DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO Court Address: 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521-2761	DATE FILED: September 8, 2021 11:02 AM FILING ID: 139F5E5F69C72 CASE NUMBER: 2021CV30598
Plaintiff: JACKI MARSH **v.** **Defendants: JOHN FOGLE** **SHAUN ADAMS**	**▲ COURT USE ONLY ▲**
Attorney for Defendant Shaun Adams Name: Mitch Murray, #17930 Address: Murray Law, PLLC 322 East Oak Street Fort Collins, CO 80524 (970) 452-8488 E-mail: mitch@murraylawcolorado.com	Case Number: **2021CV30598** Ctrm.: 5A

MOTION TO DISMISS ON BEHALF OF DEFENDANT SHAUN ADAMS

COME NOW Shaun Adams, by and through his attorney Mitch Murray and submits this Motion to Dismiss pursuant to C.R.C.P 12(b)(5) as follows:

C.R.C.P 121 COMPLIANCE

Undersigned counsel spoke over the phone with opposing counsel, at length, regarding this motion and the legal basis for the relief requested. Opposing counsel opposes the motion.

INTRODUCTION

On July 20, 2021, Mr. Adams, a concerned citizen of the City of Loveland, spoke at the City Council meeting during public comment. The plaintiff, Jacki Marsh, Mayor of the City of Loveland, was present at, and presided over, the City Council meeting. Mr. Adams was yielded

time by four other citizens of Loveland, concerned about the actions of the plaintiff, so that he could complete his statement. Mr. Adams read a prepared statements at the meeting. The statement brought forth allegations that the plaintiff had broken the law by beginning remodeling construction at her home without obtaining the proper permits required by the Loveland Municipal Code, among other allegations addressing her performance of her duties as Mayor and fitness for that office. *See, July 20 statement,* attached as exhibit 1.

Plaintiff served the complaint in this matter on defendant Shaun Adams on August 17, 2021. The complaint alleges in count 3 that Mr. Adams committed the tort of intentional infliction of emotional distress, in count 4, the tort of defamation – slander per se, in count 5, defamation – slander per quod, and in count 6, outrageous conduct. Colorado does not recognize a cause of action for outrageous conduct separate and apart from intentional infliction of emotional distress, so counts 3 and 6 will be addressed simultaneously.

The allegations against Mr. Adams are contained in paragraphs 31 through 35 of the complaint. The allegations fail to provide the statements which are the subject matter of this suit or the circumstances in which they were uttered. The allegations consist almost entirely of inflammatory opinion and conclusory statements, such as that these unidentified statements were, "defaming, slanderous and illegal information", that "it was all a lie and nearly identical to the lie perpetuated by Defendant Fogel", and that they were "ridiculous but slanderous and libelous speech". The allegations are completely devoid of any factual allegations to support the charges. Instead, plaintiff relies on meaningless statements such as, "upon information and belief," as support.

LEGAL STANDARD FOR DISMISSAL UNDER C.R.C.P. 12(b)(5)

"A C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted serves as a test of the formal sufficiency of a plaintiff's complaint." *Dorman v. Petrol Aspen,* 914 P.2d 909, 911 (Colo. 1996), *Pub. Serv.Co. v. Van Wyk,* 21 P.3d 377, 385 (Colo. 2001). Only a complaint that states a plausible claim for relief can survive a motion to dismiss. *Warne v. Hall,* 373 P.3d 588, 596 (Colo. 2016). "In ruling on a motion to dismiss for failure to

state a claim for relief, the court must accept all well-pleaded facts as true." *W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008). "However, the court is not required to accept as true legal conclusions couched as factual allegations." *Id*. "Furthermore, a complaint may be dismissed if the substantive law does not support the claims asserted." *Id*. Conclusory assertions that actions were "unlawful, arbitrary, or unreasonable" are insufficient. *Warne, supra,* at 596. While a Court is not to look outside the complaint when evaluating a motion to dismiss pursuant to C.R.C.P. 12(b)(5), the Court may consider central documents referenced in, but not attached to, a complaint without converting the motion into one under C.R.C.P. 56. *Yadon v. Lowry*, 126 P.3d 332, 336 (Colo. App. 2005).

Prompt resolution of defamation claims, particularly those involving public figures and political speech, through motions to dismiss are preferred "[b]ecause the threat of protracted litigation could have a chilling effect upon constitutionally protected rights of free speech" *Barnett v. Denver Publ'g Co.*, 36 P.3d 145 (Colo.App. 2001).

ARGUMENT

A. Count 3, Intentional Infliction of Emotional Distress and Count 6, Outrageous Conduct

The elements of liability for the tort of intentional infliction of emotional distress through extreme and outrageous conduct are 1. the defendant engaged in extreme and outrageous conduct; 2. the defendant did so recklessly or with the intent of causing the plaintiff severe emotional distress; and 3. the defendant's conduct caused the plaintiff severe emotional distress. *See*, CJI-Civ. 3d 23:1. Further, because plaintiff is a public figure, she may not recover without establishing by clear and convincing evidence that the publication contained false statements of fact which were made with knowledge that the statements were false or with reckless disregard as to whether or not they were true. Brooks v. Paige, 773 P.2d 1098, 1102 (Colo. App. 1988), Lewis v. McGraw-Hill Broadcasting Co., 832 P.2d 1118, 1125 (Colo. App. 1992). Pierce v. St. Vrain Valley Sch. Dist., 944 P.2d 646, 652 (Colo. App. 1997). See, Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988).

"Before permitting a plaintiff to present a claim for outrageous conduct to the jury, the trial court must initially rule on the threshold issue of whether the plaintiff's allegations of outrageous conduct are sufficiently outrageous as a matter of law: "Although the question of whether conduct is outrageous is generally one of fact to be determined by a jury, it is first the responsibility of a court to determine whether reasonable persons could differ on the question." Culpepper v. Pearl St. Bldg., Inc., 877 P.2d 877, 883 (Colo. 1994)." *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 666 (Colo. 1999).

"Colorado case law has erected an extremely high bar that a plaintiff must satisfy in order to have such a claim put before a jury. Factual allegations must reflect circumstances that are utterly intolerable in a civil society; they must be extreme in kind and degree. *See Reigel v. SavaSeniorCare L.L.C.*, 292 P.3d 977, 2011 WL 6091709, at *12 (Colo. App. Dec. 8, 2011) (stating that "the level of outrageousness required to constitute [the] tort of extreme and outrageous conduct is extremely high . . . mere insults, indignities . . . and threats are insufficient.")" *Ayon v. Kent Denver Sch.,* 2013 U.S. Dist. LEXIS 59925, 2013 WL 1786978.

"Such liability can be found only if the defendant's conduct toward another is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Destefano v. Grabrian*, 763 P.2d 275, 286 (Colo. 1988); *Bob Blake Builders, Inc. v. Gramling*, 18 P.3d 859, 865 (Colo. App. 2001); *see also Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988)." *Green v. Qwest Servs. Corp.*155 P.3d 383, 385 (Colo. 2006).

For purposes of a claim of extreme and outrageous conduct, "Severe Emotional Distress" is defined as follows; "Severe emotional distress consists of highly unpleasant mental reactions, such as (nervous shock, fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, or worry) and is so extreme that no person of ordinary sensibilities could be expected to tolerate and endure it. The duration and intensity of emotional distress are factors to be considered in determining its severity." CJI-Civ. 3d 23:4.

Here, the statements made by Mr. Adams during public comment at the Loveland Commissioner's meeting, expressing concerns about the plaintiff's behavior and fitness for the office of Mayor, cannot, as a matter of law, support a claim for extreme and outrageous behavior. Rather than being actions "intolerable in a civilized society," they are actions which must be valued and encouraged in our political discourse and protected by the First Amendment of the United States Constitution and Colorado's Bill of Rights.

In order to prevail, plaintiff must establish that Mr. Adams intended to cause her severe emotional distress and that she suffered severe emotional distress. Other than the conclusory statement that she did, the complaint fails to present any factual allegations showing that the plaintiff, a political figure, suffered mental reactions so extreme that they could not be tolerated or endured. The complaint also fails to allege any facts showing that causing the plaintiff severe emotional distress was Mr. Adams' intent. Instead, the complaint speaks of a political motive to unseat the plaintiff and discourage her from seeking reelection.

Plaintiff's complaint utterly fails to present any factual allegations which would support an argument that Mr. Adams' statements were false or that he made them "with knowledge that they were false or with reckless disregard as to whether or not they were true." Rather, the complaint includes statements from the Loveland City Attorney's Office, released more than three weeks after Mr. Adams statements, corroborating that "[t]he Mayor received some building permits late related to the remodeling and reconstruction of her home." This is a clear statement that the plaintiff did in fact violate Loveland's Municipal Code, which requires that permits be obtained prior to commencing work.

The City of Loveland has adopted the 2018 International Existing Building Code, which addresses permits and provides, "Any owner or owner's authorized agent who intends to repair, add to, alter, relocate, demolish, or change occupancy of a building, or to repair, install, add, alter, remove, convert, or replace any electrical, gas, mechanical, or plumbing system, the installation of which is regulated by this code, or to cause any such work to be performed, shall first make application to the code official and obtain the required permit." Loveland municipal

code further provides that, "any person, firm or corporation violating any of the provisions of this code, as adopted and modified by the City, shall be deemed guilty of a misdemeanor and subject to penalties as set forth in Section 1.12.010 of the Loveland Municipal Code." Loveland Mun. Code 15.52.030.

The City Attorney's email goes on to state, "However, this situation is not atypical for homeowners." The fact that other homeowners in Loveland have committed the same violation does not excuse the plaintiff from her conduct and does not support an argument that Mr. Adams made statements that were false or was reckless.

B. Count 4, Defamation – Slander Per Se and Count 6, Defamation – Slander Per Quod

For a public figure to prevail on a claim of liability for Libel and Slander – Per Se, the plaintiff must establish by a preponderance of the evidence, 1. that the defendant published or caused to be published specific statements; 2. the statements caused the plaintiff actual damage; and by clear and convincing evidence, 3. the substance or gist of the statements were false at the time they were published; and 4. at the time of publication, the defendant knew that the statements were false or the defendant made the statements with reckless disregard as to whether they were false. *See,* CJI-Civ. 3d 22:1.

For a public figure to prevail on a claim of liability for Libel and Slander - Per Quod, the plaintiff must establish by a preponderance of the evidence, 1. that the defendant published or caused to be published specific statements; 2. the recipients of the publication understood the statement to be defamatory; 3. the publication of the statements caused special damages to the plaintiff, and by clear and convincing evidence, 4. the statements were about the plaintiff; 5. the substance or gist of the statements were false at the time they were published; and 6. at the time of publication, the defendant knew that the statements were false, or the defendant made the statements with reckless disregard as to whether they were false or not. *See,* CJI-Civ. 3d 22:2.

Like a claim for extreme and outrageous conduct brought by a public figure, claims for libel and slander require a showing that the statements were false and that the person making the

statements knew they were false, or made them with reckless disregard as to whether they were false or not. “If… plaintiff in a defamation action is a public figure, or an allegedly defamatory statement involved a matter of public concern, she cannot recover unless she proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, *i.e.*, with knowledge of falsity or in reckless disregard of the truth. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Diversified Management, Inc. v. Denver Post, Inc.*, *supra*.” *Lewis v. McGraw-Hill Broadcasting Co.*, 832 P.2d 1118, 1122-1123 (Colo. App. 199). Further, “[t]ruth is an absolute defense to a defamation claim brought against a public figure, and only false statements made with "actual malice" are subject to sanctions. *People v. Ryan*, 806 P.2d 935 (Colo. 1991). A party asserting truth as a defense in a defamation action is not required to justify every word of the alleged defamatory matter. It is sufficient if "the substance, the gist, the sting, of the matter is true." *Gomba v. McLaughlin*, 180 Colo. 232, 236, 504 P.2d 337, 339 (1972).” *Barnett, supra* at 147.

"Even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred. . . ." Garrison v. Louisiana, 379 U.S. 64, 73. See also Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82” *Greenbelt Cooperative Pub. Ass'n v. Bresler*, 398 U.S. 6, 10-11, (1970)

Because the preservation of our freedom of speech in the public or political arena is so vitally important, “reckless disregard” is defined to include a heightened level of knowledge as to a statement’s falsity before it is actionable. For purposes of libel and slander involving a public figure, the jury instruction on reckless disregard states as follows; “Statements are published with reckless disregard when, at the time of publication, the person publishing them <u>believes that the statements are probably false or has serious doubts as to their truth</u>.” CJI-Civ. 3d 22:3. (Emphasis added). Notes on Use, 1. This instruction is supported by **Harte-Hanks Communications, Inc. v. Connaughton**, 491 U.S. 657 (1989); **Herbert v. Lando**, 441 U.S. 153 (1979); **Gertz v. Robert Welch, Inc.**, 418 U.S. 323 (1974); **Rosenbloom v. Metromedia, Inc.**, 403 U.S. 29

(1971); **St. Amant v. Thompson**, 390 U.S. 727 (1968); **Garrison v. Louisiana**, 379 U.S. 64 (1964); **Diversified Management, Inc. v. Denver Post, Inc.**, 653 P.2d 1103 (Colo. 1982); **Walker v. Colo. Springs Sun, Inc.**, 188 Colo. 86, 538 P.2d 450 (1975), *overruled on other grounds by* **Diversified Management., Inc.**, 653 P.2d at 1106.

As was discussed previously, plaintiff's complaint fails to include factual allegations to support the argument that the statements regarding plaintiff violating the law were false. More specifically, the complaint fails completely to allege any facts regarding Mr. Adams' belief or reckless disregard that the statements were false.

Clearly, the Mayor of the City of Loveland is a public figure and her actions as described in Mr. Adams statement are matters of public concern. As has been stated by the United States Supreme Court, "We therefore hold as a matter of constitutional law that a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office for purposes of application of the "knowing falsehood or reckless disregard" rule of *New York Times Co*. v. *Sullivan*." *Monitor Patriot Co. v. Roy*, 401 U.S. 65, 277 (1970). Further, "Public discussion about the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* rule. And under any test we can conceive, the charge that a local mayor and candidate for a county elective post has been indicted for perjury in a civil rights suit is relevant to his fitness for office." *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300-301 (1970).

REQUEST FOR ATTORNEY FEES AND COSTS

Section 13-17-201 of the Colorado Revised Statutes provides, "In all actions brought as a result of a death or an injury to person or property occasioned by the tort of any other person, where any such action is dismissed on motion of the defendant prior to trial under Rule 12(b) of the Colorado Rules of Civil Procedure, such defendant shall have judgment for his reasonable attorney fees in defending the action."

As such, a court is required to award reasonable attorney fees and costs whenever a tort action is dismissed pursuant to Rule 12(b). As this Motion is brought solely pursuant to Rule 12(b)(5), an award of attorney fees is mandatory upon dismissal.

Defendant, Shaun Adams reserves the right to file additional challenges to this case pursuant to the procedures provided in Colorado's Anti-SLAPP law, C.R.S. 13-20-1101.

CONCLUSION

Wherefore, for the reasons set forth in this motion, Defendant Shaun Adams respectfully requests this Court dismiss this case as to Mr. Adams in its entirety.

Dated this 8th day of September 2021.

Respectfully submitted,

By: /S/ MITCH MURRAY
MITCH MURRAY, #17930
Attorney for Defendant Shaun Adams

CERTIFICATE OF SERVICE

I certify that on September 8, 2021, a true and correct copy of the foregoing **MOTION TO DISMISS** was served on all parties of record by filing via Colorado Courts E-Filing upon the following:

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Signed original on file at Murray Law, PLLC, pursuant to C.R.C.P. 121 §1-26
By: /s/ Brittany Beatty
Brittany Beatty, Legal Assistant