

STATE OF MAINE  
CUMBERLAND, ss.

SUPERIOR COURT  
CIVIL ACTION  
Docket No. CV-13-369

DANA DESJARDINS,

Plaintiff

v.

MICHAEL REYNOLDS,

Defendant

ORDER

**STATE OF MAINE**  
**Cumberland, ss, Clerk's Office**

**JUN 29 2015**

**RECEIVED**

Before the court is a special motion to dismiss by defendant Michael Reynolds under Maine's anti-SLAPP statute, 14 M.R.S. § 556.

Plaintiff Dana Desjardins commenced this suit in the Maine Superior Court in August 2013. At that time it included section 1983 claims and a number of state law claims against Reynolds and co-defendant Donald Willard.

In September of 2013 the case was removed to the U. S. District Court for the District of Maine, and defendants filed a motion to dismiss the section 1983 claims and a special anti-SLAPP motion to dismiss the state law tort claims. In a detailed order filed June 20, 2014, the federal court (Torresen, J.) dismissed the section 1983 claims and granted the defendants' anti-SLAPP motion. *Desjardins v. Willard*, Civil No. 2:13-cv-00338-NT, reported at 2014 U.S. Dist. LEXIS 84782.<sup>1</sup>

That decision was appealed to the First Circuit, which on January 23, 2015 affirmed the dismissal of Desjardins's federal claims but vacated the dismissal of Desjardins's defamation and

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<sup>1</sup> A copy of Judge Torresen's 41-page order is also contained in the record before this court as an addendum to Desjardins's First Circuit Brief (Tab D in the binder of federal pleadings filed by the parties).

false light claims against Reynolds and directed that those claims should be remanded to state court. *Desjardins v. Willard*, 777 F.3d 43 (1st Cir. 2015).<sup>2</sup> The First Circuit concluded that Reynolds’s anti-SLAPP motion should be remanded to the Maine courts because it concluded that there were issues of state law – specifically what it described as a tension between the Law Court’s decision in *Schelling v. Lindell*, 2008 ME 59, 942 A.2d 1226, and its subsequent decision in *Nader v. Maine Democratic Party* (*‘Nader I’*), 2012 ME 57, 41 A.3d 551 – that should be resolved by the Maine courts. 777 F.3d at 45-46.

By agreement, rather than rebriefing the issues, the parties have submitted copies of the legal memoranda, declarations, affidavits, and exhibits filed by the parties in connection with the anti-SLAPP motion filed on behalf of Reynolds in the U.S. District Court, along with copies of the appellate briefs the parties filed on the appeal to the First Circuit.

#### Application of the Anti-SLAPP Statute

Maine’s anti-SLAPP statute provides that when a plaintiff’s claims are based on a defendant’s exercise of the right of petition under the U.S. or Maine Constitution – conduct which is defined broadly under the statute – the defendant may bring a special motion to dismiss. 14 M.R.S. § 556. The statute further provides that the special motion to dismiss shall be granted “unless the [plaintiff] shows that the [defendant’s] exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the [defendant’s] acts caused actual injury to [plaintiff]”. 14 M.R.S. § 556.

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<sup>2</sup> The defamation and false light claims against Reynolds were the only remaining claims in the case because Desjardins had withdrawn his NIED and IIED claims during the proceedings before Judge Torresen and had withdrawn his claims against Willard during the course of the appeal. 777 F.3d at 44 nn. 1 and 2.

The court's first step in considering Reynolds's special motion to dismiss under 14 M.R.S. § 556 is to determine whether Desjardins's defamation and false light claims are based on Reynolds's exercise of his constitutional right of petition. If so, the court needs to determine whether Desjardins has sufficiently demonstrated that Reynolds's petitioning activity was (1) devoid of any reasonable factual support or any arguable basis in law and (2) that Reynolds's alleged actions caused actual injury to Desjardins.

The facts contained in the record, including the countervailing evidence offered by Reynolds and by Desjardins, are outlined in Judge Torresen's order, 2014 U.S. Dist. LEXIS 84782, and the court will not reiterate those facts here.

Reynolds has demonstrated that Desjardins's defamation and false light claims are based on alleged actions which fall within the definition of "a party's exercise of its right of petition" contained in 14 M.R.S. § 556. *See Schelling v. Lindell*, 2008 ME 59 ¶ 12 (Maine Legislature intended to define activity protected by the anti-SLAPP statute "in very broad terms"). Desjardins is specifically complaining about reports that Reynolds made to the Cumberland County Sheriff's office. These were "written or oral statements . . . submitted to" the Sheriff's office (an executive body) and statements "reasonably likely to encourage consideration or review of an issue" by the Sheriff's office. The court is therefore in agreement with Judge Torresen that Reynolds has made the initial showing required under 14 M.R.S. § 556. *See Desjardins v. Willard*, 2014 U.S. Dist. LEXIS 84782, \*53-\*54 (order at p. 35).

The court concludes that under the second step of the analysis required under 14 M.R.S. § 556 Desjardins has met his burden of showing that Reynolds's petitioning activity was "devoid of any reasonable factual support." On this issue all that is required is that Desjardins make a

prima facie showing – at least “some evidence” – that at least one of Reynolds’s petitioning actions was devoid of any reasonable factual support. *Nader I*, 2012 ME 57 ¶¶ 33-35.

### Actual Injury

That leaves the issue which led to the First Circuit’s decision to have this case remanded to state court – whether Desjardins has met the additional requirement of demonstrating that Reynolds’s actions caused him “actual injury” within the meaning of 14 M.R.S. § 556. The actual injury asserted by Desjardins consists of (1) the attorneys fees he incurred in order to discover the source of the allegedly false stories and reports that were made about him, (2) the “humiliation and embarrassment” he experienced when he was the subject of a traffic stop on January 8, 2013, and (3) the “great emotional distress” he suffered when he learned that he had been red flagged by the Sheriff’s Department. October 22, 2013 Desjardins Affidavit ¶¶ 33-35.

In *Schelling v. Lindell*, the Law Court ruled a plaintiff faced with an anti-SLAPP motion must show “a reasonably certain monetary valuation” of the injury that is claimed. 2008 ME 59 ¶ 17. It also ruled that presumed injury in defamation cases does not qualify as “actual injury” for purposes of the anti-SLAPP statute:

The statutory requirement that a plaintiff must demonstrate actual injury is not satisfied by the common law rule in libel cases that a plaintiff is not required to demonstrate that she has suffered any specific damages in order to recover on her claim . . . . Neither is the actual injury requirement satisfied by the common law rule that in slander cases, a plaintiff need not demonstrate any specific damages if the alleged defamation relates to her trade or business.

2008 ME 59 ¶ 18 (citations omitted). Perhaps most importantly for purposes of this case, the Court also ruled that loss of sleep, mental suffering, and embarrassment are not legally sufficient to meet the “actual injury” requirement under 14 M.R.S. § 556. *Id.*

The Court went on to state that a plaintiff who cannot show economic damages can only meet the actual injury requirement if he is able to show the kinds of damage required in Maine to recover for purely emotional harm. *Id.* ¶ 27. This would require emotional distress “so severe that no reasonable person could be expected to endure it.” *Id.* ¶ 25, citing *Curtis v. Porter*, 2001 ME 158 ¶ 10, 784 A.2d 18.

Applying the *Schelling* precedent to the facts in this case, Desjardins cannot meet the actual injury requirement under 14 M.R.S. § 556 by relying on the common law doctrine that a defamation plaintiff may recover damages under certain circumstances even without proof of economic damages – which are referred to in the law of defamation as “special harm.”<sup>3</sup> The court also agrees with Judge Torresen that Desjardins’s allegations of embarrassment, humiliation, and emotional distress do not constitute the kind of mental distress that would qualify as sufficiently severe that “a reasonable person, properly constituted, would be unable to adequately cope with the mental stress engendered by the circumstances . . .” *Desjardins v. Willard*, 2014 U.S. Dist. LEXIS 84782, \*56-\*57 (order at pp. 37-38); *Schelling v. Lindell*, 2008 ME 59 ¶ 24, quoting *Culbert v. Sampson's Supermarket Inc.*, 444 A.2d 433, 437 (Me. 1982). As far as the court can tell, Desjardins conceded the latter point when he withdrew his claims for intentional and negligent infliction of emotional distress before Judge Torresen. *Desjardins v. Willard*, 2014 U.S. Dist. LEXIS 84782, \*3-\*4 & n. 3 (order at p. 3 n.3).

Damages recoverable on a false light claim include harm to reputation, emotional distress, and any economic damages resulting from the invasion of privacy. Restatement 2d Torts § 652H and cmt. a. However, Desjardins has not demonstrated any harm to reputation in his affidavit, let alone any harm to reputation that could be reduced to a “reasonably certain monetary valuation.” *Schelling*, 2008 ME 59 ¶ 17. Moreover, under *Schelling* his claims of

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<sup>3</sup> See Restatement 2d Torts § 575 cmt. b; *Withers v. Hackett*, 1998 ME 164 ¶ 9, 714 A.2d 798.

embarrassment, humiliation, and emotional distress from the traffic stop and from allegedly being red flagged by the Sheriff's office are insufficient whether they are claimed as damages for defamation or for a false light invasion of privacy. *Id.* 2008 ME 59 ¶ 18.

Desjardins claims that he incurred economic damages that would qualify as actual injury under the anti-SLAPP statute because he had to incur attorneys fees in order to determine the source of the allegedly false reports made to the Sheriff's office. October 22, 2013 Desjardins Affidavit ¶ 33. However, this is unavailing because neither attorneys fees nor investigative costs constitute compensable damages under the law of defamation or false light invasion of privacy. While attorneys fees may be recoverable in cases where a party was the subject of a wrongful prosecution and had to hire counsel to defend himself, *see* Restatement 2d Torts § 671(b) and cmt. c, no legal proceedings were brought against Desjardins in this case.<sup>4</sup>

Thus, under *Schelling v. Lindell* Desjardins has failed to demonstrate that he was caused "actual injury" within the meaning of the anti-SLAPP statute. The remaining question is whether *Schelling* is still good law in light of the Law Court's subsequent decision in *Nader I* and in particular in light of the concurring opinion of Justices Silver and Jabar. *Nader I*, 2012 ME 57 ¶¶ 40-52. The concurring opinion questioned whether the "actual injury" requirement in the anti-SLAPP statute could be constitutionally interpreted to deny plaintiffs the right to proceed on claims that would be cognizable under the common law, and specifically mentioned *Schelling v. Lindell* as a case where an "otherwise valid" claim had been dismissed. 2012 ME 57 ¶ 46.

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<sup>4</sup> In *Aqua Cove Mortgage Corp. v. Auritt*, CV-11-499 (Superior Ct. Cumberland Nov. 25, 2013), this court found that the defendants had instigated a baseless proceeding before the Maine Human Rights Commission in violation of a court injunction. The attorneys fees incurred by Aqua Cove constituted actual injury in that case because, just as in a claim for malicious prosecution, they were compensable under the rule governing contempt. *See also* M.R.Civ.P. 66(d)(3)(C) – which expressly permits assessment of attorneys fees.

This court is not free to ignore Law Court precedent and will adhere to the law as stated in *Schelling v. Lindell* for two reasons. First, the majority opinion in *Nader I* did not express any reservations about the *Schelling* decision. It cited *Schelling* at least five times, *see* 2012 ME 57 ¶¶ 14-16, 18, and it emphasized in a footnote that the issue before it was different than the issue in *Schelling*. 2012 ME 57 ¶ 20 n.6. As a result, the court does not see any indication that the justices who joined the majority opinion in *Nader I* shared the doubts expressed by the concurring opinion as to the correctness of *Schelling*.

Second, the Legislature has the authority to modify the common law, and the Law Court appears to have concluded that it did so to the extent necessary to provide a remedy against so-called SLAPP suits. *See Maietta Construction Inc. v. Wainwright*, 2004 ME 53 ¶ 10, 847 A.2d 1169. That aspect of the *Maietta* decision was not overruled in *Nader I*.

Whether *Schelling v. Lindell* should be reconsidered in light of the arguments expressed in the concurring opinion in *Nader I* and the question of whether the anti-SLAPP statute has resulted in the unintended consequences discussed in the concurring opinion, *see* 2012 ME 57 ¶ 45, are issues for the Law Court.

The entry shall be:

The special motion to dismiss filed by defendant Michael Reynolds pursuant to 14 M.R.S. § 556 is granted, and the remaining claims in this case against Reynolds are dismissed. The clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: June 29, 2015



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Thomas D. Warren  
Justice, Superior Court