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 NEWSPAPERS OF NEW HAMPSHIRE, INC., D/B/A CONCORD MONITOR

Submitted by her non-attorney representative:

Nikolas Gascard
P.O. Box 231
Keene, NH 03431
(603) 352-6604
nikolas.g@me.com

TABLE OF CONTENTS

TABLE OF CASES

ARGUMENT

I. The *Monitor* ignores that a lack of factual disclosure itself implies the existence of undisclosed facts.

The *Monitor* characterizes Hall's account, featured in the article, as "forthright," "self-revealing" and "credible." See MB (Monitor's Brief) at 16. However, Hall, the man who proceeded all the way to trial and a fraud verdict on works he believed were unarguably authentic, was not sufficiently forthright to disclose the full set of facts which underlie his opinion. The reason for his not doing so was apparently the erroneous basis for his opinion. This lack of factual disclosure is evident from the article and crucial to this Court's determination since as the *Monitor* in its brief ignores: ***A lack of factual disclosure (regardless of the statement's qualification) itself implies the existence of undisclosed facts.*** See *Milkovich v. Lorain Journal Co*., 497 US 1, 18-19 (1990); see also *Suzuki Motor Corp. v. Consumers Union of US*, 330 F. 3d 1110, 1117 (9th Cir. 2003) ("The logic behind the rule is straightforward and unassailable: When a publisher prints an opinion but doesn't state the basis for it, the reader may infer a factual basis that doesn't exist.") Had Hall fully disclosed the facts in his possession, a reader would not infer the existence of undisclosed facts, which must be assumed to be numerous as "accusations of criminal conduct are statements 'laden with factual content'," with Hall's statement published at the heal of a civil action that he personally commenced. See *Ollman v. Evans*, 750 F. 2d 970, 980 (D.D.C. 1984).

Moreover, the article's reference to Lorettann Gascard as an "art professor," a fact not even part of Hall's factual basis[1], misleads the reader, as it directly cuts to her propensity and ability to paint the works at issue. Thus, this false fact, only serves to strengthen the inference that undisclosed facts were introduced during the course of the civil action pertaining to Lorettann Gascard forging the works. The *Monitor* advocates for its truthfulness by arguing that it accurately describes Lorettann Gascard's activity as an art history professor. See MB at 26. However, the *Monitor* fails to appreciate the crucial difference between a professor of art history, a theoretician by trade and profession and an art professor, who is known to teach techniques of

[1] The reasons underlying his belief were provided by Hall in response to interrogatory questions, months before the publication of the articles. See Plaintiff's Brief, *Complaint*, Apx. Vol. II at 6-7.

studio painting and drawing in a professional capacity. Compare to *Phantom Touring, Inc. v. Affiliated Publications*, 953 F. 2d 724, 730 (1st Cir. 1992) (dismissing claims where court found a "full disclosure of the facts underlying [the] judgment—none of which have been challenged as false").

II. The very facts from the article that the *Monitor* highlights as dispelling an implication of undisclosed facts, when considered properly together with the article as a whole, in fact strengthen the implication or remain at best neutral on the issue.

The *Monitor* presents a number of passages from the article that it believes, when coupled with Hall's qualification *"he never knew for sure,"* dispel the implication of the existence of any undisclosed facts. In support of this argument, the *Monitor* relies on several cases in which courts found no implication of undisclosed facts due to the uncertain or speculative nature of the statements at issue. See MB at 20-21. Although Hall states that they "firmly anchor Hall's statements non-actionable," in each of these cases, unlike here, a disclosed and truthful factual basis was present. See *Piccone v. Bartels*, 785 F. 3d 766, 773-774 (1st Cir. 2015) ("The transcript of Defendant's conversation with Carbone shows that Defendant disclosed several non-defamatory facts underlying his 'assum[ption] that [Plaintiffs] know where they are.'"); *Elias v. Rolling Stone LLC*, 872 F.3d 97, 111 (2d Cir. 2017) (the "statements clearly represent Erdely's interpretation of the Article based on the words in the Article…"); *Mar-Jac Poultry, Inc. v. Katz*, 773 F. Supp. 2d 103, 123 (D.D.C. 2011) (disclosure of a "chart that listed Mar-Jac as an entity in the so-called Saar Network [which] identified some candidates through which Ms. Katz alleged that money flowed."). This distinguishes[2] these cases from the present case. Since here a factual basis is absent, Hall's accusation of criminal activity, whether qualified or not[3], is capable of implying a factual basis regardless of the article's reporting on the civil

[2] Further distinguishing *Mar-Jac Poultry, Inc.,* the statements at issue in that case conveyed more uncertainty than conveyed by Hall, with the court holding that "[a]ny further implication that Mar-Jac acted knowingly in laundering money to assist terrorists or terrorist groups ***remained so unspoken*** that it, too, could only be — at best — speculation and surmise." (italics and emphasis added)

[3] Courts have held that with accusations of criminal conduct "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) and such should be said to be particularly the case whereas here, the factual basis is not disclosed and a published fact is misleading and false.

action. This is exactly the proposition that *Milkovich* stands for and is one the *Monitor* fails to appreciate in stating that "[h]ad [Hall] not added the qualification, Hall's belief about Lorettann could have implied to readers he was aware of facts to support his belief." See MB at 17.

Nevertheless, the very facts that the *Monitor* highlights from the article in support of its argument in fact strengthen this implication, rather than dispel it:

The *Monitor* argues that Hall's qualified statement communicated to the reader that he "*lacked knowledge because the Golub Foundation representative and expert at trial concluded only that the paintings were 'forgeries,' not who had painted the forgeries*." See MB at 16.

The *Monitor* however interprets these facts in isolation and ignores that the reader is also informed about the case culminating in a fraud verdict against Lorettann Gascard, falsely described as an "art professor." The action against her was not based in contract or negligence for which a mere showing of inauthenticity of the works would have sufficed. A fraud verdict demands a great deal more evidence, set against a higher evidentiary standard. A standard which would certainly have been satisfied with the introduction of evidence that Lorettann Gascard had painted the works, thereby establishing that she knew them to be forgeries. Notably, the article does not report on exactly how the fraud verdict was reached. ***Therefore, it is exactly this information gap between Hall's statement and the other facts in the article, which strengthens the implication of the existence of undisclosed facts.*** Compare to *Phantom Touring* at 731 (barring suit where nothing in challenged articles indicated that author "or anyone else, had more information" about the defamatory allegations than was reported in the articles). Said differently and in short: The article's facts certainly provide a basis for an opinion on the authenticity of the works, not who painted them.

The *Monitor* further points to the article's reference *to "Hall's interactions with the Gascards and his discovery of the forged paintings"* as dispelling any inference of undisclosed facts. See MB at 25. These events however stand neutral at best on whether Lorettann Gascard painted the works and what facts relating thereto may have come up during the litigation and trial. At any rate the reader is made to understand that they occurred prior to Hall commencing his civil action.

The *Monitor* also relies on the article's reference to Hall's extreme anger over his *"monetary loss"* and the "*damage [the Gascards] were doing to the reputation and legacy of Leon Golub."* The *Monitor* argues that *"despite his anger he declined to make an accusation*

about Lorettann he did not believe to be true." See MB at 22. The *Monitor* appears to again argue that the qualification at issue here aids in dispelling the existence of undisclosed facts. However, given that a factual basis is completely absent from the article and the implication of undisclosed facts is only strengthened by the article's reporting as shown above, any reference to Hall's anger cannot be said to dispel this notion and stands at best neutral on the issue.

The *Monitor* finally holds out the article's reference to Hall's self-described naïveté and his lack of due diligence, which related exclusively to his purchase of the works, as dispelling any implication of undisclosed facts. MB 22, 27. Setting aside the question how naïve a billionaire Wall Street oil trader could realistically be, the clear import of the article is that Hall, while perhaps less than diligent at the time of the sales, is an otherwise extraordinarily astute and cunning man. These traits lead to extreme success and wealth and the means for Hall to purchase the art works and initiate legal proceedings against the Gascards. The very first sentence of the article only underlines this: "*Sometimes,* even a man nicknamed God can be fooled." Therefore, any reference to Hall's naivety or lack of diligence does not in the least dispel the notion that Hall was in possession of facts relating to Lorettann Gascard painting the works, which he may have learned over the court of the civil action.

Notably, the *Monitor* also argues, in contradiction with the above, that a Wall Street investor would not have used the qualifier if he had been in possession of such facts. See MB at 17. Setting aside that this assertion contravenes the principle regarding couched language set out in *Milkovich*, the *Monitor* cannot have it both ways in arguing that Hall is at once naïve and incompetent while at the same time a successful Wallstreet investor when it serves its arguments. Compare MB at 17 and 22. Hall cannot be both a master of the universe and a babe in the woods. The article can only be reasonably understood to convey the former and, as Plaintiff stated in her opening brief, a reader would not likely expect that someone of Hall's stature would make the statement, even in couched form, without being in possession of underlying facts.

III. The holding in *Milkovich* applies here and does not usurp the application of New Hampshire law.

The *Monitor* also contends that the trial court's ruling should be upheld since the facts in *Milkovich* are distinguishable from those in the present case. See MB at 5. As Plaintiff already

laid out in her opening brief, while this Court in *Boyle* recognized that the U.S. Federal Supreme Court can impose "additional limitations in defamation cases" (i.e., the use of qualifiers not rendering fact implying statements non-factual), New Hampshire state law still applies here. According to the applicable New Hampshire law, "an opinion statement, is actionable only if it implies the existence of an undisclosed defamatory fact." See *Boyle v. Dwyer*, 216 A. 3d 89, 99 (N.H. 2019) citing *Thomas*, 155 N.H. at 338, 929 A.2d 993. Plaintiff respectfully submits that Hall's statement for the reasons given in Plaintiff's briefs meets this bar. In *Milkovich*, the disclosed facts were found to be true. The defendant disclosed to readers that he had attended both the wrestling meet and subsequent hearing and that he was the only person who had attended both events. A reader was therefore unable to fully share in all of the facts underlying the defendant's opinion that Michael Milkovich had perjured himself during a court proceeding which overturned the ruling of the hearing. This has an equivalent effect as not disclosing the facts which underly an opinion, as is the case here. While the defendant in *Milkovich* court was in a "unique position" to know facts about the plaintiff, the legal standard applicable in this case may be satisfied either by showing that a defamation defendant is either "uniquely situated" to know facts or by implying a knowledge of undisclosed facts. See *Bourne v. Arruda, Dist. Court*, No. 10-cv-393-LM (D.N.H. 2013) ("Had Brooks, for example, included a statement implying he had knowledge of additional objective facts … to support his opinion, ***or*** that he was uniquely situated to know the facts about [the plaintiff], the case might properly be decided by a jury.") (emphasis added).

The *Monitor* further argues that since the article published *"Hall's account that Lorettann was in Golub's art class in the 1960s, she and her family had formed a 'close bond' with Golub, and that the Gascards inherited the paintings after they were found in the closet of a relative who had died[,]"* the article implicitly invited the reader to draw their own conclusion about Hall's statements from the "mixed information provided." See MB at 22*; Phantom Touring* at 731. However, in the *Phantom Touring* court, to which the *Monitor* cites, the defendant provided a "full disclosure of the facts underlying his judgment — none of which [had] been challenged as false." See *Phantom Touring* at 730. Here, by contrast, the article is devoid of an adequate factual basis to Hall's statement. The *Monitor* therefore cannot point to a supposed counter to a factual basis that was never disclosed to begin with. As published, these facts stand as mere background information to the civil case, nothing more.

IV. Count 49, pertaining to Hall's verbal statement to the *Monitor*, requires discovery and should be considered separately from counts 50 and 51.

While discovery is not needed to analyze the counts relating to Hall's statements as they appear in the articles (counts 50 and 51), it is needed to put Hall's verbal statement to the *Monitor* into proper context (count 49). See MB at 26. While the article infers that Hall did communicate his belief to the article's author via a phone conversation, the statement itself, as Hall in his reply noted, along with several statements attributed to Hall, appear unquoted. As such it, is not possible at this stage to ascertain to what extent, if at all, Hall verbally disclosed his factual basis to the article's author, Ray Duckler. See *Garrett v. Tandy Corp.*, 295 F. 3d 94, 106 (1st Cir. 2002).

As with count 49 here, the *Garrett* court did not have the benefit of the statement's entire context and therefore allowed for discovery. Assuming that the trial court in this case, performed the relevant contextual analysis for counts 50 and 51, *Garrett* still applies to Hall's verbal statement (count 49). And while in *Garrett,* the alleged statement was verbal and its "level of certitude" not yet clear, the court assumed for the purposes of its analysis that the statement had been qualified with "I suspect," a term identical to the one used here. See MB at 24-25.

V. The trial court's order never dealt with the *Monitor*'s argument that Plaintiff failed to show that the *Monitor* failed to exercise reasonable case. Moreover, the Complaint alleges facts which infer that the *Monitor* failed to exercise reasonable care.

The *Monitor* also requests this Court to affirm the trial court's ruling on an alternative basis, arguing that the Complaint fails to allege facts that the *Monitor* failed to exercise reasonable care in publishing Hall's statement.

Firstly, this issue is not before this Court for review as the trial court's orders did not rule on it. 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"). The trial court decided not the rule on this issue and accordingly it is not up for appellate review. This Court should therefore decline to rule on this issue in the first instance.

Secondly, the *Monitor* is plainly wrong in stating that Plaintiff failed to dispute this point in her objection to the *Monitor's* motion to dismiss. See Addendum at 13. Nor can Plaintiff be held to curing an alleged defect to an issue that was not even treated in the trial court's order. See MB at 28. Nevertheless, while the *Monitor* is correct that Plaintiff must allege that the *Monitor* failed to exercise reasonable care in publishing the defamatory statement, see *Automated Transactions v. American Bankers*, 216 A. 3d 71, 77 (N.H. 2019), the *Monitor* ignores that the Complaint alleges, that Ray Duckler, the author of the article, made no effort to contact either of the Gascards to hear their side of the story. See Plaintiff's Brief, *Complaint*, Apx. Vol. II. at 10. The *Monitor* acknowledges this fact in its own brief. See MB at 7. The article clearly features no direct statements from either of the Gascards. See *Mandel v. Boston Phoenix*, Inc., 456 F. 3d 198, 209-210 (1st Cir. 2006) (negligence found on the part of publisher who failed to contact individuals who might have provided opposing views). Nor did the *Monitor* publish the facts underlying Hall's opinion. At the very least, the Complaint sufficiently alleges negligence on the part of the *Monitor* in republishing Hall's false and defamatory *per se* statement.

CONCLUSION

For the reasons provided in Plaintiff's opening brief and replies, Hall's statement, even couched as opinion, implies the existence of undisclosed defamatory facts.

Plaintiff, Lorettann Gascard, thereby 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,
Nikolas Gascard

Dated: December 1, 2021

/s/ Nikolas Gascard

Nikolas Gascard
P.O. Box 231
Keene, NH 03431
(603) 352-6604
nikolas.g@me.com

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 2,885 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 and by first class mail to all other parties/counsel not registered with the electronic filing system.

December 1, 2021

/s/ Nikolas Gascard
Nikolas Gascard

ADDENDUM

III. Plaintiffs have stated valid defamation claims against the Monitor.

Counts 50 and 51

A. The Monitor failed to exercise reasonable care in republishing Hall's defamatory statement.

Mtd., Par. 12: In support of its contention that Counts 50 and 51 should be dismissed, the Monitor posits that Plaintiffs have not "alleged that the Monitor failed to exercise reasonable care[14] in publishing the statement they complain about." As the Complaint alleges, Mr. Duckler, the author of the article, made no effort to contact either Plaintiffs to hear their side. *Compl. 280. See Mandel* (negligence found on the part of publisher who failed to contact individuals who might have provided opposing views). Nor did the Monitor publish the facts underlying Hall's opinion, instead it published Hall's opinion as defamatory fact. At the very least, the Complaint sufficiently alleges negligence on the part of the Monitor in republishing Hall's false and defamatory *per se* statement.

B. Hall's statement, republished by the Monitor, did not fully disclose the factual basis underlying his opinion and implied the existence of undisclosed facts and is therefore actionable.

Mtd., Par. 13: The Monitor argues that the statement, **"[Hall] had said that he believed Lorettann, an artist herself, had painted the forgeries,"** complained of in Counts 50 and 51, *Compl., Exhibit X, Y,* should be dismissed as non-actionable opinion. In doing so, the Monitor ignores the standard that it itself explicitly acknowledges on page 3 of its Motion and blames Plaintiffs for not taking into account—namely that an alleged defamatory statement must be read in context. *Mtd., Pages 1, 2*. To begin with, the Monitor contends that the statements *"…he believed…" and "…but he never knew for sure*" accompanying Hall's statement, aid in bringing Hall's accusation into the realm of opinion and out of that of fact. This contention, however,