

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-235

MARCH TERM, 2021

Kevin Hoyt* v. John Klar	}	APPEALED FROM:
	}	
	}	Superior Court, Bennington Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 16-1-20 Bncv
		Trial Judge: Cortland Corsones

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

Plaintiff appeals the trial court’s dismissal of his defamation complaint against defendant. We affirm.

In January 2020, plaintiff filed a complaint against defendant for defamation. Plaintiff alleged that after he announced his intention to run for governor, defendant, who was a political opponent, began attacking plaintiff by “perpetuating misleading information and false narratives through old and partial news stories.” Plaintiff further asserted that defendant had “knowingly and willfully spoken and written untruths and damaging defamatory statements against [plaintiff] to third parties and on social media.” Attached to plaintiff’s complaint were several pages of what appeared to be printouts from social media pages. Plaintiff’s complaint did not cite to these documents or explain which statements were alleged to be defamatory.

Defendant filed a motion to dismiss, arguing that his statements were true. In response, the court ordered plaintiff to amend his complaint to explain the defamatory statements defendant allegedly made and what defendant did to publish the statements. After plaintiff filed his amended complaint, the court granted defendant’s motion to dismiss. It concluded that plaintiff failed to state a claim for defamation because defendant’s alleged statements were truthful, were statements of opinion, or were only made to plaintiff. Plaintiff appealed.

We review a decision granting a motion to dismiss for failure to state a claim without deference to the trial court. Birchwood Land Co. v. Krizan, 2015 VT 37, ¶ 6, 198 Vt. 420. We accept all factual allegations in the complaint as true and will affirm the dismissal “only if it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief.” Id. (quotation omitted). “Where pleadings rely upon outside documents, those documents merge into the pleadings and the court may properly consider them under a Rule 12(b)(6) motion to dismiss.” Davis v. Am. Legion, Dep’t of Vt., 2014 VT 134, ¶ 13, 198 Vt. 204 (quotation omitted) (alteration omitted).

A claim for defamation, whether based on spoken or written statements, requires proof of the following elements: “(1) a false and defamatory statement concerning another; (2) some

negligence, or greater fault, in publishing the statement; (3) publication to at least one third person; (4) lack of privilege in the publication; (5) special damages, unless actionable per se; and (6) some actual harm so as to warrant compensatory damages.” Lent v. Huntoon, 143 Vt. 539, 546-47 (1983) (footnote omitted). A defamatory statement is one that tends to tarnish a plaintiff’s reputation and “expose her to public hatred, contempt or ridicule.” Davis, 2014 VT 134, ¶ 22. “Truth . . . is a complete defense to defamation.” Lent, 143 Vt. at 548. “[F]or the defense of truth to apply, it is now generally agreed that it is not necessary to prove the literal truth of the accusation in every detail, and that it is sufficient to show that the imputation is substantially true.” Russin v. Wesson, 2008 VT 22, ¶ 8, 183 Vt. 301 (quotation omitted).

Construed in the light most favorable to plaintiff, his amended complaint alleged that defendant defamed him in various Facebook postings by referring to plaintiff as an “alleged child molester”; posting an old newspaper article that discussed criminal charges against plaintiff; and stating: “I’ve also defended people FALSELY charged with molestation, and it is horrific. But allegations by a very young child are very different from a 9-year-old, with such graphic and clear memories. Maybe he’s innocent, maybe he ain’t, but it’s a fact he was charged.” Finally, plaintiff alleged that defendant “attacked [him] personally online” by calling him a “proven liar” in a Facebook message. Plaintiff attached copies of the allegedly defamatory postings to his amended complaint.

We agree with the trial court that plaintiff’s allegations are insufficient to state a claim for defamation. Plaintiff conceded in his pleadings that several years earlier he was the subject of a criminal charge that stemmed from allegations by a young girl that he sexually abused her. Although the charge was eventually dismissed, defendant’s statement referring to plaintiff as an “alleged child molester” was not false because plaintiff had been alleged by the State to have molested a child. See Lent, 143 Vt. at 548. Plaintiff did not allege that the newspaper article about the charge that defendant posted was false or defamatory. Furthermore, defendant’s statements suggesting that he believed the alleged victim was telling the truth cannot be the basis for a defamation claim because they were plainly statements of opinion, which is not capable of being proven true or false. See Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219, 223 (2d Cir. 1985) (“[W]e have held that generally one cannot be liable simply for expressing an opinion.”); see also Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (“Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”). Finally, as the trial court explained, plaintiff did not allege that defendant’s statement that plaintiff was a liar was published to any third person, as required to form the basis for a defamation claim. Lent, 143 Vt. at 548. The court therefore properly dismissed plaintiff’s complaint for failure to state a claim.

On appeal, plaintiff does not challenge the trial court’s reasons for dismissal. Rather, he argues that we should reverse the decision because he stated a claim for a different but closely related tort, invasion of privacy by publicity placing a person in a false light, as defined in Restatement (Second) of Torts § 652E. See Lemnah v. Am. Breeders Serv., Inc., 144 Vt. 568, 575 & n.1 (1984) (applying Restatement (Second) of Torts § 652E because parties agreed that it controlled, but noting that Vermont has not adopted any specific definition of tort of false-light invasion of privacy). Plaintiff argues that defendant placed him in a false light by posting information about his decade-old criminal charges without mentioning that the charges had been dismissed.

To state a claim under § 652E, the plaintiff must allege that the defendant gave publicity to a matter concerning the plaintiff that placed the plaintiff in a false light, “the false light in which

the [plaintiff] was placed would be highly offensive to a reasonable person,” and the defendant “had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the [plaintiff] would be placed.” Restatement (Second) of Torts § 652E. Comment a to § 652E states that “it is essential to the rule stated in this [s]ection that the matter published concerning the plaintiff is not true.” *Id.* cmt. a. As explained above, the information that defendant posted in this case was true: plaintiff was alleged by the State to have sexually abused a minor. Plaintiff therefore has failed to state a claim for false-light invasion of privacy. The fact that defendant failed to mention that plaintiff’s criminal charges were later dismissed and thereby place plaintiff in a more positive light does not rise to the level of tortious conduct. See Goodrich v. Waterbury Republican-Am., Inc., 448 A.2d 1317, 1331 (Conn. 1982) (rejecting claim against newspaper for false-light invasion of privacy because plaintiff conceded published statements were true; plaintiff could not recover under theory that “[d]espite the truth of such statements there exist additional circumstances which when expanded, cast the plaintiff in a more favorable light more in keeping with reality” (emphasis omitted)).

Affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice