THE STATE OF NEW HAMPSHIRE

SUPREME COURT

CASE NO. 2018-0517

JAMES G. BOYLE, ET AL.

V.

MARY CHRISTINE DWYER

MANDATORY APPEAL FROM FINAL DECISION OF
THE ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT–APPELLEE MARY CHRISTINE DWYER

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Statement of the Case

Plaintiff–Appellant James G. Boyle[1] sued Defendant–Appellee Mary Christine Dwyer ("Councilor Dwyer"), an incumbent city councilor of the City of Portsmouth ("Portsmouth"), alleging that she defamed him and negligently and intentionally interfered with his contractual relationships.[2] See Appellant App. 3–8. These allegations were based solely on Councilor Dwyer's responses to a survey for candidates running for Portsmouth city council published on October 25, 2017. See id. at 3–8, 15.

Councilor Dwyer moved to dismiss all claims on February 14, 2018. Councilor Dwyer argued that Mr. Boyle sued her not because he was defamed, but as a means to censor and intimidate her and other city officials, create a conflict of interest so that she could not sit as a Portsmouth city councilor on matters related to Mr. Boyle, and retaliate against her for past votes and actions as a city councilor. Appellee App. (Vol. 1) at 7–8 ("This lawsuit amounts to a 'SLAPP'—a strategic lawsuit against public participation—intended to censor, intimidate, and silence one of Mr. Boyle's critics by burdening [Councilor Dwyer] with the cost of a legal defense until she abandons her criticism or opposition."); Appellant App. 21 (letter to Councilor Dwyer suggesting that she withdraw from the city council election because of her statements).

Councilor Dwyer asserted that Mr. Boyle did not state a claim for defamation because her responses to the candidate survey consisted of facially non-defamatory statements, statements of opinion, and true or substantially true statements. Id. at 8–9. She further argued that her statements addressed matters of public concern entitled to constitutional protection, and that Mr. Boyle, as a limited-purpose public figure, did not and could not provide the necessary factual support for defamation under the applicable

[1] This lawsuit was filed by Mr. Boyle, individually and as trustee of 150 Greenleaf Avenue Realty Trust, and Minato Auto, LLC. References to "Mr. Boyle" include all plaintiffs.

[2] In his notice of appeal and his appellate brief, Mr. Boyle does not substantively address the dismissal of his interference with contractual relationships claims. See Am. Notice Appeal 3 ("This is a defamation case . . . . Mr. Boyle sued for defamation."). See generally Appellant Br. (not mentioning interference with contractual relationships). The lower court's dismissal of these claims should be affirmed because any issues regarding these claims were not fully briefed, were not preserved, were not raised in the notice of appeal, and/or were not sufficiently developed for appellate review. State v. Blackmer, 149 N.H. 47, 48–49 (2003).

actual malice standard. Id. at 10–14. Councilor Dwyer also maintained that Mr. Boyle's interference with contractual relationships claims were baseless, and that she was entitled to both statutory immunity under RSA 507-B and official immunity under New Hampshire common law. Id. at 14–23.

On July 10, 2018, Judge Andrew R. Schulman of the Rockingham Superior Court granted Councilor Dwyer's motion and dismissed all claims, finding that Mr. Boyle's lawsuit was an "unacceptable" assault on constitutionally protected speech that "[struck] at the heart of the political and democratic process." Appellant Br. (Addendum) 31. Specifically, Judge Schulman dismissed Mr. Boyle's defamation claim because Councilor Dwyer's remarks consisted of (1) "clearly constitutionally protected political speech" about matters of public concern that "falls within the molten core of First Amendment protection," (2) nonactionable and constitutionally protected opinion, and (3) facts that are uncontested and non-defamatory on their face. Id. at 30–31, 36, 39–44 (emphasis in original). Judge Schulman dismissed Mr. Boyle's interference with contractual relationships claims because (1) there is no cause for negligent interference of contractual relationships under New Hampshire law, (2) Mr. Boyle did not state a claim for intentional interference with contractual relationships, and (3) Councilor Dwyer's statements constituted constitutionally protected speech.[3] Id. at 44–46.

Mr. Boyle filed a motion for reconsideration, to which Councilor Dwyer objected. Appellee App. (Vol. 2) at 231–39. Judge Schulman denied Mr. Boyle's motion for reconsideration in August 2018, and again ruled that Councilor Dwyer's speech "was constitutionally protected, regardless of whether plaintiff agrees with or disputes the speaker's opinions on this matter of public concern." Id. at 240.

Mr. Boyle filed this appeal in early September 2018. Am. Notice Appeal.

[3] In dicta, Judge Schulman wrote that Councilor Dwyer was not entitled to statutory immunity under RSA 507-B or official immunity under New Hampshire common law. Appellant Br. (Addendum) 46 ("Loose Ends"). Councilor Dwyer continues to maintain that she is entitled to both statutory immunity and official immunity because she was intending to serve Portsmouth as an incumbent city councilor when she responded to the candidate survey.

Statement of the Facts

Councilor Dwyer is a member of the city council for Portsmouth. Appellant Br. (Addendum) 31. She has served in this capacity for over 12 years. Appellee App. (Vol. 1) at 6. At this time, she is the current longest-sitting city councilor. Id. Councilor Dwyer, an at-large delegate, represents the entire Portsmouth population of approximately 21,500. Id.

Mr. Boyle is the owner of a Toyota dealership in Portsmouth. See Appellant Br. 8. Mr. Boyle is currently engaged in litigation with Portsmouth over sewer line and eminent domain issues concerning the property on which his car dealership is located (the "Pending Sewer and Eminent Domain Disputes"). Appellant Br. 8–9. For years, Mr. Boyle has advocated publicly and vociferously for his legal positions in the Pending Sewer and Eminent Domain disputes via news stories, interviews, and letters to the editor published in major New Hampshire news outlets. Appellee App. (Vol. 1) at 10–11, 24–70.

In the fall of 2017, Councilor Dwyer was campaigning for reelection as an at-large delegate to the city council of Portsmouth in a competitive field of 18 qualified candidates. Id. at 6; Appellant App. 10. In the weeks leading up to the November 2017 election, a local Portsmouth publication distributed a "Candidate Survey" to each of the city councilor candidates with questions about important public issues that would allow Portsmouth voters to make better informed decisions at the ballot box. Appellant App. 10–17. These topics included such politically, economically, and socially important issues as the transparency and accessibility of city government, the Prescott Park Art Festival, housing costs, city spending and taxes, short-term housing rentals, and Keno gambling. Id.; Appellant Br. (Addendum) 31–32.

Two candidate survey questions were devoted to the candidates' position regarding Mr. Boyle and the Pending Sewer and Eminent Domain Disputes. Appellant App. 15. Knowing that these issues were of political, economic, and social importance to her constituents, Councilor Dwyer responded to these candidate survey questions with her personal and professional opinions:

Candidate Survey Prompt: *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.*

Candidate Survey Question 1: *Should the [city] council have settled with Boyle at the amount he requested?*

Councilor Dwyer's 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?*

Candidate Survey Question 2: *Should the city proceed with efforts to take the land by eminent domain?*

Councilor Dwyer's 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 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. Councilor Dwyer's responses to these questions and the other candidate survey questions were published on October 25, 2017. Id. at 10.

Less than a week later, Mr. Boyle's counsel sent Councilor Dwyer a letter accusing her of defamation, demanding her withdrawal from the city council race, and demanding a retraction of her statements about the Pending Sewer and Eminent Domain Disputes. Id. at 19–22. Councilor Dwyer did not comply with Mr. Boyle's demands. Id.

at 6. She was reelected to her at-large city council position on November 7, 2017. Appellee App. (Vol. 1) at 6.

Summary of the Argument

Mr. Boyle filed this defamation lawsuit to advance his own political and economic interests at the expense of Councilor Dwyer's First Amendment rights. In a comprehensive and well-reasoned opinion, Judge Schulman dismissed Mr. Boyle's lawsuit because Councilor Dwyer's statements consisted of constitutionally protected political speech about matters of public concern and because they were not defamatory on their face. This Court should affirm the dismissal not only to preserve Councilor Dwyer's rights to speak publicly about the Pending Sewer and Eminent Domain Disputes, but also to preserve the rights of others who wish to speak publicly about issues of political, economic, and social importance.

Specifically, this Court should uphold the lower court's decision for three main reasons: (1) Councilor Dwyer's remarks about Mr. Boyle and Pending Sewer and Eminent Domain Disputes constitute political speech about matters of public concern that "falls within the molten core of First Amendment protection," Appellant Br. (Addendum) 36, (2) Mr. Boyle, a limited-purpose public figure, must plead sufficient factual support that Councilor Dwyer acted with actual malice—something he has not and cannot do, and (3) Mr. Boyle has not stated a claim upon which relief can be granted because Counselor Dwyer's remarks in the candidate survey consisted of non-defamatory statements, uncontested and true or substantially true statements, and statements of opinion.

Argument

The Court reviews motions to dismiss to determine whether the plaintiff–appellant's allegations are reasonably susceptible of a construction that would permit recovery. Coyle v. Battles, 147 N.H. 98, 100 (2001). On appeal, the plaintiff–appellant has the burden to demonstrate error and must provide an adequate record for the Court's review. Garod v. Steiner Law Office, PLLC, 170 N.H. 1, 5 (2017). In ruling on a motion to dismiss, the Court need not accept as true statements in the complaint that not well pleaded, including conclusions of fact, principles of law, and statements that "merely rehash" the elements of the cause of action. Snierson v. Scruton, 145 N.H. 73, 76 (2000); Lemelson v. Bloomberg L.P., 903 F.3d 19, 23 (1st Cir. 2018).

The decision of the trial court should be upheld if there are valid alternative grounds to support it. See Handley v. Town of Hooksett, 147 N.H. 184, 191 (2001). Similarly, the Court should not disturb judgment for error that does not affect the outcome of the lawsuit. Kessler v. Gleich, 156 N.H. 488, 494 (2007).

I. Councilor Dwyer's speech is constitutionally protected under the First Amendment.

"[T]he First Amendment to the United States Constitution place[s] limits on the application of the state law of defamation." Milkovich v. Lorain Journal Co., 497 U.S. 1, 14 (1990). Speech on matters of public concern is "at the heart of the First Amendment's protection" and "occupies the highest rung of the hierarchy of First Amendment values." Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) (quotation omitted). 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" or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." Id. at 1216 (citations and quotation omitted).

Political speech concerning public affairs is "the essence of self-government" and is afforded special protection because "debate on public issues should be uninhibited, robust, and wide-open." Id. (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)); see also Morrissette v. Cowette,

122 N.H. 731, 734 (1982) ("Freedom of expression is encouraged and protected in the area of political debate."). Political speech about matters of public concern is protected in order to promote informed decision-making by the electorate and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Lane v. Franks, 573 U.S. 228, 235–36 (2014) (quotation omitted); Connick v. Myers, 461 U.S. 138, 145 (1983).

a. Councilor Dwyer's statements are political speech about matters of public concern.

It is undisputed that the Pending Sewer and Eminent Domain Disputes constitute matters of public concern. Mr. Boyle admitted in his complaint that Councilor Dwyer's statements regard "an issue of public interest" and that such statements are "protected." Appellant App. 5–6, 19.

Even if this issue were disputed, there is no doubt that the Pending Sewer and Eminent Domain Disputes are matters of public concern. The inclusion of a two-part question in the candidate survey about these topics is evidence in and of itself that they affected and concerned the citizens of Portsmouth. The Pending Sewer and Eminent Domain Disputes have also received widespread coverage over the years—often prompted by Mr. Boyle himself—in major New Hampshire print and online publications. See, e.g., Appellee App. (Vol. 1) at 24–70.

Upholding the lower court's dismissal of Mr. Boyle's complaint is crucial to preserve Councilor Dwyer's rights. Had Mr. Boyle's defamation claim survived dismissal, Councilor Dwyer would have needed to devote substantial time and energy, and incurred considerable discovery costs, to defend herself from a politically motivated lawsuit intended to silence her constitutionally protected speech. See, e.g., Schatz v. Republican State Leadership Comm., 669 F.3d 50, 56 (1st Cir. 2012) (stating that dismissal is intended to "keep defendants from wasting time and money in discovery on 'largely groundless' claims"). This would have chilled Councilor Dwyer's ability and willingness to speak publicly about the Pending Sewer and Eminent Domain Disputes and other important public issues—and would have dissuaded others from doing the

same. See N.Y. Times Co., 376 U.S. at 270 (describing importance of free public discourse).

To be sure, Mr. Boyle was and is entitled to disagree with Councilor Dwyer's opinions about the Pending Sewer and Eminent Domain Disputes, and could have chosen to engage her publicly on these issues. Instead, Mr. Boyle initiated this lawsuit as an attempt to smother her viewpoints because they ran counter to his own. This tactic of using a defamation claim as a weapon to silence others harms not only Councilor Dwyer, but also the people of Portsmouth, who are entitled to hear candidates' opinions on issues that have important political, economic, and social consequences. This is why the U.S. Supreme Court has enacted constitutional protections for political speech on matters of public concern—to foster "uninhibited, robust, and wide-open" debate without fear of tort liability. Snyder, 131 S. Ct. at 1215 (quotation omitted).

b. Councilor Dwyer's speech is entitled to constitutional protection because her statements reflected her personal and professional beliefs.

Statements are protected under the First Amendment when the speaker "outlines the facts available to him [or her], thus making it clear that the challenged statements represent his [or her] own interpretation of those facts and leaving the reader free to draw his [or her] own conclusions . . . ." Partington v. Bugliosi, 56 F.3d 1147, 1156–57 (9th Cir. 1995); Riley v. Harr, 292 F.3d 282, 289–90 (1st Cir. 2002); Moldea v. N.Y. Times Co., 306 U.S. App. D.C. 1 (D.C. Cir. 1994). This constitutional protection shields public speakers from defamation lawsuits when they present and analyze information so that they are not afraid to go beyond "dry, colorless descriptions of facts, bereft of analysis or insight." Riley, 292 F.3d at 290–91 (quoting Partington, 56 F.3d at 1154).

Councilor Dwyer's statements cannot be subject to a defamation action because she was expressing her personal and professional opinions. In her responses, Councilor Dwyer fairly described the relevant events and offered her personal perspective about some of the ambiguities and disputed facts. See id. at 290. It is clear that Councilor Dwyer was expressing her personal and professional opinion not only from the nature of the responses themselves, but also from the context in which they were published. The

article containing Councilor Dwyer's remarks was prominently entitled "Candidate Survey," and the content and format of the survey conveyed that the responses consisted of candidates' unfiltered opinions. See Appellant App. 10–17.

Readers were also free to form their own opinions about the Pending Sewer and Eminent Domain disputes. Readers know that litigation is "inherently ambiguous" and presents "a number of varying rational interpretations." Riley, 292 F.3d at 290. And if readers wished to access varying perspectives on the Pending Sewer and Eminent Domain Disputes, they could have referenced the other city council candidates' responses to the candidate survey or reviewed the many editorials, interviews, and news reports available online that feature Mr. Boyle's legal position. See, e.g., Appellee App. (Vol. 1) at 24–70.

Councilor Dwyer's statements are thus protected by the First Amendment and cannot be subject to a defamation action.

c. Mr. Boyle has no valid objections to the lower court's analysis of constitutionally protected political speech on matters of public concern.

i. Mr. Boyle misconstrues the analysis for political speech on matters of public concern.

Contrary to Mr. Boyle's pleadings, whether statements constitute protected political speech on matters of public concern is not subject to a rigid three-factor analysis. Compare Appellant Br. 16 with Morrissette, 122 N.H. at 734 (stating guiding criteria for analyzing protected statements of opinion) and Snyder, 131 S. Ct. at 1216 ("In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.") and Klentzman v. Brady, 456 S.W.3d 239, 262–63 (Tex. App. 2014) ("[C]ourts ought not to define matters of public concern in so narrow a way as to require [the speaker] to anticipate and take action to avoid every conceivable circumstance . . . ." (quotation omitted)). Rather, in determining whether speech is protected political speech, the court examines "all the circumstances of the case." Snyder, 131 S. Ct. at 1215. This is precisely what the lower court did in determining that

Councilor Dwyer's remarks were constitutionally protected political speech on matters of public concern.

ii. Minor errors in political speech on matters of public concern do not constitute defamation.

Mr. Boyle contends that Councilor Dwyer defamed him because she allegedly erred in her characterizations of the Pending Sewer and Eminent Domain Disputes. See, e.g., Appellant Br. 23–26. This contention is misplaced for two reasons. Firstly, as discussed below, Councilor Dwyer's statements were uncontested and were true or substantially true. See id. at 39–44; Appellee App. (Vol. 1) at 9; Appellee App. (Vol. 2) at 3–220; infra section III. Secondly, political speech on matters of public concern is not defamatory simply because it may contain errors. The U.S. Supreme Court has held on several occasions that "[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 . . . ." Phila. Newspapers v. Hepps, 475 U.S. 767, 778 (1986) (emphasis in original) (citations and quotation omitted); St. Amant v. Thompson, 390 U.S. 727, 731 (1968) ("[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones."); Gertz v. Robert Welch, 418 U.S. 323, 341 (1974) ("The First Amendment requires that we protect some falsehood in order to protect speech that matters").

iii. Councilor Dwyer did not have specialized knowledge of the Pending Sewer and Eminent Domain Disputes, and even if she did, her speech was entitled to First Amendment protection under the fair report privilege.

Mr. Boyle's allegation that Councilor Dwyer should not be afforded constitutional protection because she relied on her "specialized knowledge" is meritless. See, e.g., Appellant Br. 12.

As an initial matter, Councilor Dwyer's knowledge of the Pending Sewer and Eminent Domain Disputes was not specialized. Rather, the basis for Councilor Dwyer's statements can be found in the public judicial record. Nothing in Councilor Dwyer's remarks was classified or privileged—the information was readily accessible to members

of the public. In fact, many in the community were already familiar with the circumstances summarized by Councilor Dwyer because major N.H. publications had provided detailed coverage of the Pending Sewer and Eminent Domain Disputes. See, e.g., Kimberly Haas, Portsmouth Car Dealer Continues Eminent Domain Fight Against City, Union Leader, Dec. 29, 2016, available at https://www.unionleader.com/news/business/portsmouth-car-dealer-continues-eminent-domain-fight-against-city/article_2e1f77b4-00ae-592d-b838-b6402d91f64b.html; Elizabeth Dinan, Jury: Portsmouth Must Pay Toyota Dealer $3.57M, Seacoast Online, Feb. 6, 2017, available at http://www.seacoastonline.com/news/20170206/jury-portsmouth-must-pay-toyota-dealer-357m.

Even if Councilor Dwyer did rely on specialized knowledge, her speech was nonetheless entitled to First Amendment protection pursuant to the fair report privilege. Under this doctrine, "the publication of defamatory matter concerning another in a report of an official proceeding that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported." Riley, 292 F.3d at 296 (brackets and ellipses omitted) (quoting Hayes v. Newspapers of New Hampshire, Inc., 141 N.H. 464, 466 (1996)). A fair report need not be verbatim—it is enough that the report be "a rough-and-ready summary that is substantially correct." Id. (citation and quotation omitted); see also Lambert v. Providence Journal Co., 508 F.2d 656, 659 (1st Cir. 1975) (noting that courts are reluctant to entertain libel suits dependent upon a "precise construction" of "technical legal terminology"); Ricci v. Venture Magazine, Inc., 574 F. Supp. 1563, 1567 (D. Mass. 1983) (noting that a "report need not describe legal proceedings in technically precise language" if it meets "a common sense standard of expected lay interpretation").

Here, Councilor Dwyer's remarks reflected her understanding as a layperson of the official legal documents surrounding the Pending Sewer and Eminent Domain Disputes. She did what was required of her—provide a "rough-and-ready summary" of the Pending Sewer and Eminent Domain Disputes that was substantially correct. See Air Wis. Airlines Corp. v. Hoeper, 571 U.S. 237, 255 (2014) (finding that a layperson's

statements were not defamatory because they conveyed the "gist" of the situation and that it was "irrelevant whether trained lawyers or judges might with the luxury of time have chosen more precise words"). Councilor Dwyer's speech was privileged and cannot be subject to Mr. Boyle's defamation claim.

II. Mr. Boyle has not alleged sufficient factual support that Councilor Dwyer acted with actual malice.

a. It is uncontested that Mr. Boyle is a limited-purpose public figure for purposes of the Pending Sewer and Eminent Domain Disputes.

"When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier . . . than is raised by the common law." Hepps, 475 U.S. at 775. There are two types of public figures: (1) persons who are public figures for all purposes, and (2) "limited-purpose public figures" who are public figures for particular public controversies. Thomas v. Tel. Publ'g Co., 155 N.H. 314, 340 (2007); Gertz, 418 U.S. at 351. Individuals are considered limited-purpose public figures when they "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." Gertz, 418 U.S. at 345. Courts make the limited-purpose public figure determination "by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." Id. at 352. Determining whether an individual is a public or private figure presents a threshold question of law, which is "grist for the court's—not the jury's—mill." Thomas, 155 N.H. at 340 (quotation omitted). Plaintiffs alleging defamation who are public officials, public figures, or limited-purpose public figures must allege and prove actual malice. Pendleton v. City of Haverhill, 156 F.3d 57, 66 (1st Cir. 1998).

Here, it is uncontested that Mr. Boyle is a limited-purpose public figure for the purposes of the Pending Sewer and Eminent Domain Disputes. Mr. Boyle has repeatedly conceded in his pleadings that he is a public figure who must satisfy the actual malice standard. See Appellant Br. 10 ("Due to the constant publication of the disputes between Mr. Boyle and the City of Portsmouth, Mr. Boyle can be considered a public figure."); id. ("Mr. Boyle could qualify as a limited-purposed public figure . . . ."); Appellant App. 19

(conceding that Mr. Boyle will need to prove "malice" for his defamation claim); Appellee App. (Vol. 2) at 203, 205–07 (arguing actual malice only in opposition to the motion to dismiss).

Even if Mr. Boyle were to now claim that he did not concede that he is a limited-purpose public figure, Mr. Boyle has "thrust [himself] to the forefront" of the Pending Sewer and Eminent Domain Disputes in order to influence their outcome; he has voluntarily conducted radio interviews, given public speeches, and written letters to the editor in order to cultivate public favor on the topic. See Gertz, 418 U.S. at 345; Appellee App. (Vol. 1) at 24–70; see also Appellant Br. (Addendum) 46–47 (stating in dicta that Mr. Boyle is "likely" a limited-purpose public figure).

b. Mr. Boyle has not provided the necessary factual support to state a claim under the actual malice standard.

The question of whether the plaintiff has provided sufficient factual support for actual malice is a question of law. Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 685 (1989). Actual malice requires the plaintiff to allege "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his [or her] publication." St. Amant, 390 U.S. at 731; N.Y. Times Co., 376 U.S. at 279–80. "The burden of proving [actual] malice is great; it must be proved by clear and convincing evidence." 8 R. McNamara, New Hampshire Practice: Tort and Insurance Practice § 1.08[4], at 22 (2003); Harte-Hanks Commc'ns, Inc., 491 U.S. at 659, 686. More than "mere falsity" is required to establish actual malice—the falsity must be "material." Air Wis. Airlines Corp., 571 U.S. at 247 (quoting Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991)). "[M]ere negligence in failing to verify statements and discover falsity does not rise to the level of reckless disregard for truth or falsity," Nash v. Keene Publ'g Corp., 127 N.H. 214, 223 (1985), and not even "an extreme departure from professional standards" is sufficient to establish actual malice, Lemelson v. Bloomberg L.P., 903 F.3d 19, 25 (1st Cir. 2018) (quotation omitted).

Because Mr. Boyle is a limited-purpose public figure, he must provide factual support that Councilor Dwyer made her statements with actual malice. Schatz, 669 F.3d

at 56–58. He has not done so and cannot do so. In his pleadings, Mr. Boyle only makes bare legal assertions that Councilor Dwyer's statements were made with "actual knowledge of their falsity or [] made in reckless disregard for the truth." See, e.g., Appellant App. 6. These unsupported allegations are inadequate to survive a motion to dismiss—actual malice cannot reasonably be inferred from legal assertions alone. Schatz, 669 F.3d at 56–58; see also Karch v. BayBank FSB, 147 N.H. 525, 530 (2002) (stating that conclusions of law should not be credited by the Court).

Mr. Boyle contends that Councilor Dwyer is liable because she allegedly acted negligently. Appellant Br. 12 ("[Councilor Dwyer] simply neglected to answer using the objectively verifiable facts as they do not fit her narrative."); id. at 26 ("Mr. Boyle need only prove that [Councilor Dwyer] made false statements . . . under New Hampshire law."). This is not the proper standard for actual malice. Mere negligence in failing to verify statements does not rise to the level of actual malice. Nash, 127 N.H. at 223. Instead, Mr. Boyle must provide factual support that Councilor Dwyer "entertained serious doubts as to the truth of [her] publication." St. Amant, 390 U.S. at 731. He has not done so and cannot do so.

Even if Councilor Dwyer made one or more mistakes in her remarks, which Councilor Dwyer denies, they were immaterial, limited, and made with a genuine belief of their accuracy. Such minor, honest errors in speech are protected and cannot form the basis for defamation under New Hampshire law. See Thomas, 155 N.H. at 335 (stating that every detail need not be accurate, and literal truth is not required so long as the substance of the statement is substantially true); Masson, 501 U.S. at 516 (stating that the common law "overlooks minor inaccuracies and concentrates upon substantial truth"); N.Y. Times Co., 376 U.S. at 271–72 ("[E]rroneous statement[s] [are] inevitable in free debate, and [such statements] must be protected if the freedoms of expression are to have the breathing space that they need to survive . . . ." (quotation, ellipsis, and citation omitted)).

III. Mr. Boyle failed to state a claim because Councilor Dwyer's statements are nonactionable under New Hampshire defamation law.

Under New Hampshire law, a plaintiff proves defamation by "showing that the defendant failed to exercise reasonable care in publishing a false and defamatory statement of fact about the plaintiff to a third party, assuming no valid privilege applies to the communication." Thomas, 155 N.H. at 321 (quotation omitted); 8 R. McNamara, New Hampshire Practice: Tort and Insurance Practice § 1.02[2], at 4 (2003). Courts analyze allegedly defamatory statements by examining the individual statements in the context of the publication as a whole. Thomas, 155 N.H. at 336.

a. Non-defamatory statements, uncontested and true or substantially true statements, and statements of opinion are nonactionable under New Hampshire defamation law.

i. Non-defamatory statements.

Defamatory statements must have a defamatory meaning. "Whether a communication is capable of bearing a defamatory meaning is an issue of law for the Court." Id. at 338 (quotation omitted). Statements have a defamatory meaning if they "hold the plaintiff up to contempt, hatred, scorn or ridicule, or tend to impair his [or her] standing in the community." Id. (quoting Burke v. Town of Walpole, 405 F.3d 66, 94–95 (1st Cir. 2005)). Defamatory meaning must be one that "could be ascribed to the words by hearers of common and reasonable understanding." Thomson v. Cash, 119 N.H. 371, 373 (1979) (quotation omitted). A defamation action cannot be maintained on "an artificial, unreasonable, or tortured construction imposed upon innocent words, nor when only supersensitive persons with morbid imaginations would consider the words defamatory." Id. (quotation omitted).

ii. True or substantially true statements.

To be actionable, defamatory statements must also be false; uncontested and true or substantially true statements cannot constitute grounds for defamation. In the context of a defamation action, truth is defined as "substantial truth" because "it is not necessary that every detail be accurate." Faigin v. Kelly, 978 F. Supp. 420, 425 (D.N.H. 1997) (quotations and citations omitted). In other words, the literal truth of a statement is not

required so long as "the imputation is substantially true so as to justify the 'gist' or 'sting' of the remark." Id. (emphasis added) (quotations and citations omitted); see also Restatement (Second) of Torts § 581A, at 235–37 (1977).

iii. Statements of opinion.

A plaintiff alleging defamation cannot recover on statements of opinion. See Nash, 127 N.H. at 219. 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, 292 F.3d at 289 (citations and quotation omitted).

b. Councilor Dwyer's statements are nonactionable because they consist of non-defamatory statements, uncontested and true or substantially true statements, and statements of opinion.

None of Councilor Dwyer's statements is actionable when considered in the context of Councilor Dwyer's response as whole. Councilor Dwyer's statements consist of non-defamatory statements, uncontested and true or substantially true statements, and statements of opinion. See Appellant Br. (Addendum) 39–44.

i. Candidate Survey Question 1: Should the [city] council have settled with Boyle at the amount he requested?

Councilor Dwyer's Answer: Certainly not.

Councilor Dwyer's answer is nonactionable because her belief that the city council should not have settled with Mr. Boyle for $10 million is not defamatory and is a matter of opinion.

> *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 reference to Mr. Boyle purchasing a building on wetlands is nonactionable because it is not defamatory. Purchasing a building on or near wetlands is not uncommon, and does not constitute an action that would "hold the plaintiff up to contempt, hatred, scorn or ridicule." Thomas, 155 N.H. 314 at 338, Burke, 405 F.3d at 94–95. It is also uncontested that the property on which the building sits contains wetlands. Appellant App. 19–20 (conceding that there are wetlands on the property).

The statement that the building was sold to Mr. Boyle by the N.H. Department of Education is nonactionable because it is not defamatory on its face. This statement is also substantially true—it is uncontested that the State of New Hampshire was the predecessor in title or that the building was once home to a vocational school run by the N.H. State Board of Education. Appellee App. (Vol. 1) at 6; see, e.g., Great Bay Community College, Dedication Ceremony: Friday, October 9, 2009, p. 4, available at https://greatbay.edu/sites/default/files/media/Dedication_Ceremony_100909.pdf (noting that the community college was once located at 150 Greenleaf Avenue, the address of Mr. Boyle's property); Appellee App. (Vol. 2) at 21.

The statement that the building was sinking is similarly nonactionable because it is not defamatory and is true or substantially true. See Appellant Br. (Addendum) 39–40 & n.3 ("[A] 1982 engineering report indicat[ed] that the building had settled four inches in some places and would continue to settle over time.").

> *The wetland and the sewer line are clearly marked on the deed to the property.*

This, too, is a nonactionable statement because it is not capable of defamatory meaning when examined in the context of Councilor Dwyer's response. See Appellant Br. (Addendum) 3.

Furthermore, this statement is nonactionable because it consists of uncontested facts and is true or substantially true. Mr. Boyle conceded in his complaint that there are wetlands on the property. Appellant App. 19–20; see also Appellee App. (Vol. 2) 20, 22–23 (maps of the property depicting wetlands). Additionally, plans of the property recorded with the registry of deeds depict a sewer line. See Appellant Br. 20; Appellee App. (Vol. 2) at 5, 60–62; Appellant Br. (Addendum) 40 n.3. Even if the depiction of the sewer line was not expressly contained in the property deed itself, there is no dispute that the deed references a recorded plan that contains a depiction of the sewer line. Appellee App. (Vol. 2) at 5, 60–62; Appellant Br. (Addendum) 40 n.3. This constitutes substantial truth. Appellee App. (Vol. 1) at 9; see Thomas, 155 N.H. at 335; Faigin, 978 F. Supp. at 425 ("[I]t is not necessary that every detail be accurate."); Lambert, 508 F.2d at 659

(noting that courts are reluctant to entertain libel suits dependent upon a "precise construction" of "technical legal terminology").

> *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.*

This statement is nonactionable because it consists of uncontested facts and protected opinion. Appellant Br. (Addendum) 40. Firstly, it is uncontested and true that Mr. Boyle is engaged in more than one lawsuit against Portsmouth in which he demands monetary compensation. Appellant Br. 8; id. at 24 (stating that Mr. Boyle has sought compensation in two lawsuits with Portsmouth); id. (Addendum) at 41. Secondly, Councilor Dwyer's characterization of Mr. Boyle's "apparent mistake" is nonactionable opinion. When read in context, Councilor Dwyer believes that it was misguided for Mr. Boyle to seek compensation from Portsmouth when he knew or should have known about the existence of the sewer line when he purchased the property in 2003 with a sewer line that had been constructed and operational since 1967. See id. at 40; Appellant App. (Vol. 2) at 6.

> *The city has repeatedly defended taxpayers against these lawsuits.*

This is nonactionable because it is an undisputed statement of fact. Mr. Boyle has filed lawsuits against Portsmouth, and Portsmouth has defended itself on behalf of its citizens and taxpayers on each occasion. Appellant Br. 8, 24; id. (Addendum) 41.

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

This is a nonactionable statement because it is incapable of defamatory meaning. Although Mr. Boyle alleges that the term "mollify" is defamatory in this context, Appellant Br. 15, his interpretation is unreasonable—"only supersensitive persons with morbid imaginations" would consider the term "mollify" defamatory here, see Thomson, 119 N.H. at 373 ("No mere claim of the plaintiff can add a defamatory meaning where none is apparent from the publication itself." (quotation omitted)). A reader might think Mr. Boyle's legal position is misplaced from reading Councilor Dwyer's responses to the candidate survey, but no rational person would believe Mr. Boyle was engaging in

criminal or unethical conduct from this publication alone. See Appellant Br. (Addendum) 41.

This statement is also nonactionable because it is a protected statement of opinion. Councilor Dwyer says that she does not believe Portsmouth's taxpayers should have to pay Mr. Boyle $10 million to settle his claims. This is Councilor Dwyer's opinion of Mr. Boyle and his lawsuits—one that is relevant to the citizens of Portsmouth in making an informed decision about whether or not to vote for Councilor Dwyer. Such a statement of opinion does not constitute defamation under the First Amendment. See Trump v. Chicago Tribune Co., 616 F. Supp. 1434, 1435 (S.D.N.Y. 1985) ("Expressions of one's opinion of another, however unreasonable or vituperative . . . cannot be held libelous and thus are entitled to absolute immunity from liability under the First Amendment." (quotation omitted)); Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 283 (1974) (finding that language that implied the plaintiffs had "rotten principles," were "lacking [in] character," and were "traitors" did not constitute defamation); Gertz, 418 U.S. at 339 ("Under the First Amendment there is no such thing as a false idea.").

ii. Candidate Survey Question 2: Should the city proceed with efforts to take the land by eminent domain?

Councilor Dwyer's Answer: Yes.

This statement in response to the second question about the Pending Sewer and Eminent Domain Disputes is nonactionable because it is not defamatory and because it is Councilor Dwyer's opinion.

> *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.*

This statement is nonactionable because it consists of opinion, non-defamatory statements, and uncontested and true or substantially true statements.

As an initial matter, Councilor Dwyer's use of the word "pry" to characterize Mr. Boyle's lawsuits is constitutionally protected opinion. It suggests only that Councilor Dwyer does not believe that Portsmouth should have capitulated to Mr. Boyle's demands

for payment. See Appellant Br. (Addendum) 42. Further, Mr. Boyle does not contest that he was attempting to extract, i.e. "pry," money from Portsmouth's taxpayers through litigation. See Appellant Br. 24; see also id. (Addendum) at 7 (finding that Mr. Boyle would benefit "dollar for dollar[] by the amount depleted from the public treasury").

The balance of this statement consists of uncontested and true or substantially true statements and statements of opinion. It is uncontested that the presiding judge in the Pending Sewer and Eminent Domain Disputes suggested an eminent domain remedy. Id. at 42; Appellee App. (Vol. 2) at 8; Appellant App. 20 (conceding that the "judge suggested eminent domain as a possibility for the sewer line"). Councilor Dwyer reasonably inferred that the judge raised this approach in order to bring an end to the Pending Sewer and Eminent Domain Disputes and free up the docket for other cases. Her summary of the facts and the underlying rationale is also entitled to constitutional protection because it was a fair description of the facts and reflects Councilor Dwyer's personal perspective and analysis. See Riley, 292 F.3d at 289–90.

The judge's advice seemed like a feasible direction.

This statement is nonactionable because it is not defamatory and is Councilor Dwyer's opinion.

> *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.*

Finally, this statement is nonactionable because it consists of opinion, non-defamatory statements, and uncontested and true or substantially true statements. This fairly summarizes the facts of the case and is a reflection of what Councilor Dwyer believes would occur should Portsmouth take a portion of Mr. Boyle's property by eminent domain. See Riley, 292 F.3d at 289–90; Appellee App. (Vol. 2) at 7–8; Appellant Br. (Addendum) 42–43.

* * *

In light of the above, Councilor Dwyer's statements consist of non-defamatory statements, uncontested and true or substantially true statements, and statements of

opinion. Because none of Councilor Dwyer's statements is actionable, the lower court's dismissal of Mr. Boyle's complaint should be upheld.

IV. The lower court properly analyzed Councilor Dwyer's statements.

a. The lower court correctly considered Councilor Dwyer's individual statements in the context of the publication as a whole in accordance with current law.

Mr. Boyle alleges that the court improperly considered the facts individually instead of in the context of the larger publication. Appellant Br. 14–16; Appellee App. (Vol. 2) at 231 (alleging that the lower court did not properly analyze Councilor Dwyer's remarks because the Court considered "narrow groups of words, rather than . . . [Councilor] Dwyer's statement as a whole"). This is an incorrect characterization of the lower court's analysis and the law.

Under New Hampshire defamation law, courts should analyze the individual statements in the context of the publication as a whole. Thomas, 155 N.H. at 336. This is precisely what the court did in its decision. Throughout its analysis, the lower court examined Councilor Dwyer's statements in the context of the broader candidate survey. Appellant Br. (Addendum) 40 (noting that it was reading a statement by Councilor Dwyer "in context"). See generally id. at 39–44 (lower court's analysis of Councilor Dwyer's statements). This approach of analyzing statements line-by-line with an eye towards the wider context is how leading New Hampshire and First Circuit courts have approached the defamation analysis. See, e.g., Thomas, 155 N.H. 314; Riley, 292 F.3d 282; Schatz, 669 F.3d 50.

b. A court may consider the truth or substantial truth of a statement on a motion to dismiss.

Mr. Boyle alleges that a court may not consider the truth or falsity of a statement on a motion to dismiss. See Appellant Br. 13, 20–23. This is incorrect as a matter of law. A court may consider the truth or substantial truth as a defense in deciding to dismiss a complaint. See Thomas, 155 N.H. at 335 (finding that a court may dismiss a claim based on truth or substantial truth).

Even if this were not the current state of the law, the lower court did not evaluate the truth or substantial truth of Councilor Dwyer's statements. See, e.g., Appellant Br. (Addendum) 42–44 (holding that Councilor Dwyer's statements were nonactionable for reasons other than their truth or substantial truth). Instead, the lower court found that Councilor Dwyer's remarks were constitutionally protected political speech and non-defamatory as a matter of law. Id. at 42 ("[A]ll of the statements that plaintiff complains about are constitutionally protected by the First Amendment."); id. at 31 (listing reasons for dismissal). The lower court only referenced the truth or substantial truth of Councilor Dwyer's statements as secondary support to its central holdings. See., e.g., id. at 40 n.3 ("Although the court does not consider Dwyer's factual defense, it is worth noting that she has one."); id. at 39 (noting that the court's prior order was irrelevant to its decision).

c. The lower court did not improperly consider factual materials outside of Mr. Boyle's complaint.

Mr. Boyle alleges that the lower court improperly considered factual materials outside of the complaint. Appellant Br. 13, 18–26. This allegation is misguided.

In addition to the language of the complaint, a court may consider on a motion to dismiss: "documents the authenticity of which are not disputed by the parties[,] official public records[,] documents sufficiently referred to in the complaint" and "documents attached to the plaintiff's pleadings." Beane v. Dana S. Beane & Co., 160 N.H. 708, 711 (2010) (quotation and ellipses omitted); see also McGranahan v. Dahar, 119 N.H. 758, 762 (1979) ("[P]leadings, testimony, and other portions of judicial proceedings are public documents and events.").

In this case, Councilor Dwyer submitted documents regarding the Pending Sewer and Eminent Domain Disputes that consisted of documents not disputed by the parties, official public records, documents sufficiently referred to in Mr. Boyle's complaint, and documents attached to Mr. Boyle's pleadings. See Appellee App. (Vol. 1) at 24–70; Appellee App. (Vol. 2) at 3–220. All of these documents may be properly considered on a motion to dismiss. See Beane, 160 N.H. at 711.

Even though the lower court could have considered the totality of Councilor Dwyer's submissions, it chose only to consider one document submitted by Councilor Dwyer—a prior order of the lower court—which held that Mr. Boyle was on constructive notice of the sewer line. Appellant Br. (Addendum) 35, 39. The lower court found that Mr. Boyle's deed explicitly referenced a recorded plan that, in turn, "clearly" depicted the sewer line. Id.; Appellant App. (Vol. 2) at 5. The lower court's decision to take judicial notice of this prior order was proper because it involved an interdependent matter decided by the same court. See Envtl. Utils., LLC. v. PSC of Mo., 219 S.W.3d 256, 265 (Mo. Ct. App. 2007) ("Courts may take judicial notice of other proceedings when the cases are interwoven or interdependent."); 29 Am. Jur. 2d Evidence § 149 (2018) (same).

d. Whether or not the prior order was under appeal is irrelevant.

Mr. Boyle alleges that the lower court should not have taken judicial notice of the prior order because it was on appeal. Appellant Br. 18–20; see also N.H. Sup. Ct. Docket Nos. 2018-0327, 2018-0649. This is a red herring and ought to be disregarded for two reasons.

Firstly, the lower court did not rely on this document in rendering its decision. Appellant Br. (Addendum) 39 (noting that the court's prior order was not necessary for evaluating Councilor Dwyer's statements). Instead, the lower court held that Councilor Dwyer's statements regarding the sewer line were constitutionally protected and not defamatory on their face—conclusions entirely independent of the prior order. See id. Therefore, whether or not the lower court should or should not have taken judicial notice of this prior order is irrelevant. At worst, it constitutes harmless error. See Kessler, 156 N.H. at 494 (declining to disturb judgment for error that does not affect outcome).

Secondly, the lower court did not rely on the prior order for the truth of the statements it contained; rather, it was referenced (as ancillary support) to substantiate Councilor Dwyer's belief that her statements regarding the sewer line were accurate. See Appellant Br. (Addendum) 35, 40. Whether the prior order was or was not on appeal is irrelevant in determining whether, from Councilor Dwyer's perspective, there was reason to believe that Mr. Boyle was on notice of the sewer line. Defamation cannot be found if

Councilor Dwyer made substantially accurate statements based on an official record. See Riley, 292 F.3d at 296 (discussing fair report privilege); Hayes, 141 N.H. at 466 (same); Nash, 127 N.H. at 223 ("[M]ere negligence in failing to verify statements and discover falsity does not rise to the level of reckless disregard for truth or falsity.").

e. There are no disputes of material fact.

Finally, Mr. Boyle contends that there are disputed issues of material fact. Appellant Br. 20–26. However, the material facts are not in dispute. Councilor Dwyer does not deny that she made the public statements regarding the Pending Sewer and Eminent Domain Disputes on October 25, 2017. The disputes in this case are legal, e.g., whether Mr. Boyle has pleaded defamation under New Hampshire law.

As described above and in Judge Schulman's order, the basis for dismissal in this case was legal. To be sure, Mr. Boyle states the elements of defamation and the actual malice standard. See Appellant App. 6. But there is insufficient factual basis for his legal claims to survive a motion to dismiss. Id. Mr. Boyle's disagreement with Councilor Dwyer's characterizations of the Pending Sewer and Eminent Domain Disputes alone does not form the basis for a defamation action under New Hampshire law. And even if Councilor Dwyer's summary of these disputes was not entirely accurate, which Councilor Dwyer denies, nothing she said is defamatory on its face and, more crucially, all of her speech is protected under the First Amendment. See supra sections I–III .

Mr. Boyle's recourse for any perceived issues with Councilor Dwyer's statements was to engage the court of public opinion—not the court of law. This Court should therefore uphold the dismissal of Mr. Boyle's claims.

Conclusion

For the reasons stated herein, Councilor Dwyer respectfully requests the Court affirm the Rockingham Superior Court's dismissal of Mr. Boyle's claims against her.

Oral Argument

Councilor Dwyer believes that the briefs, the record, and Judge Schulman's well-reasoned decision are sufficient to affirm the dismissal of Mr. Boyle's claims without the

need for oral argument. Nevertheless, if the Court determines that oral argument is necessary, counsel for Councilor Dwyer would be happy to present.

Respectfully submitted,

Mary Christine Dwyer

By Her Attorneys,
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Date: January 14, 2019

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Certificate of Service

I hereby certify that I have served this document on all counsel of record.

Date: January 14, 2019

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