

COMMONWEALTH OF MASSACHUSETTS

APPELLATE DOCKET
#2020P0088
LOWER COURT DOCKET # 1879CV00344

RIAN WATERS,
Appellant/ Plaintiff

v.

AIDAN KEARNEY,
WORCESTER DIGITAL MARKETING, LLC
TURTLEBOY ENTERPRISES, LLC
Appellee/ Defendant

Appellant brief

Filed Pro se by Rian Waters

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1 Statement of the issues

- I. Whether criminal allegations are still defamatory per se.
- II. Whether the court erred in ruling Aidan Kearney’s comments as non-actionable opinions
- III. Whether G.L. c. 156C, § 22 protects Aidan Kearney from liability of his own actions, or if he can be held liable as an operator.

- IV. Whether the Lower court failed it's constitutional, and canon law duties, and whether it should have used its inherent power.
- V. Whether a perjurious excuse, and a bare allegation of a meritorious defense is adequate to remove a default when the Defendant strategically defaulted.

2 Statement of case

On May 18th, 2018, I Rian Waters, filed a lawsuit against Aidan Kearney, and his two companies for libel, slander, and intentional infliction of emotional distress. I filed an amended complaint on June 1st, 2018. Aidan Kearney did not answer in the prescribed time and was defaulted on September 18th, 2018. Aidan Kearney and his companies moved to remove the default on September 25th, 2018, and the motion was granted by the Honorable Constance Sweeney at the hearing on November 20th, 2018. The court said the answer must be filed by November 26th, but the Defendants did not answer the Amended complaint until December 10th, 2018. I filed a motion to reconsider the defaults removal on December 14th, 2018, and later made the mistake of filing an interlocutory notice of appeal in the Superior court. On December 21st I filed a motion

to amend the complaint a second time to reflect that John Doe 2's name was ascertained as Aidan Kearney, and to include the additional defamation in Aidan Kearney's book. I filed an Emergency Motion for a temporary restraining order, and preliminary injunction on January 2nd, 2019. I filed a motion to convert the Default Judgment hearing for Samantha Cardin into a Temporary Restraining Order hearing, which was denied. On January 9th, 2019, I voluntarily dismissed Samantha Cardin from the lawsuit at her damages hearing because of relentless harassment. The defendants served me with their opposition to the preliminary injunction and a motion to dismiss at the start of the preliminary injunction hearing on January 17th, 2019. On January 18th I asked the court for clarification on whether they were going to convert the motion to dismiss into a rule 56 summary judgment motion or disregard the new affidavits. But the court waited until after my opposition for the motion to dismiss was due and converted the motion to a Summary Judgment motion on February 8th, 2019. On January 31st I filed an emergency motion for impoundment to stop witness intimidation, but it was denied February 8th, 2019, as the court did not think it was an emergency. The court also denied the Preliminary Injunction on February 8th, 2019. On March 12th, 2019,

at the Rule 56 hearing I argued that I was still unable to fairly represent myself because of witness intimidation and I asked that the court take an affirmative role in ensuring my right to be fairly heard. On March 18th I filed a motion for leave to amend the complaint, which was denied June 18th without reason. On April 25th I filed a motion to reconsider the preliminary injunction with a letter from my therapist showing that Aidan Kearney's actions were the cause of my adjustment disorder, and that they were inhibiting my ability to represent myself, but it was also denied on June 13th 2019. On June 18th, 2019 Judge Jane Mulqueen ruled summary Judgment in the Defendants favor. On July 3rd I filed a notice of appeal, but the clerk's office decided it was premature, and invalid. On November 6th I served the Defendants with a Motion to declare notice of appeal valid, which was allowed on December 13th, 2019.

3 Statement of facts

1. I asked for consolidation of summary judgment with the preliminary injunction "pursuant of MCRP 65 (B)(2)" A.R. 32, TRII-10-11
2. On November 20th 2018, Honorable Constance Sweeny removed the Defendant's default, and said "counsel for the moving parties must file an answer on their behalf no later than 11 /26/18." A.R. 29-30

3. The Defendant's answered the Amended complaint on December 10th 2018. A.R. 70
4. This lawsuit was either Aidan Kearney's third or fourth time defaulting as a defendant. A.R. 23
5. Aidan Kearney won a case in small claims court by default. A.R. 28
6. Aidan Kearney has talked about the strategic advantages of defaulting on multiple occasions. A.R. 23 & A.R. 26
7. Aidan Kearney's 9/24/18 affidavit was perjurious as it misrepresented emails to make an excuse for defaulting. A.R. 11 & A.R. 20
8. Aidan Kearney's 9/24/18 affidavit only had a bare allegation of a meritorious defense. A.R. 11
9. In November 2018, Aidan Kearney self-published a book titled "I am Turtleboy." In Aidan's book he wrote the following defamatory statements; A.R. 46 A.R. 82
 - a. "Rian Waters sold drugs in California,"
 - b. "he allegedly shipped himself drugs via the USPS, which he intended to sell here"
 - c. "allegedly assaulted her, causing the black eye."

- d. “He then went into the house and killed the dog in front of his special needs daughter by stomping it in the back.”
- e. “Everything she had posted on Facebook was true... I know this as a fact because Rian had a trial and it all came out.”

10. I have never had a trial involving any of the listed criminal allegations, and the Defendant’s did not prove otherwise. A.R 67-79

11. The Defendants have not presented any evidence that I sold or shipped drugs. A.R. 67-79

12. The Defendants submitted a necropsy and Veterinarians report that showed that my dog was injured by blunt force, and that in the reporter’s opinion it could have been a kick.

13. The Defendant’s submitted Officer Jeremy Haley’s narrative from my arrest, Officer Haley claimed that I said “I know I f*cked up”

14. I filed a motion requesting impoundment for safety concerns of;

- a. The Plaintiff’s new address and phone number.
- b. Any witness or potential witnesses name, address, and phone number.
- c. The transcribed jail phone calls between Samantha Cardin, and Rian Waters.

d. Messages submitted as evidence between Samantha Cardin and Rian Waters.

e. The future deposition of Samantha Cardin. A.R 59

15.Samantha Cardin's affidavit contained conclusory statements of belief. A.R. 81

16.Aidan Kearney is the sole owner, manager, and officer of both of his LLC's. At all times relevant, neither of Aidan Kearney's companies had filed an annual report since 2016. A.R. 96-102

17.On November 11th, 2018, Aidan Kearney claimed on his recorded online show that I "killed a dog in front of a special needs daughter" and then he said "I'm going to bury that mother f*cker, that guy is going to die, I'm going to, not really die, I am going to f*cking murder him with words and we are going to bury him" A.R 45

18.After Aidan Kearney's threat on 11/11/2018, I felt uncomfortable at my house and moved away. A.R. 46

19.Aidan Kearney's harassment caused me to have adjustment disorder, which negatively affected my life in every aspect A.R. 130

20.Because of the harassment and the resulting adjustment disorder, my best quality brief was my first one A.R. 12-18 & A.R 31-45

21. Aidan Kearney told my Roommate that she deserved to have her sh*t blown up because I used her address to file the lawsuit. A.R. 65
22. Michael Gaffney filled out an affidavit to show that the default was strategic, and part of a long pattern. A.R. 23-24
23. Shortly before hearings, the Defendant's website published fabricated images with Michael Gaffney's face, and my face, and placed them on homosexual men in bed. AR 124-125
24. I told the court at the January 9th, 2019 hearing that "the harassment that I've been getting from the defendants that he represents has been so severe that I am not able to properly litigate. I mean, I've gotten literal death threats" TRI-4/17-20
25. When the court asked what had changed since I filed a motion a week prior, I said "They have published at least -- at least three blogs and have at least six, seven Facebook posts per each account that they have, and I've gotten death threats" TRI-9 I also explained that "they continually have done some sort of intimidation before every important event with this case." TRI-10/13-15 I also explained "on a daily basis they try to destroy lives and it's like their goal. They have this Turtle Boy Graveyard which is, like, all the lives that

they've like ruined and they put in, so it's just, yeah, his threats if done by a normal person would not be that threatening, done by him is extremely threatening” TRI-10-11/20-8

26. The court interrupted me before I finished reading the first threat, and denied the TRO arguing that third-party threats were irrelevant. TRI-11

27. Aidan Kearney said multiple times that he has hidden his assets, and that he will bankrupt the company if I win, so that he will never have to pay a judgment TRII-6/14-20

28. I told the court that Aidan had made me his organization's number one enemy, and explained that he frequently used clever words to direct his followers to harass people, and further explained that sadistic people gang together to harass Aidan's targets. TRII-9

29. I told the court that I wanted to depose Samantha Cardin before the motion to dismiss hearing because the motion to dismiss included an 11th hour affidavit from Samantha Cardin. But the court said that's not how it works, and claimed that I only had ten days to respond. TRII-11-12/17-16

30. I told the court that I had moved away from my house because of Aidan's harassment, and that it made it inconvenient to get court papers. The court said it wouldn't compel email service and told me that I can trust Kevin Chrisanthopolous to keep my address from Aidan Kearney. TRII-16-17 Less than a week later Aidan Kearney's website listed my new address. TRIII-16

31. At the beginning of the March 12th summary judgment hearing, the court asked if I was ready to proceed, and I said no. I explained "the defendants have been doing clear violations of 268 13B and it has been causing severe damage emotionally and mentally, and it's also the witness intimidation it blocks -- it makes it so that I can't do a deposition fairly and get a fair result... Any witness knows that if they end up going forward if they try to help me in this case, then they are going to have like sexually explicit pictures of them, and they're going to have all sorts of people attacking them and taunting them and harassing them on Facebook... I argue that it is your duty to see that I am fairly heard, and I mean if you want me to supplement some sort of brief that's a more narrowly tailored preliminary injunction, I can do so, but it's unfair and it's unjust to

force me to argue this case and to do depositions under these circumstances.” TRIII-4-5 But the court said that they could not investigate criminal offences TRIII-6

32. When the court asked what I was trying to enjoin, I said to prevent them from harassing witnesses, and by harassing witnesses I mean put them on a public shaming device that is known for destroying lives. TRIII-7/11-14

33. I then told the court that in the Defendant’s most recent article they listed the District attorney's number and asked their readers to call and try to get them to press criminal charges against me, and I said the harassment was making it difficult for me to do basic tasks, let alone fairly argue. TRIII-8/9-24

34. The court and I argued for several minutes on what an affirmative role was, and the court said if I wanted an injunction or a protective order then I would have to file a motion. TRIII-20-23

4 Summary of Argument.

p. 27 I never got a reasonable opportunity to present pertinent material about the allegations that I hurt Samantha Cardin and my dog, as Aidan Keareny’s relentless harassment made it too dangerous for me to

have witnesses. P. 19 Criminal allegations are defamatory per se, and Aidan Kearney never presented any evidence that I sold or shipped drugs. P. 38 Aidan Kearney also strategically flouted, and the court removed the default without considering any of the relevant factors. P. 25 Finally, Aidan Kearney should be held liable for his own actions.

5 Argument

Samantha Cardin's conclusory affidavit was irrelevant

Samantha Cardin's 11th hour affidavit that was attached to the Defendant's motion to dismiss should not have held any weight as it contained conclusory statements of belief. "Statements of belief carry no weight in an affidavit in support of summary judgment." Hartford Acci. & Indem. Co. v. Millis Roofing & Sheet Metal, Inc., 11 Mass. App. Ct. 998, 998 (1981) More importantly, I would have deposed Samantha Cardin, and presented the evidence listed in my motion for impoundment had the court stopped the obstruction in any way. I told the court that Aidan was harassing everyone involved, and explained that I couldn't get a fair result without some help from the court. Had Samantha Cardin admitted that she knew I was innocent of her allegations, or had I presented evidence that proved she knew I was innocent of her allegations, Aidan Kearney

certainly would have destroyed her by publishing blogs on his weaponized public shaming device, which automatically would have directed hundreds of people to harass her. But since the court didn't care that the Defendants harassed Michael Gaffney, my roommate, or myself, and the court didn't care that Aidan Kearney committed perjury to remove the default, there is no logical motive for Samantha to say anything that Aidan Kearney was not going to like. "The burden of proof was on the defendants to maintain that defence by showing the substantial truth of the charge in all material respects." Maloof v. Post Pub. Co., 306 Mass. 279, 280 (1940)

Criminal allegations are defamatory per se

In Aidan Kearney's book, (I am Turtleboy) he accused me of selling drugs in California, and shipping drugs via USPS. To this day he has not come up with a hint of evidence for either allegation. "The fact that the charge was qualified by the words 'it is alleged' or their equivalent, does not absolve the defendants from responsibility for publishing it. An accusation purporting to rest on hearsay is none the less defamatory." Maloof v. Post Pub. Co., 306 Mass. 279, 279 (1940) "an imputation of crime is defamatory per se" Stone v. Essex County Newspapers, Inc., 365 Mass. 246, 247 (1974) "Defamatory statements that are accusations of crime are actionable

without proof of special damage.” Galvin v. New York, N. H. & H. R. Co., 341 Mass. 293, 293 (1960) “A newspaper article that charges a party with a criminal offence is libelous on its face... The mere fact that a charge against a person is not made by direct averment but only by saying that such an allegation had been made is not material; for a statement of unfounded charges is none the less actionable that it is made only by way of repeating them as having been made by others. Nor have publishers of newspapers any greater right to give in this way currency to false charges than other persons... The reasons for allowing fair reports of the proceedings of courts of justice have no application whatever to the contents of a preliminary written statement of a claim or charge. These do not constitute a proceeding in open court.” Lundin v. Post Pub. Co., 217 Mass. 213, 215 (1914) The Defendant’s operate a blog that specializes in public shaming, so simply having your name listed on their website is enough to damage anyone’s reputation. “It is not necessary that the charge of indiscretions or want of chastity be direct and explicit; but anything fairly imputing immorality is actionable... An insinuation may be as actionable as a direct statement. In libel it is enough, whatever the form, that the manifest tendency of the words is seriously to hurt the plaintiff’s

reputation.” Thayer v. Worcester Post Co., 284 Mass. 160, 161 (1933)

“Proof of actual malice in making a defamatory statement will constitute an abuse of the privilege that provides for immunity as to statements that accuse someone of a crime where there is reasonable cause to believe that the crime is committed and the person seeks to discover the guilty party for his own protection. It is not necessary to prove malice by extrinsic evidence. It may be inferred from the relation of the parties, the circumstances attending the publication, and even from the terms of the publication itself. There may be an abuse of the privilege in the absence of actual malice. The privilege may be abused by an unnecessary, unreasonable or **excessive** publication of the defamatory matter. Where a publication is privileged by reason of the circumstances and occasion on which it is made, the privilege may be so far abused by an unnecessary and excessive publication that the immunity is lost, i.e., the defendant has gone beyond the area that is allowed by the privilege and is no longer protected.”

Galvin v. New York, N. H. & H. R. Co., 341 Mass. 293, 293 (1960)

Both the Defendant and court used cherry-picked parts of common law for determining opinions.

“To determine whether a statement is defamatory, the court must decide whether it is an assertion of fact or opinion. The distinction is often subtle

and difficult, particularly at the summary judgment stage. The determination is **considered a question of law only when it is unambiguous... if a statement is susceptible of being read by a reasonable person as either a factual statement or an opinion, it is for the jury to determine...** The court must consider all the words used, not merely a particular phrase or sentence... the court must consider all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published.” Downey v. Chutehall Constr. Co., Ltd., 86 Mass. App. Ct. 660, 661 (2014)

The Defendant tells the public he is a news company and claims to check facts. So, when the Defendant said “Everything she had posted on Facebook was true... I know this as a fact because Rian had a trial and it all came out.” most people would believe he was saying facts. Regardless, even if this court unanimously decides that the statements were opinion, they are still actionable, as the opinion is based on a trial that never happened “A statement cast in the form of an opinion may imply the existence of undisclosed defamatory facts on which the opinion purports to be based, and thus may be actionable.” King v. Globe Newspaper Co., 400 Mass. 705, 713 (1987) see also Lyons v. Globe Newspaper Co., 415 Mass. 258, 258 (1993)

The lower court did not have a reason to deny my motion to amend the complaint.

“Once a responsive pleading is served, a complaint may be amended only by leave of court or by written consent of an adverse party, and leave shall be freely given when justice so requires.” Mass. R. Civ. P. 15(a). “Although leave to amend is within the discretion of a judge, leave should be granted unless there appears some good reason for denying a motion. Such reasons include undue delay, bad faith or dilatory motive on the part of a movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of amendment. When trial is imminent, a judge may give weight to the public interest in the efficient operation of a trial list and to the interests of other parties who are ready for trial. A statement of reasons or finding of fact may be required to demonstrate adequate justification for a judge's action in denying a motion to amend a pleading.” Goulet v. Whitin Mach. Works, 399 Mass. 547, 548 (1987) The Court denied my motion to amend the complaint without any justification

“The Supreme Court of the United States, construing identical language in Rule 15 (a) of the Federal Rules of Civil Procedure, has discussed the considerations which a judge should have in mind when a motion to amend a pleading is presented for allowance. An ‘outright

refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.” Castellucci v. United States Fid. & Guar. Co., 372 Mass. 288, 289 (1977) quoting from Foman v. Davis, 371 U.S. 178 (1962)

Ruling summary judgment was an abuse of discretion

“In reviewing a ruling on a summary judgment motion, an appellate court views the evidence in the light most favorable to the nonmoving party.” Downey v. Chutehall Constr. Co., Ltd., 86 Mass. App. Ct. 660, 661 (2014) “Summary judgment, when appropriate, may be rendered against the moving party.” Mass R. Civ. P. 56 “Where state attaches a badge of infamy to citizen, due process comes into play.” Wisconsin v. Constantineau, 400 U.S. 433, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971) “In order to constitute a deprivation of liberty based on serious damage to one's standing in the community, more must be shown than mere allegations of incompetence or inefficiency at a particular job.” Stetson v. Bd. of Selectmen of Carlisle, 369 Mass. 755, 761 (1976) “A pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure

to state a claim if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Hughes v. Rowe, 449 U.S. 5, 6 (1980) “the danger of prejudicial pretrial publicity is substantially greater where a defendant's pretrial interrogation can be seen and [***23] heard on public and social media in an already highly publicized case, especially where that interrogation is suppressed and would not otherwise be seen and heard by the jury” Commonwealth v. Chism, 476 Mass. 171, 184 (2017) “If in fact a trial is dominated by a mob so that there is an actual interference with the course of justice, there is a departure from due process of law.” Moore v. Dempsey, 261 U.S. 86, 87 (1923) “Carelessly to utter defamatory statements entails the same responsibility for the injurious consequences as negligently to cast about firebrands, or shoot off a gun: since the defendant has in fact done the wrongful act he must be taken to have intended the consequences which naturally resulted.” Barrows v. Wareham Fire Dist., 82 Mass. App. Ct. 623, 623 (2012)

Aidan Kearney’s LLCs should not protect him from his personal actions.

“Except as otherwise provided by this chapter, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort

or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company; and no member or manager of a limited liability company shall be personally liable, directly or indirectly, including, without limitation, by way of indemnification, contribution, assessment or otherwise, for any such debt, obligation or liability of the limited liability company **solely by reason of being a member or acting as a manager of the limited liability company.**” G.L. c. 156C, § 22

The courts sole reason for ruling summary Judgment for claim 6 was “The impact of this statute is fatal to the claims against Kearney individually.” Judge Mulqueens decision. But the key word in the statute is solely. Aidan Kearney admitted he was the online host who said the defamatory statements, and Aidan Kearney wrote, self-edited, and self-published the book with defamatory statements. “A person who is an operator of a facility is not protected from liability by the legal structure of ownership... In a mechanical sense, to "operate" ordinarily means to control the functioning of; run: operate a sewing machine; to work; as, to operate a machine.” United States v. Bestfoods, 524 U.S. 51, 55 (1998) Additionally, the Defendant’s hadn’t filed an annual report for either company since 2016, and they didn’t keep the addresses up to date. “A party cannot retain the benefits received and at the same time escape the obligations imposed by the contract.” Dorn v. Astra USA, 975 F. Supp. 388, 393 (D. Mass. 1997) Aidan Kearney also should be held liable for his

bloggers blogs, as the blogs would not have done significant damage without the existence of his public shaming device, and the blogger spoke as, and referred to himself as “Turtleboy.” “A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.” Burlington Indus. v. Ellerth, 524 U.S. 742, 746 (1998) “A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: (a) the master intended the conduct or the consequences, or (b) the master was negligent or reckless, or (c) the conduct violated a non-delegable duty of the master, or (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.” Burlington Indus. v. Ellerth, 524 U.S. 742, 746 (1998)

I never got a reasonable opportunity to present pertinent material, and my motion for impoundment was an emergency that could not be filed under rule 9a

“If, on any motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court,

the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and *all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.* Mass. R. Civ. P. 12

But I had repeatedly told the court that the witness intimidation made it that I could not present evidence or list witnesses without Mr. Kearney destroying innocent lives. The stated reason for my impoundment motion was for "integrity, safety, and privacy concerns detailed in the attached memorandum." The affidavit I filled out showed that Mr. Kearney told my roommate that letting me use her address was a stupid mistake, and that he then threatened her saying "We are the ones you don't do that to unless you want to get your sh*t blown up." Mr. Kearney also implied that if she did not help him hurt me then he would use his public shaming device against her. The Affidavit also showed that Mr. Kearney's harassment of an individual who found a missing person's phone, caused the individual to be threatened and have his house broken into. The conclusion of my attached memorandum stated, "Impoundment of the requested evidence is necessary for the safety of private citizens, and for the court to find out the truth of the merits of this case." It was also

extremely difficult for me to follow 9a rules, as I did not want the Defendant to learn my address, and I was living under his financial sanctions. I realized that it was impossible to get a protection order in time to depose Samantha Cardin if I followed rule 9a.

The lower court should have issued sanctions using it's inherent power.

Standard of Review

Normally “an appellate court reviews the judge's imposition of sanctions under the court's inherent powers for abuse of discretion.” Wong v. Luu, 472 Mass. 208, 209 (2015) Although in this case the judge didn't use her inherent powers, so I argue that this court should instead determine if the court failed her duty to ensure I was fairly heard with conformity to the laws. I also believe the standard the US Supreme court used in *Bridges* to be relevant, as it involved contempts of out of court publications. “There must be a determination of whether or not the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils.” Bridges v. California, 314 U.S. 252, 258 (1941) (Clear and present danger is an

appropriate guide in determining the constitutionality of restrictions upon expression where the substantive evil sought to be prevented by the restriction is destruction of life or property, or invasion of the right of privacy.)

The lower court had a fundamental duty to use it's inherent power as necessary to ensure I was fairly heard with conformity to the laws.

“The intimate relationship between these rights and the judicial power is made clear in art. 29 of the Declaration of Rights: ‘It is essential to the preservation of the rights of every individual, his life, liberty, property, and *character*, that there be an impartial interpretation of the laws, and administration of justice.’ Also it is provided in art. 11 of the Declaration of Rights: ‘Every subject of the Commonwealth . . . ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; *conformably to the laws.*’” O'Coin's, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 509 (Mass. 1972) I’m of the opinion that John Adams wanted court cases to conform to all laws, and that had he meant a particular type of law, I believe he would have listed the specific type of

law. Regardless this case hasn't conformed to any type of laws. The Defendant intentionally harassed and caused financial and emotional damage to Michael Gaffney and myself violating G.L. c. 268 § 13B. Aidan Kearney lied on an affidavit to create a "good cause" excuse for defaulting, which clearly violates G.L. c. 268 § 1. Common law precedents were also ignored, like that criminal allegations are defamatory per se, or that people can't strategically flout with impunity. Lastly canon law currently requires a judge to ensure that all litigants are fairly heard. "The courts of general jurisdiction have the inherent power to do whatever may be done under the general principles of jurisprudence to insure to the citizen a fair trial, whenever his life, liberty, property or *character* is at stake. The possession of such power involves its exercise as a duty whenever public or private interests require." Crocker v. Justices of Superior Court, 208 Mass. 162, 163 (1911) "Although they may be recognized by statute, [these powers] . . . exist without a statute, for they 'directly affect the capacity of the judicial department to function.' Commonwealth v. Jackson, 369 Mass. 904, 921-922 (1976) "Every judge 'must exercise his inherent powers as necessary to secure the full and effective administration of justice.' O'Coin's, Inc.,

supra at 514.” Commonwealth v. O’Neil, 418 Mass. 760, 763-64 (Mass. 1994)

Canon law also recognizes a judge’s duty to ensure litigants are fairly heard. “A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge may make reasonable efforts, consistent with the law,* to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard.” Mass. Sup. Jud. Ct. R. 3:10 Rule 2.6(A) ([1]) (The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed. [1A] The judge has an affirmative role in facilitating the ability of every person who has a legal interest in a proceeding to be fairly heard.)

Given the severity of my allegations, the lower court should have appointed a private prosecutor to investigate the obstruction.

The lower court said “intimidation of a witness is a criminal offense, and so the Court does not investigate criminal offenses.” TRIII-6 But with the courts constitutional and canon law duties in mind, I argue that if a party claims that relentless harassment from the opposing party is

obstructing justice, and the party can show some evidence of an actual interference, or a clear and present danger, like for example a medical diagnosis of adjustment disorder... Then I argue that it is then the judge's duty to either warn the offending party, sanction the offending party, or on it's own initiative appoint a private attorney to investigate the obstruction. "courts possess inherent authority to initiate contempt proceedings for disobedience to their orders, authority which necessarily encompasses the ability to appoint a private attorney to prosecute the contempt." Young v. United States ex rel. Vuitton Et Fils S. A., 481 U.S. 787, 789 (1987) (the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative. Thus, while the prosecution of in-court and out-of-court contempts must proceed in a different manner, they both proceed at the *instigation of the court.*) "In *Young*, the Supreme Court held that a federal court has the power to appoint a special prosecutor to pursue a charge of criminal contempt when the Department of Justice declines to prosecute. Although the Supreme Court was declaring the power of the federal courts, the Supreme Court's reasoning applies equally to the judicial power of state courts" State v. Williams, 356 P.3d 804, 809 (Alaska Ct. App. 2015) The Pennsylvania

supreme court,¹ New Hampshire Supreme court², and the Washington Appeals court³ have all cited *Young* as confirmation of a state court's inherent power to appoint a private prosecutor.

“The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches... Courts cannot be at the mercy of another Branch in deciding whether such proceedings should be initiated. The ability to appoint a private attorney to prosecute a contempt action satisfies the need for an independent means of self-protection, without which courts would be ‘mere boards of arbitration whose judgments and decrees would be only advisory.’” State v. Williams, 356 P.3d 804, 809 (Alaska Ct. App. 2015), [Quoting Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911)]

The offending conduct meets clear and present danger.

Aidan Kearney continued to publish articles that he knew would cause hundreds of people to harass me, even though I kept telling the court that the harassment was preventing me from presenting evidence, and that

¹ In re Thirty-Fifth Statewide Investigating Jury, 631 Pa. 383 (2015)

² Rogowicz v. O'Connell, 147 N.H. 270 (2001)

³ In re Interest of Mowery, 141 Wash. App. 263 (2007)

he had caused me to have Adjustment disorder. “Where defendants used Web site to recruit others to harass victims, defendants could not launder their harassment of the [victims] through the Internet to escape liability” for criminal harassment under G. L. c. 265, § 43A) Commonwealth v. Walters, 472 Mass. 680, 696-697 (2015) “All parties, whether represented by attorneys or not, are obligated to proceed in good faith, to ‘act with reasonable diligence to bring their litigation to a final conclusion,’ Bucchiere v. New England Tel. Tel. Co., 396 Mass. 639, 642 (1986), and to conduct themselves with at least that modicum of civility, courtesy and respect, for both the court and other parties, that simple common decency and common sense dictate... they are as obligated, at the very least, to refrain from any action which obstructs or degrades the administration of justice or derogates from the authority and dignity of the court” Reznik v. Friswell, 2003 Mass. App. Div. 42, 44 (2003) “There are special, limited circumstances in which speech is so interlaced with burgeoning violence that it is not protected by the broad guarantee of U.S. Const. amend. I.” Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 176 (1968) “One purpose of ALM G.L. c. 268 § 13B is protection of participants in judicial proceedings and thereby protection of public

interest in due administration of justice.” Commonwealth v. Burt (Mass. App. Ct. Apr. 5, 1996) “The purpose for which courts are established is to do justice. A fundamental principle of free institutions was stated by Hamilton in these words: ‘Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained or until liberty be lost in the pursuit. In a society, under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign, as in a state of nature where the weaker individual is not secured against the violence of the stronger.’” (The Federalist, ed. 1864, No. 51, p. 401.) Crocker v. Justices of the Superior Court, 208 Mass. 162, 179-80 (Mass. 1911) "

“It is not enough that we know ourselves to be fair and impartial or that we believe this of our colleagues. Our power over our fellow citizens requires that we appear to be so as well” In the Matter of Brown, 427 Mass. 146, 149 (Mass. 1998) “Under general equity principles, an injunction issues only if there is a showing that the Defendant has violated, or imminently will violate, some provision of statutory or common law, and that there is a ‘cognizable danger of recurrent violation.’” Madsen v.

Women's Health Ctr., 512 U.S. 753, 757 (1994), see also United States v. W T. Grant Co., 345 U. S. 629, 633 (1953)

A default judgment is the just solution in this case.

“The judge should take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms. Whether deterrence or compensation is the goal, the punishment should be reasonably suited to the crime.” Anderson v. Beatrice Foods Co., 900 F.2d 388, 395 (1st Cir. 1990) “we generally require that the extreme sanction of dismissal or default judgment be predicated on a finding of wilfulness or bad faith” Keene v. Brigham Hospital, 439 Mass. 223, 235-36 (Mass. 2003) see also Gos v. Brownstein, 403 Mass. 252, 257 (1988) “an initial sanction of default judgment may still be justified where the circumstances require it. As the First Circuit has said, if the sanction fits the misconduct, a trial court is not obliged to withhold the sanction until it has first slapped the offender on the wrist.” AngioDynamics, Inc. v. Biolitec AG, 991 F. Supp. 2d 283, 285 (D. Mass. 2014) I also argue that a Default Judgment is appropriate as “anything less than a default judgment would have the same result on the Plaintiff.” Keene v. Brigham Hospital, 439 Mass. 223, 237

(Mass. 2003) “it is the duty of government to protect the one against the many as well as the many against the one.” Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 435 (1911). “Because the right to procedural due process is absolute in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, the denial of procedural due process should be actionable for nominal damages without proof of actual injury.” Hughes v. Rowe, 449 U.S. 5, 6 (1980)

Removing the Default was an abuse of discretion that encouraged further misconduct.

The Superior court did not consider any of the precedent case law in the Plaintiff's brief, or the relevant factors. The affidavit attached to the Defendant's brief simply said “I have meritorious defenses.” “A bare allegation or of merit will not suffice. There should be support in the form of affidavits or reference material” Carlson v. Silvia, App. Div. 190 (2002) Also even if this court believes that the Defendant's lawyer satisfied this element by writing in the memorandum that truth is always a defense, the default should not have been removed on the other claims. “meritorious

nature of defense to one claim of a multi-claim action does not justify removal of default on other claims” Cicchese v. Tape Time Corp., 28 Mass. App. Ct. 72 (1989) The Defendant’s “good reason” was that he accused the Plaintiff of extortion, but if you look at the emails attached to the Plaintiff’s brief this excuse was clearly perjury, as the alleged extortion was nothing more than settlement negotiations initiated by the Defendant. Being distracted and attempting to settle is not a valid excuse to ignore the courts rules. see Kenney v. Rust, 17 Mass. App. Ct. 699 (1984) Also, the exhibits attached to my opposition showed that Aidan Kearney had defaulted in at least 2 other lawsuits, and that he had even won a case by default. Michael Gaffney’s affidavit showed that the Defendant has talked about the advantages of defaulting, and that Aidan Kearney didn’t believe this case was serious because I was Pro se. “Parties cannot, with impunity, ignore, flout, or circumvent the [Mass. R. Civ. P. 12] (a)(1) twenty-day deadline for filing an answer.” Floyd v. Owens, Mass. App. Div. 219 (2009) Finally the court’s stated reason for removing the Default was because defamation claims require the removal of defaults, which is contrary to other recent decisions in other defamation cases, see Ceruolo v. Garcia, 92 Mass. App. Ct. 185, 189 (2017). The *Ceruolo* court stated;

“There is no mechanical formula for determining whether good cause exists to set aside the entry of default and courts may consider a host of relevant factors. The three typically considered are (1) whether the default was willful; (2) whether setting it aside would prejudice the adversary; and (3) whether a meritorious defense is presented. Courts may also consider other relevant factors, including (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.”

The Superior court should have held evidentiary hearings

When the Plaintiff said that he could prove damages, the court said “that’s not how the court works.” But Mass. R. Civ. P. 55 states “If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.”

6 Conclusion

I request that this court rule summary judgment in my favor, and send the case back to the trial court to assess damages. I did ask for consolidation pursuant to MCRP 65 (B)(2), and Aidan Kearney should be held responsible for his own actions, and the Defendant’s never presented

any evidence that I sold drugs, or shipped drugs. I believe I should win as criminal allegations are defamatory per se.

I also request that this court consider ruling default judgment in my favor. It is clearly inequitable, and unreasonable for the court to remove a default without Aidan Kearney listing a meritorious defense in his affidavit, but then dismiss the lawsuit because witness intimidation prevented me from presenting evidence for summary judgment. If I had defaulted in two prior cases, and did not present a meritorious defense, and if I committed perjury as an excuse for defaulting, I am sure the courts would not have allowed it. If I told Aidan Kearney's roommate that I was going to blow up her sh*t, because Aidan used her address, the courts would not have allowed it.

Affidavit of compliance

I, Rian Waters, hereby certify that this brief is compliant.

Rian Waters

Certificate of service

I, Rian Waters, hereby certify that on June 17th, 2020, I served the

Defendants by emailing:

Kevin Chrisanthopoulos, Esq.
kevin@kctrialattorney.com

Subscribed under the pains and penalties of perjury.

Rian Waters

Dated June 17th, 2020

Respectfully Submitted

Rian Waters

6/17/2020

Rian Waters
199 Allen st.
East Longmeadow MA 01028
(530)739-8951
Watersrian@gmail.com

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CLERK'S NOTICE	DOCKET NUMBER 1879CV00344	Trial Court of Massachusetts The Superior Court 
CASE NAME: Rian Waters vs. Aidan Kearney et al		Laura S Gentile, Clerk of Courts
TO: Rian Waters 199 Allen St East Longmeadow, MA 01028		COURT NAME & ADDRESS Hampden County Superior Court Hall of Justice - 50 State Street P.O. Box 559 Springfield, MA 01102
You are hereby notified that on 11/20/2018 the following entry was made on the above referenced docket: Endorsement on Motion to remove default and file answer late (#15.0): ALLOWED After hearing, the motion is allowed. However, counsel for the moving parties must file an answer on their behalf no later than 11/26/18. Judge: Sweeney, Hon. Constance M		
DATE ISSUED 11/21/2018	ASSOCIATE JUSTICE/ ASSISTANT CLERK Hon. Constance M Sweeney	SESSION PHONE# (413)735-6016 45

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

HAMPDEN, SS.

SUPERIOR COURT
CIVIL ACTION NO. 1879CV00344

RIAN WATERS
Plaintiff

vs.

AIDAN KEARNEY,
WORCESTER DIGITAL MARKETING, LLC
TURTLEBOY ENTERPRISES, LLC AND
SAMANTHA CARDIN
Defendants

HAMPDEN COUNTY
SUPERIOR COURT

FILED

OCT 18 2018

CLERK OF COURTS

**EMERGENCY MOTION OF THE DEFENDANTS, AIDAN KEARNEY, WORCESTER
DIGITAL MARKETING, LLC, AND TURTLEBOY ENTERPRISES, LLC TO REMOVE
THE DEFAULT AND REQUEST FOR LEAVE TO FILE ANSWER LATE**

NOW COME the defendants, Aidan Kearney, Worcester Digital Marketing, LLC, and Turtleboy Enterprises, LLC ("Defendants"), and respectfully requests that this Court strike the Request for Default filed by the plaintiff, Rian Waters and/or remove the default pursuant to Rule 55(b) of the Massachusetts Rules of Civil Procedure. As grounds therefore, the Defendants refer to and incorporate the memorandum of law attached hereto.

WHEREFORE, based upon the foregoing, the Defendants respectfully request that the Request for Default be stricken and/or any default be vacated and the Defendants be allowed to answer the Plaintiff's Complaint.

*To the Court - Please schedule the hearing, which
does not have to occur on an
expedited basis.*

A. Kearney
10/29/18
dml

15

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS.

SUPERIOR COURT
CIVIL ACTION NO. 1879CV00344

RIAN WATERS,
Plaintiff

vs.

AIDAN KEARNEY;

WORCESTER DIGITAL MARKETING, LLC

TURTLEBOY ENTERPRISES, LLC

SAMANTHA CARDIN,

JOHN DOES 1-10,
Defendants

HAMPDEN COUNTY
SUPERIOR COURT
FILED

JAN - 2 2019

[Signature]
CLERK OF COURTS

PLAINTIFF RIAN WATERS EMERGENCY MOTION FOR A TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Now Comes the Plaintiff, Rian Waters, and respectfully requests that pursuant of MRCP 65, this court issue a temporary restraining order on Defendant Aidan Kearney, and hold a hearing to issue a preliminary injunction against Defendants Aidan Kearney, Turtleboy Enterprises LLC, and Worcester Digital Marketing LLC. As grounds therefore, the Plaintiff refers to and incorporates the memorandum of law attached hereto.

Wherefore, based upon the foregoing, the Plaintiff respectfully requests that this court enter

the following:

*5w
2/1/19
(m)*
2/1/19 After hearing, and careful and thorough consideration of the submissions and arguments of the parties, the court finds that there is a likelihood of success on the merits, not that irreparable harm will result from denial of the injunction. Accordingly, the motion is DENIED.
1/2/19 Short Order to issue for 1/15/19 @ 2pm.
Mulqueen, J.
mlk al KS.

CLERK'S NOTICE

DOCKET NUMBER

1879CV00344**Trial Court of Massachusetts
The Superior Court**

CASE NAME:

Rian Waters vs. Aidan Kearney et al

Laura S Gentile, Clerk of Courts

TO:

Rian Waters
199 Allen St
East Longmeadow, MA 01028

COURT NAME & ADDRESS

Hampden County Superior Court
Hall of Justice - 50 State Street
P.O. Box 559
Springfield, MA 01102

You are hereby notified that on 01/09/2019 the following entry was made on the above referenced docket:

Endorsement on Motion to convert default judgment hearing into temporary restraining order hearing (#32.0):

DENIED

Mailed 1/10/2019

Judge: Mulqueen, Hon. Jane E

DATE ISSUED

01/10/2019

ASSOCIATE JUSTICE/ ASSISTANT CLERK

Hon. Jane E Mulqueen

SESSION PHONE#

(413) 748-6017

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS:

SUPERIOR COURT
CIVIL ACTION NO. 1879CV00344

RIAN WATERS,
Plaintiff

vs.

AIDAN KEARNEY,

WORCESTER DIGITAL MARKETING, LLC

TURTLEBOY ENTERPRISES, LLC

SAMANTHA CARDIN,

JOHN DOES 1-10,
Defendants

HAMPDEN COUNTY
SUPERIOR COURT
FILED

JAN - 8 2019

[Signature]
CLERK OF COURTS

**PLAINTIFF'S EMERGENCY MOTION TO CONVERT DEFAULT JUDGMENT
HEARING INTO A TEMPORARY RESTRAINING ORDER HEARING.**

Now Comes the Plaintiff, Rian Waters, and respectfully requests a continuance for the Default Judgment Hearing, and that this court convert the January 9th Default Judgment hearing into a hearing for a temporary restraining order on Defendant Aidan Kearney. As grounds therefore, the Plaintiff refers to and incorporates the memorandum of law attached hereto.

Wherefore, based upon the foregoing, the Plaintiff respectfully requests that this court enter the following:

1. Compel email service of motions.
2. Allow the Plaintiff to impound his new address.

CLERK'S NOTICE	DOCKET NUMBER 1879CV00344	Trial Court of Massachusetts The Superior Court 
CASE NAME: Rian Waters vs. Aidan Kearney et al		Laura S Gentile, Clerk of Courts
TO: Rian Waters 199 Allen St East Longmeadow, MA 01028		COURT NAME & ADDRESS Hampden County Superior Court Hall of Justice - 50 State Street P.O. Box 559 Springfield, MA 01102
You are hereby notified that on 02/08/2019 the following entry was made on the above referenced docket: Endorsement on Motion for impoundment (#42.0): Other action taken This matter is not an emergency, subsequent filing to be done in accordance with Rule 9A. (dated 2/1/19 & m 2/8/19) Judge: Mulqueen, Hon. Jane E		
DATE ISSUED 02/08/2019	ASSOCIATE JUSTICE/ ASSISTANT CLERK Hon. Jane E Mulqueen	SESSION PHONE# (413)735-6017

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS.

SUPERIOR COURT
CIVIL ACTION NO. 1879CV00344

RIAN WATERS,
Plaintiff

vs.

AIDAN KEARNEY,

WORCESTER DIGITAL MARKETING, LLC

TURTLEBOY ENTERPRISES, LLC

JOHN DOES 1-10
Defendants

HAMPDEN COUNTY
SUPERIOR COURT
FILED

JAN 31 2019

[Signature]
CLERK OF COURTS

EMERGENCY MOTION FOR IMPOUNDMENT

The Plaintiff moves for this court to impound the below listed items for integrity, safety, and privacy concerns detailed in the attached memorandum.

1. The Plaintiff's new address and phone number. (email address can remain public)
2. Any witness or potential witnesses name, address, and phone number.
3. The transcribed jail phone calls between Samantha Cardin and Rian Waters.
4. Messages submitted as evidence between Samantha Cardin and Rian Waters.
5. The future deposition of Samantha Cardin.

Alternatively the Plaintiff requests a hearing to argue the merits of the proposed impoundment.

Respectfully Submitted

[Signature]

1/31/2019

Rian Waters

199 Allen st. East Longmeadow MA 01028

2/1/19 The matter is not an emergency. Subsequent filing to be done accordance with Rule 9A.
Mulqueen, 51, 42.

CLERK'S NOTICE	DOCKET NUMBER 1879CV00344	Trial Court of Massachusetts The Superior Court 
CASE NAME: Rian Waters vs. Aidan Kearney et al		Laura S Gentile, Clerk of Courts
TO: Rian Waters 199 Allen St East Longmeadow, MA 01028		COURT NAME & ADDRESS Hampden County Superior Court Hall of Justice - 50 State Street P.O. Box 559 Springfield, MA 01102
You are hereby notified that on 06/13/2019 the following entry was made on the above referenced docket: Endorsement on Motion of Plaintiff, Rian Waters to reconsider preliminary injunction. (Emergency) (#47.0): DENIED (dated 6/12/2019) After review, the court finds that the additional submission does not alter the courts original finding that there is no likelihood of success on the merits.		
DATE ISSUED 06/13/2019	ASSOCIATE JUSTICE/ ASSISTANT CLERK Hon. Jane E Mulqueen	SESSION PHONE# (413)735-6017

A

SUPERIOR COURT
CIVIL ACTION NO. 1879CV00344

$$\begin{array}{c}) \\) \\) \\) \\) \\) \\) \\) \\) \\) \\) \\) \end{array}$$

MAR 18 2019

Ann S. Allen
CLERK OF COURTS

J.W.
6/20/19
(m)

6/18/19 DENIED Joe E Mulgrew

CLERK'S NOTICE		DOCKET NUMBER 1879CV00344	Trial Court of Massachusetts The Superior Court 
CASE NAME: Rian Waters vs. Aidan Kearney et al		Laura S Gentile, Clerk of Courts	
TO: Rian Waters 199 Allen St East Longmeadow, MA 01028		COURT NAME & ADDRESS Hampden County Superior Court Hall of Justice - 50 State Street P.O. Box 559 Springfield, MA 01102	
You are hereby notified that on 06/18/2019 the following entry was made on the above referenced docket: Endorsement on Motion to dismiss (#43.0): ALLOWED memorandum of decision and order (m. 6/20/19)			
DATE ISSUED 06/20/2019	ASSOCIATE JUSTICE/ ASSISTANT CLERK Hon. Jane E Mulqueen		SESSION PHONE# (413)735-6017

SUMMARY JUDGMENT MASS. R. CIV. P. 56		Trial Court of Massachusetts The Superior Court	
DOCKET NUMBER 1879CV00344		Laura S Gentile, Clerk of Courts	
CASE NAME Rian Waters vs. Aidan Kearney et al		COURT NAME & ADDRESS Hampden County Superior Court Hall of Justice - 50 State Street P.O. Box 559 Springfield, MA 01102	
JUDGMENT FOR THE FOLLOWING DEFENDANT(S) Kearney, Aidan Worcester Digital Marketing LLC Turtleboy Enterprises LLC			
JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S) Waters, Rian			
This action came before the Court, Hon. Jane E Mulqueen, presiding, upon Motion for Summary Judgment of the named above, pursuant to Mass. R. Civ. P. 56. The parties having been heard, and/or the Court having considered the pleadings and submissions, finds there is no genuine issue as to material fact and that the defendant is entitled to a judgment as a matter of law. It is ORDERED and ADJUDGED: The Plaintiff's Complaint is hereby DISMISSED against the Defendants.			
DATE JUDGMENT ENTERED 06/27/2019	CLERK OF COURTS/ ASST. CLERK X <i>Stephanie Roscoe</i>		

HAMPDEN COUNTY
SUPERIOR COURT
FILED

JUN 27 2019

Laura S Gentile
CLERK OF COURTS

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1879 CV 0344

HAMPDEN COUNTY
SUPERIOR COURT
FILED

JUN 20 2019

RIAN WATERS


CLERK OF COURTS

vs.

AIDAN KEARNEY & others¹

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT²**

Rian Waters (plaintiff) filed a ten-count complaint³ against Aidan Kearney (Kearney); Worcester Digital Marketing, LLC (WDM); and Turtleboy Enterprises, LLC (Turtleboy) (collectively, the defendants), alleging defamation, intentional infliction of emotional distress, fraud, and loss of consortium. Plaintiff alleges that the defendants published defamatory statements on the Turtleboy blog, Facebook Live, and in the book "I am Turtleboy" authored by Kearney and published by WDM. The defendants move for summary judgment⁴ on all counts of the complaint. For the reasons that follow, this motion is **ALLOWED**.

BACKGROUND

On December 31, 2016, plaintiff was arrested for animal cruelty and assault and battery on Samantha Cardin (Cardin),⁵ his fiancé at that time. Shortly thereafter, Cardin posted, on her

¹ Worcester Digital Marketing, LLC and Turtleboy Enterprises, LLC

² The defendants originally filed a motion to dismiss, but because additional matters outside the complaint were included, the court gave the parties notice and an opportunity to supplement the pleadings. The court accordingly treated the motion to dismiss as a summary judgment motion, except for Counts VII, VIII, and IX that are dismissed pursuant to the Rule 12(b)(6) standard as no supplemental materials were provided.

³ See Second Amended Complaint.

⁴ See Note 1.

⁵ Cardin was a defendant in this matter until plaintiff voluntarily dismissed suit against her on January 9, 2019 removing Counts III and VI from the complaint.

Facebook account, photographs of her black eye and statements concerning plaintiff's alleged assault on her and her dog. On or about January 6, 2017, a blog was posted on Turtleboy Sports, a social media platform operated by defendant WDM.⁶ A third-party blogger posted a blog containing Cardin's Facebook posts in which she stated that she was assaulted by plaintiff and that her dog was injured by him and subsequently died. Plaintiff's Facebook posts were also added to the blog.

On May 16, 2018, plaintiff filed this action. On or about May 20, 2018, Kearney discussed this blog, and the related criminal case, on an online "live show." On or about November 13, 2018, WDM published a book entitled "I am Turtleboy" written by Kearney. This action is discussed on several pages of the book.

On February 4, 2019, the defendants filed this motion to dismiss asserting, inter alia, that: (1) Kearney cannot be individually liable to plaintiff; and (2) plaintiff has not alleged a viable claim for defamation because: (a) the defendants did not make any statements concerning plaintiff; (b) the defendants alleged statements are not false; and (c) much of the alleged statements constitute opinion and thus are not actionable. A hearing was held on this motion on March 12, 2019.

DISCUSSION

Summary judgment is appropriate where, "viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." Scholz v. Delp, 473 Mass. 242, 249 (2015), quoting Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991). "[The] party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is

⁶ Third-party bloggers are permitted to post their own blogs to the Turtleboy Sports' social media platforms.

entitled to summary judgment if [the moving party] demonstrates . . . that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." Id. quoting Ravnikar v. Bogojavlensky, 438 Mass. 627, 629 (2003) (alterations in original).

The court will address each count of the complaint separately.

Count I: Libel vs. John Does 1-10⁷

Plaintiff alleges that nine separate statements contained in the January 6, 2017 blog are defamatory. The first statement is that plaintiff has dirt and pubes on his upper lip. The context of this statement is as follows: "But there's two sides to every story. This is the accused, Rian Waters from Palmer.⁸ Although based on that Voke-stache, I think we all knew he was from Palmer. That collection of dirt and pubes on his upper lip is strike one. Because when I look at a picture like that, one of the first things that crosses my mind as an unbiased Facebook juror is, 'domestic abuse.'"

Next, plaintiff alleges that the statement "LOL Dumbass Ludlow cops don't know about celiac disease" was falsely attributed to him. That statement appeared in quotation marks after the reprint of plaintiff's 1/4/17 Facebook post which read, "Okay so now for the possibly really good news. Ludlow jail was stupid enough to not initially trust that I had Celiac disease. Their unprepared policy is to wait until they get a fax with a diagnosis from a doctor. Problem with this is if someone gets arrested on a Friday afternoon, and it happens to be a holiday weekend. Then the said person would be stuck eating less than 1000 safe calories in at least 4 days! I got a lot of work to do, and it's far from a sure thing. But if I get the right lawyer, I may be able to correct some outdated policies."

⁷ Plaintiff alleges John Doe #2 is Kearney.

⁸ A photograph of plaintiff was imbedded in the blog article.

The third statement is that plaintiff found his dog crushed underneath a big metal cabinet. The fourth statement is that plaintiff's dog was clearly in need of a vet for several days. The context of these two statements is as follows: "Wait . . . what??? You came home and found the dog crushed underneath a big metal cabinet? And you 'didn't think much of it?' Yea, that sounds believable. Because sometimes I come home and find my dog buried in rubble, and I'm like, 'whatever.' IF what he's saying is true, and that's a huge IF, then that means this dog was clearly in need of a vet for days, and they did nothing about it."

Next, plaintiff challenges that his statement, "Sadly I can't share the evidence yet, but it's enough to make me wonder if I even did cause that black eye" meant he was convinced he did cause the black eye. The blog, after repeating the above Facebook post by plaintiff, reads "But wait . . . that would mean that before he made this post that he was pretty convinced that he DID cause the black eye. Yea, that's a smart thing to post on Facebook when you have a court date in your future."

The next statements that plaintiff challenges are that plaintiff is far from innocent and that plaintiff was re-enacting his favorite episode of "16 and Pregnant." The blog reads, "The bottom line is that the real losers here are the dog and the child. I'm sure both he and her are far from innocent. A couple unwed Palmerites in their pajamas re-enacting their favorite episode of *16 and Pregnant*."

"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.” Id. at 249. Although each of the challenged statements arguably meets one or more of the above-stated elements of a claim of defamation, none of them meet all elements. In addition, “to be actionable, the statement must be one of fact rather than opinion.” Id. “Whether a statement is a factual assertion or an opinion is a question of law ‘if the statement unambiguously constitutes either fact or opinion,’ and a question of fact ‘if the statement reasonably can be understood both ways.’” Id. at 250, quoting King v. Globe Newspaper Co., 400 Mass. 705, 709 (1987). “In determining whether a statement reasonably could be understood as 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.” Scholz, 473 Mass. at 250 (internal quotations and citation omitted). The factors to be considered in differentiating statements of fact from statements of opinion include: (1) specific language used; (2) whether the statement is verifiable; (3) general context of the statement; and (4) the broader context in which the statement appeared. Id. at 250, quoting Milkovich v. Lorain Journal Co., 497 U.S. 1, 9 (1990). An additional consideration is any “cautionary terms used by the person publishing the statement.” Id., quoting Lyons v. Globe Newspaper Co., 415 Mass. 258, 263 (1993).

Applying the appropriate factors to each of the challenged statements detailed above, including “the medium by which the statement was disseminated and the audience to which it [was] published,” Cole v. Westinghouse Broadcasting Co., 386 Mass. 303, 309 (1982), it is clear that the alleged defamatory statements are constitutionally protected expressions of opinion. See King, 400 Mass. at 708 (“Statements of pure opinion are constitutionally protected.”). Additionally, the use of cautionary terms and language “relay[] to the reader that the authors were ‘indulging in speculation.’” Scholz, 473 Mass. at 251, quoting King, 400 Mass. at 713.

Here, the blog article contained the following 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 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 times, and their heads banging into each other, than so can any real life juror.” It is clear that the author is “expressing subjective view, an interpretation, a theory, conjecture or surmise . . . [therefore] the statement[s] are not actionable.” Haynes v. Alfred A Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993).⁹ Accordingly, the motion for summary judgment as to Count I is

ALLOWED.

Count II: Libel vs. Turtleboy Enterprises LLC and Worcester Digital Marketing LLC

The second count of plaintiff’s complaint, brought against the corporations, is based on the same nine statements detailed above. For the same reasons detailed above, the motion for summary judgment as to this count is **ALLOWED.**

Count IV: Libel vs. Aidan Kearney

Plaintiff alleges that five statements written in Kearney’s book “I Am Turtleboy” are libelous. Those statements, outlined in Paragraph 40 of the Amended Complaint are: (1) “Rian

⁹ The final challenged statements – that plaintiff lived in Palmer and that his January 4th post was in response to Cardin’s January 5th post– do not constitute opinion. Plaintiff does, however, fail to demonstrate that the statements could damage plaintiff’s reputation in the community, and that they caused economic loss. As such, the claims with regard to the statements fail as a matter of law and are appropriate for summary judgment.

Waters sold drugs in California;” (2) “shipped himself drugs via the USPS, which he intended to sell here;” (3) “allegedly assaulted Samantha Cardin, causing the black eye;” (4) “went into the house and killed the dog in front of his special needs daughter by stomping it in the back;” and (5) “everything she (Samantha 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 Rian had a trial and it all came out.” The full excerpt in the book “I Am Turtleboy” reads as follows:

In January 2017 Rian appeared in a blog written by one of the girls after his baby’s mother *alleged* domestic abuse by posting a picture of herself with a black eye on Facebook. She also *alleged* that Rian Waters had killed their dog. The blogger never said that he did it, and simply satirized the story as an example of trashy people airing their trash publicly. . .

According to the woman he assaulted, Rian Waters sold drugs in California and hardly ever saw his daughter or baby momma in Palmer. However, on a visit to see them he *allegedly* shipped himself drugs via the USPS, which he intended to sell here. One day he got into an argument with his baby’s mother and *allegedly* assaulted her, causing the black eye. He then went into the house and killed the dog in front of his special needs daughter by stomping it in the back.

Everything she 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 Rian had a trial and it all came out. In court a veterinarian testified that the autopsy on the dog indicated that he killed the poor thing. . . (emphasis added).

“A plaintiff alleging libel must ordinarily establish five elements: (1) that the defendant published a written statement; (2) of and concerning the plaintiff; that was both (3) defamatory, and (4) false; and (5) either caused economic loss, or is actionable without proof of economic loss.” Clay Corp. v. Colter, 2012 WL 6928132 at *3 (Mass Super. 2012). “Since a given statement, even if libelous, must also be false to give rise to a cause of action, the defendant may assert the statement’s truth as an absolute defense to a libel claim.” Noonan v. Staples, Inc., 556

F.3d 20, 26 (1st Cir. 2009) (citations omitted). Kearney advances this argument in his motion. In the first four challenged statements, cautionary terms and language used (i.e., “alleged domestic abuse;” “alleged he killed their dog;” “according to the woman he assaulted he sold drugs;” “allegedly shipped himself drugs;” “allegedly assaulted her”), “relay[s] to the reader that the authors were ‘indulging in speculation.’” Scholz, 473 Mass. at 251, quoting King, 400 Mass. at 713. These four statements are not actionable.

The defense asserts that the final challenged statement, “everything she (Samantha 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 Rian had a trial and it all came out,” is not actionable. In support of their motion for summary judgment, the defendants submitted an affidavit of Cardin, 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, as well as a forensic veterinary investigation (autopsy) report regarding the death of the dog.

The party seeking summary judgment has the burden of showing the absence of any genuine issue of material fact, which, under applicable principles of substantive law, entitles it to a judgment as a matter of law; the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. Mass. R. Civ. P. 56 (c) and (e); see also Pederson v. Time, Inc., 404 Mass. 14 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party’s case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of its case at trial. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). The opposing party to a motion for summary judgment must substantiate

its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue, demonstrated by counter affidavits and concrete evidence. Pederson, 404 Mass. at 17. The nonmoving party cannot defeat a motion for summary judgment by resting on his pleadings and mere assertions of disputed facts. LaLonde v. Eissner, 405 Mass. 207, 209 (1989).

Here, plaintiff's supplemental brief opposing the summary judgment motion cites Kearney's "flagrant violations of [G. L. c.] 268 § 13B" and the court's denial of plaintiff's request for appointed counsel and for a preliminary injunction, and argues that it was this court's responsibility to take an affirmative role in securing plaintiff's constitutional rights and his right to be fairly heard. Plaintiff suggested that the only way to secure such rights was to allow an injunction, impound the proceedings, or appoint counsel for plaintiff. Plaintiff offered no counter affidavits or concrete evidence regarding the alleged falsity of the challenged statement. Cardin's affidavit, signed under the pains and penalties of perjury, details that, on or about December 31, 2016, plaintiff did physically assault her leaving a black eye and bruises on her body; that it was Cardin's opinion that on that same date plaintiff did physically assault her dog leading to its death a few hours later; and that, on the same date, plaintiff was arrested for those crimes.¹⁰ The affidavit further states that, shortly after December 31, 2016, Cardin posted to her Facebook account photographs of the injury and statements concerning the assault on her and her dog; on or about January 6, 2017, a blog was posted on Kearney's social media pages detailing and commenting on her Facebook posts; and that "the Facebook posts within the Defendants' blog are true and accurate copies of my Facebook posts." The Forensic Veterinary

¹⁰ Palmer District Court Criminal Complaint No. 1743 CR 0009, shows plaintiff was arrested on December 31, 2016 for the crimes of domestic assault and battery in violation of G. L. c. 265 § 13M, and cruelty to animals in violation of G. L. c. 272 § 77.

Investigations report of the dog's postmortem examination indicates that, in the investigator's veterinary opinion, the dog suffered blunt force trauma which caused injuries. The report stated that it would have been painful and caused the dog's sudden inability to use her back legs. The report further detailed that "this constellation of injuries is not consistent with natural disease or an accidental fall. The allegation of a kick or other blunt force trauma (stomp or kneeling injury) would be plausible as the cause of these traumatic and painful injuries." This evidence, together with other information in the summary judgment record, negates an essential element (falsity) of plaintiff's claim; plaintiff has failed to substantiate his adverse claim with counter affidavits or concrete evidence. Accordingly, this court finds that there is no genuine issue of material fact as to the truth of Kearney's statement, and he is entitled to summary judgment as a matter of law on this count. Therefore, the motion as to Count IV is **ALLOWED**.

Count V: Slander Per Se vs. Aidan Kearney

In this count, plaintiff alleges that, on May 20, 2018, the Turtleboy Sports Facebook page hosted a live show, hosted by Kearney going by the name "Uncle Turtleboy," and made statements about emails that plaintiff "believes and alleges that no such emails exist." Plaintiff has sued Kearney in his individual capacity.

The affidavit of Kearney, signed under the pains and penalties of perjury, states that he is the manager of WDM which does business as Turtleboy Sports, owns all Turtleboy Sports publications, and operates all Turtleboy Sports social media platforms. Kearney moves for summary judgment on this count arguing that under G. L. c. 156C, § 22, he cannot be held personally liable for the limited liability corporation's obligations. G. L. c. 156C, § 22 provides that:

Except as otherwise provided by this chapter, the debts, obligations and liabilities of a limited liability company, whether arising in contract,

tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company; and no member or manager of a limited liability company shall be personally liable, directly or indirectly, including, without limitation, by way of indemnification, contribution, assessment or otherwise, for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.

The impact of this statute is fatal to the claims against Kearney individually. Accordingly, the motion for summary judgment as to Count V is ALLOWED.

Count VII: Intentional Infliction of Emotional Distress

To sustain a claim of intentional infliction of emotional distress, a plaintiff must prove:

(1) “that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct;” (2) “that the conduct was extreme and outrageous, was beyond all possible bounds of decency and was utterly intolerable in a civilized community;” (3) “that the actions of the defendant were the cause of the plaintiff’s distress;” and (4) “that the emotional distress sustained by the plaintiff was severe and of a nature that no reasonable man could be expected to endure it.” Agis v. Howard Johnson Co., 371 Mass. 140, 144-145 (1976) (citations and internal quotations omitted). A plaintiff faces a high burden in making a claim of intentional infliction of emotional distress; “[l]iability cannot be predicated on mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.” Tetrault v. Mahoney, Hawkes & Goldings, 425 Mass. 456, 466 (1997) (citation and internal quotations omitted).

Plaintiff’s complaint for intentional infliction of emotional distress contains the following three allegations. First, “the defendant’s article stated their reason for writing the article is because; We like watching the world burn.” Second, “the plaintiff received death threats and lost contact with family members.” Finally, “as a result the Plaintiff has sustained damages.”

Reading the complaint and the record in as harsh a manner as possible, giving all deference to the plaintiff, the court finds that no trier of fact could reasonably find that the publications attributed to the defendants were “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” Butcher v. University of Mass., 94 Mass. App. Ct. 33, 42–43 (2018).

The motion to dismiss Count VII is **ALLOWED**.

Count VIII: Negligent Publication

Negligent publication is a theory by which a plaintiff can prove the element of falsity in a defamation claim; it is not a separate cause of action. The motion to dismiss Count VIII is **ALLOWED**.

Count IX: Fraud vs. Aidan Kearney and “Alter Ego Corporations”¹¹

In Count IX, plaintiff alleges that Kearney and the “Alter Ego Corporations” have publicly claimed that they listen to concerns of inaccuracy, and that they provide victims who allege mistakes with a form to address their concerns. He further alleges that, on May 11, 2018, the defendants published an article claiming that they are a blog of integrity and that they have an allegiance to facts, logic, and truth. Plaintiff states that, in his posts that were featured in the article, he tried to inform the defendants of the real story and provide evidence, but the defendants were unwilling to look at his evidence and never provided him with a form to complain. Plaintiff alleges that these statements “constitute a fraud as the Plaintiff reasonably expected for his concerns to be addressed, and did not expect to be attacked based on sharing a

¹¹ In Paragraph 12a – 12h, plaintiff avers that WDM and Turtleboy are Alter-Ego corporations of Kearney.

genuine complaint.” Finally, plaintiff avers “the defendants false claims of integrity have greatly increased the impact and amount of damage the Plaintiff has received.”

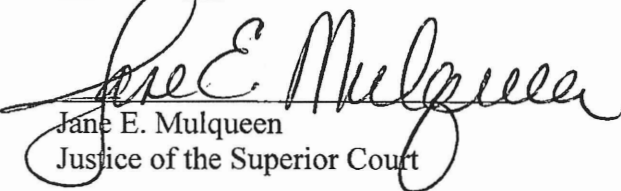
Mass. R. Civ. P. 9(b) requires all averments of fraud to be stated with particularity. To satisfy Rule 9(b), “the plaintiff must allege the content of the fraudulent statement, who made the statement and when and where it was made, the falsity of the statement and the defendant’s knowledge of the falsity, the materiality of the statement, and the plaintiff’s reliance thereon.” Feldman v. Aspen Technology, Inc., 2007 WL 1089220 at *8 (Mass. Super. 2007), citing Friedman v. Jablonski, 371 Mass. 482, 488 (1976) and Equipment & Sys. for Indus., Inc. v. Northmeadows Constr. Co., 59 Mass. App. Ct. 931, 931-932 (2003). Treating the motion on this count as a motion to dismiss, the court finds that the fraud count was not pleaded with sufficient particularity; specifically, there is no averment that the statements were made to induce reliance on them or that plaintiff relied on those statements to his detriment. Accordingly, the motion to dismiss is **ALLOWED** as to this count.

Count X: Loss of Consortium

It is unclear against whom this cause of action is brought, but, to the extent it is pled against the defendants,¹² the motion to dismiss is **ALLOWED**. Plaintiff’s daughter is not a party to the suit and therefore he cannot claim loss of consortium.

ORDER

For the foregoing reasons, the defendants’ motion is **ALLOWED**.


Jane E. Mulqueen
Justice of the Superior Court

DATE: June 18, 2019

¹² To the extent it is pled as against Cardin, plaintiff voluntarily dismissed the case against her in January of 2019.

Constitutional Provisions

[ALM Constitution Pt. 1, Art. XI](#)

Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

[ALM Constitution Pt. 1, Art. XXIX](#)

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws.

Statutes

[GL ch. 156C, § 22 \(2016\)](#) **Obligations and Liabilities of Limited Liability Company; Personal Liability Based on Status as Member or Manager.**

Except as otherwise provided by this chapter, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company; and no member or manager of a limited liability company shall be personally liable, directly or indirectly, including, without limitation, by way of indemnification, contribution, assessment or otherwise, for any such debt, obligation or liability of

the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.

[G.L. c. 231, § 92](#)

The defendant in an action for writing or for publishing a libel may introduce in evidence the truth of the matter contained in the publication charged as libellous; and the truth shall be a justification unless actual malice is proved.

[GL ch. 268, § 1 \(2018\) Perjury.](#)

Whoever, being lawfully required to depose the truth in a judicial proceeding or in a proceeding in a course of justice, wilfully swears or affirms falsely in a matter material to the issue or point in question, or whoever, being required by law to take an oath or affirmation, wilfully swears or affirms falsely in a matter relative to which such oath or affirmation is required, shall be guilty of perjury. Whoever commits perjury on the trial of an indictment for a capital crime shall be punished by imprisonment in the state prison for life or for any term of years, and whoever commits perjury in any other case shall be punished by imprisonment in the state prison for not more than twenty years or by a fine of not more than one thousand dollars or by imprisonment in jail for not more than two and one half years, or by both such fine and imprisonment in jail.

An indictment or complaint for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury proceedings relating to an indictment or complaint for the commission of a violent crime, as defined in section 121 of chapter 140, the defendant under oath has knowingly made 2 or more declarations, which are inconsistent to the degree that 1 of them is necessarily false, need not specify which declaration is false if: (1) each declaration was material to the point in question and (2) each declaration was made within the period of the statute of limitations for the offense charged under this section. In any prosecution under this section, the falsity of a declaration set forth in the indictment or complaint shall be established sufficient for conviction by proof that the defendant, while under oath, made irreconcilably contradictory declarations

material to the point in question. If, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits to such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed. It shall be a defense to an indictment or complaint made pursuant to this section that the defendant, at the time he made each declaration, believed each such declaration to be true or its falsity was the result of a good faith mistake or error.

ALM GL ch. 268, § 13B Court Proceedings -- Intimidation of Witnesses or Jurors.

(a) As used in this section, the following words shall have the following meanings unless the context clearly requires otherwise:-

"Investigator", an individual or group of individuals lawfully authorized by a department or agency of the federal government or any political subdivision thereof or a department or agency of the commonwealth or any political subdivision thereof to conduct or engage in an investigation of, prosecution for, or defense of a violation of the laws of the United States or of the commonwealth in the course of such individual's or group's official duties.

"Harass", to engage in an act directed at a specific person or group of persons that seriously alarms or annoys such person or group of persons and would cause a reasonable person or group of persons to suffer substantial emotional distress including, but not limited to, an act conducted by mail or by use of a telephonic or telecommunication device or electronic communication device including, but not limited to, a device that transfers signs, signals, writing, images, sounds, data or intelligence of any nature, transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photo-optical system including, but not limited to, electronic mail, internet communications, instant messages and facsimile communications.

(b) Whoever willfully, either directly or indirectly: (i) threatens, attempts or causes physical, emotional or economic injury or property damage to; (ii) conveys a gift, offer or promise of anything of value to; or (iii) misleads, intimidates or

harasses another person who is a: (A) witness or potential witness; (B) person who is or was aware of information, records, documents or objects that relate to a violation of a criminal law or a violation of conditions of probation, parole, bail or other court order; (C) judge, juror, grand juror, attorney, victim witness advocate, police officer, correction officer, federal agent, investigator, clerk, court officer, court reporter, court interpreter, probation officer or parole officer; (D) person who is or was attending or a person who had made known an intention to attend a proceeding described in this section; or (E) family member of a person described in this section, with the intent to or with reckless disregard for the fact that it may; (1) impede, obstruct, delay, prevent or otherwise interfere with: a criminal investigation at any stage, a grand jury proceeding, a dangerousness hearing, a motion hearing, a trial or other criminal proceeding of any type or a parole hearing, parole violation proceeding or probation violation proceeding; or an administrative hearing or a probate or family court proceeding, juvenile proceeding, housing proceeding, land proceeding, clerk's hearing, court-ordered mediation or any other civil proceeding of any type; or (2) punish, harm or otherwise retaliate against any such person described in this section for such person or such person's family member's participation in any of the proceedings described in this section, shall be punished by imprisonment in the state prison for not more than 10 years or by imprisonment in the house of correction for not more than 21/2 years or by a fine of not less than \$ 1,000 or more than \$ 5,000 or by both such fine and imprisonment. If the proceeding in which the misconduct is directed at is the investigation or prosecution of a crime punishable by life imprisonment or the parole of a person convicted of a crime punishable by life imprisonment, such person shall be punished by imprisonment in the state prison for not more than 20 years or by imprisonment in the house of corrections for not more than 21/2 years or by a fine of not more than \$ 10,000 or by both such fine and imprisonment.

(c) A prosecution under this section may be brought in the county in which the criminal investigation, trial or other proceeding was being conducted or took place or in the county in which the alleged conduct constituting the offense occurred.

Rules

M R. Civ. P. Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for admission under Rule 36, together with the affidavits, if any, show that 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. 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. Summary judgment, when appropriate, may be rendered against the moving party.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the

action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

ALM R. Civ. P. Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served and prior to entry of an order of dismissal or, if the pleading is one to which no responsive pleading is permitted

and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment (including an amendment changing a party) relates back to the original pleading.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading it shall so order, specifying the time therefor.

Sup. Jud. Ct. Rule 3:09, Code of Judicial Conduct 2.06.

Ensuring the Right to be Heard

(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.* A judge may make reasonable efforts, consistent with the law,* to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard.

(B) A judge may encourage parties and their lawyers to resolve matters in dispute and, in accordance with applicable law,* may participate in settlement discussions in civil proceedings and plea discussions in criminal proceedings, but shall not act in a manner that coerces any party into settlement or resolution of a proceeding.