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IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

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

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

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

[1] 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.

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

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

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

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

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

b. The statements at issue were true.

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

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

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

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

a. Barred by the statute of limitations; and

b. The statements were true.

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

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

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

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

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

II.

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

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

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

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

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

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

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

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

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

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

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

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

III.

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

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

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

IV.

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

In the Court's ruling, Judge Araneta commented:

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

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

> I immediately walked overwing and looked outside and saw: leading edge: **ice** from the winglet towards fuselage about 2-3 feet. Trailing edge: **ice** from fuselage all the way across to winglet. The temperature was in the minus degree Fahrenheit range from 3 - 7. There was no precipitation overnight.
>
> As I was looking out the window, 2 different passengers noticed and commented on the **ice** on the wing. I went to the back galley. By this time we had pushed back to prepare for taxi. Sue had told me that someone had said something to her about the **ice** on the wings. I voiced my concern about not being de-iced with Sue and Brian and they agreed having seen the **ice** on the wings as well. So, I told her she better call the flight deck to let them know that passengers are now asking questions 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

> 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.[2]

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

[2]Walker Deposition: 11:20-12:19; 40:5-41:3; Burris Deposition: 8:16-9:2; 14:5-14:7; Shunick Deposition: 9:8-9:15.

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

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

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

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

VI.

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

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

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

VII.

COURT DID NOT PROPERLY RULE ON THE STATUTE OF LIMITATIONS DEFENSE

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

VIII.

COURT ERRONEOUSLY DENIED LEAVE TO ASSERT THE FALSE LIGHT CLAIM

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

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

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

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

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

RESPECTFULLY SUBMITTED this 9th day of March, 2009.

STEIN and STEIN, P.C.
Attorneys at Law

By: _____
Henry M. Stein
Attorney for Plaintiff

COPY of the foregoing delivered this 9th day of March, 2009, to:

Hon. Barbara Jarrett
MARICOPA COUNTY SUPERIOR COURT
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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:

SHARON COLLINS
Notary Public - Arizona
Maricopa County
My Comm. Expires Dec 18, 2011