

STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-13-359

MARIE GUNNING,

Plaintiff,

v.

JOHN DOE,

Defendant.

**PLAINTIFF'S OBJECTION TO
DEFENDANT JOHN DOE #1'S
MOTION TO QUASH AND FOR
ADDITIONAL RELIEF
AND
INCORPORATED MEMORANDUM
OF LAW**

NOW COMES Plaintiff Marie Gunning, by and through counsel, and hereby objects to the Motion to Quash and For Additional Relief filed by Defendant John Doe #1. For the reasons set forth herein, Doe #1's Motion to Quash should be denied since he holds no cognizable privilege *vis-a-viz* the subpoenaed non-party witness and otherwise lacks standing to challenge the subpoena. Furthermore, Doe #1's request for "additional relief" – essentially seeking an order of dismissal¹ – should be denied since the evidence establishes that the statements at issue constitute libel *per se* actionable under Maine law.

MEMORANDUM OF LAW

I. DOE #1'S MOTION TO QUASH SHOULD BE DENIED SINCE THERE IS NO PRIVILEGE AND HE OTHERWISE LACKS STANDING TO CHALLENGE THE SUBPOENA.

As set forth in Plaintiff's Objection to Richard Simard's Motion to Quash, the relevant portions of which are incorporated herein by reference, there is no cognizable privilege as between Doe #1 and Mr. Simard. Mr. Simard avers that he does not know the identities of the

¹ Plaintiff questions whether Doe #1 has standing to seek dismissal inasmuch as his counsel has entered a limited appearance for the purpose of challenging the Simard subpoena. Should the Court nonetheless consider such arguments and find against Doe #1, it should reconsider its prior ruling on Plaintiff's Motion For Service By Alternative Means and compel Doe #1's counsel to accept service on his behalf.

authors/publishers of the *Crow's Nest* and Doe #1 does not contend otherwise. There is only one possible conclusion to this syllogism: no privilege can exist.

Absent a viable claim of privilege, Doe #1 lacks standing to otherwise challenge the subpoena at issue and his Motion to Quash should properly be denied. *See, e.g., FTC v. Trudeau*, 2012 U.S. Dist. LEXIS 160545, 9-10 (N.D. Ohio Nov. 8, 2012) (citations omitted) (“[A] party has no standing to seek to quash a subpoena issued to someone who is not a party to the action unless the party claims some personal right or privilege with regard to the documents sought.”); *First Mariner Bank v. Resolution Law Group, P.C.*, 2014 U.S. Dist. LEXIS 19565 (D. Md. Feb. 14, 2014) (“Absent standing, a motion to quash a subpoena issued to a nonparty should be denied without reaching the motion’s merits.”).

II. DOE #1’S MOTION FOR “ADDITIONAL RELIEF” SHOULD BE DENIED SINCE THE EVIDENCE ESTABLISHES LIBEL *PER SE*.

The gravamen of Doe #1’s request for “additional relief” is that the Complaint should be dismissed because Marie Gunning was, at all times relevant, a “public figure” and that the statements at issue are constitutionally protected “parody.” As is demonstrated by the following, this argument is wrong on the facts and the law.

a. Factual Background.

Marie Gunning moved to Freeport 15 years ago. *See* Affidavit of Marie Gunning filed herewith, paragraph 2 (hereinafter “*Gunning Aff.* ¶__”). It was some ten years later, in or about 2010, that she first attended a public meeting of the Town Council. *See Gunning Aff.* ¶ 3.

In September of 2011 – motivated by her growing interest in the community and a belief that she could make a valuable contribution – Marie decided to run for one of the open Council seats. *Id.* at ¶ 4. Her “campaign” was brief (52 days), unfunded, and ultimately unsuccessful.

Id. at ¶ 5. Since her loss, Marie has not sought election or appointment to any public office and has no present intention of doing so in the future. *Id.* at ¶ 6.

A few days *after* Marie lost the Council election and returned to private life, the first *Crow's Nest* issue was published.² *Id.* at ¶ 7. The self-styled "Election Special" included an article about Marie under the caption: "Marie Gunning – aka: 'Gunner Gunning' 'Miss Prozac 2003'." *Id.* at ¶ 7. From that date on the *Crow's Nest* continued to publish malicious articles about Marie. *Id.* at ¶ 8.

The intent and motivation of those who published the *Crow's Nest* is palpably evident from the following "Op-Editorial Summary," *id.* at ¶¶ 8-9:

For those who haven't ever seen the publication of "A CROW'S NEST" it has been around off and on for nearly thirty years and most everyone who enters the public forum and speaks to public issues is fair game within reason. If you choose to speak on the public record, that is your choice to make.

Speaking the truth being civil, you will be heard. That has always been the Town Council's open policy and has not changed.

Anyone who chooses to do otherwise, can well be taken to task for their irresponsible statements and accusations.

Last year nearly a week to the day after all the campaigning, all the votes had been cast, tallied, and after the New Town Council had been sworn in, on November 15th, 2011, "A CROW'S NEST" reappeared.

For over five years "A CROW'S NEST" has been silent until that night.

From that night on you could clearly hear Banjo music when certain people went to the podium. (Note: the close set nature of the eyes. The bib coveralls, one eyebrow and no neck.)

² Most if not all the *Crow's Nest* publications appeared in both print form (copies of which were distributed throughout the Freeport community) and the *Crow's Nest* website at www.freeportcrowstnest.com. *Id.* at ¶ 10.

Every Town in Maine has some, these are Freeport's own. They are called "THE LOONYS" [sic] they live among us.

The Crow's Nest message could not be more clear: "We will target, malign and intimidate any private Town resident who dares to speak out at a public meeting in a manner that we do not like." Marie Gunning was among those private residents so targeted. *Id.* at ¶¶ 8-9.

While the *Crow's Nest* continued to publish malicious articles about Marie for years – painting her in a false, offensive and injurious light – its "Issue #72", quoted below, took these attacks to a new level, *id.* at ¶ 16:

Freeport's own Marie Gunning

The last lost election has not slowed Marie Gunning down one bit. With the iron will and force of a bulldozer, she's back and more determined than ever.

"I drove that crooked dirt bag manager out of town and that Council is next, said, a very mad Gunning!

"I'll make them sorry they didn't elect me"!

Rumors continue that, Marie is suffering from a bipolar disorder with acute depression and paranoia, amplified by substance abuse.

She continues to deny it saying that "it's just the same rotten people, my opponents, always trying to discredit me and stop me from exposing the truth"!

Recently Gunning charged that there is an inherent conflict of interest when town employees approve anything that the Town Council wants. "They're interested parties, they work for the town" Gunning snarled, "and that is a conflict of interest"! "They're getting paid with thousands of tax payer's dollars and no one wants to talk about it"!

Gunning claims to have documents from inside sources, supporting her allegations.

The *Crow's Nest* statements that Marie "suffer[ed] from bipolar disorder," had "acute depression and paranoia," and a problem with "substance abuse" were and are patently and

demonstrably false. *Id.* at ¶ 16. The above captioned article, as published on the *Crow's Nest* website, appeared as a separate page that included no other articles from the issue or any purported disclaimer of parody. *Id.* at ¶ 17. Anyone who read the foregoing as it appeared on the *Crow's Nest* website would reasonably believe that the statements about Marie Gunning were factual. *Id.* at ¶ 18.

- b. The statements published in "Issue #72 of the *Crow's Nest* are libelous *per se*³ since Plaintiff was a private person, the statements at issue did not involve matters of public concern nor could they reasonably be construed as parody.

As is clear from the foregoing, at all times relevant Marie Gunning was a private not public figure. Following her one-time (52-day) campaign for a seat on the Town Council, she returned to her life as a private citizen and has never since sought public office.

But Marie was not targeted by the *Crow's Nest* during the two-months when she was actually a candidate (its first issue was published only *after* she had lost). And she was not targeted because she had been, however briefly, a candidate. Marie Gunning was attacked by the *Crow's Nest* because she dared to exercise her right as a private citizen to speak at open town meetings.⁴ Marie Gunning was attacked because in the mind of John Doe #1, she was just another "bib-coverall" wearing, "one eye-browed," "Loony" who dared approach the podium during public meetings.

Furthermore, it cannot be seriously be argued that the statements at issue – that Marie is a paranoid, acutely depressed, bipolar substance abuser – are matters of "public concern." These

³ "Under Maine law, no special damages need be alleged in a claim for libel." *Springer v. Seaman*, 658 F. Supp. 1502, 1508 (D. Me. 1987).

⁴ Doe #1's malicious intent to intimidate Plaintiff from freely participating in civic affairs as a private citizen would satisfy even a heightened level of scrutiny were it applicable.

patently false statements were intended to and did in fact injure Marie Gunning personally. See *Gunning Aff.* ¶¶ 19-20.

Doe #1 cannot shield himself from liability by claiming his “work” was parody, satire or the like. As noted above, the statements at issue published on the *Crow’s Nest* website appeared as a separate page that included no other articles from the “Issue #72” or any purported disclaimer of parody. *Id.* at ¶ 17. Indeed, the text of the article (quoted in full, *supra*) appears to be totally factual – and any reasonable reader would consider it as such. See *Powers v. Durgin-Snow Publishing Co.*, 154 Me. 108, 112 (Me. 1958) (“The defendant does not escape liability [for libel] on the ground the article was written in jest, if such was the fact. The joke that goes too far and causes harm, not laughter, is within our common experience.”); *Salomone v. Macmillan Pub. Co.*, 97 Misc. 2d 346, 347-352 (N.Y. Sup. Ct. 1978) (denying motion to dismiss libel action of private person: “[t]he parody and satire to which public figures may be subject does not equally apply to private persons.”).

Therefore, the statements at issue can be accorded no constitutional protection and are actionable under Maine law. See *Galarneau v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 504 F.3d 189, 199 (1st Cir. Me. 2007) (citations omitted) (“To establish that a particular defamation case raises First Amendment concerns, a defendant must show that the purportedly defamatory statement involved either a public official or a matter of public concern, or both.”); *Ramirez v. Rogers*, 540 A.2d 475, 477-478 (Me. 1988) (“Because this case involves a non-media defendant, defaming a private plaintiff concerning a matter that is not of public concern, we hold that the trial justice properly applied the common law defamation rules when instructing the jury.”) *citing Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 89 L. Ed. 2d 783, 797, 106 S. Ct. 1558 (1986); *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 86 L. Ed. 2d 593, 105 S. Ct. 2939

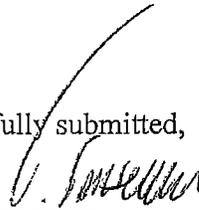
(1985); *see, also, Fitch v. Stanley*, 2005 Me. Super. LEXIS 190, 8-9 (Me. Super. 2005) (J. Warren) (citations omitted) (Stanley's First Amendment defense is based on *Hustler Magazine v. Falwell*. However, the *Hustler Magazine* case relates to public figures. Viewing the allegations of the complaint in the light most favorable to plaintiff for purposes of this motion, Fitch is neither a public figure nor was the offending email a matter of public concern. Accordingly, no special First Amendment protection applies.”).

There is a twisted irony in Doe #1 maintaining that his identity and libelous statements are protected by his First Amendment right to free speech, when his attacks were intended to intimidate Marie Gunning from exercising her own. The lofty constitutional ideals he now invokes stand in stark contrast to the low, ugly, and malicious conduct at issue. Doe #1 would have this Court believe that he is carrying the torch passed on by the likes of Alexander Hamilton, James Madison, and John Jay. The “reasonable reader” recognizes these assertions for what they are: parody.

For the foregoing reasons, Doe #1’s Motion for “Additional Relief” should be denied.

DATED at Portland, Maine, August 7, 2015.

Respectfully submitted,



L. John Topchik, Bar No. 8492
Attorney for Plaintiff Marie Gunning

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Defendant.

AFFIDAVIT OF MARIE GUNNING

NOW COMES Plaintiff Marie Gunning and deposes and states as follows:

1. This Affidavit is based upon personal knowledge of the facts stated herein.
2. I have been a resident of Freeport for approximately 15 years.
3. Sometime in or about 2010 I attended my first open meeting of the Freeport Town Council (hereinafter the "Council"). I did so out of interest in various issues that were pending before the Council.
4. In or about September 2011, I decided to make a run for one of the open seats on the Council. Before that time I had never sought a public office or considered running. I decided to run because of my growing interest in the Freeport community and the thought that I could make a valuable contribution to the Town.
5. My short election bid was unfunded (I did not accept offered contributions). For better or worse, my 52-day "campaign" came to an end when the votes were officially tallied on November 8, 2011. I had lost.

MsG

6. My election bid for the Council seat was a one-time thing. After losing I was determined and very happy to return to my private life. Since that time I have never sought public office and have no present intention of doing so in the future.

7. On or about November 15, 2011 (*i.e.*, within a few days after the election had closed), the first *Crow's Nest* issue was published. This "Election Special" included an article about me under the caption: "Marie Gunning – aka: 'Gunner Gunning' 'Miss Prozac 2003'."

8. As set forth in my Complaint and illustrated by the exhibits annexed thereto, the *Crow's Nest* continued to publish malicious articles about me throughout the following years. The intent and motivation of those who published the *Crow's Nest* was clearly stated in an "Op-Editorial Summary" – a true and accurate copy of which is attached hereto as Exhibit A:

For those who haven't ever seen the publication of "A CROW'S NEST" it has been around off and on for nearly thirty years and most everyone who enters the public forum and speaks to public issues is fair game within reason. If you choose to speak on the public record, that is your choice to make.

Speaking the truth being civil, you will be heard. That has always been the Town Council's open policy and has not changed.

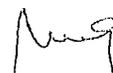
Anyone who chooses to do otherwise, can well be taken to task for their irresponsible statements and accusations.

Last year nearly a week to the day after all the campaigning, all the votes had been cast, tallied, and after the New Town Council had been sworn in, on November 15th, 2011, "A CROW'S NEST" reappeared.

For over five years "A CROW'S NEST" has been silent until that night.

From that night on you could clearly hear Banjo music when certain people went to the podium. (Note: the close set nature of the eyes. The bib coveralls, one eyebrow and no neck.)

Everyone Town in Maine has some, these are Freeport's own. They are called "THE LOONYS" [sic] they live among us.



9. As is clear from the above quoted "Op-Editorial Summary," the motive and intent of the *Crow's Nest* publishers was plain: they sought to publicly humiliate those who had the temerity to speak at Council meetings and intimidate them from exercising the basic civic right of all private residents in the community. I was one of a number of private individuals so targeted by the *Crow's Nest*.

10. Like most of its publications, the "Op-Editorial Summary" quoted above was disseminated in print form (copies of which were distributed throughout the Freeport community) and through the *Crow's Nest* website – www.freeportcrownsnest.com.

11. I now know, after it has been raised in the course of this litigation, that hard-copies of the *Crow's Nest* and perhaps the "home page" of its online version included (in very small type) a purported caveat that it was "a parody look at the news."

12. The "Op-Editorial Summary" attached as Exhibit A is a true and accurate copy of what was published on the internet at www.freeportcrownsnest.com.

13. Over the course of the following years – during which time I was a private individual living in Freeport – the *Crow's Nest* continued to publish malicious articles about me (via its website and in hard-copy) which painted me in a patently false, offensive and injurious light.

14. I, and other members of the Freeport community with whom I spoke, believed then (and believe now) that the ultimate aim of the *Crow's Nest* – consistent with its screed against "Looneys" taking the podium at public meetings – was to intimidate residents from engaging in public forums.

15. The Exhibits annexed to my Complaint are true and accurate copies of the *Crow's Nest* published statements concerning me.

16. As fabricated and offensive as the *Crow's Nest* statements about me had been, its "Issue #72" – published in or about May 2013 – was horrifically false and harmful. Attached to my Complaint (as Exhibit 16) is a true and accurate copy of the print version of "Issue #72," which falsely states, among other things, that I "suffer from bipolar disorder," have "acute depression and paranoia" – all amplified by "substance abuse." Each and every such statement is patently and demonstrably false.

17. It is my recollection that this article about me in "Issue #72", as published on the *Crow's Nest* website, appeared as a separate page that included no other articles from the issue or any purported disclaimer of parody. Any person who read that page would see only:

Freeport's own Marie Gunning

The last lost election has not slowed Marie Gunning down one bit. With the iron will and force of a bulldozer, she's back and more determined than ever.

"I drove that crooked dirt bag manager out of town and that Council is next, said, a very mad Gunning!

"I'll make them sorry they didn't elect me"!

Rumors continue that, Marie is suffering from a bipolar disorder with acute depression and paranoia, amplified by substance abuse.

She continues to deny it saying that "it's just the same rotten people, my opponents, always trying to discredit me and stop me from exposing the truth"!

Recently Gunning charged that there is an inherent conflict of interest when town employees approve anything that the Town Council wants. "They're interested parties, they work for the town" Gunning snarled, "and that is a conflict of interest"!
"They're getting paid with thousands of tax payer's dollars and no one wants to talk about it"!

Gunning claims to have documents from inside sources, supporting her allegations.

Mug

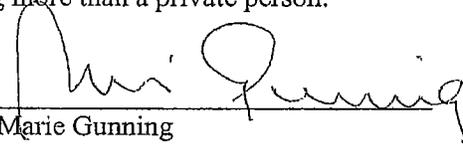
18. Read in isolation, as it appeared on the Crow's Nest website, a reasonable person would understandably believe that above statements about me were factual.

19. I am a financial and business consultant with advanced degrees in business and natural resource management. I own and run my own business and have a national client base that includes major financial institutions. Suffice it to say that my reputation and good name are integral to my ability to earn a living in my profession. Due to the nature of my work, prospective clients as a matter of course perform background checks – any one of which, during the relevant time frame, could have “hit” on the false and defamatory statements published by the *Crow's Nest*.

20. Since the *Crow's Nest* publications began, I have suffered serious harm to my reputation and emotional wellbeing.

21. I appreciate that my decision to run for a seat on the Freeport Town council could, for the 52-odd days that I was running, cast me as a “public figure.” However, from the moment I lost that election (which was determined before the first issue of the *Crow's Nest* was published) to the present, I have been nothing more than a private person.

DATE: 8/6/15


Marie Gunning

STATE OF MAINE
Cumberland County

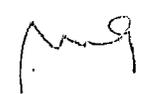
August 6, 2015.

Personally appeared the above named Marie Gunning and made oath that the foregoing statements made by her are true based upon her personal knowledge.

Before me,


Notary Public/Attorney at Law

DREW PATTERSON
Notary Public
Maine
My Commission Expires Dec. 13, 2018



From Crow's Nest #62

Op-Editorial summary:

For those who haven't ever seen the publication "A CROW'S NEST" it has been around off and on for nearly thirty years and most everyone who enters the public forum and speaks to public issues is fair game within reason. If you choose to speak on the public record, that is your choice to make.

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WWW.freeportcrowsnest.com
