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Case No. 35671
Dept. No. III

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CHURCHILL

KATHLEEN A. ARCHEY,

Plaintiff,

vs.

MYKE NELSON, individually and in his capacity
as Editor of "THE FLASH",
STEVE RANSON in his capacity as Editor of the
LAHONTAN VALLEY NEWS, KEVIN LORDS
in his capacity as Principal of CHURCHILL
COUNTY HIGH SCHOOL, CAROLYN ROSS
in her capacity as Superintendent of CHURCHILL
COUNTY HIGH SCHOOL DISTRICT, DOES 1-
10 AND ROE Corporation I-V,

Defendants.

ORDER

Plaintiff Kathleen Archey ("Ms. Archey") brought this action alleging two
claims for relief. The First Claim for Relief titled "Defamation," and the Second Claim
for Relief is untitled. The second claim appears to be the same as the first, but claims
that she has no plain, speedy or adequate remedy at law.

The Defendants have brought a Special Motions to Dismiss Pursuant to NRS
41.635 *et seq.*

The gravamen of Ms. Archey's suit is that she was defamed in an article written
by a student reporter/editor for the Churchill County High School newspaper, "The

1 Flash" and an article in the Lahonton Valley News reporting on the controversy. One
2 of the issues before the court is if the articles are a "communication" and as such comes
3 within the protection of Nevada's Anti-SLAPP statute. If the articles are a
4 communication, once that threshold showing is made, the Plaintiff must establish a
5 genuine issue of material fact so as to preclude dismissal. There is also the issue if Ms.
6 Archey is a public figure. If she is a public figure, the Court must then determine if she
7 has adequately set forth her complaint by clear and convincing evidence.
8

9
10 Based upon the pleading, exhibits and evidence received at the hearing, the
11 Court makes the following Findings of Facts, Conclusion of Law and Order.

12 FINDINGS OF FACTS

13 Ms. Archey is a music teacher at Churchill County High School ("CCHS") in
14 the Churchill County School District ("CCSD"), where she has been teaching since
15 approximately 1995. As part of her duties at CCHS, Ms. Archey oversees the choir
16 program. As part of Ms. Archey's duties related to the choir program, she participates
17 with the Nevada Music Educators' Association ("NMEA"), and the Northern Zone of
18 the Nevada Music Educators' Association ("NZNMEA").
19

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21 In the fall of 2009, in her role as the music teacher at CCHS, Ms. Archey
22 facilitated auditions for the choir students for Honors Choir. Students who were
23 accepted into Honors Choir would then become eligible for All State Choir. According
24 to her complaint, she followed the same procedures for this audition process as she had
25 used for the past eight years. She did not submit the audition tape of every student who
26 auditioned. She submitted audition tapes for those students she deemed to have "made
27 the cut by achieving a passing score or otherwise meeting the NZNMEA criteria."
28

1 After learning that the audition tape for their son had not been forwarded to
2 NZNMEA, Susan Robertson contacted CCHS principal Kevin Lords to voice her
3 concerns and the concerns of her husband Carl Robertson. Mr. Lords urged Mrs.
4 Robertson to communicate directly with Ms. Archey and advised Ms. Archey about
5 Mrs. Robertson's concerns. Mr. Lords also advised the CCSD superintendent, Dr.
6 Carolyn Ross, about these parent concerns. After communicating with Ms. Archey, Mr.
7 and Mrs. Robertson remained dissatisfied and filed a complaint with Dr. Ross. Dr.
8 Ross was also contacted by Mrs. Wendy Nelsen, the parent of another CCHS student
9 who had auditioned for Honors Choir, and wife of Myke Nelsen, a District Defendant
10 in this action, who raised similar concerns and subsequently filed a complaint.
11
12 Eventually, a total of five written complaints were filed by parents of students who
13 auditioned for Honors Choir. Dr. Ross asked Mr. Lords to oversee an official inquiry
14 and investigation into the parent concerns.
15

16
17 At about this time, Ms. Archey was told by NZNMEA president Bill Zabelsky
18 that two parents had requested that their children be given an opportunity to audition
19 again. Ms. Archey objected to allowing a "re-audition." At least two students were
20 allowed to "re-audition," including the Robertsons' son, as well as the son of Defendant
21 Myke Nelsen and his wife Wendy Nelsen. Myke Nelsen is also the adviser for the
22 CCHS newspaper, "The Flash."
23

24
25 In January of 2010, Ms. Archey was notified that an article would be published in
26 "The Flash" addressing the concerns of the students and parents. Ms. Archey was invited
27 to provide input into the article, and refused to be interviewed. After Ms. Archey was
28 advised that a student newspaper article was being prepared for publication, principal

1 Kevin Lords was contacted by a representative of the Churchill County Education
2 Association who requested that Mr. Lords stop publication of the article and who advised
3 Mr. Lords that a grievance and a lawsuit would be filed if he did not halt the publication of
4 the article. Mr. Lords approved publication of the article.
5

6 On January 26th, 2010 the Lahonton Valley News published an article about the
7 controversy in their web version and on January 27, 2010 published their print version.
8 The article reported the filing of the union grievance, and that the grievance resulted from a
9 planned student article in "The Flash" about the petitions by parents "demanding the
10 District investigate Honor Choir audition Practices". Among her complaints, Ms Archey
11 objects to the use of the word "disciplinary" in the Lahonton Valley News article rather
12 then the word "personnel" in reporting the actions taken by the school.
13

14 On approximately January 29, 2010, "The Flash" published an article related to the
15 Honors Choir Program at CCHS, the procedures which were used in the audition
16 process, and concerns voiced by parents about the procedures. The Plaintiff, as one of her
17 claims, argues the use of the word "lost" in the Flash article to describe the un-
18 submitted audition tapes was defamatory.
19

20 CONCLUSIONS OF LAW

21
22 In 1993, the Nevada Legislature enacted legislation under Chapter 41 titled
23 "Liability of Person who Engages in Right to Petition," in response to the vast number
24 of retaliatory lawsuits known as Strategic Lawsuits Against Public Participation
25 (SLAPP) being brought against citizens who petitioned government. The Legislature's
26 effort was to provide immunity from civil liability for claims based upon a good faith
27 communication to a legislator, officer or employee of the government.
28

1 Section 3 of S.B. 405 provided:

2 A person who in good faith communicates a complaint
3 information to an officer or employee of this state or of a
4 political subdivision or to an officer or employee of the
5 Federal Government regarding a matter reasonably of
6 concern to the respective governmental agency is immune
7 from civil liability on claims based upon the
8 communication.

9 Section 4 further provided:

10 In any civil action brought against a person who in good faith
11 communicated a complaint or information to an officer or
12 employee of this state or of a political subdivision regarding a
13 matter reasonably of concern to the respective governmental
14 agency, the attorney general or other legal representative of
15 the state may provide for the defense of the action on behalf
16 of the person who communicated the complaint or
17 information.

18 This legislation became effective July 13, 1993.

19 In 1997, the Legislature revised the provisions governing immunity for persons
20 engaging in communication in furtherance of the right to petition. The bill implemented
21 procedures for defendants to file a special motion to dismiss if the action is brought against
22 a person, business or organization who engaged in such good faith communication based
23 on their valid exercise of the right to petition.

24 NRS 41.650 provides that, "[a] person who engages in a good faith communication
25 in furtherance of the right to petition is immune from civil liability for claims based upon
26 the communication." Good faith communications in furtherance of the right to petition
27 under NRS 41.637 include:

- 28
1. Communication that is aimed at procuring any governmental or electoral action, result or outcome;
 2. Communication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity; or

1 3. Written or oral statement made in direct connection
2 with an issue under consideration by a legislative,
3 executive or judicial body, or any other official
4 proceeding authorized by law,

5 which is truthful or is made without knowledge of its falsehood.

6 Under NRS 41.660(1), if a lawsuit arises as a result of a good faith communication
7 in furtherance of the right to petition, the person(s) against whom the lawsuit is brought
8 may file a special motion to dismiss. This motion must be filed within 60 days after service
9 of the complaint. *NRS 41.661(1)*. Upon the filing of this motion, the court "shall treat the
10 motion as a motion for summary judgment." Additionally, discovery is stayed during such
11 period pending "(1) a ruling by the court on the motion; and (2) the disposition of any
12 appeal from the ruling on the motion." If a court grants the motion, "the dismissal operates
13 as adjudication upon the merits." *NRS 41.660(4)*.

14 Since the special motion to dismiss is procedurally treated as a summary
15 judgment, the following standards apply. First, the district court can only grant the
16 special motion to dismiss if there is no genuine issue of material fact and the moving
17 party is entitled to a judgment as a matter of law. Second, the nonmoving party cannot
18 overcome the special motion to dismiss on the gossamer threads of whimsy,
19 speculation and conjecture. Instead, the nonmoving party must provide more than
20 general allegations and conclusions; it must submit specific factual evidence
21 demonstrating the existence of a genuine factual issue. *John v. Douglas County School*
22 *Dist.*, 219 P.3d 1276 (Nev. 2009)

23 When a party moves for a special motion to dismiss under Nevada's Anti-SLAPP
24 statute, it bears the initial burden of production and persuasion. This means the moving
25 party must first make a threshold showing that the lawsuit is based on good faith
26 communications made in furtherance of the right to petition the government. If the
27 moving party satisfies this threshold showing, then the burden of production shifts to the
28 nonmoving party, who must demonstrate a genuine issue of material fact.

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1 A good faith communication includes communication of information or a complaint
2 to, for example, an employee of a political subdivision (a school district in Nevada)
3 regarding a matter reasonably of concern to the governmental entity; or a written or oral
4 statement made in direct connection with an issue under consideration by a legislative,
5 executive or judicial body, or any other official proceeding authorized by law. The
6 communication must be truthful or be made without knowledge of its falsehood. *NRS*
7 *41.637(2) and (3)*. Thus the legislature made it clear that their intent was to also apply
8 the protections afforded by this legislation to news media accounts when they publish
9 an article that directly pertains to a matter under consideration by a governmental body.
10 *NRS41.637(3)*.

11 One of the many purposes of the student newspaper at CCHS is to communicate
12 about issues of concern to school district officials, as well as to students and their
13 families. The article in "The Flash" relayed concerns of parent advocates about the
14 process used by Ms. Archey to determine which student auditions would be forwarded
15 to NZNMEA. In fact, a review of the article reveals that the article is exclusively
16 comprised of parent concerns, the reaction of NMEA to the concerns raised by parents,
17 and the comment by principal Kevin Lords that prescreening such as that done by Ms.
18 Archey was not specifically prohibited. The article relayed the concerns of the
19 Robertsons that their son's audition tape was not forwarded to NZNMEA, despite the
20 fact that he had a score of 50 out of 50 at his audition, and the fact that he had
21 successfully been accepted to Honor Choir and All State Choir the previous year. The
22 Robertsons questioned Ms. Archey's determination that he was "unprepared.". The
23 article also reported that NMEA granted a private audition to six CCHS students. Ms.
24 Archey has not shown that anyone of these statements is untrue.

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1 The Court finds that the article in "The Flash" was truthful and/or made without
2 knowledge of its falsehood and was regarding a matter reasonably of concern to the
3 CCSD. The Court further finds that the publication of these concerns by a student
4 author/editor in a student newspaper serves to communicate this information directly to
5 CCSD administrators.

6 Because the article is truthful, because it communicated the complaints of
7 parents to CCSD employees, and because these complaints regarded a matter
8 reasonably of concern to the CCSD, the article fits squarely within the protection of
9 NRS 41.637(2).

10 Further, this article was published at a time when the formal process for selecting
11 student audition tapes to forward to NZNMEA had just begun to be examined more
12 closely by CCSD officials, following parent complaints. Because the article was in
13 direct connection with an issue under consideration by CCSD officials in response to
14 parent complaints, the article also fits within the protection of NRS 41.637(3).

15 As discussed above, the content of "The Flash" article is clear; the article reports
16 about the concerns of parents from CCHS. There is not a single sentence contained in
17 the school article which is false or known by any District Defendant to be false. The
18 student newspaper article satisfies the NRS definition of a "good faith communication,"
19 and the District Defendants have satisfied this threshold showing.

20 An issue in this case is the use of the word "disciplinary" in the Lahonton
21 Valley News article rather than the word "personnel" in reporting the actions taken by
22 the school regarding Ms Archey. The Plaintiff also argues the use of the word "lost" in
23 the Flash article to describe the un-submitted audition tapes was defamatory. The Court
24 finds under the facts of this case that the use of the word "disciplinary" by the
25 Lahonton Valley News and the use of the word "lost" by the Flash was substantially
26 true. "A publication describing what someone has said cannot be libelous because it
27 contains minor inaccuracies as long as the substance, the gist, the sting of the statement
28 is the same." *Flowers v. Carville*, 310 F. Supp.2d 1157 (D.Nev.,2004). The Court finds

1 that the article in Lahonton Valley News was truthful and/or made without knowledge
2 of its falsehood and was regarding a matter reasonably of concern to the CCSD. The
3 Court finds that the Lahonton Valley News Defendants and the Flash Defendants are
4 entitled to the protection provided by NRS 41.635 *et seq.*

5 To prove defamation, Ms. Archey must show that the Defendants (1) made a
6 false and defamatory statement concerning her; (2) an unprivileged publication of this
7 statement was made by a third person; (3) Defendants were at least negligent in making
8 the statement; and (4) she sustained actual or presumed damages as a result of the
9 statement. *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 57 P. 3d 82 (2002)

10 Since public figures must prove by clear and convincing evidence that an
11 allegedly defamatory statement is made with knowledge of falsity or reckless disregard
12 for truth, a threshold determination in a defamation action is whether the plaintiff is a
13 public figure. *New York Times v. Sullivan*, 376 U.S. 254, 279-280, 84 S.Ct. 710, 11
14 L.Ed.2d 686 (1964):

15 The Court finds that a public school teacher is a public official for purposes of a
16 defamation action. Given the authority accorded to teachers and position of special
17 trust, the public has a greater than normal interest in being able to debate and criticize
18 freely the conduct of public school teachers. As a public official, Ms. Archey must
19 plead and prove actual malice. Actual malice is proven when a statement is published
20 with knowledge that it was false or with reckless disregard for its veracity. Reckless
21 disregard for the truth may be found when the defendant entertained serious doubts as
22 to the truth of the statement, but published it anyway. *Pegasus v. Reno Newspapers*,
23 118 Nev. 706, 57 P. 3d 82 (2002)

24 Ms. Archey has not pled the requisite actual malice, and therefore, her
25 Complaint fails to state a claim upon which relief can be granted.

26 The Court finds that the Defendants have shown that this action is based on good
27 faith communications made in furtherance of the right to petition the government; that
28 the statements in the articles were substantially truthful or is made without knowledge

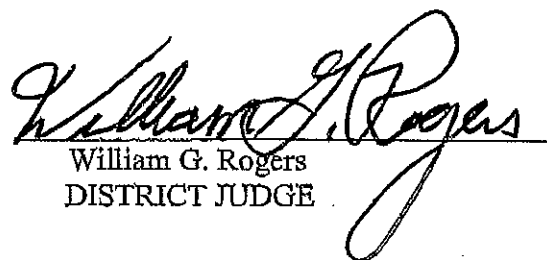
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of any falsehood. The Court further finds that the Plaintiff has failed to demonstrate any genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

Based upon the above findings and Good Cause appearing;

The Special Motions to Dismiss are hereby granted as to all Defendants, and the action is dismissed. Based upon the Courts decision in this case, Plaintiffs Motion to Amend their Complaint is denied as moot.

DATED: This 10th day of August, 2010.


William G. Rogers
DISTRICT JUDGE

CERTIFICATE OF MAILING

The undersigned, an employee of the Third Judicial District Court, hereby certifies that I served the foregoing ORDER on the parties by depositing a copy thereof in the U.S. Mail at Fallon, Nevada, postage prepaid, as follows:

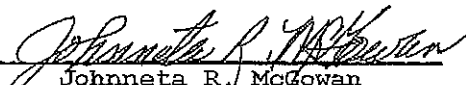
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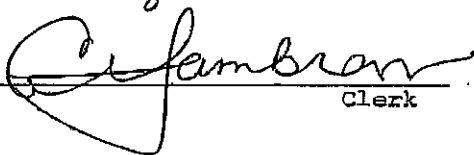
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DATED this 10th day of August, 2010.


Johneta R. McGowan

Subscribed and sworn to this
10th day of August, 2010.


Clerk