Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-001353 09/20/2023

HONORABLE JOAN M. SINCLAIR

CLERK OF THE COURT
Y. Rodriguez
Deputy

MARK ALAN GREENBURG CHRISTOPHER T RAPP

v.

AMANDA WRAY, et al. JOHN DOUGLAS WILENCHIK

DAVIS P BAUER
JUDGE SINCLAIR

MINUTE ENTRY

RULING ON DEFENDANTS' SPECIAL MOTION TO DISMISS

On July 10, 2023, the Court held an evidentiary hearing under A.R.S. § 12-751 on the Defendants' Special Motion to Dismiss Complaint filed March 25, 2023. On August 11, 2023, both parties filed their respective closing arguments pursuant to court order; the Court then took this issue under advisement. For the reasons set forth below, the Court grants the Defendants' Special Motion to Dismiss.

A.R.S. § 12-751 now requires a two-step process: (1) the person filing the motion "has the burden of establishing prima facie proof that the legal action was substantially motivated by a desire to deter, retaliate against or prevent the lawful exercise of a constitutional right" and, once that burden is met; (2) a response is ordered and "the court shall conduct an evidentiary hearing or consider the pleadings and supporting and opposing affidavits stating facts on which the

liability, defense or action is based." A.R.S. § 12-751 (B), (C). The Plaintiff Mark Greenburg is not a state actor, so his burden at the evidentiary hearing was to show that his Complaint in this case was "justified by existing law or supported by a reasonable argument for extending or modifying existing law." A.R.S. § 12-751(B)(2).

At the outset, the Court notes that the evidence provided at the evidentiary hearing supported the prior determination that this lawsuit was substantially motivated by a desire to deter, retaliate against or prevent the Defendant's lawful exercise of her constitutional rights. "Amanda Wray is just fixated on you and if you think for one minute that when you run for MCCC that she is going to leave you alone, I think you are wrong. It is a mistake not to surgically punish her with litigation." Defendant's Exhibit 53. From the testimony of both the Plaintiff and the Defendant, everything they each did relative to this case was motivated by the desire to affect a particular political outcome at the Scottsdale Unified School District ("SUSD" or "the District") level and therefore involved the exercise of their respective constitutional rights to free speech and association. The Defendant set up the FaceBook group SUSD-CAN to affect change concerning the District's policies about vaccines, in-school learning, etc. The Plaintiff gathered information on the members of this group because they were opposed to his son's policies as Board President. "If the district falls into their hands, it'll be the end." Defendant's Exhibit 5 at 10:58-59. Nevertheless, the Plaintiff is the party who filed this lawsuit so the Court addresses only the application of A.R.S. §12-751 to the Defendant's rights.

The statute mandates ("shall") that the Court grant the motion unless "the responding party shows that the legal action on which the motion is based is justified by existing law or supported by a reasonable argument for extending or modifying existing law." This Court is not aware of any caselaw addressing this new language in the modified statute. The Court interprets the aforementioned statutory language to mean that it must determine if the claims made are legally viable.

Plaintiff alleges four claims: defamation; false light; intrusion upon seclusion; and public disclosure of private facts. The first issue to examine is whether the Plaintiff is a limited public figure. As noted in the Court's under advisement ruling filed on February 7, 2023, a variety of factors are considered in making that determination such as the person's position, whether the person thrust themselves into public controversy, or were closely involved with matters of public concern. *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 483 (1986) (citation omitted).

The Plaintiff here testified that he has an active interest in local school board issues. His son was on the SUSD Board (and for a time was the SUSD President) when the activity underlying this case occurred. The Plaintiff testified that he has both a personal and professional interest in public education. See Complaint, ¶¶ 14, 16-18. During the COVID-19 pandemic in 2021, whether and when children would return to in-school learning was a heated political topic.

The Defendant testified that she was involved in advocating for children to return to the classroom. The Plaintiff testified that he wanted to find out what SUSD-CAN was doing as he was aware that this particular group advocated for the schools to reopen, and that comments about him were being made on SUSD-CAN's FaceBook page. According to the Defendant's testimony, the Plaintiff was well known in the SUSD community.

Mr. Greenburg used a pseudonym ("Frank Graham"), later his wife's name, and then even later his employee's FaceBook account, to monitor SUSD-CAN's activities anonymously. As these pseudonyms were discovered and he was kicked out of the group, he would create another to continue his efforts. He testified that he used these methods to obtain information because he knew that the group would not let him in otherwise.

Mr. Greenburg attended the January, 2021 in-person school board meeting that Ms. Wray also attended. He then sent a message through SUSD-CAN's FaceBook page saying that he finally saw her in person and she might want to buy a Peloton. The Plaintiff admitted he sent this message and apologized for the

immature comment. After this, the Defendant removed "Frank Graham" from the group.

The Plaintiff testified that when he received documents in response to a public records request to the District, he saw the January 2021 letter written by the Defendant to Dr. Menzel, the school district superintendent. He stated this occurred around April, 2021, and after this point he started to compile information on SUSD-CAN "full on." He admitted that he compiled public information on SUSD-CAN members to protect himself and his family, and in anticipation of litigation. Complaint, ¶ 81. This is the Google drive information that was obtained by members of SUSD-CAN, and was later released to the news media.

On August 24, 2021, both the Defendant and the Plaintiff were at the Coronado High School parking lot for the recall petition drive. The Plaintiff kept his motorcycle helmet on and covered up his license plate in the parking lot because he did not want others to know he was there. He testified that he took photos to record information to help challenge the recall petition if needed. On the body camera footage of this day, the Plaintiff stated that he was already contemplating litigation.

Of course, preparing for litigation is not illegal. But all of these activities took place in the context of a heated political environment relative to the re-opening of schools. The Court finds, based on the Plaintiff's activities noted above, that he "thrust" himself into a matter of public concern. Therefore,

THE COURT FINDS that the Plaintiff is a limited public figure.

Defamation Claim

This means that to sustain a defamation claim, the Plaintiff must prove that Ms. Wray made a false statement about him, that is defamatory, that was published to a third party, that was made with actual malice, and resulted in damages. *Harris v. Warner in and for County of Maricopa*, 255 Ariz. 29, 527 P.3d 314, 317, ¶ 11 (2023) (citations omitted) ("*Harris*"). "Understanding a statement in context is

even more important when the speech relates to issues of public concern." *Harris, id.* at 318, ¶13 (citations omitted). In fact, the context of statements can be "dispositive." *Rogers v. Mroz*, 252 Ariz. 335, 342, ¶ 31 (2022) (citation omitted) ("*Rogers*"). The context here, of course, was the political environment of school officials determining when and how to send public school students back to in-school learning in 2021.

The Defendant compiled an appendix of her statements for the court. However, the Court must look to the statements alleged in the complaint as the Plaintiff did not submit particular statements from Ms. Wray at the evidentiary hearing. The Court should not have to determine which statements Mr. Greenburg claims are defamatory; the Court must base its determination on the record before it.

Looking to the Complaint, the words and phrases listed by the Plaintiff as being allegedly defamatory are listed as follows: Plaintiff "stalked" the Defendant-¶ 39; Plaintiff "intimidated" the Defendant-¶ 40; Defendant "challenged" Plaintiff's son-¶ 43; Defendant sent FaceBook messages "in the middle of the night"-¶ 44; Plaintiff "harassed" the Defendant-¶¶ 45, 46; the Defendant wrote "I have heard from a reliable source that Mark Greenburg threatened another private citizen by displaying a weapon while out placing campaign signs for Eric Kurland."-¶ 48; the Defendant "put [herself] at great risk by making this public" and "will ask the police officers present [at board meetings] to make note of [Plaintiff's] presence…"-¶50; Defendant told police officers "to be on the lookout for [Plaintiff]"-¶ 52; Defendant was "afraid of this man"-¶ 56; Defendant stated that "there's bodycam footage of Mark Greenburg…stalking me and talking about concealing his identity and intimidating me"-¶ 57; Defendant stated that the Plaintiff collected the information on the Google drive to "harass and intimidate" and the Plaintiff "had no legitimate purpose to collect this information"-¶ 123; Defendant claimed she "was cyber stalked, harassed, and even followed by the school board president and his father"-¶ 125.

To be "false," the statements at issue must be statements of fact, not opinion. "The expression of one's opinion is absolutely protected by the First and

Fourteenth Amendments to the U.S. Constitution." *AMCOR Inv. Corp. v. Cox Arizona Publications, Inc.*, 158 Ariz. 566, 568 (App. 1988). The following language is not in any way defamatory because it does not bring the Plaintiff into any disrepute: "challenged"; "in the middle of the night"; "no legitimate purpose to collect this information." The allegations that the Defendant felt "intimidated," "afraid of this man," "harassed," and that she "put [herself] at great risk by making this public" and would "ask the police officers present [at board meetings] to make note of [Plaintiff's] presence and "be on the lookout for [Plaintiff]" are all expressions of the Defendant's feelings and opinions. There are also not defamatory.

The gravamen of the Plaintiff's complaint is that the Defendant accused him of allegedly criminal conduct. Complaint, ¶¶ 64-68. These allegations are that the Plaintiff "heard from a reliable source that [the Plaintiff] threatened another private citizen by displaying a weapon while out placing campaign signs," "there's bodycam footage of [the Plaintiff]…stalking me and talking about concealing his identity and intimidating me," the Plaintiff collecting information on SUSD-CAN members to "harass and intimidate" the Defendant; and that the Defendant "was cyber stalked, harassed, and even followed by the school board president and his father."

All of these comments are opinion or hyperbole made in the context of a heated political debate. As noted above, "context is important in determining whether a statement is a genuine factual statement or rhetorical hyperbole." *Rogers, id.* at 341, ¶ 26. Implying that someone committed blackmail at public meeting has been considered hyperbole. *Yetman v. English*, 168 Ariz. 71, 74 (1991) (citing *Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970)). A reasonable listener would interpret the aforementioned comments to be the Defendant's perception that she is a victim of political attack, not that she is actually stating that the Plaintiff committed criminal offenses. Allowing a defamation case to proceed based on these statements "would not only chill free speech in this case but also open the floodgates to litigants who are aggrieved by perceived indignities visited upon them… ." *Rogers, id.* at 343-44, ¶ 38. Therefore,

THE COURT DOES NOT FIND that the Defendant's statements as alleged in the Complaint to be legally viable as defamatory statements.

False Light Invasion of Privacy and Intrusion Upon Seclusion

The Defendant argues here that because Mr. Greenburg is a limited public figure, he cannot sue for a false light invasion of privacy or intrusion upon seclusion. *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 343 (1989) ("[P]rivacy does not exist where the plaintiff has become a public character… .") (internal quotations and citations omitted) ("*Godbehere*"). This is true where the "publication relates to performance of his or her public life or duties." *Godbehere, id.* at 343. In this case, the allegations stem from the very same activities that caused the Plaintiff to be considered a limited public figure, i.e., the actions he took in the context of the contentious political environment of when public school students would return to in-school learning. Thus,

THE COURT ALSO FINDS that there is no legally viable claim for false light invasion of privacy or intrusion upon seclusion.

Public Disclosure of Private Facts

This claim is based on the Defendant disclosing the information he collected on a Google drive about members of SUSD-CAN which was inadvertently shared by the Plaintiff's son. The allegations are that the Defendant accessed, downloaded and made changes to that private information. Complaint, ¶¶ 96, 101-106. The information on the Google drive did not pertain to the Plaintiff; on the contrary, it referenced information on the Defendant and others. The record before the Court does not include any private facts about the Plaintiff that anyone allegedly disclosed. Therefore,

THE COURT ALSO DOES NOT FIND that the public disclosure of private facts is a legally viable claim.

Given the findings noted above, the Court must dismiss the Plaintiff's Complaint under A.R.S. § 12-751.

IT IS ORDERED that the Defendant shall file a proposed order with the Court by October 4, 2023, along with any request for attorneys' fees or costs. The Plaintiff shall file any objections to the same by October 18, 2023.