

STATE OF MICHIGAN
IN THE SUPREME COURT

DERITH SMITH,
Plaintiff-Appellant,

vs

DONALD BARROWS, JOHN STANEK,
and NOEL FLOHE,

Defendants-Appellees,

and

AN ANONYMOUS JOINT ENTERPRISE
including GEORGE PRESTON, MARY
BARROWS, and THE VILLAGE OF SUTTONS
BAY and CHARLES STEWART,

Defendants.

Supreme Court Nos.
138456, 138457, 138458

Court of Appeals Nos.
275297, 275316, 275463

Leelanau County Circuit Court
No. 05-6952-CZ

DEFENDANT-APPELLEE JOHN STANEK'S
BRIEF ON APPEAL

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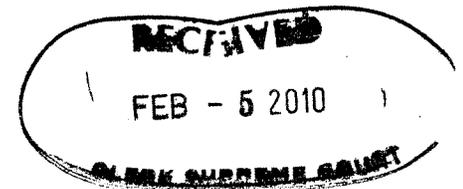


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COUNTER STATEMENT OF QUESTIONS PRESENTED

- I. Plaintiff is an elected official suing her political opponents for an alleged defamatory statement circulated in support of a recall campaign. Her claim is constitutionally prohibited by the First Amendment unless she can show “actual malice.” There is *no* evidence that John Stanek knew the public report contained inaccurate information. Nor is there clear and convincing evidence that he had any serious doubt about its accuracy. Should the trial court have decided plaintiff’s claim as a matter of law by granting Stanek’s motion for summary disposition or alternatively, his motion for a directed verdict?

The trial court answered “No.”

The Court of Appeals answered “Yes.”

Plaintiff Derith Smith argues that the answer is “No.”

Defendant John Stanek contends that the correct answer is “Yes.”

- II. Is the caption added to the staff report sufficiently “false and defamatory” by itself to establish actual malice?

The Court of Appeals answered “No.”

Plaintiff Derith Smith argues that this is a jury question.

Defendant John Stanek contends that the correct answer is “No.”

COUNTER STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A. Introduction

This case involves the juxtaposition of state defamation law and the freedom of political speech guaranteed by the First Amendment of the United States Constitution. At issue are public statements made, not by the news media, but by ordinary, everyday citizens engaged in the political process. Plaintiff intends to impose consequences on constituents who actively opposed her qualifications for elected office. She is obligated, therefore, to establish by clear and convincing evidence that their statements in opposition were made with actual malice.

The constitutional analysis is an exacting one. It requires a careful review of the alleged defamatory statement along with the evidence offered to prove that it was uttered with actual knowledge of falsity or in reckless disregard for its truthfulness. The alleged defamatory statement in this case is a memo, the contents of which are barely mentioned in plaintiff's brief. And the discussion of the purported evidence of malice mischaracterizes the evidence actually presented. A precise analysis of the claim and the evidence should lead this Court to affirm the decision of the Court of Appeals.

B. Plaintiff's defamation claim pertains to purely political speech

Plaintiff Derith Smith and defendant John Stanek are citizens of Elmwood Township, Michigan.¹ Both were actively involved in Township politics at the time of this incident, and both have served, off and on, in positions of public office for many

¹Smith, *Stanek Appendix*, p 89b; See also Stanek, *Appendix* p 251a.

years.² Stanek and Smith have often found themselves on opposite sides of the political fence. They disagree, for example, on land use issues and on the operation of the local marina (an important source of Township revenue).³ Their adversarial relationship culminated in a fairly intense political battle during the years 2003 through 2005, with each opposing the other's bid for public office.⁴

Smith worked with a group of citizens in 2003 to recall Stanek and defendant Noel Flohe from their elected positions.⁵ This recall effort was unsuccessful but it set the stage for elections in 2004, which saw Smith unseat Flohe for Elmwood Township Supervisor and another member of her slate defeat Stanek in his bid for reelection to the Board of Trustees.

Some months after Smith took office, another group of citizens, including Stanek, Flohe and Donald Barrows, began organizing their own recall campaign due to their dissatisfaction with several of Smith's policies and decisions. Smith claims they went too far in their efforts to discredit her when they mass mailed a memo retrieved from her personnel file at the neighboring Village of Suttons Bay. Smith had served as Suttons Bay Village Clerk from 2002-2004.⁶ The memo was written in August of 2004 by Charles Stewart, Suttons Bay's Village Manager. It was directed to the personnel

²Smith served as Elmwood Township Supervisor at the time of trial; she was the Township Clerk from 1988 to 2000 (Smith, *Stanek Appendix*, pp 89b-90b; Stanek served as a Leelanau County Commissioner from 1985 to 1994, and was an Elmwood Township Trustee from 1998 to 2004 (Stanek, *Appendix* pp 251a-252a).

³Stanek, *Appendix* pp 273a-274a.

⁴Stanek, *Appendix*, p 252a.

⁵Flohe was the Township Supervisor at the time, and Stanek was on the Township Board of Trustees.

⁶Smith, *Appendix* p 382a.

committee.⁷ It was a public document, available under the Freedom of Information Act, MCL, MCL 15.231 et. seq.⁸

C. *The “Stewart memo” is highly critical of Smith’s performance as Village Clerk and even questions her integrity, but contains no allegation of criminality*

Plaintiff’s overriding theme is that defendants distributed a document wrongly accusing her of criminal activity. But there is no dispute that what defendants published was the “Stewart memo” with a handwritten caption at the top.⁹ It is a five page memo authored by Suttons Bay Village Manager Charles Stewart completely devoid of any allegation of criminal misconduct. Stewart confirmed at trial that he never intended the memo to expressly or implicitly suggest criminal conduct.¹⁰ The memo does, however, provide a candid and stinging assessment of Smith’s services for the Village of Suttons Bay.

By way of background, Smith was hired by Suttons Bay in May of 2001 to fill a part-time position of accountant and bookkeeper.¹¹ A few months later, Suttons Bay decided to transform the position of Village Clerk into an appointed rather than an elected position and named Smith as its first appointee. Her first term ended in March of 2004,¹² and she was not reappointed.¹³ Smith was, however, offered a part-time position as assistant bookkeeper/treasurer at a reduced hourly wage, though there is a dispute

⁷Stewart Memo, *Appendix* pp 21a-28a.

⁸Decision and Order of June 21, 2006, *Appendix* 43a.

⁹Defendants’ Mailing, *Appendix* pp 29a-33a.

¹⁰Stewart, *Appendix* pp 67a, 94a; *Stanek Appendix* p 29b.

¹¹Smith, *Appendix* pp 379a, 382a.

¹²Smith, *Appendix* p 382a; Stewart, *Appendix* p 51a.

¹³Stewart, *Appendix* p 51a.

between Smith and Stewart about whether this information was clearly conveyed to her.¹⁴ In any event, the personnel committee unanimously decided to terminate Smith in August of 2004.¹⁵

Smith's termination was in large part driven by the memo at issue in this case. Earlier that month, Charles Stewart had prepared a memo for the personnel committee stating his concerns about Smith's continued employment with the Village after losing her appointed position. His stated purpose was to raise "a number of issues related to Deri and her position with the Village."¹⁶ He characterized his memo as a discussion of problems and possible dispositions regarding Smith's future.¹⁷

Stewart began his memo by noting (mistakenly, as he later found out) that Smith was originally hired as an independent contractor to install a software accounting program.¹⁸ He was under the impression that she remained an independent contractor even after her appointment as Village Clerk and expressed concern that she had managed to collect benefits reserved for employees:

At no time during this period was Deri ever offered employment with the Village in order to receive employee benefits such as sick time, personnel time, holiday pay, vacation pay, etc. . . . Deri has not ever received a W-2, nor has she completed an employment application, W-4, I-9, or State New hire form, if she had it was not with the approval of the Village.¹⁹

¹⁴Stewart, *Appendix* p 62a; *Stanek Appendix*, p 4b; Smith, *Appendix* pp 400a-402a.

¹⁵Stewart, *Appendix* p 96a.

¹⁶Stewart Memo, *Appendix* p 21a.

¹⁷Stewart, *Stanek Appendix* p 29b.

¹⁸Stewart Memo, *Appendix* pp 21a-22a.

¹⁹Stewart memo, *Appendix* p 21a.

Stewart later learned that he was wrong about Smith's contractor status. She had been hired before he came on board as the Village Manager,²⁰ and was never an independent contractor.²¹ Her appointment to the full-time position of Village Clerk in 2002 entitled her to employee benefits.²² Stewart did not learn of his error, however, until approximately February of 2005, when the Village was preparing for the hearing to contest Smith's application for unemployment benefits.²³ In the course of preparing for that hearing, Stewart discovered Smith's W-2 forms confirming her status as an employee.²⁴

At trial, Stewart conceded his error regarding plaintiff's independent contractor status *but stood firm on the rest of the criticisms laid out in his memo, particularly his belief that Smith had purposefully circumvented the personnel committee's decision to reduce her hourly rate when she moved to the part-time position.*²⁵ He was sure that Smith knew her pay as assistant bookkeeper was to be reduced effective April, 2004.²⁶ In his memo to the personnel committee, Stewart recounts how, in his view, she managed to manipulate matters to retain the higher hourly rate:

During the personal [sic] committee's review of the position [of part-time assistant to the bookkeeper], they specified that they would offer the position to Deri however since this was to be an employment position instead of a contract position the rate of salary was established at \$17.00 per hour Deri was informed

²⁰Smith, *Appendix* pp 382a, 384a, 396a.

²¹Smith, *Appendix* p 396a.

²²Smith, *Appendix* pp 382a, 384a.

²³Stewart, *Appendix* p 56a.

²⁴Stewart, *Appendix* p 56a; *Stanek Appendix*, p 52b.

²⁵Stewart, *Stanek Appendix* pp 4b, 11b-13b.

²⁶Stewart, *Stanek Appendix* pp 30b-32b.

the day after the meeting of the committee's decision and rate of pay. Understandably, she was concerned with the information.²⁷

Stewart describes how Smith objected to the part-time plan and complained that members of the personnel committee "had previously stated there would be no change" in her position.²⁸ Smith also complained that the Village was violating employment law.

Stewart also described how Smith never formally responded to the offer of part-time employment; she just kept working after her appointment as Clerk officially expired. When Stewart asked her if she had decided to accept the offer, she merely responded: "I'm here, aren't I?"²⁹ Stewart believes Smith's failure to formally respond to the offer was a deliberate attempt to avoid the pay reduction.³⁰ He believes she purposefully waited until he was away from the office and the Village was facing a payroll deadline, which gave her reason to telephone Council President, Larry Mawby, to discuss her hourly rate.³¹

On May 4, 2004 I talked with Larry, and he stated that she had contact [sic] him to determine what her rate of pay really was; it was identified to her that her previous rate of pay was still standing until action by the Council. I would agree with this assessment since the position was officially offered to Deri, however, Deri has not accepted the position One part that concerned me is that prior to her conversation with Larry as to her pay; Deri was made known that I would be working from home to get caught up on projects without interruption; she elected that day to contact Larry about the pay and basically indicated to him (if I heard correctly) I wasn't in and was unavailable to answer he questions and she needed to get payroll completed Although

²⁷Stewart Memo, *Appendix* p 22a.

²⁸Stewart Memo, *Appendix* p 22a.

²⁹Stewart, *Stanek Appendix* pp 5b-6b.

³⁰Stewart, *Stanek Appendix* pp 30b-32b.

³¹Stewart, *Appendix* p 95a.

the personnel committee recommended the position salary at \$17.00 an hour, in which she attempted to circumvent by contacting Larry and only giving him part of the information, she is currently paying herself \$21.74 per hour.³²

At trial, Stewart described how Smith had informed Mawby that she would essentially be performing the same tasks, which is why Mawby authorized her continued higher hourly rate.³³ Stewart did not realize Smith was receiving the higher hourly rate until late May or early June even though he had signed off on every payroll.³⁴ In his view, Smith's acceptance of an hourly rate higher than \$17.00 was a misappropriation of public funds.³⁵ He questioned her honesty and pointed out that in his opinion, Smith had acted unethically.³⁶

Stewart also stood by his criticisms of Smith's job performance. His memo stated that the Village was "at a crossroads" with regard to Smith, and the committee was urged to consider her effectiveness – or lack of it – during her years of service.³⁷ Stewart challenged Smith's track record and concluded that she did not meet expected performance standards:

Is there a history of behavior that would tell you that there would be continued issues that would have a negative impact and not work into a true team effort of all the employees? Is there a history of in-actions [sic] or inabilities that would indicate that there would be no change of future actions as an employee? Her history, in the short time I have been around has shown that she is not a team player, nor would she be willing or be able to change her behavior. The ongoing issues in how

³²Stewart memo, *Appendix* p 23a.

³³Smith, *Appendix* p 401a.

³⁴Stewart, *Stanek Appendix* pp 33b-34b.

³⁵Stewart, *Stanek Appendix* pp 60b-62b.

³⁶Stewart, *Stanek Appendix* pp 48b-49b.

³⁷Stewart Memo, *Appendix* p 24a.

she interacts with other employees leads me to believe that she would have a difficult time in becoming an effective member of a team effort. On more than one occasion, I find that she strives to achieve only the required minimum in order to get by and does not go over and above, nor willing to go over and above.³⁸

Nowhere in his memo did Stewart make any reference to criminal misconduct.³⁹

He never even recommended that she be terminated. Stewart's sole purpose was to urge the personnel committee to consider Smith's position going forward and decide whether she should continue her employment with the Village as a part-time assistant bookkeeper at a lower hourly rate, as a contractual employee, or at all. The decision was made to terminate her position.

D. The Stewart memo is published

In August of 2004 (after learning that she would not be reappointed to the position of Suttons Bay Village Clerk), Smith decided to run in the primary election for Elmwood Township Supervisor. It was not her first foray into local politics. From 1988 through 2000, Smith had served as the Elmwood Township Clerk.⁴⁰ She was also involved with a local group, called SOS (Save Open Space), which was organized around land use issues.⁴¹ It was this group that, in 2003, spearheaded an effort to recall the entire Board of Trustees due to the members' positions on land development in Elmwood Township.⁴² The effort was unsuccessful, but the SOS slate unseated the incumbents in the following

³⁸Stewart Memo, *Appendix* pp 24-25a.

³⁹Stewart, *Appendix* pp 67a, 94a.

⁴⁰Smith, *Appendix* p 379a.

⁴¹Smith, *Appendix* p 407a.

⁴²Smith, *Appendix* pp 407a-408a.

election year. Smith and five others ran on the reform slate.⁴³ Smith prevailed over incumbent Flohe in a very tight primary race, and then went on to win the election in the fall. Stanek, a Board of Trustee member aligned with Flohe on most issues, was also defeated.

Defendants Stanek, Flohe and Donald Barrows remained involved in Township politics even after Smith won the November 2004 election and continued to attend Board meetings. They were unhappy with the direction the Township was taking and so, together with other citizens, organized their own recall campaign. Questions were raised about the circumstances of Smith's departure from Suttons Bay.⁴⁴ Barrows happened to be acquainted with the Suttons Bay Village Treasurer, Jerry VanHuystee, and so approached him for information. VanHuystee never supervised Smith during her tenure at Suttons Bay and had no personal knowledge of her work.⁴⁵ Plaintiff insists at various points in her brief that VanHuystee assured Barrows five times that Smith was not involved in any illegal activity. What VanHuystee really said was that he had "no idea,"⁴⁶ and did not know "one way or another"⁴⁷ but "[a]s far as I know," there was no illegal activity.⁴⁸ VanHuystee ultimately obtained a copy of the "Stewart memo," which explained the reasons for Smith's departure.⁴⁹ Both Barrows and VanHuystee recall that

⁴³Smith, *Appendix* pp 407a-408a.

⁴⁴Barrows, *Appendix* p 183a.

⁴⁵VanHuystee, *Appendix* p 124a; *Stanek Appendix* p 67b.

⁴⁶VanHuystee, *Stanek Appendix* p 67b.

⁴⁷VanHuystee, *Stanek Appendix* p 67b.

⁴⁸VanHuystee, *Appendix* p 128a.

⁴⁹VanHuystee, *Appendix* p 128a.

the memo was produced in the latter part of 2004 (before Stewart learned of his mistake concerning the W-2 forms, Smith's employee status, and her right to benefits).⁵⁰

Barrows made copies of the memo and gave them to a handful of others, and then left for Mexico.⁵¹ The memo later showed up at the meeting at Stanek's shop on May 5, 2005.⁵² Someone added a caption posing the following question: "Attention: Suttons Bay Villagers Alledged [sic] Misuse of Village Taxpayer Funds?"⁵³ No one knows who authored the caption but Stanek testified that he believed the caption to be consistent with the questions posed by the memo.⁵⁴ Someone also copied a ledger on the last page of the memo, which Stewart confirmed was an accurate representation of a public record; it may have been one of the reports attached to the memo.⁵⁵ Stewart also agreed that his description of Smith's actions in circumventing the lower pay rate were properly described as "a misappropriation of public funds."⁵⁶

E. John Stanek did not know of any inaccuracy in the Stewart memo when it was distributed. That point is established by George Preston, the very witness relied on by plaintiff to prove actual knowledge.

Stanek recalls the meeting at his office in May, 2005, at which the "Stewart memo" was first discussed.⁵⁷ He did not recall having seen the memo before.⁵⁸ Like Barrows, Stanek assumed the report was accurate because it was authored by a reliable

⁵⁰VanHuystee, *Stanek Appendix* p 65b; Barrows, *Appendix* p 197a.

⁵¹Barrow, *Appendix* p 197a.

⁵²Stanek, *Appendix* p 253a.

⁵³Defendants' Mailing, *Appendix* p 29a; Stanek, *Appendix* p 257a.

⁵⁴Stanek, *Appendix* pp 257a; *Stanek Appendix* pp 72b-73b.

⁵⁵Stewart, *Stanek Appendix* p 26b.

⁵⁶Stewart, *Stanek Appendix* 60b-62b.

⁵⁷Stanek, *Appendix* p 253a.

⁵⁸Stanek, *Appendix* pp 253a-254a.

source, the Village Manager of Suttons Bay.⁵⁹ He viewed the memo as a public document, available to all.⁶⁰ It contained a lot of information, much of it unfavorable to Smith, and none of it known by Stanek to be untrue.⁶¹

Plaintiff places a great deal of emphasis on the testimony of George Preston as evidence that defendants actually knew of the inaccuracies in the memo when they distributed it. Preston's testimony thus deserves particularly close attention. Preston, a former police officer, was not active in politics and was not part of the recall group. He attended one meeting – the “first one I ever been to in my life” – which was the May 5th meeting at Stanek's place.⁶² Many issues were discussed that day, the most important of which concerned an issue of land use, which was the reason Preston attended.⁶³ Someone brought copies of the Stewart memo to the meeting and Preston explained that people “were concerned there may have been an issue with some wrongdoing on Derith Smith's behalf while she was working out in Suttons Bay. And, there was talk amongst some of the people there that the public should be brought to attention of this potential wrongdoing”⁶⁴ Preston voiced his opinion the memo might not be accurate and might not have been authored by Charles Stewart.⁶⁵ He volunteered to approach Stewart, and “mentioned” to the group that he would do so, but he was never appointed that task.⁶⁶

⁵⁹ Stanek, *Appendix* p 257a.

⁶⁰ Stanek, *Appendix* pp 271a-272a; Stanek *Appendix*, p 87b.

⁶¹ Stanek, *Appendix* pp 257a, 297a.

⁶² Preston, *Appendix* p 151a.

⁶³ Preston, *Appendix* pp 134a, 151a, 160a-162a.

⁶⁴ Preston, *Appendix* pp 135a-137a.

⁶⁵ Preston, *Appendix* pp 135a-137a, 153a-154a.

⁶⁶ Preston, *Appendix* pp 139a, 151a, 154a.

Stanek testified that he did not hear Preston say he would approach Stewart,⁶⁷ though Barrows did.⁶⁸

Preston called Stewart but not right away. It was a “[m]inimum of two weeks before I even talked to him on the telephone.”⁶⁹ Stewart became very upset upon learning of plans to distribute the memo because he never intended it to be public.⁷⁰ Preston, a former police officer, asked Stewart “if there was a criminal investigation.”⁷¹ Stewart told him “there wasn’t enough substance to prosecute on it.”⁷² Preston plainly testified, however, that in the course of their 20-minute telephone conversation, *Stewart never described any inaccuracies in the memo.*⁷³

Preston did not immediately contact Stanek or any of the other defendants to advise of his conversation with Stewart. Rather, he saw Stanek at a Board of Trustees meeting and caught up with Stanek as he was preparing to leave. Preston spoke to Stanek for “just several minutes,”⁷⁴ informing Stanek that he had contacted Stewart. Preston recalls telling Stanek that “this thing should not go out,” and “it’s not a good idea.”⁷⁵ He also recalls stating that “there was no criminal investigation on this and that I felt that it

⁶⁷Preston, *Appendix* p 283a.

⁶⁸Barrows, *Appendix* p 203a.

⁶⁹Preston, *Appendix* p 163a.

⁷⁰Preston, *Appendix* p 139a.

⁷¹Preston, *Appendix* p 140a-141a.

⁷²Preston, *Appendix* p 167a.

⁷³Preston, *Appendix* pp 155a, 165a-166a.

⁷⁴Preston, *Appendix* p 143a.

⁷⁵Preston, *Appendix* p 144a.

wasn't right to send that letter out."⁷⁶ But beyond that, "I can't tell you exactly" what was said to Stanek.⁷⁷

One thing that was not said to Stanek is that the memo contained false information. Preston is sure of this because *Stewart never advised him of that fact:*

Q. [By counsel for Barrows] Then after you talked to Mr. Stewart or when you talked to Mr. Stewart, Mr. Stewart never told you there was anything false in the memo, is that true?

A. No, he did not say that what was inside here was false.

Q. All right. So you had this conversation with Mr. Stewart, and as a result or during the conversation, you and as a result of the conversation you came away from it not knowing whether there was anything true or false in the memo, was that true?

A. No. I disagree with that.

Q. All right.

A. He had indicated I had asked him if there was a police investigation, he said the police did look at it, he was advised they felt there wasn't enough in here to prosecute on it and he never denied that he typed this. He never denied the fact he typed this. Matter of fact, our conversation one could have come to the conclusion he did in fact type it because his name was on it.

Q. Sure, exactly. But he [Stewart] never told you there was anything false in that memo, did he?

A. He did not.

Q. As a consequence you never told anybody after that, anybody you talked to, about the conversation with Mr. Stewart. You never said to them, Mr. Stewart said there is something false in the memo?

A. That's correct, I never said that.

⁷⁶Preston, *Appendix* p 145a.

⁷⁷Preston, *Appendix* p 142a.

* * *

Q. [By counsel for Stanek] And, we know from your testimony today Mr. Stewart did not say to you that anything in the memo was false, is that correct?

A. That's correct.

Q. So likewise you did not know to tell Mr. Stanek or anyone else that anything in the memo was false, correct?

A. I'm sorry, repeat that.

Q. You hadn't received any information from Mr. Stewart that anything in the memo was false, to convey to Mr. Stanek or anyone else, correct?

A. That's correct.

Q. And, in fact, when you pulled Mr. Stanek aside after this meeting, where he spoke at length [the Board meeting], you did not tell him that anything in the memo was false, correct?

A. That's correct.⁷⁸

Stewart generally confirms what Preston said at trial. He concedes that he did not inform Preston about the inaccuracies in the memo. He recalls that he did tell Preston that the report was not a final resolution and was later determined to contain some inaccuracies.⁷⁹ But *Stewart acknowledges that he never identified what those inaccuracies were:*

Q. And, the misinformation, did you – do you recall whether you specified to him what the misinformation was exactly or what was found?

⁷⁸Preston, *Appendix* pp 155a, 165a-166a.

⁷⁹Stewart, *Appendix* pp 71a, 73a, 82a.

A. I did not specify.⁸⁰

Stewart also testified that he never spoke to Stanek about the memo or its contents.⁸¹

F. Summary of trial proceedings

Derith Smith responded to the publication of the Stewart memo by filing this lawsuit in July of 2005. The original complaint named George Preston, Donald and Mary Barrows, the Village of Suttons Bay and Charles Stewart. A First Amended Complaint filed on December 5, 2005, added John Stanek and Noel Flohe. Plaintiff later dismissed George Preston and Mary Barrows voluntarily.

Smith alleged that Stewart and the Village of Suttons Bay violated the Bullard Plawecki Act, MCL 423.501, et seq., by placing the memo in the public realm. The trial court granted summary disposition to Suttons Bay and Stewart on June 21, 2006, holding that the memo was not a disciplinary report but a public record, subject to public disclosure. ***“The Stewart report was not a disciplinary report, was not required to have been destroyed and was subject to disclosure under FOIA.”***⁸² This ruling was never appealed.

As to defendants Stanek, Barrows and Flohe, Smith alleged constitutional violations and defamation. In the same order disposing of the claims against Suttons Bay and Stewart, the trial court granted summary disposition to these defendants on Smith’s constitutional claims⁸³

⁸⁰Stewart, *Appendix* p 83a.

⁸¹Stewart, *Appendix* pp 81a, 100a, 111a.

⁸²Decision and Order of June 21, 2006, *Appendix* p 43a.

⁸³Decision and Order of June 21, 2006, *Appendix* p 44a.

That left only the defamation claims for trial (coupled with a joint enterprise theory that was dismissed at the close of proofs, an order never challenged on appeal).⁸⁴ Stanek twice sought the dismissal of Smith's defamation claim under the First Amendment of the United States Constitution due to lack of evidence of actual malice.⁸⁵ He raised the issue first by way of a motion for summary disposition and later by way of a motion for directed verdict. Stanek also twice asserted the fair reporting privilege afforded by MCL 600.2911(3), which precludes liability for damages caused by the dissemination of a public record.⁸⁶ But the trial judge rejected both motions on both grounds.⁸⁷

At the summary disposition stage, the court found evidence that, if believed, was clear and convincing proof of actual malice on the part of defendants in publishing the Stewart memo. Without citing the specific evidence, the trial court concluded a jury could find that "Defendants . . . each knowingly participated in mailing the Stewart report and that they did so with actual knowledge that it was false or with reckless disregard of its truth."⁸⁸ The court also refused to apply the statutory, qualified privilege for fair reporting using essentially the same reasoning, and without reference to the purported evidence of defendants' knowledge.⁸⁹

⁸⁴Directed verdict ruling, *Appendix* pp 428a-429a.

⁸⁵Decision and Order of June 21, 2006, *Appendix* p 36a ff; Motion for Directed Verdict, *Appendix* pp 409a ff.

⁸⁶*Id.*

⁸⁷Decision and Order of June 21, 2006, *Appendix* p 36a; Ruling on directed verdict, *Appendix* pp 421a-427a.

⁸⁸Decision and Order of June 21, 2006, *Appendix* p 46a.

⁸⁹Stanek's Motion for Summary Disposition. See also the motions filed by co-defendants.

Plaintiff's complaint does not involve a fair and true report of a public record. The issue is not whether the Defendants made an accurate publication of a public record. Rather, the issue is whether they published the public record with actual knowledge that the statements contained in the record were false or with reckless disregard for the truth of the statements. In other words, did they proceed with publication out of actual malice. Whether the Defendants individually or collectively had actual knowledge that this report was false or published the report with reckless disregard for the truth are questions to be determined by a jury subject to the clear and convincing evidentiary standard. Stated alternatively, if a jury finds that the publication was false and not made in good faith and with an honest belief that the report was true, the qualified privilege is defeated and damages may be awarded. * * *⁹⁰

Defendants each sought interlocutory review of these rulings,⁹¹ but their applications for leave were denied on October 20, 2006.

The parties then proceeded to trial. Defendants moved for a directed verdict at the close of plaintiff's proofs, again pointing to the lack of evidence of "actual malice" and again asserting the fair reporting privilege. The motion was denied: "if Mr. Preston [who expressly testified that he was never told about the inaccuracies in the report and thus never informed Stanek or anyone else that the Stewart memo was inaccurate] is to be believed then Mr. Stanek may have had actual knowledge that the document was false."⁹² The trial court also gave significant weight to Mr. Preston's admonitions not to publish, and concluded that defendants' failure to heed Preston's advice allowed "an inference that they [defendants] might have acted with reckless disregard."⁹³

⁹⁰Decision and Order, June 21, 2006, *Appendix* p 47a.

⁹¹*Smith v Stanek*, Court of Appeals Docket No. 273442.

⁹²Directed verdict ruling, *Appendix* pp 421a-422a.

⁹³Directed verdict ruling, *Appendix* p 423a.

As to the fair reporting privilege, the trial court first observed, correctly, that while the fair reporting privilege is not absolute, it “provides a great deal of protection” for the defendants, and imposes an “extraordinarily high” burden of proof on the plaintiff. But the court then repeated its summary disposition ruling.⁹⁴ Instead of applying the words of the statute, the court decided that the public record had to be true and accurate in order for the privilege to apply, and there could be no actual malice in publishing it. It commented that the “difficulty” with this case was that “substantial portions of the Stewart memorandum . . . are simply wrong and false and Mr. Stewart [who was not a defendant at trial] to a large degree acknowledges as much.”⁹⁵ The trial court questioned whether “the law of this state would allow a knowing publication of a false public record, and you could complicate that by making it a knowing and anonymous . . . publication of a false public record or allow it to be done with . . . reckless disregard”⁹⁶

The jury returned verdicts for plaintiff.⁹⁷ On December 13, 2006, the trial court entered judgment against Stanek in the amount of \$44,000.⁹⁸ In addition to the damages award, the trial court incorporated into the judgment the jury’s gratuitously voiced wish that “defendant John Stanek must publish a public apology to Derith Smith in the form of a legal notice in both the Traverse City Record Eagle and the Leelanau Enterprise, within 10 business days from today, November 1, 2006.”⁹⁹

⁹⁴Directed verdict ruling, *Appendix*, p 423a.

⁹⁵Directed verdict ruling, *Appendix* p 424a.

⁹⁶Directed verdict ruling, *Appendix* p 425a.

⁹⁷Jury Verdicts, *Appendix* pp 433a-441a.

⁹⁸Stanek Jury Verdict, *Appendix* pp 439a-441a.

⁹⁹Order Settling Judgment, *Stanek Appendix*, pp 1b-2b.

G. The Court of Appeals unanimously reversed the jury's verdict because plaintiff failed to meet her burden under the First Amendment of proving actual malice with clear and convincing evidence.

All three defendants appealed as of right to the Court of Appeals, asserting the same legal defenses asserted throughout the case by way of motions for summary disposition, petitions for interlocutory review, and motions for directed verdict: (1) insufficient evidence of actual malice, and (2) the fair reporting privilege. The Court of Appeals agreed with the defendants' First Amendment/actual malice arguments and reversed on that basis in an unpublished opinion released February 3, 2000. It did not decide the fair reporting privilege.

Plaintiff is critical of the Court of Appeals for failing to provide a more extensive discussion of the evidence. But this case was decided by way of an unpublished opinion and thus presumed the parties were aware of the facts and needed only an explanation of the decision. What is clear from the opinion is that the Court of Appeals was not misled by plaintiff's preoccupation with "criminality." The panel focused on the alleged defamatory statement - the Stewart memo - and accurately described its contents, including the alleged defamatory parts. The panel pointed out that the defendants did not draft the memo and were not responsible for its content.

In the absence of any evidence of any actual knowledge of the inaccuracies in the memo, the Court of Appeals understandably focused on whether defendants failure to investigate that memo could be viewed as clear and convincing evidence of reckless disregard. The Court answered that question in the only way possible: "Defendants cannot be held liable for the reliance on this written memorandum and the failure to

investigate the allegations contained within the document does not constitute the reckless disregard that underlies actual malice.”¹⁰⁰

Plaintiff sought leave to appeal from this decision and the Court granted leave on September 16, 2009.¹⁰¹

¹⁰⁰ Court of Appeals Opinion, *Appendix* p 446a.

¹⁰¹ Supreme Court Order, *Appendix* p 448a.

STANDARD OF REVIEW

This appeal asks the Court to decide whether plaintiff produced legally sufficient evidence of *actual malice* to support her defamation verdicts. Sufficiency of the evidence is always a question of law for the courts and rulings on motions for directed verdict are generally subject to *de novo* appellate review. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131 (2003). See also *Kreiner v Fischer*, 471 Mich 109, 129 (2004) (*de novo* review is also accorded rulings on motions for summary disposition).

There is an even higher standard of review in this case, however, because plaintiff is an elected public official suing her political opponents for defamation, and is thus subject to the stringent constitutional limitations imposed by the First Amendment of the United States Constitution. When this Court reviews the record, it must look not for a preponderance of evidence but for clear and convincing evidence that defendants published the Stewart memo with actual malice. And its review requires a truly “independent examination” of the record, without deference to the jury, to guard against a jury’s forbidden intrusion into the field of free expression. *New York Times Co v Sullivan*, 376 US 254, 285; 84 S Ct 710, 11 LEd 2d 686 (1964); *Bose Corp v Consumers Union of United States*, 466 US 485, 510-511; 104 S Ct 1949; 80 L Ed 2d 502 (1984). Whether a defamation claim meets the test of constitutionality is a question of law, *Harte-Hanks Communications v Connaughton*, 491 US 657, 685; 109 S Ct 2678; 105 L Ed 2d 562 (1989); *Rouch v Enquirer & News of Battle Creek*, 440 Mich 238, 253-258 (1992).

SUMMARY OF THE ARGUMENT

Plaintiff is an elected official seeking to impose tort liability on political opponents for their dissemination of a public report critical of her performance in a prior office. She must therefore overcome the strict limitations imposed by the Fifth Amendment of the United States Constitution. There is no dispute that defendants were engaged in political speech, which is accorded the highest constitutional deference. State law inhibiting such speech is prohibited unless it can be shown that a false and defamatory statement was made with actual malice.

Actual malice is a constitutional test and requires an exacting analysis. Plaintiff must show by clear and convincing evidence that defendant actually knew the alleged defamatory statement was false or acted with a high degree of awareness that the statement was probably false. When the sufficiency of evidence of actual malice is challenged, as it is here, the Courts must conduct an independent review of the record, without any special deference to the jury, and decide whether the evidence is so convincing as to enable a finding of actual malice without hesitancy.

Plaintiff has failed to meet her heavy burden here. Her legal argument requires the Court to essentially ignore the content of the alleged defamatory statement and hold defendants accountable for some unspecified accusation of criminal misconduct. Her discussion of the evidence lacks any semblance of the precision required for appropriate constitutional analysis and rests on inferences that find no support in the testimony. Plaintiff's defamation claim must be denied as a matter of law.

ARGUMENT I

Plaintiff is an elected official suing her political opponents for alleged defamatory statements made in the course of a recall campaign. Her claim is prohibited by the First Amendment of the United States Constitution unless she can show *through clear and convincing evidence* that defendant acted with “actual malice.” Actual malice means (a) knowledge that the information is false, or (b) a reckless disregard for its truthfulness. There is no evidence that John Stanek actually knew of the inaccuracies in the Stewart memo or entertained serious doubt about its veracity. The jury verdict violates his constitutional right to free political speech.

- A. Plaintiff has to show that her tort claim does not run afoul of the First Amendment, which guarantees freedom of political speech and requires the highest constitutional deference.*

Plaintiff is notably low-key about the political nature of the alleged defamatory speech. She approaches this case as an ordinary tort claim, as if the only question is the sufficiency of evidence on the special element of actual malice. This appeal presents a much deeper issue. Plaintiff is an elected official seeking to impose tort liability on political opponents for their dissemination of statements negatively reflecting on her performance in a prior government position. The statements were disseminated in an effort to drum up support for a recall campaign. There can be no dispute that plaintiff is challenging political speech. Her tort claim cannot succeed under the First Amendment of the United States Constitution unless she proves, by clear and convincing evidence, that defendants acted with actual malice. Actual malice has a very limited application in this context. It serves as the litmus test for ensuring that state tort law does not interfere with the protections guaranteed every citizen of this country under the First Amendment.

The controlling law is well established. Beginning with the United States Supreme Court's decision in *New York Times v Sullivan*, 376 US 254, , 285; 84 S Ct 710, 11 LEd 2d 686 (1964), political speech has been vigorously shielded from claims of tort liability pursued by public officials when they are the subjected to criticism the political arena. The next four and a half decades saw political speech become entrenched as a “core of our electoral process and of the First Amendment freedoms’ . . . an area of public policy where protection of robust discussion is at its zenith.” *In re Chmura (After Remand)*, 464 Mich 58, 65 (2001), citing *Meyer v Grant*, 486 U.S. 414, 425; 108 S Ct 1886; 100 L Ed 2d 425 (1988). It is now settled that free speech is to be accorded the highest degree of deference when it occurs in the context of a political campaign. In *Chmura*, this Court went so far as to recognize that “[t]he First Amendment ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.” *Chmura, supra*, at 67, quoting *Eu v San Fransisco Co Democratic Cantral Comm*, 489 US 214, 223; 109 SCt 1013, 103 LE2d 271 (1989), quoting *Monitor Patriot Co v Roy*, 401 US 265, 272; 91 SCt 621; 28 LEd2d 35 (1971).

This Court's review of plaintiff's defamation evidence must be guided first and foremost by the heightened constitutional deference accorded every citizen who engages in political speech and debate, even where that speech turns out to be based on misinformation. “The chilling effect of . . . absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns.” *Brown v Hartlage*, 456 US 45, 60-61; 102 S Ct 1523; 71 LE2d 732 (1982).

This country's deep and abiding commitment to free and robust political debate requires stringent limitations on the defamation claims that emerge from such debate.

B. Actual malice is the constitutional test – and it is a stringent one. Defendants had to actually know the Stewart memo contained false information or they had to have entertained serious doubt about its accuracy.

To promote an unfettered atmosphere conducive to vigorous political discussion and debate, the Supreme Court in *New York Times v Sullivan* set the bar high for those who would seek to punish or limit such speech. Public officials suing for defamation must prove that an alleged falsehood was published with “actual malice.” 376 US at 264. It is a far more formidable threshold than plaintiff makes out in her brief. Actual malice is certainly not, as plaintiff contends, one of “several defenses” available to a defendant in a defamation case.¹⁰² It is an essential element of the claim itself, and the sole test for deciding whether the claim is prohibited by the Constitution. “[T]he common law rule requiring a defendant to prove the truthfulness of his statement was superseded by the constitutional rule (of the first Amendment) that the plaintiff, in a defamation action, must show the falsity of a statement.” *Chmura*, 464 Mich at 71. The burden was on Derith Smith to prove actual malice in her case in chief, an important point given the Court's stated interest in assessing the legal sufficiency of her proofs.

Plaintiff's discussion of her proofs applies a fairly broad view of actual malice. The term, however, has a very narrow meaning in the constitutional context. Actual malice exists only where a defendant actually knew the alleged defamatory statement was false, or where the defendant published the statement in “reckless disregard of whether it

¹⁰² Plaintiff's Brief, p 18.

is false or not.” *New York Times*, 376 US at 279-280. See also, *Anderson v Liberty Lobby, Inc.*, 477 US 242, 244; 106 S Ct 2502; 91 L Ed 2d 202 (1986)(actual malice required as an element of lobbyist’s libel suit against magazine for articles portraying lobbyist as racist, fascist, and anti-Semitic). Reckless disregard means that “defendant *in fact* entertained serious doubts as to the truth of his publication.” *St. Amant v Thompson*, 390 US 727, 731; 88 S Ct 1323; 20 L Ed2d 262 (1968) (emphasis added). Whether a defendant acted in reckless disregard must be assessed under a subjective standard because it requires evidence of a “high degree of awareness of [the] probable falsity” of the published statement. *Harte-Hanks Communications v Connaughton*, 491 US 657, 667; 109 S Ct 2678; 105 L Ed 2d 562 (1989).

Our own state courts have long cautioned that “reckless disregard for the truth” cannot be equated with negligence. Actual malice is never measured by the “reasonable person” standard and plaintiff may not prove serious doubt through evidence of carelessness or lack of due care:

Reckless disregard for the truth is not established merely by showing that the statements were made with preconceived objectives or *insufficient investigation*. Ill will, spite, or even hatred, standing alone, do not amount to actual malice. ‘Reckless disregard’ is not measured by whether a reasonably prudent man would have published *or would have investigated before publishing*, but by whether the publisher in fact entertained serious doubts concerning the truth of the statements published.

Ireland v Edwards, 230 Mich App 607, 622 (1998), quoting *Grebner v Runyon*, 132 Mich App 327, 333 (1984).

Plaintiff is indignant over the publication of the Stewart memo because of its inaccurate content. But the First Amendment assumes that false and defamatory statements will find their way into the public arena in the course of political discussion: the “erroneous statement is inevitable in free debate.” *New York Times*, 376 US at 271. The goal of the constitution is to protect such false and damaging statements where they occur in the absence of actual malice as a way of ensuring the “breathing space” that political speech needs “to survive.” *Id.* at 272.

Michigan has steadfastly adhered to the limitations imposed on defamation actions filed by public officials; who have been strictly held to the actual malice requirement of *New York Times*. Cases other than *Chmura* have acknowledged the “particularly narrow meaning” of actual malice required by our constitution. *Faxon v Michigan Republican State Central Committee*, 244 Mich App 468, 474 (2001), citing *Garvelink v The Detroit News*, 206 Mich App 604, 608 (1994). And the Michigan Legislature has codified this constitutional standard in Michigan’s Revised Judicature Act, at MCL 600.2911(6), which provides: “[a]n action for libel or slander shall not be brought based upon a communication involving public officials or public figures unless the claim is sustained by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether or not it was false.”

C. This Court must conduct an independent review of the record and decide whether it contains clear and convincing evidence of Stanek’s actual malice.

Plaintiff wrongly contends that the standard of review is “unsettled” and open to “significant debate.”¹⁰³ To the contrary, the analysis to be applied by this Court is well settled. *New York Times v Sullivan* and its progeny “identif[ies] the applicable burden and standard of proof” imposed on a plaintiff who asserts defamation on the basis of political speech protected by the First Amendment. *Chmura*, 464 Mich at 70. It is a difficult burden; plaintiff may not succeed merely on a preponderance of the evidence, she must produce “clear and convincing evidence, that defendant acted with ‘actual malice’ when he related the defamatory falsehood.” *Id.* at 71. Clear and convincing evidence leaves little room for doubt; it

. . . “produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.” Evidence may be uncontroverted and yet not be ‘clear and convincing.’ . . . Conversely, evidence may be clear and convincing” despite the fact that it has been contradicted.”

Kefgen v Davidson, 241 Mich App 611, 625 (2000), quoting *In re Martin*, 450 Mich 204, 227 (1995), quoting *In re Jobes* 108 NJ 394, 407-408; 529 A2d 434 (1987).

In considering whether plaintiff has produced such clear and convincing evidence of actual malice, the appellate courts are to conduct an independent review of the whole record. Independent review is more probing than *de novo* review because it is a rule of federal constitutional law designed “to preserve the liberties established and ordained by

¹⁰³ Plaintiff’s Brief, pp 20-21.

the Constitution,” issues which cannot always be left to a jury. *Bose Corp v Consumers Union of United States*, 466 US 485, 510-511; 104 S Ct 1949; 80 L Ed 2d 502 (1984). Independent appellate review means a judicial assessment without particular deference to the jury. Whether “the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact.” *Id.* at 511. “Judges, as expositors of the Constitution, have a duty to independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of ‘actual malice.’” *Chmura*, at 71, quoting *Harte-Hanks Communications, Inc.*, *supra* at 686, quoting *Bose*, *supra* at 511.

D. There is no evidence that John Stanek actually knew about the inaccuracies in Stewart’s memo.

This record is completely devoid of any evidence that John Stanek mailed the Stewart memo knowing that it contained false information about plaintiff’s W-2 forms, her employment status, and her right to receive employee benefits. *And plaintiff does not contend otherwise.* Rather, plaintiff’s argument is that Stanek published the Stewart memo knowing that plaintiff was never charged with a crime. Inasmuch as the alleged defamatory statement is the Stewart memo, which contains no charge of illegal or criminal misconduct against plaintiff, it is difficult to know how to respond to plaintiff’s argument other than to simply state that it is misdirected. Plaintiff argues that the Stewart memo suggests criminality, but this contention is never backed up with any discussion of the memo itself.

The correct analysis is to begin with the defamatory statement, a five page memo to the Suttons Bay personnel committee, supplemented by the handwritten caption. That memo presents Smith in a negative light in four ways:

- Smith was hired as an independent contractor. She never filled out a W-2 form, which is the only way she could have been considered an employee; yet she put herself on the payroll as an employee and received employee benefits (this is the part of the memo that turned out to be incorrect);
- After Suttons Bay declined to reappoint Smith for a second term as Village Clerk, Smith was offered a part-time position as assistant bookkeeper at a reduced rate of pay, which she clearly understood. Smith purposefully delayed responding to the offer until the Village Manager was out of the office, and then called the Village Council president and gained his approval for a higher wage;
- Smith was an ineffective employee, applying only minimum effort to her job; she was unwilling to strive for higher standards; and
- Smith was not a team player and went to great lengths to avoid responsibility.

Stewart testified that in his view, *most of his criticisms of Smith were true*. This is a fact often lost in the plaintiff's analysis. Stewart still believes Smith knew her hourly rate was to be reduced and purposefully circumvented that decision, which he views as a misappropriation of public funds. And he still believes that Smith was an unsatisfactory employee. The memo contains only some false statements, relating to Smith's status as an employee. Nowhere in the memo is there any reference to the criminal charges explored by Stewart prior to writing the memo. Nor is there any suggestion that the Village planned to pursue a criminal investigation. The sole issue, therefore, is whether

plaintiff produced clear and convincing evidence of Stanek's actual knowledge of the errors in the memo concerning Smith's employment status and her right to receive employee benefits.

Plaintiff would concede that her best evidence of Stanek's actual knowledge is the testimony of George Preston, which has been extensively addressed in this statement of facts. When Preston contacted Stewart (the only witness in the case with personal knowledge of the facts in the memo), Preston was primarily concerned about whether Suttons Bay had ever pursued "a criminal investigation."¹⁰⁴ Stewart informed him that he had discussed the matter with Village attorneys but it was decided that "there wasn't enough substance to prosecute on it."¹⁰⁵

Plaintiff makes much of the fact that Preston relayed that information to Stanek. But criminality is not the relevant inquiry. The important question is whether Preston ever told Stanek that the memo contained inaccuracies. He did not. Preston was very clear that, in the course of his 20-minute conversation with Stewart, *Stewart never told him of any inaccuracies in the memo.*¹⁰⁶

Q. [By counsel for Stanek] And, we know from your testimony today Mr. Stewart did not say to you that anything in the memo was false, is that correct?

A. That's correct.

Q. So likewise you did not know to tell Mr. Stanek or anyone else that anything in the memo was false, correct?

¹⁰⁴ Preston, *Appendix* p 140a-141a.

¹⁰⁵ Preston, *Appendix* p 167a.

¹⁰⁶ Preston, *Appendix* pp 155a, 165a-166a.

A. I'm sorry, repeat that.

Q. You hadn't received any information from Mr. Stewart that anything in the memo was false, to convey to Mr. Stanek or anyone else, correct?

A. That's correct.

Q. And, in fact, when you pulled Mr. Stanek aside after this meeting, where he spoke at length [the Board meeting], you did not tell him that anything in the memo was false, correct?

A. That's correct.¹⁰⁷

Consequently, when Preston spoke to Stanek for "just several minutes"¹⁰⁸ after the Township Board meeting, he never told Stanek that the memo contained erroneous information; he had no reason to think that it did. Preston recalls telling Stanek that "there was no criminal investigation," which was Preston's primary concern. And he knows he voiced his opinion that "this thing should not go out," and "it's not a good idea."¹⁰⁹ But beyond that, "I can't tell you exactly" what was said to Stanek.¹¹⁰

Stewart confirms that he never relayed the particulars of the memo to Preston but just spoke in generalities:

Q. And, the misinformation, did you – do you recall whether you specified to him what the misinformation was exactly or what was found?

A. I did not specify.¹¹¹

¹⁰⁷Preston, *Appendix* pp 155a, 165a-166a.

¹⁰⁸Preston, *Appendix* p 143a.

¹⁰⁹Preston, *Appendix* p 144a.

¹¹⁰Preston, *Appendix* p 142a.

¹¹¹Stewart, *Appendix* p 83a.

And Stewart never spoke to Stanek directly.¹¹² Plaintiff thus produced no evidence of Stanek’s actual knowledge that Stanek actually knew of the inaccuracies in the memo.

Besides testimony from Preston, plaintiff relies on conversations between VanHuystee and Don Barrows as evidence of actual knowledge. But there is no evidence that VanHuystee informed Barrows about the particular inaccuracies in the memo concerning Smith’s W-2 forms or her status as an employee (he only told Barrows that he was unaware of any criminal conduct); nor is there evidence that Barrows relayed his conversations with VanHuystee to Stanek.

Plaintiff contends that the question of actual knowledge “went completely unaddressed” by the Court of Appeals. But it is likely that the Court of Appeals understood that the defamatory statement made no claims of criminal conduct or investigations and so defendants’ knowledge of the decision not to prosecute was of no particular relevance to the First Amendment analysis.

E. Plaintiff did not produce clear and convincing evidence of Stanek’s reckless disregard for the truthfulness of the Stewart memo

Given that there was *no* evidence of Stanek’s *actual* knowledge of the inaccuracies in Stewart’s memo concerning W-2 forms and employee status, plaintiff must persuade this Court that there is clear and convincing evidence that Stanek published the memo while entertaining serious doubt about its truthfulness.

Plaintiff again bases much of her argument on the testimony of George Preston, which she inaccurately paraphrases. For example, plaintiff talks about “Preston’s

¹¹² Stewart, *Appendix* pp 81a, 100a, 111a.

insistence at a meeting of the anti-Smith group that public distribution of the substance of the memorandum be delayed while he investigated its accuracy.”¹¹³ Preston’s actual testimony is that he was not much involved in politics, attended only the one meeting at Stanek’s office because of a land use issue which was the primary purpose of the meeting, and merely volunteered to talk to Stewart because of his own concerns about authorship and accuracy. He waited at least two weeks before making the call to Stewart and then spent “just a few minutes” talking to Stanek when the two happened to attend the same Board meeting. Preston did not tell Stanek that “the memorandum contained inaccuracies and should not be used in a recall effort involving Ms. Smith,” as plaintiff contends.¹¹⁴ Preston testified that he did not know of any inaccuracies in the memo because Stewart never informed him of any. Preston’s sole message to Stanek was that no criminal charges had ever been pursued and that, in his, Preston’s, opinion, the memo should not be sent. This can in no sense be described as clear and convincing evidence that Stanek would have serious doubts about the accuracy of them memo.

Plaintiff additionally points to (1) the history of political animosity between these parties, and (2) the anonymous nature of the mailing as evidence of reckless disregard for the truth of the statement circulated. But political animosity between the parties will almost always exist when opponents engage in political debate. The First Amendment protections would be decimated if a history of political animosity were enough to prove reckless disregard for the truth wherever negative criticisms are leveled in the course of

¹¹³ Plaintiff’s Brief, p 33.

¹¹⁴ Plaintiff’s Brief, p 34.

public debate. Disparaging an opponent's political reputation and record must "be distinguished from a bad or corrupt or some personal spite or desire to injure the plaintiff." *Hayes v Booth Newspapers*, 97 Mich App 758, 774 (1980), citing *Beckley Newspapers Corp v Hanks*, 389 US 81, 82; 88 S Ct 197; 19 L Ed 2d 248 (1967). In *Konikoff v Prudential Ins Co of America*, 234 F3d 92, 98-99 (CA 2, 2000), the Second Circuit Court of Appeals distinguished between common law malice and malice of the "constitutional variety," by pointing out that common law malice "mean[s] spite or ill will." In contrast, "[c]onstitutional or "actual" malice means publication "with [a] high degree of awareness of [the publication's] probable falsity" or while "the defendant in fact entertained serious doubts as to the truth of [the] publication [citations omitted]." One "critical difference" between the two is "that the former focuses on the defendant's attitude toward the plaintiff, the latter on the defendant's attitude toward the truth." *Id.*, citing *Price v Viking Penguin, Inc.*, 881 F 2d 1426, 1433 (CA 8 1989); *cert den* 493 US 1036, 107 L E2d 774, 110 S Ct 757 (1990).

As to the fact that the memo was mailed anonymously, plaintiff offers no factual basis or legal authority for the proposition that a preference to remain anonymous – without a lot more – amounts to clear and convincing evidence of serious doubt about the truthfulness of the statement. "It is a prized American privilege to speak one's mind, although not always with perfect good taste," citing *Bridges v California*, 314 US 252, 270 (1941).

F. Reckless disregard cannot be inferred from a failure to investigate

In the end, plaintiff's claim of "reckless disregard" is really an insistence that defendants should have investigated the Stewart memo. She essentially argues that defendants should have been more like Preston, or at least followed his advice, or made some attempt to speak with Stewart before publishing the memo. The fact that they did none of these things, plaintiff contends, is clear and convincing evidence of reckless disregard for the truth. In support of this argument, plaintiff relies exclusively on *Harte-Hanks Communications, Inc v Connaughton, supra*.

Harte-Hanks is a unique case in the body of First Amendment law. In *Harte-Hanks*, plaintiff was the local prosecutor and a candidate for the position of municipal judge in Ohio. He hoped to unseat the incumbent judge, who was supported by the local newspaper. Just prior to the election, the local newspaper ran a story about plaintiff's alleged improprieties in conducting a "dirty" campaign against the incumbent by manufacturing a criminal charge against the incumbent's court administrator (for accepting money in return for dismissing traffic tickets). According to the article, plaintiff convinced a witness to testify against the administrator by promising that witness money and favors.

Plaintiff alleged that the newspaper story was false and sued for libel. He produced evidence establishing that the reporters responsible for the story interviewed several people, *but not the witness who was allegedly bribed by plaintiff to give false testimony*. Plaintiff also produced evidence that the reporters had interviewed him for the story and he had informed them that the allegations were false and bizarre. And finally,

plaintiff established that the reporters possessed a tape of plaintiff's interviews with the witness and her sister in which he purportedly promised favors in return for their testimony against the court administrator. The reporters never listened to that tape.

On these unique facts, the United States Supreme Court found sufficient evidence of actual malice to clearly and convincingly show that the newspaper published the story with actual malice. The Court was very careful, however, to state that a "failure to investigate will not alone support a finding of actual malice;" only where the evidence shows that a defendant purposefully avoided readily accessible truth may actual malice be inferred. *Id.* at 692. As noted by the Sixth Circuit in *Perk v Reader's Digest Ass'n, Inc*, 931 F2d 408, 412 (CA 6, 1991), *Harte-Hanks* is not the general rule, but "a unique situation in which the newspaper's own sources" established a reason to question the truth of the statement to be published.

Plaintiff relies on *Harte-Hanks* to argue that these defendants purposefully avoided the truth when they failed to pick up the phone and call Stewart before publishing the memo. She argues that the omission is purposeful avoidance of the truth amounting to actual malice. But the invitation to apply *Harte-Hanks* so liberally must be declined because it would effectively eviscerate the freedoms guaranteed by the First Amendment. In *Harte-Hanks*, the defendant: (1) gathered the facts that were ultimately reported, (2) drafted the offending statements, (3) actually heard from plaintiff that the offending statements were untrue, (4) possessed evidence that could have corroborated plaintiff's story, (5) but failed to review it, and (6) opted not to contact a key witness in the story it was creating. In stark contrast, John Stanek distributed a document prepared

by a public official reporting on matters in the course of his duties and available under FOIA. Stanek was never told by anyone that the contents of the memo were untrue, and indeed, much of its content *was* true. Stanek had no other information in his possession to inform that the memo was untrue. To the contrary, he knew that plaintiff had not been reappointed for a second term as Village Clerk, and he knew that she had left her position with the Village soon after the memo was presented to the personnel committee. This case is not *Harte-Hanks*.

Other than *Harte-Hanks*, “failure to investigate” claims have been uniformly rejected by the appellate courts, beginning with *New York Times*. Plaintiff in that case was a public official of Montgomery, Alabama. He sued the New York Times over an advertisement containing defamatory falsehoods about Montgomery’s alleged reaction to civil rights activists in its community. Some of the false and defamatory statements were contradicted by stories already contained in the Times’ news files. Plaintiff argued that the defendant’s actual possession of information contradicting the defamatory statements evidenced a reckless disregard for the truthfulness of what it published.

The Supreme Court rejected the “failure to investigate” claim on grounds that are relevant there. First, it found that knowledge by one department did not establish the “state of mind” of the person at the Times responsible for the advertisement. Second, actual malice could not be inferred where the publisher relied on “the good reputation of many of those whose names were listed as sponsors” on the advertisement. And the Times’ failure to check facts against existing news files may have been negligence and poor practice, but it was “constitutionally insufficient to show the recklessness that is

required for a finding of actual malice.” 376 US at 287-288. Under *New York Times*, this Court may not infer actual malice on the part of Stank for failing to investigate a public document prepared by a public official, particularly where the criticisms voiced in the memo were consistent with what Smith knew: that Smith was not reappointed and was no longer employed by the Village.

In *St. Amant v Thompson*, 390 US 727; 88 S Ct 1323; 20 LE3d 262 (1968), a candidate for political office relied on the statements of others to accuse a deputy sheriff of taking payoffs from a union official. The allegations were false and the deputy sheriff sued for defamation. He argued that defendant should have attempted to verify the information before publishing it and the fact no such attempt was made allowed an inference of reckless disregard. The Supreme Court cautioned that reckless disregard “is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.” 390 US at 731. While this constitutional threshold of actual malice might admittedly reward “ignorance” and even encourage “the irresponsible publisher not to inquire,” it was the price to be paid for the freedom to engage in controversial political speech: “it is essential that the First Amendment protect some erroneous publications as well as true ones.” 732.

Kefgen v Davidson, supra, is an instructive Michigan case. Defendants were taxpayers and parents of students in the Bentley School District. They vigorously opposed the school board’s plans to spend up to \$200,000 for a new administration building. They blamed plaintiff, the school district superintendent, for the decision and believed that he and some of the board members were receiving kickbacks from the

contractor. One of the defendants traveled to the Algonac School District, where plaintiff had previously served as superintendent. She reviewed the public records for evidence of improprieties and brought back copies of certain documents to share with co-defendant. These materials included an Algonac School Board letter implicating plaintiff in certain irregularities. Defendants proceeded to distribute the letter, adding some typewritten pages criticizing the decision to go forward with the construction project. Defendants also told a reporter that plaintiff's position in Algonac was terminated for misappropriation of funds; they told individuals attending a Bentley School Board meeting that plaintiff had lied; they told several people that plaintiff was incompetent and not to be trusted; and they told at least one person that plaintiff was evicted from his residence and had crawled out of a second story window leaving the gas on inside.

The Court of Appeals determined that plaintiff's defamation claim in *Kefgan* was not actionable. As a school superintendent, plaintiff was a public figure, subject to the heightened burden of clear and convincing evidence of actual malice. The Court concluded that he failed to meet that burden, on facts far more egregious than those presented here. The extra pages attached to the Algonac School Board letter "were 'an extremely slanted restatement' of information contained in the Algonac School Board's evaluation of plaintiff," 241 Mich App at 626, but they were not actionable. "Reckless disregard for the truth necessary to prove actual malice is not established by showing merely that a defendant acted with preconceived objectives or acted upon insufficient investigation. . . . [T]he question is not whether a prudent person would have published or would have investigated before publishing, but instead is whether the publisher

entertained serious doubts regarding the truth of the statements published.” 241 Mich App at 267, citing *Ireland, supra*. The Court generally concluded that defendants’ statements “at most create an inference of malice.” 241 Mich App at 631. ***And inferences of malice are not enough:*** “[g]iven plaintiff’s status as a public figure, a mere inference is insufficient to prove defamation.” *Id.*

In *Faxon, supra*, “the evidence of actual malice admitted at trial fell below this clear and convincing level” because the record was “simply devoid of evidence that the [defendant] had knowledge that any statements in the brochure were false at the time of publication.” 244 Mich App at 475. The executive director of the Republican committee testified that he relied on a variety of newspaper reports in preparing a brochure that accused Faxon of knowingly misrepresenting that a vase sold in the course of his business was from the Ming Dynasty.

The Court declined to find clear and convincing evidence of any reckless disregard for the truth because the evidence “did not establish that the committee published the brochure with a ‘high degree of awareness of . . . probable falsity’ or that the committee ‘entertained serious doubts as to the truth of [the] publication,’” 244 Mich App at 475-476, quoting *Harte-Hanks, Inc v Connaughton, supra*, quoting *Garrison v Louisiana*, 379 U.S. 64, 74; 85 S Ct 209; 13 L Ed 2d 125 (1964). Of particular relevance here is the court’s observation that defendants’ “failure to investigate the allegations in those articles before including them in the brochure does not constitute the reckless disregard that underlies actual malice.” 244 Mich App at 476, citing *Harte-Hanks*, at 692, and *Grebner, supra*, at 333:

Although we recognize that “purposeful avoidance of the truth” can constitute actual malice, there was no clear and convincing evidence in this case that the committee was attempting to avoid the truth when it decided not to investigate this issue. Instead, the evidence tended to substantiate the committee’s claim that it was actually relying on those articles as the foundation for the brochure and had no reason, at the time, to doubt their veracity. 244 Mich App at 476.

Derith Smith’s claim falls squarely in line with the foregoing cases, in which the courts uniformly rejected claims of actual malice based on a failure to investigate. She failed to produce clear and convincing evidence that John Stanek possessed a high degree of awareness of the probable falsity of the Stewart memo or entertained serious doubts about its truthfulness. This case never should have been submitted to a jury and the Court of Appeals did not err in reversing its verdict.

ARGUMENT II

The Court of Appeals properly held that the handwritten caption on the Stewart memo did not, as plaintiff urged, require a different result because, taken alone, it was neither false nor defamatory.

In explaining its decision to reverse the jury verdict below, the Court of Appeals expressly addressed the handwritten caption separate and apart from the contents of the original memo. This is because plaintiff in his briefing had urged a finding of actual malice based on the caption alone. The Court of Appeals clearly intended to address plaintiff's argument that the caption might warrant a different constitutional analysis.

In addition, defendants have always insisted that the caption accurately reflects the contents of the memo. This argument was presented primarily in the discussion of the fair reporting privilege. The handwritten caption states: "Attention: Suttons Bay Villagers Alledged [sic] Misuse of Village Taxpayer Funds?" As discussed at some length elsewhere in this brief, Charles Stewart believed when he wrote his memo that plaintiff had purposefully circumvented the personnel committee's plans to reduce her hourly rate once she assumed her position as part-time bookkeeper.¹¹⁵ He believes that to this day. And he believes that by circumventing the pay reduction, Smith effectively misappropriated public funds.¹¹⁶ Consequently, the addition of a caption raising this very possibility can hardly be deemed as an independently false and defamatory statement requiring a separate analysis of actual malice.

¹¹⁵Stewart, *Appendix* pp 67a, 94a.

¹¹⁶Stewart, *Appendix*, pp 67a, 94a.

CONCLUSION AND RELIEF REQUESTED

There is *no* evidence that John Stanek actually knew of the errors in Stewart's memo pertaining to plaintiff's W-2 forms, her status as an employee, and her right to employee benefits when he helped distribute it to the public. Plaintiff thus did not prove actual malice on the basis of actual knowledge. Moreover, even accepting that Stanek had political ill will toward Smith, even accepting that Stanek knew there were never any criminal investigations or charges brought against Smith by the Village of Suttons Bay, and even accepting that George Preston urged Stanek not to publish the memo, there is no clear and convincing evidence that Stanek circulated the memo with a high degree of awareness that it contained false and defamatory information. Consequently, plaintiff did not sustain her burden of proving actual malice on the basis of reckless disregard. The Court of Appeals reached the only conclusion that the evidence was allowed and properly reversed the verdict.

John Stanek asks this Court to affirm the decision of the Court of Appeals. But if the Court finds the record sufficient to support the result in the trial court, it should remand this case to the Court of Appeals for consideration of the fair reporting privilege.

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