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**Fair Report & Neutral Report Privileges
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1. FAIR REPORT PRIVILEGE
	1. *Aleksej Gubarev, et al., v. BuzzFeed, Inc., et al.*, Case No. 1:17-cv-60426-UU (S.D. Fla.)
		1. BACKGROUND
			1. Gubarev and his businesses brought this case, alleging defamation, in February 2017 in Florida state court; it was subsequently moved to the U.S. District Court for the Southern District of Florida. The case was assigned to Judge Ursula Ungaro.
			2. The case was brought as a result of BuzzFeed’s publication of the Steele Dossier on January 10, 2017. In the dossier’s final memorandum (Report 166) emerges an allegation that Gubarev and his web-hosting companies were involved in Russian efforts to hack the Democratic party leadership during the 2016 election campaign.
			3. On June 4, 2018, Judge Ungaro ruled that BuzzFeed would be allowed to assert a fair report privilege defense, but that they would not be permitted to assert a neutral report privilege defense. Judge Ungaro determined that New York law would control. New York law regarding the fair report privilege is construed more broadly than common law.[[1]](#footnote-1)
			4. BuzzFeed argued that their publication of the Dossier was protected by the fair report privilege because the document was subject to official government activity, including a counter-intelligence investigation.
			5. Pursuant to a successful Motion to Compel by Judge Mehta of the D.C. federal district court on August 3, 2018, the government was ordered to “produce a sworn affidavit that is responsive” to one of the two following questions:
				1. Prior to 5:20 pm EST on January 10, 2017, did the FBI and/or any of the other Defendant agencies possess the two-page memorandum contained within the Dossier dated December 13, 2017, i.e. Report 2016/166?; or
				2. Prior to 5:20 p.m. EST on January 10, 2017, did the FBI and/or any of the other Defendant agencies possess all 35 pages of the Dossier?
				3. E.W. Preistap, then-Assistant Director of the FBI’s Counterintelligence Division, declared under penalty of perjury:

(U) Revised Narrowed Topic No. 3(A):Prior to 5:20 p.m. EST on January 10, 2017, did the FBI possess the two-page memorandum contained within the Dossier dated December 13, 2016, i.e. Report 2016/166?

(U) Response to Revised Narrowed Topic No. 3(A):Yes.

* + - 1. BuzzFeed moved for summary judgment on December 19, 2018. Judge Ungaro granted the motion on fair report grounds. The court found that:
				1. An “official proceeding” was underway when BuzzFeed published the article because President Obama and President-elect Trump were briefed on its contents and the FBI undertook an investigation into the truth of the Dossier’s allegations.
				2. An “ordinary reader” would have understood that the Dossier was part of an official action: the article included a hyperlink to a separate CNN article that described the confidential briefings and reported that the FBI was investigating the truth of the Dossier’s allegations.[[2]](#footnote-2)[[3]](#footnote-3)
				3. Though it was unclear whether Report 166 was used in connection with the “official proceedings,” the court found two issues in Report 166 that were discussed and were indisputably part of the “official proceeding.” The Court found that those two sections in Report 166 were covered by the fair report privilege and, therefore, “in according with [the privilege’s] broad construction and the degree of liberality which a media report is afforded, so too, by extension is the remainder of the Report.”
			2. Notably, Ungaro’s decision did not rely on the FBI’s declaration; Ungaro’s 23-page decision mentioned Priestap’s declaration two times, neither of which had material bearing on the Judge’s decision.
		1. THE APPEAL
			1. An appeal to the 11th Circuit swiftly followed.
			2. On December 9, 2019, after briefing had concluded and the matter was awaiting oral argument, the inspector general of the Department of Justice released a report (the “IG Report”) regarding the FBI’s investigation of Russian interference in the 2016 presidential election. Gubarev argued that a portion of the IG Report flatly indicates that the memorandum containing the allegations against Gubarev was not in the FBI’s possession when BuzzFeed published the Dossier on January 10, 2017, and on this basis filed a motion to supplement the record with the IG Report.  Gubarev argues that if the FBI did not possess this key memorandum, then it could not have formed a part of the “official proceeding,” and, therefore, the fair report privilege does not apply.
			3. Gubarev further contended that there was an inconsistency between the FBI affidavit obtained by BuzzFeed in discovery during the District Court proceeding, which stated that the FBI was, in fact, in possession of the memorandum, and the more recent IG Report. This contradiction, according to Gubarev, gave rise to concerns that the signatory to the FBI affidavit perjured himself, requiring a reopening of the record in the case and reconsideration of the applicability of the fair report privilege.
			4. BuzzFeed contended, among other things, that the FBI affidavit did not contradict the IG Report.  BuzzFeed argued that the affidavit only stated that the FBI was in possession of the 17th memorandum on June 10, 2017, without specifying how it came to possess it. Therefore, the IG Report merely called into question the way that the FBI came may have come into possession of the memorandum (i.e., not from Steele, a member of Congress, or journalists). The IG Report left open the possibility of others – such as from a sister agency during the inter-agency process (which would support the memorandum being part of an “official proceeding.”)
			5. BuzzFeed also argued that if there was a true conflict between the FBI affidavit and the IG Report, no reversal would be warranted, but an issue of fact would be created for consideration by the District Court and that this would yield nothing more than what they currently have – the FBI affidavit.  Under those circumstances, BuzzFeed contended, they had the best evidence – a sworn affidavit – while plaintiffs had a document that consists of unattributed opinion based upon hearsay.
			6. The Eleventh Circuit remanded the matter to the district court for the limited purpose of allowing Gubarev to move that court for relief that would allow for the record to be supplemented with the IG report; the court further ordered that if the district court did, in fact, state in an order supplementing the record and that the IG Report would alter the court’s previously issued summary judgment order, then the parties should seek a full remand of the case.
			7. Back before the district court, Gubarev moved to supplement the record with the IG report and to order that this supplementation would reverse the previously-issued order granting summary judgment to BuzzFeed.
			8. In addition to the arguments made in the motion to supplement the record in the 11th Circuit, Gubarev argued that the allegedly defamatory comments in Report 166 were, per the IG Report, not part of an “official proceeding” at the time of BuzzFeed’s publication of the Dossier and, thus, the plain language of Section 74 under NY Law, which excludes from protection “the report of anything said or done at the time and place of such a proceeding which was not a part thereof,” controls. (*See* NY CIV RTS § 74.)
			9. On December 17, 2020, the District Court issued an order denying Gubarev’s motion to supplement the record with the IG report. The court held that Gubarev’s motion was controlled by Federal Rule of Civil Procedure 60 – as a motion to supplement the record – and that the motion was untimely because it was filed well over a year after the court’s original entry of judgment. (Rule 60(c)(1) provides that a motion to supplement the record must be filed “no more than a year after the entry of the judgment or order or the date of the proceeding.”) The court separately rejected Gubarev’s argument that the court has inherent authority to supplement the record post-judgment.
			10. Gubarev timely filed a notice of appeal, and the case is now pending before the Eleventh Circuit. Oral argument on the appeal is expected to be held in December 2021.
	1. *Mikhail Fridman, et al., v. BuzzFeed, Inc., et al.*, Index No. 154895/2017 (N.Y. Cty. Sup. Ct.).
		1. On May 26, 2017, Mikhail Fridman, Peter Aven, and German Khan filed suit against BuzzFeed and a handful of editors and reporters in the Supreme Court of the State of New York, County of New York. The case was assigned to Judge Arlene Bluth and then to Judge Francis A. Kahn II.
		2. The case was also brought as a result of BuzzFeed’s publication of the Steele Dossier on January 10, 2017. In one of the dossier’s memoranda (CIR 112), the Alfa Group and its three highest officials allegedly engaged in acts of criminal bribery against Vladimir Putin to receive preferential business treatment and suggests that, in a quid-pro-quo arrangement, these officials and Alfa Group would participate in Kremlin-fueled attempts to influence the 2016 U.S. presidential election.
		3. On November 10, 2017, Plaintiffs filed a motion to dismiss four of BuzzFeed’s affirmative defenses, including the fair report privilege and the neutral report privilege.
		4. On May 7, 2018, the Court determined that BuzzFeed alleged facts in their amended answer sufficient to avail themselves of the fair report privilege defense, specifically, that the Dossier was part of a government proceeding, that the Dossier was part of briefings to the President and President-Elect, and that the Dossier was given to the FBI Director, suggesting that the article “reported on a matter of national public interest.” The Court rejected Plaintiff’s theory that BuzzFeed could only publish the Dossier if they knew that every sentence was in it was part of a government investigation, calling it an illogical “reading of the fair report privilege.”
		5. The Court rejected the neutral report defense, citing to the precedent established when the Court of Appeals affirmed the Appellate Division’s conclusion in *Hogan v. Herald Co.*, (84 AD2d 470, 446 NYS2d 836 [4th Dep’t 1982]) that the New York courts do not recognize a neutral report privilege.
		6. Plaintiffs appealed the denial of their motion to dismiss the fair report privilege as an affirmative defense. On May 2, 2019, the Appellate Division, First Department, affirmed the denial, citing specifically to the Gubarev motion to dismiss the fair report privilege as an affirmative defense and basing their conclusion on that of Gubarev’s.
		7. On June 18, 2019, BuzzFeed filed a motion for summary judgment. Plaintiffs answered in kind on October 4, 2019, filing a cross-motion for partial summary judgment dismissing BuzzFeed’s fair report defense.
		8. BuzzFeed argues that the publication satisfies the fair report privilege criteria as being “’of’ a proceeding” and that is “fair and true.” *Fine v. ESPN, Inc.*, 11 F. Supp. 3d 209, 216-24 (N.D.N.Y. 2014). They argue that the First Dep’t and the Court already decided most of the elements of the privilege: that the document was part of an “official proceeding” because it was subject to “action taken by a person officially empowered to do so.” *Freeze Right Refrigeration & Air Conditioning Servs., Inc. v. City of N.Y.*, 101 A.D.2d 175, 182 (1st Dep’t 1984); that provided the “dossier as a whole” was subject to one or more of the “official proceedings,” including the report discussing Plaintiffs (“Report 112”), the privilege applies regardless of whether the 40-odd names cited in the Dossier was discussed with the President or investigated by the FBI; and that, per the First Department, an ordinary reader of the report would recognize that these were “official proceedings.”
		9. BuzzFeed also argues that the report was “fair and true” because, per *Gubarev*, BuzzFeed’s report on the Dossier did “not editorialize; it simply reproduce[d] the Dossier.” (*Cf*. Footnote #3.)
		10. Plaintiffs argue that the Appellate Division did not decide the whether the hyperlinked CNN article was part of BuzzFeed’s report and that, if it did not, then, citing the *Gubarev* decision of Judge Ungaro, BuzzFeed did not report on “official proceedings.” They argue that BuzzFeed did not connect defamatory statements about plaintiffs via hyperlink to an “official proceeding” via hyperlink to CNN; rather, they merely “cited support for the statement in its article that CNN reported” that a synopsis was given to President Obama and President-Elect Trump. Plaintiffs contend that the Court cannot rule on applicability of the fair report privilege to anything other than the defamatory statements involving Plaintiffs because the “applicability of the privilege to the rest of ‘the Dossier’s’ 35 pages is not a *justiciable* question.” *See* *Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 713 (1980) (“It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal.”)
		11. Plaintiffs further argue that BuzzFeed failed to report that the purportedly defamatory statements were part of an “official proceeding”: that BuzzFeed incorrectly determined that the Appellate Division ruled that they were part of an “official proceeding,” that the BuzzFeed article, by itself, did not report that these statements were part of an “official proceeding,” and that the hyperlinked CNN article didn’t attribute the purportedly defamatory statements to an official proceeding. They cite Judge Ungaro, who held in *Gubarev* that “the Article itself does not permit an ordinary reader to understand that the Dossier was the subject of classified briefings or an FBI investigation.” *Gubarev*, 2018 U.S. Dist. LEXIS 97246, at \*23.
		12. They further argue that the CNN article does not specifically attribute the statements concerning Plaintiffs to any “official proceeding,” and, therefore, the statements concerning Plaintiffs are not immunized by Section 74.[[4]](#footnote-4)
		13. The thrust is that, unless Report 112 and its purportedly defamatory statements concerning Plaintiffs are not specifically linked to an “official proceeding,” then BuzzFeed cannot avail itself of the Fair Report Privilege.
		14. The IG Report was brought into the argument in the Plaintiff’s reply on December 16, 2019. Both parties dealt with the IG Report’s impact on the proceedings in sur-replys Filed on January 16, 2020 and January 17, 2020.
		15. Plaintiffs cite the IG Report to argue that there is no proof that Report 112 was part of any official proceedings prior to January 10, 2017, because, in part, the FBI’s solicitation and receipt of the Dossier’s contents to conduct “source validation” to assess their veracity is not assigned a date and that the FBI did not possess Report 112 prior to making the “Carter Page FISA application.” Plaintiffs argue that the FBI did not receive Report 112 directly from Christopher Steele, per the IG Report. Plaintiffs, like Gubarev, essentially argue that if there is no proof that the government possessed the full Dossier before BuzzFeed’s publication, then the fair report privilege fails.
		16. BuzzFeed argues, among other things, that the IG Report states that the FBI received Report 112 from no fewer than three separate sources prior to BuzzFeed’s publication.[[5]](#footnote-5)
		17. On March 18, 2021, the court issued an order granting BuzzFeed’s motion for summary judgment and denied the Plaintiffs’ cross-motion, holding that BuzzFeed had met its burden to present sufficient admissible evidence to establish a prima facie entitlement to the fair report privilege. The statements regarding Plaintiffs were immunized under Section 74 because BuzzFeed reported on an official “proceeding” such that the statements in the article enjoyed the protection of the privilege.
		18. The court declined to hold that the First Department’s earlier ruling was preclusive on whether BuzzFeed reported on an official proceeding, but agreed with BuzzFeed that the article did indeed report on such a proceeding.
		19. Likewise, the court agreed that the article provided sufficient information for an ordinary reader to determine that BuzzFeed was reporting on an official proceeding, even without a hyperlink to the CNN article, because the article referenced the fact that the late Senator John McCain gave copies of the Dossier to the FBI and that the FBI had already obtained several copies on its own. Given those references, the court held that it was “inconceivable that, given the enormous significance of allegations that a rival superpower was interfering in our democratic process to help elect a candidate who had allegedly been cultivated to be a Russian asset would not be investigated thoroughly by the FBI, or that the average reader would think so.”
		20. The decision is currently on appeal before the First Department.
	2. *Miller v. Gizmodo Media Grp., LLC*, 994 F.3d 1328 (11th Cir. 2021)
		1. On April 16, 2021, the U.S. Court of Appeals for the Eleventh Circuit issued an important decision addressing the scope and application of New York’s Fair Report Privilege.
		2. This case was brough by Jason Miller, who had previously served as a senior communications advisor for the Trump presidential campaign. In October 2016, when he was serving in this role, he began an affair with Arlene Delgado, who Miller had hired as a spokesperson for the campaign. Delgado became pregnant, and in July of 2017 gave birth to a son. Later that same month, Miller initiated a paternity and custody proceeding in Florida state court.
		3. In the course of that proceeding, Delgado filed materials to supplement an earlier motion she submitted urging the court to consider a psychological evaluation of Miller. In those materials – which Delgado did not file under seal – she stated that she had been recently informed that in 2012, Miller had an affair with a stripper in Florida named Jane Doe, and that after Doe had become pregnant following sexual intercourse between Miller and Doe, Miller gave Doe a beverage which, unbeknownst to her, contained an abortion pill. Delgado wrote that she had been told Doe was then taken to the hospital, bleeding heavily, and that the pill had indeed induced an abortion. Delgado also stated that Doe herself had later confirmed the story to a journalist.
		4. Although Miller had moved the following business day for the state court to seal the filing, the website *Splinter* published an article reporting on the supplement, entitled “Court Docs Allege Ex-Trump Staffer Drugged Woman He Got Pregnant with ‘Abortion Pill.” Although the state court subsequently sealed the supplement and held a hearing on Miller’s motion to seal, the motion has remained under advisement and the supplement has remained sealed to the public.
		5. Miller sued Gizmodo (the publisher of *Splinter*) and the reporter, Katherine Krueger, for defamation. Below, the defendants argued that Section 74 applied to the immunize the statements in the article. In opposition, Miller argued that the privilege did not apply because the supplement had been filed in a paternity/child custody proceeding and was thus sealed. Miller relied heavily on *Shiles v. News Syndicate Co.*, 261 N.E.2d 251 (N.Y. 1970), where the New York Court of Appeals held that Section 74 does not apply to reports of filings in matrimonial proceedings that are sealed pursuant to New York Domestic Relations Law, and the policy rationales underlying the *Shiles* decision.
		6. The district court agreed with the defendants and held that the *Splinter* article was a fair and true report of the supplement filed by Delgado because it was “substantially accurate.” On appeal, Miller did not dispute that the article was a “substantially accurate” report on the supplement, but instead continued to rely on the *Shiles* decision for the proposition that Section 74 could not apply because the supplement was filed in a paternity/child custody proceeding and sealed.
		7. In its April 2021 decision, the Eleventh Circuit affirmed the district court’s order dismissing the action and held that the *Shiles* decision did not preclude the application of Section 74 to the article.
		8. According to the Eleventh Circuit and its “independent review of New York law,” *Shiles* effectively serves as a small exception to the general rule that for most actions, the public disclosure rationale underlying Section 74 tips the scale in favor of publicity, rather than to the privacy interests of particular litigants. *Shiles* is an exception to that rule because it reflects the New York Legislature’s decision that the public interest is not served by publicizing allegations made in the course of matrimonial actions, given “their inherently personal nature; the interest in not having them be used to gratify spite or promote public scandal; and the interest in preventing a spouse from forcing the other into agreeing to a settlement on threat of disclosing allegations.” Further, *Shiles* applies with force to matrimonial actions because New York law separately provides that filings in those matters are automatically sealed.
		9. By contrast, the Eleventh Circuit held that *Shiles* should be limited to matrimonial actions and had no relevance to whether the *Splinter* report on a filing in a child custody action could be privileged. The filing of the Delgado supplement was controlled by Florida law, which in contrast to New York matrimonial law, does not afford automatic sealing to sensitive filings in a child custody dispute. The court also relied on a recent Second Circuit decision, *Zappin v. NYP Holdings Inc.*, 769 F. App’x 5 (2d Cir. 2019), which confirmed that *Shiles* has not been extended to reports of public matrimonial proceedings – even though these proceedings are likewise sensitive and personal in nature.
		10. The Eleventh Circuit rejected Miller’s argument that cases applying Section 74 to non-public documents are distinguishable because those cases did not incorporate the rationale for the Fair Report privilege regarding the press’ role as supervising government affairs. Although some cases have cited this supervisory rationale in addressing the application of Section 74 – namely, the Southern District of Florida in the *Gubarev* case – there are several other decisions that apply Section 74 to non-public records that do not make reference to this rationale. The court further held that reports of non-public records are not required to fulfill the supervisory rationale in order to earn Section 74 protection; that rationale is merely one of the “animating principles” of Section 74, but it is not a limiting principle for reports on non-public records (other than where records of New York matrimonial proceedings are automatically sealed, per *Shiles*).
1. NEUTRAL REPORTAGE PRIVILEGE
	1. *Smartmatic USA Corp., et al. v. Fox News Network, LLC, et al.*, Index No. 151136/2021 (Sup. Ct. N.Y. Cty.) & *Dominion Voting Systems, Inc.*, C.A. No. N21C-03-257 EMD (Del. Sup. Ct.)
		1. Smartmatic and Dominion, election technology companies, each filed separate defamation lawsuits against Fox News, alleging that Fox and its commentators gave significant broadcast time to hosts and commentators who baselessly claimed the existence of widespread voter fraud in the 2020 presidential election. The lawsuits generally allege that Fox endorsed, repeated, and broadcast a set of verifiably false and damaging claims against Smartmatic and Dominion, including that both engaged in wrongful activities in order to undermine the results of the election.
		2. While the lawsuits are not identical, Fox’s core arguments in its motions to dismiss both lawsuits – as those arguments relate to the principles underlying the neutral reportage privilege – is as follows: Fox’s truthful reporting of newsworthy allegations made by a sitting President and his legal team on matters of public concern is not actionable as a matter of law. According to Fox’s legal arguments, when the President of the United States and his surrogates bring lawsuits challenging election results, the public has the right to know the substance of their claims and what evidence purportedly backs up those claims. Fox’s legal briefs further stress that the network’s broadcasting of the comments made by those lawyers absolutely protected by the First Amendment, regardless of whether those lawyers can eventually substantiate their claims.
			1. In its motions to dismiss both actions, Fox relies on a series of cases purportedly standing for the proposition that the press is insulated from liability for covering allegations that are newsworthy just by virtue of being made.
			2. In seeking to dismiss both suits, Fox relies on *Edwards v. Nat’l Audubon Soc’y, Inc.*, 556 F.2d 113 (2d Cir. 1977), where the Second Circuit addressed a defamation claim against the New York Times for its reporting on accusations made by the National Audubon Society that a group of scientists were behaving as “paid liars.” There, the court held that the Times could not be held liable for its “accurate reporting of newsworthy accusations made by a responsible and well-noted organization like the National Audubon Society” – given that “[w]e do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth” where “[w]hat is newsworthy about such accusations is that they were made.” *Id.* at 120, 122.
				1. Although neither brief submitted by Fox expressly urges the complete adoption of the neutral reportage privilege, in the Smartmatic suit, Fox does identify the neutral-reporting doctrine as a source for the network’s absolute protection for providing airtime to the statements about the voting companies. The network describes the privilege as one that “protects ‘disinterested communications’ by the press of ‘matters of public concern,’ even if that involves communicating defamatory claims.” Br. at 11 (citing *Rendon v. Bloomberg, L.P.*, 403 F. Supp. 3d 1269, 1275 (S.D. Fla. 2019)). Fox then argues that “[i]f the mere fact that a statement is made is itself newsworthy, then the reporting of that statement by the press is protected expression, regardless of whether the statement is defamatory and false, and the press is not bound to verify the truth of the statement.’” Br. at 11-12 (quoting *DeLuca v. N.Y. News Inc.*, 109 Misc. 2d 341, 345-346 (Sup. Ct. N.Y. Cty. 1981)).
				2. Likewise, in the Dominion suit, Fox argues that providing a platform for the President’s lawyers to present *their own* newsworthy election-fraud allegations is not actionable against Fox, because the network had a constitutional right to inform the public of the lawyers’ newsworthy allegations.
			3. The August 2021 hearing on Fox’s motion to dismiss in the Smartmatic lawsuit received significant media attention (<https://www.washingtonpost.com/opinions/2021/08/19/fox-news-big-lie-segments-face-judicial-comeuppance/>). Fox’s motions to dismiss in both actions are still pending.
2. Additional recent FAIR REPORT cases
	1. Use of Single Quotation Marks in Headline: *Karl Reeves, et al. v. Associated Newspapers, Ltd., et al.*, Index No. 154855/2020 (Sup. Ct. N.Y. Cty. Aug. 4, 2021)
		1. Karl Reeves leads a group of corporations that own and operate elevator installation, service, and repair businesses. Reeves has been involved in a series of contentious litigations with his ex-wife over the last several years, including custody proceedings involving the couple’s only child. Reeves sued the publisher of The Daily Mail (as well as related corporate entities, and a reporter) for defamation, citing eleven allegedly defamatory statements in an article the outlet posted about the ongoing dispute between Reeves and his ex-wife.
		2. The portion of the decision relating to the fair report privilege concerns the headline of the article, which read:

*“‘Seriously, I’ll kill both of them’: NY socialite and actress is locked in vicious custody battle with ‘racist, ketamine-snorting’ millionaire CEO husband after he accused her of Pornhub fame and threatened to kill her parents”*

* + 1. Reeves argued that each portion of the headline was false and defamatory. The court disagreed and dismissed each of Reeves’ arguments (the court went on to grant the defendants’ motion to dismiss in full, with costs and disbursements).
		2. The court first cited to precedent holding that “[a] newspaper need not choose the most delicate words available in constructing its headline” and that a newspaper is indeed “permitted some drama in grabbing its reader’s attention[.]” Then, the court evaluated each section of the headline and held that each one constituted either a direct quotation of statements Reeves had made in the past or were substantially true.
			1. For example, took issue with the phrase “custody battle” because the article cited to statements that Reeves had made in a separate defamation litigation. The court disagreed, holding that “upon reading the Article, a reader clearly can see that there were multi-court legal battles between Reeves and Michelle, including a divorce action, a separate custody action, and a defamation action.”
		3. Finally, the court contended with Reeves’ argument that the headline was inaccurate because it refers to him as a “**‘racist’**, full stop” (emphasis added). The court agreed with The Daily Mail that the publication’s use of single quotation marks around the word ‘racist’ “indicat[ed] that defendants are quoting allegations made against Reeves, not making factual assertions.”
	1. Plaintiff’s Failure to Respond to Fair Use Argument Results in Dismissal on Multiple Grounds: *BYD Co. Ltd. v. VICE Media LLC*, No. 20-CV-3281 (AJN), 2021 WL 1225918 (S.D.N.Y. Mar. 31, 2021)
		1. BYD, one of the world’s largest producers of electric vehicles, protective masks and equipment, and other products, sued VICE over the publication of an online article titled *Trump Blacklisted This Chinese Company. Now It's Making Coronavirus Masks for U.S. Hospitals*.
		2. The article reported, in relevant part, on the legislative history of a provision “of the 2020 National Defense Authorization Act (“NDAA”) that prohibited the use of federal funds for the purchase of rail cars and buses from companies owned or subsidized by the Chinese government—a group of which BYD was a part.” The article also discussed a report by a separate group, Australian Strategic Policy Institute (“ASPI”), that had included BYD on a list of 83 companies “that had been associated with factories that had allegedly used forced Uyghur labor.”
			1. The ASPI report also discussed BYD’s relationship to one of the subsidiaries that allegedly used forced labor, although it does not allege that the factory in question ever produced any products or raw materials for BYD. The ASPI report also referenced BYD’s relationship to a supplier and noted that a separate subsidiary of that supplier employed over 100 Uyghur workers.
		3. BYD alleged that the VICE article was defamatory because VICE had misrepresented the content of the ASPI report, as that report never stated that BYD had used forced labor in its supply chain. BYD further alleged that the word “blacklisted” was inaccurate because no such list existed
		4. VICE moved to dismiss BYD’s complaint, arguing in relevant part that the article’s headline was a fair index of its truthful content and was protected as a privileged fair report of governmental proceedings.
		5. Although the court agreed with VICE’s separate arguments that the BYD’s complaint should be dismissed for failing to plausibly allege actual malice, the court rested on the fair report privilege as an alternative ground for dismissal.
		6. The court noted that BYD did not respond to VICE’s fair report argument in opposing the motion to dismiss, noting that its “failure to oppose [a defendant’s] specific argument in a motion to dismiss is deemed waiver of that issue.”
		7. The court then agreed with VICE that Section 74 “provides separate grounds to conclude that the headline and the relevant content of the article are privileged and therefore not actionable” – even if BYD had opposed VICE’s arguments in favor of dismissal.
		8. According to the decision, the article constituted a substantially fair and true report of the legislative proceedings relating to the NDAA and how that provision “came to bar federal funds from going to BYD.” The court held that “[t]he headline here and the corresponding text in the article fall within the scope of § 74, for even if the language used is at times hyperbolic, the discussion of the legislative process is ‘fair and true’ and conveys accurately the nature of the proceedings.”

RELATED MATERIALS:

1. K. Bensinger, M. Elder, and Mark Schoofs, “These Reports Allege Trump Has Deep Ties To Russia” (BuzzFeed News, January 10, 2017), <https://www.buzzfeednews.com/article/kenbensinger/these-reports-allege-trump-has-deep-ties-to-russia>.
2. E. Perez, J. Sciutto, J. Tapper and C. Bernstein, “Intel chiefs presented Trump with claims of Russian efforts to compromise him,” (CNN, Jan. 10, 2017), <https://www.cnn.com/2017/01/10/politics/donald-trump-intelligence-report-russia/>.
3. J. Gerstein, “Libel suit against BuzzFeed thrown out,” (Politico, Dec. 19, 2018), <https://www.politico.com/story/2018/12/19/buzzfeed-steele-dossier-libel-1070786>
4. The IG Report, or, “Review of Four FISA Applications and Other Aspects of the FBI’s Crossfire Hurricane Investigation,” (December 2019), <https://www.justice.gov/storage/120919-examination.pdf>.
1. Section 74 under New York law states that a civil action “cannot be maintained against any person, firm, or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.” (NY CIV RTS § 74.) [↑](#footnote-ref-1)
2. The court cited to *Adelson v. Harris*, 402 P.3d 665, 669 (Nev. 2017), where the Nevada Supreme Court found that a hyperlink is sufficient to confer privilege on a report provided the hyperlink is conspicuous. However, from a pre-publication standpoint, it’s worth considering whether you’re better served linking to the official proceeding than to a linked article talking about an official proceeding. A plaintiff in such a proceeding may query, for example, what inference is intended and/or endorsed by linking to an outside report and away from the official document. [↑](#footnote-ref-2)
3. Note, too, that BuzzFeed put readers on notice that the Report was unverified and included “allegations that are unverified” and that it “contains errors,” and that “BuzzFeed News reporters in the U.S. and Europe have been investigating various alleged facts in the dossier but have not verified or falsified them.” <https://www.buzzfeednews.com/article/kenbensinger/these-reports-allege-trump-has-deep-ties-to-russia>. This suggests that not everything in the dossier was meant to be taken as flatly true. [↑](#footnote-ref-3)
4. Plaintiffs cite to this passage in Section 74: “This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof.” (NY CIV RTS § 74.) [↑](#footnote-ref-4)
5. (a) FBI General Counsel James Baker, from a journalist in November 2016, (b) FBI Director James Comey, from Senator McCain on December 9, 2016, and (c) the FBI, from Associate Deputy Attorney General Bruce Ohr on December 10, 2016, after receiving it from Glenn Simpson. [↑](#footnote-ref-5)