

**Commonwealth of Massachusetts
County of Essex
The Superior Court**

CIVIL DOCKET#: **ESCV2008-01323-D**

RE: Thompson v Valley Patriot Inc et al

TO: Peter J Caruso, Esquire
Caruso & Caruso
1 Elm Square
Andover, MA 01810

NOTICE OF DOCKET ENTRY

You are hereby notified that on **01/02/2009** the following entry was made on the above referenced docket:

MEMORANDUM OF DECISION AND ORDER: the defendants' motion to dismiss Thompson's claim for libel (count I) and his claim for international infliction of emotional distress (count II) is ALLOWED. Additionally, Thompson's motion to dismiss the defendants' counterclaim for abuse of process is ALLOWED. (Merita A. Hopkins, Justice). Copies mailed 1/5/09

Dated at Lawrence, Massachusetts this 5th day of January,
2009.

Thomas H. Driscoll Jr.,
Clerk of the Courts

BY: Philip Massa
Assistant Clerk

Telephone: (978) 687-7463

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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL NO: 08-1323-D

KEVIN THOMPSON

vs.

VALLEY PATRIOT, INC. & others¹

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S
MOTION TO DISMISS AND DEFENDANTS' MOTION TO DISMISS**

This is an action brought by the plaintiff Kevin Thompson ("Thompson") against the defendants Valley Patriot, Inc. ("the Valley Patriot") and two of its editors, Tom Duggan, Jr. ("Duggan") and Paula Porten ("Porten") for libel² and intentional infliction of emotional distress. The action arises out of an editorial criticizing Thompson that was published in the Newspaper and allegedly written by Porten. In response, the defendants have filed a counterclaim against Thompson for abuse of process. The matter is currently before the court on the parties' cross-motions to dismiss.³ For the reasons stated below, the court **ALLOWS** both motions to dismiss.

BACKGROUND

In June 2004, the Probate Court awarded full physical and legal custody of Thompson's son to the boy's mother. In February 2006, Thompson published a book,

¹ Tom Duggan, Jr. and Paula Porten

² Thompson variously refers to the wrong allegedly committed by the defendants as libel, slander and defamation. Because the offending communication at issue is a written editorial, the court will treat the claim as one of libel.

³ At the hearing on the parties' respective motions, the defendant requested, and the plaintiff did not object, that their motions should be considered as motions for summary judgment. Both parties referred the court to documents beyond the complaint. The court will therefore analyze them as such.

“Exposing the Corruption in the Massachusetts Family Courts,” in which Thompson accused certain judges and family law attorneys of incompetence, corrupt practices, and systematic discrimination against fathers engaged in custody battles. A month later the book was impounded on the grounds that certain information in the book related to Thompson’s minor son and was under seal by the Probate Court.⁴ Subsequent to the impoundment of his book, Thompson appeared on several local, regional, and national media outlets to discuss his case, including appearances on Fox News, MSNBC, and WGBH.

In March 2006, Thompson met with Ralph Wilbur (“Wilbur”), a part-owner and editor of the Valley Patriot. The two agreed to publish a story about Thompson’s case in a question-and-answer format. Thompson supplied the bulk of the material and Wilbur edited it down to an acceptable length. The Valley Patriot’s other owners/editors, including Duggan and Porten, eventually agreed to publish the article, but desired to include an opinion piece expressing an opposing point of view. The May 2006 edition of the Valley Patriot contained both Wilbur’s interview with Thompson and an op-ed piece entitled “Father’s Priorities are Out of Wack.” The op-ed was highly critical of Thompson, and accused him of “blaming the judges, the entire court system, the mother, the mother’s lawyer, and everyone but himself for his loss.” The op-ed also asserted that Thompson’s book contained slanderous statements about Probate Court judges, lawyers, and Thompson’s son’s mother, and that Thompson, a Methuen high school physics teacher, had been disciplined by school authorities for allowing his custody battle, book, and surrounding media attention to disrupt his teaching.

⁴ Thompson disputes that this was the reason for the impoundment. The propriety of the judge’s decision to impound the book, however, is not before this court.

Thompson filed this action for libel and intentional infliction of emotional distress in July 2008. The defendants responded with a claim of abuse of process. Both parties have filed motions to dismiss their respective claims.

DISCUSSION

Summary judgment shall be granted where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Carey v. New England Organ Bank, 446 Mass. 270, 278 (2006). A fact is material if it would affect the outcome of the case. A dispute of fact is genuine if the evidence would permit a reasonable fact-finder to return a judgment for the non-moving party. Flesner v. Tech. Commc'ns. Corp., 410 Mass. 804, 809 (1991).

The moving party must demonstrate, “by reference to materials properly in the summary judgment record, unmet by countervailing materials” that the opposing party has no reasonable expectation of proving an essential element of her case. Carey, 446 Mass. at 278, citing Kourouvacilis v. Gen. Motors Corp., 410 Mass. 706, 716 (1991). The moving party may meet its burden either by submitting affirmative evidence that negates an essential element of the opposing party’s case against it, or by demonstrating that she has no reasonable expectation of proving an essential element of her case at trial. Flesner, 410 Mass. at 809. The opposing party may not defeat the motion merely by resting on the allegations and denials of her pleadings, but must set forth specific facts with affidavits, deposition testimony, answers to interrogatories, or admissions on file showing that there is a genuine issue for trial. Mass. R. Civ. P. 56(e); Ng Bros. Constr., Inc. v. Cranney, 436 Mass. 638, 644 (2002).

Thompson's Libel Claim

To establish a claim of libel, Thompson must prove a false and defamatory written communication of and concerning him. McAvoy v. Shufrin, 401 Mass. 593, 597 (1988).⁵ “A publication is defamatory when it tends to injure one’s reputation in the community and to expose him to hatred, ridicule, and contempt...” Brauer v. Globe Newspaper Co., 351 Mass. 53, 55 (1966). However, when the person alleged to have been libeled is a public official or public figure, or when the subject of the libelous communication is a matter of public concern, the plaintiff must also prove that the communication was made with “actual malice,” that is, that it was made with the knowledge that it was false or with reckless disregard for whether it was false. See Lewis v. Vallis, 356 Mass. 662, 667-68 (1970), citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964); see also Twohig v. Boston Herald-Traveler Corp., 362 Mass. 807 (1973), citing Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

“Whether a person is a public figure is a question of law.” Bowman v. Heller, 420 Mass. 517, 522 (1995), citing Wolston v. Reader’s Digest Ass’n, 443 U.S. 157, 166-69 (1979). “Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, a person should not be deemed a public personality for all aspects of his life.” Id. at 522, citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974). Nevertheless, a person who might not be considered a public figure “for all aspects of his life” may still be a public figure for certain, limited purposes. Id. In Massachusetts, a determination that a party is a limited purpose public figure requires at least some showing that there is a public controversy, that the alleged

⁵ Here, there is no dispute that there was a written communication of and concerning Thompson.

defamatory statement relates to the public controversy, and that the party alleging the defamation has voluntarily thrust himself into the public controversy. See Id. at 523-24.

Here, Thompson is a limited-purpose public figure. Thompson has written a book alleging incompetence, corruption, and discrimination against fathers in the Massachusetts Probate Courts. Debate on the integrity of the judicial system is certainly a matter of public concern. Moreover, Thompson has repeatedly availed himself of local, regional, and national media outlets in order to publicize his views and influence comment. He voluntarily provided the Valley Patriot with information regarding his case in order to have that information voiced in a forum for public discussion. Finally, the offending article contests Thompson's claims and offers an alternative point of view. Thompson has therefore made himself a limited-purpose public figure with respect to the subject matter of the offending article.

The next issue is whether the offending statements in the op-ed are statements of fact or opinion. "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in a false statement of fact." Cole v. Westinghouse Broadcasting Co., Inc., 386 Mass. 303, 308 (1982), citing Gertz, 418 U.S. at 339-40. "The determination whether a statement is one of fact or opinion is generally considered a question of law." Id. at 309. "In deciding whether statements can be understood reasonably as fact or opinion, the test to be applied requires that the court examine the statement in its totality in the context in which it was uttered or published. The court must consider all the words used, not merely a particular phrase or sentence. In addition, the court must give weight

to cautionary terms used by the person publishing the statement. Finally, 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.” *Id.* at 309, citing *Info. Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980). The court must also note that “what constitutes a statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole. Thus, where potentially defamatory statements are published in a public debate... in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion.” *Id.* at 310.

In this case, most of the op-ed is properly characterized as opinion. Those portions which are arguably asserted as fact are either not false or not defamatory. The court has considered all the statements in the op-ed that Thompson claims are defamatory, but for the sake of brevity will summarize, by way of a few examples, the nature of Thompson’s complaint about these statements and the reasons why the statements fail to meet the legal definition of defamation.

Thompson asserts that the statement “Much of what was presented at [the custody] trial was sealed” is defamatory because the requirements for sealing or impounding the case were not met. There are two ways to interpret Thompson’s position. Either the case was sealed and Thompson disagrees with the judge as to whether the legal requirements were met, in which case the statement is not false, or the case was not

sealed, in which case the statement is false but not defamatory since the assertion that the case was sealed is not at all injurious to Thompson's reputation.⁶

Thompson also complains of the following statement: "Kevin is a disgruntled dad and teacher from Methuen... Because of his constant anger – and being fueled by others like the fatherhood coalition – Mr. Thompson wrote a book giving his version of the case and the 'corruption in the court system.'" Specifically, he takes offense at being characterized as "disgruntled" and "constantly angry." These characterizations are statements of the author's opinion. Similarly, it was the author's opinion that Thompson incompetently represented himself in the custody hearing. Any such statements asserting a deficit in Thompson's legal skills are purely the opinion of the author. Additionally, statements that Thompson failed to take responsibility for his loss, and blamed everyone but himself, are either not statements of fact, to the extent they depend on a normative assessment of one's "responsibility," or are not false, since Thompson admits, in his pleadings, that he believes he lost his custody case due to official corruption and other wrongdoing and not based on the legal merits of his claim. There is nothing false in the statement that Thompson has blamed the court system for his lost custody battle, because Thompson states that this is his belief.

Finally, Thompson takes issue with the following statement: "Thompson is a teacher in the Methuen public schools and sources in the school system have said that his book and custody battle have disrupted and affected his teaching, and Thompson has been given several warnings about his behavior." Thompson says his problems with school officials arise out of a union-related conspiracy to drive him out of the school, and

⁶ For the same reason, other statements in the article relating to the judge's decision to impound Thompson's book are also not defamatory.

are not related to his custody dispute or the book and media exposure that followed.

Thompson himself, however, provided the editors of the Valley Patriot with documents in which he described how school officials disciplined him because they believed, or at least claimed to believe, that he was discussing his custody dispute and the surrounding media fallout with his students during class time. There was therefore nothing false about the aforementioned statement.

One cannot be so prominent and vocal a partisan in a public debate, particularly when one has had a hand in creating the debate in the first place, and then cry foul at the rough and tumble of the marketplace of ideas. Thompson cannot establish that any of the claims in the op-ed are anything other than opinion or, if they are fact, that they are false. Therefore, he cannot, a fortiori, prove that they were made with “actual malice.” Consequently, his claim must be dismissed.

Thompson’s claim for Intentional Infliction of Emotional Distress

To establish a claim of intentional infliction of emotional distress, Thompson must prove “(1) that [the defendants] intended to inflict emotional distress or that [they] knew or should have known that emotional distress was the likely result of [their] 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 defendants 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 person could be expected to endure it.” Vittands v. Sudduth, 49 Mass. App. Ct. 401, 410 (2000) (internal quotes omitted).

Success on this claim therefore requires that the defendants' conduct be objectively extreme and outrageous, and that Thompson's emotional distress be a reasonable reaction to it. Here neither is the case. The First Amendment would not long survive if words so often exchanged in public debates could easily be labeled "extreme and outrageous" or "beyond all possible bounds of decency." Moreover, Thompson's claim that he suffered emotional distress is not reasonable. As stated above, Thompson had long since placed his personal story in the public sphere in an attempt to shape public policy. He cannot complain simply because some of the commentary he has invited paints him in an unfavorable light.

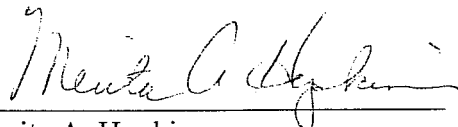
The Defendants' counter-claim for Abuse of Process

In order to make out a prima facie case of abuse of process, a party must show that "(1) process was used; (2) for an ulterior or illegitimate purpose; (3) resulting in damage." Gutierrez v. Mass. Bay Trans. Auth., 437 Mass. 396, 407 (2002). In the present case, the defendants assert that Thompson's actual motive for bringing the lawsuit was to re-litigate his custody battle and publicly harass and humiliate the judges, lawyers, and litigants from those proceedings. Aside from these conclusory allegations, the defendants point to no specific factual allegations that would support a theory of an ulterior or illegitimate purpose. Thompson's claim is restricted to challenging the op-ed article. Thompson may not grasp the law of defamation, and therefore not have a meritorious claim, but that does not make his assertion of it an abuse of process. Thus, the defendants' counterclaim must be dismissed.

ORDER

For the foregoing reasons, the defendants' motion to dismiss Thompson's claim for libel (Count I) and his claim for intentional infliction of emotional distress (Count II) is **ALLOWED**. Additionally, Thompson's motion to dismiss the defendants' counter-claim for abuse of process is **ALLOWED**.

DATED: January 2, 2009



Merita A. Hopkins
Justice of the Superior Court

Commonwealth of Massachusetts
County of Essex
The Superior Court

CIVIL DOCKET# ESCV2008-01323

Thompson,

Plaintiff(s)

vs

Valley Patriot Inc et al,

Defendant(s)

JUDGMENT ON MOTION TO DISMISS
(Mass.R.Civ.P. 12b)

This action came on for hearing before the Court, Merita A. Hopkins, Justice upon the Defendant's, Valley Patriot Inc, Tom Duggan Jr, Paula Porten, motion to dismiss pursuant to Mass. R.Civ.P. 12(b), and upon consideration thereof,

It is **ORDERED** and **ADJUDGED**:

That the Complaint of the plaintiff (s), Kevin M Thompson is hereby dismissed against the defendant (s), Valley Patriot Inc, Tom Duggan Jr, Paula Porten, and the defendant(s) recovers its costs of action.

Dated at Lawrence, Massachusetts this 5th day of January, 2009.

By: 

Assistant Clerk

Entered:

Copies mailed 01/05/2009

Commonwealth of Massachusetts
County of Essex
The Superior Court

CIVIL DOCKET# ESCV2008-01323

Thompson,
Plaintiff(s)
vs
Valley Patriot Inc et al,
Defendant(s)

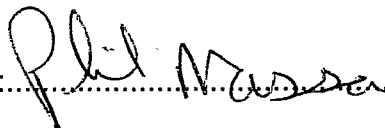
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