

**STATE OF NEW HAMPSHIRE
SUPREME COURT**

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NH SUPREME COURT

No. 2017- 0682

LORRAINE MACDONALD AND PETER MACDONALD

V.

LISA JACOBS

APPELLANT'S BRIEF

**MANDATORY APPEAL PURSUANT TO
SUPREME COURT RULE 7**

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QUESTIONS PRESENTED

1. Whether the trial court erred in denying a mistrial when Plaintiffs' counsel made a "golden rule" argument to the jury which was the subject of contemporaneous objection by the Defendant, where said objection was denied by the trial court, and the Plaintiff was permitted to continue making a "golden rule" argument to the jury? Trial Transcript of September 21, 2017 at 453; Defendant's Motion for New Trial ¶ 1-10, Appendix at 684 (hereinafter "A. at ____").
2. Whether New Hampshire requires proof of "actual damages" in a claim of negligence per se consistent with Restatement (Second) of Torts, Sec. 621 and Merullo v. Greer, Civil No. 11-cv-116-SM, 2012, WL 832832 (D.N.H. Feb. 10, 2012), and therefore the trial court erred in denying the Defendant's Motion for Summary Judgment? Defendant's Motion for Summary Judgment, A. at 29; Defendant's Legal Memorandum in Support of Motion, A. at 671; Defendant's Motion to Dismiss at Conclusion of the Plaintiff's Case, A. at 674; Trial Transcript of September 20, 2017 at 28, Trial Transcript of September 21, 2017 at 418-419.
3. Whether enhanced compensatory damages in connection with an action for negligence per se requires proof of "actual malice" consistent with St. Amant v. Thompson, 390 U.S. 727 (1968) and consistent with Munson v. Raudonis, 118 N.H. 474 (1978), or whether the common law malice standard, "ill will, hatred, hostility, or evil motive" applies? Objection to Plaintiff's Proposed Jury Instructions and Defendants Request for Jury Instructions, A. at 610; Defendant's Motion to Clarify Request for Proposed Jury Instructions, A. at 616; Defendant's Motion in Limine to Strike Irrelevant and Prejudicial Evidence and Witness Testimony, A. at 622; Defendant's Legal Memorandum in Support of Motion, A. at 671; Defendant's Motion to Dismiss at Conclusion of the Plaintiff's Case, A. 674; Defendant's Motion for Additional Jury Instructions, A. at 610; Defendant's Motion to Clarify Request for Proposed Jury Instructions, A. at 616; Defendant's Motion for New Trial, A. at 684; Trial Transcript of September 20, 2017 at 28, Trial Transcript of September 21, 2017 at 418-419; Trial Transcript of September 22, 2017 at 44;

4. Whether the trial court erred in admitting highly prejudicial 404(b) evidence of the Defendant's conduct out-of-state which occurred months after the so-called "defamation" in New Hampshire for purposes of proving common law malice at the time of the "defamatory" statements, necessitating a new trial? Emergency Motion to Quash Subpoenas and Untimely Depositions in Violation of Trial Management Order, A. at 510; Defendant's Motion in Limine to Strike Irrelevant and Prejudicial Evidence and Witness Instructions, A. at 622; Defendant's Motion for New Trial, A. at 688; Trial Transcript of September 20, 2017 at 24; 66; 136; 196.
5. Whether speech in this matter concerning purported criminal activity, corruption in law enforcement, and threats to public safety constitutes speech of "public concern" necessitating First Amendment protections, which necessitated a finding of "actual malice" at the time of the speech before a jury could award punitive or presumptive damages, and which requires heightened judicial review from both the trial court and the Appellate Court as to the existence of actual malice? Objection to Plaintiff's Proposed Jury Instructions and Defendants Request for Jury Instructions, A. at 610; Defendant's Motion to Clarify Request for Proposed Jury Instructions, A. at 616; Defendant's Motion in Limine to Strike Irrelevant and Prejudicial Evidence and Witness Instructions, A. at 622; Defendant's Legal Memorandum in Support of Motion, A. at 671; Defendant's Motion to Dismiss at Conclusion of the Plaintiff's Case, A. at 674; Defendant's Motion for Additional Jury Instructions; Defendant's Motion for New Trial; Trial Transcript of September 20, 2017 at 28, Trial Transcript of September 21, 2017 at 394-5; 418-419; 442; Trial Transcript of September 22, 2017 at 44.
6. Whether the trial court erred in ordering the physical removal of the Defendant from her family's vacation property on the basis of a series of ugly letters she wrote about the neighbors as well as based on her choice of court attire? Trial Transcript of September 22, 2017 at 32-38; Motion for Reconsideration of Order on Injunction, A. at 696.

7. Whether the trial court erred in banishing the defendant from Sterling, Massachusetts, a territorial domain of a sister state over which New Hampshire lacks sovereign power and which is not in comity with Massachusetts law and public policy? Trial Transcript of September 22, 2017 at 32-38; Motion for Reconsideration of Order on Injunction, A. at 696.

**CONSTITUTION PROVISIONS, STATUTES, ORDINANCES, RULES OR
REGULATIONS INVOLVED IN THE CASE**

U.S. Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

N.H. Constitution, Part 1, Art. 22:

Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved.

Rule 401. Test for "Relevant Evidence"

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Rule 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States or New Hampshire Constitution;
- a statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) *Character Evidence Generally.* - Evidence of a person's character or a trait of character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(1) *Character of Accused.* - Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of Victim.* - Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of Witness.* - Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) *Other Crimes, Wrongs, or Acts.* - Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF FACTS/STATEMENT OF THE CASE

Arthur and Marilyn Jacobs purchased land in Fitzwilliam in the area of Rockwood Pond where they built a summer cottage in 1966. Trial Transcript of September 21, 2017 at 424. The Jacobs had three children, who would spend summers at the cottage from their childhood onwards. Id. at 423. Subsequent to Arthur Jacobs death, the cottage is now owned by the Arthur Jacobs Trust. Trial Transcript of September 20, 2017 at 103. Lisa Jacobs is one of the children of Arthur and Marilyn Jacobs, and has been visiting the family cottage from birth. Trial Transcript of September 21, 2017 at 424. Lisa Jacobs graduated from Bowdoin, attended medical school at Boston University and the University of Liege in Belgium, but apparently began to experience difficulties in her twenties, and currently lives with her mother and receives Social Security Disability. Id. at 423; 435-6.

Peter and Lorraine MacDonald reside in Sterling, Massachusetts. Trial Transcript of September 20, 2017 at 47. In 2012, they purchased a house across the street from the cottage owned by the Jacobs Family Trust. Id. at 48. The MacDonalds both stay at the vacation property as well as rent their property to summer tenants. Id. at 49. In 2013, the MacDonalds had a confrontation with Lisa Jacobs as a result of their tenants' complaints about harassment from Jacobs over their dog and noise. Id. The MacDonalds informed Jacobs to contact them directly with any tenant complaints, which allegedly angered Jacobs, who indicated she could speak to whomever she wanted. Id.

Jacobs made numerous complaints about the MacDonalds and/or their tenants to the Fitzwilliam Police between 2013 and 2015 concerning unpermitted fires, noise, alcohol and drug use, and other nuisances. Trial Transcript of September 21, 2017 at 262; 288-89; 295-313. On or about July 15, 2015, Jacobs sent a 24-page email to the Federal Bureau of Investigation, which included the following passages:

My understanding is that issues between neighbors blossom to the point until someday one neighbor gets a gun and shoots the other neighbor. My understanding is that it is very important for me to complain to the police in order for their [sic] to be a history for a jury to evaluate in the future in the case of my death.

...

I have been having fears of homicidal ideation of having to be put in the position of killing the McDonalds [sic] and or their drunken tenants. I have thought about getting a federal contractor with an assault weapon to try to protect me to help me calm down when I am at 251 Sunset Rd. as I am feeling terrorized. A. at 128, 130.

The email to the FBI was disseminated to the Fitzwilliam Police Department and ultimately to the MacDonalds. *Id.* at 266-8. Jacobs was charged with criminal threatening as a result of the letter, although the charges were ultimately dismissed by the State of New Hampshire. *Id.* at 274. Possibly as a consequence of the dismissal, on April 25, 2016, the MacDonalds filed an *ex-parte* complaint seeking an equitable restraining order against Jacobs. A. at 1. The order was granted on an *ex-parte* basis, and affirmed after a hearing in May, 2016. A. at 6. On May 6, 2016, Attorney Hoppock filed an appearance in this matter. A. at 8. On August 2, 2016, the MacDonalds filed a motion requesting leave to amend the complaint to include a count of defamation and to schedule the matter for jury trial, a motion which was granted by the Court in September 2016. A. at 9. The Plaintiffs ultimately amended the complaint to add a claim of defamation as well as another request for injunction based on sewer regulations.¹

On February 3, 2017, the Plaintiffs filed a Superior Court Rule 22 Disclosure stating with respect to Rule 22 (a)(3), damages, “to be determined by jury arising from Jacobs’ *per se* unprivileged defamatory statements.” A. at 26. No computation of damages was provided, nor was any documentation “bearing on the nature and extent of injuries suffered” provided, other than Jacobs’

¹ The claim for an injunction based on sewer regulations was dismissed at the request of the Plaintiffs at the time of the trial on the merits.

correspondence with various police agencies, government officials, and other persons. The Defendant sought to dismiss the count of defamation on the basis that the Plaintiffs could not establish general damages consistent with the holding in Merullo v. Greer, Civil No. 11-cv-116-SM, 2012 WL 832832 (D.N.H. Feb. 10, 2012), report and recommendation approved sub nom., Merullo v. Greer, No. 110-cv-116-SM, 2012 WL 832805 (D.N.H. Mar. 12, 2012). A. at 29. The Motion was denied. Brief at 71.

During the period from July 2015 through March of 2017, Jacobs sent a number of prolix letters copied to various law enforcement and local officials, including local, state and federal law enforcement officials, as well as the Commissioner for Public Safety, the Governor of New Hampshire, the New Hampshire Attorney General, officials with the New Hampshire Forrest Service, some private attorneys (upon information and belief representing the Town of Fitzwilliam), the U.S. Attorney General's Office, etc. A. at 109-330. The letters complained that the MacDonalds were "sociopathological" and that Lorraine MacDonald was a "loud, drunk alcoholic". Id. Jacobs requested \$2,500 from the New Hampshire Victims Assistance fund to install security cameras on her property so that she could record the MacDonalds and other neighbors conducting potential "criminal activity". A. at 112. Jacobs complained of noise, underaged drinking, drug use, vandalism of her property, and unpermitted fires. Appendix at 109-135. In some letters, Jacobs claims to be a police informant, and later she developed the view that the Governor and others in the State of New Hampshire were conspiring against her because she was Jewish through the MacDonalds. A. at 280-281.

On November 11, 2016, Jacobs and her mother were rear-ended in a hit and run accident by a commercial box truck on Interstate 495 in Massachusetts. The box truck ended up being registered to a municipality that borders Sterling, Massachusetts, the home of the MacDonalds. Jacobs became convinced that the MacDonalds and their neighbors from both Sterling and Fitzwilliam, Betty and

Paul Suschyk, had somehow conspired to arrange the accident in an attempt to assassinate Jacobs and her mother. Trial Transcript of September 20, 2017 at 140-145. In the summer of 2017, Jacobs “hit the streets” of Sterling, Massachusetts in order to find witnesses who would support her views regarding the MacDonalds alcohol abuse, illegal drug parties, criminal activities, and murder-for-hire conspiracy. *Id.* at 135-6; A. at 513-609. She sent a number of unsolicited emails to individuals in the vicinity of the MacDonalds and the Suschyks in Sterling, Massachusetts, as well as seeking affidavits in the streets and local stores in Sterling, Massachusetts. The Sterling Police ended up putting up a Facebook notice warning the public that Jacobs was not working for the Massachusetts Attorney General or other law enforcement body. Trial Transcript of September 20, 2017 at 137-8. Specifically, a Barry Hines, who lived in the MacDonalds and Suschyks neighborhood had an email exchange with Jacobs over her concerns about the MacDonalds and the Suschyks. Trial Transcript of September 21, 2017 at 326 *et. al.* Jacobs also reached out to Richard Triana, a local insurance agent in Sterling, MA, and acquaintance of the MacDonalds, and was able to speak with him based on her claim to be a representative of the Attorney General’s Office. Trial Transcript of September 20, 2017 at 149 *et. al.* Jacobs spoke in a protracted fashion with an elderly couple by name of Pekkola, who happened to have a daughter who was a nurse.² Jacobs approached their daughter, Elizabeth Pekkola, at her residence, and provided a sample affidavit for her to sign. Trial Transcript of September 21, 2017 at 356. When Ms. Pekkola failed to sign the affidavit, Jacobs reported her to the local licensing board for ethical violations. *Id.* at 357.

This conduct occurred in July 2017 approximately two months before the September 2017 trial in this matter. Attorney Hoppock immediately made provisions to depose two of the Massachusetts witnesses in connection with these events, and Jacobs’ counsel filed motions in limine

² Jacobs at deposition indicated that she learned of the plot to assassinate her on the part of the MacDonalds from a nurse who worked with Lorraine MacDonald and who telephoned her to advise her of the conspiracy.

and attempted to quash the subpoenas unsuccessfully. Appendix at 510. Over objection, Attorney Hoppock at trial was permitted to introduce evidence of events transpiring after the filing of the Plaintiffs' defamation claim of events and conduct which occurred exclusively in the State of Massachusetts. Trial Transcript of September 20, 2017 at 24, 66, 136, 196. This testimony was also considered by the trial court when it produced its injunctive order physically removing Jacobs from coming within five miles of her family's property in Fitzwilliam, and severely restricting her freedom of movement in sovereign state of Massachusetts, barring her from coming within five miles of Sterling, Massachusetts.

At the trial, at the conclusion of the Plaintiffs' opening statement, the Defendant made an oral Motion to Dismiss with a supporting legal memorandum on the basis that the opening statement did not allege facts sufficient to establish "actual malice", the appropriate standard in this matter. Trial Transcript of September 20, 2017 at 28; Appendix at 671. The Motion was denied. The Plaintiffs' both testified, as well as calling Lisa Jacobs in their case in chief. Jacobs testimony ended dramatically when she revealed to the Jury she was wearing a Kevlar, bullet-proof vest out of fear for her safety. The Plaintiffs also called Gary Chamberland, the police chief of Sterling, to testify regarding Jacobs' conduct in Sterling Massachusetts, Richard Triana, the Sterling Insurance Agent, Todd Prevett, the former prosecutor for Fitzwilliam, two Fitzwilliam police officers, as well as reading into evidence the depositions of Barry Hines and Elizabeth Pekkola. Some large portion of the evidence presented to the jury concerned events that transpired in Sterling, Massachusetts. Prior to the conclusion of the Plaintiffs' case, the parties held a discussion with the trial judge on jury instructions. Trial Transcript of September 31, 2017 at 392-404. At the conclusion of the Plaintiffs case, the Defendant made a Motion to Dismiss, orally and through a written Motion. Trial Transcript of September 21, 2017 at 418-419; Appendix at 674. The Motion was denied.

The Defendant called Marilyn Jacobs, and then rested. There was a final discussion of regarding the trial courts finalization of the jury instructions in which the Defendant's objection was noted. Trial Transcript of September 21, 2017 at 442. The Court reconvened the Jury, completed the jury instructions, and the parties began closing arguments. During the closing arguments, the Plaintiffs' counsel argued:

You heard about their anxiety, that when a car comes down the road. Can you imagine that? You're sitting in this rural area on a lake, It's idyllic. It's, you know, your perfect summer home. And you're on vacation. You want to relax. You don't need that kind of nonsense. Trial Transcript of September 21, 2017 at 453.

This drew an objection from Defendant on the basis that it constitutes a "golden rule" argument. The objection was overruled by the Court. Plaintiffs' counsel continued to discuss the case placing the jurors in the personal perspective of the Plaintiffs:

. . . You're in this environment where you want to get away from it all. You have what Ms. Jacob's called the MacDonalDs, in fact it's the other way around, you have the neighbors from hell who want to drive you away. What is that worth? What – how do you value what she has done to these people? Id.

At the conclusion of trial, the jury came back with a verdict of \$80,000.00 in general damages and \$80,000.00 in enhance compensatory damages, which was the subject of the Defendant's oral Motion for Judgment Notwithstanding the Verdict. Trial Transcript of September 22, 2017 at 44. The Court denied the Motion.

The trial court took additional evidence on the subject of the restraining order and issued a 16-page order which included a restraining order physically removing Jacobs from five miles within the vicinity of Fitzwilliam, New Hampshire and Sterling, Massachusetts, and placing a prior restraint on her speech. In its order, the trial court expressly found that Jacobs firmly believed in the truth of the statements she was making against the MacDonalDs, and that Jacobs had no doubts about their veracity:

The Court also finds, based on Ms. Jacobs testimony, that she pathologically believes the lies she has concocted against the Jacobs [sic]. . . Ms. Jacobs firmly—but delusionally—believe that the MacDonalds have attempted (and conspired with others) to murder her and her mother. Order dated September 29, 2017 at 4.

SUMMARY ARGUMENT

Plaintiffs' counsel made a "golden rule" argument during closing that was the subject of a contemporaneous objection. The objection was overruled and Plaintiffs' counsel was permitted to continue making a "golden rule" argument to the Jury, without any corrective instruction. This conduct by the Plaintiffs, as well as the ruling of the trial court, in itself, constitutes a reversible error warranting a mistrial.

In addition to this defect in closing argument, there were numerous, substantive issues raised in the case. In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the United States Supreme Court put significant restrictions on the common law tort of defamation in three regards: i.) precluding presumptive and punitive damages in the absence of evidence pursuant to the subjective standard of "actual malice"; ii.) requiring proof of "actual malice" by clear and convincing evidence, iii.) requiring enhanced scrutiny of jury verdicts by trial courts and appellate courts to insure "actual malice".

The requirement of "actual malice" for presumptive and enhanced compensatory damages has been adopted by the Restatement (Second) of Torts § 621 "General Damages" (1977), and appears to be the standard for enhanced compensatory damages as established by this Court. Munson v. Raudonis, 118 N.H. 474, 478–79 (1978). While the import of New York Times was initially limited to media defendants, subsequent case law in the Federal Courts has established that the same protections apply to speech of "public concern", even the speech of private individuals. Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 128 (1st Cir. 1997). "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions. . . are without question events of legitimate concern to the public." Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975). It is clear that the purportedly defamatory communications of Jacobs, addressing crimes and potential criminal conduct of the MacDonalds, fall squarely within the category of "public concern" and are subject to the protections of the First Amendment.

The substantive and evidentiary problems with the trial include the introduction of 404(b) evidence of subsequent conduct in Massachusetts for the purpose of proving “malice”, e.g. “ill will, hatred, hostility, or evil motive”, not “actual malice” toward the truth, e.g. “with knowledge that it was false or with reckless disregard of whether it was false or not.” This evidence was not only irrelevant to the question of “actual malice”, it was highly prejudicial to the Defendant and should have been precluded consistent with New Hampshire R. of Evidence 403 and 404(b). Second, the fact that the trial court expressly found that the Defendant firmly believed in the truth of her statements would entail that the Plaintiffs failed to establish “actual malice” and the defamation claim should have been dismissed, either in the Motion to Dismiss following the Plaintiffs’ opening statement, after the Plaintiffs’ rested, or when the Defendant made its oral Motion for Judgment Notwithstanding the Verdict.

Given the modern restrictions on presumptive and punitive damages, the Plaintiffs failure to establish any evidence of reputational harm or actual damages should have resulted in the granting of Defendant’s Motion for Summary Judgment, if not at one of the numerous motions made by the Defendant’s counsel at trial.

ARGUMENT

A. Whether the trial court erred in denying a mistrial when Plaintiffs’ counsel made a “golden rule” argument to the jury which was the subject of contemporaneous objection by the Defendant, where said objection was denied by the trial court, and the Plaintiff was permitted to continue making a “golden rule” argument to the jury?

“A golden rule argument is made when counsel urges jurors to put themselves in a particular parties place.” Walton v. City of Manchester, 140 N.H. 403 (1995) citing Klein v. Herring, 347 So.2d 681, 682 (Fla. Dist. Ct. App. 1977). Plaintiffs’ counsel stated in closing argument:

You heard about their anxiety, that when a car comes down the road. Can *you* imagine that? *You're* sitting in this rural area on a lake, It's idyllic. It's, you know, *your perfect summer home*. And *you're* on vacation. *You* want to relax. *You* don't need that kind of nonsense. [Emphasis supplied.]

The Plaintiffs specifically urged the jurors to place themselves in the shoes of the Plaintiffs, and imagine themselves experiencing the anxieties of the Plaintiffs. It was a text-book golden rule argument: “[a]n argument that jurors put themselves in the plaintiff’s place, commonly known as the golden rule argument, is impermissible and constitutes reversible error.” Klein, 347 So.2d at 682. “Courts generally condemn these arguments because they encourage the jury ‘to depart from neutrality and decide the case on the basis of personal interest and bias rather than on the evidence.’” Walton, 140 N.H. at 406. “It is hard to conceive of anything that would more quickly destroy the structures of rules and principles which have been accepted by the courts as standards for measuring damages in actions of law, than for the juries to award damages in accordance with the standard of what they themselves would want if they or a loved one had received the injuries suffered by a plaintiff.” Bullock v. Branch, 130 So.2d 74, 76 (Fla.D.Ct.App. 1961).

While New Hampshire has never ruled that an impermissible closing argument such as a “golden rule” argument warrants “automatic” mistrial, it must be corrected by an immediate and appropriate instruction from the Court. Walton, 140 N.H. at 408, citing Forrestal v. Magendantz, 848 F.2d 303, 308 (1st Cir. 1988) (as an example of an appropriate remedy). However, in this case, although undersigned counsel made a contemporaneous objection to the impermissible argument, the Court overruled the objection, making the possibility of a curative instruction out of reach. Given the lack of a curative instruction, the only possible legal result can be declaration of a mistrial. The trial court plainly erred in overruling the objection of counsel and denying the Defendant’s subsequent motion for mistrial.

B. Whether New Hampshire requires proof of “actual damages” in a claim of negligence per se consistent with Restatement (Second) of Torts, Sec. 621 and Merullo v. Greer, Civil No. 11-cv-116-SM, 2012, WL 832832 (D.N.H. Feb. 10, 2012), and therefore the trial court erred in denying the Defendant’s Motion for Summary Judgment?

According to the Restatement (Second) of Torts § 621 “General Damages” (1977):

One who is liable for a defamatory communication is liable for the proved, actual harm caused to the reputation of the person defamed.

The requirement that a plaintiff demonstrate “proved actual harm” was a substantial change from the provisions of the Restatement (First) of Torts § 621 “General Damages” (1938), which stated:

One who is liable for a libel or for a slander actionable per se is liable for harm caused thereby to the reputation of the person defamed or in the absence of proof of such harm, for the harm which normally results from such a defamation.

The change in the Restatement was a response to the holding of the Supreme Court of the United States in the cases of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), which recognized the common law remedy for libel encroached upon the First Amendment right to freedom of speech. It specifically restricted damage remedies in defamation actions as follows:

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. . . . Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. . . . *the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.* . . . the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. . . . *all awards must be supported by competent evidence concerning the injury*, although there need be no evidence which assigns an actual dollar value to the injury. 418 U.S. 323, 349–50 (1974). [Emphasis supplied.]

Not only is New Hampshire subject to the First Amendment of the U.S. Constitution, but the New Hampshire Constitution, Part I, Article 22 provides equal if not more extensive protections to New Hampshire citizens.

In Joseph v. Scranton Times L.P., 634 Pa. 35, 79 (2015), the Pennsylvania Supreme Court rejected allowing presumptive or punitive damages in the absence of evidence of actual injury to reputation:

Thus, as Justice Brennan articulated in his dissent in Firestone, permitting the recovery of damages for injuries such as mental anguish without a showing of injury to reputation subverts the intended “protective influence” of Gertz's actual injury stricture. Time, Inc. v. Firestone, 424 U.S. 448, 475 n. 3, 96 S.Ct. 958, 975 n. 3 (Brennan, J., dissenting).

See also Smith v. Durden, 2012-NMSC-010, 276 P.3d 943 (2012) (holding proof of actual reputational injury is a prerequisite to recovery in a defamation case); Little Rock Newspapers, Inc. v. Dodrill, 281 Ark. 25, 660 S.W.2d 933 (1983) (indicating defamation claims always require proof of reputational injury as mental suffering alone is insufficient to permit recovery); Gobin v. Globe Pub. Co., 232 Kan. 1, 649 P.2d 1239 (1982) (holding that unless damage to reputation is shown the plaintiff has not established a valid claim for defamation damages).

The Constitutional limitations on damages in tort actions has been recognized by New Hampshire Courts. In Merullo v. Greer, Civil No. 11-cv-116-SM, 2012 WL 832832, at *3, (D.N.H. Feb. 10, 2012), report and recommendation approved sub nom. Merullo v. Greer, No. 11-CV-116-SM, 2012 WL 832805 (D.N.H. Mar. 12, 2012), the Magistrate for the District of New Hampshire held:

While New Hampshire's common law of defamation relieves Merullo of the burden of proving her damages specifically, she still must prove her damages. See Torres-Rivera, 524 F.3d at 339 n. 3; KPS, 318 F.3d at 19. Chagnon and Lassonde do not free Merullo from having to prove damages; they simply allow her to do so generally rather than specifically. See Chagnon, 103 N.H. at 441; Lassonde, 157 N.H. at 593. Without *any* evidence of the degree to which Merullo's reputation has been harmed by Greer's defamatory statements, the court has no basis for determining a reasonable amount of compensation, and “[t]he law is clear that damages cannot be awarded on the speculation, passion, or guess of the [factfinder],” Laramie v. Stone, 160 N.H. 419, 430 (2010) (quoting 2 J. Stein, Stein on Personal Injury Damages § 6:4, at 6–14) (3d ed. Rev.1997). Lassonde and Chagnon offer good examples of how general damages may be proven in cases of libel *per se*.

Because in an action for *per se* defamation, a plaintiff may recover for both general damages and special damages relating to the tort, the plaintiff is not required to plead damages. However, as 8 McNamara, New Hampshire Practice: Personal Injury—Tort and Insurance Practice §11.04 notes, “[d]amages for tort in New Hampshire are considered to be recompense for injury sustained, and are remedial rather than punitive.”

Neither at the summary judgment phase, nor during the Plaintiffs’ Opening Statements, nor throughout the trial, was there a scintilla of evidence that any individual took any of Lisa Jacob’s utterances in a defamatory sense, e.g. believed the allegations and formed a negative opinion of the MacDonalds, subjecting them to reputational harm on that basis. See Thomson v. Cash, 119 N.H. 371, 375 (1979). Chief Chamberland admitted that the Sterling Police did not investigate the allegations Jacobs made of a murder for hire scheme on the part of the MacDonalds, who are residents of Sterling. Trial Transcript of September 20, 2017 at 147. Richard Triana indicated the allegations were “totally unbelievable”. Id. at 154. Barry Hines stated his impressions based on the communications he received from Jacobs was that “I thought this woman was crazy”. Trial Transcript of September 21, 2017 at 330. Elizabeth Pekkola indicated that the Jacobs statements about the MacDonalds or the Sushchyks “aren’t facts to me” and “didn’t persuade me in any way because it sounds like a storybook when you read it”. Id. at 366-367. During direct and cross examination, although the MacDonalds did articulate injuries related to mental anguish, they failed to articulate any non-speculative damages to their reputation as a result of the communications. The MacDonalds provided contradictory testimony claiming “reduced socialization” while acknowledging a strong and on-going social connection with the Sushchyks, their neighbors in Sterling and Fitzwilliam. Even taking the claim of “reduced socialization” at face value, such “reduced socialization” does not seem to be the reasonable social outcome had Jacobs convinced the neighbors through her letters that the MacDonalds were involved in alcohol-fueled sex parties and were the principals in a conspiracy to

commit murder. The trial court erred in denying the Motion for Summary Judgment, denying the Motion to Dismiss at the close of the Plaintiffs' opening, and at the close of the Plaintiffs' case, and denying the Motion for Judgment Notwithstanding the Verdict because the MacDonalds failed to establish actual damages of reputational harm, and the verdict only represents the passions inappropriately aroused in the Jury through illicit closing arguments.

C. Whether enhanced compensatory damages in connection with an action for negligence per se requires proof of "actual malice" consistent with *St. Amant v. Thompson*, 390 U.S. 727 (1968) and consistent with *Munson v. Raudonis*, 118 N.H. 474 (1978), or whether the common law malice standard, "ill will, hatred, hostility, or evil motive" applies?

The "actual malice" standard derives from the case of *New York Times*, 376 U.S. at 279-280 (1964), which held:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. An oft-cited statement of a like rule, which has been adopted by a number of state courts. . .

The standard for "actual malice" requires actual knowledge or reckless disregard for the truth. It is a subjective standard. The "Actual Malice" requirement is the same as that articulated in *St. Amant*, 390 U.S. at 731, 88 S. Ct. at 1325 (1968), where the United States Supreme Court held:

These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

New Hampshire law would appear to make it a requirement that a punitive damage claim in New Hampshire requires proof of actual malice:

A review of our law indicates that liberal compensatory damages are to be awarded only in exceptional cases, and not in every case involving

an intentional tort. If we were to agree with the plaintiff and hold that “malice” for the purpose of measuring damages is the intentional doing of a wrongful act, then every intentional tort would give rise to the larger amount of damages. Instead of allowing an award of damages to be based on implied or legal malice (see 52 Am.Jur.2d Malice s 1 (1970); 25 C.J.S. Damages s 123(4) (1966), **we prefer to base such an award only on a showing of actual malice.** See Prosser, The Law of Torts s 2, at 10 n.65 (1971). Munson v. Raudonis, 118 N.H. 474, 478–79 (1978) [Emphasis supplied.]

However, the Munson case goes on to articulate the common law standard for “malice”, not the standard for “actual malice” pursuant to New York Times and St. Amant:

There must be ill will, hatred, hostility, or evil motive on the part of the defendant. Without such a showing, the mere commission of a tort will not give rise to the aggravated circumstances necessary for the award of liberal compensatory damages. Id.

The requirement of “actual malice” as set forth in Munson is consistent with Geertz, “[s]tates may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.” Gertz v. Robert Welch, 418 U.S. 323, 349 (1974); see also Newberry v. Allied Stores, Inc., 773 P.2d 1231, 1237 (N.M. 1989)(punitive damages in libel only recoverable if publication made with actual malice). Further, actual malice must be shown by clear and convincing evidence. Id., 418 U.S. at 330.

This case presents an opportunity to clarify the holding in Munson, to make the standard for enhanced compensatory damages in defamation require a demonstration by clear and convincing evidence of “actual malice” consistent with federal law, and to make New Hampshire jurisprudence consistent with the protections of the First Amendment. The trial court in this matter erred in relying on the common law malice standard in introducing irrelevant but highly prejudicial evidence of conduct that occurred in Massachusetts to establish “ill will, hatred, hostility, or evil motive” of Jacobs towards the MacDonalds, when it provided no evidence of conscious knowledge of falsity or reckless disregard for the truth. The trial court also erred in its jury instructions and its verdict form in utilizing the common law malice standard instead of the actual malice standard.

D. Whether the trial court erred in admitting highly prejudicial 404(b) evidence of the Defendant's conduct out-of-state which occurred months after the so-called "defamation" in New Hampshire for purposes of proving common law malice at the time of the "defamatory" statements, necessitating a new trial.

The Plaintiffs in this matter pled common law negligence as its claim of defamation. Nonetheless, the Plaintiffs requested jury instructions regarding "malice" and enhanced compensatory damages, and were permitted to admit evidence of the Defendant's conduct in Massachusetts in July/August 2017, including evidence that she threatened Elizabeth Pekkola with an ethical complaint if she refused to sign an affidavit against the MacDonalds. An enhanced compensatory damage claim in New Hampshire requires proof of actual malice. Munson, 118 N.H. 474, 478–79 (1978). According to Am. Jur. 2d Libel and Slander § 39 "Evidence Proving Actual Malice, Generally":

A plaintiff may prove the defendant's subjective state of mind through the accumulation of circumstantial evidence as well as through direct evidence. Evidence of negligence, motive, and intent may cumulatively establish the recklessness to prove actual malice in a defamation action.

While fabricating a story is evidence of actual malice, as a required element of a public figure defamation action, evidence of pressure to produce stories from a particular point of view, even when they are hard-hitting or sensationalistic, is not evidence of actual malice, nor is evidence of a defendant printing material to increase its profits. **Evidence concerning events after an article has been printed and distributed, has little, if any, bearing on actual malice.** [Emphasis supplied.]

"The actual malice inquiry focuses on the defendant's state of mind at that time of publication." Forbes, Inc. v. Granada Biosciences, Inc., 124 S.W.3d 167, 173 (Tex. 2003); See also Freedom Newspapers of Texas v. Cantu, 168 S.W.2d 847, 858 (Tex. 2005) ("Actual malice concerns the defendant's attitude toward the truth, not toward the plaintiff"); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 512 (1984). "Evidence concerning events after an article has been printed and distributed, has little, if any, bearing on that issue." Id., 124 S.W.3d at 174.

The Plaintiffs in this matter were permitted to introduce evidence through live testimony and depositions of documents disseminated in the State of Massachusetts as well as discuss Lisa Jacob's behaviors in Massachusetts well after any of the New Hampshire documents were circulated on the rationale that this conduct established "ill will, hatred, hostility, or evil motive", not because it established "actual malice". Specifically, the evidence discussed the conduct of Lisa Jacobs in July/August of 2017, which would fall squarely within NH Rules of Evidence 403 and 404(b), "Evidence of Other Crimes, Wrongs, or Acts". Leaving aside the debatable question of whether Ms. Jacobs' purported attempts to coerce Ms. Pekkola into signing an affidavit shows "actual malice" against the MacDonalds at the time of her contacts with Ms. Pekkola, it demonstrated precisely zero about Ms. Jacobs state of mind when she authored and distributed any of the documents circulated in New Hampshire. In addition, whatever marginal relevance the evidence may have, it is further barred under Rule 403, as unfairly prejudicial to the Defendant. Specifically, whatever inference the jury might make regarding Ms. Jacob's state of mind with respect to the MacDonalds in July/August of 2017 might lead to a further inference about her of mind in July 2015, the incident casts Ms. Jacobs in a negative and prejudicial light. See State v. Melcher, 140 N.H. 823, 831 (1996)(Introduction of evidence of other bad acts was unsustainable exercise of discretion resulting overturning of AFSA conviction).

The decision of the trial court to allow the introduction of the evidence was in error, based upon the wrong legal standard, was more prejudicial than probative, and, by providing negative and irrelevant evidence about Jacobs, confused the jury and unfairly prejudiced them against her.

E. Whether speech in this matter concerning purported criminal activity, corruption in law enforcement, and threats to public safety constitutes speech of “public concern” necessitating First Amendment protections, and which necessitated a finding of “actual malice” at the time of the speech before a jury could award punitive or presumptive damages, and which requires heightened judicial review from both the trial court and the Appellate Court as to the existence of actual malice?

The case of Philadelphia Newspapers, Inc. v. Hepps, 475 N.H. 767, 775 (1986) addressed the case of media defendant publishing stories concerning an individual on issues of public concern, and provided protections to a media defendant, specifically requiring clear and convincing proof of “actual malice” before awarding punitive and/or presumptive damages. In the case of Flamm v. American Assn. of University Women, 201 F.3d 144, 149 (2d Cir.2000), the First Amendment protections provided media defendants were extended to nonmedia defendants provided the statements addressed “public concern”. “Of particular relevance here is the Court's holding that a private individual who seeks damages for a defamatory statement involving a matter of public concern cannot recover presumed or punitive damages absent a showing of actual malice”. Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 128 (1st Cir. 1997)(citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 751, 756–57, 105 S.Ct. 2939, 2941, 2943–44, 86 L.Ed.2d 593 (1985); Gertz v. Robert Welch, Inc., 418 U.S. 323, 349, 94 S.Ct. 2997, 3011–12, 41 L.Ed.2d 789 (1974).

“The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions. . . are without question events of legitimate concern to the public.” Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975). “Public allegations that someone is involved in crime generally are speech on a matter of public concern.” Obsidian Finance Group, LLC v. Cox, 740 F.3d 1284, 1292 (9th Cir.), cert. denied, ___ U.S. ___, 134 S.Ct. 2680, 189 L.Ed.2d 223 (2014)(allegations that bankruptcy trustee was participant in defrauding investors was a matter of public concern); see also Gleason v. Smolinski, 319 Conn. 394 (2015)(statements relating to missing persons a subject of public concern); Boule v. Hutton, 328 F.3d 84, 91 (2d Cir. 2003)(Article

concerning fraud in the art market a matter of public concern); Miles v. Ramsey, 31 F.Supp.2d 869, 875 (D.Colo. 1998)(child murder investigation matter of public concern for purposes of defamation claim arising from article in tabloid newspaper indicating that neighbor is a pedophile); Shoen v. Shoen, 292 P.3d 1224, 1229-30 (Colo.App.2012)(statements made on a radio show concerning the defendant's brother and the murder of the defendant's brother's wife was speech of "public concern").

Note that the question of public concern deals with the subject matter of the statements, not whether the statements are made in good faith or non-negligently, as any case involving defamation will entail claims that the statements were made negligently or with actual malice. These protections stem from the First Amendment to the U.S. Constitution, and are intended to protect the free speech of all. In cases of public concern, the Plaintiff bears the burden of proving that the statements are false. NH Civil Jury Instruction 24.3; Gleason, 319 Conn. at 445 (Conn. 2015). In addition, under the negligence standard, the Plaintiff is required to show actual damages, "[s]tates may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." Gertz, 418 U.S. at 349 (1974). Further, actual malice must be shown by clear and convincing evidence. Id., 418 U.S. at 330. Evidence of malice toward the Plaintiffs is legally insufficient to establish clear and convincing evidence of actual malice, as malice must be directed toward the truth, not the Plaintiff. Woodcock v. Journal Publishing Co., 230 Conn. 525, 544, 646 A.2d 92 (Conn. 1994)("Evidence of ill will or bad motives will support a finding of actual malice only when combined with other, more substantial evidence of a defendant's bad faith"); Gambardella v. Apple Health Care, Inc., 291 Conn. 620, 638 (Conn. 2009)("proof that a defamatory falsehood has been uttered with bad or corrupt motive or with an intent to harm will not be sufficient to support a finding of actual malice").

There is insufficient evidence under the clear and convincing standard that the Defendant, knowingly or recklessly, repeatedly made false reports of a crime in violation of RSA 641:4 to law

enforcement, given the clear risks of prosecution and incarceration that such behavior would entail. While there may be evidence of “malice” toward the Plaintiffs, there is no evidence of “actual malice” toward the truth, and the Plaintiffs should not have been permitted to recover presumptive or enhanced compensatory damages in this case. Indeed, the trial court found in its order on the injunction:

The Court also finds, based on Ms. Jacobs testimony, that she pathologically believes the lies she has concocted against the Jacobs [sic]. . . Ms. Jacobs firmly—but delusionally—believes that the MacDonalds have attempted (and conspired with others) to murder her and her mother. Order dated September 29, 2017 at 4.

Given that the trial court found that Jacobs firmly believed her allegations, there is no evidence of “actual malice” on the part of Jacobs, and no basis to conclude that Jacobs entertained “serious doubts” about the truth the allegations. There was therefore no legal basis for the trial court’s denial of the Defendant’s Motion for Judgment Notwithstanding the Verdict, or the Defendant’s Motion to Dismiss, or for the jury verdict in this case.

Additionally, in cases involving public concern, an appellate court is required to apply a stricter review on appeal from the “clearly erroneous” standard consistent with New York Times Co.:

In reviewing defamation actions, “an appellate court has an obligation to ‘make an independent examination of the whole record’ in order to make sure that “the judgment does not constitute a forbidden intrusion on the field of free expression. Woodstock, 230 Conn. At 536 (quoting New York Times, 376 U.S. at 284-6).

Review of the trial record is consistent with the trial court’s factual determination that Jacobs firmly believes in the allegations against the MacDonalds, which would preclude a finding of “actual malice”, and render the Court’s rulings on Motions to dismiss and the Motion for Judgment Notwithstanding the Verdict legally erroneous.

F. The trial court erred in ordering the physical removal of the defendant from her family's vacation property and in banishing the defendant from Sterling, Massachusetts.

The Court in its Order makes note of July 15, 2015 letter authored by Lisa Jacobs and sent to numerous law enforcement agencies. Said letter contains the following menacing passages:

My understanding is that issues between neighbors blossom to the point until someday one neighbor gets a gun and shoots the other neighbor. My understanding is that it is very important for me to complain to the police in order for their [sic] to be a history for a jury to evaluate in the future in the case of my death. . .

I have been having fears of homicidal ideation of having to be put in the position of killing the McDonalds [sic] and or their drunken tenants. I have thought about getting a federal contractor with an assault weapon to try to protect me to help me calm down when I am at 251 Sunset Rd. as I am feeling terrorized.

As a result of this letter, Ms. Jacobs was charged with the crime of criminal threatening, which was ultimately dismissed. However, the letter on its face does not meet the legal requirements for criminal threatening, as the communication was made to law enforcement, and there is no evidence of a "purpose to terrorize" the MacDonalDs, as the communication was not sent to the MacDonalDs. RSA 631:4.

As far as "harassment" of the MacDonalDs, Ms. Jacobs' attempts (albeit heavy handed) to procure affidavits from neighbors and residents of Sterling Massachusetts does not meet any judicial definition of "harassment" of the MacDonalDs, as Ms. Jacobs did not contact, communicate, or approach the property of the MacDonalDs. Trial testimony indicates that charges of "harassment" against Jacobs were dismissed in Massachusetts for lack of probable cause. No evidence in the trial suggests actions that would constitute either "harassment" pursuant to RSA 644:4 or "abuse" pursuant to RSA 173-B:1.

While Ms. Jacobs has certainly spread repeated communications that contained ugly language regarding the MacDonalDs, she has never committed a crime against their persons, nor has she been

violent or invaded their property. Based on the trial court's reasoning that Ms. Jacobs believes her allegations, it is not clear that she would even meet the requirements of RSA 644:11 "Criminal Defamation". Nor was there evidence on the record that Ms. Jacobs intentionally violated the Temporary Restraining Order, although there was testimony from Lorraine MacDonald that Jacobs walked by a crowd of people (including Peter MacDonald) when she was trying to get her car around an ambulance blocking Sunset Road.

The majority of the trial court's factual findings concerned the manner of Jacob's attire, namely, her choice to wear a Kevlar bullet proof vest to Court. Given that individuals wearing bullet proof vests are a common occurrence in Court, as well as individuals bearing tattoos which signify gang affiliations or membership in violent hate groups, it is unclear what the factual basis is for banishment in this matter in comparison to many of the run-of-the-mill defendants on the criminal docket. The Superior Court routinely handles crimes of actual and serious violence, from individuals with long criminal histories, and who adopt tattoos and personal attire signifying more sinister affiliations than Jacobs' Kevlar vest or her claims to be working with law enforcement. Whatever view this trial court took with respect to Jacobs' conduct, it is not clear that she presents a danger to others.

New Hampshire is a sovereign, territorial State, albeit part of a federation of United States. Part II, Article 72(a) of the New Hampshire Constitution establishes the Judicial Branch of New Hampshire. RSA 491:7 sets forth the powers of the Superior Court, which does not empower it with equitable powers to restrict freedom of movement in the Commonwealth of Massachusetts or in other sovereign states or territories. Cf. RSA 173-B:13 (allowing for interstate recognition of foreign domestic violence orders). The Order under appeal restricting the freedom of Jacobs does not reflect comity with Massachusetts as it is contrary to the Massachusetts' Constitution and public policy. See Doe v. City of Lynn, 472 Mass. 521 (Ma. 2015)(Ordinance restricting rights of convicted sex offenders

to reside in the municipality manifested “sharp conflict” that rendered it unconstitutional under the Home Rule Amendment.); Commonwealth v. Pike, 428 Mass. 393 (1998)(Condition of probation prohibiting the defendant from entering the state during suspended sentence was invalid). The trial court lacked statutory and/or constitutional authority to promulgate an order banishing a party from travel in an out-of-state location, and the Order offends comity, as it is contrary to the public policies of Massachusetts. In addition to her banishment in Massachusetts, given that the MacDonalds residence is within approximately 50’ of the bounds of the Jacob’s family home, and Jacob’s residence is approximately 50’ from the common beach area owned by the Plaintiffs, the Court’s order effectively banishes Lisa Jacobs from the cottage her family built.

The trial court acknowledged the Defendant’s constitutional rights to travel under the Fifth and Fourteenth Amendments, but attempted to justify its restriction in a civil case exclusively on New Hampshire case concerning restrictions by probation or parole or suspended sentences. In State v. Roy, No. 2014-0364, 2015 WL 11071484 (N.H. Sept. 17, 2015), this Court acknowledged that the right to travel is a fundamental right and restrictions on the right to travel require a balancing between the rights of individuals and the needs of a community. Roy addressed a condition of a suspended sentence requiring the Defendant to live in New Hampshire, which it upheld as being beneficial to promoting the rehabilitation of the Defendant. It did not seek to banish an eccentric person in a civil case from her family’s summer residence because she wrote some ugly letters about the neighbors on grounds of “public safety”, nor did it seek to regulate a civil party’s freedom of movement within an adjacent sovereign state.

The trial court additionally relied on the civil case of Predick v. O’Connor, 280 Wis.2d 323 (Wi.Ct.App. 2003), yet the facts in Predick were:

Margaret O’Connor twice used her automobile as a dangerous weapon, once running Tina M. Busch off the road while Tina was driving both her daughter and Pamela and George Predick’s daughter to soccer practice, and once attempting to “side swipe” Pamela while Pamela

was jogging. Margaret has been stalking these people for a decade and has ignored previous orders to cease and desist from her behaviors. 280 Wis.2d at 325.

There is no allegation that Jacobs has committed a violent act against the Plaintiffs or their families. There is no basis to conclude she has even committed a crime against the Plaintiffs, notwithstanding any liability she may have in tort. There are no allegations that she knowingly violated the Order, although she may have inadvertently been in the presence of Peter MacDonald when attempting to get her car around an ambulance blocking Sunset Drive. There is nothing in the record that is remotely parallel to the facts in Predick. In conclusion, the facts concerning Jacobs do not remotely resemble the facts in Predick, and the trial court's reliance on Predick was misplaced.

The human fear of the unknown is the greatest of human fears. Ms. Jacob's is unorthodox in her beliefs, demeanor, and attire, and this eccentricity excites stigma and fear. Yet we do not live in the times of the Colonial New England village, when the Elders saw fit to banish, persecute or even execute those who were unorthodox in style or religious beliefs. The role of the modern law is to be rational, not to succumb to prejudice based in fear, but to make a rational inquiry into dangerousness. Ms. Jacobs actions consist only of words, yet the trial court contended that its order is "narrowly tailored" by removing her from her family cottage in New Hampshire and banishing her from Sterling, Massachusetts, based solely on her words and her courtroom attire. There is no evidence of dangerousness justifying the sweepingly broad injunction in this case.

Given that Ms. Jacobs can access an email account and a word processor in every library in America, there is no rational connection between the geographical restrictions and the conduct forming the basis for the injunction. It is unclear how "public safety" is promoted by banishing a libelous writer from her family cottage or a city in Massachusetts. Even assuming dangerousness, the Order is not narrowly tailored to address the "danger" which only consists of ugly letters disseminated to third parties. The court's finding that Ms. Jacobs' mother "rarely" visits the family cottage is

contradicted by the testimony of Ms. Jacobs' mother that she spends the majority of her vacation time at the family cottage. The physical removal of Lisa Jacobs from her family cottage is not "narrowly tailored" and is not justified. The Order is illegal, unconstitutional, and overly broad.

CONCLUSION

The trial court erred in overruling the Defendant's objection to the Plaintiffs' golden rule argument, and in denying the Motion for Mistrial. The trial court erred in allowing the introduction of highly prejudicial and irrelevant evidence on the basis that it established common law "malice" rather than "actual malice" as is required for presumptive and enhanced compensatory damages in a defamation claim. The trial court erred in not dismissing the defamation claim, despite no evidence of actual injury to reputation. The trial court erred in not employing the "actual malice" standard to a case involving a "public concern", and not dismissing the claim given its finding that Jacobs firmly believed in the truth of her statements. The trial court's injunction was unreasonable and overly broad, and an unsustainable exercise of discretion.

WHEREFORE, for all the reasons set forth above, the Appellant respectfully requests that the Honorable Court:

- A. Determine the trial court erred in overruling the Defendant's objection to the Plaintiffs' golden rule argument, and denying the Motion for New Trial, and declare a mistrial and remand for new trial;
- B. Determine that the speech in question was speech of "public concern" and subject to the "actual malice" standard, and vacate the verdict and dismiss the defamation claim due to the absence of evidence of "actual malice";
- C. Determine that presumptive and enhanced compensatory damages require a showing of "actual malice", and vacate the verdict and dismiss the claim due to the absence of a showing of actual damages, as well as an absence of "actual malice";

- D. Determine that enhanced compensatory damages require a showing of “actual malice”, and that the trial court’s introduction of irrelevant and prejudicial evidence for purposes of proving common-law malice prejudiced the Defendant and warranted a mistrial;
- E. Determine that the injunction issued, barring the Defendant from her family’s cottage and from a five-mile vicinity of Sterling, Massachusetts was unreasonable, unjustified and unwarranted, and unconstitutionally infringed on the Defendant’s freedom of movement, and vacate and remand for deliberations consistent with this Court’s Order;
- F. Such other and further relief as is equitable and just.

Respectfully submitted,

Lisa Jacobs
By her attorneys,
Law Offices of Kelly E. Dowd, PLLC

Dated: April 19, 2018

By: 

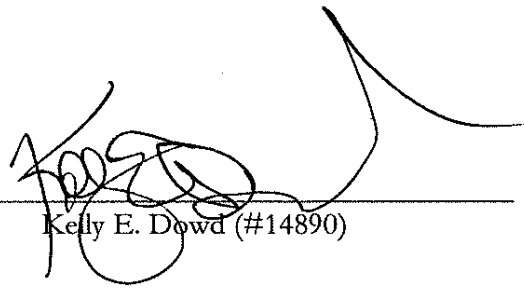
Kelly E. Dowd (#14890)
P.O. Box 188
29 Center St., Suite 12
Keene NH 03431
(603) 499-8261

**CERTIFICATION OF SERVICE, COURT ORDERS, AND WAIVER OF ORAL
ARGUMENT**

I hereby certify that copies of the foregoing Brief were mailed first class on this day to Attorney for Petitioner Lorrain E. and Peter J. MacDonald, Joseph Hoppock, Esq. at 16 Church St., Suite 3-A, Keene NH 03431. The Appellant requests oral arguments of 15 minutes before the full Court, and further certifies that all orders under appeal have been appended to this Brief.

Dated: April 19, 2018

By: _____


Kelly E. Dowd (#14890)

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Cheshire Superior Court
33 Winter Street, Suite 2
Keene NH 03431

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

NOTICE OF DECISION

File Copy

Case Name: **Lorraine MacDonald, et al v Lisa Jacobs**
Case Number: **213-2016-CV-00086**

Enclosed please find a copy of the court's order of September 22, 2017 relative to:

Jury Verdict Form

September 27, 2017

James I. Peale
Clerk of Court

(555)

C: Joseph Scott Hoppock, ESQ; Kelly E. Dowd, ESQ

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CHESHIRE, SS.

STATE OF NEW HAMPSHIRE

SUPERIOR COURT

Lorraine and Peter MacDonald

v.

Lisa Jacobs

Docket No. 213-2016-CV-0086

Jury Verdict Form

#1 Does the jury find that the plaintiffs have proven their defamation claim by a preponderance of the evidence? Yes No

If your answer is "No," this is a verdict in favor of the defendant and the jury foreperson should sign the form and notify the bailiff. If you answer "Yes", proceed to question #2 below.

#2 Does the jury find that the defendant has proven that her statements were conditionally privileged as defined in the instructions? Yes No

If your answer is "Yes," this is a verdict in favor of the defendant and the jury foreperson should sign the form and notify the bailiff. If your answer is "No," proceed to question

#3.

#3 Does the jury find that the plaintiffs have proven general damages caused by the defamatory statements? Yes No

If your answer is "Yes," enter the amount the jury awards in general damages here: \$ 80,000 and proceed to question #4. If your answer is "No," the jury foreperson should sign the form and notify the bailiff.

#4 Does the jury find that the plaintiffs have proven that the defendant's conduct was wanton, malicious, or oppressive? Yes No

If your answer is "Yes," enter the additional amount of "enhanced" or "liberal compensatory" damages here: \$ 80,000 and the foreperson should sign the form. If your answer is "No," the jury foreperson should sign the form and notify the bailiff.

09/22/2017
DATE:

TOPICA MORASEL
Jury Foreperson

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JUDICIAL BRANCH
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NOTICE OF DECISION

File Copy

Case Name: **Lorraine MacDonald, et al v Lisa Jacobs**
Case Number: **213-2016-CV-00086**

Enclosed please find a copy of the court's order of September 21, 2017 relative to:

Jury Instructions

September 27, 2017

James I. Peale
Clerk of Court

(555)

C: Joseph Scott Hoppock, ESQ; Kelly E. Dowd, ESQ

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STATE OF NEW HAMPSHIRE

CHESHIRE, SS.

SUPERIOR COURT

Lorraine and Peter MacDonald

v.

Lisa Jacobs

Docket No. 213-2016-CV-0086

Jury Instructions

Members of the jury, you are about to hear opening statements by counsel. Before that I am going to give you some general instructions as to the law that applies to this case and as to a few other matters -- which will give you some guidance as you consider the evidence in this case. At the end of the case after you have heard the evidence and closing arguments, I will give you further instructions, and then you will retire to the jury deliberation room to decide your verdict.

As you will hear, this civil action arises out of statements made by Ms. Jacobs which the MacDonald's say are false. The MacDonald's allege that they have been defamed by Ms. Jacobs in their community and that they are entitled to general damages as a result of Ms. Jacob's statements.

The defendant denies liability for any alleged loss sustained by the Plaintiff. She claims that any statements made by her were not false and that they cannot serve as the basis for liability because some of the statements were made to law enforcement officials.

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These are the issues which are to be determined by you based on the facts as you find them to be and by applying the law as the court instructs you.

The judge's responsibility in any case has three basic components: To conduct the trial in a fair, orderly and efficient manner; to decide legal questions regarding the admissibility of evidence; and to instruct you on the law that applies to the case.

It is your duty as jurors to follow all of the instructions I am about to give you.

Regardless of any opinions you may have as to what the law is or the law ought to be, the law as I give it to you in these instructions now is the law that you must follow in reaching your verdict. Also, you must consider all of the instructions which I give you, regardless of the order in which I give them. You must not single out any particular instruction alone as stating the law. Rather, you should consider each instruction in light of, and together with, the others. You are to give them all the same weight and consideration.

It is up to you to decide the facts of this case. You and you alone are the judges of the facts. You apply the facts as you find them to be to the law as I give it to you in these instructions and in this way you reach your verdict. You should decide the facts in this case without prejudice, without fear and without sympathy.

Throughout the trial I must be fair and impartial, just as you are required to be, and so if I said or did anything during the trial that causes you to believe that I favor one party over the other I now instruct you that I do not favor either party in this case. You and you alone, as I said, are the judges of the facts and you decide the verdict.

First I am going to talk to you about what is not evidence. The fact that suit was brought by the plaintiff against the defendant is likewise not evidence of legal

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responsibility. The suit is simply the means by which the controversy gets to court to be resolved by you in accordance with the facts as you find them to be and the law given in these instructions.

The statements made by counsel in their opening statements and their final arguments are not evidence. They are simply tools by which they outline, in their opening statements what they feel they are going to prove, and in their final arguments the conclusion that they wish you to draw from the evidence in the case. Their purpose is simply to help you understand the evidence and the law. If either side describes the law differently than I explain it to you in these instructions, then you must follow these instructions and disregard what they said about the law. If either side describes the evidence differently than your recollection, or even if I refer to some evidence and what I say is different than your recollection of the evidence, use your own recollection and disregard both what the attorneys or what I said about the evidence. Again, this limitation only applies to opening statements and closing arguments.

During the trial both sides may make objections. Lawyers are supposed to object when they believe that certain evidence may not be admissible under our rules of evidence. Please do not hold it against either party if they make these objections. If I sustain an objection and I exclude any evidence you must not guess as to what the evidence might have been. Likewise, if I overrule an objection and I admit certain evidence then you must not give that evidence any special weight as a result of my ruling. I am not expressing views as to the importance of evidence when I make my rulings. I am merely applying the law as is my duty. In addition, you will see that I from time to time will take notes on my computer about certain things. Pay no attention to my

conduct when I do that. My role is to keep track of different things and you are not to place any particular evidence if you see if corresponds with anything that I do on the computer.

If I order that a question and answer be stricken from the record, you are to ignore this information and must not consider either the question or the answer as evidence. Only consider the evidence that you finally heard which was admitted and not excluded.

After having told you what you must not consider, I am going to tell you what you can consider as evidence.

As I said, you are to decide what the facts are, based on the evidence. The most common forms of evidence consist of:

1. Sworn in-court testimony of witnesses, both on direct and cross-examination, regardless of who called the witness.
2. Exhibits which have been admitted into evidence.
3. Any portions of deposition testimony that have been read into the record.

Occasionally there are other forms of evidence introduced during the course of a trial. If that happens, I will give you some specific instructions about that evidence. But the most common forms of evidence in civil cases are the in-court testimony of witnesses and exhibits.

The testimony of some witnesses might be read to you from depositions. When a deposition is taken, the witness takes an oath that is identical in purpose to the oath given to the witnesses who testify before you here in the courtroom. All parties are given an opportunity to ask questions of a witness during a deposition. Deposition testimony

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should be considered by you as you would consider any other testimony, giving it the weight you think it deserves.

In evaluating the evidence, you must not guess or speculate about evidence that is not before you. In other words, you should consider only the legally admissible evidence and reasonable inferences that you can draw from the evidence. By reasonable inferences, I mean conclusions which reason and common sense lead you to draw from the facts that are proven to your satisfaction.

There are two ways to prove a fact, either through direct evidence or circumstantial evidence. Direct evidence is the testimony of a person who claims to have personal knowledge of facts about the matter in dispute, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances which tend to prove a fact.

I think an example of circumstantial evidence is always helpful. Assume that when you enter the courthouse it is cloudy outside. While you are in the court, you see someone come into the building who is wearing rain boots, the person is soaking wet, and they are closing an umbrella. If you could actually look out the window and see for yourself that there is rain falling from the sky that would be direct evidence that it is raining outside. In contrast, if you cannot see for yourself whether it is raining outside, you could consider all of the facts and circumstances of surrounding the person you observed entering the courthouse to determine whether it is raining outside.

There is no distinction between the weight to be given either direct or circumstantial evidence. You should consider all of the evidence in the case, whether it be direct or circumstantial, and decide whether the party having the burden of proof has

met that burden. In making that decision, you must consider all the evidence in light of reason, common sense and your experience.

Now, in reviewing the evidence you should consider the quality of the evidence and not the quantity. It is not the number of witnesses or the quantity of the evidence that is important but the quality of the evidence; that is, how persuasive the evidence is to you.

You will hear a number of witnesses testify in this case. As to each witness, you must decide whether to believe the testimony, and how much weight to give it. In doing so, you should consider anything that reasonably helps you to assess the reliability of the testimony. Among the things that you should consider are the following:

1. The witness's appearance, attitude, and behavior on the stand;
2. The witness's age, intelligence and experience;
3. The witness's opportunity and ability to see or hear the things about which he or she testified;
4. The accuracy of the witness's memory;
5. Any motive of the witness not to tell the truth;
6. Any interest the witness has in the outcome of the case;
7. Any bias of the witness, or friendship or animosity the witness may have toward any of the parties;
8. The consistency or inconsistency of the witness's testimony with prior statements or testimony given by the witness;
9. Whether the witness's testimony seems reasonable or unreasonable; and,

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10. Whether the witness's testimony is consistent with the testimony of other witnesses.

You may believe all, part, or none of the testimony of any witness. If you believe that part of a witness's testimony was false, you may choose to distrust other parts also, but you are not required to do so.

You are not required to believe a witness simply because the witness took an oath to testify truthfully. You are also not required to believe a witness simply because the testimony is uncontradicted. Likewise, you are not required to accept testimony as true simply because a number of witnesses agree with each other. You may decide that even the unanimous testimony of several witnesses is erroneous. When witnesses are in conflict, you need not accept the testimony of a majority of witnesses. You may find the testimony of one witness or of a few witnesses more persuasive than the testimony of a larger number. In deciding whether to believe a witness's testimony and how much weight to give it, you should act reasonably.

You should bear in mind that inconsistencies and contradictions in a witness's testimony, or between his or her testimony and that of others, do not necessarily mean that you should disbelieve the witness. Memory failures and mistaken memories are common and may explain some inconsistencies and contradictions. It is also common for two honest people to witness the same event and to see or to hear things differently. It may be helpful when you evaluate inconsistencies and contradictions to consider whether they relate to important or unimportant facts. In summary, you should evaluate the testimony of all witnesses, both on direct and cross-examination, and give it the weight you think it deserves.

In a civil case such as this, the party who makes a claim has the burden of proving it. This is called the burden of proof. The party asserting a claim does not have to prove the claim beyond a reasonable doubt, as is required in a criminal case. Rather, the burden in a civil case is proof by a preponderance of the evidence. This means that the party asserting a claim must prove that his or her claim is more probably true than not.

As an example of what I mean, imagine the scales of justice. With respect to a claim asserted by the plaintiff, put all the credible evidence on the scales, with the evidence in favor of the plaintiff on one side, and the evidence in favor of the defendant on the other. If the scales tip, ever so slightly, for the plaintiff, then the plaintiff has sustained the burden as to his claim. If the scales tip in favor of the defendant, or remain in balance, then the burden of proof has not been satisfied.

In deciding whether the plaintiff has met his burden of proof, consider all the evidence in the case, no matter who produced it. Keep in mind that what is important is the quality of the evidence, and not the quantity.

After all of the evidence has been submitted and both sides have presented their closing arguments, I will give you further instructions about the law that applies to this case, including a definition of the legal claims involved in the case and other issues that might arise during the course of the trial. You are to consider the instructions as a whole – both the instructions I gave you now and the instructions I will give you at the end of the case and not single out one particular instruction as stating the law. You will also have a written copy of my entire instructions with you in the jury deliberation room.

Now that the trial in this matter is concluded, I will give you further instructions that apply to this case. At the beginning of the case, I gave you instructions about a number of issues that typically come up during the course of trial. Remember all of the instructions I have given you throughout the case should be considered as a whole. So don't single out any particular instruction for special emphasis. As I told you at the outset, you will have a complete written copy of the instructions to have with you in the deliberation room.

The plaintiffs allege that they were defamed by statements made by the defendant to third parties and that the statements were false. Defendant denies this claim. Alternatively, she asserts that the statement was privileged. I will explain the law in these matters in the following way:

In order for the plaintiffs to recover for defamation, the plaintiffs must prove that it is more likely than not that the defendant intentionally or without reasonable care communicated or published a defamatory statement concerning the plaintiffs to a third party who understood its defamatory meaning.

Reasonable care is the degree of care which an ordinary prudent person would use under the same or similar circumstances. The failure to use reasonable care may take the form of action or inaction. That is it may consist of either doing something that an ordinary prudent person would not do under the same or similar circumstances or failing to do something that an ordinary prudent person would do under the same or similar circumstances.

The plaintiffs must establish that the statement was false. The test you must apply is whether the statement is, as a whole, substantially true. The statement need

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not be true in every detail. Minor inaccuracies do not amount to falsity. If the "gist" or "sting" of the statement is true, then a defendant is not liable for defamation.

A defamatory statement must tend to lower the plaintiffs in the esteem of any substantial and respectable group, even though it be quite a small minority. A defamatory statement must be made to a third person who understands its defamatory meaning and application to the plaintiff. This is referred to as publication.

Statements made solely to law enforcement that are pertinent to a judicial proceeding cannot be the basis of liability for defamation. Therefore statements you heard about that were made solely to law enforcement cannot be used as the basis for liability. However, the same or similar statements made to others may be used for the basis for liability.

The defendant claims that any statements she made were conditionally privileged. If a statement is conditionally privileged, it cannot be the basis for defamation judgment. A statement is conditionally privileged, even if the statement is false, if the defendant proves, by a preponderance of the evidence, that the statement was made under these four conditions: 1) that the statement was published on a lawful occasion, 2) in good faith, 3) for a justifiable purpose, and 4) with reasonable ground to believe its truth. If the defendant proves all four of these conditions by a preponderance of the evidence, you must enter a verdict in favor of the defendant.

It is now my duty to instruct you on the measure of damages. By instructing you on damages, I do not mean to suggest for which party your verdict should be rendered. I have to give you complete instructions as to all the principles of law in the event you reach that stage in your deliberations.

If you should find for the plaintiffs you should award them full, fair and reasonable compensation for the injuries caused by the defendant. A person who claims damages has the burden of proving that it is more probable than not that the damages sought were caused as a result of the legal fault of another person.

If you decide that the defendant was legally at fault, you will then decide whether the plaintiffs have proved any of the items of loss or harm that I shall talk about in a minute. For each item of loss or harm claimed, the plaintiffs must prove that it is more probable than not. In determining the amount of damages to allow the plaintiffs, you may draw such inferences as are justified by your common experiences and observations of human events, from the evidence of the nature of the injuries and the results thereof. You are not to assume that you are required to compensate the Plaintiffs for an item of loss or harm simply because I explain how to measure it.

On plaintiffs' defamation claim, you may award them those damages proven to have resulted and that will result in the future as the natural and direct consequence of the defamatory act. These damages include harm to personal reputation, harm to business reputation, and any other damages that resulted as the normal and direct consequence of the defamation.

When a defamatory statement charges a person with a crime or with activities which would tend to injure him in his trade or business, no proof of specific damages is required. The plaintiffs are entitled to recover all damages which would normally result from such defamation, such as harm to reputation. One who is liable to another for defamation is also liable for emotional distress that is caused by the defamatory publication.

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The purpose of an award of damages is to compensate the plaintiffs for their loss or harm, not to punish the defendant. You are not permitted to award money damages for the purpose of punishing the defendant or making an example of her for the public good or of preventing her or others from similar conduct.

If you find that the plaintiffs suffered actual damages that were caused or substantially caused by the conduct of the defendant, there are certain circumstances under which the law permits you, but does not require you, to consider in award of additional damages to reflect aggravating circumstances. These damages are called "enhanced damages" or "liberal compensatory damages." You may award these damages only if you find that the defendant's conduct was more probably than not wanton, malicious, or oppressive. "Wanton" means reckless indifference or disregard of consequences. "Malicious" means ill will, hatred, hostility, or bad motive. "Oppressive" means abuse of power.

DELIBERATIONS AND VERDICT

Ladies and gentlemen, this case is important to both of the parties, the plaintiff and the defendant. The principles of law that I have given to you are intended to guide you in reaching a fair result. You are to exercise your judgment and common sense with honesty, understanding and due deliberation. As I told you at the outset of the case, you should decide the facts in this case without prejudice, without fear and without sympathy. It is your highest duty as officers of this court to conscientiously determine a fair and just result in this case.

In your deliberations, you will first take up the question of liability. If you find that the plaintiffs have met their burden of proof as to liability, you will then take up the

question of whether the defendant has proven that her statements were privileged. If you find she has not sustained her burden, you move to the question of damages. Thus, I instructed you on both the issues of liability and damages. As I mentioned before, by instructing you on the issue of damages, I do not mean to suggest that the plaintiffs are entitled to damages or how this case should be decided.

Please keep in mind that your verdict must be unanimous. By unanimous, I mean that all of the deliberating jurors must agree upon the result, with respect to liability and damages or restitution. To be a unanimous verdict, the verdict of the jury must be the verdict of each one of you. You must unanimously agree to each answer that you place on the special verdict form which you will be using in your deliberations and which I will review with you very shortly.

If any you have any questions concerning the law during your deliberations, the foreperson should write the questions out and hand them to the court officer. The officer will bring them to me and I will respond. However, as I explained to you before, you are the sole judges of the facts. If you have any questions about the facts of this case, I cannot answer those questions. You will have to rely on your collective memory to resolve any matters of fact in this case.

Your duty will be discharged in this case by your answering the questions in the special verdict form, in accordance with all of the instructions I have given. I will be providing you with a copy of my jury instructions for you to have while you deliberate.

Before starting your deliberations, you must elect a foreperson. As soon as you do so, please indicate your choice in writing and give the note to the court officer. The foreperson acts much like the chair of a committee. He or she should make sure that

you take up the issues that I have described, and should make sure that each juror has full opportunity to present his or her opinions and arguments.

Unlike verdicts in criminal cases, which are delivered in open court, a verdict in a civil case such as this one is given in writing and delivered to me by the court officer to be opened in the presence of counsel. When you have reached a verdict, knock on the door of the deliberation room and deliver the written verdict to the court officer in the furnished envelope. As I said, I will provide you with a form upon which you can indicate your verdict. The foreperson is to fill out the verdict form and put it in the envelope.

I will now select the alternate jurors at random.

Thank you for your attention.

9-21-07

DATE:

D. W. Ruoff

David W. Ruoff
Presiding Justice

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Cheshire Superior Court
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NOTICE OF DECISION

FILE COPY

Case Name: **Lorraine MacDonald, et al v Lisa Jacobs**
Case Number: **213-2016-CV-00086**

Please be advised that on September 22, 2017 Judge Ruoff made the following order relative to:
Defendant's Motion for Additional Jury Instructions: Motion Denied. See instructions

September 27, 2017

James I. Peale
Clerk of Court

(555)

C: Joseph Scott Hoppock, ESQ; Kelly E. Dowd, ESQ

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NOTICE OF DECISION

FILE COPY

Case Name: **Lorraine MacDonald, et al v Lisa Jacobs**
Case Number: **213-2016-CV-00086**

Please be advised that on September 21, 2017 Judge Ruoff made the following order relative to:

Plaintiffs Motion in Limine: Motion denied without prejudice. This issue appears moot

September 27, 2017

James I. Peale
Clerk of Court

(555)

C: Joseph Scott Hoppock, ESQ; Kelly E. Dowd, ESQ

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FILE COPY

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NOTICE OF DECISION

File Copy

Case Name: **Lorraine MacDonald, et al v Lisa Jacobs**
Case Number: **213-2016-CV-00086**

Enclosed please find a copy of the court's order of September 29, 2017 relative to:

Order on Plaintiffs' Request for Permanent Injunction

September 29, 2017

James I. Peale
Clerk of Court

(555)

C: Joseph Scott Hoppock, ESQ; Kelly E. Dowd, ESQ

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THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Cheshire, SS.

Lorraine MacDonald and Peter MacDonald

v.

Lisa Jacobs

No. 213-2016-CV-00086

ORDER ON PLAINTIFFS' REQUEST FOR PERMANENT INJUNCTION

Peter and Lorraine MacDonald ("the MacDonalds") seek a restraining order against Lisa Jacobs, who was the defendant in the MacDonalds' successful defamation suit ("the defamation case"). See MacDonalds v. Jacobs, Cheshire Cty. Super. Ct., No. 213-2016-CV-00086 (Sept. 22, 2017). Ms. Jacobs seasonally resides at 251 Sunset Road in Fitzwilliam, New Hampshire, and the MacDonalds own a home located at 248 Sunset Road. A jury found Ms. Jacobs had engaged in malicious defamation through letter-writing campaigns in which Ms. Jacobs falsely accused the MacDonalds of serious, defamatory, and illegal activities. Id. The MacDonalds now seek a permanent injunction to prevent Jacobs from contacting the MacDonalds; from coming within 500 feet of the MacDonalds; from accusing the MacDonalds of committing crimes; from entering the MacDonalds' home property or workplace; from entering Sterling, Massachusetts without first notifying the police; and from being present on Sunset Road.

The MacDonalds' request is GRANTED, and Ms. Jacobs is hereby prohibited from contacting the MacDonalds or their family members either directly or

indirectly; from going within 500 feet of the MacDonalds; from publishing, through spoken word or writing, the accusations concerning the MacDonalds that have been found by a jury to be defamatory listed in Part II of this order; from entering the MacDonalds' hometown in Sterling, Massachusetts; and from going within a five-mile radius of the MacDonalds' home located at 248 Sunset Road, Fitzwilliam, New Hampshire.

FACTS

The statements Ms. Jacobs published that spawned the defamation case are vast and disturbing, accusing the MacDonalds of a variety of crimes and depraved activities. A jury found these statements to meet the elements of defamation, and that they were made with malice, thereby warranting special damages. The Court considers these statements and Ms. Jacobs' actions in deciding this injunction.

A hearing was held on September 22, 2017, in which Peter MacDonald testified that he and his wife were requesting this order because Ms. Jacobs is incapable of restraining herself from harassing the MacDonalds and they were scared for their safety. Mr. MacDonald pointed out that, at the closing of evidence in the MacDonalds' defamation case, Ms. Jacobs sought to take back the originals of certain affidavits that had been used during the trial, indicating her likely intention to continue the same behavior that warranted the defamation case.

Mr. MacDonald testified that Ms. Jacobs has no reason to visit Sterling but to harass the MacDonalds. The evidence in the defamation case showed that Ms. Jacobs went to several public places in Sterling and attempted to solicit signatures for affidavits she had drafted purporting that the MacDonalds had engaged in criminal activity.

among other defamatory accusations. No evidence was presented that Ms. Jacobs had any other reason to visit Sterling.

Ms. Jacobs' behavior, Mr. MacDonald said, is not addressed by delineated property lines between the Fitzwilliam properties. Mr. MacDonald is unaware of any occasion on which Ms. Jacobs entered the property he and his wife own, but in his testimony, Mr. MacDonald explained that her increasingly bizarre behavior and her fixation with the MacDonalds has reached the point of placing them in legitimate fear for their lives. In the defamation case, a letter Ms. Jacobs sent in 2015 to several state and federal authorities, including the Boston Federal Bureau of Investigation, stated that she had "been having fears of homicidal ideation of having to be put in the position of killing the McDonalds [sic] and or their drunken tenants. I have thought about getting a fedearal [sic] contractor with an assault weapon to try to protect me to help me calm down when I am at 251 Sunset Rd. as I am feeling terrorized." She also wrote that "issues between neighbors blossom to the point until someday one neighbor gets a gun and shoots the other neighbor" and that she has "thought about getting a gun." These statements led to Ms. Jacobs' arrest and she was investigated and prosecuted by the Fitzwilliam Police, but the investigation was ultimately dismissed as Ms. Jacobs was found not competent to stand trial. Therefore, criminal complaints are not available to the MacDonalds.

In April 2016, this Court granted the MacDonalds a temporary restraining order against Ms. Jacobs, restraining her from threatening, harassing, or intimidating them. MacDonald v. Jacobs, Cheshire Cty. Super. Ct., No. 16-CV-086 (April 26, 2016) (Order, Ruoff, J.). In May 2016, the order was converted to a preliminary order, based on Ms.

Jacobs' demonstrated "fear of the plaintiffs and that she is considering taking matters into her own hands in a violent manner." MacDonald v. Jacobs, Cheshire Cty. Super. Ct., No. 16-CV-086 (May 6, 2016) (Order, Smukler, J.). These orders did not hinder Ms. Jacobs' defamatory campaign against the MacDonalds, as she continued her accusations by sending letters—even expanding her recipients to individuals in Sterling—and visiting Sterling to gather signatures on her false affidavits.

Furthermore, Mr. MacDonald pointed to Ms. Jacobs' behavior during her testimony in the defamation case, in which she explained that she was so convinced the MacDonalds were endangering her life that she wore a bulletproof vest to the court that day—a vest that she dramatically unveiled during the last moments of her testimony by standing up, aggressively opening her jacket, and displaying to the jury. Someone who wears a bulletproof vest, Mr. MacDonald testified, is not just in fear for her own life but displays an intention to engage in violent behavior that would require such protection. The Court agrees.

The Court also finds, based on Ms. Jacobs testimony, that she pathologically believes the lies she has concocted against the Jacobs, that she is irrational and quite capable of inflicting harm – both physical and emotional – on the MacDonalds if she is not enjoined. Ms. Jacobs testified that she is a "surrogate" of multiple law enforcement agencies, including the New Hampshire Attorney General and New Hampshire State Police. She admits that she views it as her "mission" to make sure the MacDonalds are held accountable for the misdeeds that she - quite falsely – perceives. It is quite rational to conclude that she could convince herself – as a self-proclaimed law enforcement agent – to arm herself. That, would be a disastrous, but foreseeable.

result. This more poignant now that Ms. Jacobs firmly – but delusionally – believes that the MacDonalds have attempted (and conspired with others) to murder her and her mother.

ANALYSIS

An injunction is appropriate if there "is an immediate danger of irreparable harm to the party seeking injunctive relief, and there is no adequate remedy at law." UniFirst Corp. v. City of Nashua, 130 N.H. 11, 14 (1987) (quoting Murphy v. McQuade Realty, Inc., 122 N.H. 314, 316 (1982)). "The granting of an injunction . . . is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity." Gauthier v. Robinson, 122 N.H. 365, 368 (1982).

I. Five-Mile Radius & Restriction from Entering Sterling, MA

In competition with a geographical injunction is the right to travel, which is guaranteed by the equal protection clause of the Fourteenth Amendment. Dunn v. Blumstein, 405 U.S. 330, 341–42 (1972). "However, not every restriction of a right classified as fundamental incurs 'strict' scrutiny." Rather, in cases involving the fundamental right to travel, "[t]he United States Supreme Court . . . has engaged in an ad hoc balancing of the individual's liberty interest against the demands of an organized society." State v. Roy, No. 2014-0364, 2015 WL 11071484, at *5 (N.H. Sept. 17, 2015) (quoting Bleiler v. Chief, Dover Police Dep't, 155 N.H. 693, 697–98 (2007)) (quotation omitted). Geographical limitations to one's right to travel are permissible if they are narrowly tailored to the objectives. Halsted v. Sallee, 639 P.2d 877, 879 (Wash. Ct. App. 1982) (finding that an injunction preventing a man from travelling farther north in a

county past a certain town was unnecessarily broad because the objective of protecting the man's children from him could have been accomplished by enjoining communication). Cf. State v. Levitt, 148 A.3d 204, 214 (Vt. 2016) (joining state and federal courts in finding a geographic restriction on a criminal defendant is valid on its face); Johnson v. State, 672 S.W.2d 621, 623 (Tex. Ct. App. 1984) (revoking probation condition of banishment from defendant's home county because it was not reasonably related to his rehabilitation); State v. Stewart, 713 N.W.2d 165, 171 (Wis. Ct. App. 2006) (finding geographical limitation was broader than necessary).¹

Having considered the MacDonalds' circumstances and Ms. Jacobs' behavior, this Court has granted the MacDonalds' request for an injunction and, within its discretion, prohibited Ms. Jacobs from entering a five-mile radius around the MacDonalds' home at 248 Sunset Road. Such a geographical prohibition is appropriate because a less restrictive order would be ineffective. Predick v. O'Connor, 660 N.W.2d 1, 7 (Wis. Ct. App. 2003) ("[T]here is no exact formula for determining whether a geographic restriction is narrowly tailored. Each case must be analyzed on its own facts, circumstances and total atmosphere to determine whether the geographic restriction is narrowly drawn.").

The Court finds the MacDonalds' fear for their safety is a rational response to Ms. Jacobs' relentless and increasingly intimidating behavior, and her several threats toward the MacDonalds provide the Court with a compelling interest for granting this injunction. Preventing Ms. Jacobs' access to Sunset Road, the epicenter from which all of Ms.

¹ Though Ms. Jacobs has not been convicted of a crime, because the statements she has made led to a criminal investigation that was subsequently dismissed because of her incompetence to stand trial, the Court finds it appropriate to analogize the necessity of this injunction to the state's and victims' interests in geographical probationary restrictions.

Jacobs' attacks have stemmed, is an appropriate, narrowly tailored restriction to address this interest. See State v. Simonetto, 606 N.W.2d 275, 277 (Wis. Ct. App. 1999) (upholding a probation condition restricting defendant's right to travel because it "prevents him from getting himself into situations that may lead to further criminal conduct"); Haffke, Intrastate Banishment: An Examination and Argument for Strict Scrutiny of Judicially and Executively Imposed Banishment Orders, 57 CASE W. RES. L. REV. 895, 926 (2007) ("[C]ourts should consider the smallest geographical banishment area that will effectively serve to remove the offender from corrupting influences and that will adequately protect victims from unwanted contact with the offender.")²

In Predick, the Wisconsin Court of Appeals granted an injunction that prohibited O'Connor from entering an entire county with limited exceptions for court appearances. Id. at 5. Circumstances in Predick were similar or analogous to those here: the individual, O'Connor, travelled to her victims' home county, where she did not reside; twice used a vehicle as a dangerous weapon toward them; and demonstrated that she had an "absolute fixation" on the victims with "an unwillingness to accept any possibility other than that she has been wronged and has a right to follow, threaten, harass, and endanger" them. Id. at 7-8. O'Connor had "repeatedly demonstrated that a standard, more narrowly tailored, order will not deter her from harassing and endangering the lives of three innocent victims and their families, all of whom live in the county." Id. at 7. Despite previous restraining orders against the individual, O'Connor "expressed no

² The Court recognizes that this 5-mile restriction is greater than that requested of the MacDonalds in their proposed order. However, their request does not account for that fact that a Sunset Road-only restriction would not prohibit Ms. Jacobs from being on the lake - where she would be able to moor a boat off the beach. The Court thinks this is an oversight on the MacDonald's part and that a 5-mile restriction is in keeping with their general request for a no-contact order based on Ms. Jacobs' interference with their quiet enjoyment of their home in Fitzwilliam.

remorse and exhibit[ed] no inclination to discontinue her dangerous fixation on the people she torments." Id. at 2. O'Connor's failure to follow previous orders necessitated the court's order banishing her from the county. Id.

The circumstances before the Court are also similar to a stalking case in Wisconsin, in which the court allowed a probation condition that prevented the defendant from being present in an entire town. State v. Nienhardt, 537 N.W.2d 123, 125 (Wis. Ct. App. 1995). Nienhardt was convicted of making harassing phone calls to her victim. Id. Nienhardt was not convicted of physically stalking the victim, but had been seen near the victim's home before. Id. The Wisconsin court found that though Nienhardt went to the town to buy cigarettes, because she had no other reason to go there, the condition only amounted to an inconvenience and was necessary because the condition would "remove her from the temptation of stalking [the victim] in the future." Id. at 125–26.

Similar to O'Connor in Predick, Ms. Jacobs has more than demonstrated her belief that she has a right to harass the MacDonalds and that she has an "absolute fixation" on the victims. Predick, 660 N.W.2d at 7. She has published defamatory, false materials; contacted numerous federal and state authorities to report these falsities; threatened the MacDonalds' lives; and travelled to the MacDonald's hometown in Massachusetts to solicit signatures to support her false and extreme accusations. Ms. Jacobs has also given the Court no indication that she will abide by a more narrow court order, and she has shown no contrition for any of her actions—actions that were defamatory, threatening, and even criminal, as she was arrested for impersonating an agent of the New Hampshire Attorney General a week before trial and yet testified

during the defamation case that she was such an agent. Even when the defamation case was approaching trial, and even with standing orders from this Court to refrain from harassing the MacDonalds, Ms. Jacobs published more defamatory material. See MacDonald v. Jacobs, Cheshire Cty. Super. Ct., No. 213-2016-CV-00086 (Sept. 22, 2017). Ms. Jacobs' increasingly threatening actions and her failure to follow previous court orders make geographical banishments necessary. Note, Hill, Banishment: Stopping Stalkers at the County Line, 81 NOTRE DAME L. REV. 1123, 1126 (2006) (discussing the Predick decision to "banish" O'Connor from the plaintiffs' county because O'Connor demonstrated she was "unable to abide by court orders").

Ms. Jacobs has harassed the MacDonalds, similar to the circumstances in Predick, "for no apparent reason and [they] have been driven to desperation by . . . continuous harassment." Id. at 8. The rationale from the Wisconsin court applies seamlessly to the MacDonalds' situation in this case: "These innocent victims deserve to be able to live their lives free from the constant fear of being tormented and attacked. The geographic restriction the trial court imposed will provide them with a margin of territorial safety in which they can live in peace." Predick, 660 N.W.2d at 8. This Court also considered the fact that the 251 Sunset Road property, where Ms. Jacobs has occasionally resided, is not a year-round residence, and that Ms. Jacobs was not at the residence during the summer months of 2017. The evidence established that her mother rarely visits the residence and that it is poorly maintained. Ms. Jacobs, therefore, would not have her liberty and right to travel overly burdened by the five-mile restriction around the MacDonalds' Fitzwilliam residence. Similarly, since Ms. Jacobs is not a resident of Sterling, and has not evidenced reasons to visit Sterling other than to

garner signatures for her false affidavits implicating the MacDonalds, preventing her from entering Sterling would not unconstitutionally constrict her right to travel.

O'Connor's actions that led to the banishment in Predick are mirrored by Ms. Jacobs' in this case, and as O'Connor was restricted from entering a county, this Court is prohibiting Ms. Jacobs from entering a five-mile radius around 248 Sunset Road and Sterling, Massachusetts. These two restrictions, in the Court's judgment, are reasonably related and narrowly tailored to Ms. Jacobs' potential, and likely, targeting of the MacDonalds.

II. Enjoined Speech

Ms. Jacobs, through counsel, opposes a restriction on her right to publish material concerning the MacDonalds, claiming such a restriction would be a prior restraint. Ms. Jacobs also argues that a restraining order is an equitable remedy only available when there is no adequate remedy at law—here, the MacDonalds received a remedy at law through the defamation case.³ Restraint of her defamatory and false speech is not subject to a prior restraint argument, as the First Amendment and the prior restraint doctrine do not protect such speech. Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 343 (Cal. 2007), as modified (Apr. 26, 2007) (“[A]n injunction issued following a trial that determined that the defendant defamed the plaintiff that does no more than prohibit the defendant from repeating the defamation, is not a prior restraint and does not offend the First Amendment.”); In re Conservatorship of Turner,

³ Regarding the restraint on Ms. Jacobs' travel to Sunset Road and to Sterling, Massachusetts, the Court finds that such restrictions are necessities that the defamation verdict does not address. Ms. Jacobs' actions and language, in leading up to the trial and in her testimony therein, demonstrate that she is approaching the level of “homicidal ideation” that her letter discusses. For this reason, the remedy at law available to the MacDonalds for Ms. Jacobs' defamatory statements would not preclude the geographical restraints in this order.

No. M2013-01665-COA-R3CV, 2014 WL 1901115, at *20 (Tenn. Ct. App. May 9, 2014) (“[W]e adopt the ‘modern rule’ and hold that defamatory speech may be enjoined after a determination that the speech is, in fact, false.”). Contra McCarthy v. Fuller, 810 F.3d 456, 463 (7th Cir. 2015), cert. denied sub nom. Fuller v. Langsenkamp, 136 S. Ct. 1726 (2016) (finding lower court’s injunction against defamatory statements put forth to jury in defamation case, rather than statements the issuing judge determined should be enjoined, was overly broad). In a successful defamation suit, in which the defendant’s statements have been conclusively found to be defamatory, those statements may be enjoined. Lothschuetz v. Carpenter, 898 F.2d 1200, 1208–09 (6th Cir. 1990) (Wellford, J., dissenting)⁴ (“[I]n view of [the defendant’s] frequent and continuing defamatory statements, an injunction is necessary to prevent future injury to [the plaintiff’s] personal reputation and business relations. . . . [S]uch injunction [should be limited] to the statements which have been found in this and prior proceedings to be false and libelous.” (citing Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 390 (1973)); Balboa Island Vill. Inn, 156 P.3d at 349 (“[F]ollowing a trial at which it is determined that the defendant defamed the plaintiff, the court may issue an injunction prohibiting the defendant from repeating the statements determined to be defamatory.”)).

For this injunction not to function as a prior restraint, it is necessary that the Court articulate exactly what defamatory speech is prohibited. See Evans v. Evans, 162 Cal. App. 4th 1157, 1169 (2008) (finding an injunction on defamatory speech was overbroad because it “fails to adequately delineate which of [the defendant’s] future comments

⁴ Judge Wellford’s dissenting opinion was adopted as the majority opinion for the injunction topic. Lothschuetz, 898 F.2d at 1206.

might violate the injunction and lead to contempt of court"); Karnaby v. McKenzie, No. CV116025194S, 2012 WL 2149457, at *2 (Conn. Super. Ct. May 10, 2012) (unpublished opinion) ("Because the plaintiff broadly seeks to enjoin all future defamation, the court is unable to draft an injunction that would inform the intended party of what he is specifically prohibited from saying or doing.").

Ms. Jacobs made an inundation of defamatory and malicious statements about the MacDonalds, a great amount of which was presented to the jury at trial. Conveniently for the Court, Ms. Jacobs' accusations toward the MacDonalds are highly repetitive and fairly predictable – and reduced to writing. Therefore, the Court has prohibited the defamatory statements that follow:⁵

- *The MacDonalds are criminals*
- *The police have said the MacDonalds are criminals*
- *The MacDonalds should be in jail*
- *The MacDonalds are liars*
- *The MacDonalds have an unfair/a deceptive rental business*
- *The MacDonalds are a nuisance*
- *The MacDonalds are a disgrace and/or embarrassment*
- *The MacDonalds have caused neighbors to move from Sunset Road*
- *The MacDonalds are unfit to be in a society*
- *The MacDonalds are the neighbors from hell*
- *The MacDonalds are sociopaths/sociopathic/psychological*
- *Lisa Jacobs is a victim of the MacDonalds' crime(s)*

⁵ The statements that follow come from Ms. Jacobs' published statements that were presented to the jury and found to be false, defamatory, and malicious. Most were, in fact, affirmed and repeated by her during her trial testimony.

- *The MacDonalds are trying to kill Lisa Jacobs*
- *The MacDonalds have tried to kill/attempted to kill/have conspired to kill Lisa Jacobs and/or Marilyn Jacobs*
- *The MacDonalds have bragged about trying to kill Lisa Jacobs and/or Marilyn Jacobs*
- *The MacDonalds planned a hit-and-run against Lisa Jacobs*
- *The MacDonalds engaged in witness tampering and/or intimidation*
- *The MacDonalds have been ordered to move out of New Hampshire*
- *The MacDonalds have been ordered to sell their property at 248 Sunset Road*
- *The MacDonalds have not been prosecuted because law enforcement is corrupt*
- *The police are investigating the MacDonalds*
- *The MacDonalds have harassed Lisa Jacobs with lights/spot light harassment/flashlight harassment, parties, and/or noises*
- *The MacDonalds have installed cameras to look into Lisa Jacobs' house*
- *The MacDonalds poured acid into Lisa Jacobs' boat*
- *The MacDonalds have vandalized property at 251 Sunset Road*
- *The MacDonalds have stalked Lisa Jacobs*
- *The MacDonalds slashed Lisa Jacobs' tire*
- *The MacDonalds slashed a clothing line at 251 Sunset Road*
- *The MacDonalds tore down "No Trespassing" signs*
- *The MacDonalds cut or broke phone line(s) at 251 Sunset Road*

- *The MacDonalds removed or ripped a sprinkler from the ground at 251 Sunset Road*
- *The MacDonalds removed a lightbulb on the property at 251 Sunset Road*
- *The MacDonalds caused fireworks to contact the roof of the house at 251 Sunset Road*
- *The MacDonalds damaged the dock on Sunset Road*
- *The MacDonalds have had unpermitted fires*
- *The MacDonalds hosted/allowed their son to host loud parties on Sunset Road*
- *The MacDonalds hosted fraternity parties on Sunset Road*
- *The MacDonalds hosted the use of illegal drugs/hosted drug parties on Sunset Road*
- *The MacDonalds are alcoholics/drunks*
- *The MacDonalds' usual state of being is drunk*
- *The MacDonalds drive drunk*
- *The MacDonalds have been ordered to alcohol treatment*
- *The MacDonalds use illegal drugs*
- *Employers would not hire the MacDonalds*
- *Lorraine MacDonald is not allowed to work at Clinton Hospital*
- *Lorraine MacDonald stares into Lisa Jacobs' house*
- *Lorraine MacDonald cannot stop herself from committing crimes*
- *Lorraine MacDonald watches neighbors have sex*
- *Lorraine MacDonald has obsessive compulsive personality traits*

- *Lorraine MacDonald has anti-social personality traits*
- *Lorraine MacDonald is inconsiderate/uncaring/selfish*
- *Lorraine MacDonald had sex with a man other than her husband*
- *Peter MacDonald is impotent*

The statements listed above are not to be exactingly construed, as Ms. Jacobs is also prohibited from slight variations of these statements caused by changes in tense, spelling, order of the wording, or by addition of the word "allegedly." This injunction does not apply to statements Ms. Jacobs makes solely to law enforcement that are pertinent to a judicial proceeding; Ms. Jacobs' recitation of these statements to any others however are enjoined.

Based on these findings and rulings, Ms. Jacobs counterclaim seeking an injunction against the MacDonalds is DENIED. There is no competent evidence justifying her request for relief. Moreover, the MacDonalds' claim of common law nuisance in Count III is dismissed, both on the merits and as moot. This claim was predicated on the claim that Ms. Jacobs' year-round use of the Sunset Rd seasonal home violated local ordinances and septic permits, and, as a result, adversely impacted the value of the MacDonalds' property. There was no evidence presented at the trial concerning this claim. Moreover, given the relief provided in this order, a finding on this claim is moot because Ms. Jacobs is precluded from being within a 5 mile radius of either dwelling.

In light of the duration of Ms. Jacobs' campaign against the MacDonalds – at least 3 years as of the date of this order – Ms. Jacobs cannot request a review of this

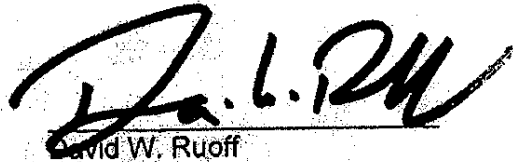
order for 10 years. If the MacDonalds sell the property on Sunset Road, they are ordered to notify this Court so that this Order may be adjusted if necessary.

A copy of this restraining order is to be provided to the police departments for the towns of Fitzwilliam, NH and Sterling, Massachusetts. Any violation of this order by Ms. Jacobs will be treated by this Court as indirect criminal contempt, punishable by incarceration at the Cheshire County House of Corrections.

SO ORDERED.

9-29-17

DATE



David W. Ruoff
Presiding Justice

000068

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

FILE COPY

Cheshire Superior Court
33 Winter Street, Suite 2
Keene NH 03431

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

NOTICE OF DECISION

FILE COPY

Case Name: **Lorraine MacDonald, et al v Lisa Jacobs**
Case Number: **213-2016-CV-00086**

Please be advised that on October 05, 2017 Judge Ruoff made the following order relative to:

Defendant's Motion to Reconsider Order on Injunction: Motion Denied

November 01, 2017

James I. Peale
Clerk of Court

(555)

C: Joseph Scott Hoppock, ESQ; Kelly E. Dowd, ESQ

000086

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

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NOTICE OF DECISION

File Copy

Case Name: **Lorraine MacDonald, et al v Lisa Jacobs**
Case Number: **213-2016-CV-00086**

Enclosed please find a copy of the court's order of October 05, 2017 relative to:

Motion for New Trial: Motion Denied

November 01, 2017

James I. Peale
Clerk of Court

(555)

C: Joseph Scott Hoppock, ESQ; Kelly E. Dowd, ESQ

000070

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

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NOTICE OF DECISION

File Copy

Case Name: **Lorraine MacDonald, et al v Lisa Jacobs**
Case Number: **213-2016-CV-00086**

Enclosed please find a copy of the court's order of September 08, 2017 relative to:

Order on Defendant's Motion for Summary Judgment

September 08, 2017

James I. Peale
Clerk of Court

(555)

C: Joseph Scott Hoppock, ESQ; Kelly E. Dowd, ESQ

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

CHESHIRE, SS.

No. 213-2016-CV-00086

LORRAINE MACDONALD AND PETER MACDONALD

v.

LISA JACOBS

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Plaintiffs, Lorraine MacDonald and Peter MacDonald (collectively "the MacDonalds") have brought claims for injunctive relief and defamation against the Defendant, Lisa Jacobs.

Facts

The MacDonalds own a home located at 248 Sunset Road, Fitzwilliam, New Hampshire ("248 Sunset Road"). Ms. Jacobs frequently stays in a home located at 251 Sunset Road, Fitzwilliam, New Hampshire ("251 Sunset Road"). In 1967, the New Hampshire Water Supply and Pollution Control Commission permitted 251 Sunset Road for "summer operation only" because "year round use will increase pollution possibly because of the small lot area." 248 Sunset Road and 251 Sunset Road either abut or are in close proximity to each other. They also either abut or are in close proximity to a freshwater body known as Rockwood Pond.

In July 2015, Ms. Jacobs wrote and sent a lengthy letter to several recipients, including the Fitzwilliam Board of Selectmen, the New Hampshire Department of Safety, the New Hampshire State Police, the Cheshire County Attorney, the Fitzwilliam Police Department, the New Hampshire Department of Environmental Services, the Fitzwilliam

Fire Department, and the Boston Division of the Federal Bureau of Investigations. In that letter, Ms. Jacobs made threatening statements directed at the MacDonalds. Additionally, Ms. Jacobs made allegedly false statements to third parties accusing the MacDonalds of alcoholism, illegal drug use, and other illegal activity. Since that time, the defendant is alleged to have repeated similar – even identical – statements to several other private citizens and public servants in both the Fitzwilliam community and Sterling, Ma. community. It is undisputed that she made these statements, which if proven false, would constitute defamation per se, entitling the MacDonalds to an award of general damages (if any).

Those kinds of statements about alcoholism, illegal drug use, and other criminal or illegal (but perhaps not felonious) conduct are what comprise the substance of the MacDonald's defamation per se claim.

The MacDonalds have also filed a claim for nuisance alleging that Ms. Jacobs year-round use of 251 Sunset Road, property owned by her family trust (which is subject to a separate law suit), creates a nuisance to the value and quiet enjoyment of their own property. Specifically, they claim that year-round use of the septic system exceeds the existing septic permit allowance and causes a spill-over effect on their property.

Analysis

In deciding a motion for summary judgment, the Court must consider the evidence, and all reasonable inferences therefrom, in the light most favorable to the non-moving party. Stewart v. Bader, 154 N.H. 75, 85 (2006). The Court assesses "the pleadings, depositions, answers to interrogatories, and admissions on file, together with

the affidavits filed" by the parties. RSA 491:8-a, III. "[T]he trial court cannot weigh the contents of the parties' affidavits and resolve factual issues, but must determine whether a reasonable basis exists to dispute the facts claimed in the moving party's affidavits at trial; if so, the trial court must deny the motion for summary judgment." Sabinson v. Trustees of Dartmouth Coll., 160 N.H. 452, 460 (2010) (emphases added).

With respect to the defamation claim, Ms. Jacobs contends that this Court lacks subject matter jurisdiction, that her statements were privileged, and that the MacDonalds have not sustained any compensable damages. With respect to the nuisance claim, Ms. Jacobs contends that the MacDonald's lack standing to assert their claim because matters concerning improper septic use should be adjudicated by the State of New Hampshire. She also argues that the alleged facts fail to allege a nuisance.

The Motion for Summary Judgment is denied.

Subject Matter Jurisdiction

"Subject matter jurisdiction is jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things." Hemenway v. Hemenway, 159 N.H. 680, 683 (2010) (quotation and brackets omitted). Subject matter jurisdiction constitutes "a tribunal's authority to adjudicate the type of controversy involved in the action." *Id.*; In the Matter of Ball & Ball, 168 N.H. 133, 140 (2015). In this case, the superior court has general jurisdiction to adjudicate all personal actions – such as defamation and nuisance. The Court also has personal jurisdiction in this matter, see RSA 510:4(I), because "the cause of action

arises out of or relates to the defendant's [New Hampshire]-based contacts" or conduct. Kimball Union Academy v. Genovesi, 165 N.H. 132, 138 (2013) (emphasis added).

As a preliminary matter, it is beyond dispute that the genesis of the Macdonald's defamation claim arises from the fact that both parties either own or reside in adjacent lots on lakefront property in this county. Moreover, many of the allegedly false allegations involve conduct (as described by Ms. Jacobs' varying accounts) at the properties in question. The fact that some of Ms. Jacobs' conduct – or alleged republication – has occurred outside the State of New Hampshire does not deprive this Court of subject matter jurisdiction. This Court has jurisdiction to adjudicate claims that arise from conduct in this State (as is present in this case) or conduct outside of this state that effects the plaintiffs in this State (as is present in this case). The MacDonald's have provided an abundance of evidence to support their claims and have a trier of fact determine whether their facts are true.

Privilege

Ms. Jacobs also argues that many of her statements were privileged, thus exempting them from a defamation claim. She argues that her statements made to law enforcement and public officials are privileged.¹ Even assuming this claim is an accurate statement, it is beyond dispute that she made the same claims to several people who were not in either category. Moreover, it remains a material issue of fact as to whether her statements to law enforcement and other public officials were in fact exempted by a qualified privilege. Not all statements made to law enforcement or other

¹ Under NH law, some statements cannot serve as the basis for liability and are thus "privileged." Such statements may include statements protected by the First Amendment, or statements that serve a compelling public interest – such as statements made during judicial proceedings, or good faith reports of criminal activity to law enforcement.

public officials are absolutely immune from liability. It would be up to a jury to determine whether a qualified privilege applies. The Plaintiffs have, again, provided an abundance of evidence to establish that this is a disputed issue and that summary judgment is not warranted based on Ms. Jacobs' mere assertion of a privilege.

Damages

As this Court has already ruled, the MacDonalds are not required to prove any special or specific damages. The Court agrees with the MacDonalds' interpretation of *IMC v. Burke & Sons*, 138 NH 110 (1993) and *Thompson v. Cash*, 119 NH 371 (1979). The MacDonalds are not required to offer proof that anyone individual believed what Ms. Jacobs was saying (i.e. actual harm). As the MacDonalds correctly point out, the focus of the tort in this defamation per se case is on the conveyance of the false statement, not the effect on the listener.

Nuisance

Lastly, there is insufficient admissible evidence in the record for the Court to grant summary judgment on the nuisance claim. The Court has already denied a substantially similar Motion to Dismiss the nuisance claim. It is the law of the case that the MacDonalds have sufficiently pleaded a common law, private nuisance claim. While the factual record suggests that the nuisance claim might not remain viable after a trial – the court is unaware of any expert testimony or evidence of harm as a result of the alleged nuisance – the burden at this point remains on Ms. Jacobs to demonstrate she is entitled to summary judgment. To that end, her motion is not supported by the verified facts/affidavits necessary to entitle her to summary judgment.


Conclusion

For the foregoing reasons, the Defendant's Motion for Summary Judgment is

DENIED.

SO ORDERED.

9-6-17
Date



David W. Ruoff
Presiding Justice