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# REVIEW LAW: NEW YORK DEFAMATION APPLIED TO ONLINE CONSUMER REVIEWS

IAN LEWIS-SLAMMON<sup>†</sup>

## INTRODUCTION

In early July 2017, Michelle Levine booked her first and only appointment with gynecologist Dr. Joon Song for an annual exam.<sup>1</sup> Ms. Levine had a dissatisfying experience with the office. She claims that Dr. Song's office did not follow up with her for almost a month,<sup>2</sup> and that when she called to ask about the results of a blood test, Dr. Song's staff falsely informed her that she tested positive for herpes.<sup>3</sup> To top it off, Ms. Levine alleges that the office overcharged her.<sup>4</sup> Following this experience, Ms. Levine did what many others do when dissatisfied with a product or service—she took to the internet to complain.<sup>5</sup>

On July 10, August 10, and August 11, 2017, Ms. Levine authored several negative reviews about Dr. Song and his business.<sup>6</sup> She posted reviews on Yelp, a popular consumer review website, and on ZocDoc, HealthGrades, and RateMDs, platforms where patients can rate and review medical professionals.<sup>7</sup> In her one-star Yelp review, Ms. Levine described Dr. Song's office as a “[v]ery poor and crooked business practice” that “caused [her] to go

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<sup>1</sup> Answer & Counterclaims at 15, *Great Wall Med. P.C. v. Levine*, No. 157517/2017 (N.Y. Sup. Ct. N.Y. Cnty. filed July 27, 2018), NYSCEF Doc. No. 89.

<sup>2</sup> *Id.* at 16.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 16–17.

<sup>5</sup> *Id.* at 18.

<sup>6</sup> Verified Complaint at 6–12, *Levine*, No. 157517/2017 (filed Aug. 22, 2017), NYSCEF Doc. No. 1.

<sup>7</sup> *Id.*

into a panic” after giving her false information over the phone.<sup>8</sup> She accused the office of trying to scam her and stated that Dr. Song “needs to lose his medical license.”<sup>9</sup>

Less than two weeks after Ms. Levine’s August 11 review, Dr. Song’s attorneys filed a complaint against her alleging defamation and trade libel, tortious interference with contracts, and intentional infliction of emotional distress.<sup>10</sup> The complaint sought a permanent injunction against her to bar her from disparaging Dr. Song or from “otherwise posting defamatory comments about” him and his business.<sup>11</sup> Additionally, Dr. Song sought “exemplary or punitive damages in an amount appropriate to punish [Ms. Levine] and to make an example of [her] to the community,” as well as actual damages “in no event less than \$1,000,000.”<sup>12</sup> Dr. Song has since described that amount as “a symbolic sum.”<sup>13</sup> Meanwhile, Ms. Levine has set up a page on GoFundMe, a crowdfunding platform, to cover the legal fees she claims are required for her defense.<sup>14</sup>

Arguably, this litigation has made matters worse for both parties. Since this litigation commenced, Ms. Levine has given interviews with news outlets, explaining that she has struggled with the financial burden of defending herself.<sup>15</sup> Initially facing only four negative reviews of his business, Dr. Song now must contend with news articles about this litigation, which, perhaps deservedly, paint him in a litigious light.<sup>16</sup> But he too has gone to the press<sup>17</sup> and both parties seem to have done so in violation of a

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<sup>8</sup> Plaintiff’s Exhibit A at 1, *Levine*, No. 157517/2017 (filed Aug. 22, 2017), NYSCEF Doc. No. 2.

<sup>9</sup> *Id.* at 1–2.

<sup>10</sup> Verified Complaint, *supra* note 6, at 13–15.

<sup>11</sup> *Id.* at 16.

<sup>12</sup> *Id.*

<sup>13</sup> Defendant’s Exhibit C, *Levine*, No. 157517/2017 (filed July 23, 2018), NYSCEF Doc. No. 84.

<sup>14</sup> Plaintiff’s Exhibit 6, *Levine*, No. 157517/2017 (filed May 30, 2018), NYSCEF Doc. No. 74.

<sup>15</sup> See Plaintiff’s Exhibit 1, *Levine*, No. 157517/2017 (filed May 30, 2018), NYSCEF Doc. No. 69; Plaintiff’s Exhibit 2, *Levine*, No. 157517/2017 (filed May 30, 2018), NYSCEF Doc. No. 70; Plaintiff’s Exhibit 3, *Levine*, No. 157517/2017 (filed May 30, 2018), NYSCEF Doc. No. 71; Plaintiff’s Exhibit 4, *Levine*, No. 157517/2017 (filed May 30, 2018), NYSCEF Doc. No. 72; Plaintiff’s Exhibit 7, *Levine*, No. 157517/2017 (filed May 30, 2018), NYSCEF Doc. No. 75.

<sup>16</sup> See First Amended Complaint at 22–23, *Levine*, No. 157517/2017 (filed June 29, 2018), NYSCEF Doc. No. 79.

<sup>17</sup> See Defendant’s Exhibit C, *supra* note 13.

stipulation made between them.<sup>18</sup> Further, Ms. Levine allegedly posted even more negative reviews after the litigation commenced, targeting both Song and his attorneys.<sup>19</sup> From the perspective of an outside observer, what started as a dissatisfied patient airing her perceived grievances online seems to have escalated into a public feud. Rather than serve as a means of resolving the differences between the parties, this litigation has only acted as an accelerant, fanning the flames of their conflict and inspiring further animosity.

Yet, this Note does not seek to comment on the specific merits of Dr. Song's claim against Ms. Levine. Instead, this Note seeks to address significant issues raised in this litigation. In a state with an opinionated populace such as New York, should consumers, like Ms. Levine, be free to post negative reviews online without fear of legal reprisal? To what degree should service providers, like Dr. Song, be able to silence those negative reviewers with litigation?

To begin answering these questions, Part I of this Note will discuss the New York State anti-SLAPP law and its very limited applicability in the online consumer review context. Next, Part II will examine free speech under the New York Constitution, compare it to the protection offered by the Federal Constitution, and illustrate that the former provides broader protection for statements of opinion than the latter. Finally, Part III will argue that, under the relevant New York case law, online reviews should most often constitute nonactionable opinion. Part III will go on to argue that the special consideration given to letters to the editor, and similar journalistic opinion pieces, should extend to the online review context. Such an extension by the New York Court of Appeals would send a message discouraging defamation suits against online reviewers and encouraging their dismissal. It would solidify the free speech rights of speakers in the consumer review context with a measure of protection currently unavailable under New York's weak anti-SLAPP law.

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<sup>18</sup> See Stipulation & Consent Order for Preliminary Injunction at 2, *Levine*, No. 157517/2017 (filed Feb. 13, 2018), NYSCEF Doc. No. 63.

<sup>19</sup> First Amended Complaint, *supra* note 16, at 16–21.

## I. ANTI-SLAPP PROTECTION IS ELUSIVE IN NEW YORK

Many states have recognized the chilling effect on an individual's freedom of speech imposed by the threat of litigation.<sup>20</sup> In the worst cases, parties seeking to silence their critics can file a frivolous lawsuit against them, known as a "strategic lawsuit[] against public participation," or a SLAPP.<sup>21</sup> Even though many such lawsuits do not succeed, the burden of litigation itself is often sufficient to silence those who would otherwise speak out.<sup>22</sup> In response, and in an effort to protect freedom of speech, more than half of states have enacted "anti-SLAPP" legislation.<sup>23</sup> Not all anti-SLAPP statutes are made equal, however, as some "provide substantial protection while others offer significantly more limited safeguards."<sup>24</sup> California, for example, has enacted a strong anti-SLAPP statute,<sup>25</sup> which, despite its critics, seems to be successfully protecting speakers from meritless lawsuits.<sup>26</sup>

New York is also among the states that have enacted anti-SLAPP legislation.<sup>27</sup> But New York's statute applies in limited contexts—only where the targeted speech deals with a public application or permit.<sup>28</sup> The Public Participation Project, which advocates for anti-SLAPP legislation,<sup>29</sup> gives New York's anti-SLAPP statute a grade of "D" and describes it as "weak."<sup>30</sup>

Conversely, California provides an example of an anti-SLAPP law that applies more broadly, including in the online consumer review context. In *Wong v. Jing*, a California appellate court modified the denial of an anti-SLAPP motion made by online

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<sup>20</sup> Jeremy Rosen & Felix Shafir, *Helping Americans to Speak Freely*, 18 FEDERALIST SOC'Y REV. 62, 63 (2017).

<sup>21</sup> Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 L. & SOC'Y REV. 385, 386 (1988).

<sup>22</sup> See Rosen & Shafir, *supra* note 20, at 62–63.

<sup>23</sup> *Id.* at 63.

<sup>24</sup> *Id.*

<sup>25</sup> See CAL. CIV. PROC. CODE § 425.16 (West, Westlaw through Ch. 291 of the 2019 Reg. Sess.); California, PUB. PARTICIPATION PROJECT, <https://anti-slapp.org/california> (last visited Jan. 11, 2020).

<sup>26</sup> See Rosen & Shafir, *supra* note 20, at 64–65.

<sup>27</sup> N.Y. CIV. RIGHTS LAW § 70-a (McKinney, Westlaw through L. 2019, ch. 256).

<sup>28</sup> See 59 CHRISTINE M. G. DAVIS ET AL., NEW YORK JURISPRUDENCE § 63 (2d ed. Supp. 2019).

<sup>29</sup> *Our Work: Federal & State Legislation*, PUB. PARTICIPATION PROJECT, <https://anti-slapp.org/federal-state-legislation> (last visited Jan. 11, 2020).

<sup>30</sup> *New York*, PUB. PARTICIPATION PROJECT, <https://anti-slapp.org/new-york>. (last visited Jan. 11, 2020).

consumer reviewers.<sup>31</sup> There, a dentist brought an action against the parents of a former patient, alleging that they posted a defamatory and injurious Yelp review.<sup>32</sup> The court established that

although “not every Web site post involves a public issue,” consumer information that goes beyond a particular interaction between the parties and implicates matters of public concern that can affect many people is generally deemed to involve an issue of public interest for purposes of the anti-SLAPP statute.<sup>33</sup>

Therefore, in that instance, California’s anti-SLAPP statute applied to the consumer review context.<sup>34</sup> Accordingly, Californian consumers who post online reviews that implicate matters of public concern are entitled to a swifter dismissal of meritless charges brought in response, and they are entitled “to recover [their] attorney’s fees and costs.”<sup>35</sup>

Meanwhile, New York reviewers are not entitled to such statutory protection. New York’s anti-SLAPP statute is available to a defendant only “in an action involving public petition and participation,”<sup>36</sup> which is defined by statute as “an action, claim, cross claim or counterclaim for damages that is brought by a *public applicant or permittee*, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.”<sup>37</sup> Therefore, New York’s anti-SLAPP statute only provides protection in very limited contexts—where a lawsuit targets speech directly relating to a public application.<sup>38</sup> Such an application only includes “a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body.”<sup>39</sup> Thus, except for the odd review that critiques a party seeking such an application or permit, New York’s anti-SLAPP statute does not protect the speech of online consumer reviewers.

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<sup>31</sup> 117 Cal. Rptr. 3d 747, 753–54 (Cal. Ct. App. 2010).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 759 (citations omitted).

<sup>34</sup> *Id.* at 761.

<sup>35</sup> CAL. CIV. PROC. CODE § 425.16(c)(1) (West, Westlaw through Ch. 291 of the 2019 Reg. Sess.).

<sup>36</sup> N.Y. CIV. RIGHTS LAW § 70-a(1) (McKinney, Westlaw through L. 2019, ch. 256).

<sup>37</sup> *Id.* § 76-a(1)(a) (emphasis added).

<sup>38</sup> *Guerrero v. Carva*, 10 A.D.3d 105, 117 (1st Dep’t 2004) (“A narrow construction of the anti-SLAPP law requires that a SLAPP-suit defendant must directly challenge an application or permission in order to establish a cause of action under the Civil Rights Law.” (citation omitted)).

<sup>39</sup> N.Y. CIV. RIGHTS LAW § 76-a(1)(b).

Therefore, in the online consumer review context, California's anti-SLAPP statute offers a measure of protection against meritless litigation that New York's does not. Yet, it seems incongruous that New York—with its opinionated populace and preeminence as a publishing capital<sup>40</sup>—would lag behind when it comes to protecting its speakers. Nonetheless, New York's anti-SLAPP law does not offer much protection for defendants in Ms. Levine's position unless they fall within the statute's narrow boundaries. Thus, such defendants will most likely have to look elsewhere.

## II. NEW YORKERS' RIGHT TO THEIR OPINIONS

### A. *An Overview of Freedom of Speech in New York*

New York has a long history of being a cultural center for the nation.<sup>41</sup> In particular, the American publishing industry has flourished in the state, as New York City “long ago became the pre-eminent publishing city in the world.”<sup>42</sup> Reflecting its prominence as a publishing and cultural hub, New York “has long provided one of the most hospitable climates for the free exchange of ideas.”<sup>43</sup> Indeed, the state's tradition of heightened protection for freedom of speech dates back to colonial times.<sup>44</sup> New Yorkers, at least those in the City, have developed a reputation for being opinionated, and many are more than willing to live up to it.<sup>45</sup>

Yet, New York's anti-SLAPP statute is weak. Where can New Yorkers look for protection when their opinions rub someone the wrong way? Well, as it happens, a fair amount of protection is built into the New York Constitution itself. The New York Constitution provides broader protection for free press and speech

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<sup>40</sup> See *infra* Section II.A.

<sup>41</sup> *Beach v. Shanley*, 62 N.Y.2d 241, 256 (1984) (Wachtler, J., concurring) (“In the 19th century a large portion of the publishing industry was established in New York and the State began to serve as a cultural center for the Nation. It still enjoys that status.”).

<sup>42</sup> Edwin McDowell, *For Publishing, the City, Remains 'the Mecca,'* N.Y. TIMES (Mar. 15, 1983), <https://www.nytimes.com/1983/03/15/nyregion/for-publishing-the-city-remains-the-mecca.html>.

<sup>43</sup> *Beach*, 62 N.Y.2d at 255 (Wachtler, J., concurring).

<sup>44</sup> *Id.*

<sup>45</sup> See N. R. Kleinfeld, *New Yorkers, Self-Assured and Opinionated, Defend Their Values*, N.Y. TIMES (Jan. 15, 2016), <https://www.nytimes.com/2016/01/16/nyregion/new-yorkers-self-assured-and-opinionated-defend-their-values.html>.

than the First Amendment to the United States Constitution.<sup>46</sup> The Federal Constitution merely provides the minimum floor for individual rights, whereas state courts are free to supplement “those standards to meet local needs and expectations.”<sup>47</sup> The drafters of the New York Constitution’s free speech guarantee made the deliberate choice not to follow the language of the First Amendment, “but instead to set forth our basic democratic ideal of liberty of the press in strong affirmative terms.”<sup>48</sup> The New York Court of Appeals recognized this in *O’Neill v. Oakgrove Construction, Inc.*, stating:

The protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the First Amendment. Article I, § 8 of the [New York] Constitution assures, in affirmative terms, the right of our citizens to “*freely speak, write and publish*” and prohibits the use of official authority which acts to “*restrain or abridge* the liberty of speech or of the press.”<sup>49</sup>

Since *O’Neill*, the Court of Appeals has continued to define that broader protection.<sup>50</sup> Of particular importance to the inquiry here, the New York high court has identified that statements of opinion receive greater protection under the New York Constitution than under the First Amendment.<sup>51</sup>

#### B. *The First Amendment Standard for Nonactionable Opinion*

The Supreme Court of the United States clarified the extent of the First Amendment’s protection for statements of opinion in *Milkovich v. Lorain Journal Co.* in 1990.<sup>52</sup> There, a high school wrestling coach sued a newspaper and one of its writers for libel based on an article in the sports pages.<sup>53</sup> According to the Court, the article implied that the coach lied under oath at an official proceeding.<sup>54</sup> The Ohio Court of Appeals had affirmed summary

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<sup>46</sup> *O’Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 529 n.3 (1988) (citations omitted); Eileen R. Kaufman & Leon Friedman, *Freedom of Speech – How Does the New York Constitution Compare to the U.S. Constitution?*, 14 TOURO L. REV. 583, 588 (1998).

<sup>47</sup> *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 248 (1991) (citation omitted).

<sup>48</sup> *Id.*

<sup>49</sup> 71 N.Y.2d at 529 n.3 (citations omitted).

<sup>50</sup> See *Davis v. Boenheim*, 24 N.Y.3d 262, 269–70 (2014); *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 156 (1993); *Immuno*, 77 N.Y.2d at 249, 251–52.

<sup>51</sup> *Immuno*, 77 N.Y.2d at 249, 252.

<sup>52</sup> See generally *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

<sup>53</sup> *Id.* at 3.

<sup>54</sup> *Id.*

judgment against the coach, "based in part on the grounds that the article constituted an 'opinion' protected from the reach of state defamation law by the First Amendment to the United States Constitution."<sup>55</sup>

In *Milkovich*, Ohio courts interpreted the Supreme Court's decision in *Gertz v. Robert Welch, Inc.* as extending greater First Amendment protection to statements of opinion.<sup>56</sup> The Ohio Supreme Court, reviewing a parallel lawsuit arising from the same article, also applied an analysis set forth in a decision by the United States Court of Appeals for the District of Columbia.<sup>57</sup> This analysis considered four factors to determine whether a statement was of fact or nonactionable opinion.<sup>58</sup> Under the first two factors, which required the court to examine "the specific language used" and ask "whether the statement is verifiable," the Ohio court found that the article's passages contained assertions of fact.<sup>59</sup> Yet under the latter two factors, which looked to "the general context of the statement" and "the broader context in which the statement appeared," the court found that the article was a constitutionally protected opinion.<sup>60</sup>

Upon its review of the wrestling coach's case, the Supreme Court rejected the Ohio court's approach, describing it as "a wholesale defamation exemption" under the First Amendment "for anything that might be labeled 'opinion.'"<sup>61</sup> The Court clarified that *Gertz* merely reiterated Justice Holmes's "marketplace of ideas" concept, and did not establish a special opinion exemption.<sup>62</sup>

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<sup>55</sup> *Id.*

<sup>56</sup> *Milkovich*, 497 U.S. at 8–10; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The following was the relevant language in *Gertz* that the Ohio Supreme Court recognized as leading to this conclusion:

Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

*Id.* at 339–40 (footnote omitted).

<sup>57</sup> *Milkovich*, 497 U.S. at 8–9. The decision that the Ohio Supreme Court relied on was *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984).

<sup>58</sup> *Milkovich*, 497 U.S. at 9.

<sup>59</sup> *Id.* (quoting *Scott v. News-Herald*, 496 N.E.2d 699, 706–07 (Ohio 1986)). The Supreme Court essentially retained these first two factors in its First Amendment opinion analysis. *Id.* at 19–20.

<sup>60</sup> *Id.* at 9 (quoting *Scott*, 496 N.E.2d at 706–07). The Ohio Court of Appeals, bound by the Ohio Supreme Court's decision, affirmed summary judgment for the newspaper and writer in the wrestling coach's case. *Id.* at 10. The Supreme Court of Ohio dismissed the coach's appeal, and the Supreme Court granted certiorari. *Id.*

<sup>61</sup> *Id.* at 18 (citation omitted).

<sup>62</sup> *Id.* (citation omitted).

Rather, under the First Amendment, a statement of opinion is only protected if it cannot be reasonably interpreted as an assertion of a provably false fact.<sup>63</sup> The Court rejected an analysis that would require what it called “the creation of an artificial dichotomy between ‘opinion’ and fact”<sup>64</sup> because “expressions of ‘opinion’ may often imply an assertion of objective fact.”<sup>65</sup> Therefore, the Court did not adopt a First Amendment analysis that considers the general context of a statement or the context in which a statement appears.<sup>66</sup> Instead, the Court held that freedom of expression was “adequately secured by existing constitutional doctrine.”<sup>67</sup> Thus, the Court established a more limited doctrine for determining whether speech constitutes nonactionable opinion under the First Amendment and reversed the Ohio Court of Appeals, finding that a reasonable fact-finder could find factual assertions in the article at issue.<sup>68</sup>

*C. The Standard for Nonactionable Opinion Under the New York Constitution*

The next year, in 1991, the *Milkovich* decision led the New York Court of Appeals to revisit one of its own decisions.<sup>69</sup> The court followed the *Milkovich* holding in its First Amendment analysis,<sup>70</sup> however, it distinguished *Milkovich* with regard to its analysis under the New York Constitution.<sup>71</sup> In *Immuno AG. v. Moor-Jankowski*, a manufacturer of biologic products had brought a defamation action based on a letter to the editor published in a medical journal.<sup>72</sup> The letter was prefaced by an editorial note that set out its background, the identity of its author, and the manufacturer’s objections to the letter.<sup>73</sup> The letter was critical of

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<sup>63</sup> *Id.* at 19–20.

<sup>64</sup> *Id.* at 19.

<sup>65</sup> *Id.* at 18.

<sup>66</sup> *Id.* at 18–23.

<sup>67</sup> *Id.* at 19.

<sup>68</sup> *Id.* at 21.

<sup>69</sup> *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 239–40 (1991).

<sup>70</sup> *Id.* at 242–48.

<sup>71</sup> *Id.* at 249–50.

<sup>72</sup> *Id.* at 240.

<sup>73</sup> *Id.* 240–41.

the manufacturer's plan to open a new facility for conducting medical research on chimpanzees in Sierra Leone, and it laid out a number of concerns.<sup>74</sup>

Previously, the Court of Appeals had affirmed the dismissal of the manufacturer's action, finding that "the letter writer's statements of opinion were entitled to the absolute protection of the State and Federal constitutional free speech guarantees."<sup>75</sup> On this review, the court again affirmed dismissal under the First Amendment, even in light of the *Milkovich* holding.<sup>76</sup> On independent, state constitutional grounds, however, the court adhered to the analysis it had previously applied and rejected the doctrine set out in *Milkovich*.<sup>77</sup>

The court "found that the *Milkovich* approach provided insufficient protection to the central values protected by Article I, section 8 of the New York State Constitution."<sup>78</sup> The *Immuno* court held that, unlike the First Amendment, the state constitution required a distinction between statements of actionable fact and statements of protected opinion.<sup>79</sup> This holding required an analysis beyond simply parsing the language at issue to determine if it "assert[ed] or impl[ied] a provably false fact."<sup>80</sup> Instead, the New York Constitution requires courts "to read published articles in context to test their effect on the average reader . . . [and] to consider the publication as a whole."<sup>81</sup> Based on that requirement, the court "adopted a highly contextual approach."<sup>82</sup>

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<sup>74</sup> *Id.* at 240. Those concerns were:

(1) that the motivation for the plan was presumably to avoid international policies or legal restrictions on the importation of chimpanzees, an endangered species; (2) that it could decimate the wild chimpanzee population, as capture of chimpanzees generally involved killing their mothers, and it was questionable whether experimental animals could be returned to the wild, as plaintiff proposed; and (3) that returning the animals to the wild could well spread hepatitis to the rest of the chimpanzee population. [The author] stated that the current population of captive chimpanzees should be adequate to supply any legitimate requirements.

*Id.*

<sup>75</sup> *Id.* at 239.

<sup>76</sup> *Id.* at 246–48. The court nonetheless reached the same result under the First Amendment because the manufacturer had not met its burden by proving falsity. *Id.* at 245–48.

<sup>77</sup> *Id.* at 251–52.

<sup>78</sup> Kaufman & Friedman, *supra* note 46, at 589.

<sup>79</sup> *Immuno*, 77 N.Y.2d at 252.

<sup>80</sup> Kaufman & Friedman, *supra* note 46, at 589.

<sup>81</sup> *Immuno*, 77 N.Y.2d at 250 (citations omitted).

<sup>82</sup> Kaufman & Friedman, *supra* note 46, at 589.

Therefore, the *Immuno* court's analysis emphasized the context in which the allegedly defamatory statements appeared.<sup>83</sup> First, because the statements appeared in a letter to the editor, the court examined the broader social context of that medium.<sup>84</sup> It reasoned that the average reader would view a letter to the editor not as a "rigorous and comprehensive presentation of factual matter" but instead as a vehicle "principally for the expression of individual opinion."<sup>85</sup> This "common expectation"<sup>86</sup> was bolstered by the presence of the editorial note, which signaled readers that they were only to give the letter's statements the weight they chose to accord the writer's views.<sup>87</sup> In that context, the reputational harm such a letter could inflict would be limited to the "inherent persuasiveness" and "credibility of the writer," since it does not have the same authority as the overall publication.<sup>88</sup>

In addition to presenting a lower risk of serious reputational harm, the court also reasoned that opinionated speech in the letter to the editor context carries high social value.<sup>89</sup> The court emphasized the important role of a letter to the editor in giving a platform to ordinary persons who might not otherwise have a way to share their views with a large audience.<sup>90</sup> "[F]or many members of the public, a letter to the editor may be the only available opportunity to air concerns about issues affecting them."<sup>91</sup> The court reasoned that a troubled citizen should feel "free" to take advantage of that opportunity and that a newspaper should similarly feel "free" to publish that citizen's views.<sup>92</sup> Indeed, "[i]t is often the only way to get things put right."<sup>93</sup>

Beyond just serving as a valuable outlet for those who write and submit letters, the court noted that "[t]he availability of such a forum is important . . . because it allows the readership to learn about grievances, both from the original writers and from those who respond, that perhaps had previously circulated only as

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<sup>83</sup> *Id.* at 590.

<sup>84</sup> *Immuno*, 77 N.Y.2d at 253.

<sup>85</sup> *Id.* (quoting *Immuno AG. v. Moor-Jankowski*, 145 A.D.2d 114, 129 (1st Dep't 1989)).

<sup>86</sup> *Id.* (quoting *Immuno*, 145 A.D.2d at 129).

<sup>87</sup> *Id.* at 252.

<sup>88</sup> *Id.* at 252–53.

<sup>89</sup> *Id.* at 253.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* (citation omitted).

<sup>93</sup> *Id.* (citation omitted).

rumor.”<sup>94</sup> The court added that “such a forum can advance an issue beyond invective.”<sup>95</sup> Yet, it conceded that “at the least, the public may learn something, for better or worse, about the person or group that wrote such a letter.”<sup>96</sup>

Following its exploration of the broader social context, the *Immuno* court considered the “immediate context of the letter.”<sup>97</sup> The court looked to the medical journal’s audience and reasoned that, on the whole, its readership was likely sophisticated and educated about the issues the letter raised.<sup>98</sup> Further, the court gave weight to the editorial note preceding the letter because it informed the reader that the statements in the letter reflected the writer’s point of view and that the manufacturer disapproved of that view.<sup>99</sup> Additionally, the court considered that the writer was a known animal rights activist and a member of an avowedly activist organization.<sup>100</sup> “The letter made clear that its purpose was to voice the conservationist concerns of this partisan group . . . .”<sup>101</sup> Thus, even though the language used in the letter was “serious and restrained,” the court held that the immediate context of the letter, along with its broader social setting, “would induce the average reader of this Journal to look upon the communication as an expression of opinion rather than a statement of fact.”<sup>102</sup>

Therefore, the Court of Appeals held that the letter to the editor constituted nonactionable opinion and reaffirmed the grant of summary judgment for the defendant.<sup>103</sup> Defending its rejection of the *Milkovich* approach for the state constitutional standard, the court wrote that

an analysis that begins by looking at the content of the whole communication, its tone and apparent purpose better balances the values at stake than an analysis that first examines the

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* (quoting *Immuno AG. v. Moor-Jankowski*, 145 A.D.2d 114, 129 (1st Dep’t 1989)).

<sup>99</sup> *Id.* at 252.

<sup>100</sup> *Id.* at 254.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 255–57.

challenged statements for express and implied factual assertions, and finds them actionable unless couched in loose, figurative or hyperbolic language in charged circumstances.<sup>104</sup>

For the court, the values at stake were the core justifications for freedom of expression under the New York Constitution, including the “‘marketplace of ideas’ and oversight and informational values,” which compel protection for “fair comment, fair report, and . . . expression of opinion.”<sup>105</sup> The court held that “[t]hese values are best effectuated by according defendant some latitude to publish a letter to the editor on a matter of legitimate public concern—the letter’s author, affiliation, bias and premises fully disclosed, rebuttal openly invited—*free of defamation litigation*.”<sup>106</sup>

In the years since *Immuno*, the Court of Appeals has upheld this privilege for nonactionable opinion.<sup>107</sup> The court has embraced a three-factor analysis, based on the same analysis rejected by the Supreme Court in *Milkovich*, for analyzing whether statements are entitled to this protection.<sup>108</sup> First, an evaluating court must ask “whether the specific language in issue has a precise meaning which is readily understood.”<sup>109</sup> Second, the court must ask “whether the statements are capable of being proven true or false.”<sup>110</sup> Finally, the evaluating court must ask “whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact.”<sup>111</sup> With that final prong, the New York high court has maintained its highly contextual approach to identifying nonactionable opinion, and has allowed a broader range of speech to fall within that protected category.

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<sup>104</sup> *Id.* at 254 (citation omitted).

<sup>105</sup> *Id.* at 255.

<sup>106</sup> *Id.* (emphasis added).

<sup>107</sup> See *Davis v. Boenheim*, 24 N.Y.3d 262, 269–70 (2014) (applying nonactionable opinion analysis); Kaufman & Friedman, *supra* note 46, at 590–93.

<sup>108</sup> *Davis*, 24 N.Y.3d at 270 (citation omitted). Although the *Immuno* court did not explicitly apply a four- or three-factor analysis, it affirmed the approach adopted by the Court of Appeals in *Steinhilber v. Alphonse*, 68 N.Y.2d 283 (1986). *Immuno*, 77 N.Y.2d at 252. *Steinhilber* had adopted its four-factor test directly from *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), the same case that the Ohio Supreme Court had relied on, before it was rejected in *Milkovich*. *Steinhilber*, 68 N.Y.2d at 292. Following *Immuno*, the Court of Appeals consolidated the third and fourth factors of the *Ollman* analysis into a single factor. See *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 153 (1993).

<sup>109</sup> *Davis*, 24 N.Y.3d at 270 (quoting *Mann v. Abel*, 10 N.Y.3d 271, 276 (2008)).

<sup>110</sup> *Id.* (quoting *Mann*, 10 N.Y.3d at 276).

<sup>111</sup> *Id.* (ellipsis in original) (quoting *Mann*, 10 N.Y.3d at 276).

### III. A JUDICIAL OPPORTUNITY TO PROTECT NEW YORKERS' ONLINE OPINIONS

#### A. *Under New York Nonactionable Opinion Analysis, the Special Consideration for Letters to the Editor Properly Extends to the Online Consumer Review Context*

Although online reviewers will not find any protection under New York's anti-SLAPP law, the New York Constitution protects statements of opinion more broadly than the First Amendment.<sup>112</sup> To what degree does that broader protection shield online consumer reviewers against the burden of speech-chilling litigation? The Court of Appeals is yet to speak directly on this issue. But parallels between the letter to the editor context and the online consumer review context suggest that the two should be treated similarly, especially given the emphasis on context in New York's opinion analysis.<sup>113</sup> Additionally, the recent jurisprudence of New York's appellate courts further support the conclusion that statements contained in an online consumer review should often constitute nonactionable opinion as a matter of law.

Recently, the Court of Appeals applied nonactionable opinion analysis in *Davis v. Boenheim*.<sup>114</sup> There, the court reviewed a defamation claim against a Syracuse University coach who had accused two alleged sexual abuse survivors of lying for financial gain.<sup>115</sup> The court reviewed the pre-answer dismissal of the defamation action and held that the plaintiffs had sufficiently stated a claim.<sup>116</sup> In reaching this decision, the *Davis* court followed the standard set in *Immuno* and relied heavily on the context in which the defendant made his statements—officially, including on the school's website, with the authority of the head coach, and from a position of someone with access to facts unavailable to the public.<sup>117</sup> Thus, the context was such that a reasonable reader or listener was likely to conclude that the defendant had stated or implied facts.<sup>118</sup>

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<sup>112</sup> See *supra* Part II.

<sup>113</sup> See *supra* Section II.C.

<sup>114</sup> 24 N.Y.3d 262.

<sup>115</sup> *Id.* at 265–67. The plaintiffs alleged that a colleague of the defendant, an assistant coach at Syracuse, had sexually abused them as children. *Id.* at 265.

<sup>116</sup> *Id.* at 274.

<sup>117</sup> *Id.* at 266–67, 272.

<sup>118</sup> *Id.* at 273 (citation omitted).

Importantly, the *Davis* court acknowledged the continuing existence of special consideration for letters to the editor and opinion pieces in newspapers and other publications.<sup>119</sup> But the allegedly defamatory statements at issue did not qualify for such consideration.<sup>120</sup> Instead, the defendant's statements were published on the university website and were made to reporters during a serious media investigation.<sup>121</sup> Therefore, "the common expectations that apply to those more opinionated journalistic endeavors were inapplicable."<sup>122</sup> Overall, the context in which the coach made his statements "encourag[ed] the reasonable reader to be less skeptical and more willing to conclude that [he] stat[ed] or impl[ied] facts."<sup>123</sup> Thus, although the Court of Appeals did not find nonactionable opinion in *Davis*, the court nonetheless adhered to the contextual approach of *Immuno* for differentiating between statements of protected opinion and statements of actionable fact.<sup>124</sup>

Though the *Davis* decision bears on the online consumer review context in several ways, foremost is the court's continued reliance on a highly contextual approach, with context "often [being] the key consideration" in nonactionable opinion analysis.<sup>125</sup> Under the *Milkovich* approach, a court would merely parse the language of any particular online consumer review and pick out statements that could "reasonably [be] interpreted as stating [or implying] actual facts."<sup>126</sup> At that point, under the First Amendment, the analysis would be complete. But under *Davis* and the New York Constitution, the context of the statements is critical to the final determination and, therefore, must still be examined.<sup>127</sup>

Much like a letter to the editor, an online consumer review indicates to the average reader that any statements contained therein constitute the opinions of the writer. At the time of *Immuno*, a letter to the editor was potentially the only available

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<sup>119</sup> *Id.* (citation omitted).

<sup>120</sup> *Id.* (citations omitted).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* (quoting *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 156 (1993)).

<sup>123</sup> *Id.* (quoting *Gross*, 82 N.Y.2d at 156) (second alteration added).

<sup>124</sup> *Id.* at 270 (citations omitted).

<sup>125</sup> *Id.* at 272 (quoting *Thomas H. v. Paul B.*, 18 N.Y.3d 580, 585 (2012)).

<sup>126</sup> *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (first alteration in original) (citation omitted).

<sup>127</sup> *Davis*, 24 N.Y.3d at 270.

option for many people to voice their concerns.<sup>128</sup> Today, however, many Americans voice their concerns online.<sup>129</sup> Meanwhile, many Americans often have to deal with large companies, including the likes of Amazon, Google, and Apple, which lack public transparency.<sup>130</sup> In the face of this landscape, many Americans feel that online reviews help to hold companies accountable to their customers.<sup>131</sup> So, just like a letter to the editor, an online review, in some instances, may be “the only way to get things put right.”<sup>132</sup>

Moreover, beyond just serving as a platform for writers to persuade the broader community, the *Immuno* court found that letters to the editor “allow[] the readership to learn about grievances, both from the original writers and from those who respond.”<sup>133</sup> Similarly, online reviews are a forum for readers to learn about the grievances of reviewers. Many websites that host online consumer reviews accommodate public responses to those reviews through an indication of whether users found the review helpful,<sup>134</sup> through an option to comment directly on the review,<sup>135</sup> or both.<sup>136</sup> Indeed, negative reviews give the reviewed party an opportunity to learn about and rectify the circumstances that led the consumer to write the review in the first place.<sup>137</sup>

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<sup>128</sup> *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 253 (1991).

<sup>129</sup> See MONICA ANDERSON ET AL., PEW RESEARCH CTR., ACTIVISM IN THE SOCIAL MEDIA AGE 5 (2018), <https://www.pewresearch.org/internet/2018/07/11/public-attitudes-toward-political-engagement-on-social-media/>.

<sup>130</sup> *Shining a Light on the World's Biggest Companies*, TRANSPARENCY INT'L (July 10, 2012), <https://www.transparency.org/news/feature/shining-a-light-on-the-worlds-biggest-companies> (rating companies based on transparency on a scale of zero to ten).

<sup>131</sup> AARON SMITH & MONICA ANDERSON, PEW RESEARCH CTR., ONLINE SHOPPING AND E-COMMERCE 15 (2016), <http://www.pewinternet.org/2016/12/19/online-reviews/> (“45% of the public says that consumer reviews help ‘a lot’ to make companies accountable to their consumers, 15 percentage points higher than the share who feels that government regulations are equally helpful (30%).”).

<sup>132</sup> *Immuno*, 77 N.Y.2d at 253 (citation omitted).

<sup>133</sup> *Id.*

<sup>134</sup> See, e.g., YELP, <https://www.yelp.com/> (last visited Jan. 13, 2020).

<sup>135</sup> See, e.g., FACEBOOK, <https://www.facebook.com> (last visited Jan. 13, 2020).

<sup>136</sup> See, e.g., AMAZON, [https://www.amazon.com/ref=ap\\_frn\\_logo](https://www.amazon.com/ref=ap_frn_logo) (last visited Jan. 13, 2020); *Get Reviews on Google*, GOOGLE MY BUS. HELP, <https://support.google.com/business/answer/3474122?hl=en> (last visited Jan. 13, 2020).

<sup>137</sup> See Brian Greenberg, *What Is the Best Way To Deal with Negative Business Reviews Online?*, FORBES (June 19, 2018), <https://www.forbes.com/sites/quora/2018/06/19/what-is-the-best-way-to-deal-with-negative-business-reviews-online/#64169adc971e>.

Additionally, with a letter to the editor, “at the least, the public may learn something, for better or worse, about the person or group that wrote such a letter.”<sup>138</sup> The same can certainly be said with regard to those who post online reviews. For example, in the online shopping context, it can often be helpful for shoppers to look to reviews posted by those with similar needs, interests, or preferences to inform their decisions.<sup>139</sup> Conversely, reviews may contain indicia that lead readers to disregard the viewpoint of the writer.<sup>140</sup> And it is possible that a tempered response to a negative review from the reviewed party will shed more positive light on that party than on the disgruntled reviewer.<sup>141</sup> Thus, speech in the online review context functions in a way similar to speech in the letter to the editor context.

There are, of course, also differences between the two contexts. For one thing, an online review may not be subject to the same sort of editorial oversight and selective publication that a letter to the editor, like the one in *Immuno*, is subject to.<sup>142</sup> For example, Yelp encourages its users to post reviews about nearly anything,<sup>143</sup> and rather than take an editorial viewpoint, Yelp “[does not] typically take sides in factual disputes and generally allow[s] Yelpers to stand behind their reviews.”<sup>144</sup>

Still, a lack of editorial selectivity in the online review context is not decisive in nonactionable opinion analysis. What the *Immuno* court emphasized regarding the editorial hand was the presence of an editorial note that appeared above the letter at

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<sup>138</sup> *Immuno*, 77 N.Y.2d at 253.

<sup>139</sup> See Caroline Beaton, *Why You Can't Really Trust Negative Online Reviews*, N.Y. TIMES (June 13, 2018), <https://www.nytimes.com/2018/06/13/smarter-living/trust-negative-product-reviews.html>.

<sup>140</sup> See Dena Cox et al., *To Err Is Human? How Typographical and Orthographical Errors Affect Perceptions of Online Reviewers*, 75 COMPUTERS IN HUM. BEHAV. 245, 251 (2017).

<sup>141</sup> See Greenberg, *supra* note 137.

<sup>142</sup> *Immuno*, 77 N.Y.2d at 240–41.

<sup>143</sup> *Getting Started with Your First Review*, YELP, [https://www.yelp-support.com/article/Getting-started-with-your-first-review?l=en\\_US](https://www.yelp-support.com/article/Getting-started-with-your-first-review?l=en_US) (last visited Jan. 13, 2020).

<sup>144</sup> *Will Yelp Remove a False or Defamatory Review?*, YELP, [https://www.yelp-support.com/article/Will-Yelp-remove-a-false-or-defamatory-review?l=en\\_US](https://www.yelp-support.com/article/Will-Yelp-remove-a-false-or-defamatory-review?l=en_US) (last visited Jan. 13, 2020). While it does not rise to the level of selective publication, Yelp does have a system of recommending reviews, thereby increasing the visibility of some reviews and not others. *What Is Yelp's Recommendation Software?*, YELP, [https://www.yelp-support.com/article/What-is-Yelp-s-recommendation-software?l=en\\_US](https://www.yelp-support.com/article/What-is-Yelp-s-recommendation-software?l=en_US) (last visited Jan. 13, 2020). According to Yelp, these determinations are made by a software program and are based on quality, reliability, and the reviewer's level of activity. *Id.*

issue.<sup>145</sup> The editorial note described the background of the letter and its author,<sup>146</sup> and indicated “that the letter was to be given only the weight its readers chose to accord [the writer’s] views.”<sup>147</sup> Although, it may not serve as quite as much of a disclaimer, a review on Yelp is presented alongside the profile picture and username of the individual who posted it.<sup>148</sup> Even though the profile picture and username are not as obvious as the editorial note, Yelp’s support pages make clear that the views of their users are not the views of the website.<sup>149</sup> Thus, in both contexts, the views expressed are attributed to the individual, and there is no suggestion that the weight of the publisher’s or platform’s authority is behind them. Therefore, despite a lack of editorial oversight and selectivity in the online review context, the similarities between online reviews and letters to the editor are still such that comparable treatment of both contexts is justified in nonactionable opinion analysis.

Nonetheless, context is not the sole factor in nonactionable opinion analysis. Though a statement’s context is perhaps most important,<sup>150</sup> “whether the specific language in issue has a precise meaning which is readily understood” and “whether the statements are capable of being proven true or false” are still determinative factors.<sup>151</sup> Thus, even though an online reviewer’s statements may not be considered in isolation,<sup>152</sup> it is still possible that an online review will contain actionable statements of fact.

To complicate matters, the *Davis* court found that many of the statements at issue there, though arguably statements of opinion, were premised on implied facts unavailable to the public at large that the defendant had the opportunity to know.<sup>153</sup> Such statements constitute “mixed opinion,” which the court held to be actionable.<sup>154</sup> In the online review context, it is not difficult to imagine a situation in which a review states an opinion but implies facts that are unavailable to the public at large, such as the details

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<sup>145</sup> *Immuno*, 77 N.Y.2d at 252–53.

<sup>146</sup> *Id.* at 240–41.

<sup>147</sup> *Id.* at 252.

<sup>148</sup> See YELP, <https://www.yelp.com> (last visited Jan. 13, 2020).

<sup>149</sup> *Can I Sue Yelp for a Bad Review?*, YELP, <https://www.yelp-support.com/article/Can-I-sue-Yelp-for-a-bad-review> (last visited Jan. 13, 2020); *Will Yelp Remove a False or Defamatory Review?*, *supra* note 144.

<sup>150</sup> *Davis v. Boenheim*, 24 N.Y.3d 262, 272 (2014) (citation omitted).

<sup>151</sup> *Id.* at 270 (quoting *Mann v. Abel*, 10 N.Y.3d 271, 276 (2008)).

<sup>152</sup> See *Immuno*, 77 N.Y.2d at 254.

<sup>153</sup> See *Davis*, 24 N.Y.3d at 273.

<sup>154</sup> *Id.* at 269 (citation omitted).

of a particular transaction between a reviewer and a reviewee. Such a review may find no protection, even under the New York Constitution.

Still, even for such a review, nonactionable opinion analysis must be conducted from the standpoint of a reasonable reader.<sup>155</sup> It is unlikely that a reasonable reader will approach a typical online review without skepticism or believe that statements found therein convey trustworthy facts about the subject of the review.<sup>156</sup> After all, as New York courts have recognized, “[r]eaders give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts.”<sup>157</sup> This sentiment seemed to be confirmed by a 2016 Pew Research Center study, which found that roughly half of Americans find online reviews difficult to trust.<sup>158</sup> Therefore, the “common expectation”<sup>159</sup> regarding online reviews seems to be that they should be taken with a healthy dose of skepticism. Thus, many reviews will still constitute nonactionable opinion even where similar statements in other contexts would constitute actionable mixed-opinion.

Moreover, two recent Appellate Division decisions lend support to the conclusion that, under New York constitutional law, online reviews are more likely to constitute nonactionable opinion than speech in other contexts.<sup>160</sup> Both of these cases dealt with defamation actions arising from allegedly defamatory Yelp reviews, and both held those reviews to be nonactionable opinion.<sup>161</sup> In *Torati v. Hodak*, the New York Appellate Division, First Department, modified the denial of a motion to dismiss, granting the motion as to negative comments that the defendant anonymously posted to consumer review websites, including

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<sup>155</sup> See *Immuno*, 77 N.Y.2d at 254; see also *Davis*, 24 N.Y.3d at 269–70 (holding that courts should approach opinion analysis from the perspective of an “average person” (citation omitted)).

<sup>156</sup> See SMITH & ANDERSON, *supra* note 131, at 13.

<sup>157</sup> *Torati v. Hodak*, 147 A.D.3d 502, 503 (1st Dep’t 2017) (quoting *Sandals Resorts Int’l Ltd. v. Google, Inc.*, 86 A.D.3d 32, 44 (1st Dep’t 2011)).

<sup>158</sup> SMITH & ANDERSON, *supra* note 131, at 13.

<sup>159</sup> *Immuno*, 77 N.Y.2d at 253.

<sup>160</sup> See *Crescendo Designs, Ltd. v. Reses*, 151 A.D.3d 1015, 1016 (2d Dep’t 2017); *Torati*, 147 A.D.3d at 503.

<sup>161</sup> See *Crescendo Designs*, 151 A.D.3d at 1016; *Torati*, 147 A.D.3d at 502–04 (finding a Yelp review nonactionable but a corresponding Facebook review actionable because it contained “statements that [were] largely factual in nature”).

Yelp.<sup>162</sup> The court acknowledged that “the Internet reviews contain[ed] elements of both fact and opinion” but nonetheless reasoned that “when viewed in context, they suggest to a reasonable reader that the author was merely expressing his opinion based on a negative business interaction with plaintiffs.”<sup>163</sup> Although the posts contained statements based on implied, undisclosed facts,<sup>164</sup> the sort that the Court of Appeals held to constitute “mixed opinion” in a different context in *Davis*,<sup>165</sup> the Appellate Division nonetheless found them nonactionable in light of their context.<sup>166</sup> Specifically, “the disgruntled tone, anonymous posting, and predominant use of statements that cannot be definitively proven true or false’ made [the posts] ‘only susceptible of a nondefamatory meaning, grounded in opinion.’ ”<sup>167</sup> Thus, the immediate context of the review was held to be such that the otherwise mixed-opinion statements constituted nonactionable opinion.<sup>168</sup>

Similarly, in *Crescendo Designs, Ltd. v. Reses*, the Appellate Division, Second Department, affirmed a grant of summary judgment, dismissing the libel claim of a home theater system installer.<sup>169</sup> There, the installer brought an action against one of his previous clients, who had posted a negative review of his service on Yelp.<sup>170</sup> In line with *Immuno*, the Appellate Division refused to “sift[] through” the review to pick out possible assertions of fact.<sup>171</sup> Instead, like the *Torati* court, the *Crescendo* court analyzed the whole context of the review from the perspective of a reasonable reader.<sup>172</sup> In doing so, the court concluded that “a

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<sup>162</sup> 147 A.D.3d at 503 (second alteration in original) (“The communications . . . referr[ed] to plaintiff as a ‘bad apple,’ ‘incompetent and dishonest,’ and a ‘disastrous businessman,’ from whom consumers should ‘[s]tay far away.’ ”).

<sup>163</sup> *Id.* (citations omitted).

<sup>164</sup> *Id.*

<sup>165</sup> *Davis v. Boenheim*, 24 N.Y.3d 262, 269 (2014) (citation omitted).

<sup>166</sup> *Torati*, 147 A.D.3d at 503.

<sup>167</sup> *Id.* (emphasis added) (quoting *In re Woodbridge Structured Funding, LLC v. Pissed Consumer*, 125 A.D.3d 508, 509 (1st Dep’t 2015)).

<sup>168</sup> *See id.*

<sup>169</sup> 151 A.D.3d 1015, 1016 (2d Dep’t 2017).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* (citation omitted).

<sup>172</sup> *Id.* (citation omitted).

reasonable reader would have believed that the writer of the review was a dissatisfied customer who utilized the Yelp website to express an opinion.”<sup>173</sup> Thus, the review was nonactionable.<sup>174</sup>

Both of these cases support the conclusion that statements in the online review context are likely to constitute nonactionable opinion under New York law, and that the rationale of *Immuno* still controls. Therefore, in light of these recent decisions, and the significant parallels between letters to the editor and online reviews, there is substantial support for the proposition that the opinion rationale that *Immuno* applied to letters to the editor should extend to the online review context. Thus, like letters to the editor, online reviews will be actionable less often than statements in other contexts and are entitled to special consideration.

*B. Special Consideration for Online Reviews in New York Opinion Analysis Would Encourage Early Dismissal, Discourage Frivolous Lawsuits, and Protect Free Expression*

Legal rationales aside, there are significant policy considerations that further justify heightened protection against defamation lawsuits for online reviewers. Extending special consideration to online consumer reviews would bring the defamation jurisprudence of the New York Court of Appeals into the twenty-first century. It would provide an added measure of protection for modern, online speakers. The *Immuno* court itself pointed out “the particular value of summary judgment, where appropriate, in libel cases.”<sup>175</sup> The court relied upon that value as a further justification for declining to apply the *Milkovich* approach and maintaining a separate, more protective state law analysis.<sup>176</sup> The court implied that the state constitutional standard it upheld would make summary dispositions more likely.<sup>177</sup> Judicial extension of special consideration to the online review context, as already enjoyed by letters to the editor, would bolster that likelihood for cases arising out of an increasingly utilized forum.

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<sup>173</sup> *Id.* (citations omitted).

<sup>174</sup> *See id.*

<sup>175</sup> *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 256 (1991) (citation omitted).

<sup>176</sup> *See id.*

<sup>177</sup> *See id.* (citations omitted).

Websites that allow users to post consumer reviews may not be the most glamorous forums for speech, but online reviews nonetheless have value in today's society and courts should protect speakers in this context. Indeed, many Americans find consumer reviews to be more helpful than government oversight when it comes to making consumers confident about their purchases, holding companies accountable, and ensuring product safety.<sup>178</sup> Above all, despite their potential for virulence, online reviewers tend to be most motivated by a desire to help others make decisions.<sup>179</sup>

Yet, while protecting the free speech rights of consumers is important, the impact that negative reviews can have should not be minimized. According to the Pew Research Center, eighty-two percent of American adults at least sometimes read online reviews before they make purchasing decisions.<sup>180</sup> That figure includes forty percent of American adults who always or almost always rely on online reviews.<sup>181</sup> Therefore, negative reviews certainly can damage a business. Indeed, many people may depend on negative reviews more than positive ones.<sup>182</sup>

Although encouraging dismissal of defamation claims based on online reviews may increase the likelihood that service providers will be discouraged from bringing meritorious defamation claims, most consumer reviews are not worth going to court over. The risk an otherwise damaging review may pose to reviewees is mitigated by several factors. Foremost, as mentioned above, any factual assertions that may be found in an online review will not necessarily be believed.<sup>183</sup> Further, a review with typing and spelling errors, such as Ms. Levine's Yelp review,<sup>184</sup> may be considered less credible, even by a reader that generally finds well-written reviews trustworthy.<sup>185</sup> Regardless, it seems that many reviews found online are demonstrably unreliable to begin with.<sup>186</sup> Recently, that unreliability has become increasingly

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<sup>178</sup> SMITH & ANDERSON, *supra* note 131, at 15–16.

<sup>179</sup> Beaton, *supra* note 139.

<sup>180</sup> SMITH & ANDERSON, *supra* note 131, at 12.

<sup>181</sup> *Id.*

<sup>182</sup> Beaton, *supra* note 139.

<sup>183</sup> SMITH & ANDERSON, *supra* note 131, at 13.

<sup>184</sup> See Plaintiff's Exhibit A, *supra* note 8, at 1–2.

<sup>185</sup> Cox et al., *supra* note 140, at 250.

<sup>186</sup> See Beaton, *supra* note 139. Reviews may be unreliable because they do not reflect objective quality. *Id.* Alternatively, they may be unreliable because they were

visible.<sup>187</sup> Perhaps, with that increasing visibility, members of the public will begin to develop a greater skepticism in the way they read online reviews.

As with a letter to the editor, “any damage to reputation done by” an online review “generally depends on its inherent persuasiveness and the credibility of the writer.”<sup>188</sup> Moreover, those being reviewed often have the opportunity to respond, and sometimes publicly on the same webpage where the review was posted.<sup>189</sup> Thereby, the target of a review that may be false or defamatory may have an opportunity to demonstrate its falsity, or, at least, to present a conflicting narrative. Further, a reviewed party may even reach out to the reviewer and attempt to publicly address the grievance, which, if done earnestly, could counteract the negative impact of the review.<sup>190</sup> Thus, where this option is available, as it is on several popular review sites,<sup>191</sup> the negative impact of a review may be mitigated without reliance on litigation. Therefore, victims of alleged defamation in the online review context are often less vulnerable than those who are defamed in contexts where such a response is neither as easy nor as effective.

Regardless, online consumer review sites serve as a platform for New Yorkers, like Ms. Levine, to exercise their free speech rights. Although the critical views expressed in that forum may be harmful to some, the New York Constitution gives reviewers the right to express their opinions without the fear of speech-chilling litigation.<sup>192</sup> Following the decisions in *Immuno* and *Davis*, and with support from *Torati* and *Crescendo*, New York courts are well positioned to protect that right by extending special consideration to the online consumer review context. This would make findings that such reviews are nonactionable opinion more likely at the summary disposition stage.

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bought and paid for. *Id.*; Lauren Dragan, *Let's Talk About Amazon Reviews: How We Spot the Fakes*, WIRECUTTER (May 13, 2016), <https://thewirecutter.com/blog/lets-talk-about-amazon-reviews/>.

<sup>187</sup> See Beaton, *supra* note 139; Nicole Nguyen, *Inside Amazon's Fake Review Economy*, BUZZFEED NEWS (May 7, 2018), <https://www.buzzfeednews.com/article/nicolenguyen/amazon-fake-review-problem#.fjMKL3yND>; *Reply All: #124 the Magic Store*, GIMLET MEDIA (July 12, 2018), <https://www.gimletmedia.com/reply-all/124>.

<sup>188</sup> *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 252–53 (1991).

<sup>189</sup> See *supra* notes 134–141 and accompanying text.

<sup>190</sup> Greenberg, *supra* note 137.

<sup>191</sup> See *supra* notes 134–141 and accompanying text.

<sup>192</sup> See *supra* Section III.A.

## CONCLUSION

Although the litigation between Dr. Song and Ms. Levine may not be the online consumer review case to reach the New York Court of Appeals, New York courts should be on the lookout for the opportunity that such a case provides. The case raises issues that are relevant to many New Yorkers and many Americans. Indeed, a majority of Americans at least sometimes post reviews online about products or services.<sup>193</sup> When those reviews are unflattering or critical, do they really justify the dramatic response of defamation litigation?

If the Court of Appeals were to extend its opinion jurisprudence regarding the letter to the editor context to online consumer reviews, it would do a great deal to protect online consumers' free speech rights. Although some victims of critical or even false online reviews may be less likely to bring meritorious claims, resorting to litigation is not necessarily the most productive way to deal with this kind of harmful speech. In some ways, it has not worked out so well for Dr. Song. As his First Amended Complaint states, news of his action against Ms. Levine has led to even more negative reviews.<sup>194</sup> "On numerous review sites, Plaintiffs' total rating has suffered sharp declines, as users who have never been Plaintiffs' patients react to Ms. Levine's false narrative of a litigious and greedy business trying to silence an individual for merely expressing her opinion on Yelp."<sup>195</sup> Therefore, it seems that initiating defamation litigation over an online review may risk damaging the reviewed party's reputation as much as, or more than, the negative review itself.

Therefore, a final argument for protecting online reviewers from defamation litigation is that doing so would not only discourage litigation but also encourage alternatives that may foster less animosity, lead to more productive consumer relationships, and keep more reputations intact. Many review websites give the targets of reviews an opportunity to respond or reach out to their reviewers.<sup>196</sup> Because doing so can negate the damage done by a negative review,<sup>197</sup> it seems that this context is

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<sup>193</sup> SMITH & ANDERSON, *supra* note 131, at 14.

<sup>194</sup> First Amended Complaint, *supra* note 16, at 23.

<sup>195</sup> *Id.* at 25. In fairness, Ms. Levine has faced unwanted attention herself, most notably in the form of anti-Semitic comments left on the webpage of a Korea Daily article, which interviewed Dr. Song. See Defendant's Exhibit C, *supra* note 13.

<sup>196</sup> See *supra* notes 134–140 and accompanying text.

<sup>197</sup> Greenberg, *supra* note 137.

ideal for using counter-speech to cure potentially damaging speech. Indeed, responding to negative reviews with customer outreach, rather than with costly and time-consuming litigation, may lead to better outcomes for all involved. Thus, New York courts are justified in finding that statements in the online review context, like statements in letters to the editor, will most likely constitute nonactionable opinion, and should often be protected as such.