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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM : PART 17

-----X  
JOSEPH RAKOFSKY,

Plaintiff,

-against-

Index No.  
105573/11

WASHINGTON POST COMPANY, ET AL.,

Defendants.  
-----X

Transcript of Motion Proceedings  
New York Supreme Court  
111 Centre Street  
New York, New York 10007  
April 8, 2013

B E F O R E:

HON. SHLOMO S. HAGLER, Justice of the Supreme Court

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A P P E A R A N C E S: (continued)

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\* \* \* \* \*

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## Proceedings

1 THE COURT: Good morning. Welcome.

2 MR. TURKEWITZ: Good morning.

3 MR. GOLDSMITH: Good morning.

4 MR. RANDAZZA: Good morning.

5 THE COURT: This is Motion Sequence No. 20 in a  
6 very voluminous pack of motions that have been submitted to  
7 me a while ago.

8 I finally have read the tens of thousands of  
9 pages that you were kind enough to submit to me. I will be  
10 rendering a decision shortly on the underlying 20 or so  
11 motions that you have submitted to me earlier. This is the  
12 20th motion. It's the, for lack of a better word,  
13 Turkewitz 35 Defendants that was talked about in the  
14 earlier motion, and it was broken up into three different  
15 parts, and this is the 35 Defendants that are making a  
16 motion for sanctions and fees.

17 And then we have a cross-motion as well by  
18 Mr. Rakofsky against Mr. Randazza.

19 MR. RANDAZZA: Against me, Your Honor.

20 THE COURT: That's what I thought. I wasn't sure.  
21 I read the motion on Friday just to refresh my  
22 recollection.

23 So, Counsel, you can argue the motion.

24 MR. RANDAZZA: Your Honor, may it please you.

25 You know, every lawyer thinks that their case is  
26

## Proceedings

1  
2 the most important one in the world, so I'd probably have  
3 an ego problem and a client problem if I didn't think this  
4 case was very important. But really, objectively, it is.

5 This case is not just about the 35 Defendants  
6 here, but it's at its core about the freedom of the press.  
7 What we had here was an example of attorney misconduct  
8 pointed out by a judge on the record.

9 THE COURT: I don't think it was attorney  
10 misconduct. I think you misquoted because this is a case  
11 of a young attorney that bit off too much than he could  
12 chew.

13 MR. RANDAZZA: I'm getting to --

14 THE COURT: That's really the sum up.

15 MR. RANDAZZA: I am getting to that.

16 THE COURT: I don't see anything from a Bar  
17 Association or a screening panel that has found him to be  
18 sanctioned or violated a rule.

19 MR. RANDAZZA: In fact, we have seen the  
20 opposite, Your Honor.

21 THE COURT: Because the papers that I read, I  
22 believe there was -- someone referred the matter to the  
23 disciplinary committee in Washington, DC.

24 MR. RANDAZZA: Correct. And they said --

25 THE COURT: They said there was no violation of  
26 any rules of that jurisdiction. However, they did use the

## Proceedings

1  
2 word, it was a close call, and that should be a wake-up  
3 call to all attorneys that bite off more than they can  
4 chew. To take a case right out of law school on a murder  
5 trial is not maybe the best thing. That's basically a hail  
6 Mary, either you shoot the ball into the end zone or you  
7 fail and fall on your face, which is a very apt analogy or  
8 a metaphor of what transpired here.

9           So there is no, as far as I know, any  
10 disciplinary committee that has found him to be in  
11 violation of any ethical obligation.

12           MR. RANDAZZA: Yes, Your Honor, but the word that  
13 the judge used was incompetence.

14           THE COURT: Okay. I understand that, but there  
15 was a different word that you used.

16           MR. RANDAZZA: Yes.

17           THE COURT: I would rather you use --

18           MR. RANDAZZA: I withdraw that.

19           THE COURT: -- the words that the judge had used  
20 in the case. I think he said that it was below  
21 expectations of any attorney should have in a case. And  
22 also, he used different words, but I don't want to get into  
23 those words, the words are in the record. But I will let  
24 you continue.

25           MR. RANDAZZA: Thank you.

26           Your Honor, it is true that this is at its

## Proceedings

1  
2 inception a rookie mistake, and we began this dispute  
3 certainly with some compassion for that fact. We attempted  
4 to resolve this with him with that in mind, providing even  
5 the opportunity for redemption, and that's all in our  
6 papers, and I don't want to rehash what you've already had  
7 to read, but as this case has gone on, it has certainly  
8 displayed something more.

9 As you have identified, you have tens of  
10 thousands of pages. For our part in that, we have, out of  
11 necessity, had to provide you with that in order to defend  
12 ourselves. But I think what we've seen in this case is  
13 each time Your Honor and your predecessor has given  
14 instructions to Mr. Rakofsky to show him the door, to show  
15 him the light at the end of the tunnel, it has really  
16 resulted with what I cannot describe as anything less than  
17 a pathological response, thus amping up the costs, amping  
18 up the amount of papers before this Court.

19 And really, this case is about two years old now,  
20 which it should never have been filed in the first place,  
21 and we have tens of thousands of pages for you to go  
22 through, hundreds of thousands of dollars in fees expended  
23 in order to defend ourselves, and for what? Because these  
24 parties have reported on matters of public concern by  
25 reporting fairly and accurately what a judge said in open  
26 Court, which is reflected in the record.

## Proceedings

1  
2           So your decision on this motion is going to  
3 create an incentive in one direction or another; either it  
4 is going to say to anybody who might be in Mr. Rakofsky's  
5 position in the future that there is no consequence for  
6 filing a blatant slap-suit in order to silence fair  
7 criticisms of your conduct. And as attorneys, if I do  
8 something today that is incompetent or unseemly, I would  
9 hope that my fellow members of the Bar would criticize me  
10 for it. I would hope that they would --

11           THE COURT: Do you represent Bannination  
12 because --

13           MR. RANDAZZA: Yes, Your Honor.

14           THE COURT: -- I read some comments there that  
15 didn't seem fair to me.

16           MR. RANDAZZA: Well, Bannination did not make  
17 those comments, Your Honor.

18           THE COURT: I understand that.

19           So let's talk turkey in terms of what would  
20 transpire. I read all of the comments and all of the  
21 alleged words that were used to depict Mr. Rakofsky, and  
22 quite frankly, I was shocked at the comments that were  
23 displayed, pornography --

24           MR. RANDAZZA: Yes, but Your Honor --

25           THE COURT: -- Racism.

26           MR. RANDAZZA: -- I do not represent the people

## Proceedings

1  
2 who made those comments, nor do we endorse them.

3 THE COURT: I understand that, but I just don't  
4 want the record to be incomplete with certainly uncalled  
5 for and beyond the pale comments that were made against  
6 Mr. Rakofsky or any other person in this world. It would  
7 not be appropriate. The other 34, nonetheless, are  
8 different, but that one is a special one that I noticed and  
9 the one that has given me the most trouble.

10 MR. RANDAZZA: Well, Your Honor, if we can  
11 address Bannination individually.

12 THE COURT: The other 34 were either opinions or  
13 fair reporting, the way I see it thus far.

14 MR. RANDAZZA: Bannination, however, is no more  
15 responsible for the words on that board than say Craig's  
16 List rants and raves is, and they actually -- even though  
17 the comments on Bannination are certainly ones that I find  
18 indefensible that I don't have any desire to defend, and I  
19 don't defend the people who made them, I represent the  
20 message board, they have a special position in this case,  
21 as they are protected under 47 USC §230.

22 THE COURT: Correct. And who is "Tarrant84"?

23 MR. RANDAZZA: That is a commenter on  
24 Bannination, but I don't know that he made any of those  
25 comments that you're referring to.

26 THE COURT: He was not making those comments?



## Proceedings

1  
2 MR. RANDAZZA: No, Your Honor.

3 THE COURT: Because I wasn't sure if "Tarrant84"  
4 had made those comments or not, I have to look again. What  
5 were the comments on "Tarrant84"?

6 I guess the easiest way to deal with that is pull  
7 out paragraph 185 or 65 to 67 that talks about the  
8 comments, if you have the complaint. I'll look at it  
9 again.

10 MR. RANDAZZA: Okay.

11 THE COURT: I wasn't sure if "Tarrant84" made  
12 those comments or not, I don't think so. I think it was  
13 just there.

14 MR. TURKEWITZ: I believe that's accurate, Your  
15 Honor.

16 THE COURT: Okay. Let's move on and I will let  
17 you finish. I'm sorry for interrupting you. I just want  
18 the record to be complete, because as you see, I have a  
19 large caseload today --

20 MR. RANDAZZA: Yes.

21 THE COURT: -- and a lot of people waiting.

22 MR. RANDAZZA: Correct.

23 THE COURT: -- and I don't mean to make short  
24 drift of your arguments; I have read it, I'm considering it  
25 and a decision will be rendered hopefully this month,  
26 sometime in April.

## Proceedings

1  
2 MR. RANDAZZA: Your Honor, with that I will give  
3 the floor.

4 THE COURT: Okay. Mr. Goldsmith.

5 MR. GOLDSMITH: Your Honor, good morning.

6 THE COURT: Good morning.

7 MR. GOLDSMITH: First, I just want to put the  
8 motion that is being made by the Defendants in perspective  
9 here, making a sanctions motion against Mr. Rakofsky, yet  
10 they are only --

11 THE COURT: Is it against Mr. Rakofsky and  
12 Mr. Goldstein(sic) or just Mr. Rakofsky alone?

13 MR. GOLDSMITH: It's Goldsmith as well, yes.

14 THE COURT: I apologize. I'm sorry for getting  
15 your name wrong.

16 MR. GOLDSMITH: That's fine.

17 Now, while they do this, and they make this  
18 motion based on the fact that they allege the statements  
19 were fair reporting, I want just the Court reviewing the  
20 motion to note that really, they only discuss two  
21 statements in their motion papers, despite the fact that in  
22 the amended complaint the Turkewitz Defendants are accused  
23 of publishing at least 19 defamatory statements. Now, it's  
24 our position that these statements were defamatory and were  
25 not fair reporting. And I would just like for the record  
26 just to highlight some of them.

## Proceedings

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2 In the Sixth Cause of Action there was an  
3 allegation that there was a mistrial for ineffective  
4 assistance of counsel. Another allegation the judge found  
5 Rakofsky too dishonest to handle the case. These were not  
6 findings; that Rakofsky is a lying piece of "S". There was  
7 no allegations that Mr. Rakofsky had lied. The mistrial  
8 was declared because of Mr. Rakofsky's blatant ineptitude.

9 Clearly, that is not a characterization within  
10 the realm of a reasonable -- however the judge described  
11 it. It also described him as grotesquely incompetent, that  
12 his ethics came into play with deception when there were no  
13 ethics that came into play with deception at all.

14 Additionally, there was an allegation that  
15 Mr. Rakofsky solicited himself for the case. He did not.  
16 The record is clear that Mr. Deaner contacted him. Again,  
17 there are other statements as well that he broke ethical  
18 rules, that a mistrial was declared because he was so bad  
19 and that the performance was so bad that the judge had to  
20 declare a mistrial. It's our position that these are not  
21 fair reporting.

22 THE COURT: Let me stop you because I think the  
23 error of your ways is this, the defamation is not the  
24 mistrial. Just because there's a mistrial doesn't mean  
25 you're defamed. It's the underlying causes, the underlying  
26 statements that were made by the judge that are -- that may

## Proceedings

1  
2 have been defamation if they were said in another context.  
3 This was done in a judicial proceeding, so therefore, the  
4 Fair Reporting Law comes into effect.

5 The statement by the judge that your client was  
6 below expectation -- I don't remember the exact words. I  
7 think he used below expectation -- did say that even if  
8 there was a verdict in favor of the prosecution, he would  
9 have set it aside based upon some Washington, DC -- some  
10 procedural rule -- basically it would be -- which  
11 essentially would be ineffective counsel. He did say all  
12 of that. That is the alleged defamation.

13 It doesn't matter that he wasn't the cause of the  
14 mistrial. The defamatory words were the words -- the  
15 alleged words that you considered defamatory. They were  
16 the ones stated by the judge. Just because they didn't  
17 cause it -- just because Mr. Rakofsky allegedly did not  
18 cause it, which we're not sure, let's assume you're right,  
19 doesn't mean you have a cause of action. That is the error  
20 of your ways.

21 MR. GOLDSMITH: In addition to those statements,  
22 I would just -- like I just repeated before, the fact that  
23 there were other characterizations of Mr. Rakofsky not  
24 having to do with the trial about him being unethical and  
25 about him using --

26 THE COURT: Yes, but the words -- I hate to say

## Proceedings

1  
2 it, but I remember the judge using the word ethical. And  
3 the word trick has a very negative connotation. That's the  
4 best way I can describe it without being subjective about  
5 it. If you look up the word trick and go to an old  
6 Webster's Dictionary, a trick means to -- I have to look it  
7 up again, but I would assume -- I shouldn't assume -- but  
8 to make someone change their mind, or a lie. To trick  
9 someone is to -- I don't have to tell everyone what the  
10 word trick means because he used that word.

11 I know that he may have said it in a different  
12 context, but the case law is very clear, the very words  
13 that he used, lent the connotation to lying. And the judge  
14 himself found that to be an ethical issue, and they  
15 reported that. And then if everyone believed that to be  
16 unethical, that's an opinion and that's protected by the  
17 Constitution.

18 In this country we don't permit people to sue  
19 someone based upon an opinion, especially when the Court  
20 said that there's an ethical issue, and now that's public  
21 comment. They can say it's unethical or ethical. That's  
22 something that he brought upon himself, unfortunately, by  
23 the poor choice of his words.

24 And the motion made by Mr. Bean, the  
25 investigator, did state very categorically, and I read the  
26 motion papers, which I had not done the last time when I

## Proceedings

1  
2 had seen you, and he in bold in his report states that -- I  
3 don't want to mischaracterize it, but my recollection was  
4 that he refused -- he's not in the trickery business he  
5 said, he's in the investigation business, and that would be  
6 a crime to do what he asked him to do. That's essentially  
7 what he said, and you have the quote.

8           So I can't see how you have a cause of action  
9 against any of the Defendants, except possibly Bannination.  
10 If that comment is one of them that you're seeking to -- I  
11 have to review it, but it looks like Tarrant84 did not make  
12 that comment, so that may be beside the point. But the  
13 only one that I saw that was very problematic was the  
14 Bannination comments that were explicitly defamatory.

15           MR. GOLDSMITH: And if I may just to discuss --  
16 well, first, I just want to clarify just one issue and  
17 not --

18           THE COURT: Then we're going to go on because I  
19 don't really want to spend a long time. You'll get the  
20 last chance. Let him finish because I interrupted him and  
21 I want to give him a fair opportunity to respond because  
22 you see where I'm going, and I am almost certain what I'm  
23 going to do, and you hear the implication that you have no  
24 cause of action, vis-a-vis all of the Defendants, except  
25 possibly Bannination, but I have to look at that again. I  
26 haven't reviewed the federal statute as to what this

## Proceedings

1  
2 bulletin board -- what the state of the law is in New York.  
3 I know there is federal cases that talk about what this  
4 bulletin board is responsible for.

5 I also haven't got into the personal jurisdiction  
6 defenses, whether or not that would survive or not. Does  
7 this Court have long arm jurisdiction over the multiple  
8 Defendants that are outside my jurisdiction from  
9 Washington, DC to Texas to Kansas to Washington State to  
10 Ohio to Florida, Colorado, California, even Canada? That's  
11 all the parties, at least within the 35 Defendants that  
12 we're discussing now. There are others outside of this as  
13 well. And I'm not sure. That's a Zippo case. I have to  
14 reread it again. There is two Federal Court cases that  
15 talk about it. I want to review that. I'm not sure about  
16 that issue.

17 But with regard to the causes of action that you  
18 have asserted against almost every one of the Defendants is  
19 either a fair reporting issue, republishing issue or its  
20 opinion that is protected by our Constitution. And the  
21 State Constitution is actually much broader than the  
22 Federal Constitution.

23 With regard to the Federal Constitution, there  
24 were federal cases that came out that basically you can't  
25 use opinion in order to defame people, but the State  
26 Constitution is more broadly written and permits more

## Proceedings

1  
2 freedom of press than the Federal Courts permit. So you're  
3 in a state that is a very pro freedom of speech, freedom of  
4 the press. Maybe in a different state you would fair  
5 better, but under our state's statutory construction, there  
6 is no way these comments are not opinion.

7 I may disagree with those opinions, you may  
8 disagree with those opinions, but nonetheless, I make no  
9 comment about those opinions. I don't know, I wasn't  
10 there, I'm just seeing it secondhand after the fact, after  
11 reading thousands of pages. I will let you comment. So I  
12 don't see a cause of action.

13 MR. GOLDSMITH: I would just ask the Court just  
14 to review since there were these at least 19 statements  
15 that are being alleged against the Defendants. While there  
16 are opinions -- while some are opinions, they are couched  
17 in facts, which is our position is not a fair --

18 THE COURT: No, because in every single one of  
19 those opinions there is a hyperlink, there's a reference to  
20 the Washington Post and the judge's comments. So when you  
21 do that, that takes it out of the fact because the facts  
22 were presented and they are saying this is the comment and  
23 opinion based upon the facts that were presented by that  
24 particular court, which then goes back to the fair  
25 reporting and goes back to the republishing. So I don't  
26 see -- and even if not, I think it would be squarely



## Proceedings

1  
2 opinion. I don't think the courts of the state would  
3 permit you to cherrypick those statements. You have to  
4 look at it based upon the context of how it was stated. In  
5 the federal courts you may fair better, but under the state  
6 law we are a context state, which means the comments made  
7 you cannot cherrypick one single word.

8 If you look upon the whole circumstances, that  
9 would give rise to whether or not it's defamatory or not,  
10 and our state under the cases that I looked at, it was just  
11 the Saxe decision that came out more recently, like last  
12 year, I forgot the name of the case in the First  
13 Department, that went through opinion testimony and it was  
14 much, much worse than the information that was imparted in  
15 our case and found it was opinion, and it was also based  
16 upon a website and internet. He didn't go into the long  
17 arm jurisdiction.

18 How do you justify negligence? That's what I  
19 couldn't figure out. That's the one that bothered me the  
20 most.

21 MR. GOLDSMITH: Well, the negligence issue was --

22 THE COURT: I will give you another two minutes  
23 because I'm running out of time.

24 MR. GOLDSMITH: Okay. It was my understanding  
25 that our intention was to withdraw the negligence claim. I  
26 believe that there was a letter that we submitted.

## Proceedings

1  
2 THE COURT: I did not see that letter. As a  
3 matter of fact, it was the opposite. My recollection is I  
4 received a letter saying that there were other cases in  
5 other jurisdictions that permitted negligence and  
6 therefore, you're keeping it.

7 Counsel, I invite you to on notice to the other  
8 side to give me a copy of that letter because I have never  
9 seen that letter. I have read every single piece of paper  
10 that I know of in this case and I've never seen that  
11 letter.

12 MR. GOLDSMITH: I believe that these letters did  
13 state that if the Court felt that it was necessary to  
14 withdraw the negligence, that we would, however, it was our  
15 basis on the -- I guess on the case law that it did stand  
16 legally, but it was our intention -- I mean, at this  
17 point --

18 THE COURT: I have to tell you then that the way  
19 you wrote it, it was very unclear because the import of  
20 that letter to me was it's defensible and we're going to  
21 keep it, I don't care. That's how I read it, but maybe I  
22 have to reread the letter. I haven't read that letter  
23 since -- I don't know -- when you sent it, I read it. I  
24 think it was in February.

25 MR. GOLDSMITH: I think it was right after the  
26 last oral argument, the second two motions.

## Proceedings

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THE COURT: Right, the second part of it.

MR. GOLDSMITH: Yes. Right.

THE COURT: So the question is are you withdrawing the negligence -- I'm asking you directly now --

MR. GOLDSMITH: Yes, we are.

THE COURT: -- are you withdrawing your negligence claim?

MR. GOLDSMITH: Yes.

THE COURT: Okay. Now it's fair, we have it on the record.

MR. GOLDSMITH: Okay.

Now, I just want to discuss -- would the Court like me to address -- I know there is not much time -- the motion, cross-motion or the personal jurisdiction?

THE COURT: Whatever you would like to do.

MR. GOLDSMITH: Well, I mean, first, after these statements were published, the lawsuit ensued. At this point, as far as our cross-motion goes, the conduct by Mr. Randazza was reprehensible in this matter. He first contacted Mr. Rakofsky's former attorney Mr. Bourzye for an extension of time to file paperwork when he was not admitted pro hac vice.

On a telephone conversation on May 16th he screamed to Mr. Rakofsky to shut the F up. Afterwards it

## Proceedings

1  
2 was learned that Mr. Randazza was seeking to practice pro  
3 hac vice and because of the language he used and because of  
4 the other circumstances, Mr. Rakofsky and his attorney  
5 Mr. Bourzye decided to make a motion to oppose the  
6 admission pro hac vice. This resulted in Mr. Randazza  
7 threatening criminal prosecution against Mr. Bourzye,  
8 extortion in the amount of \$5,000, and then a subsequent  
9 request --

10 THE COURT: So his \$5,000 is extortion and your  
11 \$5,000 is not extortion?

12 MR. GOLDSMITH: Well, this was an extortion  
13 because he stated, if you pay \$5,000, then I will not  
14 pursue this criminal --

15 THE COURT: Didn't you say the exact same thing  
16 to him? Not him. I read a letter saying that if you want  
17 to get out of this case give me \$5,000.

18 MR. GOLDSMITH: As far as a settlement.

19 THE COURT: So why can't he do that? Only one  
20 side can ask for \$5,000?

21 MR. GOLDSMITH: Well, he was asking -- I mean,  
22 this was a \$5,000 offer as part of a settlement agreement.  
23 This was a 5,000 -- he was stating, if you don't pay me  
24 \$5,000, we will criminally prosecute you for wiretapping.

25 THE COURT: You can criminally prosecute someone?  
26 He was the prosecutor?

## Proceedings

1  
2 MR. GOLDSMITH: He was saying he was going to  
3 bring criminal prosecution for wiretapping against  
4 Mr. Bourzye, which is why he eventually withdrew.

5 THE COURT: So you have standing to do that  
6 now -- when was this -- two years later?

7 MR. GOLDSMITH: Yes, it was -- well, it was two  
8 years. This is when he first sought --

9 THE COURT: So why didn't you bring this up two  
10 years ago?

11 MR. GOLDSMITH: Well, it was discussed --

12 MR. RANDAZZA: He did, Your Honor. This actually  
13 has been argued before your predecessor and twice --

14 THE COURT: You'll get a chance to respond.

15 So it was denied by the judge that was previously  
16 on the bench?

17 MR. GOLDSMITH: Well, no, it was -- the issue as  
18 to whether this conduct was frivolous was never decided by  
19 the Court, it was only mentioned in the context of the  
20 opposition of the pro hac vice.

21 THE COURT: You opposed the motion to -- strike  
22 that. One of the grounds for opposing the motion by  
23 Mr. Randazza to be admitted pro hac vice was that his  
24 conduct was below the expectations of an attorney in New  
25 York, for any choice of better words; is that correct?

26 MR. GOLDSMITH: Yes.

## Proceedings

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THE COURT: And Judge Goodman denied your motion.

MR. GOLDSMITH: The motion was denied.

THE COURT: So wouldn't that be implied that if he's allowed to practice, then the conduct was not below, and therefore, it was not frivolous?

MR. GOLDSMITH: I mean, there was never a hearing on the issue. It was mentioned. It was never considered --

THE COURT: Did you appeal?

MR. GOLDSMITH: -- directly by the Court.

THE COURT: Did you appeal?

MR. GOLDSMITH: No.

THE COURT: That's not the law of the case.

MR. GOLDSMITH: Well, it's our position that this was a different standard for admission to pro hac vice than a motion for sanctions where we are alleging now bad faith.

THE COURT: Motion for sanctions is a higher one.

MR. GOLDSMITH: Yes.

THE COURT: I don't think I've ever sanctioned anyone on the many years I've been on the bench. It's very rare to sanction someone. It's a higher standard. There has to be no semblance of law or fact and it has to be completely frivolous, and that's the standard.

MR. GOLDSMITH: Well, this is what brings me to my next point, which is that the Defendant's motion for

## Proceedings

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2 sanctions has no respect for what the standard is.  
3 Instead, they list in their motion only two alleged  
4 statements that they allege to be true and there is just  
5 merely cutting and pasting from their motion to dismiss  
6 into their sanctions argument without a discussion as to  
7 whether or not the statements are allegedly warranting  
8 sanctions.

9 Now, when the Defendants made this motion, I  
10 mean, there was no full discussion about any of these  
11 issues. And again, it was only on those two statements. A  
12 motion for sanctions is to look at the entire action to  
13 determine whether it is frivolous, and they chose two  
14 statements out of the entire amended complaint, focused on  
15 them, ignored the rest of the complaint and made no full  
16 discussion over the sanctions issue.

17 THE COURT: Mr. Goldsmith, this is a close call.  
18 I have to tell you that, and you probably can tell, I  
19 didn't think there was much merit to this case at the very  
20 beginning when I saw it. I have written on this before,  
21 and the better approach was to let it die down and let it  
22 go. It would have died down in a few days.

23 Unfortunately, for Mr. Rakofsky, this turned out  
24 to be a very bad day, April 1st. April 1st is the fools  
25 day, and it just happened that day and the internet picked  
26 up on it. A few days later it would have been gone, but

## Proceedings

1  
2 the cause of action actually stirred up the pot and the  
3 comment that Mr. Rakofsky made thereafter stirred up the  
4 pot, and it didn't make any sense.

5 I think you're mixing up the causes of action.  
6 The problem is you can't have -- you have to be objective  
7 about bringing these cases. I know it's hurtful, and I've  
8 read some of the comments, and Mr. Rakofsky is correct, it  
9 is hurtful, a lot of stuff they wrote about him. Whether  
10 it's fair reporting is a different story. Whether it's  
11 proper opinion or not, I understand that, but you're  
12 basically splitting hairs on this cause of action.

13 The only thing you're really saying is that he  
14 did not cause the mistrial, it was Mr. Deaner, it was his  
15 request, rather than the Judge sua sponte doing that. I  
16 understand that. But all the allegations and all the  
17 statements of defamations all go to comments that were made  
18 by the judge, and that's a legal principle of fair  
19 reporting, and it was all fair reporting.

20 Unfortunately, Mr. Rakofsky did something that he  
21 probably shouldn't have done his first trial, and I think  
22 he probably realizes that now, and he's probably a better  
23 lawyer now than he was a few years ago. He picked up a  
24 case that was a very difficult case to try and couldn't  
25 handle it. And the Washington DC Bar basically said he  
26 tried his hardest, and I think he did.



## Proceedings

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2 I don't think anyone is saying he didn't try his  
3 hardest for his client. And the judge found his  
4 performance to be below expectations of an attorney on a  
5 Murder One trial. It may have been good for a misdemeanor  
6 trial where there is a petit larceny where you shoplifted  
7 some toothpaste, but it's not. It wasn't good enough for  
8 someone that may spend 25 years in jail, and that's what  
9 the judge said.

10 I'm not trying to be mean here. I understand the  
11 problem, and quite frankly, I usually forgive attorneys  
12 when they make mistakes. I'm not the type of judge that  
13 lambastes attorneys. I speak very low and very calmly, and  
14 that's my own personality. The other judge lambasted him  
15 for his performance, and it's kind of obvious.

16 I read a transcript, both the March 31st one and  
17 the April 1st one, and there is no cause of action here.

18 MR. GOLDSMITH: Again, I would just -- I mean,  
19 the connotation of how the Defendants characterize us is --  
20 it's our position that Mr. Deaner made a motion to  
21 withdraw -- made a motion to have new counsel.

22 THE COURT: I'm agreeing. If you're telling  
23 me -- the record is not clear in my mind the reason why the  
24 judge did it. It looks likes he had multiple reasons for  
25 doing so, but I can't go into the mind of a judge. It's  
26 not an unfair reading to say what you just said. It's not

## Proceedings

1  
2 an unfair reading to say what the Washington Post said and  
3 all the other blogs that picked it up later because you  
4 can't tell what transpired because it's multiple days,  
5 there's March 31st, there's April 1st.

6 Initially it was Mr. Rakofsky that went to the  
7 judge because he said he had a conflict, but then later on  
8 said he granted Mr. Deaner's motion. He did say that, the  
9 judge on April 1st, which is the day after because the  
10 judge refused to grant Mr. Rakofsky's motion on March 31st.

11 He only granted it because he wanted to give Mr. Deaner an  
12 opportunity to dwell upon it because he would have to sit  
13 in jail for I don't know how many months it would take for  
14 the prosecution to start a new trial and to get defense  
15 counsel that would be able to defend him.

16 So I have to tell you that I was looking at this  
17 for many weeks already, thinking about it, and I'm not  
18 completely decided yet. But my first reaction is still the  
19 same reaction now, that the nuances that he's making is not  
20 within the law, it is fair reporting on the whole, it is a  
21 republishing and it is opinion. The only one that  
22 disturbed me, as I told you, was the Bannination comments,  
23 which was beyond the pale. Everything else is opinion. I  
24 don't necessarily agree with those opinions. I'm not  
25 characterizing those opinions, but nonetheless, they were  
26 opinion.

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MR. GOLDSMITH: Just to clarify --

THE COURT: And it is a close call on the sanctions.

MR. GOLDSMITH: Just to clarify for the Court, one of the issues that was raised by Defendants as a mischaracterization, any discussion which was allegedly raising ethical issues all happened after the fact, after the motion for Mr. Rakofsky's replacement was granted.

THE COURT: No, that's not true.

MR. GOLDSMITH: Yes.

THE COURT: It's not true because he mentioned it and then he said it again. What happened was the judge said it, I think multiple times on granting the motion, but on the last time he said alternatively this and that and then he brought it up. But it doesn't really much matter if he did not declare a mistrial based upon his unethical conduct. The alleged unethical conduct is the defamation, not the cause of mistrial. That's the problem. You're splitting hairs.

It's the content of what the judge said that may give rise to the defamation. The defamation is he's unethical, not that there was a mistrial. As a matter of fact, quite frankly, Mr. Rakofsky said in his Facebook that it was a good thing that it was a mistrial. He said congratulations, look what I did, I got a mistrial. So

## Proceedings

1  
2 that is not the defamation. A mistrial doesn't mean there  
3 is a defamation. The defamation would be he is unethical,  
4 he is incompetent or whatever other words that were used,  
5 which is not my words, it's the judge's words and it's the  
6 bloggers' words and the Washington Post's words. That's  
7 not what you're getting. The mistrial is not defamation.  
8 The defamation is the underlying conduct --

9 MR. GOLDSMITH: However, again --

10 THE COURT: -- the cause and effect.

11 And also, the case law is that you can't -- I  
12 forgot the words that the Court used. Maybe you can remind  
13 me, I forgot it. I think it was the Supreme Court or the  
14 Court of Appeals. You can't use a laser-like -- I forgot  
15 the words. But you can't just pick out a word here and say  
16 that's defamation, you have to look at the context, and  
17 look at the substantial portion of what was being said.  
18 And I'm going to leave it at that. And you see where I'm  
19 going.

20 MR. GOLDSMITH: I do. I just wanted to just  
21 impress upon the Court that our -- Mr. Rakofsky's attorney,  
22 once there are allegations that he has acted unethically,  
23 that goes to the heart of his practice, and there was never  
24 any discussion or --

25 THE COURT: Mr. Bean put in the affidavit, which  
26 I read, and the judge said those words. So I agree that if

## Proceedings

1  
2 there was -- if in an isolated context someone said,  
3 Mr. Rakofsky, you're unethical and you should not practice  
4 law because you did X, Y and Z, that's defamation, I agree,  
5 but that's not what you're saying. What you're saying is,  
6 is that since the judge didn't attribute the mistrial due  
7 to unethical conduct, that's defamation.

8 What you're forgetting is it's the unethical  
9 conduct would be defamation, not the attribution to the  
10 mistrial. The cause and effect, that's what you're  
11 missing, and that's the only thing that you're really  
12 alleging because everything else was fair reporting,  
13 everything else was a republishing issue or opinion.

14 You may not like what was said and I may disagree  
15 or even some other people, I saw some on the same blogs  
16 that you've showed me, that disagreed and said this was a  
17 rookie mistake and let's give him a little slack. I saw  
18 that too reported in the blogs. I saw one or two comments  
19 that was not -- that was the minority opinion, don't get me  
20 wrong, but I saw that as well, and that's an opinion. He  
21 made a mistake, I make mistakes, you make mistakes, we all  
22 make mistakes, some make bigger mistakes, some make smaller  
23 mistakes.

24 MR. GOLDSMITH: One more issue I would just like  
25 to discuss before --

26 THE COURT: I'm getting signals that I have to

## Proceedings

1  
2 wrap this up, so one more minute.

3 MR. GOLDSMITH: Okay.

4 So, Your Honor, the other issue related to the  
5 personal jurisdiction. Taking the Bannination website  
6 itself, Bannination, I just want to explain to the Court  
7 just quickly how this system is structured and why these  
8 Defendants are brought together. Here we submitted  
9 exhibits for the Court about why on the Bannination  
10 website, just like these other websites, there are these  
11 hyperlinks to other websites.

12 The Bannination website contains various links,  
13 and we attached these to Mr. Turkewitz's own blog, where  
14 these people -- on the Bannination website there is a  
15 specific section discussing Mr. Rakofsky, and in that  
16 section there are these links to these different Defendants  
17 where they all share and basically state what we are  
18 alleging are these defamatory statements.

19 THE COURT: So what you're arguing is that any  
20 time that you put something on the web I have jurisdiction  
21 anywhere in the world. That's what you're arguing.

22 MR. GOLDSMITH: No, we're saying that this is  
23 a -- the reason why there is jurisdiction is because we're  
24 alleging it was a defamatory statement, and the fact that  
25 these Defendants all received a commercial interest -- had  
26 a commercial interest in submitting these hyperlinks.

## Proceedings

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2 THE COURT: I don't buy any of that stuff, I have  
3 to tell you.

4 MR. GOLDSMITH: This was the case law we  
5 submitted from the Second Circuit.

6 THE COURT: Most of what I read from the expert  
7 you put in was incomprehensible, quite frankly.

8 MR. GOLDSMITH: Well, I mean, what the expert was  
9 saying -- and the expert's testimony was not refuted by the  
10 Defendants.

11 THE COURT: It was really incomprehensible.

12 MR. GOLDSMITH: The conclusion of the expert is  
13 that there is this linked network of websites which are run  
14 by the Defendants where they are all trying to achieve  
15 commercial benefit.

16 THE COURT: I'll look at it again. I still  
17 haven't made my mind up on the personal jurisdiction, long  
18 arm jurisdiction issue.

19 With regard to the defamation issues, I think  
20 I've made up my mind 99.9 percent, and I don't think I'll  
21 change it. I will start to write the decision hopefully  
22 tomorrow and try to get it out within a month.

23 One other issue while I have you. On default, I  
24 couldn't figure out who you are seeking a default against.  
25 You didn't say their names and you didn't tell me -- you  
26 have a motion as well for a default judgment.

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MR. GOLDSMITH: Yes.

THE COURT: I could not figure out who you are seeking a default judgment against. You never told me their names.

MR. GOLDSMITH: I believe -- we will clarify that for the Court. I thought this was --

THE COURT: I understand that. I don't want to speak ex parte, but I could not make out from your motion who you're seeking a default from. You didn't put their names in. There's like 80 Defendants total in the second amended complaint, and there's 60 I think in the first amended complaint, and there's at least 50 -- my count was there's 55 Defendants that I have that made motions. That was my rough count, it may be more. I counted 55 or 56 and you did I think 61, so it left about five or six more. I think you had about 61. Do you know how many Defendants you had in your first complaint?

MR. GOLDSMITH: I don't know the exact number.

THE COURT: Okay. I don't want to speak ex parte.

MR. GOLDSMITH: Okay. Just a final issue with regard to the jurisdiction is that in the motion to dismiss by the Turkewitz Defendants, they explicitly stated that they were waiving any personal jurisdiction defenses in their affirmation papers.

THE COURT: I don't remember that too.



## Proceedings

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2 MR. GOLDSMITH: I mean, I have it cited for the  
3 Court.

4 THE COURT: You said they waived all personal  
5 jurisdiction offenses?

6 MR. GOLDSMITH: They stated with regard to their  
7 Defendants that they were waiving personal jurisdiction.

8 THE COURT: I just don't remember because it's  
9 been so long ago. Okay, let's turn it over.

10 MR. TURKEWITZ: There were some that did. Other  
11 states have stronger slap statutes, and basically the  
12 attitude was that if Mr. Rakofsky wants to go sue them in  
13 their home state, that they would welcome him there and  
14 they would hit him with stronger slap sanctions because  
15 they are stronger than the State of New York.

16 THE COURT: What I need you to do, not now, is  
17 let me know who you waive personal jurisdiction for.

18 MR. TURKEWITZ: I believe it's in the transcript  
19 from the first --

20 THE COURT: Can you just do me a favor --

21 MR. TURKEWITZ: Yes.

22 THE COURT: Write a letter to the Court, just to  
23 make it simple for me.

24 MR. TURKEWITZ: Absolutely.

25 THE COURT: -- finding who you waive.

26 And you can tell me as well, and you can just cc

## Proceedings

1  
2 each other?

3 MR. GOLDSMITH: Yes.

4 THE COURT: Because that's fair because I don't  
5 remember that. I did remember you waiving on certain ones,  
6 but I wasn't clear on which ones. At that point in time, I  
7 was very new to the case, as you can tell, and I didn't  
8 take copious notes on that and they look a little different  
9 than what you said than the 35 that I see, so I want you to  
10 match them up.

11 MR. TURKEWITZ: I will let Mr. Randazza.

12 THE COURT: Whoever has to do it. I don't want  
13 to waste time now.

14 MR. GOLDSMITH: Okay. One final comment.

15 I actually came into the case at the same time  
16 when Your Honor did. If you would just let Mr. Rakofsky  
17 speak for about 30 seconds to address some points.

18 MR. RANDAZZA: By all means.

19 MR. TURKEWITZ: Under oath, Your Honor.

20 THE COURT: No, I'm not doing this under oath.

21 MR. RAKOFSKY: Good morning, Your Honor. I just  
22 wanted to say, in my letter to you I wrote, there could  
23 only be one proximate cause for the mistrial. That  
24 proximate cause in the Washington, DC case was my motion to  
25 withdraw and --

26 THE COURT: So what.

## Proceedings

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MR. RAKOFSKY: Okay.

THE COURT: I'm agreeing with you. Let's say you're right, the underlying defamatory material is clearly the alleged incompetence, the unethical issues, just because it wasn't a mistrial -- you, yourself, had glorified the fact that you got a mistrial, so how could that be bad?

MR. RAKOFSKY: I'm not saying it's bad, Your Honor.

THE COURT: Okay. So then how could it be defamatory if it's not bad? What is your damages because there was a mistrial? There is no damages because there is a mistrial.

MR. RAKOFSKY: No one is saying that the mistrial -- stating that there was a mistrial was defamatory. The issue is saying that there was a mistrial because I was incompetent.

THE COURT: But that's what the judge said.

MR. RAKOFSKY: That is not what the judge said, Your Honor, respectfully.

THE COURT: If the judge said you were below expectations of a lawyer that would try someone, I would not use the word incompetent, and I still don't. That's not the way I speak and I don't think it's appropriate to call a lawyer incompetent. I don't speak that way. I

## Proceedings

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2 think it's inappropriate. I would say it the way the judge  
3 said it, but is that a mischaracterization of what the  
4 judge said? I don't know. Is that opinion? Of course,  
5 it's an opinion based on what he said. Quite frankly, some  
6 would say below expectations of what an attorney should be  
7 in a murder trial, you could use that word. That's fair  
8 reporting. I hate to say it.

9 MR. GOLDSMITH: Again, it's our position --

10 THE COURT: And quite frankly, Washington, DC  
11 said it too. I meant the Bar, the Bar said the same thing.  
12 It was a close call. They almost sanctioned him. They  
13 said it's a -- I find this to be a rookie mistake.  
14 Mr. Rakofsky made a mistake and he's human and the  
15 Washington, DC Bar saw it. He was human, he made a  
16 mistake, he tried his hardest. He didn't purposely try to  
17 harm his client. He did his best. And I think reading the  
18 transcript, I think even the judge realized that, and I  
19 realized that.

20 MR. GOLDSMITH: Again, the allegations that we're  
21 raising are the characterization that he was grotesquely  
22 incompetent and that he was --

23 THE COURT: But that's an opinion. What does the  
24 word grotesquely incompetent mean? I don't know what it  
25 means.

26 MR. GOLDSMITH: Apparently, it's the ultimate --

## Proceedings

1  
2 the lowest of incompetence of a level a person could be.

3 THE COURT: I don't know what the word means,  
4 quite frankly, grotesquely incompetent. Either your  
5 incompetent or you're not incompetent. You're 100 percent  
6 incompetent, 99 percent incompetent, 98 percent  
7 incompetent. I don't know what that means, grotesquely  
8 incompetent. I would not use those words. I think it's a  
9 poor choice of words, and no one should be characterized as  
10 that. I agree with that, but is that defamatory? No,  
11 that's an opinion.

12 MR. GOLDSMITH: I would just ask again just the  
13 Court to review our --

14 THE COURT: I reviewed everything, and you see  
15 that I know everything that's going on in this case. I  
16 don't need you to tell me to review more. I know what to  
17 review. I reviewed everything.

18 MR. GOLDSMITH: Okay.

19 THE COURT: And quite frankly, you should review  
20 your letter because you did not tell me in your letter that  
21 you were withdrawing the negligence claim.

22 MR. GOLDSMITH: We will resubmit that letter.  
23 Well, I already withdrew the complaint.

24 THE COURT: You don't have to resubmit it, but  
25 just to be fair, I read everything, I know exactly what you  
26 said. As a matter of fact, you referred to different

## Proceedings

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2 jurisdictions that allow a negligence claim. That was the  
3 last part of the letter on the second page. I know  
4 everything you wrote. I even know the letter that  
5 Mr. Rakofsky wrote in the alleged sur reply showing me all  
6 the Bannination problems, which I had seen before. You  
7 don't have to tell me again, and bringing up a lot of  
8 stuff. I read everything.

9 Everyone finished?

10 MR. TURKEWITZ: Two quick points, Your Honor.

11 THE COURT: Really quick.

12 MR. TURKEWITZ: Two quick points.

13 First, with respect to the pro hac vice motion,  
14 there was, in fact, a hearing in front of Justice Goodman.  
15 It was not done on the record. Mr. Rakofsky had his chance  
16 to make his pitch, he lost, but then moved for  
17 reconsideration, he lost again. He then brought an order  
18 to show cause and he lost and he brought an order to show  
19 cause in the Appellate Division and lost again.

20 THE COURT: I read it.

21 MR. TURKEWITZ: Okay. The other had to do with  
22 at the very beginning you spoke about misconduct and  
23 Mr. Goldsmith had made reference to comments about ethics  
24 that were actually outside the confines of the trial  
25 itself. I want to refer Your Honor to Exhibit J in my  
26 papers, which refers to a variety of websites Mr. Rakofsky

## Proceedings

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2 had where he was practicing law without a license in a  
3 variety of states, including New York, Connecticut and  
4 Washington, DC. He said he wanted to set the standard, for  
5 example, for criminal defense in New York City where he is  
6 not licensed. So anybody who made comments about ethics,  
7 they were certainly based upon his own websites, is  
8 entitled to do so.

9 In addition, some of the websites made references  
10 to a wide variety of experience that he claimed to have,  
11 but did not. Once again, that is fair commentary for  
12 anybody who wants to write about deception or misconduct or  
13 ethics.

14 THE COURT: It's all puffery. I read the website  
15 that he had. It was all puffery that he wrote there, and  
16 this is all opinion. Everything is opinion.

17 MR. TURKEWITZ: And the only other exhibit other  
18 than Exhibit J was Exhibit M, which was the second  
19 Washington Post article when Mr. Rakofsky was found,  
20 according to the woman who had hired him, to be trolling  
21 the courthouses in New York City where he got his lead into  
22 the --

23 THE COURT: That's not defamatory anyhow. We  
24 have lawyers that try to get clients all the time. That's  
25 not defamatory.

26 MR. TURKEWITZ: But it is the basis for comments

## Proceedings

1  
2 that Mr. Goldsmith was referencing that would make that --

3 THE COURT: You know how many lawyers look for  
4 clients? That's not a crime. That's a good thing to try  
5 to get a client. I don't consider that defamatory.  
6 Without clients you can't get paid.

7 With that, I bid you adieu.

8 MR. TURKEWITZ: Thank you.

9 THE COURT: Please order the transcript if you  
10 don't mind.

11 \* \* \* \* \*

12 Certified to be a true and accurate record of the  
13 within proceedings.

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16 Laura L. Ludovico  
17 Senior Court Reporter  
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