BELOW IS A SUMMARY OF THE CASE YOU ARE FILING WITH THE **APPELLATE DIVISION.**
REVIEW ALL INFORMATION AND DOCUMENTS FOR ACCURACY PRIOR TO HITTING THE **SUBMIT** BUTTON ON THE NEXT PAGE.

FILING ID #	1672979	**TRIAL COURT DOCKET #**	SSX-L-185-24
APPELLATE #	A-003884-23	**TRIAL COURT COUNTY**	SUSSEX
CASE TITLE	DONALD J. SURDOVAL V. LISA SURDOVAL AND CATHERINE A. SURDOVAL		
CASE TYPE	CIVIL	**DISPOSITION DATE**	08/09/2024
CATEGORY	LAW-CIVIL PART		
TRIAL COURT JUDGE	VIJAYANT PAWAR, JSC		

PARTY/ATTORNEY

PARTY NAME	PARTY ROLE	PARTY DESIGNATION	FIRM NAME - ATTORNEY NAME / ATTORNEY ROLE	ADDRESS
DONALD SURDOVAL	PLAINTIFF	RESPONDENT	NORRIS MC LAUGHLIN PA - ROBERT MAHONEY (ATTORNEY OF RECORD)	400 CROSSING BLVD 8TH FL, PO BOX 5933 BRIDGEWATER, NJ 08807 908-722-0700 RMAHONEY@NORRIS-LAW.COM; JALDRICH@NORRIS-LAW.COM
LISA SURDOVAL, CATHERINE A. SURDOVAL	DEFENDANT	APPELLANT	PASHMAN STEIN WALDER HAYDEN, PC - BRUCE S ROSEN (ATTORNEY OF RECORD)	COURT PLAZA SOUTH, EAST WING, 21 MAIN ST, STE 200E HACKENSACK, NJ 07601-7054 201-488-8200 BROSEN@PASHMANSTEIN.COM; SCARVALHO@PASHMANSTEIN.COM
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, NEW JERSEY PRESS ASSOCIATION, NEWS/MEDIA ALLIANCE	OTHER	MOVANT	BALLARD SPAHR, LLP - ELIZABETH SEIDLIN-BERNSTEIN (ATTORNEY OF RECORD)	1735 MARKET ST 51ST FL PHILADELPHIA, PA 19103-7599 215-665-8500 seidline@ballardspahr.com; relyear@ballardspahr.com; tranp@ballardspahr.com

DOCUMENTS

DOCUMENT / FILE NAME	FILING PARTY	FIRM NAME / ATTORNEY ATTENTION	CATEGORY / DOCUMENT TYPE	SOURCE	DATE DOCUMENT CREATED	STATUS
MOTION TO APPEAR AS AMICUS CURIAE (M-002416-24)	REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, NEW JERSEY PRESS ASSOCIATION, NEWS/MEDIA ALLIANCE	BALLARD SPAHR, LLP - ELIZABETH SEIDLIN-BERNSTEIN	MOTION - TO APPEAR AS AMICUS CURIAE	SYSTEM GENERATED	01/06/2025	SUBMITTED
Motion Supporting Document	REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, NEW JERSEY PRESS ASSOCIATION, NEWS/MEDIA ALLIANCE	BALLARD SPAHR, LLP - ELIZABETH SEIDLIN-BERNSTEIN	MOTION SUPPORTING DOCUMENTS/ ANSWERS/ OPPOSITIONS/ ATTACHMENTS - MOTION CERTIFICATION/SUPPORTING DOCUMENT	UPLOAD	01/06/2025	SUBMITTED
PROOF OF SERVICE	REPORTERS	BALLARD SPAHR, LLP	APPELLATE DOCUMENTS - PROOF OF	SYSTEM	01/06/2025	SUBMITTED

COMMITTEE FOR FREEDOM OF THE PRESS, NEW JERSEY PRESS ASSOCIATION, NEWS/MEDIA ALLIANCE	- ELIZABETH SEIDLIN-BERNSTEIN	SERVICE	GENERATED

FEES AND PAYMENTS

Fee Type	Fee Amount	Fee Status	Fee Paid	Payment Date	Payment Type	Amount Due
No record found.						

RELATED APPEALS

CASE TYPE	APPELLATE #	TRIAL COURT/ AGENCY DOCKET #	CASE TITLE	DISPOSITION DATE	STATUS
No record found.					

New Jersey Judiciary
Superior Court - Appellate Division
NOTICE OF MOTION

ELIZABETH SEIDLIN-BERNSTEIN, Esq.
BALLARD SPAHR, LLP
1735 MARKET ST 51ST FL
PHILADELPHIA, PA 19103-7599
215-665-8500
seidline@ballardspahr.com
relyear@ballardspahr.com
tranp@ballardspahr.com

DOCKET NO: **A-003884-23**

DONALD J. SURDOVAL
V.
LISA SURDOVAL AND CATHERINE A. SURDOVAL

Notice of Motion:

MOTION TO APPEAR AS AMICUS CURIAE

PLEASE TAKE NOTICE that the undersigned hereby moves before the Superior Court of New Jersey, Appellate Division, for an Order granting the above relief:

In support of this motion, I shall rely on the accompanying brief or certification.

I hereby certify that I am submitting the original of this notice of motion and accompanying brief or certification to the Clerk of the Appellate Division, and submitting same upon my adversary by email notification. If delivery by non-electronic means, two copies of same will be served upon the following:

TO:

BRUCE S ROSEN, Esq.
PASHMAN STEIN WALDER
HAYDEN, PC
COURT PLAZA SOUTH, EAST
WING
21 MAIN ST, STE 200E
HACKENSACK, NJ 07601-
7054

ROBERT MAHONEY, Esq.
NORRIS MC LAUGHLIN PA
400 CROSSING BLVD 8TH FL
PO BOX 5933
BRIDGEWATER, NJ 08807

	For:
Trial court #: SSX-L-185-24	MOVANT, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, NEW JERSEY PRESS ASSOCIATION, NEWS/MEDIA ALLIANCE
Trial court disposition date: 08/09/2024 Category: LAW-CIVIL PART Type: CIVIL County: SUSSEX	s/ ELIZABETH SEIDLIN-BERNSTEIN, Esq. BALLARD SPAHR, LLP BAR ID#: 052882014 Date: 01/06/2025 EMAIL: seidline@ballardspahr.com; relyear@ballardspahr.com
Trial Court Judge name: VIJAYANT PAWAR, JSC	

ELIZABETH SEIDLIN-BERNSTEIN, Esq.
BALLARD SPAHR, LLP
1735 MARKET ST 51ST FL
PHILADELPHIA, PA 19103-7599
215-665-8500
seidline@ballardspahr.com
relyear@ballardspahr.com
tranp@ballardspahr.com

Before Appellate Division,
Superior Court of New Jersey
DOCKET NO. **A-003884-23**

CIVIL

DONALD J. SURDOVAL
V.
LISA SURDOVAL AND CATHERINE A. SURDOVAL

PROOF OF SERVICE

I hereby certify that an original of the following documents, **MOTION TO APPEAR AS AMICUS CURIAE, PROOF OF SERVICE, Motion Supporting Document** were submitted and transmitted to the parties listed below in the following format:

ELECTRONICALLY TO:
ATTORNEY NAME: BRUCE S ROSEN, Esq.
BROSEN@PASHMANSTEIN.COM; SCARVALHO@PASHMANSTEIN.COM
ATTORNEY NAME: ROBERT MAHONEY, Esq.
RMAHONEY@NORRIS-LAW.COM; JALDRICH@NORRIS-LAW.COM

BY MAIL:

I certify that the forgoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: **01/06/2025**

Attorney for MOVANT
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, NEW JERSEY PRESS ASSOCIATION, NEWS/MEDIA ALLIANCE
By: **S/ ELIZABETH SEIDLIN-BERNSTEIN, Esq.**

(*) truncated due to space limit. Please find full information in the additional pages of the form.

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

Elizabeth Seidlin-Bernstein (No. 052882014)
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
(215) 988-9774
seidline@ballardspahr.com

Counsel of Record for Amici Curiae

Bruce D. Brown*
Mara Gassmann*
Matthew Singer*
* *Of Counsel*
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1020
Washington, D.C. 20005
(202) 795-9300
bruce.brown@rcfp.org
mgassmann@rcfp.org
msinger@rcfp.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF AMICI CURIAE 1

INTRODUCTION 4

ARGUMENT 6

I. New Jersey's anti-SLAPP law protects speech, including news reporting, from litigation meant to chill First Amendment expression. 6

A. The threat of SLAPPs to speech. 6

B. New Jersey enacts anti-SLAPP law to discourage "weaponizing" libel suits. 9

II. The anti-SLAPP law's predicate requirement that speech address a matter of public concern is vital to its effectiveness. 12

A. Courts have broadly defined what constitutes a matter of public concern. 12

B. Speech about law enforcement investigations and alleged unsolved crimes relates to matters of public concern under New Jersey law. 16

C. Holding that the speech at issue here constitutes a matter of public concern serves the public interest. 20

CONCLUSION 22

APPENDIX OF UNPUBLISHED AUTHORITIES A-1

TABLE OF AUTHORITIES

Cases

Carter v. ABC News, Inc.,
No. 55,623-CA, 2024 WL 3168321 (La. Ct. App. June 26, 2024)............... 19, 20

Connick v. Myers,
461 U.S. 138 (1983) 13

Cornelius v. The Chronicle, Inc.,
206 A.3d 710 (Vt. 2019)..19

Cox Broad. Corp. v. Cohn,
420 U.S. 469 (1975) 16

Dairy Stores, Inc. v. Sentinel Publ'g Co.,
104 N.J. 125 (1986) 12, 18

Davenport Extreme Pools & Spas, Inc. v. Mulflur,
698 S.W.3d 140 (Ky. Ct. App. 2024)...15

Dijkstra v. Westerink,
168 N.J. Super. 128 (App. Div. 1979).. 17, 20

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,
472 U.S. 749 (1985) 13

Geyer v. Faiella,
279 N.J. Super. 386 (App. Div. 1995)..17

Gleason v. Smolinski,
125 A.3d 920 (Conn. 2015)..19

Govito v. W. Jersey Health Sys., Inc.,
332 N.J. Super. 293 (App. Div. 2000)..17

Jha v. Khan,
520 P.3d 470 (Wash. Ct. App. 2022) 14

Mick v. Am. Dental Ass'n,
49 N.J. Super. 262 12

Miller v. Schupp,
No. 02-21-00107-CV, 2022 WL 60606 (Tex. App. Jan. 6, 2022) 19

Mouktabis v. Clackamas County,
536 P.3d 1037 (Or. Ct. App. 2023) 18

Petersen v. Meggitt,
407 N.J. Super. 63 (App. Div. 2009) 16, 17

Pryor v. Brignole,
292 A.3d 701 (Conn. 2023) 19

Romaine v. Kallinger,
109 N.J. 282 (1988) 16

Senna v. Florimont,
196 N.J. 469 (2008) 13, 14, 18

Snyder v. Phelps,
562 U.S. 443 (2011) 12, 15, 17

UHS of Provo Canyon, Inc. v. Bliss,
No. 2:24-CV-163-DAK-CMR, 2024 WL 4279243
(D. Utah Sept. 24, 2024) 15

W.J.A. v. D.A.,
210 N.J. 229 (2012) 13, 14

Whitelock v. Stewart,
661 S.W.3d 583 (Tex. App. 2023) 19

Statutes

Cal. Civ. Proc. Code § 425.16 .... 8, 9

N.J.S.A. 2A:53A-49 to -61 4

N.J.S.A. 2A:53A-50 10

N.J.S.A. 2A:53A-55 .... 10, 11

N.J.S.A. 2A:53A-58 11

N.J.S.A. 2A:53A-59 .... 9, 11

N.J.S.A. 2A:53A-60 .... 14, 18

Other Authorities

Abené Clayton, ‘Far from justice’: why are nearly half of US murders going unsolved?, The Guardian (Feb. 27, 2023) 20, 21

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 3

Anti-SLAPP Legal Guide, Reporters Comm. for Freedom of the Press 9

Anti-SLAPP Legal Guide: New Jersey,
Reporters Comm. for Freedom of the Press 10

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 .... 2, 3

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) 3

Charles Ornstein, Our Editor Won a 6-Year Legal Battle. It Didn’t Feel Like a Victory, ProPublica (Aug. 30, 2024) 7

D. Victoria Baranetsky & Alexandra Gutierrez, What a costly lawsuit against investigative reporting looks like,
Colum. Journalism Rev. (Mar. 30, 2021) 7

Dana DiFilippo, New N.J. law sets hurdles for filers of frivolous lawsuits,
N.J. Monitor (Sept. 7, 2023) 10, 11

David Keating, Estimating the Cost of Fighting a SLAPP in a State with No Anti-SLAPP Law, Inst. for Free Speech (June 16, 2022) 6, 7

Editorial Board, New York’s Chance to Combat Frivolous Lawsuits,
N.Y. Times (Nov. 4, 2020) 8

Emily Hockett, UPEPA sweeps the nation,
Reporters Comm. for Freedom of the Press (June 3, 2024) 10

FBI Newark Encourages Hate Crime Reporting, Launches Unconventional Awareness Campaign, FBI Newark (Sept. 1, 2023) 22

Janice Limon, Case of 'Mr. X' solved after decades with help of former WYFF News 4 reporter, SC sheriff says, WYFF (June 10, 2024) 21

Nick Caloway, New Jersey college students, staff help police make arrest in 1974 cold case, CBS News (Nov. 12, 2024) 21

Penelope Canan & George W. Pring, Strategic Lawsuits Against Public Participation,
35 Soc. Probs. 506 (1988) 8

Press Release, State of N.J., Governor Murphy Signs Bipartisan Bill Protecting Against Lawsuits Designed to Suppress Free Speech
(Sept. 7, 2023) .... *passim*

Public Expression Protection Act, Unif. L. Comm'n 10

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) 8

Thomas A. Waldman, SLAPP Suits: Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation,
39 UCLA L. Rev. 979 (1992) 6

Understanding Anti-SLAPP Laws,
Reporters Comm. for Freedom of the Press 8

Unif. Pub. Expression Prot. Act (Unif. L. Comm'n 2020) 4, 12, 13, 14

Victoria Macchi, Journalist Shares Stories Behind Civil Rights Cold Cases,
Nat'l Archives News (Feb. 20, 2020) 21

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 to[2] 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 "criminatory 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/afdswbtx (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,

/s/ Elizabeth Seidlin-Bernstein

Elizabeth Seidlin-Bernstein (No. 052882014)
BALLARD SPAHR LLP
1735 Market Street
51st Floor
Philadelphia, PA 19103
(215) 988-9774

seidline@ballardspahr.com

Counsel of Record for Amici Curiae

Bruce D. Brown*
Mara Gassmann*
Matthew Singer*
* *Of Counsel*
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1020
Washington, D.C. 20005
(202) 795-9300
bruce.brown@rcfp.org
mgassmann@rcfp.org
msinger@rcfp.org

Appendix

2024 WL 3168321

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeal of Louisiana, Second Circuit.

Hal CARTER and Dream Creations, LLC, Plaintiff-Appellant,
v.
ABC NEWS, INC. d/b/a ABC News Productions d/b/a 20/20 News Magazine, Defendant-Appellee.

No. 55,623-CA
|
Judgment Rendered June 26, 2024

Synopsis

Background: After nationally televised news program about infamous serial killer's murder spree did not mention alleged former suspect of triple homicide that serial killer eventually confessed to, former suspect and company suspect formed to create and market products based on his experiences following murders filed petition for damages against television news network and local affiliate station, alleging that company defamed former suspect and company, that suspect and company suffered intentional infliction of emotional distress, and that affiliate station breached its duty to suspect as a business invitee when he was interviewed by station and later denied second interview. Following hearing, the District Court, 1st Judicial District, Caddo Parish, No. 636,470, Michael A. Pitman, J., rendered judgment, sustaining defendants' exceptions of no cause of action and dismissing plaintiffs' claims, and denied special motions to strike as moot. Plaintiffs appealed and filed motion for leave of court to amend and supplement the petition, which was denied.

Holdings: The Court of Appeal, Robinson, J., held that:

[1] television news network did not defame former suspect by failing to mention suspect in program;

[2] local affiliate station did not defame suspect by airing interview with suspect in conjunction with broadcast of program or by not giving suspect opportunity for second interview;

[3] conduct of television news network and local affiliate station in failing to mention suspect in program did not amount to extreme and outrageous conduct, as element of intentional infliction of emotional distress;

[4] local affiliate station did not owe suspect heightened duty of care as business invitee to protect suspect from mental, credibility, or reputational harm;

[5] trial court did not abuse its discretion in denying motion for leave of court to amend and supplement petition in order for suspect to preserve discovery claims related to special motions to strike; but

[6] special motions to strike did not become moot upon dismissal of claims;

[7] network and station made prima facie showing that program was an act in furtherance of First Amendment right and in connection with a public issue, as required to grant special motions to strike; and

[8] suspect failed to demonstrate probability of success on claims, as would support grant of special motions to strike.

Affirmed in part, reversed in part, and remanded with instructions.

West Headnotes (36)

[1] **Attorneys and Legal Services** Representation of corporations and other organizations

As general rule, corporate entities must be represented by counsel.

[2] **Corporations and Business Organizations** In general; nature and status

Even where limited liability company has sole shareholder, it is an entity separate and distinct from that shareholder in terms of procedural capacity.

[3] **Pleading** No cause of action

Function of peremptory exception of no cause of action is to test legal sufficiency of a petition, which is done by determining whether law affords a remedy on facts alleged in the pleading.

[4] **Pleading** Facts

When ruling on peremptory exception of no cause of action, court reviews the petition and accepts well-pleaded allegations of fact as true.

[5] **Pleading** Hearing and Matters Considered

When ruling on peremptory exception of no cause of action, all doubts are resolved in favor of the sufficiency of the petition to afford litigants their day in court.

[6] **Pleading** Hearing and Matters Considered

Issue at trial of exception of no cause of action is whether, on face of petition, plaintiff is legally entitled to relief sought.

[7] **Appeal and Error** Objections and exceptions; demurrer

Appellate court's review of trial court's ruling sustaining exception of no cause of action is de novo because exception raises question of law, and trial court's decision is based only on sufficiency of petition.

[8] **Libel and Slander** Nature and elements of defamation in general

Tort of "defamation" is invasion of person's interest in his or her reputation and good name.

[9] **Libel and Slander** Nature and elements of defamation in general

Four elements are necessary to establish a claim for defamation: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault, negligence or greater, on the part of the publisher; and (4) resulting injury.

[10] **Libel and Slander** Malice
Libel and Slander Implied

Fault requirement for defamation claim is generally considered to be malice, actual or implied.

[11] **Libel and Slander** Nature and elements of defamation in general

If even one of elements for defamation claim is absent, cause of action fails.

[12] **Libel and Slander** Actionable Words in General

Statement is "defamatory" if it tends to harm reputation of another so as to lower person in estimation of community, deter others from associating or dealing with person, or otherwise expose person to contempt or ridicule.

[13] **Libel and Slander** Words Imputing Crime and Immorality

Words that expressly or implicitly accuse another of criminal conduct are considered "defamatory per se."

[14] **Libel and Slander** Construction of language used

In determining whether a given communication is defamatory, court must determine whether the communication was reasonably capable of conveying particular meaning or innuendo ascribed to it by plaintiff and whether that

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

meaning is defamatory in character; that is answered by determining whether the listener could have reasonably understood the communication, taken in context, to have been intended in a defamatory sense.

[15] **Libel and Slander** Construction of language used

When determining whether a communication is defamatory, challenged words must be construed according to the meaning that will be given them by reasonable individuals of ordinary intelligence and sensitivity, and they must be understood in the context in which they were used and in the manner shown by the circumstances under which they were used.

[16] **Libel and Slander** Construction of language used

When determining whether a communication is defamatory, ultimate question posed to the court is whether a particular statement is objectively capable of having a defamatory meaning, considering the statement as a whole, the context in which it was made, and the effect it is reasonably intended to produce in the mind of the average listener.

[17] **Libel and Slander** Person defamed
Libel and Slander Persons entitled to sue

Defamatory word must refer to ascertained or ascertainable person, and that person must be plaintiff to support defamation claim.

[18] **Libel and Slander** Person defamed

If allegedly defamatory word contains no reflection on particular individual, no averment or innuendo can make it defamatory, as innuendo cannot make the person certain that was uncertain before.

[19] **Libel and Slander** Persons entitled to sue

Because defamation action is personal to party defamed, general rule precludes a person from recovering for a defamatory statement made about another, even if the statement indirectly inflicts some injury upon party seeking recovery.

[20] **Libel and Slander** Nature and elements of defamation in general

There are three types of actionable defamatory statements: (1) false defamatory statements of fact; (2) statements of opinion that imply false defamatory facts; and (3) truthful statements that carry defamatory implication.

[21] **Libel and Slander** Matter imputed

Defamation by implication or innuendo occurs when one publishes truthful statements of fact, and those truthful facts carry a false, defamatory implication about another.

[22] **Libel and Slander** Matter imputed

Defamation by implication or innuendo occurs when defamatory meaning can be insinuated from an otherwise true statement; however, it is actionable only if statements regard a private individual and private affairs.

[23] **Libel and Slander** Assault, burglary, robbery and homicide
Libel and Slander Person defamed

Television news network that aired nationally televised news program about infamous serial killer's murder spree did not defame purported former suspect of triple homicide, which serial killer eventually confessed to, by failing to mention suspect, since news program could not have been reasonably construed as implying that suspect lied about being a prime suspect in the triple homicide or that he had facilitated serial killer's confession; there was no false statement concerning suspect, it was not defamatory to imply that there were no other suspects in a crime, and crime was not a matter of private

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

affairs, as required to support defamation claim based on implication or innuendo.

[24] **Libel and Slander** Publication and discussion of news

The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions are without question events of legitimate concern to the public, rather than matters of private affairs required to support cause of action for defamation based on implication or innuendo, and consequently fall within the responsibility of the press to report the operations of government.

[25] **Libel and Slander** Person defamed
Libel and Slander Publication

Local affiliate station that aired national news program about infamous serial killer's murder spree that did not mention purported former suspect in triple homicide, which serial killer eventually confessed to, did not defame suspect by airing his interview with network in conjunction with broadcast of program or by not giving suspect the opportunity for a second interview to correct what suspect thought might have been omissions or false statements in the program; suspect would have been using his own words during interview, and decision not to offer second interview was not a statement concerning another, as element of defamation claim.

[26] **Infliction of Emotional Distress** Elements in general

In order to recover for intentional infliction of emotional distress, a plaintiff must establish: (1) that the conduct of the defendant was extreme and outrageous; (2) that the emotional distress suffered by the plaintiff was severe; and (3) that the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct.

[27] **Infliction of Emotional Distress** Extreme or outrageous conduct

In order to recover for intentional infliction of emotional distress, conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.

[28] **Infliction of Emotional Distress** Telecommunications

Conduct of television news network and local affiliate station in failing to mention former suspect of triple homicide, to which serial killer eventually confessed to, in nationally televised news program about serial killer's murder spree did not amount to extreme and outrageous conduct, as element of intentional infliction of emotional distress claim; there was no indication that network intended to produce severe mental distress.

[29] **Damages** Particular cases in general
Negligence Duty of Store and Business Proprietors

Local affiliate station did not owe former suspect in triple homicide, which serial killer eventually confessed to, heightened duty of care as a business invitee to protect suspect from mental, credibility, or reputational harm when it invited him for an interview following airing of national news program about serial killer's murder spree, which did not mention suspect, or when network did not invite suspect for another interview to defend himself on basis that program left viewers with inference that he was not a suspect in the triple homicide and that serial killer confessed of his own volition, which purportedly impacted launch of suspect's upcoming projects related to his experience as a suspect.

[30] **Pleading** Determination and operation and effect thereof

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

Trial court did not abuse its discretion in denying motion for leave of court to amend and supplement petition in order for former suspect in triple homicide to preserve discovery claims related to special motion to strike filed by television news network and local affiliate news station in action filed by suspect and company formed by suspect related to news program aired by network and station about infamous serial killer who confessed to murders but that did not mention suspect; discovery was stayed upon filing of special motions to strike, and amendment to pleading was not permitted when it would be a vain or useless act, such as after peremptory exception of no cause of action filed by network and station was granted by trial court. La. Code Civ. Proc. Ann. arts. 927, 971(D).

[31] **Pleading** Determination and operation and effect thereof

Pleading Form and sufficiency of amended pleading in general

Amendment to a pleading is not permitted when it would be vain and useless act, such as after grant of peremptory exception.

[32] **Constitutional Law** Right to Petition for Redress of Grievances

Constitutional Law Judicial Proceedings

Pleading Frivolous pleading

Statute governing special motion to strike is a procedural device to be used in the early stages of litigation to screen out meritless claims brought primarily to chill the valid exercise of the constitutional rights of freedom of speech under First Amendment and petition for redress of grievances. U.S. Const. Amend. 1; La. Code Civ. Proc. Ann. art. 971.

[33] **Pleading** Frivolous pleading

Lawsuits targeted by statute governing special motion to strike are referred to as strategic lawsuits against public participation, or SLAPP. La. Code Civ. Proc. Ann. art. 971.

[34] **Pleading** Determination and operation and effect thereof

Special motions to strike did not become moot upon grant of exceptions of no cause of action and dismissal of claims filed by former suspect in triple homicide and company formed by suspect against television news network and local affiliate station related to news program aired by network and station about infamous serial killer who confessed to murders but that did not mention suspect; while the granting of exceptions of no cause of action resolved claims, it did not resolve issues raised by special motions to strike. La. Code Civ. Proc. Ann. art. 971.

[35] **Pleading** Frivolous pleading

Television news network and local affiliate station that aired news program about serial killer's murder spree that failed to mention former suspect of triple homicide, to which serial killer eventually confessed, made a prima facie showing that content of news program was an act in furtherance of their First Amendment right to free speech and in connection with a public issue, as required to grant special motions to strike filed in suspect's action against network and station alleging defamation, intentional infliction of emotional distress, and breach of duty to business invitee; the commission of a crime, the prosecution, and the judicial proceedings arising from the prosecution were matters of legitimate public concern. U.S. Const. Amend. 1; La. Code Civ. Proc. Ann. art. 971.

[36] **Pleading** Frivolous pleading

Former suspect of triple homicide, to which serial killer eventually confessed, failed to demonstrate a probability of success on claims alleging defamation, intentional infliction of emotional distress, and breach of duty to business invitee against television news network and local affiliate station that aired news program about serial killer's murder spree that failed to mention former suspect, as would support grant of special

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

motions to strike filed by network and station, as claims could not withstand exceptions of no cause of action. La. Code Civ. Proc. Ann. art. 971.

Appealed from the First Judicial District Court for the Parish of Caddo, Louisiana, Trial Court No. 636,470, Honorable Michael A. Pitman, Judge

Attorneys and Law Firms

HAL CARTER, In Proper Person/Agent, Dream Creations, LLC

PHELPS DUNBAR, LLP, New Orleans, By: Dan Bryan Zimmerman, Mary Ellen Roy, DAVIS, WRIGHT, TREMAINE, LLP, By: Nathan Siegel, Counsel for Appellee, ABC News, Inc.

MCMICHAEL & CARTER, LLC, Shreveport, By: James C. McMichael, Jr., Counsel for Appellee, KTBS, LLC

Before THOMPSON, ROBINSON, and MARCOTTE, JJ.

Opinion

ROBINSON, J.

***1 **1** In this appeal, we are confronted with the question of whether a cause of action for defamation and/or intentional infliction of emotional distress exists when a nationally televised news program about an infamous serial killer's murder spree in Gainesville, Florida (1) did not mention that the plaintiff Hal Carter had earlier been a suspect in a triple-homicide in Shreveport, (2) stated that police had no suspect in the Shreveport murders, and (3) did not mention that Carter had facilitated the serial killer's confession to the Shreveport murders. Concluding that no cause of action exists, we affirm the judgment insofar as it granted the exceptions of no cause of action and dismissed the plaintiffs' claims. However, we further conclude that the defendants' La. C.C.P. art. 971 special motions to strike should have been granted and not declared moot. Accordingly, we reverse the judgment in part and remand the matter to the trial court for a determination of costs and attorney fees.

FACTS

On Monday, November 6, 1989, the bodies of Julie Grissom, her father, William "Tom" Grissom, and her eight-year-old nephew, Sean Grissom, were discovered at Tom Grissom's home in Shreveport. All three had been murdered ("Grissom murders"). Hal Carter, who was a Shreveport attorney at the time and who had recently ended his romantic relationship with Julie Grissom, quickly became a suspect in the Grissom murders, or as Carter describes himself, the "prime suspect." Carter, who was never arrested in the Grissom murders, moved to Washington near the end of 1989 in an attempt to escape the cloud of suspicion which had enveloped him.

****2** In August of 1990, Danny Rolling ("DR"), a former Shreveport resident, murdered five college students in their apartments over three separate incidents in Gainesville, Florida. DR was ultimately convicted of the murders of Sonja Larson, Christina Powell, Christa Hoyt, Tracy Paules, and Manny Taboada. Shortly before his execution in 2006, DR confessed to the Grissom murders through a written statement in which he wrote in part that "HAL CARTER, Julie Grissom's former fiancé is 100% INNOCENT – TOTALLY PURE of that crime."

After several years in Washington, Carter moved to Atlanta, Georgia to practice law again. Carter spent nearly a decade attempting to build what is best described as a "brand" out of his role as a "prime suspect" in the Grissom murders. He even formed a business entity, Dream Creations, LLC ("Dream Creations"), in 2019 to create and market products based on his life experiences following the Grissom murders.

On April 9, 2021, the ABC television network news show 20/20 presented a two-hour program about DR and the murders he had committed that was titled, "The Devil in Gainesville" ("DIG"). KTBS, Shreveport's ABC affiliate station, invited Carter to participate in a live interview during the broadcast of DIG.

Most of the two-hour DIG program focused on the Gainesville murders, which is understandable considering that this nation had been horrified by the depravity of those murders and relieved by the subsequent arrest and conviction of DR. The Grissom murders were not mentioned until 54 minutes into the telecast, just before a commercial break.

***2** ****3** During the remaining hour of the telecast, no more than eight minutes were spent discussing the Grissom murders. DIG showed interviews with Julie Grissom's brother and sister-in-law, a Shreveport resident who knew DR and told law enforcement in Florida that she suspected DR was the Gainesville killer, a crime author, and a Florida investigator.

Articles from *The (Shreveport) Times* ("*Times*") were displayed during the broadcast of DIG: (1) a November 7, 1989, article with the headlines, "Triple Murder rocks Southern Hills" and "Police: no motive, suspects"; (2) a November 8, 1989, article with the headline, "Police find no leads in triple murder"; (3) a November 10, 1989, article with the headlines, "Disturbed killer sought" and "Police say suspect was no stranger to Grissoms"; (4) a March 8, 1990, article with the headlines, "Grissom case at impasse" and "Police don't have any suspects in triple slaying"; and (5) an article from January 25, 1993, which had the headline, "Police return to square one in slayings[.]" The content of the March 8 article, which was blurred when shown on DIG, stated that the police had verified that Carter, who was originally targeted as a suspect, was in Atlanta during the Grissom murders.

Immediately after Julie Grissom's sister-in-law spoke about the discovery of the bodies, the March 8 article was displayed. The voice of the Florida investigator was then heard stating, "Their case was cold, at that point. Their case was a year old. They didn't have any suspects." The January 25 article was also displayed as the investigator spoke. Shortly after, the November 8 and 10 articles were shown as the former Shreveport resident who contacted law enforcement was interviewed.

****4** Near the end of the program, DIG informed viewers that shortly before his execution, DR confessed to the Grissom murders. Video of DR's pastor reading part of his confession was shown. Carter was never mentioned at any point during the program.

Aggrieved at being overlooked by ABC when DIG was produced and broadcast, Carter and Dream Creations filed a 75-page petition for damages against ABC News, Inc. d/b/a ABC News Productions d/b/a 20/20 News Magazine. KTBS LLC d/b/a KTBS Channel 3 was also made a defendant even though it was not named in the case caption.

On April 19, 2022, Carter and Dream Creations (together referred to as "plaintiffs") filed an 85-page amended petition. Among the exhibits attached to the petitions were the cover and an excerpt from Carter's book, "Trials by Fire Life Lessons"; local newspaper articles about the Grissom murders and investigation; and DR's written confession.

The petitions alleged that Carter had been the primary or prime suspect in the Grissom murders. The plaintiffs also claimed that shortly before DR's execution, Carter helped orchestrate DR's confession to the Grissom murders.

The petitions alleged that Carter began working in 2016 on his "When Tomorrow Never Comes" book and movie screenplay. He also began delivering free motivational speeches. Because of the response to his speeches, Carter set aside his book and screenplay so he could write a health and wellness self-improvement book. Carter planned to launch the promotional campaign for his "Trials By Fire Life Lessons" book, motivational speeches, and life coaching in May of 2021, but before he ****5** could do so, ABC aired DIG on April 9, 2021. The plaintiffs also asserted that KTBS invited Carter to be interviewed live during the broadcast of DIG.

***3** The plaintiffs contended that ABC went beyond simply omitting Carter from its program, but also created the false storyline that DR had been the only suspect in the Grissom murders. They accused ABC of purposely concealing or misconstruing newspaper articles showing that Carter had been a suspect. For example, DIG communicated to viewers that the Shreveport Police Department had no suspects a year after the Grissom murders, but the article displayed was dated four years after the murders.

The plaintiffs also complained that an early suspect in the Gainesville murders was considered important enough by ABC to be included in DIG, yet Carter was excluded even though he was just as material to the Grissom murders as that suspect was to the Gainesville murders.

The plaintiffs alleged that ABC defamed them by falsely leading viewers to believe DR had been the only suspect in the Grissom murders, which made Carter appear to be lying about being the prime suspect.

Moreover, not only did DIG never mention or allude to Carter or how he orchestrated DR's confession, but when DIG showed video of DR's pastor reading the confession, it omitted the part of DR's confession where he wrote that Carter was completely innocent. The plaintiffs contended this also led viewers to believe that DR had been the only suspect in the Grissom murders.

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

The plaintiffs further alleged that KTBS breached its duty to Carter as a business invitee when he was interviewed on April 9, 2021, and then when ****6** KTBS declined to give him the opportunity to defend himself in a second interview.

The plaintiffs maintained that because of Carter's emotional state following the telecast of DIG, he canceled the launch of his book, motivational speeches, and life coaching for the foreseeable future.

In July of 2022, ABC filed the exception of no cause of action and the La. C.C.P. art. 971 special motion to strike. Attached to the motion were a copy of Carter's lawsuit against the *Times* in 1990 and a transcript of DIG. Carter had sued the *Times* seeking damages for its alleged breach of contract and defamation of Carter. He alleged that a reporter's incorrect and sensationalized version of what Carter had told him contributed to the Shreveport Police Department and the general public looking at Carter as a serious suspect in the Grissom murders. He also alleged that Shreveport Police Department detectives defamed him by holding a press conference and leading much of the public to believe that Carter was the murderer. The lawsuit was dismissed as abandoned in 1999.

KTBS also filed the exception of no cause of action and the special motion to strike.

On August 29, 2022, the plaintiffs filed a motion for La. C.C.P. art. 971 discovery. On October 8, 2022, the plaintiffs filed a supplemental motion for art. 971 discovery to aid them in establishing a probability of success on their claims. They complained that the defendants had not produced all videos and scripts that had been requested.

The defendants opposed the discovery motions on the grounds that the initial motion was moot because there was nothing left to produce, and the ****7** supplemental motion failed because discovery is the exception rather than the rule under art. 971 when a special motion to strike is filed. In addition, the defendants argued that the plaintiffs had not presented good cause for why any specified discovery should be conducted. Finally, the defendants maintained that the motions to strike concerned elements of defamation claims that presented questions of law, which made discovery unnecessary to resolve the legal issues.

***4** In their opposition to the defendants' exceptions of no cause of action and motions to strike, the plaintiffs attached: (1) videos and on-air scripts produced by KTBS through discovery; (2) three KTBS website pages that Carter had found by googling "KTBS Hal Carter stories"; (3) an affidavit from a friend of Carter about his evaluation of DIG; and (4) Carter's affidavit. The plaintiffs sought discovery to determine why ABC "went to such lengths to cut him out of [DIG] and defame Hal Carter."

Following a hearing on the exceptions, the trial court rendered judgment on January 30, 2023, sustaining the exceptions of no cause of action and dismissing the plaintiffs' claims. The special motions to strike were denied as moot because the exceptions of no cause of action had been sustained.

On May 11, 2023, Carter and Dream Creations filed a motion for appeal. On that same date, they also filed a motion for leave of court to amend and supplement the amended petition, which was denied.

ABC and KTBS have answered the appeal to seek a reversal of the part of the judgment denying the special motions to strike as moot.

****8** ***Appeal***

Carter and Dream Creations (together referred to as "appellants") appeal the granting of the exceptions of no cause of action as well as the trial court's denial of their motion for leave to amend and supplement their amended petition. They contend that the trial court erred in dismissing their defamation, intentional infliction of emotional distress, and business invitee claims by not accepting their allegations as true and not viewing their factual pleadings in a light most favorable to them with all doubts resolved in favor of the appellants having stated a valid claim.

In their answers, ABC and KTBS contend that the trial court properly sustained the exception of no cause of action, but erred in concluding the special motions to strike were moot.

We note that Carter appears *pro se* individually as well as on behalf of Dream Creations LLC. Carter was an attorney in Louisiana and Georgia at one time, but has not signed his pleadings with a bar roll number. A search of the Louisiana State Bar Association member directory online shows that an attorney named James H Carter Jr. in Shreveport resigned from the practice of law in 2015.

WESTLAW © 2025 Thomson Reuters. No claim to original U.S. Government Works.

[1] [2] As a general rule, corporate entities must be represented by counsel. *D.W. Thomas & Son, Inc. v. Gregory*, 50,878 (La. App. 2 Cir. 11/23/16), 210 So. 3d 825. Even where a limited liability company has a sole shareholder, it is an entity separate and distinct from that shareholder in terms of procedural capacity. *Id.*

****9** In spite of Carter representing Dream Creations in a *pro se* capacity, we will still consider all arguments made by him on behalf of Dream Creations on appeal because their claims are related.

DISCUSSION

[3] [4] [5] [6] The function of the peremptory exception of no cause of action is to test the legal sufficiency of the petition, which is done by determining whether the law affords a remedy on the facts alleged in the pleading. *Ramey v. DeCaire*, 03-1299 (La. 3/19/04), 869 So. 2d 114. La. C.C.P. art. 931 states that no evidence may be introduced at any time to support or controvert the objection that the petition fails to state a cause of action. Therefore, the court reviews the petition and accepts well-pleaded allegations of fact as true. *Ramey*, *supra*. All doubts are resolved in favor of the sufficiency of the petition to afford litigants their day in court. *Jackson v. City of New Orleans*, 12-2742 (La. 1/28/14), 144 So. 3d 876. The issue at the trial of the exception of no cause of action is whether, on the face of the petition, the plaintiff is legally entitled to the relief sought. *Ramey*, *supra*.

***5** [7] An appellate court's review of a trial court's ruling sustaining an exception of no cause of action is *de novo* because the exception raises a question of law, and the trial court's decision is based only on the sufficiency of the petition. *Grayson v. Gulledge*, 55,214 (La. App. 2 Cir. 9/27/23), 371 So. 3d 1133, *writ denied*, 23-01437 (La. 1/10/24), 376 So.3d 847.

Defamation

Ten "counts" of defamation were alleged in the petitions. The appellants argue that through false and deceptive communications and ****10** statements, DIG intentionally led its viewers to believe that DR was the only suspect in the Grissom murders, which made Carter appear to be a liar about his "prime suspect" experience and that his upcoming projects were based upon on a lie. This forced the launch of the upcoming projects to be canceled.

The appellants maintain that ABC went beyond simply not mentioning Carter in DIG, but actually told viewers that the police did not have any suspects in the Grissom murders. In their view, ABC knowingly and intentionally created the DIG program to deceive its viewers into believing the storyline that DR had been the only suspect in the Grissom murders and that DR had confessed to the Grissom murders solely of his own volition. In doing so, ABC knowingly and intentionally concealed from the public that Carter was the original prime suspect in the Grissom murders and that he orchestrated DR's confession. For instance, the appellants accuse ABC of intentionally not displaying local newspaper headlines which refer to Carter as being a suspect, including a headline from the *Times* in which Carter refers to himself as a suspect.

ABC counters that it did not publish any statement of and concerning Carter, and even if it is assumed that ABC implied there were no other suspects in the Grissom murders, that would still not be a statement by ABC. Further, no statement made during the program could be considered defamatory of Carter. Thus, according to ABC, the defamation claim would fail because the appellants cannot establish any defamatory words concerning Carter.

****11** [8] [9] [10] The tort of defamation is the invasion of a person's interest in his or her reputation and good name. *Bradford v. Judson*, 44,092 (La. App. 2 Cir. 5/6/09), 12 So. 3d 974, *writ denied*, 09-1648 (La. 10/16/09), 19 So. 3d 482. Four elements are necessary to establish a claim for defamation: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury. *Kennedy v. Sheriff of East Baton Rouge*, 05-1418 (La. 7/10/06), 935 So. 2d 669. The fault requirement is generally considered to be malice, actual or implied. *Id.*

[11] If even one of the elements for a defamation claim is absent, the cause of action fails. *Wyatt v. Elcom of Louisiana, Inc.*, 34,786 (La. App. 2 Cir. 6/22/01), 792 So. 2d 832.

[12] A statement is defamatory if it tends to harm the reputation of another so as to lower the person in the estimation of the community, deter others from associating or dealing with the person, or otherwise expose the person to contempt or ridicule. *Kennedy*, *supra*; *Costello v. Hardy*, 03-1146 (La. 1/21/04), 864 So. 2d 129.

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

[13] In Louisiana, defamatory words have traditionally been separated into two categories: those that are defamatory *per se* and those that are susceptible of a defamatory meaning. *Kennedy, supra*; *Costello, supra*. "Words which expressly or implicitly accuse another of criminal conduct ... are considered defamatory *per se*." *Kennedy*, 05-1418 at p. 5, 935 So. 2d at 675.

***6** **[14]** In determining whether a given communication is defamatory, the court must determine whether the communication was reasonably capable of ****12** conveying the particular meaning or innuendo ascribed to it by the plaintiff and whether that meaning is defamatory in character. *Johnson v. Purpera*, 20-01175 (La. 5/13/21), 320 So. 3d 374. That is answered by determining whether a listener could have reasonably understood the communication, taken in context, to have been intended in a defamatory sense. *Sassone v. Elder*, 626 So. 2d 345 (La. 1993).

[15] **[16]** As stated by the Louisiana Supreme Court in *Johnson v. Purpera*, 20-01175 at p. 18, 320 So. 3d at 390:

> The challenged words must be construed according to the meaning that will be given them by reasonable individuals of ordinary intelligence and sensitivity, and they must be understood in the context in which they were used and in the manner shown by the circumstances under which they were used. Ultimately, the question posed to the court is whether a particular statement is objectively capable of having a defamatory meaning, considering the statement as a whole, the context in which it was made, and the effect it is reasonably intended to produce in the mind of the average listener.

Citations omitted.

[17] **[18]** A defamatory word must refer to an ascertained or ascertainable person, and that person must be the plaintiff. *McConathy v. Ungar*, 33,368 (La. App. 2 Cir. 8/23/00), 765 So. 2d 1214, *writ denied*, 00-2678 (La. 11/17/00), 774 So. 2d 982 (citing *Hyatt v. Lindner*, 133 La. 614, 63 So. 241 (1913)). If the word used contains no reflection on a particular individual, no averment or innuendo can make it defamatory as an innuendo cannot make the person certain which was uncertain before. *Id.*

[19] Because the defamation action is personal to the party defamed, this general rule precludes a person from recovering for a defamatory statement made about another, even if the statement indirectly inflicts some injury upon the party seeking recovery. ****13** *Johnson v. KTBS, Inc.*, 39,022 (La. App. 2 Cir. 11/23/04), 889 So. 2d 329, *writ denied*, 04-3192 (La. 3/11/05), 896 So. 2d 68.

[20] **[21]** **[22]** There are three types of defamatory statements that are actionable in Louisiana: (1) false defamatory statements of fact; (2) statements of opinion which imply false defamatory facts; and (3) truthful statements which carry a defamatory implication. *Johnson v. Purpera, supra*. The third category has been referred to as defamation by implication or innuendo. *Id.* This type of defamation happens "when one publishes *truthful* statements of fact, and those *truthful* facts carry a false, defamatory implication about another." *Fitzgerald v. Tucker*, 98-2313, p. 12 (La. 6/29/99), 737 So. 2d 706, 717. It occurs when a defamatory meaning can be insinuated from an otherwise true statement; however, it is actionable only if the statements regard a private individual and private affairs. *Johnson v. Purpera, supra*.

[23] The appellants maintain that DIG presented false statements and communications which led viewers to believe that DR had been the only suspect in the Grissom murders. This was accomplished through the display of newspaper articles that did not always contemporaneously link with the statements made by the person being interviewed as the articles were displayed. The appellants contend the issue was magnified when DIG concealed articles from November of 1989 in which the article headlines mentioned or implied that Carter was a suspect.

***7** The appellants' defamation claims were properly dismissed on the exceptions of no cause of action for several reasons. First, failing to mention Carter's name in reference to the Grissom murders and not displaying newspaper articles concerning Carter being a suspect do not meet the ****14** requirements for defamation as the "statement concerning another" element is missing.

Second, even if the Florida investigator's commentary in DIG ("Their case was cold, at that point. Their case was a year old. They didn't have any suspects."), which was played while supporting articles from the *Times* were displayed, could be construed as a statement implying that Carter had never been a suspect in the Grissom murders, it was not a defamatory statement. It is not defamatory to imply that there were no other suspects in a crime. As noted earlier, it is considered defamatory *per se* to expressly or implicitly accuse another of criminal conduct.

© 2025 Thomson Reuters. No claim to original U.S. Government Works.

The same holds true for when the March 8 article was shown immediately after Julie Grissom's sister-in-law spoke about the discovery of the bodies, as well as when the November 8 and November 10 articles were shown while a former Shreveport resident related how she informed law enforcement in 1990 about DR's possible connection to the Grissom murders.

[24] Third, the final category of defamatory statements involves defamation by implication or innuendo. However, it is actionable only if the statements regard a private individual and *private* affairs. *Johnson v. Purpera, supra*. Crime is not a matter of private affairs; rather, it is a matter of public concern. "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of ****15** government." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492, 95 S. Ct. 1029, 1045, 43 L. Ed. 2d 328 (1975).

The appellants also contend that ABC knowingly and intentionally concealed from the public that Carter orchestrated the confession. However, it was never stated or implied in DIG that DR discussed his confession to the Grissom murders only with his pastor or that nobody else played a role in obtaining the confession. The confession was mentioned near the end of the program. Again, failing to mention Carter is not defamation.

How DIG presented the investigation of the Grissom murders or DR's confession to those murders could not be reasonably construed as implying that Carter had lied to those who believed that he had been a prime suspect in the Grissom murders or that he had facilitated DR's confession. A reasonable viewer of ordinary intelligence and sensitivity would have considered the program to be about DR and the Gainesville murders, hence its title.

DIG was not an exhaustive treatment of the Grissom murders or even the Gainesville murders. Noted filmmaker Ken Burns was not at the helm directing an in-depth PBS documentary miniseries that was broadcast over several nights. Rather, it was a two-hour program that essentially focused on the Gainesville murders and their aftermath.

[25] KTBS did not defame Carter by airing his interview in conjunction with the broadcast of DIG or by not giving him the opportunity for a second interview to correct what Carter thought may have been omissions or false statements in DIG. Carter would have been using his own words during the ****16** interview, and the decision not to offer a second interview does not even meet the first requirement of a statement for a defamation.

***8** The exceptions of no cause of action were properly granted against the defamation claims.

Intentional infliction of emotional distress

[26] **[27]** In order to recover for intentional infliction of emotional distress, a plaintiff must establish: (1) that the conduct of the defendant was extreme and outrageous; (2) that the emotional distress suffered by the plaintiff was severe; and (3) that the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct. *White v. Monsanto Co.*, 585 So. 2d 1205 (La. 1991). The conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. *Id.* Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. *Id.*

[28] We first note that a separate cause of action did not arise from any emotional distress that appellants claimed they suffered separate and apart from any element of damages arising from their defamation claim. *See Kelly v. West Cash & Carry Bldg. Materials Store*, 99-0102 (La. App. 4 Cir. 10/20/99), 745 So. 2d 743. The alleged intentional infliction of emotional distress arose from the same facts underlying the defamation claim.

Second, despite appellants' absurd assertion that what ABC did through the DIG program was "outrageous and almost as unspeakable as [DR's] murders," leaving viewers with an inference that Carter was not a ****17** suspect in the Grissom murders or that DR confessed of his own volition is not conduct that can be remotely considered extreme and outrageous.

We note that in their opposition to the exceptions of no cause of action and the motions to strike, the plaintiffs admitted that they did not have sufficient evidence to believe that KTBS intended to produce severe mental distress. We also note that the appellants state in their brief that KTBS's actions and inactions *appear* to be intentional infliction of emotional distress.

The exceptions of no cause of action were correctly granted concerning the claim of intentional infliction of emotion distress.

Business invitee

[29] In support of their claim that KTBS owed Carter a duty of care as a business invitee, the appellants cite *Morales v. Magnolia Chemicals & Solvents, Inc.*, 399 So. 2d 640 (La. App. 4 Cir. 1981), *writ denied*, 401 So. 2d 993 (La. 1981). Following a bench trial, Morales was awarded damages for injuries that he suffered when he was severely burned by sulfuric acid which had been dispensed into his employer's truck at the defendant's plant. Affirming the judgment, the *Morales* court quoted the trial court's written reasons for judgment at length. The trial court had concluded that as a business invitee, Morales had been owed the duty of reasonable and ordinary care, which included the proper discovery of reasonably discoverable conditions on the premises which may have been unreasonably dangerous, and the business either had to correct them or warn the invitee of the danger.

***9** The appellants invite this court to expand the duty owed to business invitees as stated in *Morales* to include a duty of care imposed on KTBS to ****18** protect Carter from mental, credibility, or reputational harm resulting from KTBS's broadcasts on April 9, 2021. We decline the invitation.

Appellants contend this is "what the law of Louisiana *should* be." We disagree. KTBS owed no heightened duty of care to Carter when it invited him for an interview or when it did not invite him for another interview to defend himself following the broadcast of DIG.

The exceptions of no cause of action were properly granted as to any business invitee claims.

Amended and Supplemental Amended Petition

[30] The appellants argue the trial court erred in denying their motion for leave of court to amend and supplement their amended petition to include factual information that appellants had obtained from La. C.C.P. art. 971 discovery.

They complain that ABC and KTBS only produced some of the items that ABC and KTBS committed to produce after the appellants had filed a motion for art. 971 discovery. They argue that the trial court should have granted the motion to amend and supplement their petition so they could preserve their art. 971 discovery claims.

[31] La. C.C.P. art. 971(D) provides that discovery is stayed upon the filing of notice of a special motion to strike. Further, amendment to a pleading is not permitted when it would be a vain and useless act, such as after the grant of a peremptory exception. *Bucks v. DirecTECH Southwest*, 52,474 (La. App. 2 Cir. 2/27/19), 266 So. 3d 467, *writ denied*, 19-00701 (La. 9/6/19), 278 So. 3d 970. The exception of no cause of action is a peremptory exception. La. C.C.P. art. 927.

****19** The trial court did not abuse its discretion in denying the motion.

Special motion to strike

[32] The legislature enacted La. C.C.P. art. 971 as a procedural device to be used in the early stages of litigation to screen out meritless claims brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances. *Quinlan v. Sugar-Gold*, 53,348 (La. App. 2 Cir. 3/11/20), 293 So. 3d 722, *writ denied*, 20-00744 (La. 10/6/20), 302 So. 3d 536.

La. C.C.P. art. 971 states in part:

> A. (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established a probability of success on the claim.
>
> (2) In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.
>
> .....
>
> B. In any action subject to Paragraph A of this Article, a prevailing party on a special motion to strike shall be awarded reasonable attorney fees and costs.
>
> .....
>
> F. As used in this Article, the following terms shall have the meanings ascribed to them below, unless the context clearly indicates otherwise:

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

(1) "Act in furtherance of a person's right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue" includes but is not limited to:

.....

(c) Any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.

***10** (d) 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.

****20** **[33]** Section 2 of Act 734 of 1999, which enacted art. 971, stated that the Louisiana Legislature had found a "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances." The lawsuits targeted by art. 971 are referred to as strategic lawsuits against public participation, or SLAPP. *Hatfield v. Herring*, 54,048 (La. App. 2 Cir. 8/11/21), 326 So. 3d 944, *writ denied*, 21-01377 (La. 12/7/21), 328 So. 3d 424.

In *Wainwright v. Tyler*, 52,083, pp. 16-17 (La. App. 2 Cir. 6/27/18), 253 So. 3d 203, 217, this court discussed the burden of proof on the art. 971 motion:

> Our appellate courts interpret this statute as requiring a two-part, burden-shifting analysis. In cases where right of petition and free speech activities form the basis of the claims, the mover must first establish that the cause of action against him arises from an act by him in the exercise of his right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue. If the mover makes a *prima facie* showing that his comments were constitutionally protected and in connection with a public issue, the burden shifts to the plaintiff to demonstrate a probability of success on the claim. In cases where more than one claim is alleged in the petition, the courts examine the probability of success of each claim individually. If the plaintiff can demonstrate a probability of success on any of his claims, then the special motion to strike must fail.

Citations omitted.

[34] We conclude that the trial court erred in finding that the special motions to strike became moot upon the dismissal of appellants' claims. While the granting of the exceptions of no cause of action resolved appellants' claims, it did not resolve the issues raised by the special motions to strike.

****21** In *Roper v. City of Baton Rouge/Parish of East Baton Rouge*, 2016-1025 (La. App. 1 Cir. 3/15/18), 244 So. 3d 450, *writ denied*, 18-0854 (La. 9/28/18), 252 So. 3d 926, the trial court determined that the plaintiff's request for a writ of mandamus was moot because she had been provided with all non-exempt records sought in her public records request. However, the court still awarded attorney fees against one defendant. On appeal, the defendants argued the award should be reversed because the claim for a writ of mandamus was moot by the time of trial. The appellate court concluded that the mootness of the mandamus claim did not preclude an award of attorney fees.

[35] Turning now to the merits of the special motions to strike, we determine that ABC and KTBS made a *prima facie* showing that the content of DIG was an act in furtherance of their right to free speech and in connection with a public issue. As stated earlier, the commission of a crime, the prosecution, and the judicial proceedings arising from the prosecution are matters of legitimate public concern.

[36] The burden then shifts to the appellants to demonstrate a probability of success on their claims. They are unable to do this as their claims cannot withstand the exceptions of no cause of action. Accordingly, the trial court should have granted ABC's and KTBS's special motions to strike and considered the assessment of costs and the award of attorney fees that are allowed under art. 971.

CONCLUSION

***11** For the foregoing reasons, we affirm the judgment insofar as it granted the exceptions of no cause of action and dismissed Carter's and ****22** Dream Creations' claims. We reverse the judgment insofar as it denied ABC's and KTBS's special motions to strike as moot. This matter is remanded to the trial court for a determination of costs to be assessed and attorney fees to be awarded to ABC and KTBS for successfully establishing their special motions to strike. Costs of the appeal are assessed against Carter and Dream Creations.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WESTLAW © 2025 Thomson Reuters. No claim to original U.S. Government Works.

All Citations

--- So.3d ----, 2024 WL 3168321, 55,623 (La.App. 2 Cir. 6/26/24)

End of Document

© 2025 Thomson Reuters. No claim to original U.S. Government Works.

2022 WL 60606
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas, Fort Worth.

James MILLER, Appellant
v.
Heather SCHUPP, Appellee

No. 02-21-00107-CV
|
Delivered: January 6, 2022

On Appeal from the 431st District Court, Denton County, Texas, Trial Court No. 20-8768-158, HON. JAMES S. JOHNSON, Judge

Attorneys and Law Firms

ATTORNEYS FOR APPELLANT: CHARLES "CHAD" BARUCH, RANDY JOHNSTON, JOHNSTON TOBEY BARUCH, P.C., DALLAS, TEXAS.

ATTORNEYS FOR APPELLEE: CHRISTOPHER B. TROWBRIDGE, BEVERLY A. WHITLEY, SYDNIE A. SHIMKUS, BELL NUNNALLY & MARTIN LLP, DALLAS, TEXAS.

Before Kerr, Birdwell, and Bassel, JJ.

MEMORANDUM OPINION

Memorandum Opinion by Justice Kerr

I. Introduction

***1** Appellant James Miller challenges the trial court's order granting Appellee Heather Schupp's Texas Citizen Participation Act motion and dismissing his defamation suit against Schupp, who is his ex-wife.

Miller sued Schupp for defamation after she made allegedly defamatory statements about him to his sister and to a friend. Miller claims that in September or October 2020, Schupp contacted Miller's sister and told her that Miller had confided in her that his mother had sexually molested him when he was a child. Miller further alleges that Schupp told his sister in the same call that (1) he was addicted to crack, (2) he was fired from his job after he was charged with a crime, and (3) he had beaten her. Miller also claims that in July 2020, Schupp sent his friend Asher Creppel an Instagram message stating that (1) Miller had physically abused her, his sisters, and many women in in his life; (2) the "police were called on many occasions" as a result of Miller's physical violence; and (3) as a result of Miller's acts of physical violence, the Austin police department had "[s]everal hundred pages ... on [Miller] alone."

Schupp filed a TCPA motion to dismiss Miller's suit claiming that she had merely exercised her free-speech rights. Miller filed a response with attached evidence that he argued established a prima facie case for each essential element of his defamation claim. The trial court found that Miller did not meet his burden to establish a prima facie showing that his claim was meritorious; thus, the trial court granted Schupp's motion, dismissed Miller's suit, and awarded Schupp $26,624.93 in trial-court attorney's fees, $5,000 in sanctions, and $25,000 in conditional appellate fees.

Because we conclude that the trial court's ruling was erroneous, we reverse the trial court's order dismissing Miller's suit and awarding attorney's fees and sanctions. We remand this matter to the trial court for further proceedings consistent with this opinion.

II. Law

Texas Civil Practice & Remedies Code Chapter 27, also known as the Texas Citizens Participation Act, is an anti-SLAPP statute.[1] *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001-.011. The TCPA's purpose is "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." Tex. Civ. Prac. & Rem. Code Ann. § 27.002. Put another way, its purpose is to protect citizens who petition or speak on matters of public concern from retaliating lawsuits that seek to intimidate or silence them. *In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015) (orig. proceeding).

The TCPA uses a three-step process to resolve whether a claim is subject to its strictures and, if so, whether the claim should be dismissed or allowed to proceed because it appears

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

to have merit. The three steps are as follows: (1) the party invoking the TCPA and seeking dismissal must demonstrate that a "legal action" has been brought against it that is "based on or is in response to" an exercise of protected free-speech rights, petition rights, or association rights; (2) if the moving party satisfies step one, the trial court nevertheless "may not dismiss a legal action ... if the party bringing [the suit] establishes by clear and specific evidence a prima facie case for each essential element of the claim in question[;]" and (3) if the nonmoving party carries its step-two burden, the case may still be dismissed "if the moving party establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law." Tex. Civ. Prac. & Rem. Code Ann. § 27.005(b)–(d).

***2** When reviewing a TCPA ruling, we view the pleadings and the evidence in the light most favorable to the nonmovant. *Maggret v. Ramsey's Rods & Restoration*, No. 02-20-00395-CV, 2021 WL 2253244 at *2 (Tex. App.—Fort Worth June 3, 2021, no pet.) (mem. op.); *Stallion Oilfield Servs., Ltd. v. Gravity Oilfield Servs., LLC*, 592 S.W.3d 205, 213–14 (Tex. App.—Eastland 2019, pets. denied). We review de novo a trial court's ruling on a motion to dismiss, including whether each party has met its respective burden. *United Food & Com. Workers Int'l Union v. Wal–Mart Stores, Inc.*, 430 S.W.3d 508, 511 (Tex. App.—Fort Worth 2014, no pet.).

III. Analysis

A. Free-Speech Rights[2]

The first question in our TCPA analysis is whether Miller's lawsuit is "based on[, relates to,] or is in response" to Schupp's free-speech rights. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.005(b).

An "[e]xercise of the right of free speech" is defined as "a communication made in connection with a matter of public concern." *Id.* § 27.001(3). "Communication" includes "the making or submitting of a statement or document in any form or medium, including ... electronic." *Id.* § 27.001(1). Public-concern matters include statements regarding the commission of a crime. *Brady v. Klentzman*, 515 S.W.3d 878, 884 (Tex. 2017); *MediaOne, L.L.C. v. Henderson*, 592 S.W.3d 933, 940 (Tex. App.—Tyler 2019, pet. denied) (holding that publication reporting criminal activity was a public-concern matter).

Schupp's Instagram message to Creppel is a communication. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.001(1); *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (stating that the TCPA applies to both public and private communications). And Schupp's message that Miller physically abused her and other women is a claim that Miller committed numerous assaults[3] and is thus a statement regarding a public-concern matter. *See* Tex. Penal Code Ann. § 22.01(a)(1) ("A person commits an offense if the person ... intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse"); *Brady*, 515 S.W.3d at 884; *MediaOne, L.L.C.*, 592 S.W.3d at 940. Because Schupp's message was made in connection with a public-concern matter, it constituted an "exercise of [her] right of free speech," as that term is defined in the statute. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.001(3).

B. Clear and Specific Evidence

Because Schupp demonstrated that Miller's lawsuit implicated her free-speech rights, to prevent the lawsuit's dismissal the burden shifted to Miller to prove, by clear and specific evidence, a prima facie case for each essential element of his claim against her. *See id.* § 27.005(b) (requiring the court to dismiss the action if the movant shows that the action relates to the exercise of the right of free speech), (c) (providing that the court may not dismiss the action if the opponent "establishes by clear and specific evidence a prima facie case for each essential element of the claim in question"). The TCPA's undefined terms "clear" and "specific" have been interpreted according to their plain meanings. "Clear" has been defined as "unambiguous," "sure," or "free from doubt." *Lipsky*, 460 S.W.3d at 590. "Specific" has been defined as "explicit" or "relating to a particular named thing." *Id.* "Prima facie case" refers to the "minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *Id.*

***3** To prevail on his defamation action, Miller must prove (1) the publication of a false fact statement to a third party, (2) that defamed him, (3) made with the requisite degree of fault, and (4) damages. *Id.* at 593. Pleadings and evidence that establish the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff are sufficient to defeat a TCPA motion to dismiss. *Id.* at 591. To carry his burden, Miller need tender only the minimum amount of evidence to support a rational inference of each defamation-claim element. *Id.* at 591.

Miller argues that Schupp's statements constitute defamation per se because they are the type of statements that injure

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

his reputation and subject him to public hatred, contempt, ridicule, or financial injury.[4] To prove a defamation-per-se claim, Miller must prove only the first three defamation elements, as he would be entitled to recover general damages without proof of any specific loss. *Innovative Block of S. Tex., Ltd. v. Valley Builders Supply, Inc.*, 603 S.W.3d 409, 418 (Tex. 2020) (holding when defamation is per se, the communication is actionable in and of itself without actual-damages proof); *Lipsky*, 460 S.W.3d at 593. Defamation-per-se statements are deemed so obviously harmful that damages are presumed.[5] *Id.*

Miller alleges that falsely accusing someone of physically abusing "many women" constitutes defamation per se. We agree. *See id.* at 596 (stating that accusing someone of a crime is an example of defamation per se); *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 374 (Tex. 1984) (op. on reh'g) (explaining that a false statement charging someone with committing a crime is defamatory per se). Because defamation per se meets the second and fourth elements, *see Innovative Block*, 603 S.W.3d at 418, to determine, then, whether Miller's defamation action survived Schupp's TCPA motion to dismiss, we look only for clear and specific evidence of the first and third elements.

1. False-statement publication evidence

***4** In his petition and affidavit, Miller claims that in September or October 2020, Schupp contacted Miller's sister and told her that Miller had confided in Schupp that his mother had sexually molested him when he was a child. Miller further states that Schupp told his sister that he was addicted to crack, he had been fired from his job after being charged with a crime, and he had beaten her. Miller also claims that in July 2020, Schupp sent Creppel the Instagram message that we detailed above. Miller claims that all Schupp's statements are false—"both in their particular details and in the main point, essence[,] or gist in the context in which they were made."

Schupp does not dispute the publication of her statement to Creppel. The evidence Miller offered—that (1) he had never physically assaulted Schupp, his sisters, or "many women," (2) he never told Schupp that his mother had sexually abused him, (3) his employment had never been terminated because he was charged with committing a crime, and (4) he had never abused or been addicted to drugs—was clear and specific evidence of the statements' false nature. *See Lipsky*, 460 S.W.3d at 590.

Schupp's claim that Miller had physically abused her implies at the very least that Miller had personal knowledge regarding the alleged assaults. Assuming no witness was present, Miller was thus in a position to refute the claim but could hardly offer more than his denial. This situation is similar to the one we faced in *Van Der Linden v. Khan*, a case in which the defendant allegedly said that the plaintiff had told her that he had given money to a terrorist organization, and the plaintiff denied that he had made the statement. 535 S.W.3d 179, 198 (Tex. App.—Fort Worth 2017, pet. denied). We noted that where there were only two parties to the communication, the plaintiff could do no more than deny having made the statement. *Id.* Here, as in *Van Der Linden*, the clash between Schupp's statement that Miller physically abused her and Miller's denial that he did so is some evidence that Schupp spoke falsely. *See id.*; *see also Miller v. Watkins*, No. 02-20-00165-CV, 2021 WL 924843, at *11 (Tex. App.—Fort Worth Mar. 11, 2021, no pet.) (mem. op.) (holding that the clash between a statement that an action occurred and the denial that it did is evidence that the person making the statement spoke falsely).

And as for Schupp's statement that Miller had physically abused "many women in his life" before her, Miller's only option, beyond obtaining affidavits denying abuse from every woman he has known, was to deny that he had. Again, Miller would have personal knowledge.

Schupp argues that Miller did not dispute every statement in her message to Creppel and thus failed to offer clear and specific evidence of the message's falsity. Specifically, Schupp points to her statements in the message to Creppel that (1) the police had assisted her after Miller physically abused her and (2) the police had amassed hundreds of pages of records related to Miller's abuse of her and other women. Schupp claims that because Miller did not deny these statements, Miller failed to offer clear and specific evidence of the message's false nature. As we recently explained, however, we are not required to determine that each and every statement that a defendant made is defamatory to conclude that a plaintiff carried his burden to establish a viable defamation claim. *See Miller*, 2021 WL 924843, at *9. Instead, the inquiry is whether Miller presented sufficient proof to establish the claim's viability, a task that requires only that we determine whether any of Schupp's statements were defamatory. *Id.* As we explained,

> ***5** While the TCPA requires that each legal claim be analyzed individually, the TCPA does not require that each factual basis or theory of recovery underpinning a

© 2025 Thomson Reuters. No claim to original U.S. Government Works.

> cause of action must be analyzed separately. Tex. Civ. Prac. & Rem. Code § 27.005(c). Here, Appellees have a single defamation cause of action, which is based upon statements made by [Appellant] in a flyer he publicly distributed and a sign he publicly displayed. If Appellees are successful in presenting prima facie proof in support of their defamation claim as to any of the statements in the flyer or sign, then Appellees will have met their burden under the second step. *See* ...*Bui*[*v. Dangelas*, No. 01-18-01146-CV], 2019 WL 5151410, at *5 [(Tex. App.—Houston [1st Dist.] Oct. 15, 2019, pet. denied) (mem. op.)]; *see generally* *Landry's, Inc.*[*v. Animal Legal Def. Fund*], 566 S.W.3d [41,] 53–57 [(Tex. App.—Houston [14th Dist.] 2018, pet. granted)]. The TCPA does not require that Appellees produce evidence that each and every statement in [Appellant's] flyer is defamatory to meet their burden under the TCPA[ ] or to prove their cause of action at a trial on the merits. Rather, Appellees must establish "a prima facie case for each essential element" of their defamation claim against [Appellant]. Tex. Civ. Prac. & Rem. Code § 27.005(c).

Id. (citing *Stone v. Melillo*, No. 14-18-00971-CV, 2020 WL 6143126, at *6 (Tex. App.—Houston [14th Dist.] Oct. 20, 2020, no pet.) (mem. op.)).

Miller has satisfied his burden of providing clear and specific evidence that Schupp published a false statement to a third party. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.005(c).

2. Negligence evidence

As to the third element, whether the publications were made with the requisite degree of fault, Miller's status determines the fault degree applied. *See* *Lipsky*, 460 S.W.3d at 593. Because Miller was a private individual when Schupp made the statements, rather than a public figure or official, Miler need prove only that Schupp acted with negligence. *See* *WFAA–TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998) (explaining that a private plaintiff must prove only that the defendant "was at least negligent," whereas a public official or public figure must establish actual malice).

In his pleadings and affidavit, Miller asserts that Schupp acted negligently because she made the complained-of statements knowing they were false or without regard to the statements' false nature. *See* *D Mag. Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 440 (Tex. 2017) (holding that a person acts with negligence if she knew or should have known that the defamatory statement was false).

Schupp, on the other hand, argues that Miller failed to offer clear and specific proof that she "knew or should have known that the statements regarding her physical abuse ... were false." Schupp further argues that allowing the same evidence to prove falsity to also prove the requisite fault degree is "circular" and "does not satisfy the clear or specific requirement or establish a prima facie case." We disagree.

According to Schupp, Miller physically abused her on many occasions. But either Miller physically abused Schupp on many occasions or he did not. Only Schupp and Miller know the truth. Because Schupp knows the truth, if Miller did *not* physically abuse her on many occasions, her assertion to the contrary was not only false but also was made with knowledge of its falsity. In other words, if it was false, Schupp knew it was false; if it was true, Schupp knew that it was true. And, under these narrow facts, any evidence that proves that Schupp's assertion was false would also logically and necessarily prove that Schupp knew that her assertion was false.

By holding under the circumstances unique to this case that the same evidence that proves falsity also proves the requisite liability standard, we do not dispense with the fault element. We merely acknowledge that if the facts conclusively prove that the publisher of a defamatory statement had personal knowledge of whether the statement was true or false, proving the statement false also suffices to prove that the defamatory publisher acted with knowledge of the statement's falsity when she published it.

***6** Thus, for the same reasons that Miller met his burden under the TCPA to provide by clear and specific evidence a prima facie case for falsity, Miller has also satisfied his burden of providing clear and specific evidence that Schupp acted negligently when she published the complained-of statements. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.005(c).

IV. Conclusion

Because we hold that Miller met his burden of producing clear and specific evidence of a prima facie case for each essential defamation-per-se element, we reverse the trial court's order dismissing that claim. Further, we reverse the trial court's award of attorney's fees and sanctions. *See id.* § 27.009(a)(1), (2). Finally, we remand this matter to the trial court to allow

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

Schupp the opportunity to attempt to establish an affirmative defense or other ground upon which she might be entitled to judgment as a matter of law (i.e., the third step of the TCPA analysis). *See id.* § 27.005(d).

All Citations

Not Reported in S.W. Rptr., 2022 WL 60606

Footnotes

1 "SLAPP" is an acronym for "Strategic Lawsuits Against Public Participation." *See In re Lipsky*, 411 S.W.3d 530, 536 n.1 (Tex. App.—Fort Worth 2013, orig. proceeding).

2 Schupp does not argue that Miller's claims implicate her right to petition or her right of association.

3 These alleged offenses may also qualify as family-violence acts. *See* Tex. Fam. Code Ann. § 71.004(1) (stating that family violence is an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault).

4 During the hearing on Schupp's motion to dismiss, Schupp acknowledged that Miller's petition includes a claim of defamation per se.

5 Miller claims that even though he is not required to, he has provided sufficient proof of damages. Miller states,

> Starting in September 2020, I have been prescribed and began having to take anti-depression medication, medication to help with sleep, medication to help concentrate, and medication to treat my cramps and other stomach-related issues. Prior to my learning of Defendant Schupp's false statements, I had never experienced any of these issues or have had to take any of the medications I must now take.
>
> ...
>
> After I learned of Defendant Schupp's false statements in August 2020 (as set out in this lawsuit), I was no longer able to regularly sleep, have been unable to concentrate, have suffered significant weight gain, have felt despondent and depressed and have suffered a loss of self-worth, began experiencing severe anxiety, and began suffering severe stomach cramps.
>
> ...
>
> As a result of these issues, I have been unable to perform at work at the level I am normally accustomed to. I have lost sales—and the commissions that come with those sales—as a result of my experiencing the issues set out above. I have been passed over for promotion at work because of my experiencing these same issues and because of the false statements made by Defendant Schupp and conveyed to my supervisor David Treadway. [Miller's boss]

We need not decide whether Miller provided sufficient evidence of damages because of our holding that Schupp's statements constitute defamation per se. *See Innovative Block*, 603 S.W.3d at 418.

End of Document

© 2025 Thomson Reuters. No claim to original U.S. Government Works.

2024 WL 4279243
Only the Westlaw citation is currently available.
United States District Court, D. Utah.

UHS OF PROVO CANYON, INC., Plaintiff,
v.
Robert BLISS, Defendant.

Case No. 2:24-CV-163-DAK-CMR
|
Signed September 24, 2024

Attorneys and Law Firms

Brett L. Tolman, The Tolman Group, Draper, UT, Charles Edward Weir, Pro Hac Vice, Manatt Phelps & Phillips LLP, Los Angeles, CA, for Plaintiff.

Aaron C. Hinton, Robert O. Rice, Whitney Hulet Krogue, Ray Quinney & Nebeker PC, Salt Lake City, UT, for Defendant.

MEMORANDUM DECISION AND PRELIMINARY INJUNCTION ORDER

DALE A. KIMBALL, UNITED STATES DISTRICT JUDGE

***1** This matter is before the court on Plaintiff UHS of Provo Canyon, Inc.'s Motion for Temporary Restraining Order [ECF No. 13] and Defendant Robert Bliss's Motion to Dismiss Pursuant to Utah's Uniform Public Expression Protection Act [ECF No. 30]. On July 11, 2024, the court held a hearing on the motions. At the hearing, Charles E. Weir and Brett L. Tolman represented Plaintiff UHS of Provo Canyon, and Robert O. Rice, Whitney H. Krogue, and Aaron C. Hinton represented Defendant Robert Bliss. The court took the motions under advisement. After carefully considering the parties' memoranda and arguments as well as the facts and law relevant to the pending motions, the court issues the following Memorandum Decision and Order on the pending motions.

BACKGROUND[1]

Plaintiff UHS of Provo Canyon, Inc. ("Provo Canyon") is an intensive, psychiatric youth residential treatment center in Utah, licensed by the State of Utah and accredited by the Northwest Accreditation Commission and the Joint Commission. Provo Canyon has diagnostically focused programs, including programming dedicated to substance abuse behavior. As a HIPAA covered entity, Provo Canyon and its employees are required to protect patients' private, protected health information. Provo Canyon's agreements with its staff members contain strict confidentiality provisions, including acknowledgements of the highly sensitive nature of the work and legal regulations concerning patient protected health information.

Provo Canyon has been in the media spotlight. In 2020, Paris Hilton publicly alleged that she had been abused while a resident at Provo Canyon in the 1990s. Also, in 2020, Provo Canyon's parent company, Universal Health Services, Inc., agreed to pay the federal government and certain states $117 million to settle claims that its hospitals and facilities knowingly submitted false claims for payment when the services were not medically necessary. These allegations led to media coverage about Provo Canyon and the "troubled teen industry" and a Netflix documentary.

Defendant Robert Bliss is a filmmaker and online content creator who focuses on various social issues. On his YouTube channel, he has posted videos spotlighting homelessness, racism, and net neutrality. His videos have received as many as 29 million views. In December 2023, Bliss applied to work as a mental health technician at Provo Canyon. The mental health technician position Bliss applied for does not require a specialized certificate or license. But it includes contact with and support for many of Provo Canyon's patients. The "General Purpose" of the job, as provided for in the Position Description, is to "[s]upervise patients in their daily activities. Provide a positive role model for patients in personal dress, grooming, attitude and behavior."

***2** Provo Canyon asserts that Bliss sought the position to obtain information to create his next viral video. In his resume, Bliss claimed to have experience working with the type of patients Provo Canyon serves and he did not include numerous items about his actual background and work history. Bliss interviewed for the position in January 2024, and Provo Canyon offered him the position subject to Provo's background checks. His background checks came back clean, and Provo Canyon states that it had no cause for concern.

Bliss executed several acknowledgements and agreements with Provo Canyon, including a Confidentiality Agreement.

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

Bliss agreed not to divulge patient information to the public and further acknowledged he understood and agreed to abide by the federal and state privacy laws. Bliss signed additional acknowledgements regarding the highly confidential nature of the position.

Bliss also told Provo Canyon that he had a light photosensitivity condition that would require him to wear a baseball hat and sunglasses while he worked. Provo Canyon claims that this was Bliss' means for wearing a hidden camera while working at the facility. Bliss, however, rarely wore the sunglasses while working but kept them affixed to the top of his baseball cap most of the time. In publicly available videos and photos of Bliss prior to his hiring, he is not seen wearing sunglasses or a cap. While Provo Canyon alleges that the condition was a ruse to allow Bliss to record during his time in the facilities, Bliss retorts that his photosensitivity condition is real.

Bliss attended a new hire orientation between February 12 to February 15, 2024. During the orientation, Bliss mostly interacted with other staff and new hires, but had some interaction with at least five patients. He also obtained keys to the facility and voluminous training materials that contained, among other things, operational information, such as evacuation procedures and emergency shutoffs. Bliss took his orientation materials with him and has not returned them to Provo Canyon.

After orientation, Bliss began shadow shifts in which he would shadow a staff member assigned to a group or "cottage" of patients. The shifts occurred on five different days—February 16 and February 19-23. During those shifts, Bliss had regular interactions with patients. For example, on February 22 and 23, Bliss was assigned to the Lone Peak cottage, a stabilization and assessment cottage where patients are moved when they've exhibited an increased safety risk and require more intensive programming and observation. Throughout his shadow shifts, Bliss had access to patient observation documents. These include a form commonly called a "Q15" which accounts for where patients are spending their time, as well as more detailed clinical information, such as patient risk factors like suicidal thoughts or sexual victimization.

At times, Bliss was observed adjusting his glasses and pushing a button on them. He was also observed adjusting his shirt in a way that indicated he may have had another recording device beneath. Provo Canyon later learned through review of surveillance footage that a patient gave Bliss a stack of papers and Bliss was observed angling his glasses at each page, proceeding to take the stack of the papers to the bathroom where there are no video cameras, and then returning and handing the papers back to the patient.

A staff member who accompanied Bliss during his February 23 shift noticed Bliss was acting strange around patients. Instead of sticking to the normal check ins contemplated by the Q15 forms, the staff member noticed Bliss interviewing the patients regarding their experiences at the school, including questioning how often they "see sunlight." The staff member found these conversations to be inappropriate for anyone in his role or with Bliss's minimal tenure.

***3** After learning of the staff member's observation of Bliss, Provo Canyon researched Bliss online and uncovered his career as an activist filmmaker. Staff planned to meet and confront Bliss during his next assigned shift on February 25, 2024, but he texted Provo Canyon's program manager on the 24th, stating that he would not be coming back to work due to bad news from his family. He said he was going back to Michigan and would have to stay there for a while so he would need to suspend his employment indefinitely.

Notwithstanding the family emergency, Bliss returned to Provo Canyon when he was not assigned a shift. He entered the property for six minutes and was observed entering three different rooms and scanning areas, including the Lone Peak cottage, before leaving. Bliss also returned on February 27 to return his keys. Provo Canyon's CEO asked Bliss to come in and talk and asked whether Bliss had anything to disclose. Bliss refused to speak with him and abruptly left the building.

Bliss objects to much of what Provo Canyon characterizes as "factual background," which he states is largely based on the hearsay contained in the Declaration of Tim Marshall. Bliss points out that Marshall lacks personal knowledge of large portions of the facts contained in his declaration and requests that the court disregard several paragraphs--10, 17, 20, 22, 24, 25, 32, 33, and 35 to 40--for lack of personal knowledge and hearsay. But given that "[a] hearing for preliminary injunction is generally a restricted proceeding, often conducted under pressured time constraints, on limited evidence and expedited briefing schedules, [t]he Federal Rules of Evidence do not apply to preliminary injunction hearings." *Heideman*, 348 F.3d at 1188. "The Court can consider evidence outside the pleadings, including hearsay, when deciding whether to grant a preliminary injunction." *Nilson v. JPMorgan Chase*

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

Bank, N..A., 60 F. Supp. 2d 1231, 1238 n.2 (D. Utah 2009). Therefore, there is no basis at this stage of the proceedings to strike the materials Provo Canyon submitted.

DISCUSSION

Provo Canyon moves for a preliminary injunction and Bliss moves to dismiss Provo Canyon's action pursuant to Utah's Uniform Public Expression Protection Act ("UPEPA"). The court will first analyze Bliss's motion to dismiss because dismissal of Provo Canyon's claims would moot the motion for preliminary injunction and, in connection with the motion for preliminary injunction, it impacts the analysis of whether Provo Canyon has a likelihood of success on the merits.

Bliss's Motion to Dismiss Pursuant to Utah's UPEPA

Bliss asks the court to dismiss Provo Canyon's Complaint pursuant to Utah's Uniform Public Expression Protection Act ("UPEPA"). In 2023, Utah adopted UPEPA, Utah Code Ann. § 78B-25-101, to further protect a person's free speech rights "guaranteed by the United States Constitution or Utah Constitution, on a matter of public concern." *Id.* § 78B-25-102(2)(c). Courts are directed to "broadly" construe UPEPA. *Id.* § 78B-25-111. UPEPA also provides that "[i]n applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to the uniform law's subject matter among states that enact the uniform law." *Id.* § 78B-25-112.

UPEPA is known as an "anti-SLAPP act." Uniform Law Commission, Uniform Law and Commentary, § 1 cmt. A "SLAPP" is a "Strategic Lawsuit Against Public Participation." *Id.* SLAPPs "are often cloaked as otherwise standard claims of defamation, civil conspiracy, tortious interference, nuisance, and invasion of privacy, just to name a few." *Id.* prefatory note. "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." *Id.* UPEPA is designed "to prevent ... the impairment of First Amendment rights and the time and expense of defending against litigation that has no demonstrable merit." *Id.* § 2 cmt. 2.

***4** In federal court, UPEPA requires a two-part analysis. *See* Utah Code Ann. § 78B-25-107(1). First, the court must determine whether UPEPA applies to the action. *Id.* § 78B-25-107(1)(a). Bliss, as the moving party, bears the burden of establishing that UPEPA applies in this case. *Id.* § 78B-25-107(1)(a). Second, the court must determine whether Provo Canyon has a legally viable cause of action—*i.e.*, whether it "failed to state a cause of action upon which relief can be granted." *Id.* § 78B-25-107(1)(c)(ii)(A). Bliss also bears the burden of proving this portion of the analysis. *Id.* If the court determines that UPEPA applies and that Provo Canyon has failed to state a viable cause of action, the court must dismiss the action and "award court costs, reasonable attorney fees, and reasonable litigation expenses related to the motion" to Bliss. *Id.* § 78B-25-110(1).

In opposition to Bliss's motion to dismiss, Provo Canyon argues that Bliss cannot meet either prong of the UPEPA analysis because the First Amendment does not apply in this situation and Provo Canyon's Complaint is sufficiently pled.

1. Does UPEPA Apply to Provo Canyon's Claims?

Under the first element, Bliss, as the moving party, must establish that UPEPA applies for one of the reasons stated in Utah Code Ann. § 78B-25-102(2). Bliss relies on subsection (c): "[T]his chapter applies to a cause of action asserted in a civil action against a person based on the person's ... exercise 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 Utah Constitution, on a matter of public concern." *Id.*

"To use [UPEPA], a movant need not prove that the responding party has violated a constitutional right—only that the responding party's suit arises from the movant's constitutionally protected activity." Uniform Law Commission, Uniform Law and Commentary, § 7, cmt. 2. "[A] defendant need not demonstrate that their conduct was protected under the First Amendment to be conduct in furtherance of the constitutional right of free speech." *DeHart v. Tofte*, 533 P.3d 829, 843 (Or. App. 2023). In other words, the step one inquiry "is not an inquiry into whether the defendant's conduct was wrongful." *Id.* That analysis comes in the second step. Instead, "[t]he scope of the first anti-SLAPP step is narrow; it focuses on the nature of the conduct." *Lowes v. Thompson*, Case No. A178568, 2024 WL 952840, *3 (Or. App. Mar. 6, 2024). "If the conduct alleged in support of the plaintiff's claim is of the sort protected by the anti-SLAPP statute," then the court moves on to the next step of the analysis. *Id.*

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

In this case, the parties have a fundamental disagreement about Bliss's conduct. Provo Canyon focuses on the protected patient information that Bliss has no right to make public under the contractual agreements he signed with Provo Canyon and HIPAA. Whereas, Bliss focuses on Provo Canyon's involvement in the controversial “troubled teen” industry and the information he obtained about Provo Canyon that is relevant to those issues, which he asserts would not be protected. While Provo Canyon accuses Bliss of obtaining information and footage “with the intent to disseminate to millions of potential viewers,” the court notes that there is no actual evidence about what material Bliss will ultimately use in his final product. Moreover, under Tenth Circuit precedent, such conduct is “speech” for First Amendment purposes. *See* *Animal Legal Defense Fund v. Kelly*, 9 F.4th 1219, 1228 (10th Cir. 2021). “[A] significant volume of precedent from the Supreme Court and other circuit courts protect[ ] the creation of information in order to protect its dissemination.” *Id.* Under this precedent, “recording” information “is speech-creation and, consequently, is not mere conduct.” *Id.*

***5** In *Western Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017), the Tenth Circuit concluded that the “plaintiffs’ collection of resource data constitutes the protected creation of speech.” *Id.* at 1195-96. “Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs.” *Id.* In that case, the Tenth Circuit thought it worth special note that the “plaintiffs use of the speech-creating activities at issue were to further public debate.” *Id.* at 1197.

Bliss’ conduct in gathering facts to further public debate on Provo Canyon's role in the troubled teen industry is speech under the First Amendment and is of the sort protected by UPEPA. It is a “matter of public concern” which is “of interest to the community, whether for social, political, or other reasons.” *Lighton v. Univ. of Utah*, 209 F.3d 1213, 1224 (10th Cir. 2000); *Deutsch v. Jordan*, 618 F.3d 1093, 1100 (10th Cir. 2010). “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) (cleaned up). Speech on such matters of public concern “is at the heart of the First Amendment's protection.” *Id.* at 451-52. “The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Id.*at 452 (cleaned up). Provo Canyon acknowledges that it is not seeking to stop Bliss from engaging in speech on a matter of public concern or making internet videos on the troubled teen industry.

However, the court agrees with Provo Canyon that healthcare records of individual patients do not implicate Bliss’ First Amendment rights. The First Amendment offers no defense where a person entered into an agreement to maintain confidentiality. *See, e.g.*, *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991). Bliss cannot make the specific psychiatric care provided by Provo Canyon staff to minor patients part of his show. This information is the most private of private issues—communications between children and healthcare staff in a private healthcare facility is not a public matter. Bliss's recording of minors in a mental healthcare facility without their knowledge or consent is not speech on a matter of public concern such that it falls within UPEPA's protection. Bliss expressly agreed to keep the specific patient information he received at Provo Canyon confidential.

Although the court agrees that Bliss cannot use individual patient information without the patient's consent, Provo Canyon cannot prevent Bliss from speaking at all about his experience. Provo Canyon's actions, business model, tactics, and treatment of vulnerable populations are matters of public concern, as is evident from the repeated news coverage, public documentaries, and recent legislation related to alleged past abuses at Provo Canyon School. While the parties and the court are unclear on the extent of the information Bliss obtained, Bliss surely obtained information beyond individual patient information that would be “of the sort” protected by UPEPA because (1) it is an exercise of the right of freedom of speech guaranteed by the United States and Utah Constitutions, (2) Bliss alleges that he intends to exercise his free speech rights on a matter of public concern, and (3) Provo Canyon's claim is based on Bliss's potential expressive conduct. *See* Utah Code Ann. § 78B-25-102(2)(c). Bliss can speak about Provo Canyon generally, to the extent that it is part of a broader social concern about the “troubled teen” industry. Provo Canyon's operations are currently of interest to the community and the legitimate subject of news interest. Provo Canyon's lawsuit is seeking to restrict speech on not just individual patient information but the more general information regarding an industry that has become a matter of public concern. Therefore, the court finds that UPEPA applies to the information Bliss obtained from his experience that does not involve individual patient healthcare information, and Bliss is entitled to the statute's protections if the court

finds that Provo Canyon has failed to state a cause of action upon which relief can be granted.

2. Failure to State a Claim Upon Which Relief Can Be Granted

***6** Under the second part of the federal court UPEPA analysis, Bliss must establish that Provo Canyon has failed to state a cause of action upon which relief can be granted. Utah Code Ann. § 78B-25-107(1)(c)(ii)(A). This question requires analysis of the claims under Federal Rule of Civil Procedure 12(b)(6). *See Project Veritas*, 2022 WL 1555047, at *4 ("UPEPA essentially mimics the language of Rule 12(b)(6) in stating that standards for courts to use when analyzing a special motion for expedited relief to dismiss based on only the legal sufficiency of the complaint."). The court, therefore, must analyze each of Provo Canyon's seven causes of action to determine whether Provo Canyon has stated a claim upon which relief may be granted.

a. Breach of Contract

Upon his hiring, Bliss executed contracts with Provo Canyon containing strict confidentiality provisions, including the Confidentiality Agreement ("CA"), the Applicant Acknowledgement, and the Position Description. Provo Canyon alleges that Bliss breached the confidentiality provisions he agreed to by allegedly recording patients and staff members at the facility and recording or photographing various documents containing confidential patient information.

The CA states:

> As a condition of employment at Provo Canyon School, I agree not to divulge any information(i.e. written, verbal, photographs) concerning persons receiving services to any unauthorized persons(s) or in any way to make such information public.
>
> I agree to follow the legal regulations concerning a patient's PHI (Protected Health Information) as outlined by Health Insurance Portability and Accountability Act. I understand that I am required by federal and state law to protect the privacy of our current and discharged patients and their treatment while at this facility.
>
> I understand that unauthorized release of confidential information may make me subject to a civil action under provisions of the Welfare and Institution Code. I also understand that the release of this information will make me subject to immediate dismissal from this facility.

The Applicant Acknowledgement also includes a confidentiality provision:

> Employees and visitors often receive specific information concerning residents (i.e., residents include but is not limited to, patients, students, etc.) and their illness. This information is strictly confidential and should never be discussed with other residents, fellow employees, family or friends. All employees and visitors must fully understand that any information they receive concerning residents and/or activities is confidential information.

Also, among the "Qualifications Required At Entry" for Bliss's position is the "ability to maintain information as highly confidential. Bliss executed an acknowledgment of the Position Description that included the "Qualifications Required At Entry."

Bliss points out that while Provo Canyon relies on the agreements' restrictions on disclosing patient information, Provo Canyon's agreements do not limit Bliss's right to speak about Provo Canyon itself. Bliss contends that Provo Canyon has failed to allege any conduct that violates the parties' agreements because, although Provo Canyon alleges that Bliss holds confidential information in violation of the CA, the CA does not prohibit Bliss from possessing confidential information. The CA simply states Bliss will not divulge or release confidential information, and Provo Canyon has not and cannot allege that Bliss released or divulged any such information. Bliss claims that Provo Canyon has not attempted to state a claim for anticipatory breach. Moreover, Bliss contends that Provo Canyon does not have standing to assert privacy claims on behalf of third parties and Bliss has never manifested any desire to violate the patient's privacy rights with respect to their personal healthcare information.

***7** Again, the court must distinguish between a claim based on Bliss's alleged use of protected patient information and information about Provo Canyon. The CA restricts employees from divulging certain patient information and binds employees to follow HIPAA regulations and state and federal patient privacy laws. It does not preclude Bliss from divulging information about Provo Canyon. In the Applicant Acknowledgement ("AA"), Bliss acknowledged that specific information concerning residents and their illness was strictly confidential and should never be discussed. Therefore, the

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

AA also does not prohibit Bliss from discussing information about Provo Canyon. Therefore, Provo Canyon cannot base a breach of contract claim against Bliss with respect to information relating to its operations and practices.

With respect to individual patient information, the claim is more difficult. Provo Canyon bases its breach of contract claims on Bliss's collection of, as of yet, unknown information. Through camera footage, Provo Canyon has reason to believe that Bliss has recordings and photographs of confidential patient information. The CA refers to "divulging" information and the AA refers to "discussing" information. But Bliss has not done either at this point. Provo Canyon argues that Bliss cannot claim free speech rights with respect to the information he obtained while simultaneously arguing that he will not divulge information. However, he clearly has a right to argue that he has free speech rights as to divulging information about Provo Canyon while simultaneously not divulging any protected patient information in violation of his confidentiality agreements. Bliss states that he has no intention to divulge or discuss patient information in contradiction of the CA or AA and that Provo Canyon has not and cannot allege that he has. It is unknown what information he will use in any forthcoming video.

The Complaint alleges that Bliss breached the CA because he "holds" confidential information in his possession. But the specific language of the agreements does not prevent him from holding or possessing confidential information, only divulging or discussing that information. Provo Canyon has not attempted to state a claim for anticipatory breach. *Lantec Inc. v. Novell Inc.*, 306 F.3d 1003, 1014-15 (10th Cir. 2022) (summarizing the strict requirements for anticipatory breach under Utah law).

At oral argument, Provo Canyon argued that Bliss had already divulged the confidential information because he handed over all of his materials to his attorney. But he handed over the materials to his attorney because Provo Canyon sued him. That is not an indication that he intended to use any confidential information in his work. The lawsuit is the only thing that caused Bliss to give the information to his attorney. Provo Canyon cannot cause such a disclosure through bringing a lawsuit and then claim it supports a previously pled cause of action.

Provo Canyon argues that in addition to the specific "divulge"/"discuss" language used in the agreements, the CA also requires Bliss to follow HIPAA's legal regulations and other federal and state laws, which could support a breach of contract based on Bliss "holding" confidential information. Bliss counters that Provo Canyon has not sued Bliss for violating an alleged contractual promise to abide by HIPAA's Privacy Rule in the Complaint and HIPAA covers employers', not employees', conduct. Bliss also argues a purported agreement to follow the terms of HIPAA is too indefinite for there to be a meeting of the minds on the integral features of the agreement. *Nielsen v. Gold's Gym*, 2003 UT 37, ¶ 11, 78 P.3d 600, 602. Bliss claims that the single sentence confirming Bliss' agreement to follow HIPAA is a generalized statement about applicable laws that no one could reasonably have thought was intended to create legally binding obligations. This argument, however, raises factual issues that do not support a dismissal as a matter of law. If Provo Canyon fully trained Bliss on the HIPAA requirements, the CA's reference to HIPAA could have been clearly understood. The court cannot say at this point of the litigation that Provo Canyon could not demonstrate a binding contract based on a HIPAA violation.

***8** Assuming that Bliss was contractually bound by the Privacy Rule, Bliss argues that the contract claim fails because Bliss's alleged actions to date do not constitute an unauthorized use or disclosure of protected health information ("PHI") under HIPAA for three reasons: (1) Provo Canyon has not alleged that its information cannot be "de-identified" in compliance with the Privacy Rule, (2) any alleged information Bliss obtained from Provo Canyon is in the custody of counsel and is thus protected by HIPAA's "whistle blower" provision, and (3) in any event, Bliss is not a covered entity subject to the requirements of HIPAA.

Provo Canyon argues that Bliss violated HIPAA as soon as he took the video because HIPAA regulations prohibit the intentional use and disclosure of PHI. Without knowing exactly what information Bliss took, Provo Canyon and the court are left to only guess. However, to the extent that Bliss did take videos or photographs of PHI, it appears to the court that factual questions exist as to whether he could still comply with HIPAA through the de-identification process and as to whether he would qualify under the whistleblower provisions. 45 C.F.R. § 164.502(d)(2) (de-identification rules); 45 C.F.R. § 164.502(j)(1) (whistleblower provisions).

At this stage of the litigation, the court concludes that Bliss has not demonstrated that he is entitled to dismissal of the breach of contract claims as a matter of law. The court and

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

Provo Canyon are unaware of the materials he took from Provo Canyon. However, those materials could be a breach of his contractual obligations to Provo Canyon. There are too many unanswered questions to exonerate his actions at this time. While Bliss has a number of defenses to the breach of contract claim that could likely be successful, the Complaint provides sufficient facts for the court to conclude that a breach of contract is at least plausible. Therefore, Provo Canyon has stated a claim for breach of contract and the court denies Bliss's motion to dismiss.

b. Fraudulent Misrepresentation

Provo Canyon also brings a cause of action against Bliss for fraudulent misrepresentation. Under Utah law, a plaintiff has a cause of action for fraudulent misrepresentation when: "(1) a representation was made (2) concerning a presently existing material fact (3) which was false and (4) which the representor either (a) knew to be false or (b) made recklessly, knowing that there was insufficient knowledge upon which to base such a representation, (5) for the purpose of inducing the other party to act upon it and (6) that the other party, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it (8) and was thereby induced to act (9) to that party's injury and damage." *Prudential Ins. v. Sagers*, 421 F. Supp. 3d 1199, 1212 (D. Utah 2019).

Here, Bliss applied for and obtained a position with Provo Canyon based on numerous false misrepresentations and omissions. He hid his true purpose for seeking employment: to obtain footage of the facility and its patients. He misrepresented his work history. Provo Canyon acted in reasonable reliance on the representations and had no reason to doubt Bliss. Because Bliss induced Provo Canyon to hire him based on those false representations, Provo Canyon alleges that it and its patients and staff are now faced with injury and damage.

Bliss argues that Rule 9(b) of the Federal Rules of Civil Procedure requires Provo Canyon to plead the circumstances constituting fraud with particularity. Fed. R. Civ. P. 9(b). To plead fraud with particularity, a plaintiff must "state precisely what material misstatements were made, the time and place of each misstatement, the speaker, the content, the manner in which the statement was misleading, and what the defendants 'obtained' as a result of the fraud." *Indep. Energy Corp. v. Trigen Energy Corp.*, 944 F. Supp. 1184, 1198-99 (S.D.N.Y. 1996).

***9** Here, the Complaint adequately alleges Bliss's misrepresentations. To obtain the job at Provo Canyon, Bliss intentionally omitted his real work history and provided affirmative misrepresentations about his experience. Provo Canyon identifies when he made those allegedly fraudulent misrepresentations and to whom. When reviewing the full Complaint, it provides enough factual support meets Rule 9(b) standards.

Bliss argues that he had no duty to disclose "his true purpose for seeking employment" and "his past job history as a viral filmmaker and activist." "[I]n order to be held liable for fraudulent nondisclosure, there must have been a duty to disclose." *First Sec. Bank of Utah N.A. v. Banberry Dev. Corp.*, 786 P.2d 1326, 1328-29 (Utah 1990). The burden of establishing such a duty is "on the party alleging the fraud." *Id.* at 1329. And the determination of whether a duty exists "is a question of law for the court to decide." *Id.*

Here, Bliss argues that as an entry-level job applicant he had no affirmative duty to disclose his background accurately to Provo Canyon. But as *Banberry* acknowledges, "whether a duty to speak exists is determinable by reference to all the circumstances of the case and by comparing the facts not disclosed with the object and end in view by the contracting parties. The difficulty is not so much in stating the general principles of law, which are pretty well understood, as in applying the law to particular groups of facts." 786 P.2d at 1328.

Here, the court cannot at this stage of the litigation conclude as a matter of law that the particular group of facts at issue could not amount to fraudulent misrepresentation. The very nature of the relationship between Provo Canyon and Bliss was premised on Bliss doing the job and maintaining the confidentiality of the information to which he would be exposed. The parties had agreements to this effect. Bliss's conduct put Provo Canyon in a situation where it felt obligated to sue him to prevent the disclosure of confidential patient information. While Bliss has now responded that he will not disclose any confidential patient information in his work, Provo Canyon did not know that was the case. In his last interaction with Provo Canyon, when he could have given those assurances in person, he allegedly did not say anything about his conduct or intentions and simply left.

Bliss may view this lawsuit as an attempt to silence his ability to criticize Provo Canyon, but he must also

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

recognize that the facts before the court demonstrating the lack of good faith information between the parties, could equally establish that Provo Canyon brought the lawsuit as an attempt to comply with HIPAA and ensure that no confidential PHI gets disclosed by one of its employees. At the outset of this action, Provo Canyon's allegations, claims, and requested preliminary injunction focused heavily on protecting confidential patient information. The need to bring such an action appears to constitute an injury. The court cannot say at this stage of the litigation that Bliss had no duty to disclose to Provo Canyon anything with respect to his employment, his work as a filmmaker, and his use of the confidential information he obtained, and that Provo Canyon was not injured by Bliss's allegedly fraudulent misrepresentations and deliberate omissions. The court, therefore, concludes that based on the facts before the court, Provo Canyon has alleged sufficient facts for a claim of fraudulent misrepresentation to proceed.

c. Federal and State Wiretap Acts

***10** Bliss argues that Provo Canyon has not and cannot state a viable claim that he has violated the Federal Wiretap Act and the Utah Interception of Communications Act. Provo Canyon asserts that while Bliss was training in his new position at Provo Canyon, he wore a recording device connected to a baseball cap and sunglasses that allowed him to record the facility, staff, patients, and documents. Provo Canyon alleges that Bliss recorded throughout his time at the facility, including while he was shadowing staff interacting with patients.

In general, the FWA prohibits the intentional interception of any "wire, oral, or electronic communications." 18 U.S.C. § 2511(1). The FWA includes a private right of action for "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used." *Id.* § 2520. Like the FWA, the UICA's private right of action is expressly limited to "a person whose wire, electronic, or oral communication is intercepted." Utah Code Ann. § 77-23a-11(1).

To qualify as an "oral communication" under FWA, it must be "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C. § 2510(2). In other words, an FWA plaintiff must allege facts showing it has a "reasonable expectation of privacy." *Stewart v. City of Oklahoma City*, 47 F.4th 1125, 1133 (10th Cir. 2022). The FWA and UICA share the same definition of "oral communication." Utah Code Ann. § 77-23a-3; *see also West v. C.J. Prestman Co.*, 2:16-CV-75-DN, 2017 WL 4621611, *4 (D. Utah Oct. 13, 2017). Thus, both the state and federal acts require a plaintiff to allege facts showing that "(1) they had an actual, subjective expectation of privacy, and (2) that their expectation of privacy is one that society is willing to recognize as reasonable." *Id.*

Here, Provo Canyon alleges that Bliss secretly wore audio and video recording devices when performing his job duties at Provo Canyon. Bliss contends that Provo Canyon's allegations are not actionable under the FWA because Provo Canyon cannot state a claim for communications made by a third party. 18 U.S.C. § 2520. The FWA's private right of action is expressly limited to the person whose communication is in fact intercepted. Here, Bliss claims that the Complaint does not identify any oral communications made by Provo Canyon. Instead, the Complaint focuses largely on alleged communications made by patients. Because Provo Canyon does not have any legal basis to assert claims on behalf of patients or other third parties, Bliss argues that all such claims must be dismissed.

Bliss's position with respect to recordings of patients is interesting in that he argues that he has no intention of violating HIPAA with respect to patient's privacy rights, but he claims to simultaneously be entitled to keep and use recordings of patients interacting with their healthcare providers because the patient would need to raise their own claim. The court does not know the extent of Bliss's recordings and he has not been forthcoming in briefing as to the nature of his recordings. But Provo Canyon alleges that Bliss was recording while he was being trained by Provo Canyon employees, while he was shadowing other Provo Canyon employees, and while interacting with patients. Therefore, the court disagrees that the Complaint does not allege communications made by Provo Canyon. Any communication by a Provo Canyon employee or staff member is a communication by Provo Canyon. Accordingly, there would appear to be recordings of more than just patients.

***11** Bliss then argues that even if Provo Canyon could establish it made statements that were intercepted, Provo Canyon's claim still fails because Bliss was a party to the recorded conversations and consented to the recording. The FWA generally precludes a cause of action so long as one party consented to the recording. *Id.* § 2511(2)(d). As with the

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

FWA, the UICA generally precludes a cause of action so long as one party consented to the recording. *Id.* § 77-23a-4(7)(b).

In *Thompson v. Dulaney*, 970 F.2d 744, 748 (10th Cir. 1992), the Tenth Circuit recognized that "consent ... will take many fact patterns out of [FWA] liability." Specifically, § 2511(2)(d) "provides an exception to the prohibition against recording oral communications and specifies that the interception of oral communications is not unlawful ... where a party to the conversation is either the one who has intercepted the conversation or who has consented to the interception, and the interception is not for the purpose of committing any criminal or tortious act." *Roberts v. Americable Int'l Inc.*, 883 F. Supp. 499, 503 (E.D. Cal. 1995); *see also* *Stewart*, 47 F.4th at 1135. "It is clear from the case law that Congress intended the consent exception to be interpreted broadly." *Thompson v. Dulaney*, 838 F. Supp. 1535, 1543 (D. Utah 1993). Therefore, there are two instances where the consent exception does not apply: (1) if the person recording is not a party to the conversation, and (2) if the communication is recorded for the purpose of committing a criminal or tortious action. 18 U.S.C. § 2511(20(d).

Provo Canyon alleges that "Bliss inevitably recorded conversations ... to which he was not a party." Compl. ¶ 68. Bliss, however, asserts that Provo Canyon alleges no facts to support this assertion, it simply declares that such recordings were inevitable. But Provo Canyon has alleged that Bliss was shadowing other employees who were interacting with patients. The Complaint, therefore, alleges that Bliss recorded conversations he was not a part of but merely observing—that is the definition of shadowing. The allegation is not speculative or conclusory. The fact pattern explains Bliss's role in relation to other employees and patients. Bliss's consent would not preclude a cause of action based on those types of conversations.

Bliss claims that even if Provo Canyon properly pled that Bliss intercepted such conversations, that conduct is not actionable under the FWA because the statute "requires that interceptions be intentional before liability attaches, thereby excluding inadvertent interceptions." *Thompson*, 970 F.2d at 748. Bliss claims that to the extent that he overheard conversations involving third parties, the theoretical interception of such conversations would only constitute an inadvertent interception, which is not actionable under the FWA.

While Bliss could develop facts and evidence to support his claim that he only inadvertently intercepted third party conversations to support a defense later in this litigation, the Complaint adequately alleges a fact pattern demonstrating that he intentionally and purposefully intercepted those third-party conversations. Provo Canyon alleges that he recorded the entire time he was at its facility. If those are not the correct facts, the parties will have to address what actually happened in discovery. Bliss has not attempted to counter the allegations in the Complaint by claiming that he intentionally never recorded when he was not a party to the conversation or when he was just observing another employee interacting with a patient.

***12** Bliss further argues that even if these "inadvertent" interceptions were actionable, such statements do not meet the statutory definition of "oral communications" and are, therefore, not protected by the FWA. Again, the court does not believe that the allegations in the Complaint support the assertion that Bliss's interceptions were inadvertent. The allegations in the Complaint provide a fact pattern of intentional recording. In any event, to qualify as an "oral communication," the person speaking must have a "reasonable expectation of privacy." Bliss claims that in the scenario Provo Canyon posits, where Bliss overheard a conversation, the participants could not claim a reasonable expectation of privacy. "If a person knowingly exposes statements to the 'plain view of outsiders,' such statements are not protected ... because the speaker has not exhibited an 'intention to keep them to himself.' " *United States v. Longoria*, 177 F.3d 1179, 1182 (10th Cir. 1999).

However, these hypothetical conversations would have been in front of a new employee who was being trained and had signed confidentiality agreements and agreed to abide by HIPAA regulations. Bliss cannot reasonably argue that there was no expectation of privacy in such a private and secure setting. A psychiatric youth treatment center is a place with a high expectation of privacy. Federal law recognizes that privacy right. Bliss had to engage in an elaborate scheme to gain access to that private information otherwise he would have never overheard the communications.

The court concludes that Provo Canyon's Complaint alleges sufficient facts to support a plausible violation of the state and federal wiretap laws based on some of Bliss's recordings.

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

d. Trespass

Bliss argues that Provo Canyon's claim for trespass also fails. "The essential element of trespass is physical invasion of the land; trespass is a possessory action." *Walker Drug Co. v. La Sal oil Co.*, 972 P.2d 1238, 1243 (Utah 1998). "The gist of an action of trespass is infringement on the right of possession." *John Price Assoc. v. Utah State Conf. Bricklayers Locals Nos. 1, 2, & 6*, 615 P.2d 1210, 1214 (Utah 1980).

Here, Bliss argues that he did not trespass because he was invited onto the property. Provo Canyon admits that it hired Bliss and subsequently invited him onto its property. But Provo Canyon argues that its consent was given under false pretenses and Bliss's alleged misrepresentations negated its consent.

In *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193 (D. Utah 2017), the court considered the question presented here: "whether a person who lies to obtain permission to access private property is a trespasser." *Id.* at 1202. The court concluded that "lying to gain entry, without more, does not render someone a trespasser." *Id.* at 1205. "[A] liar does not become a trespasser merely because a property owner would have withheld consent to enter the property had he known the truth." *Id.* at 1204. To rise to the level of trespass, the defendant must cause "harm of the type the tort of trespass seeks to protect—interference with ownership or possession of the land." *Id.* at 1203.

The court concluded that it "depends on the type of harm (if any) the liar causes." *Id.* at 1202-03. "[T]he liar who causes no trespass-type harm—the restaurant critic who conceals his identity, the dinner guest who falsely claims to admire his host, or the job applicant whose resume falsely represents an interest in volunteering, to name a few—is not guilty of trespassing (because no interference has occurred)." *Id.* Bliss contends that his situation is like this list of non-trespassing acts that do not amount to a trespass. But Provo Canyon argues that the more analogous list in *Herbert* is the list of misrepresentations "caus[ing] harm of the type the tort of trespass seeks to protect": "a competitor who enters a business to steal secrets while posing as a customer is a trespasser, as is the man who is invited into a home while posing as a repairman, but is in fact just a busybody looking to snoop around (because both have interfered with ownership or possession of the property)." *Id.* at 1203. Like the secret shopper and the busybody, Provo Canyon claims that Bliss lying to gain access to Provo Canyon's facility to steal confidential information and record staff and patients is a trespass.

***13** The *Herbert* case relied on two circuit court cases--the Seventh Circuit case in *Desnick v. Am. Broad. Cos., Inc.*, 44 F.3d 1345 (7th Cir. 1995), and the Fourth Circuit case in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 517 (4th Cir. 1999). In *Desnick*, ABC sent "test patients" into eye clinics to secretly record their examinations. 44 F.3d at 1348, 1352. In *Food Lion*, ABC reporters misrepresented their work experience on their resumes to acquire jobs at a grocery store where they secretly recorded health violations. 194 F.3d at 510-11. In both cases the courts concluded that "lying to gain entry, without more, does not render someone a trespasser." Herbert, 263 F. Supp. 3d at 1205. But the *Food Lion* court "ultimately upheld the reporter's trespass convictions, concluding that although their consent to enter was not vitiated by the lies on their resumes, they subsequently exceeded the scope of that consent by recording non-public areas of the store." *Id.* at 1205 n.67. Similarly, in this case, Provo Canyon alleges that Bliss exceeded the scope of the consent by recording non-public conversations and records. Bliss was invited to enter the premises as an employee and could have worked indistinguishably from the other regular employees without exposing himself to a trespass claim. *See id.* But he exceeded the scope of a regular employee when he recorded private conversations and took confidential healthcare information from the premises. *See id.*

In *Desnick*, the reason the "test patients" did not invade the clinic's interest in possession of the land was because the offices were "open to anyone expressing a desire for ophthalmic services." *Id.* at 1352. Provo Canyon argues that there is no analogy between pretending to be a patient and recording your own exam, and what Bliss allegedly did here—recording other patients in the midst of receiving psychiatric care. The court agrees that Provo Canyon has adequately pled that there was nothing similarly open about the Provo Canyon facility. Bliss did not pretend to be a patient and then reveal his experiences. He sought a job and agreed to the same confidentiality agreements that a regular employee at Provo Canyon agrees to as part of their employment at Provo Canyon, and then allegedly exceeded what was allowed under those requirements. The parties could engage in discovery on whether Bliss in fact exceeded the scope of a regular employee, but the allegations are adequate to survive a motion to dismiss on this claim.

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

The court concludes that Provo Canyon has alleged sufficient facts to state a plausible claim for trespass because Provo Canyon alleges that Bliss exceeded the scope of his invitation onto the property and caused harm by recording private interactions and documents. Therefore, the court does not find that there is a basis for dismissing Provo Canyon's trespass claim.

e. Intrusion Upon Seclusion

Provo Canyon alleges a claim against Bliss for intrusion upon seclusion. To establish a claim of intrusion upon seclusion under Utha law, Provo Canyon must prove "(1) that there was "an intentional substantial intrusion, physically or otherwise, upon the solitude or seclusion of the complaining party," and (2) that the intrusion "would be highly offensive to the reasonable person." *Stien v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374, 378 (Utah Ct. App. 1997). The *Stien* court stated that "this holding comports with the view expressed in the Restatement." *Id.* (adopting Restatement (Second) of Torts § 652B (1977)).

Bliss also argues that Provo Canyon's claim for intrusion upon seclusion fails because Provo Canyon has "no personal right of privacy" under Utah law. *See* Restatement (Second) Torts § 6521, cmt. c; Section 6521 of the Restatement (Second) torts addresses the issue of whether a corporation can sustain a claim for intrusion upon seclusion: "A corporation, partnership, or unincorporated association has no personal right of privacy. It has therefore no cause of action for any of the four forms of invasion covered by §§ 652B to 652E." *Id.* at § 6521, cmt. c.

Provo Canyon argues that while the Utah Court of Appeals cited to Restatement (Second) Torts and stated that the elements of the tort under Utah law comports with the view expressed in the Restatement, the Utah Supreme Court has never adopted the Restatement. However, the Utah Court of Appeals specifically drew directly from section 652 in defining the contours of an intrusion upon seclusion claim, and this court finds no reason for deviating from that decision.

***14** Although the types of intrusive conduct Provo Canyon alleges is similar to that discussed in *Stien*, Provo Canyon would need an underlying right to privacy to assert a claim for intrusion upon seclusion. "The overwhelming majority of courts has ruled that corporations do not enjoy a right to ... privacy." *Hearts With Haiti, Inc. v. Kendrick*, 2015 WL 3649592, at *7 (D. Me. June 9, 2015). Because *Stien* expresses that Utah law should be in line with the Restatement, the court concludes that Provo Canyon cannot assert an intrusion upon seclusion claim. Therefore, the court grants Bliss's motion to dismiss the intrusion upon seclusion claim.

f. Conversion

Provo Canyon asserts a conversion claim against Bliss based on his receipt of training materials he would not have received but for allegedly misleading Provo Canyon into hiring him. Provo Canyon willing provided the materials to Bliss when it assumed he was a genuine employee. However, Provo Canyon asserts that it would not have willingly provided the materials to Bliss if it had known that he was there under false pretenses. One of the most common ways conversion occurs is when someone obtains property under false pretenses. *See Loney v. U.S.*, 151 F.2d 1, 4 (10th Cir. 1945) ("Where a person intending to steal another's personal property obtains possession of it, although by or with the consent of the owner, by means of fraud or through a fraudulent trick or device, and feloniously converts it pursuant to such intent, the owner will be regarded as having retained constructive possession. Hence, in such cases the conversion constitutes a trespass.").

Provo Canyon alleges that the training materials Bliss took, even if only copies, belong to Provo Canyon and contain sensitive information that could imperil patients and staff if they are disseminated to the general public. "A conversion is an act of willful interference with a chattel, done without lawful justification by which the person entitled thereto is deprived of its use and possession." *Allred v. Hinkley*, 328 P.2d 726, 728 (Utah 1958); *Fibro Trust, Inc. v. Brahman Fin., Inc.*, 1999 UT 13, ¶ 20, 974 P.2d 288. "A basic requirement of conversion is '[t]hat there be a wrongful exercise of control over personal property in violation of the rights of its owner.' " *Bonnie & Hyde, Inc. v. Lynch*, 2013 UT App 153, ¶ 30, 305 P.3d 196. "[A] conversion does not occur until the defendant exercises control over property that is inconsistent with the plaintiff's right of possession to that property." *Fibro Trust*, 1999 UT ¶ 20.

Provo Canyon alleges that Bliss took the training materials unlawfully and for purposes of disseminating the highly sensitive information to the public and, in doing so, has deprived Provo Canyon of its use of the training materials. For example, Provo Canyon contends that once safety procedures

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

are disseminated to the public, they compromise the safety of staff and patients and no longer serve their intended purpose.

Bliss argues that Provo Canyon cannot sate a claim for conversion because it admits that it willingly provided training materials to Bliss as part of his orientation process. Although Provo Canyon contends that Bliss's receipt of the training materials was "wrongful" because he was hired under false pretenses, Bliss claims that Provo Canyon has alleged no facts to support the notion that Bliss acquired the training materials "without lawful justification" and there is nothing unlawful about receiving training materials from one's employer as part of its training process.

***15** However, even though a party has a right to something —Bliss had a right to training materials as an employee—that does not mean that they cannot be liable for conversion if it is misused. In *Fibro Trust*, a party had legal title to shares of stock that had been voluntarily transferred to it. *Id.* ¶ 21 But the party that had voluntarily transferred the shares did it pursuant to a contractual agreement that required the other party to hold the shares in trust. *Id*. Instead of holding the shares in trust, the other party transferred title to the shares to a third party in breach of their agreement. *Id.* The *Fibro Trust* court held that the fact that the party "held legal title to the shares does not necessarily foreclose Fibro's conversion claim." *Id.*

Just because Bliss may have had a right to receive the training manual like any other employee does not give him a right to share its contents with the public. If Bliss exercises his control over the materials to make them public, then his exercise of control over the materials becomes inconsistent with his right as an employee to possess those materials. Provo Canyon also alleges that Bliss had no right to retain the training materials after his employment ended. Such allegations support a finding that Bliss's control over the materials after his employment ended is inconsistent with his right to possess that property.

Bliss argues that the claim should be dismissed as a matter of law because he was only given a copy of the training materials and Provo Canyon cannot allege it has been "deprived of its use and possession" of the training materials. *Fibro Trust*, 1999 UT 13, ¶20. But Provo Canyon's allegations that making elements of its training manuals public compromises safety precautions it uses at its facility raises the possibility that Provo Canyon has been deprived of the training manual's use because it would need to create new safety protocols and new manuals because the prior protocols and manuals are compromised.

Bliss further argues that a claim for conversion "is preempted to the extent that it is based on factual allegations supporting a misappropriation of trade secrets or otherwise confidential information" by the Utah Uniform Trade Secrets Act. *Soundvision Techs., LLC v. Templeton Grp. Ltd.*, 929 F. Supp. 2d 1174, 1197 (D. Utah 2013). Bliss claims this is true regardless of "whether that information meets the statutory definition of a trade secret." *CDC Restoration & Const., LC v. Tradesmen Contractors, LLC*, 2012 UT App 60, ¶ 45, 274 P.3d 317.

"Generally, courts addressing this issue have agreed that a preliminary examination of the facts underlying the non-UTSA claim is necessary to determine whether a claim is preempted." *Id.* ¶ 47. " '[I]f proof of a non-UTSA claim would also simultaneously establish a claim for misappropriation of trade secrets, it is preempted irrespective o[f] whatever surplus elements of proof were necessary to establish it.' " *Id.* (citation omitted). "However, to whatever extent that a claim is 'based upon wrongful conduct independent of the misappropriation of trade secrets' or otherwise confidential information, it is not preempted." *Id.* (citation omitted).

CDC Restoration did not involve a conversion claim. But, in *Soundivision*, the court ruled that a conversion claim was preempted by the UTSA "to the extent it is a claim that the designs and concepts used to develop the property are trade secrets or confidential," but then the court also analyzed the conversion claim on its merits to the extent that the party was asserting a property interest in the actual products developed. 929 F. Supp. 2d at 1197. Therefore, it did not rule that all conversion claims are preempted. It depends on the factual scenario involved in the case.

***16** Provo Canyon does not assert that the training materials are trade secrets, but it seeks the actual training materials returned to it. Provo Canyon asserts that part of its conversion claim is based on the fact that Bliss intends to make the training materials public and such disclosure could endanger staff and patients. That potential disclosure would appear to be similar to misappropriating confidential information. But Provo Canyon's claim also encompasses merely obtaining the materials under false pretenses and keeping the materials after his employment ended. Because of the risk to security at the facility, Provo Canyon alleges that it will have to change safety protocols if Bliss keeps the materials.

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

As in *Soundivision*, based on the allegations of Provo Canyon's Complaint, it is possible that some of the claim may be preempted and some of it may be able to go forward. The court does not believe it is in a position at this stage of the litigation to determine that the entire claim is preempted as a matter of law. Therefore, the court denies Bliss's motion to dismiss this cause of action.

Based on the above reasoning, the only claim that the court concludes fails as a matter of law is Provo Canyon's intrusion upon seclusion claim. Provo Canyon has sufficiently pled the remaining causes of action to the extent necessary to survive a motion to dismiss. Given the lack of information before the court, several issues must be addressed in discovery. Accordingly, the court concludes that Bliss has failed to meet his burden under UPEPA, Utah Code Ann. §§ 78B-25-101, *et. seq.*, to dismiss Provo Canyon's claims as a matter of law.

Plaintiffs' Motion for Preliminary Injunction

Under Rule 65(b) of the Federal Rules of Civil Procedure, Provo Canyon seeks a preliminary injunction to avoid any harm resulting from Bliss's conduct. The applicant for a preliminary injunction "must show (1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the relief is denied; (3) the threatened injury outweighs the harms that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest."

Bliss argues that the requested relief Provo Canyon seeks in its injunction "mandates action" and "changes the status quo" and, therefore, Provo Canyon's injunction is a disfavored injunction under Tenth Circuit law. *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 976 (10th Cir. 2004). However, the requested injunction would not change the status quo. "The status quo refers to the last peaceable uncontested status existing between the parties before the dispute developed." *ACLU v. Praeger*, 815 F. Supp. 2d 1204, 1208 (D. Kan. 2011). The last peaceable uncontested status between these parties is before Bliss was hired under false pretenses. The heightened standard for changes to the status quo does not apply.

Provo Canyon's requested injunction requires Bliss to return any and all videos, audio, photographs, or other recordings taken at any Provo Canyon facility." However, the mere request for return of the footage, photographs, and documents is not the type of mandatory action that is disfavored by courts. The reason preliminary injunctions that seek mandatory action are disfavored is "because they affirmatively require the nonmovant to act in a particular way, and as a result, they place the issuing court in a position where it may have to provide ongoing supervision to assure the nonmovant is abiding by the injunction." *O Centro*, 389 F.3d at 979. Provo Canyon does not seek relief that would make Bliss act in a certain way that would require ongoing supervision. Bliss would only be required to return the footage, photographs, and documents he obtained while at Provo Canyon. Therefore, the requested injunction is not a disfavored injunction that would require a heightened standard.

1. Likelihood of Success on the Merits

***17** As discussed above in connection with Bliss's Motion to Dismiss, Provo Canyon brings seven causes of action against Bliss, five of which are at issue on this preliminary motion. Provo Canyon must make a "clear showing" this its likelihood of prevailing is "substantial." *Nav. Techs., Inc. v. Fugate*, No. 2:21-CV-00356-JNP, 2021 WL 2982065, at *9 (D. Utah July 15, 2021).

The court declined to dismiss the five causes of action Provo Canyon relies on to move for a preliminary injunction—its breach of contract, fraudulent misrepresentation, state and federal wiretap acts, and conversion claims. Provo Canyon states that it does not seek to prevent Bliss's criticisms of it. Through its causes of action, Provo Canyon seeks to prevent Bliss from disseminating footage of its staff and the healthcare it provides to a vulnerable adolescent population, which Bliss is contractually and legally bound to protect.

Bliss claims that he has no intention of disclosing patient information, and the court should just accept that agreement without imposing an injunction. But he allegedly took that information despite his knowledge that it was confidential. He executed multiple agreements in which he agreed to protect the confidentiality of Provo Canyon, its staff, and residents. The First Amendment does not give Bliss the right to breach contracts, ignore privacy regulations, or violate wiretapping laws, and if he has no intention of doing so an injunction should not be a hindrance to him. Although Bliss argues that he should be allowed to police himself in deciding what information is confidential, he has not come forward with any detailed description of the information he has or intends to use. The uncertainty as to the extent of

the information he took requires the court to rely on Provo Canyon's allegations that he recorded everything while he was at Provo Canyon's facilities. Those recordings could contain a substantial amount of confidential information. The court does not believe that having an injunction in place until such time as the necessary discovery has occurred to discover what he has and what is confidential is a prior restraint on Bliss's free speech rights. First Amendment rights may be waived by contract and may need to give way to statutory and regulatory protections. *See* *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991) (finding no First Amendment right for the press to disregard an agreement to maintain confidentiality in exchange for information where the agreement would be enforceable under state law). This court has already recognized limits on First Amendment assertions when a party has contracted away their rights or is otherwise bound by federal laws. *Homeworx Franchising LLC v. Meadows*, No. 2:09CV11DAK, 2009 WL 211918, at *2 (D. Utah Jan. 26, 2009) (observing parties cannot "invoke the first amendment to recapture surrendered rights"); *XMission, L.C. v. Click Sales, Inc.*, No. 2:17CV1287DAK, 2019 WL 3769866, at *2 (D. Utah Aug. 9, 2019) ("Click Sales does not have a First Amendment right to send emails in violation of the CAN-SPAM Act.").

While the court recognizes that there are many facts that need to be addressed in discovery and a lot could change during discovery, the court finds that Provo Canyon has established a likelihood of success in connection with at least portions of Bliss's breach of contract, fraudulent misrepresentation, and wiretap claims. Therefore, this element supports the implementation of a preliminary injunction.

2. Irreparable Harm

***18** Provo Canyon argues that if Bliss releases videos containing patient PHI and communications, it will be distributed to a wide audience on the internet and that can never be undone. Also, if Bliss releases the recordings, Provo Canyon claims it will face irreparable harm to its reputation, its employees and patients could face safety risks, and the release of sensitive information could compromise its operations.

In contrast, Bliss argues that Provo Canyon fails to make a showing of irreparable harm—either actual or probable—which is "the single most important prerequisite" for the issuance of a preliminary injunction. *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004). "To constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003). "Establishing irreparable harm requires more than speculation and conclusory statements. The mere possibility of irreparable harm is insufficient to justify a preliminary injunction: 'Issuing a preliminary injunction based on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.' " *LL&L Innovations, LLC v. Jerry Leigh of California, Inc.*, No. 2:10-CV-829-TC, 2010 WL 3956815, at *9 (D. Utah Oct. 8, 2010) (citing *Winter v. HRDC, Inc.*, 555 U.S. 7, 22 (2008)).

Bliss argues that Provo's vague, speculative, and conclusory allegations are insufficient to establish a "certain, great, [and] actual" injury because Provo Canyon argues speculative harms regarding material that Bliss has not disclosed. Bliss claims that Provo Canyon has not established that Bliss intends to release video footage he recorded while working at Provo Canyon or that the release is "imminent." But those arguments ignore the allegations in the Complaint that Bliss obtained a position at Provo Canyon to obtain information for a film, which is what he actually does for a profession, he can be seen on surveillance footage recording sensitive documents and interactions throughout his time at Provo Canyon, which would be a substantial amount of footage, and that he abruptly quit when he thought he had been discovered. In connection with this lawsuit, Bliss is arguing that restraining his right to release what he obtained would be a prior restraint on his free speech rights. Bliss has not denied that he made the alleged recordings and has not argued that he has no intention of using the information he obtained.

While Bliss claims that he has never expressed or suggested any intent to violate HIPAA laws or infringe the privacy rights of patients, he took that information and has not agreed to return it. He has admitted that he intends to use some information he obtained in a film or video addressing what he claims to be a matter of public concern. If Bliss did not intend to use the materials in some way, he would have no reason for opposing the injunction. In this fact scenario, the court does not find Provo Canyon's claims of irreparable harm to be speculative. The purpose of the requested injunction is to prevent Bliss from releasing any of the confidential information until it can be determined what he has a free speech right to retain and use.

© 2025 Thomson Reuters. No claim to original U.S. Government Works.

A plaintiff meets the irreparable harm prong "when the court would be unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain." *Dominion Video*, 269 F. 3d at 1156. If Bliss were to release information later deemed to be confidential, the release would have already occurred, and an award of damages would be both inadequate and difficult to ascertain. Bliss's continued possession and intent to disseminate sensitive materials is causing harm to Provo Canyon and the Provo Canyon community. Concerned parents and patients have already contacted Utah authorities to investigate, and Bliss's attempts to downplay the gravity of the situation is unavailing.

***19** The court again notes that a lot of facts need to be discovered in this case, but based on the facts alleged in Provo Canyon's Complaint and Bliss's admissions that he intends to release footage he obtained at Provo Canyon, the court cannot accept Bliss's assertion that there is no potential irreparable harm because the court should trust him to determine for himself what is appropriate to release on the internet. Such releases are essentially permanent and can occur after the parties exchange discovery and bring the issues fully before the court.

Therefore, the court concludes that Provo Canyon has demonstrated that without a preliminary injunction, there is a high likelihood that irreparable harm would occur.

3. Balance of Harms

Provo Canyon contends that the protection of vulnerable adolescents outweighs any risk of harm to Bliss' First Amendment rights. Bliss argues that Provo Canyon asks this court to engage in an unconstitutional act of prior restraint.

"For many years it has been clearly established that any prior restraint on expression comes ... with a heavy presumption against its constitutional validity." *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (cleaned up). "Although the prohibition against prior restraints is by no means absolute, the gagging of publication has been considered acceptable only in 'exceptional cases.' " *Id.* "Even where questions of allegedly urgent national security or competing constitutional interests are concerned, [the Supreme Court] ha[s] imposed this 'most extraordinary remedy' only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures." *Id.* (cleaned up).

The Supreme Court has "refused to suppress publication of papers stolen from the Pentagon by a third party." *Id.* at 1318. "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 390 (1973).

However, Bliss's arguments completely ignore the fact that he signed confidentiality agreements. His situation is not analogous to a traditional news reporter. The court is not disregarding his assertions that the proposed injunction violates his First Amendment rights, but it must recognize that his First Amendment rights in this case are tempered by his contractual obligations, healthcare privacy laws and regulations, and state and federal wiretap laws. Provo Canyon is not alleging only economic or reputational harm. It is attempting to protect its patients. Provo Canyon is not trying to prevent Bliss from reporting on the "troubled teen" industry, but he must do so in the context of the agreements he signed, healthcare privacy laws, and wiretap statutes.

While the court believes that Bliss has free speech rights to cover the "troubled teen" industry, requiring Bliss to turn over any documents, footage, and recordings he took from and while he was at Provo Canyon before the parties can fully address the merits of the claims before the court is not more harmful than allowing confidential and sensitive information from being released on the internet where it will live forever. Therefore, the court concludes that the balance of harms element weighs in favor of Provo Canyon with respect to patient information and confidential information that could impact the safety of Provo Canyon's operations.

4. Public Interest

While the court recognizes that a preliminary prior restraint of First Amendment rights is contrary to public policy, Bliss's free speech rights are not unlimited. Courts have found that where defendants infiltrate another's property with intent to disregard confidentiality provisions they agreed to and secretly record those on the property, enjoining defendants' breach of confidential material is not against public policy. *See, e.g.*, *Nat'l Abortion Fed'n v. Ctr. For Med. Progress*, No. 15-CV-03522-WHO, 2016 WL 454082, at *20 (N.D. Cal. Feb. 5, 2016). The court concludes that enjoining Bliss from releasing materials on the internet that he should not possess or release under his confidentiality agreements, healthcare privacy regulations, and wiretap laws until the parties and

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

court can fully address the merits of Provo Canyon's claims is not against public policy.

***20** Based on the above analysis, the court finds that Provo Canyon has met all the elements for obtaining a preliminary injunction with respect to portions of its claims. The court recognizes that there are many aspects of Bliss's experience at Provo Canyon that can be shared and used without running afoul of the agreements he signed, healthcare privacy regulations, and state and federal wiretap laws. But Provo Canyon has adequately demonstrated that it is entitled to an injunction to protect its and its patients' interests. At this preliminary stage of the litigation, the court and parties are handicapped in many respects because of the unknown nature of the materials Bliss possesses. Bliss did not immediately come forward with a clear picture of what he has in his possession. But that can be addressed through the requirements of the injunction and discovery. While the court enters this order based on the initial allegations of the Complaint, which appear to support plausible claims, the court recognizes that as facts are discovered, the analysis of the asserted claims may change. However, at the present time, the court concludes that it is appropriate to grant Provo Canyon's requested motion for preliminary injunction, in part.

5. Expedited Discovery

Provo Canyon also asks for expedited discovery under FRCP 26 and FRCP 34 for the purpose of identifying (1) all visual and audio recordings Bliss took while at Provo Canyon's facility, (2) all Provo Canyon documents Bliss has in his possession, (3) any other materials in Bliss's possession that may contain Provo Canyon patient PHI, (4) information relating to Bliss's decision to target Provo Canyon and whether any person assisted him, and (5) the extent to which any information Bliss obtained from Provo Canyon has already been disseminated.

The court finds that Provo Canyon has met its burden of showing good cause to conduct expedited discovery on the requested topics. The parties should meet and confer on an expedited schedule for deposing Bliss, turning over documents, and inspecting the sunglasses, hat, cell phone, and other recording devices Bliss had on the Provo Canyon property.

Preliminary Injunction Order

Until such time as discovery is completed and the court can fully address the merits of Provo Canyon's causes of action, Bliss is preliminarily enjoined as follows:

1. Bliss is preliminarily enjoined from publishing or otherwise disclosing, posting, sharing, uploading, downloading, transferring, or any other means of disseminating, to any third party (other than his attorney) any video, audio, photographic, or other recordings taken, or any confidential information learned while employed by Provo Canyon that relates to any individual patient's treatment or care or any matters that could impact the safety of Provo Canyon's operations;

2. Bliss is preliminarily enjoined from publishing or otherwise disclosing to any third party any Patient Health Information or other records or physical documents Bliss obtained while at Provo Canyon or otherwise obtained pertaining to any Provo Canyon patient;

3. Bliss is preliminarily enjoined from reporting or otherwise sharing information relating to any confidential aspects of his employment;

4. Bliss is required to provide Provo Canyon with any and all video, audio, photographic or other recordings taken at any Provo Canyon facility;

5. Bliss is required to return any and all confidential information and PHI obtained from Provo, including any information or documents received from Provo's staff and any patients;

6. Bliss is enjoined from disclosing information contained in any training materials received in connection with his orientation and hiring at Provo that could relate to patient care or safety until the court has determined whether it is confidential and such materials must remain in the custody of Bliss's attorney;

7. Bliss is required to certify that he has not disseminated materials to any person (other than his attorney) or otherwise uploaded or transmitted the materials to any server or cloud;

8. Bliss is required to preserve all documents and communications relating to his alleged employment scheme with Provo Canyon; and

9. Bliss's attorney shall remain in possession of Bliss's disputed materials for purposes of litigating this case and

shall maintain their confidential nature and prohibit their disclosure.

***21** The parties should meet and confer as to the reasonable timing for turning over materials.

CONCLUSION

Based on the above reasoning, Defendant Robert Bliss's Motion to Dismiss [ECF No. 30] is GRANTED IN PART AND DENIED IN PART. Provo Canyon's intrusion upon seclusion claim is dismissed as a matter of law. Plaintiff Provo Canyon's Motion for Temporary Restraining Order [ECF No. 3] is GRANTED IN PART AND DENIED IN PART. The court has modified some of the requested injunction.

All Citations

Slip Copy, 2024 WL 4279243

Footnotes

1 The court notes that the findings of fact and conclusions of law made by a court in deciding a preliminary injunction motion are not binding at the trial on the merits. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 649 (10th Cir. 1992), *overruled on other grounds*, *Systemcare, Inc. v. Wang Labs Corp.*, 117 F.3d 1137 (10th Cir. 1997) (recognizing that “the district court is not bound by its prior factual findings determined in a preliminary injunction hearing.”).

End of Document

© 2025 Thomson Reuters. No claim to original U.S. Government Works.