

IN THE INDIANA COURT OF APPEALS

APPELLATE NO. 23A-SC-1089

SHERRIE MITCHELL]	APPEAL FROM THE
Appellant-Defendant]	BROWN CIRCUIT COURT
]	
V]	TRIAL COURT CASE NO.
]	07C01-2102-SC-000008
]	
CHRISTINE BUCCOS]	THE HONORABLE
Appellee-Plaintiff]	FRANK NARDI, MAGISTRATE

BRIEF OF APPELLANT

Appellant

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STATEMENT OF THE ISSUES

Consistent with the US Constitution's and Indiana Constitution's concern for free speech, Indiana's Statute provides truth as an absolute defense for defamation. In Indiana, the qualified constitutional privilege applies to alleged libel of a private individual when the published statements relate to an issue of general and public concern.

Furthermore, the legal standard involving an event of general or public interest is for the plaintiff to prove that the defamatory falsehood was published with knowledge of its falsity or with reckless disregard of whether it was false.

1. Did the Small Claims Court erroneously fail to apply Indiana's absolute privilege afforded by the US Constitution's First Amendment and the Indiana Constitution when it signed the Judgement Order awarding damages to the plaintiff, violating Mitchell's Constitutional freedom of speech rights and protections?
2. Did the Small Claims Court erroneously interpret the Brown County Zoning Ordinance?
3. Did the Small Claims Court and Buccos fail to consider the alleged defamatory statements in their plain language by creating an innuendo(s) enlarging the meaning of the alleged defamatory statements thereby changing the facts?
4. Were the alleged defamatory statements substantially true, as defined by the Substantial Truth Doctrine?

STATEMENT OF THE CASE

Christine Buccos, appellee/plaintiff filed a complaint on February 9, 2021, alleging defamation per se against her neighbor, Sherrie Mitchell, appellant/defendant, due to a post Mitchell authored on social media. On March 2, 2023, Brown County Small Claims Court issued a judgement against the defendant ruling that Mitchell's comments were false and defamation per se. Both the Small Claims Court and Buccos created an innuendo(s), a new charge enlarging/changing the meaning of the alleged defamatory statements, giving rise to this appeal.

A motion to Correct Errors was filed on March 28, 2023. The motion was denied on April 18, 2023.

Additional facts are included in the Statement of Facts in accordance with Indiana Appellate Rule 46 (A).

STATEMENT OF FACTS

Christine Buccos, appellee/plaintiff, is a 140-acre property owner in Brown County, Indiana. Buccos owns and operates Shady Oak Lakes, an RV/mobile home park, on her property. 80 acres of the Buccos land is used as commercial property for the RV/mobile home park. She has 75 rental lots on that commercial property. Buccos' sons, Christopher and Thomas Buccos, live on Christine Buccos' property, and operate a 3-acre logging operation in an industrial park on the Buccos' property. Direct Examination of Christine Buccos, Volume 2, page 10 - line 7, page 11, lines 2 and 3, page 19, line 7.

Sherrie Mitchell, appellant, is a neighbor of the Buccoses and has held herself out to the public as a political watchdog. She had attended government meetings, budget hearings, and government board meetings from 2017 to 2022. She owned and managed two separate Facebook pages engaging with 1000+ local county residents/readers. Direct Examination of Christine Buccos, Volume 2, page 10, line 17, page 11, line 9-11. Mitchell closing argument, Volume 2, page 61, lines 7-11.

Multiple lawsuits have occurred involving Buccos, Buccos family members, and Mitchell.

Below is a chronological list of all the actions and lawsuits:

October 1, 2019, Mitchell, appellant, filed a complaint with the Brown County Planning and Zoning department regarding the use of residential property for an industrial use on the Buccos property. Defendant's exhibit C, page 34, Volume 1, Exhibit Index.

October 21, 2019, Brown County Planning and Zoning Inspector mailed a letter to Christine Buccos, appellee, informing her of the potential violation of the Brown County Zoning Ordinance. Defendant's exhibit D, page 35, Volume 1, Exhibit Index.

October 22, 2019, Brown County Planning Director mailed a letter to Christine Buccos informing her of the 2 zoning districts, Forest Reserve and Industrial, in which industrial uses are permitted in Brown County, per the Brown County Zoning Ordinance, and the Buccos' current zoning district which was R2 (Residential). Defendant's Exhibit F, page 47, Volume 1, Exhibit Index.

January 29, 2020, Brown County Board of Zoning Appeals (BZA) granted a special exception for an industrial use inside of an R2 District on the Buccos property. Direct Examination of Christine Buccos, Volume 2, page 21, lines 13-15.

February 21, 2020, Mitchell filed a motion for Judicial Review of the Board of Zoning Appeals (BZA) decision granting a special exception for an industrial use inside of a R2 District on the Buccos property. Cause # 07C07-2002-PL-000066.

October 28, 2020, the BZA held a public hearing retracting the special exception granted to Christine Buccos for an industrial use on her R2 property. The BZA did not have the authority to grant a special exception for an industrial use inside of a R2 District (Residential). An industrial use is prohibited in an R2 district by the Brown County Indiana Zoning Ordinance. Defendant's Exhibit G, page 48, Volume 1 Exhibit Index.

November 10, 2020, Mitchell filed a defamation lawsuit against Ashley Dersch, girlfriend of Christine Buccos' son and mother to Buccos' grandchild. Dersch posted on Facebook that Mitchell, appellant, was a convicted drug dealer/user and convicted drunk driver. Cause #07C01-2011-SC-000051. Mitchell closing argument, Volume 2, page 61, lines 13-14.

February 1, 2021, Judicial Review of the special exception granted to Christine Buccos for an industrial use inside of a R2 District was dismissed due to mootness. Mitchell's complaint was corrected when the special exception granted to Buccos was retracted.

February 5, 2021, Mitchell, appellant, authored a Facebook post. Plaintiff's exhibit 2, Volume 1, pages 4 through 9, Exhibit Index.

February 9, 2021, Christine Buccos and son, Christopher Buccos, each filed defamation lawsuits against Mitchell.

March 19, 2021, Mitchell won her defamation lawsuit against Ashley Dersch, Buccos' grandchild's mother. Mitchell was considered a public figure by the court and had to prove malicious intent. Mitchell's closing arguments, Volume 2, page 61, lines 13-14.

March 24, 2021, Brown County Area Plan Commission approved a rezoning of 3-acres inside of the Buccos' 140 acres of R2 District property to Forest Reserve. Direct Testimony of Mitchell, Volume 2, page 55, lines 6 and 7.

April 7, 2021, Brown County Commissioners approved changing the law, the zoning maps, to reflect the 3-acres approved by the Area Plan Commission from a R2 District to an FR District on the Buccos property.

May 26, 2021, BZA approved a special exception for an industrial use on the rezoned 3-acres of Buccos property.

Defamation lawsuit Christine Buccos v Sherrie Mitchell

On February 5, 2021, Mitchell authored several comments of public interest to Christine Buccos on social media regarding the property owned by Christine Buccos and Buccos property taxes. Plaintiff's exhibit 2, pages 4 through 9, Volume 1, Exhibit index. Mitchell wrote (summarized) that Christine Buccos did not pay her fair share of

property taxes, wasn't paying taxes on all the improvements on her property, that the public was having to pay more in taxes because county government was not fixing the errors, was operating an industrial park inside of a residential district, had at least 2 structures that taxes had not been paid on, and had more than 13 acres of commercial property that was not taxed at commercial property rates. Mitchell stated that each of these infractions were illegal.

On February 9, 2021, Buccos filed a lawsuit for defamation per se in the Brown County Small Claims Court.

On March 12, 2021, Mitchell filed a Motion for Summary Judgment, Buccos failed to include the alleged defamatory statements in her lawsuit.

On April 26, 2021, the Small Claims Court entered a judgment awarding Mitchell a Summary Judgment.

On May 26, 2021, Buccos filed a Motion to Correct Errors.

On May 27, 2021, the Small Claims Court ordered a hearing on the Motion to Correct Errors.

On September 19, 2021, a hearing was held. Mitchell told the court that she was comfortable holding a trial on the merits of the Buccos lawsuit.

On February 2, 2023, the trial was held.

On March 3, 2023, Brown County Small Claims Court entered a judgement.

In the ruling of the Court, the Judge wrote that Mitchell specifically accused the plaintiff of:

1. "not paying the taxes she was assessed",
2. "was operating an illegal business.",
3. "had hidden property from the taxing authority.",
4. "was illegally not paying taxes on all of her commercial property",

The Small Claims Court ruled that "these statements of the defendant that the plaintiff was not paying her taxes and illegally operating a business were defamatory per se and were false."

Mitchell filed a Motion to Correct Error on March 28, 2023, arguing that the court changed the plain language of Mitchell's statements. Mitchell also argued that the court had assumed that the special exception approved by the Board of Zoning Appeals on January 29, 2020, was a final decision. It was not.

On April 18, 2023, the Brown County Small Claims Court denied Mitchell's motion to correct errors.

This appeal followed.

SUMMARY OF ARGUMENT

Mitchell is arguing that the Brown County Small Claims Court and Christine Bucco created an innuendo(s) and erroneously interpreted the Brown County Zoning Ordinance thereby making Mitchell's statements of fact false and defamatory per se, violating Mitchell's Constitutional freedom of speech rights and protections.

ARGUMENT

On February 5, 2021, Mitchell appellant, authored a Facebook post on the Brown County Democrat's (local newspaper) Facebook page,

1. "Christine Buccos not to mention, you are not even paying your fair share of property taxes."
2. "You haven't paid property taxes on that log cabin and all those trailers with year long residents in them."
3. "Of course you love it here, everyone else is paying your property taxes because the government offices around here are protecting you from any accountability."
4. "It's too bad I can't post pictures here. We could take a look at your property card right now. Here is the list of the laws you break in this county and get away with.
 1. You are operating an industrial park inside of a residential district. Illegal. What is being done about it? Nothing.
 2. You have 2 of your kids living in houses/trailers on your property that you pay no taxes on. Illegal.
 3. You have way more than 13 acres of commercial property that do (sic) you do not pay commercial taxes on. Illegal.
 4. Frost law violations. Loaded log trucks driving on this 16ft. wide road during January 16th to April 15th. Illegal. How are you weighing those trucks? All of this is happening and no one in government is doing a thing to stop it." Plaintiff's Exhibit 2, Volume 1, pages 4-9.

Defendant's (Appellant) physical evidence

The statements can be summarized, and physical exhibits used to support their validity.

1. **"you haven't paid taxes on that log cabin and all those trailers with year long residents in them" and "you have 2 of your kids living in houses/trailers on your property that you pay no taxes on. Illegal."**

These 2 statements summarized claim that there are improvements on the Buccos' property that had not been assessed for taxes or taxes paid. Legal precedent has determined that courts examine the gist of the alleged defamatory statement. What makes it potentially defamatory?

***New York Times Co. v Sullivan*, 376 U.S. 254 (1964)**

Page 376, U.S. 269, "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions." *Roth v United States*, 354 U.S. 476, 354 U.S. 484.

Page 376 U.S. 271, "Authoritative interpretation of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth – whether administered by judges, juries, or administrative officials – and especially one that puts the burden of proving truth on the speaker."

Page 376 U.S. 271, 272, "That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need to survive".

Page 376 U.S. 281, 282, "In such a case the occasion gives rise to a privilege, qualified to this extent: any one claiming to be defamed by the

communication must show actual malice or go remediless. This privilege extends to a great variety of subjects and includes matter of public concern, public men, and candidates for office."

***Masson v New Yorker Magazine, Inc.*, 501 U.S. 496 (1991)**

Page 501 U.S. 497 "The common law of libel overlooks minor inaccuracies and concentrates upon substantial truth."

Page 501 U.S. 517 "Minor inaccuracies do not amount to falsity so long as "the substance, the gist, the sting, of the libelous charge be justified."

The gist of the alleged complaint is that there are structures on the property owned by Buccos that are not on the property card and no taxes have been paid. This statement is substantially true. Buccos's Indiana Property Record Card, property card, is a public record. This property card is dated January 29, 2020, and was published by the Brown County Assessor's office. Mitchell used this property card to write her statements of fact about the Buccos property and taxes. This property card lists 2 structures on the Buccos' 140-acre tract: a house and a trailer. Defendant's Exhibit A, Volume 1, pages 28-32.

Mitchell had filed a complaint with the Brown County Assessor explaining the errors in the assessment. A reassessment did occur. A copy of the new assessment was given to the court. Defendant's Exhibit E, vol.1, pages 36-46. The new assessment contained an assessment for five (5) structures.

1. The original 2 structures. Pages 37 and 38,

2. A house. Built in 1950. Page 40
3. Mobile Home. Too old to tell when placed on the property. Page 42
4. Another house built in 2020. Page 44.

These additional structures being assessed and added to the property card and their erection dates prove Mitchell's statements substantially true. ***New York Times Co v. Sullivan, 376 U.S. 254 (1964)*** Substantial Truth Doctrine, cited previously.

2. **"You have way more than 13 acres of commercial property that you do not pay commercial taxes on"** Total number of commercial acres according to Buccos in her Direct testimony, "80". The county had assessed only thirteen acres of primary commercial uses for the Buccos property. The property card does indicate that thirty-seven additional acres of the eighty acres, is considered as an undeveloped commercial use. Total commercial property assessed and tax is 50. Direct Examination of Christina Buccos, page 19, line 7. Defendant's Exhibit A, Buccos Property Card, Volume 1, pages 28-32.

Buccos testified that she had eighty acres of commercial land, the assessor had only collected commercial taxes on fifty acres. Making this statement substantially true, all commercial land is not being taxed at commercial rates. ***New York Times Co. v Sullivan, 376 U.S. 254 (1964)***. Substantial Truth Doctrine, previously cited.

3. **“you are not even paying your fair share”, “everyone else is paying your taxes”**, Although opinion, the additions in taxable structures on the Buccos’ property card and her own admission that she had 80 acres of commercial property are evidence showing that Buccos was not paying the appropriate taxes or her fair share of property taxes at the time the Facebook post was written. Local property taxes are one budget number created by the Brown County Council and divided amongst all the property owners. The tax is progressive. The more you own, the more you pay. If Buccos is not paying taxes on all her structures at the appropriate rate, the rest of us pay a little more. This statement is substantially true. ***New York Times Co. v Sullivan*, 376 U.S. 254 (1964)** Substantial truth doctrine, previously cited. Mitchell direct testimony, page 49, lines 13-18.
4. **“Frost Law Violation”**. The Court did not address this issue in its judgement.
5. **Brown County Zoning Ordinance. “you are operating an industrial park inside of a residential district. Illegal”**. Defendant’s Exhibit G, Volume 1, page 48. This exhibit is an extract from the **Brown County Zoning Ordinance** (the law). This is a Primary Use Table; it guides the boards of the planning commission on board decisions. This document, along with Defendant’s Exhibits D and F, show that Industrial Uses are only permitted in FR (Forest Reserve) and I (Industrial) Districts. The Brown County Board of Zoning Appeals (BZA) approved a special exception for an industrial use in an R2 District on January 29, 2020. Mitchell sued, filing a Judicial Review. The BZA held an additional public hearing in October 2020, regarding the

special exception, granted on the Buccos property retracting the special exception approval. Buccos and Mitchell attended this meeting.

Buccos testified that it took two years to get the industrial park approved by the county. Buccos had to subdivide the 3-acres out from the 140-acres of her property. Buccos had to then rezone the subdivided 3 acres. A rezone requires 2 public hearings. One with the Area Plan Commission and one with the County Commissioners. Buccos then had to go back to the BZA to get an approval for a special exception. Mitchell's statements of fact were made 3 months **prior** to the completion of the rezoning and granting of a new special exception. Defendant's Exhibit G, Volume 1, page 48 (the asterisk behind the letter(s) denotes a special exception requirement). The special exception requirement was also stated in a letter from the Plan Commission Director. Defendant's Exhibit F, Volume 1, page 47, paragraph 4. Defendants Exhibits A and E, Volume 1, pages 28-32, and pages 36-46 (respectively), prove the subdivision of the property owned by Buccos, a reduction in total acres owned by Buccos in the R2 district had occurred. At the time that Mitchell wrote the statement of fact, Buccos was operating an industrial park inside of a residential district and that is always illegal in Brown County. The Court believed that the January 29, 2020, BZA approval of the special exception was a final determination. It was not. If this special exception had been a final determination, Buccos would have corrected her violation of the zoning ordinance in 4 months. This was not the case.

Indiana Code 34-15-1-2 and the Indiana Constitution, Section 10, provide the truth as a justification for libel.

Plaintiff's (Appellee) physical evidence.

Buccos provided the Court with her property tax bills and records of tax payments as the only physical evidence to prove Mitchell's statements defamatory. Buccos created an innuendo enlarging and changing the alleged defamatory statements to claim that Mitchell wrote Buccos wasn't paying her property tax bills. Mitchell did not say that. Plaintiff's Exhibits 3-6, Volume 1, pages 10-23.

Small Claims Court judgment.

The Court expanded the innuendo by creating its own.

In cases of defamation the long-standing legal precedent is to take the statements in their plain language. Innuendos cannot be created to change, enlarge, extend the meaning of the basic facts. ***Klein v Belle Alkali Company, 7105, 229 F. 2d 658. (1956)*** Judge Soper said, "It is familiar law that while the office of the innuendo is to connect the defamatory matter with the other facts set out, so as to show the meaning and application of the charge, it cannot enlarge or restrict the natural meaning of the words or introduce new matter. It cannot be used to give a forced and unnatural construction and application of the words, but only a reasonable and natural construction and application."

The Brown County Small Claims Court's Judgment demonstrates the innuendos created by the Court.

1. "(Mitchell) specifically accused the plaintiff of not paying her taxes."
2. "(Mitchell) specifically accused the plaintiff of not paying the taxes she was assessed".
3. "(Mitchell) specifically stated that plaintiff was operating an illegal business."
4. "The defendant stated that the plaintiff was illegally not paying taxes on all of her commercial property".
5. "These statements of the defendant that the plaintiff was not paying her taxes and illegally operating a business were defamatory per se and false."
6. "defendant stated that plaintiff was operating an illegal business".
7. "implied that plaintiff had hidden property from the taxing authority."
8. The Court reiterated its continued use of innuendos by writing, "(evidence) does show that she (Buccos) paid the taxes that were due and owing." Brown County Small Claims Court Judgment, attached to this brief.

It was the Court and the plaintiff that made Mitchell's statements defamatory and false by creating innuendos. It was the Court that denied Mitchell her constitutional freedom of speech protections and rights.

The Court did agree that the alleged defamatory statements were of public concern.

CONCLUSION

The Court should reverse the Brown County Small Claims Court's decision due to the imputations. Award Mitchell Court Filing Cost (\$250), transcription fees (\$349.34), and copying fees (\$100) in the sum of \$699.34 to be paid by Christine Buccos, as Buccos knew these alleged defamatory statements were true when she submitted her response to Mitchell's Motion to Correct Errors.

Dated: _____

Signed: _____

WORD COUNT CERTIFICATE

I certify that this Appellant brief contains less than 4000 words.

Date: _____

Signed: _____

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing was served by hand delivery upon the following on _____ day of _____, 2023.

Attorney for Plaintiff, Jennifer Jones Auger, 42 E. Jefferson Street, Franklin, IN 46131

Brown County Circuit Court, Brown County, Indiana

Date: _____

Signed: _____

STATE OF INDIANA)
) SS:
COUNTY OF BROWN)

IN THE BROWN CIRCUIT COURT

CAUSE NO. 07C01-2102-SC-008

Christina Buccos,
Plaintiff,

vs.

Sherrie Mitchell,
Defendant.

Order

The Court, having received and reviewed the Motion to Reconsider (Correct Error) filed by the defendant, and the Plaintiff's Response to Motion to Correct Errors and Brief in Support of the same, now denies the Motion to Reconsider (Correct Error) filed by the defendant.

Cause disposed.

All Ordered this 18th day of April, 2023.



Frank M. Nardi, Judge pro tempore at time of trial
Brown Circuit Court

Cc: Jennifer Auger
Defendant

STATE OF INDIANA)
) SS:
COUNTY OF BROWN)

IN THE BROWN CIRCUIT COURT

CAUSE NO. 07C01-2102-SC-008

Christina Buccos,
Plaintiff,

vs.

Sherrie Mitchell,
Defendant.

JUDGMENT

This cause came on for trial to the Court on February 2, 2023 regarding the Notice of Claim filed by the plaintiff on February 10, 2021. The plaintiff appeared in person and by attorney, Jennifer Auger. The defendant appeared in person and proceeded without an attorney. The Court conducted and completed a trial, and at the conclusion thereof, took the matter under advisement.

The Court, being duly advised, now finds and Orders as follows:

1. The Court has jurisdiction over the parties and the subject matter of this cause.
2. The plaintiff resides at 7705 N. Gartner Dr. Morgantown, Indiana 46160. She owns approximately 137 acres surrounding her residence and is the owner of Shady Oaks Logging, LLC. A portion of plaintiff's property has been developed as a camping area around a lake located on the property. Over the years, individuals have rented campsites from the plaintiff and located recreational vehicles and campers on those sites. Other portions of plaintiff's property are designated as tillable ground. Other members of plaintiff's family also reside on this property. Lastly, plaintiff and her sons operate a logging company through Shady Oaks Logging, LLC. and have facilities for this enterprise located on the property at N. Gartner Dr.
3. The defendant owns property located at 971 W. Robertson Road, Morgantown, Indiana, which property is located directly across W. Robertson Road from the entrance to N. Gartner Drive.
4. The defendant has purposely become involved in public issues, especially concerning local government and zoning laws. She holds herself out to the public as a person who monitors government action, and especially inaction, in regard to the enforcement of zoning laws and efficient use of public tax dollars. She often comments on social media regarding various public issues, especially those noted here. She regularly attends and participates in meetings of local government, including those related to zoning and land use issues.
5. After moving to her current residence, the defendant became aware of the fact that Shady Oaks Logging was conducting its business at the N. Gartner Drive location and formed the opinion that the business was being conducted in violation of the applicable Brown County zoning ordinance. On or about October 1, 2019, defendant filed a complaint with the Brown County Plan Commission which alleged that Christina Buccos was operating a logging business at the Gartner Dr. location without a special exception. The Complaint indicated that the defendant alleged that she had been run off West Robertson Road by a log truck, although it did not identify the log truck as a Shady Oaks log truck.

6. The evidence clearly shows that there has been an ongoing dispute between the parties since 2019 over defendant's complaints about the plaintiff's logging operation. As the result of defendant's complaint, plaintiff was required to seek a special exception to the Brown County Zoning Ordinance to continue the Shady Oaks Logging business. The defendant spoke in opposition to the plaintiff's request at a meeting of the Brown County Board of Zoning Appeals held on January 29, 2020 to consider plaintiff's request. The plaintiff's request for a special exception was granted. The dispute between the parties has resulted in several lawsuits.
7. The plaintiff claims that the defendant made defamatory statements about her on February 5, 2021. These statements were made on the website of the Brown County Democrat in regard to an article published by the Democrat entitled "Middle School Reorganization Plan Proposed to Save Money."
8. In response to the comment of another individual about the subject of the article, the plaintiff posted the following statement: "OMG you all wonder why people don't move to Brown County everything is always negative. I know since I pay taxes in Marion County we are not the highest in taxes. I have internet my [sic] not be the fastest but I have it."
9. The defendant responded to plaintiff's first statement as follows: "Christina Buccos you are wrong. Try reading the newspaper", and then posted a further statement: "Christina Buccos not to mention, you are not even paying your fair share of property taxes. You haven't paid property taxes on that log cabin and all those trailers with year long residents in them. Of course you love it here, everyone else is paying your property taxes because the government offices around here are protecting you from any accountability. It's disgusting."
10. The plaintiff then responded: "False accusations again I pay every bit of my taxes and then some and by the way this is about Brown County Schools not my personal things."
11. The defendant then responded "Christina Buccos you do not. It's too bad I can't post pictures here. We could take a look at your property card right now. Here is the list of the laws you break in this county and get away with.
 1. You are operating an industrial park inside of a residential district. Illegal. What is being done about it? Nothing.
 2. You have 2 of your kids living in houses/trailers on your property that you pay no taxes on. Illegal.
 3. You have way more than 13 acres of commercial property that do [sic] you do not pay commercial taxes on. Illegal.
 4. Frost law violations. Loaded log trucks driving on this 16ft. wide road during January 16th to April 15th. Illegal. How are you weighing those trucks?
All of this is happening and no one in government is doing a thing to stop it.
If my claims are false, sue me, I would love to prove you wrong again."
12. The plaintiff claims that the statements made in these Facebook posts on February 5, 2021 are defamatory, that they impute criminal conduct to the plaintiff and that she has been damaged by these statements.
13. "To establish a claim of defamation, a "plaintiff must prove the existence of 'a communication with defamatory imputation, malice, publication, and damages.'" *Trail v. Boys & Girls Clubs of N.W. Ind.*, 845 N.E.2d 130, 136 (Ind. 2006) (quoting *Davidson v. Perron*, 716 N.E.2d 29, 37

(Ind. Ct. App. 1999), *trans. denied*). A statement is defamatory if it tends "to harm a person's reputation by lowering the person in the community's estimation or deterring third persons from dealing or associating with the person." Kelley v. Tanoos, 865 N.E.2d 593, 596 (Ind. 2007) (internal citation omitted). One type of defamation action, alleging defamation *per se*, arises when the language of a statement, without reference to extrinsic evidence, constitutes an imputation of (1) criminal conduct, (2) a loathsome disease, (3) misconduct in a person's trade, profession, office, or occupation, or (4) sexual misconduct. *Id.*; see also Rambo v. Cohen, 587 N.E.2d 140, 145 (Ind. Ct. App. 1992), *trans. denied*; Elliott v. Roach, 409 N.E.2d 661, 683 (Ind. Ct. App. 1980), *trans. not sought*. In contrast, if the words used are not defamatory in themselves, but become so only when understood in the context of extrinsic evidence, they are considered defamatory *per quod*. McQueen v. Fayette County Sch. Corp., 711 N.E.2d 62, 65 (Ind. Ct. App. 1999), *trans. denied*. In actions for defamation *per se*, damages are presumed, but in actions for defamation *per quod*, a plaintiff must prove damages. Rambo, 587 N.E.2d at 145-46." Dugan v. Mittal Steel USA Inc., 929 N.E. 2d 184, at p.186 (Ind. 2010) " In an action for defamation per quod, the plaintiff must demonstrate special damages." Baker v. Tremco Inc. 917 N.E. 2d 650 (Ind. 2009). The statement must not only be defamatory in nature, but also false. Charles v. Vest, Supra. (Internal citations omitted.)

14. "As a matter of law, for an allegedly defamatory statement to qualify as defamation *per se*, it must impute not only the serious level of misconduct of the type described in *Dugan*, but also in a way that does not require reference to extrinsic facts for context." Wartell v. Lee 47 N.E. 3d 381, at p. 387 (Ind. Ct. App. 2015).
15. The defendant's statements can be broken down into two separate categories. Some of the defendant's statements are criticisms of local government based upon her belief that government officials were not assessing plaintiff's real estate taxes correctly and upon her belief that government was allowing the plaintiff to operate a business in violation of the Brown County zoning ordinance. These statements in essence, express defendant's opinion that plaintiff was not assessed her fair share of taxes and that in this regard, local government was not acting appropriately. While these statements were directed at the plaintiff, they are not defamatory insofar as they do not accuse the plaintiff of doing anything other than possibly being the beneficiary of government action or inaction.
16. The other category of statements made by the defendant do accuse the plaintiff of violating the law and of misconduct in plaintiff's trade, profession, or occupation. The defendant accused the plaintiff of "Illegal" acts in several different areas and specifically accused the plaintiff of not paying her taxes. These allegations are separate and distinct from defendant's statements that plaintiff wasn't assessed her fair share of taxes and specifically accuse the plaintiff of not paying the taxes that she was assessed. In addition, the defendant accused the plaintiff of illegally operating an industry in a residential district. While there is evidence that tended to show that the plaintiff did operate such an industry in the past without county approval, at the time the defendant published this statement, plaintiff had been granted a special exception to operate her business. While the defendant clearly believes that allowing the plaintiff to operate her business in a residential district violates the purpose of the zoning ordinance, that is not what she said. She specifically stated that plaintiff was operating an illegal business. The defendant also stated that plaintiff did not pay taxes on the trailers located on her property, although the evidence shows that the plaintiff did not own the trailers because they were owned by the tenants renting her property and would therefore owe no taxes on those trailers. The defendant stated that the plaintiff was illegally not paying taxes on all of her commercial property, while the evidence shows that plaintiff paid what she was assessed. These statements of the defendant that the plaintiff was not paying her taxes and illegally operating a business were defamatory per se and

were false. The evidence clearly shows that the defendant published the statements and that they were viewed by other individuals.

17. The question then becomes whether the defendant acted with malice in making the defamatory statements. "A private individual bringing a defamation action must show "actual" malice in matters of public or general concern. Ratcliff, 750 N.E.2d at 437. See also *Journal-Gazette Co., Inc. v. Bandido's, Inc.*, 712 N.E.2d 446, 452 (Ind. 1999), cert. denied, 528 U.S. 1005 (1999) (expressly adopting *Aafco Heating and Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), cert. denied, which applied the actual malice standard for both public and private individuals). Actual malice must be shown by clear and convincing evidence. [**13] *Bandido's*, 712 N.E.2d at 456. The question of whether there is sufficient evidence to support finding actual malice is a question of law for the court. *Id.* Actual malice exists when "the defendant publishes a defamatory statement 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Ratcliff*, 750 N.E.2d at 437 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964)). In order to prove that a defendant published with reckless disregard, a plaintiff must designate "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* "Reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *Bandido's*, 712 N.E.2d at 456 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731, 20 L. Ed. 2d 262, 88 S. Ct. 1323 (1968)). Hence, the defendant's state of mind when making the publication is a "critical factor." *Id.* A defendant's state of mind is a subjective fact that [**14] may be shown by indirect or circumstantial evidence. *Ratcliff*, 750 N.E.2d at 437. " *Poyser v. Peerless*, 775 N.E.2d 1101, 1107 (Ind. Ct. App. 2002)
18. The plaintiff has the burden of proving malice by clear and convincing evidence. *Journal-Gazette Co. v. Bandido's, Inc.*, *supra*. Clear and convincing evidence is an intermediate standard of proof greater than a preponderance of the evidence and less than proof beyond a reasonable doubt, and requires the existence of a fact to be highly probable. *Lazarus Dep's Store v. Sutherlin*, 544 N.E. 2d 513 at p. 527 (Ind. Ct. App. 1989).
19. The Court finds that the plaintiff has proven that the defendant acted with malice when she made the defamatory statements. As noted, the defendant knew that the plaintiff had been granted a special exception to operate her business when defendant stated that plaintiff was operating an illegal business. While defendant clearly disagreed with the government decision, that is not what she said. She stated that plaintiff was operating an illegal business. The evidence also tends to show that the defendant knew that the plaintiff was paying her taxes, but disagreed with the amount that she had been assessed to pay. Again, while the defendant may have disagreed with the amount of taxes assessed to plaintiff, her statement accused the plaintiff of not paying taxes and breaking the law. Defendant alludes to viewing plaintiff's property card, which would imply that she had examined the property card and the assessments on plaintiffs' property before making her statements. The defendant did not just allege that plaintiff's property was improperly assessed, she accused the plaintiff of breaking the law by not paying taxes that she had not been assessed and implied that plaintiff had hidden property from the taxing authority. The defendant did not present any evidence that the plaintiff hid improvements on her property from the government officials who determine tax assessments or that government officials were misled by the plaintiff in determining the amount of taxes due from the plaintiff. The evidence does not support the conclusion that plaintiff hid property from the taxing authority, but does show that she paid the taxes that were due and owing. The defendant did present evidence that plaintiff's property was recently re-assessed and modifications were made to the assessed values regarding

her property, however there was no evidence to indicate that the prior assessments were improper or that the plaintiff owed delinquent taxes.

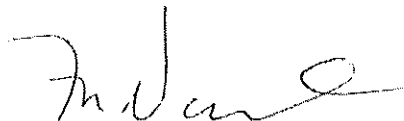
20. The plaintiff did not prove any special damages as the result of defendant's statements, however she did present evidence that some of the individuals who rent camping spaces from her questioned whether she was actually paying her taxes based upon defendant's statements and whether their rentals were in jeopardy. The evidence tends to show that plaintiff suffered embarrassment and humiliation based upon defendant's statements. As noted already, damages are presumed when statements are defamatory per se.
21. The Court therefore finds in favor of the plaintiff and against the defendant in regard to her Notice of Small Claim, and finds that the plaintiff should recover damages in the amount of \$500.00 plus costs of \$87.00 for a total judgment of Five Hundred Eighty-seven Dollars (\$587.00).

The Court accordingly now Orders, Adjudges, and Decrees as follows:

1. Judgment is entered in favor of the plaintiff, Christina Buccos, and against the defendant, Sherrie Mitchell, in the amount of Five Hundred Eighty-seven Dollars (\$ 587.00), which judgment shall accrue interest at the statutory rate of 8% per annum from this date until paid in full.
2. The Court Orders that the defendant make all payments to the Clerk of Brown County, P.O. Box 85, Nashville, IN 47448 or online at www.paygov.us and to place the cause number on each payment. Payments by mail may only be made by in-state money order or cashier's check.

Cause disposed.

All Ordered this 2nd day of March, 2023.



Frank M. Nardi, Judge pro tempore at time of trial
Brown Circuit Court

Cc: Jennifer Auger
Defendant