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**IN THE APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
NO. 2-02-1334**

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**TOM MYERS,**  
**Plaintiff-Appellant,**

**v.**

**NELSON LEVY,**  
**Defendant-Appellee,**

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On Appeal From the 19<sup>th</sup> Judicial Circuit Court, Lake County,  
Illinois, Case 01 L 553  
Honorable John Goshgarian, Judge Presiding

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**OPENING BRIEF AND APPENDIX FOR  
PLAINTIFF- APPELLANT TOM MYERS**

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**ORAL ARGUMENT REQUESTED**

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**Points and Authorities**

- I. Defendant Levy enjoys at most only a Qualified Privilege, and fact questions preclude summary judgment.

Defamation Elements

*Stauvos v. Marrese*  
323 Ill.App.3d 1052, 1057; 753 N.E.2d 1013  
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*Medow v. Flavin*  
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*Lovgren*  
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*Dubinsky v. UAL Master Council,*  
303 Ill.App.3d 317, 708 N.E.2d 441  
(1<sup>st</sup> Dist. 1999). . . . . 20

Defamation per se

*Bryson v. News America Publications, Inc.*  
174 Ill.2d 77, 672 N.E.2d 1207 (1996). . . . . 19

*Kolegas v. Heftel Broadcasting Corp.*  
154 Ill.2d 1, 10; 607 N.E.2d 210 (1992). . . . . 20

Conditional Privileges to Defamation

*Medow v. Flavin,*  
336 Ill.App.3d 20, 782 N.E.2d 733  
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*Soderlund Bros., Inc v. Carrier Corp*  
278 I.App.3d 606,615; 663 N.E.2d 1, (1<sup>st</sup> Dist. 1995). . . . . 20

*Gist v. Macon County Sheriff's Department,*  
284 Ill.App.3d 367, 671 N.E.2d 1154 (4<sup>th</sup> Dist. 1996) . . . . . 20

*Kuwik v. Starmark Star Marketing & Administration, Inc.*  
156 Ill.2d 16, 27; 619 N.E.2d 129, 134 (1993). . . . . 20

Abuse of a Privilege by the Defendant

*Kuwik v. Starmark Star Marketing & Administration, Inc.*  
156 Ill.2d 16, 27; 619 N.E.2d 129, 134 (1993). . . . . 21,22

*Pease v. IUOE Local,*  
208 Ill.App.3d 863, 567 N.E.2d 614 (2d Dist. 1991) . . . . . 21,22

*Stevens v. Tillman,*  
855 F.2d 394 (7<sup>th</sup> Cir. 1988) . . . . .

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*Kessler v. Zekman,*  
250 Ill.App.3d 172, 620 N.E.2d 1249 (1<sup>st</sup> Dist. 1993). . . . . 21

*Costello v. Capital Cities Communications,*  
125 Ill.2d 402, 532 N.E.2d 790 (1988) . . . . . 22

*Dubinsky v. UAL Master Council,*  
303 Ill.App.3d 317, 708 N.E.2d 441  
(1<sup>st</sup> Dist. 1999). . . . . 22,23

*Bryson v. News America Publications, Inc.*  
174 Ill.2d 77, 672 N.E.2d 1207 (1996). . . . . 22,23

*Kolegas v. Heftel Broadcasting Corp.*  
154 Ill.2d 1, 10; 607 N.E.2d 210 (1992). . . . . 22

*Owen v. Carr,*  
113 Ill.2d 273, 497 N.E.2d 1145, 1147 (1986). . . . . 22

*Barakat v. Matz,*  
271 Ill.App.3d 662, 648 N.E.2d 1033  
(1<sup>st</sup> Dist. 1995). . . . . 22

<i>Milkovich v. Lorain Journal Co.</i> 497 U.S. 1 (1990) . . . . .	23
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II. Coach Myers is not a “public figure” for defamation purposes.

<i>Kessler v. Zekman</i> , 250 Ill.App.3d 172, 620 N.E.2d 1249 (1 <sup>st</sup> Dist. 1993). . . . .	27,28
<i>Kumaran v. Brotman</i> , 247 Ill.App.3d 216, 229; 617 N.E.2d 191 (1 <sup>st</sup> Dist. 1993). . . . .	28
<i>Snitowsky v. NBC, Inc.</i> , 297 Ill.App.3d 304, 696 N.E.2d 751 (1 <sup>st</sup> Dist. 1998). . . . .	27
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*Dubinsky v. UAL Master Council,*  
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(1<sup>st</sup> Dist. 1999). ..... 28

**Nature of the case and Judgment Appealed From**

This is a suit for defamation and related torts committed by the Defendant, related to the dismissal of the football coach at Lake Forest High School.

The Court below entered a summary judgment for the Defendant, ruling that Defendant’s actions were privileged.

No questions are raised on the pleadings.

### Issues Presented for Review

- I. Whether the acts of the Defendant enjoy an absolute privilege, or a qualified privilege as a matter of constitutional law, and whether relevant fact questions preclude a summary judgment.
- II. Whether the Plaintiff high school football coach is a “public figure” under the law of defamation.

The standard of review on these issues is de novo, *Jones v. Chicago HMO*, 191 Ill.2d 278, 291 730 N.E.2d 119, 1127 (2000); *Kessler v. Zekman*, 250 Ill.App.3d 172, 620 N.E.2d 1249, 1259 (1<sup>st</sup> Dist. 1993).

## **Jurisdictional Statement**

The Court below entered summary judgment for Defendant on November 18, 2002 (C001105). The Court's Order also entered written findings, pursuant to S.Ct. Rule 304, that there was no just reason for delaying an appeal. (COO1105).

On December 5, 2002, the Court below entered an order making its order of November 1, 2001 finding Coach Myers to be a "public figure" (COO1109), final and appealable from November 18, 2002, and finding no just cause to delay appeal of that Order as well. (C001106A).

Plaintiff filed his timely Notice of Appeal on December 12, 2002 (COO1117).



## STATEMENT OF FACTS

### **Introduction**

This case is about a malicious effort, marked by lies, name-calling, and threats to the Athletic Director of Lake Forest High School (“LFHS”), by defendant Nelson Levy, to defame and injure LFHS football coach Tommy Myers (hereinafter “Coach Myers”). (C001082)

Levy’s ultimate objective, at a time when Levy’s son was competing with Coach Myers’ son to be the team’s quarterback, was to remove Coach Myers from his head-coaching position. (C000720)

Levy’s actual malice was more than enough to trump any ‘qualified privilege’ which Levy asserts he had to communicate with school officials.

On the eve of trial, the Court below granted summary judgment to defendant Levy on all three counts of the amended complaint, holding that Levy enjoyed an absolute First Amendment privilege; a position never even advanced by Levy below. (C001105)

### **Defendant Levy Praises Coach Myers**

Plaintiff Tommy Myers (hereafter “Coach Myers”) was named head football coach at LFHS in 1986. By 2001 his teams had amassed a 93-52 won-lost record, despite LFHS’ being the smallest school in its conference. His teams went to the Illinois State Football Quarter finals four times, and Coach Myers was even named Lake County Football Coach of the Year. (C000016-18)

Defendant Levy is a Lake Forest resident. His sons played football at LFHS. He holds an M.D. and Ph.D. He has been Vice President at Abbott Laboratories, and President of Fujisawawa

Pharmaceutical Company, the 1500 employee North American subsidiary of Japan's third largest drug company. (C001015, C001087, C00759-760)

In the fall of 1997, Defendant Levy wrote a letter to Lake Forest 8<sup>th</sup> graders in praise of Coach Myers. Said Levy:

“Our community has a great coaching role model in Tommy Myers. Tommy makes every kid on his team feel good about himself. He is a personal role model for character, kindness and fairness. His players grew from within, not from being bombarded by constant coaching demands. Tommy builds teams of self-confident kids who are not afraid to make a mistake. And, almost every year, Tommy takes a bunch of under-sized, slow boys into the state play-offs.” (C001013; Appendix to this Brief, tab 3)

In early 1998, Defendant Levy wrote a 50<sup>th</sup> birthday tribute to Coach Myers for Levy's son Mike to submit. Levy's tribute to Coach Myers stated:

“Tommy was my coach for both baseball and football, and I have countless memories from the years I spent under his leadership. One game, however, really exemplifies his unfailing positivity, sensitivity and sincerity more than any other. During the summer before my senior year, I played on a baseball team coached by Tommy. We had a very good summer and had advanced a few rounds in the playoffs. We ran into a good team from Notre Dame and found ourselves in a huge hole, down by seven runs going into our last at bat. With two outs, I

hit a double, and we began to rally. We hit around the order, and the lead miraculously was cut to one. I came up again, this time with two runners on. A hit would have at least tied the game. But I grounded out to shortstop, and our season was over. I felt so miserable. We had made such an unbelievable comeback, and I had killed it. As I made the slow, lonely walk off the field, I heard Tommy's familiar voice. He put his hand on my shoulder and told me, Hey, I know it hurts, but you know we would never have even been here without you. If there was one guy I would have chosen to make that last out, it would have been you. You'll be back. And that was all he said, but that was all he had to say. I could feel the sincerity in voice, and it was so reassuring. Tommy is as tough a competitor as there is, but he, immediately and instinctively, had put aside his own disappointment and consoled his player, whom he knew was down. His caring, his values and his honesty are more admirable than can be described, and I consider myself very lucky to have been in the presence of such a positive influence for so many years. Mike Levy" (C001015; in Appendix to this Brief, tab 3.)

By the fall 2000 football season, another Levy son, David, was set to compete with Coach Myers' son Travis to be the team's future starting quarterback. At this time, Defendant Levy's high estimation of Coach Myers suddenly changed.

**Defendant Levy Becomes Coach Myers' "number one antagonist"**

On August 9, 2000, Defendant Levy wrote a letter to the LFHS Athletic Director, Jill Bruder. In it, Defendant Levy described Coach Myers as “a fine and decent man”; but also referred to “inadequacies of coaching and leadership within the football program.” He acknowledged that Ms. Bruder had requested that Levy set aside any petition requesting the removal of Coach Myers. And he referred to his son David’s “quarterback situation.” (C00813, Appendix to this Brief, tab 3.)

Despite Defendant Levy’s assurance to Ms. Bruder, on October 16, 2000, Levy authored a five-page letter, this time to LFHS Superintendent Dr. Jonathan Lamberson, with a copy sent to Athletic Director Bruder. (Appendix to this Brief, tab 3; C00889-893) This is the infamous “buffoon” and “joke” letter. Levy’s October 16 letter included these invectives about Coach Myers:

“Tommy shows little or no concern for players who are injured”

“When a player is injured, Tommy rarely, if ever, calls and never visits, sends a get well card or in any other way expresses concern.”

“...Tommy lacks true concern for the young men who devote so much of themselves to his programs”

“Tommy lacks the respect as a coach of virtually all of his players...they have no confidence in Tommy as a leader or a motivator. Sadly they consider him a joke to be worked around, not with”

“Tommy sets a very poor example for his coaches and players”. “As poor as he is as a coach and leader of coaches, much more distressing is Tommy Myers’ abysmal failure to support his players.”

“When the team loses, Tommy and some of his assistants make the kids feel like they did not try hard enough.”

“ Such is sad, despicable and inexcusable treatment of the group of boys who play their hearts out and are denied the chance to win by the buffoons that direct the action.”

he “and his program failed miserably...”

“...set a poor example as a teacher, who consistently hired poor quality subordinates.”

... “cared little or nothing about the well-being of his students and

...commanded the respect of neither his peers nor his pupils.”

is... “grossly unprepared”

“...fails as an educator and as a leader.”

This October 16, 2000 “buffoon” letter was signed solely by Defendant Nelson Levy (not by any students or other parents).

Three weeks later, on November 8, 2000, Defendant Levy sent another letter to Superintendent Lamberson (Appendix to this Brief, tab 3; C000817). This letter, signed solely by Defendant Levy, was accompanied by an unsigned “discharge” letter to Athletic Director Bruder dated October 15, (Appendix to this Brief tab 3; C000818) and a list of parents and players (C000819-0825). Defendant Levy’s letter stated that the list was of “parents who did sign the letter” and of “current players who signed the letter.” This unsigned “discharge” letter to Ms. Bruder requested that “...Tom Myers be discharged as the head football coach...”. The attached list of parents “who did sign the letter” included the names of 105 parents; the list of players “who

signed the letter included 36 names. Notably, no actual signatures were attached to Levy's discharge letter and lists. (C000817-825; Appendix to this Brief, tab 3)

The actual signatures were produced by Defendant Levy only during discovery in this case. (C000827-0832, in Appendix to this Brief, tab 3). While Levy represented to LFHS that 105 parents had signed the discharge petition; in fact only 29 signed. Levy represented to LFHS that 36 players signed the discharge petition; in fact only 23 signed. And 16 of the alleged players were only sophomores who never even played for Coach Myers ( C0001088).

Levy's letter to LFHS also states that "no adult either encouraged or abetted in any way the effort to get the players to sign the petition letter". Levy repeated this statement in the lists themselves. In fact, the actual signature pages were typed by the parents (with Defendant Levy the "number-one antagonist"), and the signatures were solicited at a meeting held by parents at the Clegg residence. Riley Clegg, one of the players, was given the signature sheets by his mother, after the meeting. (C000599-600).

So there were 76 Lake Forest citizens who Levy represented to LFHS had "signed the letter", who in fact had not. Levy thus inflated the level of parental signatures for Coach Myer's ouster by 3 ½ times! Among those solid citizens whose signatures were falsely linked to Levy's discharge letter was Ms. Vicky Zeit, who is Judge Victoria Rossetti of the Lake County Circuit Court. At least 88 additional citizens were also falsely included on Defendant Levy's lists. (C001088) Dr. Lamberson never was provided with any actual signatures (Lamberson dep. pp. 74-76, C001089), but had to rely on Defendant Levy's false and inflated rosters.

Defendant Levy even e-mailed another parent, Joanne Mullen, on October 18, 2000, falsely stating that he had "176 signatures", and that "Jill (Bruder) intends to recommend that

Tommy not be reappointed...” (C000887).

Defendant Levy never had more than 29 signatures. Moreover, Ms. Bruder did not make her decision not to reappoint Coach Myers until January, 2001 (C001090), over three months later. As of January 25, 2001, Coach Myers ceased being LFHS football coach. His contract was not renewed.

Defendant Levy’s November 8, 2000 letter to Superintendent Lamberson also represented that Levy’s attack on Coach Myers had nothing to do with Levy’s son’s competing for the quarterback position. Levy claimed that “for over three years...I have been trying to get Tommy removed, but was attempting to do so by working quietly within the system through conversations ...with Jill.” (C001090) In fact, his first such conversation with Athletic Director Bruder was in January of 2000 (C001091), just ten months, not three years, before. Moreover, as late as 1998, as related above, Defendant Levy had nothing but high praise for Coach Myers.

Just before sending his Superintendent Lamberson letter, Defendant Levy threatened Athletic Director Bruder. As Ms. Bruder testified, she met with Defendant Levy in October, 2000:

“Q. And did he tell-did he ever threaten to remove you of - as athletic director if you didn’t remove Tommy as head football coach?

A. **I think that came up once or twice, yeah.**

Q. When was the first time he did that?

A. **Probably, I don’t know, October.**

Q. So in October of 2000 -

A. **Mm-hmm**

Q. Would - how did that conversation take place?

A. **Basically that if I didn’t remove Tommy, they would remove me.” (C001091)**

Defendant Levy’s expressed views on Coach Myers clearly changed as Levy’s son David

began to compete with Coach Myer's son Travis. In September of 1999, Defendant Levy wrote a letter to the freshman coach, Matt Ferrari (C000897) after one game. As Coach Ferrari testified, in the letter Defendant Levy attacked Travis Myers, ("...under Travis, there were four fumbled hand-offs and two interceptions and virtually no offense") and the letter was an effort to gain more playing time for Levy's son David. (C000915-964) Another parent, William Demas, stated that earlier in 1999, while watching a LFHS baseball game (coached by Coach Myers), Defendant Levy became unhappy because Levy's other son Andy did not get into the game. "Fuck you Tommy", Defendant Levy yelled at the game. (C000970) In late 1997, Defendant Levy became enraged during a junior high basketball game involving Levy's son David. Levy charged down out of the spectator gallery and verbally and physically attacked the coach - Chris Faggi (C001010-11). This incident led to Defendant Levy's written apology, in the course of which he wrote that Coach Tommy Myers was "a great coaching role model", for "character, kindness, and fairness." (C001013, Appendix to this Brief, tab 3)

Even after Coach Myers was relieved as head football coach as of January 25, 2001, Defendant Levy's defamatory campaign continued. The next day, on January 26, 2001, Defendant Levy told Taylor Bell of the *Chicago Sun Times* that "there has been a consistent unhappiness, widespread discontent, with Myers as football coach for more than a decade." (C001093, Am. Comp. ¶ 9, admitted C000742, Appendix to this Brief, tab 3: articles attached to Defendants' summary judgment motion). As noted above, this flatly contradicted Levy's unvarnished praise of Coach Myer's ability in 1997 and 1998. Defendant Levy then told Mark Perlman of the *Sun-Times*: "I was probably the number one antagonist of an organized effort that involved hundreds of people. The thrust was not wins and losses, but rather that the kids don't



respect him.” (*Id.*) Under no fair headcount, of course, did Defendant Levy have “hundreds of people”.

One month later, on February 25, 2001, Defendant Levy told Marlen Garcia of the *Chicago Tribune*: “You’ve had an incompetent coach in place for a decade who used to be a good coach.” (Am. Comp. ¶ 11, admitted, C000742, Appendix to this Brief, tab 3).

### **This Lawsuit**

The amended three -count complaint was filed on March 30, 2001, (C000016), alleging defamation, false light, and tortious interference with prospective economic advantage. On November 1, 2001, the Circuit Court denied Defendant Levy’s Motion to Dismiss the Amended Complaint, and found that Coach Myers was a “public figure” for defamation and false light purposes. Trial was set for December 17, 2002. On November 18, 2002, the Circuit court granted Summary Judgment for Defendant Levy, and entered a Rule 304(a) finding of “no just cause to delay” an appeal.

### **ARGUMENT**

The facts recited above establish an out-of-control father whose conduct crossed every line of decency, and harmed Coach Myers personally and professionally. Defendant Levy employed threats, invective, grossly exaggerated head counts, and false imputations, to “get” Coach Myers. He was surely not merely honestly petitioning the government with sincere concerns.

Fortunately for Coach Myers (and for maligned coaches everywhere) the law provides a remedy. We are confident that, given the chance, a jury will resolve questions of falsity and maliciousness favorably to Coach Myers. He is entitled to that opportunity.

**I. Defendant Levy enjoys at most only a Qualified Privilege, and fact questions preclude summary judgment.**

**Standard for Summary Judgment**

Summary judgment is a drastic remedy. It should only be granted when the right of the moving party is clear and free from doubt. *Partill v. Hess*, 111 Ill. 2d 229, 489 N.E.2d 867 (1986). The purpose of summary judgment is not to resolve the issues of material fact but to determine if issues of material fact exist. *Elliott v. Chicago Title Insurance Company*, 123 Ill. App. 3d 226, 462 N.E.2d 640 (1<sup>st</sup> Dist. 1984). To determine whether there is a triable issue of fact, the Court has a duty to strictly construe evidence against the moving party and liberally in favor of the non-moving party. *Comastro v. Village of Rosemont*, 122 Ill. App. 3d 405, 461 N.E.2d 616 (1<sup>st</sup> Dist. 1984) If it can be fairly said that a triable issue of fact exists, summary judgment must be denied. *Kern's Estate v. Handelsman*, 115 Ill.App.3d 789, 450 N.E.2d 1286 (1<sup>st</sup> Dist 1983). The non-moving Plaintiff must only establish some issues of disputed fact that support its claim. *Dobb v. Cavetts Rexall Drugs, Inc.*, 178 Ill. App. 3d 424, 533 N.E.2d 486 (1<sup>st</sup> Dist. 1988) Defendant has the burden of illustrating that there are no factual circumstances under which Plaintiffs are entitled to relief.

On appeal, this reviewing Court's scope of review is de novo. *Jones v. Chicago HMO*, 191 Ill.2d 278, 291; 730 N.E.2d 1119, 1127 (2000).

In the Court below, Defendant Levy attempted to spin his deplorable conduct in a way totally at odds with much of the actual evidence. According to the defense below, Defendant Levy "...went beyond the call of duty" (Def. Summary Judgment Memo, p. 10); had "absolutely nothing to do with Myers' losing his job" (*Id.* p. 13); and his campaign was a "perfectly proper

way for Levy to conduct himself” (*Id.* p. 17). At a trial, Defendant Levy can try to persuade a jury as to these assertions, and can argue that he was merely a passive conduit for some parents’ sincere concerns about the LFHS football program. At such a trial, of course, Coach Myers can try to persuade a jury that falsehood and malice pervaded Defendant Levy’s “scorched earth” attack on Coach Myers’ professional life. The point is that the facts are susceptible to such conflicting “spins”; and a summary judgment is inappropriate and unfair.

### **The Ruling Below**

In its ruling granting Defendant summary judgement, the Court below appeared to combine elements of the first two counts - defamation and false light - with elements of the third count - tortious interference. Ruled the Court below:

“The Court: Okay. Having coached football for eight years, the Plaintiff is kind of an emotional favorite here. I will let you know that because I know the trials and tribulations and some degree of dealing with parents. It ain’t easy. However, you have to follow the law.

And as I look through it and I read that King case and now that’s been supplemented with the Jack Pease case, I certainly have some problems, First Amendment I think as cited as set out in that King case, adopting the Noerr-Pennington. The Noerr-Pennington test pretty clearly puts some - - gives the Plaintiff some trouble with the litigation. Then when I look at the definition that I read regarding actual malice, I think it causes some severe problems, particularly with harm independent and unrelated to protected interest. I think that’s the big hang-up that I saw.

...

The Court: At any rate, there is a privilege I think. The Plaintiff is petitioning a governmental body, a school. I think it is a constitutionally protected activity. You know, the Plaintiff I think has to show the actual malice or the sham. And as I read it, that's independent or unrelated harm to the protected right. I don't think there has been any evidence of that.

I think the evidence that we do have amounts to sincerity on the part of the Defendant. I think there were certain prior warnings to the Plaintiff of being in some trouble. We have Lamberson testifying regarding the change was made, as to why the change was made, and apparently had nothing to do with the petition. I think anything else was based on speculation and inadmissible. So with that, I will grant the motion."

*King v. Levin*, 184 Ill.App. 2d 557, 540 N.E.2d 492 (1<sup>st</sup> Dist. 1989), cited by the Court below, was solely a tortious interference case, not a defamation case. The *Noerr-Pennington* test cited also derives from a tortious interference privilege, which insulates from tortious interference liability a person petitioning the government, unless the petition effort is a mere sham, or there is actual malice. Defendant agreed with this limitation below (see, e.g., Defendant's Summary Judgement Reply, p. 7; C000596). The Court's comment about "harm independent and unrelated to protected interest" also refers only to the "sham" prong of the Noerr-Pennington tortious interference privilege, not to defamation law. And when the court spoke about "why the change was made, and apparently had nothing to do with the petition", he again could only have been talking about tortious interference. The elements of the first two counts - defamation and false

light - are different. We will deal with those counts first.

### **Defamation and False Light**

To establish defamation, a plaintiff must establish: (1) that defendant made a false statement concerning plaintiff, (2) there was an unprivileged publication of the defamatory statement by defendant to a third party; and (3) plaintiff was damaged. *Stauvos v. Marrese*, 323 Ill.App.3d 1052, 1057; 753 N.E.2d 1013 (1<sup>st</sup> Dist. 2001); *Medow v. Flavin*, 336 Ill.App.3d 20, 782 N.E.2d 733 (1<sup>st</sup> Dist. 2002). Only if the Plaintiff is deemed to be a “public figure”, must “actual malice” be established. *Rosenblatt v. Baer*, 383 US 75 (1966).

A statement is considered defamatory if it tends to cause such harm to the reputation of another that it lowers that person in the eyes of the community or deters third persons from associating with him. *Bryson v. News America Publications, Inc.* 174 Ill.2d 77, 672 N.E.2d 1207 (1996). Under Illinois law, two specific categories of defamation per se are present in the instance case: words that impute an inability to perform or want of integrity in the discharge of duties of office or employment; and, words that prejudice a party, or impute lack of ability, in his trade, profession, or business. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill.2d 1, 10; 607 N.E.2d 201 (1992). To establish “the overlapping” claim for “false light”, a plaintiff must prove (1) that defendant placed the Plaintiff in a false light before the public, (2) that such false light is highly offensive to a reasonable person, and (3) that defendant acted with actual malice; that is, with knowledge of the falsity or a reckless disregard as to truth or falsity. *Lovgren v. Citizens First National Bank*, 126 Ill.2d 411, 534 N.E.2d 987, 991 (1989); *Dubinsky v. United Airlines Master Executive Council*, 303 Ill.App.3d 317, 708 N.E.2d 441 (1<sup>st</sup> Dist. 1999).

The briefing below and the Court’s ruling focused on whether Defendant’s acts were

privileged. In a defamation action, a claim of absolute privilege is treated as an affirmative defense. *Medow*, supra: judicial privilege; *Soderlund Bros., Inc., v. Carrier Corp.*, 278 Ill.App.3d 606,615; 663 N.E.2d 1, (1<sup>st</sup> Dist. 1995). In the instant case Defendant never asserted any absolute defamation privilege - only a “conditional privilege” (Defendant’s Summary Judgement Memo, p. 7). Even under Defendant’s formulation, then, Levy’s conduct is not privileged if he abused any conditional privilege. *Gist v. Macon County Sheriff’s Department*, 284 Ill.App.3d 367, 671 N.E.2d 1154 (4<sup>th</sup> Dist. 1996), on which Defendant relied below, utilized the adjectives “conditional” and “qualified” interchangeably to describe this privilege. *Gist* placed the burden of demonstrating a conditional privilege squarely upon the defendant, as did *Kuwik v. Starmark Star Marketing & Administration, Inc.*, 156 Ill.2d 16, 27; 619 N.E.2d 129, 134 (1993). In the case at bar the Court below found that “...there is a privilege I think. The [Defendant] is petitioning a governmental body, a school. I think it is a constitutionally protected activity.” (C000067-68). We henceforth assume, arguendo, that such a conditional privilege exists.

Any such conditional privilege traditionally was abused if the defendant acted “with knowledge of the lie or recklessness toward the truth” (this is “actual malice”) *Pease v. IUOE Local*, 208 Ill.App.3d 863, 567 N.E.2d 614 (2d Dist. 1991); *Stevens v. Tillman*, 855 F.2d 394 (7<sup>th</sup> Cir. 1988) (applying Illinois law). Our Supreme Court in 1993 expanded the bases on which a qualified privilege would be deemed abused. In *Kuwik v. Starmark Star Marketing and Administration, Inc.*; 156 Ill.2d 16, 619 N.E.2d 129 (1993), our Supreme Court stated:

“...we must expand the definition of abuse of a qualified privilege. We now hold that to prove an abuse of the qualified privilege, the plaintiff must show a direct intention to injure another, or \*\*\*a reckless disregard of [the defamed party’s] rights and of the

consequences that may result to him.

. . .

Thus, an abuse of a qualified privilege may consist of any reckless act which shows a disregard for the defamed party's rights, including the failure to properly investigate the truth of the matter, limit the scope of the material, or send the material to only the proper parties."

While proof of personal animosity alone is insufficient to meet this standard, such personal animosity is relevant and probative, on the issue of "actual malice". *Kessler v. Zekman*, 250 Ill.App.3d 172, 620 N.E.2d 1249 (1<sup>st</sup> Dist. 1993). The "actual malice rule often requires inquiry into the Defendant's state of mind." *Kessler* at 1259. Recklessness is defined in terms of the subjective state of mind of the defendant, and recklessness can also be inferred when the Defendant in fact entertains serious doubts as to the truth of the defamation. *Costello v. Capital Cities Communications*, 125 Ill.2d 402, 532 N.E.2d 790 (1988); *Pease*, supra, 567 N.E.2d at 620. Clearly, subjective issues such as knowledge, recklessness, and state of mind are classic questions for the fact-finder. *Kuwik*, supra.

On this question of "actual malice", we submit that the evidence was hotly in dispute, and that a summary judgment for Defendant was entirely unfair.

Defendant Levy's actual malice can be inferred from a variety of sources. It can be inferred from the nature of the libels themselves. It can be inferred from the admitted falsity of representations made by Levy. And it can be inferred from the bad motive and personal animosity of Defendant Levy in his campaign against Coach Myers.

Defendant Levy, in writing, first called Coach Myers a "joke" and a "buffoon[s]". Of

Coach Myers' professional talents, Defendant Levy said he "lacks true concern"; "shows no concern for players who are injured", "lacks respect", "sets a poor example", "sad, despicable and inexcusable treatment", "failed miserably", "sets a poor example", "consistently hired poor quality subordinates", is "grossly unprepared", "fails as an educator and a leader", etc. Wow!

Under Illinois law, statements impugning one's professional competence are actionable, without further proof of injury. And derogatory descriptions such as "buffoon" and "joke" in context, are likewise actionable. *See, Stevens v. Tillman*, 855 F.2d 394 (7<sup>th</sup> Cir. 1988) (Illinois law); *Dubinsky v. UAL Master Council, supra*: "scum", "liar", invectives; *Bryson, infra*: "slut"; *Kolegas, supra*: "scamming". *Owen v. Carr*, 113 Ill.2d 273, 497 N.E.2d 1145, 1147 (1986): "language to be considered defamatory must be so obviously and naturally harmful to the person to whom it refers that a showing of special damages is unnecessary." Tellingly, in *Barakat v. Matz*, 271 Ill.App.3d 662, 648 N.E.2d 1033 (1<sup>st</sup> Dist 1995), liability was found based on Defendant's defamatory statement that Plaintiff doctor's "practice was a joke". And, as the Court below found in denying Defendant's motion to dismiss, Defendant cannot hide behind these statements as mere opinion. Illinois follows the *Milkovich* rule which eliminated the artificial fact/opinion dichotomy in defamation cases. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). *Bryson v. News America Pub.* 174 Ill.2d 77, 672 N.E.2d 1207, (1996); *Schivarelli v. CBS Inc.*, 333 Ill.App.3d 755, 776 N.E.2d 693 (1<sup>st</sup> Dist. 2002). Here all of Defendant Levy's defamations included elaborate factual implications and context.

Coach Myers asserts that these statements are false, and submitted numerous evidentiary material to demonstrate their falsity (see discussion above). Summary Judgment was not granted on this issue, and could not have been. But the very nature of these scandalous false statements



implies actual malice. *Stevens, Dubinsky, Bryson, supra*. Coach Myers is entitled to such inferences on summary judgment.

Had Levy been a dispassionate constructive critic whose interest was in communicating his observations and concerns to the school, he would not have employed such vicious appellations. Moreover, a reasonable jury could infer that Defendant Levy in fact entertained serious doubts about the truth of his statements from Levy's own prior praise of Coach Myers (uttered prior to their sons' quarterback competition).

In addition, it is undisputed (in Coach Myers' favor!) that in Defendant Levy's November 8<sup>th</sup> petition letter to Superintendent Lamberson, Defendant Levy falsely represented that he had a virtual battalion of other parents signed up, when in fact Levy had no more than a small squad of signed parents. Defendant Levy similarly grossly inflated the number of student signatures he possessed. Moreover, Levy lied about particular prominent parents having signed the petition, including Judge Rossetti of the Circuit Court. Defendant Levy lied to parent Joanne Mullen that he had "176 signatures", and that Ms. Bruder had already decided to fire Coach Myers. Levy lied when he told LFHS that "no adult either encouraged or abetted in any way the effort to get the players to sign the petition letter". The whole exercise was orchestrated by Levy and a few other parents. Such flagrant prevarications imply actual malice, as powerfully as any evidence ever could.

If there were any doubt about Defendant Levy's "knowledge of the lies" and "recklessness", the evidence of his egregious tactics and personal motivation clinches the case. Defendant Levy's bad faith in threatening Athletic Director Jill Bruder reflects his state of mind and represents the height of recklessness and malice. No privilege could possibly attach to such

improper conduct, which was a part of Levy's libelous course of conduct directed at Coach Myers' reputation and career. And Defendant Levy's base personal motivation - his son's playing time - does not endear him with the embrace of any First Amendment privilege. Defendant Levy can deny this motivation, but he cannot deny the evidence supporting it. Levy's dramatic 180° change in his articulated opinion of Coach Myers after 1999, Levy's letter to freshman Coach Ferrari attacking Myer's son; Levy's public exclamation "Fuck you, Tommy" at a game when Levy's son was not played, and Levy's physical attack on junior high school Coach Faggi over his son David's play; all combine with the contemporaneous competition for quarterback between Levy's son and Coach Myers' son, to evidence the malice and recklessness behind Levy's falsehoods. These defamations and ignoble falsehoods are unique to Defendant Levy - the other parents did not defame Coach Myers as he did. None of the other parents called Coach Myers a "joke" and a "buffoon". None of them was quoted in the *Tribune* and in the *Sun-Times*. Levy exploited these parents generalized, quite civil criticisms of the Coach, and transmogrified them to fit his own libelous ends. He was no mere innocent conduit.

Yet the Court below necessarily ignored all of the evidence above on "actual malice", when the Court ruled that "...the evidence that we do have amounts to sincerity on the part of the Defendant". (C00068) At trial, Defendant Levy may attempt to contradict this evidence, but on summary judgment he cannot deny its existence. The finding of the Court below, about "sincerity" of Defendant Levy, cannot stand on summary judgment.

From this evidence, a reasonable jury surely could conclude that Defendant Levy was *not* engaged in a protected, good faith effort to petition his government, but rather acted with "actual malice".

Indeed, lying to the government is a felony under both State and Federal law, in most situations, *see*, 720 ILCS 5/16-3.1; 720 ILCS 5/17-6; 18 USC §1001. It is not privileged conduct.

Even after his lies to the school, Levy defamed Coach Myers in the newspapers. (See pp. 12-13 *supra*). No one has argued in this case that such statements to the press are privileged.

On summary judgment, Coach Myers is entitled to have the above evidence considered, not ignored. The best Defendant Levy can show at this stage is that he has conflicting evidence on these points. But that is for a jury to weigh. We are confident that even if conditional privilege exists, a jury would find that Defendant Levy abused and lost its protection.

### **The Tortious Interference - Count III**

It is on this count, and on this Count alone, that the Noerr- Pennington,<sup>1</sup> “sham” petition concept, and the “causation” concept, are relevant. These two concepts do not apply to Counts I and II, for defamation and false light.

As the Court below observed, the Noerr-Pennington privilege applies against tortious interference claims, and the privilege can be trumped by a showing of either a “sham” proceeding unrelated to its facial purpose, **or** a showing of actual malice.” *King v. Levin, supra*, 540 N.E.2d at 560. When the court below spoke of “harm unrelated and independent to protected interest”, he could only have been speaking of the tortious interference count.

Based on the actual malice discussion above, we believe there is ample record evidence to

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<sup>1</sup> This originated as an anti-trust doctrine, *see ERR Pres. Conf v. Noerr Motor Freight*, 365 US 127 (1961). The Illinois Supreme Court later added the “actual malice” exception to tortious interference in *Arl. Hts. Nat. Bank v. Arl. Hts. S & L*, 37 Ill.2d 546, 229 N.E.2d 514 (1967).

trump any asserted privilege. This Court (and the Court below) need not reach the alternate “sham” proceeding concept.

The reason *causing* Coach Myers’ loss of his head coaching position is relevant only on Count III. Defamation and false light damages exist apart from Myers’ loss of his job. The Court below apparently credited Superintendent Lamberson’s and Ms. Bruder’s testimony that Defendant Levy’s campaign of malice had no effect on the decision to fire Coach Myers. But that is itself a question of fact for the jury. This is especially true in light of Athletic Director Bruder’s testimony in which she acknowledged that she listened to those, led by Defendant Levy, who wanted Coach Myers removed. (C001098) She then removed him. We submit that her self-serving, after-the-fact rationalization, along with Superintendent Lamberson, for the decision, is neither credible nor dispositive of the issue. There can be multiple contributing causes for an action under Illinois law. (*See*, IPI Inst. 15.01.) Defendant Levy’s malicious campaign against Coach Myers was pervasive and insistent, and included a personal threat to Ms. Bruder. All a jury has to conclude for Coach Myers is that Levy’s conduct was relevant and a contributor to the decision to fire Coach Myers. From the record there is ample basis to draw such an inference, to which Coach Myers is entitled on summary judgment. Ms. Bruder’s after-the-fact conclusion is not dispositive.

**II. Coach Myers is not a “public figure” for defamation purposes.**

The Court below expressly found Coach Myers to be a “public figure” (C0001-9), thus requiring him affirmatively to show “actual malice” *New York Times v. Sullivan*, 376 U.S. 254

(1964).<sup>2</sup> In *Gertz v. Welch*, 418 US 323, 345 (1974), the Supreme Court held that the “actual malice” standard applies only to defamation Plaintiffs who “assume roles of especial prominence in the affairs of society”. Citing *Gertz*, the court in *Kessler v. Zekman*, 250 Ill.App. 3d 172, 180, 620 N.E.2d 1249 (1993), subdivided public figures into two types: general purpose and limited purpose public figures. The court noted that general purpose public figures always must establish actual malice to prevail in a defamation action. The court further noted that limited purpose public figures need to establish actual malice only in defamation actions involving controversies in “which they have chosen to accept a leadership role.” *Kessler*, 250 Ill.App.3d at 181. However, if the defamation action is unrelated to those controversies, the limited purpose public figure need not prove actual malice. *Kessler*, 250 Ill.App. 3d at 181.

Whether a school teacher/coach can fairly be deemed a “public figure” is a fact-specific First Amendment inquiry. *Snitowsky v. NBC*, 297 Ill.App.3d 304, 696 N.E.2d 751 (1<sup>st</sup> Dist. 1998).

In *Milkovich v. Lorain Journal Co*, 497 US 1 (1990), the Supreme Court, in limiting the First Amendment defamation privilege, accepted the Ohio Supreme Court’s conclusion that the Plaintiff wrestling coach was *not* a public figure.

As *Snitowsky* notes, Illinois Courts have “renounced” an earlier ruling that a basketball coach was a “public figure” *Basarich v. Rodeghero*, 24 IllApp. 3d 889, 321 N.E.2d 739 (1<sup>st</sup> Dist. 1974). In *Snitowsky*, the Court found that the school teacher/school council member was not a public figure. She had not injected herself into the public controversy. In the case at bar,

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<sup>2</sup> On the “false light” count, it is not necessary to distinguish between private and public figures. *Lovgren, supra*, 126 Ill.2d at 422.

Defendant Levy started the controversy. A football coach surely has less importance and less “control over the conduct of government” than does a classroom teacher. Coaches and teachers work too hard and are compensated too little to be deemed fair targets for false criticisms:

“The governance or control which a public classroom teacher might be said to exercise over the conduct of government is at most remote and philosophical: Far too much so, in our view, to justify exposing each public classroom teacher to a qualified privileged assault upon his or her reputation. We are unwilling to hold that a school teacher must be deemed to have assumed the risk of non-malicious defamation.”

*See also, Kumaran v. Brotman*, 247 Ill.App.3d 216, 229; 617 N.E.2d 191 (1<sup>st</sup> Dist. 1993): teacher not deemed a public figure for defamation purposes.

The Court below based its “public figure” ruling solely on the briefing of Defendant’s Motion to Dismiss; with no factual development whatever. Coach Myers went about his business of coaching the team and did not voluntarily inject himself into “a particular public controversy”. Defendant Levy created the problem here. Had Coach Myers thrust himself into some public issue, he might well be deemed a limited public figure, *see Dubinsky v. UAL Master Council, supra; Gertz v. Welch*, 418 US at 351; *Kessler, supra*, 620 N.E.2d at 1255. But he did not do so. At a minimum, the Court on remand should hold a hearing and/or a fact-based briefing on the question whether Coach Myers is a public figure.

As we outlined above, there is powerful (although disputed) evidence that Defendant Levy acted with “actual malice”. But we don’t believe that Plaintiff should be casually saddled with this extra burden on Count I - Defamation.<sup>3</sup>

If this Court rules that Defendant has a conditional defamation privilege on Count I, which

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<sup>3</sup> Actual malice is already an element of Plaintiff’s proof on Count II - False Light - and trumps any Noerr-Pennington privilege Defendant may assert on Count III - Tortious Interference.

can be trumped by Plaintiff's showing "actual malice", then the "public figure" issue is material only as to the respective burden of proof on Count I - defamation.

But Coach Myers is not a public figure, for defamation purposes.

**Conclusion**

For the reasons stated, Plaintiff Myers respectfully requests that this Court reverse the grant of summary judgment for Defendant, reverse the finding that Plaintiff is a public figure, and remand the case for further proceedings.

Respectfully submitted

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