NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
05 CvS 4005

KEVIN A. MONCE,

Plaintiff,

vs.

NANCY G. DEAS and EDNA E. DEAS,

Defendants.

**DEFENDANTS' BRIEF IN RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE THE "PUBLIC CONCERN" ISSUE**

Defendants Nancy G. Deas and Edna E. Deas, through their undersigned counsel of record and pursuant to Rule 5 of the North Carolina Rules of Civil Procedure, respond as follows to the plaintiff's Brief in Support of Motion for Partial Summary Judgment with respect to whether the defendants' web site addressed a "matter of public concern."

## I. The plaintiff's brief mischaracterizes certain of the facts.

The plaintiff's brief states that the material facts in this case are not in dispute. The defendants concur, but are compelled to correct the following misleading or incorrect characterizations about some of those facts in the plaintiff's brief.

### A. The plaintiff's brief mischaracterizes the defendants' complaint to the North Carolina Veterinary Medical Board.

At page 2 of his brief, the plaintiff says that the complaint filed by the defendants with the North Carolina Veterinary Medical Board ("the Board") asserted "that Drs. Monce and Jones had been incompetent and negligent in the treatment of [their dog]." A review of the defendants' complaint, which is attached to the plaintiff's brief, reveals that it makes no such accusation. Rather, the complaint simply asks the Board to determine "what actually did happen" in connection with the veterinarians' treatment of their dog, and whether the Board's own rules and standards of conduct were followed. Ex. 25, at p. 053. To assist the Board in making these determinations, the defendants provided

the Board with their pet's medical history, a detailed chronology of the events leading up to his demise, and an extensive list of questions to which they sought answers. *Id.*, at pp. 056-080. The determination that the plaintiff's treatment of the defendants' dog was affected by malpractice, incompetence and negligence was the Board's. Ex. 17.

### B. The defendants never sought an opinion concerning Dr. Monce's competence or compliance with the applicable standard of care from any veterinarian except the members of the Board.

At page 7, the plaintiff's brief asserts that the Deas sisters "consulted a dozen different veterinarians about Dr. Monce's treatment of Alex and finally confessed that they did not know of [a] single veterinarian who would say that Dr. Monce had failed to meet the proper standard of care or was incompetent or negligent or had committed malpractice." This statement seriously mischaracterizes the defendants' testimony, because they suggest that the defendants *sought* such an opinion, but the record clearly shows that they did not. Nancy Deas testified that she asked numerous veterinarians to review Alex's records because she wanted to know "what was wrong with my dog, why he died." Nancy Deas dep. at p. 35. She also testified that as the result of her discussions with these veterinarians she formed her own opinions concerning the quality of Dr. Monce's care. *Id.*, at pp. 33, 35 and 41-42. She also testified as follows:

> **Q.** **(By Mr. Crowell)** Did you ask any of the veterinarians you contacted to opine as to whether Dr. Monce's treatment had been incompetent or negligent or constituted malpractice?
>
> **A.** I did not.

*Id.*, at p. 35. See also *Id.* at p. 41. (Nancy Deas never asked the veterinarians to opine as to whether Dr. Monce's treatment had met the standard of care applicable to a veterinarian in the same situation.)

Ms. Deas explained her consultations with the veterinarians this way: "My concern was why my dog died. It was not personal about Dr. Monce or Dr. Jones. I

didn't have enough information to even form an opinion until I started seeking information. And I did form opinions after that based on the information I obtained . . ." *Id.*, at p. 41.

The plaintiff's misrepresentation concerning the defendants' purpose in consulting with a series of veterinarians after their dog died is part and parcel of the plaintiff's attempt to divert the court's attention by converting this lawsuit into what it is not – a malpractice case against Dr. Monce in which the defendants, rather than he, would have the burden of proof. The issue in this case is not whether Dr. Monce's treatment of Alex *in fact* was negligent, incompetent or constituted malpractice; the issue is whether Dr. Monce can put forward any legal theory or forecast any evidence that would permit a jury to hold the defendants liable for having truthfully reported and fairly commented on the Board's findings and conclusions in that regard. A viewing of the video of Dr. Monce's insouciant demeanor and egocentric testimony at his deposition strongly suggests that he is incapable of admitting that he was incompetent or negligent or had committed malpractice, no matter what the circumstances. What he cannot deny, however, no matter how desperately he wishes to do so, is that the Board made such findings, and has never abrogated or rescinded them.

**II. The First Amendment accords special protection to speech about matters of public concern.**

Dr. Monce's lawsuit asks this court to punish Nancy and Edna Deas, via the imposition of civil damages, for speaking out on their web site about the Veterinary Medical Board's handling of the questions they raised with the Board. In so doing, Dr. Monce is attempting to chill a type of speech that is entitled to special protection under the First Amendment.

It is "hornbook law" that speech about "the manner in which government is operated or should be operated, and all such matters related to political processes" is an

essential part of the communications necessary for self-governance, the protection of which was a central purpose of the First Amendment. *Mills v. Alabama,* 384 U.S. 214, 218-19, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484 (1966); *Republican Party of North Carolina v. Martin,* 980 F.2d 943, 959 (4th Cir. 1992). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74-75, 85 S.Ct. 209, 215-216, 13 L.Ed.2d 125 (1964). Accordingly, the Supreme Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values," and is entitled to special protection. *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 913, 102 S.Ct. 3409, 3426, 73 L.Ed.2d 1215 (1982); *Carey v. Brown*, 447 U.S. 455, 467, 100 S.Ct. 2286, 2293, 65 L.Ed.2d 263 (1980).

It is equally clear that speech about matters of public concern is entitled to a high degree of protection under the free speech clause of the North Carolina Constitution. *Corum v. University of North Carolina,* 330 N.C. 761, 775-76, 413 S.E.2d 276, 285-86 (citations omitted, *reh'g denied,* 331 N.C. 558, 418 S.E.2d 664, *cert. denied,* 506 U.S. 985 (1992) (University professor's public criticism of plan to move university's collection of historical materials involved matter of public concern and thus was protected by Article I, § 14 of the state constitution.)

When Nancy and Edna Deas asked the North Carolina Veterinary Medical Board to look into Dr. Monce's dealings with them and their animal, they were exercising their First Amendment right to petition the government for a redress of grievances. When they created their web site and posted information on it about the Board's response, including their views as to its inadequacy and lack of timeliness, they were merely exercising another right guaranteed to them by the First Amendment and by the North Carolina Constitution — the right to report and comment on the procedures, processes and behavior of a governmental agency which, in their opinion, moved too slowly and let

Dr. Monce off too lightly. In a sense they were using Internet technology to engage in "peaceful pamphleteering" – a form of speech that falls squarely within the "highest rung" of First Amendment protection. See, e.g., *Martin v. City of Struthers,* 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943); *Lovell v. Griffin,* 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938).

### III. Speech promulgated via the Internet is entitled to full First Amendment protection.

The Supreme Court has compared Internet speech with more traditional modes of expression and determined that the same level of scrutiny should be applied to the protection of Internet expression as to traditional forms. The most instructive Supreme Court language originates from *Reno v. ACLU*, 521 U.S. 844 (1997), the first of several challenges to the constitutionality of the Child Online Protection Act (COPA):

> Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought." 929 F.Supp., at 842 (finding 74). We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.

*Reno*, 521 U.S. at 870.

The *Reno* Court referred to the Internet as a "vast democratic forum." *Reno*, 521 U.S. at 868. Lower courts have incorporated this view into their First Amendment analysis. "The Internet and Worldwide Web provide an unprecedented electronic megaphone for the expression of ideas and an unparalleled opportunity for a national -- even international -- town square for expression." *In re Verizon Internet Services, Inc.*, 240 F.Supp.2d 24 (D.D.C. 2003) (*reversed* on other grounds, *Recording Industry Ass'n of America, Inc. v. Verizon Internet Services, Inc.*, 351 F.3d 1229 (D.C. Cir. 2004)).

In *American Library Ass'n v. U.S.*, 201 F. Supp. 401 (E.D. Pa. 2002), the district court examined a challenge to filtering requirements which blocked access to certain

websites in public libraries. The court applied the notion that "just as important as the openness of the forum to listeners is its openness to its speakers." *Id.* at 467. The court went on to compare the soap boxes and pamphlets of the past to the Internet of today. *Id.* at 467-68. Later in its opinion, the court compared the Internet's modern role with that of the speech-enhancing properties of the postal service, noting that both are open to the public at large and provide a relatively low-cost means for disseminating information to a geographically dispersed audience. *Id.* at 469.

## IV. The content of the defendants' website relates to a matter of public concern.

Because the First Amendment is deemed to accord more protection to speech about matters of public concern than about purely private matters, the legal principles applicable to a particular defamation claim depend not only on the public/private status of the plaintiff, but also on the subject matter of the publication at issue. See, e.g., *Neill Grading and Const. Co., Inc. v. Lingafelt,* 168 N.C. App. 36, 42-43, 606 S.E.2d 734, 738-39 (2005); see also, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985). As explained below, the public concern/private concern dichotomy determines what the plaintiff must prove, and by what evidentiary standard, in order to be eligible to recover various types of damages. As further explained below, the fact that the contents of the defendants' website relate to matters of public concern effectively entitles the defendants to summary judgment in this case, because Dr. Monce cannot forecast evidence that would permit him to carry the requisite burdens of proof.

### A. The "public concern" issue is determined by the content, form and context of the communication or publication at issue.

The determination whether the speech at issue in a defamation action involves a matter of public concern must be based on the content, form and context of the publication "as revealed by the whole record." *Neill Grading and Const. Co., Inc. v.*

*Lingafelt,* 168 N.C. App. 36, 45, 606 S.E.2d 734, 740, *appeal dism.,* 360 N.C. 172, 622 S.E.2d 490 (2005) (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. at 760-61); see also, *Corum v. University of North Carolina,* 330 N.C. 761, 775-76, 413 S.E.2d 276, 285-86 (citations omitted, *reh'g denied,* 331 N.C. 558, 418 S.E.2d 664, *cert. denied,* 506 U.S. 985 (1992). Judged by this standard, the defendants' web site unquestionably addressed matters of public concern.

The court need look no further than Exhibit 22, the electronic copy of the defendants' web site, to see that its contents consisted principally of public records that recount and reveal, in copious and occasionally tedious detail, what happened after the defendants filed their administrative complaint against the plaintiff and Dr. Jones with the North Carolina Veterinary Medical Board. The second largest portion of the web site's contents consists of a chronology and an index linked to these voluminous public documents.

When viewed in context, as the law requires, the web site's contents thoroughly support Nancy Deas' explanation as to why she created and maintained the website:

> After I made the complaint and [got] into the process with this regulatory agency, I wanted people to see that it is not a prompt or an orderly or an efficient process and alert them to that, because that is certainly not what we anticipated when we began the complaint process.

Nancy Deas dep. at p. 74.

At another point, Ms. Deas explained that the purpose of the website was

> . . . to chronicle the handling of a complaint by a citizen about veterinary malpractice and incompetence. . . . I used the public records to alert people that this process is not orderly."

*Id.* at p. 78.

Edna Deas described the purpose of the website similarly:

> [It was] to share what we had done right and what we had done wrong in filing the complaint with the regulatory board and problems we incurred along the way, and to inform anyone who might be considering filing a complaint that this is an example of what can happen.

Edna Deas dep. at p. 35.[1]

There can be no serious question that the proceedings of a state regulatory, licensing and quasi-judicial agency are inherently "matters of public concern." The North Carolina Veterinary Medical Board was created by Article 11 of Chapter 90 of the General Statutes, G.S. §§ 90-179 through 90-187.15. Among other powers, the Board is authorized to establish the criteria for licensing veterinarians in this state; to issue, renew, deny, suspend or revoke veterinary licenses; to investigate and punish violations of the Veterinary Practice Act; and to inspect all facilities in which veterinary services are dispensed. G.S. §§ 90-185 and 90-186. The Board maintains a public website at www.ncvmb.org.

Given the number of pets and farm animals in North Carolina[2], their emotional and economic significance to their owners and non-owners alike, and their potential to affect the public health, the public interest in the regulation, licensure and discipline of the veterinarians who care for them[3] is self-evident. Moreover, North Carolina's citizens and taxpayers have an inherent interest in the fairness, efficiency and timeliness with which the Board and any other government regulatory agency handles complaints and quasi-judicial proceedings. Thus it is hardly surprising that, in the only case similar to

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[1] Dr. Monce is not in a position to offer any evidence or opinion to contradict the defendants' explanations of their purpose, because he has never seen any of the contents of the website except the printed excerpts attached to the complaint in this action. Monce dep. at pp. 55-63. Moreover, the Supreme Court has held that the speaker's or writer's *motive* is not determinative of whether a particular communication or publication addresses a matter of public concern. *Connick v. Myers,* 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *see also, Reuland v. Hynes,* 460 F.3d 409 (2d Cir. 2006).

[2] The court may judicially notice that for the year 2006 the City of Raleigh issued 30,400 one-year and 34,900 three-year cat and dog rabies tags. See www.epi.state.nc.us/epi/rabies/control.html.

[3] The court may judicially notice that the Board currently oversees 3,460 licensed veterinarians in North Carolina.

this one of which the defendants are aware, the Massachusetts Court of Appeals readily found that a newspaper article concerning the possible discipline of a licensed veterinarian owing to negligent care involved a matter of public concern. *Reilly v. Associated Press,* 59 Mass. App. Ct. 764, 769, 797 N.E.2d 1204, 1210 (2003), *rev. denied,* 441 Mass. 1103, 803 N.E.2d 333(2004).

In recent years courts from many jurisdictions have found myriad and varied publications to have addressed "matters of public concern," including articles or commentaries directed to the performance of public and quasi-public agencies concerned with the care and treatment of animals. See, e.g., *Humane Society of Dallas v. Dallas Morning News, L.P.*, 180 S.W.3d 921 (Tex. Ct. of Appeals 2005) (newspaper column about family's finding lost dog at humane society adoption event); *Harkins v. Atlanta Humane Society,* 273 Ga. App. 489, 618 S.E.2d 16 (2005) (public statements by animal rights activist about humane society policies and procedures).

The only reported North Carolina case dealing with the "public concern" issue in the context of a libel case is *Neill Grading and Const. Co., Inc. v. Lingafelt, supra.* In that case, the Court of Appeals held that a radio commentary linking the plaintiff to sinkholes that appeared in the parking lot of a Hickory restaurant involved a matter of public concern. See also, *Chapin v. Knight-Ridder, Inc.,* 993 F.2d 1087 (4th Cir. 1993) (articles concerning non-profit charity that sent "Gift Pacs" to U.S. troops in Saudi Arabia).

Cases from other jurisdictions finding that publications involve "matters of public concern" are remarkable for their variety. For example, see *Unelko Corp. v. Rooney,* 912 F.2d 1049, 1056 (9th Cir. 1990), *cert. denied,* 499 U.S. 961, 111 S. Ct. 1586, 113 L.Ed.2d 650 (1991) (statement by "60 Minutes" commentator that consumer product "didn't work"); *Turner v. Devlin,* 174 Ariz. 201, 848 P.2d 286 (1993) (letter criticizing police officer); *Karedes v. Ackerley Group, Inc.*, 423 F.3d 107 (2d. Cir. 2005) (newspaper article reporting on audit of public golf course); *Burton v. American Lawyer Media, Inc.,*

83 Conn. App. 134, 847 A.2d 1115 (2004) (coverage of federal court's imposition of sanctions on attorney); *American Future Systems, Inc. v. Better Business Bureau,* 872 A.2d 1202 (Pa. 2005) (report critical of company that published business newsletters); *Wilson v. Meyer,* 126 P.3d 276 (Colo. App. 2005) (report concerning proceedings of hospital board); *Alves v. Hometown Newspapers, Inc.,* 857 A.2d 743 (R.I. 2004) (public statements and letters to newspaper concerning proceedings of town council and local school committee); *Nampa Charter School, Inc. v. DeLaPaz,* 140 Idaho 23, 89 P.2d 863 (2004) (criticism of manner in which officials operated charter school).

Although *Neill Grading and Const. Co., Inc. v. Lingafelt, supra,* is the only North Carolina case that has addressed the "public concern" issue in the context of a libel case, our courts have addressed the issue frequently in the context of the right of public employees to speak freely and without fear of retribution. In *Corum v. University of North Carolina,* 330 N.C. 761, 775-76, 413 S.E.2d 276, 285-86 (citations omitted, *reh'g denied,* 331 N.C. 558, 418 S.E.2d 664, *cert. denied,* 506 U.S. 985 (1992), the North Carolina Supreme Court held that a university professor's public criticism of a decision to relocate the institution's collection of historical materials addressed a matter of public concern. In so holding, the court looked to "the content, form and context" of the professor's speech. *Id.* Our courts subsequently have applied this standard in holding that commentary about the following subjects involved matters of public concern:

-- Investigation into possible mistreatment of patients at state alcohol rehabilitation facility. *Lenzer v. Flaherty,* 106 N.C. App. 496, 507-08, 418 S.E.2d 276, 283, *disc. rev. denied,* 332 N.C. 345, 421 S.E.2d 348 (1992).

-- Survey reporting public school teachers' dissatisfaction with experimental merit pay program. *Warren v. New Hanover County Bd. of Educ.*, 104 N.C. App. 522, 526-27, 410 S.E.2d 232, 234-35 (1991).

This same standard was applied by the Fourth Circuit in holding that a public school teacher spoke out about a matter of public concern when he urged the local school board to grant tenure to the principal of Topsail High School and signed a petition protesting the school board's adverse decision. *Piver v. Pender County Bd. of Educ.*, 835 F.2d 1076 (4th Cir. 1987).

The lines of cases stemming from *Connick* and *Corum* make it plain that the federal and state tests for determining whether particular speech addresses a "matter of public concern" are the same: The court must look to the subject matter of the communication, the form in which it is disseminated, and the context in which it is uttered. When these factors are applied in this case it is clear that the defendants' web site addresses a matter of public concern because it describes, and impliedly or overtly criticizes, the workings of a government regulatory agency.

**B. Whether a publication addresses a matter of public concern is determined by the substance of the publication – not by the amount of publicity it engenders.**

Dr. Monce argues that the defendants' web site does not deal with a matter of public concern because it has not been the subject of widespread media publicity and public discussion of the sort cited by the Court of Appeals in the *Neill Grading* case. This court should reject this argument, for at least three reasons:

1. There is no suggestion in the *Neill Grading* opinion or in any of the state or federal precedents cited therein that the amount or type of publicity attendant to a particular subject matter is dispositive, or even significant, in determining whether it is a matter of public concern. To the contrary, the public concern issue turns on the *content, form and context* of the communication at issue. *Neill Grading and Const. Co., Inc. v. Lingafelt,* 168 N.C. App. 36, 45, 606 S.E.2d 734, 740, *appeal dism.,* 360 N.C. 172, 622 S.E.2d 490 (2005).

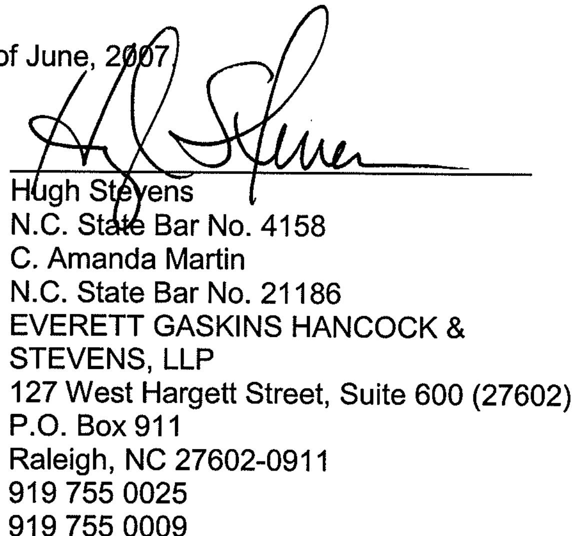
2. The defendants' web site discusses the actions of a government regulatory and licensing agency, which are inherently matters of public concern. By contrast, the radio broadcast at issue in *Neill Grading* related to two large sinkholes that had opened in the parking lot of a privately owned business after an unusually heavy rainstorm. Judge McCullough's opinion for the three-judge panel in that case cites the media coverage as evidence that the sinkholes were "discussed throughout the community, nationally, and even internationally." *Id.*

3. The Court of Appeal's ruling in *Neill Grading* does not rest solely, or even principally, on the fact that the sinkholes engendered media coverage. To the contrary, the court's opinion notes that the sinkholes were geological phenomena that had important safety ramifications for the entire community and were discussed at a regional government forum and in classes at the University of North Carolina and North Carolina State University. *Id.* at 45-46, 606 S.E.2d at 740-41.

## Conclusion

For the reasons set forth above, this court should deny the plaintiff's motion and enter partial summary judgment in favor of the defendants on the issue of law as to whether the internet web site that is the subject of this action addresses a matter of public concern.

Respectfully submitted this 4th day of June, 2007.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Defendants' Response to Plaintiff's Brief in Support of Motion for Partial Summary Judgment was served on counsel of record by email and hand delivery to:

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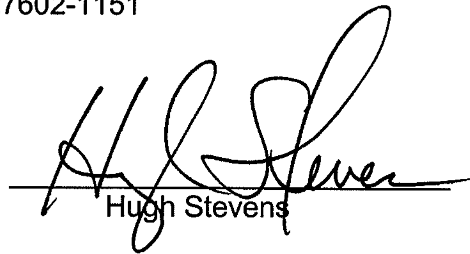
This the 4th day of June, 2007.



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