

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Casella Waste Systems, Inc.

v.

Docket #217-2020-CV-212

Jon Swan f/k/a Jon Alvarez, Forest Lake Association,  
Save Forest Lake, Doe Defendants 1-20

**PLAINTIFF'S SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF ITS  
OBJECTION TO DEFENDANTS' MOTION TO DISMISS**

During the July 8, 2020, hearing on the motion to dismiss filed by defendants Jon Swan (f/k/a Jon Alvarez) and Save Forest Lake, the court stated that it considered the analysis set forth in *Automated Transactions, LLC v. American Bankers Ass'n*, 172 N.H. 528 (2019) (“*ATL*”) to be controlling here. Because neither the plaintiff’s motion nor the defendants’ objection addressed *ATL*, plaintiff submits this supplemental memorandum discussing the application of *ATL* to this case.

In *ATL*, an inventor and his company alleged defamation claims against the American Bankers Association (“ABA”); the Credit Union National Association (“CUNA”); Pierce Atwood, LLP; and a lawyer with that firm. *ATL*, 172 N.H. at 530. The plaintiff inventor held a patent on a device with “automatic teller machine” functionality to dispense cash. *Id.* Although the inventor and his company never commercialized the product, they licensed the patent to others and brought infringement litigation while also pursuing additional patents related to the “ATM” technology. *Id.* at 531. The plaintiffs alleged that the defendants referred to the plaintiff company, Automated Transactions, LLC, as a “patent troll” in public remarks in more than one setting and criticized the plaintiffs’ licensing practices as “extortive,” among other things. *Id.*

The plaintiffs attached as exhibits to the complaint all of the publications in which the defendants had allegedly defamed the plaintiffs.<sup>1</sup> This enabled both the superior court and the supreme court to consider the full context in which the allegedly defamatory statements took place.

In upholding the superior court's dismissal of the complaint, the New Hampshire Supreme Court observed that it is a general principle that "[w]ords alleged to be defamatory must be read in the context of the publication taken as a whole." *Id.* at 533. If, upon considering the words in context the statement is an opinion and not an assertion of fact it is not actionable. *Id.* at 532. One measure of actionability is whether "the statement is capable of being proven true or false." *Id.* at 533 (citing authorities). When a statement cannot be proven true or false it is opinion and is not actionable. *Id.* Similarly, if the court is able to discern from the complaint and its attachments that the defendant disclosed to all those reading or hearing the statement all of the grounds on which the defendant made the assertion of fact it makes it "clear that the challenged statements represent his own interpretation of those facts." *Id.* at 534. In such an instance, the statement is not actionable because it can only be construed as the speaker's opinion. *Id.*; *see also Pease v. Telegraph Pub. Co., Inc.*, 121 N.H. 62, 66 (1981). Finally, the court recognized that some assertions are simple name-calling that no reasonable person could construe as statements of fact. For example, calling a person a "bastard" or a "pig" is generally nonactionable because it "cannot reasonably be interpreted as stating actual facts about an individual." *ATL*, 172 N.H. at 534 (citation omitted). Whether a statement "can be read as being

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<sup>1</sup> *See ATL*, 172 N.H. at 537 (plaintiffs appended to the complaint a copy of a CUNA slideshow presentation that allegedly said ATL is a "well-known patent troll"); 541 (plaintiffs attached a copy of the ABA's 2013 congressional testimony to their complaint that included "references to ATL as a patent troll"); 543 (plaintiffs attached a copy of the ABA's 2014 congressional testimony to the complaint that contained allegedly defamatory statements); and 546, n.7 ("almost all of the complained-of statements" from Pierce Atwood appear in articles on the firm website, which were attached to the complaint).

or implying an actionable statement of fact” in its overall context is a question of law for the court to decide. *ATL*, 172 N.H. at 533.

The principles arising from *ATL* are instructive, but the case is not controlling. The crucial distinction between this case and *ATL* is that here the defendants have asked the court to construe their defamatory statements *without the full factual context*. Unlike in *ATL*, the plaintiff in this case did not attach the dozens of statements referred to in the complaint. In *ATL*, the supreme court repeatedly noted that the statements and their context were in the attachments to the complaint, so the superior court could consider them on a motion to dismiss. *Ante* at n. 1; *see Beane v. Dana S. Beane & Co., P.C.*, 160 N.H. 708, 711 (2010) (trial court may consider “documents attached to the plaintiff’s pleadings” on a motion to dismiss). Without this context it would have been improper for the superior court to attempt to determine whether the defendants’ statements were actionable as defamatory.

It would be a misinterpretation of *ATL* to construe it as holding that the use of certain words is always not actionable. The court did hold that the term “patent troll” is not actionable because, in part, there is no consensus of opinion on its meaning and therefore the plaintiff could not disprove it. *ATL*, 172 N.H. at 542. Some words, however, are capable of being construed as an assertion of fact or a statement of opinion. For example, “Ted Bundy was a predator” is a statement of fact because he preyed on young women, something that was proven true in his criminal trial. “All politicians are predators,” on the other hand, is on its face a statement of opinion because of its obvious generality. “Casella is a predator” is an assertion that the company preys on the communities in which it does business, a proposition that is demonstrably false. Similarly, in context calling someone’s behavior a “scam” can be an assertion of fact (“The FRM Ponzi scheme was a scam.”); *cf.* <https://www.doj.nh.gov/consumer/> (part of the

mission of the Consumer Protection Bureau at the New Hampshire Attorney General's office is to raise "widespread public awareness of consumer's rights and common scams to prevent problems"). Used loosely, of course, it can also be hyperbole or an opinion.

In addition to the utter lack of context within which to determine whether defendants' statements are actionable, this case differs from *ATL* in that here the defendants have made what are unequivocally statements of fact. These include:

- Statements that Casella spilled 8,000 gallons of landfill leachate into the Black River (Complaint at ¶20) and that there is 1,4-dioxane in the Ammonoosuc River coming from the company's landfill in Bethlehem (*id.* at ¶22). Both of these statements are provably false.
- A statement that the proposed Dalton landfill would release leachate that would contaminate groundwater and also affect surface water (*id.* at ¶32) and a photoshopped image purportedly depicting the landfill rising over 100 feet above the ridgeline between the site and the lake (*id.* at ¶31). Again, both statements are provably false.

*ATL*, then, is meaningfully distinguishable from this case because here the court does not have before it the context in which the defendants' defamatory statements were made. It is therefore not possible for the court in this case to perform the analysis on a motion to dismiss that the superior and supreme courts were able to undertake in *ATL*, which is why defendants sought to provide the court with a curated set of exhibits in its motion.

For the reasons stated in plaintiff's objection, at the hearing, and in this supplemental memo, defendants' motion to dismiss must be denied.

