
DONALD J. SURDOVAL,

Plaintiff,

vs.

LISA SURDOVAL AND CATHERINE
A. SURDOVAL

Defendants.

x SUPERIOR COURT OF NEW
: JERSEY
: APPELLATE DIVISION
:
: DOCKET NO. A-003884-23
:
:
: SUPERIOR COURT OF NEW
: JERSEY LAW DIVISION –
: SUSSEX COUNTY, DOCKET NO.
: SSX-L-185-24

x Sat Below:
Hon. Vijayant Pawar

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PRELIMINARY STATEMENT

This appeal is among the first to this Court seeking an interpretation of the new Uniform Public Expression Protection Act (“UPEPA” or “Act”), N.J.S.A. 2A:53A-49 et seq., enacted to expeditiously dispose of Strategic Lawsuits Against Public Participation (“SLAPP”). UPEPA serves to protect individuals exercising their rights to petition and speak freely on matters of public concern. This case presents an important question: whether UPEPA’s broad, remedial purposes to summarily dismiss SLAPP suits is triggered by a complaint that alleges defamatory statements regarding a possible crime to a prosecutor’s office, in addition to those same statements being made to others.

Plaintiff Donald Surdoval (“Plaintiff”) alleges that his younger two sisters Catherine and Lisa Surdoval (“Defendants”) “almost immediately” after their younger brother Brian’s death on December 31, 2021, told members of their extended family and others “that Plaintiff murdered Brian and covered up the supposed murder to look like suicide.” This is the only defamatory language alleged in the Complaint. No other details were provided – not the exact language, who was the recipient of this statement, or when the statement was made.

The Complaint alleges the statement was made before, leading up to, during and after Defendants met with the Bergen County Prosecutor’s Office (“BCPO”) in October 2023 to petition for an investigation into Brian’s death. Timing is crucial

because any statement made during the 15 months between Brian's death on December 31, 2021 and April 22, 2023 – one year before Complaint was filed – falls outside of the one-year statute of limitations for defamation and is not actionable. The Complaint's only reference to any specific date was to October 6, 2023, when Defendants and other relatives met with the BCPO after sending written statements petitioning that office to open an investigation. The Complaint then alleges that after that meeting with prosecutors, "Defendants continued to make their false statements to others" without identifying the who, what, when or where of said statements.

Questioning governmental action or inaction involving a suspected murder is speech that is a matter of public concern, as is petitioning law enforcement to open an investigation. This is also encapsulated in our courts' longstanding recognition of a privilege for statements made in good faith for the purpose of helping to bring a criminal to justice, in the absence of a proof of actual malice.

The first step in analyzing whether UPEPA applies is for a court to determine whether a filed action is based upon *inter alia*, "the exercise of freedom of speech or of the press, the right to assembly or petition ... guaranteed by the federal or state constitutions, on a matter of public concern." Plaintiff acknowledges that communications between Defendants and the prosecutor's office are a matter of public concern protected under UPEPA; the Trial Court said it "may be."

However, the Trial Court decisively erred when it ruled those communications were insufficient for UPEPA to apply because they were not an integral to the Complaint. Of the nine paragraphs in the Complaint that allege Defendants made false statements to third parties, five concern communications with the prosecutor's office, while the remaining four paragraphs plead conclusory allegations of general defamation to non-specified third parties. Bizarrely, the trial court's decision relied heavily on Plaintiff's opposition certification, ignoring that it almost exclusively focused on Defendants' communications with the BCPO in order to fill in the barebones Complaint.

While Defendants maintain that all the actions attributed to them in the Complaint reflect a matter of public concern, under UPEPA dismissal with prejudice is warranted if even part of a cause of action falls within the scope of the statute. At very least, Defendants' alleged statements to the prosecutor's office clearly implicate a matter of public concern.

Reading UPEPA to require that all allegations in the complaint be a matter of public concern is contrary to the explicit language of the statute itself. The decision below risks profound adverse effects on the future applicability of UPEPA to SLAPP cases. Plaintiff's Complaint falls squarely within the ambit of the Act; this case should be reversed and remanded to the Trial Court for a determination on the second step of the law.

PROCEDURAL HISTORY¹

On April 22, 2024, Plaintiff filed his Complaint against Defendants alleging one count of defamation and one count of intentional infliction of emotional distress. [Da001]. On June 27, 2024, in lieu of an Answer, Defendants filed an Order to Show Cause (“OTSC”) seeking a dismissal of the Complaint with prejudice under the Anti-SLAPP Law. [Da007]. A show cause hearing was held on August 5, 2024.² [1T.] On August 9, 2024, the Trial Court denied the OTSC, finding that the Anti-SLAPP Law did not apply to this case on the sole basis that the alleged defamatory statements were not a matter of public concern. [Da015]. The Trial Court held that:

[T]he speech is not a matter of public concern as there is no relationship between the challenged statements and defendants’ asserted public interest. While the circumstances surrounding the death of Brian may be connected to an issue of public interest, it is not enough for this Act to apply.

According to plaintiff, the statements made by defendants to the BCPO are not the subject of this defamation action and the fact that the meeting occurred was pled simply for contextual background. While defendants argue plaintiff only recently made that concession in their opposition to the order to show cause, this court finds that the complaint is regarding the statements made to third parties, not the BCPO. Defendants offered no argument as to how those statements made to third parties touched a matter of public concern.***

¹ Da = Defendants’ Appendix

² Transcript of the August 5, 2024 Order to Show Cause Hearing is referred to herein as 1T et. seq.

Defendants heavily relied on the contention that because the alleged defamatory statements were concerning the potential crime of murder committed by plaintiff, it meets the definition of a public concern...However, this court finds defendants' argument regarding public concern to be unconvincing and therefore, does not reach the merits of the issues presented regarding plaintiff's prima facie case.

[Da021-22.]

Defendants filed a Notice of Appeal of the August 9, 2024 Order that day. [Da024]. On August 13, 2024, Defendants sought a stay from the Trial Court pending appeal, which was denied on August 30, 2024. [Da027].

Defendants filed a motion to stay the Trial Court proceedings with the Appellate Division on September 10, 2024 and the Appellate Division denied the motion for a stay on September 27, 2024. [Da028]. Defendants filed a motion to stay before the Supreme Court, which remains pending. [Da030].

STATEMENT OF FACTS

Brian Surdoval died by gunshot wound on December 31, 2021, at the age of 48. [Da001-2]. He was married with two young sons. [Da002]. Brian has an older brother, Plaintiff Donald, and two older sisters, Defendants Catherine and Lisa. [Da001].

The certificate of death issued by the State of New Jersey lists the manner of death as suicide. [Da002] An autopsy was performed on January 3, 2022, and the

Bergen County Medical Examiner’s report lists the manner of death as suicide by gunshot wound to the head. Ibid.

“Almost immediately” after Brian’s death, Defendants allegedly began to make unspecified defamatory statements to third persons regarding Plaintiff. Ibid. The Complaint alleges that Defendants “told members of their extended family that Brian did not commit suicide, that Plaintiff murdered Brian; and that that Plaintiff covered up the supposed murder to make it look like suicide.” Ibid. The Complaint further alleges that Defendants “repeated these false and defamatory statements to others outside of their extended family” without saying what statements and to whom and by whom. Ibid. However, because the purported suicide occurred on December 31, 2021, and the Complaint was not filed until April 22, 2024, any statements that were allegedly made “almost immediately” after Brian’s death through April 22, 2023, are non-actionable because of the one-year statute of limitations³. No details regarding these allegations or their timing were included in the Complaint.

³ The statute of limitations for defamation is one year from the date of publication without any discovery rule. Lawrence v. Bauer Publishing & Printing, Ltd., 78 N.J. 371 (1979); NuWave Inv. Corp. v. Hyman Beck & Co., 432 N.J. Super. 539, 568, (App. Div. 2013), aff’d, 221 N.J. 495 (2015). The only allegation clearly set forth to be within the relevant one-year period are alleged statements to the BCPO, which are matters of public concern.

The Complaint also alleged that Defendant Catherine posted multiple Facebook images “which are clearly intended to accuse Plaintiff of destroying Brian’s life” again without Plaintiff identifying the images or the words on the images, or exactly how each image was allegedly defamatory as required by our case law.⁴ Ibid.

The Complaint then alleges that Defendants sent written statements to the BCPO relating to the “false and defamatory statements regarding Brian’s death, Ibid., and that Defendants repeated the false statements in those statements at a meeting with prosecutors on October 6, 2023, Ibid., and that “despite being advised by the prosecutor’s office that their statements were false, Defendants continued to make their false statements to others” without saying what those false statements were, to whom or when they were made. [Da002]. The Complaint alleges that “Defendants’ statements made to the Prosecutor’s office were made with actual malice,” Ibid., but fails to provide the factual basis required by Neuwirth v. State, 476 N.J. Super. 377 (App. Div. 2023).

Defendant’s OTSC sought an adjudication under UPEPA that the Complaint (or part thereof) should be dismissed upon an expedited review of the allegations,

⁴ Even on a cursory review, Defendant’s Catherine Surdoval’s Facebook posts are of such a generalized nature and without any of the specificity in pleading required by Zoneraich v. Overlook Hospital, 212 N.J. Super. 83 (App. Div. 1986) as to be non-actionable. The trial court did not address this.

either under the motion to dismiss or summary judgment standard as provided in the statute.

Both sides submitted certifications in support of the OTSC but at argument Defendants asserted the matter could and should be decided on the basis of a motion to dismiss, not summary judgment. The Trial Court permitted the inclusion of additional allegations of fact from the parties and incorporated certain submissions by Plaintiff in its decision, essentially amending the Complaint.

1. Additional Facts Submitted By Defendants

While Defendants argued that the Complaint is insufficient to state a claim upon which relief may be granted, the Certifications of Defendant Catherine Surdoval (“Catherine Cert”) and that of Lisa Surdoval (“Lisa Cert.”) provide ample evidence that (1) the Complaint does not differentiate between the Defendants’ statements; (2) both Defendants categorically deny accusing their brother of murdering Brian; and (3) both Defendants had ample reason for suspecting that Brian did not commit suicide.

Catherine is a Certified Public Accountant with her own business. [Da032]. She has been estranged from Plaintiff for nearly 12 years. Ibid. Lisa worked for Plaintiff at his company, Storis, for 11 years until she was fired in October 2023. [Da038]. Plaintiff is the trustee for Lisa’s portion of the proceeds of their mother’s

will. Ibid. Catherine also denies alleging to anyone but the Prosecutor that Plaintiff murdered Brian or that Plaintiff covered up any such murder. Ibid., [Da044].

Catherine was estranged from Plaintiff and Brian in a dispute over their mother's estate where they were co-executors, in 2012. [Da032]. She reconciled with Brian in June 2021 after a long estrangement from Brian, who had worked with Don (Plaintiff) as his investment advisor. Ibid. Plaintiff and Brian had a particularly nasty falling out, after which Plaintiff told Lisa he was moving his accounts from Brian's control to another trading platform. Ibid.

Thereafter, Catherine and Brian were in nearly daily contact, visiting each other's homes and attending local events and activities and sharing their deepest feelings, including the controlling and narcissistic nature of their brother the Plaintiff, how Plaintiff was bad-mouthing Brian to clients, former coworkers at Merrill Lynch and country club friends, stating that he was doing drugs "24/7." Ibid., [Da039]

Brian made clear to Catherine that, based on the 2019 suicide of a family friend and how devastating that was to him and his best friend that it was something he adamantly could **never** do. [Da033, Da039]. He was not suicidal and discussed his long-term plans, his professional activities, his deep Christian faith, his healing/emotions surrounding Don, his self-assuredness in his life, pride in his accomplishments, his daily gym/self-care and his involvement in his children's well-being and activities. [Da033, Da039].

Lisa spent time with Brian on Thursday December 30, 2021, the day before his death. She found him in excellent spirits. She asked him to help her with a financial issue and he said that he would work with her on the following Monday, January 3, 2022. [Da040].

On December 31, 2021, the morning of Brian's death, Catherine said there were several confusing actions that later added to Defendants' suspicions. [Da33-34]. In the days immediately following his death, there were even more incidents that raised concern. For example: (1) the Franklin Lakes Police told Catherine that both Plaintiff and Brian's wife, Jessica, claimed Brian was on drugs 24/7, had financial problems, bought a pot farm, and the gunshot wound he died from was under his chin; (2), a confidant of Brian, a Catholic nun, told Catherine that Brian would never take his own life; Catherine learned that Brian's phones, car and gun were released to Don hours after his body was found and that Don was desperate to obtain the passcode to get into his phones by asking Lisa and others if they knew it. Ibid., [Da039-40].

Further, the assistant Medical Examiner of Bergen County, who performed the autopsy on Brian, told Catherine there was no gunshot residue on Brian's hands and that the direction of the bullet contradicted what she was told by Franklin Lakes Police; she learned that Brian's body was released from the Medical Examiner's office after a 90-minute autopsy, and that Brian was immediately cremated, as

arranged by Plaintiff and Jessica without any communication to either defendant (his sisters) [Da035].

Jessica reacted to Catherine's efforts to obtain a copy of the Medical Examiner's report by having a lawyer send a cease-and-desist letter to Catherine and then cutting Catherine off from Brian's children. [Da035-36]. Nevertheless, Catherine eventually received a copy of the Medical Examiner's report on or about January 23, 2023, from her sister Lisa. [Da036]. Plaintiff had provided Lisa with the report after apparently misreading it to think that it reflected that Brian's blood showed a wide array of drugs. Ibid. Lisa said that Plaintiff told her to read it when she was alone because it was so disturbing as it was positive for so many drugs. Ibid. Don clearly had misread the report and missed the words "NONE DETECTED," indicating there were no positive drug findings in the report. Therefore, Don's defamatory claims that Brian was a drug addict that he had been consistently and relentlessly repeating for two years after Brian's death were clearly incorrect. Ibid., [Da 040].

Based upon these facts and on behalf of Lisa and two cousins with similar suspicions, Catherine approached the BCPO to obtain an appointment to share their concerns. [Da036]. They met in a face-to-face meeting in Hackensack in October 6, 2023. Ibid. At one point during the meeting, one person on the BCPO team said that some of the facts presented to the Bergen County Prosecutor's Office by Defendants

were false, but when challenged by Catherine, agreed to look into whether they were true. Ibid. The meeting did not provide them with any additional information, and although at least one attendee for the Bergen County Prosecutor's Office, after saying that some of the facts in Defendants' submissions to them were false, agreed to follow up with other law enforcement after Cathy explained why they were not false, however the Bergen County Prosecutor's Office did not follow up. Ibid. Lisa did not make any substantive statements to the Prosecutors during that meeting. [Da041].

2. Additional Facts Submitted By Plaintiff.

The additional facts submitted by Plaintiff centered on Defendants' approach to the BCPO. Plaintiff alleged in his opposition Certification ("Plaintiff Cert.") that Defendants had communicated with their cousins Kevin Murphy and Chris Rowland prior to the meeting with the BCPO and had sent written statements to the BCPO regarding Plaintiff's alleged involvement in Brian's death. [Da046]. On October 6, 2023, Defendants had a meeting with the BCPO along with Murphy and Rowland, during which these cousins repeated that Plaintiff murdered Brian and covered up the murder to make it look like suicide (demonstrating Defendants were not alone in their suspicions). [Da053].

Plaintiff also attempts to add facts to the Complaint through his Certification implicating Lisa, alleging she texted Murphy, referring to "Brian's murder."

[Da047]. Further, that Lisa told Murphy and Rowland that Plaintiff was involved with Brian's murder and accused Plaintiff in another text of "tak[ing] Brian down." Ibid. Plaintiff also alleges that Lisa prepared a memo, apparently for the prosecutor's office, in which she stated, "I knew immediately my brother Don was involved whether he did it or instigated it," and "Cathy and I knew Don was involved in Brian [sic] death and beginning to suspected [sic] Jessica too." Ibid. This memo was shared with Murphy and Rowland. Plaintiff further alleges that Catherine sent an email to the BCPO where the "Subject" of the email is "Per Evan Feather's Request," wherein Catherine states that Brian was murdered by Plaintiff and that the "certainty" of this fact was shared by others including Murphy, Rowland and a nun who was Brian's acquaintance, Sister Doris. Ibid. None of these allegations are in the Complaint.

Plaintiff alleges that months after the BCPO meeting, these false statements caused Murphy to post on Facebook in or about January 2024 that Plaintiff murdered Brian,. [Da052]. However, those posts cannot be the subject of the current defamation action as they were not made by Defendants. Plaintiff also alleges that Catherine has posted Facebook images, which he claims are intended to accuse Plaintiff of destroying Brian's life, yet make no reference to Plaintiff, and were not included or specifically cited in the Complaint. [Da002]. Plaintiff further asserted that he had a "loving relationship" with Brian but admits that their relationship

became strained and distant when Plaintiff confronted Brian about smoking marijuana. [Da048].

LEGAL ARGUMENT

I. STANDARD OF REVIEW

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).

Because the Trial Court incorrectly interpreted the UPEPA's provisions, specifically N.J.S.A. 2A:53-55(a)(3)(b)(ii) requiring a dismissal with prejudice if 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", its findings are not entitled to any special deference. Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019)(holding that "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.")

The Trial Court also considered evidence outside of the pleadings, akin to a summary judgment motion. The UPEPA permits the trial court to consider any evidence that could be considered in ruling on a motion for summary judgment, N.J.S.A. 2A:53A-54. Appellate courts review the trial court's grant or denial of a motion for summary judgment *de novo*. Samolyk v. Berthe, 251 N.J. 73 (2022); Stewart v. N.J. Tpk. Auth./Garden State Parkway, 249 N.J. 642, 655 (2022); Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). Legal conclusions regarding the summary judgment motion itself are subject to plenary review. New Gold Equities Corp. v. Jaffe Spindler Company, 453 N.J. Super. 358 (2018).

II. THE TRIAL COURT ERRED IN DENYING APPLICATION OF THE ANTI-SLAPP LAW IN FINDING THAT NO MATTER OF PUBLIC CONCERN WAS RAISED BY DEFENDANTS' STATEMENTS TO THE PROSECUTOR'S OFFICE (RAISED BELOW, DA019-22).

This is a case of first impression for this Court, in that it is faced with (a) what constitutes a matter of public concern as to these facts, and (b) whether any action which implicates, even if only in part, a matter of public concern, meets the first prong of the UPEPA.

Plaintiff had argued in his briefs that the alleged statements made by Defendants to the prosecutor's office were merely pleaded for "contextual background" and were incidental to the Complaint. [Da021]. However during oral

argument, under questioning by the Court, counsel conceded that statements made to the prosecutor's office are a matter of public concern. [1T18:17-20, Da020-21]. The Trial Court denied Defendants' OTSC, asserting that Defendants' UPEPA claim was based upon the erroneous holding that the alleged defamatory speech is "not a matter of public concern as there is no relationship between the challenged statements and defendants' asserted public interest." [Da021.]

Although the Trial Court acknowledged that the circumstances surrounding Brian's death "may be connected to an issue of public interest," it nevertheless found the UPEPA did not apply. Ibid. The Trial Court disregarded the Complaint's clear (if partial) reliance on defamatory statements made to the prosecutor's office and focused on allegations that were not part of the Complaint, i.e., claims that the statements were allegedly made to specific individuals: Kevin Murphy, Chris Rowland, Sister Doris and Evan Feather, who were identified for the first time in Plaintiff's certification (Murphy and Rowland had actually attended the BCPO meeting asking for an investigation). [Da021-22]. This holding was in error as it explicitly contradicts the plain language of the statute and is contrary to established case law on matters of public concern.

A. The Trial Court Erred in Holding That The Alleged Defamatory Statements To The Prosecutor's Office Did Not Trigger the UPEPA (raised below, DA021).

“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). “An overriding principle of statutory construction compels that every effort be made to harmonize legislative schemes enacted by the Legislature.” Richter v. Oakland Bd. of Educ., 246 N.J. 507, 538 (2021). Those principles of statutory interpretation require reversal here.

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. 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) (emphasis added).

The statutory language “part of the cause of action” is critical here. Defendants filed an OTSC under UPEPA seeking an expedited determination under the two-step analysis, first as whether the speech at issue in the Complaint is a matter of public concern and second as to whether the Complaint failed to present a prima facie case of defamation. The Trial Court crossed out everything but the first step in the executed OTSC, but the limitations of the hearing did not become apparent until oral argument. [Da008]. Nevertheless, as the Trial Court improperly determined that the first step had not been met, it did not proceed to analyze the second.

In ruling on the 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. The Court may do so under the motion to dismiss or summary judgment standard. N.J.S.A. 2A:53A-55.

The law 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. 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. 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.

UPEPA’s goal of a prompt resolution and deterrence of SLAPP suits and broad protections for the constitutional right of free speech require a reversal of the Trial Court’s holding. The Trial Court directly acknowledged in its written opinion that the alleged defamatory statements to the prosecutor’s office “may” be connected to an issue of public interest, but nonetheless found that it was “not enough” for UPEPA to apply. The Trial Court interpreted the statute narrowly, rather than broadly. UPEPA explicitly requires dismissal of any part of the claim that involves a matter of public concern and for which there is no prima facie case of

defamation, even if the remainder of the complaint falls outside UPEPA. See, N.J.S.A. 2A:53A-55(a). This common-sense approach comports both with UPEPA's express goals and the plain language of the statute.

As set forth *infra* at II(B), Defendants attempted to petition the prosecutor's office to open a criminal investigation into Brian death. These statements, regardless of whether an investigation was ultimately opened, implicated a matter of public concern.

In the Complaint, Plaintiff specifically alleges that the statements to the BCPO before and during the 2023 meeting were defamatory. Out of a factual background consisting of sixteen paragraphs, only nine paragraphs allege that Defendants made false statements to third parties. Out of those nine paragraphs, five of the paragraphs concern the statements made to the prosecutor's office. The first cause of action for defamation alleges that Defendants made defamatory statements to the prosecutor's office with malice. Contrary to the Trial Court's decision, the alleged defamatory statements to the prosecutor's office constituted a significant part of the Complaint and triggered application of the UPEPA.⁵

⁵ Although the Step One analysis is solely based on whether the Complaint attempts to abridge rights as defined in the Act, if this Court were to decide, like the trial court, to weigh the import of the approach to the BCPO in the context of the entire Complaint, the fact that parts of the Complaint may not even be operative should enter into that determination. The Trial Court noted (and Plaintiff conceded) that the Complaint was not well drafted. T12: 19-20.

B. The Speech at Issue Is a Matter of Public Concern (Raised Below, Da019).

While Plaintiff asserted that the petition for an investigation by the BCPO was merely context for his claims of general defamation, in fact, the opposite is true. The public or even private expression that the BCPO and other police authorities did not thoroughly investigate a murder – is a matter of public concern, especially here in the context of the Complaint, where petitioning authorities to investigate is the culmination of the statements and suspicions of Defendants. No matter how the alleged defamation is trumpeted by Plaintiffs, it does not become any less a matter of public concern; it may simply open the speaker to potential defamation liability.

⁶ Had the court gone onto Step Two of the UPEPA analysis, however, the problems with the substantive allegations in the Complaint become clear.

As stated above, the Complaint alleges that one specific allegedly defamatory comment was repeated by Defendants: that Plaintiff “murdered Brian and covered up the murder to make it look like suicide.” [Da002]. The Complaint lacks specificity as to all but one of the allegedly defamatory comments complained of, as well as the

⁶ Even if Plaintiff alleges falsity in Defendants’ communications, that should not affect the Step One of the analysis, because if a defendant were precluded from satisfying step one, anytime a plaintiff alleged that the defendant’s otherwise-protected statements were false, it would undercut the purposes of the anti-SLAPP statute and would allow a plaintiff to evade the statute merely by alleging falsity. See, L.S.S. v. S.A.P., 523 P.3d 1280, 1287 (Colo. Ct of Appeals 2023) cert. denied, No. 22SC880, 2023 WL 4568488 (Colo. July 17, 2023).

extent of distribution of the alleged defamatory statements except that they were made to “third persons” to “extended family,” to “others outside of their extended family”, that Catherine posted multiple unspecified Facebook images, that Defendants sent statements to the Bergen County Prosecutor’s Office, repeated those statements at a meeting with the BCPO on October 6, 2023, and then continued to make alleged false statements to others. [Da002-3] Again, while the Complaint refers to false statements, only one statement is specified in the Complaint.⁷

The New Jersey Supreme Court has dovetailed defining a matter of public concern with the need to plead actual malice in matters of public concern in what it has termed the “fair comment” privilege, which requires proof of actual malice where statements are a matter of public concern (not simply where public officials or public figures are plaintiffs as in the federal constitutional standard). The Court

⁷ “In the case of a complaint charging defamation, plaintiff must plead facts sufficient to identify the defamatory words, their utterer and the fact of their publication. A vague conclusory allegation is not enough.” Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 767–68 (1989) (citing Zoneraich, 212 N.J. Super. at 101). See also, Darakjian v. Hanna, 366 N.J. Super. 238, 249 (App. Div. 2004) (noting that the Supreme Court in Printing Mart applied the Zoneraich standard to a motion to dismiss); Dello Russo v. Nagel, 358 N.J. Super. 254, 269, 434–35 (App. Div. 2003). Printing Mart also pointed out that essential facts supporting the alleged defamation cannot be dredged up through discovery. “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, 116 N.J. at 767-68, citing Zoneraich, 212 N.J. Super. at 101–02.

reflected on the privilege's broad gloss and history in first applying it to specific areas of public concern, such as health and safety:

Generally speaking, the doctrine of fair comment extends to virtually all matters of legitimate public interest. Through the principle of fair comment, New Jersey courts have long accorded protection to wide-ranging statements about public officials. Kotlikoff v. The Community News, 89 N.J. 62, 65 (1982); Leers v. Green, 24 N.J. 239, 258–59 (1957). The courts have likewise applied the principle to controversial public issues, such as internal security during the McCarthy era, Coleman v. Newark Morning Ledger Co., 29 N.J. 357, 382–83 (1957) and to criticism of a proposed trailer park that was perceived as posing a threat to drainage, property values, and taxes, Hohl v. Mettler, 62 N.J. Super. 62, 66–67 (App. Div. 1960). Drinking water, the subject of the present litigation, has also been held to be a topic of vital public concern and subject to fair comment. Mick v. American Dental Ass'n, 49 N.J. Super. 262, 280, 282–83, certif. denied, 27 N.J. 74 (1958). (App.Div.).

Dairy Stores, Inc. v. Sentinel Pub. Co., 104 N.J. 125, 141–42 (1986).

The Court first applied its revived fair comment privilege in Dairy Stores, where the actual malice standard of fault was applied to speech that touched on health and safety, and on the same day in Sisler v. Gannett Co., 104 N.J. 256 (1986), where it was applied to speech touching on highly-regulated industries, in that case a banker. Nine years later, the Court returned to the privilege in Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 139 N.J. 392 (1995), cert. denied, 516 U.S. 1066 (1996), which required proof of actual malice where speech touched on consumer fraud.

Finally, the Court set forth principles for determining whether speech is a matter of public concern in Senna v. Florimont, 196 N.J. 469, 496-7 (2008). In Senna, the Supreme Court limited application of the privilege so that it would not apply to allegedly defamatory statements by one business against another, which it defined as a particular kind of commercial speech not entitled to the privilege. But Senna also declared that statements on matters of public concern in general are entitled to the protection of the privilege's actual malice standard, and that while the media is presumptively entitled to the privilege, this additional protection can and should be applied to non-media speech:

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, 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.

Since Senna was decided, the United States Supreme Court has refined 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).

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,” appears even broader than the construction in Senna. Under Senna and Snyder, the speech complained of in the Complaint – comments made concerning a suspected murder, coupled with a demand for an investigation of that death -- are a matter of public concern.

The UPEPA commentary itself confirms its adoption of both the U.S. Supreme Court’s Dun & Bradstreet formulation of “content, form and context” for determining a matter of public concern (as also adopted by our Supreme Court in Senna) as well the as the broader language in Snyder a 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 v. Myers*, 461 U.S. 138, 147-48 (1983)). 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).

Because the law also requires uniformity with UPEPA jurisdictions, we look at Washington State, another UPEPA jurisdiction, and how it interprets matter of public concern to be “relating to any matter of political, social, or other concern to the community”:

UPEPA applies to a complaint or cause of action when it is asserted against a person based on the person's “[e]xercise of the right of freedom of speech or of the press, the right to assemble or petition, or the right of association, guaranteed by the United States Constitution or Washington state Constitution, on a matter of public concern.” RCW 4.105.010(2)(c). Whether speech is a matter of public concern is a question of law, which courts must determine “‘by the content, form, and context of a given statement, as revealed by the whole record.’” We have previously held that “[s]peech involves ‘matters of public

concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community.”

Jha v. Khan, 520 P.3d 470, 477–78 (2022), review denied, 530 P.3d 182 (Wash. 2023)(internal citations omitted).

In Thurman v. Cowles Co., 541 P.3d 403, 413 (Wash. Ct. App. 2024), the Court articulated the state legislature’s “reasonable grounds for treating defamation plaintiffs and defendants differently when the former brings a cause of action against the latter for exercising First Amendment activities on a matter of public concern” under UPEPA, quoting from the uniform law’s prefatory comments:

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 for harm or to vindicate one’s legal rights, but rather to silence or intimidate citizens by subjecting them to costly and lengthy litigation. These kinds of abusive lawsuits are particularly troublesome when defendants find themselves targeted for exercising their constitutional rights to publish and speak freely, petition the government, and associate with others. Commentators dubbed these kinds of civil actions “Strategic Lawsuits Against Public Participation,” or SLAPPs.

SLAPPs defy simple definition. They can be brought by and against individuals, corporate entities, or government officials across all points of the political or social spectrum. They can address a wide variety of issues—from zoning, to the environment, to politics, to education. They are often cloaked as otherwise standard claims of defamation, civil conspiracy, tortious interference, nuisance, and invasion of privacy, just to name a few. But for all the ways in which SLAPPs may clothe themselves, their unifying features make them a dangerous force: Their purpose is to ensnare their targets in costly litigation that chills society from engaging in constitutionally protected activity.

Ibid., quoting Unif. Pub. Expression Prot. Act prefatory note intro., 13 pt. 2 U.L.A. 30, 31-32 (2022).

In this matter, the speech in question as framed by the Complaint comments directly on suspicions of family members involving the circumstances surrounding the death of their brother, suspicions which were ultimately presented to the BCPO. Although it is unknown whether the Office further investigated the death as a crime, it was a matter for initial police investigation; the entreaties to the BCPO by Defendants were indisputably part of a petition to that office requesting an investigation into a potential crime.

C. Defendants' Alleged Statements Before and After Communicating with the Prosecutor Were Also a Matter of Public Concern (Raised Below, Da019).

Facts surrounding the commission of a crime are subjects of legitimate public concern. Romaine v. Kallinger, 109 N.J. 282, 302–03 (1988), citing, inter alia, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975) (The commission of a crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public). See also Petersen v. Meggitt, 407 N.J. Super. 63, 77–78 (App. Div. 2009) (content/form/context analysis not required because statements related to an issue of public health and safety). In the instant matter, context – airing suspicions about a potential crime to those with an interest and by petitioning a public law enforcement agency; form – through narrow contact with individuals with an interest and in a

visit with law enforcement authorities; and content - specific concerns about public safety issues, surely meet the Senna test.

Moreover, the public concern is magnified by the qualified privilege that protects defamatory statements made in the public interest in the context of reports to law enforcement. See, Dijkstra v. Westerink, 168 N.J. Super. 128 (1979)(communications accusing someone of a crime to the police is qualifiedly privileged); Geyer v. Faiella, 279 N.J. Super. 386 (1995)(recognizing a list of cases holding citizens have a qualified privilege in making statements to authorities for the prevention and detection of crime). It also extends beyond law enforcement, not only to communications with those with whom the speaker has a duty to communicate, but also when the party communicating the statement has “an interest.” Govito v. W. Jersey Health Sys., Inc., 332 N.J. Super. 293 (App. Div. 2000).⁸

A qualified privilege requires, by definition, circumstances that induce a correct or reasonable belief that (a) there is information that affects a sufficiently important interest of the publisher, and (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest. Gallo

⁸ While there are no recipients of allegedly defamatory statements other than the BCPO in the Complaint, the persons identified in Plaintiff's Certification are all friends or relatives of Defendants who would have an interest, at least, in the statements.

v. Princeton University, 281 N.J. Super. 134, 143 (App. Div. 1995). This qualified privilege can only be overcome by establishing actual malice from the publisher. Ibid.

To Defendants’ knowledge, at this writing two other UPEPA decisions have been rendered in New Jersey since its enactment, one a bench decision in Lento Law Group, P.C. v Hendrickson, (MER-L-668-24, June 7, 2024) and the other a bench decision in Holtec International v. Javerbaum Wurgaft Hicks, Kahn Wikstrom & Sinins, P.C. (CAM-L-2069-24, September 13, 2024). [Da103, Da115].

Lento Law Group involved a law firm suing a former client and whether a public online review of attorney services was a “matter of public concern.” In his decision, Hon. R. Brian McLaughlin, J.S.C. acknowledged that UPEPA requires a broad construction and that case law of other jurisdictions are instructive and addressed the fact that such reviews are part of free speech rights under the federal and state constitutions. [Da105-112.]

The court in Lento Law Group, P.C. v Hendrickson ruled that the law does not require any calculation of how much of a matter of public concern such reviews can be. “That is not what the law required and the Court even finds in broadly interpreting the law, it’s intended to not to – to not restrict the right of people to comment on matters of public concern and to – ferret out cases that don’t involve issues of – of defamation from protracted litigation by the very infrastructure of the

legislative scheme.” [Da108]. Once Judge McLaughlin ruled that the online post at issue was eligible for UPEPA protection, he turned to whether Plaintiff presented a prima facie case of defamation. Ibid. Here, the trial court should have conducted a similar analysis to construe and apply the broad purposes of UPEPA to Defendants’ statements to law enforcement.

Holtec involved a defamation suit against the Javerbaum law firm for posts on the firm’s web site and on social media about an underlying whistleblowing case the firm brought against Holtec on behalf of its fired CFO. Judge Kassel ruled the posts were matters of public concern and found that they were not actionable defamation. [Da149].

D. The Trial Court Erred In Finding Persuasive Value in FilmOn.com v. Double Verify Inc., 7 Cal. 5th 133 (2019) (Da020).

Instead of relying on Senna and Snyder to determine the matter of public concern issue, the Trial Court turned to a California case cited by Plaintiff, FilmOn.com v. Double Verify Inc., 7 Cal. 5th 133 (2019). This was inappropriate for several reasons. The case involved a media provider which provides paid authentication services to online advertisers which Plaintiff alleged falsely classified their websites as “copyright infringement-file sharing” and “adult content.” FilmOn alleges that reports issued by Double-Verify, which provides much the same services to clients, resulted in the loss of advertising revenue.

FilmOn also relies on a catch-all provision in California’s anti-SLAPP statute that includes different language than New Jersey’s UPEPA and analyzes that additional language in order to reach its conclusions. FilmOn.com, 7 Cal. 5th at 150-152, (citing Section 425.16 of that state’s SLAPP statute). Second, the parties were competitors, which would not been seen as a matter of public concern under Senna, and the speech at issue was made confidentially to paying clients.

While, like our Supreme Court, the California Court did not rule that commercial speech was categorically not covered by the statute, the nature of the speech “can bear on whether it was made in furtherance of free speech in connection with a public issue.” Third, the analysis involved whether the context of the speech should apply in the catch-all provision and “content and context” should be considered. Id. at 154.

As set forth above, in Senna, New Jersey applies the Dun & Bradstreet test of “content form and context” in determining whether a statement is a matter of public concern. Although Senna applied to whether New Jersey’s common law “fair comment” privilege – applying an actual malice standard to statements involving matters of public concern – it could similarly apply, perhaps with some modification, to application in the anti-SLAPP context.

Finally, while UPEPA requires that it must be broadly construed and uniformly applied with other states which adopted, applied and construed the

UPEPA (N.J.S.A. 2A:53A-60), California, although having the oldest anti-SLAPP statute, is not a UPEPA state.

In other words, New Jersey has already reached its own conclusions regarding how to determine whether a statement is a matter of public concern in Senna and FilmOn adds nothing to that discussion.

E. Uniformity with UPEPA and Other Anti-SLAPP laws Require a Remand (Raised Below in Defendants’ Briefs).

The UPEPA Commentary instructs that communication should be broadly interpreted:

“Communication” should be construed broadly—consistent with holdings of the Supreme Court of the United States—to include any expressive conduct that likewise implicates the First Amendment. See Texas v. Johnson, 491 U.S. 397, 404 (1989) (“[W]e have long recognized that [First Amendment] protection does not end at the spoken or written word.”); Spence v. Washington, 418 U.S. 405, 409-11 (1974) (holding that conduct constitutes “communication” when it is accompanied by an intent to convey a particularized message and, given the surrounding circumstances, the likelihood is great that the message will be understood by those who view it).

Comment 6 to Section 2 (Scope), Uniform Public Expression Protection Act (UPEPA), National Conference of Commissioners on Uniform State Laws (2020).

In Oregon, a UPEPA jurisdiction (effective May 2023) its appellate court has already dealt with this issue head-on in Mouktabis v. Clackamas Cnty., 536 P.3d 1037, 327 Or. App. 763 (2023) and ruled that a report to law enforcement was a matter of public concern and because the defendant did so, “the form and context of

the speech confirms that it was in connection with a public issue or an issue of public interest.” Mouktabis, 536 P.3d at 1046, 327 Or. App. at 773-774. This case was presented to and ignored by the Trial Court.

In Mouktabis, plaintiff alleged that his former wife falsely contacted the police to report a violation of a restraining order. The Oregon Court of Appeals ruled that requests to police are protected under UPEPA, particularly because approaching law enforcement can be considered part of the right of petition. 536 P.3d at 1045; 327 Or. App. at 772, noting “A petition conveys the special concerns of its author to the government and, in its usual form, requests action by the government to address those concerns.” (citation omitted). The Court specifically found that Article I, section 8, and Article I, section 26, of the Oregon Constitution protect a similar right. Similarly, the New Jersey Constitution, Article I, Paragraph 18 reads: “The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, **and to petition for redress of grievances.**” (emphasis added).

The Mouktabis Court – identically with New Jersey Courts, assumed its legislature intended to give words of common usage their ordinary meaning, and consulted a dictionary to define “petition.” Id. Definitions of “petition” include “an earnest request,” and “a formal written request addressed to an official person or organized body.” Webster's Third New Int'l Dictionary, 1690 (unabridged ed. 2002).

The right of petition has been defined as “[t]he constitutional right—guaranteed by the First Amendment—of the people to make formal requests to the government, as by lobbying or writing letters to public officials.” Black's Law Dictionary, 1350-51 (8th ed. 2004).

That is exactly the law in New Jersey:

Words in the statute which are not specifically defined are given their common meaning. *Scatuorchio v. Jersey City Incinerator Auth.*, 14 N.J. 72 (1953); *Fuschetti v. Bierman*, 128 N.J. Super. 290 (Law Div. 1974). See also 2A Sutherland, *Statutory Construction*, § 46.01 (5th ed. 1992). In determining the common meaning of words, it is appropriate to look to dictionary definitions. *Matthews v. State*, 187 N.J. Super. 1, 7–8, (App. Div. 1982), *appeal dismissed*, 93 N.J. 298, 460 A.2d 694 (1983). “Reimburse” is defined as “[t]o pay back, to make restoration, to repay that expended; to indemnify, or make whole.” *Black's Law Dictionary*, 1452 (4th ed. 1957).

Miah v. Ahmed, 359 N.J. Super. 151 (App. Div. 2003), *rev'd*, 179 N.J. 511 (2004). See also, e.g., *E.C. by D.C. v. Inglima-Donaldson*, 470 N.J. Super. 41, 53–54 (App. Div. 2021).

The Mouktabis Court found that when the defendant made her report to the police, she was requesting assistance from the state regarding a perceived violation of a restraining order, and the claims of Plaintiff arose out of that conduct. Here, Plaintiff's claims against Defendants, in good measure arise from Defendants' communications with the BCPO. In LoBiondo v. Schwartz⁹, 323 N.J. Super 391

⁹ Ironically the N.J. Supreme Court, in a follow-up to that litigation over malicious abuse of process, declined to impose a court-made anti-SLAPP remedy. LoBiondo v. Schwartz, 199 N.J. 62 (2009).

(App. Div. 1999) the Appellate Division determined that letters written by an area resident to a planning board, which were allegedly defamatory, “clearly constituted petitions to the government for redress of grievances” as the thrust of the petition was directed to official unresponsiveness. Id. at 414. Moreover, because the defendant’s petitioning involved a public issue (and because plaintiffs, as land use applicants, were public figures), the actual malice standard applied and was not met. Ibid.

The Mouktabis Court then looked to defendant’s conduct could be considered petitioning activity in connection with a public issue or an issue of public interest. Exactly like the New Jersey Supreme Court ruled in Senna, the Oregon Court focused on the statement’s content, form, and context, citing that state’s Supreme Court in Neumann v. Liles, 369 P.3d 1117, 358 Or. 706, 720 (2016). The Oregon Court ruled that because the speech was about a perceived violation of a domestic violence restraining order, it was a matter of public interest. “Because [Defendant] sought the state’s help in enforcing the terms of her restraining order, the form and context of the speech confirms that it was in connection with a public issue or an issue of public interest.” Mouktabis, 536 P.3d at 1046. Similarly and importantly, a report to police concerning possible foul play in a death cannot be considered a “private matter” and is a matter of public concern. Mouktabis goes on to note that a central goal of the anti-SLAPP statute is to encourage citizens to engage with and

participate in government. It follows that a report of a suspicious death to law enforcement as part of a petition to investigate is similarly a matter of public concern.

Other anti-SLAPP state cases similarly support this interpretation. See, e.g., Yu v. Koo, 633 S.W.3d 712, 722 (Tex. App. 2021)(appellant's statements to any third party, whether public or private, concerning either an alleged sexual assault or reporting of it to the police, are based on or in response to Appellant's exercise of her right of free speech under anti-SLAPP law); Whitelock v. Stewart, 661 S.W.3d 583, 596-98 (Tex. App. 2023)(noting that even accusations of animal abuse, fraud, or criminal activity can be considered a matter of public concern); Pryor v. Brignole, 292 A.3d 701, 706 (2023)(in anti-SLAPP action, public allegations that someone is involved in crime generally are speech on a matter of public concern). In Pryor, the Connecticut Supreme Court held that the commission of a crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions are, without question, events of legitimate concern to the public. 292 A.3d at 706.

CONCLUSION

Based on the foregoing, Defendants/Appellants Lisa Surdoval and Catherine A. Surdoval respectfully request that the Court reverse the denial of the OTSC and determine that Step One of UPEPA has been satisfied and this matter should be remanded to the Trial Court for further proceedings in accordance with UPEPA.

Respectfully submitted,

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DONALD J. SURDOVAL,

Respondent,

v.

LISA SURDOVAL and CATHERINE A.
SURDOVAL,

Appellants.

: SUPERIOR COURT OF NEW JERSEY
: APPELLATE DIVISION
:

: Docket No.: A-003884-23
:

: SUPERIOR COURT OF NEW JERSEY
: LAW DIVISION – SUSSEX COUNTY,
: DOCKET NO.: SSX-L-185-24
:

: Sat Below:
: Hon. Vijayant Pawar
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:

BRIEF ON BEHALF OF PLAINTIFF/RESPONDENT

On the brief:

Robert Mahoney, Esq.
Kimberly Brunner, Esq.

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PRELIMINARY STATEMENT

Defendants Catherine A. Surdoval's ("Catherine") and Lisa Surdoval's ("Lisa") (collectively "Defendants") strain to expand the scope and applicability of New Jersey's Anti-SLAPP statute to very private, albeit outrageous defamatory statements. The very target of the statute – strategic lawsuits against public participation – reveals that the statute does not apply to this very private defamation claim: Plaintiff Donald Surdoval's ("Plaintiff") sisters, the Defendants, stating to family members, friends and acquaintances that Plaintiff murdered their brother. Defendants' argument comes down to this: Defendants' slanderous statements constitute "public participation" and "public expression" simply because they also repeated those statements to the Bergen County Prosecutor's Office ("BCPO"). There is no support in the statute, New Jersey defamation case law, or the decisions of other jurisdictions that have adopted the uniform act that defendants may invoke the statute to shield themselves from liability for defamatory statements made to private individuals by repeating those statements to the police.

This case arises from Defendants statements about Plaintiff Donald Surdoval's alleged involvement in their brother Brian Surdoval's ("Brian") death. Defendants do contend that Brian's death was not a newsworthy event. Other than the standard obituary, there were no news articles regarding his death. The complaint alleges that Defendants falsely stated to family members, friends, and others that

Plaintiff murdered Brian or was otherwise involved in his death. Plaintiff further alleges that Defendants eventually brought their false beliefs to the attention of the BCPO, where they were advised that their so-called “facts” were false. Nonetheless, Defendants continued to repeat false statement concerning Plaintiff and Brian’s death. Defendants’ entire argument is premised on the mischaracterization of the complaint that the statements to the BCPO is the tortious conduct for which relief is sought. The Trial Court correctly recognized that Plaintiff’s causes of action (for defamation and intentional infliction of emotional distress) relate solely to the statements made to family, friends and acquaintances and that the discussion in the complaint concerning the BCPO is only for context.

Furthermore, on this appeal, Defendants seek a “do over” of their Order to Show Cause (“OTSC”). Defendants want this Court to treat the Trial Court’s order under a motion to dismiss standard and ignore the certifications both sides submitted in opposition to the OTSC. The Uniform Public Expression Protection Act (“UPEPA”) permits the court to consider supporting certifications in connection with an OTSC, and the Trial Court properly did so.

The issue of whether a statement is a matter of public concern is not a matter of first impression. Defendants overstate the breadth of what is a matter of public concern. The case law is clear that when the statements are made by private individuals, the content, form, and context of the alleged defamatory statements must

be examined. Allegations of criminal activity do not automatically become a matter of public concern, for which actual malice must be alleged and proven, as Defendants argue. Under Defendants' position, anyone could spread false statements against another concerning suspected criminal activity and therefore require the innocent plaintiff to prove the heightened element of actual malice. Because the statements at issue are not a matter of public concern, the Trial Court properly found that Defendants did not satisfy the first step of the UPEPA analysis.

The sole issue before this Court is whether the trial court properly applied Step One of UPEPA, that is, whether the defamatory statements address a matter of public concern. Because it decided that they did not, the court did not need to reach Step Two, whether the complaint stated a cause of action or could withstand a motion for summary judgment.

Plaintiff respectfully submits that the Trial Court properly determined that Defendants failed to satisfy Step One of UPEPA and denied Defendants' application to dismiss the complaint.

PROCEDURAL HISTORY

Plaintiff filed his Complaint against Defendants alleging one count of defamation and one count of intentional infliction of emotional distress on April 22, 2024. [Da001]. The parties stipulated to extend the time by which Defendants were to answer or otherwise respond to Plaintiff's Complaint to June 28, 2024. On June

27, 2024, in lieu of an Answer, Defendants filed an OTSC seeking dismissal of the Complaint with prejudice under UPEPA. [Da007]. The trial court held a show cause hearing on August 5, 2024. [1T]. On August 9, 2024, the trial court denied Defendants' application, finding that UPEPA did not apply because Defendants' defamatory statements were not a matter of public concern. [Da015][Pa005]¹. Relevant to the instant motion, the Trial Court found that "[...] the complaint is regarding the statements made to third parties, not the BCPO. Defendants offered no argument as to how those statements to third parties touched a matter of public concern." [Da021-22][Pa012]. The Trial Court further found:

Defendants heavily relied on the contention that because the alleged defamatory statements were concerning the potential crime of murder committed by plaintiff, it meets the definition of a public concern. Therefore, most of defendants' arguments address the other part of the UPEPA which concerns plaintiff's prima facie case for defamation and the insufficiency of plaintiff's complaint. However, this court finds defendants' argument regarding public concern to be unconvincing and therefore, does not reach the merits of the issues presented regarding plaintiff's prima facie case.

This court finds defendants have failed to prove the speech in this case is a matter of public concern. As such, the UPEPA does not apply here.

[Pa012-Pa013].

¹ Defendants' Appendix contains only the Trial Court's August 9, 2024 Order and Statement of Reasons. The Trial court amended its Order and Statement of Reasons on April 12, 2024. The Amended Order and Statement of Reasons is included in Plaintiff's Appendix.

Defendants filed their Notice of Appeal on August 9, 2024 and filed an Amended Notice of Appeal on August 13, 2024. [Da024]. On August 13, 2024, Defendants also filed a motion to stay this action in the trial court pending the appeal, which motion was denied on August 30, 2024. [Da027]. Defendants thereafter sought a stay from the Appellate Division, which motion was denied on September 27, 2024. [Da028]. Defendants then sought a stay from the Supreme Court. [Da030]. On November 15, 2024, the Supreme Court also denied Defendants' motion. [Pa015].

COUNTERSTATEMENT OF FACTS

The Defendants are Plaintiff's sisters. [Da001]. Brian, Defendants' and Plaintiff's younger brother, committed suicide on December 31, 2021. [Da001-002]. The Office of the Medical Examiner of Bergen County performed an autopsy on January 3, 2022 and concluded that the manner of death was suicide and the cause of death as a gunshot wound to the head. [Da002].

Following Brian's death, Defendants made defamatory statements to third persons regarding Plaintiff.² Ibid. In addition, Catherine posted multiple images to

² Defendants claim that the defamatory statements made immediately following Brian's death are barred by the one-year statute of limitations for defamation. Although Defendants' raised the statute of limitations in passing before the trial court, the trial court made no finding as to whether the statute of limitations barred some of Plaintiff's claims. Further, the issue was not fully briefed in the court below. Defendants' argument assumes that Plaintiff had knowledge of Defendants' statements when made. Not true. Indeed, such arguments are irrelevant to the instant

Facebook, which images were clearly intended to accuse Plaintiff of destroying Brian's life. Ibid.³ By way of certification dated July 26, 2024, Plaintiff provided specific examples of the defamatory Facebook Posts, which, under UPEPA, the court is permitted to consider. [Da083-91].

Eventually, Defendants sent written statements to the BCPO, which statements repeated the defamatory statements that Defendants had made to third parties. [Da002]. On October 6, 2023, Defendants met with the BCPO and repeated the same false statements they had made to third parties – i.e., that Plaintiff murdered Brian and covered up the murder. Ibid. Defendants also brought two family members with them to the BCPO, family members to whom they had repeatedly made the defamatory statements, in an attempt to substantiate their falsehoods. Ibid. The BCPO realized that Defendants' purported evidence had no merit and so advised

appeal and exceptions to the statute of limitations including but not limited to the discovery rule must be explored. Plaintiff asserts that he did not learn of the defamatory statements until January 2024. [Da053]. Such arguments would be more properly made before the Trial Court on a motion for summary judgment at the appropriate time.

³ Defendants improperly claim that the Trial Court erred in not addressing the sufficiency of Plaintiff's pleadings, specifically whether the Facebook posts meet the specificity in pleadings required by Zoneraich v. Overlook Hospital, 212 N.J. Super. 83 (App. Div. 1986). Defendants ignore the procedural requirement of UPEPA. The Trial Court never reached Step Two of UPEPA because, as discussed herein, it found that the defamatory statements were not a matter of public concern. Therefore, the Trial Court did not reach, nor was it required to determine, whether the Complaint states a claim upon which relief may be granted.

Defendants. [Da003]. Despite being advised by the BCPO that the statements were false, Defendants continued to make false statements to others. Ibid.

In support of the OTSC, Catherine submitted a certification. At first, Catherine certified that she never accused Plaintiff of murdering Brian or that Plaintiff covered up such murder. [Da032]. By way of supplemental certification, she changed her story. She certified that “[i]n October 2023, [she] wrote the BCPO that [she] believed that if they obtained the phone records of Don, Jessica [Brian’s wife] & Brian, as well as recordings of calls with Morgan Stanley and if the BCPO were to investigate the money trails, that ‘it will be proven Brian was murdered by Don and Jessica who both had their individual and united motives and opportunity.’” [Da044]. (Jessica is Brian’s widow.) In fact, however, Catherine stated more than that in her email to the BCPO, referring to the “absolute certainty that my brother was murdered by his wife and my older brother Don. This certainty is not only mine but my sister Lisa, cousin Chris and Kevin and Brian’s 25 year relationship with Sister Doris to name a few.” [Da046-47] (Emphasis added). Catherine’s communication confirms her dissemination of the falsehoods to private parties.

Catherine further certified that she had been estranged from Plaintiff and Brian since 2012 over a dispute over their mother’s estate. [Da044].

In addition, Catherine certified that “[o]n January 3, 2022 [she] met with the Franklin Lakes Police Department where she was provided with a narrative provided

to the department by Plaintiff and Brian's wife Jessica, which stated that Brian was on drugs 24/7, had financial problems, brought a pot farm and that the gunshot wound he died from was under his chin." [Da034].

Lisa also submitted a certification in support of the OTSC. Within the certification she stated, "I do believe that if Brian committed suicide, Donald's cruelty, narcissism and manipulative nature toward Brian may have driven him to it." [Da040].

In opposition to the OTSC, Plaintiff submitted a certification of his own. Plaintiff certified that Catherine defamed Plaintiff to Catherine's client Evan Feather in that her email to the BCPO, wherein she repeated her false allegations that Plaintiff was involved in Brian's death, is titled "Per Evan Feather's Request." [Da047]. In addition, Plaintiff certified that Lisa referred to Plaintiff as "Brian's Murderer" in a text message to Kevin Murphy and that she told Murphy and Christopher Rowland that Plaintiff was involved in Brian's murder. Ibid. Additionally in a memo prepared for the BCPO but shared with third parties including family members, Lisa wrote "I knew immediately my brother Don was involved whether he did it or instigated it," and "Cathy and I knew Don was involved in Brian's death [sic] death and beginning to suspected [sic] Jessica too." Ibid.

Plaintiff certified that he and Brian had a loving relationship. [Da048]. Plaintiff helped Brian get sober when he was thirty and he remained sober for almost

seventeen years. Ibid. Brian was a financial adviser with Merrill Lynch and managed the accounts of the company of which Plaintiff is the CEO, including the company's 401K plan. Ibid. Brian also managed Plaintiff's family's personal investments. Ibid.

Plaintiff further certified that Brian and Catherine were estranged for almost nine years following a lawsuit concerning their mother's estate. Ibid. In connection with that lawsuit, Catherine wrote to Brian's employer, accusing him of acting improperly following Catherine's unlimited requests for more information regarding the estate, and accusations that Brian and Plaintiff did not manage the estate properly. Ibid.

Following the COVID-19 pandemic lockdown began, Plaintiff noticed a change in Brian's personality. [Da049]. He became distant, hyperactive, and restless. Ibid. Brian began to neglect management of Plaintiff's company's and family's account. Ibid. In February 2021, Plaintiff learned that Brian had begun to smoke marijuana. Ibid. As a result, Plaintiff eventually moved all accounts away from Brian's management at Merrill Lynch. Ibid. During the summer of 2021, Brian began to make questionable decisions including making large purchases, changing jobs from Merrill Lynch to Morgan Stanley and accepting a large cash advance which was premised on meeting certain production requirements and backed by a promissory note. Ibid. In addition, Brian's friends shared concerns regarding his drug use. Ibid.

In November 2021, Brian and Plaintiff reconnected, at which time Plaintiff told him that he would help him in any way he could. Ibid. Plaintiff last spoke to Brian on December 30, 2024, at which time Brian advised that he had a good call with a job recruiter and had a call later in the day with another recruiter. [Da052]. At around ten o'clock in the evening on December 30, 2024, Plaintiff received a call from Brian's wife, Jessica who advised that Brian had gone to the golf club to clean out his locker and had not returned. Ibid. On December 31, 2024, Brian's wife advised Plaintiff that Brian's body had been found. Ibid. Plaintiff then immediately began to assist Brian's wife in dealing with the tragedy and protecting Brian's young sons. Ibid. Plaintiff has since learned that his efforts to help Brian's wife and protect his children were considered to be suspicious by Defendants. Ibid.

Plaintiff further certified that he learned that Defendants were defaming him after he saw a Facebook post by Kevin Murphy, which accused Plaintiff of murdering his brother. Ibid.

LEGAL ARGUMENT

I. Standard of Review

An appellate court's review of rulings of law and issues regarding the applicability, validity or interpretation of laws, statutes, or rules is de novo. See In re Ridgefield Park Bd. Of Educ., 244 N.J. 1, 17 (2020). The Appellate Division's "objective ... 'is to effectuate legislative intent,' and '[t]he best source for direction

on legislative intent is the very language used by the Legislature.” W.S. v. Hildreth, 470 N.J. Super. 57, 62 (App. Div. 2021), aff’d, 252 N.J. 506 (2023) (citing Bozzi v. City of Jersey City, 248 N.J. 274, 283, 258 A.3d 1048 (2021)).

II. The Trial Court Properly Applied The UPEPA Statute [Da019-22] [Pa010-13].

Pursuant to N.J.S.A. 2A:53A-50(b)(3), 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 State Constitution or the New Jersey Constitution, on a matter of public concern.” The statute is intended to address situations where the purpose of the litigation is to stymie a defendant’s legitimate expression regarding a matter of public concern. SLAPP lawsuits have been historically used against journalists, academics, advocates and whistleblowers. New Jersey Governor's Message, 2023 S.B. 2802/A.B. 4393. “A SLAPP is generally used to silence individuals or organizations from publicly criticizing or bringing legitimate issues to light about an individual or entity with greater power and resources.” Id. The uniform act has been adopted in some form in many other jurisdictions.

Here, the trial court properly determined that the statements at issue do not involve a matter of public concern nor fall under the protections of the First Amendment. Plaintiff’s complaint seeks to redress a private harm to him; that is,

Defendants' defamatory statements by which they intended to ruin his reputation. Plaintiff is not a public figure, nor was Brian's death the subject of any public discussion. Plaintiff does not seek to stifle legitimate speech regarding a matter of public concern. Indeed, Plaintiff's intention is evident as Plaintiff conceded before the Trial Court that the statements to the BCPO are not the basis of his defamation claims. [1T18:17-20].

Under N.J.S.A. 2A:53A-51, when a pleading asserts a cause of action to which the statute applies, a party must file an application for an order to show cause to dismiss the cause of action or parts of the cause of action within 60 days after being served. The statute requires that the order to show cause be heard expeditiously and to the extent that discovery is required, that the court hear the order to show cause as soon as practicable after the conclusion of time set forth in its order permitting limited discovery. N.J.S.A. 2A:53A-53. "In ruling on an order to show cause under section 3 of P.L.2023, c. 155 (C.2A:53A-51), the court may consider the pleadings, 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.

Dismissal of a cause of action under the statute requires a two-step process:

- a. In ruling on an order to show cause under section 3 of P.L.2023, c. 155 (C.2A:53A-51), 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. 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.S.A. 2A:53A-55(a). (Emphasis added.) Further, the statute requires that courts promote uniformity of the law with respect to its subject matter among states that enact it. N.J.S.A. 2A:53A-60.

The Trial Court found that “defendants have failed to prove the speech in his case is a matter of public concern. As such, the UPEPA does not apply here.” [Pa013]. In other words, the Trial Court found that Defendants failed to establish Step One of UPEPA. Because the Trial Court found that Defendants failed to establish that N.J.S.A. 2A:53A-50(b)(3) applies, the Court properly did not reach Step Two and consider whether Plaintiff stated a prima facie cause of action or

whether Defendants established that Plaintiff failed to state a cause of action upon which relief may be granted.⁴

Principles of statutory construction require such an interpretation. The Appellate Division’s “primary objective is to ascertain the intent of the Legislature by first looking to the plain words of the statute. We give ‘the statutory words their ordinary meaning and significance, and read them in context with related provisions so as to give sense to the legislation as a whole.’” Pugliese v. State-Operated Sch. Dist. of City of Newark, 454 N.J. Super. 495, 504 (App. Div. 2018) (quoting N.J. Election Law Enf’t Comm’n v. DiVincenzo, 451 N.J. Super. 554, 576 (App. Div. 2017)). Further, the Appellate Division has noted that “[i]n interpreting a statute, we strive to give effect to every word rather than to ascribe a meaning that would render part of the statute superfluous.” Pugliese, 454 N.J. Super. at 504 (quoting N.J. Div. of Youth and Family Servs. v. I.S., 214 N.J. 8, 29 (2013)).

Here, the statute requires that both Step One and Step Two be satisfied to warrant dismissal of a defamation claim. Because the Trial Court properly found that Defendants’ defamatory statements were not a matter of public concern, the Trial Court was not required to analyze the Complaint under Step Two, that is, whether

⁴ Defendants conceded at oral argument that once the court determined if the speech was a matter of public concern, the analysis then moves to the sufficiency of the pleadings, which can be analyzed under a motion to dismiss or summary judgment standard. [1T10:22-25].

the complaint stated a cause of action or could survive a motion for summary judgment.

The Trial Court properly accepted Plaintiff's representation that the allegations concerning Defendants' statements to the BCPO were for context and not part of Plaintiff's claims. [Da021][Pa012]. As such, the statements to the BCPO were not part of the Step One analysis and there was no need to consider whether part of the cause of action (i.e., the statements to the BCPO) should be dismissed.⁵

Therefore, the Trial Court properly applied the UPEPA statute and because the Trial Court found that the private statements to third parties were not a matter of public concern, there was no need for the Trial Court to reach Step Two of UPEPA.

III. The Trial Court Properly Found That The Speech At Issue Is Not A Matter of Public Concern [Da019-22] [Pa010-13].

Defendants continue to argue an untenable position: one can make defamatory statements concerning another without being liable therefor, so long as they also publicly or privately express such statements to the authorities. The law does not support such a position.

⁵ Defendants at oral argument conceded that under the UPEPA statute, the court could dismiss everything that has to do with the BCPO and then analyze what is left in the Complaint **if** the court determined that the defamatory statements were a matter of public concern. [1T11:1-5]. See, N.J.S.A 2A:53A-55(a).

A. The Trial Court properly considered the content, form, and context of the speech at issue.

Not all speech is of equal First Amendment importance and matters of public concern are at the heart of the First Amendment’s protection. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985). Generally, “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 ... 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,” Snyder v. Phelps, 562 U.S. 443, 453 (2011) (internal citations and quotations omitted); see also Jha v. Khan, 520 P.3d 470, 477-78 (2022), review denied, 530 P.3d 182 (Wash. 2023) (“[s]peech involves ‘matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community.’”)(internal citation omitted).

In non-media cases, such as the case before this Court, to determine what constitutes a matter of public concern, courts consider the content, form, and context of the speech. W.J.A. v. D.A., 210 N.J. 229, 244 (2012) (citing Dun & Bradstreet, Inc., 472 U.S. at 761-62) (finding that petitioner’s credit report was not a matter of public concern as it was speech solely in the individual interest of the speaker and its specific business audience and the report was made available to only five subscribers)); see also Senna v. Florimont, 196 N.J. 469, 500-501 (where defendant

attempted to tar its competitor's business with accusations of consumer fraud, such speech, although involving a highly regulated industry, did not arise to the level of public concern because the speech at issue was intended to keep patrons from plaintiff's business).

In determining whether an alleged defamatory statement concerns a matter of public concern, in Senna our Supreme Court held as follows:

When published by a media or media related defendant, a news story concerning public health and safety, a highly regulated industry, or allegations of criminal or consumer fraud or a substantial regulatory violation will, by definition involve a matter of public interest or concern. [internal citation omitted.] In all other media and non-media cases, 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.

196 N.J. at 496-497. The Senna Court further advised that in determining whether speech involves a matter of public interest, the source of the speech should be considered. Id. at 495. By way of example, speech published by the media is afforded extra protection compared to speech from a private individual, such as a business owner who maligns his competitor for an apparent economic gain. Id. at 495-496.

Defendants' contention that in Snyder, *supra*, the United States Supreme Court expanded the scope of what is a matter of public concern as set forth in Senna has no merit. In fact, the very block quote from Snyder inserted into their brief at pp. 24-25 belies their argument. The Snyder Court merely repeated the standards of

what constitutes a matter of public concern from Connick v. Meyers, 461 U.S. 138 (1983) and San Diego v. Roe, 543 U.S. 77 (2004). Both cases preceded our Supreme Court’s 2008 decision in Senna. Defendants’ further suggestion that the Snyder decision as goes further than its decision in Dun & Bradstreet is belied by the Snyder Court’s favorable reliance on its Dun & Bradstreet opinion. 562 U.S. 453-454.

Moreover, Defendants’ arguments concerning the breadth of the Snyder decision and the mention of that opinion in the uniform act’s commentary are particularly misplaced because the Snyder Court specifically cautioned: “Our holding today is narrow. We are required in First Amendment cases to carefully review the record, and the reach of our opinion here is limited by the particular facts before us.” 562 U.S. at 460.⁶ The facts before the court in Snyder were extraordinary and not at all similar to those in the present case. There, the defamation defendants had publicly picketed a soldier’s funeral, standing on public ground, under a permit issued by the local authorities, concerning their particularly harmful, yet unquestionably political beliefs. Id. at 456. Under those extraordinary facts, the Supreme Court considered that the political content and public context of the speech was “fairly speech characterized as constituting speech on a matter of public concern.” Id. at 455, citing Connick, 461 U.S. at 146.

⁶ Although the commentary to the Uniform Public Expression Protection Act confirms its adoption of the formulation of “matter of public concern” as set forth in Snyder, the Snyder Court’s caution must not be ignored.

Here, Plaintiff seeks redress for the defamatory statements made to others about their brother's death. That death was not newsworthy; it was not a political issue; it did not involve a matter of public health or safety. The content, form and context of the speech at issue in the present case cannot be characterized as speech on a matter of public concern.

In considering the content, form and context of speech, no factor is dispositive, and the court must evaluate all circumstances of the speech, including what was said, where it was said and how it was said. Snyder, 562 U.S. at 454. Further, one cannot turn an otherwise private matter into a matter of public interest by merely communicating it to a large number of people. Tender Care Veterinary Ctr., Inc. v. Lind-Barnett, 544 P.3d 693, 698 (Colo. App. 2023).

A matter does not become one of public concern simply because the statement involved an allegation of criminal activity. In W.J.A., our Supreme Court held that simply because the offending speech makes accusations of criminal conduct does not make the matter an issue of public concern: “[W]e have never suggested that such an allegation [of criminal conduct], in itself, vaults the public concern threshold.” 210 N.J. at 245. In W.J.A. the plaintiff created a website on which he accused the defendant of sexual abuse. The Supreme Court held that the dissemination of the criminal allegations did not make the matter one of public concern. Ibid.

Defendants do not and cannot contend that the unfortunate death of their brother was newsworthy, subject to public debate, or rose above a private matter amongst those acquainted with the family. Further, Plaintiff is not and has not been aware of any media or press coverage of Brian's suicide and the only notifications regarding his death were posted at the funeral home and his obituary was posted on North Jersey.com. [Da054]. The Trial Court accepted these facts in rendering its determination that the defamatory statements were not a matter of public concern.

Defendant's reliance on unreported trial court opinions concerning statements made by and against lawyers is misplaced. The speech in Lento Law Group, P.C. v. Hendrickson, (MER-L-668-24, June 7, 2024). [Da105-112] involved a review or opinion by the defendant regarding a law firm. [Da106]. The court concluded that comments on lawyer behavior are matters of public concern in that the defendant was merely expressing her review of the firm and its practices in a public forum which has long been done. [Da108-109]. Further, the court noted twice that the defendant, unlike the Defendants here, did not accuse the firm of doing anything illegal or unethical. [Da110-111]. It is well settled that the behavior of attorneys is highly regulated by the New Jersey Constitution and New Jersey Supreme Court. Cohen v. Radio-Elecs. Officers Union, Dist. 3, NMEBA, 146 N.J. 140, 155 (1996). Further, the right to discuss attorney discipline or behavior has long been considered

a matter of public concern. R.M. v. Supreme Ct., 185 N.J. 208, 223 (2005), citing Landmark Communications, Inc. v. Virginia, 435 U.S. 828, 842 (1978).

Holtec International v. Javerbaum Wurgraft Hicks, Kahn Wikstrom & Sinins, P.C., (CAM-L-2069-24, September 3, 2024), is also distinguishable. [Da115]. The plaintiff in Holtec contended that the Javerbaum law firm published defamatory statements on the firm's website about an underlying whistleblowing case the firm brought against Holtec. The court found in part that the statements at issue were a matter of public concern because: (1) Holtec is a major company; and (2) Holtec is involved in the business of nuclear reactors, which the court found to be a significant business. [Da141]. Here, the parties are private individuals, and the defamatory statements involved the non-newsworthy death of an individual.

B. Defendants' discussion regarding the fair comment privilege is irrelevant to the issue before this Court.

The doctrine of fair comment extends to all matters of legitimate public interest. Dairy Stores, Inc. v. Sentinel Pub. Co., Inc., 104 N.J. 125, 141 (1986). Therefore, for the privilege to apply, the statement at issue must be of a matter of public concern. Accordingly, Defendants' discussion of the privilege adds nothing to the analysis of what is a matter of public concern for purposes of UPEPA. In fact, Defendants admit at p. 24 of their brief that in Senna, our Supreme Court limited the application of the privilege and found no matter of public concern in speech

concerning a competitor's business even when that speech alleged consumer fraud in a highly regulated business. 196 N.J. at 495-497.

IV. The Trial Court Properly Concluded that the Statements Concerning the BCPO in the Complaint Are For Context Only [Da020-21] [Pa011-13].

At p. 21 of their brief, Defendants, in a futile attempt to shoehorn Plaintiff's Complaint into their public concern analysis, improperly reframe Plaintiff's allegations as concerning a "public or private expression that the BCPO and other police authorities did not thoroughly investigate a murder". Of course, that is not what is alleged in the Complaint. Plaintiff alleges that Defendants told family, friends and acquaintances that he murdered or was involved in the murder of his brother. There is no allegation in the Complaint that the defamatory statements complained of had asserted the mishandling of a criminal investigation by the BCPO.

Defendants concede that Plaintiff acknowledged in his opposition to the OTSC that the statements made by Defendants to the BCPO were provided for contextual background and incidental to the Complaint. [Pa012]. The Trial Court further accepted Plaintiff's representation that the basis for the complaint is the defamatory statements Defendants made to third parties, including but not limited to Kevin Murphy, Christopher Rowland, Evan Feather, and Sister Doris, regarding Plaintiff's alleged involvement in his brother's death, not the statements to the

BCPO.⁷ Ibid. The Trial Court further found that “[Defendants] offered no argument as to how those statements made to third parties touched a matter of public concern.”

Ibid.

Defendants misrepresent the record below. During oral argument, The Honorable Vijayant Pawar, J.S.C. asked Plaintiff if he conceded that statements made to the BCPO are a matter of public concern. [1T18:17-20]. Plaintiff answered yes with the caveat that the statements to the BCPO are merely used for context and are not the basis of the complaint. [1T18:22-19:22].

Further, the Complaint does not rely on the statements made to the BCPO. Defendants argue that because some of the allegations in the Complaint concern the statements made to the BCPO, those statements naturally must form the entire basis of the Complaint. Contrary to Defendants’ brief, only three of the factual allegations reference statements made to the BCPO. [Da002]. Moreover, while Plaintiff does allege that the statements to the BCPO were made with malice, Plaintiff was not required to plead actual malice and therefore, it is irrelevant to the underlying claim. [Da003]. Defendants fail to cite any authority as to why the Trial Court erred in accepting Plaintiff’s representation that the statements to the BCPO do not form the

⁷ Plaintiff does not dispute that petitioning the government, or reports to the BCPO are protected by a qualified privilege. However, as argued herein, Defendants’ discussion regarding qualified privilege is irrelevant because that statements to the BCPO do not form the basis of Plaintiff’s Complaint.

basis for his claim for defamation. Having found that the statements made to the BCPO were for context only, there was no basis for the Trial Court to dismiss any part of the Complaint.

V. The Trial Court Did Not Err In Finding Persuasive Value in FilmOn.com v. Double Verify, Inc., 7 Cal. 5th 133 (2019) [Da020].

The Trial Court properly relied on FilmOn.com v. Double Verify, Inc., 7 Cal. 5th 133 (2019). Defendants’ conceded in the court below that “[b]ecause California’s Anti-SLAPP law – which at 32-years-old is the template for much of the UPEPA (and is specifically cited in UPEPA’s commentary at several points) as well as acting as the template other states with similar statutes, this Court can also look to California law.” [1T:12:2-4]. Therefore, with Defendants’ blessing and direction, the trial court properly referenced FilmOn in denying Defendants’ OTSC.

The trial court relied on FilmOn for its analysis of what constitutes a matter of public concern and the need to look at the context of the speech to determine whether it is a matter of public concern. Although the court conducted this analysis in connection with California’s catchall provision within its Anti-SLAPP statute, the purpose of the analysis was to determine “whether that statement furthers the exercise of constitutional speech rights in connection with a matter of public interest.” FilmOn, 7 Cal. 5th at 149. Specifically, the trial court relied upon the two-part analysis set forth in FilmOn: (1) “what ‘public issue or [] issue of public interest’ the speech in question implicates—a question we answer by looking to the content

of the speech[;]" and (2) "what functional relationship exists between the speech and the public conversation about some matter of public interest." Id. at 149-150. As to part two of the analysis, the FilmOn court reasoned it can be done by looking at context. Id. at 150. The court further noted that "it is not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate." Ibid. (quoting Wilbanks v. Wolk, 121 Cal. App. 4th 883, 898 (2004)).

In FilmOn, The Supreme Court of California did nothing more than our Supreme Court did in Senna or the U.S. Supreme Court did in Snyder: in a non-media defendant case, the court considers the content, form, and context of the speech.

In analyzing the content, form and context of the defamatory speech at issue in the present case, the Trial Court correctly concluded that the basis of Plaintiff's complaint are the defamatory communications Defendants made to certain third parties, not the BCPO. [Pa012]. Further, the statements concerned a private figure, not public. [Pa012-13]. Plaintiff has never been charged with his brother's death and there has been no investigation of Plaintiff's involvement. Id. As such, the trial court could not conclude that the statements touched a matter of public concern. Id.

VI. Uniformity with UPEPA and Other Anti-SLAPP Statutes Does Not Require Remand.

N.J.S.A. 2A:53A-60 provides “[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.” The trial court did just that. to satisfy Step One of UPEPA, the speech at issue must involve a matter of public concern. The question of what speech touches a matter of public concern is already well-settled.

Defendants erroneously argue that uniformity amongst UPEPA requires that the trial court and this court ignore the well-settled case law. This certainly cannot be what our legislature intended.

Defendants rely upon Mouktabis v. Clackamas Cnty., 536 P.3d 1037 (2023) for the proposition that a report to law enforcement is a matter of public concern. However, Mouktabis is clearly distinguishable. In that case, the sole basis for Plaintiff’s claim was defendant’s report to the police that Plaintiff had violated a restraining order (“We conclude that, because reports to the police about whether court orders are being violated implicate public safety and effective governance, such reports are matter of public interest”). Id. 1041-42. Unlike, the case presently before the Court, there were no allegations that defamatory statements were made to third parties in addition to the police. As Plaintiff argued below and the Trial Court

properly accepted, the basis of Plaintiff's Complaint arises from the defamatory statements made to third parties, not the BCPO.

Rather, this case is similar to that of Sayerad v. Butler-Lopez, A166884, 2024 WL 1979898 (Cal. Ct. App. May 6, 2024), decided under California's anti-SLAPP law. There, the plaintiff sued for defamation over statements accusing her of "a wide range of unlawful conduct, including . . . conspiracy to commit murder." Id. at *1. The court found that the fact that defendants reported their allegations to law enforcement did not make the matter one of public concern: "Allegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken" because they are not subject to the statute." Id. at *3. Also, "We also find that [defendant's] communications with law enforcement are not subject to a special motion to strike because they merely provide context and do not form the basis for liability under the complaint." Id. at *5.

Defendants' discussion concerning the definition of "petition" is irrelevant and not dispositive as to the instant appeal. Likewise, LoBiondo v. Schwartz, 323 N.J. Super. 391 (App. Div. 1991) is distinguishable as the alleged defamatory statements at issue in the present case are not those which were made to the BCPO but third parties including but not limited to Evan Feather, Kevin Murphy, and Sister Doris.

A matter does not become one of public concern just because the defamatory statement involves an allegation of criminal activity. There is no evidence that a crime actually took place. Further, the death of Brian Surdoval was not a newsworthy event, a fact which the Defendants did not dispute in the court below. Compare Romaine v. Kallinger, 109 N.J. 282, (1988) (where a crime was especially newsworthy, involving a psychotic killer who went on a criminal rampage in New Jersey and Pennsylvania and was the subject of widespread and intense publicity when it occurred and therefore a matter of legitimate public concern).

Further, Defendants cite Yu v. Koo, 633 S.W.3d 712, 722 (Tex. App. 2021), Whitelock v. Stewart, 661 S.W.3d 701, 706 (Tex. App. 2023), and Pryor v. Brignole, 292 A.3d 701, 706 (2023) in support of their contention that any accusation of criminal activity is a matter of public concern. Defendants ignore W.J.A. v. D.A., 210 N.J. 229, 245 (2012), where our Supreme Court held that simply because the offending speech makes accusations of criminal conduct does not make the matter an issue of public concern: “[W]e have never suggested that such an allegation [of criminal conduct], in itself, vaults the public concern threshold.”

Courts in other jurisdictions have denied anti-SLAPP motions where, as here, the alleged defamatory speech concerned criminal activity. See Gibson v. Swingle, B217082, 2010 WL 2136655, at *1 (Cal. Ct. App. May 28, 2010) (denying anti-SLAPP motion where the alleged defamatory statements accused plaintiff of

breaking laws, using illegal drugs, harassing and stalking people, being mentally ill and threatening people with violence); Albustani v. Alger, C22-5238JLR, 2022 WL 3213331, at *6 (W.D. Wash. Aug. 9, 2022) (denying UPEPA motion where defendants, including one defendant who appeared on a national syndicated radio program, made false statements in the wake of plaintiff's wife's suicide, including statements that the plaintiff's wife was murdered).

VII. Even if the Court reached Step Two of the UPEPA analysis, Plaintiff's complaint adequately states a claim for defamation and intentional infliction of emotional distress.

Had the trial court reached Step Two of the UPEPA analysis, Plaintiff has stated a claim upon which relief may be granted. Generally, to prove defamation a plaintiff must establish that the defendant “(1) made a defamatory statement of fact (2) concerning the plaintiff (3) which was false, and (4) which was communicated to a person or persons other than the plaintiff.” Feggans v. Billington, 291 N.J. Super. 382, 390–91 (App. Div. 1996). The plaintiff must plead facts sufficient to identify the defamatory words, their utterer, and the fact of their publication. Darakjian v. Hanna, 366 N.J. Super. 238, 249 (App. Div. 2004). In addition, New Jersey maintains a fault standard of negligence for defamation cases involving private-figure defendants. W.J.A., 210 N.J. at 242. However, where the statements concern a matter of public concern, New Jersey requires actual malice. Id.

As an initial matter, because the statements at issue were not a matter of public concern, Plaintiff was not required to allege actual malice. Nonetheless, Plaintiff did assert that Defendants' defamatory statements were made with actual malice. [Da003 at ¶21.]

Further, the Complaint sufficiently pleads the elements of defamation. Plaintiff sufficiently identified the person who made the defamatory statements and the fact of their publication. Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 767 (1989). By way of example but not limitation, Plaintiff alleges “[a]mong things, that Defendants told members of their extended family that Brian did not commit suicide; that Plaintiff murdered Brian; and that Plaintiff covered up the supposed murder to make it look like a suicide.” [Da002at ¶9]. Further, the Complaint alleges that the statements were made by both defendants, that the statements were made following Brian's death, and that the statements were made to those within the parties' extended family and to others outside of the family. [Da002]. Plaintiff submitted a certification in opposition to the OTSC which supplemented and expanded upon the defamatory statements made by Defendants. [Da046 to Da054].

In addition, Plaintiff alleges that Catherine Surdoval published Facebook images which were intended to accuse Plaintiff of destroying Brian's life. Plaintiff, again, in his pleadings, has identified the person uttering the defamatory statements,

to whom they were published (i.e., Catherine Surdoval's Facebook friends and potentially the public), and that the defamatory statements were in the form of Facebook images which created the appearance that Plaintiff destroyed Brian's life. [Da002at ¶11]. Plaintiff's certification in opposition to the order to show cause attached as exhibits examples of Catherine Surdoval's defamatory Facebook posts. Although the posts do not explicitly accuse Plaintiff of murdering Brian, it is clear that they are directed at Plaintiff and accuse him of destroying Brian's life. The law is clear that where statements are susceptible of only one meaning and that meaning is defamatory, the statement is defamatory as a matter of law. Gray v. Press Communications, LLC, 342 N.J. Super. 1, 9 (App. Div. 2001). However, where a statement is capable of being assigned more than one meaning, one of which is defamatory and another not, the question is whether the content is defamatory must be resolved by the factfinder. Id.

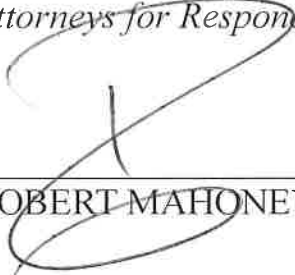
Therefore, it is clear from the Complaint: (1) what defamatory statements were made; (2) by whom the defamatory statements were made; (3) to whom the defamatory statements were made; and (4) when the defamatory statements were made. As such, Plaintiff has adequately pled a meritorious cause of action for defamation. It is worth noting in this regard that if Plaintiff had failed to state a claim upon which relief may be granted, Defendants would not have been in a position to respond to Plaintiff's allegations by way of their detailed certifications.

CONCLUSION

For the reasons set forth above, Plaintiff Donald Surdoval respectfully requests that the Court affirm the denial of Defendants Catherine A. Surdoval's and Lisa Surdoval's OTSC and determine that Step One of UPEPA has not been satisfied.

NORRIS McLAUGHLIN, P.A.
Attorneys for Respondent

Dated: December 16, 2024

By: 
ROBERT MAHONEY

DONALD J. SURDOVAL,
Plaintiff-Respondent,

v.

LISA SURDOVAL AND
CATHERINE A. SURDOVAL,
Defendants-Appellants.

SUPERIOR COURT OF NEW
JERSEY APPELLATE DIVISION
DOCKET NO. A-003884-23

CIVIL ACTION

On Appeal From:
SUPERIOR COURT, LAW DIVISION
SUSSEX COUNTY,
DOCKET NO. SSX-L-185-24

Sat Below: Hon. Vijayant Pawar

**BRIEF OF PROPOSED AMICI CURIAE
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, NEW
JERSEY PRESS ASSOCIATION, AND NEWS/MEDIA ALLIANCE
IN SUPPORT OF DEFENDANTS-APPELLANTS SEEKING REVERSAL**

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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.

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.

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. 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.* It applies to speech on matters of public concern, and if that predicate requirement is met, a defamation defendant has an

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>.

opportunity to show, on an expedited basis, that the claim lacks merit. This statutory protection for certain categories of speech serves the broad, remedial goals of anti-SLAPP legislation.

In this case, Defendants-Appellants are two sisters who made public statements, including to law enforcement, that they believed their younger brother did not commit suicide, which was his official cause of death. According to the complaint, they expressed their view that their older brother, Plaintiff-Respondent, had killed him and criticized the official investigation for overlooking relevant facts in ruling the death a suicide. Amici file this brief solely to address the lower court's holding that the speech at issue does not constitute speech on a matter of public concern, a predicate to the application of New Jersey's anti-SLAPP law. As explained herein, cases decided inside and outside New Jersey, including cases decided under other states' anti-SLAPP statutes, have found statements regarding alleged criminal wrongdoing, and the possibility that a law enforcement investigation reached the wrong conclusion, to be speech on a matter of public concern. And indeed, the public, including the press, and law enforcement itself rely as a matter of public policy on the consistent interpretation of that standard, in order to speak freely about matters of public safety and related topics of community importance.

Amici therefore urge this Court to hold that—whatever the applicability of other defenses to defamation may be and regardless of whether the motion under the anti-SLAPP statute will ultimately succeed—statements made to² and about law enforcement regarding an alleged failure to solve a violent crime constitute speech on a matter of public concern.

ARGUMENT

I. New Jersey’s anti-SLAPP law protects speech, including news reporting, from litigation meant to chill First Amendment expression.

A. The threat of SLAPPs to speech.

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). Even when defendants defend against and 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

² While Plaintiff-Respondent argues on appeal that Defendants-Appellants’ statements to law enforcement are not the basis for his defamation claims, *see* Pl.-Resp’t Br. at 12, amici discuss such statements to highlight for the Court the importance of properly categorizing them as matters of public concern.

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, including journalists. They “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 news organizations 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).

The problem of SLAPPS against journalists and other members of the public had become sufficiently widespread that state legislatures began to craft solutions beginning in the late 1980s, after sociologists coined the term in publications about these 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.³ 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

³ 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).

grievances.” Cal. Civ. Proc. Code § 425.16(a). The law recognized “that it is in 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.

In the decades since, a national consensus 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 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

B. New Jersey enacts anti-SLAPP law to discourage “weaponizing” libel suits.

In 2023, New Jersey enacted its anti-SLAPP statute 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

⁴ Anti-SLAPP laws, including New Jersey’s, typically allow for more expedited dismissals of SLAPPs, a presumptive 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. Additionally, a court applying the statute may dismiss certain claims within a case, thus narrowing the litigation, even if not every statement at issue is subject to dismissal under the anti-SLAPP motion.

or the New Jersey Constitution.” N.J.S.A. 2A:53A-59. New Jersey is one of nine 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 Governor and “bipartisan” majorities in the legislature 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>.

The law applies to 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) (emphasis added). Once that threshold requirement is satisfied, dismissal is appropriate if the claim can be shown to fail as a matter of law, or there is no genuine dispute of material fact that would allow the plaintiff to prevail as a matter of law. See id. at 53A-55(a)(3)(a)–(b); see also id. at 53A-55(a)(1)–(2) (setting forth the two-step process of establishing that the speech is

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 kind to which the anti-SLAPP applies before moving on to determining whether plaintiff has made a *prima facie* case). Where these steps have been satisfied—first, the speech at issue involves a matter of public concern, thus the anti-SLAPP applies; and second, the claim is deemed not legally sufficient—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 that the anti-SLAPP “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”).

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 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.

II. The anti-SLAPP law’s predicate requirement that speech address a matter of public concern is vital to its effectiveness.

A. Courts have broadly defined what constitutes a matter of public concern.

“The term ‘matter of public concern’” in the UPEPA statute “should be construed consistently with caselaw of the Supreme Court of the United States and the state’s highest court.” UPEPA Comments at 8. As the Supreme Court of the United States has explained, “[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[.]” Snyder v. Phelps, 562 U.S. 443, 453 (2011) (citations and internal quotation marks omitted). The New Jersey Supreme Court has explained, in the context of applying the fair comment privilege, that a matter of public concern should be interpreted broadly to include public criticisms of actions taken in local communities. See Dairy Stores, Inc. v. Sentinel Publ’g Co., 104 N.J. 125, 141–42 (1986) (explaining that statements about public officials, controversial public issues, and the general welfare of communities have been seen as matters of legitimate public interest); see Mick v. Am. Dental Ass’n, 49 N.J. Super. 262, 280–83, certif. denied, 27 N.J.

74 (1958) (collecting New Jersey decisions holding that matters of legitimate public interest include localized criticisms involving the health and safety of neighborhoods).

Where it is unclear whether particular “speech addresses a matter of public concern,” it can be determined by reference to the expression’s “content, form, and context.” Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761–62 (1985) (quoting Connick v. Myers, 461 U.S. 138, 147–48 (1983)); accord Senna v. Florimont, 196 N.J. 469, 496–97 (2008) (“[T]o determine whether speech involves a matter of public concern or interest . . . a court should consider the content, form, and context of the speech.” (citing Dun & Bradstreet, Inc., 472 U.S. at 761–62)); UPEPA Comments at 8 (“The [matter-of-public-concern] inquiry turns on the content, form, and context of the speech.” (citations and internal quotation marks omitted)). As the New Jersey Supreme Court explained,

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.

W.J.A. v. D.A., 210 N.J. 229, 244 (2012). This inquiry attempts to ensure that the speech at issue does not include, for example, derogatory “commercial speech” by one private business owner about a competitor’s product, Senna, 196 N.J. at 496–

97, but would include, for instance, “critiques of the government” and “risks to public health and safety,” id. at 497.⁶

Applying this “content, form, and context” standard to speech put at issue by a motion under its UPEPA statute,⁷ Washington state’s highest court defined a matter of public concern much like the U.S. Supreme Court did in Snyder. See Jha v. Khan, 520 P.3d 470, 477–78 (Wash. Ct. App. 2022), review denied, 530 P.3d 182 (Wash. 2023). While noting that “[w]hether speech is a matter of public concern is a question of law, which courts must determine by the content, form, and context of a given statement,” it held that “[s]peech involves matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community.” Id. (citations and internal quotation

⁶ Plaintiff-Respondent cites W.J.A. to argue that public concern does not encompass allegations of a flawed investigation, Pl.-Resp’t Br. at 19, but that decision—in which two courts had already determined that an accuser’s claim of child abuse was unfounded and defamatory, yet the accuser continued to advance the allegation, without proper context for the law enforcement and judicial findings, W.J.A., 210 N.J. at 233–37—is readily distinguishable from this case on the facts.

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.

marks omitted) (holding that statements made by a political candidate in an article concerning an opponent's business interests and political financiers constituted a matter of public concern).

Likewise, the Kentucky Court of Appeals described how that state's legislature drafted its own UPEPA statute "broadly" to "encompass all speech and press, public or private, and in all forums, about matters of public concern."

Davenport Extreme Pools & Spas, Inc. v. Mulflur, 698 S.W.3d 140, 155 (Ky. Ct. App. 2024). And in Utah, a court held that speech related to a subject "currently of interest to the community and the legitimate subject of news interest" qualifies as a matter of public concern under its UPEPA law. UHS of Provo Canyon, Inc. v. Bliss, No. 2:24-CV-163-DAK-CMR, 2024 WL 4279243, at *5 (D. Utah Sept. 24, 2024).

As described above, the UPEPA commentary offers both Dun & Bradstreet's "content, form, and context" analysis to define matters of public concern, while also adopting the more expansive language contained in Snyder. New Jersey's adoption of UPEPA, therefore, demonstrates a legislative intent to give broad meaning to what constitutes a matter of public concern, allowing for judges to consider the "content, form, and context" of the speech at issue, while requiring the protection of speech that more generally is of interest to local communities. See Snyder, 562 U.S. at 453 (matters of public concern broadly

protect speech “relating to any matter of political, social, or other concern to the community” or “subject[s] of general interest and of value and concern to the public” (emphasis added) (citations omitted)).

B. Speech about law enforcement investigations and alleged unsolved crimes relates to matters of public concern under New Jersey law.

The lower court erred in concluding that, as a threshold matter, speech about one’s belief that a serious crime was committed, remains unsolved and, in fact, that the official investigation of the matter was flawed, is not a matter of public concern. The New Jersey Supreme Court has previously observed that “the facts surrounding the commission of a crime are subjects of legitimate public concern.” Romaine v. Kallinger, 109 N.J. 282, 302–03 (1988) (citing Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975)). The Court further explained that the public’s legitimate interest may extend to facts about the “victims and other individuals who unwillingly become involved in the commission of a crime,” and that “[t]he news value and public interest in criminal events are not abated by the passage of time.” Id. at 303–04. Importantly, criminal acts—including their commission, prosecution, and related judicial proceedings—all “fall within the responsibility of the press to report the operations of government.” Cox Broad. Corp., 420 U.S. at 492.

As this court explained in Petersen v. Meggitt, speech on matters touching on public health and safety presents clear issues of public concern. 407 N.J. Super.

63, 77–78 (App. Div. 2009). In that case, the speech at issue concerned an article alleging that an individual committed animal abuse and subsequent judicial proceedings. Id. at 68–71. The court found that this kind of speech was entitled to the highest First Amendment protection due to its legitimate societal value and clear connection “to an issue of public health and safety.” See id. at 78; accord Snyder, 562 U.S. at 453.⁸ Allegations of a crime, expressed to members of a community, and subsequent calls for further investigations made to law enforcement, represent subjects of utmost interest to the public.⁹ This remains the case when allegations are made against a particular individual and that individual

⁸ The court in Petersen viewed speech involving safety and the commission of crime as so clearly relating to matters of public concern that the “content, form, and context” analysis from Dun & Bradstreet and Senna was not even required.

⁹ Additionally, New Jersey courts have recognized that a qualified privilege exists, which can only be overcome through evidence that a statement was made with actual malice, that protects communications made by private citizens to law enforcement authorities for the purpose of preventing or detecting crimes. See, e.g., Dijkstra v. Westerink, 168 N.J. Super. 128, 135 (App. Div. 1979) (“[C]ommunications by private citizens giving information to proper authorities for the prevention or detection of crime” are qualifiedly privileged); Geyer v. Faiella, 279 N.J. Super. 386, 391 (App. Div. 1995) (same); Govito v. W. Jersey Health Sys., Inc., 332 N.J. Super. 293, 308 (App. Div. 2000) (recognizing that the qualified privilege exists when a party has “an interest” in the “criminatorial matter” (citation omitted)).

attempts to silence their speech through a SLAPP suit, as here. See Petersen, 407 N.J. Super. at 77–78.¹⁰

Courts in other states with anti-SLAPP statutes based on UPEPA—authority that is particularly persuasive in light of the New Jersey legislature’s goal of uniformity, see N.J.S.A. 2A:53A-60—have likewise held that crime and law enforcement investigations are matters of public concern. For example, in Mouktabis v. Clackamas County, the Oregon Court of Appeals held that an allegedly false report to the police that the plaintiff had violated a restraining order related to a matter of public concern. 536 P.3d 1037, 1037–47 (Or. Ct. App. 2023). The court found its conclusion to be consistent with “a central goal of the anti-SLAPP statute, which is to encourage citizens to engage with and participate in government.” Id. at 1046. Otherwise, the court recognized, victims of domestic abuse could be subjected “to the fear of civil liability for reporting what they perceive to be violations of [restraining] orders. Id. at 1047.

¹⁰ As noted in Section I.B., supra, resolving this predicate question as to what speech constitutes a matter of public concern does not alone dictate the ultimate decision on the anti-SLAPP motion, but it ensures that New Jersey’s statutory protection is available in appropriate circumstances to this speech that, as a matter of both common sense and legal precedent, is clearly of great community and societal importance. See Senna, 196 N.J. at 497 (“Public policy and common sense also suggest that the same protections be given to speech concerning significant risks to public health and safety.” (citing Dairy Stores, Inc., 104 N.J. at 144–45)).

Similarly, the New Jersey Supreme Court in Senna opined that “critiques of the government will always fall within the category of protected speech,” as they are legitimate matters of public concern. 196 N.J. at 497. Here, where the speech at issue necessarily involved discussion of an alleged unsolved murder and a critique of the official finding of a local law enforcement agency, and where the government would ultimately decide whether or not to act on the speech, it was error not to deem the speech a matter of public concern.

Other jurisdictions with anti-SLAPP statutes have likewise held that complaints involving criminal activity relate to matters of public concern. See, e.g., Whitelock v. Stewart, 661 S.W.3d 583, 596–98 (Tex. App. 2023) (stating that accusations that an individual engaged in a criminal offense or is under criminal investigation are matters of public concern); Pryor v. Brignole, 292 A.3d 701, 706 (Conn. 2023) (“The commission of [a] crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public[.]” (citation omitted)); Miller v. Schupp, No. 02-21-00107-CV, 2022 WL 60606, at *2 (Tex. App. Jan. 6, 2022) (holding that a social media message alleging that plaintiff had committed assault involved a matter of public concern); Cornelius v. The Chronicle, Inc., 206 A.3d 710, 715 (Vt. 2019) (holding that articles were “connected to a public issue because they concerned public safety, law enforcement activity, possible criminal behavior, and

the reporting of arrests”); Gleason v. Smolinski, 125 A.3d 920, 938 (Conn. 2015) (describing how public allegations that an individual is involved in criminal activity generally relate to speech on a matter of public concern); see also Carter v. ABC News, Inc., No. 55,623-CA, 2024 WL 3168321, at *7 (La. Ct. App. June 26, 2024) (“Crime is not a matter of private affairs; rather, it is a matter of public concern.”).

C. Holding that the speech at issue here constitutes a matter of public concern serves the public interest.

The kind of speech challenged in this case constitutes a matter of public concern under the statute. If the lower court decision stands, it will restrict the public’s ability to speak about crimes and hold government accountable in its administration of justice, and the press’s ability to report on those important topics. This would be contrary to public policy. See Westerink, 168 N.J. Super. at 135 (“It is the duty of citizens to give to police or other officers such information as they may have respecting crimes which have been committed[.]” (citation omitted)).

It is important that citizens feel free to challenge the findings of government, including law enforcement and its handling of criminal accusations. Governor Murphy Signs Bipartisan Bill Protecting Against Lawsuits Designed to Suppress Free Speech, supra (“People should be able to speak their mind on the issues that matter most to them without the fear of becoming ensnared in an expensive, time-

consuming lawsuit.” (statement of First Assistant Attorney General Lyndsay V. Ruotolo)). This is especially significant because, over the past four decades, the percentage of homicides that law enforcement solved has decreased from approximately 71% in 1980 to 50% in 2020. Abené Clayton, ‘Far from justice’: why are nearly half of US murders going unsolved?, The Guardian (Feb. 27, 2023), <https://tinyurl.com/bdz2hnu6>.

Therefore, from a public policy perspective, it is critical that members of the public, generally, and press, more specifically, are not disincentivized from speaking freely about allegations of criminal activity, as such speech can lead to justice served. See, e.g., Janice Limon, Case of ‘Mr. X’ solved after decades with help of former WYFF News 4 reporter, SC sheriff says, WYFF (June 10, 2024), <https://tinyurl.com/afdswebtx> (demonstrating how a journalist assisted law enforcement in solving a murder by drawing attention to the case); Nick Caloway, New Jersey college students, staff help police make arrest in 1974 cold case, CBS News (Nov. 12, 2024), <https://perma.cc/BY2F-X9QZ> (detailing how student researchers were able to solve a cold case following a murder which occurred 50 years ago); Victoria Macchi, Journalist Shares Stories Behind Civil Rights Cold Cases, Nat’l Archives News (Feb. 20, 2020), <https://tinyurl.com/bdh642as> (discussing how an investigative journalist’s reporting led to the retrial of a cold case involving hate crimes and subsequently multiple criminal convictions).

Indeed, the way that law enforcement authorities encourage and rely on the public's involvement further reinforces that crime, and the ability of law enforcement to understand or solve a particular crime, is a matter of public concern. For example, government agencies have even urged the public to report suspected crimes. See, e.g., FBI Newark Encourages Hate Crime Reporting, Launches Unconventional Awareness Campaign, FBI Newark (Sept. 1, 2023), <https://perma.cc/5RZH-WS7M> (showing that the FBI initiated a public awareness campaign to encourage the public to report hate crimes).

The recognition that statements like those at issue here constitute speech on a matter of public concern is therefore not only consistent with well-established precedent and the intent of the New Jersey legislature in enacting the UPEPA statute, but it is also good public policy.

CONCLUSION

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

Dated: January 6, 2025

Respectfully submitted,

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DONALD J. SURDOVAL,

Plaintiff/Respondent

v.

LISA SURDOVAL and
CATHERINE A. SURDOVAL,

Defendants/Appellants

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No.: A-003884-23

Civil Action

On appeal from:

Superior Court of New Jersey,
Law Division, Sussex County
Docket No.: SSX-L-185-24

Sat below:

Hon. Vijayant Pawar, J.S.C.

BRIEF OF *AMICUS CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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PRELIMINARY STATEMENT

New Jersey's Uniform Public Expression Protection Act statute erects a procedural framework to protect speech touching on matters of public concern. It reflects decades of judicial authority explaining that our state constitution affords greater protection for this type of speech than is provided by the federal constitution or by other states. The statute must be applied broadly to ensure that these constitutional protections are safeguarded rather than circumvented.

The decision below was erroneous. While the application of the new statute presents many issues of first impression, courts are not writing on a blank slate. Under longstanding New Jersey law, the speech in this case related to a matter of public concern, as acknowledged below by both the court and Plaintiff. That acknowledgement conclusively establishes that the statute applies. Instead, the court conducted additional analysis, relying upon a California standard. The court then determined that, although the speech related to matters of public concern, it nevertheless lost the protection of the statute.

The statute must be applied broadly. The use of legal standards from other jurisdictions, rather than the analysis specifically crafted by our own Supreme Court, in order to find a basis to exclude speech from the protection of the statute, is contrary to both the intent of the Legislature and the protections guaranteed by our state constitution. The decision below should be reversed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

ACLU-NJ joins the procedural and factual history of Appellants.

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. (Da18-23, Da173-77)

“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* 1 (2022) (prefatory note to final act). Thus was coined the acronym “SLAPP”: strategic lawsuits against public participation. And while SLAPPs take many shapes and forms, defying simple definition, they have one unifying feature: to ensnare their targets in costly litigation that chills constitutionally protected activity. In such cases, it is no comfort that the critic may ultimately prevail in the lawsuit (often several years later). 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-modelled S-2802/A-4393 (the "Statute," 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 Jan. 9, 2025) (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 a motion for expedited relief to dismiss the speech-based cause of action.

To understand the legislative intent behind the Statute, one need only look to its model forebearer UPEPA, the product of the Uniform Law Commission's concern regarding the degree of variance amongst the various states' anti-

SLAPP legislation and its attempt “to harmonize these varying approaches by enunciating a clear process through which SLAPPs can be challenged and their merits fairly evaluated in an expedited manner.” *Uniform Public Expression Protection Act* at 3 (prefatory note to final act).

Of particular importance to the UPEPA drafting committee was the model law’s scope because:

A primary difference among the various states centers on the scope of the statutes: To what kinds of “speech” and “public participation” should the law extend? Some states have enacted protections that only apply to suits related to limited activities, specific individuals, or certain forums. Conversely, other states – and this appears to be the trend – have adopted statutes that essentially encompass any action that arises out of a person’s exercise of free speech rights on issues of public import. ***The Committee almost universally agreed that the Act ought to be of this latter type – that it should apply broadly and to any case where a citizen’s free-speech rights were threatened by litigation efforts.***

Uniform Law Commission Drafting Committee, *Issues Memorandum: Public Participation Protection Act* 3 (2019) (emphasis added).

To this end, the commentary to UPEPA notes that “[t]he 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.” *Uniform Public Expression Protection Act* at 8 (comment 9 to Section 2 of the model act, codified in New Jersey at N.J.S.A. § 2A:53A-50). The Drafting Committee noted that ***“the Act ought to have a broad scope, because the rights at issue are***

so incredibly important and easy to infringe upon.” Issues Memorandum: Public Participation Protection Act at 5 (emphasis added).

Thus, states that have adopted UPEPA, either wholly or derivatively, have broadly construed what constitutes a matter of concern to the community. For example, in *Davoodian v. Rivera*, 327 Ore. App. 197 (Ore. App. 2023), the Oregon Court of Appeals found that a pre-litigation letter and draft complaint sent to the plaintiff by the defendant alleging sexual assault constituted an “issue of public interest” under Oregon’s UPEPA derivative, O.R.S. § 31.150(2)(d). The court observed that even though the letter and unfiled complaint were communicated privately, the subject matter would be of interest to members of the public who used online dating applications or required anesthesia at the university where the plaintiff was employed. 327 Ore. App. at 212. *See also Larson v. Gannett Co.*, 940 N.W.2d 120, 134 (Minn. 2020) (finding that a press conference held, and press release issued, by law enforcement that identified the plaintiff as a suspect in the murder of a police officer involved matters of public concern because “[t]he citizens of Cold Spring and surrounding communities had a great need to be informed about matters affecting their safety[.]”); *Forbes v. King Shooters Supply*, 230 A.3d 1181, 1189-90 (Pa. Sup. Ct. 2020) (gun store employees’ statements to police that a customer was believed to require psychiatric intervention were a matter of public concern).

Another concern was the law’s practical application. Thus, in commenting on UPEPA’s use of the term “cause of action,” the Uniform Law Commission explained that the term “contemplates that in one civil action, a party seeking relief may assert multiple causes of action that invoke difference facts and theories for relief.” *Uniform Public Expression Protection Act* at 8 (comment 5 to Section 2 of the model act, codified in New Jersey at N.J.S.A. § 2A:53A-50). However, “[r]egardless of the term used by a state, the Act can be utilized to challenge part or all of a single cause of action, or multiple causes of action in the same case.” *Id.* Thus, even if protected speech forms only a part of a cause of action, it is still subject to the act’s protection.

The New Jersey Legislature followed this approach, as illustrated in N.J.S.A. § 2A:53A-55(a)(3)(b)(ii), which mandates dismissal of a speech-based cause of action when the movant demonstrates “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.*” (emphasis added).

II. THE STATUTE SERVES NEW JERSEY’S UNIQUE AND LONGSTANDING CONSTITUTIONAL PROTECTIONS FOR SPEECH ON MATTERS OF PUBLIC CONCERN – IT SHOULD BE BROADLY CONSTRUED TO THAT END. (Da18-23, Da173-77)

The New Jersey Constitution guarantees freedom of speech and expression. The importance of fostering constructive public discourse has led New Jersey – “[u]nlike most states” – to provide even greater protection under

our state constitution than is afforded by the United States Constitution where a person speaks on a matter of public concern.

This protection evolved as a result of and in response to developments in federal First Amendment law. In the 1964 case of *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), the United States Supreme Court imposed the heightened actual malice standard for defamation claims based upon press reports concerning public officials. Federal protections were expanded in the years that followed, reaching their zenith in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), in which “a plurality of the Court extended the actual-malice standard to protect speakers who discuss ‘matters of public or general concern,’ even when the person claiming to be defamed is a private figure.” *Senna v. Florimont*, 196 N.J. 469, 484 (2008) (quoting *Rosenbloom*, 403 U.S. at 43-44).

The United States Supreme Court later rejected that approach and held that “for [federal] First Amendment purposes, the actual-malice standard does not apply when private individuals seek redress for ‘injury inflicted by defamatory falsehood.’” *Senna*, 196 N.J. at 484 (quoting *Gertz v. Robert Welch*, 418 U.S. 323, 345-46 (1974)). *Gertz*, however, granted wide latitude to the states to define their own law governing defamation claims by private individuals. “Unlike most states, New Jersey accepted the invitation to provide greater protection to speech involving matters of public concern than mandated by the

United States Supreme Court’s First Amendment jurisprudence.” *Senna*, 196 N.J. at 484-85; *see also W.J.A. v. D.A.*, 210 N.J. 229, 242 (2012) (“[New Jersey] thus expanded application of the requirement of proof of actual malice to statements regarding private citizens in matters of public concern.”).

This greater protection for speech involving matters of public concern is now embodied in New Jersey’s fair comment privilege, which was first established in the three seminal cases of *Sisler v. Gannett Co.*, 104 N.J. 256 (1986), *Dairy Stores, Inc. v. Sentinel Pub. Co.*, 104 N.J. 125 (1986), and *Turf Lawnmower Repair v. Bergen Record Corp.*, 139 N.J. 392 (1995). This common law privilege is inspired by New Jersey’s Constitution, at Art. I § 6, which is even more sweeping in scope than the First Amendment, “thus our decisions, pronounced in the benevolent light of New Jersey’s constitutional commitment to free speech, have stressed the vigor with which New Jersey fosters and nurtures speech on matters of public concern.” *Sisler*, 104 N.J. at 271-72.¹

The privilege is not limited to speech concerning public figures. In 2012, the New Jersey Supreme Court explicated: “the actual-malice standard applies to all speech-based torts involving matters of public concern...” *Durando v. Nutley Sun*, 209 N.J. 235, 250-51 (2012); *see also DeAngelis v. Hill*, 180 N.J. 1, 14 (2004); *Rocci v. Ecole Secondaire Macdonald-Cartier*, 165 N.J. 149 (2000).

¹ See *Senna*, 196 N.J. at 482-289, for a more detailed history.

Critically, a preexisting public debate is not a requirement under either the Statute or our constitution. The purposes of the fair comment privilege includes not only fostering ongoing debate, but also informing the public of previously unknown facts. In *Senna*, the Court explained that the privilege was extended in *Sisler* to the press's actions not only in "reporting government activity respecting banking but also in *informing the public* about bank conduct." *Senna*, 196 N.J. at 487-88 (quoting *Sisler*, at 104 N.J. 268-69) (emphasis added). Indeed, the seminal cases of *Sisler*, *Dairy Stores*, and *Turf Lawnmower* all involve reporting of previously unknown information.

Our Supreme Court has long recognized that the New Jersey Constitution requires that there be "adequate breathing room in a democratic society" so that speech on matters of public concern is not unduly discouraged. *Senna*, 196 N.J. at 491 (citing *N.Y. Times*, 376 U.S. at 271-72). The Statute would not serve its express purpose of protecting this "breathing room" if it did not protect the individuals who communicate information to the public even in the absence of prior media attention. The Statute likewise would not serve its purpose if defendants were required to establish that their speech on matters of public concern contributed sufficient worth or value to public discourse.

The Statute must be construed broadly in order to achieve the Legislature's unambiguous intent and to protect the constitutional interests that

our Supreme Court has identified. This includes, at a minimum, broadly construing protection for speech on matters of public concern – an interest that our Supreme Court has long held to warrant greater protection under the New Jersey Constitution than is afforded at the federal level or in most other states.

III. THE DECISION BELOW WAS ERRONEOUS. (Da18-23, Da173-77)

A. The court below erred by not applying the standard prescribed by our Supreme Court in *Senna*. (Da18-23, Da173-77)

Part and parcel of our Supreme Court’s vigorous commitment to our constitution’s protection of expression was the Court’s expansion of the scope of what constitutes a matter of public concern. For example, in *Dairy Stores*, the Court held that media reports concerning a convenience store’s bottled water related to a matter of public concern. 104 N.J. at 145. Nine years later, in *Turf Lawnmower*, the Court applied the same protections to reports of consumer fraud by a lawnmower repair company, a business whose operations would not ordinarily constitute a matter of public concern. 139 N.J. at 413 (describing history of the development of the privilege). In non-media cases, like this one, our Supreme Court prescribed a three-part analytical framework in *Senna*.

Specifically, 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 court below began properly by citing *Senna*. Da173. However, it appears that the court then proceeded to forgo the *Senna* analysis, relying upon case law from the United States Supreme Court construing the federal constitution and from the Supreme Court of California. Da174. The court then expressly invoked and applied a two-part standard used in California, noting that California “has one of the oldest anti-SLAPP legislations that specifically involve the question of whether speech is a matter of public concern.” *Id.*

By opting to rely upon federal authority and apply a California standard rather than following the approach laid out in *Senna*, the court below erred.

B. The trial court’s application of federal and California standards was inconsistent with longstanding principles of New Jersey law. (Da18-23, Da173-77)

As an initial matter, the court’s quotation from *Snyder v. Phelps*, 562 U.S. 443 (2011), indicates that the analysis below was not consistent with New Jersey law. That “[s]peech deals with a matter of public concern when it can ‘be fairly considered as relating to any matter of political of political, social or other concern to the community’” (Da174) is a generic observation that may

accommodate many approaches. However, the following statement, that speech relates to a matter of public concern where it “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public” (*id.*) imposes conditions and limitations that do not comport with New Jersey’s broader constitutional protections or the analysis prescribed by *Senna*.

More importantly, the court then applied the “two-part” analysis outlined by the Supreme Court of California in *FilmOn.com Inc. v. DoubleVerify Inc.*, 439 P.3d 1156, 1158 (Cal. 2019). This standard considers: (1) identifying a public concern that is implicated by the speech, and (2) evaluating “the relationship between the speech and the ‘public conversation’” to ensure that the speech “‘contribute[s] to the public debate.’” Da174-75. This standard has not been adopted by our Supreme Court and a Lexis+ Shepards® search indicates that *FilmOn.com* does not appear to have ever been cited in any New Jersey appellate decision or published trial court decision.²

² It must also be noted that the California Supreme Court has since cautioned against rigid application of the two-step *FilmOn.com* standard. In the case of *Geiser v. Kuhns*, 515 P.3d 623 (Cal. 2022) – not cited by the court below – the California Supreme Court explained that in many cases “it may be more efficient to look to the whole context from which the conduct underlying the lawsuit arises, rather than attempting to parse which considerations fall under which of *FilmOn*’s two steps.” *Id.* at 635. Critically, the *Geiser* Court also pointedly observed that *FilmOn.com* itself “disapproved” of the reasoning in prior anti-SLAPP decisions premised upon an “insistence that the challenged conduct implicated only a private dispute and not an issue of public interest.” *Id.* at 630.

Further, the California standard is contrary to New Jersey law as articulated by our Supreme Court. The first step is logical and likely necessary to any analysis. However, the second part of the analysis enlists the court in assessing of the merit of speech, asking if it offers a sufficient contribution.

This inquiry runs contrary to New Jersey law. First, New Jersey law does not require that a public “debate” or “conversation” already exist for speech to be eligible for protection. Our constitution cannot provide “breathing room” for speech on matters of public concern if it does not protect the first speaker. Second, the *Senna* standard considers the subject matter and the audience of the speech in order to determine whether it relates to an issue of public concern. *Senna*, 196 N.J. at 497. If the speech does relate to a matter of public concern, the analysis ends. It does not demand a sufficiently valuable contribution.

Although California has an anti-SLAPP law, it is not based on UPEPA like New Jersey’s Statute. Deference to standards governing California’s statute is not therefore necessarily warranted in all cases. Where standards from other jurisdictions are inconsistent with New Jersey’s uniquely broad constitutional protections, it is error to construe our Statute under those standards.

C. The Statute applies because it is undisputed that the statements at issue relate to matters of public concern. (Da18-23, Da173-77)

Here, the speech at issue involves a matter of public concern under the *Senna* standard. Both the trial court and Plaintiff acknowledged below that the

Defendants' speech related to an issue that was a matter of public concern. That is the end of the analysis. There is no basis for imposing any additional analysis or requirement to disqualify a statement from the protection of the Statute after it has already been acknowledged to relate to issues of public concern.

First, the speech here "advance[s] the public's vital interests" because it relates to the investigation of a death by law enforcement authorities and the performance of investigatory efforts. It is intrinsically a matter of public concern when speech questions if law enforcement authorities did not follow up on allegations of murder. Indeed, the court noted that "Plaintiff has conceded that communications between defendants and the BCPO is speech which would be a matter of public concern" and that "the circumstances surrounding the death of Brian may be connected to an issue of public interest." Da175-76.

A crucial consideration in evaluating the "content" prong – omitted from the discussion of *Senna* below – is whether the speech "predominantly relate[s] to the economic interests of the speaker." *Senna*, 196 N.J. at 497. Here, Defendants' speech did not further any "economic interests" (unlike in *Senna*).

Further, the "targeted audience" are members of the community who are inherently interested in the operations of their law enforcement authorities. The fact that the statements were made to third parties (members of the community) and not to the law enforcement authorities themselves does not change this.

Thus, the speech here touches on matters of public concern and is subject to the Statute. The court below should have employed the *Senna* analysis and not imposed any alternative standard or additional requirements.

CONCLUSION

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

Respectfully submitted,

Dated: January 13, 2024

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DONALD J. SURDOVAL,

Plaintiff,

vs.

LISA SURDOVAL AND CATHERINE
A. SURDOVAL

Defendants.

x SUPERIOR COURT OF NEW
: JERSEY
: APPELLATE DIVISION
:

: DOCKET NO. A-003884-23
:

: SUPERIOR COURT OF NEW
: JERSEY LAW DIVISION –
: SUSSEX COUNTY, DOCKET NO.
: SSX-L-185-24

x Sat Below:
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DEFENDANTS/APPELLANTS' REPLY BRIEF

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Rules

Cal. R. Ct. 8.111512

INTRODUCTORY STATEMENT

Plaintiff Donald Surdoval continues to attempt to amend his Complaint to omit its true import – that its thrust – and the only substantive details contained within it – concern statements made to the Bergen County Prosecutor’s Office (“BCPO”) in furtherance of Defendants’ petition to open an investigation of their brother Brian’s death.

The new anti-SLAPP law -- the Uniform Public Expression Protection Act (“UPEPA”) N.J.S.A. 2A:53A-49 to -61 -- specifically provides that such a petition is within its ambit, whether the subject matter of that petition is contained in all or part of the Complaint. Defendants are alleged to have made false statements accusing Plaintiff, their older brother, of involvement in the murder of their younger brother Brian. The Complaint alleges they talked to extended family members about their suspicions and then, accompanied by two of those family members, approached the BCPO about their concerns. Although it could be seen as a private issue in that it was not disseminated publicly, this speech involved the right to petition, the right of free speech to express concerns about public safety and the right to relay such concerns to law enforcement.

The trial court’s “editing” of the Complaint’s most specific passages to essentially eliminate the approach to the BCPO and that court’s adoption of irrelevant portions of Plaintiff’s Certification in its place undermines the whole

purpose of the anti-SLAPP law and flies in the face of its required broad interpretation. Moreover, Plaintiff's (and the trial court's) baseless notion that the information about the BCPO approach was included only for "context," belies the law's instruction that even part of a claim can be a SLAPP and flies in the face of the details about the BCPO approach in both the Complaint and Plaintiff's Certification. The Complaint itself describes Defendants' ultimate goal of having law enforcement opening an investigation into Brian's death as the manifestation of the concerns they are accused of communicating. It was hardly simply "context."

Plaintiff complains that the Petitioners are seeking to "shield themselves from liability for allegedly defamatory statements made to private individuals by repeating those statements to police," but the fallacy of that argument is evidenced by both the dearth of information provided by the Complaint as to what actionable defamation was published within the statute of limitations prior to the approach to the prosecutor's office and the Complaint's more significant detail as to what was sent to and discussed with the BCPO.

While UPEPA requires that even part of a claim that meet the definition of public concern or petition be covered by the anti-SLAPP protections, California law (upon which a large part of the anti-SLAPP law is based) has addressed how to analyze such "mixed" claims -- where only part of the claim may be a matter of public concern -- and requires that the matter should proceed nevertheless to Step

Two of the anti-SLAPP law for adjudication where further clarity as to the claim would be revealed.

That is exactly what should occur here, where an examination of the Complaint's allegations on either side of the approach to the prosecutor's office is most revealing of its frivolous nature. Without providing the exact defamatory words allegedly spoken before the BCPO approach and knowing that any statement made "almost immediately following Brian [Surdoval's] death" (as described by the Complaint), was likely made at least a year before the statute of limitations expired, the allegations of defamation made prior to the approach to BCPO (Paragraphs 8-10) fall of their own weight.

There is similarly no detail in the Complaint as to what exactly was said to whom by whom following the October 2023 BCPO meetings. That allegation should then also be considered non-actionable. Nevertheless, even if these alleged statements to unnamed others were to survive such a review, discussion of a potential murder and a cover up with those with like interest and their seeking an investigation is certainly a matter of public safety and thus public concern.

For these reasons and others previously stated, Defendants believe that all -- or at very least a substantial part of the Complaint -- is a matter of public concern under the Anti-SLAPP law and the matter should be remanded with instructions to for the trial court to proceed to Step Two.

ARGUMENT

I. UPEPA APPLIES TO THE ALLEGATIONS IN THE COMPLAINT

A. New Jersey law would find the Complaint to be a Matter of Public Concern.

Defendants argued below that the speech at issue, whether treated as a matter of speech or the right to petition under N.J.S.A. 2A:53A-50 b.3, is protected under UPEPA and that the act must be broadly construed pursuant to 2A:53A-60. Defendants further argued that in general, Defendants' speech was a matter of public concern under Senna v. Florimont, 196 N.J. 469, 496-7 (2008) ("context, form and context" analysis derived from Dun & Bradstreet v. Inc. v. Greenmoss Builders, Inc., and the "fairly considered as **relating to** any matter of political, social or mother concern to the community" analysis as set forth in Snyder v. Phelps, 562 U.S. 443 (2011)). (emphasis added) See Uniform Public Expression Protection Act (UPEPA), National Conference of Commissioners on Uniform State Laws (2020), cmt. 9 to §2.

Defendants then argued that the facts surrounding the commission of a crime are subjects of legitimate public concern. Romaine v. Kallinger, 109 N.J. 282, 302–03 (1988), citing, inter alia, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975) ("The commission of a crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public"). See also Petersen v. Meggitt, 407 N.J. Super. 63,

77–78 (App. Div. 2009) (content/form/context analysis not required because statements related to an issue of public health and safety).

Finally, UPEPA requires the act must be broadly construed and uniformly applied with other states which adopted, applied and construed it (N.J.S.A. 2A:53A-60). In particular Defendants pointed to Oregon, a UPEPA jurisdiction, which has already dealt with this issue head-on in Mouktabis v. Clackamas Cnty., 536 P.3d 1037, 771–1047 (Or. 2023), which ruled that requests to law enforcement are protected under UPEPA as part of a right to petition. 536 P.3d at 1046.¹ Other state law cases, both in and out of UPEPA states, were discussed as well. (Db9-20).²

Plaintiff argues that W.J. A. v. D.A., 210 N.J. 229, 245 (2012) was somehow dispositive because it states that an allegation of criminal conduct cannot automatically “vault the public concern threshold.” (Db19, 29). In that case, an individual created a website accusing his uncle of sexual abuse. However, two courts, including a jury trial, had already determined that the accuser’s continued claims were not only defamatory but unfounded, and the WJA Court rejected his

¹ The trial court ignored Mouktabis, which was cited in Defendants’ papers, in effect ignoring the instruction in N.J.S.A. 2A:53A-60 that “In applying and construing the 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.”

² Db = Defendant’s Appellant Brief; Pb = Plaintiff’s Appellant Brief.

claim that in that context, the general topic of child abuse was a matter of public concern.

While Defendants are not arguing that any discussion of criminal conduct is automatically a matter of public concern, in this case, what is easily gleanable from the Complaint was that Defendants collaborated on their suspicions with members of the parties' extended family and that at two of them not only communicated with prosecutors, but then attended the meeting with them to seek an investigation of circumstances surrounding Brian's death.

W.J.A. did not involve a report to law enforcement, but a nephew who published a website attacking law enforcement's failures to prosecute his uncle for sexual abuse, even though two courts had already rejected his claims. Here, whether Defendants were right or wrong in their suspicions, it would not be unreasonable to assume that Defendants' alleged defamatory statements reflected fears of a significant risk to public safety, in addition to a petition to law enforcement for official action. Defendants' actions in pursuing the meeting with the BCPO certainly advanced a public interest and had nothing to do with the economic interests of the speaker.

B. UPEPA Applies to Even Partial Claims

Defendants also explained in their moving brief that UPEPA itself applies to an action "or part of the cause of action," N.J.S.A. 2A:53A-51. Thus, even if the

court decides that part of what was communicated other than to the BCPO was not matter of public concern (which Defendants dispute as it should apply to all such communications on this subject matter), the Complaint still qualifies as a matter of public concern under UPEPA. Plaintiff and the Court ignored this argument in Defendants' Briefs.

In fact, it is not necessary for all the allegations at issue to be based on protected activity for an anti-SLAPP statute to apply, as long as just *some* of the allegations are based on such activity. In the case of these so-called "mixed claims," California courts (whose anti-SLAPP statute UPEPA mirrors in large part) have found that "it is not the general rule that a plaintiff may defeat an anti-SLAPP motion by establishing a probability of prevailing on *any part of* a pleaded cause of action. Rather, the plaintiff must make the requisite showing as to each challenged claim that is based on allegations of protected activity." Sheley v. Harrop, 215 Cal. Rptr. 3d 606, 617–19 (Ct. App. 2017) (citing Baral v. Schnitt, 376 P.3d 604, 613-14 (Cal. 2016)) (emphasis added). Specifically, "if the supporting allegations include conduct furthering the defendant's exercise of the constitutional rights of free speech or petition, the pleaded cause of action aris[es] from protected activity, at least in part, and is subject to the special motion to strike" authorized by the anti-SLAPP statute. Baral, 376 P.3d at 609..

When relief is sought based on allegations of both protected and unprotected activity, unprotected activity is disregarded at the initial stage (Step One). Id. at 396. If the defendant then makes the required showing that some of the allegations arise from the protected activity, the burden shifts to the plaintiff to demonstrate the merit of the claim and establish the probability of success. Pech v. Doniger, 290 Cal. Rptr. 3d 471, 481, 483-84 (Ct. App. 2022). “The court does not weigh evidence or resolve conflicting factual claims” during this process. Id. Essentially, a plaintiff in an anti-SLAPP suit is not able to pick-and-choose but is required to make a showing as to each challenged claim that is based on allegations of protected activity. Id. at 392; see also Pech, 290 Cal. Rptr. 3d at 484 (noting that a court can “consider the ‘gravamen’ of a claim to evaluate whether a particular act or series of acts supplies an element or simply incidental context, but not to determine the primary focus of a mixed cause of action.”). That determination is exactly what the trial court did below.

Plaintiff here contends that UPEPA does not apply because the allegations involve unprotected and private speech and that the only “public speech” at issue was the Defendants’ comments to BCPO, which Plaintiff conveniently claims was only pleaded for contextual background. However, Plaintiff’s allegations in his Complaint are simple: (a) statements were made “almost immediately after Brians death” on December 31, 2021 to the effect that Plaintiff murdered Brian and covered

up the murder to look like a suicide; (b) statements were made to the BCPO in the approach to and at the meeting itself; and (c) afterwards “defendants continued to make their false statements to others.” One single paraphrased statement is used to support (a) and no statement is provided to support (c). In addition, there is a claim completely unsupported by the Complaint that Catherine Surdoval posted images “clearly intended to accuse Plaintiff of destroying Brian’s life” which is completely insufficient to establish falsity. Together this Complaint is, at worst, the very definition of mixed claims that should trigger UPEPA’s protections.

By asserting that the approach to the BCPO was only “contextual,” Plaintiff is simply attempting to downplay the allegations in his Complaint involving BCPO in an endeavor to circumvent the applicability of UPEPA to his claims. As the Court in Baral specifically determined, any allegations of protected activity, even if they are only part of the claim, will trigger the protections of the anti-SLAPP statute. Baral, 1 Cal. 5th at 381-82.

Here, Defendants’ statements to the Prosecutor’s Office, regardless of whatever purported reason they were included in Plaintiff’s Complaint, clearly implicate public safety concerns. Their very presence in the Complaint should be enough to require that Plaintiff demonstrate the merits of and probability of success on his claims. On its statement of reasons, the trial court noted that Plaintiff *conceded* that communications between Defendants and the BCPO is speech which would be

a matter of public concern. (Pa011). Yet the court below simply adopted Plaintiff's afterthought (after they realized that the Complaint's focus on the BCPO meeting would subject it to the anti-SLAPP law) and without any substantive analysis, simply excised the five paragraphs of 16 paragraphs in the Complaint dealing with the BCPO. This must be reversed in whole or part. **Allowing a plaintiff to effectively amend his complaint in such a way to avoid anti-SLAPP liability undermines the very purpose of the anti-SLAPP law.** Any determination of whether the anti-SLAPP law applies must be based on what the complaint states, not what a clever plaintiff insists it really means after he is served with an anti-SLAPP motion.

C. FilmOn v. Double Verify, Inc. is Neither Dispositive nor Good Law

The trial court, borrowing from Plaintiff's argument, adopted FilmOn v. Double Verify, 439 P.3d 1156 (Cal. 2019), for the proposition that the court should look to the content of the speech and what "functional relationship exists between the speech and the public conversation about some matter of public interest." Id. at 149-150; Pa 10. The case is inapposite at the outset because it interprets a catchall provision in California's law that does not exist in the UPEPA,³ but even if it were to merit some persuasiveness, the trial court used FilmOn to arbitrarily determine

³ The provision reads; "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Cal. Civ. Proc. Code § 425.16(e)(4) (West).

that the context – the basis of Plaintiff’s Complaint – was the defamatory statements allegedly made to “unnamed members of their extended family,” and not involving the culmination of those statements, which was Defendants sending written statements to the BCPO and then personally meeting with the BCPO along with two other family members to seek an investigation.

But importantly, missing from the trial court’s decision and Plaintiff’s argument is that FilmOn was subsequently reinterpreted far more broadly by the California Supreme Court three years later in Geiser v. Kuhns, 515 P.3d 623 (Cal. 2022), where the Court concluded that:

FilmOn’s first step [context of speech] is satisfied so long as the challenged speech or conduct, considered in light of its context, may reasonably be understood to implicate a public issue, even if it also implicates a private dispute. Only when an expressive activity, viewed in context, cannot reasonably be understood as implicating a public issue does an anti-SLAPP motion fail on *FilmOn’s* first step.

[Id. at 633-34.]

Even if California law were to be considered persuasive in this circumstance despite UPEPA not containing the catchall clause at issue, the Geiser standard is far broader, requiring the Court to determine that the approach to the BCPO “cannot reasonably be understood as implicating a public issue,” especially in view of not only New Jersey law, but Mouktabis’ interpretation of UPEPA’s use of the word

“petition” and its application of UPEPA to a movant who has been named a defendant in an action for seeking an investigation by law enforcement.

Geiser involved a sidewalk demonstration against a property owner ostensibly for the purpose of coercing the owner to sell back the property. In discussing step two of the FilmOn analysis, the Geiser Court said that not only was there a private reason for the dispute in that case, but it also brought up broader issues concerning unfair foreclosures and evictions and brought attention to unfair business practices. Id. at 634-35. Although the demonstration attracted media attention, such attention is not necessary, the Court said. Ibid. In fact, the Court concluded that rather than have two steps, “it may be more efficient to look to the whole context from which the conduct underlying the lawsuit arises, rather than attempting to parse which considerations fall under FilmOn’s two steps.” Id. at 635.

Under the Geiser analysis, the context of the Complaint is unmistakable: Defendants are alleged to have made false statements accusing Plaintiff, talked to extended family members about it and then went with two of those family members to the prosecutor’s office to petition for an investigation. This is one consistent action, not some parsing of each individual action. And although it could be seen as a private issue in that it was not publicly posted or covered by media, it involved the

right to petition, the right of free speech to express concerns about public safety and the right to relay such concerns to law enforcement.⁴

Finally, Plaintiff's citation of Sayerad v. Butler Lopez, A166884, 2024 WL 1979898 (Cal. Ct. App. May 6, 2024) is of no moment. First, the case is unpublished and under California rules, "uncitable." See Cal. R. Ct. 8.1115 (any opinion "that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action"). Second, while the court determined that the movant's contact with law enforcement after posting an allegedly defamatory Facebook Post was "context," it explained that a key reason for that conclusion was because unlike the instant case, the plaintiff did not include the contact with law enforcement in her complaint. Id. at *5. Because of that, and because the movant in Sayerad did not provide adequate proofs concerning the contact and the reason for the contact, it was insufficient to be considered. The Sayerad court did note that making a report of suspected unlawful activity to law enforcement is protected activity under the statute because law enforcement is an official proceeding authorized by law. Id. at *5.

⁴ Moreover, in Dairy Stores, Inc. v. Sentinel Pub. Co., 104 N.J. 125, 137 (1986), the Supreme Court recognized a qualified privilege of citizens "to make statements to authorities for the prevention and detection of crime."; see also e.g., Geyer v. Faiella, 279 N.J. Super. 386, 391 (App. Div. 1995).

CONCLUSION

For the reasons set forth above and in Defendants' moving brief and arguments below, the decision of the trial court denying the Order to Show Cause must be reversed and remanded with instructions the Court below be instructed to immediately consider Step Two of UPEPA and that Defendant has made the required showing that some of the allegations arise from protected activity, shifting the burden to Plaintiff to demonstrate the merit of the claim and establish the probability of success.

Respectfully submitted,

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DONALD J. SURDOVAL,
Respondent,
v.

LISA SURDOVAL and
CATHERINE A. SURDOVAL,
Appellants.

: SUPERIOR COURT OF NEW
: JERSEY
: APPELLATE DIVISION
:
: Docket No.: A-003884-23
:
: SUPERIOR COURT OF NEW
: JERSEY LAW DIVISION – SUSSEX
: COUNTY, DOCKET NO.: SSX-L-
: 185-24
:
: Sat Below:
: Hon. Vijayant Pawar
:
:

**BRIEF OF PLAINTIFF/RESPONDENT IN RESPONSE
TO THE BRIEFS OF AMICI CURIAE**

On the brief:

Robert Mahoney, Esq.

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PRELIMINARY STATEMENT

Plaintiff-Respondent Donald J. Surdoval submits this brief in response to the briefs of amici curiae Reporters Committee For Freedom Of The Press, New Jersey Press Association, and News/Media Alliance (the “Media Amici”) and American Civil Liberties Union of New Jersey (“ACLU”, and together with the Media Amici, the “Amici Curiae”). Because some of the Amici Curiae’s arguments mirror those of Defendants-Appellants, even to the extent of misrepresenting the facts and the Trial Court’s decision, we rely on the arguments made in Plaintiff’s Respondent’s brief.

It is undisputed that there was no media coverage of Brian Surdoval’s suicide, the medical examiner’s report, or the defamatory statements Defendants made to family, friends and acquaintances. Nor are any of the parties public figures. The parties to the lawsuit are brother and two sisters. The decedent was the parties’ brother. There are no media defendants involved. The defamatory statements alleged in the complaint are those Defendants disseminated to family, friends and acquaintances. The Amici Curiae, like the Defendants, incorrectly focus on the statements Defendants made to the Bergen County Prosecutor’s Office. Defendants themselves have acknowledged that in his opposition to the order to show cause, Plaintiff made clear that the statements made to the Prosecutor’s Office referred to in the Complaint were for context and were not the statements for which Plaintiff

sought a remedy, that is, despite having been advised that there was no merit to their positions, Defendants continued to make the defamatory statements. Furthermore, like Defendants, the Amici Curiae further mischaracterize the defamatory statements at issue by wrongly asserting that those statements concern an allegation that law enforcement did not properly investigate a murder. No such statement is referred to in the Complaint.

Therefore, Amici Curiae's arguments provide no basis to reverse the trial court's well-reasoned decision that the defamatory statements do not involve an issue of public concern under the Uniform Public Expression Protection Act, N.J.S.A. 2A:53A-49 et seq. ("UPEPA").

STATEMENT OF FACTS

Plaintiff relies upon and incorporates herein his Counterstatement of Facts contained in his Respondent's brief. For purposes of responding to Amici Curiae's briefs, Plaintiff provides the following summary.

Defendants are Plaintiff's sisters. [Da001]. Brian Surdoval, Defendants' and Plaintiff's younger brother, committed suicide on December 31, 2021. [Da001-002]. The Office of the Medical Examiner of Bergen County performed an autopsy on January 3, 2022 and confirmed that the manner of death was suicide and the cause of death was a gunshot wound to the head. [Da002].

Defendants made defamatory statements to third persons stating that Brian

had not committed suicide, but that Plaintiff had murdered him and covered it up. [Ibid]. In addition, Defendant Catherine Surdoval posted multiple images to Facebook, which images were clearly intended to accuse Plaintiff of destroying Brian's life. [Ibid]. By way of certification dated July 26, 2024, Plaintiff provided specific examples of the defamatory Facebook Posts, which, under the N.J.S.A. 2A:53A-54, the trial court was permitted to consider. [Da083-91].

Eventually, Defendants sent written statements to the Bergen County Prosecutor's Office, which statements repeated the defamatory statements that Defendants had made to third parties. [Da002]. On October 6, 2023, Defendants met with the Prosecutor's Office and repeated the same false statements they had made to third parties – i.e., that Plaintiff murdered Brian and covered up the murder. Defendants also brought two family members with them to that meeting, family members to whom they had repeatedly made the defamatory statements, in an attempt to substantiate their falsehoods. [Ibid]. The Prosecutor's Office realized that Defendants' purported evidence had no merit and so advised Defendants. [Da003]. Despite being advised that the statements were false, Defendants continued to make false statements to others. [Ibid].

Defendants filed certifications in support of their order to show cause to dismiss the Complaint. [Da032, 038 and 042]. Plaintiff submitted a certification of his own. [Da046]. Plaintiff certified that Defendant Catherine Surdoval defamed

Plaintiff to Catherine's client Evan Feather. [Da047]. In addition, Plaintiff certified that Lisa referred to Plaintiff as "Brian's Murderer" in a text message to their cousin Kevin Murphy and that she told Murphy and another relative, Christopher Rowland, that Plaintiff was involved in Brian's murder. [Ibid]. Additionally in a memo prepared for the Prosecutor's Office but shared with third parties including family members, Lisa wrote "I knew immediately my brother Don was involved whether he did it or instigated it," and "Cathy and I knew Don was involved in Brian's death [sic] death and beginning to suspected [sic] Jessica too." (Jessica is Brian's widow.) [Ibid]. Plaintiff further certified that he learned that Defendants were defaming him after he saw a Facebook post by Kevin Murphy, which accused Plaintiff of murdering his brother. [Da052]. Plaintiff filed his complaint after Defendants' meeting with the Prosecutor's Office. [Da001].

POINT I

The defamatory statements Defendants made about Plaintiff to friends and acquaintances, as pled in the Complaint, do not involve a matter of public concern.

There are no media parties in this case and no newsgathering or reporting activities at issue. This lawsuit and the tortious conduct alleged in the Complaint involve exactly what the Trial Court concluded this case is about: "a private defamation claim between a brother and his two sisters." [Pa013]. None of the parties are public figures; nor was their brother who committed suicide. There was

no news coverage of Brian Surdoval's death, the medical examiner's report, or the defamatory statements Defendants made to family, friends and acquaintances. Plaintiff's lawsuit is not brought to chill newsgathering and reporting activities. There was no public discourse of a matter of any newsworthiness that Plaintiff's Complaint was intended to silence, strategically or otherwise.

First, Plaintiff, and the Trial Court, have made it absolutely clear that the statements Defendants made to the Prosecutor's Office are not the tortious conduct for which Plaintiff seeks relief. In the footnote on p. 6 of their brief, the Media Amici acknowledge that Plaintiff does not contend that the statements to law enforcement are the basis for his defamation claims, yet they persist in discussing those statements in the hope that this Court, addressing some hypothetical set of facts alleged in a hypothetical complaint will hold that statements made to law enforcement are a matter of public concern.

Second, Amici Curiae's arguments adopt the same mischaracterization of the defamatory statements as Defendants. The defamation at issue does not involve statements made about law enforcement's failure to solve a crime (Media Amici Br. at 6) or that the official investigation of the crime was flawed (Id. at 16) or that "law enforcement authorities did not follow up on allegations of murder." (ACLU Br. at 14.). The statements complained of do not involve anything law enforcement did or did not do. None of the defamatory speech for which Plaintiff seeks redress relates

to the Prosecutor's investigation or criticism of the Prosecutor's investigatory efforts.

Like Defendants, Amici Curiae argue that one can make defamatory statements concerning another without being liable therefor, so long as she also privately shares those statements with the authorities. The law does not support such a position. UPEPA was enacted to prevent strategic lawsuits against public participation. In this matter, it is the Defendants who are being strategic: they made private, defamatory statements but now invoke the protections of the statute because they made the same statements to the Prosecutor's Office.

Again, like Defendants, Amici Curiae's arguments misconstrue the tortious conduct complained of. The speech complained of does not involve a flawed criminal investigation. The content, form and context of the speech at issue concerns the defamatory per se statements Defendants made to family, friends and acquaintances in text messages, in person and on social media stating that Plaintiff murdered his brother. Nowhere in the Complaint is there an allegation of speech criticizing a flawed criminal investigation.

In the hypothetical situation imagined by Defendants and Amici Curiae – that is, publication of speech criticizing a flawed investigation – a lawsuit brought by the subject of that speech could conceivably be categorized a SLAPP, brought to silence the criticism. But there is no such hypothetical speech at issue in this lawsuit.

Moreover, the Complaint was filed after Defendants had already met with the Prosecutor's Office. Under the actual, not hypothetical facts of the case on appeal, Plaintiff's Complaint cannot possibly be construed as strategically intended to thwart public participation because the Defendants' dealings with the Prosecutor's Office had already ended.

It bears noting in this context that the Media Amici showed no interest in Brian's suicide, the medical examiner's report, or Defendants' false accusations until this appeal was filed.

In order to shoehorn their arguments into UPEPA, Defendants and Amici Curiae argue that one cannot separate the speech complained of – that is, the statements made to family, friends and acquaintances – from the statements made to the authorities, but they cannot explain why not. Their argument suggests that through the enactment of UPEPA, the state has broadened the privileges which protect certain speech. Of course, the statute does nothing of the sort. As the Media Amici acknowledge on p. 12 of their brief, the official comments to the uniform act make it clear that what is a “matter of public concern” is to be construed consistently with existing caselaw. See, Comment 9 to Section 2, Uniform Public Expression Protection Act (UPEPA), National Conference of Commissioners on Uniform State Laws (2020).

A matter does not become one of public concern simply because the statement involves an allegation of criminal activity. In W.J.A. v. D.A., 210 N.J. 229 (2012) our Supreme Court held that simply because the offending speech makes accusations of criminal conduct it does not make the matter an issue of public concern: “[W]e have never suggested that such an allegation [of criminal conduct], in itself, vaults the public concern threshold.” 210 N.J. at 245. In W.J.A. the plaintiff created a website on which he accused the defendant of sexual abuse. The Supreme Court held that the dissemination of the criminal allegations did not make the matter one of public concern. Ibid. The Supreme Court reconfirmed that an accusation of serious criminal conduct constitutes defamation per se. Ibid.

Media Amici’s attempt to distinguish W.J.A. (Media Amici Br. at 14, n.6) fails on two grounds. First, they argue that the conduct in W.J.A. was not one of public concern because the accuser’s claim of child abuse had already been determined to be unfounded. Nothing in the Supreme Court’s opinion supports that conclusion. As the Court’s opinion makes clear, “Although Adams argues that his postings involved the public issue of allegations of failed justice, a personal and subjective belief that error occurred in a trial does not transform an essentially private dispute into one that implicates the public interest.” Id. at 246. Second, the Media Amici, like Defendants, rely instead on the Supreme Court’s earlier opinion in Romaine v. Kallinger, 109 N.J. 282 (1988) for the unremarkable proposition that “the facts

surrounding the commission of a crime are subjects of legitimate public concern.” Media Amici Br. at 16, quoting Romaine 109 N.J. at 302. Romaine is easily distinguished. First there was an actual crime in that matter, which was especially newsworthy, involving a psychotic killer who went on a criminal rampage in New Jersey and Pennsylvania, which was the subject of widespread and intense publicity when it occurred. Second, the sentence from the opinion quoted by Proposed Amici is immediately preceded by this: “The events that occurred in the Romaine home on January 8, 1975, were newsworthy and matters of legitimate public concern. These events were the subject of widespread and intense publicity when they occurred. Extensive contemporaneous publicity of this sort is a strong indication that the subject is one that is clearly newsworthy.” Ibid. There was absolutely no publicity concerning Defendants’ allegations that a crime had been committed, let alone widespread and intense publicity.

POINT II

The trial court’s reference to California caselaw was not error

ACLU criticizes the Trial Court for referencing the Supreme Court of California’s opinion in FilmOn.com v. Double Verify, Inc., 7 Cal. 5th 133 (2019). (ACLU Br. at 12). ACLU fails to acknowledge that it was Defendants who urged the Trial Court to follow California’s caselaw. In their brief in support of their order to show cause, Defendants asserted that “Because California’s Anti-SLAPP law –

which at 32-years-old is the template for much of the UPEPA (and is specifically cited in UPEPA's commentary at several points) as well [as] acting as the template for other states with similar statutes, this Court can also look to California law." Memorandum of Law in Support of Defendants' Application for an Order to Show Cause, p. 17 fn. 2. Therefore, with Defendants' blessing and direction, the trial court properly referenced FilmOn.com in denying Defendants' OTSC.

In any event, the ACLU overstates the importance of the Trial Court's reliance on the FilmOn.com opinion. While the Trial Court referred to the California Supreme Court's two-part analysis, it resolved Defendants' order to show cause by relying on the "content, form and context" formula articulated by our Supreme Court in Senna v. Florimont, 196 N.J. 469, 493 (2008) and W.J.A. v. D.A., 210 N.J. 229 (2012). See, the Trial Court's Statement of Reasons at Pa009-10.

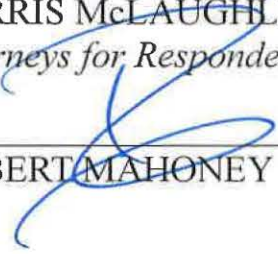
As for the remainder of Amici Curiae's legal arguments, they are virtually identical to those of Defendants. Accordingly, Plaintiff relies on his merits brief to address the balance of their arguments.

CONCLUSION

For all of the foregoing reasons, and for the reasons stated in Plaintiff's Respondent's brief, the trial court's order denying Defendants' application to dismiss the Complaint must be allowed.

NORRIS McLAUGHLIN, P.A.
Attorneys for Respondent

Dated: February 13, 2025

By: 
ROBERT MAHONEY