To be Argued by:
HENRY R. KAUFMAN
(Time Requested: 30 Minutes)

Westchester County Clerk's Index No. 14180/03
Appellate Division, Second Department Docket No. 2005-11255

Court of Appeals

of the

State of New York

MONROE YALE MANN,

Plaintiff-Respondent,

– against –

BERNARD ABEL and WESTMORE NEWS, INC.,

Defendants-Appellants,

– and –

RICHARD ABEL and JANNANE ABEL,

Defendants.

BRIEF FOR DEFENDANTS-APPELLANTS

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QUESTIONS PRESENTED

1. Did the Amended Judgment, entered after the Appellate Division affirmed the jury's finding of liability in favor of Respondent public official in this defamation action, violate Appellant newspaper publisher's and columnist's substantial constitutional rights under the First Amendment of the U.S. Constitution and Article I, Section 8 of the New York State Constitution?

In affirming the jury's verdict of liability, without any visible discussion or consideration of Appellants' constitutional claims, the Appellate Division apparently answered this question in the negative.

2. Should the Appellate Division have reversed the trial court's denial of Appellants' Cross-Motion for Summary Judgment, on the ground that Appellants' statements critical of Respondent's official actions, in a political column published on the opinion page of Appellants' newspaper, were either constitutionally-protected statements of opinion or were not published with actual malice?

Although the issue of summary judgment was nowhere discussed in the Second Department's Decision and Order, this question was evidently answered in the negative in the court below.

3. Did the Amended Judgment, entered after a jury trial of the "truth" or "falsity" of Appellants' political column, improperly punish constitutionally-protected statements of opinion, as opposed to legally-actionable statements of fact, in violation of Appellants' substantial constitutional rights under Article I, Section 8 of the N.Y.S. Constitution and the First Amendment?

Although the issue of opinion was never discussed in the Second Department's Decision and Order, in affirming the Amended Judgment this question was apparently answered in the negative in the court below.

4. Did Respondent public official meet his constitutionally-mandated burden, under the First Amendment, of proving by clear and convincing evidence that Appellants published any substantially false and defamatory statement of fact about his official positions and actions with "actual malice" – i.e., with actual knowledge of its falsity or with a conscious awareness and reckless disregard of its probable falsity?

Although the issues of falsity, defamatory meaning and constitutionally-sufficient proof of actual malice were also not discussed in the Second Department's Decision and Order, this question was apparently answered in the affirmative in the court below.

THE COURT'S JURISDICTION

The Court has jurisdiction to entertain the appeal and to review the questions raised on appeal as of right under § 5601(b)(1), in that the final Order of the Appellate Division raises substantial constitutional questions directly involving construction of the constitutions of both this state and of the United States. Substantial constitutional questions are raised regarding construction of the U.S. Constitution because, inter alia, the Appellate Division affirmed the Amended Judgment entered in favor of Respondent public official in this defamation action without a proper finding of actual malice as required by the First Amendment. That issue was preserved for the Court's review, inter alia, by Appellants' answer to the complaint containing a general denial (R. 19[1]), their cross-motion for summary judgment (R. 113-36); their motion for a directed verdict (R. 401-03; 538-39); and their timely-filed Notices of Appeal, first to the Appellate Division (R. 3), and then to this Court. (R. 680-82) Substantial constitutional questions are also raised regarding construction of both the state and federal constitutions because the Appellate Division affirmed the Amended Judgment notwithstanding that it imposed liability for publication of statements of opinion privileged under Article I, Section 8 and the First Amendment. The opinion issue was also raised and preserved in the courts below. (Id.)

[1] Record on Appeal hereafter referred to as "R. ___."

PRELIMINARY STATEMENT

This is a defamation action brought by a public official against an independent weekly newspaper. Plaintiff-Respondent's ("Respondent's") defamation claim arises out of a political column on the opinion page of the newspaper. (R. 18, 644)

The column at issue was published by Defendants-Appellants ("Appellants") in the course of a local election campaign. (R. 299) Among other things, the column addressed and broadly criticized Respondent's public actions and official policies as Town Attorney and a former School Board member.

As such, Appellants' column should have received the full benefit of the panoply of protections and privileges recognized by the modern constitutional law of defamation – both under Article I, Section 8 of the New York State Constitution, which broadly protects statements of opinion, and under the First Amendment, which broadly protects even false factual statements so long as they are not published with "actual malice" – i.e., with knowledge of their defamatory falsity or with a conscious awareness and reckless disregard of their probable falsity.

Instead, for reasons not once discussed much less made clear, the courts below never acknowledged or visibly applied this Court's governing constitutional

doctrine protecting statements of opinion – a pivotal oversight that led to an unprecedented, and extraordinarily inappropriate, jury trial of the purported "truth" or "falsity" of political opinions, subsequently affirmed without comment or analysis by the Appellate Division. (R. 685-86)

Moreover, although the constitutional standard of "actual malice" was defined in instructions to the jury (R. 562-63), the courts below appear to have erroneously assumed, again without visible analysis, that Appellants' political column contained actionable statements of fact. Neither the trial judge nor the Appellate Division ever independently considered or reviewed – as constitutionally-required – whether Respondent's proof of fault as to any such actionable fact was "of the convincing clarity required to strip the utterance of First Amendment protection" under the stringent liability standard of "actual malice."

In this action Appellants have repeatedly sought, at every appropriate stage, to assert their well-established constitutional defenses to Respondent's claims. (See generally Affidavit in Opposition to Respondent's Motion to Dismiss the Appeal.) Despite this, for reasons unknown, and never visibly or substantively explained, those efforts consistently fell on deaf ears in the courts below over the course of three motions, a trial, the ensuing verdict and judgment, and two appeals.

This appeal seeks finally to remedy those clear, direct and substantial constitutional errors – both substantive and procedural.

THE ORDER APPEALED FROM

On their plenary appeal of the judgment Appellants sought to overturn the jury's finding of liability against them on the key constitutional grounds of failure to protect opinion and failure to require and to find sufficient proof of substantial factual falsity, defamatory meaning or actual malice.

Appellants had also appealed from the denial of their cross-motion for summary judgment, contending that this ruling necessarily affected the outcome of the trial by failing to address the key constitutional issues, thus unduly prolonging the action by sending it to the jury for resolution. Moreover, as Appellants argued on appeal, failure to address the threshold opinion issue, in particular, necessarily and prejudicially affected the course of the ensuing trial by failing to distinguish for the benefit of counsel and the jury, between any actionable facts in Appellants' column and constitutionally-protected opinions.

In its Decision and Order the Appellate Division never addressed Appellants' separate appeal from denial of the cross-motion for summary judgment. Indeed, for the second time in a case addressed to a political column on the "Opinion" page of a newspaper, the Second Department inexplicably and entirely ignored the issue of constitutional protection for opinion.

Neither did the Second Department address the many substantial issues and points of error that had been raised by Appellants regarding the elements of factual

falsity, defamatory meaning and constitutional malice that are indispensable to any public official's recovery in a defamation action.

Procedurally, notwithstanding that the court's constitutional obligation was clear and clearly briefed, the Appellate Division gave no visible sign that it had accorded the constitutionally-requisite, searching, independent review of the record regarding Respondent's proof of actual malice. Quite the contrary, its conditional affirmance of the judgment was said to be merely based "on the facts and as an exercise of discretion," with no further discussion of the record, the facts or the law and no express finding that Respondent had indeed met his heavy constitutional burdens in proving Appellants liability for defamation. (R. 685; Mann v. Abel, 37 A.D.3d 778 (1st Dept. 2007))

Essentially, the Second Department's brief, three-paragraph decision, although it overturned certain elements of the damages awarded and reduced the compensatory damages subject to Respondent's stipulation, evidenced no review of the record, much less the requisite searching and "independent" one, and provided no more than the most conclusory recitation affirming the jury's verdict. Moreover, the Appellate Division's Decision and Order was specifically stated to be based on the entirely inapposite holding that "the jury's finding that the plaintiff

was defamed, and that he was entitled to compensatory damages, could have been reached on a fair interpretation of the evidence." (R. 686) (emphasis supplied)[2]

The Appellate Division's lax, erroneous and completely inadequate standard of jury review, and its casual, Solomonic affirmation of the judgment, with no substantive discussion of the record, merely modifying the judgment based on a conditional remittitur of damages – whatever the utility of that process might be in disposing of run-of-the-mill personal injury actions – is insupportable as a matter of law, and has no place as a matter of constitutional command, in defamation actions involving public officials where the liability standard is "actual malice" and a searching independent review of the record is constitutionally required to assure that sensitive rights of free speech and press have not been infringed.

The Second Department applied a similarly Solomonic approach to the issue of damages – punitive and compensatory.[3] Again, either ignoring, or at least not visibly addressing, the many substantial legal and constitutional flaws Appellants had identified, the Court below simply split the baby on damages, reversing the

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[2] See discussion of the Second Department's incorrect standard of review, Point III.B., infra.

[3] Whatever the deficiencies of the Appellate Division's damages rulings, in terms of their substance and certainly their lack of transparency, Respondent, having stipulated to the reduction in damages, is not an "aggrieved" party for purposes of any appeal from those rulings. Harris v. City of New York, 2 N.Y.3d 758 (2004), citing Whitfield v City of New York, 90 N.Y.2d 777, 780 (1997). Moreover, Respondent, by his stipulation to the conditional Order remitting damages, has "forg[one] all further review of other issues raised by that order ..." Batavia Turf Farms, Inc. v. County of Genesee, 91 N.Y.2d 906, reconsideration denied, 91 N.Y. 1003 (1998). See also Klos v. NYC Transit Authority, 91 N.Y.2d 885 (1998).

punitive award in its entirety[4] but conditionally affirming a substantially reduced compensatory award, subject to Respondent's stipulation or a new trial on that element of damages.[5] The Court merely announced those results as to the appealed elements of damages with no analysis or explanation.

In sum, because this Court cannot possibly be satisfied that the Appellate Division accorded the requisite independent review of the entire record in the prior proceedings, or that it properly protected the substantial constitutional interests

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[4] In any event, the Second Department's Order overturning the punitive award, although unexplained and not appealable, was clearly correct under this Court's restrictive view of the availability of punitive damages in general, and in public plaintiff defamation cases in particular. Thus, under Prozeralik v. Capital Cities Communications, Inc, 82 N.Y.2d 466 (1993), before Respondent could recover punitive damages he was required not only to prove actual malice – which he did not do (see Point III. D., infra) – but he was also required to establish both that Appellants' actions evidenced common law malice rising to the level of "outrage frequently associated with crime," id. at 479, and that the "sole motive" for the publication in furtherance of such an outrageous intent was to injure Respondent. Stukuls v. State of New York. 42 N.Y.2d 272, 282 (1977). Surely, publication of a newspaper column intended to inform the public of political views could not be found to rise to the severe level of outrage this Court has held is required – even if its intent were also to do political damage to the subject of the column.

[5] The Appellate Division's conditional reduction of the compensatory award was also fully justified, not merely as an "exercise of discretion," but on the law which indeed should have justified overturning the award in its entirety. Inter alia, the trial court had erred by permitting Respondent to attempt to prove actual damages based on the facially incredible claim that he lost fully one-half of his clients and law firm revenues as a direct result of Appellants' publication. (R. 309-10; 331-32) Yet at the same time the trial judge ruled, over objection, that Respondent could refuse to produce any financial documents allegedly establishing the lost revenues, and that he could not be cross-examined regarding the names of allegedly lost clients, based on attorney-client privilege. (R. 342-47) This ruling was clearly erroneous and prejudicial. As this Court has held, the attorney-client privilege protects only communications "of a legal character relating to the engagement." Madden v. Creative Services, 84 N.Y.2d 738, 745 (1995). The identity of a client and the fee arrangement are both collateral matters, unrelated to the subject matter of the engagement, and thus are not privileged. See In re Jacqueline F., 47 N.Y.2d 215, 219 (1979)("inasmuch as a client's identity is not relevant to the advice proffered by attorney, such communication is not privileged"); Priest v. Hennessey, 51 N.Y.2d 62, 69 (1980) ("A communication concerning the fee to be paid . . . is a collateral matter which . . . is not privileged"); see also In re Nassau County Grand Jury Doe Law Firm, 4 N.Y.3d 665 (2005).

here at stake, it falls to this Court to do so on the pending appeal. (See generally Point III, infra).

THE RECORD THIS COURT MUST INDEPENDENTLY REVIEW

On this appeal as of right from the Amended Judgment affirmed by the Appellate Division, this Court is required to do what it has previously recognized that any appellate court is constitutionally-required to do – but which by all indications the Second Department failed to do, or at least what its truncated and opaque opinion entirely fails satisfactorily to establish that it did. That is, it is required to independently examine, de novo, whether the judgment of liability entered upon the jury's verdict in this public official defamation action violated Appellants' substantial constitutional rights under the First Amendment and Article I, Section 8 of the New York State Constitution.

Accordingly, this Court must review for itself the entire record to determine whether the libel judgment entered against the Appellant local independent newspaper and columnist, based on their political opinion column, passes constitutional muster. The purpose of this extraordinary review is, as this Court has previously stated, to assure that the judges of this Court, and not simply a jury, acting "as expositors of the Constitution," find the record evidence "of the convincing clarity required to strip the utterance of First Amendment protection."

Prozeralik v. Capital Cities Communications, 82 N.Y.2d 466, 474 (1993), quoting Bose Corp. v. Consumers Union, 466 U.S. 485, 511 (1984).

Here, in pursuing this constitutionally-essential function, the Court writes on a clean slate in light of the Appellate Division's complete failure to visibly perform the necessary review. Yet upon this Court's independent examination of the publication at issue, its overall context and reasonable meaning, in relation to the trial evidence, it will be clear that the judgment cannot withstand constitutional scrutiny. In the Appellate Division and the trial court, privileged opinions, and statements about a public official published without the requisite degree of fault, were indeed "stripped" of the constitutional protection to which they are entitled.

The questionable process resulted in a trial, after Appellants' summary judgment motion was improvidently denied, in which isolated "factual" statements were wrenched out of a publication that reasonable readers would recognize as one of opinion. Compounding its constitutional error, the trial court permitted Respondent to contest, and seek compensation before the jury for, the very opinions supposedly excluded from consideration – statements that even he had conceded were not actionable. The result of this insupportable process was the constitutionally-intolerable punishment of protected political expression, subsequently ratified by the Appellate Division without discussion or explanation.

But even if the opinionated essence of Appellants' political column were overlooked, and the publication were judged as if one solely of fact, this Court's independent review of the record will also establish that Respondent failed to prove each of the indispensable elements of any public official's libel claim: defamatory meaning, substantial falsity and actual malice, the latter two by clear and convincing evidence.

A. The Immediate and Broader Context of Appellants' Allegedly Defamatory Publication as a Whole

Founded in 1964 by Appellant Bernard Abel ("Appellant Abel"), Appellant Westmore News, Inc. is the corporate owner of the Westmore News, a local independent newspaper serving the villages of Rye Brook and Port Chester in Westchester County. (R. 256-57) The allegedly libelous statements appeared in a column of political opinion entitled "The Town Crier," written by Appellant Abel and published on the newspaper's "Opinion" page. (R. 18, 644) An "Editor's Note" at the bottom of the page clearly stated that the column "represent[ed] … [Bernard Abel's] opinion …" and "not necessarily that of this newspaper." (R. 18, 644)

In his column, addressed solely to the official actions of local public officials, Appellant Abel roundly criticized several Town incumbents, including Mike Borelli, who was a Rye Town Councilman; Robert Morabito, the Rye Town Supervisor; the Rye Town Board; and Respondent, for what Abel viewed as

political machinations and various public policy offenses. Employing metaphorical and hyperbolic language throughout, that could only signal to any reasonable reader the non-literal nature of the publication, the column's broadly opinionated conclusion, in regard to Respondent, was that his actions as Town Attorney, and his past policies on the School Board, were "destructive."

The Town Crier column was published during a contested local election campaign (R. 299), on August 22, 2003, under the obviously figurative headline "Borelli on Par With Marie Antoinette." Consistent with the royal metaphor, Respondent was characterized as "the power behind the throne" and referred to rhetorically as the Town Supervisor's hatchet man.[6] The Supervisor and Town Board were also identified figuratively as "puppets" for whom Respondent was said to "pull the strings." (Id.)

Focusing on Mr. Mann's actions over the years as a public official, the column decried as a "power play" and as "destructive" a 1968 policy decision by the Port Chester School Board, on which Respondent then served, to exclude students of what later became the Blind Brook School District from Port Chester High School.[7] The exclusionary policy had directly affected Appellant Abel's son,

[6] The column intentionally misspelled this as "hatchet Mann" and thus on its face presented the negative characterization as a pun and play on words – yet another clear signal of its non-literal meaning and the generally opinionated content of the column. (R. 18, 644)

[7] Technically the "Blind Brook" District was the Port Chester-Rye Union Free School District No. 5. (R. 132)

Defendant Richard Abel (who is today the publisher and co-owner with his wife, Defendant Jananne Abel, of the newspaper), but who was a young teenager at the time and who, as a result of the policy Respondent supported, was unable to attend Port Chester High School. (R. 229, 237-38)

In commenting on Respondent's official actions the column characterized his role as being "the one most instrumental" in "kicking out the … kids." The column complained broadly that, as a result of the criticized policy, "[i]t took the Port Chester school system over 10 years to recover." (R.18, 644) Commenting on much more recent events, the column took Respondent to task for having "jumped ship" from one political party to another in order to secure his position of influence in the Town administration and again hyperbolically questioned whether Respondent's activities as the current Rye Town Attorney were "leading the Town to destruction." (Id.)

There can be little dispute that the freedom to publish a political column of this kind, commenting robustly but rhetorically on the public actions of a public official, in the course of an election, stands at the very heart and core of the rights of a free press in this state and Nation. The founding fathers understood the centrality of constitutional protection for political sentiments and opinions. Surely they would have recognized The Town Crier column for what any reasonable modern reader would also have understood it to be: a strong statement of political

opinion, clearly labeled and positioned as such on the "Opinion" page of Appellants' newspaper.

B. The Five Specific Statements from the Column that Were Formally Submitted to the Jury

After the cross-motions for summary judgment were denied, the case proceeded to trial on the trial court's determination – never fully articulated or fleshed out – that at least some portions of the column were not statements of opinion but would be tried as statements of fact. (R. 543) Ultimately, five key statements from The Town Crier column were isolated from the column as a whole and formally submitted to the jury. Even assuming arguendo it was proper (which Appellants submit it was not) to wrench these statements out of context and try each separately as a potentially actionable statement of fact, this Court's independent examination of the record will nonetheless demonstrate that Respondent entirely failed to meet his burden of proving, much less proving by clear and convincing evidence, that any of the five statements were substantially false and defamatory statements of fact published with actual malice.[8]

[8] The jury was instructed to determine whether any of the five statements supported a verdict. The special verdict form did not require identification of which statements the jury found actionable. (R. 662-66) If the Court concludes that any of the statements were protected opinions, or were factual statements as to which constitutionally-sufficient proof of falsity, defamation or fault was lacking, it would be impossible to exclude the possibility that the jury's verdict was improperly based on those non-actionable statements in violation of Appellants' substantial constitutional rights.

- Statement #1: Respondent's Admitted Change of Party Affiliation Characterized as "Jump[ing] Ship"[9]

The Town Crier column asked rhetorically why Respondent "jumped ship" from the Republican Party. The unstated question was whether Respondent had switched party affiliation to establish a position of power with the Democratic administration of Rye Town Supervisor Morabito. (R. 18, 644)

- Changing Party Affiliation

Clearly, the gist or sting of this comment – assuming that such a statement could be defamatory, which clearly it is not (see Point III.C., infra) – was the implication that Respondent had changed his party affiliation, not as a matter of genuine conversion, but for self-serving purposes to curry favor with the Town administration. In fact, the record reveals that, by Respondent's own admission on direct examination, this negative implication was true:

> "Q. *** Can you explain how this transfer from Republican to Conservative came about, and why it came about?
> A. Well, the Town Board in the Town of Rye is basically a Democratic board, but they are also supported by the Conservative Party. *** And so they asked if I would register as a conservative were I to be appointed, and I said I would. And I did."(R. 318)

Respondent later repeated this pivotal admission:

[9] Statement #1 reads in full as follows, as set forth in ¶8 of the Complaint (R. 14) and as actually charged to the jury (R. 560):

"Mann had been a Republican but jumped ship. He is now a Democrat. Why?"

Q. Now you say they asked you if you would become a Conservative for them to appoint you to the Rye Town attorney position?

A. Yes. ***

Q. So you understood *** that if you changed your affiliation, you could get the attorney position?

A. Yes.

Q. And you changed it so you could get the job?

A. Yes. (R. 337 [cross-examination]) (emphasis supplied)

In other words, Respondent admitted the substantial truth of Statement #1, rendering it non-actionable as a matter of law.

- Respondent's "Jump[ing] Ship"

Despite his admitted change of party affiliation, Respondent insisted the negative editorial characterization that he had "jump[ed] any ship" was false and defamatory. (R. 318) But it is undeniable that he had, at least figuratively, "jumped ship" – i.e., left one political party and moved to another – and the admitted reason he "jumped" was entirely consistent with the pregnant question asked but left unanswered in the column. In any event, even if the rhetorical characterization "jumped ship" added any negative connotation to the admitted facts, that connotation was a protected opinion commenting on the admitted facts. See Point II.A., infra.

- The Erroneous Party Identification

Despite his pivotal concessions about the truth of the change of party affiliation and the reasons he switched, Respondent was permitted to pursue his claim, evidently because Statement #1 contained a single false fact: Respondent's

self-serving conversion was not to the Democratic but to the Conservative Party. (R. 317-18)[10] But even if the Court found the falsity of this single aspect to be substantial and defamatory, the judgment against Appellants based on Statement #1 would still be insupportable because Respondent entirely failed to prove publication of the statement with actual malice.

At trial, Appellants acknowledged they mistakenly identified Respondent's changed party affiliation but denied awareness of the error at the time the column ran. There is no contrary proof in the Record. Both Appellants testified that their error resulted from understandable, albeit faulty, assumptions: that, because Mr. Mann had admittedly changed party affiliation to obtain a position in a Democratic administration, and because he also admittedly supported the Democratic administration with substantial contributions (R. 645, 657), his change of affiliation was to the Democratic Party. Neither Appellant felt the need to check this information because both believed it to be accurate and neither had – nor had entertained – any reason to doubt their assumptions. (R. 248 [R. Abel]; 268-69 [B. Abel])

In the face of Appellants' testimony that this was an innocent error, Respondent offered neither evidence of Appellants' actual knowledge of the falsity

[10] Respondent also argued that this error was defamatory and damaged his relationships with Republican clients. (R. 514-15) However, he introduced no evidence in support of this claim and refused to identify any lost client, Republican or otherwise. (R. 343) Even Respondent's counsel felt compelled to acknowledge: "I'm not in any instance suggesting that it's bad to be a Democrat." (R. 514-15)

of the Democratic Party affiliation nor, alternatively, any evidence that Appellants had consciously entertained, or had any reason to entertain, doubt as to the truth of the assumed party affiliation prior to publication. Instead, Respondent's support for the allegation of actual malice came down to the claim that Appellants were "reckless" in "assuming" Respondent had switched to the Democrats and then in failing to check this assumption by either asking Respondent or examining party registration records. (R. 269-70 [examination of B. Abel]).

But Respondent does not claim – nor was a scintilla of evidence ever adduced – that Appellants actually entertained any reason to doubt the truth of their publication. Indeed, Respondent's closing effectively acknowledged that Respondent had no evidence – much less clear and convincing evidence – of Appellants' awareness of probable or even potential falsity:

> "He [Bernard Abel] assumed [Respondent] was a Democrat. He just assumed it because [Respondent] was working for Morabito. Fine. You can assume whatever you want, but is that a basis for publishing something and then saying it's a fact?
>
> Richard did the same thing. ***
>
> That's reckless disregard for the truth when you print something as a fact because you make an assumption. *** That's reckless disregard of the truth big time.
>
> Pick up the phone and call Monroe. What are you. *** Go to the Board of Elections and pull out the registration.
>
> They slapped together a piece. They didn't care whether it was true or not." (R. 513-15; see also 406-07 [comments of Respondent's counsel opposing Appellants' motion for directed verdict]) (emphasis supplied)

In sum, Respondent's only "proof" of actual malice confused Appellants' failure to investigate with reckless disregard in the constitutionally-required sense. But it is absolutely clear that, as a matter of the established definition of constitutional malice, Appellants were under no obligation to inquire or investigate further – see Point III.D., infra.

- Statement #2: Respondent's Admitted Support for the Blind Brook Achool District Exclusion, with Respondent Characterized as the "The One Most Instrumental" [11]

Respondent made another dispositive admission in connection with Statement #2 when he acknowledged – as the historical record compelled – that he supported, and had voted in favor of, the controversial 1968 Port Chester School Board decision to exclude Blind Brook district students from Port Chester. (R. 323-325) At trial, Respondent reiterated his support for that policy and defended it on the merits against the competing view that the exclusionary policy had caused dislocations for the excluded students and thus that it was "destructive" to the Port Chester district.

In light of Respondent's pivotal admission, this Court's independent review of the record as to Statement #2 can largely trace the same ground as the analysis of Statement #1. Having admitted the core fact on which Statement #2 was based,

[11] Statement #2:

"When Mann was on the Port Chester School Board, he was the one most instrumental in kicking out the Blind Brook School District kids from the Port Chester High School." (R. 15; 560)

Respondent's position boils down to an attempt to prove defamation based on allegedly erroneous subsidiary details that cannot deflect from the substantial truth of the core statement, and based on editorial characterizations that are either protected opinions or facts neither proven false nor published with actual malice.

- Respondent As "The One Most Instrumental"

Although Respondent admitted he supported the Blind Brook exclusion, his central contention was that he was not "the one most instrumental" in adopting the policy, because the Board vote approving the policy was unanimous. (R. 320-23) Initially, it is difficult to understand, if the exclusionary policy was entirely appropriate, how the claim that Respondent was the one most instrumental in pursuing a reasonable policy could be defamatory. See Point III.C., infra.

But even assuming this characterization could somehow be deemed negative and defamatory – and also assuming it was not an opinion – Respondent nonetheless failed to meet his burden of proving the statement was factually false. At best, Respondent established that the thirty-eight-year-old record does not conclusively prove his singular role. But it was not Appellants' burden to prove Respondent was the one most instrumental; it was Respondent's burden to prove its falsity – and to do so by clear and convincing evidence. See Point III.C., infra.

Respondent not only failed to prove this but, in fact, surviving documents in the record establish that – whether or not it can today be stated with factual

certainty that Mann was "the one most instrumental" – he was indisputably very instrumental in effectuating exclusion of the students.

Thus, the record establishes that the question of exclusion had been under discussion for portions of two decades. (R. 197; cf. R. 321). Respondent was elected to the School Board at the end of 1967 (R. 319). By the beginning of 1968 he was taking a visible interest in the district's space requirements, as recorded in School Board minutes. (R. 638, 640) When the exclusionary resolution was passed barely half a year after he joined the Board, Respondent not only voted for the exclusion but he was the one Board member quoted as justifying the action. At the pivotal Board meeting, when the exclusionary resolution was unanimously passed, it was Respondent who is quoted stating the reasons for the Board's unanimous agreement. (R. 643 [Board Minutes of 4/10/68]) The record does not reveal any other Board member nearly as active as Respondent on the issue. If this is not a very instrumental role – if not "the one most instrumental" – it is difficult to imagine what would have been.

But, finally, even if Respondent had proved factual falsity, one searches the record in vain for proof of any kind that Appellants published their view of Respondent's central role in the exclusion with actual malice.[12]

[12] At trial, Appellant Abel testified to two meetings with Respondent, years after the School Board resolution, one at Respondent's first wife's funeral and one at West Point. At both meetings, according to Abel, Mann acknowledged his "instrumental" role in "influenc[ing]"

- Were the Kids "Kicked Out"?

Respondent also complained of the negative characterization that he "kicked out" the Blind Brook kids. Respondent argued that this was false because no student already in the school was asked to leave. (R. 324-25, 508-11 [Respondent's summation]) But this hypertechnical parsing of critical commentary must cede to the common sense recognition that students who would otherwise have gone to the high school were excluded by the policy Respondent supported.[13] Just as "jumping ship" from the Republican Party could not be deemed actionable, because it accurately albeit negatively described an admitted event, it also cannot seriously be argued that "kicking out" is not fairly understood as an opinion based on the admitted fact that Blind Brook students, who would otherwise have gone to Port Chester High under arrangements dating back seventy years, were in fact "kicked out" – i.e., excluded – because they were no longer eligible to attend the High School. It borders on sophistry, and is simply not

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adoption of the policy. (R. 418-21) Abel considered these admissions to confirm his opinion that Respondent had led the effort to push through the exclusion after years of inconclusive debate. Respondent attempted to dispute this testimony by alleging that his wife's funeral predated the Board actions. Respondent admitted seeing Abel at the PX, but denied saying anything about the Board action at that time. (R. 338-39; 435-37) Even if the jury credited Respondent's testimony and disbelieved Appellant Abel's in these regards, this would still not be proof either of falsity or of actual malice. Appellant Abel was free to conclude that Respondent had been the one most instrumental, even without any person-to-person admission by Mr. Mann.

[13] The record includes essentially the same characterization by those contemporaneously involved in negotiating the potential exclusion in the 1960's. Indeed, the minutes of one meeting of the outgoing district reported that the Port Chester negotiators had expressly threatened "that our kids would be thrown out if we did not move quickly." (R. 131, quoting from minutes of District Five Board Meeting (September 1966) (emphasis supplied).

correct, to claim that "kicked out" can only be viewed in one literal sense of physically removing someone already present.

In any event, even if it is assumed that "kicked out" is defamatory and factually false, any judgment based on the claim must still be dismissed because Respondent adduced no proof of actual malice. The only evidence that in any way addresses this issue appears in Respondent's testimony about a brief interaction with defendant Richard Abel three years before publication of column:

> "Mr. Richard Abel approached me and said to me that, 'You were the one who kicked out the students in Blind Brook.' And I said to him, 'What are you talking about?' I said, 'I don't know what you're talking about. Nobody was ever kicked out.' And that ended the conversation." (R. 328)

Respondent evidently believed this event supports his claim. In fact, it does the opposite. What the confrontation shows is that – years earlier, and unrelated to the later publication or to his defense in this action – Richard Abel genuinely held the belief that Respondent was responsible for "kicking out" the students. This precludes a finding of actual malice, at least as to Richard, and the record is silent on this issue as to Appellant Abel, thus establishing a failure of proof of actual malice as to him as well. Any argument that Respondent's naked denial[14] put

[14] If his testimony on cross-examination is also considered, Respondent's response to the confrontation with Richard is entitled to even less credence than a mere denial. Respondent claimed: "I said, 'I had nothing whatever to do with whatever you're talking about.'" (R. 340) But if this is what Respondent told Richard, by his own admission his disingenuous denial warranted no credence at all in light of what the record reveals was undeniably Respondent's very active involvement in the exclusion.

Richard, or Appellant Abel, on notice of falsity is also unavailing. See Point III.D., infra.

Statement #3: "Last Minute" Timing of the Blind Brook Exclusion [15]

Respondent has acknowledged his support for the exclusion and the record indisputably establishes that he was very instrumental in its adoption. However, Board records now establish that the exclusionary resolution was passed in April 1968, more than a year before it was to go fully into effect. (R. 641-42) Thus, Appellant Abel's recollection, thirty-five years later, that the resolution came "just before the school year started" was incorrect. However, it was not substantially false, it is submitted, to complain unspecifically that the exclusion was "[a]t the last minute."

Indeed, the record establishes that the resolution did in fact cause substantial difficulties even in the several months between its passage and its effective date in the summer of the following year. Individual students prospectively excluded were left uncertain – well into 9th grade (the transitional year prior to 10th through 12th grades at Port Chester High) – where they would be attending high school the following year. (R. 240-42, (R. Abel]) For the excluded district, passage of the resolution also came none too soon, as the record documents that, even with

[15] Statement #3 :
"He did that just before the school year started. At the last minute the Blind Brook students were bussed (sic) to the Valhalla High School. For the following few class years the students were bussed to Mamaroneck High School. Finally, after Mann's actions, the Blind Brook School District built its own high school." (R. 15, 560)

months to make alternative arrangements, the district had to scramble to find another home for their excluded students. (R. 135-36)[16] That they were only able to arrange an alternative placement at Valhalla in November of the year before the transition, after a difficult search process that could well have taken longer, is more than sufficient to justify Appellants' editorializing that the busing to Valhalla came "at the last minute." (Id.)

Thus, the literal falsity of the resolution having been "just before the school year started," was insubstantial in relation to the fundamental truth of Appellants' recollection that these events came "at the last minute," in relation to the seventy-year history of Blind Brook student attendance at Port Chester High, in relation to the twelve or more years that the dispute over merger or exclusion had been pending and, finally, in relation to the time consuming adjustments that were required in a relatively short period to respond to the final resolution.[17]

[16] "On April 12, we received a copy of a resolution from the Port Chester Board stating that our ninth graders will no longer be permitted to attend Port Chester High School. This was the third time our students had been denied admission in as many years. *** We decided ... to survey all school districts in a radius of ten miles as to the availability of space for our ninth graders. This was a very difficult and time consuming task ..." (Excerpted from Minutes of District Five [Blind Brook] Board meeting, 11/18/68) (R. 136) (emphasis supplied)

[17] One further element explains Appellants' failure to recall the precise timing. It is undisputed that, over the three prior years, there were a series of last-minute reprieves from threats to effectuate the exclusion. When there was no relief from the April 1968 resolution, it is reasonable to credit Appellants' testimony that – some thirty-six years later – their recollection was of a sense of hope to the last minute. (R. 136)

But even if the "last minute" characterization were treated as a substantially false fact, Respondent's proof of actual malice is nonetheless lacking. There is no evidence of Appellants' knowledge of falsity at the time of publication. Instead, Respondent argues that Appellants must be presumed to have actual malice because they lived through the events and must have known the resolution was not passed "just before the school year" and thus must also have known that the events did not occur "at the last minute."[18] But the actual malice standard does not depend on what a publisher once knew, or what he should have known more than thirty-five years later.[19] Instead, it depends on his actual state of mind at the time of the publication. See Point III.D., infra.

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[18] Actually, Statement #3 does not say that Respondent's actions were last minute. It says the students were bused to Valhalla "at the last minute." Arguably this does not even refer to Respondent, or only indirectly, and could just as easily be read to reflect poorly on the Blind Brook district, rather than Respondent.

[19] One telling exchange during the trial exemplifies the flaw in Respondent's theory of implicit actual malice. Thus, it became clear that Richard Abel, who had been a young teenager at the time, had not realized until he was questioned at trial that the April 1968 resolution would not have occurred in his 9th grade year, but in the spring of his 8th:

> "Q. And you were in the eighth grade at that time?
> A. No.
> Q. What grade were you in?
> A. Ninth.
> Q. In April of '68?
> A. Yes. April – let me think this through here. So September of –
> Q. In April of 1968, Mr. Abel, what grade were you in?
> A. April, I would have been in the eighth grade. You're correct." (R. 237-38)

In other words, after the passage of decades, in the consciousness of someone 13 or 14 years old at the time, present knowledge of falsity simply cannot be presumed more than three-and-a-half decades after the fact. The same can be said as to the author of the column so many years later.

Statement #4: "Destructive[ness]" of The Blind Brook Exclusion[20]

It should have been self-evident, notwithstanding the inappropriate undertaking at trial to isolate certain purported statements of "fact" from the column as a whole, that Appellants' broad characterization of the exclusion policy as "destructive" was a classically opinionated statement that should never have been permitted to go to the jury.

Nonetheless, without ever articulating its reasoning, the trial court permitted Respondent to put the issue of "destructiveness" on trial, notwithstanding Appellants' motions for summary judgment, as if such an obvious expression of opinion could be proven "true" or "false." To that inappropriate end, Respondent called two witnesses, current or former public officials, who testified that in their opinion Respondent's actions were not "detrimental" and did not have "a negative impact" on the school district, supposedly proving it was "false" to publish the opinion that Respondent's actions were destructive.

But even if it were held that the examination and trial of such a broad and opinionated statement could ever be appropriate, Respondent still failed to establish through this testimony either the statement's falsity or its publication with actual malice.

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[20] Statement #4:

> "Before Mann's power play, the Blind Brook School District had been sending its students on tuition to Port Chester High School for over 70 years. It took the Port Chester school system over ten years to recover from Mann's destructive actions."

Superintendent of Schools Charles Coletti testified briefly and inconclusively regarding the impact exclusion of the Blind Brook students had on the district's capital needs. (R. 373)[21] Coletti, an elementary school teacher, grant coordinator and elementary school principal during the ten-year period 1968 through 1978 (R. 369), testified that he had nothing to do with the exclusion resolution contemporaneously and, indeed, that he was entirely unaware of it until 2004. (R. 382) Notwithstanding this lack of first-hand knowledge, Dr. Coletti was permitted to testify, over objection and based not on his direct observations but "upon the record," that the exclusionary policy was directed at a "class size and classroom capacity" issue. (R. 373) Dr. Coletti never testified, nor did he volunteer an opinion on, whether the exclusion was helpful or harmful to the Port Chester school district. When asked "to briefly summarize the course of the Port Chester School District from the late sixties up to today," Dr. Coletti in fact identified as concerns some of the very same issues that Appellants articulated as the basis for their complaints about the exclusion:

> "The District has a declining managerial/professional class. *** We are still challenged by a low tax base in the community because the wealth of the community is just not there." (R. 378-79)

[21] Dr. Coletti had been employed by the Port Chester schools for thirty-eight years and knew Respondent as a member and later President of the School Board. (R. 369; 382-83) The Superintendent's sympathy for his former boss, in volunteering to testify without a subpoena, speaks for itself. Coletti candidly acknowledged that, at Respondent's request, he had a District employee gather information supporting Respondent's case. (R. 376; 382-83, 384)

In other words, Coletti confirmed that both of Appellants' concerns about the exclusion – elimination of the higher demographic students and loss of additional school district revenues – were still concerns in the district nearly forty years later. Despite this concession, Dr. Coletti obliged his former boss, long-standing acquaintance and colleague in Town government, by testifying:

> "Q. And finally, are you aware of any actions on the part of Monroe Mann that have been detrimental to the school district?
> A. No." (R. 379)

Of course, this gross generalization provides no support – much less clear and convincing support – for a finding of the falsity of Appellants' statement – even if it were deemed factual – that the Blind Brook exclusion was "destructive," much less Appellants' knowledge of its falsity or conscious awareness of its probable falsity.

In addition, on cross-examination, Dr. Coletti candidly conceded he had no knowledge of the tuition that Blind Brook students had been paying to Port Chester prior to their exclusion, or the revenue they generated. He was thus wholly unable to opine on, much less contest, Appellants' concerns as to the financial impact that the loss of revenues from the district may have had on Port Chester.

> "Q. Do you know what the financial effect, if any, was on Port Chester School district by a removal of the students who you say came from Blind Brook in 1968, '69, '70, '71?
> A. I can theorize that, but no." (R. 385)

The only other supposed "evidence" on the issue of the "destructiveness" of the exclusion was the testimony of Doris Blank, President of the Port Chester Teacher's Association at the time of the exclusion. Blank's only testimony about policy's impact – unclear, inconclusive and inapposite – was as follows:

> "Q. Did you develop any opinion as *** President of the Teacher's Association during the years after 1968 as to whether the decision to reduce and eventually eliminate the presence of Blind Brook students at the high school had a negative impact on the Port Chester school system?
> [Objection and side bar conference]
> A. No." (R. 357-58)[22]

In sum, to the extent appellant Abel's opinion as to "destructiveness" was based on lost revenues to the school district, there is simply no evidence in the record – much less clear and convincing evidence – that the "destructiveness" characterization in this sense was false. In any event, even if "destructiveness" were incorrectly assumed to have been proven factual and false, Respondent offered no proof whatever of Appellants' actual malice as to Statement #4.

> Statement #5: Respondent as "Leading the Town to Destruction" and the "Power Behind the Throne" of the Town Supervisor[23]

In Statement #5, the sheer absurdity of trying the "truth" or "falsity" of political opinions reaches it zenith. There is a complete lack of provably false

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[22] Read literally, it actually appears Ms. Blank was denying that she had "develop[ed] any opinion" on the issue, not that she was claiming, for whatever her opinion was worth, that the exclusion had or did not have a "negative impact" on the school system.

[23] Statement #5:

> "Will Rye Town ever recover from Monroe Mann? Is the power behind Morabito's throne leading the Town of Rye to destruction? I think it is." (R. 15; 561)

content in this broad, hyperbolic statement, devoid of specific factual reference. This is confirmed by the fact that Respondent himself totally failed to put on any case – much less a clear and convincing one – to support a finding that this statement, or any element of it, was either false or published with actual malice.

Statement #5 can be broken down into its four constituent parts, but no amount of parsing can avoid the fact that each element suffers from the same absence of factual specificity and lack of trial proof. First, the column raises the question whether the Town will "ever recover from [Respondent]." Second, it suggests Respondent is "the power behind [the Town Supervisor's throne]." Third, it raises the question whether Respondent is "leading the Town ... to destruction." Finally, the columnist opines that he "think[s]" Respondent is leading the Town to destruction.

A moment's reflection will confirm that an effort to prove the "falsity" of any of these components – each of which is clearly a statement of opinion – would have been both ridiculous and unavailing. Perhaps that is why Respondent presented no evidence to in any way contest the "truth" or "falsity" of these opinions. Indeed, although Respondent testified at length, he never specifically attempted to prove the "falsity" of Appellants' opinions that he was the "power behind ...[the] throne" or that he was "leading the Town to destruction."

Two witnesses called by Respondent could potentially have addressed Respondent's current or future "destructiveness" quotient in the Town. The first, Raymond Sculky, was a Town employee since 1992, and Assistant/Confidential Secretary to the Town Supervisor since 1998. A long-time colleague of Respondent's, Sculky testified that he read The Town Crier column and was particularly "shocked" that his friend was accused of "throwing out" the Rye Brook students decades earlier.[24] But Sculky, a member of the current Town administration, was asked nothing about Mann's power within the administration nor whether he believed Respondent was leading the Town to "destruction." (R. 386-95)

Carmen Santangelo, a local businessman and Respondent's longtime friend, testified he found the column "crude," not worthy of being "dignified," and that he "threw it in the garbage can." (R. 398) He also testified that Respondent is "a credit to his profession" and "a credit to the human race." (R. 399) But Santangelo gave no testimony as to whether Respondent was the "power" behind the proverbial "throne," nor was he even asked to deny – as he presumably would have – that Respondent was leading the Town of Rye to "destruction."

In sum, Respondent never attempted to prove the falsity of Statement #5 for the obvious reason that it would have been absurd to try. And since the statement

[24] This testimony, of course, made no sense at all because the record indisputably establishes that, in fact, Respondent was an active supporter of the exclusion policy.

was not proven false, a fortiori Appellants could not have published it with actual malice, which, not surprisingly, Respondent also made no effort to prove. So why would Respondent put before the jury a statement whose falsity he did not even attempt to prove? Strategically, the motivation is obvious and indeed admitted. Outraged at the criticism he had suffered, Respondent was inviting the jury to punish his political opponents for their allegedly calculated intent to harm him by publishing "damaging" political opinions. This motive is evident in the examination of Appellant Abel, where counsel's comments effectively concede defendant's lack of malice, but nonetheless pursue Respondent's insupportable alternative theory of his case as one somehow established by Appellants alleged intent to harm him politically[25]:

> "Q. You say he's the power behind Morabito's throne?
> A. Yes, sir.
> Q. Do you believe that?
> A. Yes.
> Q. I don't doubt you believe all those things, Mr. Abel ***
> [Objection made and overruled] (emphasis supplied)
> Q. Wasn't your article – calculated to damage not only Mr. Morabito, but also Mr. Mann?
> A. My article was written in an election campaign and it was my opinion as to what was happening in the election." (R. 298-99)

[25] Intent to harm or cause emotional distress does not amount to actual malice and is not separately actionable by a public figure or based on a truthful, newsworthy publication. See Hustler Magazine v. Falwell, 485 U.S. 46, 53 (1988) (First Amendment bars claim by public figure based on intent to injure or cause emotional distress); accord, Howell v. N.Y. Post, 81 N.Y.2d 115, 116 (1993) (no claim for intent to cause emotional distress based on an otherwise truthful, newsworthy publication). If intent to harm or cause distress by the publication of truthful facts or non-actionable opinions were permitted, the actual malice rule could be readily circumvented, as it was in this case.

C. Other Statements of Concededly Non-Actionable Opinion in Appellants' Column Not Effectively Excluded from The Jury's Consideration

The opinions implicit in the five key statements were only the beginning of Respondent's efforts to focus the jury's attention on the column's negative but constitutionally-protected opinions. In addition to the five statements of alleged fact formally submitted to the jury, various other clearly opinionated statements were presented to the jury in a fashion that must have caused confusion and that could well have led the jury to make its finding of defamation based, in whole or in part, on opinionated – and thus absolutely-protected – statements.

During the trial, Respondent repeatedly represented that only factual statements, isolated from the column as a whole, were at issue. And he repeatedly appeared to concede that the column did contain opinions which should be excluded from consideration. Yet on many other occasions, when it suited his purposes, Respondent ignored those concessions and – in the jury's presence – freely argued his grievances, both for liability and damages purposes, regarding clearly opinionated or hyperbolic statements in Appellants' column.[26]

Confusion over the distinction, if any, between fact and opinion in Appellants' column, was reflected from the outset. The Verified Complaint

[26] Permitting this improper and confusing presentation of opinions not contained in the five statements was prejudicial error. But the root problem is that the inconsistent treatment also reflects the fundamental constitutional flaw in the rulings of the courts below – including their denial of summary judgment on the issue of opinion (see Point I.A., infra) and the prejudicial manner in which the trial judge permitted the case to be tried (see Point I.B., infra).

originally alleged that the entire column was defamatory. (R. 13-16) But even in his complaint Respondent appeared to acknowledge that not all statements about him were equally actionable. He singled out for attention precisely those portions of the column (R. 26, ¶8) that became the five key statements submitted to the jury. (R. 560-61) Later, in an affidavit supporting his motion for summary judgment, Respondent again singled out those same portions of the column, but again failed to distinguish between obviously opinionated statements and factual statements that were provably true or false. (R. 23-34) For example, Respondent's motion not only complained of allegedly false factual statements regarding the exclusionary policy, but his supporting affidavit also claimed, inter alia, that it was "false" to characterize the Board's actions as a "power play" (R. 28, ¶10) and he argued that it was "completely untrue" to publish the view that his official actions, on the School Board and as Town Attorney, were "destructive." (R. 34, ¶25)

Again at trial, Respondent at times appeared to concede that critical portions of the column were non-actionable opinions. His trial counsel's opening, for example, clearly recognized – and indeed attempted to set out a distinction for the jury – between factual statements and other merely "derogatory" references:

> "In addition to referring to him in a derogatory way such as 'controversial politico and political hatchet Mann,' it also makes factual statements which are false. And that's the focus of the case." (R. 187)

Likewise, he specifically distinguished "factual falsity" from "things that one could say is opinion":

> "But we will show you beyond that that it contains falsity, factual falsity. We're trying to separate out the mean, nasty things that one could say is opinion like that he's a hatchet man, or the things that people could argue about, that he's highly paid … We're not going to quibble with that." (R. 204 [Respondent's opening]) (emphasis supplied)

Respondent then ignored those concessions, in a manner that could only have confused and misled the jury. On direct examination, for example, Appellant Abel was asked whether he actually "believe[d]" Respondent was "the power behind Mr. Morabito's throne?" (R. 298) And in his closing, addressing whether there were "statements inserted in this article that were defamatory, that libeled Monroe, that were not true …" (R. 501), Respondent's counsel argued:

> "I think it's pretty obvious that when you call someone a political hatchetman who was also the highly paid Town attorney, you're disparaging them in their office. You're not saying a political hatchetman who likes to go fishing for trout. You're saying a political hatchetman who is the highly paid Town attorney. Well, that's his office. They are disparaging him in his office." (R. 502) (emphasis supplied)

Yet these are precisely the same "mean, nasty" statements that in his opening Respondent acknowledged were opinions or statements that he would not "quibble" with. And later, again backsliding from his original position, Respondent attacked yet another statement whose truth had never been contested:

> "Now, how do they do that ["disparage" Respondent]? Well, aside from calling him a name, okay, he's an adult, he can take that. But aside from calling him a name, they go on and make other statements. They imply that

because he donated $7,000, he's able to pull the strings." (R. 502-03, 507 [Respondent's closing])

Respondent's testimony slipped into the same improper, prejudicial pattern, relying on statements of opinion not in the five statements when it suited him. For example, on direct examination Respondent testified:

> Q. Was there any impact at all in respect to your functioning in work and service as Rye Town attorney?
> * * *
> A. Yes, it has.
> Q. Can you explain that?
> A. Well, I am constantly being referred to as a hatchetman.
> Q. By whom.
> A. By people in the community and by members of the Town Board.
> Q. How does that make you feel?
> A. It's very depressing. (R. 332)

And Respondent reiterated this complaint on cross-examination, relying again on the same mean, nasty opinion, "hatchetman," his counsel had conceded should be "separate[d] out" from "factual falsity." And "hatchet Mann" came back in again, supporting Respondent's claim for damages, by focusing on unnamed "Members of the Town Board" and "people in the community" and "parents who tell their children in my presence, 'There's the hatchetman -–' . . . And I don't know some of them. They know me. They point to me." (R. 348)

In Respondent's opening and closing, in comments counsel made, in questions he was permitted to ask throughout the trial, and in Respondent's own testimony, the fundamental flaw in this case was exploited over and over.

Effectively, although the jury was formally charged to consider only those portions of Appellants' publication containing the five supposedly factual statements, Respondent was permitted to repeatedly make plain that his true complaint extended well beyond those statements to others that were clearly opinions. The jury was thus signaled that it had the latitude to consider, and ultimately to punish, constitutionally-protected statements of opinion and it is now not possible to determine whether the jury confined its verdict only to any allegedly "factual" portion of the five statements or whether the verdict was improperly based on protected opinions.

ARGUMENT

I.
THE APPELLATE DIVISION ERRED IN OVERLOOKING, OR IN REJECTING WITHOUT EXPLANATION, APPELLANTS' APPEAL FROM DENIAL OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

In its Decision and Order the Appellate Division made no comment whatever on Appellants' appeal from the trial court's order denying their cross-motion for summary judgment. (R. 685-86) Of course, the Second Department, in its truncated and opaque opinion, also altogether ignored the questions of constitutional protection for opinion, and any factual statements published without actual malice, which were also squarely raised by Appellants' appeal from the adverse verdict and judgment. (Id.) The appeal from the trial court's denial of

summary judgment should have been addressed by the Appellate Division and the denial should have been reversed. Failure to do so represented a violation of Appellants' substantial constitutional rights that should be redressed by this Court.

Appellants' trial counsel made an initial motion for summary judgment which clearly raised, inter alia, the defense that the allegedly defamatory statements constituted non-actionable opinion as a matter of law, citing cases decided both under the First Amendment and Article I, Section 8. See generally Affidavit in Opposition to Respondent's Motion to Dismiss the Appeal. The trial judge held – without ever addressing the substance of the opinion defense – that Appellants' motion was deficient in that it "failed to offer proof in admissible form sufficient to support their request for summary judgment." (R. 49)[27]

On the prior interlocutory appeal in this action, Appellants again vigorously raised the issue of constitutional protection for opinion. However, the Appellate Division's previous Order affirmed the trial court's denial of summary judgment on the ground that the "motion papers failed to establish a prima facie entitlement

[27] The trial court's concern over proof in admissible form must have been addressed to the branch of Appellants' motion that sought to raise a separate, factually-intensive defense based on Respondent's allegedly wrongful political motivation in bringing the action to punish Appellants for exercising their First Amendment rights. See Affidavit in Opposition to Respondent's Motion to Dismiss the Appeal, Exhibit A at 1-2; Record on First Appeal at 7-8 (Affidavit of Bernard Abel). However, for purposes of a motion to dismiss Respondent's defamation claim, addressed to statements of opinion evident on the face of the publication, there should have been no question as to "proof in admissible form." The issue of constitutional protection for opinion has long been recognized as a question of law for the trial judge in the first instance. See Point I.A., infra.

to judgment as a matter of law," citing Winegrad v. New York Univ. Med Ctr., 64 N.Y.2d 851 (1985). The Second Department's one-sentence Order never adverted to or addressed Appellants' opinion defense. (R. 43; Mann v. Abel, 12 A.D.3d 646 (1st Dept. 2004))

On remand, and prior to trial, Respondent moved for summary judgment as to liability. In opposing that motion Appellants also cross-moved for summary judgment, renewing their defense, inter alia, of constitutional protection for opinion that had not been addressed – and by all indications had not been substantively ruled upon – in the two previous decisions denying summary judgment in the trial court and on the first interlocutory appeal. Both Respondent and Appellants also briefed the issue of Appellants' actual malice vel non. See Kaufman Affidavit in Opposition to Respondent's Motion to Dismiss Appeal, ¶¶32-36; Exhibits E and F.

This time, the trial judge did consider the merits of the cross-motions. However, she denied both motions on the ground that there were disputed issues of fact, "including … the veracity of the statements made in the article and whether Defendants had reasonable belief in their veracity, even if ultimately proven untrue …" (R. 10) In other words, the trial judge clearly recognized that falsity and Appellants' knowledge of falsity were issues to be determined, although she declined to enter summary judgment on those issues in favor of either party. Once

again, however, she totally ignored – or at least never discussed or adverted to – the entirely separate issue of opinion, except perhaps in the implicit conclusion that some of the published statements must, in Judge Jamieson's view, have been capable of being proven factually "untrue" and thus, implicitly, that the column as a whole was not protected by the constitutional privilege for statements of opinion.

Denial of Appellants' cross-motion for summary judgment "necessarily affected" the outcome of the action because it unduly prolonged the action by sending it to the jury for resolution.[28] Moreover, the complete failure to address the opinion issue necessarily and prejudicially affected the course of the ensuing trial by failing to distinguish for the benefit of counsel and the jury between any actionable facts in Appellants' column and constitutionally-protected opinions. The Appellate Division erred in never considering, or at least visibly addressing, Appellants' appeal from the denial of summary judgment.

A. Summary Judgment Is the Preferred Method for Disposing of Non-Actionable Defamation Claims That Threaten to Chill Freedom of Speech and Press

Under general New York practice, courts not infrequently take a cautious approach toward summary judgment. In denying summary judgment Judge

[28] Appellant's appeal from the final judgment brought up for review the trial court's nonfinal, pretrial decision and Order of June 14, 2005 (R. 7-11), which denied Appellants' cross-motion for summary judgment and thus "necessarily affected" the final judgment since it sent the matter for resolution by a jury. See CPLR §5501(a); D. Siegel, New York Practice, §530 at pp. 909-11 (4th ed. 2005) (orders that would have "dismissed the case at the threshold and thereby blocked the judgment altogether" are "assured review as part of an appeal from a final judgment"); Matter of Aho, 39 N.Y.2d 241 (1976).

Jamieson elected to follow that conservative approach, describing summary judgment as a "drastic remedy." (R.9) In this, the court below erred. The "drastic remedy" cases cited were entirely inapposite, as none of them involved constitutionally-sensitive defamation claims.

This Court, in contrast, has time and again "reaffirmed [its] regard for the particular value of summary judgment, where appropriate, in libel cases" because of the Court's recognition of "[t]he chilling effect of protracted litigation." Immuno AG v. Moor-Jankowski, 77 N.Y.2d 235, 256, cert. denied, 500 U.S. 954 (1991). See also Karaduman v. Newsday, Inc., 51 N.Y.2d 531, 545 (1980) (observing that "[t]he threat of being put to the defense of a lawsuit … may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself."); Gross v. New York Times Co., 82 N.Y.2d 146, 156 (observing that protecting "defendants' expressional rights as well as the cherished values embodied in the First Amendment guarantees" in the context of a public official defamation action requiring proof of actual malice "is well suited to testing, at least in the first instance, on a motion for summary judgment …"); Armstrong v. Simon & Schuster, 85 N.Y.2d 373, 379 (1995) ("We recognize that summary judgment has particular value, where appropriate, in libel cases, so as not to protract litigation through discovery and trial and thereby chill the exercise of constitutionally protected freedoms") (internal citations omitted).

The tradition of early dismissal in defamation actions, where appropriate, is particularly well suited to the case at bar because protection of opinion raises issues of constitutional privilege under the state as well as federal constitution that can frequently be determined as matter of law by the court in the first instance. As a result, this Court has itself upheld or granted summary judgment in defamation cases involving the defense of opinion on a number of occasions. See, e.g., Immuno AG, supra, 77 N.Y.2d 235 (upholding summary judgment based on protection for statements of opinion in a letter to the editor of a scientific journal); 600 West 115th Street Corp. v. Von Gutfeld, 80 N.Y.2d 130 (1992) (upholding summary judgment based on protection for opinion in statements made at a public hearing); Millus v. Newsday, Inc., 89 N.Y.2d 840 (1996) (granting summary judgment based on protection for opinion in a newspaper editorial evaluating legislative candidates).[29]

[29] Other lower courts have also frequently followed this Court's lead in granting summary judgment under CPLR § 3212 based on an opinion defense. See, e.g., Shchegol v. Rabinovich, 30 A.D.3d 311 (1st Dept. 2006) (when viewed in context, newspaper articles constituted non-actionable opinion and appearance of some factual statements within certain of the articles did not render the articles actionable); Gilliam v. Richard M. Greenspan, P.C., 17 A.D.3d 634 (2d Dept. 2005) (letter by defendant attorney to client of plaintiff attorney stating plaintiff was doing a "distinct disservice" to her client if she was encouraging her to believe the lawsuit was not frivolous and a "further disservice" if she was "attempting to benefit from her [client's] misfortune" constituted non-actionable opinion); Silverman v. Clark, 35 A.D.3d 1 (1st Dept. 2006) (critical statements casting aspersions on plaintiff attorney's professional ability constitute non-actionable opinion); Wanamaker v. VHA, Inc., 19 A.D.3d 1011 (4th Dept. 2005) (reference to plaintiff as "surgery Nazi" was an expression of opinion); Cancer Action NY v. St. Lawrence County Newspapers Corp., 12 A.D.3d 880 (4th Dept. 2004) ("viewed within the context of the spirited debate regarding important public issues and involving public figures, the comments in the editorials are properly characterized as opinions and, even if they were found to be assertions

For similar reasons this Court has also affirmed CPLR § 3211 dismissals on the face of defamation complaints on grounds of opinion. See Steinhilber v. Alphonse, 68 N.Y.2d 283, 289 (1986) (affirming grant of motion to dismiss based on protection for opinions displayed on a labor banner and stated in a tape-recorded union message); Brian v. Richardson, 87 N.Y.2d 46 (1995) (upholding grant of motion to dismiss based on protection for opinion in statements made in an "Op Ed" article in the New York Times).[30]

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of fact, they fail to clear the combined hurdles of constituting defamatory false facts and being motivated by actual malice"); Dancer v. Bergman, 246 A.D.2d 573 (2d Dept. 1998) (editorial concluding plaintiff harness driver "had simply mailed in his second placing and refused to contest the issue from start to finish," that it was clear "the horse had plenty of speed left and could have actually won the race if given a realistic opportunity" and calling for an investigation constituted non-actionable opinion), appeal dismissed, 92 N.Y.2d 876 (1998); Gatto v. Callaghan, 231 A.D.2d 552 (2d Dept. 1996) (articles reflecting union opposition to growth of private bus lines employing nonunion drivers, published in bus drivers' union newspaper, would be recognized as expressions of individual opinion rather than serious objective reportage); Mogil v. Mark B. Zaia Enters., 230 A.D.2d 778 (2d Dept. 1996) (defendant's claim that he had been "mistreated, used and robbed by [plaintiff] Judge" constituted nonactionable opinion inasmuch as it was "a subjective characterization which could not be objectively verified"); Guarneri v. Korea News, 214 A.D.2d 649 (2d Dept. 1995) (articles stating plaintiff was dismissed as the attorney on a criminal appeal because he was considered to have been unprepared and negligent and lost opportunity to appeal despite having been granted two extensions constituted pure opinion and thus were constitutionally protected); Morrison v. Poullet, 227 A.D.2d 599 (2d Dept.1996) (characterization of plaintiff as "unprofessional, disrespectful, rude, and even accusatory" in conducting a job interview of defendant and "verbally abusive" in discussing her lack of qualifications constituted non-actionable opinion).

[30] In reliance on this Court's teachings, dismissal in defamation actions based on opinion has frequently been granted in the lower courts on CPLR § 3211 motions to dismiss as a matter of law. See, e.g., Klepetko v. Reisman, 2007 NY Slip Op 5231 (2d Dept. 2007) (column stating that plaintiff was "cowardly," an "idiotic menace," and lived with another middle-aged man, which plaintiff alleged was an insinuation that he was a homosexual, constituted pure opinion); Galasso v. Saltzman, 2007 NY Slip Op 5830 (1st Dept. 2007) (statements made in the context of a heated dispute among residential property owners that plaintiff was a "criminal," had engaged in "criminal conduct" and had "committed crimes" against the property, with implication that defendant was "connected" to organized crime, constituted non-actionable opinion); Kamalian v.

B. Denial of Appellants' Cross-Motion for Summary Judgment Unduly Prolonged this Action and Resulted in a Trial and Verdict that Unconstitutionally Punished Protected Statements of Opinion Published Without Actual Malice

The trial court completely overlooked the foregoing body of precedent and its order denying the cross-motion for summary judgment inappropriately and unduly prolonged the action. The court's failure even to discuss the opinion issue also resulted in an ill-focused trial and a verdict that unconstitutionally punished statements of opinion, thereby, in the words of the First Department in Immuno AG v. Moor-Jankowski, supra, 145 A.D.2d at 114, 128, "countenanc[ing] waste

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Reader's Digest Assn., Inc., 29 A.D.3d 527 (1st Dept. 2006) (article about plaintiff surgeon, entitled "Dangerous Doctors - When medical boards don't do their job, patients pay the price," constituted pure opinion); The Renco Group, Inc. v. Workers World Party, Inc., 13 Misc. 3d 1213A (Sup. Ct. N.Y. Co. 2006) (accusation that plaintiff was guilty of "robbing the pension" fund constituted nonactionable opinion); Navrozov v. Novoye Russkoye Slovo Publishing Corp., 2001 N.Y. App. Div. LEXIS 1903 (1st Dept. 2001) (sarcastic and mocking pieces published on the editorial or 'Op-Ed' pages of defendant newspaper and preceded by disclaimers are "non-actionable expressions of opinion), appeal denied, 96 N.Y.2d 713 (2001), cert. denied, 534 U.S. 1021 (2001); Shinn v. Williamson and Sony Music Entertainment, 225 A.D.2d 605, 606 (2d Dept. 1996) ("two-faced backstabber" constituted "personal opinion and rhetorical hyperbole"); Vengroff v. Coyle, 231 A.D. 2d 624 (2d Dept. 1996) (letter questioning whether plaintiff had engaged in arson for profit and urging an investigation was an expression of opinion); Bryant v. Ford Kinder et al., 204 A.D.2d 377, 378 (2d Dept. 1994) ("our review of the purported remarks persuades us that they . . . consist of non-actionable rhetorical hyperbole or statements of personal opinion and advocacy rather than objective fact"); McGill v. Parker, 179 A.D.2d 98 (1st Dept. 1990) (statements that involve a matter of public concern either not shown to be provably false or constituted protected opinion under New York State law); Parks v. Steinbrenner, 131 A.D.2d 60 (1st Dept. 1987) (statements that umpire was "not capable," "did not measure up," and "misjudges" plays would be "readily understood by the average reader" as "rhetorical hyperbole"); Lukashok v. Concerned Residents of North Salem, 160 A.D.2d 685, 686 (2d Dept. 1990) (statement that plaintiff "resorted to what can only be called terrorism by suing every member of the town board" is "pure opinion" not resting on any undisclosed facts, and examination of context makes clear that the remarks were merely figurative and did not accuse plaintiff of criminal activity).

and inefficiency" and "enhanc[ing] the value of [this] action[]" as an "instrument[] of harassment and coercion inimical to the exercise of First Amendment rights." These untoward results are precisely what the rule favoring entry of summary judgment, where appropriate, in constitutional defamation actions, requires the courts assiduously to avoid.[31] For reasons unexplained, the Second Department never addressed the summary judgment issue in its Decision and Order.

[31] The trial court's failure to grant summary judgment on the issue of actual malice also unduly prolonged the action, ignoring Respondent's inability to adduce "clear and convincing" evidence as to Appellants' knowledge of the falsity of (or reckless disregard as to) any actionable factual statement in Appellants' column. The trial judge inappositely relied on non-constitutional case law for the rule that summary judgment is to be sparingly granted. If, instead, the trial judge had carefully parsed Respondent's proffered evidence on the actual malice issue, and had measured those proofs against the uniquely high quantum of proof required of Respondent – even at the summary judgment stage – there would, on this basis as well, have been no need for a plenary trial with all the attendant expense and chill on Appellants' freedom of political expression. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254, 257 (1986) (on a motion for summary judgment the trial judge must "view the evidence presented through the prism of the substantive evidentiary burden" – i.e., the "clear and convincing" evidence standard). This Court has also held, relying on the Supreme Court's approach, that summary judgment on the issue of actual malice must be measured against the "convincing clarity" requirement. Freeman v. Johnston, 84 N.Y.2d 52, 57-58 (1994):

> "This standard of 'convincing clarity' applies even on a motion for summary judgment (Anderson v Liberty Lobby, 477 US, at 254, supra). Moreover, '[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party …. If the evidence is merely colorable … or is not significantly probative …, summary judgment may be granted' (id., at 249-250 [citations omitted])."
>
> * * *
>
> "When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under New York Times."

C. Failure to Give Due Consideration to Appellants' Constitutional Opinion Defense at the Summary Judgment Stage Left Counsel and the Jury Without Guidance in Attempting to Distinguish Between Actionable Fact and Protected Opinion and Resulted in a Constitutionally-Impermissible Trial of the "Truth" or "Falsity" of Political Opinions

The erroneous denial of summary judgment here was compounded by the trial court's failure to give due consideration to the issues of opinion raised on the cross-motion, and its consequent failure to articulate any guiding principles for distinguishing between fact and opinion at trial. This led to the extraordinarily inappropriate undertaking – effectively compelled by Judge Jamieson twice refusing to address Appellants' attempts to raise their opinion defense – to place on trial the supposed "truth" or "falsity" of Appellants' protected political opinions, as if they were triable facts. Failure to address or clarify these issues also confused and misled the jury – to the Appellants' severe prejudice – due to Respondent's constant intermixing in the jury's presence of supposedly actionable fact with concededly protected opinion.

This prejudicial confusion continued when the trial court submitted to the jury clearly unproven and unprovable claims directed at non-actionable statements, thus leaving the jury to search for the "truth" or "falsity" of those obviously protected opinions among the other purportedly "factual" statements submitted for its consideration. That erroneous procedure, dictated by Judge Jamieson's failure to address or resolve Appellants' attempts to raise the opinion issue, and evidently

condoned by the Appellate Division, or simply ignored, now leaves this Court with no ability to determine whether protected statements of opinion improperly formed the basis for the verdict, in whole or in part.

All of the foregoing untoward and constitutionally-proscribed effects, flowing from the fact and thoughtless manner of the lower courts' denial of summary judgment, prove the wisdom of adopting a prophylactic approach to summary judgment in a public official's defamation action involving constitutionally-protected statements of opinion. Where, as here, the broad protective mandate of the governing cases (see Point II.A., infra) is ignored, purported "factual" components or implications of protected statements of opinion can always be found, picked apart (or, in this Court's terminology, "hypertechnically pars[ed]") and inappropriately put on trial. But the fundamental lesson of this Court's governing precedent is that this is an utterly improper process which would – and did in this case – represent a gross violation of any defamation defendant's constitutional rights.

One example will suffice to demonstrate the extraordinary impropriety and prejudice of the trial of Appellants' opinions as if they were facts. In 600 West 115th Street Corp., supra, the defamation defendant, Von Gutfeld, was a resident in a cooperative apartment where the plaintiff corporation applied for a building permit for a sidewalk café adjacent to the co-op. Mr. Von Gutfeld appeared at a

public hearing on the application and spoke out against the permit. He alleged that plaintiff had entered into an "illegal lease" with the prior landlord and that the lease and the permit proposal was "as fraudulent as you can get and it smells of bribery and corruption." 80 N.Y.2d at 134-35. Plaintiff corporation commenced a defamation action and the trial court, in an order affirmed by the First Department, denied defendant summary judgment on the ground that:

> "[i]t cannot be said as a matter of law that the average recipient of these statements would not interpret them as meaning that plaintiff had actually bribed, corrupted or fraudulently obtained the license or permit."

This Court reversed in one of its line of cases strongly protective of opinion, holding that Von Gutfeld's critical statements must, when considered in their overall context, be viewed as non-actionable "statement[s] of opinion and advocacy," 80 N.Y.2d at 145, as to which summary judgment dismissing the complaint should have been granted.

Without this Court's insistence on a broad prophylactic rule – to be applied as a matter of law in the first instance at the motion to dismiss or the summary judgment stage – focused on "the content of the whole communication," and the mandate to avoid "fine parsing" of fact from opinion, 80 N.Y.2d at 145, citing Immuno, supra, 77 N.Y.2d at 254, 255, a trial would have been held in Von Gutfeld – as it was here – contesting the supposedly actionable statements of fact

that the lower courts had found not so deeply buried in the defendant's intemperate diatribe.

It is illuminating to contemplate what might have transpired if this Court had not held that Von Gutfeld's diatribe was to be constitutionally-protected on summary judgment and if such a hypothetical trial had been permitted to go forward. Testimony from City officials and the affected private parties would presumably have been admitted on the "factual" issues of whether a "bribe" had been offered or taken and whether participants in the underlying transactions had been "corrupted." Experts might have been called to opine on whether, in fact, the lease was "illegal," or whether the transactions were "fraudulent," based on all of the relevant legal documentation and surrounding circumstances.

Indeed, a trial of the alleged Von Gutfeld defamations, if treated as "facts," would arguably have made more sense, and been more straightforward as a matter of purported "factual" proof, than the similarly questionable undertakings in this case to determine whether, inter alia, Respondent was "the one most instrumental" or only "instrumental" in imposing a decades-old exclusion policy; whether the exclusion policy could be said to have been imposed "at the last minute" if it was actually approved a year in advance; or whether Respondent's prior or current official actions were "destructive," among all of the other matters of this kind

purportedly tried as "facts," and affirmed as a "fair interpretation of the evidence," in this case in the courts below.

In sum, the point of Von Gutfeld, entirely ignored by the courts below, is that, although "factual" statements can always be wrenched out of the context of opinions and purportedly tried as "true" or "false," such a process should not be undertaken at all if, on a careful preliminary assessment on the face of the publication, and as a matter of law, the overall "tone and apparent purpose" of the allegedly defamatory publication is reasonably understood as one of opinion – opinion to be protected at the earliest possible juncture, as this Court has wisely instructed, in order to preserve precious constitutional rights of free expression.

II.
THE JUDGMENT SHOULD BE REVERSED BECAUSE IT WAS IMPERMISSIBLY BASED ON CONSTITUTIONALLY-PROTECTED STATEMENTS OF OPINION

A. Political Opinions and Obvious Hyperbolic Statements, Especially Those Concerning Public Officials, are Absolutely Privileged Under Both Article I, Section 8 and the First Amendment

In an unbroken series of defamation cases, dating back some three decades, this Court has developed a powerful line of authority mandating thoroughgoing and effective protection for the unfettered publication of statements of opinion and obvious hyperbole. The Court has staked out a broad, constitutionally-based privilege for opinion and has developed methods of analysis that are even more

protective than the First Amendment in preserving the liberty freely to express sentiments and opinions in this State. See Immuno, supra, 77 N.Y.2d at 250 (expressing concern that the First Amendment, as applied to statements of opinion by the U.S. Supreme Court, may afford "insufficient protection . . . to central values protected by the law of this State"); accord, Gross v. New York Times Co., 82 N.Y.2d 146, 152 (1993) ("This Court . . . under our own State Constitution . . . has embraced a test for determining what constitutes a nonactionable statement of opinion that is more flexible and is decidedly more protective of the cherished constitutional guarantee of free speech.") (internal quotations and citations omitted).

Statements of opinion about public officials have been singled out for particular solicitude by this Court. Thus, in Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369 (1977), where the defamation plaintiff was a judge subject to election, the Court's intention to provide broad protection for statements of opinion in the context of elective scrutiny was centrally premised on the fact that the judge's official performance is inherently:

> "a matter of public interest and concern. The rule of the Times case was designed to protect the free flow of information to the people concerning the performance of their public officials.
> ***
> The expression of opinion, even in the form of pejorative rhetoric, relating to fitness for [] office or to performance while in [] office, is safeguarded.
> ***

> Plaintiff may not recover from defendants for simply expressing their opinion of his [official] performance, no matter how unreasonable, extreme or erroneous these opinions might be.
> ***
> An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case." Id. at 380-81.[32]

This Court has identified several factors to be applied by courts in separating expressions of opinion from statements of fact:

> "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal...readers or listeners that what is being read or heard is likely to be opinion, not fact." Brian v. Richardson, 87 N.Y.2d 46, 51 (1995) (internal quotations and citations omitted).

Because context is critical to this determination, this Court has instructed that analysis must begin with a consideration of the context in which the statement appeared:

> "Rather than sifting through a communication for the purpose of isolating and identifying assertions of fact, the court should look to the over-all context in which the assertions were made and determine on that basis whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff." Brian, supra, 87 N.Y.2d at 51.

[32] The fact that Respondent is a Town Attorney rather than a judge, and that he is an appointed rather than directly elected public official, should make no difference for these purposes. Appellants' column was written about Respondent as a highly-placed public official in the Town administration at the time of a Town election. His official actions were and are properly subject to the same degree of citizen scrutiny, and the public interest in his activities and his retention in office are also intimately affected by whether the administration is voted in or out of office.

This Court has expressly rejected the opposite approach – the one followed by the courts below in this case – warning that "hypertechnical parsing of a possible 'fact' from its plain context of 'opinion' loses sight of the objective of the entire exercise," namely, ensuring that "the cherished constitutional guarantee of free speech is preserved." Immuno, supra, 77 N.Y.2d at 256. Accord, Gross, supra, 82 N.Y.2d 146 (1993) ("[W]e stress once again our commitment to avoiding the 'hypertechnical parsing' of written and spoken words for the purpose of identifying 'possible "fact[s]"' that might form the basis of a sustainable libel action ***. The core goal of 'exercises' such as this is to protect the individual's historic right to vindicate reputation without impairing our 'cherished constitutional guarantee of free speech' *** or casting a pall over citizens' ability to engage in robust debate through the print and broadcast media.") (internal citations to Immuno omitted)

This Court has also specifically recognized that readers expect to encounter statements of opinion in the "editorial" sections of a newspaper, such as the page on which The Town Crier column (R. 644) here at issue appeared:

> "Like the "letters to the editor" section in which the Immuno publication appeared, the Op Ed page is a forum traditionally reserved for the airing of ideas on matters of public concern. Indeed, the common expectation is that the columns and articles published on a newspaper's Op Ed sections will represent the viewpoints of their authors and, as such, contain considerable hyperbole, speculation, diversified forms of expression and opinion. Thus, the "broader context" in which "A High-Tech Watergate" was published

provided some signals to the reader that its contents were expressions of opinion." Brian v. Richardson, supra, 87 N.Y.2d at 53.

See also Millus v. Newsday, Inc., 89 N.Y.2d 840, 842 (1996), cert. denied, 520 U.S. 1144 (1997) (appearance of allegedly defamatory statement on editorial page, and the tenor of the editorial, served to "alert . . . the reader that the piece contained expressions of opinion").

Additionally, the need to protect hyperbolic statements, even if seemingly factual when taken out of context, has also been recognized by both this Court and the U.S. Supreme Court. See 600 West 115th Street Corp., supra (in context of strident and emotional statements aired at a public hearing, charges of "illegal" and "fraudulent" activity that "smells of bribery and corruption" is protected as hyperbole); Steinhilber v. Alphonse, supra (in the context of labor dispute, accusation that a union opponent is a "scab" is protected hyperbole); Old Dominion Branch No. 496 v. Austin, 418 U.S. 264 (1974) (in the context of a labor dispute, "scab" and "traitor" are protected hyperbole); Greenbelt Cooperative Pub. Ass'n v. Bresler, 398 U.S. 6 (1970) (characterization of real estate developer's negotiating position as "blackmail" is protected "rhetorical hyperbole").

Under the authority of all of these governing precedents, it should have been clear that the judgment entered in the trial court, based on the unwarranted trial and insupportable punishment of a column of obvious political opinion, about a public official, featuring colorful, hyperbolic characterizations, cannot pass constitutional

muster. Yet neither court below appeared to give any consideration to the nature of The Town Crier column as protected opinion, to the immediate context of its placement on the editorial page of the newspaper where readers expect to encounter expressions of opinion, and to its broader context in presenting political opinions about a public official during the course of an election campaign.

B. In the Trial Court Incidental Statements of Fact Were Wrenched Out of the Context of What Could Only Be Reasonably Understood as a Political Column of Constitutionally-Protected Opinion; Then the "Truth" or "Falsity" of the Incidental Facts – Along with the Opinions – Was Improperly Placed on Trial

Entirely ignoring this Court's governing principles that mandate broad protection for opinion, the courts below appear to have totally overlooked the nature and context of Appellant's publication, concluding instead (although without ever articulating their reasoning) that all of the challenged statements were facts capable of being proven false. Evidently for that reason, the trial court permitted, and the Appellate Division apparently condoned, submitting them all to the jury, notwithstanding Appellants' persistent efforts to assert their constitutional opinion defense in two motions and the prior appeal.

In so doing, the courts below erred by adopting the discredited approach of the trial court and First Department in 600 West 115th Street (see Point I.C., supra), ignoring not only the immediate and broader context of the column, but also its overall tone and tenor in favor of the "hypertechnical parsing of a possible 'fact'

from its plain context of 'opinion'." Both courts thus "lost sight of the objective of the entire exercise," namely, ensuring that "the cherished constitutional guarantee of free speech is preserved." And, in so doing, the courts below violated every other principle of construction laid down in the governing case law.

They "first searched [Appellants' column] for specific factual assertions and then [held] those assertions actionable," as warned against in Brian, supra, 87 N.Y.2d at 51, even where "they were couched in figurative or hyperbolic language," id. In so doing they ignored this Court's observation in Steinhilber, supra, 68 N.Y.2d at 294, that "even apparent statements of fact may assume the character of statements of opinion." And, in parsing out the supposed facts, they failed to "look at the content of the whole communication, its tone and apparent purpose," 600 West 115th Street Corp., supra, 80 N.Y.2d at 145.

As a result, they permitted statements that did not have "a precise meaning which is readily understood" (e.g., "destructive," "the one most instrumental," "at the last minute," "jumped ship," "kicked out," "power play") – statements that, because not readily understood, were also not "capable of being proven true or false" – to be subjected to trial as if they were objectively provable statements of fact.

Moreover, the trial judge also permitted obviously non-actionable opinions and hyperbolic statements (e.g., "hatchet Mann," "controversial politico," "power

behind the throne," "pull the ['puppets'] strings") to be complained of throughout the trial, at the very least improperly influencing the jury's attitude and in all likelihood leading to the Respondent's verdict and substantial damage award. Yet, for reasons unexplained, the Appellate Division also condoned without explanation these obvious legal and constitutional errors.

Finally, both courts entirely ignored the "full context of the communication in which the statement appears" – namely, on the Opinion page of the newspaper – as well as "the broader social context and surrounding circumstances" of The Town Crier column, in the heat of an election campaign, so that all of those pivotal elements that would have been "signal[s]" to the reader "that what is being read ... is likely to be opinion, not fact" were ignored and rendered irrelevant.

In sum, by permitting the case to be tried in this fashion, the courts below ignored governing law and allowed Respondent to prevail in his defamation claim based on alleged minor factual inaccuracies, wrenched out of context, in a case that should never have been submitted to a jury in the first place, and then to parlay those alleged, minor factual errors into an unwarranted damage award based on the entirety of a constitutionally-privileged publication.[33]

[33] Application of a "pure opinion" analysis would not change the result insofar as Appellants' column was "accompanied by a recitation of the facts upon which it [was] based" and "[did] not imply that it [was] based upon undisclosed facts," see Steinhilber, supra, 68 N.Y.2d at 289, and, even assuming arguendo minor inaccuracies in the disclosed facts, plaintiff failed to prove those alleged inaccuracies substantially false or defamatory. See Section III.C., infra.

And, finally, because the jury was allowed to consider statements that even the Respondent agreed were hyperbole or opinions, the adverse judgment was further tainted because the jury's verdict may well have been the result of an intent to punish Appellants for publishing statements of opinion and hyperbole that even the Respondent had acknowledged could not properly serve as the basis for a judgment of liability. Surely, this is the ultimate violation of Appellants' "cherished constitutional guarantee" of unfettered freedom to express their opinions without fear of retribution or punishment.

III.
THE JUDGMENT SHOULD ALSO HAVE BEEN REVERSED BECAUSE RESPONDENT FAILED TO PROVE, BY CLEAR AND CONVINCING EVIDENCE, THAT APPELLANTS PUBLISHED ANY SUBSTANTIALLY FALSE AND DEFAMATORY STATEMENT OF FACT WITH ACTUAL MALICE

If this Court were for any reason to conclude that The Town Crier column was not subject, in its entirety, to absolute protection as constitutionally-protected opinion, the Court would then be required to address the fatal deficiencies in Respondent's proof of a fact-based case of defamation.

The Second Department's Decision and Order fails to reveal that the court conducted the required appellate review or that it properly made such findings. But the law is clear and well-settled: the Amended Judgment may not be affirmed unless Respondent has proven, by clear and convincing evidence, both "substantial

falsity" and "actual malice" regarding any "defamatory" statement of "fact" contained in Appellants' publication. In the absence of such clear findings, it falls to this Court to scrutinize the entire record, de novo, to assure that this high quantum of proof was in fact adduced. This Court's searching review of the record will establish that Respondent quite clearly failed to adduce such evidence, and for that reason as well the judgment should be reversed and the case dismissed, as it should have been in the court below.

A. The Appellate Division Was Required To – But As Far as Can Be Discerned Did Not – Conduct an "Independent" Review of the Entire Record to Determine Whether Respondent Presented Clear and Convincing Evidence of Actual Malice

Courts reviewing libel judgments involving public officials such as Respondent are required to undertake an "independent," de novo review of the entire record to ensure that the constitutional protections of free speech and press are satisfied.[34] Unfortunately, as far as can be discerned from its truncated and opaque opinion, the Appellate Division did not conduct the required review.

[34] This Court has variously referred to the constitutionally-mandated standard as an "independent review," or as a "special heightened … review" or as "de novo" review. See, e.g., Prozeralik, supra, 82 N.Y.2d at 477 ("For assessing the prima facie proof burden to get to a jury, even within the special heightened appellate review standard, this Court may include in its over-all consideration the strengths and weaknesses of the whole evidentiary record"); Mahoney v. Adirondack Pub. Co., 71 N.Y.2d 31, 39 (1987) ("appellate review must include an independent review of the evidence germane to the actual-malice determination to ensure that the determination rests upon clear and convincing evidence); Sweeney v. Prisoners' Legal Servs., 84 N.Y.2d 786, 793 (1995) ("In reviewing a case of actual malice the appellate court must make a de novo review of the entire record, and determine whether the proof before the trial court supports the finding of actual malice with convincing clarity.") (emphasis supplied)

This Court's role in reviewing the Appellate Division's Order, and the underlying jury's verdict that the Second Department upheld without visible analysis, is far different from the limited role the Court typically plays. The difference stems from what this Court, relying on federal precedent, has described as the Court's "constitutional duty to 'exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.'" Prozeralik v. Capital Cities Communications, Inc., supra, 82 N.Y. 2d at 474 (citation omitted). As this Court summarized that special role, the "independent review" standard is far from merely procedural – it goes to the very heart of the First Amendment protections outlined by the U.S. Supreme Court and long ago embraced by this Court:[35]

> "'[J]udges … must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not

[35] Leading commentator Robert Sack, now U.S. Court of Appeals Judge Sack of the Second Circuit, put the First Amendment independent judicial review principle, simply and felicitously, this way: "The antidote [to the danger of jury "preference" in favor of "popular people at the expense of unpopular speech"], as the Times Court concluded, is judicial vigilance, case by case. To safeguard free expression, reviewing judges must assure themselves that libel judgments do not constitute punishment of unliked speakers or speech in disguise." Robert D. Sack, Sack on Defamation (3d ed. 2007), § 16.5.5.3, at 16-56 (emphasis supplied). Regrettably, what the Second Department displayed in this case fell far short of the "judicial vigilance" to which Judge Sack, and the Times Court, was referring.

> supported by clear and convincing proof of 'actual malice.'" Id. at 474-75, quoting Bose Corp. v. Consumers Union, 466 U.S. 485, 511 (1984).

In addition, as also held in Prozeralik, this Court "must be satisfied that an 'independent review' was conducted" by the reviewing court. Id. at 475. Here, clearly, there is simply no way to be satisfied from the Decision and Order that the required review was conducted; indeed, there is every indication that the Appellate Division either did not conduct such a review or, even if it purported to do so, sub silentio, that it applied the wrong standard in its consideration. If this Court cannot be satisfied that the requisite review was conducted it can and must do so itself, unconstrained by the normal limitations on its review power:

> "Thus, although this Court is 'usually constrained to review only the law and without the power to disturb affirmed findings of fact,' we must scrutinize the evidence of actual malice for 'convincing clarity' (compare, Mahoney v Adirondack Publ. Co., 71 NY2d 31, 39, with Cohen v Hallmark Cards, 45 NY2d 493, 499).
>
> This heightened review responsibility does not preclude consideration of all of the factual record in full, including 'circumstantial evidence' and evidence of the defendant's motive, and the findings of the fact finder (see, Harte-Hanks Communications v Connaughton, 491 US 657, 668, supra). Rather, our review of the Appellate Division's analysis of the trial evidence necessarily encompasses all of these usual factors. We must be sure 'undue weight' was not given to the jury's findings in the usual mode and must be satisfied that an 'independent review' was conducted." Prozeralik, supra, 82 N.Y.2d at 475.

Applying what the Court has called this "special review power," id., based on its own independent review of the entire record, this Court will readily find that Respondent totally failed to meet his heavy burden of proving Appellants' "actual

malice" as to any false and defamatory statement of fact in The Town Crier column.

B. The "Fair Interpretation of the Evidence" Standard Evidently Applied by the Second Department, "On the Facts and as an Exercise of Discretion," Was Clearly Inapposite and Did Not Comport With Its Constitutionally-Mandated, Independent Review Obligation

Entirely ignoring this Court's careful articulation of the "heightened review responsibility" of the appellate courts in applying the independent, de novo review standard that indisputably governs this public official defamation action, the Appellate Division inexplicably elected to apply an entirely inapposite appellate standard for reviewing a jury's verdict, "on the facts and as an exercise of discretion," merely to assure that the jury's findings were based on "a fair interpretation of the evidence," R. 686, citing Lolik v. Big V Supermarkets, Inc., 86 N.Y.2d 744 (1995), a slip and fall case presenting no constitutional issues.[36] In support of this standard the court below also inappositely cited Grieco v. Galasso, 297 A.D.2d 659 (2d Dept. 2002) and Iannaccone v. 21st Century Open MRI, P.C., 8 A.D.3d 233 (2d Dept. 2004), defamation cases that also did not present constitutional issues. Grieco was a private defamation action, which the court expressly held did not involve matters of public concern, and which, therefore –

[36] Indeed, application of that permissive standard was also at variance with the Second Department's own precedent. See, e.g., Kaplansky v. Rockaway Press, 203 A.D.2d 425 (2d Dept.1994) (reversing jury verdict in favor of plaintiff, following its "independent review of the record, as required" [citing Mahoney , supra and Bose, supra]) (emphasis supplied).

unlike here – the court held did not require the plaintiff to bear the burden of proving either falsity or actual malice. Similarly, although the facts are not fully described, by all appearances Iannaccone was also a non-media, non-public interest defamation claim, arising in an employment context, in which the "fault" standard at issue would seem to be common law, not constitutional, "malice."[37]

The Appellate Division committed clear error of constitutional dimension in applying a "fair interpretation of the evidence" standard in reliance on Lolik and the other cases cited instead of the independent review standard clearly defined by Prozeralik and this Court's other equally definitive rulings setting forth the very different, heightened appellate review standard mandated in defamation cases involving public plaintiffs, public issues and jury findings of constitutional malice. Lolik, in contrast, merely defines the usual, permissive standard for judicial review of jury verdicts based on mere "weight of the evidence." See also Cohen v. Hallmark Cards, Inc., 45 N.Y.2d 493 (1978). This error would seem to be precisely what this Court was referring to in Prozeralik when it warned that, in

[37] Inexplicably, the only public-official, constitutional malice, defamation case the Appellate Division chose to cite was Gross v. New York Times, 82 N.Y.2d 146 (1993). This is curious, as Gross has nothing at all to do with the standard for reviewing a jury's finding of actual malice. The issue in Gross, as this Court is well aware, "involve[d] a preanswer dispute over the sufficiency of the complaint" in regard to the issue of opinion. Id. at 152. As such, it could hardly provide support for the Second Department's watered-down, post-verdict standard for reviewing a jury finding of actual malice, in the face of the constitutionally-based command of Prozeralik and Bose, supra, that such a finding must be independently reviewed. Indeed, in Gross, this Court specifically distinguished the separate issue of actual malice from the preliminary legal issue there presented. The Court took pains to note that the issue of actual malice might or might not ever be presented to a jury at trial because it was "well-suited for testing, at least in the first instance, on a motion for summary judgment …" Id. at 156.

applying the special heightened review standard, the reviewing court "must be sure 'undue weight' was not given to the jury's findings in the usual mode and must be satisfied that an 'independent review' was conducted." Id. at 475 (emphasis supplied).

C. This Court's Independent Review of the Record Will Establish that Respondent Failed to Prove, by Clear and Convincing Evidence, That Appellants Published Any Substantially False Statement of Defamatory Fact

The standard of "actual malice" was first defined and applied in the landmark case of New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Under Sullivan a public official cannot recover in a defamation action without "clear and convincing" proof that the Appellants published a defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." Id. at 279-80.

- Lack of Proof of Falsity

An indispensable, threshold component of the actual malice standard is the requirement that, to be actionable, a factual statement – not an opinion – must be false.[38] And it has also been held, because proof of falsity is integral to the actual

[38] "The essence of the tort of libel is the publication of a statement about an individual that is both false and defamatory. Since falsity is a sine qua non of a libel claim and since only assertions of fact are capable of being proven false, we have consistently held that a libel action cannot be maintained unless it is premised on published assertions of fact (Gross v New York Times Co., supra, at 152-153; Immuno AG v. Moor-Jankowski, supra; see also, Milkovich v. Lorain Journal Co., 497 U.S. 1, 17-21)." Brian v. Richardson, 87 N.Y.2d 46, 50-51 (1995).

malice standard, that falsity must also be proven by clear and convincing evidence, as the trial judge properly charged the jury in this case.[39] (R. 562) In addition, under both common law tradition and modern constitutional principle, in evaluating truth or falsity the issue is not whether the publication was precisely accurate in every minor particular. As the Supreme Court has instructed:

> "The common law of libel takes but one approach to the question of falsity …. It overlooks minor inaccuracies and concentrates upon substantial truth." Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991)(emphasis supplied).

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[39] In DiBella v. Hopkins, 403 F.3d 102, 112 (2d Cir.), cert. denied sub nom, Hopkins v. DiBella, 546 U.S. 939 (2005), the Second Circuit systematically examined whether "clear and convincing" proof of falsity is required under New York law. It noted that "New York Appellate Divisions -- with the exception of the Fourth Department, which does not appear to have written on the issue -- have uniformly stated that a public figure in New York must prove falsity by clear and convincing evidence." Recognizing that this Court has not specifically ruled on the issue, the Second Circuit held that "there is significant and persuasive evidence from which to conclude that the New York Court of Appeals would hold that falsity must be proved by clear and convincing evidence. We base this conclusion on (1) the uniform view of the New York Appellate Divisions, (2) the majority view of other jurisdictions (both state and federal), (3) the fact that the clear and convincing evidence standard has already been incorporated into the New York Pattern Jury Instructions, and (4) scholarly writing in this field." Id. at 115. Beyond merely predicting the outcome of this Court's consideration, the Second Circuit observed on the merits that "courts have found good reason to favor the higher standard of proof," quoting Robertson v. McCloskey, 666 F. Supp. 241, 248 (D.D.C. 1987):

> "[A] clear and convincing standard of proof for falsity would resolve doubts in favor of speech when the truth of a statement is difficult to ascertain conclusively. Indeed, as a practical matter, public-figure plaintiffs already bear such a burden, for in order to prove actual malice they must, of necessity, show by clear and convincing evidence that the defendant knew the statement was false or acted in reckless disregard of its truth. Finally, [the standard] has more than merely a logical or symmetrical appeal. To instruct a jury that a plaintiff must prove falsity by a preponderance of evidence, but must also prove actual malice, which to a large extent subsumes the issue of falsity, by a different and more demanding standard is to invite confusion and error." See also Nevada Indep. Broadcasting Corp. v. Allen, 99 Nev. 404, 664 P.2d 337, 343 n.5 (Nev. 1983) (noting that "practically speaking, it may be impossible to apply a higher standard to 'actual malice' than to the issue of falsity").

Thus, under the doctrine of "substantial truth," a defamation plaintiff's burden is more than simply proving the literal falsity of a publication. The falsity must go to what has been described as the "gist" or "sting" of the defamation. The test is whether the alleged defamation, as published, "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." Masson v. New Yorker Magazine, Inc., supra, 501 U.S. at 517. See also Fleckenstein v. Freedman, 266 N.Y. 19, 23 (1934) ("When the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done.") (citation omitted) And omission of immaterial details, not significant enough to substantially alter the conclusions to be reasonably "drawn from the episodes reported," is not actionable, as this is "largely a matter of editorial judgment in which the courts and juries have no proper function." Rinaldi v. Holt, Rinehart & Winston, Inc., supra, 42 N.Y.2d at 383.

Based on these fundamental principles, this Court's independent review of the factual record will make evident the extent to which Respondent failed to meet his burden of proving, by clear and convincing evidence, the substantial falsity of any defamatory statement of fact in The Town Crier column, as well as how deeply inadequate was the Appellate Division's perfunctory ratification of the jury's

verdict without visible analysis of this and the other essential elements of a fact-based constitutional defamation claim.

Statement #1: Respondent failed to meet his burden of proving this statement was substantially false. Erroneously identifying Respondent as a Democrat does not go to the gist or sting of the column, which focuses on the admitted reason for Respondent's conceded switch and not the party label, and which is not defamatory in any event – see discussion of "defamatory meaning," infra. The one other subsidiary detail ("jumped ship") is either not false, not factual and/or not additionally defamatory. See p. 16-20, supra.

Statement #2: Respondent did not prove this statement false by clear and convincing evidence. Respondent admits that he supported the exclusion policy and the record establishes, at the very minimum, that he was "instrumental" in its passage. Respondent failed to meet his burden of proving that he was not "the one most instrumental," which is not defamatory in any event. The one other subsidiary detail ("kicked out") is either not false, factual and/or additionally defamatory. See pp. 20-25, supra.

Statement #3 was not proven by Respondent to be substantially false. The statement that the exclusion resolution was passed "just before the school year started" was factually incorrect due to faded recollection. However, the gist and sting, if any, of Statement #3 was that the controversial policy was implemented

"at the last minute" and this subjective characterization was not proven substantially false, assuming that it is a factual statement and that it is defamatory in the context of the overall column. The one other subsidiary detail ("busing" of the students) is admittedly true. See pp. 25-27, supra.

Statement #4 was not proven by Respondent to be false. Even assuming, arguendo, that characterization of the exclusion policy as a "destructive action" was a statement of fact and not an opinion regarding a policy judgment that cannot be proven true or false, Respondent failed to meet his burden of proving the falsity of the claim that the policy was "destructive" in the broad sense maintained in the column. The other subsidiary details (70-year history; "power play") are admittedly true and/or not factual. See pp. 28-31, supra.

Statement #5: Respondent completed failed to meet his burden of proving this Statement false. Assuming Appellants' claim that Respondent is "leading the Town … to destruction" was a statement of fact and not an obvious opinion, Respondent failed even to attempt to prove that the statement was false. The other subsidiary aspect ("power behind the throne") is clearly not a factual statement and was also not factually contested at trial. See pp. 31-34, supra.

- **Lack of Defamatory Meaning**

To be actionable, any false statement of fact found by the Court must also have actionable defamatory meaning. Whether particular words are defamatory is

a matter of law to be decided by the court in the first instance. If the words "are not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction." Golub v. Enquirer/Star Group, Inc., 89 N.Y.2d 1074, 1076 (1997). In order to be considered defamatory, the challenged statement must "expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community.'" Id.

Under these threshold definitions, it is respectfully submitted, none of the statements submitted to the jury in the case at bar can properly be deemed to be defamatory, except "by a strained or artificial construction." Indeed, some of the statements submitted to the jury simply cannot be said, even under a strained construction, to rise to the level of defamation. Other more strongly negative statements in the column, that might arguably be viewed as defamatory, for example in certain private contexts in reference to personal wrongdoing, should not, properly understood, be viewed as such in the context of a column expressing protected views regarding the public policies and official actions of a public official. Specifically, the effort to convince voters to oppose a particular public administration, and to suggest that its policies, and those of its officials, are wrong, harsh or even "destructive," should by definition not be deemed to have the kind of

actionable reputational impact on a particular official which is the traditional concern of the law of defamation.

There are two ways to analytically reach the conclusion that actionable defamatory meaning is entirely lacking in The Town Crier column. One is by a traditional common law analysis, always sensitive to context as this Court has instructed; the other is by applying a constitutionally-sensitive, speech-protective gloss on the definition of defamatory meaning.

Applying a common law analysis, in James v. Gannett Co., 40 N.Y.2d 415 (1976), this Court demonstrated how a sensitive understanding of the context of a publication can appropriately limit a finding of defamatory meaning even as to a category of expression traditionally deemed libelous per se. In James, a feature newspaper article was said to impute "unchaste conduct" to the plaintiff, a belly dancer. Historically, the alleged imputation was a most serious one, this Court noted, considered under "old law" to be "libelous per se." Id. at 419. But in rejecting the claim of defamatory meaning this Court emphasized that, before accepting as dispositive such a definitional label, the court must first determine whether the statements complained of were "reasonably susceptible to any defamatory interpretation" and "whether there is a reasonable basis for drawing the defamatory conclusion." This Court found that, "when read in context" and "consider[ing] the publication as a whole" as "read against the background of its

issuance with respect to the circumstances of its publication" – even as to a statement otherwise libelous per se – a defamatory "construction" was not fairly or reasonably "to be derived … from the expressions used [as well] as from the whole scope and apparent object of the writer."[40] Id. at 419-20 (internal citations and quotations omitted).

As reviewed below, a similarly sensitive consideration of context in this case, under these same common law principles, will lead to a conclusion that none of the allegedly defamatory statements here at issue, considering all of the circumstances and properly understood, should be deemed actionably defamatory, again particularly as they all concern political discussion and policy criticism of the public actions of a public official.

As far as constitutional limitations on defamatory meaning are concerned, one leading commentator has noted that there is a "constitutional dimension" to a determination of what is defamatory. "The theory seems to be that, as a matter of constitutional law, the First Amendment thumb is put on the balance in favor of finding expression to be non-defamatory." Robert D. Sack, Sack on Defamation, §2.4.19 at 2-80 (3d Edition 2007). Judge Sack finds this "thumb on the scale" approach in the "readiness to view communications that in other circumstances

[40] It is worthy of note that the sensitive contextual analysis of James as to defamatory meaning under the common law is also in various ways reminiscent of the similar contextual analysis adopted by this Court in Immuno , supra, for distinguishing actionable fact from protected opinion as a matter of state constitutional law. See Point II.B., supra.

might be considered defamatory statements of fact as protected statements of opinion given the public-issue context in which they arise," and in the inclination to characterize even highly negative and intemperate statements, in their particular context of public interest and concern, as "no more than rhetorical hyperbole," citing, Greenbelt Cooperative Pub Ass'n, Inc. v. Bresler, supra , 398 U.S. at 14 and Buckley v. Littell, 539 F.2d 882, 890 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977) ("what is libelous must … be measured very carefully because, as Mr. Justice Harlan said in Curtis Publishing Co. v. Butts, … public officials and public figures have 'sufficient access to means of counter-argument to be able to expose through discussion the falsehoods and fallacies' of defamatory statements").

Such an approach would seem entirely consistent with this Court's previously-demonstrated sensitivity, under both federal and state constitutional principles, to the inherently chilling, and potentially speech suppressive, impact of defamation claims. Thus, although the judgment here can be reversed on many grounds, including by application of the standard common law definitions and limitations, this case, arising as it does out of public speech standing at the heart of free political expression, is a most apt one for recognizing and applying a constitutionally-limited definition of defamatory meaning.

Given the public-issue context in which this case arises, given the absence of any factual allegations or implications rising to (or even approaching) the

seriousness of professional incompetence, or personal moral turpitude, corruption or criminality, and given the ready means of counterargument that a public official such as Respondent has available to him in the course of an election to respond to and counteract criticism of a generalized political and policy nature, a constitutionally-sensitive examination should recognize that any allegedly false factual components of Appellants' column can and should be deemed non-defamatory in order to advance the speech-protective aims of this Court's modern, "constitutionalized" view of the proper scope of the law of defamation.

In sum, whether viewed on a definitional, a common law, or a constitutional basis, none of the five statements submitted to the jury should be held to be actionably defamatory.

Statement #1, regarding Respondent's change of party affiliation, has no actionable defamatory meaning. For a public official to admittedly change mainstream party affiliation, even if characterized negatively as "jumping ship," is simply not sufficient to expose even a politician to actionable "hatred, contempt or ridicule." Similarly, the erroneous allegation that Respondent became a member of the Democratic rather than the Conservative Party, is one which, as a matter of policy, cannot and should not be deemed to be defamatory. See Steinman v. Di Roberts, 23 A.D.2d 693, 693 (2d Dept. 1965), aff'd, 17 N.Y.2d 512 (1966)

(reference to plaintiff as, at most, a "liberal" does not constitute libel per se; and, since no special damage is alleged, the complaint cannot stand).[41]

Statement #2, regarding Respondent's support for the Blind Brook exclusion, also has no significant defamatory content – especially in light of Respondent's position to this day that this was a proper public policy. To criticize a public official's admitted policy positions, and even to characterize them negatively as unduly harsh (viz, Respondent didn't just exclude the other District's students, he "kicked [them] out") cannot as a definitional matter, and should not as a policy or constitutional matter, be deemed a statement with actionably defamatory content. Finally, although the trial judge allowed this issue to be tried in depth before the jury, it is surely difficult to discern how an allegedly false accusation of being "the one most instrumental" in supporting a public policy that a defamation plaintiff did in fact support, and that he defended and still defends, adds any actionably defamatory connotation to the admittedly truthful underlying statement about the plaintiff's support for the policy, whether or not "most instrumental." Similar questions can be raised as to several of the other statements

[41] See also Cox v. Hatch, 761 P.2d 556, 562 (Utah 1988) ("Clearly both Republican and Democratic Parties are mainstream parties, and neither party can legitimately be said, for purposes of defamation law, to be at odds in any way with the fundamental social order.") (internal citations omitted); Frinzi v. Hanson, 30 Wis. 2d 271, 278, 140 N.W.2d, 259, 262 (Wis. 1966) ("the thrust of the statement charges Frinzi with pretending to be a Democrat and the implied assertion he was not or, at least, not a good one. Being charged with being a good, lukewarm or nonmember of a political party is not libelous. *** The degree of allegiance one has to a political party is not libelous.")

submitted to the jury, such as "jumped ship," and "kicked out," which are both, properly understood, merely editorial characterizations of otherwise true statements.

Statement #3, regarding the timing of the Blind Brook exclusion, was doubtless intended by Appellant Abel to comment negatively on Respondent's admitted public policies. But for these purposes the question is whether that particular commentary – even if assumed to be substantially false – should be deemed to have defamatory meaning. Acknowledging that "just before the school year" was incorrect, and assuming arguendo that "at the last minute" was not substantially true, the question becomes whether such false subsidiary details, of an otherwise true statement regarding a policy position, presented as part of the author's criticism of that position, rises to the level of defamation. Appellants respectfully submit that it does not.

Statement #4, regarding the allegedly "destructive" effects of Respondent's actions in supporting the Blind Brook exclusion, this statement, once again, simply does not rise to the level of defamation, either by definition, under a common law contextual analysis, or under constitutional principles. The statement merely argues that Respondent was a part of the decision to change a long-standing policy that, according to Appellant Abel's opposing view, had a destructive impact on the Town schools. Other than the policy criticism – right or wrong – there simply is

no actionably defamatory allegation or imputation directed at Respondent that would do cognizable harm to his personal, as opposed to political, reputation.

Statement #5, suggesting ultimately that Respondent "is leading the Town to "destruction" is surely not defamatory as a matter of law. By definition, labeling a public official's actions as potentially "destructive" – where the statement has no specific, false referent to any other actionable allegation or implication suggesting personal corruption, criminality, moral turpitude or professional incompetence – should not be deemed to not rise to the level of defamation. In context, under a common law analysis, considering the scope and apparent purpose of Appellants' column, to express concern in the course of an election that the alleged "power" behind a government administration will pursue "destructive" policies or actions if the administration is kept in office, a defamatory construction cannot fairly or reasonably be derived from the publication.

In the end, if the state and federal constitutional guarantees of liberty and freedom of expression are to retain any practical vitality, it must be that in the course of public debate a political critic or opponent is categorically free to use broadly negative, but non-specific, labels of the kind employed in The Town Crier column without fear of having to defend his "robust" and "wide-open," but non-defamatory, language, at great oppression and expense, in a defamation courtroom.

D. An Independent Review of the Record Also Establishes that Respondent Failed to Prove, by Clear and Convincing Evidence, Appellants' "Actual Malice" as to Any False and Defamatory Statement of Fact

Finally, were this Court, upon its independent review of the entire record, to find any statement submitted to the jury in this case to be factual, substantially false and defamatory, Respondent must nonetheless have also met his burden of proving, by clear and convincing evidence, that Appellants published the statement with "actual malice." Actual malice for these purposes is a term of art. As noted in Prozeralik, supra, "'[t]he burden of proving "actual malice" requires the Respondent to demonstrate with clear and convincing evidence that defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement.'" 82 N.Y. 2d at 474 (citation omitted). And in Sweeney v. Prisoner's Legal Services, 84 N.Y.2d 786 (1995), after conducting the "de novo review of the entire record" required by Prozeralik, 84 N.Y.2d at 793, the Court concluded that the plaintiff in that case, like Respondent here, had failed to submit clear and convincing evidence of actual malice, noting that:

> "'Actual malice' means that defendants published the false information about plaintiff 'with knowledge that it was false or with reckless disregard of whether it was false or not' (New York Times Co. v. Sullivan, 376 U.S. 254, 280). Inasmuch as defendants did not know the statement was false, plaintiff's claim rests on proof of reckless disregard of whether it was false or not. To satisfy the reckless disregard standard, plaintiff had to establish that defendants in fact 'entertained serious doubts as to the truth of [the] publication' … or that they actually had a 'high degree of awareness of its probable falsity'".

The standard is subjective and the bar for Respondent is extremely high:

> "We have observed that there is a genuine and critical distinction between lacking knowledge of a statement's falsity and being aware that it is probably false or entertaining serious doubts about its truth (see Liberman v. Gelstein, 80 N.Y.2d, at 483, supra). A qualified privilege may be sustained if the speaker is genuinely unaware that a statement is false because the failure to investigate its truth, standing alone, is not enough to prove actual malice even if a prudent person would have investigated before publishing the statement." Sweeney, supra, 84 N.Y.2d at 792-93 (citations omitted; emphasis supplied)

Applying these definitional requirements to the five key statements, this Court's independent review of the record will establish that, as a matter of law, Respondent never came close to adducing the constitutionally-required clear and convincing proof of actual malice and that, once again, the Appellate Division's rubber-stamping of the jury's finding that Respondent was defamed is as unsustainable as it is constitutionally-inadequate.

Statement #1 (party affiliation): as to the only admittedly incorrect element of this statement (Conservative Party rather than Democrat), there is no cognizable proof of actual malice; Respondent put forward no evidence that Appellants in fact knew of the statement's falsity, or entertained any serious doubts about it prior to publication. The law could not be more clear that a publisher, not actually on notice of probable falsity, has not evidenced the requisite actual knowledge of falsity. Harte-Hanks Communications v. Connaughton, 491 U.S. 657 (1989).

Similarly, Respondent's contention that Appellants were "reckless" in assuming the party affiliation and not inquiring or checking further (R. 513-15) ignores the same, well-settled definition of "reckless disregard" for purposes of actual malice under Sullivan. As the Supreme Court has authoritatively held, "[f]ailure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." Harte-Hanks Communications, supra, 491 U.S. at 688 (1989); accord Sweeney, supra, 84 N.Y.2d at 793 ("failure to investigate [a statement's] truth, standing alone, is not enough to prove actual malice").

Statement #2 (Respondent's role in the Blind Brook exclusion): There is no cognizable proof of Appellants' actual malice with respect to this statement. Respondent's suggestion that his general denial, when confronted by Richard Abel, of any role in "kicking out" the students, was evidence of actual malice, is entirely contrary to settled law. (R. 328, 340) A plaintiff's mere denial is insufficient to establish actual malice. See Harte-Hanks Communications v. Connaughton, supra, 491 U.S. at 692 ("Of course, the press need not accept 'denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error.'") (citing, Edwards v. National Audubon Society, Inc., 556

F.2d 113, 121 (2d Cir.1977)); accord, Prozeralik v. Capital Cities Communs., supra, 82 N.Y.2d at 486-487 (quoting the same language from Edwards).

Statement #3 (timing of the exclusion): Respondent has failed to prove – whatever Appellants may have known more than thirty-five years previously – that at the time of the publication Appellants knew this statement was false. Indeed, it is hornbook libel law that actual malice is determined on the basis of the defendant's knowledge at the time of publication. See Sweeney, supra, 84 N.Y.2d at 792 ("'Actual malice' means that defendants published the false information about plaintiff 'with knowledge that it was false or with reckless disregard of whether it was false or not'" (citing Sullivan, supra, 376 U.S. at 280)). Just as information acquired after publication cannot establish actual malice, e.g., Herbert v. Lando, 781 F.2d 298, 305-306 (2d Cir. 1986); Farrakhan v. N.Y.P. Holdings, 168 Misc. 2d 536, 543 (N.Y. County 1995), information from events that occurred 35 years earlier that has been forgotten or remembered with less than perfect accuracy cannot establish actual malice because it is no longer present in defendant's subjective awareness.

Statement #4 ("destructive" effect of the exclusion): There is absolutely no proof of Appellants' actual malice with respect to this statement – that is, that Appellants knew of its falsity or entertained serious doubts as to its truth. Indeed, the evidence shows that Appellants genuinely believed – both contemporaneously

and thirty-five years later – that the Blind Brook exclusion had a destructive impact on the community, including the negative impact on their own household.

Statement #5 ("leading the Town to destruction"): There has been absolutely no proof offered of Appellants' actual malice as to this final statement.

CONCLUSION

On either an opinion-based or a fact-based review, the Amended Judgment should be reversed because it violates the two bedrock constitutional principles applicable to a public official's defamation claims: first, that a finding of liability and damages cannot constitutionally be imposed to punish protected statements of opinion; and second, that no judgment for defamation may be sustained without clear and convincing proof of the publication of substantially false and defamatory statements of fact with constitutional malice.

In dismissing Respondent's claims, this Court should also make note of the significant failures of the courts below to exercise due judicial diligence in protecting Appellants' substantial constitutional rights in a timely fashion at each stage of this litigation. To remedy the serious shortcomings of the procedures applied – on summary judgment, at trial and on appeal – this Court should hold, and make clear for future cases, that courts must remain vigilant in examining and, where appropriate, dismissing constitutionally-deficient defamation claims at the earliest possible stage in order to avoid the "chilling effects" of unwarranted and

unduly extended defamation litigation (the heavy costs of which have the most troubling impact on small, independent publishers such as Appellants); that appropriate procedures should be applied by trial judges to avoid inappropriately putting protected expression on trial; and that the state's appellate courts must always take seriously their constitutional obligation to independently review such determinations and judgments with an appropriately heightened sensitivity to the essential rights and values at stake in such cases under the First Amendment and Article I, Section 8.

Dated: New York, New York
August 21, 2007

Respectfully Submitted,

_____

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Section 500.1 of the Rules of the Court of Appeals, Defendant-Appellant Westmore News, Inc. certifies that it is a New York corporation and that it has no corporate parents, subsidiaries or affiliates.

Dated: New York, New York
August 21, 2007

HENRY R. KAUFMAN, P.C.

By: _____
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