

STATE OF MICHIGAN
IN THE SUPREME COURT

DERITH SMITH,
Plaintiff-Appellant,

Supreme Court Nos.
138456, 138547, 138458

-vs.-

Michigan Court of Appeals
Nos. 275297, 275316, 275463

DONALD BARROWS, JOHN STANEK,
And NOEL FLOHE,

Leelanau County Circuit Court
No. 05-6952-CZ

Defendants-Appellees,

And

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

Defendants.

DEFENDANT-APPELLEE NOEL FLOHE'S RESPONSE BRIEF ON APPEAL

CERTIFICATE OF SERVICE

***** ORAL ARGUMENT REQUESTED *****

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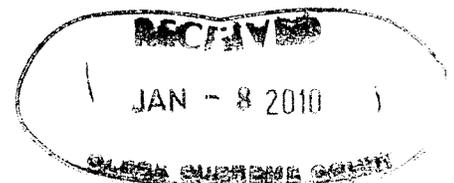


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STATEMENT OF QUESTIONS PRESENTED

- I. DID PLAINTAIFF-APPELLANT SMITH MEET HER HIGH PROOF BURDON NEEDED OF A PUBLIC OFFICIAL WITH SUFFICIENT EVIDENCE TO SHOW MALICE NEEDED FOR DEFAMATION DAMAGES?**

Plaintiff-Appellant says "Yes."

The Circuit Trial Court decided "Yes."

Defendant-Appellees say "No."

The Unanimous Michigan Court of Appeals decided "No."

- II. DID PLAINTIFF-APPELLANT SMITH DEFEAT THE FAIR REPORTING PRIVILEGE, MCL 600.3911(3) NEGATING DEFENDANT-APPELLEES' IMMUNITY FROM LIABILITY FOR A "FAIR & TRUE REPORT" OF MATTERS OF PUBLIC RECORD?**

Plaintiff-Appellant says "Yes."

The Circuit Trial Court decided "Yes."

Defendant-Appellees say "No."

The Unanimous Michigan Court of Appeals decided "No."

- III. HAD THE TRIAL COURT ERRED IN ITS DENIAL OF SUMMARY DISPOSITION, IN ALLOWING THIS CASE TO PROCEED TO TRIAL, AND ITS DENIAL OF THE DIRECTED VERDIC MOTION IN FAVOR OF DEFENDANT-APPELLEES?**

Plaintiff-Appellant says "No."

The Circuit Trial Court decided "No."

Defendant-Appellees say "Yes."

The Unanimous Michigan Court of Appeals decided "Yes."

- IV. SHOULD THIS HONORABLE MICHIGAN SUPREME COURT REVERSE THE MICHIGAN APPEALS COURT'S FINDINGS IN FAVOR OF DEFENDANT-APPELLEES?**

Plaintiff-Appellant submits the answer should be "Yes."

Defendant-Appellees submit the answer should be "No."

STATEMENT OF FACTS

This was a Civil case alleging defamation of a public official while in public office (p.9 Circuit Court Decision & Order 6/21/06--Smith App. p. 44a). The Lower Circuit Court dismissed some of Plaintiff's claims at Summary Disposition (p. 12 Decision & Order 6/12/06--Smith App. p. 47a), but erred by allowing a final defamation claim to proceed to Trial (p. 12 Decision & Order 6/12/06--Smith App. p. 47a) based upon an "inference of malice" (p. 10 Circuit Court Decision & Order--Smith App. p. 45a). Defendant-Appellees Barrows, Flohe, and Stanek were Jury tried as "Anonymous Joint Enterprise" (First Amended Complaint, p. 1) for which the Jury awarded damages of \$14,000 from Flohe, \$44,000 from Stanek, \$49,000 from Barrows, an Illicit apology requirement added to its Verdict forms' final pages of 11/1/06 (Smith App. pp. 433a-441a) which was erroneously included in the Court's Judgment Order riled 12/11/06. At the Appeals Court level, Plaintiff-Appellant conceded that the Jury's inclusion in its verdict of a demand that the Defendant-Appellees publicly apologize to Ms. Smith, was not appropriately included in the judgment for this case. Thus, it was withdrawn from Appeals Court consideration.

This case and its arguments dealt mostly with the mailing of a public record written by Plaintiff's former Supervisor (Stewart) for the Village of Suttons Bay, who was critical of her work performance and raised certain "apparent" irregularities, possibly alleged misuse of public funds to be reviewed by the Village Council's personnel committee (Stewart staff Report to Personnel Committee--Smith App. pp. 21a-28a). Plaintiff-Appellant was fired because of its findings (p. 2 Circuit Court Decision & Order 6/21/06--Smith App. p 37a). While the Defendant-Appellees generally felt that the public ought to know about their elected official in her prior public office, Plaintiff-Appellant never provided any direct evidence of Appellee Flohe's involvement in this matter through out 31.5 hours of deposition testimony by 10

deponents (Summary Disposition Transcript 6/5/06, p. 14-19) or at

trial. There simply was no proof of malice to support a verdict of defamation.

Defendant-Appellees Barrows, Stanek, and Flohe appealed to the Michigan Court of Appeals via jurisdiction afforded under MCL 600.308(1)(a); MSA 27.308(1), which provides "all final judgments from the circuit court" are appealable as of right.

Appellees timely appealed from the final judgment entered on a jury verdict, signed by the Honorable Phillip J. Rodgers, of the Leelanau County Circuit Court, case no.

05-6952-CZ. All three Defendant-Appellee cases were consolidated February 7, 2007. Defendant-Appellee Flohe timely filed his Appeals Brief dated 10/1/07.

Likewise, Barrows filed 10/30/07 and Stanek filed 10/31/07. However, Plaintiff-Appellant Smith, even after being granted extended time to 1/29/08, did not timely file a Response Brief until 6/24/08 for Stanek, 6/26/08 for Barrows, and 6/25/08 for Flohe received by him 6/30/08, just one day before oral arguments. Oral arguments were heard July 1, 2008 from the Defendant-Appellees, but denied to Plaintiff-Appellant Smith (Smith App p. 19a, #74). On February 3, 2009, the Court of Appeals' panel assigned to this case rendered a 3/0 decision which reversed the Lower Circuit Court's judgments entered on a jury verdict for all three Defendant-Appellees. The PER CURIAM decision copy is (Smith App. pp. 443a-447a). It is this unanimous decision to which Plaintiff-Appellant has filed a Notice of Hearing seeking Application For Leave to Appeal in the Michigan Supreme Court which was granted in its order dated 9/16/09 (Smith App. P. 448a).

Now comes Defendant-Appellee Noel Flohe, *In Pro Per*, to make his case to simply ask this Honorable Michigan Supreme Court to:

1. **Reaffirm the Court of Appeals' February 3, 2009 Decision & Order in favor of Defendant-Appellees;**
2. **Reaffirm the Court of Appeals has not erred in determining that the Plaintiff presented insufficient evidence to support a finding of actual malice for the purposes of her defamation claim;**
3. **Reaffirm Michigan's qualified privilege for fair reporting, MCL 600.3911(3) as applied to the Defendant-Appellees.**

CONCURRENCE STATEMENT

Flohe also incorporates by reference the briefs and exhibits submitted by co-Defendant-Appellees, Barrows and Stanek regarding legal issues on this matter, as if fully set forth herein.

PLAINTIFF'S VANHUUSTEE EVIDENCE ARGUMENT REBUTTAL

It is interesting that Plaintiff-Appellant, in her Michigan Supreme Court briefs (brief dated 3/17/09 pp. 16 & 17 and brief dated 12/8/09 pp. 4,5,24. & 26-29) for leave to appeal the February 3, 2009 Court of Appeals decision tries to argue that Defendant-Appellee Barrows somehow knew in advance of the memo mailing from the Village Treasurer VanHuystee, that Smith had not done anything illegal in her employment with the village of Suttons Bay. Apparently Smith, via her attorneys, choose to give little weight to other testimony by VanHuystee:

1. He had no daily role in the operations of the Village (Cct. transcript p 366, lines 19-21 and Smith App. p. 123a);
2. I'm not on the council (Cct. transcript p. 367, line 17 and Smith App. p. 124a);
3. He did not hear of any dispute between Stewart and Smith (Cct. transcript p. 367, lines 19-21 and Smith App. p. 124a);
4. There was no personnel file for Smith, just the Stewart report (Cct transcript p. 371, lines 18-24, Smith App. p.128a, lines 18-24);

5. As Treasurer, Vanhuystee was not involved with oversight or supervising Ms. Smith (Cct transcript p. 380, lines 5-8 & balance of p.380 and Flohe App. Tab-A);

6. "So when you say that Mr. Barrows asked you whether Ms. Smith had done anything illegal, you didn't know one way or another did you?...That's correct." (Cct transcript p. 380, lines 15-23 and Flohe App. Tab-A);

7. In Defendant-Appellee Flohe's cross examination of Vanhuystee, this witness testified he had no communication about the Stewart memo with Flohe and made no representation to Flohe of any Smith illegality (Cct transcript p. 383, lines 8-17 and Flohe App. Tab-A);

8. In Defendant-Appellee Stanek's attorney, Mr. Grierson's cross examination of VanHuystee, this witness also testified he never discussed the Stewart memo with Stanek (Cct transcript p. 385, lines 21-25 & p. 386, lines 1-3). Also, Mr. Stewart never discussed the memo with Mr. Stanek (Smith App. p. 100a), nor Mr. Barrows (Smith App. p. 97a), nor Mr. Flohe (Smith App. p. 98a).

Also (Smith App. p. 34a) is the letter drafted by Mr. Stewart to Defendant-Appellee Barrows, after the mailings of the Stewart memo, with Stewart's pen hand note "Letter not sent based on recommendation"--thus, it communicates nothing to any of the Defendant-Appellees prior to the mailing of 5/16/05 (postmarks). The same can be said of (Smith App. p. 35a), an e-mail sent to Smith on 5/19/05 because it went to the Plaintiff, not the Defendants, and again after the memo mailing.

PLAINTIFF'S "ILL WILL" ARGUMENT REBUTTAL

Defendant-Appellee Flohe takes issue with Plaintiff-Appellant Smith's "ill will" and "bitterness" statements (Footnote #9, p. 44 of Plaintiff-Appellant's brief on appeal in the Michigan Supreme Court dated 12/8/09). It woefully is a mischaracterization of the trial court's evidence:

1. Consider Flohe's testimony regarding Smith's handling of the reappointments of the planning commission members in the township (Smith App. pp. 360a & 361a);
2. Why Flohe detests what Smith does behind the scenes because it hurts people and interrupts their lives...lacks a Board team playership (Smith App. p. 361a);
3. Smith's acting outside the authority of the Township Board (Smith App. pp. 363-

364a);

4. Smith's "my way or the highway" handling of public meeting motions, consider Flohe's testimony of two motions on the table at the same time (Smith App. pp. 368a-369a);
5. Flohe's first hand knowledge of how Smith fired two marina employees (Harbormaster & Deputy Harbormaster) without Board approval, both of which had "at will" employee contracts with the Township Board (Smith App. p. 370a).

Such testimony by Flohe is not evidence of ill will or bitterness, but legitimate personal and township citizen concerns regarding her unpleasant leadership style. In fact, if one continues to read (Smith App. pp. 372a-375a), the reader may conclude the ill will was directed toward Mr. Flohe by Plaintiff's Attorney, Parsons and the Trial Court put a stop to it. Note the attorney's apology to the Trial Court, but not Mr. Flohe (Smith App. p. 373a). More light is shed on the election if one continues to read Attorney Grierson's re-cross examination of Mr. Flohe (Smith App. pp. 375a-378a). Again, Defendant-Appellee Flohe states such a claim is mere hyperbole.

Furthermore, Flohe contends this kind of political free speech is protected to ensure uninhibited, robust and wide-open debate that the Michigan Appeals Court referred to in its penultimate paragraph of its February 2, 2009 Opinion (Smith App. p. 447a and Masson, supra & Chmura, supra). Plaintiff Smith's defenders simply have it wrong.

FUTHER INSUFFICIENT EVIDENCE ARGUMENT

Having read the motions and hearing oral arguments for Summary Disposition, Defendant-Appellee Flohe believed the lower Circuit Court erred by not dismissing all pleadings against him. Plaintiff-Appellant, by and through her counsel, had continuously failed to recognize sworn deposition evidence of Flohe's non-involve-

ment in this case:

1. Flohe had never attended any meetings at the Library composed of "disgruntled citizens" as alleged in the First Amended Complaint (summary disposition court transcript p. 14, lines 15-21--also Flohe Deposition transcripts pages 19-20);
2. Flohe had arrived late to the 5/2/05 meeting at the Stanek Farms' office (acknowledged in both Barrows & Preston depositions) and Flohe deposition Exhibit #1 and in Flohe Deposition transcript pages 20-26 where he could not have heard any alleged representation by Preston to not mail out the Stewart Memo (Ct. summary deposition transcript p. 14-25 & p. 15, lines 1-3, and Smith App. pp. 146a-157a).

In fact when Flohe arrived at the tail end of the meeting after completing his parish CSA Campaign duties earlier, the only discussion going on had to do with proposed minimum lot zoning issues in the agricultural/open space districts of the township. Concerns over lot sizes, 10 v 5 acres which were highly controversial and a waste of good land use (sprawl). There was no mention of Smith or Stewart memo discussions during Flohe's presents for him to hear.

3. Flohe did not mail or publish the Stewart memo (Flohe deposition transcript pages 26-34 & 38-41--also Ct. summary disposition transcript p. 15, lines 3-4, and Smith App. pp. 333a, 338a-345a);
4. Flohe had no one make any representation to him that the Stewart memo was false--not by Preston at the 5/2/05 meeting or by Stewart (Stewart deposition transcript answers to Flohe's cross examination questions pages 159-160--also Ct. summary disposition transcript p. 15, lines 6-10, also Smith App. p. 98a);
5. Flohe was no member of any group until E.C.H.O. ("Elmwood Citizens for Honest Officials") was formed in December 2005 (7 months after the May memo mailing) to circulate the Smith recall petitions following its filing by Stanek on 11/1/05 and subsequent Clarity Hearings okaying the petition language in December 2005.

Flohe gave \$20 to ECHO and to his knowledge there was no earlier group existing (Stanek deposition transcript pages 60-61 in Flohe's cross examination--also Ct. Summary disposition transcript p. 15, lines 10-20);

6. How could Plaintiff-Appellant have argued that Flohe along with Barrows & Stanek spent over two hours at the Stanek Farms' Office stuffing, labeling, and stamping envelopes with the Stewart memo insert when Flohe was not present at any such meeting (Flohe deposition transcripts pages 32-36). When only one person came to his home (either Barrows or Stanek) for 15-20 minutes and Flohe's testimony volunteering he had only helped label & stamp 20-30 sealed envelopes without knowing the envelope contents (Flohe's only assistance in the mailing preparations)? (Ct. summary deposition transcript p. 15, lines 20-25 & p. 16, lines 1-4, and Smith App. pp. 333a, 340a-341a);
7. Plaintiff-Appellant seemed to ignore the fact that Flohe/Barrows/Stanek were never her employer...that the Stewart memo was produced by her employer/supervisor who had concerns regarding her employment activity...that she should not be transparent as any other public official in public office such as her village employer said she should be (Stewart, Hamburg, VanHuystee depositions--also Ct. summary disposition transcript p. 16, lines 11-18);
8. Plaintiff-Appellant downplayed Trooper Hiltz's investigation and her own part in findings of wrong doing in the 2003 recall attempt of the full Township Board, when Leelanau County Clerk, Michelle Crocker disqualified many petition signature entries meeting fatal error, that 6 or 7 warrants were sought, including one on Smith, that the Township BOARD, not individual members of the Board, not assembled in quorum (4 of 7), and not in a public meeting, acted on their own individual petitions in the Election Tampering investigation, that this somehow was all a policeman/board friendship matter (Trooper Hiltz deposition and exhibit #1, his investigative reports)--a matter Flohe found personally

offensive and some media reports to have been very misleading to public readers (Ct. summary disposition transcript p. 16, lines 19-25 & p. 17, lines 1-9, Smith App. pp. 345a-347a). In fact, none of this had anything to do with the Stewart memo for which no police investigation was ever made. Stewart testified: "Did officer Mead actually investigate your Smith concerns?"..."No". "Was there a State Police investigation at all"?"..."I have no knowledge of one." "Do you have knowledge of any police investigation at all"?"..."No."(Flohe App Tab-A p. 326b, lines 11-20).

Yet Plaintiff-Appellant tried to argue Defendant-Appellees had prior knowledge of her no-wrongdoing before the 5/16/05 memo mailing. When Preston, the only group member Stewart talked to, testified he could not recall Mr. Stewart making a no-wrongdoing representation to him during his one phone call (Smith App. pp. 139a-141a, 154a-155a, 165a-166a). The Village of Suttons Bay never made such a determination either, they simply dropped their opposition to Plaintiff's claim for unemployment compensation (Flohe App. Tab-A pp. 330 & 331). In fact, the Village never amended, redacted any part, or withdrew the memo from its records and Flohe believes it is still available via FOIA, unchanged to this present day.

Defendant-Appellee Flohe believes the insufficiency or total lack of evidence to support malice needed for this public official defamation claimant to prevail was a major factor in the present case and the Michigan Appeals Court was unanimous in agreement in its Decision and Order dated February 3, 2009 (Smith App. pp. 443a-447a).

DEFAMATION ARGUMENT:

1. Plaintiff-Appellant had made no factual showing that Flohe or other Defendants knew Stewart's staff report was false or assisted in mailing it in reckless disregard of whether it was false. Furthermore, Plaintiff-Smith had failed even to allege

actual malice or any inference supporting actual malice (Ct. summary disposition transcript p. 17, lines 11-14).

New York Times v Sullivan, 376 US 254; 84 S Ct 7100; 11 L Ed 2d 686 (1964) concluded that every newspaper reporter may write about public officials, unless there is actual malice--that is "with knowledge that it was false or with reckless disregard of whether it was false or not". In lay person's language, Defendant-Appellee Flohe concluded that a person is not liable for making a false and defamatory statement about a public official unless the person spoke or (published) knowing that the statement was false or spoke (published) in reckless disregard of whether the statement was false. MCL 600.2911(6) parallels that decision.

In Faxon v Michigan Republican Central Committee, 244 Mich app 469; 624 NW2d 509 (2001) the court of Appeals reversed the lower court's decision stating that "there was no evidence that committee actually knew the information in the brochure was false at the time of the publication". It should be noted that even the committee's "failure to investigate the allegations in those articles before including them in the brochure does not constitute the reckless disregard that undermines actual malice". Faxon, p. 476. Plaintiff had not claimed any facts that Defendant-Appellees Flohe, Barrows or Stanek, entertained any serious doubts about the truth of the Stewart memo. Although, Defendant-Appellee Flohe was only at the May 2, 2005 meeting at the very end and offered an oak tree story to highlight the smoke-screen approach to matters in Elmwood Township zoning politics, he engaged in neither discussion with others regarding the veracity of the Stewart report nor ever discussed the matter with Charles Steward or Preston (Smith App. p. 98a). The mailed staff report was identical to the official document presented to the Suttons Bay Village personel committee by the village manager, with the exception of the handwritten heading.

2. Defendant-Appellee Flohe did nothing to further a fraudulent or false scheme, considering the public nature of the document. There is no evidence that Flohe knew that the staff report was false in any way or that he assisted in mailing it in May, 2005, in reckless disregard of whether it was false. No one made such a representation to him, neither Stewart, Preston, nor VanHuystee. It was a government document prepared by the village manager of Suttons Bay (Stewart) for the village council's personnel committee. In fact, Plaintiff-Appellant Smith was fired because of its findings (Circuit Ct. Summary disposition transcript p. 17, lines 14-19, and Smith App. p. 37a).

PUBLIC RECORD ARGUMENT

Defendant-Appellee Flohe made no statements regarding Plaintiff-Appellant Smith. The statements were made in the village staff report by her employer. Flohe did not publish any personal opinion about Smith. The staff report outlined her independent contractor status, stated that she re-classified herself to employee status and that she apparently overpaid herself. The defendants called into question certain "apparent" irregularities found and posed by her former employer. Why shouldn't the public ought to know about their elected official in his or her prior employment? (Circuit Ct. summary disposition transcript p. 17, lines 19-25 & p. 18, lines 1-2).

MCL 600.2911(3) protects a person from liability for a "fair and true report" of matters of public record. The document was a "written... report or record generally available to the public". Defendant-Appellee Flohe was thus protected from liability for any part which he may have played in the mailing preparation or agreeing with those who actually did mail it.

MCL 600.2911(3) actually renders a conditional privilege to members of the public who seek to question conduct by elected or public officials. The public needs to know

what occurs in official proceedings and public meetings. Defendant-Appellee Flohe has never ceased from his active involvement in Elmwood Township affairs even though he was no longer serving in any official capacity (Today however, he serves, without compensation, as vice chair of the Fire & Safety Committee and serves as secretary for the Parks & Recreation Committee appointed by the Township Board). The privilege exists even though the publisher does not believe the "defamatory" words or questionable conduct is true and even when he knows them to be false. Restatement Torts 2d Section 611. (Ct. summary disposition transcript p. 18, lines 3-14). Again however, Flohe was never presented with any evidence or entertained any aspect of false info in the memo until served with the First Amended Complaint in 12/2005 and discovery during March-April 2006 which are months after the mailings of 5/16/05.

FALSE LIGHT INVASION OF PRIVACY ARGUMENT

The common law right of privacy redressed publicity which places plaintiff in a false light in the public eye. Battaglieri v Michinac Center for Public Policy 261 Mich App 296; 680 NW2d 915 (2004) stands for the principle that Plaintiff must prove actual malice. Smith had failed even to present a scintilla of facts in her complaint to support such a conclusion even in the light most favorable to her. The Plaintiff's claim is similar to a defamation complaint and, as with such a claim, the First Amendment requires that the public figure must prove actual malice with clear and convincing evidence. The Count for false light invasion of privacy had to be dismissed, based on the pleadings of the Plaintiff, because the Plaintiff had failed to allege any semblance of actual malice.

**ERRORS BY THE LOWER CIRCUIT COURT IN ITS DECISION AND ORDER
REGARDING MOTIONS FOR SUMMARY DISPOSITION**

In its Decision and Order regarding Summary Disposition, the Lower Circuit Court did dismiss some of Plaintiff-Appellant's claims and it also dismissed from the suit Defendants, Stewart (author of the memo) and her Employer, The Village of Suttons Bay. In so doing, Defendant-Appellee Flohe believed the responsibility for the Stewart authored memo unfairly shifted to the shoulders of Defendant-Appellees Flohe, Barrows and Stanek. Flohe, in his oral comments at the Hearing for Motion for Summary Disposition pointed out that after sitting through over 31.5 hours of sworn deposition testimony by 10 deponents, he still had not been presented with any direct evidence of his involvement or facts as to why he was in this lawsuit (Circuit Ct. summary disposition transcript p. 18, lines 21-25). Then he moved that all pleadings against him be dismissed (Circuit Ct. summary disposition transcript p. 19, lines 1-2).

The Lower Circuit Court ruled that a jury may decide that the defendants acted with "actual malice" if it believed deposition testimony from Stewart stating that the report "contained some false allegations" and that Flohe, Barrows and Stanek somehow knew the report was flawed prior to its mailing. It said, "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 doing so, it defied all the evidence mentioned above. Prior to the mailings of 5/16/05, no one suggested any falsity contained in the Stewart memo. Defendant-Appellee Flohe first learned of such allegations when served with the First Amended Complaint about December 8, 2005. Then during depositions taken March/April 2006, both of which are months after the actual mailing

postmarked 5/16/05. However, Defendant-Appellee Flohe believed the Lower Circuit Court wrongfully allowed the defamation claim to remain and go forward. The Michigan Appeals Court agreed 3/0 in its February 3, 2009 Decision & Order (Smith App. pp. 443a-444a).

In July of 2006, Defendant-Appellees timely filed their Motions to Reconsider for Dismissal The Final Defamation Claim. The Lower Circuit Court's recitation of facts regarding the defamation claim contained some misstatement of facts as applicable to Defendant-Appellee Flohe. At that time, Flohe also incorporated by reference the briefs submitted by Defendant-Appellees Barrows and Stanek regarding the legal issues on the matter then before the Court. It was an error of material fact to suggest any of the following in its Decision & Order Smith App. pp. 36a-48a):

1. That State Police Trooper Daniel Hiltz had investigated allegations against Smith and helped determine they were without merit (In fact no police agency investigated anything on this memo matter--Cct. Trial transcript p. 326, lines 10-20 Flohe App. Tab-A). In fact, Trooper Hiltz was not involved with the Stewart memo issues whatsoever.
2. That Flohe mailed the Stewart memo. He neither mailed nor published any opinion regarding the memo contents. In fact, he had little exposure to the memo until discovery (He had lost the 5/9/05 township meeting copy picked up (Smith App. p. 345a) and the Amended Complaint exhibit was all redacted except for the heading).
3. That Flohe sat for two and one half hours with Barrows and Stanek, stuffing, stamping, and labeling envelopes without knowing its contents--Flohe was not present for such an effort at the Stanek Farm Office. In fact his only assistance was at his home for fifteen minutes one evening stamping and labeling 15-30 sealed envelopes with one person for a job apparently almost completed (Smith

App. pp. 340a-344a). To exaggerate the claim as Plaintiff-Appellant had, was akin to suggesting that Flohe's daily two cups of morning coffee with other retired friends at Meijer, was to subsidize a Comumbian Drug Cartel!

4. Flohe had no one disclose to him that the memo contained falsehoods-- testimony by deponents Stewart, Preston, Hamburg, VanHuystee, Barrows, Stanek, and others--also at trial by Stewart, Smith App. 98a).
5. That Flohe continued to use the memo during the recall effort of Plaintiff-Appellant Smith--at that time he did not even possess a copy of the memo (Smith App. p. 345a).

Plaintiff-Appellant Smith had made no factual showing that Defendant-Appellee Flohe knew the Stewart memo was false or assisted in mailing it in reckless disregard of whether it was false. Plaintiff could not provide any evidence to the contrary because none existed. Furthermore, Plaintiff had failed even to allege actual malice or any inference supporting actual malice. While the Lower Circuit Court ruled that an "inference" of defamation was reasonable, "malice" would seem to require evidence of knowledge beforehand and an ill intent to cause harm to which there simply was no evidence presented. In fact there is substantial evidence to the contrary through out the record and knowledge of any false aspects of the memo had not surfaced until weeks and months after the mailing through discovery. It simply did not happen before the mailing. Therefore, Defendant-Appellee Flohe should have had the final defamation claim against him dismissed. The Lower Circuit Court erred as a matter of law (MCL 600.2911(6); MCL 600.2911(3); and the Michigan Appeals Court agreed in its Decision & Order dated February 3, 2009.

SLAPP v DEFAMATION ARGUMENT

Defendant-Appellee Flohe believes the Lower Circuit Court erred when it failed to recognize that this Plaintiff-Appellant case was a cause for SLAPP, not defamation.

As able attorney for Defendant-Appellee Stanek, Mark Grierson, pointed out in his brief for Motion to Reconsideration for Dismissal of the Final Defamation Claim (denied) that "The Plaintiff, as a public official under public scrutiny and facing a recall effort, filed a **SLAPP** lawsuit against Defendant Stanek [Flohe too via the First Amended Complaint] attempting to silence and oppress Mr. Stanek's constitutional right of free speech, right to assemble and right to redress government and government officials. A SLAPP lawsuit is a Strategic Lawsuit Against Public Participation. SLAPPs are lawsuits filed in response or retaliation for citizen communications with or regarding governmental entities or employees. SLAPP lawsuits are not designed to achieve a litigation outcome; rather, they are filed to silence the opposition. Generally, the mere filing of the suit, or just the threat of a suit, accomplishes the purpose. SLAPP lawsuits are further designed to cause citizens to rethink and retreat from their public participation for fear of costly and time-consuming litigation. The Plaintiff filed the lawsuit to silence political opponents. The Plaintiff filed the lawsuit to 'protect herself against a group of residents determined to force her from office'. She filed the lawsuit anticipating a recall effort [Her deposition testimony admission]. Specifically, as an admitted public official and public figure in Elmwood Township, while in office, the Plaintiff sued Mr. Stanek for his part in the mailing of a public record to potential voters because the public record reflected upon her public employment unfavorably". While Plaintiff-Appellant had claimed to have her political reputation damaged, she retained her office in the recall election of May 2006, she had not made a claim for any specific amount of money, and had not substantiated a claim for monetary damages. Wherefore, again Defendant-Appellee Flohe had reiterated in his motion to move the Lower Circuit Court to dismiss the final claim against him as there was no evidence to support actual malice because none existed and the lower Circuit Court failed to do so. Wherefore again, since the Michigan Appeals Court's February 3, 2009

decision was unanimous in its favor of the Defendants, it obviously agreed (Smith App. pp. 443a-447a).

**SPECULATIVE/DISINGENUOUS ADMISSON OF ERRONEOUSE
EXPERT TESTIMONY**

Defendant-Appellee Flohe believes the Lower Court erred by allowing the following two "expert witness" and their tainted testimony for the Plaintiff:

1. Mr. Tuttle, a high school friend of Plaintiff's Attorney, Parsons (Cct. transcript p. 697, lines 15-19), living in Arizona (Cct. transcript p. 697, lines 7-8), having had talked with Plaintiff-Smith for only about 2.5 hours (Cct. transcript p. 704, lines 8-17), and having had talked to no one other than Parsons & Smith (Cct. transcript p. 711, lines 1-7), especially no one from Elmwood Township politics (Cct. transcript pp. 711-712), who admitted no certification in his field (Cct. transcript p. 699, lines 19-25, p. 706, line 21, and p. 707, line 11), stated that anyone can try to be a political consultant (Cct. transcript p. 707, lines 12-24), and that even Plaintiff-Smith could have done it for herself (Cct. transcript p. 707, lines 10-21), who stated he had never testified in a court case like this one (Cct. transcript p. 709, lines 6-8), now wished to speculate that the Stewart memo would cause Smith to lose the two year hence 2008 re-election for her office (Cct. transcript p. 711, lines 8-13). Furthermore, he had no prior *voir dire* to his court appearance (Cct. transcript p. 715, lines 16 thru p. 716), no response to the discovery requests (Cct. transcript p. 717), no defendant opportunity for deposition (Cct. transcript pp. 718 & 719), did not meet requirements of Court rule MCR 2.302(E) (Cct. transcript pp. 719 & 720), and causing further concerns for defendants' defense of plaintiff's alleged damages in running for an election in 2008 (Cct. transcript p. 721, lines 4-9). He hypothesized damages amounting to \$19,530.42 to which the Jury scaled down and awarded \$12,000 split equally

among the three Defendant-Appellees (Cct. transcript pp. 740-751). In fairness to the defendants, this testimony should not have been allowed in court before the Jury.

2. Professor Hoerneman, a Consulting Economist Emeritus, Delta College (Cct. Hoerneman exhibits 1 & 2), produced a deposition video tape for the Plaintiff to be played at Trial. In it he made a number of assumptions (Cct. transcript p. 865, lines 14-25), including one of a Kelly Service Bookkeeper @ \$10/hr. to offset a loss of future salary calculations due to defamation causing the loss of 2008 and future re-elections by the Plaintiff (Cct. transcript p. 866, lines 3-6). The future salary loss was pegged at \$171,000.00 (Hoerneman exhibit #2). Defendant-Appellee Flohe, In Pro Per, in his cross examination of Plaintiff-Smith got her to testify she passed Levels 1 & 2 Tax Assessor Certification in the State of Michigan via the township education reimbursement program. (Cct. transcript p. 863, lines 8-25). Also that in Elmwood Township where she was Supervisor, there already was a seasoned Assessor on duty four days a week and paid over \$40,000.00 per year (Cct. transcript p. 10-17). Flohe brought to the Circuit Court's attention that neighboring townships, Garfield's starting pay for a non-experienced Level 2 Assessor Certification was \$19.49/hr. plus benefits, and Peninsula Township paid its longer standing part-time Level 2 Assessor \$26.60/hr. (Cct. transcript p. 864, lines 18-25). When Flohe pointed out that Professor Hoerneman had not been told about Plaintiff's Level 2 Certification, that perhaps a \$20/hr. v \$10/hr. Kelly Service bookkeeper rate should have been used, he proved with visual hand easel board calculations, the \$171,000.00 future wage loss would be zero since \$20/hr. had twice the power of \$10/hr. (Cct. Transcript p. 867, lines 12 thru pp. 868-870). Flohe believed this oversight was no accident and the Jury awarded "zero" on its verdict forms (Smith App. pp. 433a-441a) to throw out the flawed assumption \$171,000.00 Hoerneman Conclusion (Cct. transcript for Flohe verdict

form p. 1098, line 16 and Smith App. pp. 437a-438a).

Defendant-Appellee Flohe concluded that both experts speculated with too much hyperbole the effect of the Stewart memo had for damages to the Plaintiff. In politics, how is anyone to factually assert whether Smith would actually run in the 2008 election two years hence, and whether she would actually win or lose the election if she did? Would she have had to pay back any judgment prematurely awarded in 2006 if she ran and won in 2008? There should either have been better Lower Circuit Court instructions in the admission of or rejection of this "expert testimony".

MCL 600.3911(3) FIRST ARGUMENT

As able Attorney, DEBORAH A. HEBERT, attorney for Defendant-Appellee Stanek pointed out in her Brief to the Michigan Court of Appeals dated 10/31/07:

"Because plaintiff is a public figure, she is required by the First Amendment to support her defamation claim with clear and convincing evidence of 'actual malice.' Actual malice means knowledge that the Published information is false or a reckless disregard for truth. Defendant distributed a public record with no knowledge or reason to suspect that it was false. He was entitled to summary disposition or alternatively, a direct verdict as a matter of law".

"The essential elements of defamation claim[s] are well settled. To prove an actionable claim, Derith Smith was required to produce evidence of: (1) a false and defamatory statement, (2) an *unprivileged* communication to a third person, (3) the requisite degree of fault (at a minimum, negligence), and (4) either defamation *per se* or the existence of a special harm caused by publication. *Oesterle v Wallace*, 272 Mich App 260, 263-264; 725 NW2d 470 (2006), quoting *Mitan v. Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005). In this case, defendant challenged plaintiff's ability to prove the middle two elements of her claim, fault and an unprivileged communication. As to fault, plaintiff bears the highest possible burden of proof. Because she is a public official seeking to recover damages for political libel, plaintiff

must show clear and convincing evidence of defendant's 'actual malice'.

A. The burden of proving actual malice is a difficult one

This increased burden of 'actual malice' is reserved for public officials in order to ensure the constitutional protections afforded in this country for free political speech and association. *Garvelink v The Detroit News*, 206 Mich App 604, 609; 522 NW2d 883 (1994). For public officials, '[t]his special standard entails proving with *clear and convincing evidence* that the publication was false and a product of *actual malice*, meaning that the injurious falsehood was made knowing that it was false or with reckless disregard for whether it was true.' *Faxon v Michigan Republican State Central Committee*, 244 Mich App 468, 474; 624 NW2d 509 (2001)(emphasis added), citing *Garvelink, supra* at 608> See also, *Glazer v Lamkin*, 201 Mich App 432, 438; 506 NW2d 570 (1993).

'Actual malice in this specific context [of defamation] has a particularly narrow meaning.' *Faxon, supra* at 474. It must not be confused with the notion of intent or even ill will. In an analysis particularly relevant here, this Court cautioned against the interpretation of actions such as those taken by Mr. Stanek as actual malice:

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; 584 NW2d 632 (1998), quoting *Grebner v Runyon*, 132 Mich App 327, 333; 347 NW2d 741 (1984). A person may intend to harm the reputation of another without actual malice, which 'is to 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; 295 NW2d 858 (1980), citing *Beckley Newspapers Corp v Hanks*, 389 US 81, 82; 88 S Ct 197; 19 L Ed 2d 248 (1967).

Actual malice must be proven not by a preponderance of the evidence, but by *clear and convincing evidence*, which is evidence that:

...‘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 fact finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.’ Evidence may be uncontroversial and yet not be ‘clear and convincing,’...despite the fact that it has been contradicted.’

Kefgen v Davidson, 241 Mich App 611, 625; 617 NW2d 351 (2000), quoting *In re Matin*, 450 Mich 204, 227; 538 NW2d 399 (1995), quoting *In re Jobes* 108 NJ 394, 407-408; 529 A2d 434 (1987). And whether evidence is ‘clear and convincing’ is a question of law for the courts: ‘Whether evidence is sufficient to support a finding of actual malice is a question of law.’ *Kefgen v Davidson*, supra at 642.

B. There is no clear and convincing evidence of actual malice in this case

Although the trial court gave lip service to the heightened burden of proof required of plaintiff in proceeding with her claim, it essentially handled this case as an ordinary negligence claim. There is no evidence whatsoever that Stanek actually knew the Stewart memo contained any false information [Flohe either]. Stanek [Flohe too] and Stewart both testified that they never spoke to each other or otherwise communicated about the matter. Stewart spoke only to George Preston, who was not a regular member of the group challenging Smith’s incumbency [recall]. And Stewart never informed Preston of the inaccuracies in the memo. More importantly, Preston never told anyone, not even Stanek when he spoke to him at a Trustee [Township Board] meeting in either May or June, that the memo contained false information. He was never led to that conclusion by Stewart.

Consequently, this judgment can only be sustained if the Court finds clear and convincing evidence that Stanek [and co-Defendants Flohe & Barrows] acted with

reckless disregard for the truth of the memo when he mailed it to the voters. In assessing this issue, the trial court clearly relied on a preponderance of the evidence standard ordinarily applied in civil actions. The purported evidence of Stanek's 'reckless disregard' for truth is simply this: (1) a history of political animosity between the parties, (2) Stanek knowingly participated in the mailing, (3) Preston knew that no criminal charges were ever filed against Smith and informed Stanek of that fact, and (4) Preston advised against sending the memo. Judge Rodgers concluded that '[t]his evidence, if believed by a jury, is sufficient to support Plaintiff's claims against the individual Defendants each knowingly participated in mailing the Stewart report and that they did so either with actual knowledge that it was false or with reckless disrespect of its truth (Decision and Order June 21, 2006 [Smith App. p. 46a]). But there is simply no sense in which this evidence, even if believed creates 'a firm conviction' that Stanek [Flohe too] knew that the memo was false. Nor is it evidence that is 'so clear, direct and weighty and convincing' so also to allow such a clear conviction to be formed. The trial court clearly erred as a matter of law in denying the motion for summary disposition.

And the error was not cured by the evidence at trial. Plaintiff failed to produce any more compelling evidence of Stanek's [Flohe's either] reckless disregard of the truth of the memo. In fact, when plaintiff was required to respond to the motions for direct verdict, she never even bothered to direct the court to the evidence. Instead, she spoke about negative campaigning and other issues of public interest, reflecting the true basis for this suit [SLAPP]. She explained that the lawsuit was about a 'return [of] the playing field to a reasonable level' (Trial Tr Vol IV, p 967 [Smith App p. 418a]). She argued that defendants were under the misimpression that they could do anything they wanted, and attitude that 'discourages every person...from wanting to serve' in a public position (*Id.* [Smith App. p. 418a]). But as to the actual

evidence, plaintiff only argued that Preston's admonition not to send the memo was enough; it purportedly created 'high degree of awareness that something is wrong...when people say don't do it' (Trial Tr Vol IV, page 968 [Smith App. p. 419a]. And she criticized defendants' decision to act anonymously: 'it's not an American tradition, it's the worse sort of cowardness that again denotes a guilty mind' (Trial Tr Vol IV, p 969 [Smith App. p. 420a]). The jury was left to infer from the anonymous nature of the mailing that defendants 'know there is something wrong with what they are saying,' (Trial Tr Vol IV, p 969 [Smith App. p. 420a]) which is clearly not the same as saying that they had reason to believe the information was false. The trial court was swayed by plaintiff's argument. It concludes that reckless disregard for the truth may be inferred from the fact that defendants proceeded despite Preston's admonition to hold off until he spoke with Stewart (Trial Tr Vol IV, p 972 [Smith App. p. 423a]). In deciding that this was enough to support the claim, the trial court apparently forgot about the special need for clear and convincing evidence and decided that 'unless there is a complete absence of proof with respect to a necessary element or the only proof with respect to that element is incapable of belief by a reasonable jury, the court should deny the motion' (Trial Tr Vol, p 971 [Smith App. p. 422a]).

C. There is no precedence for this type of defamation claim.

No Michigan case has recognized a public official's defamation claim on evidence as meager as this. A review of the *Kefgen v Davidson, supra*, is a particularly instructive. Defendants were taxpayers and parents of students in the Bently School District who 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, 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 Algomac School Board letter implicating plaintiff in certain irregularities. Defendants proceeded to distribute the letter, along with some typewritten pages which they added. Defendants also told a reporter that plaintiff's position in Algonac was terminated for misappropriation of funds; they told individuals attending a Bently 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 gas on inside.

This Court 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 another case, *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.

This 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. Cannaughton*, 491 US 657, 667; 109 S Ct 2678; 105 L Ed 2d 562 (1989), 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 the underlines 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.

In *Grebner v Ingham Newspaper Co*, unpublished per curiam opinion of the Court of Appeals, decided April 7, 1998 (Docketed No. 196310); 1998 Mich App Lexis 1310 (Flohe App. Tab-B), defendants published a column accusing plaintiff of ‘purloining’ private papers from a judge running for reelection. Plaintiff sued for

defamation, arguing that 'purloined' was an accusation of theft, and was defamatory.

The jury agreed and returned a verdict for plaintiff. But this Court reversed.

'[P]laintiffs focus on precise definition of the words "purloin" and "document" is the kind of analysis of the Michigan Supreme Court discouraged in libel cases.' SI Op, p 3, quoting *Rouch, supra*. Plaintiff further claimed that the substance of the allegation was false, and that defendants would have discovered that if they had investigated. But the Court rejected plaintiff's position because it 'appears to be premised on the assumption that defendants were required to follow some unnamed standard for proper investigation...But the Supreme Court has concluded that even demonstrably false statements may deserve constitutional protection despite the fact that, Presumably, a sufficiently thorough investigation would always root out false Statements,' citing *Beckley, supra*. SI Op. pp 4. "[t]he First Amendment protects even false statements when directed against public officials or public figures,' SI Op. p.5.

The trial court in this case allowed the defamation claim on the notion that defendant's actual malice, and more specifically, his [their] reckless disregard for the truth, could somehow be inferred from his [their] failure to heed Preston's advice and refrain from disseminating the memo in the absence of further investigation. This was clearly a wrong view of the law. Plaintiff did not otherwise present evidence sufficient to satisfy the proof requirement imposed by the First Amendment or even by Michigan common law. The judgment should be reversed on this ground alone."

The Unanimous Michigan Appeals Court's Decision Dated February 3, 2009 did precisely just that (Smith App. pp. 443a-447a).

MCL 600.3911(3) SECOND ARGUMENT

Able Attorney, DEBORAH A HEBERT continued:

"Michigan recognizes a qualified privilege for fair reporting. MCL 600.3911(3). Libel damages may not be awarded for the publication of

any record generally available to the public (including any added heading that is a fair and true head note). John Stanet [and others] disseminated a public record, with a short caption that accurately headlined its content. The communication was privileged as a matter of law."

"Even if Derith Smith had come forward with clear and convincing evidence of actual malice sufficient to survive First Amendment scrutiny, her claim would fail on another, wholly independent ground, because the information disseminated was privileged under Michigan's 'fair reporting statute.' MCL 600.2911(3). It protects not only the media but every Michigan citizen against claims of defamation for communications about matters of public record. The statute says in relevant part:

*** Damages shall not be awarded in a libel action for the publications or broadcast of a fair and true report of matters of public record, a public and official proceeding, or of a governmental notice, announcement, written, or recorded report or record generally available to the public, or act or action of a public body, or for a heading of the report which is a fair and true head note of the report.

The language of this statute is clear and unambiguous. If the information disseminated is a 'record generally available to the public,' damages for libel 'shall not be awarded.' *Id.* If the information disseminated is 'a heading...which is a fair and true head note of the report,' damages for libel 'shall not be awarded.' *Id.* And if the information disseminated is 'a fair and true report of matters of public record,' damages for libel 'shall not be awarded.' *Id.*

Clearly, the flyer mailed by defendants was a 'fair and true' report of a record generally available to the public; it was the record itself *verbatim*, supplemented by a single heading drafted in the form of a question that accurately reflected the concerns raised in the memo, as explained at some length by Stewart. Because an essential element of defamation is an *unprivileged* communication, *Oesterle, supra*, plaintiff's claim fails as a matter of law on this element as well.

A. Michigan's fair reporting privilege

Michigan's fair reporting statute creates a qualified privilege, applied most often by

this Court in media cases, see *Koniak v Heritage Newspapers, Inc.*, 198 Mich App 577; 499 NW2d 346 (1991); *Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc.*, 213 Mich App 317; 539 NW2d 774 (1995), but equally applicable to disputes between ordinary parties. It is particularly easy to apply when the information disseminated is a reproduction of the public document itself. In *Deutsch v Berliner*, 2004 Mich App Lexis 2243; unpublished per curiam opinion, decided August 24, 2004 (Docket No. 246991) (Flohe App. Tab-C), for example, defendant sent out an email which attached a document obtained from a Missouri court file. Plaintiff sued, claiming republication of a defamatory statement. But the Court analyzed the claim under Michigan's fair reporting act and rejected it as a matter of law: 'Here, plaintiff's claim is based on defendants' republication of a document that was included in the Missouri Court file. Plaintiff does not dispute that the document was a public record.' Sl op at 2.

Defendant in *Deutsch* was entitled to summary disposition because the publication was a duplication of a public record and was therefore privileged. The same is true here. There is no meaningful distinction between attaching a public document to an email, as occurred in *Deutsch*, and distributing a public document by regular mail, as occurred here.

Michigan's fair reporting privilege is even broader in its application because it applies not only to the distribution of the public record itself, but also to the dissemination of non-verbatim information taken from the public record, as long as the 'gist' of it is an accurate representation of what the public record contains. In *Northland Wheels Roller Skating Center, Inc. supra*, the Detroit News published an article about teen shootings associated with plaintiff's roller skating rink. Because the information was taken from, and essentially consistent with, the police reports, the Court applied the privilege and affirmed the order of summary disposition for defendants. 'The

existence of a privilege that immunizes a defendant from liability for libel is a question of law that this Court determines *de novo*.' 213 Mich App at 325, citing *Koniak v Heritage Newspaper, Inc*, 190 Mich App 516, 520; 476 NW2d 447 (1991). As long as the publication is substantially consistent with the public record, defendant is immunized from liability. Because the 'sting' or the 'gist' of the newspaper article was the same as the information contained in the police report, the privilege applied. *Id.*

The 6th Circuit Court of Appeals applied this broader interpretation of the fair reporting privilege in *Amway Corp v The Proctor & Gamble Co*, 346 F3d 180 (6th Cir 2003). Defendants in that case operated an anti-Amway website, where they reported various civil complaints filed against Amway for illegal conduct, including pyramid distribution schemes. The Sixth Circuit agreed with the district court that the lawsuit could not escape Michigan's fair reporting privilege, MCL 600.2911(3). Both courts rejected Amway's reliance on the fact that defendants themselves had filed the civil complaints about which they reported. 346 F3d at 186. The 6th Circuit applied a plain reading of the statute and concluded that the privilege applied.

In *Dupuis v City of Hamtramck*, 502 F Supp 2d 654 (ED Mich 2007), plaintiff, a former Hamtramck police officer, alleged that defendant defamed him with an unkind report in Maxim Magazine, reprinted from an APS report, describing how plaintiff had 'tasered' his partner with a stun gun when she refused to stop at a gas station so that he could purchase a soda. Plaintiff was ultimately discharged from the police judgment on two grounds: (1) the statements were substantially true, and (2) the statements are an accurate account of a public record. The court agreed with both arguments. As to the latter, it held that defendant's statements derived from a fair and true report and that '[d]efendants need not prove they actually relied on, or even consulted, these reports. It suffices that their statements are consistent with

such sources.’ 502 F supp 2d at 657.

In other words, there is no requirement that the publisher ascertain the truth of the matters contained in the public record in order for the privilege to apply. In *Mayfield v Detroit News*, unpublished per curiam opinion of the Court of Appeals, decided August 2, 1996 (Docketed No. 180687), 1996 Mich App Lexis 1331 (Flohe App. Tab-D), plaintiff sued for defamation after plaintiffs published an article stating that she had been denied a license to practice law for reasons of character and fitness, due to a history of bouncing checks and her failure to disclose to the Bar her numerous civil lawsuits. The article was based on an order issued by the United States District Court of the Eastern District of Michigan, disposing of plaintiff’s lawsuit against the Michigan Board of Law Examiners.

This Court relied on the fair reporting privilege to affirm the trial court’s order of summary disposition for defendants. ‘The primary question when determining whether the privilege applies concerns not the truth of the questioned statement itself, but whether the statement accurately reports a matter contained in a public record.’ SI Op, p 2. In applying the fair reporting requirement to court documents, the Court observed that the communication is privileged if it ‘substantially represent[s] the matter contained in the court records.’ SI Op, p 2. This Court refused to give any weight to plaintiff’s complaint that the article said the information was ‘considered’ as opposed to ‘cited.’ as stated in the order. Summary disposition was affirmed under the fair reporting privilege. And this Court has long held that where a defamation claim involves the statutory privilege of fair reporting, ‘defendant is statutorily immune from liability’ as long as he accurately reported the public record, *Stablein v Schuster*, 183 Mich App 477, 482; 455 NW2d 315 (1990). ‘[D]efendant’s motivation is irrelevant if a fair and true report is made of the proceeding.’ 183 Mich App at 482.

B. Stanek [and others] disseminated a public record protected by qualified immunity

The Stewart memo is a 'record generally available to the public.' In dismissing plaintiff's Bullard Plawecki claims against Stewart and the Village of Suttons Bay, the trial court expressly stated that the report was not a disciplinary report but a public record, 'subject to disclosure under FOIA (Decision and Order, June 21, 2006, p 8 [Smith App. p. 43a]). Plaintiff has not challenged that ruling. Under MCL 600.2911(3), '[d]amages shall not be awarded in a libel action' for the publication of a record, such as this memo, generally available to the public. The Stewart memo was a qualifiedly privileged communication, and it defeated the second element of plaintiff's defamation claim without regard to the third element of actual malice. An 'unprivileged communication' is required for a defamation claim, separate and independent from every other element.

The trial court never really understood this point. It repeatedly linked privilege and actual malice as though they were two sides of the same coin. The court decided, with no reference to any language in the statute, that the fair reporting privilege only applied if the information contained in the public report was 'fair and true.' It was convinced that 'there is no privilege to publish a public record which the Defendant knows contains false statements, (Decision and Order, June 21, 2006 p 11[Smith App. p. 46a]), explaining that '[t]he 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' (Decision and Order, June 21, 2006, p 12 [Smith App p. 47a]. Not surprisingly, the trial court found this to be a question of fact for the jury and denied the motions for summary disposition.

This theme was repeated in the ruling on defendants' motion for directed verdict.

The court again questioned whether 'it is accurate that the law of this state would allow a knowing publication of a false public record. (Trial Tr. Vol IV, p 974 [Smith App. p. 425a]). [I]s this the kind of political speech that is protected by the first amendment (Trial Tr, Vol IV, p. 974 [Smith App. p. 425a])?' The court essentially concluded that 'actual malice' trumped everything and that defamation was actionable even for the publication of privileged, public records if the malice element was met. [I]t is this court's opinion as a matter of law that if it is known that the public record is false...' (Trial Tr Vol IV, p 974 {Smith App. p. 425a}).

The trial court clearly erred as a matter of statutory interpretation. The only relevant question is whether defendants disseminated a record generally available to the public, with a heading that was a fair and true head note of what was contained in the record. If so, the communication was privileged and could not support a defamation claim. The Stewart memo was a record generally available to the public. There is no dispute on that point and it was for that very reason that the trial court dismissed the Bullard Plawecki claims against Stewart and The Village. Given that the memo was a public record, plaintiff was not entitled to go to the jury on the claim that defendants were liable for damages caused by its communication to third persons.

And even as to the caption, the trial court acknowledged, correctly so, that the words could be reasonably viewed as an accurate description of the contents of the memo. '[T]he Court does respect that one inference from the caption is it raises a question intended to generate debate about misusing, potentially misusing funds within the township...,' which is the very concern Stewart intended to raise, per his own testimony. The trial court clearly erred as a matter of law in refusing to apply the privilege and enter judgment for Stanek [the other Defendants too]."

Attorney Hebert presented excellent research, clarity of settled law on these matters, and **again it is apparent that the Michigan Appeals Court agreed in its unanimous Decision dated February 3, 2009.**

CONCLUSION AND RELIEF REQUESTED

The Lower Circuit Court erred by failing to dismiss the final claim of defamation against Defendant-Appellee Flohe at Summary Disposition, erred in denying motions for directed verdict, erred by allowing this case to proceed to trial, failed to recognize the admitted SLAPP v Defamation nature of Plaintiff-Appellant Smith's claims, and allowed erroneous expert testimony at trial; all paving the way for a Jury Verdict and Judgment against Defendant-Appellees.

The Michigan Court of Appeals heard Oral Arguments 7/1/09, deliberated this case a very long time before rendering its unanimous 3/0 **STARE DECISIS** Judgement and Order dated 2-3-09, reversing the Lower Circuit Court in favor of Defendant-Appellees, and remanding the case back for an entry of a judgment of no cause for action.

Defendant-Appellant filed an application for leave to appeal the 2/3/09 Michigan Court of Appeals' unanimous Judgment and Order to the Michigan Supreme Court, granted 9/16/09.

For all of the reasons stated in this brief, and those of co-Defendant-Appellees Barrows & Stanek by concurrence, Defendant-Appellee Flohe respectfully asks this Honorable Michigan Supreme Court:

1. Reaffirm the Appeals' Court Decision and Order of 2/3/09 in favor of Defendant-Appellees;
2. Reaffirm the Court of Appeals has not erred in determining that the Plaintiff-Appellant presented insufficient evidence to support a finding of actual malice for the purposes of her defamation claim;
3. Reaffirm Michigan's qualified privilege for fair reporting, MCL 6000.3911(3) as applied by the Defendant-Appellees in this case.

By:  Dated: January 6, 2010

Noel J. Flohe, Defendant-Appellee, *In Pro Per*
9881 E. Cherry Bend Road
Traverse City, MI 49684(231) 946-0011

CERTIFICATE OF SERVICE

Noel Flohe, says that on January____, 2010, he served copies of his Defendant-Appellee's Michigan State Supreme Court **Response** Brief filed in Case No. 138458 on:

Mark Granzotto, Esq., P.C
225 South Troy Street, Suite 120
Royal Oak, MI 48067

Grant W. Parsons, Esq.
520 South Union Street
P.O. Box 1710
Traverse City, MI 49685-1710

Deborah A. Hebert, Esq.
4000 Town Center, Suite 909
Southfield, MI 48075

Rosalind H. Rochkind, Esq.
1000 Woodbridge Street
Detroit, MI 48207-3192

By placing same in envelope(s) properly addressed and depositing the said envelope(s) in the United States Mail, postage thereon fully prepaid.

I herby declare that the statement above is true to the best of my knowledge, information an belief.



Noel Flohe, In Pro Per

A

CHARLES STEWART TRIAL TESTIMONY

1 events he would cover that Preston called you on May
2 3rd of '05, that would have been the telephone, can
3 you clear up as to whether that was in fact May 3rd of
4 '05, or don't you know?

5 A. I do not know of the specific date.

6 Q. Okay. Are you sure that you actually talked to
7 Mr. Preston, was that before or after the mailing went
8 out?

9 A. To the best of my knowledge it was before the mailing.

10 Q. Before. Now, let's jump ahead a little bit, I think
11 John touched on this a little bit. Did Officer Mead
12 actually investigate your Smith concerns?

13 A. No.

14 Q. Did the state police ever investigate your concerns
15 about Mrs. Smith? Was there a state police
16 investigation at all?

17 A. I have no knowledge of one.

18 Q. Okay. Do you have any knowledge of any police
19 investigation at all?

20 A. No.

21 Q. Okay. On Page 108 of your deposition testimony -- I
22 know you don't have it in front of you.

23 THE COURT: What works best, ask him a
24 question, if you get an answer you think is different
25 then you can refer him to the deposition.

CHARLES STEWART TRIAL TESTIMONY

1 MR. PARSONS: There was no workmans'
2 compensation claim.

3 THE COURT: Sustained. Workers'
4 compensation involves an injury at work, physical
5 injury, I think you are talking about unemployment
6 compensation.

7 MR. FLOHE: There seems to be some confusion
8 that process applies to another situation and I'm just
9 trying to make sure it was either one or the other or
10 both, that's what I'm trying to clear up here.

11 THE COURT: I don't know. You gentlemen
12 discovered the case, all I've ever been told of is an
13 unemployment compensation claim.

14 MR. PARSONS: Ms. Smith never had workmans'
15 comp.

16 MR. FLOHE: I did mean my question in terms
17 of unemployment comp, not workmans' comp.

18 BY MR. FLOHE:

19 Q. The attorney from Graham and Young and Ms. Doyle had
20 to do with an opinion that led you to you dropping
21 your objection to the unemployment compensation claim,
22 right?

23 A. I had a number of conversations with them, I'm not for
24 certain I could answer that question.

25 Q. Okay. Do you remember anybody else that you spoke

CHARLES STEWART TRIAL TESTIMONY

1 with that gave you professional advice before the
2 objection was withdrawn to the claim?

3 A. I'm not recalling any, no.

4 Q. Do you know, and I think John touched on this and I
5 think the answer was no, but I'm a little confused,
6 after that claim objection got denied, your testimony
7 at deposition was you had so many things on your
8 plate, you kind of dropped this aside, went about
9 other things that were more demanding of your time.
10 And, my question to you at this time is that did the
11 Village ever make a determination about non-wrongdoing
12 on the part of Mrs. Smith, the Village itself?

13 A. I came to the conclusion that there was no criminal
14 wrongdoing.

15 Q. Okay. Can you explain how you came to that opinion,
16 that conclusion?

17 A. My biggest focus was on the pay. And, through the pay
18 we have my signature or my initials on an hourly
19 verification report and two independent individuals
20 that signed a payroll check from the Village's
21 perspective. The Village ordinary in our policies and
22 our procedures I did not do a proper review of the
23 document I initialed approving it to proceed and at
24 the same time there was no call to question from any
25 of the signators of the Village. In addition to that,

JERRY VANHUUSTEE TRIAL TESTIMONY

1 THE COURT: Mr. Sharp.

2 MR. SHARP: Thank you, Judge.

3 CROSS-EXAMINATION

4 BY MR. SHARP:

5 Q. Mr. Vanhuystee, as the Village treasurer, you were not
6 involved with oversight or supervising Ms. Smith at
7 her work in 2004, were you?

8 A. No, I was not.

9 Q. And, you were not in any contact with Mr. Stewart
10 about his supervision of Ms. Smith, were you?

11 A. No.

12 Q. And, were you in any contact with the Village counsel
13 about any supervision they had of Ms. Smith?

14 A. No, I was not.

15 Q. So when you say that Mr. Barrows asked you whether
16 Ms. Smith had done anything illegal you didn't know
17 one way or another, did you?

18 A. That's correct.

19 Q. You told him, I don't know of anything she did
20 illegal?

21 A. That's correct.

22 Q. But you also told him I don't have any idea?

23 A. That's correct.

24 Q. And, then you say that you ask -- Mr. Barrows had
25 asked you five times whether she had done anything

B

~~STATE OF MICHIGAN~~
~~COURT OF APPEALS~~

MARK L. GREBNER,

Plaintiff-Appellee,

v

INGHAM NEWSPAPER COMPANY d/b/a
TOWNE COURIER and SCOTT T. SCHULTZ,

Defendants-Appellants,

and

RICHARD L. MILLIMAN a/k/a DIRK
MILLIMAN and STEVEN P. RUHLING,

Defendants.

UNPUBLISHED

April 7, 1998

No. 196310

Ingham Circuit Court

LC No. 94-77693 CZ

Before: O'Connell, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

In this libel action, defendants appeal as of right a judgment entered in favor of plaintiff. Following a jury trial, defendant Schultz was ordered to pay plaintiff \$17,259.79 in damages and defendant Ingham Newspaper Company was ordered to pay \$40,270.04. We reverse.

The libel action was based on the following statement that appeared in a newspaper article written by Schultz and published in the February 26, 1994, edition of the Towne Courier: "For example, she alleges that an employee of Judge Jordan's conspired with a well-known Democratic political consultant to unseat incumbent District Court Judge Jules Hanslovsky by supplying purloined private documents from Hanslovsky's private files." The "she" referred to in the article was a former magistrate of the 54-B District Court, Joan Elizabeth Koblas. "Judge Jordan" is Judge David L. Jordon, then chief judge of the 54-B District Court, the "employee" is apparently Marc Thomas and the political consultant is apparently plaintiff. Judge Hanslovsky had been defeated in his bid for reelection to the 54-B District Court in 1992.

Defendants challenge the determinations below that the statement was “of and concerning” plaintiff, that the statement was false and that the statement was made with actual malice. Because these questions implicate protections afforded defendants under the United States Constitution, appellate review entails an “independent examination” of the record where we “examine for ourselves the statements in issue and the circumstances under which they were made.” *New York Times Co v Sullivan*, 376 US 254, 285; 84 S Ct 710 (1964). We conduct such a review to determine whether there is clear and convincing evidence of actual malice. *Harte-Hanks Communications v Connaughton*, 491 US 657, 688; 109 S Ct 2678; 105 L Ed 2d 562 (1989); see also *Rouch v Inquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 253-258; 487 NW2d 205 (1992); *Locricchio v Evening News Assn*, 438 Mich 84, 110-114; 476 NW2d 112 (1991). Essentially, whether the facts in a case meet the constitutional standard is a question of law. *Locricchio*, *supra* at 111. However, we afford considerable deference to credibility determinations by the trial court. *Harte-Hanks*, *supra* at 688.

Defendants argue that plaintiff failed to establish that the statement at issue was “of and concerning” plaintiff. *Rouch*, *supra* at 251. We disagree. “To render a statement defamatory, it must indicate the person intended by name, or connect that person with some fact or circumstance known to those to whom the publication is directed, by which they may understand who is meant . . .” Taylor et al., Michigan Torts Practice Guide, sec 1:648 at 1-82. “It is not necessary that all the world should understand the libel; it is sufficient if those who knew the plaintiff can make out that he is the person meant.” *Miller v Maxwell*, 16 Wend 9, (18 NY Sup Ct, 1836). Our independent review of the record shows that there is ample evidence to sustain the finding that the statement was “of and concerning” plaintiff. Given plaintiff’s reputation in the community as a political commentator, a Democratic political consultant, and a seven-time elected public official in Ingham County, and given the frequency with which Schultz had previously attacked plaintiff in his newspaper column,¹ we conclude that readers of the statement would recognize plaintiff as the “well-known Democratic political consultant” referenced in the statement.²

Defendants also assert that plaintiff failed to prove that the statement was false. In order to prove that he has been libeled, a plaintiff must show that the defendant published a “false and defamatory” statement concerning the plaintiff. *Rouch*, *supra* at 251. The burden rests with the plaintiff to prove falsity. *Philadelphia Newspapers v Hepps*, 475 US 767, 776; 106 S Ct 1558; 89 L Ed 2d 783 (1986); *Rouch*, *supra* at 263. If, by “the statement,” defendants are referring to the language quoted above, as opposed to the underlying allegation directed toward plaintiff, we agree.

At trial, plaintiff made a two-pronged attack on the falsity of this statement. First, he challenged Schultz’s choice of language in the statement, focusing on the words “purloined” and “documents.” With regard to this issue, plaintiff spent some time questioning Schultz and defendant Richard Milliman, the publisher of the Towne Courier, on their understanding of the meaning of the word “purloined” and both of them conceded that the word “steal” is a synonym for “purloin.” Koblas then admitted that she had not told Schultz that Thomas had passed on “purloined” documents from Judge Hanslovsky’s private files to plaintiff. When asked by plaintiff whether she would have used the word “steal” to characterize what Thomas had done, Koblas gave the following response: “I probably would not have

used that word because that word indicates to me that he, you know, took the document and took it out and permanently deprived the Court of a document as opposed to taking information.” Plaintiff also focused on the semantic distinction between the words “document” and “information.” Schultz indicated that he believed the two words were synonymous and that when another witness testified in her deposition in the whistleblower action that Thomas had supplied information to plaintiff, Schultz saw this as support for the assertion that Thomas had supplied plaintiff with documents from Judge Hanslovsky’s private files.

In our judgment, plaintiff’s focus on the precise definition of the words “purloin” and “document” is the kind of analysis that the Michigan Supreme Court discouraged in libel cases. *Rouch, supra* at 263-264. “To ensure the requisite ‘breathing space’ for free and robust debate on matters of public concern,” the Court stated, “we think it is important to allow for imprecision and ambiguity in the choice of language.” *Id.* at 264 n 25. Within the context of protected First Amendment expression, the question is not necessarily whether the meaning conveyed by the technical definition of the words is accurate, but rather whether the gist or essence of the statement is justified. Minor inaccuracies do not amount to falsity so long as “the substance, the gist, the sting, of the libelous charge be justified.” *Masson v New Yorker Magazine, Inc.*, 501 US 496, 517; 111 S Ct 2419; 115 L Ed 2d 447 (1991), quoting *Heuer v Kee*, 15 Cal App 2d 710, 714; 59 P2d 1063 (1936).³

Here, Koblas specifically testified that, as written, the statement accurately reflected the “gist” of her allegation. She testified that the allegation she made was that Thomas “took the information” and passed it on to plaintiff. Substituting Koblas’ language (“information [taken]”) for Schultz’s language (“documents purloined”), the statement at issue would read: “For example, she alleges that an employee of Judge Jordan’s conspired with a well-known Democratic political consultant to unseat incumbent District Court Judge Jules Hanslovsky by supplying *information taken* from Hanslovsky’s private files.” In our judgement, the use of the words “taken” and “information” would not have created a markedly different effect in the mind of the reader. In either instance, the reader would have been left with the impression that Thomas had obtained information from a place he should not have been (i.e., Judge Hanslovsky’s private files) and improperly passed it on to plaintiff. Whether that information was contained in an actual physical document that was delivered to plaintiff is unimportant in this context. Bearing in mind that plaintiff bears the burden of proof on the issue of falsity, we conclude that these variances in language do not evidence that the statement was false. Schultz’s misconception of what Koblas had told him “is commonplace in the forum of robust debate,” *Masson, supra*, at 519, and is not sufficient evidence of falsity to justify the forfeiture of defendants’ First Amendment protections here.

Plaintiff’s second argument is that, regardless of the technical accuracy or inaccuracy of Schultz’s reporting about Koblas’ testimony, Thomas, in fact, never provided him with information from Judge Hanslovsky’s private files. Here, plaintiff challenges the accuracy of what Koblas said rather than the accuracy of what Schultz wrote. Essentially, plaintiff argues that because the substance of the allegation was false, had defendants properly investigated the matter they would have reached this conclusion. This argument appears to be premised on the assumption that defendants were required to follow some unnamed standard for proper investigation. *Cf.*, however, *Beckly Newspapers Corp v*

Hanks, 389 US 81, 85; 88 S Ct 197; 19 L Ed 2d 248 (1967); see also *St. Amant v Thompson*, 390 US 727, 733; 88 S Ct 1323; 20 L Ed 2d 262 (1968). But the Supreme Court has concluded that even demonstrably false statements may deserve constitutional protection despite the fact that, presumably, a sufficiently thorough investigation would always root out false statements. *New York Times*, *supra* at 288. Rather, in *New York Times*, the Court opined that such false statements “must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’” *Id.* at 271-72 (quoting *NAACP v Button*, 317 US 415, 433; 83 S Ct 328; 9 L Ed 2d 405 [1963]). In order to assure that such “breathing space” is maintained, the Court established the following test:

The constitutional guarantees [of the First Amendment] require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not. [*Id.* at 279-80.]

In Michigan, this constitutional standard has been adopted by the Legislature in MCL 600.2911(6); MSA 27A.2911(6).⁴

It is unnecessary, therefore, that we address whether defendants here can insulate themselves from a libel action merely by attributing a false statement to another speaker. For, in the end, we are unable to conclude that defendants acted with “actual malice” in printing the statement in controversy. An independent review of the record does not sustain such a finding based on clear and convincing proof. Both Schultz and Milliman continue to profess a belief in the accuracy of the statement. Milliman testified that he did not print a retraction because he “believe[d] that the allegations contained in the paragraph are true.” His professed belief in the accuracy of the statement does not evidence a knowing publication of a defamatory falsehood. See *New York Times*, *supra* at 286 (finding that a statement by a newspaper employee that, aside from one allegation, “he thought the [allegedly libelous statement] was ‘substantially correct,’” did not evidence actual malice).

Additionally, the record shows that Milliman and Schultz did investigate Koblas’ allegations before publishing. Accord *New York Times*, *supra* at 287. Schultz testified that he went through a substantial amount of information provided to him by Koblas before publishing. He specifically identified portions of a deposition from a whistleblower action, that had earlier been brought by Koblas against the 54-B District Court, that he said supported Koblas’ allegations. In that deposition, Gwen Thompson-Simmons, a court clerk, testified that she had heard that Thomas had gone through Judge Hanslovsky’s files, and that Thomas had passed on information regarding Judge Hanslovsky. Further, Koblas testified that she told Schultz that Judge Hanslovsky had testified at his deposition in the same case that he “believed that Mark Thomas had taken a letter . . . and also various other information that was obtained . . . through searching his computer files.” Milliman testified that after reading Judge Hanslovsky’s deposition post-publication, he was further convinced of the truthfulness of the statement in question.

Both Schultz and Milliman found Koblas to be credible. Schultz testified that he spoke with District Court Judge Frank Del Vero and East Lansing Councilman Bill Sharp prior to publication, and

that both persons had indicated that Koblas was a credible individual. In fact, the article from which the statement at issue was taken contained a quote from Judge Del Vero with regard to Koblas' credibility. Defendants were permitted to rely on Koblas' apparent credibility when publishing her allegations. See *New York Times*, *supra* at 287 (observing that the failure to reject an allegedly libelous advertisement was not unreasonable given that the Times had "relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement").

The determination of whether an individual published with malice or reckless disregard "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 731. The record here, in our judgment, does not show that defendants either knew that the statement was false or that they acted with reckless disregard as to its truthfulness.⁵

In fairness to plaintiff, however, we emphasize again that the First Amendment protects even false statements when directed against public officials or public figures, at least in the absence of malice. At the end of the day, we do not know whether plaintiff received documents from Thomas, much less whether he received them knowing that they were obtained improperly. Therefore, we do not decide this case on the basis of whether the underlying allegation is true or false. While there may be some who decry that such an inquiry is not dispositive, or even necessarily at the heart of, the instant action, it is clear from both *New York Times* and MCL 600.2911(6); MSA 27A.2911(6), that other factors must be considered and ultimately predominate. What we can state, however, in an effort to clarify the significance of this decision is that defendants have not proved -- nor have they been called upon to prove -- the truthfulness of Koblas' assertion about plaintiff's conduct.

Finally, we conclude that the publication of the statement was not privileged under MCL 600.2911(3); MSA 27A.2911(3). This statute protects the publication of true reports of matters of public record.⁶ Because we do not believe that the allegation was part of a public record, we reject defendants assertion that the statutory privilege applies here.

We reverse.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Stephen J. Markman

¹ Plaintiff testified that Schultz published articles critical of plaintiff "roughly once a month," an assertion that was not challenged by either defendant. Both defendants acknowledged that the reference in controversy was intended to refer to plaintiff.

² Largely for these reasons, plaintiff is also properly characterized as a public official or public figure for purposes of constitutional libel analysis. *Curtis Publishing Co v Butts*, 388 US 130, 164; 87 S Ct 1975; 18 L Ed 2d 1094 (1967).

³ The “gist” or “sting” of the statement here is in two parts. The first part is that “an employee of Judge Jordan “conspired with [plaintiff] to unseat incumbent District Judge Jules Hanslovsky.” This part is per se not actionable. All elections against incumbents can be described by the press or especially by the incumbent as conspiracy to unseat the incumbent. If we were to consider this part of the statement libelous we would subject all challengers and the press to libel suits. Politics by definition can be classified as “a conspiracy to unseat the incumbent” without fear of a libel suit. While some judges might wish to prevent citizens from “conspiring,” or agreeing, to unseat them, such agreements are commonly made and are an integral part of our political system.

The second part of the statement is more problematic. Here, it is alleged that “an employee of Judge Jordan” supplied “purloined private documents” to plaintiff. Plaintiff alleges that this statement accuses him of being a thief or at least conspiring to be a thief. First, we note that being supplied with purloined documents is not the same thing as stealing documents, particularly where there is no allegation that plaintiff was made aware that the documents were purloined. Second, plaintiff admits that he obtained sensitive information concerning Judge Hanslovsky and admits that he published this information in an attempt to unseat the incumbent. The only issue-- and we do not gainsay its significance-- is whether this particular information was “purloined,” or, as plaintiff argues, derived from another source. The record below contains ample evidence that some sensitive information “was taken” from Hanslovsky’s files.

While we find the choice of the word “purloined” to be ill-advised, this word alone does not transfer an otherwise newsworthy story into a libel or defamation lawsuit. The article does not accuse plaintiff of any criminal activity – it merely reports the allegations made in the Koblas lawsuit (i.e. that another person [Mark Thomas] supplied plaintiff with documents from Judge Hanslovsky’s files). The gist or “sting” of the article is not actionable. *Masson, supra* at 517.

⁴ This section provides:

An 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.

⁵ Plaintiffs argue that there was evidence showing that sources relied upon for the story did not have personal knowledge regarding the allegation made. However, this would not establish actual malice; lack of personal knowledge among sources does not indicate that the account they provide is false. Having said this, we emphasize that it is not our intent to give our imprimatur to the investigation conducted here. It is troubling, for example, that Schultz did not discuss the allegations in his statement with plaintiff prior to their publication. While there is indication that other individuals expressly chose not to speak with Schultz, there is no such indication in plaintiffs’ case and Schultz at most attempted on only a single occasion to speak with plaintiff prior to publication.

⁶ Section 2911(3) provides an exception for a true report of:

matters of public record, a public or official proceeding, or of a governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, or for a heading of the report which is a fair and true headnote of the report.

2

STATE OF MICHIGAN
COURT OF APPEALS

EDWARD A. DEUTSCH,

Plaintiff-Appellant,

v

RONALD R. BERLINER,

Defendant-Appellee.

UNPUBLISHED

August 24, 2004

No. 246991

Washtenaw Circuit Court

LC No. 02-000589-NZ

Before: Hoekstra, P.J., and Cooper and Kelly, JJ.

MEMORANDUM.

Plaintiff appeals as of right the order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff brought this defamation action based on defendant's republication of allegedly defamatory statements through an e-mail attachment of an item contained in a Missouri court record. The trial court granted summary disposition, finding that the document was a record generally available to the public, and damages could not be awarded under MCL 600.2911(3).

MCL 600.2911(3) provides in relevant part:

Damages shall not be awarded in a libel action for the publication or broadcast of a fair and true report of matters of public record, a public and official proceeding, or of a governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, or for a heading of the report which is a fair and true headnote of the report. This privilege shall not apply to a libel which is contained in a matter added by a person concerned in the publication or contained in the report of anything said or done at the time and place of the public and official proceeding or governmental notice, announcement, written or reported report or record generally available to the public, or act or action of a public body, which was not part of the public and official proceeding or governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body.

To establish a defamation claim, the plaintiff must show that a false or defamatory statement was made, and there was an unprivileged publication to a third party. *Kefgen v*

Davidson, 241 Mich App 611, 617; 617 NW2d 351 (2000). MCL 600.2911(3) provides a fair reporting privilege for public documents. *Id.*, 623, n 7.

Here, plaintiff's claim is based on defendant's republication of a document that was included in the Missouri court file. Plaintiff does not dispute that the document was a public record. Instead, he asserts that defendant improperly used MCL 600.2911(3) to shield his initial defamatory statements. However, there is no exception in the statute that would allow plaintiff to defeat the privilege.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly

9

STATE OF MICHIGAN
COURT OF APPEALS

HELEN MAYFIELD,

Plaintiff-Appellant,

v

DETROIT NEWS and ROBERT GILES,
Defendants-Appellees.

UNPUBLISHED

August 2, 1996

No. 180687

LC No. 94-423381 CZ

Before: O'Connell, P.J., and Gribbs and T. P. Pickard,* JJ.

PER CURIAM.

In this defamation action, plaintiff appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant. We affirm.

On August 30, 1993, defendants published an article concerning plaintiff which stated that she had been refused a license to practice law in the State of Michigan.¹ The article also related that the plaintiff

had passed the written exam, but a State Bar committee found she lacked the necessary character and fitness to practice law. *The committee cited [plaintiff's] history of bouncing checks and her failure to disclose that she was a litigant in a number of civil lawsuits.* [Emphasis supplied.]

Plaintiff brought suit against defendant newspaper, submitting that the highlighted portions of the article above were false and defamatory. Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that they enjoyed a statutory privilege against libel claims under MCL 600.2911(3); MSA 27A.2911(3), which provides as follows: "Damages shall not be awarded in a libel action for the publication . . . of a fair and true report of matters of public record . . . or record generally available to the public . . ." Defendants contended that the information above was obtained from a memorandum and order of the United States District Court, Eastern District of Michigan, dismissing plaintiff's previous suit against the Michigan Board of Law Examiners. Because defendants had simply

* Circuit judge, sitting on the Court of Appeals by assignment.

presented a fair and true report of a public record, they contended, plaintiff could not prevail in her defamation suit. The circuit court agreed with defendants, and granted summary disposition in their favor. Plaintiff now appeals.

The statutory “fair reporting” privilege, MCL 600.2911(3); MSA 600.2911(3), precludes damages in a libel suit where a defendant engages in the publication of the contents of a public record, provided that the defendant presents a “fair and true” report of that record. The primary question when determining whether the privilege applies concerns not the truth of the questioned statement itself, but whether the statement accurately reports a matter contained in a public record, regardless of the accuracy of the public record. In order for the privilege to apply in the context of court documents, which are, of course, public records, the report must “substantially represent the matter contained in the court records.” *Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 325; 539 NW2d 774 (1995), quoting *Koniak v Heritage Newspapers, Inc*, 190 Mich App 516, 523; 476 NW2d 447 (1991).

In the present case, the article in question presented a fair and true report of *Mayfield v Michigan Board of Law Examiners*, unpublished memorandum and order of the United States District Court, Eastern District of Michigan, Southern Division, entered June 3, 1993 (Case No. 92-CV-77354-DT), p 2, n 4. The *Mayfield* order contained a list of matters concerning plaintiff’s application to the bar that had been referred to the State Bar Standing Committee on Character and Fitness, such as the fact that plaintiff had failed to disclose information about herself that she was obligated to disclose, and that she had a long-standing history of bouncing checks. The article in question substantially represented this information, stating “[t]he committee cited [plaintiff’s] history of bouncing checks and her failure to disclose that she was a litigant in a number of civil lawsuits.” *Northland Wheels, supra*. While the use of the word “considered” rather than “cited” in the article may have been more accurate (because the order itself stated only that the matters had been *referred* to the committee), we find that the article substantially represented the thrust of the statement in the order.² Therefore, in light of the fair reporting privilege, MCL 600.2911(3); MSA 600.2911(3), we agree that summary disposition was appropriate.

Affirmed.

/s/ Peter D. O’Connell
/s/ Roman S. Gibbs
/s/ Timothy P. Pickard

¹ While plaintiff referred to four articles in her complaint and continues to refer to four articles in her brief on appeal, the record before this Court contains evidence of only one article, that appearing on August 30, 1993.