IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

CARLA BURKHART AND HERRICANE GRAPHICS, INC.,

Plaintiff,

vs.

EDGAR COUNTY WATCHDOGS, INC., *et al.*,

Defendants.

Case No. 15 L 001244

PLAINTIFFS' RESPONSE TO SECTION 2-619.1 MOTION TO DISMISS OF EDGAR COUNTY WATCHDOGS AND KIRK ALLEN

NOW COME the Plaintiffs, CARLA BURKHART ("Burkhart") and HERRICANE GRAPHICS, INC. ("HGI"), by and through their attorneys, GRIFFIN | WILLIAMS LLP, and for their response in opposition to the Motion to Dismiss Pursuant to 735 ILCS 5/2-619.1 filed by the Defendants, EDGAR COUNTY WATCHDOGS, INC. and KIRK ALLEN, state as follows:

Introduction

As the saying goes, "politics is a contact sport." The Defendant, Kirk Allen ("Allen"), and his supposed "not-for-profit" company, the Edgar County Watchdogs, Inc. ("ECWI") have bullied, harassed, intimidated and litigated their way up and down the state for the last five years manufacturing hysteria surrounding their chosen causes. While Allen professes to be a journalist and likens the *Illinois Leaks* blog ran by ECWI to the *Chicago Tribune* or *Daily Herald*, his brand of biased, political opportunism would never pass professional muster in that arena.

In the instant case, Allen has led a vindictive, targeted, mean-spirited and defamatory campaign against the Plaintiffs designed to propel his cohort, Kathy Hamilton, into power at the College of DuPage ("COD"). Allen's malicious campaign ignored the facts, intentionally perverted documents and spun patently untrue statements about the Plaintiffs while, at times,

suggesting Mrs. Burkhart was romantically involved with COD's former president. The campaign of defamation led by Allen centered on publications on *Illinois Leaks* throughout 2015 that accused Plaintiffs of (1) engaging in fraud and corruption via a pay to play scheme with COD and (2) violating state law by deceptively executing a contract to perform architecture services as an architect while holding herself and HGI out as architects.

The accusations of Allen and ECWI are patently false. The Plaintiffs never paid a dime to anyone connected with the COD to obtain a contract and Burkhart's involvement with the COD Foundation was an act of charity based on civic responsibility. Further, a plain review of the 2012 Signage Design Contract reveals that while COD should have used another form document, the parties went out of their way to distance the substance of the agreement from architectural services – even expressly disclaiming such services in an exhibit!

In attempting to play the victims, Allen and ECWI cannot help but continue their perverted smear campaign in their Motion to Dismiss. While ironically lamenting Burkhart and HGI's lawsuit as harassment and intimidation, Allen and ECWI waste no time taking shots at Plaintiffs in their opening salvo again attacking with the supposed "'pay to play' scandal." The Defendants argue that their smear campaign is "identical" to the coverage of the *Chicago Tribune* and *Daily Herald* and the lawsuit should be dismissed because their statements were (1) true, (2) opinions, (3) capable of innocent construction and/or (4) lacking malice. Contrary to such assertions, the mainstream press never accused Plaintiffs of engaging in a pay to play scandal or deceptively executing a contract for architecture services as an architect. The reason that mainstream press did not publish such statements is simple – they are not true. The Defendants remaining arguments are without merit and should be denied.[1]

[1] Defendants argue for dismissal under Section 2-606 of the Code of Civil Procedure for failing to attach the blog posts as exhibits. While Plaintiffs did cite the website address at issue and otherwise incorporate the blog posts into

Argument

A. The Accusations Leveled By Allen & ECWI Concerning The Plaintiffs' Engagement In A Pay To Play Scandal Are Defamatory *Per Se*.[2]

There is no constitutional right to defame. *Hadley v. Doe*, 2014 IL App(2d) 130489, ¶ 16, 12 N.E.3d 75, 382 Ill.Dec. 75 (2nd Dist. 2015). To state a claim for defamation, a plaintiff must allege facts demonstrating that the defendant made a false statement about the plaintiff, that the defendant made an unprivileged publication of the statement to a third party, and that the publication caused damages to the plaintiff. *Id.* at ¶ 19. A statement is defamatory if it harms an individual's reputation by lowering the individual in the eyes of the community or deters the community from associating with him. *Id.* at ¶ 19 citing *Tuite v. Corbitt,* 224 Ill.2d 490, 501, 866 N.E.2d 114, 310 Ill.Dec. 303 (Ill. 2006). There are five categories of defamation *per se* and those applicable to this case include (1) statements imputing the commission of a crime; (2) statements imputing a want of integrity in performing employment duties; and (3) statements that prejudice a person in his or her profession or business. *Id* at ¶ 20.

In a series of more than 20 blog posts on *Illinois Leaks*, Allen and ECWI accused Burkhart and HGI of engaging in a pay to play scandal with COD. The phrase "pay to play" has a clear and plain meaning, especially in Illinois. Pay to play is a phrase used for a variety of situations in which money is exchanged for services or the privilege to engage (play) in certain activities.[3] Perhaps the most famous case of pay to play in Illinois surrounds the alleged

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the Complaint, any failure to attach the actual posts is curable and copies of all posts are filed separately as Group Exhibit As and incorporate herein for the Court's convenience.

[2] While Plaintiffs plead defamation under a *per se* theory, defamation *per quod* is equally applicable given the economic damages alleged.

[3] See *Wikipedia*, https://en.wikipedia.org/wiki/Pay_to_play; *Collins Dictionary*, http://www.collinsdictionary.com/submission/14425/Pay-for-Play; Oxford Dictionaries, http://www.oxforddictionaries.com/us/definition/american_english/pay-to-play (*US* (Especially in politics) relating

attempts of the former governor, Rod Blagojevich, to sell the Illinois Senate seat of President Obama.[4] It is indisputable that bribing government officials to obtain government contracts is criminal. In addition, accusations of engaging in a fraudulent pay to play scheme also imputes a want of integrity in performing employment duties and prejudices Plaintiffs in their profession and business. Thus, the subject accusations are a clear example of defamation *per se*.

In defense of their outrageous accusations, Allen and ECWI backtrack from their initial grandstanding that their articles are truthful. Instead, the Defendant argue the use of the pay to play phrase is (1) political rhetoric and hyperbole, (2) capable of an innocent construction or (3) opinion. As discussed below, the professed excuses are without merit.

1. The Innocent Construction Rule Is Inapplicable.

In construing a statement under the innocent construction rule, a court must give the allegedly defamatory words their natural and obvious meaning and interpret them as they appear to have been used and according to the idea they were intended to convey to the reasonable reader. *Tuite v. Corbitt, 224 Ill.2d* at 510. The context of a statement is critical to its meaning, and the court must read any defamatory words in the context of the entire document. *Id.* at 512. The innocent construction rule does not require a court to strain to find an unnatural innocent meaning for a statement when a defamatory meaning is far more reasonable, nor does it require a court to "espouse a naïveté unwarranted under the circumstances." *Id.* at 505.

Allen and ECWI initially claim that the phrase "pay to play" does not necessarily impute the commission of a crime. Later, the Defendants argue that Burkhart's volunteerism with the COD Foundation was "pay to play," although "equally corrupt" as actually paying money for

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to or denoting a situation in which payment is demanded, often illegally, from those wishing to take part in a particular business activity).

[4] Pay to Play: How Rod Blagojevich Turned Political Corruption Into A National Sideshow by Elizabeth Brackett.

HGI's contracts. While it seems inconceivable that Allen does not understand the natural and obvious meaning of the phrase "pay to play," any suggestion that volunteering at a foundation to raise money for needy students constituted a corrupt "pay to play" scheme is unnatural in the context of the recognized meaning of "pay to play" and, particularly in Illinois politics, "espouse[s] a naïveté unwarranted under the circumstances." *Tuite v. Corbitt, 224 Ill.2d* at 505. Moreover, even if such a phrase was non-criminal, it still imputes a want of integrity in performing employment duties and prejudices Plaintiffs in their profession and business.

In addition, the accusations at issue must be viewed in light of the entirety of the content on the *Illinois Leaks* blog. In targeting Plaintiffs, Allen claimed to have engaged in a massive investigation, reviewed thousands of documents and spoken with a secret informant. Nowhere on the blog does Allen spell out his unique definition of the phrase "pay to play." While the Defendants do label Burkhart as an "insider" and HGI's business with COD as a "conflict of interest," these accusations were always made ***in addition to*** the pay to play accusations, not as a description thereof. Ultimately, the Court must strain to find that the phrase "pay to play" could be viewed as synonymous with the Defendants' espoused meaning. Moreover, as the Defendants admit, they view both scenarios as corrupt.[5]

The Supreme Court's Ruling in *Tuite v. Corbitt* is directly on point. Therein, in a book about organized crime, the author intimated that an attorney was paid to represent mobsters and commit bribery to win his clients' case. The attorney later sued for defamation. In rejecting the author's innocent construction defense, the Supreme Court held that given the context of the overall book and the story of the attorney, "the clear message" was that the attorney "was ready and able" and "paid to fix" the case. While the Court acknowledged that the attorney was never

[5] To the extent the Court finds merit to the innocent construction rule argument, such a defense does not apply to defamation *per quod* and would not justify dismissal. See *Huon v. Breaking Media, LLC*, 75 F.Supp.3d 747, 770, fn 26 (N.D. Ill. 2014) citing *Tuite v. Corbitt, 224 Ill.2d* at 501-2.

explicitly accused of bribery, it would not find an innocent construction where a defamatory construction was far more reasonable given the "context of the story about corruption."

Finally, even in viewing the Defendants' strained and naïve definition of "pay to play," the accusations that Plaintiffs' contracts with COD were made in exchange for her volunteerism at the COD Foundation is also defamatory. The Plaintiffs had done business with the COD since 2003. The 2012 Signage Design Contract was awarded by the Board of Trustees in April of 2012. Burkhart did not begin volunteering with the COD Foundation until June of 2012. See Complaint at ¶'s 8-11. Under no scenario could Plaintiff's volunteerism in June of 2012 "pay" for her work (play) at COD that had begun in 2003 or in her April 2012 contract.

2. The Statements Are Not Opinion.

Next, the Defendants argue that their statements about the Plaintiffs engaging in a pay to play scheme were opinions. A statement will not be viewed as an opinion if it can be reasonably interpreted as stating facts. To determine whether the statement is intended to present a fact about the plaintiff, we look to three factors: (1) whether the language of the statement has a precise and readily understood meaning; (2) whether the context of the statement negates the impression that the speaker intended to convey a fact; and (3) whether the statement can be objectively verified as true or false. *Hadley v. Doe*, 2014 IL App(2d) 130489 ¶ 36.

An analysis of the factors at play reveals that all three side with Plaintiffs. The phrase "pay to play" has a precise and readily understood meaning. The statements were made throughout the course of more than 20 blog posts which boasted about Allen's extensive investigation and secret informant. Indeed, in Allen's August 5, 2015 blog post, he brags that "[E]verything I wrote was accurate and supported with documents." Finally, whether Burkhart

paid someone to obtain COD contracts is objectively verifiable. Thus, the factor test clearly establishes the statements as facts, not opinions.

3. The Pay To Play Accusations Were Not Rhetoric Or Hyperbole.

Finally, Defendants argue the statements were political rhetoric and hyperbole. Rhetoric is defined as "language that is intended to influence people and that may not be honest or reasonable."[6] Similarly, hyperbole is defined as "language that describes something as better or worse than it really is."[7] While it is telling that the Defendants would resort to a defense that essentially admits the falsehood of their statements, Allen's own blog post from August 5, 2015 belies any notion that his articles were meant as exaggerations or speculation; i.e. "[E]verything I wrote was accurate and supported with documents."

Moreover, rhetorical hyperbole consists of terms such as "scab," "traitor," "amoral," "scam," "fake," "phony," "rat," and "crank," among others, that are "too vague to be falsifiable or sure to be understood as merely a label for the labeler's underlying assertions." See *Dilworth v. Dudley*, 75 F.3d 307, 309 (7th Cir. 1996). Even then, "[e]ach of the terms has both a literal and a figurative meaning and whether it is capable of being defamatory depends on which meaning is intended, a question that can be answered only by considering the context in which the term appears." *Id.* at 310. In contrast, accusing someone of engaging in a pay to play scheme while asserting the impressiveness of your investigation and secret informant over the course of more than 20 blog posts is far from "vague" or "sure to be understood…as a label."

B. The Accusations Leveled By Allen & ECWI Concerning The 2012 Signage Design Contract Are Also Defamatory *Per Se*.

Next, the Defendants argue that their blog posts concerning the 2012 Signage Design Contract between HGI and COD were true. The absurdity of this defense is borne out by a plain

[6] See Merriam-Webster's Dictionary, http://www.merriam-webster.com/dictionary/rhetoric.
[7] See Merriam-Webster's Dictionary, http://www.merriam-webster.com/dictionary/hyperbole.

reading of the Contract at issue. For instance, the Defendants claimed the Contract was for architectural services. However, Exhibit E to the Contract expressly disclaims and excludes architectural services from the scope of work. Defendants also claim that Burkhart signed the Contract as an architect. In reality, Burkhart signed the Contract on behalf of HGI and under the title of "DESIGNER". Defendants also claimed that Burkhart deceived the COD Board of Trustees in executing the Contract. In reality, HGI's contract for graphic design/signage services was approved by the Board in April of 2012 and modified in July of 2012 as detailed in Exhibit A to the Contract, the Consent Agendas. There is no indication the Board viewed or approved the actual Contract, a document that was not executed until December of 2012!

Defendants also claim through the various posts that HGI characterized itself throughout the 2012 Signage Design Contract as "architect" and thereby held themselves out as architects. This argument reveals an ignorance of contract drafting principles. In drafting a contract, defined terms are often used in place of party names or lengthy definitions. A common example would be a real estate contract wherein the person (i.e. John Doe) buying a property would be referred to as "Buyer" throughout the document. In that context, the term "Buyer" does not have its readily understood meaning, but instead is intended to literally mean "John Doe" throughout the document. In the 2012 Signage Design Contract, the term "architect" was used as a defined term and intended to mean HGI. As alleged by Plaintiffs, the Contract was a form document chosen and altered by COD for its purposes. Complaint at ¶ 12. In reality, the Plaintiffs never represented themselves as architects or that they performed architectural services.

Finally, Allen repeatedly asserted that Plaintiffs' execution of the 2012 Signage Design Contract was a criminal violation of state law. As explained above, this assertion is based on intentional falsehoods and intentional distortion of the Contract. The Defendants' pursuit of this

false notion and characterization of the Contract as a fraud evinces not only a failure to honestly view and interpret information, but an obsession with painting Burkhart as a corrupt and immoral business woman. The attack leveled against Burkhart by Allen is unprecedented in comparison to other COD Foundation members.

C. Allegations Of Malice Are Not Necessary Because Burkhart Is Not A Public Figure.

Defendants also argue that Plaintiffs' defamation allegations fail to plead malice. Such arguments are incorrect. In Paragraphs 57 and 64 of the Complaint, Plaintiffs alleged that "Allen and ECWI acted recklessly and, at times, with actual malice in making false and defamatory statements to the public regarding Burkhart [and HGI]." Such allegations are proper in Illinois. *Moriarty v. Greene*, 315 Ill.App.3d 225, 237, 732 N.E.2d 730, 247 Ill.Dec. 675 (1st Dist. 2000).

However, the Defendants' argument that pleading actual malice is necessary rests upon a false assumption; i.e. that Burkhart is a public figure. The law recognizes two types of public figures. The first, known as a general purpose public figure, includes individuals who have achieved "such pervasive fame or notoriety" that they "become a public figure for all purposes and in all contexts." See *Jacobson v. CBS*, 2014 IL App (1st) 132480, ¶ 27, 19 N.E.3d 1165, 386 Ill.Dec. 12 (1st Dist. 2014). Burkhart is clearly not a general purpose public figure.

The second type of public figure is the "limited purpose" public figure. *Jacobson v. CBS*, 2014 IL App (1st) 132480 at ¶ 28. Where individuals "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," they become public figures for the limited range of issues associated with those controversies. To qualify as a limited purpose public figure, the plaintiff must have undertaken some voluntary act seeking to influence the resolution of the issues involved and the alleged defamation must be germane to the plaintiff's participation in the controversy. *Id.* at ¶ 31. Burkhart also does not fit

within this category as she has not undertaken any act to influence or resolve the issues and the alleged defamation is not related to such acts. Accordingly, although malice is alleged, it was not necessary in order to state a claim.

D. Misappropriation, Tortious Interference And Conspiracy Claims Properly Alleged.

Defendants' arguments concerning the tortious interference and conspiracy claims hinge upon the notion that their blog posts were true. As detailed above, the arguments are without merit. As to the misappropriation claim, the news account exemption does not apply. ECWI is not a news agency. It is a political watchdog group that ran a biased blog designed to politically maneuver Kathy Hamilton into power at COD. More importantly, photographs of Burkhart were used in a context without a "news" purpose such as in the blog post from August 5, 2015 wherein Allen directly challenges Plaintiffs relative to the veracity of his prior reporting.

Conclusion

The Defendants have bullied from the pulpit long enough. They must be held accountable for their outrageous and unsupported claims. Their Motion should be denied.

WHEREFORE, the Plaintiffs, CARLA BURKHART and HERRICANE GRAPHICS, INC. request that the Motion to Dismiss be denied and for such other and further relief as is deemed equitable and just.

CARLA BURKHART & HERRICANE GRAPHICS, INC.,

By: _____
One of Their Attorneys

Joshua M. Feagans/6286141
Griffin Williams LLP/27822
501 W. State, Ste. 203
Geneva, IL 60134
630-524-2563 (t)
630-262-0644 (f)

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Defendants.

Case No. 2015 L 001244

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on the 30th day of March, 2016, the undersigned, on behalf of the Plaintiff, Carla Burkhart, caused to be electronically filed via the i2file Internet Case Filing System in the above-entitled cause with the DuPage County Circuit Court Clerk, **Plaintiffs' Response to Section 2-619.1 Motion to Dismiss of Edgar County Watchdogs and Kirk Allen** before 5:00 p.m. A copy of which is attached and served upon you.

GRIFFIN|WILLIAMS LLP

By: /s/ Joshua M. Feagans

CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that I caused the foregoing **Notice of Filing** and **Plaintiffs' Response to Section 2-619.1 Motion to Dismiss of Edgar County Watchdogs and Kirk Allen** to be served on the above parties by depositing a copy of same in the U.S. Mail, in Geneva, Illinois postage prepaid before 5:00p.m. on March 30, 2015.

/s/ Joshua M. Feagans

Joshua M. Feagans / 6286141
Kristin N. Stone / 6314084
Griffin Williams LLP / 27822
501 W. State, Ste. 203
Geneva, IL 60134
630-524-2563 (t) / 630-262-0644 (f)

SERVICE LIST

Attorneys for Edgar County Watchdogs, Inc., Kirk Allen, and Claire Ball
Shawn M. Collins
Robert L. Dawidiuk
Jeffrey M. Cisowski
THE COLLINS LAW FIRM, P.C.
1770 Park Street, Suite 200
Naperville, Illinois 60563

Attorney for Adam Andrzejewski
Peter Breen
Law Office of Peter Breen, P.C.
19 South LaSalle Street, Suite 604
Chicago, Illinois 60603

Attorneys for Kathy Hamilton
Frank J. Favia, Jr.
Nisha Chandran
Sidley Austin LLP
One South Dearborn
Chicago, Illinois 60603