STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER COURT
DOCKET NO. BCD-CV-2019-03

DR. KATHLEEN T. PRUNIER, Plaintiff, v. MARK GOOD, et al., Defendants.	))))))))	ORDER GRANTING DEFENDANT ROBERT BYRON'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff Dr. Kathleen T. Prunier ("Prunier"), a veterinarian, filed a Complaint against multiple defendants alleging that she is entitled to recover damages for defamatory statements made in connection with an article captioned "Two charged in elder theft" in the *Mount Desert Islander*. Upon completing discovery, the remaining defendants—Mark Good, Earl Brechlin, and the *Mount Desert Islander* (collectively, the "Publisher Defendants"), and Robert Byron ("Byron")—each moved for summary judgment pursuant to M.R. Civ. P. 56(b). The Court heard oral argument on the Publisher Defendants' motion and on Byron's motion on June 23, 2020. This order only addresses Byron's motion. For the reasons discussed below, the Court grants Byron's motion.

FACTS

The undisputed material facts are as follows: On October 6, 2016, Prunier was indicted by a Grand Jury for one count of Theft By Deception, 17-A M.R.S.A. § 354 (Class B). (Affidavit of

Dr. Kathleen T. Prunier ("Prunier Aff.") ¶ 42, Exhibit 15, referenced in Plaintiff's Opposition Statement of Material Facts ("O.S.M.F.") ¶ 15.)[1] According to the Indictment, the Grand Jury charged that Prunier committed "theft by obtaining or exercising control over the property of Richard Royal, such property consisting of real estate with a value in excess of $10,000, with the intent to deprive Richard Royal thereof, and as a result of deception, in that the Defendant did intentionally create or reinforce the impression that the assessed value of the real estate was less than $10,000, which impression was false and which Defendant did not believe to be true, all in violation of" Maine law.[2] (Prunier Aff. ¶ 42, Exhibit 15.)

On the same day of Prunier's indictment, the Grand Jury also indicted Lisa Harriman ("Harriman") for one count of Theft by Unauthorized Taking, 17-A M.R.S.A. § 353 (Class B), and one count of Misuse of Entrusted Property, 17-A M.R.S.A. § 903(1) & (4)(B) (Class B). With regard to Harriman, the Grand Jury charged that between November 19, 2012, to July 17, 2015, Harriman misused "entrusted property, in that she dealt with money of Richard Royal that had been entrusted to her as a fiduciary, in a manner which she knew to be a violation of her duty, which involved a substantial risk of loss to Richard Royal and which in fact resulted in a loss of Richard Royal's money with an aggregate value of more than $10,000. At the time of the offense, Richard Royal was a vulnerable person." (Prunier Aff. ¶ 54, Exhibit 21.)

On October 18, 2016, Mark Good of the *Mount Desert Islander* interviewed Byron, a relative of Royal, for a story regarding Prunier and Harriman. (Affidavit of Defendant Robert

[1] The copy of the Indictment provided by Prunier is missing the second page, which contains the date. The Court takes judicial notice that the Indictment is dated October 6, 2016. Further, although the Indictments of Prunier and Harriman are central to this case, and have been referred to by the parties throughout the life of this case, neither party includes a convenient S.M.F. referring to the content of the Indictments which is undisputed. Accordingly, the Court cites to the attachments to Prunier's affidavit.

[2] On March 9, 2017, the State filed a Superseding Indictment of Prunier, charging her with one count of Theft by Unauthorized Taking, 17-A M.R.S.A. § 354 (Class B). (Prunier Aff. ¶ 51, Exhibit 18, referenced in O.S.M.F. ¶ 15.) As confirmed at oral argument, Prunier was ultimately found not guilty of the charge.

Byron ("Byron Aff.") ¶ 4).[3] Prunier was not present during the interview,[4] and has no independent knowledge of the exact wording Byron used when talking to Good.[5] (Defendant Robert Byron's Statement of Material Facts ("Byron's S.M.F.") ¶ 2.) Byron told Good that Prunier and Royal were friends, but Byron did not use the word "befriended." (Byron's S.M.F. ¶¶ 7, 32.)[6] Byron did not refer to Royal as a "victim." (Byron's S.M.F. ¶ 24.) Byron did not tell Good that Prunier "[t]ook advantage of the (victim) by befriending him and convincing him to sell her a 6-acre property with a right-of-way to the shore, valued by the town at $77,000." (Byron's S.M.F. ¶ 31.) The amount of loss Byron attributed to the Harriman matter as unclear. (Byron's S.M.F. ¶ 29.) Byron's statement about Royal being flat broke was referencing a time in the Harriman matter. (Byron's S.M.F. ¶ 26.) Byron's reference to a sad situation applied to the situation in total and not to any individual or anything specific. (Byron's S.M.F. ¶ 28.)

On October 19, 2016, the day after Good interviewed Byron, an article written by Good headlined "Two charged in elder theft" was published in the *Mount Desert Islander*. (Byron's

3 The interview is a central element of this case, and has been referred to by the parties throughout the life of the case. Both parties discuss the interview in their briefs, and the date and fact of the interview are undisputed. However, neither party includes a convenient S.M.F. referring to the interview, and so the Court cites to Byron's affidavit.

4 Verified during oral argument.

5 In her O.S.M.F., Prunier attempts to qualify or dispute the paragraphs of Byron's S.M.F. setting forth what Byron said or didn't say to Good. Prunier relies primarily on paragraphs 56, 78, and 81 of her affidavit and the exhibits attached thereto. Paragraph 56 of her affidavit refers to the newspaper article itself, the contents of which as to Byron are inadmissible hearsay. Paragraph 78 of her affidavit refers to Byron's answers to Prunier's second set of interrogatories, none of which provide the basis to qualify or dispute Byron's S.M.F. Paragraph 81 of Prunier's affidavit refers to Good's answers to Prunier's interrogatories, none of which provide the basis to qualify or dispute Byron's S.M.F. Prunier was not present at the interview, did not depose Byron or Good, and has not identified anyone who overheard the interview. Accordingly, Prunier's attempts to qualify or dispute the paragraphs of Byron's S.M.F. setting forth what Byron said or didn't say to Good are unsuccessful.

6 Prunier objects to several of the paragraphs contained in Byron's S.M.F. referred to in this Order. Prunier argues that although Byron supports the paragraphs by referring to his affidavit, he refers to his affidavit as a whole and not to specific paragraphs in his affidavit. The Court overrules the objections. As Byron notes in his Reply Brief, Byron's affidavit is short and the information contained therein is easily ascertainable. Further, as Exhibit D to his Reply Brief, Byron provides a Cross Reference to the specific supporting paragraphs in his affidavit. Byron therefore satisfies the requirement for citation to specific paragraphs.

S.M.F. ¶ 1, Prunier Aff. ¶ 56, Exhibit 23.) Byron did not write, read, or approve the article prior to publication. (Byron's S.M.F. ¶ 23.)

STANDARD OF REVIEW

Summary judgment is appropriate if, based on the parties' statements of material fact and the cited record, there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. M.R. Civ. P. 56(c); *Levine v. R.B.K. Caly Corp.*, 2001 ME 77, ¶ 4, 770 A.2d 653. A genuine issue of material fact exists when a fact-finder must choose between competing versions of the truth, even if one party's version appears more credible or persuasive. *Id.* A fact is material if it has the potential to affect the outcome of the suit. *Id*. To survive a defendant's motion for summary judgment, the plaintiff must establish a prima facie case for every element of the plaintiff's cause of action. *Oceanic Inn, Inc., v. Sloan's Cove, LLC,* 2016 ME 34, ¶ 26, 133 A.3d 1021. "When a plaintiff has the burden of proof on an issue, a court may properly grant summary judgment in favor of the defendant if it is clear that the defendant would be entitled to a judgment as a matter of law if the plaintiff presented nothing more than was before the court" when the motion was decided. *Reliance Nat'l Indem. v. Knowles Indus. Servs., Corp.*, 2005 ME 29, ¶ 9, 868 A.2d 220.

DISCUSSION

At the outset, the Court notes that the analysis of Byron's motion is somewhat different from the analysis of the Publisher Defendant's motion, which will be discussed in a separate order. Byron did not write, read or approve the newspaper article. Further, Byron maintains that he did not make some of the statements attributed to him in the article. As a result, this case is distinguished from cases in which the source admits making the statements published in a newspaper article. *See, e.g., Yohe v. Nugent*, 321 F.3d 35, 39 (1st Cir. 2003) ("[i]t is undisputed

that the articles accurately recounted" statements made by the source). The analysis of Byron's motion turns in large part on what Byron said to Good, not on what Good wrote in the article. As to what Byron said to Good, however, Prunier has little admissible evidence.[7] Prunier did not depose Byron or Good. Prunier was not present during Good's interview of Byron. At least as to the statements Byron denies making, Prunier's reliance on the newspaper article to establish a prima facie case is unavailing.

Under Maine law, a "communication is defamatory 'if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *Bakal v. Weare*, 583 A.2d 1028, 1029 (Me. 1990) (quoting Restatement (Second) of Torts § 559 (Am. Law Inst. 1977)). In order for a plaintiff to have a viable claim for defamation, the plaintiff must show the following:

> "(a) a false and defamatory statement concerning another;
>
> (b) an unprivileged publication to a third party;
>
> (c) fault amounting at least to negligence on the part of the publisher; and
>
> (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication."

Restatement (Second) of Torts § 558 (Am. Law Inst. 1977); *Lester v. Powers*, 596 A.2d 65, 69 (Me. 1991). To "avoid a judgment as a matter of law for the defendant[] on a given claim, [the plaintiff] must establish a prima facie case for each element of that claim." *Rippett v. Bemis*, 672 A.2d 82, 85 (Me. 1996).

[7] Apart from attempting, unsuccessfully, to qualify or dispute Byron's S.M.F., Prunier offers essentially no admissible evidence to establish that Byron made any statements that were false and defamatory. Prunier's Statement of Additional Facts is only five paragraphs long, and fails to offer any facts establishing that Byron made false and defamatory statements.

In her Complaint, Prunier alleges Byron (along with the Publisher Defendants), made four[8] false statements reflected in the newspaper article.[9] Paragraph 13 is the operative paragraph of the Complaint, and reads in its entirety as follows: "The following statements are false: 'been indicted by a grand jury for allegedly bilking an elderly Trenton man with dementia', 'took advantage of the victim by befriending him and convincing him to sell her a 6-acre property', 'he was absolutely flat broke … it was just a sad situation.'" Each of the statements will be considered in order. For the reasons set forth below, the Court concludes Prunier cannot establish a prima facie defamation claim as to Byron regarding any of these four statements.[10] Accordingly, summary judgment must be granted in favor of Byron.

1. Been indicted by a grand jury for allegedly bilking an elderly Trenton man with dementia.

Prunier has provided no evidence that Byron (as distinct from the Publisher Defendants) made this statement. At a minimum, a claim in "defamation requires proof, by a preponderance of the evidence, of . . . a false and defamatory statement concerning another." *Waugh v. Genesis Healthcare LLC*, 2019 ME 179, ¶ 10, 222 A.3d 1063 (quoting *Rippett*, 672 A.2d at 86); Restatement (Second) of Torts § 558 (Am. Law Inst. 1977). Prunier cannot cross this threshold

8 In contrast to Byron, the Publisher Defendants treat this same collection of statements as three, rather than four, because the Publisher Defendants consider the following language to constitute a single statement, rather than two statements: "he was absolutely flat broke … it was just a sad situation." The outcome of the analysis with regard to Byron is the same either way.

9 Prunier lumps Byron in with the Publisher Defendants, and does not distinguish between false statements allegedly made by Byron, and those made by the Publisher Defendants. The Court therefore considers all of the statements.

10 The parties argue over whether a fifth statement from the newspaper article warrants analysis: "Byron estimates the total loss at more than $200,000." Prunier did not allege in her Complaint that this was one of the false and defamatory statements on which she was proceeding against Byron. *See* Complaint ¶ 13. Prunier also fails to include the statement in her Additional Statement of Material Fact. The Court is therefore reluctant to allow Prunier to rely on the statement to avoid summary judgment. But even if the Court considers the statement, the result is no different. It is undisputed that the amount of loss Byron attributed to Harriman was unclear. Prunier's attempt to establish the falsity of the statement (or at least generate a dispute of fact) by focusing on only the value of the real estate she purchased is unsuccessful, because she fails to address the magnitude of the losses alleged to have also been caused by Harriman.

element of her defamation claim against Byron, because she cannot show Byron made the statement to Good (or to anyone else). Accordingly, summary judgment is granted to Byron regarding this statement.

2. Took advantage of the victim by befriending him and convincing him to sell her a 6-acre property with a right-of-way to the shore, valued by the town at $77,000.

Byron denies making this statement, and Prunier has failed to come forward with any admissible evidence establishing that Byron made the statement. Byron admits telling Good that Prunier and Royal were friends, but that statement is not defamatory (nor does Prunier contend it is false). As the author of the newspaper article, Good may or may not have stitched together, interpreted, paraphrased, or embellished various things Byron said during the interview, but Byron cannot be held liable for the article written by Good. Byron denies making the statement alleged, and Prunier is unable to even raise a dispute of material fact regarding the statement. Once again, Prunier is unable to get past the defamation threshold as to this statement. *Id.* Accordingly, summary judgment is granted to Byron regarding this second statement.

3. He was absolutely flat broke.

Byron admits making this statement to Good, but asserts the statement cannot be defamatory because it refers to Royal, not to Prunier. Moreover, Byron made the statement in the context of discussing Harriman, not Prunier. Prunier argues that any reasonable reader of the newspaper article would interpret the statement as meaning that she was the cause of Royal being "absolutely flat broke" and the statement is therefore defamatory to her. Prunier, however, conflates her claim against the Publisher Defendants with her claim against Byron. Prunier has not come forward with any evidence disputing Byron's affidavit testimony that when Byron made the statement to Good, Byron was referring to Royal in the context of a discussion regarding Harriman. It is fundamental that a plaintiff "must prove that [the statement] was published of and

concerning [her]." Restatement (First) of Torts § 613 cmt. d (Am. Law Inst. 1938); *Lester*, 596 A.2d at 69. This Prunier fails to do. Accordingly, summary judgment is granted to Byron regarding this third statement.

4. It was just a sad situation.

Byron admits making this statement to Good, but asserts that this statement was merely an opinion and is incapable of being proven as true or false. Additionally, Byron argues that "it" refers to Royal's situation as a whole, including Harriman's status as a family member, and not specifically to Prunier. Conversely, Prunier argues that because the previous statements are defamatory, Byron stating that it was a "sad situation" is defamation by implication.

As the Court has already determined, the prior statements do not form the basis of a defamation claim against Byron. Thus, as to Byron, there is no defamation by implication. Moreover, in order to have a successful defamation claim, the first element requires a "false" statement which must be "an assertion of fact, either explicit or implied, and not merely an opinion." *Lester*, 596 A.2d at 69; *see* Restatement (Second) of Torts § 558 (Am. Law Inst. 1977). The question of whether an "allegedly defamatory statement is a statement of fact or opinion is a question of law." *Caron v. Bangor Publ'g Co.*, 470 A.2d 782, 784 (Me. 1984). When determining whether a statement is a fact or an opinion, the court considers the "surrounding circumstances" and whether "the maker of the statement did not intend to state an objective fact but intended rather to make a personal observation of the facts." *Lester*, 596 A.2d at 71. Should "the court conclude[] that the average reader could not reasonably understand the statement as anything other than an opinion, no genuine issue of material fact exists and summary judgment . . . may be entered" for the defendant. *Caron*, 470 A.2d at 784.

Looking at the nature of the statement and its context, including that family member Harriman was in criminal proceedings, the Court agrees with Byron that his statement is an opinion and is not actionable. Under the circumstances, stating that something is a "sad situation" cannot reasonably be construed as an objective fact. Even if Prunier had shown that the previous statements were all made by Byron, and were defamatory, this particular statement would still be considered nondefamatory because it is a subjective evaluation. There is nothing in the summary judgment record to indicate that Byron was specifically referring to Prunier or implying objective, negative facts about her. The Court is compelled to find that this was merely a statement of opinion and not actionable. Accordingly, summary judgment is granted to Byron regarding this fourth statement.[11]

CONCLUSION

Without evidence to generate a genuine issue of material fact, Prunier's defamation claim against Byron cannot survive summary judgment. For all the foregoing reasons,[12] the Court grants Byron's motion, and enters summary judgment in his favor on the Complaint.

The Clerk is instructed to enter this Order on the docket for this case by incorporating it by reference. M.R. Civ. P. 79(a).

So Ordered.

Dated: August 5, 2020

/s
Michael A. Duddy
Judge, Business and Consumer Court

[11] The Court notes that Prunier contends other language in the newspaper article is defamatory and can be attributed to Byron. Specifically, Prunier contends that Byron is responsible for use of the words "dementia," "victim," "thefts," and "raised red flags with the family." (Pl.'s Opp'n to Def.'s Mot. Summ. J. 2.) However, Prunier has provided no prima facie evidence in the summary judgment record to establish that Byron uttered those words or phrases.

[12] Because the Court grants Byron summary judgment on other grounds, the Court does not address Byron's argument that he is entitled to a conditional privilege because Prunier is a limited public figure.