THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, ss SUPERIOR COURT

No. 218-2022-CV-00803

ERIC SPOFFORD

v.

NEW HAMPSHIRE PUBLIC RADIO, INC.,
LAUREN CHOOLJIAN, JASON MOON, DAN BARRICK, NANCY BOURQUE,
JUSTIN DOWNEY, AND BRIAN STOESZ

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE, NEW ENGLAND FIRST AMENDMENT COALITION, UNION LEADER CORPORATION, AND THE CALEDONIAN RECORD PUBLICATION CO., INC. IN SUPPORT OF NHPR DEFENDANTS' MOTION TO DISMISS

NOW COME *Amici Curiae* American Civil Liberties Union of New Hampshire ("ACLU-NH"), New England First Amendment Coalition ("NEFAC"), Union Leader Corporation, and the Caledonian Record Publication Co., Inc., and hereby submit their brief in support of the NHPR Defendants' October 14, 2022 Motion to Dismiss. For the reasons explained below, *Amici* argue that the Motion to Dismiss should be granted. Plaintiff Eric Spofford has failed to plead facts sufficient to substantiate his conclusory allegations of actual malice.

Interests of *Amici Curiae*

The ACLU-NH is the New Hampshire affiliate of the American Civil Liberties Union—a nationwide, nonpartisan, public-interest civil liberties organization with over 1.7 million members (including over 9,000 New Hampshire members and supporters). The ACLU-NH engages in litigation to encourage the protection of individual rights guaranteed under the United States and New Hampshire Constitutions, as well as under our state and federal civil rights laws.

As part of its mission, the ACLU-NH works to preserve freedom of expression—including the protection of the right to engage in speech on matters of public concern and the right to a free press. Accordingly, the ACLU-NH regularly participates before New Hampshire courts through direct representation and as *amicus curiae* in cases involving free speech issues, including defending against defamation cases that hamper public debate on important issues of the day. *See e.g., Montenegro v. N.H. DMV*, 166 N.H. 215 (2014) (holding that, on its face, a prohibition of vanity registration plates that are "offensive to good taste" violates the right to free speech under N.H. Const. pt. I, art. 22 because the regulation authorizes or even encourages arbitrary and discriminatory enforcement; as *amicus curiae*); *City of Keene v. Cleaveland*, 167 N.H. 731 (2015) (affirming, in part, dismissal of civil causes of action against speakers on the ground that "the First Amendment shields the respondents from tort liability for the challenged conduct"; as *amicus curiae*); *Automated Transactions, LLC v. American Bankers Association*, 172 N.H. 528 (2019) (affirming dismissal of defamation case alleging that use of term "patent troll" is defamatory, and concluding that usage of the term is protected opinion; as *amicus curiae*).

NEFAC is a non-profit corporation organized and existing under the laws of the Commonwealth of Massachusetts. It is dedicated to protecting the First Amendment and the public's right of access to governmental information in the six New England states. Its members include lawyers, journalists, historians, librarians, and academicians, as well as private citizens and organizations whose core beliefs include the principles of the First Amendment. In collaboration with other like-minded advocacy organizations, NEFAC also seeks to advance the understanding of the First Amendment and freedom of speech/press issues across the nation and around the world. Accordingly, NEFAC has participated before New Hampshire courts as *amicus curiae*. *See Provenza v. Town of Canaan*, 175 N.H. 121 (2022) (holding that a police investigatory

report is not exempt under RSA 91-A:5, IV, as the officer's privacy interest is not weighty in that the report does not reveal intimate details of his life, but rather only information relating to his conduct as a government employee while performing his official duties; as *amicus curiae*); *Union Leader Corp. v. N.H. Ret. Sys.*, 162 N.H. 673 (2011) (ordering disclosure of a list of names of the 500 state retirement system members who received the highest annual pension payments during 2009 because the public had an interest both in knowing how public funds are spent and in uncovering corruption and error; as *amicus curiae*).[1]

Union Leader Corporation is a media corporation that publishes the daily New Hampshire Union Leader, the largest newspaper in New Hampshire. On Sundays, it publishes the New Hampshire Sunday News. The New Hampshire Union Leader, founded in 1863, is the only statewide newspaper in New Hampshire. In print, the New Hampshire Union Leader and New Hampshire Sunday News are delivered to every county in the state. The Union Leader Corporation also owns and maintains the website unionleader.com. The Union Leader Corporation is located at 100 William Loeb Drive, Manchester, NH 03109. The Union Leader Corporation has been a leader in ensuring that Granite Staters are informed, including through litigating cases invoking the public's right to know. *See, e.g., Union Leader Corp./ACLU-NH v. Town of Salem*, 173 N.H. 345, 355 (2020) (overruling 1993 *Fenniman* decision in holding that the public's interest in disclosure must be balanced in determining whether the "internal personnel practices" exemption under RSA 91-A:5, IV applies to requested records); *Union Leader Corp. v. N.H. Retirement Sys.*,

[1] Both the ACLU-NH and NEFAC, on October 19, 2022, filed an *amicus* brief before the New Hampshire Supreme Court in the pending defamation matter *Richards v. Azzi and Union Leader Corp.*, No. 2022-0197. In that brief, they argue that a speaker's suggestion that a person is a "white supremacist" is a nonactionable expression of opinion that cannot be subject to defamation liability under the First Amendment and Part I, Article 22 of the New Hampshire Constitution.

162 N.H. 673, 684 (2011) (holding that the government must disclose the names of retired public employees receiving retirement funds and the amounts notwithstanding RSA 91-A:5, IV).

Founded in 1837, the Caledonian Record Publication Co., Inc. is a family-owned newspaper providing daily news coverage in the Northeast Kingdom of Vermont and the North Country of New Hampshire. The company publishes the daily Caledonian-Record newspaper from its headquarters in St. Johnsbury, Vermont, the weekly Littleton Record from its office in Littleton, New Hampshire, and the newspaper's website at caledonianrecord.com. The paper has long been a champion of open records and the public's right to know, securing a bedrock Vermont Supreme Court decision in *Caledonian-Record Publishing Co. v. Walton*, 154 Vt. 15 (Vt. 1990).

Because the ACLU-NH, NEFAC, Union Leader Corporation, and the Caledonian Record Publication Co., Inc. have a longstanding interest in the protection of the First Amendment and the rights embedded in Part I, Article 22 of the New Hampshire Constitution, this case is of concern to them, their members, and their readers.

Argument

I. The First Amendment and Part I, Article 22 of the New Hampshire Constitution Mandate Dismissal.

The First Amendment and Part I, Article 22 of the New Hampshire Constitution impose stringent requirements on those who seek to use tort law to punish or inhibit the free exchange of information and ideas, including through the press. To afford the "breathing space essential" to the "fruitful exercise" of First Amendment rights, the United States Supreme Court has held that plaintiffs who "are properly classed as public figures . . . may recover for injury to reputation only on clear and convincing proof that [a] defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (quotation marks omitted) (referring to the "actual malice" standard set forth in *N.Y. Times*

Co. v. Sullivan, 376 U.S. 254 (1964)); *see also Nash v. Keene Publishing Corp*., 127 N.H. 214, 222 (1985) (to establish a claim for libel where a public figure is implicated, "the plaintiff will have the burden … to prove by clear and convincing evidence that the defendant acted with actual malice. That is, the plaintiff may have the burden to prove that the defendant acted either with knowledge of the falsity or with a reckless disregard for truth or falsity"). To establish reckless disregard, the plaintiff must show that the defendant acted with a "'high degree of awareness of … probable falsity,'" *see Nash*, 127 N.H. at 223 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)), which requires "'sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of [the] publication,'" *id.* (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). Mere negligence in failing to verify statements and discover falsity does not rise to the level of reckless disregard. *Id.*

A. As Pled in the Complaint, Plaintiff Eric Spofford is at Least a Limited-Purpose Public Figure.

Public figures are individuals who are "notori[ous for] . . . their achievements or the vigor and success with which they seek the public's attention." *Gertz*, 418 U.S. at 342. "In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." *Id*. at 351. In other cases, "an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* Notably, the distinction between public and private persons in the context of a defamation claim exists because "private persons have not voluntarily exposed themselves to increased risk of injury from defamatory statements and because they generally lack effective opportunities for rebutting such statements." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756 (1985).

Public figures "assume special prominence in the resolution of public questions," *Gertz*, 418 U.S. at 351, and "[o]ur citizenry has a legitimate and substantial interest in [their] conduct." *Milkovich*, 497 U.S. 1, 15 (1990) (first alteration in original). Requiring such parties to demonstrate "actual malice" to pursue defamation claims provides "breathing room" for journalists to make "unintentional, good faith mistakes" while reporting on information that self-governing people need to carry out their civic duty.[2] And, as then-Judge Kavanaugh observed, requiring defamation plaintiffs to satisfy the actual-malice standard early in the case is "essential" because subjecting defendants to long and costly litigation will thwart the First Amendment's purpose "even if the defendant ultimately prevails." *Kahl v. Bureau of Nat'l Affairs, Inc.*, 856 F.3d 106, 116 (D.C. Cir. 2017).

Here, for the reasons articulated by the NHPR Defendants, Mr. Spofford is at least a limited-purpose public figure based on the allegations in the Complaint, thereby requiring that the actual-malice standard be met. *See* NHPR Defs.' Oct. 14, 2022 Memo. of Law, at pp. 5-8; *see also* Compl. ¶¶ 3 ("When Eric achieved sobriety, he also discovered his life's purpose: to help pull others from the depths of their substance abuse. To fulfill that purpose, he built the largest addiction treatment network in New Hampshire, Granite Recovery Centers ("GRC"). While at the helm of GRC, Eric worked alongside hundreds of dedicated recovery workers to save thousands upon thousands of souls struggling with substance use disorder and their family members."), 11 (noting that Mr. Spofford is "a leader in the substance use disorder recovery industry"), 45 (noting that Mr. Spofford is "a national authority on how to combat the opioid epidemic"), 192 (noting that, as of 2016, Mr. Spofford was "catapult[ed] to national acclaim, becoming a leading authority on the

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[2] *See New York Times v. Sullivan: The Case for Preserving an Essential Precedent* 114, Media Law Resource Ctr., https://medialaw.org/issue/new-york-times-v-sullivan-the-case-for-preserving-an-essential-precedent/.

country's strategy for combatting the opioid epidemic"), 33 (noting that Mr. Spofford "testif[ied] before the United States Senate in 2015, [was] named the Small Business Administration Young Entrepreneur of the Year for New Hampshire and New England in 2018, and co-author[ed] a critically acclaimed book about addiction titled, *Real People Real Recovery: Overcoming Addiction in Modern America*"), 52-55 (noting similar public recognition). Mr. Spofford's own website—https://ericspofford.com—states that he has been featured in many publications for his work, and the website has a link (i) to a "press kit" containing "[a]ll the necessary resources to feature Eric in your print or digital publication"[3], and (ii) to "Invite Eric to Speak."

B. The Complaint Fails to Adequately Plead Actual Malice.

It is not sufficient for a plaintiff's complaint to conclusorily state that the defendant showed "reckless disregard" for the truth. Rather, the plaintiff must allege specific "facts which are sufficient to constitute a cause of action" where this Court "must rigorously scrutinize the complaint." *See In re Guardianship of Madelyn B.*, 166 N.H. 453, 457 (2014) (quoting *Kennedy v. Titcomb*, 131 N.H. 399, 401 (1989)) (citing pleadings standard). This Court should "not … assume the truth or accuracy of any allegations which are not well-pleaded, including conclusions of fact and principles of law." *Stone v. Bruce*, No. 2018-0230, 2018 N.H. LEXIS 231, at *1-2 (N.H. Sup. Ct. Nov. 27, 2018) (dismissing defamation case at pleadings stage for failure to plead actual malice). For instance, in *Schatz v. Republican State Leadership Committee*, 669 F.3d 50, 58 (1st Cir. 2012), the First Circuit held that the plaintiff, who alleged that the Republican State Leadership Committee ("RSLC") published libelous campaign ads about him, "ha[d] not nudged his actual malice claim across the line from conceivable to plausible," because none of his factual allegations plausibly suggested that "the RSLC either knew that its statements were false or had

[3] https://ericspofford.com/press-kit/.

serious doubts about their truth and dove recklessly ahead anyway." (internal citation and quotation marks omitted). The same problem exists here.

To properly allege actual malice as a limited-purpose public figure, Plaintiff Eric Spofford is required to produce credible allegations that the challenged statements were made "with knowledge that [the statements were] false or with reckless disregard of whether [they were] false or not" at the time NHPR's reporting was published on March 22, 2022. *See Sullivan*, 376 U.S. at 280; *see also Stone*, 2018 N.H. LEXIS 231, at *3 ("In his complaint, the plaintiff failed to allege any facts that would allow a finding that the defendant had reason to believe that her statements were probably inaccurate when she made them."). For example, the *Sullivan* Court held that the allegations and evidence before it—including allegations that the "advertisement was not 'substantially correct,'" allegations and evidence of "the Times' failure to retract upon respondent's demand, although it later retracted upon [another person's] demand," and evidence showing "that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files"—could not establish actual malice. *Sullivan*, 376 U.S. at 286–87. The Court also refused to view the Times' eventual retraction of the advertisement as evidence of malice, instead holding that the Times had given a reasonable explanation for the publication of the material that was later retracted. *Id.* at 287. And the Court held that the "evidence that the Times published the advertisement without checking its accuracy" against its news stories at most established negligence, not actual malice. *Id.* at 287–88.

"Reckless disregard" requires a showing that "the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). The mere fact that a publication is erroneous does not demonstrate such disregard. *Id.* A failure to investigate—even if a prudent person would have investigated further—does not constitute malice.

Harte-Hanks Comms., Inc. v. Connaughton, 491 U.S. 657, 688 (1989). Nor does an alleged failure to investigate, standing by itself, give rise to a plausible inference of actual malice sufficient to withstand a motion to dismiss. *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 704 (11th Cir. 2016). "Rather, the plaintiff must plead facts giving rise to a reasonable inference that the defendants acted to intentionally avoid learning the truth." *Id.*

Here, Mr. Spofford's core malice allegations are that (i) the NHPR Defendants reported certain things he objected to, and did not include certain things in the story he thinks should have been included, *see* Compl. ¶¶ 202, 304; Pl.'s Nov. 17, 2022 Obj. at pp. 8-14, (ii) the NHPR Defendants used "on the record" sources who did not identify themselves, *see* Compl. ¶¶ 111-112, 158, and (iii) NHPR declined to publish a source's May 17, 2022 post-publication "clarification" that did not contradict anything in the published story, *see id.* ¶¶ 174, 180, 202; Pl.'s Nov. 17, 2022 Obj. at pp. 12-14. This is not "reckless disregard," especially where the alleged defamatory statements were based on "on the record" interviews; it is, at most, an alleged failure to investigate and/or an alleged failure to report a story in a way that Mr. Spofford wants. But the New Hampshire Supreme Court has made clear that the "mere negligence in failing to verify statements and discover falsity does not rise to the level of reckless disregard for truth or falsity," and that a "[f]ailure to investigate does not in itself establish bad faith." *See Nash*, 127 N.H. at 223. Nor does a failure to identify a source constitute malice. *See Stone*, 2018 N.H. LEXIS 231, at *5 (rejecting plaintiff's argument that "the fact that the defendant did not declare the sources of her information created a presumption that she had no source and, therefore, was aware that the statements were probably false").

Mr. Spofford's contention that "the NHPR Defendants falsely stated and implied that [he] had committed and was charged with a crime," *see* Pl.'s Nov. 17, 2022 Obj. at pp. 6-8, is similarly

deficient. At the outset, NHPR's reporting does not state or imply that a crime was committed, but rather that Mr. Spofford "faces accusations of sexual misconduct." *See* Compl. ¶ 125. And "[t]he complaint does not allege that [NHPR's] anonymous sources were fake, or that the article[] misrepresented what the [sources] told defendants." *See Portnoy v. Insider, Inc.*, No. 22-10197-FDS, 2022 U.S. Dist. LEXIS 202080, at *20 (D. Mass. Nov. 7, 2022). Nor does Mr. Spofford appear to dispute the fact that NHPR, prior to the March 22, 2022 publication, sought Mr. Spofford's comment and even published the following multiple paragraphs containing his general denial:

> Spofford did not respond to specific questions about the allegations. His lawyer, Mitchell Schuster, said in a written statement, "Mr. Spofford denies any alleged misconduct -- in particular, the sexual assault accusations, which are not only categorically untrue, but defamatory in nature." Schuster threatened legal action if NHPR published its story.
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> "Eric Spofford," Schuster wrote, "has spent most of his adult life pulling thousands of people out of the depths of addiction, depression and trauma."
>
> The statement continues, "Some recovering addicts are uniquely suited to work in the field and are able to use their past experiences to help others in need. Others relapse and revert to the lies that tragically go hand-in-hand with addiction."
>
> Schuster also said that "former and current" GRC employees "refused to corroborate these false allegations." But when asked to provide contact information so NHPR could interview these people, Schuster did not respond.

This should end the matter. *See Portnoy*, 2022 U.S. Dist. LEXIS 202080, at *20 ("Furthermore, plaintiff admits that Insider investigated its first article for months, requested an interview with him, sought his comment before publication, included his denials, and hyperlinked to his press conference and his lawyer's full denial letter, thus 'undercut[ting] any inference of actual malice.'"); *Lemelson v. Bloomberg L.P.*, 903 F.3d 19, 24 (1st Cir. 2018) (finding that the plaintiff failed to plausibly allege actual malice where the publisher had, prior to publication, "reached out

repeatedly to secure an interview with [the plaintiff] and to otherwise solicit his comment, and then published his denial").

Mr. Spofford's attacks on the motives of NHPR—namely, its alleged motivation "to destroy Eric's reputation" or to "increase donations," *see* Pls.' Obj. at pp. 14-17—similarly fail by themselves where "the complaint does not plausibly allege that defendants published the allegedly defamatory statements with a reckless disregard for the truth." *See Portnoy*, 2022 U.S. Dist. LEXIS 202080, at *17 ("the complaint's allegations of improper motive, standing alone, fail to nudge[] [plaintiff's] claims across the line from conceivable to plausible") (internal quotations omitted). In sum, here, Mr. Spofford "does not identify any allegation in his complaint … that would support a finding that the defendant[s] doubted the veracity of [their] statements when [they] published them [on March 22, 2022]." *Stone*, 2018 N.H. LEXIS 231, at *3-4. As a result, Mr. Spofford has failed to plead facts sufficient to substantiate his conclusory allegations of actual malice.

II. The First Amendment and Part I, Article 22 of the New Hampshire Constitution Require Dismissal of Deficient Defamation Complaints at the Pleadings Stage to Avoid a Chilling Effect on Vital Reporting on Matters of Public Concern and the Speech of Victims of Misconduct.

A ruling in favor of the NHPR Defendants would be consistent with the New Hampshire Supreme Court's precedents. The Supreme Court has been sensitive to allow breathing space for robust discussions on matters of public concern by dismissing defamation cases at the motion to dismiss stage that, if allowed to proceed to discovery, could stifle important debate on matters of public concern. *See Automated Transactions, LLC v. American Bankers Association*, 172 N.H. 528, 538 (2019) (at motion to dismiss stage, concluding that use of the term "patent troll" is protected opinion because the term "cannot be proven true or false" and "means different things to different people"); *see also id.* at 540 (further holding that "[w]e have consistently held that

whether an opinion statement 'can be read as … implying an actionable statement of fact is a question of law,' not of fact") (quoting *Thomas v. Tel. Publ'g Co.*, 155 N.H. 314, 339 (2007)); *Boyle v. Dwyer*, 172 N.H. 548, 557-558 (2019) (at motion to dismiss stage, holding that "[t]he defendant's conclusion [in a questionnaire sent to political candidates that was subsequently published on a website as part of a 'voter's guide'] that Boyle made a 'mistake' in purchasing the property is not objectively verifiable"); *Gascard v. Hall*, No. 2021-0151, 2022 N.H. LEXIS 127, at *7 (N.H. Sup. Ct. Oct. 20, 2022) (affirming dismissal of defamation case at pleadings stage where defendant art collector said that the plaintiff artist—who sold paintings to defendant collector that turned out to be forged—had herself painted the forged artwork, but qualified his statement by adding that "he never knew for sure" who painted the forgeries); *Stone*, 2018 N.H. LEXIS 231, at *3, 6 (dismissing defamation complaint at pleadings stage for failure to adequately plead actual malice, and noting that this is not a claim for the jury where a plaintiff is unable to "allege facts from which the jury could reasonably draw such an inference in order to survive the motion to dismiss"); *see also Gatsas v. Cushin*, No. 216-2017-cv-00492 (Hillsborough Cty. Super. Ct. N. Dist. Apr. 5, 2018) (Abramson, J.) (dismissing defamation case at pleadings stage filed by plaintiff public figure where "the Court finds plaintiff has failed to allege facts indicating defendants harbored serious doubts about the truth of their allegations," and, thus," "plaintiff has failed to sufficiently plead actual malice"), attached as *Exhibit A*.

This chill is of concern here, especially where Mr. Spofford has sued the NHPR Defendants, as well as their sources who may not have the immense resources that he has. Misconduct towards women occurs in the United States at an alarming rate,[4] and it can hardly be

[4] *See, e.g.*, CDC, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF—UPDATED RELEASE 6, https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf ("Nearly 1 in 6 women (16.0%, or 19.1 million) in the U.S. were victims of stalking at some point in their lifetime, during which she felt very fearful or believed that she or someone close to her would be harmed or killed.").

disputed that individuals in recovery from addiction are particularly vulnerable. If this case is allowed to proceed with such conclusory allegations of malice, not only will journalists' vital reporting be chilled, but sources who may have been the victims of sexual or other misconduct by people in power also will be less likely to go on the record and describe their experiences out of a fear of litigation. This case highlights this concern. Here, Mr. Spofford states that there are "potentially more than 50 witnesses," and he intends to "pursue written and testimonial discovery from each, particularized to their biases, credibility issues, and motives, among other relevant issues." *See* Pl.'s Nov. 17, 2022 Obj. to Mot, to Stay Discovery, at pp. 1, 2. While Mr. Spofford may have the resources to hire lawyers and file an 89-page complaint with 438 paragraphs, many he seeks to burden with this litigation may not have similar resources. If this case proceeds in the face of Mr. Spofford's deficient allegations of malice, then he will already have won in punishing his critics, even if this case is ultimately dismissed at summary judgment or at trial. This is because Mr. Spofford will have succeeded in accomplishing his objective of subjecting both NHPR and their sources to discovery. The result will be an environment in New Hampshire where those who may have been victims of (or who witnessed) abuse will decide to never publicly tell their story out of a fear of being raked over the coals in costly litigation. What is the consequence of this chill? A less informed public and a lack of accountability for those with power.

For these reasons, this case should be dismissed.

Conclusion

Accordingly, *Amici Curiae* ACLU-NH, NEFAC, Union Leader Corporation, and the Caledonian Record Publication Co., Inc. respectfully pray that this Honorable Court dismiss Mr. Spofford's Complaint against the NHPR Defendants for failure to state a claim on which relief can be granted.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF
NEW HAMPSHIRE FOUNDATION,

By their attorneys,

Date: December 2, 2022

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NEW ENGLAND FIRST AMENDMENT
COALITION, UNION LEADER CORPORATION,
AND THE CALEDONIAN RECORD
PUBLICATION CO., INC.,

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Certificate of Service

I hereby certify that a copy of the foregoing was sent to all counsel of record.

/s/ Gilles Bissonnette
Gilles Bissonnette

December 2, 2022

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Gatsas v. Cushin, No. 216-2017-cv-00492 (Hillsborough Cty. Super. Ct. N. Dist. Apr. 5, 2018) (Abramson, J.)

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Theodore Gatsas

v.

William Cashin and Jon Hopwood

Docket No. 216-2017-CV-00492

ORDER

Plaintiff brought this action alleging a single count of defamation against defendants. On November 14, 2017, the Court granted defendants' motion to dismiss, finding the complaint failed to allege sufficient facts to state a claim, but allowed plaintiff an opportunity to amend. Plaintiff has since amended his complaint, and defendants have filed new motions to dismiss. Upon consideration of the pleadings, arguments, and applicable law, the Court finds and rules as follows.

Factual Background

On June 27, 2017, defendant William Cashin mailed a letter to plaintiff, which was copied to the city clerk and the city attorney. The letter, which had been drafted by defendant Jon Hopwood for Mr. Cashin's signature, made numerous allegations that plaintiff, as mayor of Manchester, violated the city charter by engaging in a cover-up of a rape that occurred at Manchester West High School in 2015.

In his amended complaint, plaintiff added facts demonstrating that defendants are active in the Manchester political scene. The complaint further alleges that a

number of individuals, including plaintiff's political rivals, were informed of the incident at West High School. Plaintiff thus alleges that any cover-up of the rape would have required the complicity of plaintiff's adversaries, highlighting the absurdity of defendants' claims.

Analysis

In ruling on a motion to dismiss, the Court determines "whether the allegations contained in the pleadings are reasonably susceptible of a construction that would permit recovery." Pesaturo v. Kinne, 161 N.H. 550, 552 (2011). The Court rigorously scrutinizes the facts contained on the face of the complaint to determine whether a cause of action has been asserted. In re Guardianship of Madelyn B., 166 N.H. 453, 457 (2014). The Court may also consider documents attached to the petitioner's pleadings, documents the authenticity of which are not disputed by the parties, and documents sufficiently referred to in the petition. Beane v. Dana S. Beane & Co., 160 N.H. 708, 711 (2010). The Court "assume[s] the truth of the facts alleged by the plaintiff and construe[s] all reasonable inferences in the light most favorable to the plaintiff." Lamb v. Shaker Reg'l Sch. Dist., 168 N.H. 47, 49 (2015). The Court "need not, however, assume the truth of statements that are merely conclusions of law." Id. "If the facts do not constitute a basis for legal relief, [the court will grant] the motion to dismiss." Graves v. Estabrook, 149 N.H. 202, 203 (2003).

In his complaint, plaintiff identifies sixteen[1] sentences from defendants' letter, labeled (a) through (q), that he maintains constitute defamatory statements. While the complaint claims the defamatory statements "include, but are not limited to," the specified sentences, the Court notes that plaintiff in essence calls out the entirety of the

[1] The complaint identifies seventeen sentences, but (d) and (f) identify the same sentence.

letter, omitting only sentences that could under no circumstances be defamatory. Therefore, for all intents and purposes, the identified sentences constitute the entirety of plaintiff's cause of action.

"A plaintiff proves defamation by showing that the defendant failed to exercise reasonable care in publishing a false and defamatory statement of fact about the plaintiff to a third party, assuming no valid privilege applies to the communication." Pierson v. Hubbard, 147 N.H. 760, 763 (2002). A statement of opinion can also be actionable if "it may reasonably be understood to imply the existence of defamatory fact as the basis for the opinion." Tomas v. Telegraph Pub. Co., 155 N.H. 314, 338 (2007). "Whether a given statement can be read as being or implying an actionable statement of fact is a question of law to be determined by the trial court in the first instance, considering the context of the publication as a whole." Id. at 338–39.

Defendants rely heavily on Pease v. Telegraph Pub. Co., Inc., 121 N.H. 62 (1981). In that case, the defendant published an editorial written by Philip Grandmaison, a public figure who was responding to a negative article written by one of the defendant's employees. In the editorial, Grandmaison made a reference to "what in [his] mind was the worst single example of a journalistic smear," by which he meant prior coverage of an unrelated event written by the plaintiff, R. Warren Pease. Grandmaison also referred to Mr. Pease as "journalistic scum of the earth," prompting Mr. Pease to file suit.

On appeal, the New Hampshire Supreme Court concluded that the statements in the editorial "could not reasonably be understood as assertions of fact," noting Grandmaison had prefaced two of his assertions with language such as "I do feel." Id.

at 65. The plaintiff argued the statements were libelous even if considered to be opinions, as "the facts upon which the opinions were based were neither disclosed nor assumed." Id. at 66. The Court disagreed, finding that "[t]he letter to the editor fully disclosed the factual basis upon which Grandmaison formed his opinion," that is, the articles authored by Mr. Pease to which Grandmaison referred. Id. "The series of articles by the plaintiff was in the public domain, and anybody with sufficient interest could have reviewed it in order to determine whether they agreed with Grandmaison's opinion that the series constituted a smear campaign." Id. "Thus, the 'facts' upon which Grandmaison formed his opinion were disclosed and the opinion does not imply other facts." Id.

Here, defendants' letter begins with the following sentence: "News reports about the September 30, 2015 West Side High School rape containing statements from city officials including Mayor Theodore Gatsas strongly indicate that the mayor engineered a cover-up of the rape during a mayoral race in which crime was a top issue." This sets the stage for the remainder of the letter, as all subsequent statements are premised on the existence of the alleged cover-up. Unlike in Pease, this sentence does not contain any opinion phrases, nor does it constitute obvious hyperbole. Moreover, the news articles referenced in defendants' letter, while public record, do not contain any reference to a cover-up, nor do they suggest a cover-up took place.

The Court finds this first statement is not one of opinion, but of fact. "[C]ases are likely to protect a statement as 'opinion' where it involves expressions of personal judgment, especially as the judgments become more vague and subjective in character." Grey v. St. Martin's Press, Inc., 221 F.3d 243, 248 (1st Cir. 2000). In

Pease, the alleged defamatory statement was an attack on the quality and integrity of the plaintiff's journalism. Here, on the other hand, defendants have alleged very specific factual conduct, i.e., that plaintiff engaged in a cover-up of a rape in order to secure a political victory. Therefore, taking all inferences in plaintiff's favor, the Court finds the letter, considered as a whole, constitutes a statement of fact that does not fall within the scope of Pease.

Notwithstanding the foregoing, public figures must establish that the false publication was made with "actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964). "Reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." St. Amant v. Thompson, 390 U.S. 727, 731 (1968). "There must be sufficient evidence to permit the conclusion that defendant in fact entertained serious doubts as to the truth of his publication." Id.; see also Edwards v. Com., 76 N.E.3d 248, 257 (Mass. 2017) ("That information was available which would cause a reasonably prudent man to entertain serious doubts is not sufficient. In order to negate the privilege, the jury must find such doubts were in fact entertained by the defendant."); Attorney Grievance Comm'n of Maryland v. Stanalonis, 126 A.3d 6, 14 (Md. 2015) ("The subjective test thus focuses on what the defendant personally knew and thought."). "The plaintiff may show that the defendant had such serious doubts about the truth of the statement inferentially, by proof that the defendant had a high degree of awareness of the statement's probable falsity." Competitive Enter. Inst. v. Mann, 150 A.3d 1213, 1252 (D.C. 2016).

Here, plaintiff alleges in his amended complaint that defendants are involved in the Manchester political scene, and are therefore familiar with both the people and processes at play. Plaintiff further alleges that many of the members of the Board of School Committee were political rivals that were not afraid to speak against him, as evidenced by a vote of no confidence taken against him in August 2015. Plaintiff cites this factor as one highlighting the absurdity of defendants' claims, in that a cover-up would require the complicity of these political adversaries who would presumably have no motive to cooperate.

As an initial matter, the Court finds this latter argument appears to misconstrue defendants' letter. The letter does not allege any action that would require the complicity of the Board of School Committee members. Instead, the letter alleges that plaintiff himself withheld information from the committee, which prevented it from taking appropriate action in the wake of the West High School rape. Specifically, the letter alleges that plaintiff failed to inform the committee and the Board of Mayor and Aldermen about the "true nature" of the crime. In context of the articles attached to the amended complaint, the Court understands this to mean that plaintiff was aware that a rape had occurred, whereas everyone else had only been notified of an undefined "sexual assault." (See Compl., Ex. 4 & 5.) Therefore, the Court finds the presence of political rivals on the Board of School Committee is not relevant to the determination of whether defendants published the letter with actual malice.

Nor does the Court find defendants' degree of political knowledge or involvement to be particularly relevant in this case. It is hardly an absurd proposition that a politician would lie or employ deceptive techniques to secure a political advantage. With respect

to plaintiff, the articles attached to the amended complaint contain the following relevant statements:

> In an interview on Thursday, Mayor Ted Gatsas said "we were not told a rape took place at West." But after Police Chief Nick Willard told a reporter that he informed Gatsas at least twice, Gatsas said the discussion revolved around locking the hallway doors after an unspecified "incident."
>
> "I didn't know the severity of it," Gatsas said.
>
> . . . .
>
> [Gatsas] said Assistant Superintended David Ryan had sent an email about the West High School incident to the school board.

(Compl. Ex. 4 at 3–4.)

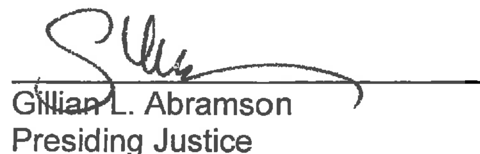
> School board members, including Gatsas, were notified the day of the attack in an email.
>
> . . . .
>
> Ryan said he spoke to Gatsas shortly after the West High School principal informed him about the rape allegations.
>
> . . . .
>
> Last week, Gatsas, Hogan and Willard addressed their reasons for not releasing information sooner.
>
> In part, Gatsas said he wasn't aware of the severity of the attack and was never told it was a rape.
>
> Ryan said he used the word "rape" when he spoke to Gatsas about the attack.
>
> . . . .
>
> Former Superintendent Dr. Debra Livingston said "I'm pretty sure I used that word (rape)" when she spoke to Gatsas about the assault. She said she definitely conveyed the serious nature of the assault.
>
> . . . .
>
> Gatsas noted that emails that Ryan wrote about the matter used the term "sexual assault."
>
> "My recall was pretty clear," Gatsas said, "why didn't they tell the Board of School Committee it was rape?"
>
> . . . .
>
> "I think this board needs to be given information," said Ward 1 school board member Sarah Ambrogi. "I don't think we should have been kept in the dark. I can speculate as to the reasons why, but I think it's completely inappropriate given the magnitude of this case."

(Compl. Ex. 5 at 2–4.) The email to the Board of School Committee referenced in the article read: "This is to inform you that a female student has alleged being the victim of a sexual assault at West High School today. School administration and the Police Department are investigating and as it is an open investigation, details are not being released yet." (Compl. Ex. 6.)

From the foregoing, it can readily be inferred that plaintiff was aware of certain information that was not shared with the Board of School Committee. It can also be inferred that plaintiff was attempting to downplay his knowledge of the circumstances surrounding the rape. Finally, given that the rape and its subsequent public disclosure both occurred during election years, it can be inferred that whatever actions plaintiff did take were made with political considerations in mind. While at no point does either article suggest any malfeasance on plaintiff's part or speculate as to his motives, neither forecloses the possibility of an intentional failure to keep the committee informed. Therefore, under the circumstances of this case, the Court finds plaintiff has failed to allege facts indicating defendants harbored serious doubts about the truth of their allegations. Accordingly, as plaintiff has failed to sufficiently plead actual malice, defendants' motions to dismiss are GRANTED.

SO ORDERED.

4/5/18
Date



Gillian L. Abramson
Presiding Justice