Appendix A-1

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

23-P-414

ANTHONY MICHAEL BRANCH

vs.

AIDAN T. KEARNEY & others.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following the publication of a "blog" post, the plaintiff, Anthony Michael Branch, filed an amended defamation complaint in the Superior Court against the defendants, Aidan T. Kearney and related entities. A judge allowed the defendants' motion for summary judgment and dismissed the amended complaint. We affirm.

Background. On August 23, 2016, when former Secretary of State Hillary Clinton was running for President, a social media blog published a photograph of the plaintiff and Clinton under the title: "Fake Bishop Tony Branch Forces Brockton High School

[1] Turtleboy Digital Marketing, LLC; Turtleboy Enterprises, LLC, doing business as Turleboysports.com; and Worcester Digital Marketing, LLC.

to Change Name From 'Housemasters' To 'Deans' Because . . . . . Slavery." After quoting extensively from an article attributed to the Brockton Enterprise newspaper, which identified the plaintiff as chairman of the Brockton diversity commission, the blog criticized the name change, noted the plaintiff's support for Brockton creating the position of "Community Relations Director," and argued that the plaintiff "is interested in the same thing Hillary is -- money and power." Under a photograph of people marching and led by a person in a clerical collar, the blog continued, "See, Worcester isn't the only place with fake pastors who exist for the sole purpose of bilking the taxpayers and stirring up racial tensions." The blog concluded, "Anyway, this is how people like 'Bishop' Tony Branch make a living. They get fake theology degrees from online schools, and then they expect special treatment from the local governments because they call themselves 'religious leaders.'"

Three years later, the plaintiff filed his amended complaint and alleged that he is a "Pentecostal Bishop and well-respected civil rights leader." He claimed that the defendants published the blog and "knew or should have known" the statements in the blog were "false and made without reasonable grounds for belief in their truth." The plaintiff further alleged that the defendants "published the statements maliciously with knowledge of their falsity or with reckless

disregard for the truth." A judge allowed the defendants' motion for summary judgment. The plaintiff appealed from the judgment dismissing his complaint.

Discussion. 1. Summary judgment. "We review a grant of summary judgment de novo," Deutsche Bank Nat'l Trust Co. v. Fitchburg Capital, LLC, 471 Mass. 248, 252-253 (2015), to determine "whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the nonmoving party is entitled to judgment as a matter of law" (citation omitted). Molina v. State Garden, Inc., 88 Mass. App. Ct. 173, 177 (2015). In a defamation case, a public official must demonstrate by "clear and convincing" proof, Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974), 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." New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964). "Statements of pure opinion are constitutionally protected." King v. Globe Newspaper Co., 400 Mass. 705, 708 (1987), cert. denied, 485 U.S. 940, 962 (1988).

On the record before us, the plaintiff has not met his burden. Without identifying the many hats worn by the plaintiff in his community, we conclude that the New York Times standard applies at least because of the plaintiff's undisputed status as an elected member of the southeast regional vocational school

committee; chairman of the Brockton diversity commission; and candidate for elective offices of mayor, Brockton city council, and Governor's Council. Applying that rigorous standard, the summary judgment record is bereft of any facts showing that the defendants knew they published a false statement or had reckless disregard for the truth. New York Times Co., 376 U.S. at 279-280. For this reason alone, summary judgment was appropriate.

We disagree with the plaintiff's contention that calling someone a "fake bishop" or a "fake pastor" is an actionable false statement of fact in the context presented here. The blog reference to fake religious offices was nothing more than a constitutionally protected opinion, King, 400 Mass. at 708, especially in the context of the blog criticizing the plaintiff for leveraging his religious status to achieve political gains including being photographed with a presidential candidate, holding public office, and being responsible for changing the nomenclature of school administrators. See Cole v. Westinghouse Broadcasting Co., 386 Mass. 303, 311 (1982), cert. denied, 459 Mass. 1037 (1982) (nonactionable opinion that reporter was "sloppy and irresponsible" and had "history of bad reporting techniques"); Myers v. Boston Magazine Co., 380 Mass. 336, 338 (1980) (nonactionable opinion that sports announcer was "worst" in Boston and was "enrolled in a course for remedial speaking"). The statement about "bilking taxpayers" also constitutes a

protected opinion clearly linked to the plaintiff publicly supporting the creation of a $90,000-per-year position called "Community Relations Director." "When the statements are viewed within their context, they do not imply the allegation of undisclosed defamatory facts as their basis." Cole, 386 Mass. at 313. A harsh critic may resort to hyperbole as well as "caricature or rhetorical license" without losing constitutional protection for freedom of speech. Myers, 380 Mass. at 344.

We also reject the plaintiff's claim that the blog reference to a degree from an "online school" was false. That reference was not directed at the plaintiff. To the extent the statement could have been perceived as suggesting the plaintiff had an "online" degree, the plaintiff's deposition testimony resolves this claim in favor of the defendants. The plaintiff acknowledged in his testimony that he never obtained a bachelor's degree, and he also acknowledged that he falsely claimed to be a college graduate with a bachelor's degree. Thus, the reference to the "online" degree was even more generous than the truth of no degree at all. See Reilly v. Associated Press, 59 Mass. App. Ct. 764, 770 (2003) ("a factual statement need not state the precise truth").

In reviewing this matter, we are reminded of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it

may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times Co., 376 U.S. at 270. Even if the defendants' motivations were less than noble as the plaintiff suggests in his brief, "[d]ebate on public issues will not be uninhibited" if the challenged speech must be free of "hatred" or other "ill-will." Garrison v. Louisiana, 379 U.S. 64, 73-74 (1964). Also, "[t]he New York Times rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed." Id. at 77.

2. Other claims. While the civil action was pending, the defendants published a variety of blogs, with content appearing on Facebook and Twitter and broadcast on YouTube. Postings included extremely detailed findings of fact by a judge in the plaintiff's divorce proceedings, documents pertaining to civil judgments against the plaintiff, and documents from the plaintiff's filings in the United States bankruptcy court. In response to this barrage, the plaintiff filed a motion "to enjoin the defendants from harassing and causing emotional distress by intentionally engaging in a smear campaign to harm the plaintiff through the publishing and video posting of false statements." The plaintiff argued that Kearney's "intimidation under the cloak of being a reporter must not go unchallenged."

Another judge denied the motion for a preliminary injunction on April 25, 2022.

The appeal from the denial of this motion is not properly before us. Although the plaintiff referenced the unsuccessful motion for a preliminary injunction in the summary judgment notice of appeal (filed on March 7, 2023), the plaintiff failed to file a timely notice of appeal one year earlier following the denial of the motion for a preliminary injunction. See G. L. c. 231, § 118, second par. (appeal from denial of preliminary injunction "shall be taken within thirty days"); Mass. R. App. P. 4 (a) (1), as appearing in 481 Mass. 1606 (2019) (notice of appeal must be filed "within 30 days"). "A timely notice of appeal is a jurisdictional prerequisite to our authority to consider any matter on appeal." Wells Fargo Bank, N.A. v. Sutton, 103 Mass. App. Ct. 148, 152 (2023), quoting DeLucia v. Kfoury, 93 Mass. App. Ct. 166, 170 (2018). Accordingly, we lack jurisdiction to consider this additional claim, and we also note that the entry of a final judgment renders the denial of preliminary relief moot. See Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of the Dep't of Mental Retardation (No. 2), 424 Mass. 471, 472 (1997), S.C., 492 Mass. 772 (2023).[2]

[2] In response to the alleged smear campaign, the plaintiff also unsuccessfully requested the appointment of counsel based on his belief that the information published by the defendants suggested that the plaintiff engaged "in serious criminal

Judgment affirmed.

By the Court (Milkey, Hodgens & Toone, JJ.[3]),

Paul Little

Clerk

Entered: July 24, 2024.

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conduct." On appeal, he contends that the judge erred by denying his request, but he has not identified the origin of such a right to counsel in the circumstances presented. In any event, we discern no error. The right to counsel was not triggered by the mere suggestion of criminal conduct or even anticipation of a possible criminal prosecution. See, e.g., Kirby v. Illinois, 406 U.S. 682, 689 (1972) (Sixth Amendment right to counsel attaches only "at or after the initiation of adversary judicial criminal proceedings"); Miranda v. Arizona, 384 U.S. 436, 479 (1966) (Fifth Amendment right to counsel arises during custodial interrogation).

[3] The panelists are listed in order of seniority.

Appendix B-1

From: SJC Full Court Clerk
To: tonybranch@icloud.com
Subject: FAR-29958 - Notice: FAR denied
Date: Friday, November 15, 2024 10:00:59 AM

Supreme Judicial Court for the Commonwealth of Massachusetts

Telephone

RE: Docket No. FAR-29958

ANTHONY MICHAEL BRANCH
vs.
AIDAN T. KEARNEY & others

Plymouth Superior (Brockton) No. 1983CV00920
A.C. No. 2023-P-0414

NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW

Please take note that on November 14, 2024, the application for further appellate review was denied.

Very truly yours,
The Clerk's Office

Dated: November 14, 2024

To: Anthony Michael Branch
Ryan Patrick McLane, Esquire

Appendix C-1

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
1983CV00920

ANTHONY MICHAEL BRANCH

vs.

TURTLEBOY DIGITAL MARKETING, LLC & others[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Anthony Michael Branch filed this action against the defendants alleging that they defamed him through a 2016 blog post. For the reasons discussed below, the Defendants' Motion For Summary Judgment is **ALLOWED**.

BACKGROUND

The summary judgment record reveals the following facts. Aiden Kearney ("Kearney") is a self-described investigative reporter, entertainer, YouTuber, and entrepreneur. In his own words, Kearney is the best journalist in Massachusetts, the most trusted media outlet that has ever existed, and a legend when it comes to investigative reporting. Kearney publishes two blogs: tbdailynews.com and turtleboysports.com. Kearney authors some of the content[2] that appears on these blogs, but some of the content is authored by third parties. Kearney has derived income from the two blogs since 2014 through Google AdSense. He has sponsors for his

[1]Turtleboy Enterprises, LLC d/b/a Turtleboysports.com; Worcester Digital Marketing, LLC: and Aiden T. Kearney

[2]Content refers to postings other than mere comments on an existing story.

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Kearney has been blogging on tbdailynews.com since 2019. He does not allow third parties to post on that website at this time. Kearney believes it is important to be truthful in his reporting. He conducts an investigation before publishing a story on his "TB investigates" blog. However, his other blogs are simply commentary on events already reported by the media. Kearney's typical investigation consists of background research, calling people for their side of the story, and reviewing public records. An investigation can take as little as an hour or two or as long as weeks or months. If someone contacts Kearney and he learns that something he wrote was wrong, he will either take down the blog or edit it with a note explaining what happened. This has occurred fewer than five times.

Anthony Michael Branch ("Branch") has been an ordained Pentecostal minister since 1986 and is currently a Pentecostal Bishop. Branch was ordained to the Office of Elder on February 7, 2010 at a public ceremony at the Greater Miracle Deliverance Tabernacle Church of Brockton ("Greater Miracle"). His Pentecostal Apostolic faith believes that the positions of Elder and Bishop are synonymous. Branch was ordained by the presiding bishop, Bishop Robert Bridges, who is now deceased, after a ten-day examination of his character. Branch does not know how Bridges himself became a Bishop. Greater Miracle was independent and did not fall under any Assembly of God in the Pentecostal denomination. Branch received an Ordination Certificate that states: "After satisfactory examination regarding Christian experience, called to the ministry, personal qualifications and educational qualifications, Elder Anthony Michael Branch was duly ordained to the Christian ministry by the Greater Miracle Deliverance Tabernacle Christian ministry." This certificate is signed by Jacqueline Hill as Clerk of the Church, Pastor Alice Bridges as Clerk of the Council, and Bishop Robert Bridges as Moderator of the Council. Greater Miracle is no longer in existence and Branch does not know whether

any records exist regarding his ordination. People in the community called Branch "Bishop" before he was ordained, when he was only licensed as a youth minister, and he did not correct them.

Dr. Anthony Clark has a Ph.D. from Abotra Bible Institute & Seminary in Scottsburg, Alabama and is a professor at Faith Bible College in Independence, Missouri. He is the national Chaplain of the Kansas City Chapter of the Christian Fundamentalist Internal Revenue Employees. Dr. Clark avers that the ordination of Elder is synonymous with Bishop and that Branch is recognized as a Bishop in the Pentecostal Apostolic Faith. Dr. Clark avers that Branch remains a Bishop until his death, whether or not he oversees a congregation.

On August 23, 2016, a post appeared on the turtleboysports.com website, under the "Social Justice Warriors" tab, entitled: "Fake Bishop Tony Branch Forces Brockton High School to Change Name From 'Housemasters' to 'Deans' Because . . . Slavery." The post quotes from an article in the *Brockton Enterprise* and states, in relevant part:

> See, Worcester isn't the only place with fake pastors who exist for the sole purpose of bilking the taxpayers and stirring up racial tensions. Gotta love how Bishop Tony Branch calls Brockton High School a "plantation system." Because free public education and a lifetime full of involuntary brutal servitude are basically the exact same thing. Such a brilliant analogy. . . .
>
> Anyway, this is how people like "Bishop" Tony Branch make a living. They get fake theology degrees from online schools, and then they expect special treatment from the local government because they call themselves "religious leaders." But all they're really trying to do is make money. Because there's a lot of money to be made in the racism-industrial complex.

The author of this post is listed as "Turtleboy," which is the default username the website used after Kearney deleted the accounts of all the individuals who previously were permitted to post on the website. Sometime prior to 2019, Kearney deleted the account of whoever wrote the August 23, 2016 post. Kearney testified that he did not author the post and does not know the

identity of the author. People do call Kearney "Turtleboy" in public and he does not correct them, but Kearney's personal posts are attributed to his username, "Uncle Turtleboy." Kearney published a book, available on Amazon.com, entitled: "I am Turtleboy." The front cover states: "A teacher turned blogger battles big tech censorship, threats, and political correctness to protect free speech and democracy." Kearney testified that the title is a joke and explained: "Turtleboy is not a person. Turtleboy is a brand. Turtleboy is a movement. It is a movement of free speech of the people that say the things that, you know, that society frowns upon and political correctness frowns upon." Kearney has posted on tbdailynews.com under the name Clarence Woods Emerson. One such post commented on the turtleboysports.com post about Branch, stating: "Oh look, another chiseler with an online pastor degree is pretending to be a religious leader so he can profit [off] creating racial tension over non-issues."

As noted, *supra*, the August 23, 2016 post references people "who are so far removed from the everyday reality of public schools, but who still think they are in a position to dictate school policy." Kearney admits that he was a public high school teacher in Dudley, Massachusetts until November of 2014. The post states: "Worcester isn't the only place with fake pastors who exist for the sole purpose of bilking the taxpayers and stirring up racial tensions." Kearney admits that he used to live in Worcester, writes mostly about events in the Worcester area, and has written in the past about "fake pastors" out of Worcester who "bilk taxpayers" and "stir up racial tensions." However, he testified that the author of the August 23, 2016 post was just "following his lead with that."

Kearney testified that the first time he heard of Branch was when he received notice of this lawsuit. Kearney then googled Branch and read the August 23, 2016 post, which referenced a *Brockton Enterprise* article. In Kearney's view, the reference to Branch as a "fake" Bishop is

clearly opinion. Kearney uses hyperbolic statements all the time, such as calling Al Sharpton a "fake pastor" because he thinks Sharpton is a con artist and his conduct is not Christ-like.

Kearney deleted the August 23, 2016 post when he became aware that Branch was going to sue him, in August of 2019. Kearney does not know if the emails used by posters on turtleboysports.com were real or fake or whether they could be traced to an IP address. He has not engaged an expert to examine the website or determine that. By deleting the post. Kearney eliminated any ability to identify the author of the post. He testified that he deleted the post as a sign of good faith because Branch was so embarrassed by it, and not to erase any record of him authoring the post. He deletes posts all the time to make potential lawsuits go away.

Kate Peter ("Peter") avers that between August of 2018 and February of 2020, Kearney paid her to blog for the turtleboysports.com website. Peter also helped Kearney build his YouTube channel following. Peter and Kearney parted on bad terms and filed harassment proceedings against each other. According to Peter, Kearney had complete editorial control over all posts on the website, and no one could post anonymously on his site. She avers that Kearney recruited bloggers, paid them, reviewed their work, and rejected or edited work he did not like. On two occasions, Kearney published blogs written entirely by him under Peter's username. Bristol Turtlechick. On another occasion, Kearney changed a post authored by Peter under the username Bristol Turtlechick to indicate that it was authored by Turtleboy to take credit for her work involving potential national news. Peter avers that in 2018, Kearney approached her and told her that he was being sued by Branch for a blog he wrote in 2016. He expressed frustration that Branch waited to file the suit unitl the last day when the statute of limitations was going to expire.

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The Turtleboy blog disseminated information contained in a publicly available July 5, 2016 decision of a judge of the Plymouth Division of the Probate and Family Court in Branch's divorce. Judge Lisa Roberts found, among other things, that his ex-wife, Evelyn Wiggins, obtained an abuse prevention order against him. However, the blog did not disseminate that the court vacated that abuse prevention order on July 8, 2015 and expunged it from the Domestic Violence Registry. Judge Roberts found that Branch and his wife failed to inform the Department of Children and Families about their marriage because they did not want to lose the wife's cash tuition benefits. Judge Roberts also found that Wiggins testified that Branch took her virginity when she was 15 and he was 35 and that Branch's testimony that he never had sex with Wiggins until she was 18 was not credible. According to Branch, during the divorce trial, the judge did not ask him any questions about when he first had sexual intercourse with Wiggins. Judge Roberts found that Branch used the name "Toney Shabazz" on Facebook. Branch used this name when he was considering joining the Nation of Islam. He was not considering becoming a Muslim but was becoming militant and exploring Black nationalism.

The Turtleboy blog disseminated information that a woman named Lashaun Middleton obtained an abuse prevention order against Branch. However, the blog failed to note that the court declined to renew that ten-day abuse prevention order on June 26, 2015. The blog also disseminated information that Branch was arrested on firearm charges. After Branch asked Middleton to leave his house, on June 11, 2015, Middleton gave police ammunition from the house. However, Branch testified that the District Attorney dismissed the firearms case against him on November 8, 2018.

After the August 23, 2016 post, Branch experienced emotional distress at having to constantly explain that the blog was incorrect about his ministry and status as a Bishop. He experienced insomnia, fear, and weight loss.

In September of 2016, Branch received three wedding cancelations. He usually charged $600 to $800 per wedding. Two cancellations stated that they heard Branch had license issues. The third said her son heard bad things about Branch on the Internet from Turtleboy. Branch has no documents to support his claim that any weddings he was to perform were cancelled due to the August 23, 2016 post. He cannot remember the names of any of the three couples he claims cancelled their weddings and has no records to show that he lost income from wedding cancellations. Branch has no documents to support his claim that he performed ten to twelve weddings a year prior to the August 23, 2016 post. In his 2016 bankruptcy filing, Branch did not list any income from performing weddings.

In November of 2016, one of Branch's daughters was working on a school project that required her to find interesting things about her father. She googled Branch and found the Turtleboy post. Branch's daughter was very upset that her classmates would think Branch was not a preacher.

In July of 2017, Branch was asked to test preach at Lighthouse Church in Brockton and Life Ministries in Taunton. One church paid $400 per service and the other paid $300 per service. Neither church hired him after researching him and reading the August 23, 2016 post because they did not want any issues of legitimacy. The Tree of Life Ministry was offering an annual salary of $42,000, and Branch test preached there on July 23, 2017. On July 25, Debra Calhoun of Tree of Life messaged Branch that the pastor was going to conduct a background check but would love to have him again. However, later that day, Calhoun told Branch that he

would not be offered the appointment because members of the church had concerns about him after reading Turtleboy posts.

Branch is a community activist who volunteers for the Social Justice Coalition, the NAACP, Haitian Community Partners, the Cape Verdean Association of Brockton, and the Massachusetts Alliance Against Predatory Lending. After the August 23, 2016 post, Branch was suspended from the NAACP for one week based on community complaints that he falsified his status as a Bishop. Thereafter, however, the NAACP issued a statement supporting him. Numerous individuals at the Social Justice Coalition questioned Branch about the post. Branch has run for the positions of Mayor and City Councilor in Brockton and the position of Governor's Councilor.

Branch admits that in 2007, he inaccurately reported his income to the Section 8 subsidized housing agency. Branch also admits that he lied to his automobile insurance agency after his wife was in a single-vehicle accident and submitted a claim to the insurance carrier. Branch admits that he falsely stated on his resume for a job at the Citizens Commission that he graduated from Bradford College. In 2017, Branch sued the Department of Revenue for suspending his driver's license without proper notice for a child support arrearage. As a result of the lawsuit, DOR reinstated his license and the Probate and Family Court later resolved the arrearage issue.

Branch filed this action on August 23, 2019, alleging defamation and seeking compensatory damages and injunctive relief. Branch is an elected member of the Southeastern Regional Vocational School Committee. In 2022, many parents in the Southeastern Regional School District sought Branch's resignation as Chair of the School Committee based on information in the post on the Turtleboy website. Kearney's repeated appearance at school

committee meetings with signs calling Branch a pedophile to force him to resign has frightened and disgusted Branch.

DISCUSSION

Summary judgment shall be granted where there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56. The moving party bears the burden of affirmatively demonstrating the absence of a triable issue and that the summary judgment record entitles it to judgment as a matter of law. *Scholz* v. *Delp*, 473 Mass. 242, 249 (2015), cert. den., 136 S.Ct. 2411 (2016). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. *Id.*

Defamation requires proof that the defendant made a statement of and concerning the plaintiff to a third party, the statement could damage the plaintiff's reputation in the community, the defendant was at fault for making the statement, and the statement caused economic loss or is actionable without such loss. *Scholtz* v. *Delp*, 473 Mass. at 249. Summary judgment is especially favored in defamation cases. *King* v. *Globe Newspaper Co.*, 400 Mass. 705, 708 (1987), cert. den., 485 U.S. 940 (1988). Kearney contends that Branch has no reasonable expectation of proving defamation at trial.

Communications Decency Act

Kearney first contends that a defamation claim is barred by the Communications Decency Act ("the Act"), which provides in relevant part: "Treatment of publisher or speaker. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any

information provided by another information content provider." 47 U.S.C. § 230(c)(1). Under the Act, an "interactive computer service" is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server. . ." 47 U.S.C. § 230(f)(2). An "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). Thus, the Act provides broad immunity from suit to entities that facilitate the speech of others on the Internet. *Massachusetts Port Auth.* v. *Turo Inc.*, 487 Mass. 235, 240 (2021); *Universal Commc'n Sys.* v. *Lycos, Inc.*, 478 F.3d 413, 415 (1st Cir. 2007). "Congress intended that, within broad limits, message board operators would not be held responsible for the postings made by others on that board." *Universal Commc'n Sys.* v. *Lycos, Inc.*, 478 F.3d at 418. See also *Force* v. *Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019), cert. den., 140 S.Ct. 2761 (2020) (Act is interpreted broadly in favor of immunity). Liability for the creation or development of content requires something more than a publisher's traditional editorial function of deciding what to publish and altering content. *Monsarrat* v. *Newman*, 28 F.4th 314, 318 (1st Cir. 2022); *Nemet Chevrolet, Ltd.* v. *Consumeraffairs.com, Inc.*, 591 F.3d 250, 258 (4th Cir. 2009). See also *Force* v. *Facebook, Inc.*, 934 F.3d at 68 (defendant does not develop content unless he directly and materially contributes to what makes the content unlawful). Under the Act, an interactive computer service provider remains liable for its own speech. *Massachusetts Port Auth.* v. *Turo Inc.*, 487 Mass. at 240; *Monsarrat* v. *Newman*, 28 F.4th at 318; *Universal Commc'n Sys.* v. *Lycos, Inc.*, 478 F.3d at 419. See also *Nemet Chevrolet, Ltd.* v. *Consumeraffairs.com, Inc.*, 591 F.3d at 254 (providers are liable only for speech that is properly attributable to them).

Kearney argues that he is entitled to judgment as a matter of law on Branch's defamation claim because he is an interactive computer service provider and was not responsible for the creation or development of the August 23, 2016 post. The turtleboysports.com website is a social media platform that qualifies as an interactive computer service provider under the Act. However, viewing the summary judgment record in the light most favorable to Branch, there is a genuine issue of material fact with respect to whether Kearney authored the post and is an information content provider not entitled to immunity under the Act.

The August 23, 2016 post is attributed to "Turtleboy" and although Kearney testified that this is a default username and he personally posts under the username "Uncle Turtleboy," there is evidence that Kearney answers to the name Turtleboy and wrote a book entitled, "I am Turtleboy." In addition, the content of the post, including references to the reality of public schools and fake pastors out of Worcester who bilk taxpayers, are similar to other posts by Kearney and may support a reasonable inference that he more likely than not is the author. Cf. *Commonwealth* v. *Welch*, 487 Mass. 425, 441 (2021) (text message or other electronic communication may be authenticated by circumstantial evidence including content, substance, internal pattern, or other distinctive characteristics). Finally, Peter asserts in her affidavit that Kearney admitted to writing the post. See Mass. G. Evid. § 801(d)(2) (2022) (out-of-court statement made by opposing party and offered against him is not hearsay). Although Peter arguably is a biased witness, the Court cannot weigh the credibility of her affidavit on summary judgment. See *Barbetti* v. *Stempniewicz*, 490 Mass. 98, 116 (2022). Thus, Kearney has not established that as a matter of law, he is entitled to immunity under the Act because he was not the creator or developer of the August 23, 2016 post but merely the host of the platform. See

Khalsa v. *Sovereign Bank, N.A.*, 88 Mass. App. Ct. 824, 830 (2015) (only a toehold is required to survive summary judgment).

Damages

Kearney further contends that he is entitled to summary judgment because Branch has no reasonable expectation of proving damages. Damages for defamation are limited to compensatory damages for actual injury such as harm to reputation and mental suffering. *Shafir* v. *Steele*, 431 Mass. 365, 373 (2000). Kearney argues that Branch cannot show damage from the statements in the August 23, 2016 post because so much other negative information about Branch was publicly available, including the Probate Court judge's findings in his divorce. A plaintiff may be defamation-proof if, based on his existing poor reputation, it is clear as a matter of law that the defamatory statements at issue could not have harmed him. *Jackson* v. *Longcope*, 394 Mass. 577, 579 (1985); *Sullivan* v. *Superintendent, Mass. Corr. Inst., Shirley*, 101 Mass. App. Ct. 766, 776 (2022). "Depending upon the nature of the conduct, the number of offenses, and the degree and range of publicity received, there comes a time when the individual's reputation for specific conduct, or his general reputation for honesty and fair dealing is sufficiently low in the public's estimation that he can recover only nominal damages for subsequent defamatory statements." *Jackson* v. *Longcope*, 394 Mass. at 579. Kearney has not shown that, as a matter of law, Branch is defamation-proof with respect to statements that he is a fake Bishop and bilked the taxpayers. See *Sullivan* v. *Superintendent, Mass. Corr. Inst., Shirley*, 101 Mass. App. Ct. at 776 (inmate was not defamation-proof as matter of law where accusation of theft was inconsistent with his prior criminal history of alcohol abuse and domestic violence). Cf. *Jackson* v. *Longcope*, 394 Mass. at 582 (notorious serial rapist and murderer could not be defamed by inaccuracies in article about his crimes).

Kearney further argues that Branch cannot prove that he lost any income as a result of the August 23, 2016 post. However, a statement impugning one's professional competence or qualifications is actionable without proof of economic damages. *Ravnikar* v. *Bogojavlensky*, 438 Mass. 627, 630 (2003). The statement that Branch is a "fake pastor" falls into this category. In addition, the statement that Branch exists only to bilk the taxpayers could reasonably be understood as accusing him of illegal activity. A statement imputing a crime is actionable without proof of economic loss. *Sullivan* v. *Superintendent, Mass. Corr. Inst., Shirley*, 101 Mass. App. Ct. at 776. Moreover, a plaintiff who is not defamation-proof and can prove defamation but not actual injury may recover nominal damages. *Shafir* v. *Steele*, 431 Mass. at 373; *Yong Li* v. *Yanling Zeng*, 98 Mass. App. Ct. 743, 748 n.10 (2020). Thus, Kearney has not demonstrated that he is entitled to judgment as a matter of law based on Branch's lack of damages.

Substantial Truth

Kearney also contends that Branch has no reasonable expectation of proving that the statements at issue are false. To recover for defamation with respect to a matter of public concern, the plaintiff must prove not only that the statements were defamatory but also that they were false. *Dulgarian* v. *Stone*, 420 Mass. 843, 847 (1995). "This requirement insulates from liability statements that are not provable as false." *Id.* To prove a statement false, the plaintiff must show there is no possibility, however slight, that it was true. *Id.* See also *Milgroom* v. *News Group Boston, Inc.*, 412 Mass. 9, 13 (1992) (there is no liability for defamation if statements are substantially true); *Reilly* v. *The Associated Press*, 59 Mass. App. Ct. 764, 770 (2003), rev. den., 441 Mass. 1103 (2004) (factual statement need not state precise truth and minor inaccuracy will not support defamation claim).

Kearney argues that the statements that Branch is a "fake pastor" and has a "fake theology degree" are substantially true because Branch has no degree and admitted that he called himself a Bishop before he in fact was one. However, the summary judgment record reveals that at the time of the August 23, 2016 post, Branch had been ordained as a Bishop within his religion and had a certificate of that ordination. In addition, according to Dr. Clark, Branch is recognized as a Bishop in the Pentecostal Apostolic Faith and remains a Bishop until his death, whether or not he oversees a congregation. Accordingly, there is a genuine issue of material fact with respect to the truth or falsity of the statement that Branch is a fake pastor.

Kearney further argues that the statement that Branch bilked the taxpayers is substantially true because Branch admitted that he used a fake bachelor's degree to get a job, lied to his insurance company when submitting a claim for his wife's accident, and inaccurately reported his income to a subsidized housing agency. However, the first two admissions imply fraud to gain a financial benefit from private companies, not the taxpayers. Further, although lying about one's income to obtain a public housing benefit involves defrauding the taxpayers, the August 23, 2016 post suggests that Branch bilked the taxpayers in connection with his role as a religious leader and/or with respect to civil rights issues. Cf. *Jones* v. *Taibbi*, 400 Mass. 786, 795-796 (1987) (statement is substantially true if it did not create a substantially greater defamatory sting than accurate statement would). There is no evidence in the record that this occurred. Accordingly, there is a genuine issue of material fact with respect to the truth or falsity of the statement about bilking the taxpayers.

Non-Actionable Opinion

Kearney next contends that Branch cannot prove defamation because the statements at issue are hyperbole and opinion. To be actionable, a statement must be a false statement of fact

rather than an opinion, because statements of pure opinion are constitutionally protected. *Scholtz* v. *Delp*, 473 Mass. at 249-250; *King* v. *Globe Newspaper Co.*, 400 Mass. at 708. An opinion which implies the existence of undisclosed defamatory facts may be actionable, but an opinion based on disclosed or assumed nondefamatory facts is not actionable no matter how unjustified or how derogatory it may be. *Scholtz* v. *Delp*, 473 Mass. at 252-253; *Dulgarian* v. *Stone*, 420 Mass. at 849. In determining whether a statement constitutes opinion, the court examines the statement in the context in which it was published, considering all the words used and the medium by which it was disseminated. *Lyons* v. *Globe Newspaper Co.*, 415 Mass. 258, 263 (1993); *Van Liew* v. *Eliopoulos*, 92 Mass. App. Ct. 114, 120, rev. den., 478 Mass. 1105 (2017). See *Tuvell* v. *Marshall*, 2019 WL 5654950 at *2-3 (Mass. App. Ct. Rule 1:28), rev. den., 483 Mass. 1108 (2019) (noting that blog is forum generally understood to reflect personal views of writer, implying commentary rather than statement of objective facts).

The statement that Branch is a "fake pastor" is clearly an opinion that is based on the disclosed fact that he got his theology degree from an online school. See *Scholtz* v. *Delp*, 473 Mass. at 253 (statement is not actionable if logical nexus between facts and opinion is sufficiently apparent to render unreasonable an inference that derogatory opinion was based on undisclosed facts). Accordingly, even if this statement is derogatory and unjustified, it is not actionable. See *Scholtz* v. *Delp*, 473 Mass. at 252-253; *Dulgarian* v. *Stone*, 420 Mass. at 849. The statement that Branch "exists for the sole purpose of bilking the taxpayers" also appears to be an opinion, but there are no disclosed facts in the post to support it. An opinion which implies the existence of undisclosed defamatory facts may be actionable. *Id.* If a statement reasonably can be understood as either a fact or an opinion, it is a question of fact for a jury. *Scholtz* v. *Delp*, 473 Mass. at 250; *King* v. *Globe Newspaper Co.*, 400 Mass. at 709. Viewed in the light most

favorable to Branch, the statement that he bilks the taxpayers reasonably could be understood as based on undisclosed defamatory facts which can be proved true or false. Cf. *Scholtz* v. *Delp*, 473 Mass. at 250 (statement that does not contain objectively verifiable facts is not actionable). Accordingly, Kearney is not entitled to judgment as a matter of law with respect to that statement.

Actual Malice

Finally, Kearney argues that Branch has no reasonable expectation of proving the requisite level of fault for defamation. Given that Branch is a limited public figure,[5] he must prove that the challenged statements were made with actual malice: knowledge that they were false or reckless disregard for their falsity. *Edwards* v. *Commonwealth*, 477 Mass. 254, 263 (2017); *Scholtz* v. *Delp*, 473 Mass. at 249 n.8; *Lane* v. *MPG Newspapers*, 438 Mass. 476, 485 (2003). Reckless disregard requires more than mere negligence, and even a showing of gross carelessness by a defendant is not sufficient to establish actual malice. *Edwards* v. *Commonwealth*, 477 Mass. at 263; *Stone* v. *Essex Cty. Newspapers, Inc.*, 367 Mass. 849, 869 (1975). It is not enough to show that information was available that would cause a reasonably prudent man to entertain serious doubts. *Edwards* v. *Commonwealth*, 477 Mass. at 264. The fact that journalistic standards were not met or that a reasonable person would have investigated further is not sufficient to prove malice. *Murphy* v. *Boston Herald, Inc.*, 449 Mass. 42, 49 (2007). A public figure must prove more than an extreme departure from professional standards to prevail on a defamation claim. *Id.*

[5]The Court (Buckley, J.) held that Branch is a limited public figure in a December 3, 2020 Memorandum of Decision and Order on Defendant's Motion to Dismiss. Branch does not challenge that ruling for purposes of summary judgment.

Reckless disregard means serious doubt as to the truth of the statement. *Milgroom* v. *News Group Boston, Inc.*, 412 Mass. 9, 11 (1992); *Tosti* v. *Ayik*, 394 Mass. 482, 491 (1985). "The inquiry is a subjective one as to the defendant's attitude toward the truth or falsity of the statement rather than the defendant's attitude toward the plaintiff." *Rotkiewicz* v. *Sadowsky*, 431 Mass. 748, 755 (2000). The defendant's state of mind may be shown by inferences drawn from the objective evidence. *Edwards* v. *Commonwealth*, 477 Mass. at 264; *Tosti* v. *Ayik*, 394 Mass. at 492. "Recklessness amounting to actual malice may be found where a publisher fabricates an account, makes inherently improbable allegations, relies on a source where there is an obvious reason to doubt its veracity, or deliberately ignores evidence that calls into question his published statements." *Levesque* v. *Doocy*, 560 F.3d 82, 90 (1st Cir. 2009).

To proceed to trial, the evidence must warrant a jury in concluding that actual malice was proved by clear and convincing evidence. *Tosti* v. *Ayik*, 394 Mass. at 491; *Stone* v. *Essex Cty. Newspapers, Inc.*, 367 Mass. at 870. Viewed in the light most favorable to Branch, the summary judgment record fails to raise a genuine issue of material fact with respect to whether Kearney published the August 23, 2016 post with actual malice. At best, the record shows that Kearney was negligent because he failed to conduct a more thorough investigation. Branch argues that a jury could infer malice from the fact that Kearney has conducted a "smear campaign" against him, frequently posting about him, disseminating negative information about him taken from public records, and harassing him at School Committee meetings. However, evidence of personal ill will, spite, or hatred toward the plaintiff is insufficient, without more, to establish actual malice for purposes of defamation. *Edwards* v. *Commonwealth*, 477 Mass. at 266; *HipSaver, Inc.* v. *Kiel*, 464 Mass. 517, 530 (2013).

On this record, Branch has no reasonable expectation of proving, by clear and convincing evidence, that Kearney harbored serious doubt about the truth of the statements that he is a fake Bishop and bilks the taxpayers. Cf. *Tosti* v. *Ayik*, 394 Mass. at 493 (jury could find actual malice based on defendant's admission that he did not care whether statement was true and objective evidence that defendant either fabricated accusations or made them solely based on suspicion, not fact); *Stone* v. *Essex Cty. Newspapers, Inc.*, 367 Mass. at 869 (jury could find actual malice where defendant admitted he was surprised by accusation of criminal conduct by plaintiff because he had detailed knowledge of plaintiff's reputation and character that was inconsistent with nature of alleged crime). Thus, Kearney is entitled to judgment as a matter of law on Branch's defamation claim.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Defendants' Motion For Summary Judgment be **ALLOWED**.

William M. White, Jr.
Justice of the Superior Court

DATED: February 8 , 2023

A TRUE COPY ATTEST
Clerk of Courts

Additional material from this filing is available in the Clerk's Office.