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 REPLY BRIEF

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INTRODUCTION

Generally, Candidate Dwyer correctly articulated the law of defamation. In a lengthy brief, perhaps to give her argument weight, she covers all aspects of defamation, some of which are not even debated in this appeal. However, she pays short shrift to the real questions presented: (1) is actual malice sufficiently pled? (2) are her statements false? and (3) are her statements defamatory? Instead of addressing these fundamental issues, Candidate Dwyer newly contends that errors in her statements are immaterial. Unfortunately, this fallback position does not work as all of her statements are false, and throughout her brief, she ignores the standard of review. All inferences are to be taken in Mr. Boyle's favor. *Lamprey v. Britton Constr., Inc.,* 37 A.3d 359 (N.H., 2012). The falsity of one particular statement goes to the heart of the matter - Mr. Boyle continuously sues the City for monetary gain and to cover his own mistake. While there have been multiple lawsuits, all but one were defenses to enforcement actions or administrative appeals; they did not involve money. The sewer line suit involved nominal damages as its principal purpose was to get an injunction to prevent trespass. The City caused the damages to grow exponentially by taking unreasonable legal positions, dragging out litigation and stalling development. Mr. Boyle was not litigation happy, clearly a defamatory inference, but rather a citizen defending the use of his property - and he has prevailed in every suit involving the City.

The issue of malice is ordinarily a fact issue not resolved on a motion to dismiss, particularly where, as here, actual malice as pled is supported by a host of falsehoods. As a City Councilor, Candidate Dwyer has knowledge of years of litigation and yet she either ignored or falsified the facts. This is presented in detail in the demand letter attached to the complaint and incorporated within, which is never addressed in her brief. Her attitude, the total falsity of her statements, and specialized knowledge of the

litigation all establish a reasonable inference of actual malice.[1] *See Lane v. Franks*, 134 S. Ct. 2369 (2014) (discussing "speech by public employees …holds special value precisely because those employees gain knowledge of matters of public concern through their employment.").

ARGUMENT

I. The Complaint Sufficiently Alleges Actual Malice

When reviewing a motion to dismiss, all allegations and reasonable inferences therefrom are assumed to be true. *Harrington v. Brooks Drugs*, 148 N.H. 101, 104 (2002) In defamation a plaintiff need only allege false statements and communication. *Traylor v Hammond,* 94 F. Supp.3d 203, 217 (D. Conn. 2017); *Westbrook v. Ulrich,* 90 F. Supp.3d 803, 810 (W.D. Wis. 2015). Actual Malice need not be alleged with particularity as long as it is alleged and there is some falsity alleged in the pleadings. *Karch v. Baybank FSB,* 147 N.H. 525 (2002); *Kotarba v. Kotabra,* 97 N.H. 252 (1952). In *Karch,* the Court held the issue of whether the plaintiff pled sufficient facts to establish intentional or reckless disregard were "…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. Here, Candidate Dwyer's actual malice or reckless disregard for the truth are expressly alleged. Her comments about being sick with one of Mr. Boyle's projects is also alleged. This is sufficient to meet the standard,

The court's error in ruling malice is not sufficiently pled is shown by the fact proof of reckless disregard for the truth generally relies on circumstantial evidence and "does not readily lend itself to summary disposition". *Nash v. Keene Pub. Corp.*, 127 N.H. 214, 223 (1985). It logically follows if proof of reckless disregard for the truth "does not

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[1] Although the decision was not issued at the time of the complaint, Judge Delker effectively found the eminent domain proceeding was lacking in grounds. His opinion confirms Candidate Dwyer and the councilors who voted for the taking were in bad faith. Apparently, she felt free to ignore the entire lack of a basis for the taking in her comments. The City has appealed Judge Delker's ruling, which is currently before the Court.

readily lend itself to summary disposition" that it does not readily lend itself to overcome the higher standard for dismissal. Nevertheless, Candidate Dwyer complains there is not enough detail in the allegation of actual malice, seemingly ignoring the demand letter incorporated in the complaint. That letter listed seven absolutely false statements, and one quote so out of context as to be false. Actual malice or reckless disregard for truth can be inferred from the falsity of numerous statements. *See Nash v. Keene Pub. Corp.*, 127 N.H. 214 (N.H., 1985) (discussing numerous allegedly false factual assertions, at least one of which is verifiably false, is sufficient to overcome summary judgment and allow a jury to find malice.) Here, malice was sufficiently pled based on the numerous falsehoods as well as the overall tone of the statements. She attempts to diminish her statements by stating it was her personal and professional belief "about some of the ambiguities and disputed facts." Defendant Brief, Page 14. However, her statements occurred after a jury had determined the "disputed facts". Any factual statements not resolved by the jury were facts she would have knowledge were false as a City Councilor voting in favor of eminent domain, and which were subsequently proved to be false by a court order determining the taking was done in bad faith.

Moreover, there was no response to the letter which sought an explanation and asked her to justify her statements like the City will deal appropriately with the wetlands. Ex. 2 Par. no. 8. Judge Delker found the City had no plans for the wetlands while sustaining Mr. Boyle's preliminary objection to the eminent domain. Certainly, Candidate Dwyer knew the basis for her eminent domain vote. The Court found preventing development to maintain wetlands was not a valid reason; thus, her very statement has judicially been proved false. It is this type of completely unsupported statement which give rise to an inference of bad faith and malice. *See Huskie v. Griffin*, 75 N.H. 345 (1909). Malice requires proof of a mental state, which can be inferred from circumstantial evidence, and whether that burden is met is a question for the jury. *Thomson v. Cash*, 119 N.H. 371 (1979). "At trial the plaintiff will bear 'a heavy burden involving proof of the

state of mind of the defendants (but he) is entitled to the benefit of all competent evidence to support (his) contentions." *Thomson v. Cash*, 119 N.H. 371, 378 (1979) quoting *Roy v. Monitor-Patriot Co.*, 112 N.H. 80, 82, 290 A.2d 207, 208-09 (1972). As a Councilor, she knew about the prior litigation and knew or should have known that none of the prior litigations sought damages. The statements were not "an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts....'" *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 248 (1st Cir.2000). Candidate Dwyer was, and implicitly claimed to be, in possession of objectively verifiable facts; she continuously referred to herself as "we" to elevate her position as an incumbent with knowledge. Rather than accurately surmise the facts, she used the opportunity to spread verifiably false facts to portray Mr. Boyle in a negative light. This was not a "minor error" where she was reflecting her understanding as a candidate running for office. *See Air Wis. Airlines Corp. v. Hoeper*, 134 S.Ct. 852 (2014). As a sitting City Councilor, Candidate Dwyer has superior knowledge than a lay person who would not have sat in negotiations or been briefed by city attorneys. The lower court's ruling on a motion to dismiss prior to any discovery denied Mr. Boyle his right to prove his allegations that Candidate Dwyer acted with malice when defaming him.

II. Candidate Dwyer's Statements Are False

Candidate Dwyer essentially states as a fact that Mr. Boyle is trying to pry money from the taxpayers as a result of his mistake based on multiple lawsuits clogging the courts. This involves two types of falsehoods.

First, Candidate Dwyer lays out facts giving rise to Mr. Boyle's "mistake". They range from the existence of wetlands to markings on his deed. In each instance, Ex. 2 to the complaint explains how Candidate Dwyer's statements are false and unsupported by the evidence. Rather than repeat each analysis here, Mr. Boyle asks the Court to review Exhibit 2 to the Complaint to determine if falsity is alleged. There was no basis for the Court to determine any of these statements were true. This is particularly important to

the claimed identification of the sewer line on the deed. As plead, the deed contains no such reference. The statement is absolutely false yet it makes Mr. Boyle appear he did no due diligence and cannot read a deed. Her statements cannot be determined to be true as a matter of law when there is a detailed contradictory pleading.

The second area of falsity is that Mr. Boyle has engaged in multiple lawsuits to get money. Mr. Boyle has engaged in a number of lawsuits with Portsmouth.[2] , but virtually all were defending enforcement actions or appealing various Board decisions. Boyle's Motion for Reconsideration, Dwyer Appendix vol.2, p. 232. Only the sewer line suit and eminent domain sought monetary damages for trespass and nuisance, and just compensation, respectively. Id. More importantly, if the City had not so vigorously opposed the requested injunction in the sewer line suit, at times with thin arguments, the damages would not have exponentially increased to the $10,000,000 claim referenced in the candidate questionnaire. The falsity of the factual basis for her statement is easily verified by the Court taking notice of the various cases.[3]

While, a Court may consider truth on a motion to dismiss, it is only undisputed truth that supports a dismissal. Here, the pleadings were detailed about the falsity of the statements. Mr. Boyle believes there is no dispute the statements were false - hence the Candidate's shift to mistake or non-materiality. However, at the very least, the extensive pleadings show there is a dispute of material facts concerning all elements of the statements made by the Candidate that could not be resolved on a motion to dismiss.

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[2] *City of Portsmouth v. 150 Greenleaf Avenue*, Docket No. 2018-0649 (eminent domain); *Boyle v. City of Portsmouth*, Docket No. 2018-0327 (jury verdict appeal); *City of Portsmouth v. Boyle*, 8 A.3d 37, Docket No. 2007-722 (2010) (city enforcement action); *Boyle v. City of Portsmouth*, 154 N.H. 390, Docket No. 2005-432 (2006) (appeal from administrative denial); Rockingham Superior Court Dockets: 07-E-0044, 07-E-0690, 08-E-0612, 08-E-0633 and 09-E-0077 (further cases involving development and which do not seek money).

[3] Rules of Evidence, Rule 201. The trial court's failure to understand the entire litigation history and instead characterizing a non-final finding as determinative does a serious injustice to Mr. Boyle.

III. The Statements As a Whole Are Defamatory

While individual statements need to be analyzed, the overall context must also be addressed. *Nash v. Keene Pub. Corp.,* 127 N.H. 214 (1985). Here, it was clearly a candidate's swipe at a citizen and his business based on made up facts and non-existent claims. This is precisely the conduct that must be prevented through a defamation action. Candidate Dwyer made a series of verifiably false factual statements to bolster the overall context of her statements, such as Mr. Boyle is trying to make the taxpayers pay through a series of lawsuits. As noted above, this is false. Candidate Dwyer's statement portrays Mr. Boyle as engaged in relentless litigation to baselessly take money from taxpayers. The defamatory nature of this statement about a person in a local business is patent. Further, as stated in the complaint, Mr. Boyle is the face of Toyota of Portsmouth, and such false statements about the person who is the face of the business is defamatory to Minato Auto, LLC.

IV. The Statement Is Not Protected Under The United States Constitution

The lower court erred when determining Candidate Dwyer's speech constitutes political speech protected by the First Amendment. The United States Constitution places limits on defamation cases, but a court must balance "the First Amendment's vital guarantee of free and uninhibited discussion of public issues with the important social values that underlie defamation law and society's pervasive and strong interest in preventing and redressing attacks upon reputation" *Milkovich v. Lorain Journal Co*, 497 U.S. 1, 2 (1990); *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). She misleadingly quotes "[t]o provide 'breathing space' for true speech on matters of public concern, the Court has been willing to insulate even demonstrably false speech from liability . . . .". Defendant Brief, Page 16. The remainder of the quotation states "…and has imposed additional requirements of fault upon the plaintiff in a suit for defamation. *Philadelphia Newspapers, Inc v. Hepps*, 475 U.S. 767, 787 (1986). The trier of fact will determine whether additional requirements of fault will be applied, but either way, there is no

absolute constitutional protection for any and all speech involving a matter of public concern. Although there is great leeway in political speech, it does not include a candidate defaming a citizen to harm his business. Indeed, through defamation, a party can terrorize another. The rubric of a political issue does not erase this unwarranted conduct. *McDonald v. Jacobs,* No 2017-0682 (January 15, 2019).

Second, a statement of opinion is not protected by the First Amendment if the question of "whether a reasonable factfinder could conclude that the contested statement 'impl[ies] an assertion of objective fact" can be answered in the affirmative. *Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir., 1995); *Milkovich v. Lorain Journal Co*, 497 U.S. 1, 2 (1990). New Hampshire has held a statement of opinion may be actionable if "it may reasonably be understood to imply the existence of defamatory fact as the basis for the opinion." *Nash v. Keene Pub. Corp.,* 127 N.H. 214, 219 (1985) quoting *Duchesnaye v. Munro Enterprises, Inc*., supra, 125 N.H. at 249, 480 A.2d at 125; Restatement (Second) of Torts § 566 (1977)[4]. "The reference to "opinion" in dictum in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340, 94 S.Ct. 2997, 3006-3007, 41 L.Ed.2d 789, was not intended to create a wholesale defamation exemption for "opinion."" *Milkovich v. Lorain Journal Co*, 497 U.S. 1, 2 (1990). "[E]ven the privilege of fair comment did not extend to "a false statement of fact, whether it was expressly stated or implied from an expression of opinion." Restatement (Second) of Torts, § 566, Comment a (1977)". *Id.* at 19. A reasonable fact finder could conclude the statements imply the defamatory assertion Mr. Boyle made a mistake in purchasing the property and has repeatedly sued the City for money damages to pay for his mistake. It is an objectively verifiable fact that he has not sued the City repeatedly for money damages. This standard of impugning liability where a statement is provably false is further confirmed in the next case cited by Candidate Dwyer. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (holding no liability where statements were on matters of public concern, *were not provably false*, and expressed solely through

hyperbolic rhetoric). Further, there is a long-standing history between Mr. Boyle and Candidate Dwyer. This greatly differs from *Snyder* where the court stated, "there was no pre-existing relationship or conflict between Westboro and Snyder that might suggest Westboro's speech on public matters was intended to mask an attack on Snyder over a private matter. Contrast *Connick*, supra, at 153, 103 S.Ct. 1684 (finding public employee speech a matter of private concern when it was "no coincidence that [the speech] followed upon the heels of [a] transfer notice" affecting the employee)." *Snyder v. Phelps*, 131 S. Ct. 1207, 1217 (2011); *Connick v. Myers*, 461 U.S. 138 (1983).

Finally, Candidate Dwyer is not a media defendant and "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against <u>a media defendant</u> for speech of public concern" does not apply. *Philadelphia Newspapers, Inc v. Hepps*, 475 U.S. 767, 777 (1986). She lists multiple cases against media defendants to support her speech as protected under the First Amendment. *Partington v. Bugliosi*, 56 F.3d 1147 (9th Cir. 1995); *Riley v. Harr*, 292 F.3d 282 (1st Cir. 2002); *Moldea v. N.Y. Times Co.*, 306 U.S. App. D.C. 1 (D.C. Cir. 1994). This case greatly differs from a summarization of facts where both sides are represented. Candidate Dwyer did not provide both sides, but rather reiterated factual arguments the jury found unpersuasive to support her opinion to not settle or "mollify" the opposing party. The standard provided by *Riley* is whether only one conclusion could possibly be derived from the statement, or whether "readers implicitly were invited to draw their own conclusions from the mixed information provided". *Riley v. Harr*, 292 F.3d 282, 290 (1st Cir. 2002). The only conclusion that could possibly be derived from Candidate Dwyer's statement is that Mr. Boyle made a mistake in purchasing his property and is "attempting to pry money" from the taxpayers as a result. There was no "mixed information provided" upon which readers were implicitly invited to draw their own conclusion. As pointed out in the complaint and the appellant brief, all others refused to comment or encouraged settlement in generalities. Boyle's Opposition to Motion to Dismiss, Dwyer

Appendix vol II at 202. Even if other candidates did answer the question, Candidate Dwyer cannot rely upon other candidates to qualify her statements and provide the necessary mixed information.

CONCLUSION

In the end, this is a simple case where a candidate attacked a local businessman without any regard for the facts. Accordingly, Mr. Boyle requests the Court reverse the dismissal and remand the case for discovery and such further proceeding as justice may require.

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REQUEST FOR ORAL ARGUMENT

To the extent that oral argument may assist the Court, Mr. Boyle requests it. Any oral argument will be presented by John Kuzinevich, Esq.

/s/ John Kuzinevich

CERTIFICATE OF SERVICE

I certify I served this document on all counsel of record on January 29, 2019.

/s/ John Kuzinevich