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8 Attorneys for Plaintiff

9 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**

10 **IN AND FOR THE COUNTY OF MARICOPA**

11	EDWARD T. GANNON, a single )	CASE NO. CV2006-092488
12	male, )	
13	Plaintiff, )	MOTION FOR NEW TRIAL ON COURT'S
14	vs. )	SUMMARY JUDGMENT RULING; MOTION
15	PAULA WALKER, et al., )	TO RECONSIDER DENIAL OF MOTION
16	Defendants. )	FOR LEAVE TO FILE AMENDED
17	_____ )	COMPLAINT
18		(Oral Argument Requested)
19		(Hon. Barbara Jarrett)

20 Plaintiff, by and through his undersigned counsel, moves the  
21 Court pursuant to Rule 59 of the Arizona Rules of Civil Procedure  
22 for a New Trial in connection with the Court's February 25, 2009  
23 ruling on the Defendants' Motion for Summary Judgment.<sup>1</sup> As more  
24 fully set forth below, the Court's summary judgment ruling was not  
25 justified by the evidence and is contrary to law.

26 This Motion for New Trial is supported by the following  
27 Memorandum of Points and Authorities which are incorporated herein  
28 by this reference.

<sup>1</sup> A Motion for New Trial may be directed against a summary judgment ruling even though there has not been any "trial." Farmers Insurance v. Vagnozzi, 132 Ariz. 219, 644 P.2d 1305 (1982).

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

BACKGROUND

Plaintiff was, at all times relevant to this lawsuit, a first officer/co-pilot employed by America West Airlines/US Airways (the "Airline"). Defendants are flight attendants employed by the Airline.

This case involves claims for defamation initially arising out of false written statements submitted by the Defendants to the Federal Aviation Administration concerning a flight from Calgary, Canada to Phoenix, Arizona on January 24, 2003. Without belaboring the factual details, which are fully set forth in Plaintiff's Response to the Defendants' Motion for Summary Judgment and in the Plaintiff's Response to the Defendants' Separate Statement of Facts (including affidavits and other materials), all of which are incorporated herein by this reference, Defendants' statements were materially false and effectively accused the Plaintiff of being seriously derelict in his duties as an Airline pilot. More particularly, the written statements falsely accused Plaintiff of attempting to depart the Calgary Airport with substantial ice accumulations on the aircraft. Such, if true, would be a dramatic and serious indictment of Plaintiff's duties as a pilot.

In response to the Defendants' false statements, the FAA initiated proceedings to revoke the Plaintiff's pilot's license.

1 After a multi-year battle, the FAA dropped its efforts once it  
2 became clear the Defendants' written statements to the FAA  
3 contained a number of false assertions. Thereafter, Plaintiff  
4 filed his suit for defamation based upon the false statements  
5 submitted to the FAA. Plaintiff's complaint also sought damages  
6 for additional false and defamatory statements by one or more of  
7 the Defendants:  
8

9 a. Made to the Airline about Plaintiff's "threatening"  
10 conduct in a deposition; and

11 b. Made to the Airline about Plaintiff harassing  
12 Defendant Walker.

13 Defendants initially filed a Motion for Summary Judgment on  
14 or about February 11, 2008 (the "First Motion for Summary  
15 Judgment"), at which time the Defendants sought the Court's ruling  
16 that Defendants were entitled to summary judgment because, amongst  
17 other things:

18 a. Defendants' statements to the FAA were absolutely  
19 privileged; and

20 b. The statements at issue were true.

21 Judge Whitten, in his minute entry dated May 9, 2008, denied  
22 the Motion for Summary Judgment as to the defamation claims  
23 because he concluded statements made to the FAA were subject to a  
24 conditional, not absolute privilege. He also denied the Motion  
25 finding there existed factual issues. Judge Whitten stated:  
26

27 Whether the Defendants statements in this case were  
28 true or false, whether Defendants knew the statements  
were false and whether the Defendants actually

1 entertained doubts about the truth of their statements  
2 all involve questions of material fact that should be  
3 resolved by a jury. Defendants' Motion for Summary  
4 Judgment on the Plaintiffs' defamation claim is  
5 therefore *denied*.

6 Following unsuccessful appeals to the Arizona Court of  
7 Appeals and to the Arizona Supreme Court, Defendants filed a  
8 second motion for summary judgment (the "Second Motion for Summary  
9 Judgment) seeking summary judgment respecting the defamation  
10 claims based upon arguments that such claims were:

- 11 a. Barred by the statute of limitations; and
- 12 b. The statements were true.

13 This was now the second time the Defendants had raised the  
14 "truth" defense on the same factual record despite Judge Whitten  
15 having found, less than one year earlier, that factual issues  
16 precluded the grant of summary judgment.

17 Also, in January 2009, Defendants commenced an internet-based  
18 and media-based (newspaper) campaign to repeat their false  
19 statements. Upon Plaintiff becoming aware of these new defamation  
20 claims, Plaintiff sought leave of the Court to assert new  
21 defamation claims. Also, Plaintiff sought to assert a false light  
22 invasion of privacy claim under the authority of Godbehere v.  
23 Phoenix Newspapers, 162 Ariz. 335, 783 P.2d 781 (1989).  
24

25 On February 13, 2009, the Court held a joint oral argument on  
26 Defendants' Motion for Summary Judgment and on Plaintiff's Motion  
27 for Leave to Amend. As set forth in the Court's ruling dated  
28 February 25, 2009, the Court granted the Defendants' Motion for

1 Summary Judgment on the pending defamation claims and denied  
2 Plaintiff leave to file an Amended Complaint.

3 Plaintiff submits the Court's rulings were predicated upon  
4 several erroneous assumptions and, in other respects, were  
5 contrary to law. Each of these issues is addressed below:  
6

7 II.

8 FALSE ASSUMPTION 1 - PRESENCE OF "FROST"  
9 DISCOVERED AFTER THE AIRCRAFT PUSHED-BACK FROM THE  
10 GATE VITIATES DEFENDANTS' FALSE STATEMENTS THAT ICE WAS PRESENT

11 As detailed in Plaintiff's Response to the Defendants'  
12 Statement of Facts, Plaintiff performed an exterior pre-flight  
13 inspection of the aircraft to determine if there was any  
14 contamination (i.e., snow, ice or frost) on the aircraft prior to  
15 departure.

16 Defendants' statements to the FAA that there was a  
17 substantial amount of ice on the aircraft at the time of departure  
18 could reasonably be interpreted by the jury that:

19 a. Plaintiff Gannon was wholly derelict in his duties  
20 as a pilot in failing to observe this substantial ice present  
21 on the aircraft; and/or

22 b. Plaintiff Gannon, knowing that ice was indeed  
23 present on the aircraft, nevertheless was willing to tell the  
24 Captain the aircraft was ready to depart.

25 ONE OF THE FOREGOING INTERPRETATIONS IS THE REASON THE FAA SOUGHT  
26 TO REVOKE THE PLAINTIFF'S PILOT'S LICENSE. Plaintiff has  
27 submitted evidence, including his own statements, the statement of  
28 the Captain and an expert witness statement (i.e., meteorologist

1 Ed Phillips) attesting that ice was not, nor could have been,  
2 present on the aircraft.

3 The "bottom line" of this analysis is that a jury could  
4 reasonably conclude the Defendants' statements were false and such  
5 caused Plaintiff damage and injury. The Court, however, seemed to  
6 be concerned with the later discovery of light frost on the  
7 aircraft. THE LATER DISCOVERY OF THE LIGHT FROST DOES NOT VITIATE  
8 DEFENDANTS' STATEMENTS TO THE FAA, WHICH COULD BE REASONABLY  
9 INTERPRETED AS ASSERTING:

11 a. Plaintiff was woefully derelict in his duties by  
12 failing to have observed the alleged substantial ice claimed  
13 to have been present; or

14 b. Plaintiff knowingly ignored the presence of the  
15 alleged substantial ice and was willing to depart Calgary in  
16 the face of this substantial risk.

17 Simply put, the "sting" associated with Defendants' false  
18 statements is centered upon the assertion that Plaintiff ignored  
19 the presence of substantial ice despite his duty: (a) to have  
20 discovered it; and (b) to have appropriately addressed such  
21 situation by advising the captain or otherwise insisting upon  
22 having the aircraft de-iced. The fact that "light frost" was  
23 later discovered is wholly beside the point and ignores the  
24 gravamen of the Defendants' false statements. As noted during  
25 oral argument, had Defendants' truthfully disclosed to the FAA the  
26 events which occurred on this flight, no enforcement action would  
27 have been taken as Plaintiff's conduct was wholly in harmony with  
28 all applicable rules, regulations and procedures.

1 Much as Judge Whitten found, there exist substantial factual  
2 issues which preclude summary judgment and Plaintiff respectfully  
3 submits the Court's ruling is contrary to law.  
4

5 III.

6 FALSE ASSUMPTION 2 - DEFENDANT ADMITTED IT WAS PROPER  
7 FOR THE FLIGHT ATTENDANTS TO REPORT THE PRESENCE OF ICE

8 In its ruling, the Court references Plaintiff's deposition  
9 testimony where he indicates it would not be reckless for the  
10 flight attendants to report the presence of ice or contamination.  
11 A reading of Mr. Gannon's deposition makes clear his answer was  
12 based upon the qualifier: "If they see contamination on the  
13 aircraft."  
14

15 Here, there exist contested issues of fact as to whether ice  
16 was or was not present on the aircraft. In no stretch did the  
17 Plaintiff admit it would be proper for Defendants to report the  
18 presence of substantial ice on the aircraft where, as here, ice  
19 was not present on the aircraft. Once again, Plaintiff  
20 respectfully submits the Court failed to perceive the existence of  
21 a pervasive factual issue which precludes summary judgment.  
22

23 IV.

24 FALSE ASSUMPTION 3 - DEFENDANTS'  
25 SAW FROST BUT THOUGHT IT WAS ICE

26 In the Court's ruling, Judge Araneta commented:

27 . . . Plaintiff's viewing of frost was consistent  
28 with the Defendants having seen what they thought was  
ice and reporting it. . . .

1 This finding is not supported by the record and, at best, is  
2 a contested fact not amenable to being resolved by summary  
3 judgment. Plaintiff states he observed a small patch of frost.  
4 Defendants, on the other hand, testified at deposition, consistent  
5 with their written statements to the FAA, that there was  
6 substantial ice on the wings. For example, in Defendants'  
7 January 30, 2003 statement to the FAA (Exhibit "A" to the  
8 Plaintiffs' Response to the Defendants' Separate Statement of  
9 Facts), they stated, in relevant part, as follows:  
10

11 I immediately walked overwing and looked outside  
12 and saw: leading edge: ice from the winglet towards  
13 fuselage about 2-3 feet. Trailing edge: ice from  
14 fuselage all the way across to winglet. The  
15 temperature was in the minus degree Fahrenheit  
16 range from 3 - 7. There was no precipitation  
17 overnight.

18 As I was looking out the window, 2 different  
19 passengers noticed and commented on the ice on the  
20 wing. I went to the back galley. By this time we  
21 had pushed back to prepare for taxi. Sue had told  
22 me that someone had said something to her about the  
23 ice on the wings. I voiced my concern about not  
24 being de-iced with Sue and Brian and they agreed  
25 having seen the ice on the wings as well. So, I  
26 told her she better call the flight deck to let  
27 them know that passengers are now asking questions  
28 about it too. She called and immediately I was  
called to go up in the flight deck so F/O Ed could  
come back and look at the wings. I am not sure  
exactly how much time had elapsed by this time, but  
from the time we called the flight deck to Ed  
coming out to look was very fast. . . .

Now, the reason we are writing this letter is to  
find out about the de-icing standard procedures.  
We have all been here over 16 years. Being that I  
was First Flight Attendant, I feel somewhat  
responsible to keep in communication with the  
pilots as much as possible and to ask questions as



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we have been taught since day one of this airline. I was a LOFT instructor for the pilots representing the Flight Attendant role for 5 years. The purpose of that is, SAFETY. We are very familiar with "ice on the wings" not being the proper, legal way to take-off. "Clean wings" are what we are told is the only way to go. Also, when every other airplane is being de-iced, that is a big concern for us and we are not getting de-iced. (emphasis added)

In Plaintiff's Response to the Defendants' Separate Statement of Facts, Plaintiff also directed the Court's attention to various pages and lines from the Defendants' depositions (copies attached to that Response as Exhibits "C", "D" and "E") where the Defendants testified in graphic detail as to the existence of "ice," not "frost" on the aircraft.<sup>2</sup>

Based upon the record before the Court, there does not exist any support for the Court having concluded the Defendants had misperceived seeing ice when frost was present. Such is not the case and ought not be the basis for the Court's ruling.

v.

FALSE ASSUMPTION 4 - PLAINTIFF CANNOT, AS A MATTER OF LAW, DEMONSTRATE DEFENDANT WALKER LIED ABOUT PLAINTIFF ALLEGEDLY THREATENING HER

Whether or not Plaintiff threatened Defendant Walker at a deposition is a contested factual issue. Unlike the case relied upon by the Court (Miller v. Servicemaster, 174 Ariz. 518, 851 P.2d 143, (App. 1993)), Plaintiff absolutely denies doing anything which remotely could be construed as threatening. In

<sup>2</sup>Walker Deposition: 11:20-12:19; 40:5-41:3; Burriss Deposition: 8:16-9:2; 14:5-14:7; Shunick Deposition: 9:8-9:15.

1 Servicemaster, the Plaintiff admitted touching the Defendant but  
2 argued the Defendant misperceived the nature of the touching. In  
3 that context, the Court of Appeals held the Defendant's perception  
4 could not be challenged.

5 Here, the Plaintiff submitted his affidavit and, at  
6 paragraph 40, he stated:  
7

8 With respect to the assertion appearing in  
9 paragraphs 17, 18 and 19 of Paula Walker's affidavit, I  
10 never "scowled" threatened, harassed, or engaged in any  
11 contact remotely similar to what is alleged. Similarly,  
12 I did not make an "angry face" nor did I "glare" at  
13 Ms. Walker as stated in paragraph 23 of her affidavit.  
14 Such is untrue and patently false.

15 His denial of engaging in any conduct alleged by Defendant Walker  
16 creates a factual issue as to what actually occurred and the jury  
17 should be allowed to make that determination. Moreover, Defendant  
18 Walker's claims must also be viewed in light of her earlier false  
19 statements submitted to the FAA as discussed above. Hence, under  
20 record present in this case, a jury could reasonably determine  
21 that Defendant Walker fabricated her claim that Plaintiff  
22 threatened her. A similar analysis would similarly apply to the  
23 Plaintiff's remaining defamation claims.

24 VI.

25 COURT DENIED MOTION FOR LEAVE  
26 TO AMEND BASED UPON FALSE ASSUMPTIONS DESCRIBED ABOVE

27 Based upon the Court's erroneous reasoning as to the  
28 Defendants' Motion for Summary Judgment, the Court similarly  
concluded an amendment to add defamation claims was futile. For

1 the reasons described above, Plaintiff has set forth viable claims  
2 in his proposed Amended Complaint. Of course, pursuant to Rule  
3 15(a), leave to amend shall be freely granted. However, the Court  
4 denied that motion predicated upon the erroneous assumptions  
5 described above.  
6

7 VII.

8 COURT DID NOT PROPERLY RULE ON THE STATUTE OF LIMITATIONS DEFENSE

9 A reading of the Court's ruling on the Defendants' Statute of  
10 Limitations Defense does not reveal the Court considered the  
11 various legal theories by which the statute of limitations would  
12 not bar the Plaintiff's claims. Plaintiff therefore asserts such  
13 ruling is contrary to law.  
14

15 VIII.

16 COURT ERRONEOUSLY DENIED LEAVE TO ASSERT THE FALSE LIGHT CLAIM

17 Once again, the Court infused its ruling on Defendants'  
18 Motion for Summary Judgment on the Plaintiff's Motion for Leave to  
19 Amend. For the reasons set forth above, Plaintiff asks the Court  
20 to reconsider its rulings. Also, Plaintiff respectfully submits  
21 neither Godbehere nor Reed v. Real Detective Publishing Company,  
22 63 Ariz. 294, 162 P.2d 133 (1945), supports the proposition that  
23 Plaintiff is now a "public figure" and has thereby lost sufficient  
24 privacy rights to maintain his claims. To the contrary, the  
25 Supreme Court in Godbehere succinctly stated:  
26

27 Consequently, we adopt the following legal standard: a  
28 plaintiff cannot sue for false light invasion of privacy

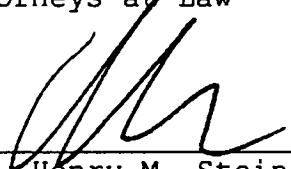
1 if he or she is a public official and the publication  
2 relates to performance of his or her public life or  
3 duties. We do not go so far as to say, however, that a  
4 public official has no privacy rights at all and may  
5 never bring an action for invasion of privacy.  
6 Certainly, if the publication presents the public  
7 official's private life in a false light, he or she can  
8 sue under the false light tort, although actual malice  
9 must be shown.

7 Here, Plaintiff disputes he is a "public official" but, even  
8 if he were, the Godbehere ruling does not prevent Plaintiff from  
9 maintaining this cause of action.

10 WHEREFORE, Plaintiff requests that the Court grant his Motion  
11 for New Trial by reversing its ruling on the Motion for Summary  
12 Judgment. Plaintiff further requests that the Court reconsider  
13 its ruling on the Motion for Leave to Amend and allow such  
14 amendment to proceed.

15 RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of March, 2009.

16 STEIN and STEIN, P.C.  
17 Attorneys at Law

18 By:   
19 Henry M. Stein  
20 Attorney for Plaintiff

21 COPY of the foregoing delivered  
22 this 9<sup>th</sup> day of March, 2009, to:

23 Hon. Barbara Jarrett  
24 MARICOPA COUNTY SUPERIOR COURT  
25 222 E. Javelina Avenue  
26 Mesa, Arizona 85210

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With a copy mailed on  
the same date to:

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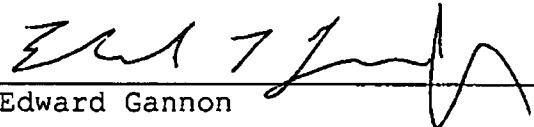
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VERIFICATION

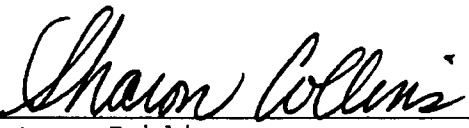
STATE OF ARIZONA     )  
                                  ) ss:  
County of Maricopa    )

I, Edward Gannon, am the Plaintiff in the above-entitled matter. I have read the foregoing "Motion for New Trial on Court's Summary Judgment Ruling; Motion to Reconsider Denial of Motion for Leave to File Amended Complaint" and know that the contents therein are true to the best of my knowledge, except those matters stated upon information and belief, and as to such matters, I believe them to be true.

DATED: March 6, 2009.

  
Edward Gannon

SUBSCRIBED AND SWORN to before me this 6th day of March, 2009, by Edward Gannon.

  
Notary Public

My Commission Expires:

