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IN THE DISTRICT COURT OF JOHNSON COUNTY, NEBRASKA

MARK A. HOGUE,	)	Case ID CI98-20
	)	Docket No. 47
Plaintiff,	)	
	)	
v.	)	
	)	
JOURNAL STAR PRINTING CO.,	)	
A Nebraska corporation,	)	
	)	
Defendant.	)	

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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SUMMARY OF CASE

This is a libel case against a newspaper. Plaintiff Mark A. Hogue has filed an Amended Petition against Defendant Journal Star Printing Co. alleging that the Defendant published a libelous news story about him in July 1997. Defendant has filed an Answer to Amended Petition (hereinafter "*Answer*") admitting publication of the story, but denying that it was defamatory. Defendant also claims that the statements were true, that they were qualifiedly privileged, and that it is protected from liability by printing a correction story. These pleadings, along with the pending Motion for Partial Summary Judgment, frame the issues before the court.

Two related lawsuits are also pending in this Court against two individuals that made the original slanderous statements published by the Defendant: Hogue v. Mike Wolken, Docket 20 Page 297, Case No. 7214, and Hogue v. Tracy Cox, Docket 20 Page 297, Case No. 7215. These cases will be referred to herein collectively as the "Cox/Wolken cases." Discovery from those cases, previously provided to Defendant's counsel, will be offered to the Court and referred to in this Brief.

On November 15, 1999, in support of this motion, Plaintiff offered the following Exhibits:

Exhibit 1 Deposition of Mark Hogue (hereinafter "Hogue Deposition")

Exhibit 2 Deposition of Carrie Critchfield from the Cox/Wolken cases (hereinafter "Critchfield Deposition")

Exhibit 3 Deposition of Sheriff Stanley Osterhoudt (hereinafter "Osterhoudt Deposition")

Exhibit 4 Deposition of Tracy Cox from the Cox/Wolken cases (hereinafter "Cox Deposition")

Exhibit 5 Deposition of Mike Wolken from the Cox/Wolken cases (hereinafter "Wolken deposition")

Exhibit 6 Defendant's Objections and Answers to First Set of Requests for Admissions, Interrogatories, and Requests for Production of Documents (hereinafter "Defendant's Answers")

Exhibit 7 One page printout of the earliest story printed by the Defendant newspaper about the fatal accident in question (hereinafter "Exhibit 7")

Exhibits 1, 3, and 6 were admitted without objection. The parties stipulated that Exhibit 7 be admitted as an addition to Exhibit 6. Exhibits 2, 4, and 5 were offered, but their admission into

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evidence was taken under advisement so the Court can review the law of the admissibility of depositions from another lawsuit for purposes of a summary judgment motion.[1]

The Court also took judicial notice of the Amended Petition and Answer to Amended Petition in this case. Plaintiff intends to offer two more exhibits on December 6, 1999 and those are also discussed in this case.

The Defendant did not offer any evidence to the Court on November 15, 1999, but indicated an intent to offer evidence on this motion on December 6, 1999. It is Plaintiff counsel's understanding that additional evidence will be presented by the Defendant in opposition to this motion, and in support of its anticipated motion for summary judgment on that date. Plaintiff respectfully requests the Court to allow Plaintiff to further respond by brief after Plaintiff has obtained and reviewed the proposed evidence by Defendant.

FACTUAL SUMMARY

The following facts have been established by the pleadings, depositions, and affidavits offered or to be offered into evidence at the time of hearing on this motion. No genuine issue of material fact exists as to the following facts:

The Accident

1. On or about July 26, 1997, Plaintiff Mark A. Hogue, in performance of his legal duties as a Johnson County Deputy Sheriff, attempted to stop a vehicle with an apparent drunken driver. *Amended Petition*, ¶¶ 4 and 7; *Answer*, ¶ 4 and 7; *Hogue Deposition* 66:11-68:11.

2. The driver of the vehicle, Kenneth Persinger, failed to stop his vehicle and took off at a high rate of speed, in excess of the posted speed limit by 19-29 mph. *Hogue Deposition* 68:3-7; *Osterhoudt Deposition*, Exhibit 6, Page 16.

3. Several minutes later Persinger's vehicle slid 266 feet before going airborne, hitting an embankment, and vaulting 28 feet; Persinger died at the scene. *Hogue Deposition* 77:11-80:14; *Osterhoudt Deposition*, Exhibit 6, Page 37; see also *Amended Petition* ¶ 7 and Answer ¶ 7.

4. This accident was fully investigated by the Nebraska State Patrol, the Johnson County Attorney, the Johnson County Sheriff, and finally by a grand jury. *Hogue Deposition* 80:16-82:11.

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[1] See Argument, Section I, herein.

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5. Deputy Hogue was found to have conducted himself properly and in accordance with all legal requirements in his pursuit of Persinger's vehicle. *Hogue Deposition* 26:22-27:20 (see 25:18-26:21 for context); *Osterhoudt Deposition* 21:16-19; 44:8-14.

Defendant's contact with Tracy Cox and Mike Wolken

6. The Defendant publishes a daily newspaper in Lincoln, Nebraska, with circulation including Johnson County, Nebraska. *Amended Petition*, ¶ 5; *Answer* ¶ 5.

7. Carrie Critchfield was, at all relevant times, acting as a reporter for the Defendant. *Amended Petition* ¶ 6; *Answer* ¶ 6.

8. Several days after the accident, Tracy Cox, a friend of Persinger, had a telephone conversation with Critchfield about the Persinger accident. *Cox's Answers to Plaintiff's First Request for Admissions and Interrogatories* (hereinafter "Cox's Answers"), Answers to Interrogatory No. 4 and No. 6.

9. In that conversation, Cox stated that:

a. Hogue had threatened Persinger with a gun, and that Hogue was going to kill Persinger. *Cox Deposition* 21:16-20. (Hereinafter, the "threat" statement.)

b. Hogue had previously followed her and Persinger "like a stalker, except he was the law" *(Critchfield Deposition* 49:18-22) or made reference to "stalking" (*Cox Deposition* 23:4-17). (Hereinafter, the "stalking" statement.)

10. Cox admits that she was not present nor had any first-hand knowledge of the circumstances of the death of Persinger. *Cox's Answers*, Responses to Requests for Admissions Nos. 4-7, inclusive, and 11.

11. Furthermore, Cox had no factual or reasonable basis to support her statements about the alleged prior problems between Hogue and Persinger or her inference of a connection to the cause of the fatal accident. She had no training or expertise in law enforcement techniques (*Id.* 25:12-14) or accident reconstruction "other than Perry Mason" (*Cox Deposition* 25:7-9).

10. Cox was not present for any of the incidents that Persinger supposedly told her happened with Hogue. *Cox Deposition* 26:9-24.

11. Shortly before that conversation, Mike Wolken, another friend of Persinger, called the Defendant to complain about the newspaper's summary coverage of the accident involving Persinger. *Wolken's Answers to Plaintiff's First Request for Admissions and Interrogatories* (hereinafter "Wolken's Answers"), Answer to Interrogatory No. 4; see also Exhibit 7. He also spoke with Critchfield. *Wolken's Answers*, Answer to Requests Nos. 8 and 9, and Answers to Interrogatories Nos. 4(a) and 6; *Wolken Deposition* 13:17-20; 16:20.

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12. In that conversation, Wolken told Critchfield that:

a. Hogue had previously threatened Persinger with a gun. *Wolken's Answers,* Answer to Interrogatory No. 6. (Hereinafter, along with Cox's similar statement, the "threat" statements.)

b. In conjunction with his questioning of Hogue's job performance as it related to the fatal accident, Hogue "had it in for" Persinger. *Wolken's Answers,* Answer to Interrogatory No. 6. (Hereinafter, the "had it in for" statement.)

c. In conjunction with his questioning of Hogue's job performance as it related to the fatal accident, Deputy Hogue and Persinger had a history of conflict. *Wolken's Answers,* Answer to Interrogatory No. 6. (Hereinafter, "conflict" statement.)

13. Wolken says he called the newspaper "because they didn't tell the whole truth in the paper." *Wolken Deposition* 17:17-21; see also Exhibit 7.

14. Wolken also admits that he was neither present nor had any first-hand knowledge about the circumstances of the death of Persinger. *Wolken's Answers,* Responses to Requests for Admissions Nos. 4-7, inclusive, and 11. Wolken's basis for his statements against Hogue was "this was told to me by Kenneth Persinger." *Wolken's Answers*, Answers to Requests for Admission Nos. 12, 13, and 14.

15. Wolken had no other basis for his statements nor justification for the imputation that Plaintiff had committed some misconduct or illegal action with respect to the death of Persinger. *Wolken Deposition* 18:13-19:11.

16. Each of the statements listed in Paragraphs 9, 10, and 12-14, above, were false. *Hogue Deposition* 44:7-9; 55:6-57:8; 58:20-59:7; 63:1-9.

17. At the time of his conversation with Critchfield, Wolken believed that Hogue had engaged in some sort of misconduct or that he had violated the law in reference to the Persinger accident, and conveyed that to Critchfield "in one way or another." *Wolken Deposition* 19:12-20:2. Furthermore, Critchfield understood his comments to mean that Plaintiff was "angry with" or "maybe wanted revenge" against Persinger. *Critchfield Deposition* 74:1-25.

18. Critchfield did not have counsel present with her at her deposition, but had been in contact with Defendant's counsel, Shawn Renner, prior to her deposition. *Critchfield Deposition* 5:20-25; 35:25-36:23; 38:5-20.

19. Critchfield has claimed privilege under the Nebraska Shield Law[2] and refused to disclose information regarding details of her conversations with Cox or Wolken, including her

[2] Free Flow of Information Act, *Neb. Rev. Stat.* § 20-146.

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notes. *Critchfield Deposition* 16:2-7; 17:4-18:4; 18:5-16; 21:7-12; 17:4-18:4; 20:10-17; 21:4-6; 35:22-23; 38:11-20. She has also testified under oath that she will not, in the future, change her mind about waiving the privilege. *Critchfield Deposition* 58:15-59:12.

Defendant's contact with Mark Hogue

20. Critchfield never spoke with Mark Hogue. *Critchfield Deposition* 19:10-13.

Defendant's contact with other sources

21. In preparation of the article, Critchfield spoke with only the following four sources: Mike Wolken, Tracy Cox, Stan Osterhoudt, and Steve Mercure. *Critchfield Deposition* 16:12-17:3; 19:10-18; 19:14-18.

22. Johnson County officials, presumably Sheriff Stanley Osterhoudt and County Attorney Steve Mercure, told Critchfield that Cox and Wolken's allegations against Hogue should not be taken seriously. *Hogue Deposition*, Exhibit 1.

The Story - "Friends urge inquiry into fatal pursuit"

23. On or about July 27, 1997, Critchfield wrote a story for publication in the Defendant's newspaper headlined "Friends urge inquiry into fatal pursuit." *Amended Petition* ¶ 8, *Answer* ¶ 8.

24. The first paragraph of the story said that ". . . Kenneth Persinger died Wednesday after fleeing from a sheriff's deputy . . . friends question the pursuit, saying the chase was the result of a history of conflict between the two men [Persinger and Hogue]." The story continued "'He [Persinger] was being chased by a deputy sheriff down here who had it in for him,' said longtime friend Mike Wolken. 'They both saw each other and they both had it in for each other. . . . It doesn't take a cop to figure it out.'" *Hogue Deposition*, Exhibit 1.

25. The story continued with a fairly factually-formatted recounting of the pursuit, but then returned to the allegations of misconduct against Hogue. "Wolken, 40, of Tecumseh said Hogue and Persinger had a history of conflict, including an incident in which Hogue allegedly threatened Persinger by pointing his gun at him." Next came Tracy Cox's allegation that "Hogue allegedly followed the couple in her car 'like a stalker, except he was the law.'" *Hogue Deposition*, Exhibit 1.

26. There is no reference in the story to Deputy Hogue's response, if any, to the accusations, nor does it state that he could not be contacted. *Hogue Deposition*, Exhibit 1.

27. Critchfield acknowledges that she did not know the facts. *Critchfield Deposition* 45:9.

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28. Defendant acknowledges repeating Wolken's "had it in for" statement. *Defendant's Answers*, Response to Request for Admission No. 3.

29. Defendant acknowledges repeating Wolken's "conflict" statement. *Defendant's Answers*, Response to Request for Admission No. 3.

30. Defendant acknowledges repeating Wolken's "threat" statement. *Defendant's Answers*, Response to Request for Admission No. 5.

31. Defendant acknowledges repeating Cox's "stalker" statement. *Defendant's Answers*, Response to Request for Admission No. 6.

32. The Defendant has acknowledged that the statements could not be verified by any other sources. *Hogue Deposition*, Exhibit 2.

33. The Defendant admits it "had no personal knowledge that Plaintiff in fact pointed a gun at Persinger, and it is, of course, possible that Mr. Wolken was mistaken about that." *Defendant's Answers*, Response to Request for Admission No. 5.

34. Critchfield acknowledges that she did not know whether the contents of Cox and Wolken's statements were correct. *Critchfield Deposition* 44:15-21 [". . . I have no way of proving that the contents of the quotes are, are accurate - or are correct."].

The "Retraction" Story - "Tecumseh pursuit story corrected"

35. The Defendant did not publish any correction or retraction until demand from Plaintiff's attorney. *Hogue Deposition*, Exhibit 2.

36. The Defendant printed a follow-up story, citing Hogue's attorney's demand for retraction and admitting that it was "unable to verify" Cox's statements from any other source. The Defendant had not found any evidence that Hogue ever pointed a gun at Persinger, and no evidence that Hogue "had it in for" or followed Persinger. Reference was made to a 1990 incident in which Deputy Sheriff Tuttle, not Hogue, had pulled out his weapon when Persinger threatened him [Tuttle] with a "club." *Hogue Deposition*, Exhibit 2.

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ARGUMENT

"A party is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, that the ultimate inferences to be drawn from those facts are clear, and that the moving party is entitled to judgment as a matter of law." *White v. Ardan*, 230 Neb. 11, 17 (1988)

Summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. *Neb. Rev. Stat.* § 25-1332.

"In the first instance it is a question of law for the court as to whether a particular publication was libelous. [cites omitted] *Silence v. Journal Star Publishing Co.*, 201 Neb. 159, 163 (1978).

Whether a communication was privileged is a question to be determined by the court as an issue of law, unless the facts are in dispute, in which case the jury will be instructed as to proper rules to apply. *Turner v. Welliver*, 226 Neb. 275 (1987). See also *Helmstadter v. North American Biological, Inc.*, 5 Neb.App. 440 (1997); *K Corporation v. Stewart*, 247 Neb. 290 (1995).

The adverse party prior to the day of hearing may serve opposing affidavits. *Neb. Rev. Stat.* § 25-1332. Party resisting motion for summary judgment is required to serve affidavits in opposition by day prior to hearing. *Barelmann v. Fox*, 239 Neb. 771 (1992).

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. *Neb. Rev. Stat.* § 25-1334.

The United States Supreme Court has stated that constitutional guarantees require a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves the statement was made with actual malice--knowledge that the defamation published was false or with reckless disregard of whether it was false or not. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964).

The Plaintiff is entitled to summary judgment against the Defendant on the issue of liability in this matter because no genuine issues of material facts exist, and the law to be applied to those facts is clear.

1. Cox and Wolken made defamatory statements to the Defendant's reporter, Critchfield. There is no dispute that the statements were made, nor a dispute as to the essential contents of those statement. The statements were slander per se as a matter of law.

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2. Defendant admits republication of the Cox and Wolken statements in its newspaper, an action that by law makes the Defendant responsible for the contents of the statements.

3. Defendant acted with "actual malice" for purposes of *Neb. Rev. Stat.* § 25-840.01(2) and therefore can be held to answer for general damages despite the "retraction" story published.

4. Defendant also acted with "actual malice" or reckless disregard for the truth within the meaning of *New York Times v. Sullivan*. Plaintiff does not concede that he falls within the categorization of the public-libel cases, yet can demonstrate that the Defendant acted with reckless disregard for the truth in publishing the story.

I. DEPOSITIONS FROM THE COX AND WOLKEN LAWSUITS ARE ADMISSIBLE FOR PURPOSES OF THIS SUMMARY JUDGMENT MOTION.

Sworn statements in a question-and-answer format, created by questioning a witness under oath in a nonadversarial context and having a court reporter record the exchange, are affidavits. *Thorne v. Omaha Pub. Power Dist.*, 2 Neb.App. 437 (1994).

Exhibits 2, 4, and 5--depositions of Carrie Critchfield, Tracy Cox, and Mike Wolken, respectively--offered at the hearing on November 15, 1999, were created under oath, in an adversarial context, and with a court reporter recording the exchange. There is no reason to deny admissibility of these exhibits for purposes of this summary judgment motion.

II. DEFENDANT IS LIABLE TO PLAINTIFF FOR PUBLICATION OF STATEMENTS LIBELOUS PER SE AS A MATTER OF LAW.

Spoken or written words are slanderous or libelous per se if they falsely impute the commission of a crime involving moral turpitude, unfitness to perform the duties of an office or employment, or if they prejudice one in his or her profession or trade. *Helmstadter*, supra, 448; *K Corporation*, supra, 294; *Matheson v. Stork*, 239 Neb. 547 (1991).

The rule is that any language the nature and obvious meaning of which is to impute to a person the commission of a crime, or to subject him to public ridicule, ignominy, or disgrace, is actionable of itself. *Rhodes v. Star Herald Printing Co.*, 173 Neb. 496 (1962); *Helmstadter, supra*. See also *Schriner v. Meginnis Ford Co.*, 228 Neb. 85; *Sheibley v. Nelson*, 75 Neb. 804 (1906); and *Cline v. Holdrege*, 122 Neb. 151 (1931). Imputation of a crime presents slander per se if the crime, in the place of publication, would be punishable by imprisonment in a state or federal institution or regarded by public opinion as involving moral turpitude. *Norris v. Hathaway*, 5 Neb.App. 544 (1997).

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In a suit for slander per se, no proof of actual harm to reputation or any other damage is required for recovery of either nominal or substantial damages. *McCune v. Neitzel*, 235 Neb. 754 (1990).

The statements made by Tracy Cox and Mike Wolken to Carrie Critchfield, an agent of the Defendant, were slanderous per se.

A court looks at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed, considering the specificity of the statement, its verifiability, the literary context, and the broader setting in which the statement appears. *K Corporation,* supra, at 296. Language alleged to be defamatory must be interpreted in its ordinary and popular sense (*Silence,* supra, 163; *Hruby v. Kalina*, 228 Neb. 713, 714 (1988)) rather than in a technical manner. *McCune,* supra, 759.

The statements made by Cox and Wolken to Critchfield fall within the definition of slander per se.

Threatening another person with a gun is a criminal offense prohibited by a number of Nebraska criminal statutes:

1. Assault in the Third Degree (threatening another in a menacing manner), *Neb. Rev. Stat.* § 28-310;

2. Terroristic Threats (threatening to commit a crime of violence with the intent to terrorize or with reckless disregard of the risk of causing such terror), *Neb. Rev. Stat.* § 28-311.01;

3. Attempted Assault in the Second Degree (attempt to cause bodily injury to another person with a dangerous instrument or with reckless disregard of causing serious bodily injury), *Neb. Rev. Stat.* § 28-309 and § 28-201; and

4. Use of a Weapon to Commit a Felony, *Neb. Rev. Stat.* § 28-1205.

Stalking is a crime under Nebraska law. Any person who willfully harasses another person with the intent to injure, terrify, threaten, or intimidate commits the offense of stalking. *Neb. Rev. Stat.* § 28-311.03.

A death resulting from a vendetta ("history of conflict", "had it in for" the other person) also imputes criminal homicide such as murder or manslaughter. *Neb. Rev. Stat.* §§ 28-303, 304 and 305.

Death of a person following a law enforcement pursuit, in light of the contemporaneous statements of "conflict" and "threat," also impute several crimes.

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1. Official Misconduct (knowingly violates any statute or lawfully adopted rule or regulation relating to his official duties), *Neb. Rev. Stat.* § 28-924(1); and

2. Oppression Under Color of Office (peace officer who, by color of or in the execution of his office, designedly, willfully, or corruptly injury, deceive, harm, or oppress any person, or shall attempt to injure, deceive, harm, or oppress any person), *Neb. Rev. Stat.* § 28-926(1).

The "threat," "stalking," and "conflict" statements not only impute commission of a crime, but they also impute unfitness to perform the duties of Hogue's employment and tend to prejudice him in his profession of law enforcement.

Q. . . . The reputation for being a good law enforcement officer is valuable, right?
A. Very valuable.
Q. Valuable to you?
A. Yes.
Q. And to Deputy Hogue, I'm sure.
A. To every law enforcement officer.
Q. Okay.
A. It's your credibility.
Q. Okay.
A. And your integrity.
Q. Uh-huh.
A. Once you lose that, you might as well get out of law enforcement.

Osterhoudt Deposition 55:6-20.

Each of the statements made by Cox and Wolken to Critchfield were false. Each statement, viewed in its ordinary and popular sense, also imputed crimes of moral turpitude and unfitness to perform the duties of a deputy sheriff and would certainly prejudice a deputy sheriff in his profession.

Defendant newspaper republished the slanderous per se statements of Tracy Cox and Mike Wolken.

One who repeats or otherwise republishes defamatory matter is subject to liability as if he or she originally published it. *McCune, supra* at 764; Restatement (Second) of Torts § 578 (1977). See also, 50 Am.Jur.2d *Libel and Slander § 170* (1970).

To repeat or publish a slanderous or libelous communication is to indorse it as genuine. *Bee Publishing Co. v. Shields*, 68 Neb. 750 (1903).

Defendant republished the statements that Hogue had threatened Persinger with a gun and that Hogue followed Cox and Persinger like a stalker. Defendant also republished the "conflict"

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statements in connection with the criticism of Hogue's pursuit of Persinger as Cox and Wolken had done.

Defendant republished slander in written form, indorsing it as genuine, and is liable to Plaintiff as though the Defendant has originally published it.

III. DEFENDANT ACTED WITH "ACTUAL MALICE" FOR PURPOSES OF *NEB. REV. STAT.* § 25-840.01 AND THEREFORE CANNOT BE PROTECTED FROM LIABILITY BY PUBLICATION OF A "RETRACTION" STORY.

A newspaper[3] can avoid liability for more than special damages for publication of libel if, after notice of demand for correction, it publishes a correction. *Neb. Rev. Stat.* § 25-840.01(1). However, if the publication was prompted by actual malice, the limitation on damages does not apply. *Neb. Rev. Stat.* § 25-840.01(2).

> (1) In an action for damages for the publication of a libel or for invasion of privacy as provided by section 20-204 by any medium, the plaintiff shall recover no more than special damages unless correction was requested as herein provided and was not published. Within twenty days after knowledge of the publication, plaintiff shall have given each defendant a notice by certified or registered mail specifying the statements claimed to be libelous or to have invaded privacy as provided by section 20-204 and specifically requesting correction. Publication of a correction shall be made within three weeks after receipt of the request. It shall be made in substantially as conspicuous a manner as the original publication about which complaint was made. A correction, published prior to receipt of a request therefor, shall have the same force and effect as if published after such request. The term special damages, as used in this section, shall include only such damages as plaintiff alleges and proves were suffered in respect to his or her property, business, trade, profession, or occupation as the direct and proximate result of the defendant's publication.
> (2) <u>This section shall not apply if it is alleged and proved that the publication was prompted by actual malice</u>, and actual malice shall not be inferred or presumed from the publication.

Neb. Rev. Stat. § 25-840.01 (emphasis added).

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[3] The dissenting opinion in *Whitcomb v. Nebraska State Education Assn.*, 184 Neb. 31 (1969) reviews the legislative history of *Neb. Rev. Stat.* § 25-840.01 and concludes that it refers only to newspapers.

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No definition of "actual malice" is contained within the statute and Nebraska courts have never defined "actual malice" for purposes of *Neb. Rev. Stat.* § 25-840.01(2). Therefore, it is necessary to review related cases and legislative history to frame a proper definition.

Related Judicial History

The Nebraska Supreme Court has mentioned several definitions of "malice" over the years for other purposes. In 1953, in *Rimmer v. Chadron Printing Co.*, 156 Neb. 533, 539 (1953), the Court stated:

> The rule is: "Malice in law will be presumed from the publication of an article libelous per se, and that presumption will become conclusive unless the truth of the libel is established.[4] Such malice does not mean hatred or ill will, but the want of legal excuse for the publication." *Sheibley v. Nelson*, 84 Neb. 393, 121 N.W. 458. See, also, *Iden v. Evans Model Laundry*, 121 Neb. 184, 236 N.W. 444.

Rimmer at 539.

In 1987, a full 34 years after the *Rimmer* case, the Nebraska Supreme Court claims to have found no definition for malice in a majority opinion, and resorts to a definition of "express malice" that was found in a dissenting opinion from 56 years previous (and 22 years prior to *Rimmer*).

> This court apparently has never defined common-law actual malice in a majority opinion. In *Iden v. Evans Model Laundry*, 121 Neb. 184, 236 N.W. 444 (1931), a dissenting opinion defines express malice (another word for actual malice) as hate, spite, or ill will. The common-law actual malice rule seems to focus on the defendant's attitude toward the plaintiff, while the *New York Times* actual malice rule focuses on the defendant's attitude toward the truth. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980). This is consistent with the definition of the term in the dissenting opinion in *Iden*, and we adopt that definition for the purpose of this case.

Turner, supra, 290 (emphasis added). With all due respect to the *Turner* court, this definition appears to have been based on erroneous research of the court's prior decisions. In any event, the "malice" discussed in *Turner* was for the purpose of overcoming a qualified privilege possessed by

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4 This presumption has since been change by statute, LB 318, passed in 1957, amending *Neb. Rev. Stat.* § 25-840 to eliminate the presumption of malice arising from publication and established truth as an absolute defense, unless malice was proven.

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the party making the libelous statements, not for purposes of *Neb. Rev. Stat.* § 25-840.01; it is not binding precedent for the question at hand.

In 1990, the Court again states that the definition of "malice in the common-law sense" means "hate, spite, or ill will" and refers to the erroneous definition set forth in the *Turner* case. *McCune, supra,* 762. The Court does, however, limit its definition to situations involving truth or conditional privilege. "However, proof of common-law malice is at issue only when truth or a conditional privilege has been asserted by the declarant." *McCune, supra,* 763 (emphasis added). Again, this case does not attempt to define "actual malice" for purposes of *Neb. Rev. Stat.* § 25-840.01 and therefore is not binding precedent on this issue.

In 1993, the Court acknowledged the United States Supreme Court decision in *New York Times v. Sullivan*, adding the element of "actual malice" to plaintiff's prima facie case in public-libel cases. *Hoch v. Prokop*, 244 Neb. 443, 446 (1993). It also incorporates the *New York Times* definition of "actual malice" as acting with knowledge of falsity or reckless disregard for the truth. *Id.* Again, this case does discuss "actual malice" for purposes of *Neb. Rev. Stat.* § 25-840.01.

In 1994 and 1997, the Court again states the definition of "actual malice" to overcome truth or qualified privilege to be "hate, spite, or ill will. *Young v. First United Bank of Bellevue*, 246 Neb. 43, 516 N.W.2d 256, 259 (1994); *Helmstadter, supra,* 450. Again, both decisions rely completely on the flawed definition from the *Turner* case, and do not purport to define "actual malice" for purposes of *Neb. Rev. Stat.* § 25-840.01.

The judicial history demonstrates no precedent at all defining "actual malice" for purposes of *Neb. Rev. Stat.* § 25-840.01, a 1953 majority opinion defining malice as "want of legal excuse" for publication, and several more recent opinions that are based on a 1931 minority opinion. The next step is to review the legislative history of the statute.

Legislative History

The legislative history of *Neb. Rev. Stat.* § 25-840.01 is more enlightening in providing a definition of "actual malice" in subsection (2). The Judiciary Committee records are attached to this Brief as Exhibit A. LB 318, Section 2 (*Neb. Rev. Stat.* § 25-840.01) was actually referred to as "honest mistake libel law." Exhibit A, page 22, "Simple Facts," last paragraph.

> Section 2 allows the newspaper to publish a correction or retraction, which correction can be introduced as evidence to mitigate damages. A plaintiff will be limited to actual damages if the libelous statement was an honest mistake and a correction was promptly published.

Exhibit A, page 2, "Statement on Legislative Bill 318" (emphasis added).

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There are numerous other references to accident and mistake. ". . . where libel by a newspaper is occasioned by accident or honest mistake." Exhibit A, page 13, "Proposed Retraction Law," paragraph 4.

Other retraction statutes referred to also discuss "honest mistake of the facts", "reasonable grounds for believing that the statements in said article were true." Exhibit A, page 21.

> "Section 2 provides that in the event a mistake is made and a prompt correction is published, the party libeled is limited to actual damages to his property, business, trade or profession. The only relief granted a publisher who corrects or retracts an honest mistake is that from liability for imaginary damages.'

Exhibit A, page 22 (emphasis in original).

There is also a clear distinction between malice for the purpose of overcoming a "truth" defense and "actual malice" to overcome a retraction story. Section 1 of LB 318 provided the truth defense that now appears in *Neb. Rev. Stat.* § 25-840. It provides that "truth" of the published article is a defense, unless the plaintiff can prove that it was made "maliciously." Section 2 of LB 318, however, refers to mistaken publications.

> Section 2 provides that in the event a mistake is made and the party making the mistake publishes a correction, the party libeled is limited to actual damages . . . Honest mistakes occur and if prompt correction is made there is no reason why parties making them should be liable for any damages in excess of actual loss. . . . Likewise, there is no provision under existing Nebraska law for honest intent being used as a defense to mitigate damages.

Exhibit A, page 11, "Simple Facts About LB 318" (emphasis added).

These statements, combined with the reference to the then recent *Rimmer* case which had held a newspaper liable for libel after a truly honest mistake (Exhibit A, page 14, "Proposed Retraction Law," Section I) demonstrate the Legislature's intent to protect newspapers from only honest mistakes, not libelous statements made without actual spite or ill will.

> "It is his duty [the newspaper] to take all reasonable precautions to verify the truth of the statement and to prevent untrue and injurious publications against others."

Exhibit A, page 17, "Proposed Retraction Law," Section IV.

The unmistakable conclusion from the legislative history is that "actual malice" for purposes of *Neb. Rev. Stat.* § 25-840.01(2) was intended to mean "not accidental" or "without being an honest mistake." This seems to be very close to the *New York Times* standard of knowledge of falsity or reckless disregard of falsity.

Defendant's actions

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Defendant's publication of the defamatory statements in question was made neither by accident nor through honest mistake.

Wolken's initial contact with Defendant was for the purpose of complaining about the newspaper's prior coverage of the Persinger accident story. Despite the obvious severity of the accusations received by Critchfield, no effort was made to verify the facts. Critchfield had never met Cox or Wolken (*Critchfield Deposition* 17:4-17; 18:8-13) and had no way to know whether they were credible. Critchfield had never even been in Johnson County (*Id.* 20:8-9).

Critchfield spoke with both the Johnson County Sheriff (Osterhoudt) and County Attorney (Mercure), yet she ignored their warning that the accusations were untrue. She never spoke with Deputy Hogue, even about the matters that clearly were alleged to have occurred much prior to the accident. Quite simply, the newspaper did not check its facts before publishing its story.

The conclusion that Critchfield had not in any way checked out or verified the underlying facts is buttressed by reading the "retraction" story that admits that it was "unable to verify" Cox's statements from any other source. The Defendant had not found any evidence that Hogue ever pointed a gun at Persinger, and no evidence that Hogue "had it in for" or followed Persinger. There was no mistake or accident in Defendant's publication of the slanderous statements.

IV. DEFENDANT ACTED WITH "ACTUAL MALICE" AS DEFINED BY *NEW YORK TIMES* CASE--RECKLESS DISREGARD WHETHER IT WAS FALSE OR NOT.

The United States Supreme Court has stated that constitutional guarantees require a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves the statement was made with actual malice--knowledge that the defamation published was false or with reckless disregard of whether it was false or not. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964).

Caselaw contains no actual definition of "public official" or "relating to official conduct" and the United States Supreme Court has never specifically defined "reckless disregard" of the truth. A case-by-case review, however, can provide guidance.

Simple reliance on someone else's statement does not absolve an author or publisher of liability. *Fitzgerald v. Penthouse Int'l*, 691 F.2d 666 (CA4 Md), *cert. den.* 460 U.S. 1024, 103 S.Ct. 1277, *appeal after remand* (CA4 Md) 776 F.2d 1236.

Actual malice may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323; *Fitzgerald, supra.*

"Although failure to investigate will not alone support a finding of actual malice . . . the purposeful avoidance of the truth is in a different category." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 691, 109 S.Ct. 2678, 2698 (1989).

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Where the defendant finds apparently reliable information that contradicts its libelous assertions, but nevertheless publishes those statements anyway, the actual malice test can be met. *Schiavone Constru. Co. v. Time, Inc.*, (CA3 MJ) 847 F.2d 1069.

Plaintiff does not concede that he is a public official for purposes of this case, nor that the matters alleged were matters of public concern, thereby implicating the *New York Times* protections for the Defendant. However, Plaintiff can demonstrate that the Defendant did act with reckless disregard for the truth.

Defendant admits it "had no personal knowledge that Plaintiff in fact pointed a gun at Persinger, and it is, of course, possible that Mr. Wolken was mistaken about that." *Defendant's Answers*, Response to Request for Admission No. 5. This admission gives a clear understanding of the Defendant's attitude towards the truth about the statements made about Mark Hogue. Furthermore, Critchfield admitted "I have no way of proving that the contents of the quotes are, are accurate - or are correct." Critchfield had never met Cox or Wolken, had no idea whether they were credible, and disregarded warnings of the local sheriff and county attorney that the statements made about Hogue were untrue. Critchfield never talked with Hogue and, though Defendant will likely argue that Osterhoudt was not helpful in getting the Defendant in contact with Hogue, no real effort was made to talk to him to obtain his side of the story. Rather than obtaining independent verification of Cox and Wolken's statements after questions as to their truthfulness arose, Defendant simply published them as fact.

Unlike the situation in the *New York Times* case (a newspaper published an advertisement endorsed by presumably well-known and credible sources) the Defendant published story purporting to be news with absolutely no basis for believing it was true. That is purposeful avoidance of the truth and acting with a reckless disregard for the falsity of the statements of Cox and Wolken.

V. PLAINTIFF HAS DEMONSTRATED FACTS ENTITLING HIM TO JUDGMENT AS A MATTER OF LAW; IT IS THE DEFENDANT'S BURDEN TO PRESENT EVIDENCE SHOWING AN ISSUE OF MATERIAL FACT.

After the moving party has shown facts entitling it to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party. *Hassett v. Swift & Co.*, 222 Neb. 819 (1986); *Mason State Bank v. Sekutera*, 236 Neb. 361 (1990); *Eastroads, Inc. v. City of Omaha*, 237 Neb. 837 (1991); *Wiles v. Metzger*, 238 Neb. 943 (1991); *Barelmann, supra*; *Turek v. Saint Elizabeth Community Health Ctr.*, 241 Neb. 467 (1992); *Abboud v. Michals*, 241 Neb. 747 (1992); *Alder v. First Nat'l Bank & Trust Co.*, 241 Neb. 873 (1992); *Double K, Inc. v. Scottsdale Ins. Co.*, 245 Neb. 712 (1994); *Larson v. Vyskocil*, 245 Neb. 917 (1994); *Young*, supra.

Defendant has the burden of proving its' claimed defense of truth.

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A defendant who relies upon the truth of the defamatory matter published by the defendant has the burden of proving it. *Bartels v. Retail Credit Co.*, 185 Neb. 304 (1970); *Helmstadter*, supra, at 449.

The rule in Nebraska regarding . . . affidavits requires that supporting and opposing affidavits [1] shall be made on personal knowledge, [2] shall set forth such facts as would be admissible in evidence, and [3] shall show affirmatively that the affiant is competent to testify to the matters stated therein. *White*, supra; *Young*, supra, 260.

As discussed above, the Defendant has not yet presented evidence in opposition to this motion and therefore Plaintiff respectfully requests leave to supplement this Brief upon receipt of additional evidence. It is anticipated, however, that Defendant will offer affidavits of Critchfield, Cox, and Wolken.

The Court need not necessarily consider these affidavits, however. In the *White v. Ardan, Inc.* case, *supra*, the court refused to consider a party's affidavits that had been received in evidence at a summary judgment hearing.

> Plaintiffs attempted to "correct" or "explain" "the intended" meaning of the statements made during their depositions. The exhibits received in evidence were not executed by the plaintiffs, nor do they reflect that the plaintiff's took an oath that the "facts" contained in the "affidavits" were true. The three affidavits are virtually carbon copies and contain the "understandings," "beliefs," and conclusions of the plaintiffs. Plaintiffs' "affidavits" argue with statements in the defendants' brief filed in support of defendants' motions for summary judgment. . . .
> In writing this opinion, great care has been taken to use only that deposition testimony of each plaintiff that is unambiguous and where the intent of the party is clearly shown. We note that each plaintiff was represented by counsel at the time her deposition was taken. At that time, apparently, there was no question as to the clarity or intent of answers the plaintiffs gave. At least, there were no questions by the plaintiffs' own counsel to clarify any "ambiguous" or "confused" answer.
>
> The plaintiffs' complaints regarding the consideration given to their affidavits are without merit.

White, supra, 20.

The Court is already in possession of deposition testimony of all these witnesses regarding the events and conversations forming the basis of this lawsuit. As discussed in more detail above, Defendant's proposed defense must fail as a matter of law.

Defendant has the burden of proving its' claimed defense of qualified privilege.

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In a defamation action, conditional privilege must be pled as an affirmative defense. *Helmstadter*, supra.

Conditional or qualified privilege comprehends communications made in good faith, without actual malice, with reasonable or probable grounds for believing them to be true, on subject matter in which author of communication has interest, or in respect to which he has duty, public, personal, or private, either legal, judicial, political, moral, or social, made to person having corresponding interest or duty. *Turner*, supra.

A defendant is not liable for publishing privileged communications unless there is actual malice on his part, and such malice must appear before there can be recovery. If, however, the statements of fact published are libelous per se, proof that such statements were untrue is sufficient to cast the burden upon the defendant to prove that the evidence of truth of the statements was such as would justify him in making them, and that he did so in good faith, believing them to be true. *Estelle*, supra.

A conditional or qualified privilege has been held to exist in the following circumstances in Nebraska: (1) statements regarding the fitness of a candidate for public office while seeking election (*Estelle*, supra); (2) newspaper article purporting to be a statement of the acts of courts and officers in relation to court proceedings, fixing of bonds, failure of plaintiff to post bond, and attempt of an officer to take plaintiff into custody in default of bond (*Rhodes*, supra); (3) reports of mercantile agencies when they exercise all reasonable care to ascertain the facts and when they act impartially and in good faith, carefully evaluating all information before disseminating any defamatory statements (*Bartels*, supra): (4) mutual exchange of security information between security people at a department store (*Dangberg v. Sears, Roebuck & Co.*, 198 Neb. 234 (1977)); and (5) between insurer and insureds (*Turner*, supra).

The conditional privilege of newspapers, however, is not unlimited.

An occasion of privilege, however, will not justify false and groundless imputations of wicked motives or of crime. The conduct of public officers is open to criticism, and it is for the interest of society that their acts may be drawn between hostile criticism upon public conduct and the imputation of bad motives, or of criminal offenses, where such motives or offenses cannot be justly and reasonably inferred from the conduct. *Estelle v. Daily News Pub. Co.*, 99 Neb. 397 (1916); *Farley v. McBride*, 74 Neb. 49; *Bee Publishing, supra*. The liberty of the press is and should be no more sacred than the liberty of speech. *Estelle*, supra. It is unquestionably the right of the press to freely discuss, criticize, state, or comment fairly upon the acts or omissions of a public officer of the county, state, or nation; but it is not permitted, under the guise of criticizing official acts, to maliciously defame the character of an official. *Id.* A line must be drawn between hostile criticism upon public conduct and the imputation of bad motives or of criminal offenses, when such motives or offenses cannot be justly and reasonably inferred from the conduct. *Id.*

Ordinarily the right of a newspaper to comment or criticize in regard to public matters extends and is limited to that enjoyed by the public generally, and this is true whether the

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publication is in the form of an item of news, an advertisement, or correspondence. Defamatory matter published in good faith, in the honest belief in its truth, is not privileged if false because it was published as a matter of news. *Fitch v. Daily News Pub. Co.*, 116 Neb. 474 (1928).

The Defendant in this case clearly went beyond any possible conditional or qualified privilege it may have had in publication of the story and therefore its proposed defense must fail as a matter of law. (See also Argument, Sections III & IV.)

CONCLUSION

Plaintiff is entitled to summary judgment against the Defendant on the issue of liability because no genuine issues of material facts exist, the law to be applied to those facts is clear, and the Defendant's proposed defenses are inadequate as a matter of law.

It is undisputed that Cox and Wolken made defamatory statements to the Defendant and that the Defendant republished those statements in its newspaper. The statements were defamatory per se as a matter of law, and republication necessarily assigns liability to the Defendant.

Defendant acted with "actual malice" for purposes of *Neb. Rev. Stat.* § 25-840.01(2) (overcoming any possible reduction in liability for general damages) and with "actual malice" within the meaning of *New York Times v. Sullivan* (though Plaintiff does not concede its application to him).

No genuine issues of material fact remain to support the Defendant's additional proposed defenses of truth or qualified privilege.

Plaintiff hereby respectfully requests the Court to enter judgment on the issue of liability against the Defendant and in favor of the Plaintiff, and to set this matter for trial on the issue of damages.

RESPECTFULLY SUBMITTED this 23rd day of November, 1999.

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