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

APPELLATE CASE NUMBER 03 CA 2117

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 REPLY BRIEF TO ALL DEFENDANTS/APPELLEES ANSWER BRIEFS

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### BOARD MEMBERS' QUESTIONS

*Question 1*

First, the Board Defendants ask if the trial court correctly ruled "the alleged defamatory statements are not actionable against" them. The court held Defendant Keck's statement was opinion under Keohane. (Rec. Vol. II, p. 333). Keohane v. Stewart, 882 P.2d 1293 (Colo. 1994) ("This court in Burns and the United States Supreme Court in Milkovich, however, specifically noted there is no "wholesale defamation exemption for anything that might be labeled 'opinion.'" Milkovich, 497 U.S. at 18; Burns, 659 P.2d at 1358 (noting Gertz did not immunize all forms of opinion).")

The Board Defendants assert that because Plaintiff admits only Defendant Keck actually spoke the defamatory words, she has failed to state a claim against the other Board Defendants. This is incorrect. They participated in the publication. They adopted and affirmed the statements by their silence when spoken, clearly publishing it. Then they approved minutes referencing the statements at the next meeting. They could have said or done a number of things to make it clear that they did not share in the statements; including calling an executive session to handle it.

As Plaintiff's Brief sets forth, Defendant Keck's statements fail the Keohane test, as they were highly susceptible to proof. Keohane, supra. In fact Defendant Keck was in error; the public record clearly supports the truth of the Plaintiff's statements. Defendant Keck knew the information was not only true, but was already public knowledge. Dr. Heyl's issue was a detail of an arrangement long made and a matter of public record, as was the Continuum/MCHD lease. Rec. Vol. II, p. 457-474, Affidavit, Ex. 1 to Response to Defendant McCabe's Motion for

Summary Judgment. The transcript of the April 12 meeting shows the Plaintiff was aware of these matters before the executive session. As Defendant Keck knew it was true and public knowledge, she also knew it was not privileged. She maliciously misrepresented the facts. Thus she can only seek shelter under the Colorado Governmental Immunity Act (hereinafter "CGIA").

*Question 2*

Then, the Board Defendants ask if they are immune under the CGIA. As Plaintiff's Brief sets forth, they are "unless such act or omission was willful and wanton". C.R.S. 24-10-105.

Plaintiff has shown Defendant Keck made her statement willfully and wantonly. She is not required to prove willful and wanton conduct with certainty, but only to plead facts which, if ultimately proven, would enable the jury to find in her favor. McDonald v. Lakewood Country Club, 170 Colo. 355, 461 P.2d 437 (1969). Dismissal in the face of such pleading is erroneous. Colorado Nat'l Bank v. F. E. Biegert Co., 165 Colo. 78, 438 P.2d 506 (1968). She is only required to present evidence showing a question of fact exists to overcome a motion to dismiss. Zapp v. Kukuris, 847 P.2d 150 (Colo.App. 04/23/1992) ("Consequently, if plaintiffs' allegations would permit proof of circumstances that are beyond the ambit of the . . . . provisions of the [CGIA], dismissal of the complaint, . . . . was improper.") The law has long recognized that it is at times necessary for the Plaintiff to engage in some discovery to unearth the full proof, a process which she did not have benefit of in this case.

Defendant Keck knew the executive session was illegal due to insufficient votes to meet the requirement set forth in the Open Meeting Law (hereinafter "OML"). C.R.S. 24-6-402(4). She also knew the reasons cited were inadequate. The OML specifically requires

> "upon the announcement . . . . to the public of the topic for discussion in the executive session, including specific citation to the provision of this subsection (4) authorizing the

> body to meet in an executive session and identification of the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized, and the affirmative vote of two-thirds of the quorum present, after such announcement, may hold an executive session . . . ."

C.R.S. 24-6-402(4)(a) (emphasis added).

Only Defendant Rutledge addressed the purpose of the executive session; "So, I don't want to disappoint [the Plaintiff], I'm going to make a motion that we go into executive session to discuss the letter from Dr. Heyl." Response to Defendant McCabe's Motion for Summary Judgment. Rec. Vol. II, p. 457-474 (Ex. 2, transcript, and Ex. 3, Dr. Heyl's letter). Merely calling it an executive session is not sufficient to grant it confidentiality, as it is clearly in violation of the OML requirement of a specific citation of purpose. C.R.S. 24-6-402(4).

Furthermore, Defendant McCabe admitted in the April 19, 2000 meeting that the walls should be thicker where they hold executive sessions. The expectation for privacy was low; the Board Defendants knew people were standing outside. The laws pertaining to eavesdropping require a reasonable expectation of privacy. The OML provisions do not permit them to hold an executive session with no reasonable expectation of privacy and then cry foul when overheard. They portray the Plaintiff with her ear pressed to the door. In fact, she was seated several feet away, visiting, and overheard at a distance and over the sounds of people waiting. This Court can appreciate the practical and legal difference between the reality and the image.

The OML is very specific that if the requirements are not met, the meeting becomes public record and no confidentiality attaches. C.R.S. 24-6-402(2)(d.5)(II)(C). Despite the Board Defendants' knowledge and failure to comply with the OML, they publicly defamed the Plaintiff, misstating facts and deliberately misleading the public.

Defendant Keck acted willfully, wantonly, and maliciously when she falsely accused the Plaintiff of lying and manufacturing information. It is well established that if a party to a

confidential communication shares it with a third party, that third party has no duty to keep it confidential. At no time did anyone ever inquire whether the Plaintiff had any other source of information. In fact, after the meeting, she met with people who were in the executive session who confirmed everything she later put in the paper. Rec. Vol. II, p. 457-474, Ex. 8.

The Board Defendants propose that Defendant Keck relied on advice of counsel when she spoke. Yet, the transcript shows she spoke without prior disclosure, and Defendant McCabe, the counsel upon whom she "relied", provided his "counsel" after she read her entire letter. She cannot reasonably have relied upon "advice" which had not yet been given.

The Board Defendants went into executive session over things less serious than handling an accusation of illegal conduct, yet did not suggest handling this in one, outside the presence of public and press, nor even ask Defendant Keck what she was reading that was not on the agenda. Their acquiescence, in front of press and public, knowing they could handle it, indicates both their adoption of the statements and the malice on the part of the Board Defendants.

*Questions 3, 4 and 5*

Then, the Board Defendants ask if the Plaintiff perfected her appeal of the May 8, 2003 order awarding attorneys fees and costs, and if so, whether she presented any basis for reversal. Clearly she did not appeal the May 8, 2003 order. However, the award was based on the court's assessment that she failed to plead willful and wanton conduct under the CGIA and lost on a Rule 12(b) Motion, thereby failing to substantially prevail on her claim. Rec. Vol III, p447. Upon prevailing, those findings will be reversed. In doing so, this Court must find that the basis upon which the attorneys fees were awarded was in error, and therefore reverse that award. The same is true in regard to the Newspaper Defendants' award of attorneys fees.

"The Colorado Supreme Court has stated that "[a] judgment of reversal . . . simply leaves the parties in the same position as they were before the judgment of the lower court was rendered." Schleier v. Bonella, 77 Colo. 603, 605, 237 P. 1113, 1113 (1925). Thus, when an underlying judgment is reversed, an award that is dependent on that judgment for its validity is also necessarily reversed and becomes a nullity. Nichols v. Burlington Northern & Santa Fe Ry., __ P.3d __ (Colo. App. No. 01CA1279, Aug. 1, 2002) (award of costs becomes null when judgment supporting that award is reversed); Harkrider v. Posey, 24 P.3d 821 (Okla. 2000) (same); see Nagy v. Landau, 807 P.2d 1227 (Colo. App. 1990) (award of attorney fees is necessarily reversed where judgment upon which it relied was reversed)."
Bainbridge, Inc. v. Douglas County Board of Commissioners, 55 P.3d 271 (Colo.App. 2002).

Finally, the Board Defendants ask if this case should be remanded for an award of attorneys fees incurred on appeal. The Plaintiff has set forth arguments to support her claims. Upon prevailing, there will be no basis for this request, as with the previous award. Therefore, it should not be remanded for determination of attorneys fees.

## NEWSPAPER DEFENDANTS' QUESTIONS

### *Question 1*

First, the Newspaper Defendants ask if the trial court erred in finding them not liable for the two statements published in the article on April 22, 2000 (hereinafter "article"). The court held that they fell within the fair report privilege. Notwithstanding the grumbling about Plaintiff's failure to reference Tonnessen v. Denver Publishing Co., 5P.3d 959 (Colo. App. 2000), in her Brief, she did address the point the court relied on. The court cited Tonnessen for the premise that if a statement is privileged, the defamatory portion still will not ground liability. Tonnessen did not change the fair report privilege and is only cited for jurisdictional holdings. As the Plaintiff's Brief plainly addressed the fair report privilege, the characterization of her neglect in citing Tonnessen is grossly misleading. Tonnessen is easily distinguished, as it determined liability for statements relating to judicial proceedings. It is no surprise that these statements are absolutely privileged. To hold otherwise would be bad policy, particularly as such

statements have an indicia of reliability. Protecting press reports of such proceedings is a reasonable extension of the original privilege. Unlike Tonnessen, this case concerns a report of a public meeting. The fair report doctrine applies, but there is no reason to give the broad latitude given to judicial proceedings. Statements in public meetings lack the same indicia of reliability or good faith. In deciding what is privileged, the Court must balance the press' First Amendment rights with the Plaintiff's right not to be defamed. Gertz v. Welch, 418 U.S. 323 (1974). The fair report test is very subjective, requiring only that the report be a "fair and accurate" representation or summary. Tonnessen, supra.

Not all reports are privileged in the Tenth Circuit. In Quigley v. Rosenthal, 327 F.3d 1044 (2003), it held a statement reporting a judicial proceeding, based on allegations in the complaint prior to any official court action, was not protected. Quigley, supra, citing Meeker v. Post Printing & Publishing v., 135 P. 457, 458 (Colo. 1913). The Quigley court held the statements "went well beyond merely reporting the allegations in the . . . . complaint" and found that even if the fair report privilege could attach, it would offer no defense. *Id.* The statements published by the Newspaper Defendants likewise went beyond the realm of fair report. *Id.*

As the Newspaper Defendants quoted, "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918), see also Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351 (Colo. 1983) (statement must be reviewed in its full context). In the full context the article is clearly not a fair report.

While the fair report doctrine provides absolute privilege for statements made within its protection, it does not provide it for every statement. Gertz, supra, and Quigley, supra. A fair

report must be fair and substantially correct and should not assert allegations as true or imply that the author has evidence to support them. Tonnessen, supra, and Quigley, supra.

The quotes in the article are correct. However, in the totality of the article, their gist is far different than when originally spoken. Attendees knew this exchange was only a small part and not the sole business conducted. Rec. Vol. III, p.457-474 (Ex. 9), Rec. Vol. III, p.407-439 (Ex. C, meeting minutes, with over five pages of business prior to mention of Plaintiff or letter). They knew the Plaintiff not only refused to back down, she also specifically denied the felony accusation, and asserted that the "executive sessions" at issue were in violation of the OML. Rec. Vol. III, p.407-439 (Ex. D), and C.R.S. 24-6-402(4). Contrarily, article readers have no sense of the meeting. It focuses entirely on the exchange, without mentioning other business (despite a unanimous vote about a new nursing home – of no small interest to the public), indicating the sole business concerned the Plaintiff. Furthermore, quoting her refusal to "back down" in the face of legal proceedings does not provide a fair picture of her response. This report utterly failed to give the reader an idea of what occurred, and contained such slant and bias as to leave the reader believing the defamatory statements. Merely quoting the Plaintiff and reporting that the D. A. had not been called were not sufficient to dispel the dominant impression that it was true.

*Question 2*

Then, the Newspaper Defendants ask if the trial court erred in finding that they were not liable for the five statements published in the editorial on April 25, 2000 (hereinafter "editorial"). The court found that they were protected as opinion, under the fair commentary privilege, as well as the public concern privilege. Rec. Vol. II, p.330-334.

Fair commentary is a corollary to fair reporting, and is also restricted. The test is set forth in New York Times v. Sullivan, 376 U.S. 254, (1964). The parties agree that the Keohane test determines whether opinion is privileged. As set forth in Plaintiff's Brief, the statements fail the Keohane test and are not privileged. Keohane, supra.

These events occurred in the small community of Cortez, where everyone within 50 miles is aware of its politics and news. Thus the impact is much greater than if they were published in Denver. In small communities, once a person's reputation is tarnished as to sexual immorality or mental illness, she finds herself unable to obtain any employment, even in nearby communities.

The Newspaper Defendants' comparison of the Plaintiff to "the Clinton scandal" was an unmistakable reference to President Clinton's sexual immorality. The editorial connects this directly to the Plaintiff, stating her actions raised "a similar question". The statement that she is "undoubtedly paranoid" indicates mental instability, if not an outright clinical condition. The soap-opera politics statement is a key part of the editorial, as they are known for characters with a total lack of morality, particularly sexually, and mental illness, especially paranoia. Outrageous characters are key and the comparison, in context, asserts that she is such an outrageous person.

The statement regarding the inability to prosecute the Plaintiff without making her a symbol clearly asserts that her actions were indeed criminal. It further besmirches her character, indicating that she has worked into an untouchable position, also a soap opera paradigm.

The Plaintiff is not required to prove or to concoct what undisclosed facts may have been relied upon. Bucher v. Roberts, 198 Colo. 1 (Colo. 1979). The statement must "imply the allegation of undisclosed defamatory facts as the basis of the opinion." *Id.* If it leads readers to conclude "the reporter must know more", then it appears to rely on undisclosed facts. *Id.* If this Court were to allow the assertion of candidacy together with reliance on the public's familiarity

with prior publications as sufficient to overcome the implication of undisclosed facts, every media defendant would simply start every opinion with a single phrase and then freely say anything. This argument precludes any liability. Such results would obviate any need for the undisclosed facts standard, and would be in clear opposition to existing law.

"In determining whether words are libelous, they are given their ordinary, popular meaning", Churchey v. Adolph Coors Co., 759 P.2d 1336 (Colo. 1988), citing Knapp v. Post Printing & Publishing Co., 111 Colo. 492, 144 P.2d 981 (1943), and also citing Restatement (Second) of Torts §563 (1977) ("meaning of allegedly defamatory communication is "that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express""). See also Burns, supra.

Reading the whole editorial, one senses that the writer knows more than is contained in the first sentence, the Plaintiff's letter, or even the article. They did not reference or imply soap-operas, President Clinton, mental illness or paranoia, or the Plaintiff's alleged politically untouchable status. People believe that a lot of crime goes unpunished for political reasons; that is precisely the conclusion readers would reach, and it would necessarily diminish her reputation.

The Plaintiff is **not** asserting a different standard of liability for small towns. Rather, the total circumstances which color and shape the words include the norms of the area. Towne, supra. Under these norms, with which the Newspaper Defendants know, these words convey precisely the above-stated meaning to readers. In a small town, one's reputation means more than any position, title, or asset, and can be the difference in being able to continue earning a living.

The Newspaper Defendants also assert that this is a matter of public concern. Newspaper Defendants' Answer Brief, p.22. Courts must use reason and caution in determining what is of "public concern". See Brown v. Kelly Broadcasting, 48 Cal. 3d 711, 771 P.2d 406 (Cal. 1989)

(interpreting public interest under California statute, "We think it would be a rare case in which a media defendant would contend that its viewers or readers were not interested in the communication or that the defendant itself was not also interested", declined to make the public interest privilege absolute as "the practical result . . . . would be that nearly everything [the media] publish and broadcast would be privileged.") Plaintiff agrees that her candidacy is a matter of public concern, but she is a public figure for only a limited purpose, thus a narrower privilege applies.

The Newspaper Defendants' statements were published with actual malice, in complete disregard for the truth. This is shown in part by the fact that the article quoted the D.A. as saying criminal eavesdropping ranged from misdemeanor to felony, and no inquiry had been made about the Plaintiff. Despite that knowledge, they wrote as if the Plaintiff had in fact committed a felony criminal eavesdropping. The privilege is thus lost as such knowledge demonstrates actual malice. Clint Eastwood v. National Enquirer, Inc., No. 95-56758 (9th Cir. 1997) (publishing a statement when there is or should be actual knowledge or that it is false removes the privilege).

The Newspaper Defendants assert that the trial court correctly found that the editorial was protected opinion under Keohane. However, as the Plaintiff has set forth repeatedly, it goes well beyond opinion, well outside of the realm of protected speech, and well beyond fair commentary and public concern. The mere fact that the statements are published in an editorial and called opinion is not sufficient to give them protection. Bucher, supra. It must still pass the tests set forth in Keohane, supra.

In Gertz, supra, the U.S. Supreme Court distinguished statements made about three categories of people; public officials and figures, public figures for limited purposes, and private citizens. In this case, the Plaintiff's candidacy made her a public figure for limited purposes. As

such, any privilege is limited to statements relating to her limited public image. Gertz, supra. Allegations of sexual immorality and mental illness are clearly not related to her candidacy for the MCHD board.

## ANSWERS TO DEFENDANT MCCABE'S QUESTIONS

### *Admission*

Defendant McCabe asserts the Plaintiff admitted her conduct and he merely repeated it, adding opinion and legal advice. This clearly misstates the facts.

Defendant McCabe admits that he stated that she "sat and purposely listened in on a governmental entity's executive session." Defendant McCabe's Answer Brief, p. 4; Rec. Vol. III, p.407-439 (Page 1 of Defendant McCabe's Ex. A to Ex. G to his Motion for Summary Judgment). Defendant McCabe cites Costa v. Smith, 43 Colo. App. 251, 601 P.2d 661 (1979) as support for the alleged consent, but it is inapposite here, as it concerned an individual who asked a question to which he disliked the answer. He has not asserted that he was answering anyone's question. Rather, he claims that he merely repeated her own statement and added his opinion.

This Court previously held that in proving the truth of the statement, "it is sufficient if the substance, the gist, the sting, of the matter is true. Heuer v. Kee, 15 Cal.App.2d 710, 59 P.2d 1063 (1936); Prosser, Law of Torts, [798 (4th ed. 1971) and cases cited therein]." Emphasis added, Gomba v. McLaughlin, 180 Colo. 232, 504 P.2d 337 (1972). The Plaintiff has no legal background, and her use of language is, and must be interpreted as, colloquial in nature. In our society, people and the media, particularly where the events occurred, 'eavesdrop' is used to describe anything overheard by one not a party to the conversation. Alone, it does not imply that the discussion was privileged or that speakers had any reasonable expectation of privacy, let

alone that the hearer committed any offense, or even social faux pas. It requires adjectives to distinguish between conversations casually or accidentally overheard, overheard with some attention but not sought out, and the listener seeking out and intending to overhear.

Defendant McCabe is well aware of the colloquial use of 'eavesdrop' and was well aware that his restatement "sat and purposely listened" was not mere restatement, but greatly changed the gist and sting of what was said. "Eavesdrop I did" and "sat and purposely listened" create very different images, the first being one who overheard and tuned in, the second being one who set out to listen in and possibly used a cup, as the editorial (published after his statement) described. Rec. Vol. III, p407-439 (Ex. F). Clearly the sting is much different.

Defendant McCabe did not stop there, but also attached a very legal and technical definition, which the public and press, never would have, saying "eavesdropping as described by Wilson, an [sic] class six felony". Emphasis added, Defendant McCabe's Answer Brief, p. 4; Rec. Vol. III, p.407-439 (Page 1 of Ex. A to Ex. G to his Motion for Summary Judgment). This clearly modified the Plaintiff's words, and substantially changed the gist and sting. In fact, she admitted no such thing, nor could one familiar with the law reasonably believe she had (though the public was extremely likely to believe he, a lawyer, was correct). The felony he cited requires eavesdropping on a conversation for with a reasonable expectation of privacy or the revelation of information obtained by such. C.R.S. 18-9-304.

Plaintiff's own statement precludes an interpretation of any admission to any such thing. She stated she eavesdropped, nothing more. Her full statement was "Eavesdrop I did, because there was no reason for the first "secret" meeting." That statement clearly indicates her belief that the "executive session" was outside the limits of the OML. At best, she admitted overhearing a session entitled to no protection whatsoever. *Id.* Furthermore, he admitted, with

his defamatory statements, that they should "make sure the walls are thicker." Rec. Vol. III, p.407-439 (Ex. D, p.2). The Plaintiff submitted an affidavit from another person present, indicating her proximity to the door, as well as the impropriety of the executive session. Rec. Vol. III, p. 457-474 (Ex. 6). As such, her activity could not fall under C.R.S. 18-9-304. No one ever inquired whether she had another source, though in fact she did. Rec. Vol. III, p.457-474 (Ex. 1). As counsel for the MCHD Board, he knew the "executive session" was held improperly, as set forth in Plaintiff's Brief. This is fully set forth above, and is incorporated by reference.

The Plaintiff has demonstrated that there is a genuine issue of material fact as to what, if anything, she admitted. Summary judgment is completely inappropriate. "The right to assert "the truth thereof" is a constitutional right and, if established to the satisfaction of the finder of fact, is an absolute defense to a libel action." Emphasis added, Gomba, supra, acknowledging Article II, Section 10 of the Constitution of Colorado (COLO. CONST. Art II, §10). It is the province of the jury to determine whether the statement is true. His mere assertion is insufficient to support dismissal as there is a genuine issue of material fact which must be decided by the jury. The Plaintiff is not required to prove that she is correct, but only to set forth sufficient facts to support her allegations so a jury might find in her favor. Churchey v. Adolph Coors Co., 759 P.2d 1336 (Colo. 08/08/1988), citing Mount Emmons Mining Co. v. Town of Crested Butte, 690 P.2d 231 at 239 (Colo. 11/05/1984) ("Even if the historical facts underlying the mixed question [of law and fact] might be undisputed, as long as a reasonable trier of fact nevertheless could draw divergent inferences from the application of the legal criteria to the facts, summary judgment should be denied."). Any doubts are to be resolved in her favor. Churchey, citing Abrahamsen v. Mountain States Tel. & Tel. Co., 177 Colo. 422, 426, 494 P.2d 1287, 1289 (1972); also see generally Prosser & Keeton on the Law of Torts § 113 (W. Keeton, D. Dobbs, R.

Keeton & D. Owen, 5th ed. 1984, § 116, at 839-41 (law presumes all defamatory statements are false and defendant has burden of pleading and proving truth).

*CGIA*

The trial court found Defendant McCabe was protected under the CGIA. However, that was erroneous. The CGIA does not cover independent contractors, which he is. Even if he were not, the CGIA would not protect him, as set forth above, as he acted willfully and wantonly.

The position held by Defendant McCabe is a subcontract normally put out for bid. He does not meet any requirements of an employee; he doesn't make a fixed rate set by the Board, he isn't paid automatically, no taxes or social security are withheld. He submits his bill, along with other subcontractors including accountants, engineers, and insurance providers. True and correct copies of two separate minutes approving Defendant McCabe's fees are attached as Ex. 1, and incorporated by reference as if fully set forth herein. It is clearly implausible to stretch the CGIA to include as an employee an engineer contracted for a project, even if it continued for a year or more. Defendant McCabe is fully responsible for all of his own taxes and benefits.

Defendant McCabe's position is easily distinguished from in-house counsel, where the attorney is an employee. In-house counsel works exclusively for a single entity and receives compensation directly from that entity, usually at a rate set by the entity, and which he has no authority to modify. The entity controls the work hours and load. His relationship with the Board is no different than any other attorney-client relationship. He maintains a thriving practice completely unrelated to his contract with the Board. He submits his bills to the Board as to other clients. The Board has no more supervision or control over him than any other client. He clearly fits all definitions of an independent contractor. It would go far beyond legislative intentions to

stretch the CGIA to cover him, when it has repeatedly been held that it is to be construed strictly and narrowly. Padilla v. School Dist. No. 1 in the City and County of Denver, 25 P.3d 1176 (Colo. 06/11/2001), citing Springer v. City & County of Denver, 13 P.3d 794, 798 (Colo. 2000) and Bertrand v. Board of County Comm'rs, 872 P.2d 223, 227 (Colo. 1994).

*Privileged Communication*

Defendant McCabe asserts his statements are privileged and cites Lininger v. Knight, 123 Colo. 213, 226 P.2d 809 (1951). The privilege in Lininger is common law, limited to statements of concern to both speaker and hearer. Patane v. Broadmoor Hotel, Inc., 708 P.2d 473 (Colo. App. 1985). Price v. Conoco, Inc., 748 P.2d 349 (Colo. App. 1987) is inapposite. Price, dealt with an employee who disliked his review and there was no publication beyond interested parties.

Defendant McCabe claims privilege for his statement based on his portrayal of it as 'legal advice', common interest, and protection of the Board's legitimate interests. However, this assertion must fail for reasons set forth in Patane, specifically the publication involved people who were not interested parties. Patane, supra. His 'legal advice' did not concern the public and press, nor did protection of the Board's legitimate interests. If this Court were to go so far as to say that his statement is protected as a privileged communication based upon a common interest, and that the press and public were members of the interested group, it would create a blanket privilege for anything that might be vaguely colored to impact the public. As this argument might be made about any issue before a public body, it would create a very broad privilege; far larger and less specific than the common law ever intended. This Court has been specific that even if the privilege attaches, it can be lost by publication outside the interested group, which is precisely the opposite of the effect described above. Thompson v. Public Service Co., 773 P.2d

1103 (Colo.App. 12/15/1988) (upholding privilege for statements "not published to persons outside the interested group" and citing Patane as support).

If any privilege existed in relation to Defendant McCabe's defamatory statements, it would be a qualified privilege. Qualified privileges may be lost when they are abused.

> "Restatement (Second) of Torts section 600 (1977) states that a privilege to publish false and defamatory matter is lost if the publisher "(a) knows the matter to be false, or (b) acts in reckless disregard as to its truth or falsity." The Restatement (Second) of Torts (1977) defines reckless disregard as "a high degree of awareness for probable falsity or serious doubt as to the truth of the statement." §600 comment b. We have defined "malice" and "reckless disregard" previously only in media cases; therefore, we now determine that one who publishes defamatory or false material loses the qualified privilege for that publication if he publishes the material with malice, that is, knowing the matter to be false, or acts in reckless disregard as to its veracity as defined by the Restatement (Second) of Torts."

Dominguez v. Babcock, 727 P.2d 362 (Colo. 11/03/1986). See also Burke v. Greene, 963 P.2d 1119 (Colo.App. 06/11/1998) ("[P]laintiff could still recover here if he could prove that defendant made the alleged statements with malice, i.e., with knowledge that they were false or with reckless disregard for whether they were true or false. See Seible v. Denver Post Corp., 782 P.2d 805 (Colo. App. 1989)."), and Pittman v. Larson Distributing Co., 724 P.2d 1379 (Colo. App. 06/12/1986) (holding privilege was abused when speaker had reason to know of falsity).

The Plaintiff has repeatedly set forth that he had reason to know of the falsity of his statements. Rec. Vol. III, p.457-474. In summary, Defendant McCabe, as an attorney: 1) knew his "restatement" substantially changed the gist and sting, Gomba, supra; 2) knew the executive session overheard was improperly held, C.R.S. 24-6-402; 3) knew the walls were too thin where the executive session was held, Rec. Vol. III, p.407-439 (Ex. D, p.2) and Defendant McCabe's Answer Brief, Ex. B, p.2; 4) knew Plaintiff did not commit the class six felony of eavesdropping as there was no reasonable expectation of privacy, Rec. Vol. III, p.407-439 (Ex. D, p.2, admits walls should be thicker), Defendant McCabe's Answer Brief, Ex. B, p.2 Rec. Vol. III, p.457-474

(Ex. 6, indicating Plaintiff's location relative to the meeting), People v. Hart, 787 P.2d 186 (Colo.App. 09/21/1989) and C.R.S. 24-6-402 (the "executive session" was called improperly and entitled to no confidentiality); 5) knew his statements would substantially damage Plaintiff, as they constitute libel per se; McCammon & Associates Inc. v. McGraw-Hill Broadcasting Co., 716 P.2d 490 (Colo.App. 02/20/1986) ("To be libelous per se, the broadcast must contain a defamatory meaning specifically directed at the person claiming injury, which must, on its face, and without the aid of intrinsic proof, be unmistakably recognized as injurious. See Inter-State Derective Bureau v. Denver Post, Inc., 29 Colo. App. 313, 484 P.2d 131 (1971)") and 6) knew his statements were completely false and misleading.

*Summary Judgment – Genuine Issues Of Material Fact*

The trial court's determination that there were no genuine issues of material fact in relation to Defendant McCabe is in error. The Plaintiff has repeatedly set forth reasons why his defamatory statement is not privileged or protected, as well as facts showing that he acted with malice, overcoming any qualified privilege that might attach. Dominguez, Burke, Seible, and Pittman, supra. The trial court's decision was based upon finding that he was protected under the CGIA. Rec. Vol. III, p.505. As set forth above, he is not covered by the CGIA.

Defendant McCabe notes the Plaintiff can not rely on speculation to meet her burden to overcome his Motion for Summary Judgment, and correctly cites Kanarado Mining & Development Co. v. Sutton, 36 Colo. App. 375, 539 P.2d 1325 (1975). The moving party has the burden of proving there are no genuine issues of material fact, which he has not met. Kanarado, supra. Assuming *arguendo* that he has, she has gone well beyond speculation that the evidence will support her claim, and produced affidavits and set forth facts supporting her claim. These

are precisely what is required; she is not required to prove her case to defeat a motion for summary judgment. Churchey, supra, and Mount Emmons Mining Co., supra. She was also entitled to the resolution of any doubts in her favor. Churchey, supra, and Abrahamsen, supra. She also respectfully reminds this Court that she did not have the benefit of discovery, as the Defendants declined to participate in any discovery while awaiting the trial court's orders.

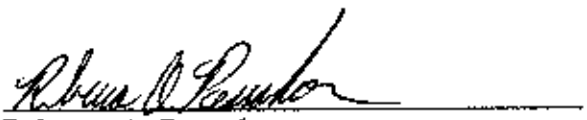
## CONCLUSION

The Plaintiff plainly set forth allegations tending to show that the conduct of the Board Member Defendants was willful and wanton, thereby removing their statements from the protection of the CGIA. She has also demonstrated that their statements went well beyond the realm of protected opinion, and crossed into that speech for which they may be held liable.

The Plaintiff plainly set forth allegations tending to show that the statements made by the Newspaper Defendants went well beyond the bounds of fair report or fair commentary. She has also demonstrated that their statements went well beyond the realm of protected opinion, and crossed into that speech for which they may be held liable.

The Plaintiff has provided sufficient facts and affidavits to show that his statement is not protected under the CGIA, as he is an independent contractor. No privilege attaches to his statement. Even if it could attach, it would be qualified at best and he has clearly abused the privilege, thereby opening him up to liability for his statements in any event.

Respectfully submitted this 3rd day of September, 2004.



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**CERTIFICATE OF MAILING**

I hereby certify that I caused to be served a true and correct copy of the foregoing Appellant's Reply Brief To Defendants/Appellees postage prepaid, at Boulder, Colorado, by facsimile transmission to the number set forth below, or by personal service, this 3rd day of September, 2004, addressed as follows:

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