Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-176

NOVEMBER TERM, 2017

Gordon Bock	}	APPEALED FROM:
	}	
	}	Superior Court, Washington Unit,
v.	}	Civil Division
	}	
	}	
William S. Smith & Northfield News Publishing, LLC	}	DOCKET NO. 739-12-16 Wncv

Trial Judge: Mary Miles Teachout

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals the trial court's order granting defendants' motions to strike plaintiff's defamation complaint pursuant to 12 V.S.A. § 1041. We affirm.

In November 2016, plaintiff, a resident of Northfield, was a candidate for election to the Vermont House of Representatives. In its November 3, 2016 edition, the Northfield News published several letters regarding plaintiff. The first letter was written by a person from Williston who suggested that plaintiff was unfit for office due to his violent criminal past. Below that letter appeared a response from plaintiff stating, in effect, that he had learned from his past mistakes, regretted them, and now works for the public good.

The paper also published a letter submitted by defendant William S. Smith. In his letter, Smith supported other candidates and suggested that while plaintiff's past may be "ancient history," he remained unfit for office. Plaintiff alleges that the letter contained two defamatory statements. The first was: "A previous Washington County State's Attorney told the Free Press that in 1992 Gordon had been kicked out of my alma mater, Vermont Law School, for cheating." The second was: "But this year he has been removed from local businesses for disruptive behavior." After he lost the election, plaintiff filed a libel action against Mr. Smith and the Northfield News.

Each defendant filed a special motion to strike plaintiff's complaint pursuant to 12 V.S.A. § 1041, Vermont's anti-SLAPP (Strategic Lawsuit Against Public Participation) statute. See Felis v. Downs Rachlin Martin PLLC, 2015 VT 129, ¶ 1 n.1, 200 Vt. 465. Section 1041(a) provides that "[a] defendant in an action arising from the defendant's exercise, in connection with a public issue, of the right to freedom of speech or to petition the government for redress of grievances under the U.S. or Vermont Constitution may file a special motion to strike under this section." The statute protects "any written or oral statement concerning an issue of public interest made in a public forum or a place open to the public." Id. § 1041(i)(3); see also Felis, 2015 VT 129, ¶ 52 (holding that "the 'in connection with a public issue' requirement of 12 V.S.A. § 1041(a) must be met in any motion to strike under the anti-SLAPP statute, regardless of the type of activity"). If a

defendant shows that the disputed statement falls within this category of protected speech, the court must grant the motion to strike "unless the plaintiff shows that: (A) the defendant's exercise of his or her right to freedom of speech and to petition was devoid of any reasonable factual support and any arguable basis in law; and (B) the defendant's acts caused actual injury to the plaintiff." 12 V.S.A. § 1041(e)(1).

Plaintiff did not file a response to the motions to strike. Following a hearing, the trial court granted the motions in a written decision. It held that Mr. Smith's letter was a written statement concerning an issue of public interest made in a public forum, and that plaintiff failed to meet his burden of showing that the disputed statements did not have reasonable factual support. Plaintiff appealed.

Plaintiff argues that: the trial court ignored applicable case law protecting him from defendants' publication with actual malice of false statements about him; § 1041 is inapplicable to the statements at issue here because they do not concern a public issue; the burden-shifting procedure in § 1041 is unconstitutional; and the court failed to consider whether defendants' motions to strike were frivolous or intended to cause unnecessary delay.

We find no error. First, we agree with the trial court that § 1041 applies here because plaintiff's complaint concerns defendants' "exercise, in connection with a public issue, of the right to freedom of speech." 12 V.S.A. § 1041(a). The right to freedom of speech "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 (1957). Accordingly, "the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971); see also Garrison v. Louisiana, 379 U.S. 64, 77 (1964) (explaining that statement concerning "anything which might touch on an official's fitness for office" is protected unless both false and made with actual malice). The character, behavior, and qualifications of a candidate for elective office therefore constitute a "public issue" for purposes of 12 V.S.A. § 1041. See Collier v. Harris, 192 Cal. Rptr. 3d 31, 39 (Ct. App. 2015), review denied, (Dec. 9, 2015) (holding that California's anti-SLAPP statute applies to statements made about candidate during political campaign). Defendant Smith's statements about plaintiff fall within this category of protected speech.

Plaintiff therefore had the burden of demonstrating that defendants' statements were "devoid of any reasonable factual support." 12 V.S.A. § 1041(e)(1). We note that plaintiff would have had to meet this burden, albeit at a later stage of the proceedings, even in the absence of § 1041. See Burns v. Times Argus Ass'n, Inc., 139 Vt. 381, 384 (1981) (explaining that successful defamation suit against public figure requires "proof that an alleged libelous statement is made with knowledge of its falsity or with reckless disregard of whether it is true or false," that is, "a high degree of awareness of probable falsity or severe doubts as to its truth" (citing New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964)). Plaintiff provided no affidavits or other specific evidence in support of his assertions of falsity, other than the police report attached to his complaint. See 12 V.S.A. § 1041(e)(2) ("In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based."). As the trial court correctly determined, the police report was insufficient to satisfy plaintiff's burden.

According to the report, Mr. Smith visited the Northfield police chief on November 1, 2016. He told the chief that he had written a letter to the editor of the Northfield News about plaintiff, and was concerned for his own safety. The chief reported:

> I read the letter and noted that Smith had made statements about [plaintiff's] alleged past. I said to Smith, I suspect you have the facts to back up what you are saying about [plaintiff]. I advised Smith that in my opinion, the information contained in his letter could trigger civil litigation if the facts were not correct. I further stated that even if the facts were correct, you could still get sued for defamation of character and libel, as anyone can file a complaint with the court for anything.

The report went on to state that Mr. Smith told the chief that he was concerned due to recent situations involving plaintiff, including an incident in which plaintiff was "kicked out of the Town Pool this summer and a trespassing situation at Subway." The chief told Mr. Smith that neither of the events involved violence, and that he did not believe plaintiff was a physical threat to anyone outside of his intimate circle.

As the trial court found, the police report does not show that the disputed statements were devoid of reasonable factual support. To the contrary, it acknowledges that the alleged incidents occurred. The report does not contradict the statement made by Mr. Smith in his letter that plaintiff was removed from local businesses for disruptive behavior. The police report also makes no reference whatsoever to the statement regarding plaintiff being "kicked out" of law school. The report is therefore insufficient to meet plaintiff's burden under § 1041(e).

Further, although not required to do so by § 1041, Mr. Smith provided with his motion affirmative evidence that his statements had reasonable factual support. Attached to Mr. Smith's motion was a copy of a June 1992 Burlington Free Press article that quoted a former Washington County State's Attorney as stating that plaintiff "was expelled from Vermont Law School after his first year a few weeks ago for cheating." Mr. Smith also provided copies of police reports detailing, first, a June 20, 2016 report from the manager of the public pool that plaintiff had been bothering pool patrons and that she discussed with plaintiff the possibility of his pool pass being "pulled" if he did not stop talking about politics; second, an August 5, 2016 incident in which plaintiff was reported to have caused a disturbance at a local Subway shop and was asked to leave, and did so; and third, an August 19, 2016 incident in which plaintiff allegedly began yelling after an employee of the same Subway shop served him with a notice against trespass when he attempted to enter the store. These documents provide reasonable factual support for the assertions in Mr. Smith's letter.

Plaintiff argues that § 1041 is unconstitutional because it infringes his First Amendment right to petition the court for redress of grievances. This Court will not consider arguments that a litigant has not properly preserved for appeal. In re Entergy Nuclear Vt. Yankee, LLC, 2007 VT 103, ¶ 9, 182 Vt. 340. "To properly preserve an issue for appeal a party must present the issue with specificity and clarity in a manner which gives the trial court a fair opportunity to rule on it." State v. Ben-Mont Corp., 163 Vt. 53, 61 (1994). Although we allow greater flexibility to pro se litigants with regard to preservation of issues, there must still be some indication that the pro se litigant attempted to raise an argument below. Entergy, 2007 VT 103, ¶ 12. Plaintiff's citation in his complaint to New York Times v. Sullivan and Burns v. Times Argus was not sufficient to alert the court to his argument that Vermont's anti-SLAPP statute violates the First Amendment. On the record before us, we see no indication that plaintiff argued to the trial court that § 1041 was unconstitutional. Accordingly, we will not address this claim.

Finally, the trial court did not err by failing to consider whether defendants' motions to strike were frivolous or intended solely to cause unnecessary delay. Under the plain language of

the statute, the trial court is only required to undergo this analysis if it denies a motion to strike. 12 V.S.A. § 1041(f)(1) ("If the court denies the special motion to strike and finds the motion is frivolous or is intended solely to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to the plaintiff."). The analysis was unnecessary in this case because the trial court properly granted defendant's motions to strike.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Karen R. Carroll, Associate Justice