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COURT OF APPEALS  
STATE OF NEW YORK

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LUKASZ GOTTWALD,  
Appellant,

-against-

KESHA ROSE SEBERT,  
Respondent.

NOS. 32  
33

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20 Eagle Street  
Albany, New York  
April 18, 2023

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE SHIRLEY TROUTMAN

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1                   ACTING CHIEF JUDGE CANNATARO: Number 32 and 33,  
2                   Gottwald v. Sebert. Counsel?

3                   MR. METLITSKY: Thank you, Your Honor. Anton  
4                   Metlitsky for Kesha Rose Sebert. I'd like to reserve three  
5                   minutes, if I could?

6                   ACTING CHIEF JUDGE CANNATARO: You have three  
7                   minutes.

8                   MR. METLITSKY: Thank you, and may it please the  
9                   Court. Kesha has, for nearly a decade, had to defend  
10                  against what we will show to be a baseless lawsuit brought  
11                  to retaliate against her for her speech.

12                 That suit has required Kesha to spend millions of  
13                 dollars in her own defense. It has required her to endure  
14                 among many other things, being deposed about the details of  
15                 her sex life, and in July, she'll have to be cross-examined  
16                 about her rape in a very public Manhattan courtroom.

17                 JUDGE SINGAS: Counselor, do you think there's a  
18                 difference between the constitutional actual malice  
19                 standard and the anti-SLAPP one?

20                 MR. METLITSKY: No, I don't think so. So the  
21                 legislature enacted the November 2020 anti-SLAPP amendments  
22                 in large part to provide a remedy to victims of such  
23                 vindictive lawsuits and also to ensure that the actual  
24                 malice standard applies in all cases.

25                 JUDGE TROUTMAN: Did they indicate that it was

1 retroactive at the time?

2 MR. METLITSKY: I think they indicated it was  
3 retroactive in several different ways, so the first is just  
4 the stated purpose of the act. The stated purpose of the  
5 act was the 2020 legislature understood that the '92 act  
6 was supposed to provide maximum protection for First  
7 Amendment rights and - - -

8 JUDGE GARCIA: But Counsel, you're not  
9 suggesting, and I don't see it in the papers, that that '92  
10 act was meant to do what the later amendments did?

11 MR. METLITSKY: No, what's relevant is the intent  
12 of the 2020 legislature, and the 2020 legislature  
13 understood that the original act was - - -

14 JUDGE GARCIA: But I think that's relevant for  
15 the amendment, certainly.

16 MR. METLITSKY: Yeah.

17 JUDGE GARCIA: But why is that relevant for the  
18 1992 statute?

19 MR. METLITSKY: It's not. The 1992 statute is  
20 totally irrelevant except insofar as the 1992 statute had a  
21 particular purpose, a stated purpose which was utmost  
22 protection for free speech, and the 2020 legislature,  
23 that's what's relevant, thought, we understood that  
24 purpose, we agree with that purpose, and we think it was  
25 supposed to protect a group of people and interests that it

1 in fact did not protect. It fell short.

2 JUDGE WILSON: Well, that's the question, though.  
3 Supposed to protect, or we now want to protect more?

4 MR. METLITSKY: Well, I think probably both, and  
5 the legislative history makes clear - - -

6 JUDGE WILSON: So does that - - - is that fork  
7 there, if you want to call it that, the both you just said.  
8 Does one branch of that or the other affect whether you  
9 think of this as remedial?

10 MR. METLITSKY: No, I don't think so. So what I  
11 understand - - - I mean, remedial can mean a lot of things  
12 as the cases have said. The way I understand it as  
13 relevant to this analysis is when a legislature understands  
14 that prior law was supposed to, should have protected a  
15 particular interest or group of people and didn't, the new  
16 legislature - - -

17 JUDGE WILSON: The should have, though, is  
18 ambiguous, right?

19 MR. METLITSKY: So I don't - - - so I don't mean  
20 should have in the sense that it actually did but then,  
21 like, turned out not to. I mean, the statute was supposed  
22 to provide maximum protection for free speech - - -

23 JUDGE WILSON: Well, to a maximum protection for  
24 a particular class, and now, the idea is the class really -  
25 - - we look at it now. We think we would like to provide

1           it to a bigger class; is that fair?

2                   MR. METLITSKY: That's right, and because the  
3           prior statute was supposed to - - - should have in the  
4           sense - - - not that it was written to, but what the intent  
5           was not to have these kinds of retaliatory lawsuits, and  
6           just - - - I think it's easier to speak in particulars.

7                   So the impetus for the statute was the  
8           legislature - - - and this is in the legislative history,  
9           noticing that there was a proliferation of vindictive  
10          harassing, retaliatory lawsuits against journalists,  
11          consumer advocates, and survivors of sexual abuse.

12                   And the legislature said, we need an amendment so  
13          that these people are protected, and it seems to me bizarre  
14          to presume that the legislature would not want to provide a  
15          remedy for the very people that were the impetus for the  
16          statute in the first place, but I think this is just one  
17          argument.

18                   I mean, move on to the actual statutory amendment  
19          history, right? The statute had a prospective only  
20          provision in it and it was removed. This Court has held  
21          both inside within the retroactivity context in *Majewski*  
22          and outside of that context that that is extremely  
23          pertinent evidence of the legislature's intent because of  
24          course it is.

25                   Imagine a legislature that wants the statute to

1 apply prospectively, and that legislature sees the bill,  
2 and it has a prospective only provision. Why on earth  
3 would the - - -

4 JUDGE TROUTMAN: Wouldn't it have just been  
5 easier for the legislation to so state it is retroactive?

6 MR. METLITSKY: Well, so I think lots of  
7 legislation says that. Lots of legislation says  
8 prospective only. This doctrine has developed to account  
9 for legislation that says neither, right? So express  
10 retroactivity is not required, but there are a few reasons  
11 - - -

12 JUDGE TROUTMAN: But there was nothing to stop  
13 them from simply stating it at the time that they passed  
14 it?

15 MR. METLITSKY: So I think that there might be a  
16 few explanations for why somebody wouldn't have expressly  
17 stated retroactively. Imagine somebody wanted the statute  
18 to apply retroactively in the sense that it applied to  
19 pending cases but not retroactively in the sense that it  
20 applied to completed cases.

21 State - - - putting in a retroactivity provision  
22 could have created ambiguity there.

23 JUDGE GARCIA: Couldn't you have said that in  
24 your retroactivity provision, this applies to pending cases  
25 only?

1 MR. METLITSKY: You could have, Your Honor, but -  
2 - - but the other reason - - - another reason why you  
3 wouldn't have said that is because there's commenced or  
4 continued language in the statute already which seems to me  
5 to imply application to pending cases.

6 ACTING CHIEF JUDGE CANNATARO: I was thinking  
7 about that, commence and continue. Exactly. Would you  
8 agree with the proposition that by using the phrase,  
9 commenced or continued, continued would suggest that they  
10 meant application to already pending cases?

11 MR. METLITSKY: Yeah, I think that's totally  
12 obvious.

13 JUDGE GARCIA: Is that - - -

14 MR. METLITSKY: That's what it means. I'm sorry.

15 ACTING CHIEF JUDGE CANNATARO: I'm sorry, and  
16 just quickly, by corollary to that, you know, they could  
17 have said - - - they could have included language that  
18 indicated that with respect to those cases that had already  
19 been commenced, that it was effective back to the  
20 commencement, but that's not what you get.

21 MR. METLITSKY: Well, so let me be clear. I was  
22 going to say at the beginning, we have a fallback argument  
23 here, which is that we at the very least should get damages  
24 from the date of commencement on. That's not even a  
25 retroactive application.

1           That's just a present-day application, and I  
2           can't imagine why we wouldn't be entitled to that, but as  
3           to the retroactivity piece, again, it's true that there  
4           might - - - the legislature obviously could have said the  
5           statute applies retroactively - - - it could have been more  
6           clear. That's true in every single one of these cases.

7           JUDGE GARCIA: What's your retroactivity - - -  
8           what's the retroactive application here, then, because as  
9           Judge Cannataro was saying, it seems like application to a  
10          current case, especially given the language in the statute,  
11          it's not retroactive, so what's the retroactive  
12          application, here?

13          MR. METLITSKY: So I'm not going to fight you on  
14          that. I think that's right, so applying the actual malice  
15          standard to a case that hasn't continued at the end of the  
16          case doesn't even seem like - - -

17          JUDGE GARCIA: What about punitive and  
18          compensatory damages?

19          MR. METLITSKY: Well, so that one, there could be  
20          a retroactive application as to attorneys' fees, punitive  
21          and compensatory damages, depending on when you start.

22          JUDGE GARCIA: Attorneys' fees seems fairly  
23          simple if you use the pivot as the statute passes, and from  
24          then on, you can mark attorneys' fees, but how about  
25          compensatory and punitive?



1 MR. METLITSKY: So same thing. Compensatory  
2 damages - - - if you wanted a purely nonretroactive  
3 application, you would do compensatories from the effective  
4 date and whatever punitive damages were available based on  
5 conduct after the effective date, because after all, the  
6 signal from the legislature is if you are currently  
7 prosecuting a baseless, vindictive lawsuit, stop, and if  
8 you don't stop, why wouldn't you - - - why wouldn't the  
9 victim of that lawsuit be entitled to the - - - the entire  
10 panoply of remedies?

11 JUDGE WILSON: Is there a way to consistently  
12 read 76(a) and 70(a), taking into account the continued and  
13 maintained language, so that the - - - I don't want to call  
14 it retroactivity, but application to pending cases applies  
15 in 70(a) but not in 76(a)? That is to say, they deal with  
16 different things.

17 MR. METLITSKY: So the theory, in theory, like,  
18 two different provisions could be different in terms of  
19 retroactivity. I think in this case, there are some  
20 reasons to not think that, so the commenced or continued  
21 language I think is not just relevant to whether, you know,  
22 you're entitled to damages from the date of the effective  
23 date, but just generally implies the existence of an  
24 already existing lawsuit.

25 That's one, and there's - - - on 76(a), there's

1 language that says that the actual malice standard applies  
2 when you're seeking to recover damages, and the Becker case  
3 is very similar. It suggests not full retroactivity that  
4 is to completed proceedings, but the intent to apply that  
5 sort of standard at the end of the case if the case hasn't  
6 ended yet.

7 JUDGE WILSON: But you might say that the  
8 standard in 76(a) doesn't apply to a pending case, but the  
9 provisions of 70(a) allowing for counterclaims and damages  
10 and - - -

11 MR. METLITSKY: You could in theory say that, but  
12 another reason not to say that, Your Honor, is because  
13 there was a prospective only provision in the statute that  
14 applied to both provisions, and the one thing that I  
15 haven't mentioned that this Court has also held to be quite  
16 important in determining the meaning of the statute is the  
17 public commentary on this.

18 There was commentary in the bill jacket that  
19 said, by the way, the commenced or continued language plus  
20 the deletion of the prospective only provision is going to  
21 make courts read this as retroactive, so and that's bad,  
22 they said, and so the governor, you shouldn't sign it.

23 JUDGE GARCIA: That's a letter from somebody,  
24 right? Is that a letter from somebody?

25 MR. METLITSKY: Yeah, it was - - - there were a



1 lot of letters, and you know, that was - - -

2 JUDGE GARCIA: That was one letter, though, from  
3 - - - who was that from? I can't remember.

4 MR. METLITSKY: It was from the Rent  
5 Stabilization Association, which is an important  
6 association when it comes to these kinds of suits because  
7 they often happen in landlord/tenant disputes, but this  
8 Court, in Duell against Condon, didn't suggest that you had  
9 to have a lot of letters.

10 The point is that the bill jacket is the material  
11 that is before the governor, and when there is express  
12 understanding by interested parties that a statute is going  
13 to be applied retroactively, that is good evidence that the  
14 statute was intended to be retroactive, and the thing that  
15 I don't understand is the answer to the deletion.

16 JUDGE GARCIA: Any issue, do you see due process,  
17 a due process issue with the punitive damages being applied  
18 to commencement prior to the effective date of the statute?

19 MR. METLITSKY: Your Honor, I don't think that  
20 there is any punitive damages issue here for the very  
21 simple reason that you never have a right to file a  
22 frivolous litigation.

23 Remember, if this litigation is found not to be  
24 frivolous, none of this applies. It only applies to  
25 frivolous litigation, and there is no vested right, due

1 process interest, or anything else in filing lawsuits that  
2 - - - the punitive damages provision only applies to  
3 lawsuits commenced or continued for the sole purpose of  
4 harassing, intimidating, punishing, or otherwise  
5 maliciously inhibiting the exercise of free speech. What  
6 due process right could possibly protect that kind of  
7 lawsuit?

8 ACTING CHIEF JUDGE CANNATARO: Thank you,  
9 Counsel.

10 MS. LEPERA: Good afternoon, Your Honors. May it  
11 please the Court. Christine Lepera on behalf of  
12 Respondents. I would like to first, if I might - - -

13 JUDGE GARCIA: Can you just pick up on that  
14 point? Why do you have the right to file a frivolous  
15 retaliatory lawsuit?

16 MS. LEPERA: Yes, Your Honor. Let me say at the  
17 outset, this is not a frivolous litigation. We didn't file  
18 a frivolous litigation. We filed a defamation action in  
19 response to Ms. Sebert starting the litigation and we take  
20 great issue with that.

21 But getting right, if I might, to these issues  
22 that the Court has flagged as considerable relevance to  
23 these issues, obviously, there is a presumption against  
24 retroactivity, which can be overcome, but it is not  
25 eliminated.

1 JUDGE WILSON: I wonder why you think of this as  
2 retroactive to begin with? That is, suppose for a moment  
3 that instead of 76(a), the legislature has said, we're  
4 going to cap defamation damages at a million dollars, and  
5 for a case that hadn't gone to trial yet, wouldn't you  
6 think that that cap would apply, and if not, what's the  
7 vested property interest in the unlimited damages as  
8 opposed to the cap?

9 MS. LEPERA: Here, I think that it is retroactive  
10 for two reasons as the Regina court did say, and - - -

11 JUDGE WILSON: Well, can you try - - -

12 MS. LEPERA: - - - as Landgraf said with respect  
13 to substantive rights - - -

14 JUDGE WILSON: - - - can you try my question  
15 about a damages cap first - - -

16 MS. LEPERA: Yes.

17 JUDGE WILSON: - - - and then say whatever it is  
18 you have to say?

19 MS. LEPERA: So the remedy issue with respect to  
20 a potential remedy on an existing claim may - - - may very  
21 well be considered remedial and procedural. This is a  
22 situation where you have a substantive change in the fault  
23 element of an existing claim and you also have a situation  
24 where you have increased liability, not just attorneys'  
25 fees aside, but compensatory and punitive damages that are

1 attended to that new retroactive decision.

2 JUDGE WILSON: The difficulty I have with that, I  
3 think, is that you could reduce that cap from a million-  
4 dollar example to a dollar and you would still characterize  
5 that as procedural, where here, you've toughened this  
6 standard for liability, but that might have less of an  
7 actual effect.

8 MS. LEPERA: I think it has potentially more of  
9 an effect, Your Honor. I think that, obviously, it's a  
10 case-by-case analysis, but when you impose on someone who's  
11 litigated for six, now almost nine years, a new claim for  
12 potential compensatory and punitive damages, as Landgraf  
13 says, clearly punitive damages is something that is  
14 abhorred in terms of the constitutional sense for  
15 retroactivity.

16 I do believe that this is a retroactive  
17 application. 76(a) adds a new element of fault to an  
18 existing cause of action. It changes that and it adds new  
19 claims for liability and compensatory damages. I would  
20 love to address the continued - - -

21 JUDGE GARCIA: You pled malice, though, right?

22 MS. LEPERA: We did, but ultimately, and here's  
23 where there's this issue. We are now - - - of course, the  
24 Court reverses. We are a private figure with a burden of  
25 proof of negligence. We have litigated that case for six

1 years in reliance on existing law.

2 That is clearly one of the factors that the  
3 courts consider when looking at both the due process but  
4 also the impairment of rights, so I believe that we have a  
5 retroactive application being sought affecting substantive  
6 rights under Regina. You look at that, and then you look  
7 to the clear intent.

8 There's no clear intent, here. There's no  
9 express intent. The continued language is from the 1992  
10 statute which is not retroactive. It was simply adopted  
11 over, and as the court here said in Shielcrawt,  
12 maintaining, which is the same thing as continuing, can  
13 have two different meanings.

14 It can have the meaning as appellant urges of  
15 continuing with respect to a pending case, but it can also  
16 have the meaning of continuing a new case that's filed upon  
17 which there's a determination that to continue it would be  
18 potentially frivolous.

19 It would be, for example, if I was accusing  
20 someone of defaming me and I sued so-and-so, and then in  
21 discovery, I learned, well, it literally wasn't so-and-so.  
22 It was someone else. That's the situation.

23 ACTING CHIEF JUDGE CANNATARO: Well, wouldn't  
24 that interpretation make the word that comes before it,  
25 commenced, superfluous in this context?

1 MS. LEPERA: No, Your Honor. In Shielcrawt,  
2 there was institute or maintain. It was the exact same  
3 analysis, so commence - - -

4 JUDGE WILSON: Maintain in legalese has kind of  
5 another meaning, right?

6 MS. LEPERA: It's ambiguous. Here's the point,  
7 Your Honor. With all due respect from our position,  
8 they're grasping at various things. Let me talk about the  
9 deletion, which is one of the centerpieces of their  
10 argument.

11 If you look back at the bill that was changed,  
12 there was also a significant number of procedural changes  
13 that were made with respect to 3211. Procedural changes  
14 with respect to a stay, procedural changes with respect to  
15 affidavits being submitted on a motion to dismiss, so it  
16 could clearly have been spelled out. We intend this to  
17 apply to pending cases as was said in Regina.

18 Even in Regina, the court wasn't clear that  
19 pending cases meant pending cases, but I think we would say  
20 if it says pending cases, it means pending cases. It  
21 didn't alter that. It didn't change that. It added some  
22 procedural changes. It wasn't a singular change between  
23 the two drafts, which is significant.

24 So you have the issue of the continue, which I  
25 think is ambiguity at best. You have the issue of the



1 deletion, which is ambiguity at best. You have a remedial  
2 concept, which is - - - there's lots of different  
3 definitions for remedial.

4 I don't think that that, as Majewski says, passes  
5 the muster to get it over the presumption, and you really  
6 only have the other word, immediately, which this Court  
7 repeatedly says. Does not - - -

8 JUDGE RIVERA: Now you've got a bit of a  
9 cumulative effect, right?

10 MS. LEPERA: I thought of that, Your Honor. Yes.

11 JUDGE RIVERA: This alone is not good enough.

12 MS. LEPERA: Correct.

13 JUDGE RIVERA: This isn't sufficient standing on  
14 its own.

15 MS. LEPERA: Yes.

16 JUDGE RIVERA: This also will not get you past  
17 the line, but at some point - - -

18 MS. LEPERA: Well, I think - - -

19 JUDGE RIVERA: - - - all of those have to have  
20 some meaning and impact on someone else.

21 MS. LEPERA: I thought about that a lot, Your  
22 Honor, and here's what I think.

23 JUDGE RIVERA: One would think.

24 MS. LEPERA: Ambiguity plus ambiguity plus  
25 ambiguity plus ambiguity, zero plus zero equals zero. It's

1           like a contract. The more ambiguities you have doesn't  
2           make it more clearer or susceptible, and here's the point.  
3           It's the legislature's burden.

4                        They know the law. They know what they're  
5           supposed to do to make it clearer for application. I've  
6           not seen a single case, and we've - - -

7                        JUDGE RIVERA: Well, but he is correct about  
8           this. Really, the debate is about what happens when you  
9           don't use the word, prospectively or retroactively, right?

10                      MS. LEPERA: That's right. There's no clear  
11           intent.

12                      JUDGE RIVERA: The point is, there is  
13           jurisprudence. If it had been expressed, we wouldn't be  
14           here.

15                      MS. LEPERA: Correct.

16                      JUDGE RIVERA: The point is what happens when it  
17           is not expressed - - -

18                      MS. LEPERA: That's right. That's right.

19                      JUDGE RIVERA: - - - but I do think that neither  
20           side has fully responded to some of the questioning,  
21           certainly from Judge Wilson, but I think from other members  
22           of the bench, why this is really a case about  
23           retroactivity.

24                      MS. LEPERA: Because it impairs significant  
25           rights, substantive rights.

1 JUDGE RIVERA: Yes, and what would those rights  
2 be?

3 MS. LEPERA: The rights would be - - -

4 JUDGE RIVERA: In this case.

5 MS. LEPERA: In this case, the right would be,  
6 assuming there's affirmance of the private figure status -  
7 - -

8 JUDGE RIVERA: Okay.

9 MS. LEPERA: - - - that it would be a change in  
10 the fault element of a cause of action. The cause of  
11 action is a substantive right. It would be a change in the  
12 burden of proof on that fault.

13 JUDGE GARCIA: But you have no decision yet on  
14 the malice yet.

15 MS. LEPERA: No, I understand. If - - -

16 JUDGE GARCIA: But you've pled malice.

17 MS. LEPERA: Yes.

18 JUDGE GARCIA: You've argued and litigated  
19 malice.

20 MS. LEPERA: Yes.

21 JUDGE GARCIA: You're up here on malice, so how  
22 are we changing the standard for a verdict that hasn't  
23 happened yet?

24 MS. LEPERA: Well, if these are going to be  
25 decided presumably together, there is an interplay, and one

1 is not moot by the other, but - - -

2 JUDGE RIVERA: But isn't that the point in part  
3 that I think my colleague is asking about, and he'll  
4 correct me if I'm wrong, that if you start the litigation  
5 uncertain what burden might be imposed - - -

6 MS. LEPERA: Correct, correct.

7 JUDGE RIVERA: - - - then what possible  
8 substantive right is being adversely affected by a decision  
9 that is not the one you were looking for?

10 MS. LEPERA: If this Court were to determine that  
11 he is still a private figure, then there is a substantive  
12 impact. Also clearly it's the new liability.

13 JUDGE RIVERA: But all I'm saying - - - but  
14 that's the point, right?

15 MS. LEPERA: So that's the rights factor.

16 JUDGE RIVERA: You went into the litigation not  
17 knowing where that would go.

18 MS. LEPERA: Yes, I understand.

19 JUDGE RIVERA: You have your arguments. You  
20 certainly thought they were colorable, if not the ones - -  
21 -

22 MS. LEPERA: Correct.

23 JUDGE RIVERA: - - - that would be persuasive,  
24 and the fact of the matter is, a court may very well hold  
25 against you moving up the food chain, right?

1 MS. LEPERA: May very well, but again, now you're  
2 confronted with the issue with respect to both the new  
3 claim for liability for compensatory and punitive, and  
4 there's no question that applying that in this context,  
5 even on a going forward basis, it would be theoretically  
6 like saying to a court or a jury, well, let's forget about  
7 the nine years of litigation. Let's only look at the trial  
8 and see whether there was a substantial basis for the  
9 trial.

10 It's, I don't want to say slicing the salami too  
11 thin, but it's a dichotomy that's a fiction, so of course  
12 you can't just apply it prospectively.

13 JUDGE WILSON: But there's something that's  
14 unusual about your substantive due process claim, which is  
15 that ordinarily, the substantive right that's claimed is  
16 something on which the person relied in taking some action,  
17 and this is different. That is, the substantive claim that  
18 you're making is a claim that you have a right to the  
19 essentially legal rules for determining a dispute the way  
20 they existed previously, and I can't think of another case  
21 like that.

22 MS. LEPERA: I think that with respect to the  
23 issue of whether or not there's a SLAPP statute on the  
24 books, every practitioner and every client looks to see  
25 whether there's a SLAPP statute or not in pursuing a claim

1 early on because it does change the burden. It does change  
2 the whole metrics and you're relying on existing laws as to  
3 the exist - - - the whole point of a SLAPP statute and very  
4 different in the other states.

5 California doesn't have anything this broad. You  
6 are taking steps. You are pursuing your litigation  
7 strategy in the absence of an anti-SLAPP statute, of  
8 course.

9 JUDGE TROUTMAN: But don't you prepare for the  
10 possibility that he's not deemed to be a private person?

11 MS. LEPERA: Yes, but that doesn't bring on the  
12 claims of liability, then. It doesn't bring on the  
13 compensatory or punitive damages claims. That is one  
14 single - - - but these are - - - to be - - - I guess the  
15 court - - -

16 JUDGE TROUTMAN: So the actual malice part is one  
17 part.

18 MS. LEPERA: Correct.

19 JUDGE TROUTMAN: But you were talking about the  
20 exposure - - -

21 MS. LEPERA: 70(a), Your Honor.

22 JUDGE TROUTMAN: The exposure?

23 MS. LEPERA: Yes. 76(a) is the new definition  
24 and the broad swath that has been given now to this anti-  
25 SLAPP statute in New York, far more broadly than I would

1 say most anti-SLAPP statutes around the country.

2 JUDGE WILSON: It just seems to me a fairly  
3 dangerous proposition to claim that you have a substantive  
4 due process right in the rules of evidence and the rules of  
5 the burden of proof in how much damages you can occur, and  
6 all the things that go into getting a claim you have  
7 litigated to its end.

8 The claiming a substantive due process right in  
9 those things would really impair the legislature and the  
10 courts in their ability to adapt the law.

11 MS. LEPERA: This is beyond the rule of evidence,  
12 Your Honor, and I think that the appellant has cited a  
13 couple of cases about changing the rule of evidence might  
14 not be an impairment, but the court is also given a lot of  
15 clarity in saying that a question of vested rights or  
16 substantive rights - - - it's a case-by-case analysis.

17 It has to be looked at in the concept of  
18 fairness. It has to be looked at in the context of how  
19 long of a retroactivity, even before you get to due  
20 process, which, of course, if you look at six to nine years  
21 of the retroactivity application, I've not seen any case  
22 that has sanctioned anything that lengthy.

23 JUDGE RIVERA: So does your entire argument then  
24 turn on whether or not we agree with you that there's a  
25 substantive right that's impaired? If we disagree with you



1 on that, do you lose?

2 MS. LEPERA: If you disagree that there's a  
3 substantive right that is affected by virtue of 76(a) and  
4 70(a), then I think we're still in the land of, is there an  
5 express legislative intent? I think that's the balance. I  
6 do not agree that it's moot, but I think that obviously to  
7 the extent we are correct, and we believe we are, that by  
8 virtue of this 76(a), which is changing a fault element of  
9 a statute - - - of a cause of action and the 70(a)  
10 liability component combined.

11 Those two under this Court's jurisprudence and in  
12 the analysis of the span of retroactivity being afforded  
13 generally, even though that's usually looked at in due  
14 process cases, it should be looked at just generally.

15 If you look at it in that context, I think what  
16 you're seeing is here, you must have a clear expression,  
17 and there was ample opportunity to do it. I think the  
18 cherry picking that's going on here to close that gap of  
19 the express legislative intent is where I think the burden  
20 shifts back to rebut the presumption against retroactivity.

21 It is not rebutted unless there is that clear  
22 expression or by necessary implication required.

23 JUDGE GARCIA: Counsel?

24 MS. LEPERA: Yes?

25 JUDGE GARCIA: I see your time is up.



1 MS. LEPERA: Yes, Your Honor.

2 JUDGE GARCIA: But one last thing. If we were to  
3 find that there is an application of the anti-SLAPP  
4 statute's malice standard, is there any reason for us to  
5 decide the public private figure issue?

6 MS. LEPERA: Yes, Your Honor, there is. It is  
7 not moot and that is because there are a number of  
8 statements that arguably fall within the private category  
9 that would be her burden of proving that respectively some  
10 of the statements that were made were made in a private  
11 context, not a public forum, yes. It's not moot.

12 ACTING CHIEF JUDGE CANNATARO: Thank you.

13 MS. LEPERA: Thank you, Your Honor.

14 MR. METLITSKY: Thank you, Your Honor. Just a  
15 few points. So first of all, as to due process, the  
16 Supreme Court held I think for the first time in 1912 that  
17 there is no due process right to a particular burden of  
18 proof or anything like that. We cite the cases in our  
19 reply brief there, Easterling Lumber and Reitler.

20 As to a due process right as to the counterclaim,  
21 what this Court explained in Regina is that there's a due  
22 process issue when your past conduct was immunized by then  
23 current law. You never had the right to file frivolous  
24 litigation. You never had the right to file harassing  
25 litigation.

1           There was exposure for sanctions, disbarment, you  
2 know, malicious prosecution, all of that. All the  
3 legislature did was make the sanctions stronger. As to  
4 this point about layering ambiguity upon ambiguity, that's  
5 not what we're talking about.

6           Every single one of the things that we have cited  
7 is evidence in favor of retroactive intent, and so we think  
8 any one of them really is sufficient, but when you layer  
9 them all on top of each other, I mean, the fact that the  
10 legislature took out a prospective only provision, the fact  
11 that commenters understood the effect in the commenced or  
12 continued language, all of that is evidence in our favor,  
13 and cumulatively, it's got to be sufficient.

14           As to the Shielcrawt case, that case did not use  
15 the words, commenced. It used maintain. Maintain, in law,  
16 can mean starting a lawsuit or it can mean continuing a  
17 lawsuit. Continuing cannot mean starting a lawsuit and it  
18 obviously can't mean starting a lawsuit when the phrase is  
19 commence or continued, right?

20           And then finally, the deletion of the prospective  
21 only provision. I have not heard an explanation for that  
22 deletion other than that they didn't want it to apply  
23 prospective only. A legislature looking at that bill,  
24 seeing a prospective only provision, and saying, you know  
25 what, I want this bill to be prospective only so I am going

1 to delete the prospective only provision, is nonsense.

2 That can't possibly have happened. The only  
3 reason why it would have deleted it is because you didn't  
4 want it to apply. That's what the court held in Majewski  
5 and that's what the court held in the Grand Jury cases, and  
6 we think that even by itself, and certainly, with all the  
7 other evidence dispositive of the legislature's retroactive  
8 intent.

9 ACTING CHIEF JUDGE CANNATARO: Thank you.  
10 Counsel, would you like to move on to privileges and public  
11 figure?

12 MR. METLITSKY: Just one second, Judge. So thank  
13 you again, Your Honor. I'd like to reserve three minutes  
14 on this one also.

15 So here, there are two independent issues as the  
16 Court knows, and I'd like to start with the litigation  
17 privilege issue because it's got a lot of moving pieces,  
18 and then hopefully, I'll have a little bit of time at the  
19 end to talk about public figure.

20 So there are three different related litigation  
21 privileges, here. The absolute privilege for statements  
22 made in court, the section 74 privilege for statements made  
23 about litigation, and the prelitigation privilege.

24 So as to the absolute litigation privilege first,  
25 the First Department has recognized the sham exception for

1 that privilege, and the First Department's decision is just  
2 definitionally incorrect.

3 The whole point of the absolute privilege for  
4 statements made in litigation is that it affords no  
5 exceptions. It is - - - so long as the statements are  
6 pertinent to the litigation, which is not in dispute, there  
7 is no malice exception to that - - -

8 JUDGE GARCIA: Did you make that argument or was  
9 it your argument that this wasn't a sham litigation?

10 MR. METLITSKY: Right, so our argument was that  
11 it wasn't a sham litigation and we still have that fallback  
12 argument as to the absolute privilege point. This waiver  
13 piece, by the way, only applies to the absolute privilege.  
14 It doesn't apply to the other one.

15 JUDGE GARCIA: I see.

16 MR. METLITSKY: And so that is not a waiver for  
17 two reasons. The first reason is that this Court can  
18 always hear purely legal questions - - - I'm just quoting,  
19 if it could not have been obviated or cured by factual  
20 showings or legal counter steps in the court of first  
21 instance, and that obviously applies here.

22 But the actual reason why we didn't raise it is  
23 because the First Department recognized the sham exception,  
24 like, in the '80s, the 1980s, I believe. It didn't come up  
25 for a while and there were a bunch of federal district

1 courts and New York trial courts that had said, this is a  
2 weird decision.

3 It's an outlier decision. It's inconsistent with  
4 Court of Appeals precedent, and one of those decisions, one  
5 of those trial court decisions was the Flomenhaft decision.  
6 That's what the trial court held. That one went up to the  
7 First Department, and all of these arguments that we're  
8 making here were vetted in that case.

9 That was the argument that the original sham  
10 exception was just definitionally inconsistent with this  
11 Court's precedent, and the First Department - - -

12 ACTING CHIEF JUDGE CANNATARO: But it hadn't been  
13 decided here, the - - - you know, whether the Flomenhaft  
14 decision was valid or not. Isn't that an argument you  
15 could have made at the trial court?

16 MR. METLITSKY: No, I don't think so. I mean,  
17 the trial court was bound by the Flomenhaft decision, and  
18 the Appellate Division was certainly not - - - it would  
19 have been totally futile to reargue that point when they  
20 had rejected these very same arguments three years earlier,  
21 right?

22 Why would we have ever done that, and it seems to  
23 me the only court that can decide that the First  
24 Department's sham exception is invalid is this Court. We  
25 raised this argument in the motion for leave to appeal and

1 the Appellate Division granted the motion, so - - -

2 JUDGE RIVERA: And you were not willing it risk  
3 that a different panel might see it your way?

4 MR. METLITSKY: I don't think it - - -

5 JUDGE RIVERA: It does happen in the First  
6 Department. It happens sometimes in - - - in the division.  
7 They come out different ways.

8 MR. METLITSKY: I don't think the Appellate  
9 Division would have had authority to overrule its own  
10 three-year-old prior decision, especially when these  
11 particular arguments were vetted, but if the Court has a  
12 worry about that, again, I would just - - -

13 JUDGE RIVERA: Well, no, I said it because you  
14 said these arguments came up in - - - in the other case.

15 MR. METLITSKY: Flomenhaft, yeah.

16 JUDGE RIVERA: Not - - - not that they had been  
17 decided in the '80s when the doctrine is originally  
18 adopted.

19 MR. METLITSKY: Right, exactly.

20 JUDGE RIVERA: It strikes me as more recent and  
21 might very well have lent itself to an argument of why the  
22 prior panel perhaps went astray.

23 MR. METLITSKY: No, sorry. Let me just start  
24 again.

25 JUDGE RIVERA: Yes.

1 MR. METLITSKY: So in 2015, these arguments were  
2 raised, not in 1980, whatever.

3 JUDGE RIVERA: Right, yes.

4 MR. METLITSKY: In 2015, these arguments were  
5 raised, and the Appellate Division just rejected them. It  
6 said that its own sham exception decision was not an  
7 outlier, and so three years later, we're supposed to say it  
8 was?

9 JUDGE WILSON: So why is that holding wrong,  
10 substantively?

11 MR. METLITSKY: That holding was wrong because  
12 since I think 18, I don't know, '90, this Court has said as  
13 a definitional matter, the absolute litigation privilege  
14 does not have any kind of malice exception. I think their  
15 argument, if I understand it, is that might be true for  
16 statements made in an already existing litigation, but it  
17 doesn't apply to a litigation that's started for some bad  
18 purpose.

19 And that argument is just foreclosed by the  
20 court's decision in Weiner against Weintraub, which was the  
21 defamatory statements were in the commencement, the  
22 complaint filed in that litigation, and it also seems to me  
23 to make no sense.

24 If anything, right, the purposes behind the  
25 absolute litigation privilege apply with more force when

1       you're commencing a litigation because there's a petition  
2       clause right to commence litigation, and the very last  
3       thing you would want is for someone with a meritorious  
4       claim to think twice about bringing that claim because  
5       they're worried about a defamation suit brought against  
6       them.

7               And then on the other side of the ledger, unlike  
8       just for statements made within litigation, the  
9       commencement of a frivolous litigation, as we've already  
10      discussed, is already subject to sanction, disbarment,  
11      whatever, malicious prosecution, all of that.

12              So there's just no reason to create the strange,  
13      totally unheard of exception to the absolute litigation  
14      privilege, so that's five of the statements that were made  
15      in, like, complaints, counter claims, and the like.

16              Then there are nineteen statements under section  
17      74 of the fair report privilege, and the main argument  
18      there is that the court's decision in Williams against  
19      Williams applies, and so the privilege doesn't apply. That  
20      is a sham exception.

21              Williams against Williams is something akin to a  
22      sham exception. The question is its scope, and it seems to  
23      me that Williams doesn't apply here for two reasons. So  
24      Williams was - - - the worry there was somebody files a  
25      complaint purely for purposes to defame.



1           That complaint is privileged, by the way. The  
2 whole premise of Williams is that the complaint is  
3 privileged, but then you send out a press release to  
4 publish it and then you're going to hide behind section 74.  
5 Williams said, that's no good, but here, my client, on the  
6 same day that she filed a complaint, became the defendant  
7 in this case.

8           You can't possibly apply the Williams exception  
9 to the defendant in a litigation talking about her  
10 defenses. That has never - - - nobody's ever even thought  
11 to argue that.

12           JUDGE WILSON: Another unusual thing about  
13 Williams, if I remember the facts correctly, which is it  
14 was a breakup of the partnership between two brothers - - -

15           MR. METLITSKY: Right.

16           JUDGE WILSON: - - - and the one brother was  
17 using the lawsuit and particularly the dissemination of the  
18 press release to send to the trade group - - -

19           MR. METLITSKY: Yes.

20           JUDGE WILSON: - - - essentially to injure the  
21 business of his brother who beat him.

22           MR. METLITSKY: That's right.

23           JUDGE WILSON: So there was, like, an  
24 anticompetitive element to it as well.

25           MR. METLITSKY: Yeah, that's right. I mean, it

1 was a very strange case and it's kind of a strange decision  
2 because of course the statute not only doesn't admit any  
3 exceptions, but it had been amended in the past to get rid  
4 of a malice exception.

5 Like, there was a malice exception in the statute  
6 and then that was taken out, and so if you - - -

7 JUDGE GARCIA: So would it apply to the  
8 California action that your client brought and not the New  
9 York action?

10 MR. METLITSKY: No, no. So our primary  
11 submission - - - well, there is no difference between the  
12 two.

13 JUDGE GARCIA: Well, one is a counter claim I  
14 thought you said - - -

15 MR. METLITSKY: Say that again?

16 JUDGE GARCIA: One is a counter claim - - - I  
17 thought you said that Williams doesn't apply to counter  
18 claims.

19 MR. METLITSKY: No, Williams doesn't apply when  
20 you're a defendant in a lawsuit, so what happened here is  
21 my client filed a lawsuit the same day they filed a  
22 lawsuit, this lawsuit.

23 JUDGE GARCIA: And are some of the statements  
24 included in that lawsuit, the allegedly - - - just are some  
25 of the alleged defamatory statements included in the

1 California lawsuit your client filed?

2 MR. METLITSKY: So what I'm talking about, none  
3 of them were - - - none of these statements were in the  
4 lawsuit. They were about lawsuits. They were, like, here  
5 are our allegations, right?

6 JUDGE GARCIA: Right.

7 MR. METLITSKY: Yeah.

8 JUDGE GARCIA: So were they about the California  
9 suit or no?

10 MR. METLITSKY: They're the same. The California  
11 suit - - -

12 JUDGE GARCIA: Right, but California is an  
13 affirmative suit, and I thought you were making a  
14 distinction about counter claims under Williams.

15 MR. METLITSKY: Not counter claims. So we are a  
16 defendant in this action. Every single one of these  
17 statements was made as a defendant in this action. This  
18 action is, you defamed me when you made the allegation that  
19 Dr. Luke drugged and raped my client, and all these  
20 statements were, no, those statements, those are true.

21 JUDGE GARCIA: Isn't that a little bit - - -  
22 cutting it a little thin, because you bring an action, and  
23 then you use this as a defense here, and you're commenting  
24 also on that action, and you're knocking out that as an  
25 absolute litigation privilege, but then you're saying

1 there's no Williams exception because you're only  
2 commenting as a defense?

3 MR. METLITSKY: Well, it's - - - I mean, this is  
4 what happened, right? So they filed a complaint. They  
5 have this use - - -

6 JUDGE GARCIA: The press filed a complaint.

7 MR. METLITSKY: We filed a complaint, they filed  
8 a complaint. We both filed a complaint. There was a press  
9 blitz on their side. They're going to say there was one on  
10 our side. Fine, for present purposes, let's just assume,  
11 but they tried to absolutely destroy my client's reputation  
12 in the press - - -

13 JUDGE GARCIA: And that's what kind of this case  
14 is all about.

15 MR. METLITSKY: Absolutely, but - - -

16 JUDGE GARCIA: - - - but two cases get filed.

17 MR. METLITSKY: Yeah.

18 JUDGE GARCIA: You file, they file.

19 MR. METLITSKY: Right.

20 JUDGE GARCIA: And now you say, no, no, no, this  
21 is only, you know, applies to our defense, but you filed,  
22 right?

23 MR. METLITSKY: But it's not that it only applies  
24 to our defense. I'm just saying the statute is absolute.  
25 There is a tiny exception to the statute that you have to

1           construe narrowly. I mean, courts don't even do this  
2           anymore, right, but you have to construe the exception  
3           narrowly because it's not in the statute, and all I'm  
4           saying is in this circumstance, when you're both a  
5           plaintiff and a defendant and the statements are relevant  
6           to both your suit and the other suit, Williams can't apply.

7           In any event, just forget about the defense for a  
8           second. Williams can't apply anyway because the only way  
9           that Williams makes sense in combination with the deletion  
10          of the actual malice provision from this statute is you  
11          can't interpret Williams as just, like, a malice provision.

12          JUDGE TROUTMAN: So the California suit - - -

13          MR. METLITSKY: Yeah.

14          JUDGE TROUTMAN: - - - that was discontinued is  
15          irrelevant?

16          MR. METLITSKY: No, right now, I'm arguing that  
17          just assume that it is relevant. Assume that the only suit  
18          was the California suit for present purposes. I think we  
19          win on the fact that they sued us and we were a defendant,  
20          but if you don't like that, here's another argument, just -  
21          - -

22          JUDGE TROUTMAN: Even though your client is the  
23          first one that instituted an action?

24          MR. METLITSKY: Yeah, because this isn't about -  
25          - - this isn't about statements in the action. This is



1 about public statements and whether they're privileged  
2 under the fair report privilege. Parties are always  
3 allowed to talk about their own litigation or whether  
4 they're a defendant or a plaintiff.

5 JUDGE GARCIA: And this would apply, though, to  
6 the copy of your complaint that you sent to TMZ before the  
7 litigation started?

8 MR. METLITSKY: So I think that one applies both  
9 under the fair report privilege and the prelitigation  
10 privilege - - -

11 JUDGE GARCIA: But let's stick to this one.

12 MR. METLITSKY: The fair report.

13 JUDGE GARCIA: You're arguing that this would - -  
14 - fair reporting would apply because you're raising this  
15 defense in New York to you sending your complaint in the  
16 California action to the TMZ?

17 MR. METLITSKY: No, so that's the one statement  
18 that wouldn't apply as a defendant because we weren't a  
19 defendant then, but it would apply - - - let me explain why  
20 the Williams exception shouldn't apply even if you'd forget  
21 about the fact that we're defendants.

22 JUDGE GARCIA: That's just anticipation of  
23 litigation, the TMZ.

24 MR. METLITSKY: No, that's also under the fair  
25 report privilege. The reason that sort of embargoed copies

1 of complaints should fall under the fair report privilege  
2 is because the whole purpose of that privilege is to make  
3 sure that the public understands fair and accurate and  
4 quick reporting of judicial proceedings.

5 JUDGE GARCIA: At least as to that statement,  
6 there's no argument that that's made as part of your  
7 defense to the New York case?

8 MR. METLITSKY: Yeah, that's right. So let me  
9 be, like - - - let me try to be totally clear. I have two  
10 arguments for why Williams doesn't apply. One of them is  
11 that one, so I think we're right about that, but for  
12 present purposes, assume I just never said it, and now  
13 we're just talking about our complaint, okay?

14 So there's a second reason why the Williams  
15 exception doesn't apply, because I think the Williams  
16 exception has to apply only to complaints that are not real  
17 complaints. They're filed purely for purposes of  
18 defamation and not as an instrument to institute - - -

19 JUDGE GARCIA: Isn't that a jury issue here?

20 MR. METLITSKY: Say it again?

21 JUDGE GARCIA: Why wasn't that a jury question?

22 MR. METLITSKY: Oh, because you know that just as  
23 a matter of fact, that this litigation was prosecuted. My  
24 client filed the California litigation. It was stayed in  
25 favor of this action. She tried to get the stay lifted.



1 She - - -

2 JUDGE RIVERA: So that's the rule? If you pursue  
3 the action?

4 MR. METLITSKY: Yes, I think so. So it - - -

5 JUDGE RIVERA: And so how far do you have to go  
6 with that pursuit?

7 MR. METLITSKY: Well, I'll tell - - - I think if  
8 you start litigating, it's probably enough, but let me just  
9 tell you what my client did.

10 JUDGE RIVERA: Start litigating as in, I filed  
11 the lawsuit?

12 MR. METLITSKY: No, no, no. If you actually  
13 start engaging in the litigation process, because then, you  
14 know, then - - -

15 JUDGE RIVERA: Filing motions, responding to  
16 motions?

17 MR. METLITSKY: Yeah, and here's what happened  
18 here. So she filed the complaint. It was stayed in favor  
19 of this action. She tried to get the stay lifted. She  
20 appeared at multiple conferences. When it became clear  
21 that she wasn't going to get the stay lifted, she dropped  
22 that action and filed the exact same action here as counter  
23 claims, right?

24 She litigated that through a motion to dismiss.  
25 That was dismissed on limitations grounds. She appealed,





1 dropped the appeal, and instead tried to - - -

2 JUDGE RIVERA: Well, wherever the line might be  
3 drawn - - -

4 MR. METLITSKY: Yeah.

5 JUDGE RIVERA: We don't necessarily have to draw  
6 that today or at least in this case because this is so far  
7 past any possible line.

8 MR. METLITSKY: Exactly. You don't have - - -  
9 exactly. You don't have to draw the line here because this  
10 is - - - I mean, she litigated these claims either in  
11 California or in New York, all the way through - - -

12 JUDGE RIVERA: So is your rule that if all you do  
13 is file and do nothing else - - -

14 MR. METLITSKY: Yeah, I think - - -

15 JUDGE RIVERA: Or eventually withdraw or abandon?

16 MR. METLITSKY: Yes, and ironically enough, I  
17 think a good model for this kind of exception that I'm  
18 talking about is how the New York courts before - - -  
19 excuse me, the Appellate Division, the First Department  
20 before this case understood its own sham exception to the  
21 absolute privilege.

22 Every one of those cases was always about  
23 litigation that actually was not pursued, and the reason  
24 they thought that that was okay as a sham exception is  
25 because it wasn't real litigation.

1 JUDGE RIVERA: What if you've made an error?  
2 What if you made an error in your assessment about your  
3 lawsuit and you filed, you get an answer, a motion to  
4 dismiss, and you're persuaded, and now you withdraw?

5 MR. METLITSKY: Well, so I think that would be an  
6 additional kind of situation where the - - -

7 JUDGE RIVERA: Did they pursue this argument that  
8 it's a sham, and that would then be a fact question? This  
9 is why we - - -

10 MR. METLITSKY: That might be a fact question  
11 unless there are no facts, you know, material facts in  
12 dispute, but that could be a fact question. It can't be a  
13 fact question when the litigation was actually pursued, and  
14 again, if you construe the Williams exception more broadly  
15 than that, you're just going to have a malice exception  
16 which is what the legislature excised from the statute in  
17 the first place.

18 ACTING CHIEF JUDGE CANNATARO: Thank you,  
19 Counsel.

20 MR. METLITSKY: Okay. I'm happy to answer on  
21 public figure if - - - on rebuttal if you have any  
22 questions.

23 ACTING CHIEF JUDGE CANNATARO: In your rebuttal,  
24 sir.

25 JUDGE RIVERA: Please.

1 MR. STEINBERG: Good afternoon, Your Honors.  
2 David Steinberg for Respondents. May it please the Court.

3 We have a very unique situation here, Your Honor.  
4 This is a rare situation where the improper purpose and the  
5 sole and improper - - - purpose of the litigant's activity  
6 is spelled out in writing. Her press plan stated that it  
7 was designed to incite a deluge of negative media attention  
8 and public pressure.

9 JUDGE GARCIA: What's an absolute privilege if  
10 there's a sham exception?

11 MR. STEINBERG: Your Honor, I think this Court  
12 has enunciated going back over a century that if a  
13 privilege is abused, then protection is withdrawn, and I  
14 think that the sham exception as articulated - - -

15 JUDGE GARCIA: Then there's never - - -

16 ACTING CHIEF JUDGE CANNATARO: That reads  
17 absolute - - - yeah, I'm sorry. That takes absolute out of  
18 the equation. What does absolute mean if not that?

19 MR. STEINBERG: Well, I think in this situation,  
20 Your Honor, as the First Department has articulated for 40  
21 years now, when something is filed for a sole and improper  
22 purpose, that it doesn't come within any kind of privilege.

23 JUDGE WILSON: The difficulty I'm having with the  
24 line you were about to go down which is the deluge of  
25 negative publicity, scorched earth, burn these people to

1 the ground, destroy their families and all that sort of  
2 stuff is that that doesn't mean the allegations aren't  
3 true, right?

4 You might actually have a meritorious claim and  
5 still be super aggressive and want to destroy your  
6 adversaries, so I'm not sure why that line you were going  
7 to go down matters.

8 MR. STEINBERG: Because - - -

9 JUDGE RIVERA: Especially in this industry, since  
10 this is a common practice.

11 MR. STEINBERG: Because Your Honor, in this  
12 particular situation, in these unique facts, the evidence  
13 supports a conclusion that the sole reason the litigation  
14 was filed was to defame the respondent in order to try to  
15 achieve something that was otherwise unavailable.

16 JUDGE GARCIA: But doesn't the balancing of the  
17 qualified and absolute privileges get you that? An  
18 absolute privilege applies to the documents you file and  
19 these qualified privileges, taking into account the  
20 argument you're making.

21 MR. STEINBERG: Well, Your Honor, of course, we  
22 do believe that the qualified privileges for the press  
23 statements and the prelitigation statements certainly do  
24 protect those statements, but for the purpose of someone  
25 who just files a complaint and does nothing else, but that

1 complaint is for a sole and improper purpose, what is the  
2 remedy for that person?

3 ACTING CHIEF JUDGE CANNATARO: So you reject the  
4 argument that this was not a situation where it was just a  
5 filing of a complaint and nothing else? I mean, there was  
6 stay litigation in California. There was a number of  
7 motions made right through a dismissal motion in New York,  
8 so this is not - - - the test that's being promoted here  
9 is, let's see how serious they were about this litigation,  
10 and it seems as if they were.

11 MR. STEINBERG: Your Honor, we take very much an  
12 opposition to any argument that this was litigated. This  
13 case was filed. It was abandoned. She said she would  
14 amend. She didn't. She said she would appeal. She  
15 didn't.

16 There was no litigation on the merits and the  
17 issue of whether or not she intended to litigate is an  
18 issue that should go to the jury. I think it's important  
19 to emphasize that none of - - -

20 JUDGE RIVERA: Well, the intent issue carries  
21 weight at the point you're deciding whether or not to file,  
22 correct?

23 MR. STEINBERG: I'm sorry?

24 JUDGE RIVERA: The moment she's deciding to file,  
25 that's about the intent? I'm filing this - - - I thought

1 your argument was, the only point of filing this is because  
2 I wish to defame, because I'm trying to get them to - - -  
3 I'm trying to coerce them to give me what I've demanded in  
4 these negotiations. I thought that was your argument.

5 MR. STEINBERG: Correct, Your Honor.

6 JUDGE RIVERA: Okay. So she files and then your  
7 client files, right?

8 MR. STEINBERG: Yes.

9 JUDGE RIVERA: So is it possible that one would  
10 then say, we've got to have a particular strategy given now  
11 that we're not only in a plaintiff position in this  
12 jurisdiction, but we're in a defendant's position in this  
13 other jurisdiction?

14 MR. STEINBERG: Your Honor - - -

15 JUDGE RIVERA: Would that not call for counsel to  
16 reconsider strategy and sit down with their client?

17 MR. STEINBERG: If Your Honor is referring to the  
18 exception to - - -

19 JUDGE RIVERA: Yeah.

20 MR. STEINBERG: - - - in Williams for the  
21 statements made to the press, there is no such exception  
22 enunciated in Williams. Williams simply says that if you  
23 are - - - you file a malicious action and then you try to  
24 get publicity for that malicious action, you can lose  
25 whatever privilege exists and you can be subject to a

1           defamation claim.

2                     And in Williams, it was just a motion to dismiss.  
3           They were just allegations. Here - - -

4                     JUDGE RIVERA: Let me ask you this. I understood  
5           you to be arguing that the plan that you discover is the  
6           smoking gun. What if there is no plan, but there are press  
7           statements?

8                     MR. STEINBERG: Your Honor, that - - -

9                     JUDGE RIVERA: Is it then a fact question that  
10          goes to the jury whether or not those statements to the  
11          press were intended as part of this plan of solely filing  
12          to defame or coerce?

13                    MR. STEINBERG: Your Honor, each case would  
14          obviously have to be looked at on its own individual  
15          merits. We have that plan here and we certainly have a  
16          reasonable basis for our jury to conclude that this was  
17          filed for sole and improper purpose, and it's important to  
18          emphasize - - -

19                    JUDGE RIVERA: I'm just trying to get a better  
20          sense of sort of the contours of this rule. If you don't  
21          have the plan - - - I understand in your case, you think  
22          we've got, as they say, the goods, but let's say you don't  
23          have the plan.

24                    What else might reveal this? Is it merely you  
25          filed and did nothing else but made these statements to the

1 press or made public statements?

2 MR. STEINBERG: No, Your Honor. I think you're  
3 going to be put to the test and you're going to be put to  
4 the test early on as to whether you can actually show that  
5 there was a sole and improper purpose for the filing of the  
6 litigation.

7 It's important to emphasize, Your Honor, that - -  
8 -

9 JUDGE RIVERA: Not have a chilling effect that  
10 undermines the purpose of the exception?

11 MR. STEINBERG: I'm sorry?

12 JUDGE RIVERA: How does that not have a chilling  
13 effect that undermines the purpose?

14 MR. STEINBERG: A chilling effect for filing a  
15 lawsuit?

16 JUDGE RIVERA: Yes, and perhaps particular types  
17 of very candid conversations between lawyer and client and  
18 public statements.

19 MR. STEINBERG: Are you talking about the  
20 prelitigation privilege now?

21 JUDGE RIVERA: Yes.

22 MR. STEINBERG: Your Honor, the prelitigation  
23 privilege as enunciated in the seminal case that was  
24 decided by this Court, *Front*, referred to communication  
25 between counsel that was leading up to litigation, and in



1 that case, what they said was, in essence, you can't have  
2 blackmail. You can't have extortion. You can't have  
3 defamation in prelitigation communications. Those  
4 privileges are not protected, and what the court said was  
5 you have to have good faith anticipated litigation.

6 Now, good faith anticipated litigation can't just  
7 mean, I have a defamatory blackmail extortion purpose, but  
8 I have a good faith belief that I'm going to file a  
9 meritless lawsuit, so therefore, I'm protected.

10 It has to be good faith litigation and that - - -  
11 we do not have that here. There is ample evidence - - -  
12 the court, the trial court, and the First Department  
13 unanimously found issues of fact to go to the jury as to  
14 whether these privileges should apply.

15 They did not reject these privileges. She still  
16 can assert those privileges.

17 JUDGE GARCIA: Counsel, is there a difference - -  
18 - you're using the language, sole and improper purpose  
19 filing. Is there a difference between that and malice?

20 MR. STEINBERG: Yes, Your Honor, I believe it is.  
21 When you are using the litigation for an ulterior purpose,  
22 for a purpose that has nothing to do with the actual merits  
23 of the litigation, then that should be considered different  
24 than malice.

25 You are, in essence, abusing the court process.



1 You are using it as a tool of oppression itself.

2 JUDGE WILSON: Isn't that a little - - - I'm not  
3 sure about that. I mean, I think I've had clients who  
4 filed, let's say, breach of contract actions and securities  
5 fraud actions, but what they really wanted was a patent  
6 license, and they were using a piece of litigation as a  
7 leverage to get something else they wanted. I didn't see  
8 anything wrong with that.

9 MR. STEINBERG: Well, Your Honor, I think you'd  
10 have to look at the facts of that particular case, but  
11 here, we have, in writing, spelled out - - -

12 JUDGE WILSON: Exactly, but it is exactly the way  
13 you described it. An ulterior purpose having nothing  
14 really to do with the breach of contract litigation. Now,  
15 those were not frivolous breach of contract litigations,  
16 but I'm not sure that the ulterior purpose gets you where  
17 you want to go.

18 MR. STEINBERG: Well, I think that the ulterior  
19 purpose that we're talking about here is the purpose to  
20 defame. The purpose to destroy someone's reputation.

21 JUDGE GARCIA: The malice, though - - - I mean, I  
22 think you're avoiding malice because I think *Andrews v.*  
23 *Gardiner*, our case says you can't destroy an absolute  
24 privilege by showing malice, right, so you're kind of stuck  
25 on malice.

1           So I'm trying to understand what the difference  
2           is between your standard and malice.

3           MR. STEINBERG: Well, Your Honor, I think that  
4           the sham litigation exception as expressed in the First  
5           Department has articulated that. I see that I'm running  
6           out of time. If I can just address the one issue that I  
7           think is important here on the waiver issue, and the waiver  
8           issue is this Court, the trial court and the First  
9           Department all looked at this with the assumption that the  
10          sham litigation exception applied, and therefore, what it  
11          did was it didn't look through each defamatory publication  
12          and didn't assess each litigation privilege for each  
13          defamatory publication.

14          And because that happened, because they found  
15          issues of fact with regard to the sham litigation, there  
16          was no - - - there was no separate adjudication or separate  
17          looking at each of every one of those facts.

18          As a result, even if this Court finds that there  
19          is no sham litigation exception, there certainly are issues  
20          of fact as to whether under Williams or whether under  
21          Front, those privileges should apply to any statement that  
22          was not made in the litigation.

23          And if this Court is inclined to find that  
24          there's no sham litigation, at the very least, it needs to  
25          remand this to the court to go through each and every

1 separate defamatory statement to determine whether any  
2 litigation privilege applies in any way.

3 ACTING CHIEF JUDGE CANNATARO: And let me just  
4 ask you real quickly. If this Court were to hold that Mr.  
5 Gottwald is indeed a general purpose public figure or even  
6 a limited purpose public figure, how would that affect the  
7 arguments with respect to the qualified privileges?

8 MR. STEINBERG: I think, Your Honor, either way,  
9 we have to have a jury determine whether the privilege  
10 applies, whether he's a general purpose figure or a limited  
11 purpose public figure, but I'd like to address those if the  
12 Court is inclined.

13 ACTING CHIEF JUDGE CANNATARO: About ten seconds  
14 of it.

15 MR. STEINBERG: Your Honor, there is no evidence  
16 that he was a household name, who knew of him beforehand.  
17 Your Honor, everything that the cases say, all the cases  
18 relied upon say that even for limited purpose public  
19 figure, there has to be some direct relationship between  
20 the person who thrust himself into the vortex of the public  
21 discussion, even if it's not a public debate.

22 JUDGE RIVERA: And how do you define the public  
23 in that? Unfortunately, apparently, there are many  
24 Americans who don't know the nine members of the U.S.  
25 Supreme Court.

1 MR. STEINBERG: Your Honor - - -

2 JUDGE RIVERA: And I think we all think they're  
3 public, yes?

4 MR. STEINBERG: Well, I - - -

5 JUDGE RIVERA: Do you disagree with me - - -

6 MR. STEINBERG: Your Honor, I know all nine  
7 members. Don't test me, but I do know all nine members,  
8 but - - -

9 JUDGE RIVERA: As long as you know the six here,  
10 you're in good shape.

11 MR. STEINBERG: Thank you, Your Honor, but in  
12 terms of the limited purpose public figure test, there has  
13 to be some relationship between the person who thrust  
14 themselves into the public, a public figure, and the  
15 defamation.

16 And here, Mr. Gottwald was a songwriter, was a  
17 producer, and then we go back to 2014 for the analysis. He  
18 was putting himself out as a songwriter and as a musician.

19 JUDGE SINGAS: And but who would thrust  
20 themselves into the conversation of talking about sexual  
21 assault and young artists? It seems to me that even if it  
22 was true or not true, that wouldn't be a subject that he  
23 would be entertaining, so shouldn't we expand that a little  
24 more?

25 MR. STEINBERG: No, Your Honor, and here's why,

1           because if - - - that would apply to everybody who puts  
2           themselves in the public.  If I'm the manager of a Target  
3           and I do a commercial, a local commercial, and I talk about  
4           the people who come in, the customers who come in, the  
5           vendors who I work with, my employees, come on in, this is  
6           a great place.  Does that make me a - - -

7                         JUDGE WILSON:  So is Roman Polanski a limited  
8           public figure?

9                         MR. STEINBERG:  I don't know the facts of whether  
10          Mr. Polanski would be considered a limited public figure.  
11          For what purpose, Your Honor?

12                        JUDGE WILSON:  Well, for the purpose of an action  
13          presumably where the thirteen-year-old that he had sex  
14          with, you know, something like this.

15                        MR. STEINBERG:  Perhaps, but under the facts  
16          here, Your Honor - - -

17                        JUDGE WILSON:  Well, but why?  He's a director  
18          just like Mr. Gottwald, right?

19                        MR. STEINBERG:  Well, I assume the Court doesn't  
20          think that every director is a public figure, every  
21          songwriter is a public figure.  You have to look at each  
22          particular set of facts.  Just by - - -

23                        JUDGE WILSON:  So is the question here really not  
24          whether he has injected himself into the vortex of public  
25          discussion about sexual assault, but rather, within the

1 world of songwriting or music production or something like  
2 that, in that world, he's a limited public figure?

3 MR. STEINBERG: Your Honor, if he was being  
4 accused of being a plagiarist or copyright infringement,  
5 then yes, he would be a limited purpose public figure, but  
6 the person at Target who talks about his employees, his  
7 vendors, his customers - - -

8 JUDGE TROUTMAN: And it doesn't matter that  
9 associating with these young women was a part of that?

10 MR. STEINBERG: Your Honor, they were the  
11 singers. It's not only young women, but young men and  
12 older people were singers of his songs.

13 ACTING CHIEF JUDGE CANNATARO: Mr. Gottwald  
14 certainly spent a fair amount of time prelitigation talking  
15 about his successful collaboration with Kesha specifically,  
16 didn't he?

17 MR. STEINBERG: Your Honor, he certainly did hold  
18 himself out as a songwriter, as a music producer, and  
19 publicized his success as such and the - - -

20 ACTING CHIEF JUDGE CANNATARO: Collaborating with  
21 this defendant?

22 MR. STEINBERG: Collaborating with lots of  
23 artists, Your Honor. That's correct, but that doesn't make  
24 him a limited purpose public figure for the purpose of all  
25 potential defamations, whether in the Target example,

1           whether it's going to be someone who's accusing him  
2           falsely, the manager of fraud, or being a racist.

3                   JUDGE SINGAS:  Yeah, but isn't that different?  I  
4           mean, is it really fair to compare him to someone at  
5           Target?  This is someone the Supreme Court said, look, if  
6           you have access to the media and you could address these  
7           comments, then it's more likely that you're a public  
8           figure.

9                   So someone like Dr. Luke could call up seemingly  
10          Rolling Stone or Billboard and say, I want to do an  
11          interview, and you know what, they'd show up, but a manager  
12          at Target would say that and wouldn't get very far.

13                   MR. STEINBERG:  Well, I'm not sure there's a  
14          distinction there under the limited purpose public figure  
15          test, Your Honor.  If you're not putting yourself out there  
16          in the category of the issues that are at issue in the  
17          defamation, then you're not a limited purpose public  
18          figure.

19                   JUDGE SINGAS:  What about general, just a general  
20          figure?

21                   MR. STEINBERG:  In order to be a general purpose  
22          public figure, you have to be, in essence, a household  
23          name.

24                   JUDGE SINGAS:  Well, in this industry, he was, in  
25          essence, a household name.



1 MR. STEINBERG: Your Honor, but the defamation  
2 didn't occur in the industry. Appellant defamed my client  
3 throughout the world. She defamed him by going on social  
4 media with her millions of followers. She defamed him by  
5 going to TMZ and to the L.A. Times and to Nightline on  
6 television.

7 JUDGE TROUTMAN: So he can seek out interviews  
8 and be in the public, but as long as his publicity is  
9 solely related to music, he's not a public figure?

10 MR. STEINBERG: Well, Your Honor, I don't think  
11 that's necessarily so. If you are so pervasive in the  
12 public, if you are so well known throughout the public,  
13 then you are indeed a general purpose public figure, but  
14 those are the rare creatures as enunciated by the Supreme  
15 Court.

16 JUDGE RIVERA: Yes, but not everyone has to - - -  
17 as I said, not everyone knows those nine members, so it  
18 doesn't have to be that it's only that half of the one  
19 percent, right? The class can be larger than that?

20 MR. STEINBERG: Yes - - -

21 JUDGE RIVERA: I mean, that's the point, so then  
22 how much further do you have to go to include people in?  
23 What do they have to do? And I'm a little bit confused by  
24 your argument, because although, yes, I get your point that  
25 he's sort of in this niche and that's where perhaps he's

1 known, the reality is the niche is directly connected to  
2 the clients.

3 It is directly about how he manages his clients,  
4 how he can bring them fame, how he helps them actually  
5 achieve their artistry, and I thought she was alleging,  
6 yes, but all of that comes with physical, emotional abuse,  
7 and that's what she is pursuing.

8 Whether or not she can make her claim is another  
9 story, but those are her allegations.

10 MR. STEINBERG: Your Honor, with regards to the  
11 publicity about his expertise, about his profession.

12 JUDGE RIVERA: Yes.

13 MR. STEINBERG: Again, it's about him being a  
14 songwriter and a music producer. To the extent others,  
15 journalists actually go in and they talk about his  
16 relationship with artists or about anything more than him  
17 being a music producer or a songwriter, that doesn't mean  
18 that he has thrust himself into that area of discussion.

19 It has to be him voluntarily doing that and  
20 there's no evidence in the record that shows that that's -  
21 - -

22 JUDGE RIVERA: But his notoriety is because of  
23 that success, is it not?

24 MR. STEINBERG: And again, success, of course,  
25 Your Honor, is - - -

1 JUDGE RIVERA: I mean, I might have written a  
2 song five minutes ago. No one's going to care about it,  
3 right?

4 MR. STEINBERG: But Your Honor, of course,  
5 success in your profession is not sufficient to make you a  
6 general purpose public figure.

7 JUDGE RIVERA: That is true. That is true.

8 MR. STEINBERG: And he was successful. Of course  
9 he was successful, and like any good businessman, he  
10 promoted his business, and - - -

11 JUDGE RIVERA: He solicited great public interest  
12 in him.

13 MR. STEINBERG: I'm sorry?

14 JUDGE RIVERA: He solicited tremendous public  
15 interest in him?

16 MR. STEINBERG: In him and his - - -

17 JUDGE RIVERA: Not merely his clients?

18 MR. STEINBERG: In his business, in his  
19 songwriting. That's correct, and that doesn't make him - -  
20 -

21 JUDGE RIVERA: In the world of artistry like this  
22 - - -

23 MR. STEINBERG: Yes.

24 JUDGE RIVERA: - - - you are the business. It  
25 is.

1 MR. STEINBERG: Yes, but that doesn't make him a  
2 public figure.

3 JUDGE SINGAS: Well, do you think New York has a  
4 different definition of public figure than the Supreme  
5 Court does?

6 MR. STEINBERG: I think that New York's  
7 definition of public figure should be consistent with Gertz  
8 as enunciated by the Supreme Court.

9 JUDGE TROUTMAN: Does it have to be?

10 MR. STEINBERG: It doesn't have to be, but I  
11 think it can be and it should be, and I think that in this  
12 particular situation, the evidence is just not there that  
13 his fame, prior to 2014, was so pervasive that everybody  
14 knew who he was.

15 Who knew who - - - and we talked about things  
16 like American Idol and the Walk of Fame and who knew who  
17 Simon Cowell was before he was on American Idol? I mean,  
18 there's just a certain amount of - - -

19 JUDGE RIVERA: Some people in England kind of  
20 knew him. Some people in England kind of knew him, which  
21 is just circling back to my point. It depends on what you  
22 think is the public and who knows who. I may know people  
23 that you would never know.

24 MR. STEINBERG: I think that - - -

25 JUDGE RIVERA: In my community, they may be

1 extremely well known.

2 MR. STEINBERG: I think your point is a good one  
3 and I think it has to be defined by who is she defaming him  
4 in front of, and that's the world, here. She didn't just  
5 pick some record companies to defame him. She went on  
6 social media to her millions of followers.

7 She went to TMZ, Nightline, television  
8 interviews. That's what she did to defame him, to ruin him  
9 - - -

10 ACTING CHIEF JUDGE CANNATARO: Okay.

11 MR. STEINBERG: - - - for these false  
12 allegations. Last point is that the burden is on the  
13 appellant to show that he's a public figure and it has to  
14 be done by clear and convincing evidence. We submit that  
15 the First Department was correct.

16 ACTING CHIEF JUDGE CANNATARO: Thank you,  
17 Counsel.

18 MR. STEINBERG: Thank you, Your Honors.

19 ACTING CHIEF JUDGE CANNATARO: So Mr. Metlitsky,  
20 could Dr. Luke be a general purpose public figure?

21 MR. METLITSKY: Oh, yeah.

22 ACTING CHIEF JUDGE CANNATARO: Did you show that  
23 or at least make sufficient allegations of that?

24 MR. METLITSKY: For sure.

25 ACTING CHIEF JUDGE CANNATARO: How so?



1 MR. METLITSKY: So I mean, one week after this  
2 litigation was filed, his counsel filed a sworn affidavit  
3 in trial court calling him a celebrity. He was a  
4 celebrity. He was - - - he hired four public relations  
5 firms to make himself famous, not just as a music producer,  
6 but as a music producer for young female artists.

7 He was chosen to get a star on the Hollywood walk  
8 of fame. That's for famous people. He was a finalist as a  
9 judge in American Idol. Those producers don't pick people  
10 who aren't going to draw an audience.

11 He was the subject of articles in the New Yorker,  
12 Billboard, New York Magazine, all - - - he was invited to  
13 red carpets. I mean, I - - -

14 ACTING CHIEF JUDGE CANNATARO: There was just an  
15 argument made that for purposes of determining whether or  
16 not someone is a public figure, especially a general  
17 purpose public figure, you have to look at the audience to  
18 which the claims and statements are being made.

19 And you know, in this context, Dr. Luke, I would  
20 venture to guess maybe more people in the back of the room  
21 know who Dr. Luke is than in the front of the room.

22 MR. METLITSKY: Absolutely, and that is - - -

23 ACTING CHIEF JUDGE CANNATARO: Is that a valid  
24 way of doing it?

25 MR. METLITSKY: First of all, there is no case

1 that says that, and it can't possibly be right because in  
2 the world of social media, everything gets retweeted to  
3 everybody immediately, but as to whether more young people  
4 would know Dr. Luke than any of us, it seems to me that  
5 that's an argument in our favor because it can't possibly  
6 be - - - the test can't be whether the judges or the  
7 lawyers talk about this person in their household.

8 It's whether the - - - I'll just read from James.  
9 The essential element underlying the category of public  
10 figures is that the publicized person has taken an  
11 affirmative step to attract public attention.

12 And you know, in James, that was a limited  
13 purpose public figure. She was a belly dancer in  
14 Rochester, and she attracted public attention as a belly  
15 dancer, so articles about her belly dancing counted. It's  
16 the - - -

17 JUDGE GARCIA: But the defamatory statements as I  
18 understand it in that case came out of her interview,  
19 right?

20 MR. METLITSKY: Well, that's true, but not in  
21 Park, for example. Park was an eye doctor and he had  
22 publicized his business, and he was accused of being  
23 unethical in his medical practice. He had never written an  
24 article about medical ethics.

25 He just sort of got notoriety in this little

1 community, and so allegations within the scope of the  
2 notoriety that he sought out made him a limited public  
3 figure. That test is easily satisfied here.

4 I mean, it's pretty hard for me I think to better  
5 Justice Scarpulla's formulation. You know, she said he's a  
6 limited purpose public figure because he's purposefully and  
7 continuously publicized and promoted his business  
8 relationship with his young female music artists like Kesha  
9 to continue to attract publicity for himself and new talent  
10 for his label.

11 The allegedly defamatory statements at issue  
12 directly relate to Dr. Luke's self-publicized,  
13 professional, and personal relationships with his clients,  
14 his integrity and business practices in attracting new  
15 talent.

16 That's exactly right, and if a guy at a Target -  
17 - -

18 ACTING CHIEF JUDGE CANNATARO: But the claim here  
19 is not that your client was attempting to destroy Dr.  
20 Luke's reputation in the music industry. It was that it  
21 was directed towards the entire world, that this was going  
22 to be very newsworthy and people were going to revile Dr.  
23 Luke.

24 MR. METLITSKY: Your Honor, there has never been  
25 a case that, as far as I know, that looks at, like, how



1 widely disseminated the defamation was. I've never heard  
2 of such a case and it would make no sense today because any  
3 statement by a, you know, famous person is going to be  
4 disseminated to everybody immediately, okay? But so - - -

5 JUDGE RIVERA: Well, you're just saying if you  
6 say it to one person, it's defamatory. If you say it to  
7 millions, it's defamatory. It's not the point.

8 MR. METLITSKY: Yeah, exactly. That's not the  
9 point. It's about the - - -

10 JUDGE GARCIA: But let's say you're a famous eye  
11 surgeon and you go and you speak and you publish papers  
12 about eye surgery, and you're an eye surgeon for, you know,  
13 young people. Now, someone comes in and says, I was  
14 abused, I was sexually abused. I was one of this doctor's  
15 patients. You're a limited purpose public figure?

16 MR. METLITSKY: For purposes of those statements,  
17 that's right, and here, I think the connection is even  
18 closer because he touted how good of a music producer he  
19 was with respect - - -

20 JUDGE GARCIA: An eye doctor touts how good of an  
21 eye surgeon he is.

22 MR. METLITSKY: Then yes, he would be a limited  
23 purpose public figure.

24 JUDGE GARCIA: People are accusing him of  
25 molesting his patients.

1 MR. METLITSKY: He would be a limited purpose  
2 public figure for that purpose, but Dr. Luke is not just a  
3 limited purpose public figure. Limited purpose public  
4 figures don't get chosen for stars on the walk of fame.

5 JUDGE SINGAS: So what are you arguing? Which  
6 one is your better argument, do you think? General public  
7 or limited?

8 MR. METLITSKY: I mean, limited seems to me  
9 obvious, but I don't even understand the contrary argument,  
10 but - - -

11 JUDGE SINGAS: And do you think that New York has  
12 a different standard than the Supreme Court?

13 MR. METLITSKY: I don't think so, but if it - - -  
14 I mean, this Court should follow its own precedent, right,  
15 and so if that's a precedent construing the New York  
16 Constitution, the Court's never made that clear, but the  
17 precedent is the precedent.

18 If the Court has - - - I'd like to just answer a  
19 few of the points on the litigation privilege. So one  
20 point is that all of this can be worked out in front of a  
21 jury. That just eviscerate - - - these are privileges.  
22 These are privileges against litigation.

23 That eviscerates the purpose of the privilege, so  
24 they have to be construed very narrowly.

25 JUDGE SINGAS: But aren't they credibility

1 assessments, so just send it to the jury to make their  
2 credibility findings?

3 MR. METLITSKY: But that's an argument in my  
4 favor because they're always going to be credibility  
5 findings and they're always going to go to the jury. You  
6 can always concoct some argument that this was made up to  
7 pressure Dr. Luke to, you know, to let her out of the  
8 contract or whatever, and that means they wouldn't be  
9 privileges.

10 The whole point of the privilege is that you can  
11 decide it at the outset of the case and the person doesn't  
12 have to be subject to the litigation.

13 JUDGE GARCIA: But what's the difference, then,  
14 between an absolute and a qualified privilege?

15 MR. METLITSKY: So I wanted to answer your  
16 question about that. So as a general matter, absolute  
17 privileges have no exceptions. Qualifying privileges have  
18 a malice exception, but not the Front qualified privilege.

19 In Front, the court expressly held that it was  
20 not adopting a general malice standard, so the court said  
21 rather than applying a general malice standard to this  
22 prelitigation stage, the privilege should only be applied  
23 to statements pertinent to a good faith anticipated  
24 litigation, and I think - - - we've cited the California  
25 courts that have a very similar prelitigation standard that

1 explicate what that means.

2 So the dispute is about whether that means that  
3 the litigation that you actually anticipated was going to  
4 be filed with malice, which would be a malice exception, or  
5 whether you actually anticipated in good faith filing a  
6 real litigation. The California courts hold the latter.

7 JUDGE GARCIA: I don't read Front's language  
8 exactly that way. I mean, it says they have to be  
9 pertinent to a good faith anticipated litigation, right?

10 MR. METLITSKY: That's right.

11 JUDGE GARCIA: So I don't think that's just  
12 filing in good faith. I think it has to be - - - I think  
13 that's a sham exception - - -

14 MR. METLITSKY: Well - - -

15 JUDGE GARCIA: - - - a good faith anticipation.

16 MR. METLITSKY: It's a sham exception to a  
17 certain extent, but it can't be a malice exception because  
18 Front said it's not adopting a malice exception. So here's  
19 the California standard. I think it's basically identical.  
20 It's a prelitigation communication is privileged only when  
21 it relates to litigation that is contemplated in good faith  
22 and under serious consideration.

23 And the California Supreme Court in the Action  
24 Apartment case, which we discuss at length, explain what  
25 that means. It does not mean a malice exception, that is,

1 that the litigation that you anticipated to file was going  
2 to be filed for the purposes of defamation.

3 JUDGE GARCIA: So aren't they alleging even under  
4 the California test that you fail?

5 MR. METLITSKY: Yeah, they're alleging it, but  
6 they can't just allege it, right? We know the facts. We  
7 know the facts, and so - - -

8 JUDGE GARCIA: And through a number of  
9 discoveries, et cetera. Like, why isn't this a jury issue?

10 MR. METLITSKY: This is not a - - - so my  
11 colleague said that this privilege applies when you file a  
12 complaint and do nothing else, and fine, that's fine with  
13 us, but there is no plausible dispute of fact that my  
14 client did nothing else.

15 JUDGE GARCIA: What if that isn't the test? What  
16 if the test is a good faith case that we said in our Front  
17 decision isn't - - - they're saying that's not. They've  
18 brought forth certain evidence. You've countered that.  
19 Why are we going to decide that?

20 MR. METLITSKY: It depends on what you mean by a  
21 good faith case. If by a good faith case, you mean a  
22 malice exception. That is, you didn't believe the  
23 allegations or you had a reckless regard for their truth,  
24 then yeah, that would be a fact dispute.

25 Our argument is it can't be a malice exception



1 because Front said so and second of all, it wouldn't  
2 protect the privilege that the court was trying to protect,  
3 which is statements in anticipation of a litigation that  
4 was likely to be filed or anticipated to be filed.

5 That's what the California Supreme Court  
6 explained, and if you disagree with the California Supreme  
7 Court, then only as to these prelitigation statements, I  
8 can't make an argument that there's not a fact question,  
9 but - - -

10 ACTING CHIEF JUDGE CANNATARO: And does the  
11 content of those prelitigation statements matter in any  
12 way, and here, I'm specifically thinking of the Lady Gaga  
13 text message.

14 MR. METLITSKY: So that one's not subject to - -  
15 -

16 ACTING CHIEF JUDGE CANNATARO: It's not part of  
17 it?

18 MR. METLITSKY: It's not part of this. The  
19 content of the statements does matter to this extent. I'm  
20 quoting from Front. They have to be pertinent to the  
21 anticipated litigation.

22 I just want to make one other point, if I could,  
23 because this is about the waiver issue. So the waiver  
24 issue - - - their waiver argument can only possibly be even  
25 applicable to the absolute privilege.

1           We did not argue that there was no exception to  
2           the report privilege. We argued that the exception didn't  
3           apply. They say the court never considered the particular  
4           statements that would fall under that privilege to see  
5           whether they actually did.

6           There's a reason the court never did that. They  
7           never asked the trial court to do so. They didn't even  
8           mention it in the Appellate Division, and you can't raise a  
9           fact question for the first time in this Court, and not  
10          only that, they are judicially estopped from making that  
11          argument.

12          They sought leave - - - the original complaint  
13          that they filed in this case was only about statements made  
14          before Kesha filed her complaint. Then they sought to  
15          amend and we said, you can't do that. The limitations  
16          period has expired.

17          They said they were laid back, and the reason  
18          they were laid back is that all the statements that we're  
19          talking about right now are simply reiterations of the  
20          general allegation that Dr. Luke drugged and raped Kesha.

21          They won. That is what the trial court said.  
22          That's why the trial court let them amend their complaint.  
23          We appealed, the Appellate Division affirmed, and now  
24          they're saying that maybe these statements are actually  
25          broader than the general allegations.

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That is the entire purpose for the judicial  
estoppel doctrine. You can't win, and then once you've  
won, change your mind about what the facts are. Thank you,  
Your Honor.

(Court is adjourned)





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C E R T I F I C A T I O N

I, Alexander Reaves, certify that the foregoing transcript of proceedings in the Court of Appeals of Lukasz Gottwald v. Kesha Rose Sebert, No. 32, 33 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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