To be Argued by:
HENRY R. KAUFMAN
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Second Department

GERARD MATOVCIK,

Docket No.: 2012-03646

Plaintiff-Respondent,

– against –

TIMES BEACON RECORD NEWSPAPERS, THE VILLAGE BEACON RECORD, VILLAGE TIMES, INC. and PETER C. MASTROSIMONE,

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

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Suffolk County Clerk's Index No. 12283/04

STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—Second Department

GERARD MATOVCIK,

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1. The index number of the case in the court below is 12283/04.

2. The full names of the original parties were Gerard Matovcik, Times Beacon Record Newspapers a/k/a The Village Times Herald, a/k/a The Port Times Record, a/k/a The Village Beacon Record, a/k/a The Times of Smithtown, The Times of St. James, The Times of

Nesconset and Peter C. Mastrosimone. The caption was amended as of September 28, 2005. The current caption is as set forth above.

3. The action was commenced in Supreme Court, Suffolk County.

4. The action was commenced on or about May 18, 2004 by filing of a Summons with Notice. Issue was joined on or about September 20, 2004 by service of an Answer.

5. The nature and object of the action involves alleged defamation.

6. This appeal is from an Order of the Honorable Daniel M. Martin, entered on or about March 30, 2012, which denied Defendants' Motion for an Order Granting Summary Judgment.

7. This appeal is on the full reproduced record.

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QUESTIONS PRESENTED

1. Did the court below err, as a matter of constitutional law and procedure, in denying Defendants-Appellants' Motion for Summary Judgment in this constitutional defamation action?

Yes.

2. On its de novo review of the undisputed record, should this Court grant summary judgment in Defendants-Appellants' favor for lack of a triable issue of fault?

Yes.

3. On its de novo review of the undisputed record, should this Court grant summary judgment in Defendants-Appellants' favor for lack of a triable issue of falsity?

Yes.

PRELIMINARY STATEMENT

This is an appeal from the complete failure, by a newly-assigned Justice, unfamiliar with the facts and the prior extended history of the case, to properly examine or rule upon a Motion for Summary Judgment made by the media defendants in this constitutional defamation action.[1]

In a case where media-protective constitutional standards, substantive and procedural, are indisputably applicable, the court below, in denying Defendants-Appellants' Motion for Summary Judgment, completely misunderstood, and misapplied or failed to apply, those essential constitutional standards. In fact, Justice Martin turned the applicable constitutional standards on their heads and he failed even to accord the normal standard of review to which any fully-documented summary judgment motion is entitled.

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[1] A "constitutional" defamation action is one whose governing standards are defined by constitutional principles the express purpose of which is to limit liability in order to protect freedom of speech and of the press. *See*, *e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (First Amendment limitations); *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235 (1991) (State constitutional limitations under Article I, Section 8). Constitutional defamation actions are not only governed by substantive standards intended to limit liability but those standards are also effectuated by special *procedures* adopted to achieve the same purpose, including the shifting of burdens and, of greatest significance on this appeal, an emphasis on summary judgment in order to minimize the burdens and chilling effects of prolonged defamation litigation. *See* Point I.D.2., *infra*. There is no dispute that this case, involving publications about a public official, and/or a subject of undoubted public concern, is a constitutional defamation action, subject to the full range of substantive and procedural protections.

As a direct result of the clear and reversible errors of the court below, of its failure to perform its proper function at the summary judgment stage, and of its clearly erroneous failure to dismiss this baseless constitutional defamation action, Defendants-Appellants' constitutional rights have been violated and their vindication has been improperly delayed or denied.

Defendants-Appellants' rights are now placed in further jeopardy by the looming prospect of a burdensome and wholly unwarranted trial based on patently unconstitutional standards. Considering Defendants-Appellants' clear entitlement to summary judgment as a matter of law, submitting the facts of this case to a jury, on the undisputed record of non-actionable, constitutionally-protected media publications on matters of clear public concern, would represent a further violation of Defendants-Appellants' protected constitutional rights.

THE PRIOR APPEAL VERSUS THE ISSUES NOW PRESENTED ON SUMMARY JUDGMENT

On the prior appeal, Defendants-Appellants had moved to dismiss on the ground that the documentary evidence of the sworn admissions made in Plaintiff-Respondent's separate litigation over the same issues with the School District established the substantial truth of their publications.

On that appeal this Court disagreed with Justice Costello that the documentary evidence resolved *all* issues as to substantial truth *as a matter of law*. In two respects it held that the documentary evidence revealed remaining factual disputes: first, whether Plaintiff-Respondent's admitted actions in collecting money from students for books that had already been budgeted had been known to and authorized by school officials (the "prior authorization" claim); and second, whether Plaintiff-Respondent's off-the-books expenditures had "benefited only the faculty" rather than being spent on "supplies used by or for the students (the "student expenditures" claim). R.237.

On remand, Plaintiff-Respondent made an earlier motion for summary judgment on the preposterous claim that this Court's initial ruling amounted to a finding of Defendants-Appellants' liability for defamation as a matter of law. R.323. Justice Costello appropriately rejected Plaintiff-Respondent's extreme misreading of this Court's prior ruling, holding that reversal of a dismissal on the pleadings could not properly be interpreted as a finding in favor of Plaintiff-Respondent on liability or as justifying any limitations on the normal process of discovery. R.253.

After party depositions were concluded, and Plaintiff-Respondent elected to file his Note of Issue without taking any witness depositions or submitting any other new evidence as to either falsity or fault, Defendants-Appellants moved for summary judgment and Plaintiff-Respondent cross-moved for the same relief.

On those motions it was Plaintiff-Respondent's constitutional burden – at the summary judgment stage – to adduce a triable issue as to *both* falsity *and* fault based on competent evidence. And it was the obligation of the court below – also at the summary judgment stage – to carefully examine the record to determine whether Plaintiff-Respondent had met his dual, constitutionally-mandated burdens.

In every respect, the court below failed to perform its clearly-delineated functions as to each of these issues.

It failed to apply the proper constitutional standard of fault. Actually, it did not even bother to determine the proper standard. And in the face of a detailed presentation of the undisputed facts of Defendants-Appellants' reporting, including multiple sources for every statement in their publications, it relied on nothing more than Plaintiff-Respondent's attorney's affidavit – that has no probative force – to support its finding of a triable

dispute on the issue of fault yet it failed to in any way particularize the material facts on the fault issue that were supposedly in dispute.

Defendants-Appellants were clearly entitled to a determination of the standard of fault applicable to that dispositive issue on their motion for summary judgment. Yet their non-frivolous argument in favor of the highest standard of fault (constitutional malice[2]) was entirely ignored by the court below.

Had the court below bothered to consider that argument, and had it properly applied the constitutional malice standard, Plaintiff-Respondent could not possibly have defeated summary judgment on the undisputed record. This is because Plaintiff-Respondent had not adduced a scintilla of proof of constitutional malice, whereas the First Amendment required that his proof on that issue must be "clear and convincing" – *and* that such clear and convincing evidence must have been adduced at the summary judgment stage.

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[2] The technical term for the constitutional standard of fault applicable to public officials is "actual malice." However, for precision some courts have adopted the shorthand term, "constitutional malice." For an explanation of the contrast between the "constitutional" malice standard and the preexisting common-law "malice" standard), *see Liberman v. Gelstein*, 80 N.Y.2d 429, 438 (1992); s*ee also* Point II.B.2., *infra*.

But even if the court below had properly considered the applicable standard of fault and had held that Plaintiff-Respondent was a private figure, Plaintiff-Respondent would still have had to adduce a triable issue of fault under New York's special requirement of "gross irresponsibility." Yet, once again, the court below totally ignored the well-defined requirements of that highly-protective standard. And in so doing the court below completely failed to consider or even to acknowledge the detailed factual record of meticulous verification that had been submitted by Defendants-Appellants in support of their Motion – a record undisputed by any competent evidence submitted by Plaintiff-Respondent in opposition to summary judgment.

Instead, the court below merely noted – without identifying any record basis for its ruling, and relying solely (and improperly) on an attorney's affidavit: "as plaintiff's counsel indicates in his affirmation (*sic*), questions of fact exist as to whether defendants complied with the proper standards for verifying the story." R.7. Yet "proper standards for verifying [a] story" is not a standard recognized by the constitutional law of defamation.

Also regarding the issue of fault, the court below completely failed to address what is ultimately the dispositive fact in this case – under either the

actual malice or gross irresponsibility standard. That is, that Plaintiff-Respondent has adduced no proof at all that Defendants-Appellants were *ever* made aware, or that they could have been aware – *prior to publication* – of Plaintiff-Respondent's prior authorization and student expenditure claims. Indeed, on the undisputed record, neither of those claims were made known to Defendants-Appellants until one week *after* the publications at issue in this case. On this basis alone, over and above all of the others, Plaintiff-Respondent's failure of proof on the issue of fault was complete, fatal to his claim, yet left unnoted by the court below.

The prior appeal, from grant of the motion to dismiss, could be resolved solely on the basis of whether *Defendants-Appellants* had met *their* burden of establishing that the document evidence completely resolved all issues as to the substantial truth of the publications at issue – as a matter of law. The question of fault was not before this Court and discovery had not been taken on that issue.

On this appeal it is essential to recognize that the issues and the applicable burdens are entirely different. On this appeal the issue is whether *Plaintiff-Respondent* met *his* heavy burden of proof to adduce a triable issue as to Defendants-Appellants' fault in relation to any statement that Plaintiff-

Respondent has met his burden of establishing was false (or at least triable as to falsity).

In any case, this Court reviews the summary judgment record *de novo*. And in this case, involving undoubted constitutional rights, this Court should all the more thoroughly examine the record to assure that errors of constitutional dimension are corrected.

When there is no triable issue as to the dispositive legal defenses, summary judgment is warranted in any case. On the undisputed record this is not a close case. But even in cases of doubt, the constitutional command is clear: courts are obligated to err in favor of freedom of speech because erroneous prolongation of unmeritorious defamation actions burdens the speaker's constitutional rights.

Accordingly, as Plaintiff-Respondent clearly cannot meet his proper constitutional burdens, this court must reverse the denial of summary judgment and dismiss this meritless defamation action.

THE UNDISPUTED FACTS ON THE SUMMARY JUDGMENT RECORD

In June 2003, Plaintiff-Respondent, Gerard Matovcik, stepped down as Chairman of the English Department of the Miller Place High School, R.313, and beginning in the Fall of 2003, he went on medical leave. R.318.

Shortly thereafter, school officials hired a Special Counsel to investigate Matovcik's role in collecting monies from students for vocabulary books that had been paid for and in using the funds for other unbudgeted Departmental purposes. R.405.

As of the beginning May, 2004, after the secret investigation was evidently coming to a conclusion, Matovcik remained on leave while the School District and his attorney were negotiating a possible confidential settlement of the matter. R.409.

It was at that juncture, on May 10, 2004, that Defendant-Appellants' reporter/editor, Defendant-Appellant Mastrosimone, first received a tip from an anonymous caller, claiming to have inside knowledge of the investigation. R.48.

It was that tip, later confirmed by multiple, responsible sources, that ultimately led to the publications of May 13, 2004, that are at issue in this action. R.47-58.

The anonymous tipster, who claimed to be a School District employee and a parent in the District, disclosed various details of Matovcik's book collections, expenditures and the pending investigation, criticized his

activities, and expressed her opposition to any arrangement that would have permitted him to return to the classroom. R.49-50.

Unable to establish the anonymous source's identity, and seeking to confirm her story, Mastrosimone embarked on a systematic investigation of the tipster's claims. R.50-56.

When all was said and done, Mastrosimone spoke to a total of thirteen sources related to the news story he ultimately wrote. R.55.

These authoritative and reliable sources included the Superintendent of the School District, the highest official with direct knowledge of the investigation and the underlying events, and three members of the School Board. R.50-53.

Both the Superintendent and one member of the School Board expressly confirmed the key elements of the anonymous tipster's story and they provided certain further details. R.50-53.

No person contacted by Mastrosimone contradicted or denied the central elements of the original tip or of the news story or editorial ultimately published by Defendants-Appellants. R.56.

In the course of his systematic effort to verify all aspects of his reporting Mastrosimone also sought to obtain Plaintiff-Respondent's side of

the story. He attempted to leave messages for Mr. Matovcik but never connected. R.54.

However, Mastrosimone did speak to Matovcik's attorney, John Ray. The record is undisputed that Mr. Ray limited his comments to the question of Matovcik's leave of absence, and to generally assuring Mastrosimone that Plaintiff-Respondent had done "nothing unlawful." R.54. It is indisputed Mastrosimone included *all* of Ray's comments in his news article. R.95-96.

Most significantly, the decision by Mr. Ray to limit his initial public comments to such general denials meant that, prior to publication, Mastrosimone was *never* advised of the prior authorization and student expenditure claims.[3]

In sum, prior to Defendants-Appellants' publication, Plaintiff-Respondent's attorney made no attempt to deny his client's involvement in the collection and expenditure of student funds, he did not deny that the matter was under investigation and – most significantly – he did not claim

[3] Matovcik and Ray ultimately held a press conference in which for the first time they publicly aired these two claims. Defendant-Appellants' newspaper covered that event and published those claims. However, that press conference was held one week *after* the original article and editorial were published. R. 99-100.

either that the collections were authorized or that the funds were being used to benefit students as opposed to the English Department. R.54.

On May 13, 2004, Defendants-Appellants published the news story and editorial that are the subject of Plaintiff-Respondent's defamation claims.

Thereafter, Plaintiff-Respondent and the School District failed to consummate the confidential settlement that had been under discussion. Instead, on June 7, 2004, the Miller Place School Board formally found that probable cause existed, based on the investigation of its Special Counsel, to pursue a total of 410 disciplinary charges, pursuant to Education Law Section 3020-a, against Plaintiff-Respondent in connection with his book collection activities. R.123-84.

The 410 disciplinary charges were based on the very same activities that Defendants-Appellants had reported and commented on editorially. Among the specific disciplinary charges advanced by the District against Plaintiff-Respondent were several counts of "misappropriation" (Specifications 82, 164, 246, 328 and 410) and another series of counts alleging violations of the New York Penal Law (Specifications 76, 158, 240, 322 and 404). R.123-84.

Plaintiff-Respondent commenced an Article 78 proceeding contesting the School's disciplinary charges. During the course of that proceeding it is undisputed that Matovcik acknowledged, in multiple submissions the central role he played in the book collections and expenditures that had been reported by Defendants-Appellants. R.16-24.

Indeed, in course of post-remand depositions in this case, Matovcik not only admitted the truth of the core elements of Defendants-Appellants' publication but also admitted various additional facts which might have portrayed him in an even more negative light had they been known at the time of publication.

For example, because his collections were off the normal books, Plaintiff-Respondent admitted that: he kept the money he collected, some of it in cash, in a briefcase that he carried around or left in his office (R.356-58); the money collected from students to purchase vocabulary books was used for other departmental purposes, there was no formal plan or budget for these expenditures, so that the funds were spent as his discretion (R.379-80); when confronted by school officials, he was unable to provide proper receipts for many of his expenditures (R.425); and it took him (assisted by his wife) several weeks to attempt to recreate a full accounting of his

expenditures (R.407, 422). Yet, in the end, he lacked receipts for more than one-third of the purchases ($1845.60 of the total $5,490.33 expended). R.121. Moreover, Defendants-Appellants did not report, because they were not told, that the School District had commenced a formal investigation into Plaintiff-Respondent's activities led by a Special Counsel. R.405.

In January 2005, Matovcik and the School District entered into a settlement of their separate litigation over his vocabulary book collection activities. R.193-202.

The result of that settlement was that, although admitting no wrongdoing or liability, Plaintiff-Respondent accepted a severe "Reprimand," R.195, which recited that his uncontested actions in connection with the vocabulary book collections, and his failure to account for the unbudgeted expenditures, were "unacceptable;" he paid an "Administrative Penalty;" and he agreed to transfer to another school district, to a loss of tenure, and to early retirement. R.193-202.

SUMMARY OF ARGUMENT

The decision of the court below must be reversed because Justice Martin committed multiple errors of constitutional dimension, substantive and procedural, in denying Defendants-Appellants' Motion for Summary Judgment. (Point I)

In light of the well-settled constitutional requirement that Plaintiff-Respondent meet his burden of proving a triable issue as to falsity, at the summary judgment stage, the decision of the court below was erroneous, and violated clear constitutional law, when it purported to shift the burden to Defendants-Appellants to establish the truth of their publications. (Point I.A.)

The court below also erroneously failed to impose a meaningful burden of proof on Plaintiff-Respondent to adduce a triable issue as to Defendants-Appellants' fault, at the summary judgment stage, when it declined even to identify, much less to apply, the applicable, constitutionally-mandated standard of fault and when it failed to discuss or even identify in what respect Defendants-Appellants had purportedly failed to meet some undefined "standard for verification" of their article and editorial. (Point I.B)

Moreover, the court below erroneously misread and misunderstood this Court's ruling on the prior appeal to the extent it concluded that its unconstitutional failure to apply the well-established constitutional burdens on the issues of falsity and fault, at the summary judgment stage, was somehow justified by this Court's ruling. (Point I.C.)

Finally, the court below erred when it failed to apply even the normal standards for ruling on a Motion for Summary Judgment and in so doing also failed to accord to Defendants-Appellants' the special vigilance required in considering motions for summary judgment in constitutional defamation actions. (Point I.D.)

This Court's *de novo* review of the undisputed record will establish that Defendants-Appellants are entitled to summary judgment for lack of a triable issue as to fault. (Point II)

The undisputed and uncontested record of Defendants-Appellants' systematic reporting, based on highly-reliable sources, negates a finding of fault under any standard. (Point II.A.)

If held to be a "public official," there is no question but that Plaintiff-Respondent failed to adduce a triable issue as to Defendants-Appellants "constitutional malice." (Point II.B.)

If held to be a private figure, Plaintiff-Respondent still failed to adduce a triable issue as to Defendants-Appellants' fault under the demanding standard of "gross irresponsibility." The undisputed fact that Defendants-Appellants had at least two highly-reliable sources for every allegedly false and defamatory factual statement in their publications makes it impossible, as a matter of law, for Plaintiff-Respondent to meet his burden to adduce a triable issue of fault at the summary judgment stage even under that lesser standard. (Point II.C.)

Plaintiff-Respondent also failed to meet his burden of adducing a triable issue as to fault, under either fault standard, because there is no evidence in the record that Defendants-Appellants were ever told, or could possibly have known prior to publication, of Plaintiff-Respondent's prior authorization or student expenditure claims. (Point II.D.)

Because the finding of a triable issue as to fault was clearly and indeed constitutionally-erroneous, this appeal can be disposed of, and on the undisputed record summary judgment in favor of Defendants-Appellants can be granted by this Court, even if the alleged falsity of any defamatory statement in the article is for argument's sake assumed. Nonetheless, this Court's *de novo* review of Plaintiff-Respondent's failure to meet his burden

of adducing a triable issue as to falsity will put into further perspective the clear errors of the court below and the clear entitlement of Defendants-Appellants to summary judgment on the issue of falsity as well as fault. (Point III)

Plaintiff-Respondent has never seriously contested the truth of the core factual allegations of his admitted involvement in the collection and diversion of student vocabulary book funds, as to which he also does not contest that he ultimately accepted a "reprimand" reciting that his actions were "unacceptable," along with other severe sanctions. (Point III.A.)

As to the two issues identified by this Court on the prior appeal, the substantial truth of which it held was not established as a matter of law by the documentary evidence, on remand and after the close of all discovery Plaintiff-Respondent completely failed to meet what was then *his* burden to adduce any new evidence that could sustain a finding of a triable issue as to falsity. In fact, although it was not their burden, during the course of discovery Defendants-Appellants adduced further evidence and admissions by Plaintiff-Respondent which negate the possibility of any proper finding as to the falsity of their publications even on those two issues. (Point III.B.)

ARGUMENT

I. THE COURT BELOW COMMITTED MULTIPLE ERRORS OF CONSTITUTIONAL DIMENSION, SUBSTANTIVE AND PROCEDURAL, IN DENYING DEFENDANTS-APPELLANTS' MOTION FOR SUMMARY JUDGMENT

On this appeal from the denial of Defendants-Appellants' Motion for Summary Judgment, this Court has the ability and the power to review questions of fact as well as law. CPLR § 5501. And this Court is not bound by any findings of the court below with which, upon its independent review of the Record, it disagrees. *See, e.g., Rothouse v. Ass'n of Lake Mohegan Park Prop. Owners, Inc.*, 15 A.D.2d 739, 739 (1st Dept. 1962) ("We, of course, are free to resolve de novo the question of whether summary judgment should be granted."); *Fairley v. Peekskill Star Corp.*, 83 A.D.2d 294, 294 (2d Dept. 1981) ("Special Term denied the [defendant's] motion [for summary judgment], finding that questions of fact existed. We disagree."); *Guarneri v. Korea News, Inc.*, 214 A.D.2d 649, 650 (2d Dept. 1995) (reversing denial of the newspaper defendants' motion for summary judgment).

In any event, in its decision denying summary judgment to Defendants-Appellants, the court below made no findings – despite an

extensive, carefully-briefed record – that warrant credence or concern, either legal or factual. Indeed, on each and every pertinent aspect of Defendants-Appellants' summary judgment motion: the substantive law, interpretation of the undisputed factual record, and application of the proper procedures for considering summary judgment, the court below clearly erred.

A. Ignoring and Violating Decades of Binding Precedent, the Court Below Purported to Impose on Defendants-Appellants the Burden of Proving the Truth of their Allegedly Defamatory Publications, at the Summary Judgment Stage, a Clear Error of Constitutional Law

The court below attempted to justify its refusal to grant defendants' motion for summary judgment on their failure "to come forth with new evidence which would establish, as a matter of law, that the facts, as set forth in the article and editorial, are true." R.7.

In so reasoning, the court below clearly defied decades of binding constitutional precedent. For there can be no doubt but that it is the defamation plaintiff who bears the burden of proving the falsity of the allegedly defamatory publication (and not the defendant who must prove its truth). *New York Times v. Sullivan*, 376 U.S. 254 (1964).

Indeed, as the Supreme Court has instructed, it would be "antithetical to the First Amendment's protection of true speech on matters of public

concern" to burden the defendant, even if the end result is to "insulate from liability some speech that is false, but unprovably so," accepting that as the price for preserving this country's most cherished value: "The First Amendment requires that we protect some falsehood in order to protect speech that matters." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777-78 (1986).

Finally, this Court has itself recognized, as it must, that libel plaintiffs bear the burden of proving falsity at the summary judgment stage. *See Love v. William Morrow & Co., Inc.*, 193 A.D.2d 586, 587 (2d Dept. 1993) ("New York courts will not hesitate to apply the ordinary rules of summary judgment when the plaintiff has not set forth sufficient evidentiary facts to generate a triable issue as to the falsity of a statement in issue.")

B. The Court Below Erred as a Matter of Constitutional Law When it Failed to Impose on Plaintiff-Respondent His Burden to Establish a Triable Issue as to Defendants-Appellants' "Fault," Properly Defined, and It Failed Even to Identify the Requisite Fault Standard

Similarly ignoring decades of constitutional command, the court below also failed to require Plaintiff-Respondent to establish a triable issue as to Defendant-Appellants' "fault" in publishing the allegedly defamatory statements. Indeed, the court failed to determine, much less even to

consider, the proper standard of fault in this case – be it the "actual malice" standard of *New York Times* applicable to "public officials" or the "gross irresponsibility" standard applicable to "private figures" on matters of public concern under *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196 (1975).

Rather than put Plaintiff-Respondent to his properly-defined burden, and without identifying any triable fact issues as to fault, the court below essentially rested its decision on some unspecified allegations in the affidavit submitted by Plaintiff-Respondent's attorney: "as plaintiff's counsel indicates in his affirmation, questions of fact exist as to whether defendants complied with the proper standards for verifying the story prior to publication of the article and editorial." R.7.

Clearly, Justice Martin's cursory finding of a dispute over "standards for verifying," with no discussion of the legally-define standards or the undisputed record of Defendants-Appellants' meticulous reporting, did not accord with the well-established constitutional law of "fault." *See generally* Point II., *infra*.

C. The Court Below Misread and Misapplied this Court's Ruling on the Prior Appeal In Purporting to Justify Its Unconstitutional Application of Erroneous Standards at the Summary Judgment Stage

Nothing in this Court's ruling on the prior appeal can possibly justify shifting the established constitutional burdens of proof from Plaintiff-Respondent to the Defendants-Appellants at the summary judgment stage, or ignoring the normal summary judgment rules that require the nonmovant to come forward with sufficient evidence to establish a factual dispute as to a material issue raised by the motion.

In reinstating Plaintiff-Respondent's complaint more than four years ago, this Court relied on the very high burden faced – *by a defendant* – in seeking to dismiss a complaint based upon documentary evidence: "Where, as here, the defendants move pursuant to CPLR 3211(a)(1) to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." R.238.

Notwithstanding Plaintiff-Respondent's failed attempt to transform that narrow holding into a determination that Defendants-Appellants' publications were actionable as a matter of law, it is clear that in reinstating

this case this Court did nothing more than identify two issues that were not fully resolved by the documentary evidence on a motion to dismiss. Certainly this Court did not (and could not) relieve Plaintiff-Respondent of *his* burden of proving, on Defendants-Appellants' motion for summary judgment, (1) that Defendants-Appellants' publications were false; and (2) that Defendants-Appellants acted with the constitutionally requisite level of fault.

Nonetheless, that is exactly how the court below misread this Court's narrow holding. First, the court below placed on Defendants-Appellants the burden of introducing "new evidence, which would establish, as a matter of law, that the facts, as set forth in the article and editorial, are true," with particular with reference to the issues of prior authorization and student expenditures claims previously identified by this Court. *See* Point I.C., *supra*.

Second, again seeming to suggest that this Court's prior opinion had so substantiated Plaintiff-Respondent's claim of defamation that nothing further was required by way of proof at the summary judgment stage ("As the Appellate Division has determined that the amended complaint set forth a legally cognizant cause of action to recover damages for libel . . ."), the

court below even failed to identify the applicable standard of fault, much less to put Plaintiff-Respondent to his constitutionally-mandated burden of demonstrating a triable issue as to whether Defendants-Appellants had acted with the constitutionally-requisite level of fault.

As a result, on the issue of the truth or falsity of Defendants-Appellants' publication, the court below failed to examine Plaintiff-Respondent's opposition to determine whether he had come forward with sufficient evidence to raise a triable issue. Indeed, Justice Martin entirely ignored the fact that in Plaintiff-Respondent's opposition to Defendants-Appellants' motion no submission was made by a party with direct knowledge of the events; only an attorney's affidavit was submitted, a hornbook example of an inadequate evidentiary showing in resisting the grant of summary judgment.

As to the issue of fault, instead of actually examining the Record and seeking to determine if competent evidence had been submitted by the nonmovant, the court below merely relied on unidentified allegations in Plaintiff-Respondent's attorney's affidavit in purporting to identify an unspecified triable issue of fact. This inadequate assessment was then compounded when Justice Martin failed to identify the applicable standard

of fault (relying instead on the vague "verification standard" fashioned by Plaintiff-Respondent's attorney out of whole cloth).

D. Finally, the Court Below Failed to Give Due Procedural Consideration to Defendants-Appellants' Summary Judgment Motion

1. The court below failed to apply even the normal standards for ruling on a summary judgment motion under CPLR 3212

Even a cursory examination of the opinion of the court below, in relation to the undisputed record marshaled by Defendants-Appellants in support of their motion, demonstrates Justice Martin's failure to apply even the normal standards for review of a well-supported and fully-briefed motion for summary judgment, much less the especially vigilant standards required in a constitutional defamation action.

Those normal standards require that, once the movant for summary judgment has submitted sufficient evidence to show that "the cause of action . . . has no merit," the court must grant the motion for summary judgment unless the nonmovant has come forth with sufficient evidence "to require a trial of any issue of fact." CPLR 3212(b).[4]

[4]This is, of course, entirely unlike the burden facing the party moving to dismiss a complaint for failure to state a cause of action under CPLR 3211, as on the prior appeal in this case, where a court must "accept the facts as alleged in the complaint as true, accord

As this Court has held, "once a moving party has established a prima facie case for summary judgment, a party opposing the motion must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests." *Winters v. Menowitz*, 226 A.D.2d 451, 452 (2d Dept. 1996). (internal citation omitted).

In a defamation action, as this court has also held, "[t]o defeat a motion for summary judgment by a media defendant in a libel action, the plaintiff must demonstrate that genuine and material questions of fact exist concerning the challenged elements of the cause of action. The plaintiff must also show that he can establish those elements at trial by the appropriate burden of proof." *Fairley*, 83 A.D.2d at 294.

Here, in this constitutional defamation action, it is absolutely clear and undisputed that Plaintiff-Respondent bears the burden of proving *both* falsity *and* fault *at the summary judgment stage* in order to defeat the motion.[5]

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plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *See Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

[5] *Love v. William Morrow & Co., Inc.*, 193 A.D.2d 586, 587 (2d Dept. 1993) (plaintiff's burden to prove falsity and gross irresponsibility at the summary judgment); *Freeman v. Johnston*, 84 N.Y.2d 52, 56 (1994), *cert. denied*, 513 U.S. 1016 (1994) (burden of public official or public figure to "prove actual malice by clear and convincing evidence applies even on a motion for summary judgment."); *Chapadeau v. Utica Observer-Dispatch,*

Under these governing standards, the court below, in imposing the wrong burdens on the wrong party, entirely failed to properly assess whether Plaintiff-Respondent had met his burden of adducing a triable issue as to those two elements of falsity and fault on which it was his burden at the summary judgment stage.

In fact, Plaintiff-Respondent put in no "evidentiary proof in admissible form." Indeed, the only document submitted in this case that contains "evidentiary proof in admissible form" was the sworn affidavit of Defendant-Appellant Mastrosimone who was the only witness whose deposition was taken in this case and whose testimony is in the Record who had direct knowledge of the process undertaken by Defendants-Appellants in reporting and verifying their news article and editorial. In support of his affidavit, R.47-58, Mastrosimone submitted a typewritten transcript of his notes, R.293-298 (the handwritten notes appear at R.268-84), which again were the only competent evidence of the sources that Mastrosimone interviewed and of what those sources said or did not say to him in the course of his reporting. There is no other competent evidence in the record

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Inc., 38 N.Y.2d 196, 200 (1975) (plaintiff submitted insufficient evidence of gross irresponsibility to defeat summary judgment motion).

bearing on the issue of Defendants-Appellants' "fault" or contesting Mastrosimone's notes and recollection on that issue.

Plaintiff-Respondent's only response to the Mastrosimone affidavit was his attorney's affidavit. The best that can be said of Mr. Ray's affidavit is that it is some combination of legal brief (Plaintiff-Respondent submitted no separate Brief in Opposition) and attorney argumentation, directed at the undisputed facts of record, attempting to characterize or dispute them in a fashion favorable to Plaintiff-Respondent's position.[6]

In no fashion did the Ray affidavit amount to "evidentiary proof in admissible form" – it is not based on competent competing evidence on the dispositive issue of fault, but solely based on attorney argumentation from the undisputed facts established in Defendant-Appellant Mastrosimone's sworn submissions.[7]

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[6] Notably, even as to the one issue on which Mr. Ray could in theory have submitted direct evidence – as a potentially pivotal fact witness regarding what Ray did or did not tell Mastrosimone about Matovcik's activities when he was contacted by Mastrosimone – the Ray affidavit elects to submit no evidence on that point.

[7] It is hornbook law that "an attorney's affidavit, unless the attorney happens to have first-hand knowledge of the facts—which is the exception rather than the rule—has no probative force." Professor David Siegel, in Siegel, N.Y. Practice § 281, at 464 (4th ed.). *See also Zuckerman v. City of New York*, 49 N.Y.2d 557, 563 (1980) ("bare affirmation of [plaintiff's] attorney who demonstrated no personal knowledge . . . is without evidentiary value and thus unavailing" to defeat motion for summary judgment).

The Ray affidavit also attempts to turn the testimony of Defendants-Appellants' publisher, Ms. Dunaief, regarding her aspirational standards for the newspaper, into some kind of super-legal requirement that would trump the well-established legal definition of "gross irresponsibility" in the governing case law. *See* Point II.C, *infra*. It is clear, however, that gross irresponsibility is an objective standard that is intended to focus on a gross departure from "the standards of information gathering and dissemination ordinarily followed by responsible parties." *Chapadeau*, 38 N.Y.2d at 199. Where a publisher sets for herself a higher standard, such an aspirational goal cannot be said to replace the minimum standard set by the Court of Appeals in *Chapadeau*.

Similarly, when Plaintiff-Respondent belatedly submitted a Reply Affidavit, solely in support of his Cross-Motion for Summary Judgment, R.1129-42, he provided no "evidentiary proof in admissible form" material to the issue of fault or gross irresponsibility. In fact, Plaintiff-Respondent candidly acknowledged at his deposition that he had no knowledge of Defendants-Appellants' state of mind when they published their news article and editorial. R.475-76.

2. Shunting summary judgment aside as a "drastic" remedy, the court below failed to accord the special vigilance mandated in a constitutional defamation action for assessing summary judgment motions, and for granting them whenever appropriate

Masking its failure to comply with the normal standards for summary judgment review behind the shibboleth of "drastic remedy," the court below also completely overlooked the special vigilance mandated in constitutional defamation actions. As this Court has held, the summary judgment court "should not hesitate to apply the normal standards" in such cases. *Love*, *supra*, 193 A.D.2d at 587.

Under general New York practice, courts frequently take a cautious approach toward summary judgment, describing it as a "drastic remedy." But in cases that implicate the free speech rights protected under both the U.S. and New York State Constitutions, however, New York's highest court has repeatedly cautioned that this approach is inapposite. Indeed, it is fair to say that summary judgment is the *preferred* method for disposing of defamation claims that threaten to chill freedom of speech.

The Court of Appeals, recognizing the "chilling effect of protracted litigation," has time and again "reaffirmed [its] regard for the particular value of summary judgment, where appropriate, in libel cases." *Immuno AG*

v. Moor-Jankowski, 77 N.Y.2d 235, 256 (1991). It has repeatedly recognized that the "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." *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 545 (1980); *see also 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); *Immuno AG v. Moor-Jankowski*, 145 A.D.2d 114, 128 (1st Dept. 1989), *aff'd*, 74 N.Y.2d 548 (1989) ("To unnecessarily delay the disposition of a libel action is not only to countenance waste and inefficiency but to enhance the value of such actions as instruments of harassment and coercion inimical to the exercise of First Amendment rights. Thus it has been recognized that [i]n the First Amendment area, summary procedures are even more essential [than other kinds of litigation]. For the stake here, if harassment succeeds, is free debate.") (internal quotations and citations omitted). Indeed, unless unmeritorious suits are dismissed at this early stage, "libel defendants will not be substantially better off than they were at common law before the era

of First Amendment jurisprudence ushered in by New York Times Co. v Sullivan." *Id.*

The Court of Appeals has also repeatedly recognized that summary judgment motions are particularly appropriate for testing plaintiffs' ability to meet their constitutional burdens. *See Gross v. New York Times Co.*, 82 N.Y.2d 146, 156 (1993) (reiterating that "compliance with the [constitutional] requirements is a matter that is well suited to testing, at least in the first instance, on a motion for summary judgment …"); *see also Mann v. Abel*, 10 N.Y.3d 271 (2008) (reversing denial of summary judgment in defamation action that the trial court had erroneously permitted to go to trial).

This tradition of "early" dismissal in defamation actions, where appropriate, is particularly well suited to the case at bar where – after eight years of litigation – Plaintiff-Respondent still cannot sustain his burden of proving either the falsity of the allegedly defamatory statements, *see* Point III, *infra*, or of establishing that Defendants acted with the constitutionally-requisite level of fault in publishing these statements. *See* Point II, *infra*.

II. THIS COURT'S *DE NOVO* REVIEW OF THE UNDISPUTED RECORD WILL ESTABLISH THAT SUMMARY JUDGMENT MUST BE GRANTED FOR LACK OF A TRIABLE ISSUE AS TO DEFENDANTS-APPELLANTS' FAULT

New York Times, *supra*, defines the stringent constitutional fault standard of "actual malice" applicable to any defamation action brought by a "public official." To establish constitutional malice the plaintiff must demonstrate, by clear and convincing evidence, that the defendant published an actionable defamation with "knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80.

In cases where the plaintiff is deemed not to be a public official (or public figure), if the alleged defamatory statement involves a matter of public concern, the Supreme Court has prohibited the states from imposing liability without a demonstration that the defendant was "at fault." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The Supreme Court left it to the states to determine what constitutes fault, holding only that – at a minimum – the plaintiff must prove negligence.

In *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196 (1975), the Court of Appeals chose to impose a more exacting standard than negligence. Under *Chapadeau*, the plaintiff must demonstrate that the defendant has "acted in a grossly irresponsible manner without due

consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." 38 N.Y.2d at 299.

Finally, and critical to the disposition of the case at bar, it is well-established that a defamation plaintiff's burden to prove fault – in addition to falsity – applies not only at trial but at the summary judgment stage. *See, e.g.*, *Freeman v. Johnston*, 84 N.Y.2d 52, 56 (1994), *cert. denied*, 513 U.S. 1016 (1994) (constitutional malice standard); *Chapadeau*, *supra* (gross irresponsibility standard).

A. Defendants-Appellants' Exhaustive Investigation, Including an Interview with Plaintiff-Respondent's Attorney, Easily Satisfies Any Applicable Standard of Fault

The undisputed record in this case provides *no* evidence that the Defendants published their articles with any applicable degree of fault. Indeed, Plaintiff-Respondent admitted at his deposition that he has no evidence of Defendants-Appellants' knowledge of falsity or reckless disregard. R.475-76. And Plaintiff-Respondent also submitted no evidence that could possibly establish Defendants-Appellants' gross irresponsibility.

To the contrary, far from being in any way aware of the falsity of his publication, recklessly disregarding any serious doubts to truth, or acting in a grossly irresponsible manner, the record is clear, powerful and undisputed

that Defendant-Appellant Mastrosimone conducted an exhaustive investigation before the publishing the allegedly defamatory material *and* that he was *never* put on notice of the claimed falsity of any aspect of what he ultimately wrote prior to publication. R.50-56.

Mastrosimone spoke *twice* with school Superintendent Donald Carlisle, the highest official with the most authoritative knowledge of the subject events, who confirmed the central details provided by the initial anonymous source (e.g., that Plaintiff-Respondent was involved in the collection of money for vocabulary books, that he had spent it on other items, that his use of this use of the funds was "inappropriate," that he had been suspended or excluded from the classroom in some fashion and that some official process was underway to deal with or settle the matter). R.50-52.[8]

In addition, Mastrosimone spoke with *three* members of the school board, the president of the teachers' union, and other parents and local community activists in the school district as well as Plaintiff-Respondent's attorney. R.53-55. One Board member, Ann O'Brien, also provided

[8] Mastrosimone also left a message for the school principal, Seth Lipshie, but never connected. R. 834-35.

substantive confirmation of key aspects of Defendants-Appellants' publications (e.g., Plaintiff-Respondent was collecting money for one stated purpose and using it for another, which she characterized as a "slush fund for the English Department"). R.53; 294; 733; 813-14.

All together, Mastrosimone spoke with thirteen sources, not one of whom denied the essentials of the original tip he had received. R.55-56. The only other information provided was from Plaintiff-Respondent's attorney, who also did not deny the basic facts but simply issued a broad denial that Plaintiff-Respondent had engaged in any unlawful activity,[9] which response was duly quoted in the article. R.54; 96.

This Court on the prior appeal did not have the benefit of this uncontested evidence documenting Defendants-Appellants' careful and meticulous reporting process, and their complete absence of knowledge of falsity or any other cognizable fault. And most significantly, on remand, Plaintiff-Respondent neither undertook to develop, nor did he put into the record in opposition to summary judgment, any competent evidence from

[9] It has long been held that mere denials, without more, are entirely insufficient to meet the burden of establishing actual malice by clear and convincing evidence. See, e.g., *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113, 121 (2d. Cir. 1977) (Actual malice "cannot be predicated on mere 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").

any competing witness or source to dispute the facts of Defendants-Appellants' total lack of fault. Indeed, at the summary judgment stage, Plaintiff-Respondent did not in any way contest the accuracy of Mastrosimone's undisputed recollection, or of his detailed supporting notes, as to the sources he spoke to, and as to what they told him, about the vocabulary book collection controversy.

In short, on the dispositive issue of Defendants-Appellants' fault, the undisputed record is barren of any competence evidence of fault and on that basis alone, the case is ripe for summary judgment in Defendants-Appellants' favor.

B. Plaintiff-Respondent Is a Public Official Who Has Failed to Adduce Any Evidence, Much Less "Clear and Convincing" Evidence, of Defendants' "Constitutional Malice"

1. As the Chairman of a Public High School English Department, Plaintiff-Respondent Is a "Public Official" for Purposes of a Defamation Claim Involving His Exercise of Substantial Authority and Unilateral Discretion Over Students in Collecting and Misappropriating their Money

The rule that public officials cannot be held liable in defamation without proof of actual malice originated in the *New York Times* case, and the definition of a "public official" is a matter of federal constitutional law. *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966). In New York, at the present

time, whether a public school teacher should be deemed a public official or not for purposes of a defamation action has not been authoritatively determined.[10]

Here Plaintiff-Respondent was far more than merely a public school teacher – he was the Chairman of the English Department – and the publications at issue addressed actions by Plaintiff-Respondent that could only have been taken by virtue of the authority vested in him as Chairman. As such, Plaintiff-Respondent should be deemed a "public official," as that term of art has been defined for purposes of this constitutional defamation action.

Plaintiff-Respondent's administrative authority makes him more akin to a public school principal than a teacher, and New York courts have held that principals are public officials for purposes of defamation law. *See*, *e.g.*, *Jee v. New York Post Co.*, 176 Misc.2d 253 (N.Y. Co. 1998), *aff'd* 260 A.D.2d 215 (1st Dept 1999), *lv app den*, 93 N.Y.2d 817 (1999); *Neuschotz v.*

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[10]In *Chapadeau*, the Court of Appeals applied its new standard of "gross irresponsibility" to the plaintiff, who happened to be a public school teacher. However, there is no basis to conclude that *Chapadeau* stands for the proposition that a public school teacher can never be a public official. The news article in *Chapadeau* had nothing to do with the plaintiff's activities as a teacher. And no party had argued that the plaintiff was a public official for purposes of an article mistakenly linking the plaintiff to a drug arrest off school premises.

Newsday Inc., 824 N.Y.S.2d 769 (Kings Co. 2006); *Jimenez v. United Fed'n of Teachers*, 239 A.D.2d 265, 266 (1st Dept. 1997).

Indeed, given the widespread public concern about how taxpayer dollars are spent on public education, and the vigorous debate over school budgets in Plaintiff-Respondent's own school district, it is apparent that Plaintiff-Respondent's authority over the finances and administration of the English Department would spark the kind of public interest in his qualifications and performance that the Supreme Court has identified as the basis of the public official designation.[11]

Plaintiff-Respondent thus should be held to be a "public official" whose burden is to prove constitutional malice as defined under *Sullivan* and its progeny.

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[11] *See Rosenblatt v. Baer*, 383 U.S. 75 (1966) (public official designation applies to governmental employees "... who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs," *id.* at 85, or whose particular position "has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees ...." *Id.* at 86).

2. As a Public Official, Plaintiff-Respondent Wholly Failed to Meet His Burden of Coming Forward at the Summary Judgment Stage With Even a Scintilla of Evidence – Much Less "Clear And Convincing" Proof – of Defendants-Appellants' Constitutional Malice

Under *New York Times* and its progeny, the public official plaintiff in a defamation suit must establish – *by clear and convincing evidence* – that the defendant acted with "actual malice," that is, with "knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80.

Moreover, when the governing liability standard requires proof of actual malice by clear and convincing evidence, it is well-established that a genuine issue as to the existence of actual malice with convincing clarity must be established *at the summary judgment stage*. *Anderson v. Liberty Lobby*, 477 U.S. 242, 254 (1986); *Freeman*, 84 N.Y.2d at 56 ("This standard of 'convincing clarity' applies even on a motion for summary judgment."); *Goldblatt v. Seaman*, 225 A.D.2d 585 (2d Dept. 1996) (court must determine on motion for summary judgment "whether the plaintiff has met his or her burden of presenting evidence that could demonstrate, with convincing clarity [that defendant acted with actual malice]").

The undisputed record in the case at bar provides *no* evidence, much less *clear and convincing* evidence, that Defendants-Appellants published their articles with knowledge they were false or with a high degree of awareness that they were probably false. *See* Point II.A., *supra*. Indeed, a comparison of the undisputed record in this case with the record in cases in which summary judgment has been granted or upheld by appellate courts clearly mandates a dismissal in the case at bar.

For example, the defendant in *Freeman*, *supra*, allegedly "(1) received conflicting information, (2) was advised of a witness who could confirm the probable falsity of the accuser's charges, and (3) failed to make any effort to interview that witness." 84 N.Y.2d at 57. Yet the Court of Appeals nevertheless upheld the dismissal on summary judgment, holding that "no rational finder of fact could, in this case, find actual malice by clear and convincing evidence." 84 N.Y.2d at 58.

And in *Gross*, *supra*, a grant of summary judgment was upheld notwithstanding evidence that (1) the defendants had failed to investigate certain sources and (2) some of the sources may have borne the plaintiff ill will:

> The evidence relied upon by plaintiff in opposing the Times defendants' summary judgment motion, much of which is purportedly probative of the Times's failure to investigate certain sources and of the circumstance that some of the Times's sources may have borne plaintiff ill will, *is not probative of actual malice since it does not warrant the inference that the Times defendants entertained serious doubts about the truth of the complained of statements*. Accordingly, with respect to the Times defendants, plaintiff has not sustained his "daunting" burden of demonstrating that a jury could find actual malice with "convincing clarity."

281 A.D.2d 299, 299 (1st Dept.), *app. denied*, 96 N.Y.2d 716 (2001) (emphasis supplied; internal citations omitted).

These cases clearly establish that mere failure to investigate is not enough unless there is clear and convincing proof that the publisher subjectively entertained serious doubt but then failed to further investigate to alleviate those doubts. *See Sweeney Prisoners' Legal Services of New York, Inc.*, 84 N.Y.2d 786, 793 (1995) ("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.")

A fortiori, dismissal is required when – as here – a defendant speaks to numerous sources before going to press and no one gives him any cause to

doubt that the story he is about to publish is not accurate in all its essential details even if it turns out to be false in any regard.

Likewise, failure to speak to other witnesses, or to the plaintiff himself, is also clearly not enough to establish a defendant's constitutional malice. *See Sanderson v. Bellevue Hosp., Inc.*, 259 A.D.2d 888, 891 (3d Dept. 1999). Here, of course, Defendant-Appellant Mastrosimone left messages for Plaintiff-Respondent, and also spoke with his attorney, who declined to provide any information that would have caused Mastrosimone to doubt the accuracy of his story.

Countless other New York cases have granted summary judgment in media defamation actions under the "daunting" standard of constitutional malice. *See, e.g., Dancer v. Bergman*, 246 A.D.2d 573 (2d Dept. 1998); *Feldschuh v. State of New York*, 240 A.D.2d 914 (3d Dept. 1997); *Goldblatt, supra*; *Seltzer v. Orlando*, 225 A.D.2d 456 (1st Dept. 1996); *Roberts v. Oellrich and Behling, Inc.*, 223 A.D.2d 860 (3d Dept. 1996); *Roche v. Mulvihill*, 214 A.D.2d 376 (1st Dept. 1995).

Under these high standards and criteria, the record indisputably establishes that as a public official Plaintiff-Respondent cannot raise a triable issue as to the Defendants' constitutional malice.

C. Even If Held To Be a Private Figure, Plaintiff-Respondent Did Not Meet His Burden of Establishing That Defendants-Appellants Published Any False and Defamatory Statement in a "Grossly Irresponsible" Manner

Even if this court disagrees that Plaintiff-Respondent is a public official who is required to establish Defendants' constitutional malice by clear and convincing evidence, the protections available under New York law to publications about private figures on matters of public concern would require dismissal of this lawsuit in any event, also at the summary judgment stage.

Chapadeau and its progeny define gross irresponsibility as a high standard of fault.[12] Time and again, those cases grant summary judgment on findings that questionable journalistic practices, resulting in the publication of undeniably false and defamatory statements, do *not* rise to the level of gross irresponsibility.

As formulated in those cases, a media defendant's obligation is no more than to have had a reliable source for its publication. If the media defendant had no good reason to doubt the veracity of its source or the

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[12]Indeed, because the gross irresponsibility standard is an objective one, questions that have been raised regarding the appropriateness of summary judgment involving a defendant's subjective "state of mind" under are inapplicable under *Chapadeau*. ***See*** *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 545 (1980)

accuracy of its publication there can be no finding of gross irresponsibility. Moreover, under *Chapadeau*, a media defendant has no obligation to interview every possible witness to an incident or to write the most balanced article possible.

The Court of Appeals' tolerance for considerable unintended media error under the gross irresponsibility standard is clear. And this tolerance has been well understood in many cases subsequent to *Chapadeau*, all of which demonstrate that Plaintiff-Respondent wholly failed to meet his burden of establishing that Defendants-Appellants were grossly irresponsible.

Thus, in *Chapadeau* itself, it was undisputed that the newspaper had erroneously placed the plaintiff among a "trio" of persons arrested for certain very serious felony drug offenses. In fact, it was a "duo" that had been arrested and the plaintiff was not one of them. The record on appeal established that the newspaper consulted two sources and was said to have had two editors check its copy in regard to these facts. Yet it turned out that neither the source the newspaper had allegedly interviewed (a local police captain), nor the police records the newspaper was said to have examined,

actually supported the published allegation that plaintiff had been arrested along with the other two suspects.

In short, the article in *Chapadeau* published clearly erroneous details about serious and defamatory charges against the plaintiff and it was determined that the admitted errors were not based on any information received from any source but rather due solely to errors made by the media defendants themselves. Nonetheless, the Court of Appeals excused these undeniable journalistic errors as "hardly indicative of gross irresponsibility * * * [a] limited number of typographical errors, as this appears to be, are inevitable." 38 N.Y.2d at 200.

A long and largely unbroken line of cases since *Chapadeau* have followed the Court of Appeals in approving the award of summary judgment to media defendants under the gross irresponsibility standard – even where the defamation plaintiff was able to demonstrate that palpable and often damaging errors were committed by the defendants. Indeed, subsequent glosses on the gross irresponsibility standard make clear just how far the undisputed facts of this case depart from the kind of evidentiary showing that would be considered necessary to make out a case of actionable fault, in the sense of gross irresponsibility under *Chapadeau*.

For example, under *Chapadeau* there can be no finding of gross irresponsibility even when the media defendant relies on but a single source for its publication, provided that source is reliable, or if the media defendant had no good reason to doubt the veracity of its source or the accuracy of its publication, even when the defendant fails to interview significant witnesses and writes an article that is unbalanced, so long as the story is based on a reliable source.

Here, by contrast, it is undisputed that Defendants relied on multiple, reliable sources and that no one (including Plaintiff-Respondent's attorney) gave them reason to doubt the accuracy of the information provided by the original anonymous source.

In *Carlucci v. Poughkeepsie Newspapers, Inc.*, 88 A.D.2d 608 (2d Dept. 1982), the newspaper inaccurately linked the plaintiff corporation and its two principals to a man arrested on gambling charges. Although based on but a single source – a policeman at the local police barracks – this Court held that reliance on this source was sufficient to prevent a finding a gross irresponsibility, citing *Robart v. Post-Standard*, 74 A.D.2d 963 (3d Dept. 1980), *aff'd*, 52 N.Y.2d 843 (1981).

In *Robart*, the defendant newspaper incorrectly reported that the plaintiff was arrested by village police and charged with driving an uninsured vehicle. In fact, she was issued a ticket for failure to have an insurance card in her possession and required to appear in court where she was to be formally charged. No charges were brought and the ticket was dismissed after she appeared in court with proof of insurance. Notwithstanding the error, the appellate court reversed the trial court and granted defendant's motion for summary judgment.

Significantly, as the First Department later noted, not only was summary judgment granted in both *Carlucci* and *Robart* based on a single source, but in neither case was there any evidence that the sources were in fact reliable:

> In both *Robart* and *Carlucci* summary judgment was granted without any evidence of the reliability of the sources involved. In neither case did the reporter know even the name of the alleged police officer with whom he had spoken, and neither reporter verified the erroneous information with a second source. In both cases, the only evidence relating to the sources was a statement to the effect that the reporters, following normal procedure, had spoken to individuals whom they believed to be police officers.

Ortiz v. Valdescastilla, 102 A.D.2d 513, 520, 478 N.Y.S.2d 895, 900 (1st Dept. 1984). *See also Robare v. Plattsburg Publishing*, 257 A.D.2d 892, 685 N.Y.S.2d 129 (3d Dept. 1999) (reliance on a reliable source of

information for information about the plaintiff's past criminal record was not grossly irresponsible, even though the publication contained two clear errors, at least one of which was contradicted by a prior article that had been published in the same newspaper).

This Court has also demonstrated a very high tolerance for error under the gross irresponsibility standard, indeed error approaching sloppiness. For example, in *Grobe v. Three Village Herald*, 69 A.D.2d 175 (2d Dept. 1979), *aff'd*, 49 N.Y.2d 932 (1980), this Court granted summary judgment on a defamation claim based on an incorrect report that the plaintiff had pled guilty to harassment for striking a 13-year-old boy following a collision between the boy, who was riding his bicycle, and the plaintiff in a shopping mall of which plaintiff was the majority shareholder. In fact, however, the plaintiff had received nothing more than an adjournment in contemplation of dismissal (ACOD).

In *Grobe*, the reporter undertook to verify the information about plaintiff's criminal plea status by questioning the arresting officer, who was also the victim's father, and by calling the court. In holding that the plaintiff had failed to demonstrate gross irresponsibility, this Court was not deterred by the fact that the official on whom the reporter relied was the boy's father

and clearly not an unbiased source. Nor was it deterred by the fact that the reporter had been correctly informed by the court clerk (whose name he neither recorded nor could recall) that the plaintiff had received an ACOD. The reporter did not know and made no attempt to ascertain the meaning of that term even though he was unfamiliar with it. In sum, this Court held that the publication of a false and defamatory account that was based upon information received from an undeniably biased source and that ignored correct information received from the most reliable source was not grossly irresponsible.

In *Gorman v. Random House, Inc.*, 655 N.Y.S.2d 625, 237 A.D.2d 564 (2d Dept. 1997), the defendant book author and publisher were alleged to have falsely reported that in his class the plaintiff psychology professor had "espoused false beliefs and stereotyping with respect to people suffering from mental illnesses." In fact, however, it was actually the plaintiff's brother who taught the class in question. The defendant author had contacted the psychology department at the plaintiff's college in order to ascertain plaintiff's first name and the spelling of his last name. The college employee responding to defendant's question whether there was a "Professor

Gorman" in the department did not suggest that there were more than one but merely replied "Bernard Gorman."

In marked contrast to *Grobe* and *Gorman*, Mastrosimone did not rely on a single source for indisputably false information or elect to believe a biased source instead of the most reliable source in publishing undeniably false information. In this case, Mastrosimone conducted 13 interviews in researching his news article. R.55-56. None of the sources, including Plaintiff-Respondent's attorney, contradicted the essential details he had first heard from the original source. Moreover, Mastrosimone investigated further and located two highly reliable sources (the school superintendent and a school board member, both of whom indisputably had direct knowledge of the situation) for every core piece of information in the story. Even though the information provided by the original anonymous tipster whose identity he could not determine turned out to be essentially accurate, Mastrosimone did not simply rely on her claims. Rather he treated her claims as if they might have been biased or inaccurate and systemically sought to confirm them with multiple highly placed and reliable sources whose identity was known to him. R.55, 922.

In *Gaeta v. New York News, Inc.*, 62 N.Y.2d 340, 477 N.Y.S.2d 82 (1984), the Court of Appeals reversed the lower courts' denial of a motion for summary judgment under *Chapadeau* where, despite allegations of defamatory errors in the reporting, "[t]here was no reason to doubt the veracity of the information received from [the source], and indeed good reason to believe it was accurate." *Accord, Robart v. Post-Standard*, 425 N.Y.S.2d 891 (3d Dept. 1980), *aff'd*, 437 N.Y.S.2d 71 (1981) (granting summary judgment where "[t]he reporter would have no reason to doubt the accuracy of the information supplied [by a State police public information officer] and relying upon it did not demonstrate gross irresponsibility, even though the report given by the officer later proved to be inaccurate"); *Lee v. City of Rochester*, 254 A.D.2d 790 (4th Dept. 1998) (affirming grant of summary judgment on grounds that the "standard of 'gross irresponsibility' demands no more than that a publisher utilize methods of verification that are reasonably calculated to produce accurate copy * * * A newspaper reporter may 'rely on official reports by law enforcement officers, including unsworn reports, unless the reporter is aware of the probable falsity of the reports or has some reason to doubt their accuracy'") (Citations omitted); *Pollnow v. Poughkeepsie Newspapers, Inc.*, 107 A.D.2d 10, 17 (2d Dept.

1985) (affirming grant of summary judgment with respect to the newspaper on the ground that there was "no basis to doubt the factual accuracy" of a published letter to the editor).

In sum, there is absolutely no competent evidence in the summary judgment record here that would have given Defendants-Appellants' reporter reason to doubt the veracity of his highly placed sources or the accuracy of the information they provided. Accordingly, there is simply no triable issue as to Defendants-Appellants' gross irresponsibility.

Finally, as also recognized in the gross irresponsibility standard cases, *see, e.g.*, *Mitchell v. The Herald,* 137 A.D.2d 213 (4th Dept. 1988), a "newspaper is under no legal obligation to interview every possible witness … or to write the most balanced article possible. The newspaper's obligation is to base its story on a reliable source. It is clear that defendant's reporter did so and thus defendant was properly granted summary judgment." *See also Lee v. City of Rochester*, *supra*, 254 A.D.2d at 792-93 (4th Dept. 1998) ("Contrary to plaintiff's contention, a 'newspaper is under no legal obligation to interview every possible witness to an incident ... The newspaper's obligation is to base its story on a reliable source,'… . The fact

that the information published by Gannett proved to be inaccurate does not demonstrate gross irresponsibility.") (Citation omitted)

D. The *Unknowing* Omission of Facts that Might Have Placed Plaintiff-Respondent in a More Favorable Light Does Not Rise to the Level of Fault Under Any Standard

Plaintiff-Respondent argues that other "facts," not reported by Defendants-Appellants, would have cast his actions in a different light and that such alleged omissions amount to proof of some fault. It is well-settled, however, that it is the domain neither of juries nor courts (nor libel plaintiffs) to interfere with editorial judgments about what should or should not be included in media publications. *See James v. Gannett Co., Inc.*, 40 N.Y.2d 415, 424 (1976) ("Outsiders have no right to sit in the editor's chair."); *see also Gaeta*, 62 N.Y.2d at 349 (1984) ("Determining what editorial content is of legitimate public interest and concern is a function for editors.")

Moreover, Plaintiff-Respondent's admissions at his deposition reveal that many of the "facts" omitted in Defendants-Appellants' coverage would not necessarily have cast Plaintiff-Respondent in a better light (and at least in some respects might well have painted a darker picture of Plaintiff-Respondent's actions).

In any event, even assuming *arguendo* that readers would have viewed Plaintiff-Respondent more favorably if provided selectively with additional facts that might have portrayed Plaintiff-Respondent in a more positive light, Defendants-Appellants' failure to include this material cannot possibly be said to rise to the level of fault, either under the constitutional malice or the gross irresponsibility standards.

First, it is undisputed that Defendant-Appellant Mastrosimone spoke with not one but rather 13 different sources for the news article, including the district superintendent, three members of the school board, two members of the PTA, and several community activists. Not one of those sources advised Mastrosimone of the additional "facts" regarding prior authorization. Moreover, on the issue of student expenditures, the record is undisputed that every source who spoke to that issue emphasized only the most glaring instances of expenditures on the English Department. R.55-56.

In addition, Plaintiff-Respondent's attorney had the opportunity, but declined to exercise it, to "set the record straight" on both the prior authorization and student expenditures issues. Instead Mr. Ray merely issued a general denial. There is no dispute that he did not alert Defendants-Appellants' reporter to the claims Plaintiff-Respondent later asserted, as he

did at a press conference one week later, which Defendants-Appellants covered and published. R.99.

In short, surely there can be no finding of fault of any kind, much less of "gross" fault, for not publishing allegedly exonerating details that no source had brought to Defendants-Appellants' attention. Because there is no proof that they were ever advised prior to publication of the prior authorization or student expenditure claims, Defendants-Appellants cannot possibly be said to have been at fault in unknowingly omitting them from their publications.

III. THE AMENDED COMPLAINT CAN BE DISMISSED BASED SOLELY ON THE LACK OF A TRIABLE ISSUE AS TO FAULT, BUT SUMMARY JUDGMENT IS ALSO WARRANTED BECAUSE PLAINTIFF-RESPONDENT FAILED TO MEET HIS BURDEN OF ADDUCING ANY TRIABLE ISSUE AS TO FALSITY

The court below erred when it held that "defendants have failed to come forth with new evidence which would establish, as a matter of law, the truth..." R.7. At the summary judgment stage, the holding that Defendants-Appellants were required to adduce a triable issue as to truth was clear error of constitutional dimension. At the same time, however, Justice Martin was also incorrect when he found, on the undisputed summary judgment record,

that Defendants-Appellants had failed to come forward with "new evidence" of truth.

A. Plaintiff-Respondent Has Never Seriously Contested the Core Allegations of Defendants-Appellants' Publications, the Substantial Truth of Which Had Been Established in the Documentary Evidence, and as to Which Plaintiff-Respondent Came Forward with No New Evidence in Opposition to Summary Judgment

As previously discussed, it is black letter law that in a case involving a public official and/or an issue of public concern, no cause of action for defamation can be stated without proof of factual falsity, *and* that the burden of proving factual falsity lies with the plaintiff. *See* Point I.A., *supra*.

As this Court recognized on the prior appeal:

> Truth is an absolute defense to a libel action, regardless of the harm done by the statements. Even if a publication is not literally or technically true in all respects, the defense of truth applies as long as the publication is "substantially true," and minor inaccuracies are acceptable.

R.239.

The central gist and the allegedly defamatory sting of the facts reported in Defendants-Appellants' publications were that Plaintiff-Respondent was involved in a questionable practice of taking monies from students who believed they were paying for their vocabulary books, although the vocabulary books had already been paid for out of budgeted funds; that

Plaintiff-Respondent had been diverting such student monies, purportedly needed to pay for the students' vocabulary books, to other Departmental purposes; that school officials had placed Plaintiff-Respondent on extended leave or suspension while investigating those actions; and that the school officials were negotiating a settlement with Plaintiff-Respondent that might permit him to return to school.

On remand from the prior appeal, Plaintiff-Respondent essentially admitted to the substantial truth of all these core operative facts and did not seriously contest them in opposition to Defendants-Appellants motion for summary judgment.[13]

1. Plaintiff-Respondent admitted his central involvement in collecting and holding the book money from students. Plaintiff-Respondent admitted that in fact he was in charge of collecting – and did collect – the book money from students. During his tenure as Chairman, teachers in the English Department collected fees from the students to pay for the vocabulary books and turned the money over to him. R.351-52. When the fees were paid in cash, he put the cash in envelopes, and when they were

[13] These admissions as to substantial truth were fully presented in one of Defendants-Appellants' moving affidavits, based on the undisputed record of Plaintiff-Respondent's admissions at his deposition. See generally Kaufman Affidavit, R. 26-40.

paid by check, he cashed the checks at the school store and put that cash in envelopes. He kept the money either in his desk or carried it in his briefcase. R.354-57. After questions arose about this practice, Plaintiff-Respondent was asked to account for the money. R.397-98. Subsequently he was advised by the District Superintendent, Donald Carlisle, that an investigator had been hired. R.405.

Plaintiff-Respondent prepared several documents in which he attempted to account for the amount of money that had been collected during his tenure as Department Chair and the manner in which it had been held and spent. Plaintiff-Respondent wrote two letters to Superintendent Carlisle in an effort to account for the money received and expenditures from the student book funds. R.117-22. In the first, he admitted that he personally received the student monies and never deposited any of the funds collected. R.118.[14]

Plaintiff-Respondent admitted that he was never able to account for all of the money received. R.424. And despite Plaintiff-Respondent's attempts

[14] Plaintiff-Respondent described his method of accounting for and safeguarding the student funds as follows: ". . . the English teachers brought me the money for the vocabulary books at various times in the fall as they collected it, and I would write down how much they gave me on an envelope and put the money in the envelope. I kept the envelope with the money in my briefcase. I did not deposit any money into a bank account or other financial institution." R. 118.

(and apparently because the admitted purchases were made in cash and he had neither previously deposited nor otherwise accounted for the monies), he admitted that he lacked receipts for nearly $2000 of the purchases he made with the student funds. R.425.

2. Plaintiff-Respondent also admitted that the vocabulary books had already been paid for – and that he was well aware they had been paid for – out of budgeted funds. Defendants-Appellants reported that Plaintiff-Respondent had collected money from students for vocabulary books that had already been budgeted. In his February 27 letter to Carlisle, Plaintiff-Respondent admitted that students were being charged for vocabulary books that had already been purchased the prior year through the normal budgeting process but he nonetheless authorized the teachers to make the collections. R.119.

Plaintiff-Respondent also admitted the percentage of vocabulary books that were included in the school budget increased throughout his tenure as Chairman and that in his final year fully 100% of the vocabulary books were included in the school budget. R.539-40.

3. Plaintiff-Respondent-Respondent admitted the student's monies were used for other Departmental purposes. Plaintiff-Respondent admitted

to using the money collected from students to purchase items for use by the English Department, such as storage cabinets, a space heater, and a computer table. R.369, 371-72, 375-76, 378, 395-96. He exercised complete discretion over such expenditures, which were made entirely outside the school's normal budgetary process. R.380.

4. Plaintiff-Respondent admitted that students were unaware that the money they paid for vocabulary books was diverted to purchases for the English Department. The students from whom the money was collected were told that the money was needed to pay for their vocabulary books; they had no idea that the money was being used to purchase items for the English Department and that none of the money was used to purchase the books they were asked to pay for. R.533-34.

5. Plaintiff-Respondent admitted that he was under investigation by the school district and was negotiating a settlement that would have permitted him to return to teaching and that he later entered into a settlement in which he accepted a strong reprimand and significant sanctions. Plaintiff-Respondent admitted that he was under investigation by the School District. R.405. He also admitted that he had reached a possible settlement with the School District that would have involved the payment of a sum of money to

the school. R.409-414. The settlement under discussion would also have permitted Plaintiff-Respondent, who was on an extended leave, to return to teaching at the school. R.414.

Plaintiff-Respondent admitted that he later entered into a formal settlement agreement with the School District in which he accept a strong reprimand and significant sanctions arising out of the activities reported in Defendants' publications. R.520-22, 193-202. Thus, he consented to a formal reprimand placed in his employment file, R.195, he accepted and paid a $2000 administrative penalty, R.196, and he accepted loss of tenure and reassignment from the High School where he had been Chairman of the English Department, to a junior high school. R.194.

B. On Remand, Plaintiff-Respondent Failed to Meet His Burden of Adducing New Evidence of a Triable Issue as to Falsity Regarding the Two Issues Identified by This Court as Unproven by the Documentary Evidence

In reversing Justice Costello's dismissal this Court on the prior appeal identified the two issues that it held the documentary evidence had failed to resolve as a matter of law regarding prior authorization and student expenditures. On remand, after all discovery, Plaintiff-Respondent failed to meet his burden of adducing a triable issue of falsity even as to these two issues.

1. Plaintiff-Respondent Admitted At His Deposition that He Has No Evidence, Nor Has He Taken Any Steps to Gather Such Evidence, Supporting His Prior Authorization Claim

At his deposition Plaintiff-Respondent repeated his claim that previous school officials knew about and had authorized vocabulary book collections. R.598. However, he also acknowledged and could not dispute that in the Article 78 proceeding brought by Plaintiff-Respondent to challenge the § 3020-a disciplinary proceeding instituted by the school district, then-current principal Lipshie and Superintendent Carlisle submitted sworn affidavits (R.187, 190, respectively) clearly stating they were unaware of and had not authorized the practice of collecting money from students to pay for vocabulary books that had already been paid for and that they had not approved such a practice. R.603, 606.

Moreover, at his deposition, Plaintiff-Respondent admitted that he has no documents to support his contention that previous school officials *were* aware and approved of this practice – even in earlier years when the vocabulary books were no paid – or fully paid – for in the school budget.[15]

[15] Indeed, Plaintiff-Respondent's own testimony during his deposition in this case provides substantial support to the sworn testimony of the current school officials that they were unaware of and had not authorized Plaintiff-Respondent to collect money for vocabulary books that the school had already paid for. For example, Plaintiff-

Nor, in the more than seven years that had elapsed since he filed this case, did Plaintiff-Respondent take any steps to collect evidence that might support this contention.

In opposition to the motion for summary judgment, Plaintiff-Respondent never sought to supplement the record, to submit statements from officials he alleged had previously approved the collections or to call them or any of Defendants-Appellants' sources for depositions as third-party witnesses.

As this Court previously held, Defendants-Appellants bore the burden on their motion to dismiss of establishing that the documentary evidence was completely sufficient to prove the substantial truth of its publications. But – at the summary judgment stage – it was Plaintiff-Respondent who bore the burden of proving falsity. Without any evidence beyond his naked insistence to rebut the previous sworn testimony of the school principal and superintendent, Plaintiff-Respondent clearly failed to sustain his burden to

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Respondent testified that the principal under whom the practice had originated had retired before Plaintiff-Respondent became English Department Chairman in 1997, and that two interim principals had served before Principal Lisphie was appointed in 2002-03, which was also the last year of Plaintiff-Respondent's chairmanship, R. 599. Moreover, Superintendent Carlisle advised Mastrosimone that school had changed its former procedure and had begun including the cost of vocabulary books in the school budget. R. 294.

establish falsity on the prior authorization claim at the summary judgment stage.

2. As Regards the Student Expenditures Claim, Plaintiff-Respondent Admitted At His Deposition that He Spent Nearly Two-Thirds of the Money He Collected on Items other than Vocabulary Books, and that Nearly One-Quarter of the Money Was Spent on Items Solely for the English Department

The second issue regarding truth or falsity cited on the prior appeal involved this Court's concern that Defendants referenced "only the lunches and the air conditioner as examples of the plaintiff's purchases," which, "left the reader with the impression that the plaintiff had used money collected from students to purchase items which benefitted only the faculty." R.239. The documentary evidence, this Court found, "suggested that the plaintiff spent the money largely on books and other classroom supplies used by or for the students, and this fact would have significantly altered the conclusion drawn by the reader." R.239.

When examined further on remand, the distinction between departmental versus student expenditures was shown to be a somewhat artificial one. In fact, when questioned at his deposition regarding the nature of the expenditures, Plaintiff-Respondent himself made no such distinction:

Q Were any of these funds ever spent on something other than for the English Department?

A No.

Q They were exclusively used for the English Department supplies or other items?

A Yes.

R.380.

In any event, the undisputed evidence after all discovery has been completed demonstrates that nearly two-thirds of the money collected from students was spent on items other than vocabulary books for students. R.235. In addition, a substantial portion of the remaining purchases involved items for the English department, including storage cabinets, a space heater, a computer table, and research books. R.369, 371-72, 375-76, 378, 395-96..

Under all of the foregoing circumstances, and putting the issue of Plaintiff-Respondent's failure of proof of falsity to one side, it would nonetheless be impossible to establish Defendants' fault in failing to present Plaintiff-Respondent's version of his expenditures. Defendants-Appellants were not told and therefore could not have known of the alleged falsity of their article as regards the student expenditures claim, they could not have harbored serious doubts as to its truth and could not have been grossly

irresponsible in publishing the Departmental expenditure allegations – even if incomplete – received as they were from two or three reliable sources.

It is also important to recall that the documentary evidence which detailed Plaintiff-Respondent's expenditures was not available to Defendants for at least several months *after* the article and editorial appeared and that not one of the thirteen persons interviewed by Mastrosimone in connection with the article – *including* Plaintiff-Respondent's attorney – suggested that Plaintiff-Respondent "spent the money largely on books and other classroom supplies used by or for the students." In fact, it is undisputed that Defendants' sources provided information only as to expenditures on the air conditioner and faculty refreshments or lunches, with one of the sources indisputably characterizing Plaintiff-Respondent's use of student monies as a "slush fund for the English Department, " R.53; 294 – hardly signaling to Defendants-Appellants' reporter that the monies were being spent on the students and not the Department.

Finally it is undisputed that Plaintiff-Respondent's attorney did not provide any contrary information to Defendants' reporter on this subject. R.54

In sum, based on all of the above, it is clear that Plaintiff-Respondent failed to establish, on the summary judgment record, the constitutionally-requisite level of fault even assuming *arguendo* that the failure to include information about student expenditures created a misimpression that rose to the level of a false, actionable defamation. That is, Plaintiff-Respondent would still need to prove that Defendants-Appellants acted either with "actual malice" or that they were grossly irresponsible in creating such an impression,[16] an insurmountable burden given Defendant-Appellant Mastrosimone's careful pre-publication research.

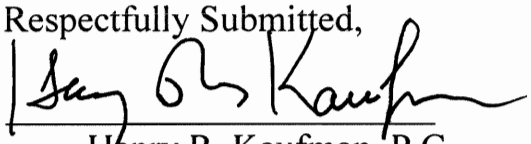
[16] *See, e.g., Chaiken v. VV Publ'g Corp.*, 907 F. Supp. 689, 698 (S.D.N.Y. 1995) *aff'd sub nom. Chaiken v. VV Pub. Corp.*, 119 F.3d 1018 (2d Cir. 1997) ("Even assuming that the article can be read to imply that the Chaikens are terrorists, the Voice cannot be held grossly irresponsible on this basis. A publisher is not liable for a defamatory innuendo unless it intended or endorsed that inference.")

CONCLUSION

It is time now, on this appeal, for this Court to put an end to a case that on the undisputed summary judgment record has no merit or possibility of success. Only in this fashion can the indispensable promises of the constitutional law of defamation be fulfilled: the promise that the burden will be squarely placed on the defamation plaintiff to come forward with sufficient proof of a triable issue as to falsity and fault at the summary judgment stage; and the promise that where, as here, the plaintiff fails to meet those stringent burdens, the Courts of this State will not hesitate to grant summary judgment so as to prevent prolongation of the burdens of defending a legally baseless defamation claim.

Dated: New York, New York
May 24, 2012

Respectfully Submitted,



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Dated: New York, New York
May 24, 2012

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