NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3695-21

CHRISTOPHER NEUWIRTH,

Plaintiff-Respondent,

v.

STATE OF NEW JERSEY and
GOVERNOR PHILIP D. MURPHY,

Defendants-Appellants,

and

GEORGE HELMY and
MATTHEW J. PLATKIN,

Defendants.

APPROVED FOR PUBLICATION

August 2, 2023

APPELLATE DIVISION

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Argued March 7, 2023 – Decided August 2, 2023

Before Judges Messano, Rose, and Gummer.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1083-20.

Angela Cai, Deputy State Solicitor, argued the cause for appellants (Friedman Kaplan Seiler & Adelman LLP, Eric Corngold (Friedman Kaplan Seiler & Adelman LLP) of the New York bar, admitted pro hac vice, and Nora Bojar (Friedman Kaplan Seiler & Adelman LLP) of the New York bar, admitted pro hac

vice, attorneys; Blair R. Albom, Eric Corngold and Nora Bojar, on the briefs).

Christopher J. Eibeler argued the cause for respondent (Smith Eibeler, LLC, attorneys; Christopher J. Eibeler, Lisa A. Hernandez and Devin T. Russo, on the brief).

The opinion of the court was delivered by

GUMMER, J.A.D.

Defendants State of New Jersey and Governor Philip D. Murphy appeal from an order denying their motion to dismiss the defamation count of the fourth amended complaint. Because the motion judge erred in finding plaintiff Christopher Neuwirth had adequately pleaded actual malice, we reverse.

I.

This appeal comes to us on a Rule 4:6-2(e) motion to dismiss the second count of the fourth amended complaint; thus, we accept the facts alleged in that pleading as true, granting plaintiff "every reasonable inference of fact." Major v. Maguire, 224 N.J. 1, 26 (2016) (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)). We begin with a summary of those facts.

On October 29, 2018, plaintiff began employment with the State as an assistant commissioner for the Department of Health (DOH). As assistant commissioner, plaintiff was "responsible for providing strategic leadership and guidance to the Division of Public Health Infrastructure, Laboratories and

Emergency Preparedness comprised of approximately 250 staff across the Offices of Disaster Resilience, Emergency Medical Services and the Public Health and Environmental Laboratories." Plaintiff's direct supervisor was DOH Chief of Staff Andrea Martinez-Mejia. Judith Persichilli was the Commissioner of DOH.

On January 24, 2020, New Jersey began its response to the COVID-19 pandemic. On January 27, 2020, plaintiff "established the DOH Crisis Management Team, authorized the original Coronavirus Response Plan and served as the initial Incident Commander for the [S]tate's pandemic response, coordinating all DOH activities related to COVID-19." Governor Murphy created a statewide Coronavirus Task Force on February 3, 2020, and declared a state of emergency on March 9, 2020. See Exec. Order No. 102 (Feb. 3, 2020), 52 N.J.R. 366(b) (Mar. 2, 2020); Exec. Order No. 103 (Mar. 9, 2020), 52 N.J.R. 549(a) (Apr. 6, 2020).

At the beginning of the pandemic, "[t]here were widespread shortages of [personal protective equipment] and molecular testing supplies . . . ." Because of those shortages, the State adopted a public policy that individuals without COVID-19 symptoms would forgo testing and those with mild symptoms would isolate at home. "Testing was prioritized for (1) individuals with symptoms of fever, cough and shortness of breath severe enough to require hospitalization,

(2) those who were in close contact with confirmed COVID-19 cases and (3) individuals who traveled to/from highly affected areas."

During an April 24, 2020 telephone call, State Police Superintendent Patrick J. Callahan told plaintiff he "need[ed] a favor" regarding George Helmy, who was the Governor's Chief of Staff. Callahan asked plaintiff to have someone go to the home of one of Helmy's relatives and collect from two of Helmy's relatives specimens, which would be tested for COVID-19 at DOH's Public Health and Environmental Laboratories. Plaintiff did not want to grant the "favor" because he believed Callahan's request was incompatible with public policy and a misuse of government resources and power. However, because Callahan was a member of the "Governor's inner circle," plaintiff told Callahan he would "look into it" and see if he had "staff available" to collect the specimens.

The next day, Callahan contacted plaintiff and demanded to know why the tests had not yet been performed. Plaintiff said he did not have staff available. Callahan suggested plaintiff perform the tests, and plaintiff agreed to do so, stating he did not "have a choice." After that call, plaintiff sent an email to Martinez-Mejia, disclosing Callahan's request and complaining he had been asked to perform private COVID-19 tests on Helmy's relatives as a "favor." The next morning, Martinez-Mejia replied that she would discuss the matter with the

Commissioner. In the meantime, Callahan sent plaintiff a text with additional instructions concerning the "favor."

On that same day, plaintiff called the Division Director of DOH's Office of Legal and Regulatory Compliance Joy Lindo and told her he had been instructed to perform private COVID-19 tests on relatives of a Governor's Office employee as a "favor." Lindo responded, saying "this is a textbook ethics violation." Lindo later called plaintiff back, told him she had relayed his complaints to Commissioner Persichilli, and instructed him not to proceed with the specimen collection. Plaintiff then called the Commissioner directly, and she confirmed plaintiff should not perform the tests on Helmy's relatives.

On April 27, 2020, plaintiff telephoned the State Ethics Hotline to file a complaint, but no one answered the call. At Lindo's suggestion, plaintiff contacted DOH's internal ethics officer Lubna Qazi-Chowdhry and, during a May 14, 2020 call, told her about Callahan's request. Qazi-Chowdhry stated she was not the person to handle his complaint because it involved high-ranking individuals within the Governor's Office. After speaking with the State Ethics Commissioner, Qazi-Chowdhry advised plaintiff later that day he needed to consult an attorney before proceeding with a complaint. The following day, in response to some questions from plaintiff, Qazi-Chowdhry told plaintiff to consult a criminal defense attorney who could explain to him the consequences

of filing the ethics complaint. That conversation with Qazi-Chowdhry confirmed plaintiff's concern that he was being threatened with criminal repercussions if he filed the ethics complaint.

The following week, Qazi-Chowdhry asked plaintiff if he had consulted a criminal defense attorney. Plaintiff replied that he had and believed he had done nothing wrong. He asked her how his complaint would proceed. She did not provide him with a direct answer, other than to say she would not be the person handling it.

After that conversation, "senior staff removed scheduled meetings . . . from his calendar, refused to share information with him, would not respond to his emails and would not participate in scheduled meetings with him." Plaintiff was no longer consulted on important matters and no longer received communications from senior staff such as Commissioner Persichilli and Martinez-Mejia.

On May 19, 2020, the Commissioner's executive assistant Dee Morris sent plaintiff an invitation to a meeting the next day with "staff from the Governor's Office." The staff members were two attorneys, one of whom was the chief ethics officer of the Governor's Office. The attorneys asked plaintiff if he was aware of a news article, citing to anonymous sources, about the Commissioner and whether he knew or had had any contact with the reporter. Plaintiff denied

speaking with, or providing information to, anyone in the media or knowing who had leaked information.

On May 28, 2020, the Director of Human Resources notified plaintiff that his employment was terminated. Plaintiff asked if his termination was for cause and was told it was a "no-cause termination" and that his "services were no longer needed."

According to plaintiff, people associated with "the State and/or Governor's Office" anonymously and falsely reported to the media that plaintiff had been terminated for cause, specifically because he had failed to properly disclose and obtain approval for consulting work he had performed for Margolis Healy and Associates (MHA), and that he had been "overloaded" with his work for MHA and had a poor attendance record in his DOH position. Plaintiff disputes those claims and contends that rather than correct them, officials, including Governor Murphy, "endorse[d]" them.

During a May 29, 2020 press briefing, a reporter asked Governor Murphy about plaintiff's termination:

> I have some questions for you about Chris Neuwirth. Were you aware of his part-time consulting gig? Why didn't you announce his firing? Do you have a response to his claims about being made a scapegoat? Lastly, are there any other senior members of your administration that have private, part-time jobs?

Governor Murphy responded:

> I've got no comment on any personnel – 64,000 people I believe work for me, not counting the authority, so people come and go a fair amount, actually when you've got 64,000 people. I've got no comment on Chris's situation. But I will say this, that folks are not – it's par for the course that you're not supposed to have another source of income, that's just as a general matter. We'll leave it there.

During a June 1, 2020 press briefing, a reporter asked the Governor: "Has anybody filled Chris Neuwirth's position? And have you learned if anyone else in your administration has a second job? And can someone, maybe Matt Platkin, explain what the rules are about [S]tate workers holding outside employment?" Defendant Platkin was Chief Counsel to the Governor. Governor Murphy and Platkin responded:

> [Governor Murphy]: . . . I've got no comment one way or the other on the vacancy at the [DOH], I assume a vacancy exists. I don't know. I don't have a good answer about anyone else who may have a second job. But there is a process, and I don't think I addressed it quite as crisply as I could have when you all asked me about [it] at the end of the week. And Matt, you may want to go through that, or I'm happy to go through it. But you basically, someone has to declare themselves and seek basically a waiver or an exemption for it, I think is the right way to put it.
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> [Platkin]: Yeah, that's correct. There are certain classes of employees that can't have any outside income. And then for others, they have to get Ethics approval as well as through the State Ethics Commission [(SEC)]. And for employees who have to fill out financial disclosures, they would have to

> disclose that outside income, if approved, on their annual financial disclosure forms.
>
> [Governor Murphy]: And that's, I want to caution to say that's a general comment in terms of the rules of the road, not specific to any one individual.

In a June 10, 2020 letter to "the Governor's Office," plaintiff's counsel asserted "the State" had taken a "'public' position," which was "demonstrably false," that plaintiff had been terminated "because he failed to disclose to the State his consulting work for [MHA]." Counsel relayed plaintiff's demand that "the State cease and desist making any further defamatory statements concerning him . . . and to take immediate steps to inform the public" he had not committed "any wrongdoing concerning disclosures of his relationship with [MHA]."

On June 16, 2020, plaintiff filed a complaint against the State and various fictitious defendants, alleging a claim under the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -8. After amending the complaint on July 30, 2020, plaintiff filed a second amended complaint on June 25, 2021, asserting a defamation claim against the State and Governor Murphy in his official and individual capacity. Defendants moved to dismiss the defamation claim. While that motion was pending, plaintiff filed a third amended complaint on October 20, 2021.

During argument on October 28, 2021, plaintiff's counsel confirmed plaintiff intended to bring the defamation claim only against Governor Murphy

individually and conceded the defamation claim against State defendants and Governor Murphy in his official capacity could be dismissed with prejudice. Regarding the defamation claim against the Governor individually, the motion judge concluded plaintiff had "appropriately" pleaded "the factors of defamation" except actual malice and that plaintiff "need[ed] more specificity with respect to actual malice." The judge granted the motion to dismiss the defamation claim with prejudice as to the State and Governor Murphy in his official capacity and without prejudice as to Governor Murphy in his individual capacity. The judge gave plaintiff leave to amend as to "the actual malice issue."

On January 17, 2022, plaintiff filed a fourth amended complaint. In the first count of that complaint, plaintiff accused the State, Helmy, and Platkin of CEPA violations and contended he had been unlawfully terminated in violation of CEPA because he complained about being instructed to obtain specimens from relatives of a member of the Governor's Office for COVID-19 testing.

In the second count, which plaintiff stated was "AGAINST DEFENDANT MURPHY," plaintiff alleged "[t]he State, through anonymous sources, and Governor Murphy, made false and defamatory statements, knowing them not to be true, to the news media and the entire public of New Jersey during public Coronavirus Press Briefings." He asserted Governor Murphy had "publicly endorsed" false statements by "'anonymous sources' of the Governor's [O]ffice

to media outlets" that plaintiff had failed to disclose or obtain approval for his consulting services for MHA and had been terminated "for cause," "overloaded" with work at his MHA job, and criticized for poor attendance at his DOH job. Plaintiff specifically referenced the statements made by the Governor during the May 29 and June 1, 2020 press briefings. The State and the Governor subsequently moved to dismiss the second count of the fourth amended complaint.

After hearing argument, the judge denied the motion. He declined to "revisit" defendants' arguments regarding the non-malice elements of the defamation, stating he had "already considered" those elements "as part of the earlier motion." As to actual malice, the judge found plaintiff had pleaded sufficient facts "showing that Governor Murphy acted with actual malice in participating in plaintiff's alleged unlawful termination and the dissemination of false information to attempt to cover up the alleged whistleblower retaliation." In reaching that conclusion, the judge cited the following paragraphs of the fourth amended complaint:

> 156. The State, including those in [the] Governor['s] Office, including [d]efendants Governor Murphy, Helmy and Platkin, conspired to fabricate and disseminate to the public a knowingly false reason for termination to further punish [p]laintiff, damage and impair [p]laintiff's professional reputation and to cover up the true reason for [p]laintiff['s] retaliatory discharge concerning his complaints and refusal to

perform a private COVID-19 test on relatives of [d]efendant Helmy, which is further evidence of the maliciousness of his defamatory statements.

. . . .

171. Governor Murphy was also aware of the true reason for [p]laintiff's termination, which was for engaging in the aforesaid protected activity for complaining and refusing to collect specimens from two relatives of [d]efendant Helmy for testing of SARS-COV-2 to be performed at DOH's Public Health and Environmental Laboratories, prior to making his defamatory public statements concerning [p]laintiff, further evidencing the maliciousness of his actions.

. . . .

180. If [p]laintiff were, in fact, terminated for not having approval to have "a second source of income" as publicly stated by Governor Murphy, that decision was to be made by the [SEC] after [p]laintiff was provided his due process rights to address these false allegations in connection with a proper investigation, none of which happened at any time prior to Governor Murphy's defamatory remarks, further establishing the maliciousness of Governor Murphy's and the State's conduct.

. . . .

198. The fact that Governor Murphy and no one from the Governor['s] Office or the State conducted any investigation as to whether [p]laintiff obtained approval to provide consulting services to MHA before disseminating the defamatory statements about [p]laintiff, further evidences the maliciousness of his actions.

199. The actual malice of the defamatory statement is even further evidenced by the fact that Governor Murphy, the Governor['s] Office and/or the State never confronted [p]laintiff about any allegations of wrongdoing in connection with his consulting services at MHA nor was it in their job duties to make such a determination without the SEC or anyone from the State conducting a proper investigation into any such allegation.

. . . .

229. After receiving [p]laintiff's [c]ounsel's June 10, 2020 letter and/or the filing of the lawsuit, [d]efendants instructed the [Office of Public Integrity and Accountability (OPIA)] to open an investigation, including serving a secret subpoena upon MHA to try to obtain evidence, without [p]laintiff's knowledge, in order to use against [p]laintiff in this lawsuit.

. . . .

241. The improper use of governmental resources, including the investigatory powers of the SEC for their own personal gain, including to attempt to re-manufacture yet another reason for terminating [p]laintiff, amounts to an egregious abuse of power and further evidence of the pretextual nature of [d]efendants' reasons for [p]laintiff's termination and further evidence of the maliciousness of Governor Murphy's defamatory statements and of the maliciousness of Governor Murphy's defamatory remarks.

. . . .

264. Upon information and belief, the aforesaid statements were made by state employees and/or representatives at the direction and/or knowledge of State officials who were involved in the termination of

[p]laintiff's employment, including [d]efendants Murphy, Platkin and Helmy.

. . . .

270. Governor[] Murphy made his comments about [p]laintiff recklessly and/or with actual knowledge of their falsity and to punish and further retaliate against [p]laintiff for engaging in whistleblowing activity concerning high ranking officials of his administration, which is further evidence of the maliciousness of his actions.

. . . .

273. Defendant Murphy was fully aware and participated in the decision to terminate [p]laintiff in retaliation for complaints he made after being instructed to perform a private COVID-19 test on relatives of a Governor's Office employee as "a favor."

274. Defendant Murphy was further aware and participated in the manufacturing of the pretextual reason that [p]laintiff did not properly obtain the SEC approval to provide consulting services with MHA.

. . . .

290. The use of state resources, including the SEC and the OPIA, to obtain information it otherwise was not entitled to obtain through available means to attempt to discover something about [p]laintiff and his consulting services with MHA to use in the manufacturing of a new defense to this lawsuit is an abuse of power and further evidence of maliciousness of the defamatory statements made concerning [p]laintiff.

On leave, the State and Governor Murphy appeal, arguing the judge erred in denying their motion to dismiss the second count of the fourth amended complaint by finding plaintiff had sufficiently pleaded the non-malice elements of defamation and by misapplying the actual-malice standard. Because we agree the judge misapplied the actual-malice standard, we reverse.

II.

We review a decision on a Rule 4:6-2(e) dismissal motion "de novo, without deference to the judge's legal conclusions." McNellis-Wallace v. Hoffman, 464 N.J. Super. 409, 415 (App. Div. 2020). Rule 4:6-2(e) provides that a complaint may be dismissed for "failure to state a claim upon which relief can be granted." The Rule tests "the legal sufficiency of the facts alleged on the face of the complaint." Printing Mart, 116 N.J. at 746. To defeat a Rule 4:6-2(e) motion, a plaintiff does not have to prove his or her case but must establish the complaint contains "allegations which, if proven, would constitute a valid cause of action." Kieffer v. High Point Ins. Co., 422 N.J. Super. 38, 43 (App. Div. 2011) (quoting Leon v. Rite Aid Corp., 340 N.J. Super. 462, 472 (App. Div. 2001)). When a complaint "fail[s] to articulate a legal basis entitling [the] plaintiff to relief," the "court must dismiss the plaintiff's complaint." Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005).

"[P]leadings reciting mere conclusions without facts . . . do not justify a lawsuit." Glass v. Suburban Restoration Co., 317 N.J. Super. 574, 582 (App. Div. 1998). That tenet is especially true in defamation cases, in which courts must balance "an individual's right to protect his reputation . . . and our citizens' right to free expression and robust debate in our democratic society." Petro-Lubricant Testing Labs., Inc. v. Adelman, 233 N.J. 236, 243 (2018); see also Rocci v. Ecole Secondaire Macdonald-Cartier, 165 N.J. 149, 155 (2000) (noting courts in defamation cases must "achieve the proper balance between protecting reputation and protecting free speech" (quoting Ward v. Zelikovsky, 136 N.J. 516, 528 (1994))). As our Supreme Court has held, in a defamation case, "[i]t is not enough for plaintiffs to assert . . . that any essential facts that the court may find lacking can be dredged up in discovery. A plaintiff can 'bolster a defamation cause of action through discovery, but not [] file a conclusory complaint to find out if one exists.'" Printing Mart, 116 N.J. at 768 (quoting Zoneraich v. Overlook Hosp., 212 N.J. Super. 83, 101-02 (App. Div. 1986)). In a defamation case, "[a] vague conclusory allegation is not enough. . . . [A] conclusory complaint . . . must be dismissed." Zoneraich, 212 N.J. Super. at 101-02.

The Court has "identified the elements of the cause of action for defamation to be: '(1) the assertion of a false and defamatory statement

concerning another; (2) the unprivileged publication of that statement to a third party; and (3) fault amounting at least to negligence by the publisher.'" Leang v. Jersey City Bd. of Educ., 198 N.J. 557, 585 (2009) (quoting DeAngelis v. Hill, 180 N.J. 1, 13 (2004)); see also Petersen v. Meggitt, 407 N.J. Super. 63, 74 (App. Div. 2009) ("Fault, either negligence or malice, must also be proven."). "The allegedly defamatory statements must be viewed in the context of the whole publication." Petro-Lubricant Testing Labs., Inc., 233 N.J. at 254. We focus on the last element – fault – because whether plaintiff had sufficiently pleaded that element was the basis of the motion judge's decision.

Speech on "matters of public concern [is] at the heart of the First Amendment's protection" and "occupies the 'highest rung of the hierarchy of First Amendment values.'" Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-59 (1985) (first quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978); and then quoting Connick v. Myers, 461 U.S. 138, 145 (1983)). "Such speech 'requires maximum protection.'" Rocci, 165 N.J. at 156 (quoting Sisler v. Gannett Co., 104 N.J. 256, 266 (1986)). Thus, false statements about public officials, public figures, and matters of public concern are not actionable unless they were made with actual malice. See Senna v. Florimont, 196 N.J. 469, 498 (2008). The parties agree the actual-malice

standard applies in this case, and plaintiff concedes he "must clearly allege facts supporting that element of the defamation claim."

"To satisfy the actual-malice standard, a plaintiff must show by clear and convincing evidence that the publisher either knew that the statement was false or published with reckless disregard for the truth." Lynch v. N.J. Educ. Ass'n, 161 N.J. 152, 165 (1999). That is a high standard.

> To prove publication with reckless disregard for the truth, a plaintiff must show that the publisher made the statement with a "high degree of awareness of [its] probable falsity," Garrison v. Louisiana, 379 U.S. 64, 74 (1964), or with "serious doubts" as to the truth of the publication, St. Amant v. Thompson, 390 U.S. 727, 731 (1968). To be actionable, "the recklessness in publishing material of obviously doubtful veracity must approach the level of publishing a 'knowing, calculated falsehood.'" Lawrence v. Bauer Publ'g & Printing Ltd., 89 N.J. 451, 466 (1982) (citation omitted). Negligent publishing does not satisfy the actual-malice test.
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> . . . .
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> A finding of reckless publication . . . may result if the publisher fabricates a story, publishes one that is wholly unbelievable, or relies on an informant of dubious veracity, [St. Amant,] 390 U.S. at 732; Costello v. Ocean County Observer, 136 N.J. 594, 615 (1994), or purposely avoids the truth, Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 661 n.2 (1989).
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> [Id. at 165-66.]

The actual-malice standard is a subjective standard that does not involve consideration of whether a reasonable person would have, or should have, known the statement was false but rather whether "the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant, 390 U.S. at 731; see also DeAngelis, 180 N.J. at 13 (finding the actual-malice standard is a "subjective" standard); Costello, 136 N.J. at 615 (finding "the actual-malice standard is subjective," meaning "the inquiry concerns [the defendant's] state of mind" and whether "the defendant in fact entertained serious doubts about the truth of the statement or . . . had a subjective awareness of the story's probable falsity"). Thus, "the focus of the 'actual malice' inquiry is on a defendant's attitude toward the truth or falsity of the publication, on his subjective awareness of its probable falsity and his actual doubts as to its accuracy." Costello, 136 N.J. at 617 (quoting Lawrence, 89 N.J. at 467-68).

Malice in a defamation case does not refer to a "bad or corrupt motive" or "personal spite, ill will or a desire to injure [the] plaintiff." Marchiano v. Sandman, 178 N.J. Super. 171, 174 (App. Div. 1981) (quoting Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967)); see also Trump v. O'Brien, 422 N.J. Super. 540, 559 (App. Div. 2011) (finding "ill will does not constitute actual malice"). "[E]rrors of interpretation of judgment" and "misconceptions" are not sufficient to demonstrate actual malice. Lawrence, 89 N.J. at 468

(quoting Time, Inc. v. Pape, 401 U.S. 279, 290 (1971)). "Rather, malice concerns the [defendant's] 'state of knowledge of the falsity of what he published, not at all . . . his motivation in publishing it . . . .'" Trump, 422 N.J. Super. at 559 (quoting Lawrence, 89 N.J. at 468 (internal quotation marks omitted)).

Like the allegations in Darakjian v. Hanna, 366 N.J. Super. 238, 247 (App. Div. 2004), "[p]laintiff's allegation of actual malice, i.e., knowledge of falsity or reckless disregard for truth or falsity, is unsupported by factual contentions offered to substantiate the assertion." Plaintiff asserts no facts from which a factfinder could conclude that Governor Murphy knew, or had serious doubts about, the veracity of the allegedly defamatory statements he made. Repeated, conclusory allegations that Governor Murphy was "aware" of the truth and made the statements "recklessly and/or with actual knowledge of their falsity" are mere recitations of the applicable legal standard, not factual assertions. Plaintiff's allegations regarding Governor Murphy's failure to conduct an investigation between plaintiff's May 28, 2020 termination and the May 29, 2020 press briefing are similarly unavailing. See Lynch, 161 N.J. at 172 (finding that a "[m]ere failure to investigate all sources" does not demonstrate actual malice). Plaintiff's allegation that after receiving his counsel's June 10, 2020 letter, "[d]efendants instructed OPIA to open an investigation" says nothing about the

Governor's subjective state of mind when he made the statements at the May 29 and June 1, 2020 press briefings. With nothing more, plaintiff's defamation claim fails. Accordingly, we reverse the order denying defendants' motion and remand with a directive that the motion judge enter an order dismissing the second count of the fourth amended complaint for failure to state a claim pursuant to Rule 4:6-2(e).

We recognize Darakjian involved press defendants. However, that characteristic does not render the case "easily distinguishable" as found by the motion judge. Our concern in Darakjian – that "permit[ting] a defamation action . . . to survive on the basis of a mere allegation of knowledge of falsity or reckless disregard [would] afford[] insufficient breathing space to the critical rights protected, in the public interest, by the First Amendment" – applies equally here. 366 N.J. Super. at 247.

Because the motion judge based his decision to deny defendants' motion to dismiss the fourth amended complaint on whether plaintiff had adequately pleaded actual malice and because we reverse the decision on that basis, we need not address defendants' arguments concerning the non-malice aspects of plaintiff's defamation claim.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.