

August 3, 2024

RE: Josh Stein for North Carolina’s Advertisement – “Unsafe”

Mr. Spies and Mr. Mehr:

We represent Josh Stein for North Carolina (the “*Campaign*”). We are in receipt of your letter on behalf of Friends of Mark Robinson.

Libel by Mr. Robinson and His Campaign

Your letter includes false and libelous statements about Attorney General Josh Stein. It falsely states that “a Democrat prosecutor went so far as to convene a grand jury and indict Stein” and that Mr. Stein was subject to “criminal charges related to his running false ads.” But Mr. Stein was *not* “indicted” and/or “charge[d]” with a crime. In the case in question, Mr. Stein’s 2020 opponent for Attorney General filed a complaint with the State Board of Elections alleging a violation of N.C. Gen. Stat. § 163-274(a)(9). Mr. Stein’s campaign and other plaintiffs eventually prevailed in a federal court litigation, with the Fourth Circuit holding that the statute in question is unconstitutional and could not be enforced.¹ At the time the federal litigation commenced, the District Attorney had only “decided ... to present the evidence to a grand jury for a determination of whether criminal charges arising out of the ‘Survivor’ advertisement should be brought for violation of § 163-274(a)(9).”² The grand jury never returned a bill of indictment; Mr. Stein, therefore, was *never* “indict[ed]” or “charge[d]” with violating N.C. Gen. Stat. § 163-274(a)(9) (or any other statute).

This fact was well-known in the political circles in which Mr. Robinson travels and the legal community in which his lawyers actively participate. Moreover, the claim could have been objectively verified by even a cursory review of news articles and/or public records at Mr. Robinson’s disposal. Notwithstanding this, your letter either knowingly included this false statement or did so with reckless disregard for the truth of the claim. And Mr. Robinson then gratuitously posted your letter on his X account – prior to your stated deadline for our response – to his 128,300 followers on social media, thereby “publishing” the libelous claim.³ The publication of your letter by Mr. Robinson, which falsely alleges that Mr. Stein was

¹ See *Grimmett v. Freeman*, 59 F.4th 689 (4th Cir. 2023).

² *Grimmett v. Circosta*, No. 1:22-CV-568, 2022 WL 3212325, at *2 (M.D.N.C. Aug. 9, 2022), *vacated and remanded sub nom. Grimmett v. Freeman*, 59 F.4th 689 (4th Cir. 2023).

³ @markrobinsonNC, X.com (Aug. 2, 2024), <https://x.com/markrobinsonNC/status/1819390462517445001>.

“indict[ed]” and “charge[d]” with a crime, constitutes defamation *per se* under North Carolina law.⁴

“Unsafe” Advertisement

In July, the Raleigh News & Observer published an article about Precious Beginnings Child Development Center (“*Precious Beginnings*”), a child development center once run by Mr. Robinson and his wife. The article reported that “[s]tate inspectors made several unannounced visits to the center and cited it for dozens of violations” with those violations including various “sanitary, safety and nutrition issues,” as well as significant issues with falsification of documents.⁵ A June 2007 report issued by the state Department of Health and Human Services (“*DHHS*”) noted that “that an administrative action against the center’s license was underway because of ‘attempts to falsify information regarding Credential Certificates.’”⁶ In apparent response to the DHHS administrative action, “[t]he Robinsons sold the center in the midst of the investigation.”⁷ The “agency indicated at the time that it would not pursue the matter once the center changed hands.”⁸

Mr. Robinson is now running to be North Carolina’s governor. He is a public figure. The advertisement to which the Robinson campaign now objects, “Unsafe,” is a truthful recitation of what led to the State’s administrative action, based on the documents available to the Campaign. The public record is limited by the fact that “DHHS has not retained records on the center beyond the inspection reports.”⁹ But as we explain below, the Campaign showed its work throughout the ad, placing accurate quotations and citations from documentary (and other) sources on screen, so that viewers could understand the basis for the conclusions that the Campaign reached. The Robinson campaign’s complaints about the advertisement are unfounded.

The full “Unsafe” advertisement – both the on-screen claims and the audio – is pasted below:

Visual	Audio
MARK ROBINSON CHILD CARE CENTER	Mark Robinson and his wife owned and operated a child care center.
Mark Robinson NCDHHS Unsanitary Endangered children	State documents show it was unsanitary and endangered children.

⁴ See *Cummings v. Lumbee Tribe of N. Carolina*, 590 F. Supp. 2d 769, 774 (E.D.N.C. 2008).

⁵ Ned Barnett, *New: Yet Another Mark Robinson Misadventure – A Troubled NC Child Care Center*, News Observer (Jul. 3, 2024), available at <https://www.newsobserver.com/opinion/article289611232.html>.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

Mark Robinson Visit summary NCDHHS “1 and 2 year-old children could not be visually supervised”	The Robinsons were officially cited for lack of supervision
NCDHHS Mark Robinson Visit summary “Electrical outlets in the room for one year old children were left uncovered”	And uncovered electrical outlets around one year olds.
NCDHHS Mark Robinson Visit summary “the operator made attempts to falsify information” “violations”	Inspectors found falsified staff credentials and no criminal background checks
Mark Robinson “The lights in the daycare have been cut off” “The gas had been cut off” “It is unknown if the daycare has running water at this time.” Complaint to NCDHHS	Documents show the daycare center even operated at times without lights, heat or running water.
MARK ROBINSON UNSAFE FOR OUR KIDS PAID FOR BY JOSH STEIN FOR NORTH CAROLINA	Mark Robinson Unsafe for Our Kids
MARK ROBINSON UNFIT TO BE GOVERNOR PAID FOR BY JOSH STEIN FOR NORTH CAROLINA	Unfit to be Governor

What is most notable about the Robinson campaign’s letter is what it does *not* object to. The Robinson campaign does not object to the following claims:

- That the Robinsons’ day care center was officially cited “for lack of supervision” and the associated on-screen quotation that “1 and 2 year-old children could not be visually supervised.”
- That the Robinsons’ day care center was officially cited for “uncovered electrical outlets around one year olds” and the associated on-screen quotation that “[e]lectrical outlets in the room for one year old children were left uncovered.”
- That “[i]nspectors found falsified staff credentials and no criminal background checks”

and the associated on-screen quotation that “the operator made attempts to falsify information.”

- That “[d]ocuments show the daycare center even operated at times without light, heat...” and the associated on-screen quotations that “[t]he lights in the daycare have been cut off” and “[t]he gas had been cut off.”

Regarding Mr. Robinson’s objections, they are without merit.

First, the ad is truthful in stating that “state documents show [the daycare center] was unsanitary and endangered children.” The evidence from state documents showing that the daycare center was unsanitary and endangered children is overwhelming and, contrary to the Robinson campaign’s letter, does not rest on the so-called “technicalities” that he cites.

For example, with regard to unsanitary conditions, among other things, DCDEE reports show that Precious Beginnings was cited for (1) failing to wash childrens’ hands with soap and water after diaper changes;¹⁰ (2) failing to keep the walls and ceilings clean and in good repair;¹¹ (3) failing to properly handle, store or clean and sanitize beds, cots, and mats between users, including storing mats so that the sleep side of one mat touched the floor side of another;¹² and (4) failure to properly identify and refrigerate formula and other beverages for infants and children.¹³ DCDEE reports also cited Precious Beginnings for not having health assessment records for children in its care and for failure to ensure children were properly immunized in accordance with state law.¹⁴ These are unsanitary conditions for children. There is no basis to challenge the veracity of this statement.

With regard to endangering children, in addition to the dangers presented by the unsanitary conditions above, DCDEE reports show that Precious Beginnings was cited for, among other things, (1) failing to cover electrical outlets in a room of one year old children;¹⁵ (2) failing to keep medicine in locked storage separate from food and cleaning supplies;¹⁶ (3) failure to have a staffer on the premises who had successfully completed a CPR course within the previous year;¹⁷ (4) and failure to have a working phone that can contact all parents in the event of an incident or emergency, regardless of whether the parent is local.¹⁸ These are just a few of the violations named in DCDEE’s reports, and they clearly prove that “state documents show

¹⁰ Exhibit A, DCDEE Visit Summary Report, Precious Beginnings Child Development Center (completed Nov. 14, 2006).

¹¹ *Id.* at 2.

¹² *Id.* at 2.

¹³ Exhibit B, DCDEE Visit Summary Report at 2, Precious Beginnings Child Development Center (completed Nov. 8, 2005).

¹⁴ Exhibit A, at 3.

¹⁵ Exhibit B, at 2.

¹⁶ Exhibit B, at 2.

¹⁷ Exhibit C, DCDEE Visit Summary Report at 2, Precious Beginnings Child Development Center (completed Jun. 22, 2007).

¹⁸ Exhibit C, at 1.

[Precious Beginnings] was unsanitary and endangered children.” These unsafe conditions endangered children. There is no basis to challenge the veracity of this statement.

Mr. Robinson then objects that the ad “further attempts to mislead voters by showing graphics indicating these terms were citations from state documents.” But notably – and left unacknowledged by the Robinson campaign’s letter – the ad does not put the words “unsanitary” or “endangered children” in quotation marks. When the ad is quoting from state documents, it puts quotation marks around the words; when it is not quoting from state documents, it does not put quotation marks around the words. The ad does not state that these two phrases appeared verbatim in the state documents; it simply notes that evidence contained within the state documents – summarized in the two paragraphs above – shows that Precious Beginnings was, in fact, unsanitary and that it, in fact, endangered children.

Second, the ad is truthful in stating that the Robinsons’ daycare center was cited for having “uncovered electrical outlets around one year olds.” Notably, the Robinson campaign does not even object to this claim. What it objects to is the visual that accompanies the truthful audio claim, with your letter arguing that “there were no loose electric cords or circuits sticking out of the wall at the childcare enter.” But the ad does not claim otherwise. The Campaign does not have video footage of the daycare center and, accordingly, uses the common artistic technique of dramatic visualization throughout the ad. That is plainly obvious to any viewer. No individual snippet of the dramatic visualization constitutes a factual statement. And the factual statements that accompany the visual snippet – that the daycare center was cited for having “uncovered electrical outlets around one year olds” and that “[e]lectrical outlets in the room for one year old children were left uncovered” – are truthful statements *to which the Robinson campaign does not even object*.

Third, the ad is truthful in stating that “[d]ocuments show the daycare center even operated *at times* without lights, heat or running water.” The ad does not hide the ball regarding its sourcing for this claim. Instead, it clearly shows the viewer the backup documentation: verbatim quotations from a complaint filed with DCDEE in April 2007 that “[t]he lights in the daycare have been cut off”, “[t]he gas had been cut off”, and “[i]t is unknown if the daycare has running water at this time.”¹⁹

The complaint’s use of “at that time” clearly suggests that, at other times, the daycare did not have running water. Otherwise, there is no reason to include that phrase in the complaint. This interpretation is consistent with the remainder of the complaint, which cites *past* instances of issues in the daycare center with the light and heat, without specifying whether those issues persisted to the present day. Accordingly, the ad carefully cabins the claim, stating that the center operated “at times” without lights, heat, or running water, and stating plainly on screen its basis for the claim.

¹⁹ Exhibit D, Precious Beginnings Complaint Form.

The Campaign sees nothing in the public record to refute this complaint, and in any event, the Campaign shared with viewers that the challenged statement is based on a complaint made to DCDEE, and verbatim quotations from the complaint, so that voters can make up their own minds. If Mr. Robinson has documentation showing that the Campaign has interpreted the complaint incorrectly and that Precious Beginnings always had running water during the entire period Mr. Robinson and his wife owned and operated it, we will review that documentation and consider altering the advertisement. The Campaign undertakes significant time and resources to ensure the factual accuracy of its ads. But notably, your letter does not even deny the underlying factual claim, let alone provide any evidence to refute it.

Your letter asserts that the ad contains “false and defamatory information.” To make out a claim of defamation, a plaintiff must “prove that the defendant made false, defamatory statements of or concerning the plaintiff, which were published to a third person, causing injury to the plaintiff’s reputation.”²⁰ This claim is made with regard to the Campaign’s political speech, where “First Amendment concerns are at their ‘zenith.’”²¹

Accordingly, because the Lieutenant Governor is a public figure, he must “prove, by clear and convincing evidence, that the false statement was made with actual malice.” That, in turn, requires proof by clear and convincing evidence that the disputed statement was, in fact, false and that the false claim was made “with either actual knowledge of falsity, reckless disregard for the truth, or a high degree of awareness of probable falsity.”²² “Actual malice is a subjective standard”; what matters is what the publisher believed at the time of publication, not whether a reasonable third-party might have understood or believed.²³ Simply put, “[r]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.”²⁴ And it is well-established that reasonable reliance on previously published reports cuts against a finding of actual malice.²⁵

Here, the Campaign is aware of reporting that Precious Beginnings was subject to administrative action regarding its license after inspectors had cited it for several issues related to safety, sanitation, nutrition, and falsification of records. The Campaign reviewed underlying public records reflecting that these violations had been uncovered after DCDEE received complaints about conditions at the daycare center. Included among these documents is a complaint that, in the Campaign’s understanding, noted times that the facility had operated without heat, electricity, or running water. Our client has every reason to believe that this

²⁰ *Smith–Price v. Charter Behavioral Health Sys.*, 164 N.C. App. 349, 356 (2004).

²¹ *Grimmett*, 59 F.4th at 696 (quoting *Buckley v. American Const. Law Found., Inc.*, 525 U.S. 182, 186–87 (1999)).

²² *Taylor v. Greensboro News Co.*, 57 N.C. App. 426, 436 (1982).

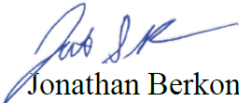
²³ *Cannon v. Vill. of Bald Head Island, N. Carolina*, 891 F.3d 489, 507 (4th Cir. 2018) (quoting *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 714 (4th Cir. 1991) (en banc)).

²⁴ *Griffin v. Holden*, 180 N.C. App. 129, 136–37, 636 S.E.2d 298, 304 (2006).

²⁵ See *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 295–300 (4th Cir. 2008) (finding no actual malice where radio host used reliable sources, including government-commissioned reports, as basis for allegedly defamatory statements); *Ryan v. Brooks*, 634 F.2d 726, 734–35 (4th Cir. 1980) (similar). See also *id.* at 730 (“Brooks testified that though none of these sources contained the exact words that he used in his book, he felt that his sentence was a ‘fair synthesis’ of the information he had gathered.”).

complaint was true. It has seen no evidence to the contrary. And, again, it showed its work to voters by providing them with the specific language at issue and its source – a complaint made to DCDEE. The threatened defamation claim has no merit.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jonathan Berkon".

Jonathan Berkon

Ben Stafford

Courtney Weisman

Counsel to Josh Stein for North Carolina