

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Glen Posusta and Clint Herbst,

Complainants,

vs.

**FINDINGS OF FACT,  
CONCLUSIONS, AND  
ORDER**

Susie Wojchouski, Fred Patch, Bruce  
Thielen,<sup>1</sup> and Rhonda Thielen,

Respondents.

The above-entitled matter came on for an evidentiary hearing on December 11, 2006 and January 2, 2007, before a panel of three Administrative Law Judges: Kathleen D. Sheehy (Presiding Judge), Beverly Jones Heydinger, and Eric L. Lipman. The hearing record closed on January 16, 2007, with the receipt of the parties' briefs.

William J. Everett, Attorney at Law, Everett Law LLC, 100 Center Drive, Buffalo, MN 55313, represented the Complainants.

Jay Benanav, Attorney at Law, Weinblatt & Gaylord, PLC, 111 East Kellogg Boulevard, Suite 300, St. Paul, MN 55101, represented Respondent Susie Wojchouski. J. Robert Keena, Attorney at Law, Hellmuth & Johnson, PLLC, 10400 Viking Drive, Suite 500, Eden Prairie, MN 55344, represented Respondent Fred Patch. Christian M. Sande, Attorney at Law, 3010 Hennepin Avenue South, No. 232, Minneapolis, MN 55408, represented Rhonda Thielen.

**NOTICE**

This is the final decision in this case, as provided in Minn. Stat. § 211B.36, subd. 5. A party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

**STATEMENT OF ISSUES**

Did Respondents violate Minn. Stat. § 211B.06 by intentionally participating in the preparation or dissemination of false campaign material that Respondents knew was false or communicated to others with reckless disregard as to whether it was false?

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<sup>1</sup> During the evidentiary hearing, Bruce Thielen was dismissed as a Respondent by agreement of the parties, and with consent of the panel.

The panel concludes that the Complainants have established by clear and convincing evidence that Respondents Fred Patch and Rhonda Thielen violated Minn. Stat. § 211B.06.

The panel concludes that the Complainants have failed to establish by clear and convincing evidence that Respondent Susie Wojchouski violated Minn. Stat. § 211B.06.

Based upon the entire record, the panel makes the following:

## **FINDINGS OF FACT**

### **Background**

1. In November 2002, Complainant Glen Posusta was elected to the Monticello City Council. He took office in January 2003. In 2006, Mr. Posusta ran for re-election to the City Council.

2. Complainant Clint Herbst was first elected to the Monticello City Council in 1990. He served from 1991-2002. In 2002, Mr. Herbst ran for mayor of Monticello. He lost to Bruce Thielen, another council member, by approximately 300 votes. In 2004, Mr. Herbst ran for mayor again against Bruce Thielen and was elected.<sup>2</sup> Mr. Herbst ran for re-election in 2006.

3. Respondent Susie Wojchouski is the director of the Monticello Chamber of Commerce. In 2006, Ms. Wojchouski was a candidate for the Monticello City Council.

4. Respondent Rhonda Thielen is the wife of Bruce Thielen. Mr. Thielen was a member of the Monticello City Council from 1998 through December 2002. He served one term as Mayor of Monticello from January 2003 through December 2004.

5. Respondent Fred Patch is the former building code official for the City of Monticello. Mr. Patch was employed by the City of Monticello for nine years, from approximately 1996-2005. Mr. Patch currently has a 17-count complaint pending in U.S. District Court against the City and both Mr. Posusta and Mr. Herbst individually.<sup>3</sup> The claims for relief arise out of the termination of Mr. Patch's employment. Mr. Patch testified that he has suffered greatly because of harassment by Mr. Posusta. Mr. Patch believes that Mr. Posusta led a "crusade" against him that resulted in the loss of his job.<sup>4</sup>

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<sup>2</sup> Testimony of Herbst and R. Thielen.

<sup>3</sup> Ex. PH 18.

<sup>4</sup> Testimony of Patch.

6. Mr. Patch supported Ms. Wojchouski's candidacy for City Council during the 2006 campaign season. He helped Ms. Wojchouski's campaign by placing approximately eight of her lawn signs around Monticello.<sup>5</sup>

7. Ms. Wojchouski knew that there was ill will between Mr. Patch and the Complainants.<sup>6</sup> Sometime in late September of 2006, Ms. Wojchouski indicated to Mr. Patch that she was interested in receiving from him any information he had about Mr. Posusta and Mr. Herbst that might help her campaign.<sup>7</sup>

8. Mr. Patch drafted a campaign flyer with 8 bullet point paragraphs detailing alleged misconduct that he believed was "particularly politically offensive" regarding Mr. Posusta and Mr. Herbst.<sup>8</sup>

9. Mr. Patch designed the flyer so that it could be distributed to the voters in Monticello. At the top of the flyer Mr. Patch put a heading in bold-face type that read: "This time let's elect a better alternative to the 'good-ol-boys.'" Mr. Patch listed the eight bullet points describing Mr. Posusta's and Mr. Herbst's alleged misconduct in chronological order under this heading. After the eighth bullet point, Mr. Patch wrote the following paragraph:

Offensive juvenile behavior, half-truths, misrepresentations, lies, hidden agendas, give-aways, retaliatory threats, hostility, bullying and an absence of support for Monticello Schools . . . Tune in to their "reality show" on cable TV or attend a council meeting on the first and third Monday of the month at 7:00 p.m. Do they represent who we are? Are they our best representatives?<sup>9</sup>

10. In early October of 2006, Mr. Patch delivered two copies of his flyer to Ms. Wojchouski at her office.<sup>10</sup> Ms. Wojchouski read through the flyer and then folded both copies and stored them under a book in her living room at home.<sup>11</sup>

11. There is no evidence that Mr. Patch gave the flyer to anyone other than Ms. Wojchouski.

12. Sometime in early to mid-October 2006, Ms. Wojchouski had a campaign meeting in her home. At the end of the meeting, after others had left, Ms. Wojchouski showed the flyer prepared by Mr. Patch to Rhonda and Bruce Thielen. Rhonda Thielen read through the flyer, and she and Ms. Wojchouski commented on the information contained in the bullet points. Ms. Wojchouski

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<sup>5</sup> Testimony of Patch; Ex. PH14.

<sup>6</sup> Testimony of Wojchouski.

<sup>7</sup> Testimony of Patch.

<sup>8</sup> Testimony of Patch; Ex. PH 2.

<sup>9</sup> Ex. PH2.

<sup>10</sup> Testimony of Patch and Wojchouski; Ex. PH2.

<sup>11</sup> Testimony of Wojchouski.

knew that some of the information in the flyer was false, and she felt that one could “poke holes” in almost every bullet point. In general, she viewed the information as merely “stupid” and insignificant. She told Ms. Thielen she had decided not to use it in her campaign.<sup>12</sup>

13. Rhonda Thielen asked Ms. Wojchouski if she could keep a copy of the flyer. Ms. Wojchouski told her that she could keep a copy of the flyer so long as she did not use it in any way that would be associated with her campaign or with Fred Patch.<sup>13</sup> Ms. Thielen left Ms. Wojchouski’s house with a copy of the flyer.<sup>14</sup>

14. On her home computer, Ms. Thielen retyped Mr. Patch’s flyer. She made additions to some of Mr. Patch’s paragraphs, including bullet points 2, 7, and 8, and she added two additional bullet points. Neither of the two additional bullet points is at issue in this matter.<sup>15</sup>

15. Ms. Thielen changed the heading of the flyer to read: “Re-elect the ‘Good-Ol-boys’ to City Council?” and under the heading she added the phrase “Voters should know that . . .” Following this phrase is a list of the ten paragraphs that detail alleged misconduct on the part of Posusta and Herbst, and Mr. Patch’s closing paragraph that begins: “Offensive juvenile behavior...”<sup>16</sup> After this paragraph, Ms. Thielen added the following in bold-face type:

**THIS ELECTION THERE IS AN ALTERNATIVE TO THE “GOOD-OL-BOYS.” ASK YOURSELF WHAT CONSTITUENTS DO THEY LISTEN TO? VOTE FOR A DIFFERENT CANDIDATE TO REPRESENT YOU!**<sup>17</sup>

16. At the very bottom of the flyer, Rhonda Thielen added a disclaimer that reads: “This is public information not paid for or endorsed by any candidate.” Ms. Thielen added the disclaimer in response to Ms. Wojchouski’s request that she not associate the flyer with Fred Patch or with Wojchouski’s campaign.<sup>18</sup>

17. Rhonda Thielen printed out approximately six copies of the 10-point flyer.<sup>19</sup> She gave a copy of the flyer to three people: Harvey Kendall (her husband’s first campaign manager); Don Doran (her husband’s second campaign manager); and Cindy Anderson (Mr. Herbst’s opponent in the 2006 mayoral race). Ms. Anderson is also a long-time friend of the Thielens.<sup>20</sup>

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<sup>12</sup> Testimony of Wojchouski; Ex. PH2.

<sup>13</sup> Testimony of R. Thielen.

<sup>14</sup> Testimony of R. Thielen and Wojchouski.

<sup>15</sup> Testimony of R. Thielen; Ex. PH1.

<sup>16</sup> See Finding of Fact No. 9.

<sup>17</sup> Ex. PH1.

<sup>18</sup> Ex. PH1; Testimony of R. Thielen.

<sup>19</sup> Ex. PH1.

<sup>20</sup> Testimony of R. Thielen.

18. Ms. Thielen maintains she threw her remaining three copies of the flyer into a construction dumpster outside of the Sunny Fresh Foods store where she works. Ms. Thielen does not know how the 10-point flyer got to be distributed beyond the three persons to whom she gave it.<sup>21</sup>

19. In mid-October of 2006, the 10-point flyer was distributed on a limited basis to homes in Monticello.<sup>22</sup> At least three different residences on Main, River and 3<sup>rd</sup> Streets, received the flyer.<sup>23</sup> Members of the community have contacted the Complainants' family members to discuss the flyer and the Complainants have heard discussions of the flyer elsewhere in the community.<sup>24</sup>

20. Mr. Posusta first became aware of the 10-point flyer on October 14, 2006, when he received a call about the flyer from Wright County Commissioner Pat Sawatske. Mr. Sawatske called Mr. Posusta after receiving a copy of the flyer from his neighbor. Mr. Sawatske dropped off the flyer at Mr. Posusta's office, and together they telephoned Mr. Herbst (who was out of town at the time) to tell him about the flyer.<sup>25</sup>

21. On the evening of October 16, 2006, Mr. Herbst spoke to Ms. Wojchouski and asked her if she knew anything about the flyer. She denied any involvement with a flyer; said she knew nothing about it; and asked him if he had any idea who was responsible for it.<sup>26</sup>

22. On October 17, 2006, Mr. Patch was deposed in connection with his lawsuit against the City. Both Mr. Herbst and Mr. Posusta attended Mr. Patch's deposition. During the deposition, Mr. Patch admitted that he had created a document for Ms. Wojchouski that listed "particularly politically offensive" items about Mr. Herbst and Mr. Posusta. Mr. Patch testified that he had given Ms. Wojchouski two copies of the flyer sometime in early October of 2006.<sup>27</sup>

23. After Mr. Patch's deposition was over, Mr. Posusta and Mr. Herbst went to Ms. Wojchouski's office at the Monticello Chamber of Commerce to confront her about her involvement with the flyer. Mr. Herbst brought with him the copy of the flyer that Mr. Posusta had obtained from Mr. Sawatske. At first Ms. Wojchouski again denied that she had any knowledge of the flyer. However, once Mr. Posusta and Mr. Herbst told her that Mr. Patch had testified under oath in his deposition that he had created the flyer and given her two copies, Ms. Wojchouski admitted that Mr. Patch had given her such a document. Ms.

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<sup>21</sup> Testimony of R. Thielen.

<sup>22</sup> Testimony of Herbst and Posusta.

<sup>23</sup> Testimony of Herbst.

<sup>24</sup> Testimony of Herbst and Posusta.

<sup>25</sup> Testimony of Posusta; Ex. PH1.

<sup>26</sup> Testimony of Herbst.

<sup>27</sup> Testimony of Patch; Ex. PH 14. Mr. Patch incorrectly stated that the document he created listed 10 items, when in fact his version of the flyer had 8 bullet points.

Wojchouski asked Mr. Herbst to show her his copy of the flyer. After looking at it, Ms. Wojchouski told Mr. Herbst and Mr. Posusta that the copy they had was not the same flyer that she had received from Patch.<sup>28</sup>

24. At the close of their conversation, Mr. Posusta and Mr. Herbst suggested that Ms. Wojchouski should hire an attorney.<sup>29</sup>

25. At a Monticello candidates' forum held on October 18, 2006, Mr. Herbst and Mr. Patch mentioned the flyer and asked those attending the forum to contact them or the police if they had any information as to who was distributing it. Mr. Herbst told those in attendance that the flyer was full of lies and innuendos and had been distributed by someone with an "evil mind" in order to influence the election.<sup>30</sup> About 10 people attended the candidates' forum. The forum was also televised on a local cable network.<sup>31</sup>

26. On October 19, 2006, the *Monticello Times* printed a letter to the editor written by Rhonda Thielen. In it, Ms. Thielen endorsed Cindy Anderson for mayor and referred generally to "allegations of impropriety and possible illegality" in the Monticello City Council and mayoral races.<sup>32</sup> The original draft of her letter to the editor included a paragraph that stated the mayor and a current city council member had engaged in improprieties. After she submitted the letter, however, Ms. Thielen called the newspaper's editor and asked her to remove that paragraph from the letter.<sup>33</sup>

27. At some point between October 18 and October 23, 2006, Ms. Wojchouski met Rhonda Thielen at a restaurant to discuss the distribution of the flyer. Ms. Thielen told Ms. Wojchouski that she had added a disclaimer to the bottom of the flyer, as Ms. Wojchouski had requested, but that she did not know how or whether it had been distributed.<sup>34</sup>

28. The Complainants filed this complaint against Respondents Fred Patch and Susie Wojchouski on October 25, 2006. A probable cause hearing was held on October 30, 2006. Based on information obtained during the probable cause hearing, the Complainants filed a second Complaint on November 13, 2006, against Respondents Rhonda and Bruce Thielen. By Order dated November 16, 2006, the complaints were consolidated.

29. In late October of 2006, about 25 to 30 lawn signs appeared along Highway 25 in Monticello that said: "Dump Posusta."<sup>35</sup>

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<sup>28</sup> Testimony of Herbst, Wojchouski.

<sup>29</sup> Testimony of Wojchouski.

<sup>30</sup> Testimony of Herbst and Posusta.

<sup>31</sup> Testimony of Herbst.

<sup>32</sup> Ex. PH13.

<sup>33</sup> Testimony of R. Thielen.

<sup>34</sup> Testimony of Wojchouski.

<sup>35</sup> Testimony of Wojchouski, Posusta and B. Thielen.

30. Clint Herbst was re-elected mayor of Monticello in the November 7, 2006, general election. Mr. Herbst received 2,419 votes to Ms. Anderson's 1,093 votes.

31. Glen Posusta was defeated in his bid for re-election to the Monticello City Council. Ms. Wojchowski received 2,026 votes; Mr. Brian Stumpf received 1,751 votes; and Mr. Posusta received 1,733 votes.

32. The campaign flyer bullet points that are at issue in this hearing are Bullet Points 2, 3, 7, 8, and 10.<sup>36</sup>

## **Bullet Point No. 2**

Election 2004—Your Mayor Herbst accepted substantial political contributions from his township cronies to pay for election expenses—including all his BIG SIGNS. After the election, Posusta, Herbst, Mayer and Perrault provided a little political pay-back by settling a lawsuit, awarding that resident nearly \$100,000! Of course, that same township resident remains a faithful campaign contributor this election, *and the sign litter is there to prove it this campaign as well!*

33. Mr. Patch wrote most of the text of Bullet Point 2.<sup>37</sup> Rhonda Thielen added only the last phrase, "and the sign litter is there to prove it this campaign as well!"<sup>38</sup>

34. The settlement referenced in Bullet Point 2 refers to the City's settlement of a lawsuit commenced by Rebecca Young, a former employee of the City of Monticello. Young brought a wrongful termination lawsuit against the City and City Administrator Richard Wolfsteller after she was fired in 2004. Her suit alleged that she was fired, at least in part, for using the City's copy machine to make 50 copies of an anti-annexation petition.<sup>39</sup>

35. Ms. Young and her husband, Jeff Young, live in Buffalo, Minnesota, and own land in Monticello Township. Jeff Young was an outspoken critic of former Mayor Bruce Thielen and was the chair of a group called Monticello Township Citizens Against Annexation (MTCAA). The group opposes efforts by the City to annex Monticello Township land. In 2004, the City and Monticello Township were engaged in a bitter dispute over the City's plan to annex 11,500 acres of township land, including land owned by Mr. Young.<sup>40</sup>

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<sup>36</sup> Claims concerning other bullet points were dismissed in the Notice of Determination of Prima Facie Violation and Notice and Order for Probable Cause Hearing (Oct. 27, 2006).

<sup>37</sup> Ex. PH2.

<sup>38</sup> Testimony of Patch and R. Thielen; Ex. PH1 (italics added).

<sup>39</sup> Exs. PH 5 and PH 6. At the time she was fired, Bruce Thielen was the mayor. Glen Posusta had voted against terminating her.

<sup>40</sup> Exs. PH5 and PH6.

36. Mr. Patch testified that, in 2004, Jeff Young had boasted that he and his anti-annexation group would do everything they could to defeat Bruce Thielen and two other council members. Mr. Patch believed Mr. Young and his group had made “substantial efforts” on behalf of their favored candidates in the form of endorsements and letters to the editor.<sup>41</sup>

37. The City of Monticello is a member of the League of Minnesota Cities. As a member, the City receives liability insurance coverage and legal representation from the League of Minnesota Cities Insurance Trust (LMCIT). LMCIT attorneys Patricia Beety and Mark Rossow represented the City and former Monticello City Administrator Richard Wolfsteller in Ms. Young’s lawsuit. Prior to a settlement conference, the City gave complete authority to LMCIT to resolve the matter since any settlement funds would be paid by LMCIT as opposed to the City.<sup>42</sup>

38. On or about April 26, 2006, during a settlement conference, LMCIT reached an agreement to resolve the matter with Ms. Young. The terms included a payment of \$98,000 and a written letter of apology to Ms. Young. Ms. Young wanted the letter of apology to come from Mr. Wolfsteller, but he refused to sign such a letter. Ms. Young agreed to accept a letter of apology signed by Mayor Herbst instead. Herbst wrote the letter as requested, although he was dismayed at the amount of the settlement.<sup>43</sup>

39. In a letter to the editor that was printed in the June 14, 2006, *Monticello Times*, Jeff Young stated that he was a “strong supporter of Mr. Herbst for mayor.”<sup>44</sup>

40. In 2006, Mr. Young met with Ms. Wojchouski at the Monticello Chamber of Commerce. Ms. Wojchouski testified that Mr. Young inquired about her candidacy for City Council, and he said that there could be a contribution for her if she answered some questions “correctly.” Mr. Young then asked Ms. Wojchouski whether she believed the City should “keep” Mr. Wolfsteller, the Monticello City Administrator. Ms. Wojchouski interpreted the question to mean that Mr. Young wanted a commitment from her that, if elected, she would vote to terminate Wolfsteller’s employment. Ms. Wojchouski was insulted by the question and she reminded Mr. Young that he would not be one of her constituents as he does not live in the City of Monticello. According to Ms. Wojchouski, Mr. Young responded that “we made substantial contributions to ‘the boys’ last time and look what we got from them.” Ms. Wojchouski interpreted “the boys” to mean Mr. Posusta and Mr. Herbst.<sup>45</sup>

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<sup>41</sup> Testimony of Patch.

<sup>42</sup> Ex. PH11; Testimony of Posusta and Herbst.

<sup>43</sup> Testimony of Herbst.

<sup>44</sup> Ex. PH5

<sup>45</sup> Testimony of Wojchouski.

41. Mr. Patch had no personal knowledge regarding the settlement of Ms. Young's lawsuit. In drafting Bullet Point 2, Mr. Patch relied on articles in the *Monticello Times* referring to the City's settlement of the litigation and on "opinions expressed in City Hall."<sup>46</sup>

42. Mr. Herbst did not receive any financial contributions for his campaign from either Rebecca or Jeff Young in 2004 or 2006. In 2004, however, Mr. Herbst did receive a campaign contribution of \$100 from the anti-annexation group. Mr. Herbst did not receive any financial contributions from this group in 2006.<sup>47</sup>

43. Mr. Patch had no personal knowledge as to what amount, if any, the Youngs or the anti-annexation group contributed to Mr. Herbst's campaign in 2004 or 2006. Patch based the statement that Mr. Herbst accepted "substantial political contributions from his township cronies to pay for election expenses" on two facts: (1) what Mr. Young told him in 2004 about his anti-annexation group supporting Mr. Herbst's campaign; and (2) on Mr. Young's letter to the editor published in June 2006 in which Young stated that he "was a strong supporter of Mr. Herbst." Patch based the statement in Bullet Point 2 that the "same township resident remains a faithful campaign contributor" on what Ms. Wojchowski reported to him about the conversation she and Jeff Young had in 2006.<sup>48</sup>

44. Rhonda Thielen had no personal knowledge as to what amount, if any, the anti-annexation group or its members contributed to Mr. Herbst's campaign in either 2004 or 2006. Ms. Thielen knew only that Jeff Young was supporting Mr. Herbst in 2004, and that Mr. Herbst received more campaign contributions in 2004 than he did in 2002. Ms. Thielen assumed that the increase in contributions to Mr. Herbst's campaign in 2004 was due to support from the anti-annexation group and its members. Based on this assumption, Ms. Thielen assumed further that the settlement of Rebecca Young's wrongful termination lawsuit was "political payback" for those contributions.<sup>49</sup>

### **Bullet Point No. 3**

November 30, 2004—According to a written report from the Minnesota State Auditor, your councilman Posusta had a conflict of interest when he purchased city property along Hwy 25 while he was seated on the City Council. From his council seat, he reduced the purchase price and wrongly benefited in thousands of dollars to buy prime Highway 25 frontage from the City in a closed sale.

45. Bullet Point 3 is the same in both versions of the flyer.<sup>50</sup>

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<sup>46</sup> Testimony of Patch.

<sup>47</sup> Testimony of Herbst.

<sup>48</sup> Testimony of Patch; Ex. PH5.

<sup>49</sup> Testimony of R. Thielen.

<sup>50</sup> Exs. PH1 and PH2.

46. On July 10, 2002, the City entered into a purchase agreement with Mr. Posusta in which the City was to sell him a parcel of land for \$71,920. The land abuts other property owned by Mr. Posusta and includes an abandoned right-of-way. The sale of the land was due to close within 90 days from the execution of the purchase agreement. If the closing did not take place within those 90 days, the terms of the purchase agreement provided that the purchase price was to be adjusted by 6% annual interest rate prorated to the date of the actual closing.<sup>51</sup>

47. The closing of the sale was delayed for months because the City was unable to obtain clear title on the land. In the end, the City sold the land to Mr. Posusta by quit claim deed, but the closing did not take place until October 2003, some 15 months after the parties had entered into the purchase agreement and ten months after Mr. Posusta's election to the City Council.<sup>52</sup>

48. At an October 27, 2003, City Council meeting, the City Council discussed the interest due as a result of the delay in closing the land sale. Mr. Posusta maintained that he should not have to pay the interest because he was not responsible for the delay. As a compromise, then-Mayor Bruce Thielen proposed splitting the interest between Mr. Posusta and the City. The City Council did not take a formal vote on the matter but directed City staff to split the interest owed with Mr. Posusta.<sup>53</sup>

49. At the time that Mr. Posusta entered into the purchase agreement with the City, he was not a member of the City Council. However, when the City Council directed splitting the interest owed with Mr. Posusta, he was a City Council member.

50. Fred Patch contacted the State Auditor's Office regarding the City's land sale to Mr. Posusta. Mr. Patch expressed concern about the sale creating a potential conflict of interest for Mr. Posusta. In response to Mr. Patch's inquiry, the Auditor's Office reviewed the sale between the City and Mr. Posusta. In a five-page letter to then-Mayor Bruce Thielen, dated November 30, 2004, the State Auditor's Office found no conflict of interest regarding the original purchase agreement between the City and Mr. Posusta, because it was entered into before Mr. Posusta became a city council member. Nor did the State Auditor find that closing on this agreement after Mr. Posusta was elected constituted a conflict of interest. The Auditor's Office, however, cautioned that:

a conflict of interest may have resulted when the terms of the agreement were changed to split the interest after Mr. Posusta became a city council member. . . . The City's decision to change the terms of the contract when Mr. Posusta was a city council member could be viewed as a new contract or an amendment to

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<sup>51</sup> Exs. PH8 and PH9.

<sup>52</sup> Testimony of Posusta; Exs. PH8, PH9, and PH17.

<sup>53</sup> Exs. PH8 and PH17; Testimony of Posusta, B. Thielen.

the existing contract. Mr. Posusta saved \$2,232 after he became a council member than was provided by a contract signed prior to him becoming a council member. This benefit to him could be viewed as a conflict of interest.<sup>54</sup>

51. The Auditor' Office closed its letter by stating the following:

The State Auditor's Office cannot determine how a court would resolve this issue. We suggest the City avoid similar actions in the future and consider adopting its own conflict of interest policy. In addition, we recommend that the City document decisions, such as adjusting a contractual interest payment, in its city council meeting minutes.<sup>55</sup>

52. Mr. Patch relied on this report from the State Auditor's Office when drafting Bullet Point 3.<sup>56</sup>

53. Rhonda Thielen assumed the information supplied by Mr. Patch in Bullet Point 3 was accurate because Mr. Patch was preparing his own lawsuit against the City and Mr. Posusta. Although Ms. Thielen had read the State Auditor's report in 2004, when it was issued, she did not recall the report's specific findings when reading and retyping Bullet Point 3 in 2006.<sup>57</sup>

### **Bullet Point No. 7**

Fall 2005—Posusta and Herbst concluded a bullying and retaliatory crusade by creating a new policy that ended in wrongful termination of a city employee, resulting in another dismal lawsuit against the City *to the tune of approximately \$3 million taxpayer dollars. While the city does have insurance for such lawsuits, it is still a taxpayer expense to pay attorneys through the League of Minnesota Cities membership.*

54. Rhonda Thielen added the italicized portion to Mr. Patch's original Bullet Point 7, and it is only this italicized portion that is challenged in this bullet point.<sup>58</sup> Ms. Thielen claims she came up with the \$3 million dollar figure based on her husband's report of a conversation he had with Mr. Patch in which Mr. Patch indicated that his lawsuit against the City may be worth "a couple million dollars."<sup>59</sup>

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<sup>54</sup> Ex. PH8 at 5.

<sup>55</sup> Ex. PH 8.

<sup>56</sup> Testimony of Patch.

<sup>57</sup> Testimony of R. Thielen.

<sup>58</sup> Ex. PH1 (italics added).

<sup>59</sup> Testimony of R. Thielen, Patch, and B. Thielen.

55. Neither Fred Patch nor Bruce Thielen recalls discussing the \$3 million dollar figure with each other or Ms. Thielen.<sup>60</sup>

### **Bullet Point No. 8**

Winter 2005—At the Lions Club holiday party Herbst and one of his club mates participated in an explicitly sexual performance that was demeaning to women and offensive to nearly all Lions Club members, for which Mayor Herbst later wrote a letter of apology to try to cover up his antics. *At another local meeting, while discussing trees, Mayor Herbst made an inappropriate comment in front of females, referring to his own “woody.”*

56. The last sentence in Bullet Point 8, regarding Mr. Herbst’s alleged “woody” comment, was not in Mr. Patch’s original flyer.<sup>61</sup> Ms. Thielen added the last sentence to Bullet Point 8 when she created the 10-point flyer, and it is only this sentence that is challenged.<sup>62</sup> Ms. Thielen added the sentence based on her misinterpretation of something Ms. Wojchouski had told her earlier about a comment made by another City Council member. Ms. Thielen mistakenly attributed the “woody” comment to Mr. Herbst.<sup>63</sup>

57. Ms. Wojchouski knew that the statement in Bullet Point 8 that Mr. Herbst had made an inappropriate reference to his own “woody” at a local meeting was false. Ms. Wojchouski knew that someone other than Mr. Herbst had made the “woody” comment at that meeting.<sup>64</sup>

58. After the probable cause hearing in this matter, Ms. Wojchouski called Rhonda Thielen and told her that the Mr. Herbst did not make the “woody” comment and that this part of Bullet Point 8 was wrong. Ms. Thielen responded that she had misunderstood Ms. Wojchouski, a position she reiterated at the hearing.<sup>65</sup>

### **Bullet Point No. 10**

September 29, 2006—Posusta accosted and battered a senior high school girl in front of the High School for moving one of his many political signs that are unlawfully located in the public right of way.

59. Bullet Point 10 is the same in both flyers and was written by Mr. Patch.

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<sup>60</sup> Testimony of Patch and B. Thielen.

<sup>61</sup> Ex. PH2.

<sup>62</sup> Ex. PH1 (italics added).

<sup>63</sup> Testimony of Patch and R. Thielen.

<sup>64</sup> Testimony of Wojchouski.

<sup>65</sup> Testimony of Wojchouski.

60. On September 29, 2006, Mr. Posusta was driving by Monticello High School when he saw two girls pull one of his campaign signs out of the lawn of a home across the street from the high school, bend the sign in half, and stomp on it. The girls were members of the high school cross-country team and had detoured from a training exercise to uproot the sign. When he saw what the girls were doing, Mr. Posusta honked his horn, pulled his car over to the shoulder of the road, exited his car, and ran toward the girls, yelling. Mr. Posusta grabbed one of the girls by her right shoulder and turned her around to face him. Mr. Posusta released his hand from the girl's shoulder once she was facing him. Mr. Posusta yelled at both of the girls in a loud and angry voice. He told the girls that they were damaging his sign, and he demanded to know their names so that he could tell their parents what they had done. Instead of answering, the girls ran across the street, causing a passing motorist to quickly apply her brakes in order to avoid hitting one of the girls. The other members of the girls' cross-country team, including Fred Patch's daughter, watched the encounter between Mr. Posusta and the two girls from across the street.<sup>66</sup>

61. Mr. Posusta then returned to his car and drove over to the high school to talk to Gail Grieme, one of the cross-country coaches. Mr. Posusta told Ms. Grieme that the two girls had damaged his sign, and he asked her to tell him the girls' names so that he could contact their parents. At this point, the two girls ran up to the coach and apologized to Mr. Posusta for damaging his sign. They also offered to pay for it. The girls were afraid that they were going to get into trouble for pulling out the lawn sign.<sup>67</sup>

62. Fred Patch learned of the incident between Mr. Posusta and the high school girls from his daughter later that same day. That evening, he also received a call about the incident from Ms. Kim Nygaard. Ms. Nygaard is another coach for the cross-country team. She is also a friend of the Patch family. Ms. Nygaard learned about the incident from some of the girls but did not personally witness the incident. During their conversation, Ms. Nygaard told Mr. Patch that she would see to it that the incident "became a legal matter."<sup>68</sup>

63. On October 3, 2006, Monticello High School Activities Director Lisa Johnson called Wright County Sheriff's Deputy Craig Canton. She told him there had been an incident involving two students on the cross-country team and an adult male. She asked the deputy to come to her office to meet with the girls. Deputy Canton went to Ms. Johnson's office and interviewed the two girls directly involved. Fred Patch's daughter was initially present in Ms. Johnson's office, but once Deputy Canton determined that she was not directly involved in the incident, he asked her to leave so that he could interview the other two girls in private.<sup>69</sup>

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<sup>66</sup> Testimony of Posusta; F. Patch, and L. Patch; Ex. PH12.

<sup>67</sup> Testimony of Posusta; Ex. PH12.

<sup>68</sup> Testimony of F. Patch.

<sup>69</sup> Testimony of Posusta and L. Patch; Ex. PH12.

64. The girl who Mr. Posusta had grabbed by the shoulder told Deputy Canton that Mr. Posusta was loud and angry but that he did not threaten her or hurt her. She also stated that Mr. Posusta did not “put fear in her” and that he immediately released his hand from her shoulder once she turned and faced him.<sup>70</sup>

65. Both Ms. Wojchouski and Ms. Thielen heard about the incident involving Mr. Posusta and the high school girls from a number of people in Monticello. The incident became the subject of gossip very quickly throughout Monticello.<sup>71</sup>

66. Ms. Thielen talked to yet another high school girl who was on the cross-country team and had witnessed the incident. In recounting the incident, this girl did not report that Mr. Posusta hit, shook, or grabbed the high school girl who damaged his sign. She said only that the incident was “scary.”<sup>72</sup>

67. No one ever reported to Fred Patch or Rhonda Thielen that Mr. Posusta hit or struck the high school girl in any way.

68. Mr. Patch wrote the flyer<sup>73</sup> in anger after talking to his daughter and Ms. Nygaard about the September 29<sup>th</sup> incident with Mr. Posusta.<sup>74</sup>

69. Immediately before the probable cause hearing in this matter, Mr. Patch contacted the Wright County Sheriff’s Department and requested a copy of any investigation reports relating to the September 29<sup>th</sup> incident. Upon receipt of this request, the Sheriff’s Department contacted Mr. Posusta the next morning, October 30, 2006, and said they needed to follow-up on the incident because “someone” had requested a written report. Mr. Posusta later learned that it was Mr. Patch who had requested a written report.<sup>75</sup>

70. Based on the interviews with the persons involved in the incident, the police concluded that no follow-up investigation was needed.<sup>76</sup>

Based upon the foregoing Findings of Fact, the panel makes the following:

## **CONCLUSIONS**

1. Minn. Stat. § 211B.35 authorizes the panel of Administrative Law Judges to consider this matter.

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<sup>70</sup> Ex. PH12.

<sup>71</sup> Testimony of Wojchouski and R. Thielen.

<sup>72</sup> Testimony of R. Thielen.

<sup>73</sup> Ex. PH2.

<sup>74</sup> Testimony of F. Patch; Exs. PH1 and PH2.

<sup>75</sup> Testimony of Posusta; Ex. PH12.

<sup>76</sup> Ex. PH12.

2. Campaign material is defined to mean “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, ...”<sup>77</sup>

3. The 10-bullet point flyer<sup>78</sup> is campaign material within the meaning of Minn. Stat. § 211B.01, subd. 2. It was written by Mr. Patch and Ms. Thielen and disseminated, albeit on a limited basis, for the purpose of influencing voting in the 2006 election.

4. Minn. Stat. § 211B.06, subd. 1, provides, in part: “A person is guilty of a gross misdemeanor who intentionally participates in the preparation [or] dissemination ... of ... campaign material with respect to the personal or political character or acts of a candidate ... that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office ..., that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.”

5. The burden of proving the allegations in the complaint is on the Complainants. The standard of proof of a violation of Minn. Stat. § 211B.06, relating to false campaign material, is clear and convincing evidence.<sup>79</sup>

6. The Complainants have demonstrated by clear and convincing evidence that Respondent Fred Patch violated Minn. Stat. § 211B.06 by intentionally participating in the preparation of campaign material (portions of Bullet Point 2 and Bullet Point 10) that was false and that he knew was false or communicated to others with reckless disregard as to whether it was false.

7. The Complainants have failed to demonstrate by clear and convincing evidence that Respondent Susie Wojchouski violated Minn. Stat. § 211B.06.

8. The Complainants have demonstrated by clear and convincing evidence that Respondent Rhonda Thielen violated Minn. Stat. § 211B.06 by intentionally participating in the preparation and dissemination of campaign material (portions of Bullet Point 2 and Bullet Point 10) that was false and that she knew was false or communicated to others with reckless disregard as to whether it was false.

9. The violations were committed knowingly or with reckless disregard for the truth. They likely had some impact on some voters, and could not have been countered easily by the Complainants; however, the record does not suggest that many voters were misled or that the electoral process was corrupted as a result. Each Respondent shall be fined \$600 for each of these violations.

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<sup>77</sup> Minn. Stat. § 211B.01, subd. 2.

<sup>78</sup> Ex. PH1.

<sup>79</sup> Minn. Stat. § 211B.32, subd. 4.

10. The Complainants failed to demonstrate by clear and convincing evidence that the Respondents violated Minn. Stat. § 211B.06 with respect to Bullet Points 3, 7 and 8 of the campaign flyer.

Based upon the record herein, and for the reasons stated in the following Memorandum, the panel of Administrative Law Judges makes the following:

**ORDER**

IT IS ORDERED:

1. That having been found to have violated Minn. Stat. § 211B.06, Fred Patch pay a civil penalty of \$1,200 by March 1, 2007.<sup>80</sup>
2. That having been found to have violated Minn. Stat. § 211B.06, Rhonda Thielen pay a civil penalty of \$1,200 by March 1, 2007.<sup>81</sup>
3. That the Complaint as against Respondent Susie Wojchouski is DISMISSED.

Dated: January 29, 2007

/s/ Kathleen D. Sheehy  
KATHLEEN D. SHEEHY  
Presiding Administrative Law Judge

/s/ Eric L. Lipman  
ERIC L. LIPMAN  
Administrative Law Judge

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<sup>80</sup> The check should be made payable to "Treasurer, State of Minnesota" and sent to the Office of Administrative Hearings, 100 Washington Avenue South, Suite 1700, Minneapolis, MN 55401.

<sup>81</sup> The check should be made payable to "Treasurer, State of Minnesota" and sent to the Office of Administrative Hearings, 100 Washington Avenue South, Suite 1700, Minneapolis, MN 55401.

## MEMORANDUM

Minn. Stat. § 211B.06 prohibits the preparation and dissemination of false campaign material. In order to be found to have violated this section, a person must intentionally participate in the preparation or dissemination of campaign material that the person knows is false or communicates with reckless disregard of whether it is false.

### Campaign Material

As an initial matter, Ms. Wojchouski and Ms. Thielen argue that the flyer was not campaign material or, if it was, that they were not involved in disseminating it. Campaign material is “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media.”<sup>82</sup> Respondents contend that because the flyer was not distributed widely throughout Monticello it should not be considered campaign material.

Fred Patch testified that his version of the flyer was prepared as campaign material and that he intended it to influence voters to vote for candidates other than Mr. Posusta and Mr. Herbst. Ms. Thielen made a few changes to the text and added a disclaimer providing that it was “public information not paid for or endorsed by any candidate.” She then gave it to three friends who are active in local politics, and she testified she intended that her friends would “read and destroy” the document. She also testified that she disposed of her remaining copies in a dumpster outside her place of employment. It is not altogether clear from the record how widely the material was distributed or who distributed the flyers beyond this group. It is clear, however, that further distribution did take place. The Complainants testified that several of the flyers were found in doors in the downtown area of Monticello and that many people made comments to them and to their family members about the contents of the flyer.

Mr. Patch intended the flyer to be distributed by Ms. Wojchouski; the fact that Ms. Thielen was the vehicle by which it was disseminated does not materially alter his responsibility for it. Ms. Thielen’s testimony that she intended that her friends read, and then destroy, the document is not plausible. Based on the format and wording of the flyer, and the express appeal to vote out Mr. Posusta and Mr. Herbst; based on the addition of a disclaimer intended to protect Mr. Patch and Ms. Wojchouski; and based on the further fact that one of the persons she gave the flyer to was Mr. Herbst’s opponent in the mayoral race, the panel concludes that Ms. Thielen prepared this material and disseminated it for the purpose of influencing voters.

The panel concludes that both Mr. Patch and Ms. Thielen are responsible for preparation of the flyer, which is campaign material and that the flyer was disseminated for the purpose of influencing voters. The panel also concludes, however, that Ms. Wojchouski is not responsible for preparing or disseminating

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<sup>82</sup> Minn. Stat. § 211B.01, subd. 2.

the flyer. Although she told Patch that she would look at any information he prepared that might be useful to her campaign, and she gave it to Rhonda Thielen knowing that Ms. Thielen might disseminate it further, Ms. Wojchowski did not write any of the material and had no desire to use it in connection with her campaign. When she gave it to Ms. Thielen, she was not sure what Ms. Thielen would do with it, nor did she particularly care, as long as Ms. Thielen did not connect her to it. On this record, the panel could not find that Ms. Wojchowski was responsible for preparing or disseminating the flyer. The Complaint against her is dismissed.

### **Falsity and Actual Malice**

The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard applicable to defamation cases involving public officials from *New York Times v. Sullivan*.<sup>83</sup> Based upon this standard, the Complainants must show by clear and convincing evidence that Fred Patch and Rhonda Thielen either published the challenged statements knowing the statements were false or published them with reckless disregard for truth or falsity. The test is subjective; the Complainants must come forward with sufficient evidence to prove that the Respondents “in fact entertained serious doubts” as to the truth of the publication or acted “with a high degree of awareness” of its probable falsity.<sup>84</sup>

As the U.S. Supreme Court has noted, there is not one precise definition of “reckless disregard.” Inevitably, its outer limits must be marked through case-by-case adjudication. A respondent cannot automatically ensure a favorable decision by testifying that he published with a belief that the statements were true.<sup>85</sup> A statement may have been made with actual malice if it

is fabricated by the defendant, is the product of his imagination, . . . is based wholly on an unverified anonymous telephone call [or if] the publisher’s allegations are so inherently improbable that only a reckless man would have put them in circulation.<sup>86</sup>

In determining whether a respondent had serious doubts about the truth of his statement, the panel must assess the information available when the statement was made, including the identities of the sources and what those sources said. Evidence that there were no sources, that the sources were unreliable or uninformed, or that the information provided by the source was misrepresented may prove the requisite mental state.<sup>87</sup>

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<sup>83</sup> *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

<sup>84</sup> See *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); see also *Riley v. Jankowski*, No. A051125 (Minn. App. Apr. 26, 2006).

<sup>85</sup> *St. Amant*, 390 U.S. at 732; *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1253 (9<sup>th</sup> Cir. 1997) (“As we have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published, we must be guided by circumstantial evidence.”).

<sup>86</sup> *St. Amant*, 390 U.S. at 732.

<sup>87</sup> See *In re Charges of Unprofessional Conduct Involving File No. 17139*, 720 N.W.2d 807, 815-16 (Minn. 2006).

Although for different reasons, both Fred Patch and Rhonda Thielen strongly resent the Complainants. Mr. Patch holds them both responsible for the loss of his job; and Ms. Thielen views them as the political team that ended her husband's career in politics. Both of them are willing to believe almost anything negative about Mr. Herbst and Mr. Posusta. This slanted perspective alone, however, is not sufficient to show actual malice.<sup>88</sup>

## **Bullet Point No. 2**

This bullet point states that in 2004 Mr. Herbst "accepted substantial political contributions from his township cronies to pay for election expenses." It then states that Herbst, Posusta, and other council members settled Rebecca Young's lawsuit for nearly \$100,000 as "political pay-back" for these substantial contributions. The flyer concludes with the assertion that "this same township resident remains a faithful contributor during the 2006 election, and the sign litter is there to prove it!"

The evidence established that, contrary to the flyer's statements, Mr. Herbst did not receive any financial contributions from Jeff or Rebecca Young in either 2004 or 2006. Mr. Herbst received only a \$100 campaign contribution from MTCAA in 2004, and he received no financial contributions from this group in 2006.

Mr. Patch argues that it was fair to conclude, based upon newspaper articles concerning the settlement, that the City settled this litigation, notwithstanding Herbst's and Posusta's view that the League of Minnesota Cities was making key litigation decisions. The Administrative Law Judges concur that stating the City settled this litigation is not a false statement of fact.

Both Mr. Patch and Ms. Thielen further argue that in using the term "contribution," they intended it to mean demonstrations of public support for, and endorsement of, Mr. Herbst; such as statements made by Jeff Young in newspaper articles and letters to the editor.

Fred Patch admitted that he had no personal knowledge as to what amount, if any, the Youngs or the anti-annexation group contributed to Mr. Herbst's campaign in 2004 or 2006. Mr. Patch testified that he based his statement that Mr. Herbst had accepted "substantial political contributions from his township cronies to pay for election expenses" on what Mr. Young told him in 2004 about his anti-annexation group supporting Mr. Herbst's campaign. Furthermore, he based his assertion that financial contributions were made in 2006 on Ms. Wojchowski's description of Mr. Young's offer to support her if she answered certain questions the right way and on his belief that the same "offer"

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<sup>88</sup> *Stokes v. CBS, Inc.*, 25 F.Supp.2d 992, 1003 (D. Minn. 1998) (a showing of ill will is relevant evidence in determining whether defendant possessed a state of mind highly conducive to reckless disregard); *Chafoulias v. Peterson*, 668 N.W.2d 642, 655 (Minn. 2003) (a "highly slanted perspective" may contribute to a finding of actual malice but it is not enough by itself to establish actual malice).

had been made to Mr. Herbst and Mr. Posusta. In his testimony, Mr. Patch did not claim that Mr. Young had disclosed any financial contributions to Mr. Herbst at any time. Instead, Mr. Patch consistently described Mr. Young's statements as involving contributions of "support" rather than "dollars and cents."

Rhonda Thielen also admitted that she had no personal knowledge as to what amount, if any, the Youngs or the anti-annexation group gave to Mr. Herbst's 2004 or 2006 campaigns. She knew only that Jeff Young was supporting Mr. Herbst in 2004, and that Mr. Herbst received more financial contributions in 2004 than he did in 2002. Ms. Thielen simply assumed that Herbst's increase in financial contributions in 2004 was due to support from the Youngs and the anti-annexation group. Based on this assumption, Ms. Thielen assumed that the settlement of Rebecca Young's lawsuit was "political payback" for those contributions.

In determining whether a statement is false, the words used must be given their obvious and natural meaning, unless they are alleged to have been used and understood in a different sense.<sup>89</sup> A court must look to the nature and obvious meaning of the language in its plain and ordinary sense, construing it as a whole, including innuendos reasonably laid from the statement.<sup>90</sup>

The Respondents' purported construction of the word "contribution" to mean non-financial support is not plausible, principally because both Mr. Patch and Ms. Thielen, in their respective versions of the flyer, link contributions from Mr. Herbst's "cronies" to later campaign *expenditures* by Mr. Herbst for lawn signs. One cannot make campaign expenditures, or purchase lawn signs, with letters to the editor or endorsements from well-known persons. The ordinary reader would understand, from the manner in which the flyer links contributions to payment of election expenses, that Mr. Herbst accepted substantial financial contributions from the Youngs, that Mr. Herbst returned the favor by agreeing to settle Ms. Young's litigation on generous terms, and that Mr. Herbst continued to accept financial contributions from the Youngs during the 2006 election. This is a false statement.

The panel also concludes that the Complainants have established by clear and convincing evidence that both Fred Patch and Rhonda Thielen knew this statement was false or that they acted with a high degree of awareness of probable falsity. The facts they believed to be true do not come close to supporting what they said. The difference, the majority of the panel believes, was either imagined or fabricated, and it demonstrates actual malice.

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<sup>89</sup> *Church of Scientology of Minnesota v. Minnesota State Medical Association Foundation*, 264 N.W.2d 152, 155 (Minn. 1978). See also *Jones v. Monico*, 276 Minn. 371, 374, 150 N.W.2d 213, 215 (1967) (the question always is how would ordinary men naturally understand the language).

<sup>90</sup> See *Fine v. Bernstein*, No. A05-2393, slip op. at 15 (Minn. App. Jan. 23, 2007); *Phipps v. Clark Oil & Refining Corp.*, 396 N.W.2d 588, 594 (Minn. App. 1987) (citing *Tawney v. Simonson, Whitcomb, & Hurley Co.*, 109 Minn. 341, 124 N.W. 229 (1909)); *Jadwin v. Minneapolis Star & Tribune Co.*, 390 N.W.2d 437, 442 (Minn. App. 1986). See also *Stokes*, 25 F. Supp. 2d at 998.

### **Bullet Point No. 3**

Bullet Point 3 provides that “According to a written report from the Minnesota State Auditor, your councilman Mr. Posusta had a conflict of interest when he purchased city property along Hwy 25 while he was seated on the City Council. From his council seat, he reduced the purchase price and wrongly benefited in thousands of dollars to buy prime Highway 25 frontage from the City in a closed sale.”

Mr. Posusta argues that nowhere in the report does the Auditor say that his actions constituted a conflict of interest. Furthermore, he contends that the purchase price was not reduced by a single penny; the only reduction was in the amount of interest that later accrued.

Mr. Posusta is correct that there was no reduction in the “purchase price” for the property, but it is undisputed that there was a reduction in the interest that was owed. Thus, the total cost to Mr. Posusta to complete the transaction was reduced, following the agreement to “split the interest.” Although Mr. Patch stated that Mr. Posusta “reduced the purchase price,” the distinction between reducing the purchase price and the interest payment paid at the time of closing is small and of little import. It is not disputed that the amount Mr. Posusta owed to the City was reduced by \$2,232. The panel concludes that this portion of the bullet point is not a false statement.

Mr. Posusta is also correct that the Auditor’s Report concluded only that a conflict of interest “*may have resulted*”<sup>91</sup> when he discussed “splitting the interest” in 2003. The panel concludes that in attributing a different conclusion to the State Auditor (one that more closely matched his own), Mr. Patch made a false statement of fact. Mr. Posusta further contends that in falsely characterizing the Auditor’s Report as containing a conclusion that he had a conflict of interest, Mr. Patch intentionally misrepresented his source (the Auditor’s Report) and accordingly demonstrated actual malice.

The Auditor’s Report states that the \$2,232 reduction in interest that Mr. Posusta obtained after he became a council member was a benefit to him that “could be viewed as a conflict of interest.”<sup>92</sup> It further states that the Auditor’s Office cannot determine how a court would resolve the issue, and it recommends that to avoid such issues in the future, the City Council adopt a policy on conflicts of interest and ensure that its decisions on financial matters involving a council member are reflected in meeting minutes.

The panel concludes that although Mr. Patch’s characterization of the report is not accurate, it is not so inaccurate that the difference should be attributed to actual malice. The claims concerning Bullet Point 3 against Mr. Patch and Rhonda Thielen (who relied entirely on Patch as the source of this information) are accordingly dismissed.

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<sup>91</sup> Ex. PH8, page 5 (emphasis added).

<sup>92</sup> Ex. PH8 at p. 5.

### **Bullet Point No. 7**

Bullet Point 7 provides that Mr. Posusta and Mr. Herbst created a new policy that ended in wrongful termination of a city employee, “resulting in another dismal lawsuit against the City *to the tune of approximately \$3 million taxpayer dollars. While the city does have insurance for such lawsuits, it is still a taxpayer expense to pay attorneys through the League of Minnesota Cities membership.*” Rhonda Thielen added the italicized portion above.

The Complainants argue that this statement falsely communicates to readers that the Patch lawsuit has cost, or predictably will cost, taxpayers approximately \$3 million. It is unclear where Ms. Thielen obtained the \$3 million figure, because the purported sources (her husband and Mr. Patch) do not recall discussing such a figure with her or with each other. In connection with the federal litigation, Mr. Patch has calculated his damages “in seven figures,” and Mr. Posusta testified in the probable cause hearing that his attorney in the federal litigation recognized that number as one that Mr. Patch has used to describe his alleged lost wages.

The panel concludes that the statement does not clearly communicate any false statement of fact. Saying there is a lawsuit “to the tune of” \$3 million taxpayer dollars, wherever that figure came from, could mean the plaintiff is claiming \$3 million, which could be true. Or it could mean the lawsuit might cost \$3 million taxpayer dollars, which would be a prediction of what might happen in the future, as opposed to a verifiably false statement about what has happened to date. In any event, the panel concludes that there is an insufficient basis for finding the statement is false. The claims concerning Bullet Point 7 are dismissed.

### **Bullet Point No. 8**

Bullet Point 8 describes a holiday party at which Mr. Herbst “participated in an explicitly sexual performance that was demeaning to women and offensive to nearly all Lions Club members, for which Mayor Herbst later wrote a letter of apology to try to cover up his antics.” This much of Bullet Point 8 has been determined to be substantially true. To this statement, Rhonda Thielen added “*At another local meeting, while discussing trees, Mayor Herbst made an inappropriate comment in front of females, referring to his own ‘woody.’*”

This added statement is undisputedly false. Ms. Thielen testified that she misunderstood a story related to her by Ms. Wojchowski to involve Mr. Herbst, when in fact Ms. Wojchowski had attributed the statement to someone else. Ms. Thielen apparently believed the statement was true when she wrote it. And given the evidence that Mr. Herbst has a somewhat bawdy sense of humor, the statement is not so inherently improbable that she was reckless in circulating it. The allegations concerning Bullet Point 8 are dismissed because the Complainants failed to establish by clear and convincing evidence that Ms. Thielen knew the statement was false or made it while subjectively believing it was probably false.

## Bullet Point No. 10

Bullet Point 10 states that on September 29, 2006, “Posusta accosted and battered a senior high school girl in front of the High School for moving one of his many political signs that are unlawfully located in the public right of way.” Mr. Patch contends that he intended the word “battered” to mean that Mr. Posusta touched the girl without her consent. He argues that his purported meaning is supported by the legal definition of the tort of battery, which is defined as “intentional and wrongful physical contact with a person without his or her consent that entails some injury or offensive touching.”<sup>93</sup>

Again, in determining whether a statement is false the words used must be given their obvious and natural meaning, unless they are alleged to have been used and understood in a different sense.<sup>94</sup> This was not a publication intended for an audience of lawyers. The commonly understood meaning of the word “batter” is quite different from the legal definition of the tort. It is defined as follows: “to beat with successive blows so as to bruise, shatter, or demolish”; “to subject to strong, overwhelming, or repeated attack”; and “to wear or damage by hard usage or blows,” or “to strike heavily and repeatedly.”<sup>95</sup> The panel concludes that Mr. Patch’s purported meaning is not at all clear from the context of the statement, is disingenuous, and is not likely to be the ordinary meaning attached to the statement.<sup>96</sup> The ordinary reader would conclude from this Bullet Point that Mr. Posusta had struck a teen-age girl for removing one of his lawn signs.

Fred Patch and Rhonda Thielen were both very careful in their testimony to say that their sources described the incident as involving Mr. Posusta yelling at the girls and grabbing one by the shoulder and turning her around, demanding to know her name. The girl reported no more than this to her coach and to the authorities. Although this incident immediately became the subject of gossip, no one ever reported to Mr. Patch or Ms. Thielen that Mr. Posusta hit, struck, shook or otherwise physically abused the girl. Accordingly, the statement that Posusta “accosted and battered a senior high school girl” is false. Moreover, the panel concludes that the Complainants have established by clear and convincing evidence that Mr. Patch and Ms. Thielen either knew the statement was false or made the statement with a high degree of awareness of its probable falsity. Again, the facts that Mr. Patch and Ms. Thielen believed to be true completely fail to support what they said to voters. The difference, the panel believes, was a fabrication that demonstrates actual malice.

K.D.S., E.L.L.

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<sup>93</sup> *Black’s Law Dictionary* (6<sup>th</sup> ed. 1999).

<sup>94</sup> *Church of Scientology of Minnesota v. Minnesota State Medical Association Foundation*, 264 N.W.2d 152, 155 (Minn. 1978). See also *Jones v. Monico*, 276 Minn. 371, 374, 150 N.W.2d 213, 215 (1967) (the question always is how would ordinary men naturally understand the language).

<sup>95</sup> *Merriam-Webster Online Dictionary*.

<sup>96</sup> *Fine v. Bernstein*, slip op. at 15.

**Administrative Law Judge Beverly Jones Heydinger, concurring in part and dissenting in part:**

I dissent from the panel in one instance. Although I concur that the statement in Bullet Point 2 that “that same township resident remains a faithful campaign contributor [in] this election” is false, I cannot conclude that Mr. Patch knew that the statement was false, or disseminated it in reckless disregard of its truth or falsity.

Mr. Patch asserts that he believed that the statement was true. In evaluating that representation, one must examine whether Mr. Patch fabricated the statement, or it was a product of his imagination, or based wholly on an unverified source so inherently improbable that only a reckless person would put the statement in circulation.<sup>97</sup> At the time that Mr. Patch made the statement, he lacked the requisite knowledge of the statement’s probable falsity. Although he acknowledged that he had no personal knowledge as to what amount, if any, the Youngs or the anti-annexation township group contributed to Mr. Herbst’s campaign in 2004 or 2006, he knew that Mr. Young was a member of a group of township residents who opposed annexation and supported Mr. Herbst’s campaign in 2004. He also knew that Mr. Young remained a strong supporter of Mr. Herbst, based on articles in the Monticello newspaper, including Mr. Young’s letter in June, 2006, stating that he remained “a strong supporter of Mr. Herbst.” Mr. Patch also relied on his conversation with Ms. Wojchouski about Mr. Young’s statement to her that Mr. Young had made substantial contributions to “the boys” last time, with good results. Ms. Wojchouski understood that the reference to “the boys” meant Mr. Herbst and Mr. Posusta. Mr. Young made this statement to line up support from Ms. Wojchouski for another personnel action, and suggested that she would get a contribution in return.

In light of the circumstances, Mr. Patch could reasonably believe that the Youngs remained “faithful campaign contributors” in the 2006 election, even if the evidence showed that the Youngs did not in fact make a financial contribution. For these reasons, I conclude that Mr. Patch did not violate Minn. Stat. § 211B.06. Therefore, I would reduce his fine to a total of \$600.

I concur, however, that Ms. Thielen violated Minn. Stat. § 211B.06 for disseminating Bullet Point 2. She offered no basis for believing that Bullet Point 2 was correct except that Mr. Patch had written it on the flyer. She admitted that she had no information about the contributions that MTCOA or Mr. Young made, and that she simply assumed that Mr. Herbst’s increased contributions must have come from those who opposed annexation of the township property, including the Youngs. She disseminated the statement with no personal knowledge, without making any attempt to verify the accuracy of the information, and in reliance on a person who had a strong bias to misstate the facts. It is

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<sup>97</sup> *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

appropriate to conclude that Ms. Thielen made the statement in reckless disregard of its truth or falsity.

I also concur that both Mr. Patch and Ms. Thielen violated Minn. Stat. § 211B.06 with respect to Bullet Point 10.

/s/ Beverly Jones Heydinger  
BEVERLY JONES HEYDINGER  
Administrative Law Judge