# EXHIBIT 2

**New York Pattern Jury Instructions--Civil**
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Committee on Pattern Jury Instructions Association of Supreme Court Justices

**Division 3. Torts Other Than Negligence**
**G. Business Torts**
**1. Injurious Falsehood**

PJI 3:55 Intentional Torts--Business Torts--Injurious Falsehood

A person who makes a statement about another person's (lands, personal property, intangible things) which is reasonably understood to cast doubt upon the (quality, ownership) of the (lands, personal property, intangible things) by those who (see, hear) the statement, is liable for the pecuniary loss which results directly and naturally from the statement, provided first, that the statement is false, and second, that it was made maliciously.

In this action, plaintiff contends that defendant said of plaintiff's *[specify property involved]* that it *[set forth statement claimed to be disparaging]*. As defendant denies that ((he, she) made such statement, that it was understood to be disparaging), you must first determine (whether defendant made such statement, whether such statement was reasonably understood by those who ((saw, heard)) it to cast doubt upon the ((quality, ownership)) of the ((property)). If you find that (no statement was made, the statement was not reasonably understood to cast such doubt), you will find for the defendant.

If you find that defendant made the statement claimed and that it was reasonably understood to cast doubt on the (quality, ownership) of plaintiff's (property), you must then determine whether the statement was false. If you find that it was not, you will find for the defendant. If you find that it was false, you will then consider whether the statement was maliciously made.

The burden of proving malice is upon plaintiff. *[Use so much of the next two sentences as the evidence in the case warrants.]* A false statement is maliciously made if the person making it knows that (his, her) statement is false. A false statement is maliciously made even though the person making it did not know that it was false if (1) it is made with (*[use the clause in these parentheses only when defendant has no privilege:--]* intent to interfere with another person's interests or) a deliberate desire to do another person harm, or (2) it is made recklessly, without regard to the consequences, and under circumstances which defendant as a reasonably prudent person should have anticipated that injury to another would follow. From the making of a false statement the law presumes malice, and, therefore, if you find that the statement was false, you must find malice unless on all the evidence you find the presumption overcome. In determining whether the statement was maliciously made you may consider (*[set forth factors on which there is evidence, such as:--]* the language in which the statement was cast, whether at the time (he, she) made the statement defendant knew that it was untrue or believed that it was true) and all of the other facts and circumstances surrounding the making of the statement. If you find that the statement was not made maliciously, you will find for the defendant.

If you find that the statement was maliciously made, you will next consider whether the statement was a substantial factor in causing plaintiff pecuniary loss. Plaintiff claims to have suffered pecuniary loss in the following respects *[set forth plaintiff's claims]*. If you find that plaintiff did not suffer such loss, or that though (he, she) did, the statement was not a substantial factor in causing that loss, you will find for the defendant. If you find that the statement was a substantial factor in causing plaintiff pecuniary loss you will find for plaintiff in

the amount of such pecuniary loss as you find resulted directly and naturally from the making of the statement.

**Comment**

The charge assumes that the statement alleged to have been made by defendant was not privileged; as to privilege see infra this comment. The charge is based on Ruder & Finn, Inc. v Seaboard Surety Co., 52 NY2d 663, 439 NYS2d 858, 422 NE2d 518; Drug Research Corp. v Curtis Publishing Co., 7 NY2d 435, 199 NYS2d 33, 166 NE2d 319; Walters v Clairemont Sterilized Egg Co., 242 NY 521, 152 NE 410; Hovey v Rubber Tip Pencil Co., 57 NY 119; Kendall v Stone, 5 NY 14; Continental Air Ticketing Agency, Inc. v Empire International Travel, Inc., 51 AD2d 104, 380 NYS2d 369; Squire Records, Inc. v Vanguard Recording Soc., Inc., 25 AD2d 190, 268 NYS2d 251, aff'd, 19 NY2d 797, 279 NYS2d 737, 226 NE2d 542; Berman v Medical Soc. of State, 23 AD2d 98, 258 NYS2d 497; Carnival Co. v Metro-Goldwyn-Mayer, Inc., 23 AD2d 75, 258 NYS2d 110; Payrolls & Tabulating, Inc. v Sperry Rand Corp., 22 AD2d 595, 257 NYS2d 884; Penn-Ohio Steel Corp. v Allis-Chalmers Mfg. Co., 7 AD2d 441, 184 NYS2d 58; see Harwood Pharmacal Co. v National Broadcasting Co., 9 NY2d 460, 214 NYS2d 725, 174 NE2d 602. See generally, Prosser, Torts (4th Ed) 915, Sec. 128, 1 Harper & James, The Law of Torts 474, §§ 6.1-6.4; Restatement, Second, Torts Secs. 623A-652; 43A NYJur2d, Defamation & Privacy §§ 175 et seq.; Prosser, Injurious Falsehood: The Basis of Liability, 59 Col. L Rev 425; Comment: 63 Yale LJ 64. The first paragraph of the pattern charge refers to a statement "which is reasonably understood to cast doubt," and the second and third paragraphs use corresponding language. There is liability also if the statement is intended to cast doubt and it is in fact so understood, even though reasonable people would not have to so understand it, see infra this comment, and Restatement, Second, Torts § 629, Comment f. In a case of the latter type there must be inserted in the first paragraph in place of the above quoted clause the words "which is intended to be and is in fact understood to cast doubt," and corresponding changes must be made in the second paragraph.

The tort which the common law referred to as "slander of title" or "trade libel" and which is sometimes also denominated "disparagement" initially concerned only ownership or quality of property, Lampert v Edelman, 24 AD2d 562, 261 NYS2d 450; Payrolls & Tabulating, Inc. v Sperry Rand Corp., 22 AD2d 595, 257 NYS2d 884. By analogy it has been extended to include non-property injuries resulting from intentional falsehood. The title "injurious falsehood" encompasses both aspects, Al Raschid v News Syndicate Co., 265 NY 1, 4, 191 NE 713; Morrison v National Broadcasting Co., 24 AD2d 284, 266 NYS2d 406, rev'd on other grounds 19 NY2d 453, 280 NYS2d 641, 227 NE2d 572 (ovrld by Board of Education v Farmingdale Classroom Teachers Asso., 38 NY2d 397, 380 NYS2d 635, 343 NE2d 278). The pattern charge illustrates the property aspect: this comment deals with both aspects.

The elements of slander of title are (1) a communication falsely casting doubt on the validity of complainant's title, (2) reasonably calculated to cause harm, and (3) resulting in special damages, 39 College Point Corp. v Transpac Capital Corp., 27 AD3d 454, 810 NYS2d 520); Rosenbaum v New York, 24 AD3d 349, 806 NYS2d 543; Fink v Shawangunk Conservancy, Inc., 15 AD3d 754, 790 NYS2d 249; Brown v Bethlehem Terrace Associates, 136 AD2d 222, 525 NYS2d 978. When the tort involves defamation of a product or a service, sometimes called "injurious falsehood", its elements are typically described as falsity, malice and special damage, Collision Plan Unlimited, Inc. v Bankers Trust Co., 63 NY2d 827, 482 NYS2d 252, 472 NE2d 28; Drug Research Corp. v Curtis Publishing Co., 7 NY2d 435, 199 NYS2d 33, 166 NE2d 319; Kendall v Stone, 5 NY 14; Continental Air Ticketing Agency, Inc. v Empire International Travel, Inc., 51 AD2d 104, 380 NYS2d 369; Restatement, Second, Torts §§ 623A & 633; see Hirschhorn v Harrison, 210 AD2d 587, 619 NYS2d 810.

Although the tort originated as "slander of title" and involves elements of defamation, such as privilege

(infra), confusion results from treating the action as one only in defamation, Lampert v Edelman, 24 AD2d 562, 261 NYS2d 450. Essentially, injurious falsehood is a form of interference with economic relations; Prosser, Torts (4th ed) 915, § 128; see Cunningham v Hagedorn, 72 AD2d 702, 422 NYS2d 70. The gist of the action is false disparagement of title resulting in an impairment of vendibility, Rosenbaum v New York, 24 AD3d 349, 806 NYS2d 543, citing 44 NYJur2d Defamation and Privacy § 260. The interest interfered with may be any type of legally protected property interest that is capable of being sold, Lampert v Edelman, supra; Prosser, op cit, 918, as, for example, an easement, Lampert v Edelman, supra, a mortgage, Cooper v Weissblatt, 154 Misc 522, 277 NYS 709, personal property, Like v McKinstry (NY) 41 Barb 186, 4 Keyes 397, a publication, Le Massena v Storm, 62 App Div 150, 70 NYS 882; Stuart v Anti-Defamation League of B'nai B'rith, 127 NYS2d 362, the title of a motion picture, Carroll v Warner Bros. Pictures, Inc., 20 F Supp 405 (SDNY), the goodwill or custom of a restaurant or hotel, Maglio v New York Herald Co., 83 App Div 44, 82 NYS 509; Bosi v New York Herald Co., 33 Misc 622, 68 NYS 898, aff'd, 58 App Div 619, 68 NYS 1134, or the right to sell a product free of defendant's claim of patent infringement, Zenie v Miskend, 245 App Div 634, 284 NYS 63, aff'd, 270 NY 636, 1 NE2d 367. It may also be such non-property interest as the right not to be subjected to deportation proceedings, Al Raschid v News Syndicate Co., 265 NY 1, 191 NE 713; the right to remain free of unwarranted income tax prosecution, Penn-Ohio Steel Corp. v Allis-Chalmers Mfg. Co., 7 AD2d 441, 184 NYS2d 58; Gale v Ryan, 263 App Div 76, 31 NYS2d 732; or the right not to be made to appear to be a cheater, Morrison v National Broadcasting Co., 24 AD2d 284, 266 NYS2d 406, rev'd on other grounds 19 NY2d 453, 280 NYS2d 641, 227 NE2d 572). An employee may not disguise a non-actionable wrongful discharge claim into an action for injurious falsehood, La Duke v Lyons, 250 AD2d 969, 673 NYS2d 240.

The interference may take the form of a written or oral statement, Al Raschid v News Syndicate Co., 265 NY 1, 191 NE 713, but may also be a picture, Comment: 63 Yale LJ 64, 75 n58, or an act, 1 Harper & James, The Law of Torts 489, § 6.4. Though it be a statement, it does not appear essential, as it would be in a defamation action, that the exact words used be pleaded, Carnival Co. v Metro-Goldwyn-Mayer, Inc., 23 AD2d 75, 258 NYS2d 110; Payrolls & Tabulating, Inc. v Sperry Rand Corp., 22 AD2d 595, 257 NYS2d 884; but see Al Raschid v News Syndicate Co., 265 NY 1, 191 NE 713 (complaint dismissed for failure to plead the allegedly false information). Whether the defendant made the statement or did the act claimed will generally be a question for the jury, Benton v Pratt (NY) 2 Wend 385.

The words, picture or act need not be defamatory, Al Raschid v News Syndicate Co., 265 NY 1, 191 NE 713; Eldredge, The Spurious Rule of Libel per Quod, 79 Harv L Rev 733, 741. It is enough that they could reasonably be understood to be injurious, or that they were intended to be so understood, and were so understood, to plaintiff's injury, Al Raschid v News Syndicate Co., supra; Payrolls & Tabulating, Inc. v Sperry Rand Corp., 22 AD2d 595, 257 NYS2d 884; Restatement, Second, Torts § 629; Comment: 63 Yale LJ 64, 77. Whether they could be so understood is a question for the court, Restatement, Second, Torts § 652(1)(a); whether they were reasonably so understood is generally a question for the jury, Restatement, Second, Torts § 652(2)(a). Whether a statement concerns the owner or manufacturer personally or only relates to his property or product is often difficult to ascertain, see Larsen v Brooklyn Daily Eagle, 165 App Div 4, 150 NYS 464, aff'd, 214 NY 713, 108 NE 1098; Kennedy v Press Publishing Co., 41 Hun 422; *compare* Bosi v New York Herald Co., 33 Misc 622, 68 NYS 898, aff'd, 58 App Div 619, 68 NYS 1134 (article stating that anarchists frequented plaintiff's restaurant did not concern owner personally) *with*Merle v Sociological Research Film Corp., 166 App Div 376, 152 NYS 829 (film indicative that "white slave" traffic took place at plaintiff's factory did concern owner personally); but if it necessarily implies that plaintiff has committed a criminal act, as by selling adulterated food, Larsen v Brooklyn Daily Eagle, supra, or is unethical, as by duping the purchaser into buying a worthless article by

grossly unfair advertising, Tex Smith, Harmonica Man, Inc. v Godfrey, 198 Misc 1006, 102 NYS2d 251, the cause of action is in defamation rather than for injurious falsehood. In such case special damage need not be pleaded, Harwood Pharmacal Co. v National Broadcasting Co., 9 NY2d 460, 214 NYS2d 725, 174 NE2d 602; Continental Air Ticketing Agency, Inc. v Empire International Travel, Inc., 51 AD2d 104, 380 NYS2d 369; see Drug Research Corp. v Curtis Publishing Co., 7 NY2d 435, 199 NYS2d 33, 166 NE2d 319, but if proven is recoverable in the defamation action, Restatement, Second, Torts § 626, Comment d. When the words used are not defamatory as a matter of law, but the jury could find that they refer to both plaintiff and his product and impute to plaintiff misconduct in his trade or business, it may be necessary to instruct the jury in the elements of both defamation and injurious falsehood, see Harwood Pharmacal Co. v National Broadcasting Co., 9 NY2d 460, 214 NYS2d 725, 174 NE2d 602.

By special damage is meant "pecuniary" damage, Kendall v Stone, 5 NY 14; Restatement, Second, Torts § 633; i.e., "direct financial loss," Payrolls & Tabulating, Inc. v Sperry Rand Corp., 22 AD2d 595, 257 NYS2d 884, which must be asserted with sufficient particularity, Lesesne v Lesesne, 292 AD2d 507, 740 NYS2d 352; Rall v Hellman, 284 AD2d 113, 726 NYS2d 629. When the special damage claimed is loss of customers, the proof must establish the particular persons who ceased to be or refused to become customers, Drug Research Corp. v Curtis Publishing Co., 7 NY2d 435, 199 NYS2d 33, 166 NE2d 319; Squire Records, Inc. v Vanguard Recording Soc., Inc., 25 AD2d 190, 268 NYS2d 251, aff'd, 19 NY2d 797, 279 NYS2d 737, 226 NE2d 542; general proof of loss of customers is not sufficient, Marlin Firearms Co. v Shields, 171 NY 384, 64 NE 163; DiSanto v Forsyth, 258 AD2d 497, 684 NYS2d 628; De Marco-Stone Funeral Home v WRGB Broadcasting, 203 AD2d 780, 610 NYS2d 666 (citing PJI); see Continental Air Ticketing Agency, Inc. v Empire International Travel, Inc., 51 AD2d 104, 380 NYS2d 369. Note, however, that Restatement, Second, Torts, § 633 and Comment h, adopts the view that if it can be shown with reasonable certainty that a decline in sales resulted from the conduct of persons that plaintiff is unable to identify, recovery is permitted; accord, Tex Smith, Harmonica Man, Inc. v Godfrey, 198 Misc 1006, 102 NYS2d 251; Rochester Brewing Co. v Certo Bottling Works, Inc., 192 Misc 629, 80 NYS2d 925. The damages claimed must be proved to be the direct and natural result of the statement or act, Kendall v Stone, supra; Penn-Ohio Steel Corp. v Allis-Chalmers Mfg. Co., 28 AD2d 659, 280 NYS2d 679, aff'd, 21 NY2d 916, 289 NYS2d 753, 237 NE2d 73; **Restatement, Second, Torts § 632**; see SRW Associates v Bellport Beach Property Owners, 129 AD2d 328, 517 NYS2d 741. Thus, when the injury claimed is the loss of a prospective advantage, it must be shown that but for the words or act the advantage would have in fact materialized, Kriger v Industrial Rehabilitation Corp., 8 AD2d 29, 185 NYS2d 658, aff'd, 7 NY2d 958, 198 NYS2d 611, 166 NE2d 189; see Morrison v National Broadcasting Co., 19 NY2d 453, 280 NYS2d 641, 227 NE2d 572). So also, if it is shown that but for the falsehood the contract would have been performed, it is immaterial that it is unenforceable under the Statute of Frauds, Rice v Manley, 66 NY 82; Livoti v Elston, 52 AD2d 444, 384 NYS2d 484; Payrolls & Tabulating Inc. v Sperry Rand Corp., supra. However, proof that plaintiff released a third party from the contract between them or reduced the contract price is insufficient to take the case to the jury, since plaintiff should hold the third party to his contract and the release or reduction results, therefore, from plaintiff's act rather than defendant's words, Kendall v Stone, supra; Gilchrest House, Inc. v Guaranteed Title & Mortg. Co., 277 App Div 788, 97 NYS2d 226, aff'd, 302 NY 852, 100 NE2d 46; Felt v Germania Life Ins. Co., 149 App Div 14, 133 NYS 519. Evidence that three factories had refused to accept plaintiff's milk on the basis of defendant's statement that it was impure is, however, sufficient to require submission to the jury whether plaintiff was in fact damaged, Brooks v Harison, 91 NY 83. Expenses for counsel to defend the tax prosecution resulting from the falsehood are recoverable, Gale v Ryan, 263 App Div 76, 31 NYS2d 732; see Cooper v Weissblatt, 154 Misc 522, 277 NYS 709; Restatement, Second, Torts § 633(b); but cf. Cohen v Minzesheimer, 118 NYS 385. Furthermore, as in the law of defamation, expense for offsetting publicity should also be recover-

able if the jury finds that the publicity constituted a reasonable effort to minimize damages, Den Norske Ameriekalinje Actiesselskabet v Sun Printing & Publishing Ass'n, 226 NY 1, 122 NE 463. Apparently punitive damages may also be recovered in an action for injurious falsehood, Brooks v Harison, supra; Kendall v Stone, 5 NY 14.

Since falsity is one of the essentials, the burden is upon plaintiff to prove the statement false, Cornwell v Parke, 52 Hun 596, 5 NYS 905, aff'd, 123 NY 657, 25 NE 955; Jurlique, Inc. v Austral Biolab Pty., Ltd., 187 AD2d 637, 590 NYS2d 235; Hahn v Duveen, 133 Misc 871, 234 NYS 185; Restatement, Second, Torts § 651(1)(c); Prosser, Torts (4th ed) 920, § 128. Brown v Bethlehem Terrace Associates, 136 AD2d 222, 525 NYS2d 978, held that the filing of a lis pendens which was undeniably true would not support an action for slander of title; 35-45 May Assoc. v Mayloc Assoc., 162 AD2d 389, 557 NYS2d 41; see Sopher v Martin, 243 AD2d 459, 663 NYS2d 83. However, the wrongful filing for record of a document that casts doubt upon another's title to or interest in realty gives rise to an action for slander of title, 39 College Point Corp. v Transpac Capital Corp., 27 AD3d 454, 810 NYS2d 520; Rosenbaum v New York, 24 AD3d 349, 806 NYS2d 543. When the statement sued upon is that a painting owned by plaintiff is not genuine, expert testimony that the painting is in fact genuine is sufficient to take the case to the jury, Hahn v Duveen, supra.

A prima facie case is made out upon proof that the statement was made, that it was false and that plaintiff was damaged, for malice, the third essential, is presumed from proof of falsity if the statement or act is not privileged, John W. Lovell Co. v Houghton, 116 NY 520, 22 NE 1066; see Restatement, Second, Torts § 651, Comment d; Prosser, Torts (4th ed), 920, § 128; Prosser, Injurious Falsehood: The Basis of Liability, 59 Col. L Rev 425, 439; 1 Harper & James, The Law of Torts 479, § 6.1. Generally, as to the effect of the presumption, see comment to PJI 1:63, on which that portion of the fourth paragraph of the pattern charge dealing with presumption is based. Whether the evidence presented to rebut the presumption of malice is legally sufficient for that purpose is a question of law for the court. Whether the presumption has in fact been rebutted may also be for the court, if the only conclusion that can be drawn from the uncontradicted evidence, even though it comes from interested witnesses, is that the statement was not maliciously made, cf. St. Andrassy v Mooney, 262 NY 368, 372, 186 NE 867 (dealing with presumption that driver had permission of owner to drive vehicle). But where the evidence produced to rebut the presumption has been contradicted, or although not contradicted comes from interested witnesses, the truthfulness of accuracy or whose testimony is on all the evidence open to reasonable doubt and which testimony because it is within the witness' sole knowledge cannot be contradicted, the question whether the presumption has been rebutted is for the jury, cf. Piwowarski v Cornwell, 273 NY 226, 7 NE2d 111 (dealing with owner/driver presumption). If privilege exists, however, the presumption is inapplicable; express malice must be shown, John W. Lovell Co. v Houghton, 116 NY 520, 22 NE 1066; Hovey v Rubber Tip Pencil Co., 57 NY 119. In such a case the fourth sentence of the fourth paragraph of the pattern charge should be deleted and there should be inserted between its present third and fourth paragraphs instructions on privilege (see infra this comment).

Malice may be found from the making of a statement or doing of an act with knowledge that it is false even though there is no motive to harm, or with deliberate intent to do harm even though in the honest belief that the statement is true, John W. Lovell Co. v Houghton, 116 NY 520, 22 NE 1066; Hovey v Rubber Tip Pencil Co., 57 NY 119; Prosser, Injurious Falsehood: The Basis of Liability, 59 Col. L Rev 425, 437-38. The language used may be evidence of malice, Croft v Richardson, 59 How Pr 356. Knowledge of falsity under the Lovell and Hovey cases means actual knowledge, but there is dictum in Penn-Ohio Steel Corp. v Allis-Chalmers Mfg. Co., 7 AD2d 441, 444, 184 NYS2d 58 and Morrison v National Broadcasting Co., 24 AD2d 284, 291, 266 NYS2d 406, rev'd on other grounds, 19 NY2d 453, 280 NYS2d 641, 227 NE2d 572), that the utterance of false informa-

tion may be actionable "if done.... so recklessly and without regard to its consequences, that a reasonably prudent person should anticipate that damage to another will naturally follow." Thus, it appears that either actual knowledge or recklessness is sufficient under New York case law. But it is not enough that defendant, in the exercise of reasonable care, should have known of the falsity of the act or statement, see Dale System, Inc. v General Teleradio, Inc., 105 F Supp 745 (SDNY); Remick Music Corp. v American Tobacco Co., 57 F Supp 475 (SDNY); Restatement, Second, Torts & 623A, Comment d; Prosser, op cit supra at 438. Malice may be established by actual knowledge, proven directly or reasonably inferred, or recklessness, but not by negligence. (For a comparison with "constitutional malice" in defamation cases involving public figures, see generally New York Times Co. v Sullivan, 376 US 254, 84 SCt 710; St. Amant v Thompson, 390 US 727, 88 SCt 1323).

In the absence of privilege, malice may also be found from intentional interference with the plaintiff's interests, even though defendant is not motivated by ill will and even though he honestly and reasonably believes his statement or act to be true, Penn-Ohio Steel Corp. v Allis-Chalmers Mfg. Co., 7 AD2d 441, 184 NYS2d 58; Restatement, Second, Torts § 623A and Comment d; Prosser, op cit supra at 438. When privilege exists, however, intentional interference by itself is not enough. In such case the words "intent to interfere with another person's interests or" should be deleted from the third sentence of the fourth paragraph of the pattern charge. In such case also, the complaint must be dismissed unless evidence is introduced from which the jury can infer malice. Thus, one who asserts his rights under a patent, copyright, deed or lease may not be held for his assertions notwithstanding the invalidity of his patent, Hovey v Rubber Tip Pencil Co., 57 NY 119; John W. Lovell Co. v Houghton, 116 NY 520, 22 NE 1066; deed, Like v McKinstry (NY) 41 Barb 186, 4 Keyes 397; or lease, Cornwell v Parke, 52 Hun 596, 5 NYS 905, aff'd, 123 NY 657, 25 NE 955; unless it be shown that he knew it was invalid or that he acted with sole intent of injuring plaintiff rather than for protection of his own interest, see Union Car Advertising Co. v Collier, 263 NY 386, 189 NE 463. The question for the jury is whether defendant acted in good faith and in the honest belief that his statement was true or without such belief and for an improper purpose, such as preventing a sale by plaintiff, Kendall v Stone, NY Super 269, rev'd on other grounds, 5 NY 14 ; Hahn v Duveen, 133 Misc 871, 234 NYS 185. "The absence of probable cause for the belief may permit the jury to infer that it does not exist, but it is not necessarily conclusive; and the advice of counsel, while it is evidence in favor of good faith, is likewise not determinative in itself." Prosser, Torts (4th ed) 925, § 128.

Privilege exists when a statement is fairly made by a person in discharge of a private or public duty, legal or moral, or in the conduct of his own affairs in a matter where his interests are concerned, John W. Lovell Co. v Houghton, 116 NY 520, 22 NE 1066. Whether defendant's interest is such as to make his statement privileged is a question of law for the court; the existence of the facts on which the claim is based and the determination whether defendant acted in good faith for the protection of his interests may be questions of fact for the jury, John W. Lovell Co. v Houghton, supra; Brooks v Harison, 91 NY 83. The burden of proving the facts establishing the existence of an absolute or conditional privilege is on defendant, Restatement, Second, Torts § 651(2).

The privilege so far discussed is the qualified or conditional privilege accorded a rival claimant to property for a business competitor, Restatement, Second, Torts §§ 647, 649; Prosser, Torts (4th ed) 924-26, § 128; 1 Harper & James, The Law of Torts 481, § 6.2. Qualified or conditional privilege for fair comment is also recognized, see Mack, Miller Candle Co. v Macmillan Co., 239 App Div 738, 269 NYS 33, aff'd, 266 NY 489, 195 NE 167; Purofied Down Products Corp. v National Ass'n of Bedding Mfrs., 97 NYS2d 683; Prosser op cit, supra at 924; 1 Harper & James, op cit supra at 485, § 6.3, and may present a question of good faith for the jury. However, the privilege of persons participating in judicial, legislative or executive proceedings, or of spouses, is absolute, Restatement, Second, Torts § 635; Prosser, op cit supra at 924; 1 Harper & James, op cit supra at 485, as is the privilege of fair report accorded by Civil Rights Law § 74, 1 Seelman, The Law of Libel (Accum.

Supp.) 94, § 211, and see PJI 3:31 and comment. While the existence of the facts upon which the absolute privilege depends may be a question for the jury, the good faith of defendant is not in issue once the privilege is found to exist.

The "Noerr-Pennington" doctrine, which arose originally in the antitrust field, protects the First Amendment right to petition the government and immunizes defendants from claims of injurious falsehood, even when defendant made the statements knowing they were false, Villanova Estates, Inc. v Fieldston Property Owners Association, Inc., 23 AD3d 160, 803 NYS2d 521. Where, however, defendant is shown to have no genuine interest in seeking governmental action, but seeks simply to harass or delay, the "sham" exception to the doctrine applies, see Alfred Weissman Real Estate, Inc. v Big V Supermarkets, Inc., 268 AD2d 101, 707 NYS2d 647. However, a successful effort to influence governmental action cannot be considered a sham, id.

The statute of limitations for an "action to recover damages for .... false words causing special damages" is one year, CPLR 215(3). The claim accrues when the lien is recorded, Rosenbaum v New York, 24 AD3d 349, 806 NYS2d 543; but see Hanbidge v Hunt, 183 AD2d 700, 583 NYS2d 288 (where plaintiff did not learn of easement until three years after it was filed, claim accrued when plaintiff made aware of easement and suffered damages). When words are the basis for the action the one-year period applies, see Milone v Jacobson, 78 AD2d 548, 432 NYS2d 30. However, when the interference is a picture or an act and thus not within the wording of CPLR 215(3), it may be that the three year limitation period of CPLR 214(4) or (5) applies (injury to property or personal injury), cf. Morrison v National Broadcasting Co., 19 NY2d 453, 280 NYS2d 641, 227 NE2d 572); see also Goldberg v Sitomer, Sitomer & Porges, 97 AD2d 114, 469 NYS2d 81, aff'd for reasons in AD op. 63 NY2d 831, 482 NYS2d 268, 472 NE2d 44.

As to special damages, malice and privilege, compare the related defamation charges, PJI 3:26, 3:32, and 3:33.



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