STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. SUPERIOR COURT

[Filed: August 16, 2018]

EILEEN FUOCO	:	
	:	
v.	:	C.A. No. PC-2013-5356
	:	
JOSEPH POLISENA	:	

DECISION

LICHT, J. Defendant Mayor Joseph Polisena (Defendant, Mayor Polisena, or the Mayor) has renewed his motion for judgment as a matter of law, and in the alternative, has moved for a new trial. Also before the Court is Defendant's motion for a remittitur. The Court, sitting with a jury, heard the within matter, which concluded on June 7, 2018, with a verdict for Plaintiff Eileen Fuoco (Plaintiff or Councilwoman Fuoco) on her slander claim.[1] The jury awarded Councilwoman Fuoco compensatory damages of $20,000, plus the stipend she would have earned for two additional terms on the Johnston Town Council. Jurisdiction is pursuant to G.L. 1956 § 8-2-14 and Rules 50 and 59 of the Superior Court Rules of Civil Procedure.

For the reasons set forth herein, each of Defendant's motions is granted.

[1] The Court notes that Defendant brought a counterclaim seeking immunity pursuant to G.L. 1956 § 9-33-2, the Strategic Litigation Against Public Participation (SLAPP) statute. The jury found that while Mayor Polisena was speaking on a matter of public interest, his speech constituted a sham, and that the immunity therefore did not apply. Defendant has made no motion as to the jury's determination on that issue in his post-trial motions. This Court, therefore, considers that issue waived and will leave the jury's determination of that issue undisturbed.

I

Facts and Travel

This entire case revolves around the public meeting of the Town Council for the Town of Johnston, Rhode Island (the Town) held October 15, 2013 (the Meeting). A transcript of portions of the Meeting was introduced into evidence as Plaintiff's Exhibit 1.[2] A member of the public, Tammy Cardillo (Ms. Cardillo), questioned why certain roads in District One, Councilwoman Fuoco's district, had not been repaved. This inquiry led the Plaintiff and Defendant to take over the Meeting and engage in a spirited and heated interaction during which Mayor Polisena made a number of accusatory statements about Councilwoman Fuoco. Plaintiff alleges that Mayor Polisena claimed Councilwoman Fuoco (1) attempted to collect TDI from the Town; (2) attempted to collect unemployment compensation[3] from the Town; (3) was not properly fulfilling her duties on the Johnston Town Council; (4) missed many meetings while she was in Florida during the wintertime; (5) tried to put herself on the Town's health care plan; and (6) was only concerned about getting her own street paved in her district.

On October 23, 2013, roughly one week after the Meeting, Councilwoman Fuoco brought the instant lawsuit. The lawsuit contained three counts: (1) deprivation of right to privacy; (2) slander and libel; and (3) intentional infliction of emotional distress.

In addition to the transcript of the Meeting, other exhibits were introduced and the Court and the jury heard from the Plaintiff, the Defendant, a Town payroll clerk, the Town Council President at the time of the Meeting and another Councilman who was in attendance.

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[2] Specifically pages 1, 13-15, 37-60, and 72 of the Meeting transcript were introduced. The Court infers therefore that these were the only pages relevant to this case.

[3] In her objection to Defendant's motions, Plaintiff mistakenly stated that Mayor Polisena accused Councilwoman Fuoco of seeking workers' compensation benefits, but clarified at the hearing on these motions that Plaintiff was referring to unemployment benefits.

To give context to the Meeting, the Court will summarize the evidence relevant to these motions. Plaintiff ran for the Town Council in 2010, and she unseated an incumbent who was supported by the Mayor. On May 4, 2011, Lucia Tracy, the Town's payroll clerk, received a letter from the Temporary Disability Insurance (TDI) Division of the State Department of Labor and Training referencing Eileen Fuoco. (Pl.'s Ex. 3 hereinafter referred to as "the TDI Letter"). The TDI Letter stated "The person above has filed a claim for Temporary Disability Insurance benefits." Since the Town does not participate in TDI, Ms. Tracy thought this unusual and brought it to the Mayor's attention by showing him a copy of the letter on which she had written that Ms. Fuoco was a Council member and did not contribute to TDI. The Mayor testified that he redacted the social security number and locked the copy of the letter in the top drawer of his desk.

In 2012, Mayor Polisena supported Councilwoman Fuoco for reelection, even providing a message of endorsement for her campaign literature. Sometime in 2013, however, the relationship between Plaintiff and Defendant soured, apparently over the Town's road repaving program. The Town was not repaving the streets that Councilwoman Fuoco wanted done in her district. Mayor Polisena, at the Meeting and in his testimony, claimed he called Councilwoman Fuoco several times to obtain her priority list of five streets in her district she wanted paved. He and two Town employees claimed at the Meeting that she never submitted her list. Councilwoman Fuoco claimed in her testimony and at the Meeting that she had submitted the list.

As a result, Ms. Cardillo, a resident of Councilwoman Fuoco's district, came to the Meeting to voice concerns about District One not having five streets repaved. She did not get much of a chance to air her grievance, however, as Mayor Polisena seized the opportunity to

engage Councilwoman Fuoco. In their discourse, Plaintiff and Defendant repeatedly interrupted one another making it difficult to follow their respective arguments. The gist of Mayor Polisena's contentions were that Councilwoman Fuoco had a problem with his administration as she had called some of his appointees "the Three Stooges"; that she was not effectively representing her district; and that she had tried to "rip off" the Town. Obviously, Councilwoman Fuoco vigorously disputed those contentions, although she admitted at the Meeting using the term "the Three Stooges," but said she could have been referring to anyone, including herself, her husband, and her daughter.

In 2014, Councilwoman Fuoco lost her bid for reelection to the son of the Town's Democratic Committee Chair who was supported by the Mayor.

This Court granted Defendant's motion for judgment as a matter of law as to Plaintiff's deprivation of right to privacy claim prior to submitting the case to the jury. The jury found in favor of the Defendant on the question of intentional infliction of emotional distress and for the Plaintiff on the defamation count. As previously stated, the jury awarded Councilwoman Fuoco compensatory damages of $20,000 plus the stipend she would have earned for two additional terms on the Johnston Town Council.

II

Standard of Review

A

Motion for Judgment as a Matter of Law

Rule 50(a)(1) of the Rhode Island Superior Court Rules of Civil Procedure provides:

> "If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a

> matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue." Super. R. Civ. P. 50(a)(1).

When ruling on a motion for judgment as a matter of law, this Court "must consider the evidence in the light most favorable to the party against whom the motion is made without weighing the evidence or considering the credibility of the witnesses and extract from the record only those reasonable inferences that support the position of the party opposing the motion." *AAA Pool Serv. & Supply, Inc. v. Aetna Cas. & Sur. Co.*, 479 A.2d 112, 115 (R.I. 1984) (internal quotations omitted). This Court must deny the motion "if there are factual issues upon which reasonable people may have differing conclusions." *Broadley v. State*, 939 A.2d 1016, 1020 (R.I. 2008) (citing *Trainor v. The Standard Times*, 924 A.2d 766, 769 (R.I. 2007)).

When, at the close of all the evidence, this Court submits a case to a jury without granting a pending motion for judgment as a matter of law, "the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." Super. R. Civ. P. 50(b). The moving party may then renew his or her motion after the entry of judgment. *Id.* When ruling on a renewed motion for judgment as a matter of law, this Court may allow the verdict to stand or may direct the entry of judgment as a matter of law. *Id.* This Court may properly grant judgment as a matter of law when there is uncontradicted testimony that clearly establishes the operative facts. *See Franco v. Latina*, 916 A.2d 1251, 1263 (R.I. 2007).

B

Motion for a New Trial

It is well established in Rhode Island that when ruling on a motion for a new trial, this Court acts as a "super-juror" and must "independently weigh, evaluate, and assess the credibility

of the trial witnesses and evidence." *Morrocco v. Piccardi*, 713 A.2d 250, 253 (R.I. 1998). This Court's review is a three step process: this Court "'must (1) consider the evidence in light of the jury charge, (2) independently assess the credibility of the witnesses and the weight of the evidence, and then (3) determine whether [it] would have reached a result different from that reached by the jury.'" *State v. Ferreira*, 21 A.3d 355, 364 (R.I. 2011) (quoting *State v. Prout*, 996 A.2d 641, 645 (R.I. 2010) (internal quotations omitted)). In independently reviewing the evidence, this Court may reject testimony that is contradicted by other testimony or circumstantial evidence. *Barbato v. Epstein*, 97 R.I. 191, 193, 196 A.2d 836, 837 (1964). If this Court agrees with the jury's verdict or if "reasonable minds could differ as to the outcome," this Court must deny the motion for a new trial. *Ferreira*, 21 A.3d at 364-65 (quotation omitted). If, however, this Court disagrees with the jury's verdict, it must perform a fourth step of analysis whereby it must determine whether the jury's verdict is "against the fair preponderance of the evidence and fails to do substantial justice." *Id.* at 365 (citing *State v. Guerra*, 12 A.3d 759, 765-66 (R.I. 2011) (internal quotations omitted)). In the event this standard is satisfied, this Court must grant the motion for a new trial. *Id.*

When ruling on a motion for a new trial, this Court need not engage in an exhaustive review and analysis of all of the evidence and testimony. *Reccko v. Criss Cadillac Co., Inc.*, 610 A.2d 542, 545 (R.I. 1992) (citing *Zarrella v. Robinson*, 460 A.2d 415, 418 (R.I. 1983)). This Court must, however, reference the facts that have motivated its conclusion with enough specificity to allow the reviewing court to determine whether error was committed. *Id.* When this Court has properly performed the review required by Rule 59, the Supreme Court will afford this Court's decision great weight and will not overturn the decision unless this Court overlooked

or misconceived material evidence, or was otherwise clearly wrong. *Oliveira v. Jacobson*, 846 A.2d 822, 826 (R.I. 2004) (citations omitted).

C

Motion for a Remittitur

A remittitur has been defined by our Supreme Court as "'[a]n order awarding a new trial, or a damages amount lower than that awarded by the jury, and requiring the plaintiff to choose between those alternatives.'" *Free & Clear Co. v. Narragansett Bay Comm'n*, 131 A.3d 1102, 1111 (R.I. 2016) (quoting Black's Law Dictionary 1486 (10th ed. 2014)). "The devices of remittitur and additur are designed to avoid the costs and delays that arise from relitigation of the same issues, while providing a just result for the litigants." *Lennon v. Dacomed Corp.*, 901 A.2d 582, 590 (R.I. 2006) (citing *Cotrona v. Johnson & Wales Coll.*, 501 A.2d 728, 733 (R.I. 1985)). "A remittitur is available only when the jury award clearly appears to be excessive or is found to be the result of the jury's passion and prejudice." *Id.* (citing *Mazzaroppi v. Tocco*, 533 A.2d 203, 206 (R.I. 1987)). Our Supreme Court has long held that the decision to grant a motion for a remittitur is within the sound discretion of the trial justice. *See Zarrella*, 460 A.2d at 419.

III

Analysis

A

Motion for Judgment as a Matter of Law

The Court must first decide whether the statements made by Defendant were defamatory as a matter of law. *See Mills v. C.H.I.L.D., Inc.*, 837 A.2d 714, 720 (R.I. 2003) (holding that an action for defamation may be sustained where the plaintiff can show: "(1) the utterance of a false and defamatory statement concerning another; (2) an unprivileged communication to a third

party; (3) fault amounting to at least negligence; and (4) damages."). Specifically, the Rhode Island Supreme Court has stated that "[a] defamatory statement consists of 'any words, if false and malicious, imputing conduct which injuriously affects a [person's] reputation, or which tends to degrade him [or her] in society or bring him [or her] into public hatred or contempt[.]'" *Id.* Furthermore, "the question of whether a particular statement or conduct alleged to be defamatory is, in fact, defamatory is a question of law for the court to decide." *Alves v. Hometown Newspapers, Inc.*, 857 A.2d 743, 750 (R.I. 2004).

Plaintiff, as a city councilwoman, was a public official, thus subjecting her claim to the higher "actual malice" standard articulated first in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964). In *New York Times Co.*, the United States Supreme Court held:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80.

The Supreme Court of Rhode Island has held that the clear and convincing evidentiary standard applies to this determination. *Capuano v. Outlet Co.*, 579 A.2d 469, 472 (R.I. 1990).

Notably, "the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 666 (1989). In order to demonstrate "actual malice" by clear and convincing evidence, the plaintiff must either establish that the defendant had "actual knowledge that the published statement was false" or that the defendant acted with "reckless disregard for whether or not it was false." *Capuano*, 579 A.2d at 472.

The United States Supreme Court advises us "'reckless disregard' . . . cannot be fully encompassed in one infallible definition." *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968). The Court held that:

> "A 'reckless disregard' for the truth . . . requires more than a departure from reasonably prudent conduct. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication . . . The standard is a subjective one—there must be sufficient evidence to permit the conclusion that the defendant actually had a high degree of awareness of . . . probable falsity . . . As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." *Harte-Hanks Commc'ns, Inc.*, *491 U.S.* at 688 (internal quotations and citations omitted).

Adopting the *St. Amant* standard, our Supreme Court has said that "[r]eckless disregard is more than mere negligence." *Major v. Drapeau*, 507 A.2d 938, 941 (R.I. 1986). Our Supreme Court has concluded that "'[a]s long as the sources of the libelous information appeared reliable, and the defendant had no doubts about its accuracy, the courts have held the evidence of malice insufficient to support a jury verdict, even if a more thorough investigation might have prevented the admitted error.'" *Hall v. Rogers*, 490 A.2d 502, 505 (R.I. 1985) (quoting *Ryan v. Brooks*, 634 F.2d 726, 734 (4th Cir. 1980)). As such, Plaintiff must show that Defendant acted with "actual malice" to sustain her claim.

The Plaintiff's first hurdle is to establish first and foremost that the Defendant's statement(s) are false. The onus is then on Plaintiff to prove by clear and convincing evidence that Defendant had actual knowledge that they were false, or acted with reckless disregard as to whether they were false or not.

With that background, the Court will examine each of the five areas of statements which Plaintiff asserts are defamatory to determine if they were false. If any of them were, the Court

will apply the standard of *New York Times Co.*, and its progeny, and scour the record to determine if there was clear and convincing evidence that Mayor Polisena knew the statements to be false or acted with reckless disregard for whether or not they were false.

1

Temporary Disability Insurance

At trial, Councilwoman Fuoco admitted to filing for TDI in 2011 because of a back injury following a fall. She said this application related to her husband's company where she worked. When asked on direct examination at trial about refuting Mayor Polisena's contention, Councilwoman Fuoco testified that, if she recalled correctly, Mayor Polisena said she was suing the Town of Johnston for workers' compensation and TDI benefits. However, an examination of the transcript of the Meeting reveals no mention of a lawsuit against the Town. Mayor Polisena showed the TDI Letter to the Council President and no one else. That fact was confirmed at trial by the Plaintiff, the Council President, and Councilman Santos. Councilwoman Fuoco did not see the letter but seemed to assume the Mayor accused her of writing it, so she denied writing the letter. (Ex. 1, Meeting Tr. 51:24-25:2.) Mayor Polisena responded, "I didn't say you wrote the letter." *Id.* at 52:3-4. Councilwoman Fuoco even acknowledged that she needed a request from the payroll clerk "[b]ecause [Councilwoman Fuoco] needed a copy of [her] wages to give to [her] lawyer." *Id.* at 52:9-10. In fact, at the meeting, Mayor Polisena then said, "You put in against the Town according to that[.]" *Id.* at 52:11-12. The "that" was the TDI Letter because Council President Russo then identified it for the record and gave it back.

There was no evidence presented that suggests that the TDI Letter Mayor Polisena presented at the council meeting was inauthentic. All of the evidence supports Mayor Polisena's statement that Councilwoman Fuoco applied for TDI benefits. The core of Plaintiff's objection

to Mayor Polisena's statement is that she contends she did not file for benefits "against the Town." The fact that the Town was involved in the benefit determination, as demonstrated by the Department of Labor and Training sending the TDI Letter to the Town, is adequate to support Defendant's statement as accurate. Moreover, Plaintiff never submitted into evidence her application for TDI to establish exactly what she applied for. Ultimately, Plaintiff offered no evidence to affirmatively demonstrate the falsity of the statement. Even when viewing the evidence in the light most favorable to Plaintiff, there is no evidentiary basis for finding the statement about TDI false. Moreover, even if Plaintiff had established that the Defendant's statement was false, there is no evidence whatsoever, let alone clear and convincing evidence, that would establish that the Mayor knew that she had not applied for "TDI against the Town," as his statement was based on the TDI Letter.

2

Unemployment Insurance

With respect to unemployment insurance, Councilwoman Fuoco did testify at trial that for at least ten years, while working for her husband's contracting company as a secretary, she would be laid off for three to four months each year and collect unemployment insurance. Her testimony is unclear as to when this practice stopped, but it appears that it continued during her time on the Council, up until she became disabled. On two occasions at the Meeting, Mayor Polisena referred to seeking unemployment insurance against the Town. In the first instance, he said, "on 4-28-11 she tried to put in for temporary disability, unemployment insurance." *Id.* at 44:15-16. The TDI Letter was dated April 28, 2011. On the second occasion, the discourse was as follows:

> "MAYOR POLISENA: But you put it in against the Town. You put in against the Town.

"COUNCILWOMAN FUOCO: Excuse me, can I see that letter?

MAYOR POLISENA: You certainly can.

"COUNCILWOMAN FUOCO: I didn't put nothing against the Town, nothing against the Town that --

"MAYOR POLISENA: Yes, you did.

"COUNCILWOMAN FUOCO: I fell down in my --

"MAYOR POLISENA: You put in for unemployment compensation.

"COUNCILWOMAN FUOCO: I did not put in for compensation.

"MAYOR POLISENA: It's right there." (Meeting Tr. 45:5-18.)

The "there" is the TDI Letter. In both instances the Mayor linked unemployment insurance with TDI. As stated above, there is no evidence that the TDI Letter was false let alone that the Mayor knew it was false. Furthermore, even if Councilwoman Fuoco had not filed for unemployment insurance against the Town, as distinguished from her TDI application, there is no evidence that the Mayor recklessly disregarded the distinction between these two programs.

3

Missing Meetings While in Florida

The Mayor did say to Councilwoman Fuoco "Your problem is you spend three months in Florida." *Id.* at 46:14-15. While at the Meeting, she denied it. She testified at trial, however, that she collected unemployment insurance from December to March, and that during that time, she went to her condominium in Florida. The Mayor also accused her of being "missing in action." The two then argued about how many meetings the Plaintiff missed. She admitted to missing one in 2013, but the Mayor suggested there were more in prior years. The Plaintiff never introduced her attendance record into evidence nor was Mayor Polisena queried at trial on

what he meant by "missing in action." So again, Plaintiff has failed to prove Mayor Polisena's statements false.

4

Only Concerned About Her Road

On two occasions, Mayor Polisena accused Councilwoman Fuoco of being interested only in getting her own road paved. On both occasions, Councilwoman Fuoco admitted that was the case. *Id.* at 49:7-12, 56:2-5. Obviously, therefore, these comments were not false.

5

Health Insurance

Mayor Polisena also claimed that Councilwoman Fuoco "ha[d] a problem with [the Polisena] administration" because she was not permitted to receive health benefits through the Town. *Id.* at 42:1-2. The Councilwoman admitted to asking one of the Town's attorneys if she was eligible for enrollment in the Town's health insurance plan by virtue of her role on the Town Council. *Id.* at 43:9-11. Councilwoman Fuoco also sent a letter inquiring about obtaining health insurance through the Town. Mayor Polisena's statement that she was angry about the response is not defamatory.

6

Not Fulfilling Duties as a Councilwoman

Plaintiff, in her Memorandum in Opposition to Defendant's post-trial motions, contends that among other things, Mayor Polisena slandered her "by claiming that she . . . was not properly fulfilling her duties on the Johnston Town Council." While Mayor Polisena never used such words at the Meeting, it can be inferred from his confrontation with Councilwoman Fuoco that he was implying that she cared more about doing things for herself than for her constituents.

"[Our Supreme Court] has recognized that there is no wholesale exemption of opinion pieces from the purview of defamation claims." *Alves*, 857 A.2d at 750 (citing *Beattie v. Fleet Nat'l Bank*, 746 A.2d 717, 727 (R.I. 2000)). "However, a defamatory publication that consists of a statement in the form of opinion is 'actionable if and only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.'" *Id.* at 751 (quoting *Healey v. New England Newspapers, Inc.*, 555 A.2d 321, 324 (R.I. 1989)). "As a result, if the non-defamatory facts underlying an expressed derogatory opinion are publicly known or disclosed, the opinion, justified or unjustified, is privileged as a matter of law." *Id.* (citing *Hawkins v. Oden*, 459 A.2d 481 (R.I. 1983)). "Such statements are privileged because '[w]hen the facts underlying a statement of opinion are disclosed, readers will understand they are getting the author's interpretation of the facts presented; they are therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed [defamatory] facts.'" *Id.* (quoting *Standing Committee on Discipline of U.S. District Court for Cent. Dist. of California v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995)).

Mayor Polisena's opinion about Councilwoman Fuoco's performance on the council was based upon non-defamatory facts—namely, that she had applied for TDI and unemployment benefits, her desire to have her own street paved, and that she had spent considerable time in Florida—which he articulated at length at the Meeting. This opinion is therefore privileged as a matter of law. *See id.* (holding that "if the non-defamatory facts underlying an expressed derogatory opinion are publicly known or disclosed, the opinion, justified or unjustified, is privileged as a matter of law.").

Additionally, even beyond our Supreme Court's instruction regarding the non-defamatory nature of opinions that are based on disclosed, non-defamatory facts, the First Amendment's core

guarantee is the protection of political speech. One politician vocalizing his opinion about the performance of another politician is not just non-defamatory as a matter of law—it is the very core of democratic discourse in a free society. Indeed, as the U.S. Supreme Court has observed:

> "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

For a Court to conclude that Defendant's grievances with Plaintiff's performance were defamatory would be to eviscerate the concept of protected speech and to end all potential for public debate over issues of significant public importance—including the performance of a public official. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346–47 (1995) (holding that restrictions on political speech strike at the core of the First Amendment's protections).

7

Summation

The evidence leads to the conclusion that Mayor Polisena intended to confront Plaintiff at the Meeting on her performance as a Councilwoman. He testified that he took the TDI Letter out of his desk drawer after it having been there for two and one-half years. He put it in a folder, went home, took a shower, and had his dinner. He then went to the Meeting, interrupted Ms. Cardillo, and engaged Councilwoman Fuoco in the discourse discussed at length above. The Plaintiff was not caught by surprise. She said she was told she was going to be "crucified" at the Meeting. That prompted her to invite News Channel 10 to the Meeting. Mayor Polisena even confessed to "crucifying" her.

Counsel for Plaintiff, in closing argument to the jury and in oral argument on these motions, contended that the Defendant was intent on defeating the Plaintiff and electing the son of the Town Democratic Chairman. Whether that was Mayor Polisena's true motive is of no moment.

As the U.S. Supreme Court noted in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971), "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." The United States, since its founding, has enjoyed a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.*, 376 U.S. at 270.

The Meeting was more than robust, some might say it was raucous, and some might contend that Mayor Polisena's conduct lacked the civility one would hope to see at a public meeting. However, politics is not played by the *Marquis of Queensbury rules*.[4] The heart of the American experience is free expression. Plaintiff's position, and indeed this case in its entirety, evinces a concerning lack of veneration for the First Amendment. A Court cannot tell an elected official, a candidate for office, or a member of the public that he or she cannot be rude, insulting, or boorish. The Courts may not like what someone says or how it is said, but it is the duty of the Courts to protect the right of anyone to express oneself about a public official as long as the statements are not knowingly false or made with a reckless disregard for the truth.

Mayor Polisena's First Amendment rights, as well as the right of the public at large to share in a free and open exchange of ideas, supersedes any hurt feelings that such expression might cause, except in the narrowest of cases, which are not represented here. After viewing all

[4] Named for Sir John Sholto Douglas, the 8th Marquis of Queensbury, England, the *Marquis of Queensbury rules* are a code of fair-play governing boxing matches. *See* Webster's Third New International Dictionary 1384 (1971).

of the evidence in the light most favorable to Plaintiff, this Court finds that there are no "factual issues upon which reasonable people may have differing conclusions." *See Broadley*, 939 A.2d at 1020 (citing *Trainor*, 924 A.2d at 769). Accordingly, this Court grants Defendant's motion for judgment as a matter of law.

B

New Trial

This Court believes its ruling as to Defendant's motion for judgment as a matter of law is dispositive of this case. However, this Court will also consider Defendant's remaining motions. This Court is charged, on a motion for a new trial, with acting as a "super-juror" to "independently weigh, evaluate, and assess the credibility of the trial witnesses and evidence." *Morrocco*, 713 A.2d at 253.

The jury's verdict in this case demonstrates a lack of understanding on the part of the jury as to the instructions this Court provided prior to deliberations. The instructions, which neither party objected to, highlighted Councilwoman Fuoco's burden to prove by clear and convincing evidence that Mayor Polisena acted with actual malice. Despite the definition of clear and convincing that this Court provided, the jury found Mayor Polisena acted with actual malice. While there is no question that the Mayor hoped to undermine Councilwoman Fuoco's standing with her constituents, no evidence whatsoever was offered at trial as to Mayor Polisena's subjective knowledge of the falsity of his statements. The trial evidence was also wholly inadequate to support finding by clear and convincing evidence that Mayor Polisena acted with reckless disregard for the truth of his statements. Indeed, the evidence demonstrated that each and every complained-of statement he made at the Meeting was accurate in whole or in part, and the accuracy of those statements was not seriously rebutted at trial. Councilwoman Fuoco

questioned Mayor Polisena's opinions and the conclusions he drew from the facts he presented, but as previously discussed, opinions based upon disclosed, non-defamatory facts are not themselves defamatory. *See Alves*, 857 A.2d at 750.

This Court finds that reasonable minds could not differ as to the correct outcome of this case. *See Ferreira*, 21 A.3d at 364-65. Additionally, this Court holds that "the verdict is contrary to the fair preponderance of the evidence and fails . . . to respond to the merits of the controversy[.]" *Carlin v. Parkview Serv. Co.*, 625 A.2d 212, 213 (R.I. 1993). Accordingly, this Court would, absent this Court's ruling on Defendant's motion for judgment as a matter of law, grant Defendant a new trial on all issues.

C

Remittitur

In addition to the specific monetary damages awarded, the jury also awarded Plaintiff "2 terms town council stipend." The jury heard no testimony about the amount of a councilperson's stipend. Section 2-4 of the Charter of the Town of Johnston provides that a councilperson serves a two-year term, and after the verdict was rendered, the parties stipulated that the annual stipend for a councilperson is $6447.80. (Stipulation, June 27, 2018.) The jury's verdict would therefore include four years of this stipend, totaling $25,791.20.

This amount, as well as its method of calculation, is far too speculative to be sustained. While "[d]amages do not have to be calculated with mathematical exactitude[,]" they cannot be based on pure speculation. *Butera v. Boucher*, 798 A.2d 340, 350 (R.I. 2002). It is unclear from the evidence presented, and indeed likely impossible to demonstrate, that but for Mayor Polisena's statements at the Meeting that Councilwoman Fuoco would have been reelected. Even more speculative, the jury's verdict implies that but for Mayor Polisena's statements she

would have been reelected to an additional term thereafter. The nature of the jury's award demonstrates that "the jury proceeded from a clearly erroneous basis in assessing the fair amount of compensation to which [Plaintiff] is entitled." *Id.* at 350. Accordingly, if this case were not resolved by this Court's rulings on the preceding motions, this Court would grant Defendant's motion for a remittitur; specifically, unless Plaintiff agreed to reduce the damages awarded to $20,000, Defendant would be granted a new trial on the issue of damages only.

IV

Conclusion

For the reasons articulated above, Defendant's motion for judgment as a matter of law is granted. In the alternative, this Court also grants Defendant's motion for a new trial on all issues. This Court also, again in the alternative, grants Defendant's motion for a remittitur.

Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Eileen Fuoco v. Joseph Polisena
CASE NO:	PC-2013-5356
COURT:	Providence County Superior Court
DATE DECISION FILED:	August 16, 2018
JUSTICE/MAGISTRATE:	Licht, J.
ATTORNEYS:	
For Plaintiff:	Gregory J. Acciardo, Esq.
For Defendant:	Paul J. Sullivan, Esq.