

STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY, SS.

SUPERIOR COURT

Case No. 218-2022-CV-00803

Eric Spofford

Plaintiff

v.

New Hampshire Public Radio, Inc.

Lauren Chooljian

Jason Moon

Dan Barrick

Nancy Bourque

Brian Stoesz

Justin Downey

Defendants

**MOTION FOR LIMITED DISCOVERY RELATED TO
CURING PERCEIVED DEFICIENCIES WITH COMPLAINT**

Plaintiff Eric Spofford moves for an order granting him leave to obtain limited discovery from the NHPR Defendants. Eric seeks: (i) the complete unredacted recordings of interviews of “Elizabeth”, “Employee A”, Nancy Bourque, Justin Downey, Piers Kaniuka, and Brian Stoesz; (ii) Lauren Chooljian’s notes concerning and communications with these sources; (iii) Chooljian’s notes concerning and communications with Lysie Metivier, and recordings (if any) of their March 22, 2022 phone call; and (iv) Chooljian’s notes concerning and communications with the mother of Eric’s eldest son, Amy Cloutier (formerly Anagnost), and recordings (if any) of her interview(s). Eric also requests that the Court stay the deadline for him to file an amended complaint until after the Court rules on this Motion and, if granted, until 30 days after the NHPR Defendants have complied with the discovery requests.

This discovery pertains directly to curing the deficiencies the Court has identified with the original complaint. Order at 19 (“In the Court’s view, the primary issue relevant to actual malice in this case is the reliability of NHPR’s sources.”); Order at 20 (“Absent clearer indicia that the NHPR Defendants . . . were subjectively aware that the information by these sources was probably false, the [original complaint] fails to allege actual malice.”). And the NHPR Defendants are in *exclusive* possession of the information likely needed to remedy those perceived defects.

Because the New Hampshire Constitution entitles Eric to his day in court to hold the NHPR Defendants accountable for defaming him, he should be given a fair opportunity to sufficiently allege actual malice.¹ See N.H. Const. part I, art. 14; see also *Nash v. Keene Publishing Corp.*, 127 N.H. 214, 223 (1985) (recognizing that because credibility assessments are “extremely difficult” without a trial, “the issue of malice does not readily lend itself to summary disposition.”). Absent this relief, the Court has imposed so substantial a burden on a limited-purpose public figure defamation plaintiff that—unless one has secured smoking gun evidence *without* discovery—the New Hampshire media is effectively immune from defamation actions of this kind.

RELEVANT BACKGROUND

1. On March 22 and 23, 2022, the NHPR Defendants published a false and defamatory story about Eric titled, *He built New Hampshire’s largest addiction treatment network. Now, he faces accusations of sexual misconduct*. This story was published as an online article, a podcast, and a two-part radio broadcast that aired over two days.

2. On September 20, 2022, Eric filed his original complaint against New Hampshire Public Radio, Inc., Lauren Chooljian, Jason Moon, and Dan Barrick (the “NHPR Defendants”),

¹ Eric does not concede that his original complaint failed to allege actual malice against each Defendant. Nothing in this Motion should be construed as a waiver of Eric’s right to amend the complaint or appeal the Court’s ruling on the motions to dismiss.

and Nancy Bourque, Justin Downey, and Brian Stoesz (the “Source Defendants”).²

3. A few days later, pursuant to the New Hampshire Superior Court Civil Rules, Eric propounded discovery on the NHPR Defendants, Source Defendants, and two third parties.

4. Shortly after that, the NHPR Defendants and Source Defendants (except Stoesz) moved to dismiss the complaint. The NHPR Defendants also moved for a stay of discovery.

5. On October 20, 2022, the Court set a briefing schedule for the motions to dismiss and the NHPR Defendants’ motion to stay discovery, and the Court stayed discovery pending its ruling on those motions.

6. After extensive briefing and argument, on April 17, 2023, the Court issued its order, granting the NHPR Defendants, Bourque, and Downey’s motions to dismiss without prejudice to Eric filing an amended complaint within 30 days.³

7. In its Order, the Court ruled—over Eric’s legal arguments and factual allegations to the contrary—that Eric was a limited-purpose public figure who must allege actual malice to proceed with his defamation and false light claims against the Defendants. The Court concluded that Eric failed to do so.

8. At the heart of that conclusion, according to the Court, was the “reliability of NHPR’s sources.” Order at 19. Despite acknowledging that Eric had alleged each source was biased, motivated to harm Eric’s reputation, and inherently unreliable, the Court determined those allegations were not “fatal” to each source’s credibility. *See id.*

9. The Court moreover found that information Metivier (the Director of Human

² On October 24, 2022, Eric amended the original complaint exclusively to redact the individual defendants’ physical addresses. Eric did not substantively amend the complaint at that time.

³ Stoesz’s Motion to Dismiss is still pending. Given the Court’s ruling and Eric’s forthcoming amended complaint, Eric anticipates stipulating to dismissal of his claims against Stoesz, without prejudice.

Resources at Granite Recovery Centers when Eric’s supposed misconduct occurred) gave Chooljian did not “undermine[] the content of the Article such that it created a false and defamatory impression.” *See id.* Thus, despite the complaint’s allegations and Metivier’s affidavit, the Court concluded “NHPR’s omission of Metivier’s account does not rise to the level of actual malice.” *Id.*; *see also id.* n.6 (also finding “Metivier’s call did not provide the NHPR Defendants with a subjective awareness of probable falsity in their reporting. . .”). The Court similarly did not view Eric’s allegations about Kaniuka’s retraction letter as indicative of actual malice. *See id.*

10. All told, the Court wrote, “[a]bsent *clearer indicia* that the NHPR Defendants acted in bad faith *in relying on these sources*, or were *subjectively aware* that the *information provided by these sources was probably false*, the [original complaint] fails to allege actual malice.” *Id.* at 20 (emphases added). Although the Court granted the NHPR Defendants, Bourque, and Downey’s motions to dismiss, it also granted Eric leave to “amend his complaint to remedy the deficiencies identified” and to “supplement his allegations with facts indicative of actual malice.” *Id.* at 23.

11. For Eric to have a meaningful opportunity to do so, however, the Court should permit him access to information that is *exclusively* in the NHPR Defendants’ control.

DISCOVERY REQUESTS

12. Eric seeks the following limited discovery from the NHPR Defendants:

- The complete unredacted recordings of interviews of “Elizabeth”, “Employee A”, Nancy Bourque, Justin Downey, Brian Stoesz, and Piers Kaniuka.⁴
- Lauren Chooljian’s notes about and communications with “Elizabeth”, “Employee A”, “Employee B”, Nancy Bourque, Justin Downey, Brian Stoesz, and Piers Kaniuka.
- Lauren Chooljian’s notes about and communications with Lysie Metivier and any recordings of their phone call on or about March 22,

⁴ The NHPR Defendants should produce every recording they have of these sources.

2022.

- Lauren Chooljian’s notes about and communications with Amy Cloutier (formerly Anagnost) and any recordings of interviews of her.
- Lauren Chooljian’s communications with NHPR personnel concerning the credibility of “Elizabeth”, “Employee A”, “Employee B”, Nancy Bourque, Justin Downey, Brian Stoesz, Piers Kaniuka, Lysie Metivier, Amy Cloutier, or their respective accounts about Eric Spofford.

13. The temporal scope of this discovery should cover the time when Chooljian began reporting about Eric to the present.

ARGUMENT

14. Eric’s Motion should be granted for at least two reasons.

15. First, the discovery requested is essential to Eric having a legitimate ability to cure perceived defects with his complaint. Indeed, the Court decided Eric’s complaint failed to sufficiently allege the NHPR Defendants “were subjectively aware that the information provided by these sources was probably false.” Order at 20. While Eric respectfully disagrees with the ruling, he nonetheless will endeavor to address what the Court has identified as deficiencies with the complaint. By granting Eric access to the narrow discovery identified above, the Court will at least position Eric with a fair opportunity to allege—with the “*clearer indicia*” desired (*see* Order at 20)—that the NHPR Defendants subjectively believed their reporting was probably false.

16. Justice Souter’s opinion in *Nash* supports granting this Motion. Even on a summary judgment motion—after discovery had been conducted—Justice Souter cautioned that the “issue of malice does not readily lend itself to summary disposition.” *See Nash*, 127 N.H. at 223 (Souter, J.) (quoting *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979)). That is especially true where, as the Court ruled here, the actual malice determination turns on credibility assessments, which are “extremely difficult, if not impossible, to make” before trial. *See Nash*, 127 at 223; *see also*

Church of Scientology Int'l v. Behar, 238 F.3d, 168, 173-74 (2d Cir. 2001) (recognizing that “resolution of the falsity and actual malice inquiries typically requires discovery”). Justice Souter’s warning in *Nash* carries more weight at the pleadings stage.

17. Indeed, Eric alleged actual malice based on the circumstantial evidence of the NHPR Defendants’ state of mind that was available to him when he filed suit. Those allegations identified each source’s motive, bias, inherent unreliability, and obviously flawed accounts. Virtually every allegation was tethered to objective evidence about the sources, their supposed stories, and third-party witnesses and records, including, for example, the New Hampshire Department of Justice, Office of the Attorney General. When accepted as true and with reasonable inferences drawn in *Eric’s* favor (as required on a motion to dismiss), the complaint, respectfully, sufficiently alleged actual malice.

18. But the Court has ruled otherwise, doing so almost entirely because, in its view, the complaint did not offer clear enough indicia that the NHPR Defendants subjectively believed the source accounts were probably false. *See generally* Order. Because proof of “state of mind will rest on circumstantial evidence,” however, granting Eric access to the complete recorded source interviews and Chooljian’s contemporaneous notes and communications concerning those sources is the only genuine way for Eric to cure the perceived defects with his complaint. *See, e.g., Sawyer v. Boufford*, 113 N.H. 627, 628 (1973) (“The underlying purpose of discovery . . . is to **reach the truth** and to reach it as **early in the process** as possible by narrowing the issues pertaining to the controversy between the parties.”) (emphasis added).

19. *N.E. Data Servs., Inc. v. Becher*, 829 F.2d 286 (1st Cir. 1987) is analogous. There, the U.S. Court of Appeals for the First Circuit considered whether a civil RICO plaintiff, who must allege fraud with particularity under the Federal Rules of Civil Procedure, should have been

afforded limited discovery of information within the defendants' control before amending his complaint to cure perceived deficiencies. *See id.* The First Circuit concluded discovery was appropriate because a plaintiff should have the “meaningful opportunity to discover . . . fact[s] peculiarly within defendants' knowledge” and which are “difficult to expose.” *See id.* at 292.

20. Here, similarly, based on the Court's application of the actual malice standard, Eric's forthcoming amended complaint will be evaluated under a heightened pleading standard. While the Court appears to acknowledge that Eric's original complaint contained *some* indicia of actual malice, that indicia, according to the Court, needs to be “clearer” to survive dismissal. *See* Order at 20. Yet the clarity sought concerns the NHPR Defendants' subjective beliefs about sources and their stories, which irrefutably are facts “within [the NHPR Defendants'] knowledge” and “difficult to expose” without access to the discovery requested in this Motion. *See N.E. Data Servs., Inc.*, 829 at 292.

21. Second, the discovery sought would neither prejudice the NHPR Defendants nor run afoul of First Amendment principles. The NHPR Defendants already have published portions of each source's recorded interviews, including unmasked audio excerpts from Elizabeth and Employee A's interviews, thus outing their identities. Requiring the NHPR Defendants to produce the complete recorded interviews would permit Eric a fair ability to assess—then allege in his amended complaint—the NHPR Defendants' subjective beliefs and the plausibility of the sources' accounts. It also would be consistent with the doctrine of completeness. *See, e.g.*, N.H. Rules of Evid. 106. The same is true for Chooljian's notes about and communications with sources.

22. If this story, as the NHPR Defendants have ardently claimed, was meticulously investigated and reported, then this discovery would only serve to enhance their defense. If, alternatively, the NHPR Defendants knew or recklessly disregarded the falsity of their reporting,

then this discovery would fairly enable Eric to allege, with the “clearer indicia” desired by the Court, their actual malice.

23. Likewise, granting Eric this limited discovery would not conflict with the First Amendment principles applicable here. In New Hampshire, a defamation plaintiff who must demonstrate actual malice is entitled to source discovery. *See Downing v. Monitor Pub. Co. Inc.*, 120 N.H. 383, 386-87 (1980). To secure that discovery, the plaintiff must merely proffer that there is a genuine issue as to the *falsity* of the NHPR Defendants’ defamatory statements (including the false statements that Eric sexually assaulted former employees and sexually harassed a former client). *See, e.g., de Laire v. Voris*, No. 21-CV-131-JD, 2021 WL 6883274, *3 (D.N.H. Nov. 29, 2021) (“proffer of evidence of falsity” is all that is required). The complaint, on its face, proffered facts that established a genuine issue as to the falsity of the NHPR Defendants’ defamatory statements.⁵ Nothing in the Court’s order suggests that it viewed Eric’s “claim of falsehood” as “entirely baseless” such that source discovery should be precluded. *See Downing*, 120 N.H. at 387.

24. Under state constitutional law, moreover, Eric has a right to his day in court. *See* N.H. Const. part I, art. 14 (“Every subject of this State is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, *or character*. . .”) (emphasis added). While that right is not unlimited, it is of a constitutional dimension, and it does “entitle[]” Eric to “obtain right and justice . . . completely, and without any denial; promptly, and without delay; conformably to the laws.” *See id.*; *see also, e.g., Estate of Cargill v. Rochester*, 119 N.H. 661, 665 (1979) (“The purpose of part I, article 14 was to make civil remedies readily available, and to guard against arbitrary and discriminatory infringements on access to the courts.”). The discovery Eric requests here will give him, at the very least, a fair opportunity to

⁵ If the Court requires more, Eric will submit an affidavit confirming, under oath, that NHPR’s claims that he sexually harassed a former client and sexually assaulted two former employees are false.

exercise his constitutional right to “obtain right and justice” for the injuries he has suffered. To rule otherwise would arbitrarily preclude a defamation plaintiff from his day in court.

CONCLUSION

25. All told, the Court has determined Eric is a limited-purpose public figure who must allege actual malice and that he failed to do so. That decision rested on the Court’s perception of Eric’s allegations about the NHPR Defendants’ subjective beliefs concerning the credibility of their sources—assessments that are “extremely difficult, if not impossible, to make” at this stage of the case. *See Nash*, 127 N.H. at 223.

26. At minimum, for Eric to have a fair opportunity to cure the perceived deficiencies with the complaint, the Court should order the production of the discovery he has requested in this Motion, which has been reproduced below for convenience:

- The complete unredacted recordings of interviews of “Elizabeth”, “Employee A”, Nancy Bourque, Justin Downey, Brian Stoesz, and Piers Kaniuka.
- Lauren Chooljian’s notes about and communications with “Elizabeth”, “Employee A”, “Employee B”, Nancy Bourque, Justin Downey, Brian Stoesz, and Piers Kaniuka.
- Lauren Chooljian’s notes about and communications with Lysie Metivier and any recordings of their phone call on or about March 22, 2022.
- Lauren Chooljian’s notes about and communications with Amy Cloutier (formerly Anagnost) and any recordings of interviews of her.
- Lauren Chooljian’s communications with NHPR personnel concerning the credibility of “Elizabeth”, “Employee A”, “Employee B”, Nancy Bourque, Justin Downey, Brian Stoesz, Piers Kaniuka, Lysie Metivier, Amy Cloutier, or their respective accounts about Eric Spofford.

27. Given the NHPR Defendants’ previous position on discovery, Eric did not seek their concurrence in the relief sought.

PRAYER FOR RELIEF

Plaintiff Eric Spofford respectfully requests this Court:

- A. Grant this Motion;
- B. Order the NHPR Defendants to produce the discovery identified herein;
- C. Stay the deadline for Eric to file an amended complaint until after the Court rules on this Motion and, if granted, until 30 days after the NHPR Defendants have complied with the discovery requests; and
- D. Grant such other and further relief as is just and necessary.

Dated: April 26, 2023

Respectfully submitted,

ERIC SPOFFORD

By his attorneys,

/s/ Michael E. Strauss

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CERTIFICATE OF SERVICE

I, Joseph M. Cacace, hereby certify that this document has been filed electronically and a copy will be served by the electronic filing system, by email, and/or in accordance with Superior Court Rules 3 and 4 on all other parties.

Dated: April 26, 2023

/s/ Joseph M. Cacace

Joseph M. Cacace