

COMMONWEALTH OF MASSACHUSETTS
MASSACHUSETTS APPEALS COURT

2019-P-0230

Middlesex County, SS

Brandon Navom, Plaintiff-Appellant

v.

Martin J. Walsh, Defendant-Appellee

On Appeal From Judgment of Middlesex Superior Court

BRIEF OF DEFENDANT-APPELLEE MARTIN J. WALSH

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ISSUES PRESENTED

1. Whether Mayor Walsh's statements were defamatory?
2. Whether Mayor Walsh is immune from liability for Brandon Navom's defamation claim because his statements were absolutely privileged?
3. Whether the Superior Court was correct in holding that Mayor Walsh is immune from liability for Brandon Navom's defamation claim because his statements were conditionally privileged?

STATEMENT OF THE CASE

I. NATURE OF THE CASE

On August 12, 2017, the "Unite the Right" rally took place in Charlottesville, Virginia. Organizers of the rally included white supremacists, neo-Nazis, and a number of other controversial groups. The rally was violent. One woman was killed. Many others were injured when a man deliberately drove his car through a crowd of protestors. The rally received national media attention and was in the news for several weeks.

Immediately following the Charlottesville rally, Brandon Navom ("Navom") along with others began planning a rally to take place in Boston just one week later. In anticipation of the Boston rally, and on the heels of what just happened in Charlottesville, City of Boston Mayor Martin J. Walsh ("Mayor Walsh") made a number of public statements, both to the press and on his official social media accounts. The crux of Mayor Walsh's statements was that the type of hate that was just displayed in Charlottesville was not welcome in Boston. Navom claims that these statements defamed him and he sued Mayor Walsh for libel and slander.

II. COURSE OF PROCEEDINGS AND DISPOSITION IN THE SUPERIOR COURT

Navom filed suit in Berkshire Superior Court. Record Appendix ("A"), at 6.¹ Mayor Walsh moved to dismiss because venue was improper.² Berkshire Superior Court (Agostini, J.) transferred the case to Middlesex Superior Court on February 20, 2018. Navom filed an amended complaint, again alleging that Mayor Walsh defamed him. A 20. Mayor Walsh moved to dismiss on grounds that his comments were not defamatory and, in any event, he was immune from liability because his statements were absolutely or conditionally privileged. Mayor Walsh's motion to dismiss was allowed (Barry-Smith, J.) on October 17, 2018 and judgment entered in his favor on October 19, 2018. Navom filed a notice of appeal on or about October 24, 2018.

¹ References to the Record Appendix filed by Navom will be referred to as "A" followed by the page number.

² Alternatively, Mayor Walsh moved to dismiss on grounds that Navom failed to state a claim for defamation.

STATEMENT OF THE FACTS³

Just one day after the Charlottesville rally, Navom and his fellow organizers began planning the Boston rally. A 23, ¶ 4; A 24, ¶ 9(b). They began by scheduling speakers. Id. The Anti-Defamation League ("ADL") published biographies of all the scheduled speakers on its website. Id. According to the website, one of the scheduled speakers, Augustus Invictus, was actively involved with the Charlottesville rally. A 23-24, ¶ 9(a). Another speaker, Joe Biggs, was a proponent of date rape and an advocate of sexual violence. A 25, ¶ 9(b). Another speaker, Kyle Chapman, gained notoriety after arming himself with a stick and confronting demonstrators in California. Id. These are just three of the many speakers scheduled to appear at the Boston rally.⁴ In addition to posting the speakers' biographies, the ADL website also stated that:

³ The following facts are assumed to be true for the limited purpose of this appeal only.

⁴ Other speakers included Dina Hollister (whose motto is "we are Western chauvinists who refuse to apologize for creating the modern world. The west is best"); Jeremy Herrell ("an ardent Trump supporter" who "rails against liberals and progressives in videos"); and Shiva Ayyadurai (a Massachusetts resident who ran for United States Senate in 2018 and was a "favorite of the far right"). A 24-25, ¶ 9(b).

There are significant differences between what happened in Charlottesville and what's scheduled in Boston. Unlike Charlottesville, the Boston event, as currently planned, is not a white supremacist gathering. It has been organized under the auspices of the alt lite, which embraces civic nationalism, rather than the alt right, which advocates white nationalism . . . The exception in this case is scheduled speaker Augustus Invictus, who was actively involved in the Charlottesville planning and works closely with the alt right.

A 23-24, ¶ 9(a).

When news of the Boston rally broke, Mayor Walsh addressed the issue by making a number of statements to the media and on his social media accounts. The following statements were made on either August 12th or August 13th (in either event, at most, two days after Charlottesville):

- "Boston is an inclusive place for all. Hate will not be tolerated in our City."
- "There's no place for the hate that they're spewing . . . [i]t's my understanding that they're scheduled to come to Boston. I know we probably can't stop it because of free speech, but they're spewing hate. We don't need that right now in our country."
- "There's no place in Boston for that type of hate."

- "We don't need this type of hate . . . [s]o my message is clear to this group. We don't want you in Boston. We don't want you on Boston Common. We don't want you spewing the hate that we saw yesterday, and the loss of life."
- "The whole premise behind what they're doing there--the white supremacist group and the neo-Nazis, I don't quite understand what their message is."

A 30-34, ¶ 13(t-y).

The following day, on August 14th, the ADL updated its website to reflect that Augustus Invictus had been disinvited from the rally. A 23-24, ¶ 9(a). In the media and on their social media websites, the organizers of the Boston rally repeatedly denied that they were associated with Charlottesville. A 23-29, ¶¶ 9-10.

Between August 14th and August 21st, Mayor Walsh made the following additional statements:

- "Don't hand hatred a microphone and pretend you don't hear it."
- "Today & every day Boston stands up against hate. I'm saddened to see such a despicable action in this great city."

- "Leaders call out hate and reject it before it becomes violence. That's why we're here today. That's why this weekend myself and the governor spend [sic] nearly about 10 or 15 different phone calls talking about how do we reject hate in the commonwealth and in the city of Boston."
- "We also have a message for the hate groups, especially any who are planning to come to our city this weekend: Boston does not welcome you here. Boston does not want you here. Boston rejects your message."
- "Hatred and intimidation are not welcome in Boston or the Commonwealth."
- "We have to support those that are targeted, and stand together in unity."
- "We'll return hate with love. And we will stand together for peace and unity - always. #OutOfMany1."
- "They [the Southern Poverty Law Center] say that interacting with these groups just gives them a platform to spread their message of hate."

- "I ask everyone to be peaceful today and respect our City. Love, not hate. We stand together against intolerance."
- "Today, Boston stood for peace and love, not bigotry and hate. We should work to bring people together, not apart."
- "Why give attention to people spewing hate?"
- "Today Boston showed there's no place for hate in our City."
- "This is a potentially very important moment in time for our country here in Boston, Massachusetts to push back on some of the rhetoric and the hate, the anti-Semitism and the racism that's being talked about and going on in our country. I think Boston can start to turn that tide."

A 30-33, ¶ 13(a-s).

Navom claims that these statements defamed him.

SUMMARY OF THE ARGUMENT

Navom's defamation claim fails because Mayor Walsh's statements amount to nothing more than opinions. Opinions are protected by the First Amendment and are not actionable as a matter of law.

Even if the statements could be construed as alleging facts, they nonetheless were not defamatory because Mayor Walsh did not reference Navom, no reasonable person would think that Mayor Walsh was referencing Navom, and Navom has not alleged that Mayor Walsh acted with malice.

Even if the statements were defamatory, though, Mayor Walsh is not subject to liability because the statements were absolutely privileged. As mayor of Boston, he was commenting on a matter of public concern. His statements were also conditionally privileged because they were made within the scope of his official duties. As a result, Navom's amended complaint was properly dismissed by the Superior Court.

STANDARD OF REVIEW

The allowance of a motion to dismiss is reviewed de novo. See Galiastro v. Mortgage Electronic Registration Systems, Inc., 467 Mass. 160, 164 (2014). Factual allegations are sufficient to survive a motion to dismiss under Rule 12(b)(6) if they “plausibly suggest [and are] (not merely consistent with)” an entitlement to relief.” Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008). Although a complaint need not contain “detailed factual allegations,” it must offer more than mere “labels and conclusions.” Id. citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

ARGUMENT

I. MAYOR WALSH'S STATEMENTS WERE NOT DEFAMATORY.

To state a claim for defamation a complaint must allege 1) that the defendant made a statement of and concerning the plaintiff to a third party; 2) that the statement could damage the plaintiff's reputation in the community; 3) that the defendant was at fault for making the statement; and 4) that the statement caused economic loss. See Scholz v. Delp, 473 Mass. 242, 249 (2015). Further, to be actionable, the statement must be one of fact rather than of opinion. See King v. Globe Newspaper Co., 400 Mass. 705, 708 (1987).

Navom's defamation claim fails because all of Mayor Walsh's statements were either 1) nonactionable opinions; 2) not "of and concerning" Navom; or 3) lacking in the degree of fault required to support a defamation claim.

A. Mayor Walsh's Statements Are Not Actionable Because They Are Opinions.

Opinions are constitutionally protected under the First Amendment and cannot form the basis of a defamation claim. See Gertz v. Welch, 418 U.S. 323, 339-40 (1974). In determining whether a statement is an opinion, the critical question is whether the

statement can be proven true or false.⁵ See Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990). In answering this question, a court must consider all the words used, not merely a particular phrase or sentence. See Cole v. Westinghouse Broadcast Co., 386 Mass. 303, 309 (1982). Context is also critically important. Id. at 310 (“What constitutes a statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the communication as a whole”).

Here, the statements made by Mayor Walsh were clearly his opinions. First, context makes clear that Mayor Walsh was expressing his belief that Boston would not welcome the type of conduct that was just on display in Charlottesville. The statements were made in the hours, days, and weeks following the Charlottesville rally. Second, statements like “hatred and intimidation are not welcome in Boston” and “there’s no place for the hate that they’re spewing” are not capable of being proven true or false. There is no way to prove, for example, that Boston rejects “hate”. And even if it could be

⁵ This is a question of law when, as is the case here, reasonable people could not decide the matter differently. See King, 400 Mass. at 709.

proven, the word "hate" is too amorphous to be considered defamatory. See Old Dominion Branch No. 496 Nat. Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 284 (1974) (loose language like "unfair" or "fascist" that is part of the give-and-take in our economic and political controversies is not actionable). In any event, even if these statements could be construed as alleging defamatory facts, they nonetheless are not actionable because Mayor Walsh disclosed the basis for his opinions, i.e., the events that transpired in Charlottesville. See National Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp., 379 Mass. 220, 227 (1979) ("[a] simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified or unreasonable the opinion may be or how derogatory it is"). Because Mayor Walsh's statements amount to nonactionable opinions, they cannot give rise to a defamation claim.

B. Mayor Walsh's Statements Are Not Actionable Because They Are Not "Of And Concerning" Navom.

In order to state a claim for defamation, a complaint must allege that the defendant published

statements "of and concerning" the plaintiff. New England Tractor-Trailer Training of Conn., Inc. v. Globe Newspaper Co., 395 Mass. 471, 474 (1985). There are two alternative tests to determine whether a statement is "of and concerning" the plaintiff: one subjective, one objective. See Eyal v. Helen Broadcasting Corp., 411 Mass. 426, 430-31 (1991). The subjective test inquires as to whether the defendant intended the statements to refer to the plaintiff. Id. at 430. The objective test inquires as to whether the statement could reasonably be understood to refer to the plaintiff. Id. Mayor Walsh's statements do not rise to the level of being "of and concerning" Navom under either test.

Turning first to the statements made by Mayor Walsh on August 12th and 13th:

- "There's no place for the hate that they're spewing...It's my understanding that they're scheduled to come to Boston. I know we probably can't stop it because of free speech, but they're spewing hate. We don't need that right now in our country."
- "The whole premise behind what they're doing there - the white supremacist group and the neo-Nazis, I don't quite understand what their message is."
- "Boston is an inclusive place for all. Hate will not be tolerated in our City."

- "There's no place in Boston for that type of hate."
- "We don't need this type of hate...So my message is clear to this group. We don't want you in Boston. We don't want you on Boston Common. We don't want you spewing the hate that we saw yesterday, and the loss of life."
- "Boston is an inclusive place for all. Hate will not be tolerated in our City."

These statements were made either the same day or the day after the Charlottesville rally. Given this context, it is clear that the "they" Mayor Walsh is referring to are the participants in the Charlottesville rally--not Navom.

Turning next, then, to the statements made by Mayor Walsh between August 14th and August 21st:

- "Don't hand hatred a microphone and pretend you don't hear it."
- "Today & every day Boston stands up against hate. I'm saddened to see such a despicable action in this great city."
- "Leaders call out hate and reject it before it becomes violence. That's why we're here today. That's why this weekend myself and the governor spend [sic] nearly about 10 or 15 different phone calls talking about how do we reject hate in the commonwealth and in the city of Boston."
- "We also have a message for the hate groups, especially any who are planning to come to our city this weekend: Boston does not welcome you here. Boston does not want you here. Boston rejects your message."

- "Hatred and intimidation are not welcome in Boston or the Commonwealth."
- "We have to support those that are targeted, and stand together in unity."
- "We'll return hate with love. And we will stand together for peace and unity - always. #OutOfMany1."
- "They [the Southern Poverty Law Center] say that interacting with these groups just gives them a platform to spread their message of hate."
- "I ask everyone to be peaceful today and respect our City. Love, not hate. We stand together against intolerance."
- "Today, Boston stood for peace and love, not bigotry and hate. We should work to bring people together, not apart."
- "Why give attention to people spewing hate?"
- "Today Boston showed there's no place for hate in our City."
- "This is a potentially very important moment in time for our country here in Boston, Massachusetts to push back on some of the rhetoric and the hate, the anti-Semitism and the racism that's being talked about and going on in our country. I think Boston can start to turn that tide."

These statements are not about Navom. They are not even about the organizers of the Boston rally. They are general statements about Boston's intolerance for "hate". No reasonable person would construe these statements as referencing Navom. To the extent Navom is arguing that these statements cast him as part of a

"hate" group, as discussed above, the word "hate" is too amorphous to be considered defamatory. See Myers v. Boston Magazine Co., Inc., 380 Mass. 336, 343 (1980); see also Ayyadurai v. Floor64, Inc., 270 F. Supp. 3d 343, 364 (D. Mass. Sep. 6, 2017) (rejecting argument that calling someone a "racist" was defamatory in the context in which it was used). Moreover, given the context in which these statements were made—following the Charlottesville rally and with the understanding that at least one of Charlottesville's organizers was coming to Boston—Mayor Walsh had clearly disclosed the basis for his statements. See Central Broadcasting, 379 Mass. at 227 (1979) ("[a] simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation"). As Mayor Walsh's statements were not "of and concerning" Navom from either a subjective or objective standpoint, they did not defame him.

C. Mayor Walsh's Statements Are Not Actionable Because He Was Not At Fault For Making The Statements.

The level of fault required for proving a defamation claim varies between negligence (for statements concerning private persons) and actual

malice (for statements concerning public officials and public figures). Ravnikar v. Bogojavlensky, 438 Mass. 627, 630 (2003). Whether a person constitutes a public figure is a question of law. See Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 862 (1975). An otherwise private person can become a public figure for a limited range of issues by injecting himself into a public controversy. Id. at 866. Public figures typically include those who "command sufficient continuing public interest and [have] sufficient access to the means of counter-argument to be able to expose through discussion the falsehood and fallacies of the [alleged] defamatory statements." Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967). Such is the case here.

Navom injected himself into the public controversy regarding the Charlottesville rally by trying to organize a similar event to take place in Boston just one week later. A 23, ¶ 4. He was a scheduled speaker at the event. A 23-24, ¶ 9(a-b). His biography was published on the ADL website. Id. He appeared on the rally's promotional flier and participated in television newscasts about the event. A 6, ¶ 5. By Navom's own admission, the Boston rally

"garnered tremendous media coverage." A 7, ¶ 7. Navom and his fellow organizers made ample use of the media to rebut the statements issued by Mayor Walsh. A 26-29, ¶ 10(a-k). See also Butts, 388 U.S. at 155 (access to media is a key identifier of public figures). Under these circumstances, Navom was a public figure for the limited range of issues relating to the Boston rally.

Since Navom is a limited public figure, he must allege, by clear and convincing evidence, that Mayor Walsh published defamatory material with actual malice.⁶ See Murphy v. Boston Herald, 449 Mass. 41, 48 (2007). As Navom has not done so, for the reasons discussed in Section II(B) below, Navom has not alleged that Mayor Walsh issued the statements with the requisite degree of fault to be held liable for defamation. For this reason, Navom's amended complaint was properly dismissed.

⁶ Even if this Court were to conclude that Navom is a private person and, therefore, need only show negligence, Mayor Walsh's statements would be protected by the conditional privilege, as discussed below. See Dexter's Hearthside Restaurant, Inc. v. Whitehall Co., 24 Mass. App. Ct. 217, 223 (1987). (negligence is not enough to cause the loss of the privilege).

II. MAYOR WALSH IS IMMUNE FROM LIABILITY BECAUSE HIS STATEMENTS REGARDING THE BOSTON RALLY WERE PRIVILEGED.

Even assuming arguendo that Mayor Walsh's statements were defamatory, Mayor Walsh is immune from liability for Navom's defamation claim because his statements regarding the Boston rally were either absolutely or conditionally privileged.

A. Absolute Privilege

The United States Supreme Court recognizes an absolute privilege for statements made by federal officials within the scope of their official duties. See Barr v. Matteo, 360 U.S. 564, 569-576 (1959). There are two significant policy reasons behind this. First, government officials should be able to discharge their duties uninhibited by the fear and distraction of lawsuits. Id. at 571-573; see also Westfall v. Erwin, 484 U.S. 292, 295 (1988) ("[I]mmunity rests on the view that the threat of liability will make . . . officials unduly timid in carrying out their official duties, and that effective government will be promoted if officials are freed of the costs of vexatious and often frivolous damages suits"). Second, an absolute privilege furthers speech by allowing officials to speak with complete

candor concerning matters of public importance. Barr, 360 U.S. at 577. (Black, J., concurring).

Consistent with the holding in Barr, the Restatement (Second) of Torts § 591 (2002) affords federal and state executive officers with absolute immunity from defamation claims: “[a]n absolute privilege to publish defamatory matter concerning another in communications made in the performance of his official duties exists for (a) any executive or administrative officer of the United States; or (b) a governor or other superior executive officers of the state.” Id.

Relying on Barr and the Restatement, most states have adopted an absolute privilege for state officials from defamation claims for statements made in the course of their official duties.⁷ See e.g. District of Columbia v. Jones, 919 A.2d 604, 612 (2007) (granting mayor absolute immunity for statements made to press); Lindner v. Mollan, 544 Pa. 487, 492 (1996) (affirming common law doctrine of absolute privilege for

⁷ Where an absolute privilege has not been adopted, it is because a conditional privilege exists that is sufficient to protect high-ranking public officials from liability where their statements are made in good faith and without malice. See e.g. Aspen Exploration Corp. v. Sheffield, 739 P.2d 150, 161 (Alaska 1987).

statements made by public officials); Jones v. State, 426 S.W.3d 50, 58 (2013) (granting cabinet-level executives with absolute immunity from defamation claims); Blair v. Walker, 64 Ill. 2d 1, 6-11 (1976) (adopting absolute immunity to shield governor from defamation claim); Salazar v. Morales, 900 S.W.2d 929, 932 (Tex. App. 1995) (giving Texas Attorney General absolute privilege to publish defamatory statements in communications associated with official duties).

Massachusetts, to date, has reserved on the question of whether an absolute privilege extends to statements made by public officials in connection with their official duties.⁸ See Mulgrew v. Taunton, 410 Mass. 631, 634-35 (1991). That being said, Massachusetts has recognized an absolute privilege in contexts where "public policy or the administration of justice" requires it. Ezekiel v. Jones Motor Co., Inc., 374 Mass. 382, 385 (1978). Contexts that involve the administration of justice have been

⁸ When the issue has been considered, the courts have found that a conditional privilege applied and they therefore declined to resolve whether an absolute privilege would have applied. See Mulgrew, 410 Mass. at 635; Vigoda v. Barton, 348 Mass. 478, 483-484 (1965); Barrows v. Wareham Fire Dist., 82 Mass. App. Ct. 623, 631 (2012); but see Edwards v. Commonwealth, 447 Mass. 254, 262 (2017) (opting to decide case on merits of defamation claim).

developed in Massachusetts and typically include judicial or legislative proceedings where the participants must "not be hampered by fear of an action for defamation". Correllas v. Viveiros, 410 Mass 314, 320 (1991). Contexts that involve public policy are less defined, though in keeping with the reasoning of the Supreme Court and the majority of states, they should include instances where public officials are commenting on matters of public importance.

This is because the spirit of the privilege is not so much to protect public officials but to promote effective government by keeping the public informed. See Barr, 360 U.S. at 570 ("The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government.") The Supreme Court recognized that by instituting an absolute privilege for government officials "there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good." Id. at 576.

Here, Mayor Walsh was commenting on a highly-publicized, violent rally that fueled a national

debate. The fact that another rally was scheduled to take place in Boston just one week later, that featured at least one of the same organizers as Charlottesville, made it even more appropriate for Mayor Walsh to address the issue. Boston residents were looking to their mayor for guidance on what would be happening in their back yard in less than a week. Mayor Walsh would have been remiss not to comment on the upcoming Boston rally under these circumstances. At bottom, absolute immunity exists to "serve the public interest in effective government." Jones, 919 A.2d at 607. Mayor Walsh cannot effectively govern his City if he has to curb his speech on a matter of public concern due to the possibility of civil lawsuit.

When an absolute privilege is applied to Mayor's Walsh's statements, Navom's defamation claim fails as a matter of law.

B. Conditional Privilege

In addition to being absolutely privileged, Mayor Walsh's statements were also conditionally privileged. A conditional privilege applies to all statements made by public officials while performing their official duties. See Vigoda v. Barton, 348 Mass. 478, 483-485

(1965). Its purpose is to allow public officials to speak freely on matters of public importance. See Mulgrew, 410 Mass. at 635. Here, Mayor Walsh's statements were conditionally privileged because they concerned a matter of public importance. See Connick v. Myers, 461 U.S. 138, 146 (1983) (holding that speech is of public concern when it relates to any matter of political, social, or other concern to the community). Mayor Walsh was commenting on the upcoming Boston rally that was receiving national media attention due to its close temporal proximity to Charlottesville.

In an attempt to get around the conditional privilege, Navom argues that the statements were outside the scope of Mayor Walsh's "official duties" because they were not required by law. But whether a statement is required by law is not dispositive of whether it is part of a mayor's official duties. See Foley v. Town of Randolph, 598 F.3d 1, 7 (1st Cir. 2010) (noting that even though Fire Chief was not required to speak to the press as part of his job, his election to do so was still within his official duties); see also Brammer-Hoelter v. Twin Peaks Charter Academy, 492 F.3d 1192, 1203 (10th Cir. 2007)

("speech may be made pursuant to an employee's official duties even if it deals with activities that the employee is not expressly required to perform"); Williams v. Dallas Ind. Sch. Dist., 480 F.3d 689, 693 (5th Cir. 2007) ("[a]ctivities undertaken in the course of performing one's job are activities pursuant to official duties even if the speech at issue is not necessarily required by the employee's job duties"). Mayor Walsh had an interest in ensuring that the chaos and violence of Charlottesville was not repeated, and the public had an interest in hearing what guidance Mayor Walsh had to offer. This is quintessentially the role of a mayor, regardless of whether it is required by law.

Because Mayor Walsh's statements were conditionally privileged, Navom can only succeed with his defamation claim if he can establish that Mayor Walsh 1) acted with actual malice; 2) published the defamatory statements with knowledge of their falsity or with reckless disregard for their truth; or 3) published the statements in an unnecessary, unreasonable, or excessive manner. See Barrows v. Wareham Fire Dist., 82 Mass. App. Ct. 623, 631 (2012). Whatever the manner of the loss of privilege, a

minimum of recklessness is required.⁹ See Bratt v. International Bus. Machs. Corp., 392 Mass. 408, 515 (1984). To show recklessness, the plaintiff must put forth "sufficient evidence . . . that the defendant in fact entertained serious doubts as to the truth of [the] publication." King, 400 Mass. at 720 (emphasis added). The plaintiff must prove this by clear and convincing evidence. See Stone, 367 Mass. at 870-871. Navom has not done that here.

Instead, Navom argues that Mayor Walsh acted recklessly because, as Navom sees it, a quick internet search would have revealed that the Boston rally organizers were not racists or white supremacists. But the law is clear that the fact that Mayor Walsh did not conduct an internet search does not mean he acted recklessly. See HipSaver, Inc. v. Kiel, 464 Mass. 517, 530 (2013) ("[R]eckless conduct is not measured by whether a reasonably prudent man would have published or would have investigated before publishing"); St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (defendant must in fact entertain serious doubts as to the truth of his publication in order to

⁹ Negligence is not enough to cause the loss of the privilege. See Dexter's Hearthside Restaurant, 24 Mass. App. Ct. at 223.

act recklessly). As Navom has not alleged that Mayor Walsh in fact entertained any doubts as to the truth of his statements, he cannot prove recklessness.¹⁰

Apparently recognizing that failing to investigate before publishing is not reckless under the law, Navom argues that Mayor Walsh deliberately avoided the truth, which the Supreme Court has said may be enough to establish malice in limited circumstances. See Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 692 (1989). But Harte-Hanks still requires the publisher to know of the probable falsity of his statement. See id. (noting that when a reporter is aware of the allegation's probable inaccuracy, a deliberate intent to avoid the truth may establish malice); see also Murphy, 449 Mass. at 42 (malice found where reporter deliberately did not interview people he knew would contradict his publication). The test remains wholly subjective. See St. Amant, 390 U.S. at 731. And again, Navom has not alleged that Mayor Walsh knew his statements were

¹⁰ Navom's other arguments—that Mayor Walsh had an improper motive and that Mayor Walsh published the statements excessively—likewise fail because both require, at minimum, a finding that Mayor Walsh acted recklessly. See Bratt, 392 Mass. at 515.

probably false.¹¹ Navom argues that Mayor Walsh deliberately avoided the truth by failing to read or acknowledge the various Facebook posts and news articles¹² in which the Boston rally organizers denied being associated with hate groups, but this is not enough to show a reckless disregard for the truth. “[L]iability under the clear and convincing proof standard . . . cannot be predicated on mere denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error.” Pacella v. Milford Radio Corp., 18 Mass. App. Ct. 6, 15 (1984) (internal quotations and citations omitted). As correctly noted by the Superior Court in its decision

¹¹ Mayor Walsh’s statements are not even capable of being proven false, as described in Section II(A) below.

¹² The Amended Complaint cites the following sources as “evidence” that Mayor Walsh knew his statements were false: four news articles quoting John Medlar, one of the rally organizers, in which he denied any connection between the Boston and Charlottesville rallies (A 26-28, ¶ 10(a), 10(b), 10(c), and 10(k)); two news articles reporting that rally organizers invited members of the Black Lives Matter movement to the rally (A 28, ¶¶ 10(i), 10(j)); five posts appearing on the rally’s Facebook page, all containing denials that the Boston rally was associated with the Charlottesville rally, the Ku Klux Klan, or with hate groups in general (A 26-28, ¶¶ 10(d), 10(e), 10(f), 10(g), and 10(h)).

holding that Mayor Walsh's statements were conditionally privileged, "[i]f a subject's simple denial is sufficient to demonstrate that subsequent publication shows a reckless disregard for the truth, then no disputed fact could ever safely be published." Lemelson v. Bloomberg LP, 253 F. Supp. 3d 333, 340-341 (D. Mass. 2017).

Because Navom has not alleged and cannot prove that Mayor Walsh acted with malice, Mayor Walsh's statements were conditionally privileged and Navom's defamation claim was properly dismissed.

CONCLUSION

Mayor Walsh is immune from liability for any defamation claim because his statements were both absolutely and conditionally privileged. Moreover, Navom's claim fails on its merits because Mayor Walsh's statements were 1) his nonactionable opinions; 2) not "of and concerning" Navom; and 3) lacking in the degree of fault necessary to state a claim. For these reasons, this Court should affirm the dismissal of Navom's amended complaint.

Respectfully submitted:

DEFENDANT-APPELLEE,
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Date: August 20, 2019

CERTIFICATE OF SERVICE

I, Nicole M. O'Connor, hereby certify that I served a true copy of the above brief of Defendant-Appellee Mayor Martin J. Walsh upon counsel for the Plaintiff, Rinaldo Del Gallo, Esq., via first class mail, postage prepaid, at the address listed below as well as via email at rinaldodelgallo@gmail.com:

Rinaldo Del Gallo
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Date: August 20, 2019

/s/ Nicole M. O'Connor
Nicole M. O'Connor

**CERTIFICATION OF COMPLIANCE WITH MASS. R. APP. P.
16(a)(6), 16(e), 16(f), 16(h) and 20**

I, Nicole M. O'Connor, hereby certify that the Defendant-Appellee Mayor Martin J. Walsh has complied with Mass. R. App. P. 16(a)(6), 16(e), 16(f), 16(h) and 20.

Date: August 20, 2019

/s/ Nicole M. O'Connor
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