THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2018-0517

James G. Boyle, Individually and as Trustee
Of Minato Auto, LLC

v.

Mary Christine Dwyer

MANDATORY APPEAL
FROM RULINGS OF THE ROCKINGHAM COUNTY SUPERIOR COURT

APPELLEE JAMES G. BOYLE, INDIVIDUALLY AND AS TRUSTEE'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF CASES

QUESTION PRESENTED

1. Did the trial court commit an error of law when it dismissed the complaint and failed to accept well plead facts in the Complaint and take all reasonable inferences in the plaintiffs' favor when the facts plead conclusively established the falsity of the defendant's statements and the defendant's knowledge of their falsity or reckless disregard for the truth? Motion for Reconsideration, paragraph 1.

2. Did the trial court commit an error of law when it parsed and changed the defendant's statements in a manner that ignored the defamatory nature of the defendant's statement as a whole when it determined the statements were not defamatory? Motion for Reconsideration, paragraph 1.

3. Did the trial court commit an error of law by protecting political speech at all costs and ignoring the standard that even political speech is not protected when made with actual malice as demonstrated by a knowledge of falsity or reckless disregard for the truth? Motion for Reconsideration, paragraph 8.

4. Did the trial court commit an error of law by taking judicial notice of a specific point in a decision on summary judgment in the Sewer Line Suit which was not final, and which was rendered moot upon reconsideration of the summary judgment, when appeals have not been exhausted (pending as docket no. 2018-0327) and when Mr. Boyle would not appeal that point because it was irrelevant to the trial court's decision even though the initial finding was highly contested, erroneous and should not have been determined on summary judgment due to factual disputes? Motion for Reconsideration, paragraph 4.

5. Were the factual findings made by the trial court in its decision on a motion to dismiss disputed facts that should not have been resolved on a motion to dismiss, without discovery or giving the plaintiff any opportunity to be heard such that the fact findings constitute an error of law? Motion for Reconsideration, paragraph 1.

6. Were the factual findings made by the trial court against the weight of the facts plead, clearly erroneous and an error of law? Motion for Reconsideration, paragraphs 4 and 5.

STATEMENT OF THE CASE

Procedural History

This is an appeal of an order granting a motion to dismiss. Mr. Boyle filed suit against Ms. Dwyer, principally for defamation, on November 29, 2017. The defendant moved to dismiss which was granted on July 11, 2018. A timely motion for reconsideration was denied on August 3, 2018.

In the fall of 2017, Ms. Christine Dwyer was running for re-election for her City Council seat. Comp. 10, App. 5. During the campaign process she voluntarily participated in a questionnaire labeled the 2017 Portsmouth City Council Voter's Guide, which was published on www.portsmouthnh.com. Id. The questions were related to candidates' background and positions on current issues. In particular, as relevant here, Question 7 of the Voter's Guide pertained to Mr. Boyle:

> 7. The council is attempting to take 4.6 acres of land containing a city sewer line from Toyota of Portsmouth owner James Boyle. In March, Boyle said he was seeing about $10 million in a settlement offer, but no settlement was reached.
>
> A) Should the council have settled with Boyle at the amount he required?
>
> B) Should the city proceed with efforts to take the land by eminent domain? Comp. Ex. A., App. 15

In answering these questions, Ms. Dwyer stated:

A) Certainly not. Mr. Boyle purchased a building on wetlands, which had been sold to him by the N.H. Department of Education; the building was sold because it was sinking. The wetland and the sewer line are clearly marked on the deed to the property. Ever since then, he has been trying to get the taxpayers of the city of Portsmouth to pay for his apparent mistake through filing various lawsuits. The city has repeatedly defended taxpayers against these lawsuits. Why would we give Mr. Boyle $10 million of taxpayer money simply to mollify him?

B) Yes. In a ruling from one of Mr. Boyle's lawsuit attempts to pry money out of Portsmouth taxpayers, the presiding judge suggested the eminent domain remedy to the city, apparently believing that it might end the controversy and stop clogging up the courts. The judge's advice seemed like a feasible direction. The city can then manage that portion of the property, monitor the sewer pipe that runs under a corner of the property, and deal appropriately with the wetlands. Id.

In totality, these statements were false. Comp. 10, App 5. Ms. Dwyer knowingly made these false statements, or made the statements with a reckless disregard for the truth as she was a sitting City Councilor with knowledge of the facts. Complaint. 16, App.6. These statements were made to cast Mr. Boyle and his business in a false and negative light, and for the purpose of "poisoning" new City Council members. Comp. 17, App. 6. All other candidates either did not answer question 7, answered with one-word answers, or answered with no comment since the question related to ongoing disputes.

Shortly after the questionnaire was published, Mr. Boyle sent a letter to Ms. Dwyer through his attorney further detailing the inaccuracies of her statement. Comp. 10, App. 5; Comp. Ex. B, App. 19-21. Mr. Boyle even expressed his concern that the statements would carry extra weight since they were made by a sitting city councilor with superior knowledge on the subject matter than other candidates. Comp. Ex. B, App. 21. Ms. Dwyer refused to retract or modify her statement.

Litigation History

In order to understand the context of the defamatory statements, it is necessary to understand some of the litigation upon which Mrs. Dwyer was commenting. The following is a brief summary of almost ten years of litigation in Rockingham Superior Court Dockets 2010-EQ-00100 consolidated with 2010-CV-01205 (Sewer Line Suit) and in Superior Court Docket 218-2017-CV-00071 (Eminent Domain). Since this is a background summary from the multitude of pleadings and order, citations are not given unless highly relevant.

Mr. Boyle owns and operates Toyota of Portsmouth, at 150 Greenleaf Avenue, Portsmouth, through Minato Auto, LLC in Portsmouth. Prior to the purchase and for some time after the closing, due to the overgrown, impassable nature of the west portion of the property, a sewer line was not visible nor discovered by Mr. Boyle, environmental experts, land surveyors, engineers or attorneys. After purchasing the land where the dealership is located, he discovered the sewer line traversing the western portion of his property. This sewer line is in a berm, which created wetlands and seriously damaged the property. There is no record of any permission or easement for a sewer line in the Registry of Deeds, and there is no easement which mistakenly had not been recorded. After discovering the sewer line, Mr. Boyle sought to grant an easement to the City if the City stopped harassing him and instead viewed his development plan reasonably. When it became clear that Mr. Boyle and the City of Portsmouth could not reach agreement in 2010, Mr. Boyle brought suit for trespass and nuisance against the City (Sewer Line Suit).

The Court initially granted summary judgment in the City's favor holding that Mr. Boyle had constructive knowledge of the sewer line, in part based on a plan reference. Superior Court Dockets 2010-EQ-00100 consolidated with 2010-CV-01205 Summary Judgment Order, October 30, 2013. Mr. Boyle disputed this

as a plan does not establish an easement as a matter of law. The plan did not show the sewer line connected to a municipal system and appeared to be an abandoned private drainage line. This issue became moot when upon a motion for reconsideration, the Superior Court held that the sewer line was present pursuant to a revocable license, which Mr. Boyle had revoked. Superior Court Dockets 2010-EQ-00100 consolidated with 2010-CV-01205 Order on Reconsideration, February 27, 2014, page 19. Therefore, the sewer line was trespassing as a matter of law. Superior Court Dockets 2010-EQ-00100 consolidated with 2010-CV-01205 Order on Reconsideration, February 27, 2014, page 20. The issue of damages and a nuisance claim were reserved for trial.

On the eve of trial, after six years of litigation, the City of Portsmouth attempted to acquire a portion of Mr. Boyle's property on December 19, 2016 by eminent domain to which Mr. Boyle objected. Nevertheless, the trial proceeded. After a two-week trial in January of 2017, a jury found the City liable for 3.57 million dollars for trespass and nuisance, which decision is currently under appeal in Supreme Court Docket No. 2018-0327. Mr. Boyle contends the amount should have been higher and was improperly reduced by the instructions. Thereafter, on October 23, 2018, the superior court sustained Mr. Boyle's preliminary objection to the eminent domain on the basis of a lack of public use, necessity or net public benefit. That decision is under appeal as of November 21, 2018.

All of this litigation provides the background for existing questions about Mr. Boyle in a campaign, and Ms. Dwyer's statements about him.

ARGUMENT

1. THE TRIAL COURT COMMITTED AN ERROR OF LAW WHEN IT DISMISSED THE COMPLAINT BY FAILING TO ACCEPT WELL PLEAD FACTS AND TO TAKE ALL REASONABLE INFERENCES IN THE PLAINTIFFS' FAVOR WHEN THE FACTS PLEAD CONCLUSIVELY ESTABLISHED A CAUSE OF ACTION WAS PLED.

A motion to dismiss can only succeed when, after construing the facts and all reasonable inferences therefrom, the complaint fails to allege a claim upon which relief may be granted. *Cluff-Landry v. Roman Catholic Bishop of Manchester,* 156 A.3d 147 (N.H., 2017); *In re Sawyer*, 161 N.H. 11 (2010). "If a plaintiff is entitled to recover upon any state of facts findable under the pleadings, the motion to dismiss should be denied." *Thomson v. Cash*, 119 N.H. 371, 373 (1979). "We assume the truth of the facts alleged in the plaintiff's pleadings and construe all reasonable inferences in the light most favorable to him." *Harrington v. Brooks Drugs*, 148 N.H. 101, 104 (2002). As will be shown below, Mr. Boyle's complaint on its face supports a claim upon which relief may be granted upon a review of the facts pled in the light most favorable to him, and therefore the motion to dismiss should have failed.

Due to the constant publication of the disputes between Mr. Boyle and the City of Portsmouth, Mr. Boyle can be considered a public figure. Public figures are divided into two categories: "(1) persons who are public figures for all purposes; and (2) so-called limited-purpose public figures who are public figures for particular public controversies." *Thomas v. Telegraph Pub. Co*., 155 N.H. 314 (2007) quoting *Gertz v. Robert Welch, Inc*, 418 U.S. at 351 (1974). Mr. Boyle could qualify as a limited-purposed public figure concerning litigation with the

City, and if he is a public figure, he would have to allege and ultimately prove the added element of malice.

The elements of a cause of action concerning a public figure are: A defendant (1) failed to exercise reasonable care in (2) publishing a (3) false and defamatory fact to a third party, and (4) the defendant acted with malice. *Thomas v. Telegraph Pub. Co*., 155 N.H. 314 (2007); *Pierson v. Hubbard*, 147 N.H. 760 (2002); *Thomson v. Cash*, 119 N.H. 371 (1979). There is no higher standard for "political speech" that rises above the status of public figures. Here, in particular, each of these elements is pled with specificity.

The first element is whether a defendant failed to exercise reasonable care. There is no question that Ms. Dwyer failed to exercise reasonable care. Ms. Dwyer has sat on various boards within the City since 2003. Comp. 7, App. 5. As a result of sitting on those boards, being involved in negotiations, and voting for the eminent domain, Ms. Dwyer acquired knowledge of the facts concerning Mr. Boyle's property. Id. At the time of publication, Ms. Dwyer had actual knowledge facts in her statement were false, or at a minimum had a reckless disregard for the truth. Comp. 16, App. 6. Ms. Dwyer failed to exercise reasonable care by knowingly spreading false information as facts, or having a reckless disregard for the truth in spreading information that is easily disproved with minimal research.

The second element is the defendant caused the fact to be published. There can be no question that Ms. Dwyer knew her answers would be published. Ms. Dwyer answered a questionnaire to be publicly published on portsmouthnh.com. Comp. 10, App. 5; Comp. Ex. A, App. 10. She knew her answers would be published publicly. Comp. 15, App. 6.

The third element is the published facts were false and defamatory. Mr. Boyle specifically pled how each statement was false in defamatory in the October 31, 2017 letter sent to Ms. Dwyer, which was incorporated into the complaint.

Comp. Ex. A, App. 19-21. The trial court cites to *Riley v. Harr*, 292 F.3d 282 (1st Cir. 2002) to state that "even a provably false statement is not actionable if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts." This case is not relevant to the case at hand, and the opposite is true. Ms. Dwyer was running as incumbent city councilor. Comp. Ex. A, App. 11. She had superior knowledge to the facts over the general public and other candidate who were not incumbent, and emphasized that fact. Comp. Ex. B, App. 21. Throughout the questionnaire, Ms. Dwyer focused on her specialized knowledge and consistently referred to "we", referring to the City and City Council as a whole, when taking standpoints opposed to "I". Comp. Ex. A, App. 11-16. She not only claimed to be in possession of objectively verifiable facts, she actually was. Comp. 7, App. 5. She simply neglected to answer using the objectively verifiable facts as they do not fit her narrative. Nor could her answers be read as to be merely expressing an opinion. She talked about Mr. Boyle's "mistake" in purchasing the property and multiple lawsuits when neither is objectively true. She based her entire statements on false premises and managed to impugn a reputation. Ms. Dwyer's statements were false and defamatory, she was and appeared to claim to be in possession of objectively verifiable facts, and they were not expressing a subjective view, interpretation, theory, conjecture, or surmise.

The fourth element is Ms. Dwyer acted with malice. Malice has been defined as either: (1) constitutional or "actual" malice, which is "a subjective awareness of the falsity or probable falsity of a statement" or (2) common law malice, which is ill will or intent to harm. *Thomas v. Telegraph Pub. Co*., 155 N.H. 314 (2007). As shown above, Ms. Dwyer had actual knowledge her statements were false establishing the first definition of constitutional or "actual" malice.

Comp. 7, App. 5. The second type of malice is similarly specifically pled within the complaint by alleging that Ms. Dwyer has always been antagonistic towards Mr. Boyle, and made the statements with the intent to cause him harm. Comp. 9, App. 5; Comp. 17, App.6. She has even gone as far to publicly state one of Mr. Boyle's lawfully approved actions made her sick. Comp. 9, App. 5.

The facts, as summarized above, conclusively establish Ms. Dwyer knowingly made false statements pertaining to Mr. Boyle and his business with the intention of harming his reputation.

Moreover, in her motion to dismiss, Ms. Dwyer did not argue there was no claim upon which relief may be granted, rather she claimed the statements were true, substantially true, or opinion. Mr. Boyle disputes Ms. Dwyer's factual assertions in her motion to dismiss. Even Ms. Dwyer appears to acknowledge there is a factual dispute by attaching a plethora of circumstantial documents two inches thick to support her factual arguments. However, such factual disputes are proper after discovery on a motion for summary judgment, not on a motion to dismiss. *Baker v. Wilmot*, 128 N.H. 121(1986). See *Fiorello v. Hewlett-Packard Company*, Opinion No. 2003 DNH 195 (N.H. 11/14/2003) (concluding that summary judgment may be more proper to determine what the disputed material facts are and then determine whether a legal cause of action exists). Yet in evaluating the complaint, the trial court went far beyond Ms. Dwyer's arguments as to the truth and held as a matter of law, the statements were not defamatory. This error will be detailed in Section 5 below, however, it is clear that it is an analysis beyond well pled allegations and reasonable inferences.

Nor does somehow calling speech political, prove to be a defense as will be detailed in Section 3, below.

2. THE TRIAL COURT COMMITTED AN ERROR OF LAW WHEN IT PARSED AND CHANGED THE DEFENDANT'S STATEMENTS IN A MANNER THAT IGNORED THE DEFAMATORY NATURE OF THE DEFENDANT'S STATEMENT AS A WHOLE WHEN IT DETERMINED THE STATEMENTS WERE NOT DEFAMATORY.

The trial court made an error of law by analyzing each of Ms. Dwyer's sentences individually rather than considering the statement as a whole. A sentence must be read in the context of the whole statement to determine if it is defamatory. *Thomas v. Telegraph Pub. Co.*, 155 N.H. 314 (2007); *Duchesnaye v. Munro Enterprises, Inc*., 125 N.H. 244 (1984). It was an error of law to parse Ms. Dwyer's statement into individual sentences rather than review the sentences in the context of the whole statement. Similar to *Thomas v. Telegraph Pub. Co.*, where the alleged defamatory statements had to be read in the context of the entire article, Ms. Dwyer's statements must be read in the context of the entirety of her answers to the questionnaire. For example, the lower court read the following statement as alleging non-defamatory facts:

> Mr. Boyle purchased a building on wetlands, which had been sold to him by the N.H. Department of Education; the building was sold because it was sinking. The wetland and the sewer line are clearly marked on the deed. Order, Page 10.

The facts in the two sentences above are false. Mr. Boyle did not purchase a building on wetlands, the building was not sold because it was sinking but rather due to an unprecedented state budget crisis, it was not sold by the Board of Education, and most egregious the wetland and sewer line are not marked on the deed. Ms. Dwyer's knew her statements were false, because she knew the jury in the sewer line litigation ruled in Mr. Boyle's favor six months prior to making these statements. These statements set the stage for the overall defamation, although clearly they are designed to discredit the soundness of Mr. Boyle's action in purchasing the property.

Ms. Dwyer's defamatory statements are that Mr. Boyle made a mistake in buying the property and that he has been [wrongfully] suing to recover his mistake. Specifically she said:

> "Mr. Boyle purchased a building on wetlands, which had been sold to him by the N.H. Department of Education; the building was sold because it was sinking. The wetland and the sewer line are clearly marked on the deed to the property. Ever since then, he has been trying to get the taxpayers of the city of Portsmouth to pay for his apparent mistake through filing various lawsuits. The city has repeatedly defended taxpayers against these lawsuits."

These statements were based on facts she knew to be false and were used to create a false and misleading story to support her opinion statement,

> "Why would we give Mr. Boyle $10 million of taxpayer money simply to mollify him."

Ms. Dwyer paints a picture of Mr. Boyle knowingly buying property with a wetland and City sewer line, and then consistently suing and trying to get the City of Portsmouth to compensate him for his mistake. Simply he is portrayed as an unscrupulous rascal. This is an extremely negative picture, and is detrimental to anyone whose business relies on reputation and has customers in the seacoast area. The opinion needs to be read in context of the whole statement, it was not a stand alone statement. The statement, "why would we give Mr. Boyle $10 million of taxpayer money simply to mollify him" does not have the defamatory nature on its own as it does when read after the false facts of the building is on wetlands, it was sold to him by the Department of Education, it was sold because it was sinking, and both the wetlands and sewer line were clearly marked on the deed.

The effect is magnified by Ms. Dwyer's position as a councilor. A member of the general public does not have the detailed knowledge that Ms. Dwyer does of the facts of the case, but knows she would have that knowledge as a City Councilor and would believe her statement is valid. The result is the general

public, Mr. Boyle's customer base, believes he knew he bought a wetland with a City sewer line traversing the west of the property, and of course taxpayers shouldn't have to pay for "his apparent mistake". If Ms. Dwyer had listed the true facts, which she knows to exist: Mr. Boyle bought the property from a prior business; there are man-made drainage ditches on the back portion which DES believes needs to be paved to remedy a hazardous situation; the building has been standing for over 50 years; and the City has been ruled a trespasser and liable for creating a nuisance, then her statement of "why would we mollify him" would sound ridiculous. The defamatory facts are the basis of her opinion, and it was an error for the court parse each individual sentence rather than read them in the context of the whole statement.

3. THE TRIAL COURT COMMITTED AN ERROR OF LAW BY PROTECTING POLITICAL SPEECH AT ALL COSTS AND IGNORING THE STANDARD THAT EVEN POLITICAL SPEECH IS NOT PROTECTED WHEN MADE WITH ACTUAL MALICE AS DEMONSTRATED BY A KNOWLEDGE OF FALSITY OR RECKLESS DISREGARD FOR THE TRUTH.

The lower court erred in protecting Ms. Dwyer's statement as political speech. Political speech is protected where it is 1) opinion, 2) directed at a public figure in a political context, and 3) it is not implied the opinion is based on fact. *Morrisette v. Cowette*, 122 N.H. 732 (1982). Ms. Dwyer's statement fails to satisfy the first and third criteria listed as her statement was primarily not opinion, and the narrow sections which may qualify as opinion are implied to be based on fact. Therefore, Ms. Dwyer's statement fails to be protected as political speech. Even if Ms. Dwyer's speech could be qualified as political speech, it would still not be protected as Mr. Boyle has alleged malice. Political speech is similarly limited as

speech about a public figure as discussed in *Communications, Inc v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989).

> Vigorous reportage of political campaigns is necessary for the optimal functioning of democratic institutions and central to our history of individual liberty. We have not gone so far, however, as to accord the press absolute immunity in its coverage of public figures or elections. If a false and defamatory statement is published with knowledge of falsity or a reckless disregard for the truth, the public figure may prevail. See *Curtis Publishing Co. v. Butts*, 388 U.S., at 162, 87 S.Ct., at 1995 (opinion of Warren, C.J.). A "reckless disregard" for the truth, however, requires more than a departure from reasonably prudent conduct. "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant*, 390 U.S., at 731, 88 S.Ct., at 1325. The standard is a subjective one—there must be sufficient evidence to permit the conclusion that the defendant actually had a "high degree of awareness of . . . probable falsity." *Garrison v. Louisiana*, 379 U.S., at 74, 85 S.Ct., at 215.

Ms. Dwyer appears to state as fact that Mr. Boyle made a mistake with the property, and that he wants to unfairly collect from Portsmouth. She bases her statement on what she gives as an erroneous history of the transaction, and in doing so she relies on her specialized knowledge as a Councilor. Political speech is not protected where the speaker causes reputation damage by making defamatory statements "with knowledge that it was false or with reckless disregard of whether it was false or not." *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) quoting *New York Times Company v. Sullivan*, 376 U.S., at 279-280 (1964). At the very least, it raises issues of fact for a trier of fact.

Further, the portions that are arguably opinion appear to be stating fact based on more detailed facts. Ms. Dwyer lists her qualifications as a candidate as including being and incumbent candidate and asserts her position of having superior knowledge regarding the issues. Comp. Ex. A, App. 11. A member of the public reading her answers would reasonably believe she was basing her answer utilizing her knowledge as an incumbent candidate. This is unlike candidates that

were not incumbent candidates, whose opinions regarding question 7 would be regarded as mere opinion. Ms. Dwyer makes it clear to readers that she has more knowledge concerning the sewer line litigation and eminent domain than the average person, and that her opinion is based on her allegedly superior knowledge of the facts. Comp. 10, App. 5; Comp. Ex. A, App. 11; Comp. Ex. B, App.19.

4. THE TRIAL COURT COMMITTED AN ERROR OF LAW BY TAKING JUDICIAL NOTICE OF A ISOLATED POINT IN A DECISION ON SUMMARY JUDGEMENT IN THE SEWER LINE SUIT WHICH WAS NOT FINAL, AND WHICH WAS RENDERED MOOT UPON RECONSIDERATION OF THE SUMMARY JUDGMENT, WHEN APPEALS HAVE NOT BEEN EXHAUSTED (PENDING AS DOCKET NO. 2018-0327) AND WHEN MR. BOYLE WOULD NOT APPEAL THAT POINT BECAUSE IT WAS IRRELEVANT TO THE TRIAL COURT'S DECISION EVEN THOUGH THE INITIAL FINDING WAS HIGHLY CONTESTED, ERRONEOUS AND SHOULD NOT HAVE BEEN DETERMINED ON SUMMARY JUDGMENT DUE TO FACTUAL DISPUTES.

The lower court erred in taking judicial notice of a non-final ruling on a disputed fact, which ruling was rendered moot upon reconsideration of the order. In the sewer line case, Judge Delker issued a 33-page order on summary judgment that included a finding that the City was not liable for trespass for the sewer line and berm. Also included was a finding that Mr. Boyle had constructive knowledge of the sewer line and wetlands. After a motion for reconsideration, Judge Delker issued a 27-page order and changed the order to hold the City's sewer line and berm were trespassing on Mr. Boyle's property. In finding the City to be a trespasser, Judge Delker held that the City had a revocable license, and that Mr. Boyle revoked that license on November 12, 2013.[1] In finding the City had only a

[1] This date is disputed and under appeal.

revocable license, the issue of whether Mr. Boyle had constructive notice or was a bona fide purchases was rendered moot.

Mr. Boyle does not dispute the court's ability to take judicial notice of a previous final court order. The issue of whether Mr. Boyle had constructive notice of the sewer line was rendered moot by a subsequent holding, and the underlying case is currently under appeal. It was improper to judicially notice a fact that is easily disputed. The "underlying theory [of judicial notice] is that there is no need to prove what everyone already knows." *State v. Gagnon*, 155 N.H. 418 (2007) *quoting* C. Douglas, New Hampshire Evidence Manual 59 (4th ed.2000). While case law appears to be silent on the issue of whether the court can judicially notice an appealable fact, there is case law on the inability to pursue a cause of action based on an order under appeal. *See In re S.T.,* 151 A.3d 522 (N.H., 2016). In that case, a petition was filed to terminate parental rights based on a "conviction" in a separate proceeding. The court held that as a matter of the law, the "conviction" cannot be used as a basis to terminate parental rights while that conviction was under appeal. Similar, res judicata and collateral estoppel require a final, not appealed or appealable, decision to apply. *Petition of Donovan*, 137 N.H. 78 (1993). Indeed, the Trial Court erred in a judicial notice analysis as it was really applying collateral estoppel to establish a fact. However, collateral estoppel does not apply to a non-final order. *Thomas v. Contoocook Valley School Dist.*, 150 F.3d 31 (1st Cir., 1998). As most recently stated in *Solito v. Direct Capital Corp.*, No. 219-2017-CV-00411 (N.H. Super., 2018), collateral estoppel applies where:

> (1) the issue subject to estoppel is identical in each action; (2) the first action resolved the issue finally on the merits; (3) the party to be estopped appeared in the first action or was in privity with someone who did; (4) the party to be estopped had a full and fair opportunity to litigate the issue; and (5) the finding at issue was essential to the first judgment. *Garod v. Steiner Law Office, PLLC*, 170 N.H. 1, 5-6 (2017). The burden of proving

collateral estoppel is on the party asserting it. *See Gray v. Kelly*, 161 N.H. 160, 164 (2010).

The summary judgment order was subsequently reconsidered, and factual findings from the original summary judgment order are not resolved finally on the merits. Further, Mr. Boyle was not granted the opportunity to fully and fairly litigate the issue of whether the plan showed the sewer line, providing him with notice, because the issue was ruled as moot.

The error of taking judicial notice of a disputed fact can be seen by the court erroneously jumping to the conclusion that the plan showed a *public* sewer line, and that the wetlands were shown on the deed. The recorded plan does not 1) show wetlands, 2) show it is a City sewer line, or 3) show that there are any easements or interest in the property besides the title holder. A plan on its own cannot create an easement. *Soukoup v. Brook*, 159 N.H. 9, 13-14 (2009). The plan on its own does not support Ms. Dwyer's statements, and the lower court erred in taking judicial notice of a reconsidered summary judgment order to demonstrate constructive notice. See plan recorded at Rockingham Registry of Deeds, D-14106. As described in the deed, the plan is referenced to show the boundaries of Mr. Boyle's property to be Lot 1 on the subdivision plan. Book 2765, page 1109.

5. THE FACTUAL FINDINGS MADE BY THE TRIAL COURT IN ITS DECISION ON A MOTION TO DISMISS WERE DISPUTED FACTS THAT SHOULD NOT HAVE BEEN RESOLVED ON A MOTION TO DISMISS, WITHOUT DISCOVERY OR GIVING THE PLAINTIFF ANY OPPORTUNITY TO BE HEARD SUCH THAT THE FACT FINDINGS CONSTITUTE AN ERROR OF LAW.

Throughout the lower court's order dated July 11, 2018, there are numerous disputed facts, which the lower court ruled were not disputed. This order was on a

motion to dismiss, prior to any discovery, and therefore the plaintiff was denied the opportunity to support disputed facts. It is worth noting that clearly every fact was a disputed fact as Mr. Boyle alleged they were false and Ms. Dwyer alleges they are all opinion, true or substantially true. The following statements made by Ms. Dwyer were alleged to be false:

A. Mr. Boyle purchased a building on wetlands;
B. Which had been sold to him by the N.H. Department of Education;
C. The building was sold because it was sinking;
D. The wetland and the sewer line are clearly marked on the deed to the property;
E. Ever since then, he has been trying to get the taxpayers of the city of Portsmouth to pay for his apparent mistake through filing various lawsuits;
F. The city has repeatedly defended taxpayer against these lawsuits
G. In a ruling from one of Mr. Boyle's lawsuit attempts to pry money out of Portsmouth taxpayers;
H. The presiding judge suggest the eminent domain remedy to the city, apparently believing that it might end the controversy and stop clogging the courts[2];
I. The sewer pipe that runs under a corner of the property

On October 31, 2017, Mr. Boyle sent Ms. Dwyer a letter explaining why each of the statements above were false, and requested a retraction. Comp. Ex. B, App. 19-21. Based on her response, it is clear Ms. Dwyer defends these statements as true or substantially true. The trial court did not consider Ms. Dwyer's additional

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[2] Mr. Boyle admits the court had suggested taking a sewer line easement by eminent domain as an alternative to paying rent. The court suggested this alternative after the sewer line was ruled to be trespassing on the property. It was not to "stop clogging the courts" and would not "end the controversy" since there maintained a dispute over rights to flow water.

improper supplementation to her response, and therefore has no information on whether these statements are true or false. The lower court made an error in not reviewing the facts in a light most favorable to Mr. Boyle as is the standard for a motion to dismiss, and further made an error in summarily resolving the factual disputes prior to discovery or summary judgment. Assuming the facts pled to be true and taking all reasonable inference therefrom in the light most favorable to Mr. Boyle, Mr. Boyle did plead with sufficient factual particularity that Ms. Dwyer acted with actual malice. *Karch v. BAYBANK FSB*, 147 N.H. 525 (2002); *Kotarba v. Kotarba*, 97 N.H. 252, (1952). In *Karch*, the defendant moved to dismiss on the basis the plaintiff did not allege with sufficient facts to sustain an action the defendant acted with intentional or reckless disregard. The court held that whether the action was "willfull" or "inadvertent", or if they acted in good faith, were arguments "pertinent to the trier of fact, but they have no bearing on whether the plaintiff has stated a claim for purposes of reviewing a motion to dismiss". *Karch* at 532. Similar to *Karch*, Mr. Boyle has pled sufficient facts to be "reasonably susceptible of a construction that would permit recovery".

The lower court erroneously ruled Ms. Dwyer's speech as constitutionally protected on the basis of its factual findings. For example, the court ruled the following statement as consisting of uncontested facts.

> In a ruling from one of Mr. Boyle's lawsuit attempts to pry money out of Portsmouth taxpayers, the presiding judge suggested the eminent domain remedy to the city, apparently believing that it might end the controversy and stop clogging the courts. The judge's advice seemed like a feasible direction. The city can then manage that portion of the property, monitor the sewer pipe that runs under a corner of the property, and deal with the wetlands.

The court explained that "the word 'pry' suggests only that (a) the city defended the lawsuits (which it did) and (b) Dwyer did not believe that the City should have paid plaintiffs' demands." Order, page 13. The Court neglects to include the fact

Mr. Boyle only sued the City for monetary compensation once, and the idea it was one of the attempts to pry money is completely fabricated. The word "attempts" assumes there was more than the one, and the City did not have to defend multiple lawsuits to protect taxpayer monies. The only other lawsuit dealing with taxpayer funds is the eminent domain action, which was initiated by the City. As a City Councilor voting in favor of eminent domain, Ms. Dwyer would know the City is not the defendant in that lawsuit. Mr. Boyle should have been given the opportunity to conduct discovery and prove the facts as alleged in the complaint rather than the lower court making erroneous factual findings in Ms. Dwyer's favor.

Finally, the lower court only suggested taking the sewer line, not taking the 4.6 acres which the City actually attempted to take. There is no comparison of the actions.[3]

6. THE FACTUAL FINDINGS BY THE TRIAL COURT AGAINST THE WEIGHT OF THE FACTS PLEAD, CLEARLY ERRONEOUS AND AN ERROR OF LAW.

The trial court made an error of law when it made factual findings that were against the weight of the facts plead and clearly erroneous. On pages 14-15 of the order, the trial court stated; "Dwyer's statements were limited to (a) statements of uncontested facts, (b) statements of non-defamatory facts and (c) statements of opinion." There is virtually no fact in Ms. Dwyer's statements that are

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[3] Recently, the same trial court judge, Judge Delker, sustained Mr. Boyle's preliminary objection to the eminent domain. He noted his prior suggestion of taking the sewer line and further noted that the City far exceeded what he had suggested. This shows the danger of taking matters out of context and before they are finally resolved.

Judge Delker's order is a scathing criticism of the City's attempts at eminent domain. His current order, in fact, gives context to and supports the defamation claims. The trial court here did not have benefit of that order, again highlighting the danger of relying on an incomplete case.

uncontested. As previously detailed, Mr. Boyle alleged the false facts are defamatory in nature, especially when read as a whole. The facts plead include, "Ms. Dwyer responded to questions of candidates, which answers were posted on the internet". Comp. 10, App. 5. From the response, Ms. Dwyer appears to be asserting matters of fact based on specialized knowledge obtained over the years. The responses concerning Mr. Boyle and his property were false, defamatory and intended to cast Mr. Boyle and his business in a negative light." Complaint 10, App. 5. The October 31, 2017 letter to Ms. Dwyer detailing each false statement was expressly incorporated into the complaint. Complaint 10, App. 5-6. As stated above, virtually every statement is contested. To further the example given above, the trial court stated the sentence "the city has repeatedly defended taxpayers against these lawsuits" as not contested. Mr. Boyle did not contest there is a long litigious history with the City of Portsmouth, but does contest that the City is always "defending". The majority of the prior litigations were revolved around zoning disputes or Mr. Boyle defending enforcement actions, and not lawsuits in which Mr. Boyle "has been trying to get the taxpayers of the city of Portsmouth to pay for his apparent mistake through filing various lawsuits." Mr. Boyle has only sought compensation in two lawsuits, one being the eminent domain action, which clearly he did not initiate.

The trial court goes on to state the balance of the following paragraph contains uncontested facts "i.e. that the trial judge suggested that the parties' dispute could be resolved by eminent domain; that this seemed feasible; and that a taking would allow the City to manage its sewer pipe and preserve the wetlands." Order, Page 13. The trial court left out the harsh words and tone of the paragraph in its summary, and made a finding that was clearly against the facts pled. The complaint specifically addressed that portion of the statement in paragraphs 6, 7, and 8 of the incorprated October 31, 2017 letter. Comp. Ex. B., App. 20-21.

Paragraph 6 demonstrated that "the presiding judge suggested the eminent domain remedy" is false by explaining that the presiding judge suggested the eminent domain remedy for the sewer line only. The order did not discuss that remedy for the wetlands, and further stated the City owes Mr. Boyle rent in the interim for the sewer line. The City far exceeded the recommendation of the judge in taking 4.6 acres rather than a sewer easement, and has not paid any rent for its trespassing sewer line. Comp. Ex. B., App. 20-21. Paragraph 7 showed the overall defamatory nature of Ms. Dwyer's statements by including "apparently believing it might end the controversy and stop clogging up the courts." Ms. Dwyer is well aware that Mr. Boyle has only sued the City for monetary compensation once, and all other lawsuits were appeals of administrative decisions. Ms. Dwyer is also aware that the City has continuously lost each lawsuit. Comp. Ex. B., App. 21. To an uninformed reader it would appear that Mr. Boyle is "clogging up the courts" with litigation when in reality he is a private citizen being forced to court to ensure property rights. Paragraph 8 was similarly false in stating, "The city can manage that portion of the property, monitor the sewer pipe that runs under the corner of the property, and deal appropriately with the wetlands." Factually this statement includes numerous false assertions, such as a "the sewer pipe that runs under the corner of the property". The sewer line traverses the western portion of the property, and bisects the 4.6 acres taken by the City. Comp. Ex. B., App. 21. Stating it runs under the corner of the property implies a minor imposition on the property owner, which is false as it impacts the entire remainder of the developable property. Id. Further, to state "deal appropriately with the wetlands" is a statement with a reckless disregard for the truth. Ms. Dwyer is aware there is a DES consent decree to address the safety hazards of the sewer line in its present form, and specifically requires development of the entire parcel. Id. Ms. Dwyer's statement implies the wetlands are not appropriately being dealt with when she

knows that both Mr. Boyle and NH DES have worked diligently to address concerns on the property, and the City to date has done no study or analysis of the property.

For the trial court to have any findings of statement of uncontested facts or statements of non-defamatory facts is clearly against the weight of the facts pled.

CONCLUSION

As alleged in the complaint, Ms. Dwyer has always been antagonistic towards Mr. Boyle. Her personal distaste for him has refused her to accept reality around the history between Mr. Boyle and the City of Portsmouth. As a previous planning board member and incumbent City Councilor, Ms. Dwyer had actual knowledge to the false and defamatory nature of her statements. She used her position as a sitting City Councilor to elevate her opinions as superior to other candidates to the general public and to influence any incoming city councilors. She knows as a business in Portsmouth, Mr. Boyle relied upon his reputation. Further, as both issues were ongoing litigation at the time of the candidate survey, she knew her answers could influence any settlement negotiations by poisoning new members to the city council. Mr. Boyle need only prove that she made false statements in order to cast him and his business in a negative light under New Hampshire law. There is no question the complaint alleges sufficient facts to allege such a claim and the trial court erred in dismissing his complaint.

REQUEST FOR RELIEF

Mr. Boyle request the Court to reverse the trial court's order dismissing the case and remand the matter to the trial court for further proceedings.

RULE 16(3)(i) CERTIFICATION

Pursuant to Supreme Court Rule 16(3)(i), I hereby certify that a copy of the decision being appealed is included as an addendum to this brief.

Respectfully submitted,

James G. Boyle, Trustee

By his attorneys

/s/ John Kuzinevich

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CERTIFICATE OF SERVICE

I certify I served this document on all counsel of record on November 28, 2018.

/s/ John Kuzinevich

ADDENDUM

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
Kingston NH 03848-1258

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

NOTICE OF DECISION

File Copy

Case Name: **James G Boyle, Ind & as Trustee, et al v Mary Christine Dwyer**
Case Number: **218-2017-CV-01363**

Enclosed please find a copy of the court's order of July 10, 2018 relative to:

Motion to Dismiss

July 11, 2018

Maureen F. O'Neil
Clerk of Court

(398)

C: John J. Kuzinevich, ESQ; Charles P. Bauer, ESQ; Weston Robert Sager, ESQ

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss.

JAMES G. BOYLE,
Individually and as Trustee for the
150 GREENLEAF AVENUE REALTY TRUST
and
MINATO AUTO, LLC.

v.

MARY CHRISTINE DWYER

ORDER

The matter before the court is defendant Mary Christine Dwyer's motion to dismiss (Docket Document 8, see also Docket Document 9). The complaint alleges that Ms. Dwyer spoke out on a matter of public concern while she was a candidate for reelection to the Portsmouth City Council. Dwyer voiced strong opposition to a proposal that the City pay plaintiffs $10 million to resolve a long-standing dispute concerning a City sewer line on plaintiffs' land. Dwyer opined that plaintiffs were wrongheaded to seek compensation from the taxpayers in the first place. However, Dwyer did not suggest that the plaintiffs lacked a *legal* basis to seek compensation and she did not claim that the plaintiffs engaged in any litigation misconduct in prior proceedings.

The complaint seeks monetary damages for (a) alleged defamation and (b) alleged intentional and negligent interference with contractual relations and prospective contractual relations.

The motion to dismiss is GRANTED. Regardless of the merits of the underlying property dispute, plaintiffs' defamation claims are groundless. The statements alleged in the complaint are a combination of (a) clearly constitutionally protected political speech,

(b) nonactionable and constitutionally protected opinion and (c) facts are non-defamatory on their face. The complaint does not state a claim for defamation.

Plaintiffs' claims for intentional and negligent interference with present and prospective contractual relations are equally infirm. For starters, there is no cause of action for *negligent* interference with contractual relations and the complaint itself proves that there was no improper intentional interference. More important, the alleged statements are constitutionally protected speech.

Plaintiffs' lawsuit strikes at the heart of the political and democratic process. Suing a political candidate for constitutionally protected political speech is unacceptable. This is especially so in this case because the candidate was voicing her opposition to paying plaintiffs $10 million in taxpayer funds.

Facts

The following facts are taken from the complaint and the exhibits referenced in the complaint:

Defendant Dwyer is a Portsmouth City Councilor. In connection with her re-election campaign she answered a written questionnaire. The questionnaire was captioned as a "Candidate Survey" and it was published as part of a "voter's guide" on Portsmouthnh.com. The questions and answers relate to a number of topics including (a) the candidate's background (e.g. age, occupation, length of city residence and public service experience), (b) the City Council's consideration of resolutions relating to national and international issues, (c) the City Council's "welcoming and diversity resolution," (d) climate change, (e) kneeling during the national anthem, (f) the Prescott Parks Arts Festival, (g) the transparency and accessibility of city government, (h) city

housing costs, (i) residential and workforce parking in the city, (j) city spending and taxes, (k) short-term rentals in the city, (l) keno gambling in the city, and (m) challenges and opportunities of the city over the next 10 to 20 years.

The "Candidate Survey" also included questions about a long-standing dispute between plaintiffs and the City regarding a sewer line on the plaintiffs' land.[1] The contours of the dispute were sketched in the complaint as follows:

-The City opined that it had a valid, enforceable easement for the sewer line.

-Plaintiffs opined, and later proved in court, that the City lacked an enforceable easement and was trespassing.

-Plaintiffs obtained a $3.5 million jury verdict against the City in the trespassing case.

-Plaintiffs appealed the verdict to the New Hampshire Supreme Court because they believed that they were entitled to more than $10 million for the many years of trespass.

-The City instituted eminent domain proceedings to take approximately one third of plaintiffs' property so that the City could continue to use its sewer line.

- Plaintiffs dispute both the legality of the taking and the amount of compensation for the taking.

-Per the complaint, defendant Dwyer "has always been antagonistic towards [plaintiffs].

Plaintiffs ground this lawsuit on Dwyer's answers to the following questions:

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[1]For the purpose of this order, it is not necessary to distinguish between the different interests that the three plaintiffs have in the land. Plaintiff Boyle is the trustee of 150 Greenleaf Avenue Realty Trust which owns the fee simple. Boyle is also the managing member of plaintiff Minato Auto LLC., which operates a car dealership on the land. In his personal capacity, Boyle is closely and publicly associated with both the dealership and the trust. More generally, he is a principal, if not the principal, behind the entities the dealership and the trust.

Q7: The council is attempting to take 4.6 acres of land containing a city sewer line from Toyota of Portsmouth owner James Boyle. In March, Boyle said he was seeking about $10 million in a settlement offer, but no settlement was reached.

A) Should the council have settled with Boyle at the amount he requested.

[Answer] ***Certainly not. Mr. Boyle purchased a building on wetlands, which had been sold to him by the N.H. Department of Education; the building was sold because it was sinking. The wetland and the sewer line are clearly marked on the deed to the property. Ever since then, he has been trying to get the taxpayers of the city of Portsmouth to pay for his apparent mistake through filing various lawsuits. The city has repeatedly defended taxpayers against these lawsuits. Why would we give Mr. Boyle $10 million of taxpayer money simply to mollify him.***

B) Should the city proceed with efforts to take the land by eminent domain?

[Answer] Yes. In a ruling from one of Mr. Boyle's lawsuit attempts to pry money out of Portsmouth taxpayers, the presiding judge suggested the eminent domain remedy to the city, apparently believing that it might end the controversy and stop clogging the courts. The judge's advice seemed like a feasible direction. The city can then manage that portion of the property, monitor the sewer pipe that runs under a corner of the property, and deal with the wetlands.

Analysis

I. Governing Standard

In ruling on a motion to dismiss for failure to state a claim the court must "determine whether the allegations in the plaintiff's pleadings are reasonably susceptible of a construction that would permit recovery." Ojo v. Lorenzo, 164 N.H. 717, 721 (2013). Put another way, the court must "rigorously scrutinize" the complaint and then decide whether it alleges facts that are sufficient to constitute a cause of action. Trinity EMS, Inc. v. Coombs, 166 N.H. 523, 525 (2014).

In making this determination the court must accept the well-pled facts in the Complaint and take all reasonable inferences in the plaintiffs favor. Ojo, 164 N.H. at 721; Bel Air Associates v. New Hampshire Department of Health and Human Services, 154 N.H. 228, 231 (2006); Berry v. Watchtower Bible & Tract Society, 152 N.H. 407, 410 (2005). The court need not, however, assume the truth of statements in the complaint that are merely conclusions of law. Ojo, 164 N.H. at 721. Nor must the court accept any "invective . . . bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like" that may be included in the complaint. Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996); see also, Brown v. Latin Am. Music Co., 498 F.3d 18, 24 (1st Cir. 2007). See generally, N.H. Superior Court Civil Rule 8(a), which requires plaintiffs to allege in the Complaint "a statement of the material facts known to the pleading party on which the claim is based, showing that the pleader is entitled to relief[.]" (emphasis added).

II. Evidence Submitted By Dwyer

Dwyer has proffered a large number of facts in her motion to dismiss. In support of those facts she submitted various documents including (a) several newspaper articles (which purportedly demonstrate that plaintiff Boyle is a public figure for First Amendment purposes); (b) an excerpt from a prior order of this court in a case between plaintiffs and the City; (d) deposition excerpts; (e) an engineering report; and documents relating to DES involvement with plaintiffs' land.

With one very limited exception, the court will not consider any of the facts that Dwyer tendered or any of the evidence that Dwyer submitted. In ruling on a motion to dismiss for failure to state claim, the court's inquiry is generally limited to the four

corners of the complaint. Avery v. New Hampshire Department of Education., 162 N.H. 604, 606-07 (2011); Ossipee Auto Parts v. Ossipee Planning Board, 134 N.H. 401, 403 (1991). Thus, as a general rule, the court cannot look beyond the well-pled facts in the complaint.

However, the court may consider documents that are directly or indirectly referred to in the complaint as well as matters of public record capable of judicial notice. See, Beane v. Dana S. Beane & Company, P.C., 160 N.H. 708, 711 (2010) (in ruling on a motion to dismiss the court may consider "documents sufficiently referred to in the complaint"); Gill v. Ross, Slip Op., 218-2011-CV-591, 2012 WL 11916324, *1 (N.H. Super. Ct. Dec. 7, 2012) (McHugh, J); See also, Haley v. City of Boston, 657 F.3d 39, 46 (1st Cir. 2011) (in determining whether a complaint states a claim upon which relief may be granted, the court may consider "documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice"); Rivera v. Centro Medico de Turabo, Inc., 575 F.3d 10, 15 (1st Cir. 2009) (allowing the court to consider "documents central to plaintiff's claim" and "documents the authenticity of which are not disputed by the parties[.]").

Applying these principles to this case, the court takes judicial notice of its prior order, submitted as Exhibit 2E to Dwyer's Memorandum (Docket Document 9). The court takes judicial notice for the sole purpose of recognizing that it issued this order in prior litigation between plaintiff Boyle and the City of Portsmouth. The court does not consider the remainder of the Dwyer's factual defense.

III. The Constitutional Challenge To Complaint

Plaintiffs have challenged, as unlawful and actionable, a political candidate's statements in a "voter guide." Those statements relate to a matter of public concern that was pending before the body to which the candidate sought reelection. The issue upon which the candidate opined involved the proposed expenditure of up to $10 million dollars from the public fisc of a small city. The plaintiffs, who wish to squelch the candidate's opinions, would benefit personally, dollar for dollar, by the amount depleted from the public treasury for this purpose. To say the least, the candidate's campaign speech on this issue falls within the molten core of First Amendment protection. See e.g., Snyder v. Phelps, 562 U.S. 443, 451–52 (2011):

> Speech on matters of public concern is at the heart of the First Amendment's protection. The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. That is because speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.

(internal citations, quotation marks, bracketing and formatting omitted); see also Lane v. Franks, 134 S. Ct. 2369, 2377 (2014); Connick v. Myers, 461 U.S. 138, 145 (1983); First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978); New York Times Co. v. Sullivan, 376 U.S. 254, 270, (1964); Garrison v.Louisiana, 379 U.S. 64, 74–75 (1964); City of Keene v. Cleaveland, 167 N.H. 731, 739 (2015); Porter v. City of Manchester, 151 N.H. 30, 49 (2004).[2]

[2] Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," Connick, 461 U.S. at 146.

The First Amendment restricts the application of state tort law by, *inter alia*, prohibiting tort recoveries for statements about matters of public concern that cannot be construed as alleging actual defamatory facts. Thus, for example, in Greenbelt Co–op. Publishing Association v. Bresler, 398 U.S. 6, 13–14 (1970), the U.S. Supreme Court reversed a libel judgment against a newspaper that accused a real estate developer of engaging in "blackmail." The developer was seeking a zoning variance for high density housing on land that it owned. The developer was simultaneously engaged in negotiations with the same locality for the sale of land that the locality wished to use for a school. The two issues were negotiated jointly, leading to several tumultuous city council hearings. The defendant newspaper reported that the developer's negotiating strategy was frequently called "blackmail." The newspaper used the word "blackmail" both with and without quotation marks and, on one occasion, placed it in the subheading for an article. The U.S. Supreme Court held that the newspaper had a constitutional right to use such a strong epithet because, under the circumstances, it did not refer to actual, illegal blackmail:

> It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant: it was [plaintiff's] public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging [plaintiff] with the commission of a criminal offense. [footnote omitted]. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [plaintiff's] negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought [plaintiff] had been charged with a crime.
>
> To permit the infliction of financial liability upon the petitioners for publishing these two news articles would subvert the most fundamental

> meaning of a free press, protected by the First and Fourteenth Amendments.

Greenbelt, 398 U.S. at 14; see also, Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264, 284—286 (1974) (use of the word "traitor" to describe a worker who crossed a picket line was a protected expression of opinion rather than a factual allegation of actual treason); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 48 (1988) (vulgar parody suggesting that Jerry Falwell's "first time" was during a drunken incestuous rendezvous with his mother in an outhouse was constitutionally protected because it could not be reasonably understood to describe an actual fact about Falwell).

This distinction between the direct or implied allegation of provable, defamatory facts, on the one hand, and forceful name calling on the other, was made clear by the D.C. Circuit in Novecon Ltd. v. Bulgarian-American Enterprise Fund, 190 F.3d 556, 567–68 (D.C. Cir. 1999). The defendant in that case had said that the plaintiff was attempting to "extort $200,000 of U.S. taxpayer money" and sell "a veritable Brooklyn Bridge." Citing Greenbelt, the U.S. Court of Appeals held that the context in which this harsh language appeared "made clear to the reader that the reference was to [plaintiff's] civil lawsuit and not to some nefarious scheme." Id. see also, Remick v. Manfredy, 238 F.3d 248, 262 (3d Cir. 2001) (statement that the opposing party was trying to "extort" money was clearly hyperbole in the context of correspondence between the parties' counsel relating to settlement of disputed claims); Trump v. Chicago Tribune Company, 616 F. Supp. 1434, 1435 (S.D.N.Y. 1985):

> Expressions of one's opinion of another, however unreasonable or vituperative, since they cannot be subjected to the test of truth or falsity, cannot be held libelous and thus are entitled to absolute immunity from

> liability under the First Amendment. Opinion may be expressed through rhetorical hyperbole and vigorous epithets, even in the most pejorative terms[.]

(internal quotation marks and footnotes omitted).

Furthermore, "even a provably false statement is not actionable if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts[.]" Riley v. Harr, 292 F.3d 282, 289 (1st Cir. 2002) (internal citations and quotation marks omitted).

With these principles in mind, the court turns to the purportedly actionable statements in this case:

A. ***"Mr. Boyle purchased a building on wetlands, which had been sold to him by the N.H. Department of Education; the building was sold because it was sinking. The wetland and the sewer line are clearly marked on the deed to the property."***

These two sentences clearly allege facts. However, those facts are not defamatory. See Thomas v. Telegraph Publishing Company, 155 N.H. 314, 338 (2007), citing with approval Burke v. Town of Walpole, 405 F.3d 66, 94–95 (1st Cir.2005) ("Words may be found to be defamatory if they hold the plaintiff up to contempt, hatred, scorn or ridicule, or tend to impair his standing in the community."). Purchasing a building on wetlands is not the kind of activity that provokes contempt, hatred, scorn or ridicule.

Furthermore—not that it matters—(a) the court takes judicial notice of its prior order which indicates the sewer line was clearly marked on a recorded plan that is in plaintiffs' chain of title, providing them with statutory constructive notice of the sewer line (Dwyer's Ex. 2E), (b) plaintiffs concede in their demand letter (attached to the

Complaint) that the State of New Hampshire is their predecessor in title (even though they deny obtaining a deed from the Department of Education), and (c) plaintiffs concede that there are wetlands on the property (even though they claim that heir building is not sinking).[3]

B. *"Ever since then, he has been trying to get the taxpayers of the city of Portsmouth to pay for his apparent mistake through filing various lawsuits."*

The characterization of plaintiffs' purchase of the property as a "mistake" is plainly one of opinion. Cf: Kin Chun Chung v. JPMorgan Chase Bank, N.A., 975 F. Supp. 2d 1333, 1349 (N.D. Ga. 2013) ("[L]anguage imputing to a business or professional man ignorance or mistake on a single occasion and not accusing him of general ignorance or lack of skill is not actionable per se. A charge that plaintiff in a single instance was guilty of a mistake, impropriety or other unprofessional conduct does not imply that he is generally unfit."); Paterson v. Little, Brown & Co., 502 F. Supp. 2d 1124, 1139 (W.D. Wash. 2007) (statement that "mistakes were made" was not defamatory);

The claim that plaintiffs have filed various lawsuits seeking money from the City (i.e. the taxpayers) is not contested. Indeed, the Complaint alleges the very same fact.

Read in context, one can infer that Dwyer believes it was wrongheaded for plaintiffs to seek compensation from the City for trespass when they should have known about the existence of the sewer line at the time they purchased the property. However:

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[3]Although the court does not consider Dwyer's factual defense, it is worth noting that she has one. Dwyer has submitted maps that depict the wetlands on plaintiffs' property and a 1982 engineering report indicating that the building had settled four inches in some places and would continue to settle over time. Dwyer's Ex. 1D.

(A) Dwyer does not allege that the plaintiffs' trespass lawsuit lacked legal merit; (B) Dwyer does not dispute the validity or correctness of the court judgment in plaintiffs' favor; (C) Dwyer does not claim that plaintiffs were dishonest in any of their lawsuits or misled the court in any way; (D) Dwyer does not allege any sort of litigation misconduct; and (E) Dwyer does not claim that the plaintiffs engaged in any sort of underhanded or dishonest action when they decided to seek compensation through the courts.

Thus, Dwyer has stated no more than her personal belief that a landowner who is on record notice of a public sewer line on the property at the time of purchase should not sue the municipality (i.e. the taxpayers) for the fact that the sewer line exists and limits the landowner's use of the property. That, of course, is a matter of pure opinion.

C. *The city has repeatedly defended taxpayers against these lawsuits. Why would we give Mr. Boyle $10 million of taxpayer money simply to mollify him?*

The first sentence alleges facts that are not contested. There is no question that plaintiff filed a number of lawsuits against the City. There is no dispute about the fact that City defended those lawsuits.

The second sentence states a pure opinion and does not allege any defamatory fact. Dwyer states that she does not think the City (i.e. the taxpayers) should have accepted plaintiffs' settlement demand of $10 million. If reelected, Dwyer might be required to vote on precisely such a request in connection with the possible purchase of a portion of plaintiffs' property. There is nothing even colorably actionable about a candidate's point blank statement of her position on an issue likely to come before the body to which she seeks election.

There is nothing factual (in the sense that it can be proven to be true or false) or defamatory about Dwyer's opposition to "mollifying" plaintiffs. She views plaintiffs' settlement demand as excessive and sees no reason to give in to it just because they asked. There is a quantum difference between disputing a landowner's valuation of its land, or a plaintiff's valuation of its claim, on the one hand, and defaming the landowner or plaintiff on the other.

D. In a ruling from one of Mr. Boyle's lawsuit attempts to pry money out of Portsmouth taxpayers, the presiding judge suggested the eminent domain remedy to the city, apparently believing that it might end the controversy and stop clogging the courts. The judge's advice seemed like a feasible direction. The city can then manage that portion of the property, monitor the sewer pipe that runs under a corner of the property, and deal with the wetlands.

Dwyer's characterization of plaintiffs' lawsuits "attempts to pry money out of Portsmouth taxpayers," is clearly constitutionally protected opinion. When the City is a defendant, and the *ad damnum* clause of the complaint seeks monetary damages, then by definition the plaintiff is attempting pry money out of the taxpayers. The use of the word "pry" suggests only that (a) the City defended the lawsuits (which it did) and (b) Dwyer did not believe that the City should have paid plaintiffs' demands.

The balance of the paragraph alleges only uncontested facts, i.e., that the trial judge suggested that the parties' dispute could be resolved by eminent domain; that this seemed feasible; and that a taking would allow the City to manage its sewer pipe and preserve the wetlands.

As the foregoing makes clear, all of the statements that plaintiff complains about are constitutionally protected by the First Amendment. Therefore, Dwyer cannot be held liable under state tort law for makings these statements. This dooms not only plaintiffs'

defamation claim but also plaintiffs' claims for interference with contractual and prospective contractual relations. See City of Keene, 167 N.H. 731, 738 (2015) (First Amendment barred claim for monetary damages for tortious interference with contractual relations); see also, Hustler Magazine (First Amendment barred claim for intentional infliction of emotional distress because it was grounded solely on protected speech); Jefferson County School District v. Moody's Investor's Services, Inc., 175 F.3d 848, 856–58 (10th Cir.1999) (claims for interference with contractual and business relationships must be dismissed if they are grounded solely on speech protected by the First Amendment); Unelko Corp. v. Rooney, 912 F.2d 1049, 1057–58 (9th Cir. 1990) (claim for tortious interference with business relationships is "subject to the same first amendment requirements that govern actions for defamation.").

IV. Common Law Analysis

Although the motion to dismiss can be resolved easily on First Amendment grounds, the court will nonetheless issue additional and alternative rulings based on New Hampshire common law.

Defamation: Under New Hampshire law, "a plaintiff establishes defamation by showing that the defendant failed to exercise reasonable care in publishing a false and defamatory statement of fact about the plaintiff to a third party, unless a valid privilege applies to the communication." Thomas, 155 N.H. at 327; see also Pierson v. Hubbard, 147 N.H. 760, 763 (2002). "A statement of opinion is not actionable unless it may reasonably be understood to imply the existence of defamatory fact as the basis for the opinion." Thomas, 155 N.H. at 338. As explained above at length, none of Dwyer's statements in the "voter guide" were false and defamatory statements of fact. Dwyer's

statements were limited to (a) statements of uncontested facts, (b) statements of non-defamatory facts and (c) statements of opinion.

Intentional Interference With Present And Prospective Contractual Relations: "To establish liability for intentional interference with contractual relations, a plaintiff must show: (1) the plaintiff had an economic relationship with a third party; (2) the defendant knew of this relationship; (3) the defendant *intentionally* and *improperly* interfered with this relationship; and (4) the plaintiff was damaged by such interference." Hughes v. New Hampshire Div. of Aeronautics, 152 N.H. 30, 40–41 (2005) (emphasis in original); Jay Edwards, Inc. v. Baker, 130 N.H. 41, 46 (1987); Demetracopoulos v. Wilson, 138 N.H. 371, 373–74 (1994); see generally Restatement (Second) of Torts §766. The tort of intentional interference with prospective contractual relationships has virtually identical elements. Baker v. Dennis Brown Realty, Inc., 121 N.H. 640, 644 (1981); Restatement (Second) of Torts §766B.

Putting aside both questions of proof (which cannot be addressed at this juncture), and the question of whether the complaint alleges *intentional* interference with any present or identifiable prospective contractual relationship, plaintiffs' claim fails because the complaint affirmatively disproves *improper* interference. "Action is not improper when the interference in contractual relations fosters a social interest of greater public import than is the social interest invaded." City of Keene, 167 N.H. at 738, citing Restatement §766, comment c.

In this case, the alleged "interference" consisted of answering a question on a "candidate survey" to be published as a voter guide. There is no allegation that Dwyer personally solicited any individual, or any group of individuals, to cease doing business

with plaintiffs' auto dealership. Indeed, she did not address plaintiffs' business operations at all, let alone call for a boycott. She simply opined that (a) plaintiffs were wrongheaded to seek compensation from the taxpayers and (b) the City should not pay plaintiffs' $10 million dollar demand to resolve the dispute. Voicing these opinions served an important social interest because it allowed the voters to know where Dwyer stood on an issue of public concern that was bound to come before the body to which she sought reelection. This far outweighed the risk that a prospective purchaser would eschew plaintiffs' auto dealership based on Dwyer's statements. Thus, plaintiffs' claim fails because they did not allege "improper" conduct.

Negligent Interference With Present And Prospective Contractual Relations:

The New Hampshire Supreme Court has never recognized a tort for negligent interference with contractual relations or prospective contractual relations. See Blue Cross/Blue Shield of New Hampshire-Vermont v. St. Cyr, 123 N.H. 137, 143 (1983) ("We have not recognized liability for negligent interference with a contractual relationship. [citation omitted]. Consequently, the question of the defendant's intent was crucial to the plaintiff's claim."); Ferrero v. Coutts, 134 N.H. 292, 295 (1991) (reversing a ruling finding tortious interference with contractual relations because "the conduct . . . falls short of the intentional conduct for which recovery is permitted); see also, See Restatement (Second) of Torts, Chapter 37, Introductory Note:

> The tort of interference with existing or prospective contractual relations . . . is intentional, in the sense that the defendant must have either desired to bring about the harm to the plaintiff or have known that this result was substantially certain to be produced by his conduct.

and Restatement (Second) of Torts, §766C:

> One is not liable to another for pecuniary harm not deriving from physical harm to the other, if that harm results from the actor's negligently
>
> > (a) causing a third person not to perform a contract with the other, or
> >
> > (b) interfering with the other's performance of his contract or making the performance more expensive or burdensome, or'
> >
> > (c) interfering with the other's acquiring a contractual relation with a third person.

and Restatement (Third) of Torts, Liability for Physical and Emotional Harm, Tentative Draft 1, §1(a) (2012) ("An actor has no general duty to avoid the unintentional infliction of economic loss on another.").

V. Loose Ends

The court has resolved the pending motion to dismiss based on the foregoing analysis. The court need not, therefore, address the parties' other arguments. Nonetheless, there are some loose ends that should properly be acknowledged:

A. The court rejects the Dwyer's claims of statutory and official immunity. She was not acting in her capacity as a City Councilor, but rather in her capacity as a private citizen running for reelection to the City Council. Her statements were made in response to a candidate survey.

B. Dwyer's statements did not fall within any absolute privilege. The existence and scope of any qualified privilege is a question of fact that cannot be addressed at the present juncture.

C. It was not necessary to decide whether plaintiff Boyle or the plaintiff entities he controls are limited purpose public figures. It seems likely that they

are. Why else would a candidate questionnaire have mentioned plaintiff Boyle by name? Nonetheless, neither the complaint nor the two attachments to the complaint compel a finding that all three plaintiffs have achieved public figure status. Were the issue dispositive, it would have to wait for summary judgment. Notwithstanding the stack of newspaper articles that Dwyer would have the court consider, some featuring large pictures of Boyle, the court must police the line between dismissal and summary judgment carefully because the court stayed discovery over plaintiffs' objections.

July 10, 2018

Andrew R. Schulman,
Presiding Justice