THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2021-0151

LORETTANN GASCARD
(Plaintiff-Appellant)

vs.

ANDREW J. HALL and NEWSPAPERS OF NEW HAMPSHIRE, d/b/a CONCORD MONITOR
(Defendants-Appellees)

Rule 7 Mandatory Appeal from the New Hampshire Superior Court, Sullivan County

Case No. 213-2019-CV-00256

BRIEF FOR THE PLAINTIFF
LORETTANN GASCARD

Submitted by her non-attorney representative:

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QUESTIONS PRESENTED

1. Whether in dismissing Counts 49, 50 and 51 the Superior Court erred in concluding that statements by Andrew J. Hall ("Hall") to Ray Duckler of the *Concord Monitor* (the "*Monitor*"), publishing Hall's belief that Lorettann Gascard forged the art works at issue in the civil action brought by Hall against Lorettann Gascard and her son, were protected opinion and did not imply the existence of undisclosed, defamatory facts despite (a) U.S. Supreme Court precedent set in *Milkovich* and recognized in the lower courts that "[s]imply couching such statements in terms of opinion does not dispel these implications[,]" and despite (b) Hall's statements being published after trial in the context of online and print *Monitor* news articles which reported on the fact-intense civil case brought by Hall personally, implying that Hall was in a position to know facts upon which his belief was based.

   Issue Preserved by:
   Plaintiff's Obj. to Hall's Motion to Dismiss. See Apx. Vol. II at 37-40;
   Plaintiff's Supplemented[1] Obj. to the *Monitor's* Motion to Dismiss. See Apx. Vol. II at 57-60; and
   Plaintiff's Motion for Reconsideration on Hall's and the *Monitor's* Motions to Dismiss. See Apx. Vol. II at 68-71.

[1]The trial court granted Plaintiff leave to supplement her previously filed objection as her motion to extend time to file her objection was granted only after the original submission deadline.

STATEMENT OF FACTS AND OF THE CASE

On October 24, 2019, Nikolas Gascard and Lorettann Gascard (the "Plaintiff") (collectively the "Gascards") filed a Complaint (the "Complaint") in New Hampshire Superior Court alleging counts of defamation against various media defendants, including the *Concord Monitor* (the "*Monitor*") and Andrew J. Hall ("Hall") for statements that were published during and after the litigation of a civil action (the "civil action") that Hall filed against the Gascards in 2016 in the Federal District Court of New Hampshire. The civil action alleged that the Gascards had sold Hall forged works by the late, contemporary artist Leon Golub. See *Complaint*, Appendix ("Apx.") Vol. II at 3-4 and *Order on Mtds.,* Apx. Vol. I at 3-4.

Despite stating that there was "no argument" that some of these works were authentic and despite Hall's own daughter in-law and director of the Hall Art Foundation, Maryse Brand, confirming Nikolas Gascard's account of the works' provenance and contradicting his own, Hall pressed on with his claims all the way through to trial to secure a verdict in his favor—***intentionally delegitimizing what were once authentic works by Leon Golub***. See *Complaint*, Apx. Vol. II at 4-5.

Shortly after trial, Hall stated to the *Monitor* his belief that Plaintiff painted the works at issue in the civil action. This statement was published in both print and online editions of the *Monitor* on December 4 and 5, 2018, respectively. See *Monitor Articles,* Apx. Vol. II. at 15-19 and 20-22.

Plaintiff alleged in counts 49, 50 and 51 of her Complaint that this statement constituted defamation *per se,* as it accused Plaintiff of having committed the crime of forgery. These counts are the subject of this appeal. See *Complaint*, Apx. Vol. II at 9-10 and 11-13.

Challenging these allegations, Defendants Hall and the *Monitor* filed their motions to dismiss on January 16, 2020 and December 23, 2019, respectively. See *Hall's Mtd.*, Apx. Vol. II at 23-31; and *Monitor's Mtd.*, Apx. Vol II. at 47-52.

Plaintiff filed her objections to Hall's and the *Monitor's* motions to dismiss on February 14, 2020 and February 3, 2020, respectively. See *Plaintiff's Obj. to Hall's Mtd.*, Apx. Vol II. at 32-41; and *Plaintiff's Suppl. Obj. to the Monitor's Mtd.*, Apx. Vol. II at 53-60.

On February 24, 2020 Hall filed a reply to Plaintiff's objection to his motion to dismiss. See *Hall's Reply to Plaintiff's Obj. to Hall's Mtd.*, Apx. Vol. II at 42-46.

Pursuant to a February 4, 2020 motion by trial defendant New Hampshire Public Radio, Inc. a hearing was held before Sullivan County Superior Court Judge Brian T. Tucker on all motions to dismiss. See *Motion for Hearing on Mtds.,* Apx. Vol. II at 61-62.

In a February 15, 2021 dated order, Judge Brian T. Tucker granted all trial defendants' motions to dismiss. See *Order on Mtds.,* Apx. Vol. I at 10.

On March 4, 2021 Plaintiff filed a motion for reconsideration of the trial court's ruling on defendants' motions to dismiss. See *Plaintiff's Motion for Reconsideration,* Apx. Vol. II at 68-72.

Concurrent to filing her motion for reconsideration, Plaintiff also filed a motion for the trial court to waive the untimeliness of her motion for reconsideration and to consider its merits. On March 18, 2021 the trial court granted her motion, explicitly waiving the untimeliness within the original appeal period, and thereby extending the appeal period. See *Plaintiff's Rule 1(d) Motion,* Apx. Vol. II at 63-67. See also Supr. C. Rule 7(1)(C).

On March 12, 2021 Hall filed an objection to Plaintiff's motion for reconsideration, while the *Monitor* filed no objection. See *Hall's Obj. to Plaintiff's Motion for Reconsideration*, Apx. Vol. II at 73-76.

On March 26, 2021 the trial court issued a written order denying Plaintiff's motion for reconsideration. See *Order on Plaintiff's Motion for Reconsideration*, Apx. Vol. I at 13.

On April 19, 2021, Plaintiff filed a Rule 7 notice of appeal with this Court, appealing the trial court's decisions on counts 49, 50 and 51 which relate to Hall's statement published to and via the *Monitor* right after the conclusion of trial in the civil action in December 2018.

SUMMARY OF THE ARGUMENT

Plaintiff appeals the orders of the Sullivan Superior Court granting Defendant Hall's and the *Monitor*'s motions to dismiss counts 49, 50, and 51 of her Complaint, and denying reconsideration of the Superior Court's ruling. These counts relate to the post-trial publication of Hall's belief that Plaintiff painted the works at issue in the civil action brought by Hall against her and her son in 2016.

The trial court's dismissal of these counts was solely premised on the appended phrase, *"he never knew for sure,"* to Hall's statement. By doing so, the trial court contravened the U.S. Supreme Court precedent set by *Milkovich*, which held that the mere couching of a statement in terms of opinion does not dispel its factual implications and thereby does not render such a statement non-actionable as a matter of law. *Milkovich* plainly states that to hold otherwise would invite serious abuse on the part of the libel defendants seeking to escape liability for otherwise fact implying, defamatory statements. To be sure, accusations of criminal conduct, as the one at issue in this appeal, were recognized by courts even before *Milkovich* to imply such highly damaging facts that cautionary language could generally not serve diffuse these factual implications. Moreover, the First Circuit in *Garrett* applied *Milkovich* to couched language essentially identical to that at issue in this case.

Finally, not only do the articles, within which the statements at issue appear, fail to fully disclose the facts which Hall asserted in support of his opinion, but in fact strengthen the implication of the existence of undisclosed facts, as the articles reported on and were published directly after a fact intense trial which Hall himself initiated against the Gascards.

ARGUMENT

Standard of Review

The appeal before this Court involves questions of law which this Court reviews ***de novo***. See *Pittera v. Mauck*, No. 2020-0242, N.H. (2021). Moreover, the interpretation of a court order is a question of law. See *Seacoast Helicopters, LLC v. Beaulieu*, No. 2019-0697, N.H. (2020).

In addressing a motion to dismiss, the facts stated in the Complaint are taken to be true, with reasonable inferences from the facts drawn in favor of the claim. The motion fails if, on comparing the Complaint's content to the applicable law, "the allegations in the [C]omplaint are reasonably susceptible of a construction that would permit recovery." See *Pro Done, Inc. v. Basham*, 172 N.H. 138, 141-42 (2019).

I. THE TRIAL COURT ERRORED IN CONLUDING THAT ANDREW J. HALL'S STATEMENT DID NOT IMPLY UNDISCLOSED DEFAMATORY FACTS AND WAS THEREFORE NOT ACTIONABLE.

A. It is settled law that simply couching fact implying statements in the form of an opinion does not dispel those factual implications.

A basic tenet of New Hampshire defamation law, is the "requirement that the challenged statement be one 'of fact.'" See *Automated Transactions v. American Bankers,* 216 A. 3d 71, 77 (N.H. 2019). When such a statement is one of opinion it is "not actionable unless it may reasonably be understood to imply the existence of defamatory fact as the basis for the opinion." See *Id*. citing *Thomas v. Telegraph Publ'g Co.*, 929 A.2d 993, 1015 (N.H. 2007). "If an average reader could reasonably understand a statement as actionably factual, then there is an issue for a jury's determination...." See *Thomas at 1015.*

Plaintiff alleged in her Complaint against Hall and the *Monitor* that the *Monitor* published an article online and in print on December 4 and 5, 2018 (counts 50 and 51), containing the statement at issue in this appeal. The Complaint also pled an additional count only against Hall for having communicated his statement to the *Monitor* (count 49). See *Complaint*, Apx. Vol. II at 9-10 and 11-13.

The statement[2] reads as follows:

> "He had said that he believed Lorettann, an artist herself, had painted the forgeries, but he never knew for sure."
>
> See *Monitor Articles,* Apx. Vol. II. at 15-19 and 20-22.

Hall, in his motion to dismiss and related reply, and his objection to Plaintiff's motion for reconsideration, argued that the phrase "*he never knew for sure"* dispelled any implication that he was in possession of undisclosed facts which underlie his opinion[3]. See *Hall's Mtd.*, Apx. Vol. II at 28-30; *Hall's Reply to Plaintiff's Obj. to Hall's Mtd.*, Apx. Vol. II at 44-45; *Hall's Obj. to Plaintiff's Motion for Reconsideration*, Apx. Vol. II at 75.

The Monitor made an identical argument in its own motion to dismiss. See *Monitor's Mtd.*, Apx. Vol II, at 50-51.

However, the current state of defamation law on this issue, which Plaintiff outlined in her objections to Defendants' dispositive motions, her motion for reconsideration and presents in this brief, does not support Defendants' contention. See *Plaintiff's Obj. to Hall's Mtd.*, Apx. Vol II. at 37-38; *Plaintiff's Obj. to the Monitor's Mtd.*, Apx. Vol. II at 57-58; and *Plaintiff's Motion for Reconsideration,* Apx. Vol. II at 68-69.

In adopting the *Monitor*'s and Hall's mistake of law, the trial court, in its order on Defendants' motions to dismiss, premised its dismissal of counts 49-51 solely on the appendage "*never knew for sure"* to Hall's statement. The court reasoned that "Hall's qualification that he '*never knew for sure*' that Lorettann Gascard created the forgeries dispels an implication of undisclosed defamatory facts" and concluded that "[v]iewed in its totality, the statement, ***couched as conjecture***, does not imply it is grounded on undisclosed defamatory facts." See *Order on Mtds.*, Apx. Vol. I at 7.

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[2] The trial court noted in its order on Defendants' motions to dismiss that Plaintiff did not allege Hall's statement in full. Plaintiff attached true and exact copies of the articles containing the full statements to her Complaint. See Apx. Vol. II at 15-22. Plaintiff also readily acknowledged the entire statement in her objections to Defendants' motions to dismiss and contends now as at the time of filing of the Complaint that the phrase *"he never knew for sure*" does not render the statements at issue non-actionable as a matter of law.

The trial court's conclusion, however, directly contravenes *Milkovich* which plainly held that "[s]imply ***couching*** such statements in terms of opinion does not dispel these implications." See *Milkovich v. Lorain Journal Co*., 497 US 1, 19 (1990).

To begin with, Plaintiff notes that although this appeal is governed by New Hampshire state law, the seminal U.S. Supreme Court case *Milkovich* is controlling. See *Boyle v. Dwyer*, 216 A. 3d 89, 101 (N.H. 2019) ("We decide this appeal under New Hampshire law, rather than the First Amendment. In so doing, we are cognizant of the limitations placed on the application of state defamation law by the United States Supreme Court, through its interpretation of the First Amendment. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 14-23, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) (outlining various limitations)").

In *Milkovich*, the Supreme Court did away with the idea of a "wholesale defamation exemption for anything that might be labeled 'opinion'." See *Milkovich* at 18. Of utmost importance to the *Milkovich* Court was whether a given statement at issue could reasonably be understood to imply assertions of fact which could be proven as true or false, not whether such a statement was couched or labeled in the language of opinion.

The New Hampshire Supreme Court also recognized this legal principle in stating that "[o]f course, even if a statement is properly described as an opinion, that does not automatically shield it from a defamation claim. After all, expressions of opinion may often imply an assertion of objective fact." See *Automated Transactions v. American Bankers,* 216 A. 3d 71, 78 (N.H. 2019) (internal quotations omitted).

The relevant passage from the *Milkovich* opinion states as follows:

> "If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.' As Judge Friendly aptly stated: '[It] would be destructive of the law of libel if a writer could escape liability for accusations of

> [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'"
>
> See *Milkovich* at 18-19.

Even before *Milkovich,* courts held that "[w]hen a statement is as 'factually laden' as the accusation of a crime, […] cautionary language is by and large unavailing to dilute the statement's factual implications." See *Ollman v. Evans*, 750 F. 2d 970, 983 (D.D.C. 1984). See also *Cianci v. New Times Pub'g Co.*, 639 F.2d 54, 64 (2nd Cir.1980) ("It would be destructive of the law of libel if a writer could escape liability for accusations of crime simply by using, explicitly or implicitly, the words 'I think.'").

Moreover, since *Milkovich,* lower courts have consistently held, as they must, that qualifiers which serve to couch otherwise fact implying statements in terms of opinion do not, as a matter of law, dispel the factual implications conveyed by such statements (i.e., "I think", "I believe", "in my opinion", or "I suspect").

One such case from the First Circuit, *Garrett v. Tandy Corp.*, 295 F. 3d 94 (1st Cir. 2002), applying Maine state defamation law[4], is particularly on point here as the statement at issue was couched with language essentially identical to that which followed Hall's accusation of forgery and which the trial court based its dismissal on. In *Garrett*, the manager of a RadioShack store was alleged to have communicated to the police that he suspected a customer of theft. In granting RadioShack's motion to dismiss, the *Garrett* district court held that "[t]he statement's very uncertainty stops it from implying anything defamatory." See *Garrett v. Tandy Corp.*, 142 F. Supp. 2d 117, 121 (D. Maine 2001). The *Garrett* district court appeared to have based its conclusion in part on its contention that the terms "I think" and "I suspect" expressed varying degrees of certainty. See *Id. at* 120-121 ("[The statement does not] assert that the manager personally believed that Garrett committed the crime: 'I suspect' connotes less certainty than 'I believe,' or 'I think'."). The First Circuit rejected this reasoning, reversed the district court's ruling and concluded that "[the manager's] use of the term 'I suspect' is not determinative of whether his statement to the police is actionable." See *Garrett v. Tandy Corp.*, 295 F. 3d 94, 104

[4] The elements to be proven in a Maine and New Hampshire defamation action are essentially identical. Compare *Rippett v. Bemis*, 672 A.2d 82, 86 (Me.1996) with *Thomas v. Telegraph Publ'g Co.*, 929 A.2d 993, 1002 (N.H. 2007)

(1st Cir. 2002) ("We conclude, therefore, that a speaker's use of a prefatory term such as 'I suspect' does not automatically inoculate him against liability for defamation."). In citing to pre-*Milkovich* cases, *Garrett* additionally noted that, "[w]e are not the first court to find a speaker's use of a preface such as 'I suspect' or 'I believe' or 'I think' to be non-dispositive for purposes of a defamation claim" and that "***[i]f any doubt remained [on this issue] Milkovich dispelled it***." *Id.* at 104-105.

Thereby, while it might possibly be for a fact finder to determine the amount of weight, if any, to give to such qualifying statements in determining whether the alleged statement as a whole is defamatory, at this stage, the exact form taken or degree of certainty conveyed by a given qualifier is not decisive in evaluating said statement's actionability as a matter of law. As the quoted passage above from Milkovich makes clear, to hold otherwise would be to invite abuse by allowing publishers to escape liability by simply couching otherwise fact implying statements as merely non-actionable opinion.

The district court's flawed reasoning in *Garrett* was in substance identical to the trial court's reasoning in the present case. To suspect is definitionally equivalent to not knowing for sure. Therefore, just as with the qualification *"I suspect"* at issue in *Garrett*, the qualification *"he never knew for sure,"* cannot not shield Hall nor the *Monitor* as a matter of law from the claims brought against them. ***Hall's apparent lack of certainty merely speaks to his own subjective evaluation of the facts upon which his opinion is based, and does not imply in the least that he is not in possession of such facts.***

As outlined above, the trial court's reasoning and conclusion contravened established precedent. Nor can they find sound legal grounds in the precedent the trial court relied on in the lead up to its conclusion:

> "[E]ven 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[.]"
>
> See *Riley v. Harr*, 292 F.3d 282, 289 (1st Cir. 2002); *Order on Mtds.*, Apx. Vol. I at 6.

In so stating, however, the *Riley* court*,* did not grant any license for a defamation defendant to escape liability by simply couching a factually laden statement as conjecture, as the trial court appears to have taken it to mean. Quite to the contrary, Riley explicitly recognized the precedent regarding couched language established in *Milkovich*. See *Riley* at 289 ("[I]t would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words, 'I think.'").

Rather, according to the relevant and clarifying passage from *Riley* which followed the portion cited by the trial court, a statement is only rendered non-actionable "when an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusion..." *Riley v. Harr*, 292 F. 3d 282, 289 (1st Cir. 2002). See also *Automated Transactions v. American Bankers*, 216 A. 3d 71, 77-78 N.H. (2019).

Such a full disclosure of facts is particularly essential in order to dispel the implication that the author of a statement is in possession of undisclosed facts supporting his opinion, where, as in this present case, the statement involves accusation of a crime, since such statements are generally known to give rise to "clear factual implications" provable as true or false. See *Thomas v. Telegraph Pub. Co*., 929 A. 2d 993, 1016 (N.H. 2007) (citation omitted); See also *Automated Transactions v. American Bankers,* 216 A. 3d 71, 78 (N.H. 2019) citing *Milkovich* at 21-22 (accusation of perjury in form of opinion verifiable by way of a criminal perjury action).

B. The full context within which Andrew J. Hall's statement appears further strengthens the implication that he was in possession of facts which underlie his opinion.

It is a well-established tenet of defamation law that "[w]hether a given statement can be read as being or implying an actionable statement of fact is a question of law to be determined by the trial court in the first instance, considering the context of the publication as a whole." See *Boyle v. Dwyer*, 216 A. 3d 89, 94 (N.H. 2019).

While explicitly recognizing the above principle in its order on Defendants' motions to dismiss, Plaintiff notes that the trial court, having premised its dismissal solely on Hall's qualification, apparently did not consider it necessary to take the next step and evaluate the Hall's statement in the context of the *Monitor* articles. See *Order on Mtds.*, Apx. Vol. I at 5-9.

Plaintiff raised the issue of the statement's context in her objections to Defendants' dispositive motions, see *Plaintiff's Obj. to Hall's Mtd.*, Apx. Vol II. at 38-40; *Plaintiff's Obj. to the Monitor's Mtd.*, Apx. Vol. II at 58-59, and in her motion for reconsideration pointed out the lack of contextual analysis in the trial court's dismissal order. See *Plaintiff's Motion for Reconsideration,* Apx. Vol. II at 69-70. Even so, as with its dismissal order, the trial court's order on her motion for reconsideration was devoid of any such analysis. See Apx. Vol. I at 12. Nor did the Defendants undertake any such analysis in their motions to dismiss. While this task is generally for the trial court to complete in the first instance, Plaintiff has nevertheless included it in this brief for this Court's consideration. Plaintiff has requested a remand, should this Court decline to perform this analysis in the first instance. See *Conclusion of Brief*.

As this brief outlined in the previous section, the author of an opinion may not escape liability by merely couching his or her statements as such, but rather by fully disclosing the factual basis for her or his opinion.

As an initial matter, Plaintiff notes that this discussion only applies to the statements as published in the online and print *Monitor* articles (counts 50 and 51). Count 49 related to the statement as communicated by Hall to Ray Duckler, the author of the articles. In stating that "Hall was reached at his part-time residence," the *Monitor* articles infer that Hall communicated the information to Mr. Duckler during a phone conversation. At this stage, the exact context within which this presumably verbal statement was made is not ascertainable without the benefit of discovery. See *Garrett v. Tandy Corp*., 295 F. 3d 94, 106 (1st Cir. 2002) (allowing opinion-based defamation claim to proceed to "discovery in order to clarify exactly what was said and to develop the facts necessary to put what was said in a meaningful context").

In analyzing the written statements within the greater context of the print and online *Monitor* articles and against the legal backdrop so far developed, it becomes evident that the articles are devoid of facts underlying Hall's opinion such that readers could draw their own conclusions about it. Tellingly, neither Hall nor the *Monitor* ever argued before the trial court, nor could they, that the articles fully disclosed the facts underlying Hall's opinion.

The full set of facts which underlie Hall's opinion were published as part of a summary judgement motion filed in the civil action. ***However, even if they had been adequately referenced or disclosed in the articles, since the facts regarding Plaintiff's research into Golub's work and the similarities between the artists are false, they cannot provide an escape***

from liability for the Defendants at this stage. See *Complaint*, Apx. Vol. II at 6, 7. See *Milkovich* at 19 ("Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.").

Devoid of any adequate factual disclosure, the *Monitor* articles as a whole only further bolster the inference of the existence of undisclosed facts to an already factually laden statement—the accusation of the crime of forgery. Before a reader encounters Hall's statement, the *Monitor* articles refer to "the fraud" and the jury verdict in Hall's favor. See *Monitor Articles,* Apx. Vol. II at 15-22. Given that the articles were published a few days after the end of trial, and the fact that legal battles are widely recognized by the populace as fact intense and fact revealing battles, an average and reasonable reader could readily conclude that Hall, having personally initiated the legal proceedings, was in a position to gain knowledge of evidence being introduced during the course of the litigation that Lorettann Gascard, the "art professor"[5] had painted the works.

Moreover, given that the article right from the start mentions "multi-millionaire" Hall's "instincts and vision on Wall Street" and that his "ability to predict oil markets lead to great wealth" a reader would be even less likely to conclude that someone with Hall's incredible success, track record and intellect would jump to rash conclusions without being in possession of supporting facts. Compare to *Boyle v. Dwyer*, 216 A. 3d 89, 98 (N.H. 2019) (dismissing opinion-based defamation claim where "the facts on which the defendant based her opinion…were fully disclosed[]"). See also *Automated Transactions* at 82 (concluding that "the challenged statement does not imply the existence of undisclosed defamatory facts. On the contrary, the facts…upon which the statement is based are clearly stated….")

Finally, and in further alignment with *Milkovich*, the *Monitor* articles contained no response from the targets of the criticism, in this case Lorettann Gascard. Nor does the general tone of the articles negate the implication of undisclosed facts. The *Monitor* articles, just as the column at issue in *Milkovich,* maintain a sufficiently solemn tone, and base their reporting on the

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[5] The articles' reference to Plaintiff as an "art professor" cannot constitute an underlying fact, as it is incorrect. See *Complaint*, Apx. Vol. II at 8. Nor can the *Monitor* articles' brief reference to Lorettann Gascard as "an artist," (assuming that it is even attributable to Hall) in light of the factually laden nature of criminal accusations, dispel the articles' implication of undisclosed facts.

facts surrounding the civil action, the parties and the outcome of the action. See *Milkovich* at 21 ("This is not the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.")

CONCLUSION

Whether an alleged statement of opinion is couched in uncertainty or otherwise presented in the form of an opinion is not determinative of whether the statement is actionable as a matter of law. As *Milkovich* stated, to hold otherwise would be to invite serious abuse on the part of the libel defendants seeking to escape liability for otherwise fact implying and damaging statements. Thus, the governing precedent set by *Milkovich* which New Hampshire Courts are bound to follow, has long since closed the loophole that the trial court improperly reopened for Mr. Hall and the *Monitor*. Furthermore, the *Monitor* articles, having failed to fully disclosed the statement's factual basis, only strengthen the implication that Hall was in possession of undisclosed facts which lead him to the conclusion that Lorettann Gascard painted the works.

By way of the foregoing, Plaintiff, Lorettann Gascard, respectfully asks this Honorable Court to reverse the order of the Sullivan County Superior Court dismissing counts 49, 50 and 51. Should this Court decline, in the first instance, to analyze the statements at issue in the context of the articles in which they appear, Plaintiff also respectfully requests that this Court remand with instructions to the trial court to properly analyze the statements in full context, before issuing its ruling on this appeal.

STATEMENT ON ORAL ARGUMENT

Plaintiff submits to this Court that the trial court misapplied settled law, and that the circumstances of this misapplication have been comprehensively addressed in this brief. Plaintiff therefore waives oral argument. However, should this Honorable Court nevertheless decide that its decisional process would be aided significantly by oral argument, Plaintiff looks forward to clarifying, by way of oral argument, any issue this Court deems inadequately addressed in this brief.

RULE 16 (3) (i) CERTIFICATION

I hereby certify that the appealed decisions are in writing and are submitted in a separate appendix at the time this brief is filed.

/s/ Nikolas Gascard
Nikolas Gascard

Respectfully submitted,

LORETTANN GASCARD

By her non-attorney representative,
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Dated: October 12, 2021

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STATEMENT OF COMPLIANCE

Plaintiff hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with New Hampshire Supreme Court Rule 26(2)-(4). Further, this brief complies with New Hampshire Supreme Court Rule 16(11), which states that "no other brief shall exceed 9,500 words exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters." Plaintiff certifies that the brief contains 4710 words (including footnotes) from the "Questions Presented" to the "Conclusion" sections of the brief.

/s/ Nikolas Gascard
Nikolas Gascard

CERTIFICATE OF SERVICE

I hereby certify that on this date, a true and exact copy of the foregoing was sent by electronic mail to all parties via the New Hampshire Supreme Court'selectronic filing system.

October 12, 2021

*/s/ Nikolas Gascard*______
Nikolas Gascard