THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. 2021-0151

Lorettann Gascard

Plaintiff, Appellant

v.

Andrew J. Hall

and

Newspapers of New Hampshire, Inc. d/b/a Concord Monitor

Defendants, Appellees

MANDATORY APPEAL FROM A FINAL DECISION OF THE SULLIVAN COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT/APPELLEE ANDREW J. HALL

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(Oral Argument Waived)

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STATEMENT OF THE CASE

On October 24, 2019, Lorettann Gascard and Nikolas Gascard[1] filed a defamation action in Cheshire County Superior Court against multiple defendants including Andrew Hall ("Hall"). The complaint included 51 counts of defamation and conspiracy to commit defamation arising out of media coverage of a federal lawsuit brought by Hall against the Gascards related to the sale to Hall of certain forged paintings. In December 2019 and January 2020, the defendants filed motions to dismiss the complaint. On February 15, 2021, the Superior Court (Tucker, J.) entered an order dismissing all of the claims against all of the defendants. See Appendix, Vol. 1 pages 3 – 10. The Gascards subsequently moved to amend their complaint and for reconsideration of the dismissal order. The court denied the motions on March 26, 2021. See Appendix, Vol. 1, pages 11-13.

Lorettann Gascard filed a notice of mandatory appeal stating that she was appealing the dismissal order as to counts 49 (defamation per se for statements made by Hall to Monitor reporter Ray Duckler against Hall); 50 (defamation per se for statement published in the December 4, 2018 online edition of the Monitor against the Monitor and Hall); and 51 (defamation per se for statement made in the December 5, 2018 print edition of the Monitor against the Monitor and Hall). These counts pertain to one statement published by the Concord Monitor attributed to Hall:

> He has said that he believed Lorettann, an artist herself, had painted the forgeries, but he never knew for sure.[2] See Appendix, Vol. II, pages 18 and 22.

[1] Nikolas Gascard is not a party to the appeal.

[2] In Appellant's brief at page 9, this statement is contained within quotation marks - apparently quoting from the article. However, the statement contained within the Monitor article by Ray Duckler is not contained within quotation marks. See Appendix, Vol. II, pages 18 and 22.

The Gascard litigation followed a civil suit that Hall had filed against the Gascards in September 2016 in the United States District Court for the District of New Hampshire. Hall sued the Gascards alleging fraud and conspiracy to defraud relating to their sale to him of a number of paintings represented to have been painted by the late artist, Leon Golub. At trial, the only expert witness called, Prof. Jon Bird, testified that every painting at issue was a forgery[3]. See Complaint, par. 52 at Addendum[4]. On November 29, 2018, the jury returned a verdict in favor of Hall in the amount of $465,000.00. See Verdict Form at Addendum.

SUMMARY OF ARGUMENT

Hall is immune from a defamation claim because the statement, even if made by Hall, is: 1) protected by the absolute litigation privilege; and 2) is a statement of opinion constitutionally protected by the first amendment.

ARGUMENT

At issue in this case is a statement reported by Ray Duckler in the Concord Monitor on December 4, 2018, that has been attributed to the Defendant Andy Hall. The statement at issue reads as follows:

> He had said that he believed that Lorettann, an artist herself, had painted the forgeries, but he never knew for sure.

[3] Gascard in her brief includes an incorrect factual assertion that is not supported by the record in the Statement of Facts and of the Case. Gascard brief includes at page 5, "despite stating that there was 'no argument' that some of these works were authentic..." As argued below, Gascard is relying on a September 6, 2018 settlement discussion email written by Hall's counsel to the Gascards counsel while the litigation was still pending. Unfortunately, Gascard failed to quote the language they are referring to in the Complaint, failed to provide the complete email for context; and failed to even quote a complete sentence. Regardless, it is undisputed that Hall sued the Gascards in the United States District Court for the District of New Hampshire alleging fraud and conspiracy to defraud relating to the Gascards sale to him of paintings represented to have been painted by the late artist, Leon Golub; at trial Hall's expert offered testimony that every painting at issue was a forgery; and the jury returned a verdict against both of the Gascards for conspiracy to commit fraud and as against Nikolas Gascard for fraud (see Verdict Form at Addendum). Hall denies plaintiffs assertion that he did not believe the works at issue in the civil action to be fake. However, it should be noted that this disputed factual issue is not relevant to the appeal but requires a response where the incorrect statement is included in Gascard's brief.

[4] Plaintiff's Appendix does not include a complete copy of the Complaint. Therefore, the pages of the Complaint that include paragraphs citing herein that are not part of the Appendix are provided in the attached Addendum.

The source and timing of the statement is not provided by Duckler. Nor does Duckler specify that the statement is a direct quote from Hall. This is significant in that a review of the article as a whole reveals that Duckler used quotation marks when referring to a direct quote from a source. Here, the statement at issue is not a direct quote because the statement is not contained in quotation marks. Duckler also does not specify when Hall "had said" that he believed Lorettann painted the forgeries. But "had said" suggests something that occurred in the past. The verdict in Hall's favor in his case against the Gascards was issued on November 29, 2018. Duckler's article was published on December 4, 2018. Duckler does not tell the reader when the comment attributed to Hall was said or even if it was said to Duckler or if it was something Duckler learned from the Pacer record or from the trial or even another news article. Gascard asserted in her Complaint:

- September 16, 2016, Hall filed the civil action, Hall v. Gascard, Case No. 16-CV-418-SM in the Federal District Court of New Hampshire. Complaint, Par. 2.
- April 10, 2018, NHPR[5] article published, "Apparently, Hall has a 'strong suspicion' that Lorettann Gascard painted them herself, according to court records." Complaint, Par. 214. The same article included "Hall has a 'strong suspicion' that Lorettann Gascard painted them herself," and "Hall is of the belief she did." Complaint, Par. 215.
- The court record that the online April 10, 2018 NHPR article relied on was a single PDF document submitted as part of a summary judgment motion filed with the district court on March 1, 2018. Complaint, Paragraph 216.

[5] NHPR is not a party to the appeal and the article published by NHPR is not at issue. But the article published during the Federal litigation contains some of the same information at issue in this appeal published by the Monitor.

- November 27, 2018, NHPR article published, "Hall, in his deposition, stated that he believes Lorettann Gascard painted them." Complaint, Par. 246.
- Over the course of a two year period, during litigation of the civil action, defendants continued to peddle the false narrative… Complaint, Par. 285.
- November 29, 2018, verdict in favor of Andrew Hall. See Verdict Form at Addendum.

The alleged statement in the Monitor article, even if it was made by Hall, in the form that it was published is protected by the absolute litigation privilege. The statement published by the Monitor was made during the judicial proceeding.

When a privilege applies to an alleged defamatory statement, there is immunity. Privileged communications fall into two categories: (1) those that are absolutely privileged and (2) those that are qualifiedly or conditionally privileged. Pierson v. Hubbard, 147 N.H. 760, 764 (2002). "If a communication is absolutely privileged, the speaker is absolutely immune from suit regardless of his or her motive in making the communication. Id. citing Pickering v. Frink, 123 N.H. 326, 328 (1983). Under New Hampshire law, absolute privilege extends to statements made in the course of judicial proceedings, provided they are pertinent to the subject of the proceeding. McGranahan v. Dahar, 119 N.H. 758 (1979). A statement falls outside the privilege only if it is "so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety" and all doubts are to be resolved in favor of pertinency and application of the privilege. McGranahan, supra at 126-127. The policy of granting absolute immunity for such statements "reflects a determination that the potential harm to an individual

is far outweighed by the need to encourage participants in litigation, parties, attorneys, and witnesses, to speak freely in the course of judicial proceedings." Id.

Additionally, the alleged statement, even if made by Hall, in the form that it was published by the Concord Monitor, is a subjective view and an opinion and as such cannot be defamatory and therefore not actionable. In testing whether a given statement is a fact or an opinion, the Court considers the words in the context of the publication as a whole. Pease v. Telegraph Pub. Co., Inc., 121 N.H. 62, 65 (1981). The First Amendment unquestionably protects opinions from defamation liability. Pease at 65. A statement is constitutionally protected opinion unless it is "factual or capable of being proven true or false". Pease, 121 N.H. at 65 (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990)). An opinion is generally a statement that "involves expressions of personal judgment". Id. (quoting Gray v. St. Martin's Press Inc., 221 F3rd 243, 248 (First Cir. 2000)). "Because defamation requires a false statement at its core, opinions typically do not give rise to liability since they are not susceptible or being proved true or false." Piccone v. Bartels, 785 F3rd 766, 771 (First Cir. 2015). "[A] Statement cannot be defamatory 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'" Id., quoting Gray v. St. Martin's Press Inc., 221 F3rd, 243, 248 (First Cir. 2000).

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. Gray v. St. Martin's Press, Inc., 221 F. 3d 243, 248 (1st Cir. 2000) (quoting Haynes v Alfred A. Knopf. Inc., 8 F. 3d 1222, 1227 (7th Cir. 1993)).

The statement at issue is clearly a statement of opinion. Duckler expressly reports Hall's subjective "belief" and that "he never knew for sure". The words "he never knew for sure" makes clear that there are no undisclosed facts supporting Hall's "belief". Thus, the basis for the statement is disclosed and no undisclosed facts are implied. Automated Transactions, LLC v. American Bankers Association, 216 A3rd 71, 88 (N.H. 2019).

The format, tone and entire content of the article makes it clear that the statement is an expression of a point of view only and not a statement of actual facts. See Riley v Harr, 292 F. 3d 282, 290 (1st Cir. 2002) citing Phantom Touring, Inc. v Affiliated Publications, 953 F. 2d 724, 729 (1st Cir. 1992). It is clear that the statement which includes the language "believed" and "he never knew for sure" was an expression of a point of view only.

There is no reasonable interpretation of the statement even assuming arguendo that Hall even made the statement as it is reported other than that it is one of opinion. That Duckler reports Hall's "belief" that Lorettann Gascard painted the forged paintings, but that "he never knew for sure," is indicative of a subjective view and an opinion and as such cannot be defamatory. The statement does not imply the existence of underlying facts that can be proven true or false.

The Garrett v. Tandy Corp case at 295 F. 3d 94 (First Cir. 2002) provides a compelling analysis of certain statement examples.

> "I suspect that the Patriots will win the Super Bowl next year," made by a football fan at a tailgate party, is plainly a guess (and, indeed, may represent the triumph of hope over reason). In contrast, a statement like "I suspect that your house is infested by termites," made by an exterminator after inspecting a dwelling, implies the existence of undisclosed facts - - something seen or noted in the course of the inspection - - that have led the speaker to a reasoned conclusion. Context makes the difference - - and by "context" we mean such factors as the identity of the speaker, the identity of the audience, the circumstances in which the statement is made, what else is said in the course of the conversation, and a myriad of other considerations. Garrett, supra at 104.

Couching a statement with "I believe" or "I suspect" is not dispositive for purposes of a defamation claim. The statement must be viewed in context. The statement that "he believed" "but he never knew for sure" that Lorettann had painted the forgeries allegedly made by a litigant who a jury had concluded had been defrauded is much more in line with the Super Bowl statement in the Garrett case than the termite statement by the exterminator. The exterminator example provided by the Garrett court implies the existence of undisclosed facts because the inspector conducted an inspection and may have seen something. Here, there is no implication of any undisclosed facts which is made clear by the "but he never knew for sure" language. As such, a defamation claim must be dismissed when resting on non-actionable opinion when the challenged statement "is incapable of defamatory interpretation." Garrett, supra at 106.

The statement at issue is also unlike the statement analyzed in Milkovich v. Lorain Journal Co., 497 U.S.1 (1990). The article at issue in Milkovich accused the wrestling coach of committing the crime of perjury[6]. The article implied that Milkovich lied under oath. There, the Court found that the connotation that Milkovich committed perjury is sufficiently factual that it is susceptible of being proved true or false by comparing his testimony before the Athletic Association with his subsequent testimony before the trial court. Milkovich, supra at 2. Transcripts were available to prove or disprove whether Milkovich perjured himself in a judicial proceeding. Loose, figurative, or hyperbolic language like "believe" or "never knew for sure" is not capable of being proven true of false because they are nothing more than protected opinion.

[6] Gascard asserts that the statement at issue accuses her of the crime of forgery. This is conclusory allegation not briefed by Gascard. But there is no support for the suggestion that the painting of another's artwork is a crime.

CONCLUSION

The statement is not actionable because it is plain that the speaker was expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts. See Riley v Harr, 292 F.3d 282, 289 (1st Cir. 2002). The statement attributed to Hall is clearly a statement of opinion [he never knew for sure]. The trial court was therefore correct to grant Hall's motion to dismiss. The statement is also protected by the absolute litigation privilege. This argument was not addressed by the trial court likely because the *protected opinion* ruling was dispositive.

WHEREFORE, the Defendant/Appellee, Andrew J. Hall, respectfully requests that this Honorable Court Affirm the lower court order granting Hall's Motion to Dismiss.

Respectfully submitted,
ANDREW J. HALL

By his attorneys,
DESMARAIS LAW GROUP, PLLC

Dated: 11-8-21

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STATEMENT ON ORAL ARGUMENT AND CERTIFICATIONS

Undersigned counsel of behalf of Defendant/Appellee Andrew J. Hall waives oral argument.

Pursuant to Supreme Court Rule 26(7), undersigned counsel hereby certifies that this brief contains 2926 words and is in compliance with Rule 16(11).

Undersigned counsel hereby certifies that a copy of this brief has been delivered through the electronic filing system on November 8, 2021 to all registered e-filers.

Dated: 11-8-21

Respectfully submitted,

/s/Debra L. Mayotte
Debra L. Mayotte, Esquire
N.H. Bar No. 8207

ADDENDUM

THE STATE OF NEW HAMPSHIRE

CHESHIRE, SS

SUPERIOR COURT

213-2019-CV-00256

NIKOLAS GASCARD and LORETTANN GASCARD[1]

Plaintiffs

v.

ANDREW J. HALL; NEW HAMPSHIRE PUBLIC RADIO, INC.; KEENE PUBLISHING CORPORATION; NEWSPAPERS OF NEW HAMPSHIRE, INC., d/b/a CONCORD MONITOR; NEWSPAPERS OF NEW HAMPSHIRE, INC., d/b/a MONADNOCK LEDGER-TRANSCRIPT; NEWSPAPERS OF NEW ENGLAND, INC.

Defendants

JURY TRIAL REQUESTED

COMPLAINT

I. INTRODUCTION

1. This Complaint (the "Complaint") outlines a prolonged, fraudulent and malicious defamation scheme by billionaire commodities hedge fund manager Andrew J. Hall ("Hall"), also known in the financial community as the "Oil God", and various members of the local New Hampshire press (collectively "Defendants"), to defame Nikolas Gascard ("Nikolas") and Lorettann Gascard ("Lorettann") (collectively "Plaintiffs").

2. On September 16, 2016, Hall, through his attorneys, filed the civil action (the "civil action") Hall v. Gascard, case no. 16-cv-418-SM, in the Federal District Court of New Hampshire

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[1] Although appearing *pro se*, Plaintiffs have written this Complaint in the familiar 3rd person and respectfully ask this Court to consider it in light of the liberal pleading standards afforded to *pro se* litigants. See Ayala Serrano v. Lebron Gonzalez, 909 F.2d 8, 15 (1st Cir. 1990). "[A] court must read a *pro se* complaint with great liberality, and ... is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." See White v. Walsh, 649 F. 2d 560, 561 (8th Cir. 1981)

45. On information and belief, in late 2014, Hall commenced preparations for an exhibition (the "exhibition") by the Hall Art Foundation of his collection of Golub works at his museum in Vermont. The exhibition was to include the twenty-four paintings that he purchased from Nikolas.

46. On information and belief, in preparation for this exhibition of works by Golub, Brand, contacted the Spero-Golub Foundation (the "Golub Foundation") in order to confirm information, including the titles, of the works to be featured in the exhibit.

47. Brand also contacted Lorettann, who provided Brand with correspondence from Golub and his wife and promised to send Brand any other possible materials that she came across.

48. On information and belief, the Golub Foundation is administered by Golub's sons, who actively protect the value of Golub's works.

49. As Hall alleged in the civil action complaint, the children of Golub are closely involved on the board of the Golub Foundation in order to protect the value of Golub artworks.

50. In March 2015, after an inspection of the works by Samm Kunce, one of Golub's former studio assistants and administrator of the Golub Foundation, Stephan Golub, one of Golub's sons and a Golub Foundation board member, emailed Brand (the "March 2015 email") stating that all of the twenty-four paintings were "likely forgeries."

51. The board members of the Golub Foundation own extensive collections of works by Golub.

52. Jon Bird, also a board member of the Golub Foundation, would later testify as an expert witness in the civil action that all of the twenty-four paintings are forgeries.

53. The market for Golub works is illiquid and therefore the addition or removal of even a few of his works has the potential to cause large price swings in the market for works by Golub.

54. Shortly after receiving the March 2015 email, Brand forwarded the contents of this email to

244. The online November 27, 2018 NHPR article included an edited transcript of the November 2018 NHPR broadcast and an embedded digital audio file of the November 2018 NHPR broadcast.

245. The online November 27, 2018 NHPR article published the following statements by Bookman, who in a dialog with Biello was asked by Biello, "Well, okay, if Mr. Hall believes Leon Golub didn't paint these, I guess the question is...who did?" Bookman replied:

> 'That's an interesting undercurrent to this whole case. Hall, in his deposition, stated that he believes Lorettann Gascard painted them. She is herself an artist, and she was a student of Golubs. She's accused by Hall of very much taking part in this scheme. In court today, Nikolas was asked point blank: did your mother paint these works? He let out a loud laugh and said "No," unequivocally.'

246. The online November 27, 2018 NHPR article published the defamatory *per se* statement, "Hall, in his deposition, stated that he believes Lorettann Gascard painted them."

247. The online November 27, 2018 NHPR article did not mention that the information presented in the online November 27, 2018 NHPR article was based on a fragmented and incomplete deposition transcript of Hall.

248. By failing to include all facts, underlying Hall's belief that Lorettann had painted the twenty-four paintings, the online November 27, 2018 NHPR article presented this belief as a statement of fact, which is false and defamatory *per se*.

249. By publishing that Nikolas denied that Lorettann had painted the twenty-four paintings, the online November 27, 2018 NHPR article conveyed the false and defamatory *per se* implication that Nikolas committed perjury during the trial.

250. The November 2018 NHPR broadcast published the following statements by Bookman, who in a dialog with Biello was asked by Biello, "Ok, so if Mr. Hall believes Leon Golub didn't paint these paintings, the question is who did?" Bookman replied:

CONCLUSION

282. Plaintiffs reincorporate by reference all of the allegations of this Complaint as if the same were fully rewritten herein.

283. From the very start of their defamatory scheme in late-2016, Defendants painted Nikolas and Lorettann as a "counterfeiting pair" who "remained at-large" and "on the loose" from a proceeding being investigated by officials. All of these statements, in addition to the many others which formed Defendants' defamation scheme, are false and defamatory.

284. Even considered in the context of the entire articles which contained them, these unambiguous statements left readers with the incurable and misleading impression that Nikolas and Lorettann had been charged with a crime and were evading criminal charges.

285. Over the course of a 2-year period, during the litigation of the civil action, Defendants continued to peddle the false narrative through prominent headlines that Nikolas and Lorettann were accused of art forgery.

286. Even considered in the context of the entire articles which contain them, such unambiguous statements left readers with the incurable and misleading impression that Plaintiffs were not only accused of selling forged art but actually forged and then proceeded to sell the twenty-four paintings to Hall.

287. Many other articles were rendered defamatory through the placement of these articles in an online "Crime" section and the placement of hyperlinks to these articles among hyperlinks to other news articles which reported on purely criminal activities, including but not limited to Ponzi schemers, bank robbers, drug dealers, financial criminals and bomb hoaxers.

288. Even assuming that the defamatory impressions left by these defamatory statements could in any way be cured or negated, not a single article containing the defamatory

UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

Andrew Hall,
Plaintiff

v.

No. 16-cv-418-SM

Lorettann Gascard
and Nikolas Gascard,
Defendants

VERDICT FORM

I. **Fraud.**

A. With regard to Andrew Hall's claim of fraud against Lorettann Gascard, we, the jury, find in favor of:

_____ Plaintiff, Andrew Hall

_X_ Defendant, Lorettann Gascard

B. With regard to Andrew Hall's claim of fraud against Nikolas Gascard, we, the jury, find in favor of:

_X_ Plaintiff, Andrew Hall

_____ Defendant, Nikolas Gascard

II. **Conspiracy to Defraud.**

With regard to Andrew Hall's claim of conspiracy to defraud against Lorettann and Nikolas Gascard, we, the jury, find in favor of:

_X_ Plaintiff, Andrew Hall

_____ Defendants, Lorettann and Nikolas Gascard

If you found in favor of the plaintiff, Andrew Hall, on either one or both of his claims, please proceed to the next section and record the amount you award him in damages.

If you found in favor of the defendants, Lorettann Gascard and Nikolas Gascard, on both of Mr. Hall's claims, your deliberations are complete. Please have the Jury Foreperson sign and date this form, and notify the Court Security Officer that you have reached a verdict.

III. **Damages.**

Having found in favor of the plaintiff, Andrew Hall, on either one or both of his claims, we, the jury award him the following sum as damages.

Please write the amount using both numbers and words, as though you were completing a check.

$ 465,000^00

FOUR HUNDRED SIXTY-FIVE THOUSAND AND 00/100 Dollars

Signed: [redacted]
Foreperson

Date: ~~December~~ NOVEMBER 29, 2018