COLORADO COURT OF APPEALS
2 East 14th Avenue
Denver, Colorado 80203

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APPELLATE CASE NUMBER 2003 CA 002117

COPY

DISTRICT COURT OF LAPLATA COUNTY, STATE OF COLORADO

HONORABLE DAVID L. DICKINSON, and
HONORABLE AL H. HAAS, and
HONORABLE JAMES D. CHILDRESS

TRIAL COURT NUMBER 01 CV 77

Appellant:

SHEILA WILSON, the Plaintiff

v.

Appellees:

SUZY MEYER, JOSH MOORE, LOIS E. RUTLEDGE, SUSAN KECK, JAMES R. BIESEL, JR., RANDY SMITH, KELLY R. MCCABE, ANIMAS PUBLISHING, INC., RICHARD BALLANTINE, and CORTEZ JOURNAL, the Defendants.

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APPELLANT'S APPEAL BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

This is a defamation case. The Appellees/Defendants (hereinafter "Defendants") made certain statements about the Appellant/Plaintiff (hereinafter "Plaintiff"). The Plaintiff asserts that those statements are false and have caused her damage.

The issues presented for review are:

1. Are the Appellant/Defendants Lois E. Rutledge, Susan Keck, James R. Biesel, Jr., and Randy Smith (hereinafter "Defendant Board Members") protected from suit by the Governmental Immunity Act for statements which were made willfully, wantonly, and/or maliciously?

2. Are the Appellant/Defendants Lois E. Rutledge, James R. Biesel, Jr., and Randy Smith, as members of the Montezuma County Hospital District Board, liable for the statements of a fellow board member, when those statements were made in the context of a board meeting and they made no objection or commentary, thus effectively adopting those statements as the statements of the Board?

3. Is the Appellant/Defendant Kelly R. McCabe (hereinafter "Defendant McCabe") protected from suit by the Governmental Immunity Act for statements which were made in a Board meeting which he was attending as independently contracted counsel to the Board?

4. Are the Appellants/Defendants Animas Publishing, Inc., Richard Ballantine, and the Cortez Journal (hereinafter collectively "Newspaper Defendants" protected from suit by the Fair Report and/or Fair Commentary doctrine for statements which went beyond that which was said and done by others?

5. Are the Newspaper Defendants protected from suit by the First Amendments of the United States Constitution and/or the First Amendment of the Colorado Constitution for statements which were presented to the public as if the writer had knowledge of additional facts upon which the "opinion" was based, thereby lending it an air of truth?

6. Are the Appellants/Defendants Suzy Meyer and Josh Moore (hereinafter collectively "Defendant Reporters") protected from suit by the Fair Report and/or Fair Commentary doctrine for statements which went beyond that which was said by others?

7. Are the Defendant Reporters protected from suit by the First Amendments of the United States Constitution and/or the First Amendment of the Colorado Constitution for statements which were presented to the public as if the writer had knowledge of additional facts upon which the "opinion" was based, thereby lending it an air of truth?

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STATEMENT OF CASE

The procedures in this case have been truncated to those relevant to the Defendants on Appeal, as the Court has the entire record before it.

The Plaintiff filed this case pro se on April 11, 2001.

On May 9, 2001, the Defendant McCabe filed a Motion to Change Venue. Also on that date, the Returns of Service on all Defendants were filed.

On May 10, 2001, the Defendant Suzy Meyer filed a Motion for More Definite Statement. Also on that date, the Defendant Josh Moore filed a Motion for More Definite Statement.

On May 18, 2001, the Defendant Board Members filed a Motion to Dismiss and also filed a Motion for More Definite Statement on that date.

On May 23, 2001, the Defendant Ballantine Development filed a Motion for Summary Judgment Pursuant to C.R.C.P. 56(h).

On May 29, 2001, the Plaintiff filed a Motion to Amend Complaint, and an Amended Complaint. Also on that date, the Plaintiff filed a Response to the Defendant Suzy Meyer's

Motion for More Definite Statement, and a Response to the Defendant Josh Moore's Motion for More Definite Statement, and filed a Request to Dismiss Valentine Development.

On May 31, 2001, the Court entered an Order Granting the Plaintiff's Motion to Amend Complaint, and an Order Granting Plaintiff's Request to Dismiss Valentine Development, together with her First Amended Complaint.

On June 5, 2001, the Court entered an Order Denying Defendant McCabe's Motion for Change of Venue.

On June 7, 2001, the Defendant Reporters filed a Joint Reply Brief in Support of Motion for More Definite Statement.

On June 13, 2001, the Court entered an Order Granting the Defendant Reporters' Motion to Dismiss the Plaintiff's Complaint with Leave to Refile Pursuant to C.R.C.P. 12(a).

On June 14, 2001, the Plaintiff filed a Motion for Relief from Order.

On June 19, 2001, the Defendant McCabe filed an Answer to the Plaintiff's Amended Complaint

On June 22, 2001, the Plaintiff filed her Second Amended Complaint.

On June 25, 2001, the Plaintiff filed her Response to Defendant Cortez Newspaper's Motion for Summary Judgment Pursuant to C.R.C.P. 56(b).

On July 9, 2001, the Defendant Newspapers and Defendant Reporters filed a Motion to Dismiss Under Rule 12(b)(5) All Claims Against all Journal Defendants.

On July 11, 2001, the Plaintiff filed a Response to Defendant Cortez Newspaper Inc.'s Motion for Summary Judgment. Also on that date, the Plaintiff filed an Objection to the amount of Attorney Fees claimed by the Defendant Montezuma County Hospital District.

On July 19, 2001, the Court entered an Order Denying the Plaintiff's Motion for Relief from Order.

On July 27, 2001, the Plaintiff filed an Objection to the Defendant Cortez Journal's Joint Motion to Dismiss Pursuant to Rule 12(b)(5).

On August 13, 2001, the Defendant Newspapers and Defendant Reporters filed a Reply in Support of Joint Motion to Dismiss All Claims.

On March 26, 2003, the Defendant Board Members filed a Motion for Attorney Fees and Costs.

On April 2, 2003, the Plaintiff filed a Motion for Reconsideration of the Order dismissing the Defendant Board Members, Defendant Newspapers, and Defendant Reporters. Also on that date, the Defendant Newspapers and Defendant Reporters filed a Motion for Reasonable Attorney Fees and Costs.

On April 7, 2003, the Defendant Board Members filed a Response to the Plaintiff's Motion for Reconsideration. Also on that date, the Defendant McCabe filed a Status Report.

On April 8, 2003, the Defendant Newspapers and Defendant Reporters filed a Response to Plaintiff's Motion for Reconsideration.

On April 16, 2003, the Defendant McCabe filed a Motion for Summary Judgment.

On May 8, 2003, the Court entered an Order on Motion for Attorney Fees by Hospital District Defendants, Motion for Attorney Fees by Journal Defendants, Motion for Reconsideration by Plaintiff, and Plaintiff's Motion for Enlargement of Time to Respond to Defendant McCabe's Motion for Summary Judgment.

On May 30, 2003, the Plaintiff filed a Response to Defendant McCabe's Motion for Summary Judgment.

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On June 27, 2003, the plaintiff filed a Motion for Leave to Amend Response to Defendant McCabe's Motion for Summary Judgment, and an Amended Response to Defendant McCabe's Motion for Summary Judgment.

On August 25, 2003, the Court entered an Order on Plaintiff's Motion for Leave to Amend Response to Defendant McCabe's Motion for Summary Judgment.

On September 11, 2003, the Court entered an Order Granting the Defendant McCabe's Motion for Summary Judgment.

On October 31, 2003, the Plaintiff filed her Notice of Appeal.

SUMMARY OF ARGUMENT

It is well established that free speech and expression of opinion are fundamental rights with great protection, as is the protection for governmental officials acting in their governmental capacity. However, it is equally well established that speech and opinion privileges are limited for public policy reasons and to protect the fundamental right of privacy. The Court in Keohane v. Stewart, 882 P.2d 1293, 1298-99 (Colo. 1994) said it quite well:

> "Defamation is a communication that holds an individual up to contempt or ridicule thereby causing him to incur injury or damage. *fn5 See W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 111, at 771-85 (5th ed. 1984). At common law, the tort of defamation existed to redress and compensate individuals who suffered serious harm

to their reputations due to the careless or malicious communications of others. See Milkovich, 497 U.S. at 11 ("Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements."); Gertz v. Robert Welch, Inc., 418 U.S. 323, 341, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974) (stating that the legislature has an interest in protecting and compensating individuals who are harmed by defamation). A cause of action for the tort of defamation exists today to protect individuals from those who would inflict an invidious and careless harm: "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being--a concept at the root of any decent system of ordered liberty." Rosenblatt v. Baer, 383 U.S. 75, 92-93, 15 L. Ed. 2d 597, 86 S. Ct. 669 (1966) (Stewart, J., Concurring). Additionally, defamatory statements are so egregious and intolerable because the statement destroys an individual's reputation: a characteristic which cannot be bought, and one that, once lost, is extremely difficult to restore.[*fn6] See Curtis Publishing Co. v. Butts, 388 U.S. 130, 152, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967) (noting that libel is as serious as the keeping of dangerous animals and the use of explosives); Hayes v. Todd, 34 Fla. 233, 15 So. 752, 755 (Fla. 1894) (discussing why there is such a compelling interest in preventing and redressing attacks upon an individual's reputation). Additionally, a defamatory statement is an action over which the defamed individual has little control. See generally Diane L. Zimmerman, Curbing the High Price of Loose Talk, 18 U.C. Davis L. Rev. 359, 360 (1985) ("In modern times, the potential for the careless, or worse, the intentional falsehood to destroy livelihoods, disrupt families, and damage friendships has been viewed almost without

exception by English and American Judges as so serious a wrong that no judicial system would dare abandon a remedy for it."); Joan E. Schaffner, Note, Protection of Reputation Versus Freedom of Expression: Striking a Manageable Compromise in the Tort of Defamation, 63 S. Cal. L. Rev. 435, 440 (1990) (stressing the importance of redressing libelous injury)."

Notwithstanding the political nature of the events and statements, the governmental status of some defendants, and the press status of other defendants, the statements made by the defendants were not protected under any privilege. The statements made by the Defendants went so far that they were willful and wanton. At least one statement met the requirements for slander per se. The so-called 'opinions' of the Defendant Reporters and Defendant Newspapers went beyond mere opinion, making statements about things which were subject to being proved or disproved, as well as insinuating that the writers knew other information which made these more than mere opinions. The Plaintiff suffered grievously as a result.

ARGUMENT

Background Facts

The facts underlying this case occurred in April 2000. The Plaintiff was attending the meetings of the Montezuma County Hospital District Board (hereinafter "the Board"), as she had been in the habit of doing. She was also running for a seat on the Board at the time of the incidents complained of.

The Plaintiff was in attendance at the April 12, 2000 meeting, at which the Board went into an executive session. However, they took no efforts to secure the room, aside from asking all non-Board members to leave the room and pulling the door to, but not closed. The purposes for this executive session were not among those permissible under the Open Meetings Law, found at C.R.S. 24-6-401, et seq. The Plaintiff was among those sitting in the hallway, and overheard substantial portions of the meeting, without any effort. Having long followed the Board's activities, she recognized that the items of discussion were already public knowledge. She also felt strongly that the matters should be brought to the public's attention. The Plaintiff wrote an editorial to the newspaper which was published on April 18, 2000, in which she stated that she had "eavesdropped", using the term in the colloquial sense of having overheard something.

At the next Board meeting, Defendant Susan Keck read a prepared statement, which was not on the agenda, which reading was in direct violation not only of the Open Meetings Law, but also of the Board's bylaws. Despite the fact that this would have been an appropriate reason for the Board to go into executive session, it did not. Rather, Defendant Keck read her statement into the record of the meeting, in which she accused the Plaintiff of "an act that is not only improper but probably illegal. . . .making unfounded accusations, misrepresenting facts, basically inventing information." This was referred to as Statement A in the Trial Court, and that reference will be used herein for clarity. A true and correct copy is attached as Exhibit A and is incorporated by reference as if fully set forth herein.

Defendant McCabe, who was attending as independently contracted counsel for the Board, then responded, indicating that the Plaintiff's behavior was clearly a Class 6 felony and recommending that the Board take action and press charges. This was referred to as Statement B in the Trial Court, and that reference will be used herein for clarity. A true and correct copy of the transcript of the relevant portion of the meeting is attached as Exhibit B and is incorporated by reference as if fully set forth herein. Defendant McCabe was in attendance at the previous meeting and was therefore aware of both the lack of security and the impropriety of the "executive session". The Defendant McCabe did not recommend or suggest that these concerns about the Plaintiff might more appropriately be addressed in an executive session, despite the fact that the press and numerous community members were in attendance. The Defendant McCabe did not bring up the fact that the letter was improperly heard, as it was not on the agenda, as required by the Open Meeting Laws and by the Board's own bylaws.

None of the Defendants at any time ever looked at whether the April 12, 2000 meeting which was overheard was even entitled to any privilege. The Board said it was, and not even Defendant McCabe, as their attorney, looked to see if that was accurate. In actual fact, it was called for a reason not permitted. The meeting itself was in violation of the Open Meeting Law and therefore had no privilege. Without that privilege, there is no possibility that anyone overhearing it could be found to have done anything wrong. The Defendants, certainly Defendant McCabe, at a minimum, had an obligation to be certain they were conducting a proper executive session before making such statements.

None of the Defendant Board Members took any action or made any objection to this completely inappropriate procedure or to the statements made. These statements were thus adopted into the record of the April 19, 2000 Board meeting without comment.

At that meeting, the Plaintiff was recognized and attempted to defend her actions on the record. Although she was cut short, she did get her defense on the record, despite the Defendant Board Members and Defendant McCabe.

The Defendant Cortez Journal, owned at that time by Richard Ballantine and Ballantine Development, LLC, and Animas Publishing, Inc., ran an article on the meeting on April 22, 2000. In that article, written by Jim Mimiaga, a reporter for Newspaper Defendants, both Defendant Keck's and Defendant McCabe's statements were printed in the recounting of the meeting. No space was given to the fact that the Plaintiff defended herself or to her explanation of the situation. This was referred to as Statement C in the Trial Court, and that reference will be used herein for clarity. A true and correct copy of the article is attached as Exhibit C and is incorporated by reference as if fully set forth herein.

This article was followed by a masthead editorial, published on April 25, 2000. In that editorial, the remaining statements were made, previously referred to as Statements D, E, F, and G. A true and correct copy of the article is attached as Exhibit D and is incorporated by reference as if fully set forth herein

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Scope of Colorado Governmental Immunity Act

Although the trial court avoided relying on this doctrine as to the Defendant Board Members, they raised it as their primary defense and will clearly do so again. Therefore, the Plaintiff respectfully requests that this Court consider its applicability to them, as well as to Defendant McCabe, whom the trial court did apply it to.

The Colorado Governmental Immunity Act (hereinafter "CGIA"), found at Colorado Revised Statutes (C.R.S.) 24-10-101, et seq., sets forth the limitations on the liability of governmental entities and personnel. C.R.S.24-10-102 provides the rationale behind the CGIA and specifies that since 1972 it has been solely a creature of statute. Thus, if it is not protected under the statute, it is not included under the CGIA.

C.R.S. 24-10-103 sets forth the definitions for the article. It specifies that a "public employee" is "an officer, employee, servant, or authorized volunteer of the public entity, whether or not compensated, elected, or appointed, but does not include an independent contractor or any person who is sentenced to participate in any type of useful public service. For the purposes of this subsection (4), "authorized volunteer" means a person who performs an act for the benefit of a public entity at the request of and subject to the control of such public entity.". C.R.S. 24-10-103. While the Defendant Board Members are clearly covered, it is not so clear that Defendant McCabe is covered under this language. The only category Defendant McCabe even remotely fits is that of 'authorized volunteer'. However, the language above specifically states that independent contractors are not covered. Although counsel has not been able to find any cases

on point, the status of an attorney who is not in-house counsel clearly does not fit the "authorized volunteer" status. An attorney must, by the Rules of Professional Conduct, maintain a level of independence which is in keeping with that of an independent contractor, not with the 'subject to the direction and control of the public entity' requirement set forth in the CGIA. Therefore, an attorney who is retained by a public entity, unless he is hired as in-house counsel, is not covered by the CGIA.

Once having determined whether the Defendant McCabe is covered under the CGIA, and having already determined that the Defendant Board Members are covered under the CGIA, we must turn to what is protected and what is not. As set forth in C.R.S. 24-10-101, the immunities granted in the CGIA are limited. As the acts and omissions here are not of a type for which the statute specifically waives immunity, the possible liability for those individuals is found in C.R.S. 24-10-105; "and no public employee shall be liable for injuries arising out of an act or omission occurring during the performance of his duties and within the scope of his employment, unless such act or omission was willful and wanton, except as provided in this article." C.R.S. 24-10-105.

The Defendant Susan Keck's statement made to the Board was clearly made willfully and wantonly, as revealed by the record. She deliberately read the statement on the record, in the public meeting, without previously putting it on the agenda or making any effort to address her concerns in any other way. Additionally, in her statement, she accused the Plaintiff of lying in her editorial. However, as a long-time Board member herself, she was well aware that not only were the Plaintiff's statements true, but the underlying content of the Plaintiff's statements could

also be shown to be true by a review of documents which were already of public record. Furthermore, she was aware, or should have been aware, that the Plaintiff's ability to have heard the meeting was created by the Defendant Board Members' failure to reasonably secure the room.

As a willful and wanton statement, the Defendant Keck's statement was not privileged, even if she was covered by the CGIA. The fact that the statement is slander per se (it knowingly and maliciously falsely maligns the Plaintiff's integrity) is evidence that this statement went well beyond the privilege offered by the CGIA. This result is further indicated by the fact that to the extent this statement was remotely Board business, the Board bylaws and Open Meeting Laws specify a closed session for dealing with such concerns, neither of which was even so much as considered by Defendant Keck, any other Defendant Board Member, or even Defendant McCabe.

Oddly enough, Defendant McCabe contradicts himself in his statement, as he first says that he had "similar" concerns to those of Ms. Keck regarding the accuracy of the Plaintiff's statements, but then goes on to accuse the Plaintiff of having committed a Class 6 felony by eavesdropping on the executive session. If the Plaintiff's statements were not true, there was no reason to believe that she had committed any crime, let alone the Class 6 felony described by Defendant McCabe. This statement was unsolicited, and was made in the midst of the public Board meeting with the press and public present. However, as Defendant McCabe had been at the previous meeting and was aware (or should have been aware) of the woefully inadequate security measures, he had reason to know that his statement was not true. Like Defendant

Keck's statement, Defendant McCabe's statement was made willfully and the fact that the statement is slander per se (it knowingly and/or recklessly falsely impugns the Plaintiff's integrity and honesty by accusing her of criminal conduct) is evidence that this statement went well beyond the privilege offered by the CGIA.

The trial court permitted Defendant McCabe to cloak his statement in the protective garb of a public employee under the CGIA. As discussed above, the Defendant McCabe is not a 'public employee' for purposes of the CGIA. Furthermore, even if he is, he clearly made the statements willfully, wantonly, and maliciously. Defendant McCabe was aware of the inherent untruth of his statements, as a failure to take reasonable security measures is an absolute defense to an eavesdropping charge. Furthermore, he was well aware of the fact that the press was there and that since the Plaintiff was a candidate, his comments were certain to be used to publicly discredit the Plaintiff.

As the trial court noted in its Order of Dismissal, the other Defendant Board Members did not actually utter any of the statements complained of. However, they are nonetheless liable for the statements of Defendants Keck and McCabe. The statements were made in the context of a Board meeting. The statements were made in violation of the rules and proper procedure, yet not one of the Defendant Board Members took any action or made any effort what so ever to even so much as disagree with the statements, let alone attempt to enforce proper procedures for their announcement. Through their willful and wanton silence, the Defendant Board Members clearly adopted the statements made by Defendants Keck and McCabe. Being willful and wanton, the Defendant Board Members' adoption was also beyond the privilege of the CGIA.

Scope of Fair Report and Fair Commentary Doctrine

The Fair Report Doctrine and the Fair Commentary Doctrine are born of common law. They are set forth in Diversified Management, Inc. v. Denver Post, Inc., 653 P.2d 1103 (Colo. 1982). The essence of the Fair Report Doctrine is to protect the press from liability for fairly reporting what someone said or did. While this is generally good public policy, to avoid dampening the freedom of the press, the Court also recognized that this is not an absolute privilege. Diversified Management, Inc., supra (statements made with malice are not privileged).

The Fair Report Doctrine is limited. If a reported opinion seems to be relying on facts that are not disclosed, and consequently leads the public to believe it is true, it is not protected under the Fair Report Doctrine. Burns v. McGraw-Hill Broadcasting, 659 P.2d 1351 (Colo. 1983). If the context would lead a reasonable person to perceive "the comment as essentially an assertion of fact," the comment becomes actionable. Burns, supra, citing with approval Hill, Defamation and Privacy Under the First Amendment, 76 Colum. L. Rev. 1205, 1234 n.133 (1976) (commenting on Phoenix Newspapers, Inc. v. Church, 103 Ariz. 582, 447 P.2d 840 (1968)). Additionally, the Colorado Supreme Court in Kuhn v. Tribune-Republican Publishing Co., 637 P.2d 315 (Colo. 1981) specifically held that it is possible for the press to cross the line between 'fair and accurate reporting' and defamation. In Keohane, the Court held that there is no such thing as unlimited privilege on opinions, citing the Burns, supra, case and citing the U.S. Supreme Court case of Milkovich v. Lorain Journal Co., 497 U.S. 1, 111 L. Ed. 2d 1, 110 S. Ct. 2695 (1990). Keohane, supra ("This court in Burns and the United States Supreme Court in

Milkovich, however, specifically noted that there was no "wholesale defamation exemption for anything that might be labeled 'opinion.'" Milkovich, 497 U.S. at 18; Burns, 659 P.2d at 1358 (noting that Gertz did not immunize all forms of opinion)."

The Supreme Court has likewise long held that mere opinion is not actionable as libel. Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), Bucher v. Roberts, 198 Colo. 1 (Colo. 1979) (595 P.2d 239). However, the mere fact that something is stated as an opinion is not enough to make it protected speech. An 'opinion' that seems to be based upon facts not disclosed or which is based upon information which the reporter knows is false or where the reporter recklessly disregards the truth of the matter is also actionable. Burns, supra. In Burns, supra, Colorado adopted the Ninth Circuit's three part test set out in Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980). This was later updated in Keohane, supra:

> "Milkovich and Burns thus provide the necessary framework to determine if a statement is protected.[*fn7] This framework involves two inquiries.[*fn8] The first inquiry is whether the statement is "sufficiently factual to be susceptible of being proved true or false." Milkovich, 497 U.S. at 20. The second inquiry is whether reasonable people would conclude that the assertion is one of fact.[*fn9] Id. The factors relevant to the second inquiry are: (1) how the assertion is phrased; (2) the context of the entire statement; and (3) the circumstances surrounding the assertion, including the medium through which the information is disseminated and the audience to whom the statement is directed. Burns, 659 P.2d at 1360; see Milkovich, 497 U.S. at 20 (holding that loose, figurative, or hyperbolic language may

indicate that the statement could not reasonably be interpreted as a statement of fact); Falwell, 485 U.S. at 50 (noting that the statement as a whole as well as the broader social context must be considered); see also Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6, 13-14, 26 L. Ed. 2d 6, 90 S. Ct. 1537 (1970); Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 284-86, 41 L. Ed. 2d 745, 94 S. Ct. 2770 (1974); White v. Fraternal Order of Police, 285 U.S. App. D.C. 273, 909 F.2d 512, 516 (D.C. Cir. 1990) (stating a court must examine the entire context of a publication and the dramatic intonations of the speaker)."

Statements C through G were dismissed by the trial court as being mere opinion and fair commentary on the events. The trial court indicated that it took the statements in their full contexts, but the Plaintiff argues that if it had, the Court would have found that clearly these statements went well beyond fair commentary and mere opinion.

It is true that they were found in the editorial section of the paper, where readers usually expect to find biased opinions. However, the decision in Burns, supra, made it very clear that language indicating that it is an opinion is not determinative, but rather is only a single factor the court must consider. The Keohane, supra, court likewise made it clear that the full context was important. When the whole context of the statements is considered, along with the media and the audience, it becomes very clear that the statements were made outside the privilege and are actionable. The language used in those editorials was not so extreme as that in Keohane, supra, and thus did not carry the signals of venting found in that case. Furthermore, the statements complained of are clearly subject to being proved true or false. Finally, these statements clearly

led the reader to believe that the author had more information which was not being shared, which led the author to make those particular statements, thereby giving them an air of fact. The reader was clearly led to believe that the author knew the statements to be true.

Scope of First Amendment Protection of Speech

The United States Constitution protects opinion, which "by definition can never be false" and therefore can never be the basis of an action for defamation. Bucher, supra. This privilege, however, is not absolute. See Burns, supra, and KeohaneError! Bookmark not defined., supra. If the opinion does not fully disclose the underlying factual premise or leads the reader to believe that the writer has inside information, or is published with malice or reckless disregard for the truth, it is not privileged as an opinion. See Burns, supra, and Keohane, supra.

Colorado law also protects opinions, to a point. "A defamatory communication . . . . in the form of an opinion . . . . is actionable only if it implies the allegation of undisclosed defamatory facts as the basis of the opinion." Bucher, supra. Additionally, "[a] speaker is not accorded free speech protection for attacks on an individual's reputation interests by framing the attack as an "opinion."" Id. Furthermore, there is no protection for allegations regarding a person's ethics in the State of Colorado. Burns, supra, citing with approval Brady v. Ottaway Newspapers, 84 A.D.2d 226, 445 N.Y.S.2d 786 (N.Y. App. Div. 1981) (allegation of corruption actionable opinion) and Fields Foundation, Ltd. v. Christensen, 103 Wis.2d 465, 309 N.W.2d 125 (1981) (statements of dishonorable, unethical or unprofessional conduct of a doctor when phrased as opinion are capable of defamatory meaning).

"Neither Gertz nor Bucher have eliminated all defamation actions based on allegations concerning matters of motive, integrity, and political characterization. See, e.g., Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976); Kuhn v. Tribune-Republican Publishing Co., 637 P.2d 315 (Colo. 1981). See also Note, Fact and Opinion After Gertz v. Robert Welch, Inc.: The Evolution of a Privilege, 34 Rutgers L. Rev. 81 (1981)." Burns, supra. When statements are so laden with factual content as to incinerate that there is a factual basis the author knows but is not disclosing to the reader, the statements leave the realm of privileged opinion. Burns, supra, citing with approval McManus v. Doubleday, 513 F.Supp. 1383 (S.D.N.Y. 1981) (holding that an allegation that a priest has "homicidal tendencies" may support a defamation action because the 'opinion' was "so laden with factual content" as to be actionable).

The statements made by the Defendants in this case clearly were attacks on the Plaintiff's reputation interests. Furthermore, they were only thinly disguised as the "opinions" of the Defendants.

CONCLUSION

Upon reviewing the total circumstances of each statement, it becomes clear that no protection or privilege applies to the statements at issue in this case.

Statement A was made by Defendant Keck willfully and wantonly, with reckless disregard for the truth, if not outright malice. The CGIA does not protect such willful and wanton conduct of a public employee.

Statement B was made by Defendant McCabe willfully and wantonly, with reckless disregard for the truth, if not outright malice. Defendant McCabe does not meet the requirement to be considered a public employee for purposes of the CGIA. Even if he did, the CGIA does not protect such willful and wanton conduct of a public employee.

Statements C through G were made by Defendant Reporters and Defendant Newspapers willfully and wantonly, with reckless disregard for the truth, if not outright malice. The initial article did not live up to the Fair Report privilege, as it made no mention of the Plaintiff's side of the story or of her effort to defend this assault on her credibility. Indeed, it took the Defendant Keck's statement and the Defendant McCabe's statement and set them forth as truth, implying that the politics of the situation would be the sole reason no action would be taken against the Plaintiff. The subsequent opinions went well beyond the protections of the Fair Commentary privilege, thinly veiling as opinion assertions subject to proof as well as insinuating that the author had more information which, though undisclosed to the reader, made these 'opinions' carry the weight of truth.

As these statements are unprotected, it is appropriate for this Court to remand this case back to the trial court with instructions to hear the case on its merits.

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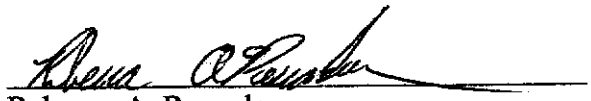
Respectfully submitted this 18th day of February, 2004.



Rebecca A. Pescador
Attorney for Appellant Sheila Wilson

CERTIFICATE OF MAILING

I hereby certify that I caused to be served a true and correct copy of the foregoing OPENING BRIEF, by the method marked below, by the placing the copy in the U.S. Mails, postage prepaid, at Boulder, Colorado, by facsimile transmission to the number set forth below, or by personal service, this 18th day of February, 2004, addressed as follows:

[X] By U.S. Mail
[ ] By Facsimile
[ ] By Personal Service to the address listed directly below

Hazen D. Brown
KELLY R. McCABE, P.C.
22 E. Main Street
P.O. Box 1296
Cortez, CO 81321

[X] By U.S. Mail
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