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

REPLY BRIEF FOR THE PLAINTIFF LORETTANN GASCARD
TO BRIEF OF DEFENDANT ANDREW J. HALL

Submitted by her non-attorney representative:

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ARGUMENT

I. Hall sets forth several arguments in his brief that are not properly before this Court for review.

The issue that is the focus of this appeal is whether the trial court erred in holding that Hall's statement, couched as opinion, that Plaintiff painted the works[1] at issue in the action he filed against Plaintiff and her son, dispels any inference of undisclosed facts when considered in full context. While Hall's brief does argue this issue, he presents several additional arguments not treated by the trial court in its opinions. Hall also argues that, a) there is no inference that Hall made the statement; b) the statement is absolutely privileged; c) the statement is incapable of being proven true or false; and d) painting of another's work is not a crime.

In addition to signaling a lack of confidence in the issue that is the focus of this appeal, Hall presents arguments that were not were addressed in the trial court orders being appealed. Accordingly, they are not up for review before this Court. See *Carter v. Liberty Mut. Fire Ins. Co*., 135 N.H. 406, 409 (1992) (issue not resolved by trial court unripe for appellate review). See also *Winecellar Farm, Inc. v. Hibbard*, 27 A. 3d 777, 790 (N.H. 2011) (declining to review issue where "trial court's decision was silent on the matter"). Hall even admits that his absolute privilege argument "was not addressed by the trial court[.]" See HB (Hall's Brief) at 11.

This Court should for this reason alone limit its review to the issue treated by the trial court's orders and to the question presented by Plaintiff in her opening brief. Nevertheless, Plaintiff addresses Hall's new arguments below, in addition to his argument related to the issue before this Court. See *Section IV*.

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[1]In reference to footnote 3 of Hall's brief: Hall's statement that there is "no argument" that some of the works are authentic is factually supported by the record as it is alleged in the Complaint and clearly presents a pain point for Hall, since **he, as a sophisticated collector of Leon Golub, will be left to explain why he proceeded to trial with claims for works which he believed were unarguably authentic.** Nevertheless, the circumstances under which this statement was made and any related disputes concerning it involve issues of fact and law not currently before this Court, as even Hall admits. See HB at 5. At this point they only serve to distract from the core issue of the appeal. Suffice it to say that this and other facts alleged in Plaintiff's Complaint enjoy the presumption of truth without being challenged by improperly venturing outside of its four corners as Hall had done in an attempt to explain away this damning statement.

II. The trial court, drawing all inferences in favor of Plaintiff, properly assumed that Hall made the statement as alleged.

Departing from the *Monitor's* own stance, Hall unsurprisingly advocates for a source other than himself as the origin for the statement at issue (i.e., public court records or another news article). See HB at 5. However, such an inference is not supported by the fact the statement's source is not referenced accordingly, as would be expected in such as a case. What the article does infer is that the source for all of Hall's statements, published in the article, quoted or unquoted, was an interview conducted via a phone conversation. Compare to *Englert v. MacDonell*, No. 05-1863-AA. (D. Oregon 2010) (disposing of claim at summary judgment where court found "no evidence that [defendant] spoke to the reporter or caused any statement by him to be published or republished in the article").

Nor is the lack of quotes indicative of a source other than Hall for the statement. In the paragraphs just preceding the paragraph containing the statement at issue, Ray Duckler, the author of the article, published statements, in both quoted and unquoted[2] form, presumably taken from an interview with auctioneer Dudley Cobb.

The trial court in its motion to dismiss order properly drew all inferences in favor of the facts alleged and assumed for the purposes of the motion that Hall made the statement to the *Monitor*.

III. The absolute privilege cannot apply to Hall's post-trial, extra-judicial statement.

Further, Hall contends that his statement is protected by the absolute privilege. See HB at 7. It is uncontested that Hall's statement was not uttered "in the course of judicial proceedings," see *McGranahan v. Dahar*, 119 N.H. 758, 762 (1979), during which it would clearly enjoy absolute privilege (i.e., at a deposition, a court hearing or at a trial). Nor was it made in preparation for litigation, having been made to the press after the conclusion of trial. See

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[2] To the extent that Hall argues that the lack of quotes in and over itself is dispositive, Hall fails to provide any support for this contention. See *Ludlow v. Northwestern University*, 79 F. Supp. 3d 824, 838 (N.D. Ill. 2015) ("Neither party provides any case law stating that a plaintiff cannot state a claim for defamation based on comments, rather than quotes, to a newspaper; therefore, the fact that Schapiro is not quoted is not dispositive.").

Provencher v. Buzzell-Plourde Assoc., 142 N.H. 848, 855 (1998) ("[P]ertinent pre-litigation communications between a witness and a litigant or attorney are absolutely privileged from civil liability[.]").

Moreover, courts have explicitly recognized that statements to the press do not serve the policy considerations underlying the absolute privilege and are therefore not protected by it. See *Pratt v. Nelson*, 164 P. 3d 366 (Utah 2007) footnote 83 ("[A]bsolute immunity has been confined to very few situations where there is an obvious policy in favor of permitting complete freedom of expression such as a judicial proceeding and … although a judicial proceeding has not been defined very exactly, it is clear ... that statements given to the newspapers concerning the case are no part of a judicial proceeding, and are not absolutely privileged") (internal quotations omitted); See also *Green Acres Trust v. London*, 141 Ariz. 609, 614 (Ariz. 1984).

The absolute privilege therefore does not dispose of the claims against Hall.

IV. Hall's statement, taken in the context of the *Concord Monitor* article, infers the existence of undisclosed facts.

In sole support of his argument[3] that his statement does not imply the existence of undisclosed facts, Hall contrasts his statement with the following hypothetical statement provided by the *Garrett* court*,* made by an exterminator after undertaking an inspection of somebody's dwelling: "I suspect that your house is infested with termites." See *Garrett v. Tandy Corp.*, 295 F. 3d 94, 104 (1st Cir. 2002). Hall notes that this statement "implies the existence of undisclosed facts because the inspector conducted an inspection and may have seen something." Plaintiff submits that his own statement is in line with this example from *Garrett* as it was, as Hall himself describes, made "by a litigant who a jury had concluded had been defrauded" and therefore signals that he (the litigant) may have learned something over the course of the litigation pertaining to Lorettann having forged the works.

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[3] Although Hall states that "[t]he 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" Hall's argument does not relate to any other part of the article other than the statements "believed" and "he never knew for sure." See HB at 9.

For brevity's sake, since Hall's argument is significantly aligned with those of the *Monitor*, Plaintiff respectfully refers this Court to Plaintiff's forthcoming reply to the *Monitor'*s own opposition brief, for Plaintiff's full set of arguments on this issue.

V. Hall's couched language does not render the statement, charging criminal conduct, incapable of being proven as true or false.

Hall concludes by arguing that, pursuant to *Milkovich,* the couched language "believe" or "never knew for sure" renders his statement loose, figurative or hyperbolic, incapable of being proven true of false. See HB at 10. Nothing in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) stands for this proposition. To the contrary, *Milkovich* explicitly held, and Hall himself admits, that such language is not "dispositive for purposes of a defamation claim." See HB at 10. Moreover, just like in *Milkovich,* the statement as issue involved an accusation "of criminal activity [which] generally give[s] rise to clear factual implications." See *Thomas v. Telegraph Pub. Co.*, 929 A. 2d 993, 1016 (N.H. 2007) citing *Jorg v. Cincinnati Black United Front*, 153 Ohio App.3d 258, 792 N.E.2d 781, 784 (2003) (quotations omitted). Therefore, the statement at issue is clearly capable of being proven as true or false.

Lastly, in reference to Hall's terse assertion that the painting of another's work does not constitute forgery, see HB at 10, footnote 6, pursuant to N.H. RSA 638:1, the signing of a work of art "with the purpose to defraud anyone" would constitute criminal forgery under New Hampshire law.

CONCLUSION

Plaintiff, Lorettann Gascard, respectfully asks this Honorable Court to reverse the order of the Sullivan County Superior Court dismissing counts 49, 50 and 51 of Plaintiff's Complaint.

Respectfully submitted,

LORETTANN GASCARD

By her non-attorney representative,
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Dated: November 29, 2021

*/s/ Nikolas Gascard*________________
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STATEMENT OF COMPLIANCE

Plaintiff hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this reply brief complies with New Hampshire Supreme Court Rule 26(2)-(4). Plaintiff further certifies that this reply brief complies with the word limitation of 3,000 words and that it contains 1,526 words (including footnotes) from the "Argument" to the "Conclusion" sections of this 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's electronic filing system.

November 29, 2021

*/s/ Nikolas Gascard*______
Nikolas Gascard