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 SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Introduction

This is a suit for libel *per se*. The plaintiff is a veterinarian. The defendants are a retired school teacher and her sister, an employee of North Carolina State University. The plaintiff complains about two statements posted on an internet website, www.aligus.com. The defendants created the site in order to chronicle, and alert others to, the delays and other vicissitudes they confronted after they filed a complaint with the North Carolina Veterinary Medical Board against the plaintiff and another veterinarian in 2000. More than three years later the plaintiff resolved both the defendants' complaint and a related complaint initiated by the Board by negotiating a consent order and agreeing to pay a $5,000 fine. Two years later the plaintiff sued the defendants for libel *per se*, alleging that their website – which he had never seen – falsely defamed him.

When the appropriate legal principles are applied to the undisputed facts, defendants Nancy G. Deas and Edna E. Deas are entitled to have summary judgment entered in their favor. Additionally and alternatively, the defendants are entitled to have partial summary judgment entered in their favor with respect to each of the following threshold legal issues:

1. The publication at issue involves a matter of public concern.

2. The plaintiff is barred from seeking presumed or punitive damages.

3. The plaintiff is not entitled to pursue an award of attorney fees.

4. The court is constitutionally prohibited from granting any of the prohibitory or mandatory injunctive relief sought by the plaintiff.

Statement of Undisputed Material Facts

The plaintiff, Kevin A. Monce, is a veterinarian. The defendants are sisters who, in 1999, owned two Manchester terrier dogs named Alex and Gus. In late December 1999, the defendants took Alex to Durant Road Animal Hospital & Kennel in Raleigh, where he was seen and treated by Dr. Dana Jones, a licensed veterinarian affiliated with the hospital. In early January 2000 the plaintiff, who had treated Alex previously, consulted with Dr. Jones and became involved in the diagnosis and treatment of Alex at the defendants' request. Complaint, ¶ 11; Nancy Deas deposition at pp. 30-31. On January 4, 2000, Alex's deteriorating condition led the defendants to consent to his being euthanized. Monce dep. at p. 110; Exhibit 23, at p. 5.

In February, 2000 the defendants filed a complaint with the North Carolina Veterinary Medical Board ("the Board") concerning the treatment provided to Alex by Dr. Jones and by the plaintiff. Their complaint, number 00006-1-1, was assigned to the Board's Committee on Investigations No. 1 ("the Committee") and was processed in accordance with rules and procedures authorized by and prescribed pursuant to G.S. § 90-185(6). George G. Hearn deposition, at pp. 9-18, . On or about December 22, 2000, the Board initiated a separate complaint against the plaintiff. Hearn dep. at p. 21; Exhibit 24. The Board's complaint, which was assigned number 00048-2-1, also was assigned to the Committee and was processed in accordance with rules and procedures authorized by and prescribed pursuant to G.S. § 90-185(6). Hearn dep. at pp. 20-22.

In the course of processing and considering complaints 00006-1-1 and 00048-2-1 the Board, through its staff and the Committee, gathered and reviewed hundreds of pages of

materials, including evidence submitted by Dr. Monce in writing and in an interview. Hearn dep. at pp. 8-14; Exhibits 5 and 24.

On October 17, 2001, the Board and the Committee issued Letters of Reprimand to Dr. Jones and to the plaintiff with respect to the defendants' complaint, No. 00006-1-1. Exhibits 5 and 23. The Letter of Reprimand issued to Dr. Monce included findings that he had acted negligently and incompetently and had committed malpractice in violation of the Veterinary Practice Act and the Board's administrative rules. Among other things, the letter found that:

1. The plaintiff violated the Veterinary Practice Act and Board administrative rules by delivering veterinary services in an uninspected facility, and this conduct "constituted incompetence and malpractice in the practice of veterinary medicine in violation of G.S. § 90-187.8(c)(6);

2. The plaintiff violated Board Rule .0207(b)(13) with respect to minimum standards for recordkeeping, which also constituted a violation of the competency standards established by G.S. § 90-187.8(c)(6);

3. The plaintiff's total care and treatment of Alex fell below the minimum competency standards of G.S. § 90-187(c)(6); and,

4. Treating Alex in an uninspected mobile facility was a deceptive or fraudulent act vis-à-vis the defendants.

Exhibit 5.

The Letter of Reprimand notified the plaintiff that, based on the foregoing and other findings set forth in the letter, the Board had voted to impose a civil monetary penalty in the amount of $3,000. Id.

The Letters of Reprimand issued on October 17, 2001 informed both Dr. Jones and the plaintiff that they could either accept the reprimand or reject it and request a formal hearing. Dr. Jones accepted his reprimand, but the plaintiff did not. Complaint, ¶ ¶12 and 13.

On October 18, 2001, the Board issued a letter to the plaintiff with respect to the separate December 22, 2000 complaint No. 00048-2-1 instituted at the Board's initiative. Exhibit 18. Among other things, the Board's letter notified the plaintiff that the Committee had found probable cause that he had violated several sections of the Veterinary Practice Act and

the Board's administrative rules. Id. The letter also proposed that its complaint be resolved via a Consent Order pursuant to which the plaintiff would accept certain disciplinary sanctions, including a 12-month suspension of his license, three months of which would be active, and a civil monetary penalty of $5,000. The plaintiff again declined the Board's proposal.

In November 2002 – more than a year after the Board issued its letters to Dr. Monce -- the defendants created a website, www.aligus.com. Nancy Deas dep. at p. 71. The contents of the website consisted of (a) public records generated in connection with both the defendants' and the Board's complaints against Dr. Jones and the plaintiff; (b) an index and chronology linked to those public records; and (c) miscellaneous links and information related to veterinary medicine having nothing to do with the Board or with the plaintiff. Exhibit 22. The purpose of the website was to chronicle the defendants' experience in pursuing their complaints before the Board and to let people see "that it is not a prompt or an orderly or an efficient process." Nancy Deas dep. at p. 74. See also, Edna Deas dep. at p. 35. (Purpose was "to share what we had done right and wrong in filing the complaint with the [veterinary] board and problems that 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.").

Although the defendants jointly decided to create the website and collaborated with respect to its purpose and concept, defendant Nancy Deas designed the site, posted all of the public records on it, and wrote the text of the index and other ancillary verbiage. Nancy Deas dep. at pp. 72-73; Edna Deas dep. at p. 36. Ms. Deas updated the site whenever she received new public records from the Board. Nancy Deas dep. at p. 74.

After the plaintiff rejected the Board's October 17, 2001 Letter of Reprimand with respect to the defendants' complaint No. 00006-1-1and declined the Board's proposed resolution of its complaint No. 00048-2-1, Dr. Monce's attorney began negotiating with the Board and its attorney concerning a possible resolution of both complaints. Hearn dep. at pp. 30-31; 46. On October 15, 2002 - approximately one year after the Board had issued its Letter of Reprimand

with respect to the defendants' complaint and its letter finding probable cause with respect to the Board complaint -- the Board issued a Notice of Hearing advising the plaintiff that it would conduct a contested case hearing with respect to the issues raised by both matters. Exhibit 21. Although the Board customarily conducts its own hearings, the Board asked the chief judge of the Office of Administrative Hearings to assign an administrative law judge to preside over the hearing. Id.; Hearn dep. at p. 34 .

On April 7, 2003, the plaintiff and the Board entered into a negotiated Consent Order resolving both complaints. Exhibit 17. The plaintiff agreed to pay a civil penalty of $5,000 and to have his license to practice veterinary medicine suspended for a period of 30 days. The suspension was stayed contingent upon the plaintiff's successful completion of a one-year period of probation. Id.

After the defendants posted the Consent Order on their website, the plaintiff's attorney sent an email message to the defendants asserting that the information posted on the site concerning the Consent Order was "seriously misleading" and demanding that it be "corrected." Exhibit 6 (message sent April 8, 2003 at 12:15 PM from Michael Crowell to the defendants). Following an exchange of email messages between Mr. Crowell and Nancy Deas, Ms. Deas drafted a revised version of the website material concerning the Consent Order and sent a message to Mr. Crowell inviting him to review the draft revision via a "preview page" that could be seen at an unpublished internet site and let her know whether he had any further "factual objections." Id. (message sent April 9, 2003 at 11:32 AM from Nancy Deas to Michael Crowell). Although Mr. Crowell visited the unpublished site and viewed the revised material, he did not respond to Ms. Deas. Nancy Deas dep. at pp. 103-111.

On March 24, 2005, without ever having visited the defendants' website or seen any of its contents, Dr. Monce sued the defendants for libel *per se*. Monce dep. at pp. 56-57; 59-60; 89. The plaintiff's claim is grounded solely on two items published on the website's home page: a headline or banner reading, "Veterinary Malpractice, Incompetence & Negligence" and a

sentence that says, "The North Carolina Veterinary Medical Board decided our complaint March 23, 2001. It issued some discipline to the veterinarians nine months later. Included were reprimands for incompetence, gross negligence, or other malpractice in the practice of veterinary medicine." Complaint, ¶¶ 15-16.

Argument

Under the applicable law, the plaintiff is not entitled to go forward with this lawsuit, in which he asserts a single claim for libel *per se.* For myriad reasons, the defendants are entitled to summary judgment in their favor with respect to the plaintiff's claim.

I. The Law Applicable to Plaintiff's Claim.

A. The vagaries and anomalies of libel law.

American libel law is an arcane and complex combination of common law concepts overlaid with First Amendment principles. Among other idiosyncrasies, it is the only field of tort law in which, owing to First Amendment considerations, the applicable law varies according to the status of the plaintiff and the subject matter of the publication at issue. See, North Carolina Pattern Instruction Civil 806.40 (libel is a "complex tort" in which "The elements vary depending upon how the claim is classified for common law and for constitutional purposes"). See also, *Mittelman v. Witous,* 135 Ill. 2d 220, 232, 552 N.E. 2d 973, 978 (1989) (defamation law is a "morass") and *Columbia Sussex Corp., Inc. v. Hay*, 627 S.W. 2d 270, 273 (Ky. Ct. App. 1981) (Defamation is "not a readily understood area of the law").

In this case the plaintiff concededly is a private figure who has asserted a claim for "libel *per* se" that arises out of a publication "about a matter of public concern." Accordingly, this memo first analyzes the common law and constitutional principles applicable to such a claim.

B. The law of libel *per se* in North Carolina.

1. Libel *per se* defined.

North Carolina common law recognizes three varieties of libel claims, of which the plaintiff has pleaded only one – a claim for libel *per se.*[1] Under North Carolina law a "libel *per se*" is a false written statement that is defamatory on its face. *Robinson v. Nationwide Ins. Co.*, 273 N.C. 391, 393, 159 S.E.2d 896, 899 (1968). The seminal exposition of North Carolina's common law of libel *per se* is found in *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938). The late Justice Barnhill's erudite opinion for the court in *Flake* defines libel *per se* as follows:

> It may be stated as a general proposition that defamatory matter written or printed . . . may be libelous and actionable *per se* . . . if they tend to expose plaintiff to public hatred, ridicule, aversion or disgrace and to induce an evil opinion of him in the minds of right-thinking persons and to deprive him of their friendly intercourse and society. . . .
>
> And,
>
> The decisions in this jurisdiction . . . clearly establish that a publication is libelous *per se* . . . if, when considered alone without innuendo: (1) it charges that a person has committed an infamous crime; (2) it charges a person with having an infectious disease; (3) it tends to subject one to ridicule, contempt, or disgrace, or (4) it tends to impeach one in his trade or profession.

Id. at 786-87, 195 S.E. at 60.

In this case, the plaintiff asserts that selected statements posted on the defendants' website falsely impeach him in his profession as a veterinarian. Complaint, ¶ ¶ 18-20, 22-23. Some elements of the plaintiff's claim are not in dispute, because the defendants admit that they published the website, and that it includes information about the plaintiff that is defamatory on its

[1] A leading treatise describes North Carolina libel law as "a stew" that is not duplicated in any other jurisdiction. Robert W. Sack, SACK ON DEFAMATION § 2.8.6 (3d Ed. 2006). See also, *Sleem v. Yale University*, 843 F. Supp. 57, 62 (1993) "North Carolina's libel law is a somewhat unique variation on the generic common law." Id. What makes North Carolina's formulation unique is its division of libel into three categories: (1) libel *per se*, which refers to publications that are facially and unambiguously defamatory; (2) publications that are susceptible to two reasonable publications, one of which is defamatory and the other of which is not; and (3) libel *per quod*, which refers to publications that are not transparently defamatory, but which become so when considered with innuendo, colloquium, and explanatory circumstances. SACK, *supra*.

face. In order to succeed on his claim the plaintiff must prove, in addition, that the defamatory statements were false *and* that the defendants were negligent in publishing them. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (in case involving newspaper's publication of information involving a matter of public concern, constitution requires private plaintiff to prove falsity); *Neill Grading & Const. Co., Inc. v. Lingafelt*, 168 N.C. App. 36, 606 S.E.2d 734 (2005) (standard of fault in libel *per se* case is negligence where plaintiff is a private person and publication involves matter of public concern); *Pinehurst, Inc. v. O'Leary Bros. Realty, Inc.*, 79 N.C. App. 51, 58, 338 S.E.2d 918, 922, *rev. denied,* 316 N.C. 378, 342 S.E.2d 896 (1986) ("Falsity is an essential element of libel."); *Brown v. Boney,* 41 N.C. App. 636, 647, 255 S.E.2d 784, 791 (1979) ("In a libel action, the defamatory statements must be false in order to be actionable . . .").

2. The special rules of construction applicable to libel *per se*.

In addition to defining libel *per se*, Justice Barnhill's opinion in *Flake* laid down several rules of construction that our courts have applied repeatedly over the ensuing six decades. They are:

(a) The "single meaning" rule.

Flake holds that to be libelous *per se*, false and defamatory words "must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the [plaintiff] or hold him up to public hatred, contempt or ridicule, or cause him to be shunned or avoided." *Flake,* 212 N.C. at 786, 195 S.E. at 60. This principle means that "[t]he initial question for the court in reviewing a claim for libel *per se* is whether the publication is such as to be subject to only one interpretation." *Renwick v. News and Observer Pub. Co.,* 310 N.C. 312, 317, 312 S.E.2d 405, 409 (1984).

(b) The "ordinary meaning" rule.

Flake requires that when a publication is the subject of a claim of libel *per se*, it must be viewed in its most obvious and natural sense and understood as ordinary people would

understand it. *Flake,* 212 N.C. at 786, 195 S.E. at 60. See, *Renwick,* 310 N.C. 312, 312 S.E.2d 405 (1984) (applying rule to newspaper editorial); *Cathy's Boutique, Inc. v. Winston-Salem Joint Venture,* 72 N.C. App. 641, 325 S.E.2d 283 (1985) (applying rule to cartoon in humorous advertisement); *Robinson v. Nationwide Ins. Co.,* 273 N. C. 391, 159 S.E. 2d 896 (1968) (applying rule to letter stating that plaintiff's automobile insurance was canceled owing to "infavorable [sic] personal habits").

(c) The "four corners" rule.

Justice Barnhill's opinion in *Flake* prescribes that, in determining whether a publication is libelous *per se*, the publication must be construed "stripped of all insinuations, innuendo, colloquium, and explanatory circumstances" and must be defamatory on its face "within the four corners thereof." *Flake,* 212 N.C. at 787, 195 S.E. at 60. This rule means that in determining whether a publication is actionable, the entire statement is to be considered. The intent and meaning of an allegedly defamatory statement must be gathered not from the words singled out by the plaintiff as libelous, but from the context in which they appear. All the parts of the publication must be considered in order to ascertain the true meaning of the words about which the plaintiff complains. RESTATEMENT (SECOND) OF TORTS § 563, comment d; Rodney A. Smolla, LAW OF DEFAMATION §§ 4:17, 4:27. See, *Daniels v. Metro Magazine Holding Co., L.L.C.,* ____ N.C. App. _____, 634 S.E.2d 586 (September 19, 2006) (sarcastic, emotional magazine essay containing facially defamatory statements is not actionable because it is patently absurd and unbelievable when read "as a whole"); *LaComb v. Jacksonville Daily News Co.*, 142 N.C. App. 511, 543 S.E.2d 219, *disc. rev. denied,* 353 N.C. 727, 550 S.E.2d 778 (2001) (newspaper account of criminal charges lodged against plaintiff was "substantially true" when considered as a whole); *Tyson v. L'Eggs Products, Inc.*, 84 N.C. App. 1, 12-13, 351 S.E.2d 834, 841 (1987) (letter not defamatory when read "as a whole"). See also, *Chapin v. Knight-Ridder, Inc.,* 993 F.2d 1087 (4th Cir. 1993).

3. The status of the plaintiff and the nature of the publication.

As noted above, in recent years the common law of libel has been transmuted by the application of First Amendment principles.[2] Among other effects, the "constitutionalization" of defamation law requires courts to make threshold determinations as to the status of the plaintiff and the nature of the publication that has engendered the plaintiff's claim.

(a) Dr. Monce is a "private person."

Because First Amendment concerns have led the courts to create two bodies of defamation law — one for private persons and the other for public persons -- the court in every defamation case must make an initial threshold determination whether the plaintiff is a private person, a public figure, or a public official. Bruce W. Sanford, LIBEL AND PRIVACY §§ 7.1 (Second Ed. 2005); *Proffitt v. Greensboro News & Record, Inc.,* 91 N.C. App. 218, 221, 371 S.E.2d 292,293 (1988) ("In actions for defamation, the nature or status of the parties involved is a significant factor in determining the applicable legal standards.") In this case, the court need not be concerned with the public/private dichotomy, because the defendants concede that for defamation purposes Dr. Monce is a private person.

(b) The information published on 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

[2] One leading commentator has characterized the change in libel law since 1964, when the Supreme Court decided *New York Times Co. v. Sullivan*, 376 U. S. 254, as "the evolution of a new tort." Bruce W. Sanford, LIBEL AND PRIVACY §§ 1.1-1.12 (Second Ed. 2005).

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.

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 (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' website unquestionably addressed matters of public concern.

The court need look no further than Exhibit 22, the electronic copy of the defendants' website, 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 contents after the records themselves consists of a chronology and an index linked to the public documents. When viewed in context, as the law requires, these 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.[3]

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 to 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[4], 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[5] is self-evident. Moreover, North Carolina's citizens and taxpayers have an inherent interest in the fairness, efficiency and speed with which the Board and other government regulatory agencies handle complaints and quasi-judicial proceedings. Thus it is hardly surprising that, in the only case similar to 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

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[3] 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.

[4] 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.

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

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).

II. The defendants are entitled to summary judgment.

A. Summary judgment is favored in defamation cases.

The very pendency of a libel suit poses a significant threat to freedom of speech and press, because "[e]ven if many actions fail, the risks and high costs of litigation may lead to undesirable forms of self-censorship." *McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 717 F.2d 1460, 1466 (D.C. Cir. 1983) (per Bork, J.). Summary judgment is appropriate to prevent all but the strongest libel cases from proceeding to trial, thereby advancing the first amendment policy of encouraging vigorous debate and discussion about matters of public concern. *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 954 (D. C.D.C. 1976); *Meeropol v. Nizer*, 381 F. Supp 29, 32 (S.D.N.Y. 1974), *aff'd*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) ("[i]n recognition of the constitutional privilege of free expression secured by the First and Fourteenth Amendments, the courts in libel actions have recognized the need for affording summary relief to defendants in order to avoid the 'chilling effect' on freedom of speech and press."); *Myers v. Plan Takoma, Inc.*, 472 A.2d 44, 50 (D.C. 1983) ("At the threshold it is the court, not the jury, that must vigilantly stand guard against even slight encroachments on the fundamental right of all citizens to speak out on public issues without fear of reprisal.") In accordance with this philosophy, North Carolina courts routinely grant summary judgment to libel defendants. See, e.g., *Dobson v. Harris*, 352 N.C. 77, 87, 530 S.E.2d 829, 837 (2000); *Ryan v. University of North Carolina Hospitals*, 2005 WL 465554, 6 (N.C. App. 2005); *Coremin v. Sherrill Furniture Co.*, 2005 WL 1330966, *4 (N.C. App. 2005); *Javurek v. Jumper*, 2005 WL 465571, *6 (N.C. App. 2005); *Lambert v. Harrell*, 2003 WL 21791656, 2 (2003); *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 28, 588

S.E.2d 20, 27 (2003); *Priest v. Sobeck*, 160 N.C. App. 230, 231, 584 S.E.2d 867, 868 (2003); *Bass v. New Hanover County Bd. of Educ.*, 2003 WL 21268024, 2 (N.C. App. 2003); *LaComb v. Jacksonville Daily News Co.*, 142 N.C. App. 511, 512, 543 S.E.2d 219, 220 (2001); *Gaunt v. Pittaway*, 135 N.C. App. 442, 449, 520 S.E.2d 603, 608 (1999) *after remand* 139 N.C. App. 778, 787, 534 S.E.2d 660, 666 (2000); *Market America, Inc. v. Christman-Orth*, 135 N.C. App. 143, 149, 520 S.E.2d 570, 575 (1999); *Johnson v. York*, 134 N.C. App. 332, 337, 517 S.E.2d 670, 673 (1999); *Gibson v. Mutual Life Ins. Co. of New York*, 121 N.C. App. 284, 286, 465 S.E.2d 56, 58 (1996); *Phillips v. Winston-Salem/Forsyth County Bd. of Educ.*, 117 N.C. App. 274, 277, 450 S.E.2d 753, 755 (1994); *Varner v. Bryan*, 113 N.C. App. 697, 704, 440 S.E.2d 295, 300 (1994); *Long v. Vertical Technologies, Inc.*, 113 N.C. App. 598, 601 and 603, 439 S.E.2d 797, 800 and 801 (1994); *Friel v. Angell Care Inc.*, 113 N.C. App. 505, 508, 440 S.E.2d 111, 113 (1994); *Dickens v. Thorne*, 110 N.C. App. 39, 41, 429 S.E.2d 176, 178 (1993); *Drouillard v. Keister Williams Newspaper Services, Inc.*, 108 N.C. App. 169, 171, 423 S.E.2d 324,325 - 326 (1992); *Rickenbacker v. Coffey*, 103 N.C. App. 352, 353, 405 S.E.2d 585, 585 (1991); *Harris v. Procter & Gamble Mfg. Co.*, 102 N.C. App. 329, 330, 401 S.E.2d 849, 850 (1991); *McKinney v. Avery Journal, Inc.*, 99 N.C. App. 529, 531, 393 S.E.2d 295, 296 (1990); *Davis v. Durham City Schools*, 91 N.C. App. 520, 523, 372 S.E.2d 318, 320 (1988); *Proffitt v. Greensboro News & Record, Inc.*, 91 N.C. App. 218, 219, 371 S.E.2d 292, 292 (1988); *Fox v. Barrett*, 90 N.C. App. 135, 138-139, 367 S.E.2d 412,414 (1988); *Troxler v. Charter Mandala Center, Inc.*, 89 N.C. App. 268, 271, 365 S.E.2d 665, 668 (1988); *Burton v. NCNB Nat. Bank of North Carolina*, 85 N.C. App. 702, 705, 355 S.E.2d 800, 802 (1987); *Tyson v. L'Eggs Products, Inc.*, 84 N.C. App. 1, 14, 351 S.E.2d 834, 842 (1987); *Morris v. Bruney*, 78 N.C. App. 668, 677, 338 S.E.2d 561, 567 (1986); *Angel v. Ward*, 43 N.C. App. 288, 294, 258 S.E.2d 788, 792 (1979); *Dellinger v. Belk*, 34 N.C. App. 488, 491, 238 S.E.2d 788, 790 (1977); *Towne v. Cope*, 32 N.C. App. 660, 664-665, 233 S.E.2d 624,627 (1977); *Cline v. Brown*, 24 N.C. App. 209, 216, 210 S.E.2d 446, 450 (1974); *Maurer v. Slickedit, Inc.*, 2005 WL 3790509, *6 (N.C. Super. 2005).

Summary judgment is appropriate where there is no genuine issue of material fact and the moving parties are entitled to judgment as a matter of law. N.C.R. Civ. P. 56. A defendant may show entitlement to summary judgment by "(1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense." *Draughon v. Harnett County Bd. of Educ.*, 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003). As explained below, in this case the defendants are entitled to summary judgment under all of these standards, because the plaintiff cannot prove that the statements about which he complains are false or that the defendants were negligent and because the contents of the defendants' website are privileged as a matter of law.

B. The plaintiff cannot prove essential element of his claims – i.e., that the statements about which he complains are false or that the defendants were negligent in publishing them.

As noted above, the plaintiff's libel claim is grounded in one statement and one headline or banner published on the home page of the defendants' website. The only portion of the substantive contents about which he complains says, "The North Carolina Veterinary Medical Board decided our complaint March 23, 2001. It issued some discipline to the veterinarians nine months later. Included were reprimands for incompetence, gross negligence, or other malpractice in the practice of veterinary medicine." Complaint, ¶ 16. The headline or banner reads, "Veterinary Malpractice, Incompetence & Negligence." Complaint, ¶ 15.

In violation of the "four corners rule" laid down by the Supreme Court of North Carolina in *Flake,* the plaintiff's complaint lifts both the statement and the headline out of context. Rather than viewing the defendants' publication as a whole, as the law requires, the plaintiff focuses only on a few selected words, thereby distorting the defendants' message.

The defendants' aligus.com website contained dozens of pages and hundreds of documents, the vast majority of which are public records that the defendants obtained from the

Board pursuant to the North Carolina Public Records Law. See Exhibit 22 to the Affidavit of Nancy G. Deas; Nancy Deas dep. at pp. 74, 78-79, 83-84. The statements about which the plaintiff complains appeared on only one page of the website, the "home" or index page.[6] Under the "four corners" rule, it would be clear error for this court to assess a defamation claim lodged against a book by looking solely to statements that appeared only in the index or the table of contents. Likewise, Dr. Monce's claim must be assessed in light of the contents of the website as a whole. When it is so viewed, it is clear that Dr. Monce cannot carry his burden of proving that the statements about which he complains are false.

1. The substantive statements about which Dr. Monce complains are true.

At paragraphs 16 and 18 of his complaint, the plaintiff asserts that the following statements are false: "The North Carolina Veterinary Medical Board decided our complaint March 23, 2001. It issued some discipline to the veterinarians nine months later. Included were reprimands for incompetence, gross negligence, or other malpractice in the practice of veterinary medicine." The undisputed evidence of record, however, demonstrates that these statements are true. As Dr. Monce admitted at his deposition, the Board issued him a Letter of Reprimand dated October 17, 2001 with respect to the defendants' claim. Exhibit 5. In the Letter of Reprimand the Board found, among other things:

> (1) that Dr. Monce's diagnosis, care and treatment of the defendants' dog Alex "was not competent and did not meet the minimum standard of veterinary medical care;"
>
> (2) that Dr. Monce's conduct in leading Dr. Jones and the defendants to believe that the facility in which he treated Alex was appropriate for the delivery of veterinary medical services, when it was not, constituted an

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[6] As demonstrated by the electronic copy of the aligus.com website filed in support of the defendants' Motion for Summary Judgment (Exhibit 22 to the Affidavit of Nancy G. Deas), the website's index page alone contains 3,087 words, only 42 of which are the subject of Dr. Monce's claim. Under the "four corners rule," of course, the website must be assessed in its entirety – not by the contents of any single page.

act of misrepresentation in the veterinarian-client-patient relationship in violation of G. S. § 90-187.8(c)(19);

(3) that Dr. Monce's total conduct in connection with treating Alex in an unlicensed and inappropriate facility "constituted incompetence and malpractice in the practice of veterinary medicine;"

(4) that Dr. Monce's recordkeeping did not meet the Board's standards, and thus "constitute[d] a violation of the competency practice standards" imposed by G.S. § 90-187.8(6); and,

(5) that Dr. Monce's treatment of Alex in an uninspected mobile facility was willful and intentional.

The findings and conclusions set out in the Letter of Reprimand are a matter of public record, and none of them has ever been rescinded, withdrawn, modified or repudiated by the Board. See, Monce dep. at pp. 117, 133-34, 140-41; Hearn dep. at pp. 41, 54. As the Board's counsel acknowledged, anyone who reviewed the Board's public records about Dr. Monce today would find the Letter of Reprimand among them. Hearn dep. at pp. 53-54.

The plaintiff presumably will argue that although the defendants' statements about the Letter of Reprimand are literally true, they are "misleading" because the Letter of Reprimand was superseded by the Consent Order that Dr. Monce signed in 2003, which does not contain the findings of negligence, incompetence and malpractice set out in the Letter of Reprimand. This argument fails, however, because the defendants' website includes a complete chronology of the veterinary board's proceedings, including both a complete copy of the Consent Order and an analysis of how it differs from the Letter of Reprimand. Exhibit 22. An ordinary person visiting the site readily would see that the Board's issuance of the Letter of Reprimand was only one event in a long series of events that began with the plaintiff's treatment of Alex and culminated in the Consent Order. (See also the explanation elsewhere in this brief as to why the defendants' website is not actionable because it constitutes a fair report of the Board's proceedings vis-à-vis Dr. Monce.)

Dr. Monce also may argue that the portions of defendants' website about which he complains are false because the defendants' complaint was "dismissed" by the Board. Shortly

after the defendants posted the Consent Order on their website, Dr. Monce's attorney sent an email message to Nancy Deas asserting that "the information you have posted on your website, www.aligus.com, concerning the Consent Order signed by the Veterinary Medical Board and Dr. Kevin Monce is seriously misleading" and that "the Consent Order dismisses your complaint 00006-1-1." Exhibit 6 (message from Michael Crowell to Nancy Deas sent April 8, 2003 at 12:15:13 EDT.) Ms. Deas' reply pointed Mr. Crowell to the prefatory language accompanying the Consent Order posting and asked him for his specific objections. Id. (Message from Nancy Deas to Michael Crowell sent April 8, 2003 at 1:55 PM.) Mr. Crowell's response said:

> I am sure you believe you are being very clever, but there is no question you are attempting to create the impression that the board's order finds "incompetence, negligence or other malpractice;" that the actions involved "elements of fraud or deception" to you and your sister; and so forth. If you wished to be accurate and wanted to inform the reader what truly happened, all you would need to do is say that your complaint containing all those allegations was dismissed.

Id. (Message from Michael Crowell to Nancy Deas sent April 8, 2003 at 3:03:04 EDT.) (Emphasis supplied.)

The undisputed evidence demonstrates that this court should reject any contention by the plaintiff that the Board dismissed the defendants' complaint, whether via the Consent Order or otherwise. Neither the Consent Order or any other order or communication by the Board contains any language that purports to dismiss the defendants' complaint, or which reasonably can be construed as doing so. To the contrary, the Consent Order specifically states that Dr. Monce consented to its entry in order "to resolve the allegations and issues in the Notice of Hearing issued by the Board dated October 15, 2002 in this matter concerning [the defendants'] complaint no. 00006-1-1 and [the Board's] complaint no. 00048-1-1." Exhibit 17.

The dozens of public records posted on the defendants' website (Exhibit 22) and other evidence of record plainly show that the Consent Order whereby Dr. Monce and the Board resolved both the defendants' and the Boards' complaints was the product of protracted negotiations between Dr. Monce's counsel and the Board's attorney. Monce dep. at pp. 124-25;

Hearn dep. at pp. 30-32; 46-47; Exhibits 19, 20. As the Board's attorney acknowledged, the process had many of the attributes of a "plea bargain" that permitted Dr. Monce to accept punishment from the Board while avoiding a contested case hearing.[7] Hearn dep. at p. 47. The bargain struck did not, however, include any language dismissing the defendants' claim or withdrawing, rescinding or expunging any of the findings embodied in the Board's Letter of Reprimand with respect to their claim.

In sum, if the defendants had acceded to Mr. Crowell's demand that they revise their website to say that their complaint had been "dismissed" by the Board, they would have posted a statement on the website that genuinely was false.

2. Viewed in context, the "headline" or banner about which the plaintiff complains is justified and thus is not actionable.

In addition to the language discussed in the preceding section, Dr. Monce also contends that the "headline" or banner at the top of the home page of the defendants' website is libelous. In so doing, he again asks the court to divorce the banner from its context, in violation of the rules of construction laid down in *Flake*. The banner, however, is completely justified by the contents of the website, which chronicles the Board's handling of proceedings in which the Board itself found a veterinarian to have acted incompetently and negligently, and to have committed veterinary malpractice. Moreover, even if the banner were not reflective of the website's subject matter, it also is protected as an expression of the defendants' opinions.

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[7] As in a typical plea bargain, the negotiations between Dr. Monce's attorney and the Board's attorney resulted in Dr. Monce's being subjected to punishment less severe than the aggregate punishment proposed by the letters that the Board sent Dr. Monce in October, 2001. The Board's October 17, 2001 Letter of Reprimand concerning the defendants' claim (Exhibit 5) proposed that Dr. Monce pay a civil penalty of $3,000. The Board's letter of October 18, 2001 concerning its own claim (Exhibit 18) proposed a 12-month suspension of Dr. Monce's license, of which three months would be active, and a civil penalty of $5,000. The Consent Order (Exhibit 17) imposed a stayed suspension of Dr. Monce's license for a period of 30 days and required him to pay a civil penalty of $5,000.

3. The plaintiff cannot forecast evidence that would support a finding of negligence on the part of the defendants.

Even if Dr. Monce could forecast evidence from which a jury could find that the contents of the website are false, the record is devoid of any evidence that would support a jury's finding that the defendants were negligent in publishing the information about which he complains. A person who publishes information that accurately and fairly reflects the contents of a public record cannot be said to be negligent, as a matter of law.

4. The plaintiff cannot forecast evidence of "actual malice."

As explained in § III(A), below, Dr. Monce may not recover either presumed or punitive damages in this case unless he proves, by clear and convincing evidence, that the defendants published information about him that was defamatory and false, and that in doing so they acted with "actual malice" – i.e., with knowledge that the defamatory information was false, or in reckless disregard of its probable falsity. *New York Times Co. v. Sullivan,* 376 U.S. at 279-80 (1964). Our courts have held that proving reckless regard requires a plaintiff to offer evidence sufficient to demonstrate clearly that the defendant in fact entertained serious doubts about the truth of the publication. *Gaunt v. Pittaway*, 135 N.C. App. 442, 448, 520 S.E.2d 603, 608 (1999) (citing *St. Amant v. Thompson,* 390 U.S. 727, 731(1968)). Dr. Monce's complaint does not include an allegation of "actual malice," nor can he forecast *any* evidence to support such a finding, much less the clear and convincing evidence that the law requires.

Dr. Monce's complaint simply does not allege either that the defendants knew that the statements about which he complains were false or that they published them in reckless disregard of their probable falsity. This deficiency alone entitles the defendants to summary judgment on the plaintiff's claims for presumed and punitive damages.

Even if the complaint had included proper allegations of actual malice, however, Dr. Monce admits that he has no knowledge of any facts that would support such a finding. At his deposition, Dr. Monce was asked whether he contended that the defendants knew that the

statements about him published on their website were false. He replied, "I can't attest to their – what they know and what they don't know." Monce dep. at p. 55. The plaintiff has produced no evidence in discovery that would support a finding of "actual malice" on the part of the defendants.

C. The publication about which the plaintiff complains is privileged as a matter of law.

Summary judgment for the defendant also is appropriate when the record affirmatively demonstrates that the publication at issue is privileged. A qualified privilege will prevent liability for a defamatory statement, when the statement is made: "(1) on subject matter (a) in which the declarant has an interest, or (b) in reference to which the declarant has a right or duty, (2) to a person having a corresponding interest, right, or duty, (3) on a privileged occasion, and (4) in a manner and under circumstances fairly warranted by the occasion and duty, right, or interest." *Phillips v. Winston-Salem/Forsyth County Bd. of Educ.*, 117 N.C. App. 274, 278, 450 S.E.2d 753, 756 (1994) (quoting *Clark v. Brown*, 99 N.C. App. 255, 262, 393 S.E.2d 134,138 (1990)). As explained below, the contents of the defendants' website are privileged because they constitute a complete and fair report about the official proceedings of a state regulatory agency.

1. The "fair report" privilege.

The "fair report" privilege is a common-law[8] privilege grounded in the premise that citizens in a democratic society have the right to know about public government proceedings and records, and to report on them. One court has explained the rationale for the privilege as follows: "[O]ne who reports on what happens in a public, official proceeding acts as an agent for

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[8] The privilege also has a constitutional basis. See *Greenbelt Co-op Pub. Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970) (First Amendment protects truthful report about city council hearing at which citizens characterized developer's conduct as "blackmail."); RESTATEMENT (SECOND) OF TORTS § 611 (1977), comment b ("If the report of a public official proceeding is accurate or a fair abridgment, an action cannot constitutionally be maintained, either for defamation or for invasion of the right of privacy.") See also *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 712 (4th Cir. 1991), citing *Lee v. Dong-A Ilbo,* 849 F.2d 876, 878 (4th Cir. 1988)*; Medico v. Time, Inc.,* 643 F.2d 134, 143-45 (3d Cir. 1981); and *Edwards v. National Audubon Society, Inc.,* 556 F.2d 113, 120 (2d Cir. 1977).

persons who had a right to attend, and informs them of what they might have seen for themselves." *Medico v. Time, Inc.*, 643 F.2d 134, 141 (3d Cir. 1981); see also RESTATEMENT (SECOND) OF TORTS §611, comment a (1977) (The basis of this privilege is the interest of the public in having information made available about what occurs in official proceedings and public meetings.)

The RESTATEMENT formulation of the privilege provides that "[t]he publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported." RESTATEMENT (SECOND) OF TORTS § 611 (1977). Although the privilege is not absolute, it affords greater protection than other qualified privileges. Id. at comment a. At least one commentator has described it as a "door-closing" privilege, because once "the accuracy and fairness tests have been met, both the publication's truth and the publisher's knowledge of its truth or motivation for publishing it are irrelevant." Robert D. Sack, SACK ON DEFAMATION § 7.3.2.2.1 (3d ed. 2006). See *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 712 (4th Cir. 1991) (en banc), *cert. denied,* 501 U.S. 1212 (1991) (fair report privilege foreclosed defamation action grounded in publication of letter of reprimand issued to scientist by National Cancer Institute contractor).

The privilege applies to reports about a wide array of legislative, judicial and quasi-judicial administrative proceedings and records at all levels of government, including regulatory and licensing agencies like the North Carolina Veterinary Medical Board. Ruth Walden, "Libel," NORTH CAROLINA MEDIA LAW HANDBOOK (2001), at 27; RESTATEMENT (SECOND) OF TORTS § 611, comment d (1977). (Privilege extends to any meeting or proceeding dealing with matters of public concern, including proceedings of organizations that are authorized by law to perform public duties, such as a medical or bar association charged with authority to examine, license and discipline practitioners.) See also, *Ronwin v. Shapiro*, 657 F.2d 1071 (9th Cir. 1981) (Report of state bar's denial of law license on grounds that applicant had a "paranoid personality" was

privileged.); *Briarcliff Lodge Hotel v. Citizen-Sentinel Publishers,* 260 N.Y. 106, 183 N.E. 193 (1932) (Privilege extends to report of water board proceedings.). Although the privilege commonly is asserted by newspapers and other commercial news organizations, it is available to any persons, such as the defendants, who report information about a public governmental proceeding. RESTATEMENT (SECOND) OF TORTS § 611, comment c (1977).

Application of the privilege does not require that the report at issue "be exact in every immaterial detail or that it conform to that precision demanded in technical or scientific reporting. It is enough that it conveys to the persons who read it a substantially correct account of the proceedings." Id., comment e.

(a) North Carolina law recognizes the fair report privilege.

North Carolina's appellate courts have recognized and applied the fair report privilege. *LaComb v. Jacksonville Daily News Co.*, 142 N.C. App. 511, 543 S.E.2d 219 (2001).

(b) The plaintiff's claim is foreclosed by the fair report privilege.

Here, the defendants' website, when properly considered as a whole, constituted a complete and accurate report about the veterinary board's proceedings related to Dr. Monce. Indeed, the defendants' report of the veterinary board's proceedings was more than "complete;" it was exhaustive. Exhibit 22. Unlike a summary or abridgment that might appear in a newspaper or magazine, the website included virtually all documents filed in the proceedings, because Nancy Deas updated the site whenever she received new documents from the Board.[9] Nancy Deas dep. at 74. Because the defendants' account of the veterinary board's proceedings is comprehensive, by definition it also is "fair." Both inaccuracy and unfairness, if they occur, are products of selectivity and editing. When a publisher is not faced with deciding what to include in a report and what to omit, "fairness" and "accuracy" take care of themselves.

[9] Unlike newspapers, which function under page limitations, or television stations, whose broadcasts are confined by time constraints, space on the internet is "virtually" unlimited; consequently, by choosing a website as their medium, the defendants were able to provide the public with complete documentation of the Board's handling of their complaint against Dr. Monce.

Dr. Monce is visibly angry and disputatious about the Letter of Reprimand issued to him by the Board. He vigorously asserts that the committee's findings of negligence and malpractice were unjustified and that the veterinarians who issued them were not qualified to make them. See, e.g., Monce dep. at pp. 71-77; 101-107. Dr. Monce's choleric dismay and vituperative criticism aside, the fact remains that the Board's committee *did* make those findings and conclusions and that it has never rescinded, withdrawn or modified them.

Dr. Monce may wish that the Consent Order reflected his view that the defendants' complaint was frivolous and unfounded, but it does not. Rather, his situation is precisely parallel to that of an indicted criminal defendant who pleads guilty to one or few of multiple charges and accepts an agreed-upon sentence in order to avoid a trial that may lead to more serious punishment. The fact that the government elects not to pursue the charges to which the defendant does not plead guilty does not vitiate or expunge them. News organizations regularly report on such plea bargains[10]; when they do, they are protected by the same fair report privilege that entitles the defendants to summary judgment here.

2. The opinion privilege.

The opinion privilege or defense protects two kinds of statements: loose, figurative or hyperbolic rhetoric that no reasonable person would interpret as a statement of actual fact, and statements reflecting subjective views that cannot be proven true or false. Ruth Walden, "Libel," NORTH CAROLINA MEDIA LAW HANDBOOK (2001), at 33; *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 23 (1990) ("Only defamatory statements that are capable of being proved false are subject to liability under state libel laws.");*Greenbelt Co-op Pub. Co. Ass'n v. Bresler,* 398 U.S. 6 (1970) (Accusation that developer was attempting to "blackmail" city zoning agency was protected as "rhetorical hyperbole."); *Daniels v. Metro Magazine Holding Co., LLC,* ___ N.C. App. ___, 634 S.E.2d 586 (2006). In this case the latter version of the privilege or defense applies to the

[10] See, e.g., "Phipps admits illegal fund-raising conspiracy," *The News & Observer*, November 11, 2003, at A-1. (Copy attached for the court's convenience.)

"headline" or "banner" on the home page of the defendants' website. As explained above, the banner about which Dr. Monce complains is not actionable because it merely repeats or summarizes findings and conclusions set forth in the Letter of Reprimand issued to Dr. Monce by the veterinary board. Even if it the banner did not reflect the Board's findings and conclusions, however, it would be protected as an expression of personal opinions formed by the defendants on the basis of the public records posted on the website.

At her deposition, Nancy Deas testified that after seeking information from other veterinarians, she formed the opinion that Dr. Monce's treatment of Alex did not conform to the applicable standard of care, and that the website's banner reflected that opinion. Nancy Deas dep. at pp. 41-43, 78-80, 100-102. Among other things, she said:

> I want [the readers] to know that this web site is about veterinary malpractice, incompetence, and negligence. This is a board complaint which I documented and chronicled with public record. These are the persons in those public records that this board assessed. This is what the board found. That's what the web site chronicled from the start to the end, I believe. And I believe I was very complete and fair. This is my opinion. This is the view I came up with on the topic of this web site, not about Dr. Jones and Monce.
>
> Veterinary--maybe you're not involved in it. Veterinary malpractice and the way boards handle complaints is a big topic of public interest to a huge population. Dr. Jones and Dr. Monce were the poster boys in this case because they were the--they were who our complaint was about. The topic is about veterinary malpractice, incompetence, and negligence. As you know there was a whole page that I wrote devoted just to that, which did not highlight Dr. Monce or Dr. Jones, but about this issue, which is of public interest, and how regulatory agencies deal with citizen complaints on this topic. That is what this is about. But that was my opinion as well, and it was validated by that vet board.

Nancy Deas dep. at p. 79.

When Edna Deas was asked at her deposition whether she believed that Dr. Monce was incompetent, negligent or guilty of malpractice, she declined to express her own opinion but said, "I believe the veterinary board found that he was." Edna Deas dep. at p. 30.

Clearly, the defendants were entitled to form, and to voice, their opinions that Dr. Monce was incompetent and negligent, and that he committed malpractice by failing to live up to the standard of care they expected of him. Indeed, as both testified, their opinions were buttressed

and justified by the Board's own findings and conclusions. Dr. Monce, of course, strenuously expresses a contrary opinion. See, e.g., Monce dep. at p. 86. In the context of this defamation action, however, Dr. Monce cannot prove that the defendants' opinions are "false," nor could they prove that their opinions are "true." To illustrate this point, consider the following hypothetical.

John Jones is charged with first-degree murder in the death of Jack Williams. Jones hires a brilliant criminal defense lawyer (Mr. Crowell's partner Wade Smith, for instance), who negotiates a plea bargain with the district attorney whereby Jones pleads guilty to one count of voluntary manslaughter. When Jones is sentenced, *The News & Observer* publishes a story that recounts the history of the case, including the fact that Jones originally was charged with first-degree murder and the fact that he has pleaded guilty to a lesser offence. The story quotes Williams' wife Jane as saying, "The district attorney should be disbarred. In my book, Jones is a murderer." Jane Williams' comment is not actionable, because she clearly is expressing an opinion, the factual context for which is provided by the story. On the other hand, if Jane Williams later writes a book about her husband's death in which she states that "John Jones was convicted of murder," she will then have made a statement of fact that can be proven false by reference to the court file.

As explained above, the defendants' website laid out the entire factual history of the proceedings before the veterinary board concerning Dr. Monce and Dr. Jones; thus it provided ample context for the banner on the home page, which expresses not only their opinion but also the views outlined by the Board itself in Dr. Monce's Letter of Reprimand. Therefore, the opinion privilege or defense provides still another basis for the entry of summary judgment in the defendants' favor.

III. Alternatively, the defendants are entitled to partial summary judgment.

For the reasons set forth above, defendants submit that this court should enter summary judgment in their favor with respect to the plaintiff's claim for libel *per se*. Alternatively and

additionally, the defendants are entitled to partial summary judgment on each of the following issues.

A. The plaintiff is not entitled to pursue or recover presumed or punitive damages because he has neither pleaded nor can prove that the defendants published false and defamatory statements about him with "actual malice."

The complexity that clothes liability issues in defamation cases also rears its head in connection with damages issues in these cases. This is true because, like the standards for liability, the standards for awarding various kinds of damages differ according to the public/private status of the plaintiff and whether the speech at issue involves a matter of public concern. Under North Carolina common law, malice was presumed in cases of libel *per se* and a plaintiff could recover at least nominal reputational damages without specific proof of actual injury. See *Stewart v. Nation-Wide Check Corp.*, 279 N.C. 278, 284, 182 S.E.2d 410, 414 (1971); *Flake v. Greensboro News Co.,* 212 N.C. 780, 785, 195 S.E. 55, 59 (1938). However, the Supreme Court of the United States has supplanted the common law and ruled that in many instances these presumptions are unconstitutional and that a defamation plaintiff must prove an appropriate level of fault, both to establish liability and to recover damages.

1. Compensatory damages in cases of libel *per se.*

In cases where, as here, the plaintiff's claim is for libel *per se*, the case law has created three categories of "compensatory"[11] damages:

(a) Pecuniary or special damages.

Pecuniary or special damages reimburse the plaintiff for actual, specific monetary loss, such as lost income. These damages are subject to specific pleading and proof requirements, regardless of whether they are sought in the context of a defamation suit or some other context. See, e.g., *Lieb v. Mayer*, 244 N.C. 613, 94 S.E.2d 658 (1956) In the defamation context, North Carolina law requires that claims for libel *per quod* be supported by allegation and proof of

[11] As used herein, "compensatory damages" refers to damages other than punitive or presumed damages.

special or pecuniary damages. *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938). Pecuniary damages are not at issue in this case because Dr. Monce's complaint neither alleges nor seeks such damages.

(b) Actual damages

Actual damages are intended to compensate a defamation plaintiff for injury to his or her reputation and standing in the community. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). The Supreme Court has held that although the plaintiff need not prove the actual dollar value of such injury, the First Amendment requires that "all awards must be supported by competent evidence concerning the injury." Id.

(c) Presumed damages

Presumed damages are damages that can be assumed to have occurred and which may be recovered without proof. At common law, where words were actionable *per se,* the plaintiff was entitled to such damages as a matter of law. A plaintiff could rest his case on proof of the publication of a defamatory falsehood alone, without undertaking to prove actual injury. See, e.g., *Flake v. Greensboro News Co.*, 212 N.C. 780, 785, 195 S.E. 55, 59 (1938). The Supreme Court, however, modified this common law rule by its opinions in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974) and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). As the North Carolina Court of Appeals has noted, *Gertz* focused on the status of the plaintiff and defendant, whereas *Dun & Bradstreet* focused on the content of the speech at issue. *Neill Grading & Const. Co., Inc. v. Lingafelt,* 168 N.C. App. 36, 43, 606 S.E.2d 734, 739 (2005). In *Dun & Bradstreet,* the Court held that speech about "matters of public concern" is entitled to greater First Amendment protection than speech about matters of purely private interest. *Dun & Bradstreet,* 472 U.S. at 758-59. Consequently, when a defamation claim is asserted by a private plaintiff (i.e., a plaintiff who is neither a public official or a public figure) and the publication at issue deals with a matter of private concern only, a state court may permit the plaintiff to recover presumed damages upon proof that the publication in question is

defamatory, is false, and was published with the requisite degree of fault. *Neill Grading & Const. Co., Inc. v. Lingafelt,* 168 N.C. App. 36, 43, 606 S.E.2d 734, 739 (2005). On the other hand, when a private plaintiff sues over a publication that deals with a matter of public concern, the *Gertz* standard applies, and the plaintiff may not recover presumed damages unless he or she proves "actual malice" – that is, that the publication not only was false and defamatory, but also that the defendants either knew that it was false or recklessly disregarded indications that it probably was false. Id.; Rodney A. Smolla, LAW OF DEFAMATION §§ 9:17-9:21 (Second Ed. 2005); see also *Hugger v. Rutherford Institute*, 2004 WL 765067 (4th Cir. 2004) (unpublished *per curiam* opinion applying North Carolina law).

As explained above, the contents of the website at issue in this case clearly relate to a matter of public concern, and Dr. Monce has neither pleaded nor can forecast any evidence of "actual malice;" therefore, he would not be entitled to recover presumed damages even if he were able to prove that the website were false and that the defendants were negligent in publishing it.

2. Punitive damages in cases of libel *per se.*

The *Gertz* rules also apply to punitive damages in libel cases where, as here, the plaintiff is a private person and his claim is predicated on a publication that involves a matter of public concern. See North Carolina Pattern Jury Instruction Civil 806.52. Under those rules, Dr. Monce is not entitled to an award of punitive damages unless he proves, by clear, strong and convincing evidence, that the defendants either knew that the statements about him that they published on their website were false, or published them in reckless disregard of indications that they were false. Id. *In addition,* he must carry the heavy burden of proof imposed by North Carolina's punitive damages statute, which provides that "[p]unitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which

compensatory damages were awarded: (1) fraud; (2) malice;[12] or (3) willful or wanton conduct." G.S. § 1D-15(a). Any aggravating factor must be proved by clear and convincing evidence. G.S. §1D-15(b). As explained above, the plaintiff in this case cannot forecast evidence that would permit him to carry either of these formidable evidentiary burdens, much less both of them.

B. Plaintiff is not eligible for an award of attorney fees.

The plaintiff's complaint neither alleges any facts nor purports to state any claim that would support an award of attorney fees under North Carolina law; therefore, defendants are entitled to summary judgment on this issue.

C. The injunctive relief sought by the plaintiff would be unconstitutional.

In his complaint, Dr. Monce asks the court to impose three types of prohibitory and mandatory injunctive relief. He wants the court to order the defendants (1) to cease publication of the "libelous statements" on their website or elsewhere; (2) to replace the content of their website with statements approved by the plaintiff and the court acknowledging the "incorrectness" of their claims and apologizing to the plaintiff; and (3) to notify visitors to their website that its contents were "false." Complaint at 5.

As explained above, Dr. Monce is not entitled to *any* relief of any kind, but even if he were able to carry the heavy burdens required to prove both liability and damages, the injunctive relief he seeks would be beyond the power of this court to impose because such relief would constitute an impermissible prior restraint on speech in violation of both the First Amendment to the United States Constitution and Article I, § 14[13] of the North Carolina Constitution. See,

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[12] The state law "malice" referenced in the statute requires proof, by clear and convincing evidence, of personal animus or hostility. This type of malice must be proved *in addition to* constitutional "actual malice," with which it should not be confused. *Varner v. Bryan*, 113 N.C. App. 697, 704, 440 S.E.2d 295, 300 (1994) (Evidence of personal hostility and "run-ins" does not constitute evidence of "actual malice.")

[13] "Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never been restrained, but every person shall be held responsible for their abuse."

Kramer v. Thompson, 947 F.2d 666 (3d. Cir. 1991) (Prior restraints on libel are prohibited by Article I, § 7 of the Pennsylvania Constitution which, like Article I, § 14 of North Carolina Constitution, provides that speech and press may never be restrained.); Robert D. Sack, SACK ON DEFAMATION § 10.6.1(3d ed. 2006) (Rule that defamation cannot be enjoined is venerable and near-absolute.); *Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc. v. Sullivan*, 251 Neb. 722, 559 N.W. 2d 740 (1997) (reviewing history of "no injunction" principle and limited exceptions to it).

In light of the foregoing, the defendants are entitled to summary judgment with respect to the plaintiff's requests for injunctive relief.

Conclusion

For the reasons set forth above, defendants are entitled to the entry of summary judgment in their favor.

Respectfully submitted this 31st day of October, 2006.

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CERTIFICATE OF SERVICE

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

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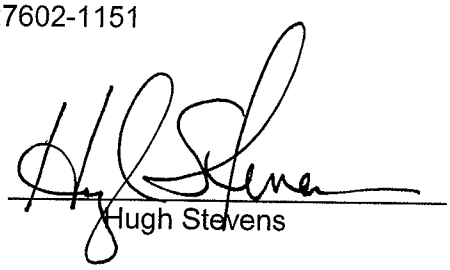
This the 31st day of October, 2006.



Hugh Stevens

The News & Observer

The News & Observer

November 11, 2003

Phipps admits illegal fund raising conspiracy

Author: Kristin Collins; Staff Writer

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Index Terms:
PRISON
FINANCE
POLITICAL FINANCE
CAMPAIGN
NC
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CRIME
FRAUD
Meg Scott Phipps
Lead

Estimated printed pages: 5

Correction: A story on the front page Tuesday gave the wrong year for Meg Scott Phipps' campaign for agriculture commissioner. It was 2000.

Article Text:

GREENVILLE -- Former Agriculture Commissioner Meg Scott Phipps walked shackled into federal court Monday and, after a year of claiming innocence, admitted taking part in an illegal campaign fund-raising conspiracy.

Phipps, the daughter and granddaughter of governors, pleaded guilty to committing two counts each of extortion and mail fraud and one of conspiracy during her 2002 campaign. She likely will serve five years in prison without parole -- long enough that her children, now 12 and 13, will be nearly grown when she gets out.

U.S. District Judge Malcolm Howard delayed sentencing until March, but as part of a plea agreement, prosecutors agreed to request far less than the 55-year maximum. They also dropped 25 charges on which Phipps was indicted in September.

"Ms. Phipps literally sold her office by accepting cash payments that compromised her ability to carry

out her duties," Assistant U.S. Attorney Dennis Duffy told the judge just before Howard pronounced Phipps guilty.

As part of the deal, Phipps also must pay back the government at least $25,000 of the illegal cash she took during her campaign.

Phipps, 47, has been in jail for a week and a half, since a jury found her guilty of four state counts of perjury and obstruction of justice. Those charges, which carry a maximum of more than four years in prison, are based on the same evidence that led to the federal charges.

She is to be sentenced Wednesday in that case, and Wake Superior Court Judge Donald Stephens made it clear to Phipps when he sent her to jail that the only way to avoid state prison time, in addition to the federal time, is to admit guilt. Until now, Phipps has maintained that other people orchestrated her campaign's illegal activity without her knowledge.

Phipps' plea Monday will allow her to give Stephens the confession he requested. Stephens could free Phipps until her federal sentencing.

Phipps' lawyers, brothers Roger and Wade Smith, wouldn't explain why Phipps decided to give up her claims to innocence.

"This was a strong decision by her to step forward and accept responsibility," Roger Smith said. "Certainly [the state conviction] was a major event, and it had an impact, just as many other circumstances did."

Phipps, who was taken back to Wake County jail to await her state sentencing, said almost nothing during the court hearing.

Federal probe continues

Federal prosecutors say their investigation continues and that charges against other people are still possible. Several witnesses, who have so far not been charged with crimes, admitted during Phipps' state trial that they either gave or accepted illegal contributions to the Phipps campaign.

Phipps' plea is the climax of a political corruption scandal that erupted in April 2002, when The News & Observer first printed stories about allegations that the Phipps campaign was making illegal payments on a former rival's debt.

Since then, the case has mushroomed into a federal-state investigation that led Phipps and three of her closest aides to plead guilty to federal felonies. Another defendant, a carnival operator who gave Phipps illegal contributions, pleaded guilty in state court.

Phipps resigned in June.

U.S. Attorney Frank Whitney, the lead federal prosecutor, said Phipps' decision to admit guilt "closes the biggest part of this investigation."

Phipps' problems stem from her 2000 campaign for agriculture commissioner, which cost her more than $1 million.

Desperate to raise money, Phipps, a Democrat, took tens of thousands in illegal contributions from carnival vendors, prosecutors say.

The vendors agreed to help Phipps because she chose which companies could work at the lucrative N.C. State Fair in Raleigh and Mountain State Fair near Asheville.

The owners of Amusements of America, the New Jersey company to which Phipps gave the contract to run the 2002 State Fair midway, gave the Phipps campaign at least $16,000 in illegal cash, prosecutors charged. And Jimmy Drew, whose family company runs the Mountain State Fair, testified that he gave Phipps at least $20,000 in cash.

Cash contributions over $100, and any contributions over $4,000, are illegal.

Those contributions never were recorded on campaign finance reports, and Phipps admitted Monday that she and her aides conspired to hide the payments from state and federal investigators. Phipps also admitted pressuring her former campaign treasurer, Linda Saunders, to protect her by lying under oath.

Phipps' sentence for those crimes likely will be longer than what many violent criminals get for their offenses, but Whitney said it is justified.

"Is there any greater theft," Whitney asked, "than stealing the honest election from the public?"

Phipps came to court Monday in the same olive-green business suit she wore the day she was sent to jail, her ankle shackles jangling as she walked in high heels. She sat at a table with a handful of other defendants dressed in bright orange prison jumpsuits and made pleasant conversation with her fellow inmates as she waited for court to begin.

Howard accepted pleas from four men charged with drug and gun violations before calling on Phipps, who is a lawyer and former administrative law judge.

He went through the standard litany of questions, asking whether she had ever been treated for drug addiction or mental illness, whether she understood what was happening, whether she had taken drugs or alcohol in the previous day.

Then Howard read out each of the five counts to which she had agreed to plead guilty that morning.

'Did you do that?'

"Did you do that?" Howard asked after each count.

"Yes, sir," Phipps said quietly, looking down at the table in front of her.

With her plea, Phipps, who once thought of being governor, gave away her right to vote and to hold public office.

The hearing was over in less than half an hour, and Phipps turned to smile at her family before federal officials led her from the courtroom. Her husband, sister and father, former Gov. Bob Scott, watched from the front row as she shuffled back to jail.

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The Guilty Plea

In legal papers filed Monday, Phipps acknowledged the facts of the case:

The defendant, Meg Scott Phipps, with the concurrence of her attorneys, hereby agrees to the following admissions relevant to the factual basis for her guilty plea, entered this date:

1. The Defendant personally accepted cash campaign contributions, in excess of the legal limits, from persons seeking contracts with the North Carolina Department of Agriculture, and she knew that her campaign staff received other such contributions, and that these contributions were not reported as required by state law;

2. Some of the cash so received was converted to the Defendant's own use;

3. The Defendant agreed that her campaign would help repay the debts of the Bobby McLamb Campaign and knew that this was being done;

4. The Defendant knew on or before January 29, 2002, that Amusements of America had originally funded the $75,000 loan to the McLamb Campaign;

5. The Defendant knew that the memorandum she submitted to the North Carolina Board of Elections in April, 2002, contained false and misleading information concerning her campaign's payments on the McLamb Campaign's debts;

6. Prior to the North Carolina Board of Elections hearings in June 2002, the Defendant knew that Linda Johnson Saunders was going to falsely deny that the Defendant:

a. knew of illegal cash contributions to the campaign; and

b. knew that her campaign had helped repay the debt of the McLamb Campaign; and the Defendant encouraged Linda Johnson Saunders to give said false testimony;

7. At said Board of Elections hearings, the Defendant testified falsely concerning the matters in paragraph 6 above; and

8. After she learned of the federal and state criminal investigations, the Defendant encouraged Linda Johnson Saunders to maintain the false story to which Saunders had testified at the Board of Elections hearings.

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WHAT'S NEXT

On Wednesday, Phipps is set to be sentenced on four state counts of perjury and obstruction of justice. Wake Superior Court Judge Donald Stephens could impose a sentence ranging from probation to more than 4 years in prison.

Next, the federal court will set sentencing on five federal counts. That will happen no sooner than March. Stephens will decide Wednesday whether Phipps awaits that sentencing at home or in state prison.

Meanwhile, the criminal investigation into other people involved with the 2000 Phipps campaign continues. Three of Phipps' aides, who also pleaded guilty to federal charges, have not been sentenced. The court has not set a date for those sentencing hearings.

Caption:
'This was a strong decision by her to ... take responsibility,' says Roger Smith, left, one of Phipps' attorneys, shown outside the courthouse with Roger Smith Jr. and Wade Smith.
Staff Photo by Chuck Liddy

Record Number: ho666m89