This Court Need Not Address Riley's Remaining Assignments of Error.

[7] Having determined that Riley's convictions should be reversed based on the polygraph issue, we need not address Riley's remaining assignments of error. However, an appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *State v. Parker*, 276 Neb. 661, 757 N.W.2d 7 (2008). We discussed Riley's assignments of error with regard to the manslaughter instruction and the inconsistent verdicts to the extent necessary in connection with our review above of whether there may be a retrial on remand. We need not comment further on such issues, and we need not consider any of Riley's remaining assignments of error.

CONCLUSION

We conclude that the district court erred when it overruled Riley's motion for a mistrial based on Jones' testimony that he took a polygraph test. We therefore reverse Riley's convictions for manslaughter and three counts of attempted second degree murder. We further conclude that there was sufficient evidence to support Riley's convictions and that therefore, Riley may be retried on such charges on remand.

REVERSED AND REMANDED FOR A NEW TRIAL.

REX J. MOATS, APPELLANT, V. REPUBLICAN PARTY OF NEBRASKA, ALSO KNOWN AS THE NEBRASKA REPUBLICAN PARTY, APPELLEE.

796 N.W.2d 584

Filed April 28, 2011. No. S-09-929.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual

allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.

3. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Libel and Slander: Negligence.** A claim of defamation requires (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.
5. **Libel and Slander: Proof: Words and Phrases.** When the plaintiff in a libel action is a public figure and the speech is a matter of public concern, the plaintiff must demonstrate actual malice, which means knowledge of falsity or reckless disregard for the truth, by clear and convincing evidence.
6. **Libel and Slander: Proof.** The plaintiff in a public-libel action must establish by clear and convincing evidence that the alleged statement is false.
7. **Libel and Slander: Words and Phrases.** There are two types of libel: Words may be actionable per se, that is, in themselves, or they may be actionable per quod, that is, only on allegation and proof of the defamatory meaning of the words used and of special damages.
8. **Libel and Slander.** Whether a communication is libelous per se is a threshold question of law for the court.
9. ____. A communication is defamatory if it tends so to harm the reputation of another as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her.
10. ____. Trial courts initially determine whether a statement is capable of defamatory meaning, and then the jury decides whether the words were so understood.
11. **Constitutional Law: Libel and Slander.** In the context of a defamation claim, the First Amendment protects the publication of statements which cannot be interpreted as stating actual facts, but, rather, is the opinion of the author.
12. ____: ____. In assessing whether a statement implies a false assertion of fact or a protected opinion, a court looks at the nature and content of the communication and to the knowledge and understanding of the audience to whom the publication was directed.
13. ____: ____. Courts applying the totality of the circumstances test in a defamation claim look to factors such as whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact, whether the defendant used figurative or hyperbolic language that negates the impression, and whether the statement in question is susceptible of being proved true or false.
14. ____: ____. Publications that are alleged to constitute a false light invasion of privacy merit the same constitutional protections as publications alleged to be defamatory.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

David A. Domina, of Domina Law Group, P.C., L.L.O., and, on brief, Mark D. Raffety, for appellant.

L. Steven Grasz, of Husch, Blackwell & Sanders, L.L.P., for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

The appellant, Rex J. Moats, a former candidate for the Nebraska Legislature, filed a complaint in the district court for Douglas County against the appellee, the Republican Party of Nebraska, also known as the Nebraska Republican Party (Republican Party). In his complaint, Moats identified 11 numbered publications issued by the Republican Party which he alleges were actionable under various theories. With respect to each publication, except publication No. 10, Moats alleged that the publication violated his rights under Nebraska's Consumer Protection Act (CPA), see Neb. Rev. Stat. § 59-1601 et seq. (Reissue 2010); defamed him; and amounted to an invasion of privacy by putting him in a false light in violation of Neb. Rev. Stat. § 20-204 (Reissue 2007). Moats also alleged that publication No. 10, although not defamatory, violated his rights under the CPA and amounted to an invasion of privacy by putting him in a false light.

The Republican Party filed a motion to dismiss the complaint. The district court for Douglas County dismissed Moats' complaint in its entirety under Neb. Ct. R. Pldg. § 6-1112(b)(6) for failing to state a claim upon which relief could be granted. Moats appeals. We affirm.

FACTUAL BACKGROUND

In 2008, Moats became a candidate for the Nebraska Legislature in District 39. During the course of the election, the Republican Party paid for and distributed publications

in opposition to Moats' candidacy. Moats filed a complaint in Douglas County District Court in which he identified 11 numbered publications that he alleged were actionable. Moats claimed that 10 of these publications were actionable under three theories: violation of the CPA, defamation, and the tort of invasion of privacy by false light. In his complaint, Moats claimed that publication No. 10 was actionable only under the theories of violation of the CPA and the tort of invasion of privacy by false light. The content of publication No. 10 is not quoted in the complaint.

The relevant portions of the 11 publications are described in Moats' complaint as follows:

Publication No. 1: On or about April 20, 2008, a publication designated "NE GOP 39-001" asserted: "'*Trial attorney Rex Moats is a registered Democratic* [sic] *and the Democrat* [sic] *Party is supporting him!*'"

Publication No. 2: On May 7, 2008, an 8½- by 11-inch folder designated "NE GOP 39-003" asserted: "'*Moats received a $50,000 trust fund from the director of National Warranty*.'"

Publication No. 3: On May 5, 2008, a publication stated: "'*Would you put a shady insurance company based in the Cayman Islands ahead of Nebraska's consumers? You wouldn't. But trial attorney Rex Moats would . . .*'" This publication further stated: "'*How did Rex Moats mislead creditors and the public? Rex Moats claimed in an affidavit that National Warranty was doing financially well*.'"

Publication No. 4: This publication was an illustrated letter purportedly sent by Moats from the Cayman Islands to Nebraskans. On the front, it stated: "'*Greetings from the Cayman Islands. From insurance company trial lawyer extraordinaire Rex Moats*.'" On the back of the letter, it stated in relevant part:

> **Dear Nebraskan,**
>
> Hello from the Cayman Islands! I have really enjoyed my time over here. The weather is great, the food is great, and most importantly — **I have a fantastic job working for a shady insurance company that is incorporated right here in the Cayman Islands.** The tax benefits sure are great out here!

> Unfortunately my company, National Warranty, has gone bankrupt and is unable to pay off numerous claims for thousands of Nebraskans. Also, it looks like I have made misleading statements in an affidavit. Evidently, I claimed that my company is doing "just fine," but then declared bankruptcy two weeks later.

Publication No. 5: On October 2, 2008, a brochure publication designated "NE GOP 0004" asserted: "'*Rex Moats and National Warranty went down as a result of the same irresponsibility we see on Wall Street*.'"

Publication No. 6: On October 8, 2008, a publication designated "NE GOP 002" asserted: "'*Rex Moats cannot be trusted with your money*.'" The publication further stated that Moats was a "'*trial attorney*'" and that "'*National Warranty's directors set aside $50,000 for Rex Moats*.'"

Publication No. 7: An October 20, 2008, publication asserted that Moats was sued as a defendant in litigation. According to the complaint, the publication failed to disclose that the litigation against Moats was dismissed without a trial and had no merit. The publication also asserted: "'*Rex Moats took a $50,000 golden parachute just as National Warranty cost 150 Nebraskans their jobs and left unpaid promises to hundreds of thousands of vehicle buyers*.'"

Publication No. 8: On October 30, 2008, a publication designated "NE GOP 009" asserted: "'*Rex Moats received a $50,000 golden parachute even though 150 Nebraskans lost their jobs*.'" On October 31, the Republican Party issued a publication which stated: "'*Rex Moats misled creditors and the public about the solvency of National Warranty. Even worse, right before the company folded, Moats received $50,000 from the directors of National Warranty*.'"

Publication No. 9: On November 1, 2008, a publication designated "NEB 023," exhibiting a newborn baby, asserted: "'[*A*]*ccording to his own letter to the editor of a local newspaper, Rex Moats supports using your tax dollars to fund abortions*.'"

Publication No. 10: On November 1, 2008, the Republican Party issued a publication designated "NEB-015" which, according to the complaint, asserted "false information." The

complaint does not contain the substance of the publication. Moats alleges that this publication was within the bounds of what is permissible under the law of defamation.

Publication No. 11: On November 3, 2008, the Republican Party issued a publication which asserted: "'*Rex Moats was legal counsel for a now bankrupt insurance company that cost Nebraskans their jobs but rewarded Rex with a $50,000 trust*,'" and "'*Rex Moats supports using tax dollars to fund abortions*.'"

In his complaint, Moats claimed that each one of the above publications was false and that the statements in each of the publications were made by the Republican Party with actual malice. Moats further alleged that the actions undertaken by the Republican Party constituted "smears against . . . Moats, i.e., deliberate and unsubstantiated accusations intended to foment distrust or hatred against . . . Moats." Moats' complaint stated that he suffered actual and special damages but did not plead damages with particularity.

The Republican Party filed a motion to dismiss the complaint for failure to state a claim for relief pursuant to § 6-1112(b)(6). The court held a hearing on the matter on May 27, 2009, and filed an order granting the motion to dismiss the complaint in its entirety on September 3. Moats appeals.

ASSIGNMENTS OF ERROR

Moats claims that the district court erred in (1) dismissing Moats' complaint for failure to state any claim upon which relief could be granted; (2) failing to recognize that the 11 publications constituted a violation of the CPA by the Republican Party; (3) failing to recognize that the claims asserted by Moats constituted defamation against him; (4) failing to recognize that Moats has stated "one or more" claims for having been placed in a false light contrary to § 20-204; and (5) failing to grant Moats leave to amend his complaint to cure any technical deficiencies, such as pleading special damages with particularity.

STANDARD OF REVIEW

[1,2] An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting all the allegations

in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[1] To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.[2]

ANALYSIS

Constitutional Considerations

As an initial matter, both Moats and the Republican Party draw our attention to the fact that this case arises in the context of a political campaign and has First Amendment implications. While considering a First Amendment challenge to the constitutionality of a federal criminal statute, the U.S. Supreme Court recently summarized the historical and accepted restrictions upon the content of speech as follows:

> "From 1791 to the present," . . . the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," and has never "include[d] a freedom to disregard these traditional limitations." . . . These "historic and traditional categories long familiar to the bar," . . . including obscenity, . . . defamation, . . . fraud, . . . incitement, . . . and speech integral to criminal conduct, . . . are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[3]

Both parties note that the First Amendment's provision of freedom of speech affords broad protection to political

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[1] *Doe v. Board of* Regents, 280 Neb. 492, 788 N.W.2d 264 (2010).

[2] *Id.*

[3] *United States v. Stevens*, 559 U.S. 460, 468-69, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010) (citations omitted).

expression[4] and that free "discussions of candidates" are to be encouraged.[5] It has been said that "'in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate "breathing space" to the freedoms protected by the First Amendment.'"[6] Both parties agree that Moats is a public figure and acknowledge that in order to protect his reputation, as a former candidate, he is entitled to bring an action relative to the discourse which occurred during the campaign.[7] It is in this context that we examine the viability of the allegations in the complaint filed by Moats.

Publications Issued by Republican Party Did Not Violate CPA

Moats claims that the statements issued by the Republican Party violate the CPA, which provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful."[8] Elsewhere, the CPA provides: "Trade and commerce shall mean the sale of assets or services and any commerce directly or indirectly affecting the people of the State of Nebraska."[9]

> [The] CPA mirrors federal law. *Compare* 15 U.S.C. § 45(a)(1) ("[U]nfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.") *with* Neb. Rev. Stat. § 59-1602 ("[U]nfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful.") . . . the CPA is essentially the state

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[4] See *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957).

[5] *Mills v. Alabama*, 384 U.S. 214, 218, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966).

[6] *Snyder v. Phelps*, 562 U.S. 443, 458, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011) (quoting *Boos v. Barry*, 485 U.S. 312, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988)).

[7] See *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989).

[8] § 59-1602.

[9] § 59-1601(2).

> version of the Sherman Antitrust Act. . . . Although the CPA provides both a private right of action and a public right, disputes that fall within the ambit of the CPA are unfair or deceptive trade practices that affect the public interest.[10]

Moats contends that the statements made by the Republican Party during the campaign were deceptive acts or practices in the conduct of the Republican Party's trade or commerce; Moats claims the trades at issue are political speech and political campaigns. We understand Moats' argument to be that because the Republican Party conducts a trade, it is subject to the provisions of the CPA. The Republican Party disagrees with Moats. It claims that the complaint involves campaign literature which is political speech and not an asset or service under § 59-1601(2) and, therefore, not covered by the CPA. The Republican Party claims that the complaint fails to allege facts actionable under the CPA and does not raise a reasonable expectation that discovery will cure the defects.

The district court concluded that this case does not fall within the ambit of the CPA because the Republican Party was not engaged in "the sale of assets or services" and therefore not engaged in "[t]rade and commerce" under the CPA.[11] The district court cited to Black's Law Dictionary which defines commerce as "[t]he exchange of goods and services."[12] The court concluded that with respect to each of the 11 publications, Moats was attempting to expand the CPA beyond that which it was intended to regulate. This ruling was not error.

On appeal, Moats claims that the Republican Party is a business and therefore subject to the CPA. Moats relies on cases and treatises noting that political parties must organize and file tax returns, and argues that such activities show that political parties conduct a "trade or commerce" for purposes

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[10] *Triple 7, Inc. v. Intervet, Inc.*, 338 F. Supp. 2d 1082, 1087 (D. Neb. 2004).

[11] See § 59-1601(2).

[12] Black's Law Dictionary 304 (9th ed. 2009).

of § 59-1602 of the CPA.[13] Moats relies on *Grebner v. State*,[14] in which the Michigan Supreme Court considered a statute regulating balloting and indicated that a political consulting firm was a business. Moats also asserts that "'political speech'" is a "'"trade"'" and refers this court to publications indicating that large sums of money are spent on campaigns.[15] We do not find these authorities, references, or arguments to be persuasive in establishing Moats' contention that this court should read the CPA to encompass the political speech made during the campaign at issue. We also note that in his arguments, Moats has not set forth any case holding that the CPA of this state, or any other state, regulates speech used during a political campaign.

[3] In assessing the meaning of a statute, we are guided by the principle that in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[16]

The CPA states in § 59-1602 that it is unlawful to engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. Trade and commerce mean the sale of assets or services.[17] This case involves the propriety of the content of political speech used during a political campaign; regardless of the fact that the public was exposed to the speech and regardless of whether the Republican Party is a form of business, this case does not involve the sale of goods or services to the public. As the district court correctly concluded, the plain language of the CPA does not encompass a prohibition on the content of the campaign literature or political speech issued by the

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[13] See, e.g., 25 Am. Jur. 2d *Elections* § 197 (2004).

[14] *Grebner v. State*, 480 Mich. 939, 744 N.W.2d 123 (2007).

[15] Brief for appellant at 28.

[16] *Swift & Co. v. Nebraska Dept. of Rev.*, 278 Neb. 763, 773 N.W.2d 381 (2009).

[17] § 59-1601(2).

Republican Party in this case. Accordingly, we affirm the district court's ruling that none of the 11 claims made under the CPA are actionable.

Publications Are Not Defamatory

Moats claims that with the exception of publication No. 10, the publications made by the Republican Party were defamatory. Moats further contends that he should be given leave to amend his complaint to cure any technical deficiencies in the complaint. Moats argues that he has not waived his right to amend because there was no opportunity to request leave to amend, at the district court level.

The Republican Party challenges the allegations of defamation for various reasons, including that the allegations of defamation in the complaint lack contextual specificity, and asserts that even if the complaint were sufficiently pled, the publications were not defamatory because they were generally either opinion, parody, or were otherwise not actionable assertions. The Republican Party also argues that the complaint is insufficient because Moats did not plead special damages with particularity.

The district court determined that none of the statements made by the Republican Party were defamatory per se and that therefore, it was necessary for Moats to plead the defamatory nature of the language. The district court determined that because Moats failed to do so, the complaint was insufficient and dismissed the complaint.

We first address whether the contents of the publications at issue are potentially viable in defamation.

[4-6] In the ordinary case, a claim of defamation requires (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[18] However, with respect to fault, when the plaintiff in a libel action is a public figure and the speech is a matter of

[18] *Nolan v. Campbell*, 13 Neb. App. 212, 690 N.W.2d 638 (2004).

public concern, the plaintiff must demonstrate "actual malice," which means knowledge of falsity or reckless disregard for the truth, by clear and convincing evidence.[19] The plaintiff in a "public-libel" action must establish that the alleged statement is false by clear and convincing evidence and establish special damages.[20] In this case, the parties agree that Moats is a public figure.

[7,8] There are two types of libel: Words may be actionable per se, that is, in themselves, or they may be actionable per quod, that is, only on allegation and proof of the defamatory meaning of the words used and the existence of special damages.[21] Whether a communication is libelous per se is a threshold question of law for the court.[22]

In *Matheson v. Stork*,[23] we stated:

> Spoken or written words are slanderous or libelous per se only if they falsely impute the commission of a crime involving moral turpitude, an infectious disease, or unfitness to perform the duties of an office or employment, or if they prejudice one in his or her profession or trade or tend to disinherit one. . . . In determining whether a communication is libelous or slanderous per se, the court must construe the questioned language "in its ordinary and popular sense." [However,] [w]here a communication is "ambiguous or . . . meaningless unless explained, or . . . *prima facie* innocent, but capable of defamatory meaning, it [is per quod and it] is necessary to specially allege and prove the defamatory meaning of the words used, and to allege and prove special damages." . . . Further, the circumstances under which the publication of an allegedly defamatory communication was made,

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[19] See *Hoch v. Prokop*, 244 Neb. 443, 445, 507 N.W.2d 626, 629 (1993).

[20] See *id.* See, also, *K Corporation v. Stewart*, 247 Neb. 290, 526 N.W.2d 429 (1995).

[21] *K Corporation v. Stewart, supra* note 20.

[22] *Id.*

[23] *Matheson v. Stork*, 239 Neb. 547, 553, 477 N.W.2d 156, 160-61 (1991) (citations omitted).

> the character of the audience and its relationship to the subject of the publication, and the effect the publication may reasonably have had upon such audience must be taken into consideration.

Moats argues that the statements in publications Nos. 3 and 4 involving misleading statements made by him in an affidavit accuse him of falsifying an affidavit and were defamatory per se, because falsifying an affidavit is a crime.[24] We disagree with Moats' conclusion. A review of the language in these publications shows that the publications accused Moats of making *misleading* statements in an affidavit, not of making *false* statements in an affidavit. As such, the statements in publications Nos. 3 and 4 do not rise to the level of accusing Moats of committing any crime and therefore are not defamatory per se. Indeed, after reviewing all 10 publications, we conclude that none of the publications were defamatory per se.

Because the publications at issue were not defamatory per se, it was necessary for Moats to plead the defamatory nature of the words and special damages to properly plead his defamation per quod claims.[25] A defamation per quod claim is available within the context of a political campaign.[26] In assessing whether Moats has sufficiently pled a claim for defamation per quod, we consider that the statements at issue in this case were made in the course of a political campaign. We also acknowledge the tension between the need to protect one's reputation through a defamation action and the importance of First Amendment guarantees as they relate to political speech. Indeed, the U.S. Supreme Court noted that the First Amendment has "'"its fullest and most urgent application"'" to

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[24] See Neb. Rev. Stat. §§ 28-915 and 28-915.01 (Reissue 2008).

[25] See *K Corporation v. Stewart, supra* note 20. See, also, *Norris v. Hathaway*, 5 Neb. App. 544, 561 N.W.2d 583 (1997).

[26] See, e.g., *Maag v. Illinois Coalition for Jobs*, 368 Ill. App. 3d 844, 858 N.E.2d 967, 306 Ill. Dec. 909 (2006) (discussing defamation in connection with judicial retention campaign).

speech uttered during political campaigns.[27] The U.S. Supreme Court has pointed out the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on . . . public officials."[28] We have similarly observed that the "First Amendment encourages robust political debate,"[29] though we have also noted that "its protections are not absolute."[30] It is well settled that there is no constitutional right to espouse false assertions of facts, even against a public figure in the course of public discourse.[31]

[9,10] It is within this context that we review the defamatory nature of the statements made by the Republican Party. "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[32] Trial courts initially determine whether a statement is capable of defamatory meaning, and then the jury decides whether the words were so understood.[33] Courts make the determination in the first instance because a jury is "'unlikely to be neutral with respect to the content of [the] speech,' posing 'a real danger of becoming an instrument for

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[27] See, *McIntrye v. Ohio Elections Comm'n*, 514 U.S. 334, 347, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995) (quoting *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)). See, also, *Ky. Registry of Election Finance v. Blevins*, 57 S.W.3d 289 (Ky. 2001); *State v. Brookins*, 380 Md. 345, 844 A.2d 1162 (2004).

[28] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

[29] *State v. Drahota*, 280 Neb. 627, 637, 788 N.W.2d 796, 804 (2010).

[30] *Id.* at 632, 788 N.W.2d at 801.

[31] *New York Times Co. v. Sullivan, supra* note 28.

[32] Restatement (Second) of Torts § 559 at 156 (1977).

[33] *Henry v. Halliburton*, 690 S.W.2d 775 (Mo. 1985); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 111 (5th ed. 1984). See, also, *Davis v. Ross*, 754 F.2d 80 (2d Cir. 1985); *Worley v. OPS*, 69 Or. App. 241, 686 P.2d 404 (1984); *Thomas Merton Ctr. v. Rockwell Intern. Corp.*, 497 Pa. 460, 442 A.2d 213 (1981).

the suppression of . . . "vehement, caustic, and sometimes unpleasan[t]"' expression."[34]

[11] In the context of a defamation claim, the First Amendment protects the publication of statements which cannot be interpreted as stating actual facts, but, rather, is the opinion of the author.[35] Courts considering the distinction between fact and opinion have generally determined that making the distinction is a question of law to be decided by the trial judge.[36] "'While courts are divided in their methods of distinguishing between assertions of fact and expressions of opinion, they are universally agreed that the task is a difficult one.'"[37] The Restatement (Second) of Torts provides that a "defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."[38]

[12,13] In assessing whether a statement implies a false assertion of fact or a protected opinion, this court "looks at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed."[39] Courts applying the totality of the circumstances test in a defamation claim look to factors such as "(1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact, (2) whether the defendant used figurative or hyperbolic language that negates the impression, and (3) whether

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[34] *Snyder v. Phelps, supra* note 6, 131 S. Ct. at 1219 (quoting *Bose Corp. v. Consumers Union of U. S., Inc.*, 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)).

[35] See *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993).

[36] *Henry v. Halliburton, supra* note 33.

[37] *Id.* at 787 (quoting *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984)).

[38] Restatement, *supra* note 32, § 566 at 170.

[39] *Wheeler v. Nebraska State Bar Assn., supra* note 35, 244 Neb. at 791, 508 N.W.2d at 921.

the statement in question is susceptible of being proved true or false."[40]

As noted above, context is important to an analysis of whether a communication expresses a fact or an opinion: "[L]iterary, public, and social contexts are a major determinant of whether an ordinary reader would view an alleged defamatory statement as constituting fact or opinion."[41] Specifically with respect to a public debate, one court has held that

> "'where potentially defamatory statements are published in a public debate . . . or in another setting in which the audience may anticipate efforts by the parties to persuade others of their positions by use of epithets, fiery rhetoric, or hyberbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion.'"[42]

We first consider the allegedly defamatory statements in publication No. 3, which begins by asking: "'*Would you put a shady insurance company based in the Cayman Islands ahead of Nebraska consumers? You wouldn't. But trial attorney Rex Moats would . . . . How did Rex Moats mislead creditors and the public? Rex Moats claimed in an affidavit that National Warranty was doing financially well*.'"

In examining the totality of the circumstances, we note that this statement appeared in a political campaign brochure. It was written to persuade voters to vote against Moats through the use of both rhetoric and hyberbole—namely that National Warranty was "shady" and that Moats would choose it over Nebraska consumers. And the general tone of the publication suggests that the Republican Party was not making assertions of fact and that no reasonable reader would conclude otherwise. Nor are the terms "mislead" and "doing financially well" capable of being proved true or false. These terms

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[40] *Gardner v. Martino*, 563 F.3d 981, 987 (9th Cir. 2009). See, also, *Klein v. Victor*, 903 F. Supp. 1327 (E.D. Mo. 1995).

[41] *Brennan v. Kadner*, 351 Ill. App. 3d 963, 970, 814 N.E.2d 951, 958, 286 Ill. Dec. 725, 732 (2004).

[42] *Id.*

are instead relative to the situation, and constitute opinion statements.

Given this context, we simply cannot find this statement to be reasonably susceptible of an interpretation which implies a false assertion of fact, but instead conclude that it constitutes an opinion protected by the First Amendment.

We turn next to publication No. 4, which was a letter or greeting card mailing decorated with tropical artwork, including a tiki carving. The text of the card is purportedly sent by Moats from the Cayman Islands. In this text, Moats makes comments about the great food and great weather, states that he has a "**fantastic job working for a shady insurance company**," and comments that the "tax benefits sure are great" in the Cayman Islands. The card continues with Moats' expressing concern about his company's bankruptcy and suggesting that he may have made "misleading statements in an affidavit." Included on the card is a disclaimer indicating that the mailing was paid for by the Republican Party.

As with publication No. 3, we examine the totality of the circumstances surrounding this card. It was written as if by Moats, but from the contents of the mailing, it was very clearly not written by Moats. This card includes epithets, rhetoric, and hyberbole. The general tenor of the card suggests that it was not meant to assert objective fact, and its statements could not be mistaken for ones intended as truthful. And as we found above with regard to publication No. 3, the card's reference to Moats' making "misleading statements" and claiming that his company was doing "'just fine'" are not capable of being proved true or false, and constitute opinion statements. We therefore conclude that this card, like publication No. 3, is also protected speech under the First Amendment.

Publications Issued by Republican Party Did Not Set Forth Separate Claim for Tort of Invasion of Privacy by False Light

Moats also claims that each of the publications referenced earlier in this opinion violated the tort of invasion of privacy by false light. In his complaint, Moats alleged that each of the 11 statements outlined above "were false, made knowingly or with

reckless disregard for the truth, and were made for the purpose, and with the effect, of placing . . . Moats in a false light, to create a false public persona and image of him."

Section 20-204 provides:

> Any person, firm, or corporation which gives publicity to a matter concerning a natural person that places that person before the public in a false light is subject to liability for invasion of privacy if:
>
> (1) The false light in which the other was placed would be highly offensive to a reasonable person; and
>
> (2) The actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

[14] Invasion of privacy as a common-law tort has evolved over the years into several separate torts, one of which is the false light privacy claim at issue here.[43] We have recognized that publications that are alleged to constitute a false light invasion of privacy merit the same constitutional protections as publications alleged to be defamatory.[44] It has been stated that "[i]n order to survive as a separate cause of action, a false light claim must allege a nondefamatory statement. If the statements alleged are defamatory, the claims would be for defamation only, not false light privacy."[45] Thus, it has been widely held that a false light invasion of privacy claim "'sufficiently duplicative of libel'" is subsumed within the defamation claim.[46] We agree with these authorities and conclude that a statement alleged to be both defamatory and a false light invasion of privacy is subsumed within the defamation claim and is not separately actionable.

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[43] William L. Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960).

[44] See *Schoneweis v. Dando*, 231 Neb. 180, 435 N.W.2d 666 (1989).

[45] *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1193 n.3 (9th Cir. 1989). See *Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967).

[46] See *Dworkin v. Hustler Magazine, supra* note 45 at 1193 n.3. See, e.g., *Rice v. Comtek Mfg. of Oregon, Inc.*, 766 F. Supp. 1539 (D. Or. 1990); *Bollea v. World Championship* Wrestling, 271 Ga. App. 555, 610 S.E.2d 92 (2005).

In this case, Moats alleged a false light claim which is duplicative of his defamation claim with respect to each publication except publication No. 10, and therefore the false light aspects of his privacy claim, with the exception of publication No. 10, are subsumed in his defamation claims. Because each allegedly defamatory publication failed to state a claim for relief under defamation, they likewise fail to state a claim for relief for false light invasion of privacy. We consider publication No. 10, "NEB-015," separately because it is alleged to be a false light invasion of privacy, but not defamatory.

Publication No. 10 is not quoted in the complaint, and the allegation in the complaint merely suggests that it is in bad taste. We therefore determine that nothing in the complaint regarding publication No. 10, even under liberal notice pleading standards, see Neb. Ct. R. Pldg. § 6-1108(a)(2), indicates that a claim for relief under false light invasion of privacy is plausible or suggests that discovery will reveal evidence of a claim regarding publication No. 10. Thus, the complaint fails to state a false light invasion of privacy claim with respect to publication No. 10.

Although our reasoning differs somewhat from that of the district court, the district court did not err when it concluded that Moats failed to state a claim for relief based on invasion of privacy by false light with respect to all publications. We affirm this ruling.

CONCLUSION

The publications issued by the Republican Party are not in violation of the CPA or the tort of invasion of privacy by false light. Nor are the publications defamatory. We therefore affirm the decision of the district court.

AFFIRMED.

WRIGHT, J., not participating.

MILLER-LERMAN, J., concurring in part, and in part dissenting.

I concur in part in the majority opinion of the court and would affirm the district court's grant of the pretrial motion to dismiss the claims under Nebraska's Consumer Protection Act and the tort of invasion of privacy by false light. With respect to the defamation claims, I concur in affirming the dismissal

of all the claims, with the exception of allegations regarding publications Nos. 3 and 4.

I respectfully dissent in part, and would reverse the district court's grant of the pretrial motion to dismiss the defamation claims regarding publications Nos. 3 and 4, the latter of which includes the statement that Moats "made misleading statements in an affidavit." The affidavit-related statements impute that Moats committed the specific criminal act of making false statements under oath. See Neb. Rev. Stat. §§ 28-915 (felony false statement under oath) and 28-915.01 (misdemeanor false statement under oath) (Reissue 2008). Even though they were made in a political campaign, such accusations, if proved at trial to be false and made with malice, are not constitutionally protected under the First Amendment. Upon such proof, such accusations are defamatory. Charges of illegal conduct by a public individual are not opinion and, if false, are protected solely by the actual malice test. *Rinaldi v Holt, Rinehart*, 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943 (1977). Regardless of the ultimate success of these defamation claims at trial, I conclude at this early stage of this case that they state a claim for relief and because they are plausible, should have survived the pretrial motion to dismiss.

As an initial matter, I am aware of the rough-and-tumble nature of political campaigns and that under the First Amendment, "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). We have recognized the foregoing, but have also noted that the First Amendment's "protections are not absolute." *State v. Drahota*, 280 Neb. 627, 632, 788 N.W.2d 796, 801 (2010). It is well settled that there is no constitutional right to espouse false assertions of facts, even against a public figure in the course of public disclosure. *New York Times Co. v. Sullivan, supra.*

In the present case, I emphasize that we must view Moats' claims of defamation in the procedural posture of this case.

This case was dismissed based on a pretrial motion to dismiss in which it was claimed that the complaint failed to plausibly state a claim for relief and could not be proved meritorious at trial. This case is at the early pleading stage. We have recently explained the new standard that this court has adopted in assessing when a complaint survives a motion to dismiss in *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010). In *Doe*, we explained that to prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim. *Id.*

Keeping these principles in mind, I have reviewed each of the 10 publications. I would conclude that given the words themselves, the context of a political campaign, the First Amendment protections afforded political speech, and the context of how information is disseminated in the course of a political campaign, the only publications that are plausibly defamation per quod that can survive the motion to dismiss are the portions of publications Nos. 3 and 4 which allege that Moats made misleading statements in an affidavit and impute that he committed a crime. At this early stage of the case, the task with respect to the misleading affidavit publications is to assess the viability of the complaint without the benefit of examining the affidavit, which is not yet in the record.

Publication No. 3 stated: "'*How did Rex Moats mislead creditors and the public? Rex Moats claimed in an affidavit that National Warranty was doing financially well.*'" In his complaint with respect to publication No. 3, Moats states that he did not claim in an affidavit that National Warranty was doing financially well, only to be proved false later that the company "'went bankrupt.'" Moats alleged that "[t]o the contrary, National Warranty sought, and entered into, insolvency proceedings because . . . Moats reported its condition to regulatory officials in the Cayman Islands."

Publication No. 4, a fictitious letter or greeting card purportedly authored by Moats, stated: "Also, it looks like I have made misleading statements in an affidavit. Evidently, I claimed that my company is doing 'just fine,' but then declared bankruptcy two weeks later." In his complaint with respect to publication No. 4 and its reference to "misleading statements in an affidavit," Moats again alleged that he "did not make misleading statements in an affidavit as outlined above."

Moats urges on appeal and I agree that the two statements to the effect that Moats made misleading statements in an affidavit not only place his reputation in disrepute, but more significantly impute commission of a crime and are susceptible of defamatory meaning. See §§ 28-915 (felony false statement under oath) and 28-915.01 (misdemeanor false statement under oath). See, also, Neb. Rev. Stat. § 7-106 (Reissue 2007) (providing for disbarment of attorney for deceit to court, judge, or party); *State ex rel. NSBA v. Zakrzewski*, 252 Neb. 40, 560 N.W.2d 150 (1997) (suspending attorney from practice of law based in part on false statements in affidavit). Even given the nature of the two affidavit-related publications as imputing commission of a crime, I am mindful that to establish their defamatory character and recover damages, Moats must also establish, inter alia, that the statements were false and were made with actual malice and that he suffered special damages. See, *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626 (1993); *Woodcock v. Journal Pub. Co., Inc.*, 230 Conn. 525, 646 A.2d 92 (1994). This he may or may not be able to do.

The essence of Moats' defamation per quod claim regarding the affidavit-related statements is that the statements falsely impute that he committed the specific crime of making a false statement under oath. See §§ 28-915 and 28-915.01. Regarding public officials, it has been stated that "[n]o First Amendment protection enfolds false charges of criminal behavior," *Rinaldi v Holt, Rinehart*, 42 N.Y.2d 369, 382, 366 N.E.2d 1299, 1307, 397 N.Y.S.2d 943, 951 (1977), and "'a charge of criminal conduct . . . can never be irrelevant to . . . a candidate's fitness for office for purposes of application of the "knowing

falsehood or reckless diregard" rule of *New York Times Co. v. Sullivan*,'" *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 59 (2d Cir. 1980). Contemporary candidates are evidently expected to suffer insults, but under accepted jurisprudence, they are not expected to suffer false charges of criminal conduct without recourse.

As a preliminary matter, I reject the suggestion that publication No. 4 cannot be actionable because it was printed on an island-themed card and is therefore protected as parody or satire. Although the medium containing publication No. 4 is more colorful than a conventional campaign flyer, I do not accept the argument that the statement that Moats "made misleading statements in an affidavit" is immunized simply by its appearance on fanciful stationery. Compare, *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988); *Garvelink v. Detroit News*, 206 Mich. App. 604, 522 N.W.2d 883 (1994) (parodies, political cartoons, and satires are generally entitled to protection). Further, although publication No. 4 is purportedly from Moats, I do not think a reasonable reader would adopt the conceit that the publication was actually sent by the candidate himself. Instead, publication No. 4 clearly states the factual assertion of the author that Moats "made misleading statements in an affidavit."

The first task regarding the affidavit-related statements in publications Nos. 3 and 4 is to inquire whether the statements are reasonably susceptible of a defamatory connotation so as to warrant submission to a fact finder to determine if in fact the defamatory connotation was conveyed. See *Cianci v. New Times Pub. Co., supra*. The statements are considered in the context in which they appear, and the words taken as they are commonly understood. See *id*. To perform this task, I would consider the words "misleading" and "affidavit."

I reject the suggestion that the word "misleading" used to describe an "affidavit" is ambiguous and is incapable of defamatory connotation. It has been stated that the plain meaning of the word "misleading" is to cause to have a false impression. *Concordia Theological Seminary, Inc. v. Hendry*, No. 1:05-CV-285-TS, 2006 WL 1408385 (N.D. Ind. May 17, 2006) (unpublished opinion). See, similarly, Merriam

Webster's Dictionary of Law 315 (1996). More particularly, the federal obstruction of justice criminal statute provides that "misleading conduct" includes making a false statement. 18 U.S.C. § 1515(a)(3) (2006). Thus, "misleading" can connote falsity and a "misleading statement" can connote a false statement.

An affidavit is a legal instrument, and "affidavit" is a word of art. "Affidavit" is defined in Nebraska statutes as follows: "An affidavit is a written declaration under oath, made without notice to the adverse party." Neb. Rev. Stat. § 25-1241 (Reissue 2008). An affidavit has been described as a verified pleading that sets forth evidentiary facts within the personal knowledge of the verifying signatory. *Mata v. State*, 124 Idaho 588, 861 P.2d 1253 (Idaho App. 1993); 3 Am. Jur. 2d *Affidavits* § 8 (2002). Statements in affidavits are not casual musings but must set forth facts asserted to be true and show affirmatively that the affiant obtained personal knowledge of those facts. 3 Am. Jur. 2d, *supra*. We have stressed the legal significance of an affidavit and the importance that the statements in an affidavit be made under oath. See, e.g., *Moyer v. Nebraska Dept. of Motor Vehicles*, 275 Neb. 688, 747 N.W.2d 924 (2008). Further, we have stated that "[d]eliberate false testimony in a court proceeding tends to destroy the integrity of the judicial system and cannot be tolerated." *State v. McCaslin*, 240 Neb. 482, 493, 482 N.W.2d 558, 566 (1992). Thus, an "affidavit" is a legally significant statement made "under oath." See § 25-1241. I would conclude that the use of the word "misleading" proximate to the word "affidavit" is reasonably susceptible of the defamatory connotation that Moats committed a crime of false statement under oath.

Next I would consider whether the affidavit-related statements were protected as an expression of opinion. Contrary to the majority's view, I would not conclude that the affidavit-related statements are mere opinion. In *Cianci v. New Times Pub. Co.*, 639 F.2d 54 (2d Cir. 1980), the Court of Appeals for the Second Circuit provided an often-quoted summary of the law in this area, which I suggest we adopt. To distinguish between statements of fact and opinion with respect to public figures, the controlling principle is

> (1) that a pejorative statement of opinion concerning a public figure generally is constitutionally protected, quite apart from *Sullivan*, no matter how vigorously expressed; (2) that this principle applies even when the statement includes a term which could refer to criminal conduct if the term could not reasonably be so understood in context; but (3) that the principle does not cover a charge which could reasonably be understood as imputing specific criminal or other wrongful acts.

639 F.2d at 64. Applying the foregoing to the instant case, I would conclude that the affidavit-related statements complained of could reasonably be understood as imputing a specific criminal act by Moats; thus, the statements are assertions of fact, not opinion, and are actionable.

Numerous cases are reported which consider whether comments made against political figures suggesting a crime are actionable. For the most part, where the statement is found to be opinion, and therefore, not actionable, the statement suggesting a crime is described by the courts as hyperbole or the criminal allegation has been used in a figurative sense. See, e.g., *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6, 14, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970); *Rinaldi v Holt, Rinehart*, 42 N.Y.2d 369, 381, 366 N.E.2d 1299, 1307, 397 N.Y.S.2d 943, 951 (1977) (in advocating for judge's removal, statements claiming judge was "incompetent" are opinion, but statement claiming judge was "'probably corrupt'" was fact). Cases involving nonpolitical figures are to the same effect. *Lauderback v. American Broadcasting Companies*, 741 F.2d 193, 195 (8th Cir. 1984) (suggestion that insurance agent was "a crook and a liar" did not suggest specific criminal conduct); *Henry v. Halliburton*, 690 S.W.2d 775, 778 (Mo. 1985) (statements that insurance agent is "'a fraud and a twister'" did not suggest that agent committed specific crime).

In the instant case, the statements in publications Nos. 3 and 4 were not merely loose or figurative, nor were they limited to the suggestion that the publisher simply disagreed with Moats. The challenged statements suggest that Moats committed a specific crime as well as that he is personally dishonest. See *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 552

P.2d 425, 131 Cal. Rptr. 641 (1976). I would conclude that the ordinary and average reader could likely understand the use of the affidavit-related words, in the context of the entire publication, as meaning that Moats had committed illegal actions. Such accusations are not constitutionally protected, and Moats' claim that such accusations are defamatory is entirely plausible. Charges of illegal conduct by a public individual are not opinion and, if false, are protected solely by the actual malice test. *Rinaldi v Holt, Rinehart, supra.*

The potentially defamatory meaning of the affidavit-related statements in publications Nos. 3 and 4 can be appreciated based on the words used in the publications when combined with allegations in Moats' complaint. Notwithstanding that the affidavit-related statements were published in the context of a political campaign and giving due weight to the First Amendment concerns, I believe that Moats has alleged sufficient facts with respect to these two statements, when taken as true, to state a claim for relief of defamation per quod that is plausible on its face.

It is important to stress that my conclusion regarding the defamatory potential of portions of publications Nos. 3 and 4 is dictated by the fact that this lawsuit is at the early stage of litigation, and I, and this court, must assess the plausibility of the allegation of defamation based on the allegations in the complaint. See *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010). In this regard, I reiterate that the affidavit in question has not yet been produced for review by the trial court or this court in the limited context of consideration of the pretrial motion to dismiss. Because the affidavit is not part of the record, I make no comment regarding the ultimate merits at trial of Moats' defamation allegations concerning making a misleading affidavit referred to in publications Nos. 3 and 4.

I agree with the majority opinion except with respect to the decision to affirm the pretrial dismissal of the defamation claims regarding publications Nos. 3 and 4. Moats alleges he was defamed in publications Nos. 3 and 4, the latter of which states that Moats "made misleading statements in an affidavit." This statement imputes that Moats committed the specific

criminal act of making false statements under oath. Even in rough-and-tumble political discourse, a charge of specific illegal conduct by a public individual, if false and made with actual malice, is not protected by the First Amendment and is defamatory. Whether these accusations are false and made with malice can only be determined by examining evidence at trial. Neither the trial court nor this court has seen the affidavit. I would conclude that the district court erred when it determined prematurely that the affidavit-related allegations in publications Nos. 3 and 4 could not succeed at trial and therefore dismissed these claims at the pretrial stage. To this limited extent, I would reverse the district court's order, permit the case to proceed solely as to the defamation claims regarding publications Nos. 3 and 4, and await the evidence.

Betty Vandenberg, appellee, v. Butler County Board of Equalization, appellant.

796 N.W.2d 580

Filed April 28, 2011. No. S-10-783.

1. **Taxation: Judgments: Appeal and Error.** Appellate courts review decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.

Appeal from the Tax Equalization and Review Commission. Reversed and remanded.

Julie L. Reiter, Butler County Attorney, for appellant.

No appearance for appellee.

Heavican, C.J., Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.