

SUPREME COURT OF NEW JERSEY

DOCKET NO. 63,529

Civil Action

THOMAS JOHN SALZANO,

Plaintiff,

v.

NORTH JERSEY MEDIA GROUP, INC.
d/b/a THE RECORD, NORTH
JERSEY.COM, GLEN RIDGE VOICE,
INC., MALCOLM BORG, an
Individual, STEPHEN A. BORG,
an Individual, MARTHA MCKAY,
an Individual, 'JOHN & JANE
DOES I-X," and other persons
whose identities are unknown,

Defendants.

On Appeal and Petition for
Certification from the Final
Judgment of the Superior
Court Appellate Division
Docket No. A-6715-06T1

Sat Below:

Hon. Mary Catherine Cuff
Hon. Clarkson S. Fisher
Hon. Christine L. Miniman

**BRIEF OF AMICI CURIAE: NEW JERSEY PRESS ASSOCIATION, ABC, INC.,
ADVANCE PUBLICATIONS, INC., THE NEW YORK TIMES COMPANY, NYP
HOLDINGS, INC., GANNETT CO., INC., THE ASSOCIATED PRESS, DAILY
NEWS, L.P., DOW JONES & COMPANY, INC., NBC UNIVERSAL, INC.,
COURTHOUSE NEWS SERVICE, THE REPORTERS COMMITTEE FOR FREEDOM OF
THE PRESS, FIRST MEDIA, ALM MEDIA, INC. (soon to be known as
Incisive Media, LLC), NEWSPAPER ASSOCIATION OF AMERICA, THE
AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, THE ASSOCIATION OF
AMERICAN PUBLISHERS, INC., WPIX, INC., and AMERICAN SOCIETY OF
NEWSPAPER EDITORS**

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PRELIMINARY STATEMENT

Acting as the eyes and ears of the public, the media fulfills a fundamental role in society. Indeed, so critical is this role to the functioning of our form of government, that the press is afforded certain privileges when reporting on matters of public concern, including the operations of government.

One long-standing common law privilege is the "fair report privilege," which protects the publication of full, fair and accurate accounts of official proceedings or reports, even when those official proceedings or reports contain defamatory statements. An underlying rationale for extending this privilege to the press is that any member of the public may go to the courthouse to view public proceedings or documents and the reporter is, thus, merely acting as a substitute for the public presence.

In New York Times v. Sullivan, 376 U.S. 254 (1964), the United States Supreme Court held, for the first time, that the First and Fourteenth Amendments apply to defamation law. Thereafter, in Cox Broadcasting v. Cohn, 420 U.S. 469 (1975), the Supreme Court determined that the First and Fourteenth Amendments preclude States from imposing sanctions on the publication of truthful information contained in official court records open to public inspection -- thus affording a constitutional privilege to the publisher of otherwise

defamatory statements contained in public court records as long as the reports are accurate.

In New Jersey, court records, with limited exceptions, are public records. Yet, with the stroke of a pen, the Appellate Division has eviscerated the constitutional protections afforded to the press to accurately report on matters of public record, even though there is no dispute that members of the public could themselves travel to any courthouse in this State to view such records on their own.

Not only is the Appellate Division decision unconstitutional, but also the court's interpretation of the common law fair report privilege undermines the very foundation of the privilege. Moreover, the court's decision is contrary to the majority, modern view of the fair report privilege.

The effect of the court's ruling is to leave this area of law in a state of utter chaos and confusion and create a chill in every newsroom when the media seeks to report on public court proceedings and documents. This outcome is in direct contravention to the deep-rooted and steadfast commitment of our Courts and Legislature to the scrupulous protection of free speech.

LEGAL ARGUMENT

I. THE APPELLATE DIVISION'S INTERPRETATION OF THE FAIR REPORT PRIVILEGE IS UNCONSTITUTIONAL

Despite having found that Defendants' report was fair and accurate, the Appellate Division, nevertheless, concluded that Defendants were not entitled to assert the fair report privilege. See Appellate Division opinion ("App. Div."), p. 19. The Appellate Division based this conclusion on what the court erroneously construed as the holding in Costello v. Ocean County Observer, 136 N.J. 594 (1994). Specifically, the Appellate Division was under the mistaken belief that this Court, in Costello, "determined that the fair report privilege does not apply to 'the publication . . . of the contents of preliminary pleadings such as a complaint or petition, before any judicial action has been taken....'" App. Div., p 19.

Not only is this an incorrect reading of Costello, but also, more important, the Appellate Division's holding in the case *sub judice* is unconstitutional.

A. History of The Fair Report Privilege

Defamation law is grounded on the important public policy that individuals should generally be free to enjoy their reputations unimpaired by false and defamatory attacks. Costello v. Ocean County Observer, 136 N.J. 594, 606 (1994).

The common law, recognizing that the tort of defamation may conflict with the public interest in open expression and chill

the free exchange of ideas, identified "certain situations in which society's interest in unfettered communication outweighed an individual's interest in protecting his or her own reputation. The common law classified these protected occasions as 'privileged communications.'" 1985 *U. Ill. L. Rev.* 1059 (1985).

Privileges were categorized as either "absolute" or "conditional." "An absolute privilege confers complete immunity on otherwise defamatory statements." *Fees v. Trow*, 105 *N.J.* 330, 336 (1987). "A conditional or qualified privilege, on the other hand, is designed to advance the important public interest in unrestrained speech while retaining a measure of protection for the plaintiff who is maliciously defamed." *Id.* at 337. Under a qualified privilege, plaintiff was required to prove defendant's malice in making the statement. Malice was shown through proof of defendant's spite, ill will, hatred, or intent to inflict harm, and was said to be the equivalent of bad faith. See Sack on Defamation, § 9.3.1.

One privilege that was recognized under common law was the "fair report privilege." The fair report privilege has been defined as:

[a] full, fair and accurate report of a judicial proceeding is qualifiedly privileged, although the report contains matters that would otherwise be

defamatory and actionable, and no action will lie therefor except on proof of malice in making it.

Costello, supra, at 607, citing Rogers v. Courier Post Co., 2 N.J. 393, 402 (1949).

There is confusion surrounding the exact nature of the fair report privilege. In fact, New Jersey courts have alternately referred to the privilege as a qualified privilege and an absolute privilege. Compare e.g. Schwarz Brothers Company v. Evening News Publishing Co., 84 N.J.L. 486, 496 (1913) ("It is settled that the publication of fair reports of judicial proceedings are absolutely privileged...") with Rogers v. Courier Post, 2 N.J. 393, 402 (1949) ("A full fair and accurate report of a judicial proceeding is qualifiedly privileged.") Other courts have described the privilege as something of a hybrid:

The fair-report privilege, if not an absolute privilege, is much broader than many other conditional privileges.

Orso v. Goldberg, 284 N.J. Super. 446, 452 (App. Div. 1995). No matter how the privilege is categorized, the privilege is clearly different from other conditional privileges in that it protects the publisher of defamatory material **even when the publisher knows the material to be false**. Id. at 452. Such broad protection is afforded to the reporting of judicial proceeding based on the rationale underlying the privilege itself:

The underlying rationale is that "any member of the

public, if he were present, might see and hear for himself [statements made at a public proceeding], so that the reporter is merely a substitute for the public eye."

Costello, supra, at 607.

While the common law granted fair and accurate reports of official proceedings and public documents protection, a constitutionally based "privilege" that is completely independent of the publisher's motives has evolved. See 1985 U. Ill. L. Rev. 1059 (1985).

B. The United States Supreme Court affords First Amendment protection to defamatory statements

Although defamatory statements did not traditionally come within the scope of First Amendment protection, that changed when the United States Supreme Court held, in New York Times v. Sullivan, 376 U.S. 254 (1964), that a public official could not recover in a defamation action unless the statement at issue was published with knowledge of its falsity or with reckless disregard to its truth or falsity.

Beginning with New York Times v. Sullivan, supra, the United States Supreme Court has "reshaped defamation law" and:

has heightened the barrier against recovery in defamation actions, particularly when the challenged statements involve public persons or documents. Commentators have termed the first amendment protection granted to such statements by the Court a constitutional privilege.

1985 U. Ill. L. Rev. 1059 (1985).

C. The United States Supreme Court affords First Amendment protection to accurate reports of court documents open to public inspection

Thereafter, in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), the United States Supreme Court held that accurate reports of public records are constitutionally protected. In that case, the United States Supreme Court determined that States could not impose sanctions on the accurate publication of material in court documents open to public inspection.¹ Id. at 496.

By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. ***In preserving that form of government the First and Fourteenth Amendments command nothing less that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.***²

¹ Although Cox involved a claim for invasion of privacy, "the constitutional immunity granted to publications within its purview extends to all civil and criminal sanctions, including defamation. See 1985 U. Ill. L. Rev. 1059 (1985), citing Time, Inc. v. Firestone, 424 U.S. 448, 455 (1976); Medico v. Time, Inc., 643 F.2d 134, 143 (3d Cir. 1981).

² Courts measure the "truthfulness" of a privileged report by the report's accuracy. "When a publication repeats what another has said or written, as reports on public proceedings or public documents often do, 'truth' relates not to the content of the statement reported upon but to the correctness of the

Id. at 495 (emphasis added). In so determining, the Court acknowledged the critical role of the press, stating:

In a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.

Cox, supra, at 491.

In 1976, as a result of these and other United States Supreme Court decisions, the American Law Institute modified Section 611 of the Restatement. Section 611 of the Restatement (Second) of Torts provides that:

[t]he publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

Under the Restatement (Second), "whether the publication was made in good faith or without actual malice is no longer an inquiry.³ The only condition is that the report be accurate and complete or a fair abridgment of the proceedings reported." 36 *Creighton L. Rev.* 21 (2002/2003).

D. The Appellate Division decision in this case violates the constitutional protections afforded to accurate

(Footnote cont'd.)

republication." See 1985 *U. Ill. L. Rev.* 1059, citing Time, Inc. v. Pape, 401 U.S. 279 (1971) and Cox, supra, at 496.

³ The Appellate Division relied upon commentary to this section of the Restatement to support its adoption of the first pleading exception to the fair report privilege. Amici discuss this commentary, infra, at 19-20.

reports of information contained in court documents
open to public inspection

It is against this backdrop that the decision of the Appellate Division must be reviewed. The United States Supreme Court has clearly defined the accurate reporting of public documents as a constitutionally protected activity, which is not subject to the imposition of penalties, including monetary damages in a civil action, against a publisher. The Appellate Division decision is in direct contravention to the constitutional protections afforded to such publications.

New Jersey has determined to place court records in the public domain. To this end, R. 1:38 provides that, with certain limited exceptions (which are set forth therein), "[a]ll records which are required by statute or rule to be made, maintained or kept on file by any court, office or official within the judicial branch of government shall be deemed a public record and shall be available for public inspection and copying, as provided by law...."

By placing these records in the public domain, the State of New Jersey must be "presumed to have concluded that the public interest was thereby being served," Cox, supra, at 495, and "a public benefit is performed by the reporting of the true contents of the records by the media." Id. Thus, as the Supreme Court held in Cox, the First and Fourteenth Amendments dictate that sanctions cannot, consistent with the Federal

Constitution, be imposed on the accurate publication of such information contained in court records open to public inspection. Id.

...where the government has made certain information publicly available, it is highly anomalous to sanction persons other than the source of its release. . . . As Daily Mail observed in its summary of Oklahoma Publishing, "once the truthful information was 'publicly revealed' or 'in the public domain' the court could not constitutionally restrain its dissemination." 443 U.S., at 103.

The Florida Star v. B.J.F., 491 U.S. 524, 535 (1989) (emphasis added).

Once a publication is determined to be an accurate report of a public record, the publisher is cloaked with the constitutional protections recognized by the Supreme Court in Cox. No distinction may be made between a first-filed pleading and any other court document that is open to public inspection. Indeed, such a distinction would be antithetical to the fundamental principles upon which the constitutional protections are based. For the same reason, the motive of the publisher is irrelevant.

Here, the subject articles were based on a filed court record open to public inspection. App. Div., p. 2. Moreover, the Appellate Division has already determined that Defendants' reports were fair and accurate. App. Div., p. 19. That ends the constitutional analysis. The Appellate Division could not, consistent with the United States and New Jersey Constitutions,

provide Plaintiff with an avenue for recovery against Defendants for their fair and accurate reporting of a court record open to public inspection.

Indeed, New Jersey's State Constitution affords even broader speech protections than does the Federal Constitution. See Sisler v. Gannett Co., Inc., 104 N.J. 256, 271 (1986); State v. Schmid, 84 N.J. 535 (1980); New Jersey Coalition Against War in the Middle East v. J.M.B Realty Corp., 138 N.J. 326 (1994). New Jersey's "paramount concern for freedom of speech and press" is clearly reflected in legislative enactments and Court decisions on matter of free speech. See, for example, N.J.S.A. § 2A:43-1, which extends to the press a privilege for publication of official statements issued by police department heads and county prosecutors relating to investigations. In addition, although the vast majority of states hold that the negligence standard applies for private plaintiffs seeking to recover against media defendants, even when the speech involves matters of public concern (see Turf Lawnmower v. Bergen Record, 139 N.J. 392, 405-406 (1995) (providing that "forty-two jurisdictions in the United States follow the negligence standard" . . . "even when the subject matter is of public concern")), this Court has provided the media with greater protection by applying the actual malice standard in matters of public concern including speech that affects the health and

safety of the public, speech that involves a highly regulated industry, and speech that concerns allegations of consumer fraud. See Dairy Stores, Inc. v. Sentinel Publishing, 104 N.J. 125 (1986); Sisler v. Gannett Co., Inc., 104 N.J. 256 (1986); Turf Lawnmower v. Bergen Record, 139 N.J. 392 (1995); Senna v. Florimont, 196 N.J. 469 (2008).

Consequently, the Appellate Division's flawed view of when the fair report privilege applies contradicts this long-standing commitment to the principles of free speech afforded by the New Jersey Courts and Legislature.

II. EVEN UNDER A COMMON LAW FAIR REPORT PRIVILEGE ANALYSIS, DEFENDANTS MUST PREVAIL IN THIS CASE

Although this case must be decided in favor of Defendants on constitutional grounds, this Court may also decide the matter based solely on the proper application of the common law fair report privilege. The Appellate Division based its decision on an erroneous reading and subsequent misapplication of dicta in Costello, supra.

In Costello, this Court unequivocally stated that the case was being decided on the grounds that the privilege did not apply because the news report at issue was not "full, fair and accurate" and that this Court was not deciding the issue of whether the privilege attaches to a draft complaint that is annexed as an exhibit to an affidavit filed in a separate

proceeding involving different parties. Costello, supra, at 612. It was in the context of this unfiled draft complaint, attached to an affidavit actually filed in a matter different from the proceeding contemplated by the draft complaint, that this Court, in dicta, discussed the view of some courts that the fair report privilege does not apply to initial pleadings, before any judicial action has been taken. Since the Costello case was decided upon different grounds, this Court's dicta regarding the view of other courts on the preliminary pleading issue is clearly not controlling.

Not only did the Appellate Division rely on dicta in Costello, but also the Appellate Division transmogrified the language used by this Court. The Appellate Division converted this Court's reference to "judicial action" to the term "judicial review" - terms that unquestionably have different meanings, applications and effect. Specifically, this Court, in Costello, while making reference to a comment to § 611 of the Restatement (Second) of Torts, stated the following:

The privilege also does not apply to

[t]he publication . . . of the contents of preliminary pleadings such as a complaint or petition, before any judicial action has been taken.

Costello, supra, at 611 (emphasis added).⁴ The Appellate Division

⁴ Note that the Appellate Division erroneously concluded from this quotation that this Court "determined" that the fair report

then transformed this language to read:

To summarize, because the trustee's complaint was filed in the bankruptcy court the day prior to the first of these articles, and was not subject to any sort of judicial review by the time the articles were published, we must conclude that the fair report privilege does not apply . . .

App. Div., p. 19 (emphasis added).

The terms "judicial action" and "judicial review" are not synonymous, yet the distinction between the two was clearly lost by the Appellate Division. The primary definition of "action" in Webster's Ninth New Collegiate Dictionary is "a proceeding in a court of justice by which one demands or enforces one's right." On the other hand, "review" is defined as, *inter alia*, "judicial reexamination (as of the proceedings of a lower tribunal by a higher); . . . a critical evaluation (as of a book or play)."

A filed complaint is a "judicial action" through which, in this case, the trustee for the bankruptcy estate of NorVergence sought to enforce its rights against Salzano. This term, "judicial action," is consistent with this Court's discussion in Costello of the proposition that a "contemplated" lawsuit is not enough to trigger the privilege's protection:

Under that reasoning, the unfiled and unsigned federal-court pleading alone would not be entitled to the fair-report privilege. In addition, we doubt that the rule could be overcome merely by filing the draft

(Footnote cont'd.)

privilege does not apply to the contents of preliminary pleadings (see App. Div., p. 19) when, in fact, this Court, in dicta, was simply quoting from a comment to a section of the Restatement.

complaint as an exhibit to an affidavit in a separate proceeding that involved neither Fesl nor Costello as parties.

Costello, supra, at 612. Not only did the Appellate Division rely upon dicta in Costello, supra, but also it actually modified the language used by this Court, compounding chaos and confusion by engrafting the added uncertainty of whether the filing of a complaint constitutes a "judicial action" warranting protection under Costello, or whether some sort of additional undefined "judicial review" is required by virtue of the Appellate Division decision. The result, of course, is a chilling effect on the press that has been caused by the appellate court opinion.

Moreover, limiting the fair report privilege to reports of court records only after some form of judicial review has taken place, is (1) inconsistent with the underlying purpose of the privilege; (2) contrary to the majority rule; and (3) unworkable and leads to untenable results.

Significantly, this Court, in reaching its decision in Costello, was mindful of the purpose underlying the fair report privilege:

The underlying rationale is that "any member of the public, if he were present, might see and hear for himself [statements made a public proceeding], so that the reporter is merely a substitute for the public eye." . . .

Costello, supra, at 607 (citations omitted). This underlying

rationale applies equally not only to first-filed pleadings but also to all court documents filed thereafter. Clearly, any member of the public could walk into any courthouse and view a filed complaint. Increasingly, this activity may also occur on-line. There is no logical reason for carving out an exception to the fair report privilege that is fundamentally inconsistent with the entire basis of the privilege. Yet, that is exactly what the Appellate Division has done.

The Appellate Division decision is also contrary to the majority, modern view, which does not exempt initial pleadings from the fair report privilege. Although Costello contains a quotation from *Prosser & Keeton on Torts*, § 115, that "it is the prevailing view, with some few courts to the contrary, that a pleading or deposition filed in a case but not yet acted upon may not be reported under the claim of privilege," that is, in fact, actually the minority view. See Sack on Defamation, § 7.3.2; see also 12 *Comm. L. & Pol'y* 143 (Spring, 2007) ("the majority rule accords protection to these initial pleadings because the act of filing is worthy of public attention").

Furthermore, application of the Appellate Division decision is unworkable and leads to untenable results. The decision does not define "judicial review." Those reporting on court records are then left in the dark as to what type of "judicial review" is required before the privilege will attach. Obviously,

judicial review can take many forms. If, for example, a plaintiff in a pending action files an *ex parte* motion to change venue, pursuant to R. 4:3-3(c), and the court grants the motion to transfer the case, does that qualify as the type of "judicial review" necessary to trigger the privilege? Or, must the judicial review be of such a nature as to constitute some form of determination as to the *prima facie* sufficiency of the initial pleading? No direction is given in this regard. Certainly, not all cases are judicially examined on the merits before trial. Indeed, it is likely that such examination is the exception. Does this mean that there can be no reporting on such actions until the court takes some substantive action at trial? Such an outcome is untenable.

The Appellate Division decision engenders equal uncertainty in the reporting upon criminal charges. Warrantless arrests without a preceding indictment, if an indictment even qualifies as a form of "judicial review," are often made by police officers, and criminal complaints filed without any judicial oversight or action at the initial stages. Since the Appellate Division made clear that filings of government officials are not to be accorded any more weight than filings of ordinary citizens⁵, the press would be without the privilege when

⁵ Although Amici agree with the Appellate Division's determination that court filings of government officials ordinarily should not be afforded any greater weight than

reporting on such arrests, even though these cases are of significant interest to the citizens of this State and even though, historically, these matters have been afforded protection under the common law fair report privilege. Again, such limitations chill and deter the press in performing its critical role of reporting such matters of public concern.

Traditionally, reports of proceedings in open court have enjoyed the protection of the common law fair report privilege. However, based on the Appellate Division's ruling, it is unclear whether reporters may still publish accounts of what takes place in open court, if no judicial review on the merits of the case has been made. Carried to its "logical" conclusion, does the Appellate Division decision also preclude **any** protection for reporting on judicial proceedings if a court ultimately determines that there was no legal basis for the action, even though the proceedings and court decision all occurred in a courtroom open to the public? Of course, such an outcome would run contrary to the underpinnings of the media's constitutional right of access to court proceedings. The First Amendment secures to the public and the media a right of access to criminal and civil proceedings. See Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1 (1986); Richmond (Footnote cont'd.)

filings of ordinary citizens, Amici highlight the Appellate Division's determination in this regard to illustrate the very real impact of the court's "initial pleading" ruling on the day-to-day reporting of matters germane to the public.

Newspapers v. Virginia, 448 U.S. 555 (1980); Publicker Industries, Inc. v. Philadelphia Newspapers, Inc., 733 F.2d 1059, (C.A. Pa 1984). These decisions are based on the understanding of the critical role the press plays in imparting to the public what transpires during judicial proceedings. See Richmond Newspapers, supra, at 573, n. 9. ("One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right.")

These are just a few of the countless problems created by the Appellate Division's determination. The decision has the very real effect of muting the press, thereby rendering the "eyes and ears" of the public, for all intents and purposes, blind and deaf until some form of "judicial review" restores the public's access to court records and proceedings.

In support of its first-pleading exception to the fair report privilege, the Appellate Division has offered only a single basis. The Appellate Division, relying on dicta of this Court in Costello, supra, citing to the Restatement Second of Torts, § 611, comment e, notes:

An important reason for this position has been to prevent implementation of a scheme to file a complaint for the purpose of establishing a privilege to publicize its contents and then dropping the action.

App. Div., 19. Certainly, this hypothetical and unsupported

fear of possible untoward motives of some claimants cannot support a sweeping disregard of the fundamental constitutional principles upon which the fair report privilege is based.

Exposing the press to potential liability for the publication of such filings does not combat the problem perceived by the court. Any member of the public would still have access to the complaint as soon as it is filed, as court records are open to the public.

Moreover, the concern noted by the Appellate Division is already adequately addressed under existing law and court rule. Clearly, those aggrieved by the filing of a frivolous or malicious complaint, which is thereafter dismissed upon publication of its contents, have numerous avenues of redress, none of which results in censorship and chilling of the press.

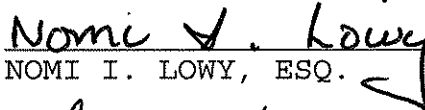
For example, an aggrieved party could file a request for sanctions, pursuant to R. 1:4-8, in connection with the filing and maintenance of frivolous litigation. In addition, claims could be instituted for, *inter alia*, malicious use of process, intentional infliction of emotional distress, and/or harassment. Simply put, these remedies, and potentially others, are currently available under existing law and render the concern of the appellate court that much less compelling.

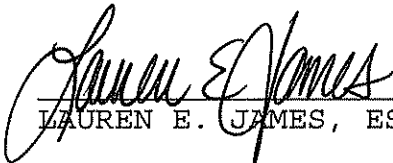
CONCLUSION

For these reasons, Amici respectfully request that this Court reverse the decision of the Appellate Division and find that Defendants' fair and accurate reporting of information contained in public court documents is constitutionally protected. If this Court decides the matter based solely on the application of the common law fair report privilege, Amici request a reversal of the Appellate Division's decision and a determination that the fair report privilege protects the fair and accurate reporting of all court records open to the public.

DATED: December 11, 2008


THOMAS J. CAFFERTY, ESQ.


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