

# O'Brien v. Pembroke, 2022 Mass. App. Unpub. LEXIS 261

Appeals Court of Massachusetts

April 8, 2022, Entered

21-P-99

## Reporter

2022 Mass. App. Unpub. LEXIS 261 \*

BRYAN O'BRIEN vs. TOWN OF PEMBROKE & others.**1**

## Notice:

Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See *Chace v. Curran*, 71 Mass. App. Ct. 258, 260 n.4, 881 N.E.2d 792 (2008).

## Disposition:

Judgment affirmed.

## Core Terms

---

defamatory statement, defamation, member of the board, pleadings, amend

**Judges:** Massing, Grant & Walsh, JJ.

## Opinion

---

### *MEMORANDUM AND ORDER PURSUANT TO RULE 23.0*

The plaintiff, Bryan O'Brien, filed a defamation complaint against the town of Pembroke and four municipal officials (collectively, the defendants) and a motion to amend the complaint to add State Representative Joshua Cutler as a defendant. A Superior Court judge denied the plaintiff's motion to amend and granted the defendants' motion for judgment on the pleadings. We affirm.

*Background.* The plaintiff filed his complaint, which he later amended as a matter of right, on May 11, 2018. We summarize the facts as alleged by the plaintiff, drawing every reasonable inference in his favor. See *Pacific Indem. Co. v. Lampro*, 86 Mass. App. Ct. 60, 63, 12 N.E.3d 1037 (2014).

The plaintiff's defamation claim arises from the production of two reports that detailed health and safety concerns at a rental property in Pembroke that the plaintiff owned. The first report was published by Environmental

Resources, LLC, on or about December 29, 2014, at the request of Representative Cutler. The plaintiff alleged that the Environmental Resources report "omitted important background information, stated false and defamatory statements as facts, and contained misleading reports." The plaintiff also alleged that Cutler discussed the Environmental Resources report with members of the Pembroke board of health (board) and the South Shore Community Action Council "before the report was made public."**2**

The second report was published by defendant Lisa Cullity, a health agent for the board, at the board's public meeting on April 27, 2015. When the board met again on May 11, 2015, defendant board members Donna Bagni, Tom Driscoll, and Gary Fine "accepted" the Cullity report and "ordered [it] to be published on the public record." In doing so, they attached the Environmental Resources report as part of the Cullity report. The plaintiff identified at least twelve statements in the reports that he alleged were false, although he did not specify which statements were contained in which report. He alleged that Cullity defamed him by "submitting her report" to the board and that Bagni, Driscoll, and Fine defamed him by "accepting and filing" the Cullity and Environmental Resources reports on the public record.

The defendants filed a motion for judgment on the pleadings. The judge granted the motion on the grounds that Pembroke was exempt from liability under the Massachusetts Tort Claims Act, G. L. c. 258, § 10 (c),**3** and that the allegedly defamatory statements were conditionally privileged because they were communicated within the scope of the individual defendants' official duties.

Before the defendants filed their motion for judgment on the pleadings, the plaintiff filed a motion to amend the complaint, proposing to add Cutler as a defendant. The judge denied the motion because the plaintiff's proposed pleadings against Cutler failed to state a claim.

*Discussion.* 1. *Proposed claim against Cutler.* We review the denial of the plaintiff's motion to amend the complaint for abuse of discretion. See *Dzung Duy Nguyen v. Massachusetts Inst. of Tech.*, 479 Mass. 436, 461, 96 N.E.3d 128 (2018). Denial of a motion to amend is within a judge's discretion if amending would be "futile." *Id.* An amendment is futile if it pleads a claim outside the statute of limitations, see *Adorno v. Crowley Towing & Transp. Co.*, 443 F.3d 122, 126-127 (1st Cir. 2006), or otherwise fails to state a claim upon which relief can be granted, see *Jessie v. Boynton*, 372 Mass. 293, 295, 361 N.E.2d 1267 (1977).

"An action for defamation must be commenced within three years after the cause of action accrues." *Wolsfelt v. Gloucester Times*, 98 Mass. App. Ct. 321, 324, 155 N.E.3d 737 (2020), citing G. L. c. 260, § 4. "[T]he cause of action accrues, and the statute of limitations begins to run, on publication of the defamatory statement," which occurs when the statement "is communicated to a third party." *Wolsfelt, supra*, quoting *Harrington v. Costello*, 467 Mass. 720, 725, 7 N.E.3d 449 (2014). A subsequent cause of action against the original defamer for the same statement may accrue if the original defamer repeats or republishes the statement. See *Wolsfelt, supra* at 329, citing Restatement (Second) of Torts § 577A comment d, at 210 (1977). Republication of a defamatory statement by other parties subjects those parties to "liability as if [they] had originally published it." *Jones v. Taibbi*, 400 Mass. 786, 792, 512 N.E.2d 260 (1987), quoting *Appleby v. Daily Hampshire Gazette*, 395 Mass. 32, 36, 478 N.E.2d 721 (1985).

The defamatory statements attributed to Cutler were all published prior to or on completion of the Environmental Resources report on or around December 29, 2014. The board's decision to repeat those statements by publishing the Environmental Resources report in a public record with the

Cullity report gave rise to a new cause of action against the board members, not against Cutler. See *Jones*, 400 Mass. at 792. The proposed claims against Cutler, which relate back to the plaintiff's original complaint filed on May 11, 2018, were thus beyond the three-year statute of limitations, and amending the complaint to add Cutler would have been futile. See *Adorno*, 443 F. 3d at 126-127; *Jessie*, 372 Mass. at 295.

2. *Claim against Cullity*. The plaintiff's claim against Cullity is similarly time barred.<sup>4</sup> Cullity's only publication of the defamatory statements occurred at the board's meeting on April 27, 2015, more than three years before the plaintiff filed his original complaint. A new cause of action against Cullity did not arise from the board's republication of her statements.

3. *Claims against Bagni, Driscoll, and Fine*. The statements of Bagni, Driscoll, and Fine were made in their official capacities as members of the board engaged in a routine health and sanitation investigation. Such statements are generally subject to a conditional privilege. See *Lawless v. Estrella*, 99 Mass. App. Ct. 16, 23, 160 N.E.3d 1253 (2020). The privilege may be lost, however, "if (1) there is 'unnecessary, unreasonable or excessive publication,' and the defendant recklessly published the defamatory statements; (2) the defendant published the defamatory statements with knowledge of their falsity or with reckless disregard of the truth; or (3) the defendant acted with actual malice." *Id.* at 24, quoting *Barrows v. Wareham Fire Dist.*, 82 Mass. App. Ct. 623, 631, 976 N.E.2d 830 (2012). Individuals act with reckless disregard as to a statement's truth when they entertain "serious doubts" about its truth. *Lawless, supra* at 24-25.

The plaintiff's allegations do not reasonably support the conclusion that Bagni, Driscoll, or Fine excessively publicized the Cullity or Environmental Resources report, harbored serious doubts about the veracity of the reports, or published the reports out of some malice or ill will against the plaintiff.

Assuming the plaintiff's factual allegations are true, as we must, the board members ordered one of the board's health agents to write a report about the plaintiff's property in response to a request they received from a former tenant, Cullity produced the report for the board two weeks later, and the board published the report on the public record two weeks after that. The plaintiff does not allege that this sequence of events deviated from the board's usual procedures for responding to inspection requests or disseminating a health agent's report. Nor does he allege that the board members were aware of any reasons to question the accuracy of the Cullity or Environmental Resources report.<sup>5</sup> Accordingly, the plaintiff did not plausibly allege facts to overcome the defendants' conditional privilege.

*Judgment affirmed.*

By the Court (Massing, Grant & Walsh, JJ.<sup>6</sup>),

Entered: April 8, 2022.

## Footnotes

---

- **1**

Donna Bagni, Tom Driscoll, Gary Fine, and Lisa Cullity.

- **2**

The plaintiff sought to add these allegations regarding Cutler's discussions of the Environmental Resources report in the plaintiff's motion to amend.

- **3**

The plaintiff conceded in Superior Court that the Massachusetts Tort Claims Act exempted Pembroke from liability and does not argue otherwise on appeal.

- **4**

Although the judge dismissed the claim against Cullity because her statements were subject to a conditional privilege, we can affirm the dismissal on any ground apparent on the record.

See *Padmanabhan v. City of Cambridge*, 99 Mass. App. Ct. 332, 338, 166 N.E.3d 1010 (2021).

- **5**

The plaintiff's allegation that Cullity reported on dampness in the plaintiff's attic and crawlspace even though she never inspected those areas, disregarded third-party reports that contradicted her own, and relied on the Environmental Resources report even though the plaintiff told her it was inaccurate go only to whether Cullity, not the board members, acted with reckless disregard for the truth.

- **6**

The panelists are listed in order of seniority.

[O'Brien v. Pembroke, 2022 Mass. App. Unpub. LEXIS 261](#)