STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0551

Dan Hynes
v.
New Hampshire Democratic Party & a.

RULE 7 APPEAL OF FINAL DECISION OF
HILLSBOROUGH SUPERIOR COURT

BRIEF OF APPELLANT,
Dan Hynes

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TEXT OF RELEVANT STATUTES

N.H. RSA 311:8 Disbarment, Etc. – The supreme court shall inquire in a summary manner into any charges of fraud, malpractice, or contempt of court against an attorney, and, upon satisfactory evidence of the attorney's guilt, shall suspend such attorney from practice, or may remove the attorney from office.

N.H. RSA 651:5 Annulment of Criminal Records. –
I. Except as provided in paragraphs V-VIII, the record of arrest, conviction and sentence of any person may be annulled by the sentencing court at any time in response to a petition for annulment which is timely brought in accordance with the provisions of this section if in the opinion of the court, the annulment will assist in the petitioner's rehabilitation and will be consistent with the public welfare. The court may grant or deny an annulment without a hearing, unless a hearing is requested by the petitioner.
II. For an offense disposed of before January 1, 2019 and any offense not subject to paragraph II-a, any person whose arrest has resulted in a finding of not guilty, or whose case was dismissed or not prosecuted, may petition for annulment of the arrest record or court record, or both, at any time in accordance with the provisions of this section. Any person who was convicted of a criminal offense whose conviction was subsequently vacated by a court may petition for annulment of the arrest record or court record, or both, in accordance with the provisions of this section. Nothing in this paragraph shall limit the provisions of subparagraph XI(b).
II-a. (a) For an offense disposed of on or after January 1, 2019, any person whose arrest has resulted in a finding of not guilty on all charges that resulted from the arrest, or whose case was dismissed or not prosecuted, shall have the arrest record and court record annulled:
(1) Thirty days following the finding of dismissal if an appeal is not taken under RSA 606:10 or finding of not guilty; or
(2) Upon final determination of the appeal affirming the finding of dismissal if an appeal is taken under RSA 606:10.
(b) For an offense disposed of on or after January 1, 2019, any person who was convicted of a criminal offense whose conviction was subsequently vacated by a court shall have the arrest record and court record annulled. Nothing in this paragraph shall limit the provisions of subparagraph XI(b).
III. Except as provided in RSA 265-A:21 or in paragraphs V and VI, any person convicted of an offense may petition for annulment of the record of arrest, conviction, and sentence when the petitioner has completed all the terms and conditions of the sentence and has thereafter been convicted of no other crime, except a motor vehicle offense classified as a violation other than driving while intoxicated under RSA 265-A:2, I, RSA 265:82, or RSA 265:82-a for a period of time as follows:
(a)(1) For a violation with a conviction date prior to January 1, 2019 or a violation with a conviction date on or after January 1, 2019 that was not the highest offense of conviction, one year, unless the underlying conviction was for an offense specified under RSA 259:39.
(2) For a violation with a conviction date on or after January 1, 2019 where the violation was the highest offense of conviction, unless the underlying conviction was for an offense specified under RSA 259:39, or another violation for which there is an enhanced penalty for a subsequent

conviction, one year after the person has completed all the terms and conditions of the sentence. Upon completion of a petition by the person stating that the conviction is eligible for annulment, the court shall submit a notice of its determination to the person convicted of the offense and to the prosecutor. The prosecutor shall have 20 days from the date of receipt of the notice to object to the annulment on the ground that the offense is not eligible for annulment or that the person has not completed all the terms and conditions of the sentence. If the prosecutor fails to timely object or the court denies the prosecutor's objection, the court shall annul the conviction.
(b)(1) For a class B misdemeanor with a conviction date prior to January 1, 2019 or a class B misdemeanor with a conviction date on or after January 1, 2019 that was not the highest offense of conviction, except as provided in subparagraphs (f) and (h), 2 years.
(2) For a class B misdemeanor with a conviction date on or after January 1, 2019 where the class B misdemeanor was the highest offense of conviction, except as provided in subparagraphs (f) and (h), 2 years after the person has completed all the terms and conditions of the sentence. Upon completion of a petition by the person stating that the class B misdemeanor is eligible for annulment, the court shall submit a notice of its determination to the person convicted of the offense and to the prosecutor. The prosecutor shall have 20 days from the date of receipt of the notice to object to the annulment on the ground that the offense is not eligible for annulment or that the person has not completed all the terms and conditions of the sentence. If the prosecutor fails to timely object or the court denies the prosecutor's objection, the court shall annul the conviction.
(c) For a class A misdemeanor except as provided in subparagraphs (f) and (i), 3 years.
(d) For a class B felony except as provided in subparagraphs (g) and (i), 5 years.
(e) For a class A felony, except as provided in subparagraph (i), 10 years.
(f) For sexual assault under RSA 632-A:4, 10 years.
(g) For felony indecent exposure or lewdness under RSA 645:1, II, 10 years.
(h) For any misdemeanor domestic violence offense under RSA 631:2-b, 10 years. In the event an individual is convicted of a subsequent misdemeanor or felony domestic violence offense under RSA 631:2-b, the earlier domestic violence conviction shall not eligible for an annulment until the most recent domestic violence conviction has become eligible for an annulment.
(i) For a class A misdemeanor or felony offense under RSA 318-B:26, II, 2 years.
IV. If a petition for annulment is denied, no further petition shall be brought more frequently than every 3 years thereafter.
V. No petition shall be brought and no annulment granted in the case of any violent crime, of felony obstruction of justice crimes, or of any offense for which the petitioner was sentenced to an extended term of imprisonment under RSA 651:6.
VI. If a person has been convicted of more than one offense, no petition for annulment shall be brought and no annulment granted:
(a) If annulment of any part of the record is barred under paragraph V; or
(b) Until the time requirements under paragraphs III and IV for all offenses of record have been met.
VI-a. A conviction for an offense committed under the laws of another state which would not be considered an offense under New Hampshire law, shall not count as a conviction for the purpose of obtaining an annulment under this section.
VII. If, prior to disposition by the court of a petition for annulment, the petitioner is charged with an offense conviction for which would bar such annulment under paragraph V or VI(a) or would extend the time requirements under paragraphs III, IV and VI(b), the petition shall not be acted

upon until the charge is disposed.
VIII. Any petition for annulment which does not meet the requirements of paragraphs III-VI shall be dismissed without a hearing.
IX. When a petition for annulment is timely brought, the court shall require the department of corrections to report to the court concerning any state or federal convictions, arrests, or prosecutions of the petitioner and any other information which the court believes may aid in making a determination on the petition. The department shall charge the petitioner a fee of $100 to cover the cost of such investigation unless the petitioner demonstrates that he or she is indigent, or has been found not guilty, or the case has been dismissed or not prosecuted in accordance with paragraph II. The department of safety shall charge the successful petitioner a fee of $100 for researching and correcting the criminal history record accordingly, unless the petitioner demonstrates that he or she is indigent, or has been found not guilty, or the case has been dismissed or not prosecuted in accordance with paragraph II. The court shall provide a copy of the petition to the prosecutor of the underlying offense and permit them to be heard regarding the interest of justice in regard to the petition. The petitioner's request for a court filing fee waiver shall be submitted on a form supplied by the court.
X. Upon entry of an order of annulment:
(a) The person whose record is annulled shall be treated in all respects as if he or she had never been arrested, convicted or sentenced, except that, upon conviction of any crime committed after the order of annulment has been entered, the prior conviction may be considered by the court in determining the sentence to be imposed, and may be counted toward habitual offender status under RSA 259:39.
(b) The court shall issue the person a certificate stating that such person's behavior after the conviction has warranted the issuance of the order, and that its effect is to annul the arrest, conviction, and sentence, and shall notify the state police criminal records unit, the prosecuting agency, and the arresting agency.
(c) The court records relating to an annulled arrest, conviction, or sentence shall be sealed and available only to the person whose record was annulled, his or her attorney, a court for sentencing pursuant to subparagraph (a), law enforcement personnel for legitimate law enforcement purposes, or as otherwise provided in this section.
(d) Upon payment of a fee not to exceed $100 to the state police, and subject to the provisions of subparagraph XI(b), the state police criminal records unit shall remove the annulled criminal record and inform all appropriate state and federal agencies of the annulment, unless the petitioner demonstrates that he or she is indigent, or has been found not guilty, or the case has been dismissed or not prosecuted in accordance with paragraph II. The state police shall grant the fee waiver request where the petitioner demonstrates indigency by including with the fee waiver request an affidavit listing the petitioner's monthly net income and that of his or her spouse, and the assets of the petitioner and his or her spouse. The fee waiver request form used shall be substantially similar to the forms for waiver of fees and costs in the superior courts.
(e) The arresting agency and the prosecuting agency shall clearly identify in their respective files and in their respective electronic records that the arrest or conviction and sentence have been annulled.
(f) In any application for employment, license or other civil right or privilege, or in any appearance as a witness in any proceeding or hearing, a person may be questioned about a previous criminal record only in terms such as "Have you ever been arrested for or convicted of a crime that has not been annulled by a court?"

XI. Nothing in this section shall affect any right:
(a) Of the person whose record has been annulled to appeal from the conviction or sentence or to rely on it in bar of any subsequent proceedings for the same offense; or
(b) Of law enforcement officers to maintain arrest and conviction records and to communicate information regarding the annulled record of arrest or conviction to other law enforcement officers for legitimate investigative purposes or in defense of any civil suit arising out of the facts of the arrest, or to the police standards and training council solely for the purpose of assisting the council in determining the fitness of an individual to serve as a law enforcement officer, in any of which cases such information shall not be disclosed to any other person.
XII. [Repealed.]
XIII. As used in this section, "violent crime" means:
(a) Capital murder, first or second degree murder, manslaughter, or class A felony negligent homicide under RSA 630;
(b) First degree assault under RSA 631:1;
(c) Aggravated felonious sexual assault or felonious sexual assault under RSA 632-A;
(d) Kidnapping or criminal restraint under RSA 633;
(e) Class A felony arson under RSA 634:1;
(f) Robbery under RSA 636;
(g) Incest under RSA 639:2, III or endangering the welfare of a child by solicitation under RSA 639:3, III; or
(h) Any felonious offense involving child sexual abuse images under RSA 649-A.
XIV. As used in this section, "crime of obstruction of justice" means:
(a) Tampering with witnesses or informants under RSA 641:5 or falsifying evidence under RSA 641:6; or
(b) Any felonious offense of obstructing governmental operations under RSA 642.
XV. A petition for annulment of any record of arrest, conviction, and sentence authorized by this section may be brought in the supreme court with respect to any such record in the supreme court, provided that no record in the supreme court relating to an opinion published in the New Hampshire Reports may be annulled.
XVI. A journalist or reporter shall not be subject to civil or criminal penalties for publishing or broadcasting:
(a) That a person had a criminal record that has been annulled, including the content of that record.
(b) That a person has a criminal record, including the content of such record, without reporting that the record has been annulled, if the journalist or reporter does not have knowledge of the annulment.
XVII. No person or entity, whether public or private, shall be subject to civil or criminal penalties for not removing from public access or making corrections to a report or statement that a person has a criminal record, including the content of such record, if thereafter the criminal record was annulled. This provision shall apply to any report or statement, regardless of its format.

N.H. RSA 491:8-a Motions for Summary Judgment III Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment,

interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

N.H. RSA 311:7 Prohibition No person shall be permitted commonly to practice as an attorney in court unless he has been admitted by the court and taken the oath prescribed in RSA 311:6.

N.H. Supreme Court Rules 37(2)(d) Disbarment: "Disbarment" means the termination of a New Hampshire licensed attorney's right to practice law in this State and automatic expulsion from membership in the bar of this State. A disbarred attorney may only apply for readmission to the bar of this State upon petition to this court, after having complied with the terms and conditions set forth in the disbarment order promulgated by the court which shall include all requirements applicable to applications for admission to the bar, including passing the bar examination and a favorable report by the professional conduct committee and the character and fitness committee.

N.H. Supreme Court Rules 38 (2) (j) Suspension: "Suspension" means the suspension of an attorney's right to practice law in this State, for a period of time specified by the court or by the professional conduct committee. Suspension by the professional conduct committee may not exceed six (6) months. The suspended attorney shall have the right to resume the practice of law, after the expiration of the suspension period, upon compliance with the terms and conditions set forth in the suspension order promulgated by the court or the professional conduct committee and pursuant to the procedure set forth in section 14 regarding reinstatement.

QUESTIONS PRESENTED

1. Whether the Court erred in dismissing Count IV (Invasion of Privacy – False Light) of Plaintiff's original complaint. Preserved through Complaint and Objection to Defendants' motion to dismiss pgs. 13-14.

2. Whether the Court erred by dismissing various Counts of the complaint by precluding a cause of action due to defendants disclosing plaintiff's annulled conviction without disclosing the annulment. Preserved through Complaint and Objection to defendant's motion to dismiss pgs. 3-13.

3. Whether the Court erred by granting defendant N.H. Democratic Party & Defendant Raymond Buckley's motion for Summary Judgment. Preserved through Objection to defendants' motion for Summary Judgment and Motion to reconsider Order on Defendants motion for Summary Judgment

4. Whether the Court erred in finding that plaintiff did not prove actual malice as a matter of law. Preserved through objection to defendants motion for Summary Judgment and motion to reconsider Order on defendants' motion for Summary Judgment pgs 8-10.

5. Whether the Court erred in finding that the statement "disbarred" was substantially true as a matter of law. Preserved through objection to defendants motion for Summary Judgment motion to reconsider Order on defendants motion for Summary Judgment pgs 1-8.

6. Whether the Court erred in not applying a prior order in this case finding the statement "disbarred" was not substantially true. Preserved through motion to reconsider Order on defendants' motion for Summary Judgment pgs. 6-8

STATEMENT OF THE CASE

Plaintiff brought an action for defamation and invasion of privacy as a result of a mailer Defendants published. Plaintiff appeals the decision of the lower court dismissing the complaint in part and granting Summary Judgment to Defendants on their motion for Summary Judgment. There were material facts in dispute. Further, the Court's order finding the statement "disbarred" was not substantially true went against a prior order in the case and is incorrect as a matter of law.

STATEMENT OF THE FACTS

Plaintiff was running for State Senate during the relevant time leading to this cause of action[1].

Plaintiff agrees he is considered a "public official" as it relates to defamation claims related to the cause of actions in this case and accordingly must show "actual malice"[2].

During the race, defendants sent a mailer that is the basis of the complaint[3].

Defendants are New Hampshire Democratic Party (NHDP), and Raymond Buckley (chair of NHDP who authorized the mailing in question).

Prior co-defendant was Bridge Communication who in collaboration with defendants printed/published the mailpiece.[4]

Nick Taylor, produced/created the mailer during his employment with NHDP and acted within the scope of his employment[5]. Defendants did not provide evidence that Nick Taylor believed the statement "disbarred" was true.

The mailer stated, in bold, that Plaintiff was "disbarred"[6]. This statement is false and is defamatory. The mailer further included a citation telling the reader to "check the facts". The citations provided by defendants on the mailer did not show Plaintiff was ever disbarred.

Defendants were the ones who created the false statement "disbarred"[7]. Further, none of the information they relied on indicated plaintiff was ever disbarred. The information known to them

[1] Final statement of material facts #1.
[2] Id. 6.
[3] Id. 16, 19,20.
[4] Id. 19
[5] Id. 17-20.
[6] Id. 21.
[7] Final Statement of material facts 18-22

shows the opposite. Defendants knew at the time of publication that Plaintiff was a practicing attorney[8].

The mailer further disclosed a criminal conviction which was previously annulled. This annulment was known to Defendants. Defendants did not add language alerting the recipient that it was annulled. [9]

The mailer further created a fake book photo which used a recent picture of plaintiff and presented plaintiff with his eyes shut and head tilt[10]. The false photo presented plaintiff in a false light. In part, it would have created the impression in a reasonable person that plaintiff was on drugs at the time arrest and/or that the arrest was recent since the photo that was used was taken from plaintiff's campaign materials. If the defendants used the actual booking photo, it would have shown plaintiff without eyes shut and appearing more than 10 years younger.

Plaintiff would show at trial that defendants acted with actual malice by showing they acted with knowledge of its falsity or with reckless disregard for the truth in publishing defamatory statements.

Defendants filed a motion to dismiss which was partly granted. Plaintiff appeals the counts that were dismissed.

In its order denying in part the motion to dismiss, the court found that the statement "disbarred" was not substantially true.

[8] Id. 7.
[9] Id.
[10] Exhibit A of complaint.

Defendants were the ones who came up with the phrase “disbarred”, and did not rely on any other source that identified Plaintiff as disbarred as other evidence identified Plaintiff as previously suspended from practicing law[11].

There is overwhelming evidence that defendants committed defamation with actual malice (that the false statement was made intentionally or with reckless disregard as to whether it was true or false)[12].

It is a disputed fact as to the gist/sting of the word “disbarred” as it relates to “substantial truth”.[13]

A reasonable jury could find for plaintiff and accordingly if this case proceeded to trial.

[11] Id. , 37, 38, 45, 46, etc.
[12] Id. 35,36, 47, etc.
[13] Id.

SUMMARY OF THE ARGUMENT

I. The court erred in partially dismissing causes of action related to referencing Plaintiff's prior criminal record without disclosing it was annulled.

II. The court erred in dismissing the cause of action related to invasion of privacy – false light, related to an admitted false booking photo.

III. There are material facts in dispute that required summary judgment to be denied. Plaintiff submitted overwhelming evidence for a reasonable jury to find "actual malice".

III. A. Whether the statement "disbarred" was substantially true is a question for the jury and requires summary judgment be denied. The gist/sting of the defamatory statement is a material fact in dispute.

III. B. If the issue of whether "disbarred" was substantially true is a matter of law, then it is not substantially true as a matter of law.

III. C. The court already addressed the issue of substantial truth in its order denying the motion to dismiss, and defendants should not be allowed to re-litigate it.

ARGUMENT

I. THE COURT ERRED BY PRECLUDING PLAINTIFF FROM PURSUING CAUSES OF ACTION RELATED TO DISCLOSING AN ANNULLED CONVICTON

The court should not have dismissed counts related to defendants knowingly disclosing an annulled conviction.

Defendants correctly cited the standard of review in their motion to dismiss.

> "[T]he standard of review on a motion to dismiss is whether the facts as pled are sufficient under the law to constitute a cause of action." Brizica v. Trustees of Dartmouth College, 147 N.H. 443, 450 (2002). When ruling on a motion to dismiss for failure to state a claim, courts determine whether the allegations in the complaint are reasonably susceptible of a construction that would permit granting of the requested relief. Rounds v. Standex International, 131 N.H. 71, 74 (1988). "Courts accept the allegations as true and construe all reasonable inferences in favor of the non-moving party." Graves v. Estabrook, 149 N.H. 202, 203 (2003).Courts then engage "in a threshold inquiry that tests the facts in the complaint against the applicable law." Berry v. Watchtower Bible & Tract Soc., 152 N.H. 407, 410 (2005) (quotation omitted)[14].

Defendants argument, and the court's order, primarily relies on a single New Jersey case for support that it is not defamatory to knowingly disclose an annulled conviction.

Defendants claim their statement that Plaintiff was convicted of extortion is true despite the conviction being annulled. To support their position, they rely on G.D. v. Kenny 205 A3d 300 (N.J. 2011), that is not binding upon this court.

The rationale for the holding in G.D. should not apply to New Hampshire as the statutes are not the same. In G.D., the court found: "We cannot conceive that the Legislature intended to punish, under our Criminal Code, persons who have spoken truthfully about lawfully acquired information long contained in public records, even if they *know* of the existence of an expungement order." Id. at 314. Contrary to New Jersey law, the New Hampshire legislature has

[14] Defendants' memorandum in support of their motion to dismiss pgs. 4-5.

deemed it a cause of action when someone knowingly discloses an annulled conviction without also stating it is annulled (if they are aware of the annulment)[15].

Further, G.D. relied on other jurisdictions stating there is nothing in the statute to suggest once it sealed, it becomes non-existent. This is contrary to New Hampshire. N.H. RSA 651:5 X(a) states:

"**The person whose record is annulled shall be treated in all respects as if he or she had never been arrested, convicted or sentenced**, except that, upon conviction of any crime committed after the order of annulment has been entered, the prior conviction may be considered by the court in determining the sentence to be imposed, and may be counted toward habitual offender status under RSA 259:39.(Emphasis added)"

The exception does not apply in this case, and accordingly, Mr. Hynes was not arrested, or convicted.

The court in G.D. found "For purposes of the present case, perhaps the most pertinent exception to the expungement statute's cloak of confidentiality is *N.J.S.A.* 2C:52-19. That section permits the inspection of expunged records if the Superior Court finds "good cause shown and compelling need based on specific facts," and "only in those instances where the subject matter of the records of arrest or conviction is the object of litigation or judicial proceedings.". Id. at 312. N.H. has no similar exception.

In applying the N.J. statute, the court found :"the breadth of the expungement statute—on its face—is limited to those government agencies that are statutorily required to be served with the expungement order. *See N.J.S.A.* 2C:52-10, -15.". Id. at 313. N.H. has no similar exception/requirement/rule.

The other major case relied upon in G.D. was Bahr v. Statesman Journal Co., 624 P. 2d 664 - Or: Court of Appeals 1981. Bahr interpreted a statute that held ""For purposes of any civil action in which truth is an element of a cause of action or affirmative defense, the provisions of section (3)

[15] Defendants are correct to point out that the annulment statute used to have a criminal cause of action for disclosing an annulment. What they failed to address is that the New Hampshire annulment statute sets forth the parameters of when disclosing an annulment leads to civil liability. See N.H. RSA 651:5 XVI, XVII

of this section providing that the conviction, arrest or other proceeding be deemed not to have occurred shall not apply. Id. at 666. Not only does that provision not exist under the N.H. annulment statute, RSA 651:5 specifically lays out when there can be a civil cause of action.

Defendants argue "The annulment statute does not require newspapers to "excise from its archives a past story", courts to "razor from the bound volumes of its reporters a published case", or people to "banish from their memories stored knowledge." Citing G.D., 15 A.3d at 313[16]. On this point, they are correct.

The New Hampshire annulment statute specifically says:

> "No person or entity, whether public or private, shall be subject to civil or criminal penalties for not removing from public access or making corrections to a report or statement that a person has a criminal record, including the content of such record, if thereafter the criminal record was annulled. This provision shall apply to any report or statement, regardless of its format. " RSA 651:5 XVII .

There is no obligation for courts (or anyone else) to retract decisions or statements that are already made prior to an annulment. People need not erase their memories. However, in order to not be held civilly liable, one must still comply with the requirements of RSA 651:5. (See specifically 651:5 XVI).

Defendants try to ignore the plain language of RSA 651:5 XVI essentially claiming that it should not apply. Part of their reason being that other parts of the annulment statute were amended[17]. However, the language of RSA 651:5 XVI is plain and unambiguous. The court should not either add words that the legislature chose to omit, Diana Rudder v. Director, New Hampshire Division of Motor Vehicles, Opinion Issued: March 16, 2022. The Court "can neither ignore the plain language of the legislature nor add words which the lawmakers did not see fit to include." Appeal of Astro Spectacular, Inc., 138 N.H. 298, 300, 639 A.2d 249, 250 (1994) (quotation omitted).

If defendants want to be able to avoid civil liability from knowingly withholding evidence of an annulment, then their remedy is with the legislature, not the courts.

[16] Defendants' memo in support of motion to dismiss pg 11.
[17] Defendants' reply to objection to motion to dismiss footnote 2.

The New Hampshire annulment statute says "The person whose record is annulled shall be treated in all respects as if he or she had never been arrested, convicted or sentenced…". Accordingly, Plaintiff does not have a conviction as a matter of law.
However, the annulment statute provides immunity to defendants, or anyone else, to disclose an annulled conviction as long as they also state the conviction is annulled (assuming they know it is annulled). Defendants intentionally did not do this as it wouldn't have mislead the voters in the way they wanted.

To put it another way, the statement: "Mr. Hynes was convicted of theft by extortion" is legally and factually false, and can give rise to a defamation claim. On the contrary, the statement: "Mr. Hynes was convicted of theft by extortion which has been annulled", would be a factually correct statement that would not be a cause of action, under present law, for defamation, or violation of the annulment statute.

This form of defamation is sometimes referred to as: "defamation by implication". It is defamation through omission by leaving out facts that affect the truth and someone's reputation.

> "[I]n certain circumstances even a technically true statement can be so constructed as to carry a false and defamatory meaning by implication or innuendo. Where a publication implies something false and defamatory by omitting or strategically juxtaposing key facts, the publication may be actionable even though all of the individual statements are literally true when considered in isolation. See Strada v. Conn. Newspapers, Inc., 193 Conn. 313, 322–23, 477 A.2d 1005 (1984); see also Robert D. Sack, Sack on Defamation § 3:8 (4th ed.2010).

One example of defamation by implication is Memphis Publishing Co. v. Nichols, 569 S.W.2d 412 (Tenn.1978), in which a newspaper reported that a woman, upon arriving at the home of another woman and finding her own husband there "first fired a shot at her husband and then at [the other woman], striking her in the arm." Id. at 414. The article neglected to mention, however, the additional facts that several neighbors and the husband of the other woman were also present, that all were sitting together in the living room talking, and that the shooting was accidental. Even though the statements in the article were all technically true, the article falsely implied that the husband and the other woman had been shot at because they were caught in an adulterous affair and had become targets of an enraged wife—a meaning both false and defamatory. Id. at 419. Martin v. Hearst Corporation, Court of Appeals, 2nd Circuit 2015

This type of defamation is specifically recognized in New Hampshire. “a false and defamatory inference may be derived from a factually accurate news report.” Thomas v. Telegraph Pub. Co., 929 A. 2d 993 - NH: Supreme Court 2007.

A similar issue often arises frequently in New Hampshire. One can be convicted of a Class A misdemeanor in District Court, then appeal to Superior Court for a de novo jury trial. If a newspaper reported someone was convicted of a crime in District Court after knowing the person was found not guilty by a jury (or appeal), the newspaper should be held liable. The fact of the conviction has subsequently become false, but also by omitting the not guilty part, there is defamation through omission. An annulment is similar to a not guilty verdict (except for the sentencing exception that does not apply in this case) in either a de novo trial, or appeal.

II. THE COURT ERRED BY PRECLUDING PLAINTIFF FROM PURSUING A CAUSE OF ACTION RELATED TO INVASION OF PRIVACY – FALSE LIGHT

The court erred by dismissing the count for invasion of privacy – false light. The court held “publishing an unflattering image of a candidate for public office during the course of a political campaign does not state a claim for invasion of privacy” (Order on motion to dismiss pg 11). Plaintiff would agree with that assessment if the image in question were real. However, defendants fabricated/photo shopped the image in question. False speech is not entitled to the same level of 1st Amendment protection as political speech is.

“The elements of the tort of false light invasion of privacy are set forth in the Restatement (Second) of Torts 652E. “One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if: (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.: Id. A false light claim therefore requires publicity and falsity. See Hamberger v. Eastman, 106 N.H. 109, 110-11 (1964). (Id. 10-11).

Plaintiff met that standard, particularly at the level of a motion to dismiss. The statement in question was published to thousands of people, and defendants knew of its falsity as they were the ones who created the fake image. A reasonable person would have found the fake booking photo highly offensive where it misrepresents plaintiff's age by more than a decade (making it appear very recent), and appears in such a way as to lead the recipient to believe plaintiff was on drugs at the time of arrest. Defendants chose to create a fake booking photo, in lieu of a real booking photo, to create a more shocking/highly offensive image.

III. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE THERE WAS A DISPUTE OF MATERIAL FACT AS TO WHETHER DEFENDANTS ACTED WITH ACTUAL MALICE

Defendants correctly cited the standard for a Motion for Summary Judgment

> "To prevail on a motion for summary judgment, the moving party must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. A dispute of fact is material when it "affects the outcome of the litigation." Porter v. City of Manchester, 155 N.H. 149, 153 (2007). A dispute of fact is genuine "if the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party." Pennichuck Corp. v. City of Nashua, 152 N.H. 729, 739 (2005) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (citation omitted)). Ultimately, the facts presented on summary judgment must be evaluated in the light most favorable to the nonmoving party along with all reasonable inferences drawn therefrom. See Sintros v. Hamon, 148 N.H. 478, 480 (2002).[18]"

Plaintiff agrees with some of Defendant's position as to the standard of proof for defamation in this case.

Specifically, In New Hampshire, a plaintiff proves defamation by showing that the defendant failed to exercise reasonable care in publishing a false and defamatory statement of fact about the plaintiff to a third party, assuming no valid privilege applies to the communication. Thomas v. Tel. Publ'g Co., 155 N.H. 314, 321 (2007) (quoting Pierson v. Hubbard, 147 N.H. 760, 763 (2002)). To state a claim for defamation, ―the language complained of must be defamatory, that is, it must tend to lower the plaintiff in the esteem of any substantial and respectable group, even though it may be quite a small minority. The defamatory meaning must be one that could be

[18] Defendants' memo for motion for SJ pgs 3-4.

ascribed to the words by hearers of common and reasonable understanding. Thomson v. Cash, 119 N.H. 371, 393 (1979) (internal citations and quotation omitted); see also Restatement (Second) of Torts § 558 (1965).

Although strictly private plaintiffs in defamation actions may proceed under a common law negligence standard of proof, the First Amendment —imposes a higher hurdle for public figures and requires them to prove actual malice. Thomas, 155 N.H. at 340 (quoting Pendleton v. City of Haverhill, 156 F.3d 57, 66 (1st Cir. 1988))…"[19] Actual malice is when a "false statement was made intentionally or with reckless disregard as to whether it was true or false. Sullivan, 376 U.S. at 285-286).

In this case, defendants admit they sent the mailer in question. Defendants have denied, however, that they acted with actual malice[20]. This is a dispute of material fact. In support of their position, defendants submitted an affidavit denying they acted with malice and denying they knew Plaintiff was not disbarred. However, an affidavit by a party moving for summary-judgment, can't support a finding that that there is no dispute of fact as a matter of law. A jury is free to give no weight to statements made in the affidavit and not believe the person making the affidavit. Similarly, if Nick Taylor claimed under oath during a deposition or affidavit that he believed the statement "disbarred" was true/accurate, a jury would be free to decide whether or not to believe it.

In granting the motion for summary judgment, the Court in part held: "Plaintiff has put forth no evidence that Defendants seriously doubted the truth of the publication." Order at pg. 7. This is not accurate.

Plaintiff has submitting overwhelming evidence that a reasonable jury could use to find that defendants acted with actual malice.

[19] Defendants' memo for SJ pgs 4-5

[20] Defendants stated "As recognized by the Court, NHDP presented evidence that it believed the statement was accurate or substantially true" Defendants objection to motion to reconsider pg 4. However, a jury is free to completely disregard this "fact". It is a material fact in dispute.

That evidence includes: Defendants admit they authorized the mail piece containing the statement that Plaintiff was disbarred3. Defendants NHDP/Raymond Buckley admit defendant was never disbarred[21].Defendant NHDP/Raymond Buckley admits they were responsible for the mail piece in question that contained that statement[22].

The mail piece in question actually provides citations by defendants for their claim of Hynes being disbarred. However, Citation 1 actually stated Hynes had his license to practice law returned to him[23]. Those citations prove Hynes was not disbarred, and there was no inference of disbarment in either citation.

Defendants own admissions through discovery show they knew (or at a minimum acted with reckless disregard) the word disbarred was false[24].

In their answers to the complaint, Defendants admit Hynes was not disbarred[25].

Defendant Ray Buckley's affidavit provides further evidence that defendants acted with actual malice[26]. Defendant stated:

> "12. Prior to publication of the statement, NHDP knew that Mr. Hynes had been convicted of theft by extortion and disciplined by the New Hampshire Supreme Court.
>
> 13. Prior to publication of the statement, NHDP knew the fact of Mr. Hynes' conviction
>
> and bar discipline had been published in the media including articles in which Mr. Hynes was quoted.[27]"

[21] Defendants answer to complaint para 28. "NHDP Defendants admit the Plaintiff was not disbarred. NHDP Defendants admit the mail piece cited to an article and the article speaks for itself."

[22] Defendants NHDP answers to interrogatories #6. and answer to amended complaint para 33

[23] "http://www.nashuatelegraph.com 8/24/14" (can be viewed online at: https://www.nashuatelegraph.com/opinion/local-commentary/2014/08/24/wrong-%2B-wrong-%2B-nh-%3D-still-wrong/)

[24] Defendants do dispute this through Affidavit of Raymond Buckley paras 9-11. However, the cause of action against NHDP includes not just Raymond Buckley (who authorized the mailpiece), but also authorized employees of NHDP. In this case, the evidence would show Nick Taylor was employed by NHDP and authorize the mailpiece where he chose the word —disbarred"

[25] Para 28 answer to complaint

[26] Although Defendant Ray Buckley denied that in paragraphs 9-11 of the affidavit.

[27] Affidavit of Raymond Buckley; previously submitted as Defendant's exhibit in their motion for Summary Judgment

Every New Hampshire Supreme Court order/opinion referencing the discipline certainly would have used the correct term; suspended. Further, as previously stated, all the media articles relied upon by Defendant also used the term suspended, and not one used the term disbarred[28].

Though interrogatories, Hynes asked: "Please identify all sources, if any, that defendants relied on at the time of the mailing that led them to believe Hynes was disbarred". In response, defendant NHDP/Raymond Buckley said:: …Defendants state as follows:
See documents produced in discovery. Additionally, Defendants relied on the expertise of Bridge Communications for the text of the mailer including, but not limited to, the use of the word "disbarred" in the mailer[29].

The only document(s) obtained through discovery that used the word disbarred (besides the mailpiece) involved defendants choosing to use that word.
One of the documents provided in discovery show on 9/28/2018, Nick Taylor, of NHDP, emailed Bridge Communications (former co-defendant and company who printed and mailed the piece in question) stating:

"IV Dietsch/Hynes
-3x Extortion
- Using Boutin concepts for front
- —Dan Hynes was arrested by Attorney General Kelley…
- Back: Dan Hynes was disbarred after he was convicted of extortion
- —In the State House, Dan Hynes has a record of voting against our families: I'll dig up votes **"[30]**

[28] See also Massachusetts order correctly using the term suspended and referencing the N.H. Supreme Court order. https://bbopublic.blob.core.windows.net/web/f/bd08-053-2.pdf

[29] Defendants' NHDP / Raymond Buckley answer to interrogatories #4 . Defendants later expanded upon this at oral argument "We pointed to the media articles that are in the record that were discovered by New Hampshire Democratic Party and provided to Bridge Communications. When he cites in his pleading that Bridge says, we received information from the Democratic Party, that's what they're referring to. They are media articles from a prior campaign that Mr. Hynes was in, that these issues were raised previously.
And the media articles referenced the fact of the conviction, the fact of the annulment, and the fact of the bar discipline. It's all there in the media articles that were provided to Bridge. Then Bridge and NHDP work collaboratively to come up with a mailer, so we have provided that information. " Transcript of oral argument pg. 15. It is clear based upon this expanded answer that not a single media source, or person other than defendants, had ever identified Plaintiff as disbarred. Defendants were solely the ones who made it up. The undisputed fact that they specifically saw numerous media sources/other documents referencing a suspension, and knew of Plaintiff's reinstatement to practice law is overwhelming proof that they acted with "actual malice".

On Oct. 7, 2018 Nick Taylor asked for a revision to the mailer stating**:**
"Dietsch Contract Mailer 3
-Add Republican before Attorney General Kelley Ayotte
- Bold and underline ―disbarred‖
- For citation 1, SB 193, 2018 & HB 144, 2018 "[31]

Further, defendants NHDP/Ray Buckley claim that Defendant Bridge Communications was responsible for the language[32]. However, Bridge Communications expressly denied that to be true[33].
Plaintiff asked Bridge to "Please identify all sources, if any, that defendants relied on at the time of the mailing that led them to believe Hynes was disbarred"[34].

In response, Bridge replied in part: "The source of information regarding disbarment‖ of the plaintiff was provided by Nick Taylor of NHDP"[35].
Defendant Bridge further stated: "The term "disbarred" as used in the mailer was provided to Bridge by Nick Taylor of NHDP".[36]

Further, Bridge stated "Bridge, in conjunction with NHPD (sic), assisted with the design and layout of the mailpiece. Further answering, Bridge says that NHPD (sic) had 100% responsibility for oversight and control of content".[37]
Through discovery, it has become clear that no one other than the Defendants came up with the word "disbarred". Further, they were not relying on any other source for that word because no other source has identified Hynes as "disbarred".
There is further circumstantial evidence that would lead a jury to believe Defendants acted with actual malice.
"Because direct evidence of actual malice is rare, it may be proved through inference,
and circumstantial evidence,

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[30] Pg 8. Defendant Bridge Communications answers to request for production of documents.
[31] Pg 9. Defendant Bridge Communications answers to request for production of documents.
[32] Defendants NHDP / Raymond Buckley's answer to interrogatories #4.
[33] Defendant Bridge answer to interrogatory #3,11,14
[34] Plaintiff's interrogatories to Bridge Communication #3
[35] Bridge Communications answer to interrogatories #3
[36] Bridge answer to interrogatory #11
[37] Bridge answer to interrogatory #14

Recklessness amounting to actual malice may be found where a publisher fabricates an account, makes inherently improbable allegations, relies on a source where there is an obvious reason to doubt its veracity, or deliberately ignores evidence that calls into question his published statements."(internal citations omitted) Levesque v. Doocy, 560 F. 3d 82 - Court of Appeals, 1st Circuit 2009.

A court should consider the context in which the challenged statement is made, viewing it within the communication as a whole. Id.

Defendants NHDP had concerns regarding the truth of some language contained in the mailer. On Oct 5, 2018, Nick Taylor asked Bridge in part:"

—Dietsch Contrast 1

- This looks great!
- Only edits are the date of the case was 8/5/09 and are those his actual weight and height"(referring to the fake booking photo)[38]

It is unclear the response to that as it does not appear to be provided through discovery. However, it is undisputed that the false height and weight, which Nick Taylor was concerned about, did make it into the final mail piece. Also, it was not truthful and appears to have just been made up out of thin air. Defendants further made up an image of what appeared to be a booking photo with false information regarding a booking number[39].

There is additional circumstantial evidence that would lead a juror to conclude that Defendant acted with actual malice due to their intent. As alleged in the complaint, Plaintiff would intend to show at trial that the intention behind the word "disbarred" was to show Plaintiff in a more harmful, and defamatory perception to the voter. The intention of the mail piece was for the recipient to not vote for Hynes. Defendants have worked on numerous mail pieces and have significant expertise in this area.[40] Defendants aren't just the average recreational blogger who

[38] Bridge Communications answer to production of documents pg 10.

[39] See mailpiece. Plaintiff originally filed a complaint incorporating the fake booking photo as defamation, but the court dismissed it. Even if it is not actionable in itself, it is relevant to a jury for the proposition that defendants made up information they knew to be false on the mailing as the court looks at the piece as a whole.

[40] "Bridge has worked on and consulted with NHPD on hundreds of mailpieces over a span of the last 20 years". Defendant Bridge Communications answer to interrogatory #13.

might accidentally say something without being aware of their legal responsibility to publish the truth.

There is such overwhelming evidence of actual malice that a reasonable jury could find plaintiff met his burden. Especially when the evidence is evaluated in the light most favorable to Plaintiff, as is required at the Summary Judgment level.

IV. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT BY FINDING THE PHRASE "DISBARRED" WAS SUBSTANTIALLY TRUE AS A MATTER OF LAW

A: Whether the word "disbarred" is substantially true is a question of fact that should be left up to a jury as the trial court ordered in its order denying defendants' motion to dismiss

> "A defendant asserting truth as a defense in a libel action is not required to justify every word of the alleged defamatory matter; it is sufficient if the substance, the gist, the sting, of the matter is true. The question, a factual one, is whether there is a substantial difference between the allegedly libelous statement and the truth; or stated differently, whether the statement produces a different effect upon the reader than that which would be produced by the literal truth of the matter. 180 Colo. at 236, 504 P.2d at 339 (citations omitted).
>
> The issue of substantial truth is ordinarily a matter for the jury to decide. The Restatement (Second) of Torts § 617(b) (1977) provides that
>
> Subject to the control of the court whenever the issue arises, the jury determines whether ... (b) the matter was true or false... .
>
> Comment a to section 617(b) states in relevant part that "the question of whether the defamatory imputations are true ... is ordinarily for the jury."
>
> It was the function of the jury, rather than the trial court at the summary judgment level, to determine whether the article was substantially true, as far as it concerned Kohn's Sporting Goods. A jury is especially suited to make the factual determination of whether the average reader would have been affected by the article in a far different manner than if the article had been accurately written. Viewing the article in its most reasonable light, a jury could have reasonably concluded that the allegation of "promotion of dangerous drugs" such as "heroin, cocaine, hashish, and morphine," as reported in the article, carried a far different connotation and stigma than the actual confiscation of six grams of marijuana. Since the defense of substantial truth in this case was a matter of factual interpretation, the trial court properly denied defendant's motion for summary judgment." Kohn v. West Hawaii Today, Inc.

656 P.2d 79, 83-84 (1982)

The lower court in this case also ruled on substantial truth in the order denying Defendants' motion to dismiss:

> "Considering similar facts, a Florida Federal District Court concluded this was a matter for a jury to resolve. In Klayman v. Judicial Watch Inc. , Klayman, an attorney and former U.S. Senate candidate, had been indicted on two counts of criminal nonsupport for failure to pay child support, but was never convicted. 22 F. Supp. 3d 1240, 1244 (S.D. Fla 2014). The defendant inaccurately wrote online that Klayman had been convicted of failing to pay child support. Underneath this online statement, defendant included detailed, accurate information regarding Klayman's indictments and a link for additional information. Id. The court found that a trier of fact may, or may not conclude the publication, taken as a whole, was substantially true. Id. At 1254. '[While the statement Klayman was 'convicted,' as written on [the] website, is technically false, whether the falsity is negated because the online posting taken as a whole is substantially true is an issue for the jury." [41]
>
> "Here, defendants" publication did not include the accurate information regarding the status of plaintiff"s law license, but only provided a citation. Furthermore, the citation was printed on a physical piece of paper as opposed to a hyperlink on a website, requiring a reader to take the addition step of using a computer or their phone to manually search for the information online. The Court questions where an average reader of defendant"s mailer would take that additional step.
>
> The statement that plaintiff was disbarred rather than suspended harms his reputation by implying that he had been lying about the current state of his bar licensure and employment in the court of his campaign and that he has been practicing law illegally. In Lopez v. Univision Communications, Inc. a television station reported that a physician was practicing medicine without a valid medical license. 45 F. Supp. 2d 348, 357-58 (S.D.N.Y. 1999). The physician's license was in fully force but his medical registration expired for a period of months. Id. In New York, a physician must be both license and registered to practice medicine. Id. Registration is an administrative matter and expires every two years, but licensure goes through the State Board and can only be revoked by the board, and suggests issues with competence or ethics. Id. Further, practicing medicine without a license is a felony, whereas a lapsed registration only results in a fine. Id. Given the significant differences, the court found the broadcasted statement was "literally false" and that "[A] trier of fact reasonably could find that there is a material difference between the expiration of a registration for non-payment of fees and the revocation of a license to practice medicine". Id.
>
> "Similarly, a jury in this case could reasonably find a material difference between suspension of a license to practice law and disbarment, given the comparative severity and duration of discipline implied by each. Accordingly defendant's motion to dismiss is DENIED as to Counts I-III to the extent the claims rely upon the statement that defendant was "disbarred". [42]

[41] Order on motion to dismiss pgs 8-9
[42] Order on motion to dismiss pgs 8-9.

Similarly to Lopez, in New Hampshire, it is illegal to engage in the unauthorized practice of law (N.H. RSA 311:7). Accordingly, Defendants also accused defendant of presently breaking the law due to their false statement.

B: If the issue of whether "disbarred" was substantially true is a matter of law, it is false and not substantially true as a matter of law.

The Court held that "[W]hen underlying facts as to the gist or sting of a statement are undisputed, substantial truth may be determined as a matter of law." Boyle v. Dwyer, 172 N.H. 548, 554 (2019).[43]" However, there are underlying facts in dispute as to the gist or sting of the statement.

Defendants claim the gist or sting was: "NHDP intended to inform voters that Mr. Hynes, a candidate for high political office, had been convicted of a crime and subject to attorney discipline."[44]

The court seems to have partially adopted this view holding: "the "gist" or "sting" of the flyer is Plaintiff's previous criminal history"[45]

Plaintiff has submitted contrary evidence and accordingly the facts are not undisputed. The gist/sting is an additional material fact that is in dispute. The word disbarred was in bold in the mailpiece with citations encouraging the reader to "check the facts". Accordingly, defendants intended to specifically bring the recipients attention to it. Similarly, in Nash v. Keene Publishing Corp., 127 NH 214, 220 - NH: Supreme Court 1985, the Court denied Summary Judgment in part because the "The defendant printed "Specific facts" in large print above the letter, and the letter began with the phrase, "As for specific facts:". The Court held "Whether

[43] Order on Summary Judgment pg 3
[44] Affidavit of Raymond Buckley para 15.
[45] Id. at pg 4.

readers actually did understand the statements as factual is, of course, not a matter that is before us. But it is clear that the trial court erred in determining that readers could not understand them as factual. In effect, the trial court's ruling resolved an issue that is properly for the consideration of a jury." Id.

Defendants sought to convey to the reader that plaintiff was "disbarred" and accordingly not practicing law. If the defendants wished to convey that plaintiff was merely subject to disciplinary action, they would have said he was previously "suspended", or more broadly said subjected to disciplinary action.

During the campaign for State Senate, Plaintiff repeatedly informed the voters that he was an attorney through various methods of communication.[46] The images used by defendants on the mailpiece apparently came from defendants media communication (likely his website hynes4nh.com). Accordingly, defendants were aware Plaintiff was both an attorney, and informing the voters of this fact.

The court found "The purpose of the flyer *in its entirety* is to notify potential voters of Plaintiff's previous criminal activity and that, *as a result of* such criminal activity, his law license was adversely affected. (emphasis added) Id. 4-5.

By lying to the voters telling them plaintiff was disbarred, defendants at a minimum, implied plaintiff was a liar. This is outside of the sting/gist to which defendants claim, and to which the

[46] Attached exhibits to Plaintiff's motion to reconsider denying Summary Judgment including Affidavit of Dan Hynes. Those media outlets included his campaign Website (hynes4nh.com), legal website:(nh.legal) (website archives at the date of the mailpiece found at https://archive.org/web/ ; https://web.archive.org/web/20181020173413/http://hynes4nh.com/dan-hynes.html): various Facebook sites, mailpieces, door hangers, media interviews. Plaintiff also believes he mentioned being a lawyer through radio ads, but doesn't have copies of the recordings at this time to confirm.

court found. Disbarred is much more serious than suspended which would lead the recipient to think the underlying conduct was worse.

At this stage for summary judgment, the facts, and evidence, with all inferences are to be resolved in the light most favorable to the non-moving party (plaintiff).

Accordingly, there is a factual dispute to which the jury should decide and accordingly summary judgment should be denied.

It was also error to conclude :" Further, it is not apparent that Plaintiff's reputation would have fared better if Defendants had used the word "suspended" as opposed to "disbarred," as the reader's takeaway remains the same." " Order granting Summary Judgment pg 5. (as discussed above, the takeaway is worse in part because the reader would incorrectly believe plaintiff lied about his status practicing law)

Plaintiff has alleged and shown defamation per se. "When as in this case, the jury could find that the defamatory publication charged the plaintiff with a crime *or with activities which would tend to injure him in his trade or business*, commonly called libel *per se,* he can recover as general damages all damages which would normally result from such a defamation, such as harm to his reputation." Chagnon v. Union-Leader Co., 103 NH 426, 441 - NH: Supreme Court 1961. This court found "While the Court acknowledges that the general public understands that disbarment is a more serious punishment than suspension, there is no evidence in this case to suggest that Plaintiff suffered a greater harm to his reputation as a result of the use of one word versus the other " (emphasis added)[47].

[47] Order granting Summary Judgment at pg 5

However, Plaintiff need not specifically show a greater harm to his reputation in a defamation per se cause of action. See Chagnon v. Union-Leader Co. 103 NH 426 NH: Supreme Court 1961.

> "In addition to the above he is entitled to recover such special damages as he has proved have resulted and will result in the future as the natural and proximate consequence of defendant's defamatory act. These would include specific harm to his personal reputation in addition to the general harm which would be assumed to result from the libel, harm to his business reputation and credit reputation, loss of business and any other damage which he has proved resulted as the normal and direct consequence of the defamation.
>
> When the element of malice enters into the wrong "the rule of damages is different and more liberal . . . In such cases there enter into the question of damages considerations which cannot be made the subject of exact pecuniary compensation,—such as . . . mental distress and vexation, what in common language might be spoken of as offences to the feelings, insult, degradation, offences against honest pride, and all matters which cannot arise except in those wrongs which are attended with malice." Id at 442"

Defendants' lie made plaintiff out to be a liar, which harmed his reputation. Further, the statements reasonably harmed plaintiff's law practice. Plaintiff practices law in the geographic location where the mailpiece was sent[48]. Anyone who saw the piece and incorrectly believed plaintiff was not practicing law, would not pursue hiring him.

In Lasonnde, the court held "The plaintiff is entitled to recover general damages and no proof of special damages is required. The plaintiff is entitled to recover all damages that would normally result from such defamation, such as harm to reputation.

In awarding general damages the Court is mindful of the geographic location in which Lassonde works. Pittsburg, New Hampshire is a small business market and the defendants [ ] [made a] purposeful and willful attempt to interfere with Lassonde's business opportunities. Accordingly, the Court finds and rules that the plaintiff is entitled to damages for defamation *per se* and

[48] See exhibit 1 Affidavit of Dan Hynes

award[s] him damages in the amount of $10,000.“ Lassonde v. Stanton, 956 A. 2d 332,342 - NH: Supreme Court 2008

Pittsburg N.H. presently has a population of 800 people. Defendants' mailpiece was delivered to over 6000 households[49]. Accordingly, damages are likely well above those which were properly awarded in Lassonde due to the harm of reputation of plaintiff's business.

The statement that plaintiff was disbarred is false[50]. It is further not "substantially true".

At the outset, substantial truth is an affirmative defense, and accordingly it should be defendant's burden to prove[51]. In defamation cases, a statement is "substantially true" if ""it would have a different effect on the mind of the reader from that which the pleaded truth would have produced." Masson, 501 U.S. at 517, 111 S.Ct. 2419 (quotation marks omitted)."

The phrase "disbarred" is worse than "suspended" as a matter of law. Further, a reasonable juror would conclude it is worse. "A jury could reasonably find a material difference between suspension of a license to practice law and disbarment, given the comparative severity and duration of discipline implied by each." Order on motion dismiss pg 10.

Even the argument raised by defendants as to definitions of disbarred show there is a difference.

"N.H. RSA 311:8 **Disbarment, Etc. –** The supreme court shall inquire in a summary manner into any charges of fraud, malpractice, or contempt of court against an attorney, and, upon

[49] See Exhibit 3 Defendants' Answers to Plaintiff's Interrogatory #3.
[50] Admitted through Dedendants' answer to complain para 28.
[51] Bourne v. Arruda, Dist. Court, D. New Hampshire 2012 No. 10-cv-393-LM.

United States District Court, D. New Hampshire. April 2, 2012.

See also Simpkins v. Snow, 139 NH 735 - NH: Supreme Court 1995 740, citing Chagnon v. Union-Leader Co., 103 NH 426 - NH: Supreme Court 1961 pg 437.

satisfactory evidence of the attorney's guilt, shall **suspend such attorney from practice, or may remove** the attorney from office. (emphasis added)" The fact that the legislature added "**Etc**." in the title of that RSA shows there is a difference between disbarment, and suspension (which is used in the text of the RSA).

N.H. Supreme Court rules specifically state the difference between Disbarment and Suspension.

"N.H. Sup. Ct. Rule 37 (2)**(**d) *Disbarment*: "Disbarment" means the termination of a New Hampshire licensed attorney's right to practice law in this State and automatic expulsion from membership in the bar of this State. A disbarred attorney may only apply for readmission to the bar of this State upon petition to this court, after having complied with the terms and conditions set forth in the disbarment order promulgated by the court which shall include all requirements applicable to applications for admission to the bar, including passing the bar examination and a favorable report by the professional conduct committee and the character and fitness committee."

"N.H. Sup Ct. Rule 37 (2) (j) *Suspension*: "Suspension" means the suspension of an attorney's right to practice law in this State, for a period of time specified by the court or by the professional conduct committee. Suspension by the professional conduct committee may not exceed six (6) months. The suspended attorney shall have the right to resume the practice of law, after the expiration of the suspension period, upon compliance with the terms and conditions set forth in the suspension order promulgated by the court or the professional conduct committee and pursuant to the procedure set forth in section 14 regarding reinstatement.

Those definitions align with what the average reasonable person would believe them to mean; disbarment is "termination"/ "expulsion", while suspended means "suspension" "for a period of time". "If the words are susceptible of more than one meaning, whether they were used in the defamatory sense is a question of fact for the jury" Thomson v. Cash, 119 N.H. 371, 374, 402 A.2d 651, 653 (1979)

If defendants' argument that "disbarred" is "substantially true" were allowed to stand, then defendants (and others) could knowingly, and repeatedly, refer to Hynes as disbarred even though they know it is not true. Hynes would have no legal recourse for such defamatory statement if the court were to find it to be "substantially true".

Even if the phrase disbarred could in some circumstance become substantially true, it is not in the context of this case. Defendants claim in part the gist, or sting is the same because: "The mail piece links Mr. Hynes' criminal conviction and bar discipline with his convictions as a politician informing voters that Mr. Hynes does not have the character to hold public office and, if elected, that he will vote against issues important to Democratic voters[52]." However, plaintiff made numerous statements, including through events, debates, social media, and mailers, during the campaign as to how he was[53] (during the campaign) an attorney[54]. A reasonable person seeing the statement that Hynes was disbarred, while also seeing Hynes stating he was an attorney, could/would address Hynes' character as being a liar. Clearly, that false statement by defendants produces a worse effect on the reader and the gist or sting is not the same.

While substantial truth is a defense to a libel or defamation claim, such a "claim *can only rarely be dismissed* on the rationale that the statements complained of are substantially true, as the notion of substantial truth necessarily implies a thread of untruth, and the conclusion that a statement is substantially true will therefore involve a determination that whatever errors are in

[52] Defendants memorandum pg 10.
[53] Hynes has remained admitted to practice in law in N.H. at all times since the campaign
[54] Amended complaint paras 30-31.

the statement are irrelevant in the minds of the audience. Thomas v. Telegraph Pub. Co., 929 A. 2d 993, 1013 - NH: Supreme Court 2007 (internal citations omitted, emphasis added)

The difference between disbarred and suspended is not irrelevant in the minds of the audience as a matter of law. At a minimum, a reasonable jury could appreciate the differences and accordingly the motion for summary judgment should be denied.

C) The issue of substantial truth was already litigated during the motion to dismiss

The court in its order on the motion to dismiss found the statement "disbarred" was not substantially true and that a jury could find so.

The court specifically held "Similarly, a jury in this case could reasonably find a material difference between suspension of a license to practice law and disbarment, given the comparative severity and duration of discipline implied by each". Order on motion to dismiss pg 9.

The legal standard in the motion to dismiss is akin to the standard for summary judgment on this issue.
"In ruling on a motion to dismiss…, the Court must "assume the truth of the facts alleged in the plaintiff's pleadings and construe all reasonable inferences in the light most favorable to him." Harrington v. Brooks Drugs, 148 N.H. 101, 148 N.H. at 104" Order on motion to dismiss pgs 2-3. Similarly the standard for summary judgment requires **"**Ultimately, the facts presented on summary judgment must be evaluated in the light most favorable to the nonmoving party along with all reasonable inferences drawn therefrom. See Sintros v. Hamon, 148 N.H. 478, 480 (2002)."

Under res judicata and/or collateral estoppel, the issue of substantial truth as it relates to disbarment being substantially true has already been decided in this case. Accordingly, summary judgment should have been denied as a matter of law. "Spurred by considerations of judicial

economy and a policy of certainty and finality in our legal system, the doctrines of res judicata and collateral estoppel have been established to avoid repetitive litigation so that at some point litigation over a particular controversy must come to an end." Eastern Marine Const. Corp. v. First Southern Leasing, 129 N.H. 270, 273 (1987). “At its core, the doctrine of collateral estoppel bars a party to a prior action, or a person in privity with such a party, from relitigating any issue or fact actually litigated and determined in the prior action.” Gephart v. Daigneault, 137 NH 166, 172 - NH: Supreme Court 1993.

If the issue of whether “disbarred” is substantially true in this case, is one solely of law, then summary judgment should be denied as this issue has already been decided in this case. The prior order denying defendant’s motion to dismiss the cause of action for being substantially true was previously denied.

CONCLUSION

The court erred in partially dismissing causes of action related to referencing Plaintiff’s prior criminal record without disclosing it was annulled.

The court erred in dismissing the cause of action related to invasion of privacy – false light, related to an admitted false booking photo.

There are material facts in dispute that required summary judgment to be denied. Plaintiff submitted overwhelming evidence for a reasonable jury to find “actual malice”.

Whether the statement “disbarred” was substantially true is a question for the jury and requires summary judgment be denied.

If the issue of whether “disbarred” was substantially true is a matter of law, then it is not substantially true as a matter of law.

The court already addressed the issue of substantial truth in its order denying the motion to dismiss, and defendants should not be allowed to re-litigate it.

Plaintiff requests the court reverse the partial dismissal of the counts involving defamation as it relates to knowingly disclosing an annulled conviction without referencing the annulment.

Plaintiff requests the court reverse the dismissal of the count in the complaint as it relates to invasion of privacy – false light, related to a false booking photo.

Plaintiff requests the court reverse the finding granting summary judgment so that this case may properly proceed to a jury trial.

Plaintiff waives oral argument

Certification for Rule 16 (3)(i)

The decisions being appealed are in writing and are attached through the e-file system as a separate appendix.

Respectfully Submitted,

/s/Dan Hynes_____

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CERTIFICATION

I hereby certify that a digital copy of the brief and exhibits/appendix have been provided to opposing counsel through the NH Supreme Court e-file system, at the time this document is e-filed.

/s/Dan Hynes_____

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