STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF RAMSEY **SECOND JUDICIAL DISTRICT**

Michelle L. MacDonald,
MacDonald Law Firm, LLC,

Plaintiffs,

v.

Michael Brodkorb, individually
and doing business as
www.MissinginMinnesota.com,
Missing in Minnesota, LLC,
and John and Mary Does,

Defendants.

Case No. 62-CV-18-4145

ORDER

On November 1, 2018, the above-entitled matter came before the Honorable Richard H. Kyle, Jr., Judge of District Court, upon Plaintiffs' motion for default judgment and Defendants' motion for summary judgment. Karlowba R. Adams Powell, Esq., appeared on behalf of Plaintiffs Michelle MacDonald ("MacDonald") and the MacDonald Law Firm LLC. MacDonald appeared personally at the hearing. Nathan M. Hansen, Esq., appeared on behalf of Defendants Michael Brodkorb ("Brodkorb"), individually and doing business as www.MissinginMinnesota.com and Missing in Minnesota, LLC. Brodkorb and Allison Mann appeared personally at the hearing.

Based upon the arguments of counsel and all of the records, files, and proceedings herein, the Court makes the following:

ORDER

1. Plaintiffs' Motion for Default Judgment is **DENIED**.

2. Defendants' Motion for Summary Judgment is **GRANTED**.

3. The attached Memorandum is incorporated herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 1, 2019

BY THE COURT:

Kyle, Richard Jr. (Judge)
Mar 1 2019 2:29 PM

Richard H. Kyle, Jr.
Ramsey County District Court

MEMORANDUM

Plaintiffs' Amended Complaint for Defamation claims MacDonald's reputation has been damaged by statements made by Defendants. Plaintiffs allege three actionable false statements by Defendants: (1) that MacDonald was a "person of interest" in the disappearance of two children; (2) that an unflattering photograph of MacDonald was published to appear "as if a mugshot;" and (3) that MacDonald was convicted of driving under the influence. Plaintiffs move for default judgment and Defendants seek summary judgment on both counts 1 and 2 of the Amended Compliant. For the reasons set forth herein, the Court denies Plaintiffs' motion for default judgment and grants Defendants' motion for summary judgment.

PROCEDURAL BACKGROUND

On June 14, 2918, Plaintiffs served their original Complaint for Defamation on Defendants. In their Complaint, Plaintiffs alleged that Defendants violated provisions of the Society of Professional Journalists' Code of Ethics by defaming McDonald. Plaintiffs assert claims of Defamation and Defamation Per Se in Count 1, and Defamation by Implication in Count 2. Plaintiffs' filed their Complaint in Ramsey County District Court on June 18, 2018 (the "Ramsey County case").

On June 15, 2018, Plaintiffs filed an identical Complaint for Defamation in Dakota County District Court (File No. 19HA-CV-18-2643) (the "Dakota County case"). On June 18, 2018, Plaintiffs filed a proposed order for a change of venue to Ramsey County District Court. Four days later, on June 22, 2018, Plaintiffs filed a letter notifying the Dakota County District Court that the case had been e-filed and accepted in Dakota County District Court in error. That same day, June 22, 2018, Defendants filed a letter in Dakota County opposing Plaintiff's request to change venue. On July 10, 2018, Plaintiffs filed a notice to dismiss the Dakota County case

pursuant to Minn. R. Civ. P. 41(a). On July 11, 2018, Defendants filed a motion for Rule 11 sanctions against Plaintiffs' attorneys for bringing "frivolous and vexatious lawsuits against Defendants." On August 17, 2018, the District Court dismissed the Dakota County case without prejudice.[1]

On July 20, 2018, Defendants moved for Rule 11 Sanctions against MacDonald in the Ramsey County case. In their Motion, Defendants argued that

> The Plaintiffs have filed the same lawsuit in two counties in Minnesota. Prior to filing the instant case, the Plaintiffs filed this lawsuit in Dakota County on June 15, 2018 and case number 19HA-CV-18-2643 was assigned. As of the date of this memorandum, that case is pending and the Dakota County Court has issued a scheduling order. [Defendants' counsel] has spoken by telephone with Michelle MacDonald about dismissing this Ramsey County Case and she has declined to do so.
>
> * * *
>
> The Defendants contend that the Complaint in [the Ramsey County] case violates the above provision of Minn. R. Civ. P. 11.02. Specifically, the filing of the same lawsuit in two counties is harassing and creates needless increase in the cost of litigation.

On July 24, 2018, Plaintiffs served an Amended Complaint for Defamation on Defendants in the Ramsey County case. The next day, July 25, 2018, Defendants filed a second motion for Rule 11 sanctions in the Ramsey County case seeking an award of attorneys' fees and "dismissal of all pretended claims with prejudice." A hearing on Defendants' sanctions motion in the Ramsey County case was set for September 10, 2018. On September 6, 2018, Defendants withdrew their Rule 11 sanctions motion in the Ramsey County case.

On September 18, 2018, Plaintiffs moved for default judgment in the Ramsey County case on the basis that "Defendants' have failed to Answer Plaintiffs' Complaints for defamation,

[1] The information concerning the procedural history of the Dakota County case is set forth in the Dakota County District Court's Order for Judgment of Dismissal without Prejudice, filed on August 17, 2018. The undersigned takes judicial notice of this procedural history.

defamation per se and defamation by implication served on June 14, 2018 and July 24, 2018." The next day, September 19, 2018, Defendants moved to "dismiss pursuant to Minn. R. Civ. P. 12 and/or Minn. R. Civ. P. 56."

On November 1, 2018, the Court heard oral argument on Plaintiffs' motion for default judgment and Defendants' motion for summary judgment on counts 1 and 2 of the Amended Complaint.[2] The Court took both motions under advisement.

UNDISPUTED FACTS

Against this undisputed procedural background, which is primarily relevant to Plaintiffs' motion for default judgment, the Court reviews the record submitted by the parties regarding the events giving rise to Plaintiffs' defamation claims. Plaintiffs' Amended Complaint alleges numerous statements attributed to Defendants as having possible defamatory meaning. Plaintiffs' allegations fall into three factual scenarios which the Court must analyze for defamatory content: (1) that MacDonald was convicted of driving under the influence (DUI); (2) that MacDonald was a "person of interest" in the disappearance of two children in a custody battle involving one of MacDonald's clients (the mother of the children); (3) that an unflattering photograph of MacDonald was published on Defendants' website and in tweets to appear "as if a mugshot." For purposes of Defendants' summary judgment motion, the undisputed material facts regarding the three primary subjects demonstrate that this matter is wholly appropriate for summary judgment.

[2] Although Defendants' Notice of Motion sought to dismiss pursuant to "Rule 12 and/or Rule 56," Defendants' pleadings make clear that Defendants seek summary judgment on both Counts 1 and 2 of the Amended Complaint. Defendants' counsel confirmed this fact at the motions hearing on November 1, 2018.

A. DUI Conviction

Plaintiffs allege that Brodkorb falsely reported in a February 16, 2016 tweet that MacDonald had "a DUI conviction, and that it was upheld by the Court of Appeals." (Amended Complaint "Amend. Comp." at 58; MacDonald Affidavit "Aff." at 52)[3] Brodkorb denies ever stating that MacDonald was convicted of a DUI. (Brodkorb Aff. at 13).

The record contains evidence that on May 2, 2013, the Hastings City Attorney charged MacDonald with Third Degree Test Refusal, a gross misdemeanor, Fourth Degree Operating a Motor Vehicle under the Influence of Alcohol, a misdemeanor, Obstructing Legal Process or Arrest, a misdemeanor, Failure to Produce Proof of Insurance, a misdemeanor, and Speeding, a petty misdemeanor. MacDonald plead not guilty to each count and the case proceeded to jury trial in Dakota County in September 2014.[4] On September 17, 2014, the Dakota County jury found MacDonald guilty of test refusal and obstructing legal process but not guilty of driving under the influence. MacDonald appealed the convictions. The Minnesota Court of Appeals affirmed the convictions in an Opinion filed on February 16, 2016. *State v. Michelle MacDonald Shimota*, 875 N.W.2d 363 (Minn. Ct. App. 2016), *review denied* (April 27, 2016).

The record also contains evidence that on May 18, 2016, an article appeared Defendants'' website, "MissinginMinnesota.com," entitled, "Michelle MacDonald recommended for GOP endorsement for MN Supreme Court – again." The article contains two statements concerning MacDonald's criminal charges in Dakota County:

> After MacDonald was endorsed [in 2014], news broke that she was facing criminal charges for suspicion of drunk driving and resisting arrest.
>
> * * *

[3] Plaintiffs' Amended Complaint and MacDonald's Affidavit are virtually identical documents. As such, the Court will quote both pleadings throughout this Order.

[4] Before trial, the Court dismissed the charge of Failure to Produce Proof of Insurance in an Order dated September 26, 2013.

> In September 2014, MacDonald was found not guilty of drunk driving, but was found guilty of refusing to submit to breath testing, obstructing the legal process and speeding.

(Brodkorb Aff. at 13, Ex E).

B. A "Person of Interest"

Plaintiffs next allege that Defendants identified MacDonald as a "person of interest" on October 22, 2015 and August 3, 2016, in the investigation of the disappearance of two missing girls in a child custody case venued in Dakota County. (Amend. Comp. at 56, 61; MacDonald Aff. at 51, 55). MacDonald represented the mother of the missing children in that custody case. Brodkorb does not dispute that he identified MacDonald as a "person of interest" in text messages and on social media on those dates. Rather, he claims to have made a truthful report about MacDonald's status after a reasoned examination of the facts. (Brodkorb Aff. at 4-9).

1. <u>October 22, 2015</u>

On October 22, 2015, MacDonald claims to have sent a text to Brodkorb that contained a photograph of herself with Governor Mark Dayton at the signing of a family law bill that MacDonald says was the result of a "custody-parenting time dialogue group" that she was actively involved in. According to MacDonald,

> Rather than acknowledging my accomplishment and the dialogue group as news, Brodkorb reacted by replying via text: "[Representative] *Peggy Scott was not aware you were a 'person of interest' in a case involving missing kids*." Apparently, Brodkorb contacted and told several others this false report in person, as he also texted "Many I spoke with today did not feel it was appropriate for you to attend, as police do wish to question you about your involvement with the disappearance of two missing girls."

(Amend. Comp. at 57; MacDonald Aff. at 51) (emphasis in original). Brodkorb admits to making the above statements on October 22, 2015, which he says refer to the 2013 disappearance of the daughters of MacDonald's client, Sandra Grazzini-Rucki. (Brodkorb Aff. at 4).

2. August 3, 2016

The record contains evidence that on August 3, 2016, Defendants' website, www.MissinginMinnesota.com, posted an article entitled, "Attorney: Sandra Grazzini-Rucki used donated 'food stamp cards' for $50K bail." (Brodkorb Aff., Ex. B). The article reported that "Sandra Grazzini-Rucki was able to post her $50,000 bail within hours of being convicted of six felonies for deprivation of parental rights [related to the disappearance of her two daughters], by using donated 'food stamp cards' according to her attorney, Michelle MacDonald." Near the end of the article, it notes that "MacDonald currently serves as Grazzini-Rucki's family court attorney" having been replaced as Grazzini-Rucki's criminal defense attorney "on November 18, 2015---the same day the girls were found living on a ranch in northern Minnesota by law enforcement, headed by the Lakeville Police Department." The article concludes:

> MacDonald was labeled in April 2015 as a "person of interest" by the Lakeville Police Department in the disappearance of [the two girls]. MacDonald refused to cooperate with the Lakeville Police Department's investigation into her possible involvement in the disappearance of the sisters----even after public statements from her that she would cooperate in the investigation. Her criminal defense attorney, Stephen Grigsby, said in 2015 that he would advise MacDonald to not speak with the Lakeville Police Department. (emphasis in original)

Id. MacDonald disputes this account. In her Amended Complaint and sworn affidavit, she claims to have "also contacted the Lakeville police who confirmed she was not a person of interest, or suspect, that they do not use those terms, and that her complaint was with Brodkorb, and there was no investigation of her." (Amend. Comp. at 66; MacDonald Aff. at 60).

C. Use of Photograph "As if a Mugshot"

Plaintiffs allege that Defendants posted and tweeted an unflattering photograph of her on multiple occasions, including January 5, 2017 and June 5, 2018, "as if a mugshot." (Amend. Comp. at 9 & 76-77; MacDonald Aff. at 9, 70-71). Brodkorb admits to posting the photograph of MacDonald and contends the photograph is a public booking photograph of MacDonald that he obtained from the Dakota County Sheriff's Department. (Brodkorb Aff. at 11-12).

1. January 5, 2017

The record contains evidence that on January 5, 2017, Brodkorb posted and tweeted a photograph of MacDonald, stating "BREAKING: MN Supreme Court referee recommends 60-day susp., 2-yer prob, mental health evaluation for Michelle MacDonald." (Amend. Comp. at 76-77, Ex 7.2; MacDonald Aff. at 70-71).[5] There are no references in the tweet that the photograph is a mug shot or booking photograph of MacDonald.

2. June 5, 2018

The record also contains evidence that on June 5, 2018, missinginminnesota posted and tweeted the same unflattering photograph of MacDonald from the earlier January 5, 2017 tweet, alongside her Supreme Court candidacy headshot, stating: "Déjà vu: Michelle MacDonald running again for Minnesota Supreme Court. Michelle MacDonald, who was labeled a 'person of interest' in the disappearance of missing children, filed to run again for the Minnesota Supreme Court." (Amend. Comp. at 9, Ex. 2.1-2.3; MacDonald Aff. at 9).[6] Like the January 5, 2018 tweet, there are no references in the tweet that the photograph is a mug shot or booking photograph of MacDonald.

[5] Exhibit 7.2 is filed under seal.
[6] Exhibits 2.1-2.3 are filed under seal.

LEGAL ANALYSIS

I. PLAINTIFFS ARE NOT ENTITLED TO A DEFAULT JUDGMENT AGAINST DEFENDANTS.

Plaintiffs move for default judgment pursuant to Minn. R. Civ. P. 55.01 on the grounds that Defendants failed to answer or otherwise defend within the time allowed under the rules. Plaintiffs' filed their original Complaint on June 18, 2018, and an Amended Complaint on July 24, 2018. Defendants concede they have not filed formal written answers to either Complaint, but argue that Defendants "otherwise defended" this lawsuit by filing a motion for Rule 11 sanctions in response to Plaintiffs' original Complaint.[7]

A. Legal Standard

"When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend within the time allowed therefor by these rules or by statute, and that fact is made to appear by affidavit, judgment by default shall be entered against that party. . . ." Minn. R. Civ. P. 55.01.

The term "otherwise defend" has not been explicitly defined by the Courts of this State. However, the Court of Appeals, in *Black v. Rimmer*, 700 N.W.2d 521, 525-26 (Minn. App. 2005) cited the federal judiciary's interpretation of the term as it appears in Rule 55(a) of the Federal Rules of Civil Procedure. It noted that "otherwise defend" as defined by the Fifth Circuit Court of Appeals, refers to "attacks on the service, or motions to dismiss, or for better particulars, and the like, which may prevent default without presently pleading to the merits." *Id*. at 526 (quoting *Bass v. Hoagland*, 172 F.2d 205, 210 (5th Cir. 1949)). In *Black*, the pro se defendant did not file

[7] Defendants did not file a responsive pleading to Plaintiffs' motion for default judgment. Therefore, the Court relies on the argument made by defense counsel at the motions hearing.

an answer and did not make a motion to dismiss or other defensive motion, but "appeared for his deposition" and "answered all of the questions put to him." The Court held that such "cooperation" does not satisfy the requirements of "otherwise defend" as contemplated by Minn. R. Civ. P. 55.01. *Id.*

B. Defendants "Otherwise Defended" This Lawsuit by Filing a Motion for Sanctions in Response to Plaintiffs' Complaint.

While Defendants' motion for Rule 11 sanctions was not an attack on the pleadings as contemplated by the Court in *Bass*, it nonetheless constituted a formal act by Defendants to position themselves in opposition to the Plaintiffs' Complaint. Specifically, Defendants' sanctions motion was based on the argument that Plaintiffs' filing the identical lawsuit in two counties---first in Dakota County and then in Ramsey County---constituted harassment and created a needless increase in the cost of litigation warranting sanctions under Rule 11.02. In this sense, the Defendants' motion for Rule 11 sanctions was more similar to actions listed in *Bass* than the "cooperation" at issue in *Black* and, therefore, appears to meet the definition of "otherwise defend."

C. Defendants Can Show A Reasonable Defense On The Merits, Due Diligence and Plaintiffs Suffered No Prejudice.

Plaintiffs are not entitled to entry of default judgment even if Defendants' motion for Rule 11 sanctions was not a timely defense. As the Supreme Court of Minnesota has noted, "denial of a motion for a default judgment is proper when four requirements are met: defendant has a reasonable defense on the merits; defendant has a reasonable excuse for his failure to answer; defendant acted with due diligence after notice of the entry of judgment; and no substantial prejudice will result to other parties." *Cotter v. Guardian Angels Roman Catholic Church of Chaska*, 294 N.W.2d 712, 715 (Minn. 1980). All four factors must be met for a non-

answering party to prevent default. But a "strong showing on the other factors may offset relative weakness on one factor." *Imperial Premium Fin. Inc. v. GK Cab Co*., 603 N.W.2d 853, 857 (Minn. App. 2000).

"Generally, a reasonable defense on the merits requires more than a general denial or an unverified answer." *Wiethoff v. Williams*, 412 N.W.2d 533, 536 (Minn. App. 1987). Here, Defendants have presented more than a general denial or unverified statements. As set forth more fully in Section II below, the Court finds that Defendants are entitled to summary judgment on both Counts 1 and 2 of Plaintiffs' defamation action.

Defendants also filed their motion for sanctions only eleven days after their time to answer the original complaint had expired. The record evidences multiple court filings in both the Dakota County and Ramsey County cases in June and July 2018. Plaintiffs filed their Complaint in the Dakota County case in error prompting an immediate motion for sanctions from Defendants. Plaintiffs' filing of an identical Complaint in Ramsey County was similarly met with a sanctions motion by Defendants. Without ruling on the merits of Defendants' motion, the Court finds that Defendants acted with diligence in filing their sanctions motion in the Ramsey County case, thereby alerting Plaintiffs of their intent to contest the defamation claims. Defendants then appropriately withdrew their sanctions motion after the District Court granted Plaintiffs' Rule 41 dismissal of the Dakota County case.

There has been no prejudice to Plaintiffs due to Defendants' failure to formally answer the Complaint and Amended Complaint. To the extent that Plaintiffs considered Defendants in default, Plaintiffs took no steps to obtain a default judgment for over three months. In fact, Plaintiffs took no steps until after Defendants filed – and withdrew – their second sanctions

motion with this Court. Further, nothing about the prosecution of this matter has been delayed to prejudice Plaintiffs. Accordingly, Defendants can make a strong showing on this factor.

When asked at oral argument on November 1 why Defendants did not also file an Answer to Plaintiffs' Complaint (along with their sanctions motion), counsel represented to the Court that he felt it more appropriate to wait until proper venue was established in either Dakota or Ramsey County. This Court accepts counsel's representation for purposes of the present default motion. At worse, pursuant to *Wiethoff*, this is a weak showing on this factor. *See* 412 N.W.2d at 536 (finding a complete failure to provide a reasonable excuse was a weak showing on that factor).

Because Defendants can make a strong showing on three of four factors, and a weak showing on the fourth, relief is warranted. *See Valley View v. Schutte*, 399 N.W.2d 182, 185-86 (Minn. Ct. App. 1987) (granting relief from default and finding "the strong showing on these three factors must be balanced against the relatively weak showing on the fourth [reasonable excuse] factor. This court has twice reversed a trial court's denial of a motion to vacate a default judgment where the defaulting party's weak excuse for failing to answer the lawsuit was outweighed by a strong showing on the three remaining factors." (citations omitted)).

In short, while Defendants failed to present a reasonable excuse for not interposing an answer in a timely fashion, Defendants' due diligence, the lack of any prejudice to Plaintiffs as well as the merits of Defendants' defense weigh against granting Plaintiffs' motion for default judgment.

II. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' DEFAMATION AND DEFAMATION PER SE CLAIM (COUNT 1).

A. Legal Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.03. "A fact is material if its resolution will affect the outcome of a case." *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996). "[S]ummary judgment is inappropriate where reasonable persons might draw different conclusions from the evidence presented." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (*citing Illinois Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978)). "Thus, the moving party has the burden of showing an absence of factual issues, and the nonmoving party has the benefit of that view of the evidence most favorable to him." *Montemayor v. Sebright Prod., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (internal quotations omitted) (citing *Lowry Hill Props., Inc., v. Ashbach Constr. Co.*, 291 Minn. 429, 194 N.W.2d 767, 769 (1971)).

"All doubts and factual inferences must be resolved against the moving party." *Id.* However, "there is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc.*, 566 N.W.2d at 71. "The nonmoving party must present specific facts which give rise to a genuine issue of material fact for trial." *W.J.L. v. Bugge*, 573 N.W.2d 677, 680 (Minn. 1998). "[T]he function of the court on a

motion for summary judgment is not to resolve issues of fact but to determine whether they exist." *Albright v. Henry*, 285 Minn. 452, 464, 174 N.W.2d 106, 113 (1970).

B. The Requirement of Actual Malice In Public Figure Defamation Claims

To prevail on a defamation claim a plaintiff must prove (1) the defamatory statement was communicated to someone other than the plaintiff; (2) the statement is false; (3) the statement tends to harm the plaintiff's reputation and to lower the plaintiff in the estimation of the community; and (4) the recipient of the false statement reasonably understands it to refer to a specific individual. *McKee v. Laurion*, 825 N.W.2d 725, 729-30 (Minn. 2013).

In public figure defamation cases, the test on summary judgment "is whether the evidence in the record could support a reasonable jury finding that the plaintiff has shown actual malice by clear and convincing evidence." *Foley v. WCCO Television, Inc*., 449 N.W.2d 497, 503 (Minn. App. 1989), *review denied* (Minn. Feb. 9, 1990). "Actual malice requires proof that the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not." *Id*. (citing *New York Times Co. v. Sullivan*, 84 S.Ct. 710, 725-26 (1964)).

Actual malice is a subjective standard. *In re Charges of Unprofessional Conduct Involving File No. 17139*, 720 N.W.2d 807, 813 (Minn. 2006) (citing *Harte –Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S.Ct. 2678 (1989)). Although it may be proved through circumstantial evidence, *see Harte –Hanks*, 491 U.S. at 668, 106 S.Ct. at 2686, actual "[m]alice is not to be presumed or inferred from the fact that a false statement has been made, but must be proved by plaintiff with convincing clarity," *Valento v. Ulrich*, 402 N.W.2d 809, 813 (Minn. App. 1987). "A genuine issue of fact as to actual malice exists only if the facts permit the conclusion that the defendant[ ] in fact entertained serious doubts as to the truth of the

publication." *Jadwin v. Minneapolis Star and Tribune Co*., 367 N.W2d 476, 488 (Minn. 1985) (quotation omitted).

C. MacDonald is a Public Figure Subject to the Heightened Actual Malice Clear-And-Convincing Standard.

"[O]ne who volunteers [herself] as a candidate for public office becomes a public figure and is subjected to greater scrutiny as [she] aspires for positions of higher responsibility." *Klaus v. Minn. State Ethics Comm'n*, 309 Minn. 430, 244 N.W.2d 672, 676 (Minn. 1976). *In Monitor Patriot Co. v. Roy*, 91 S.Ct. 621, 625 (1971), the United States Supreme Court explained: "[I]t is abundantly clear that . . . publications concerning candidates must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office." *See also Jadwin*, 367 N.W2d at 482.

Here, MacDonald has been a perennial candidate for statewide office, challenging incumbent justices for a seat on the Minnesota Supreme Court in 2014, 2016 and again in 2018. For purposes of this defamation lawsuit, the Court concludes that McDonald is a public figure. Therefore, the Court must consider the alleged defamatory statements in light of what is legally required to state an actionable claim for defamation of a public figure: actual malice under the heighted clear-and-convincing standard.

D. There Are No Genuine Issues of Material Fact Precluding Judgment For Defendants On The Basis of Truth or The Absence of Actual Malice.

Plaintiffs' amended complaint alleges three defamatory statements by Defendants: (1) that MacDonald was convicted of driving under the influence; (2) that MacDonald was a "person of interest" in the disappearance of two girls; and (3) that a photograph of MacDonald was published to appear "as if a mugshot." The Court finds that summary judgment is proper because

the claimed defamatory statements are either factually accurate or there is an absence of any issues of material facts relating to actual malice.

1. Driving Under the Influence

Truth is a complete defense, and true statements, however disparaging, are not actionable. *Stuempges v. Parke, Davis & Co*., 297 N.W.2d 252, 255 (Minn. 1980). Whether a statement is one of opinion, which is absolutely protected by the First Amendment, or one of fact, is a question of law for the trial court. *Foley*, 449 N.W.2d at 501 (citing *Janklow v. Newsweek, Inc*., 788 F.2d 1300, 1305 n.7 (8th Cir. 1986) (en banc), *cert. denied* 107 S.Ct. 272 (1986)).

MacDonald alleges in her Amended Complaint that "on February 16, 2016, Defendants falsely reported in a tweet that Ms. MacDonald had a DUI conviction, and that it was upheld by the Court of Appeals. In fact, Ms. MacDonald had been acquitted of DUI." (Amend. Comp. at 58) The record, however, is devoid of any evidence of Brodkorb's purported tweet from February 16, 2016. MacDonald's Affidavit submitted in support of Plaintiffs' Motion for Default Judgment makes the same allegation (MacDonald Aff. at 52), but again without supplying the Court with a copy of the offending tweet.

Brodkorb denies every stating that MacDonald was convicted of DUI. In his supporting Affidavit, he submits a copy of a May 18, 2016 article published at missinginminnesota.com concerning MacDonald's efforts to be endorsed as the Republican Party candidate for the Minnesota Supreme Court. (Brodkorb Aff., Ex. E). The article included these statements about MacDonald's criminal case:

> After MacDonald was endorsed [in 2014], news broke out that she was facing criminal charges for suspicion of drunk driving and resisting arrest.
>
> * * *

> In September 2014, MacDonald was found not guilty of drunk driving, but was found guilty of refusing to submit to breath testing, obstructing legal process and speeding. *Id*.

This reporting is consistent with the public case filings of MacDonald's jury trial in Dakota County, which are found in the Minnesota State Court Information System (MNCIS) records.[8] According to MNCIS, a Dakota County jury acquitted MacDonald of Fourth Degree Operating a Motor Vehicle under the Influence of Alcohol, but convicted her of Refusal to Submit to Breath Testing, Obstructing Legal Process and Speeding. The term "drunk driving" is arguably a synonymous term for the formal criminal charge of operating a motor vehicle under the influence of alcohol (or DUI). The Court concludes that Defendnats' May 18, 2016 article accurately describes the disposition of MacDonald's criminal case in Dakota County. As such, there is no genuine issue of material fact regarding the truth of Brodkorb's statements regarding this defamation claim.

2. A "Person of Interest"

A "person of interest" is a "person who is believed to be possibly involved in a crime but has not been charged or arrested." Merriam-Webster.com.2019.https:// www.merriam-webster.com (27 February 2019).

MacDonald alleges that Defendants identified her as a "person of interest" on October 22, 2105, and again on August 3, 2016, in the investigation of the disappearance of the two missing girls. In his sworn Affidavit, Brodkorb readily admits that he did identify MacDonald as a "person of interest." He claims to have done so based, in part, upon earlier reports published by the Star Tribune. (Brodkorb Aff. at 4). He notes that MacDonald had been identified as a "person of interest" in an April 2015 article by Brandon Stahl, published in the Star Tribune. He

[8] The Court reviewed the MNCIS Record for Case No. 19HA-CR-13-1371 and takes judicial notice of the outcome of the Dakota County prosecution after receiving permission from the parties.

claims the phrase was repeated in subsequent articles by Star Tribune reporters Stahl and Karen Zamora (July 29, 2016). (Brodkorb Aff. at 4). MacDonald does not dispute that the Star Tribune reporter, Brandon Stahl, published a story (on April 29, 2015) in which a Lakeville police detective identified MacDonald as a "person of interest" in the case of the missing girls. (Amend. Comp. at 65; MacDonald Aff. at 59). MacDonald claims that after reading the article she told Stahl that the claim was false and the Star Tribune subsequently "ceased perpetuating or publishing" references to her being a "person of interest." *Id*.

In his Affidavit, Brodkorb also asserts that Lakeville Police investigators "confirmed to me, on multiple occasions, that [MacDonald] was a 'person of interest' in the investigation, based on their belief that she was involved and that she knew what was going on." (Brodkorb Aff. at 7). MacDonald claims that she too spoke to Lakeville police who "confirmed that she was not a person of interest." (Amend. Comp. at 66; MacDonald Aff. at 60). As such, the Court is presented with competing Affidavits and must assess the admissibility of the statements and claims contained in those Affidavits.

On summary judgment, "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Minn. R. Civ. P. 56.05. Facts set forth in an affidavit that constitute hearsay or otherwise remain subject to the exclusionary rules of evidence do not meet the requirements of Rule 56.05. *American Security Co. v. Hamilton Glass Co*., 254 F.2d 889 (7th Cir. 1958); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co*., Ltd., 505 F.Supp. 1125 (E.D. Pa. 1980).

Hearsay is an out-of-court statement offered as evidence to prove the truth of the matter asserted. Minn. R. Evid. 801(c). The rules of evidence bar admission of hearsay unless it fits

under a recognized exception. *See* Minn. R. Evid. 802 (barring admission of hearsay), 803 (listing exceptions to the hearsay rule), and 804 (same). But testimony that is offered to show something other than the truth of the matter asserted is not hearsay. *State v. Moua*, 678 N.W.2d 29, 37 (Minn. 2004).

Here, Brodkorb's statement concerning what he learned from the Lakeville police about whether MacDonald was a "person of interest" is arguably admissible under this exception to the hearsay rule. The statement is not offered by Brodkorb to prove the truth of the matter; rather it is offered to establish his state of mind when he claimed that MacDonald was a "person of interest." The statement also goes to the issue of malice and recklessness. In addition to relying on stories from the Star Tribune, Brodkorb attempted to corroborate those stories by speaking to the Lakeville police.

By contrast, MacDonald's statement concerning what she learned from the Lakeville police is inadmissible hearsay. It is offered for the truth of the matter; to establish that she was not considered a "person of interest" by the law enforcement agency investigating the case. Moreover, there is no evidence that MacDonald spoke to the same law enforcement person(s) as Brodkorb, making a credibility assessment of the parties impossible.

Whether MacDonald was, in fact, a "person of interest" cannot be determined based on the record before the Court. The Court, however, concludes that Brodkorb reasonably believed MacDonald was a "person of interest" based on his review of published news accounts in the Star Tribune and his contact with the Lakeville police. The record is devoid of evidence that Defendants broadcasted their statements that MacDonald was a "person of interest" knowing that the information was false or that Defendants entertained serious doubts as to the truth of their

statements. Therefore, the Court concludes that summary judgment is proper on this alleged defamatory claim in the absence of any issues of material facts relating to actual malice.

3. Use of Photograph "As if a Mugshot"

A mugshot is a "photograph of a person's face taken after the person has been arrested and booked." *Mug Shot*, Black's Law Dictionary (7th ed. 1999). A typical mug shot is two-part, with one side-view photograph, and one front-view.

Plaintiffs allege that on June 5, 2018, Defendants posted and tweeted a photograph of MacDonald, "as if a mugshot," alongside her Supreme Court candidacy headshot, stating: "Déjà vu: Michelle MacDonald running again for Minnesota Supreme Court. Michelle MacDonald, who was labeled a 'person of interest' in the disappearance of missing children, filed to run again for the Minnesota Supreme Court." MacDonald also alleges that this same "image first appeared in a tweet by Defendants on or about January 5, 2017 where [Brodkorb] highlighted a 'mental health eval for Michelle MacDonald'."[9] MacDonald asserts that the image is "not a mugshot." In her Affidavit, she claims the image is a screen shot from a family court hearing taken from a security video at the Dakota County Courthouse that she shared with Brodkorb back in 2013. (Amend. Comp. at 48-49, 76-78; MacDonald Aff. at 41-42, 70-72). Brodkorb claims the

[9] The Director of the Office of Lawyers Professional Responsibility filed a petition for disciplinary action against MacDonald alleging various acts of professional misconduct. After MacDonald responded to the allegations, the Minnesota Supreme Court appointed a referee, who held a hearing and determined that MacDonald's conduct violated certain provisions of the Minnesota Rules of Professional Conduct. The referee recommended that the Supreme Court impose a "60-day suspension followed by 2 years of probation, and that [the Supreme Court] require MacDonald to undergo a mental-health evaluation." (Brodkorb Aff., Ex. A at 2). In an opinion filed on January 17, 2018, the Supreme Court concluded that the "referee's findings and conclusions were not clearly erroneous and that a 60-day suspension followed by 2 years of supervised probation is the appropriate discipline for MacDonald's conduct. We decline, however, to impose a mental-health evaluation as a conduction of MacDonald's probation." *Id*. As such, Defendants' reference to the referee's recommendation that MacDonald undergo a "mental health eval" is factually accurate notwithstanding the fact the Supreme Court ultimately declined to adopt the referee's recommendation.

"photograph in question is a photograph of Plaintiff. It is a booking photo, a public record obtained by me, and available to the public at large, from Dakota County Sheriff's Department, maintained on the county jail's booking photo database. I posted this photo in connection with articles where it was relevant to the story." (Brodkorb Aff. at 11-12).

Significantly, neither tweet refers to the photograph of MacDonald being a mug shot or a booking photograph. There is no indication in the photograph or underlying caption that MacDonald has been arrested or booked. The photograph is not a two-part, front and side view, typical of many mug shots. It is arguably not a flattering photograph of MacDonald, but there is nothing about the photograph that suggests it is a mug shot or booking photograph.

Significantly, the MissinginMinnesota website clearly displayed a booking photograph taken of Sandra Grazzini-Rucki in an August 3, 2016 article entitled, "Attorney: Sandra Grazzini-Rucki used donated 'food stamp cards' for $50K bail." (Brodkorb Aff., Ex. B). The photograph of Grazzini-Rucki shows a two-part head shot (one front-view and one side-view) and the article attributes the source of the photograph as the Dakota County Sheriff's Office.

By contrast, the tweeted photograph of MacDonald does not contain similar indicia of a classic mugshot. Not even the reference to MacDonald being a "person of interest" in the June 5, 2018 tweet transforms the photograph into anything more than an unflattering image of Plaintiff MacDonald, which Defendants placed beside a photograph taken from her promotional campaign materials for Supreme Court.

What Plaintiffs are really arguing is that the unflattering photograph and caption containing the reference to MacDonald being a "person of interest," even if true or lacking actual malice, are defamatory by implication. As set forth below in Section III, Minnesota does not recognize a claim for defamation by implication involving public figures.

In summary, on the full record presented, even with all inferences drawn in Plaintiffs' favor, no reasonable jury could find that Plaintiffs have proven actual malice under the heightened clear-and-convincing evidence standard. Even assuming Defendants were wrong about MacDonald being a "person of interest" or posting a photograph "as if a mugshot," no evidence in the record indicates that Defendants "in fact entertained serious doubts as to the truth of" the statements made in their social media tweets and articles. Because Plaintiffs have not offered evidence sufficient to dispute Defendants' testimony that they believed the statements to be accurate, the Court has no choice but to grant Defendants' motion for summary judgment on Count 2.

III. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' DEFAMAITON BY IMPLICATION CLAIM (COUNT 2).

In Count 2, Plaintiffs assert a claim for defamation by implication. Plaintiffs argue that if some of Defendants' representations concerning MacDonald are deemed to be "technically true," Defendants' website "creates a false impression concerning Ms. MacDonald's career as a lawyer, as involved in ongoing criminal activity, ongoing criminal investigation by police, a drunk, mentally ill, . . ." (Amend. Comp. at 113) As set forth above, there are no genuine issues of material fact precluding judgment for Defendants on the basis of truth or the absence of actual malice. Rather the issue in Count 2 is whether the inferences that can be drawn from those statements establish actionable defamation.

In *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990), the Minnesota Supreme Court refused to recognize defamation by implication in cases involving defamation of public officials. Applying Minnesota defamation law to a county attorney's claim against a Duluth-area newspaper, *Diesen* held that a public-official plaintiff could not base a defamation cause of

action on true statements that, because of the particular juxtaposition of the statements or the omissions of particular facts, became false. *Id*. at 451-52.

In *Schlieman v. Gannett Minnesota Broadcasting, Inc*. 637 N.W.2d 297 (Minn. Ct. App. 2001), the Minnesota Court of Appeals noted that *Diesen's* rejection of defamation by implication is consistent with First Amendment principles that guarantee a free press:

> It reaffirms the body of Minnesota case law that provides that 'true statements, however disparaging, are not actionable.' *Diesen* also avoids the difficulty of defining what is being implied, with the attendant problem that 'the implication varies with the implicator.' And significantly, *Diesen* spares Minnesota courts the challenging task of adapting the constitutional-malice standard to statements that are true on their face and false only by implication." *Id.* at 303-04 (citations omitted).

Schlieman acknowledges that *Diesen* is a narrowly focused holding that applies "to only one type of public-official defamation action---an action that attempts to establish defamation through false implications from true statements." *Id*. at 304. However, the Court of Appeals was quick to note that *Diesen* does not change the basic components of public-official defamation law in cases that do not involve defamation by implication. *Id*. Courts must still interpret the defamatory-meaning element of a defamation action in light of the context surrounding the alleged defamatory statements. *Id*.

Here, one may infer certain negative connotations from statements that MacDonald is a "person of interest" or was convicted of test refusal and obstructing legal process (as opposed to driving under the influence). Additional negative connotations may arise from Defendants' multiple publication of an unflattering photograph of MacDonald that makes no reference to the photograph being a mugshot but reminds readers that MacDonald is a "person of interest" in the disappearance of two young girls. However, publication of those true statements cannot form the basis of a defamation by implication claim in Minnesota, especially involving a public figure like

MacDonald. The Court has already addressed the context in which these alleged defamatory statements were made and ruled that they do not rise to the level of actionable defamation either because the statements were true or lacked the requisite showing of actual malice by Defendants.

Because Plaintiffs do not have a cognizable claim for defamation by implication, the Court grants Defendants' motion for summary judgment as to Count 2 of the Amended Complaint.

RHK