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 RESPONSE TO DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Kevin A. Monce files this response to Defendants' Brief in Support of Motions for Partial Summary Judgment.

Plaintiff and defendants each have filed motions for partial summary judgment and have submitted briefs in support of those motions. Taken together, the motions raise legal issues which will effectively decide the case. It may assist the Court to summarize the legal issues in play and how they affect the outcome of the case.

This is an action for libel. The Deas acknowledge that they published the defamatory statements about Dr. Monce on their website. They argue, however, that they are not liable because, first, the two statements about which Dr. Monce complains are not false. They say that the headline — "Veterinary Malpractice, Incompetence & Negligence" — is merely a matter of opinion, and that the statement that the Veterinary Medical Board "issued some discipline" to Dr. Monce is substantially true. If the Deas are correct and the statements are not considered false, they have no liability.

The Deas go on to argue that they are not liable even if the statements are false, because the statements are about a matter of public concern and thus subject to First

Amendment protection. If the First Amendment applies, it overrides ordinary common law rules of libel in two significant ways. One is that Dr. Monce must prove actual malice in the publication by the Deas and the other is that there is no presumption of damages. The Deas say that if Dr. Monce is subjected to those standards he cannot prove his case. If, however, the statements are not about a matter of public concern, there is no First Amendment analysis needed, common law rules of libel apply, and malice and damages are presumed from publication of statements that are libelous *per se*.

The other implication of the Deas' argument that their statements are about a matter of public concern is that it opens the door for them to argue a fair reporting privilege.

The linchpin legal issues, thus, are whether the defamatory statements made by the Deas are false and whether they address a matter of public concern. Dr. Monce already has spoken to those issues in his brief in support of his motion for partial summary judgment, but this response will elaborate on a couple of points related to those issues. This response also will address the Deas' argument on the fair reporting privilege.

I. The Deas statements are defamatory "within the four corners" of the statements, and thus are libelous *per se*, even though mingled with other, non-libelous material.

The Deas' discussion of the "four corners rule" gives a misleading impression of the law. The Deas quote *Flake v. Greensboro News Co.*, 212 N.C. 780, 787, 195 S.E.2d 55 (1938), for the proposition that in deciding whether a statement is libelous *per se* the court must view the publication "stripped of all insinuations, innuendo, colloquium, and explanatory circumstances", and the statement must be defamatory on its face "within the four corners thereof." They then argue that those words from *Flake* mean the entire publication must be reviewed to determine if the statement is defamatory, leading to their

conclusion that the headline on the website — "Veterinary Malpractice, Incompetence & Negligence" — is not libelous because there is a great deal of other material on the website which says nothing defamatory. This argument misapplies *Flake*, asserting incorrectly that a libelous statement does not matter if it is surrounded by a sufficient volume of non-libelous material.

The court in *Flake* was only stating the well-established rule that in determining whether a statement is libelous *per se* one does not look beyond the statement itself, one cannot bring in extraneous materials to determine whether the words have a defamatory meaning. In short, one must find the libelous meaning within the four corners of the publication itself without resort to outside sources.

As authority for the "four corners" quote the *Flake* court cites the 1919 Oklahoma case of *Kee v. Armstrong, Byrd & Co.*, 75 Okla. 84, 182 P. 494 (1919). *Kee* has a lengthy discussion of the meaning of "libelous *per se*" and whether the plaintiff had properly pleaded a cause of action. Holding that the words at issue there were not libelous on their face, the court said in such a case the plaintiff needed to plead "by way of inducement or averment, colloquium and innuendo, certain extrinsic facts which connect the plaintiff with the libelous publication and to plead the meaning the words have and that they would be understood to have . . . ." 182 P. at 498. Then the court explained the meaning of the common law terms "inducement or averment, colloquium and innuendo," concluding that they all can be lumped together as "innuendoes", and that they signify nothing more than a pleading to explain the meaning of the words. *Id.* Nowhere in *Kee* is there any suggestion — just as there is not in *Flake* — that libelous words can lose their defamatory meaning just because they are in the middle of non-defamatory statements.

Regardless of what else is on the website, the headline "Veterinary Malpractice, Incompetence & Negligence" defames Kevin Monce, as does the statement about his being disciplined for malpractice and gross negligence. The headline is the first and most prominent statement a reader sees on the site, and the other statement likewise is featured on the home page. Whatever else may be on subsequent pages does not remove the libelous *per se* character of those statements. The libelous nature of the Deas' words is clear from the four corners of the statement; it is not necessary to go outside the statement to determine its libelous meaning.

II. The Deas' statement about malpractice, incompetence and negligence is not protected as a matter of opinion.

The Deas argue that the headline is protected as a matter of opinion. Again, however, their explanation of the law is incomplete.

As the Deas say, there is no libel when a defendant's statements consist of such rhetorical hyperbole that "a reasonable reader or listener would not construe that assertion seriously." *Daniels v. Metro Magazine Holding Co., LLC*, __ N.C. App. __; 634 S.E.2d 586, 590 (2006). The article in *Daniels* described an insurance adjuster lapsing into "bureaucratic order-giving that would put former Soviet security police to shame," speaking in "that quiet Gestapo voice," and wanting to take the writer "to the gas chamber." Those statements were part of a "frivolous tone and general tenor of absurdity throughout the article" which could not reasonably be interpreted as stating actual facts and, consequently, there was no libel. The Deas do not argue that this version of an opinion exception applies to the present case; their statements are not rhetorical hyperbole.

The Deas argue, though, that there is a more general defense of opinion when the defamatory words are "statements reflecting subjective views that cannot be proven true or false." Defendants' Brief at 18. In support they cite the United States Supreme Court's decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). *Milkovich* does not go that far, however. In *Milkovich* the court considered, but rejected, the proposition that matters of opinion were always protected by the First Amendment, deciding that existing constitutional defenses to libel were sufficient. The majority noted that the court already had held in *Philadelphia Newspapers, Inc., v. Hepp*, 475U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986), that only defamatory statements capable of being proven false could be the basis for liability when the media was reporting on matters of public concern. The *Milkovich* majority noted that the *Hepp* court had refused to extend its holding to non-media defendants, and the *Milkovich* court refused to do so as well. "In *Hepps* the Court reserved judgment on cases involving nonmedia defendants, see 475 U.S., at 779, n. 4, 106 S.Ct., at 1565, n. 4, and accordingly we do the same." 497 U.S. at 20, n. 7.

The opinion defense described by the Deas, then, is a defense which the Supreme Court has applied only to media defendants and only when the statement is about a matter of public concern, neither of which is present in the current case.

Even if an opinion defense applied, the statements by the Deas would not qualify for protection. The *Milkovich* court observed that the proper analysis for whether a statement is fact or opinion was set out in *Ollman v. Evans*, 242 U.S. App. D.C. 301, 750 F.2d 970 (1984), *cert. denied*, 471 U.S. 1127 (1985), and requires the consideration of four factors under the totality of circumstances: "(1) 'the specific language used'; (2) 'whether

the statement is verifiable'; (3) 'the general context of the statement'; and (4) 'the broader context in which the statement appeared.'" 487 U.S. at 9. The context of the Deas' statements on their website show that they are asserting that Dr. Monce committed malpractice and was negligent and incompetent in the treatment of the Deas' dog, Alex, and that the Veterinary Medical Board disciplined him for such malpractice, incompetence and negligence. Those are factual assertions.

The North Carolina Supreme Court decision in *Clark v. Brown, supra*, confirms that a statement about malpractice, incompetence and negligence may be the basis for a libel action. There, the district attorney had referred to his assistant as incompetent and the libel action was sustained. A headline of "malpractice, incompetence and negligence" tied to Dr. Monce's name, likewise, is an assertion that he has committed malpractice and negligence and is incompetent. Those are factual statements for which the Deas may be liable.

III. The "fair reporting" privilege is not applicable to the Deas website or to their personal descriptions of their experience.

The only North Carolina appellate decision to recognize a fair reporting privilege is *LaComb v. Jacksonville Daily News Company*, 142 N.C. App. 511, 543 S.E.2d 219, *disc. rev. denied*, 353 N.C. 727 (2001). In *LaComb* the court acknowledged that "the fair report privilege has never been explicitly defined by North Carolina case law," but the court accepted the way in which "[c]ourts in other jurisdictions have articulated the privilege protecting the media when reporting on official arrests. . . ." 142 N.C. App. at 512-13. Said the court, "Substantial accuracy is therefore the test to apply when a plaintiff alleges defamation against a member of the media reporting on a matter of public interest, such

as an arrest." (emphasis added) 142 N.C. App. at 513. The court then found that the Jacksonville newspaper's report of the arrests of two adults for contributing to the delinquency of minors was substantially accurate and not libelous.

To the extent the fair reporting privilege exists in North Carolina, as expressed in *LaComb*, it is a privilege thus far recognized only for newspapers and other traditional news media, and it is a privilege only for that media's reporting on matters of public concern. The Deas complaint about Dr. Monce is not a matter of public concern and, of course, the Deas website is not a newspaper. The privilege exists for traditional news media who report on a variety of topics of general public interest, recognizing the difficulty a news organization has in verifying the accuracy of its stories before the pressing deadlines for publication. In that context, recognizing the important First Amendment function served by the news media, the courts have said the standard of reporting should be one of substantial accuracy, and there should be no liability for minor errors that creep in. There is no reason to extend such a privilege to a website maintained by the Deas sisters to detail their longstanding and bitter personal grievance over the treatment of their dog on one occasion, with the content constructed at their leisure free of any regular publication schedule.

If the fair reporting privilege did apply to the Deas, it would be a protection only for reporting that is substantially accurate. The Deas' statements are not substantially accurate; indeed, they are incorrect on the most essential facts of the story. The Deas say that Dr. Monce has been disciplined by the vet board for malpractice, incompetence and negligence, which is not true and not substantially accurate.

CONCLUSION

The Deas are not entitled to partial summary judgment. Their statements are factual assertions, are libelous *per se*, and are false. Their arguments that their comments are protected by the First Amendment because they address a matter of public concern and are fair reporting are not supported by the law. The Deas' website is not a news outlet reporting on matters of general public interest; it is no more than a place to compile all their grievances about Dr. Monce and the Veterinary Medical Board and to publish defamatory statements for the whole world to read.

RESPECTFULLY SUBMITTED this 4th day of June 2007.

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CERTIFICATE OF SERVICE

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

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This 4th day of June 2007.

Michael Crowell

Michael Crowell