IN THE SUPREME COURT OF IOWA

No. 16-1136

LINDA LINN and MARK SHUCK,

Plaintiff-Appellants,

vs.

PAT MONTGOMERY, CHRISTY SCHRADER, and BRAD ALLEN,

Defendant-Appellees.

Appeal from the Iowa District Court in and for Scott County
The Honorable J. Hobart Darbyshire, Judge
The Honorable Marlita A. Greve, Judge
The Honorable Thomas G. Reidel, Judge

APPELLEE BRAD ALLEN'S FINAL BRIEF

PAULA L. ROBY AT0006749
NICHOLAS J. KILBURG AT0010571
ELDERKIN & PIRNIE, P.L.C.
316 Second St. SE Ste. 124, P.O. Box 1968
Cedar Rapids, IA 52406-1968
T: (319) 362-2137 F: (319) 362-1640
proby2@elderkinpirnie.com nkilburg@elderkinpirnie.com
ATTORNEYS FOR DEFENDANT-APPELLEE BRAD ALLEN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. The trial court properly directed a verdict in Allen's favor, and Plaintiffs have waived any assignment of error against Allen on appeal by failing to raise any such alleged error in their initial Brief.

Authorities

Iowa R. App. P. 6.903

Barreca v. Nickolas, 683 N.W.2d 111 (Iowa 2004)

Fuller v. Local Union No. 106 of United Bhd. of Carpenters & Joiners of Am., 567 N.W.2d 419 (Iowa 1997)

Lukecart v. Swift & Co., 130 N.W.2d 716 (Iowa 1964)

ROUTING STATEMENT

This case is appropriate for resolution by the Iowa Court of Appeals because it involves the application of established law to a particular set of facts. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

I. Summary of Argument

After an almost weeklong trial, the trial court, the Honorable Thomas G. Reidel, directed a verdict in favor of Defendant-Appellee Brad Allen. The trial court was correct in directing a verdict in Allen's favor: the evidence Plaintiffs presented at trial could not have supported a verdict against him. Plaintiffs' remaining claims against Allen's co-Defendants went to the jury, which found in favor of Schrader and Montgomery in a verdict was supported by more than sufficient evidence.

Allen sits in a different position in this appeal than his co-Defendants (and co-Appellees), Christy Schrader and Pat Montgomery, who both obtained partial summary judgment before trial removing portions of Plaintiffs' claims against them.

First, because Plaintiffs' Proof Brief did not include a separate, numbered argument directed against the trial court's grant of a directed verdict in Allen's favor, they have waived any argument against the directed verdict under Iowa Rule of Appellate Procedure 6.903(2)(g).

Second, because a directed verdict was entered in Allen's favor, rather than a ruling on a motion for partial summary judgment, Allen reviews the evidence (and lack thereof) supporting the grant of the directed verdict on each of the Plaintiffs' claims. This directed verdict was proper, as Plaintiffs did not provide sufficient evidence for a jury to find liability on the part of Allen. Instead, the evidence at trial showed Allen's connection to the "examination team" was almost nonexistent, and the link to Shuck's prosecution and Plaintiffs' resulting damages so tenuous as to be non-existent.

II. Background

Mark Shuck ("Shuck") and Linda Linn ("Linn") were residents of Partridge Villa Building X ("Building X"), a condominium building managed by Partridge Villa Townhomes Association, Inc. III

("PVTA") in Bettendorf, Iowa. At some point in 1997, a second waterline was put in behind their condominium, with a separate meter charged to PVTA. Shuck served as PVTA president from 2004 to 2008, during which time he set up contracts for his personal business to do work on Building X, including cleaning the gutters.

Montgomery and Schrader owned respective units in Building X for a time, while Allen served as the accountant for PVTA. Schrader took over as PVTA president at a time after Shuck had resigned, while Montgomery took over as treasurer in 2012. After Montgomery joined the PVTA leadership, the board noticed irregularities in the expenditure of PVTA funds during Shuck's tenure.

An "examination team" comprising Schrader, Montgomery, and Ellen Frey ("Frey") was assembled to review documentation of PVTA funds during that time. The examination team assembled a written report that Montgomery discussed with the Scott County Attorney's office, and then turned over to the Bettendorf Police Department.

Plaintiffs assert Allen provided support for the examination team, but notably, it was undisputed Allen had never spoken with Montgomery until after the current case was filed.

After learning the issues raised in their examination were incapable of moving forward as criminal charges because they were outside the applicable statute of limitations, Montgomery relayed an additional allegation Shuck and Linn had committed theft by having PVTA pay the bill for the second spigot behind their unit. Based on the amount of funds diverted from PVTA for this purpose over the years, Bettendorf Police Detective Sergeant Brad Levetzow ("Levetzow" or "Detective Levetzow") filed a complaint and affidavit charging Shuck with theft. While the charges against Shuck were later dismissed, Detective Levetzow stated at trial he believed probable cause existed, and that he could obtain a conviction of Shuck at the current time if not for the statute of limitations having run in the meantime.

III. Procedural History

Allen agrees with Plaintiffs' recitation of the procedural history of the case.

STATEMENT OF THE FACTS

Partridge Villa Townhomes Association, Inc. III ("PVTA") is a homeowners' association located in Bettendorf, Iowa. Tr. 92:15-24, app. 56. It represents and manages several condominium buildings, including the building relevant to the immediate proceedings, Partridge Villa Building X ("Building X"). Ruling on Defendant Christy Schrader's Motion for Summary Judgment at 1, app. 220.

Shuck and Linn are spouses, and lived together in Building X. Tr. 99:18-23, app. 327. Shuck moved into Building X in 2001, and later served as president of PVTA from 2004 to 2008. Tr. 645:13-17; tr. 488:14-16, app. 358.

Allen served as an accountant and tax preparer for PVTA beginning in 1995. Tr. 333:1-16, app. 352. While Shuck was PVTA president, Allen had possession of the PVTA checkbook, received its billing statements and bills, and prepared quarterly financial statements. Tr. 106:23-107:3, 340:1-341:7, app. 329. Allen dealt with both Shuck and Linn while performing association business during this time. Tr. 334:13-17, app. 352.

Schrader moved into Building X and joined PVTA in 2008,

and later served as PVTA president. Tr. 488:14-16, app. 358. After Shuck's term as president, PVTA members discovered the association had charges it had not approved, including a waterline serving a spigot outside of Linn's and Shuck's unit ("waterline"). Ruling on Defendant Pat Montgomery's Motion for Summary Judgment at 3, app. 199. This waterline had a separate meter installed in 1997, tr. 103:18-24, app. 328, and the separate meter was billed to PVTA until 2010. Tr. 147:25-149:3, app. 337-38. The checks used to pay the waterline's bills were written from PVTA's account. 2016/04/18 Ruling on Defendant Christy Schrader's Motion for Summary Judgment at 2, app. 221. An April 26, 2010 letter from the water company confirmed the waterline account was closed in March of 2010 and the meter removed. Tr. 513:6-8, app. 359.

Montgomery became a PVTA member in July 2011, and served as PVTA treasurer in 2012. 2016/04/11 Ruling on Defendant Pat Montgomery's Motion for Summary Judgment at 2, app. 198.

In early 2012, PVTA members discovered additional .unapproved charges paid using PVTA funds and incurred during Shuck's tenure, and spoke with an Assistant Scott County Attorney. Tr.

224:10-17, app. 339. An "investigative team" for PVTA was assembled, comprising Schrader, Montgomery, and Frey. Ex. 1; tr. 92:25-93:9, app. 325-26. The investigative team collected additional information from PVTA members, which Montgomery then compiled. Tr. 231:15-21, app. 340, 239:5-8, app. 3421. Allen did not speak with Montgomery during this time. Tr. 345:1-14, 347:15-20, app. 353.

Montgomery then met with an Assistant County Attorney from the Scott County Attorney's Office, presenting the alleged financial schemes run by Shuck and Linn during Shuck's tenure, but not including the waterline information. Tr. 232:2-233:6, app. 340-41. Montgomery learned during this meeting these allegations were all barred by the applicable statute of limitations. Tr. 233:7-10, app. 341. After learning this, and separately learning of the waterline issue, Montgomery spoke with an Assistant County Attorney regarding the waterline and misappropriated funds issue. Tr. 236:19-237:9, app. 341-42.

Montgomery delivered the binder to the Bettendorf Police Department in December of 2012. Tr. 224:11-17, app. 339. Detective Levetzow met with Montgomery to discuss the matters addressed

in the binder on March 4, 2013, and possibly spoke with on other occasions. Tr. 89:23-90:19, app. 325. On March 12, 2013, Detective Levetzow interviewed Schrader about the unauthorized charges and Shuck's involvement. *Id.* at 91:9-13, app. 325. On March 14, 2013, Detective Levetzow initiated criminal charges against Shuck by filing a complaint and affidavit alleging Shuck had committed theft through the unauthorized use of PVTA funds in paying the quarterly water bills between 1997 and 2010. Ex. 13, app. 291; tr. 91:20-24, 94:6-25, app. 325-26.

Allen's only connection to the "examination team" was a single phone call from Schrader informing him Levetzow might be calling him. Tr. 363:22-13, app. 355. Schrader did not make any requests of Allen during this phone call regarding what he should say. *Id.*

Detective Levetzow had not yet spoken to Allen when he filed the complaint. *Id.* at 91:9-19, app. 325. When Levetzow met with Allen, *after* the complaint was filed, Allen informed him he had recently turned over the PVTA checkbook and financial records to the association. Tr. 106:12-22, app. 329.

An Assistant Scott County Attorney filed a trial information

formally charging Shuck with Second Degree Theft on May 1, 2013. 2016/04/18 Ruling on Defendant Christy Schrader's Motion for Summary Judgment at 3, app. 222. The district court ultimately dismissed the charges against Shuck on July 3, 2013 because the alleged theft took place outside the statute of limitation. *Id.* at 4, app. 223.

ARGUMENT

I. The trial court properly directed a verdict in Allen's favor, and Plaintiffs have waived any assignment of error against Allen by failing to raise any such alleged error in their initial Brief.

a. Plaintiffs have waived any claim of error regarding the directed verdict in Allen's favor because they failed to preserve error and failed to properly bring the issue before this Court.

Plaintiffs have failed to properly preserve for appellate review any alleged error in the trial court's directing a verdict in Allen's favor, and have failed to properly bring the issue before this Court. They have thus waived any assignment of error.

In their Brief, Linn and Shuck raised two issues: whether the trial court erred in granting Montgomery's and Schrader's motions for partial summary judgment on Shuck's defamation claim, and whether the trial court erred in granting Montgomery's and

Schrader's separate motions for partial summary judgment on Shuck's malicious prosecution claim. Plaintiffs' Proof Brief at 22, 27. Neither of these motions involve Allen, whose request to join the Schrader Motion was denied and who ultimately did not join in either of the Motions. *See* 2016/04/18 Order, App. 241. Allen instead obtained a separate directed verdict after the presentation of evidence at trial. *See* tr. 694:12-705:19, app. 375-78; 2016/05/02 Order Granting Motion for Directed Verdict, app. 256. Plaintiffs make no reference to the directed verdict in their argument headings.

The Iowa Rules of Appellate Procedure require an appellant to file a brief containing an argument section, with "each issue raised on appeal . . . addressed in a separately numbered division." Iowa R. App. P. 6.903(2)(g). Each of these divisions must contain "an argument containing the appellant's contentions and the reasons for them with citations to the authorities relied on and references to the pertinent parts of the record . . . . *Failure to cite authority in support of an issue may be deemed waiver of that issue*." Iowa R. App. P. 6.903(2)(g)(3) (emphasis added).

Rather than raising specifications of error pertaining to Allen,

Plaintiffs instead chose to concentrate on the alleged errors in the trial court's rulings in favor of the other Defendant-Appellees in this case, Montgomery and Schrader. The first argument section of Plaintiffs' Proof Brief contends the trial court erred in granting partial summary judgment in Montgomery's and Schrader's favor on Shuck's claims of defamation relating to statements made before March 10, 2013. Plaintiffs' Proof Brief at 22, 26-27. The Plaintiffs' second argument centers on their belief the trial court erred in granting Montgomery and Schrader partial summary judgment on Shuck's malicious prosecution claim, claiming the trial court's application of *Lukecart v. Swift & Company*, 130 N.W.2d 716, 724 (Iowa 1964) was in error. Plaintiffs' Proof Brief at 27-29.

Because Plaintiffs did not raise any separate and specific allegations pertaining to the trial court's order of a directed verdict in Allen's favor in their initial Brief, or present any argument against the grant of a directed verdict in Allen's favor, they have waived any arguments against Allen on appeal, even if they now raise an assignment of error pertaining to Allen in their reply. *See, e.g.*, *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 642 (Iowa

1996) ("Parties cannot assert an issue for the first time in a reply brief. When they do, this court will not consider the issue.") (citing *Young v. Gregg*, 480 N.W.2d 75, 78 (Iowa 1992); *Ames v. Bd. of Supervisors*, 12 N.W.2d 567, 570-71 (Iowa 1944)). Even if these claims were vaguely included in Appellants' Brief, without a separate argument, they have not adequately raised the issue for appellate review. *See Gehrke, Inc. v. Steeple Chase Farms, LLC*, No. 15-0601, 2016 WL 156025 at *10 n. 3 (Iowa App.) (declining to address issue appellant did not separately argue until its reply brief) (citing *State v. Mann*, 602 N.W.2d 785, 788 n. 1 (Iowa 1999)).

Because Plaintiffs failed in their initial Brief to specify any alleged error made by the trial court in Allen's favor, they cannot raise any such claim now.

b. Standard of Review

An appellate court will affirm the grant of a directed verdict where no substantial evidence supports each element of a plaintiff's claim. *Godar v. Edwards*, 588 N.W.2d 701, 705 (Iowa 1999) (citing *Stover v. Lakeland Square Owners Ass'n*, 434 N.W.2d 866, 873 (Iowa 1989)). "Evidence is substantial when a reasonable mind

would accept it as adequate to reach a conclusion." *Johnson v. Dodgen*, 451 N.W.2d 168, 171 (Iowa 1990). In reviewing the district court's decision, the appellate court views in the light most favorable to the party against whom the motion was directed. *Godar*, 588 N.W.2d at 705 (citing *Johnson*, 451 N.W.2d at 171).

c. Argument

As discussed above, Plaintiffs did not properly bring the issue of Allen's directed verdict before this Court. Even if they had, however, the trial court correctly directed a verdict in Allen's favor: Plaintiffs' claims were not supported by sufficient evidence at trial to raise a question for the jury. For the Court's convenience, Allen will address each claim in turn.

i. The trial court properly directed a verdict in favor of Allen on Shuck's malicious prosecution claim.

To reach the jury on his malicious prosecution claim against Allen, Shuck was required to show sufficient evidence to support a verdict in his favor on the following elements: (1) a previous prosecution of Shuck; (2) instigation of that prosecution by Allen; (3) termination of the prosecution by acquittal or discharge; (4) a lack of

probable cause; (5) malice on the part Allen in bringing the prosecution; and (6) damages. *See Employers Mut. Cas. Co. v. Cedar Rapids Television Co.*, 552 N.W.2d 639, 643 (Iowa 1996); *Royce v. Hoening*, 423 N.W.2d 198, 200 (Iowa 1988). Plaintiffs' case against Allen failed on several of these elements, making it proper for the trial court to direct the verdict in Allen's favor.

In discussing the prosecution of Shuck, Detective Levetzow made clear his charging affidavit, Plaintiffs' exhibit 13, was filed before he had spoken to Allen, and that his filing of the complaint was based on statements made by parties *other* than Allen. Tr. 91:2-93:9, app. 325. Instead, Levetzow spoke with Allen only after his complaint that led to the prosecution against Shuck was submitted. *Id.* at 106:12-14, app. 329. For this reason alone, Plaintiffs could not present sufficient evidence Allen "instigated" the prosecution.

Further, however, the Iowa Supreme Court has previously recognized that merely providing information to an authority who then independently decides to file an action is not the type of "instigation" required to support the second element of a malicious prosecution claim. See *Lukecart*, 130 N.W.2d at 723-24. In that case, the

court cited to the Restatement of Torts, which explains that providing such information to a third party who then institutes criminal proceedings "does not constitute a procurement of the proceedings which the third person initiates thereon if it is left to the uncontrolled choice of the third person to bring the proceedings or not as he may see fit." *Id.* (quoting Restatement (First) of Torts, § 653, cmt. b).

Levetzow made clear his decision to pursue charges against Shuck was independent of any of the Defendants' statements, as he had the ability to independently review the information presented to him, and relied primarily on the billing statements provided to him in doing his investigation, reaching his own conclusions, and submitting the charge to the county attorney. Tr. 131:2-132:22, app. 333; tr. 137:6-138:6, app. 335.

There was likewise no evidence suggesting the county attorney who pursued charges against Shuck did so anything short of independently. Instead, Detective Levetzow made clear the county attorney's office proceeded on its own. Tr. 96:19-98:2, app. 326-27.

No evidence was presented at trial asserting the county attorney had any contact with Allen.

Additionally, Levetzow made clear he not only believed he had probable cause to pursue charges against Shuck at the time he was arrested, but that Levetzow still believed there was probable cause and that he could have obtained a conviction against Shuck but for the statute of limitations. Tr. 140:8-20, app. 335. Levetzow testified as to his experience and training to support his ability to support a probable cause determination. Tr. 130:6:24, app. 333. Even if a reasonable jury disagreed with Detective Levetzow's assessment of the likelihood of conviction, it could not find the charges against Shuck proceeded without probable cause, as required for a malicious prosecution claim against Allen.

Further, no reasonable jury could have found malice on the part of Allen in his statements to Detective Levetzow. It was undisputed Allen in fact corrected a misunderstanding that had arisen, such that Allen's statements at least in part *supported* Shuck's claims of not having misappropriated funds. *See* tr. 133:9-18, app. 334 (Detective Levetzow stating Allen explained to him the bills

were sent to Allen, rather than to Plaintiffs, as they were originally marked); 705:7-11, app. 378 (trial court agreeing Allen's statements on the water bill issue supported Shuck). Even Plaintiffs' counsel characterized this as Allen having "corrected" misinformation. *Id.* at 111:18-22, app. 330.

Because no reasonable jury could have found Allen "instigated" the charges against Shuck merely by speaking with Detective Levetzow *after* the Detective had submitted his complaint against Shuck, that Detective Levetzow lacked probable cause in bringing the complaint, or that Allen "instigated" the charges with malice, the trial court correctly granted a directed verdict in Allen's favor on Shuck's claim of malicious prosecution.

ii. The trial court properly directed a verdict in favor of Allen on Shuck's abuse of process claim.

Regarding the abuse of process claim, Plaintiffs could not present sufficient evidence to raise an issue as to whether Allen made an "improper" use of the legal process when he merely answered Detective Levetzow's questions, and it was undisputed Detective Levetzow had already signed the affidavit leading to the charges against Shuck before he spoke with Allen. For these reasons, the

trial court correctly directed a verdict in Allen's favor on Shuck's abuse of process claim.

The tort of abuse of process is "the use of legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it was not designed." *Palmer v. Tandem Mgmt. Servs., Inc.*, 505 N.W.2d 813, 817 (Iowa 1993) (citing *Lindaman v. Bode*, 478 N.W.2d 312, 314-15 (Iowa App.1991); *Wilson v. Hayes*, 464 N.W.2d 250, 266 (Iowa 1990)). "The three elements of an abuse-of-process claim are: (1) the use of a legal process; (2) its use in an improper or unauthorized manner; and (3) the plaintiff suffered damages as a result of the abuse." *Fuller v. Local Union No. 106 of United Bhd. of Carpenters & Joiners of Am.*, 567 N.W.2d 419, 421 (Iowa 1997) (citing *Palmer*, 505 N.W.2d at 817; *Wilson*, 464 N.W.2d at 266). The tort is limited in circumstances like the present case, however:

> The mere report to police of possible criminal activity does not constitute legal process. One might criticize selfish or improper motives prompting a false or reckless report. Extreme cases can be imagined in which such a report might become actionable on another basis. But a report to the police is not sufficient to constitute "legal process" required for an abuse-of-process claim.

Fuller, 567 N.W.2d at 422.

Not only would calling Allen's statements part of an "abuse of process" against Shuck go against Iowa law making clear reports of criminal activity to police are not use of the legal process, it would require a jury to find Allen had somehow gone back in time to influence Levetzow before ever speaking with him.

Even if Plaintiffs could show Allen's discussion with Levetzow was enough to rise to the level of "legal process", however, they did not introduce sufficient evidence to show it was done primarily for an impermissible or illegal motive, as required for Shuck's claim of abuse of process. *Wilson*, 464 N.W.2d at 266. "A very restrictive view is taken of this element." *Palmer*, 505 N.W.2d at 817 (citing *Wilson*, 464 N.W.2d at 267). Not even proof of an improper motive by the person filing the lawsuit "for even a malicious purpose" will satisfy this element. *Palmer*, 505 N.W.2d at 817 (citing *Grell v. Poulsen*, 389 N.W.2d 661, 664 (Iowa 1986)).

Because Shuck could not present sufficient evidence for a reasonable jury to find Allen used a legal process against him, much

less did so improperly, the trial court corrected directed a verdict in Allen's favor on the issue.

iii. The trial court properly directed a verdict in favor of Allen on Plaintiffs' defamation claim.

The trial court correctly granted Allen's motion for a directed verdict on Plaintiffs' defamation claim. Plaintiffs simply failed to present sufficient evidence for a reasonable jury to find Allen had made any defamatory statements regarding either of them.

Plaintiffs' defamation claim rested on Detective Levetzow's March 18, 2013 interview of Allen. To show Allen defamed Plaintiffs, they were required to present evidence Allen had made statements "tend[ing] to injure [their] reputation and good name." *Huegerich v. IBP, Inc.*, 547 N.W.2d 216, 221 (Iowa 1996) (citation omitted). Defamation includes "the twin torts of libel and slander. . . . 'Libel is generally a written publication of defamatory matter, and slander is generally an oral publication of such matter.'" *Yates v. Iowa W. Racing Ass'n*, 721 N.W.2d 762, 768 (Iowa 2006) (quoting *Schlegel v. The Ottumwa Courier*, 585 N.W.2d 217, 221 (Iowa 1998)).

However, "Iowa cases have long held that truth is a complete defense to a defamation action." *Hovey v. Iowa State Daily Publication Bd., Inc.*, 372 N.W.2d 253, 255 (Iowa 1985).

> [M]any charges are made in terms that are accepted by their recipients in a popular rather than a technical sense . . . It is not necessary to establish the literal truth of the precise statement made. Slight inaccuracies of expression are immaterial provided the defamatory charge is true in substance.

Id. (quoting Restatement (Second) of Torts § 581A cmt f (1976)). As such, "if an allegedly defamatory statement is substantially true, it provides an absolute defense to an action for defamation." *Hovey*, 372 N.W.2d at 256. "Under this view, it is sufficient to show that the charge or imputation is 'substantially true, or as it is often put, to justify the 'gist', the 'sting' or the 'substantial truth' of the defamation." *Id.* (quoting W. Prosser and W. Keeton, Prosser and Keeton on The Law of Torts 842 (5th ed. 1984)).

In this case, even if Plaintiffs had been able to present sufficient evidence from which a jury could have found Allen's statements defamatory, the Iowa Supreme Court has also made clear an affirmative defense of qualified privilege may attach to otherwise-defamatory statements, protecting them from liability. *See Barreca*

v. Nickolas, 683 N.W.2d 111, 117 (Iowa 2004) (discussing doctrine of qualified privilege). This defense arises because "[t]he law recognizes certain situations may arise in which a person, in order to protect his own interests or the interests of others, must make statements about another which are indeed libelous. When this happens, the statement is said to be privileged, which simply means no liability attaches to its publication." *Vojak v. Jensen*, 161 N.W.2d 100, 105 (Iowa 1968).

This privilege:

> exists with respect to statements that are otherwise defamatory if the following elements exist: (1) the statement was made in good faith; (2) the defendant had an interest to uphold; (3) the scope of the statement was limited to the identified interest; and (4) the statement was published on a proper occasion, in a proper manner, and to proper parties only.

Winckel v. Von Maur, Inc., 652 N.W.2d 453, 458 (Iowa 2002) (citing *Theisen v. Covenant Med. Ctr., Inc.*, 636 N.W.2d 74, 83-84 (Iowa 2001)). It can be lost when statements are made with actual malice. *Barreca*, 683 N.W.2d at 111 (citing *Vojak*, 161 N.W.2d at 105).

The only statements made by Allen within the scope of the statute of limitations were those during his March 18, 2013 interview with Detective Levetzow; any prior statements by Allen were outside the applicable statute of limitations. Tr. 704:8-20, app. 377. Allen moved at trial to conform his answer to the evidence presented and incorporate qualified privilege as an affirmative defense. Tr. 697:13-24, app. 376. Plaintiffs objected. *Id.* The trial court did not reach the issue, as it determined the only potentially-defamatory statements made by Allen within the statute of limitations were true, except possibly statements unrelated to and thus unable to show causation for Shuck's alleged damages. *Id.* at 704:8-20, app. 377.

As the trial court stated in its oral ruling granting Allen's motion, Plaintiffs were unable to present evidence sufficient to support the idea any of Allen's statements during the March 18, 2013 interview were untrue, except possibly for his statement regarding the number of trees in the neighborhood. Further, Allen's statements to Levetzow during Levetzow's interview were made in his capacity as the accountant for the condominium association. Allen possessed

a proper interest in ensuring his client's money had not and would not be misappropriated, while Levetzow was a law enforcement officer investigating just such a misappropriation. Allen's statements were properly limited in scope, and made without any expectation of publication by Levetzow, much less an improper one.

Even at that point, the only statement Allen made that Plaintiffs presented any evidence *might* have been untrue—much less made with malice or reckless disregard for its truth—was Allen's statement regarding trees in the area. Tr. 113:23-114:114:25, app. 331; 353:20-354:7, app. 354. Regardless of the actual tree count, the trial court was correct that such a statement would be so distant from Shuck's prosecution and resulting damages, and the causal connection between the two so attenuated, that no reasonable jury could have found it a proper basis for defamation liability. Tr. 704:13-18, app. 377.

The only evidence presented at trial showed Allen's statements were not defamatory; were true or represented his opinion; or were properly protected by qualified privilege. Allen's only statement that fell within the statute of limitations that Plaintiffs could

argue was *not* wholly truthful was a statement of Allen's erroneous belief as to the conditions of the trees in the neighborhood, and was wholly immaterial to their claim. For these reasons, the trial court did not err in granting a directed verdict in Allen's favor on Plaintiffs' defamation claim.

iv. The trial court properly directed a verdict in favor of Allen on Plaintiffs' concerted action claim.

To succeed in concert of action claim, Plaintiffs were required to show more than "[s]peculation, relationship, or association and companionship". *Cf. Ezzone v. Riccardi*, 525 N.W.2d 388, 398 (Iowa 1994), *as amended on denial of reh'g* (1994) (citing *Am. Sec. Benevolent Ass'n, Inc. v. Dist. Court*, 147 N.W.2d 55, 63 (Iowa 1966)). Instead, the claim required either an independent breach of duty by Allen, or that Allen aided and abetted the other Defendants in committing a wrong against the Plaintiffs. *See Reilly v. Anderson*, 727 N.W.2d 102, 107 (Iowa 2006) (citing Restatement (Second) of Torts § 876, at 315 (1979)).

The only evidence presented at trial to suggest Allen "acted in concert" with the other Defendants was Schrader's call to Allen to let him know Levetzow would be calling to speak with him. Tr.

363:22-364:13, app. 355. It was undisputed Allen had not met Montgomery, or even heard of him, prior to the Plaintiffs' filing their suit. Tr. 368:8-21, app. 356. There was no evidence from which a reasonable jury could have found Allen and the other Defendants "acted in concert" against Plaintiffs, and Plaintiffs' claims otherwise relied wholly on mere speculation. For these reasons, the trial court properly directed a verdict in Allen's favor on Shuck's claim of concerted action.

v. The trial court properly directed a verdict in favor of Allen on Linn's consortium claim.

Finally, because no evidence existed that would have led a reasonable jury to believe Allen had breached any duty or caused damage to Shuck on his various theories of liability, as discussed above. Without damage to Shuck, there can be no derivative claim of lost consortium for Linn. The trial court did not err in granting Allen a directed verdict on this claim.

CONCLUSION

Plaintiffs have failed in their Proof Brief to directly address any issues with the trial court's grant of a directed verdict in favor of Allen. Because they did not raise any such issues in their initial

Brief, they have waived any argument they may have under Iowa R. App. P. 6.903(2)(g)(3), and their appeal against Allen should be dismissed on these grounds.

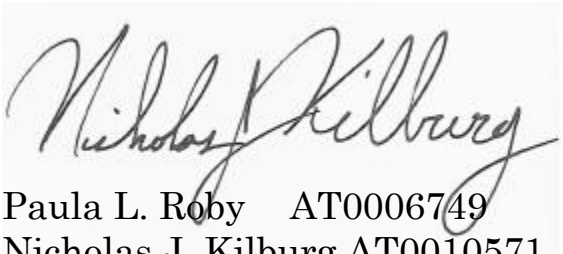
Even if Plaintiffs had offered an argument against the directed verdict in Allen's favor, however, the trial court did not err in granting the directed verdict. Plaintiffs could not show Allen's statements to Detective Levetzow, made *after* Levetzow had filed the affidavit and complaint starting the process of charging Shuck, constituted "instigation" of prosecution against Shuck or the "use" of legal process. Further, Allen's statements during the interview were either absolutely privileged as true; mere statements of opinion; or entitled to qualified privilege as having been made on a proper occasion between parties with a proper interest in the statements, without expectation of excessive publication, and without malice. Claims of Allen's involvement in a "concerted action" would have been mere speculation, as would any link between Allen's statements and Linn's allegation of lost consortium. Ultimately, no reasonable jury could have found Allen liable to Plaintiffs on their

various theories. For these reasons, the trial court did not err in granting a directed verdict in Allen's favor on Plaintiffs' claims.

Defendant-Appellee Brad Allen respectfully requests the Court dismiss Plaintiffs' appeal at their cost.

STATEMENT ON ORAL ARGUMENT

Allen does not request oral argument.

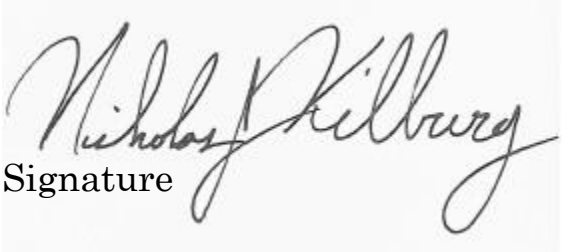


Paula L. Roby AT0006749
Nicholas J. Kilburg AT0010571
Elderkin & Pirnie, P.L.C.
316 Second Street SE, Suite 124
P.O. Box 1968
Cedar Rapids, IA 52406-1968
T: (319) 362-2137
F: (319) 362-1640
proby2@elderkinpirnie.com
nkilburg@elderkinpirnie.com
ATTORNEYS FOR DEFEND-ANT-APPELLEE BRAD ALLEN

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because it contains 5,095 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook.



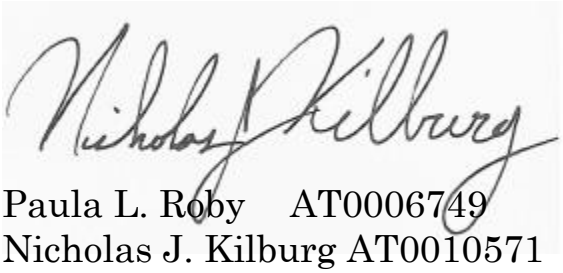
Signature

2017-01-26
Date

CERTIFICATE OF FILING AND SERVICE

I certify the preceding Defendant-Appellees' Proof Brief was filed with the Supreme Court of Iowa by electronically filing the same with the Iowa Supreme Court Clerk on January 26, 2017.

I further certify I served the preceding Defendant-Appellees' Proof Brief on attorneys of record for all other parties by electronically filing this document in accordance with the Chapter 16 Rules on January 26, 2017.



Paula L. Roby AT0006749
Nicholas J. Kilburg AT0010571
Elderkin & Pirnie, P.L.C.
316 Second Street SE, Suite 124
P.O. Box 1968
Cedar Rapids, IA 52406-1968
T: (319) 362-2137
F: (319) 362-1640
proby2@elderkinpirnie.com
nkilburg@elderkinpirnie.com
ATTORNEYS FOR DEFENDANT-APPELLEE BRAD ALLEN