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.

PLAINTIFF'S BRIEF IN SUPPORT OF PARTIAL SUMMARY JUDGMENT

This brief is filed in support of plaintiff Kevin A. Monce's motion for partial summary judgment. Dr. Monce seeks summary judgment that the defendants' libelous statements are not about a matter of public concern. Whether the statements are on a matter of public concern affects the standard of proof.

NATURE OF CASE

This is an action for libel. Kevin Monce is a veterinarian, and this action grows out of his treatment of Nancy and Edna Deas' terrier Alex. After the dog died in early 2000 the Deas filed a complaint with the Veterinary Medical Board. In November 2002 the Deas created a web site dedicated to their complaint and posted on it defamatory statements including the large, bold headline "Veterinary Malpractice, Incompetence & Negligence" above Dr. Monce's name. To the Deas' disappointment, their complaint was eventually resolved in April 2003 with the board and Dr. Monce agreeing to a consent order which did not find him guilty of malpractice or negligence or incompetency. Nevertheless they maintained the defamatory statements on the web site.

The Deas previously moved for judgment on the pleadings based on the statute of limitations, but that motion was denied. The Deas subsequently moved for summary judgment, which was denied, as was Dr. Monce's request for summary judgment in his favor. Each side now has moved for partial summary judgment on specific threshold issues.

STATEMENT OF FACTS

Although the parties certainly disagree as to what to make of the facts, the facts themselves are not in dispute. Kevin Monce has been a licensed veterinarian since 1994, and at the end of 1999 he was a consulting veterinarian to other vets. At the request of Nancy and Edna Deas, Dr. Monce consulted with Dr. Dana Jones of Raleigh in the treatment of Alex, a 14-year old terrier, at the end of 1999 and beginning of 2000. Complaint, ¶ 11. Alex's condition deteriorated, and he was euthanized on January 4, 2000. Complaint, ¶ 10.

The Deas filed a complaint with the Veterinary Medical Board in February 2000, asserting that Drs. Monce and Jones had been incompetent and negligent in the treatment of Alex (the "treatment complaint"). Complaint, ¶ 11; Exhibit 25.[1] Based on information received from the Deas the board initiated its own complaint concerning certain non-medical regulatory matters, such as the inspection of Dr. Monce's mobile facility and his failure to timely reports of changes in the name and locations of his practice (the "regulatory complaint"). Exhibit 18.

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[1]All deposition transcripts, exhibits and affidavits have been filed with the court previously. Note that exhibits are numbered consecutively from one deposition to the next without duplication. Copies of important exhibits will be provided at the hearing on the motion to which this brief is addressed.

In October 2001 the board issued a "letter of reprimand" to Dr. Monce in the Deas' treatment complaint, notifying him that under board rules he could accept the letter and accept the proposed penalty or could contest it. Exhibit 5. The board also issued a letter on the complaint concerning non-medical regulatory issues, again proposing penalties. Exhibit 18. In both instances Dr. Monce chose to contest the reprimand and penalites and a contested case was initiated in the Office of Administrative Hearings (OAH). Complaint, ¶ 13; Exhibit 21.

The only news media coverage of the Deas' complaint was a story in the October 16, 2002, Raleigh News & Observer that resulted from the Deas contacting a columnist. N. Deas dep. at 90. The story mainly concerned the volume of paper generated by the Deas.

The Deas opened their web site, aligus.com, in November 2002 featuring the headline "Veterinarian Malpractice, Incompetence & Negligence" immediately above the words "Dana Jones, DVM, Durant Road Animal Hospital" and "Kevin Monce, DVM, PetSound, Inc." Complaint, Exhibit A; Exhibit 3; Nancy Deas deposition at 71. Also on the home page was the 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.

Complaint, Exhibit A.

In April 2003 Dr. Monce and the vet board entered a Consent Order which concluded the contested case at OAH and finally resolved both complaints. Exhibit 17. Dr. Monce accepted certain findings and violations related to the non-medical regulatory

complaint — *e.g.*, his failure to get approval of practice name changes—and agreed to pay a fine related to those matters. The order, however, has no findings related to the treatment complaint.

The Deas' web site remained on the internet, with the same "Veterinary Malpractice, Incompetence & Negligence" headline and the same statement about the board disciplining Dr. Monce.

The Consent Order signed in April 2003 finally resolved both complaints against Dr. Monce — both the complaint initiated by the Deas concerning the treatment of Alex, and the board-initiated complaint about regulatory matters — and included no findings as to improper, incompetent or negligent treatment by Dr. Monce. He was unwilling at any point to agree that his treatment had been improper, and the Veterinary Medical Board entered a final order which contained no such findings.

ARGUMENT

I. The Deas' statements are libelous *per se*.

"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, 568 S.E.2d 893 (2002), *disc. rev. denied*, 357 N.C. 163, *cert. denied*, 540 U.S. 965 (2003). The law recognizes several forms of libel *per se*:

> In North Carolina, the term defamation applies to the two distinct torts of libel and slander. 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.'" (emphasis added)

Id., 153 N.C. App. at 29 (quoting *Phillips v. Winston-Salem/Forsyth County Bd. of Educ.*, 117 N.C. App. 274, 277, 450 S.E.2d 753 (1994), *disc. rev. denied*, 340 N.C. 115, 456 S.E.2d 318 (1995)).

To be libelous *per se*, the defamatory nature of the words must be apparent on their face:

> In construing the publication, we are guided by the rule that to be actionable *per se,* the 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 party or hold him up to public hatred, contempt or ridicule . . . .'

Clark v. Brown, 99 N.C. App. 255, 260, 393 S.E.2d 134, *disc. rev. denied*, 327 N.C. 426 (1990) (quoting *Tyson v. L'Eggs Products, Inc.*, 84 N.C. App. 1, 12, 351 S.E.2d 834 (1987)). "Whether a publication is libelous *per se* is a question of law for the court." *Boyce & Isley*, 153 N.C. App. at 31. In *Brown*, the defamation was a district attorney's statement that a former assistant had been fired for "Incompetence." The court found that the statement was libelous *per se*:

> First, we determine as a matter of law that ordinary men would naturally understand defendant's statements to the newspaper reporter as disgracing plaintiff in his profession as an attorney and hurtful to his reputation. 'Incompetent' means '[o]f inadequate ability or fitness; not having the requisite capacity or qualification; incapable.' Oxford English Dictionary 166 (1st ed. 1971). On its face, the statement 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.

Clark v. Brown. 99 N.C. App. at 261. In the present case, the Deas have made the same kind of statements, with a bold headline on their web site declaring "Veterinary Malpractice, Incompetence & Negligence" above the name of Dr. Monce.

Once libel *per se* is established, as it is in this case, there is no need for further evidence of harm. "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.

II. The Deas' defamatory statements are false.

The Deas' web site contains two defamatory statements. The first is the headline at the top of the home page, "Veterinary Malpractice, Incompetence & Negligence," which appears in large bold letters above the words "Dana Jones, DVM, Durant Road Animal Hospital," and "Kevin Monce, DVM, VetSound, Inc." The second is this statement, also on the home page:

> The North Carolina Veterinary Medical Board decided our complaint on 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.

Both are statements composed by the Deas themselves, not quotes from vet board documents or any other source.

The headline, "Veterinarian Malpractice, Incompetence & Negligence," coupled with Dr. Monce's name, asserts in unequivocal terms that he has committed malpractice and is incompetent and negligent. The statement is libelous *per se*, and the statement is false. Dr. Monce has never been found liable for malpractice, incompetence or negligence.

Veterinarians who are familiar with his abilities and his reputation report that he is competent, capable and qualified. Affidavits of Christine Fagan, Sheila Hanby, John D. Killoran, Katherine E. Wagner and G. Robert Weedon (compiled in Exhibit 26). In their depositions the Deas admitted that they had consulted a dozen different veterinarians about Dr. Monce's treatment of Alex and finally confessed that they did not know of single veterinarian who would say that Dr. Monce had failed to meet the proper standard of care or was incompetent or negligent or had committed malpractice. N. Deas dep. at 33, 44, 101; E. Deas dep. at 32.

The second statement is that Dr. Monce was "issued . . . discipline" by the Veterinary Medical Board for "incompetence, gross negligence, or other malpractice in the practice of veterinary medicine." The statement is false. On October 17, 2001, the board mailed to Dr. Monce a "Letter of Reprimand" which, indeed, included proposed findings of incompetence and malpractice. The letter was clear, however, that it was not a final action by the board, that Dr. Monce could "choose to reject the reprimand and request a formal hearing." Exhibit 5. Dr. Monce chose to do so. The result was the April 17, 2003, Consent Order entered between the Veterinary Medical Board and Dr. Monce to resolve all pending complaints against him. The Consent Order, of course, superseded the October 2001 letter from the board, and it contained no findings whatsoever concerning malpractice, incompetence or negligence. Throughout the discussions with the board Dr. Monce adamantly refused to ever accept any finding of malpractice, incompetence or negligence. Karin Monce deposition at 117-18, 134; Exhibit 20.

Contrary to the statement on the Deas' web site, the Veterinary Medical Board never "issued some discipline" to Dr. Monce based on "incompetence, gross negligence, or other

malpractice." To the extent the board charged Dr. Monce with incompetence and malpractice in its October 2001 letter, those issues were fully resolved in the April 2003 Consent Order. The Deas know and understand the effect of the Consent Order, and it is the reason they are so unhappy with the vet board. In deposition they stubbornly refused to acknowledge the obvious fact that the Consent Order had ended their complaint with no finding of malpractice, incompetence or negligence by Dr. Monce—N. Deas dep. at 21-23, 51-55; E. Deas dep. at 21-23— but the effect is clear to everyone else.

III. The treatment of the Deas' dog is not a matter of "public concern" offering the Deas First Amendment protection from their defamatory statements.

The degree of fault which must be shown in a libel case depends on whether the person being defamed is a public figure or a private person and whether the issue being reported is a matter of public concern. First Amendment law requires a showing of malice to sustain a libel claim when the subject is a public figure engaged in a matter of public concern, but lesser proof suffices when the person libeled is a private individual or the issue is not one of public concern. *Philadelphia Newspapers, Inc. v. Hepp*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986). Traditional common law libel concepts, freed of First Amendment ramifications, apply when a private individual is being defamed about a matter that is not of public concern. *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985). The Deas concede that Dr. Monce is not a public figure, but they assert that their defamation is about a matter of public concern. If, however, it is not a matter of public concern, "then North Carolina's common law standards of libel govern plaintiff's claims without regard to the First Amendment. . . ." *Neill Grading*

and Const. Co., Inc., v. Lingafelt, 168 N.C. App. 36, 44-45, 606 S.E.2d 734, 740, *appeal dism.*, 360 N.C. 172 (2005).

The issue of the treatment of Alex simply is not a matter of public concern. The only North Carolina appellate decision addressing this issue is instructive for the present case, especially in the facts that existed there but are missing here. In *Neill Grading*, *supra*, the court acknowledged that there was no developed North Carolina case law on whether something is a matter of public concern, but it noted the Supreme Court's guidance in *Dun & Bradstreet* that the question "must be determined by [the expression's] content, form, and context . . . as revealed by the whole record."

In *Neill Grading* the issue was whether a radio station's reporting about two large sinkholes at a restaurant in Hickory was a matter of public concern. The court found it was a matter of public concern based on a record showing that the sinkholes had been reported on CNN, on Fox morning news, on other news programs and on television in Germany; that the sinkholes had been discussed by the regional council of governments at a meeting with Department of Transportation officials; that N.C. State and UNC-Charlotte had begun teaching about the sinkholes; and that the local visitors bureau had received calls about the sinkholes from as far away as Michigan. Moreover, the court noted the clear and immediate safety concerns to residents.

None of the *Neill Grading* factors can be found in the present case. Dr. Monce's treatment has not been a matter of public discussion and widespread news reporting, nor is it a matter of clear and immediate safety to the public. The only newspaper article that had appeared was written by a single columnist who was contacted by the Deas. There is no evidence that any other newspaper or news outlet picked up the story and spread it.

The Deas' complaint has not prompted meetings of public officials; it has not been the subject of academic studies; people do not call the vet board to inquire about it. Although the Deas have attempted mightily to generate interest in their story, it has not caught the public's attention.

CONCLUSION

Dr. Monce is entitled to partial summary judgment on the issue of whether the Deas' defamatory statements are about a matter of public concern. While the Deas themselves may consider Alex's treatment and their subsequent complaints a matter of great public concern, there is no evidence that anyone else views it that way. Because the defamatory statements are not about a matter of public concern, ordinary rules of libel apply and malice and damages are presumed from publication.

RESPECTFULLY SUBMITTED this 31st day of May 2007.

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CERTIFICATE OF SERVICE

I certify that a copy of **PLAINTIFF'S BRIEF IN SUPPORT OF PARTIAL SUMMARY JUDGMENT** was served by hand delivery to the following:

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This 31st day of May 2007.

Michael Crowell
Michael Crowell