THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2021-0151

Lorettann Gascard

v.

Andrew J. Hall and Newspaper New Hampshire, Inc.,
d/b/a Concord Monitor

Rule 7 Mandatory Appeal from
Sullivan County Superior Court

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

William L. Chapman
NH Bar #397
Elizabeth C. Velez, Esq.
NH Bar #266579
Orr & Reno, P.A.
45 S. Main Street, P.O. Box 3550
Concord, NH 03302-3550
Phone: (603) 224-2381
Fax: (603) 224-2318
wchapman@orr-reno.com

To be argued by:
William L. Chapman

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QUESTION PRESENTED FOR REVIEW

1. A statement of opinion is not defamatory unless the statement may reasonably be understood to imply the existence of defamatory facts. The trial court granted appellees' motions to dismiss defamation claims after concluding that the statement Hall "believed [the plaintiff], an artist herself, had painted the forgeries, but he never knew for sure" did not imply the existence of undisclosed defamatory facts when considered in the context of the publication as a whole. Did the trial court err?

STATEMENT OF THE CASE AND FACTS

The following facts are taken from the complaint and exhibits[1] filed by Nikolas and Lorettann Gascard, a retired art history professor, in this case. They owned many works of art purportedly painted by Leon Golub. CM Appendix 4 ¶17; 7 ¶ 28. The Gascards say they inherited the paintings from two family members. CM Appendix 7 ¶ 28. From 2009 to 2011, Andrew J. Hall, a hedge fund manager and art collector, purchased twenty-four paintings he believed to be Golubs from the Gascards' collection. CM Appendix 7 ¶19; 8 ¶38.

[1] The plaintiff only included excerpts of the complaint, exhibits X and Y (the Concord Monitor December 4 and 5, 2018 columns), the Concord Monitor's motion to dismiss, filings related to Andrew J. Hall's motion to dismiss, and the trial court's February 15, 2021 order in her appendixes. These excerpts omit relevant background facts about the sale and discovery of the forged Golub paintings and do not provide this Court with an adequate record. The Concord Monitor is submitting an appendix with the entire trial court order, complaint, and filings related to its motion to dismiss. Citations to the record are as follows:
"LB __" refers to Lorettann's brief and page number.
"L Appendix __" refers to the cited volume of Lorettann's appendix and page number.
"CM Appendix __" refers to the Concord Monitor's appendix and page number.

In late 2014, Hall began preparing to exhibit his Golub collection—including the paintings the Gascards had owned—and the director of his art foundation, Maryse Brand, contacted the Spero-Golub Foundation ("Golub Foundation") to confirm information about the collection. CM appendix 5 ¶ 10; 10 ¶¶ 45, 46. A representative of the Golub Foundation inspected Hall's collection and, together with one of Golub's sons, a board member of the Golub Foundation, emailed Brand to advise her the twenty-four paintings acquired from the Gascards were "likely forgeries." CM Appendix 10 ¶50. Brand, in turn, forwarded the contents of the email to Hall. CM Appendix 10 ¶54.

In September 2016, Hall filed a civil action in the Federal District Court of New Hampshire against Nikolas and Lorettann Gascard alleging they sold him forged art. CM appendix 3¶¶ 2-3; 10 ¶58. On November 29, 2018, after a five-day jury trial, Hall prevailed in his civil case. CM appendix 35 ¶ 255. The jury awarded damages of $465,000. CM Appendix 35 ¶256; 79.

On December 4, 2018, after the conclusion of the civil case, the Concord Monitor published an online article by columnist Ray Duckler titled "Art of deception: Collector awarded $500K after buying fraudulent paintings." CM Appendix 37 ¶¶ 269-274; 79-82. The column stated that "[Hall] had said that he believed Lorettann, an artist herself, had painted the forgeries, but he never knew for sure."[2] CM Appendix 38 ¶ 274; 78. On

[2] The Gascards did not include the entire statement as published in their complaint. They left out the phrase "but he never knew for sure." CM Appendix 103. The trial court noted this discrepancy and analyzed whether the entire statement as published was defamatory. *Id.* at 102-04, 118-19. On appeal, Lorettann acknowledges she failed to include the full statement in her complaint and acknowledges that the court should decide whether the statement, taken as a whole as published, is defamatory. LB 9.

December 5, 2018, the column appeared in the print edition of the Concord Monitor. CM Appendix 38 ¶¶ 276-278; 81-83. Duckler did not contact the Gascards or their attorney before publishing the column. CM Appendix 38 ¶280.

The Gascards subsequently brought a seventy-three page, fifty-one count complaint against Hall, Newspapers of New Hampshire, Inc. d/b/a the Concord Monitor, and several other media defendants accusing each of them of defamation. CM Appendix 3-83. At issue in this appeal are three counts related to the statement Hall made to Duckler "that he believed Lorettann, an artist herself, had painted the forgeries, but he never knew for sure." Count forty-nine alleged that Hall defamed Lorettann by making that statement to Duckler. CM Appendix 72 ¶¶ 504-508. Count fifty alleged that Hall and the Concord Monitor defamed Lorettann when the Monitor republished Hall's statement online. CM Appendix 72-73 ¶¶ 509-513; 76-80. Count five-one alleged that Hall and the Concord Monitor defamed the Lorettann when the Monitor republished Hall's statement in print. CM Appendix 73-74 ¶¶ 514-518; 81-83. Lorettann claimed the columns are defamatory because they "fail[ed] to disclose the full factual basis and impl[ied] the existence of undisclosed facts underlying Hall's belief that Lorettann painted the twenty-four paintings" and therefore "conveyed Hall's belief as a statement of fact." CM Appendix at 38 ¶281; *see also* ¶ 275.

Hall, the Concord Monitor, and the other media defendants moved to dismiss. CM Appendix 84-99; L Appendix II 23-31. After a hearing, the court dismissed each of the counts brought against Hall, the Concord Monitor, and the other media defendants. CM Appendix 126. The court

reasoned that the defamation claim against Hall failed as a matter of law because when his statement was considered in the "context of the publication as a whole" and "viewed in its totality, the statement, couched as conjecture, does not imply it is grounded on undisclosed defamatory facts." CM Appendix 103-04. The court dismissed the identical claim against the Concord Monitor for the same reasons: "the statement is an opinion with no undisclosed defamatory facts." CM Appendix 119.

The trial court denied the Gascards' motion for reconsideration. L Appendix I, 11-13. Thereafter, Lorettann appealed to this Court the trial court's dismissal of counts forty-nine, fifty, and fifty-one.

SUMMARY OF THE ARGUMENT

When Hall told Duckler "that he believed Lorettann, an artist herself, had painted the forgeries, but he never knew for sure," he was expressing his personal "belief" about which he forthrightly admitted doubt. The First Amendment protects a person's right to share a belief, impression, or opinion so long as it is clear that what the person said cannot be reasonably understood to imply the existence of defamatory facts. The trial court concluded that Hall's statement was non-actionable as a matter of law. The language he used considered in the context of what he told Duckler, as Duckler reported, dispelled any implication of undisclosed defamatory facts.

The trial court's conclusion is correct. Even after his interactions with the Gascards and the investigation he undertook into the origins of the paintings that revealed they were "likely forgeries," not to mention the five-day trial about the paintings, Hall stated he "never knew for sure" whether

his belief was correct. A person reading the column would expect Hall, given "his instincts and vision on Wall Street," having just convinced a jury the paintings were forgeries, to state, without qualification, that Lorettann had painted them *had he been aware of such facts.* His statement – with the explicit qualification "but he never knew for sure" – cannot be understood to imply defamatory facts. The tone and content of the column do not bolster Hall's belief. To the contrary, the column included facts that gave readers reason to understand his statement did not imply defamatory facts about Lorettann. They include, for example, the Gascards' account of Lorettann's "close bond" with Golub, and how they came to own the paintings, thereby inviting readers to come to their own conclusion.

The trial court's ruling that Hall's "statement, couched as conjecture, does not imply it is grounded on undisclosed defamatory facts," was correct. This Court should affirm.

STANDARD OF REVIEW

When this Court reviews a trial court's grant of a motion to dismiss, it considers "whether the allegations in the plaintiff's pleadings are reasonably susceptible of a construction that would permit recovery." *Slania Enterprises, Inc. v. Appledore Med. Grp., Inc.*, 170 N.H. 738, 741 (2018). The Court assumes that the plaintiff's pleadings are true and construes all reasonable inferences in the light most favorable to the plaintiff. *See id.* The Court may also consider "documents attached to the plaintiffs' pleadings, documents the authenticity of which are not disputed by the parties, official public records, or documents sufficiently referred to in the complaint." *Automated Transactions, LLC v. Am. Bankers Ass'n*, 172

N.H. 528, 532 (2019). The Court does not need to assume the truth of statements that are merely conclusions of law. *Id.* It then engages "in a threshold inquiry that tests the facts in the complaint against the applicable law, and if the allegations constitute a basis for legal relief, [the Court] must hold that it was improper to grant the motion to dismiss." *Id.*

When, as here, "defamation issues implicate free speech concerns … appellate judges must conduct a whole-record review and 'examine for themselves the statements in issue and the circumstances under which they were made to see … whether they are of a character which the principles of the First Amendment' protect." *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 127 (1st Cir. 1997) (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 285 (1964)); *accord Milkovich v. Lorain J. Co.,* 497 U.S. 1, 17 (1990). "[C]ourts treat the issue of labeling a statement as verifiable fact or as opinion as one ordinarily decided by judges as a matter of law." *Gray v. St. Martin's Press, Inc.,* 221 F.3d 243, 248 (1st Cir. 2000) (*citing Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 510–11 (1984) (brackets omitted).

ARGUMENT

In order for Lorettann to survive a motion to dismiss her defamation claims, she "must have alleged facts that would show that the defendant[s] failed to exercise reasonable care in publishing a false and defamatory statement of fact about [the plaintiffs] to a third party." *Automated Transactions,* 172 N.H. at 532. "Embedded in this recitation is the requirement that the challenged statement be one 'of fact.'" *Id.* (quoting *Pierson v. Hubbard*, 147 N.H. 760, 763 (2002)).

"[A] statement of opinion is not actionable unless it may reasonably be understood to imply the existence of defamatory fact as the basis for the opinion." *Id.* (quotation and brackets omitted); *see also Restatement (Second) of Torts* § 566, at 170 (1977) ("A defamatory communication may consist of ... an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."). "[T]he relevant question is not whether challenged language may be described as an opinion, but whether it reasonably would be understood to declare or imply provable assertions of fact." *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 727 (1st Cir. 1992). "Whether 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." *Automated Transactions,* 172 N.H. at 533; *accord Piccone v. Bartels*, 785 F.3d 766, 772 (1st Cir. 2015); *see also Riley v. Harr*, 292 F.3d 282, 291 (1st Cir. 2002) ("[T]he courts treat the issue of labeling a statement as verifiable fact or as protected opinion as one ordinarily decided by judges as a matter of law." (quotation and brackets omitted)). "Words alleged to be defamatory must be read in the context of the publication taken as a whole." *Automated Transactions*, 172 N.H. at 533. The Court "must take into consideration all the circumstances under which [the] words were written, their context, [and] the meaning which could reasonably be given to them by the readers." *Morrisette v. Cowette*, 122 N.H. 731, 733 (1982).

"'[E]ven a provably false statement is not 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.'" *Automated*

Transactions, 172 N.H. at 534 (*quoting Riley,* 292 F.3d at 289. A 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 (quotation omitted). A "crucial distinction" is whether the speaker's statements can reasonably be interpreted to suggest that the speaker had access to information not accessible to others. *Phantom Touring*, 953 F.2d at 730-31. *Compare Milkovich*, 497 U.S. at 5 n.2, 21-22 (allowing suit where author claimed to be in a "unique position" to verify defamatory allegations) *with Phantom Touring*, 953 F.2d at 731 (barring suit where nothing in challenged articles indicated that the author "had more information" about the defamatory allegations "than was reported in the articles"). "[W]hen a speaker outlines the factual basis for his conclusion, his statement is protected by the First Amendment." *Partington v. Bugliosi*, 56 F.3d 1147, 1156 (9th Cir. 1995) (collecting cases).

I. The Trial Court Properly Concluded that Hall's Statement as Republished by the Concord Monitor is Not Actionable

Hall told Duckler: "that he believed Lorettann, an artist herself, had painted the forgeries, but he never knew for sure." CM Appendix 76-80; 81-83. The trial court concluded that Hall's statement was not actionable because his statement did not imply that he possessed undisclosed defamatory facts. CM Appendix at 104; 119.

In reaching this conclusion, the trial court looked at the plain and ordinary meaning of the words in Hall's statement and considered them within the context of the publication as a whole as this Court has instructed.

CM Appendix 104 (*quoting Boyle v. Dwyer*, 172 N.H. 548, 555 (2019)) ("Whether a given statement can be read as being or implying an actionable statement of fact must be considered in the context of the publication as a whole.") (quotation omitted)). Courts commonly apply these basic principles—looking at language and context—in other cases interpreting written or spoken language, such as, statutory and contract interpretation. *See Petition of Carrier*, 165 N.H. 719, 721 (2013) (when interpreting a statute, this Court looks to the statutory language, construes the language according to its plain and ordinary meaning, and considers words and phrases in the context of the statute as a whole*); Found. for Seacoast Health v. HCA Health Servs. of New Hampshire, Inc.*, 157 N.H. 487, 492 (2008) (explaining that when this Court interprets a contract, it focuses on the plain meaning of the language used, gives words and phrases "their common meaning," and considers the meaning a "reasonable person" would give the contract).

The trial court found that Hall's statement "reflects [Hall's] opinion rather than a statement of fact" but observed that such a statement could still be defamatory "if it 'may reasonably be understood to imply the existence of fact as the basis of the opinion.'" CM Appendix 103 (*quoting Nash v. Keene Publishing Corp.*, 127 N.H. 214, 219 (1985)). The court also observed that "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." CM Appendix 103 (*quoting Riley*, 292 F.3d at 289). The court dismissed the defamation counts because Hall's statement could not be read to imply that he possessed objectively verifiable facts.

The court reasoned that Hall's qualification "but he never knew for sure" whether Lorettann created the forgeries "dispels an implication of undisclosed defamatory facts." CM Appendix at 104. The trial court concluded its analysis as follows: "Viewed in its totality, the statement, couched as conjecture, does not imply it is grounded on undisclosed defamatory facts." *Id.*

On appeal, Lorettann appears to take issue with the somewhat summary nature of the trial court's discussion.[3] Yet, a more extensive consideration of Hall's statement in the context of what else he told Duckler leads to the same conclusion. The column begins: "Sometimes, even a man nicknamed God can be fooled" and continues "Such was the case for multi-millionaire Andy Hall." As Duckler reported:

- "[A] jury ordered Nikolas Gascard and mom Lorettann Gascard to pay Hall about $500,000 for selling him forged paintings."
- Hall told Duckler, "At the time, I did not see any reason to doubt what they were telling me . . . (Nikolas) was very convincing and I have to tell you that generally in life I find people tell the truth. Maybe I'm naïve. Maybe I should have been more circumspect, but this had never happened to me until this time."
- Lorettan Gascard was "a former art professor at Franklin Pierce University."
- "Lorettann told Hall she was in Golub's art class in the 1960s and the two had formed a close bond that extended to the other members of the Gascard family."
- The Gascards told Hall that they found the paintings in the closet of a relative in Germany who had died.

[3] As discussed *infra* at 6, n.2, Lorettann acknowledged in her brief at footnote 2, that the trial court, in addressing Hall's statement, stated that she had omitted "*but he never knew for sure*" in the complaint. *See* LB 9 n.2. The trial court added an allegedly defamatory statement "must be considered as a whole," therefore Hall's "qualification … is integral to addressing the claim." See CM Appendix 103. The court went on to dispense with Hall's statement in two paragraphs. *Id.* at 103-04.

- Hall told Duckler, “Nikolas had a plausible explanation as to how these works had come into the ownership of his mother and late father . . . . According to Nikolas’s tale, they had become close friends with Leon Golub and (wife) Nancy Spero and had received gifts” and that they “continued to add to their collections, some gifts, some purchases.”
- Hall “never asked for documentation or receipts”
- “In hindsight, I was obviously duped and did not do enough due diligence ….”
- Dudley Cobb, an auctioneer in Peterborough, “said it’s common for someone to ask for help selling a painting without realizing it’s not the real thing.”
- “‘It’s mostly a case of mistaken information, or they were misled,’ Cobb told me”
- Hall had no such thoughts that the Gascards themselves had been fooled and thus were innocent of deliberate deceit. He saw them as crooks. *He had said he believed Lorettann, an artist herself, had painted the forgeries, but he never knew for sure*”
- “‘I was extremely angry . . . [n]ot only for [his] monetary loss, but angry about the damage they were doing to the reputation and legacy of Leon Golub.’”
- Hall “learned about the fraud without initially suspecting a thing … He approached the foundation in charge of Golub’s work, trying to catalog each painting in preparation for his art show.”
- “Records couldn’t be found for the paintings once owned by the Gascards … while paperwork existed for Golub’s work that Hall purchased from other sources.”
- “Experts later ‘studied the flesh and determined without a doubt that they were forgeries’ Hall told me.”
- “Next a woman from Hall’s foundation then went to the Smithsonian Museum in Washington, D.C., seeking evidence from the vast archives there about Golub. She went through countless boxes, looking for documentation, letters, something, anything that would link the mother and her son to the painter.”
- Hall told Duckler: “She went there hoping to find evidence to contradict what the group foundation was telling us . . . [but a]fter nearly a week, she concluded these are forgeries.”

- Hall "then approached the Gascards and asked for proof … [but] he got nothing …."
- Hall said "In hindsight, I was obviously duped and did not do enough due diligence, but so were others. If I was stupid, others were too";
- Duckler reported that "[a]n expert on Golub's work was brought in from London and told jurors that the paintings in question did not match the artist's style."
- "After deliberating for two hours, jurors awarded Hall $465,000 …."
- "Upon reflection, Hall put a positive spin on his experience. He trusted two people and got burned, swindled out of half-a-million dollars, yet the man known as God on Wall Street said this when asked if he'd lost faith in people; 'I'm not sure I would go that far. I'm 68 years old, so maybe I have been lucky at this point in my life, not dealing with too many bad people.'"

CM Appendix 76-80; 81-83.

The Duckler column gives readers background information about Hall's experience as an art collector, his belief in the Gascards' explanation of how they acquired the Golub paintings, his admitted lack of due diligence, how he learned the paintings were "forgeries," the experts testimony at trial to that effect, the jury verdict, and, despite his dealings with the Gascards, he would not say "he'd lost faith in people." Forthright, self-revealing and credible; yet nothing to suggest that his qualification – "but he never knew for sure" – implied undisclosed defamatory facts. Rather, through Duckler, Hall told readers he lacked knowledge; lacked knowledge because the Golub Foundation representative and expert at trial concluded only that the paintings were "forgeries," not who had painted the forgeries.

Had he not added the qualification, Hall's belief about Lorettann could have implied to readers he was aware of facts to support his belief. Why would a successful Wall Street investor, in an interview with the press, state such a belief without a basis for doing so? But Hall's qualification, which the trial court had to consider, dispels that implication. *Why would he have added it, if he believed otherwise*? Read in the context of the column as a whole, Hall's belief is opinion and not actionable. *See Thomas v. Telegraph Publ'g Co.*, 155 N.H. 314, 338 (2007) ("A statement of opinion is not actionable unless it may reasonably be understood to imply the existence of defamatory fact as the basis for the opinion.").

Chief Judge Posner explained in *Haynes v. Alfred A. Knopf, Inc.,* 8 F.3d 1222, 1227 (7th Cir.1993):

> A statement of fact is not shielded from an action for defamation by being prefaced with the words 'in my opinion,' but 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, the statement is not actionable.

A person reading Hall's statement would understand that it was his conjecture, a personal impression that was not free of doubt. Nothing Hall told Duckler can be understood to mean *other than what he said*. And what he said is protected by the First Amendment.

II. The Cases Cited by Lorettann, *Milkovich* and *Garrett*, are Distinguishable and Do Not Support Reversing the Trial Court's Conclusion

On appeal, Lorettann urges this Court to find that the trial court erred when it concluded, contrary to *Milkovich*, that Hall's statement was non-

actionable because "[s]imply couching such statements in terms of opinion does not dispel these implications." LB 10 (*citing Milkovich*, 497 U.S. at 19); *see also Garrett v. Tandy Corp.,* 295 F.3d 94, 104 (1st Cir. 2002) (reasoning that "use of the term 'I suspect' is not determinative of whether [a] statement . . . is actionable" because "use of a preface such as 'I suspect' or 'I believe' or 'I think' [are] non-dispositive for purposes of a defamation claim"). Although she correctly quotes *Milkovich* and *Garrett*, Lorettann's argument misapprehends the holding of those cases.

The Supreme Court in *Milkovich* and the First Circuit in *Garrett* held that statements of opinion are not categorically exempt from defamation liability; statements of opinion that imply the existence of undisclosed, defamatory facts are actionable. The courts concluded that the statements at issue in the two cases could imply defamatory fact; therefore, *those* statements of opinion were actionable. However, Hall's statement, as republished in the Concord Monitor column, is markedly different from the statements at issue in *Milkovich* and *Garrett*. Unlike in *Milkovich* and *Garrett*, here the Court should rule—as did the trial court—that the defamation claims must be dismissed because Hall's statement is non-actionable as a matter of law. *See Riley*, 292 F.3d at 291.

In *Milkovich*, a newspaper printed a column in which the columnist called the plaintiff, a wrestling coach, a liar for what the columnist stated was deceitful testimony before a high-school athletics council. 497 U.S. at 4-5 & n.2. The column was headlined "Maple [Heights High School] beat the law with a 'big lie.'" *Id.* at 4. The column stated: "'Anyone who attended the meet . . . knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth," and

"they got away with it." *Id.* at 5. The statement did not include language that would suggest the columnist was uncertain as to his opinion. Nevertheless, on appeal, the newspaper argued it could not be held liable for defamation because the columnist had stated an opinion and therefore enjoyed absolute protection under the First Amendment. *Id.* at 17-18.

The Court rejected this argument, reasoning that there is not a "wholesale defamation exemption for anything that might be labeled 'opinion.'" *Id.* at 18. The Court explained that even statements couched as opinion—for example, "In my opinion John Jones is a liar"—can be actionable if the statement "implies a knowledge of facts which lead to the conclusion that Jones told an untruth." *Id.* at 18. The relevant question is not whether challenged language may be described as opinion, but whether the language can be understood to declare or imply a provable assertion of fact. *See id.* at 21. Applying these principles, the Court concluded that the newspaper could be liable for defamation because the "clear impact" of the column was that Milkovich "lied at the hearing after having given his solemn oath to tell the truth." *Id.* (quotation and ellipses omitted). The Court stated that the column did not include "the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that [the] petitioner committed the crime of perjury" and that "the general tenor of the article" did not "negate this impression." *Id.*

The language and context of Hall's statement are markedly different from the statement in *Milkovich* in ways that support the conclusion that Hall's statement is non-actionable as a matter of law.

First, Hall—unlike the columnist in *Milkovich*—expressed his opinion in terms that make clear to readers that he is expressing a belief, and only a belief because he does not know "for sure." In contrast, the *Milkovich* columnist made a factual assertion that "anyone" with knowledge of the meet would "know in his heart" that Milkovich lied—thereby plainly implying the truth of his conclusion. Hall made no such assertion. Instead, his six-word plainly stated qualification—"but he never knew for sure" —ruled out any implication that he knew Lorettann painted the forgeries.

Although words such as "suspect" or "believe" do not automatically render a statement non-actionable, whether a statement is expressed in speculative terms is relevant and speculative words—when considered in context—may make it clear that the speaker's opinion is not based on undisclosed, defamatory facts. *See, e.g., Piccone*, 785 F.3d at 774 (finding a "definitively speculative" statement to be non-actionable because, "in combination with the disclosure of underlying facts, it becomes even more clear that the speaker is merely speculating about an inference")(quotation, brackets, and ellipses omitted); *Elias v. Rolling Stone LLC*, 872 F.3d 97, 111 (2d Cir. 2017) (concluding that statements "were readily identifiable as speculation and hypothesis" and therefore non-actionable because language including "I would speculate that . . . ." and "it seems impossible to imagine" made it clear that the speaker's view was not based on undisclosed facts); *Mar-Jac Poultry, Inc. v. Katz*, 773 F. Supp. 2d 103, 123 (D.D.C. 2011) (finding that the "cumulative effect of [the speaker's] speculative language within the context of the Broadcast makes clear that she was only presenting an hypothesis, and not implying that she was in

possession of objectively verifiable facts."). These authorities firmly anchor Hall's statement as non-actionable. Hall expressed his opinion about the paintings' origins in speculative terms: "he believed." He also expressed his definitive lack of certainty about his belief: "but he never knew for sure." Hall's statement that he lacked knowledge to confirm his belief rules out any implication of undisclosed, defamatory facts. His statement about Lorettann—as published by the Concord Monitor—is "properly understood as purely speculation," and is "protected as opinion." *Gray,* 221 F.3d at 250.

Second, as discussed in Part I, what Hall told Duckler, as reported in the Concord Monitor column —unlike the statement at issue in *Milkovich*—negates any understanding that Hall was accusing Lorettann of committing a crime.

Third, Hall—unlike the columnist in *Milkovich*—does not imply that he has special but unstated information about who forged the paintings. The column in *Milkovich* noted that the columnist "had been the only non-involved person at both the controversial meet and the administrative hearing, a fact that could have suggested to readers that he was uniquely situated to draw the inference [that Milkovich was] lying." *Phantom Touring*, 953 F.2d at 730 (characterizing *Milkovich*). Thus, "a reader reasonably could have understood the columnist in *Milkovich* to be suggesting that he was singularly capable of evaluating the plaintiffs' conduct." *Id.* at 730-31. The takeaway for a person reading the *Milkovich* column is that if a reader knew what the columnist knew, the reader would "know[] in his heart that Milkovich and Scott lied." *Milkovich*, 497 U.S. at 5.

In contrast, the Concord Monitor column include a number of facts that would lead a reader to understand that Hall was not implying any undisclosed, defamatory facts about Lorettann. As discussed in Part I, he admitted he "was extremely angry" over both his "monetary loss" and "the damage [the Gascards] were doing to the reputation and legacy of Leon Golub." Yet, despite his anger Hall declined to make an accusation about Lorettann he did not know to be true. Hall characterizes himself as "naïve," saying he "should have been more circumspect," and that he "was obviously duped and did not do enough due diligence." The takeaway from the Monitor column is not defamatory, a different takeaway than *Milkovich*.

Finally, the Concord Monitor column —unlike the column in *Milkovich*—provide a reader with Lorettann's side of the story; thereby inviting readers to draw their own conclusion. In *Milkovich*, the columnist did not provide readers with any information that suggested the wrestling coaches had not lied under oath. In contrast, the Monitor column included 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 Gascards do not dispute this account; to the contrary, their complaint states Nikolas Gascard inherited the "collection of works by Golub . . . from his father who died in 1994, and from his aunt who committed suicide in 2005." CM Appendix 7 ¶28.

The Monitor column "implicitly . . . invited [readers] to draw their own conclusions from the mixed information provided." *Phantom Touring*, 953 F.2d at 731. "This is a 'crucial distinction' from *Milkovich* where the statement at issue implied that "only one conclusion was possible."

Piccone, 785 F.3d at 773-74 (finding a statement non-actionable when statement possessed "a definitively speculative nature," defendant "made clear" that he "lacked concrete facts to confirm his suspicion," and defendant disclosed the non-defamatory facts in his possession thereby inviting the listener to "extrapolate his own independent impressions from the information provided."). "[W]hen 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 conclusions, those statements are generally protected by the First Amendment." *Partington v. Bugliosi,* 56 F.3d 1147, 1156–57 (9th Cir.1995).

"[A]n author who fairly describes the general events involved and offers his personal perspective about some of the ambiguities and disputed facts should not be subject to a defamation action." *Riley,* 292 F.3d at 290 (quotation and brackets omitted). "Otherwise, authors would hesitate to venture beyond dry, colorless descriptions of facts, bereft of analysis or insight, and the threat of defamation lawsuits would discourage expressions of opinion by commentators, experts in a field, figures closely involved in a public controversy, or others whose perspectives might be of interest to the public." *Id.* (quotation omitted).

In sum, Hall's qualified statement—"he believed Lorettann, an artist herself, had painted the forgeries, but he never knew for sure"—differs from the statement in *Milkovich* both in meaning and context. These differences make it clear that the column in the Concord Monitor did not imply undisclosed, defamatory facts about Lorettann. and is non-actionable as a matter of law.

The First Circuit's opinion in *Garrett v. Tandy Corp.,* 295 F.3d 94 (1st Cir. 2002) does not support a different result. In *Garrett*, the complaint alleged that a Radio Shack manager discovered a missing computer, and then, "'without having performed a reasonable investigation and in bad faith,' singled out the appellant and 'informed the [police department] that he suspected [the appellant] of the theft.'" *Id. at 103.* The trial court dismissed the appellant's defamation claim on the basis that the statement's use of the phrase "I suspect" rendered it non-actionable opinion. *Garrett v. Tandy Corp.*, 142 F. Supp. 2d 117, 121 (D. Me. 2001), *aff'd in part, rev'd in part,* 295 F.3d 94 (1st Cir. 2002). The district court reasoned that "[t]o suspect is to surmise, based on little or no evidence" and "[t]he statement's very uncertainty stops it from implying anything defamatory." *Id.*at 121.

The First Circuit reversed reasoning that *Milkovich* made clear that "a speaker's use of a preface such as 'I suspect' or 'I believe' or 'I think'" is "non-dispositive for purposes of a defamation claim" because statements including such prefaces could still imply a false assertion of fact. *Garrett*, 295 F.3d at 104. Because the prefaces were non-dispositive, the court stated that it "must know more about the context" in order to determine whether the statements were actionable. *Id.* When the court looked at the complaint, the only available context, it could not determine whether the statement constituted fact-based defamation because the appellant "employed the terms 'suspect' and 'suspicion' in a general sense, seeking to convey the idea that [the speaker] had contacted the police to tell them of the theft and of his belief—*at what level of certitude is unclear*—that the appellant was the culprit." *Id.* (emphasis added). The court explained:

> From the available information, the most that can be said is that [the speaker's] statement implied that he had some basis for pointing the finger at the appellant—but we cannot tell, without additional contextual trappings, whether that basis was real or imaginary, correct or incorrect, reasonable or unreasonable. Consequently, we are unable to ascertain at this early stage of the proceedings whether the challenged statement constitutes fact-based defamation.

Id. at 105. "This lack of certainty is telling." *Id.*

Here, unlike *Garrett*, the complaint and attached exhibits provide information about the "level of certitude" and context of Hall's statement. When Hall's statement is taken as a whole and viewed in context, it is clear to readers that despite his stated belief, he admits he does not know for sure whether his belief is correct. His qualification is an unequivocal statement that does not imply the existence of undisclosed, defamatory facts.

III. Lorettann's Arguments Regarding the Context of Hall's Statement in the Concord Monitor Column Are Unavailing

On appeal, Lorettann argues that the context of Hall's statement in the Concord Monitor column "strengthens the implication that he was in possession of facts which underlie his option." LB 13. In making this argument, Lorettann ignores the additional statements Hall made to Duckler about Hall's interactions with the Gascards and his discovery of the forged paintings, statements that dispel the notion that Hall based his belief on other non-disclosed, defamatory facts. Instead, Lorettann focuses on several purported problems in the column which, she argues, require this Court to

reverse and allow the case to proceed to discovery. Her arguments fail for the reasons stated below.

First, she asserts that "the articles' reference to Plaintiff as an 'art professor' cannot constitute an underlying fact, as it is incorrect." LB 15 n.5 (*citing* complaint at ¶226). Paragraph 226 of the complaint states that "Lorettann has never been an art professor." CM Appendix 32 ¶226. However, paragraph 17 of the complaint states that before Lorettann retired in 2015, "she had been employed as an Art History Professor at Franklin Pierce University for 18 years." CM Appendix 6 ¶17. Thus, the Gascards' complaint provides a basis for the column's statement about Lorettann's professional background.

Second, Lorettann asserts that discovery is needed in order to reveal the "exact context" of Hall's conversation with Duckler. LB 14. She claims that because the column states that "Hall was reached at his part-time residence," it implies that "Hall communicated the information to Mr. Duckler during a phone conversation." LB 14. The case, according to Lorettann, must "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.'" LB 14 (*citing Garrett*, 295 F.3d at 106). Discovery is not necessary. Unlike in *Garrett*, here the Monitor column provides enough context to allow a reader to independently conclude that Hall's belief about the paintings' origins is a personal opinion that does not imply the existence of undisclosed defamatory facts. Relevant context does not include what Hall might have told Duckler during the interview *if* it was not reported in the Monitor column. What was not reported can have no bearing on how Hall's statement was understood by readers.

Third, Lorettann argues that "the articles are devoid of facts underlying Hall's opinion such that readers could draw their own conclusions about it." LB 14. Specifically, she stated "[t]he full set of facts which underlie Hall's opinion were published as part of a summary judgment motion filed in the civil action," asserting even if those facts had been included in the column "they cannot provide an escape from liability" because they are "false." LB 14-15. But, here too, information included in a summary judgment motion but not included in the Monitor column has no bearing on how Hall's statement was understood by readers.

Finally, Lorettann asserts that because the article refers to "the fraud" and mentions that Hall is a "multi-millionaire" and that his "ability to predict oil markets led 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." LB 15. But, by Hall's own published admissions he was "naïve," "never asked for documentation or receipts," "should have been more circumspect," and "was obviously duped and did not do enough due diligence." CM Appendix 78-79. The first line of the Concord Monitor articles highlights Hall's fallibility, stating: "Sometimes, even a man nicknamed God can be fooled." *Id.* at 77. Therefore, unlike *Milkovich*, where the tone of the article suggested that the author was "singularly capable of evaluating the plaintiffs' conduct," *Phantom Touring*, 953 F.2d at 730-31, here Hall's lack of knowledge about the paintings' origin, admissions of poor judgment, and the gist of the Monitor columns give readers ample reason to understand he was not implying any undisclosed, defamatory facts.

IV. This Court Also Can Affirm on an Alternative Ground: The Complaint Fails to Allege Facts That Show the Concord Monitor Failed to Exercise Reasonable Care

In order for Lorettann to survive a motion to dismiss her defamation claim, she "must have alleged facts that would show that the defendant[s] *failed to exercise reasonable care* in publishing a false and defamatory statement of fact about [the plaintiffs] to a third party." *Automated Transactions,* 172 N.H. at 532 (emphasis added). Because "significant constitutional protections" are warranted in cases involving "a private individual's defamation actions involving statements of public concern," states can "not impose liability without requiring some showing of fault." *Milkovich,* 497 U.S. at 15; *see also Levinsky's*, 127 F.3d at 128 ("[D]efamation law does not recognize liability without fault."). "This approach recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation." *Milkovich,* 497 U.S.at 15 (quotation and ellipses omitted).

The Gascards' complaint does not allege any facts that the Concord Monitor failed to exercise reasonable care in publishing Hall's statement. The Monitor raised this argument in its motion to dismiss. CM Appendix 97. The Gascards did not dispute this point in their objection. They also failed to cure their failure when they submitted an amended complaint after the trial court issued its order.

The failure to allege facts that would show the Concord Monitor failed to exercise reasonable care is a fatal defect that warrants dismissal. Other courts have dismissed defamation claims when a complaint fails to

allege facts that would show that the defendant failed to exercise the required level of care. *See, e.g.*, *Ellis v. Starbucks Corp.,* No. 15-CV-3451-PJH, 2015 WL 8293965, at *7 (N.D. Cal. Dec. 9, 2015) (granting defendants motion to dismiss because *inter alia* "plaintiff has not alleged facts showing [the defendants] failed to use reasonable care in determining the truth or falsity of the alleged statement"); *Partington v. Bugliosi*, 825 F. Supp. 906, 918 (D. Haw. 1993), *aff'd*, 56 F.3d 1147 (9th Cir. 1995) (granting summary judgment for defendant solely because the complaint failed to allege actual malice—the requisite level of fault in that case). The Court can affirm the trial court's ruling on this alternative basis.

CONCLUSION AND REQUEST TO AFFIRM

The content and context of Hall's statement as republished in the Concord Monitor column dispel the inference that the statement is based on undisclosed, defamatory facts. Accordingly, Hall's statements are "properly understood as purely speculation," and are "protected as opinion." *Gray*, 221 F.3d at 250; *see also Piccone*, 785 F.3d at 774 (same). "An 'expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified or unreasonable the opinion may be or how derogatory it is." *Yohe v. Nugent*, 321 F.3d 35, 42 (1st Cir. 2003) (quotation omitted). The Gascards complaint also did not allege that the Concord Monitor failed to exercise reasonable care in publishing the statement—a necessary element of a defamation claim. This Court may affirm on either basis.

ORAL ARGUMENT

Lorettann has waived oral argument. The Concord Monitor consents to the Court deciding the case without argument. That said, the Concord Monitor would welcome the opportunity to address through argument any questions the Court might have about the parties' positions.

RULE 16(11) CERTIFICATION

I certify that the foregoing reply brief complies with the word limitation of 9,500 words and that it contains 7,935 total words.

Respectfully submitted,

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

By its Attorneys,

ORR & RENO, P.A.

Date: November 11, 2021 By: */s/ William L. Chapman*

William L. Chapman, Esq.
NH Bar #397
wchapman@orr-reno.com
Elizabeth C. Velez, Esq.
NH Bar #266579
evelez@orr-reno.com
Orr & Reno, P.A.
45 South Main Street, Suite 400
P.O. Box 3550
Concord, NH 03302-3550
Phone: (603) 224-2381
Fax: (603) 224-2318

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of the Appellee and Appendix to the Brief of the Appellee have been forwarded, this day, to Nikolas Gascard, non-attorney representative to the Appellant, and counsel for Andrew J. Hall via the Supreme Court's electronic filing File and Serve system.

Date: November 11, 2021 __*/s/ William L. Chapman*_____

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