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Sent: Thursday, September 16, 2021 6:00 PM
To: hampden.clerksoffice Mailing List.
Subject: 2020-P-0088 - Notice of Rescript to Trial Court
Attachments: 20P88-RC.PDF; 20P0088-SD.pdf; ATT00001.txt

-COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT CLERK'S OFFICE

Dated: September 16, 2021

RE: No. 2020-P-0088
Lower Court No: 1879CV00344

RIAN WATERS vs. AIDAN KEARNEY & others

NOTICE OF RESCRIPT

In accordance with Massachusetts Rule of Appellate Procedure 23, please note that the rescript in the above-referenced case has been entered on the Appeals Court docket and is enclosed.

Very truly yours,
Joseph F. Stanton, Clerk

If you have any questions, or wish to communicate with the Clerk's Office about this case, please contact the Clerk's Office at 617-725-8106. Thank you.

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 20-P-88

RIAN WATERS

vs.

AIDAN KEARNEY & others.

Pending in the Superior

Court for the County of Hampden

Ordered, that the following entry be made on the docket:

So much of the judgment entered on July 8, 2019, that dismissed count four of the plaintiff's second amended complaint stating a claim for libel based on the statements in Kearney's book that Waters sold drugs in California and shipped drugs to Massachusetts, is reversed. In all other respects, the judgment is affirmed. The matter is remanded to the Superior Court for further proceedings consistent with the memorandum and order of the Appeals Court.

By the Court,

Joseph F. Stanton, Clerk

Date August 19, 2021.

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-88

RIAN WATERS

vs.

AIDAN KEARNEY & others.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The present action concerns claims for libel, slander per se, intentional infliction of emotional distress, negligent publication, fraud, and loss of consortium arising from allegedly false and defamatory statements made and published by the defendants, Aidan Kearney, Worcester Digital Marketing, LLC (WDM), and Turtleboy Enterprises, LLC (Turtleboy) (collectively the defendants).[2] The defendants were defaulted, and after they moved successfully to remove the default, they filed a motion to dismiss that was converted into a motion for summary judgment.

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[1] Worcester Digital Marketing, LLC, and Turtleboy Enterprises.
[2] Waters did not include a copy of his second amended complaint in the record appendix; however, we obtained a copy of it from the Superior Court. We note that the amended complaint names Samantha Cardin and John Does 1-10 as defendants. However, none of these defendants are identified in Waters's notice of appeal and they are not parties to this appeal.

Following a hearing, a judge of the Superior Court allowed the motion and dismissed Waters's second amended complaint. The judgment is affirmed in part and reversed in part.[3]

1. Motion to remove default. Waters's appeal from the order granting the motion to remove the default was not timely and therefore we have no jurisdiction to consider that order. Even if we were to reach the merits, Waters fares no better. The court may set aside an entry of default on a showing of "good cause." Ceruolo v. Garcia, 92 Mass. App. Ct. 185, 188 (2017), quoting Mass. R. Civ. P. 55 (c), 365 Mass. 822 (1974). Factors that are relevant in determining if good cause exists include:

> "(1) whether the default was willful; (2) whether setting it aside would prejudice the adversary; . . . (3) whether a meritorious defense is presented[;] '(4) the nature of the defendant's explanation for the default; (5) the good faith of the parties; (6) the amount of money involved; [and] (7) the timing of the motion [to set aside the entry of default].'"

Id. at 189, quoting Indigo America, Inc. v. Big Impressions, LLC, 597 F.3d 1, 3 (1st Cir. 2010). We review the judge's

[3] Waters also purports to appeal from orders denying his motions for a temporary restraining order and preliminary injunction dated February 1, 2019, for impoundment dated February 1, 2019, and for leave to amend the complaint dated June 18, 2019. Based on our review of the limited record provided to us, we discern no abuse of discretion or error of law made in connection with any of these orders.

decision to set aside an entry of default for abuse of discretion. See id. at 188.

Kearney's motion to remove the default was supported by an affidavit in which he explained the reasons for his failure to timely file an answer. These reasons included that Waters had contacted Kearney via e-mail about dismissing the lawsuit in exchange for a monetary payment, that Kearney filed a report with the police alleging that Waters was attempting to extort money from him, and that Waters's "continued emails distracted [Kearney's attention] from this civil matter." In addition, Kearney promptly moved to remove the default once he received notice of its entry, and set forth the bases for potential defenses to Waters's claims. Given these circumstances, particularly the fact that the motion to remove the default was early in the proceedings, we conclude that the motion judge did not abuse her discretion by vacating the entry of default.[4] Ceruolo, 92 Mass. App. Ct. at 189 ("a [trial] court should resolve doubts in favor of a party seeking relief from the entry of a default").

2. Motion for summary judgment. "A party is entitled to summary judgment where the movant . . . shows that, viewing the evidence in the light most favorable to the nonmoving party,

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[4] We note that a transcript of the hearing on the motion was not included in the appellate record.

'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Lynch v. Crawford, 483 Mass. 631, 641 (2019), quoting Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002). 'We review an order granting or denying summary judgment de novo because the record before us is the same as the record before the motion judge, and the decision is a matter of law rather than of discretionary judgment." See id.

a. Background. We summarize the facts as set forth by the Superior Court judge in her memorandum of decision and order allowing the defendants' motion for summary judgment.[5] In December 2016, Waters was arrested and charged with animal cruelty and assault and battery on Samantha Cardin, who was his fiancé at the time and the mother of his child. Shortly thereafter, Cardin posted photographs of herself with a black eye and made comments concerning Waters's alleged assaultive conduct against her and her dog on her Facebook account. On January 6, 2017, a blog was posted on "Turtleboy Sports," a social media platform operated by WDM. That blog post reproduced Cardin's Facebook posts in which she stated that Waters assaulted her, and that Waters injured her dog who

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[5] As discussed in more detail later, Waters has failed to present an adequate appendix. Consequently, we rely on the factual summary provided by the judge in her memorandum of decision.

subsequently died. On May 20, 2018, Kearney discussed those blog posts and Waters's criminal case on an online live show. On November 13, 2018, WDM published a book titled "I am Turtleboy," authored by Kearney. The book included several references to Waters and his alleged criminal conduct.

Soon thereafter, Waters brought this action alleging that various statements made in the blog dated January 6, 2017, in the online live show on May 20, 2018, and in the book published on November 13, 2018, were defamatory and that the defendants are liable to him for libel, slander, intentional infliction of emotional distress, negligent publication, fraud, and loss of consortium. As noted, the defendants filed a motion to dismiss the complaint that the judge converted to a motion for summary judgment. Following a hearing, the judge allowed the motion in a comprehensive memorandum of decision and order.

b. Discussion. At the outset, we note that "it is the appellant's responsibility to ensure that the record is adequate for appellate review." Commonwealth v. Woody, 429 Mass. 95, 97 (1999). See, e.g., Shawmut Community Bank, N.A. v. Zagami, 30 Mass. App. Ct. 371, 372-373 (1991), S.C., 411 Mass. 807 (1992). This obligation extends to pro se litigants. See International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 847 (1983). Waters has not fulfilled his obligation. He has not included copies of several exhibits that the motion judge expressly relied on in

reaching her conclusions in his appendix.[6] See Mass. R. A. P. 18 (a) (1) (A) (v), as appearing in 481 Mass. 1637 (2019) (appellant's appendix must include "any parts of the record relied upon in the brief [and] any document, or portion thereof, filed in the case relating to an issue which is to be argued on appeal"). As a result of these omissions, it is difficult, if not impossible, to properly evaluate many of Waters's arguments. We have nevertheless conducted an independent review to the best of our ability based on the materials provided and affirm the grant of summary judgment on all counts with one exception as discussed below.

i. Libel against Turtleboy and WDM (count two). Waters's claim of libel is premised on nine allegedly defamatory statements published in the January 6, 2017 blog post: (1) Waters "had dirt and pubes on his upper lip"; (2) Waters "said 'LOL Dumbass Ludlow cops don't know about celiac disease'"; (3) Waters "found his dog crushed underneath a big metal cabinet"; (4) Waters's "dog was clearly in need of a vet for days"; (5) Waters's "statements meant he was convinced he

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[6] Waters failed to include the following documents -- on which the motion judge relied -- and that are essential for review of the issues raised on appeal: the January 6, 2017 blog post; the Palmer Police Department's application for criminal complaint; Palmer Police Department Arrest Report; Criminal Complaint 1743 CR 0009; victim impact statement; photographs of Cardin's injured eye; and a forensic veterinary investigation (autopsy) report regarding the death of the dog.

did cause [Cardin's] black eye"; (6) Waters "was far from innocent"; (7) Waters "lived in Palmer"; (8) Waters "was re-enacting his favorite episode of 16 and pregnant"; and (9) Waters's "January 4th post was in response to [Cardin's] January 5th post." The judge determined that the statements were not defamatory because they constituted opinion not fact and, consequently, she concluded that the defendants were entitled to summary judgment on count two. We reach the same conclusion.

"Defamation encompasses the torts of libel and slander -- the one being in general written while the other in general is oral." Draghetti v. Chmielewski, 416 Mass. 808, 812 n.4 (1994).

> "To withstand a motion for summary judgment on a defamation claim, a plaintiff must have a reasonable expectation of proving four elements: first, the defendant made a statement, of and 'concerning the plaintiff, to a third party'; second, the 'statement could damage the plaintiff's reputation in the community'; third, the defendant was at fault for making the statement; and fourth, the statement caused economic loss or, in four specific circumstances, is actionable without economic loss" (citation omitted).

Scholz v. Delp, 473 Mass. 249, 249 (2015). "Furthermore, to be actionable, the statement must be one of fact rather than of opinion." Id.

As we have discussed, Waters did not include the January 6, 2017 blog post in his appendix. However, based on the motion judge's description of the context in which the statements at issue were made, it is evident that the statements were not

actionable because they constituted opinions.[7] See e.g., Scholz, 473 Mass. at 250, quoting Cole v. Westinghouse Broadcasting Co., 386 Mass. 303, 309, cert. denied, 459 U.S. 1037 (1982) (to determine whether statement is fact or opinion, "a court must 'examine the statement in its totality in the context in which it was uttered or published,' and 'must consider all the words used, not merely a particular phrase or sentence'").

As the judge observed, the blog contained cautionary terms that relayed to the reader that the author was "indulging in speculation." Scholz, 473 Mass. at 251, quoting King v. Globe Newspaper Co., 400 Mass. 705, 713 (1987), cert. denied, 485 U.S. 940 and 485 U.S. 962 (1988). The judge, who clearly reviewed the entire blog, wrote that the blog article contained the following additional language: "She's saying he head butted her. She's also accusing him of killing their dog. Not good if true. But there's two sides to every story"; "You have to be careful with these domestic abuse stories. Your initial instinct is often to believe the battered woman. I know it was Turtleboy's. But at the same time, we don't know these people. And some chicks are capable of anything"; "Nothing about this

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[7] We also agree with the motion judge that summary judgment was appropriate as to the statements that Waters lived in Palmer and Waters posted his January 4th post in response to Cardin's January 5th post, because Waters failed to demonstrate that the statements could damage his reputation in the community or that they caused him an economic loss.

story makes much sense, and if you're keeping score, she's winning in the court of public opinion"; and "If I can easily picture these two cheesehogs going at it, and her getting up in his grill and smacking him a couple of times, and their heads banging into each other, [then] so can any real life juror." Given these cautionary statements, in particular the comment "But, there are two sides to every story," we likewise conclude that the context of the blog puts the reader on notice that what is being read is opinion. Accordingly, summary judgement properly entered in favor of Turtleboy and WDM on Waters's claim of libel.

ii. Libel against Kearney (count four). Waters's claim of libel against Kearney is premised on the following five statements published in the book, "I am Turtleboy:" (1) "According to the woman he assaulted, Rian Waters sold drugs in California"; (2) "[O]n a visit to see [his daughter and Cardin in Massachusetts] he allegedly shipped himself drugs via the USPS, which he intended to sell here"; (3) "One day [Waters] got into an argument with [Cardin] and allegedly assaulted her, causing the black eye"; (4) Waters "then went into the house and killed the dog in front of his special needs daughter by stomping it in the back"; and (5) "Everything [Cardin] had posted on Facebook was true, and she had finally gotten the

courage to speak out against her abuser. I know this as a fact because [Waters] had a trial and it all came out."

According to the judge, the defendants argued that none of these statements are actionable because they either constituted opinion or were true. In support of their argument, the defendants submitted an affidavit from Cardin, the application for the criminal complaint, the arrest report, the criminal complaint, a victim impact statement, photographs of Cardin's injured eye, and apparently a forensic veterinary report of the dog's postmortem examination. Waters did not produce a counter affidavit or offer any evidence to show that the statements were false. Accordingly, the judge concluded that there was no genuine issue of material fact as to the truth of the statements that Cardin posted on Facebook and the defendants were entitled to summary judgment as a matter of law.

Although Waters has included the relevant excerpt of the book in his appendix, he failed to produce the exhibits (i.e., the relevant Facebook posts, police reports and arrest record, the forensic veterinary investigation report, and documentation of Cardin's injuries) on which the judge relied in reaching her conclusion that the statements concerning Cardin's allegations that Waters assaulted her and injured her dog are true.[8] See

[8] We note that Waters attached a copy of G. L. c. 231, § 92, to his brief; however, he makes no argument concerning the statute.

supra note 6. On this record, we cannot say that the motion judge erred in allowing summary judgment as to those statements, particularly where the judge concluded that Kearney presented sufficient evidence to support his contention that the statements Cardin made about her black eye and the dog's death on Facebook were true, and Waters failed to present competent evidence to the contrary necessary to raise a genuine issue for trial.[9] See Arch Med. Assocs., Inc. v. Bartlett Health Enters., Inc., 32 Mass. App. Ct. 404, 406 (1992) ("Errors that are not disclosed by the record afford no basis for reversal').

The two remaining statements alleging that Waters sold drugs in California and shipped drugs to Massachusetts stand on different footing. The motion judge concluded that the statements were not actionable based on the use of cautionary terms and language, i.e., "[a]ccording to" and "allegedly." However, "[a]n imputation of crime is defamatory per se." Jones v. Taibbi, 400 Mass. 786, 792 (1987). This is so even when "the charge was qualified by the words 'it is alleged' or their equivalent," Maloof v. Post Publ. Co., 306 Mass. 279, 280

We therefore do not address the relevance, if any, the statute bears on the issues raised on appeal. See Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019) ("appellate court need not pass upon questions or issues not argued in the brief").

[9] In the appellate record on this issue, we are presented only with Cardin's affidavit wherein she states that Waters did physically assault her and opines that Waters assaulted her dog.

(1940), or a mere "truthful preface [was added] that someone else has so stated." Jones, supra, quoting Ricci v. Venture Magazine, Inc., 574 F. Supp. 1563, 1572 (D. Mass. 1983). Accordingly, we reverse so much of the judgment entered in favor of Kearney on Waters's libel claim that is based on the statements that Waters sold drugs in California and shipped drugs to Massachusetts via USPS.

iii. Slander per se against Kearney (count five). Waters alleges that various statements made by Kearney during a Facebook live show amounted to slander per se. The Facebook live show is not part of the appellate record, and it is unclear whether it was part of the summary judgment record. However, even if we were to consider the statements as set forth in the unverified complaint regarding what was said at the show, we conclude that Kearney is entitled to summary judgment on this claim but for a different reason than that relied on by the motion judge.[10] See Roman v. Trustees of Tufts College, 461 Mass. 707, 711 (2012) (appellate court may affirm summary judgment on any ground supported by the record).

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[10] The motion judge determined that the claim failed under G. L. c. 156C, § 22, because Kearney cannot be held individually liable solely by reason of being a member or acting as a manager of a limited liability company. We note that Waters did allege that WDM and Turtleboy were alter egos of Kearney.

Waters alleges that during the show, "Kearney said that he got emails from people that were in the courtroom of the trial that never happened. He said the emails talked about how manipulative the Plaintiff was, and that they couldn't believe there was this great miscarriage of justice that the Plaintiff was found not guilty, and that the Plaintiff is a psycho. The Plaintiff believes and alleges that no such emails exist." The challenged comments are statements of opinion and not statements of fact, and as such, they are not actionable. See Scholz, 473 Mass. at 249 (only statements of fact, not statements of opinion, are actionable on defamation claim); King, 400 Mass. at 709 ("in an action of libel, the defendant is entitled to summary judgment if the challenged statement cannot reasonably be construed as a statement of fact"). Moreover, it matters not, as Waters asserts, that the statements are falsely attributed to other individuals. None of the statements are actionable. The statements describing Waters as "manipulative" and a "psycho" are subjective statements of opinion. See Scholz, supra at 250, quoting Levinksy's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 127 (1st Cir. 1997) ("a statement that does not contain 'objectively verifiable facts' is not actionable"). The statement that it was a great miscarriage of justice that Waters was found not guilty also is not actionable. Waters argues that the statement is slanderous because he was

not acquitted after a trial on the merits, rather the charges against him were dismissed for failure to prosecute. The statement, however, is substantially true and, as such, does not support a claim of defamation. See Reilly v. Associated Press, 59 Mass. App. Ct. 764, 770 (2003) ("when a statement is substantially true, a minor inaccuracy will not support a defamation claim"). Cf. Jones, 400 Mass. at 795-796 ("Although the plaintiff was not actually charged, the impact of that statement did not create a substantially greater defamatory sting than an accurate report that the plaintiff had only been booked on suspicion of murder"). To the extent Waters takes issue with the assertion that it was a great miscarriage of justice that he was not convicted, that too is a statement of opinion, not fact.

iv. Intentional infliction of emotional distress (count seven). Waters also claims that the defendants are liable for intentional infliction of emotional distress because he received death threats and lost contact with family members as a result of the January 6, 2017 blog post. However, where Waters has not prevailed on his defamation claim related to that post, he also "cannot establish the derivative claim of intentional infliction of emotional distress." See Scholz, 473 Mass. at 254.

v. Negligent publication (count eight). We agree with the conclusion reached by the motion judge that a claim of negligent

publication is not a separate cause of action. Consequently, the defendants are entitled to summary judgment on count eight of Waters's complaint. Cf. HipSaver, Inc. v. Kiel, 464 Mass. 517, 531 n.14 (2013) (private figure may recover for defamation by proving "negligent publication" of defamatory falsehood).

vi. Fraud and loss of consortium (counts nine and ten). As observed by the motion judge, Waters failed to adequately plead a claim for fraud as well as a claim for loss of consortium and, therefore, counts nine and ten were properly dismissed.[11]

Conclusion. So much of the judgment entered on July 8, 2019, that dismissed count four of the plaintiff's second amended complaint stating a claim for libel based on the statements in Kearney's book that Waters sold drugs in California and shipped drugs to Massachusetts, is reversed. In all other respects, the judgment is affirmed. The matter

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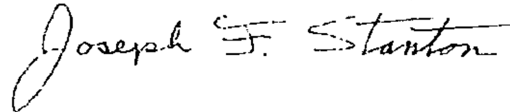
[11] To the extent that we do not address Waters's other contentions, they "have not been overlooked. We find nothing in them that requires discussion." Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).

is remanded to the Superior Court for further proceedings consistent with this memorandum and order.

So ordered.

By the Court (Green, C.J., Vuono & Shin, JJ.[12]),



Clerk

Entered: August 19, 2021.

[12] The panelists are listed in order of seniority.