ELECTRONICALLY FILED FEB 01, 2019 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

No. 18–1732

Scott County No. LACE129075

ORDER

CRAIG MALIN,
Plaintiff-Appellee,

vs.

THE QUAD-CITY TIMES,
LEE ENTERPRISES, INCORPORATED,
BARB ICKES and BRIAN WELLNER,
Defendants-Appellants.

This matter comes before the court on appellants' application for interlocutory appeal, request for stay, and motion for overlength attachments. Appellee resists the application.

The court grants the motion for overlength attachments. Upon consideration of the papers filed, the court denies the application for interlocutory appeal and request for stay.

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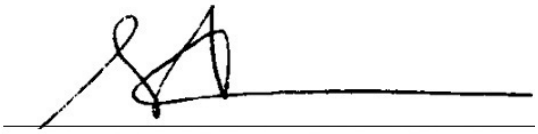
IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
18-1732	Malin v. The Quad-City Times

So Ordered



Susan Christensen, Justice

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IN THE IOWA DISTRICT COURT IN AND FOR SCOTT COUNTY

Craig Malin, Plaintiff,	)	LACE 129075
vs.	)	RULING ON MOTIONS FOR RECONSIDERATION
The Quad-City Times, Lee Enterprises, Inc., Barb Ickes and Brian Wellner, Defendants.	)	

The Motions for Reconsideration came before the Court for consideration.

PROCEDURAL BACKGROUND

On October 4, 2018, the Court granted summary judgment in favor of Defendants, the Quad City Times et al., on Plaintiff Craig Malin's claim for libel and defamation by implication (false light); the Court denied summary judgment on Plaintiff's claim for intentional interference with contract. Defendants filed a motion to reconsider under Iowa Rule of Civil Procedure 1.904(2) and application for interlocutory appeal on October 8, 2018, assigning error to the Court's decision to allow Plaintiff's tortious interference claim to continue to trial. Plaintiff filed its own motion to enlarge, amend, or modify the Court's ruling dismissing Plaintiff's defamation claims on October 18, 2018.

ANALYSIS

I. Motions to Reconsider, Enlarge, or Amend Under Rule 1.904(2).

Motions to reconsider a district court's ruling under Iowa Rule of Civil Procedure 1.904(2) are available for the purpose of preserving error on "purely legal issue[s] presented but not ruled on in the district court's ruling." *Sierra Club Iowa Chapter v. Iowa Dep't Transp.*, 832 N.W.2d 636, 641 (Iowa 2013). As the Iowa Supreme Court recently iterated,

> [t]he propriety of a rule 1.904(2) motion depends on the nature of the request it makes of the district court. Rule 1.904(2) generally gives each party an opportunity to request a change or modification to each adverse judgment entered against it by the district court before deciding whether to incur the time and expense of an appeal. A proper rule 1.904(2) motion does not merely seek reconsideration of an adverse district court judgment. Nor does it merely seek to rehash legal issues adversely decided. A rule 1.904(2) motion is ordinarily improper if it seeks to enlarge or amend a district court ruling on a question of law involving no underlying issues of fact. Likewise, a rule 1.904(2) motion that asks the district court to amend or enlarge its prior ruling based solely on new evidence

> is generally improper. Ordinarily, a proper rule 1.904(2) motion asks the district court to amend or enlarge either a ruling on a factual issue or a ruling on a legal issue raised in the context of an underlying factual issue based on the evidence in the record.
>
> Nonetheless, when a party has presented an issue, claim, or legal theory and the district court has failed to rule on it, a rule 1.904(2) motion is proper means by which to preserve error and request a ruling from the district court. When a rule 1.904(2) motion requests a ruling on an issue properly presented to but not decided by the district court, the motion is proper even if the issue is a purely legal one.

Horman v. Branstad, 887 N.W.2d 153, 161 (Iowa 2016) (internal citations omitted). Thus, a motion asking a district court to reconsider its conclusions in a previous ruling is generally limited to questions of law raised but not ruled on or questions of fact asserted but disregarded or overlooked by the district court. *See McKee v. Isle of Capri Casinos, Inc.*, 864 Nn.W.2d 518, 525–26 (Iowa 2015); *Sierra Club*, 832 N.W.2d at 641; *Meier v. Senecaut*, 641 N.W.2d 532, 538 (Iowa 2002).

II. Defendants' Motion to Reconsider.

In Defendants' Rule 1.904(2) Motion, Defendants assign three points of error with the District Court's ruling denying Defendants' Motion for Summary Judgment on Plaintiff's claim for tortious interference. First, Defendants contend Plaintiff's tortious interference claim must be dismissed as a matter of law because it was brought alleging the same underlying basis and injury as Plaintiff's failed defamation claim and is merely an attempt to re-cast Plaintiff's libel claim as another tort. Second, Defendants argue that since *The Quad City Times* is a media defendant and Plaintiff's claims arise out of its speech, the First Amendment demands that Plaintiff prove Defendants acted with "actual malice," and the Court erred by conflating this with a "motive" standard. Finally, Defendants assert the Court should have dismissed Plaintiff's tortious interference claim because he cannot prove an essential element of this tort—that Defendants acted with the "predominant purpose" to "financially injure or destroy" the Plaintiff.

A. Recasting a Defamation Claim as Another Tort in violation of the First Amendment.

Defendants argue that Plaintiff's claim of tortious interference should not be allowed to continue in light of the fact that his defamation claim was dismissed by the Court's prior ruling because the conduct complained and injury of—Defendants' publications critical of the

Plaintiff's conduct as City Administrator and its effect on his professional reputation—is the same as his defamation claims and merely seeks to recast those claims as a different tort. Defendants contend allowing Plaintiff's claim and injury stemming from the same underlying publications that form the basis of his defamation claim chills speech and accordingly undermines First Amendment principles.

1. Procedural propriety.

This is purely a question of law, and it appears Defendants did not advance this argument in their initial motion for summary judgment or reply brief. Because it was not raised prior to the Court's summary judgment ruling and was not "raised in the context of an underlying factual issue based on the evidence in the record," this argument is likely not properly before the Court. *See Branstad*, 887 N.W.2d at 161 ("Ordinarily, a proper rule 1.904(2) motion asks the district court to amend or enlarge either a ruling on a factual issue or a ruling on a legal issue raised in the context of an underlying factual issue based on the evidence in the record."). However, Defendants' argument on this point stems out of the Court's ruling dismissing Plaintiff's defamation claim, but not his tortious interference claim; this wholly legal issue on the consistency of its holdings is proper for the Court to consider in this context. *See McKee*, 864 N.W.2d at 525–26 (finding a proper purpose for bringing a rule 1.904(2) motion when challenging the consistency of the district court's ruling in its factual and legal conclusions).

2. Merits.

Defendants' argument that other causes of action sounding in tort should be dismissed under the First Amendment where there is a failed defamation claim should be rejected. Defendants cite an array of extra-jurisdictional case law imposing stricter standards on collateral torts brought alongside defamation claims; rulings of other courts cited by Defendants[1] that have "concluded that a plaintiff [cannot] recast a defamation claim as a different tort claim" have done so when the "different tort claim" was still directed at the same underlying injury alleged in the defamation suit. *See, e.g.*, *Nelson v. Am. Hometown Publ'g, Inc.*, 333 P.3d 962, 969 (Okla. Civ. App. 2014) (holding that ("negligence is not an independent tort theory based on publication of a newspaper article" because "when the nature of the action is a libel claim, the importance of protecting newspapers' First Amendment rights requires adherence to the standards for defamation claims"); *Decker v. Princeton Packet, Inc.*, 561 A.2d 1122, 432 (N.J. 1989) (holding

[1] *See* Def.'s Rule 1.904(2) Mot. at 5–6.

a plaintiff cannot recover for tortious infliction of emotional distress based on publications the court deemed not to be defamatory as a matter of law); *cf. Apostle v. Booth Newspapers, Inc.*, 572 F.Supp. 897, 905 (W.D. Mich. 1983) (holding that the plaintiff's negligent and intentional infliction of emotional distress tort claims must conform to the defamation "actual malice" standard of proof because "where both defamation and another similar tort arise out of the same facts, consistency requires that the same standard of liability be applied to both torts"). This principle is in line with Supreme Court First Amendment jurisprudence. The Supreme Court has held that the tort of intentional infliction of emotional distress is precluded by the principles of free speech when based on the publication of statements that are protected by the First Amendment. *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S. Ct. 876 (1988) (concluding such a result was "necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment").

Here, the nature of the underlying action against the *Quad City Times* very well resembles a defamation claim. Indeed, Plaintiff's chief complaint centers on the publications of the newspaper that were critical of his work as City Administrator and called for his removal. However, the injury claimed in the two causes of action are nevertheless distinct. Iowa law makes clear that defamation protects fundamentally different interests than those of other torts. "Defamation is an impairment of a relational interest . . . Defamation law protects interests of personality, not of property." 50 Am.Jur.2d *Libel and Slander* § 2, at 338–39 (1995); *see also Schlegel v. Ottumwa Courier*, 585 N.W.2d 217, 221 (Iowa 1998) ("The gravamen or gist of an action for defamation is damage to the plaintiff's reputation. It is the reputation which is defamed, reputation which is injured, and reputation which is protected by the law of defamation."). Tortious interference with contract, however, protects the "pecuniary loss" and associated benefits—injury to one's property interests—resulting from the intentional and improper interference with another's contract with a third person. Rest.2d Torts § 766A (1979); *see also id.* cmt. *(c)* (stating the rationale for the tort of intentional interference with contract to be to compensate the injured party when "the cost that he incurs in order to obtain the performance by the third party has increased, and the net benefit from the third person's performance has been correspondingly diminished"). By contrast, damages in defamation claims often seek to redress the *same type of injury*—emotional harm—as claims for IIED. *See Bierman v. Weier*, 826 N.W.2d 436, 447 (Iowa 2013) (recognizing that a plaintiff may recover "a broad

formulation of actual damages" but requiring an Iowa plaintiff to establish "actual reputational harm" when suing a media defendant for defamation "before he or she may recover for any parasitic damages such as personal humiliation or mental anguish"); *Schlegel*, 585 N.W.2d at 222–23 (same).[2]

However, several federal appellate courts have extended First Amendment protections in defamation actions to bar collateral tort claims for intentional interference with contract and prospective advantage. *See Jefferson Cty. Sch. Dist. No. R-1 v. Moody's Inv. Serv., Inc.*, 175 F.3d 848, 857 (10th Cir. 1999) (holding the First Amendment and the Supreme Court's holding in *Hustler Magazine*, 485 U.S.at 56–57 barred claims for intentional interference with contract and business relations, as well as defamation, brought against a credit rating agency for its rating of municipal bonds issued by the plaintiff); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057–58 (9th Cir. 1990) (holding state law claims for trade libel and tortious interference with business relationships were subject to same First Amendment requirements as claims for defamation when asserted against televised statements that the plaintiff's product "didn't work"); *see also Hengjun Chao v. Mount Sinai Hosp.*, 476 Fed. App'x 892, 895 (2d Cir. 2012) (dismissing tort claims related to damages claimed from the plaintiff's termination of employment where each was "duplicative of [plaintiff's] defamation claim" because each "flow[ed] from the effect on [plaintiff's] reputation caused by defendants' alleged defamatory statements") (internal quotations omitted); *South Dakota v. Kansas City Southern Indus.* 880 F.2d 40, 50–54 (8th Cir. 1989) (concluding a plaintiff cannot bring a claim for tortious interference with contract based on the defendant's act of filing a lawsuit to petition the government for antitrust redress because such speech was protected by the First Amendment); *Redco Corp. v. CBS, Inc.*, 758 F.2d 970, 973 (3d Cir. 1985) (holding that because the broadcasts at issue were not defamatory product disparagement as a matter of law, the plaintiff could not recover under a theory of intentional

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[2] *Bertrand v. Mullin*, cited by Defendants, does not support adding *additional tort immunity* for traditional media organizations simply because a failed defamation action is alleged against them. 846 N.W.2d 884, 899–900 (Iowa 2014) (restating the law that a defamation action brought "to vindicate and protect a person's common law reputational interest" is insufficient to overcome First Amendment protections "unless the lodged attack is clearly shown to be false and made with actual malice" because "[a] contrary rule would efface constitutional protection for political commentary."). Nowhere does the *Bertrand* decision discuss the effect of collateral torts brought with defamation actions. The case law cited by Defendants in this argument (and the language quoted therein) specifically addressed the First Amendment requirements on *defamation* claims, not other torts. *Bertrand*, 846 N.W.2d at 892, 899–900 (proclaiming the democratic values underlying the constitutional rule that the First Amendment requires a defamatory statement against a public official be "false and made with actual malice" because "[a] contrary rule would efface the constitutional protection for political commentary").

interference with contractual relations because "there [was] no basis for finding that their actions were 'improper'" to fulfill that element of the tort);[3] *cf. Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191, 196 (8th Cir. 1994) (analyzing First Amendment protections *in the context of federal labor law* and concluding "the malice standard required for actionable defamation claims during labor disputes must equally be met for a tortious interference claim based on the same conduct or statements"). The United States Supreme Court has not explicitly ruled on this front. *Cf. N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 916–17, 102 S. Ct. 3409, 3427 (1982) ("No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, 'precision of regulation' is demanded.").

Assuming even that the same constitutional principles would extend to the tort of intentional interference with contract, the Supreme Court held in *Hustler Magazine* that First Amendment protections preclude tort liability where the underlying injury is based on protected speech rather than actionable defamation. *See* 485 U.S. at 50 (declining to conclude that a plaintiff may recover under a theory of IIED for emotional distress based on "speech that is patently offensive and is intended to inflict emotional injury" "even when that speech could not reasonable have been interpreted as stating actual facts about the public figure involved"). Here, the Court has held that the allegedly defamatory statements at issue *are* capable of being proven true or false and are capable of bearing a defamatory meaning; the only part of Plaintiff's defamation claim that was lacking was proof of "reputational harm" since Plaintiff has sued media defendants. Plaintiff's petition asserts both injury to his reputation (defamation) and financial harm from loss of his job (intentional interference with contract). That Plaintiff has failed to advance evidence of damages in the former does not preclude a jury finding of damages for the latter. Thus, Plaintiff's cause of action for tortious interference may not be barred by First Amendment principals even under a generous reading of *Hustler Magazine* and related cases.

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[3] Several federal district courts have reached similar conclusions regarding business torts like intentional interference with contract. *See Katz v. Travelers*, 241 F. Supp. 3d 397 (E.D.N.Y. 2017) (concluding the plaintiff's claims of intentional interference with contract and business relations were barred by the shorter defamation statute of limitations because "the gravamen of Plaintiff's alleged injury in each of the [] counts is either harm to [his] reputation or harm that flows from the alleged effect on Plaintiff's reputation," such as loss of contracts and business relationships, and were therefore defamation claims recast as other torts); *Eddy's Toyota of Wichita, Inc. v. Kmart Corp.*, 945 F.Supp. 220, 224 (D. Kan. 1996) (holding "expressions of opinion and peaceful means of protest" constituted "protected free speech and cannot form a basis for plaintiff's tortious interference claim").

B. Conflating "Motive" and "Actual Malice."

Defendants contend the Court erred in applying *King v. Sioux City Radiological Group*, 985 F. Supp. 869 (N.D. Iowa 1997) to hold that Defendants were not entitled to summary judgment on Plaintiff's tortious interference claim because the alleged interference arises out of Defendants' publications. First Amendment principles demand application of a stricter standard for this collateral tort, Defendants argue; the Court should have required Plaintiff to establish Defendants acted with "actual malice"—the knowing or reckless disregard of a publication's truth or falsity—to advance a claim of intentional interference with contract when the claim arises out of otherwise protected speech by a media defendant. Defendants contend the Court erred by conflating "motive" with "actual malice," which the Iowa Supreme Court has abrogated. *See Barreca v. Nickolas*, 683 N.W.2d 111 (Iowa 2004).

1. Procedural propriety.

Defendants raised this point, briefly, in Defendants' reply brief concerning Plaintiff's defamation claims.[4] Conversely, Defendants did not expressly raise this legal argument—that courts must apply an "actual malice" standard to collateral torts when brought in tandem with a defamation action—in regards to Plaintiff's tortious interference claim for the Court to consider. To this point, Defendants' assignment of error "seeks to enlarge or amend a district court ruling on a question of law involving no underlying issues of fact." *See Branstad*, 887 N.W.2d at 161.

2. Merits.

Barreca does not require reconsideration of the Court's ruling denying summary judgment on Plaintiff's intentional interference with contract claim for failing to prove "actual malice" in that tort. *Barreca* involved libel and intentional infliction of emotional distress claims. Though the Iowa Supreme Court held that to conflate "motive" with "actual malice" for establishing damages to defeat a claim of qualified privilege in defamation actions, *Barreca*, 683 N.W.2d at 119–20 (abrogating prior Iowa case law conflating "actual malice" with "motive"), this holding was not a part of the Court's analysis on the plaintiff's IIED claim. After laying out the common law elements of a prima facie case for IIED, unaffected by First Amendment

[4] *See* Defs.' Reply to Pl.'s Resistance to Defs.' Mot. Summ. J., at 4 (arguing "[Plaintiff's] Clarification of Background Facts spends significant time wrongly conflating 'actual malice' with motive. In First Amendment cases, actual malice does not mean motive").

principles analyzed with the defamation action and discussion of actual malice to prove that tort, the Court merely held that the plaintiff limited liability company "certainly cannot suffer emotional distress; such would stretch the bounds of the legal fiction of corporate personhood too far" and "the uncontroverted evidence in support of [the individual plaintiff's] claim . . . does not amount to 'severe or extreme emotional distress." *Id.* at 123–24.

As discussed above in Part II.A, *supra*, Defendant cites no Iowa case law demanding the First Amendment requirement of "actual malice" in defamation actions brought by a public official should be grafted onto torts other than defamation simply because they involve the publication of speech; extra-jurisdictional case law cited by Defendants is distinguishable absent a specific appellate ruling by the Iowa Supreme Court. Moreover, the *Barreca* Court itself did not apply an "actual malice" standard to the plaintiff's IIED claim—the Court's rejection of a "motive" standard occurred in the context of its analysis for what showing was required to overcome a defense of qualified privilege in a defamation action, not for an IIED claim. *See Barreca*, 683 N.W.2d at 119–23 (discarding the "old common law wrongful motive standard" and adopting "the *New York Times* 'knowing or reckless disregard' definition of 'actual malice' as the standard to be applied to determine whether a defendant has abused a qualified privilege" in a defamation action). Defendants have not advanced an argument that the analysis for intentional interference with contract should be any different from the common law IIED tort considered in *Barreca*, despite the differences between the torts. *Cf. Newell v. JDS Holdings, L.L.C.*, 834 N.W.2d 463, 474 (Iowa Ct. App. 2013) (analyzing a traditional common law tortious interference claim predicated on the same facts as the plaintiff's defamation action without First Amendment considerations).

C. "Predominant Purpose" Element of Intentional Interference with Contract.

Finally, Defendants assert that Plaintiff cannot prove an essential element of his tortious interference claim because Plaintiff failed to advance "substantial evidence of a predominant motive on the part of [the defendant] to terminate the [contract] for improper reasons" as an at-will contract because "proof is more demanding than when the claimed interference is with an existing contract." *See Water Dev. Co. v. Bd. of Water Works*, 488 N.W.2d 158, 162 (quoting *Toney v. Casey's Gen. Stores, Inc.*, 460 N.W.2d 849, 852 (Iowa 1990)); *see also Compiano v. Hawkeye Bank & Tr. of Des Moines*, 588 N.W.2d 462, 464–65 (Iowa 1999) (holding that banking contracts that were terminable at will "are more properly protected as a prospective

business advantage rather than as a contract" and "[c]onsequently, the higher standard of proof requiring substantial evidence that the defendant's predominant or sole motive was to damage the plaintiff is required").

1. Procedural propriety.

This final assignment of error in the Court's ruling is a repeat of Defendants' reply brief. It therefore "merely seeks to rehash legal issues adversely decided." *Branstad*, 887 N.W.2d at 161; *see also Meier*, 641 N.W.2d at 538 ("The difference between the reconsideration of a ruling based on the application of facts to law and a ruling based solely on the law can be significant. A second hearing solely involving a legal issue is merely repetitive.").

2. Merits.

Defendants concede intentional torts are "generally poor candidates for summary judgment because of the subjective nature of motive and intent." *Hoefer v. Wisconsin Educ. Ass'n Ins. Tr.*, 470 N.W.2d 336, 338–39 (Iowa 1991); *State Sav. Bank v. Allis–Chalmers Corp.*, 431 N.W.2d 383, 386 (Iowa App. 1988). While a more demanding standard of proof is undoubtedly necessary in this case whether the tortious interference claim is characterized as with a contract or prospective advantage, the fact remains the Plaintiff resisting Defendants' motion is only required to generate a fact issue to survive summary judgment.

Here, Plaintiff has advanced more than just speculation of Defendants' "predominant purpose." *See Willey v. Riley*, 541 N.W.2d 521, 527 (Iowa 1995) (holding no disputed issue of material fact precluding summary judgment on the plaintiff's tortious interference claim because there was no evidence that the defendant's conduct was made "for the sole or predominant purpose to financially injure or destroy the plaintiff" and "[s]peculation . . . is not evidence and a case should not be submitted to a jury for deliberation when no evidence has been presented"). As discussed in the Court's ruling on Defendants' motion for summary judgment, Plaintiff presented evidence that at least suggested Defendants intended Plaintiff be fired from his position as City Administrator, not merely that they recognized Plaintiff's termination might be a necessary consequents of their critical publications; and inferences that Defendants sought Plaintiff's removal from office without any legitimate, business-related justification arose from communications with the Plaintiff and other members of the community that Defendants' criticism and commentary were false or misleading. The Court found that these two points raised by Plaintiff sufficient to generate a fact issue as to Defendants' argument that they were merely

exercising their First Amendment right to publish speech critical of a public official on matters of public concern. *Cf. Willey*, 541 N.W.2d at 527 (concluding the record contained to no inference of such predominant purpose because the evidence demonstrated one clear, legitimate purpose for the allegedly tortious conduct and was "absent of any evidence that [the defendant] . . . would have any reason to interfere" with the plaintiff's business); *Newell v. JDS Holdings, L.L.C.*, 834 N.W.2d 463, 474 (Iowa Ct. App. 2013) (holding that even if the statements at issue were made maliciously, there was no evidence of a predominant purpose to financially injure or destroy the plaintiff when discussing her job performance as a subordinate).

III. Plaintiff's Motion to Enlarge or Amend.

Plaintiff also moves for reconsideration of the Court's ruling, arguing that the Court overlooked evidence of reputational harm to the Plaintiff in the form of his actual termination from his position as City Administrator and thus erred in dismissing Plaintiff's defamation claim for a lack of proof on that ground. Plaintiff argues, in essence, that his reputational harm can be found by looking at the circumstances of City Council Aldermen and the Mayor losing confidence in Plaintiff as a city official and voting to remove him from as a result of Defendants' critical publications. Plaintiff claims the record demonstrates "a high level of approval and many commendations for Mr. Malin before the defamatory publications occurred" and "the reputational harm to Mr. Malin in terms of individuals changing their opinion of him can be directly found through the actions of the City Council that approved, awarded, and complimented his work as City Administrator but changed enough after the publications to bring about the termination agreement that Mr. Malin was forced to sign with the City of Davenport." Pl.'s Rule 1.904(2) Mot., at 13. Stated otherwise, "Plaintiff submits that once a person's reputation is brought into question through a publication that can be shown to be malicious, and if that challenge to a reputation is accompanied with a tangible property loss (employment contract), such evidence is sufficient to allow a plaintiff to proceed with a defamation and libel claim." *Id.* at 14.

1. Procedural Propriety.

Though Plaintiff made essentially the same argument that there was ample evidence of reputational harm in his resistance to Defendant's motion for summary judgment, Plaintiff points to different evidence and inferences that Plaintiff claims the Court overlooked in finding a lack of reputational harm in the record. This is a proper purpose for the Court to consider Plaintiff's

Rule 1.904(2) Motion. *See Branstad*, 887 N.W.2d at 161 ("Ordinarily, a proper rule 1.904(2) motion asks the district court to amend or enlarge either a ruling on a factual issue or a ruling on a legal issue raised in the context of an underlying factual issue based on the evidence in the record.").

2. Merits.

Plaintiff's motion should be denied because Plaintiff's position is inconsistent with federal and state constitutional principles that proof of reputational harm by a public figure against a media defendant must be strictly proven, not presumed.

Plaintiff cites *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155 (1976) and *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972) for the proposition that because Plaintiff lost a property (contract) interest in his employment allegedly as the result of Defendants' publications, this should be sufficient to survive summary judgment in his defamation action. Neither *Paul* nor *Roth* specifically involved defamation actions, however. Both cases concerned alleged defamation by state actors, but the claims at issue in each case concerned the deprivation of *procedural due process* rights protected by the Fourteenth Amendment through an action brought under 42 U.S.C. § 1983. *See Paul*, 424 U.S. at 698 ("[The plaintiff] asserted not a claim for defamation under the laws of Kentucky, but a claim that he had been deprived of rights secured to him by the Fourteenth Amendment of the United States Constitution."); *Roth*, 408 U.S. at 568–69 ("The [plaintiff] . . . brought this action in Federal District Court alleging that the decision not to rehire him for the next year infringed his Fourteenth Amendment rights. The only question presented to us at this stage in the case is whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year. We hold that he did not."). In both cases, the Supreme Court held that where a plaintiff is deprived of a sufficiently significant property or liberty interest by the action of a State actor, he or she is entitled to *procedural due process* to redress that harm. *Paul*, 424 U.S. at 712 ("[Plaintiff] in this case cannot assert denial of any right vouchsafed to him by the State and thereby protected under the Fourteenth Amendment. That being the case, [the defendant's] defamatory publications, however seriously they may have harmed [the plaintiff's] reputation, did not deprive him of any 'liberty' or 'property' interests protected by the Due Process Clause."); *Roth*, 408 U.S. at 579 ("We must conclude that the summary judgment for the respondent should not have been granted, since the respondent has not shown that he was

deprived of liberty or property protected by the Fourteenth Amendment."). Thus, *Paul* and *Roth* merely examined the nature and extend of such property and liberty interests sufficient to trigger a plaintiff's procedural due process rights; neither case commented on the sufficiency of proof required for a plaintiff to advance evidence of "reputational harm" in a defamation action.

Here, Plaintiff is not asserting a due process violation under the Fourteenth Amendment; nor could he, since Defendants are not State actors. Rather, Plaintiff's lawsuit is a "classic *New York Times*" case. Plaintiff is required to advance evidence of actual reputational harm as a public official asserting defamation claims against a media defendant. Plaintiff's argument, even redirected at his termination itself, ultimately seeks to infer reputational harm from the fact of his departure as City Administrator. Even if Plaintiff were not a public official, Plaintiff's attempt to infer damages does not conform to the standard of proof constitutionally required against media defendants. Though the First Amendment permits states to allow presumed damages so long as there is a showing of "actual malice," *see Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (holding that, under the First Amendment, "States may not permit recovery of presumed or punitive damages" against media defendants on matter of public concern unless liability is based on "knowledge of falsity or reckless disregard for the truth"), Iowa law reflects the determination that even in such instances damages may not be presumed against a media defendant and proof reputational harm is required. *See Bierman v. Weier*, 826 N.W.2d 436 (Iowa 2013) (holding that an Iowa plaintiff may presume damages through libel per se "only when a private figure plaintiff sues a nonmedia defendant for certain kinds of defamatory statements that do not concern a matter of public importance"); *Schlegel v. Ottumwa Courier*, 585 N.W.2d 217, 222 (Iowa 1998) (holding a Iowa plaintiffs must establish actual reputational harm to recover against a media defendant for defamation).

CONCLUSION

1. Defendants' Rule 1.904(2) motion is hereby denied.

(a) While the United States Supreme Court's First Amendment precedent requires that collateral torts like IIED be barred when the alleged injury is based on the publication of protected speech and cannot constitutionally form the basis of a defamation action, no Iowa court and only a few other courts have extended this logic to other collateral torts like intentional interference with contract. Regardless, the Court has already held that, in this case,

the allegedly defamatory publications are actionable, so First Amendment considerations would not bar the Plaintiff's claim for tortious interference even under this minority rule.

(b) While Iowa law requires "actual malice" to recover for *defamation* against a media defendant, there is no similar rule for collateral torts brought in tandem with a defamation action. While the Iowa Supreme Court has abrogated case law allowing a "motive" showing instead of an "actual malice" showing for overcoming a qualified privilege claim in a defamation action, the Court's decisions have not grafted this standard of proof onto other tort claims simply because they are based on a media defendant's publications.

(c) The Court's prior assessment that the record demonstrated a genuine issue of material fact as to whether Defendants' publications were done with the "predominant purpose" to "financially injure or destroy" Plaintiff's at-will employment should stand.

2. Plaintiff's Rule 1.904(2) motion is hereby denied.

(a) Plaintiff's attempt to recharacterize the record to show "reputational harm" simply seeks to infer damages from the fact of his termination and does not meet the standard of proof constitutionally required against media defendants.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
LACE129075	MALIN CRAIG VS QUAD CITY TIMES ET AL

So Ordered

Nancy S. Tabor, District Court Judge,
Seventh Judicial District of Iowa

E-FILED 2018 OCT 04 11:39 AM SCOTT - CLERK OF DISTRICT COURT

IN THE IOWA DISTRICT COURT IN AND FOR SCOTT COUNTY

Craig Malin, Plaintiff,	)	LACE 129075
vs.	)	RULING ON MOTION FOR SUMMARY JUDGMENT
The Quad-City Times, Lee Enterprises, Inc., Barb Ickes and Brian Wellner, Defendants.	)	

The Defendant's Motion for Summary Judgment came before the Court for contested oral argument on September 27, 2018.

INTRODUCTION

Craig Malin, the plaintiff, brings suit against the Quad City Times, a print and digital media defendant, the newspaper's parent company, and its staff reporters and editors ("Defendants") for defamation and intentional interference with his employment contract as City Administrator of the City of Davenport. Through his involvement in municipal development projects as City Administrator, Malin fell under scrutiny by the reporters of the *Quad City Times* and was repeatedly the focus of their critical reporting. Malin alleges the articles about him contained false and misleading information that directly defamed him and painted him in a false light, leading to a damaged reputation in the City of Davenport and ultimately led to his removal as City Administrator.

Defendant Quad City Times et al. filed its motion for summary judgment on August 16, 2018. The plaintiff, former Davenport City Administrator, filed his resistance to the defendant's motion on September 10, 2018 after obtaining leave from the Court to extend time for filing. Defendants filed their reply on September 18, 2018. Oral argument were heard on September 27, 2018.

QUESTIONS PRESENTED

(I) Whether a local newspaper that publishes articles and editorials attacking the judgment of a former City Administrator and his official conduct in public works projects involving public-private partnerships (P3's) undertaken by his office is entitled to judgment as a matter of law on the City Administrator's defamation, or whether the City Administrator presents a triable issue of fact that states a triable claim for libel that a jury must resolve;

(II) Whether a local newspaper is entitled to judgment as a matter of law on a City Administrator's claim for intentional interference with contract, dismissing that count as a matter of law, where the City Administrator contends the newspaper's history of articles and editorials criticizing his official conduct and, ultimately, calling for his removal from office, resulted in soured relations between himself, the Mayor, and City Council Aldermen, and negatively affected his standing as a public official and reputation in the community.

BACKGROUND

Malin's defamation claim can be distilled down to a series of articles, columns, and editorials he alleges are either expressly defamatory or impliedly defamatory by placing him in a false light:

> Exhibit 59: *June 18, 2015 article titled "Aldermen at odds with Malin over Elmore Road process."* This article documents dissension between Malin and City council over his negotiations of the contract to develop the Rhythm City Casino site and grading of the city road leading to the site. The article further reports that the public understanding the contract, after it was signed, was that the city would be paying for the preparation work at the casino site, contrary to the wishes of City Council. It reports that Aldermen felt they did not have all of the necessary information when voting on the deal and were misled into paying for the site preparation of the casino itself; Malin denied the city would pay for the site grading, and was only responsible for the road grading.
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> Exhibit 60: *June 18 article titled "Gluba seeks to oust Malin, attorney."* This article recounts the special meeting held by City Council to vote on the removal of Malin and the city attorney who were involved in the casino development deal. It also tells of the Aldermen's accounts of feeling "misled" about the city's obligations in paying for the preliminary work on the casino site, in addition to the road extension. The article further documents specific Aldermen's reactions to the revelation that the city would be obligated to pay for the casino site work and Malin's role in the negotiations process.

Exhibit 61: June 19, 2015 column titled "Ickes: the mile-long mess." This column by Barb Ickes expresses displeasure at the casino site preparation deal and criticizes Malin for his role in the negotiations process that led the city to incur this obligation. Ickes accuses Malin of not giving a straight answer about how much the city is obligated to pay for the site preparation. She recounts a previous column published on May 13, 2015 where she "smelled a rat on the Elmore Avenue [casino] extension," noting that "[t]hat rat now has fully decomposed." Ickes also insinuates that at the City Council meeting to regarding Malin's negotiating the deal, he failed to fully inform Aldermen about any concerns about the city's obligations to pay for the casino site grading itself. The column also incorporates an interview with the city attorney who also worked on the deal, who reported second-hand that when he asked Malin whether the contract was obligating the city to pay for the casino's site preparation, Malin responded, quote, that it "wasn't up for debate." Ickes asserts Malin's "overstretch of authority" is the current cause for removing him from his position as City Administrator, positing that "Malin never can make one simple declarative statement without twisting it into a pretzel." Ickes also accuses Malin of "stab[bing] him [the city attorney] in the back with one hand and pat[ting] him with the other" when responding to criticisms of his negotiation of the deal. The column claims this deal, and Malin's role in it, was not the result of misunderstanding, but misleading.

Exhibit 63: June 22, 2015 editorial titled "Time to manage 'hired help.'" Here the editorial board calls for City Council to get to the bottom of the casino grading deal through an appointed investigative commission and hold Malin accountable for their findings. The editorial lauds Malin for promoting "admirable Davenport growth" yet identifies him as "a defensive, double-talker" in recent public endeavors like the casino controversy.

Exhibit 64: June 24, 2015 editorial titled "Who's the boss?" In this editorial the board again calls for full disclosure to taxpayers on the city's obligations

regarding the casino site development project and Malin's role in bringing about the end result. The editorial posits what it views as two truths: (1) "Aldermen unwittingly committed taxpayers to millions of dollars in site improvements on the Rhythm City Casino site"; (2) "Malin is bound to get a big, fat severance check." It concludes that "[i]f full, public discussion does not occur today, all 10 aldermen deserve voters' wrath" in the next November city election.

Exhibit 65: June 27, 2015 column titled "Ickes: Malin's departure lacks clarity." This column raises questions surrounding Malin's removal from his position as City Administrator, the reasons for his departure juxtaposed with a "$310,000 payday for the self-proclaimed hired help." It criticizes Malin's belief that he did no wrong in the events leading up to his removal and, in Ickes' words, "his stubbornness against fact" lead her to conclude "the man [Malin] is hopeless." Ickes asserts Malin's removal was specifically for "[e]xercising more authority than he had," while attempting to blame others for the resulting city obligations on the casino site. Ickes calls attention to previous municipal works projects Malin worked on that had come under public scrutiny, such as a deal with AT&T for the development of a cellphone tower that bypassed public hearing and permitting processes. In both instances, Ickes claims Malin acted with "convoluted non-answers to specific questions" and "slyly cryptic responses from the guy who thinks he's smarter than everyone in the room (every room)."

Exhibit 66: June 29, 2015 editorial titled "Council commends Malin." In this editorial the Editorial Board point out that Davenport Aldermen have not provided the public with a list of "performance issues" forming the basis to pay Malin $310,000 for terminating him as City Administrator. Despite reporting they felt misled by Malin in his negotiating and endorsement of the casino development deal, the editorial asserts Aldermen have not voiced any concern or condemnation regarding any reasons for his departure. It also points out the discrepancy between Malin's removal, the events surrounding his departure regarding the casino site controversy, his six-figure severance package, and the

lack of public criticism from Council. Ultimately, the editorial calls the transparency of Malin's removal into question—and calls for "voter accountability."

Plaintiff claims that an additional series of articles provide the "context" he claims demonstrates the merits of his narrative and argument that he was defamed by the *Quad City Times* and improperly forced out of his employment:

Exhibit 41: July 21, 2014 editorial titled "Malin leads city into another business." This editorial accuses Malin of first "attempt[ing] to run the Davenport School Board, then buy a private casino," "led aldermen to pursue a $25 million federal education grant without school board leadership," and then using $178,000 of taxpayer money to create a news site owned and operated by the City of Davenport for public transparency and public outreach—"a government-run news bureau." The editorial notes the *Quad City Times* doesn't "sweat the competition". We're just sorry to see the city squander the equivalent of three police officer salaries on an overpriced public relations scheme.

Exhibit 43: July 24, 2014 article titled "City news agency concept ill-advised." This editorial again criticizes Malin's efforts to establish a city-run website to provide residents with municipal news.

Exhibit 45: August 25, 2014 editorial titled "Cell tower deal gets poor reception." This editorial criticizes Malin's involvement in a cell tower deal with AT&T that, the board alleges, bypassed public hearing and permitting requirements.

Exhibit 49: November 21, 2014 article by Barb Ickes titled "New Davenport website launches." This article reports on the rollout of the "davenporttoday.com" website meant for the city to share news and information with the public.

Exhibit 50: article by Barb Ickes titled "City money vs. city money." Here, Ickes reports on the Davenport budget employing $13 million of public money for the extension of Elmore Avenue for the Rhythm City Casino. Ickes complains about her conversations with Malin as he attempted to explain the public financing for the project without agreeing with Ickes that it was "public money" through property taxes that would pay for the project. Ickes accuses Malin and others in City Hall of manipulating semantics when trying to sell their development plan.

Exhibit 51: January 29, 2015 column titled "Barb's Blog: City money II." Here Ickes again "called BS" on Malin and other city officials for "the creative wording some people employ to get around the fact they are spending city money." Ickes reports that Dave Heller, owner of the River Bandits baseball team, responded to her prior article objecting to her criticism of officials declining to call the development project "city money." After arguing her position that "once the lease money is paid to the city, it is public money," she concludes: Now, then. Anybody want to fight about the road to the casino?"

Exhibit 54; February 8, 2015 editorial titled "Integrity on trial." This editorial by the *Quad City Times* editorial board reports on the open records lawsuit and positing that, at trial, the lawsuit will determine whether Malin overstepped his legal authority in the Rhythm City Casino deal—the editorial asserts Malin recklessly pursued the deal to expose the city to millions of extra dollars in obligations while shielding accounting records from the public view.

The statements made in these additional articles and/or editorials are not actionable, however, as they are outside the two-year statute of limitations running from June 15, 2015 (see discussion below).

ANALYSIS

A. Applicable Law.

1. Introduction.

At common law, the tort of defamation protects a person's "interest in reputation and good name." *Bertrand v. Mullin*, 846 N.W.2d 884, 891 (Iowa 2014) (quoting *Johnson v. Nickerson*, 542 N.W.2d 506, 510 (Iowa 1996)). Libel, specifically, is the "malicious publication, expressed either in printing or in writing, or by signs and pictures, tending to injure the reputation of another person or to expose [the person] to public hatred, contempt, or ridicule or to injure [the person] in the maintenance of [the person's] business." *Vinson v. Linn-Mar Cmty. Sch. Dist.*, 360 N.W.2d 108, 115 (Iowa 1984). "The gravamen or gist of an action for defamation is damage to the plaintiff's reputation. It is the reputation which is defamed, reputation which is injured, and reputation which is protected by the law of defamation." *Schlegel v. Ottumwa Courier*, 585 N.W.2d 217, 221 (Iowa 1998) (quoting 50 Am.Jur.2d *Libel and Slander* § 2, at 338–39 (1995)).

To establish a prima facie case for defamation, the plaintiff ordinarily bears the burden of establishing the defendant "(1) published a statement that (2) was defamatory (3) of and concerning the plaintiff, and (4) resulted in injury to the plaintiff." *Bertrand*, 846 N.W.2d at 892. At common law, malice was presumed from the publication itself. *Johnson v. Nickerson*, 542 N.W.2d 506, 510 (Iowa 1996). Injury typically involves "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

Defamatory publication may be implied, rather than explicit in nature. *See* Rest.2d Torts § 563 cmt. *c*, at 163 (1965) ("The defamatory imputation may be made by innuendo, by figure of speech, by expressions of belief, by allusion or by irony or satire."). Defamation by implication, otherwise known as "false light," occurs where a defendant

> (1) juxtaposes a series of facts so as to imply a defamatory connection between them, or (2) creates a defamatory implication by omitting facts, [such that] he may be held responsible for the defamatory implication, unless it qualifies as an opinion, even though the particular facts are correct.

Stevens v. Iowa Newspapers, Inc., 728 N.W.2d 823, 828 (Iowa 2007) (quoting Dan B. Dobbs, *Prosser & Keeton on the Law of Torts* § 116, at 117 (Supp. 1988)).

Certain statements spoken or published can be defamatory *per se*. Such statements have "a natural tendency to provoke the plaintiff to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse." *Bierman v. Weier*, 826 N.W.2d 436, 444 (Iowa 2013). "An attack on the integrity and moral character of a party is libelous per se," and there is "no meaningful distinction between accusing a person of being a liar and accusing a person of falsifying information." *Vinson*, 360 N.W.2d at 116.[1]

2. Public officials and the requirement of "actual malice."

However, defamation *per se* is not available when the plaintiff is a public official and the allegedly defamatory statements concern his or her official conduct. *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964). The First Amendment imposes two additional elements when the plaintiff is a public official: "the statement must be false and it must be made with actual malice." *Bertrand*, 846 N.W.2d at 892 (citing *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964)) (emphasis added); *see also Stevens*, 728 N.W.2d at 830; *Anderson v. Low Rent Housing Comm'n of Muscatine*, 304 N.W.2d 239, 248 (Iowa 1981).

The Supreme Court has defined "actual malice" as "knowledge that [the allegedly defamatory falsehood] was false or with reckless disregard of whether it was false or not." *N.Y. Times*, 376 U.S. at 279–80; *accord Carr v. Bankers Trust Co.*, 546 N.W.2d 901, 904 (Iowa 1996). A defendant communicates with "reckless disregard" as to truth or falsity where the statements are made with a "high degree of awareness of their probable falsity." *Garrison v. State of Louisiana*, 379 U.S. 64, 75 (1964); *accord Bertrand*, 846 N.W2d at 894; *Stevens*, 728 N.W.2d at 830. This is a subjective inquiry. *Harte-Hanks Commc'ns*, 491 U.S. 657, 688 (1989).

> [R]eckless conduct 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.* Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

[1] Iowa law characterizes statements that are defamatory *per se* into several categories: imputation of (1) certain indictable crimes, (2) loathsome disease, (3) incompetence in occupation, and (4) unchastity). *See* Patrick J. McNulty, *The Law of Defamation: A Primer for the Iowa Practitioner*, 44 Drake L. Rev. 639, 650–52 (1996); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 112, at 788–93 (5th ed. 1984).

St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (emphasis added). The actual malice standard to prove defamation of a public official is not the same as common law malice—"[U]nlike the common law definition of actual malice, *New York Times* actual malice focuses upon the attitudes of defendants vis-à-vis the truth of their statements, as opposed to their attitudes towards plaintiffs." *Barreca*, 683 N.W.2d at 120. "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Stevens*, 782 N.W.2d at 830 (quoting *Harte-Hanks* Commc'ns, 491 U.S. at 688). Thus, "ill-will" or even an "intent to inflict harm" is insufficient to meet the "actual malice" standard for a reckless disregard for the truth. *Bertrand*, 846 N.W.2d at 899; *but cf. Harte-Hanks*, 491 U.S. at 668 (noting that "it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry" and opining that evidence of motive may be *circumstantially probative* of the defendant's attitude towards the truth of the statement at issue). The Iowa Supreme Court has characterized this burden of proving actual malice in a defamation case—demonstrating a reckless disregard for the truth—as "substantial." *Bertrand*, 846 N.W.2d at 892; *Stevens*, 782 N.W.2d at 830; *see also Harte-Hanks Commc'ns*, 491 U.S. at 688 (applying a "high degree of awareness" standard).

A plaintiff is designated a "public official" for libel purposes when "among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 84, 86 S. Ct. 669, 675 (1966).[2] A plaintiff is designated a "public figure" for libel purposes "by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention." *Gertz*, 418 U.S. at 342. In Iowa, Courts have found government employees to be public officials or public figures where they possess a degree of authority over subordinates, authority to act on behalf of the public institution, the daily operations of their department

[2] "[The *New York Times* case] express[s] 'a profound national commitment to the principle that debate on public issue should be uninhibited, robust, and wide-open, and that (such debate) may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 84, 86 S. Ct. 669, 675 (1966) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

Compare Vinson, 360 N.W.2d at 118 (concluding the plaintiff bus driver not to be a public official or public figure) *and Jones*, 440 N.W.2d at 895 (rejecting an expansive "government affiliation" test of other jurisdictions and finding a low-ranking firefighter to not be a public official; also finding the plaintiff not to be a public figure simply because he became employed by the city fire department) *with McCarney v. Des Moines Register & Tribune Co.*, 239 N.W.2d 152, 156, 158 (Iowa 1976) (finding the plaintiff police captain to be a public official) *and Anderson*, 304 N.W.2d at 246 (finding the plaintiff secretary to be a public figure because she "had thrust herself into the issues then swirling in city government").

3. Media-defendants and the requirement of "reputational harm."

A defendant's status as a media organization also plays a role in the analysis. In Iowa, a plaintiff must establish "actual *reputational* harm when suing a media defendant, and not merely emotional distress or humiliation, before he or she may recover for any parasitic damages such as personal humiliation or mental anguish." *Bierman*, 826 N.W.2d at 447 (emphasis in original); *see also Schlegel*, 585 N.W.2d at 223–24 *Nickerson*, 542 N.W.2d at 513. The Iowa Supreme Court has explicitly disavowed prior case law implying "an expansive definition of actual damages" and has since required a plaintiff to prove reputational harm prior to other recovery. *Schlegel*, 585 N.W.2d at 224 (abrogating *Jones v. Palmer Communications, Inc.*, 400 N.W.2d 884 (Iowa 1989) to the extent it allowed broad recovery of damages prior to the evidentiary showing of loss of reputation). Thus, a media defendant is entitled to judgment as a matter of law when the plaintiff fails to advance any evidence of loss of reputation arising from the statements at issue. *Id.* at 225 (holding the district court should have directed a verdict for the media defendant because the plaintiff presented no evidence of the good reputation he purported to have, nor evidence that members of the community lost respect for him as a result of the defamatory publication).

4. Applicable defenses.

(i) Truth.

Truth is one defense to a defamation action. The rule in Iowa is a "substantial truth" defense—"[t]he libel defendant need not establish the literal truth of every detail of the broadcasting so long as the 'gist' or 'sting' of the broadcast in question is substantially true." *Jones v. Palmer Comm'n, Inc.*, 440 N.W.2d 884, 891–92 (Iowa 1989), *abrogated on other grounds by Schlegel*, 585 N.W.2d at 224. The inquiry is centered on "the heart of the matter in

question—the hurtfulness of the utterance." *Id.* (quoting *Behr v. Meredith Corp.*, 414 N.W.2d 339, 342 (Iowa 1987)). The "gist" or "sting" of the allegedly defamatory statement is determined by "look[ing] at the highlight of the [publication], the pertinent angle of it, and not to items of secondary importance which are inoffensive details, immaterial to the truth of the defamatory statement." *Behr*, 414 N.W.2d at 342 (quotation omitted).

(ii) Opinion.

Another defense to a defamation action is opinion, which is protected by the First Amendment. *See Gertz*, 418 U.S. at 339–40 ("Under the First Amendment there is no such thing as a false idea. . . . But there is no constitutional value in false statements of fact."). To determine whether the allegedly defamatory statements in question are actionable fact or constitutionally-protected opinion, Iowa has adopted a four-factor test: (1) "the precision and specificity of the disputed statement," and whether the statement has a precise core meaning; (2) verifiability of the statement—the degree to which the statement is objectively capable of proof or disproof; (3) the "literary context" in which the disputed statement was made; and (4) the "social context" or "public context" which considers "the category of publication, its style of writing and intended audience," as well as the political arena in which the statements were made. *Jones*, 440 N.W.2d at 891–92 (citing and quoting *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1302 (8th Cir. 1986)); *see also Yates*, 721 N.W.2d at 770.

However, arguing that the allegedly defamatory statements in question are "opinion" is not a complete defense to a libel action. *Yates*, 721 N.W.2d at 771. Only statements "regarding matters of public concern that are not sufficiently factual to be capable of being proven true or false and statements that cannot reasonably be interpreted as stating actual facts are absolutely protected under the Constitution." *Id.*; *Milkovoch*, 497 U.S. 1, 18 (1990) (rejecting "the creation of an artificial dichotomy between 'opinion' and fact")). Thus, the test to determine whether a purported opinion is actionable as libel is "whether the allegedly defamatory statement can reasonably be interpreted as stating actual facts and whether those facts are capable of being proven true or false." *Yates*, 721 N.W.2d at 771 (citing *Moldea v. New York Times* ("[S]tatements of opinion can be actionable if they imply a provable false fact, or rely upon stated facts that are provably false.")). The literal wording of the statement is not as important as "what a reasonable reader or listener would have understood the author to have said." *Id.*; *Milkovich*, at 15–18.

B. Summary Judgment Principles in Defamation Actions.

"Unique rules apply in defamation cases because First Amendment rights are implicated." *Stevens*, 728 N.W.2d at 827. A plaintiff resisting a motion for summary judgment must do more than simply point to a disputed issue of material fact. *Stevens*, 728 N.W.2d at 830.

At the summary judgment stage, the Court is first tasked with the initial determination of whether the defendants' words *were capable* of a defamatory meaning; if so, it is for the jury to determine whether that communication was *actually understood* to have had that effect on the reader or audience. *Stevens*, 728 N.W.2d at 830 (quoting Rest.2d Torts § 614, at 311 (1965)); *Yates*, 721 N.W.2d at 772 ("If the court determines that a statement is indeed capable of bearing a defamatory meaning, then whether that statement is in fact defamatory and false [is a question] of fact to be resolved by the jury." (internal quotations omitted)).

Further, it is the Court's role is to "examine the evidence to determine if a rational fact finder could conclude that malice had been established by clear-and-convincing evidence." *Carr v. Bankers Trust Co.*, 546 N.W.2d 901, 904 (Iowa 1996); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255–56 (1986) ("[W]here the *New York Times* 'clear and convincing' evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant." (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). "Thus, where [a] factual dispute concerns actual malice, . . . the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Anderson*, 477 U.S. at 255–56. However, "[t]he proof of 'actual malice' calls a defendant's state of mind into question and does not readily lend itself to summary disposition." *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979).

The Court may decide the defamation action summarily when considering either affirmative defense of the defendant. "If the underlying facts as to the gist or sting of the defamatory charge are undisputed, the court may determine substantial truth as a matter of law." *Behr*, 414 N.W.2d at 342. The Court's inquiry involves "whether the plaintiff would have been exposed to any more public disgrace had the publication been free of error." *Jones*, 440 N.W.2d at 891. In considering whether the defendant's allegedly defamatory statement constitutes non-actionable opinion, there must be undisputed material facts allowing the Court to consider each

of the "*Janklow* factors," *see id.*, and evaluate "whether the alleged defamatory statement can reasonably be interpreted as stating actual facts and whether those facts are capable of being proven true or false." *See Yates*, 721 N.W.2d at 770–71.

C. Discussion & Analysis.

1. Whether the allegedly defamatory statements are capable of a defamatory meaning.

The Court's first and most important question in evaluating Defendants' summary judgment motion will be determining whether the statements at issue are capable of a defamatory meaning. *Stevens*, 728 N.W.2d at 830; *Yates*, 721 N.W.2d at 772. This centers on whether the statements can reasonably be seen as damaging Malin's reputation. *See Schlegel*, 585 N.W.2d at 221.

In their motion for summary judgment on Malin's defamation claims, Defendants point out that Malin's pleadings only refer directly to five publications to support his defamation claim (Ex. 59, 60, 61, 65, and 66); the others, an additional five in particular (Ex. 41, 43, 50, 54, and 64), are provided only for context. In his petition, Malin cites only Exhibits 59 and 60 for his pure defamation claim in Count III. These statements appear to be straight fact-reporting of the ongoing dissention between City Council Aldermen, the Mayor, and Malin. Malin argues that stating there was "dissension" between himself and City Council as a result of their being "mislead into paying for site preparation at the land-based casino" is defamatory because such tension did not result until after Defendants' reporting of Malin's role in the negotiations, which Malin alleges is false. *See* Ex. 59. Malin also contends the statements that he "overstepped his authority" in his participation of the casino development project was false and defamatory because he did not agree to a document that committed the city to paying the casino site costs. *See* Ex. 60. However, the statements are largely true. Malin acknowledged that the city did end up paying for those costs. *See* Ex. K (Malin Dep., at 196:19–197:02).

Malin cites Exhibits 59, 60, 61, 65 and 66 in Count IV of his petition for his claim of implied defamation (false light). The statements contained in these publications may be actionable as implied defamation, even if not as direct defamation, because they are at least capable of defamatory meaning. The June 18, 2015 articles (Ex. 59 and 60), coupled with Ickes' June 19, 2015 column (Ex. 61), the June 22, 2015 editorial (Ex. 63), the June 24, 2015 editorial

(Ex. 64), Ickes' June 27, 2015 column (Ex. 65), and the June 29, 2015 editorial (Ex. 66) could reasonably be interpreted by a reader as implying (or asserting) that Malin was untruthful and deceitful, intentionally misleading City Council Aldermen in the Rhythm City Casino project. Such statements attacking Malin's character and integrity constitute defamation per se. *Vinson*, 360 N.W.2d at 116 ("An attack on the integrity and moral character of a party is libelous per se."); *see also Bierman*, 826 N.W.2d at 444.

2. Whether Malin was a "public figure" or "public official" when serving as Davenport City Administrator.

Malin claims he is not a public figure or a public official because he was not elected to his position as City Administrator. Because he worked under City Aldermen and could not act without their approval, Malin contends he cannot be deemed a public official. Further, Malin argues he cannot be made a public figure simply because Defendants published articles about him and his work for the City of Davenport.

Like a police captain, Malin is a public official under Iowa law. *See McCarney*, 239 N.W.2d at 156, 158; *cf. Jones*, 440 N.W.2d at 895 (holding a low-ranking firefighter not to be a public official). As City Administrator, he was certainly "among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *See Rosenblatt*, 383 U.S. at 84. Malin played a significant role in many of the public works projects for which he ultimately came under scrutiny (i.e. renovation of Modern Woodman Park, Rhythm City Casino development). Even though he answered to City Council, he was in charge of the administration of city government on a day-to-day basis. Malin is a public figure, also, given how he "thrust [himself] into the issues then swirling in city government" by writing opinion and advocacy pieces on behalf of the City and was quoted often by the newspaper as an official spokesperson of the city. *See Anderson*, 304 N.W.2d at 246.

Because Malin is a public official, the Court need not decide whether he is a public figure by virtue of the publicity his tenure as City Administrator generated.

Regardless, as a public official, Malin is not entitled to presume damages or malice through a "defamation per se" action; he must strictly prove these elements.

3. Whether "a rational fact finder could conclude that malice had been established by clear-and convincing evidence."

Since Malin is a public official, Malin must show that a reasonable jury could find he has shown actual malice by clear and convincing evidence to survive summary judgment. *Bertrand*, 846 N.W.2d at 891; *Stevens*, 728 N.W.2d at 827.

Defendants argue that, as a public official, Malin has not advanced evidence that any of the allegedly defamatory statements were made with "actual malice." Defendants point out that Malin admits the City ultimately paid for the casino site grading, which was the "gist" of the newspaper's reporting on that issue at the time, and no evidence in the record to show Defendants Wellner, Ickes, or the Editorial Board "entertained serious doubts as to the truth of [the] publication." *See Stevens*, 782 N.W.2d at 830.

Malin contends he has provided ample evidence of actual malice. Malin repeatedly references internal emails among the Defendants—particularly from Barb Ickes—that he argues shows Defendants' intent to harm him (common law malice), as well as knowledge that there might be ethical problems with the substance of their reporting due to the spin that was put on the events reported on (defamation malice).[3] Malin also points to his own email correspondence with Defendants (namely Barb Ickes and Brian Wellner) to show his efforts to provide explanations and clarifications of what he believed Defendants got wrong in their reporting—demonstrating at least a reckless disregard for the truth or falsity of their publications. *See, e.g.*, Ex. 160 (emails between Ickes and Heller re: Modern Woodmen Park development).

Malin emphasizes his long, contentious history with the *Quad City Times*, but ultimately, he conflates common law malice and any intent on the part of Defendants to damage his reputation with the subjective inquiry into whether the Defendants published the statements without proper regard to whether or not they were true. The record does contain a documented effort by Malin, as well as several others involved in projects with him to correct the newspaper's account of use of public money on a number of these projects. Without explaining to readers the way public-private partnerships and public financing commonly worked on municipal projects such as the Modern Woodmen Park renovation and the Rhythm City Casino development, Defendants' insistence that "public money" was being used on these projects

[3] Malin cites to Exhibit 26 for this purpose, yet Exhibit 26 does not contain these emails.

despite Malin's protestations or explanations otherwise demonstrates, at the least, a genuine issue of material fact on whether the statements were published with actual malice; at most, this shows actual malice and the insinuation that Malin was lying.

4. Whether the QC Time columns and editorials are protect "opinion" under the First Amendment.

Defendants contend the columns and editorials published by the *Quad City Times* were opinion and "absolutely protected under the First Amendment." Defendants argue the publications at issue are not actionable because (1) Ickes' columns used "first-person pronouns" and "rhetorical questions," as well as indicated her name, SUF ¶¶ 25–26; and (2) the editorials were clearly labelled "Our Editorial" written by the "Times Editorial Board," also employing first-person pronouns and providing "our [the Editorial Board's] translation," SUF ¶¶ 31–34, 36.

Here, though, Defendants misstate the law. Only statements "regarding matters of public concern that are not sufficiently factual to be capable of being proven true or false and statements that cannot reasonably be interpreted as stating actual facts are absolutely protected under the Constitution." *Yates*, 721 N.W.2d at 771; *see also Milkovoch*, 497 U.S. at 18. The test to determine whether a purported opinion is actionable as libel is "whether the allegedly defamatory statement can reasonably be interpreted as stating actual facts and whether those facts are capable of being proven true or false." *Yates*, 721 N.W.2d at 771.

Malin asserts Defendants' publications cannot be so easily characterized as "opinion" that is protected under the First Amendment. Malin points to expert testimony pointing out that statements made by the Defendants in their publications are made in a context which renders it unclear to the reader whether it is factual reporting or opinion-commentary. *See* Ex. 199, 200. Malin cites the same expert report that opines Defendants failed to meet the professional standard of care for journalists, *see* Ex. 199, 200, and asserts that Defendants admit they have no written standards for its writers. *See* Ex. B (Ickes Dep., at 40:02–04). Malin contends these statements published about him contain enough false facts that he proved to the Defendants were false, and his efforts to correct the record were ignored. Thus, Malin asserts (without specificity) these articles are not non-actionable opinion statements.

Considering (1) "the precision and specificity of the disputed statement," and whether the statement has a precise core meaning; (2) verifiability of the statement—the degree to which the statement is objectively capable of proof or disproof; (3) the "literary context" in which the

disputed statement was made; and (4) the "social context" or "public context" which considers "the category of publication, its style of writing and intended audience," as well as the political arena in which the statements were made, *Jones*, 440 N.W.2d at 891–92 (quoting *Janklow*, 788 F.2d at 1302), the alleged defamatory statements can reasonably be interpreted as stating actual facts that are capable of being true or false. *See Yates*, 721 N.W.2d at 770–71. The Ickes columns, in particular, lace commentary and opinion with quasi-factual reporting that is more than rhetorical hyperbole. Thus, they should not receive First Amendment protection as pure opinion.

5. Whether the "gist" of the statements contained in the publications were "substantially true."

"The libel defendant need not establish the literal truth of every detail of the broadcasting so long as the 'gist' or 'sting' of the broadcast in question is substantially true." *Jones v. Palmer Comm'n, Inc.*, 440 N.W.2d at 891–92.

Defendants argue the statements made in the publications at issue were substantially true and, therefore, not actionable. The "gist" of the contested statements, they argue, are in fact true. Specifically, Defendants assert the "substantial truth" of the publications in question undermine his defamation claim, namely, that: (1) Malin was the point of contact between the City of Davenport, the construction company, (2) Malin himself testified that he recognizes the City of Davenport ultimately paid for the grading of the casino site as well as the road, (3) Aldermen were in fact confused about the City's obligations regarding that contract.

Malin spends considerable time explaining the facts and circumstances of municipal events and the publications that relate to them to urge that the statements made by the *Quad City Times* were not substantially true, and outright false. Malin argues Defendants falsely accused him—directly or impliedly—of criminal activity on numerous occasions: (1) attempting to run the Davenport School Board; (2) leading taxpayers into "another business"; (3) "ginning up" an overpriced news bureau; (4) improperly pursuing a $25 million grant; (5) leveraging taxpayer money to buy a casino; (6) waiving a $1,800 lease for AT&T to save $151,000; (7) using "back-alley tactics"; (8) giving AT&T free rent on a cell tower; (9) causing the City of Davenport to pay $1 million for a Ferris wheel; (10) causing the City to be "on the hook" for an unauthorized accounting bill; (11) having no integrity; (12) wrongfully costing the City $387,500; and (13) giving $5 million of City funds to a casino. Unlike the extra-jurisdictional cases discussed in

Behr v. Meredith Corp., 414 N.W.2d 253 (Iowa 1987), Malin argues that he was in fact not engaged in the criminal activity he alleges he was accused of, demonstrating the falsity of the publications in question.

Here, it appears that each of the statements at issue, and their implications, are "substantially true." However, the "gist" or "meaning" of the statements at issue are not undisputed for all statements. There is a disputed issue of material fact regarding whether these statements are substantially true as to Malin's point (9), (10), (11), (12), and (13). *See Behr*, 414 N.W.2d at 342 (stating courts may resolve defamation claims as a matter of law on grounds of substantial truth where "the underlying facts as to the gist or sting of the defamatory charge are undisputed"). Summary judgment should therefore be denied as to Defendants' affirmative defense.

6. Whether Malin, has advanced evidentiary proof of "reputational harm."

As a public official asserting a defamation claim against a media-defendant, Malin bears the burden of establishing actual damages—he may not presume injury from the publication of the allegedly libelous statements but instead must submit evidence of "reputational harm." *Bierman*, 826 N.W.2d at 447; *Schlegel*, 585 N.W.2d at 224. The measure of loss of reputation in a defamation action is the impairment of a relational interest. *Kiesau v. Bantz*, 686 N.W.2d 164, 175 (Iowa 2004) *overruled on unrelated grounds by Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699 (Iowa 2016).

Defendants argue that Malin has not advanced sufficient proof of reputational harm to strictly prove damages as he is required to do as a public official against a media defendant. Defendants assert that while all witnesses identified by Malin speak to his good reputation, none intend to testify that his reputation has been harmed or damaged, let alone as a result of the publications at issue. No other deposition testimony, Defendants asset, demonstrates reputational harm.[4]

[4] In their reply, Defendants emphasize two additional points. First, Defendants point out that any article published prior to June 15, 2015 falls outside the two-year statute of limitations prescribed by Iowa Code § 614.1(2). Malin filed his petition on June 15, 2017. The statute of limitations for libel claims begins to run at the time the allegedly defamatory statement is published. *Kiner v. Reliance Ins. C9o.*, 463 N.W.2d 9, 13 (Iowa 1990). Second, Defendants contend Malin's heavy reliance on his own affidavit to resist summary judgment is both self-serving and not credible and is procedurally improper because it contains allegations that present problems of hearsay, speculation, and lack of personal knowledge (in violation of Iowa Rule of Civil Procedure 1.981(5).

Malin asserts he has established ample evidence of reputational harm through several anecdotal examples of letters to the editor published by the *Quad City Times* that exhibited negative opinions of Malin in response to the Defendants' articles, columns, and editorials about his handling of city affairs. *See* Ex. 46 (published September 8, 2014), 48 (published September 29, 2014), 55 (published February 11, 2015), 56 (published February 22, 2015). However, these letters were published *before* the allegedly defamatory statements at issue that are actually actionable. They might be demonstrative of reputational loss in general, but their connection to his reputational harm *caused by* the actionable statements at issue is tenuous.

Malin also points to the deposition testimony of Tory Brecht (Ex. 28) and Jason Gordon (Ex. 27), as well as his own self-serving affidavit, to establish proof of his diminished reputation in Davenport and his inability to maintain his job as City Administrator. Finally, Malin relies on his own affidavit describing the evil looks and negative comments he receives from strangers when he is recognized in public.

The initial disclosures provided by plaintiff in this case list multiple witnesses who will testify that he was a "dedicated city manager, professional and had a reputation for integrity and positive action." In answers to interrogatories he lists several witnesses that will testify as to his "loss of reputation" due to the publication of the "articles". Plaintiff in his brief cites to the four (4) letters to the editor written by citizens in 2014 as support for his claim that the "articles" in this action causes his reputation to diminish. It is noteworthy that those articles were written and published months prior to the single article and columns and editorials that are in controversy in this action. Clearly the 2015 article and opinions were not the cause of the negative statements in the 2014 letters to the editor. The plaintiff further cites to one Alderman leaving the meeting in which Malin's resignation was discussed due to the "articles" in the Times, however that is the same witness that was disclosed as supporting the fact that the Plaintiff had a reputation of being a dedicated, professional manager with integrity. Also, in Jason Gordon's deposition he testified that his relationship with the plaintiff is the same today as it was at the time of the articles. His opinion stated at deposition was "I think he did a good job with the City of Davenport". When asked if his opinion had changed today he answered "Not of consequence, I would say –or not of any level of significance, no." He further testified that on the date of the special meeting regarding the resignation of Mr. Malin that he "wasn't comfortable, as an alderman, that we weren't exposing ourselves to potential lawsuits or

whatever from Craig or others, I didn't think we had fully vetted what the risk of making a decision to fire him without fully understanding what the implications were relative to his contract." He testified that he did not talk to others about the media coverage as to whether they were just tired of it or believed the articles. He speculated that the feelings of the others was a combination of being tired of and wanting to get rid of the media coverage and calm down things as it was an election year for alderman and concern over whether what was reported was the truth.

Jennifer Nahra and Tory Brecht both testified in deposition that they hold the same high opinion of Mr. Malin today as they did before the media coverage at issue in this case was published. Mr. Malin indicated that he and former Mayor Gluba are still friends and on good terms.

As the Defendants here are all media-defendants the plaintiff must show actual reputational harm. Plaintiff's own affidavit includes numerous exhibits of his background and professional accolades for many years, including prior to his employment with the City of Davenport. It also includes evidence of his positive reputation while employed with the City. The citizen letters to the editor published in 2014 questioning his integrity were prior to the publications in question and there is no evidence that those letters affected the reputation of the plaintiff. In fact, all his witnesses proposed and deposed, all state that they thought highly of Mr. Malin and continue to do so to this day. Obviously, those four letters had no effect on their opinions of Mr. Malin. The alleged starring, frowning or rude comments by unknown persons in random public places, may very well have been emotionally traumatic to Mr. Malin, however, they are not proof of a change from good reputation to bad due to publications in the local newspaper.

Discovery deadlines have come and gone in this case. This is a media-defendant case and therefore damages to reputation cannot be inferred from distribution. There is no evidence in this record to support that there was any individual that changed their opinion of Mr. Malin because of the publications at issue here. The four citizen letters cited were published over a year prior to the publications here. Even if they were to be considered, there is no evidence that those four people represented the opinions of the thousands of residents of Davenport or that those months prior unsubstantiated letters to the editor about an entirely different matter in anyway influenced the opinions of the citizenry as a whole or Mr. Malin's direct supervisors, the

Mayor or the Alderman as the reputation of Mr. Malin. There is no evidence that anything was said or done to Mr. Malin in 2014 as a result of those letters. The only possible evidence of a change of opinion due to the June 2015 publishings is contained in the plaintiff's affidavit and Mr. Brecht's deposition where that both indicate that they "heard" that "others" had changed their opinion of Mr. Malin. The origin of these purported statements is unknown and there is no evidence to support that these statement but unknown persons at an unknown time would meet any exception to the hearsay exclusionary rules.

Even though a genuine issue of material fact may exist on whether the statements were published with actual malice and the insinuation that Malin was lying; and even though the "gist" or "meaning" of the statements at issue are not undisputed for all statements and there is a disputed issue of material fact regarding whether these statements are substantially true as to Malin's points (9), (10), (11), (12), and (13); the plaintiff must still have evidence of actual reputational harm, which is not present in this case.

Therefore the Defendant's Motion for Summary Judgment in the claims of Defamation (Libel) and Libel by Implication or False Light should be granted.

II. Intentional Interference with Contract (Intersection with Defamation Law).

A. Applicable Law.

To recover for intentional interference with an existing contract, a plaintiff must show:

> (1) plaintiff had a contract with a third-party; (2) defendant knew of the contract; (3) defendant intentionally and improperly interfered with the contract; (4) the interference caused the third-party not to perform, or made performance more burdensome or expensive; and (5) damage to the plaintiff resulted.

Kern v. Palmer Coll. of Chiropractic, 757 N.W.2d 651, 662 (Iowa 2008); *see also* Iowa Civ. Jury Instr. 1200.1. At the summary judgment stage, it is the Court's job to determine "whether the record includes evidence from which a rational jury could find intentional and improper interference." *Id.* The following factors are relevant to considering whether a defendant's conduct was improper:

> (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties.

Hunter v. Bd. of Trs. Of Broadlawns Med. Ctr., 481 N.W.2d 510, 518 (Iowa 1992 (quoting Rest. 2d Torts § 767 (1981)). Determining whether the defendants' actions were improper turns on the "the nature of [the parties'] conduct, their motives, and a balancing of the respective interests." *Kern*, 757 N.W.2d at 662.

To prevail under a theory of intentional interference with prospective business advantage, the plaintiff must prove

> (1) The plaintiff has a prospective [contractual relationship/business relationship] with another; (2) the defendant knew of the prospective relationship; (3) the defendant intentionally and improperly interfered with the relationship; (4)(a) the interference caused [the other] not to enter/to continue the relationship or (4)(b) the interference prevented [the other] from entering/continuing the relationship; and (5) the nature ad amount of damage.

Iowa Civ. Jury Instr. 1200.2. Moreover the plaintiff must show the defendant "intentionally and improperly interfere[d] with another's prospective contractual relationships with the sole or primary purpose to injure or destroy the plaintiff." *Fin. Marketing Serv., Inc. v. Hawkeye Bank & Trust*, 588 N.W.2d 450, 459 (Iowa 1999). "[T]here must be substantial evidence of a predominant motive on the part of [the defendant] to terminate the [contract] for improper reasons." *Water Development Co.*, 488 N.W.2d at 162 (quoting *Toney v. Casey's Gen. Stores, Inc.*, 460 N.W.2d 849, 853 (Iowa 1990)).

B. Discussion & Analysis.

Defendants contend Malin's intentional interference with contract claim is precluded because he voluntarily terminated his at-will employment contract with the City. Defendants argue Malin cannot show they intentionally and improperly interfered with his employment

contract. Even if there was improper interference, Defendants further assert there is no evidence such it caused the City not to perform under the contract.

Moreover, in their reply, Defendants contend Malin plead the wrong cause of action and cannot prevail on his claim for intentional interference with contract. Defendants assert Malin's claim is barred because as an at-will public employee the proper claim should have been one for intentional interference with prospective business advantage. *See, e.g.*, *Water Dev. Co. v. Bd. of Water Works*, 488 N.W.2d 158, 162 (Iowa 1992) (noting interference with contract and interference with prospective business advantage are two distinct causes of action "to which [Iowa] law of contract interference has applied different rules").

Defendants argue that even if Malin could prove Defendants committed interference with his future employment that was improper, he cannot prove it was done with the predominant purpose of financially harming or destroying Malin's prospective business advantage in his at-will employment with the City. *See Water Dev. Co.*, 488 N.W.2d at 162; *Hawkeye Bank & Trust*, 588 N.W.2d at 459. Defendants' predominant purpose," they contend, is simply to report the news and publish opinion pieces about the Quad Cities community. Moreover, Defendants assert it would not be enough even to believe Malin's theory of Defendants' competition with davenporttoday.com as its motivation behind its reporting on Malin and his allegations about Defendants seeking to pressure Malin to remove the site, his claim fails because Lee Enterprises and the Quad City Times had an independent financial interest in fighting the competition it generated against Defendants' business. *See Berger v. Cas' Feed Store, Inc.*, 543 N.W.2d 597, 599 (Iowa 1996) ("A party does not improperly interfere with another's contract by exercising its own legal rights in protection of its own financial interests.").

Malin also resists Defendants' motion for summary judgment on his intentional interference with contract claim. Malin argues the history of articles published against him by the Defendants, especially those that consist of his defamation claim and the later editorials calling for his removal, show an intent to influence City Council Aldermen into removing him from office, interfering with his employment contract. Malin claims his allegations are substantiated by the testimony of Alderman Gordon, stating that the Aldermen felt they would have been voted out of office had they not terminated Malin's employment in response to Defendants' editorials. *See* Ex. 27 (Gordon Dep., at 69:21–70:23).

The key words are "intentionally" and "improperly." In this case, there is no question that the editorial encouraged a full investigation and the holding of accountability by Malin or the alderman would suffer the "wrath" of the voters. In determining whether a defendant's action is "improper," the court may consider (1) the nature of the defendant's conduct, (2) their motive, (3) the interest sought to be protected by the plaintiff, (4) the interest sought to be advanced by the defendant, (5) any social interest in protecting the freedom of action of the defendant versus the contractual interests of the plaintiff, (6) the proximity of the defendant's conduct to the interference, and (7) the relations between the parties. Toney, 460 N.W.2d at 853; Restatement § 767. Water Dev. Co. v. Bd. of Water Works, 488 N.W.2d 158, 161–62 (Iowa 1992).

In employments at will and the law of contract interference Iowa Court has applied different rules. In those cases, the proof is more demanding than when the claimed interference is with an existing contract. See Toney, 460 N.W.2d at 853–54. As one authority states,

"a contract at will is usually not protected when the defendant's interference with it is based on any legitimate business purpose and no improper means is used, as where one employer hires away employees of another whose contract rights are terminable at will. The principle would logically apply to any agreement that could not be enforced as a contract, since such an agreement can be avoided at will, as where a contract lacks mutuality. In all such cases the plaintiff's interest may be protected, but as a prospective advantage rather than as a contract, with the correspondingly greater freedom of action on the defendant's part." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 129, at 996 (5th ed. 1984) (footnotes omitted) [hereinafter Prosser].

In the case of an alleged interference with a prospective contract, there must be substantial evidence of a predominant motive on the part of [the defendant] to terminate the [contract] for improper reasons. Toney, 460 N.W.2d at 853. See Preferred Mktg. Assocs. Co. v. Hawkeye Nat'l Life Ins. Co., 452 N.W.2d 389, 396 (Iowa 1990) (claim of interference with prospective business advantage requires showing that purpose was to damage plaintiff's business). Water Dev. Co. v. Bd. of Water Works, 488 N.W.2d 158, 162 (Iowa 1992).

The Iowa Supreme Court compared the closely-related elements of these two causes of action in Nesler v. Fisher and Co., Inc., 452 N.W.2d 191, 196–99 (Iowa 1990). Intentional interference with a contract requires proof that (1) plaintiff had a contract with a third party; (2) defendant knew of the contract; (3) defendant intentionally and improperly interfered with the

contract; (4) the interference caused the third party not to perform, or made performance more burdensome or expensive; and (5) damage to the plaintiff resulted. Id. at 198. Proof of intentional interference with a prospective contract or business relationship essentially calls for evidence on the same elements relative to future business. See id. at 198–99. Burke v. Hawkeye Nat. Life Ins. Co., 474 N.W.2d 110, 114 (Iowa 1991). The Supreme Court found that the primary distinction between the two causes of action is the nature and degree of proof required on the element of motive. In a claim of intentional interference with a prospective business advantage, plaintiff must prove that the defendant intended to financially injure or destroy the plaintiff. Id. at 199; Page County Appliance Center v. Honeywell, Inc., 347 N.W.2d 171, 177 (Iowa 1984); Harsha v. State Sav. Bank, 346 N.W.2d 791, 799 (Iowa 1984). In cases of interference with existing contracts, proof of such purpose is not essential. Nesler, 452 N.W.2d at 199; Farmers Coop. Elevator, Inc., Duncombe v. State Bank, 236 N.W.2d 674, 679 (Iowa 1975). Burke v. Hawkeye Nat. Life Ins. Co., 474 N.W.2d 110, 114 (Iowa 1991).

The issues of at-will employment and maintaining a claim for tortious interference with a contract were thoroughly discussed by Judge Bennet in King v. Sioux City Radiological Grp., P.C., 985 F. Supp. 869, 882–86 (N.D. Iowa 1997).

In that case the Technical Director of Radiology at a medical center in Sioux City, Iowa sued his former employer for defamation and tortious interference with his at-will employment contract. The court found that there was not dispute that the plaintiff was an at-will employee of St. Luke's. However, they did dispute the repercussions of that fact for his tortious interference claim. The defendant in that case, as the one here, maintained that the proper claim when at-will employment is involved is tortious interference with a business advantage, and that the Kings cannot generate a genuine issue of material fact as to the defendant's intent to financially injure or destroy plaintiff, an essential element of such a claim, as explained above. The plaintiffs there as the plaintiff here, contended that, even in at-will employment cases, the proper claim is tortious interference with an existing contract of at-will employment, and only "improper purpose" must be proved, not "intent to financially injure or destroy" the plaintiff.

Judge Bennet applying Iowa law found that the existence of an at-will contract of employment, however, does not insulate a defendant from liability for tortious interferences. Citing Toney v. Casey's General Stores, Inc., 460 N.W.2d 849, 853 [(Iowa 1985)]; Restatement (Second) of Torts § 766 cmt. g (1979). See also Europlast, Ltd. v. Oak Switch Systems, Inc., 10

F.3d 1266, 1274 (7th Cir.1993). He went on to find the following "Until a contract is terminated, it remains valid and subsisting, and third persons may not improperly interfere with it. Restatement (Second) of Torts § 766 cmt. g. (1979). Nevertheless, the standard of proof is more demanding when the employment contract is at-will, and our law of contract interference applies different rules. Water Dev. Co. v. Bd. of Water Works, 488 N.W.2d 158, 162 (Iowa 1992). A higher standard is required because interference with at-will employment contracts only gives rise to the interference with a future expectancy, not a legal right. Restatement (Second) of Torts § 766 cmt. g (1979). The situation, therefore, is more analogous to the interference with a prospective contractual relation, with the corresponding greater freedom of action on the part of the defendant. Water Dev. Co., 488 N.W.2d at 162; Toney, 460 N.W.2d at 853–54, (quoting Prosser and Keeton on the [L]aw of Torts § 129, 996 (5th ed.1984))."

The torts of interference with an existing contract and interference with a prospective contractual relation both require the interference to be "improper." Nesler v. Fisher & Co., Inc., 452 N.W.2d 191, 199 (Iowa 1990). The term "improper," however is defined differently for each tort. Id. In cases involving interference with a prospective contract, the defendant's purpose must be to financially injure or damage plaintiff's business. Id. There must be substantial evidence of a predominant motive by the defendant to terminate the contract for improper reasons. Water Dev. Co., 488 N.W.2d at 162; Toney, 460 N.W.2d at 853. This same requirement is applied to at-will employment contracts. RTL Distrib., 545 N.W.2d at 590 (emphasis added).

Judge Bennet further found "that the decisions of the Iowa Supreme Court in Toney and the Iowa Court of Appeals in RTL Distributing settle the question of the nature and elements of a claim of tortious interference with at-will employment. First, in Toney, after examining the pertinent provisions of the restatement (Second) of Torts, sections 766, 766A, 767, and comments thereto, the Iowa Supreme Court wrote, One authority, while noting that employment and other contracts terminable at will may be the subject of actions for interference, states that a contract at will is usually not protected when the defendant's interference with it is based on any legitimate business purpose and no improper means is used, as where one employer hires away employees of another whose contract rights are terminable at will. The principle would logically apply to any agreement that could not be enforced as a contract, since such an agreement can be avoided at will, as where a contract lacks mutuality. In all such cases the plaintiff's interest may be protected, but as a prospective advantage rather than as a contract, with the correspondingly

greater freedom of action on the defendant's part. Prosser and Keeton on the Law of Torts § 129, at 995 (5th ed.1984).

Applying these principles to the present case, we believe that there must be substantial evidence of a predominant motive on the part of Casey's to terminate the [at-will] employment of Toney for improper reasons… This court holds, therefore, that when a defendant is alleged to have interfered with the plaintiffs at-will employment with a third party, "there must be substantial evidence of a predominant motive on the part of [the defendant] to terminate the employment of [the plaintiff] for improper reasons." Toney, 460 N.W.2d at 853; RTL Distrib., 545 N.W.2d at 590. Furthermore, tailoring the elements of tortious interference claims to the context of tortious interference with at-will employment, the court finds that the elements the Kings must ultimately prove are the following:

1. The plaintiff was an at-will employee of a third person.

2. The defendant knew of the at-will employment relationship.

3. The defendant intentionally and improperly interfered with the plaintiff's employment relationship in that there must be substantial evidence of a predominant motive on the part of the defendant to terminate the employment of the plaintiff for improper reasons.

4. The interference caused the third person to terminate the plaintiff's employment.

5. The amount of damage.

See Toney, 460 N.W.2d at 853; RTL Distrib., 545 N.W.2d at 590.

The Mayor calling for Malin's resignation and the Alderman voting to fire him, even if intended by the defendants, may have been a very likely consequence of their complaints and criticisms about Malin's handling and management of the casino project, particularly if the Mayor had found those criticism well grounded. Thus, there is at least a genuine issue of material fact on the material issue of whether the defendants intended that Malin be terminated, not merely that they recognized Malin's termination might be a necessary consequence of their complaints and criticism.

The closer issue is whether the Defendants' motive to terminate Malin's employment was for improper reasons, another material issue to Malin's tortious interference claim. See Toney, 460 N.W.2d at 853 (stating one element of a claim of tortious interference with at-will employment as whether the interfering defendant did so for an "improper reason"); RTL Distrib., 545 N.W.2d at 590 (same). In Toney, the Iowa Supreme Court quoted comment d to restatement

(Second) of Torts § 767, which states that, because intent alone may be insufficient to establish tortious interference, " 'it may become very important to ascertain whether the actor was motivated, in whole or in part, by a desire to interfere with the other's contractual relations. If this was the sole motive the interference is almost certain to be held improper.' " Toney, 460 N.W.2d at 853 (quoting restatement (Second) of Torts § 767 cmt. d).

The defendant's s assert—and there is evidence to support their position—that they were merely exercising their constitutionally protected free speech and in addition had a legitimate business interest to eliminate the competition of the City of Davenport website they claim was developed and managed by Malin.

The plaintiff assets that there are also contrary inferences that their purpose was to get rid of Malin, with or without any legitimate, business-related justification. See Toney, 460 N.W.2d at 853 (interference is improper when it is not a " 'necessary consequence' " of the defendant's legitimate action, but is instead the result of the defendant's desire " 'to bring it about,' " quoting restatement (Second) of Torts § 767 cmt. d). These inferences again arise, at least in part, from the fact that, after being told by the plaintiff and others in the community that the comments and criticism in the paper were either false or misleading, that the columns and opinions continued. Continuing to assert potentially misleading allegations as the basis for demanding someone's termination gives rise to a reasonable inference that the termination is the speaker's goal, not rectifying problems stated in those allegations.

The court's responsibility at the summary judgment stage of the proceedings is not to weigh this evidence and determine the truth of the matter, but to determine whether there are genuine issues for trial. Quick, 90 F.3d at 1376–77; Johnson, 906 F.2d at 1237. On the present record, there are indeed such genuine issues of material fact. Therefore, the defendants' motion for summary judgment on the Malin's tortious interference claim should be denied.

ORDER

IT IS THEREFORE ORDERED that the Defendant's Motion for Summary Judgment on the Plaintiff's Claims of Defamation (Libel) and Libel by Implication or False Light is hereby GRANTED.

IT IS FURTHER ORDERED that the Defendant's Motion for Summary Judgment on the Plaintiff's Claim of Tortious Interference with Contract is hereby DENIED.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
LACE129075	MALIN CRAIG VS QUAD CITY TIMES ET AL

So Ordered

Nancy S. Tabor, District Court Judge,
Seventh Judicial District of Iowa