IN THE SUPREME COURT OF IOWA

NO. 16-1136

LINDA LINN and MARK SHUCK,
Appellants,

vs.

PAT MONTGOMERY, CHRISTY SCHRADER and BRAD ALLEN,
Appellees.

APPEAL FROM THE DISTRICT COURT IN AND FOR SCOTT COUNTY

THE HONORABLE J. HOBART DARBYSHIRE, JUDGE
THE HONORABLE THOMAS G. REIDELL, JUDGE
THE HONORABLE MARLITA A. GREVE, JUDGE

APPELLANTS' AMENDED FINAL BRIEF AND ARGUMENT

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ROUTING STATEMENT PER IOWA R. APP. P. 6.903(2)(d)

This case may be appropriate for retention as it presents issues concerning application of the discovery rule to defamation claims, both generally, and in the specific situation where defamatory statements are secret and inherently undiscoverable until made public, such as in this case when a criminal complaint is filed. The only authority on the general application of the discovery rule to defamation claims is an unreported Iowa Court of Appeals decision, and that case did not involve statements that were initially secret and undiscoverable. Therefore, this case presents a substantial issue of first impression. Iowa R. App. 6.1101(2)(c).

STATEMENT OF THE CASE

NATURE OF THE CASE

Mark Shuck (Shuck) and Linda Linn (Linn) sued Pat Montgomery (Montgomery), Christy Schrader (Schrader) and Brad Allen (Allen) for their roles in giving false information to the Bettendorf Police and the Scott County Attorney's office which led to theft charges against Shuck. Linn resided with her husband, Shuck, in a condo Linn owned at Partridge Villa, Building X. Montgomery and Schrader also owned condo units. Allen was the accountant for the Property Owners Association. Montgomery, Schrader and another resident, Ellen Frey, calling themselves the "examination team," worked together to assemble a written report that was turned over to the Bettendorf Police Department and the Scott County Attorney's office for the expressly-stated purpose of having criminal charges brought against Shuck and Linn. Shuck and Linn allege Allen assisted the examination team.

When Montgomery first talked with the County Attorney's office, Montgomery was told all of the allegations of wrongdoing were barred by the Statute of Limitations. The "examination team" then submitted their written report, and included a new allegation that Shuck and

Linn committed theft because the association paid a water bill for a water line that came through the basement floor slab of Linn's unit and provided service to a spigot on the exterior wall of the building which was available to all Building X residents. Shuck was charged with theft. While the charges were later dismissed, the charges affected Shuck's employment opportunities.

Shuck and Linn appeal various Trial Court rulings including a partial summary judgment ruling that the discovery rule did not apply to defamation claims, even for statements that were made in secret and not immediately public; and therefore barred any claims by Shuck on statements made two years prior to the filing of his Petition. In addition, the Trial Court also granted summary judgment on Shuck's malicious prosecution claim.

RELEVANT PROCEEDINGS

On March 10, 2015, Linn and Shuck filed a Petition in Scott County District Court asserting claims against Montgomery, Schrader, and Allen. (March 10, 2015 Petition at Law and Jury Demand, App. 1-5) The Petition set forth claims of defamation, malicious prosecution and abuse of process, and sought actual and punitive damages. On April 28, 2015, Montgomery answered. (April

28, 2015 Montgomery Answer, App. 6-11) On April 29, 2015, Allen filed his Answer. (April 29, 2015 Allen Answer, App. 12-14) On May 5, 2015, Schrader answered. (May 5, 2015 Schrader Answer, App. 15-18) Schrader filed a Motion to Amend Answer and an Amended Answer on February 12, 2016. (February 12, 2016 Schrader Motion to Amend and Amended Answer, App. 19-25)

On February 18, 2016, Montgomery filed for Summary Judgment. (February 18, 2016 Montgomery Motion for Summary Judgment, App. 26-27; February 18, 2016 Montgomery Statement of Material Facts, App. 28-102; and February 18, 2016 Montgomery Brief) On February 24, 2016, Schrader filed for Summary Judgment. (February 24, 2016 Schrader Motion for Summary Judgment, App. 103-105; and February 24, 2016 Schrader Brief) On March 14, 2016, Linn and Shuck resisted both Motions for Summary Judgment. (March 14, 2016 Resistance to Montgomery's Motion for Summary Judgment, App. 106-107; March 14, 2016 Response to Montgomery's Statement of Facts, App. 108-122; March 14, 2016 Memorandum In Support of Resistance to Montgomery's Motion for Summary Judgment,; March 14, 2016 Resistance to Schrader's Motion for Summary Judgment, App. 123-124; March 14, 2016

Response to Schrader's Statement of Facts, App. 125-132; March 14, 2016 Memorandum In Support of Resistance to Schrader's Motion for Summary Judgment) On March 18, 2016, Montgomery filed a Reply Brief. (March 18, 2016 Montgomery's Reply Brief) Hearing was set on Montgomery's Motion for March 22, 2016.

On March 21, 2016, Allen filed a Joinder in Schrader's Motion for Summary Judgment. (March 21, 2016 Allen's Joinder, App. 190-192) On April 5, 2016, Linn and Shuck filed a Resistance to Allen's Joinder. (April 5, 2016 Resistance to Allen's Joinder, App. 193-196)

On April 11, 2016, the Trial Court, the Honorable J. Hobart Darbyshire, ruled on Montgomery's Motion for Summary Judgment, granting summary judgment on the malicious prosecution and abuse of process claims and partial summary judgment on Shuck's defamation claim as to any statements made prior to March 10, 2013, and denying the Summary Judgment Motion as to Linn's consortium claim. (April 11, 2016 Montgomery Order, App. 197-219) On April 18, 2016, the Trial Court, the Honorable Marlita A. Greve, entered a similar Order on Schrader's Motion for Summary Judgment. (April 18, 2016 Schrader Order, App. 220-240) The Trial Court denied

Allen's Joinder to Schrader's Motion for Summary Judgment. (April 18, 2016 Allen Order, App. 241-243)

Trial to the Honorable Thomas G. Reidell commenced on April 29, 2016 and concluded on April 29, 2016. At the close of the evidence, Allen moved for directed verdict, and Shuck and Linn resisted. (Tr. 674-703, App. 370-377) Allen's Motion was granted. (Tr. 703-5, App. 377-378) Subsequently the Trial Court entered an Order Granting Directed Verdict. (April 29, 2016 Order Granting Directed Verdict, App. 256-257)

On April 29, 2016 the jury returned a verdict against Shuck and Linn. (April 29, 2016 Civil Verdict, App. 246-252) Subsequently, the Trial Court entered an Order for Judgment. (April 29, 2016 Order for Judgment, App. 253-255)

Linn and Shuck filed a Motion for New Trial on May 16, 2016, (May 16, 2016 Motion for New Trial, App. 258-261) On May 20, 2016, Allen filed a Resistance to Linn Appellant's Motion for New Trial. (May 20, 2016 Allen's Resistance to Motion for New Trial, App. 277-281) Schrader filed her Resistance to Linn and Shuck's Motion for New Trial. (May 24, 2016 Schrader's Resistance to Motion for New Trial, App. 262-268) Montgomery filed a Resistance to Linn

Appellant's Motion for New Trial on May 25, 2016. (May 25, 2016 Montgomery's Resistance to Motion for New Trial, App. 269-276) On June 7, 2016, the Trial Court entered an Order denying Linn and Shuck's Motion for New Trial. (June 7, 2016 Order, App. 282-283) On July 5, 2016, Linn and Shuck filed a Notice of Appeal. (July 5, 2016 Notice of Appeal, App. 284-285)

STATEMENT OF FACTS

Because this appeal involves two summary judgment rulings and the claim those rulings deprived Shuck and Linn of a fair trial, the Statement of Facts will reference statements from the summary judgment record. Therefore, citations to support the Statement of Facts will relate to the evidentiary materials filed in support of and resistance to the Motions for Summary Judgment (by reference with the abbreviation MSJ). Where there is a reference to transcript pages, the Statement of Facts will identify whose deposition is being cited. References to depositions that were attached to the Movants' or Resistors' materials will merely be referenced by the deposition page number.

Linn purchased a condo unit in 1997 at Partridge Villa. (Linn Depo. pp. 102:2-102:5, App. 321; Trial Exhibit 24, App. 292-296)

Shuck began residing in the property in 2006. (Shuck Depo. pp. 45:16-46:4, App. 45) At the time of construction of Linn's property, an exterior spigot was installed on the property which was hooked up to its own individual meter. (Shuck Depo. pp. 45:4-47:25, App. 45) The exterior spigot was for common use among the residents of Partridge Villa Townhomes Association, Inc. III (hereinafter PVTA), the property owner's association for the condominiums in which Linn, Montgomery and Schrader owned units. (Shuck Depo. pp. 45:4-47:25, App. 45) The water bills that were part of the summary judgment record show bills from 2003 to 2010 were sent to Partridge Villa, bldg c/o Allen Acct Svcs. (Resistance Montgomery's MSJ, Exh. 15, App. 163-187) Written materials were assembled and delivered to the Bettendorf Police Department and Scott County Attorney's office. Those materials included a three-page summary with attached schedule showing thirteen "alleged schemes." (Exh. 6, Schrader MSJ Resistance) This summary is dated November 7, 2012. The area entitled "BACKGROUND" made allegations including the following:

> The initial alleged scheme began in 1997 and was perpetrated by Linda L. Linn ("Linn"), and in later years by both Linn and Mark C. Shuck. It is not know (sic) what, if any, PVTA corporate office was held by Linn at this time. It is believed that Linn and Shuck were unmarried at the time.

> It is suggested that Linda Linn, through close interactions and communications with Allen Accounting (PVTA's accounting firm since 1995), as well as communications with the master homeowner's association and the owners/membership of PVTA, was a de facto officer of PVTA during the Shuck tenure as PVTA president, and should be included as an alleged co-conspirator with Shuck. Additionally, several of the alleged schemes had as beneficiaries of misappropriated funds, both Linn and Shuck.
>
> PVTA commenced an examination team in 2012. That team consists of Christy Schrader – PVTA Corporate President; Ellen Frey – PVTA Corporate Secretary, Assisted by Patrick Montgomery while in the position of PVTA Treasurer and currently a PVTA Corporate Member.

The area entitled "CASE SUMMARY" included the following allegations:

> Linda L. Linn (formerly known as Linda L. Linn-Holsteen) apparently is unemployed. Mack (sic) C. Shuck apparently is a Vice President of Corporate Affairs, Rock Island Arsenal, Chapter 5102, Association of Unites (sic) States Army. Shuck has also apparently established residency in Orlando, Florida.
>
> Allen Accounting Services, Inc., owned by Brad Allen, was the accounting firm for PVTA since 1995. A letter from Brad Allen regarding this examination is attached as an exhibit.

The report concluded with a recommendation, including the following:

> If the enclosed evidence supports criminal filings against Linn/Shuck, the PVTA membership would be willing to suggest that a plea arrangement would be acceptable in order to expedite the case load of the Scott County Attorney's office. It would be acceptable that Linn/Shuck not serve any jail time, just so long as any such plea arrangement include a felony judgment be implemented against Linn/Shuck. PVTA would

> also be willing to waive any order for restitution if that would expedite any plea arrangement.
>
> If conviction is realized, and if restitution id (sic) ordered, we ask that the restitution funds be evenly deposited to the other five PVTA resident's reserve funds, with none of the funds accruing to the Linn/Shuck reserve funds.

The summary page included thirteen alleged schemes, Scheme #01 being a claim that Linn and Shuck misappropriated water. The Bettendorf Police Department case report summarizes the initial report. (Exh. 7, Schrader MSJ Resistance):

> The following narrative reflects the information 1, Officer Tripp #4073, received concerning the report of fraud/misappropriation of funds from a homeowners association on Prairie Dr. that has taken place over the last several years.
>
> On 12/17/12 at about 0916 hrs. I was dispatched to the station for a walk-in report of fraud. I spoke to the complainant, Patrick Montgomery, who was making the complainant (sic) on behalf of the Partridge Villa Townhouse Association, Inc. III. He is a past treasurer of the association and is still a member and resident at 4054 Prairie Dr. The current president of the association, Christy Schrader, was not available to come to the station today for the report. Patrick gave me a binder with all of the information that he has been able to put together on the different ways in which the suspects, former president of the association, Mark C. Shuck and his wife Linda Linn, were able to use an estimated $24,000 in association moneys for things not approved for by the association. Patrick has already had some conversations with the Scott Co. Attorney's office and has been told there is enough information for a report and investigation.
>
> One of the ways in which Mark and Linda misappropriated funds was by having the water company install a separate

> water meter in the basement of their condo with an outside water spigot. The bill for the meter and the water was paid by association money and it was not authorized by the association. The estimated total for the water was $1,686.81. It was believed to have taken place from 1997 to 2010.

Bettendorf Police Department Detective Sgt. Levetzow (Levetzow) provided a narrative of his investigation. (Exh. 8, Schrader MSJ Resistance):

> The primary suspect in this case is Mark Shuck. Shuck resides at 4056 Prairie Lane, along with Linda Linn. Shuck was the President of the association from through 11/6/8, when he submitted his resignation. The resignation came about one month prior to the association taking a vote to remove Shuck as President. In early 2009, after Shuck's resignation, it was discovered that PTVA funds were nearly depleted. A review of the financial records for 2007/2008 noted over $19,000 in unauthorized disbursements. The review was conducted by PVTA members with the cooperation of Brad Allen (Allen Accounting Services).
>
> In regard to the attached folder, I talked with Julie Walton about this mess as Pat had initially talked with her about it. Most of the issues pointed out in the folder are past the statute of limitations and some are to unclear to move forward. However, the issue of using association funds to pay for water was not so this report will address that issue.
>
> Section 1 in the folder is in regard to the water bill. Shuck/Linn live at 4056 Prairie Lane. It is presumed they have water service at their residence, providing them with water for showers, dishes, laundry and other needs. This is being confirmed by subpoena, which is pending. However, a second water service was put in place back in March of 1997. The secondary account is listed to the same address, 4056 Prairie Lane, but it is in the name of association (Partridge Villa Bldg).

Levetzow prepared a narrative report of his December 17, 2012 interview with Christy Schrader. (Exh. 9, Schrader MSJ Resistance):

> The result of their search (her and Pat Montgomery) resulted in the initial police report and attached three ring binder of information. Among numerous issues was a water bill the association had been paying for years. Christy was aware of the bill and that the association was paying it. At some point she got around to asking what it the bill was actually for. The result was that the bill in question was going to 4056 Prairie Lane #HM under the name of the association. Christy talked to other association members and nobody knew why there was a bill or what possible reason there would be a need for water at that location.
>
> Christy told me that association members own their buildings but the exterior/yards belong to and are maintained by the association. She contacted Iowa American Water and learned that the account was for an exterior water faucet. This account was an additional account to the residence. Christy said that the buildings don't have exterior faucets because the exterior maintenance if (sic) the responsibility of the association, not the specific owners.
>
> Christy learned that Mark Shuck took the quarterly water bills to Allen Accounting Services (association accountant) to be paid. I had looked over the bills (provided by Montgomery) and noted the first bill was paid back on 6/24/97 via check #274 in the amount of $68...98. I asked her how Shuck was able to get the association to pay for his secondary water bill. Christy said she had no idea how that happened, especially since it started before he was association president. I asked her if there were any information in the association minutes. She told me that Shuck never passed along any of the historical information to her when she took over. The furthest back she could go was around November 2008. Every historical document (financial statements, corporate minutes, bank statements) were kept by Shuck and never relinquished.

> Christy said the second water service at Shuck's home was in the name of the association so once everything was figured out she had the water company terminate the service. This was done on 3/17/10. The final bill (check #1023 for $38.73) was written from the association's account at Christy's direction. I asked her why, once it was clear there was an issue, why she would still use association funds. She said she wanted this issue resolved and not left to change by trying to get Shuck to pay it.

As a result of the investigation, Shuck was charged with second degree theft by Complaint filed March 14, 2013. (Exh. D, Montgomery MSJ, App. 97) The complaint stated:

> During the noted dates the defendant had two water services at his residence. One service was private and the second was listed under Partridge Villa Townhomes Association, located at the defendant's address. The second service was for an outside water source.
>
> Starting on 6/24/97 the defendant started submitting the quarterly water bills (for the association account) to the association's accountant for payment. The payments continued until early 2010, when the association discovered the unauthorized use of their funds. The association had the water service terminated because the association had not approved it. The final bill was paid on 3/15/10. The association filed the complaint and advised it never authorized the water service or the use of their funds to pay for it.
>
> The total loss to the association over this time period was $1686.81.

The Minutes of Testimony were filed May 1, 2013. (Exh. 12, Montgomery MSJ Resistance, App. 153). The Minutes attribute to Allen the following:

> The accountant for the association, Brad Allen, expressed surprise that some of the defendant's disbursements and also at the defendant's request for several blank checks on the association account which he then utilized for his own personal use. As the accountant stated, the defendant used the association account as if it were his own personal checking account. Copies of all available police reports are attached. Also, a detailed accounting regarding the transactions is available for review and copying at the Office of the Scott County Attorney.

Schrader testified that although she didn't know when she and other individuals involved with PVTA discovered the water bill issue, once discovered, she contacted the water company to disconnect the water service to the spigot. (Schrader Depo. pp. 34:16—35:9, App. 96) The April 26, 2010 letter from the water company confirmed the account was closed on March 18, 2010 and the meter was removed on March 23, 2010. (Resistance to Schrader's Motion for Summary Judgment, Exhibit 9, App. 151-152)

Montgomery testified that he had his first conversation with the Scott County Attorney's office early in January 2012. (Montgomery Depo. pp. 32:8—36:5) Montgomery claimed that during his first conversation with the Scott County Attorney's office, he did not know about the water line issue. (Montgomery Depo. pp. 32:7—36:5, App. 85-86) Montgomery further claimed he discovered that everything that was being complained about in regards to Plaintiffs, was barred

by the statute of limitations. It was only at this point that the water line issue was raised as it was a claim that wouldn't be barred by statute of limitations. (Montgomery Depo. pp. 32:7—36:5, App. 85-86) Montgomery's testimony the waterline issue was discovered after the early January 2012 conversation with the Scott County Attorney's office is demonstratively false.

There can be no dispute that the water line issue was known no later than March of 2010 when Schrader contacted the water company to have service terminated, long before Montgomery's first conversation with the County Attorney. The reasonable inference why the water line issue was not presented to the Scott County Attorney's Office during Montgomery's initial conversation is Montgomery knew the water line issue did not constitute criminal wrongdoing. Since this was the only allegation that was not time barred, the reasonable inference is that after learning the alleged acts of wrongdoing were all time-barred, Montgomery and others contrived a false claim concerning a matter they knew was not wrong, but also knew would not be time-barred.

Montgomery admits that he made statements to law enforcement that were not true when he claimed that the water bills

started being sent to the association when Linn moved into her unit, despite having water bills dated back to May 1997, which was approximately seven months before Linn purchased the property. (Montgomery Depo. pp. 45:1—49:7, App. 89-90)

Montgomery admitted that his statement to law enforcement that the service address for the water bills was also the mailing address of the bill was incorrect since the bill went to PVTA. (Montgomery Depo. pp. 50:4—51:4, App. 90)

Montgomery acknowledged that since there were no barriers preventing access to the spigot, anyone could use the spigot. (Montgomery Depo. pp. 51:17—52:10, App. 90)

Montgomery testified that Linn was the only person he and the other PVTA members knew of that used the spigot. (Montgomery Depo. pp. 52:11—54:1, App. 90-91) Montgomery further testified that Schrader's mother-in-law never used the spigot. (Montgomery Depp. 53:5—53:19, App. 91) Schrader acknowledged that her mother-in-law used the spigot. (Schrader Depo. pp. 52:9—52:15, App. 139)

Montgomery admitted his statement to law enforcement that Linn and Shuck would have had to present each water bill to Allen for payment was untrue. (Montgomery Depo. pp. 55:8—55:21, App. 91)

Montgomery admitted that his statements to law enforcement that a second water service was put in place in March 1997 was untrue. (Montgomery Depo. pp. 58:24—59:5, App. 92)

Montgomery admitted he did not provide any information that would have shown that the water spigot had been in place since the building was built. (Montgomery Depo. 60:9—60:13, App. 92)

The exterior spigot was installed on the Linn/Shuck property prior to Linn's purchase in 1997. (Exhibit 13; Linn Affidavit, App. 291)

Linn and Shuck never installed any waterlines or water meters in their property. (Exhibit 13; Linn Affidavit, App. 291)

At least two bills were paid by PVTA for water service going into that waterline prior to Linn owning the property. (Exhibit 14, Plaintiffs' Resistance to Montgomery's Motion for Summary Judgment, App. 153-162)

Starting no later than December 3, 2003 and continuing until at least March 23, 2010, at least twenty-five water bills were sent directly from the water company to Allen's office for water service to the exterior spigot. (Exhibit 15, Plaintiffs' Resistance to Montgomery's Motion for Summary Judgment, App. 163-187)

Schrader first saw the spigot in 2008 when Schrader's mother-in-law moved into PVTA. (Exhibit 5, Schrader Depo. pp. 35:10-35:22)

Schrader never saw how the water line was set up. (Exhibit 5 pp. 38:1-38:10, App. 136) Schrader was unaware that there were two lines in Linn and Shuck's home, one for the unit and the other for the spigot. (Exhibit 5, Plaintiffs' Resistance to Schrader's Motion for Summary Judgment, Schrader Depo. pp. 38:4-38:8, App. 136) Schrader admits that when she spoke with the water company, she did not ask how long PVTA was paying for the water line or how long PVTA was billed for the waterline. (Exhibit 5, Plaintiffs' Resistance to Schrader's Motion for Summary Judgment, Schrader Depo. pp. 38:11-38:17, App. 136)

Despite providing the information she did to the police, Schrader admits that she did not know when the water line was established and admits that she has no information to suggest that the water line was not established as part of the original construction. (Exhibit 5, Plaintiffs' Resistance to Schrader Motion for Summary Judgment, Schrader Depo. pp. 38:18-39:8, App. 136)

Schrader admits she aided in compiling information included in the Case Summary (Exhibit 6, Plaintiffs' Resistance to Schrader

Motion for Summary Judgment, Schrader Depo., App. 144-147) which was submitted to the Bettendorf Police Department. (Exhibit 5, Plaintiffs' Resistance to Schrader Motion for Summary Judgment, Schrader Depo. pp. 43:9-44:23, App. 137)

Schrader admits that she made statements that she knew or should have known were false, or that she did not have a reasonable basis to believe were true, when she told law enforcement that the water line scheme was originally perpetrated by Linn starting in 1997. (Exhibit 5, Plaintiffs' Resistance to Schrader's Motion for Summary Judgment, Schrader Depo. pp. 56:6-57:19, App. 140-141)

ARGUMENT

I. WHETHER THE TRIAL COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT ON MARK SHUCK'S DEFAMATION CLAIM?

PRESERVATION OF ERROR

Linn and Shuck preserved error by resisting both the Montgomery and Schrader Motions for Summary Judgment. (March 14, 2016 Resistance to Montgomery's Motion for Summary Judgment, App. 106-107; March 14, 2016 Response to Montgomery's Statement of Facts, App. 108-122; March 14, 2016 Memorandum In Support of Resistance to Montgomery's Motion for

Summary Judgment; March 14, 2016 Resistance to Schrader's Motion for Summary Judgment, App. 123-124; March 14, 2016 Response to Schrader's Statement of Facts, App. 125-132; March 14, 2016 Memorandum In Support of Resistance to Schrader's Motion for Summary Judgment) Shuck and Linn further preserved error by raising the granting of Summary Judgment as a basis for their Motion for New Trial (May 16, 2016 Motion for New Trial, App. 258-261), and by filing a Notice of Appeal. (July 5, 2016 Notice of Appeal, App. 284-285)

STANDARD OF REVIEW

Review of a summary judgment ruling is for correction of errors at law. Summary judgment is proper only when the record shows no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The Court must view the record in the light most favorable to the nonmoving party. In deciding whether there is a genuine issue of material fact, the Court should also afford the nonmoving party every legitimate inference the record will bear. Eggiman v. Self-Insured Services Co., 718 N.W.2d 754, 758 (Iowa 2006).

ARGUMENT

Defamation

In ruling first on the Montgomery and then Schrader Motions for Summary Judgment, the Trial Courts declined to apply the discovery rule as a matter of general law, and in addition, did not follow those cases from other jurisdictions which recognized an exception where statements are secretive or inherently undiscoverable. The Court also rejected Shuck and Linn's argument that the republication, when the Complaint was filed, would bring any statements within the Statute of Limitations. Therefore, since all of Montgomery's statements were made prior to March 10, 2013, two years before the suit was filed, the Court granted summary judgment in its entirety on the defamation claim. With respect to Schrader, the Court limited Schrader to the statements she made when interviewed on March 12, 2013. The respective Courts' rulings with respect to Montgomery and Schrader therefore precluded the examination team report as a basis for defamation.

The unpublished decision of Davenport v. City of Corning, 742 N.W.2d 605, (Table) (Iowa App. 2007) is not persuasive under these circumstances. In Davenport, the defamatory statements were made

in a public setting. Here, the defamatory statements, including initial examination team report and subsequent interview, were provided only to the Bettendorf Police Department, and the Scott County Attorney's office. Because these statements were part of an investigation of allegations of criminal wrongdoing, they were not known to the public and subject to the confidentiality that attends any criminal investigation. Clearly Shuck and Linn did not know of the communications to the Police and County Attorney's office. Allowing the Statute of Limitations to begin to run when the statements are made to law enforcement and/or prosecutorial authorities, without regard to the discovery rule, could bar otherwise legitimate defamation claims. To the extent that Davenport v. City of Corning could be relied upon as good authority, it is clearly distinguishable from the circumstances here.

The Court of Appeals holding that the discovery rule did not apply to a defamation was not necessary to the result. It followed the Court's discussion that there was no publication because the statements alleged to be defamatory were republished to investigators hired by the Plaintiff who sought to elicit defamatory statements from the Defendant. Therefore, the subsequent

discussion about Statute of Limitations was not necessary to the decision.

There was no support for the principle the discovery rule didn't apply in the prior authorities cited. Clark v. Figge, 181 N.W.2d 211, 215 (Iowa 1970) was cited for the undisputed proposition that the two-year Statute of Limitations in Iowa Code Section 614.1(2) applies to defamation claims.

The Court in Davenport v. City of Corning relied on Kiner v. Reliance Ins. Co., 463 N.W.2d 9, 13 (Iowa 1990) that the Statute of Limitations begins to run on the date of publication. Kiner did not involve the discovery rule. Nor did Jean v. Hennessey, 69 Iowa 373, 375-76, 28 N.W. 645, 647 (1886). In fact, Iowa did not even adopt the discovery rule until 1967. Chrischilles v. Griswold, 1260 Iowa 453, 463, 150 N.W.2d 94, 100 (1967).

Publication is an essential element of defamation and requires communication of statements to one or more third persons. Bierman v. Weier, 826 N.W.2d 436, 464 (Iowa 2013); Huegerich v. IBP, Inc., 547 N.W.2d 216, 221 (Iowa 1996). A person who makes a defamatory statement is liable for damages resulting from the repetition of the statement if the repetition was reasonably

foreseeable. Huegerich v. IBP, Inc., 547 N.W.2d at 222; Brown v. First Nat'l. Bank, 193 N.W.2d 457, 555 (Iowa 1972). Recovery is limited to damages that were a probable and natural consequence of the original statement or its defamation. Huegerich, Id.; Brown, Id. Every repetition of a defamatory statement constitutes a claim which is separate and independent from any claims arising out of the original publication. Huegerich, Id.; Kiner v. Reliance Ins. Co., 463 N.W.2d 9, 14 (Iowa 1990). It would be reasonably foreseeable that the defamatory statements that were communicated by Montgomery, and others, to law enforcement and the County Attorney, for the express purpose of seeking to have Shuck and Linn criminally prosecuted, would be republished when the charges were filed.

Even if the discovery rule applies generally, many Courts have recognized an exception for statements that are not discoverable when initially published. A line of cases have recognized that the discovery rule applies to delay of accrual of defamation claim in those limited circumstances where the statements are secretive or inherently undiscoverable. Atkinson v. McLaughlin, 462 F.Supp.2d 1038, 1056 (N.D. 2006) (communications to Attorney General's office); Stahli v. Smith, 548 So.2d 1299, 1303 (Miss. 1989); Hobson

v. Coastal Corporation, 962 F.Supp. 1407, 1410-11 (D. Kan. 1997) (credit reporting information); Rinsley v. Brandt, 446 F.Supp. 850, 853 (D. Kan. 1997); McKown v. Dunn & Bradstreet, Inc. 744 F.Supp. 1046, 1049 (D. Kan. 1990); Rickman v. Cone Mills Corp., 129 Frd. 181, 185, fn. 5 (D. Kan. 1989).

The Trial Court's rulings were in error in granting summary judgment on any claims made prior to March 10, 2013. It was not until March 14, 2013, when the Complaint was filed, that Shuck and Linn were even aware of the defamatory statements. It is questionable whether the discovery rule should apply to defamation claims, but even if it does, two separate exceptions would allow them in this case. First, Iowa should recognize the exception which other states have and apply the discovery rule to the unique situation of statements that are secretive and not ascertainable until made public. In addition, the criminal Complaint was a republication of the defamation and the maker of the original makers of statements are responsible for the republication.

II. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON MARK SHUCK'S MALICIOUS PROSECUTION CLAIM?

PRESERVATION OF ERROR

See Issue I.

STANDARD OF REVIEW

See Issue I.

ARGUMENT

Malicious Prosecution

The initial Trial Court ruling, adopted with respect to the Montgomery Motion, adopted with respect to the Schrader Motion, on malicious prosecution, relied on Lukecart v. Swift & Company, 130 N.W.2d 716, 724 (Iowa 1964), which stated:

> The giving of information or the making of the acquisition, however, does not constitute procurement of the proceedings which the third person initiates thereon if it is left to the uncontrolled choice of the third party to bring the proceedings or not as he may see fit.

Shuck and Linn believe that the actions of the examination team go far beyond providing information or making an accusation. Two members of the examination team who had subsequent communications with law enforcement provided a detailed analysis and specifically recommended prosecution be commenced.

Citing Lukecart v. Swift & Company, 256 Iowa 1268, 130 N.W.2d 716 (Iowa 1964), the Court in Winckel v. Von Maur, Inc. 652 N.W.2d 453, 460 (Iowa 2002), noted:

> It is an essential element of a malicious-prosecution claim that the defendant procured or instigated criminal prosecution. (Citations omitted) As revealed by the quotation from Lukecart relied on by the Court of Appeals, we have recognized that merely furnishing information to the police is not the instigation of a criminal prosecution. Our cases also recognize, however, that ordinarily the filing of a criminal complaint is the instigation of criminal charges, and indeed, a private person may be an instigator even though that person has not filed a formal complaint. (Citation omitted)

In this case, the examination team compiled a lengthy analysis of information for the express purpose of having criminal charges brought against Shuck and Linn. Moreover, Montgomery, and the others, knew the information concerning the waterline was false. Montgomery initially met with the County Attorney's office in 2011, prior to the November 7, 2011 "Case Summary." In this meeting Montgomery raised other allegations of impropriety, but did not make any claim with respect to the waterline. After the County Attorney told Montgomery that all of his claims of wrongdoing were barred by the Statute of Limitations, Montgomery came back with allegations concerning the use of the waterline. Since the waterline had been shut off on March 11, 2010, the examination team would have known

about the waterline issue. Moreover, Montgomery admits he provided false information concerning the waterline. Under these circumstances, it may be fairly said that their actions procured the prosecution.

CONCLUSION

Shuck and Linn did not know that Montgomery and Schrader had compiled a report provided to police and the County Attorney containing statements that were not only false, but known to be false. Shuck and Linn did not know until the criminal Complaint was filed against Shuck, and filed their claims within two years. While it may be proper to refuse to apply the discovery rule to defamation claims, the Court should recognize an exception where the communications are initially not public. In addition, the Court should find that the republication subjects the original defamers to liability. In addition, when persons knowingly compile a report for the express purpose of seeking criminal prosecution, under circumstances where they know the facts they are giving for the one claim they know is not subject to a statute of limitations, are false, it may be fairly said that they procured the prosecution.

REQUEST FOR ORAL SUBMISSION

Plaintiffs-Appellants Linda Linn and Mark Shuck would request the opportunity to be heard at oral argument as the complexities of the matters are appropriate for oral argument.

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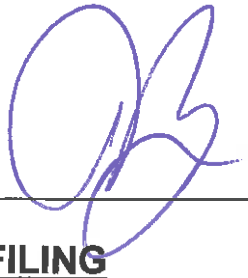

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