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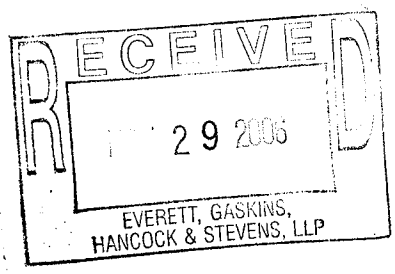
November 29, 2006



Via Hand Delivery

The Honorable Carl R. Fox
Judge of Superior Court
Tenth Floor
Wake County Courthouse
316 Fayetteville Street
Raleigh, North Carolina 27601

Re: *Kevin A. Monce v. Nancy G. Deas and Edna E. Deas*
Wake Co. Sup. Ct., No. 05 CVS 4005

Dear Judge Fox:

Enclosed, as you requested, is a draft order in the *Monce v. Deas* libel case you heard the week before Thanksgiving. This proposed order sets out our view of why summary judgment for Dr. Monce is appropriate. Also enclosed for your consideration is a 2004 order in the Wake County libel case of *Carolyn Grant v. R. Bradley Miller*. Some of the issues in that case were the same or similar to those in the present case.

I need to correct a statement made in the summary judgment hearing. You may recall that I said that the defendants had hired a private detective to follow Dr. Monce. That statement is not supported by the record. In looking back at the transcript of Nancy Deas' deposition I see that she testified that she and her sister had employed a private detective, and also testified to some of the work done by the detective, but she stated that neither the detective nor anyone else had been hired to follow Dr. Monce. I apologize for not being more careful in my statement to the court.

Thank you for consideration of our proposed order. Please let me know if you need anything else.

Sincerely,

THARRINGTON SMITH, L.L.P.

Michael Crowell

Michael Crowell

MC/eml
Enclosures
c: Mr. Hugh Stevens
217249

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.

ORDER

THIS MATTER came on for hearing on November 17, 2006, in Wake County Superior Court upon defendants' motion for summary judgment. Defendants were represented by Hugh Stevens and Amanda Martin of Everett Gaskins Hancock & Stevens, LLP, and plaintiff was represented by Michael Crowell of Tharrington Smith, LLP. After having considered the briefs submitted by the parties, the affidavits and discovery documents and transcripts submitted by the parties, and having heard and considered the arguments of counsel, the Court determines that the material facts are not in dispute and that summary judgment is appropriate. Having carefully considered the legal arguments, the Court determines that pursuant to Rule 56(c), North Carolina Rules of Civil Procedure, summary judgment against the moving party is appropriate and that plaintiff Kevin A. Monce, is entitled to summary judgment on his claim that statements published by the defendants Nancy G. Deas and Edna E. Deas are libelous. The bases for the Court's decision are as follows:

1. Although the parties disagree as to how the facts should be characterized, and the conclusions to be drawn from the facts, none of the material facts is in dispute.

2. Plaintiff Kevin A. Monce is a licensed veterinarian. In November 2002 the defendants Nancy and Edna Deas created a website entitled aligus.com in which they described in detail the history of their complaints to the North Carolina Veterinary Medical Board about Dr. Monce's and Dr. Dana Jones' treatment of the Deas' 14-year old dog Alex before his euthanasia in January 2000.

3. The aligus.com website included a large number of public documents from the Veterinary Medical Board's investigation of Dr. Monce. It also contained text written by the Deas. The headline on the homepage of the website stated "Veterinarian Malpractice, Incompetence & Negligence" immediately above the words "Dana Jones, DVM, Durant Road Animal Hospital" and "Kevin Monce, DVM, PetSound, Inc." Also on the home page was the following statement: "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."

4. "In order to recover for defamation, a plaintiff must allege that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person." *Boyce & Isley, PLLC, v. Cooper*, 153 N.C. App. 25, 29 (2002), *disc. rev. denied*, 357 N.C. 163, *cert. denied*, 540 U.S. 965 (2003). Defendants admit that they made the statements quoted above and that the statements concern plaintiff.

5. The defendants' statements concerning Dr. Monce are libelous *per se*.

> Libel *per se* is 'a publication which, when considered alone without explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3)

> tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace.'

Boyce & Isley, PLLC, v. Cooper, 153 N.C. App. at 29 (quoting *Phillips v. Winston-Salem/Forsyth County Bd. of Educ.*, 117 N.C. App. 274, 277, *disc. rev. denied*, 340 N.C. 115 (1995)). "Whether a publication is libelous *per se* is a question of law for the court." *Id.*, 153 N.C. App. at 31.

6. "In an action for libel or slander *per se*, malice and damages are presumed by proof of publication, with no further evidence required as to any resulting injury." *Boyce & Isley,* 153 N.C. App. at 30.

7. A statement that a professional is "incompetent" is libelous *per se*. *Clark v. Brown*, 99 N.C. App. 255, *disc. rev. denied*, 327 N.C. 426 (1990). As decided with respect to such a statement about an attorney: "On its face, the statement [incompetence] has but one meaning, defamatory *per se*, which degrades plaintiff's legal ability and disgraces him in his capacity as an attorney. Such imputations tend to prejudice plaintiff in his livelihood." *Id.*, 99 N.C. App. at 261. The same conclusion is appropriate for a veterinarian. The statements concerning negligence and malpractice carry the same libelous *per me* meanings.

8. The statement that Dr. Monce was "issued some discipline" by the Veterinary Medical Board for malpractice, incompetence and gross negligence is libelous *per se* and is false. The Veterinary Medical Board never issued discipline to Dr. Monce for malpractice, incompetence or gross negligence.

9. As the defendants argue, the headline "Veterinary Malpractice, Incompetence & Negligence" must be read and understood in the context in which it appears. *Flake v.*

Greensboro News Co., 212 N.C. 780 (1938). The juxtaposition of the headline with plaintiff's name makes clear that the statement is about Dr. Monce. The headline also must be read in the context of the other text on the home page. In addition to various insinuations as to Dr. Monce's competency, the other text includes this statement: "Then Alex died — the victim of veterinary malpractice, incompetence and negligence." Most significantly, it also states that Dr. Monce was "issued some discipline" by the Veterinary Medical Board for malpractice, incompetence and gross negligence. Given that context, the headline would be understood by the ordinary, reasonable person to mean that Dr. Monce was disciplined by the Veterinary Medical Board for malpractice, incompetence and negligence in the treatment of Alex. As so understood, the statement is false.

10. An action for libel has First Amendment implications when the statement is about a public figure or is about a matter of public concern. *Neill Grading and Const. Co., Inc., v. Lingafelt,* 168 N.C. App. 36, *appeal dismissed*, 360 N.C. 172 (2005). Defendants concede that Dr. Monce is not a public figure. The principal subject of the website, which is the defendants' complaint about Dr. Monce's treatment of their dog Alex, has none of the earmarks of a matter of public concern as delineated in *Neill Grading and Const. Co.* Because Dr. Monce is not a public figure, and the subject is not a matter of public concern, there are no First Amendment implications affecting the Court's decision on defendants' liability for defamation.

11. Defendants have urged the Court to recognize a fair reporting privilege for their website. To date, the North Carolina appellate courts have recognized such a privilege only for the news media. *LaComb v. Jacksonville Daily News Company*, 142 N.C.

App. 511, *disc. rev. denied*, 353 N.C. 727 (2001). Even if the privilege applied to defendants, however, it is applicable only when the reporting is about a matter of public concern. As stated above, Dr. Monce's treatment of the Deas' dog is not a matter of public concern. Moreover, even if the privilege applied and the subject were a matter of public concern, the privilege only protects reporting which is substantially accurate. The statement that the Veterinary Medical Board issued some discipline to Dr. Monce, which is the essence of the libel, is not substantially accurate. Rather, it is fundamentally and wholly inaccurate on the most important point of the statement, whether Dr. Monce was disciplined by the board.

ACCORDINGLY, it is ORDERED that:

1. Summary judgment is denied for defendants.

2. Summary judgment is granted for plaintiff Kevin A. Monce on the issues of the libelous nature of the statements by the defendants and the liability of defendants for such defamation.

3. This matter shall remain open for a determination of the damages to be awarded to plaintiff and whether other relief is appropriate.

SO ORDERED, this __ day of _____, 2006.

_____
Carl R. Fox
Judge of Superior Court

217055

NORTH CAROLINA: IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
WAKE COUNTY: 02 CVS 17172

CAROLYN GRANT,
Plaintiff,

Vs.

R. BRADLEY MILLER;
THE BRADLEY MILLER
CONGRESSIONAL
CAMPAIGN, et al.

MEMORANDUM OF DECISION AND ORDER

The use of a known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Hence the knowingly false statement and the false statement made with the reckless disregard of the truth, do not enjoy constitutional protection. Garrison v. Louisiana, 379 U.S. 64,75 (1964)

This is a case in which the plaintiff contends she was defamed by two political television ads sponsored by her opponent, R. Bradley Miller, during a campaign for the North Carolina 13th Congressional District in 2002. The television ads at issue follow:

Ad I: Carolyn Grant's partners sued her for taking $95,000 of company money to spend on her political campaign. Carolyn Grant even admitted in court that she took $40,000 of her son's college money because she wanted to buy a new car. (Complaint, para. 7)

Ad II: Carolyn Grant's (sic) took thousands of dollars from developers and voted to use thirty-three million dollars to build a highway interchange for a developer. (Complaint, para. 28)

THIS MATTER is now before the Court upon the defendants' motion to dismiss the plaintiff's complaint pursuant to Rule 12(b)(6), North Carolina Rules of Civil Procedure and for the award of costs and attorneys' fees against the plaintiff. The motion to dismiss was heard on December 22, 2003.

At the hearing, the Court allowed the plaintiff's counsel to submit memoranda and supporting materials in response to the matters submitted by the defendants. On January 12, 2004, plaintiff's counsel submitted a memorandum of law in opposition to the motion to dismiss, an affidavit of plaintiff. On January 21, 2004, defendants' counsel submitted a reply memorandum.

The Court has considered the arguments, the memoranda and authorities submitted, the materials submitted by defendants and other matters of record. This matter is now ripe for disposition.

Standard of review for a Rule 12(b)(6) Motion to Dismiss.

In ruling on a Rule 12(b)(6) motion to dismiss the trial court is compelled to take the complaint's allegations as true and to then determine if the allegations are sufficient to state a claim upon which relief may be granted under one or all of the legal claims asserted in the complaint.

The trial court's function is not to determine whether or not the plaintiff will "win" but to determine whether or not the plaintiff may go forward towards a trial on the issues. A claim may not be dismissed unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." ***Garvin v. City of Fayetteville***, 102 N.C. App. 121, 123 (1991).

On the other hand, an action is subject to dismissal when the complaint itself shows that no law or valid legal theory supports any claim contained therein; if a material fact necessary to support a claim is absent; or if the complaint discloses a fact that will defeat the plaintiff's claim(s). For example, a complaint that shows on its face that the statute of limitations had expired before the action was filed, would be subject to dismissal. ***Walker v. Sloan***, 137 N.C. App. 387, 392 (2000).

The Court recognizes that defamation actions involving political candidates are generally unpopular and disfavored because of the nature of the political process and the protections afforded under the First Amendment to the United States Constitution. As such, defamation complaints arising out of a political campaign are put under a microscope and closely construed by the Courts.

FACTUAL AND PROCEDURAL BACKGROUND

This defamation action springs from negative political advertising during the 2002 political campaign for the newly created 13th Congressional District to the United States House of Representatives. The parties are:

Plaintiff: Carolyn Grant, the Republican nominee for the 13th Congressional District ("Grant").

Defendants: R. Bradley Miller, the Democratic nominee for the 13th Congressional District, and the duly elected Representative from the 13th Congressional District; The Brad Miller Congressional Campaign which is an entity formed to support and advance Miller's campaign for the United States Congress; Kevin LeCount, campaign manager for the Miller campaign; and Deb Smith, treasurer for the Miller campaign (hereafter collectively referred to as "Miller").

The General Election was held on November 5, 2002. Prior to that election, Grant and Miller campaigned extensively. The fly in the ointment involves two political advertisements sponsored by Miller and aired on television prior to Election Day.

The first political advertisement was aired in October, 2002 (the "October Ad") and the second political advertisement was aired in November, 2002 (the "November Ad").

On September 17, 2002, before the publication of the first political ad, the North Carolina Court of Appeals handed down its decision in ***Boyce & Isley, PLLC v. Roy A. COOPER, III, 153 N.C.App 25 (2002)*** reversing a decision dismissing plaintiffs' claims for defamation per se and unfair and deceptive trade practices pursuant to Rule 12(b)(6), an action arising out of political advertisement aired by Attorney General Cooper during the November 2000 General Election campaign.

The October Ad:

Carolyn Grant's partners sued her for taking $95,000 of company money to spend on her political campaign. Carolyn Grant even admitted in court that she took $40,000 of her son's college money because she wanted to buy a new car. (Complaint, para. 7)

The November Ad:

Carolyn Grant's (sic) took thousands of dollars from developers and voted to use thirty-three million dollars to build a highway interchange for a developer. (Complaint, para. 28)

Grant alleges that Miller, prior to publishing the October and November Ads, undertook careful research and review of sources.

On Monday, November 4, 2002, Grant served Notice on Miller, per G.S. 99-1 advising that Grant considered the political Ads to be defamatory and attached a draft of the complaint. The same day, Grant also announced that she intended to sue Miller for defamation. (***The News & Observer, Nov. 5, 2002, B5***). The complaint in this action was filed on December 27, 2002.

The complaint contains five (5) claims for relief:

First Claim: Grant seeks a declaratory judgment that the ads violate G.S. 163-274(8) that concerns derogatory reports about a candidate for public office. Violation of G.S. 163-274(8) is a Class II Misdemeanor.

Second Claim: Grant contends that the Miller defendants conspired to violate her rights under G.S. 163-274(8).

Third Claim: Grant contends that the ads constitute libel *per se*.

Fourth Claim: Grant contends that the ads constitute slander *per se*.

Fifth Claim: Grant contends that the ads were unfair and deceptive trade practices in violation of G.S. 75-1.1.

Miller filed the motion to dismiss on March 21, 2003 together with Five Exhibits in support of the motion to dismiss:

Exhibit A - Court files from Grant v. Long, et al. 02 CVS 2554, Wake County Superior Court, which action was referenced in the complaint.

Exhibit B - Court files from Grant v. Grant, 96 CVD 2755, Wake County District Court, which action was referenced in the complaint.

Exhibit C - Federal Election Commission Reports, which reports were referenced in the complaint.

Exhibit D - Article from ***The News & Observer*** by Matthew Eisley entitled *DOT to spend $33 million on ramp to new mall Unusual deal bends policy on location* dated June 1, 1997, which article was referenced in the complaint.

Exhibit E - Minutes from N.C. Board of Transportation meetings, 4/4/97, 9/11/98 and 3/2/99.

The Court will consider the Exhibits in connection with the motion to dismiss and does so for the reason(s) expressed in ***Coley v. North***

Carolina National Bank, 41 N.C. App. 121,126 (1979) and *Brooks Distrib. Co.,Inc. v. Pugh,* 91 N.C. App. 715 (1988), 324 N.C. 326 (1989).

Taking the allegations of the complaint as true for purposes of this motion, the Court will consider that the five exhibits proffered by Miller constitute the underlying "source" of the October Ad and the November Ad and will also assume as true that Miller reviewed, researched and examined those sources carefully in preparation of the exact wording of those ads.

Grant has submitted an affidavit to the Court. For purposes of ruling on the motion to dismiss, the Court has elected not to consider the affidavit and has further elected, in its discretion, not to convert the Rule 12(b)(6) motion to a Rule 56 motion for summary judgment.

With the foregoing factual and procedural background in mind, the Court will now address the motion to dismiss separately as to each of the Five Claims for Relief.

DISCUSSION AND DECISION ON CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF - ALLEGED VIOLATION OF G.S. 163-274(8)

SECOND CLAIM FOR RELIEF - ALLEGED CONSPIRACY TO VIOLATE G.S. 163-274(8)

Grant seeks civil relief against Miller on these two claims, both of which rise or fall on G.S. 163-274 (8), a criminal statute.

G.S. 163-274 declares certain acts done in connection with any primary or election in North

Carolina to be a Class 2 misdemeanor and states in pertinent part:

It shall be unlawful: (8) For any person to publish or cause to be circulated derogatory reports with reference to any candidate in any primary or election, knowing such report to be false or in reckless disregard of its truth or falsity, when such report is calculated or intended to affect the chances of such candidate for nomination or election.

This statute prohibits conduct and ascribes a criminal penalty as the sanction. The statute does not provide for any other form of relief, including a right for a citizen to bring his or her own private action for redress of a violation of the criminal law.

Reduced to essentials, Grant may not assert the alleged violation of G.S. 163-274(8) by Miller as a separate civil claim in this action. ***Moose v. Barrett,*** 223 N.C. 524, 527 (1943).

The Second Claim for Relief alleges a conspiracy by the Miller defendants to violate G.S.163-274 (8). Since there is no independent civil claim or right of action based on G.S. 163-274 (8), the conspiracy claim alleged in the Second Claim for Relief must fail as well as a conspiracy claim "cannot succeed without a successful underlying claim." ***Swain v. Efland,*** 145 N.C. 383 (2001).

Accordingly, the motion to dismiss as to the First and Second Claims for Relief shall be granted.

THIRD CLAIM FOR RELIEF - THE OCTOBER AND NOVEMBER ADS SEPARATELY AND/OR TOGETHER CONSTITUTE LIBEL *PER SE*.

FOURTH CLAIM FOR RELIEF - THE OCTOBER AND NOVEMBER ADS SEPARATELY AND/OR TOGETHER CONSTITUTE SLANDER *PER SE*.

Each of these claims purports to assert a separate claim of defamation against Miller based on the content of the same two political ads, one based on the spoken word and the other on the written word. Libel *per se* is defamation by the written word and Slander *per se* is defamation by the spoken word. Libel *per se* and slander *per se* are **separate torts** under the law of North Carolina.

In order to make out an action for defamation, either libel *per se* or slander *per se*, a plaintiff must prove: (i) **that the defendant made a false statement** (ii) **about the plaintiff** (iii) **that is defamatory and** (iv) **that was communicated to a third party** (v) **causing damage to the plaintiff, and** (vi) **that the defendant was at least negligent in doing so.** ***Renwick v. News & Observer***, 63 N.C. App. 200, 204(1983), reversed on other grounds, 310 N.C. 312(1984), cert. denied, 469 U.S. 858.

Libel Per Se - Elements of the Claim.

In ***Ellis v. Northern Star Co.***, 326 N.C. 219 (1990) the Supreme Court outlined the elements of a claim of libel *per se*.

> ***Further, a publication is libelous per se, or actionable 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. Flake v. News Co. 212 N.C.at 787… p. 223-224……..

For defamatory words to be libel *per se*, they *must be susceptible of but one meaning and such nature that a court can presume as a matter of law that those words tend to disgrace or degrade the party or hold the party up to public hatred, contempt or ridicule, or cause him to be shunned or avoided. Flake v. Greensboro News Co.*, 212 N.C. 780,786 (1938).

Slander *Per Se* - Elements of the Claim.

The elements of Slander *per se* are outlined in ***Phillips v. Winston-Salem/Forsyth County Bd. Of Educ.***, 117 N.C. App 274,277 (1991).

Slander *per se* is

an oral communication to a third party which amounts to (1) an accusation that the plaintiff committed a crime involving moral turpitude; (2) an allegation that impeaches the plaintiff in his trade, business or profession; or (3) an imputation that the plaintiff has a loathsome disease.

Actual Malice is an additional element in this case because Grant is a public figure.

In addition to meeting the elements of the defamation claims as set forth above, Grant must overcome an additional obstacle applicable to libel and slander alike. As a candidate for public office, Grant is undisputedly a public figure. A public figure cannot succeed on a claim of defamation, even if he or she proves the publication to be defamatory, unless the public

figure proves that the statements were made with actual malice. ***New York Times v. Sullivan,*** 376 U.S. 254, 279-80 (1964).

Actual malice occurs when a defamatory statement is published " ***with knowledge that it was false or with reckless disregard of whether it was false or not.*** " ***New York Times,*** supra. at 280.

In this case, as in ***Boyce & Isley v. Cooper, supra.,*** there can be no dispute that the political ads were intentionally placed into the media for the purpose of getting the attention of as many of the general public in North Carolina's 13th Congressional District as possible so as to help the Miller campaign win the election. Such is the sole purpose of political ads.

This Court must review the challenged publications initially to determine whether or not the publication(s) may be deemed libelous *per se* as a matter of law. In undertaking such an review, the Court must act as gatekeeper and follow the well established law in North Carolina for such cases:

The duty of the trial court in determining whether or not a publication is libelous *per se* was clearly defined in ***Renwick v. News and Observer and Renwick v. Greensboro News,*** 310 N.C. 312 (1984).

> ***Under the well established common law of North Carolina, a libel per se is a publication by writing, printing, signs or pictures which, when considered alone without innuendo, colloquium or explanatory circumstances:(1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a***

person in tha person's trade or profession; (4) otherwise tends to subject one to ridicule; contempt or disgrace. (citation omitted) It is not always necessary that the publication involve an imputation of crime, moral turpitude or immoral conduct. (citation omitted) 'But defamatory words to be libelous per se 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 party or hold him up to public hatred, contempt or ridicule or cause him to be shunned and avoided.'Flake v. Greensboro News Co. 212 N.C. at 786.(emphasis added).

The 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. (citation omitted) If the court determines that the publication is subject to only one interpretation, 'it is then for the court to say whether that signification is defamatory.' Id. It is only after the court has decided the answer to both of these questions is affirmative that such cases should be submitted to the jury on a theory of libel per se.

We next turn to the question of whether the editorial published and republished by the defendants is susceptible of but one interpretation, which is defamatory when considered alone without innuendo or explanatory circumstances. We find that it is not. The worst that could be said of the editorial is that it is 'reasonably susceptible of a defamatory meaning.' (citation omitted) However, we find the editorial at the very least to be equally susceptible of a nondefamatory interpretation. Therefore, it

could not be libelous per se." 310 N.C. at 317-318.

In determining whether publications are susceptible of only one meaning, and that a defamatory meaning, so as to be libelous per se:

The principle of common sense requires that courts shall understand them as other people would. The question always is how ordinary men would naturally understand the publication... The fact that supersensitive persons with morbid imaginations may be able, by reading between the lines of an article, to discover some defamatory meaning therein is not sufficient to make them libelous...." 310 N.C. 318-19.

With the foregoing in mind, the Court will now conduct its review of the October and November Ads to determine if each ad, or any part thereof, is defamatory *per se*.

The October Ad:

Carolyn Grant's partners sued her for taking $95,000 of company money to spend on her political campaign. Carolyn Grant even admitted in court that she took $40,000 of her son's college money because she wanted to buy a new car.

The first sentence of the October Ad - **Carolyn Grant's partners sued her for taking $95,000 of company money to spend on her political campaign.** - is substantially accurate and based on allegations contained in the Answer and Counterclaim of L. Duane Long and Patricia Long filed in ***Grant v. Long***, 02 CVS 2554, Wake County Superior Court. **(Exhibit A of Defendants' Materials submitted to the Court in support of motion to dismiss)**

Because the first sentence of the October ad is substantially true and accurate and based on pleadings filed in a civil action of public record, Grant cannot overcome the initial hurdle, that the statement was false. The Court finds and concludes as a matter of law that the first sentence of the October ad is not defamatory and the motion to dismiss as to the first sentence, will be granted.

The second sentence of the October Ad - **Carolyn Grant even admitted in court that she took $40,000 of her son's college money because she wanted to buy a new car.** - is a different matter entirely.

Defendants glibly argue that this statement is also true. An examination of the source of the second sentence in the October Ad, provided to the Court by defendants, does not reveal that the second sentence is true, but rather that the second sentence was a mean spirited, intellectually dishonest attempt by Miller to smear Grant's reputation with the voters of the 13th Congressional District so Miller could be elected to Congress. Here's why.

The defendants refer the Court to two pleadings and one affidavit in Wake County District Court, 96 CVD 2755, in support of their claim as to the truth of the assertion that Grant even admitted in Court that she took $40,000 of her son's college money to buy a new car.

The Court has reviewed the pleadings in 96 CVD 2755 on this subject:

Paragraph 15 of the amended complaint alleges:

Defendant (Grant) has withdrawn part or all of the funds from the Merrill Lynch account to use for

purposes other than paying for the minor child's educational expenses.

Grant's Answer to Paragraph 15 of the amended complaint states:

Responding to Paragraph 15, it is admitted that defendant (Grant) withdrew a portion of the funds from the Merrill Lynch account to purchase an automobile for the minor child.

Grant's Affidavit filed January 8, 1997, in that action stated in pertinent part:

On October 5, 1995, I withdrew $38,500 from the Merrill Lynch account to use for Forest's benefit.

The Court has reviewed the pleadings and affidavit and none contain any statement or affirmation that Grant purchased the car for herself, the date of the purchase of the car, the make of the car, or that the cost of the car was $40,000. To the contrary, and in each instance, Grant responded by stating that the withdrawal of a portion of the fund (not $40,000) was to purchase her son an automobile, and to use for her son's benefit.

In fact, the amended complaint only asserts a breach of the Separation Agreement between Grant's former husband and Grant with respect to the custodial account for their son. Not even Grant's former husband charged Grant with withdrawing the funds to purchase a $40,000 automobile.

The only allegation with respect to the facts relating to the alleged breach is that "Defendant has withdrawn part or all of the funds from the Merrill Lynch account to use for purposes other

than paying for the minor child's educational expenses." Paragraph 15 of Amended Compl.

Reduced to essentials, the pleadings and affidavit relied upon by defendants to support their assertion that the advertisement with respect to the purchase of an automobile for $40,000 from Grant's son's college account fail to contain any factual information to support the statement that she took $40,000 of her son's college money because to buy a new car.

To the contrary, the pleadings and affidavit with its attachment showing the accounts in place show that Grant admitted to withdrawing $38,500 for her son's benefit and that she withdrew a part of the funds to purchase her son a car. There is no statement in the pleadings to support the allegation that she took $40,000 of her son's college money to buy a new car.

Thus, the second sentence of the advertisement is not substantially true. The second sentence is simply untrue.

The second sentence charges, without inference or equivocation, Grant with taking $40,000 of her son's college money to buy a new car. This statement is not true and is defamatory *per se*.

Despite the defamatory nature of the second sentence of the October Ad, Grant may not proceed without allegations that the statement was published with **actual malice**. The Court has examined the complaint and finds that Grant has in fact alleged actual malice sufficiently to meet the requirements of notice pleading in the North Carolina Rules of Civil Procedure and the Court has also determined, based on its examination of the

genesis of the second sentence, that the intellectually dishonest crafting of the second sentence constitutes a *prima facie* case of actual malice. Here's why.

The mere fact that Miller had the ***Grant v. Grant*** pleadings in hand at the time the Second Sentence in the October Ad was carefully crafted is *prima facie* evidence that not only was the Second Sentence untrue and misleading. Its creation was a classic case of intellectual dishonesty as it was drafted with the knowledge that it was false and deceptive, and at best, with a reckless disregard for the truth. Such conduct fits precisely within the definition of actual malice as the second sentence of the October Ad was published "with knowledge that it was false or with reckless disregard of whether it was false or not." ***New York Times v. Sullivan, supra.***

While the truth was staring Miller in the face, it appears Miller deliberately elected to cut, paste and leave out the truth in an effort to put Grant before the voting public as a person who had stolen $40,000 from her own child to buy a new car. This creates a *prima facie* case of defamation *per se* with actual malice.

The November Ad:

Carolyn Grant's (sic) took thousands of dollars from developers and voted to use thirty-three million dollars to build a highway interchange for a developer.

Grant alleges that the November Ad is false in that at the time of the final approval of the Triangle Towne Boulevard interchange project Grant was not a member of the North Carolina Board of Transportation. The Court has carefully examined

Exhibits C,D&E provided by Miller in support of the motion to dismiss and has carefully examined the November Ad, sentence by sentence and word by word.

The November Ad consists of one long sentence - ***Carolyn Grant's (sic) took thousands from developers and voted to use thirty-three million dollars to build a highway interchange for a developer*** - is supported by the Federal Elections Commission reports filed by Grant's election committee, the newspaper article and minutes of the N.C. Board of Transportation. (Exhibits C, D & E).

The crux of Grant's complaint about the November Ad is that it appears to send the message that Grant took thousands of dollars from developers and in return voted for the thirty-three million dollar interchange project for a developer.

The truth of the matter is that Grant's campaign in 2002 accepted several thousand dollars from developer supporters. However, Grant was not on the DOT Board when the final official vote to approve the $33,000,000 Triangle Town interchange project was made. The truth of the matter is that Grant did vote for the project while she was on the board and actually supported the project.

What is not true is that the chronology in the November Ad is backwards and leaves out the fact that Grant was not on the DOT Board when the project was finally approved. The developer donations came in 2002 and the project was finally approved after she had resigned from the DOT Board. It should also be noted that the developer of Triangle Towne Center **did not** contribute to Grant.

While the November Ad is intellectually dishonest in the message it tends to create - that Grant is in the pocket of developers, or that Grant

voted for the project because she took donations from the developer - the Court, viewing the November Ad in its entirety, cannot say that the November Ad is subject to only one interpretation, or that it rises to the level of defamation at all. The worst that can be said of the November Ad is that it is "reasonably susceptible of a defamatory meaning" set forth by the North Carolina Supreme Court:

> ***In determining whether publications are susceptible of only one meaning, and that a defamatory meaning, so as to be libelous per se:***
>
> ***The principle of common sense requires that courts shall understand them as other people would. The question always is how ordinary men would naturally understand the publication... The fact that supersensitive persons with morbid imaginations may be able, by reading between the lines of an article, to discover some defamatory meaning therein is not sufficient to make them libelous...."*** 310 N.C. 318-19.

While the November Ad conveys an unfavorable message about Grant, it can be interpreted in more than one way, as contrasted with the October Ad, and thus cannot reach the level of defamation *per se* so as to survive a Rule 12(b)(6) motion to dismiss.

Before leaving the November Ad, the Court would note that if a licensed attorney were to file a complaint against Grant alleging that Grant took money from developer as a member of the DOT Board and thereafter voted for the developer's project while on the DOT Board - which is one way to interpret the November Ad - that licensed attorney would have violated Rule 11 of the North Carolina

Rules of Civil Procedure based on the "supporting" data presented here.

The reason for that violation would be that the chronological sequence of events to support such an allegation, as well as no evidence of any such behavior on Grant's part, was not true and positing such a claim in Court would be intellectually dishonest, not based on fact and deserve sanctions by the Court against counsel.

Fortunately for Miller, the November Ad was not a complaint against Grant filed in the Superior Court and because it was a political ad which does not rise to the level of defamation *per se*, the motion to dismiss as to the November Ad will be allowed.

The Fair Reporting Privilege does not save Miller in this case.

However, the Court's inquiry does not stop here as Miller argues that even if the ads are defamatory, that they are privileged as fair and accurate reports of official proceedings and public meetings.

This Court has concluded as a matter of law that the Second Sentence of the October Ad is defamatory *per se* affecting a public figure and that actual malice has been sufficiently alleged, pleaded and *prima facie* exists with respect to that portion of the October Ad.

Notwithstanding this, Grant cannot succeed in this case under any libel theory if the offending portion of the October Ad is protected by the fair reporting privilege.

> ***The RESTATEMENT (SECOND) OF TORTS provides: …publication of a 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. Section 611 (1977).***

The fair reporting privilege was recognized by the North Carolina Court of Appeals in ***LaComb v. Jacksonville Daily News Co.***, supra, a decision published in May, 2001. Judge John Martin wrote: ***"Although the fair report privilege has never been explicitly defined by North Carolina case law, the privilege nonetheless exists to protect the media from charges of defamation."*** Id. at 220. Citing ***Kinloch v. News & Observer Pub. Co.***, 314 F. Supp. 602, 606 (E.D.N.C.1969), affirmed, 427 F. 2d 350 (4th Cir.1970), the ***LaComb*** court explained that the conditional fair report privilege protects a newspaper when the account of an incident is substantially accurate.

> ***The law does not require absolute accuracy in reporting. It does impose the word "substantial" on the accuracy, fairness and completeness. It is sufficient if it conveys to the persons who read it a substantially correct account of the proceedings.***

Id.

It has long been held that publication of matters of public interest is conditionally privileged if fair, accurate, complete and not published for the purpose of harming the person involved, even though the information contained therein is false. ***Gattis v. Kilgo***, 140 N.C. 106 1905); ***Herndon v. Melton***, 249 N.C. 217(1938).

The "fair report" privilege has been extended to protect accurate accounts of public records and statements made by governmental officials, as well as judicial proceedings. In ***McKinney v. Avery Journal***, supra, the N.C. Court of Appeals held that it was proper to rely on a sheriff ***"to gain information regarding plaintiff's being listed on Interpol or as to the status of warrants sworn out against plaintiff [the allegedly defamatory statement]. In fact, consulting a law enforcement agency may have been the only avenue for obtaining this information."***

See also ***Time, Inc. v. Pape***, 401 U.S. 279(1971) and ***Medico v. Time, Inc.***, 643 F. 2d 134 (3rd Cir.), cert. denied, 454 U.S. 836 (1981).

In order to retain the privilege for reporting the contents of public records, the challenged statements need not be verbatim reports; they need only be substantially accurate. ***LaComb***, supra., 543 S.E. 2d at 220. ***"Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified."*** ***Masson v. New Yorker Magazine, Inc.***, 501 U.S. 496, 517(1991).

"The law does not require absolute accuracy in reporting. It does impose the word 'substantial' on the accuracy, fairness and completeness. It is sufficient if it conveys to the persons who read it a substantially correct account of the proceedings." ***Parker v. Edwards***, 222 N.C. 75, 78(1942).

The Court will assume, ***arguendo***, the fair report privilege applies to political campaigns and candidates. Assuming the privilege applies here, the Second Sentence of the October Ad fails the test for substantial accuracy, fairness and completeness by leaps and bounds and the Court

finds and concludes that the Second Sentence of the October Ad, for the reasons stated earlier in this Memorandum of Decision, is not protected by the privilege because it is not substantially accurate in the first place.

THE FIFTH CLAIM FOR RELIEF - UNFAIR AND DECEPTIVE TRADE PRACTICES IN VIOLATION OF G.S. 75-1.1.

Grant filed this action after ***Boyce & Isley v. Cooper, supra,*** was handed down in September, 2002. That case permitted a claim for unfair and deceptive trade practices to survive a motion to dismiss in the context of a defamation suit arising from a political campaign. Miller urges this Court to dismiss the unfair and deceptive trade practices claim in this case on the grounds that publication of political statements in the heat of a political campaign is simply not conduct covered by Chapter 75 of the General Statutes.

This Court believes that ***Boyce & Isley v. Cooper*** is quite different from this action when it comes to the unfair and deceptive trade practice claim and as such, the unfair and deceptive trade practice claim alleged under the facts of this action cannot be maintained. Here's why.

In ***Boyce & Isley*** the law firm of the candidate, Dan Boyce, was determined to have been the subject of defamation *per se*. Simply put, the Isley family, which consisted of two of the firm's members, were innocent victims of the defamation *per se* as discussed in that opinion.

In this case, the defamation occurs between two candidates for public office, not between the candidates and innocent by-standers. This Court cannot conceive of how a candidate for public

office through general election can be, standing alone, engaged in a business activity sufficient to put that candidate under the protection of Chapter 75 of the North Carolina General Statutes. Accordingly, the motion to dismiss the Fifth Claim for Relief will be granted.

CONCLUSION

Cases like this would never be brought if political candidates conducted honorable, positive campaign advertising as opposed to negative, character assassination advertising. The First Amendment provides wide latitude and protection in the "rough and tumble" of political speech, as it should. In this case, however, the line was crossed and Grant is entitled to proceed with discovery and move on with this action. Since this action is not fully ended, the Court will not rule on the Motion for Sanctions or Attorney's fees.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. The First Claim for Relief seeking a declaratory judgment that the political advertisements violate G.S. 163-274 (8) is dismissed for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), North Carolina Rules of Civil Procedure.
2. The Second Claim for Relief for conspiracy to violate G.S. 163-274(8) is dismissed for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), North Carolina Rules of Civil Procedure.
3. The Motion to Dismiss the Third and Fourth Claims for Relief alleging defamation *per se* to the extent the motion is based upon the published statement contained in the October, 2002 Ad - ***Carolyn Grant even admitted in court***

that she took $40,000 of her son's college money because she wanted to buy a new car - is denied. As to that statement, Grant may proceed with her defamation *per se* action under the Third and Fourth Claims for Relief.

4. The Motion to Dismiss the Third and Fourth Claims for Relief alleging defamation *per se* as to **that portion of the October Ad not set forth in subparagraph 3 above**, and as to all of the November Ad, is allowed and those claims are dismissed [subject to subparagraph 3 above] for failure to state a claim upon which relief can be granted pursuant to Rule 12 (b)(6) North Carolina Rules of Civil Procedure.
5. The Fifth Claim for Relief for alleged unfair and deceptive trade practices in connection with the political ads is dismissed for failure to state a claim upon which can be granted pursuant to Rule 12(b)(6), North Carolina Rules of Civil Procedure.
6. The defendants shall have thirty(30)days from the date of this Order in which to answer or otherwise plead to the remaining claim(s) in this action.
7. The Court takes no action at this time on defendants' motion for costs and attorneys' fees.

THIS the 19th day of April, 2004.

Howard E. Manning, Jr.
Superior Court Judge

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Memorandum of Decision and Order was served on counsel of record this date by facsimile and by depositing a copy thereof in the United States Mail, postage prepaid, addressed as follows:

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This the 20th of April, 2004.

Judicial Assistant, 10th Judicial District