APPENDIX

IN THE SUPREME COURT OF IOWA

No. 22-1940

Scott County No. LACE132888

March 18, 2024

CRAIG MALIN,

Plaintiff-Appellant/Cross-Appellee,

vs.

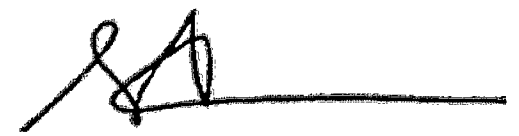
LEE ENTERPRISES, INC., LEE PUBLICATIONS, INC., d/b/a WATERLOO CEDAR FALLS COURIER, ST. LOUIS POST-DISPATCH, LLC, d/b/a ST. LOUIS POST DISPATCH, ROY BIONDI, RAY FERRIS, TOD ROBBERSON and KEVIN MOWBRAY,

Defendants-Appellees/Cross-Appellants.

After consideration by this court, with justices Waterman and McDermott taking no part, further review of the above-captioned case is denied.

Case Number	Case Title
22-1940	Malin v. Lee Enterprises, Inc.

So Ordered



Susan Larson Christensen, Chief Justice

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IN THE COURT OF APPEALS OF IOWA

No. 22-1940

Filed January 24, 2024

CRAIG MALIN,

Plaintiff-Appellant/Cross-Appellee,

vs.

LEE ENTERPRISES, INC., LEE PUBLICATIONS, INC., d/b/a WATERLOO CEDAR FALLS COURIER, ST. LOUIS POST-DISPATCH, LLC, d/b/a ST. LOUIS POST DISPATCH, ROY BIONDI, RAY FERRIS, TOD ROBBERSON and KEVIN MOWBRAY,

Defendants-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Scott County, Stuart P. Werling, Judge.

Craig Malin appeals the district court's summary judgment ruling. The defendants cross-appeal, asserting the court erred in not also granting summary judgment on additional grounds. AFFIRMED ON APPEAL AND CROSS-APPEAL.

Theodore Sporer, Des Moines, for appellant/cross-appellee.

Ian J. Russell, Abbey C. Furlong, and Jenny L. Juehring of Lane & Waterman LLP, Davenport, for appellees/cross-appellants.

Heard by Tabor, P.J., and Ahlers and Chicchelly, JJ.

AHLERS, Judge.

Former Davenport city administrator Craig Malin brought a civil action against Lee Enterprises, Inc., doing business as the Quad-City Times, and two of its writers alleging the newspaper published articles in 2014 and 2015 that libeled him and intentionally interfered with his employment contract. With respect to Malin's libel claims, the district court ultimately granted summary judgment in favor of the defendants. The intentional-interference-with-contractual-relations claim proceeded to a jury trial, and the jury found in favor of the defendants. Malin appealed, and a panel of this court "affirm[ed] the verdict and judgment in favor of the defendants." Malin v.

Quad-City Times, No. 19-1838, 2021 WL 1399837, at *3 (Iowa Ct. App. Apr. 14, 2021).

In 2019, while those proceedings were ongoing, two other Lee Enterprises, Inc. newspapers—the Waterloo Cedar Falls Courier and the St. Louis Post- Dispatch—printed editorials under the heading "Opinion." The editorials were entitled either "Editorial: Lawsuit threatens to put a chill on aggressive reporting that exposes wrongdoing" or "Truth on trial[:] Lawsuit could put a chill on aggressive journalism that exposes wrongdoing" and were printed as follows:

"Libel allegations always send a shudder through news organizations, but thanks to First Amendment protections affirmed by the U.S. Supreme Court, judges rarely agree to hear libel cases against reporters and even more rarely do courts side with plaintiffs. The bar is set extraordinarily high for good reasons. Otherwise, corrupt officials like former St. Louis County Executive Steve Stenger could use frivolous lawsuits to bankrupt local organizations whose aggressive reporting exposes wrongdoing.

In Davenport, Iowa, a former city administrator is trying a chilling tactic to punish the local newspaper for reporting that exposed backroom wheeling and dealing and cost him his job. The accuracy of reporting by Davenport's Quad-City Times newspaper

might not be adequate to fend off the "tortious interference" case brought by former city administrator Craig Malin.

The Quad-City Times, which along with this newspaper is owned by Lee Enterprises, published a series of damning reports in 2015 exposing involvement by Malin and Davenport's former city attorney in the advancement of taxpayer-funded groundwork for a future casino project. The city council and mayor had given them no authorization to do so. The newspaper's reporting led to Malin's negotiated departure from office.

Recall the backroom wheeling and dealing by Stenger, who likely would have escaped public accountability if not for the Post- Dispatch's aggressive reporting. Stenger and his cronies tried all kinds of maneuvers to silence this newspaper's reporting but failed. Malin tried a libel lawsuit in 2017 but also failed. Malin is instead suing the Quad-City Times for tortious interference, arguing that the newspaper's reporting interfered with his employment contract. In June 2015, the city council overwhelmingly approved a severance agreement that Malin signed. He's now city manager in the northern California town of Seaside.

But his resort to a tortious interference complaint gives him the ability to sidestep the Supreme Court's normal libel standard of proof for plaintiffs in news

media cases—that reporters displayed a "reckless disregard" for the truth, and were malicious and premeditated in trying to damage the plaintiff. That's why this case is so troubling. Adherence to professional reporting standards might not provide protection—as suggested by Judge Nancy Tabor's decision to let the case proceed.

Attorney Sarah Matthews, with the Reporters Committee for Freedom of the Press, warns the case "could have a significant chilling effect" on news coverage.

The mere threat of a tortious interference lawsuit caused CBS News to back down from an investigative report on "60 Minutes" in 1995 exposing that a chief executive of a major tobacco company lied about his knowledge of nicotine's addictiveness. Rather than face potential bankruptcy from such a lawsuit, CBS pulled back—even though the truthfulness of its report was not challenged.

The trial starts Monday in Iowa. The only acceptable ruling would be one that upholds press freedoms and rejects frivolous efforts to stifle aggressive reporting."

In response, Malin brought the instant action against Lee Enterprises, Inc.; Waterloo-Cedar Falls Courier; St. Louis Post-Dispatch; Roy Biondi; Ray Farris; Tod Robberson; and Kevin Mowbray.

Malin's claims include defamation; invasion of privacy; unjust enrichment; intentional infliction of emotional distress; and negligent hiring, training, and supervision. Malin moved for partial summary judgment on his defamation claim. The defendants resisted and filed their own motion for summary judgment. The district court ultimately denied Malin's motion and instead granted summary judgment in favor of the defendants. Although it granted the defendants summary judgment on other grounds, the court rejected the defendants' contention that Malin's claims were barred by res judicata.

Malin appeals claiming the district court erred by denying his partial motion for summary judgment and instead granting summary judgment in favor of the defendants.[1] The defendants cross-appeal the rejection of their res judicata theory.

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[1] Malin also raises a constitutional claim on appeal. However, that claim is not preserved for our review because Malin never developed the argument below. See Taft v. Iowa Dist. Ct., 828 N.W.2d 309, 322–23 (Iowa 2013) ("A party cannot preserve error for appeal by making only general reference to a constitutional provision in the district court and then seeking to develop the argument on appeal.").

I. Scope and Standard of Review

Our review of a grant of summary judgment is for correction of errors at law. Stevens v. Iowa Newspapers, Inc., 728 N.W.2d 823, 827 (Iowa 2007). "Summary judgment is appropriate only when the entire record demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." Id.; Iowa R. Civ. P. 1.981(3). "The record on summary judgment includes the pleadings, depositions, affidavits, and exhibits presented." Stevens, 728 N.W.2d at 827. "We review the evidence in the light most favorable to the nonmoving party." Id.

II. Discussion

The claims in this case are all rooted in and inextricably intertwined with Malin's defamation claim. See Malin, 2021 WL 1399837, at *2 (applying defamation standards to other causes of action that are rooted in defamation). So if the district court properly granted summary judgment in favor of the defendants with respect to that claim, then all of Malin's other claims necessarily fail.

"The law of defamation includes the twin torts of libel and slander. Libel is generally a written publication of defamatory matter, and slander is generally an oral publication of such matter."

Schlegel v. Ottumwa Courier, 585 N.W.2d 217, 221 (Iowa 1998) (internal citations omitted). "Unique rules apply in defamation cases because First Amendment rights are implicated." Stevens, 728 N.W.2d at 827.

In an ordinary case, a plaintiff establishes a prima facie claim for defamation by showing the defendant "(1) published a statement that (2) was defamatory (3) of and concerning the plaintiff, and (4) resulted in injury to the plaintiff." We have previously held the defamatory publication need not be explicit, but may be implied "by a careful choice of words in juxtaposition of statements." . . . When a plaintiff is a public official, the First Amendment adds two elements to the tort that must be established by clear and convincing evidence—the statement must be false and it must be made with actual malice.[2]

Bertrand v. Mullin, 846 N.W.2d 884, 892 (Iowa 2014) (internal citations and footnote omitted). The court must initially examine the "totality of the circumstances in which [the] statements are made" and "decide whether the challenged statement is 'capable of bearing a particular meaning, and whether that meaning is defamatory.'" Yates v. Iowa W. Racing Ass'n, 721 N.W.2d 762, 769, 771–72 (Iowa 2006) (citation omitted). But the court

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[2] Malin concedes he is a public official.

should not "indulge far- fetched interpretations of the challenged publication. The statements at issue 'should . . . be construed as the average or common mind would naturally understand [them].'" Id. at 772 (alterations in original) (citation omitted).

Truth "is an absolute defense" to a defamation claim. Huegerich v. IBP, Inc., 547 N.W.2d 216, 221 (Iowa 1996). The substantial truth of a statement entitles a defendant to summary judgment:

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. In that event, the test, for summary judgment purposes, is whether the plaintiff would have been exposed to any more opprobrium had the publication been free of error. Behr v. Meredith Corp., 414 N.W.2d 339, 342 (Iowa 1987) (internal citation omitted). Similarly, opinion is generally protected under the First Amendment. Kiesau v. Bantz, 686 N.W.2d 164, 177 (Iowa 2004), overruled on other grounds by Alcala v. Marriott Int'l, 880 N.W.2d 699, 708 n.3 (Iowa 2016); see also Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974) ("Under the First Amendment there is no such thing as a false idea."). More precisely, "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." Andrew v.

Hamilton Cnty. Pub. Hosp., 960 N.W.2d 481, 491 (Iowa 2021) (citation omitted). We use a four- factor test to determine whether opinion statements are protected. See Yates, 721 N.W.2d at 769–70; Andrew, 960 N.W.2d at 491–92 (reaffirming that we continue to use the four-factor test). The first factor considers "the precision and specificity of the disputed statement." Yates, 721 N.W.2d at 770 (citation omitted). The second factor explains "if a statement is precise and easy to verify, it is likely the statement is fact." Id. (citation omitted). The third factor considers the "literary context in which the disputed statement [is] made." Id. (alteration in original) (citation and internal quotation marks omitted). The final factor focuses on "the social context" meaning "the category of publication, its style of writing and intended audience." Id. (citation omitted).

With these concepts in mind, we consider whether the district court correctly denied Malin's partial motion for summary judgment and instead granted judgment in favor of the defendants.

As counsel for the defendants stressed at oral argument, these publications were specifically styled as editorials, not articles—"an important distinction." Review of the publications[3]makes clear

[3] The publications were nearly identical and only differed slightly in title depending on the format viewed by the reader (e.g., online, print, etc.).

they discussed the editorial board's thoughts and concerns on the impact of libel actions against reporters (like Malin's original action) and the potential impact on zealous reporting. The publications also contained some factual statements. It generally explained that Quad-City Times had published reports about Malin's involvement in a casino project in Davenport. That is a factually correct statement—Quad-City Times did make such reports about Malin.[4] And Malin does not dispute the reports played a part in his "departure from office" as stated in the publications.

Malin takes issue with the publications' reference to his "backroom wheeling and dealing" and references to "corrupt official . . . former St. Louis County Executive Steve Stenger" and "a chief executive of a major tobacco company [who] lied about his knowledge of nicotine's addictiveness." Malin argues that describing him as someone who participates in backroom wheeling and dealing and

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[4] Malin complains that the publications describe groundwork for the casino project as "taxpayer-funded" and claims that is not true because bond funding for the casino would be abated through tax increment financing generated by the casino upon its completion. We consider the gist of the publications' statement to be true because the casino development was to be funded by bonds that would be repaid by tax revenue.

then discussing persons of ill repute implies he is a dishonest or corrupt person. But considering the references in context, it is apparent that the editorials make no comparison between Malin and Stenger or the tobacco executive. There is no insinuation that Malin and those individuals are of the same ilk. Instead, the editorials discuss the investigative reporting efforts used to uncover Stenger's wrongdoing and legal threats used to kill a story about the tobacco executive's knowledge of nicotine's dangers. This was discussed to highlight the importance of investigative journalism and the dangers of legal efforts to suppress reporting. After all, that was the point of the editorials—to highlight the importance of journalism to the public and stress it should not be suppressed through litigation efforts.

Following our review of the applicable law and the publications, we conclude the district court correctly granted summary judgment to the defendants. Because of that conclusion, it is unnecessary for us to address the defendants' cross-appeal arguing an alternative basis to affirm, so we decline to do so.

AFFIRMED ON APPEAL AND CROSS-APPEAL.

IN THE IOWA DISTRICT COURT FOR SCOTT COUNTY

Case No. 08721 LACE132888

October 28, 2022

ORDER

CRAIG MALIN,

Plaintiff-Appellant/Cross-Appellee,

vs.

LEE ENTERPRISES, INC., LEE PUBLICATIONS, INC., d/b/a WATERLOO CEDAR FALLS COURIER, ST. LOUIS POST-DISPATCH, LLC, d/b/a ST. LOUIS POST DISPATCH, ROY BIONDI, RAY FERRIS, TOD ROBBERSON and KEVIN MOWBRAY,

Defendants-Appellees/Cross-Appellants.

Having carefully reviewed Plaintiff's motion for reconsideration, the resistance thereto and the reply to said resistance, it is the ORDER of the Court that said motion is DENIED for the reasons set forth in said resistance.

ALL ABOVE IS SO ORDERED this 28th day of October, 2022. Clerk to notify all self-represented litigants and attorneys of record.

Case Number	**Case Title**
LACE132888	Malin v. Lee Enterprises, Inc.
Type:	Other Order

So Ordered

Stuart P. Werling, District Court Judge,
Seventh Judicial District of Iowa

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IN THE DISTRICT COURT IN AND FOR SCOTT COUNTY

LACE132888

September 11, 2022

CRAIG MALIN,

Plaintiff

vs.

LEE ENTERPRISES, INC., LEE PUBLICATIONS, INC., d/b/a WATERLOO CEDAR FALLS COURIER, ST. LOUIS POST-DISPATCH, LLC, d/b/a ST. LOUIS POST DISPATCH, ROY BIONDI, RAY FERRIS, TOD ROBBERSON and KEVIN MOWBRAY,

Defendants

Ruling on Parties' Cross-Motions For Summary Judgement, Stuart P. Werling, Judge.

On August 8, 2022, the Parties' Cross-Motions for Summary Judgment came before the Court for argument. The Plaintiff was represented by Theodore Sporer. The Defendants were represented

by Ian Russell. After having considered the evidence, the written and oral arguments of counsel, and the applicable law, the Court enters the following ruling on the pending motion.

FACTUAL BACKGROUND

Plaintiff was employed as the City Administrator by the City of Davenport from August 2001 through June of 2015.[1] On June 15, 2017, Plaintiff filed a lawsuit against Defendant Lee Enterprises, Incorporated ("Lee Enterprises") alleging defamation regarding various news articles published through the Quad City Times newspaper and qctimes.com website in June of 2015.[2] That lawsuit alleged defamation, libel by implication or false light, and intentional interference with contract. Petition at Law and Jury Demand, p. 8, 16, and 39, *Malin v. The Quad-City Times et. al.*, No. LACE129075 (EDMS) (Iowa Dist. Ct. for Scott County June 15, 2017). The central issue of that lawsuit concerned the Quad City Times's reporting on a road paving project on Elmore Avenue leading to the Rhythm City Casino in Davenport, Iowa ("The Elmore Avenue Project"). *Id.* at 2-8, 9-19, 21, 23-25, 27, 29, 31. Specifically, the Quad City Times reported that the paving project would be an

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[1] Petition and Jury Demand ("Petition"), filed May 18, 2020, at p. 4; Answer to Petition and Demand for Jury Trial ("Answer") at p. 27.

[2] Petition at p. 19-24; Answer at p. 9-12.

additional financial burden on taxpayers, which Plaintiff contended was objectively false and defamatory. *Id.* The defendants in that case subsequently filed for summary judgment, and the merits of that motion were addressed by the Court in a ruling issued on October 4, 2018. *Id.*, Ruling on Motion for Summary Judgment, filed October 4, 2018.

The Court found that allegations by the Quad City Times to the effect that the city ended up paying the costs of the casino were "largely true." *Id.* at p. 13 ("[T]he statements are largely true. Malin acknowledged that the city did end up paying for those costs"). The Court found that certain other statements "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" and that such statements, if interpreted that way by a jury, would be "attacking [Plaintiff's] character and integrity" and constitute "defamation per se." *Id.* at p.14 However, the Court found that Plaintiff was a public official, and thus was not entitled to pursue a defamation *per se* action under the circumstances of that case. *Id.* Ultimately, the Court granted summary judgment against Plaintiff's defamation and libel by implication claims, holding that although there was a genuine issue of material fact as to whether the Quad City Times' statements were capable of a defamatory meaning, Plaintiff

had not demonstrated "evidence of actual reputational harm." *Id.* at p. 21. At trial on the merits of Plaintiff's intentional interference with contract claim, the jury returned a unanimous general verdict in favor of the defendants. *Id.*, *Verdict Form Back for Defendants,* filed Oct. 7, 2019.

Plaintiff then appealed, challenging two jury instructions that "essentially precluded liability if the jury found the defendants' actions were protected by the First Amendment to the United States Constitution." *Malin v. Quad-City Times*, 964 N.W.2d 10 (Table); 2021 WL 1399837 at *1 (Iowa Ct. App. Apr. 14, 2021). The Iowa Court of Appeals found that "the gravamen of Malin's intentional-interference claim...was the falsity of the media defendant's statements" and that they were therefore entitled to first amendment protections. *Id.* at *2. The court found plaintiff was attempting to use the intentional interference with contract claim as a means to "avoid the strict requirements for establishing a libel or defamation claim." *Id.* at *3 ("*Cohen* does not assist Malin. There, the Court determined the plaintiff was not 'attempting to use a promissory estoppel cause of action to avoid the strict requirements for establishing a libel or defamation claim.' Malin's claim does just that."). The court ultimately held that "the jury either found that Malin failed to prove the falsity of the defendants' statements... or found the defendants were entitled to First

Amendment protections..." and that "[b]oth findings were supported by the evidence." *Id.*

Approximately one year prior to the adverse Iowa Court of Appeals ruling, Plaintiff filed a second defamation suit against Lee Enterprises and the other named defendants in this suit. In addition to reiterating the factual basis underpinning his first defamation lawsuit, Plaintiff brings a claim for Negligent Hiring, Training, and Supervision against Lee Enterprises for an alleged failure to train and supervise its employees in connection with the publishing of the 2015 articles which were the subject of Plaintiff's first defamation suit, as well as other allegedly defamatory articles published afterward.[3] Plaintiff also brings a claim for defamation against Defendants Post-Dispatch and Defendant Courier, two of Lee Enterprises' other newspapers, regarding an article published online in 2019.[4] One component of Plaintiff's claim is that the article unfairly compares Plaintiff to a convicted felon: Steve Stenger.[5] The claim also reasserts Plaintiff's previous defamation claim that the Quad City Times' article stating that the Elmore Avenue

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[3] Petition and Jury Demand (Amended) ("Amended Petition"), filed as attachment to Motion for Leave to Amend, filed Sept. 16, 2021, at p. 29-36.

[4] Amended Petition at p. 37, 38.

[5] Amended Petition at p. 39-40

Project was a tax burden is false.[6] Plaintiff also brings claims of invasion of privacy, unjust enrichment, and intentional infliction of emotional distress based on this 2019 article.[7]

On March 3, 2022, Plaintiff filed the Motion for Partial Summary Judgment now before the Court.[8] Plaintiff argues that the undisputed material facts of this case show that the Elmore Avenue Project was not "taxpayer-funded" and that otherwise the elements of his defamation claim are established such that summary judgment is appropriate.[9] Plaintiff seeks in relief for the Court to enter Summary Judgment on Plaintiff's claim of defamation, except for the element of damages.[10] On April 8, 2022, Defendants filed the other Motion for Summary Judgment now before the Court.[11] Defendants in a combined resistance and brief argue that Plaintiff's claims are barred by the doctrines of issue preclusion and claim preclusion, and that otherwise the undisputed facts of the case demonstrate that Plaintiff's claims fail as a matter of law.[12] Plaintiff resists, arguing that claim and

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[6] Amended Petition at p. 42.

[7] Amended Petition at p. 46, 50,

[8] Plaintiff's Motion for Partial Summary Judgment, field Mar. 3, 2022.

[9] Plaintiff's Motion for Partial Summary Judgment at p. 1-3.

[10] Plaintiff's Motion for Partial Summary Judgment at p. 3.

[11] Defendant's Motion for Summary Judgment, filed Apr. 8, 2022.

[12] Defendant's Motion for Summary Judgment at p. 2.

issue preclusion do not apply in this case and that further there are disputes of material fact precluding summary judgment.[13]

ANALYSIS

"Summary judgment is appropriate only when the record shows no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Hedlund v. State*, 930 N.W.2d 707, 715 (Iowa 2019) (citing Iowa R. Civ. P. 1.981(3)). "On motion for summary judgment, the court must: (1) view the facts in the light most favorable to the nonmoving party, and (2) consider on behalf of the nonmoving party every legitimate inference reasonably deduced from the record." *Morris v. Legends Fieldhouse Bar and Grill, LLC*, 958 N.W.2d 817, 821 (Iowa 2021). The moving party bears the burden of showing there is no genuine issue of material fact. *Mormann v. Iowa Workforce Development*, 913 N.W.2d 554, 565 (Iowa 2018). "Even if the facts are undisputed, summary judgment is not proper if reasonable minds could draw different inferences from them and thereby reach different conclusions." *Hedlund*, 930 N.W.2d at 715. "Questions of negligence are ordinarily reserved for the jury, and only in extraordinary cases is summary judgment proper." *Clinkscales v.*

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[13] Plaintiff's Reply to Defendant's Combined Brief Dated April 8, 2022 ("Plaintiff's Reply Brief"), filed Apr. 24, 2022, at p. 28-30.

Nelson Securities, Inc., 697 N.W.2d 836, 846 (Iowa 2005). "[A] court deciding a motion for summary judgment must not weigh the evidence, but rather simply inquire whether a reasonable jury faced with the evidence presented could return a verdict for the nonmoving party." *Id.* at 841. Being the more expansive in scope, the Court first addresses Defendants' Motion for Summary Judgment.

I. Res Judicata

The judicial doctrine of *res judicata* "includes both claim preclusion and issue preclusion. *Pavone v. Kirke*, 807 N.W.2d 828, 835 (Iowa 2011). Issue preclusion (also known as collateral estoppel) "prevents parties from relitigating issues already raised and resolved in a prior action." *Clark v. State*, 955 N.W.2d 459, 464 (Iowa 2021).

The doctrine serves a dual purpose: to protect litigants from the vexation of relitigating identical issues with identical parties or those persons with a significant connected interest to the prior litigation, and to further the interest of judicial economy and efficiency by preventing unnecessary litigation. *Id.* at 464-465 (internal quotation marks omitted). "Issue preclusion also promotes public faith in the judicial system by avoiding two authoritative but conflicting answers being given to the very same question." *Id.* at 465 (internal quotation marks omitted). Issue preclusion no longer requires mutuality of the parties, but is restricted to "use only against a

party, or one in privity to a party, to the prior suit." *Id.* In addition, [a] party must establish four elements to employ issue preclusion: (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. *Id.*

Here, the plaintiff is the same in both cases, so the relaxed standard of same-party mutuality in issue preclusion is satisfied. The Court next addresses whether the issue concluded is identical. In Plaintiff's own words "the issue...of the *current* defamation claim..." is concerned with "whether 'taxpayers' funded groundwork for the casino project."[14] This is an issue that the Court determined upon motion for summary judgment in the previous defamation case. Ruling on Motion for Summary Judgment, *Malin*, No. LACE129075 at p. 13 ("However, the statements are largely true. Malin acknowledged that the city did end up paying for those costs"). As to the third element, materiality and relevance, the Iowa Supreme Court has held that this element is satisfied when the issue sought to be precluded constitutes the basis

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[14] Plaintiff's Reply at p. 4.

for the previous claim. *Hunter v. City of Des Moines*, 300 N.W.2d 121, 126 (Iowa 1981) ("The issue of the city's negligence and of proximate cause were clearly material and relevant to the disposition of the previous case, in that those issues constituted the bases for Wadle's claim against the city"). The purported falsity of the Quad-City Times claim that taxpayers footed the bill for the casino project was the "gravamen of Malin's intentional-interference claim." *Malin*, 2021 WL 1399837 at *2. And again, the Court in the previous case's summary judgment ruling made a specific finding that the taxpayer burden comments were largely true. Accordingly, the Court finds that the third element, materiality and relevance, is satisfied. This leaves the final element: "the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment." *Clark*, 955 N.W.2d at 465.

"Admittedly, the fourth requirement of our collateral estoppel analysis—the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment—is exceedingly vague." *Comes v. Microsoft Corp.*, 709 N.W.2d 114, 118 (Iowa 2006). However, generally Iowa courts "apply the necessary and essential requirement narrowly, and only preclude those facts vital or crucial to the previous judgment, or those properly characterized as ultimate facts without which the previous judgment would lack support." *Id.* at 119. By

contrast, mere "subsidiary facts" do not receive preclusive treatment. *Id.* at 120. There are two rulings that the Court must analyze to determine if the issue of the taxpayer burden reporting was already decided as a necessary and essential issue: the prior ruling on summary judgment and the jury's general verdict on Plaintiff's claim for tortious interference. Upon review of the Court's prior summary judgment, the Court finds that the truth or falsity of the taxpayer burden reporting was a crucial fact in the Court's prior summary judgment ruling on Plaintiff's previous defamation case. The determination of the truth or falsity of those taxpayer burden claims was not subsidiary to Plaintiff's case, rather, the determination was the very heart of Plaintiff's legal claims. Petition at Law and Jury Demand, p. 2-8, 9-19, 21, 23-25, 27, 29, 31, *Malin* No. LACE129075 (EDMS). However, the determination of the truth or falsity of that issue was not essential to the Court's resolution of Plaintiff's claim. Rather, the Court dismissed Plaintiff's petition on the grounds that Plaintiff had not proved reputational harm. *Id.* at p. 21.

The issue was likewise not definitively settled by the general jury verdict in that case. *See e.g. In re Richardson's Estate*, 93 N.W.2d 777, 782 (Iowa 1958) ("In view of the general verdict of the jury in favor of defendant we are unable to determine as to what issues were given special consideration by the jury; whether one or all of the issues involved produced determination of the case

in favor of defendant"). The Iowa Court of Appeals specifically noted that the jury "either found that Malin failed to prove the falsity of the defendant's statements...or found the defendants were entitled to First Amendment protections." *Malin,* 2021 WL 1399837 at *3. As the Court can find no certainty as to which of these issues the jury found in favor of the defendants, "the whole subject-matter" of those two issues is "at large." *Richardson*, 93 N.W.2d at 784. Thus, issue preclusion does not apply as to the truth or falsity of Defendants' taxpayer burden claims.

The Court now considers claim preclusion. "Claim preclusion is 'based on the principle that a party may not split or try his claim piecemeal .... A party must litigate all matters growing out of his claim at one time and not in separate actions.'" *Lemartec Engineering & Construction v. Advance Conveying Technologies, LLC*, 940 N.W.2d 775, 779 (Iowa 2020) (quoting *Iowa Coal Mining Co. v. Monroe County*, 555 N.W.2d 418, 441 (Iowa 1996)). "Once an issue has been resolved, there is no further fact-finding function to be performed." *Id.* (quoting *Colvin v. Story Cty. Bd. of Review,* 653 N.W.2d 345, 349 (Iowa 2002).

The general rule of claim preclusion provides a valid and final judgment on a claim precludes a second action on that claim or any part of it. The rule applies not only as to every matter which was offered and received to sustain or defeat the claim or

demand, but also as to any other admissible matter which could have been offered for that purpose. Claim preclusion, as opposed to issue preclusion, may foreclose litigation of matters that have never been litigated. It does not, however, apply unless the party against whom preclusion is asserted had a "full and fair opportunity" to litigate the claim or issue in the first action. A second claim is likely to be barred by claim preclusion where the "acts complained of, and the recovery demanded are the same or where the same evidence will support both actions." A plaintiff is not entitled to a second day in court by alleging a new ground of recovery for the same wrong.

Spiker v. Spiker, 708 N.W.2d 347, 353 (Iowa 2006) (quoting *Arnevik v. Univ. of Minn. Bd. of Regents*, 642 N.W.2d 315, 319 (Iowa 2002)) (emphasis in original). "[T]he party seeking to invoke the doctrine of claim preclusion must establish three elements: (1) the parties in the first and second action were the same; (2) the claim in the second suit could have been fully and fairly adjudicated in the prior case; and (3) there was a final judgment on the merits in the first action." Id. (internal quotation marks omitted). The Court considers the defense element by element. First, are the parties in the first and second action the same? Certainly, the plaintiff is the same. Craig Malin is the sole plaintiff in both suits. An analysis of the Defendants is less straightforward. Lee Enterprises is a named defendant in both suits.

However, Defendants Lee Publications, Inc., St. Louis Post-Dispatch, LLC, St. Louis Post Dispatch, Roy Biondi, Ray Farris, Tod Robberson, and Kevin Mowbray were not parties to the first suit. Petition at Law and Jury Demand, *Malin* No. LACE129075 (EDMS). The fact that such defendants were not named is not the end of the inquiry, however, as the requirement of sameness also includes parties who are in privity. *Pavone*, 807 N.W.2d at 836. For the purposes of claim preclusion, "[t]he definition of privity is identical to that used for issue preclusion." *Penn v. Iowa State Bd. of Regents*, 577 N.W.2d 393, 398 (Iowa 1998). "A privy for purposes of this doctrine is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase." *Id.* The term "privy" also includes "those who control an action although not parties to it and those whose interests are represented by a party to the action." *Estate of Naeve by Naeve v. FBL Financial Group, Inc.*, 929 N.W.2d 279 (Table); 2019 WL 2879936 at *4 (Iowa Ct. App. July 3, 2019). For example, the corporate parent and manager of a previously sued entity is in privity for the purposes of claim preclusion. *Id.* Here, Plaintiff alleges that "Defendant Lee Enterprises has controlled or directed the actions of all other Defendants named herein at all times relevant hereto" and that "Defendant Lee Enterprises has acted with respect to Plaintiff by and through all

other Defendants named herein."[15] Plaintiff also alleges that "Defendants Courier and Post-Dispatch are wholly owned by Defendant Lee Enterprises," "Defendant Lee Enterprises engages in the management of Defendants Courier and Post-Dispatch," and "Defendant Lee Enterprises controls the management personnel of Defendants Courier and Post-Dispatch."[16] Defendants Roy Biondi and Ray Farris are alleged to be employees of Defendants Courier and Lee Enterprises, respectively.[17] Defendant Kevin Mowbray is a senior executive at Lee Enterprises.[18] Defendant Tod Robberson is the Editorial Page Editor for the St. Louis Post-Dispatch.[19] The structure is thus that all other defendants in this case are subservient to Lee Enterprises through ownership or employment, and per Plaintiff Lee Enterprises controlled or directed their actions at all relative times thereto. The Court finds that Lee Enterprises thus represented the interests of the other defendants, at least to the extent that the allegations of the current lawsuit overlap with the allegations of Plaintiff's prior defamation suit. *Id.* The Court finds that the first element, sameness of the parties, is satisfied. The second element of

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[15] Amended Petition at p. 4.
[16] Amended Petition at p. 3.
[17] Amended Petition at p. 3-4.
[18] Amended Petition at p. 32.
[19] Amended Petition at p. 37.

claim preclusion is that the claim in the second suit could have been fully and fairly adjudicated on the merits in the first suit. "To determine whether the claim in the second suit could have been fully and fairly adjudicated in the prior case, that is, whether both suits involve the same cause of action, [Iowa courts] must examine (1) the protected right, (2) the alleged wrong, and (3) the relevant evidence." *Pavone*, 807 N.W.2d at 83. "However, we carefully distinguish between two cases involving the same cause of action—where claim preclusion bars initiation of the second suit—and two cases involving related causes of action—where claim preclusion does not bar initiation of the second suit." *Id.* A single cause of action:

> connotes a natural grouping or common nucleus of operative facts. Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes. Though no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first. If there is a substantial overlap, the second action should ordinarily be held precluded. But the opposite does not hold true; even when there is not a substantial

overlap, the second action may be precluded if it stems from the same transaction or series. *Id.*

Plaintiff's Petition pleads two key claims, from which their various theories of recovery derive. First, that Defendants ratified their prior claim regarding the Elmore Avenue Project by publishing two identical editorials in the Post-Dispatch and Couriers' websites.[20] These editorials referenced the previous Quad-City Times reports, saying that the newspaper "published a series of damning reports in 2015 exposing involvement by Malin and Davenport's former city attorney in the advancement of taxpayer-funded groundwork for a future casino project."[21] The second component is Plaintiff's allegations that these new publications unfairly compare him to "Convicted felon Steve Stenger."[22] The first claim is important to the Court's consideration of claim preclusion[23], while the second deals with new allegations mostly unrelated to the previous lawsuit. The Court now

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[20] Amended Petition at p. 37-38.

[21] Attachment 10 to Plaintiff's Petition at p. 1-2; Attachment 11 to Plaintiff's Petition at p. 2.

[22] Amended Petition at p. 39.

[23] Plaintiff describes the publications as "Defendant Lee Enterprises' September 2019 publications," further reinforcing the Court's finding of party sameness in this case. Amended Petition at p. 39.

evaluates whether Plaintiff's ratification claim is the same cause of action as Plaintiff's original suit, and thus barred by claim preclusion. First, the Court notes that the protected right allegedly breached is identical in both cases. Plaintiff claims that Defendants defamed him by stating that the Elmore Avenue Project was taxpayer- funded. The alleged wrong is nearly but not quite identical. The separation is the publishing of articles in 2015 and the publishing of articles in 2019, although the Court finds that the distinction between the two is narrow as the 2019 articles do no more than affirm the claims made in the 2015 articles. The evidence required to prove both cases is nearly identical. Plaintiff will have to relitigate all the same alleged falsity issues that were extensively litigated in the first defamation lawsuit, with the only difference being that in the current lawsuit Plaintiff will also have to present evidence establishing that the ratifying 2019 articles were also published. In short, there will be a substantial overlap of the witnesses and proofs relevant to both actions.

Iowa law is clear that "Perfect identity of evidence is not the standard in Iowa for whether claim preclusion applies." *Villarreal v. United Fire & Cas. Co.*, 873 N.W.2d 714, 729 (Iowa 2016). Thus, the slight difference in necessary proofs is not in and of itself sufficient grounds to deny a defense of claim preclusion. However, the Court ultimately finds that this new claim is not barred by the doctrine of claim preclusion, because the 2019

publications constitute a separate action upon which a separate claim may be made. A hypothetical example demonstrates the point well. Claim preclusion does not require a favorable or unfavorable resolution of the prior claim. *Spiker*, 708 N.W.2d at 353 (holding that the elements only require a "final adjudication on the merits"). If Plaintiff had won his first suit against defendants, there can be little doubt that he would be entitled to sue them again for republishing the same defamatory articles later on. Under those circumstances, the fact of the prior lawsuit would not be a bar to the second suit. The harm, though substantially similar, would be distinct and compounding to the original defamatory publications. While Plaintiff's claim is closely related to the prior suit, it is not the same cause of action. The Court holds that claim preclusion does not apply in this case. The Court now addresses the other merits of Defendants' Motion for Summary Judgment.

II. Defamation

"The centuries-old tort of defamation of character protects a person's common law interest in reputation and good name." *Bertrand v. Mullin*, 846 N.W.2d 884, 891 (Iowa 2014) (internal quotation marks omitted). "The tort applies to both written and oral statements, as well as altered images." *Id.* (internal citations omitted). "In an ordinary case, a plaintiff establishes a prima facie

claim for defamation by showing the defendant "(1) published a statement that (2) was defamatory (3) of and concerning the plaintiff, and (4) resulted in injury to the plaintiff." *Id.* Defamation can also occur by implication, known as "false light" defamation. Defamation by implication 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)).

In addition, The First Amendment to the United States Constitution 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. [T]he public official designation applies at the very least to those among the hierarch 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, 85 (1966). A person may also be "properly classified as [a] public figure" due to "the

notoriety of their achievements or the vigor and success with which they seek the public's attention." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). A school bus driver is not considered a public official. *See Vinson v. Linn-Mar Community School Dist.*, 360 N.W.2d 108 (Iowa 1984). Nor is a "low-ranking fire fighter." *Jones v. Palmer Communications, Inc.*, 440 N.W.2d 884, 895 (Iowa 1989). Rather than employing a broad government affiliation test, Iowa courts consider whether an individual working in government had significant responsibility or influence. *Id.* A police captain is an example of a public official holding significant responsibility or influence. *Id.*

As a City Administrator, Plaintiff 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." *Rosenblatt,* 383 U.S. at 84. The publications at issue concern his actions during his tenure as the City Administrator for Davenport. Further, Plaintiff styles himself as a "national award-winning City Manager."[24] The Court finds that Plaintiff is a public official for the purposes of this lawsuit. Thus, Plaintiff must also prove that the statements at issue are false and made with actual malice.

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[24] Amended Petition at p. 39.

Plaintiff advances the following statements by Defendants in the 2019 publication as defamatory:

> Libel allegations always send a shudder through news organizations, but thanks to First Amendment protections affirmed by the U.S. Supreme Court, judges rarely agree to hear libel cases against reporters and even more rarely do courts side with plaintiffs. The bar is set extraordinarily high for good reasons. Otherwise, corrupt officials like former St. Louis County Executive Steve Stenger could use frivolous lawsuits to bankrupt local organizations whose aggressive reporting exposes wrongdoing... Recall the backroom wheeling and dealing by Stenger, who likely would have escaped public accountability if not for the Post-Dispatch's aggressive reporting. Stenger and his cronies tried all kinds of maneuvers to silence this newspaper's reporting but failed.[25]

Plaintiff contends this reference to Steven Stenger is defamatory in that it did not explain that the Court's 2015 ruling found some of Lee Enterprises' publications defamatory per se.[26] Specifically, Plaintiff alleges that "[t]hey concealed Judge Tabor's Ruling that the 2015 Lee Enterprises

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[25] Amended Petition at p. 39-40.
[26] Amended Petition at p. 40.

publications were defamatory per se to the extent the 2015 publications attacked Plaintiff's character, honesty and integrity."[27] This is somewhat of a mischaracterization of the Court's prior ruling, however. The Court never found any of the 2015 publications defamatory per se, nor did it rule that the 2015 publications necessarily attacked Plaintiff's character, honesty, and integrity. The prior ruling specifically held a combination of several 2015 articles published by the Quad City Times "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." Ruling on Motion for Summary Judgment at p. 13 *Malin* No. LACE129075 (EDMS). The Court in so ruling was viewing the facts in the light most favorable to Plaintiff, the non-moving party, and drawing all reasonable inferences in his favor, as it must on a Motion for Summary Judgment. *Morris,* 958 N.W.2d at 821. The Court found that a jury could interpret some of the statements in Defendants' publications as per se defamatory. This does not equate to a Court finding of per se defamation. Alternatively, Plaintiff also alleges that the 2019 statements are impliedly defamatory

[27] Amended Petition at p. 40.

because "they equate Plaintiff's conduct with Stenger's felonious bribery and favoritism."[28]

Plaintiff further contends that the following statements are objectively false:

> In Davenport, Iowa, a former city administrator is trying a chilling tactic to punish the local newspaper for reporting that exposed backroom wheeling and dealing and cost him his job.
>
> The Quad-City Times, which along with this newspaper is owned by Lee Enterprises, published a series of damning reports in 2015 exposing involvement by Malin and Davenport's former city attorney in the advancement of taxpayer funded groundwork for a future casino project.
>
> The city council and mayor had given them no authorization to do so. Malin tried a libel lawsuit in 2017 but also failed. Malin is instead suing the Quad-City Times for tortious interference, arguing that the newspaper's reporting interfered with his employment contract.[29]

Defendants first contend that Malin cannot prove that the 2019 Editorial is false. In support of this proposition, Defendants point to the Court's

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[28] Amended Petition at p. 40.
[29] Amended Petition at p. 40-41.

previous finding that the statements at issue in the 2017 defamation case were "substantially true."[30] This begs the question of whether the Court can consider its prior holding as substantive evidence in this case if res judicata does not apply. "It is not generally permissible for a trial court to take judicial notice of proceedings in a related but wholly different case." *State v. Stergion, 248 N.W.2d 911, 913-914 (Iowa 1976).* Nonetheless, both parties in this case want to use the Court's previous ruling as substantive evidence to support their respective cases.[31] The ruling is submitted into the record as evidence in this case.[32] Given that it is not appropriate to use the ruling for issue

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[30] Defendants' Combined Brief in Support of their Motion for Summary Judgment and in Resistance to Malin's Motion for Partial Summary Judgment ("Defendant's Combined Brief"), filed Apr. 8, 2022, at p. 39.

[31] Defendants' Combined Brief at p. 39 ("The 2019 Editorial was published nearly a year after Judge Tabor issued her ruling finding that the 2015 Quad City Times publications were not defamation"); Plaintiff's Statement of Undisputed Material Facts in Support of Motion for Partial Summary Judgment at p. 9 ("Defendants knew from the plain language of Judge Tabor's October 4, 2018 summary judgment ruling that Defendant Lee Enterprises' 2014/2015 publications about Plaintiff's work on the casino was far from accurate, and stating 'public money' was used on the casino without further explanation was evidence of actual malice").

[32] Defendants' Appendix in Support of their Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Partial Summary Judgment, filed Apr. 11, 2022, at p. 125.

preclusion purposes,[33] the Court finds it cannot consider its prior ruling as substantive evidence of the claims that ruling makes. That is to say, the Court cannot take its prior findings of "substantial truth," nor its findings of possible per se defamatory meaning, as evidence of the fact that those findings are correct. The Court thus rejects Defendants' argument that the ruling is proof positive that taxpayers funded the Elmore Avenue Project. However, the fact of that ruling's existence and the language it contains is beyond dispute. Simply put, the parties agree that the order exists, it contains the language it contains, and it was published on the day it so avers. Given that the ruling is permanently documented in Iowa's EDMS record system, no one could reasonably argue otherwise. Thus, while the Court does not consider the merit of the ruling's factual findings, it must consider the effect of that ruling's publication on the issue of malice, which brings the Court to Defendants' next argument.

Defendants argue that because the Court's prior ruling granted summary judgment in their favor on Plaintiff's defamation claim and found that several of Defendants' published statements were "substantially true," Plaintiff cannot establish the malice element of his defamation claim.

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[33] *See Supra* at p. 8.

"Under the actual malice prong of a public official defamation claim, the plaintiff bears the burden of showing actual malice by clear and convincing evidence." *Bertrand*, 846 N.W.2d at 892. The Iowa Supreme Court characterizes this "burden, in the context of showing reckless disregard for the truth—as substantial." *Id.* at 893 (internal quotation marks omitted). "The burden to establish actual malice was deliberately set high by the First Amendment protections recognized in *New York Times.*"[34] *Id.* "Consequently, the *New York Times* standard defines a crucial exception to ordinary defamation rules. This exception is based upon a '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 government and public officials.'" *Id.* (citing *N.Y. Times,* 376 U.S. at 270). "To promote this ideal, a commentator is afforded a buffer zone to protect it from the chilling effect which might otherwise cast over it a pall of fear and timidity by raising the specter of numerous libel actions." *Id.* (internal quotation marks omitted).

> [R]eckless conduct is not measured by whether a reasonably prudent man would have

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[34] Referring to the landmark United States Supreme Court Case *New York Times Co. v. Sullivan.* 376 U.S. 254 (1964).

> 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. *Id.* at 894.
>
> The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. *Id.* at 895.

"However, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." *Id.* (internal quotation marks omitted). "Similarly, reliance on a single source, in the absence of a high degree of awareness of probable falsity, does not constitute actual malice." *Id.* (internal quotation marks omitted). "Nor does a shoddy investigation." *Id.* (internal quotation

marks omitted). "Failure to follow journalistic standards and lack of investigation may establish irresponsibility or even possibly gross irresponsibility, but not reckless disregard of truth." *Id.* (citing *Faigin v. Kelly,* F.Supp. 420, 429 (D.N.H. 1997)).[35]

Because the Court's prior ruling cannot preclude the issue of whether Defendants acted with malice, the Court considers all bases of malice alleged by Plaintiff. Plaintiff advances the following quote from the 2019 publications as proof of malice: "the accuracy of reporting by Davenport's Quad City Times newspaper might not be adequate..."[36] In doing so, Plaintiff ignores the context in which the quote was made. The full sentence states that "[t]he accuracy of reporting by Davenport's Quad-City Times newspaper might not be adequate to fend off the 'tortious interference' case brought by former city administrator Craig Malin."[37] Obviously, the full sentence avers to the accuracy of the prior reporting but entertains doubts that this reporting will be adequate to fend off a tortious interference claim, likely because it was unclear at

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[35] Because neither party distinguishes between malice supporting Plaintiff's defamation claims regarding the "taxpayer-funded" elements and malice supporting the "notorious felon" comparison, the Court does likewise.
[36] Plaintiff's Reply Brief at p. 18.
[37] Attachment 10 to Plaintiff's Petition at p. 1; Attachment 11 to Plaintiff's Petition at p. 2-3.

the time that truth would be a full defense to Plaintiff's claim.[38] A reasonable jury could not consider this quote evidence of malice because a reasonable jury would consider the full sentence from which the quote was sourced. Plaintiff also references a comment posted by the Waterloo Courier in 2015 "that their reporting was 'far from accurate.'"[39] This appears to reference Plaintiff's attachment 32 in support of their motion for summary judgment. Attachment 32 of Plaintiff's appendix is a comment posted on The Courier's website by a user named "shelley" which states "It's far from over. This is also far from an accurate account of the situation."[40] This comment is in reference to one of The Courier's articles titled "Mayor's effort to have Davenport officials ousted fails."[41] Defendants contend that this statement is inadmissible hearsay.[42] Hearsay is a statement

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[38] The Iowa Court of Appeals ultimately affirmed that truth would constitute a total defense to Plaintiff's claims of tortious interference because he was using them as a substitute for a defamation action in order to avoid the strict requirements of proving a defamation claim. *Malin*, 2021 WL 1399837 at *3.

[39] Plaintiff's Reply Brief at p. 18.

[40] Plaintiff's Appendix, stored in physical copy by flashdrive at the Scott County Courthouse due to volume of appendix, at p. 178..

[41] Plaintiff's Appendix at p. 175-177.

[42] Defendants' Response to Plaintiff's Amended Statement of Undisputed Material Facts in Support of Plaintiff's Motion for Partial Summary Judgment, filed Apr. 8, 2022, at p. 18.

that the declarant does not make while testifying at the current trial or hearing and which a party offers into evidence to prove the truth of the matter asserted. Iowa R. Evid.§5.801(c). Inadmissible hearsay may not be used to support or resist a motion for summary judgment. *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 109 (Iowa 2012).

Here, Plaintiffs seek to offer the statement to demonstrate that Defendants recklessly disregarded a substantial risk that their publication was false. "[A] statement that would ordinarily be deemed hearsay is admissible if it is offered for a non-hearsay purpose that does not depend upon the truth of the facts presented." *McElroy v. State*, 637 N.W.2d 488, 501 (Iowa 2001). "For example, the statement may be offered simply to demonstrate it was made, to explain subsequent actions by the listener, or to show notice to or knowledge of the listener." *Id.* While the comment was posted on Defendants' website, the Court does not find that this alone establishes that it was actually read by any of the Defendants such that the comment might be admissible to demonstrate its effect on Defendants. Plaintiff offers no other evidence suggesting that a particular Defendant actually read the comment. As such, the Court does not find the statement would be admissible for its effect on a reader, and thus could only be probative

for the truth of the matter asserted in the comment. This makes the comment inadmissible hearsay, absent a particular exception.

Regardless, the Court does not find that an internet comment posted on an article demonstrates actual malice. Failure to consider the validity of a two-sentence long internet comment posted by a stranger in evaluating the accuracy of a news article does not constitute negligence, much less a "reckless disregard for the truth." *Bertrand*, 846 N.W.2d at 893. Next, Plaintiff argues that "[t]he Waterloo Courier had four years, three months, and four days to independently investigate the adequacy of the accuracy of the Defendant Lee Enterprises 2014/2015 publications," demonstrating malice. Iowa law clearly rejects this as a basis for finding malice. "Failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." *Id.* at 895.

Plaintiff's final argument for malice is the "plain language of Judge Tabor's October 4, 2018 summary judgment ruling that Defendant Lee Enterprises' 2014/2015 publications about Plaintiff's work on the casino was far from accurate, and stating 'public money' was used on the casino without further explanation was evidence of actual malice."[43] The Court's prior ruling on summary judgment certainly presents a

[43] Plaintiff's Reply Brief at P. 18

mixed bag in terms of findings favorable to either party.[44] The Court, referencing Defendants' prior publication claims that public money funded the Elmore Avenue Project, found that "[w]ithout explaining to readers the way public-private partnerships and public financing commonly worked on municipal projects... Defendants' insistence that 'public money' was being used on these projects 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." Ruling on Motion for Summary Judgment at p. 15-16, *Malin* No. LACE129075 (EDMS). Plaintiff contends that "Lee Enterprises was warned, in no uncertain terms by the Court, that stating public money funded the casino without further explanation was evidence of actual malice."[45] This overstates the Court's finding. The Court found that there was an issue of material fact. In doing so, the Court did not specifically find that there was malice in Defendants' claims, but rather found that a reasonable jury faced with that evidence could find

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[44] As noted *Supra* at p. 17, the Court does not consider the merits of the Court's prior summary judgment ruling, but rather the effect of that ruling on Defendants' *mens rea* regarding malice.

[45] Plaintiff's Reply Brief at P. 19

malice. Defendants were put on notice that it was *possible* that their publications could be found malicious.

However, the Court *did* specifically find that each of the following published statements by Defendants, and their implications, are substantially true: that Malin was "(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 an $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." *Id.* at p. 17-18. The Court also remarked that statements that Plaintiff "committed the city to paying the casino site costs" were "largely true." *Id.* at p. 13. These findings tend to vindicate the accuracy of Defendants' prior publications. The Court ultimately granted summary judgment against Plaintiff on his defamation claim, although this was on the basis that Plaintiff had no evidence of actual reputational harm. *Id.* at 21.

"The *New York Times* analysis requires a plaintiff resisting a motion for summary judgment to do more than show a genuine issue of material fact; he must produce evidence from which a fact finder could reasonably find malice by clear and convincing evidence." *Stevens,* 728 N.W.2d at 830.

"[T]here must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of ... probable falsity.'" *Id.* at 831. Here, the Court's prior ruling vindicated several of Defendants' previous published claims and ruled in their favor on Plaintiff's defamation claim. In light of this, it is far from clear that Defendants would have had a "high degree of awareness" that their taxpayer funding claims were probably false based on the Court's ruling. *Id.* As Plaintiff offers no further basis to demonstrate that the 2019 publications were made with malice, the Court finds that Plaintiff has failed to carry his burden. Even considering all the bases alleged by Plaintiff collectively in the light most favorable to him, a reasonable jury could not conclude that Plaintiff has shown malice by clear and convincing evidence. The Court accordingly grants summary judgment in favor of Defendants on Plaintiff's claim for defamation.

III. Invasion of Privacy

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his 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. *Bierman*

v. Weier, 826 N.W.2d 436, 465 (Iowa 2013). "False light cases are subject to the same constitutional restraints as defamation cases." *Jones*, 440 N.W.2d at 894. As Invasion of Privacy adheres to the same malice standards as a defamation action, Plaintiff's claim in this regard also fails for lack of malice. The Court grants summary judgment in favor of Defendants on Plaintiff's claim for Invasion of Privacy.

IV. Negligent Hiring, Training and Supervision

Next, Defendants contend that Plaintiff's other claims are disguised defamation claims and thus fail because they are subject to First Amendment protections and Plaintiff must also prove falsity and actual malice as to those claims.[46] Defendants correctly note that the Iowa Court of Appeals found that in the 2018 defamation suit the defendants were entitled to raise First Amendment protections in defense of Malin's tortious interference claim because the claim was really an attempt to avoid defamation requirements. Under the law of *Malin v. Quad-City Times* and *Jones,* a defendant is entitled to assert a defense of lack of malice against an action that is substantively a defamation claim. 2021 WL 1399837 at *3; *Jones,* 440 N.W.2d at 894 ("It is unreasonable to allow a party to evade the standards surrounding

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[46] Defendants' Combined Brief at p. 47.

defamation law because the plaintiff has pled an alternative theory"). The Court must now decide if Plaintiff has pled his alternative claims as a substitute for defamation in order to avoid the stringent restrictions of a defamation claim.

In order to do so, the Court must determine whether "the gravamen" of Plaintiff's other claims is "the falsity of the media defendants' statements." *Malin*, 2021 WL 1399837 at *1. Plaintiff's Negligent Hiring, Training, and Supervision claim is based in part on Defendant Lee Enterprises' hiring of Brian Wellner as a beat reporter.[47] Plaintiff's claim contends that Defendants "knew Wellner was unqualified to provide competent, accurate and truthful reportage of the municipal government and financing of the City of Davenport."[48] Plaintiff's claim also levies allegations that Senior Executives of Lee Enterprises "were provided with sufficient factual detail to at least place them on inquiry notice regarding the accuracy and truthfulness of the 2015 publications."[49] Most critically, the culmination of Plaintiff's various allegations is that Lee enterprises failed to train staff "that reference to previously published false and misleading 2015 representations as accurate or truthful in a new publication constitutes another, new defamatory publication," and alternatively pleads that Lee

[47] Amended Petition at p. 29.
[48] Amended Petition at p. 31.
[49] Amended Petition at p. 32.

Enterprises failed to supervise staff "so as to prevent the representation of previous 2015 false and defamatory publications as truthful and accurate."[50] While Plaintiff levies some accusations that there was a cover-up as well, such claims are also based on Plaintiff's assertions that the 2015 publications were false and defamatory.[51] Based on the foregoing, Plaintiff's Negligent Hiring, Training, and Supervision claim is clearly an attempt to "avoid the strict requirements for establishing a libel or defamation claim." *Id.* at *3. Thus, the requirements of defamation pleading apply and Plaintiff must demonstrate malice. As Plaintiffs have provided insufficient evidence of malice, the Court grants summary judgment in favor of Defendants as to Plaintiff's claim of Negligent Hiring, Training, and Supervision.

V. Unjust Enrichment

"Unjust enrichment has three basic elements. (1) enrichment of the defendant, (2) at the expense of the plaintiff, (3) under circumstances that make it unjust for the defendant to retain the benefit." *Endress v. Iowa Department of Human Services*, 944 N.W.2d 71, 80 (Iowa 2020). Plaintiff's claim for unjust enrichment pleads only three separate allegations to support

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[50] Amended Petition at p. 35-36.
[51] Amended Petition at p. 36.

that cause of action, otherwise relying on preceding paragraphs supporting his claims for defamation, false light, and negligent hiring.[52] The only basis pled is that "[t]he individual Defendants are enriched by the practice of publishing fake news and by the kind of defamation per se in which Defendants engaged against Plaintiff in 2019."[53] This claim also clearly turns on Plaintiff's underlying claims of defamation, and is thus subject to the same defamation standards as Plaintiff's other claims. The Court grants summary judgment in favor of Defendants as to Plaintiff's claim for unjust enrichment.

VI. Intentional Infliction of Emotional Distress

To sustain a claim of intentional infliction of emotional distress, [a plaintiff] must prove four things: (1) outrageous conduct by the defendant; (2) the defendant's intentional causing, or reckless disregard of the probability of causing emotional distress; (3) the plaintiff has suffered severe or extreme emotional distress; and (4) actual proximate causation of the emotional distress by the defendant's outrageous conduct. *Ette ex rel. Ette v. Linn-Mar Community School Dist.*, 656 N.W.2d 62, 70 (Iowa 2002).

Plaintiff's claim for intentional infliction of emotional distress also plainly derives from his

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[52] Amended Petition at p. 50.
[53] Amended Petition at p. 50.

underlying defamation action. The claim relies on assertions that the 2019 publications caused his emotional distress.[54] The Court accordingly finds that Plaintiff's intentional infliction of emotional distress claim also fails for lack of malice.

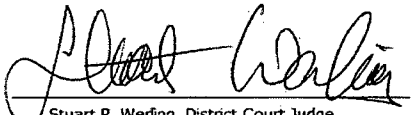
VII. Plaintoff's Motion For Partial Summary Judgement

As the Court finds that Defendant's Motion for Summary Judgment should be granted in whole and there are no viable claims remaining for trial, the issues of Plaintiff's Motion for Partial Summary Judgment are accordingly moot. The Court denies Plaintiff's Motion for Partial Summary Judgment.

RULING

For all of the above-stated reasons, it is the ruling of the Court that the Defendants' Motion for Summary Judgment is GRANTED. Plaintiff's Motion for Summary Judgment is DENIED.

So Ordered



Stuart P. Werling, District Court Judge,
Seventh Judicial District of Iowa

[54] Amended Petition at p. 51.

https://www.stltoday.com/opinion/editorial/editorial-lawsuit-threatens-to-put-a-chill-on-aggressive-reporting-that-exposes-wrongdoing/article_288f3964-97ae-5645-abe7-28c39175f824.html

Editorial: Lawsuit Threatens to put a Chill on Aggressive Reporting That Exposes Wrongdoing

September 14, 2019

Libel allegations always send a shudder through news organizations, but thanks to First Amendment protections affirmed by the U.S. Supreme Court, judges rarely agree to hear libel cases against reporters and even more rarely do courts side with plaintiffs. The bar is set extraordinarily high for good reasons. Otherwise, corrupt officials like former St. Louis County Executive Steve Stenger could use frivolous lawsuits to bankrupt local organizations whose aggressive reporting exposes wrongdoing.

In Davenport, Iowa, a former city administrator is trying a chilling tactic to punish the local newspaper for reporting that exposed backroom wheeling and dealing and cost him his job. The accuracy of reporting by Davenport's Quad-City Times newspaper might not be adequate

to fend off the "tortious interference" case brought by former city administrator Craig Malin.

The Quad-City Times, which along with this newspaper is owned by Lee Enterprises, published a series of damning reports in 2015 exposing involvement by Malin and Davenport's former city attorney in the advancement of taxpayer-funded groundwork for a future casino project. The city council and mayor had given them no authorization to do so. The newspaper's reporting led to Malin's negotiated departure from office.

Recall the backroom wheeling and dealing by Stenger, who likely would have escaped public accountability if not for the Post- Dispatch's aggressive reporting. Stenger and his cronies tried all kinds of maneuvers to silence this newspaper's reporting but failed. Malin tried a libel lawsuit in 2017 but also failed. Malin is instead suing the Quad-City Times for tortious interference, arguing that the newspaper's reporting interfered with his employment contract. In June 2015, the city council overwhelmingly approved a severance agreement that Malin signed. He's now city manager in the northern California town of Seaside.

But his resort to a tortious interference complaint gives him the ability to sidestep the Supreme Court's normal libel standard of proof for plaintiffs in news media cases—that reporters displayed a "reckless disregard" for the truth, and were malicious and premeditated in trying to

damage the plaintiff. That's why this case is so troubling. Adherence to professional reporting standards might not provide protection—as suggested by Judge Nancy Tabor's decision to let the case proceed.

Attorney Sarah Matthews, with the Reporters Committee for Freedom of the Press, warns the case "could have a significant chilling effect" on news coverage.

The mere threat of a tortious interference lawsuit caused CBS News to back down from an investigative report on "60 Minutes" in 1995 exposing that a chief executive of a major tobacco company lied about his knowledge of nicotine's addictiveness. Rather than face potential bankruptcy from such a lawsuit, CBS pulled back—even though the truthfulness of its report was not challenged.

The trial starts Monday in Iowa. The only acceptable ruling would be one that upholds press freedoms and rejects frivolous efforts to stifle aggressive reporting.

https://qctimes.com/news/local/government-and-politics/the-big-story-rhythm-city-casino-and-community-win-big/article_6bfb0d6d-fc33-5c5e-aa3d-9b75f64dcbbb.html

The Big Story: Rhythm City Casino and community win big in its first year on land

Devan Patel June 4, 2017

After opening a new land-based casino in the Elmore Avenue corridor nearly a year ago, Rhythm City Casino Resort is holding on to its early momentum, increasing gaming revenue by 44 percent over the previous year.

"We're fast approaching our one-year anniversary, which is, lo and behold, coming around the corner on June 16," General Manager Mo Hyder said. "We're going to be celebrating a lot of successes, ... "All of that is reflected in the numbers, and not only are we able to meet a lot of the entertainment demands of our local constituents, but also folks up and down the interstate," he said. "That's really exciting for us, because we are seeing a lot of new faces, and people

are pulling off the interstate to come in and stay here."

Taxpayers Win

While Rhythm City is winning big in its debut on land, its mandate to share is translating into wins for others, too.

Higher gaming revenues mean greater gaming taxes, which benefits the state, counties and cities where casinos are located.

According to a 2015 Iowa legislative report, for example, 46 percent of the $310 million state's share of gaming revenue generated throughout all of Iowa went to higher education.

The Rebuild Iowa Infrastructure Fund, which gets 80 percent of its funding from gaming taxes, has allocated more than a quarter-billion dollars to infrastructure improvements at state universities over the past four years.

Most gaming revenue is distributed throughout the state, but a portion is shared locally. The Regional Development Authority, or RDA, which is a nonprofit that holds the Rhythm

City Casino's gaming license, collects a percentage of the casino's gaming receipts and distributes them throughout the community in twice-a-year grants.

Before Rhythm City moved to the Elmore corridor, RDA grants plateaued between $850,000 and $930,000 each cycle from fall 2013 to spring 2016.

But the June 16 migration to land delivered a sudden influx of cash, dramatically driving up the amount of grant money available.

The RDA's fall 2016 grant cycle distributed more than $1.5 million to 57 nonprofit groups. The recent spring grants awarded $1.2 million to the same number of recipients.

As the lone source of RDA grant funding, Director Frank Clark said, Rhythm City's success is paramount, especially because the RDA typically receives requests for double the amount of funds available.

"That's why we stand up and cheer the Rhythm City for even greater success and growing this industry and this casino's results," Clark said. "It only helps to provide more and more funding to the community." ...

City of Davenport

Agenda Group | Action / Date

Department: Finance | 10/7/2015

Contact Info: Brandon Wright – 326-7750

Wards: 6

Subject:

Motion approving an economic development incentive payment of not-to-exceed $3,965,000 related to the Elmore Avenue South Extension project (one phase of a two-phase project) from the northern terminus of Elmore Avenue to just north of Veterans Memorial Parkway. [Ward 6]

Recommendation:

Approve the motion

Relationship to Goals:

Welcoming investment

Background:

On June 25, 2014, the City Council approved an amendment to the joint development agreement with Scott County Casino, LLC that provided an economic development incentive for the extension of Elmore Avenue. This motion approves the first portion of this project known as Elmore Extension

South, which runs from the current terminus of Elmore Avenue to just north of Veterans Memorial Parkway. The economic development incentive amount for Elmore Extension South is not-to-exceed $3,965,000. The final price will vary slightly due to interest costs depending on the day of the closing.

Attached is supporting paperwork for eligible costs associated with the economic development incentive. City staff have reviewed these costs as they relate to the terms of the June 25 amendment to the joint development agreement and find that they are normal and customary amounts consistent with the terms of the agreement. A map of the Elmore Extension South project area is also attached.

Under the terms of the joint development agreement, Scott County Casino is required to construct a land-based casino of not-less-than $100 million. With a final economic development incentive amount estimated at $13.8 million, the City's full participation in this project will be no more than 13.8% of overall project costs and as low as 5.4% if the entire 250-acre site is taken into account. In addition to servicing the new land-based casino, the extension of Elmore Avenue will open up 250 acres as a continuation of the strongest economic corridor in the Quad Cities. The development of this area is estimated to grow

Davenport's property tax base by $250 million with a new development already occurring with Mills Chevrolet. Interest from other private developers and companies remains high.

The development of this area with 13.8% of public funds is conservative based on other major economic development projects. Below are some examples of other large-scale projects that involved more typical amounts of public investment and do not provide the same level of community impact as opening 250 acres to mixed-use development ...

The entire Elmore Extension project (both phases) of $13.8 million will be funded through the issuance of bonds abated by tax increment financing (TIF) generated from the casino development alone. The joint development agreement has a minimum assessment valuation for the new casino of $55 million. In addition to the use of TIF funds, the City will use the 0.4% casino improvement district funds described in the joint development agreement as a source of bond repayment. The casino improvement district funds are estimated to total $1.9 million.

City of Davenport

Agenda Group | Action / Date

Department: Finance | 12/2/2015

Contact Info: Brandon Wright – 326-7750

Wards: 6

Subject:

Motion approving the final economic development incentive payment to Scott County Casino, LLC of not-to-exceed $9,975,000 related to the Elmore Avenue Extension Phase I project from just north of Veterans Memorial Parkway to Jersey Ridge Road. [Ward 6]

Recommendation:

Approve the motion

Relationship to Goals:

Welcoming investment

Background:

On June 25, 2014, the City Council approved an amendment to the joint development agreement with Scott County Casino, LLC that provided an economic development incentive for the extension of Elmore Avenue. This motion approves the

second and final payment of this project for Phase I, which runs just north of Veterans Memorial Parkway to Jersey Ridge Road. The economic development incentive amount for Elmore Extension Phase I is not-to-exceed $9,975,000. The final price will vary slightly due to interest costs depending on the day of the closing.

Attached is supporting paperwork for eligible costs associated with the economic development incentive. City staff have reviewed these costs as they relate to the terms of the June 25 amendment to the joint development agreement and find that they are normal and customary amounts consistent with the terms of the agreement. A map of the Elmore Extension Phase I project area is also attached.

The first payment for the completion of the Elmore South phase of the project was $3,960,562.64. Together with this second and final payment, the total amount is expected to be $13,925,000.

Under the terms of the joint development agreement, Scott County Casino is required to construct a land-based casino of not-less-than $100 million. With a final economic development incentive amount of $13.925 million, the City's full participation in this

project will be no more than 13.9% of overall project costs and as low as 5.6% if the entire 250-acre site is taken into account. In addition to servicing the new land-based casino, the extension of Elmore Avenue will open up 250 acres as a continuation of the strongest economic corridor in the Quad Cities. The development of this area is estimated to grow Davenport's property tax base by $250 million with new development already occurring with Mills Chevrolet. Interest from other private developers and companies remains high.

The development of this area with 13.9% of public funds is conservative based on other major economic development projects. Below are some examples of other large-scale projects that involved more typical amounts of public investment and do not provide the same level of community impact as opening 250 acres to mixed-use development ...

The entire Elmore Extension project (both phases) of $13.925 million will be funded through the issuance of bonds abated by tax increment financing (TIF) generated from the casino development alone. The joint development agreement has a minimum assessment valuation for the new casino of $55 million. In addition to the use of TIF funds, the City will use the 0.4% casino

improvement district funds described in the joint development agreement as a source of bond repayment. The casino improvement district funds are estimated to total $1.9 million.

Affidavit of _____

Before me comes _____ whose residence is _____, and hereby swears to the following facts 1 – 14 under penalty of perjury.

#1 I am an adult over the age of 18.

#2 I was interviewed by Brian Shock on [date] at [location].

#3 Mr. Shock paid me $50 for reading the attached editorial and answering three questions.

#4 Mr. Shock did not direct or guide any of my answers, nor did he condition payment upon how I answered his questions.

#5 At no time during the interview, did Mr. Shoch tell me anything about Craig Malin.

#6 Question #1 Mr. Shock asked me if I had ever met, heard of, or had any opinion regarding Craig Malin.

#7 Answer #1 Prior to Mr. Shock's question, I had never met, heard of, or had any opinion regarding Craig Malin.

#8 After answering Question #1, Mr. Shock provided the attached copy of an editorial of the Waterloo Cedar Falls Courier to me to read.

#9 I read the editorial, in its entirety.

#10 Question #2 After reading the editorial, Mr. Shock asked me if I had a positive or negative opinion of Craig Malin.

#11 Answer #2 After reading the editorial, I told Mr. Shock I had a negative opinion of Craig Malin.

#12 Question #3 Mr. Shock asked me if the editorial would make it more likely or less likely for me to hire Craig Malin to work for me.

#13 Answer #3 The editorial would make it less likely for me to hire Craig Malin.

#14 After I answered Mr. Shock's three questions, I signed this document in Mr. Shock's presence, and placed my initials on the attached copy of the editorial.

Signed and notarized copies of the preceding affidavit from Jordan White, Corey Timm, Blake Wasekuk, Lauren Haun and Christopher Dickson were included in Plaintiff's Summary Judgment Appendix on pages 150, 151, 155, 156 and 158