No. _____

In The

Supreme Court of the United States

RICK BERTRAND,

Petitioner,

v.

RICK MULLIN and THE IOWA DEMOCRATIC PARTY,

Respondents.

On Petition For A Writ Of Certiorari To The Iowa Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Iowa Supreme Court, in deciding whether a political campaign advertisement constituted actionable defamation by implication, erred by applying an unreasonably high legal standard when it found a lack of sufficient evidence of actual malice pursuant to *N.Y. Times v. Sullivan* even though Petitioner informed Respondents several times of the false nature of the advertisement (1) at a meeting and (2) through a lawsuit which (a) sought immediate injunctive relief and (b) was accompanied by a sworn affidavit refuting the false implication.

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The opinion of the Supreme Court of the State of Iowa is reported as *Rick Bertrand v. Rick Mullin and The Iowa Democratic Party*, 846 N.W.2d 884 (Iowa 2014).

JURISDICTION

The judgment of the Supreme Court of the State of Iowa was entered on May 16, 2014. This petition was timely filed within ninety days after judgment, and this Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTORY PROVISIONS INVOLVED

None.

STATEMENT OF FACTS

A. The Defamatory Advertisement Which was Aired During the Iowa Senate Race and Respondents' Continued Publication of the Advertisement After Being Notified of its False Implications

This lawsuit derives from oral and written statements made in a televised political advertisement during an Iowa State Senate campaign. In 2010, the Petitioner, Rick Bertrand (Republican), ran

for the Iowa State Senate against Rick Mullin (Democrat). Mullin and the Iowa Democratic Party, who funded Mullin's campaign, published a television advertisement in October 2010, entitled "Secrets," which indicted Bertrand's business ethics and contained several offensive verbal statements including:

> "*Because Bertrand doesn't want you to know he put his profits ahead of children's health";* and
>
> "*The FDA singled out Bertrand's company for marketing a dangerous sleep drug to children."*

The advertisement also included several statements in large capital letters, including but not limited to: "*BERTRAND'S COMPANY MARKETED SLEEP DRUG TO CHILDREN*."

After the advertisement was broadcast, Bertrand immediately began receiving threatening phone calls and offensive comments. Constituents slammed doors in his face as a result of the advertisement while he was campaigning in his voting district, and dirty diapers were smeared on his company's signage. In fact, he lost business deals and good press for the businesses he was opening because people believed he marketed dangerous drugs to children, as implied by the egregious advertisement.

A few days after the advertisement started airing, Bertrand spoke at an October 21, 2010 meeting before the Homebuilders Association of Greater Siouxland at which he advised Mullin of the following:

the advertisement was false, Bertrand's former employer (Takeda) was never owned by him; he never sold the drug in question and did not work for the division within Takeda that sold the drug; and none of his companies marketed dangerous drugs to children or sleep drugs to children. He demanded Mullin stop the advertisement.

The day immediately following the Homebuilders' meeting, Bertrand filed a lawsuit against Mullin and The Iowa Democratic Party. In connection with the filing of the lawsuit, Bertrand also submitted an affidavit again pronouncing unequivocally that the advertisement's implications were false (among other things, Bertrand's affidavit confirmed he never sold the drug in question).

Thereafter, Respondents continued to run the advertisement and continued ordering its further publication from various media outlets. Mullin expressed doubts regarding the continued airing of the commercial, and discussed several times with his wife, Amber Pringnitz (the Director of Iowa's Senate Majority Fund) and Senator Mark Warnstadt (Democratic Senate Majority Leader) whether to continue running the advertisement, going so far as to explain how Bertrand became "extremely animated about the terrible attack ad" at the Homebuilders' meeting and had told Mullin the commercial made his wife cry. However, Respondents did not stop airing the advertisement (to the contrary, they continued media buys to air the commercial) and did not take any further actions whatsoever to determine whether Bertrand's

representations regarding the false implications of the advertisement were legitimate.

B. Relevant District Court Proceedings and Rulings

On October 22, 2010, the day after Bertrand had advised Mullin of the advertisement's falsities, and the same day Mullin relayed such information to the Iowa Democratic Party and expressed concerns, Bertrand filed a lawsuit in the District Court for Woodbury County, Iowa against Respondents, seeking injunctive relief and asserting claims for libel, slander and conspiracy to defame. The Petition sought punitive damages and attorney fees.

Although Bertrand suffered in the polls as a result of the advertisement, he won the election by a very narrow margin of 222 votes. Bertrand pursued the lawsuit after he won the election. In a pre-trial motion in limine, Bertrand moved the District Court to instruct the jury on punitive damages. The District Court withheld its ruling on the issue. However, Bertrand renewed the issue during trial (the day before the jury deliberated) by filing a Motion for Punitive Damages.

In ruling on the Motion for Punitive Damages, the District Court discussed the similar – but different – standards which apply to claims for punitive damages versus claims of actual malice under *N.Y. Times v. Sullivan*. The District Court concluded the standards are distinct in their focus (attitude toward

falsity [actual malice] versus attitude toward a plaintiff's rights [punitive damages]), and also distinct in their burdens of proof since actual malice allows a finding based on reckless disregard while punitive damages requires disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which is usually accompanied by a conscious indifference to the consequences.

The District Court denied Bertrand's Motion for Punitive Damages, finding that common law malice – rather than actual malice utilized to find defamation in a First Amendment public figure case – applied to the punitive damages claim. Ultimately, the District Court held that Bertrand did not present evidence sufficient to satisfy the burden required for punitive damages. However, the District Court failed to address the fact that Respondents proceeded to purchase additional airtime to continue running the advertisement after being advised of its falsity and failed to conduct any investigation after being so advised.

In addition, the District Court denied Respondents' Motion for Directed Verdict, finding there was sufficient evidence for Bertrand's defamation by implication claim to go to the jury under the definition of actual malice pursuant to *New York Times v. Sullivan*, 376 U.S. 254 (1964). More specifically, the District Court ruled that the advertisement's statements were not actionable as express defamation, but found that Bertrand had presented sufficient evidence for a reasonable jury to find that two of the

advertisement's statements implied a false fact, namely that Bertrand personally sold a dangerous sleep drug to children and/or owned a company that sold a dangerous sleep drug to children. Thus, the District Court submitted the case to the jury under an implied defamation theory.

After a four-day jury trial, the jury returned a verdict of $31,000 against Rick Mullin and $200,000 against the Iowa Democratic Party on April 6, 2012. The District Court entered a corresponding Judgment.

C. Bertrand's Appeal to the Iowa Supreme Court and Subsequent District Court Rulings on Limited Remand

On April 9, 2012, Bertrand filed a Notice of Appeal regarding the District Court's ruling on his Motion for Punitive Damages. Shortly thereafter, the Iowa Supreme Court granted Respondents' motion for a limited remand for the District Court to address post-trial motions.

On April 18, 2012, Respondents filed two post-trial motions: (1) a Motion for Judgment Notwithstanding the Verdict or in the Alternative for New Trial; and (2) a Motion for New Trial or in the Alternative a Remittitur.

The District Court denied Respondents' Motion for Judgment Notwithstanding the Verdict, finding that there was substantial evidence to support a

finding that the implication Bertrand personally sold or marketed a dangerous drug to children was a reasonable inference from the commercial taken as a whole and was a "provably false fact." The District Court also found that the record established clear and convincing evidence that Respondents published the implication with knowledge or reckless disregard of the truth of the implication when they ordered more ads on October 31, 2010.[1]

In addition, the District Court issued a remittitur after finding there was insufficient evidence to support the jury's award because Bertrand's expert witness impermissibly assumed damages and was too speculative. The District Court reduced the judgment to $50,000 (and allocated the judgment $6,705 against Mullin and $43,295 against the Iowa Democratic Party).

On July 13, 2012, Bertrand filed a Notice of Appeal regarding the District Court's Order granting a remittitur. On July 30, 2012, Respondents cross-appealed the District Court's denial of their Motion for Judgment Notwithstanding the Verdict.

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[1] The District Court did, however, conclude that it should have directed a verdict in Respondents' favor regarding the alleged implication that Bertrand owned the company that sold the drug in question. Thus, the only actionable defamation claim was based on the implication that Bertrand sold dangerous drugs to children.

D. The Iowa Supreme Court Decision

Bertrand raised the following two issues on appeal: (1) whether the District Court erred in failing to allow the issue of punitive damages to be submitted to the jury; and (2) whether the District Court erred in granting a remittitur.

Respondents raised one issue on appeal: whether the District Court erred in overruling their Motion for Judgment Notwithstanding the Verdict. The Iowa Supreme Court ruled affirmatively for Respondents, finding that Bertrand had failed to present sufficient evidence to prove the actual malice element of defamation.[2] More specifically, the Iowa Supreme Court held that (1) the evidence did not support a finding that Respondents had actual knowledge of the falsity of the advertisement's implication; and (2) the evidence did not support a finding that Respondents acted with reckless disregard for the truth or falsity of the advertisement's implication, as required by *N.Y. Times v. Sullivan.*

[2] As a result, the Iowa Supreme Court did not address the other issues which Bertrand raised on appeal.

REASON FOR GRANTING THE PETITION

I. THE IOWA SUPREME COURT APPLIED AN UNREASONABLY HIGH STANDARD FOR DEFAMATION IN A POLITICAL CASE AND THIS COURT SHOULD REVISIT AND CLARIFY THE STANDARD, ESPECIALLY AS IT RELATES TO "DEFAMATION BY IMPLICATION" CASES

Whether the evidence in a public figure defamation lawsuit is sufficient to support a finding of actual malice is a question of law. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-511 (1984). Stated another way, it is for the court to decide whether a defendant's words are capable of a defamatory meaning, while it is for the jury to decide whether the words actually had that effect on the reader or listener. *See, e.g., Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 830 (Iowa 2007), quoting Restatement (Second) of Torts § 614, at 311 (1965). A trial court must permit a *N.Y. Times* defamation claim to go to a jury when the evidence presented could lead a reasonable jury to find actual malice by clear and convincing evidence. *See, e.g.*, *Stevens*, 728 N.W.2d at 830, quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-256 (1986).

The Iowa Supreme Court interpreted *N.Y. Times* so narrowly that it approves an unrestricted open season on political candidates/public figures, unfettered by the truth or falsity of a statement's implications. The Court held incorrectly that Bertrand failed to present sufficient evidence from which a reasonable

jury could conclude clearly and convincingly that Respondents (1) had actual knowledge of the falsity of the implied statement in the advertisement; or (2) acted with reckless disregard for the truth or falsity of the advertisement's implication. 846 N.W.2d at 888, 896-902. As a result, the Court reversed the District Court's denial of Respondents' related Motion for Judgment Notwithstanding the Verdict.

In reaching its conclusion, the Iowa Supreme Court applied an unreasonably high standard and disregarded several facts which put Respondents on notice of the false nature of the advertisement's implication or, at a minimum, supported a finding that Respondents acted with reckless disregard for the truth or falsity of the advertisement's implication.

This Court should grant this Petition for a Writ of Certiorari to correct the Iowa Supreme Court's misapplication of *N.Y Times* and to revisit and clarify the standard as it relates to a political candidate's obligation to investigate whether a campaign advertisement is defamatory. Otherwise, political campaign advertisements will continue to become an increasingly offensive and uncontrolled "free for all" at the local, state and national level.

While political campaign advertisements are afforded some "breathing room" under the First Amendment, the right to attack a political candidate is not unfettered and must be accompanied by a certain level of civility and, perhaps more importantly,

accountability. As Justice Fortas stated in his dissenting opinion in *St. Amant v. Thompson*:

> The First Amendment is not so fragile that it requires us to immunize this kind of reckless, destructive invasion of the life, even of public officials, heedless of their interests and sensitivities. The First Amendment is not a shelter for the character assassinator, whether his action is heedless and reckless or deliberate. The First Amendment does not require that we license shotgun attacks on public officials in virtually unlimited open season. The occupation of public officeholder does not forfeit one's membership in the human race. The public official should be subject to severe scrutiny and to free and open criticism. But if he is needlessly, heedlessly, falsely accused of crime, he should have a remedy in law. *New York Times* does not preclude this minimal standard of civilized living.

St. Amant v. Thompson, 390 U.S. 727, 734 (1968). Indeed, Justice Rehnquist raised concerns regarding the abusive protections being afforded in public figure defamation cases under the shelter of the First Amendment nearly twenty years ago in his dissenting opinion in *Ollman v. Evans*, 471 U.S. 1127 (1985). In light of the increasingly unruly world of political campaign advertisements, those concerns should be revisited and this Court should clarify that the applicable standard is not an insurmountable hurdle, but merely a fair and reasonable obstacle.

A. The Iowa Supreme Court Erred when it Found a Lack of Sufficient Evidence that Respondents Had Actual Knowledge the Advertisement's Implication was False

It is undisputed that Bertrand, in no uncertain terms, informed Respondents repeatedly of the advertisement's false implication (1) at a pre-election meeting; and (2) through a lawsuit filed the day after the meeting which (a) sought immediate injunctive relief and (b) was accompanied by Bertrand's sworn affidavit refuting the false implication. Nonetheless, Respondents proceeded to purchase airtime to continue running the advertisement without conducting any investigation, even though they had no evidence to dispute Bertrand's protestations. Respondent Mullin expressed concerns regarding the continued airing of the commercial to both his wife and Respondent The Iowa Democratic Party on the same day Bertrand filed the lawsuit. 846 N.W.2d at 896. Respondents knew Bertrand was "extremely animated" due to the commercial and knew it had made Bertrand's wife cry. Yet Respondents did nothing to stop the advertisement from running. When Respondents continued to publish the advertisement, their conduct generated a clear inference of actual malice.

The Iowa Supreme Court erroneously determined Bertrand did not present sufficient evidence to support a finding that Respondents had actual knowledge that the implication (Bertrand sold a dangerous

baby-killing drug) was indeed false. In reaching its conclusion, the Iowa Supreme Court cited *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 691 n. 37 (1989) for the proposition that the press need not accept denials, which are "so commonplace in the world of polemical charge and countercharge that, *in themselves*, they hardly alter the conscientious reporter to the likelihood of error." Emphasis added. The Court also cited *N.Y. Times* for the principle that failure to retract is not, *by itself*, adequate evidence of malice for constitutional purposes. *N.Y. Times*, 376 U.S. at 286.

In addition, Respondents' actions go beyond a mere failure to retract (discussed by the Iowa Supreme Court, citing *N.Y. Times*). Not only did Respondents fail to retract the advertisement, but they actually continued to order more airtime for the commercial after being told repeatedly that the advertisement was false and after being sued for defamation. *There was really nothing more Bertrand could have done to notify Respondents of the advertisement's false implication.*

While *Harte-Hanks* did recognize that a mere denial of a publication, *standing alone*, will not support a finding of actual malice against the publisher of a statement, the present matter was not limited to a mere denial by Bertrand. Rather, Bertrand's denial in a face-to-face meeting with Mullin preceded the filing of a lawsuit and related affidavit which Bertrand signed under penalty of perjury again making it evident that the advertisement's implications were

false. These additional facts take the present matter well beyond a mere denial. The facts rise to the level of actual knowledge, for which Respondents lacked any evidence to the contrary. As this Court recognized in *Harte-Hanks*, a plaintiff is entitled to prove a defendant's state of mind through circumstantial evidence. *Harte-Hanks*, 491 U.S. at 668. There was clearly sufficient circumstantial evidence from which a reasonable jury could find actual malice (actual knowledge of the advertisement's false implications) by clear and convincing evidence.[3]

Although the Iowa Supreme Court did acknowledge that the "actual malice" standard does not allow a defendant to purposefully avoid discovering the truth (citing *Harte-Hanks Communications, Inc.*, 491 U.S. at 692), the Court nonetheless ruled in Respondents' favor. Based upon the facts of this case, however, there was clearly sufficient evidence to support a reasonable jury's finding that Respondents purposefully avoided discovering the truth through their lack of investigation. Indeed, the Iowa Supreme Court's opinion recognized:

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[3] This Court has frequently recognized that circumstantial evidence may not only be sufficient, but in some circumstances more certain, satisfying and persuasive than direct evidence. *See, e.g., Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 329 (1960), citing *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508 (1957); accord *State of Iowa v. Stamper,* 195 N.W.2d 110, 111 (Iowa 1972) ("Circumstantial evidence may be equal in value to and sometimes more reliable than direct evidence.").

> [A]ctual malice could be derived from the actions of a candidate in continuing to run an advertisement after being informed of a false implication in the advertisement. It goes without saying that a speaker who repeats a defamatory statement after being informed of the statement's unambiguous falsity does so at the peril of generating an inference of actual malice.

846 N.W.2d at 901. Respondents were, in fact, informed of the advertisement's unambiguous false implication – that Bertrand sold the dangerous drug in question.

In summary, the evidence presented at trial was more than sufficient to permit a reasonable jury to find clear and convincing evidence that Respondents had actual knowledge of the falsity of the implied statement, or purposefully avoided discovering the truth. Notwithstanding the First Amendment protections which are afforded by *N.Y. Times* and its progeny, the Iowa Supreme Court interpreted *N.Y. Times* too narrowly and, as a result, applied an unreasonably high standard. The Court should not have reversed the District Court's denial of Respondents' Motion for Judgment Notwithstanding the Verdict.

B. The Iowa Supreme Court Erred when it Found a Lack of Evidence that Respondents Published the Advertisement with Reckless Disregard of Whether it Contained a False Implication

After finding Respondents lacked actual knowledge of the false implications of their advertisement, the Iowa Supreme Court held that Bertrand also failed to present sufficient evidence from which a reasonable jury could conclude Respondents acted with reckless disregard, i.e., whether they had a high degree of awareness of the advertisement's false implication or entertained serious doubts as to the truth of the false implication, as required by *N.Y. Times*. 846 N.W.2d at 896-901. In reaching its conclusion, the Iowa Supreme Court relied upon two misplaced theories and ignored the fact that Respondents actually expressed concerns regarding the continued publication of the advertisement.

1. The Court Improperly Determined the Political Forum Used by Bertrand to Notify Respondents of the False Implication was not an Environment Suited to Alert Them of the Likelihood of Their Error

In stretching to reach its desired outcome, the Iowa Supreme Court found the political forum which Bertrand used to notify Respondents of the false implication (a Homebuilders Association of Greater Siouxland meeting) "was not an environment suited

to alert Mullin or the Iowa Democratic Party of the likelihood of error." 846 N.W.2d at 901. According to the Court, Bertrand's comments at the Homebuilders' meeting, and his subsequent filing of a lawsuit, were merely a "political stunt." Indeed, the nature of the particular venue was an "important" factor in the Court's analysis. *Id.*

In support of its conclusion, the Iowa Supreme Court cited Justice Warren's concurring opinion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 169-170 (1967), even though that opinion actually supports Bertrand's position. Notably, Justice Warren opined that liability could be imposed where "no additional inquiries were made even after the editors were notified by respondent and his daughter that the account, to be published was absolutely untrue." 388 U.S. at 169-170. Justice Warren also recognized that the definition of actual malice "is not so restrictive that recovery is limited to situations where there is 'knowing falsehood' on the part of the publisher of false and defamatory matter. 'Reckless disregard' for the truth or falsity, measured by the conduct of the publisher, will also expose him to liability. . . ." *Id.* at 164. Justice Warren opined that the publisher in that case did little investigative work initially, and made no additional inquiries after the opposing party and his daughter told them the publication was false. Under those circumstances, which are quite similar to the present matter, Justice Warren was "satisfied that the evidence here discloses that degree of reckless

disregard for the truth of which was spoke in New York Times and Garrison." *Id.* at 170.

The statements in Respondents' advertisement had to be based upon truth or based upon what, in good faith and upon probable cause, was believed to be true. *See, e.g., NAACP v. Button*, 371 U.S. 415, 433 (1963); accord *Cherry v. Des Moines Leader*, 86 N.W. 323, 325 (Iowa 1901). Recklessness may be found where there are obvious reasons to doubt the veracity of the information or the accuracy of the report upon which the publisher relies. *St. Amant*, 390 U.S. at 731.

Despite the prior guidance by this Court, the Iowa Supreme Court held that Bertrand used the forum in front of an audience of prospective voters and the subsequent filing of a lawsuit "to score political points and seize the moment." *Id.* As such, the Iowa Supreme Court concluded the evidence did not support a high degree of subjective awareness of the commercial's false implication due to the type of venue in which Bertrand notified Respondents of the advertisement's false implications. 846 N.W.2d at 901.

While *N.Y. Times* undoubtedly provides a political candidate with significant "breathing room" under the First Amendment, the right to attack a political candidate is not unbounded. The Iowa Supreme Court improperly focused on the "venue" in which Respondents first became aware of their error, and also ignored the significance of the lawsuit (with

Bertrand's affidavit signed under penalty of perjury) which Bertrand filed in the District Court the following day. If the Court allows lawsuits and court-filed affidavits to be considered mere "stunts," then the value of the judicial system will be discredited and politicians will continue to be held unaccountable for things they say during a political campaign.

2. The Court Erred when it Concluded that a Possible Nondefamatory Implication of the Advertisement Effectively Permitted it to Disregard the Defamatory Implication

According to the Iowa Supreme Court, the false implication (that Bertrand sold the dangerous drug) "did not undermine or eliminate the political relevance of the nondefamatory implication from the advertisement intended" (that Bertrand had associated with an unethical business). 846 N.W.2d at 897-898. While Bertrand established that the implication he personally sold the dangerous drug was false, the Court found that the "general background story" from which both implications were derived was not false. *Id*. As a result, the Iowa Supreme Court found the defamatory statement was not built on a "totally fabricated story" as the United States Supreme Court has opined would support a finding of actual malice. *See St. Amant*, 390 U.S. at 732. While the Court indicated this fact was "insufficient to conclusively establish the absence of malice" (846 N.W.2d at 898), the Court nonetheless found this fact to be highly

significant and afforded it too much weight, thereby construing *N.Y. Times* too narrowly.

Essentially, the Iowa Supreme Court determined that, because there was a possible nondefamatory implication to the advertisement, the defamatory implication could be disregarded. This conclusion twists the point of implied defamation, which involves a statement of facts which are technically true, but carry a defamatory meaning due to the juxtaposition of the facts. *See, e.g., New York Times Co. v. Connor*, 365 F.2d 567 (7th Cir. 1986); *Stevens,* 728 N.W.2d 823; *Chapin v. Knight-Ridder*, 993 F.2d 1087 (4th Cir. 1993); *Newton v. Nat'l Broad. Co.,* 930 F.2d 662 (9th Cir. 1990); *Woods v. Evansville Press Co.,* 791 F.2d 480 (7th Cir. 1986); *Dodds v. Am. Broad. Co.,* 145 F.3d 1053 (5th Cir. 1966).

Even if an advertisement has a nondefamatory implication, the advertisement can still be found defamatory due to some other implication. Based upon the Iowa Supreme Court's rationale, however, any potentially legitimate interpretation of a statement would insulate the speaker from liability for defamation by implication. Freedom of speech is not so broad.

3. The Iowa Supreme Court Ignored Respondents' Admitted Concerns Regarding the Advertisement

Respondent Mullin expressed concerns regarding the continued airing of the commercial to both his

wife and Respondent The Iowa Democratic Party on the same day Bertrand filed the lawsuit. 846 N.W.2d at 896. In addition, in one of the emails circulated between the Iowa Democratic Party (Trial Exhibit 35) while the advertisement was being run, an advisor of Mullin stated "I guess I thought Bertrand had at least sold the drug in question. It is a flimsy attack." Furthermore, Mullin's email to The Iowa Democratic Party explained in no uncertain terms how Bertrand was "extremely animated about the terrible attack ad" at the Homebuilders' meeting and had even told Mullin the commercial made his wife cry.

In *N.Y. Times*, this Court found "no evidence" that the Times knew its statements were false or were "in any way" reckless in that regard. *N.Y. Times*, 376 U.S. at 285-286. The present matter is readily distinguishable because Bertrand presented ample evidence to support a reasonable jury's finding of recklessness. Respondents questioned themselves on more than one occasion, and the evidence showed they actually knew the advertisement was false or, at a minimum, had a high degree of awareness of the advertisement's false implication or entertained serious doubts as to the truth of the false implication. Nonetheless, Respondents plowed forward with reckless abandon and took no actions whatsoever to stop running the advertisement. The Iowa Supreme Court ignored this set of facts entirely while conducting its "reckless disregard" analysis. *Id.* at 896-901.

The undisputed evidence showed that Respondents not only had a "high degree of awareness"

regarding the advertisement's false implication, *they had an actual awareness and did, in fact, entertain serious doubts as to the truth of the advertisement's false implication.* As such, Bertrand presented sufficient evidence to satisfy both alternative avenues for finding reckless disregard under *N.Y. Times*. Therefore, the Iowa Supreme Court erred when it reversed the District Court's denial of Respondents' Motion for Judgment Notwithstanding the Verdict.

CONCLUSION

This Court should grant this Petition for a Writ of Certiorari to correct the Iowa Supreme Court's application of an unreasonably high standard for public figure defamation, and should revisit and clarify the *N.Y. Times* standard as it relates to "defamation by implication" cases.

The Iowa Supreme Court's decision should be reversed and the matter should be remanded to the Iowa Supreme Court for further findings.

August 14, 2014 Respectfully submitted,

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IN THE SUPREME COURT OF IOWA

No. 12-0649

Filed May 16, 2014

RICK BERTRAND,

Appellant,

vs.

RICK MULLIN and **THE IOWA DEMOCRATIC PARTY**,

Appellees.

Appeal from the Iowa District Court for Woodbury County, Jeffrey L. Paulson, Judge.

Appeal and cross-appeal from a judgment entered by the district court on a claim for defamation of character. **JUDGMENT OF THE DISTRICT COURT REVERSED; CASE DISMISSED.**

Jeana L. Goosmann and Emilee Boyle Gehling of Goosmann Law Firm, PLC, Sioux City, for appellant.

Mark McCormick of Belin McCormick, P.C., Des Moines, for appellees.

CADY, Chief Justice.

In this appeal and cross-appeal, we must decide whether a political campaign advertisement aired on television constituted actionable defamation. The district court overruled a motion for directed verdict at trial, and a jury returned a verdict for the plaintiff. Both parties appealed and raised a variety of claims

of error. On our review, we conclude the verdict cannot stand because the action was not supported by sufficient evidence of actual malice. We reverse the judgment of the district court and dismiss the case.

I. Background Facts and Prior Proceedings.

Rick Bertrand and Rick Mullin were candidates for the Iowa Senate from Sioux City and Woodbury County in the 2010 general election. Bertrand ran as a Republican, and Mullin ran as a Democrat. Mullin was a former chair of the Woodbury County Democratic Party.

Bertrand owned a number of businesses and real estate in the Pearl Street district of Sioux City. From 1999 until 2009, however, he worked as a salesperson and later as district manager for Takeda Pharmaceuticals (Takeda), a large multinational pharmaceutical company. Bertrand worked in the metabolic division of the company, which produced and marketed the diabetes drug Actos. Bertrand did not own stock in Takeda, and his local business interests were unrelated to the pharmaceutical industry.

Another division of Takeda sold a tablet called Rozerem, a prescription sleep aid. Bertrand, however, never personally sold the drug.

In October 2010, Bertrand ran a campaign advertisement on television called "Running from the Past." The advertisement focused on certain current policy positions of Mullin and compared them to

positions Mullin took as Woodbury County Democratic Chair. The advertisement made Mullin angry and offended him. Additionally, his internal polling revealed the advertisement was causing him to lose support. His campaign manager told him: "Bertrand hit you hard. Hit him back harder."

Opposition research conducted on behalf of Mullin revealed a *Los Angeles Times* article about the disclosure by a consumer group of a Food and Drug Administration (FDA) report that expressed concern over the sale of Actos by Takeda. The article reported the FDA had found 388 patients were hospitalized for heart failure after taking Actos. Research also revealed the FDA had criticized the marketing of Rozerem by Takeda, particularly an advertisement that made it appear that Rozerem was being marketed to children. Finally, research uncovered an article from the *Morning Herald* in Sidney, Australia, which reported a consumer advocacy group had declared Takeda "the most unethical drug company in the world."

This research was used as the basis for a television advertisement ultimately run by Mullin in response to the "Running from the Past" advertisement by Bertrand. Mullin and several Iowa Democratic Party staff members discussed the themes and content of the advertisement between October 15 and 17. Mullin initially had significant misgivings about the script. He disliked the proposed tone of the script and found it to be at odds with the positive

tenor he believed characterized his campaign. Mullin said:

> I really don't like this new ad at all – it isn't me and it is totally inconsistent with the beautiful print pieces we've been mailing out by the thousands. It also devalues the great TV spot we are already running.
>
> Can't we find a way to be derisive/dismissive of Bertrand's negative attack and then pivot to our positive message? I really don't like the positioning of me in this, and it buys into Bertrand's frame. Let's bust out of his frame and keep positive.

In a later email, Mullin introduced a rewrite of the script as being "less vile." Eventually, Mullin approved the script.

The advertisement – titled "Secrets" – formed the basis for this lawsuit. It first aired on television on October 17. The audio portion of "Secrets" contained the following statements:

> Rick Bertrand said he would run a positive campaign but now he is falsely attacking Rick Mullin. Why?
>
> Because Bertrand doesn't want you to know he put his profits ahead of children's health.
>
> Bertrand was a sales agent for a big drug company that was rated the most unethical company in the world. The FDA singled out

> Bertrand's company for marketing a dangerous sleep drug to children.
>
> Rick Bertrand. Broken promises. A record of deceit.

At the bottom of the screen during one shot was a written image, which stated in bold capital letters, "BERTRAND'S COMPANY MARKETED SLEEP DRUG TO CHILDREN."

The statements in the advertisement cited to newspaper articles, which also flashed across the television screen. The sources cited for the statements made in the advertisement focused on Takeda. There was no mention of the local companies owned by Bertrand. Mullin admitted he did not know if Bertrand had ever sold Rozerem or marketed dangerous drugs to children at the time the advertisement aired. When he approved the script, he said he liked the "'profiting at the expense of children' line." A friend of Mullin confided in a later email to the Iowa Democratic Party staff, "I guess I thought Bertrand had at least sold the drug in question" and acknowledged "Secrets" was a "pretty flimsy attack."

Bertrand and Mullin engaged in a public debate at a forum sponsored by the Home Builders Association on October 21. At the debate, Bertrand called the "Secrets" advertisement false and demanded Mullin stop airing it. The next day, on October 22, Bertrand filed a lawsuit against Mullin in district court seeking injunctive relief and monetary damages based on defamation. Mullin viewed the lawsuit as a political

tactic by Bertrand and did not stop airing the commercial. Mullin last ran the advertisement on October 31, two days before the election on November 2. Bertrand won the election by 222 votes.

The defamation action proceeded to trial. Bertrand identified ten statements in the advertisement he considered defamatory. These statements included nearly every spoken statement from the advertisement and one written statement, as well as statements from the advertisement that were repeated in mailed advertising. Bertrand alleged a broad array of damages, including emotional distress from harassing phone calls, vandalism of a construction site of one his businesses, ill-treatment on the campaign trail, and economic losses.

The trial court refused to submit Bertrand's claim for punitive damages to the jury. It found he failed to present clear and convincing evidence that Mullin intentionally acted unreasonably.

At the same time, Mullin claimed Bertrand failed to introduce clear and convincing evidence the allegedly defamatory statements were false and made with actual malice. The trial court found eight of the ten allegedly defamatory statements were not defamatory as a matter of law. However, the court submitted two statements from the advertisement to the jury under the claim for defamation. The first statement was: "The FDA singled out Bertrand's company for the marketing of dangerous drugs to children." The second statement was: "BERTRAND'S

COMPANY MARKETED SLEEP DRUG TO CHILDREN." The district court found "a reasonable jury [could] find that these statements imply a false fact, namely that Rick Bertrand personally sold a dangerous sleep drug to children, or that he owns a company that sold a dangerous sleep drug to children."

The jury returned a verdict of $31,000 against Mullin and $200,000 against the Iowa Democratic Party. In response to a motion for judgment notwithstanding the verdict (JNOV), the trial court found no reasonable juror could conclude Takeda was Bertrand's company. It reasoned no reasonable viewer could ignore the statement that Bertrand had been a Takeda sales agent, which immediately preceded the "Bertrand's company" line in the advertisement. Consequently, the court concluded it should have granted a directed verdict for Mullin and the Iowa Democratic Party regarding the alleged implication that Bertrand owned a company that sold Rozerem.

However, the district court concluded a reasonable juror could have believed that the content of the statement by Mullin was that Bertrand *personally* sold Rozerem. The district court reasoned "the language and juxtaposition of the phrases" allowed a reasonable jury to conclude the advertisement implied Bertrand personally sold Rozerem. The district court rejected Mullin's argument that "Secrets" was simply a "guilt by association" advertisement. It reasoned that even if Mullin expressed a legitimate point, a reasonable person hearing the statement could infer that the person personally sold the product. The court

stated: "If somebody states that John is a car salesman at A&B car dealership and that A&B sells Fords, it is reasonable to infer that John sells Fords, regardless of what other models A&B actually sells." Additionally, the district court found sufficient evidence to support a finding of actual malice. Primarily, it reasoned that Bertrand's public denial of the implication that he sold the drug, followed by the filing of his defamation lawsuit the next day, alerted Mullin of the false implication. It then reasoned that the subsequent actions of Mullin and the Iowa Democratic Party in failing to pull the advertisement showed they purposefully avoided the false implication and recklessly disregarded the truth as they continued to broadcast the advertisement. Therefore, the district court denied the motion for JNOV.

On appeal, Mullin contends the district court erred by failing to grant his motion for JNOV. As a part of his arguments, he asserts Bertrand failed to introduce clear and convincing evidence of actual malice. Bertrand claims the district court erred by failing to submit his punitive damages claim to the jury and by granting Mullin's motion for remittitur.

II. Scope of Review.

We normally review the denial of a motion for JNOV for correction of errors at law. *See Dorshkind v. Oak Park Place of Dubuque II, L.L.C.,* 835 N.W.2d 293, 299-300 (Iowa 2013); *see also* Iowa R. App. P. 6.907. Our task is to decide if the district court "'correctly

determined there was sufficient evidence to submit the issue to the jury.'" *Dorshkind,* 835 N.W.2d at 300 (quoting *Easton v. Howard,* 751 N.W.2d 1, 5 (2008)). Yet, we have held this standard has been modified slightly in the review of the actual malice element of a defamation lawsuit by *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). We have said:

> "[W]here the *New York Times* 'clear and convincing' evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not."

Stevens v. Iowa Newspapers, Inc., 728 N.W.2d 823, 830 (Iowa 2007) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255-56, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202, 216 (1986)). This same standard applies to any claim that the evidence is insufficient to support a judgment at any stage in the proceedings.

III. Discussion.

The centuries-old tort of defamation of character protects a person's common law "interest in reputation and good name." *Johnson v. Nickerson,* 542 N.W.2d 506, 510 (Iowa 1996). It does this in a broad way. The tort applies to both written and oral statements, *Schlegel v. Ottumwa Courier,* 585 N.W.2d 217, 221 (Iowa 1998), as well as altered images, *Kiesau v. Bantz,* 686 N.W.2d 164, 178 (Iowa 2004). It also extends beyond the literal meaning of the communication. *Yates v. Iowa W. Racing Ass'n,* 721 N.W.2d 762, 770 (Iowa 2006). The tort recognizes "[i]t is the thought conveyed, not the words, that does the harm." *Turner v. Brien,* 184 Iowa 320, 326, 167 N.W. 584, 586 (1918), *overruled on other grounds by Ragland v. Household Fin. Corp.,* 254 Iowa 976, 981, 119 N.W.2d 788, 791 (1963). Moreover, defamation was, at common law, functionally a strict liability tort. *See Barreca v. Nickolas,* 683 N.W.2d 111, 117 n.2 (Iowa 2004); *see also* Patrick J. McNulty, *The Law of Defamation: A Primer for the Iowa Practitioner,* 44 Drake L. Rev. 639, 718 (1996) (mentioning the "strict liability nature of the defamation tort").

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." *Johnson,* 542 N.W.2d at 510. 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."

Stevens, 728 N.W.2d at 828. Yet, a plaintiff who is a candidate for public office becomes a public official. *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 271-72, 91 S. Ct. 621, 625, 28 L. Ed. 2d 35, 41 (1971). 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. *See N.Y. Times,* 376 U.S. at 279-80, 285-86, 84 S. Ct. at 726, 729, 11 L. Ed. 2d at 706, 710.

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. *Blessum v. Howard Cnty. Bd. of Supervisors,* 295 N.W.2d 836, 843 (Iowa 1980). We have characterized this burden – in the context of showing reckless disregard for the truth – as "substantial." *Stevens,* 728 N.W.2d at 830; *see Harte-Hanks Commc'ns, Inc. v. Connaughton,* 491 U.S. 657, 688, 109 S. Ct. 2678, 2696, 105 L. Ed. 2d 562, 589 (1989) (applying "'high degree of awareness'" standard (quoting *Garrison v. Louisiana,* 379 U.S. 64, 74, 85 S. Ct. 209, 216, 13 L. Ed. 2d 125, 133 (1964))).

The burden to establish actual malice was deliberately set high by the First Amendment protections recognized in *New York Times*.[1] Consequently, the

[1] We note Mullin and the Iowa Democratic Party have only asserted privilege under the First Amendment to the United States Constitution and not article I, section 7 of the Iowa Constitution. More than a century ago – and more than half a

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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." *N.Y. Times,* 376 U.S. at 270, 84 S. Ct. at 721, 11 L. Ed. 2d at 701. To promote this ideal, a commentator "is afforded a buffer zone to protect it from the

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century before the Supreme Court decided *New York Times* – we recognized persons who place themselves in the public sphere are subject to a vastly greater degree of comment, criticism, and even ridicule. *See Cherry v. Des Moines Leader,* 114 Iowa 298, 305, 86 N.W. 323, 325 (1901), *abrogated in part on other grounds by Barrica v. Nickolas,* 683 N.W.2d 111, 119-20 (2004). Irrespective of the social utility of the *Des Moines Leader*'s old-timey rebuke of the Cherry Sisters' apparently salacious performance, we recognized:

> One who goes upon the stage to exhibit himself to the public, or who gives any kind of a performance to which the public is invited, may be freely criticised. He may be held up to ridicule, and entire freedom of expression is guarantied dramatic critics, provided they are not actuated by malice or evil purpose in what they write. Fitting strictures, sarcasm, or ridicule, even, may be used, if based on facts, without liability, in the absence of malice or wicked purpose. The comments, however, must be based on truth, or on what in good faith and upon probable cause is believed to be true, and the matter must be pertinent to the conduct that is made the subject of criticism. Freedom of discussion is guarantied by our fundamental law and a long line of judicial decisions.

Id. at 304, 86 N.W.2d at 325.

chilling effect which might otherwise cast over it a 'pall of fear and timidity' by raising the spectre of numerous libel actions." *McCarney v. Des Moines Register & Tribune Co.,* 239 N.W.2d 152, 156 (Iowa 1976) (quoting *N.Y. Times,* 376 U.S. at 278, 84 S. Ct. at 725, 11 L. Ed. 2d at 705). In other words, "[t]he prized American right 'to speak one's mind' about public officials and affairs needs 'breathing space to survive.'" *N.Y. Times,* 376 U.S. at 298, 84 S. Ct. at 736, 11 L. Ed. 2d at 719 (Goldberg, J., concurring) (quoting *Bridges v. California,* 314 U.S. 252, 270, 62 S. Ct. 190, 197, 86 L. Ed. 192, 207 (1941) (first quotation); *NAACP v. Button,* 371 U.S. 415, 433, 83 S. Ct. 328, 338, 9 L. Ed. 2d 405, 418 (1963) (second quotation)).

At its core, the First Amendment guarantee "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co.,* 401 U.S. at 272, 91 S. Ct. at 625, 28 L. Ed. 2d at 41. While "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution," *Buckley v. Valeo,* 424 U.S. 1, 14, 96 S. Ct. 612, 632, 46 L. Ed. 2d 659, 685 (1976) (per curiam), "an election campaign is a means of disseminating ideas as well as attaining political office," *Ill. State Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 186, 99 S. Ct. 983, 991, 59 L. Ed. 2d 230, 242 (1979). Consequently, constitutional protection for political speech in the context of a campaign extends to "anything which might touch on an official's fitness for office." *Garrison,* 379 U.S. at 77, 85 S. Ct. at 217, 13 L. Ed. 2d at 134.

Understandably, the range of private conduct that affects an official's fitness for elective office can be broad. "Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character." *Id.*

A statement is made with actual malice when accompanied by "knowledge that it was false or with reckless disregard for its truth or falsity." *Carr v. Bankers Trust Co.,* 546 N.W.22 901, 904 (Iowa 1996). However, as Justice Black pointed out a half a century ago, actual malice "is an elusive, abstract concept, hard to prove and hard to disprove." *N.Y. Times,* 376 U.S. at 293, 84 S. Ct. at 733, 11 L. Ed. 2d at 716 (Black, J., concurring). A knowing falsehood may be easy to identify in theory, but any effort to peer into the recesses of human attitudes towards the truthfulness of a statement is certain to be difficult.

"'Reckless disregard,' it is true, cannot be fully encompassed in one infallible definition." *St. Amant v. Thompson,* 390 U.S. 727, 730, 88 S. Ct. 1323, 1325, 20 L. Ed. 2d 262, 267 (1968). Yet, in the half century the *New York Times* rule has preserved the First Amendment's guarantee of uninhibited commentary regarding public officials and figures, the Supreme Court has crafted some useful guideposts. Most prominently, an early case nearly contemporaneous with *New York Times* opined that statements made with a "high degree of awareness of their probable falsity" may subject the speaker to civil damages. *Garrison,*

379 U.S. at 74, 85 S. Ct. at 216, 13 L. Ed. 2d at 133. The negative implication, of course, is that a court may not award damages against one who negligently communicates a falsehood about a public official. *Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496, 510, 111 S. Ct. 2419, 2429, 115 L. Ed. 2d 447, 468 (1991) ("Mere negligence does not suffice."); *see also Harte-Hanks Commc'ns,* 491 U.S. at 688, 109 S. Ct. at 2696, 105 L. Ed. 2d at 589 (explaining that establishing liability under *New York Times* "requires more than a departure from reasonably prudent conduct"); *McCarney,* 239 N.W.2d at 156 (holding plaintiff failed to present evidence of actual malice because defendant's explanation of the mistaken statement "shows negligence, but no more than that").

The Supreme Court has explained its reasoning:

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant *in fact entertained serious doubts as to the truth of his publication.* Publishing with such doubts shows reckless diregard for truth or falsity and demonstrates actual malice.

St. Amant, 390 U.S. at 731, 88 S. Ct. at 1325, 20 L. Ed. 2d at 267 (emphasis added). In a later case, the Court clarified that "[t]he standard is a subjective one." *Harte-Hanks Commc'ns,* 491 U.S. at 688, 109 S. Ct. at 2696, 105 L. Ed. 2d at 589.

Candidly, the *New York Times* standard tilts the balance strongly in favor of negligent defendants:

> It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity.

St. Amant, 390 U.S. at 731, 88 S. Ct. at 1326, 20 L. Ed. 2d at 267. However, the Supreme Court has indicated that mere protestations of good faith and declarations that the speaker believed the statement to be true are not automatically sufficient to avoid liability. *Id.* at 732, 88 S. Ct. at 1326, 20 L. Ed. 2d at 267-68. The Court explained:

> 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. Thus, while courts look at the speaker's subjective state of mind regarding the truthfulness of his or her

statement, mere subjective belief in the statement's truth is insufficient to avoid liability if objective indications – such as pure fabrication of the story – wholly belie the credibility of the statement.

However, "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." *Harte-Hanks Commc'ns,* 491 U.S. at 688, 109 S. Ct. at 2696, 105 L. Ed. 2d at 589. Similarly, "[r]eliance on a single source, in the absence of a high degree of awareness of probable falsity, does not constitute actual malice." *Woods v. Evansville Press Co.,* 791 F.2d 480, 488 (7th Cir. 1986); *accord N.Y. Times Co. v. Connor,* 365 F.2d 567, 576 (5th Cir. 1966). Nor does a "shoddy" investigation constitute actual malice. *See Dodds v. Am. Broad. Co.,* 145 F.3d 1053, 1062-63 (9th Cir. 1998); *see also Faigin v. Kelly,* 978 F. Supp. 420, 429 (D.N.H. 1997) ("[F]ailure to follow journalistic standards and lack of investigation may establish irresponsibility or even possibly gross irresponsibility, but not reckless disregard of truth."). Indeed, sources of information need not be completely neutral. *See Dodds,* 145 F.3d at 1062 (holding that a reporter's deeply religious source who expressed skepticism about a judge's reliance on a crystal ball to decide cases was not so biased as to render her statements unreliable).

Mullin and the Iowa Democratic Party challenge the judgment entered on the claim of defamation on several grounds, including the sufficiency of evidence to support the actual malice element of the tort. If the

evidence was insufficient to support actual malice, the judgment must be reversed, and we need not address any further issues raised on appeal. Accordingly, we turn to consider the sufficiency of evidence to support the element of actual malice.

In considering the actual malice element of the tort, we must decide if the evidence supports a finding that Mullin and the Iowa Democratic Party "in fact entertained serious doubts as to the truth" of the implied communication in the commercial – that Bertrand personally sold a dangerous drug – or if they had "a high degree of awareness of [its] probable falsity." *St. Amant*, 390 U.S. at 731, 88 S. Ct. at 1326, 20 L. Ed. 2d at 267 (first quotation); *Garrison,* 379 U.S. at 74, 85 S. Ct. at 216, 13 L. Ed. 2d at 133 (second quotation). In making this determination, we "consider the factual record in full." *Harte-Hanks Commc'ns,* 491 U.S. at 688, 109 S. Ct. at 2696, 105 L. Ed. 2d at 589.

Bertrand argues actual malice was supported by the evidence in a number of ways. First, Bertrand claims the evidence showed Mullin and the Iowa Democratic Party knew the implication in the commercial at issue was false because they knew that none of his Sioux City companies sold drugs and they did not know which division within the pharmaceutical company Bertrand worked in or which division of the company sold the drug in dispute. Second, Bertrand claims Mullin and the Iowa Democratic Party should have known the implication in the commercial was false because Mullin expressed doubts

about the commercial before it aired. Third, Bertrand claims actual malice was supported by evidence that Mullin and the Iowa Democratic Party acquired ill will towards him after he aired his own hard-hitting commercial. Fourth, Bertrand asserts the jury could have found actual malice because the purpose of the commercial was to curtail electoral support for Bertrand. Finally, Bertrand asserts actual malice was supported by evidence that the commercial continued to be aired by Mullin after he was told it was false.

We first consider the evidence to support a finding that Mullin and the Iowa Democratic Party had actual knowledge of the falsity of the implied statement in the commercial. In doing so, we clarify that the district court ultimately found the only actionable defamation claim was based on the implication that Bertrand sold drugs to children, reported to be dangerous, when he worked for a pharmaceutical company.[2] Thus, any knowledge by Mullin and the Iowa

[2] The district court ultimately concluded it should have directed a verdict in Mullin's favor on the alleged implication that Bertrand owned a company that sold Rozerem. In doing so, the district court did not consider whether Mullin intended to convey the implication. Instead, it ruled the "Secrets" commercial was not capable of bearing the implication as a matter of law, reasoning no reasonable viewer could ignore the "sales agent" language immediately preceding the "Bertrand's company" language. *See Stevens,* 728 N.W.2d at 830 ("'The court determines whether . . . a communication is capable of bearing a particular meaning, and . . . whether that meaning is defamatory.'" (quoting Restatement (Second) of Torts § 614, at 311 (1965))). Consequently, Mullin prevailed on his argument that

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the commercial made no implication that Bertrand owned a company that sold Rozerem. We agree with the district court's conclusion.

However, we note that in the district court, Mullin argued that, at least in the First Amendment context, a defamation-by-implication plaintiff must prove the defendant subjectively endorsed or intended the implication in the publication. *See Chapin v. Knight-Ridder,* 993 F.2d 1087, 1092-93 (4th Cir. 1993) ("The language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference."); *Howard v. Antilla,* 191 F.R.D. 39, 44 (D.N.H. 1999) ("To prove libel by implication Howard must demonstrate that Antilla subjectively or actually intended to impart the defamatory implication of the reported rumor."); *see also Dodds,* 145 F.3d at 1064 (noting every federal circuit court to consider the issue has required the plaintiff to prove the defendant intended a defamatory inference to be drawn and collecting cases). Stated differently, in the First Amendment context, it is not enough that the language of the publication can "be reasonably read to impart the false innuendo." *Chapin,* 993 F.2d at 1093. The Ninth Circuit considers the subjective-intent requirement necessary in public official defamation claims because imposing liability in the absence of some proof of intent "eviscerates the First Amendment protections established by *New York Times*" by permitting "liability to be imposed not only for what was not said but also for what was not intended to be said." *Newton v. Nat'l Broad. Co.,* 930 F.2d 662, 681 (9th Cir. 1990); *see also Woods v. Evansville Press Co.,* 791 F.2d 480, 488 (7th Cir. 1986) ("A publisher reporting on matters of general or public interest cannot be charged with the intolerable burden of guessing what inferences a jury might draw from an article and ruling out all possible false and defamatory innuendoes that could be drawn from the article.").

The district court agreed with Mullin that the subjective-intent showing contemplated by *Chapin* and *Newton* is a required one. Bertrand did not raise a claim of error regarding this aspect of the ruling on appeal but only mentioned it in his reply brief in response to the issues raised by Mullin on cross-appeal.

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Democratic Party that Bertrand's Sioux City businesses never marketed drugs to children has no impact on the pertinent question whether they knew Bertrand never actually sold a dangerous drug to children when he worked for the pharmaceutical company. Instead, the evidence of actual malice necessary to support the implied defamation in this case centers on knowledge of the falsity of the implied statement that Bertrand personally marketed Rozerem, not on knowledge that he did not own the company that marketed the drug or that the businesses he actually owned did not market the drug.

The evidence at trial established that Mullin and the Iowa Democratic Party did *not* know if Bertrand was personally responsible in any way for marketing or selling the drug. They conducted some research for

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Similarly, Mullin did not heavily rely on this point in his cross-appeal. We recognize defamation by implication is "an area of law 'fraught with subtle complexities.'" *Guilford Transp. Indus., Inc. v. Wilner,* 760 A.2d 580, 596 (D.C. 2000) (quoting *White v. Fraternal Order of Police,* 909 F.2d 512, 518 (D.C. Cir. 1990)). In light of the absence of thorough briefing on the issue or the necessity that we decide it as a factual matter, we decline to address the subjective-intent requirement in this opinion. *Cf. State v. Hoeck,* 843, N.W.2d 67, 71 (Iowa 2014) (exercising discretion not to address an issue in the absence thorough briefing and full development of factual issues necessary to decide an issue raised for the first time on appeal). Thus, we only consider the implied claim that Bertrand personally sold Rozerem. As above, we decide the case solely on the actual malice ground and express no opinion regarding whether Mullin or any staff of the Iowa Democratic Party subjectively endorsed or intended the implication that Bertrand personally sold or marketed rozerem.

the purpose of running an attack advertisement and concluded from this research that Bertrand worked for the drug company and the company marketed the drug. The research revealed the FDA and others criticized Takeda for selling Rozerem. These statements were true and formed the basis for their claim that Bertrand was associated with an unethical business. Yet, Mullin and the Iowa Democratic Party did not look into the matter further to uncover the complete story that would have told them that Bertrand had nothing to do with the marketing of the drug other than to work for the company that marketed it. The truth, of course, was that Bertrand never worked in the particular division of the company that marketed the drug and never sold the drug. Nevertheless, there was no evidence that Mullin or the Iowa Democratic Party knew the implied statement that Bertrand sold the drug was false.

Without evidence of actual knowledge, we turn to consider if the implied statement was made with reckless disregard for its truth or falsity. We begin by considering the degree of awareness of the probable falsity and any doubts that may have existed about the truth or falsity of the implied statement.

Mullins and the Iowa Democratic Party asserted the implication that Bertrand sold a dangerous drug was made in good faith because they only wanted to inform voters that Bertrand was associated with an unethical company. While this assertion is alone insufficient to conclusively establish the absence of malice, *see St. Amant,* 390 U.S. at 732, 88 S. Ct. at 1326,

20 L. Ed. 2d at 268, it is important to recognize that the nondefamatory implication Mullin and the Iowa Democratic Party sought to communicate – Bertrand was associated with an unethical company that sold a dangerous drug – can be implied from the advertisement. Bertrand established the implication was false, but the general background story from which both implications were derived was not false. Thus, the defamatory statement in this case was not built on a totally fabricated story as the Court opined might support a finding of actual malice in other cases. *See id.* (identifying "where a story is fabricated by the defendant" as possible evidence of actual malice).

Additionally, defamation by implication arises, not from what is stated but, as in this case, from what can be implied when a statement juxtaposes a series of facts that imply a defamatory connection between them. *Stevens,* 728 N.W.2d at 827. Yet, when defamation is implied, the evidence must affirmatively show the author subjectively endorsed or intended the inference. *Chapin v. Knight-Ridder, Inc.,* 993 F.2d 1089, 1092-93 (4th Cir. 1993). Here, after Bertrand asserted at the public forum that a false implication had been made – that he personally sold the dangerous drugs – Mullin and the Iowa Democratic Party staff responded that they did not intend that implication. Thus, there was no direct evidence that Mullin and the Iowa Democratic Party endorsed the defamatory implication after it was revealed. Bertrand only argued that Mullin must have subjectively intended the implication because he failed to

retract it and continued to run the advertisement after he was told of the false implication.

It is also important to observe that the sources of information used to gather the background information for the advertisement were not so unreliable as to be unworthy of credence and indicative of reckless disregard for the truth. *See St. Amant,* 390 U.S. at 732, 88 S. Ct. at 1326, 20 L. Ed. 2d at 268 ("[R]ecklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."). Some of the reports may not have been neutral, but mere reliance on sources with predisposed viewpoints does not establish actual malice concerning the falsity of implied statements. *See Dodds,* 145 F.3d at 1062. This case does not contain evidence of patently unreliable sources to support actual malice. Additionally, there was evidence that Mullin and the Iowa Democratic Party did not even subjectively entertain the idea that the implication that Bertrand sold Rozerem was false. There was some evidence that Mullin and the staff with the Iowa Democratic Party assumed Bertrand sold the drug.

The broader background setting of the advertisement must also be considered. Modern political campaigns exist within news cycles that often require overnight action, especially as the campaign closes in on the day of the election. This backdrop supports the need for "breathing room" recognized by the First Amendment to permit meaningful political speech to survive. It is a part of this case and militates against

the finding of a subjective awareness of falsity needed to support actual malice.

We next consider the evidence that Mullin initially maintained a strong dislike for the tone of the commercial as proof of actual malice. While this is true, the doubts expressed by Mullin are irrelevant unless related to the truth of the statements. *See St. Amant,* 390 U.S. at 731, 88 S. Ct. at 1325, 20 L. Ed. 2d at 267. The indispensable consideration in this case concerns the subjective attitudes of Mullin and individuals of the Iowa Democratic Party *regarding the truth* of the implication. *See Harte-Hanks Commc'ns,* 491 U.S. at 688, 109 S. Ct. at 2696, 105 L. Ed. 2d at 589. There was no evidence that the concerns expressed by Mullin pertained to the falsity of any statements. The expressions of doubt were not evidence of actual malice, but were pragmatic and expedient considerations of tenor and political image-crafting with which the First Amendment is fundamentally unconcerned.

We next consider the evidence that Mullin was angry at Bertrand for running his negative campaign advertisement and sought to "hit back" hard at him. This is the type of evidence, however, that demonstrates common law actual malice. *See Winckel v. Von Maur, Inc.,* 652 N.W.2d 453, 459 (Iowa 2002), *abrogated on other grounds by Barreca,* 683 N.W.2d at 119, 123. As used in the First Amendment context, "actual malice" is only a helpful "shorthand," *Masson,* 501 U.S. at 511, 111 S. Ct. at 2430, 115 L. Ed. 2d at 468, and "has nothing to do with bad motive or ill will," *Harte-Hanks Commc'ns,* 491 U.S. at 666 n.7,

109 S. Ct. at 2685 n.7, 105 L. Ed. 2d at 576 n.7. "[U]nlike the common law definition of actual malice, *New York Times* actual malice focuses upon the attitudes of defendants vis-à-vis the truth of their statements, as opposed to their attitudes towards plaintiffs." *Barreca,* 683 N.W.2d at 120.

Thus, under *New York Times,* a plaintiff cannot demonstrate actual malice "merely through a showing of ill will or '"malice" in the ordinary sense of the term.'" *Stevens,* 728 N.W.2d at 831 (quoting *Harte-Hanks Commc'ns,* 491 U.S. at 666, 109 S. Ct. at 2685, 105 L. Ed. 2d at 576). Stated differently, [a]ctual antagonism or contempt has been held insufficient to show malice." *McCarney,* 239 N.W.2d at 156. We note the Supreme Court has commented that "it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry" and opined that such an attitude may be circumstantially probative of the defendant's attitude towards the truth of the statement at issue. *Harte-Hanks Commc'ns,* 491 U.S. at 668, 109 S. Ct. at 2686, 105 L. Ed. 2d at 577. But, the evidence of alleged enmity proffered here does not tend to show any doubts about the truth of the information conveyed in the advertisement. The uninhibited debate the First Amendment envisions would be undermined if liability attached merely upon proof the speaker "spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Garrison,* 379 U.S. at 73, 85 S. Ct. at 215, 13 L. Ed. 2d at 132.

We next consider the claim by Bertrand that actual malice was established because the very purpose of the commercial was to attack, and thereby negatively affect, a candidate's reputation. An "intent to inflict harm" is insufficient to demonstrate a reckless disregard for the truth. *McCarney,* 239 N.W.2d at 156; *see also Garrison,* 379 U.S. at 73-74, 85 S. Ct. at 215, 13 L. Ed. 2d at 132. "There must be an intent to inflict harm *through falsehood*." *McCarney,* 239 N.W.2d at 156. The very point of the trenchant public discourse protected under the legal standards of *New York Times* is oftentimes to weaken the support for political rivals in future elections: "'[S]elfish political motives,'" which naturally and expectedly accompany such acicular criticism, do not reduce the value of free speech. *See Garrison,* 379 U.S. at 73-74, 85 S. Ct. at 215, 13 L. Ed. 2d at 132 (quoting Dix W. Noel, *Defamation of Public Officers and Candidates,* 49 Colum. L. Rev. 875, 893 n.90 (1949)). The standards of *New York Times* do not constrain First Amendment protection to political discourse of a sterile, academic character or an undiluted high-minded nature. The First Amendment protects the use of "rhetorical hyperbole," *Greenbelt Coop. Publ'g Ass'n v. Bresler,* 398 U.S. 6, 14, 90 S. Ct. 1537, 1542, 26 L. Ed. 2d 6, 15 (1970), and "imaginative expression[s]" designed to evoke contempt for the targets of protected speech, *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin,* 418 U.S. 264, 285-86, 94 S. Ct. 2770, 2782, 41 L. Ed. 2d 745, 763 (1974). After all, "[r]idicule is often the strongest weapon in the hands of a public writer." *Cherry v. Des Moines*

Leader, 114 Iowa 298, 305, 86 N.W. 323, 325 (1901), *abrogated in part on other grounds by Barrica,* 683 N.W.2d at 119-20.

It is not enough to assert that the ordinary purpose of a defamation action is to vindicate and protect a person's common law reputational interest. The First Amendment protects public discourse – even in the form of withering criticism of a political opponent's past dealings or associations – unless the lodged attack is clearly shown to be false and made with actual malice. *See Monitor Patriot Co.,* 401 U.S. at 274-77, 91 S. Ct. at 626-28, 28 L. Ed. 2d at 42-44 (discussing attacks based on private conduct in political campaigns); *Garrison,* 379 U.S. at 72-73, 85 S. Ct. at 215, 13 L. Ed. 2d at 132 ("[W]here the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth."); *see also N.Y. Times,* 376 U.S. at 279-80, 94 S. Ct. at 726, 11 L. Ed. 2d at 706; *cf. NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 910, 102 S. Ct. 3409, 3424, 73 L. Ed. 2d 1215, 1234 (1982) ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."). After all, *New York Times* and its progeny even reach so far as to protect pillorying barbs some may regard as offensive and outrageous. *See Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 55, 108 S. Ct. 876, 882, 99 L. Ed. 2d 41, 52 (1988) (rejecting an "outrageous" exception to traditional public official tort suit rules). A

contrary rule would efface constitutional protection for political commentary; "liberty of speech and of the press guarantied by the constitution [would be] nothing more than a name." *Cherry,* 114 Iowa at 305, 86 N.W. at 325.

Finally, we reject the claim that actual malice was established by the evidence that Mullin continued to air the commercial after Bertrand publicly told him the implication was false. *See Harte-Hanks Commc'ns,* 491 U.S. at 691 n.37, 109 S. Ct. at 2698 n.37, 105 L. Ed. 2d at 591 n.37 ("Of course, the press need not accept 'denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error.'" (quoting *Edwards v. Nat'l Audubon Soc'y, Inc.,* 556 F.2d 113, 121 (2d Cir. 1977))). A finding of actual malice based on this circumstance in this case would significantly chill constitutionally protected speech. *See N.Y. Times,* 376 U.S. at 286, 84 S. Ct. at 729, 11 L. Ed. 2d at 710 (holding failure to retract an allegedly defamatory statement is not, by itself, "adequate evidence of malice for constitutional purposes"). The actual malice standard cannot be applied to make a speaker who negligently makes an inaccurate statement liable based on evidence that may amount to a good-faith refusal to back down.

Such a result is anathema to the First Amendment both as originally conceived and in the context of the *New York Times* doctrine laid down half a century ago. *See N.Y. Times,* 376 U.S. at 275, 84 S. Ct.

at 723, 11 L. Ed. 2d at 703 ("The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government."). We understand that unscrupulous individuals were certainly capable of using "calculated falsehood[s]" at the time the First Amendment was adopted. *Garrison,* 379 U.S. at 75, 85 S. Ct. at 216, 13 L. Ed. 2d at 133. But, we need to look no further than the Sedition Act of 1798 to further understand that equally unscrupulous individuals would use the coercive force of government to censor their critics and retain power. *See N.Y. Times,* 376 U.S. at 273-76, 84 S. Ct. at 722-24, 11 L. Ed. 2d at 70204. Indeed, as the Court recognized in *New York Times*, "[a]lthough the Sedition Act was never tested in [the Supreme Court], the attack upon its validity has carried the day in the court of history." *Id.* at 276, 84 S. Ct. at 723, 11 L. Ed. 2d at 704.

We reiterate that the actual malice element does not allow a defendant to purposefully avoid discovering the truth. *Stevens,* 728 N.W.2d at 831 (citing *Harte-Hanks Commc'ns,* 491 U.S. at 692, 109 S. Ct. at 2698, 105 L. Ed. 2d at 591). Moreover, we acknowledge actual malice could be derived from the actions of a candidate in continuing to run an advertisement after being informed of a false implication in the advertisement. It goes without saying that a speaker who repeats a defamatory statement after being informed of the statement's unambiguous falsity does so at the peril of generating an inference of actual malice.

However, two factors in this case do not permit actual malice to be established by evidence that Mullin and the Iowa Democratic Party continued to run the advertisement. First, the false implication exposed by Bertrand did not undermine or eliminate the political relevance of the nondefamatory implication from the advertisement intended by Mullin that Bertrand had associated with an unethical business. This legitimate implication remained speech related to the breathing room that the actual malice standard exists to protect. As discussed previously, no evidence supported a conclusion that Mullin or the Iowa Democratic Party subjectively intended the defamatory implication as opposed to the legitimate implication.

Second, the political forum used by Bertrand to communicate the false implication was not an environment suited to alert Mullin or the Iowa Democratic Party of the likelihood of error. *See Curtis Publ'g Co. v. Butts,* 388 U.S. 130, 169-70, 87 S. Ct. 1975, 1999, 18 L. Ed. 2d 1094, 1119 (1967) (Warren, C.J., concurring in the result) (opining liability could be imposed where "no additional inquiries were made even after the editors were [privately and through an attorney] notified by respondent and his daughter that the account, *to be published* was absolutely untrue" (emphasis added)). Bertrand chose to inform Mullin that the implication was false at a political forum in front of an audience of perspective voters. Even if Bertrand was using the forum to communicate the truth so that Mullin would stop running the advertisement, he also necessarily used the forum

and the subsequent filing of a defamation lawsuit to score political points and seize the public moment as a means to achieve a political advantage. This latter objective undermined Bertrand's argument that Mullin's failure to stop running the advertisement in response to his actions showed reckless disregard for the truth. A candidate does not purposely avoid the truth if the truth is buried in political grandstanding and rhetoric.

Overall, we conclude the evidence failed to establish actual malice. The failure to write the advertisement in a way to avoid the false implication in this case may have been negligence, but it did not rise to the level of reckless disregard for the truth. *See McCarney,* 239 N.W.2d at 156. It is the obligation of the courts to carefully review the evidence in each case to make sure the high standard of proof in a defamation action by one political candidate against another political candidate is met. The evidence in this case failed to support a high degree of subjective awareness of falsity needed for a public official to recover for defamation.

The result of this case is not to imply actual malice cannot exist within the rough and tumble Wild West approach to negative commercials that have seemingly become standard discourse in many political campaigns. Protection from defamatory statements does exist and should exist, but the high standards established under the First Amendment to permit a free exchange of ideas within the same discourse must also be protected. Among public figures and officials,

an added layer of toughness is expected, and a greater showing of culpability is required under our governing legal standards to make sure the freedom of political speech, even when it sounds like speech far removed from the dignity of the office being sought, is not suppressed or chilled.

While the Constitution has delivered the freedom of speech to all with just a few simple words, the history and purpose of those iconic words are immense and powerful, and have solidified a long-standing right for people in this country, including public officials, to criticize public officials. Of course, this does not mean greater civility in public discourse would not better serve democracy. Moreover, no right is absolute. Nevertheless, the protective constitutional line of free speech in the arena of public officials is drawn at actual malice. Within this arena, speech cannot become actionable defamation until the line has been crossed. It was not in this case.

IV. Conclusion.

We conclude the record failed to support sufficient evidence of actual malice. Bertrand failed to meet his burden to prove the actual malice element of defamation. Accordingly, we need not address the other issues raised on appeal. The judgment must be reversed and the case dismissed.

JUDGMENT OF THE DISTRICT COURT REVERSED; CASE DISMISSED.

All justices concur except Appel and Mansfield, JJ., who take no part.

IN THE SUPREME COURT OF IOWA

No. 12-0649

Woodbury County No. EQCV143342

CORRECTION ORDER

(Filed May 30, 2014)

RICK BERTRAND,

Appellant,

v.

RICK MULLIN and **THE IOWA DEMOCRATIC PARTY**,

Appellees.

The opinion in the above-captioned case, filed May 16, 2014, has been revised on page 9 and 10 with the addition of a footnote now labeled 1, which reads:

> [1] We recognize the United States Supreme Court has indicated it is an open question "whether the *New York Times* standard can apply to an individual defendant rather than to a media defendant." *Hutchinson v. Proxmire*, 443 U.S. 111, 133 n.16, 99 S. Ct. 2675, 2687 n.16, 61 L. Ed. 2d 411, 430 n.16 (1979); *accord Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 n.6, 110 S. Ct. 2695, 2706 n.6, 111 L. Ed. 2d 1, 18 n.6 (1990); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 779 n.4, 106 S. Ct. 1558, 1565 n.4, 89 L. Ed. 2d 783, 794 n.4 (1986); *see also Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d

1284, 1290 (9th Cir. 2014) (recognizing the Supreme Court has never resolved whether First Amendment protections apply beyond the institutionalized press). Yet, in a case in which the Court rejected a robust First Amendment defense in cases brought by non-public plaintiffs involving matters of "purely private concern," *see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759-61, 105 S. Ct. 2939, 2945-46, 86 L. Ed. 2d 593, 602-04 (1985) (judgment of the court), a four-Justice dissent and one-Justice concurrence rejected any distinction in First Amendment-protection based on identity of the defendant, *id.* at 781-83, 105 S. Ct. at 2957-58, 86 L. Ed. 2d at 617-18 (Brennan, J., dissenting); *id.* at 772-74, 105 S. Ct. at 2952-53, 86 L. Ed. 2d at 611-12 (White, J., concurring); *see also Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 149 (2d Cir. 2000) (considering the combined dissent and concurrence of *Dun & Bradstreet* as persuasive).

We have suggested the *New York Times* standard applies to nonmedia defendants, at least when the plaintiff is a public official. *See Anderson v. Low Rent Hous. Comm'n*, 304 N.W.2d 239, 247 (Iowa 1981) ("[W]e find no basis in the plain language of the first amendment that would justify according greater protection to the media than private parties. . . ."). *But see Vinson v. Linn-Mar Cmty. Sch. Dist.*, 360 N.W.2d 108, 118 (Iowa 1984) (distinguishing *Anderson* based on the fact that *Anderson* involved a public official). Our reasoning in *Anderson* closely resembled

Justice Brennan's reasoning (apparently representing the reasoning of five Justices) that a distinction based on whether the defendant is a member of the press

> is irreconcilable with the fundamental First Amendment principle that "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identify of its source. . . ." First Amendment difficulties lurk in the definitional questions such an approach would generate.

Dun & Bradstreet, 472 U.S. at 781-82, 105 S. Ct. at 2957, 86 L. Ed. 2d at 617 (Brennan, J., dissenting) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777, 98 S. Ct. 1407, 1416, 55 L. Ed. 2d 707, 718 (1978)); *see also Anderson*, 304 N.W.2d at 247.

Nevertheless, we do not address the issue in this case. The trial court instructed the jury on Bertrand's claims of libel, slander, and defamation by implication under the actual malice standard defined by *New York Times*. On appeal, Bertrand did not argue that Mullin, as a nonmedia defendant, deserved less protection than offered by *New York Times*. Therefore, we proceed to analyze Bertrand's defamation claim against Mullin under the *New York Times* framework.

Subsequent footnotes have been renumbered beginning on page 10.

The paragraph on original opinion pages 18 and 19 beginning with the word, "Additionally," has been eliminated.

The final sentence of the first full paragraph on page 25 beginning with the words, "As discussed" has been eliminated. In the following paragraph, the first sentence now begins, "Second, and more importantly, the political forum. . . ."

In all other respects, the opinion is unchanged. The corrected pages are attached to this order.

Dated this 30th day of May, 2014.

SUPREME COURT OF IOWA

/s/ Mark S. Cady
Mark S. Cady, Chief Justice

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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." *Johnson*, 542 N.W.2d at 510. 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." *Stevens*, 728 N.W.2d at 828. Yet, a plaintiff who is a candidate for public office becomes a public official. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-72, 91 S. Ct. 621, 625, 28 L. Ed. 2d 35, 41 (1971). 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.[1] *See N.Y. Times*, 376 U.S. at 279-80, 285-86, 84 S. Ct. at 726, 729, 11 L. Ed. 2d at 706, 710.

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[1] We recognize the United States Supreme Court has indicated it is an open question "whether the *New York Times* standard can apply to an individual defendant rather than to a media defendant." *Hutchinson v. Proxmire*, 443 U.S. 111, 133 n.16, 99 S. Ct. 2675, 2687 n.16, 61 L. Ed. 2d 411, 430 n.16 (1979); *accord Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 n.6, 110 S. Ct. 2695, 2706 n.6, 111 L. Ed. 2d 1, 18 n.6 (1990); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 779 n.4, 106 S. Ct. 1558, 1565 n.4, 89 L. Ed. 2d 783, 794 n.4 (1986); *see also Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1290 (9th Cir. 2014) (recognizing the Supreme Court has never resolved whether First Amendment protections apply beyond the institutionalized press). Yet, in a case in which the Court rejected a robust First Amendment defense in cases brought by nonpublic plaintiffs involving matters of "purely private concern," *see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759-61, 105 S. Ct. 2939, 2945-46, 86 L. Ed. 2d 593, 602-04 (1985) (judgment of the court), a four-Justice dissent and one-Justice concurrence rejected any distinction in First Amendment-protection based on identity of the defendant, *id.* at 781-83, 105 S. Ct. at 2957-58, 86 L. Ed. 2d at 617-18 (Brennan, J., dissenting); *id.* at 772-74, 105 S. Ct. at 2952-53, 86 L. Ed. 2d at 611-12 (White, J., concurring); *see also Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 149 (2d Cir. 2000) (considering the combined dissent and concurrence of *Dun & Bradstreet* as persuasive).

We have suggested the *New York Times* standard applies to nonmedia defendants, at least when the plaintiff is a public official. *See Anderson v. Low Rent Hous. Comm'n*, 304 N.W.2d 239, 247 (Iowa 1981) ("[W]e find no basis in the plain language of the first amendment that would justify according greater protection to the media than private parties. . . ."). *But see Vinson v. Linn-Mar Cmty. Sch. Dist.*, 360 N.W.2d 108, 118 (Iowa 1984) (distinguishing *Anderson* based on the fact that *Anderson* involved a public official). Our reasoning in *Anderson* closely resembled Justice Brennan's reasoning (apparently representing

(Continued on following page)

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. *Blessum v. Howard Cnty. Bd. of Supervisors*, 295 N.W.2d 836, 843 (Iowa 1980). We have characterized this burden – in the context of showing reckless disregard for the truth – as "substantial." *Stevens*, 728 N.W.2d at 830; *see Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S. Ct. 2678, 2696, 105 L. Ed. 2d 562, 589 (1989) (applying "'high degree of awareness'" standard (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S. Ct. 209, 216, 13 L. Ed. 2d 125, 133 (1964))).

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the reasoning of five Justices) that a distinction based on whether the defendant is a member of the press

> is irreconcilable with the fundamental First Amendment principle that "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identify of its source. . . ." First Amendment difficulties lurk in the definitional questions such an approach would generate.

Dun & Bradstreet, 472 U.S. at 781-82, 105 S. Ct. at 2957, 86 L. Ed. 2d at 617 (Brennan, J., dissenting) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777, 98 S. Ct. 1407, 1416, 55 L. Ed. 2d 707, 718 (1978)); *see also Anderson*, 304 N.W.2d at 247.

Nevertheless, we do not address the issue in this case. The trial court instructed the jury on Bertrand's claims of libel, slander, and defamation by implication under the actual malice standard defined by *New York Times*. On appeal, Bertrand did not argue that Mullin, as a nonmedia defendant, deserved less protection than offered by *New York Times*. Therefore, we proceed to analyze Bertrand's defamation claim against Mullin under the *New York Times* framework.

The burden to establish actual malice was deliberately set high by the First Amendment protections recognized in *New York Times*.[2] 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

[2] We note Mullin and the Iowa Democratic Party have only asserted privilege under the First Amendment to the United States Constitution and not article I, section 7 of the Iowa Constitution. More than a century ago – and more than half a century before the Supreme Court decided *New York Times* – we recognized persons who place themselves in the public sphere are subject to a vastly greater degree of comment, criticism, and even ridicule. *See Cherry v. Des Moines Leader*, 114 Iowa 298, 305, 86 N.W. 323, 325 (1901), *abrogated in part on other grounds by Barrica v. Nickolas*, 683 N.W.2d 111, 119-20 (2004). Irrespective of the social utility of the *Des Moines Leader*'s old-timey rebuke of the Cherry Sisters' apparently salacious performance, we recognized:

> One who goes upon the stage to exhibit himself to the public, or who gives any kind of a performance to which the public is invited, may be freely criticised. He may be held up to ridicule, and entire freedom of expression is guarantied dramatic critics, provided they are not actuated by malice or evil purpose in what they write. Fitting strictures, sarcasm, or ridicule, even, may be used, if based on facts, without liability, in the absence of malice or wicked purpose. The comments, however, must be based on truth, or on what in good faith and upon probable cause is believed to be true, and the matter must be pertinent to the conduct that is made the subject of criticism. Freedom of discussion is guarantied by our fundamental law and a long line of judicial decisions.

Id. at 304, 86 N.W.2d at 325.

uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times*, 376 U.S. at 270, 84 S. Ct. at 721, 11 L. Ed. 2d at 701. 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 spectre of numerous libel actions." *McCarney v. Des Moines Register & Tribune Co.*, 239 N.W.2d 152, 156 (Iowa 1976) (quoting *N.Y. Times*, 376 U.S. at 278, 84 S. Ct. at 725, 11 L. Ed. 2d at 705). In other words, "[t]he prized American right 'to speak one's mind' about public officials and affairs needs 'breathing space to survive.'" *N.Y. Times*, 376 U.S. at 298, 84 S. Ct. at 736, 11 L. Ed. 2d at 719 (Goldberg, J., concurring) (quoting *Bridges v. California*, 314 U.S. 252, 270, 62 S. Ct. 190, 197, 86 L. Ed. 192, 207 (1941) (first quotation); *NAACP v. Button*, 371 U.S. 415, 433, 83 S. Ct. 328, 338, 9 L. Ed. 2d 405, 418 (1963) (second quotation)).

At its core, the First Amendment guarantee "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co.*, 401 U.S. at 272, 91 S. Ct. at 625, 28 L. Ed. 2d at 41. While "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution," *Buckley v. Valeo*, 424 U.S. 1, 14, 96 S. Ct. 612, 632, 46 L. Ed. 2d 659, 685 (1976) (per curiam), "an election campaign is a means of disseminating ideas as well

as attaining political office," *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186, 99 S. Ct. 983, 991, 59 L. Ed. 2d 230, 242 (1979). Consequently, constitutional protection for political speech in the context of a campaign extends to "anything which might touch on an official's fitness for office." *Garrison*, 379 U.S. at 77, 85 S. Ct. at 217, 13 L. Ed. 2d at 134. Understandably, the range of private conduct that affects an official's fitness for elective office can be broad. "Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character." *Id.*

A statement is made with actual malice when accompanied by "knowledge that it was false or with reckless disregard for its truth or falsity." *Carr v. Bankers Trust Co.*, 546 N.W.22 901, 904 (Iowa 1996). However, as Justice Black pointed out a half a century ago, actual malice "is an elusive, abstract concept, hard to prove and hard to disprove." *N.Y. Times*, 376 U.S. at 293, 84 S. Ct. at 733, 11 L. Ed. 2d at 716 (Black, J., concurring). A knowing falsehood may be easy to identify in theory, but any effort to peer into the recesses of human attitudes towards the truthfulness of a statement is certain to be difficult.

"'Reckless disregard,' it is true, cannot be fully encompassed in one infallible definition." *St. Amant v. Thompson*, 390 U.S. 727, 730, 88 S. Ct. 1323, 1325, 20 L. Ed. 2d 262, 267 (1968). Yet, in the half century the *New York Times* rule has preserved the First Amendment's guarantee of uninhibited commentary

regarding public officials and figures, the Supreme Court has crafted some useful guideposts. Most prominently, an early case nearly contemporaneous with *New York Times* opined that statements made with a "high degree of awareness of their probable falsity" may subject the speaker to civil damages. *Garrison*, 379 U.S. at 74, 85 S. Ct. at 216, 13 L. Ed. 2d at 133. The negative implication, of course, is that a court may not award damages against one who negligently communicates a falsehood about a public official. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510, 111 S. Ct. 2419, 2429, 115 L. Ed. 2d 447, 468 (1991) ("Mere negligence does not suffice."); *see also Harte-Hanks Commc'ns*, 491 U.S. at 688, 109 S. Ct. at 2696, 105 L. Ed. 2d at 589 (explaining that establishing liability under *New York Times* "requires more than a departure from reasonably prudent conduct"); *McCarney*, 239 N.W.2d at 156 (holding plaintiff failed to present evidence of actual malice because defendant's explanation of the mistaken statement "shows negligence, but no more than that").

The Supreme Court has explained its reasoning:

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant *in fact entertained serious doubts as to the truth of his publication*. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant, 390 U.S. at 731, 88 S. Ct. at 1325, 20 L. Ed. 2d at 267 (emphasis added). In a later case, the Court clarified that "[t]he standard is a subjective one." *Harte-Hanks Commc'ns*, 491 U.S. at 688, 109 S. Ct. at 2696, 105 L. Ed. 2d at 589.

Candidly, the *New York Times* standard tilts the balance strongly in favor of negligent defendants:

> It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity.

St. Amant, 390 U.S. at 731, 88 S. Ct. at 1326, 20 L. Ed. 2d at 267. However, the Supreme Court has indicated that mere protestations of good faith and declarations that the speaker believed the statement to be true are not automatically sufficient to avoid liability. *Id.* at 732, 88 S. Ct. at 1326, 20 L. Ed. 2d at 267-68. The Court explained:

> 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. Thus, while courts look at the speaker's subjective state of mind regarding the truthfulness of his or her statement, mere subjective belief in the statement's truth is insufficient to avoid liability if objective indications – such as pure fabrication of the story – wholly belie the credibility of the statement.

However, "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." *Harte-Hanks Commc'ns*, 491 U.S. at 688, 109 S. Ct. at 2696, 105 L. Ed. 2d at 589. Similarly, "[r]eliance on a single source, in the absence of a high degree of awareness of probable falsity, does not constitute actual malice." *Woods v. Evansville Press Co.*, 791 F.2d 480, 488 (7th Cir. 1986); *accord N.Y. Times Co. v. Connor*, 365 F.2d 567, 576 (5th Cir. 1966). Nor does a "shoddy" investigation constitute actual malice. *See Dodds v. Am. Broad. Co.*, 145 F.3d 1053, 1062-63 (9th Cir. 1998); *see also Faigin v. Kelly*, 978 F. Supp. 420, 429 (D.N.H. 1997) ("[F]ailure to follow journalistic standards and lack of investigation may establish irresponsibility or even possibly gross irresponsibility, but not reckless disregard of truth."). Indeed, sources of information need not be completely neutral. *See Dodds*, 145 F.3d at 1062 (holding that a reporter's deeply religious source who expressed skepticism about a judge's reliance on a crystal ball to decide

cases was not so biased as to render her statements unreliable).

Mullin and the Iowa Democratic Party challenge the judgment entered on the claim of defamation on several grounds, including the sufficiency of evidence to support the actual malice element of the tort. If the evidence was insufficient to support actual malice, the judgment must be reversed, and we need not address any further issues raised on appeal. Accordingly, we turn to consider the sufficiency of evidence to support the element of actual malice.

In considering the actual malice element of the tort, we must decide if the evidence supports a finding that Mullin and the Iowa Democratic Party "in fact entertained serious doubts as to the truth" of the implied communication in the commercial – that Bertrand personally sold a dangerous drug – or if they had "a high degree of awareness of [its] probable falsity." *St. Amant*, 390 U.S. at 731, 88 S. Ct. at 1326, 20 L. Ed. 2d at 267 (first quotation); *Garrison*, 379 U.S. at 74, 85 S. Ct. at 216, 13 L. Ed. 2d at 133 (second quotation). In making this determination, we "consider the factual record in full." *Harte-Hanks Commc'ns*, 491 U.S. at 688, 109 S. Ct. at 2696, 105 L. Ed. 2d at 589.

Bertrand argues actual malice was supported by the evidence in a number of ways. First, Bertrand claims the evidence showed Mullin and the Iowa Democratic Party knew the implication in the commercial at issue was false because they knew that

none of his Sioux City companies sold drugs and they did not know which division within the pharmaceutical company Bertrand worked in or which division of the company sold the drug in dispute. Second, Bertrand claims Mullin and the Iowa Democratic Party should have known the implication in the commercial was false because Mullin expressed doubts about the commercial before it aired. Third, Bertrand claims actual malice was supported by evidence that Mullin and the Iowa Democratic Party acquired ill will towards him after he aired his own hard-hitting commercial. Fourth, Bertrand asserts the jury could have found actual malice because the purpose of the commercial was to curtail electoral support for Bertrand. Finally, Bertrand asserts actual malice was supported by evidence that the commercial continued to be aired by Mullin after he was told it was false.

We first consider the evidence to support a finding that Mullin and the Iowa Democratic Party had actual knowledge of the falsity of the implied statement in the commercial. In doing so, we clarify that the district court ultimately found the only actionable defamation claim was based on the implication that Bertrand sold drugs to children, reported to be dangerous, when he worked for a pharmaceutical company.[3]

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[3] The district court ultimately concluded it should have directed a verdict in Mullin's favor on the alleged implication that Bertrand owned a company that sold Rozerem. In doing so, the district court did not consider whether Mullin intended to convey the implication. Instead, it ruled the "Secrets" commercial was not capable of bearing the implication as a matter of law,

(Continued on following page)

reasoning no reasonable viewer could ignore the "sales agent" language immediately preceding the "Bertrand's company" language. *See Stevens*, 728 N.W.2d at 830 (" 'The court determines whether . . . a communication is capable of bearing a particular meaning, and . . . whether that meaning is defamatory.' " (quoting Restatement (Second) of Torts § 614, at 311 (1965))). Consequently, Mullin prevailed on his argument that the commercial made no implication that Bertrand owned a company that sold Rozerem. We agree with the district court's conclusion.

However, we note that in the district court, Mullin argued that, at least in the First Amendment context, a defamation-by-implication plaintiff must prove the defendant subjectively endorsed or intended the implication in the publication. *See Chapin v. Knight-Ridder*, 993 F.2d 1087, 1092-93 (4th Cir. 1993) ("The language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference."); *Howard v. Antilla*, 191 F.R.D. 39, 44 (D.N.H. 1999) ("To prove libel by implication Howard must demonstrate that Antilla subjectively or actually intended to impart the defamatory implication of the reported rumor."); *see also Dodds*, 145 F.3d at 1064 (noting every federal circuit court to consider the issue has required the plaintiff to prove the defendant intended a defamatory inference to be drawn and collecting cases). Stated differently, in the First Amendment context, it is not enough that the language of the publication can "be reasonably read to impart the false innuendo." *Chapin*, 993 F.2d at 1093. The Ninth Circuit considers the subjective-intent requirement necessary in public official defamation claims because imposing liability in the absence of some proof of intent "eviscerates the First Amendment protections established by *New York Times*" by permitting "liability to be imposed not only for what was not said but also for what was not intended to be said." *Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 681 (9th Cir. 1990); *see also Woods v. Evansville Press Co.*, 791 F.2d 480, 488 (7th Cir. 1986) ("A publisher reporting on matters of general or public interest cannot be charged with the intolerable burden of guessing what inferences a jury might draw from an article and

(Continued on following page)

Thus, any knowledge by Mullin and the Iowa Democratic Party that Bertrand's Sioux City businesses never marketed drugs to children has no impact on the pertinent question whether they knew Bertrand never actually sold a dangerous drug to children when he worked for the pharmaceutical company. Instead, the evidence of actual malice necessary to support the implied defamation in this case centers on knowledge of the falsity of the implied statement that Bertrand personally marketed Rozerem, not on knowledge that he did not own the company that marketed the drug

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ruling out all possible false and defamatory innuendoes that could be drawn from the article.").

The district court agreed with Mullin that the subjective-intent showing contemplated by *Chapin* and *Newton* is a required one. Bertrand did not raise a claim of error regarding this aspect of the ruling on appeal but only mentioned it in his reply brief in response to the issues raised by Muffin on cross-appeal. Similarly, Mullin did not heavily rely on this point in his cross-appeal. We recognize defamation by implication is "an area of law 'fraught with subtle complexities.'" *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 596 (D.C. 2000) (quoting *White v. Fraternal Order of Police*, 909 F.2d 512, 518 (D.C. Cir. 1990)). In light of the absence of thorough briefing on the issue or the necessity that we decide it as a factual matter, we decline to address the subjective-intent requirement in this opinion. *Cf. State v. Hoeck*, 843, N.W.2d 67, 71 (Iowa 2014) (exercising discretion not to address an issue in the absence thorough briefing and full development of factual issues necessary to decide an issue raised for the first time on appeal). Thus, we only consider the implied claim that Bertrand personally sold Rozerem. As above, we decide the case solely on the actual malice ground and express no opinion regarding whether Mullin or any staff of the Iowa Democratic Party subjectively endorsed or intended the implication that Bertrand personally sold or marketed rozerem.

or that the businesses he actually owned did not market the drug.

The evidence at trial established that Mullin and the Iowa Democratic Party did *not* know if Bertrand was personally responsible in any way for marketing or selling the drug. They conducted some research for the purpose of running an attack advertisement and concluded from this research that Bertrand worked for the drug company and the company marketed the drug. The research revealed the FDA and others criticized Takeda for selling Rozerem. These statements were true and formed the basis for their claim that Bertrand was associated with an unethical business. Yet, Mullin and the Iowa Democratic Party did not look into the matter further to uncover the complete story that would have told them that Bertrand had nothing to do with the marketing of the drug other than to work for the company that marketed it. The truth, of course, was that Bertrand never worked in the particular division of the company that marketed the drug and never sold the drug. Nevertheless, there was no evidence that Mullin or the Iowa Democratic Party knew the implied statement that Bertrand sold the drug was false.

Without evidence of actual knowledge, we turn to consider if the implied statement was made with reckless disregard for its truth or falsity. We begin by considering the degree of awareness of the probable falsity and any doubts that may have existed about the truth or falsity of the implied statement.

Mullins and the Iowa Democratic Party asserted the implication that Bertrand sold a dangerous drug was made in good faith because they only wanted to inform voters that Bertrand was associated with an unethical company. While this assertion is alone insufficient to conclusively establish the absence of malice, *see St. Amant*, 390 U.S. at 732, 88 S. Ct. at 1326, 20 L. Ed. 2d at 268, it is important to recognize that the nondefamatory implication Mullin and the Iowa Democratic Party sought to communicate – Bertrand was associated with an unethical company that sold a dangerous drug – can be implied from the advertisement. Bertrand established the implication was false, but the general background story from which both implications were derived was not false. Thus, the defamatory statement in this case was not built on a totally fabricated story as the Court opined might support a finding of actual malice in other cases. *See id.* (identifying "where a story is fabricated by the defendant" as possible evidence of actual malice).

It is also important to observe that the sources of information used to gather the background information for the advertisement were not so unreliable as to be unworthy of credence and indicative of reckless disregard for the truth. *See id.* ("[R]ecklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."). Some of the reports may not have been neutral, but mere reliance on sources with predisposed viewpoints does not establish actual malice

concerning the falsity of implied statements. *See Dodds*, 145 F.3d at 1062. This case does not contain evidence of patently unreliable sources to support actual malice. Additionally, there was evidence that Mullin and the Iowa Democratic Party did not even subjectively entertain the idea that the implication that Bertrand sold Rozerem was false. There was some evidence that Mullin and the staff with the Iowa Democratic Party assumed Bertrand sold the drug.

The broader background setting of the advertisement must also be considered. Modern political campaigns exist within news cycles that often require overnight action, especially as the campaign closes in on the day of the election. This backdrop supports the need for "breathing room" recognized by the First Amendment to permit meaningful political speech to survive. It is a part of this case and militates against the finding of a subjective awareness of falsity needed to support actual malice.

We next consider the evidence that Mullin initially maintained a strong dislike for the tone of the commercial as proof of actual malice. While this is true, the doubts expressed by Mullin are irrelevant unless related to the truth of the statements. *See St. Amant*, 390 U.S. at 731, 88 S. Ct. at 1325, 20 L. Ed. 2d at 267. The indispensable consideration in this case concerns the subjective attitudes of Mullin and individuals of the Iowa Democratic Party *regarding the truth* of the implication. *See Harte-Hanks Commc'ns*, 491 U.S. at 688, 109 S. Ct. at 2696, 105

L. Ed. 2d at 589. There was no evidence that the concerns expressed by Mullin pertained to the falsity of any statements. The expressions of doubt were not evidence of actual malice, but were pragmatic and expedient considerations of tenor and political image-crafting with which the First Amendment is fundamentally unconcerned.

We next consider the evidence that Mullin was angry at Bertrand for running his negative campaign advertisement and sought to "hit back" hard at him. This is the type of evidence, however, that demonstrates common law actual malice. *See Winckel v. Von Maur, Inc.*, 652 N.W.2d 453, 459 (Iowa 2002), *abrogated on other grounds by Barreca*, 683 N.W.2d at 119, 123. As used in the First Amendment context, "actual malice" is only a helpful "shorthand," *Masson*, 501 U.S. at 511, 111 S. Ct. at 2430, 115 L. Ed. 2d at 468, and "has nothing to do with bad motive or ill will," *Harte-Hanks Commc'ns*, 491 U.S. at 666 n.7, 109 S. Ct. at 2685 n.7, 105 L. Ed. 2d at 576 n.7. "[U]nlike the common law definition of actual malice, *New York Times* actual malice focuses upon the attitudes of defendants vis-à-vis the truth of their statements, as opposed to their attitudes towards plaintiffs." *Barreca*, 683 N.W.2d at 120.

Thus, under *New York Times*, a plaintiff cannot demonstrate actual malice "merely through a showing of ill will or '"malice" in the ordinary sense of the term.'" *Stevens*, 728 N.W.2d at 831 (quoting *Harte-Hanks Commc'ns*, 491 U.S. at 666, 109 S. Ct. at 2685, 105 L. Ed. 2d at 576). Stated differently, "[a]ctual

antagonism or contempt has been held insufficient to show malice." *McCarney*, 239 N.W.2d at 156. We note the Supreme Court has commented that "it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry" and opined that such an attitude may be circumstantially probative of the defendant's attitude towards the truth of the statement at issue. *Harte-Hanks Commc'ns*, 491 U.S. at 668, 109 S. Ct. at 2686, 105 L. Ed. 2d at 577. But, the evidence of alleged enmity proffered here does not tend to show any doubts about the truth of the information conveyed in the advertisement. The uninhibited debate the First Amendment envisions would be undermined if liability attached merely upon proof the speaker "spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Garrison*, 379 U.S. at 73, 85 S. Ct. at 215, 13 L. Ed. 2d at 132.

We next consider the claim by Bertrand that actual malice was established because the very purpose of the commercial was to attack, and thereby negatively affect, a candidate's reputation. An "intent to inflict harm" is insufficient to demonstrate a reckless disregard for the truth. *McCarney*, 239 N.W.2d at 156; *see also Garrison*, 379 U.S. at 73-74, 85 S. Ct. at 215, 13 L. Ed. 2d at 132. "There must be an intent to inflict harm *through falsehood*." *McCarney*, 239 N.W.2d at 156. The very point of the trenchant public discourse protected under the legal standards of *New York Times* is oftentimes to weaken

the support for political rivals in future elections: "'[S]elfish political motives,'" which naturally and expectedly accompany such acicular criticism, do not reduce the value of free speech. *See Garrison*, 379 U.S. at 73-74, 85 S. Ct. at 215, 13 L. Ed. 2d at 132 (quoting Dix W. Noel, *Defamation of Public Officers and Candidates*, 49 Colum. L. Rev. 875, 893 n.90 (1949)). The standards of *New York Times* do not constrain First Amendment protection to political discourse of a sterile, academic character or an undiluted high-minded nature. The First Amendment protects the use of "rhetorical hyperbole," *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14, 90 S. Ct. 1537, 1542, 26 L. Ed. 2d 6, 15 (1970), and "imaginative expression[s]" designed to evoke contempt for the targets of protected speech, *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 285-86, 94 S. Ct. 2770, 2782, 41 L. Ed. 2d 745, 763 (1974). After all, "[r]idicule is often the strongest weapon in the hands of a public writer." *Cherry v. Des Moines Leader*, 114 Iowa 298, 305, 86 N.W. 323, 325 (1901), *abrogated in part on other grounds by Barrica*, 683 N.W.2d at 119-20.

It is not enough to assert that the ordinary purpose of a defamation action is to vindicate and protect a person's common law reputational interest. The First Amendment protects public discourse – even in the form of withering criticism of a political opponent's past dealings or associations – unless the lodged attack is clearly shown to be false and made with actual malice. *See Monitor Patriot Co.*, 401 U.S. at

274-77, 91 S. Ct. at 626-28, 28 L. Ed. 2d at 42-44 (discussing attacks based on private conduct in political campaigns); *Garrison*, 379 U.S. at 72-73, 85 S. Ct. at 215, 13 L. Ed. 2d at 132 ("[W]here the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth."); *see also N.Y. Times*, 376 U.S. at 279-80, 94 S. Ct. at 726, 11 L. Ed. 2d at 706; *cf. NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910, 102 S. Ct. 3409, 3424, 73 L. Ed. 2d 1215, 1234 (1982) ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."). After all, *New York Times* and its progeny even reach so far as to protect pillorying barbs some may regard as offensive and outrageous. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55, 108 S. Ct. 876, 882, 99 L. Ed. 2d 41, 52 (1988) (rejecting an "outrageous" exception to traditional public official tort suit rules). A contrary rule would efface constitutional protection for political commentary; "liberty of speech and of the press guarantied by the constitution [would be] nothing more than a name." *Cherry*, 114 Iowa at 305, 86 N.W. at 325.

Finally, we reject the claim that actual malice was established by the evidence that Mullin continued to air the commercial after Bertrand publicly told him the implication was false. *See Harte-Hanks Commc'ns*, 491 U.S. at 691 n.37, 109 S. Ct. at 2698 n.37, 105 L. Ed. 2d at 591 n.37 ("Of course, the press need not accept 'denials, however vehement; such

denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error.'" (quoting *Edwards v. Nat'l Audubon Soc'y, Inc.*, 556 F.2d 113, 121 (2d Cir. 1977))). A finding of actual malice based on this circumstance in this case would significantly chill constitutionally protected speech. *See N.Y. Times*, 376 U.S. at 286, 84 S. Ct. at 729, 11 L. Ed. 2d at 710 (holding failure to retract an allegedly defamatory statement is not, by itself, "adequate evidence of malice for constitutional purposes"). The actual malice standard cannot be applied to make a speaker who negligently makes an inaccurate statement liable based on evidence that may amount to a good-faith refusal to back down.

Such a result is anathema to the First Amendment both as originally conceived and in the context of the *New York Times* doctrine laid down half a century ago. *See N.Y. Times*, 376 U.S. at 275, 84 S. Ct. at 723, 11 L. Ed. 2d at 703 ("The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government."). We understand that unscrupulous individuals were certainly capable of using "calculated falsehood[s]" at the time the First Amendment was adopted. *Garrison*, 379 U.S. at 75, 85 S. Ct. at 216, 13 L. Ed. 2d at 133. But, we need to look no further than the Sedition Act of 1798 to further understand that equally unscrupulous individuals would use the coercive force of government to censor their critics and retain power. *See N.Y. Times*,

376 U.S. at 273-76, 84 S. Ct. at 722-24, 11 L. Ed. 2d at 702-04. Indeed, as the Court recognized in *New York Times*, "[a]lthough the Sedition Act was never tested in [the Supreme Court], the attack upon its validity has carried the day in the court of history." *Id.* at 276, 84 S. Ct. at 723, 11 L. Ed. 2d at 704.

We reiterate that the actual malice element does not allow a defendant to purposefully avoid discovering the truth. *Stevens*, 728 N.W.2d at 831 (citing *Harte-Hanks Commc'ns*, 491 U.S. at 692, 109 S. Ct. at 2698, 105 L. Ed. 2d at 591). Moreover, we acknowledge actual malice could be derived from the actions of a candidate in continuing to run an advertisement after being informed of a false implication in the advertisement. It goes without saying that a speaker who repeats a defamatory statement after being informed of the statement's unambiguous falsity does so at the peril of generating an inference of actual malice.

However, two factors in this case do not permit actual malice to be established by evidence that Mullin and the Iowa Democratic Party continued to run the advertisement. First, the false implication exposed by Bertrand did not undermine or eliminate the political relevance of the nondefamatory implication from the advertisement intended by Mullin that Bertrand had associated with an unethical business. This legitimate implication remained speech related to the breathing room that the actual malice standard exists to protect.

Second, and more importantly, and the political forum used by Bertrand to communicate the false implication was not an environment suited to alert Mullin or the Iowa Democratic Party of the likelihood of error. *See Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 169-70, 87 S. Ct. 1975, 1999, 18 L. Ed. 2d 1094, 1119 (1967) (Warren, C.J., concurring in the result) (opining liability could be imposed where "no additional inquiries were made even after the editors were [privately and through an attorney] notified by respondent and his daughter that the account, *to be published* was absolutely untrue" (emphasis added)). Bertrand chose to inform Mullin that the implication was false at a political forum in front of an audience of prospective voters. Even if Bertrand was using the forum to communicate the truth so that Mullin would stop running the advertisement, he also necessarily used the forum and the subsequent filing of a defamation lawsuit to score political points and seize the public moment as a means to achieve a political advantage. This latter objective undermined Bertrand's argument that Mullin's failure to stop running the advertisement in response to his actions showed reckless disregard for the truth. A candidate does not purposely avoid the truth if the truth is buried in political grandstanding and rhetoric.

Overall, we conclude the evidence failed to establish actual malice. The failure to write the advertisement in a way to avoid the false implication in this case may have been negligence, but it did not rise to the level of reckless disregard for the truth. *See*

McCarney, 239 N.W.2d at 156. It is the obligation of the courts to carefully review the evidence in each case to make sure the high standard of proof in a defamation action by one political candidate against another political candidate is met. The evidence in this case failed to support a high degree of subjective awareness of falsity needed for a public official to recover for defamation.

The result of this case is not to imply actual malice cannot exist within the rough and tumble Wild West approach to negative commercials that have seemingly become standard discourse in many political campaigns. Protection from defamatory statements does exist and should exist, but the high standards established under the First Amendment to permit a free exchange of ideas within the same discourse must also be protected. Among public figures and officials, an added layer of toughness is expected, and a greater showing of culpability is required under our governing legal standards to make sure the freedom of political speech, even when it sounds like speech far removed from the dignity of the office being sought, is not suppressed or chilled.

While the Constitution has delivered the freedom of speech to all with just a few simple words, the history and purpose of those iconic words are immense and powerful, and have solidified a long-standing right for people in this country, including public officials, to criticize public officials. Of course, this does not mean greater civility in public discourse would not better serve democracy. Moreover, no right

is absolute. Nevertheless, the protective constitutional line of free speech in the arena of public officials is drawn at actual malice. Within this arena, speech cannot become actionable defamation until the line has been crossed. It was not in this case.

IV. Conclusion.

We conclude the record failed to support sufficient evidence of actual malice. Bertrand failed to meet his burden to prove the actual malice element of defamation. Accordingly, we need not address the other issues raised on appeal. The judgment must be reversed and the case dismissed.

JUDGMENT OF THE DISTRICT COURT REVERSED; CASE DISMISSED.

All justices concur except Appel and Mansfield, JJ., who take no part.

**IN THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY**

RICK BERTRAND, Plaintiff, v. RICK MULLEN and the IOWA DEMOCRATIC PARTY, Defendant.	* No. EQCV143342 * * RULING ON MOTION * FOR JUDGMENT * NOTWITHSTANDING * THE VERDICT OR IN * ALTERNATIVE FOR * NEW TRIAL AND * MOTION FOR NEW * TRIAL OR IN THE * ALTERNATIVE * A REMITTITUR * * (Filed Jul. 5, 2012)

On May 18, 2012, hearing was held on the Defendants' two post-trial motions: Motion for Judgment Notwithstanding the Verdict or in the Alternative a Request for New Trial filed on April 18, 2012, and Motion for a New Trial or in the Alternative a Remittitur filed on April 18, 2012. Attorney Steven P. Wandro represented the Defendants, and Attorneys Jeana L. Goosman and Emilee B. Gehling represented the Plaintiff. The hearing was stenographically reported by Amy Lutgen. Having heard oral arguments from counsel and reviewed the record, trial transcript and the pleadings, the court now enters the following ruling.

STATEMENT OF THE CASE

This case involves claims of defamation arising from a 2010 state senate campaign between Rick Bertrand and Rick Mullin. During that campaign Mullin and the Iowa Democratic Party ("IDP") created an ad called "Secrets" that negatively portrayed Bertrand based on his former job with a pharmaceutical company. The ad stated that Bertrand put his profits ahead of children's health, was a "drug salesman for the most unethical company in the world," and that "the FDA singled out Bertrand's company for marketing a dangerous sleep drug to children." Bertrand filed this lawsuit on October 22, 2010, as an injunction action against Mullin and the IDP (collectively, "the Defendants"). No hearing was held before the 2010 election, which Bertrand won in a close vote.

After the commercial began airing, Bertrand received numerous comments regarding the ad. He received phone calls calling him a "baby killer," "drug dealer," and numerous other profanity laden insults. People also confronted him while campaigning. The effects extended beyond the election. On Christmas 2010, Bertrand discovered that his townhome construction project site had been littered with dirty diapers, with many of them smeared over his name on the construction sign. Bertrand also claimed it affected his relationship with the media, his banker, and potential employees.

In June 2011, seven months after the election, Bertrand opened a restaurant, McCarthy and Bailey's

Irish Pub. Thirteen months after the election, Bertrand opened a banquet hall called the Big Snug. Bertrand contends that the commercial made people less likely to visit his restaurant. To help estimate potential lost profits, Bertrand relied on the expert testimony of University of Iowa Professor Kyle Mattes.

The court held a four-day trial from April 3 through April 6, 2012. Following the Plaintiff's case, the Plaintiff moved to instruct the jury on punitive damages. The Defendants resisted and moved for a directed verdict, claiming that the alleged defamatory statements were not actionable because they were protected by the First Amendment, that the Plaintiff had failed to establish actual malice, and that they were substantially true. The court denied the motion for instructions on punitive damages, granted the motion for directed verdict with respect to the express statements themselves, but allowed the Plaintiff to proceed with claims of defamation by implication.

The jury found the Defendants liable and awarded damages of $231,000. The Plaintiff appealed the court's ruling that denied the request for punitive damages. The Defendants requested a judgment notwithstanding the verdict (JNOV), arguing that there was insufficient evidence to support a finding of defamatory meaning, actual malice, and reputational damage. The Defendants requested a new trial, or alternatively a remittitur, alleging that Plaintiff's counsel made statements constituting misconduct,

that the award was excessive and not supported by sufficient evidence.

ANALYSIS

I. Defendants' Motion for JNOV

A. Legal Standard

A party requesting a JNOV must rely exclusively on grounds which the party asserted in its motion for directed verdict. *Schlegel v. Ottumwa Courier*, 585 N.W.2d 217, 221 (Iowa 1998). Upon a motion for JNOV, courts view the evidence in the light most favorable to the non-moving party. *Id*. "A party moving for a directed verdict is considered to have admitted the truth of all evidence offered by the other party, as well as every favorable inference that may fairly and reasonably be deduced from it." *McClure v. Walgreen Co.*, 613 N.W.2d 225, 230 (Iowa 2000).

The primary inquiry for the court is "whether substantial evidence exists to support each element of the plaintiff's claim, justifying submission of the case to the jury." *Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388, 391 (Iowa 2001). "Evidence is substantial if reasonable minds would accept it as adequate to reach a conclusion." *Schlegel*, 585 N.W.2d at 221. If the moving party prevails the court may enter judgment as if it had granted the motion for directed verdict. Iowa R. Civ. P. 1.1003(2).

The parties' status as public officials might modify the standard.[1] Public official defamation actions entail important First Amendment rights. To protect those rights courts use heightened standards on summary judgment and on appellate review. *Carr v. Bankers Trust Co.*, 546 N.W.2d 901, 905 (Iowa 1996) (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 566 U.S. 485, 510 (1984)) (summary judgment); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688-89 (1989) (appellate review).

The court must determine whether Iowa's traditional law regarding motions for JNOV applies or if a heightened burden applies. The Supreme Court has stated that:

> Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'

Bose Corp., 466 U.S at 511. Some language suggests though that independent review is limited to appellate review. *Id.* at 514; *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990). Given the First Amendment concerns, the court finds that trial judges must use independent review to ensure that courts do not punish protected speech. However the heightened

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[1] *See Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971); C.J.S. Libel and Slander § 144.

standard applies only to the finding of actual malice. *Id.* at 514 n.31.

B. Background on the Applicable Law

1. General Law of Defamation Law in Iowa

The tort of defamation consists of libel and slander, written and spoken defamation respectively. *Johnson v. Nickerson*, 542 N.W.2d 506, 510 (Iowa 1996). The plaintiff must prove "that the defendant (1) published a statement (2) that was defamatory (3) of and concerning the plaintiff, and (4) resulted in an injury to the plaintiff." *Id.* Whether a statement is capable of a defamatory meaning is a question of law involving a two-step inquiry. *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 830-31 (2007). First, the court determines if the publication is capable of a defamatory meaning; second, the jury determines if the publication was so understood. *Id.*

The law of defamation protects a person's interest in their reputation and good name. *Johnson*, 542 N.W.2d at 510. "'It is reputation which is defamed, reputation which is injured, and reputation which is protected by the law of defamation.'" *Schlegel*, 585 N.W.2d at 221. A plaintiff must prove damage to reputation because "[h]urt feelings alone cannot serve as the basis of a defamation action." *Id.* at 224.

2. Public Officials and Heightened Standards

The United States Supreme Court significantly modified defamation law in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *E.g. Milkovich*, 497 U.S. at 14-17. *New York Times* held that the First Amendment applies where the plaintiff is a public official, a public figure, or where the statements address matters of public concern. *Id.; Johnson*, 542 N.W.2d at 510. The parties concede that they are public officials.

The constitution imposes different burdens and standards in order to safeguard First Amendment rights. In addition to the common law elements, a public official must prove that the statement was false and that the defendant made the statement with "actual malice." *Stevens*, 728 N.W.2d at 826-27 (citations omitted). A public official plaintiff must prove these two additional elements by clear and convincing evidence.[2] *Id.*

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[2] The Plaintiff argued that he need not prove falsity by clear and convincing evidence. Authority on this issue is split. *DiBella v. Hopkins*, 403 F.3d 102, 110-15 (2d Cir. 2005). Iowa courts appear to require clear and convincing evidence. *Stevens*, 728 N.W.2d at 826 ("Stevens, as a public figure, had the burden to show that a reasonable jury could find by clear and convincing evidence that (1) the challenged statements in Harman's column were false and (2) Harman made the statements with 'actual malice.' "); *Carr*, 546 N.W.2d at 906; *see DiBella*, 403 F.3d at 114. Absent any contrary Iowa authority, the court finds the language of the Iowa opinions and the reasoning of *DiBella* to be persuasive authority. *Id.*

"Actual malice" under *New York Times*, sometimes referred to as *New York Times* malice, is wholly distinct from common law malice. *Barreca v. Nickolas*, 683 N.W.2d 111, 120-23 (Iowa 2004). To prove *New York Times* malice, the plaintiff must prove that the defendant acted with a "knowing or reckless disregard for the truth." *Id.*

> A 'reckless disregard' for the truth [under *New York Times*] requires more than a departure from reasonably prudent conduct. 'There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.' The standard is a subjective one-there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of . . . probable falsity.'

Stevens, 728 N.W.2d at 830-831 (quoting *Harte-Hanks*, 491 U.S. at 688).

3. Competing Concerns of Free Speech and Reputation

The purpose of the rule is to create "'breathing space' so that protected speech is not discouraged." *Harte-Hanks*, 491 U.S. at 686. The rule favors protection, because "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S 767, 778 (1986). There is concern that juries may be unable to ignore the offensiveness of

the speech and impose liability for protected statements. *Bose*, 466 U.S. at 510. The rule applies with particular force to "'public discussion of the qualifications of a candidate for elective office.'" *Harte-Hanks*, 491 U.S. at 686-87. Candidates "must expect that the debate will sometimes be rough and personal." *Id.*

The Court, however, has reaffirmed that the First Amendment must be balanced against society's "pervasive and strong interest in preventing and redressing attacks upon reputation." *Milkovich*, 497 U.S. at 22-23; *see also Curtis Pub. Co. v. Butts*, 388 U.S. 130, 134-35 (1967) (plurality opinion). The Supreme Court has recognized that the need to prevent "calculated falsehoods" and injury to reputation applies with full and equal force to discussions of a candidate's qualifications:

> That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected."

Harte-Hanks, 491 U.S. at 687 n.34 (quotation omitted). With these concepts and requirements in mind, the court now turns to the merits of the Defendants' motions.

C. Application to the Defendants' Motion

On the Defendants' directed verdict motion, the court ruled that the statements were inactionable as express defamation. However, the court allowed the claims to move forward as implied defamation, finding that in the context of the entire commercial the statements were capable of implying two defamatory facts: Bertrand was personally involved in the sale or marketing of a dangerous sleep drug to children; or Bertrand owned a company that sold or marketed a dangerous sleep drug to children.

To uphold the jury's imposition of liability, the court must find that: (1) the defamatory implications are reasonably drawn from the commercial, (2) the Defendants did more than merely state true facts in a way that suggests that they intended or endorsed the implication; (3) the implication was in fact defamatory; (4) the publication resulted in reputational injury to the plaintiff; (5) the statement was false; and (6) the Defendants published the statements with knowledge or reckless disregard for their falsity. There must be substantial evidence to support these elements, except for falsity and knowledge or reckless disregard which require clear and convincing evidence.

The Defendants appear not to challenge that the implications are defamatory or that they are false. It seems clear that stating a person marketed dangerous sleep drugs to children would harm one's

reputation.[3] The court also notes that the record clearly establishes that Bertrand never sold nor marketed Rozerem.

The Defendants argue that they are entitled to JNOV because Bertrand failed to establish the requisite level of evidence. The Defendants assert that the evidence was insufficient to support a finding of (1) implication of provably false fact; (2) actual malice; and (3) prior good reputation and reputational damage subsequent to the commercial.

1. Defamatory Meaning and Provably False Facts

a. Implied Defamation

Iowa expressly recognized claims for defamation by implication in *Stevens*, 728 N.W.2d 823. The court considered implied defamation claims to be necessary to avoid situations where, "by a careful choice of words in juxtaposition of statements in a publication, a potential defendant may make statements that are true yet just as damaging as if they were actually

[3] The court also notes that a statement that someone marketed or sold the drug Rozerem would not appear defamatory. However, it becomes defamatory per quod in the context of the commercial. Here the commercial states that the drug was dangerous and that the drug had harmful side effects for children, including causing self-harm. There is substantial evidence that such a statement would damage one's reputation in the community. Additionally, in this case, it caused actual harm to Bertrand's reputation.

false." *Id.* at 828. The Supreme Court appears to recognize defamation by implication, at least in substance. *Milkovich*, 494 U.S. at 20.

Some courts do not allow public official plaintiffs to pursue claims of defamation by implication. However, *Stevens* rejected this limitation. *Stevens*, 728 N.W.2d at 829. The court stated that limiting the action would allow anyone "who deliberately seeks to harm the reputation of a public person to manipulate statements purposefully or to omit critical facts with the design of implying a false, defamatory meaning." *Id.* (quoting C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of New York Times Co. v. Sullivan*, 78 Iowa L. Rev. 237, 308 (1993).

The test to determine whether a publication is capable of a defamatory meaning is the same whether the action is for express defamation or for defamation by implication. *White v. Fraternal Order of Police*, 909 F.2d 512, 519 (D.C. Cir. 1990). The court determines whether the statements in the context of the publication as a whole are capable of implying a defamatory and false fact and, if so, the jury decides whether those statements were in fact understood in a defamatory sense. *Id*.

b. Does the Commercial Imply a Defamatory Fact

To determine whether the commercial is capable of implying a defamatory fact, the court must

"examine what defamatory inferences might reasonably be drawn" from the commercial. *Id.* 520. The Plaintiff argues that the commercial implies two defamatory facts: that Bertrand personally sold or marketed Rozerem and that Bertrand owned a company that sold or marketed Rozerem. The court will address these in turn.

i. Bertrand sold or marketed Rozerem

The ad included the following verbal statements: "Bertrand doesn't want you to know that he put his profits ahead of children's health. Bertrand was a sales agent for a big drug company that was rated the most unethical company in the world. The FDA singled out Bertrand's company for marketing a dangerous sleep drug to children."

The commercial says that *Bertrand* put *his* profits ahead of children's health. This suggests that he personally profited at the expense of children. The use of the word "profits" suggests that Bertrand was selling a product. A reasonable person would not consider salary as "profit." The ad next states Bertrand was a drug salesman. This explains how Bertrand profited, he sold drugs. The next statement tells viewers that Bertrand's company was singled out for marketing a dangerous sleep drug to children. The viewer connects the statements through the reference to children: Bertrand put his profits ahead of children's health by marketing a dangerous sleep

drug to children. The combination of the statements creates an inference that Bertrand was personally involved with selling or marketing a dangerous sleep drug to children.

The Defendants argue that this was a "guilt by association ad," that he put profits ahead of children by merely working for Takeda. Def. Mot. JNOV ¶ 11. This is one potential interpretation of the commercial. The court need not address whether this is a reasonable interpretation. The only question for the court is whether a defamatory implication may be reasonably drawn. The language and juxtaposition of the phrases allow the implication to be reasonably drawn. If somebody states that John is a car salesman at A&B car dealership and that A&B sells Fords, it is reasonable to infer that John sells Fords, regardless of what other models A&B actually sells.

The statements must be considered in the context of the entire ad. The fact that each statement is not individually actionable does not prevent the commercial as a whole from implying a defamatory fact. This is the very definition of defamation by implication. The court concludes that there is substantial evidence to support a finding that the implication that Bertrand personally sold or marketed a dangerous drug to children is a reasonable inference from the commercial taken as a whole.[4]

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[4] The court notes briefly that another implied false fact is that Takeda Pharmaceuticals profited from selling a sleep drug

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ii. Bertrand owned a drug company that sold Rozerem

The Secrets ad stated that "The FDA singled out Bertrand's company for marketing a dangerous sleep drug to children." Plaintiff contends that, because he was a known businessman who owned many companies, the commercial implies that the Plaintiff owned a drug company that sold the drug. The Defendants argue that this statement is immediately preceded by the statement that "Bertrand was a sales agent for a big drug company that was rated the most unethical company in the world." The Defendants argue that the only reasonable interpretation is that "Bertrand's company" means "the company for which Bertrand worked."

If an allegedly defamatory statement is accompanied by a fully disclosed factual basis, the statement will not generally be a basis for defamation liability. *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir. 1993); *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 185 (4th Cir. 1998). Here, the commercial disclosed that Bertrand was a "sales agent for a big drug company" and that the "FDA singled out Bertrand's company." A listener could only conclude

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to children. However, the drug was not approved for children, so it is unlikely that a physician would have prescribed it. Therefore it appears that Takeda never profited from selling the drug to children – and in fact probably lost money due to the FDA action. Because Takeda did not profit by selling drugs to children, the implication that Bertrand did is even more implausible.

that Bertrand owned a drug company by ignoring the express statement that "Bertrand was a sales agent." The commercial must be viewed in context of the entire publication, and a reasonable listener could not ignore this statement. The court concludes that the implication that Bertrand in fact owned a drug company was not a reasonable inference from the commercial.

Consequently, the court should have granted directed verdict to the Defendant with respect to the implication that Bertrand owned a company that sold Rozerem. However, this conclusion does not affect whether the jury's verdict should be upheld for the implication that Bertrand was personally involved in the sale or marketing of Rozerem. The inference that Mr. Bertrand owned the company is not nearly as clear as the implication that Bertrand sold or marketed Rozerem. It is unlikely that the jury would have found liability solely on the implication that Bertrand owned a company without finding liability on the implication that Bertrand personally sold or marketed the drug.

c. Intent or Endorsement

Some courts require implied defamation plaintiffs to prove that the defendant intended or endorsed the implication. *See White*, 909 F.2d at 518-20; Smolla, Law of Defamation § 4:16 n.10 (hereinafter "Smolla"). The *Stevens* court never discussed this requirement. The Defendants urge this court to adopt the endorsement test because otherwise courts might

punish and chill legitimate expressions of protected speech. One court stated that every court of appeal has "imposed a similar actual intent requirement." *Dodds v. Am. Broad. Co.*, 145 F.3d, 1053, 1064 (9th Cir. 1998). However, it is unclear whether courts have applied the requirement in the same way.

The intent or endorsement requirement applies only when the allegedly defamatory publication contains true facts. The *White* court described the rule:

> In sum, the court must first examine what defamatory inferences might reasonably be drawn from a materially true communication, and then evaluate whether the author or broadcaster has done something beyond the mere reporting of true facts to suggest that the author or broadcaster intends or endorses the inference.

White, 909 F.2d at 520.[5] The court noted that "it is immaterial for purposes of finding defamatory meaning whether the author or broadcaster *actually* intends or endorses the defamatory meaning." *Id.* (emphasis in original); *see also Howard v. Antilla*, 191 F.R.D. 39,

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[5] The court summarized the rule as follows: "If a communication, viewed in its entire context, merely conveys materially true facts from which a defamatory inference can reasonably be drawn, the libel is not established. But if the communication, by the particular manner or language in which the true facts are conveyed, supplies additional affirmative evidence suggesting that the defendant intends or endorses the defamatory inference, the communication will be deemed capable of bearing that meaning." *Id*. at 520.

45 (D. N.H. 1999). The rule is not an inquiry into the speaker's subjective state of mind but rather an objective analysis of the publication and its context to determine of the speaker did anything other than report true facts.

For example, the *White* court noted that in one case "the author's juxtaposition of two classes of expert fees supplied the affirmative evidence" of intent or endorsement. *Id.* at 519-20 (referencing *McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 717 F.2d 1460 (D.C. Cir. 1983)). In *McBride* the defendant stated "[t]hese expert witnesses included William McBride . . . who was paid $5,000 a day to testify in Orlando. In contrast, Richardson-Merrell pays witnesses $250 to $500 a day, and the most it has ever paid is $1,000 a day." *Id.* The court held that juxtaposition of these facts supported an endorsement of the implication that the expert's testimony was for sale. *Id.*

This court agrees with *White*. When a publication contains otherwise inactionable material, a plaintiff cannot recover unless there is some showing that defendant did more than merely report true facts. Under *White*, a court must first determine what defamatory inferences might reasonably be drawn from a materially true publication and then evaluate whether the defendant has done something beyond the mere reporting of true facts to suggest that the defendant intends or endorses the inference.

Stevens did not adopt the requirement, but the decision cited with approval a Fourth Circuit decision

which did. *Stevens*, 728 N.W.2d at 828 (citing *Chapin*, 993 F.2d at 1093). This court finds that the *White* rule adequately balances First Amendment concerns against the need to protect an individual's reputation and character. Concerns of unchecked liability are unfounded because implied defamation claims are still subject to the full panoply of other protections, including the protection of *New York Times*.

The Defendants contend that the standard of "clear and convincing evidence" applies to all aspects of the case, including the endorsement test, relying on *Dodds*, 145 F.3d at 104. However, *Dodds* appears to conflate the elements of defamatory meaning and actual malice. This court was unable to find any authority requiring a public official to prove defamatory meaning by clear and convincing evidence. Therefore the court finds that the proper standard is whether there was substantial evidence to support the jury's findings for each element, other than falsity and *New York Times* malice.

d. Opinions and First Amendment Protection

Finally the Defendants assert that the commercial was constitutionally protected opinion because it did not contain a provably false fact. Some courts previously held that statements of opinion were fully protected. *Yates v. Iowa West Racing Ass'n*, 721 N.W.2d 762, 769-71 (Iowa 2006). *Milkovich* modified this approach, ruling that a statement that "does not contain

a provably false factual connotation will receive full constitutional protection." *Id*. at 19-20. The rule is distinct from *New York Times*, and therefore the clear and convincing standard does not apply. *Id.* at 770-72 (applying the rule without discussing *New York Times*).

An additional rule for opinions states that if "the bases for the . . . conclusion are fully disclosed, no reasonable reader would consider the term anything but the opinion of the author drawn from the circumstances related." *Chapin*, 993 F.2d at 1093. However, "[e]ven if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." *Milkovich*, 494 U.S. at 18-19.

The Defendants argue that the implication does not contain a provably false fact, precluding liability under *Milkovich*. This incorrectly combines claims of express and implied defamation. For implied defamation claims, "it is the "defamatory implication – not the underlying assertions giving rise to the implication – which must be examined to discern whether the statements are entitled to full constitutional protection." *White*, 909 F.2d at 523. "A defendant may escape liability if the defamatory meaning is established as true or as constitutionally protected speech." *Id.*

The implication that Bertrand personally sold or marketed the drug Rozerem is provable as true or false. *Milkovich* does not preclude liability. The record

contains substantial evidence that Bertrand never sold or marketed Rozerem. Trial Tr. at 209. The court therefore finds that the implication at issue was a provably false fact.

2. Insufficient Evidence to Find *New York Times* Malice

a. Evidence of *New York Times* malice

Courts treat an implied defamation claim the same as direct defamation once the publication is found capable of defamatory meaning. *White*, 909 F.2d at 523. The court examines the implication to see if it is entitled to constitutional protection. *Id.* Therefore the issue is whether the Defendants published with knowledge or reckless disregard to the truth of the implication that Bertrand personally sold or marketed Rozerem.

New York Times malice must be proven by clear and convincing evidence. *Stevens*, 728 N.W.2d at 830-831. "'There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. The standard is a subjective one-there must be sufficient evidence to permit the conclusion that the defendant actually had a high degree of awareness of . . . probable falsity.'" *Id.* A failure to investigate before publishing and showing of ill will or common law malice are by themselves inadequate. *Id.* Although motive and malice are inadequate by themselves, they are still relevant factors that can contribute to a finding

of *New York Times* malice. *See Harte-Hanks*, 491 U.S. at 667-68; Smolla, § 3:47.

"'Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category.'" *Id.* (quoting *Harte-Hanks*, 491 U.S. at 692). Bertrand filed his lawsuit on October 22, 2010, and confronted Mullin at a Homebuilders Association (HBA) event on October 22, 2010. Pl. Res. To Def. Mot. JNOV ¶ 19. The Defendants ordered more ads on October 31, 2010. Bertrand contends that his denial at the HBA event and the lawsuit establish that the Defendants' additional order on October 31 qualify as republication with *New York Times* malice.

It is unclear whether denials or lawsuits can establish *New York Times* malice. The Supreme Court has stated "the press need not accept denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error." *Harte-Hanks*, 491 U.S at 692 n.37. However, this was not a mere denial; it was an action for an injunction with a signed affidavit stating that the he never sold Rozerem.

One treatise states "[i]f the denial is of a kind that would plausibly induce subjective doubt, then the denial may be a factor that can be used to construct a case for the existence of actual malice, for once a publisher has reasons to doubt the accuracy of a story, the publisher must act reasonably to dispel

those doubts prior to publishing." Smolla, § 3:65.50 (citing *Lohrenz v. Donnelly*, 350 F.3d 1272, 1285-86 (D.C. Cir. 2003)); *see also* Rest.2d Torts § 580A cmt. d ("Republication of a statement after the defendant has been notified that the plaintiff contends that it is false and defamatory may be treated as evidence of reckless disregard."). "Availability of sufficient time and opportunity to investigate the truth of the statement . . . may have some relevance in determining whether the publisher acted with reckless disregard as to truth or falsity." *Id.* The Defendants had nine days prior to the October 31 order, and they never actually thought Bertrand sold or marketed the drug.[6] The court therefore concludes that the lawsuit and the HBA denial were sufficiently plausible to alert the Defendants to the falsity of the implication and are probative evidence of *New York Times* malice. *See Johnson*, 542 N.W.2d at 512 ("a motion to be filed as a court document by a member of the legal profession can be presumed to warrant a high degree of trustworthiness").[7]

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[6] *See* Trial Tr. At 484-85; *Id.* at 485-86 (Mullin stating the ad was truthful because it never stated that Bertrand sold the drug); Ex. 35, email Doug Heyl to Amber Prignintz on October 22, 2010 (stating "By the way we never say he sold the drug we said he worked for the company that did"); *Id.* Ron Parker to Pringnitz on October 22, 2010 stating "I hope Bertrand . . . spends a lot of money talking about how he didn't work in a particular division of a company that sold dangerous drugs!"

[7] Bertrand's signed affidavit provides equal if not greater indicia of reliability. If court documents can help defeat *New*

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The record contains numerous examples of a motive to attack Bertrand's reputation to get votes. Mullin was angry at Bertrand for the "Running ad." Trial Tr. at 22-23. Advisers told Mullin that he needed "to hit Bertrand's credibility [and] stick to a focused hit on Bertrand's drug company background." *Id.* at 28. An email allows an inference that Defendants wanted to force Bertrand to spend time and money defending himself.[8] Mullin himself referred to the ad as "vile." *Id.* at 29. Pat Mack even expressed surprise after the lawsuit stating that "I had thought he had at least sold the drug in question. It's a pretty flimsy attack." Ex. 35, October 28, 2010, email of Mack to Bakker.[9]

In *Stevens* the defendant published an article expressing a true fact: that the plaintiff "rarely attended events upon which he wrote columns." *Stevens*, 728 N.W.2d at 831. The court agreed that this implied that the plaintiff was untruthful. *Id.* The

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York Times malice, they can also support a finding of *New York Times* malice.

[8] Ex. 35 Mullin e-mail to Pringnitz, October 22, 2010 ("negative ads are so effective because it takes 10-minutes to refute the claims that they make in 30 seconds. I also stressed the point that my campaign was required to respond in kind or his attack would be considered the truth")

[9] The parties disagree as to whether these emails bind the Defendants. Regardless of each individual's authority, the emails establish that the creators of the ad, advisers to Mullin and members of the IDP all discussed and were aware of the defamatory implication at least by the time they ordered more ads.

defendant made the statement with the knowledge "that personal attendance was not required by professional standards." *Id.* The court ruled that this qualified as "purposeful avoidance of the truth" and clear and convincing evidence of *New York Times* malice.

Bertrand presented a substantially stronger case than the *Stevens* plaintiff. The implication that Bertrand had personal involvement with Rozerem is much stronger than the implication at issue in *Stevens*. Before the Defendants ordered more ads on October 31, 2010, Bertrand personally confronted Mullin and told him the ads were false and that he had never sold or marketed Rozerem; Bertand and the IDP received a lawsuit accompanied by a signed affidavit stating the same; e-mails were exchanged among the IDP and Mullin acknowledging the implication, but ignoring it because "we didn't say that." This evidence establishes at least a "purposeful avoidance" of the presence of a false defamatory implication in the ad, which the Defendants knew was false. When confronted with a defamatory implication, parties cannot evade liability with "we didn't say that." To do so would allow any person or group to falsely attack public officials so long as they do not do it explicitly.

The court therefore finds that the record establishes by clear and convincing evidence that the Defendants published the implication – that Bertrand sold or marketed Rozerem – with knowledge or reckless disregard of the truth of the implication, at least when they ordered more ads on October 31, 2010.

Although the court does not base its conclusion on the finding of the jury, the court notes that a jury unanimously agreed.

b. Should the Court Impose an Additional Requirement?

If the commercial had explicitly stated that Bertrand sold Rozerem, then the record would unquestionably establish *New York Times* malice. Mullin and other IDP officials expressly acknowledged that they had no evidence, or even belief, that Bertrand sold Rozerem.[10] Once a court concludes that an implication is reasonably drawn, courts must treat it no different than an express statement. *White*, 909 F.2d at 523. Consequently, the admissions would independently justify a finding of *New York Times* malice by clear and convincing evidence with regard to the implication as well, even ignoring the lawsuit, the HBA denial, and the other evidence of actual malice.

The heart of this case, then, is not a traditional inquiry of *New York Times* malice, but if the standard changes when examining a defamatory implication. This brings the court to what appears to be a novel legal issue, at least in Iowa: does *New York Times* malice require the Defendant to be subjectively aware of the alleged implication?

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[10] Trial Tr. at 37.

Implied defamation claims involve increased risks of endangering First Amendment protections. The Iowa Supreme Court held, though, that public officials are still subject to defamation by implication claims. Yet the court finds some merit in the Defendants' concern for liability and chilled speech. The Supreme Court in *Milkovich* stated "where a statement of 'opinion' on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth." *Milkovich*, 497 U.S at 20. This excerpt states that "knowledge of their false implication or with reckless disregard of their truth is required." To have knowledge of false implications would require an awareness that the implication exists. Similarly, it is difficult to understand how one can recklessly disregard the truth of an implication without at least some awareness of the implication.

The court then has three options for a defendant's awareness of an implication: actual intent to convey the implication, subjective awareness of the implication, or no awareness at all. Requiring actual intent would be a difficult standard. It would require a plaintiff to find smoking gun evidence, an email or statement where a defendant states "I want to say that he sold the drug, but I know that he didn't, but this ad lets me imply it." This would effectively immunize public officials from liability for defamation by implication. However, not requiring an element of

awareness might put protected speech at risk of liability. To be "capable of defamatory meaning" only requires that implications be reasonable. This suggests a "negligence" standard rather than the stricter subjective standard of *New York Times* malice. Not requiring an additional element would therefore be insufficient because it would allow liability for negligent implications.

Consequently, the court concludes that a subjective awareness standard is the proper balance between protection of reputation interests and First Amendment speech. Under this standard when a defendant initially publishes a communication, if the defendant is unaware of its defamatory implication, no liability would attach. However, liability would attach if the defendant subsequently gains subjective awareness of the defamatory implication, and then with knowledge or reckless disregard of its falsity, publishes the communication again. This is the scenario presently before the court.

The record establishes by clear and convincing evidence in this case that the Defendants were aware of the implication prior to the second publication. Bertrand told them about his interpretation of the ad – that it implied he sold the drug. Trial Tr. at 485-86. The Defendants discussed a *Sioux City Journal* article among them discussing Bertrand's assertion that the ad implied he sold the drug. Ex. 35; *see also* Ex. 11. The Defendants were subjectively aware of the implication at least after the lawsuit and HBA event, meaning that republication on October 31 was

made with knowledge of the implication and its falsity. This and other evidence in the record establishes subjective awareness of the implication by clear and convincing evidence.

c. Other Issues

The Defendants made various arguments that do not fit neatly into the previous discussion. They claimed that the jury imposed liability on true statements concerning discussion of public affairs. Def. Mot. JNOV ¶ 13. However, the jury did not find liability on the statements; they found liability based on false facts implied from statements. To accept the Defendants' argument would be to exempt public officials from defamation by implication claims. *Stevens* expressly rejected such an exemption.

The Defendants also argue that the Supreme Court has recently reiterated its commitment to First Amendment principles in *Snyder v. Phelps*, 131 S.Ct. 1207 (2011). The Defendants argue that the speech in *Phelps* was much more offensive and that the speech at issue here implicates greater First Amendment concerns. The controversial character of a statement is irrelevant and the statements in *Phelps* were not actionable because they did not state provably false facts. Whether Bertrand sold Rozerem is a provably false fact, and therefore the protections in *Phelps* do not apply.

Finally, the Defendants also argue that "a reasonable viewer of a campaign ad in this day and age

is sufficiently sophisticated to understand that any negative factual assertions are going to be set forth in the ad." Def. Mot. JNOV ¶ 11. Apparently the Defendants argue that in today's current political and social climate, the public should expect that our elected officials and their electoral opponents will imply false facts. The Defendants request a rule that implications cannot be defamatory when made in a campaign context. This would forever inoculate public officials and figures from implied defamation claims – again an argument rejected by the *Stevens* court. Furthermore, the facts of this case prove that viewers are susceptible to implied defamatory facts. Bertrand endured numerous verbal attacks on his home answering machine and while he was campaigning. The reasonable viewer is not immune to defamatory implications, especially implications as clearly present as those in the Secrets commercial.

The Supreme Court continues to recognize the need to protect an individual's reputation, even when he is a public official. The Court has specifically recognized the need to prevent false speech in political campaigns, "[f]or the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." *Harte-Hanks*, 491 U.S. at 687 n.34 (quoting *Garrison*, 379 U.S. at 75). The Court has also cautioned against "blind application" of the *New York Times* rule. *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 148 (1967) (plurality opinion) (quoting *Time, Inc. v. Hill*, 385 U.S., 374, 390

(1967)). The Court expressed concern that the excessive application of the rule might "immunize the press from having to make just reparation for the infliction of needless injury upon honor and reputation through false publication." *Id.* at 134-35. Furthermore, individuals have increased power to influence the political process through digital media and internet distribution. The potential to use this power to distribute false ads will be an increasingly dangerous problem for the political process. *See* Gerald G. Ashdown, *Distorting Democracy: Campaign Lies in the 21st Century*, 20 Wm. & Mary Bill Rts. J. 1085 (2012).

The court concludes that the jury's finding of liability is supported by adequate evidence and that the imposition of liability does not offend notions of free speech. The Defendants had knowledge of both Bertrand's and the general public's understanding that the ad implied that Bertrand sold Rozerem. The Defendants knew this was false. Their only defense at trial is that "they didn't say that." This defense is insufficient when Iowa law denies public officials an exemption for defamation by implication claims. The Defendants claim that this type of "guilt by association" ad is common in today's political climate, but the type of ad is irrelevant when applying *New York Times*. Imposition of liability may discourage some speech, but only unprotected false speech. The ruling discourages republication of an ad that implies false defamatory facts only after the defendant is made aware of the false implication and has time to prevent republication, but yet republishes with knowledge of

the implication and its falsity. To overrule the jury's finding of liability would create a new hurdle specific to public officials, or would amount to a blind application of *New York Times*. The court concludes that the Secrets ad crossed the line from protected speech to unprotected defamatory falsehood.

3. Insufficient Reputation Evidence

The Defendants identify two alleged deficiencies in the Plaintiff's case regarding reputational damages. The Defendants state that the Plaintiff did not prove that the alleged defamatory implications harmed his reputation. The Defendants also assert that the Plaintiff failed to put on sufficient evidence of prior good reputation.

a. Evidence that the Commercial Harmed Bertrand's Reputation

In order to recover for defamation, a plaintiff must prove a "cognizable injury, such as injury to reputation." *Johnson*, 542 N.W.2d at 513. "Hurt feelings alone cannot serve as the basis of a defamation action." *Id.* If a plaintiff fails to present evidence of reputational injury, there can be no liability. *Schlegel*, 585 N.W.2d at 223-24. The Defendants' main argument is that the supposed damage to Bertrand's reputation involves mostly "tongue-in-cheek" comments and not real reputational damage.

The Plaintiff testified to numerous instances of angry comments from the public. Bertrand received

phone calls calling him a "baby killer," "drug dealer," and more. Ex. 37. He received so many messages with angry or derogatory comments that he unplugged his answering machine. His family members received numerous comments about the commercial. Trial Tr. at 318-20, 322-25. His banker declined to extend a loan to him following the commercial.[11] Bertrand also offered a job to his food and beverage director, who later told him that he considered not accepting for Bertrand because of the commercial. This is an example of a third party that was reluctant to create a business relationship with Bertrand because the commercial caused him to think less of Bertrand.

In *Schlegel* the court discussed the type of damages necessary to sustain a finding of reputational harm. The court cited with approval a Minnesota decision, *Richie v. Paramount Pictures, Inc.*, 544 N.W.2d 21, 26-27 (Minn. 1996). There the court found that the plaintiffs failed to present sufficient evidence of reputational damage where the evidence consisted of: feelings of embarrassment and humiliation, inquiries from family and friends, a restaurant employee gave

[11] This could have simply been the Bank not wishing to overextend its credit line. However, the jury was able to judge whether they believed Bertrand's assessment. Defense counsel had the opportunity to question Bertrand. The fact the Bertrand was easily able to obtain a loan from a Le Mars bank suggests that Bertrand's businesses were doing sufficiently well to justify an additional loan. This lends support to Bertrand's opinion that his former banker's choice was based on something other than finances.

him the cold shoulder, and once a restaurant served them raw cheeseburgers. *Schlegel*, 585 N.W.2d at 225. The Minnesota court stated that there was "no evidence that anyone thought less of them." *Id*.

Unlike *Schlegel* and the cases cited therein, Bertrand has presented stronger evidence of reputational harm. First, all of the phone calls show that people actually thought that Bertrand had harmed children through his work as a drug salesman. Second, there is evidence that it harmed Bertrand's business reputation: it may have harmed his relationship with his banker, whether people were willing to work for him, and whether journalists were willing to run stories about his businesses. Additionally, unlike the "raw burger" incident in *Richie*, Bertrand's experience with the diapers and his worksite is more clearly linked to the defamation.

Bertrand did provide evidence that would not support a finding of reputational damage. "Tongue-in-cheek" comments suggest that the person did not believe the ad. However, the fact Bertrand has introduced some evidence that does not support harm to reputation does not negate evidence that does. The court finds that there is substantial evidence to support the jury's finding that Bertrand suffered reputational harm.

b. Insufficient Evidence of Good Reputation Prior to the Commercial

In *Schlegel*, the court granted JNOV to the defendant on the basis that the evidence did not establish actual damage to the plaintiff's reputation. The court stated that the plaintiff "presented no evidence of that good reputation. The only evidence on this point is Richard's deposition testimony referred to in trial that he was well known, 'good or bad.'" *Schlegel*, 585 N.W.2d at 225. This suggests that the amount of evidence necessary to prove prior good reputation is low.

The Plaintiff claims that Tammy Bertrand, Rick Mullin, and Jennifer Engleke-Findley all provided sufficient reputation testimony. Tammy testified that Mr. Bertrand was not the type of person that would have profited off children and he was known as a caring individual. Trial Tr. at 88-92. Tammy stated that they were known for attending fundraisers for diseases, that Bertrand encouraged and paid for an employee to get his GED, and that he helped another person maintain a job and stay sober. *Id.* She testified that people's generally good opinion of him changed after the ad. *Id.* 93-95. Jennifer Lynn Engleke-Findley testified that Bertrand was an excellent manager, he understood the business, and cared about his employees. *Id.* at 200. The Defendants did not present any contrary evidence. The court therefore concludes that substantial evidence supports the jury's verdict concerning good reputation and reputational damage.

II. Motion for a New Trial or Remittitur

A. Misconduct

Iowa Rule of Civil Procedure 1.1004(2) provides that a court may grant a new trial when "misconduct of the jury or prevailing party" "materially affected [the] movant's substantial rights." To obtain a new trial, the party must show misconduct and prejudice as a result of the misconduct. *Loehr v. Mettille*, 806 N.W.2d 270, 279 (Iowa 2011). Defendants complain that Plaintiff's counsel committed misconduct by referring to statements that the court had ruled were non-defamatory and by referring to Patrick Mack as an employee of Mullin's election campaign and/or the IDP.

The law on defamation by implication not only allows, but requires examination of the communication as a whole. The only statements that were no longer at issue were those contained in the mailer advertisements. The court has examined Plaintiff's closing arguments and did not find any reference to the mailers. The only potentially improper reference was by Defendants' counsel, who incorrectly suggested that the jury could not consider some of the statements in the commercial. Trial Tr. 539-40. Plaintiff's counsel did not commit misconduct by directing jurors to consider all of the statements in the commercial to determine the commercial's meaning and effect.

The Defendants next assert that Plaintiff's counsel committed misconduct by referring to Patrick Mack as an employee of the IDP or Mullin's

campaign. Mullin testified that Mack was a "friend and adviser on the campaign." Trial Tr. at 61; *Id.* at 454. Mack also played a role in developing the Secrets ad. *Id.* at 29-31. Warnstadt also stated that Mack "looked over and validated the content of the ad before it was approved." *Id.* at 456-57. Mack performed the same services as an employee, even if he was not paid. His statements are at least evidence that the Defendants were aware of the implication and its falsity. Reference to Mack as an employee does not constitute misconduct. Also the Defendants offered no proof of prejudice.

B. Excessive Award due to Passion and Prejudice

Defendants claim that the jury award was influenced by passion and prejudice, citing the "unpleasant comments" Bertrand received, use of the phrase democratic or party "machine," and the sheer size of the verdict. If a verdict is "clearly excessive" it raises a presumption of passion or prejudice. *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 771 (Iowa 2009) (citations omitted). If this presumption does not apply, the party must point to evidence in the record that "affirmatively establishe[s]" passion or prejudice. *Id.* (citing *WSH Props., L.L.C. v. Daniels*, 761 N.W.2d 45, 49-50 (Iowa 2008)).

The jury ultimately awarded $231,000.00. Instruction No. 13 described damages, stating:

> If you find Rick Bertrand is entitled to recover damages, it is your duty to determine the amount. In doing so, you shall consider the following items:
>
> 1. The reasonable value of any loss of reputation suffered by Rick Bertrand. In determining this item of damage, you may consider Rick Bertrand's reputation before the statements were made. You may also consider the extent to which the statements were communicated
>
> 2. The reasonable value of any loss of business suffered by Rick Bertrand.
>
> 3. Damages cannot simply be presumed – nor may hurt feelings alone serve as the basis of a defamation action.
>
> Damages must be limited to those which naturally result from the Defendants' statements

Professor Kyle Mattes testified that the lost profits consisted of $216,630, an average based on a range of $145,630 minimum to a $303,650. The jury's award could have been based on the $216,630 average with additional compensation for the injury to reputation. Because the jury's award was within the range of evidence presented to the jury, it is not excessive and does not raise a presumption of passion or prejudice.

Because there is no presumption, the Defendants must affirmatively establish passion or prejudice from the record. Defendants cite Bertrand's testimony

regarding negative comments he received and the use of the word "machine." Neither is sufficient to affirmatively establish passion or prejudice. Bertrand was entitled to testify on the public's response to the commercial. The word "machine" is not inflammatory, and the court finds that it is insufficient to affirmatively establish passion or prejudice.

C. Deficiencies in Evidence

Defendants either assert that the court should grant a new trial or remittitur because the verdict was unsupported by sufficient evidence or contrary to law. The Defendants complain of failures to establish (1) *New York Times* malice; (2) that the commercial implied provably false facts; (3) injury to reputation; and Defendants also assert that (4) the expert testimony was insufficient to award lost profits. The first three assertions are duplicative of arguments in the motion for JNOV. The court need only address the Defendants' complaint concerning the testimony of Professor Mattes.

A court may order a new trial "[i]f a jury verdict is not supported by sufficient evidence and fails to effectuate substantial justice[.]" *Olson v. Sumpter*, 728 N.W.2d 844, 850 (Iowa 2007). When a damage verdict is excessive because it is not supported by sufficient evidence, courts may order a remittitur as a condition to avoiding a new trial. *WSH Props*., 761 N.W.2d at 49-50; Iowa R. Civ. P. 1.1010. A court may issue a remittitur when "the jury's damage award

was not justified by the evidence before it; [and] the jury failed to respond to the evidence[.]" *Id.* at 52. This issue then is whether Mattes' testimony is sufficiently reliable to support the award of lost profits for the businesses: a pub which opened seven months after the election and the banquet hall which opened thirteen months after the election. Trial Tr. at 177, 304.

1. Summary of the Mattes Testimony

In order to determine whether the testimony supported the verdict, the court must first summarize the testimony. Counsel for Plaintiff and Defendants have very different interpretations of how Mattes came to his conclusions. Generally Mattes' testimony contains two parts: connecting the commercial to Bertrand's pub and banquet hall (the "restaurants") and predicting how much profit might have been lost.

In connecting the commercial to decreased consumer opinion of the restaurants, Mattes made numerous assumptions. Mattes repeatedly testified that "the main assumption in the model is that the advertisements hurt people's opinions of Rick Bertrand." Trial Tr. at 152-153, 141, 197.[12] Mattes then

[12] "The main assumption running the model is that people saw the ads. It affected their opinion of Rick Bertrand. And it made them just a little bit less likely. Not a lot. Just a little less likely to go to the restaurant." Trial Tr. at 141. "A key assumption is that the advertisements hurt Mr. Bertrand." *Id.* at 153.

(Continued on following page)

referenced thirteen newspaper and television pieces discussing Bertrand's restaurants. *Id.* at 131-136; Pl. Ex. 45-57. Mattes relied on these articles to assume that viewers in Siouxland connected the Secrets commercial with Bertrand's restaurants. *Id.* Mattes then assumed that it made people in Siouxland less likely to go to the restaurants. *Id.* at 141. Mattes then created a model intended to estimate the amount of lost profits. The parties disagree as to the validity of Mattes' model. The court believes the following summary fairly describes the creation and functioning of the model.

The model simulates consumers' decision-making process. To create the model, Mattes first had to determine the potential market. Mattes had only two numbers, both based on the first six months of the pub's operation: $700,063 in revenue, and an average per check bill of $28. Trial Tr. at 174. Mattes used these two numbers to estimate the restaurant received 1,050 customers per week. *Id*. Mattes used this number to determine that only 15% of Siouxland would ever visit the restaurant, regardless of the defamation. *Id.* at 139. Mattes never explained how the model created this number.[13] Based on this, the model determined that the potential customer base

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"The main assumption in the model is that the advertisements hurt people's opinions of Rick Bertrand." *Id.*

[13] The court will assume for the purposes of this motion that the 15% and 85% statistics are accurate. This does not prejudice the Defendants given the court's ultimate conclusion.

was 15% of Siouxland. *Id.* at 141 ("except for the 85 percent that we sort of excluded").

Mr. Mattes created a model and tweaked the parameters in order to create an equation that reflected the results from the restaurant's first six months.[14] The model reflects an elaborate decision-making process and takes into account various unidentified factors that would affect consumers' likelihood of visiting a particular restaurant. Trial Tr. 189-90. One factor is how much consumers "value" a restaurant, basically, the consumer's opinion of the restaurant.

Mattes next modified the model to estimate the effect of the Secrets ad. Mattes relied on political science articles for the idea that political ads lower the reputation of a candidate by five to eleven percent. Mattes then assumed that lowering the reputation of a candidate through a political ad would have an equal effect on any business owned by that candidate. The original model had a neutral value for opinion of the restaurant, but to figure out "lost profits," Mattes lowered the entire customer base's opinion of the restaurant by five percent. *Id.* at 149, 191. Lowering the likelihood of customers to choose the restaurant resulted in fewer customers. Mattes

[14] Plaintiff refers to this as cross-checking to ensure accuracy. However, it appears to be a self-fulfilling prophecy. Mattes created the equation based on the six-month revenue numbers. Unsurprisingly, when Mattes "tested" the equation by plugging in the six-month customer numbers, the numbers matched.

ran the model fifty times, with a range of $145,630 minimum to a $303,650 maximum. Pl. Post-Hearing Br. ¶ 10; Trial Tr. at 144-45. The average was $216,630 dollar average. *Id.*

The explanation for this large number is that Mattes relied on "repeat business" profits. Citing academic studies on repeat business, Mattes concluded that consumers are at least twenty percent likely to be a repeat customer. These studies were based on consumer purchases, such as laundry detergent and groceries like lettuce. Mattes testified that he has seen similar articles involving restaurants, but chose not to include them. Mattes never specified how he defined as repeat business, whether it was multiple times per day, per week, or per month.

2. Analysis of Mattes' Testimony Regarding Lost Profits

When dealing with damages, there is a "distinction between the proof of the fact that damages have been sustained and proof of the amount of those damages." *Renze Hybrids, Inc. v. Shell Oil Co.*, 418 N.W.2d 634, 639 (Iowa 1988) (quotation omitted). "If it is speculative and uncertain whether damages have been sustained, recovery is denied. If the uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated." *Id. see also Olson v. Nieman's, Ltd.*, 579 N.W.2d 299, 309

(Iowa 1998); *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 641 (Iowa 1996).

Mattes made numerous assumptions in his testimony, but the testimony would be admissible if it goes to amount rather than the existence of damages. Mattes testified that the model assumes that the commercial harmed Bertrand's reputation and the model assumes that the ad caused people to not patronize his restaurant. Trial Tr. at 152-153, 141, 197.[15] Bertrand provided no evidence that one person did not visit the restaurant because of the ad, let alone whether it affected the entire customer base. In fact, Bertrand testified that many people who saw the commercial still came to the pub. *Id.* at 327-29. Mattes' own testimony makes clear that the mathematical model improperly assumed the existence of damages.

Additionally, there are other deficiencies in Mattes' assumption that the Secrets ad lowered the public's opinion of Bertrand by five to eleven percent. Mattes relied on a handful of political science articles, but these articles contained express caveats

[15] "[I]t pertains to the assumption that the advertisements hurt Mr. Bertrand." Trial Tr. at 151-52. "The main assumption running the model is that people saw the ads. It affected their opinion of Rick Bertrand. And it made them just a little bit less likely. Not a lot. Just a little less likely to go to the restaurant." *Id.* at 141. "A key assumption is that the advertisements hurt Mr. Bertrand." *Id.* at 153. "So the main assumption in the model is that the advertisements hurt people's opinions of Rick Bertrand." *Id.*

concerning their applicability.[16] Mattes relied exclusively on these articles for a general proposition without applying the articles to the specific details of the Secrets ad. In fact, the article based on the most similar negative ad concluded that negative attacks on personal grounds were "counterproductive" and could actually improve the viewer's opinion of the attacked candidate. Pl. Ex. 60, Kahn and Geer, *Creating Impressions: An Experimental Investigation of Political Advertising on Television*, 16 Pol. Behav. 93, 103-04 (1994). Mattes' failure to specifically analyze the Secrets commercial and how the limitations of the studies might apply presents a major deficiency in the evidence, making his five to eleven percent assumption questionable.

Apart from these limitations, the articles only addressed how negative ads affect the reputation of a politician as a candidate. The articles do not address secondary effects, such as whether an ad could affect a politician in their business or professional career. The studies do not support the assumption that

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[16] *See* Def. Mot. in Limine to Exclude Expert, ¶¶ 21-26; Def. Reply in Support of Mot. to Exclude Expert, 1-3. The problems include, but are not limited to express reservations stating that their conclusions apply only to closed experiments, that the results apply only to unknown candidates and that they apply only when the advertisement is run at the beginning of a campaign. *Id.* Bertrand had already run for office and was by his own admission a "known businessman," making the studies based on unknown candidates inapplicable. The ad was also run at the end of the campaign rather than the beginning.

reduced opinion of a candidate as a candidate extends to the rest of the individual's endeavors at a one-to-one ratio.

The Defendants also question Mattes' calculation of repeat business. Mattes never specified how he defined the frequency of repeat business. It could be once per day, once per week, or once per month. To establish a repeat business rate of 20%, Mattes relied on studies based on consumer purchasing habits for basic goods, like laundry detergent and groceries, including lettuce and cheese sticks. The court does not believe that consumers' purchasing habits are the same for purchasing lettuce or detergent as they are to choosing a restaurant.[17] Mattes' reliance on these articles presents an additional reason to doubt the reliability of Mattes' model.

Even if the court were to ignore these assumptions, the evidence for "lost profits" is so speculative that it cannot support the jury's verdict. The pub did not open until seven months after the election and the rental hall did not open until thirteen months after the election. Iowa follows the "new business rule" which requires stricter evidence to support a claim for anticipated profits. *Harsha v. State Savings Bank*, 346 N.W.2d 791, 797-99 (Iowa 1984). Generally

[17] The decision process for groceries and household goods seems much different than choosing a restaurant. Factors such as the location, type of cuisine, range of prices, available time, and other variables are not present for groceries or household goods.

the anticipated profits must be shown with "reasonable certainty." *Id*. Courts have found anticipated profits to be proven with "reasonable certainty" in some cases, but those plaintiffs had existing contracts or at least one or two years of profits prior to the complained-of act. *See Employee Benefits Plus, Inc. v. Des Moines General Hosp.*, 535 N.W.2d 149 (Iowa Ct. App. 1995); *DePenning v. Resource Elec., Inc.*, 2011 WL 3115172 (Iowa Ct. App. 2011).

All of the assumptions discussed above are relevant evidence of whether the damages are too speculative. Under Mattes' model, it is impossible for there to be no damages. In the model it doesn't matter whether the restaurant sold Irish fare, Italian food, or if it was a vegetarian hotdog stand. If there was at least one customer, an equation could be created. The model would lower all the potential customers' opinions by five percent, resulting in fewer sales and "lost profits." The model cannot distinguish between people who did not go to the restaurant because of the ad and those that did not go for some other reason, such as bad location, not in the mood for "pub food," or perhaps the cost. Yet the model awards damage for repeat business of 15% of Siouxland until every potential customer has visited the pub at least once.

Not only did Mattes' model award Bertrand lost profits for some lost customers, he awarded for *every potential customer*. According to Mattes, the eighty-five percent would never under any circumstance enter the pub. Trial Tr. at 139. The fifteen percent therefore is only a potential base. The model provides

an estimate of what lost profits would be if the entire potential customer base lowered its opinion of Bertrand's pub by five percent. Many individuals and the *Sioux City Journal* considered the ad to be questionable or over the line, and Bertrand still won the election. Even though these people appeared to be unaffected by the Secrets ad, Mattes' model assumes that the commercial negatively affected all potential customers. It is overly speculative for any business, particularly a restaurant, to claim damages for every potential customer.

Mattes' model also assumes that for five years, nothing will happen to correct the defamation. The model ignores the fact that Bertrand won the election. The passage of time might have improved the pub's reputation. The thirteen news articles that painted Bertrand in a positive light, describing his revitalization of Pearl Street likely corrected some of the defamation. Certainly repeated exposure in the same media outlets over thirteen months would have a noticeable effect to counteract a 30 second ad that ran, albeit frequently, for only two weeks.

In sum, Mattes assumed that the commercials lowered people's opinion of Bertrand. Then ignoring the limitations of the articles and failing to analyze the details of the commercial, Mattes assumed that the ad reduced people's opinions of Bertrand by five percent. Mattes then assumed that a reduced opinion of a candidate equally lowers the opinion of any business associated with the candidate. Mattes then assumed that nothing changed the public's opinion

for five years. Mattes determined that every potential customer saw the ad, believed the ad, and that all of these people saw the articles connecting Bertrand to the pub, but were completely unaffected by the articles' positive comments. Mattes also assumed that all of this fifteen percent were not part of the public who thought the ad was unfair or untrue. Mattes then created an equation to predict an incredibly complex decision, where and when to eat.[18] Mattes based the equation on the first six months of a business and extrapolated five years of results.

The court finds that Mattes' testimony regarding lost profits not only assumes the existence of damages, but is also overly speculative. When the court overruled the Defendants' motion to exclude Professor Mattes' testimony, the court had concerns about its legitimacy and reliability. The court thought that those concerns would go to the weight of the evidence. *Olson*, 579 N.W.2d at 309. After hearing Mattes' trial testimony, the court concludes that the testimony regarding his model is too speculative to support an award of lost profits. The evidence especially falls short of *Harsha*'s "reasonable certainty" standard. Consequently, the court grants the Defendants'

[18] The court notes that Mattes claimed to take account of the possibility of eating at home by including "home" as a restaurant choice. This suggests that Mattes assumes that people in Siouxland are as likely to eat any given meal at a restaurant as they are to eat at home. This assumption seems to inflate the amount of profits, particularly in more difficult economic times.

request for a remittitur based on insufficient evidence for lost profits.[19]

"When a remittitur of damages is granted, only the excess of the award is remitted." *Jasper*, 764 N.W.2d at 777. "Generally, this standard means the award should be reduced "to the maximum amount proved" under the record." *Id*. (citing In re *Knickerbocker*, 827 F.2d 281, 289 n. 6 (8th Cir. 1987)). The remittitur should only reduce the award with respect to the amount the jury likely awarded for lost profits.

3. Amount of Remittitur

The jury's verdict found damages to Bertrand at a total of $231,000.00, $31,000 payable by Mullin and $200,000 by the IDP. The testimony regarding lost profits generally relied on a total of $216,630 dollar average, based on a range of $145,630 minimum to a $303,650 maximum. Pl. Post-Hearing Br. ¶ 10; Trial Tr. at 144-45. The court must reduce the amount of the award by the amount of lost profits and maintain the verdict to the extent that it was based on injury to Bertrand's reputation, emotional damages, and any proven damages other than lost profits.

A successful defamation plaintiff may recover actual damages, including general damages. Rest.2d

[19] Mattes' testimony relating to negative ads generally is still admissible. The court's ruling and the Defendants' objections were based only on the speculative nature of Mattes' model.

Torts § 621 (1977); *Kelly v. Iowa State Educ. Ass'n*, 372 N.W.2d 288, 299-302 (Iowa Ct. App. 1985); *Rees v. O'Malley*, 461 N.W.2d 833, 839-40 (Iowa 1990).[20] "General damages are limited to the natural and probable consequences of the publication. These may include recovery for emotional distress and resulting bodily harm." *Lara v. Thomas*, 512 N.W.2d 777, 786 (Iowa 1994) (citations omitted).

It is very difficult to quantify harm to reputation. *Kelly*, 372 N.W.2d at 302 ("As everybody knows, there is no market price for reputation, no historical cost which can be depreciated, and no replacement cost to be calculated."). In Lara the court affirmed an award of $10,000 for "injury to [Lara's] reputation, feelings, humiliation, and mental anguish" after prevailing on a claim that the defendant stated she was unreliable and had a substance abuse problem. *Lara*, 512 N.W.2d at 785-86. In *Kelly*, the plaintiff complained of statements that questioned his work as an administrator, suggested that he abused his powers, personally profited while laying others off, and possibly engaged in criminal or fraudulent activities. *Kelly*, 372 N.W.2d at 292-94. The *Kelly* court upheld an award of $75,000, but noted that it "may be at the

[20] For claims of slander per se, the plaintiff may recover general damages without any proof of damages. The same damages are available to any defamation plaintiff, so long as they prove the requisite harm. *See gen* Rest.2d Torts § 621 (1977). Here, Bertrand has proven harm to reputation in line with *Schlegel* entitling him to general damages.

limit of what the evidence sustained." *Id*. at 301. Although Bertrand may not recover lost profits based on Mattes' testimony, ownership of a business "increases the potential for injury" and that loss of some business is a "natural and probable consequence of statements challenging [his] integrity." *Rees*, 461 N.W.2d at 840.

In reducing the award, the court must ensure that no award is given for lost profits based on Mattes' model, but also ensure that the Plaintiff is adequately awarded for the natural and probable consequences of the defamation. Bertrand deserves compensation for the harm to his reputation, embarrassment, humiliation. Bertrand experienced extensive verbal abuse, was called a "thug," "baby killer," and other names. He was forced to confront the attacks throughout the campaign and thereafter. On the day after Christmas, someone vandalized his construction site by smearing dirty diapers over his sign and site. The demeanor and substance of his testimony adequately established that the commercial caused him embarrassment, humiliation, and emotional distress. However, the court also notes that Bertrand won the election and appears to have begun multiple successful businesses. Bertrand himself has also noted that most of the more recent incidents involving the commercial involve tongue-in-cheek references during introductions.

Removing the award of lost profits based upon the deficiencies in his model is not as simple as removing the $216,630 which was the number he

used as his expert opinion. His model produced a range of lost profit damages from $145,630 to $303,650. At the hearing both attorneys agreed that the jury would have found support if they accepted the model in finding lost profits within this range. The court adopts a number in the lower part of this range and finds lost profits based upon the Mattes' opinion of $180,000.00. Based on all of these factors, the court determines that the award should be reduced to $ 50,000.00.

SUMMARY

The court has concluded the Defendants' motion for JNOV should be denied. The commercial was capable of a defamatory implication of a provably false fact, namely that Bertrand personally sold or marketed Rozerem. There was substantial evidence to support a finding that the Defendants intended or endorsed the inference by juxtaposing true facts together and by coloring the statements with additional language. The implication that Bertrand owned a company that sold or marketed Rozerem is inactionable. The record contains clear and convincing evidence that actual malice existed with regard to the defamatory implication that Bertrand personally sold or marketed the drug Rozerem, at least for the republication of the ad on October 31, 2010. The Plaintiff presented sufficient evidence of his prior good reputation and of damage to his reputation. Consequently, the court denies the Defendants' Motion for Judgment Notwithstanding the Verdict.

With respect to the Defendants' Motion for New Trial, or in the Alternative a Remittitur, the court concludes that the motion should be granted. There is insufficient evidence to support the jury's award because Mattes' testimony impermissibly assumed damages and was impermissibly speculative. The court rejects the other grounds asserted by the Defendants in their Motion for New Trial. The court reduces the judgment to $50,000.00. The jury originally levied 86.59% of the total award against the IDP and 13.41% against Mullin. Based on these percentages, the reduced award is divided as follows: $6,705.00 against Rick Mullin and $43,295.00 against the Iowa Democratic Party.

ORDER

IT IS THEREFORE ORDERED AS FOLLOWS:

1) All of the above.

2) Defendants' Motion for JNOV filed on April 18, 2012, is denied.

3) Defendants' Motion for New Trial or Remittitur filed on April 18, 2012, is granted in part, denied in part.

4) The Clerk of Court is requested to forward a copy of this ruling to all attorneys of record, and to the court administrator's office.

SO ORDERED this 5th day of July day of 2012.

[SEAL]

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
EQCV143342	BERTRAND, RICK VS MULLIN, RICK ET AL

So Ordered

/s/ Jeffrey L. Poulson

Jeffrey L. Poulson,
District Court Judge,
Third Judicial District
of Iowa

**IN THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY**

RICK BERTRAND, Plaintiff, v. RICK MULLEN and the IOWA DEMOCRATIC PARTY, Defendant.	* No. EQCV143342 * * RULING ON MOTION * FOR PUNITIVE * DAMAGES AND * DEFENDANT'S * MOTION FOR * DIRECTED VERDICT * * (Filed Apr. 6, 2012)

This case involves claims of defamation arising out of a 2010 state senate campaign between Rick Bertrand and Rick Mullin. During that campaign Mullin and the Democratic Party created an ad entitled "Secrets" which negatively portrayed Bertrand's experience as an employee of a pharmaceutical company. Following the Plaintiff's presentation of evidence, the Plaintiff moved for a ruling that the Plaintiff had satisfied the evidentiary burden to allow a jury instruction on punitive damages. The Defendants resisted and moved for a directed verdict, claiming that the alleged defamatory statements were not actionable because they were either protected by absolute privilege of the first amendment, that the Plaintiff had failed to establish actual malice, and that they were substantially true.

If a defamation claim involves either public officials, public figures, or matters of public concern, the First Amendment requires additional protection

to ensure that government does not chill freedom of expression. *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). The United States Supreme Court has held that candidates for political office are public officials as a matter of law and that the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 271-72 (1971). The Supreme Court has directed courts to serve as the gatekeeper of defamation action in order to ensure that the law of defamation is not used to punish speech protected by the First Amendment. *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 510 (1984).

In determining whether the alleged statements are capable of a defamatory meaning, the court will first determine whether any of the statements are protected by absolute privilege. Statements of opinion are not actionable if they "are not sufficiently factual to be capable of being proven true or false and cannot reasonably be interpreted as stating actual facts." *Yates v. Iowa West Racing Ass'n,* 721 N.W.2d 762 (Iowa 2006) (citing *Milkovich v. Lorain Journal Co.,* 497 U.S. 1 (1990)). In determining whether a statement merits absolute First Amendment protection, Iowa courts look to the totality of the circumstances and consider four factors. *Yates,* 721 N.W.2d at 770. Those four factors are: (1) the precision and specificity of the disputed statement, (2) the degree to which the alleged defamatory statements are objectively capable of proof or disproof, (3) the literary context of

the statement, and (4) the broader social context of the statement. *Id*. (citations and quotations omitted).

With these factors in mind, the court finds as a matter of law that eight of the ten alleged statements are not actionable, with some absolutely protected by the First Amendment. The court will briefly address each statement with its conclusion. In general, all of these statements are read in the context of political campaign ads where the social and literary context are addressing one candidate's assessment of the other candidate's qualifications for public office. In determining whether the statements are opinions that do not imply false facts, the court considers the Iowa Supreme Court's ruling in *Yates*. There an owner of a dog kennel sued a racing association for allegedly defamatory statements. A member of the defendant association had stated that the plaintiff's kennel was in "second from last place" and referenced the kennel as "poor and substandard performers." The court ruled that "substandard and poor performers" does not have a precise and verifiable meaning and that the statement presented the basis of this opinion. Therefore the court held that the statement was neither a provable fact nor implied any false fact and therefore deserved full First Amendment protection.

The first statement "Because Rick Bertrand doesn't want you to know that he put profits ahead of children's health" is incapable of proof as either true or false. The statement does not imply any false assertion of fact. *See Yates,* 721 N.W.2d at 773; *Moats*

v. Republican Party of Nebraska, 796 N.W.2d 584, 596-597 (Neb. 2011). It is impossible to prove that someone put profits ahead of another's health. This statement is an opinion and an example of rhetorical hyperbole protected by the First Amendment. For this same reason the court finds that the statement in the mailer that "Rick Bertrand puts profits ahead of people's lives" is also incapable of being proven true or false.

Second, the statements "record of deceit," "broken promises," "we can't trust Bertrand's judgment" are also examples of rhetorical hyperbole and opinion that cannot be proven as either true or false. Similar to the phrase "poor and substandard performers," a person might have an opinion of whether it was true, but the statement itself is merely a subjective opinion. The context of a political advertisement provides further additional reason to find that these statements are absolutely protected. The context of the ad provides the evidence that the speaker relied on, that Bertrand promised to run a positive campaign and then ran a negative ad.

The court also finds that some of the alleged defamatory statements are not actionable because the plaintiff has failed to meet their burden to prove by clear and convincing evidence that the statements were false and that the defendants acted with knowledge of the falsity or with reckless disregard of the statements probable falsity. The mailer statement that "Rick Bertrand makes a fortune as a salesman for a company that marketed a dangerous sleep drug

to children" is substantially true. The portion referencing "a fortune" is not capable of proof as true or false and would be rhetorical hyperbole. The remaining portion is substantially true. Bertrand did work as a salesman for a company that marketed Rozerem. The FDA expressed concerns that the company marketed the ad in a way that it appeared to be meant for children. The Plaintiff has not carried their burden of clear and convincing evidence of knowledge or reckless disregard of falsity, or of actual falsity with regard to this statement. This reasoning also applies to the statement in the television ad that "Bertrand was a sales agent that was rated the most unethical company in the world" and the written statement "Drug salesman for most unethical company in the world." The court further finds that the Plaintiff has failed to show the statement that "Bertrand even convinced Siouxland doctors to prescribe a diabetes pill that the FDA said is dangerous and linked to significantly greater risk for heart attacks and death" was not provide to be made with actual malice by clear and convincing evidence under the *Sullivan* standard.

As to the allegations of defamation regarding these statements, the court sustains the motion for directed verdict.

However there are two remaining statements: (1) The FDA singled out Bertrand's company for marketing dangerous drugs to children, and (2) The court at this time finds that there is sufficient evidence for a reasonable jury to find that these statements imply

a false fact, namely that Rick Bertrand personally sold a dangerous sleep drug to children, or that he owned a company that sold a dangerous sleep drug to children.

Punitive Damages

The standard for punitive damages is set out in Iowa Code 668A.1 and requires proof "by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another." The Supreme Court has stated that a willful and wanton disregard means that "[t]he actor has intentionally done an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." *McClure v. Walgreen Co.,* 613 N.W.2d 225, 230 (Iowa 2000) (citation omitted).

Although the standard for punitive damages and *Sullivan* constitutional actual malice are similar, the court finds that they are separate and distinct standards. When determining whether actual malice has been established, the court examines evidence of the plaintiff's attitude toward the truth or falsity of a statement. However when examining the standard for punitive damages, the court examines the plaintiff's attitude toward the rights or safety of another. At least one other court has addressed a similar

situation and concluded that the standards are distinct and that a showing of actual malice does not create a finding of common law malice. *PPG Industries, Inc. v. Zurawin,* 52 Fed.Appx. 570 (3d Cir. 2002) *available at* 2002 WL 31289285. The "[i]ll will toward the plaintiff" a defendant must possess to act with common law malice is "not [an] element[ ] of the actual malice standard." Id. (quoting *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29 (1971)).

The court finds that under Iowa law, the standards for awarding punitive damages and constitutional actual malice under *Sullivan* are also distinct. They are distinct both in their focus (attitude toward falsity versus attitude toward plaintiff's rights) and in their burdens of proof. Actual malice allows a finding based on reckless disregard while punitive damages requires disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences. The court finds that there is an area between these two standards whereby conduct could meet the *Sullivan* actual malice standard without rising to the level of punitive damages.

The Plaintiff has put into evidence that Mullin was angry when he viewed the ad. However such evidence is insufficient to meet the high burden required for punitive damages, which requires that "[t]he actor has intentionally done an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable

that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." Examining the complained of actions, the court finds that the Plaintiff did not present sufficient evidence to establish by a preponderance of clear and convincing evidence that the Plaintiff should receive an instruction on punitive damages. The court notes that its decision is further supported by the context of the actions within a political campaign and the important implications of the First Amendment. *Brokaw v. Winfield-Mt. Union Community School Dist.,* 788 N.W.2d 386 (Iowa 2010) (finding the totality of the circumstances and the context of the actions important when considering whether punitive damages should be available). Both the Defendant and Plaintiff were public candidates for political office and the speech at issue was also a matter of public concern: a candidate's qualifications for public office. With such strong first amendment implications as well as the general tenor of political campaigns, the Defendant's actions do not constitute an intentional act of unreasonable character in disregard of a known or obvious risk that the Plaintiff's rights would be violated. The only evidence the Plaintiff has presented is that Bertrand was angry at the ad. This alone does not establish by a preponderance of clear and convincing evidence willful and wanton disregard for the Plaintiff's rights.

For these reasons the court finds that the threshold for seeking punitive damages under Iowa Code Section 668A has not been met.

So ordered.

[SEAL]

State of Iowa Courts

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Case Number: EQCV143342

Type: OTHER ORDER

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/s/ Jeffrey L. Poulson

Jeffrey L. Poulson,
District Court Judge,
Third Judicial District
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IN THE IOWA DISTRICT COURT
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RICK BERTRAND, Plaintiff, v. RICK MULLIN and THE IOWA DEMOCRATIC PARTY Defendants.	EQCV 143342 JUDGMENT (Filed Apr. 6, 2012)

Be it remembered the above-entitled matter came on for a contested trial before a jury beginning on April 3, 2012. Evidence was received on behalf of both parties and at the close of the evidence, the jury, having been instructed, did on the 6th day of April, 2012, at or around 4:30 p.m. return its verdict in favor of the plaintiff and against the defendants. Therefore, in accordance with the findings and the verdict of the jury, **IT IS ORDERED**:

1. Judgment is entered in favor of the plaintiff and against the defendant Rick Mullin in the amount of $31,000.00

2. Judgment is entered in favor of the plaintiff against the Iowa Democratic Party in the amount of $200,000.00

3. Court costs are assessed against the defendants.

4. The parties are advised pursuant to Iowa R.Civ.P. 1.1007 and 1.008, as amended, of the 15-day deadline for the filing of post-trial motions.

SO ORDERED.

[SEAL]

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