Superior Court of New Jersey

Appellate Division

Docket No. A-003541-23

LENTO LAW GROUP, P.C.,	:	CIVIL ACTION
	:	
	:	ON APPEAL FROM A
Plaintiff-Appellant,	:	FINAL ORDER OF THE
	:	SUPERIOR COURT
	:	OF NEW JERSEY,
vs.	:	MERCER COUNTY,
	:	LAW DIVISION
	:	
CARLY HENDRICKSON,	:	DOCKET NO. MER-L-000668-24
	:	
	:	Sat Below:
	:	
Defendant-Respondent.	:	HON. R. BRIAN MCLAUGHLIN,
	:	J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

On the Brief:
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Date Submitted: November 13, 2024

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PRELIMINARY STATEMENT

The appellant, plaintiff below, is a law firm. The appellee, defendant below, was a client of the law firm. They will be referenced herein as Firm and Client.

This is case of first impression involving the New Jersey *Uniform Public Expression Act*, N.J.S.A. 2A:53A-49 et seq., also known as the anti-SLAPP law. The law provides an expedited procedure to review the merits of a lawsuit brought against a person who has commented on a matter of alleged public concern. Most often, these lawsuits seek damages for defamation.

The law is a two-edged sword. While it protects the free speech of the speaker, it does so by limiting the rights of the plaintiff (victim) to sue for defamatory statements made against them. However, when enacting the anti-SLAPP law, the legislature did not abolish the tort of defamation. Therefore, it is essential that it be interpreted and applied in a manner that protects *both* parties, as each has its own distinct rights.

In this case, the Trial Court committed a fundamental error of law by ignoring the rights of the Firm to seek compensation for damages to their constitutional right of reputation. The Trial Court concluded that the statements at issue were merely opinions, rather than containing statements of fact. However, it did so without viewing the statements in the light most favorable to the Firm, the non-moving party. Such an interpretation is required by courts in analogous circumstances and must be required when evaluating a complaint under the anti-SLAPP law.

Because the Trial Court failed to properly interpret the alleged defamatory statement, it erroneously decided that Firm could not make a prima facie case of defamation. This resulted in the improper dismissal of the lawsuit.

Accordingly, this Honorable Appellate Division should reverse the Trial Court order/decision and allow the lawsuit to proceed toward trial.

The question before the Court is:

> Where the New Jersey anti-SLAPP law utilizes a summary judgment-like procedure to determine whether a complaint seeking damages for a defamatory social media post should be dismissed or permitted to proceed to trial, but the Trial Court failed to view the alleged defamatory statement the light most favorable to the non-moving party, and therefore erroneously concludes that there was no defamation and improperly dismisses the case, should the Honorable Appellate Division reverse the Trial Court
>
> and order the case to proceed toward trial?

SUGGESTED RESPONSE: Yes.

PROCEDURAL HISTORY

The Complaint alleging, *inter alia*, defamation was filed on March 29, 2024. (Pa-9) The Complaint was served on April 24, 2024, and on April 25, 2024, Client filed a Motion to Show Cause under the anti-SLAPP Act. (Pa-34)

The Trial Court issued the Rule on May 3, 2024. (Pa-43) On May 17, 2024, Firm filed a Response in Opposition to the Rule. (Pa-47)

The hearing on the Rule was held before the Honorable R. Brian McLaughlin on June 7, 2024. (1T 1-39) After argument (1T 1-30), the Trial Court issued its decision from the bench. (1T 31-39)

As noted above, the Trial Court erroneously dismissed the lawsuit. This was contained in a formal (amended) Order dated June 13, 2024. (Pa-7) On July 2, 2024, the Trial Court awarded counsel fees to Client. (Pa-1)

A final Notice of Appeal was filed on July 3, 2024. (Pa-19, 29)

STATEMENT OF FACTS[1]

The Contingent Fee Agreement

This case arises from a private contractual transaction. The Client retained the Firm to represent her in a legal matter. She paid a $5,000.00 non-refundable fee. Client signed a Fee Agreement which provided, in relevant part:

[1] There is only a single volume of transcript relevant to this proceeding, the transcript of the June 7, 2024 remote Rule hearing and decision issued from the bench.

> "As the Lento Law Firm is allocating resources to a client's case and is foregoing other available opportunities, the Lento Law Firm requires a non-refundable fee to proceed with representation. Per our standard practice, **a reduced non-refundable fee of $5,000.00** will go towards the attorney fees which must be paid at the beginning of our representation." (emphasis in original) (Pa-47)

The litigation was successfully concluded for the Client. Thereafter, she requested a refund of a portion of the $5,000.00 she paid. This request was denied, and Firm referred the Client to the unambiguous "non-refundable" language in the Fee Agreement. (Pa-10-11)

Social Media Review/Posting

In response to the Firm's refusal to return any of the non-refundable fee, on August 13, 2023, Client posted a negative, false, and defamatory review or social media post on the Better Business Bureau website. (Pa-11) The review read:

> Total rip off. If you have an issue that you know has the chance to be settled before even hiring a law firm, I don't recommend this firm. Knowing we were going into settlement they took $5000.00 With that being said **every other law firm takes the full retainer respectfully but whatever is not used they return to you** especially when knowing you are going to settle vs go to trial. You can get a lawyer that will settle with the other party for a lot cheaper! Probably good lawyers but if you are tight on money and know you will be settling go with a firm that does not take a full retainer and tell you to kick rocks afterwards. Especially if it is a matter happening in your life that had catastrophic events to follow, don't get taken advantage of when your emotions are all over the place. **Had I known this was how this firm operates** I would have definitely gone with someone else and saved myself the headache of wondering

> how this firm believes this to be acceptable. (emphasis added)

(Pa-11)

The bolded portion above constitutes the defamatory statements. Combined they imply that every law firm except the Appellant-Firm returns the portion of a fee that was not used during the case, but that the Appellant-Firm *hid* from the Client that it did not refund unused fees.

Trial Court Order/Decision

The crux of the Trial Court's decision is that Firm had not established a prima facie case of defamation because the language above was not a statement of fact, but only an opinion. (1T 33-34) Specifically, the Trial Court held, "[W]hat Ms. Hendrickson did was expressing her opinion as a -- a dissatisfied former client of -- of the firm. * * * [T]he Court finds just in -- in drilling down on her actual comments, she was expressing her opinion as a dissatisfied client." (1T 33-34)

However, it reached this flawed conclusion by failing to consider the Client's statement in the light most favorable to the Firm.

ARGUMENT

Point I: Standard of Review (Pa-1, 7)

"In construing the meaning of a statute or the common law, [an appellate court's] review is de novo." *Nicholas v. Mynster*, 213 N.J. 463, 478 (2013). "[Appellate courts] review issues of law de novo and accord no deference to the trial judge's conclusions on

issues of law." *MTK Food Servs., Inc. v. Sirius Am. Ins. Co*., 455 N.J. Super. 307, 312 (App. Div. 2018).

Point II: The New Jersey Anti-SLAPP Law (Pa-1, 7)

The *Uniform Public Expression Act,* N.J.S.A. 2A:53A-49 et seq., also known as the anti-SLAPP law, establishes a two-step analysis. Under the Act:

> [T]he court shall dismiss with prejudice a cause of action, or part of a cause of action, if:
> (1) the moving party established under subsection b. of section 2 of P.L.2023, c.155 (C.2A:53A-50) that this act applies;
> (2) the responding party fails to establish under subsection c. of section 2 of P.L.2023, c.155 (C.2A:53A-50) that this act does not apply; and
> (3) either:
> (a) the responding party fails to establish a prima facie case as to each essential element of any cause of action in the complaint; or
> (b) the moving party establishes that:
> (i) the responding party failed to state a cause of action upon which relief can be granted; or
> (ii) there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the cause of action or part of the cause of action.

N.J. Stat. § 2A:53A-55.

Step one of the Act requires that the alleged defamatory comments are based on "the person's: (1) communication in a legislative, executive, judicial, administrative, or other governmental proceeding; (2) communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental

proceeding; or (3) exercise of the right of freedom of speech or of the press, the right to assembly or petition, or the right of association, guaranteed by the United States Constitution or the New Jersey Constitution, on a matter of public concern."

If Step one is met, Step two is only met where the plaintiff is unable to make a prima facie defamation case. In New Jesey, to establish that a statement is defamatory, the plaintiff must establish "three factors: (1) the content, (2) the verifiability, and (3) the context of the challenged statement." *DeAngelis v. Hill*, 180 N.J. 1, 14, 847 A.2d 1261, 1268 (2004).

"The 'content' analysis requires courts to consider the 'fair and natural meaning that will be given [to the statement] by reasonable persons of ordinary intelligence.' The use of epithets, insults, name-calling, profanity and hyperbole may be hurtful to the listener and are to be discouraged, but such comments are not actionable. Courts are required to differentiate between defamatory statements and 'obscenities, vulgarities, insults, epithets, name-calling, and other verbal abuse.'" *Id*., 180 N.J. at 14, 847 A.2d at 1268 (internal citation omitted). "A defamatory statement is one that is false and injurious to the reputation of another or exposes another person to hatred, contempt, or ridicule or subjects another person to a loss of the good will and confidence in which he or she is held by others." *Petersen v. Meggitt*, 407 N.J. Super. 63, 74, 969 A.2d 500, 507 (Super. Ct. App. Div. 2009).

While N.J. Stat. § 2A:53A-59 requires the anti-SLAPP Act be "broadly construed and applied to protect the exercise of the right of freedom of speech . . .", it cannot be so broadly construed that it violates the fundamental "right to the common law of defamation as a remedy for those who 'abuse[d]' the right to speak and write freely." *Senna v. Florimont*, 196 N.J. 469, 481 (2008).

The anti-SLAPP law also provides a procedure for disposition of the validity of the complaint at the initial stage of the case.

Point III: Because Anti-SLAPP Laws Are Highly Prejudicial To Those Bringing A Defamation Lawsuit, Their Broad Construction Must Not Eliminate The Victim Of Defamation's Right To Redress Injuries (Pa-1, 7)

"The requirements imposed by [anti-SLAPP] statutes present nearly insuperable obstacles for defamation plaintiffs."[2]

It is widely recognized that there is a "glaring defect in [anti-SLAPP] statutes. [B]y broadly defining the activities to be protected, they may immunize from scrutiny the very lawsuits they seek to discourage . . . * * * [T]hese statutes provide little guidance to distinguish a SLAPP suit from one which is grounded on a genuinely actionable tort claim."[3]

[2] ARTICLE: THE ANTI-SLAPP KNOCKOUT: LITIGATION INCENTIVES, THE SEVENTH AMENDMENT, AND THE LOST TORT OF DEFAMATION, 62 U. Louisville L. Rev. 293, 295 (2024).
[3] COMMENT: *When Rights Collide: Reconciling the First Amendment Rights of Opposing Parties in Civil Litigation*, 52 U. Miami L. Rev. 587, 596 (1998).

Another problem inherent in anti-SLAPP laws is that defamation "defenses and privileges were devised at common law and were intended to be resolved by juries. They were not developed at common law to be applied by judges as a matter of law. They especially were not made to be applied by a judge at the pleading stage before any discovery or other formal evidentiary investigation allows for the development of nuanced matters of proof."[4] Yet, that is what the judge is required to do.

Furthermore, the counsel fee provisions of the anti-SLAPP laws often serve to deter deserving victims from pursuing legitimate lawsuits to recover damages for the defamatory injuries they sustain.[5]

Significantly, although "state [anti-SLAPP] statutes potentially apply to numerous causes of action, it is the tort of defamation and similar speech-based torts that comprise the paradigmatic SLAPP actions that these statutes seek to regulate. These speech-based torts are commonly classified as intentional torts that require intentional conduct. They are characteristically ill-suited to summary resolution; the [anti-SLAPP] statutes. Defamation is an unusually complex area of tort law and features elements that amount to little more than standards. Predictions as to judicial or jury outcomes are highly indeterminate."[6]

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[4] *See*, fn. 3 at 296.
[5] *See*, fn. 3 at 298.
[6] See fn. 3 at 306.

Hence, the manner in which the Trial Court evaluates the alleged defamatory statement must not further disadvantage the defamation plaintiff.

Point IV: The Court Must View The Alleged Defamatory Statement Using The Same Standard As In Summary Judgment Decisions (Pa-1, 7)

Although outside the context of an anti-SLAPP law, the New Jersey Supreme Court has recognized, "The summary judgment standard is encouraged in libel and defamation actions." *DeAngelis v. Hill*, 180 N.J. 1, 12 (2004).

Courts of sister states that have considered similar anti-SLAPP laws have required that judges view the complaint and the alleged defamatory statement, and all reasonable inferences therefrom, in the light most favorable to the plaintiff, the non-moving party.

In *Mulvihill v. Spinnato*, 228 Conn. App. 781, 794-95 (2024), the Connecticut Court of Appeals explained its anti-SLAPP law,

> [W]e note that this court previously has observed that the procedural mechanism embodied in § 52-196a is 'similar to a motion for summary judgment.' Under Connecticut law, courts reviewing such motions are *obligated to construe* the pleadings, affidavits, and other proof submitted *in the light most favorable to the nonmoving party*. *Other courts have taken a similar approach in applying their anti-SLAPP statutes*." (emphasis added; internal citations omitted).

In *Thurlow v. Nelson*, 2021 ME 58, 2021 ME 58, 263 A.3d 494, 501 n. 5 (Me. 2021), the Maine Supreme Court observed, "Other states . . . use different standards to be applied when reviewing a motion brought under their respective anti-SLAPP statutes. . .

. *What [they] all have in common* is that when there are disputed facts, the nonmoving party is given all favorable inferences." (emphasis added)

See also, *Roche v. Hyde*, 51 Cal. App. 5th 757, 787, 265 Cal. Rptr. 3d 301 (2020) ("We must draw every legitimate favorable inference from the [anti-SLAPP] plaintiff's evidence." (internal quotation marks omitted)); L.S.S. v. S.A.P., 2022 COA 123, 523 P.3d 1280, 1286 (Colo. App. 2022) (Special motion to dismiss filed pursuant to Colorado anti-SLAPP statute entails summary judgment like procedure where court accepts plaintiff's evidence as true.), *cert. denied*, Colorado Supreme Court (July 17, 2023) (No. 22SC880); *ACLU, Inc. v. Zeh*, 312 Ga. 647, 652-53, 864 S.E.2d 422 (2021) (Motion to strike filed pursuant to Georgia anti-SLAPP statute involves summary judgment-like procedure where court is obligated to accept as true evidence favorable to plaintiff.); *Wynn v. Associated Press*, 555 P.3d 272 (Nev. 2024) (In ruling on motion to dismiss pursuant to Nevada anti-SLAPP statute, "the evidence, and any reasonable inferences drawn from it, must be viewed in [the] light most favorable to the nonmoving party."); *Mohabeer v. Farmers Ins. Exchange*, 318 Or. App. 313, 316-17, 508 P.3d 37 ("We review a trial court's ruling on a special motion to strike [pursuant to the Oregon anti-SLAPP statute] for legal error, viewing the evidence and drawing all reasonable inferences in the light most favorable to the plaintiff."), *review denied*, 370 Ore. 212, 519 P.3d 536 (2022); *Charles v. McQueen*, 693 S.W.3d 262, 281 (Tenn. 2024) ("[A]s is the case when a court rules on a motion for summary judgment or motion for directed verdict, the court [in ruling on a

motion to dismiss pursuant to Tennessee's anti-SLAPP statute] should view the evidence in the light most favorable to the party seeking to establish the prima facie case and disregard countervailing evidence."); *ML Dev, LP v. Ross Dress for Less, Inc*., 649 S.W.3d 623, 627 (Tex. App. 2022) (Courts "view the pleadings and evidence in a light most favorable to the plaintiff non-movant" in ruling on motion to dismiss pursuant to Texas anti-SLAPP statute.); *Kruger v. Daniel*, Docket No. 43155-6-II, 2013 Wash. App. LEXIS 2201, 2013 WL 5339143, *3 n. 4 (Wn. App. September 17, 2013) (unpublished opinion) (Stating that process set forth in Washington anti-SLAPP statute "is identical to that of summary judgment" and court must "accept as true all evidence favorable to the plaintiff and assess the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law.")

Point V: The Trial Court Committed A Reversable Error Of Law By Failing To Interpret The Alleged Defamatory Statement In The Light Most Favorable To The Appellant-Firm, The Non-Moving Party (Pa-1, 7)

As noted previously, the post at issue reads:

> Total rip off. If you have an issue that you know has the chance to be settled before even hiring a law firm, I don't recommend this firm. Knowing we were going into settlement they took $5000.00 With that being said **every other law firm takes the full retainer respectfully but whatever is not used they return to you** especially when knowing you are going to settle vs go to trial. You can get a lawyer that will settle with the other party for a lot cheaper! Probably good lawyers but if you are tight on money and know you will be settling go with a firm that does not take a full retainer and tell you to kick rocks afterwards. Especially if it is a matter happening in your life that had catastrophic

> events to follow, don't get taken advantage of when your emotions are all over the place. **Had I known this was how this firm operates** I would have definitely gone with someone else and saved myself the headache of wondering how this firm believes this to be acceptable. (emphasis added)

(Pa-11)

The key phrases are bolded above. The Trail Judge ruled they are not defamatory statements of fact, but merely the Client's opinion. The Trial court was mistaken. (1T 33-34)

Client first states, "[E]very other law firm takes the full retainer respectfully but whatever is not used they return to you ." Second, she says, "Had I known this was how this firm operates I would have definitely gone with someone else . . ." "This" refers to the Firm's policy of *not* returning fees which are clearly presented and conspicuously marked as non-refundable to the Client in the Fee Agreement signed by the client. (Pa-11)

The clear, and actually only, implication of these statements is that allegedly the Firm did not tell Client how its fees operated, i.e., that the fee was non-refundable. In other words, Client alleges that the Firm hid, mislead, tricked, or otherwise misrepresented the fee agreement to her. This was a direct attack on Firm's reputation as it is a statement likely to deter future potential clients of the Firm by falsely misrepresenting the Firm's honesty.

Moreover, this statement of the Client is a blatant lie because Client was specifically informed by the Fee Agreement which she signed that "the Lento Law Firm requires a non-refundable fee to proceed with representation. Per our standard practice, **a reduced non-refundable fee of $5,000.00**. . ." (Pa-47)

The Trial Court's conclusion -- "[W]hat Ms. Hendrickson did was expressing her opinion as a -- a dissatisfied former client of -- of the firm. * * * [T]he Court finds just in -- in drilling down on her actual comments, she was expressing her opinion as a dissatisfied client." (1T 33-34) -- is inconsistent with the language she used. It is a bizarre and illogical interpretation of her language. It ignores the "fair and natural meaning that [would] be given [to the statement] by reasonable persons of ordinary intelligence." *DeAngelis*, 180 N.J. at 14, 847 A.2d at 1268.

However, even if the Trial Court's interpretation of the Client's language was somehow one reasonable interpretation, under the doctrine of interpreting the evidence in the light most favorable to the non-moving party, the Trial Court was obligated to accept the Firm's other reasonable interpretation of the Client's statement. In failing to do so, the Trial Court committed serious error, resulting in the improper dismissal of this lawsuit.

As courts of numerous other states have recognized, because of the anti-SLAPP law's mechanism of taking traditional jury questions away from a jury and giving them to a judge, and because anti-SLAPP laws "present nearly insuperable obstacles for

defamation plaintiffs,"[7] the traditional summary judgment standard must be applied when analyzing the alleged defamatory statement. This protects the rights of the speaker *and* the victim of defamatory speech. The Trial Court failed to do this. As such, its interpretation of the statements at issue resulted in an erroneous decision. Therefore, this Trial Court decision should be reversed.

Point VI: Had The Trial Court Properly Applied The Summary Judgment Standard When Interpreting The Alleged Defamatory Statement, It Would Have Recognized That The Firm Successfully Pleaded A Prima Facie Case Of Defamation (Pa-1, 7)

In New Jesey, to establish that a statement is defamatory, the plaintiff must establish "three factors: (1) the content, (2) the verifiability, and (3) the context of the challenged statement." *DeAngelis*, 180 N.J. 1, 14, 847 A.2d 1261, 1268 (2004).

"A defamatory statement is one that is false and injurious to the reputation of another or exposes another person to hatred, contempt, or ridicule or subjects another person to a loss of the good will and confidence in which he or she is held by others." *Petersen,* 407 N.J. Super. at 74, 969 A.2d at 507. Client's statement was false. Client did know how the Firm operated with regard to the fee being non-refundable. It was unambiguously stated in the Fee Agreement that she signed. Client's online post implied that the Firm was dishonest by tricking her, misleading her, or otherwise hiding from her that once she paid her fee it was non-refundable. As such, the statement was defamatory

[7] See fn. 2.

as it was a lie that was "injurious to the [Firm's]reputation" and "subject[ed the Firm] to a loss of the good will and confidence in which [it] is held by others." *Id*.

The Client's statement can be verified as false. The signed Fee Agreement verified that Client knew that her fee was non-refundable. (Pa-47) Thus, her statement, "Had I known . . ." was verifiably false. Client lied and her lie was easily proven.

Finally, the context of the statement confirms its defamatory intent. The context of the statement is clear --- Client intended to discourage people from hiring the Firm. While Client has the First Amendment right to do so, she may not do so by lying, or by making false unproved claims about the Firm.

Before the Trial Court was also the question of whether circumstances required a showing of actual malice. Assuming arguendo that such a showing was necessary, Firm has done so. The United States Supreme Court has defined actual malice as: making a statement with "knowledge that it was false or with reckless disregard of whether it was false or not." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); *see also, Dairy Stores, Inc. v. Sentinel Pub. Co.*, 104 N.J. 125, 138 (1986)(New Jersey Supreme Court citing the same language). Client *knew* the fee she paid the firm was non-refundable. She *knew* her statement that she did not know the fee was non-refundable was a lie. Thus, assuming it was applicable, the *Sullivan* definition of "actual malice" has been clearly met. The client had malice in that the purpose of her post was to harm the Firm's

reputation and to have future and potential Clients hold the Firm in disrepute and not hire the law firm.

Had the Trial Court applied the proper standards when determining whether Firm established a prima facie case a defamation, the only conclusion would have been that it did. The Trial Court's conclusion to the contrary, resulting in the dismissal of the lawsuit, was erroneous and requires reversal.

CONCLUSION

The Trial Court improperly dismissed this lawsuit under the New Jersey anti-SLAPP law because it failed to analyze the alleged defamatory post, as required, in the light most favorable to the Firm, the non-moving party. Had the Trial Court properly analyzed the statements at issue, it would have found that Client's public posting contained a lie and not merely an opinion. She stated that she did not know that the fee paid to the Firm was non-refundable even though she signed a fee agreement explaining unambiguously the non-refundable nature of the fee. Within the context of the entire post, it is clear that the purpose of the post was to harm the Firm's reputation and to have others hold the Firm in disrepute so that others would not hire the law firm. Client's post was made with actual malice. She knew it was false, but nonetheless posted a lie.

Appellant/Firm's complaint established each element of a prima facie defamation action.

For these reasons, and the other reasons set forth above, the Trial Court's dismissal of the complaint should be reversed.

Respectfully submitted,

s/ Lawrence A. Katz, Esq.
LAWRENCE A. KATZ
Counsel for Appellant-Lento

LENTO LAW GROUP P.C., Plaintiff, vs. CARLY HENDRICKSON, Defendant.	**SUPERIOR COURT OF NEW JERSEY** **APPELLATE DIVISION** DOCKET NO. A-003541-23 SUPERIOR COURT OF NEW JERSEY, LAW DIVISION – MERCER COUNTY DOCKET NO. MER-L-668-24 Sat Below: HON. BRIAN MCLAUGHLIN, J.S.C.

RESPONDENT/DEFENDANT CARLY HENDRICKSON'S BRIEF

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PRELIMINARY STATEMENT

The newly-enacted Uniform Public Expression Protection Act ("UPEPA" or "Act") serves to protect individuals exercising their rights to petition and speak freely on matters of public concern. On its face, the Complaint in this matter is the type of intimidation and harassment the new law was designed to protect against: a meritless lawsuit intended to stifle an individual's right to express her opinion on a matter of public concern.

This is likely the first appeal of a dismissal under the Act. It involves a law firm which filed a Strategic Lawsuit Against Public Participation ("SLAPP") against a young former client for allegedly defamatory comments she posted on a public website. In fact, the allegations are non-actionable and the law firm's arguments as to why it should escape the consequences of the new law are spurious at best.

Defendant/Respondent Carly Hendrickson's ("Ms. Hendrickson") posted a less than positive review of her experience with Plaintiff/Appellant Lento Law Group P.C. ("Lento Law") on the Better Business Bureau website after the firm charged her a non-refundable $5,000 retainer for a case that settled shortly after retention, and then denied her request for a return of the unused funds.

After Ms. Hendrickson filed an Order to Show Cause seeking relief under UPEPA's expedited process, the trial court conducted the requisite two-step analysis under UPEPA and concluded firstly that Ms. Hendrickson had shown that the speech

involved was a matter of public concern (a finding which Lento Law does not challenge on appeal), and secondly, that Lento Law did not establish a prima facie case of defamation as to each essential element of defamation.

Lento Law now appeals the trial court's decision by advancing two arguments: (1) that the anti-SLAPP law unfairly deprives Lento Law of its right to seek compensation for a "constitutional right of reputation," (a right that does not exist) and (2), that the trial court made its decision on a summary judgment basis "without viewing the statements in the light most favorable to the firm, the non-moving party." Both arguments are frivolous and without basis in law or fact.

First, the Legislature enacted UPEPA under the directive that its provisions are to be interpreted "broadly" to achieve its goals of providing a prompt resolution and deterrence of SLAPP suits while providing broad protections for the constitutional right of free speech and petition. N.J.S.A. 2A:53A-59. UPEPA employs existing defamation law, which appropriately balances reputational rights with the fundamental right to free speech. The only substantial differences between the Act and previous practice are its expeditious process, finality in dismissing with prejudice, and the award of legal fees to a successful movant.

Second, the trial court found that Lento Law failed to establish a prima facie case as to each essential element of defamation, i.e., a false statement of fact, a

communication to another person, publication with actual malice, and reputational damages. The trial court ruled that statements at issue are merely Ms. Hendrickson's opinion, not factual statements capable of verifiability. Because of that finding, the trial court stated it did not need to opine on Plaintiff's argument that the Complaint is fatally flawed in that it does not allege, much less provide a factual basis, that Ms. Hendrickson acted with actual malice.

Finally, the Act does not require the application of a summary judgment standard. Instead, the Act provides that a trial court can determine dismissal based on any of three different standards: 1) that plaintiff failed to establish a prima facie case as to each element of defamation; 2) that the movant established the Complaint fails to state a cause of action upon which relief can be granted (a motion to dismiss standard); or 3) the movant established that there is no genuine issue of material fact and she is entitled to judgment as a matter of law (summary judgment standard). N.J.S.A. 2A:53A-55(a)(3). Here, the trial court clearly granted UPEPA relief under the first option, the prima facie standard, but it could easily have done so under the motion to dismiss standard as well. The tortious interference claim also fails as it is based on the identical allegedly defamatory speech.

As the trial court's decision to grant Ms. Hendrickson's Order to Show Cause pursuant to UPEPA and dismiss Lento Law's Complaint was proper, this Court should affirm and award Ms. Hendrickson legal fees for this appeal.

PROCEDURAL HISTORY[1]

On March 29, 2024, Plaintiff Lento Law filed a Complaint asserting one count of defamation and one count of tortious interference against Defendant Carly Hendrickson, its former client. Pa9. On April 25, 2024, Ms. Hendrickson filed an Order to Show Cause pursuant to the Act, arguing that the Complaint violated UPEPA and should be dismissed with prejudice. Pa34. The Parties submitted briefing under the schedule set by the trial court, with Ms. Hendrickson also submitting a certification of counsel that attached several news articles and other examples of Lento Law's online presence. Pa38-Pa39.

Lento Law did not supplement its papers with any other facts or evidence, relying solely on the arguments in its brief and the alleged facts in the Complaint.

The trial court held an Order to Show Cause Hearing on June 7, 2024 and issued an oral opinion granting Ms. Hendrickson's Order to Show Cause. 1T31:1-39:7. It entered a June 13, 2024 Amended Order dismissing the Complaint and awarding legal fees and costs to Ms. Hendrickson. Pa7.

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[1] Da = Defendants' Appendix

1T = Transcript of June 7, 2024 Decision

STATEMENT OF FACTS

On or about July 12, 2023, Ms. Henrickson contracted with Lento Law for representation. Da002. The Complaint alleges that she signed an engagement letter charging her a $5,000.00 non-refundable retainer, which she paid. Ibid. The matter was quickly resolved. Ibid. On or about August 13, 2023, Defendant, a young woman admittedly struggling financially, posted a review on the Better Business Bureau's website (as cited in Paragraph 13 of the Complaint) ("the Post") which stated as follows:

> **Carly H**
> 1 star
> 08/13/2023
> Total rip off. If you have an issue that you know has the chance to be settled before even hiring a law firm, I don't recommend this firm. Knowing we were going into settlement they took $5000.00. With that being said every other law firm takes the full retainer respectfully but whatever is not used they return to you especially when knowing you are going to settle vs go to trial. You can get a lawyer that will settle with the other party for a lot cheaper! Probably good lawyers but if you are tight on money and know you will be settling go with a firm that does not take a full retainer and tell you to kick rocks afterwards. Especially if it is a matter happening in your life that had catastrophic events to follow, don't get taken advantage of when your emotions are all over the place. Had I known this was how this firm operates I would have definitely gone with someone else and saved myself the headache of wondering how this firm believes this to be acceptable.

Da003.

Lento Law, which has offices in New Jersey, New York, Pennsylvania and other states, had previously sued other clients over negative reviews. See, e.g. https://www.law360.com/pulse/articles/1719079/philly-firm-sues-would-be-client-

oversalacious-yelp-review. Pa38 at ¶ 2. Lento Law zealously advertises its products and relies heavily on attracting clients from its online presence and reviews. Da002.

In examining the sufficiency of the Complaint under UPEPA and defamation case law, the trial court observed that the intent of the Act was to weed out defamation claims that should not go to a jury in an expeditious fashion. 1T31:8-19. The trial court also recognized that the Legislature drafted UPEPA to be construed broadly by courts. 1T31:20-32:4.

As to Step One of the Act's analysis, the trial court found that the Post contained opinion submitted by Ms. Hendrickson that concerned a matter of public concern, which it ruled should be broadly defined. 1T32:18-33:2. The trial court ruled that comments on lawyer behavior are matters of public concern. 1T33:16-34:11. Further, the trial court held that Lento Law invited clients to give provide reviews of its services and that Ms. Hendrickson did so. 1T32:11-17.

As to Step Two, the trial court ruled that the Complaint did not set forth a prima facie case of defamation because Ms. Hendrickson was "merely expressing her opinion as a dissatisfied client," and some of what she stated was conceded by Plaintiff's counsel. 1T34:12-35:5. The trial court further noted that the point of the Post was not simply about the non-refundable retainer or whether the firm did anything illegal: "Ms. Hendrickson did not say that Lento Law acted illegally, but that she did not like the way that the law firm treated her." 1T35:6-36:8.

Among other things, Lento Law argued below that Ms. Hendrickson knew her retainer was non-refundable as set forth in her engagement letter, but her Post made it seem like the firm was doing something illegal or unethical in not giving her a partial refund because her case was disposed of quickly. 1T16:2-17:6. Plaintiff then argued that it would have been permissible for Ms. Hendrickson to have said: "Even though I signed a contract, and the contract told me that my fee was non-refundable, I would have thought under the circumstances, they would have treated me more kindly", but instead she said "Had I known how the firm operates." 1T18:7-13.

The trial court specifically rejected Lento Law's skewed characterizations of the Post, finding that suggesting the use of alternative language suggested by Plaintiff during oral argument —"it's fine if you criticize them, but only if you go this far, or use this language"— would result in a chilling effect on giving feedback to the community and therefore inhibit free speech. 1T35:11-21. The trial court found that the statements expressed in Ms. Hendrickson's post were merely her beliefs:

> [W]hat she is essentially saying is that – and much – much is made of, had I known – had I known this was how the firm operates I would have definitely gone with someone else and save[d] myself the headache of wondering how this firm believes this to be acceptable.
>
> It doesn't take a lot of interpretation to indicate it[s] just dissatisfaction with the practice. Had I known this – also that she didn't know how easy it would be to resolve her dispute …
> * * *

> It's clear from the context that her issue was handled in her favor. It's the fact that she's largely complaining about the price. That it shouldn't – it didn't take them – take them very long to get the desired result so they shouldn't have to charge me that much or they should have given part of the money back.
>
> It's not a matter of whether she's legally entitled to that, but it was her subjective feelings that – she should – she felt she should've gotten some sort of discount that she – in her mind was involved to – in order to resolve the dispute.
>
> 1T36:4-37:3.

In fact, the trial court pointed out that Ms. Hendrickson was circumspect in her Post, even complementing the firm as "probably good lawyers, but if you're tight on money – settling, go with the firm that does not take your full retainer and tell you to kick rocks afterwards." 1T37:4-9. Finally, the trial court found that in attacking her opinion, the Complaint violated UPEPA:

> It's just that a person in my circumstances, I would have thought that I would have been given part of my retainer back. She may well have been wrong in that – and – but it this is – free speech – and for – any – more carefully we clearly have a chilling effect and The Court finds it would be antithetical to the purpose of the uniform expression law.
>
> 1T37:10-16.

The Court found there was no prima facie defamation and then dismissed the tortious interference claim as duplicative of the defamation claims. 1T37:17-20, 1T39:3-7.

As the Post did not constitute defamation and that was Lento Law's sole factual basis for all its claims, the trial court properly dismissed the Complaint. Pa7.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

Ms. Hendrickson agrees that the standard of review on this appeal is *de novo*. See State v. Courtney, 243 N.J. 77, 85 (2020) (interpretation of sentencing provisions in the Criminal Code); State v. G.E.P., 243 N.J. 362, 382 (2020) (retroactivity of statute); Kocanowski v. Twp. of Bridgewater, 237 N.J. 3, 9 (2019) (statutory interpretation); State v. Fuqua, 234 N.J. 583, 591 (2018) (statutory interpretation); State v. Dickerson, 232 N.J. 2, 17 (2018) (interpretation of court rules); Allstate N.J. Ins. Co. v. Lajara, 222 N.J. 129, 139 (2015)(interpretation of statutes).

II. THE TRIAL COURT CORRECTLY FOUND THAT LENTO LAW'S COMPLAINT CONSTITUTED A SLAPP SUIT UNDER UPEPA (Raised Below, 1T37:17-20).

Lento Law does not challenge the trial court's decision that the Post involved a matter of public concern, and implicitly concedes that point on appeal. Ms. Hendrickson therefore focuses only on the general challenge raised as to UPEPA's applicability and whether the trial court's analysis of the second prong of the UPEPA test was correct.

Lento Law's commentary on UPEPA infringing upon its rights as a "victim of defamation" lacks any persuasive or precedential support and should be afforded no credence. Furthermore, Lento Law's argument that the Court should permit an alternative interpretation of the Post in a light most favorable to the law firm under

a summary judgment standard is misguided. The Act does not require application of the summary judgment standard and the trial court did not do so. Instead, the Act calls for dismissal if Lento Law cannot establish a prima facie case of defamation against Ms. Hendrickson. Lastly, Lento Law fails to establish a prima facie case of defamation because the Post was pure opinion protected by the constitutional right to free speech and because as a matter of public concern it does not provide a factual basis for actual malice under Neuwirth v. State, 476 N.J. Super. 377 (App. Div. 2023).

A. Lento Law Is Palpably Incorrect In Its Interpretation of UPEPA's Provisions (Raised Below in Briefs).

Effective as of October 7, 2023, New Jersey adopted a slightly modified version of the Uniform Public Expression Protection Act and codified same in N.J.S.A. 2A:53A-49 et seq. It was the 33rd state to adopt an anti-SLAPP suit law and the fifth state to adopt UPEPA. UPEPA applies to causes of action asserted in a civil action based on a person's "exercise of the right of freedom of speech or of the press, the right to assembly or petition, or the right of association, guaranteed by the United States Constitution or the New Jersey Constitution, on a matter of public concern." N.J.S.A. 2A:53A-59.

A litigant asserting the right to protections under UPEPA must file an order to show cause. The Court may consider the order to show cause application and supporting certifications, briefs, any reply or response to the order to show cause,

and any evidence that could be considered in ruling on a motion for summary judgment. N.J.S.A. 2A:53A-54. Here, Lento Law relied solely upon the allegations in its Complaint and elected not to supplement its pleadings for the Order to Show Cause.

In ruling on an order to show cause under UPEPA, "the court shall dismiss with prejudice a cause of action, or part of a cause of action, if":

> (1) the moving party establishes under subsection b that the Act applies.
> (2) the responding party fails to establish the Act does not apply, and
> (3) either:
>> (a) the responding party fails to establish a prima facie case as to each essential element of any cause of action in the complaint.
>> (b) The moving party establishes that:
>>> (i) The responding party failed to state a cause of action upon which relief can be granted; or
>>> (ii) There is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the cause of action or part of the cause of action.

N.J.S.A. 2A:53A-55(a) .

First, Lento Law's argument that the trial court should have applied a summary judgment standard is **directly contradicted** by the plain language of the statute. The Act sets forth the standards by which an Order to Show Cause would be granted, specifically, where 1) Lento Law fails to establish a prima facie case as to each element of defamation and tortious interference; 2) Ms. Hendrickson establishes the Complaint fails to state a cause of action upon which relief can be granted (a motion to dismiss standard); or 3) Ms. Hendrickson establishes that there

is no genuine issue of material fact and she is entitled to judgment as a matter of law (summary judgment standard). N.J.S.A. 2A:53A-55(a)(3).[2]

Because no case law on UPEPA in New Jersey exists, Lento Law cites case law in other jurisdictions for the proposition that New Jersey should singularly impose a summary judgment standard on Orders to Show Cause brought under UPEPA. This argument is misguided, essentially because Appellant confuses a *process* potentially similar to summary judgment (if there are submission which require to the Court to consider materials other than the pleadings) with the legal standards set forth in UPEPA: the plain language of New Jersey's Act distinctly permits three different standards under which a SLAPP suit can be dismissed.

This Court should not lend any credence to Lento Law's argument as it would violate the principles of statutory interpretation. "The fundamental objective of statutory interpretation is to identify and promote the Legislature's intent." Parsons ex rel. Parsons v. Mullica Twp. Bd. of Educ., 226 N.J. 297, 307 (2016). The court begins with the words of the statute "and read[s] them in context with related provisions so as to give sense to the legislation as a whole." DiProspero v. Penn, 183 N.J. 477, 492 (2005).

[2] For the reasons set forth below, the first standard is actually subsumed within the second.

The need to establish a prima facie case under New Jersey law has essentially been subsumed within the second alternative, the motion to dismiss standard. It is well settled that on a motion to dismiss, the court's function is not to weigh the evidence but only to determine whether plaintiffs' proofs, together with all favorable inferences permissible therefrom, could sustain a judgment in plaintiffs' favor, i.e., whether plaintiffs have presented a prima facie case. Beadling v. William Bowman Assocs., 355 N.J. Super. 70, 87 (App. Div. 2002), citing, among other cases, Davis v. Pecorino, 69 N.J. 1, 3 (1975) and Dolson v. Anastasia, 55 N.J. 2, 5–6 (1969).

The Legislature also noted that in application and construal of the UPEPA, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that have enacted the uniform act. N.J.S.A. 2A:53A-60. As such, the Court of Appeals of Kentucky, which also adopted UPEPA, similarly noted that the burdens of proof in the uniform law were identical to those already existing in that state's law and do not alter these standards. Davenport Extreme Pools & Spas, Inc. v. Mulflur, No. 2023-CA-0313-MR, 2024 WL 2982718 (Ky. Ct. App. June 14, 2024). The Kentucky Court explained that, like New Jersey, the requirement of proving a prima facie case is already subsumed into the standards for dismissals and summary judgments. Id.

Second, Lento Law is incorrect in asserting that UPEPA should be construed more narrowly to avoid undermining its rights as a "victim" of defamation. The Act

makes plain that it "shall be broadly construed and applied to protect the exercise of the right of freedom of speech and of the press, the right to assembly and petition, and the right of association, guaranteed by the United State Constitution or the New Jersey Constitution. N.J.S.A. 2A:53A-59. UPEPA also disincentivizes SLAPP suits primarily by permitting an award of reasonable attorney's fees and costs to a prevailing moving party and recourse to an abbreviated litigation process. N.J.S.A. 2A:53A-58.

Further, there is no constitutional right to be free of defamation (as Lento Law blithely claims without citing any supporting law). Paul v. Davis, 424 U.S. 693, 712, 96 S. Ct. 1155, 1166 (1976) (an interest in reputation is neither "liberty" nor "property" guaranteed against state deprivation without due process of law.) "[M]ere damage to reputation, apart from the impairment of some additional interest previously recognized under state law, is not cognizable under the due process clause." Doe v. Poritz, 142 N.J. 1, 102 (1995), citing Strum v. Clark, 835 F.2d 1009, 1012 (3d Cir. 1987).

The trial court correctly recognized UPEPA's goal of a prompt resolution and deterrence of SLAPP suits and broad protections for the constitutional right of free speech. Lento Law's undercooked argument that a court should interpret the Act to run counter to its stated goals (and the clear Legislative intent) in favor of a litigant's "right to redress injuries" is wholly unsupported by case law,

as Lento Law cites only to statements generally critical of anti-SLAPP laws made in two law review articles – one from more than 25 years ago. These sources are not the least bit persuasive, much less precedential, especially because Lento Law is not challenging the constitutionality of the Act.

A so-called victim of defamation is no victim at all until and unless they can meet all of the elements to prove a prima facie case. Where a lawsuit is clearly a SLAPP action meant to intimidate, silence, or censor critics by making them pay for a costly legal defense, UPEPA mandates that such actions be expeditiously dismissed to deter meritless suits that have no place in the judicial forum, under *any* of the three standards in N.J.S.A. 2A:53A-55(a)(3).

Indeed, Lento Law's unfounded commentary that anti-SLAPP laws such as UPEPA are "highly prejudicial" to victims of defamation ignores the long line of New Jersey jurisprudence holding defamation cases uniquely suited for review under motions to dismiss. See, Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739 (1989)(holding that a plaintiff can bolster a defamation cause of action through discovery, but not file a conclusory complaint to find out if one exists); See, e.g., Darakjian v. Hanna, 366 N.J. Super. 238, 247 (App. Div. 2004); Dello Russo v. Nagel, 358 N.J. Super. 254 (App. Div. 2003). Neuwirth, 476 N.J. Super. at 390 (noting that a defamation complaint that asserts mere conclusions without facts will not survive a motion to dismiss). In particular, the

very issues raised by this Order to Show Cause are appropriately resolved on a motion to dismiss standard because they are, by definition, threshold issues of law for the court to determine:

> Unlike in most litigation, in a libel suit the central event—the communication about which suit has been brought—is ordinarily before the judge at the pleading stage. * * * Thus, courts routinely consider, on motions to dismiss, motion for judgment on the pleadings, or demurrer, issues such as whether the statement at bar is capable of bearing a defamatory meaning . . . whether it is "of and concerning" the plaintiff, whether it is protected opinion . . . and whether the suit is barred by privilege or the statute of limitations, and they frequently grant motions on these grounds and others.
>
> Hon. Robert D. Sack, 2 SACK ON DEFAMATION, Libel, Slander and Related Problems, 16.2.1 (5th ed. 2023).

Lento Law's Complaint against Ms. Hendrickson plainly does not allege actionable defamation for the reasons further discussed in Section II(B), and the trial court's dismissal of the Complaint should be affirmed upon appeal.

B. Lento Law's Complaint Failed To Establish A Prima Facie Case As To Each Essential Element Of Defamation (Raised Below, 1T34:12-21).

To succeed in a defamation action based upon a statement about a public official or figure or touching on a matter of public interest or concern, a plaintiff must allege: "(1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the statement was communicated to another person (and was not privileged); and (3) that the defendant published the defamatory statement with actual malice." Durando v. Nutley Sun, 209 N.J. 235, 248 (2012).

Here, the trial court correctly found that Lento Law failed to establish a prima facie case as to the first and third prongs of the test. There was no actionable defamatory statement in the Post and there was no actual malice by Ms. Hendrickson when publishing the Post.

In determining whether the statements are defamatory, a Court must consider the content, verifiability, and context of the challenged statements. Ward v. Zelikovsky, 136 N.J. 516, 529 (1994)(noting that name calling, epithets, rhetorical hyperbole and abusive language are not actionable because they do not have verifiable defamatory content). Courts begin their review to determine whether a statement is susceptible of a defamatory meaning by looking " 'to the fair and natural meaning which will be given it by reasonable persons of ordinary intelligence.'" Romaine v. Kallinger, 109 N.J. 282, 290 (1988). If the statement is susceptible of only a non-defamatory meaning, it cannot be considered defamatory, and the complaint must be dismissed. Dello Russo v. Nagel, 358 N.J. Super. 254 (2003).

1. Content: The Post Is Not Defamatory Because The Statements were Ms. Hendrickson's Subjective Opinions And Beliefs (Raised Below 1T6:4-8:4).

As the trial court properly concluded, Lento Law failed to establish that there was any actionable defamation in the Post. The content of the Post, as a whole, reflects Ms. Henrickson's dissatisfaction with the fact that the Lento Law Group would not provide her with the accommodation of returning some portion of the

retainer after spending far less than $5,000 worth of attorney time in resolving her claim. The Post contains non-verifiable opinion and substantial truth.

Opinion statements are generally not capable of proof of truth or falsity because they reflect a person's state of mind. Hence, opinion statements generally have received substantial protection under the law. Id. at 531. An analysis of verifiability requires courts to determine whether the statement is one of fact or opinion. Id. "Statements of opinion, as a matter of constitutional law, enjoy absolute immunity." Dairy Stores Inc. v. Sentinel Pub. Co., 104 N.J. 125, 147 (1995)(noting that Supreme Court has declared that "expressions of pure opinion on matters of public concern will not give rise to an action for defamation" and affirming dismissal of a defamation claim against a newspaper.); see also, Gulrajaney v. Petricha, 381 N.J. Super. 241, 253–54 (App.Div.2005)(observing that a statement that a person was dishonest and lacking in integrity is an opinion not generally subject to verification.)

The trial court specifically found that Ms. Hendrickson was merely expressing her opinion as a dissatisfied client in posting on a public review forum. 1T37:4-6. The Post did not state that Lento Law acted illegally or even unethically, but only that Ms. Hendrickson did not like the way that the law firm treated her. 1T35:6-15. The statements in the post, taken as whole, were unequivocally her beliefs and opinions, rather than an assertion of unmitigated fact:

> what she's essentially saying is that…had I known how this was how the firm operates I would have definitely gone with someone else and save myself the headache of wondering how this firm believes this be acceptable. It doesn't take a lot of interpretation to indicate it just—dissatisfaction with the practice.
>
> 1T36:4-10.

Ms. Hendrickson used phrases such as "total rip off," "I don't recommend this firm" and "go with a firm that does not take a full retainer and tell you to kick rocks afterwards." Da003. As a matter of law, the statements in the Post are pure name-calling or rhetorical hyperbole or unverifiable opinion, not fact. The Court acknowledged that even speaking as a dissatisfied customer, Ms. Hendrickson was also quite circumspect in her words, and in fact complimentary at times towards Lento Law. She noted that they were "probably good lawyers" but "had I known this was how this firm operates I would have definitely gone with someone else and saved myself the headache of wondering how this firm believes this to be acceptable." Da003.

Lento Law disputes the trial court's holding by offering tortured, alternative interpretations of how the Post can be interpreted, but those interpretations are not objectively reasonable. Specifically, Lento Law asserts that the implication of Ms. Hendrickson's statements is that she "alleges that the Firm hid, mislead [sic], tricked, or otherwise misrepresented the fee agreement to her." Pb13. Nowhere in the Post is

such language actually used. Lento Law is quite literally putting words into Ms. Hendrickson's mouth in order to resuscitate their failed defamation action.

When considering the statement's "fair and natural" meaning, therefore, courts permit the context in which the statement appears to inform its determination of whether the statement was capable of a defamatory meaning. See, Cibenko v. Worth Publishers, Inc., 510 F.Supp. 761, 764 (D.N.J. 1981); Romaine, 109 N.J. at 290. Courts do not automatically decide a case on "[t]he literal words of the challenged statement." Ward v. Zelikovsky, 136 N.J. at 532. Rather, courts must "consider the impression created by the words used as well as the general tenor of the expression, as experienced by a reasonable person." Ibid. This is called substantial truth. G.D. v. Kenny, 205 N.J. 275, 306–07 (2011)

2. Context: The Statements Were Made in the Course of a Publicly-Posted Review (Raised Below, 1T25:18-26:8).

The reviewing court should view the publication as a whole in assessing the language for a defamatory meaning and "consider particularly the context in which the statement appears." Petersen v. Meggitt, 407 N.J. Super. 63, 75, 969 A.2d 500, 507 (App. Div. 2009) citing Romaine, 109 N.J. at 290. DeAngelis v. Hill, 180 N.J. 1, 14–15 (2004).

The listener's reasonable interpretation, which will be based in part on the context in which the statement appears, is the proper measure for whether the

statement is actionable. Ward, 136 N.J. at 532. See also Restatement (Second) of Torts, supra, § 566 comment c.

If the comment occurred during an argument or is an outburst unrelated to the general topic of discussion, for example, a reasonable listener is less likely to accord to the challenged statement its literal meaning. Wilson v. Grant, 297 N.J. Super. 128, 137–38 (App. Div. 1996). Here, the context of the Post is that of a review. It is clear that in providing a critical review, a poster often has a grudge or problem with the company being reviewed. Reviews are often hyperbolic and filled with name-calling or critical comments, but certainly filled with opinion. A reasonable reader would understand that context and understand the statements in the Post as having a point of view that might not be favorable. Even if the statement were verifiable, taken in context it may not be defamatory. Lynch v. New Jersey Educ. Ass'n, 161 N.J. 152, 170 (1999).

In addition to the above circumstances, when considering context we also look at the "medium by which the statement is disseminated and the audience to which it is published." Wilson, 297 N.J. Super. at 137–38. "Indeed "[t]he ordinary reasonable recipient of a communication naturally discounts to some degree statements made in the heat of vitriolic battle, because the recipient understands and anticipates the human tendency to exaggerate positions during the passions and prejudices of the moment." Ward 136 N.J. at 532–33. While the Post was not made in vitriolic battle,

it is indisputable that its context was a critical review -- on a website that was filled with critical reviews by nature -- and that a feeling of aggrievement is evident.

This Court should therefore judge Ms. Hendrickson's statements in the full context of how they were made, the medium in which they were made and in their entirety and affirm the trial court's holding that the Post was not actionable defamation.

3. Verifiability: The Post Is Not Defamatory Because The Statements are not Verifiable or Substantially True (Raised Below, 1T25:7-17).

Only verifiable statements can be defamatory. Dello Russo, 358 N.J. Super. at 263. Actionable defamation requires that the statement "suggested specific factual assertions that could be proven true or false". Ward, 136 N.J. at 531 (requiring that a statement be verifiable ensures that defendants are not punished for exercising their First Amendment right to express their thoughts). "Loose, figurative or hyperbolic language" will be less likely to imply specific facts, and more likely to be deemed non-actionable as rhetorical hyperbole or a vigorous epithet. Id, at 531-32 (citations omitted). Thus, Lento Law must establish as a prima facie element of defamation that Ms. Henrickson's statements in the Post suggest specific factual assertions that could be proven true or false.

Since falsity is the bedrock requirement of any defamation claim, "[a] plaintiff does not make a prima facie claim of defamation if the contested statement is essentially true." Hill v. Evening News Co., 314 N.J. Super. 545, 552 (App. Div.

1998). Further, in evaluating whether a statement is true or false, "[t]he law of defamation overlooks minor inaccuracies, focusing instead on 'substantial truth,'" and therefore "[m]inor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.'" G.D. v. Kenny, 205 N.J. 275, 294 (2011) (citing Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 516-17 (1991)).

The New Jersey District Court in Sciore v. Phung, Civ. 19-13775, 2022 WL 950261 at *9-11 (D.N.J. 2022) dealt with a similar instance where several negative restaurant reviews were posted on Yelp.com, and the restaurant owner sued the reviewers for defamation among other related claims. In granting the defendant's motion to dismiss for failure to state a claim, the Court noted that in the context of Yelp, "a reasonable reader would understand that the review at issue here was [Defendant's] subjective opinion as a disgruntled customer" and the statements were unlikely to be verifiable.

In the trial court, Leno Law alleged numerous statements in the Post were defamatory. In an effort to overcome the hurdle of verifiability, Lento Law has now focused on only two specific statements it claims were verifiably false: 1) "Every other law firm takes the full retainer respectfully but whatever is not used they return to you especially when knowing you are going to settle vs go to trial", and 2) "Had I known this was how this firm operates I would have definitely gone with someone

else and saved myself the headache of wondering how this firm believes this to be acceptable." Pb13.

However, even though the law requires that the alleged defamatory statement be taken in context with the complete statement, when broken down to each component sentence, the Post contains no defamatory statement of fact that can be verified. The below chart includes every alleged defamatory statement raised by Lento Law Group in its Complaint and breaks down each of the statements in the Post with a comparison of Lento Law's allegations in the Complaint as well as on appeal as to what each statement represented as well as a rational reader's interpretation of the statement:

The Post	**Lento Law's Position**	**Reasonable Person's Interpretation**
Total rip off.	Incompatible with their business. Da006.	Name-calling/hyperbole. Unable to be verified. Pure unverifiable opinion.
If you have an issue that you know has the chance to be settled before even hiring a law firm, I don't recommend this firm.		Pure unverifiable opinion.
Knowing we were going into settlement they took $5000.00.	Lento Law takes issue with the word "took." Da004. Lento Law also says "it did not 'definitely' know that the matter could be settled until after the engagement began. Da004.	A reasonable reader would not find the word "took" to be defamatory, as it is literally what Lento Law did when they accepted the retainer funds. Although Lento Law claims it did not "definitely" know the matter could be settled before it accepted the

		engagement, the complaint concedes they had some idea that it could be settled. The statement is from the point of view of Ms. Hendrickson; she felt the case could be settled and in any event, even if part of the statement could be verified, it remains substantially true.
Every other law firm takes the full retainer respectfully but whatever is not used they return to you especially when knowing you are going to settle vs go to trial.	Lento Law claims it did not know it would settle and that Agreement makes clear the retainer amount was non-refundable. Da005. In the appeal they are complaining the Post makes it appeal as if the Firm hid, mislead or misrepresented to fee agreement to her. Pb13.	Ms. Hendrickson is taking issue with Lento Law's policy of non-refundable retainers and that she had hoped, because of her situation and the early settlement, that the firm would return the unearned portion of the retainer in despite the firm's policy.
You can get a lawyer that will settle with the other party for a lot cheaper!		Pure unverifiable opinion.
Probably good lawyers but if you are tight on money and know you will be settling go with a firm that does not take a full retainer and tell you to kick rocks afterwards.		Begins with a complementary statement and otherwise is true or substantially true and/or hyperbole.
Especially if it is a matter happening in your life that had catastrophic events to follow, don't get taken advantage of when your	Implies that something is wrong with the statement because they often deal with clients who are in a highly emotional state and claims she was not	This is not defamatory and pure unverifiable opinion as to how she felt about the engagement: that Lento Law should have provided her with an accommodation

emotions are all over the place.	"taken advantage of". Da005.	because of her financial situation and the short amount of time it took to resolve her case.
Had I known this was how this firm operates I would have definitely gone with someone else and saved myself the headache of wondering how this firm believes this to be acceptable.	Asserts she did know how firm operates and how she would be charged. Da006.	This is pure opinion; it expresses what she would have done had she had the opportunity to do it over again. She was referring to the refusal of the firm to modify its policy in her case.

Lento Law argues that the two statements it found to be objectionable can be verified as false merely because Ms. Hendrickson "knew" her fee was non-refundable as it was sta. in the retainer agreement. Yet the Post never alleges that the retainer agreement lacked such language or that Lento Law lied to her. It is verifiably true, for example, that a nonrefundable retainer to settle a matter is uncommon. In that context, Ms. Hendrickson was merely expressing her dissatisfaction with Lento Law's *practice* of retaining the entire $5,000 despite the firm quickly resolving the matter without spending enough time to justify payment of the full fee. Moreover, the second statement must be interpreted in light of the entire Post, which only two sentences before states that "if you are tight on money and know you will be settling, go with a firm that does not take a full retainer and tell you to kick rocks afterwards." In other words, despite the policy of not returning unused retainers, had Ms. Hendrickson known that Lento Law would tell her to

"kick rocks afterwards", she would have gone with a different law firm. This is not a statement capable of falsity as the only person who can attest to its truth is Ms. Hendrickson herself.

Because all of the contested statements are substantially true or unverifiable opinion, Lento Law fails to establish a prima facie case of defamation and the trial court's dismissal of the Complaint was proper.

4. The Complaint Fails to Plead Actual Malice (Raised Below, 1T12:3-8).

a. Applying the Actual Malice Standard in the Anti-SLAPP Context

Another element that Lento Law must establish under the prima facie defamation (or motion to dismiss) standard is that Ms. Hendrickson published the allegedly defamatory statements with actual malice. Under New Jersey Law, the Complaint itself must contain a factual basis for actual malice, not simply a boilerplate recitation of the actual malice standard. Neuwirth, 476 N.J. Super. at 390. The Complaint includes neither. As Lento Law does not challenge on appeal the Trial Court's finding that the Post was a matter of public concern, that should automatically require that Lento Law be required to adequately plead and then prove actual malice.

Notwithstanding Plaintiff's failure to challenge the trial court's ruling on whether the Post was a matter of public concern and thus eligible for UPEPA, the trial court was correct in making such a determination. New York Times v. Sullivan,

376 U.S. 254, 279-80 (1964) and its progeny requires that under the first amendment, public officials and other public figures plead and prove actual malice, *i.e.*, that the statements at issue were made with knowledge of falsity or with reckless disregard for the truth, as an element of any defamation claim where the plaintiff is a public official or public figure.

Under Senna v. Florimont, 196 N.J. 469, 496-7 (2008), our Supreme Court has dovetailed application of the actual malice standard with the our fair-comment privilege – which requires application of the actual malice standard to all matters of public concern except purely commercial speech including defamatory statements by one business against another. The Senna Court declared that while the media is presumptively entitled to the privilege, this additional protection can and should be applied to non-media speech under a specific test that is incorporated as part of the comments to the UPEPA national act:

> To determine whether speech involves a matter of public concern or interest that will trigger the actual-malice standard, a court should consider the content, form, and context of the speech. See Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 761–62 (1985) (opinion of Powell, J.). Content requires that we look at the nature and importance of the speech. For instance, does the speech in question promote self-government or advance the public's vital interests, or does it predominantly relate to the economic interests of the speaker? Context requires that we look at the identity of the speaker, his ability to exercise due care, and the identity of the targeted audience.
>
> 196 N.J. at 496-7.

In this matter, the speech in question comments directly on attorney behavior in a form that is open to the public on a site that monitors business responses to customers. It is not being made by a competitor, but a client who is critical of a law firm's behavior in the face of per personal situation. The target audience is consumers. While the Post tangentially touches on Defendant's economic interests, the context is a public post on a website dedicated to consumer protection by a non-lawyer involving a warning to other consumers regarding behavior that Defendant believes was unethical and wrong. Similarly, the ethics and responsiveness of attorneys is very much a matter of public concern and frequent subject of disciplinary proceedings. New Jersey extensively regulates and requires accountability in virtually every aspect of New Jersey attorney life. The Supreme Court micromanages many lawyer activities within its means: the Rules of Professional Conduct, Office of Attorney Ethics, fee dispute committees, attorney advertising regulation, unauthorized practice of law committees, and rules for civil and criminal practice and other entities. Lawyer behavior is consistently reported in the news.

Since Senna was decided, the United States Supreme Court appears to have broadened or at least simplified, the federal constitutional definition of a matter of public concern beyond Dun & Bradstreet, a private speech case:

> Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," Connick v. Myers, 461 U.S. *138,* 146, (1983) or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public," San Diego v. Roe, 543 U.S. 77, 83–84 (2004) See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Time, Inc. v. Hill, 385 U.S. 374 (1967). The arguably "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." Rankin v. McPherson, 483 U.S. 378 (1987).
>
> Snyder v. Phelps, 562 U.S. 443, 453 (2011) (speech by a fringe group protesting near a military funeral).

Snyder's reliance on speech "fairly considered as relating to any matter of political, social, or other concern to the community," or "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public," appear far broader than the construction in Senna. Yet for reasons set forth below, even under Senna the speech in the Post is a matter of public concern.

The UPEPA commentary itself confirms its adoption of both the Dun & Bradstreet, Inc. "context, form and context" formula for determining a matter of public concern (as adopted by Senna) as well as Snyder's broader standard where speech that is "fairly considered as **relating to** any matter of political, social or mother concern to the community" should be demarked as a matter of public concern

> The term "matter of public concern" should be construed consistently with caselaw of the Supreme Court of the United States and the state's

> highest court. See, e.g., Snyder v. Phelps (holding that "[s]peech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public'" (citations omitted)); Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790 (2011) ("The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try."). "The [matter-of-public-concern] inquiry turns on the 'content, form, and context' of the speech." Lane v. Franks, 573 U.S. 228, 241 (2014) (quoting Connick, 461 U.S. 147-48). The term should also be construed consistently with terms like "public issue" and "matter of public interest" seen in some state statutes.
>
> Comment 9 to Section 2 (Scope), Uniform Public Expression Protection Act (UPEPA), National Conference of Commissioners on Uniform State Laws (2020). https://www.uniformlaws.org/viewdocument/final-act-110?CommunityKey=4f486460-199c-49d7-9fac-05570be1e7b1&tab=librarydocuments

In addition, several states with strong anti-SLAPP laws, such as California and New York, have taken the unequivocal position that online reviews of businesses are matters of public interest, as did Oregon in 2018 even before it enacted UPEPA. California's anti-SLAPP law, being the oldest and most encompassing in the nation, forms the basis for all other anti-SLAPP laws and is explicitly recognized in the UPEPA notes, though it is not identical to UPEPA.

"It is settled that Web sites accessible to the public" such as Yelp, "are 'public forums' for purposes of the anti-SLAPP statute." Wong v. Jing, 189 Cal. App. 4th 1354, 1366 (2010) (collecting authorities); see also Wilbanks v. Wolk, 121 Cal. App. 4th 883, 896-97 (2004) (a long line of cases holding that where the defendant publicly criticizes a plaintiffs' "business practices," that comment is a matter of public

interest, because it is a "warning" to consumers "not to use plaintiff's services"; Abir Cohen Treyzon Salo, LLP v. Lahiji, 40 Cal. App. 5th 882, 888, 254 Cal. Rptr. 3d 1, 5 (2019) (online reviews critical of a lawyer and the firm where he worked were of public concern, so anti-SLAPP Act applied); and Warnings to the public about a business or organization business practices are matters of public interest. Geiser v. Kuhns, 13 Cal. 5th 1238, 1243 (2022). Like UPEPA, the California SLAPP statute requires that the question whether something is an issue of public interest must be "construed broadly." Hecimovich v. Encinal School PTO, 203 Cal. App. 4th 450, 464 (2012) (internal citations omitted); Cross v. Cooper, 197 Cal. App. 4th 357, 372 (2011).

The issue of whether public reviews of businesses are matters of public concern has been firmly established in New York. In Aristocrat Plastic Surgery, P.C. v. Sila, 206 A.D.3d 26, 30 (2nd Dept. 2022), the New York Appellate Division went through the same "content, form and context" analysis from Dun & Bradstreet that our Supreme Court adopted in Senna. While the New York court said it would not recognize as matters of public concern statements of "pure gossip and prurient interest," or "publications directed only to a limited, private audience," business reviews, whether of a restaurant, a physician or others, were of the public interest. Id. The Court then examined numerous cases decided the same way since New York strengthened its anti-SLAPP law in November 2020.

Oregon took a similar tact even before it adopted UPEPA. In Neumann v. Liles, 295 Or. App. 340, 345, 434 P.3d 438, 440–41 (2018) an Oregon appellate court reaffirmed that a review on a website for those looking for a wedding venue was a matter of "general interest" to the public and a matter of public concern. See also, Unelko Corp. v. Rooney, 912 F.2d 1049, 1056 (1990)(Andy Rooney's statement on '60 Minutes' that a consumer product 'didn't work' involved a matter of public concern because it 'was of general interest and was made available to the general public')."

For these reasons and recognizing that Lento Law did not challenge the Court's finding that her Post was a matter of public concern, the actual malice standard should apply.

b. The Complaint Fails to Sufficiently Assert Actual Malice.

Under the actual malice standard, "reckless disregard for the truth" requires far more than negligent or accidental falsity. To meet this standard, a plaintiff must plead facts that, if true, would establish that the defendant "actually doubt[ed] the veracity" of the statements, Durando, 209 N.J. at 252, or had a "high degree of awareness" as to their probable falsity, Harte-Hanks Commc'ns v. Connaughton, 491 U.S. 657, 667 (1989) (internal quotation marks omitted), at the time of publication. See also, Sullivan, 376 U.S. at 286 (failure to retract upon plaintiff's demand not evidence of actual malice).

Actual malice is a "high or strict burden," Sisler v. Courier News Co., 199 N.J. 307 (1985) and Durando, 209 N.J. at 269, and is necessary to guarantee the "national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open[.]" Sullivan, 376 U.S. at 270. A plaintiff "must prove with convincing clarity that the defamatory statements were published by the defendant" with actual malice. Berkery v. Est. of Stuart, 412 N.J. Super. 76, 90 (App. Div. 2010)(noting that a prima facie case of actual malice cannot be established merely by attacking the defendants' credibility).

This Court has ruled that actual malice must be pleaded with particularity; its cannot be pleaded in a conclusory fashion and must state the factual basis for that knowledge. Neuwirth, 476 N.J. at 392-93 (App. Div. 2023). See also, Herman v. Muhammed, No. A-0784-232024, WL 4489630 (App Div., October 15, 2024) (reasserting and applying Neuwirth). A rote recital of the actual malice standard is insufficient to meet that pleading standard. In Neuwirth, this Court ruled that a defamation plaintiff in an actual malice case cannot survive a motion to dismiss unless she pleads "facts from which a factfinder could conclude that [the defendant] knew, or had serious doubts about, the veracity of the allegedly defamatory statements he made." Id. at 393. See also, Darakjian, 366 N.J. Super. at 247.

Neuwirth involved defamation claims in connection with Governor Murphy's statements at a press conference that Neuwirth had been fired for cause, specifically

for failing to disclose a source of outside consulting income. Id. at 385. Neuwirth claimed that these statements about the reason for his firing were false and defamatory, but Neuwirth initially failed to plead actual malice, and was given an opportunity to amend. His amended complaint included lengthy but conclusory allegations on actual malice, including that Governor Murphy made the statements at issue "knowing them not to be true"; that the Governor was "aware of the true reason for [p]laintiff's termination" and "participated in the decision to terminate [p]laintiff in retaliation for [his ethics] complaints"; that neither the Governor nor anyone from his officer "conducted any investigation" as to the truth of the purported cause for Neuwirth's firing and "never confronted [p]laintiff about any allegations of wrongdoing" before making the public claims; and that the Governor made the statements "recklessly and/or with actual knowledge of their falsity to punish and further retaliate against [p]laintiff." Id. at 387.

In considering whether these allegations were sufficient to overcome a motion to dismiss under Rule 4:6-2(e), the Neuwirth Court cautioned that "conclusory allegation[s]" do not meet the requisite pleading standard, since "'a plaintiff can bolster a defamation cause of action through discovery, but not file a conclusory complaint to find out if one exists.'" Id. (quoting Printing Mart-Morristown). The Court then held that Neuwirth could not survive a Rule 4:6-2(e) motion to dismiss

unless he "clearly allege[d] facts supporting that element" of actual malice. Id. at 394.

Applying this standard, this Court concluded that Neuwirth's allegations as to actual malice were deficient as a matter of law. Specifically, the court found Neuwirth's allegations fell into four categories, none of which were sufficient to plead actual malice:

- First, it held that Neuwirth's "[r]epeated, conclusory allegations that Governor Murphy was 'aware' of the truth and made the statements 'recklessly and/or with actual knowledge of their falsity' are mere recitations of the applicable legal standard, not factual assertions." Id. at 392-393.

- Second, it held that Neuwirth's allegations regarding Governor Murphy's failure to investigate or confront Murphy were insufficient because "a '[m]ere failure to investigate all sources' does not demonstrate actual malice." Id. (citing Lynch v. New Jersey Educ. Ass'n).

- Third, it held that allegations concerning information the Governor received after publication were irrelevant to actual malice, since they "say nothing about the Governor's subjective state of mind when he made the statements." Id.

- Finally, the court also brushed aside Neuwirth's claims that Governor Murphy acted out of a desire to "retaliate" against him, noting that "[m]alice

in a defamation case does not refer to a 'bad or corrupt motive,'" and "'ill will does not constitute actual malice.'" Id. (citations omitted).

The court also instructed courts to apply a motion to dismiss standard vigilantly in defamation cases, in order to ensure "our citizens' right to free expression and robust debate in our democratic society." Id. (citing Petro-Lubricant Testing Labs., Inc. v. Adelman, 233 N.J. 236, 243, (2018) and Rocci v. Ecole Secondaire Macdonald-Cartier, 165 N.J. 149, 155 (2000)).

Here, the Complaint falls far short of establishing a prima facie case of defamation as it does not contain any allegations that demonstrate Ms. Hendrickson acted with actual malice. In fact, the Complaint is bare of the phrase "actual malice" and alleges only that the statements in the post are defamatory as a matter of law, or "per se." Da006. The Complaint then confuses "slander per se," an ancient doctrine by which oral defamation involving four specific topics would obviate the need for proving special damages, with defamation "per se," which essentially means defamatory on its face. It also ignores several passages in the case it cites, Biondi v. Nassimos, 300 N.J. Super. 148, 155–56 (App. Div. 1997) which points out that the slander per se categories were as of 28 years ago essentially on life support:

> Therefore, even though the slander *per se* doctrine continues to be a part of New Jersey's law of defamation, the Court's characterization of the doctrine as "a relic from tort law's previous age" and its conclusion that "the trend should be toward elimination ... of the *per se* categories," *ibid.,* suggests that

> lower courts should invoke the slander *per se* doctrine only in cases where it clearly applies.
>
> Id. at 155-56.

The deficiencies in the pleading show that Lento Law fundamentally misunderstands the element of actual malice.

Lento Law argues that actual malice was established merely because Ms. Hendrikson knew that the retainer was non-refundable. Yet such an argument echoes that made by the plaintiff in Neuwirth, whose bare allegation that Governor Murphy was aware of the truth and made the statements recklessly and/or with actual knowledge of their falsity was rejected as insufficient by the Appellate Division.

There is nothing in the Complaint that shows Ms. Hendrickson had a subjective awareness that what she was publishing in the Post was false or that she had a high degree of awareness that the statements were false. As the Complaint is devoid of any facts regarding the essential element of actual malice, it is a frivolous SLAPP suit that the trial court properly dismissed under UPEPA.

III. THE TORTIOUS INTERFERENCE CLAIM WAS PROPERLY DISMISSED (RAISED BELOW, 1T39:3-7.

Lento Law did not challenge the trial court's dismissal of Count Two of its Complaint for intentional (tortious) interference with prospective economic advantage. New Jersey law is clear that this Count must also be dismissed because

torts ancillary to defamation are unavailable where, as here, it is based on the same underlying conduct as a deficient defamation claim.

> [I]f an intentional tort count ... is predicated upon the same conduct on which the defamation count is predicated, the defamation cause completely comprehends" the intentional tort claims. LoBiondo v. Schwartz, 323 N.J. Super. 391, 417 (App. Div. 1999); see also Binkewitz v. Allstate Ins. Co., 222 N.J. Super. 501, 516 (App. Div. 1988) (holding "words which are absolutely privileged against an action for defamation are also absolutely privileged against an action for tortious interference with contract or economic advantage."). Additionally, "a party who claims that its reputation has been damaged by a false statement cannot circumvent the strictures of the law of defamation ... by labeling its action as one for negligence." Dairy Stores, Inc. v. Sentinel Pub. Co., Inc., 191 N.J. Super. 202, 217 (Law Div. 1983), aff'd, 104 N.J. 125 (1986).
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> Brainbuilders, LLC v. Optum Services, Inc. et al., No. A-0621-22, 2024 WL 1693717, at *7 (App. Div. Apr. 19, 2024).

See also Lutz v. Royal Ins. Co. of Am., 245 N.J. Super. 480, 503 (App. Div. 1991) (citing Bainhauer v. Manoukian, 215 N.J. Super. 9, 48 (App. Div. 1987)) (proof or failure of proof of the operative facts of the defamation count would completely comprehend the malicious interference cause)). Sylvan Dental, P.A. v. Chen, No. A-4544-18, 2021 WL 3671164, at *9 (App. Div. Aug. 19, 2021) (because plaintiffs' proof of the tortious interference claims was "precisely the same evidence" forming "the basis for [the] defamation claim," they were properly dismissed as duplicative of plaintiffs' defamation claim); Williams v. MLB Network, Inc., No. A-5586-16T2,

2019 WL 1222954, at *30 (App. Div. Mar. 14, 2019) (when there is no actionable defamation, "'there can be no claim for damages flowing from the alleged defamation but attributed to a different intentional tort whose gravamen is the same as that of the defamation claim'").

Upon even the slightest examination, it is clear that Count Two is based on the identical allegedly defamatory language in the Post. Moreover, the Tortious Interference Count must be dismissed for the same reasons as the defamation claim, namely that the pleading is insufficient as to falsity and fails to plead factual allegations of actual malice. See Kenny, 205 N.J. at 307-08 ("Because G.D.'s arguments in support of his false-light claim are essentially the same as those he advances on his defamation claim, the result can be no different."); Salek v. Passaic Collegiate Sch., 255 N.J. Super. 355, 360-61 (App. Div. 1992) (dismissing false light claim for failure to plead a false statement of fact and defamatory meaning); Hornberger v. American Broadcasting Cos, 351 N.J. Super. 577, 598 (App. Div. 2002).

CONCLUSION

Based on the foregoing, Defendant/Respondent Carly Hendrickson respectfully requests that this Court affirm the trial court's grant of the Order to Show Cause dismissing Lento Law's Complaint in its entirety and allow Ms. Hendrickson to seek legal fees for defense of this appeal.

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LENTO LAW GROUP, P.C., Plaintiff/Appellant v. CARLY HENDRICKSON, Defendant/Respondent	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-003541-23 Civil Action On appeal from: Superior Court of New Jersey, Law Division, Mercer County Docket No.: MER-L-668-24 Sat below: Hon. R. Brian McLaughlin, J.S.C.

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PRELIMINARY STATEMENT

New Jersey's Uniform Public Expression Protection Act reflects decades of judicial authority explaining and interpreting the guarantees of free speech and expression afforded by our state Constitution. The statute erects a procedural framework to ensure that those constitutional rights are safeguarded rather than circumvented. The statute must be interpreted and applied broadly so that it achieves the protective purpose intended by the Legislature.

In that context, the decision of the court below was correct. Under any legal standard, Plaintiff's claim was deficient as a matter of law. Plaintiff offered only conclusory allegations of actual malice and, in any event, the statements complained of were expressions of protected opinion. As a result, it is clear on the face of the Complaint and as a matter of law that Plaintiff cannot either state a cause of action warranting discovery or demonstrate the existence of a genuine issue of material fact so as to justify a trial.

This case presents the precise sort of controversy that our Supreme Court and our Legislature have clearly marked for expeditious dismissal. The decision of the court below should be affirmed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

ACLU-NJ joins the procedural history and statement of facts of Respondent.

ARGUMENT

I. THE HISTORICAL BACKGROUND AND POLICY OBJECTIVES OF NEW JERSEY'S ANTI-SLAPP STATUTE PROVIDE CONTEXT NECESSARY FOR BALANCING THE CONSTITUTIONAL AND COMMON LAW RIGHTS AT ISSUE. (Pa1-7)

"In the late 1980s, commentators began observing that the civil litigation system was increasingly being used in an illegitimate way: not to seek redress or relief from harm or to vindicate one's legal rights, but rather to silence or intimidate citizens by subjecting them to costly and lengthy litigation." *See* Uniform Law Commission, *Uniform Public Expression Protection Act Prefatory Note* 1 (2022). Thus was coined the acronym "SLAPP," for strategic lawsuits against public participation. And while SLAPPs defy simple definition, taking many shapes and forms, they have one unifying feature: to ensnare their targets in costly litigation that chills society from engaging in constitutionally protected activity. In such cases, it is no comfort that the critic may ultimately prevail in the lawsuit (often several years later) because the damage – time-consuming and resource-draining litigation for otherwise constitutionally protected speech – is already done.

In 1989, Washington became the first state to pass what is known as an "anti-SLAPP" law. *See* Wash. Rev. Code §§ 4.24.500-520 (1989). Since then,

thirty-three other states, as well as the District of Columbia and the Territory of Guam, have enacted various forms of anti-SLAPP legislation.

On September 7, 2020 Governor Murphy signed into law bill S-2802/A-4393, making New Jersey the 33rd state to enact such legislation, and the sixth to adopt the Uniform Law Commission's particularly stringent protections embodied in the Uniform Public Expression Protection Act ("UPEPA"). The purpose of New Jersey's UPEPA-modeled S-2802/A-4393 (the "Statute," codified at N.J.S.A. § 2A:53A-49 et seq.): to allow people "to speak their mind on the issues that matter most to them without the fear of becoming ensnared in an expensive, time-consuming lawsuit." *Governor Murphy Signs Bipartisan Bill Protecting Against Lawsuits Designed to Suppress Free Speech* (Sep. 7, 2023), STATE OF NEW JERSEY, OFFICE OF THE GOVERNOR, https://www.nj.gov/governor/news/news/562023/20230907d.shtml (last visited Dec. 26, 2024) (comments by First Assistant Attorney General Lyndsay V. Ruotolo). The mechanism for that protection: the defendant's ability, within sixty days of service of the lawsuit, to file an order to show cause seeking expedited relief to dismiss the speech-based cause of action, forcing the plaintiff to prove a prima facie case for its speech-based claim.

As noted above, New Jersey's Statute is the progeny of UPEPA, which the UCL began drafting in 2019 to harmonize the varying approaches among the

individual states' prior anti-SLAPP laws and to "enunciate[e] a clear process through which SLAPPs can be challenged and their merits fairly evaluated in an expedited manner." *Uniform Public Expression Protection Act Prefatory Note* at 3. In setting forth this exemplar, the UCL made clear UPEPA's two-fold purpose: "protecting individuals' rights to petition and speak freely on issues of public interest while, at the same time, protecting the rights of people and entities to file meritorious lawsuits for real injuries." (*Id.*)

In other words, UPEPA – and the various state anti-SLAPP laws modeled after it, including New Jersey's Statute – recognizes that common law defamation causes of action have a place in the Country's jurisprudence; however, they must yield to the Constitutional rights of freedom of speech and expression. The New Jersey Legislature's near verbatim adoption of UPEPA in the State's analogue demonstrates the Legislature's intent to vault individuals' constitutional rights over common law claims for defamation.

II. THE STATUTE PROTECTS CONSTITUTIONAL RIGHTS OF FREE SPEECH AND EXPRESSION THAT UNDISPUTEDLY LIMIT THE COMMON LAW RIGHT TO BRING A CAUSE OF ACTION FOR DEFAMATION AND SHOULD BE BROADLY CONSTRUED TO THAT END. (Pa1-7)

The premise of Plaintiff's entire argument is that the Statute cannot be construed so as to affect the *status quo ante* of substantive defamation law as it existed prior to the enactment of the Statute. However, this misses the point.

What Plaintiff fails to grasp is that New Jersey courts have always limited expression-based causes of action in accordance with our state Constitution, which provides broad protection for speech and expression. "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." N.J. Const., Art. I, § 6.

This constitutional protection does not only restrain the government; it also affects the litigation of civil causes of action. That is, although speech-based causes of action such as defamation are long-established in the common law, they are subject to – and limited by – the speech protections enshrined in our state Constitution. In *Senna v. Florimont*, 196 N.J. 469 (2008), the New Jersey Supreme Court noted that constitutional rights limit a "court's 'power to award damages for libel in actions.'" *Senna*, 196 N.J. at 482 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 283 (1964)); *see also W.J.A. v. D.A.*, 210 N.J. 229, 241 (2012) (discussing limitations on defamation claims after *Sullivan*); *Sisler v. Gannett Co.*, 104 N.J. 256, 262 (1986) (addressing the "unhappy cohabitation of the tort of defamation, which is protective of an individual's reputation, with constitutional guarantees that serve to protect free speech and press.").

Accordingly, Appellants' complaint that the Statute and the decision below restrict the common law cause of action for defamation is unremarkable and unavailing. Common law causes of action have historically been restricted by the provisions of New Jersey's Constitution. The Statute does not change this, but rather provides neutral procedural mechanisms to ensure that constitutional protections are not circumvented by costly litigation.

It is no objection that these constitutional protections, left unthwarted, have the effect of limiting what causes of action a plaintiff might assert for alleged defamation. Rather, this limitation is exactly what our Constitution and law intend. The Statute "shall be broadly construed and applied to protect the exercise of the right of freedom of speech and of the press, the right to assembly and petition, and the right of association, guaranteed by the United States Constitution or the New Jersey Constitution." N.J.S.A. § 2A:53A-59.

Thus, the Statute serves to protect longstanding and fundamental constitutional rights – which rights happen to be particularly vulnerable to circumvention through civil litigation. Therefore, it should be broadly construed in accordance with our Constitution and the Legislature's intent.

III. THE DECISION BELOW WAS CORRECT. (Pa1-7)

Plaintiff argues that the court below referred to, but misapplied, the familiar summary judgment standard. This argument is without merit because

the Statute expressly provides three alternate grounds for dismissal. N.J.S.A. § 2A:53A-55(a). Under any analytical framework, the Complaint fails. It does not establish the prima facie elements of a defamation claim, does not state a cause of action, and cannot withstand summary judgment because the statements are not actionable as a matter of law.

A. The Statute applies to this matter because the statements at issue involve matters of public concern. (Pa1-7)

As a threshold matter, the statements challenged by Plaintiff relate to a matter of public concern. As a result, the protections and procedures of the Statute apply here. N.J.S.A. § 2A:53A-50(b)(3) (providing that the Statute "applies to a cause of action" based on "exercise of the right of freedom of speech … on a matter of public concern.").

The question of which subjects constitute a matter of public concern has been well explored by our Supreme Court in connection with New Jersey's fair comment privilege. *Sisler*, involved news articles reporting on improper loans made by a bank. These reports reflected "the public's interest in the conduct of the banking industry" and therefore "relate[d] to a matter of legitimate public interest." *Sisler*, 104 N.J. at 269. *Dairy Stores, Inc. v. Sentinel Pub. Co.*, 104 N.J. 125 (1986) (decided the same day as *Sisler*), involved articles reporting that the bottled water sold at the plaintiff's stores could not be pure "spring water" (as advertised) because it contained chlorine. The Court determined that this

issue was "unquestionably a matter of legitimate public concern," *Dairy Stores*, 104 N.J. at 146, 151.

Years later, *Turf Lawnmower Repair v. Bergen Record Corp.*, 139 N.J. 392 (1995), involved two articles describing the plaintiff's "deceptive business practices that 'ripped off' customers." *Turf Lawnmower*, 139 N.J. at 396. The Court explained that "*Dairy Stores* and *Sisler* involved business activities that intrinsically implicated important public interests, a matter of public health – the sale of such an essential of life as bottled water – and an industry heavily regulated by the government – banks." *Id.* at 411-12. And although media reporting on the operations of most "ordinary business" (such as a local "shoemaker, tailor, cleaner, or barber") would not constitute matters of public concern, "[t]he public does, however, have a legitimate interest in any business charged with criminal fraud, a substantial regulatory violation, or consumer fraud that raises a matter of legitimate public concern." *Id.* at 412-13.

In non-media cases, courts "consider the content, form, and context of the speech." *Senna*, 196 N.J. at 497. The content prong examines "the nature and importance of the speech" – *i.e.*, does it "promote self-government or advance the public's vital interests, or does it predominantly relate to the economic interests of the speaker?" *Id.* In evaluating context, courts "look at the identity of the speaker, his ability to exercise due care, and the identity of the targeted

audience." *Id.* (finding that purely commercial speech between competitors did not rise to matter of public concern).

Here, the online review at issue involves a matter of public concern under the *Senna* analysis. The review contains useful consumer information that "advance[s] the public's vital interests." It does not further any "economic interests of the speaker" (whose transaction had already closed, unlike the speech in *Senna*). Further, the "targeted audience" are potential consumers of legal services who may find great value in reading the experiences of prior customers such as the defendant here. On this point, it is notable that the review relates to deceptive business practices and the conduct of attorneys, members of a highly regulated industry. Thus, the review in this case touches on matters of public concern and is therefore subject to the Statute.

B. Plaintiff failed to establish a prima facie case on its causes of action because it did not plead facts to support actual malice as required by *Neuwirth*. (Pa1-7)

Because this matter involves a matter of public concern, Plaintiff must satisfy the actual malice fault standard. *Senna*, 196 N.J. at 495-96; *Durando v. Nutley Sun*, 209 N.J. 235, 239 (2012). Additionally, Plaintiff's Complaint must set forth factual allegations – not mere conclusions – to support this finding. Here, Plaintiff failed to allege a factual basis for a finding of actual malice. The Complaint was deficient on its face and the decision below was correct.

"To satisfy the actual-malice standard, a plaintiff must show by clear and convincing evidence that the publisher either knew that the statement was false or published with reckless disregard for the truth." *Neuwirth v. State*, 476 N.J. Super. 377, 391 (App. Div. 2023) (quoting *Lynch v. N.J. Educ. Ass'n*, 161 N.J. 152, 165 (1999)). At the pleading stage, a complaint "reciting mere conclusions without facts … do[es]not justify a lawsuit." *Id.* (quoting *Glass v. Suburban Restoration Co.*, 317 N.J. Super. 574, 582 (App. Div. 1998)). "A plaintiff can 'bolster a defamation cause of action through discovery, but not [] file a conclusory complaint to find out if one exists.'" *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 768 (1989) (quoting *Zoneraich v. Overlook Hosp.*, 212 N.J. Super. 83, 101-02 (App. Div. 1986)).

Thus, this Court clearly explained last year that "[i]n a defamation case, 'a vague conclusory allegation'" of actual malice is "not enough" and that a "conclusory complaint must be dismissed." *Neuwirth*, 476 N.J. Super at 390 (quoting *Zoneraich*, 212 N.J. Super. at 101-02). That is, a complaint that offers a conclusory allegation of "knowledge of falsity or reckless disregard for truth or falsity" that is "unsupported by factual contentions offered to substantiate the assertion" must fail. *Id.* (quoting *Darakjian v. Hanna*, 366 N.J. Super. 238, 247 (App. Div. 2004)). Where plaintiffs assert "mere recitations of the applicable legal standard, not factual assertions," they fail to state a cause of action. *Id.*

Here, as in *Neuwirth*, Plaintiff "asserts no facts from which a factfinder could conclude" that the defendant acted with actual malice. "With nothing more, plaintiff's defamation claim fails." *Id.* at 393.

C. Plaintiff's claims cannot withstand either a motion to dismiss or a motion for summary judgment because the statements are nonactionable opinion as a matter of law. (Pa1-7)

Separate from the pleading deficiencies in the Complaint, Plaintiff's claim inevitably fails because the statements at issue are expressions of opinion. This is true as a matter of law – on the face of the Complaint and regardless of which legal standard is applied. Plaintiff can neither state a cause of action nor show the existence of a genuine issue of material fact.

Here, Plaintiff cannot establish either actual malice or falsity because the only reading of the statement in question is as an expression of Defendant's opinion. An opinion cannot be false, and therefore cannot be made with actual malice. *Ward v. Zelikovsky*, 136 N.J. 516, 531 (1994); *NuWave Inv. Corp. v. Hyman Beck & Co., Inc.*, 432 N.J. Super. 539, 553 (App. Div. 2013).

The question of whether speech is "a statement of fact or an expression of opinion … is a question of law for the court." *Kotlikoff v. Cmty. News*, 89 N.J. 62, 67 (1982). Although Plaintiff devotes greater attention to the issue of defamatory meaning, that too "is a question of law for the court." *DeAngelis v. Hill*, 180 N.J. 1, 14 (2004) (quoting *Ward*, 136 N.J. at 529); *Kotlikoff*, 89 N.J. at

67. Accordingly, Plaintiff's contention that dismissal was not proper here because "defamation defenses and privileges were devised at common law and were intended to be resolved by juries … [not] to be applied by judges as a matter of law" (Pb9 (internal quotation omitted)) is categorically incorrect.

The argument that an issue has been improperly removed from the province of the jury has no merit. The issues of defamatory meaning and opinion are questions of law and are ascertainable from the face of Plaintiff's Complaint. Fact finding is not required with respect to intent or any other issue. Dismissal under the Statute was warranted in light of our Constitution's guarantee of free speech and the intent of our Legislature.

CONCLUSION

Accordingly, ACLU-NJ respectfully submits that this Court should find for Respondent and affirm the decision below.

Respectfully submitted,

Dated: December 26, 2024 By: _____

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LENTO LAW GROUP, P.C., Plaintiff-Appellant, v. CARLY HENDRICKSON, Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003541-23 CIVIL ACTION On Appeal From: SUPERIOR COURT, LAW DIVISION MERCER COUNTY, DOCKET NO. MER-L-000668-24 Sat Below: Hon. Brian McLaughlin, J.S.C.

BRIEF OF PROPOSED AMICI CURIAE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, NEW JERSEY PRESS ASSOCIATION, AND NEWS/MEDIA ALLIANCE IN SUPPORT OF DEFENDANT-RESPONDENT SEEKING TO AFFIRM

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STATEMENT OF INTEREST OF AMICI CURIAE

The Reporters Committee for Freedom of the Press ("Reporters Committee") is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970, when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The Reporters Committee is joined in this brief by the New Jersey Press Association and the News/Media Alliance (together, "amici"). The New Jersey Press Association ("NJPA") is a non-profit organization incorporated in 1857 under the laws of the State of New Jersey. It has a membership composed of daily newspapers, affiliate newspapers, weekly newspapers, and digital news websites, as well as corporate and non-profit associate members. NJPA is a membership association formed to advance the interests of newspapers and to increase awareness of the benefits of newspaper readership. The mission of NJPA is to help newspapers remain editorially strong, financially sound, and free of outside influence. NJPA pursues these goals in every way possible, as a service both to its members and to the people of New Jersey. Journalists and news organizations are frequently the targets of strategic lawsuits against public participation ("SLAPPs")

designed to chill their constitutionally protected newsgathering and reporting activities.

The News/Media Alliance represents over 2,200 diverse publishers in the U.S. and internationally, ranging from the largest news and magazine publishers to hyperlocal newspapers, and from digital-only outlets to papers who have printed news since before the Constitutional Convention. Its membership creates quality journalistic content that accounts for nearly 90 percent of daily newspaper circulation in the U.S., over 500 individual magazine brands, and dozens of digital-only properties. The Alliance diligently advocates for newspapers, magazine, and digital publishers, on issues that affect them today.

Even with no hope of succeeding on the merits, SLAPPs can impose significant litigation costs on defendants and discourage the exercise of First Amendment rights. Amici therefore have a strong interest in ensuring that courts properly apply state anti-SLAPP laws intended to stop such meritless suits. Accordingly, the Reporters Committee regularly weighs in on the interpretation and application of state anti-SLAPP laws. See, e.g., Br. of Amici Curiae Reporters Comm. for Freedom of the Press & Other Media Orgs. in Supp. of Pet'rs-Appellants, Glorioso v. Sun-Times Media Holdings, LLC, __ N.E.3d __ (Ill. 2024) (slip op.) (No. 130137), 2024 WL 4009053 (interpretation of Illinois anti-SLAPP law); Br. of Amici Curiae Reporters Comm. for Freedom of the Press et al. in

Supp. of Appellants, Flade v. City of Shelbyville, 699 S.W.3d 272 (Tenn. 2024) (No. M2022-00553-SC-R11-CV) (Tennessee anti-SLAPP law); Amici Curiae Br. of Reporters Comm. for Freedom of the Press & 14 Media Orgs., Thurlow v. Nelson, 263 A.3d 494 (Me. 2021) (No. CUM-20-63), 2021 WL 6335375 (Maine anti-SLAPP law).

INTRODUCTION

SLAPPs are meritless suits "generally used to silence individuals or organizations from publicly criticizing or bringing legitimate issues to light" and to chill the exercise of First Amendment rights.[1] While SLAPPs, by definition, lack legal foundation, defendants are often forced to spend substantial time and financial resources defending against them; the threat alone of expensive, protracted litigation can discourage speech.

To combat this troubling trend, New Jersey enacted an anti-SLAPP statute in 2023. N.J.S.A. 2A:53A-49 to -61. The New Jersey statute is based on the Uniform Public Expression Protection Act ("UPEPA"), a model law drafted by the non-partisan Uniform Law Commission. It provides "a clear process through which SLAPPs can be challenged and their merits fairly evaluated in an expedited manner." Unif. Pub. Expression Prot. Act 3 (Unif. L. Comm'n 2020), https://perma.cc/J3AE-EZHC ("UPEPA Comments"). UPEPA is intended to "protect[] individuals' rights to petition and speak freely on issues of public interest while, at the same time, protecting the rights of people and entities to file meritorious lawsuits for real injuries." Id.

[1] Press Release, State of N.J., Governor Murphy Signs Bipartisan Bill Protecting Against Lawsuits Designed to Suppress Free Speech (Sept. 7, 2023), https://perma.cc/E87Q-SWLC.

In enacting a version of UPEPA, New Jersey's legislature intended to provide a mechanism for defamation defendants, including journalists and news organizations, to obtain dismissal of SLAPP suits that concern protected speech, including criticism of a business within a highly regulated industry. And it applies to a case such as here, where a member of the public submitted a critical review with the Better Business Bureau ("BBB") about her experience with a law firm that had represented her in a legal matter.

ARGUMENT

I. SLAPPs pose a significant threat to speech, including news reporting, and risk chilling First Amendment expression.

For decades, SLAPPs have been a growing problem and a threat to speech. A SLAPP, by definition, lacks merit, yet the plaintiff pursues his claim "to punish" the defendants "for exercising the constitutional right to speak and petition the government for redress of grievances" or scare them into future silence. Thomas A. Waldman, SLAPP Suits: Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation, 39 UCLA L. Rev. 979, 981–82 (1992); see also Trevor Timm, Devin Nunes Has a Cow, and Free Speech Is Endangered, GEN (Mar. 21, 2019), https://bit.ly/2Yt33si. Even when defendants prevail in these cases, they may ultimately lose given that it can cost significant financial resources to defend against a SLAPP. See David Keating, Estimating the Cost of Fighting a SLAPP in a State with No Anti-SLAPP Law, Inst. for Free Speech

(June 16, 2022), https://tinyurl.com/5c588da5 (estimating that it would cost between $21,000 and $55,000 to defeat a typical meritless defamation lawsuit in court).

SLAPPs also can take a non-financial toll on those forced to defend themselves in court. Journalists "will never be able to recover the time that could have been spent on reporting, or forget the stress" that drawn-out litigation inflicts. D. Victoria Baranetsky & Alexandra Gutierrez, What a costly lawsuit against investigative reporting looks like, Colum. Journalism Rev. (Mar. 30, 2021), https://bit.ly/3AjdlbO (noting that discovery in connection with a SLAPP filed against the authors' nonprofit newsroom was so "burdensome" it required "two reporters and one editor working full time" on it over the course of nearly two years); see Charles Ornstein, Our Editor Won a 6-Year Legal Battle. It Didn't Feel Like a Victory, ProPublica (Aug. 30, 2024), https://perma.cc/NT3G-NY26 (discussing mental toll, time drain, and distraction caused by libel suits, in addition to financial pain). This, all too often, is the point: to warn journalists that "reporting on powerful or deep-pocketed organizations isn't worth the risk." Baranetsky & Gutierrez, What a costly lawsuit against investigative reporting looks like, supra. In this way, SLAPPs threaten to silence reporting on matters of public concern. See Ornstein, Our Editor Won a 6-Year Legal Battle, supra

(explaining that ProPublica has been targeted with lawsuits six times since its inception over investigative reporting on matters of public concern).

State legislatures began to craft solutions to the problem of SLAPPs beginning in the late 1980s after sociologists coined the term to refer to civil lawsuits "aimed at preventing citizens from exercising their political rights or punishing those who have done so." Penelope Canan & George W. Pring, Strategic Lawsuits Against Public Participation, 35 Soc. Probs. 506, 506 (1988), https://www.jstor.org/stable/800612. These jurisdictions recognized, and sought to address, the problem of libel plaintiffs using the courts as a tool to silence and retaliate against members of the public, including the press, for engaging in First Amendment-protected activity.[2] In 1992, California was among the first states to adopt an anti-SLAPP law, in response to the state legislature finding "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Cal. Civ. Proc. Code § 425.16(a). The law recognized "that it is in

[2] See, e.g., Shannon Jankowski & Charles Hogle, SLAPP-ing Back: Recent Legal Challenges to the Application of State Anti-SLAPP Laws, Am. Bar Ass'n (Mar. 16, 2022), https://tinyurl.com/mr228njc (describing how SLAPP suits punish targets with time-consuming litigation that is costly and deters similar speech); Editorial Board, New York's Chance to Combat Frivolous Lawsuits, N.Y. Times (Nov. 4, 2020), https://nyti.ms/3uSgPAZ (describing SLAPPs and noting that they have become "pervasive"); Understanding Anti-SLAPP Laws, Reporters Comm. for Freedom of the Press, https://www.rcfp.org/resources/anti-slapp-laws (collecting stories of SLAPPs).

the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." Id.

This was no less true in New Jersey. For example, before the state became an anti-SLAPP jurisdiction, the journalist Tim O'Brien and his publisher were sued for libel here regarding statements about now-President Elect Donald Trump's net worth. See Trump v. O'Brien, 422 N.J. Super. 540, 543–44 (App. Div. 2011). The court ultimately granted the defendants' motion for summary judgment because it found "no triable issue as to the existence of actual malice." Id. at 560. Although the case was dismissed, Trump described it as a win for himself, stating, "I spent a couple of bucks on legal fees, and they spent a whole lot more. I did it to make [O'Brien's] life miserable, which I'm happy about." See Former President Trump and the First Amendment: What You Need to Know, Pub. Participation Project, https://perma.cc/76Q3-SK7V. This result highlights the way in which SLAPP suits punish critics, including the press. If New Jersey law had an anti-SLAPP law on the books at that time, the case could have potentially been dismissed sooner, with fewer party and judicial resources expended, and defendants might have received their attorney's fees.[3]

[3] Notably, over a decade before the legislature acted, the Supreme Court of New Jersey recognized the troubling problem, and in the absence of an anti-SLAPP law, held that a claim "for malicious use of process" would "afford[] a remedy to one

In the last three decades, a national consensus has emerged, as thirty-four states, the District of Columbia, and the Territory of Guam adopted some form of anti-SLAPP protections. Anti-SLAPP Legal Guide, Reporters Comm. for Freedom of the Press, https://www.rcfp.org/anti-slapp-legal-guide/. While anti-SLAPP laws may differ in some respects across jurisdictions, they share a common goal: to discourage the filing of SLAPPs and prevent them from imposing onerous financial and other burdens on the public and press.[4] New Jersey is among the states that understood the threat that SLAPPs present and the toll they take on individuals speaking on matters relevant to others in their communities and enacted a law to make it more challenging for plaintiffs to use the judiciary as a means of silencing speech.

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who has been victimized by a SLAPP suit." LoBiondo v. Schwartz, 199 N.J. 62, 92 (2009). Even after LoBiondo, however, SLAPPs continued to pose serious harms, prompting the carefully crafted statutory framework that is now New Jersey's anti-SLAPP law. See Section II.A, infra.

[4] Anti-SLAPP laws, including New Jersey's, typically allow for more expedited dismissals of SLAPPs, a stay of discovery while the anti-SLAPP motion is pending, a mechanism for an immediate appeal of a denial of an anti-SLAPP motion, and the opportunity to recover attorney's fees and costs.

II. New Jersey's UPEPA law was enacted to counter the threat from SLAPPs.

A. The law was carefully crafted to discourage SLAPP plaintiffs, including businesses, from "weaponizing" libel suits and "bullying" critics.

New Jersey enacted its bipartisan anti-SLAPP statute to protect, *inter alia*, "the exercise of the right of freedom of speech and of the press . . . guaranteed by the United States Constitution or the New Jersey Constitution." N.J.S.A. 2A:53A-59. It is one of eight states to "specifically enact [the] particularly strong protections" embodied in the UPEPA statute. Governor Murphy Signs Bipartisan Bill Protecting Against Lawsuits Designed to Suppress Free Speech, supra; see also Anti-SLAPP Legal Guide: New Jersey, Reporters Comm. for Freedom of the Press, https://www.rcfp.org/anti-slapp-guide/new-jersey/.[5] In so doing, the legislature and Governor intended "to discourage people from filing frivolous lawsuits meant to intimidate or silence critics." Dana DiFilippo, New N.J. law sets hurdles for filers of frivolous lawsuits, N.J. Monitor (Sept. 7, 2023), https://tinyurl.com/zxxtu9pt.

[5] Those are Hawaii, Maine, Pennsylvania, Kentucky, Minnesota, Utah, Washington, and Oregon. Public Expression Protection Act, Unif. L. Comm'n, https://perma.cc/E8PB-9LYY; see also Emily Hockett, UPEPA sweeps the nation, Reporters Comm. for Freedom of the Press (June 3, 2024), https://www.rcfp.org/upepa-sweeps-the-nation/.

The law provides a mechanism for early dismissal, and other protections, from causes of action arising out of a defendant's "exercise of the right of freedom of speech or of the press . . . on a matter of public concern." N.J.S.A. 2A:53A-50(b)(3). UPEPA protects speech on a variety of societal and community concerns: It broadly applies to defendants speaking in different forums and on a multitude of topics "so long as that exercise is on a matter of public concern." UPEPA Comments at 8.

New Jersey courts have long held that activities that intrinsically implicate important public interests, including criticisms of businesses or industries that are heavily regulated by the government, present matters of public concern. See, e.g., Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 139 N.J. 392, 411–12 (1995) (holding that speech concerning a business allegedly committing consumer fraud constitutes a matter of public interest); Rocci v. Ecole Secondaire Macdonald-Cartier, 165 N.J. 149, 159–60 (2000) (holding that allegations of a teacher behaving inappropriately on a school trip were a matter of public concern); Sisler v. Gannett Co., 104 N.J. 256, 268 (1986) ("The business of banking . . . intimately affects the commercial welfare and business interests of the people[.]" (citation omitted)).[6] This approach is reflected in the decisions out of other

[6] And before UPEPA was enacted, New Jersey courts sought to protect speech on matters of public concern. In Senna v. Florimont, 196 N.J. 469, 496–97 (2008), the Court required the actual malice standard to be applied wherever there was a

UPEPA states involving consumer complaints, like here. See, e.g., UHS of Provo Canyon, Inc. v. Bliss, No. 2:24-CV-163-DAK-CMR, 2024 WL4279243, at *5 (D. Utah Sept. 24, 2024) (explaining that a private business's "actions, business model, tactics, and treatment of vulnerable populations are matters of public concern" under Utah's UPEPA law); Davenport Extreme Pools & Spas, Inc. v. Mulflur, 698 S.W.3d 140, 155 (Ky. Ct. App. 2024) (interpreting Kentucky's UPEPA-based law "to apply widely to expressions both public and private, especially speech relating to consumer opinions, commentary, complaints, reviews, and ratings of businesses"); see also Governor Murphy Signs Bipartisan Bill Protecting Against Lawsuits Designed to Suppress Free Speech, supra ("Money and power shouldn't be tools to muzzle the voices of critics and whistleblowers." (statement of Assembly sponsor Raj Mukherji)).[7]

matter of public concern, and in non-media cases it instructed that "to determine whether speech involves a matter of public concern or interest . . . a court should consider the content, form, and context of the speech." See also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761–62 (1985).

[7] The New Jersey UPEPA statute directs that "[i]n applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it," N.J.S.A. 2A:53A-60, thereby signaling the legislature's intent that courts interpret the law in a manner that promotes uniformity among jurisdictions. This was in keeping with the goal behind the model law of creating a statute that could be adopted across a wide number of states to discourage "litigation tourism" and promote cohesiveness through uniformity in this area of the law. UPEPA Comments at 3.

Once the threshold requirement that the speech relates to a matter of public concern is satisfied (of which there is no dispute here), dismissal is appropriate if the claim can be shown to fail as a matter of law, *or* if there is no genuine dispute of material fact that would allow the plaintiff to prevail as a matter of law. See N.J.S.A. 2A:53A-55(a)(3)(a)–(b); see also id. at 53A-55(a)(1)–(2) (if the anti-SLAPP applies, the court must determine whether plaintiff has made a *prima facie* case). Where these steps have been satisfied, the statute provides for early dismissal and other protections, including the recovery of attorney's fees and costs. Id. at 53A-58 & 53A-55; see also DiFilippo, New N.J. law sets hurdles for filers of frivolous lawsuits, supra (Gov. Murphy explaining "law will expedite the process to get these cases dismissed on behalf of the journalists, small businesses, activists, and countless others who have been unfairly targeted by these lawsuits").[8]

The Act is to be "broadly construed," N.J.S.A. 2A:53A-59, to accomplish the statute's goal of ending the "weaponiz[ation]" of lawsuits "as a means of silencing someone speaking out about a controversial issue," Governor Murphy Signs Bipartisan Bill Protecting Against Lawsuits Designed to Suppress Free

[8] Specifically, the statute contains five mechanisms to achieve its goal: allowing for the filing of motions to dismiss or strike in the early stages of litigation, requiring an expedited hearing on such motions and a stay on discovery while the anti-SLAPP motion is pending, compelling the SLAPP plaintiff to demonstrate its libel case has merit, awarding attorney's fees when the plaintiff cannot carry its burden, and permitting an interlocutory appeal of orders denying the SLAPP defendant's motion. N.J.S.A. 2A:53A-49 to -61.

Speech, supra (statement of Senate sponsor Joseph Lagana). Correctly applied, the law makes it "more difficult to use the legal system as a weapon, with the intent to bully individuals into silence." Id. (statement of First Assistant Attorney General Lyndsay V. Ruotolo).

Because SLAPPs target individuals exercising their right to speak freely on matters that concern their communities, and provide a means to retaliate against such speech, New Jersey lawmakers, through the adoption of UPEPA, have shown a clear intent to protect the public, including the press, from such suits.

B. Far from abolishing defamation, the law reflects the legislature's understanding that the tort was being used in "illegitimate" ways to suppress speech and its policy choice to restore balance.

New Jersey's legislature understood that certain defamation plaintiffs were using the courts for improper ends and enacted a version of UPEPA to facilitate the dismissal of lawsuits intended to stifle protected speech. Appellant argues that, under New Jersey's anti-SLAPP law, "the manner in which the Trial Court evaluates the alleged defamatory statement must not further disadvantage the defamation plaintiff." Appellant's Br. at 10. But UPEPA was designed to even the playing field between defamation plaintiffs and defendants, since defendants who are facing SLAPPs have been disadvantaged for many years. See supra, Section II.A. In fact, UPEPA's prefatory note mentions that in the 1980s, plaintiffs had begun targeting defendants exercising their rights to publish and speak freely,

using civil litigation in an "illegitimate way . . . to silence or intimidate citizens by subjecting them to costly and lengthy litigation." UPEPA Comments at 1 (emphasis added). In response, the UPEPA drafters state unequivocally that

> the Act's procedural features are designed to prevent substantive consequences: the impairment of First Amendment rights and the time and expense of defending against litigation that has no demonstrable merit. As stated by one California court, "[t]he point of the anti-SLAPP statute is that you have a right not to be dragged through the courts because you exercised your constitutional rights."

UPEPA Comments at 7 (internal citations omitted).

UPEPA was intended to put defamation defendants on more even footing with SLAPP plaintiffs. *See* id. at 14 (stating that "the ultimate purpose of the Act" is "to allow a party to avoid the expense and burden of frivolous litigation until the court can determine that the claims are not frivolous"). For instance, the legislative history demonstrates that the Senate Budget and Appropriations Committee amended the bill to (1) require courts to hear orders to show cause under the Act as expeditiously as possible and to provide rulings as soon as practicable, and (2) expressly provide in the synopsis of the Act that UPEPA provides an expedited means for the dismissal of SLAPP suits. S.B. 2802, Reg. Sess. (N.J. 2023) (as amended June 27, 2023), https://www.njleg.state.nj.us/bill-search/2022/S2802/bill-text?f=S3000&n=2802_S2. Thus, it is clear the New Jersey legislature wanted to ensure that the Act would serve as an effective means for defamation defendants to quickly dispose of meritless suits.

Further, after enacting New Jersey's version of UPEPA, Governor Murphy explained that these same goals were foundational to his signing it into law:

> If a SLAPP is initiated, the bill (S-2802/A-4393) now allows eligible defendants to file paperwork requiring the plaintiff to demonstrate the basis for the lawsuit and requiring the court to consider the issues in an expeditious manner. This process will enable these kinds of cases to be dismissed quickly, and at less expense to the defendant, rather than being drawn out in court.

Governor Murphy Signs Bipartisan Bill Protecting Against Lawsuits Designed to Suppress Free Speech, supra.

Thus, while "the legislature did not abolish the tort of defamation," Appellant's Br. at 1, it did make the intentional policy choice to correct what it perceived to be an imbalance in the law and enable courts to expeditiously dismiss SLAPPs as a means of protecting the right of New Jerseyans to speak freely on matters of public concern. See N.J.S.A. 2A:53A-50. Courts in other jurisdictions have rejected the argument raised by Appellant here that anti-SLAPP laws inherently eradicate defamation claims. See, e.g., Gottwald v. Sebert, 220 N.E.3d 621, 638–40 (N.Y. 2023) (describing that amendments to New York's anti-SLAPP statute would not foreclose respondents' defamation claims). And the decision of the court below, which likewise rejected Appellant's request to subvert the legislature's policy choice, faithfully applied the law to the specific comments at issue. See Appellant's Br. at 7-8, 14-16; see also Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 553 (2009) (explaining that it is the judiciary's role to "determine

and effectuate the Legislature's intent"). As exemplified by the commentary provided by the UPEPA drafters, the Act's legislative history, and Governor Murphy's explanation once the Act was signed into law, New Jersey's anti-SLAPP law is intended to better protect the public's ability to speak freely on issues concerning their communities.

For the reasons stated above, this Court should hold that New Jersey's anti-SLAPP law applies in this matter and, more generally, make clear that N.J.S.A. 2A:53A-49 to -61 provides broad protections for defamation defendants facing SLAPPs that, among other things, enable them to obtain quick dismissals of cases intended to suppress their ability to speak freely about matters of public concern.

CONCLUSION

For the foregoing reasons, amici respectfully urge the Court to affirm the decision below.

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Respectfully submitted,

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