State of New York
Supreme Court Chambers
612 STATE STREET
SCHENECTADY, NEW YORK 12305
(518) 285-8450
chambersmpowers@nycourts.gov

HON. MARK L. POWERS
Supreme Court Justice

Eileen B. Kassner, Esq.
Principal Court Attorney

Kim A. Ambesi
Secretary to Justice

May 15, 2020

Alan J. Pierce, Esq.
Hancock Estabrook, LLP
1500 AXA Tower I
100 Madison Street
Syracuse, New York, 13202

David A. Schulz, Esq.
Elizabeth Seidlin-Bernstein, Esq.
Ballard Spahr, LLP,
1675 Broadway – 19th Floor
New York, New York, 10019-5820

Re: Porco v. Lifetime Entertainment Services, LLC
Index No. 2013-0190
RJI No. 09-1-2013-0080

Counselors,

Please find enclosed executed Decision and Order of the Court in the above-entitled matter.

Attorney Pierce please ensure the Decision and Order is filed with the County Clerk's Office and served upon all parties.

Very truly yours,

Hon. Mark L. Powers/kaa

Hon. Mark L. Powers
Schenectady County Supreme Court Justice

/kaa
Enclosure

SUPREME COURT
STATE OF NEW YORK

COUNTY OF CLINTON

PRESENT: **HON. MARK L. POWERS**
SUPREME COURT JUSTICE

DECISION AND ORDER

Index No. 2013-0190
RJI No.:09-1-2013-0080

CHRISTOPHER PORCO and JOAN PORCO,

Plaintiffs,

-against-

LIFETIME ENTERTAINMENT SERVICES, LLC,

Defendant.

NOTICE: PURSUANT TO ARTICLE 55 OF THE CIVIL PRACTICE LAW AND RULES, AN APPEAL FROM THIS JUDGMENT MUST BE TAKEN WITHIN 30 DAYS AFTER SERVICE BY A PARTY UPON THE APPELLANT OF A COPY OF THE JUDGMENT WITH PROOF OF ENTRY EXCEPT THAT WHERE SERVICE OF THE JUDGMENT IS BY MAIL PURSUANT TO RULE 2103(b)(2) or 2103(b)(6), THE ADDITIONAL DAYS PROVIDED SHALL APPLY REGARDLESS OF WHICH PARTY SERVES THE JUDGMENT WITH NOTICE OF ENTRY.

APPEARANCES:

Hancock Estabrook, LLP, 1500 AXA Tower I, 100 Madison Street, Syracuse, New York, 13202 (*Alan J. Pierce*, of counsel) for Plaintiffs.

Ballard Spahr, LLP, 1675 Broadway, 19th Floor, New York, New York, 10019-5820 (*David A. Schulz* and *Elizabeth Seidlin-Bernstein*, of counsel) for Defendant.

HON. MARK L. POWERS, JSC

Plaintiffs commenced an action against defendant seeking damages for its alleged violation of their rights under Civil Rights Law §51. Defendant answered, denying the material allegations of the complaint. Now, defendant moves for summary judgment dismissing the complaint with prejudice. Plaintiffs cross-move for partial summary judgment on the issue of liability and move to renew the Court's prior decision denying defendant's motion to dismiss plaintiffs' claims without prejudice.

BACKGROUND

Early in the morning on November 15, 2004, Peter Porco (hereinafter "Peter") and Joan Porco (hereinafter "Joan") were attacked with an axe while they slept in their family home in the hamlet of Delmar, New York. Police were called to the scene by a court officer who went to check on Peter because he was uncharacteristically absent

from work at a county courthouse. The police arrived at the home to find Peter's body at the base of the stairs, near the front door. Joan was found in bed upstairs, seriously injured. Joan had sustained severe head injuries during the attack and was unable to speak because her jaw was fractured. The police discovered that the attacker had entered the home and disabled the alarm system before smashing the alarm pad. Few people knew the family alarm code, among them Peter and Joan, and their sons, Johnathan Porco (hereinafter "Johnathan" and Christopher Porco (hereinafter "Christopher"). At the time of the crime, Johnathan was active in the United States Navy and was stationed on a submarine and Christopher was studying economics at the University of Rochester.

At school, Christopher had an active social life and a girlfriend. His life was not as perfect as it seemed, however. Christopher had told his friends that he came from a wealthy family and would receive a considerable inheritance, when in reality his family finances were more modest. Christopher himself had financial troubles; he had outstanding credit card bills and had used Peter's name to secure a car loan for his yellow Jeep Wrangler and a student loan, without Peter's permission. Peter had recently found out about the loans and expressed his anger with his son. Additionally, Christopher was struggling academically. He had left the university for a period of time in 2002 after contracting mononucleosis and was also academically separated from the university in 2003. Christopher was at school in Rochester when he was called by a Times Union

Newspaper reporter seeking comment about the attack and maintained that this was how he first learned of it.

That night, Christopher drove to visit Joan in the hospital. While he was there, police officers escorted him to the station for questioning. Christopher's interview with the police lasted for approximately seven hours, during which time he provided a saliva sample. He was questioned about his reputation at school, his financial problems, and his relationship with his parents. An officer advised Christopher that Joan had identified him as her attacker. Christopher denied this, indicating that he had been sleeping in a dormitory common room at the time, nearly 200 miles away. Christopher was not taken into custody at the conclusion of the interview. In early 2005, Christopher moved back to Delmar and he and Joan lived in the home of family friends, with Christopher working in a veterinary clinic.

The investigation into the crimes lasted nearly a year, and continued to focus on Christopher. In the course of the investigation, police found footage of Christopher's car leaving the university at 10:36 pm on the night of the attack and returning to campus at 8:30 am the next morning. Toll collectors working on the New York State Thruway ("thruway") recalled seeing a vehicle that looked like Christopher's entering the thruway at 10:45 pm that night and exiting near Delmar at 1:51 am. This evidence was used to place Christopher at the family home at the time of the crime. Police also discovered

that Christopher had taken a laptop belonging to Joan and sold it online. When the police interviewed Joan, after a period of recovery, she had no memory of the attack and could not identify her attacker.

In November 2005, Christopher was indicted on charges of murder in the second degree and attempted murder in the second degree. He voluntarily appeared at his arraignment, and was taken into custody. Christopher spent a month in jail before being released on bail, and at his bail hearing, Joan submitted a written statement in his support and appeared publicly for the first time since the attack. In 2006, Christopher was tried by a jury and convicted of the crimes. He is now incarcerated at the Clinton Correctional Facility in Clinton County, New York, serving a sentence of 50 years to life.

Defendant, Lifetime Entertainment Services, LLC (hereinafter "Lifetime"), acquired rights to the story in 2012 and, thereafter, developed a film to broadcast on its network. The film, titled *Romeo Killer: The Chris Porco Story* (hereinafter "the film"), portrayed a dramatized version of the above events. Two months prior to Lifetime broadcasting the film, Christopher initiated the instant action, alleging that Lifetime had used his name without his consent for advertising or trade purposes in violation of Civil Rights Law §50. Simultaneous with his complaint, Christopher filed an order to show cause seeking a preliminary injunction barring Lifetime from broadcasting the film. Subsequently, Christopher sought to bar Lifetime via a temporary restraining order by

an amended order to show cause filed on February 12, 2013. The Court (Muller, J.) granted the temporary restraint, pending resolution of the demand for a preliminary injunction. Lifetime appealed with the Appellate Division granting an emergency stay, pending resolution of the appeal on the merits. The Appellate Division then reversed and vacated the Court's order, thereby permitting Lifetime to broadcast the film, which Lifetime proceeded to do, for the first time, on March 23, 2013. Lifetime then moved to dismiss Christopher's complaint, which motion the Court (Muller, J.) granted. Christopher appealed that decision; the Appellate Division reversed, and denied Lifetime's motions for leave to reargue and leave to appeal to the Court of Appeals. Lifetime answered the complaint on June 27, 2017, and on July 31, 2017, Christopher filed an amended complaint in which he included a claim for money damages pursuant to Civil Rights Law §51[1] and also added Joan as a co-plaintiff. Lifetime then moved to dismiss Joan's claims as time-barred. In response, Christopher and Joan (hereinafter

---

[1] Civil Rights Law §51 provides, in relevant part:

> Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages.

collectively referred to as "plaintiffs") cross-moved for leave to further amend the complaint to allege facts to defeat Lifetime's motion. The Court entered an order denying Lifetime's motion to dismiss Joan's claims without prejudice, agreeing that Joan's claims do not relate back to Christopher's, but granting Joan time for discovery on whether she has a claim within the statute of limitations. Joan filed an appeal of that order. Plaintiffs then filed their second amended complaint, which Lifetime answered on April 2, 2018.

Now, Lifetime moves for summary judgment dismissing the complaint against it with prejudice, asserting that plaintiffs are not entitled to damages because the film depicts a newsworthy event and its use of plaintiffs' names is reasonably related to that depiction. Plaintiffs oppose, and cross-move for partial summary judgment on liability on the grounds that the film is materially and substantially fictitious and that Lifetime knew the film is false. Additionally, plaintiffs cross-move to renew Lifetime's motion to dismiss Joan's claims, and upon renewal, ask the Court to deny the motion with prejudice.

DISCUSSION

A party moving for summary judgment must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate

the absence of any material issues of fact" to obtain relief (*Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]*). If the proponent does not eliminate such issues of fact through evidentiary submissions, the motion must be dismissed, "regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; see Lacasse v Sorbello, 121 AD3d 1241 [3d Dept. 2014]*).

The parties dispute the legal standard the Court should apply to the facts at issue in deciding the cross-motions for summary judgment. Plaintiffs have alleged that they are entitled to money damages because of Lifetime's violation of Civil Rights Law §51, which protects individuals from commercial exploitation *(see Spahn v Julian Messner, Inc., 21 NY2d 124, 129 [1967]; Davis v High Soc. Mag., Inc., 90 AD2d 374, 381 [1982])*. A party alleging a violation must prove the defendant (1) used his or her "name portrait picture or voice (2) for advertising purposes or for the purposes of trade (3) without consent" (*Lohan v Take-Two Interactive Software, Inc., 31 NY3d 111, 120 [2018], quoting Lohan v. Perez, 924 F Supp2d 447, 454 [ED NY 2013]*).

Generally, portrayals of newsworthy events fall outside the scope of the statute, as they are not for advertising purposes or purposes of trade (*see Meeropol v Nizer, 381 F Supp 29, 38 [SD NY 1974]; Messenger ex rel. Messenger v Gruner + Jahr Print. and Publ., 94 NY2d 436, 442-43 [2000]; Davis v High Soc. Mag., Inc., 90 AD2d at 382)*. This is in recognition of "the constitutional value of uninhibited discussion of newsworthy topics"

(Messenger ex rel. Messenger v Gruner + Jahr Print. and Publ., 94 NY2d at 443). "The constitutional guarantee of free speech and a free press protects factual reporting concerning newsworthy persons and events, overriding the right of privacy, statutory or otherwise" *(Smith v Goro, 66 Misc2d 1011, 1015 [Sup Ct, NY County 1970]; see Time Inc. v Hill, 385 US 374 [1967]; Stephano v News Group Publ., Inc., 64 NY2d 174 [1984]).* Such freedom extends to entertainment because "'[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period'" (*Time, Inc. v Hill*, 385 US at 388, quoting *Thornhill v State of Alabama*, 310 US 88, 102 [1940]). Drawing a line between entertaining content and informing content for First Amendment protection "'is too elusive'" (*Time, Inc. v Hill, 385 US at 388 quoting Winters v People of State of New York, 333 US 507, 510 [1948]).* Furthermore, because "[e]rroneous statement" is "inevitable" in entertaining content and informing content, such statements "'must be protected if the freedoms of expression are to have the breathing space that they need to survive'" if "innocent or merely negligent" (*Time, Inc. v Hill, 385 US at 388 quoting New York Times Co. v Sullivan, 376 US 254, 271-72 [1964][internal quotations omitted]).* "We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a

person's name, picture or portrait, particularly as related to non-defamatory matter[]" (*Time, Inc. v Hill, 385 US at 389).* For example, opinion and interpretation of disputed or ambiguous facts is largely protected by the First Amendment (*see Milkovich v Lorain Journal Co., 497 US 1 [1990]; Partington v Bugliosi, 56 F3d 1147, 1154 [9th Cir1995].* The freedom to create entertaining and informing content is not absolute, however. "The constitutional guarantees can tolerate sanctions against calculated falsehood without significant impairment of their essential function[]" (*Time, Inc. v Hill, 385 US at 390).* Thus, liability based on knowingly false content does not run afoul of the First Amendment (*see Time, Inc. v Hill, 385 US at 390, Porco v Lifetime Entertainment Servs., LLC, 147 AD3d 1253, 1254-55 [3d Dept. 2017]).* That the First Amendment prohibits the state from proscribing all forms of false speech and largely limits civil recovery for fictional content, does not mean that any claims in such instances are unconstitutional (*see US v Alvarez, 567 US 709, 716-19 [2012]; NY Times Co v Sullivan, 376 US 254; Time, Inc. v Hill, 385 US 374).*

The courts in New York have considered this constitutional framework and crafted legal standards for Civil Rights § 51 cases that fully comply with it. Therefore, if a defendant's use of a plaintiff's name or likeness accompanies newsworthy content, and the plaintiff's name or likeness has a real relationship to that content, the plaintiff cannot recover *(Messenger ex rel. Messenger v Gruner + Jahr Print. and Publ., 94 NY2d at 442-*

43). If, on the other hand, content is not newsworthy, a plaintiff may recover. Though the true story such content is based on may be newsworthy, content "may be so infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the newsworthiness exception" because such substantially fictitious work is only an attempt to trade on the plaintiff's persona *(Id. at 446)*. Consequently, a defendant may be liable for a "materially and substantially fictitious biography where a knowing fictionalization amounts to an all-pervasive use of imaginary incidents" *(Porco v Lifetime Entertainment Servs., LLC, 147 AD3d at 1254)*. The Court of Appeals has expressly recognized this distinction between newsworthy content and materially and substantially fictitious content as grounds for recovery *(see Messenger ex rel. Messenger v Gruner + Jahr Print. and Publ., 94 NY2d at 446)*. It is the work's content only that determines whether it is newsworthy, not any of the defendant's financial motives *(Id. at 442)*. Courts have been fairly strict in applying the statute.[2]

---

[2] Parties may not recover, though a film was based on their lives, if their names or likenesses were not featured therein *(Hampton v Guare, 195 AD2d 366, 366 [1st Dept. 1993]; Waters v Moore, 70 Misc2d 372, 374 [Sup Ct, Nassau County 1972])*. Additionally, a plaintiff cannot recover when his image is used only incidentally to illustrate newsworthy media *(see Alfano v NGHT, Inc., 623 F Supp2d 355, 360-61 [ED NY 2009])* or for a fictitious portrayal of a deceased person *(Frosch v Grosset & Dunlap, 75 AD2d 768, 769 [1st Dept. 1980]*. Nor can a plaintiff recover for a fictionalized account of true events where it is obvious to the viewer that the content is fictitious *(Hicks v Casablana Records, 464 FSupp 426, 431-33 [SD NY 1978]*[no liability for fictionalized account of Agatha Christie's disappearance wherein the only facts were the names of four individuals and the amount of time Christie was gone]).

Here, the crux of the parties' argument is whether the film is newsworthy. Lifetime advocates for the standard applied in *Messenger*, that plaintiffs cannot recover if the film is newsworthy and their names are related to that newsworthy content. That standard is inapplicable at this stage, if at all. In *Messenger*, the plaintiff conceded that the article her photograph was featured with was newsworthy such that there was no dispute on that issue *(94 NY2d at 444-445)*. Here, plaintiffs dispute the point, alleging in their complaint that the film is a "substantially fictionalized" account. While, undoubtedly, the underlying story of Peter's murder, the attempted murder of Joan, and Christopher's conviction is newsworthy, the question must be applied as to Lifetime's film. To recover, plaintiffs must establish that the film is materially and substantially fictitious and that Lifetime knew it was so fictionalized. Thus, the Court's first inquiry here is whether the film is materially and substantially fictitious.

Having set forth the applicable legal standard, the Court will consider the parties' cross-motions for summary judgment, beginning with the evidentiary issues raised by plaintiffs. Plaintiffs contend that Lifetime's motion largely relies on inadmissible hearsay, taken from trial transcripts, including testimony from third-party witnesses and attorney arguments, newspaper articles, books, and television news programs. The Court does not agree that all of Lifetime's evidence is inadmissible hearsay for purposes of this motion.[3] Certain portions of the trial testimony may come in under the doctrine of

---

[3]

The Court will consider the following "true facts" contained in Lifetime's appendices A and B, drawn from various sources: the crime took place in Delmar, in the fall; the Porco home is located on Brockley Drive; Peter was an attorney; Johnathan is Christopher's older brother, and was a naval officer at the time, stationed on a submarine; the Porco family had a dog named Barrister; After being attacked, Peter got dressed, walked around the house, and started his morning routine; Joan had severe head injuries after the attack; a Porco family member was involved in organized crime; Christopher owned a yellow Jeep Wrangler at the time; Christopher told friends he had a large inheritance; Christopher withdrew from ROTC because of his grades; Christopher had been a member of the varsity swim team; Christopher burned a couch on a hill; Christopher had mononucleosis the first semester of his freshman year at college; Christopher had a girlfriend who attended a different university; Christopher had briefly dated the eldest daughter of Detective Tony Arduini; Christopher's relationship with Joan gave him strength during the trial; Christopher had support from four female friends at sentencing; Joan maintained Christopher's innocence; Christopher maintains his innocence; the investigation persisted for more than a year before Christopher was charged; many first responders arrived on the scene including Detective Christopher Bowdish; a Times Union reporter was the first person to contact Christopher about the crime; Christopher went to the hospital to see Joan following the attack; Christopher was taken from the hospital by the police for questioning; the police interview lasted approximately seven hours; Christopher allowed police to take a saliva sample during the interview; Christopher admitted lying to his friends, girlfriend, and parents; during the interview, the police informed Christopher that Joan had said he was involved in the attack; Christopher said he was in Rochester at the time of the attack; Christopher said he slept in the dormitory lounge because he gave up his room to a visiting fraternity brother; no physical evidence was found in Christopher's car or anywhere else; Peter had expressed anger that Christopher was not paying his bills and was holding Christopher personally responsible for his car and student loans; Christopher had high credit card balances; Christopher took Joan's computer and sold it on eBay without her knowledge or consent; Terence Kindlon, Esq., was one of Christopher's trial attorneys; Hon. Jeffrey Berry presided over the criminal trial; Joan suffered a traumatic brain injury and does not recall the attack or any conversation with police after the attack; Joan believed the police were biased against Christopher; Christopher was sentenced to a minimum of 25 years incarceration; Christopher had been a Cub Scout; Christopher had discussed financial aid with Peter; Christopher did not believe his

collateral estoppel. "In order to invoke the doctrine of collateral estoppel, there must have been an identity of issue which has necessarily been decided in the prior action and is decisive in the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling" *(Launders v Steinberg, 9 NY3d 930, 932 [2007][internal quotations omitted])*.

In 2006, the jury convicted Christopher of murder in the first degree as to his father, finding that "with intent to cause the death of [his father], he cause[d his] death" and, as to his mother, of attempted murder in the second degree, whereby the jury found that Christopher intended to cause her death (Penal Law § 125.25[1]). The verdict required the jury to find that Christopher had driven to and entered the family home at the time of the attack, crediting testimony that his car was seen leaving the university and traveling the thruway on the night of the attack, that he had not slept in a dormitory common room, that he had disabled the home alarm system with the code and smashed the alarm pad, and that he had driven back to Rochester after the attack.[4] "Although evidence [of other issues] was presented at [Christopher's] criminal trial, [they were] not

---

mother had named him as a suspect during police interview; Christopher questioned the experience of the police officers with murder investigations during his police interview; and, Christopher was not excelling at school.

[4] Whether Lifetime had access to the trial transcripts and other materials at the time the script was written and the film broadcast is irrelevant to their admissibility and the issue of whether the film is materially and substantially false.

necessarily 'decided therein'" and he is not estopped from contesting Lifetime's use of such evidence here *(Launders v Steinberg, 9 NY3d at 932)*. Lifetime may rely on statements given by Christopher in an interview for *48 Hours Mystery*, his statements during his police interview, his and Joan's statements at the sentencing hearing, Joan's statements in her published letters dated June 3, 2006, and August 24, 2005, and Joan's testimony at the trial as admissions (*see White v Empire Mut. Ins. Co., 59 Misc2d 527, 529 [Civ Ct, NY County 1969]*). Similarly, facts adduced from statements by Christopher's counsel, either in argument, during trial, or in appellate briefs, are admissible here as informal judicial admissions (*see Matter of Union Indem. Ins. Co. of NY, 89 NY2d 94, 103 [1996]*). The news articles, books, and third-party trial testimony are hearsay, and the Court will not consider them with Lifetime's motion papers (*see Peckman v Mut. Life Ins. Co. of NY, 125 AD2d 244, 246-47 [1986]*). Of course, Lifetime may rely on any statements for non-hearsay purposes.

Turning to the merits of Lifetime's motion, "[u]nlike at trial, where plaintiff[s] will bear the initial burden of establishing" Lifetime's liability by a preponderance of the evidence, "on this motion for summary judgment, [Lifetime] bears the initial burden of demonstrating its entitlement to judgment as a matter of law by proffering evidentiary proof in admissible form" *(DiBartolomeo v St. Peter's Hosp. of City of Albany, 73 AD3d 1326, 1326 [3d Dept. 2010])*. Specifically, Lifetime must establish that the film is not materially

and substantially fictitious. According to Lifetime, the film is "a faithful retelling of the material facts concerning Christopher's crime and prosecution" and is "substantially true to the actual events in all material respects." Lifetime points to the film setting, its portrayal of the Porco family dynamic and Christopher's relationships with women, the crime, the investigation, the public response, and the prosecution and trial as faithful representations of true events. The Court has reviewed Lifetime's proof, including the film, and certainly, the film contains many elements drawn from truth. At the same time, Lifetime acknowledges invented dialogue or moving conversations between characters to different settings than that in which they actually took place. Lifetime also ascribed fictional names and created characters that are composites of more than one actual person. For instance, the film's "Detective Sullivan" is a composite character based on Detectives Bowdish and Arduini; "Brody" is a composite of Christopher's college roommate Matthew Ambrosio and fraternity brothers who testified at trial; and "Betsy" is a composite of the family friends with whom Christopher and Joan resided after the crime. Lifetime also concedes that the film portrays imagined interviews of some of the characters which are used to advance themes of Christopher's manipulation and his friends' and family's denial that he committed the crimes. Additionally, though not specifically addressed by Lifetime, the film's title *Romeo Killer: The Chris Porco*, is an apparent dramatization. It creates an association between Christopher and William Shakespeare's famous fictional lover, Romeo Montague, whose name is often used

colloquially to describe a man with many romantic interests (*see* Merriam-Webster Online Thesaurus, romeo [https://www.merriam-webster.com/thesaurus/Romeo] [Note: online free version]; Merriam-Webster Online Dictionary, romeo [https://www.merriam-webster.com/dictionary/Romeo][Note: online free version]). Because Lifetime's record establishes only that Christopher had a girlfriend at the time of the crime, briefly dated the daughter of Detective Arduini, and had letters of support from four female friends at his sentencing hearing, the Court concludes that the film title is another dramatic element. After considering all of Lifetime's proof, the Court finds that Lifetime has not met its prima facie burden. It has not established that the acknowledged dramatizations, composite characters, fictional dialogue, and film title are other than the types of "imaginary incidents, manufactured dialogue and manipulated chronology" that constitute material and substantial fictionalization as a matter of law (*Spahn v Julian Messner, Inc., 21 NY2d at 127).*

Likewise, plaintiffs have not met their summary judgment burden of proving that the film is a material and substantial fiction. In his supporting affidavit, Christopher alleges that the film contains 24 complete fabrications of the total 32 depictions of him. He avers that the film fictionalized his relationships with the daughter of Detective Arduini as portrayed by "Melanie," members of the press, fraternity members, the family friends with whom he resided and employed him, and with the fictional character "Detective Sullivan." Christopher explains that he nor his parents socialized with either

Detective Arduini or Detective Bowdish, and that the relationship between his family and "Detective Sullivan" depicted in the film is false. Christopher alleges multiple instances of manufactured dialogue between himself and his girlfriend; law enforcement officers; hospital staff; members of the media; and, friends and family. Specifically, Christopher argues that the film's depictions of him discussing finances with his parents; flirting with hospital nurses and convincing them to allow him to visit Joan; discussing the crime and investigation with Joan as she recovered; asking "Melanie" to steal evidence; discussing potential testimony with witnesses; interacting with law enforcement officers at Peter's funeral, when his car was impounded, while socializing at bars during the trial; and, blaming the investigation on personal animus, are all false. Christopher also asserts that the film misrepresents portions of his interview with police as well as his statement when released from county jail, and completely fabricated the arrest scene. He points to four complete fabrications at specific time stamps throughout the film. According to Christopher, the portions of the film that have a basis in truth are often depicted out of context and interspersed "within intentionally fictionalized" content.

Shifting to Joan's arguments, in her affidavit, she states that she was diagnosed with traumatic brain injury and retrograde amnesia, and never formed memories of the attack or the hours thereafter. She indicates that 11 of the 12 depictions of her character in the film are completely fabricated or substantially fictitious, with the only scene derived from truth is a single depiction of her testifying at Christopher's trial. She

characterizes three scenes in the film as "flashbacks" during which her character recalls the attack and identity of her attacker, and alleges that such scenes paint her as a liar and perjurer. She also avers that the scenes depicting conversations between her character, Christopher, and Peter; a discussion with Christopher about her trial testimony; conversations about the investigation with law enforcement, friends, and family during her recovery; a conversation between her character and Peter during which Peter referred to Christopher as a "sociopath"; public statements about the trial; interactions with the family friends she and Christopher lived with; and, her reaction at the jury's verdict, all are fabrications.

While plaintiffs articulate in detail the inaccuracies related to main characters in the film, they do not assert that the depictions of the crimes, investigation as a whole, or trial, with the exception of Joan's testimony, are false. As to the flashbacks purportedly depicting Joan remembering incidents of the attack, that is her interpretation of those scenes in the film and are not facts. Though the cited inaccuracies are disturbing to plaintiffs, they do not render the film "'mainly a product of the imagination'" as a matter of law (*Messenger ex rel. Messenger v Gruner + Jahr Print. and Publ., 94 NY2d at 445, quoting Binns v Vitagraph Co., 210 NY 51, 56-59 [1913]; see Meeropol v Nizer, 381 FSupp at 38–39).* Because plaintiffs have not met their prima facie burden of proving the film is materially and substantially fictitious, the Court need not address plaintiffs arguments regarding Lifetime's knowledge of the same.

As to both motions for summary judgment, the Court is mindful that, generally, whether content is newsworthy is a question of law for the Court to resolve (*see* Walter v NBC Tel. Network, Inc., *27 AD3d 1069, 1070 [4th Dept. 2006]*; Freihofer v Hearst Corp., 65 NY2d 135, 140–141 [1985]). Here, however, whether the film is newsworthy depends on a finding that it is not materially and substantially fictitious, which the Court cannot determine as a matter of law. Materiality is a question for the trier of fact (*see e.g.* People v Weiss, *99 AD3d 1035 [3d Dept. 2012]*; Magie v Preferred Mut. Ins. Co., *91 AD3d 1232 [3d Dept. 2012]*). "It is for the triers of the facts to determine whether the [film is] educational or informative, or whether the primary purpose, as the complaint alleges, was to amuse and astonish" by "the exploitation of plaintiff[s] without [their] consent and against [their] will" Sutton v Hearst Corp., *277 AD 155, 156–57 [1st Dept. 1950]*). It is a challenge for the Court to conceive of any evidence that either party might submit on a summary judgment motion that could establish, as a matter of law, that the film is, or is not, materially and substantially fictitious. Indeed, deciding whether the film comports with the truth is largely a matter of opinion (*see* Youssoupoff v Columbia Broad. Sys. Inc., *41 Misc 2d 42, 43–49 [Sup Ct, NY County 1963], aff'd, 19 AD2d 865 [1st Dept. 1963][denying cross-motions for summary judgment on this issue]*).

Finally, the Court considers plaintiffs' motion to renew. A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221[e][2]). A motion to renew "must contain a reasonable justification for the failure to present such facts on the original motion" and

will not be granted where the information presented was in the movant's possession at the time of the original motion (*Matter of James H. Supplemental Needs Trusts, 172 AD3d 1570, 1574 [3d Dept. 2019]*). Plaintiffs move to renew on the grounds that, since the prior motion and decision, they have obtained certified copies of the script and the film. It is apparent from their prior moving papers, however, that they had access to the film at that time. Because plaintiffs have not articulated any differences between the film as they saw it in 2017 and the certified copies of the script and film, their motion to renew is denied (*see Id.*).

RULING

Now, therefore, based upon the foregoing, it is hereby

ORDERED that Lifetime's motion for summary judgment is denied; and it is further

ORDERED that plaintiffs' motion for partial summary judgment is denied; and it is further

ORDERED that plaintiffs' motion to renew is denied; and it is further

ORDERED that this Decision shall constitute the Decision and Order of this Court.

Signed: May 15, 2020
at Plattsburgh, New York

HON. MARK L. POWERS
SUPREME COURT JUSTICE

PAPERS CONSIDERED

Lifetime's Notice of Motion;

Attorney Affirmation of David A.Schulz, Esq. and accompanying exhibits, as limited by decision;

Lifetime's Memorandum of Law;

Plaintiff's Notice of Cross-Motion;

Attorney Affirmation of Alan J. Pierce, Esq. and accompanying exhibits;

Attorney Affirmation of Laurie Shanks, Esq.;

Affidavit of Joan L. Porco;

Affidavit of Christopher Porco;

Plaintiffs' Memorandum of Law in Opposition to Lifetime's Motion and in Support of Plaintiff's Cross-Motion;

Lifetime's Memorandum of Law in Further Support of its Motion for Summary Judgment and in Opposition to Plaintiff's Cross-Motions;

Plaintiffs' Reply Memorandum of Law in Support of Plaintiffs' Cross-Motion;

Plaintiff's September 27, 2017 Notice of Cross-Motion; and

Attorney Affirmation of Alan J. Pierce, dated September 27, 2017.