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Clerk of the Trial Courts  
By \_\_\_\_\_ Deputy

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

JEREMY CUBAS, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
NATHANIEL HERZ, CURTIS GILBERT, )  
ALASKA PUBLIC MEDIA, AMERICAN )  
PUBLIC MEDIA, and ANCHORAGE )  
DAILY NEWS, LLC, )  
 )  
Defendants. )  
 )

Case No. 3AN-25-4852 CI

#7

**MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS DEFENDANT  
ANCHORAGE DAILY NEWS**

[Ak.R.Civ.Pro. 12(b)(6)]

Plaintiff Jeremy Cubas has sued the Anchorage Daily News for republishing with permission a news story initially published a day earlier by co-Defendants Alaska Public Media and American Public Media. There is no dispute that what the Daily News re-published was “the same” as what the public media news organization had published.<sup>1</sup>

Anchorage Daily News is entitled to dismissal pursuant to Alaska Rule of Civil Procedure 12(b)(6). An essential element of a cause of action for defamation is that the

<sup>1</sup> Complaint, ¶9.

statement(s) at issue be unprivileged. The publication of the Article<sup>2</sup> in question by the Daily News was clearly privileged.

The Article involved a matter of public interest or concern, and the plaintiff was a public official and public figure. Any of these three factors requires application of the “actual malice” standard, which means that to show the Article published in the Daily News was unprivileged, Cubas must show that the Daily News re-published it with knowledge that the statements put at issue by Cubas were false, or with reckless disregard of the truth, i.e., being highly aware that they were probably false and publishing them anyway, or having serious doubts about the truth of these statements in the Article and publishing it anyway.

This is a subjective test, meaning that Plaintiff’s case depends on proving what was actually in the mind of the Daily News editors who published the story, not whatever might have been known to the public media journalists who investigated and wrote the Article, or what their respective public media editors or employers knew. And not what some hypothetical “reasonable reporter” or “reasonable editor” might have known or believed, as an objective test might make relevant.

As the Complaint makes clear, the Daily News simply republished what Plaintiff acknowledges in his complaint was “the same” Article. There is not a single other specific reference to the Anchorage Daily News in the Complaint. Nowhere does the Complaint allege

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<sup>2</sup> A motion to dismiss has been filed contemporaneously on behalf of Alaska Public Media, as well as ADN (referred to herein as “AKPM Memo”). Anchorage Daily News joins in that motion and incorporates by reference as though set forth fully herein the AKPM Memo, and adopts for this filing the shorthand descriptions used in the AKPM Memo for referring the parties, the Article and incorporated podcasts, and otherwise.

any fact supporting a claim that the Daily News' republication of the article was unprivileged because it was done with knowledge that the Article contained false defamatory statements of fact concerning the Plaintiff, or with reckless disregard for the truth of the re-published Article. Cubas has clearly failed to state a cause of action against the Daily News upon which relief can be granted.

Construing the Complaint most favorably for Cubas, he might argue that the conclusory allegations later in this pleading, asserting without factual support that "the Defendants" deliberately misrepresented the statements at issue, is supposed to include the Daily News. He doesn't say this, and in any event, all Defendants are entitled to dismissal because all statements in the Article were privileged (and for other reasons), as demonstrated in the AKPM Memo.

But indulging in speculation as well as it can, it appears to Defendant ADN that that Cubas is really saying—though not actually saying in the Complaint—that the Daily News "could have" or "might have" or "should have" done some further investigation or checking to corroborate or question the reporting done by public media journalists Herz and Gilbert and editing by their respective news organization. As a matter of law, this is wrong.

For purposes of this litigation, Plaintiff Cubas is a "public official" and/or "public figure," and in any event the Article dealt with matters of public interest and concern. It is because of this is that Cubas must show that the defendant he seeks to hold liable for the defamation he is alleging—in this instance, the Anchorage Daily News—published with

knowledge that the allegedly defamatory statements he complaints of were false, or with reckless disregard of their truth or falsity.<sup>3</sup> This he has not done, and cannot do.

As decades of applicable federal and state case law makes clear, this subjective “knowing or reckless disregard of the truth” test provides very strong protections for freedom of the press and freedom of speech, and is extremely difficult to satisfy. *Mount Juneau Enterprises*, a leading Alaska Supreme Court decision in this area, illustrates this.

Failure to make a prior investigation into the accuracy of published statements does not itself “constitute[] proof sufficient to present a jury question whether the statements were published with reckless disregard of whether they were false or not.” *Beckley Newspapers Corp. v Hanks*, 389 U.S. 81, 84-85, 19 L.Ed. 2d 248, 88 S.Ct. 197 (1967); accord, *St. Amant*, 390 U.S. at 733; *Tavoulareas*, 817 F.2d at 797-98; see also *Gay*, 486 F. Supp. at 16-17 (declining to find actual malice where local newspaper printed release from national wire service without independent investigation of the article's accuracy). Reckless disregard “is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.” *St. Amant*, 390 U.S. at 731. The U.S. Supreme Court has also stated that “a public figure plaintiff must prove more than an extreme departure from professional standards and that a newspaper's motive in publishing a story—whether to promote an opponent's candidacy or to increase its circulation—cannot provide a sufficient basis for finding actual malice.” *Hartke-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 665, 105 L.Ed. 2d 562, 109 S.Ct. 2678 (1978). One commentator accordingly has concluded that “recklessness may not be inferred from a publisher's failure to inquire into a matter's truth or falsity, although a responsible reporter might well have inquired.” Tribe, *supra*, § 12-12, at 871.<sup>4</sup>

Here, Plaintiff Cubas offers at best a bare conclusory allegation that the Daily News acted with “actual malice,” but no actual, specific assertion of fact to support this. A summary of how the Alaska Supreme Court applied the test in the *Mt. Juneau* case should dispel

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<sup>3</sup> The legal framework relating to how and why this standard applies is set forth in detail in section III.A.1 of the contemporaneously filed AKPM Memorandum.

<sup>4</sup> *Mount Juneau Enterprises v. City of Juneau*, 891 P.2d 829, 838-839 (Alaska 1995).

any possible doubts about whether Cubas can make a case against the Daily News:

In *Mount Juneau Enterprises*, the Alaska Supreme Court found that as a matter of law the case could not proceed to trial, in light of the standard to be applied here, even though there was evidence adduced before the trial court for summary judgment purposes through sworn testimony that 1) the reporter only reported one side of the issue; 2) that she relied primarily upon people with ulterior motives or bias against the appellants; 3) that the reporter was not ever told by anyone at *The Juneau Empire* to check her facts before writing stories; 4) that she conducted a grossly inadequate investigation; 5) that she was given this assignment despite a lack of training or understanding of legal matters; 6) that she assumed without question, whatever people tell her is "true;" and 7) that there was no rush or deadline on this case, and thus no reason for failing to adequately investigate and ascertain the true facts before publishing the article. The Court stated: "Assuming arguendo that these contentions are true, they alone do not establish actual malice."<sup>5</sup>

The facts are simply not there to support a claim by Plaintiff upon which relief can be granted. Anchorage Daily News should not be required to spend any additional time and resources defending this matter. It requests that the court dismiss Cubas's Complaint against the Daily News pursuant to Alaska Civil Rule 12(b)(6) forthwith, with prejudice.

Dated at Anchorage, Alaska, this 12th day of April, 2025.

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<sup>5</sup> *Id.*, 891 P.2d at 838.

LAW OFFICES OF D. JOHN MCKAY  
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By: /s/ D. John McKay  
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Certificate of Service

The undersigned certifies that on the 12th of April, 2025, at or about 11:55 a.m./p.m. a true and correct copy of this 6-page document was served by electronic mail, from the email address indicated below, upon the parties by transmitting it to the following at their respective electronic mail addresses:

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I believe the transmission was complete and without error.

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