

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2009-0530

Michael R. Smith

v.

**Frisbie Memorial Hospital, Laboratory Corporation of America Holdings,
Carol A. Themelis, Brenda Niland, Dawna Enman, and Dale Huntzinger**

Appellee Brenda Niland's Opposing Brief

**On Appeal from a Final Order of the
Strafford County Superior Court**

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Supreme Court Rule 13(2) [The Record].....1, 6, 8

Generally, the trial court record is not automatically transferred to the supreme court. Unless a party takes appropriate action to ensure that the record is before the supreme court either by filing an appendix pursuant to Rule 13(3) or by filing a motion pursuant to Rule 13(4), then the record may not be before the supreme court to be considered. The moving party shall be responsible for ensuring that all or such portions of the record relevant and necessary for the court to decide the questions of law presented by the case are in fact provided to the supreme court. The supreme court may dismiss the case or decline to address specific questions raised on appeal for failure to comply with this requirement.

Supreme Court Rules 16(3)(b) [Briefs].....1, 6, 8

(3) So far as possible, the brief of the moving party on the merits shall contain in the order here indicated:

.....

(b) The questions presented for review, expressed in terms and circumstances of the case but without unnecessary detail. While the statement of a question need not be worded exactly as it was in the appeal document, the question presented shall be the same as the question previously set forth in the appeal document. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. The moving party may argue in his brief any question of law not listed in his appeal document, but only if the supreme court has granted a motion to add such question, and he has presented a record that is sufficient for the supreme court to decide the questions presented. Motions to add a question may be filed only by a party who filed an appeal document (including a party who filed a cross-appeal), and shall be filed at least 20 days prior to the due date of the moving party's brief.

After each statement of a question presented, counsel shall make specific reference to the volume and page of the transcript where the issue was raised and where an objection was made, or to the pleading which raised the issue. Failure to comply with this requirement shall be cause for the court to disregard or strike the brief in whole or in part, and opposing counsel may so move within ten days of the filing of a brief not in compliance with this rule.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Appellant, Michael Smith (“Mr. Smith”), is entitled to appellate review of the Superior Court’s order dismissing his claims against Brenda Niland for breach of contract, defamation, and false light when Mr. Smith’s brief on appeal contains no argument concerning these issues and his appeal fails to comply with Supreme Court Rules 13(2) and 16(3)(b).

2. If this Honorable Court undertakes review of Mr. Smith’s appeal despite his failure to brief his questions presented and his violations of Supreme Court Rules 13(2) and 16(3)(b), whether the Superior Court erred when it dismissed Mr. Smith’s breach of contract claim, Mr. Smith having failed to allege a contract to which Ms. Niland was a party.

3. If this Honorable Court undertakes review of Mr. Smith’s appeal despite his failure to brief his questions presented and his violations of Supreme Court Rules 13(2) and 16(3)(b), whether the Superior Court erred when it dismissed Mr. Smith’s defamation claim, Mr. Smith having failed to allege that Ms. Niland published any statement of fact, whether true, false, defamatory or otherwise.

4. If this Honorable Court undertakes review of Mr. Smith’s appeal despite his failure to brief his questions presented and his violations of Supreme Court Rules 13(2) and 16(3)(b), whether the Superior Court erred when it dismissed Mr. Smith’s false light claim, even assuming New Hampshire law provides a cause of action for the tort of false light/invasion of privacy, Mr. Smith having failed to allege that Ms. Niland placed him before the public in any light (false or otherwise).

STATEMENT OF THE CASE

On October 4, 2007, Michael Smith commenced a lawsuit, *pro se*, against Brenda Niland, as well as Frisbie Memorial Hospital, Carol Themelis, Laboratory Corporation of America Holdings (“LabCorp”), Dawna Enman, and Dale Huntzinger. *See* Appendix of Brenda Niland (“A.”) 1-15. Mr. Smith asserted claims against Ms. Niland for breach of contract (Count I), defamation (Count III), and invasion of privacy – false light (Count IV).¹ *See* A. 8-14. A discussion of the undisputed material facts underlying Mr. Smith’s claims is set forth in the separate brief of Appellee/Cross-Appellant Dawna Enman filed in this matter today, at pages 3 through 11. Because Mr. Smith’s claims against Ms. Niland were dismissed on the pleadings, however, only the allegations set forth in Mr. Smith’s pleadings are necessary to adjudicate this appeal. Mr. Smith’s allegations against Ms. Niland were as follows:

Mr. Smith’s writ of summons identified Ms. Niland as “a Labcorp supervisor at Frisbie Memorial Hospital,” where he held an “evenings and night maintenance position.” A. 3-4. Mr. Smith alleged that: “On or around September 19, 2004, [Frisbie employee] Dale Huntzinger [falsely reported] to Frisbie[’s] ... Human Resource[s] Department that [Mr. Smith] was making sexual harassment advances.” A. 4. Then, “[o]n November 1, 2004, ... Dawna Enman went to the Farmington Police Department with [false] allegations that [Mr. Smith] was making harassing telephone calls. The Farmington Police Department advised ... Dawna Enman to inform her employer, Frisbie Memorial Hospital, of the allegations of harassment.” *Id.* Then, “[o]n November 11, 2004, [Mr. Smith] was ... ‘separat[ed] from employment at Frisbie Memorial Hospital for allegations of a sexual harassment complaint brought by ... Dawna

¹ Mr. Smith’s claims against Frisbie Memorial Hospital, Carol Themelis, LabCorp (which he incorrectly identified as Labcorp Burlington), Dawna Enman, and Dale Huntzinger are not relevant to Ms. Niland’s response to Mr. Smith’s appeal and therefore are not addressed herein.

Enman.” *Id.*

Mr. Smith asserted a claim of breach of contract against Ms. Niland, but did not point a *contract* to which she was a party. *See* A. 8-10. Mr. Smith also asserted claims of defamation and false light against Ms. Niland, claiming that she “failed to exercise reasonable care regarding the accuracy of the statements made by Co-Defendant Dawna Enman, in terminating the Plaintiff,” A. 12, but he did not allege any statement that Ms. Niland had uttered, published, or publicized, let alone any such false statement.

Thus, on December 14, 2007, Ms. Niland filed a motion to dismiss Mr. Smith’s lawsuit against her for failure to state a claim upon which relief may be granted. *See* A. 16-20. Ms. Niland argued that Mr. Smith’s breach of contract claim should be dismissed because it alleged *no facts* regarding *any* of the essential elements of a breach of contract claim. *See* A. 18 (discussing the absence of factual allegations on each of the essential elements, which are “(1) the existence of a valid and binding contract [with Ms. Niland]; (2) that [Mr. Smith] has complied with th[at] contract and performed [his] obligations under it; and (3) [a] breach [by Ms. Niland] of [that] contract causing damages.”) (citations omitted).

Ms. Niland moved to dismiss Mr. Smith’s defamation claim on the ground he failed to allege that she uttered or published any statement of fact, whether true, false, defamatory, or otherwise. *See* A. 18.

As to Mr. Smith’s false light claim, Ms. Niland argued that this Court has never recognized this cause of action, but even if such a claim were recognized in New Hampshire, Mr. Smith still failed allege facts that could satisfy the elements of that tort. *See* A. 19. Specifically, he alleged no facts that Ms. Niland *publicized* any false matter placing him in a false light. *Id.*

Mr. Smith objected to Ms. Niland's motion to dismiss but did not address any of these deficiencies in his writ of summons. *See* A. 21-25.

The Superior Court (Houran, J.), granted Ms. Niland's motion to dismiss by order dated May 14, 2008. *See* A. 26-39. The Court combed Mr. Smith's writ of summons, set out the allegations therein, and concluded, correctly, that:

the plaintiff [Mr. Smith] fails to allege that Ms. Niland made *any* statements regarding the plaintiff meeting the tests for all elements of a claim of defamation or false light . . . or that Ms. Niland and the plaintiff had a contractual relationship for a breach of contract claim.

A. 35 (emphasis added).

On May 27, 2008, Mr. Smith filed a motion for reconsideration of the dismissal of his false light claim, *see* A. 40-42, and filed a separate motion entitled, "Plaintiff's Motion for Reconsideration of Motion to Dismiss All Claims." A. 43-54. Neither of these motions presented any relevant issue of law or fact that was overlooked by the Superior Court, and therefore, Ms. Niland filed an objection to them on June 5, 2008. *See* A. 55-58.

On July 1, 2008, the Superior Court (Houran, J.) denied Mr. Smith's motion for reconsideration with respect to his claims against Ms. Niland. *See* A. 59-61.

On July 10, 2008, Mr. Smith filed a motion to amend his writ of summons. A. 62-93. Ms. Niland opposed the motion on the ground that (1) the proposed amended writ of summons did not cure the defects of the existing writ and (2) the proposed amendment was incoherent, scattershot, and downright incomprehensible. A. 94.

The Superior Court (Houran, J.) considered Mr. Smith's proposed amended writ of summons, and construing it broadly and in a light most favorable to Mr. Smith, concluded: "the amended writ still fails to state claims upon which relief may be granted on its assertions of

breach of contract, . . . on its assertions of false light, . . . and on its assertions of defamation.”²

A. 102.

On August 7, 2008, Mr. Smith filed yet another motion to amend his writ of summons.

A. 105-134. Again, his proposed amendment still did not cure the defects of the existing writ, and therefore, Ms. Niland objected to the amendment. *See* A. 135-36. Mr. Smith, in turn, objected to Ms. Niland’s objection, but did not suggest how his proposed amendment would cure the deficiencies in his claims against her. *See* A. 137-39.

The Superior Court (Houran, J.) construed Mr. Smith’s proposed second writ of summons broadly and in favor of Mr. Smith, “to do substantial justice.” A. 141. The Court again combed the proposed writ of summons to determine if the additional allegations had cured the deficiencies in Mr. Smith’s claims against Ms. Niland. *See* A. 142-43. It concluded, correctly, that Mr. Smith still failed to state a claim against Ms. Niland for breach of contract, defamation, and false light. A. 144. By order dated August 29, 2008, the Superior Court denied Mr. Smith’s second motion to amend the writ of summons with respect to his claims against Ms. Niland.³

On July 27, 2009, Mr. Smith filed a notice of appeal which, broadly construed, questions whether the Superior Court erred in dismissing his claims against Ms. Niland for breach of contract, defamation, and false light. *See* A. 150 (question presented no. 6).⁴

² The Court did, however, allow Mr. Smith to amend his writ of summons with respect to his defamation and tortious interference with contractual relationship claims against Ms. Enman, which Ms. Enman addresses in her opposition to Mr. Smith’s appeal and her cross-appeal, filed today.

³ Again, the Court allowed Mr. Smith to amend his writ of summons with respect to his defamation and tortious interference with contractual relationship claims against Ms. Enman.

⁴ In his sixth question presented in his notice of appeal, Mr. Smith mentions a claim he never made against Ms. Niland and does not discuss in his brief (regarding a violation of RSA 275:56, III), and therefore, Ms. Niland does not address this issue. Similarly, his eighth question presented includes Ms. Niland’s name but is utterly incomprehensible and not briefed by Mr. Smith. *See* A. 150. Therefore, Ms. Niland cannot and does not address it.

SUMMARY OF THE ARGUMENT

The Superior Court's order, dated May 14, 2008, dismissing Mr. Smith's breach of contract, defamation, and false light claims against Ms. Niland should be *affirmed*. As a threshold matter, Mr. Smith presents literally *no argument* in support of his appeal from the dismissal of these claims. Aside from the question presented, Mr. Smith's brief contains no mention of these issues. Because Mr. Smith failed to brief these issues, the Court should decline to address them and affirm the Superior Court's order without review. *See, e.g., Kelleher v. Marvin Lumber & Cedar Co.*, 152 N.H. 813, 852 (2005) (“[T]he defendant failed to adequately brief this issue. Therefore, we find this issue is not sufficiently developed for our review.”) (citing *ACG Credit Co. v. Gill*, 152 N.H. 260, 264 (2005)).

Furthermore, the Superior Court's order should be affirmed because Mr. Smith has failed to present an adequate record for review, in violation of Supreme Court Rule 13(2), and has failed to identify where in the record he preserved these issues for appeal, in violation of Supreme Court Rule 16(3)(b).

In the event the Court undertakes substantive review of Mr. Smith's appeal, the outcome should be the same. Mr. Smith's writ of summons (his original writ applicable to Ms. Niland as well as his amended ones) contains *no factual allegations* sufficient to state a claim for breach of contract, defamation, and false light. Simply, Mr. Smith has not alleged (and cannot truthfully allege) that Ms. Niland was party to a contract with him (or any other elements of a breach of contract claim), and thus cannot state a breach of contract claim. He has not alleged (and cannot truthfully allege) facts sufficient to show that Ms. Niland uttered, published, or publicized any false statement, and thus cannot state claims for defamation and false light. Accordingly, the Superior Court did not err in granting Ms. Niland's motion to dismiss these claims.

ARGUMENT

I. The Standard of Review

The Court need not even consider Mr. Smith's questions of whether the Superior Court erred in dismissing his claims against Ms. Niland of breach of contract, defamation, and false light because Mr. Smith has not presented any argument on these questions. This Court routinely declines to address issues raised on appeal that have not been adequately briefed, or as in this case, not briefed at all. *See, e.g., Kelleher*, 152 N.H. at 852; *In re AlphaDirections, Inc.*, 152 N.H. 477, 483-84 (2005); *State v. LeCouffe*, 152 N.H. 148, 152 (2005); *State v. Haines*, 142 N.H. 692, 699 (1998); *Arthur Whitcomb, Inc. v. Town of Carroll*, 141 N.H. 402, 404-05 (1996). Furthermore, the Court need not consider Mr. Smith's questions because he has failed to comply with the Supreme Court's rules that "affirmatively require the moving party both to provide a sufficient record on appeal and to demonstrate where each question presented on appeal was raised below. . . ." *Bean v. Red Oak Property Management, Inc.*, 151 N.H. 248, 250 (2004) (citing Supreme Court Rules 13, 16(3)(b)).

Should the Court consider these questions despite the deficiencies in Mr. Smith's appeal, Mr. Smith "has the burden to demonstrate error. . . ." *Canty v. Hopkins*, 146 N.H. 151, 155 (2001) (The plaintiff must also "provide an adequate record for our review."). The Court will consider whether "the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery . . . assum[ing] the truth of all well-pleaded facts alleged by the plaintiff, construing all inferences in the light most favorable to the plaintiff." *Id.*

II. The Order Dismissing Mr. Smith’s Claims Against Ms. Niland Should Be Affirmed Because Mr. Smith’s Brief Contains No Argument on this Issue and Fails to Comply with Supreme Court Rules 13(2) and 16(3)(b).

Mr. Smith offers, literally, no argument on his appeal from the Superior Court’s order dismissing all claims against Ms. Niland for failure to state a cause of action. He is not entitled to have this Court, or Ms. Niland, guess as to the basis of his appeal.

This Court routinely declines to review questions on appeal that are not adequately briefed. *See, e.g., Kelleher*, 152 N.H. at 852 (“[T]he defendant failed to adequately brief this issue. Therefore, we find this issue is not sufficiently developed for our review.”) (citing *ACG Credit Co. v. Gill*, 152 N.H. 260, 264 (2005)); *In re AlphaDirections, Inc.*, 152 N.H. at 483-84 (declining to address arguments that “were not adequately briefed”); *LeCouffe*, 152 N.H. at 152 (“Because the defendant failed to adequately brief or argue his equal protection claim, we decline to address it.”); *Arthur Whitcomb, Inc.*, 141 N.H. at 404-05 (declining to address several procedural issues raised on appeal because the appellant “did not brief them adequately.”) (citations omitted). This approach applies equally to *pro se* parties. *Haines*, 142 N.H. at 699 (because *pro se* defendant “fail[ed] to expound adequately upon” his argument, court did not consider it). Declining to review an issue raised on appeal is especially appropriate where, as here, there is literally no mention of that issue in the appellant’s brief.

Furthermore, Mr. Smith has failed to comply with the Supreme Court’s rules that “affirmatively require the moving party both to provide a sufficient record on appeal and to demonstrate where each question presented on appeal was raised below. . . .” *Bean*, 151 N.H. at 250 (citing Supreme Court Rules 13, 16(3)(b)). He has not provided a complete record on appeal, and not once does he cite where in the record he preserved the issues raised in his notice of appeal.

Therefore, the Court should affirm the Superior Court's order, dated May 14, 2008, dismissing Mr. Smith's claims against Ms. Niland for failure to state a claim.

III. The Order Dismissing Mr. Smith's Claims Against Ms. Niland Should Be Affirmed Because Mr. Smith Has Failed To State a Claim

Should this Court be inclined to consider Mr. Smith's questions presented on appeal despite the deficiencies in his appeal, discussed above, it should still affirm the Superior Court's order, dated May 14, 2008, denying Mr. Smith's claims against Ms. Niland for failure to state a claim.

A. Mr. Smith Has Failed To State a Claim for Breach of Contract

In order to prevail in an action against Ms. Niland for breach of contract, Mr. Smith was required to state facts alleging: "(1) the existence of a valid and binding contract [with Ms. Niland]; (2) that [Mr. Smith] has complied with th[at] contract and performed [his] obligations under it; and (3) [a] breach [by Ms. Niland] of [that] contract causing damages." *In re Tyco International, Ltd. Multidistrict Litigation*, MDL Docket No. 02-1335-B, Opinion No. 2004 D.N.H. 048 (*Persson v. Scotia Prince Cruises, Ltd.*, 330 F.3d 28, 34 (1st Cir. 2003) (citing 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §1235, at 268-70 (2d ed. 2002)). Mr. Smith has failed to allege *any* facts establishing *any* of the three required elements of a cause of action for breach of contract as to Ms. Niland.

Accordingly, the Superior Court appropriately granted Ms. Niland's motion to dismiss this claim. *See* A. 34-35. Further, none of the allegations in Mr. Smith's amended writ of summons, which were, appropriately, not permitted to be filed with respect to Ms. Niland, cured this fatal deficiency. *See* A. 62-93, 105-34.

B. Mr. Smith Has Failed To State a Claim for Defamation

To prevail in an action against Ms. Niland for defamation, Mr. Smith was required to state facts alleging that she “failed to exercise reasonable care [when she] *publish[ed]*, without a valid privilege, a false and defamatory statement of fact about [Mr. Smith] to a third party.” *See Independent Mechanical Contractors, Inc. v. Gordon T. Burke & Sons, Inc.*, 138 N.H. 110, 118 (1993). Mr. Smith did not (and truthfully cannot) allege that Ms. Niland uttered or published any false statement of fact about him to a third party.⁵

Accordingly, the Superior Court did not err in granting Ms. Niland’s motion to dismiss this claim. *See* A. 34-35. Further, none of the allegations in Mr. Smith’s amended writ of summons, which were appropriately not permitted to be filed with respect to Ms. Niland, cured this fatal deficiency. *See* A. 62-93, 105-34.

C. Mr. Smith Has Failed To State a Claim for Invasion of Privacy – False Light

To prevail in an action against Ms. Niland for the tort of “invasion of privacy – false light,” Mr. Smith must first prevail upon this Court to recognize this tort. *See Thomas v. Telegraph Publishing Co.*, 151 N.H. 435, 440 (2004) (“We have not yet addressed whether the tort of invasion of privacy – false light is recognized in New Hampshire, ... and we need not do so at this time.”). Were the Court to recognize this tort (even though Mr. Smith has suggested no reason to do so), Mr. Smith would still have to allege facts that satisfy its elements. This he has not done.

The elements of a false light claim are recited in the Restatement (Second) of Torts as follows:

⁵ Indeed, Mr. Smith provided deposition testimony, under oath, that Ms. Enman’s report of sexual harassment to her workplace supervisor, Ms. Niland, was substantially true (and thus is not defamatory). *See* Brief of Appellee/Cross-Appellant Dawna Enman, at pages 27-29.

One who gives publicity to a matter concerning another that placed the other before the public in a false light is subject to liability to the other for invasion of privacy, if

- (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
- (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts § 652E, Publicity Placing Person in False Light.

Mr. Smith failed to allege *any* facts establishing this tort or Ms. Niland's liability therefor. Specifically, he failed to allege that Ms. Niland "g[a]ve publicity to [any] matter[.]" or that Mr. Smith was *ever* "placed ... before the public in [any] light[.]" whether "false" or otherwise. Nor can he truthfully do so.⁶

Accordingly, the Superior Court did not err in granting Ms. Niland's motion to dismiss this claim. A. 34-35. Further, none of the allegations in Mr. Smith's amended writ of summons, which were appropriately not permitted to be filed with respect to Ms. Niland, cured this fatal deficiency. *See* A. 62-93, 105-34.

CONCLUSION

The Superior Court's order granting Ms. Niland's motion to dismiss Mr. Smith's suit against her for failure to state a claim should be *affirmed* because (1) Mr. Smith failed to brief the issues, to present an adequate record on appeal, and to identify where in the record he preserved the issues for appellate review and (2) Mr. Smith has not alleged (and cannot allege) facts sufficient to state a claim against Ms. Niland for breach of contract, defamation, or false light.

⁶ *See supra* note 5.

REQUEST FOR ORAL ARGUMENT

Ms. Niland requests oral argument not to exceed fifteen (15) minutes, to be presented by her counsel, Lawrence M. Edelman or Michele E. Kenney.

S. CT. RULE 16(10) CERTIFICATION

The undersigned hereby certifies that two copies of this brief have been sent by first class mail to Michael R. Smith, *pro se*, at P.O. Box 1076, Milton, New Hampshire 03851, and to Dawnangela Minton, Esq., Bernstein Shur Sawyer & Nelson, P.A., 670 North Commercial Street, Suite 108, P.O. Box 1120, Manchester, New Hampshire 03105, counsel for Frisbie Memorial Hospital and Carol Themelis.

Respectfully submitted,

Brenda Niland

By her attorneys,
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