referred to hearsay "eyewitness statements" in the course of examining witnesses. The written statements had been gathered by Williams and his counsel from persons who had attended the Mother's Day tournament. At the Network's request, the trial court issued a pretrial order in limine disallowing plaintiff from admitting these hearsay statements, with plaintiff reserving the right to call any of those **[*63]** witnesses in his case-in-chief or on rebuttal. We are satisfied that the cited instances do not rise to circumstances "clearly capable of producing an unjust result." *R.* 2:10-2.

In several of the cited instances, defense counsel failed to timely object when a witness or the questioner referred to the instances in which there was a timely objection, and the court either reasonably overruled the objection or addressed the concern with an instruction to the jurors reminding them that counsel's comments are not evidence and that the jurors are the triers of the facts. At most, the jurors merely learned that other eyewitnesses statements had been gathered, but the statements themselves were not divulged. We discern no abuse of discretion in the judge's handling of these concerns when they were called to his attention.

With respect to closing argument of plaintiff's counsel, the Network complains that she: (1) made an improper "adverse inference" argument against the defense by pointing to the absence of cell phone video recordings showing that Williams had used profanity; (2) suggested the Network had unfairly surprised plaintiff's counsel by calling K.N. to the stand; (3) suggested the Sunday game **[*64]** umpires did not hear Williams's alleged insult on the opposing pitcher; and (4) suggested the Network had conspired with others to prevent Williams from being reemployed as a sports analyst.

None of these contentions about the summation warrant relief on appeal. The "cell phone" reference was within the bounds of fair advocacy in pointing out the lack of such evidence. We discern no violation of the adverse-inference principles of *State v. Clawans*, 38 N.J. 162, 170-71, 183 A.2d 77 (1962) and, more recently, *State v. Hill*, 199 N.J. 545, 559-61, 974 A.2d 403 (2009). The jury saw the recordings of the tournament games and heard testimony from numerous people who had been present. Plaintiff's counsel fairly pointed out the non-existence of additional recorded evidence. Any error in allowing that point to be made was not clearly capable of producing an unjust result.

The Network made no objection at trial to counsel's reaction to the defense calling K.N. as a witness. The trial judge was within his authority to reject this belated argument when it was raised for the first time after trial. Moreover, we presume the jury heeded the court's general instruction to focus on the evidence and not treat counsel's comments as evidence. *See State v. Burns*, 192 N.J. 312, 335, 929 A.2d 1041 (2007).

Plaintiff's counsel's remarks about the Sunday umpires not hearing Williams **[*65]** insult a child was fair comment, and consistent with the testimony of Williams and Curll. Williams testified the umpire had approached him with the child's accusation, and took no action. Curll, the Ripken representative for the Sunday game, testified that the umpires and the Titians' coach had not heard Williams make the alleged insult. Although the Sunday umpires themselves did not testify, plaintiff's counsel made a fair circumstantial argument that they had not seen, heard, or corroborated the alleged insult.

Lastly, plaintiff's counsel's assertions at the end of his summation about Williams's inability to find employment after his discharge by the Network present no basis for reversal. Defense counsel did not object to the comments, and we are unpersuaded any plain error or undue prejudice occurred. Indeed, the verdict on Question Number Two rejecting plaintiff's claim concerning the option-year extension undermines the Network's argument that the jurors were unfairly swayed by counsel's intimation of some sort of ongoing conspiracy by the defendant to harm plaintiff.

For all of these reasons, the Network's various arguments to set aside the jury verdict are unavailing.

IV. Plaintiff's **[*66]** Cross-Appeal

In his cross-appeal, Williams challenges the court's February 5, 2015 grant of summary judgment to the Network on the eleven other counts of the complaint, apart from the breach of contract claim including the potential fee shifting claims under CEPA and LAD.

In assessing these arguments, we conduct de novo review and apply the general standards governing summary judgment as expressed in *Rule* 4:46-2. *See W.J.A. v. D.A.*, 210 N.J. 229, 237-38, 43 A.3d 1148 (2012). We must ascertain whether plaintiff's claims, viewing the record in a light most favorable to him, reflects genuine issues of material facts on the dismissed causes of action, and whether they are viable as a matter of law. *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540, 666 A.2d 146 (1995).

A. *CEPA Claim*

Count XI of the complaint asserted a claim under CEPA. Specifically, Williams alleged the Network terminated his employment as retaliation for his decision not to sign the contract amendment, because he had a reasonable basis for believing that the restrictions contained in the amendment — particularly, the provision preventing him from attending his children's sport events — violated the law.

The general purpose of CEPA is to "protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private **[*67]** sector employers from engaging in such conduct." *Abbamont v. Piscataway Twp. Bd. of Educ.*, 138 N.J. 405, 431, 650 A.2d 958 (1994). Pursuant to the law,

> An employer shall not take any retaliatory action against an employee because the employee does any of the following:
>
> . . . .
>
> c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:
>
> (1) is in violation of a law, or a rule or regulation promulgated pursuant to law . . . ;
>
> (2) is fraudulent or criminal . . . ; or
>
> (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.
>
> [N.J.S.A. 34:19-3(c).]

A CEPA plaintiff relying upon this section must demonstrate that:

> (1) he or she reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) he or she performed a "whistle-blowing" activity described in N.J.S.A. 34:19-3(c); (3) an adverse employment action was taken against him or her; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.
>
> *[Dzwonar v. McDevitt*, 177 N.J. 451, 462, 828 A.2d 893 (2003) (citations omitted).]

"A plaintiff who brings a claim pursuant to N.J.S.A. 34:19-3(c) need not show that his or her employer or another employee actually **[*68]** violated the law or a clear mandate of public policy." *Ibid.* Rather, the plaintiff "simply must show that he or she "reasonably believes' that to be the case.'" *Ibid.* (quoting *Estate of Roach v. TRW, Inc.*, 164 N.J. 598, 613, 754 A.2d 544 (2000)). "[W]hen a defendant requests that the trial court determine as a matter of law that a plaintiff's belief was not objectively reasonable," the court must "make a threshold determination that there is a substantial nexus between the complained-of conduct and a law or public policy identified by the court or the plaintiff." *Id.* at 464. Courts must "identify a statute, regulation, rule, or public policy that closely relates to the complained-of conduct," and should "enter judgment for a defendant when no such law or policy is forthcoming." *Id.* at 463. "If the trial court so finds, the jury then must determine whether the plaintiff actually held such a belief and, if so, whether that

belief was objectively reasonable." *Id.* at 464.

Here, the trial court held that the CEPA claim failed because Williams did not "reasonably believe" that the amendment constituted a violation of law. It observed that the Network did not specifically demand that Williams cease attending his children's games; its proposed amendment would have prohibited him from attending **[*69]** all youth sporting events, which the court viewed as reasonable. Williams could not "reasonably have believed" that the conditions in the amendment violated "any type of public policy, law, statute, rule, [or] regulation."

On appeal, Williams argues that court erred by focusing on whether the conditions themselves were reasonable, rather than on whether he had a reasonable belief that the conditions violated the law, and that the court made improper findings of fact. However, courts affirm correct decisions even when the lower court's reasoning was incorrect. *Serrano v. Serrano*, 367 N.J. Super. 450, 461, 843 A.2d 358 (App. Div. 2004). As it is clear that the complained-of conduct bears no substantial nexus to any of the laws identified by Williams, the court should affirm dismissal of the CEPA claim, even though the trial court did not utilize that line of reasoning.

To support his threshold showing, Williams first claims he reasonably believed the amendment would violate the following provision of the New Jersey Constitution:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining **[*70]** safety and happiness.
>
> [*N.J. Const.* art. 1 § 1.]

The constitutional provision says nothing regarding employer-employee relations or for that matter, attendance at youth sporting events. If this provision were interpreted as broadly as Williams suggests, then every private employer's action that limits an employee's ability to engage in any conduct could be interpreted as implicating it. That interpretation would eviscerate the contours of the CEPA cause of action set forth in *Dzwonar*. The constitutional provision manifestly lacks a substantial nexus to the Network's complained-of conduct.

Williams further argues that he reasonably believed the proposed contract amendment violated the New Jersey common law, because "parents have a right to autonomy in deciding how to rear their children has deep roots in our history and culture." *In re D.C.*, 203 N.J. 545, 568, 4 A.3d 1004 (2010). However, the proposed amendment does not entrench upon Williams's right to raise his children. The right has been described as protecting a parent's "primary role" as the caregiver for his or her children. *Ibid.* The proposed amendment did not implicate or infringe upon Williams's primary role as the caregiver for his children. It only would have required him to abstain from youth **[*71]** sporting events. The common law doctrine concerning the right to parent bears no substantial nexus to the Network's complained-of request.[13] Although the Network may have gone overboard in requesting Williams to stop attending his son's youth baseball games for a year, that request did not elevate this contractual dispute to a threat of constitutional deprivation. The impetus of Williams's discharge was his behavior at the tournament, not his desire to coach or attend his son's games.

Williams also suggests that the proposed contract amendment would have infringed upon his "right to autonomous self-expression," which he argues stems from his right to privacy, due to the proposed social media restrictions. The contract amendment contained the following proposed condition:

> (iii) during the remainder of the Term, Artist shall not, unless approved in advance, and in

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[13] No case holds that a parent's right to attend a child's games is immutable. We take judicial notice that at times Family Part judges have imposed conditions in restraining orders restricting a parent's attendance at sporting events. In addition, youth sports organizations may authorize obstreperous parents or spectators to be excluded from attending games because of their behavior. *See* N.J.S.A. 5:17-1.

> writing, by Company, post to, or otherwise actively participate in, any social media outlets (e.g., Twitter, Facebook, etc.) for any purpose.

Williams provides no support for the novel proposition that the right to privacy protects against an employer's limiting or monitoring a public figure employee's social media output. Nor **[*72]** does he provide any precedent for the existence of an employee's right to self-expression when that right conflicts with the employer's legitimate interests.

The first Deadspin article contained images of a Twitter dispute between Williams and other Twitter users regarding the Ripken Tournament allegations, along with references to Williams as a Network analyst. Williams is undoubtedly a public figure. *See Gertz v. Welch*, 418 U.S. 323, 351-52, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). Thus, the Network had a legitimate reason to regulate Williams's social media output to protect its own interests. Williams cites nothing suggesting that the proposed contract amendment bears a substantial relationship to an employee's right to self-expression.

Finally, Williams argues he reasonably believed the amendment violated New Jersey's Social Media Privacy Law, N.J.S.A. 34:6B-6. Pursuant to that law, "[n]o employer shall require or request a current or prospective employee to provide or disclose any user name or password, or in any way provide the employer access to, a personal account through an electronic communications device." N.J.S.A. 34:6B-6. Any agreement to waive those protections is void and unenforceable. N.J.S.A. 34:6B-7. This law went into effect December 1, 2013, and no case law has developed. Williams did **[*73]** not assert the Social Media Privacy Law before the trial court, either in his complaint, brief on appeal or at oral argument.

The Social Media Privacy Law bears no substantial nexus to the complained-of conduct. Williams does not allege that the Network attempted to obtain his passwords or otherwise access his social media accounts. Rather, it sought to monitor and regulate the content of his social media output, a measure which the Social Media Privacy Law does not preclude. The Network's desire to contractually limit his future social media output bears no substantial nexus to the Social Media Privacy Law's preventing employer access to social media accounts to protect employee privacy.

In conclusion, we affirm the trial court's dismissal of the CEPA claim because Williams failed to make the required threshold showing to pursue a cause of action under the statute.

B. *LAD Claim*

Count V of the complaint alleged that the Network discriminated against Williams in violation of the LAD, N.J.S.A. 10:5-1 to -42. According to the complaint, the Network perceived Williams as having a disability, and discriminated and retaliated against him by "ordering him to sign" the amendment requiring therapeutic counseling, suspending **[*74]** him, and terminating the November 2011 contract. In his cross-appeal, Williams argues the court made improper factual findings when granting summary judgment to the Network on this claim.

The LAD is "remedial legislation that was intended to be given a broad and liberal interpretation." *Quinlan v. Curtiss-Wright Corp.*, 204 N.J. 239, 259, 8 A.3d 209 (2010). The law provides "a remedy for violation of civil rights that is independent of private or public contract." *Ibid.* The LAD declares it unlawful for employers to discriminate against any individual because of disability. N.J.S.A. 10:5-12(a). The LAD also declares it unlawful for any person to "take reprisals against any person because that person has opposed any practices or acts forbidden under this act." N.J.S.A. 10:5-12(d).

A prima facie case for discriminatory discharge under the LAD requires a plaintiff to prove:

> (1) he was disabled (or perceived to be disabled);
> (2) he was objectively qualified for his former position;
> (3) he was terminated; and
> (4) the employer sought someone to perform the same work after the plaintiff's discharge.
>
> [*Hejda v. Bell Container Corp.*, 450 N.J. Super. 173,

193, 160 A.3d 741 (App. Div. 2017).]

Upon the employee establishing a prima facie case, "'the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employer's action.'" *Ibid.* (quoting *Zive v. Stanley Roberts, Inc.*, 182 N.J. 436, 449, 867 A.2d 1133 (2005)).

As to **[*75]** the first element in the prima facie LAD case, it is well settled that "those [persons who are] perceived as suffering from a particular handicap are as much within the protected class as those who are actually handicapped." *Rogers v. Campbell Foundry Co.*, 185 N.J. Super. 109, 112, 447 A.2d 589 (App. Div. 1982). However, Williams does not identify the alleged perceived disability either in the complaint or in his briefs. He alleges that the following language from the amendment's proposed conditions is "evidence from which it may be reasonably inferred that [the Network] perceived [Williams] as disabled:"

> (iv) Artist has obtained, and will continue to attend, therapeutic counseling.

Although Williams fails to identify a perceived disability, it is evident from his reliance on this language that any such disability would be mental or psychological. Under the LAD, a mental or psychological conditions falls within the definition of "disability" if it results from "anatomical, psychological, physiological, or neurological conditions which prevents the typical exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques." N.J.S.A. 10:5-5(q).

The trial court held that Williams had no disability, and that the **[*76]** Network did not perceive Williams as having a disability. The court observed that sending an individual to therapy is a common response in such situations. The court found the conditions set forth in the proposed contract amendment "perfectly reasonable" under the circumstances. Williams argues that the court improperly made a factual finding that the Network did not perceive him as having a disability prior to any discovery on the issue.

The fact that Williams failed to identify, either in the complaint or in his briefs, a perceived disability within the meaning of the LAD, undermines his claim on this cause of action. In addition, the provision for counseling does not automatically mean that the Network viewed Williams as suffering from an underlying psychological or mental disorder. He fails to cite any support for the notion that a personality trait such as anger or short temper constitutes a disability within the meaning of the LAD. *Cf. Pouncy v. Vulcan Materials Co.*, 920 F. Supp. 1566, 1580 n.8 (N.D. Ala. 1996) (observing that, under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 to 12213, it is "clear that individuals with common personality traits such as poor judgment or a quick temper are not considered disabled.").

Indeed, although the LAD claim was not pursued **[*77]** at trial, Williams testified that his *own agent* was the one to initially propose such counseling, as a way to "show the world you are taking this seriously." It is equally as likely that the Network viewed the counseling as useful for its own public relations purposes.

In any event, Williams neither alleges nor provides any facts suggesting that the Network perceived that he suffered from an underlying disability. He cites no support for the notion that he was entitled to discovery to learn which, if any, disability the Network perceived. For these many reasons, the court's decision to dismiss the LAD claim is affirmed.

C. *Defamation-Related Claims*

Williams's cross-appeal also challenges the summary judgment dismissal of three defamation causes of action: negligent defamation (count VIII); intentional defamation (count VI); and defamation per se (count VII). Williams further appeals the dismissal of his claim of invasion of privacy by portraying him in a false light (count X), and negligent misrepresentation (count III), which he acknowledges stem from the same allegations that support the defamation causes of action.

These related causes of action are all premised upon the allegation **[*78]** that the Network provided false, misleading, and/or defamatory statements to the media. According to the complaint, the Network issued a statement to the *New York Daily News* without informing him, which read: "Mitch Williams has decided to take a leave of absence from his role at MLB Network at this time." Williams alleges that this statement was false, portrayed him in a false light, and caused him to suffer damages because he never decided to take a leave of absence. The complaint also alleges that the Network unilaterally issued a statement to *USA Today*, which stated that "the decision to take the leave was mutual." Williams claims the *USA Today* statement was also false, portrayed him in a negative light, and caused him to suffer damages.

The Network supported its motion for summary judgment on these claims with a certification signed by Fisher. According to that certification, she spoke with Williams's agent, Spielman, and obtained his approval, prior to sending the first statement to the *New York Daily News*. After sending the statement, Fisher sent Spielman a text message informing him that she sent the statement. She included the *Daily News* statement itself in the text message, **[*79]** and attached a copy of the text message to her certification. Fisher certified that Spielman did not complain or object to the text message.

Fisher also certified that *Sports Illustrated* requested a follow-up to the first statement. Rather than indicate that Williams decided to take a leave of absence, as in the first statement, she informed *Sports Illustrated* that the leave of absence was the result of a mutual decision. Fisher then texted Spielman to inform him of her response to *Sports Illustrated*. Through text messages, copies of which are annexed to the certification, Spielman indicated that he preferred the first statement which had stated Williams decided to take a leave of absence. Thereafter, Fisher received another request for a statement from *USA Today*, to which she responded by explaining the decision to leave was mutual.

At oral argument in the trial court, counsel for Williams confirmed that Spielman remained his agent, but Williams did not submit any information from him to refute the Fisher certification. The court noted that it was a "problem" for Williams that he did not have his agent dispute the certification, and that he provided no reason for failing to do so. Thus, **[*80]** based on the undisputed facts set forth in the Fisher certification, the trial court found that "no reasonable jury could determine that the Agent [Spielman] did not agree to the language" in the statements. Accordingly, the court dismissed all of the defamation-related causes of action under the summary judgment rules.

"A defamatory statement, generally, is one that subjects an individual to contempt or ridicule, one that harms a person's reputation by lowering the community's estimation of him or by deterring others from wanting to associate or deal with him." *G.D. v. Kenny*, 205 N.J. 275, 293, 15 A.3d 300 (2011) (citation omitted). The elements of a common law defamation claim are as follows:

> (1) the assertion of a false and defamatory statement concerning another;
> (2) the unprivileged publication of that statement to a third party; and
> (3) fault amounting at least to negligence by the publisher.
>
> [*NuWave Inv. Corp. v. Hyman Beck & Co.*, 432 N.J. Super. 539, 552, 75 A.3d 1241 (App. Div. 2013) (quoting *Leang v. Jersey City Bd. of Educ.*, 198 N.J. 557, 585, 969 A.2d 1097 (2009)).]

When, as here, the plaintiff is a public figure, he must demonstrate actual malice by clear and convincing evidence, rather than negligence. *DeAngelis v. Hill*, 180 N.J. 1, 13, 847 A.2d 1261 (2004).

On appeal, Williams does not challenge the court's finding that he is a public figure, and the record supports that finding. Thus, the actual malice standard of liability applies.

The undisputed **[*81]** Fisher certification clearly demonstrates that the Network issued the statements with the consent of Williams's agent. Therefore, we

agree with the court's conclusion that no reasonable juror could find actual malice under the circumstances, certainly not by clear and convincing evidence.

Williams's only argument on this issue is that the court's pre-discovery decision was premature. He disputes Fisher's certification and wishes to proceed through post-verdict discovery to challenge it. We decline that request.

A "motion for summary judgment is not premature merely because discovery has not been completed, unless plaintiff is able to 'demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action.'" *Badiali v. New Jersey Mfrs. Ins. Group*, 220 N.J. 544, 555, 107 A.3d 1281 (2015) (quoting *Wellington v. Estate of Wellington*, 359 N.J. Super. 484, 496, 820 A.2d 669 (App. Div. 2003)). Further, "summary judgment is particularly appropriate for disposing of non-meritorious defamation suits." *Rocci v. Ecole Secondaire Macdonald-Cartier*, 165 N.J. 149, 158, 755 A.2d 583 (2000); *see also Sedore v. Recorder Publ'g Co.*, 315 N.J. Super. 137, 163, 716 A.2d 1196 (App. Div. 1998) (noting that Supreme Court has "urged courts trial courts not to hesitate to employ summary judgment to expedite such litigation whenever appropriate.").

As noted by the court, Williams did not obtain any certification from Spielman, the only individual who could dispute the Fisher certification, **[*82]** despite the fact that he remained his agent. Nor did Williams ask for more time to obtain such a certification, indicate in any way that Spielman would provide an alternative version of the facts in the Fisher certification, or question the authenticity of the text messages. Under these circumstances, the court did not err by granting summary judgment on the negligent defamation, intentional defamation, and defamation per se claims.[14]

Williams acknowledges that he premised the false light and negligent misrepresentation claims upon the same conduct challenged in the intentional defamation cause of action. It is well settled that it would be "intolerably anomalous and illogical for conduct that is held not to constitute actionable defamation nevertheless to be relied on to sustain a different cause of action based solely on the consequences of that alleged defamation." *LoBiondo v. Schwartz*, 323 N.J. Super. 391, 417, 733 A.2d 516 (App. Div. 1999). Thus, when there is no actionable defamation, "there can be no claim for damages flowing from the alleged defamation but attributed to a different intentional tort whose gravamen is the same as that of the defamation claim." *Ibid.* The court properly dismissed the false light and negligent misrepresentation claims together **[*83]** with the defamation claims.

For these multiple reasons, we affirm the trial court's dismissal of Williams's claims of negligent defamation, intentional defamation, defamation per se, false light, and negligent misrepresentation.

D. *Other Dismissed Claims*

Finally, Williams's cross-appeal challenges the trial court's dismissal of counts II (breach of implied covenant of good faith and fair dealing), IX (intentional interference with prospective economic advantage), and XII (prima facie tort). We are satisfied the court's dismissal of these three claims was the correct result.

1. *Implied Covenant*

Every contract contains an implied covenant that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Ass'n Grp. Life, Inc. v. Catholic War Veterans of U.S.*, 61 N.J. 150, 153, 293 A.2d 382 (1972); *see also McGarry v. Saint Anthony of Padua Roman Catholic Church*, 307 N.J. Super. 525, 533, 704 A.2d 1353 (App. Div. 1998)

[14] "Defamation per se" refers to "a statement whose defamatory meaning is so clear on its face that the court is not required to submit the issue to the jury." *McLaughlin v. Rosanio, Bailets & Talamo, Inc.*, 331 N.J. Super. 303, 319, 751 A.2d 1066 (App. Div. 2000) (quoting *Biondi v. Nassimos*, 300 N.J. Super. 148, 153 n.2, 692 A.2d 103 (App. Div. 1997)). Thus, it only relates to one of the elements of defamation — whether the statement at issue has a defamatory meaning — and was properly dismissed for the same reasons as the other defamation claims.

(same). The implied covenant cause of action applies in three scenarios: (1) it "permits the inclusion of terms and conditions which have not been expressly set forth in the written contract;" (2) it allows "redress for the bad faith performance of an agreement even when the defendant has not breached any express term;" and (3) it permits "inquiry into a party's exercise of discretion **[*84]** expressly granted by a contract's terms." *Seidenberg v. Summit Bank*, 348 N.J. Super. 243, 257, 791 A.2d 1068 (App. Div. 2002).

None of those scenarios is involved here. The Supreme Court has held that the cause of action does not provide a plaintiff with additional damages for the breach of an express term of a contract. *Wade v. Kessler Inst.*, 172 N.J. 327, 344-45, 798 A.2d 1251 (2002) (where the "two asserted breaches basically rest on the same conduct," there "can be no separate breach of an implied covenant of good faith and fair dealing"). Here, Williams premises his implied covenant claim on the same conduct (i.e., wrongful termination) alleged in the breach of contract claim, for which he has received a favorable jury verdict. Accordingly, we affirm the dismissal of the implied covenant claim.

2. *Intentional Interference*

An intentional interference claim requires proof of the following elements: (1) a reasonable expectation of economic advantage with third parties; (2) intentional interference with those prospects, without justification or excuse; (3) the loss of prospective gain; and (4) damages. *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 751, 563 A.2d 31 (1989). Williams premises his intentional interference claim upon two allegations: first, the Network issued false and defamatory statements; and second, that the Network suspended him from appearing on-air. He alleges that he expected **[*85]** to be called upon to broadcast games and/or provide written material for several television, internet, and radio programs, but the Network interfered with those prospects.

To the extent the claim is premised upon defamation, summary judgment was appropriate for the same reasons the false light and negligent misrepresentation claims were properly dismissed. *See* Part IV(C), *supra*. To the extent the claim is premised upon his suspension from the Network, Williams fails to state a claim. Nothing in the complaint suggests that the Network's intention when suspending him was to interfere with Williams's relationships with third parties. Nor does anything in the record support that notion.

Williams alleges that the Network "directly controlled" whether he would be chosen as an analyst for one broadcast network. If that were the case, the Network would have no need to suspend him from its own network to interfere with his prospects at another network.

The gravamen of the interference claim is the allegation of false statements, which we already have concluded are not actionable on this record. Therefore, the court properly dismissed this claim.

3. *Prima Facie Tort*

Pursuant to the prima facie tort doctrine, "'[o]ne **[*86]** who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances,'" even if "'the actor's conduct does not come within a traditional category of tort liability.'" *Taylor v. Metzger*, 152 N.J. 490, 522, 706 A.2d 685 (1998) (quoting *Restatement (Second) of Torts* § 870 (1979)). However, the doctrine "should not be invoked when the essential elements of an established and relevant cause of action are missing." *Id.* at 523.

"Prima facie tort should not become a 'catch-all' alternative for every cause of action which cannot stand on its legs." *Ibid.* (citation and internal quotation marks omitted). "Assuming, without deciding, that our common law may admit of a cause of action for prima facie tort, it is solely a gap-filler." *Richard A. Pulaski Constr. Co. v. Air Frame Hangars, Inc.*, 195 N.J. 457, 460, 950 A.2d 868 (2008).

As Williams succeeded before the jury on his breach of contract claim, there is no need for the prima facie

tort doctrine to serve as a common law gap-filler or back-up theory. We affirm the dismissal of this claim as well.

V. Conclusion

For the reasons we have detailed, the outcome of this hard-fought lawsuit will not be disturbed. The trial court fairly dealt with the abundant legal and evidentiary issues presented by both sides — before, during, and after the **[*87]** trial. The proofs at trial provided ample substantial evidence to support the jury's verdict, and the jury's credibility-laden assessments deserve our deference.

Although both sides are disappointed with aspects of the final judgment, we discern no injustice whatsoever in leaving it intact.

Any arguments we have not addressed in this lengthy opinion lack sufficient merit to warrant discussion. *R.* 2:11-3(e)(1)(E).

Affirmed.

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TAMAR HERMAN, **Plaintiff,** **v.** **IBTIHAJ MUHAMMAD, SELAEDIN MAKSUT, COUNCIL ON AMERICAN-ISLAMIC RELATIONS A/K/A/ CAIR A/K/A CAIRFOUNDATION INC., and CAIR NEW JERSEY A/K/A CAIR NJ A/K/A CAIR NJ INC.** **Defendants.**	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION: UNION COUNTY** **DOCKET #: UNN-L-002913-22** **CIVIL ACTION** **CERTIFICATION OF DENISE GARNER-MUHAMMAD IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND TO DISMISS**

DECLARATION OF DENISE GARNER-MUHAMMAD IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND TO DISMISS

I, Denise Garner, of full age, hereby certify:

1. My name is Denise Garner-Muhammad. I am over the age of 18, am competent to testify to the matters set forth below and I have personal knowledge of these matters.
2. I am the mother of Ibtihaj Muhammad, a defendant in this case.
3. I am a resident of Maplewood, New Jersey, and a Muslim. I am a well-known community member in our close-knit Muslim community and have been a part of the community for over 30 years.
4. My daughter, Ibtihaj, has worn hijab since she was a child. We got her into fencing because it was a sport she could play while wearing her hijab.
5. I remain close with my daughter. I speak with her almost daily.
6. I am the guardian of one of my grandchildren. She went to Seth Boyden Elementary School in Maplewood, New Jersey during the time of the events at issue in this case. She now goes to an Islamic school. I moved her in part to make sure Ibtihaj's niece had a strong Muslim background as part of her education. I also moved her because my

granddaughter wanted to start wearing hijab but expressed apprehension about doing so at Seth Boyden after the events in question.

7. Because the Maplewood Muslim community is close-knit, I am cordial with the Wyatt family. I am not close friends with them.
8. At the time of the events in question, the Wyatts' daughter also went to Seth Boyden Elementary School.
9. At some time either on October 6 or 7—I do not remember exactly when—I received a call from Cassandra Wyatt. She told me that her daughter had come home distraught and told her something bad had happened. Cassandra Wyatt told me her child came home and told her that during a test, the teacher pulled off the Student's hijab despite the Student resisting. Ms. Wyatt relayed that the teacher claimed it was a hoodie, but that the Student was in fact wearing a hijab. Cassandra also told me that the teacher made a comment regarding the student's hair being beautiful, but I no longer remember the exact statement.
10. The next time I spoke to Ibtihaj, I told her about what had happened to Wyatt's daughter. I thought this would be something important for Ibtihaj to know because of Ibtihaj's activism regarding children and hijab. I relayed everything Cassandra Wyatt told me about the incident, including that the teacher forcibly removed her daughter's hijab, that the daughter resisted but the teacher pulled the hijab off, exposing her hair to the classroom, and the statement about Herman and the daughter's hair. Ibtihaj was shocked and appalled by the events as told to her by her mother.
11. Thereafter, Ibtihaj made a social media post about the incident. Before making the post, she read off what she was going to publish. I remember listening to everything and

confirming that it was accurate, including the comment the teacher made about the daughter's hair.

12. Later that day, I spoke with Ibtihaj again. Ibtihaj told me the teacher reached out to her, saying "She claims she knows me." I asked where, and my daughter told me that the teacher claimed she knew her from the gym. Ibtihaj confirmed to me that she did not know the teacher or who she was. Ibtihaj then told me she was going to contact her gym trainer.
13. I was not and am still not close with the Wyatt family. I know nothing about their views towards Jews or any other religious groups. Nor have I seen any video of them talking about this case, or any other video about them for that matter.
14. I did not know Herman was Jewish until after the filing of this lawsuit.
15. After the events in question in this case, the Wyatt daughter left Seth Boyden and enrolled in a private religious school.

THEREFORE, I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

DATED: March 23, 2023

Denise Garner-Muhammad[1]
Denise Garner-Muhammad

[1] A copy of this document is being filed, with original signature on file with counsel, per R. 1:4-4(c).

J. Remy Green, Attorney Identification Number: 310012019
COHEN&GREEN P.L.L.C.
1639 Centre Street, Suite 216
Ridgewood, NY 11385
Tel. (929) 888.9480
Email: remy@femmelaw.com

Justin Sadowsky, *pro hac vice forthcoming*
CAIR LEGAL DEFENSE FUND
453 New Jersey Ave, SE
Washington, DC 20003
Tel. (202) 488-8787
Email: jsadowsky@cair.com

Attorneys for Defendant Ibdihaj Muhammad

TAMAR HERMAN, **Plaintiff,** **v.** **IBTIHAJ MUHAMMAD, SELAEDIN MAKSUT, COUNCIL ON AMERICAN-ISLAMIC RELATIONS A/K/A/ CAIR A/K/A CAIRFOUNDATION INC., and CAIR NEW JERSEY A/K/A CAIR NJ A/K/A CAIR NJ INC.** **Defendants.**	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION: UNION COUNTY** **DOCKET #: UNN-L-002913-22** **CIVIL ACTION** **STATEMENT OF MATERIAL FACTS PURSUANT TO *R.* 4:46-2(a)**

In support of her motion for summary judgment and dismissal, Defendant Ibtihaj Muhammad submits this statement of material facts about which she contends there is no genuine issue.

1. Ibtihaj Muhammad is a fencing Olympic medalist and World Champion. Ibtihaj Cert. ¶ 2. She is also an American Muslim, who was born and raised in Maplewood, New Jersey. *Id.* ¶¶ 2-3. She is the first Muslim American woman to wear a hijab while competing for the United States in the Olympics. *Id.* ¶ 2.

2. Ibtihaj[1] has worn hijab since she was twelve years-old. She and her parents chose fencing as a sport for her because it was one where she could participate while wearing hijab. *Id.* ¶ 4; Garner Cert. ¶ 4. Ibtihaj believes that by fencing in hijab, she can inspire Muslim youth around the world to pursue their dreams and break boundaries, even while wearing hijab. Ibtihaj Cert. ¶ 4.
3. Ibtihaj is also a co-owner, along with her siblings, of a clothing company (Louella by Ibtihaj), which manufactures modest clothing for women. *Id.* ¶ 5.
4. Ibtihaj is a sports ambassador, serving on the United States Department of State's Council to Empower Women and Girls Through Sport and has traveled extensively around the world to elevate the global conversation on sports as a means of empowerment. *Id.* ¶ 6. She also works closely with the organization Athletes for Impact, a vehicle for athlete activism & a vital resource for athletes across all sports to be part of an intersectional movement for justice. *Id.*
5. Ibtihaj is an author. She wrote a memoir entitled *Proud: My Fight for an Unlikely American Dream*, as well as a young readers edition entitled *Proud: Living My American Dream*. *Id.* ¶ 7. She also authored two children's books. *The Proudest Blue: A Story of Hijab and Family*, co-authored by S.K. Ali and illustrated by Hatem Aly and released in 2019, is a story about the first day of school and two sisters on one's first day of hijab. *Id.* The book, which she wrote to inspire young girls who wear hijab, is a New York Times bestseller, a Goodreads Choice Award nominee, a Booklist Editors' Choice selection in the youth category, a Rise: A Feminist Book Project's top ten book, received numerous

[1] Within this statement of material facts, because Ibtihaj's mother has the same last name, Ibtihaj is identified by her first name. No lack of formality is intended. The accompanying papers use her last name, since Ibtihaj's mother is only mentioned in passing therein.

starred reviews and has been translated into serval languages. *Id.* She also later wrote and published (along with Ali and Aly) a sequel, *The Kindest Red: A Story of Hijab and Friendship*. *Id.*

6. Ibtihaj remains close with her mother, with who she speaks with daily. *Id.* ¶ 8; Garner Cert. ¶ 5.
7. Ibtihaj's mother is the guardian of Ibtihaj's niece. Ibtihaj's niece went to Seth Boyden Elementary School in Maplewood, New Jersey during the time of the events at issue in this case. Ibtihaj Dec ¶ 9; Garner Cert. ¶ 6. Ibtihaj's niece now goes to a religious (Islamic) school. Ibtihaj's mother moved her in part to make sure Ibtihaj's niece had a strong reliigous background as part of her education. Garner Cert. ¶ 6. Ibtihaj's niece also wanted to go to a religious school because she wanted to start wearing hijab but did not feel comfortable doing it at Seth Boyden after the events in question. *Id.*
8. Because Ibtihaj's mother has been in the community for over 30 years, Muslims in the community look to her for advice and guidance. Garner Cert. ¶¶ 3, 7; Ibtihaj Cert. ¶ 10.
9. Ibtihaj's niece now goes to religious private school. Garner Cert. ¶ 6.
10. Because the Maplewood Muslim community is close-knit, Ibtihaj's mother was cordial with the Wyatt family, another Muslim family with kids at the time at Seth Boyden Elementary School. Garner Garner Cert. ¶ 7. They are not close friends. *Id.*
11. According to the Complaint, on October 6, 2021, Herman—a second grade teacher at Seth Boyden Elementary School—pulled off what the Complaint describes as a "hood" of Wyatt's daughter (the "Student"), who was one of Herman's students. Complaint ¶ 9. The Complaint alleges that Herman did this intentionally because the hood "partially blocked" the student's eyes. *Id.* The Complaint alleges that Herman first ordered the

Student to remove her hood, and when the Student did not do so, Herman forcibly "brushed the hood back." *Id.* According to the Complaint, the Student—who wears hijab—had nothing under her hood. *Id.*

12. After school, Wyatt's mother, Cassandra, found out what happened from her daughter and was distraught. Garner Cert. ¶ 9. She reached out to Ibtihaj's mother for advice by phone. *Id.* She told Ibtihaj's mother that her child came home and told her that during a test, the teacher pulled off the Student's hijab despite the Student resisting. *Id.* Somewhere in the conversation Cassandra told her that the teacher claimed it was a hoodie, but it was in fact a hijab. *Id.* Cassandra also told Ibtihaj's mother that the teacher made a comment regarding the student's hair being beautiful, but Ibtihaj's mother does not remember the exact statement. *Id.*
13. The mother then informed the school what happened. Complaint ¶ 10.
14. The next day, during school, Herman was informed that the school was aware of the incident, and Herman was placed on administrative leave. *Id.* ¶¶ 10-11. Herman remains on administrative leave to this day. *Id.* ¶ 12.
15. Meanwhile, at some point either on October 6 or 7, Ibtihaj had one of her regular conversations with her mother. Garner Cert. ¶ 10; Ibtihaj Cert. ¶ 11. Because of Ibtihaj's activism and her interest in ensuring that young girls can proudly wear hijab, Ibtihaj's mother told her about her conversation with Wyatt. *Id.* Ibtihaj's mother told Ibtihaj that the Student's teacher forcibly removed the Student's hijab, that the student resisted but the teacher pulled the hijab off, exposing her hair to the classroom, and that Herman told the student that her hair was beautiful and that she did not have to wear hijab anymore. Ibtihaj was shocked and appalled by the events as told to her by her mother. *Id.*

16. At 4:03pm—after the school day in which Herman was placed on administrative leave—Ibtihaj posted the following statement on her Facebook and Instagram social media pages:

> I wrote this book with the intention that moments like this would never happen again. When will it stop? Yesterday, Tamar Herman, a teacher at Seth Boyden Elementary in Maplewood, NJ forcibly removed the hijab of a second grade student. The young student resisted, by trying to hold onto her hijab, but the teacher pulled the hijab off, exposing her hair to the class. Herman told the student that her hair was beautiful and she did not have to wear hijab to school anymore. Imagine being a child and stripped of your clothing in front of your classmates. Imagine the humiliation and trauma this experience has caused her. This is abuse. School should be a haven to all of our kids to feel safe, welcome and protected – no matter their faith. We cannot move toward a post-racial America until we weed out the racism and bigotry that still exist in all layers of our society. By protecting Muslim girls who wear hijab, we are protecting the rights of all of us to have a choice in in the way we dress. Writing books and posting on social is not enough. We must stand together and vehemently denounce discrimination in all of its forms. CALL Seth Boyden Elementary (973) 378-5209 and EMAIL the principal sglander@somsd.k12.nj.us and the superintendent rtaylor@somsd.k12.nj.us.

Ibtihaj Cert. ¶ 12; Complaint ¶ 19.

17. Ibtihaj read the post to her mother before posting it on social media, to confirm its accuracy. Her mother agreed that everything in there was accurate. Ibtihaj Cert. ¶ 12; Garner Cert. ¶ 11.

18. Ibtihaj also included a photograph of a young girl holding a copy of her book. Ibtihaj included the photo because she wanted to humanize the Student's story. Ibtihaj Cert. ¶ 13.

19. Ibtihaj did not include any link or other way to purchase her book, which was already a bestseller and very likely already known by anyone who followed her online. Ibtihaj Cert. ¶ 14.

20. About a half hour later, Ibtihaj wrote a similar post on Instagram, except this time tagging civil rights groups CAIR and CAIR-NJ, and making no mention of her book:

> Yesterday, Tamar Herman, a teacher at Seth Boyden Elementary in Maplewood, NJ forcibly removed the hijab of a second grade student. The young student resisted, by trying to hold onto her hijab, but the teacher pulled the hijab off, exposing her hair to the class. Herman told the student that her hair was beautiful and she did not have to wear hijab to school anymore. Imagine being a child and stripped of your clothing in front of your classmates. Imagine the humiliation and trauma this experience has caused her. This is abuse. Schools should be a haven for all of our kids to feel safe, welcome and protected— no matter their faith. We cannot move toward a post-racial America until we weed out the racism and bigotry that still exist in all layers of our society. By protecting Muslim girls who wear hijab, we are protecting the rights of all of us to have a choice in the way we dress. Writing books and posting on social is not enough. We must stand together and vehemently denounce discrimination in all of its forms. CALL Seth Boyden Elementary (973) 378-5209 and EMAIL the principal sglander@somsd.k12.Nj.us and the superintendent Rtaylor@somsd.k12.Nj.us.
>
> Ibtihaj Cert. ¶ 15; Complaint ¶ 25.

21. Instead of a photo of a young girl holding a book, this time the pictures that accompanies the post were of the school and of Herman. Complaint ¶ 25; Ibtihaj Cert. ¶ 16.

22. At the time, Ibtihaj had no idea who Herman was. Ibtihaj Cert. ¶ 16. She obtained the photograph of Herman from Google. *Id.* Contrary to the allegations made in the Complaint, she neither had Herman's number nor was Facebook friends with Herman. *Id.* ¶¶ 17-18. [2] Ibtihaj has a personal page on Facebook, but she posts mostly on her public "fan" page. *Id.* ¶ 18. She has no recollection of ever speaking with Herman, either before or after the events in question. *Id.* ¶ 19.

23. That evening, Herman sent Ibtihaj a text message. *Id.* ¶ 20. Ibtihaj had no idea who the text message was from but could surmise from context that it was from the person who pulled off the Student's hijab. *Id.* The text message from Herman claimed the allegations were not true. *Id.* The Complaint admits that Ibtihaj "was relying on the recall" of the Student. Complaint ¶ 89. Ibtihaj responded by asking if the Student was lying. Ibtihaj

[2] It is possible that Herman followed Ibtihaj on Ibtihaj's verified account, but Herman does not accept or reject followers; instead, those who choose to follow Ibtihaj on Facebook can do so simply by pressing a button.

Cert. ¶ 20. Herman responded by saying that if the Student said that, she would have been lying. *Id.* Ibtihaj did not believe the Student, Wyatt's mother, or Ibtihaj's mother was lying. Ibtihaj Cert. ¶ 21.

24. Ibtihaj did not respond further to the texter. Complaint ¶ 90. Ibtihaj was not even sure that the texter was Herman. Ibtihaj Cert ¶ 22. This was the only communication Ibtihaj recalls ever having had with Herman. *Id.*

25. Although the Complaint alleges that a video which was later deleted shows the Student being coached by the mother, Ibtihaj never saw the video. Complaint ¶ 86; Ibtihaj Cert. ¶ 23. The Complaint alleges that the video indicates that just this time—after the fact—Wyatt learned that Herman was Jewish: "I JUST FOUND OUT THAT THE TEACHER IS JEWISH[]…. That's why I believe she did it now I'm furious." Complaint ¶ 86. While the Complaint does not list the date that this video was placed on Facebook, both the context and a later Washington Post article suggest that it occurred after Herman and Ibtihaj texted.[3]

26. Ibtihaj rarely goes on Facebook and uses it mostly to reach out to her followers through her fan page. Ibtihaj Cert. ¶ 18. She is not a member of SOMA Justice, the group where Wyatt posted the video that Herman alleges should have put Ibtihaj on notice that the Student might be lying. *Id.* ¶ 24. Ibtihaj never saw the video, and only found out about its existence after this case was filed. *Id.* ¶¶ 23, 25.

27. Likewise neither Ibtihaj nor her mother knew anything about any of the Wyatt's views towards Jews prior to the filing of this case. Ibtihaj Cert. ¶ 26; Garner Cert. ¶ 12.

[3] *See* Laura Meckler, *She pushed back her student's hijab. Was it a mistake or an act of hate?*, WASH. POST (Mar. 1, 2023) (saying that Wyatt joined the Facebook group SOMA Justice on October 7, and that thereafter someone messaged her to tell her that Herman was Jewish, leading her to post the video).

28. Nor did Ibtihaj or her mother know that Herman was Jewish. Ibtihaj Cert ¶ 27; Garner Cert ¶ 13.

29. Immediately after Herman texted Ibtihaj, Ibtihaj texted with and then spoke with her trainer by telephone. Ibtihaj Cert. ¶ 28. Her trainer confirmed that Herman went to the same gym. *Id.* Ibtihaj also confirmed with her trainer Herman's phone number, so that she knew the texts were from Herman and not a hoax. *Id.* ¶ 30. In retrospect, Ibtihaj recognizes Herman by face but not by name from the gym, but does not remember when that day she made that connection. *Id.* ¶ 31.

30. Ibtihaj to this day does not know how Herman got her cell phone number. *Id.* ¶ 32.

31. The school district never attempted to reach out to Ibtihaj about the incident. *Id.* ¶ 33.

32. To this day, Ibtihaj believes that the statements she made about the incident are true. *Id.* ¶ 34.

33. Ibtihaj later learned that (a) the school district continues to keep Herman on administrative leave, (b) the school district settled with the Wyatt family for $300,000, and (c) after the incident the Wyatts pulled the Student from school and placed her in a religious school. *Id.* ¶ 35. These three things only further confirm that the events are true. *Id.* Other than these three things, Ibtihaj had learned nothing new about the incident prior to the filing of this lawsuit. *Id.* ¶ 36.